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Legal Theory in Practice

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Historically law students have struggled to understand why they should learn legal theory. They would rather hear the details of the juicy cases expounded in the cavernous lecture theatre. This article attempts to demonstrate how legal theory is relevant in the real world.

Dworkin's theory

Leading legal theorist Ronald Dworkin rejects the old fashioned view that the law is just a set of rules that can be applied to any situation. Instead, Dworkin theorises that 'lawyers … make use of standards that do not function as rules, but operate differently as principles and policies'.[1] The interpretation of any law must take into account those standards. The three operative parts can be summarised as follows:

- Rules are 'applicable in an all-or-nothing fashion'.[2] They may have exceptions but these need to be stated, and are often found in legislation.
- A policy is 'a standard that sets out a goal to be reached'[3] and may be used to justify political and judicial decisions.
- A principle is 'a standard to be observed…because it is a requirement of justice or fairness or some other dimension of morality'.[4]

Dworkin contends that policy should be left to the politicians. In his leading work, *Taking Rights Seriously*, he suggests that the courts should take note of the established doctrine of legislative supremacy (that is, Parliament having the ultimate right to pass legislation). As such, courts should pay 'qualified deference to the acts of legislature.'[5]

Before we look at how the Parliament uses principles and polices to make rules (that is, legislation), it is useful to look at the differences between each, and consider how they interact. This theory is then applied to the enactment of laws which define the powers of police in Queensland.

Rule v Principle

The distinction between rules and principles lies in the definitive nature of rules. As mentioned, rules are an all-or-nothing concept whilst principles, though sometimes looking like rules, do not 'set out legal consequences that follow automatically.'[6]

Dworkin states that politicians and judges should consider principles when, respectively, making or interpreting legislation. Where principles intersect or conflict, the relative weight of each must be taken into account and 'they survive intact when they do not prevail'.[7] The same cannot be said for rules. If rules conflict, one must be found to be invalid.

The differentiation between rules and principles can be difficult. Dworkin argues that rules with exceptions do not change into principles; however, principles can morph, much like a transformer, into rules.[8]

Policy v Principle

Policy can sometimes be difficult to define. Crennan and Gummow JJ define policy as 'a course of action which is adopted or proposed particularly by the legislature and by the executive in its administration of legislation'.[9] It is essentially a course of action that is intended to influence, determine and guide the decisions, actions and legislative process of a government.[10] While rules are somewhat concrete, policy can change dependent upon the party in power and the voting public's whim. Policy considerations can be invoked by politicians (and to a lesser extent the courts) to solve a conflict between a rule and a principle or between two principles.

Lord Scarman, in the leading negligence case of *McLaughlin v O'Brian*, commented that '[i]f principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path.'[11]

The Queensland scenario

Queensland does not have a Bill of Rights, but rights are provided in the *Legislative Standards Act 1992* (Qld). This legislation requires each Bill introduced to Parliament to provide a statement as to its consistency and explanations as to any inconsistency with the fundamental legislative principles.[12] The fundamental legislative principles are described as those 'that underlie a parliamentary democracy based on the Rule of Law'.[13] In addition, the Parliament established the Scrutiny of Legislation Committee, which considers the application of fundamental legislative principles to Bills introduced to Parliament, prior to their passing.[14]

To demonstrate the practical application of legal theory in law making, the *Police Powers and Responsibilities Act* (PPRA) is analysed, in both its incarnations (1997 and 2000).[15]

The Police Powers and Responsibilities Act – generally

In his Second Reading Speech to Parliament on the 1997 Bill, the then Police Minister clearly outlined the government's policy reasons for its enactment; 'the government has recognised the fundamental need of the people of Queensland to be protected from criminal activity.'[16] He went on to deal with the concerns regarding the effect on fundamental legal principles, stating 'that a persons rights are irrevocably preserved and enhanced by this legislation.'[17]

The Minister in 2000 took a similar line, but possibly not as effusive, when he said his government was 'committed to being tough but fair on law and order issues'.[18]

In line with the *Legislative Standards Act 1992* (Qld), both Ministers comment in the Explanatory Notes on the consistency with the fundamental legislative principles by identifying certain sections in the relevant legislation that may impinge on individual liberties (although this is by no means exhaustive).

By the passing of this legislation, it seems that policy has triumphed over principle.

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Police Powers and Responsibilities Act – a review

Prior to discussing the operative parts of the PPRA, it should be noted that in Chapter 1 (Part 2) the legislature has attempted to get around a basic principle of statutory interpretation by legislating that the PPRA prevails over any Act before or after its enactment. This may be regarded as an attempt to avoid a clash of rules and arguably offends the principle against limiting future Parliaments,[19] which is acknowledged by the Minister.[20]

Detention

The principle that a person's liberty is 'the most elementary and important of all common law rights'[21] has been recognised for centuries. Further, the prohibition against detaining someone, after arrest, for longer than is required to take them before a justice was enacted in legislation,[22] thereby generating a rule from the principle. While this principle is also recognised in s 393 PPRA (2000) it carries the exceptions at subsection 2(b) relating to Chapter 15 of the Act. Division 3 of Chapter 15 of the PPRA (2000) allows for police officers to detain a person for questioning for a reasonable time without going before a Magistrate.[23]

In the words of the Scrutiny Committee, 'this new power of detention…appears to be a substantial abrogation of the rights and liberties of individuals.'[24] As such it would seem to breach a fundamental legislative principle.[25] This Division was enacted despite the scathing attack on the abrogation of rights in the Scrutiny Committee's report.

Neither the Explanatory Notes of the original PPRA (1997) nor the Minister's Second Reading Speech throws any light on the policy behind overriding this basic common law principle. The only, somewhat quizzical, comment in justification from the Minister is that it is in 'the spirit of the Commission of Inquiry into Aboriginal Deaths in Custody'.[26]

These provisions could though be argued to represent a clear statement of policy that the government of the day wished to provide police with the power to question suspects prior to their release on bail, contrary to principle and the legislative rules stemming from that principle.

Right to silence

The principle of the right to silence was enunciated by Lord Parker in *Rice v Connolly* where he recognised that 'the whole basis of the common law is that right of the individual to refuse to answer questions put to him by persons in authority.'[27] This was articulated later in Australia by the majority in the High Court, stating that '[a] person…is entitled to remain silent when questioned…by a person in authority.'[28] Part of the reason behind this right is the protection against self-incrimination, which is again a basic principle in the common law.[29]

On its face, this principle has been incorporated into the PPRA (2000) with an exception if 'required to answer questions by or under an Act'.[30] The most obvious example of this is s 40 PPRA (2000) where a person may be required to provide their correct name and address. Whilst this power, in differing forms, was in existence in various statutes prior to the enactment of the PPRA (1997) (originally s 23) it is fair to say that this power has been extended to suspects and potential witnesses by the PPRA (2000).

This section, whilst affecting a fundamental principle of our legal system, does not qualify for more than a simplistic explanation in the Explanatory Notes[31] and an interesting pronouncement by the Minister in his Second Reading Speech that '[t]he Bill preserves the right to silence'.[32]

The policy for this move away from the principle cannot, therefore, be easily found in the government's supporting documents or comments, even though in the words of the opposition, who supported the Bill; 'we are dealing here with a very significant shift in the law enforcement power balance between police and citizens.'[33] Paraphrasing the comments of the Scrutiny Committee, this section of the PPRA trespasses on the principle and common law right to silence previously enjoyed by all citizens and diverges from the fundamental legislative principles.[34]

This section is not the only one that seems to diverge from this principle. Another is s 566(1) which provides the power to ask an entrant to a special event site their reasons for being there. Failure to provide reason can lead to prevention from entering or removal from the site. The policy behind these increased powers is evident from the Minister's Second Reading Speech where he expounds the need for Queensland to be seen as a safe environment for visiting Olympic and Goodwill Games teams as well as the then anticipated Commonwealth Heads of Government Meeting. The increased powers are required to 'minimize the risk of criminal threats arising at those events'.[35]

Failure to answer a question pursuant to these sections could lead to a charge under s 791 of the PPRA (2000) of contravening a direction or requirement of a police officer.

As such, it would seem that while the PPRA (2000) incorporates the principle of the right to silence, it also provides exceptions due to policy considerations. These exceptions result in rules, which have a definite consequence if breached, here the commission of an offence.

Move-on powers

The principle of lawful assembly is well entrenched in the common law[36] and has been recognized by the United Nations.[37] Whilst limited to peaceful assembly,[38] the ability to gather is a basic liberty to be enjoyed by members of the public and is a fundamental legislative principle.[39] As with other principles discussed in this article, it could be described, in Dworkin's words, as 'a standard to be observed … because it is a requirement of justice or fairness or some other dimension of morality'.[40]

The Minister, in his Second Reading Speech on the implementation of the PPRA (1997), indicated that the request for a 'general move on power has been specifically rejected.'[41] This would not seem to be the case with the 2000 version as s 48 of the PPRA allows police, in certain circumstances, to direct a person to move on from a public or other prescribed place. The erosion of the principle comes about as whilst the PPRA recognises the right to authorised public assembly[42] it does not recognise unauthorised assemblies, albeit peaceful.

Again both Ministers use the policy argument of 'enabling a greater enjoyment and a feeling of safety in public places'[43] and that 'law abiding citizens are free to utilize public facilities without fear of harassment, intimidation or assault.'[44] While it may be a noble cause, it is a policy that arguably limits the principle by adversely affecting the rights and liberties of individuals[45] and the legislation generates a rule in conflict with the principle.

Search without warrant

Sections 29-39 of the PPRA sit adjacent to the powers relating to the provision of name and address. Next to the right of silence some would say sits the right to privacy. This is reflected in the fundamental legislative principles in that an intrusion into privacy should be undertaken 'only with a warrant issued by a judge or other judicial officer.'[46]

The principle is therefore clear and has been succinctly stated by the majority in the case of *Coco v The Queen*:

> Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of [that] person…commits a trespass unless…authorized or excused by law.[47]

These sections allow the search of public places[48] and, in prescribed circumstances, the search of persons (including anything in their possession),[49] vehicles[50] and the use of drug detection dogs.[51]

The government's initial comments regarding these increased powers are somewhat dismissive in the Explanatory Notes for the PPRA (2000); 'safeguards such as judicial overview are included…e.g. the need the [sic] obtain a search warrant in most instances of search'. Tellingly, later in the Explanatory Notes the Minster acknowledges the exercise of policy to overcome the principle outlined above:

> It is Parliament's intention that the section is, among other things, designed to rectify limitations on police entry to property as decided in Plenty v Dillon and others.[52]

So again a principle, supported by precedent and legislation that holds out to protect the rule of law, is overtaken by the government putting forward a policy of 'being tough but fair on law and order issues'.[53]

Forensic procedures

Another legislatively approved trespass to the person is contained in the forensic procedures in Part 3, Chapter 17 of the PPRA (2000). A refusal to comply with a police direction based in the belief that to do so may be incriminating is usually accepted as a reasonable excuse.[54] This is not the case if the requirement is pursuant to a power in this Part.[55] Under these provisions a person can be compelled to undertake certain procedures to assist the police in identification or provision of evidence. The policy reason given by the Premier was that it was 'part of the Government's determination to give police the necessary tools to fight crime.'[56]

Controlled operations and activities

Chapters 10 and 11 provide a scheme to authorise police officers to engage in, what would otherwise be, unlawful conduct to gain evidence.[57] Specifically, ss 223 and 224 PPRA (2000) deem particular activities lawful. These Chapters stem from the High Court decision of *Ridgeway v The Queen*[58] to exclude evidence, following the *Bunning v Cross*[59] principle. The basis for that principle is that courts should have such a discretion so as to 'protect the integrity of their processes'[60] and that discretion is a matter of 'high public policy'.[61] There are competing principles facing the court and, as anticipated by Dworkin, those principles need to be weighed against each other. In *Ridgeway* the majority found that 'the integrity of the administration of criminal justice outweighs the public interest in the conviction of those guilty of crime.'[62]

The government is therefore faced with strong judicial support for the principle that evidence obtained while the police are acting unlawfully should be excluded from a criminal trial. That being the case it legislates to specifically declare that evidence gathered during a controlled activity 'is not inadmissible only because it was obtained by a person while engaging in an unlawful act.'[63]

In his Second Reading Speech for this amendment the Minister recognised the comments of Justice Carter in his report regarding Operation Trident[64] and the 'judicial comment on the need for legislation dealing with covert police activities'.[65] He later reiterated the substance of s 226, advising that evidence obtained covertly will not be inadmissible 'merely due to the covert nature by which it was obtained.'[66] At the same time he acknowledged that the legislation does not fetter the court's discretion to exclude evidence on public interest grounds.

It may be argued that, in Dworkin's terms, here there has been a clash of principles, resulting in the judiciary exercising its discretion to find in favour of the integrity of the administration of justice. The government however disagrees and so exerts its policy making powers, whilst acknowledging that the principle is still intact. This could be seen as a classic example of Lord Scarman's suggestion in *McLaughlin v O'Brian*.[67]

Summary

Queensland's approach to legislating police powers provides a practical example of the implementation of Dworkin's hierarchy of principle, policy and rules. Here, legislative policy has been invoked to generate rules that are divorced from the pre-existing principles. Those principles, however, do not disappear, they coexist with those rules and in some instances are acknowledged.

Exercise:

Review the following documents:

- *Criminal Code (Double Jeopardy) Amendment Bill 2007 at http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2007/07AC049.pdf*
- *The Explanatory Memorandum to the Bill at http://www.legislation.qld.gov.au/Bills/52PDF/2007/CrimCDJAmdB07Exp_P.pdf; and*
- *The Alert Report provided by the Scrutiny of Legislation Committee at http://www.parliament.qld.gov.au/view/committees/documents/SLC/alerts/2007/06/AD%20%206%20of%202007%20-%20text.pdf*

Discuss the relevance of Dworkin's theory to this Bill, which has now been incorporated into the Criminal Code.

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2 Ibid 24.
3 Ibid 22.
4 Ibid.
5 Dworkin, above n 1, 37.
6 Dworkin, above n 1, 25.
7 Ibid 35.
8 Dworkin uses the example of *Riggs v Palmer* (1889) 115 N.Y. 506.
9 *Thomas v Mowbray* [2007] HCA 33, [80] (Crennan and Gummow JJ).
10 Paolo de Sa, Mineral Policy: 'A World Bank Perspective' in E Bastida, T Walde and J Warden-Fernandez (eds), *International and Comparative Mineral Law and Policy* (2005) 494-5.
11 (1983) 2 All ER 298, 310.
12 *Legislative Standards Act 1992* (Qld) s 23(1)(f).
13 *Legislative Standards Act 1992* (Qld) s 4(1).
14 Pursuant to *Parliamentary Committees Act 1995* (Qld) s 4.
15 *Police Powers and Responsibilities Act 1997* (Qld) and *Police Powers and Responsibilities Act 2000* (Qld).
16 Queensland, *Parliamentary Debates*, Legislative Assembly, 30 October 1997, 4081(TR Cooper, Minister for Police and Corrective Services and Minister for Racing).
17 Ibid.
18 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 February 2000, 55 (Tom Barton, Minister of Police and Corrective Services).
19 *South Eastern Drainage Board (SA)* v *Savings Bank of South Australia* (1939) 62 CLR 603.
20 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 February 2000, 51 (Tom Barton, Minister of Police and Corrective Services).
21 *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagher J).
22 See *Justices Act 1886* (Qld) s 69 and *Criminal Code 1899* (Qld) s 552.
23 *Police Powers and Responsibilities Act 2000* (Qld) s 403(1).
24 Scrutiny of Legislation Committee, Parliament of Queensland (1997) 12 *Alert Digest* 84.
25 *Legislative Standards Act 1992* (Qld) s 4(3)(g).
26 Queensland, *Parliamentary Debates*, Legislative Assembly, 30 October 1997, 4083 (TR Cooper, Minister for Police and Corrective Services and Minister for Racing).
27 *Rice v Connolly* [1966] 2 All ER 649, 652 (Lord Parker CJ).
28 *Petty v Maiden* (1991) 173 CLR 95, 95 (Mason CJ, Deane, Toohey & McHugh JJ).
29 *R v Cedric Colin Brown* [2004] QSC 364.
30 *Police Powers and Responsibilities Act 2000* (Qld) s 397.
31 Explanatory Notes, Police Powers and Responsibilities Bill 1997 (Qld).
32 Queensland, *Parliamentary Debates*, Legislative Assembly, 30 October 1997, 4085 (TR Cooper, Minister for Police and Corrective Services and Minister for Racing).
33 Queensland, *Parliamentary Debates*, Legislative Assembly, 18 November 1997, 4312 (Matt Foley).
34 *Legislative Standards Act 1992* (Qld) s 4(3)(f) 'provides appropriate protection against self – incrimination'.
35 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 February 2000, 52 (Tom Barton, Minister of Police and Corrective Services).
36 *Beatty v Gillbanks* (1882) 9 QBD 308, 313 (Field J).
37 *International Covenant on Civil and Political Rights*, ATS 1980 No23, articles 21 & 22.
38 *Hubbard v Pitt* [1976] QB 142, 178 (Lord Denning).
39 *Legislative Standards Act 1992* (Qld), s 4(3)(g).
40 Dworkin, above n 1, 22.
41 Queensland, *Parliamentary Debates*, Legislative Assembly, 30 October 1997, 4085 (TR Cooper, Minister for Police and Corrective Services and Minister for Racing).
42 *Police Powers and Responsibilities Act 2000* (Qld) s 45.
43 Queensland, *Parliamentary Debates*, Legislative Assembly, 30 October 1997, 4085 (TR Cooper, Minister for Police and Corrective Services and Minister for Racing).
44 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 February 2000, 52 (Tom Barton, Minister of Police and Corrective Services).
45 See *Legislative Standards Act 1992* (Qld) s 4(3)(g).
46 *Legislative Standards Act 1992* (Qld) s 4(3)(e).
47 (1993-1994) 179 CLR 427, 435-436 (Mason CJ, Brennan, Gaudron and McHugh JJ) (citations omitted): following *Plenty v Dillon* (1991) 171 CLR 635.
48 *Police Powers and Responsibilities Act 2000* (Qld) s 33.
49 *Police Powers and Responsibilities Act 2000* (Qld) ss 29-30.
50 *Police Powers and Responsibilities Act 2000* (Qld) ss 31-32.
51 *Police Powers and Responsibilities Act 2000* (Qld) ss 34-39.
52 Explanatory Notes, Police Powers and Responsibilities Bill 2000 (Qld) 3.
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54 *Police Powers and Responsibilities Act 2000* (Qld) s 791(4).
55 *Police Powers and Responsibilities Act 2000* (Qld) s 791(5).
56 The Honourable Peter Beattie, 'Government expands DNA sampling to be tougher on crime' (Press Release, 8 February 2000).
57 For example, Operation Trident where undercover police officers posed as car thieves.
58 (1995) 184 CLR 19. Especially Mason CJ, Deane, Dawson, Brennan and Toohey JJ.
59 (1978) 141 CLR 54.
60 *Ridgeway v The Queen* (1995) 184 CLR 19, 27 (Mason CJ, Deane and Dawson JJ).
61 Ibid 20.
62 Ibid.
63 *Police Powers and Responsibilities Act 2000* (Qld) s 226.
64 Queensland, Commission of Inquiry into Operation Trident, Abridged Report (1993).
65 Queensland, *Parliamentary Debates*, Legislative Assembly, 17 May 2000, 1083 (Tom Barton, Minister of Police and Corrective Services).
66 Ibid 1084.
67 (1983) 2 All ER 298, 310, discussed above.