Legal Pluralism

Toward a multicultural conception of law

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Ashgate

DARTMOUTH

Aldershot • Burlington USA • Singapore • Sydney

Published by
Dartmouth Publishing Company Limited
Ashgate Publishing Ltd
Gower House
Croft Road
Aldershot
Hants GU11 3HR
England

Ashgate Publishing Company
131 Main Street
Burlington
Vermont 05401
USA

Ashgate website: http://www.ashgate.com

British Library Cataloguing in Publication Data
Tie, Warwick
Legal pluralism : toward a multicultural conception of law
1. Law - Philosophy 2. Law - Interpretation and construction
3. Culture and law 4. Culture conflict
I. Title
340.1'15

Library of Congress Cataloging-in-Publication Data
Tie, Warwick.
Legal pluralism : toward a multicultural conception of law /
Warwick Tie.
p. cm.
Includes bibliographical references and index.
ISBN 1-84014-725-3 (hc.)
1. Legal polycentricity. I. Title.
K236.T54 1999
340'.11--dc21 99-25150
CIP

Reprinted 2001

ISBN 1 84014 725 3

Printed and bound by Biddles Limited
Guildford and King's Lynn

Preface

The tree of knowledge did not stand in the garden of God
in order to dispense information on good and evil,
but as an emblem of judgment over the questioner.

- Walter Benjamin

This book has been propelled, in large part, by my interest in the prospects for self-determination and sovereignty by the indigenous peoples of New Zealand/Aotearoa (Maori). Within liberal democracies, questions about the meaning of concepts such as *sovereignty* and *self-determination* have traditionally been adjudicated by the institution of law. At times, this occurs through the legal resolution of particular issues. At others, it occurs in a more remote manner through the structuring effect that constitutional law has on the machinations of public conflict and debate. Where law's right to act as the final arbitrator in social conflicts is staunchly challenged, however - for example, where it is widely perceived that legal theories and practices are embedded in the assumptions of a particular culture and that these slant lawyers' perceptions of conflicts - the situation becomes strained. In the absence of obvious replacements for law, questions develop about what law might become should such resistance prosper.

In the absence of self-evident and conclusive answers to such questions, the observer of such situations is faced by the condition alluded to by Walter Benjamin, that the questioner occupies an interminable space of judgement. In a Simmel-esque manner, the one who seeks to understand is caught between two requirements: a need to pronounce on the situation so as to create a measure of certainty about law in the name of social order (that is, to bring a measure of closure around the status of law and the social relations to which it speaks) and; to be self-reflexive about the assumptions through which they have come to know and judge law (that is, to critique their position). This site between *closure* and *critique* appears, however, to be an impossible space to inhabit.

This text engages with a series of assumptions through which the discourse of 'identity politics' attempts to address that space. The first is that its inhabitation entails the recognition of socio-cultural difference. Moreover, this recognition of difference is seen to be a sufficient basis through which an adherence can occur to the phenomenon which I call the simultaneous closure-of and critique-of law. In the lexicon of identity politics, this is the quest to both recognise cultural difference and create bases for shared social life. I am sceptical of such claims. Furthermore, as will unravel, I am sceptical of the associated notion that the recognition of identity-related differences is a sufficient basis upon which an *ethical* position can be developed towards the Other and their conceptions of law.

It is not that I am indifferent to the moral quest that is entailed in attempting to recognise the identities of others in their own terms, and of attempts to prevent the reduction of their institutions to the terms through which the observer perceives social life. A moral openness to Otherness is not simply the product of an intended 'good will', however, as the tacitly intentionalist 'recognition of difference' discourse appears to suggest. Openness to the viewpoints of others does not necessarily come about through the calculated inhabitation of an 'ethical intersubjectivity'. On many occasions something like this does indeed appear to occur, as in the arena of friendship. This seemingly intentionalist form of desire is not always a *sufficient* condition for ethical life, however, as examples in this text will attest. Nor do I predicate my argument on the contrasting idea, that the dimensions of moral life can simply be read off an overarching transcendental domain - off the wishes, needs and functions of the Divine, Discourse, or Society, for example.

Rather, my thesis pivots on the proposition that the morality which is associated with openness to Otherness fashions most acutely through the crucibles of conflict. Given such ignominious beginnings, it is an unpredictable and precarious phenomenon.

The connection which I make in this text between the tension through which ethics is fashioned and legal pluralism is that legal pluralists (generally speaking) are acutely aware of its existence and of the impossibility of its resolution within orthodox legal theory and practice. With regard to law, they are sceptical of the manner in which centralised sites of judgement can parade as universalising institutions while remaining attached to culturally particularistic horizons. Instead, legal pluralists look

towards decentralised sites of conflict resolution as fertile sources of critique.

That said, the law-related dimension of their title (*Legal* Pluralism) implies an abiding association with the legal form, demonstrating an awareness that an alternative field of dispute resolution is dependant in a variety of ways upon the possibility (if not actual existence) of centralised law. To this end, the very title of the field resonates with the tension which exists between *closure* and *critique*, a tension which becomes the problematic that propels this text.

With that tension so clearly to the fore, legal pluralism promises rich insight into the future of law - particularly the 'moderate' versions of the paradigm, whose tendencies to fragment the field of legality are more circumspect than those of their more extravagant kin. Specifically, legal pluralism has the potential to inform about the characteristics of legal forms that might ensue from social conflicts which successfully undermine the hubristic pretensions of formal law.

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November 1998

Acknowledgements

As Peter Fitzpatrick reminds us in *The Mythology of Modern Law*, beginnings are always desperate places. This is particularly the case when it comes to acknowledging people for their assistance in the writing of a book. In terms of immediate scholarly support, supreme thanks go to Gregor McLennan for his warm encouragement, guidance, and friendship throughout the course of this project. Warm memories, also, go to David Burns whose untimely death during the writing of the text heightened the significance of his role in launching me into it all. To colleagues at the Department of Sociology and Women's Studies at Massey University, and at the European Group for the Study of Deviance and Social Control in Bangor, Wales, also, many thanks for providing stimulating forums for the airing of my ideas. During the construction of the book, I was also privileged to make the acquaintance of Colin Sumner, Alan Hunt, Margaret Wilson, George Pavlich, and Peter Fitzpatrick, each of whom helped clear my thoughts in refreshing ways. Last, but by no means least, I wish to acknowledge the brilliance of the various socio-legal theorists with whom I engage in this book - including many of the above - whose committed and passionate writing provoked my curiosity so deeply.

Contents

1 The Pressure to Reimagine Law

Toward an Alternative Conception of Law

'We're here for justice' the defendant announced to the courtroom as he entered.[1] Intimations of the case's significance had emerged the previous month when he, Arthur Harawira, initially appeared in court, charged with assaulting a group of actors that had been hired to portray (at a book-launch) the fictional arrival of nineteenth century Spanish colonists to New Zealand/Aotearoa.[2]

In response to the judge's inevitable and formulaic enquiry regarding the defendant's guilt or innocence in the matter of the assaults, Arthur Harawira informed that he refused to recognise the authority of the court over the issue. Rather, he required that the case be heard in a site appropriate to his identity (Maori), in a culturally appropriate institution (the marae[3]), by his peers rather than a professionalised judiciary, and in accordance with the cultural lore of his people.

While reasonably new to the New Zealand jurisdiction, marae-based court hearings had become a respected fixture of the judicial architecture. Paradoxically for the defendant, in order for his case to be referred to the marae, he had to acknowledge the court's authority over him. To do so, however, was to cede his whole argument. His issue was not with the technicalities of the case-at-hand but with the dominance of New Zealand's Euro-centric conception of law, of the way in which this had blinded the author's agents from sensing a responsibility to respect local Maori lore and, moreover, of the manner in which the presumed superiority of the English legal system prevented local Maori lore from being recognised in its own terms. In keeping with his convictions, therefore, the defendant maintained his resistive stance toward the formal law. The judge subsequently interpreted his response as being a plea of 'not guilty'. Somewhat exasperated at not being understood, and risking contempt of court and open-ended incarceration if he was to pursue his contrary position, the defendant left to apply for legal aid.

Identity-Politics as a Source of Legal Critique

Cases such as Harawira's call into question the capacity of routine legal activity to recognise forms of identity and conceptions of law that lie beyond its conventionalised terms and classification systems. Moreover, they raise questions about how alternative conceptions of law can avoid falling prey to the limitations of their own perspectives. The challenge which they raise, is to develop an approach to the question of *Law* that simultaneously appreciates the sense of closure and moral certitude that legal pronouncement brings to conflict and, concurrently in critique of that closure, to appreciate the historically contingent and provisional nature of all legally-erected horizons.

Furthermore still, this challenge calls for an understanding of the elusive characteristic which enables subjects to simultaneously embrace both *closure* and *critique*, of the characteristic which empowers the observer to withstand the twin lures of *juridical certitude* and the *thrill of interminable critique*.

The task at hand is to provoke this impossible state from the silence within which it lies. It is a capability that seemingly exists beyond the efforts of human endeavour, yet which is firmly embedded in the possibilities of human history. It is neither willed into being nor, when emergent, able to be captured within creed or statute. It remains beyond representation and, indeed, must apparently remain that way in order to exist. Significantly, it only emerges fleetingly in the crucibles of those social conflicts where parties discover a mutual invincibility and a need to image new vistas of mutual recognition, accommodation, and co-habitation. These stimulating points of struggle potentiate horizons of possibility that are as significant in their social effects as the preceding conflicts were horrifying in practice. They are rare and precarious moments.

The Quest for Progressive Legal Change

The quest for progressive change, as exemplified in the above legal case, points to the emergence of various desires to re-evaluate the appropriateness of monistic concepts of law, as characterise Euro-centric systems of legality. They are propelled, in part, by a new-found emphasis on identity. Through political movements such as the United Nations Working Group on Indigenous Rights, to the apparent popularity of theoretical movements such as post-modernism and post-colonialism, it is increasingly recognised that 'peripheral' grounds for belonging (for example, of ethnicity, cultural identity, linguistic use, and sexual-orientation) are as significant in the

constitution of selfhood as the universal forms that have hitherto dominated socio-legal theory (of liberalism, socialism, and feminism, for example). Moreover, for socio-cultural commentators such as Charles Taylor, misrecognition of identity by others (whether of a peripheral or orthodox nature) results in a misrecognition of self which is so injurious to the psyche that it takes on the 'rank of a harm', equal in significance to 'inequality, exploitation, and injustice' (Taylor 1992: 64).

As such insights become more widely accepted, space opens for debates on the meaning and role of concepts through which identity is produced and reproduced, such as *Law*. More specifically, the space rejuvenates an important question first posed by legal pluralists in the nineteenth and early twentieth century; to what extent can orthodox conceptions of law be relied upon to recognise socio-cultural identities in a just manner and adjudicate fairly within conflicts between differently-positioned communities? This text wrestles with that question.

The emphasis on identity, upon which this text pivots, arises from a broad and disparate struggle for politico-legal affirmation that flies by 'the politics of recognition' (Taylor 1992; Tully 1995). This term encompasses the activities of a plethora of political movements that 'jointly call cultural diversity into question as a characteristic constitutional problem of our time' (Tully 1995: 1-2). The range of demands are extremely broad. Various nationalistic, linguistic, ethnic, inter-cultural, feminist, religious, and indigenous voices call for the right to self-determination. Their significance goes beyond their sheer number. Moreso, their diversity produces a 'multiplicity of demands' for self rule that 'conflict violently in practice' (ibid.: 6). The threat of violence propels a search for horizons of coexistence that are not tied to an overarching legal theory. The goal is to construct an approach that does not subjugate other perspectives to itself and, in the process, dissemble its own cultural imperatives under an aura of neutrality. It is to realise a hoary political maxim - to eradicate 'the injustice of an alien form of rule' and allow communities to aspire 'to self rule in accord with [their] own customs and traditions' (ibid.: 6).

The emphasis on localised identity and self-determination accompanies a perception that expectations must be reformulated about the capacity of modernist explanatory-theory to facilitate the emancipation and self-rule of socio-cultural communities. All too frequently the emancipationist projects that have been inspired by modernist aspirations for human-perfection have produced illiberal outcomes. Stalinism and the Chinese Cultural Revolution are two startling examples. Added to this are the countless wars that have been waged in the name of nationalist identity.

Post-modern theory - with its scepticism toward the existence of metaphysical foundations and irrefragable knowledge - issues a severe challenge to the pretensions and disempowering policy implications of modernist (particularly positivist) theorising. According to its general argument, the plethora of language games through which identity and knowledge actually develop are dissembled by the legislative meta-narratives that embody modernist thought. Moreover, the two central institutions of modernist meta-narrative - science and law - have clearly failed to manage the 'excesses and deficits' that have accrued within modern social relations (Santos 1995: 3). In a duplicitous manner, these institutions have simply (and erroneously) applied the same sets of assumptions to solving social problems as gave rise to them (such as assuming the stability of social systems for the purpose of instrumentally manipulating them, of reifying undemocratic social relations in the process [capitalist, masculinist, imperialist, etc.], and of thereby limiting the parameters of political debate to that which has not been reified (Fay 1975: 57-64)).

Silences in the Post-Modern Critique of Legal Progress

In its rebuttal of modernist theorising and legal progress, post-modernism is itself at risk of becoming a meta-narrative that threatens to coagulate into a form of social regulation. Indeed, its positioning as a binary-opposite to 'modernism' signals that it is not free from the classificatory device that lies at the centre of modernist forms of regulation - the dualism. To this end, crude variants of post-modern legal theory simply mirror many of the tenets of modernist legality that are supposedly up for deconstruction. Various examples of this will become evident as the text proceeds.

Despite these somewhat generalised observations, serious regenerative theorising is being undertaken within law to ascertain the extent to which post-modernist insights can in fact provide an escape-route from the policing effects that some commentators maintain are intrinsic to modernist social thought and policy. This thesis examines a number of these. Personally, I am sceptical that post-modernism *per se* holds the keys to such an escape, being an aspect of that which it repudiates. Rather, 'answers' might come as much from the repudiated Other (modernist social and legal theory) as from the particular insights to emerge from post-modern reflection. Post-modernism does usefully temper, however, the *attitude* with which we approach modernist theory, highlighting our inability to conclusively determine the verisimilitude of modernist presuppositions and thus signalling their interminable provisionality.

That said, such insights are not the preserve of the post-moderns. Post-positivists (for example Alexander 1995) and realists, alike (Bhaskar 1975; Hahlweg and Hooker 1989; Hahlweg 1991; Hooker 1995), argue on ontological grounds that human knowledge is inevitably out of phase with the actuality of material social life and, moreover, that the ways in which we reflect on our perceptions are frequently made the subject of specific critique and refinement.

The major benefit that these modernist forms of regenerative theorising offer the 'politics of recognition' is a form of critique that does not eviscerate the development of reasonable knowledge-claims. This saves the notion of critique from the fate of its own counter-ontology - that is, from the sense of perpetual open-endedness that apparently accompanies images of total fluidity - by subjecting the very idea of critique to knowledge-claims that presuppose the possibility of closure. In this vein, a central contention to emerge in this text is that closure and critique are an important binary opposition for the constitution of knowledge. To use Brian Fay's argot, this particular dualism is a non-pernicious one (Fay 1996), supplying a valuable, interminable tension that prevents knowledge-claims from either calcifying around dogmatically held precepts or, alternatively, being relegated to the realm of mythology.

The indeterminate nature of post-modern critique - which this text questions - is also reflected in an unreasonable level of responsibility that is given to subjectivity for the courses of human history. The significant role that is given to subjectivity is most evident in those theories that analyse law in terms of the decentred, interpenetrating, and mutually constituting nature of decision-making processes. When pushed to their logical conclusion - as I shall be demonstrating later - such arguments suggest that the centre of decision-making and legal judgement is the judging subject, understood as a dislocated site of social, cultural, and economic interpellation. The non-determined nature of that subjectivity ensures that no decision-making processes can retain an axiomatic sense of authority, that authority-claims must constantly re-create the conditions of their legitimacy and, positively, that the fluidity of this creative process ensures that innovative responses to intractable socio-legal problems remain a constant possibility.

This subjectivity is motivated to act, moreover, by states such as 'desire' and 'sense of destiny', that emerge in an inexplicable way from the 'history' of each subject's discursive interpolation. Desire and destiny thereby signify a proto-religious dynamism through which human potential is activated and realised. In so doing, they subtend - as sources of explanation - the humanist and structuralist emblems of 'morally-

autonomous individuality' and 'gender, ethnicity, class, and normative system'. In that cause, the concept of explanation alters in ways which undermine the capacity of theory to identifying generative mechanisms behind human interaction or of predicting the outcomes that might emerge from various blends of social constraint and personal freedom. Rather, explanation becomes akin to the description of processes and mechanisms through which particular expressions of power come into being. The forms that subjectivity takes, from this perspective, are not to be explained in terms of prior and causative constellations of social interest but, rather, as effects of power-strategies that exist independently of human interest. Indeed, the notion of coherent (albeit complex) constellations of interest becomes impossible. As a consequence, the ultimate attention given to subjectivity leaves little to explain. What is left is the description of the chaotic maelstrom of human interaction.

Against the Opposite: The Hope of Closure

In seeking to avoid a situation where an aleatory conception of subjectivity becomes the 'last word' in legal pluralism, I do not wish to privilege the apparently opposite approach, of legal frameworks that encase subjectivity within a closed narrative (such as liberalism), as a way of evading perpetual and directionless critique. Liberal-procedural forms of law have, indeed, accrued significant status through their apparently successful and impartial arbitration of intransigent and ambiguous conflict. Their merit is recognised in the favourable attention given to them by notable social commentators such as Jürgen Habermas (Habermas 1994; 1996).

For Habermas, liberal legality has an undeniable potential to successfully negotiate between competing moral and social horizons, in keeping with the conditions of rationality that putatively underpin the very possibility of communication. This ability translates into a neutral position for law with respect to any of the specific interests over which it adjudicates. Moreover, it ascribes each subject with a decontextualised subjectivity by according them with formal equality and by reducing conflicts to questions about the applicability of particular socio-legal rights and communicative-rules to given contexts. So long as lawyers adhere to a set of procedural-rules that are established by those over whom law rules, it is suggested, the value-commitments of its individual incumbents vanish and the issues at hand emerge for dispassionate debate. As such, liberal legality has attracted the image of an adjudicative-mechanism that is potentially and authentically neutral with respect to the socio-cultural identities and ideological commitments of its participants. This, I suggest, is a fecund image that

ought to remain deeply embedded within our collective imaginations. It is, however, only an image, not an actuality.

The critical legal studies movement, in particular, has cast serious doubt on the extent to which liberal notions of law are neutral either in theory or practice.[4] Rather, it suggests that liberalism, as both narrative and political practice, stymies thoroughgoing consideration of social conflicts that pose serious threats to the well-being of marginalised groups. From the standpoint of socialist, feminist, and post-colonial perspectives, for example, law's partiality toward bourgeois, masculinist, and Euro-centric ideals is readily apparent.

Within western legal jurisdictions such as the United Kingdom, the United States of America, Australia, and New Zealand/Aotearoa, for example, the right to private property and to individual self-determination unmistakably cement bourgeois, masculinist, and Euro-centric notions of the social good within the common consciousness. This valorisation of individualism occurs in spite of the value that legal discourse can, on occasion, ascribe to the collective consumption of social goods (through the development, for example, of agreements between ethnic groups such as New Zealand's *Treaty of Waitangi*), or the equalisation of access to education, work, and health for marginalised groups (such as women, homosexuals, and the aged). The provision of access, however, does not necessarily correlate with the realisation of positive outcomes. Empowering legal provisions can all too easily be overshadowed by the enduring social inequalities that lie beneath liberal images of a fundamentally cohesive polity, inequalities that pattern the daily lives of those for whom the provisions are intended.

Moreover, the abstracted nature of legal discourse has the potential to implicate law in the perpetuation of social inequality by failing to adequately confront such sources of injustice in the multi-faceted and internally-differentiated forms that they take in actuality. The legal discourses that should facilitate incisive deliberation on injustice tend, in practice, to congeal around dualisms that simplify the analysis of complex, social issues. To this end, according to the critical-legal account, the individualistic, consensus-oriented, and security-focused modality of liberal legal discourse has the potential to perpetuate social disadvantage.[5]

Negotiating Closure and Critique: Evolutionist Theory

The space between orthodox conceptions of law (with their emphasis on the stabilisation of meaning and social order) and pluralistic conceptions (with their emphasis on the transformation of the social and conceptual worlds)

can be usefully negotiated using the following tenet from evolutionist theory: the formulation of knowledge is a fluid and non-linear process (but not fully directionless and incomprehensible), that evolves in accordance with humanity's need to increase its adaptability in the face of changes in its socio-biological environments. This text is devoted to developing and applying that idea to the arena of law. It begins below with reflection on the use of the governance paradigm in legal analysis, arguing that a suitably configured evolutionist paradigm usefully overcomes a deficit in that approach, namely the marginalisation of identity in the construction of progressive socio-legal analysis and activism.

A failing project The past decade has seen a significant degree of socio-legal energy invested in theorising and researching the relationship between formal and indigenous conceptions of law (with regard to Australasian literature see, for example, works by Jackson 1987, 1988; Pratt 1992; Morris and Tauri 1995; Wickliffe 1995; and collections by Kawharu 1989; Hazlehurst 1995a, 1995b, 1995c; and Wilson and Yeatman 1995). Despite that considerable investment, there are few indications that indigenous perceptions are fundamentally altering the shape of formal legality. Debates about the relationship of the New Zealand Treaty of Waitangi to that nation's constitutional law, for example - which symbolise the cusp of inter-ethnic understanding in that jurisdiction - remain dominated by discourses whose origins are either European liberal philosophy (see, for example, Moore 1998; Brookfield 1989; and Palmer 1992, 1995) or European legal theory (good examples being McHugh 1989 and Keith 1995). Indeed, as indigenous lawyer, Moana Jackson, lamentably opines (1995a: 34-5), the ironical outcome of this otherwise laudable recognition of indigenous legal systems is the re-colonisation of indigenous peoples through the assimilation of their views *via* the language of *legal pluralism*.

To foreshadow the language through which I shall discuss this regressive situation, formal legal systems have the potential to use perspectives from indigenous peoples (and others) in a functionalist manner, as a resource for adapting their own self-identity to the diversifying nature of socio-cultural life (as 'core social institutions'). The field of socio-legal orders is thus interpreted as a self-regulating organism to which the various expressions of law contribute, rather than as a stratified domain of potentially independent legal sub-systems with diverse forms and identities. The outcome is the maintenance of formal law's hegemonic status.

This problem of misrecognition pivots on the issue of identity. Specifically, the various perspectives that emerge and/or exist on the

boundaries of formal legal thought fail to be accorded an identity that is independent of professionalised law. To this end, indigenous conceptions of legality tend to get subsumed by jurisprudence as a result of the latter's failure to recognise the specificity and irreducible nature of the former.

This text interrupts that regressive situation by inserting the dimension of identity into a particularly insightful and progressivist form of theorising about legal pluralism (Hunt 1993), one which uses Foucault's concept of *governance* to articulate the relationship between the professionalised justice of formal state law and the array of regulatory orders and modes that constitute the wider domain of legality. This addition is pivotal for socio-legal thought to contribute to the recognition and validation of non-European conceptions of law in their own terms.

Beyond the legal domination of law Questions about the most suitable way to conceptualise the fields of legality and regulation have been usefully posed as a confrontation between the rule-based image of law and those that portray law as a reflection of social processes (Hunt 1993: 301-8). The latter, flying under the name of socio-legal theory - and constituted by the 'law and society movement' and 'critical legal studies' - emerged in resistance to the cloistered image that developed around formal law, as a rule-based and self-referential institution. Principal protagonist for formal law was H.L.A. Hart (Hart 1961). His conception of law firmly embedded the notion of legality within professionalised justice by arguing that the grounds for legal rules lay in the activities of legal officials. Finnis' 'classical natural law' theory - as a significant co-contributor to this 'positive' conception of law - departed slightly from this perception (1980), positing that legal norms have their origin within social interaction. The ability to distinguish between plebescatory norms and those of a higher order (i.e. law) resides, however, only with those at the zenith of academic jurisprudence.

The most strident challenge to the rule-based paradigm has come from Ronald Dworkin, who has argued that the most significant issue in law is the interpretation of rules, not the rules themselves (Dworkin 1986). This thesis, however, merely repositions legal debate around questions about the nature of law's founding force (that is, about the nature of its meta-rule). In a step that is more sensitive than Hart's or Finnis' approaches to the pluralised reality of social life, Dworkin maintains that the source of the founding force is in a 'law' that exists 'beyond law'. Ironically, however, only appellant judges have access into that realm, not social scientists or lay commentators. Thus, in the same manner that Hart and Finnis locked the