REVIEW ESSAY: NON-ADVERSARIAL JUSTICE AND THE REMAKING OF THE COURTS

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Non-adversarial Justice
Michael King, Arie Freiberg, Becky Batagol and Ross Hyams
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The Remaking of the Courts: Less-Adversarial Practice and the Constitutional Role of the Judiciary in Australia
Sarah Murray
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I INTRODUCTION

In 1906, the American scholar Roscoe Pound observed that '[d]issatisfaction with the administration of justice is as old as law'.[1] This statement rings true over 100 years later: complaints that litigation is too slow, too expensive, inaccessible, and unresponsive to citizens' needs are still commonplace.[2]

Perennial dissatisfaction with the administration of justice has its upside. Dissatisfaction drives innovation. The great reforms of civil procedure brought

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1 Roscoe Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice' (1906) 40 American Law Review 729, 729.

2 See, eg, Chief Justice James Allsop, 'Judicial Case Management and the Problem of Costs' (Speech delivered at the Lord Dyson Lecture on 'The Jackson Reforms to Civil Justice in the UK', University of New South Wales, Sydney, 9 September 2014); Productivity Commission, Access to Justice Arrangements, Inquiry Report No 72 (2014) 73–4.

about by the Judicature Acts[3] were a reaction against the horrifying formality and complexity of mid-19th century English procedure.[4] Similarly, the rise of case management in the latter half of the 20th century was a response to the perceived inability of the traditional party-controlled system to deliver timely justice to the majority of litigants.[5] In the past few decades, dissatisfaction with the adversarial system has produced a flourishing range of non-traditional practices both within, and alongside, the court system. This range of practices is the subject of two books recently published by Federation Press: Sarah Murray's The Remaking of the Courts,[6] and Michael King, Arie Freiberg, Becky Batagol and Ross Hyams' Non-adversarial Justice.[7]

While the subject matter of the two books is similar, their treatment of the theme is different. Non-adversarial Justice provides an overview of the range of 'non-adversarial' practices used in Australia.[8] The breadth of the work is impressive: it covers practices extending well beyond litigation,[9] into the everyday practice of law,[10] and beyond the domestic context into the international arena.[11] Murray achieves depth rather than breadth. She focuses on the challenges of accommodating non-adversarial mechanisms within Australia's constitutional framework. She poses a question that should concern anybody interested in the administration of justice in Australia: how can courts adopt innovative practices without losing their constitutional identity?

State and federal courts are both subject to constitutional constraints.[12] Any changes in the justice system must conform to these constitutional requirements. The compatibility of non-adversarial developments with constitutional principles is touched upon in Non-adversarial Justice, and is the subject of The Remaking of the Courts. In this review essay, I explain the work done by each of the books and, in light of this, reflect upon an issue that both books hint at but do not fully engage with: the effect of constitutional uncertainty on curial legitimacy. The relevant constitutional doctrines at state and federal level are riddled with uncertainty. This makes it very difficult to assess the constitutionality of innovative non-adversarial practices. I argue that this situation creates two

3 Supreme Court of Judicature Act 1873, 36 & 37 Vict, c 66; Supreme Court of Judicature Act 1875, 38 & 39 Vict, c 77.

4 See Sir Jack I H Jacob, The Reform of Civil Procedural Law (Sweet & Maxwell, 1982) 193–220.

5 See Robert F Peckham, 'The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition' (1981) 69 California Law Review 770, 770; Justice D A Ipp, 'Judicial Intervention in the Trial Process' (1995) 69 Australian Law Journal 365.

6 Sarah Murray, The Remaking of the Courts: Less-Adversarial Practice and the Constitutional Role of the Judiciary in Australia (Federation Press, 2014).

7 Michael King et al, Non-adversarial Justice (Federation Press, 2nd ed, 2014).

8 Murray uses the term 'less-adversarial' to convey something very similar, or identical, to King et al's 'non-adversarial'. In this essay, I use the term 'non-adversarial'.

9 Eg, there is a chapter on diversion schemes and intervention programs, some of which aim to keep individuals out of the formal criminal justice system.

10 Eg, a chapter is devoted to preventive law, the aim of which is to avoid litigation ever occurring.

11 See, eg, the discussion of Truth and Reconciliation Commissions in the context of restorative justice: King et al, above n 7, 67–70.

12 See Part II of this review essay.

opposite risks: first, that innovative practices will not be implemented because they might be unconstitutional; and secondly, that constitutional principles will be ignored when implementing measures that are unlikely to be challenged. Both possibilities are detrimental to the legitimacy of courts.

II NON-ADVERSARIAL JUSTICE

The authors of Non-adversarial Justice bring to bear a wealth of academic expertise and practical experience. The result is an overview of non-adversarial practice in Australia that is both scholarly and practical. One of the aims of the book is 'to determine the common themes, values and principles that may bring disparate practices together';[13] another is to chronicle and critique the use of those practices in contemporary Australia.

The opening chapters of the book introduce the 'key theories and concepts'[14] of non-adversarial justice: therapeutic jurisprudence, restorative justice, preventive law, creative problem-solving, holistic approaches to law and appropriate dispute resolution.[15] The origins and philosophy of each concept are explained and the authors engage with some critiques of each concept. The authors do an excellent job of providing a clear introduction to these theories and concepts, while not shying away from acknowledging complexity and controversy. These chapters combine accessibility with richness, and plenty of references are provided for the reader who wishes to delve further into any of the issues raised.

The middle chapters review the application of these theories and concepts in various settings including family law, Indigenous courts and diversion schemes.[16] Here, the authors examine in detail the implementation of non-adversarial practices in each setting. While the authors are clearly proponents of the principles underlying non-adversarial justice, their evaluation of these programs is balanced: they acknowledge, for example, the high dropout rate among participants in drug court programs[17] and the dearth of evidence that Indigenous courts reduce recidivism rates.[18]

These chapters reveal an impressive variety of non-adversarial practices that have been adopted, or are in the process of development, in Australia. The source of these practices is diverse. Some innovations (such as therapeutic jurisprudence and preventive law) originated in the academy while others have been

13 King et al, above n 7, 1.

14 Ibid 19.

15 The authors prefer the term 'appropriate dispute resolution' to 'alternative dispute resolution', but acknowledge the widespread acceptance of the latter term: ibid 95–6.

16 The book could have neatly been divided into three parts (chs 1–7 on theories and concepts, chs 8–13 on practical applications and chs 14–16 on the implications of non-adversarial developments). It is not clear why the book is not divided up in this way – it would have made the structure immediately apparent to the reader. This is a quibble though. In substance, the organisation of the book is logical and satisfying.

17 King et al, above n 7, 169–70.

18 Ibid 214.

practice-driven.[19] The authors highlight the interdisciplinary nature of non-adversarial practice,[20] showing how disciplines other than law have influenced the development of non-adversarial concepts such as creative problem-solving[21] and managerial judging.[22] Overall, one is left with the impression that lawmakers, practitioners and academics have been endlessly ingenious in developing practices that respond to inadequacies in existing systems.

Many of these practices challenge established ideas about what courts are and how they should behave. For example, a judge in a problem-solving court plays a non-traditional role, monitoring the offender's progress post-adjudication, focusing on interests or needs rather than rights, and acting as 'coach' rather than 'arbiter'.[23] Indigenous sentencing conferences are another example of courts acting in non-traditional ways: the physical configuration of the court is changed, the judge is assisted by a senior member of the offender's community, and processes are relatively informal.[24] By requiring judges and lawyers to act in ways that are so different from their traditional roles, these innovations raise questions about their compatibility with core judicial values of independence and impartiality.

The authors take these themes further in the final three chapters of the book, which explore the implications of the rise of non-adversarial practice for courts, for the legal profession and for legal education. In this essay I focus on the first of these: the implications of the changing landscape of the justice system for courts.

In chapter 14 of Non-adversarial Justice, 'Implications for Courts', the authors acknowledge the profound changes that non-adversarial practice works on the judicial role: instead of analysing problems purely in legal terms, non-adversarialism requires courts to be concerned 'with how litigants feel about a particular problem or with their psychological wellbeing'.[25] Judges must 'draw more upon interpersonal skills than the intellectual skills commonly used in legal processes',[26] must be open to the contributions of other disciplines and, 'where appropriate, should see and address the different dimensions of the problem … not simply its apparent legal aspects'.[27] They suggest that an ethic of care should be adopted as a 'fourth major judicial value' alongside independence, impartiality and integrity.[28]

In this chapter, the authors acknowledge some of the tensions between non-adversarial practice and traditional conceptions of the judicial role: when courts

19 Eg, one of the earliest instances of restorative justice involved the actions of a single probation officer in Ontario: ibid 42–3.
20 Ibid 16–17.
21 Ibid ch 5.
22 Ibid 216–17.
23 Ibid 159–60.
24 Ibid 208–9.
25 Ibid 239.
26 Ibid 241.
27 Ibid 244.
28 Ibid 242.

engage with the community, and with individual offenders, they may be seen to be losing their independence and impartiality;[29] when a judge steps beyond the role of adjudicator to that of problem-solver, he or she moves 'beyond their legitimate sphere of action'.[30] The authors' response is, primarily, to say there is no necessary tension between the traditional and the new position; judges just need to be mindful of the consequences of their non-adversarial actions:

> Judicial officers can engage with participants in court processes and in the community without compromising judicial independence. This does mean that issues do not arise, only that there are proper processes within the system to address the issues.[31]

This position understates, perhaps, the difficulty of the dilemmas judges may face when attempting to reconcile traditional judicial values with non-adversarial values. It also tends to downplay the fundamental issue of whether the judiciary is institutionally equipped to act in ways that are so different from its traditional role. The qualities that make judges good at resolving legal disputes – independence, detachment and legal analytical skills – may be unhelpful when attempting to recast the judicial role as a caring, engaged participant in problem-solving.

While Non-adversarial Justice as a whole makes the case for why the justice system needs to change, there is little consideration of what might be lost in that change. The opening paragraph of the book acknowledges that:

> To many people, but particularly to those who work in it, the adversarial system is a successful set of procedures, practices and institutions that have underpinned a well-functioning social democratic society by maintaining the rule of law and the separation of powers. It is a system whose strengths lie in the concepts of the independence of the bar and bench from governments, the autonomy of the parties, the power of examination and cross-examination to elicit facts, and in the fact that the courts are open to scrutiny and that court officers are disinterested parties …[32]

The principles of the adversarial system have been developed over many decades. While those principles and their effects may legitimately be criticised, that does not mean nothing is lost if they are abandoned. While Non-adversarial Justice does acknowledge these difficulties, the breadth of the work and its focus on innovative non-adversarial practices means these very deep tensions between tradition and change are not fully explored.

Chapter 14 of Non-adversarial Justice also considers the compatibility of two examples of non-adversarial practice (judicial mediation and problem-solving judging in criminal cases) with the requirements of Chapter III of the Australian Constitution.[33] In Australia, state and federal courts are subject to different constitutional restraints. At the federal level, there is a strict separation of judicial

29 See ibid 245.
30 Ibid 251.
31 Ibid.
32 Ibid 1.
33 Constitutional issues are also raised briefly at other points in Non-adversarial Justice: see King et al, above n 7, 192–3 (in relation to problem-solving courts), 225 (in relation to judicial mediation and settlement conferences).

power, captured in the two limbs of the principle in R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254 ('Boilermakers''): federal judicial power may only be exercised by those courts named in Chapter III of the Constitution, and federal Chapter III courts must only exercise federal judicial power. At the state level, courts are subject to the principle first established in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 ('Kable'). This principle, which has been expressed in different ways over the years, requires courts to maintain the 'institutional integrity' that 'bespeaks their constitutionally mandated position in the Australian legal system'.[34]

The analysis of the constitutional issues in Non-adversarial Justice is a little disjointed and superficial. It could have benefited from, first, a clearer distinction between the application of Chapter III principles at state and federal level and, secondly, reference to the body of case law[35] and academic work[36] on the constitutional 'due process' principle. The problems with this analysis perhaps reflect the fact that the authors are not constitutional specialists and therefore have not fully engaged with the 'subtlety and technicality' of this area of law.[37]

This, in turn, says less about the authors than it does about the constitutional doctrines themselves. The concept of judicial power, on which the Boilermakers' test turns, is elusive: in 1954, Dixon CJ and McTiernan J remarked that '[m]any attempts have been made to define judicial power, but it has never been found possible to frame a definition that is at once exclusive and exhaustive'.[38] The situation has not improved since 1954, with Hayne J observing in 2008 that 'no single combination of necessary or sufficient factors identifies what is judicial power'.[39] The use of historical analogies to determine whether a function conferred on a court is 'judicial' has further complicated matters: some functions that would surely fall outside any purely conceptual definition of 'judicial power'

34 Fardon v A-G (Qld) (2004) 223 CLR 575, 617 [101] (Gummow J), quoted in Pollentine v Bleijie (2014) 311 ALR 332, 341–2 [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

35 See, eg, Re Tracey; Ex parte Ryan (1989) 166 CLR 518, 580 (Deane J); Polyukhovich v Commonwealth (1991) 172 CLR 501, 607 (Deane J), 703 (Gaudron J); Harris v Caladine (1991) 172 CLR 84, 150 (Gaudron J); Re Nolan; Ex parte Young (1991) 172 CLR 460, 496 (Gaudron J); Nicholas v The Queen (1998) 193 CLR 173, 208 [73] (Gaudron J); Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) ('Chu Kheng Lim'); Leeth v Commonwealth (1992) 174 CLR 455, 486–7 (Deane and Toohey JJ).

36 See, eg, Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 Monash University Law Review 248; Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 Federal Law Review 205; Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31 Sydney Law Review 411; James Stellios, The Federal Judicature: Chapter III of the Constitution Commentary and Cases (LexisNexis Butterworths, 2010) ch 6; Justice McHugh, 'Does Chapter III of the Constitution Protect Substantive as Well as Procedural Rights?' (2001) 21 Australian Bar Review 235; Leslie Zines, The High Court and the Constitution (Federation Press, 5th ed, 2008) 273–9.

37 R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation (1974) 130 CLR 87, 90 (Barwick CJ) ('R v Joske').

38 R v Davison (1954) 90 CLR 353, 366.

39 A-G (Cth) v Alinta Ltd (2008) 233 CLR 542, 577 [93].

have been held to be validly conferred on courts because they are similar to other functions conferred on courts in the past.[40] The Kable principle, too, has proved 'insusceptible of further definition in terms which necessarily dictate future outcomes'.[41] In other words, it has always been difficult to predict how the Kable principle will apply in a particular case. The High Court has placed different emphasis on some factors from case to case. For example, legislation abrogating the rules of procedural fairness was twice held valid,[42] yet in a later case denial of procedural fairness proved fatal to the validity of an impugned law.[43] In short, there is considerable uncertainty about the application of both the Boilermakers' and the Kable principle in any given case.

The lack of certainty in the Chapter III doctrines is a real problem because the doctrines have so many practical applications. In theory, every act by a court and every reform to court practice ought to comply with Chapter III. It is concerning if the doctrines are not readily comprehensible to experienced practitioners and academics, because they are among the people responsible for putting the constitutional principles into action in both day-to-day practice and longer term reforms.[44]

While aspects of chapter 14 are not completely satisfying, this should not detract from the value of Non-adversarial Justice, especially in light of its scope and purpose. The book provides a wide-ranging overview of the development of non-adversarial practices. Problems and critiques are identified, and references to further reading provided, but the authors do not set out to offer answers to all of the questions non-adversarial practice raises. In-depth analysis of the tension between continuity and change in the context of non-adversarial justice is a subject capable of occupying several volumes. This challenge is, however, taken up by Murray in The Remaking of the Courts.

III THE REMAKING OF THE COURTS

In The Remaking of the Courts, Murray argues that, in order to maintain their legitimacy, courts must both retain traditional values and adapt to changing times. She makes this argument by analysing curial change in terms of neo-institutionalism and constitutionalism.[45] The field of neo-institutionalism,

40 See, eg, Thomas v Mowbray (2007) 233 CLR 307.

41 Fardon v A-G (Qld) (2004) 223 CLR 575, 618 [104] (Gummow J). See also Forge v Australian Securities and Investments Commission (2006) 228 CLR 45, 76 [64] (Gummow, Hayne and Crennan JJ).

42 K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501; Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (WA) (2008) 234 CLR 532.

43 International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319.

44 Members of the High Court have, from time to time, expressed concern about the levels of understanding of Chapter III within the profession: Transcript of Proceedings, Gordon v Tolcher [2005] HCATrans 843 (7 October 2005); Justice W M C Gummow, 'Book Review: Cowen and Zines's Federal Jurisdiction in Australia Third Edition, The Federation Press (2002)' (2004) 32 Federal Law Review 163.

45 Murray, above n 6, ch 2.

she explains, 'broadly focuses on the nature and dynamism of institutions'.[46] Understanding courts in terms of neo-institutionalism means accepting that courts are 'repositories of particular ideals, values and approaches' and not merely material or formal structures.[47] It also requires an acceptance that courts interact with other institutions, forming part of 'a larger political, social and ideological system'.[48] Finally – and crucially – neo-institutionalism emphasises the role of change in maintaining 'institutional integrity and institutional relevance'.[49] Murray uses neo-institutionalism to provide theoretical justification for a claim often justified (if at all) on more intuitive grounds: courts need to change with the times in order to retain their legitimacy.

Against this, Murray invokes a theory more familiar to lawyers: constitutionalism. While neo-institutionalism emphasises the role of change in maintaining curial legitimacy, constitutionalism emphasises the maintenance of core characteristics such as independence, impartiality, openness and the application of legal standards. Because of this focus on continuity and tradition, constitutionalism can operate as a conservative force, inhibiting institutional change.[50] While Murray accepts that constitutional interpretation should not be so flexible as to 'fail to sufficiently signpost key constitutional limits',[51] she warns that courts, when interpreting the Constitution, should avoid 'over-constitutionalising': that is, 'imposing more restrictions than the Constitution requires'.[52] She argues that Chapter III should be interpreted in a way that makes 'it clear what curial institutions must retain from a constitutional standpoint while allowing space to accommodate changing expectations where the constitutional framework permits it'.[53]

The discussion of the interplay between neo-institutionalism and constitutionalism is one of the highlights of The Remaking of the Courts. The insight provided by applying neo-institutionalism in this context is original and valuable. Linking the two theories by reference to the maintenance of curial legitimacy means the problem is not conceptualised as a tension between competing imperatives; instead, Murray demonstrates that change and continuity are both necessary for legitimacy.

Against this background, the middle section of The Remaking of the Courts analyses the constitutionality of three non-adversarial developments: judicial case management in the Federal Court and Family Court, judicial mediation and drug courts. These innovations are analysed against the relevant federal and state constitutional constraints. Murray provides exceptionally lucid analysis of the constitutionality of these non-adversarial practices, unpicking the many

46 Ibid 25.
47 Ibid 26.
48 Keith E Whittington, 'Once More unto the Breach: PostBehavioralist Approaches to Judicial Politics' (2000) 25 Law & Social Inquiry 601, 621, quoted in ibid 27.
49 Murray, above n 6, 28.
50 Murray provides the example of Re Wakim; Ex parte McNally (1999) 198 CLR 511: ibid 40–2.
51 Murray, above n 6, 43.
52 Ibid 42.
53 Ibid 44.

interrelated concepts that must be dealt with. While she concludes that each of these innovations is likely to be constitutional, she identifies many points of constitutional uncertainty and artificiality[54] along the way to these conclusions. For example, at the federal level, she argues that, while legislation facilitating active case management is likely to be valid, there is little guidance on the constitutional boundaries judges must observe when implementing these measures.[55] At the state level, she concludes that drug courts are likely to be constitutional, but the complexity of the analysis leading to that conclusion demonstrates the 'practical difficulty of applying' the Kable principles.[56] In light of these inadequacies in existing doctrine, Murray proposes a new approach to analysing the constitutionality of functions conferred on state and federal courts: 'contextual incompatibility'.

Contextual incompatibility would serve two functions. At the federal level, it would replace the much-criticised second limb of Boilermakers':[57] the rule that federal courts may only exercise federal judicial power. This would be a radical step, as it would mean the partial overruling of a seminal High Court decision. However, as Murray explains, replacing the second limb with an incompatibility test is not a new idea: it has its origins in a forerunner to the Boilermakers' case,[58] was proposed by Sir Anthony Mason shortly after his retirement from the High Court,[59] and has been considered by other commentators.[60] At the state level, contextual incompatibility would form the basis for the application of the Kable doctrine. While a single test would apply in both the state and federal spheres, the application of the test would vary depending on the court in question: therefore, the constitutional requirements will be more stringent at the federal level.

Contextual incompatibility involves a four-step test to determine the validity of the conferral of a function on a court.[61] The first three steps establish context, looking to the role and nature of the court on which the function is conferred, the nature of the function, and the other functions already conferred on the court. The fourth step asks whether, in light of that context, the function, or the manner of

54 Notably in the application of the persona designata doctrine to judicial mediation: see ibid, 151–4.

55 Ibid 121.

56 Ibid 197.

57 See, eg, R v Joske (1974) 130 CLR 87, 90 (Barwick CJ); George Winterton, Parliament, The Executive and the Governor-General: A Constitutional Analysis (Melbourne University Press, 1983) 62–3; James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22 Public Law Review 113, 127–9.

58 R v Federal Court of Bankruptcy; Ex parte Lowenstein (1938) 59 CLR 556. See also the dissenting judgment of Williams J in Boilermakers itself: Boilermakers' (1956) 94 CLR 254, 313–15.

59 Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 Canberra Bulletin of Public Administration 1.

60 Murray, above n 6, 222, citing Zines, above n 36, 261. See also Zines, above n 36, 295–9; Gerard Carney, 'Wilson & Kable: The Doctrine of Incompatibility – An Alternative to Separation of Powers?' (1997) 13 Queensland University of Technology Law Journal 175, 176; Stellios, 'Reconceiving the Separation of Judicial Power', above n 57, 129–34. See also Gabrielle J Appleby, 'Imperfection and Inconvenience: Boilermakers' and the Separation of Judicial Power in Australia' (2012) 31 University of Queensland Law Journal 265; Rebecca Welsh, 'A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality' (2013) 39 Monash University Law Review 66, 95–103.

61 Murray, above n 6, ch 8.

its exercise would be incompatible with the court's Chapter III role, the exercise of Commonwealth judicial power or 'essential constitutional character as a court'.[62]

Murray identifies several advantages that contextual incompatibility would provide compared to the existing doctrine. By providing a structured path through the various overlapping tests that have been employed in Chapter III jurisprudence, contextual incompatibility would incorporate 'into one streamlined inquiry a number of factors that courts have adopted, expressly or otherwise, to analyse Chapter III scenarios'.[63] It would also provide transparency by 'open[ing] up the reasoning process for scrutiny by later courts'.[64] Further, contextual incompatibility would provide a 'purposive framework' to 'ensure that the Chapter III precepts are taken into account and protected, while not unnecessarily inhibiting reforms consistent with those precepts'.[65] In other words, contextual incompatibility would achieve the balance between protecting the constitutional essentials and permitting innovation.

Murray also claims that contextual incompatibility offers 'greater certainty and guidance' than existing doctrine.[66] This claim is open to challenge. The contextual incompatibility test is structured and transparent but it is also complex and multifactorial. Murray acknowledges that 'the difficulty with any incompatibility approach is countering the criticism that it is too vague or that it lacks a sufficient compass',[67] but argues that introducing a contextual element will avert this difficulty.[68] Yet ascertaining context is, itself, a broad and sophisticated inquiry, taking into account the court's historical, constitutional and current role, the other functions already conferred on the court and the nature of the function being conferred. Applying the incompatibility test in light of this context is also a complex exercise, in which different minds may place different emphasis on different factors. The test incorporates many of the concepts used in existing constitutional jurisprudence, including the place of the court in the integrated judicial system, the closeness of the connection of a particular function to the executive, the constitutional concept of a 'court', judicial independence and impartiality and the due administration of justice. Each of these factors raises large questions to which there will rarely be an obvious answer. In fact, the contextual incompatibility test draws on many of the ideas that have informed the Kable principle – a principle regularly criticised for the uncertainty of its

62 Ibid 243.
63 Ibid 270.
64 Ibid 268.
65 Ibid 268–9.
66 Ibid 268.
67 Ibid 232–3.
68 Ibid 233–4.

application.[69] It is doubtful that a test incorporating all of these ideas is capable of delivering certainty and clear guidance.

Murray acknowledges that contextual incompatibility can be criticised for its 'indeterminacy'.[70] In response, she points out that the same may be said of the classification of functions as either judicial or non-judicial.[71] Therefore, replacing the second limb of Boilermakers' with contextual incompatibility replaces an indeterminate, formal, and unnecessarily rigid test with one that is indeterminate but purposive and flexible. Murray defends the 'amorphous' nature of contextual incompatibility on the ground that it is necessary for constitutional tests 'to retain a degree of flexibility for them to remain workable'.[72] This is undoubtedly true, but there is a difference – perhaps only one of degree – between flexibility and unpredictability. The High Court's current Chapter III jurisprudence arguably veers too far towards unpredictability. It is not clear that contextual incompatibility would provide greater certainty.

Contextual incompatibility certainly has strong points in its favour. At the federal level, it would serve the substantive values of Chapter III more effectively, while allowing more positive innovation, than the second limb of Boilermakers'. At the state level, contextual incompatibility may have minimal effects on the substance of the Kable principle but would introduce much-needed structure and transparency to the analysis. However, it seems too optimistic to say that contextual incompatibility would provide more certainty than the current state of the law.

IV THE PRICE OF CONSTITUTIONAL UNCERTAINTY

Both Non-adversarial Justice and The Remaking of the Courts emphasise the importance of change – specifically, in the form of non-adversarial innovations – in maintaining the legitimacy of the court system. Both acknowledge a degree of uncertainty about the extent to which the Australian constitutional framework is capable of accommodating these changes. Neither text, however, really explores the price of uncertainty in constitutional doctrine, and it is this issue that I examine in the final Part of this essay. In the area of constitutional restrictions on courts, uncertainty creates some specific risks that should be acknowledged. Non-adversarial Justice and The Remaking of the Courts reveal two quite different risks.

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69 See, eg, Chris Steytler and Iain Field, 'The "Institutional Integrity" Principle: Where Are We Now, and Where Are We Headed?' (2011) 35 University of Western Australia Law Review 227, 228; Brendan Gogarty and Benedict Bartl, 'Tying Kable Down: The Uncertainty about the Independence and Impartiality of State Courts Following Kable v DPP (NSW) and Why It Matters' (2009) 32 University of New South Wales Law Journal 75, 99–105; Fiona Wheeler, 'The Kable Doctrine and State Legislative Power over State Courts' (2005) 20(2) Australasian Parliamentary Review 15, 31.

70 Murray, above n 6, 271.

71 Ibid, citing Zines, above n 36, 299.

72 Murray, above n 6, 272.

The first is the risk that, if constitutional restrictions on state and federal courts are uncertain, courts and legislators will take a conservative position and avoid implementing new measures that are close to the constitutional limits. It may be that these measures, if tested in the High Court, would be held valid. But faced with a complex and uncertain constitutional doctrine, lawmakers may decide it is not worth taking the risk. Mark Tushnet has explained that misunderstanding, on the part of the legislature, of constitutional norms articulated by the courts can lead to 'policy distortion':

> The courts' rulings will define a range of actions that are constitutionally permissible or whose permissibility is fairly litigable. … If legislators mistakenly believe that the permissible range is smaller than it actually is, they may choose a policy that is less desirable, from their own point of view, than one that the courts would allow them to adopt.[73]

Because of the uncertainty of the relevant constitutional principles, Australian legislators are particularly vulnerable to misunderstanding the range of their constitutional choices. The High Court's development of these principles has, if anything, fostered uncertainty. In South Australia v Totani, French CJ acknowledged the insusceptibility of the Kable doctrine to precise definition and the impossibility of 'codification of the limits of State legislative power with respect to State courts'.[74] The Chief Justice continued:

> For legislators this may require a prudential approach to the enactment of laws directing courts on how judicial power is to be exercised, particularly in areas central to the judicial function such as the provision of procedural fairness and the conduct of proceedings in open court. It may also require a prudential approach to the enactment of laws authorising the executive government or its authorities effectively to dictate the process or outcome of judicial proceedings.[75]

This is, in effect, a warning to parliaments to steer well clear of areas of constitutional danger, coupled with a refusal to delineate the boundaries of those areas. Murray's discussion of neo-institutionalism suggests this is an undesirable situation.[76] If change is necessary to maintain the legitimacy of the courts, constitutional doctrines that discourage change – even when change would be constitutional – may undermine this legitimacy.

Murray alludes to this risk several times. She says, for example, that greater guidance on the constitutional limits within which courts may engage in managerial judging is needed because '[w]ithout this, the risk is that judges will … not employ the managerial tools to their maximum utility'.[77] The authors of Non-adversarial Justice, while not mentioning this risk expressly, identify some non-adversarial measures adopted overseas that would probably – but not definitely – be unconstitutional in Australia. For example, they express the view

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73 Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 Michigan Law Review 245, 270.

74 (2010) 242 CLR 1, 47 [69].

75 Ibid 47–8 [69] (citations omitted).

76 See also Gabrielle Appleby, 'The High Court and Kable: A Study in Federalism and Rights Protection' (2015) forthcoming Monash University Law Review.

77 Murray, above n 6, 122. A similar point is made at 132–4.

that some practices used in drug courts in the United States, particularly those that involve the judge in non-legal interaction with the offender, are unlikely to be constitutionally permissible in Australia because 'they would be seen to be the role of professionals from other disciplines, such as psychology and counselling, and to be a significant departure from how courts operate'.[78] With respect, it is not obvious that such roles are constitutionally impermissible, at least at the state level: detailed analysis might (or might not) suggest that the functions, while novel, do not infringe the Kable principle.[79] This sort of reasoning reflects the danger that innovative ideas from other jurisdictions will be dismissed because they might breach amorphous and uncertain constitutional principles.

It is difficult to assess the degree to which this risk associated with constitutional uncertainty is affecting the progress of non-adversarial justice in Australia. Reading Non-adversarial Justice, apart from a handful of examples such as that discussed in the previous paragraph, there is not a strong sense that constitutional principles are stultifying the development of innovative practices. On the contrary, an array of less-adversarial practices have been adopted and, to varying degrees, accepted within the Australian justice system. Constraints on innovation have tended to be the result of lack of political will,[80] conservative attitudes within the legal profession[81] and a lack of training for participants,[82] rather than constitutional restrictions.

This leads to the second, quite different, risk associated with uncertainty in Chapter III principles. In the course of their discussion of the constitutionality of problem-solving courts, the authors of Non-adversarial Justice observe:

> It is not likely that the constitutionality of problem-solving court programs will come under question given that it is not in the interests of either party to mount a challenge. The prosecution, being part of the executive, is unlikely to challenge a program the executive has had a part in establishing and maintaining. Further, the defendant is unlikely to challenge a program that, in many cases, is voluntary – they can simply withdraw from the program if they do not like it – and/or involves the possibility of avoiding a prison term.[83]

This passage reveals the risk that, faced with barely comprehensible constitutional doctrine, and in a situation unlikely to attract a constitutional challenge, lawmakers and courts may (consciously or unconsciously) disregard

78 King et al, above n 7, 258. See also, eg, the discussion of the constitutionality of post-sentence supervision of offenders: at 255.

79 For an analysis of the constitutionality of the role of judges in problem-solving courts, see James Duffy, 'Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two Is Company, Is Three a Crowd?' (2011) 35 Melbourne University Law Review 394.

80 Eg, some innovative programs were abolished following a change of government: King et al, above n 7, 187.

81 Eg, the authors note that 'few [lawyers] would be comfortable with the broadest concept of holistic legal practice': ibid 94. They also identify legal culture as one of the reasons why therapeutic jurisprudence has not been adopted more widely in Australia: at 31.

82 Eg, one of the reasons why Australian judges in family courts have been reluctant to conduct judicial interviews with children is that they 'do not feel they have the skills or training to complete the task': ibid 143.

83 Ibid 257.

constitutional restrictions and hope the innovation is never challenged. Murray alludes to a similar risk when she says that, without greater guidance on the relevant constitutional limits, judges engaging in case management may 'unwittingly "over-manage" a case outside of these bounds'.[84]

This situation is undesirable for several reasons. First, it flies in the face of the basic principle of constitutionalism that governments will act in accordance with the constitution. Gabrielle Appleby and Adam Webster have argued that 'best practice' requires members of parliament to consider whether proposed laws are constitutional, even though the courts remain the final arbiter of constitutional validity.[85] For a parliament to implement a constitutionally dubious measure in the hope that it will never be challenged is a breach of this obligation. While Appleby and Webster acknowledge that the obligation in question is an 'imperfect obligation' (its breach attracts no legal consequences), they argue that '"[b]est practice", rather than the law, reflects the foundational principles of constitutionalism and the rule of law on which the whole system is based'.[86]

Secondly, if an arrangement is challenged and held unconstitutional, much time and money may have been spent on an arrangement that must be dismantled. While challenges to non-adversarial innovations are rare, they are not unheard of. Murray considers the practical aspects of a constitutional challenge to a drug court, and concludes there is no technical obstacle to such a challenge; the participant's consent to the process would not rule out a constitutional challenge.[87] She discusses the American case of Alexander v Oklahoma,[88] in which a person whose participation in a drug court program had been terminated challenged that termination on the ground that 'the proceedings were inherently biased' because the judge was 'a member of the Drug Court team' who 'crossed the line from being an adjudicator to being a participant in Appellant's treatment'.[89] It is possible to imagine a similar challenge being made in Australia on constitutional grounds.

Finally, ignoring constitutional principles may mean fundamental constitutional values are not considered in the design of non-adversarial innovations. The requirements of Chapter III that courts be independent and impartial and retain their constitutional identity are not merely formal requirements; they serve the purpose of protecting the place of courts as

84 Murray, above n 6, 122.

85 Gabrielle Appleby and Adam Webster, 'Parliament's Role in Constitutional Interpretation' (2013) 37 Melbourne University Law Review 255. See also Paul Brest, 'The Conscientious Legislator's Guide to Constitutional Interpretation' (1975) 27 Stanford Law Review 585, 587–8, which argues, albeit in the United States constitutional context, 'that legislators are obligated to determine, as best they can, the constitutionality of proposed legislation'.

86 Appleby and Webster, above n 85, 276.

87 Murray, above n 6, 179–81.

88 48 P 3d 110 (Okla, 2002).

89 Ibid 114 [16] (Judge Lumpkin).

guardians of the rule of law and of individual liberty.[90] Therefore, ensuring that any new developments are consistent with constitutional principle is a way of preserving these values within the Australian judicial system.

That is not to say that innovative non-adversarial measures necessarily ignore the traditional values of the adversarial system. But – as Non-adversarial Justice arguably shows – it can be easy to dismiss the value of the old when caught up in enthusiasm for the new. This is why Murray's theoretical insights are so important. She shows that the courts' legitimacy depends on their ability to adhere to traditional notions of what courts should be, as well as their capacity to adapt to change. Disregarding constitutional principle is just as dangerous to courts' legitimacy as inhibiting change.

Seen in this light, Non-adversarial Justice and The Remaking of the Courts present a dilemma. Non-adversarial Justice tells us the justice system is changing as we speak. The Remaking of the Courts tells us this may be a good thing, but that change needs to conform to the requirements of Chapter III. Both books tell us it is difficult to determine whether these changes do conform to Chapter III. Therefore, would-be reformers might be tempted either to play it safe and avoid making substantial changes that would raise constitutional questions, or to ignore Chapter III and hope for the best. Both possibilities have the potential to undermine the legitimacy of the courts.

The solution to this dilemma is not obvious. As argued above, it is doubtful that contextual incompatibility would increase certainty (although it would have other benefits). Nor would the adoption of rigid bright-line rules in Chapter III jurisprudence necessarily improve matters. As Murray points out, a measure of flexibility in constitutional doctrine is desirable because it permits evolution and innovation.[91] Uncertainty is not an entirely bad thing: Tushnet points out that a lack of clarity in constitutional doctrines can stimulate healthy public discourse about those doctrines.[92] However, the High Court's Chapter III jurisprudence is too often unpredictable – to the point of being almost unusable by those responsible for putting its principles into action – rather than merely flexible. Clearer guidance on the concepts of 'judicial power' and 'institutional integrity' would be more helpful than a warning to take a 'prudential approach'. Chapter III principles ought to protect the legitimacy of Australia's courts. Excessive uncertainty means they risk doing the opposite.

90 See, eg, Fiona Dowling Wheeler, The Separation of Federal Judicial Power: A Purposive Analysis (PhD Thesis, Australian National University, 1999); Peter Gerangelos, The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations (Hart Publishing, 2009) 29; Welsh, above n 60, 66–7.

91 Murray, above n 6, 272.

92 Tushnet, above n 73, 274–5.