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Foreword

A foreword normally presents its writer with an opportunity to comment sagely on the succeeding contents. For an academic journal now in its third year of production, a traditional foreword could well be seen to be superfluous. However *Cross-sections* is unusual – a university residential college publication annually producing a range of sound scholarly material from its own residents and equally involving a number of intellectual areas.

Its papers are of interest and can be of use to scholars in the various fields represented: indeed all have been refereed by scholars in the University, and have been through the other norms associated with a journal to maintain intellectual standards. Authors range from first-year undergraduates to postgraduate research scholars. The theme in each paper is often self-generated, with the edited work not forming part of the assessment or examination process, and has been carried out in addition to normal studies. To the reader, and especially to the paper's author, they are more interesting and valuable as a result. The further experience of seeing the material through into print is another bonus.

That this flow of worthwhile publishable material continues into its third year reveals a welcome but not unexpected outcome from the University's oldest undergraduate residence, whose focus has been kept on academic attainment as much as sporting prowess throughout its 45 years. While *Cross-sections* took time to germinate, it can now be said to have taken root and be flowering well.

I wish it a long and fruitful life.

W.P. Packard

Foundation Warden 1961-87

Editorial

Academic writing is the product of hours of clock hands turning in lecture theatres, armloads of library books, and at times severe sleep deprivation. We make these sacrifices at university to demonstrate our knowledge in the hope of securing marks.

The contributors, sub-editors and academic referees who have produced this diverse collection of works, however, sought to inform their peers about topical issues from a range of academic fields of study and, of course, to spotlight the work of young scholars. In doing so they contributed to building an academic community, keen to produce works of exceptional scholarly merit. *Cross-sections* has become an entrenched element of Bruce Hall's 'learning communities', which seek to extend the university educational experience beyond the lecture theatre or laboratory.

If you feel constrained by your current program we invite you to venture into the studies of physics, international relations or politics. Trek through the rock pools of Kioloa while learning the art of writing an effective lab report. Explore the concept of what it meant to be a hero before the television series had each of us wondering whether our quirks were in fact special abilities.

Many students wish to study widely, unshackled from the strictures of majors and course prerequisites. Time and financial constraints prevent most from realising this dream. The next best thing then is to be exposed to wide-ranging academic writing of the highest standard. This is both the purpose and mission of *Cross-sections*.

2007 represents the 'difficult third album' of the Journal but, looking upon the finished work we do not fear for its future: confident as we are that the residents of Bruce Hall will continue to provide future editions of the Journal with insightful, stimulating and original pieces of quality work for students to read, discuss, and enjoy. We hope you find something new or challenging in the pages which follow. Enjoy.

Nicola Thompson, Tim Vines & Jia-Wei Zhu
The 2007 Editors of Cross-sections

Portrayals of Heroism – Achilles, Agamemnon and Iphigenia

*Russell Buzby**

In Classical literature the hero is a powerful character; the heroic an important motif. The lives of those men – and occasionally women – who were so blessed by the gods are explored again and again in ancient myth and legend. But, widely revered as they may be, heroes are often censured in ancient writings: in the *Iliad* Achilles' selfishness brings hardship upon his fellow soldiers; in Euripides' *Iphigenia in Aulis* all the Homeric heroes are vituperated and a feminisation of the heroic occurs, bombastic Achilles, indecisive Agamemnon, manipulative Odysseus. For while better than mere mortals, heroes were still painfully human and could succumb to *aidōs* or shame. To overcome this they would strive all the more for *kleos*, glory, or *timē*, renown which can only be preserved by epic poetry, myth and legend.

τό καλῶς θυήσκειν ἀρετῆς μέρος ἐστὶ μέγιστον

—Simonides(?) frag. 118D = 8P¹

Heroism, by its very nature, must be portrayed through a medium – a hero. Thus the portrayal of a hero is essentially a portrayal of heroism. In Greek literature heroism is not so much a set of guidelines or rules that men must abide by, but a reflection of what actions are acceptable in a certain context. Heroism is as heroism does. Thus it is self-representing. For actions and deeds to be classed as 'heroic' they must be performed by a certain class of people: heroes. They must also work to bring the hero a measure of *kleos*, glory, or *timē*, renown. This allows many different characters in Greek literature to be classed as heroes. From Achilles, sulking in his tent, to Iphigenia willingly sacrificing herself, we see that a great variety of deeds are deemed 'heroic'. Thus any deed or feat performed by a hero is heroic, unless it meets with the

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¹ Trans. = 'A splendid death is the greatest marker of courage.'

widespread censure of his society and causes *aidōs* or shame. In Greek plays, the portrayal of the heroic is subtly different to its portrayal in epic. There are heroes, and they act heroically, but more often than not their actions are portrayed in an unflattering light. Often we see heroes of Homer reborn as the tragic heroes of Euripides. In Euripides' *Iphigenia in Aulis* we see Iphigenia sacrificed for the greater good, purely so that the Trojan expedition can occur. Euripides subverts the Homeric ideal, and feminises the heroic. Euripides and Homer give us two very different portrayals of heroism and humanity, yet they are still primarily concerned with recounting the feats of heroes. Whether they are being ridiculed or commended, these heroes 'illuminate, by their actions and by their nature ... the position, the potential, and the limitations of man in the world.'²

Achilles and Homeric *Kleos*

Achilles is introduced in the first line of the *Iliad*.³ In fact Homer's proem sets out the main focus of the *Iliad*: 'Sing, goddess, the anger of Peleus' son Achilleus and its devastation, which put pains thousandfold upon the Achaeans....'⁴ Homer's Achilles is a man of contrasts and conflicts. He is undoubtedly the finest warrior of the Achaeans, yet he spends most of the *Iliad* sitting in his tent. His refusal to fight – and his supplications to Thetis and through her, Zeus – single-handedly turns the tide of battle in the Trojan War. He is godlike, yet too painfully human, and tragically susceptible to those human emotions of fear, grief and anger. He strives for immortal glory, yet at the same time tragically realises that this will involve his inevitable death. In short 'he is great, but human and imperfect. His tragedy is an effect of free choice by a will that falls short of omniscience and is disturbed by anger.'⁵

Similar to his matchless anger, Achilles is the unrivalled fighter not only of the Achaeans but of the entire *Iliad*. No other protagonist can match him on the field of battle – the only serious threat to Achilles comes

² J. Griffin, *Homer on Life and Death* (1983) 177.

³ All line references to the *Iliad* refer to: Homer, *the Iliad of Homer* (Lattimore, R. trans, 1951 ed) (hereafter referred to as 'Il.') unless otherwise specified.

⁴ Il. 1.1-2.

⁵ Lattimore, above n 3, 46. Where other translations of *the Iliad* are referred to in this work, they shall be cited according to translator.

from Xanthus the immortal river-god.⁶ His simple appearance just after Patroclus' death is enough to frighten the Trojans, and when 'Three times across the ditch brilliant Achilles gave his great cry ... three times the Trojans and their renowned companions were routed.'⁷ But it must be remembered that Achilles rarely acts alone: his martial skills may be great, but they are supplemented by the gods' grace. Athena herself crowns Achilles with a glowing halo,⁸ and surrounds him with the aegis.⁹ When Achilles shouts, Athena shouts with him.¹⁰ His mother is an immortal, Zeus answers his supplications, he is armed by Hephaestus himself. Achilles is so close to the gods that he transcends the boundaries between mortal and immortal. It is a hero's death – and the inevitability of Achilles' doom – that immortalises him: the moment of death preserves a hero at his best – in this way a hero becomes 'a god, or a statue of a god'.¹¹

In a sense it is Achilles' overwhelming desire to be immortal that is the cause of his death and the defining feature of his heroism. Heroes, as men pre-eminent among mankind, have the opportunity to live forever in song and poetry: they can live on in the memories of their descendents and the Greek world at large by winning *timē* and *kleos*. Achilles sums up his duty to himself:

... then I will accept my own death, at whatever time immortal Zeus wishes to bring it about, and the other immortals. For not even the strength of Herakles fled away from destruction, although he was dearest of all to Zeus, son of Kronos, but his fate beat him under, and the wearisome anger of Hera. So I likewise, if such is the fate which has been wrought for me, shall lie still, when I am dead. Now I must win excellent glory ...¹²

Yet this acceptance was hard won for Achilles. After his refusal of the entreaties of the Embassy his rage becomes unjustifiable and casts *aidōs* upon his character. Since the heroic ideal of *kleos* was heavily based on

⁶ *Il.* 21.211-382.

⁷ *Il.* 18.228-229.

⁸ *Il.* 18.205-206.

⁹ *Il.* 18.204.

¹⁰ *Il.* 18.217-218.

¹¹ W.T. MacCary, *Childlike Achilles: Ontogeny and Phylogeny in the Iliad* (1982) 203.

¹² *Il.* 18.115-121.

timē – that is, heroism was defined by society's values – this censure could cause Achilles to be seen as *deilos* or cowardly, the opposite of the heroic ideal. Thus, Homer explores what it is to be, or not to be, a hero. Similarly, Homer shows us that a hero's status was dependent on how he was viewed by his peers and his descendents. It is this issue of status that lies at the heart of what it means to be a hero, and thus Homer's portrayal of heroism. In this regard, we approach a Hegelian reading of the *Iliad* where the hero's struggle is for recognition and where the hero 'must be acknowledged by other men. All consciousness is, basically, the desire to be recognised and proclaimed as such by other consciousnesses. It is others who beget us.'¹³ This struggle is illustrated by Achilles, pacing the shore of the infinite sea, calling upon his mother to appeal to Zeus as he has been dishonoured by Agamemnon, who took away Briseïs.¹⁴ This request to give Achilles honour, glory and renown 'beyond all other mortals' is repeated by Thetis when she speaks to Zeus.¹⁵

In both of these requests, though, the epithet 'short-lived' is used.¹⁶ This illustrates the other branch of heroism. Hegel also acknowledges this seeming dichotomy between recognition and an early death: 'the content of the world of imagination carries on ... gathering round the individuality of some hero, who, however, feels the strength and splendour of his life broken, and mourns the early death he sees ahead of him.'¹⁷ Not only must a hero's deeds bring *kleos* and *timē*, they must also result in a premature death in battle. In a way, though, it is the premature death which guarantees and enshrines the *kleos* of a hero for 'the beautiful young man killed in his prime has his youth and beauty hypostatised'¹⁸ by death in battle. The *Iliad* – a poem set within the scope of the Trojan War – naturally concerns itself primarily with death and battle. And, since heroes are the main actors in battle, it makes sense that they are also emphatically concerned with death. Yet, simultaneously:

¹³ M. Lynn-George, *Epos: Word, Narrative and the Iliad* (1988) 127.

¹⁴ *Il.* 1.350-356.

¹⁵ *Il.* 1.505-506.

¹⁶ *Il.* 1.352, 505.

¹⁷ G.W.F. Hegel, *the Philosophy of Right* (T. M. Knox trans, 1967 ed) 735-736.

¹⁸ MacCary, above n 11, 203.

The *Iliad* affirms the power of poetry to confer *kleos*. From this position immortal fame is a possibility in poetry, the hero's certainty of recompense for the sacrifice of life; premature death is balanced by the promise of a form of immortal life.¹⁹

Immortality is not just achieved through the doing of great heroic deeds, but in the remembrance of these deeds, and their immortalisation in epic. As Foucault noted: 'the hero accepted an early death because his life, consecrated and magnified by death, passed into immortality; and the narrative redeemed his acceptance of death.'²⁰ For unless bards sing tales of a hero's actions, they will wither unto dust: 'a man's life cannot come back again, it cannot be lifted nor captured again by force, once it has crossed the teeth's barriers'.²¹ Homer reveals his heroes to be chiefly concerned with this idea of *timē* and *kleos* – the way in which they are remembered through epic poetry: 'the hero gives his life in return for the immortal *kleos* conferred by a poetry which is indeed worth life itself.'²² His entire poem is a testament to the *timē* won by Achilles and the other heroes of the Trojan War. In essence, Homer's portrayal of heroism is simply the end result that all heroes fight, and die, for.

Associated with this concept of a heroic premature death is an 'untimely' life. It is no surprise then, that the birth of the eponymous hero to which all Homeric heroes strive to emulate – Herakles – is the epitome of untimeliness.²³ This untimeliness 'goes to the very core of the hero's essence and extends to the main hero of the *Iliad*, Achilles'²⁴ who calls himself the untimeliest of all: *pan-a-orios*.²⁵ Untimeliness is also a mother's prerogative: it is Thetis who bemoans Achilles' fate

¹⁹ Lynn-George, above n 13, 153.

²⁰ M. Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews* (ed D. F. Bouchard) (D. F. Bouchard and S. Simon trans, 1977 ed) 116-117.

²¹ *Il.* 9.408-409.

²² MacCary, above n 11, 122.

²³ *Il.* 19.95-133.

²⁴ G. Nagy, *Homeric Questions* (1996) 47-48.

²⁵ *Il.* 24.540.

... Your birth was bitterness. Why did I raise you?

...

Now it has befallen that your life must be brief and bitter
beyond all men's. To a bad destiny I bore you in my chambers.²⁶

So while a hero's life may be untimely, his death redeems him and makes them transcend the bounds of time to become timeless.

Much discussion of this portrayal of heroism is encountered in Book 9, when Agamemnon sends an Embassy to the tent of Achilles to offer gifts beyond number so that Achilles may fight again. There are three set speeches from Odysseus, Phoenix and Ajax, all emphasising different aspects of heroism, and Achilles' replies to them. Here Achilles questions the central theme of Homer's portrayal of heroism; he questions

... the very possibility of any equivalence in the structure of exchange of life for *kleos* ... where forms of recompense could be revoked, the risk denied reward, the sanctioned sacrifice of life could be seen as a gesture of pure expenditure incommensurate with any guarantee of exchange.²⁷

For if 'Homeric man's highest good is not the enjoyment of a quiet conscience, but the enjoyment of *timē*'.²⁸ Achilles wonders why it is that

... there was no gratitude given
for fighting incessantly forever against your enemies.
Fate is the same for the man who holds back, the same if he fights hard.
We are all held in a single honour, the brave with the weaklings.
A man dies if he had done nothing, as one who has done much.²⁹

According to Homer's portrayal of heroism, this is an unacceptable attitude for a hero to take. Homer shows that heroes must still be determined 'to win individual glory despite official counsels of doom'.³⁰ This is evoked when Agamemnon praises Teukros,³¹ when Agamemnon

²⁶ *Il.* 1.414-418.

²⁷ Lynn-George, above n 13, 153.

²⁸ E.R. Dodds, *The Greeks and the Irrational* (1951) 17.

²⁹ *Il.* 9.316-320.

³⁰ K. Stanley, *The Shield of Homer: Narrative Structure in the Iliad* (1993) 110.

³¹ *Il.* 8.292-297.

suggests abandoning the expedition,³² and even when Achilles warns Patroclus against winning too much glory.³³ Thus Homer portrays his heroes as men who fight, not to win against an enemy *per se*, but to win widespread *timē*, a heroic death and everlasting *kleos*.

Yet at the end of the *Iliad* Achilles still lives. His youth and beauty have not yet been hypostatized by honourable death in battle. Homer immortalises Achilles without showing his death. Nonetheless, Achilles' impending doom is ever-present within the narrative of the *Iliad*. Foretold numerous times, and tacitly implied by his epithet 'short-lived',³⁴ Achilles acknowledges it himself to the Embassy. The beginning of Book 18 first describes the death of Patroclus; secondly, anticipates the death of Hektor; and, finally, foreshadows the inevitable death of Achilles. This inchoate death, 'already past without having come to pass in the present, always at hand, yet never quite present, always not yet and still to come, haunts the structure of the epic narrative without ever happening.'³⁵ It is this indeterminacy that places the certitude of Achilles' death within the epic present. He insists upon the certainty of death:

For my mother Thetis the goddess of the silver feet tells me
I carry two sorts of destiny toward the day of my death. Either,
if I stay here and fight beside the city of the Trojans,
my return home is gone, but my glory will be everlasting;
but if I return home to the beloved land of my fathers,
the excellence of my glory is gone, but there will be a long life
left for me, and my end in death will not come to me quickly.³⁶

Here we see the heroic choice: the *Iliad* at the crossroads. Achilles can either fight or return home. Either way he will lose something valuable to him: in the first instance he will lose his return home or *nostos* or, alternatively, he will lose his *kleos*. For a hero, loss is as inevitable part of this decision as death. For a hero, *kleos* becomes the loss of life, while life becomes simply loss. Death lies in both directions: on the shores of Troy, or home in Phthia. There is a subtle parallel at work here:

³² *Il.* 9.18-28.

³³ *Il.* 16.97-100.

³⁴ *Il.* 1.352, 416, 505.

³⁵ Lynn-George, above n 13, 216.

³⁶ *Il.* 9.410-416.

everlasting glory – *aphthiton kleos* – is echoed linguistically by death – *phthi-* – in Phthia. Home becomes the sinister place of death-in-life, while the bloody battlefield is transformed into the arena in which a hero can win life-in-death.³⁷ In death the hero wins the ultimate prize of *aphthiton kleos*: immortalised in song, never to fade.

Iphigenia and Euripdean *Aidōs*

After an examination of the Homeric portrayal of heroism, it is instructive to compare it with the portrayal of heroism in Euripides' *Iphigenia in Aulis*.³⁸ Euripides was well aware of the Homeric portrayal of heroism: he recreates the 'heroic age when action was motivated both by a fierce and sometimes murderous allegiance to kin, *genos*, and by the knowledge that lives lost in serving honour were compensated by deathless renown, *kleos*.'³⁹ Yet in *Iphigenia in Aulis* it would seem that Euripides is subverting this heroic portrayal, through his shameful portrayal of Agamemnon. In essence Euripides is making us reconsider and reinterpret Homer.⁴⁰ But, as we shall see, Euripides is hardly repudiating Homer's portrayal of heroism – in fact Euripides is supporting it, to an extent. He portrays Iphigenia as a true hero, in the Homeric mould. Her premature death ensures her everlasting *kleos*, while the traditional heroic figures of Achilles and Agamemnon act only to heap *aidōs* upon themselves. Thus Euripides' portrayal of heroism in *Iphigenia in Aulis* is atypical but essentially similar to Homer's portrayal of heroism in the *Iliad*.

The play begins with Agamemnon renouncing the heroic code 'I envy those who live their lives free from danger, not winning fame or a name among men.'⁴¹ And while he concedes that there is honour in the heroic life, it is an 'honour that brings danger; eminence may be pleasurable but once attained it causes grief.'⁴² Hardly fitting words for the leader of

³⁷ Nagy, above n 24.

³⁸ Line numbers are approximate. Page numbers are a reference the Penguin Classics edition of *Euripides, the Bacchae and Other Plays* (J. Davie trans, 2005 ed) (hereafter cited as 'IA').

³⁹ D. Mendelsohn, *Gender and the City in Euripides' Political Plays* (2002) 65.

⁴⁰ C.A.E. Luschnig, *Tragic Aporia: A study of Euripides' Iphigenia at Aulis* (1988) 66.

⁴¹ IA 18, 177.

⁴² IA 21-22, 177.

the Greek expedition to Troy, and a Homeric hero. He later reiterates this wish to be ignoble or at least unheroic:

Necessity's harsh yoke is upon my shoulders. Destiny has stolen up on me and proved subtler by far than my subtle plans. There is some advantage in being of humble birth. It is easy for such men to weep and to tell the full tale of their sorrow. The man of noble birth suffers no less misfortune, but we have dignity to rule our lives and are the slaves of the mob.⁴³

This motif of slavery is repeated by Euripides throughout *Iphigenia in Aulis*. When asked who will compel him to sacrifice Iphigenia, Agamemnon replies 'the whole gathering of the Greek army.'⁴⁴ As we approach the climax of the play, Agamemnon elaborates on this point, as he explains his reasons to his daughter: 'It is not Menelaus who has turned me into a slave ... but Greece, whether I wish it or not, I am bound to offer you in sacrifice; against this I have no power. Greece must be free....'⁴⁵ It is this pathetic appeal to nationalism – or at least a form of Hellenism – that finally changes Iphigenia's mind.

Menelaus is continually reminding his brother how many times he changed his mind about sacrificing his daughter, and how desperate he was to lead the expedition,⁴⁶ unsurprising behaviour for Agamemnon.⁴⁷ This shameful behaviour is furthered by the way that Agamemnon acts when his wife and daughter arrive. The deep dramatic irony of Iphigenia's opening stichomythia with her father underscores Agamemnon's *aidōs*. The double-entendres bring him nearly to tears, but not before Iphigenia ironically expresses her desire to come with him on his voyage: 'if only your honour and mine allowed me to share your voyage.'⁴⁸ Yet the point is that Agamemnon has *no* honour at all, while Iphigenia is yet to win her heroic *kleos* by sacrificing herself. Agamemnon continually lies to both wife and daughter, even after Clytemnestra has been told what Agamemnon is actually planning to

⁴³ *IA* 443-450, 188.

⁴⁴ *IA* 512, 190.

⁴⁵ *IA* 1269-1272, 212-213.

⁴⁶ *IA* 335-375, 184-186.

⁴⁷ Even in the *Iliad* he proposed leaving Troy, and returning home without glory (*Il.* 9.9-28).

⁴⁸ *IA* 663, 194.

do. He makes clever plans and devious plots against his loved ones.⁴⁹ And when Clytemnestra confronts him about his cunning plans, she exhorts him to answer 'as a man of honour should.'⁵⁰ Yet he continues to lie. He finally gives it up, exclaiming 'why should I add shamelessness to my misfortunes by telling lies?'.⁵¹ The irony is that he has been telling lies since the opening of the play – his *aidōs* is already great. Finally, as Iphigenia convinces her mother that her self-sacrifice is her honourable duty, Clytemnestra retorts that while Agamemnon may have acted for the greater good of Greece, he still 'used treachery; he acted without honour and brought shame on Atreus.'⁵² Yet in the coda of the play,⁵³ this honour is transferred to Agamemnon of all people: the messenger remarks that Iphigenia's sacrifice has won *him* undying renown throughout all of Greece, for he is so obviously favoured by the gods.⁵⁴ Again, the myth is back on track, set up for the inevitable confrontation with the Trojans, Achilles' *kleos* and Agamemnon's fateful homecoming.

Iphigenia undergoes a radical change from being the maiden and daughter of Agamemnon when we first see her to the ultimate hero of the play, which culminates in her voluntary sacrifice.⁵⁵ This change occurs in the space of a few lines. Iphigenia is still unheroically adamant that 'a sorry life is better than a noble death',⁵⁶ which changes to despair: 'born to sorrow, then, is the race of man that lives for a day, born to sorrow. Destiny is unhappiness for men to discover.'⁵⁷ Finally Iphigenia re-emerges as the one true hero of the play:

I am resolved to die; and I want to do so gloriously, banishing all ignoble thoughts from my mind ... All eyes in mighty Greece now turn to me. On me depend the voyage of the fleet and the destruction of the Phrygians; with me it lies to stop barbarians carrying off our

⁴⁹ *IA* 746, 198.

⁵⁰ *IA* 1128, 209.

⁵¹ *IA* 1145, 209.

⁵² *IA* 1455, 219.

⁵³ Whose authenticity is debatable: Luschnig, above n 40.

⁵⁴ *IA* 1604-1608, 222.

⁵⁵ Critics since Aristotle's time have found fault with this too-sudden change of heart by Iphigenia. For a recent survey of their arguments and criticisms see Luschnig, above 40, 91-111.

⁵⁶ *IA* 1252, 212.

⁵⁷ *IA* 1329-1330, 214.

women ... All this I will achieve by my death, and *my fame as the liberator of Greece shall prove blessed* ... I give my body to Greece. Sacrifice me, sack Troy!⁵⁸

This is emphasised by the Chorus' last line to Iphigenia, as she leaves to be sacrificed: 'For glory will never leave you.'⁵⁹ This gesture ultimately 'not only reconnects with its myth a plot that has threatened to run out of control but also reintegrates the religious institutions of her society.'⁶⁰ Through this perhaps misguided Hellenism and martial fervour, a young innocent maiden was inspired by Homer's portrayal of heroism to voluntarily sacrifice herself and so inherit his concept of the hero. In essence Euripides has feminised the heroic, and in doing so feminised his portrayal of heroism. As Achilles is painfully self-aware of his inevitable death, in exchange for undying *kleos*, Iphigenia is forced to the realisation that for her to die is to live forever as the sacker of cities, of Ilium, and of the Phrygians. She basks in renown and glory. In doing so, she subverts the natural order, and 'appropriate[s] aspects of [the] masculine, heroic identity.'⁶¹

Conclusion

Thus we see that the portrayals of heroism in both the *Iliad* and *Iphigenia in Aulis* are essentially similar. Heroes are portrayed as people who strive through battle and sacrifice to gain *timē* and *kleos* and avoid *aidōs*. The inevitable conclusion to this struggle is death. It is unavoidable and yet liberating. To die old, without honour and renown is to waste a life. Homer sets up the heroic dichotomy that to live is to die for eternity, while to die young ensures immortalisation in song. Euripides emphasises this portrayal, yet simultaneously subverts it. First he portrays Homer's traditional heroes of Achilles and Agamemnon as less than heroic, or *deiloi*; secondly he feminises Homer's traditional portrayal of heroism. The same elements are there – a premature death which ensures endless *kleos* – but instead of a male hero dying in battle, it is a female hero dying so that the war may occur. In this sense Iphigenia may be regarded as the progenitor of all *kleos* in the *Iliad*: she

⁵⁸ *IA* 1375-1397, 216-217. Emphasis added.

⁵⁹ *IA* 1504, 220.

⁶⁰ H. Foley, *Ritual Irony: Poetry and Sacrifice in Euripides* (1985) 90.

⁶¹ Mendelsohn, above n 39, 45.

becomes the war's first victim, and also its greatest hero. Hers truly is *aphthiton kleos*, which time and age will never fade.

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Persuading Consensus: legitimating norms and norms legitimating - Some Implications for Diplomacy

*Gilberto Estrada Harris**

Rodger Payne's claim that 'norms that do not reflect genuinely voluntary consensus can be seen as illegitimate' lies in a Habermasian critique of persuasion as a process in norm-building. It is levelled at those constructivist approaches highlighting 'framing' as a central element of successful persuasion. This essay, however, will argue that norms that do not reflect 'genuinely voluntary consensus' do not necessarily need to be seen as illegitimate. This is clear after an examination of the failure of both realism and liberalism in explaining the process of norm-building, consensus creation and legitimization. Several constructivist arguments challenging Payne's underlying assumption will also be considered, before final conclusions offering implications of what this means for the conduct of diplomacy.

The role of norms in world politics is an increasingly controversial topic of debate. In the international relations discipline, norms are usually defined as 'shared expectations held by a community of actors,' or as 'standards about appropriate behaviour for actors with a given identity'.¹ International law is also strongly focused on norms and is generally understood as 'a body of rules which binds states and other agents in world politics in their relations with one another and is considered to have the status of law'.² Since the nineteenth century, international lawyers have sought to establish what in fact is the basis of authority given to the law, arguing that 'the only true source of

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¹ S. Khagram, J. Riker & Sikkink, K., *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (2002) 13; M. Finnemore & K. Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887, 891.

² H. Bull, *The Anarchical Society: A Study of Order in World Politics* (2002, 3rd ed), 122.

international law is the consent of states,³ either through express or tacit consent.⁴ A number of international relations and international law theorists, such as Falk, have added that there has been a trend away from the notion of consent towards one of consensus as a source of legal obligation, taken to be 'more than a simple majority but something less than unanimity or universality.'⁵

While the issue of the processes involved in developing norms is raised widely in academic scholarship, it requires further analysis. Payne's article focusing on the process of norm consensus creation and its legitimation within international relations is a welcome contribution. His central claim that 'norms that do not reflect genuinely voluntary consensus can be seen as illegitimate' lies in a Habermasian critique of persuasion as a process in norm-building, levelled at those constructivist approaches which highlight 'framing' as a central element of successful persuasion.⁶

Framing, according to constructivists, is crucial to communicating a persuasive message to challenge or create new collective meanings.⁷ For Payne, the communicative environment, or the highly contested normative context in which norm persuasion enters, rather than the content of framing of specific messages, 'almost certainly matters more.' Indeed, norms, voluntary consensus and legitimacy are contextual social constructions with different meaning across time and space. Norms or international law and the legitimacy attached to it by international actors, must be viewed complete in its social and historical context.⁸

³ Ibid 141; C. Reus-Smit, 'Politics and International Legal Obligation' (2003) 9(4) *European Journal of International Relations* 591, 598-599.

⁴ According to Article 38 of the *Statute of the International Court of Justice* (ICJ), there are four sources on international law: international conventions, international custom general principles of law, and the judicial decisions and teachings of the most highly qualified publicists. However, Bull notes that the *Statute* of the ICJ itself represents 'an instrument whose validity derives from the express consent of signatories of it': Ibid, 141-2.

⁵ Bull, above n 2, 142.

⁶ R. Payne, 'Persuasion, Frames and Norm Construction' (2001) 7(1) *European Journal of International Relations* 37, 39.

⁷ Finnemore, Sikkink, above n 1, 897.

⁸ Bull, above n 2, 144; Reus-Smit, above n 3, 594.

This essay will challenge Payne's claim and argue that norms that do not reflect 'genuinely voluntary consensus' need not be seen as illegitimate. Three arguments are key to this proposition. The first asserts that despite their role as the dominant paradigms in international relations, the rational choice theories of liberalism and realism are insufficient in seeking to address Payne's claim. The second part argues that in another area of international relations, theorising, constructivism, does in fact provide the concepts for arguing that norms that do not reflect genuinely voluntary consensus do not necessarily need to be seen as illegitimate. The final part then presents the implications of this discussion for the conduct of diplomacy.

I Liberalism and Realism

From an internationalist point of view, the two main theories explaining international relations are realism and liberalism. Realism (and later neorealism), on the one hand, denies the existence of an international society organised by norms. States are the most important, if not the only, actors in a system of international anarchy, where fear and uncertainty are predominant and each State seeks to maximise its interests defined in terms of power or security, according to neorealists.⁹ International law, regimes, and even the principle of sovereignty consecrated in the United Nations Charter,¹⁰ the supreme normative principle according to Bull,¹¹ have no binding force beyond the states' interests.

For realists, international law is 'simply irrelevant to international politics.'¹² That is, realism is a reaction 'against the tendency to apply, or seek to apply, moral norms and prescriptions to the international domain with scant regard for the innumerable constraints that the realities and complexities of power impose.'¹³ More importantly, realism, because it concentrates on power politics, fails to explain or

⁹ H. Morgenthau, *Politics Among Nations* (1985, 6th ed); K. Waltz, *Theory of International Politics* (1979).

¹⁰ *Charter of the United Nations* (1948).

¹¹ Bull, above n 2, 134.

¹² A. Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503.

¹³ A. Coates, *The Ethics of War* (1997), 18.

predict all or most of what happens outside of the great powers' interests. Norm creation, achievement of consensus, and the creation of legitimacy has been conspicuously absent from (neo)realist analyses.

Liberalism, on the other hand, asserts that humanity is inherently peaceful and institutions are built to regulate state behavior. The existing cooperation among states, whether through bilateral or multilateral diplomacy, is directed towards the regulation of international anarchy. Norms, rules and mechanisms of peaceful conflict resolution are created and sooner rather than later there shall be the moment when this world of anarchy and violence will become instead, in Kant's words, a 'perpetual peace.'¹⁴ For the recent liberal institutionalists, or the new liberalists, as Slaughter explains, agreements between nations are more likely to be concluded in an 'atmosphere of mutual trust, a precondition that will facilitate any kind of enforcement.'¹⁵

From Slaughter's point of view, there are two ways of enforcing these agreements, or international law: through vertical or horizontal enforcement. Vertical enforcement relates to the international or domestic character of norm compliance through national legislatures and courts. Horizontal enforcement relates to the inter-national character involving state responsibility, reciprocity, and countermeasures, which inevitably entail 'each party being judge in its own case, with the attendant illegitimacy of the resulting determination.'¹⁶ The dynamics between this duality, the international and the domestic public consensus necessary in order to reach agreements through diplomatic negotiation is what Putnam calls the 'Two-Level game'.¹⁷

Putnam critiques as misleading the (neo)realist and (neo)liberal institutionalist theorists' basic assumptions of the state as an atomistic, rational, unitary actor in the international anarchical system, where the first sees conflict and the latter cooperation in pursue of each states'

¹⁴ I. Kant, *Perpetual Peace and Other Essays* (1964), 8; Bull, above n 2, 25-6.

¹⁵ Slaughter, above n 12, 532.

¹⁶ Ibid.

¹⁷ R. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42(3) *International Organization* 427-60.

own egotistic interests. Putnam proposes instead this Two-Level metaphor in order to understand better the two-way interactions between the international and the national and how central decision-makers strive to reconcile domestic and international pressures simultaneously in ways that affect a diplomatic negotiation process.^{18,19} From this perspective, the logic is gaining domestic consensus and approval in order to sign an international agreement. If ratification and enforcement of any international agreement resulted from this Two-Level game process, then the domestic legitimacy would then confer the international agreement with its respective international legitimacy, the product of both, domestic (vertical) and international (horizontal) consensus.

The problem with this model is that in order for it to be effective, it must assume that all states participating are 'liberal states,' states with democratic representative governments and market economies which do not yet make up the whole world. As Slaughter explains:

'... the domestic constraints on liberal governments are more likely to create the conditions in which states entering into an international agreement have reason to believe that their co-parties are equally constrained by domestic courts, such that domestic judicial enforcement would not handicap one party significantly more than another.'²⁰

In short, neither liberalism nor realism is adequately suited to explain the process of legitimate norm-building through genuinely voluntary consensus. We then need to look elsewhere for a plausible explanation. Constructivist insights on this issue are illuminating.

II Constructivism

As opposed to the core assumptions of rationalist theories, constructivists' three core ontological propositions hold that: normative or ideational structures are just as important as material structures; identities inform interests and, in turn, actions; and agents and

¹⁸ Putnam, above n 17, 432-3.

¹⁹ In this Two-Level game, Level I refers to the bargaining between the negotiators (the international, bilateral or multilateral) and Level II to the bargaining with and among the national actors that will ratify or not such agreement.

²⁰ Slaughter, above n 12, 533.

structures are mutually constituted.²¹ In short, constructivists study how ideas, norms and identities shape behaviour and vice versa. Daniel Philpott offers an analytical framework to explain two important roles of ideas. First, ideas are important because they shape identities. Assuming that we are free, rational, autonomous agents, we adopt identities into our identity because of their intrinsic appeal to us. Through his 'reason of reflection' and 'circumstance of reflection' mechanisms, ideas become a new shared cultural reality. In constructivist words, 'ideas become social facts.'²² The second important role of ideas lies in their social power. The social power of ideas is 'the ability of believers in ideas to alter the costs and benefits facing those who are in a position to promote or hinder the policies that the ideas demand.' What is distinctive about the social power of ideas is that it is 'believers in ideas, motivated by ideas, who brandish these carrots and the sticks in order to realise political results'.²³

This resonates with constructivist claims. From this perspective, ideas are beliefs and norms are inter-subjective beliefs about proper behaviour. When principled ideas about right and wrong are accepted by a broad range of actors, they become norms. In this sense, ideas are significant as 'resolvers of uncertainty',²⁴ which according to James Rosenau, forms the key role that the diplomat needs to play in this information age. Rosenau argues that the diplomats' primary function will be to persuasively inform and educate the increasing diversity of actors now actively engaged in international politics that are overriding traditional territorially-defined sovereign borders.²⁵ Their success will be measured more and more in terms of how they are able to frame their ideas in order to persuade not only external constituencies, but their domestic constituencies as well. Persuasion according to Finnemore and Sikkink, is the process by which 'agent action becomes

²¹ C. Reus-Smit, 'Constructivism' in C. Burchill, et al. (eds), *Theories of International Relations*, (3rd ed, 2005), 196-7.

²² D. Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (2001), 51-4.

²³ *Ibid*, 57-8.

²⁴ *Ibid*, 56-7.

²⁵ J. Rosenau, 'States, Sovereignty, and Diplomacy in the Information Age' (February, 1999) *Virtual Diplomacy*, 2, 7, 11.

social structure, ideas become norms, and the subjective becomes the intersubjective.²⁶

Finnemore and Sikkink assert that there are two types of arguments about persuasion: a structural and logical one based on law and a psychological and affective one. In relation to the first, 'legal arguments are persuasive when they are grounded in precedent.' From a psychological point of view, 'both cognition and affect work systematically to produce change in attitudes, beliefs, and preferences.'²⁷ From these two perspectives, persuasion has occurred once significant behavioural change is identified.

Payne is also interested in persuasion and he agrees with Crawford's assumption that 'norms established through coercion ... lack legitimacy.'²⁸ Payne argues, however, that 'apparent State acceptance of normative standards may reflect coercion or some other mechanism, rather than persuasion, at work.'²⁹ Payne challenges this 'persuasive' idea by introducing Schelling's realist 'coercive compellence' argument, which suggests that powerful states can make or threaten weaker states to behave in certain behavioural standards against the weaker states' wishes.³⁰ This is relevant to Payne's argument about the difference between, or the shortcomings of constructivists' persuasiveness of normative ideas against the coerciveness of the realist or the rationalist.

In an attempt to bridge this divide between the rationalists and the constructivists, Checkel identifies two distinct mechanisms through which this process of persuasion takes place.³¹ First, against constructivists, he argues that norms are not necessarily internalised by the elites through a process of persuasion and socialisation by 'norm-entrepreneurs',³² but are in fact coerced through material leverage

²⁶ Finnemore & Sikkink, above n 1, 914.

²⁷ Ibid at 915.

²⁸ Cited in Payne, above n 6, 42.

²⁹ Ibid, 39-40.

³⁰ Ibid, 41.

³¹ J. Checkel, 'International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide' (1997) 3(4) *European Journal of International Relations* 473-95.

³² This refers to the increasingly important role of non-state actors or transnational norm entrepreneurs influencing decision-makers such as social movements or NGOs, the

'linking the issue of concern to money, trade, or prestige, as more powerful institutions or governments are pushed to apply pressure.'³³ That is, norms in this case act as constraints on behaviour. The second mechanism, against rationalists, is a process of learning that 'leads agents – often elite decision-makers – to adopt prescriptions embodied in international norms' without any material threat or incentive to do so.³⁴ The societal pressure dynamic is explained by rationalist theories while the social learning mechanism is explained by constructivism.

In any case, it is how these norms are framed that could potentially impact a State's compliance, whether voluntary or coerced.³⁵ Framing is a persuasive device used to 'fix meanings, organise experience, alert others that their interest and possibly their identities are at stake, and propose solutions to ongoing problems.'³⁶ If we understand diplomacy as an institutional form of organising dialogue between two or more independent, sovereign states by their official representatives, then framing, whether under an anarchy or a cosmopolitan democracy, becomes crucial.

Both realism and liberalism fail to address the social process which explains this. If Payne's main concern is that 'norms that do not reflect genuinely voluntary consensus can be seen as illegitimate,' then understanding this process at the individual, state-by-state, regional and global level is essential. Constructivists have proposed several models of norm creation and compliance, from the very simple 'boomerang effect,' to the three-stage 'life cycle' of norm creation, to the more complex five-stage 'spiral model,' which I need not describe in detail here.³⁷ For the purposes of this essay, however, it suffices to note

'meaning managers' or 'meaning architects': Finnemore & Sikkink, above n 1, 896; Khagram, Riker & Sikkink, above n 1, 19.

³³ Payne, above n 6, 41.

³⁴ Checkel, above n 31, 477.

³⁵ These can be framed in terms of political and security reasons of survival or economically, ecologically, ethically, legally and so on.

³⁶ Barnett in Payne, above n 6, 39.

³⁷ M. Keck & K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (1998); Finnemore & Sikkink, above n 1, 895-909; T. Risse, 'International and Domestic Change: Arguing and Communicative Behavior in the Human Rights Area' (1999) 27(4) *Politics and Society* 529-59; T. Risse, 'The Power of Norms versus the Norms of Power:

that each represent the communicative environment that Payne values most, and that all these agree, as well as Payne himself, that norm persuasion through ideational or material means does not enter a vacuum, but a highly contested normative context against other existent norms and particular perceptions of interests.³⁸

Payne states that normative structures should ‘develop out of communicative processes that test the veracity of claims and claimants.’³⁹ This is his process of ‘genuinely voluntary consensus’ creation. Interestingly enough, Payne never goes to the trouble of outlining what he understands by genuinely voluntary consensus, nor even the very notion of consensus itself. Falk explains consensus as more than a simple majority, but less than unanimity or universality. The ‘tipping’ or ‘threshold point’ for norm emergence⁴⁰ once a ‘critical mass’ of states is reached that will lead to the norm cascade or norm socialisation process⁴¹ does not necessarily need to be illegitimate, as Payne seems to believe.⁴² In fact, constructivists argue that ‘unanimity is not essential,’ for a norm to become a ‘social fact,’ something that international law itself recognises when most treaties, conventions or sources of international law just need the commitment of a critical mass of states to enter into force.⁴³

Of course, the question of how a critical mass is reached is problematic and resonates with Payne’s critique to constructivist’s persuasion, for as rationalists argue, a powerful state can coerce or induce weaker states to adhere to desired behavioural standards without persuasion. But a surprising example shows otherwise. While the United States exerted its hegemonic power to persuade, induce and coerce other states not to sign the Rome Statute of the International Criminal Court, many Third World states are now the ones that have not only signed, but gone on to

Transnational Civil Society and Human Rights’ in A. Florini, *The Third Force: The Rise of Transnational Civil Society* (2000).

³⁸ Finnemore & Sikkink, above n 1, 897; Payne, above n 6, 38.

³⁹ Ibid, 39.

⁴⁰ The first phase of the norm life cycle.

⁴¹ The second phase of the norm life cycle.

⁴² Payne, above n 6, 54.

⁴³ Finnemore & Sikkink, above n 1, 901.

ratify the Rome Statute first.⁴⁴ This becomes more interesting if we consider the fact that Third World states have historically favored and promoted a strong legal defense of sovereignty, non-intervention and self-determination *vis à vis* the great powers but at the same time have complied with US's demands in order not to lose privileges or be the subject of a substantial trade sanction.^{45,46}

Furthermore, as Christian Reus-Smit demonstrates, there is the uncomfortable fact that in reality 'states are bound to observe rules that they have never explicitly consented to,' in particular, 'new states are bound by law irrespective of their consent' and those states 'whose changed circumstances bring them under the purview of international rules are bound by them.'⁴⁷ Actors, as Reus-Smit points out, 'often observe rules out of obligation as well as self-interest and fear of coercion or solely out of self-interest or fear.'⁴⁸ Reasons for this can be attributed to a state's interest in enlarging their margins of manoeuvre to increase their international legitimacy, or simply to regain foreign aid.⁴⁹

The constructivists, according to Payne, 'undoubtedly document norm-building, but the mechanisms of change seem more coercive than persuasive. The process is not especially social.' Payne continues, 'the resulting norms could be said to lack legitimacy according to constructivist standards.'⁵⁰ However, Reus-Smit himself critiques the literature that stresses sanctions, consent, institutional fairness or dialogue as the source of international legal obligation. These only make sense 'if we assume the existence and legitimacy of the broader

⁴⁴ UN ICC, 2005.

⁴⁵ Ibid; C. Philipp, 'The International Criminal Court – A Brief Introduction' in A. Bogdandy & R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (vol. 7, 2003).

⁴⁶ The ICC is the greatest international instrument ever created to prosecute crimes of aggression (although not yet defined), war crimes, crimes against humanity, and genocide through universal jurisdiction: Phillip, above n 45; M.Wagner, 'The ICC and its Jurisdiction – Myths, Misperceptions and Realities' in A. von Bogdandy & R. Wolfrum (eds) *Max Planck Yearbook of United Nations Law* (vol. 7, 2003).

⁴⁷ Reus-Smit, above n 21, 599-600.

⁴⁸ Ibid at 595.

⁴⁹ Risse (1999), above n 37, 542.

⁵⁰ Payne, above n 6, 54.

international legal system.⁵¹ Through his proposed complex 'interstitial' conception of politics,⁵² historically and socially grounded, one can understand why states and other actors 'attach legitimacy to particular institutional forms, including the modern system of international law.'⁵³

This has important implications for the conduct of diplomacy, especially if we understand diplomacy as the traditional '(art of) negotiation between states which acknowledge each others' independence.'⁵⁴ Diplomacy was indeed created as a response to the absence of norms and institutions capable of coordinating relations between states. It also addresses the need to protect networks of official communication between states in an international context characterised by anarchy, uncertainty and fear, known also as the security dilemma: my security is my neighbour's insecurity. The pristine form of diplomacy, according to Bull, is the communication of messages between states.⁵⁵ But this traditional conception of diplomacy supporting the idea of states and its official representatives as the only actors able to engage in diplomatic activity has been challenged by the emergence of active non-state actors increasingly influencing diplomatic efforts.⁵⁶

Galtung and Ruge's analysis of the historical phases of diplomacy, from *ad hoc* diplomacy to institutional diplomacy, and from envoy diplomacy to residential diplomacy, from conference diplomacy to organisational diplomacy, and from bilateral to multilateral diplomacy shed important light on the historical process of world integration.⁵⁷ If the trend

⁵¹ Reus-Smit, above n 21, 593.

⁵² This is, 'one that locates politics at the intersections of ideographic, purposive, ethical and instrumental forms of reason and action': Reus-Smit, above n 21, 594.

⁵³ Reus-Smit, above n 21, 594.

⁵⁴ A. Watson, *Diplomacy: The Dialogue Between States* (1982), 33.

⁵⁵ Bull, above n 2, 158.

⁵⁶ See Finnemore & Sikkink, above n 1; Keck and Sikkink, above n 37; Florini, above n 37; Risse, above n 37; A. Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (2001); and Khagram, Riker & Sikkink, above n 1, just to name a few. For an analysis on the impact of non-state actor on diplomacy, see R. Langhorne, 'The Diplomacy of Non-State Actors' (2005) 16 *Diplomacy and Statecraft* 331; A. Cooper & B. Hocking, 'Governments, Non-governmental Organisations and the Re-calibration of Diplomacy' (2000) 14(3) *Global Society* 361.

⁵⁷ J. Galtung & M. Ruge, 'Patterns of Diplomacy. A Study of Recruitment and Career Patterns in Norwegian Diplomacy' (1965) 2(2) *Journal of Peace Research* 101-3.

continues, they argue, not only will bilateral diplomacy be replaced by many more multilateral types of diplomatic engagement, but in a fully integrated world, a superstructure will regulate almost all interaction between states.⁵⁸

Galtung and Ruge have even gone as far as to suggest that 'there may come a period when entering bilateral diplomacy may be a sign of hostility, not of friendship.'⁵⁹ Although bilateral diplomacy is far from dead, multilateralism has indeed become much more accepted and practiced among, based on the idea that the greater the participation and consensus, the greater the legitimacy of international actors and politics. Multilateral diplomacy, as an institutionalised set of norms influencing the direction of the international system, clearly points towards that normative assumption.

Not surprisingly, while both (neo)realism and (neo)liberalism pay little attention to non-State actors, publics and networks of committed believers such as intellectuals who create and organise ideas, together with activists who creatively present, spread and apply pressure on behalf of developed ideas, are central to constructivists.⁶⁰ Further still, these ideas and networks of increasingly active non-state actors influencing international politics have been identified by scholars as one of the crucial challenges diplomats will face in the next decade, in the name of public diplomacy defined as 'work which aims at influencing in a positive way the perceptions of individuals and organisations abroad about one's own country and their engagement with one's country.'⁶¹

Public diplomacy, although ancient in practice, has become increasingly fashionable at the beginning of the twenty-first century as 'government-to-people' and 'civilian people-to-people diplomacy'.⁶² Heine, for example, is very critical of the ancient 'club model' of diplomacy, where

⁵⁸ Ibid, 102.

⁵⁹ Ibid, 127.

⁶⁰ Philpott, above n 22, 69.

⁶¹ J. Melissen, 'Public Diplomacy Between Theory and Practice' in J. Noya (ed), *The Present and Future of Public Diplomacy: a European Perspective* (2006) 11; S. Riordan, *The New Diplomacy* (2003), 120-128; B. Hocking, *Foreign Ministries: Change and Adaptation* (1999).

⁶² J. Noya, *The Present and Future of Public Diplomacy: a European Perspective* (2006), 16.

anachronistic diplomats only want to meet with other diplomats or government officials and negotiate 'agreements between sovereign states' restricting themselves to fellow members of the 'club'. The club model of diplomacy 'has given way to a flatter, less hierarchical 'network model''.^{63,64}

III Conclusion

Framing, or persuasive communication in international relations is the social construction of social meaning and frames used to attempt the mobilisation of consensus around an idea, not only through words, but also through action.⁶⁵ Discursive action, as Risse explains, 'is oriented towards achieving consensus on the validity inherent in any speech act.'⁶⁶ The goal of the Habermasian communicative interaction, or argumentative rationality which Payne uses to discredit constructivist claims also used by constructivists, is to 'achieve voluntary argumentative consensus and truth seeking, not to push through one's own view of the world of moral values',⁶⁷ such as (neo)realists or (neo)liberalists usually do.

While (neo)realism and (neo)liberalism are outcome-focused, constructivism is much more concerned with the various processes employed to achieve these outcomes. From this perspective, if certain preconditions are met,⁶⁸ relationships of power, force and coercion are assumed to be absent when argumentative consensus is sought, be this within a bilateral or multilateral diplomatic negotiation. This has the affect of leveling traditional international actors, such as Sate and

⁶³ J. Heine, 'On the Manner of Practising the New Diplomacy' (Working Paper No 11, Centre for International Governance Innovation, 2006) 5-6.

⁶⁴ Several factors accounting for this include the increased democratisation and transparency of politics and diplomacy, the growing number of actors involved in policy making, and the increased interpenetration of different societies, understood as complex interdependence or globalism (Ibid, 4).

⁶⁵ Khagram, Riker & Sikkink, above n 1, 12-3.

⁶⁶ Risse (1999), above n 37, 533.

⁶⁷ Ibid, 534.

⁶⁸ These are: the ability to empathize; actors need to share a 'common lifeworld,' a shared culture and common system of norms and rules perceived as legitimate; the existence of a public sphere in which actors have regularly and routinely to explain and justify behaviour; and the necessity for actors to recognise each other as equals and have equal access to the discourse: Ibid.

intergovernmental organisations with their non-traditional counterparts, those too often excluded and marginalised such as social movements, non-governmental organisations (NGOs), and indigenous people groups.

Multilateral diplomacy has indeed become much more accepted and practiced both between states and in their relations with non-State actors. This may be one of the reasons why Ruggie, a constructivist, assigns such importance not to the number of participants in diplomatic negotiations, but to the kinds of relationships that are forged between the actors that can be conceived as an 'architectural form' to 'define and stabilise the international property rights of states, to manage coordination, and to resolve collaboration problems' in the international system.⁶⁹

Successfully persuading states to negotiate, adopt and implement better policies is crucial to building consensus in the fields of human rights, environmental and trade regulation, to name just a few. Consequently, the process of framing and the analysis of that process takes on greater importance. Potentially, with a more thorough understanding of the way in which nations build consensus and gradually create new norms and ideas, the international community will slowly, little by little, move out of its anarchical state towards one where co-operation, peace, and security may be the norm rather than the exception.

⁶⁹ J. Ruggie, 'Multilateralism: The Anatomy of an Institution' (1992) 46(3) *International Organization* 567.

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Vertical Distribution of Algal Species in Rock Pools in South-Eastern Australia

*Catherine Hayes**

The rocky shore is an environment subjected to frequent variation and increasing physical stress along a vertical gradient. Organisms such as marine algae living in the intertidal zone must tolerate changes in temperature, wave action, salinity and moisture, which become more intense as height increases. Species diversity thus declines with height above sea level, as fewer species can tolerate these increasingly harsh conditions. Rock pools, however, provide a refuge against these stresses. Remaining immersed, the species in rock pools do not endure such frequent and intense variation as those living on the rocky surface. This study of a temperate rocky shore at Kioloa in New South Wales demonstrates that the number of algal species in rock pools is negatively correlated with the height of the pools above sea level. The general intertidal trend of increasing species diversity with decreasing height is thus applicable to rock pools. This study also examines whether particular species, including *Hormosira banksii*, and particular forms of algae (foliose or encrusting) dominated the intertidal zone at particular heights. A no clear patterns of vertical distribution were found, more rigorous testing would be necessary to establish such patterns. There was no significant difference in the diversity of red and brown algae in the Kioloa rock pools. This study highlights the important refuge rock pools provide for intertidal algal species, and their potential applicability to the general patterns seen in the rocky shore intertidal zone.

Introduction

To survive in an intertidal zone, organisms must be able to withstand a range of physical and biological stresses. The intertidal zone is the area of a shore marked by the upper and lower limits of the tide; it is exposed at low tide and immersed at high tide, and exhibits zonation

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patterns in both plant and animal species. As the height above sea level increases, the harshness of conditions in the intertidal zone intensifies; there is less moisture, increased insolation, and daily changes in pH, salinity and temperature.¹ Fewer species are able to survive in these conditions, thus species diversity declines with increasing height in intertidal zones.²

For marine macroscopic algae (seaweed), distribution on rocky intertidal shores depends on several factors, such as the species' tolerance to physical factors, including daily changes in temperature and light intensity.³ Wave action is important in driving distribution, as exposure to waves may alleviate desiccation, but can result in plants being abraded on rocks or removed from the substrata.⁴ Biological factors are also significant: in New South Wales, intertidal algal distribution is strongly influenced by the presence of grazing gastropods.⁵ Competition between species may also limit a particular species distribution.⁶ Previous studies of the eastern Australian coast demonstrate that intertidal zones are occupied by distinct groups of organisms. In the lowest areas of the intertidal zone, foliose algae are abundant.⁷ In mid-shore regions, encrusting algae and gastropod grazers are more common.⁸ Thus the presence of algal grazers and the

¹ H. Womersley & R. King, 'Ecology of temperate rocky shores' in M.N. Clayton & R.J. King (eds), *Biology of marine plants* (1990) 266.

² A. Underwood & P. Jernakoff, 'Effects of interactions between algae and grazing gastropods on the structure of a low-shore intertidal algal community' (1981) 48 *Oecologia* 221.

³ Womersley & King, above n 1.

⁴ J. Lubchenco & B. Menge, 'Community development and persistence in a low rocky intertidal zone' (1978) 48 *Ecological Monographs* 67.

⁵ Underwood & Jernakoff, above n 2.

⁶ J. Lubchenco, 'Algal zonation in the New England rocky intertidal community: An experimental analysis' (1980) 61 *Ecology* 333.

⁷ A. Underwood & S. Kennelly, 'Ecology of marine algae on rocky shores and subtidal reefs in temperate Australia' (1990) 192 *Hydrobiologia* 3.

⁸ A. Underwood, 'Structure of a rocky intertidal community in New South Wales: Patterns of vertical distribution and seasonal changes' (1981) 51 *Journal of Experimental Marine Biology and Ecology* 57.

physical stresses of living at high intertidal regions are dominant causes of variation in the vertical distribution of species in the intertidal zone.⁹

Rock pools provide a buffer against the extreme variation experienced by organisms in the intertidal zone, supporting species which could not otherwise survive at such heights.¹⁰ Algae living in rock pools may not experience such marked changes in temperature, light intensity and wave action as those situated outside pools. However, these plants still experience variation. This includes a higher increase in temperature and light intensity compared to that in the surrounding coastal water, the increased impact of wave action (despite being immersed) and, less frequently, disturbances which alter the composition of species or introduce new predators.¹¹ In small and shallow pools which are high in the intertidal zone, physical factors like nutrient availability, salinity and pH are likely to vary markedly with changes such as rain.¹² Thus, as height increases in an intertidal zone, species in rock pools are subjected to increasingly harsh and variable conditions.

This study investigates whether rock pools exhibit a decrease in species diversity with increasing height above sea level, as is common for the rocky shore environment.¹³ Species diversity is measured here as the number of seaweed species found in each rock pool. Additionally, this study examines whether the species composition in rock pools is similar to that observed in previous studies of Australian rocky intertidal zones, displaying an abundance of foliose algae at lower intertidal levels, giving way to encrusting species at mid-levels.¹⁴ *Hormosira banksii* is a

⁹ A. Underwood, 'The effects of grazing by gastropods and physical factors on the upper limits of distribution of intertidal macroalgae' (1980) 46 *Oecologia* 201.

¹⁰ A. Underwood & G. Skilleter, 'Effects of patch size on the structure of assemblages in rock pools' (1996) 197 *Journal of Experimental Marine Biology and Ecology* 63.

¹¹ M. Dethier, 'Disturbance and recovery in intertidal pools: Maintenance of mosaic patterns' (1984) 54 *Ecological Monographs* 99; H. Womersley & R. King, 'Ecology of temperate rocky shores' in M.N. Clayton & R.J. King (eds), *Biology of marine plants* (1990) 266.

¹² Womersley & King, above n 1.

¹³ J. Lubchenco & B. Menge, 'Community development and persistence in a low rocky intertidal zone' (1978) 8 *Ecological Monographs* 67; A. Prathep, 'Spatial and temporal variations in diversity and percentage cover of macroalgae at Sirinart Marine National Park, Phuket Province, Thailand' (2005) 31 *ScienceAsia* 225.

¹⁴ Underwood, above n 8.

dominant species of the intertidal zone of the eastern Australian coast.¹⁵ The distribution of *H. banksii* compared to other intertidal algal species is examined to ascertain whether they are adapted to living at different heights and conditions. The diversity of the red, brown and green algae found in the rock pools is also examined to indicate whether a particular phylum dominates the Kioloa rock pools. The inherent variability of rock pools has meant they have previously been excluded in studies of the intertidal zone as they are unrepresentative of species usually occurring at particular heights.¹⁶ This study represents an exploration into whether these rock pools are reflective of the general rocky shore patterns, despite housing species which occur higher than their usual intertidal range.

This study aims to determine whether seaweed diversity in rock pools correlates with the height of rock pools above sea level. Additionally, it aims to investigate whether particular common species and forms of algae (foliose or encrusting) occur at different heights, indicating they are adapted to different conditions in the intertidal zone.

Materials and methods

Study Site

The study site was a rocky intertidal zone at Kioloa, a temperate coastal area in south-eastern NSW. Rock pools in this intertidal zone were examined for seaweed species diversity.

Measuring the height of rock pools above sea level

A set pole with three attached markers was erected on a rock in the intertidal zone to measure the height of the rock pools above sea level. A graduated pole with measurements in centimetres was held vertically against the base of the edge of the rock pool being examined. A carpenter's square was held at right angles to the graduated pole, and sighted where the square aligned with a marker on the set pole with the horizon in the background. The height in centimetres on the graduated

¹⁵ B. Fuhrer, et al. (eds), *Seaweeds of Australia*, 1981; P. Ralph, D. Morrison & A. Addison, 'A quantitative study of the patterns of morphological variation within *Hormosira banksii* (Turner) Decaisne (Fucales: Phaeophyta) in south-eastern Australia' (1998) 225 *Journal of Experimental Marine Biology and Ecology* 285.

¹⁶ Underwood, above n 8.

pole, and the marker on the set pole with which the square aligned (top, middle, or bottom) were recorded.

These initial measurements were later converted into heights above sea level. Subtracting the measurements obtained from the heights of the set pole markers above the chart datum (2.1, 2.6 or 3.1 metres), the respective heights of the rock pools above sea level were calculated.

Collecting and identifying species

After measuring the height of the rock pool above sea level, each pool was examined for the number of species of seaweed it contained. Identification books and handouts assisted in recognizing commonly found species. For unidentifiable species, samples were collected in plastic bags, taken to the field laboratory and examined under microscopes and by a seaweeds expert. Any species which could not be identified after this later examination were labeled as 'unknown'.

Statistical analysis

All statistical tests were performed by Microsoft Excel™ and SPSS™. Correlation, binomial and t-tests were performed at $\alpha = 0.05$. To determine whether the rock pools exhibited a decrease in seaweed diversity with increased height above sea level, a two-tailed Pearson's correlation test was run between the measurements of height and seaweed species number in each pool. Two-tailed binomial tests were run to examine whether there was a significantly greater diversity (measured as number of species) of red, brown or green algae in the rock pools. This was to indicate whether a particular phylum was significantly more diverse, thus potentially better adapted to conditions in the intertidal zone. Two-tailed independent sample t-tests with unequal variances assumed were run to investigate two questions: first, whether *Hormosira banksii* occurred at the same heights as *Sargassum* or Corallinaceae species. This was to analyse whether one species was better adapted to living at higher or lower levels (thus, different intertidal conditions) than the others. Second, to determine whether foliose algae occurred at a different height to encrusting algae, reflecting the intertidal pattern of a zone of foliose algae giving way to a mid-zone of encrusting algae.

Results

Relationship between seaweed diversity and rock pool height

The pools sampled in Kioloa's rocky shore had an average height of 146.47cm above sea level (sd = 38.32, n = 19) and supported an average of 3.21 species (sd = 2.72, n = 19). There was a significant correlation between the height of the rock pools and the number of species in each pool (*Pearson's correlation* = - 0.76; $P_2 < 0.001$, n = 19); (Figure 1). The height of a pool above sea level does, therefore, determine the diversity of species present within it. This result indicates that the general intertidal trend of species diversity decreasing with increasing height above sea level is applicable to the rock pools found in the intertidal zone. Here, seaweed diversity (measured as the number of seaweed species) declined with increasing height above sea level, which is most likely attributable to the increasing harshness of the conditions in the rock pools as height increases.

Comparison of algal phyla in the intertidal zone

There was no significant difference between the number of species of brown and red algae (two-tailed binomial test: $P = 0.5$; n = 10 brown algae species, 5 red algae species). However, the number of individual samples from each phylum did indicate a significant difference (two-tailed binomial test: $P = 0.002$; n = 16 red algae samples, 40 brown algae samples) (Table 1). These results demonstrate that there was no significant difference in the species diversity of red and brown algae in the Kioloa rock pools. However, there were significantly more individual plants of brown algae.

There was only one species of green algae found and this was unable to be identified.

There were significantly less species of green algae found than other species from different phyla (two-tailed binomial test: $P = 0.002$; n = 1 green algae species, 15 red/brown algae species). Thus, there was a significantly lower diversity of green algae than red and brown algae in Kioloa's rock pools.

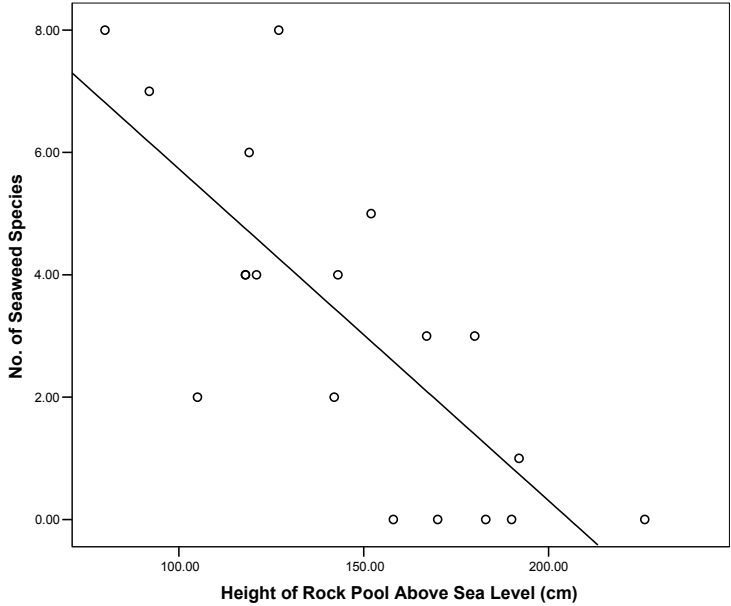


Figure 1: The relationship between species diversity and the height of a rock pool above sea level. A linear trendline has been added.

Vertical distribution of foliose and encrusting algae

Foliose algae occurred at an average height of 123.30cm above sea level (sd = 26.15, n = 46) while encrusting algae occurred at an average height of 120.27cm (sd = 36.70, n = 11). There was no significant difference between the heights above sea level of foliose or encrusting algae (T-test: $t = 0.26$, $P_2 = 0.80$, n = 46 foliose samples, 11 encrusting samples). Thus there is no significant difference between the average height of the distribution of foliose and encrusting algae species in Kioloa’s rock pools (Figure 2).

Vertical distributions of algal species

1. *Hormosira banksii* and *Sargassum*: *Hormosira banksii* occurred at a mean height of 128.00cm above sea level (sd = 28.40, n = 13) and *Sargassum* occurred at a mean height of 124.33cm (sd = 27.46, n = 9). There was no significant difference in the mean height of *Sargassum* and *Hormosira banksii* in the rock pools (T-test: $t = 0.30$, $P_2 = 0.77$, n = 13 *H. banksii*, 9

Sargassum spp) (Figure 3). Thus it appears there is no difference in the heights at which these species are found in Kioloa.

2. Encrusting coralline algae and *Hormosira banksii*: the Corallinaceae species occurred at an average height of 119.00cm (sd = 34.18, n = 6). For this t-test, two of the original eight ‘Corallinaceae’ samples were excluded as it was not known whether these were encrusting species or not. There was no significant difference between the mean heights above sea level of *Hormosira banksii* and the Corallinaceae species (T-test: $t = 0.56$, $P_2 = 0.59$, $n = 13$ *H. banksii*, 6 Corallinaceae species) (Figure 3). It was expected that encrusting species (perhaps better able to withstand the harsher conditions in the high intertidal pools) could survive higher than the foliose brown algae species. However, this was not demonstrated by the t-test.

Table 1: The number and identity of species found in each phylum.

Algal Phylum	Species in each phylum	No. of samples	No of species	Total sample numbers in each phyla
Rhodophyta (red algae)	Corallinaceae spp	8	5	16
	<i>Delisea pulchrum</i>	1		
	<i>Hildenbrandia</i> spp	1		
	<i>Porphyra</i> spp	4		
	<i>Pterocladia capillacea</i>	2		
Phaeophyta (brown algae)	<i>Bachelotia antillarum</i>	1	10	40
	<i>Colpomenia peregrina</i>	1		
	<i>Colpomenia sinuosa</i>	1		
	<i>Cystophora siliquosa</i>	1		
	<i>Ectocarpus siliculosus</i>	1		
	<i>Hormosira banksii</i>	13		
	<i>Petalonia fascia</i>	5		
	<i>Ralfsia</i> spp	4		
	<i>Sargassum</i> spp	9		
	<i>Zonaria Angustata</i>	4		
Chlorophyta (green algae)	Green Algae spp	1	1	1
Unknown	Unknown species 1	3	2	–
	Unknown species 2	1		

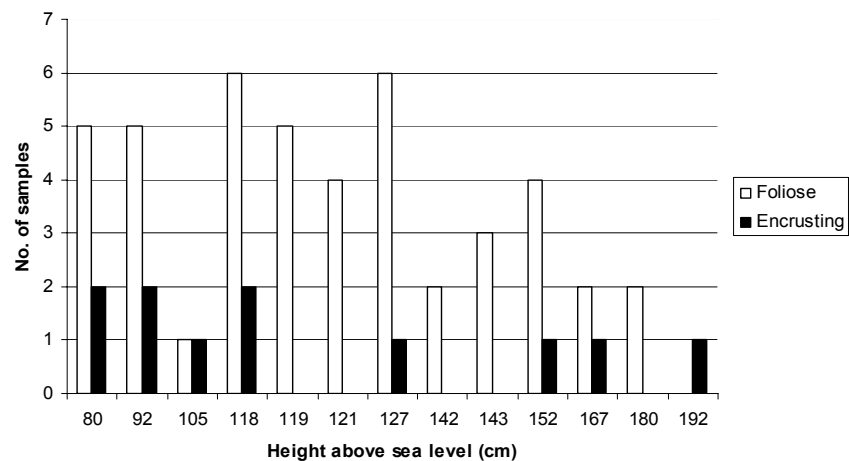


Figure 2: The number and distribution of foliose and encrusting algae samples in Kioloa.

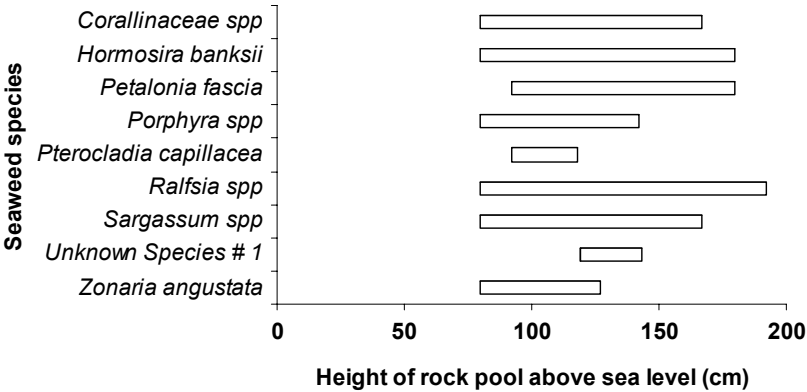


Figure 3: The distributions of species at Kioloa; here species of which two or more samples were found were included.

Discussion

Many studies indicate that as the height above sea level of rocky shores increases, the number of species able to tolerate the increasingly harsh conditions declines.¹⁷ On rocky shores, algal growth is increased when it experiences increased moisture, decreased emersion, and decreased temperatures and light regimes during low tide.¹⁸ These favourable conditions are likely to increase as height above sea level decreases. Thus, the results in this study (decreased seaweed diversity with increasing height above sea level) are expected when the conditions in intertidal rock pools are considered.

Rock pools provide havens for organisms from extreme variations, allowing survival of species higher than their normal range.¹⁹ As the tide rises and falls, organisms in an intertidal zone are subjected to varying degrees of exposure, depending on their height in the zone. Rock pools may prevent organisms from experiencing severe effects, such as desiccation, which result from changes in moisture, wave action, insolation and temperature.²⁰ However, the same gradient of increased stress on organisms as height above sea level increases is apparent for rock pools.

Higher pools (more likely to be shallower than those in lower intertidal regions) are likely to be greatly affected by environmental factors such as severe heat stress, thus more prone to drying out, particularly in summer.²¹ Shallower and smaller pools are likely to have a greater variation in nutrient availability, salinity and pH compared to larger, lower pools, and will be more susceptible to the effects of rainfall and random disturbances.²²

¹⁷ A. Prathep, 'Spatial and temporal variations in diversity and percentage cover of macroalgae at Sirinart Marine National Park, Phuket Province, Thailand' (2005) 31 *ScienceAsia* 225; A. Ingólfsson, 'Community structure and zonation patterns of rocky shores at high latitudes: An interocean comparison' (2005) 32 *Journal of Biogeography* 169.

¹⁸ Underwood & Jernakoff, above n 2.

¹⁹ Underwood, above n 8.

²⁰ Womersley & King, above n 1.

²¹ Dethier, above n 11.

²² Ibid; Womersley & King, above n 1.

Because of the increasingly harsh conditions along this vertical gradient, fewer seaweed species are likely to be able to survive in rock pools as height above sea level increases. This was demonstrated in the study. Notably, no other variables of the rock pools except height above sea level were taken into account. Such measurements or observations may have been valuable. The size and shape of rock pools are important regarding the type and abundance of species within them.²³ Thus, large pools in the intertidal zone may contain more species than small pools. For example, Underwood and Skilleter noted that in a series of artificial pools drilled into a rock platform, there were between 25 and 50 per cent more species in wide than narrow pools.²⁴

A limitation noted by Underwood and Jernakoff is that seasonal variations mean that some species of algae will extend higher and be more abundant than others during different times of the year, such as *Petalonia fasica* (largely found only in winter).²⁵ While such considerations were not included in this study and are unlikely to have significantly affected the results obtained (as the vertical gradient still drives this correlation), they could provide further insights into the composition and distribution of seaweed species at Kioloa.

Domination of the intertidal zone by different algal phyla

There was only one species of green algae found and this was unable to be identified. Given that many green algae are microscopic or relatively small,²⁶ it is possible that other green algae species present were simply missed by students in their collection of samples. However, intertidal pools are often dominated by brown macroalgae such as *Hormosira banksii*, and pink encrusting coralline and *Porphyra* species (red algae) are common in the mid-intertidal regions.²⁷ Thus, as the binomial test indicated, at Kioloa, brown and red algae dominate the rocky pools. As green algae species can occur in rock pools extending high into the

²³ Underwood & Skilleter, above n 10; L. Airoidi, 'Effects of patch shape in intertidal algal mosaics: roles of area, perimeter and distance from edge' (2003) 143 *Marine Biology* 639.

²⁴ Underwood & Skilleter, above n 10.

²⁵ Underwood & Jernakoff, above n 2.

²⁶ Fuhrer et al, above n 15.

²⁷ H. Womersley 'Biogeography of Australasian marine macroalgae' in M. Clayton & R. King (eds), *Biology of marine plants* (1990) 367.

intertidal zone,²⁸ it is possible that in the pools sampled, red or brown algae species had simply established first.²⁹ However, the significant difference in the number of samples collected indicates that at Kioloa, there is little green algal diversity. Notably, more rigorous sampling and identification methods would enable this to be examined further.

There was no significant difference between the diversity of red and brown algae at Kioloa. Australia has a rich radophyte flora, particularly in southern, temperate areas where many red algae occur sub-tidally.³⁰ Rock pools low in the intertidal zone are often dominated by large brown seaweeds.³¹ Given the prevalence of these phyla in the intertidal region, the absence of a significant difference in the species diversity of red and brown algae at Kioloa is unsurprising. It would also be expected, as demonstrated in this study, that the brown seaweeds (in particular *H. banksii* and *Sargassum*) dominated the rock pools numerically. These brown macroalgae are very conspicuous (thus easy for students to sample and identify) and commonly found in rock pools throughout the eastern Australian coast.³²

Vertical patterns of distribution: foliose and encrusting algae

Studies of the New South Wales coastline have demonstrated a trend of increased foliose algae at lower regions of the intertidal zone, gradually giving way to a mid-zone of encrusting algae and an abundance of grazing gastropods.³³

However, this pattern was not found in Kioloa's rock pools. Underwood and Skilleter demonstrated that in a series of artificial rock pools, foliose algae was more abundant in lower than higher regions, and in the absence of gastropod grazers.³⁴ Gastropod grazers limiting the abundance of foliose algae on rocky shores include *Nerita*

²⁸ Fuhrer et al., above n 15.

²⁹ Dethier, above n 11.

³⁰ Womersley, above n 27.

³¹ Fuhrer et al., above n 15.

³² Fuhrer et al., above n 15; P. Ralph, D. Morrison & A. Addison, 'A quantitative study of the patterns of morphological variation within *Hormosira banksii* (Turner) Decaisne (Fucales: Phaeophyta) in south-eastern Australia' (1998) 225 *Journal of Experimental Marine Biology and Ecology* 285.

³³ Underwood, above n 8.

³⁴ Underwood & Skilleter, above n 23.

atramentosa (the black nerite), *Bembicium namum* (the conniwink) as well as the variegated limpet, *Cellana tramoserica*.³⁵ These grazers were observed at the study site in Kioloa, in addition to the starfish *Patiriella exigua*, which can inhibit the growth of macroalgae.³⁶

The fact that many of these grazers were observed in the rock pools and that prior studies indicate that foliose algae is more abundant in lower intertidal pools would suggest that the same pattern may be expected in Kioloa's rock pools. That this was not observed may be because foliose algae species are simply better at surviving where water is present, and encrusting algae are not at a competitive advantage in rock pools where drying out at low tide is not an issue. However, as height above sea level increases for rock pools, harsher conditions such as increased insolation and water temperature would possibly cause more stress for foliose than encrusting species, as their fronds would be more prone to the effects of light and heat (and possibly variations in salinity) than the thick thallus of encrusting species. Notably, the only species found in a pool at 192cm above sea level (the highest sample found) was an encrusting species of *Ralfsia*.

However, the conclusion that rock pools do not reflect this trend should be regarded with caution, given the potential experimental errors. At Kioloa, no rock pools were examined below 80cm above sea level. This is likely to be a major factor as it means nearly half of the intertidal zone at Kioloa (where the highest tide is 1.94m above chart datum) was not measured for species diversity. This may have been a significant lower eulittoral region where pools were largely dominated by foliose algae. Thus comparisons of species in the heights sampled (80-226cm above sea level) may have been less meaningful without this lower area to consider. Further, no consideration of the shape, size or depth of the rock pools were taken into account when the sampling occurred. This may have been important given that foliose algae appear more common

³⁵ Underwood, above n 9.

³⁶ J. Arrontes & A.J. Underwood, 'Experimental studies on some aspects of the feeding ecology of the intertidal starfish *Patiriella exigua*' (1991) 148 *Journal of Experimental Marine Biology and Ecology* 255.

in wider pools.³⁷ Additionally, encrusting algae may have been less visually obvious to students taking samples, thus a more rigorous sampling may be necessary. Also, the classification of some species as 'foliose' may be misleading. While Underwood's (1981) use of species as foliose or encrusting was noted,³⁸ relying on photographs after the field study rather than classifying them at the site is arguably not a reliable method. For example, some species may be considered filamentous or gelatinous rather than foliose.

Vertical patterns of distribution: domination of particular heights

Given the harsh conditions of the intertidal zone and the diversity of species found in its rocky pools, it is expected that different species would be suited to particular conditions at varying heights in rock pools. For this reason, the most common species found at Kioloa, *Hormosira banksii*, was compared to other species to examine whether the domination of the intertidal zone by varying species changed vertically. However, the results indicated that there was no significant difference between the mean heights of *Hormosira banksii* or either of the two other common species found in the family Corallinacea and the genus *Sargassum*.

This finding is surprising given that there are indications these types of algae (particularly the foliose *Hormosira banksii* and the encrusting Corallinaceae species) generally occupy different areas in the intertidal zone.³⁹ Schrieder *et al* found that *Sargassum* was more prominent lower on the shore than *Hormosira banksii*.⁴⁰ However, rock pools may show domination by different species even at similar heights due to initial settlement of some species before others and the subsequent exclusion of other settlers.⁴¹ Thus, a more thorough and numerous sampling of more rock pools would be required to establish such patterns. Again, the problem that almost half of the intertidal zone at Kioloa was not sampled for seaweed species in rock pools could be a crucial factor.

³⁷ Underwood & Skilleter, above n 10.

³⁸ Underwood, above n 8.

³⁹ Ibid.

⁴⁰ M.J. Schreider, T.M. Glasby & A.J. Underwood, 'Effect of height on the shore and complexity of habitat on abundances of amphipods on rocky shores in New South Wales, Australia' (2003) 93 *Journal of Experimental Marine Biology and Ecology* 57.

⁴¹ Dethier, above n 11.

These species distributions could have extended into the subtidal region, or ended at a point above this. Without measuring this lower area for species it is difficult to establish where a particular species' intertidal distribution lies.

Significance of this study

Underwood and Skilleter noted that few quantitative studies have been undertaken on rock pools given their variability and difficulty to replicate.⁴² Rock pools show significant spatial variability; their slow response to disturbances (such as major wave action, wave driven rocks or logs, extreme heat stress and the influx of unusual predators) mean that the abundance and domination of species in different pools within a height range is unstable over a long period of time.⁴³ However, despite these limitations, the study of rock pools may provide a useful model for investigating habitat 'patches' and the effect of human impact on fragments of a particular habitat.⁴⁴ The study of the Kioloa rocky shore valuably indicated that the general trend of increased species diversity with decreasing height above sea level is applicable to rock pools. In a more specific investigation, the study demonstrated that that foliose and encrusting algae, and the common species *Hormosira banksii* and *Sargassum*, did not vary in their vertical distributions. However, more sampling and analysis would be needed to conclusively establish these patterns. As little quantitative research has gone into the species structure of rock pools, such studies as this (albeit on a bigger scale) will be useful in illuminating the patterns and processes of an important rocky shore environment.

⁴² Underwood & Skilleter, above n 10.

⁴³ Dethier, above n 11.

⁴⁴ Underwood & Skilleter, above n 10.

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Poverty Alleviation Efforts by Governmental, Non-Governmental and International Organisations: Do they provide any confidence that poverty can be eliminated?

*Elizabeth Humphries**

Poverty alleviation is a central topic for development organisations. Nonetheless mechanisms and methods of alleviating poverty are contested. Prominent methods of eradicating poverty by governmental, non-governmental and international organisations focus on the structural nature of poverty. This essay argues that the structural nature of poverty is real and requires attention; however, attention also needs to be paid to the ideological nature of poverty. As the current ideology functions to perpetuate poverty, a reconceptualisation is required.

Jeffery Sachs position on 'extreme poverty' suggests that it is 'a trap that can be released through targeted investments', provided that those investments are tested and implemented as 'part of a global compact between rich and poor countries'.¹ However, other academic writers often dispute the ability of various organisations to eliminate poverty. Although development organisations have differing developmental emphases – such as empowerment, participatory development, and gender and development – poverty has remained their central focus. This article will examine the attempts to alleviate poverty in India and suggest that there are many limitations to solving the 'problem of poverty' by governmental, non-governmental and international organisations. Poverty, it will be argued, is not simply a structural problem but also an ideological construction; the persistence of the ideology of poverty, despite attempts to eliminate structural causes of poverty, will only further ensure the persistence of poverty.

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¹ J. Sachs, *The end of poverty: economic possibilities for our time* (2005) 287.

The problematisation of poverty has given rise to various institutional approaches to its solution, which have been employed by non-governmental and governmental organisations as well as through international action. These institutional and professional methods to solving poverty have been critiqued as providing limited developmental responses with restricted abilities for poverty elimination success, as well as being the subject of more damning criticisms where poverty development initiatives have been seen as form of corporate colonialism.² Such criticisms call into question Sachs' premise that through certain measures, 'extreme poverty ... can be released.'³ The effectiveness and limitations of these institutions – governmental, non-governmental and direct international action – become evident through an analysis of the outcomes of various attempts at poverty alleviation in India. Such an analysis questions the concept of poverty and the commonly held perceptions of the causes and solutions to poverty. Wriggins and Adler-Karlsson's argument, explicit and implicit in much development literature, that the persistence of poverty is due to structural problems, will be challenged.⁴ Poverty, I will argue, is not only more than a structural problem, in that it globally and individually structuralises, it is also an ideological problem.

In order to understand the pervasiveness of organisations focused upon poverty alleviation and elimination in India it is necessary to examine the economic situation in India, where poverty is prominent. Although various social and historical factors, such as the caste system, contribute to the polarisation of the wealthy and poor, this polarisation has in fact increased since the implementation of development organisations following Truman's speech 1949.⁵ Eswaran and Kotwal attribute this polarisation to the unsuccessful industrialisation of India, which has seen wealth to trickle down to the members of the higher castes rather

² E. Goldsmith, 'Development as Colonialism' in J. Mander and E. Goldsmith (eds), *The case against the global economy: and for a turn toward the local* (1996) 253.

³ Sachs, above n 1, 287.

⁴ H.W. Wriggins, G. Adler-Karlsson & Council on Foreign Relations, *Reducing global inequities* (1978) 163.

⁵ M. Eswaran & A. Kotwal, *Why poverty persists in India: a framework for understanding the Indian economy* (1994) 5.

than the poorest.⁶ There have been various governmental projects aimed at alleviating poverty. Despite the prominence of these projects, many people are sceptical of the success of governmental organisations as there is a wide literature demonstrating that governmental procedures, intended to alleviate poverty, instead aggravate rich-poor disparities.⁷ These critiques will be explored through an analysis of the role of the Indian government in development initiatives through the case study of the Indian Integrated Rural Development Program.

The governmental Indian Integrated Rural Development Program (IRDP) arose after the findings in 1950s that a high number of poor Indians were dependent upon high-interest informal credit.⁸ Pulley describes the project's orientation as providing a 'capital subsidy and complementary credit at below market interest rates (10 per cent) to households below the official poverty line to finance productive investments in income-generating assets'.⁹ The project set the amount of credit given to its beneficiaries, determined by the income growth necessary for the household to cross the poverty line. The project also detailed the projected long-term spatial expansion of the project, designed to ensure a greater number of people would be eligible for the informal credit scheme.¹⁰ IRDP understood poverty not only materially – as those whose household incomes placed them below the poverty line – but also conceptualised poverty as structurally induced and so created policy that positively discriminated in favour of females and those in the subordinate castes who would otherwise be unlikely to receive credit.¹¹ The project was proactive and dynamic: during the implementation of the program the IRDP found that women were a disadvantaged target group, as they comprised less than five percent of the beneficiaries, and so they formed the subcategory titled the Development of Women and Children in Rural Areas (DWCRA). This

⁶ Ibid, 82-83.

⁷ R.M. Bird & S. Horton, *Government policy and the poor in developing countries* (1989) 4.

⁸ N. Kabeer, et al., *Compensating for institutional exclusion: lessons from Indian government and non-government credit interventions for the poor* (1996) 6.

⁹ R.V. Pulley, 'Making the poor creditworthy: a case study of the integrated rural development program in India' (World Bank Discussion Papers 58, World Bank, 1989) 3.

¹⁰ Kabeer, above n 6, 6.

¹¹ Ibid, 7.

service was both economically and socially orientated: it focused on self-employment opportunities enabled by credit, as well as concentrating on providing various health services and adult education.¹²

Although the IRDP and the DWCRA were effective in numerous ways, particularly in their ability to ensure that women received credit, these projects were constrained by limitations, which were the result of governmental policy, bureaucracy and the structure of the Indian political system. Further problems arose from the banks as well as personally from certain politicians. There was a high level of corruption within the IRDP and the DWCRA,¹³ as was exemplified by the banking sector, where managers often imposed additional requirements upon beneficiaries who they perceived to be undeserving or unreliable people. The bureaucratisation of the program affected the reach of the IRDP. The poor and the upper castes were favoured target groups whereas the poorest, who often existed in socially marginalised groups of the landless, families headed by females, and the scheduled castes, often fell outside the program's definition of poor people.¹⁴ As a result, the organisation was generally successful in reaching the poor but unsuccessful in reaching the poorest. Policy and bureaucratic regulations required the IRDP to have a controlled and inflexible view of poverty, which limited the availability and expansiveness of the IRDP programs.¹⁵ Hence, rather than the project being driven by achievement-based indicators determined by the profitability of the project, they were instead driven by target-based indicators, which regulated the amount of loans distributed.¹⁶ Additionally, the bureaucratic nature of application procedure for credit resulted in it becoming a costly and time consuming one for the beneficiary. Further, there were frequently long delays between applications for a loan and its sanction.¹⁷ The limitations of this program are reflected, not only by other government run organisations in India, but developmental government

¹² Ibid, 6.

¹³ Ibid, 11.

¹⁴ Ibid, 7-8.

¹⁵ Ibid, 7.

¹⁶ Ibid, 8-9.

¹⁷ Ibid, 11.

organisations globally. The predominant limitations of government led poverty alleviation organisations, Bird and Horton argue, is due to the nature of governmental poverty alleviation projects frequently being shaped by the political structure of the government. As a result, the projects become hostage to the hierarchies and corruption within the government, which reduces their ability to serve the interests of the poorest citizens.¹⁸ The Lal Buhadur Shastri Academy compounds this statement, commenting that: 'over the years the bureaucracy has become completely insensitive and even hostile to the poorer sections of society.'¹⁹

Non-governmental organisations (NGOs) have often been listed as an alternative to governmental schemes. However, Riddell and Robinson note that their contributions to raising the income of beneficiaries, as well as solving structural and complex problems of poverty are often limited.²⁰ They define NGOs as distinct from governmental organisations in that they: are not headed by the government, and have a voluntary and not-for-profit nature.²¹ There are a multitude of NGOs in India, some estimates put their number at over 10,000 and,²² consequently, their approaches to poverty solutions are diverse. Riddell and Robinson note three different focuses of poverty alleviation by NGOs: macroeconomic policies aimed at accelerating growth; public investments focusing on human resource development such as health, education, etc.; and programs which directly tackle poverty.²³ The Rural Development Trust (RDT), a NGO that focuses on poverty alleviation through credit schemes based on direct NGO lending, rather than beneficiaries entering the bureaucratic procedures of the bank, will be analysed as an example of an NGO approach to poverty alleviation.²⁴

The RDT, located in the Deccan plateau of India, organised a rural program targeting landless labourers and farmers with less than five

¹⁸ Bird & Horton, above n 7, 8.

¹⁹ R.C. Thakur, *Government and Politics of India* (1995) 7.

²⁰ R. Riddell & M. Robinson, *Non-governmental organizations and rural poverty alleviation* (1995) 5.

²¹ Ibid, 26.

²² Ibid, 62.

²³ Ibid, 15.

²⁴ Ibid, 25.

acres of land. RDT formed various *sangams*: target groups that were given the responsibility of identifying eligible beneficiaries.²⁵ Multiple *sangams* were created by the organisation, which targeted various castes and marginalised poor.²⁶ The community, together, created a Community Credit Fund, which families annually contributed towards. As the money increased in value, families were provided with these monetary gains. Loans were used to buy bulk quantities of seeds for farmers, providing them with subsistence as well as the occasional surplus, which could be used for emergency situations.²⁷ This NGO, like many others, was criticised for lacking flexibility. Additionally, the small scale of the organisation resulted in limited funds being available, which led to the RDT devising methods to ensure loans were repaid.²⁸

Similar to government organisations, non-governmental organisations have been the targets of criticism. In a comparison of sixteen non-governmental organisations in India, Riddel and Robinson noted that many NGOs were unable to reach the poorest, were not sustainable when the organisation left, were very expensive and usually provided only temporary and modest relief from poverty.²⁹ Ironically, governmental organisations are often criticised for being too bureaucratic, and non-governmental organisations are often given suggestions to increase their administrative skill and capacity to ensure that the poorer are targeted.³⁰ The small scale of many NGOs means they often have insufficient resources to address the complicated socio-political factors facing their benefactors.³¹ Importantly, although NGOs and governmental organisations may appear quite distinct and separate, these institutions are often linked. Many NGOs seek funding from the local government as this often provides them with, not only with important financial backing, but also a level of protection. This governmental backing, however, often results in programs being modified by the government to accommodate their priorities. NGOs

²⁵ Ibid, 19.

²⁶ Ibid, 25.

²⁷ Ibid, 19.

²⁸ Ibid, 25.

²⁹ Ibid, 59.

³⁰ Ibid, 39.

³¹ Ibid, 41.

may therefore have to tone down any political or social agendas to accommodate the government's priorities in order to ensure continued funding.³² International programs, operating either as an alternative or supplement to governmental and non-governmental projects are one final form of development action.

Although the Indian approach to development favours an independent and self-reliant method of achieving goals such as poverty alleviation, international assistance is seen as necessary in facilitating this goal.³³ Two of the predominant international action approaches to poverty alleviation in India are foreign aid and trade. Forms of aid assistance such as grants, loans and commodity aid, as well as transformations to the Indian trade sector are seen as necessary to facilitate modernisation and industrialisation. Aid and trade initiatives designed to eradicate poverty have generally rested on modernist approaches to development, where modernisation and industrialisation are seen as having widespread social, political and economic repercussions. One of these commonly emphasised repercussions is poverty reduction.³⁴ India's use of foreign assistance to minimise poverty is exemplified by its reliance on commodity aid in the 1950 to 1960s, when food grains were a form of foreign aid given to counteract the food shortages encountered during the drought. Foreign assistance development initiatives have emphasised a trickle down approach to aid, such as through the distribution and trickle down of food grains to the Indian population which will inevitably reach the poorer people, such foreign assistance initiatives have also emphasised that trade and aid initiatives facilitate modernisation and industrialisation inevitably leading to poverty reduction. This international approach to poverty development has, however, come under criticism.

Critics of poverty development have questioned the ability of international organisations' to eradicate poverty. Using India as an example they have suggested that aid and trade efforts to reduce

³² Ibid, 144.

³³ S. Mahendra, K. Parikh & M.H. Suryanarayana, 'India' in M.G. Quibria (ed), *Rural Poverty in Developing Asia* (vol. 1, 1994) 213.

³⁴ A. Greig, D. Hulme & M. Turner, *Challenging global inequality: development theory and practice in the 21st century* (2007) 76, 78.

poverty are misused by the Indian government; that the 'trickle down' nature of these initiatives are ineffective in reaching the poorest; and, furthermore, that the imperialist nature of these programs results in an inability for aid to address poverty. The World Health Organization has criticised the way in which aid provided to India has been used: stating that foreign aid merely substitutes spending which the government would have otherwise spent, and hence aid invites India to use its funds in less important areas.³⁵ Additionally, Kotwol and Estwaran's analysis of trade and its impact on India, has noted that trade has caused de-industrialisation in India, and has allowed for an unequal trickle-down in economic prosperity, with economic prosperity failing to reach the poor.³⁶ Goldsmith, similarly criticises aid, correlating it to imperialistic measures. He states that 'the Western model of development and the so-called aid programs are mere political weapons that suit Western commercial interests, destroy domestic economies, impoverish the vast majority and further push borrowing nations into the abyss of debt'.³⁷

Although non-governmental, government, and popular action in India has some success, it has largely been criticised for its inability to reach the poorest, and also for its limited success at eradicating the poverty levels of the poor. These international, non-governmental and governmental actions stand contrary to Wriggins and Adler-Karlsson statement in 1978, that through the spending of US\$125 billion on food, nutrition, education, water supplies, transport, housing, and population and health programs in developing countries, absolute poverty would be eliminated within ten years.³⁸ Now, almost thirty years later and well past the target poverty elimination date of 1988, it is evident that absolute poverty has not been eliminated in India or in the world. I believe that poverty, or a negative discriminator will always exist, and the attempt at its alleviation will ensure its perpetuation. This inability to eradicate poverty has brought about theorists who have questioned the nature of development and have critiqued the commonly held definitions of poverty.

³⁵ S. Jha, A. Rajkumar & V. Swaroop, 'Fiscal effects of foreign aid in a federal system of governance: The Case of India' (2000) 77 *Journal of Public Economics* 307, 307.

³⁶ Kotwol & Estwaran, above n 5, 82-83.

³⁷ Goldsmith, above n 2, 253.

³⁸ Wriggins & Adler-Karlsson, above n 4, 164-165.

Post-development theorist, Rahnema argues that the creation of the idea of poverty is a Western cultural construct, and that in many other languages poverty does not have the same assumed juxtaposed ideology as the opposite of rich or as a state of existence associated with the negative status of lower-class, or as synonymous with involuntarily subjugation.³⁹ Rahnema contends that although the Western notion of poverty claims to be universal, standardised, and applicable in description to entire countries,⁴⁰ poverty needs to be understood as cultural, contextual, ambiguous, and relative.⁴¹ The myth of poverty, he elaborates, has been invented, institutionalised, problematised,⁴² as well as modernised, and professionalised through development discourse.⁴³ This western concept of poverty was created in correlation with development initiatives in the post-Enlightenment period, and hence concepts of poverty and development are inherently connected to Western processes of modernisation and industrialisation. This institutional and modernised construction of poverty has led to the problematisation of poverty. This is evident through literary work and the public consciousness: exemplified by the US hegemonic claim to be battling the 'war on poverty' in developing countries.⁴⁴ The need to create solutions to the 'problem of poverty', has resulted in the creation of the professional development domain, where expertise is sought from scientific and western knowledge backgrounds and is legitimised through the institutions previously established.⁴⁵ The invention of poverty in development discourse has resulted in a chain effect of industrialising, modernising, problematising, and professionalising the poverty of developing countries. It is important in the analysis of development action targeted at poverty that poverty is understood as both created, and having many underlying assumptions.

Escobar argues that development is a teleology, in that it:

³⁹ M. Rahnema, 'Poverty' in W. Sachs (ed), *The Development dictionary: a guide to knowledge as power* (1992) 158-159.

⁴⁰ Ibid, 162.

⁴¹ M. Rahnema, 'La Pauvrete' (Paper presented at the Philia Symposium, Oxford, 2003) 3.

⁴² Ibid, 7-8.

⁴³ A. Escobar, *Encountering development: the making and unmaking of the Third World* (1995) 44-45.

⁴⁴ Ibid 21.

⁴⁵ Ibid 44-45.

Reproduces endlessly the separation between the reformers and those to be reformed by keeping alive the premise of the Third world as different and inferior, as having a limited humanity in relation to the accomplished European. Development relies on this perpetual recognition and disavowal of difference, inherent to discrimination.⁴⁶

Poverty development, I too believe, is a means of creating difference and a border between the wealthy and the poor. Although there are evident structural barriers to overcoming poverty, which governmental, non-governmental and international action in India sought to address, the belief held by these organisations that 'the persistence of absolute poverty is essentially a structural problem' ignores the ideological nature of poverty.⁴⁷ The creation of poverty and the consequent hegemony of the concept functions as an ideological mask to perpetuate the existence of poverty. In order to release this trap of extreme poverty,⁴⁸ it is necessary address the structural nature of poverty, but more importantly to work towards a reconceptualisation of poverty.

⁴⁶ Ibid, 53-54.

⁴⁷ Wriggins & Adler-Karlsson, above n 4, 163.

⁴⁸ Sachs, above n 1, 287.

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The War Powers Resolution: A Congressional Failure to Act

*Gareth Jamieson**

The War Powers Act 1973, more commonly called the War Powers Resolution, represented a Congressional attempt to restrain the ability of the President of the United States to make war without legislative approval. It has manifestly failed to do so. The blame for such failure rests with Congress both in its initial drafting of the Resolution and its subsequent failure to enforce it. Successive US presidents have done much to undermine the operation of the Resolution, but because it could have enforced the resolution despite their interference, Congress must bear the ultimate responsibility for the failure of the War Powers Resolution.

The War Powers Resolution (WPR) of 1973 was and still remains a controversial piece of legislation was both reviled as a failure and attacked because it is seen as an excessive restriction on presidential power. The resolution was enacted against the backdrop of continuing debate over the distribution of war powers between the President and Congress, which is given the power to declare war under Article I, s8 of the United States Constitution.¹ Since the end of World War II, presidents have become more assertive in using force without Congressional approval, a trend that began with Truman's commitment of American troops to the Korean War, justified by United Nations (UN) Security Council resolutions.² The WPR represented an attempt to regain Congressional control over the war power in response to the military adventurism of the Nixon administration and the unrestrained

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¹ *The Constitution of the United States* art I, § 8.

² D.G. Adler, 'The Constitution and Presidential War Making' in D.G. Adler & L.N. George (eds), *The Constitution and the Conduct of American Foreign Policy* (1996) 183; E.C. Collier, 'Statutory Constraints: The War Powers Resolution' in G.M. Stern & M.H. Halperin (eds), *The US Constitution and the power to go to war: historical and current perspectives* (1994) 57.

use of executive power that this represented.³ The WPR has failed to achieve its objectives and it is Congress who is to blame.

Congress has only itself to blame for the failure of the WPR for two primary reasons. First, failures of drafting have robbed the WPR of its effectiveness and a lack of will to enforce what remains can be directly linked to Congressional action and inaction. Secondly, although the President and the courts have contributed to the failure of the WPR they cannot be said to bear ultimate responsibility, nor would their contributions have been possible without prior Congressional failings. One popular argument among advocates of Presidential power is that the WPR was simply doomed from the start – that it does not accord with the distribution of power under the Constitution. But the failure of the WPR was not caused by the framers of the Constitution as the correct interpretation of the Constitution shows that Congress does in fact have the power to enact and enforce the WPR. In the end Congress can neither deny its responsibility for the weaknesses of the WPR, nor blame that failure on another political actor.

The Failure of the WPR

The stated objective of the WPR in section 2a is to facilitate ‘collective judgement’, so that both Congress and the President contribute to the decision to go to war and in so doing, to reign in the unilateral use of force by the President.⁴ Section 2(b) asserts Congressional supremacy in the area as flowing from the power to declare war.⁵ The failure of the resolution can be seen in the fundamentally unchanged process of deciding to go to war – one in which Congress continues to play a

³ J.H. Ely, *War and Responsibility: constitutional lessons of Vietnam and its aftermath* (1993) 31; R.A. Katzmman, ‘War Powers: Toward a New Accommodation’ in The Bookings Institute, *A Question of Balance: the president, the Congress and foreign policy* (1990) 45.

⁴ Joint Resolution Concerning the war powers of Congress and the President, Public L No 93-148, § 2(a) H.R. Res. 542 (1973) (hereafter ‘*The War Powers Resolution*’); L. Fisher, *Presidential War Power* (2nd ed, 2004) 145; T.E. Mann, ‘Making Foreign Policy: President and Congress’ in The Bookings Institute, *A Question of Balance: the president, the Congress and foreign policy* (1990) 18.

⁵ *The War Powers Resolution* § 2(b).

minimal role.⁶ Presidents have continued to act unilaterally and to declare war without Congressional approval.⁷

Reagan and his successors have shown an increasing series of military actions, from the invasion of Grenada, to Clinton's air strikes on Iraq all having been made without Congressional authority and in defiance of the WPR.⁸ The constitutionality of the WPR has also been challenged with continuing presidential assertions that it is unconstitutional severely damaging its effectiveness and credibility.⁹ Presidents have exploited loopholes in the WPR and Congress has left such violations largely unchallenged.¹⁰ Senator Jacob Javits, one of the initial sponsors of the WPR, enthusiastically supports the Resolution as an effective check on presidential power but identifies a lack of Congressional will to enforce the resolution as a weakness.¹¹ Actually, the lack of Congressional Will is one of the factors that make the resolution an ineffective check on presidential Power. It is true that presidents have sometimes gone before Congress to seek approval for a military action – the most recent Gulf War is just one example. But such appeals were not compelled by the requirements of the WPR, which George Bush Snr. still maintained he was not bound by – they were a political exercise, necessary for that reason perhaps but not a result of the operation of the WPR which has patently failed in its objective to acquire for Congress a greater role in the decision to go to war.¹²

⁶ B. Hinckley, *Less than meets the eye: foreign policy making and the myth of the assertive Congress* (1994) 99; E. Keynes, 'The War Powers Resolution and the Persian Gulf War' in D.G. Adler and L.N. George (eds), *The Constitution and the Conduct of American Foreign Policy* (1996) 241.

⁷ M.J. Glennon, *Constitutional Diplomacy* (1990) 102-103.

⁸ L. Fisher & D.G. Adler, 'The War Powers Resolution: Time to say goodbye' (Spring, 1998) 113(1) *Political Science Quarterly* 1, 10.

⁹ Mann, above n 4, 19.

¹⁰ Katzmman, above n 3, 35.

¹¹ J.K. Javits, 'War Powers Reconsidered' (1985-1986) 64 *Foreign Affairs* 130, 135-138.

¹² K.K. Schonberg, 'Global Security and legal restraint: reconsidering war powers after September 11' (Spring, 2004) 119(1) *Political Science Quarterly* 115, 120; L.Fisher, 'Deciding on War Against Iraq: Institutional Failures' (Fall, 2003) 118(3) *Political Science Quarterly* 389, 395.

Faults of Drafting

The drafting of the WPR was a long and contentious process, with the House and the Senate having wildly different versions of the text.¹³ As a result of the compromises made in this drafting process the WPR is riddled with ambiguities and textual errors.¹⁴ The main areas of weakness include ambiguities of language, the impaired operation of the most important provision of the WPR – the 60 day clock and possible unconstitutionality.

Ambiguous language

The first area of ambiguity is that although section 3 of the WPR requires that the President ‘in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities’, the precise meaning of ‘consult’ is never elaborated upon and remains ambiguous. Although many commentators have suggested that ‘consult’ means more than ‘mere notification’ there is no precise statement to this effect, leaving a loophole for Presidents to exploit.¹⁵ Typically the presidential interpretation of ‘consultation’ is a last minute notification to Congress – an example being the *Maryquez* rescue where Gerald Ford claimed the consultation requirement was fulfilled because he had notified Congress of the military action shortly before it commenced.¹⁶ It is this ambiguity of the consultation requirement that allowed such a claim to be made but such a ‘consultation’, a brief meeting with Congressional leaders after the decision has already been made, hardly fulfils the objective of the WPR.¹⁷ The requirement of consultation ‘in every possible instance’ was clearly included so as to allow Presidents some leeway, with regards to classified or time-sensitive military operations – a justification used by Jimmy Carter to explain a lack of consultation over the attempt to rescue the Embassy Hostages.¹⁸ Congress is responsible for the failure of the Consultation

¹³ Fisher, above n 4, 144-147; Fisher & Adler, above n 8, 2.

¹⁴ Katzmann, above n 3, 49.

¹⁵ Fisher, above n 4, 148; F.D. Wormuth & E.B. Firmage, *To chain the dog of war: the war power of Congress in history and law* (2nd ed, 1989) 219.

¹⁶ Keynes, above n 6, 245; Collier, above n 2, 64.

¹⁷ Collier, above n 2, 55-56.

¹⁸ Katzmann, above n 3, 61; Keynes, above n 6, 245.

requirement in two ways. First, the requirement was left somewhat ambiguous in the drafting process, meaning that presidents have been able to claim that merely notifying Congress constitutes Consultation. Secondly, Congress has failed to call to account of presidents who evade the requirement in this way or who rely on very generous interpretations of the 'in every possible instance' operational security consideration.¹⁹ It is certainly true that presidents have done much to render the requirement ineffective, deliberately minimising the extent of their consultation and justifying it through statements about military necessity.²⁰ But as is frequently the case, Congress could call Presidents to account for such behaviour but has failed to do so and so bears the ultimate responsibility for the lack of consultation.

As previously stated, the WPR was drafted as an exercise in compromise and one ambiguity directly created by that compromise relates to the interaction between section 2(c) and section 4. The Senate version of the WPR favoured specifically outlining the circumstances in which the President could use force, which is echoed in section 2(c).²¹ 2(c), a purposive provision, states that the President can use force with a declaration of war, a statutory authorisation or in 'a national emergency created by an attack on the United States' which was designed to address a long-recognised presidential power to repel sudden attacks.²² But section 2(c) is undermined and contradicted by the reporting requirements in section 4, which cover a far wider range of uses of force including the commitment of troops to hostilities overseas.²³ Section 4 implies that the President can use force in these much broader circumstances as long as a report is submitted to Congress, an implication backed up by the possible grant of power contained within the 60-day clock, a matter for later discussion.²⁴ Such a contradiction over such an important issue is ripe for presidential exploitation: they

¹⁹ Katzmman, above n 3, 61; Wormuth & Firmage, above n 15, 219.

²⁰ Fisher, above n 4, 148; D.L. Hall, *The Reagan Wars: a constitutional perspective on war powers and the presidency* (1991), 107.

²¹ Collier, above n 2, 57-58.

²² *The War Powers Resolution* §§ 2(c), 4; Fisher, above n 4, 149; P. Raven-Hausen, 'Constitutional Constraints: The War Clause' in G.M. Stern & M.H. Halperin (eds), *The US Constitution and the power to go to war: historical and current perspectives* (1994), 35.

²³ *The War Powers Resolution* §§ 2(c), 4; Fisher, above n 4, 149; Fisher & Adler, above n 8, 3.

²⁴ Fisher, above n 4, 149.

will always read their powers in the most expansive way which means ignoring section 2(c) despite its position in stating the purpose of the WPR.²⁵ The conflicting definitions in these sections show how the compromises involved in drafting the WPR have undermined its effectiveness, but creating contradictions that the executive can exploit to expand its powers. It is Congress who is wholly to blame for these errors.

The 60-day clock

Perhaps the most important part of the WPR is the '60-day clock' – section 5(b) – which requires the President to terminate the use of the armed forces within 60 days of reporting to Congress, unless Congress authorises their use.²⁶ The 60-day clock is vital because of the expectation that it would be triggered without any positive Congressional action, ensuring that the WPR operates even if Congress is divided or indecisive. However, Congress is responsible for errors that cripple the operation of the 60-day clock and perhaps even insofar as making it work against the objectives of the WPR.

Given that it was designed to be triggered automatically, the triggering mechanisms of the 60-day clock are of the utmost importance.²⁷ The 60-day clock is triggered by a presidential report, required under Section 4(1) in a wide range of circumstances involving the use or potential use of military force.²⁸ However, according to Section 5(b) the 60-day clock is triggered only in response to a report under section 4(a)(1) – that is only when troops are introduced to hostilities or where hostilities are imminent.²⁹ The problem here is that this creates a loophole that presidents have been able to exploit. Because the 60-day clock is not triggered by all reports, presidents apply a well worn formula where they simply 'report consistent with the War Powers Resolution', without stating which part of Section 4 (a) they are reporting under.³⁰ This avoids triggering the 60-day clock but provides enough of a shield

²⁵ Ely, above n 3, 117.

²⁶ *The War Powers Resolution* § 5.

²⁷ Glennon, above n 7, 103.

²⁸ *Ibid*; *The War Powers Resolution* § 5.

²⁹ *The War Powers Resolution* §§ 4, 5.

³⁰ Fisher above n 4, 150; Wormuth & Firmage, above n 15, 220.

for presidents to claim they are complying with the WPR – an example would be Reagan’s bombing of Libya in 1986.³¹ The only president to make a report under section 4(a)(1) was Gerald Ford at the time of the *Maryquez* rescue, and his report was not only later than the Resolution required, it was also made when the 60-day clock was irrelevant – combat operations had already concluded.³²

Occasionally, Congress has specifically initiated the 60-day clock, but this simply shows the ineffectiveness of the mechanism given that it was intended to activate automatically.³³ It is also an unreliable method given that Congress will not always act to start the clock.³⁴ This loophole would not be difficult to address, either by tying activation of the clock to any presidential report or as Ely suggests by amending the WPR to force Congress and the courts to hold the President to the clock even if he refuses to acknowledge it has been activated by using tricks of language.³⁵ Now it could be argued that presidents have tended to act as if bound by the 60-day clock even if they are not but the objective of the WPR is to exert control over the President and in its current state the 60-day clock cannot do so because it is so easily circumvented.³⁶ A presidential tendency is no panacea for this problem and it is a problem that is entirely the responsibility of Congress, who failed to either remove this loophole during the drafting of the resolution or to amend it when the methods of presidential evasion became obvious.

A deeper problem with the 60-day clock and one identified by some members of Congress when the bill was passed is that it may represent an extension rather than a restriction of presidential power, thus making it directly contrary to the stated aims of the resolution.³⁷ Commentators such as Louis Fisher have also raised this point: if Congress possesses the power to initiate wars (located in the power to declare war in Article I, section 8 of the Constitution), then the WPR actually gives the President the power to use force independent of Congressional

³¹ Glennon, above n 7, 106.

³² Katzmman, above n 3, 58; Hinckley, above n 6, 85; Fisher & Adler, above n 8, 11.

³³ Fisher, above n 4, 160; Glennon, above n 7, 105-106.

³⁴ Ely, above n 3, 124.

³⁵ Ibid, 124-125.

³⁶ Fisher, above n 4, 151.

³⁷ Fisher & Adler, above n 8, 1, 5.

authorisation for 60 days, a power not previously possessed and which may represent an unconstitutional delegation of Congressional power.³⁸ Given the speed with which modern military campaigns can be prosecuted, such a power could allow for widespread presidential uses of force, authorised by the very resolution intended to restrict presidential unilateralism. An example would be that when Bill Clinton contemplated an invasion of Haiti his legal advisers cited the WPR as an extension of the President's power to act unilaterally.³⁹

It is of course not certain that the WPR represents such a grant of power and some scholars maintain that the President already had such an inherent power. But regardless, the possibility that the WPR extends presidential power is a damning indictment of the way that the text of the WPR diverges from its stated objectives. It is true that Section 8(d) of the resolution states that it is not intended to alter the constitutional authority of the President or to grant additional authority but it is also true that given presidential practice, this section has been ignored. As they have with other provisions, Presidents have taken what they need from the 60-day clock and left its restrictions to lie fallow – a behaviour that Congress could have robbed of justification by more stringent drafting or by taking more action to enforce the WPR, both of which it has declined to do.

A lack of Congressional Will

Despite its textual flaws, the WPR could still have served as a powerful check on presidential action except for a lack of Congressional will, a failure to act to enforce the WPR. Indeed many of the loopholes that have been exploited in the WPR exist only because Congress is not willing to act decisively to close them – an example being Congressional reluctance to insist on meaningful consultation, allowing the consultation requirement to be flouted with ease and compounding the weakness caused by the drafting process.⁴⁰ The attitude of Congress towards presidential war-making has typically been one of acquiescence and the WPR has been robbed of effectiveness by a failure to call for the enforcement of its provisions and a tendency to make wide grants of

³⁸ Ibid 1, 17; Fisher, above n 4, 145; Wormuth & Firmage, above n 15, 191.

³⁹ Fisher & Adler, above n 8, 12.

⁴⁰ Glennon, above n 7, 114.

authority to the President.⁴¹ This acquiescence can most likely be traced both to a certain degree of jingoism and to a fear of voter backlash if a member of Congress is seen as anti-military, or as hindering the President 'in time of war'.⁴² It is also possible, as Mann asserts, that Congress desires to be visible in the area of war-making but not held responsible for failures, passing responsibility to the President.⁴³ There are exceptions, of course, and Congress has sometimes confronted the President over uses of force, but such confrontations rarely invoke or support the WPR, made for purely political reasons.

Congress has been unwilling to confront presidents over violations of the WPR.⁴⁴ For example, in the lead up to the first Gulf War, when President Bush actively avoided soliciting Congressional involvement or consulting with Congress, Congress remained quiescent, not seeking to enforce WPR requirements.⁴⁵ When Congress was finally permitted to debate the matter, it did so on the understanding that it was already resolved to support the president.⁴⁶ While some members of Congress did object to his attitude, Congress as a body did not act and it is this lack of collective action that is important, not the merits of actions such as court cases brought by individual members of Congress.⁴⁷ Congress has not acted collectively to censure the President over breaches of the WPR thus de-legitimizing presidential behaviour or to amend the WPR to close the loopholes Presidents are exploiting, making it easier to enforce the WPR. This is why Congress as a body bears the blame for the failure of the WPR.

Congress has also tended to give wide grants of authority to legitimate presidential war-making. This is of course entirely within the authority of Congress but it does serve to undermine the objective of the WPR because such grants usually mean Congress will play no further role in the war-making process. In line with Mann's argument, such grants allow Congress to appear involved in war-making while absolving itself

⁴¹ Ibid, 122; Mann, above n 4, 18-19.

⁴² Fisher, above n 4, 157; Ely, above n 3, 122.

⁴³ Katzmman, above n 3, 57.

⁴⁴ Ibid, 66; Ely, above n 3, 49.

⁴⁵ Fisher, above n 4, 170-173; Keynes, above n 6, 242.

⁴⁶ Hinckley, above n 6, 93-94.

⁴⁷ Fisher, above n 4, 171.

of responsibility.⁴⁸ Examples of these grants include the 18-month *carte blanche* given to Regan in 1982, despite his violation of consultation and reporting requirements as well as more recent blanket authorisations such as the Use of Force Act passed after September 11th, 2001 which gave very broad powers to the President and was passed with almost no objection.⁴⁹ For the more recent example it is of course true that Section 2 prescribes that the requirements of the WPR shall still apply but as a whole the resolution contradicts the purposes of the WPR because it was passed with very little consideration by Congress and grants the President enough power to act freely, without needing to involve Congress in the decision-making process.⁵⁰ Fisher makes a similar point about the later Congressional authorisation of the war in Iraq that it showed a marked rejection of ideas of collective decision-making in favour of subordinating Congress to the President.⁵¹ To give such authorisations and to avoid confrontations is obviously the choice of Congress as a body and therefore Congress must bear the blame for the way its actions contribute to the failure of the WPR.

The role of other actors: The President

Can responsibility for the failure of the WPR be laid at the feet of successive presidents? Presidents have indeed done much to cause the War Powers Resolution to fail. As discussed above, they have deliberately sought loopholes in key WPR provisions, such as the consultation requirements and the 60 day clock, doing only what they need to do to be able to claim they have acted in accordance with the WPR without actually involving Congress in the decision-making process (which is the actual objective of the WPR). Presidents have also attacked the WPR as an unwarranted restriction on their powers to use force, a power which they interpret broadly, based on a particular interpretation of the Commander-in-Chief clause. This is despite the fact that, as is discussed below, the Constitution clearly grants the bulk of the war powers to the legislature, not the executive.

⁴⁸ Mann, above n 4, 19; Ely, above n 3, 51.

⁴⁹ Ely, above n 3, 49; Fisher, above n 4, 208-209; Schonberg, above n 12, 116-120.

⁵⁰ *Joint Resolution to authorise the use of United States Armed Forces against those responsible for the recent attacks launched against the United states*, Public L No 107-40 H.R. Res. 64 (2001).

⁵¹ L. Fisher, 'Deciding on War Against Iraq: Institutional Failures' (Fall, 2003) 118(3) *Political Science Quarterly* 389, 406.

Finally, presidents have repeatedly asserted that the WPR is unconstitutional and hence they should not be bound by it. A major plank of this accusation is the idea that the WPR contains a 'legislative veto'. The Supreme Court in *Immigration and Naturalization Services (INS) v Chadha* declared that it was unconstitutional for Congress to control the executive branch by means of a concurrent resolution,⁵² because such resolutions were not presented to the President for his assent, as the Constitution requires.⁵³ However, Fisher makes it clear that this attack on the WPR is without foundation. The court in *Chadha* restricted the meaning of 'legislative veto' to powers delegated to the President – the WPR operates to control presidential power, it does not delegate legislative authority to the President.⁵⁴ It does not fall within what *Chadha* declares to be unconstitutional and Congress has wisely declined to amend the WPR in the same way that it has amended statutes that did contain legislative vetoes. Nevertheless, presidents have done significant damage to the credibility of the WPR by claiming it to be unconstitutional and have used such claims to avoid proper debate on the limits of presidential power.⁵⁵ Indeed, the extent of their efforts to evade the WPR could be considered a failure of their constitutional duty to see that the laws are faithfully executed.⁵⁶

There is, however, one powerful argument as to why Congress should bear the blame for the failure of the WPR, rather than the President. Congress bears ultimate responsibility because it could have prevented presidential violations of the Resolution. A more thorough approach to drafting or further amendments to the WPR could have cured the loopholes that presidents have exploited, while a willingness to confront the President over clear violations of the WPR requirements (of which there have been many) would serve to de-legitimize that behaviour and perhaps bring Presidents to heel. Undoubtedly, this will cause tension between the executive and the legislature, but if Congress

⁵² *INS v Chadha*, 462 U.S. 919 (1983).

⁵³ *The Constitution of the United States* art I; Glennon, above n 7, 98; Hall, above n 20, 119-120; Fisher, above n 4, 270.

⁵⁴ Fisher, above n 4, 270.

⁵⁵ Keynes, above n 6, 245.

⁵⁶ *The Constitution of the United States* art 2, § 3.

wants an equal role in the decision to use force, as the WPR states, then it must accept these. It is true that regardless of how the WPR is drafted, presidents will seek to evade its requirements. But the reason this evasion is so widespread is that Congress has acquiesced to these violations. Although presidents do bear some blame for the failure of the WPR, they do not bear ultimate responsibility. Congress has only itself to blame because it has allowed presidents to contribute to the failure of the WPR.

The Courts

If not the President, could blame for the failure of the WPR be laid with the courts? On several occasions, members of Congress or individual members have sought to enforce the WPR by means of a court case. In the bulk of these cases, however, the courts have ruled that they do not have jurisdiction and refused to hear the case. This denial of jurisdiction is based on the longstanding 'political questions' doctrine from *Marbury v Madison*, which states that Courts lack the expertise to decide political matters,⁵⁷ with Congress being the correct forum for deciding such issues.⁵⁸ This doctrine has long been a barrier to the use of legal action to control the President.⁵⁹ One example is the dismissal of a suit brought in 1987 by 110 members of Congress regarding US military actions in the Gulf and violations of the WPR.⁶⁰ It could well be argued that in failing to consider these questions the courts have contributed to the failure of the WPR, hindering its enforceability and should therefore bear some of the blame.

This position is supported by Ely, who argues that because of their politically insulated position, judges should act to ensure that the decision to go to war is congressionally authorised.⁶¹ Ely also attacks the application of the political questions doctrine, arguing that there is no special quality of non-justiciability about foreign affairs matters and that the courts should be willing to consider them.⁶² He argues that the

⁵⁷ *Marbury v Madison*, 5 U.S. 137 (1803).

⁵⁸ Ely, above n 3, 55; Hall, above n 20, 91; Wormuth & Firmage, above n 15, 235,280.

⁵⁹ Wormuth & Firmage, above n 15, 280.

⁶⁰ Katzmman, above n 3, 63.

⁶¹ Ely, above n 2, 54.

⁶² *Ibid*, 55.

doctrine was never as expansive as it has been read and that, in refusing to consider cases related to the WPR, the courts are abrogating their constitutional role to keep the executive in check.⁶³

Ely's arguments are well-made amongst other doubts as to the applicability of *Marbury v Madison*, but it cannot absolve Congress of ultimate responsibility for the failure of the WPR.⁶⁴ There are certain problems with the WPR, like its textual errors and the tendency of Congress to grant wide authority to the President, that the courts could not amend even if they were to consider cases on the matter. But more importantly, although the courts could have done more, it is only through Congress acting collectively and confronting the President over violations can the WPR be made effective. Fisher points to the folly of measures designed to allow individual members of Congress to have standing to bring court actions over violations of the WPR because they risk compelling the courts to act, which would be unconstitutional and because the courts have good reasons to decline to hear cases.⁶⁵ Fisher obviously does not share Ely's view that the courts can save the WPR. Indeed, he worries about the consequences of the Supreme Court finding in favour of the President and legitimating their evasion of the Resolution.⁶⁶

The courts are reluctant to involve themselves in disputes between members of Congress and the President, looking to Congress to act as a body.⁶⁷ At no time has a majority of the Congress been willing to confront the President in the courts and this is why the judicial option has not worked: Congress must first act before the courts will back them up and it must bear responsibility for its failure to act.⁶⁸ But Congress acting as a body is a clear show of legislative intent to reign in the President. Congress passing legislation to enforce the WPR is a matter about which the courts have indicated they would be far more receptive to finding jurisdiction.⁶⁹ Therefore, although Ely's arguments on the

⁶³ Ibid, 55-56.

⁶⁴ Fisher & Adler, above n 8, 14.

⁶⁵ Fisher, above n 4, 273.

⁶⁶ Ibid, 273-274.

⁶⁷ Schonberg, above n 12, 138.

⁶⁸ Ibid, 136.

⁶⁹ Ibid, 138.

position of the Courts have some merit, they cannot take ultimate blame away from Congress. The courts have frequently indicated that Congress must first act to assert its constitutional powers and defend the WPR before the courts can assist them.

The role of the Constitution

The distribution of war powers under the Constitution is a contentious debate, with rival schools of thought supporting the allocation of war power to the President and to Congress.⁷⁰ It is also a debate that is not particularly relevant to the question under consideration. There is however one relevant issue - it could be argued that blame for the failure of the WPR should not rest with Congress, but with the framers of the Constitution. Such an argument would be grounded in assertions of an inherent and presidential power to initiate conflicts, arising from the Constitution. If the President possessed such a power then congressional then attempts to restrict it, such as the WPR, would be unconstitutional, but no blame could be attached to Congress for their failure.⁷¹ Those who support such an inherent power have cited the Commander-in-Chief clause, the position of the President as chief executive and the idea that the President is the nation's 'sole organ' in foreign policy matters – a doctrine from the case of *USA v Curtiss-wright*.⁷² Yoo advances the argument that the Constitution creates 'a flexible system of war powers' with the President being granted substantial initiative and the power of Congress to declare war relating only to changing the status of relations at international law, rather than a broad power to initiate conflict.⁷³

As stated earlier, the full scope of the debate about war powers is not relevant to a discussion of the failure of the WPR. All that is necessary is to show that the existence of a broad inherent presidential power to initiate conflict is doubtful, and therefore the WPR was not doomed before it began and the Constitution cannot be blamed for the failure of the WPR. The existence of such a broad power is doubtful because the

⁷⁰ Katzmann, above n 3, 38-9.

⁷¹ Mann, above n 4, 7.

⁷² Raven-Hausen, above n 22, 33.

⁷³ *United States v Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); J.C. Yoo, 'War and the Constitutional Text' (Fall, 2002) 69(4) *University of Chicago Law Review* 1639, 1639-1640.

comments of the framers of the Constitution support the contention that the legislature, not the executive, was to be vested with the bulk of the war power, particularly the power to initiate wars—an intention that was notable at the time because it differed so much from its European counterparts.⁷⁴ The claim that the executive position of the President holds the power to initiate a use of force is precisely the claim the framers of the Constitution were seeking to rebut by vesting the power to declare war with Congress.⁷⁵ Also, the Constitution grants Congress a far wider swathe of powers relevant to war, such as the power to raise funds ‘for the common defence, to raise armies and navies, to regulate the armed forces and to organise the militia’ – a host of powers that when contrasted with the few and extremely specific grants of power given to the President point to the intention for the Congress to be the seat of the war power, a situation in which a broad inherent presidential power would be illogical.⁷⁶

There is also evidence against the reading of other parts of the Constitution that support an inherent presidential power. The Commander-in-Chief power was frequently referred to as a power to command troops, not to initiate conflict and to read such a power into it seems to make the congressional power to declare war meaningless, something which it was obviously not intended to be.⁷⁷ Case law shows little support for reading beyond the narrowest inherent power from the commander-in-chief clause.⁷⁸ Finally, the application of the ‘sole organ’ doctrine from *Curtiss v Wright* is doubtful, being far better interpreted as declaring that the President is the sole mouthpiece of the US in its dealings with other nations, not that he can also initiate war – for if that were the case, why would Congress have been granted war powers?⁷⁹ Fisher attacks the use of the case in asserting an ‘independent, extra-constitutional or exclusive power of the President in foreign relations’, arguing that the case does not support any such power, instead referring to the role of the President as communicator of policy to other

⁷⁴ Fisher & Adler, above n 8, 12; Adler, above n 2, 186.

⁷⁵ Adler, above n 2, 196.

⁷⁶ Glennon, above n 7, 73.

⁷⁷ Adler, above n 2, 190-191; Fisher & Adler, above n 8, 10.

⁷⁸ Glennon, above n 7, 74, 84-85.

⁷⁹ Wormuth & Firmage, above n 15, 189; Adler, above n 2, 216-217.

governments, and so does not confer any kind of inherent power.⁸⁰ There is, of course, support for an inherent presidential power to defend against sudden attacks, but such a power does not extend to overseas commitments.⁸¹ Such refutations only scratch the surface of the debate about war powers, but suffice to say that there is doubt as to the existence of an inherent presidential power of war-making so that blame for the failure of the WPR cannot lie with Constitutional arrangements. Congress had the power to restrict the President and to give effect to WPR. Its failure to use this power means that it must then bear the blame for the failure of the resolution.

Conclusion

The War Powers Resolution was intended to give Congress an equal voice in the decision to use force and to control the unilateral use of force by the executive. It has failed to do so and Congress is to blame. Congress is to blame because the two fatal weaknesses of the WPR are direct responsibility of Congress. Firstly, when Congress drafted the resolution, it made compromises and errors that crippled the operation of vital provisions and allowed presidents not only the opportunity to exploit loopholes but also to attack the constitutionality of the Resolution. Secondly, Congress has continued to weaken the WPR by failing to forcefully apply its provisions, confront the President as a body and assert its control over War powers. Instead, Congress has tended to grant broad authorisation to the President, even though such authority means the President no longer needs to involve Congress in the process. It could be argued that recent presidents consulted Congress and sought authorisation for 'big wars', as George W. Bush did before launching military actions in Afghanistan and Iraq. But such a move was not in any way compelled by Congress or by the WPR.⁸² It was merely a political move at the President's prerogative, not at the demand of Congress. Therefore it only highlights the failure of the WPR.

⁸⁰ L. Fisher, *Studies On Presidential Power in Foreign Relations: The 'Sole Organ' Doctrine* Law Library of Congress [1, 9, 28] <www.loc.gov/law/congress> at 22 August 2007.

⁸¹ Adler, above n 2, 212.

⁸² Fisher, above n 4, 151.

In establishing that Congress has only itself to blame for the failure of the WPR, it is not necessary to absolve other groups entirely. It is true that some blame could be placed before the presidents who have repeatedly undermined the WPR, as well as the Courts who have refused to hear cases that might lead to its enforcement. It is necessary to show that Congress bears the ultimate responsibility. Congress does bear the ultimate responsibility because it is congressional action that can cure the failures of the WPR. Congressional action can close the loopholes that presidents have exploited. Congressional action can bring matters to a point where the courts feel they are able to rule on the matter. Congress created the WPR, and Congress is responsible for its failure. Whether it will be Congress that allows it to succeed in the future is something that remains to be seen.

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Artwork Details

Triple Self-portrait, 2007

Herbert Consunji Jr*

Conte, pastel and charcoal on cartridge paper (59 x 83 cm)

As a portrait can not only be an external representation but also reveal the personality of both the sitter and the artist, this can be further expressed in a self portrait more so. I wanted to create an "inner" self portrait and used the picture plane as a mental, and emotional landscape. In the midst of random thoughts, feelings, my psyche, etc. an image of myself is formed; simultaneously malleable and defiant.

The First Three Minutes, 2007

Pat Holloway†

Digital Image (2436 x 1914 pixels)

The First Three Minutes represents the chaos of one's mind upon leaving dreams and waking up.

The image was constructed with 12 layers comprising a total of almost 50 separate images, each digitally manipulated to create the final result.

Within the image are remnants and characters of earlier works as well as new material which create the shape of a chaotic eye in the top left corner stretching across the screen surrounded by the vagueness of sleep.

Multicultural Festival, 2007

Jennifer Law‡

Digital Image (1400 x 980 pixels)

The multicultural festival I attended in Canberra back in February inspired me. I had never seen so many different cultures festively celebrating their unique backgrounds. It was an amazing experience and I wanted to capture past traditions in a modern setting.

* Herbert Consunji is in his first year of a Bachelor of Visual Arts at the Australian National University. He is a current resident of Bruce Hall.

† Pat Holloway is in his third year of a Bachelor of Science/Bachelor of Arts degree at the Australian National University. He is a current resident of Bruce Hall.

‡ Jennifer Law is in her final year of a Bachelor of Arts (IT/Digital Arts) degree at the Australian National University. She is a former resident of Bruce Hall.

*Foliage #2, 2007*Samuel Lewin[§]

Still Photograph (2496 x 1920 pixels)

This piece explores the dimensions of nature through the use of a short depth of field in the photograph, creating a sense of depth in the image, resulting in a more realistic representation of the flower.

*Harbour, 2004*Ying Lei[°]

Watercolour

The dynamic nature of the fishing vessels at Tauranga Harbour is exemplified in this watercolour impression. Particular attention was paid to the water reflections in the foreground so as to emphasise the constancy of motion. For the same reason, detail in the background was diminished. This work took two hours to complete with no second layer additions.

*Dare to be Different, 2006*Veng Hoong Loh[®]

Still Photograph (2496 x 1920 pixels)

This photograph was taken in my father's bakery. Normally, you would expect that all the croissants would turn out to look the same, but here you can see one that 'dares to be different'. This is just a light-hearted way of emphasising that everybody has a unique identity, despite being largely identical with people around us.

*Venetian Stairwell, 2006*Lucy Martin[•]

Still Photograph (2816 x 2112 pixels)

*Tiger, 2006*Wu Ru Gway[‡]

Metal Wire (20 cm)

[§] Samuel Lewin is in his third year of a Bachelor of Engineering degree at the Australian National University. He is a current resident of Bruce Hall.

[°] Lei Ying is in her first year of a Bachelor of Medical Science at the Australian National University. She is a current resident of Bruce Hall.

[®] Veng Hoong Loh is in his second year of a Bachelor of Actuarial Studies/Economics at the Australian National University. He is a current resident of Bruce Hall.

[•] Lucy Martin is in her first year of a Bachelor of Arts degree at the Australian National University. She is a current resident of Bruce Hall.

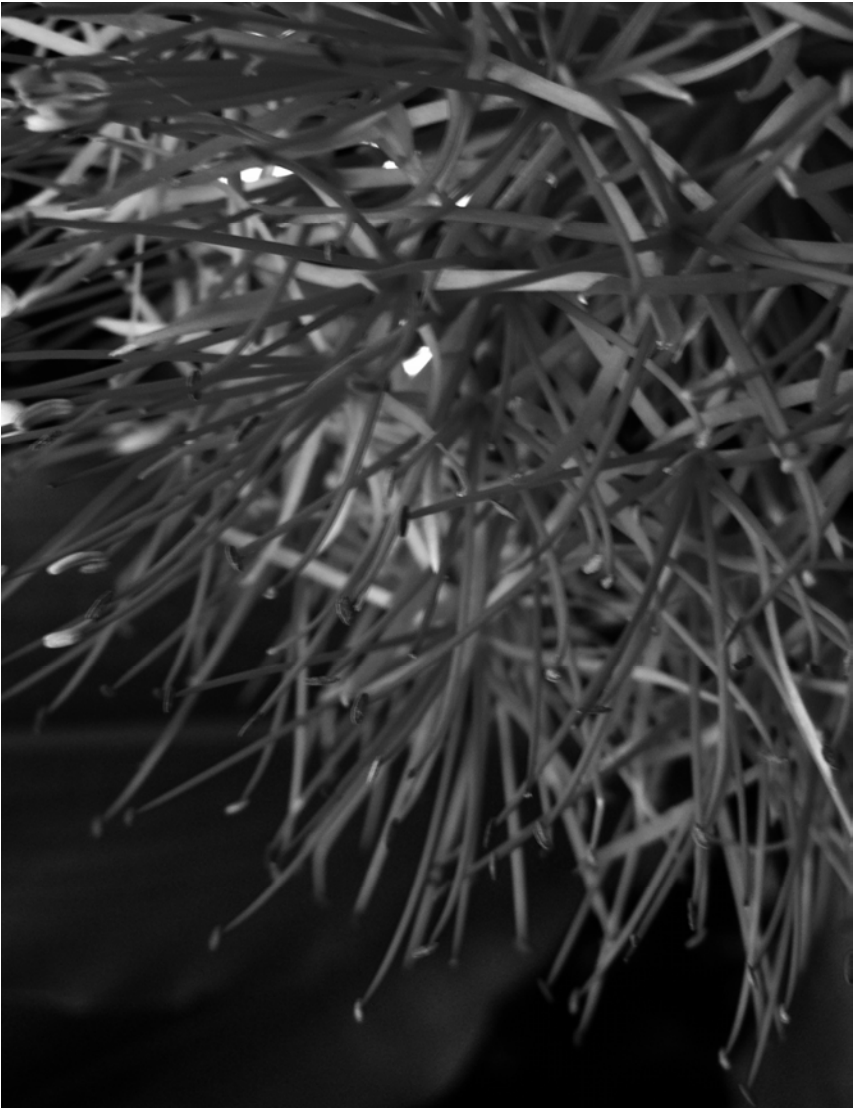
[‡] Wu Ru Gway is in his third year of a Bachelor of Science degree at the Australian National University. He is a current resident of Bruce Hall

















Are truth and reconciliation commissions an effective means of dealing with state-organised criminality?

*Daniel Pascoe**

When a nation passes out of a period of tyranny or oppression there is often a sense that those responsible for past persecution and injustices should be punished. While many former dictators or high government officials seek to protect themselves through self-granted amnesties or immunities these are now at risk due to developments in the international community, which cast doubt on the legality of such protections. Between amnesty and punishment, however, lies a third option – the truth and reconciliation commission. Designed to give a voice to victims and perpetrators alike, these commissions have become an increasingly popular tool in post-conflict reconstruction. There is growing concern, however, that commissions have become a new vehicle through which wrongdoers can escape prosecution. This work examines the history of the truth and reconciliation commission, in its various forms, from post-apartheid South Africa to the new South American democracies and through to the latest commission, set up in the new state of East Timor.

Introduction

Societies emerging from conflict, in which a democratic government replaces a repressive one, face the difficult question of how to deal with human rights abuses perpetrated under the previous regime. The processes that hope to effectively account for such abuses, and to achieve a lasting peace, are debated within the field of transitional justice. One of the foremost options for states seeking transitional justice is the truth and reconciliation commission.

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Although the first truth commissions, broadly conceived, appeared in the early 20th century,¹ there have been two notable surges in their popularity during the last 20 years. The first increase in popularity coincided with the democratic transitions in many Latin American nations in the 1980s, whereas the second period arose in response to the work of the South African Truth and Reconciliation Commission (TRC), the most comprehensive exercise in truth-telling ever seen.² Along the way, various claims have been made regarding the benefits of truth and reconciliation commissions in promoting effective and lasting nation-building after periods of societal conflict, with nearly all positive claims met by sceptical responses.³

This article sets out the perceived advantages of truth commissions in dealing with state crime, as put forward by scholars, government officials, victims, and other parties. Criticism of those perceived advantages will also be considered in an attempt to address the shortcomings of some truth commission models and to further ensure their effectiveness in the future.

The Multiplicity of Truth Commissions

It is important to keep in mind when discussing the relative value of truth commissions as instruments of peace-building that the powers, aims and composition of such bodies have varied greatly between different nations, and according to different historical trends. As Stanley observes, the principal function of all truth commissions is to 'record the extent and scale of serious violence through the use of testimony',⁴ however, this is where the similarity ends.

¹ The first investigative commissions into atrocities were the those arising from the Balkan Wars of 1912-13, and Turkish and German actions during the First World War: M.A. Weiner, 'Defeating Hatred with Truth: an Argument in Support of a Truth Commission as Part of the Solution to the Israeli-Palestinian Conflict' (2005) 38 *Connecticut Law Review* 129.

² J. Sarkin & E. Daly, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35 *Columbia Human Rights Law Review* 661, 723; J. Laakso, 'In Pursuit of Truth, Justice and Reconciliation: The Truth Commissions of East Timor and South Africa' (2003) 22(2) *Social Alternatives* 44.

³ T.G. Phelps, *Shattered Voices: Language, Violence and the Work of Truth Commissions* (2004) 124.

⁴ E. Stanley, 'Truth Commissions and the Recognition of State Crime' (2005) 45 *British Journal of Criminology* 582. Hence, models such as Germany's research-based commission

Looking at the different types of truth commissions that have been employed in post-conflict societies over the last few decades, most were statutory government bodies (eg. South Africa's TRC), although some have been inaugurated by executive decree (Chile),⁵ under a United Nations mandate (El Salvador and Timor-Leste), and others by international (Rwanda) or domestic NGOs (Brazil).⁶ Most commissions work to a limited timeframe, although those of Chad and Uganda are to run for an indefinite period.⁷ The commission's terms of reference may allow it to look at a pattern of abuses over a number of decades (Chile and South Africa), or instead focus on specific crimes or specific groups of perpetrators.⁸ Some may reveal the identities of perpetrators (Timor-Leste) and some may not (Chile, Guatemala). Some attempt a massive exercise in public participation and mobilisation (South Africa, Sierra Leone), whereas other commissions are smaller and more secretive (Guatemala, Sri Lanka, Haiti).⁹ Finally, some commissions have broad powers of subpoena, search and seizure, or to make recommendations, whilst others do not.¹⁰ As is evident, the truth commission is a flexible institution, capable of being adapted to different national circumstances.

Whether or not a truth commission report is accompanied by a recommendation for amnesty for some or all perpetrators is especially controversial, as this is the basis for much of the debate over restorative versus retributive justice processes in peace-building. The truth commissions of Guatemala, El Salvador, Argentina, Chile and South Africa included various conditional and unconditional amnesties as part

into the practices of the German Democratic Republic between 1949 and 1989 will not be discussed here: see R. Daye, *Political Forgiveness: Lessons from South Africa* (2004) 44.

⁵ R.I. Rotberg, 'Truth Commissions and the Provision of Truth, Justice and Reconciliation' in R.I. Rotberg & D. Thompson (eds.), *Truth v. Justice: the Morality of Truth Commissions* (2000) 13.

⁶ Sarkin & Daly, above n 2, 723.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid; Rotberg, above n 5, 4.

¹⁰ Sarkin & Daly, above n 2, 723; C. Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor' (2001) 95 *American Journal of International Law* 952, 955; see also United Nations Transitional Administration for East Timor, *Regulation No. 2001/10: On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*, 13 July 2001, s21(2).

of their work, whereas those of Rwanda, Yugoslavia and Timor-Leste (for serious crimes) did not.¹¹

Despite the fact that international human rights and humanitarian law places limits on the provision of amnesties for genocide, war crimes and crimes against humanity,¹² this article will not preclude the use of such amnesties merely on the basis of their legality or otherwise within international law. In looking at the methods by which a post-conflict society can heal itself and prevent further bloodshed, a full range of institutional models must be considered.¹³ As Sarkin and Daly note:

‘Crimes of state are both legal and political. Reconstruction of community likewise has both legal *and* political dimensions.’¹⁴

Claims about the Effects of Truth Commissions: Advocates and Detractors

There is increasing agreement amongst theorists and practitioners of transitional justice that some form of accounting for the past is a necessary prerequisite to achieve lasting peace in societies previously afflicted by conflict.¹⁵ A failure to deal sufficiently with the past may create mistrust between groups in society and towards the institutions of state.¹⁶ Importantly, proponents of such a view are found on both sides of the restorative versus retributive justice debate. However, is the formal mechanism of a national truth and reconciliation commission the appropriate mechanism to account for state crime? As noted above,

¹¹ D. Mendeloff, ‘Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?’ (2004) 6 *International Studies Review* 355, 367; Laakso, above n 2, 49; Stahn, above n 10, 958.

¹² I. Simunovic, ‘Dealing with the Legacy of Past War Crimes and Human Rights Abuses: Experiences and Trends.’ (2004) 2 *Journal of International Criminal Justice* 701, 702-703.

¹³ The Uruguayan case is one example where a comprehensive amnesty program initially went ahead with popular support: Sarkin and Daly, above n 2, 702.

¹⁴ *Ibid*, 688, emphasis added.

¹⁵ *Ibid*, 669-670; G. Gentilucci, ‘Truth-Telling and Accountability in Democratizing Nations: The Cases Against Chile’s Augusto Pinochet and South Korea’s Chun Doo-Hwan and Roh Tae-Woo’ (2005) 5 *Connecticut Public Interest Law Journal* 79; peace here may be defined as the absence of war, in addition to social equality and democracy: Mendeloff, above n 11, 363.

¹⁶ A. Fleschenberg, et al., ‘Statement of the “Reflection Group”’ (paper produced as a result of the Dealing with a Burdened Past – Transitional Justice and Democratization Conference, Berlin, Germany, 20-21 April 2006).

the many types of truth commissions all share one common feature, that of a *truth-seeking* mandate, and hence it is this common feature that will be the main focus of this article in attempting to answer this question.

The paragraphs below look at the various (sometimes overlapping) justifications advanced for the use of truth and reconciliation commissions, as opposed to predominantly retributive justice procedures, particularly formal criminal prosecutions. Significantly, it is through a perception that restorative justice processes, such as truth and reconciliation commissions, can serve a number of purposes beyond the reach of the domestic and international court system that their popularity has developed.¹⁷ As will be noted, some of the claims in support of truth commissions are meritorious, whereas some are misguided. Heeding lessons from the past will enable the truth commissions of the future to follow a model that increases their effectiveness.

Social Healing and Reconciliation

The first claim that is made about the value of truth-telling is that the exposure of the truth regarding human rights abuses perpetrated by the previous regime may help to psychologically heal the victims of such abuses and their families, and to assist with reconciliation.¹⁸ Proponents claim that it is only after psychological healing takes place that two previously warring parties can come together in a spirit of reconciliation.¹⁹ Reconciliation, meaning the bringing together of previously opposing parties, is a recognised means of reckoning with state-sponsored atrocity,²⁰ the success of which might be measured by an overall feeling of peace amongst a nation's citizens.²¹

Truth and reconciliation commissions, unlike trials and historical commissions, are the institutional models best equipped to promote reconciliation in a fractured society, if for no other reason than the fact that they are usually set up for this express purpose.²² Although

¹⁷ Stahn, above n 10, 954.

¹⁸ Laakso, above n 2, 50.

¹⁹ Mendeloff, above n 11, 359.

²⁰ Sarkin & Daly, above n 2, 670.

²¹ Gentilucci, above n 15, 86.

²² Sarkin and Daly, above n 2, 724.

criminal trials may offer a significant sense of healing and satisfaction to victims,²³ their utility for reconciliation is doubtful. In fact, reconciliation may in fact be the antithesis of prosecution.²⁴ Daly and Sarkin claim that:

[T]he relevance to reconciliation of trials, generally, is questionable, but the impact on reconciliation of *international* trials is surely minimal. The primary reason for this is that trials that take place outside the country are likely to have little effect on relations among people within the country. Even when international trials take place within the country, as in Sierra Leone, they are, by definition, conducted by *foreigners* – people who were not involved in the actual events.²⁵

Moreover, truth commissions are far superior to private environs for the exchange of confession and forgiveness, as such an exchange takes place in a non-confrontational and non-dangerous environment.²⁶

On the other hand, opponents argue that truth-telling, rather than having a healing effect, may reopen old wounds and divisions in society.²⁷ Certainly, in circumstances where a state is not yet fully stable, where peace has been miraculously achieved by means of a settlement or otherwise,²⁸ then truth-telling would appear to present more dangers than benefits (e.g. with the promotion of collective ‘amnesia’ in post-Franco Spain and Mozambique).²⁹ Yet, the examples of the South African TRC, Chilean Commission and Timor-Leste’s Commission on Reception, Truth and Reconciliation (CAVR³⁰) point to the opposite

²³ R.J. Goldstone, ‘Justice as a Tool for Peacemaking: Truth Commissions and International Criminal Tribunals’ (1996) 28 *New York University Journal of International Law and Politics* 485, 491 in Mendeloff, above n 11, 359.

²⁴ Sarkin & Daly, above n 2, 691.

²⁵ *Ibid.*, 690-691, emphasis added.

²⁶ D. Schalkwyk, ‘Truth, Reconciliation, and Evil in South Africa’ in M.S. Breen (ed), *Truth, Reconciliation, and Evil* (2004) 32.

²⁷ Mendeloff, above n 11, 365.

²⁸ *Ibid.*, 376.

²⁹ *Ibid.*, 367.

³⁰ CAVR is the Portuguese acronym that is commonly used for the Timor-Leste Commission: T. Järvinen, ‘Human Rights and Post-Conflict Transitional Justice in East Timor’ (Working Paper No. 47, UPI, 2004) 56, fn. 183.

conclusion.³¹ In divided societies where former adversaries are forced to live side by side, it is precisely in those circumstances that political leaders are likely to engage in stereotyping and scapegoating along ethnic, cultural, religious or other lines.³² The findings of a truth commission can preclude this type of behaviour, exposing it as fallacy before it becomes widely accepted.³³ In deeply divided nations, as Phelps notes, 'the sharing of personal narratives may be the only means by which such diverse people can begin to recognize the humanity of each other.'³⁴

One other criticism that has been levelled at the perceived 'societal healing' benefit of truth commissions is that although storytelling and acknowledgement of the facts may have significant therapeutic benefit for individuals, this personal psychological response cannot be extrapolated in its application to the psyche of an entire nation or oppressed social group.³⁵ Addressing this concern, it would appear that the larger the truth-seeking operation, the more a cathartic effect on an entire society would ensue, individual by individual.³⁶ Thus, South Africa's TRC should serve as a model to future commissions with its ambitious mandate (documenting human rights violations between 1960 and 1994³⁷) and mobilisation of mass participation (over 22,000 statements from all sides of the conflict were taken).³⁸ Although it is of course impossible to include every single surviving victim's story of suffering and every single perpetrator's confession within the one process, a truth commission report should be comprehensive enough to establish notable trends and patterns of violence that many more of the non-testifying public can relate to.

³¹ Laakso, above n 2, 52.

³² Mendeloff, above n 11, 375.

³³ *Ibid*, 375-6.

³⁴ Phelps, above n 3, 69.

³⁵ Mendeloff, above n 11, 364.

³⁶ Sarkin & Daly, above n 2, 692; Fleschenberg, et al., above n 16.

³⁷ Laakso, above n 2, 49.

³⁸ Rotberg, above n 5, 20, fn. 1.

Justice for Victims and Perpetrators: Retribution

Retribution, or the punishment of criminals for their actions, is usually a vital ingredient in transitional justice processes, in order to give perpetrators 'what they deserve' and to preclude vigilante-style revenge.³⁹ Advocates claim that truth-seeking in and of itself provides justice for victims of state crime, and acts as an effective form of retribution against the perpetrators of such actions. Their argument is that the public exposure of truth and the assignment of blame for the crimes committed are a form of punishment through shame,⁴⁰ quite apart from the more traditional forms of retribution (which include fines, trials, imprisonment, and sometimes execution).⁴¹ Rotberg argues, in relation to the South African Truth and Reconciliation Commission:

The public shaming that came through the open nature of the TRC procedures substituted reasonably well for penal justice. Exposure is punishment. It is a powerful component of accountability.⁴²

Of course, a pre-requisite for the effectiveness of such a retributive measure is the power and willingness of the commission to publicly identify the perpetrators and their superiors by name, a requirement that has not been heeded by some commissions.⁴³

If this retributive aspect of the truth-seeking process is sought, another dilemma will arise. The release of information implicating the alleged perpetrator in state crime is likely to violate the right to due process that would ordinarily be available to them during a criminal trial.⁴⁴ Although the alleged perpetrator will of course have the right to remain silent (or even not participate in commission proceedings at all), the fact that no burden of proof exists increases the chance of false accusations being made.⁴⁵ This problem has no easy solution, other than to

³⁹ Phelps, above n 3, 39, 52.

⁴⁰ Weiner, above n 1, 130.

⁴¹ Phelps, above n 3, 53.

⁴² Rotberg, above n 5, 16.

⁴³ For example, see Rotberg on the Guatemalan Commission on Historical Clarification (1997-1999): Rotberg, above n 5, 4.

⁴⁴ Weiner, above n 1, 132.

⁴⁵ Ibid.

acknowledge that the alleged perpetrator (usually) also has the right to testify before the commission, and to respond to any allegations.⁴⁶

Deterrence and Defeating Impunity

Deterrence is a kind of pre-emption, a strong statement directed at potential future perpetrators so that the crimes described in the report are never committed again. No fewer than four Latin American truth commission reports have employed the title 'Nunca Mas' ('no more' in Spanish),⁴⁷ whilst the CAVR, Timor-Leste's Commission for Reception, Truth and Reconciliation, has adopted the title 'Chega' ('enough' in Portuguese).⁴⁸ Moreover, former Argentinean President Raul Alfonsin stated that his national commission's aim 'was to prevent rather than to punish'.⁴⁹ Clearly then, deterrence is one of the primary goals of truth commissions. How then does the public exposure of human rights abuses prevent more of the same in the future?

The main way that deterrence is achieved by truth commissions, it is claimed, is through the removal of perpetrators of state crime from public life. The culprits cannot then engage in criminal behaviour again, but more significantly, other would-be perpetrators are discouraged from doing so.⁵⁰ Although generally truth commission reports are not accompanied by high-level prosecutions, the mere 'naming and shaming' of perpetrators may force them to retreat from public view, given the extent to which they are likely to be ostracised by the greater public.⁵¹ Truth commission advocates often point to the fact that ritual shaming carries more serious consequences for the subject than criminal prosecution in a number of different cultures.⁵²

Although truth-seeking may function as a dispensation of retributive justice and as a message of deterrence in individual cases, the challenge for the architects of truth commissions is how to ensure such bodies act

⁴⁶ Stahn, above n 10, 955. A prominent example is the Ugandan Commission of Enquiry Act, which allowed alleged perpetrators to cross-examine witnesses and respond to the allegations made against them.

⁴⁷ Sarkin & Daly, above n 2, 695.

⁴⁸ S. Powell, 'UN Verdict on East Timor', *The Australian* (Sydney), 19 January 2006 no page.

⁴⁹ Sarkin and Daly, above n 2, 695.

⁵⁰ Mendeloff, above n 11, 361.

⁵¹ *Ibid.*

⁵² *Ibid.*

against the *impunity* previously enjoyed by perpetrators (be they police, military, or civilians). Impunity is not merely the absence of criminal punishment, but that failure to punish reflecting an official endorsement of the perpetrators' actions.⁵³ It is not disputable that criminal prosecution abolishes impunity, by breaking the cycle of violent reprisal and sending a clear deterrent message to other would-be perpetrators.⁵⁴ However, is there a way this can be achieved through 'restorative' processes alone? This is this area where the controversy over truth commissions with attached amnesty provisions reaches its crescendo. Although, as will be noted below, the provision of an amnesty to perpetrators may help to significantly improve the truthfulness of testimony and create a more accurate historical record, on the other hand, opponents of amnesties vigorously assert that such a measure perpetuates impunity through a lack of accountability and responsibility, leading to prolonged hatred and the threat of violent revenge by victims and their families.⁵⁵

It is at this point where *conditional* amnesties, equivalent to a special type of plea-bargain,⁵⁶ become an important tool in the process. Although conditional amnesties that exonerate the perpetrators of serious human rights breaches will probably be unlawful according to international law,⁵⁷ they can still function to defeat impunity, depending on how they are framed and managed.⁵⁸ In order to convey a strong statement to the public (and the international community) that the amnesty does not legitimate the crimes committed, the amnesty should be:

⁵³ Sarkin & Daly, above n 2, 719. For a detailed account of the dangers of impunity for serious crimes, see Daye, above n 4, 107.

⁵⁴ Mendeloff, above n 11, 360.

⁵⁵ Laakso, above n 2, 51.

⁵⁶ Rotberg, above n 5, 17.

⁵⁷ Simunovic, above n 12, 702-703; nation-states have a non-derogable duty under international law to prosecute and punish individuals who commit violations of human rights: Daye, above n 4, 113. Moreover, in October 2000, UN Secretary-General Kofi Annan reported to the Security Council that the UN position on the matter was that 'amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law': Stahn, above n 10, 955.

⁵⁸ Sarkin & Daly, above n 2, 721.

1. Individual, so as to preclude blanket amnesties: each applicant must submit themselves for consideration;⁵⁹ and,
2. as mentioned, conditional, such that the amnesty is only granted in exchange for something of value to society, rather than for the performance of a pre-existing duty (i.e. to obey the law or to disarm).⁶⁰

These requirements epitomise recent international legal practice, as demonstrated in South Africa and Timor-Leste.⁶¹ The individual amnesty requirement ensures that each perpetrator takes responsibility and acknowledges their own actions, whilst the requirement of conditionality guarantees that the new administration cannot be 'held hostage' by the old regime until amnesty is awarded.⁶² Thus, involvement in this kind of amnesty regime indicates that the former power-holders are prepared to work within the parameters and laws of the new government.⁶³

Rehabilitation of Perpetrators

The opportunity to rehabilitate perpetrators emerged in the early 20th century as the third general justification for criminal punishment, along with retribution and deterrence.⁶⁴ So can a perpetrator's cooperation with a truth commission contribute towards the reform of their behaviour, and reintegration within a peaceful society?

⁵⁹ Ibid.

⁶⁰ Ibid; this element could of course be met by a requirement to tell the truth during testimony (in the TRC), or alternatively to pay restitution or engage in community service (as in Timor-Leste's 'Community Reconciliation Procedure' for less serious crimes): La'o Hamutuk, 'Reviewing the East Timor Commission for Reception, Truth and Reconciliation (CAVR)' (2003) 4(5) *La'o Hamutuk Bulletin*.
<<http://www.laohamutuk.org/Bulletin/2003/Nov/bulletinv4n5.html#cavr>> at 25 March 2006.

⁶¹ Stahn, above n 10, 954; The conditional amnesties employed in South Africa and Timor-Leste contrast with the older 'blanket' model used in Chile, Argentina and El Salvador: Daye, above n 4, 95.

⁶² Sarkin & Daly, above n 2, 721.

⁶³ Ibid, 722.

⁶⁴ Phelps, above n 3, 30.

The key to the rehabilitation of perpetrators is their acceptance of responsibility for their actions.⁶⁵ When the perpetrator steps forward at a truth commission hearing and acknowledges their own culpability, this crucial first step towards reintegration within society takes place. Such a process contrasts greatly with criminal trials, where a defendant will seek to maintain their innocence,⁶⁶ often even after a guilty verdict, and the punishment then meted out has its aim in isolating that individual from the remainder of society, rather than including them.⁶⁷ Truth-seeking processes, on the other hand, aim to reconcile the two parties so they may live together peacefully.⁶⁸ Whilst honest participation in a truth-seeking process is far from an automatic guarantee to forgiveness and a normal life within the new nation, there are a number of precedents to that effect.⁶⁹

Building a Historical Record

The findings presented in a truth commission report constitute an important addition to the public historical record.⁷⁰ Importantly, an accurate historical record can function to resolve disputes about the occurrence and extent of human rights abuses. As such, any historical lies created by the propaganda machine of the former regime will be publicly rebuked.⁷¹ A common understanding of the troubling parts of a nation's history may allow the two or more former warring factions to unite in government, rather than argue over the past.⁷² Although it is sometimes true that the otherwise laudable goal of promoting national

⁶⁵ Daye, above n 4, 96.

⁶⁶ Ibid.

⁶⁷ Ibid, 110.

⁶⁸ Ibid.

⁶⁹ For example, the comparative success of the Community Reconciliation Procedure as part of the CAVR process in East Timor, which allowed the repatriation of former militia members back to their communities, largely without incident: S. Zifcak, 'Restorative justice in Timor-Leste: The Truth and Reconciliation Commission' (2005) 68 *Development Bulletin* 51, 53; reconciliation between supporters of Ian Smith and those of Robert Mugabe following civil war in Zimbabwe: Daye, above n 4, 81; and in South Africa, the notorious former 'wet bag' police interrogator, Jeff Benzien, who continued serving in the police force after his testimony before the TRC, with a number of his former victims as his senior officers: Daye, above n 4, 93-94.

⁷⁰ Laakso, above n 2, 44; Weiner, above n 1, 130.

⁷¹ Mendeloff, above n 11, 360.

⁷² Ibid.

identity in infant nations is achieved through a great deal of mythmaking,⁷³ for a feeling of trust between former adversaries and a lasting peace to ensue, a spirit of transparency and objectivity with regards to national history is an important starting point.⁷⁴

As compared with civil or criminal trials, which can undoubtedly also make a positive contribution to the historical record,⁷⁵ truth commission hearings and reports have been criticised as providing inaccurate accounts of the past. First, the testimony obtained in truth hearings is nearly never subject to the cross-examination and burden of proof procedural requirements that characterise criminal or civil trials; as such it is more unlikely that an accurate and common understanding of the truth will arise.⁷⁶ Further, it has been argued that even if all testimony is tendered in good faith, the finite terms of reference and resources of a truth commission will mean an accurate and complete historical record of past human rights violations can never be produced, without the benefit of years of comprehensive research by qualified historians.⁷⁷

This second criticism is more easily dealt with, first by the host nation ensuring that professional historians and researchers are amongst the staff of the commission, and second by ensuring that the commission's lifespan and powers (e.g. powers of subpoena, search, and seizure⁷⁸) are sufficient in order for substantial historical research and compilation to be achieved. It is true that no history, no matter how exhaustively researched, can ever constitute the complete, objective truth, and this same principle applies to the reports of truth commissions: they are 'partially-constructed histories' like any other.⁷⁹ Ideally, a commission's

⁷³ Ibid, 371.

⁷⁴ As witnessed in the example of modern-day Germany: Mendeloff, above n 11, 371. Of course, the above point regarding nations, such as Mozambique, must be heeded: in a small number of post-conflict societies, exposure of the truth can do more harm than good.

⁷⁵ M.A. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 *Northwestern University Law Review* 539, 593.

⁷⁶ Mendeloff, above n 11, 374; Schalkwyk notes that this criticism has been levelled at the TRC: Schalkwyk, above n 26, 11.

⁷⁷ Mendeloff, above n 11, 374.

⁷⁸ For example, see Stahn, above n 10, 955 on the TRC.

⁷⁹ Laakso, above n 2, 50.

report might better be seen as producing a set of *truths* rather than *the* truth.⁸⁰

The first criticism described above, a lack of checks and balances on the accuracy of testimony, might be rectified by the use of a conditional amnesty provision, as employed by the TRC, such that perpetrators may only be granted amnesty if, amongst other factors, they satisfy the commissioners that they have told the complete truth.⁸¹ Additionally, it is precisely this relaxation of procedural rules regarding testimony that forms part of the attraction of the truth commission mechanism. As compared with formal criminal trials that provide only 'microscopic' or 'logical' truth in relation to a single case,⁸² truth commissions are able to build a much more comprehensive account of past events, due to their ability to hear many more witnesses and involve various segments of civil society over the same time period that the trials of only a few leading perpetrators might be processed.⁸³

Human Rights Education

A truth and reconciliation commission's final report, together with the publicity that will usually accompany its hearing procedure, can constitute an important source of public education. The didactic element that might be taken from such narratives can ensure that the same kind of violence never occurs again. The message ideally conveyed is that in a democratic society, the use of abusive means to achieve nation-building will never again be tolerated.⁸⁴ Moreover, apart from a focus on specific historical events, a truth commission can help to create a human rights culture and elevate its associated vocabulary into the public discourse, where, under the repressive regime, such ideas may

⁸⁰ Phelps, above n 3, 124.

⁸¹ Schalkwyk, above n 26, 4; in contrast, when the Sri Lankan Commissions on Disappearances were formed, the government and the families of victims refused to accept similar amnesties, and hence, significantly less information was obtained from alleged perpetrators: Rotberg, above n 5, 15.

⁸² Drumbl, above n 75, 593.

⁸³ Simunovic, above n 12, 703. Relevantly, a study by Ronald Slye on the TRC found that 'despite the absence of the highly developed rules of evidence, procedure, and proof that govern trials in a Western setting, the quality and quantity of information collected by the TRC was comparable or superior to that which might have been produced in a courtroom': Rotberg, above n 5, 15.

⁸⁴ Sarkin & Daly, above n 2, 697; Mendeloff, above n 11, 360.

never have previously existed.⁸⁵ Of course, the publication of a truth commission's report by itself is not enough to rapidly spread human rights awareness. At the very least, the release of the report should be accompanied, wherever possible, by a sustained and institutionalised effort in educating the broader public of the commission's findings, and the human rights doctrine which has underpinned them.⁸⁶

Although admittedly the human rights records of a number of nations that have previously instituted truth commissions remains questionable (e.g. South Africa, Guatemala, El Salvador, Nicaragua and Rwanda⁸⁷), the educative aspects of the commission's report must be given time to mature into common practice. Education remains a key step in ensuring respect for human rights in a nation's long-term future.

Institutional Reform

Although most truth commissions primarily operate by assigning blame for the commission of human rights abuses to individual perpetrators,⁸⁸ it is not just individual responsibility for state crime that can be emphasised through the commission process. The aggregation of many different individual accounts will often reveal the scope of an entire institutional culture of abuse and disregard for human rights,⁸⁹ be that in the government, military, police force, legal system, education system, or elsewhere.

Looking at institutional responsibility for crimes will enable a post-conflict society to take political steps to remedy those shortcomings,⁹⁰ whether the individual perpetrators of those crimes remain within that institution or not. This contrasts with the nature of criminal trials, with their focus on the facts of the individual case at hand, rather than a 'big picture' view which reveals the root causes of the violence, and informs recommendations as to the future.⁹¹ Relevant examples include the judicial reforms that took place in El Salvador, as recommended by the

⁸⁵ Daye, above n 4, 99.

⁸⁶ Laakso, above n 2, 51.

⁸⁷ Mendeloff, above n 11, 374.

⁸⁸ Ibid, 359.

⁸⁹ Simunovic, above n 12, 703.

⁹⁰ Laakso, above n 2, 51.

⁹¹ Simunovic, above n 12, 703.

truth commission there,⁹² the Argentinean Commission's uncovering of its military's culture of torture, leading to reforms,⁹³ and the TRC's major role in exposing the cruelty of the apartheid system in South Africa.⁹⁴

Significantly, institutional reform does not have to be limited to the formal institutions of the state. The patterns revealed by victim and perpetrator testimony may reveal substantial social injustice.⁹⁵ If for example, gender, employment, or economic-based discrimination is extremely widespread it may represent an institutionalised practice. The role of a truth commission in identifying social injustice and making recommendations to overcome it, rather than merely combating state-sanctioned violence, can be the first step in an agenda of further social change.

One area where this crucial function of truth commissions in promoting institutional reform has fallen down in the past is through governments' failures to follow the recommendations of their commission's report. Given it takes political will in order to effect institutional change (for example in the armed forces, labour market, or economy), the ultimate success of the commission's work in this area depends upon its constituent government following its recommendations. A truth commission cannot fix every ailment of a post-conflict society by itself.⁹⁶ The Chair of Timor-Leste's CAVR, Aniceto Guterres, agreed:

Sometimes when I respond to questions [about dealing with inequalities], I kind of laugh and say, 'Look, if you're really putting so much onto the CAVR then you don't need a Parliament, you don't need a Prime Minister, you don't need a Government. You don't need a President of Timor, you just ask the CAVR to do everything!'⁹⁷

A simple, yet controversial, method of overcoming this problem would be to agree in advance to make the recommendations of the commission

⁹² Mendeloff, above n 11, 368.

⁹³ Phelps, above n 3, 120.

⁹⁴ Mendeloff, above n 11, 368.

⁹⁵ Stanley, above n 4, 586.

⁹⁶ Ibid, 588; see also Phelps, above n 3, 125-126.

⁹⁷ Stanley, above n 4, 593.

obligatory.⁹⁸ However, this will only be possible in certain circumstances, such as where the commission is a legislatively-created body, and as such, has a popular democratic mandate.

Promotion of Democracy

Why is the promotion of democratic government a laudable goal of truth commissions? It is indisputable that strong democracies are far less likely to lapse into civil war than undemocratic nations.⁹⁹ Although it is true that democracy is not the only political route to a peaceful society,¹⁰⁰ its broad acceptance as a form of government by the international community and its guarantees for individual freedoms means it is an attractive model of governance.¹⁰¹ Of course, for most nations that have engaged in a major truth-seeking exercise, democratic values were far from the norm up until their recent past.

While there are of course post-conflict societies that have made a successful transition to democratic government without the aid of a truth and reconciliation commission,¹⁰² the work of such a body undoubtedly contributes towards the propagation of democratic ideals. This occurs through a threefold process: first, through the reconciliation of warring groups, as it is only where conflicting segments of society agree to be governed in common that democracy may result.¹⁰³ Second, the public exposure of a truth commission's work can indirectly inspire other democratic transformations, such as a more active judiciary, a more reformist parliament and a more politically aware populace.¹⁰⁴ Third and most directly, the process of truth-seeking promotes several democratic values in and of itself. These include popular participation,

⁹⁸ Laakso, above n 2, 51.

⁹⁹ Mendeloff, above n 11, 372.

¹⁰⁰ *Ibid.*

¹⁰¹ R. Pannikar, 'Is the Notion of Human Rights a Western Concept?' (1982) 120 *Diogenes* 75, [III]; H.J. Steiner & P. Alston, *International Human Rights in Context*, (2nd ed, 2000) 903-904.

¹⁰² Mendeloff, above n 11, 367; for example: Spain, Mozambique, Lebanon, Namibia and Cambodia.

¹⁰³ *Ibid.*, 700.

¹⁰⁴ Phelps, above n 3, 123-124.

an accurate and transparent historical record, and the rule of law.¹⁰⁵ These democratic values will now be discussed in turn.

First, popular participation is promoted through the truth-seeking process by the empowerment of victims as they step forward to give their testimony.¹⁰⁶ Under the previous regime, their opinions may have been seriously repressed, and testifying before a truth commission will serve as an encouragement (for the witness and others) to further contribute to the public discourse. As such, truth commissions mobilise the participation of the previously-powerless, and encourage them to speak critically of those in power. Once the commission's final report has been completed, if its findings are widely disseminated, this will further encourage popular participation, together with the transparency of public processes.¹⁰⁷

Second, the democratic benefits of an accurate and common historical record are manifest in the sense that the leaders of previously conflicting societal factions can focus their energies on forming an effective government for their new nation, rather than debating the past.¹⁰⁸ As previously discussed, all efforts may be focussed towards the democratic needs of the present society, rather than trying to affix blame for past misdeeds.

Third, the rule of law is the contention that no-one is 'above the law'.¹⁰⁹ One of its consequences is the principle that crimes are punished by the state, through legal means, rather than through personal reprisal.¹¹⁰ The fact that state crime can be dealt with by negotiation and truth-seeking by means of a commission, rather than reprisal killings, is seen by truth commission advocates as strengthening that principle.¹¹¹ However, this is one of the most controversial conceptual areas of the truth commission model. If an amnesty regime accompanies the tabling of the commission's final report, critics of truth commissions will claim that a

¹⁰⁵ Mendeloff, above n 11, 361; Weiner, above n 1, 131; Gentilucci, above n 15, 87.

¹⁰⁶ Weiner, above n 1, 131.

¹⁰⁷ Rotberg, above n 5, 9.

¹⁰⁸ Mendeloff, above n 11, 361.

¹⁰⁹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 202-203.

¹¹⁰ Mendeloff, above n 11, 361; W.I. Jennings, *The Law and the Constitution* (5th ed, 1959) 51.

¹¹¹ Rotberg, above n 5, 11.

failure to prosecute those responsible for prior state-sponsored crime is a direct affront to the rule of law in a democratic system. This contention might be answered by natural law theory, where, unlike with positivist theories espousing legal continuity, a break with the old legal regime may be justified because the prior law 'lacked morality and hence did not constitute a valid legal regime'.¹¹² Nonetheless this remains an important point of contention.

International Image

The establishment of a successful truth commission may have a positive role to play in the way that the outside world views the newly democratised nation.¹¹³ Although this argument obviously overlaps with a number of the others mentioned above, it is still worth considering separately. Whilst transitional justice processes generally focus on the grievances of victims and the incapacitation of perpetrators, it is still a fact that civil conflict and state-sanctioned human rights abuses can often (but not always) damage the economy of the newly democratised nation.¹¹⁴ The reconciliation of previously warring factions, the promotion of democratic principles, and the institutional reforms that truth commissions contribute substantially towards are likely to make the new nation more attractive to foreign economic investment.¹¹⁵ Therefore, in an indirect manner, the work of a truth commission can promote business, trade, reconstruction and tourism.¹¹⁶

On the other hand, the use of restorative, rather than purely retributive transitional justice mechanisms, may attract foreign criticism, particularly from nations with strong human rights traditions. This is most often the case where the truth commission report recommends blanket amnesties for perpetrators, which, as articulated above, breaches the international legal obligation on states to prosecute those who have committed war crimes and crimes against humanity on their

¹¹² Gentilucci, above n 15, 87.

¹¹³ Sarkin & Daly, above n 2, 698.

¹¹⁴ Ibid, 727.

¹¹⁵ Ibid, 689-690.

¹¹⁶ Ibid.

territory.¹¹⁷ Yet, for all the negative international attention that might arise, it would constitute a serious step in international relations to threaten an economic relationship with a newly democratised nation if they have violated this obligation. International law also calls for states to respect each other's sovereignty, and refrain from intervening in each other's internal affairs.¹¹⁸ In any case, depending on the newly democratised state's level of development, much post-conflict investment is likely to arrive from private, rather than government sources.

Conclusion

This article does not set out to claim that truth and reconciliation commissions are a cure for all of the problems created by a history of state-sponsored criminality in every single case. In certain circumstances, such as where a miraculous but fragile peace exists following civil war, exposure of the true extent of human rights violations could do more harm than good.¹¹⁹ Moreover, democratisation without the aid of a truth and reconciliation commission has not led to a relapse of war in a number of post-conflict states, including post-Franco Spain, Namibia, Mozambique and Cambodia.¹²⁰ The popularity of truth and reconciliation commissions is a comparatively new phenomenon: previously, numerous armed conflicts arrived at a final closure without the benefit of truth-telling, or even without prosecution.¹²¹

However, this is not to deny the many benefits that truth commissions can have on societies with a troubled past, in order to account for prior state-organised criminality, and aid the transition to lasting peace. Truth commissions offer many of the benefits of criminal prosecutions (for example: retribution, deterrence, rehabilitation of offenders,

¹¹⁷ Simunovic, above n 12, 702.

¹¹⁸ *Charter of the United Nations*, Article 2(1); *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res 2131, UN GAOR, 20th sess, 1408th plen mtg, UN Doc A/Res/2131 (1966); *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625, UN GAOR, 26th sess, 1883rd plen mtg, UN Doc A/Res/2625 (1970).

¹¹⁹ Daye, above n 4, 43.

¹²⁰ Mendeloff, above n 11, 367, 369.

¹²¹ *Ibid*, 367.

building a common historical record), in addition to several unique features: societal healing and reconciliation, the promotion of democratic values and human rights, improvement of a state's international image, and the possibility of initiating broad institutional reform. Finally, when the work of a truth commission is combined with political steps by the new government, such as a comprehensive program of public education, and provision of reparations to victims,¹²² together with the mere passing of time,¹²³ a lasting and comprehensive sense of justice and peace can result, and the legacy of state-organised criminality will no longer haunt the new nation.

¹²² *Ibid*, 376.

¹²³ Daye, above n 4, 43.

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The Battle of Crete: A Re-evaluation

*Charles Prestidge-King**

In the space of 11 short days in late May 1941, Crete marked the zenith of the Third Reich. Yet it is significant as more than a simple 'watermark': as this essay shall argue, the battle of Crete held a great deal of contextual influence over the eventual course of the war. I argue also that Crete serves as an excellent focal point through which to observe a variety of strategic, moral, and tactical realities of the Second World War. Naturally, an attempt at complete description of the battle would be impossible, and this essay can only briefly touch upon some long-running historical debates and areas of investigation. These include the role of ULTRA, the code-breaking system used by Allied High Command; the tension between Winston Churchill, Field Marshall Archibald Wavell and General Sir Bernard Freyberg, and much of the ongoing debate about foreknowledge; leadership dynamics within Allied command, and the importance of Crete to the intentionalism vs. functionalism debate. In light of these ongoing debates, this essay will argue for a renewed consideration of Crete by military history, focusing specifically on its more problematic elements.

Introduction

Crete, a long, thin island in the centre of the Eastern Mediterranean, has always been a target of military ambition. Since the time of the Minoans, the Achaeans, Dorians, Romans, Arabs, Venetians, and Turks have all fought to control it, and, over time, have again lost it to more formidable opponents. The possession of Crete, however, should not be considered as just territorial gain, nor can it be imagined as a purely strategic holding – the possession of Crete historically coincides with the 'zenith' of its possessor, and its loss with that power's lapse.¹

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¹ D.M. Davin, *The Official History of New Zealand in the Second World War, 1939-1945: Crete* (1953) 2.

The particulars of the battle are of some importance to historians examining the relative strengths and competing strategies of Axis and Allied forces in the Mediterranean, and the nature of German early campaign strategy at its zenith. As well as attempting to make some contribution to the above areas of inquiry, I intend to show that Crete may be useful to the historian in assessing the role of airborne infantry within war, the strategic mind of Hitler, the impact of losing Crete to Allied morale, and the utility of intelligence.²

‘Those 11 Days’

Beginning on the 20th May, 1941, with the first paratrooper landings near Maleme, the Battle of Crete already mentioned and claimed the lives of some 1751 British, Greek, Australian and New Zealand soldiers, and that of 2071 German soldiers. Marked by close quarters fighting, confusion, and perhaps above all else, the ever-present dive-bomb raids, the seventh *Fallschirmjäger* [Paratrooper Division] and fifth *Gebirgsjäger* [Mountain Division] Divisions of the German Army managed to capture Crete in its entirety by the 31st May. Those Allied soldiers who could not evacuate were taken prisoner. It is also considered something of a demarcation point for a number of reasons: firstly, it is the last major battle before the invasion of the Soviet Union; it is also, save for the *Market* side of *Operation Market Garden*, the largest single deployment of paratroops in the Second World War. It is also the first instance of an island being successfully invaded from the air, a fact that would weigh heavy on British morale.³ For many, the Battle of Crete is in fact little more than a fullstop in the history of the Second World War. Awkwardly situated between Axis victories in Poland, France, Norway, and the Balkans and the vastness of *Operation Barbarossa*, Crete is often little more than an epithet, ‘the last phase of the Balkans campaign’, ‘the end of German dominance’, and more sombrely, as ‘the grave of the

² Churchill, for instance, devotes two entire chapters of his *History of the Second World War* to it: W. Churchill, *The Second World War* (vol. III, 1950). They were revised and altered many times, for many reasons: to protect the secret of ULTRA post-war, and more significantly, to avoid damaging the reputation and legacy of key figures, including Freyberg and Wavell, who contacted him personally. See: D. Reynolds, *The Ultra Secret and Churchill's War Memoirs* (2005) 20 *Intelligence and National Security* 218.

³ A. Zapanitis, *Hitler's Balkan Campaign and the Invasion of the USSR* (1987) 64.

German paratrooper'. Finally, the story of Crete is reduced to three simple words: Axis Pyrrhic victory.

Both the course of the battle and the eventual German success have been remarked upon by many writers, and reasons abound, both positive and negative, for the battle's result. Scholarly disputation aside, any claim assessing reasons for victory cannot ignore the blunt reality of the island's topography. Mountainous, thin and long, with poor harbour sites (meaning that supplies had to come through the vulnerable northern harbours of Retimo, Heraklion, and most importantly, Suda Bay), Crete has always been a difficult island to defend. In May 1941, there were only two fully-functioning airfields upon the island at Maleme and Heraklion, with several more under construction. A number of smaller, less accessible airfields existed. Communications were hampered by the layout of the island, and by the sparseness and quality of its roads and railways.⁴

Despite these difficulties, initial reports on the situation were optimistic. Letters to Churchill and Michael Savage, the Prime Minister of New Zealand at the time, show Freyberg as unconcerned with the prospect of an aerial invasion: 'I am not in the least anxious about an airborne attack.'⁵ It was, in fact, the prospect of a joint sea and air attack that worries him greatly, and the final tone of reservation in Freyberg's letter to General Archibald Wavell, Allied Commander in the Middle East, can be directly linked to this fear. 'Although I do not wish to seem over-confident, I feel that at least we will give an excellent account of ourselves, and with the help of the Royal Navy I trust that Crete will be held.'⁶

Intelligence and the Air War

This optimism may have been justified. British military intelligence had until Crete been of modest utility. Yet in the case of Crete, ULTRA revealed the entire plan of *Operation Merkur*, right down to date and

⁴ Davin, above n 1, 11.

⁵ Department of Internal Affairs (Wellington), *Documents Relating to New Zealand's Participation in the Second World War 1939-1945* (vol. I, 1949) 293.

⁶ *Ibid*, 297.

landing positions, if not accurate troop numbers.⁷ However, after the war, historians debated whether or not this information would have made any practical difference,⁸ coming as it did some two weeks before the first landings on the island.⁹ The information regarding the use of paratroops in the Balkan region had been available since late March, when Enigma revealed movement orders amongst six *JU52 Gruppen*, and that 250 transport aircraft had arrived in Greece from Germany. Likewise, the landing patterns and ground tactics of the paratroopers was well-known, as the standard German parachutist manual, captured as early as May 1940 had been extensively studied throughout the Commonwealth Armed Forces.¹⁰

Despite this confidence, British intelligence was already concerned about the possibility of the Germans exploiting Crete's strategically advantageous position for an assault on the Middle East. Extensive discussion surrounded the possibility that Crete may, in fact, be cover for an airborne attack on Cyprus and Syria, with the final intention of an attack on Iraq.¹¹ General Kurt Student, head of the *Fallschirmjäger Division*, did, in fact, wish to 'jump' (*Sprung nach Kreta*, or 'jump to Crete', is a common name for the invasion) from Crete to Cyprus, and from there to the Suez Canal.¹² The anxiety surrounding an immediate attack upon Cyprus or Syria was so pronounced that even after Enigma had shown Crete as the next objective (on 27th April), indecision still remained as to whether to even defend Crete.¹³

⁷ F.H. Hinsley, *British Intelligence in the Second World War* (1979) 419. Most numbers were overestimations.

⁸ Ibid, 419. Hinsley's position is restated in a 1996 lecture: F.H. Hinsley, 'The Influence of ULTRA in the Second World War' (Lecture presented at Cambridge University, Cambridge, 26 November 2006) at <<http://www.cl.cam.ac.uk/research/security/Historical/hinsley.html>> at 13 October 2006.

⁹ Ibid, 415.

¹⁰ B.H. Liddell-Hart, *The Other Side of the Hill* (1948) 240. Student would later express regret for failing to have knowledge of this.

¹¹ Hinsley, above n 7, 411, 417. The Chiefs of Staff, as well as Wavell, suspected a cover plan. The MI14 document detailing said concerns is included in Appendix 14 of Hinsley, above n 7, 573.

¹² B.H. Liddell-Hart, *The German Generals Talk* (1979) 161.

¹³ Hinsley, above n 7, 416.

Nonetheless, the decision was made. The value of the intelligence surrounding Crete was given by Churchill at some £10 million; the value of the island as a strategic asset, to say nothing of the condition of its inhabitants, would surely have been much greater. Intelligence historian Francis Hinsley believes the intelligence to be of greater value because of the 'acute shortage of shipping, equipment and troops throughout the Middle East theatre';¹⁴ however, a counter-argument can be logically sustained in that intelligence cannot be effectively put to use without the *materiel* to utilise the advantages rendered by that foreknowledge. *The Official History of New Zealand in the Second World War* is also sceptical about the speculation that surrounded the issue of intelligence, largely because of the already-mentioned issue of troop numbers. 'It is unlikely', Daniel Davin concludes, 'that the conduct or the outcome of the battle were affected by the fact that the Enigma, while providing full details of the German plan and a date before which the attack would not take place, did not indicate the exact size of the assault.'¹⁵

More cursory explanations may be offered. Churchill points to the *Luftwaffe* as a primary reason, claiming that the Germans maintained 'complete superiority in the air.'¹⁶ The few Royal Air Force fighters that initially defended Crete had been removed earlier for logistical reasons.¹⁷ Davin emphasises this lack of any air support in his *Official History*, explaining: 'one shortage above all was conspicuous to the defenders, that of aircraft.'¹⁸ The *Luftwaffe* was certainly effective. Where the lightly-armed paratroopers had difficulty breaking Allied defensive positions, the *Ju87 Stukas* revelled in it and achieved notable success: the Allies had 'nothing to match it.'¹⁹ During Crete, *Stukas* would eventually sink one destroyer and damage a number of cruisers, thus rendering Allied seaborne assistance impossible – and in turn, allowing supply convoys to come from mainland Greece. A dearth of men and *materiel* in

¹⁴ Ibid, 418.

¹⁵ Davin, above n 1, 420.

¹⁶ Churchill, above n 2, 240.

¹⁷ See generally Chapter 2 of Davin, above n 1.

¹⁸ Ibid, 460.

¹⁹ Freyberg to Wavell, 23 May 1941, Department of Internal Affairs (Wellington), above n 5, 303; Freyberg to Wavell, 1 May 1941: Ibid 285.

the region, hindered by the splitting of forces between North Africa and the Mediterranean proper, also led to difficulties in maintaining any semblance of naval power.

Warum 'Sprung nach Kreta?'

As van Creveld puts it, 'the most interesting question is not how Crete was invaded, but *why*.'²⁰ Whilst there are obvious impetuses in German advances from 1939-1941, Crete remains a more difficult prospect to adequately address. Why did the Germans invade Crete? Or, to put it more precisely, why did Hitler decide upon the *Sprung nach Kreta*, or jump to Crete?

A host of answers are immediately evident. The typical understanding of the decision to invade depicts a Hitler reluctant to push his troops too much further south: his eyes were firmly focused upon the East,²¹ and the importance of *Barbarossa* to Crete, and vice versa, must be stressed. Whilst there may have strategic value in holding the Balkans to *Barbarossa*, Crete was another matter. With Italian leader Benito Mussolini's failure to capture Greece, Nazi party leadership had decided to take a more active role in Mediterranean affairs; the Italians, optimistically, referred to it as action 'in parallel'. In truth, it was anything but. Operation Marita, the German invasion of Greece, was a success, but should never have taken place. In turn, the Balkans campaign – designed, insofar as it had a design, to ensure the security of the vital southern flank of *Barbarossa* so that the all-important push to the east could take place without fear of an invasion from Yugoslavia, an alliance of Balkan states, or from the British moving through Greece – had heightened German ambitions in the region. Whilst Hitler had never intended to establish a position of importance in the Mediterranean, an attack upon Greece, he said, must drive the British out completely.²² The strategic advantage of holding the main part of the Balkans is reasonably clear, and, despite the fact that it was at least partly unintentional, German High Command – and especially Hitler – was keen to hold such an important area.

²⁰ M. van Creveld, *Hitler's Strategy, 1940-1941: The Balkan Clue* (1973) 166.

²¹ I. Kershaw, *Hitler, 1936-1945: Nemesis* (1999) 366.

²² Kershaw, above n 21, 361. See also van Creveld, above n 20, 96ff.

Crete, however, is another matter. Despite being considered strategically important by both German Supreme Command and by many individual German commanders, Hitler was reluctant to push too far into the Mediterranean. Galled at having to remedy the situation left by the ill-conceived Italian invasion of Greece,²³ stymied by Franco in his plan to take Gibraltar (*Operation Felix*),²⁴ the Balkan campaign fell into a clearly subordinate position to *Barbarossa*. The decision to jump, or *Führer Order No. 28*, sits then in a difficult context.

However Hitler was thinking, Crete is an important position to hold. A natural barrier between Alexandria and the Aegean, the capture of Crete would prevent the British from entering the latter and thus secure the important maritime oil route from the Romanian port of Constanta via the Dardanelles to Italy. This, indeed, is a reason given by Hitler himself in his speech to the Reichstag on May 4th.²⁵ Yet the *Sprung nach Kreta* was never considered an absolute priority, and it appears that pressure from Hermann Göring and Kurt Student eventually forced his hand.²⁶ After talks in Mönichkirchen, Hitler eventually conceded, epigrammatically, that the conquest of Crete would make ‘a good wind-up [*Abschluss*] of the Balkan campaign’,²⁷ and would perhaps distract the world from his eastern intent, if only for a while.²⁸

The true persuasion on Göring’s part came from mentioning the proximity of the three airfields of Crete to the oilfields at Ploesti, in Romania – a vital source of oil for eastern campaigning.²⁹ Ploesti was, in fact, the absolute priority, as Halder writes in his *Kriegstagebuch*, and the reason discussed extensively by Hitler, as documented in his letter to Mussolini on November 20th, 1940.^{30,31} Hitler’s overarching concern was

²³ The formal demand for Greek surrender was famously met by a single word reply: ‘No!’

²⁴ Kershaw, above n 21, 348.

²⁵ G. Schreiber, B. Stegemann & D. Vogel, *Germany and the Second World War* (vol. III) (D. McMurry, et. al. trans, 1995 ed) 527.

²⁶ Kershaw, above n 21, 367; See also van Creveld, above n 20, 167-168; S. Mitcham, *Men of the Luftwaffe* (1988) 117; and Liddell-Hart, above n 12, 159.

²⁷ W. Ansel, *Hitler and the Middle Sea* (1972) 199.

²⁸ Ibid 203.

²⁹ See also W. Murray, *The Luftwaffe 1933-45* (1996) 74.

³⁰ F. Halder, *Kriegstagebuch. Tägliche Aufzeichnungen des Chefs des Generalstabes des Heeres 1939-1942* (1962-1964) Entry dated April 24th, 1941.

³¹ Documented in Zapantis, above n 3, 213-216.

with Ploesti: he refused to let the veteran 22nd Airborne Division, veterans from the earliest days of campaigning in the Netherlands, to leave their guard of Ploesti to take part in *Operation Merkur*.³²

Intentions and Functions; The limit of airborne troops

Of all German operations, Operation Barbarossa, Hitler's 'ideological war', had been the most important for months, if not years. And ideological it became. Hitler's continued inability to separate strategic imperatives from racial and ideological concerns is never more obvious than in the Mediterranean campaign, with Hitler regarding the region, notably excluding Greece, as racially 'degenerate'.³³ Plans for the *Reich* included a Europe as far west as the Ural Mountains, using the eastern European states as Lebensraum – his Europe never included the Mediterranean. As he put it once to his advisors – '*Lasst uns Nordisch bleiben*' [let us stay Nordic].³⁴

Treating Merkur as such, the entire affair may be treated as something of an argument for intentionalist views of Nazi leadership, as the strategic importance of holding the Mediterranean, and Crete most centrally, appears to have all but lost upon Hitler. Lack of a strategic objective is shown clearly by the fact that, while *Führer Order No. 28* superficially endows the operation with an offensive purpose ('As a base for air warfare against Great Britain in the Eastern Mediterranean we must prepare to occupy the island of Crete...'),³⁵ Hitler himself described it as a 'defensive holding' in an early speech to the Reichstag and was content to treat it as little more than an obstacle between the Aegean and Alexandria.³⁶ The relative strategic advantages that Crete afforded for further advancement into the region – proximity to Egypt, Iraq, Syria, and North Africa; control of shipping – were, it seems, also lost on Hitler, despite 'desperate attempts' by Naval High Command to convince him to use the fall of Crete as the beginning of 'intensive

³² Liddell-Hart, above n 12, 159.

³³ Ibid, 11.

³⁴ Ibid.

³⁵ Führer Directive no. 28. For further discussion, see also W. Warlimont, *Die Kampfführung der Achsenmächte im Mittelmeerraum* ['The Military Command of the Axis Forces in the Mediterranean Theatre'] (1958) 367, 200.

³⁶ van Creveld, above n 20, 170.

operations against the English bases and fleet in the eastern Mediterranean.³⁷

Crete also serves as a useful demonstration of the particular role of paratroopers. Through notable successes at Eben Emael and throughout the Netherlands, the elite German *Fallschirmjäger* divisions had become something of an obsession to German High Command.³⁸ However, disagreement remained as to the particular strength of paratroops within a broader strategic framework: 'there was a tendency to regard these troops as constituting the major threat, whereas they only served as an advanced guard to the main body landed by troop carrier during succeeding days.'³⁹

The Allies, themselves, were struck by the casualty rates amongst the German paratroopers: as Freyberg states in his letter to Wavell on the 24th May, 'The fighting has been very fierce and we can definitely say that the much-vaunted parachutists have been heavily defeated. I cannot believe they will be used again for a similar objective.'⁴⁰ Hitler expressly forbade the use of paratroops in taking objectives.⁴¹ From a deployment of some 22,000 men, Crete claimed the lives of 2,071 German soldiers, left 2,594 injured, with a further 1,888 missing – more than the rest of the entire Balkan campaign, and during a time when casualties throughout the German armed forces were unexpectedly low.^{42,43} Notably, paratroopers were not used in the capture of Malta, barely a year after Crete.⁴⁴

³⁷ Unsigned Memo, 1.6.1941. Cited in van Creveld, above n 20, 170.

³⁸ C. Buckley, *Greece and Crete 1941* (1952) 184.

³⁹ The failure of German caïques to make the British naval blockade is, perhaps, another reason for the abnormally high paratrooper casualties: see generally Davin, above n 1, Chapter 4; See also Buckley's depiction of paratroopers as 'skirmishers': Buckley, above n 38, 184; and contentions to the view, namely: P. Lisitskiy 'Using Airborne Assaults and Special Operations' (2005) 14 *Military Thought* 169-170.

⁴⁰ Department of Internal Affairs (Wellington), above n 5, 305. Italics my own.

⁴¹ Kershaw, above n 21, 367.

⁴² Ibid. Distorted casualty figures led to initial estimates much higher than the final total.

⁴³ As Student remarked, 'the whole French campaign had not cost us as many lives as a single battle in 1870': Buckley, above n 38, 303.

⁴⁴ van Creveld, above n 20, 170. See also R. Bennett, *ULTRA and Mediterranean Strategy* (1989) 51.

The Aftermath

So, after 11 days of hard fighting, Crete was taken. The evacuation of Commonwealth troops continued until the last moments, taking Commonwealth troops to Alexandria and leaving the few left behind with the prospects of becoming prisoners, or continuing the fight as guerrillas.⁴⁵ The British were left dismayed, frustrated and disappointed by the loss of Crete. A substantial loss of face had occurred, extending further than a simple 'bloodied nose':⁴⁶ failing to hold Crete was a failure to defend against an airborne attack over a stretch of water thrice the width of the English Channel. In the same month, air raids increased in volume over London. The HMS Hood, pride of the Royal Navy, was sunk by the German battleship Bismarck. Britain's 'island status', which Churchill had emphasised in rhetoric for years was becoming less secure.⁴⁷ Or to put it more bluntly, as Sir Harold Nicolson does, 'that battle has, I fear, dealt a very serious blow to our morale.'⁴⁸

The repercussions of Crete on British morale, both civilian and military – as difficult as morale is to adequately quantify – can be easily seen in two areas: through a general feeling of disappointment, whether in the capabilities of leadership or otherwise, and through a replenished sense of insecurity. If Hitler could make Crete part of his *Reich*, it was thought, then surely he could do the same with Great Britain. At a time when *Operation Sea Lion* was widely expected despite repeated postponement, the threat of invasion, now accompanied by images of dive-bombing and paratrooper landings, grew markedly closer to home.⁴⁹ Whilst 'those 11 days' of Crete would stake themselves indissolubly in New Zealand's national consciousness ('Soldiers never fought better than

⁴⁵ The guerrilla movement can only be mentioned in passing. For more, see G.C. Kriakopoulos, *The Nazi Occupation of Crete, 1941-1945* (1995); and G. Psychoundakis, *The Cretan Runner* (1998).

⁴⁶ See generally: Department of Internal Affairs (Wellington), above n 5.

⁴⁷ W. Churchill, no title (Speeches in the House of Commons and at St. James' Place, London, June 4, 18, 1940 and June 12, 1941). Indeed, Estorick considers this doctrinal reliance upon the sea surrounding Britain to be something of a 'Maginot complex': E. Estorick, 'Morale in Contemporary England' (1944) 47 *American Journal of Sociology*, 464, 467-468.

⁴⁸ Entry on the 20th May, 1941: N. Nicolson (ed), H. Nicolson, *Diaries and Letters* (vol. II, 1967) 171.

⁴⁹ Amongst the civilian populace, at least: see Estorick, above n 47, 468.

they fought on Crete; and not least among them the soldiers of the New Zealand Division'), the damage had been done.⁵⁰

Yet for all the less empirical consequences of Crete, there are many more that can be directly felt in the weeks, months, and years following the battle. As Davin says in his official history of the battle, 'just as a move in chess is conditioned by what has gone before and is seen in its full implications only through its consequences,'⁵¹ the true importance of the battle of Crete can be seen only in the effect it has upon later events during the war. Crete would affect the course of the war in North Africa, dissuade Allied command from establishing a Second Front, and go some way into destroying the Mediterranean Strategy. Its most significant contribution, however, is the most basic: it delayed *Operation Barbarossa*. The impact of the Balkan campaign on the beginnings of *Barbarossa* has been widely commented upon, and only a few things remain 'as fact'. For instance, it is clear that holding Crete meant maintaining a garrison, and preserving it as a site of strategic worth meant devoting precious *Luftwaffe* resources to it, removing both men and *materiel* from the war effort in the East. Casualties from the elite *Fallschirmjäger* [Airborne] and *Gebirgsjäger* [Mountain] divisions cannot have helped.

Merkur and Barbarossa

Most significantly, however, time spent securing Greece – including the weeks spent planning *Merkur*, as well as the 11 days of battle – meant time lost from the beginning of *Operation Barbarossa*. From this position of certainty, however, substantial variance can be found in reports. Conservative accounts, such as that of General Fritz Halder, make relatively modest claims, and stress the loss of equipment and manpower, rather than time. He modestly concludes only that Crete (and indeed, the entire Balkans campaign) diminished overall German 'striking powers for *Barbarossa*.'⁵² Furthermore, an increasing ambition led Hitler to insist that air supremacy must be had over the eastern

⁵⁰ Davin, above n 1, 463. Fictional reports of the battle are varied, but all regard the battle with reverence: see, for instance, C.K. Stead, *Talking About O'Dwyer* (1999).

⁵¹ Davin, above n 1, 1.

⁵² From his diary. Cited in W.G. McClymont, *The Official History of New Zealand in the Second World War, 1939-1945: To Greece* (1959) 483.

Mediterranean, requiring extensive, continued deployment (of troops who were previously assigned to *Barbarossa*) in order to maintain troop and aircraft numbers.⁵³ Aircraft losses – largely from Crete, and particularly from within the ranks of the vital transport *Ju52 Gruppen* – also hampered the Luftwaffe's potency in the first weeks of *Barbarossa*, and it became 'incapable' of fulfilling the role demanded of it upon invasion.⁵⁴

Other accounts stress the importance of time lost from *Barbarossa* – some four to six weeks in all.⁵⁵ Although the influence of heavy rain in the East during April and May prevents an exact estimate on the delay,⁵⁶ British wartime leaders were exultant. Foreign Secretary Anthony Eden stated, during a speech in Manchester on 23rd October 1941, 'Greece's brave defence ... delayed his prearranged attack on Russia for at least six most important weeks. What would those six weeks of campaigning weather be worth to Hitler now?'⁵⁷ This comment was repeated by *The Times*, on January 10, 1942; and more optimistically by Churchill, who concludes that 'a delay of five weeks was imposed ... as the result of our resistance in the Balkans ... no one can measure exactly what consequences this had before winter set in upon the fortunes of the German-Russian campaign. It is reasonable to believe that Moscow was saved thereby.'⁵⁸

The triumphalist speculations that pervaded British popular discourse were useful in clawing back some measure of public trust in the usefulness of the Greek campaign, but they nevertheless remain just that: speculations. While it is certainly fair to say that Crete, as the final

⁵³ Ibid.

⁵⁴ R. Edwards, *German Airborne Troops* (1974) 51. See also K. Assmann, 'The Battle for Moscow, Turning Point of the War' (January, 1950) *Foreign Affairs*, 309; and W. Maser, *Hitler: Legend, Myth, and Reality* (1973) 298.

⁵⁵ McClymont, above n 52, 158.

⁵⁶ Liddell-Hart, above n 10, 184-185. Zapantis wishes to dispute this 'rain thesis' as something of a myth, and provides meteorological evidence to show that rainfall was not drastically above average in the weeks before *Barbarossa*: Zapantis, above n 3, 146-163. Nonetheless, the evidence seems to suggest that the prospect of losing crucial mobility was enough to deter an early invasion.

⁵⁷ Zapantis, above n 3, note 179, 163.

⁵⁸ Churchill, above n 2, 316.

stage of the Balkans campaign, delayed Barbarossa, the implications of such a delay can and perhaps will never be known certainly.

Conclusions

Yet, for all of its troubling uncertainties, for all of its odd and unplanned qualities, Crete stands fast only as the final total victory for Germany during the Second World War. As the power of Germany waxed bright in the *Blitzkrieg* years of 1939 to 1941, and as it later crumbled, Crete's status as a symbol of strength again held true. The swastika flag was finally lowered on Crete on May 23rd, 1945, taking with it thousands of German and Allied soldiers, and marking the close of a very peculiar chapter in the Second World War.

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Discovering the Classic-Romantic Continuum

*Amber Robertson**

When looking at history from a 21st century point of view, the temptation often arises to classify and compartmentalise certain aspects of the development of the human race. In artistic and musical contexts, the practice of labelling a certain period of time can be useful when identifying broad stylistic trends. The problem, however, is that this often leaves us with only half of the picture. This essay considers the use of the terms 'Classical Period'—often referred to as c. 1750-1825—and 'Romantic Period'—often referred to as c. 1820-1900. Traditionally, these terms were utilised as if they referred to two completely separate and opposing phases. This essay argues that it is more accurate to think of these terms as different aspects of one continuous process of development. The terms are a useful guide but they cannot be applied too strictly, as such our understanding of the music of this time would be greatly lacking.

The Classical and Romantic eras, spanning from approximately 1750-1900 C.E, have been the topic of much contention since they were codified around the beginning of the twentieth century and viewed as referring to specific periods. These terms are firmly embedded in our musical literature and assist in the task of defining the prominent stylistic qualities of an era. It must be remembered that we are dealing with generalities and that their qualities are by no means restricted to these periods.¹ Often the Classical/Romantic era is discussed as being neatly divided into two segments of time with specific beginning and ending dates. More often than not the word 'Romantic' is found being used as an antonym to the word 'Classic'. This kind of thinking means that many important characteristics, and a great deal of interesting music, from this period can be overlooked. However, the Classic/Romantic period was a continuum of natural growth and development in music and the arts rather than two neatly circumscribed blocks of time. There can be no means of defining the exact boundaries

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¹ R. Pauly, *Music in the Classic Period* (1965) 1.

of their stylistic tendencies, let alone how these traits developed in different places at different times. Frederick Blume goes as far as to state,

Classicism and Romanticism are just two aspects of one and the same musical phenomena and the same historical period... There is neither a 'Classic' nor a 'Romantic' style in music. Both aspects and trends are continually merging into one.²

Fundamentally, this is true; the musical activity in the nineteenth century was an expansion and broadening of the ideas that had been explored to some extent in the preceding century. Despite the amazing diversity of music composed in this period, some stylistic tendencies remained a consistent part of the musical language right throughout the eighteenth and nineteenth centuries. This essay aims to outline the ways in which musical style developed throughout this period by considering some important aspects of the music written, such as form, harmony, texture, as well as other key factors that helped bring about these changes.

Historical Background

The historical context of the eighteenth and nineteenth centuries was one of upheaval and unrest. In particular, changes to the social, political and economic structure of the eighteenth century caused by the increasing momentum of the Industrial revolution and the lead up to the French Revolution affected all of Europe in varying degrees, and created a fundamentally new environment for the development of the arts throughout the following century.

One direct effect these social and economic changes had on musicians was the decline of the musical patronage system that had largely dominated the arts during the Baroque Era. This system was still a main source of income for many musicians and composers, such as Mozart and Haydn, throughout the eighteenth century. But the decline of noble courts in the late nineteenth century meant that the musical patronage which many artists relied on no longer offered a secure livelihood as it had in earlier decades.

² F. Blume, *Classic and Romantic Music: A Comprehensive Survey* (1970) viii.

Fortunately for musicians, the growing middle-class with the time and the money to invest in instruments and study how to play them gave rise to a more musically informed and interested demographic, which in turn led to the popularity of public concerts. Musical events are no longer limited to the domestic spheres of the wealthy nobility now that any member of the public could enjoy a concert by purchasing an entrance ticket.³ For the first time, these avenues made it possible for musicians to make a living as freelance artists. As composers gradually shook loose of the old order of musical patronage, they began to experience a new freedom to expand and experiment with their musical styles.

The expansion of industry that began in England in the nineteenth century also created a different environment, sparking a reaction among artists as these changes spread throughout Europe. Although the Industrial Revolution brought much welcomed economic growth and material benefits, such as rail travel and electric lights, the growing urbanisation and the substantial loss of natural beauty resulted in a new view on the arts. In the eighteenth century, art was often regarded as merely entertainment or diversion, whereas nineteenth century art proved its possibilities for depicting lost nature and beauty and became a means of escape, or even as a substitute for religion.⁴

This reaction against the unanaesthetic Industrial areas and the love of unspoiled nature characterises much of nineteenth century poetry and painting. For example, in the preface to his poem '*Milton*', the English poet/painter William Blake contrasts the imagery of 'dark satanic mills' with 'England's mountain green'.⁵ Painter John Constable, active throughout the late 18th and early nineteenth centuries, is now well-known for his simple and beautiful depiction of the landscape surrounding his home.⁶ The theme of nature, in all of its various expressions was also predominant throughout the music of this period,

³ L. Plantinga, *Romantic Music: A History of Musical Style in Nineteenth-Century Europe* (1984) 5-11.

⁴ R. Longyear, *Nineteenth-Century Romanticism in Music* (1973) 5.

⁵ A. Watkins and R. Pettinger (eds), *Poet Seers* (2003) <http://www.poetseers.org/the_romantics/> at 20 May 2006.

⁶ M. Plumridge and M. Brown (eds), *The Worldwide Art Gallery* (2000) <<http://www.theartgallery.com.au/Constable.html>> at 20 May 2006.

conspicuously portrayed in music such as Beethoven's *Pastoral Symphony*, Mendelssohn's *Songs Without Words* and the countless *Lieder* by Schubert and Schumann.

Development of the Keyboard

Another aspect that was closely linked with composition was the continual develop of instruments, in particular the keyboard. The gradual acceptance of the piano and its changing actions, sound qualities, and increasing expressive potential was the result of many interrelated factors.

In the early Baroque Era, the growing need for greater dynamic flexibility led to an increased interest in the idea of a keyboard instrument that could produce both a large sound and a flexible range of dynamics. At this stage, the clavichord was the only instrument that could produce immediate dynamic variation controlled by the players touch. But it was not loud enough to be used with other instruments or to be heard in concert halls, and therefore was contained mainly for private use within the home. The harpsichord and organ were capable of producing the louder and more robust sound needed for ensemble and public concerts, but their method of tone production prohibited dynamic variation.

The changing musical style in the 18th century was a major factor in the emergence and acceptance of the piano. This new musical style, which had started in Italy in the 1730s, had simpler, lyrical melodies with a periodic nature. Dynamic nuance and inflection became necessary for the expressive delivery, establishing it as more than a mere afterthought.⁷

The turn of the century saw the piano undergo further changes, which were also closely linked with compositional styles and performance techniques. The stronger frame, increased dynamic range and voluminous sound of the nineteenth century piano, along with increasing interest in audiences in displays of virtuosity, set the scene for the rise of the solo virtuoso, as well as the emergence of solo

⁷ S. Rosenblum, *Performance Practices in Classic Piano Music: Their Principles and Applications* (1988) 2-3.

instrumental music that placed increasing technical demands on the performer.

The technological improvements in all musical instruments afforded composers with new resources of instrumental colour. In particular, the increased variety in colour and bigger sonority of the nineteenth century piano offered composers the possibility of including fuller, orchestral sounds in their music. This enabled the piano to break away from its long standing tradition as a salon instrument and take its place on the concert stage.⁸

The Developing Musical Style

The best way to begin to better understand the development of style throughout this period is to look to the music of the time. From the eighteenth century, Mozart's Sonata in C major (KV 279), written in 1775, as well as his Fantasy in D minor (KV 397), written in 1782, will be discussed. Liszt's nineteenth century B minor Sonata will then be considered.

Expression

As mentioned previously, there has been a tendency among writers and musicians to view the Classical and Romantic eras as two totally opposing periods of history. However, composers and music theorists of the time certainly made no such distinction. For example, in his well-known article *Beethoven's Instrumental Music* (1813), Hoffman describes not only Beethoven, but also Mozart and Haydn as Romantic composers.⁹ In doing so, he identifies Romantic tendencies in the music of the late eighteenth century¹⁰, an idea which is often overlooked. It is important to realise that the roots of the Romantic Movement lie firmly in the early 18th century¹¹, and that many of these traits that are often

⁸ '...Liszt's music, for example, required larger halls for their full effect; it was he who first placed the piano in the modern concert hall in early 1837, when he gave a recital before 3000 people in Milan': A. Walker, 'Franz Liszt' in S. Sadie & J. Tyrrell (eds), *The New Grove Dictionary of Music and Musicians* <<http://www.grovemusic.com>> at 25 September 2007.

⁹ E. Hoffmann, 'Beethoven's Instrumental Music' in Oliver Strunk, (ed) *Source Readings in Music History* (1950).

¹⁰ J. Samson, 'Romanticism' in S. Sadie & J. Tyrrell (eds), *The New Grove Dictionary of Music and Musicians* <<http://www.grovemusic.com>> at 25 September 2007.

¹¹ Plantinga, above n 1, 2.

associated with 19th century music were very prominent and sought-after in the music of the 1700s.

Often, a composer's desire to express strong emotion and passion in their music is a characteristic associated with nineteenth century music. But this trend also underlines the development of the music written in the second half of the eighteenth century. This was in essence a reaction against the Baroque idea of portraying a single affection in a piece as Classical composers sought after a wider palate of emotional expression in their music. In fact in the 1700s, the German musician and theorist Heinrich Christoph Koch stated that, *'The principal object of music is the expression of passionate feeling.'*¹² Throughout the nineteenth century this desire for the expression of emotion and drama intensified and composers experimented with new ways to portray these elements in their music.

In his B minor sonata, one way that Liszt brings a dramatic element to this lengthy instrumental work (and manages to extend this piece without it becoming monotonous), is by contrasting different sections of tempo, time signature and texture. For example in bars 296-303, the music changes from two-handed scalar passages, to a sonorous passage of block chords, and then to a flowing passage marked 'recitativo'.

If we compare Liszt's sonata in B minor with Mozart's Fantasy in D minor, it becomes apparent that the same use of expressive contrast were present in music of the eighteenth century, in a somewhat more subtle way. Here Mozart also moves between contrasting sections; a passage of broken chords flows into a singing adagio section that moves on to a virtuosic chromatic passage.

Essentially, experimenting with ways of expressing emotion and passion is another strand of continuity between the Classic and Romantic Eras rather than an element that separates the Romantic era from the neighbouring musical periods.

¹² Rosenblume, above n 7, 8.

296

299

Recitativo
ritenuto ed appassionato

302

Example 1: Liszt B minor Sonata (bars 296-303).

Andante
bar 1

Adagio
bar 12

Presto
bar 34

Example 2: Mozart Fantasy in D minor.

Elaboration of Motive A: Bar 454*Elaboration of Motive B: Bar 470**Elaboration Motive C: Bar 191***Examples 6-8:** Liszt B minor Sonata.

Harmony and Tonality

In general, early Classical composers tend to hold to close key relationships and definable harmonic structure. Mozart, for example, shows this tendency in much of his music. In his C major Sonata, he firmly establishes the listener in the home key of C major right from the opening with its definitive C major chord, which he elaborates on until the transition section bar 16, before arriving in the dominant key in bar 20.



Example 9: Mozart Sonata in C major (bars 1-3).

Mozart uses dissonant chords and notes relatively infrequently, mainly in a functional manner. For instance, in Example 10, the highlighted dissonant neighbour notes function specifically as intensifiers of the tonic chord, and in Example 11, the D7 chord is used to intensify movement to and from the dominant.



Example 10: Mozart Sonata in C major (bars 6-8).



Example 11: Mozart Sonata in C major (bars 30-31).

On the other hand, the opening of Liszt's B minor sonata gives no such harmonic stability. Not until bar 8 is there any feel of the tonic key after which it is not at all definitive, but rather, the octaves move around the tonic rather than leading strongly towards it (see Example 4). In a very general sense, there was a move in the nineteenth century away from purely functional to more colouristic harmony. There was a rise in the amount of dissonant chords used, with the milder dissonant chords, such as the diminished and dominant seventh, often being elevated to the level of consonances.¹³ In Liszt's sonata, the tonal centre is constantly shifting and definite statements of the tonic are few and far between. And rather than modulating to keys that show a close relationship with the tonic, Liszt moves to often remote and unrelated keys.

The use of chromaticism is an important expressive feature in the Classical music, but it is further experimented with in the music of the nineteenth century. In Mozart's sonata, chromatic dissonances are most often used to connect two phrases, as in Example 13, or to heighten the move to a cadence point, like Example 14. In Liszt's B minor sonata, chromatic passages are used in similar ways to connect to phrases and to heighten moves to a cadential point, but chromaticism is used much more frequently throughout his piece and in many more ways than in the Mozart Sonata. For example, Liszt uses chromaticism as a tool for modulation when he changes the key signature from two flats to one sharp in bars 386-387 (Example 14).

¹³ Longyear, above n 4, 27-28.



Example 12: Mozart Sonata in C major (bars 28-30).



Example 13: Mozart Sonata C major (bars 37-38).



Example 14: Liszt Sonata in B minor (bars 386-387).

Composers in the nineteenth century branched out in new directions with their treatment of harmony and tonality. This fundamental aspect of their composition highlights the continual development of musical style throughout this period, rather than creating strict dividing lines between Classic and Romantic music.

In conclusion, while Blume's statement, referred to at the start of this essay, may seem extreme at first reading, it is a more reflective of the development of music in this period than the idea that the Classical/Romantic eras are entirely separate from one another. In fact, deeming any period of music as totally independent and separate from another is unwise. Particularly, thinking of the Classic/Romantic era as two opposing periods can blind us to the many amazingly diverse facets and characteristics that arose during this time. Comparing some of the characteristics belonging to the music written throughout this time can help us to recognize the means by which musical styles developed and evolved, providing ways to better understand this significant and influential portion of our musical history.

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Efflux of HEPES from Erythrocytes infected with Malaria Parasite *Plasmodium Falciparum*: An Introduction to Malaria Research Methodology

Robert Summers*

Malaria is caused by the parasite *Plasmodium falciparum*, which infects hundreds of millions of people every year. The development of resistance to many of the most effective antimalarials has severely set back the successful control and treatment of malaria and highlights the need to develop new effective, safe and affordable antimalarial drugs. The completion of the malaria genome has allowed the application of functional genomics technologies such as metabolomics to elucidate novel systems within the parasite as targets for new antimalarial drugs. Previously, ^1H NMR metabolomics identified the compound HEPES at high concentrations within parasites. HEPES is a buffering agent employed in the culture of *Plasmodium falciparum* and may affect pH regulation within cultured malaria-infected human red blood cells (IRBCs). To confirm the presence and detect the efflux of HEPES from these cells, the concentration of HEPES was measured in the supernatant of an IRBC suspension both before and after one hour of incubation in a HEPES deficient buffer using ^1H NMR spectroscopy. The intracellular HEPES concentration was also measured and compared to a control sample incubated in the presence of HEPES buffer. Results confirm previous findings and demonstrate a three-fold increase in the extracellular concentration and a corresponding three-fold decrease in the intracellular concentration of HEPES during the course of the incubation period. The assay further demonstrates the utility of ^1H NMR based metabolomics in detecting unlabelled organic compounds in a complex biological system, as well as illustrating the difficulties associated with this new technology.

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Introduction

Malaria is an ancient human disease that continues to be one of the most prevalent afflictions of humanity, affecting between 300 and 600 million people and killing 1.5 million people annually.¹ Malaria is caused by protozoan parasites of the *Plasmodium* genus, of which *Plasmodium falciparum* is responsible for the vast majority of recorded infections. Malaria has been successfully treated for many years through chemotherapeutic strategies and vector control measures to prevent widespread outbreak. Although, the increasing resistance of malaria parasites and mosquito vectors to drug treatment in recent years has highlighted the need for the development of new chemotherapeutic strategies.

It is believed that with a more thorough understanding of the complex systems at work allowing the malaria parasite to survive within its host, more focussed effort can be applied to the identification of novel antimalarial targets and potential antigens for vaccine development. With the completion of the *P. falciparum* Genome Project and the subsequent genome sequence being made publicly available,² there is now great potential for the application of post-genomic technologies to investigate the biology of the malaria parasite. More than 60% of the 5400 genes predicted from the parasite genome appear to lack homology with genes from any other organism. These genes encode proteins with unknown functions.³ Subsequently, a variety of post-genomic technologies including transcriptomics and proteomics⁴ have been used to study the expression and function of many of these novel genes and gene products.

¹ R.W. Snow, et al., 'The global distribution of clinical episodes of *Plasmodium falciparum* malaria' (2005) 434 *Nature* 214.

² <http://www.plasmodb.org>

³ M.J. Gardner, et al., 'Genome sequence of the human malaria parasite *Plasmodium falciparum*' (2002) 419 *Nature* 498.

⁴ Transcriptomics aims to identify differences in the pattern of gene expression of the genome by detecting differences in mRNA levels under varying experimental conditions, whilst proteomics attempts to determine alterations in the abundance or post-translational modifications of all the proteins expressed by the genome under various experimental conditions.

Transcriptomics has been used to map the expression profile of the malaria parasite throughout the intraerythrocytic developmental cycle. Microarray expression data has revealed that approximately 75% of the genome is expressed during the intraerythrocytic developmental stage, implying that only a small fraction of the genome is specialised for particular life cycle stages, with most genes expressed throughout the lifetime of the parasite.⁵

Proteomics strategies have been employed in association with genomics studies to determine alterations in abundances or modifications of specific proteins throughout the life cycle stages of the malaria parasite.⁶ A number of proteins expressed exclusively at specific life stages have been identified using this strategy. Many of the proteins expressed in the malaria parasite are found to be absent in the host organism of the parasite, suggesting many potential parasite-specific drug targets.⁷

Metabolomics is the most recently applied of the *omics* technologies. Metabolomics aims to quantify the metabolome – the comprehensive set of all metabolites in an organism under specific physiological or environmental conditions.^{8,9} As such, the metabolome represents the end product of the expression of all of those genes encoding metabolic functions. Analysis of the metabolome in conjunction with up-stream expression patterns at the transcriptome and proteome levels can provide an in-depth systems biology approach to genetic regulation that may be employed to elucidate new networks of interaction within the parasite. Elucidation of biochemical processes by metabolomics-based strategies may then provide a means to investigate the many proteins of

⁵ Z. Bozdech, et al., 'The transcriptome of the intraerythrocytic developmental stage of *Plasmodium falciparum*' (2003) 1 *PLoS Biology* 85.

⁶ L. Florens, et al., 'A proteomic view of the *Plasmodium falciparum* life cycle' (2002) 419 *Nature* 520.

⁷ C.N. Hayes, et al., 'Enlistment of omics technologies in the fight against malaria: Panacea or Pandora's box?' (2006) 31 *Journal of Pesticide Science* 263.

⁸ O. Fiehn, 'Metabolomics - the link between genotypes and phenotypes' (2002) 48 *Plant Molecular Biology* 155.

⁹ J.K. Nicholson, J.C. Lindon & E. Holmes, "'Metabonomics": understanding the metabolic responses of living systems to pathophysiological stimuli via multivariate statistical analysis of biological NMR spectroscopic data' (1999) 29 *Xenobiotica* 1181.

unknown function within the malaria parasite, and may provide targets for drug design.¹⁰

¹H NMR spectroscopy has been employed by the lab in which this project was carried out to identify and quantify the metabolites present in the malaria parasite during the trophozoite stage of the intraerythrocytic developmental stage, a period known to be highly metabolically active. ¹H NMR spectroscopy of malaria parasites at this stage of development has revealed the presence of a number of compounds not expected to be observed in the parasite. GABA (γ -aminobutyric acid; Figure 1), a compound more commonly found as a neurotransmitter in the synapses of the central nervous system, was found within the malaria parasite at an intracellular concentration of about 2 mM. The function of GABA within the malaria parasite is not clear but its presence in protozoa has been suggested to indicate the evolutionary development of its function from an intracellular messenger to become involved in intercellular communication.

Another of the most prominent compounds detected in the malaria parasites was HEPES, or 4-(2-hydroxyethyl)-1-piperazineethanesulfonic acid. HEPES was found within parasites with an intracellular concentration of between 12 and 20 mM. The structure of HEPES is illustrated in Figure 1. HEPES is a common buffering agent that is used in the culturing of malaria infected red blood cells (IRBC) to buffer the pH decrease that occurs during cycles of cell growth. HEPES was detected only in samples grown in an incubation medium containing the HEPES buffer, indicating that HEPES is accumulated within the parasites during growth on HEPES-buffered mediums. The presence of HEPES within the parasite would be expected to affect the pH regulation of the cell due to its buffering capacity.

The aim of this study was to investigate the movement of HEPES across the plasma membrane of IRBC. The efflux of HEPES from IRBC was detected by incubating cells grown on HEPES-buffered mediums in a solution buffered with inorganic phosphate. ¹H NMR spectroscopy of supernatant samples was used to detect and quantify the appearance of

¹⁰ S.G. Oliver, et al., 'Systematic functional analysis of the yeast genome' (1998) 16 *Trends in Biotechnology* 373.

HEPES in the extracellular solution. Perchloric acid (PCA) extracts of cells incubated in phosphate buffered saline (PBS) were compared to cells incubated in HEPES by ^1H NMR spectroscopy. The results of these experiments indicated that the quantity of HEPES in the supernatant of the IRBC increased by approximately three-fold over the course of one hour of incubation. The study therefore provides clear and direct evidence that HEPES, often considered a membrane impermeant buffering agent, is transported across the plasma membrane of malaria parasite-infected erythrocytes.

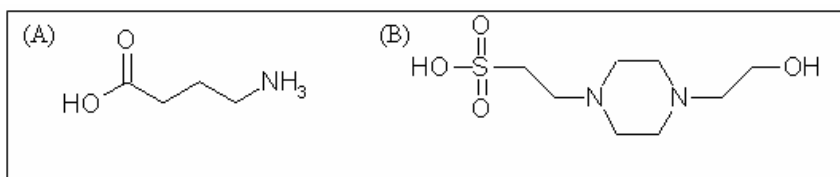


Figure 1: (A) The structure of γ -aminobutyric acid (GABA) (B) Neutral structure of 4-(2-hydroxyethyl)-1-piperazineethanesulfonic acid (HEPES).

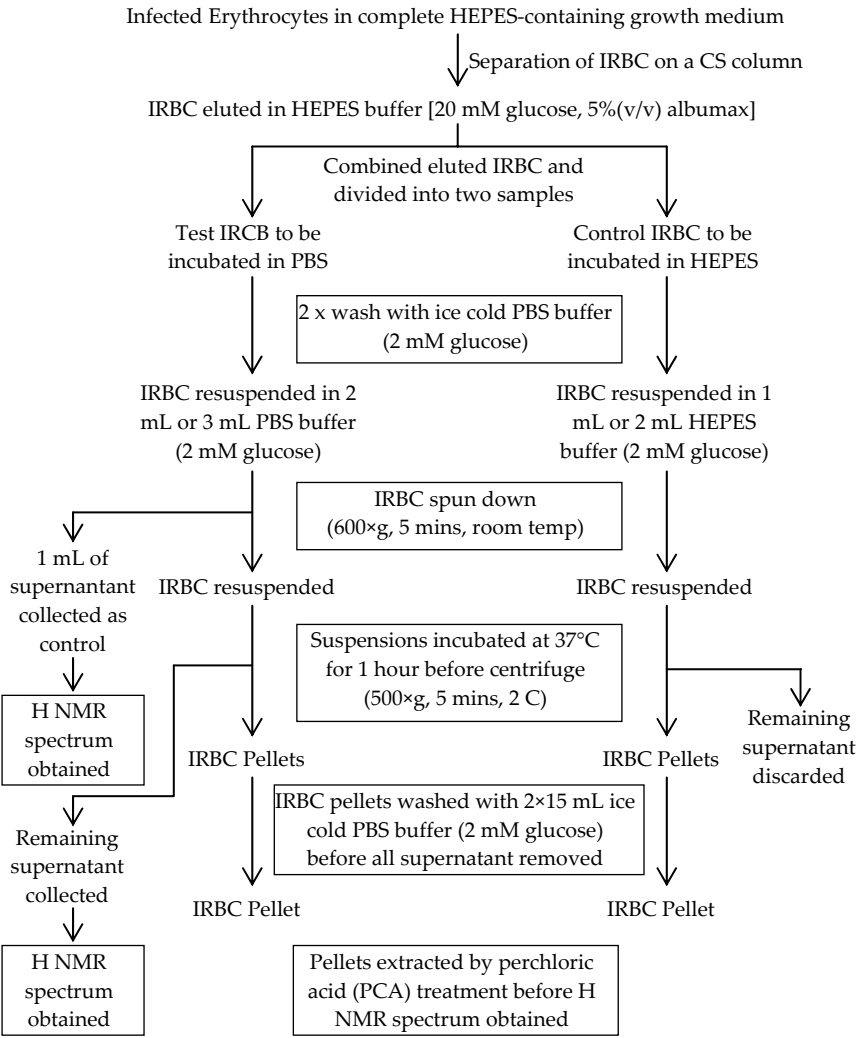
Results

Schematic 1 below depicts the experimental strategies employed for the quantification of HEPES efflux from IRBCs.

Early Experiments: Refinement of HEPES Efflux Experimental Procedure

An initial attempt to detect HEPES efflux from IRBC cultured in a HEPES medium involved isolating IRBC from a VarioMACS CS (CS) column in PBS and incubating the suspension at 37°C for 100 minutes before the supernatant was collected. ^1H NMR spectroscopy revealed glucose and lactate at high concentrations in the supernatant and only very weak HEPES signals at δ 3.1, δ 3.3 and δ 3.6 ppm, suggesting that HEPES efflux from the IRBC was occurring, but at levels too low to quantify (results not shown).

To address the reduced strength of the HEPES signal and ensure that any HEPES observed in the supernatant was due to efflux from the IRBC only over the period of incubation, IRBCs were washed and eluted from the CS column in HEPES-buffered solution rather than PBS and a 10 times higher haematocrit was used during incubation. HEPES efflux of infected erythrocytes was also compared to that of isolated parasites to test whether IRBC or isolated parasites had similar levels of HEPES efflux. The period of incubation was reduced to one hour to ensure that latent cell lysis did not contribute to the HEPES detected. The reduced incubation time allowed for the use of minimal HEPES and PBS incubation solutions, supplemented only with 2 mM of glucose. The reduced concentration of glucose and the absence of the protein Albumax reduced the overlap of HEPES signals with the prominent glucose resonances, and broad rise in the baselines due to protein in the proton NMR spectrum of the supernatant, allowing quantification of HEPES concentration.



Schematic 1: Strategy for HEPES efflux experiments for which quantification was successful. Briefly, the experiments involved separating IRBCs from uninfected, co-cultured erythrocytes in complete cell cultures by VarioMACS CS column. IRBC were eluted in HEPES containing buffer and divided into two test samples which were subsequently washed in ice cold phosphate buffered saline (PBS) supplemented with 2 mM glucose before being resuspended in either HEPES or PBS buffer containing 2 mM glucose.

Quantitative Experiments: HEPES efflux by IRBC over 1 hour with reduced glucose and no albumax

The use of a shorter period of incubation enabled the IRBC to be incubated in a minimal PBS buffer supplemented only with glucose (2 mM). In addition to the HEPES content of the supernatant, the intracellular concentration of the IRBC was compared both before and after incubation. The concentration of cells in the PBS-incubated sample prior to the removal of the control supernatant was recorded as 1.23×10^8 cells/mL (equivalent to 2.46×10^8 cells/mL after removal of control supernatant) and 1.58×10^8 cells/mL for the HEPES-incubated sample.

The ^1H NMR spectra of supernatant samples collected before and after one hour of incubation showed a clear increase in the signal strength of HEPES signals at δ 3.2, δ 3.6 and δ 3.9 (Figure 2). IRBC cells incubated in the presence and absence of HEPES exhibited a notable difference in the intensity of HEPES signals at δ 2.9, δ 3.05, δ 3.1 and δ 3.85. It was observed that the intensity of the intracellular HEPES signals for the IRBC incubated in the absence of HEPES was substantially reduced compared to those incubated in the HEPES buffer. The HEPES quantity of the samples was quantified using the HEPES signal at δ 2.9. The experiment was repeated using a slightly higher haematocrit on another day to give similar spectra to those depicted in Figure 2.

The average concentration of HEPES in the supernatant of cell suspensions prior to incubation was 3.9 ± 0.1 mM per cell. After incubation, this was measured to increase to 12.2 ± 1.8 mM per cell, an approximately three-fold increase in extracellular HEPES. When the concentration of HEPES in cell extracts was compared between IRBCs incubated in the absence or presence of HEPES, a concentration of 32.4 ± 2.1 mM per cell was observed for the cells incubated in HEPES-containing solution, while a concentration of 9.2 ± 1.7 mM per cell was observed for the IRBCs incubated in the absence of HEPES (Figure 3).

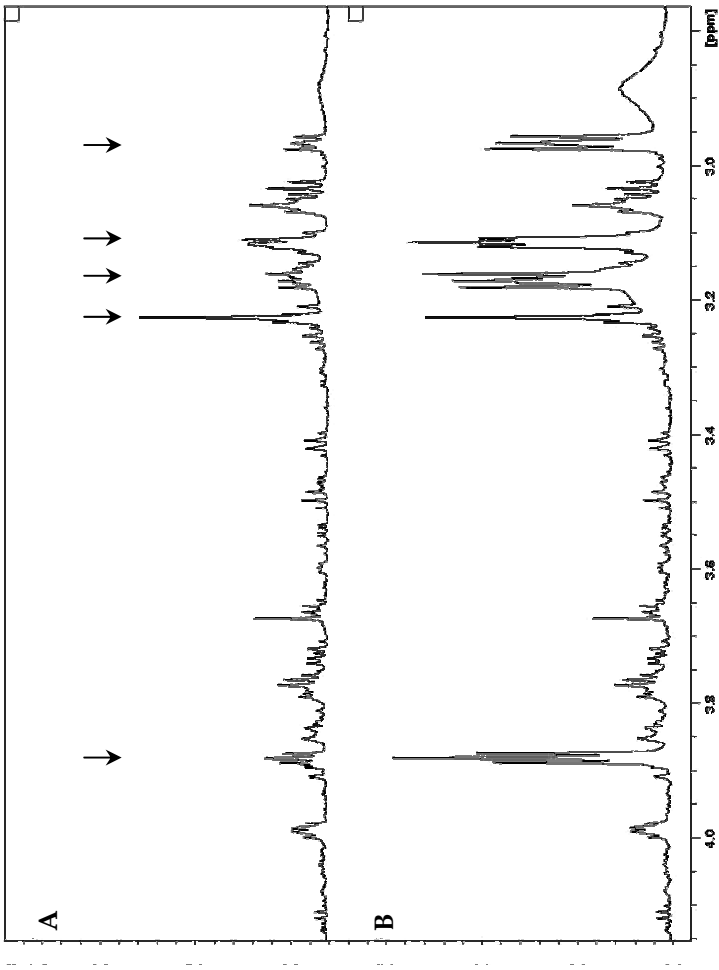


Figure 2: Representative spectra of IRBC extracts. **A** Control – IRBC incubated in the presence of HEPES Buffer for one hour prior to extraction. **B** IRBC incubated in the absence of HEPES for one hour prior to extraction. There is a significant decrease in HEPES signals at δ 2.9, δ 3.05, δ 3.2 and δ 3.9 ppm, consistent with the efflux of HEPES from IRBC during incubation in the absence of HEPES.

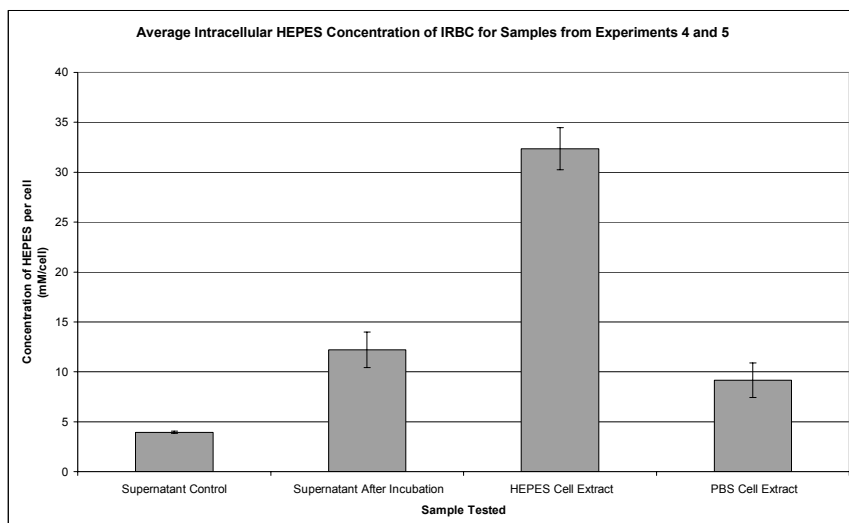


Figure 3: Average intracellular concentration of HEPES determined for the samples quantified. Supernatant concentrations were converted into concentrations per cell for comparison with intracellular HEPES concentrations determined from cell extracts.

Discussion

The advantage of ^1H NMR spectroscopy in detecting and quantifying metabolites in a metabolomics strategy is its ability to detect all compounds with minimal selectivity, with all compounds containing hydrogen atoms in the biological sample detected with signal intensities proportional to the concentration of the compound in the sample.¹¹ As a method for the detection and quantification of HEPES efflux however, this property proved to complicate the experimental process. The detection of more prevalent metabolites in the samples (such as glucose) often served to mask the intensity of HEPES signals due to signal overlap. Moreover, baseline effects due to large molecular weight compounds (such as protein) in the sample also served to give uneven baselines that did not favour quantification.

The relative insensitivity of the ^1H NMR experiment led to a requirement for dense cell suspensions for the detection of HEPES

¹¹ N.V. Reo, 'NMR-based metabolomics' (2002) 25 *Drug and Chemical Toxicology* 375.

signals in supernatant samples strong enough to be quantified. This had the effect of limiting the period of incubation to one hour and restricting the number of time points to only one prior to incubation and one of the test sample collected after incubation. These limitations required the gradual optimisation of the experimental procedure to increase the intensity of HEPES signals, decrease nearby overlapping signals, and flatten the baseline without compromising the validity of efflux measurements due to cell lysis. Accordingly, the results of quantified HEPES efflux do not show a time course for increasing HEPES concentration in the extracellular solution during the incubation period.

An increase in extracellular concentration of HEPES of 8 ± 2 mM (mean \pm standard deviation) per cell over one hour of incubation was observed in the absence of extracellular HEPES. Intracellular concentrations of HEPES for IRBC incubated in PBS buffer were observed to be 23 ± 2 mM lower (mean \pm standard deviation), compared to those of IRBC incubated in the HEPES buffer.

In order to quantify the rate of HEPES efflux, samples could be collected at various time points during the incubation period, providing a time course for the efflux of HEPES. Such a time course may then reveal the kinetics of HEPES efflux and determine whether the efflux occurs via passive diffusion through the erythrocyte membrane or whether it is facilitated by membrane proteins.

HEPES is anionic at physiological pH and would not be expected to diffuse across the lipid bilayer. As such, HEPES would be expected to permeate the erythrocyte through the new permeability pathways induced by the parasite in the erythrocyte membrane to increase the permeability of the host's plasma membrane and allow the uptake of serum nutrients and release of wastes.¹² To test whether HEPES can permeate the erythrocyte membrane without induction of the new permeation pathway, a control experiment could be performed with co-cultured un-infected erythrocytes. Co-cultured erythrocytes may be obtained by collecting the cells not retained on the CS-column during separation, or by using red blood cells cultured in HEPES in the absence

¹² H.M. Staines, et al., 'Solute transport via the new permeability pathways in *Plasmodium falciparum*-infected human red blood cells is not consistent with a simple single-channel model' (2006) 108 *Blood* 3187.

of parasites. Moreover, the use of inhibitors that block the new permeability pathways would also be useful in ascertaining whether HEPES permeates the plasma membrane of IRBC into the malaria parasites as a consequence of the new permeation pathway.

The effect of the high concentrations of HEPES inside the IRBC and malaria parasites is another topic requiring further investigation. Previous measurements of intracellular pH have been performed using parasites grown in HEPES incubation culture. The buffering effect of HEPES within the cell may then lead to consequences for the validity of these measurements. Culturing of various cell types in HEPES buffers has previously been implicated in a range of adverse effects. For instance, the replacement of a carbonate/CO₂ buffer for a 10 and 25 mM HEPES buffer has been shown to induce pH_i changes in neuronal cells that trigger a membrane depolarisation in rat brain slice preparations.¹³ HEPES buffer has been used for the culture of the intraerythrocytic developmental stage of malaria parasites for many years, while the effect of HEPES buffer has not been investigated. The pH buffering of HEPES within the malaria parasite or infected red blood cells may have an affect on the stability of membrane potentials and intracellular pH.

Conclusion

In conclusion, the efflux of the common buffering agent HEPES [4-(2-hydroxyethyl)-piperazineethanesulfonic acid] from *Plasmodium falciparum* infected human red blood cells was detected using a ¹H NMR based assay. The assay demonstrated the utility of ¹H NMR based metabolomics in detecting unlabelled organic compounds in a complex biological system, also illustrating the difficulties associated with this new technology.

Experimental

Detection of HEPES efflux by IRBC

Erythrocytes infected by malaria parasites were isolated from complete cell cultures by recovery from the CS column in 25 mL phosphate buffer saline (PBS) supplemented with 20 mM glucose and 0.5% (v/v)

¹³ A.I. Cowan & R.L. Martin 'Simultaneous measurement of pH and membrane potential in rat dorsal vagal motoneurons during normoxia and hypoxia: a comparison in bicarbonate and HEPES buffers' (1995) 74 *Journal of Neurophysiology* 2713.

Albumax. The suspension of IRBC was spun down at 500×g (five minutes, room temperature) and the volume reduced to 10 mL. 10 µL of the resuspended IRBC was taken for cell count. The suspension was incubated in a water bath at 37°C for one hour and forty minutes with inversion every 30 minutes. After this time the cells were spun down at 8000×g for one minute before 1 mL of supernatant was removed and frozen on dry ice. The remaining supernatant was removed and the IRBC pellet frozen in liquid nitrogen. The supernatant sample was sealed with Parafilm and dried by freeze-drier. An NMR sample was prepared and a ¹H NMR spectrum obtained.

Comparison of HEPES efflux by IRBC and parasites

IRBC were isolated (as above) by CS column, but collected in a HEPES buffer (25 mM), supplemented with 20 mM Glucose and 0.5% Albumax rather than PBS. IRBC suspensions were spun down at 500×g for five minutes at room temperature and the supernatant removed and the cells washed with 2 × 50 mL ice-cold PBS buffer (with 20 mM glucose and 0.5% Albumax) to remove residual HEPES from the cells. The suspension was divided into two fractions of equal volume. To one, 320 µL of 1% w/v Saponin was added and shaken by inversion for three minutes to lyse IRBCs and release isolated parasites. Both samples were spun down, the IRBC sample at 500×g and the free parasites at 3000×g for five minutes and the supernatant discarded. The pellets were resuspended in 1 mL of PBS buffer and 10 µL samples taken for cell counts. The 1 mL cell suspensions were incubated at 37°C for two hours and inverted every fifteen minutes. After this time, samples were spun down at 500×g at 2°C for five minutes before the supernatant was collected and frozen at -20°C. The supernatant samples were then freeze-dried and ¹H NMR spectra obtained of the solutes.

Refinement to the detection of HEPES efflux by IRBC with reduced glucose

The IRBC of three flasks of cultured cells were separated on a CS column as described above and eluted in HEPES buffer (with 20 mM glucose and 0.5% albumax) before being combined and divided into two samples. Both were spun down at 500×g (2°C, five minutes) and the pellets washed twice with 40 mL ice-cold PBS solution supplemented with 0.5% (v/v) Albumax and a reduced concentration of glucose (2

mM). The cells were resuspended in 3 mL PBS supplemented by 2 mM glucose and 0.5% (v/v) Albumax. 1 mL of the suspension was collected as a control and frozen at -20°C. The remaining 2 mL of suspension was incubated at 37°C for two hours and inverted every thirty minutes. After one hour, 1 mL of total cell suspension was collected. After a second hour, samples were spun down at 500×g (2°C, five minutes) and the supernatant collected. The supernatant samples were freeze-dried and ¹H NMR spectra obtained.

HEPES efflux by IRBC over one hour with reduced glucose but without Albumax

Two flasks of cell cultures were passed through the CS column and IRBC eluted with 25 mL of HEPES buffer (with 20mM glucose and 0.5% albumax). The two fractions were spun down at 500×g (five minutes, room temperature) and the supernatant removed by aspiration. The pellets were washed twice with 50 mL ice-cold PBS buffer (2 mM glucose, no Albumax) and divided into two fractions before the supernatant was removed. The pellets of one fraction were resuspended in a PBS buffer supplemented with 2 mM glucose (no Albumax) to a volume of 2 mL, and the second resuspended in a HEPES buffer with 2 mM glucose to a volume of 1 mL. 10 µL of each was taken for cell counts and both samples were spun down at 500×g (five minutes, room temperature) before 1 mL of the supernatant from the PBS solution was taken as a control. The cells were resuspended (now both at a volume of 1 mL) and incubated for one hour at 37°C with inversion every ten minutes. The suspensions were then spun down at 500×g (five minutes, room temperature) and the supernatant of the PBS sample. Both cell pellets were washed twice with 15 mL ice-cold PBS buffer and transferred into microcentrifuge tubes. At 2°C, the suspensions were spun down at 500×g (five minutes) and the supernatant removed. The cells and supernatant samples were then frozen in liquid nitrogen before storage at -80°C prior to subsequent freeze-drying of supernatant samples and extraction of cells by perchloric acid. The procedure was then repeated on a larger scale using three flasks of parasite cultures maintaining a consistent incubation haematocrit.

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The Constitutionality of Anti-terrorism Legislations – A Critique

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In the presence of a threat to national stability, adherence to fundamental constitutional principles is often overlooked as the government legislates to expand parliamentary and executive power. This is discernable from the legal regimes established by the Australian government in response to the threat of communism in the 1950's, and terrorism in the current political climate. This essay examines the development of constitutional law since the key High Court case of the *Australian Communist Party v Commonwealth* 1951. It is argued that the High Court should actively maintain the operation of constitutional safeguards to prevent the erosion of civil liberties. Further, in the recent High Court case of *Thomas v Mowbray*, the majority has deviated from the doctrine of separation of powers without a sound justification. Finally, it is argued that the expansion of the power of the Australian Security Intelligence Organisation (ASIO) is likely to erode the freedom of political communication which is guaranteed by the Constitution.

Introduction

In 1950, the Menzies government passed the *Communist Party Dissolution Act (CPDA)*.¹ It purported to protect national security by dissolving the Australia Communist Party and affiliated organisations.² This Act was subsequently invalidated by the High Court in the *Australian Communist Party v Commonwealth (the Communist Party Case)*.³ Five decades later, as a response to the September 11 attack, the Howard government legislated for a series of counter-terrorism measures.⁴ The

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¹ T. Blackshield & G. Williams, *'Australian Constitutional Law and Theory'* (4th ed, 2006) 870.

² *Ibid.*

³ (1951) 83 CLR 1.

⁴ J. Hocking, 'Protecting Democracy by Preserving Justice' (2004) 27 *University of New South Wales Law Journal* 319.

commonality shared by these legal regimes is the expansion of parliamentary and executive power in the presence of a threat to national stability.⁵ In this essay, the major anti-terrorism laws, namely the *Criminal Code Act 1995* (Cth) and *ASIO Legislation Amendment Act 2003* (Cth), are considered in light of the principles upheld in the *Communist Party Case*. Further, the majority judgment upheld in the recent High Court case of *Thomas v Mowbray*,⁶ which has widened the scope of the defence power and the concept of the separation of powers, will be examined in comparison to precedent. Finally, the focus of the essay will shift to the *ASIO Legislation Amendment Act 2003*, arguing that it has breached the implied freedom of political communication.⁷

Defence power

The government relied on the Constitutional Defence Power – located at section 51(vi) of the *Constitution* –⁸ as the major source of power in support of the Communist Party Dissolution Act 1950 (Cth) and section 104 of the *Criminal Code*.⁹ In the *Communist Party Case*, the High Court elaborated on the traditional view of the defence power as restricted to national defence against external aggression from other nations. The scope of the defence power has since evolved to include defence against the threat of terrorism, as held in the recent High Court case of *Thomas v Mowbray*. This leads us to a critical analysis of the High Court's decision, and legal issues that may potentially arise.

Australian Communist Party v the Commonwealth

In the *Communist Party Case*, the high court held that the CPDA was constitutionally invalid.¹⁰ The power of the Commonwealth to protect itself from subversion must be derived from the constitution.¹¹ The

⁵ M. Head, 'Counter-terrorism Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 22 *Melbourne University Law Review* 669.

⁶ [2007] HCA 33 (2 August 2007).

⁷ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 140 (Mason CJ).

⁸ *Commonwealth of Australian Constitution Act 1901* (Cth).

⁹ G. Carne, 'Detaining Questions or Compromising Constitutionality' (2004) 27 *University of New South Wales Law Journal* 524, 533.

¹⁰ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 155 (McTiernan, Dixon and Fullager JJ).

¹¹ G. Winterton, 'The Significance of the Communist Party Case' (2002) 26 *Melbourne Law Review* 671, 647.

parliament had relied on the section 51(vi) defence power for support of the CPDA.¹² The High Court held that the 'central purpose' of the defence power is the 'protection of the Commonwealth from external enemies'. External enemies were classified as extra-Australian nations which are at war or which have the possibility to be at war with Australia. Section 4 of the CPDA purported to declare the voluntary association with a communist organization to be unlawful and to dissolve it.¹³ The Australian Communist Party, constituted mainly by Australians, was a domestic organization. Although the communists were hostile towards government policies, they had no capacity to engage in war with Commonwealth. This provision bore no relation to the defence power¹⁴ and was therefore held to be invalid.

The traditional definition of the scope of the defence power, as explicated in this case, was expanded in the recent case of *Thomas v Mowbray*, towards which the focus of this discussion shall now turn.

Thomas v Mowbray

Section 104 of the *Criminal Code* assigns the judiciary the task of imposing restrictions on persons through making interim control orders for the purpose of protecting the public from a terrorist act.¹⁵ The validity of this section was challenged by the plaintiff who, relying on the traditional definition of the defence power given in the *Communist Party Case*, claimed that the subject matter of internal terrorist threat was beyond the scope of the defence power.¹⁶

In adjudication, the majority of the High Court extended the scope of the section 51(vi) defence power. Legislative power is no longer limited to defence against aggression from a foreign nation or waging war in a conventional sense of combat between forces of nations.¹⁷ There is sound justification for the expansion of defence power. As evidenced by September 11 attacks, a terrorist organization is capable of causing catastrophic destruction on a scale comparable to that of regular

¹² Ibid, 649.

¹³ Blackshield & Williams, above n 1, 870.

¹⁴ Winterton, above n 11, 650.

¹⁵ *Criminal Code Amendment Act 2002* (Cth) s 104.1.

¹⁶ *Thomas v Mowbray* [2007] HCA 33 (2 August 2007) [3].

¹⁷ Ibid, [7] (Gleeson J).

military action by a state.¹⁸ Further, terrorism in the 21st century operates cross-nationally. Hence its threat is external and potentially internal. These elements represent potential dangers to Australia's constitutional system, which the country is entitled to defend itself from.¹⁹ Thus Parliament legitimately invoked the defence power in support of section 104.4 of the *Criminal Code*.

In determining whether there is sufficient connection between a law and the section 51(vi) defence power, the majority affirmed that the test of proportionality is to be applied.²⁰ The test acts as a safeguard against the abuse of legislative power by the legislature through stipulating that the means of the law must be appropriate and reasonably adapted to its ends.²¹ However, the High Court did not apply this test to section 104, claiming that it is 'not called for when dealing with the interim control order system',²² for which little justification was given. It may be speculated that the reason for this is that the proportionality test has already been inserted into section 104 by the legislature: section 104.4(2) requires that the restrictions imposed on the person by the interim control order are reasonably necessary, considering the impact of the order on the person's circumstances.²³

Arguably, through inserting an in-built proportionality test into the statute, the legislature has nullified the function of the test as a qualification for the validity of the section 104. This is discernable from the subtle yet distinct difference between the judicial application of the proportionality test in conformity to the section 104 of the *Criminal Code*, and in determining the validity of section 104 itself. In the former, judicial discretion, which focuses on question of balance between the person's 'financial and personal circumstances' and the restrictions to be imposed,²⁴ is limited to the facts-at-hand insofar as its implications reach no further than the means by which the interim order shall be imposed. In the latter, by contrast, the judiciary is distanced from the statute

¹⁸ Ibid.

¹⁹ Ibid, [254] (Kirby J).

²⁰ Ibid, [1] (Gummow and Crennan JJ).

²¹ Ibid.

²² Ibid, [16] (Gummow and Crennan JJ).

²³ *Criminal Code Act 1995* (Cth) s104.4 (2).

²⁴ Ibid.

provision; the Court does not merely apply the law but considers the fundamental question of its validity, employing the *Criminal Code* proportionality test as a guiding standard. Thus, although the proportionality test is applied by the judiciary in both cases, the nature of judicial discretion in each case differs fundamentally.

The expansion of the defence power should be accompanied with rigorous constitutional safeguards against the abuse of power by the legislature. However, by inserting the proportionality test into the *Criminal Code*, the legislature is able to secure the validity of the section 104 from full judicial scrutiny. Utilising the same logic in legislating on other subject matters, the legislature could potentially make the test of proportionality redundant as a constitutional guideline for adjudicating the validity of laws. In this way, the function of the proportionality test as a protection of civil liberties may be reduced. Thus, the High Court should take a more active approach in securing the operation of legal safeguards from legislative adjustment.

Separation of powers

Section 4 of the CPDA declared the Communist Party to be an unlawful association.²⁵ Under Section 9(2), the Governor-General could declare any person to be a communist if satisfied that the person would threaten the security of the Commonwealth.²⁶ The majority in the *Communist Party Case* held that these sections invalidly conferred to the Parliament the judicial function of determining guilt of suspects, thereby affirming the fundamental principle of the separation of judicial power from legislative and executive powers of the government.²⁷ Six years later, in the *Boilermaker's Case*,²⁸ the High Court expanded the application of the separation of powers doctrine, establishing that non-judicial functions may not be conferred to the judiciary. However, this principle was not adhered to. Through inserting section 104 into the *Criminal Code*, the Parliament has conferred to the judiciary the function of assessing the risk a suspect terrorist may pose to the public. As this has traditionally been a function of the legislature, there seems to be a

²⁵ *Communist Party Dissolution Act 1950* (Cth) s4.

²⁶ *Ibid*, s 9(2).

²⁷ Hocking, above n 4, 322.

²⁸ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

breach of the separation of powers doctrine propounded by precedent. In *Thomas v Mowbray*, the validity of section 104 of the *Criminal Code* was challenged. In a 5:2 decision, the prevailing judgment held that there was no breach of the separation of powers doctrine. This leads to an examination of the justification of Gummow & Crennan JJ (as members of the majority) for the deviation from precedent, which itself requires analysis.

Communist Party Case

The High Court held that the CPDA had breached the doctrine of the separation of powers.²⁹ The CPDA outlawed the Communist Party, provided for its dissolution and empowered the Governor-General to outlaw any organization perceived to be prejudicial to national security.³⁰ The preambles of the Act expressed a parliamentary assertion of the factual basis for invoking the power to legislate in relation to defence (section 51(vi)) and the maintenance the *Constitution* (section 61).³¹ It is stated that the Australian Communist Party 'engages in activities' that would result in the 'overthrow of the government'.³² Hence it is necessary, 'for the defence of Australia', to dissolve the party.³³ The majority of the High Court, however, held that the question of whether a threat supplies sufficient connection between legislative measures and defence power is for judicial determination.³⁴ This is because the Commonwealth is a polity of limited powers.³⁵ This chain of reasoning emphasises the doctrine of the separation of powers, which is demanded by the 'very text of the Constitution'.³⁶ Strict observation of the doctrine is crucial for a healthy democracy. Enforcing boundaries of governmental power through judicial review ensures that the parliament acts consistently with the limitations imposed by Constitution.³⁷ In this way, the judicature prevents the abuse of power

²⁹ Hocking, above n 4.

³⁰ Blackshield & Williams, above n 1, 870.

³¹ Winterton, above n 11, 650.

³² Blackshield & Williams, above n 1, 870.

³³ Ibid.

³⁴ Carne, above n 9, 533.

³⁵ *Commonwealth of Australian Constitution Act 1901* (Cth) s107.

³⁶ Winterton, above n 11, 649.

³⁷ Sir G. Brennan, 'Independence of the Judiciary' (Speech delivered at the 12th South Pacific Judicial Conference, Sydney, 14 April 1997), 1.

which might oppress citizens' liberty.³⁸ As the preamble of CPDA simply declared the guilt of the party with the ensuing penalty of dissolution, the Parliament had usurped the judiciary of its power to determine whether there was a factual connection between the party and subversion.³⁹ There is clearly a breach of the doctrine of the separation of powers here, which contributed to the invalidity of the Act.⁴⁰

Has s104 of the Criminal Code breached the separation of powers doctrine?

In determining the validity of section 104, a contentious issue is whether the judiciary's role includes forwarding political objectives. In 1956, the *Boilermakers Case* settled the principle that the functions of the judicature, parliament and executive must be separated; not only that judicial functions may not be exercised by non-judicial bodies, non-judicial powers may not be exercised by Chapter III courts.⁴¹ Section 104 confers to the judiciary the discretion to determine the risk that an individual would commit a terrorist attack. Assessment of the risk of terrorism is a political question as it involves a consideration of policy formulated by the legislature.⁴² Hence the plaintiff argued that Section 104 breaches the principle of the separation of powers as it confers on the judiciary a non-judicial function of forwarding current political goals.

The majority of the court conceded that consideration of policy by the judiciary is appropriate in light of the prevalence of terrorist attacks in the recent past; most notably, the 11 September attacks and the Bali bombings in 2002.⁴³ Since *Boilermakers*, the federal legislation has refrained from conferring powers upon federal courts by reference to the criteria of 'in public interest'.⁴⁴ Now, pursuant to section 104.4, the judiciary has to determine, in the public interest, the appropriate measures for the protection of the public from terrorist threat. However,

³⁸ Ibid.

³⁹ Winterton, above n 11, 650.

⁴⁰ Ibid.

⁴¹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁴² *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁴³ *Thomas v Mowbray* (2007) 237 ALR 194, [26] (Gummow & Crennan JJ).

⁴⁴ Ibid, [22] (Kirby J).

'in the public interest' is a vague criterion which attracts numerous considerations of policy.⁴⁵ In our pluralistic society, different groups of the community hold diverse and contrasting views about what constitutes a terrorist threat and which measures are in the best interest of the community. Since the judiciary has no objectively determinable criteria,⁴⁶ it is likely that there may be a breach of the separation of powers doctrine.

The majority suggested that a clearer judicial standard can be derived by reference to public opinion through emphasizing that the subject matter of Section 104 is 'general public knowledge' of the nature of the recent terrorist attacks.⁴⁷ As already mentioned, public opinions may be diverse. Even if there is generally agreed criterion for the risk of terrorism held by the public, its soundness may be questionable, as evidenced by the characterization of terrorists as 'persons with skills in handling explosives and a willingness to die in the course of an attack' by the majority.⁴⁸ Due to its specificity, the definition fails to include other various means that individuals could employ to cause massive damage to the public. On the other hand, if miners or petrol station workers were accused of being terrorists, then by the general standard, they would be classified as suspects. Thus judicial reference to 'general public knowledge' would be problematic as it fails to provide sound guidelines for assessment of terrorist risk. Further, judicial reliance on the public standard as justification for its decisions leaves little room for public criticism of the decisions of the High Court. Public criticism could be easily evaded by the assertion that judicial decisions are based on the public standard.

Thus, despite the High Court's past emphasis on observing the separation of powers demanded by the textual division of the constitution, the majority of the High Court has deviated away from it. In pointing to the public morality on terrorism as a judicial standard in justification for this new position, however, the majority does not provide a convincing argument.

⁴⁵ Ibid.

⁴⁶ Carne, above n 29.

⁴⁷ *Thomas v Mowbray* [2007] HCA 33 (2 August 2007) [27] (Gummow & Crennan JJ).

⁴⁸ Ibid.

Freedom of political communication

In *Australian Capital Television v Commonwealth of Australia* (ACTV), the High Court took the unprecedented step in finding that the Commonwealth Constitution necessarily implies the existence of a constitutionally entrenched right to freedom of political communication. As ACTV forms the precedent for the present anti-terrorism laws, it may be argued that the *ASIO Legislation Amendment Act 2003* facilitates the erosion of this right through imposing a secrecy provision that prohibits communication of ASIO operations.

ACTV v Commonwealth of Australia

ACTV concerned the validity of Part IIID of the *Broadcasting Act 1942*. Part IIID prohibited the broadcast of political advertisements during federal election periods and allocated 'free time' slots for political advertising.⁴⁹ All five majority judges considered that section 7, section 24 and section 128 of the *Constitution* collectively constitute the doctrine of a representative democracy.⁵⁰ Their reasoning emphasised the notion of popular sovereignty and rested on the assumption that the constitution requires 'effective' and not merely 'formal' representative government.⁵¹ The existence of a genuine representative government is dependent upon the people being factually informed about political matters.⁵² Since the freedom of political communication facilitates a good understanding of political matters, it is 'necessarily implied' by the *Constitution*.⁵³ However, such freedom may be curtailed by other public interests. A restriction is justified where its benefits outweighs the importance of free communication.⁵⁴ Part IIID aims to enhance the integrity of the political process by the risk of corruption.⁵⁵ However, the exclusion of independent candidates from 'free-time' advertising severely restricts their freedom to communicate to the public.⁵⁶

⁴⁹ N. Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18 *University of Queensland Law Journal* 250, 251.

⁵⁰ *Ibid.*

⁵¹ Aroney, above n 49, 262.

⁵² *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 142 (Mason CJ)

⁵³ *Ibid.*

⁵⁴ *Ibid.*, 143.

⁵⁵ *Ibid.*, 145.

⁵⁶ *Ibid.*, 146.

Consequently, this undermines the purpose of the restriction by eroding the fairness of the election process.⁵⁷ Hence the restriction on political communication is not justified here, which is central to its invalidation.

Has the ASIO Amendment Act 2003 breached the implied right of free speech?

The *ASIO Amendment Act 2003* criminalised the public disclosure of any information on the exercise of detention and interrogation powers by ASIO. A two year prohibition has been imposed on the disclosure of 'operational information'⁵⁸ that was obtained directly as a detainee or indirectly as a family member or journalist. A person who has breached this provision would face imprisonment for five years.⁵⁹ 'Operational information' is defined widely as all information that ASIO has or had.⁶⁰ The arbitrary scope of this definition could potentially be used by the government to outlaw media coverage of ASIO's activities even if ASIO has broken procedural requirements.⁶¹ Through eliminating the channels for public scrutiny, dissent and peaceful change, the operation of the Act has increased the likelihood of abuse of detention powers by ASIO.⁶² This poses a threat to the rule of law insofar as government institutions may not be held accountable for its actions. In effect, the government could remove the public's capacity for informed public debate about the controversial detention regime.

It may be argued that a compromise in the right to freedom of political expression is reasonably adapted to the end of protecting our national security from terrorist threat. However, the proportionality test is limited insofar as it excludes consideration of the implications that could potentially arise from the enforcement of drastic legal measures which are inconsistent with the fundamental principles underlying our Constitution. A democratic state, underpinned by the rule of law and freedom of legitimate political dissent, cannot compromise those principles without at the same time also

⁵⁷ Ibid.

⁵⁸ *ASIO Legislation Amendment Act 2003*, s34AA.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ M. Head, 'Another Threat to Democratic Rights' (2004) 29 *Alternative Law Journal* 127.

⁶² Ibid, 128.

compromising the democratic nature of the state itself.⁶³ The two year ban on communicating information on ASIO activities facilitates the gradual erosion of the freedom of political speech through the exclusion of important political matters from discussion between electors. This poses a threat to our representative government, which requires the freedom of speech in order to function effectively.⁶⁴

Conclusion

The recent case *Thomas v Mowbray* reflects the development of constitutional law, especially in the broader conception of the separation of powers doctrine and the expanding scope of defense power, in response to changing social trends and technological advancements in the 21st century. Underlining the majority judgment is the judicial reluctance to intervene with matters determined by the Parliament, as evidenced by the lack of adjudication on the legislative insertion of an in-built proportionality test into the *Criminal Code* and the broadening of the separation of powers doctrine to include the judicial discretion based on government policy. These are significant modifications of the principles held in the *Communist Party Case*, and highlight the tendency for government to privilege the interests of national security over civil liberties during times of instability, which may undermine the integrity of our democracy.⁶⁵

⁶³ Hocking, above n 4, 335.

⁶⁴ Aroney, above n 49.

⁶⁵ Hocking, above n 4, 324.

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