WHAT IS A COURT OF LAW?

DENISE MEYERSON*

What is the nature of a court? In this article I argue that we need to know what a court is supposed to do in order to understand what it is. I argue against two conceptions of a court which I call 'minimalist' and 'essentialist'. The former holds that a court is simply a body empowered to make binding resolutions of disputes by applying existing laws. I argue that this conception is incomplete. The latter identifies further essential features of courts, such as the use of fair processes. I argue that the essentialist conception lacks explanatory power. Drawing on the central case methodology in legal philosophy, I introduce a conception that I call the 'paradigm case conception'. I argue that paradigm courts are not merely empowered to apply the law but equipped to do so, by virtue of possessing features that assist them to resolve legal disputes accurately and effectively (ie, with the public's acceptance). Courts that do not possess all of these features or possess them to a limited degree are not 'non-courts' but defective courts. I explain why the paradigm case conception is theoretically and practically superior to the other conceptions.

I INTRODUCTION

What is the nature of the legal institution we call a 'court'? This article seeks to answer this question from the perspective of legal philosophy. I argue that we need to know what a court is supposed to do in order to understand what it is. In particular, the best way to understand the nature of a court is as an artifact which is intentionally created to perform a particular function in the overall constitutional system of government. These arguments connect with current philosophical debates concerning the artifactual nature of law and whether viewing law as an artifact implies that we need to understand law's function or functions in order to explain it (Part IV).

* Professor, Macquarie Law School, Macquarie University. I am grateful to Therese MacDermott, Brian Opeskin, Paul Taylor, the participants in a seminar in the Philosophy Department at the University of California San Diego, and the anonymous reviewers for their very helpful comments. I also thank Lisa Billington and Lukas Opacic for their excellent research assistance. This research was funded partially by the Australian Government through the Australian Research Council's Discovery Project funding scheme (DP170100960: 'A Relational Theory of Procedural Justice').

In addition to its theoretical interest, the topic is also of interest from the perspective of political morality because, as this article will show (Part VI), an understanding of the nature of the court can be brought to bear in evaluating the merits of laws that authorise or mandate departures from traditional court arrangements. Such laws are a notable feature of the contemporary Australian legal landscape, where they have generally been passed in an effort to combat social problems such as terrorism and organised crime. The novelties have included laws conferring unusual functions on courts (such as making preventative detention orders against dangerous individuals);[1] laws empowering courts to use atypical procedures (such as declaring certain organisations 'criminal organisations' on the basis of secret evidence);[2] and laws enlisting courts in the rubber-stamping of executive schemes (for instance, by requiring a court to impose control orders on members of organisations declared to be criminal organisations by the executive branch of government).[3] Although legislative experimentation with judicial arrangements is not in itself problematic,[4] the theoretical account of the nature of a court defended in this article can help us to determine when and why laws affecting the judiciary should give rise to concern.

Inquiry into the nature of a court also has the potential to contribute to constitutional jurisprudence in jurisdictions in which legislatures are required to maintain bodies that are describable as 'courts'. This is the case in Australia, because the High Court has held that state laws affecting the state judiciary will be invalid if they interfere with the institutional integrity of state courts to such an extent that they no longer answer to the description 'courts'. This makes it important to determine what makes a body describable as a court. I will argue that the High Court's answer to this question is philosophically flawed and I will defend a different conception of a court – one that potentially has constitutional implications. I should, however, emphasise that tracing these implications is not the focus of this article. Instead, my aim is to undertake the necessary preliminary task of developing a philosophically adequate account of the nature of a court.

I will argue against two conceptions of a court that I will call 'minimalist' and 'essentialist'. According to the minimalist conception, as reflected in comments made by Joseph Raz (see Part III), there is nothing more to say about a court than that it is a governmental body that has the power to make binding resolutions of disputes by the application of existing laws. I will argue that our concept of a court is more complex than this, since there are borderline cases of courts that meet Raz's test but are nevertheless only courts in a weak or partial sense of the term. The essentialist conception, which is supported by Jeremy Waldron and Lon Fuller, and also accepted by the High Court, reflects the requisite complexity in our

1 See, eg, *Community Protection Act 1994* (NSW); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

2 See, eg, *Criminal Organisation Act 2009* (Qld) (discussed below in Part VI); *Crimes (Criminal Organisations Control) Act 2012* (NSW).

3 See *Serious and Organised Crime (Control) Act 2008* (SA), prior to amendment by the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA).

4 Gabrielle Appleby, 'The High Court and *Kable*: A Study in Federalism and Rights Protection' (2014) 40 *Monash University Law Review* 673, 691.

concept of a court by identifying further features of courts, such as the use of fair processes for reaching decisions (Part III). It is flawed, however, in regarding these features as essential to the existence of courts. I will argue that this leads it wrongly to classify borderline courts as 'non-courts', detracting from its explanatory power (Part V). Drawing on John Finnis's central case methodology in legal philosophy, I will introduce a third conception of a court, which I call the 'paradigm case conception'. I will argue that paradigm courts have features that equip them to perform the characteristic function of courts, which is to uphold the law. These features assist them to resolve legal disputes accurately and effectively (ie, with the willing acceptance of the public). Courts that do not possess all of these features or possess them to a limited degree are not courts in the full sense but neither are they 'non-courts'. Instead, they are substandard or defective courts (Parts III and IV). I will suggest that the paradigm case conception is theoretically superior to both the minimalist and essentialist conceptions in its ability to satisfy the desiderata of completeness and explanatory power (Part V). Finally, I will argue that the paradigm case conception is practically superior to the essentialist conception in casting more light on the potential dangers of laws that make novel arrangements for courts (Part VI).

II METHODOLOGICAL APPROACH

I will start with some brief methodological remarks. My aim is to develop an explanatory theory that takes its starting point from a range of cases in which people make judgements about courts, with a view to tying these judgements together in the most satisfying way so as to provide the best account of them. The cases in questions are cases in which everyone agrees that particular bodies are courts and cases in which everyone agrees that particular bodies are not courts. There are also borderline cases in which people hesitate as to whether particular bodies should be described as courts. My aim is to provide a theoretical account of the nature of a court that makes explicit the implicit principles governing this general pattern in our thinking. Although this approach involves exploring what we ordinarily call a court – as opposed to replacing the concept of a court with a different concept – arriving at a satisfying account of the distinctions and classifications everyone makes involves philosophical reflection of a specialised kind. It follows that the theory with the most explanatory power might not be able to accommodate all of our intuitive characterisations, and that some of our initial characterisations might have to be rejected as anomalous. A theory of the nature of a court could not, however, jettison in its entirety the general pattern mentioned above – the categories around which our thinking about courts clusters – without ceasing to be a theory of the nature of a court.

What, then, is the ordinary conception of a court, as revealed by people's intuitions about particular cases? First, there are bodies that everyone will agree are courts. For instance, it is uncontroversial to describe the High Court of Australia as a 'court'. There are also bodies that everyone will agree are not 'courts', notwithstanding the fact that they might have been given the name 'court'

by a legislature. An instructive example of the latter is the High Court of Parliament, which was a body created by the South African Parliament when the Nationalist Party began to implement its apartheid policies on coming to power in 1948. The Union of South Africa had been created by the *South Africa Act 1909* (UK) ('*South Africa Act*'). Section 35 of the *South Africa Act* provided that no law could disenfranchise voters in the Cape Province on the ground of race or colour, unless the law was passed by two-thirds of the members of both Houses of Parliament in joint session. This provision was entrenched by section 152 of the *South Africa Act*, which provided that no repeal of section 35 or of section 152 would be valid unless itself passed by a two-thirds majority in a joint session. In 1951, the *Separate Representation of Voters Act 1951* (South Africa) ('*Separate Representation of Voters Act*') was passed. This Act sought to remove the 'Coloured' voters in the Cape Province from the common electoral roll, a right they had enjoyed for a century.[5] It had been passed by a simple majority vote of each House sitting separately. The Appellate Division of the Supreme Court struck the Act down in *Harris v Minister of the Interior* ('the first *Harris* case'),[6] holding that it had not been passed in conformity with the procedures laid down in the *South Africa Act*.

The Prime Minister immediately announced that he did not intend to abide by the Court's decision, and a new law, the *High Court of Parliament Act 1952* (South Africa) ('*High Court of Parliament Act*'), was passed. The stated intention was 'to vest in the democratically elected representatives of the electors … the power to adjudicate finally on the validity of laws passed by Parliament'.[7] The Act made all the members of Parliament members of the 'High Court of Parliament'. It purported to give this so-called 'court of law' the power to review and overturn any decision of the Appellate Division which invalidated an Act of Parliament. Its decisions were to be final and binding. The decision of the 'court' would be determined by a majority vote. The High Court of Parliament soon voted to reverse the Appellate Division's decision in the first *Harris* case and to validate the *Separate Representation of Voters Act*. According to D M Scher, the members of the High Court were observed to be 'in high spirits, slapping one another on the back and some of them jokingly greeting each other as "regter" ["judge"]'.[8] The amusement they derived from the situation shows how obvious it was to all concerned that the High Court of Parliament was not a court but a sham body – a court only in name – which was established to dress up the will of Parliament in the guise of a judicial decision.

It is no surprise, then, that this cynical attempt to evade the procedural requirements of the *South Africa Act* was disallowed in *Minister of the Interior v Harris* ('the second *Harris* case'),[9] with the Appellate Division finding that the

5 D M Scher, '"The Court of Errors" – A Study of the High Court of Parliament Crisis of 1952' (1988) 13 *Kronos* 23, 23.

6 [1952] 2 SA 428 (Appellate Division).

7 Commonwealth of South Africa, *Parliamentary Debates*, House of Assembly, 22 April 1952, 4108–9 (T E Dönges, Minister of the Interior), quoted in Scher, above n 5, 26.

8 Ibid 31.

9 [1952] 4 SA 769 (Appellate Division).

High Court of Parliament was not in substance a court. The government had argued that the *High Court of Parliament Act* had reorganised the judicial system by creating a new court, which was superior to the Appellate Division and the final arbiter on all questions regarding the validity of laws in South Africa. The various judges in the second *Harris* case accepted that it was within the power of Parliament to establish a court with jurisdiction to review the decisions of the Appellate Division. They found, however, that this was not what Parliament had intended.

The judges observed that if Parliament had genuinely intended to establish a new court of law to correct any errors made by the Appellate Division, it would have ensured that the members of the new court were impartial and highly qualified. In fact, the Act permitted the very same persons who passed a law to declare that they had acted lawfully – something incompatible with the fundamental requirement of judicial impartiality and foreign to a court of law. In addition, these persons were not required to have legal qualifications. A further reason for thinking that the High Court of Parliament was not a court of law was that it was required to review a decision of the Appellate Division for 'error' only when the Appellate Division had declared a law invalid, not when it had declared a law valid, notwithstanding the potential for error in both cases. The Appellate Division concluded that these features of the new 'court' showed that the High Court of Parliament was 'simply Parliament functioning under another name'.[10] In this way, the Appellate Division sought to explain the nature of a court as a matter of substance, not of terminology.

I have given an example of a body that we readily classify as a court and a body that we readily classify as a 'non-court'. However, there are also borderline cases in which we hesitate whether to call a particular body a court. Consider the Court of Appeals for the Province of South Australia, which served as the final court of appeal for the colony of South Australia from 1837 until 1937 and, as Stephen McDonald explains, conducted itself in much the same way as other appellate courts. For instance, it sat in open hearings and counsel appeared before it and made submissions as to the law. It generally provided brief reasons, of an ostensibly legal kind, for its decisions. Yet it was comprised of members of the executive government of the colony (excluding the law officers) and presided over by the Governor.[11] Should we describe this body as a 'court'? Its processes make it tempting to describe it as a court but its lack of independence from the executive branch of government also makes us waver. Our discriminatory capacities struggle to come up with a clear answer to this question.

The Court of Appeals for the Province of South Australia and other borderline cases are, in fact, test cases for a theory of the nature of a court, as will become apparent in Part V, where I will argue that my theory of the nature of a court does

10 Ibid 784 (Centlivres CJ) (Appellate Division). The government did not attempt to have the Court's decision 'reviewed' by the High Court of Parliament. However, it soon found a lawful way to disenfranchise the 'Coloured' voters by passing the *Senate Act 1955* (South Africa). This Act enlarged the Senate so as to give the government the requisite two-thirds majority.

11 Stephen McDonald, '"Defining Characteristics" and the Forgotten "Court"' (2016) 38 *Sydney Law Review* 207, 213, 216–17.

a better job at accounting for borderline cases than the alternative theories. First, though, I need to explain the candidate theories.

III THREE CONCEPTIONS OF A COURT

The first conception of a court is a minimalist conception ('MC'). I have extracted it from the writings of Raz, who describes courts as 'norm-applying institutions'.[12] Although courts have a range of powers and functions, Raz argues that the power that identifies them as courts is the power to settle disputes between individuals by applying existing norms or laws, their determinations as to individuals' legal rights and duties being authoritative or binding.[13] Courts are therefore institutions in whose hands 'the authority to make binding applicative determinations' is 'concentrated'.[14]

Raz is correct to say that it is an essential characteristic of a court that it has the power he describes. We do not, for instance, describe as 'courts' bodies that have no power to apply existing rules but are empowered instead to make new rules to govern future conduct, taking into consideration broad issues of policy. We call such bodies 'legislatures', not 'courts'.[15] Again, although private persons may express opinions about a person's legal rights, we do not describe them as 'courts', because the views of private individuals are not binding.[16] Raz's conception is also able to explain why the High Court of Parliament was not a court, since the High Court of Parliament was not intended to resolve disputes according to law.

This is not to say, however, that Raz's account is entirely satisfactory. Raz believes that there is nothing more to say about the nature of a court than that it is a body that is empowered to make binding resolutions of disputes by applying existing laws. Although I agree with Raz that a body must meet the minimum test of having the 'authority to make binding applicative determinations' to be describable as a court, I will shortly argue that we need a more fine-grained and discriminating account of a court than this, because not all bodies that meet Raz's test are courts in the same sense.

Waldron also argues that Raz's account of a court is incomplete and that a satisfactory theoretical account of a court needs to make reference to additional features. I disagree, however, with a key aspect of Waldron's account. Waldron notes that Raz understands courts solely in terms of their 'output'[17] (ie, determining the legal situation of individuals by applying existing norms), and objects to this on the ground that a body, such as a secret military commission, that meets to determine the legal situation of individuals in their absence and without affording

12 Joseph Raz, *Practical Reason and Norms* (Hutchinson, 1975) 132.
13 Ibid 134–7.
14 Ibid 136.
15 See, eg, James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 222, explaining the nature of legislative power.
16 See Raz, above n 12, 134–5.
17 Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' (2011) 50 *Nomos* 3, 13.

them a hearing, would satisfy Raz's account of a court.[18] According to Waldron, Raz leaves out the distinctive process by which courts arrive at their decisions – a process that includes hearings and impartial proceedings. Fuller makes a related point in analysing the notion of adjudication, arguing that adjudication is not merely a matter of judging disputes. For Fuller, the defining feature of adjudication is that it is adversarial. He argues that adjudication involves a distinctive mode of participation by the parties, whereby affected parties are able to present proofs and reasoned arguments in their favour and the adjudicator is obliged to decide based only on the arguments that have been presented.[19]

The key feature of Waldron's and Fuller's accounts for present purposes – and the one with which I disagree – is that they regard the additional features of courts on which they focus (fair processes and the distinctive way in which the parties participate in the proceedings) as essential to courts and adjudication or as going to their very existence. Fuller talks of separating the 'tosh' that accumulates about institutions from the 'essential',[20] and says that just as there are certain essential conditions without which the participation of a voter in elections loses its meaning, so rationality is an essential condition for the functioning of adjudication.[21] Waldron says that what he '*means*' by a court is an institution that applies norms and settles disputes about their application through the medium of hearings before an impartial decision-maker.[22] It is clear, then, that Waldron and Fuller hold that bodies that do not meet their criteria fail to qualify as courts or adjudicative bodies. For convenience, I will describe this view as the 'essentialist' conception of a court ('EC'). The label is not entirely accurate, since Raz also pinpoints essential conditions for a body to be a court. A more accurate description for a conception such as Waldron's would therefore be 'enhanced essentialism', since Waldron supplements Raz's minimalist set of essential conditions with additional essential conditions. However, for ease of exposition, I will use the label 'EC' as shorthand for the beefed-up form of essentialism defended by Waldron and Fuller.

The High Court has also taken this approach in the course of considering the implications of the fact that the *Australian Constitution* establishes an integrated court system in terms of which the federal parliament may, under section 77(iii) of the *Constitution*, invest 'any court of a State' with federal jurisdiction. When the implications of this provision were first considered in the case of *Kable v Director of Public Prosecutions (NSW)*,[23] the High Court found that state courts need to be suitable receptacles for federal jurisdiction and that this prevents state parliaments from conferring on their courts functions that are incompatible with the exercise of federal judicial power.

Initially, the High Court saw the maintenance of public confidence in the independence and impartiality of state courts as playing a central role in limiting the arrangements state legislatures can make for their courts compatibly with

18 Ibid 12–13.
19 Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353, 364–7.
20 Ibid 356, 360.
21 Ibid 364–6.
22 Waldron, 'Rule of Law', above n 17, 12 (emphasis added).
23 (1996) 189 CLR 51 ('*Kable*').

maintaining their role as repositories of federal judicial power.[24] More recently, it has retreated from the criterion of public confidence, at least as a criterion of invalidity,[25] shifting its attention to the meaning of the term 'court of a State', and saying that this term has a constitutional dimension. The High Court now says that state legislatures must maintain bodies that are 'courts', 'as that word is to be understood in the *Constitution*', in order for them to be suitable receptacles for federal judicial power.[26] To meet this constitutional standard, state courts must possess 'institutional integrity', which is said to be a matter of possessing the 'defining' characteristics that 'mark a court apart from other decision-making bodies'.[27] These characteristics are also sometimes described as 'essential characteristics'.[28] State legislatures are consequently prohibited from impairing these characteristics of state courts so substantially that the bodies would no longer 'answer to' the description 'courts'.[29] The High Court has refrained from providing an exhaustive list of the defining characteristics of courts, but says that they include all of the following: the reality and appearance of decisional independence and impartiality; the application of procedural fairness; adherence as a general rule to the open court principle; and the provision of reasons for courts' decisions.[30] Furthermore, the power to review the decisions of inferior courts and tribunals for jurisdictional error is a defining characteristic of state Supreme Courts.[31]

I will defend a different alternative to MC, which I call the 'paradigm case' conception ('PCC'). It is based on a distinction between 'paradigm courts' and 'defective courts'. In explaining the nature of a court, EC takes a binary approach: bodies either qualify as courts or they do not, according to whether they meet Raz's minimum test of being empowered to make binding resolutions of disputes by applying existing laws and have further features. By contrast, the conception of a court that I will propose is scalar: it locates along a spectrum different instances of bodies that meet Raz's test. On my account, all bodies that meet Raz's minimum test are describable as 'courts' in one sense of the term. However, they can be more or less 'court-like', depending on the extent to which they possess features that equip them to perform the function of a court successfully (see Part III).

It will be evident that my diagnosis of the flaws in MC is quite different from EC's diagnosis. MC assumes that the term 'court' refers in the same sense to all

---

24 Ibid 107–8 (Gaudron J), 116–18 (McHugh J), 133–4, 143 (Gummow J).

25 The maintenance of public confidence in the courts was central to the reasoning in *Kable*. However, in subsequent cases the idea was wound back: see, eg, *Baker v The Queen* (2004) 223 CLR 513, 519 (Gleeson CJ), 542–3 (Kirby J), *Fardon v A-G (Qld)* (2004) 223 CLR 575, 593 (McHugh J), 618 (Gummow J), *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 122 (Kirby J), 149 (Heydon J) ('*Forge*'), and *South Australia v Totani* (2010) 242 CLR 1, 49 (French CJ), 82 (Hayne J), 96 (Heydon J) ('*Totani*').

26 *Forge* (2006) 228 CLR 45, 75 [61] (Gummow, Hayne and Crennan JJ).

27 Ibid 76 [63] (Gummow, Hayne and Crennan JJ).

28 See, eg, *Totani* (2010) 242 CLR 1, 45 [62] (French CJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 208–9 [44] (French CJ and Kiefel J).

29 *Forge* (2006) 228 CLR 45, 67–8 [41] (Gleeson CJ).

30 *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 71 [67] (French CJ) ('*Condon*').

31 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

bodies that share the characteristic of having the power to make binding resolutions of disputes by applying existing laws. EC objects to MC on the ground that having the power to make binding resolutions of disputes by applying existing laws is necessary but not sufficient to qualify a body as a court. This is because EC takes a 'defining characteristics' approach to the additional features that figure in a complete account of a court, so as to preclude bodies that lack these features from counting as courts. By contrast, I object to MC not on the ground that there are further essential characteristics shared by all courts that it omits, but on the ground that it is undiscriminating: within the class of bodies that are empowered to make binding resolutions of disputes by applying existing laws, some are paradigm cases of courts and some are defective cases. The former possess certain additional features that are not possessed by the latter or not to the same extent.

I am influenced here by the central case methodology in legal philosophy, which has been proposed as the correct approach to understanding the concept of law by theorists such as John Finnis. Without wishing to convey acceptance of every aspect of Finnis's method (or its application to the concept of law specifically), its key characteristic for present purposes is that Finnis seeks to understand law by identifying features that are present in the central or paradigmatic cases of law – which he calls the 'focal' meaning of law[32] – rather than features that all legal systems have in common. The latter, 'lowest common denominator' approach wrongly assumes that theorists should use the explanatory term 'law' in such a way that it 'extend[s], straightforwardly and in the same sense, to *all* the states of affairs which could reasonably, in non-theoretical discourse, be "called 'law'", however undeveloped those states of affairs may be'.[33] Finnis regards this kind of 'ordinary talk' about law as 'quite unfocused'.[34] At the same time, Finnis does not wish to rule out as 'non-laws' these undeveloped states of affairs.[35] This means that the features present in the central case should not be confused with essential characteristics of a legal system, such that instances that do not have all the features or do not exemplify them to the same degree do not count as legal systems. Instead, our concept of law should explain the 'various phenomena referred to (in an unfocused way) by "ordinary" talk about law',[36] by showing how some of them are 'fine specimen[s]', whereas others are 'deviant case[s]'.[37] By way of analogy, Finnis refers to central and peripheral cases of other phenomena, such as friendship and constitutional government. A friendship of convenience is clearly a borderline case of friendship. Finnis says that there is nevertheless no point in denying that it is an instance of friendship. Indeed, the best way to understand what is wrong with a friendship of convenience is to think of it as a 'watered-down' version of the central case.[38] In short, Finnis seeks to provide an account of law that carves out middle ground between (i) using the term

32 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 9.
33 Ibid 10 (emphasis in original).
34 Ibid 278.
35 Ibid.
36 Ibid 279.
37 Ibid 11.
38 Ibid.

'law' in an undifferentiated way, by making no distinction between the central and peripheral cases of law and failing to see that being 'law' is a matter of degree, and (ii) 'appropriating' the term 'law' by refusing to count as 'legal systems' systems that do not possess all of the characteristics of the central case or not to their full extent.[39]

I will draw on Finnis's distinction between the central and peripheral cases of a phenomenon to illuminate the nature of a court, arguing that bodies that are empowered to make binding resolutions of disputes by applying existing laws and that also have certain additional features (described below in Part IV) are 'paradigm courts'. I do not, however, claim that these additional features are essential features of courts. I therefore do not withhold the label 'court' from bodies that have the relevant power but do not have all the features of paradigm courts, or not to the same degree. I will argue that this approach is theoretically and practically superior to EC. I will also argue that it is superior to MC, in providing an account of the nature of a court that is both more complete and more refined. My account qualifies the description of bodies that do not have the 'full machinery' of paradigm courts by classifying them as 'substandard' or 'anomalous' courts. They are defective or 'watered-down' instances of the class.[40] Thus I want to make a comparable claim about courts to Finnis's claim about law: in theorising about the nature of a court, we should not use the term 'court' in an undiscriminating way, such that it covers in the same sense all the bodies that meet Raz's minimum test, however inadequate those bodies may be.

IV PARADIGM COURTS

I have suggested that within the class of bodies that have the power to make binding resolutions of disputes by applying existing laws à la Raz, some are paradigm examples of courts and some are more peripheral cases. But what is the standard in terms of which these evaluations can be made? In my view, a court is an artifact. The term 'artifact' paradigmatically covers objects that are intentionally made or produced for a certain purpose,[41] whether ordinary material objects such as alarm clocks or abstract objects such as institutions.[42] Such objects need to be understood in terms of their functions or what they are supposed to do. So far as courts are concerned, in the division of responsibilities that stems from the separation of powers in a constitutional democracy, courts are bodies that are intended to serve the purpose of enforcing and upholding the law. As Montesquieu

39 Ibid 277–9.

40 See also Jeffrey Goldsworthy, '*Kable*, *Kirk* and Judicial Statesmanship' (2014) 40 *Monash University Law Review* 75, 88.

41 Risto Hilpinen, 'Artifact' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, Winter 2011 Edition) <https://plato.stanford.edu/archives/win2011/entries/artifact/>.

42 Kenneth Ehrenberg explains that institutions are generally abstract artifacts, saying '[t]hey are artifacts in that they are tools we create to be recognizable [by others as a certain kind of thing]. But they are abstract in that they are not identical to any specific set of physical concrete entities': Kenneth M Ehrenberg, *The Functions of Law* (Oxford University Press, 2016) 11.

was one of the first to appreciate, the location of this function in a separate branch of government is an important check against the tyrannical exercise of power.[43]

It does not follow, however, that courts are necessarily able to perform their characteristic function. In order for them to be in a condition to do so, it is not enough to empower them to make binding resolutions of disputes by applying existing laws. They also need to be equipped to undertake this task successfully. I will argue that this means, first, that courts need features which assist them to arrive at accurate outcomes. I use 'accurate outcomes' as shorthand for outcomes that conform to people's pre-existing legal entitlements, the content of the law having been correctly determined and applied to the facts as truly ascertained.[44] Secondly, courts need features which encourage the public to accept their authority to undertake this task, so that they can act with what has been called 'effective authority',[45] their resolution of disputes being accepted as final, 'without further disputation'.[46] Bodies empowered to apply the law which do not possess these features or manifest them to a limited degree are compromised in their ability to uphold the law. Although they are still courts, they are defective ones. Mark Murphy makes a comparable claim about law, arguing that law has a characteristic function (to lay down norms with which agents will have decisive reason to comply), and that norms that fail to perform this function are not legally invalid but rather legally defective or defective as law. Murphy compares laws that are not backed by decisive reasons for compliance to broken alarm clocks. Broken alarm clocks are still alarm clocks, albeit defective ones.[47] I want to defend a similar view about courts: courts that are compromised in their ability to perform their characteristic function in the overall system of government are defective as courts.

This is not to deny the many complexities that attend the idea of separating governmental powers, such as the indeterminacies in the notions of legislative, executive and judicial power, and the extent to which the different branches are or should be confined to their primary functions.[48] I cannot discuss these issues here, except to emphasise that I do not deny that judges are sometimes required to make new law. Thus, when I say that paradigm courts have features that assist them to resolve disputes about legal rights and duties accurately, I do not assume that there

43 Charles Montesquieu, *The Spirit of the Laws* (Anne M Cohler, Basia C Miller and Harold S Stone trans and eds, Cambridge University Press, 1989) bk 11, ch 6 [trans of: *De l'espirit de lois* (first published 1748)]. For discussion of Montesquieu's contribution to modern understandings of the importance of the separation of judicial power, see M J C Vile, *Constitutionalism and the Separation of Powers* (Oxford University Press, 1967) 88–90, 96.

44 For this understanding of accuracy, see, eg, Robert G Bone, 'Procedure, Participation, Rights' (2010) 90 *Boston University Law Review* 1011, 1016; Robert G Bone, 'Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness' (2003) 83 *Boston University Law Review* 485, 510.

45 Susan Kenny, 'Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium' (1999) 25 *Monash University Law Review* 209, 210.

46 Ibid 214.

47 Mark C Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006) 32–6, 57. For discussion of Murphy's view, see Jonathan Crowe, 'Clarifying the Natural Law Thesis' (2012) 37 *Australian Journal of Legal Philosophy* 159, 173–4.

48 See, eg, Eric Barendt, 'Separation of Powers and Constitutional Government' [1995] (Winter) *Public Law* 599; Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016) 221.

are always right answers to legal questions or that it is always easy to arrive at right answers when they do exist. I argue merely that paradigm courts are well equipped to make decisions that conform to pre-existing 'standards of correct legal decision', to use H L A Hart's phrase,[49] when such standards exist.

Although something can be suited to serve a particular function without its being the case that serving the function is morally desirable,[50] this is not true of paradigm courts, since, as D J Galligan observes, upholding individuals' legal rights or treating them according to law is an important (though not the only) aspect of justice.[51] I am also influenced in this regard by Ronald Dworkin, who argues that whenever a court mistakenly finds against a party's legal rights, a distinctive kind of injury is caused. Dworkin considers the mistaken conviction and punishment of someone who is innocent. He argues this causes two kinds of harm. When someone is unjustly punished, they suffer 'bare harm', such as the harm of being deprived of their liberty. This is a harm that those who are justly punished also suffer. However, someone who is unjustly punished also suffers a further injury, 'just in virtue of that injustice',[52] and regardless of the substantive law that is involved in the case.[53] Dworkin calls this kind of harm 'moral harm' and argues that it is a distinct harm against which people need to be specially protected, by contrast with bare harm, which can be traded off in routine utilitarian calculations.[54]

At the same time, Dworkin does not believe that the need to avoid moral harm trumps all other considerations, since he argues that resource considerations make it unreasonable to insist that courts should use procedures that guard against moral harm to the greatest extent possible. To insist on maximal accuracy would make it impossible to satisfy the other legitimate claims that compete for social resources.[55] There are also other reasons to think that upholding the law cannot be an absolute requirement. For instance, there are cases in which the law is gravely unjust and should not be applied. In such cases, as Galligan says, officials are under a moral duty to treat people in accordance with justice in a more fundamental sense, rather than according to the standards of legal justice.[56] I will say more about these matters in Part VI, where I will consider how to evaluate the moral permissibility of laws that impose a risk of moral harm or legal injustice by creating defective courts.

I turn now to the specific features that courts need to be in a condition to perform their function successfully. I will focus on the most salient of these features, since it is not possible to discuss the matter exhaustively. I will argue that

---

49 H L A Hart, *The Concept of Law* (Oxford, 2nd ed, 1994) 145.

50 Compare Ehrenberg, above n 42, 131, arguing that understanding the purpose for which an object is used does not require valuing it in the same way that its users do.

51 D J Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996) xviii, 58–9.

52 Ronald Dworkin, 'Principle, Policy, Procedure' in *A Matter of Principle* (Harvard University Press, 1985) 72, 74, 80.

53 Bone, 'Procedure, Participation, Rights', above n 44, 1018.

54 Dworkin, above n 52, 81.

55 Ibid 84.

56 Galligan, above n 51, 59–62.

the ability of courts to arrive at accurate results is tied to the features of impartiality, judicial independence and the use of procedures that are a reliable way of ascertaining the facts, and that the ability of courts to act with effective authority depends on the courts being perceived to possess these features. Although the features to which I have referred are familiar, I will tie them together via PCC, arguing that they are unified by the contribution they make to the capacity of the courts to perform their characteristic function of upholding the law. Laws that tamper with these features of courts consequently turn them into defective courts. How defective the resultant courts are will be a matter of degree, depending on the extent to which their ability to reach accurate results and generate public acceptance for their decisions is compromised by particular legislative arrangements.

Clearly, judges are less likely to arrive at accurate outcomes if they do not administer the law impartially. Partial judges might arrive at legally correct outcomes in particular cases but they are less likely to do so as a general matter. This is not to overlook the complexities in the concept of impartiality or the well-known difficulties in fixing the point at which personal experiences, predispositions and preconceptions become incompatible with it.[57] Still, it is plain that obvious partisanship and prejudice in judgments are avoidable and that the judicial oath 'to do right to all manner of people according to law without fear or favour, affection, or ill-will' is not an empty promise. Of course, judges must be faithful to and uphold legal rules and legal values, but, as William Lucy points out, this kind of partiality is quite different from the problematic kind of partiality that consists in showing favouritism to one side and failing to approach the matter with an open and unprejudiced mind.[58] The capacity of judges to avoid these kinds of partisanship is bolstered by their independence, especially from the political branches of government.[59]

In this respect, decisional independence and branch independence are particularly important. Judges enjoy decisional independence when they are protected from outside interference or influence in deciding specific cases, especially interference from the other branches of government.[60] At the extreme end of the spectrum, interference with decisional independence might take the form of a legislative direction to decide a case in a particular way or to give effect to an executive decision. An example is the law mentioned in Part I which required a court to impose control orders on members of organisations declared to be criminal organisations by the executive branch of government.[61] Judges also need

57 For discussion, see Matthew Groves, 'The Rule against Bias' (2009) 39 *Hong Kong Law Journal* 485, 510–13.

58 William Lucy, 'The Possibility of Impartiality' (2005) 25(1) *Oxford Journal of Legal Studies* 3, 15, 18.

59 Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 3, 10.

60 See, eg, Charles Gardner Geyh and Emily Field Van Tassel, 'The Independence of the Judicial Branch in the New Republic' (1998) 74(1) *Chicago-Kent Law Review* 31, 31–2; Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge University Press, 2011) 207–8.

61 *Serious and Organised Crime (Control) Act 2008* (SA), prior to amendment by the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA).

protection from less conspicuous forms of interference, such as threats or inducements to decide cases in a way that is favourable to the government. There are a variety of legal arrangements that are used to insulate them from these kinds of pressures. Prominent among these are arrangements that provide judges with security of tenure except in circumstances of proved misbehaviour and incapacity, remunerate judges properly, and guarantee them that their salary will not be decreased during their term in office.[62] Branch independence consists in the institutional separation of the judiciary from the other branches of government. When branch independence is secured, the judiciary is the only branch of government empowered to decide legal disputes.[63]

It will be clear that decisional independence and branch independence promote the accurate resolution of legal disputes. Although they do not guarantee accurate outcomes, they make them more likely, since they insulate judges from pressures to reach outcomes that do not reflect the law and ensure that only judges (that is, only persons insulated in this way) are assigned the task of applying the law.

In order to be in a position to settle legal disputes accurately, courts also need to use procedures that are fair in the sense that they are a means to accurate outcomes: a paradigm court could not arrive at decisions by way of processes ill-suited to reach legally sound results. This is not to say that the only purpose that procedures ought to serve is arriving at the right result. Nor is it to say that litigants are entitled to maximally accurate procedures, since Dworkin is correct that this would be unaffordable.[64] The procedures used by courts should nevertheless lead for the most part to accurate outcomes, exemplifying what John Rawls calls 'imperfect procedural justice'.[65] Rawls gives the example of a criminal trial and explains that

> [i]t is imperfect because no trial procedure … can be guaranteed to convict the accused if and only if the accused has committed the crime. Yet … the procedure of a criminal trial would not be just … unless it was intelligently drawn up so that the procedure gives the correct decision, at least much of the time.[66]

Although the reliability of procedures is a matter of degree, there are clear-cut examples of reliable procedural rules, such as the hearing rule and the bias rule. Judges are more likely to find the facts truly and apply the law correctly if they have received information and argument from the persons who stand to be affected by their decisions.[67] Judges are also more likely to arrive at accurate outcomes if they are not permitted to preside in cases in which they are biased or likely to be biased – because, for instance, they have a personal or pecuniary interest in the outcome and are therefore not likely to approach the issue with an open mind.[68] Equally important is the expectation that judges will publicly justify their decisions

62 See generally J van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (The British Institute of International and Comparative Law, 2015) ch 2.

63 See, eg, Geyh and Van Tassel, above n 60, 31–2; Roger Masterman, above n 60, 207–8.

64 Dworkin, above n 52, 84.

65 John Rawls, 'Political Liberalism: Reply to Habermas' (1995) 92(3) *The Journal of Philosophy* 132, 171.

66 Ibid.

67 Galligan, above n 51, 350.

68 Ibid 441.

by providing reasons based on objective legal standards, not their own personal opinions, since a reasoned decision is more likely to be a better decision, legally speaking.[69]

I have discussed the features that equip courts to arrive at accurate outcomes, which is one aspect of their successful functioning. I turn now to the features that equip them to resolve disputes with effective authority, which is the other aspect. Here the relevant features go to matters of perception. The reason why perceptions play a role in the efficacy of the judiciary's decisions relates to the 'essential fragility'[70] of judicial authority. The judiciary is the weakest branch of government, having, as Alexander Hamilton observed in *The Federalist*, neither the 'purse', nor the 'sword'.[71] The consequence, as Susan Kenny explains, is that the courts need to rely on something in addition to the force of the state for the efficacy of their judgments. This something else is public confidence in the integrity of the judiciary – something that depends ultimately on favourable public perceptions.[72]

The requisite perceptions go primarily to matters of independence, impartiality and procedural fairness. When judges are perceived to be free of external influence, this promotes the perception of impartial adjudication, which in turn sustains the public's confidence in the soundness of judicial decisions, and assists courts to act with effective authority. The appearance of independence is supported by the same institutional arrangements that secure its reality, as well as by other practices, such as not conferring functions on courts or their members that create the impression that the courts are the instrument of or subservient to the executive branch of government.[73] Stephen Parker pays particular attention to these considerations in the course of discussing public confidence in the judiciary, arguing that perceptions of judicial impartiality,[74] as sustained by judicial independence,[75] are central to confidence. I would add that perceptions of procedural fairness play an equally important role in the ability of the courts to act with effective authority. When justice is seen to be done, because procedures are used that people have reason to believe will lead to sound outcomes, this gives litigants and the public confidence in the judiciary.[76] Perceptions of procedural

69 Ibid 431–2; Jason Bosland and Jonathan Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' (2014) 38 *Melbourne University Law Review* 482, 488.

70 *Forge* (2006) 228 CLR 45, 130 [217] (Kirby J).

71 Alexander Hamilton, 'No 78' in Alexander Hamilton, John Jay and James Madison (eds), *The Federalist* (Liberty Fund, Gideon Edition, 2001) 401, 402.

72 Kenny, above n 45, 214; see also Frances Kahn Zemans, 'The Accountable Judge: Guardian of Judicial Independence' (1999) 72 *Southern California Law Review* 625, 625.

73 For discussion of the importance of such practices, see Rebecca Ananian-Welsh and George Williams, 'Judicial Independence from the Executive: A First-Principles Review of the Australian Cases' (2014) 40 *Monash University Law Review* 593, 626–30.

74 Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 62, 68–71.

75 Ibid 64.

76 Galligan, above n 51, 72.

fairness are therefore as important a prerequisite for the judiciary's successful performance of its function as perceptions of independence and impartiality.[77]

I have argued in this Part that a court is an artifact which cannot be properly understood without reference to what it is supposed to do, namely, uphold the law. This connects my theory with the artifact theories of law recently defended by other legal theorists. Kenneth Ehrenberg, for instance, claims that institutions are generally explained in terms of the functions that they are designed or used to perform; that this makes them artifacts, albeit of an abstract kind; and that law is one such institution.[78] However, an artifact theory of law encounters a difficulty not encountered by an artifact theory of a court. This is because: (i) the orthodox view is that something cannot be an artifact unless it is an object intentionally made by a creator (the 'intention condition');[79] and (ii) on the face of it, laws do not always have a creator, customary law being an apparent example, as Jonathan Crowe points out.[80] It follows that law cannot be an artifact unless it can be shown either that law is always, contrary to appearances, intentionally created to serve a purpose (as argued by Ehrenberg),[81] or that the orthodox view is incorrect and that the class of artifacts includes both intentionally and unintentionally created artifacts (as argued by Crowe).[82] By contrast, the intention condition is not an obstacle to conceptualising a court as an artifact, since courts in the common law world have been consciously used as (evolving) tools to accomplish human goals since Henry II sent out travelling justices in the 12th century as a means of extending his authority throughout the realm.[83]

My artifact theory of a court might, however, seem to encounter a different difficulty. If I am right that a court is an artifact, the implication is that a body that is entirely incapable of upholding the law will not qualify as a court. This is because an object must have some degree of success in performing its function in order to count as an artifact. I explain this 'success condition' below. The difficulty relates to whether this implication of my theory is inconsistent with PCC. In particular, it might seem to be inconsistent with PCC's claim that all bodies that satisfy Raz's minimalist test are describable as courts (albeit that they are not necessarily good instances). I turn to this apparent problem now.

The fact that an object has been intentionally created to perform a particular function is not sufficient for it to count as an artifact, even if it is necessary as

77 This is confirmed by empirical studies: see, eg, Tom R Tyler and Yuen J Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (Russell Sage Foundation, 2002) 177–8, 185–95.

78 Ehrenberg, above n 42, 11–12.

79 See, eg, Risto Hilpinen, 'Authors and Artifacts' (1993) 93 *Proceedings of the Aristotelian Society* 155, 156.

80 Jonathan Crowe, 'Law as an Artifact Kind' (2014) 40 *Monash University Law Review* 737, 739.

81 Ehrenberg argues that a customary law is different from a customary rule. In his view, a customary rule can arise without the conscious intention of an individual or group. By contrast, a customary law can exist only where there is an expectation that violation of a customary rule requires an official or collective response, and this in turn requires that some person or group has consciously decided that the customary rule should be raised to that level: above n 42, 122–3. See also Luka Burazin, 'Can There Be an Artifact Theory of Law?' (2016) 29 *Ratio Juris* 385, 399.

82 Crowe, 'Law as an Artifact Kind', above n 80, 743–8.

83 J H Baker, *An Introduction to English Legal History* (Butterworths, 3rd ed, 1990) 16–19.

maintained by the orthodox view. Thus, Risto Hilpinen explains that in order to produce an artifact of a particular kind, the agent's productive activity must be 'successful in some respect and to some degree … If an author fails in every respect, he does not produce a genuine artifact, but only "scrap"; he is not an author of anything in the "intentional" sense of the word'.[84] Simon Evnine states likewise that the attempt to produce an artifact may involve 'botching a job so badly that one brings nothing at all into existence, not even a bad specimen'.[85] Evnine gives the example of someone who intends to make an airplane and works on some butter with that intention. This person does not succeed in making an airplane, not even a non-functioning or defective one.[86] If there are unintentionally created artifacts, the success condition can be modified to accommodate them. Thus, Crowe states that 'a putative member of an artifact kind fails the success condition if it is constitutively incapable of performing the characteristic function of members of that kind',[87] or is not even 'the right type of thing' to count as a member of that kind.[88]

If I am right that a court is an artifact, the success condition implies that a body which is entirely incapable of performing the function of a court is not a court at all, not even a defective one. Yet I have also defended PCC, which accepts Raz's claim that in order to count as a court, a body merely needs to meet the minimum condition of having been intentionally created to resolve legal disputes by applying the law. It might seem that these two aspects of my theory cannot be reconciled. How can both of the following claims be true: (i) any body that has been intentionally created to resolve legal disputes by applying the law qualifies as a court; and (ii) a body that is entirely unsuccessful at turning this intention into reality does not qualify as a court? I will argue that these claims are not, in fact, in conflict. Although my artifact theory implies that a body that is unable in any respect to uphold the law is not a court, I will suggest that a body of this kind would also fail Raz's test, because such a body could not have been intentionally created for the purpose of upholding the law. I turn to explain this now.

When the success condition for artifacts is not met, the failure cannot be deliberate. It would not make sense for someone to set out to make an object for a particular purpose and then deliberately sabotage their efforts by making an object that is entirely incapable of fulfilling that purpose (unless they have changed their mind halfway, but in that case they would now intend to produce an artifact of a different kind, namely, a 'botched' version of the original artifact). This shows that a putative artifact's failure to meet the success condition must be inadvertent – perhaps because the maker is deluded, like the person who tries to make an airplane of butter, or perhaps because the maker's expectations were too ambitious, as with a failed invention.

84 Hilpinen, 'Authors and Artifacts', above n 79, 160–1.
85 Simon J Evnine, *Making Objects and Events: A Hylomorphic Theory of Artifacts, Actions, and Organisms* (Oxford University Press, 2016) 125.
86 Ibid.
87 Crowe, 'Law as an Artifact Kind', above n 80, 743.
88 Ibid.

Now consider a body that is entirely incapable of performing the function of a court. Suppose the legislature has created a body that can be directed by the government to resolve legal disputes in any way the government pleases. It is true that such a body is not a 'court', even if that label has been bestowed on it. But can its failure to qualify as a court be explained by legislative incompetence? Did something go awry when the legislature attempted to create a body capable of upholding the law? This is an implausible supposition. In light of the benefits the legislature derives from the body, it is difficult to imagine how the body's inability to perform the function of a court could be anything but intended. The imagined case looks more like the High Court of Parliament in South Africa than the airplane made of butter. The reason why the High Court of Parliament was not a court was not because of a legislative bungle, but because the legislature deliberately set out to create a body that was not intended to uphold the law. Calling this body a 'court' was merely a way of trying to whitewash the body's decisions. Since the body was not intended to resolve disputes according to law, it therefore failed the minimum condition to qualify as a court.

It seems to me that the same would have to be true of any body which has been given features that make it entirely incapable of performing the function of a court: the reason why such a body would not qualify as a court is not because the legislature inadvertently flopped in its attempt to create a law-applying body, but because the legislature intentionally (and successfully) created a different kind of body – one intended to resolve disputes in ways preferred by the government. In short, this would not be a failed attempt to create a genuine court, but a successful attempt to create a sham court. I therefore conclude that PCC and the artifact theory of a court are not in conflict: although the artifact theory implies that a body must have some degree of success in upholding the law in order to qualify as a court, any body which fails this test would also fail Raz's minimalist test, because it could not be the product of an intention to create a law-applying body. Instead, it would be the product of an entirely different intention – an intention to create a body for the purpose of resolving disputes in accordance with the government's wishes.

V THE THEORETICAL SUPERIORITY OF THE PARADIGM CASE CONCEPTION

The discussion so far suggests that there are two desiderata that a satisfactory theoretical account of a court should satisfy. First, it should accommodate the fact that being a court is a matter of substance, not of legislative choice: calling a body a 'court' cannot make it one. Second, it should reflect the fact that there is more to a court than the power to make binding resolutions of disputes by applying existing laws. All three conceptions of a court discussed in Part III satisfy the first desideratum, and both EC and PCC satisfy the second desideratum, since they both provide a more complete account of a court than MC. I will now argue, however, that both MC and EC have difficulty in satisfying a third desideratum. An account of a court should be able to give a satisfying account of the full range of cases described in Part II by uncovering the principles that underpin our classifications

when we unhesitatingly pick out certain bodies as courts (such as the High Court of Australia), and others as 'non-courts' (such as the High Court of Parliament), as well as when we hesitate over certain bodies (such as the Court of Appeals for the Province of South Australia). It is the bodies over which we hesitate that are most relevant for present purposes. Our hesitation is not an isolated anomaly but forms a central part of the general pattern of our thinking about courts. A satisfactory account of a court should therefore be able to explain why we are pulled in opposite directions when we think about these bodies.

Both MC and EC struggle to explain this. These difficulties arise because MC is too accommodating in its conception of a court, whereas EC is too exclusionary. As explained in Part II, MC takes a lowest common denominator approach. It assumes that the term 'court' refers in the same sense to all bodies that share the characteristic of having the power to make binding resolutions of disputes by applying existing laws, ignoring the fact that in our ordinary talk about courts we have doubts about some of these bodies. Where MC assimilates borderline cases to courts in the full sense, EC suffers from the opposite flaw. It counts as 'courts' only those bodies that are uncontroversial instances of courts because they have the full range of additional features that figure in a complete account of a court. This means that EC positively excludes the bodies over which ordinary discourse is merely ambivalent. The failure of the minimalist and essentialist conceptions to attend to our uncertainty about describing certain bodies as 'courts' in turn affects their ability to explain why these bodies are problematic. This is obvious in the case of MC, since it makes no distinctions within the class of courts, but EC also has difficulties explaining what is problematic about the bodies that it describes as 'non-courts'. Since it does not conceptualise these bodies as borderline cases, it is unable to shed much light on them. It is worth dwelling on this issue, because EC's lack of explanatory power is, in my view, its fundamental flaw.

PCC provides an uncomplicated explanation of what is problematic about bodies that do not possess the additional features that figure in the complete account of a court, or do not possess them to the same extent. In arguing that bodies of this kind are defective *as* courts – revealing their deficiencies, in other words, by reference to standards that are internal to the concept of a court – it is able to situate these bodies in relation to their more satisfactory counterparts. It is therefore also able to explain why we are to some extent inclined to call them courts but also have reservations about them. By contrast, the essentialist claim that bodies which have the power to make binding resolutions of disputes by applying the law but lack certain additional features are 'non-courts' does not provide as intelligible an account of the problems with these bodies.

EC suffers from the same weakness that Hart discerned in the natural law view that unjust rules cannot be classified as 'laws' even if they exhibit all the other characteristics of laws. Hart asserted that 'nothing but confusion' could follow from splitting off the study of unjust rules that would otherwise be regarded as legal from just legal rules and extruding the former to another discipline (one that involves the study of 'non-laws'). As Hart said, the study of law should also

encompass the study of the abuse of law.[89] EC goes wrong in the same way, by relegating the study of bodies such as the Court of Appeals for the Province of South Australia to another discipline – one that studies 'non-courts'. PCC does not bifurcate the subject in this way. Instead, it sees bodies such as the Court of Appeals as belonging to the same kind as other bodies empowered to make binding resolutions of disputes according to legal standards (courts), but as being defective or substandard courts in lacking a feature which instances of that kind ought to have.[90] In this way, PCC illuminates the subject-matter more satisfactorily, by drawing comparisons and distinctions within the general class of courts.

Consider the High Court of Parliament again. There is a clear difference between this body, which was not in any sense a court because it was not established to resolve disputes according to legal standards, and the Court of Appeals, which was established for this purpose, but whose lack of independence made it poorly suited to perform this function. EC cannot explain this difference, since it regards both bodies as 'non-courts'. By contrast, PCC has a ready explanation, since it classifies the Court of Appeals as a court, while simultaneously making clear that it was a poor example.

A defender of EC might respond to the argument I have just made by claiming that EC can draw distinctions *within* the class of non-courts and in this way explain the difference between the Court of Appeals and the High Court of Parliament. EC's defender might say that bodies that fail to qualify as a court in terms of EC may do so to a greater or lesser extent: within the class of non-courts, some bodies (eg, the Court of Appeals) will have some of the essential features of courts, which makes them court-like ('court-like non-courts'), whereas other bodies within the class (eg, the High Court of Parliament) will have none of the essential features of courts ('non-court-like non-courts'). The study of courts in a suitably broad sense might then include the study of both courts and court-like non-courts, overcoming my objection that EC relegates the study of bodies such as the Court of Appeals to another discipline.

My response to this attempted defence of EC is as follows. Suppose that someone were to propose an essentialist theory of tennis rackets which describes as 'tennis rackets' only functioning tennis rackets and relegates broken tennis rackets to the category of 'non-tennis-rackets'. This theory carves up the world in a way that is not perspicuous, because the category of 'non-tennis-rackets' includes not only broken tennis rackets but also everything else in the world that is not a functioning tennis racket, such as chairs and tables. It is difficult to see how including broken tennis rackets in a category that also includes chairs and tables can help us to understand what is wrong with broken rackets. The essentialist theory of tennis rackets therefore appears to lack explanatory power. Would it then help to respond that broken tennis rackets are more like tennis rackets than other non-tennis-rackets and that this makes broken rackets suitable to be studied alongside functioning tennis rackets, with a view to uncovering their flaws? This

89 Hart, above n 49, 209–10.

90 On the notion of defectiveness, see generally Mark C Murphy, 'The Explanatory Role of the Weak Natural Law Thesis' in Wil Waluchow and Stefan Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (Oxford University Press, 2013) 3, 4–5.

would require developing a separate account of what makes an object tennis-racket-like to supplement the original account of what makes an object a tennis racket and it is unclear what theoretical resources the essentialist theory of tennis rackets would draw on in developing this separate account. It cannot be a matter of having some of the features of functioning tennis rackets but not all (eg, having strings or a handle), because the class of objects that have strings or handles is larger than the class of tennis-racket-like objects and includes unrelated objects such as guitars and mugs. This means that the problem of carving up the world in an unilluminating way would reappear.

Even if a suitable theory of tennis-racket-like objects could be developed, the point of taking such a baroque approach to the subject-matter is unclear, when a simpler way of explaining what is wrong with broken tennis rackets is available in the form of a paradigm case conception of tennis rackets, which puts functionalist considerations front and centre. Such a theory would see a tennis racket as an object made for the purpose of playing tennis and would conceptualise a broken tennis racket as a poor example of the kind. The problem with a broken racket is thereby made clear: a broken racket deviates from standards that are internal to the concept of a tennis racket. The same points can be made, mutatis mutandis, in respect of the hypothesised version of essentialism, which claims that essentialism can account for the bodies I have described as 'defective courts' by classifying them as a special kind of non-court. In the absence of an account of what makes a sub-class of non-courts 'court-like', this strategy does not help EC to explain the difference between the Court of Appeals and the High Court of Parliament.

EC also has difficulty in explaining why the characteristics it picks out are 'defining characteristics' of a court. As far as the High Court's approach to this matter is concerned, the Court has resisted providing a theoretical account,[91] confining itself to the assertion that the defining characteristics of courts are 'historical realities and not the product of judicial implication'.[92] The problem, though, as Brendan Lim points out, is that history is not a substitute for principled arguments, since history does not help us to sort 'essential' from 'non-essential' characteristics. Supposing for the sake of argument that the essentialist approach to understanding the nature of a court is correct, the fact that courts historically possessed a certain attribute cannot show that the attribute was essential, since some of the attributes historically possessed by courts were merely accidental. Furthermore, a particular characteristic which was not an attribute of courts in the past might be an essential characteristic of courts today.[93] Indeed, as my discussion of the Court of Appeals for the Province of South Australia showed, the High Court's conception of a court as essentially independent from the executive government is distinctively modern. Admittedly, the High Court is hamstrung in

91 Brendan Lim, 'Attributes and Attributions of State Courts – Federalism and the Kable Principle' (2012) 40 *Federal Law Review* 31, 47; Chief Justice Robert French, 'Essential and Defining Characteristics of Courts in an Age of Institutional Change' (Speech delivered at the Supreme and Federal Court Judges Conference, Adelaide, 21 January 2013) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21jan13.pdf>.

92 *Totani* (2010) 242 CLR 1, 37 [47] (French CJ).

93 Lim, above n 91, 48–9.

situating its view of the nature of a court within a suitable theoretical framework, since the separation of powers concerns on which I have drawn in developing PCC are not available to the High Court. This is because the *Kable* principle, which is the starting point for the High Court's 'essential characteristics' approach, is not sourced to the separation of powers.[94] That does not, however, remove the need for theoretical underpinnings of some kind to ground the distinction the High Court makes between essential and non-essential features, and it is not obvious what form such a theoretical account might take.

Waldron and Fuller likewise do not provide a compelling account of how to distinguish between the 'essential' and 'accidental' features of courts (or 'tosh', as Fuller describes them).[95] Waldron says that he does not 'want to be too essentialist about details',[96] and that it would 'be a mistake to get too concrete given the variety of court-like institutions in the world'.[97] As a result, he confines himself to arguing that the judicial task of applying norms to human individuals involves treating people with respect by 'paying attention to [their] point of view and respecting the personality of the entity one is dealing with'.[98] This highly abstract characterisation is unlikely to generate the full range of features that can be expected to figure in a complete account of the nature of a court. Fuller's account of the nature of adjudication suffers from the opposite problem: it is too concrete. As noted in Part III, Fuller claims that adversarial procedures which allow affected parties to participate in the decision-making process in a reasoned way are a defining feature of adjudication.[99] Yet it is clear that adjudication can take a more inquisitorial form. As Galligan observes adversarial adjudication is a 'transient historical form' of adjudication found in common law jurisdictions, not, as Fuller thinks, a defining element of adjudicative processes.[100]

By contrast with EC, PCC is able to explain why characteristics such as independence and procedural fairness are indispensable in understanding the nature of a court (albeit not defining features of a court), because it is grounded in a bigger philosophical picture which explains how these characteristics are connected with the ability of courts to discharge their institutional responsibility to uphold the law. Furthermore, since this picture includes characteristics courts need in order to act with effective authority, PCC is not forced to sideline the sociological dimension of public confidence in the judicial system. Essentialism can make no room for this dimension because public confidence is not a plausible criterion for a body to qualify as a court. However, once we have set aside EC, the enjoyment of public confidence can take its place as one element in a complete theoretical account of the nature of a court, by virtue of the contribution it makes to the capacity of a court to perform its function successfully.

94 Ibid 52.
95 Fuller, above n 19, 356, 360.
96 Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1, 22.
97 Ibid 23.
98 Ibid 24.
99 Fuller, above n 19, 382–4.
100 Galligan, above n 51, 246.

VI THE PRACTICAL SUPERIORITY OF THE PARADIGM CASE CONCEPTION

I turn now to the evaluation of the merits of laws that tamper with the paradigm features of courts such as the use of fair procedures. On the one hand, these measures generally seek to achieve legitimate social goals, such as protecting the community against terrorism, organised crime and sexual predators.[101] On the other hand, they may cause damage to the reputation of the judiciary for impartiality and independence and undermine important safeguards for individuals who rely on the courts to enforce their legal rights. Since, as argued in Part IV, a form of injustice arises whenever a court mistakenly finds against a person's legal rights, there is a significant cost attached when legislatures interfere with the features of courts that assist them to perform their function of protecting people's entitlements under the law. When we seek to determine whether it is morally permissible to impose this cost, does it make a difference whether we assess the effect of the legislation on the judiciary through the lens of the either-or, essentialist conception of a court or the scalar, paradigm case conception?

I want to suggest that it does make a difference. This is for two reasons. First, EC cannot afford to exclude too many law-applying bodies from qualifying as courts, since the more bodies it excludes, the more implausible it becomes. This exerts pressure to conceptualise the qualifying requirements as undemanding or bare bones requirements that most law-applying bodies can satisfy. It is therefore only in very unusual cases that application of EC can be expected to lead to the conclusion that a body no longer answers to the description 'court' – whether across the board (ie, on all of the occasions on which the body exercises its powers, as in the case of the Court of Appeals for the Province of South Australia), or on particular occasions when the body exercises problematic functions or uses dubious procedures under a particular statutory scheme. Second, if legislation affecting a court leaves intact the basic requirements for it to qualify as a court, this will end the merits inquiry for an essentialist, since EC's conceptual framework does not provide a basis for objecting to less extreme forms of damage to courts – forms of damage that do not disqualify a body from counting as a court.

By contrast, there are many ways in which laws can affect the ability of courts to uphold the law, short of turning them into bodies that do not qualify as courts. Asking à la PCC whether legislation has tampered with the paradigm features of a court is therefore more likely to be answered in the affirmative. Furthermore, PCC provides us with a reason to be concerned about these less extreme forms of damage, since they present a threat to the ability of courts to perform their function properly. PCC therefore prompts us to consider whether this kind of interference is really necessary in order to achieve the legislature's goal. When we evaluate the legislative exercise of power over the courts, we are consequently more likely to respond to the full range of morally relevant considerations if we accept PCC than if we accept EC, with its impoverished and exclusive focus on whether a law has deprived a body of its character as a court.

---

101 Appleby, above n 4, 674.

A defender of EC might attempt to challenge these arguments by claiming that EC is not forced to conceptualise damage to a court as consisting solely in removal of a court's defining characteristics, prematurely cutting short the merits inquiry, but could in fact, embrace the notion of defectiveness as a subsidiary form of damage. Thus – it might be said – EC could employ a two-part test when evaluating the merits of legislation affecting the judiciary. The first inquiry would involve examining whether the law has removed a defining feature of a court. Supposing that question is answered in the negative, as is likely to be the case, an essentialist could then examine whether the law has created a defective court. If this question is answered in the affirmative, this would then open the door to considering whether the interference with the court is really necessary to achieve the legislative goal. If this challenge to my argument is correct, EC can make two distinctions: a distinction between courts and non-courts and a distinction between better and worse courts. It would follow that there would be no difference between EC and PCC in respect of their ability to make distinctions of superiority and inferiority within the class of courts and to evaluate legislation affecting courts accordingly. The same language of defectiveness and non-defectiveness would be equally available to both.

My response to this attempted defence of EC is that it is not clear on what basis an essentialist could make these evaluative judgements. PCC makes them with reference to its functional understanding of a court. This makes it easy to judge whether one court is better than another – namely, by reference to whether it has features that equip it to perform the function of a court more successfully, making it a better instance of the kind. By contrast, if two courts have passed the essentialist test, it is not possible to say that one of them is better *as a court*, since both are, *ex hypothesi*, equally courts. How, then, can an essentialist make relative judgements of superiority and inferiority within the class of courts? It cannot be a matter of realising the defining properties of a court more or less satisfactorily, because it is difficult to understand the idea of meeting a defining criterion by degrees. It would seem, then, that the distinction between paradigm and defective courts is not available to an essentialist.

In order to bring out the practical superiority of PCC, I will use two Australian statutory regimes as examples. They concern the procedures and composition of state Supreme Courts. The first is the *Criminal Organisation Act 2009* (Qld) ('the *COA*'). Although the *COA* was repealed by the *Serious and Organised Crime Legislation Amendment Act 2016* (Qld), it is of interest for present purposes because it provides a useful springboard for reflecting on the way in which theoretical views about the nature of a court can affect the moral evaluation of laws which require departures from traditional judicial arrangements. The *COA* provided for a process in terms of which the Police Commissioner could apply to the Supreme Court of Queensland to declare an organisation to be a 'criminal organisation'. The Court was empowered to make such a declaration if satisfied that the members of the organisation were involved in serious criminal activity and the organisation posed a risk to public safety.[102] If a declaration was made, the

102 *COA* s 10.

Police Commissioner could then apply to the Court to make control orders against members of the organisation.[103] However, before the hearing of the substantive application, the Police Commissioner could apply to the Court for a declaration that certain information was 'criminal intelligence' – for instance, because its disclosure could reasonably be expected to prejudice a criminal investigation or endanger a person's life or safety.[104] The hearing of this application had to occur without notice to the affected party and in a closed hearing.[105] If the court declared that information was criminal intelligence, and the Police Commissioner relied on the intelligence, either in applying for the organisation to be declared a criminal organisation or in subsequent control order proceedings, the Court was required to close the court when the criminal intelligence was considered. Furthermore, no member of the organisation or legal representative of the organisation could be present.[106] As a result, organisations and their members could be denied access to evidence that formed part of the government's case against them, potentially compromising their ability to challenge it – for instance, by way of cross-examining the evidence of witnesses who had provided 'criminal intelligence'. Since a declaration that an organisation was a criminal organisation exposed the members of the organisation to the possibility that their liberty would be restricted by a control order, this was a serious matter.

To be clear, I am interested in the *COA* from the perspective of political morality, not constitutional law. The question of interest is whether the legislation struck a morally satisfactory balance between the competing values and interests at stake. On the one hand, the state has a legitimate interest in maintaining secrecy in relation to certain information, such as police methods of investigation and the identity of informants. On the other hand, the judicial use of untested evidence in imposing control orders might cause damage to the Supreme Court. I want to suggest that the conception of a court to which one adheres will affect how one evaluates the acceptability of the balance. If damage to the Supreme Court is understood via EC, with its exclusive focus on damage which is so severe as to deprive a body of its character as a court, attention will inevitably be directed to the question whether the *COA* altogether removed the feature of procedural fairness or whether it left some residue of it intact.

In fact, the High Court considered this question in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd*, and found that the *COA* did not altogether remove the feature of procedural fairness, primarily because the Supreme Court retained the discretion to remedy any potential unfairness arising out of the fact that a respondent in declaration proceedings was not able to test the truth or reliability of criminal intelligence. For one thing, the Supreme Court could take into account the fact that the material had not been tested, and in light of that, could determine what weight, if any, to place on it.[107] Alternatively, the Court had

103 *COA* s 16.
104 *COA* ss 59, 63.
105 *COA* s 66, 70.
106 *COA* s 78.
107 *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 79–80 [88] (French CJ), 102 [166] (Hayne, Crennan, Kiefel and Bell JJ).

the power to order a stay of proceedings if it believed that continuing them would amount to an abuse of its process.[108] Either way, the *COA* did not force the Court to act unfairly.

If it is true that the *COA* did not force the Court to act unfairly, it follows that it did not cause damage to the Court of the kind which troubles EC, and it will therefore appear to an essentialist that the scheme struck an appropriate balance between the competing interests. Yet the *COA* caused a less extreme kind of damage, which emerges if one examines the legislation from the perspective of PCC, asking not whether the proceedings the *COA* authorised met skeletal requirements of fairness sufficient to preserve the Supreme Court's status as a court, but rather whether the watered-down version of procedural fairness for which it provided compromised the ability of the Court to perform its characteristic function. If that question is answered in the affirmative, as I will now argue it should be, the assessment of the balance struck by the scheme will depend, in part, on whether it could have been made fairer while still meeting the legitimate goal of maintaining state secrecy.

As argued in Part III, a paradigm court is able to act with effective authority, in the sense that its decisions command public acceptance. Whether a court has such authority depends, inter alia, on whether its procedures are such as to give the public confidence in the results they are used to reach, by virtue of being the sorts of procedures that people have good reason to believe generally lead to sound outcomes.[109] Making a decision on the basis of one-sided evidence is not such a procedure.[110] It is true that the *COA* did not prevent the Supreme Court from 'self-regulating' its use of one-sided evidence,[111] but there is a practical question regarding how a court will go about assigning the right amount of weight to material in the absence of a challenge to it. This is not likely to be a straightforward task. It is difficult for a court to assess the strength of evidence when an affected party has not been given the opportunity to respond to it, since the court does not know whether it has been provided with incorrect or incomplete information, or whether there is an alternative explanation of the information it has been provided.[112] Even if self-regulation is an adequate mechanism for overcoming the unfairness of depriving affected parties of an opportunity to challenge the case against them, it is unlikely to be perceived as such, since members of the public cannot be expected to accept as a matter of blind faith that evidence which they have not heard, and the veracity of which has not been tested, did not play a greater role in a court's decision to declare an organisation than it should have. The idea of self-regulation is inherently opaque. It is not a procedure that provides confidence in its outcome. It follows that although the *COA* might not have

108 Ibid 115 [212] (Gageler J).

109 Galligan, above n 51, 72.

110 See also Anthony Gray, 'Constitutionally Protected Due Process and the Use of Criminal Intelligence Provisions' (2014) 37 *University of New South Wales Law Journal* 125, 148–50.

111 Steven Churches, 'How Closed Can a Court Be and Still Remain a Common Law Court?' (2013) 20 *Australian Journal of Administrative Law* 117, 120.

112 Anthony Gray, 'A Comparison and Critique of Closed Court Hearings' (2014) 18 *The International Journal of Evidence and Proof* 230, 253, 255; Gray, 'Constitutionally Protected Due Process', above n 110, 154.

deprived the Supreme Court of its character as a court, it did interfere with one of its paradigm features (the perception, if not the reality, of procedural fairness). It thereby impinged on the Court's capacity to perform its characteristic function, which is a matter of concern for PCC.

This being the case, the next question for PCC will be whether the impingement was justifiable. In my view, this question should be answered by reference to proportionality considerations[113] – ie, by investigating whether the *COA* was a necessary and proportionate means for achieving a legitimate state purpose.[114] In line with my overall approach in this article, I should emphasise that my arguments concerning proportionality are put forward as arguments of political morality, not Australian constitutional law. This article has not considered the implications of adopting PCC for the constitutional purpose of determining whether state laws affecting such matters as the functions, procedures and composition of state courts are valid. If it were to be adopted for this narrow purpose, it would become necessary to determine whether a state law that has created a body that departs from a paradigm court has fallen foul of the requirement to maintain bodies that conform to the constitutional conception of a 'court'. I have not expressed any view on how this question might be answered in particular cases and nor am I suggesting that the proportionality of the measure is relevant to the answer. Instead, my view is that proportionality is relevant when considering the different issue of the moral permissibility of laws that tamper with the paradigm features of courts.

The reason why the test of proportionality should be used to evaluate such laws, instead of other possible methods of evaluation, such as utilitarianism, is that laws creating defective courts risk injustice, in the form of failing to uphold a party's legal rights (Part IV). Since justice is at stake, we are concerned here with an interest of special weight which has substantial priority over collective goals, precluding the use of utilitarianism to decide whether its infringement is morally permissible. It follows that a government which passes a law that tampers with the paradigm features of a court needs to meet a higher standard of justification than merely demonstrating that the measure is socially advantageous. Meeting the test of proportionality is an obvious candidate for this purpose, since it is widely accepted as a suitably stringent test in a comparable context, that of evaluating legislation which infringes human rights.[115] In this case, it is the special moral importance of human rights which rules out the use of utilitarian arguments to decide whether their infringement is morally permissible.[116] There are, of course, many complexities attached to proportionality reasoning and its justification.[117] For

113 See also Appleby, arguing for the need to consider questions of proportionality when assessing the appropriateness of law and order schemes: above n 4, 693–4.

114 Malcolm Thorburn, 'Proportionality' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016) 305, 305.

115 Grant Huscroft, Bradley W Miller and Grégoire Webber, 'Introduction' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 1, 1.

116 George Letsas, 'Rescuing Proportionality' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) 316, 328–30.

117 See, eg, the essays in Huscroft, Miller and Webber, above n 115.

present purposes, however, my suggestion is merely that proportionality presents itself as an appropriate moral framework for assessing the permissibility of laws that impair the ability of courts to do legal justice, in light of its accepted use in the context of human rights, where comparably weighty interests are at stake. In assessing the *COA* from this perspective, I will focus on the 'least restrictive means' or 'minimum impairment' aspect of the proportionality enquiry, asking whether the potential damage to the affected court was a necessary cost of achieving the legislative goal, or whether the law could have been more narrowly tailored so as to present less of a threat to the court's ability to uphold the law without compromising the legislative objective.

If we evaluate the *COA* in these terms, it becomes apparent that it was not sufficiently carefully crafted. It is generally accepted that security concerns, especially national security concerns, may justify limited departures from the adversarial principle that affected parties should have access to all the material available to the court, at any rate if the proceedings are not criminal.[118] This means that some degree of defectiveness in such proceedings may have to be tolerated. It would, nevertheless, have been possible to devise a law that did less damage than the *COA* to the capacity of the Supreme Court to perform its characteristic function. Such a law would have responded to the need to protect sensitive information within a framework that was fairer to the affected parties in both reality and appearance. For instance, in some jurisdictions in which the legislature has prescribed closed court hearings in relation to evidence that compromises national security, the gist or essence of the secret materials must be disclosed to affected persons, and special advocates or security-cleared counsel, who are allowed to see the secret materials, are appointed to represent their interests. The United Kingdom and Canada have adopted practices of this kind. Although the *COA* made provision for a Criminal Organisation Public Interest Monitor, who was permitted to be present at the closed hearings and to make submissions,[119] the monitor did not represent the interests of the respondent. The UK and Canadian law on this matter is complex and it is beyond the scope of this article to consider whether the safeguards of minimum disclosure and special advocates are sufficiently fair to affected parties and robust enough to sustain public confidence in the courts.[120] I merely wish to make the point that legislation that makes provision for closed hearings can be framed in a way that preserves more of the procedurally fair character of paradigmatic judicial proceedings (by comparison with the bare essentials of procedural fairness preserved by the *COA*), while also giving due weight to the state's security concerns, thereby achieving a more satisfactory balance. Adherence to EC obscures this possibility.

---

118 See, eg, David Cole and Stephen I Vladeck, 'Navigating the Shoals of Secrecy: A Comparative Analysis of the Use of Secret Evidence and "Cleared Counsel" in the United States, the United Kingdom, and Canada' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014) 161, 162.

119 *COA* pt 7.

120 For discussion, see Greg Martin, 'Outlaw Motorcycle Gangs and Secret Evidence: Reflections on the Use of Criminal Intelligence in the Control of Serious Organised Crime in Australia' (2014) 36 *Sydney Law Review* 501, 510–14; Cole and Vladeck, above n 118, 173–7.

I turn now to my second example of the way in which PCC helps us to identify shortcomings in laws affecting judicial arrangements – in this case, a law providing for the constitution of a court. Section 37 of the *Supreme Court Act 1970* (NSW) ('*Supreme Court Act*') empowers the executive government to appoint acting judges to the Supreme Court of New South Wales for a period not exceeding five years. As noted in Part III, the independence of the judiciary is important because it is a means to the end of the impartial adjudication of disputes. As also noted there, prominent among the arrangements designed to support judicial independence, both in reality and the public's perceptions, is some form of security of tenure – not necessarily for life, but at least for an extended term with a fixed retirement age – since judges who do not have tenure may be tempted to make decisions that please the government in the hope of renewed or permanent appointment. Although there are circumstances in which a court that is not composed entirely of permanent members with security of tenure can meet the requirements of independence and impartiality, it is obvious that some limits on the power to appoint acting judges to courts on a short-term basis are morally desirable, especially when the body making the appointments is part of the executive branch of government. In considering whether the power conferred by section 37 is appropriately limited, does it make a difference whether we adopt EC or PCC? Again, I want to suggest that EC makes some of the pertinent considerations less visible.

From the perspective of political morality, the question is whether section 37 has struck a satisfactory balance between the state's legitimate interest in serving practical needs within the court system and the possible damage to the Supreme Court which might be caused by making acting judicial appointments in terms of the provision. If damage to the Supreme Court is understood via EC, which is concerned only about extreme forms of damage that prevent a body from qualifying as a court, then the adequacy of the balance will depend on whether the legislation leaves any space for judicial independence. If the legislation makes it possible for the power to make acting appointments to be used in a way that altogether removes the feature of judicial independence – for instance, by allowing the Supreme Court to be constituted entirely by acting judges – the balance will be thought unsatisfactory. If, on the other hand, the legislation preserves the bare bones requirements of judicial independence, then it will appear as though an appropriate balance has been struck, since in that case the Supreme Court will still qualify as a court.

In *Forge*, Gummow, Hayne and Crennan JJ held that section 37 was not intended to confer the power to make so many acting appointments 'as would permit the conclusion that the court was predominantly, or chiefly, composed of acting judges'.[121] Assuming that this interpretation of the provision is correct, it follows that the Act does not entirely deprive the Supreme Court of independence, and therefore that it does not cause damage to the Supreme Court of the kind that troubles EC. EC should therefore find section 37 unobjectionable. By contrast, for PCC, the Act might be flawed even if it does not deprive the Supreme Court of its

121 *Forge* (2006) 228 CLR 45, 79 [72] (Gummow, Hayne and Crennan JJ).

character as a court. Even if section 37 does not permit the making of acting appointments on such a large scale as entirely to remove the capacity of the Supreme Court to withstand governmental pressure, these implied limits would be at the margins of the exercise of the power and would operate to curtail it only in extreme circumstances. Section 37 might still open the door to a practice of making acting appointments which waters down judicial independence, both in reality and appearance, thereby turning the Supreme Court into a defective court. PCC, which regards courts as more or less 'court-like', is troubled by this lesser form of damage.

Could the power conferred by section 37 be used in such a way as to dilute judicial independence, even if section 37 does not permit it to be altogether removed? I would argue that section 37 does present this danger. Section 37 permits the appointment of any 'qualified person' to act as a judge. In terms of section 26 of the *Supreme Court Act*, those who are qualified include 'Australian lawyers of at least 7 years' standing'. As Gummow, Hayne and Crennan JJ noted in *Forge*, the appointment of professionals in active practice poses a greater threat to the independence of the judiciary than the appointment of judges and retired judges, since professionals might be ambitious for a permanent judicial appointment, which could taint or at least appear to taint their decisions.[122] Moreover, as their Honours also observed, section 37 does not impose any limits on the purposes for which acting judges can be appointed. It does not, for instance, confine appointments to specific circumstances, such as a blockage in the court system. This means that it can be used to make numerous short-term appointments for reasons that have nothing to do with pressing needs in the court system, such as the wish to save money. As their Honours explained, using the power for less pressing purposes is more likely to impair perceptions of judicial independence.[123]

If I am correct that section 37 licenses the creation of a defective court, this prompts the question whether the provision could be more finely tuned so as to secure a more satisfactory balance between the competing values and interests. In answer to this, there seems no reason why 'qualified persons' should not be confined to judges and retired judges. Although serving and retired judges might also be influenced by self-interest in the hope of promotion or a renewed appointment, the danger is greater in the case of professionals. Since PCC is concerned with degrees of defectiveness, rather than all-or-nothing judgements, a provision that permits a narrower class of persons to act as judges would achieve a more satisfactory balance. The power to make acting appointments could also be confined to special circumstances. It is not possible to discuss these matters in detail here. My point is merely that when we view section 37 through the lens of PCC, it becomes apparent that the power it confers can be used in a way which threatens the proper performance of the Supreme Court's function. Once this is appreciated, it becomes appropriate to evaluate the provision in terms of its proportionality, asking whether the power to make acting appointments could be

122 Ibid 87 [97]–[98] (Gummow, Hayne and Crennan JJ).

123 Ibid 87–8 [99]–[100] (Gummow, Hayne and Crennan JJ).

conferred in terms that license less damage to the Supreme Court while still accommodating the need for flexibility in the court system.

VII CONCLUSION

In this article, I have constructed a theory of a court around three kinds of bodies – bodies that everyone agrees are courts, bodies that everyone agrees are not courts, and borderline cases, where our intuitions waver. I have argued that PCC provides the best theoretical account of this range of cases. At the heart of PCC is a functional understanding of a court: a court is an artifact which is 'for' upholding the law. However, courts are not necessarily in a condition to perform this function. To be able to do what they are supposed to do, courts need features such as impartiality, independence and procedural fairness in both reality and appearance. Paradigm courts possess these features, whereas courts that do not possess them or not to the same extent are defective courts.

I have suggested that the virtue of my approach is that it sheds light on the ways in which different instances of courts can be more or less court-like in respect of their capacity to perform the characteristic function of a court. This means that my approach is able to explain why we are pulled in opposite directions when we encounter or imagine borderline cases of courts. This important fact cannot be accommodated within Raz's minimalist conception, or within a more complex conception such as Waldron's, on which the additional features of courts are seen as defining features. The former conception 'lumps together' all decision-making bodies that have the power to make binding resolutions of disputes by applying existing laws, without making distinctions within the class based on the adequacy of the particular body to the task. The latter conception is forced to deny that borderline cases of courts are courts, thereby obscuring the problems with these bodies. By contrast, my approach provides an account of why these bodies are problematic which is both satisfying and simple: they are defective precisely as courts.

Finally, I have discussed laws that tamper with features of courts such as independence and procedural fairness and argued that my approach provides a more fruitful angle on the potential dangers of this kind of legislative interference than the essentialist approach, which is concerned only about outlier cases in which a court has been altogether deprived of a feature identified by essentialism as 'defining'.