

Introduction

To Life to the Full: Rights and Social Justice in Australia (Connor Court, 2007)

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The late twentieth century saw two long-term trends in popular thinking about ethics. One was an increase in relativist opinions, with the “generation of the Sixties” spearheading a general libertarianism, an insistence on toleration of diverse moral views (for “Who is to say what is right? – it’s only your opinion.”) The other trend was an increasing insistence on rights – the gross violations of rights in the killing fields of the mid-century prompted immense efforts in defence of the “inalienable” rights of the victims of dictators, of oppressed peoples, of refugees. The obvious incompatibility of those ethical stances, one anti-objectivist, the other objectivist in the extreme, proved no obstacle to their both being held passionately, often by the same people.

The account of the Helsinki rights movement in Judt’s magisterial history of late twentieth-century Europe, *Postwar*, demonstrates the power of rights as a moral and political weapon.

In August 1975 the Helsinki Accords were unanimously approved and signed [between the major Eastern and Western countries]. On the face of things, the Soviet Union was the main beneficiary of the Accords... it was agreed that the participating states will respect each other’s sovereign equality ... and refrain from any intervention, direct or indirect, ... in the internal or external affairs ... of another participating State ... But also included ... was a list of rights not just of states, but of persons and peoples, grouped under Principle VII (‘Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief’) and VIII (‘Equal rights and self-determination of peoples’.) Most of the political leaders who signed off on these clauses paid them little attention – on both sides of the Iron Curtain it was generally assumed that they were diplomatic window dressing, a sop to domestic opinion, and in any case unenforceable ...

It did not work out that way ... From this wordy and, it seemed, toothless list of rights and obligations was born the Helsinki Rights movement. Within a year of getting their long-awaited international conference agreement, Soviet leaders were faced with a growing and ultimately uncontrollable flowering of circles, clubs, networks, charters and individuals, all demanding ‘merely’ that their governments stick to the letter of that same agreement ... Hoist on the petard of their own cynicism, Leonid Brezhnev and his colleagues had inadvertently opened a breach in their own defenses. Against all expectation, it was to prove mortal.¹

There had been one major institution defending the objectivity of rights all along. It was the Catholic Church, which has always defended an objectivist “natural law” view of ethics in general and of rights in particular. On that view, ethics is not fundamentally about rules, or divine commands, or the greatest happiness of the greatest number, or habits ingrained by evolution and custom. It is about the irreducible worth of persons – the irreducible equal worth of persons – and what follows from that. Because a human being is of immense value, a human death is a tragedy. That is in contrast to the explosion of a lifeless galaxy, which is just a firework. So humans have a right to life and (to put the same thing from the point of view of others) murder is prohibited. Because humans have a particular nature, their rights and duties are of particular kinds. For example, because they are intellectual beings, knowledge is central to a full human life, which is to say they have a right to education. Because they are spiritual beings, they have a right to the free exercise of their religion. Because they have the responsibility to think autonomously about what is good for human life, they have the right not to be persecuted for their political or religious beliefs. And so on for the many other rights of individuals, which have come to be widely acknowledged as “human rights”.

In thought on political and social organization of society too, the late twentieth century saw developments that were in many ways a vindication of positions long held by the Catholic Church. Because humans are social beings with free will, they have a right to participation in the political and economic decisions that affect them. Leo XIII’s 1891 encyclical *Rerum Novarum* laid out a vision of society between the extremes of state socialism and *laissez faire* capitalism. A society should consist of many organizations of different sizes and purposes cooperating in the context of an acceptance of moral rules. Families, trade unions, guilds, businesses, clubs and the state should pursue their own aims, respecting each other’s spheres of action and cooperating to build a just society. A hundred years later, the Communist experiment in

¹ T. Judt, *Postwar: A history of Europe since 1945* (London, 2005), pp. 501-3.

command economies had collapsed, and the form of “capitalism” successful in the West was so bound by safety regulations, compensation laws, truth-in-advertising legislation, powerful industry regulatory bodies and government inquiries as to be virtually unrecognizable as the *laissez faire* version of the nineteenth century. The “regulated capitalism” or “market socialism”² of the present day is much closer to Leo XIII’s plan than to the socialist or capitalist rivals of his time.

Theory, unfortunately, has not kept pace with these developments, and much argument on the most abstract plane in economics and politics remains mired in unproductive wrangling between antique thoughtforms. On the one hand, state “socialism” as a top-down cure-all for injustices to the powerless is still advocated by those who have failed to answer criticisms of the overweening state’s tendency to nationalize the means of oppression, as well as to impose inefficiency and stifle initiative and enterprise. From the other direction, polemic has been dominated by a Hayekian theory of capitalism that emphasises freedom at the expense of all other goods.

Despite its close correlation with actual historical developments, Catholic “social doctrine” has not made much impact outside the Church. It has not been widely studied and understood even within the Church. It has been generally seen, from a distance, as simultaneously platitudinous and necessarily false. It can seem platitudinous because it is moderate and balanced in its moral demands on economics and politics as well as close to the political reality we take for granted in the West. Like any position not sufficiently paradoxical to stand out, it risks the fate of Aristotle: “Aristotle’s works are full of platitudes in much the same way as Shakespeare’s *Hamlet* is full of quotations.”³ It seems false because Realpolitik and economic “forces” are presumed by self-styled hard-headed rationalists to be not subject to human command and hence beyond the reach of ethics.

Friedrich Hayek, the main theorist behind the moves towards “economic rationalism” and deregulation in the last thirty years, expresses the suspicions of many in his arguments on the “mirage of social justice”. Only human actions can be just, he says, so states of affairs such as societal arrangements cannot be either just or unjust. For they are just the unintended outcomes of the “self-organisation” of society through such means as market forces. The distribution of wealth resulting from “impersonal” market forces is not the result of the intention of any person or agency. Thinking it is would be to anthropomorphise “Society”. Therefore, no-one is to blame for that distribution and the concept of justice cannot apply to it.⁴

To the extent that an outcome is not foreseen or intended, to that extent it is indeed not subject to ethical judgement. But societies do not self-organise like eddies in turbulent fluids. Hayekians are captives of a certain simplistic model of self-organisation, the model derived from Adam Smith’s “unseen hand”. Such models of society have created a great deal of trouble. From Marx’s fantasy of history as driven by inevitable conflicts of class interests to Dawkins’ reduction of social interaction to the play of “selfish genes”, attempts to explain society as the work of amoral agents hidden behind the scenes have had a ready audience. They play to the same market as books on the “Secret History of the Court of King So-and-So”⁵ and the *Protocols of the Elders of Zion*, the market that revels in the exposure of dark forces holding the levers of power and the consequent relief of moral responsibility from those usually thought to have made the world as it is, ourselves.

But it is a matter of the most elementary observation that societies self-organise in a much more hierarchical and intentional way than fluids or ant colonies. They are much more like a game of a team sport. A game of football can look confused from a distance, and also from the point of a camera fixed to the ball. But it is not. The teams have coherence and are directed according to a conscious plan – though a plan that has to keep adjusting to unpredictable elements. The game as played is the outcome of interaction between the planned actions of the team and the cut and thrust of the ball and opposing play. So it is with economic and political ventures. The Great Pyramid, the East India Company, D-Day, Microsoft and for that matter the Catholic Church are great enterprises directed by minds. They are the outcomes of the ability of human institutions to achieve coordinated results by referring decisions to small groups who oversee a complex organization directed to planned results. After the military, capitalist enterprises are among the most successful organizations in taking advantage of such possibilities; indeed, Weber points out that what distinguishes capitalism from mere buying and selling is its long-term planning with resources.⁶ Businesses

² J. Franklin, Regulated capitalism, market socialism, *Dissent* 5 (2001), 11-13.

³ J.O. Urmson, *Aristotle’s Ethics* (Oxford, 1988), p. 71.

⁴ F.A. Hayek, *Law, Legislation and Liberty: Vol 2, The Mirage of Social Justice* (London, 1976).

⁵ D. Stove, *Darwinian Fairytales* (New York, 2006), p. 177.

⁶ “The impulse to acquisition ... has in itself nothing to do with capitalism. That impulse exists and has existed among waiters, physicians, coachmen, artists, prostitutes, dishonest officials ... capitalism is identical with the pursuit of profit, and forever

not only organise complex supply chains and market strategies individually, but cooperate to form Business Councils to lobby governments for subsidies and favours and to fund think-tanks promoting Hayekian ideas. The outcomes of those activities are both large-scale, intended and partially predictable in their outcomes. Therefore they are subject to the demands of justice. To the extent that the distribution of goods is a foreseeable result of those activities – and their point is, after all, to create and distribute certain goods – the distribution of goods is itself subject to the demands of justice. The extent of control or foreseeability of that distribution is not 100%, outside a rigid command economy, nor should it be. But neither is it 0% or close, as Hayek pretends. Hayek speaks as if justice would only be applicable to an all-powerful agent who would direct society and know with certainty the effects of its actions. But just as in the crime world there is no Mr Big but plenty of Mr Big Enoughs, so in society there are plenty of agents with considerable influence on the organization of society and probable knowledge of the general tendency of the effects of their actions. Standards of justice are therefore applicable to their actions.

Hayek, indeed, admits that hierarchical self-organisation of society is possible. In fact, he spends much of his time warning how easy it is, constantly arguing that any restrictions on market forces will slip quickly into a totalitarianism that stifles freedom and enterprise. There is such a danger. But it is a danger only because of the innate tendencies of human societies to cede control up the line in order to get things done, a tendency that realizes itself in many more partial ways than by dictatorship. When Hayek announces that the answer is “no” to both the questions

1. “Whether within an economic order based on the market the concept of “social justice” has any meaning or content whatever,
2. Whether it is possible to preserve a market order while imposing upon it ... some pattern of remuneration based on the assessment of the performance or the needs of different individuals or groups by an authority possessing the power to enforce it,”⁷

the logical tension between the two “nos” is severe. It is like telling King Canute both that ordering the sea to go back is impossible and that doing so will dangerously distort the free flow of the tides.

The essential solution to the problem of how to impose social justice without falling into the evils of totalitarianism and a command economy is the one initiated by late medieval law and developed by Catholic social justice theory. Hayek himself praises the late medieval scholastics for their insight that “comparative prices arrived at without fraud, monopoly and violence was all that justice required.”⁸ True, but how does a freely “self-organising” society suppress fraud, monopoly and violence? Those constant temptations for the powerful will be major components of any spontaneous order, since an order is spontaneous precisely when those who have power exercise it without restraints. Fraud, monopoly and violence (and pollution⁹, industrial accidents and the like) can only be suppressed – and thus prices be determined by economic reasons, that is as a result of free choices – by a strong legal system (of both criminal and commercial law), which can call on state sanctions to protect the rights of individuals. Indeed, the very existence of markets that violate rights can only be prevented by legal action – there are “market forces”, in the sense of people prepared to pay, that would create free markets in slaves, child pornography, judicial decisions, liquidation of rivals, kidneys and babies if those sales were not illegal. Market forces do not have a meaning outside the system created by these legal restrictions: those restrictions on what may be bought and sold determine whether there can even be prices of such “products” as slaves, while regulations on work safety and pollution demand that businesses internalize their costs and hence include them in prices, instead of distributing them to hapless others. On the other hand, the legal system can create markets for ethical reasons, for example when copyright and patent law requires payment to the creators of intellectual property. Or the legal system can act to restrict the consequences of some free market decisions, in the way that bankruptcy law contains the downside risk of bad investment decisions by outlawing debt slavery. The law of contract, which declared contracts void in case of fraud or duress, was an early success in incorporating ethical requirements into the control of business.¹⁰ Market “forces” have a very different meaning in a system not shaped by such an understanding and enforcement of fairness in contracts.

renewed profit, by means of a continuous, rational, capitalistic enterprise.” M. Weber, *The Protestant Ethic and the Spirit of Capitalism*, introduction (London, 2001, pp. xxxi-xxxii).

⁷ Hayek, p. 76.

⁸ Hayek, p. 73.

⁹ R.E. Zupko and R.A. Laurs, *Straws in the Wind: Medieval urban environmental law—the case of Northern Italy* (Boulder, CO, 1996)

¹⁰ J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford, 1991).

Only the state, acting in support of a legal system that is flexible about extending the protections of law, can accomplish those tasks. As John Paul II wrote in his encyclical on the hundredth anniversary of *Rerum Novarum*, “The State has the task of determining the juridical framework within which economic affairs are to be conducted, and thus of safeguarding the prerequisites of a free economy, which presumes a certain equality between the parties, such that one party would not be so powerful as practically to reduce the other to subservience,” and “Economic activity, especially the activity of a market economy, cannot be conducted in an institutional, juridical or political vacuum. On the contrary, it presupposes sure guarantees of individual freedom and private property, as well as a stable currency and efficient public services. Hence the principal task of the State is to guarantee this security.”¹¹

Later developments in the same direction have been the strengthening in the twentieth century of compensation law to protect workers and consumers against unsafe work practices and products,¹² and more recently the strong regulation of matters of business ethics such as conflict of interest and insider trading. For products where the market cannot easily be informed because the quality of the offering takes a long time to become clear, such as life insurance, bank risk and some forms of education and medication, there is pressure for enforced inspection and publication of information; the pressure comes both from the public and from reputable firms concerned not to be undercut by “cowboys”, and those industries are heavily regulated.¹³ Again, market forces are created in the context of these legal and semi-legal restrictions. Regulated capitalism is successful because of the regulation, not despite it. The regulated and generally stable capitalism of the last few decades has delivered prosperity more reliably than the unrestrained capitalism of the Depression. And it is no accident that the world’s most vibrant free enterprise society, the United States, is also the most litigious.

There are special difficulties with the regulation of the market in labour, where setting a minimum wage or imposing other industrial relations requirements on employment risks disadvantaging the unemployed. But interventions such as enforcing equal pay for equal work, non-discriminatory hiring practices and occupational health and safety standards have proved to be successful in the workplace without apparently retarding growth.

Mainstream economists, far from both Hayekian and socialist extremes, agree up to a point with these considerations, although they prefer to express themselves in ways that underplays the role of justice. They allow that the State may “support” the market in the “public good” situation (such as defence or health); the “externality” situation (as in taxing a polluter for the “quality of life” burden it imposes on others); the “merit good” situation (where it is accepted that goods such as education or social security should be provided even to those not prepared or unable to pay). The State may also “oversee” the market with watchdog bodies to enforce free competition and to correct information asymmetries by such means as publishing the results of restaurant kitchen inspections. Finally, the State may act macroeconomically by influencing interest rates to change the balances between growth, inflation and unemployment.¹⁴ The State is also the only entity likely to coordinate interests over time intervals greater than those applicable to market mechanisms, for example in taking into account the rights of future generations in policy on environmental degradation and global warming. That is a very wide sphere of potential activity by the State, even taking into account warnings that the intervention should be as little as possible consistent with accomplishing the tasks. The economists normally prefer to justify these interventions in terms of “wants” such as the desire for defence, but the ethical language of “merit goods” and the like suggests that they really mean desires that are morally defensible.

None of those developments are totalitarian. They do not command prices or allocate goods. They simply restrict what can be done by businesses and others, in the interests of justice, before they can get to the point of setting prices by a market mechanism. Those developments have largely been accepted in practice, and the legal and compliance systems have enforced them (in Western countries) with a high degree of effectiveness. The cases of, for example, pollution in China and bribery in Russia remind us that this outcome is by no means a foregone conclusion.

¹¹ John Paul II, *Centesimus Annus*, 15, 48.

¹² J. Franklin, Accountancy as computational casuistics, *Eureka Street*, 9 (1) (Jan/Feb, 1999), 2, 43-6; especially with the expansion of compensation law to cover most cases of pure economic loss: T. Carver, Woolcock Street Investments Pty Ltd v CDG Pty Ltd: beyond *Bryan*: Builders’ liability and pure economic loss, *Melbourne University Law Review* 29 (2005), 270-97.

¹³ J. Franklin, Risk-driven global compliance regimes in banking and accounting: the new Law Merchant, *Law, Probability and Risk* 4 (2005), 237-50.

¹⁴ W. Coleman and A. Hagger, *Exasperating Calculators* (Sydney, 2001), ch. 10.

If markets are structured ethically, Catholic social theory welcomes them.¹⁵ Markets, when working well, are efficient at allocating effort and ensuring needs are met. They are not in themselves “materialistic” or based on any assumptions that humans are merely economic beings. They have the ability to fulfill demand, and what humans demand is up to them. If some people demand luxury consumables, there is a market in them; if others are prepared to pay for opera or charity services, that creates a market in those. If there is to be moral evaluation, it should bear on the choices people make, not on the existence of the markets to satisfy them. And it is markets that give people the opportunity to make their own choices on what is good for them and their dependants. It is especially in accordance with human dignity to be able to make that choice, using one’s own information and responsible judgement.¹⁶ Markets are also especially successful at encouraging innovation, which, in addition to better fulfilling needs, contributes to a richer human life for those who use their intelligence and hard work to imagine and implement a new process or product. Social justice is not only for the oppressed. Someone with a good idea also deserves justice, via a market that offers escape from the dead hand of red tape and vested interest by providing an opportunity for the idea to reach the public.

The other aspect of Leo XIII’s vision that has proved successful in practice is the doctrine of the interplay of special-purpose societies. This too has medieval roots. The development of the notion of corporation allowed monasteries, universities, business companies and the like to be “legal personalities”, owing and disposing of assets to pursue their special purposes. That allowed the development of an internal space relatively free from outside interference that allowed long-term innovative pursuits such as the universities’ development of science and companies’ overseas trading ventures.¹⁷ The idea was expanded to politics with the separation of church and state and later the doctrine of separation of powers in Westminster constitutional democracies, in which legislative, executive and judicial arms of government have defined spheres of operation and agreed modes of interaction. As with the moulding of business relations by contract and compensation law, we can become so familiar with this organization of society that we fail to perceive its uniqueness, but a comparison with a different way of doing things is instructive. Islamic societies do not admit a separation of church and state and do not have legally independent corporations, while the extreme example of monistic societal structure was Mao’s China:

The essence of totalitarianism is contained in the great helmsman’s injunction to ‘put politics in command’. This is not just Communist-Chinese baby-talk. What it means is this: that you are to take over every institution, whatever it may be, and empty out everything which distinguishes it from other institutions, and turn it into yet another loudspeaker for repeating ‘the general line’. Destroy the specific institutional fabric of – a University, a trade union, a sporting body, a church – and give them all the same institutional content, viz. a political one. Contrapositively, the essence of resistance to totalitarianism must consist in trying to maintain the specific institutional integrity of different institutions.¹⁸

Business companies are, indeed, among the special-purpose societies that can contribute to both general well-being and the human development of their members. In a properly-functioning marketplace, trust is essential to business,¹⁹ while the necessity in business for long-term disciplined planning encourages certain virtues, such as prudence.²⁰

Catholic theory does however take a positive view of the possibility of large-scale state action in support of the “common good”, the collective goods like defence and the planning of health services that can only be realized in an organized society by centralized action. As Leo XIII put it, “it lies in the power of a ruler to benefit every class in the State, and amongst the rest to promote to the utmost the interests of the poor; and this in virtue of his office, and without being open to suspicion of undue interference – since it is the province of the commonwealth to serve the common good.”²¹ That is not to imply that the state should perform all the

¹⁵ P. Booth, ed, *Catholic Social Teaching and the Market Economy* (London, 2007); D. Villey, The market economy and Roman Catholic thought, *International Economic Papers* 9 (1959), 93-124.

¹⁶ A. Norton, Liberalism and social justice: the unhappy couple, in M. Goldsmith, *Social Justice: Fraud or fair go?* (Kingston, ACT 1998), 21-9.

¹⁷ T.E. Huff, *The Rise of Early Modern Science: Islam, China, and the West* (Cambridge, 1993), ch. 4

¹⁸ D. Stove, Santamaria and the bishops, *Honi Soit* 43 (32) (29/10/70), quoted in J. Franklin, *Corrupting the Youth: A history of philosophy in Australia* (Sydney, 2003), pp. 291-2.

¹⁹ P. Costello, Restoring confidence in corporate morality, *Quadrant* 34 (9) (Sept 1990), 20-22; F. Fukuyama, *Trust: the social virtues and the creation of prosperity* (London, 1995).

²⁰ M. James, Markets and morality, in C. James, C. Jones and A. Norton, eds, *A Defence of Economic Rationalism* (Sydney, 1993), 160-7.

²¹ Leo XIII, *Rerum novarum*, 32; discussion in B. Duncan, *The Church’s Social Teaching: From Rerum novarum to 1931* (Melbourne, 1991).

work. Privatised services or public-private partnerships may be the most efficient ways of providing, for example, telecommunications infrastructure or mass vaccination, but in that case attention moves to the service contracts and regulatory regimes under which the private contractors operate. The state must craft those carefully to ensure the providers secure their fee only by acting for the public good, and also that there is fair provision of essential services to those unable to pay full price.

More controversially, Catholic social theory approves of a limited degree of State action in support of redistribution of wealth. It does not aim at any particular distribution of wealth, for example an equal one, or advocate a “soak the rich” policy.²² It does however rule out certain distributions of wealth as unjust, notably those in which the disadvantaged lack opportunities to work for their survival. For example, people disabled from birth are unlikely to make their way forward in a free marketplace, so justice requires that some of society’s wealth should be redistributed to them. For the same reason, Catholic theory recommends some intervention in the labour market to ensure a minimum wage sufficient for a “condition of frugal comfort” for a worker and dependants (to use the phrase of Justice Higgins in the 1907 *Harvester* case, influenced by *Rerum Novarum*²³). Economists rightly point to the problem that a minimum wage may disadvantage the unemployed by making it harder for them to gain employment, but it is impossible to believe that a healthy modern economy cannot easily provide the resources (through government action such as subsidies for apprenticeships, as well as wages directly from employers) to find useful work for all the able-bodied at a level of frugal comfort.

With the right to survival secured for all its members, the state can move to the protection of the other rights whose fulfillment is necessary for a complete human life, such as the rights to education, to participation in political decisions and to free expression.

It is clear then that the demand for social justice is neither meaningless, platitudinous nor unrealistic. Immense efforts have been needed to implement the demands of justice and create a political, social and economic environment comparatively free from violence, intimidation, corruption, extremes of poverty, debt slavery, unsafe work practices, dangerous products, false advertising, insider trading, nepotism and all the other practices that accompany the naked and unrestrained abuse of power.

It is Catholic social justice theory that reveals how the order that protects us is founded on the worth of persons and consequent respect for their rights.

²² Contrary to some more socialist conceptions of “social justice”, as criticized in Goldsmith, *Social Justice: Fraud or fair go?*; various suggestions in Catholic Bishops of Australia, *Common Wealth And Common Good: A statement on wealth distribution* (Melbourne, 1991).

²³ K. Blackburn, The living wage in Australia: a secularization of Catholic ethics on wages, 1891-1907, *Journal of Religious History* 20 (1996), 93-113.