FROM ‘RULE OF LAW’ TO ‘LEGAL STATE’: 
A TIME OF REINCARNATION?

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I express my gratitude to the organisers for the honour of being invited to speak here for the first time—although I am not still quite sure about the expectations, given that mine is the only paper that will be followed by a ‘stretch break’.

Bashing in Byelorussia

Reflecting (as one should) upon the former Byelorussia, in 1988 it was noted that a murder inquiry had proceeded thus:

They falsified evidence. They hung suspects upside down until the blood clogged their heads and they were ready to confess. They beat them with fists and boots, slammed their heads against an office safe, and in one chilling case, repeatedly hammered the head of a suspect with the thick and weighty tome, the Byelorussian Criminal Code.

‘This may have been to ensure that the suspect had no illusions regarding the legality of the investigation process,’ Literaturnya Gazeta reported drily in its account of the investigation that finally led to the arrest of the real killer.1

Well, there could hardly be a clearer breach of the rule of law. Indeed, it is so clear that it is criticised by what was then a leading Soviet newspaper.2

Blackwater Deep

Yet that might just be a ‘bad apple’ case. Blackwater is far more disturbing.

The US military has about 160,000 troops in Iraq. Private military contractors, not all of them American, have about 180,000. Many of those 180,000 replace regular troops in functions that do not require military training, such as driving trucks or doing laundry. But it is reported that they are increasingly being allocated core military rôles: ‘They interrogate prisoners, gather intelligence, operate rendition flights, protect occupation officials and in some cases have taken command of US and international troops in battle.’3

The contractor with the highest profile in Iraq, although the largest contract is held by a British company,4 is Blackwater Worldwide. At least 90% of

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4 Aegis, headed by a former British Lieutenant Colonel, which appears to be a successor to the notorious Sandline International (ibid; Wikipedia, ‘Sandline International’
Blackwater’s revenue comes from US government contracts and, of those contracts, about two-thirds are no-bid. Blackwater is currently subject to several lawsuits in the USA on behalf of Iraqis whom it is alleged to have killed in unprovoked shootings and of several of its own personnel, as well as US military personnel, whose deaths it is alleged to have caused through operational negligence. The FBI is also investigating it for gun-running to Kurdish rebels in Iraq. As yet, although it is reported that 64 US soldiers have been court-martialled, no contractor has been charged with any crime.

Following Blackwater’s killing of 17 Iraqis on 16 September this year, the Iraqi government revoked Blackwater’s licence to operate in Iraq and announced that it intended to prosecute Blackwater and its staff over that incident. The US Defense Department responded by giving Blackwater staff immunity under US law—and of course they would find it easy to leave and stay out of Iraq. However, the US Justice Department claims that the Defense Department had no authority to provide such immunity. On 4 October the US House of Representatives passed by 389-30 a bill that would make all private contractors working in Iraq and other combat zones subject to prosecution in US courts. Democrats plan to introduce similar legislation in the US Senate.

The attempt to immunise the contractors from the law, either by granting immunity as such or by declining to lay charges, therefore appears to be an attempt by the world’s most powerful government to circumvent the rule of law through a privatisation of war. And that is being done when a commitment to the rule of law is held out as a key characteristic of the ‘war on terror’.

What is ‘the Rule of Law’?

Now, when I have referred to ‘the rule of law’, I am sure that I have made some sense. Yet I am far from sure what sense it may be that I have made. We know what Dicey meant by it, but his meaning was not intended to apply outside England or at least not outside the common-law world. I shall return to Dicey, but my focus now is on what the phrase ‘the rule of law’ can mean when one attempts to give it a universal application.

Justice Heydon, from whom our conference theme is drawn, is confident about many things that the rule of law does, yet I do not think he states plainly what it is that does these things. He does not seem to be relying entirely on

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7 Regrettably, I have not yet had an opportunity to more than glance at Pietro Costa and Danilo Zolo (eds), *The Rule of Law: History, Theory and Criticism* (2007).
8 Dicey’s meaning of ‘the rule of law’ is so well known that I think it need not be summarised here. I have critically examined it in my ‘Men of Class: Aristotle, Montesquieu and Dicey on “Separation of Powers” and “The Rule of Law”’ (2004) 4 *Macquarie Law Journal* 187, 204-19.
Dicey—which would be right, because one cannot assume that Dicey’s idea is appropriate at a distance of half a globe and more than a century. And it can be sufficient to state and value what something does, without being able to say clearly what it is. For example, I am in favour of ‘electricity’ (in the right places). However, I can switch a light on or off just as I choose, whereas ‘the rule of law’ appears to be obligatory. And I find it unsettling to be under an obligation to or through something that seems to resist clear explanation. Moreover, if one cannot state clearly what something is, one is not in a secure position to judge how far, were it to pass away, its demise should be regretted.

All Things or Nothing?

Attempts to give the idea of the rule of law a universal significance have produced a paradox. In content, it appears to be all that one could wish, while in form it resembles a box in which almost anything could be placed.

As to content, it comes to resemble a juristic chocolate factory—a category with no definite content apart from law itself and hence open to almost any legal content at all. Thus Raz complained in 1977 that the already classic New Delhi Declaration of the International Commission of Jurists 1959 mentions or refers to ‘just about every political ideal which has found support in any part of the globe during the post-war years’. He would rather thin the idea out, but he doesn’t leave us with much to bite on.

Others have been inclined to give up on the idea altogether. Half a century ago, Ivor Jennings wrote:

The truth is that the rule of law is apt to be rather an unruly horse. If it is only a synonym for law and order, it is characteristic of all civilised States; and such order may be based on principles which no democrat would welcome and may be used ... to justify the conquest of one State by another. If it is not, it is apt to express the political views of the theorist and not to be an analysis of the practice of government. If analysis is attempted, it is found that the idea includes notions which are essentially imprecise. If it is merely a phrase for distinguishing democratic or constitutional government from dictatorship, it is wise to say so.

More recently, Shklar has found the phrase ‘the rule of law’ to be merely a ‘bit of ruling-class chatter’, just a ‘self-congratulatory rhetorical device’ that has become meaningless thanks to ideological abuse and general over-use. Perhaps, as Hutchinson and Monahan have lamented, the idea of the rule of law is just ‘the will-o’-the-wisp of constitutional history’.

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12 Ivor Jennings, The Law and the Constitution (1933; 5th ed 1965), 60.
Still others, however, have run to the rescue. Coming from the angle of content, Harden and Lewis have asked whether the idea is a platonic ‘noble lie’ which nevertheless might be rescued through an immanent critique which would remould it upon its claimed values.\textsuperscript{15} But, thinking again of Raz’s critique, those values might be so various or elusive that what purported to be an immanent critique would involve heavy importation. And, in that case, why bother?

Then, coming from the angle of form, Waldron has proposed, drawing on a notion invented by philosopher Gallie, that ‘the rule of law’ is an ‘essentially contested concept’.\textsuperscript{16} For Gallie in 1956, such a concept is one ‘the proper use of which inevitably involves endless disputes about their proper uses on the part of their users’.\textsuperscript{17} Er, right.

One needs to set out the options: is the issue here a contradiction, a confrontation of opposites or an encounter between mutually untranslatable frames of reference? And are we to speak in the dimension of logic, in that of rhetoric or in some other dimension?

In the dimension of logic, one response to Gallie has been to suppose it possible to distinguish between a core meaning which is a ‘concept’ and its various instantiations which may be termed ‘conceptions’.\textsuperscript{18} But that does not seem to help here: every time that anybody has identified the rule of law as a concept, someone else has contested that identification. Waldron prefers to find within the meaning of our phrase a ‘lead idea’, which is ‘that somehow respect for law can take the edge off human political power, making it less objectionable, less dangerous, more benign and more respectful’.\textsuperscript{19} I think that Waldron needed to identify more closely the form and the content of the temptation.\textsuperscript{20}

What I will suggest instead is that the phrase ‘the rule of law’ is neither logical nor rhetorical but belongs to a class of expression that I have called ‘dark performatives’.\textsuperscript{21} Very briefly: such expressions are triggers to exclude from discussion anything that is contrary to certain preferred statements, so that those that are preferred appear to lie beyond discussion, and hence to have a suprahuman existence. Being placed beyond discussion, over time their content thins out and they become mere boxes, into whose protection almost any preferred content can be put. This might be why it appears to be far easier to say what ‘the rule of law’ does than to state what it is.

\textsuperscript{15} Ian Harden and Norman Lewis, \textit{The Noble Lie: the British Constitution and the Rule of Law} (1986).


\textsuperscript{17} W.B. Gallie, ‘Essentially Contested Concepts’ (1955-6) \textit{56 Proceedings of the Aristotelian Society} 167.

\textsuperscript{18} Wikipedia, ‘Essentially Contested Concept’<http://en.wikipedia.org/wiki/Essentially_contested_concept> at 5 November 2007; these writers include Hart and Dworkin.

\textsuperscript{19} Waldron, op cit, 159.

\textsuperscript{20} I would observe similarly of Brian Z. Tamanaha, \textit{On the Rule of Law} (2004).

‘A Government of Laws, Not Men’

If so, then one might still be able to identify ‘the rule of law’ as a box. And perhaps such a minimal meaning of the expression ‘the rule of law’ may indeed be found, in the ancient idea of ‘a government of laws, not men’. The effective origin of that idea lies in Aristotle’s Politics. It is expressed more succinctly in Locke’s phrase ‘lawful government’, in an age when the words ‘government’ and ‘state’ were synonymous. (A government of men, not laws—or an unlawful government—would be ‘tyranny’.) To give this idea a more modern formulation, it is the idea that law should have primacy over policy. And that idea may be said to have persisted throughout the western legal tradition. It is perhaps most evident in its occasional exceptions, when absolutist monarchs—from Justinian to James—have claimed to stand above the law.

That claim was for a personal exemption. How far it may be embraced a claim regarding the monarch’s servants is less clear. But why should that larger claim be made, if the monarch and his servants controlled the means of prosecution? Nor could it sensibly have been a claim that the monarch and his servants would ordinarily operate outside the law. A state of that kind would quickly fall apart. It could at most have been a claim that, where law and policy conflict, policy will prevail.

However, the timescale here is enormous. Instead of assuming the possibility of a universal essence, one needs to examine the idea of ‘a government of laws, not men’ with regard to each type of society in which it has been envisaged. And then one finds a salient change. For Aristotle, or even for a seventeenth-century English believer in the ‘ancient constitution’ or ‘the good old law’, it was still possible to understand key laws as semi-mythical—as having a known human origin, yet an origin with which there was no longer any discursive connection, so that these laws appeared effectively to be suprahuman. Today, laws change so quickly—or it is so well known that they could be changed—that it is nearly impossible for any law to become hallowed by time.

Therefore, in the idea of ‘a government of laws, not men’, the ‘not men’ part no longer hints at a suprahuman objectivity and the whole idea needs to be rethought or dropped.

22 Aristotle, Politics: see my ‘Men of Class’, op cit, 192-6.
24 ‘Princeps legibus solutus est’: Digest 1.3.31.
28 These issues are not necessarily connected with those of a ‘separation of powers’. If one were to seek connections, then it is important that, as to the English tradition, Montesquieu has been persistently misunderstood. Like Bolingbroke before him, he


Rechtsstaat

The history of the idea of ‘a government of laws’ not men’ and its later naming as the idea of a Rechtsstaat is traced in Luc Hueschling’s recent and monumental study État de droit, Rechtsstaat, Rule of Law, to which this paper will be indebted. 29 I shall focus now on the origin of the expression Rechtsstaat, which seems to have found ready translation into every major European language except English. 30 And then I shall discuss that exceptionality.

Hueschling credits the invention of this word to Johann Wilhelm Petersen (writing as ‘Placidus’) in 1798. 31 Placidus adopts Kant’s trenchant criticisms of absolutism. For Placidus, only a political body that is based on human rights is worthy of being called a state. Such a state is, specifically, a ‘Rechtsstaat’ (a rights-based state). In contrast, an absolutist state is despotic, a ‘Polizeistaat’ (a policy state), in which policy prevails over human rights. 32

However, the name Rechtsstaat was quickly given slightly different meanings by other writers, among whom one can pick out Carl Theodor Welcker. For him, in 1813, a Rechtsstaat incarnates the values of liberalism and Enlightenment rationalism: a Rechtsstaat is also a Vernunftstaat (rational state). 33

The antagonism between the idea of a Rechtsstaat and that of a Polizeistaat was diffused, however, in the 1830s by Robert von Mohl. For him the rationality of the Rechtsstaat should not be confined to a Kantian universality but should accommodate the values of the particular society. In that case, a Rechtsstaat could also be a Polizeistaat, in a sense in which the latter would be a welfare state. 34

But let us focus on the rationality factor. The commitment to rationality of the state contained a strong preference for rational law—that is, for relatively general over relatively individual norms, and hence for statute over adjudication and for codification over occasional enactment. The importance of these commitments became frighteningly evident in the Nazis’ idea of what

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30 Hueschling, op cit, 1-4.
31 Litteratur der Staatslehre (1798); Hueschling, op cit, 36-7.
32 ‘Polizeistaat’ now also means ‘police state’ and perhaps every police state is a policy state, yet the converse would not be true.
33 Die letzte Gründe von Recht, Staat und Strafe (1813), esp. 80 ff (Hueschling, op cit, 37). This meaning of the word became well known through the publication by Welcker and a colleague of a highly successful encyclopaedia of the state: Carl Theodor Welcker and Carl Rodecker von Rotteck, Staats-Lexikon oder Enzyklopädie der Staatswissenschaften (1834-48). This work became, Hueschling says (op cit, 37-8), ‘the Bible of German liberals of the Vormärz’.
34 Die Polizewissenschaft nach den Grundsätzen des Rechtsstaaates, 3 vols (1832-3, 3rd edn 1866); Hueschling, op cit, 38-9.
they too called a *Rechtsstaat*. In their view, the Nazi state was a *Rechtsstaat* in that it was governed by law (so far, so good) and the decisions of the Leader were what ultimately counted as law.\(^{35}\) In resistance, anti-Nazis emphasised the idea of a *Rechtsstaat* as involving a commitment to rational law.\(^{36}\)

**State, Law and Policy**

On finds, then, a conflict between two views of the desirable relation between law and state policy. In one view, that of the *Polizeistaat* as traditionally conceived: where there is conflict between law and state policy, policy should prevail. In the other view, that of the *Rechtsstaat* as ordinarily conceived: law should prevail.

Yet, to have a *Rechtsstaat* as ordinarily conceived is not clearly the same as having ‘the rule of law’ as ordinarily conceived. For the law to which policy is subject in a *Rechtsstaat* is statute, preferably codified—while ‘the rule of law’ as it is conceived by Dicey is quite different. For him, ‘the rule of law’ means that, where there is conflict between law and state policy, it is *judge-made* law that should ultimately prevail.

**The English Aberration**

The reason for this difference is that Dicey is working within what I have called, here and there, the English Aberration.\(^{37}\) By this I mean the failure of England, beginning with the Normans, to keep developing its law within the Romanist mainstream of the western legal tradition. The Anglo-Saxon and Danish codes seem to have been getting along quite well,\(^{38}\) alongside canon law, until the Normans swept in and installed a writ-based and later judge-based system of secular law.\(^{39}\) This happened very quickly: already in Glanvill one can see the new writ system, with its privileging of procedure over substance.\(^{40}\) Bracton’s attempt to return English law to the mainstream did not succeed.\(^{41}\) And then, with the Reformation, canon law was sidelined.\(^{42}\)

\(^{35}\) Hueschling, op cit, 516-70.

\(^{36}\) Particularly Franz Neumann: e.g. *The Rule of Law* (1933 thesis; 1986); the thesis was written in English, in exile. See further my ‘Men of Class’, op cit, 190.


\(^{39}\) Although the Anglo-Saxon legal systems had also had writs: Florence Harmer, *Anglo-Saxon Writs* (1952).


\(^{42}\) Signs of a return from the this aberration, in Australia, are: (a) written constitutions—a concept that derives from the mainstream and not from the common law; (b) that public international law, which belongs to the mainstream, is having an increasing impact domestically: through the federal parliament’s constitutional ‘external affairs’ power,
Now, it is true that during the seventeenth and eighteenth centuries human liberties were secured better in England than on the Continent. One finds envy of this among such disparate French visitors as Voltaire and Montesquieu. And it is true that this was achieved through the judiciary rather than through legislation. But the reason for this was not some intrinsic advantage of judge-made law over statute. It was, rather, the early rise of a middle class, who found their voice as to liberty within the common law—because they ran it. Moreover, they secured the liberties that were of value to themselves, while neglecting the liberties of others. Their very idea of human liberty was formulated in terms of property and contract.

*Entick v Carrington* and So On

I shall take as an example a great case of 1765, *Entick v Carrington*. In this case, as will be well known, Lord Camden found no authority in statute or in the common law for a ministerial power to issue a warrant to forcibly enter a person’s house in order to seize that person’s papers as evidence of sedition. There being no such authority, the warrant was void and the entry and seizure were trespasses. Justice Heydon quotes Lord Camden’s ringing phrases: ‘If it is law, it will be found in our books. If it is not to be found there, it is not law’.

Yet Lord Camden did not have in mind solely the letter of the law. For the words that Justice Heydon quotes are directly followed by this:

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances,

through bills of rights that incorporate international conventions (so far, in the ACT and Victoria), through adherence to the Rome Statute of the International Criminal Court, and through an increasing willingness to interpret statutes in the light of public international law.

This process has gone further in England, through British membership of the European Union, hence a formal location of the British legal order within that of the European Union, and through the Human Rights Act 1998, which has located English law more firmly within the ambit of the European Convention on Human Rights and of the court that enforces it.


45 19 Howell’s State Trials 1029 (the report to which Justice Heydon refers; the accounts in the English Reports and the All England Reports reprint are the much briefer version from Wilson’s Reports).

46 Heydon, op cit, 9; Howell 1066. Lord Camden said more fully: ‘The justifications is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.’ (Howell 1066).

47 True, he seems to have had little sympathy for the argument by counsel for the plaintiff that ‘A power to issue such a warrant as this is contrary to the genius of the law of England’ (Howell 1038). I’m not sure what a ‘genius’ could be, but it sounds rather like a vibe.
His view is not simply that the warrant was invalid because the lawbooks said nothing about it. He goes further, to say that there is good reason for it not to be in the lawbooks, because it infringes a basic right. A right that he does not find in the lawbooks. Rather, he draws this right from the contemporary doctrine that has later been named 'possessive individualism'. He asserts what today would be classified as a first-generation human right. In doing so, he was a judicial activist—and no less so in his age, if the doctrine to which he subscribes would today be seen as radically conservative.

Then, as to the case’s public-law aspect, Lord Camden resorts again to political principle, albeit that he gives it legal clothing. He rejects an argument of ‘state necessity’ and reflects:

> The Revolution restored this constitution to its first principles. It did no more. It did not enlarge the liberty of the subject; but gave it a better security. It neither widened nor contracted the foundation, but repaired, and perhaps added a buttress or two to the fabric; and if any minister of state has since deviated from the principles at that time recognized, all that I can say is, that so far from being sanctified, they are condemned by the Revolution.

These ‘first principles’ Lord Camden finds in ‘the ancient immemorable law of the land’. Impeccably, again, he adheres to the contemporary notion of the ‘ancient constitution’—a notion, moreover, that both sides in the Revolution had drawn upon according to their selective hearing of ancestral voices. And his metaphorical language—‘foundation’, ‘fabric’ and ‘a buttress or two’—almost masks the deeply political nature of his argument.

But nothing in this, nor certainly in the idea of possessive individualism, consorts with democracy as we understand it, with universal suffrage. That was, indeed, a notion that the Revolution had suppressed. On the other side, the Revolution cemented constitutional monarchy in place of absolutism. Chief Justice Coke defying his king in the name of the law remains a heroic image—even if, perhaps, Coke was a legend in his own longhand. Yet his championing of the common law against an over-mighty sovereign reads very differently if its aim is turned from the sovereignty of a monarchy to a sovereignty of the people.

‘Strict Logic and Legal Technique’

Coke’s reverence for the ‘artificial reason’ of the common law seems still to be acutely alive when, to ‘judicial activism’, Justice Heydon prefers (quoting Dixon quoting Maitland) development of the common law through ‘strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books, rooted in the centuries’ And Justice Heydon says more precisely:

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48 Howell 1066.
49 Macpherson, op cit.
50 Howell 1068.
51 Ibid.
52 Pocock, op cit.
54 Heydon, op cit, 11.
The changes could be effected by analogical reasoning, or incremental growth in existing rules, or a rational extension of existing rules to new instances not foreseen when the existing rule was first developed. Particular rules might be modified by the detection of more general principles underlying them or a more rigorous reformulation of some traditional concept. Detection of more general underlying principles ... rigorous reformulation ... .

It is hard to see here any sufficient line between detection and invention, or between renovation and innovation. But I hardly think that he means Murphy's law.

Indeed, Justice Heydon objects that, in 'judicial activism',

Often the illegitimate function is the furthering of some political, moral or social program: the law is seen not as the touchstone by which the case in hand is to be decided, but as a possible starting point or catalyst for developing a new system to solve a range of other cases.

Yet one could think that this is the very way in which the common law has developed. Surely Justice Heydon does not mean to return to the old form of common-law development, in which procedure is privileged over substance, remedies over rights. So, to object to an approach in which the particular case is seen as a starting point or catalyst for development could be to hold that the common law was born illegitimate and has similarly reproduced itself ever after.

Yet for the sake of argument I shall ask what would be the consequences of conceding Justice Heydon’s case. One consequence would be this. Law would still prevail over policy, but, as Lord Camden’s words remind us, the law that would ultimately prevail would not be law in statutes, still less law in codes—law that persons upon Bondi omnibuses have some hope of understanding. It would be law in books that few but legal specialists would trace and none but they could comprehend. It is in this factor that a return to the artificial reason of the common law becomes anything but a defence of the people.

From ‘Rule of Law’ to ‘Legal State’

Yet in conclusion I am going to agree with Justice Heydon when he says, as I take him to say, that it is not for judges to make policy. I will not go so far as to suppose that a legal state would be able actually to guarantee that judges would not make policy. An example is, a century ago, the phénomène Magnaud, when a courtful of French judges even defied statute in persistently finding for the poor against the well off and for the employee against the employer, and by introducing such scandalous reforms of the law as divorce by mutual consent. Yet in a legal state it would I think be much easier to call such mavericks to account.

55 Heydon, op cit, 12.
56 Heydon, op cit, 10.
57 Should one then condemn Lord Atkin’s ‘neighbour principle’ in Donoghue v Stevenson [1932] AC 562? Or, if one would prefer Lord Buckmaster’s more traditional approach in that case, what of his approval of equal pay for equal work in Roberts v Hopwood [1925] AC 578? Was he not, in both cases, a resourceful free-marketeer?
58 François Geny, Méthode d’interprétation et sources en droit privé positif (1899, 2nd edn 1919, 1954 reissue) II.286-300; Max Radin, ‘The Good Judge of Château-Thierry and His
Yes: any sympathy for the direction of the digression should not be permitted to suppress the fact that it would be a digression from democracy. One has to remember that digression in any politically welcome direction could as readily be digression in some other.59

To anticipate a question: I think nevertheless that the Mabo decision60 was correct, in that it healed a wound that had been inflicted while the victims were excluded from democracy (indeed, for the most part they were not even considered to be people) and for which they had not had an opportunity to obtain redress through democratic means.

So, ought one to shift from the idea of the rule of law, in its Diceyan sense, to that of the legal state? One response might be that of the Buddhist teacher who, when asked by his pupil, ‘Master: are you in favour of being reincarnated?’, replied: ‘Indeed I am. But, preferably, not just yet.’61

And yet: another response might be that this reincarnation has already taken place and only needs to be recognised. Surely, when we think of ‘the law’, we already think primarily of statute and not primarily of judge-made law. When we speak of ‘law reform’, we mean a prospect of legislation.62 A primacy of statute over judge-made law is already with us. Then what remains is to firm up a primacy of statute over policy.

In that primacy, there would be a democratic imperative for a judge to adhere to legislative intention and not frustrate it through sticking to the mere letter of the law.63

And thus: our legal state.

59 Radin (op cit, 310) notes of Magnaud that ‘his methods are as available for reactionary politicians as for radical ones’. Magnaud moved from the bench into parliament, but Radin’s remark applies to him in both occupations.

60 Mabo v Queensland (No 2) (1992) 175 CLR 1. The Commonwealth parliament did not address the possibility of native title until the Mabo decision provoked it into doing so—and, even then, the Native Title Act 1993 was a close-run thing.

61 In the Temple of Dutiful Selection, 24 November 2007.

62 I intend both parts of that anticipatory answer to be essential to it.

63 A model might be found in the dissenting judgment of Kirby J in New South Wales v Amery [2006] HCA 14; 226 ALR 196. Even more, when the legislature has actually instructed the judiciary to do so: e.g. Freedom of Information Act 1982 (Cth) s 3(2), ‘It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the object set out in subsection (1)’; see also the dissenting judgment of Gleeson CJ and Kirby J in McKinnon v Secretary, Department of Treasury [2006] HCA 45; 229 ALR 187.