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THINKING ABOUT LAW:
The Wisdom of a Common Law Tradition

by

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INTRODUCTION

1 Michael O'Dea KCSG, AM, in whose honour this 12th Annual Oration is delivered, is an exemplar of a central thesis of this lawyers' homily. **The service of others through a variety of "voluntary associations", governed by law in a common law tradition, is fundamental to the recognition, preservation and promotion of "freedom of conscience", an important freedom cherished by Australians**.

2 Michael was senior partner of the firm of solicitors Carroll & O'Dea until 2005 and he remains in active practice. He has served on the boards of many institutions including the hospital boards of Sacred Heart Hospice, the Mater and St Margaret's, the school boards of Loreto Kirribilli, St Ignatius' and Riverview College, the Overseas Aid Funds for the Sisters of St Joseph and Our Lady of the Sacred Heart, the James Milson Retirement Village, the Christian Brothers Provincial Advisory Council, North Sydney Council as Mayor and many other community organisations. He was made a member of the Order of Australia in 1992 and awarded a Papal Knighthood in 2008.

3 His career exemplifies the practice of law as a profession in which the obligations to clients and the courts are paramount, and in which the demands of justice can never be reduced to those of business.

THE ORIGINS OF THIS PAPER

4 This paper has its origins in reflections on “law”, “the nature of law” and the importance of “voluntary associations” in a free society necessitated by consideration of a routine application for judicial advice made to the Supreme Court of NSW by the administrator of a deceased estate who was troubled about the proper construction of the deceased’s will and what was required to be done, or not done, in management of the deceased’s estate.

5 The administrator was troubled by a direction given by the deceased in the will “to pay my debts, funeral and testamentary expenses, death, estate duties *and zakat payments*”. The will did not define what was meant by “zakat payments” or offer guidance about the person or persons to whom (or the purpose or purposes for which) zakat payments were to be made or the nature and value of any such payments. In those circumstances, the administrator was concerned that the testamentary direction to pay “zakat” may have been void for uncertainty.

6 “Zakat” is a uniquely Islamic form of charitable donation (in Australia, voluntary and payable according to conscience), akin to a tithe in Judeo-Christian tradition, commonly expected within an Islamic community to be paid on an annual basis by an observant Muslim. A religious obligation to pay “zakat” is perceived to be a feature of “Sharia law”.

7 The will of the deceased was evidently executed by him in the belief that it complied with “Sharia law”, principally because it made provision for the payment of “zakat” and, in accordance with a Sharia tradition, the provision made for the deceased’s children favoured his son over his daughters in a ratio of 2:1.

8 The deceased’s testamentary direction to “pay … zakat payments”, if unqualified by the existence of a liability at law or in equity accrued by the deceased during his lifetime, would have been void for uncertainty because it would have had to be construed as conferring on a legal personal representative a power, and a duty, to exercise the function of making

unconstrained discretionary “payments” of an unspecified character and value to unidentified parties for a particular purpose or purposes of an indefinite nature.

9 For reasons explained in a judgment published as *Re Estate of Ahmed Abou-Khalid* [2024] NSWSC 253, I concluded that the expression “zakat payments” in the deceased’s will referred to a conscientious commitment entered into by the deceased during his lifetime, enforceable at law or in equity (for example, as a debt) against his deceased estate, for a payment of money or a payment in kind of a type recognised in his community as a zakat purpose not proscribed by Australian law.

10 Arrival at that conclusion required consideration of the nature of “Sharia law” in the administration of a deceased estate, bearing in mind that, in much of the literature about “Sharia law”, it is presented as if it is universal in its operation and necessarily in conflict with the general law governing Australian society.

11 Upon reflection, I concluded that “Sharia law” is a construct of an Islamic community conceptually equivalent to what is variously described in other religious communities as “Ecclesiastical law”, “Canon law”, “Church law” or, it might be said more generally, “customary law”.

12 In a secular legal system such as that of Australian society that form of “law” is akin to the rules of a “voluntary association” (in common understanding, a “club”) which may bind the members of the association but do not generally affect a broader community.

13 It is not uncommon in any religious community for observant members of that particular community to view their core beliefs as meriting universal recognition even if those beliefs are not shared by the broader community within which the religious community lives. There is no problem with that in a free society so long as there is no compulsion to believe and others are free, unhindered by unwelcome religious enthusiasm, to believe otherwise.

14 The general law governing voluntary associations permits members of a voluntary association (including, but not limited to, a religious community) to live within their community of like-minded people, with minimal outside interference with their internal domestic affairs, facilitating enjoyment of freedom of conscience in a tolerant society where different perspectives of the world can co-exist in mutual respect.

15 This paper is an attempt to explore (without pretending to be definitive) why importance attaches to an understanding of the nature of law; how we think about law; and ideas that inform our understanding, and application, of "law".

16 It serves as a reminder that **"law" is not just about "rules" but requires an appreciation of purposes served by law and the animating spirit of the law**. In that connection it explores the nature of a Judeo-Christian world view that has long been thought to inform the purposes and spirit of Australian law, noting that the civil virtues promoted by a Judeo-Christian tradition are not unique to Judaism or Christianity.

17 The paper is addressed to an audience of prize-winning students who have completed studies in law, business or both in a tolerant university environment that accommodates different religious traditions. Whatever the future holds for a career in law, accountancy or business, the likelihood is that, one way or another, the law governing voluntary associations will have an explicit role to play, as it implicitly does in the general community. It is foundational to a free society.

THE NATURE OF "LAW"

18 How we think about "law" is important. "Law", however defined, is not a closed system of thought. If it were so, it would be narrow and arbitrary at the very least, if not unworkable. In both its formulation and application it must engage with the community it serves and with individuals within that community directly affected by its operation.

19 An application of "law" requires consideration of a "text" (a statement of "rules" or "principles" to be applied, whether written or not), the "context" in which the text is to be applied, and the "purpose" served by the law in the administration of justice.

20 Lawyers often speak emphatically, if not authoritatively, about "the law" despite inherent difficulties involved in settling upon an abstract definition of the concept. Its nature, scope and meaning depend on context and the different perspectives of those affected by its operation.

21 Because those affected by an application of "law" may have different perspectives of "law", and the administration of justice in an Australian context privileges the perspective of an individual affected by decisions made in the application of "law", it is necessary for those involved in the application of "law" (including lawyers of every description, not the least judges) to have, or to develop, a sense of empathy for each affected person: a capacity to see how "others" are, or may be likely to be, affected by events or, especially, decisions made in exercise of a power or authority over "the other". This requires a preparedness on the part of those involved in the application of "law" to step outside their "self". Law may serve self-interest but must, at its best, be other-directed as well.

22 Those who seek to invoke "the law" for their particular purposes must know that the law cannot solve every problem or serve every purpose. Knowledge of the law's limits is a step towards wisdom and its offspring, prudential conduct. The law is often as good as "the spirit" (commonly reflected in the purpose) served by it.

23 An advocate must endeavour to align his or her client's purposes with a purpose served by the law. A cause fought for a foreign or collateral purpose may be summarily dismissed as an abuse of the processes of a court, itself governed by law in its exercise of jurisdiction conferred upon it.

DIFFERENT WAYS OF THINKING ABOUT LAW

24 In civil (as distinct, possibly, from criminal) proceedings, **there are two profoundly different ways of thinking about the administration of justice, a foundational feature of which is a need for respect for those who can protect their own interests, a protective concern for those who cannot and wisdom to know the difference**.

25 An overtly "**purposive approach**" is generally taken in proceedings which essentially require decision-making about the **management** of persons, property and relationships in which the Court may have to deal with parties who are not wholly present before the Court and able to protect their own interests because they have no notice of proceedings or, more often, because they lack capacity for self-management or are otherwise vulnerable. In those proceedings there is generally a strong public interest that requires that the Court endeavour to respect, and protect, the interests of parties, or of unrepresented affected interests, in need of protection. The Court's performance of that function requires a judge, and all parties present before the Court, to focus explicit attention on the purpose of the proceedings. This type of case commonly involves an exercise of the Court's protective jurisdiction (including the jurisdictions historically known as the infancy jurisdiction and the lunacy jurisdiction); the probate jurisdiction (dealing with wills and deceased estates); the family provision jurisdiction (dealing with applications for provision out of a deceased estate); or the general equity jurisdiction (including cases involving allegations of "undue influence", "unconscionable conduct" and "breach of fiduciary obligations"). The appointment and supervision of a "tutor" to act for a person incapable of managing court proceedings also falls into this category.

26 **An adjudicative, rule-based approach** (in contrast to a "purposive, managerial" approach) to thinking about the administration of justice is more likely to be found in proceedings which essentially require the determination (adjudication) of competing claims of right to which all affected parties are before the Court and able to protect their own interests. The public interest

here generally favours an approach that respects the autonomy of each party to make his, her or its own decisions about his, her or its best interests and allows the parties to conduct their proceedings in an adversarial manner. This type of case includes claims on a cause of action in debt, contract, tort or restitution (common law claims) for the payment of money or damages, and commercial causes generally.

27 The two different ways of thinking about the administration of justice highlight a need to be aware of the context in which law, in theory and in practice, is engaged. The worst form of advocacy is one that is insensitive to the nature and purpose of the jurisdiction of the court sought to be invoked.

28 The two types of thinking about the administration of justice often favour different mindsets which can be found in areas of human experience other than law. Characteristically, the purposive, managerial approach might favour a mindset that favours the "general" over the "particular". Characteristically, the rule-based, adjudicative approach might favour a mindset that focuses on "the particular" rather than "the general".

NEUROSCIENTIFIC INSIGHTS INTO LEGAL THOUGHT

29 In the teachings of neuroscience there may be a physical explanation for these different tendencies of mind. In two papers I was called upon to present last year (on 21 March and 19 April 2023), published on the website of the Supreme Court, attention is drawn to the work of Professor Iain McGilchrist, the author of the popular book, *The Master and His Emissary: The Divided Brain and the Making of the Western World* (Yale University Press, expanded edition, 2019). My papers are not original, but rather an acknowledgement that the work of Professor McGilchrist has in recent years come to the notice of senior members of the legal profession as worthy of study, bearing upon how lawyers practise law.

30 In the first of its two parts, the book deals with features of the brain and their implications for an individual. The second part deals with the history of Western culture using insights drawn from the first part.

31 Neuroscience teaches that of the two hemispheres of the brain the left hemisphere tends to be linear, analytical, atomistic and mechanical. It breaks down things into their component parts and deals with them in a linear, sequential way.

32 The right hemisphere tends to be integrative, and holistic and is strong on empathy and emotion. It reads situations, atmosphere and moods. It is the locus of our social intelligence. It understands subtlety, nuance, ambiguity, irony and metaphor. It lives with the complexities the left hemisphere tries to resolve by breaking them down into their component parts.

33 An addendum to the April 2023 paper records insightful observations made by Kevin Connor SC (a medically trained doctor) and Dr Hayley Bennett (a neuroscientist), both of the NSW Bar, about the implications for legal practitioners of advances in neuroscience.

34 Kevin Connor suggested that, as lawyers, we might regularly test our constructs, our abstractions, against reality and what comes to be known as "reality" so that, as we gain new and better understandings of "reality", we might adjust "our constructs, our abstractions, our ways of thinking about the law".

35 Hayley Bennett summarised, and developed, the ideas in one of my papers in terms more insightful than the paper itself:

> "In the second part of his paper, Lindsay J applies the neuroscience understanding to the coalface practice of the profession, and the legal framework surrounding it. This includes the need for legal practitioners to understand the purposive character of the jurisdiction within which they work, which will include the role of the process of case management and the need to look beyond adversarial interests.
>
> More specifically, and in relation to protective, probate and family provision proceedings, Lindsay J also explores context, which will include, for example, contextual information in relation to a person who may be central to protective proceedings, as it is through that person that the world must be viewed.
>
> For me, Lindsay J's paper highlights the tendency of legal practitioners to be rule-bound and to be searching for certainty through text, which he explains, is a result of over-reliance on just one part of the brain (the left hemisphere).

> Furthermore, on my reading of the paper, Lindsay J extends an invitation to legal practitioners to use the whole of their brains in the practice of the profession; to not be unduly weighed down and limited by rule-bound and text focused thinking, but rather, to additionally consider the broad context, and to engage and flow with the higher-level purpose of the jurisdiction within which they work (right hemisphere).
>
> In taking up this invitation, legal practitioners will operate at a number of levels at once, from the concrete and text bound, to the more abstract, contextual and process driven, and thus use both sides and all parts of the brain in wondrous synchronicity."

DIFFERENT MINDSETS: GENERAL AND PARTICULAR

36 In a study of legal history one often encounters these different ways of thinking about the administration of justice associated with different personalities. In the late 18th and early 19th centuries, Sir William Blackstone (the author of *Commentaries on the Laws of England*) favoured the general law and was firmly criticised by Jeremy Bentham, who favoured a particularised codification of the law. In an Australian context, Sir Robert Menzies might be thought to have been the generalist (with his embrace of a common law tradition and scepticism of human rights' narratives in the form of a "bill of rights") whereas Dr HV Evatt exhibited a different, particularist mindset in his championship of the United Nations' *Declaration of Human Rights* reducing grand themes to written, codified propositions.

37 The differences in mindset between "generalists" and "particularists" can also be observed beyond the law: for example, in Catholic theology, comparing St Augustine's "storytelling" narrative style and St Thomas Aquinas' doctrinal rule-based approach, respectively reflecting the different approaches of the classical philosophers, Plato and Aristotle.

38 In thinking about law (and to paraphrase Hayley Bennett) we need to remind ourselves to "use both sides of our brains", focusing on both "the general" and "the particular". Both make a contribution to our understanding of "law" and to its application.

RULE-BASED REASONING AND STORYTELLING NARRATIVES

39 With that in mind, in this paper I aim to advance ideas about the wisdom of a common law tradition in the protection of "freedom of conscience" by reference to both "rule-based reasoning" and "storytelling" narratives.

40 Rule-based reasoning tends, literally, to get to the point, with a preference for propositional presentation which can be analytically efficient if it hits the mark in a receptive mind. But in law, as in life, the shortest distance between two points is not always a straight line. The quickest way to a destination may be the familiar one, not the direct or shortest one. A well-placed story may allow an audience, otherwise unreceptive, the space to capture a point voluntarily, unforced.

41 **Perhaps the best illustration of these two mindsets in operation in the context of a common law tradition is the judgment of the Lord Atkin (a Queensland born Welshman) in *Donoghue v Stevenson*** [1932] AC 562 at 580 (the "snail in the ginger beer bottle case") where he enunciated a general principle about the nature of a "duty of care" which can give rise to an entitlement to damages on a cause of action in negligence (with emphasis added):

> "… [In] English law, there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. *The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question*, *Who is my neighbour? receives a restricted reply*. *You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour?* The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

42 Lord Atkin's italicised words are a direct allusion to the parable of the good Samaritan attributed to Jesus in the *New Testament* at *Luke* Chapter 10 Verses

25-37, here extracted from the King James version of the *Bible* which was the translation most likely available to Lord Atkin:

> "[25] AND, behold, a certain lawyer stood up, and tempted him, saying, Master, what shall I do to inherit eternal life?
>
> [26] He said unto him, What is written in the law? How readest thou?
>
> [27] And he answering said, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy strength, and with all thy mind; and thy neighbour as thyself.
>
> [28] And he said unto him, Thou hast answered right: this do, and thou shalt live.
>
> [29] But he, willing to justify himself, said unto Jesus, And who is my neighbour?
>
> [30] And Jesus answering said, A certain man went down from Jerusalem to Jericho, and fell among thieves, which stripped him of his raiment, and wounded him, and departed, leaving him half dead.
>
> [31] And by chance there came down a certain priest that way; and when he saw him, he passed by on the other side.
>
> [32] And likewise a Levite, when he was at the place, came and looked on him and passed by on the other side.
>
> [33] But a certain Samaritan, as he journeyed, came where he was: and when he saw him, he had compassion on him.
>
> [34] And went to him, and bound up his wounds, pouring in oil and wine, and set him on his own beast, and brought him to an inn, and took care of him.
>
> [35] And on the morrow when he departed, he took out two pence, and gave them to the host, and said unto him, Take care of him; and whatsoever thou spendest more, when I come again, I will repay thee.
>
> [36] Which now of these three, thinkest thou, was the neighbour unto him that fell among the thieves?
>
> [37] And he said, He that shewed mercy on him. Then said Jesus unto him, Go, and do thou likewise."

43 Much has been written by theologians and other commentators about the parable of the good Samaritan. For present purposes, it is sufficient to draw to attention that it embodies both "rule-based reasoning" and a "storytelling narrative". Each reinforces the other.

44 Verse 27 articulates “rules” drawn from the *Old Testament* of the *Bible*. The direction to love God is taken from *Deuteronomy* Chapter 6 Verse 5. The direction to love “thy neighbour” is taken from *Leviticus* Chapter 19 Verse 18.

45 The force of the parable (conventionally taken to be an earthly story with a heavenly meaning) is derived in part from the historical fact that in Jesus’ immediate audience a Samaritan was the least likely of the three persons who passed the injured man to be expected to stop and come to his aid.

THE GENIUS OF A COMMON LAW TRADITION: THE LAW RELATING TO VOLUNTARY ASSOCIATIONS

46 Australia has, through the general law administered by judges and other judicial officers, endeavoured to respect the freedom of conscience invested in each person living, and dying, in community.

47 General law principles governing voluntary associations of like-minded members of a community are of central importance to our concept of “freedom of conscience”. Freedom of conscience and freedom of association share a symbiotic relationship in a legal system dedicated to the rule of law in a common law tradition.

48 The expression “common law tradition” is here used, in an orthodox way, to describe a national system of law that privileges the development of legal principles by judges charged with deciding “like cases alike” drawing on precedents. That tradition is commonly contrasted with a “civil law tradition” in which decision-makers privilege the operation of written codes, commonly conceptually derived from a Roman Law model.

49 As much “law” presently applied in a common law system of law is found in legislation (enacted by a Parliament or promulgated under the authority of an Act of Parliament) some of the jurisprudential differences between a common law system (which favours judge made law) and a civil law system (which privileges codes) may not be as stark as they once were imagined to be.

50 Whatever system of law prevails an application of “law” generally requires consideration of “text”, “context” and “purpose”.

51 The genius of the common law tradition to which Australia adheres is that religious, social and political groupings of like-minded people can be accommodated within the general law by legal principles governing voluntary associations; the law of trusts (where ownership of property is involved); a public policy (subject to regulatory intervention) that leans against interference by the courts in the domestic affairs of a voluntary association unless necessary to determine a dispute about a civil or proprietary right; and, within a responsible system for the administration of justice, freedom of association, freedom of contract and testamentary freedom. These understated freedoms (underpinned by ordinary common law rules and principles of general application) provide a rock upon which human rights lawyers have built a more visible narrative in support of “freedom of religion” or the like: *Re Estate of Ahmed Abou-Khalid* [2024] NSWSC 253 at [60].

52 People who come together in a voluntary association are generally motivated to serve the objects of their association in the general community, including charitable objects directed to helping others. A freely chosen commitment to the objects of a voluntary association may be as important to the broader community served by the association as it is in the conduct of the domestic affairs of the association. Suppression of free choice may affect not only those who join an association but also those who freely engage with the association.

53 In the ordinary course the common law allows external critics of a voluntary association, should they disagree with the objects or activities of the association, the freedom to establish their own voluntary association with people who share their mind, and they may do so in the service of others.

54 For some people their freedom of conscience is not complete unless everybody is compelled to conform to their views regardless of any independent, contrary, inner voice of conscience. That approach, which may be advanced in deed but

disclaimed in word, can serve as a counter-productive invitation to social disharmony and endless conflict. A good idea may be lost by overreach on the part of its promoters.

55 A voluntary association of like-minded people does not operate in a vacuum. It is defined by both its membership and those of its broader community who are not members. Its members live, and it must operate, in a broader community that recognises its legitimacy and its independent character.

56 That is why the public policy of the law that leans against interference by the courts in the domestic affairs of a voluntary association must be qualified by a need for regulatory intervention to facilitate the orderly conduct of human affairs, both public and private; to secure public safety and, so far as may be practicable, to promote harmony within and beyond the community of an association.

57 A particular problem that counsels caution against undue outside intervention in the domestic affairs of voluntary associations is experienced when those who have strong personal views about contentious issues (especially issues debated in terms of moral imperatives) seek to entrench their particular views in “law” that impinges upon the collective minds and operation of a voluntary association, by constitutional amendment, legislation, judicial fiat or executive government policy.

58 Respect for freedom of conscience and the law requires that each person be given space for reflection, and choice, in dealing with questions of fundamental importance in the conduct of a life well lived. Allowance must be made in the administration of law for the fact that respect for the law requires that the law be accepted by the community it serves and that it be applied with discretion as opinions within the community ebb and flow as, inevitably, they do.

FOUNDATIONAL VALUES INFORM THE LAW RELATING TO VOLUNTARY ASSOCIATIONS

59 The spirit of the common law, long thought to have been fostered by a Judeo-Christian tradition (or, perhaps, more accurately, a Judeo-Christian world view), is deeply embedded in the freedom afforded to all people, great and small, to come together in a "voluntary association" (a "club" by another name) for a common purpose.

60 What Australians have long identified as a Judeo-Christian tradition is not wholly unique to either Judaism or Christianity but can be discerned in other religious traditions, including Islam, and a secular world.

61 An essential feature of such a tradition is a commitment to an idea beyond "self"; an empathy and respect for "others"; and a recognition of the importance of the dignity of each individual living, and dying, in community. Such a tradition is generally associated with attachment to family relationships (however defined) and promotion of fundamental civic virtues such as justice, truth, honesty, fair dealing and charity.

62 CEW Bean (Australia's Official War Correspondent in World War I, the nation's Official Historian of that war, and a founder of the Australian War Memorial) was an early promoter of the uniquely Australian concept of "mateship" which has united Australians in war and peace. He found the fundamental civic virtues of a secular world in what (before Gallipoli) he described as "the Australian spirit" and (after Gallipoli) "the Anzac spirit", both of which guiding spirits he later attributed to "the Arnold Tradition": Geoff Lindsay, "Be Substantially Great in Thyself; Getting to Know CEW Bean; Barrister, Judge's Associate, Moral Philosopher" (Forbes Society Website, 2011).

63 Some historians have imagined that Charles Bean was not "religious" (because he made a diary entry to that effect on Christmas Eve in 1916 on the Western Front). But, in my assessment, he was both "religious" and "secular" (the two are not necessarily mutually inconsistent) as a representative of the liberal, Anglo-Catholic Christian tradition of his family. The Arnold Tradition was

named by him for Thomas Arnold, a prominent headmaster of Rugby School in England (and father of the poet, Matthew Arnold) commonly associated in Bean's youth with the concept of "muscular Christianity". In his extensive writing, Bean spoke of "Truth" rather than of "God" but, semantics aside, he was drawn to truth as an absolute value to be pursued in a good life.

64 As unexciting as it may sound, the law relating to voluntary associations, incorporating a respect for the conduct of the domestic affairs of an association by members who support its objects, is fundamental to a concept of freedom in managing relationships between individuals living, and dying, in community.

65 In a quiet way, the general law fosters and protects a tolerant society in which competing, and even diametrically opposed, world views can be accommodated. Tolerance is a two-way street. The price paid by each individual who cherishes his or her freedom of conscience living in a community of divergent views is respect for others whose views differ from his or her own.

66 The law governing voluntary associations, including the public policy leaning against interference by courts in the domestic affairs of a voluntary association and associated principles, provides a means by which "two-way tolerance" can be fostered and maintained. The general law allows likeminded people opportunities, for conscience sake, to associate with one another without compulsion on them to associate with others who do not share their mind and, for conscience sake, without compulsion on others to join them.

67 Compulsion against conscience may drive free spirits underground but it is a recipe for repressed anger, dissembling conduct in personal relationships and in the public square, and social disharmony that invites authoritarian measures in response.

68 That is not to say that all world views must be recognised as having equal value or that a relativist view of the world must be embraced. Despite contemporary challenges to the "legitimacy" of any concept of absolute truth (secular or divine) it is possible to believe in the existence of an absolute truth even if, in pursuit of it, a full understanding is elusive and it sometimes appears in different guises.

69 A thought worthy of reflection is that there may be a correlation between a communal acceptance that there is such a thing as an absolute truth (however elusive) and a recognition that standards of behaviour (greater than any individual self-perceptions) are a necessary condition for "the peace, welfare and good government" of the general community (to paraphrase section 5 of the *Constitution Act* 1902 NSW).

70 The law of voluntary associations contemplates that the members of an association can govern their own membership. Within the association members can insist that the membership, jointly and severally, adhere to particular conventions, whether or not expressed as "rules".

71 **A person may commonly: (a) be assumed to accept the conventions of a particular association in joining the association; (b) subject to considerations of procedural fairness, be liable to be expelled, suspended or disciplined for a material departure from convention; and (c) be free to surrender membership of an association for any reason or none at all.** Cf., *Scandrett v Dowling* (1992) 27 NSWLR 483 at 522F.

72 The law of voluntary associations permits ideas to be developed incrementally (inductively) from the ground up (consensually or by acquiescence) rather than imposed (by deductive reasoning) from the top down by a "legislator" whose decisions might be perceived to be authoritarian by a tender conscience.

THE VALUE OF A GOOD STORY: TOLKIEN'S GIFT

73 When it is said that the spirit of the common law has been fostered by a Judeo Christian tradition (or world view), what is meant by that expression?

74 A rule-based explanation might focus on a catalogue of social mores or legal rules in demonstration of differences between the culture of Ancient Rome and that which emerged in a Christian society (itself informed by its Jewish connection) with its emphasis on the sanctity of life and the dignity of each individual as worthy of equal respect.

75 A more memorable explanation might be found in a well-told story about the essence of the concept.

76 The importance to a free society of a tender, but resolute, conscience was recognised by JRR Tolkien in *The Lord of the Rings*, first published in three volumes in 1954-1955 and, since 1968, in a single volume.

77 Some truths are better conveyed by a narrative story (fact or fiction) than by a catalogue of logical rules. Tolkien's myths are set in an imagined world (which readers are invited to join) through which he explores themes about purposeful "fellowship" (association) between like-minded volunteers in a struggle of good against evil. His stories are informed by a Christian belief: Holly Ordway, *Tolkien's Faith: A Spiritual Biography* (Word on Fire Academic, Washington, 2023).

78 Without overt reference to scripture or theology, *The Lord of the Rings* invites reflection on a Judeo-Christian world view conventionally thought to inform the common law system of law inherited by Australia from England.

79 *The Lord of the Rings* highlights the importance to human dignity, and endeavour, of membership of a fellowship (association) of like-minded, other-directed individuals who, living and dying in community, value the

voluntary acceptance of burdens in service of community; and the doing so with humility and with mercy, and pity, towards others who err or are less fortunate than themselves.

80 It also identifies challenges for Australian law and those who engage Australian law. The robust individualism of an imagined frontier society has been displaced incrementally by an administrative state, servicing a managed society, in which the life of every member of a community is managed, more or less, from cradle to grave, by somebody other than the member: often a public authority or a large corporation but also (through enduring powers of attorney and enduring guardianship appointments, or financial management orders and guardianship orders) by a "significant other".

81 Management regimes, public or private, often involve conferral upon a "manager" of broad discretionary powers in the performance of their functions. A challenge for the law, in both its formulation and application, is to provide a means for supervision of "managers" in the performance of their functions and remedies for a "managed" person if and when a manager acts for a purpose foreign to that for which the manager was granted authority.

82 Tolkien identifies a risk that, unless informed and guided in action by "spirit" and "reason", the tendency of those with power is to assume that "if a thing can be done, it must be done". In identifying that risk he privileges the role of each individual in holding the powerful in check: "Such is oft the course of deeds that move the wheels of the world: small hands do them because they must, while the eyes of the great are elsewhere".

83 In a draft letter attributed the date "April 1956" in an authorised publication of his letters (Humphrey Carpenter (ed), *The Letters of JRR Tolkien*, Harper Collins, revised and expanded edition, 2023, pages 353-354) Tolkien explains himself in the following terms (with emphasis added):

> "Of course my story [*The Lord of the Rings*] is not an allegory of Atomic power, but of *Power* (exerted for Domination). Nuclear physics can be used for that purpose. But they need not be. They need not be used at all. **If there is any contemporary reference in my story at all it is to what seems to me the most widespread assumption of our time: that if a thing can be done, it must be done. This seems to me wholly false. The greatest examples of the action of the spirit and of reason are in *abnegation*.** … I do not think that even Power or Domination is the real centre of my story. It provides the theme of a War, about something dark and threatening enough to seem at that time of supreme importance, but that is mainly 'a setting' for characters to show themselves. **The real theme for me is about something much more permanent and difficult: Death and Immortality: the mystery of the love of the world in the hearts of a race 'doomed' to leave and seemingly lose it; the anguish in the hearts of a race 'doomed' not to leave it, until its whole evil-aroused story is complete.** But if you have now read Vol. III and the story of Aragorn, you will have perceived that. … **[Another] main point in the story for me is the remark of Elrond in Vol. I: 'Such is oft the course of deeds that move the wheels of the world: small hands do them because they must, while the eyes of the great are elsewhere.**' Though equally important is Merry's remark (Vol. III, p. 146): 'the soil of the Shire is deep. Still there are things deeper and higher; and not a gaffer could tend his garden in what he calls peace, but for them.') **I am *not* a 'democrat' only because 'humility' and equality are spiritual principles corrupted by the attempt to mechanize and formalize them, with the result that we get not universal smallness and humility, but universal greatness and pride, till some Orc gets hold of a ring of power - and then we get and are getting slavery.** But all that is rather 'after-thought'. The story is really a story about what happened in B.C. year X, and it just happened to people who were like that! . . ."

84 Tolkien's disclaimer of the label "democrat" should be taken to be a reflection of an appreciation that the formulation, and application of "law" should ideally accommodate a "spiritual" dimension (including principles about the need for "humility" and "equality") as a safeguard against attempts to "mechanise and formalise" the law to the detriment of those governed by it. We must, he implies, look to the law in substance, not merely in form, and endeavour to apply it in a manner that is just, not overwhelmed by powerful interests. Professor McGilchrist warns against allowing "the Master" (the right hand, empathetic side of the brain) to be overborne by "his Emissary" (the left hand, mechanical side of the brain). Tolkien speaks of a need to accommodate "spirit and reason and not to be overpowered by the mechanical." .

85 Tolkien's reference to "the course of deeds that move the wheels of the world" is taken from the dialogue of the Council of Elrond at which Frodo (a humble hobbit), in a fellowship of kindred spirits ("the Fellowship of the Ring"), voluntarily assumed the heavy burden of a journey into the heart of an evil

empire to destroy the Ruling Ring of Power, possession of which by a supremely evil personality (or, indeed, any person who held it for too long) would allow evil to triumph over good.

86 The following is an extract of the dialogue (with emphasis added):

> "'Thus we return once more to the destroying of the Ring,' said Erestor, 'and yet we come no nearer. What strength have we for the finding of the Fire in which it was made? That is the path of despair. Of folly I would say, if the long wisdom of Elrond did not forbid me.'
>
> 'Despair, or folly?' said Gandalf. 'It is not despair, for despair is only for those who see the end beyond all doubt. We do not. It is wisdom to recognize necessity, when all other courses have been weighed, though as folly it may appear to those who cling to false hope. Well, let folly be our cloak, a veil before the eyes of the Enemy! For he is very wise, and weighs all things to a nicety in the scales of his malice. But the only measure that he knows is desire, desire for power; and so he judges all hearts. Into his heart the thought will not enter that any will refuse it, that having the Ring we may seek to destroy it. If we seek this, we shall put him out of reckoning.'
>
> 'At least for a while,' said Elrond. '**The road must be trod, but it will be very hard. And neither strength nor wisdom will carry us far upon it. This quest may be attempted by the weak with as much hope as the strong. Yet such is oft the course of deeds that move the wheels of the world: small hands do them because they must, while the eyes of the great are elsewhere.'** …
>
> At last, with an effort [Frodo] spoke, and wondered to hear his own words, as if some other will was using his small voice.
>
> 'I will take the Ring,' he said, 'though I do not know the way.'
>
> **Elrond raised his eyes and looked at him, and Frodo felt his heart pierced by the sudden keenness of the glance. 'If I understand aright all that I have heard,' he said, 'I think that this task is appointed for you, Frodo; and that if you do not find a way, no one will.** This is the hour of the Shire-folk, when they arise from their quiet fields to shake the towers and counsels of the Great. Who of all the Wise could have foreseen it? Or, if they are wise, why should they expect to know it, until the hour has struck?
>
> **'But it is a heavy burden. So heavy that none could lay it on another. I do not lay it on you. But if you take it freely, I will say that your choice is right;** and though all the mighty elf-friends of old, Hador, and Hurin, and Turin, and Beren himself were assembled together, your seat should be among them.' …"

87 An understanding in full measure of Tolkien's tale of a burden voluntarily assumed requires notice of how Frodo's journey ended. It is commonly thought that he succeeded in his quest to destroy the Ring of Power; but Tolkien

attributed success in destruction of the Ring not to Frodo, but to something beyond his ken.

88 Frodo stood on the brink of failure because, when called upon to throw the Ring into the destructive Fire, he could not let it go. At that point the Fellowship's Cause was saved by the apparently miraculous intervention of Gollum (a hobbit withered by his earlier possession of the Ring) whose survival to that point was a product of unrequited mercy and pity shown to him by Frodo on their perilous journey. Gollum snatched the Ring from Frodo and, with the Ring in his grasp, fell to his doom in the Fire, taking the Ring with him.

89 In a draft letter attributed the date "26 July 1956" in *The Letters of JRR Tolkien* (at page 362), Tolkien explained himself (here, with editorial adaptation):

> "If you re-read all the passages dealing with Frodo and the Ring, I think you will see that not only was it *quite impossible* for him to surrender the Ring, in act or will, especially at its point of maximum power, but that this failure was adumbrated from far back. He was honoured because he had accepted the burden voluntarily, and had then done all that was within his utmost physical and mental strength to do. He (and the Cause) were saved – by Mercy: by the supreme value and efficacy of Pity and forgiveness of injury. …
>
> There exists the possibility of being placed in positions beyond one's power. In which case (as I believe) salvation from ruin will depend on something apparently unconnected: the general sanctity (and humility and mercy) of the sacrificial person. I did not 'arrange' the deliverance in this case: it again follows the logic of the story. (Gollum had had his chance of repentance, and of returning generosity with love; and had fallen off the knife-edge.) …
>
> No, Frodo 'failed'. It is possible that once the Ring was destroyed he had little recollection of the last scene. But one must face the fact: the power of Evil in the world is *not* finally resistible by incarnate creatures, however, 'good'; and the Writer of the Story is not one of us. …"

90 Oddly, the Council of Elrond scene in Peter Jackson's award-winning trilogy of the Lord of the Rings movies (2001-2003) made no mention of Tolkien's aphorism about the course of deeds that move the wheels of the world, a critical reminder of the profound significance of humble service, great or small.

91 We see in Tolkien an ethical framework, informed by his religious sensibility, that privileges an exercise of conscience in aid of others: a voluntary assumption of a heavy burden in service of a community of interest in pursuit

of a benign common purpose greater than any individual and, yet, accessible by all and sundry.

TOLKIEN'S WARNING

92 A return to Tolkien's identification (in his draft letter of April 1956) of "the most widespread assumption of our time: that if a thing can be done, it must be done". It invites reflection on the course of jurisprudence in the decades since Tolkien recorded his insight.

93 There is need of recognition that "law", as formulated and administered, is not governed by rules alone but by purpose.

94 This is hardly a secular version of Christ's response in *Matthew* 4:4 in resistance to the Devil's temptation: "It is written, Man shall not live by bread alone, but every word that proceedeth out of the mouth of God" [King James' version]. But the point is well made.

95 **In the formulation and administration of "law" there is need of something beyond the bare text of a catalogue of "rules" and "exceptions" uninformed by the purpose they serve.** The more rules you have, the more rules you need.

96 Identification of an overarching purpose of legal rules that must be applied, and principles that must guide decision-making, generally serves the interests of justice. Decision-making unconstrained by a commonly accepted purpose, informed by considerations of justice, can give rise to unintended consequences.

97 This can be seen, perhaps, in the abolition of the doctrine of *ultra vires* in limiting the activities of public corporations with economic power; and, in the personal realm, in the conferral of an "enduring, general power of attorney" on an individual responsible for management of the affairs of a person incapable of self-management, treated by some attorneys (commonly in a family setting) as a licence to favour their own interests over those of an incapacitated principal.

98 A challenge for the law, and society, is how to constrain abuses of power, whether public or private in cases of this nature. Translated, that challenge may be one of how to keep those who exercise "power" within the limits of the purpose, or purposes, for which power has been conferred upon them.

99 In its own quiet way, the general law in a common law system has endeavoured to address this challenge by the development of the concept of a "fiduciary" (initially, upon an exercise of the equity jurisdiction of courts such as the Supreme Court of NSW), which has informed the development of the law of agency, the law of voluntary associations, corporations law and administrative law.

100 A study of the history of "the equity jurisdiction" in Anglo-Australian law generally requires an acknowledgement of the influence of canon law, a topic for another day.

GCL
7 May 2024

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