



JURISPRUDENCE OF LIBERTY ^{2nd} Edition

SURI RATNAPALA | GABRIËL A MOENS

100
 LexisNexis®
Butterworths 1911 to 2011 

Jurisprudence of Liberty

Second Edition

Suri Ratnapala

LLB (Colombo), LLM (Macquarie), PhD (Queensland)

Professor of Public Law, T C Beirne School of Law

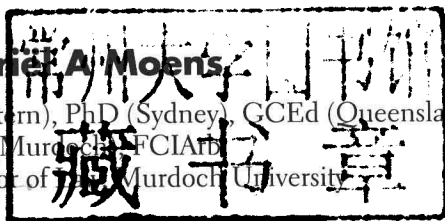
University of Queensland

Gabriel A. Moens

JD (Leuven), LLM (Northwestern), PhD (Sydney), GCed (Queensland),

MBA (Murdoch), FCI Arb

Dean and Professor of Law, Murdoch University



LexisNexis Butterworths

Australia

2011

LexisNexis

AUSTRALIA	LexisNexis Butterworths 475-495 Victoria Avenue, Chatswood NSW 2067 On the internet at: www.lexisnexis.com.au
ARGENTINA	LexisNexis Argentina, BUENOS AIRES
AUSTRIA	LexisNexis Verlag ARD Orac GmbH & Co KG, VIENNA
BRAZIL	LexisNexis Latin America, SAO PAULO
CANADA	LexisNexis Canada, Markham, ONTARIO
CHILE	LexisNexis Chile, SANTIAGO
CHINA	LexisNexis China, BEIJING, SHANGHAI
CZECH REPUBLIC	Nakladatelství Orac sro, PRAGUE
FRANCE	LexisNexis SA, PARIS
GERMANY	LexisNexis Germany, FRANKFURT
HONG KONG	LexisNexis Hong Kong, HONG KONG
HUNGARY	HVG-Orac, BUDAPEST
INDIA	LexisNexis, NEW DELHI
ITALY	Dott A Giuffrè Editore SpA, MILAN
JAPAN	LexisNexis Japan KK, TOKYO
KOREA	LexisNexis, SEOUL
MALAYSIA	LexisNexis Malaysia Sdn Bhd, PETALING JAYA, SELANGOR
NEW ZEALAND	LexisNexis, WELLINGTON
POLAND	Wydawnictwo Prawnicze LexisNexis, WARSAW
SINGAPORE	LexisNexis, SINGAPORE
SOUTH AFRICA	LexisNexis Butterworths, DURBAN
SWITZERLAND	Staempfli Verlag AG, BERNE
TAIWAN	LexisNexis, TAIWAN
UNITED KINGDOM	LexisNexis UK, LONDON, EDINBURGH
USA	LexisNexis Group, New York, NEW YORK LexisNexis, Miamisburg, OHIO

National Library of Australia Cataloguing-in-Publication entry

Author:	Ratnapala, Suri.
Title:	Jurisprudence of Liberty.
Edition:	2nd edition.
ISBN:	9780409327748 (pbk).
Notes:	Includes index.
Subjects:	Liberty. Civil rights. Civil rights - Australia. Law - Philosophy.
Other Authors/Contributors:	Moens, Gabriel.
Dewey Number:	342.94085.

© 2011 Reed International Books Australia Pty Limited trading as LexisNexis.

1st edition 1996

This book is copyright. Except as permitted under the Copyright Act 1968 (Cth), no part of this publication may be reproduced by any process, electronic or otherwise, without the specific written permission of the copyright owner. Neither may information be stored electronically in any form whatsoever without such permission.

Inquiries should be addressed to the publishers.

Typeset in Electra LH and Coronet.

Printed in Australia by Ligare Pty Ltd (NSW).

Visit LexisNexis Butterworths at www.lexisnexis.com.au

Cover Image: Statue of "Themis", Goddess of Justice, The Law Courts Complex, George Street, Brisbane, Queensland

This book is dedicated to
Edith Moens and Rusri Ratnapala for their lifetime of support and
encouragement.

Preface

The concept of 'liberty' means different things to different persons. Yet, it is clear that all human beings cherish liberty in one form or another. It is also clear that law has a profound connection with and impact on liberty. For example, people may be deprived of their liberty contrary to law or they may be denied their liberty by force of law. Indeed, law has the potential to both promote and destroy liberty.

As legal theorists we have been interested in the relationship between liberty and law for a long time. Textbooks on jurisprudence tend to focus on the great debates relating to people's understanding of the meaning of law. While these debates are central to the concerns of this book, we seek to engage the reader in a discussion of the profound further question concerning the extent to which liberty is dependent on, and fashioned by, the way in which 'law' is understood in society.

Of course, natural law theory, which is one of the oldest traditions in western jurisprudence, has always maintained the inadequacy of notions of law which associate legality solely with formal validating criteria such as a ruler's express will or a judge's authoritative determination. Although not all natural law proponents subscribe to the maxim *lex injusta non est lex*, the tradition, in general, has sought to test enacted law against moral criteria. In doing so, it has curtailed the excessive use and abuse of governmental power. Chapter 12 of this book, which deals with the German border guard cases and the duty to disobey immoral laws, provides an example of the timeless appeal and force of natural law doctrine. The re-ignition of the natural law debate in these cases stimulated us into writing and compiling this book.

There is, however, another jurisprudential tradition which has contributed significantly to the cause of liberty, but which has been studiously neglected in legal circles. This is the tradition which embraces the work of a diverse group of scholars who explain law as an endogenous 'bottom up' phenomenon rather than as an exogenous imposed 'top down' projection of authority. The revival of this tradition owes more to the efforts of F A Hayek than, perhaps, to any other modern thinker. Professor Hayek's work has inspired or provoked many of the contributions in Part Two of this volume.

The first edition of this book, published in 1996, was dedicated to the memory of Professor Eugene Kamenka who, together with his wife Alice Erh-Soon Tay, contributed to this book. Professor Kamenka died during the compilation of the first edition, on 19 January 1994. He was for many years the distinguished Professor of the History of Ideas at the Australian National University. He survived the Nazi devastation of Europe and the communist tyranny in Eastern Europe to become one of the World's most erudite and

articulate, intellectual defenders of liberty. Professor Kamenka's intellectual prowess, his courage and his sincerity of purpose, won him deep respect on both sides of the ideological divide in the west. In his endeavour, he was strongly supported by his wife, Professor Alice Erh-Soon Tay who taught *Jurisprudence* at the University of Sydney for many years. She was also the supervisor of Professor Gabriël Moens's PhD dissertation, entitled *The Quality of Equality*, completed in 1982. One could not possibly have hoped to have a better mentor than Professor Tay who, more than any other person, kindled Professor Moens's interest in jurisprudential issues. Professor Tay who died on 26 April 2004, left a formidable legacy, some of which is preserved in her article reproduced in this volume.

The second edition of this book, which is a substantially enlarged and improved edition and contains scholarly discussion on a number of contemporary threats to freedom under law, is dedicated to Edith Moens and Rusri Ratnapala. Edith and Rusri have provided the authors with a lifetime of support and encouragement, which enabled us to develop our academic careers and, most importantly, sustained us during our endless conversations with our contributors and helped us to deal with the multi-faceted challenges inevitably involved in the compilation of this volume. Due to their efforts, this has been an uplifting and 'liberating' experience.

The production of this book relies substantively, but not exclusively on contributions by academics from the T C Beirne School of Law, University of Queensland and Murdoch University School of Law. Apart from the introductory chapter on *Law, Legal Theory and Liberty*, current academics from the former institution have contributed four chapters and academics from the latter law school have contributed three chapters. In addition, during the compilation phase of the book, Professor Marc De Vos, University of Ghent, Belgium served as a Visiting Professor at Murdoch Law School.

This book is the result of the work of a truly international cast of contributors who, although diverging in their theoretical and methodological approaches, share a deep interest in the complex relationship between law and liberty. The editors of this book personally know all the contributors to this volume: these have been selected for their ability to make a substantive contribution to the intellectual and scholarly debates dealing with the relationship between law and liberty. We are grateful for their collegial and unwavering commitment to this project and their outstanding contributions to the literature on the jurisprudence of liberty.

Authoring and editing a book of writings generated within diverse stylistic systems and traditions poses special problems. In this regard we must make special mention of the excellence and dedication of our Research Assistant, Dr John Trone, Commissioning Editor Jocelyn Holmes, Development Editor Kerry Paul and the production team whose efforts considerably eased our burden and ensured that the book met the highest editorial standards.

We hope that this book will not only serve as a valuable teaching resource in courses dealing with Jurisprudence, Legal Theory and Philosophy of Law, but will also help to generate an awareness in the wider community of the relevance of legal theory to the cause of liberty.

Suri Ratnapala
Gabriel A. Moens
1 October 2010

Table of Cases

References are to paragraph numbers

- ACTV Ltd v Commonwealth (1992) 10.56
- Addie & Sons (Collieries) Ltd v Dumbreck [1929] 10.17
- Allgeyer v Louisiana (1897) 5.33
- Allegheny Co. v Greater Pittsburgh ACLU (1989) 13.46
- Arnold v Minister Administering the Water Management Act 2000 20.59, 20.60, 20.61
- Asylum case (1950) 16.14
- Attorney-General (Cth); Ex rel Mckinlay v Commonwealth (1975) 20.9
- Bagg's case (1615) 10.55
- Bank of New South Wales v The Commonwealth (1948) 20.58
- Bate's Case (1606) 3.36, 3.37
- Boos v Barry (1988) 5.49
- Bowers v Hardwick (1986) 13.84
- Brady v Maryland (1963) 5.40
- Brandenburg v Ohio (1969) 13.92
- Buck v Bell (1927) 13.76
- Buckley v Valeo (1976) 10.68
- Bushell's Case (1670) 3.45
- Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad' [1976] 10.22
- Calvin's Case (1608) 13.14
- Camara v Municipal Court (1967) 5.49
- Church of Lukumi Babalu Aye v Hialeah (1993) 13.94
- City of Boerne v Flores (1997) 13.97
- Compassion in Dying v Washington (1998) 13.56
- Compton's Case 3.34
- Cook v Fountain (1676) 10.7
- Cruzan v Director, Missouri Department of Health (1990) 13.55
- Cutter v Wilkinson (2005) 13.97
- Damell's Case (1627) 3.36, 3.37
- DeFunis v Odegaard (1974) 10.68
- Didden v Village of Port Chester (2007) 20.64
- and Goldstein v Pataki Dignan's Case (Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan) (1931) 3.54
- District of Columbia v Heller (2008) 5.49
- Donoghue v Stevenson [1932] 10.48
- Dorman v Rodgers (1982) 20.3
- Dred Scott v Sandford (1857) 5.1
- Duport Steels Ltd v Sirs [1980] 10.27
- Edwards v Aguillard (1987) 13.49, 13.52
- Eisenstadt v Baird (1972) 13.62
- Employment Division v Smith (1990) 13.94, 13.95
- Entick v Carrington (1765) 10.62
- Epperson v Arkansas (1968) 13.50
- Falkner & Ors v Giborne District Council (1995) 20.51
- Fisheries Jurisdiction case (1974) 16.15
- Furniss v Dawson [1984] 10.61
- Geddens v Hales (1686) 3.38, 3.39
- Gitlow v New York (1925) 5.24
- Goldstein v Pataki (2008) 20.64
- Gonzales v O Centro Espirita A Beneficente Uniao Do (2006) 13.97
- Griswold v Connecticut (1965) 13.62
- Herrington v British Railways Board [1972] 10.17, 10.18, 10.19
- Hodgson v Minnesota (1990) 13.63
- ICM Agriculture Pty Ltd v The Commonwealth [2009] 20.14, 20.46, 20.56, 20.58, 20.59, 20.60, 20.61
- Jackson v City of Joliet (1983) 5.57
- Jones v Padavatton [1969] 10.30

- Kelo v City of New London (2005) 20.63
 Konigsberg v State Bar of California (1961) 5.53
- Lawrence v Texas (2003) 13.85, 13.86
 Lee v Weisman (1992) 13.45
 Lemon v Kurtzman (1971) 13.48
 Lim v Camden Health Authority [1979] 10.20
 Llandovery Castle Case (1921) 12.34
 Lochner v New York (1905) 5.32, 10.69
 Loving v Virginia (1967) 13.69
 Lucas v South Carolina Coastal Authority 20.53
 Lüth's Case (1958) 12.60
- Mabo v Queensland (No 2) (1992) 10.21, 10.24, 10.30
 McCreary County v ACLU (2005) 13.43
 McDonald v Chicago (2010) 5.25
 McLoughlin v O'Brien [1983] 10.44, 10.45
 Mandurah Enterprises Pty Ltd v Western Australian Planning Commission [2010] 20.66
 Marbury v Madison (1803) 3.51, 5.20, 13.18, 13.34
 Marsh v Chambers (1983) 13.44
 Maynard v Hill (1888) 13.69
 Meyer v Nebraska (1923) 13.34, 13.72, 13.74
 Minister of State for the Army v Dalziel (1944) 20.3
 Miranda v Arizona (1966) 5.40
 Mutual Pools & Staff Pty Ltd v The Commonwealth (1994) 20.57
- Nollan v California Coastal Commission (1987) 20.54
 North Sea Continental Shelf cases (1969) 16.15
- Palko v Connecticut (1937) 5.25
 Perry Education Assn v Perry Local Educators' Assn (1983) 5.49
 Perry v Schwarzenegger (2010) 13.87, 13.88
 Pierce v Society of Sisters (1925) 13.75
 Planned Parenthood v Casey (1992) 13.59, 13.86
- R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council (2009) 20.65, 20.67
 Ralevski v Dimovski (1987) 10.19
 Reynolds v United States (1879) 13.84
 Riggs v Palmer (1889) 10.57
 Robinson v California (1962) 13.84
 Robinson v Mollett (1875) 10.48
 Roe v Wade (1973) 13.56, 13.62
 Rootes v Shelton (1967) 10.72
 Rumsfeld v Forum for Academic & Institutional Rights Inc (2006) 5.40
- Saif Ali v Sydney Mitchell & Co [1980] 10.46
 Santa Fe Independent School District v Doe (2000) 13.53
 Schechter Poultry Corp v United States (1935) 5.30
 Seven Bishops' Case (1686) 3.39
 Shadwell v Shadwell (1860) 10.30
 Sherbert v Verner (1963) 13.30, 13.92
 Ship Money Case (1636) 3.36, 3.37
 Skinner v Oklahoma (1942) 13.70, 13.76
 Slaughterhouse Cases (1873) 5.24
 Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health 20.58
 Southern Pacific Co v Jensen 10.16, 10.20
 Spartan Steel and Alloys Ltd v Martin and Co [1973] 10.30
 Spencer v Commonwealth of Australia [2008] 20.45, 20.47, 20.51
 Spencer v Commonwealth of Australia (No 2) [2008] 20.45
 Spencer v Commonwealth of Australia [2010] 20.46
 Streletz, Kessler and Krenz v Germany (2001) 12.4, 12.42
 SW v United Kingdom (1995) 12.44
- Tennessee v Garner (1985) 12.27
 Tennessee Valley Authority v Hill (1978) 10.58
 Te Runanganui o Te Ika Whenua Inc Society v Attorney-General [1994] 20.19

Table of Cases

xv

Thomas v Sorrel [1674]	3.38	Wallace v Jaffree (1985)	13.51, 13.53
Troxel v Granville (2000)	13.34, 13.78, 13.79	Ward v Wilbanks (2010 E.D.MI) 13.102
Turner Broadcasting System v FCC (1996)	13.92	Washington v Glucksberg (1997) 13.55, 13.56, 13.58, 13.64
United States v Carolene Products Co 304 US 144 (1938)	5.33	Westco Lagan v Attorney-General [2001] 20.19
United States v O'Brien (1968)	5.40	Wickard v Filburn (1942)	5.32
Van Orden v Perry (2005)	13.43	Wimbledon case (1923)	16.14
		Wisconsin v Yoder (1972)	13.92

Table of Statutes

References are to paragraph numbers

AUSTRALIA

COMMONWEALTH

Constitution

s 51 (xxxi) 20.20, 20.21, 20.22, 20.23,
20.24, 20.25, 20.44, 20.45, 20.56,
20.57, 20.58, 20.81

s 100 20.59, 20.60

Crimes Act 1969 17.41

Education Act 2004 17.41

Federal Court of Australia Act 1976

s 31A 20.45, 20.46

Legislative Instruments Act 2003 3.57

Mental Health Act 2007 17.41

National Water Commission Act (2004)
.... 20.59

Native Title Act 1993 20.37

Natural Heritage Trust of Australia
Act (1997) 20.44, 20.45

Natural Resources Management
(Financial Assistance) Act (1992)
.... 20.44, 20.45

Racial Discrimination Act 1975 20.37

Social Services Act 1975 17.41

Summary Offences Act 1988 17.41

QUEENSLAND

Legislative Standards Act 1992 3.57
s 4 3.57

Vegetation Management Act 1999 20.39

Wild Rivers Act 2005 20.31, 20.32,
20.34, 20.35

Wild Rivers (Environmental
Management) Act 2010 20.36
s 5 20.36

NEW SOUTH WALES

Administrative Appeals Tribunal Act 1975
.... 3.57

Administrative Decisions (Judicial Review)
Act 1977 3.57

Environmental Planning and Assessment
Act 1979 20.43

Land Acquisition (Just Terms
Compensation) Act 1991 20.66,
20.67

Local Government Act 1993 20.66
s 186(1) 20.66
s 188 20.66

Native Vegetation Act 2003 20.40,
20.43

Native Vegetation Conservation Act 1997
.... 20.43

Subordinate Legislation Act 1989 3.57
s 9 3.57

Water Act 1912 20.57

Water Management Act 2000 20.57

INTERNATIONAL

BRAZIL

Constitution 6.31, 6.32, 6.33, 6.42,
6.44

CHINA

Constitution 20.18

FRANCE

Constitution 2.67, 2.68, 2.71, 2.72,
2.77

Declaration of the Rights of Man and the
Citizen
Article 17 20.18

GERMANY

Basic Law 1949 12.59

Article 1(3) 12.44

Article 20(3) 12.60

Article 97(1) 12.59

Border Law of East Germany 1982
(Grenzgesetz) 12.6

Border Law of East Germany 1982 — *cont'd*

s 27 12.13, 12.21, 12.27

ss 27(1)-(2) 12.12

s 27(2) 12.13, 12.43, 12.44

Criminal Code of East Germany

(StGB-DDR)

s 3(1) 12.13

s 112 12.10

s 213 12.13

s 213(2) 12.13

s 258 12.30, 12.33, 12.34

s 258(1) 12.13, 12.14

ss 258(1)-(3) 12.14

Constitution of East Germany 12.44

Article 19 12.44

Article 30 12.44

Constitution of West Germany

Article 20(4) 12.52

Criminal Code of West Germany

(StGB-DDR) 12.6

s 2 12.6

s 2(3) 12.6

s 3 12.9

s 3(1) 12.47

s 7 12.6, 12.7, 12.9

s 7(1) 12.7, 12.8, 12.9

s 7(2) 12.7, 12.8, 12.9

s 7(2)(ii) 12.9

s 9 12.9

s 212 12.10

s 213 12.10

Military Code of West Germany

(Wehrgesetzbuch) 12.34

s 5 12.34

Reunification Treaty (Einigungsvertrag-

(EGStGB)) 1990 12.5

Article 8 12.5

Article 18 12.20

Article 19 12.20

s 315 12.6, 12.7, 12.9

ss 315(1)-(3) 12.6, 12.7

s 315(2) 12.6

s 315(3) 12.6

s 315(4) 12.7, 12.9

Weimar Constitution

Article 102 12.59

UNITED KINGDOM

Act of Settlement 1701 3.45, 3.50, 3.52

Constitution 3.50, 3.51, 2.67

Bill of Rights 1688 3.43, 3.44, 3.45, 3.52

s 1 3.44

s 2 3.44

s 3 3.44

s 4 3.44

s 9 3.44

s 11 3.45

s 13 3.44

Ecclesiastical Causes Act 1661 3.34

Habeus Corpus Act

s 10 3.45

Magna Carta 1215 3.35, 20.5

Article 39 20.5

Occupiers' Liability Act 1957 10.17

Occupiers' Liability (Scotland) Act 1960

.... 10.17

Reform Act 1832 3.50

Reform Act 1867 3.50

Reform Act 1884 3.50

Scotch Militia Bill Test Act 1708 3.38

Trade Disputes Act 1906 10.56

Trial of Treasons Act 1696 3.45

Triennial Act 1694 3.44

USA

Alabama Code 1975

s 26-21-3 (e) 13.63

Beachfront Management Act 1976

.... 20.53

Constitution 5.1, 5.4, 5.6, 5.8, 5.17,

7.28, 13.3, 13.5, 13.27, 13.28, 13.27,

13.29, 13.31, 13.32, 13.33, 13.34,

13.35, 13.36, 13.37, 13.38, 13.39,

13.41, 13.58, 13.78, 13.79, 13.82,

13.85, 13.95, 20.18

Bill of Rights 5.1, 5.2, 5.3, 5.9, 5.10,

5.11, 5.12, 5.13, 5.14, 5.15, 5.16,

5.17, 5.18, 5.21, 5.23, 5.24, 5.25,

5.26, 5.27, 5.33, 5.38, 5.39, 5.40,

5.41, 5.42, 5.43, 5.46, 5.49, 5.53,

5.54, 5.55, 5.56, 5.57, 5.58, 5.60,

5.61, 13.84

Article I 13.36

Article I, s 8 5.15

Article I, s 9 4.19

Article II 13.36

Article III 13.36

NEW ZEALAND

Resources Management Act 1991

.... 20.51, 20.52

Article VI 13.80
First Amendment 13.29, 13.42,
13.43, 13.44, 13.45, 13.4, 13.46,
13.48, 13.53, 13.89, 13.90, 13.91,
13.95
Fifth Amendment 13.58, 13.69,
20.18, 20.53
Fourteenth Amendment 13.58,
13.69, 20.18, 20.53
Glass–Steagall Act 1999 18.58
Wall Street Reform and Consumer
Protection Act (Dodd-Frank Act) 2010
.... 18.51, 18.52, 18.54, 18.61
Endangered Species Act 1973 10.58,
10.60
Massachusetts Constitution 13.18
Article XXX 13.18
Oregon Death with Dignity Act, OR Rev
Stat Ann 127.800-.897 13.64
Religious Freedom Restoration Act
(RFRA) 13.97
Title 42 United States Code § 2000bb
.... 13.95
Religious Land Use and Institutionalized
Persons Act (RLUIPA)
Title 42, United State Code, Chapter
21C 13.97
Washington Death with Dignity Act, WA
ST 70.245 13.64

USSR

Soviet Criminal Code
Article 16 4.17

INTERNATIONAL

European Convention of Human Rights
Article 7 12.44
Article 7§1 12.43, 12.44
International Covenant on Civil and
Political Rights 12.25, 12.44
Article 6 12.27
Article 12(2) 12.26
Charter of the International Military
Tribunal
Article 6 12.33
Kyoto Protocol to the United Nations
Framework Convention on Climate
Change 20.44, 20.48
Roman Constitution 509 BC 2.2
Statute of the International Court of
Justice
Article 38 16.19
U.N. Convention on the Rights of the
Child 13.80
Universal Declaration of Human Rights
Article 17 20.18
US Uniform Commercial Code
Article 2 16.19

Contents

<i>Preface</i>	ix
<i>Table of Cases</i>	xiii
<i>Table of Statutes</i>	xvii
1 Law, Legal Theory and Liberty <i>Suri Ratnapala and Gabriël A Moens</i>	1
Part 1: Constitutionalism and Liberty	
2 Republican Liberty <i>M N S Sellers</i>	19
3 Separation of Powers: The Cornerstone of Liberty under Law <i>Suri Ratnapala</i>	53
4 Rule of Law and the Democratic World Order <i>Geoffrey de Q Walker</i>	83
5 Enforcing the Bill of Rights in the United States <i>Lael Daniel Weinberger</i>	93
6 Legal Culture and the Rule of Law in Latin America <i>Augusto Zimmermann</i>	115
Part 2: Liberty and the Evolutionary Tradition in Jurisprudence	
7 Hayek's Theory of Rules and the Modern State <i>Viktor Vanberg</i>	141
8 Spontaneous Order and Rule of Law: Some Problems <i>Neil MacCormick</i>	161
9 Law as a Knowledge Process <i>Suri Ratnapala</i>	175
10 Dworkin, Hayek and the Declaratory Counter-Revolution <i>Professor Alan Fogg</i>	205

Part 3: Natural Law and the Defence of Liberty

- 11 Finnis on Liberty
Nicholas Aroney and Bradley Miller 247
- 12 The German Border Guard Cases: Natural Law
 and the Duty to Disobey Immoral Laws
Gabriel A Moens 271
- 13 The Jurisprudential Battle over the Character
 of a Nation
William Wagner 293

Part 4: Utilitarian and Economic Theories of Law

- 14 Utilitarianism and Liberty
James Allan 331
- 15 Liberty, Law and Economics
R Ian McEwin 343
- 16 Law as a Voluntary Enterprise
Francesco Parisi 361

Part 5: Contemporary Threats to Freedom under Law

- 17 Contemporary Radicalism and Legal Theory
Alice Erh-Soon Tay and Eugene Kamenka 381
- 18 The Financial Meltdown and its Threat to Freedom
 under the Law
Marc De Vos 405

Part 6: Rights and Liberties

- 19 Connecting the Hohfeldian Boxes: Towards
 a Technical Definition of Liberty
Ben Brazil 439
- 20 The Erosion of Property Rights and its Effect
 on Individual Liberty
Lorraine Findlay 465
- Index* 495

CHAPTER 1

Law, Legal Theory and Liberty

Suri Ratnapala and Gabriël A Moens¹

1.1 This book is about the relationship between law and liberty. It is obvious that there is a connection between these two concepts. Particular laws can limit liberty or even destroy liberty. Laws can also promote and protect liberty. Liberty, it appears, is ever dependent on law. This connection exists no matter how we define liberty.

1.2 There is another connection between law and liberty that is not so easily discerned. The abstract concept of law that prevails in a society may have a profound bearing on liberty in that society. The kind of liberty that is present in a society where the ruler's every whim is regarded as law is very different to the liberty found in a society where law is conceived as possessing a less arbitrary and hence more predictable quality. A concept of law under which legal rules are supplied by the private desires of lawmakers will result in a society which is very different to one in which the law must bear some relation to the morality of the community, regardless of whether such morality is determined by consulting supernatural authority, found in folkways or established by public consensus.

The meanings of liberty

1.3 The relationship between liberty and legal theory is contested. Not only is there no one agreed conception of law, there is also no single agreed conception of liberty. One's conception of law may be critically influenced by one's conception of liberty and *vice versa*.

1. Suri Ratnapala is Professor of Public Law and Fellow of the Centre for Public, International and Comparative Law, T C Beirne School of Law, The University of Queensland and Fellow of the International Centre for Economic Research, Turin. Gabriël A Moens is Dean and Professor of Law, Murdoch University School of Law; Adjunct Professor of Law, City University of Hong Kong; Deputy Secretary-General, Australian Centre for International Commercial Arbitration; *Membre Titulaire*, International Academy of Comparative Law.

1.4 In this book, the term ‘liberty’ is often used interchangeably with the term ‘freedom’. The broadest possible meaning of freedom is the absence of impediment. Of course, there is no such condition in the universe. The environment always constrains possible outcomes, whether one thinks of the physical world, the biological world or the world of culture. We do not usually use the word ‘freedom’ in relation to purely physical phenomena; we don’t say that the clouds are free to drift or that the rain is free to fall. Sometimes we speak of the freedom of animals in the wild, but generally, the words ‘freedom’ and ‘liberty’ are used to describe a particular aspect of human social life.

1.5 Everyone believes in some form of freedom. The question is: freedom from what? The terms ‘liberty’ and ‘freedom’ have been used in the history of ideas in more than 200 different senses.² The ideal of liberty is sometimes comprehended in the concrete sense. Many liberation struggles have been waged only to replace one oppressor with another, for example a foreign despot with a home-grown one. These are struggles for freedom from a particular oppressor, not from oppression. In this book we are concerned with the more abstract notions of liberty.

1.6 It is also true that we rarely use the term liberty to mean the absence of purely physical impediments. Gravity is an impediment to flight, but we do not say that we have no liberty to fly, only that we are unable to fly.³ Thus, liberty is generally regarded as signifying the absence of impediments for which human agents are responsible. At this point, agreement ends. The question ‘what forms of human action or inaction constitute abridgments of liberty?’ throws up a wide spectrum of responses, resulting, at times, in literally violent disagreement.

1.7 At one end of the spectrum are those who believe that liberty is measurable only in relation to deliberate actions of human agencies. At the other end are those who believe that liberty should be measured in relation to all those circumstances for which human beings, individually or collectively, directly or indirectly, are responsible, or about which human beings, individually or collectively, can do something. According to the latter view, human inaction can also affect liberty. There are, of course, innumerable variants of these positions in between.

Negative freedom and positive freedom

1.8 There is a tendency among political philosophers to distinguish between two types of liberty under the labels *negative freedom* and *positive freedom*. Negative freedom is identified with the words ‘freedom from’, and positive freedom with the words ‘freedom to’. Negative freedom refers to freedom from coercion by others. Positive freedom refers to the capacity to act, or as Sir Isaiah Berlin puts it, the freedom ‘of conceiving goals and policies of my

2. I Berlin, *Four Essays on Liberty*, Oxford University Press, London, 1969, p 121.

3. Helvetius: ‘... it is not lack of freedom not to fly like an eagle or swim like a whale’, in I Berlin, 1969, p 122.