Foreclosures

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Margaret Davies' suggestive and imaginative paper concerns the frequently brutal process of drawing and enforcing lines: saying who is in and who is out, who has power and who is powerless. This is the very stuff of constitutions and indeed of law. It is also the basis for institutionalising and reinforcing social and cultural divisiveness. On this basis Davies makes a strong prima facie case against the rule of law on the grounds that all law is inherently a matter of inclusion/exclusion and hence potentially, and perhaps inevitably, discriminatory and oppressive.

The easy response to Davies's analysis is to say that everything depends on what lines are drawn, how they are administered, and the prospect of their modification, should we come to the view that they are mistaken or conducive to maladministration. Line-drawing, it may be argued, is in itself, a morally neutral activity, while the particular lines that are drawn and how they are applied will always be controversial and fallible but, nevertheless, corrigible. Moreover, it is plausible to argue that a certain amount of line-drawing is a social and political necessity. Social, economic and political life must be organised in an intelligible and communicable way and power must curbed, channelled and allocated, otherwise nothing cooperative will get done or remain done. And, it may be added, since the struggle for wealth and power is present in every society, it is better that allocations of this sort be done, in so far as is possible, in a rule-governed rather than an 'arbitrary' way. Hence the many rationales for rule-governed polities in which systematic exclusions and facilitations are routinely created and administered.

Yet, this defence of rule-governance is too slick and complacent. After all, on the Razian analysis,[1] which is drawn upon by Davies, what is excluded includes even *good* reasons for action, reasons, which would otherwise properly apply, in the absence of the rule, which excludes them. Of course, Joseph Raz's full position is that, for legitimate authority to exist there must be good *second* order reasons for not permitting others or ourselves acting on good first order reasons. Nevertheless, institutionalising the exclusion of good first order reasons puts the onus of proof on those who commend rule-defined and rule-administer authority structures to show why we should abandon or modify our autonomous freedoms as moral agents. Many reasons can be given in favour of rule-governance in terms of its potential for efficient social organisation and principled treatment of each other, but the downside of rule-governance, such as the loss of individual autonomy and the potential for systematic rather than merely casual oppression, may lead us to

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1 Joseph Raz, *Practical Reason and Norms* (London: Hutchinson, 1975) 35-45, 73-76.

question even that prime rationale for constitutions, the allocation and limitation of power. There may be something deeply suspect in the project of using rule-governance to reduce the impact of wealth and force in civil society, to organise the expression of the will of the people and to limit the scope of the executive and judicial power, matters which are central to constitutionality. Raz himself is clear that law does not, in itself or by virtue of its character as law, have political authority. There may be good, even overriding, second order reasons for not curbing the use of first order reasons. And these may apply to the practice of rule-governance itself.

In this case, the problem runs deeper than the existence of improper and unjustified exclusions. The incidence of unacceptable exclusions may be endemic, even intrinsic to rule-based constitutions. Line-drawing which is reasonable in itself may become the basis for irrational social divisions between 'them' and 'us'. The oppression of others through the institutionalisation of their otherness is a constant prospect, which may justify an outright veto on any constitutionalism that takes rules seriously.

In probing this theme I confine myself to Davies' analysis of 'foreclosure' and its application to some legal arguments which appear to exhibit what Davies' regards as the pathological phenomenon of foreclosure. Davies draws on psychoanalytic theory define and analyse foreclosure and its significance for the ways in which identity thrives on and may be constituted by exclusion. This is a phenomenon, which is familiar to social psychologists as well as psychoanalysts. In particular, it echoes Durkheim's analysis of social solidarity and the function of law in sustaining various forms of social cohesion, solidarity and sense of social place.[2] Davies illustrates the artificial bright lines, which are used oppressively in relation to gender, race and property. Durkheim's favourite examples include the identification of 'crime' and 'criminals' as conceptually arbitrary and yet functional in relation to promoting social cohesion and reducing anomie and egoism. Davies stresses primarily the negative aspects of the psychology of rule-governance as an institutionalisation of divisiveness. Durkheim is more focussed on the sociological benefits in terms of social cohesion in a healthy society, with a subordinate concern for the coercive impact on individuals of strong social groupings.

Even if we accept Durkheim's view that there is a positive side to line-drawing in so far as it helps to build up a sense of identity and social cohesion through what are agreed to be objectively arbitrary social distinctions (such as the current cultural distinction in Western societies between alcohol and other drug users), these matters introduce an important and distinctive socio-psychological dimension to the evaluation of rule-based law as a social practice independently of its manifest social functions.

Davies herself does not suggest that all exclusion and differentiation is pathological, but she does hold that the phenomenon of 'foreclosure', whereby 'either the external world is not perceived at all, or the perception has no effect

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2 Emile Durkheim, *The Division of Labour in Society* (Illinois: The Free Press of Glencoe, 1960) Bk I.

whatever', does produce a defective sense of identity which 'completely denies and refuses the meanings of the world'.[3] This raises the interesting question as to whether positivist legal systems are inseparable from foreclosure and hence inherently undesirable.

Davies analyses constitutional foreclosure as follows:

> Foreclosure—the constitutional blocking of certain elements—takes place in various ways. Obviously, there is a territorial claim, which carries with it a claim to sovereignty over the territory and a barring of any competing claim to sovereignty. For instance, the presumption of Australian sovereignty which allows institutions to assume their own legitimacy and therefore to function, consists of the preclusion of any question of competing sovereignty or of any law not legitimised by the constitution from the order of law. That which is foreign, and anything which may threaten internally the unity of the constitutional system is barred. The constituting act which precludes competing normative orders and foreign jurisdictions is co-extensive with the formation of the legal reality which is specific to that system.[4]

Davies exemplifies the assertion that 'law refuses to justify its existence' with Brennan, J's comment in *Mabo v Queensland (No.2)* that the Court must preserve 'the skeleton of principle which gives the body of our law its shape and internal consistency'.[5] However, in citing this as an example of foreclosure she merges two distinct matters one of which is a logical point and the other a normative stance. The logical point is that a court cannot make a decision on the basis of an argument that, if sound, undermines the authority of the court to make that decision. The normative claim is that it is a good thing to preserve the internal structure of a system of law by not introducing anything into it, which detracts from its existing coherence and distinctiveness. Refusal by a court to question the constitutional foundation of its own authority is one thing, and is less an act of culpable blindness than a recognition that the political authority of a legal system is external to that system. Refusal to absorb new materials that upset the structure of established law is a radically different matter. Preserving existing legal content is not a logical requirement of a court's authority and if it is presented as such then we do have an example of a failure to observe or take account of the external world in a way which makes it an instance of foreclosure. However, failing to question the political authority from which a court derives its legitimacy need not involve putting beyond reconsideration an established set of allegedly coherent legal norms. Both the logical and the normative points relate to issues of 'identity', but the formal identity of a legal system need not depend on enduring content unless that content is provided for in the constitution and has not been amended by constitutionally proper means. The formal identity of a legal system derives from its constitution, which may or may not require either stability of existing content or maintenance of an internal coherence. It is possible, therefore, that Davies elides two distinct

3 Ibid 209.
4 Ibid 212f.
5 (1992) 175 CLR 1, 29.

phenomena, only one of which is potentially pathological.

Examples of constitutional exclusion of the logical variety, which need not be regarded as foreclosure in the pathological sense can be seen in such cases as *Coe (No 2)*,[6] *Walker*,[7] *Wik Peoples*,[8] and maybe less explicitly in *Mabo (No 2)*.[9] The formal exclusionary argument is that, because a court receives its authority from the state of which it is a part, it cannot question the basis of that state or the sovereign acts of that state. The courts, it is argued, cannot be instruments of their own self-destruction. This means that the authority of courts cannot extend to questioning the basis of their own authority. In law, such questions are quite simply off limits. This formal self-referential or self-preservation limitation of legal authority requires a court to reject any argument, which is inconsistent with its own authority as a court.

Thus Mason CJ in *Coe v Commonwealth* (No 2) 'Gibbs J stated [in *Coe (No 1)*] that the annexation of the east coast of Australia by Captain Cook and the subsequent acts by which the whole of the Australian continent became part of the Dominions of the Crown were acts of state whose validity could not be challenged'.[10] This may be compared with a similar point made by Mason CJ in *Walker v New South Wales*: 'Couched as they are in terms of the legislative incapacity of the Commonwealth and State Parliaments, those pleadings are untenable'.[11] Mason is responding here to a claim for land rights made by aboriginal people on the basis that Australian legislatures have no right to infringe pre-settlement/conquest ownership. We may also note the words of Kirby J in *Wik Peoples v Queensland:* 'There was no challenge to the principle established in *Mabo (No 2)* that the duty of this Court (as of every Australian court) is to apply the common law and relevant statutes although this could lead to the extinguishment or impairment of native title. This Court, established by the Constitution, operates within the Australian legal system. It draws its legitimacy from that system.'[12] In a rather different context, dealing with questions of constitutional interpretation, echoes of the formal self-preservation argument appear in the words of Brennan J. in *Theophanous v Herald and Weekly Times Ltd*: 'In the interpretation of the Constitution, judicial policy has no role to play. The Court, owing its existence and its jurisdiction ultimately to the Constitution, can do no more than interpret and apply its text, uncovering implications where they exist.'[13]

These arguments exemplify Hart's analytical point about the logical of legal validation according to which the rule of recognition is used to test legal validity but is not itself legally valid or invalid[14] and the more philosophical Kelsenian

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6 *Coe v Commonwealth (No 2)* (1993) 118 ALR 193.
7 *Walker v New South Wales* (1994) 182 CLR 45.
8 *Wik Peoples v Queensland* (1996) CLR 1.
9 *Mabo v Queensland (No 2)* 1992) 175 CLR 1.
10 (1993) 118 ALR 193, 199
11 (1994) 182 CLR 45, 47.
12 (1996) 187 CLR 1, 213
13 (1994) 182CLR 104
14 HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1962) 97-102.

thesis that the grundnorm, as the basis of all validity, is beyond validity and therefore beyond legal question. This comes through in part of Davies's formulation of '[f]oreclosure—the constitutional blocking of certain element', specifically 'the preclusion of any question of competing sovereignty or non-constitutional law from the order of law'. However, these examples of formal exclusion do not exhibit those further aspects, which she includes in her analysis of foreclosure which have to do with 'that which is foreign' or indeed 'anything which may threaten internally the unity of the constitutional system'.[15] Legal systems may incorporate foreign elements and include internal inconsistencies without surrendering their assumption of sovereignty.

Nevertheless, even in this restricted version, the formal self-preservation limitation of legal authority is a chilling and powerful looking form of argument which seems to put some difficult and problematic things, such as the violent settlement of Australia, beyond questioning in a manner which appears both arbitrary and unjust. The argument has the rigorous look of the syllogism in *Marbury v Madison*:[16] according to which, since the constitution is law, and it is the function of the courts to interpret and apply law, it follows that it is the function of the courts to interpret and apply the constitution. This looks logically watertight, but, of course, it may still be questioned if the premises are in doubt. Constitutional law is not ordinary law, it is a law which governs the powers of the Supreme Court as well as the Congress, therefore it is possible to distinguish Constitutional Law as an exception to the separation of powers, otherwise the Supreme Court is the final arbiter of its own authority, thus destroying the logic of the separation of powers.[17] In other words, it is possible to deny that it is the function of the Supreme Court to interpret the Constitution.

The formal self-preservation argument is equally suspect. It simply does not follow that if A is the authority for establishing B, that B cannot have the authority to modify A without undermining the continuing authority of A. We are not dealing here with a logical syllogism but with a temporal chain of authority creation. Such chains may allow for sequential growth in a way in which syllogisms may not. Indeed it is logically possible for a court to have the authority to terminate the legal system of which it is a part, just as a sovereign state may exercise its sovereignty to enter into a political union with another state. What matters is that these legal acts should not be inconsistent with the constitution which gives the courts or the state their authority. This means that the High Court could have taken into account prior Aboriginal sovereignty or ownership and recognised a pre-Australian political community whose rights had been infringed in settlement or conquest and whose political interests could feature legitimately in its decision, so as to restore lands, order compensation or limit future legislative power, provided that this did not violate any existing constitutional provisions.

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15 Ibid 213.

16 5 US (1 Cranch) 137 (1803).

17 See Carlos Nino, *The Constitution of Deliberative Democracy* (New Haven: Yale University Press, 1994) and Mark Tushnet, *Taking the Constitution Away from the Courts* (New Jersey: Princeton University Press, 1999).

Evidently no court can make a decision which denies its own authority to make that decision. However, for the High Court to recognise the relevance of prior Aboriginal sovereignty for the purpose of settling land claims within Australian law is not in itself to deny its own authority. What matters is whether or not such a logically possible move is compatible with the specific content of the Australian constitution.

It is a Freudian foreclosure and hence pathological for an Australian court to refuse to consider the possible relevance of prior Aboriginal sovereignty to the extent that this can be done with contradicting its authority as a court. Whether courts may do so is contingent on the content of the Australian constitution and the methods believed to be appropriate for its interpretation. It cannot be assumed that a constitution could not allow for such a possibility. If it is indeed the case that Australian courts have denied these possibilities by making spurious claims to constitutional consistency then we can see this as an example of the formal self-protection argument being misused in fallacious reasoning which unnecessarily excludes considerations which could be seen as a good reasons for reaching different and, perhaps, better, because less exclusionary, decisions.

This is certainly the case where the courts refuse, on the grounds that they would be acting outside their authority, to entertain considerations, which the Australian constitution does not exclude. Prior rights of ownership are such considerations, and these very properly feature in the majority opinions in *Mabo (No2)*. There are, of course, legally relevant factors which can count against introducing the notion of native title into Australian law, such as the force of precedent, or the danger to the structure and unity of Australian property law, but these are not overriding grounds for exclusion and should not be confused with the logical self-protection rationale. It is a case of pathological foreclosure if it is argued that it is not possible for a court to take into account relevant factors when the most that can be contended is that it is not desirable for them to do so, perhaps on the grounds, which clearly feature in the *Mabo (No 2)* decision, that this is not the way that common law development ought to occur.

It may be argued that I have overstated the power of the logical self-preservation argument in so far as I have assumed that courts must act within the constitutional rules, which give them authority. This may be thought to ignore the legitimacy of courts involving themselves in radical reinterpretation of constitutional provisions which allow for liberal readings of texts which make them better serve current political requirements. As Legal Realists point out, it is within the capacity of courts to 'interpret' a constitution in any way, which they believe will serve some useful purpose. Who is to say that a constitutional court is limited to applying the constitution in its stated terms? Such interpretative originalism is not a logical requirement. Indeed the Australian High Court, in line with global tendencies, has taken on itself for the purposes of creative interpretation to draw on sources of law not stated in the Australian Constitution and read the Constitution in ways evidently not contemplated by the founding fathers.

It is, of course, another matter to say that it is a good thing that a constitution allow for its interpretive amendment by a constituent part of that system; or that a

constitution should make provision for the dissolution of the state under whose authority it operates; or, how far courts should go, for instance, in the use of radical interpretative methods to modify and improve or update the constitution or the common law in the light of the needs and morals of the time. These are political questions that cannot be settled by text of the constitution itself, for it is the reading of the constitutional text that is in question.

Without accepting the propriety of granting such extensive interpretative discretion to courts, and holding to the view that, in constitutional matters at least, courts ought not to accept any arguments which are inconsistent with the continuing authority of the courts that are being asked to decide a matter, we can maintain the relevance of Davies analysis of foreclosure as a pathological phenomenon when this is extended to cast a protective shield around the existing structure of Australian law under the false assumption that this is required to maintain the court's authority.

This takes us back to the weaker form of Davies's thesis, that there is an every present and all to often actualised tendency for constitutional rules to be used to make improper exclusions or to make proper exclusions in ways, which have unacceptable side effects. This could be contrasted to the positivist view that, precisely because society is rife with immoral and unsupportable biases and prejudices, law has a role to play in reducing the impact of these by laying down what is and is not acceptable conduct. I believe that she is correct in many respects in her claim that such line-drawing is a dangerous power, particularly with respect to the conservative nature of constitutions which enables them to embody and preserve waning social prejudice. To this may be added the malignant effects of entrenching any divisions to which the social pathology of tribal cohesion may attach. Davies herself does not suggest that such tendencies should lead us to abandon rule-based constitution-making or all line-drawing within ordinary municipal law, but suggests that we must devise certain strategies to deal with it unfortunate side-effects which threaten to swamp beneficial conceits of rule-governance, in particular she points to the dangers of the mystical entrenchment of existing lines of separation.

If exclusion, even in the form of foreclosure, is a social and legal practice which is acknowledged to have both benefits and drawbacks, much work requires to be done is mapping these consequences and discovering ways of mitigating the evils of exclusion without abandoning their advantages. We must identify more precisely the dangers of legally sustained and initiated exclusions, particularly within constitutions. It may be that what is required is a greater emphasis on universal laws: rules, which apply to all citizens or residents, rather than to subclasses of the totality of human beings within the jurisdiction of the state. But this ignores the relevance of differences and excludes positive discrimination to counteract vulnerability and ongoing social prejudice. It may be that we should be drawing more lines in order to identify oppressed groups for the purposes of special protection of benefit: affirmative action line drawing. But who is to decide which these groups are and who are members of them?

Another approach to the pathological side-effects of line-drawing may be to

have as few rules as is feasible: a minimalist but not necessarily libertarian state. But that strategy depends on how optimistic we are as to the quality of life in self-regulating communities. If it is society, as distinct from law, which is the principal source of unjustified exclusion and oppression, then minimising legal regulation may increase rather than decrease such injustices.

Another line of thought is to contemplate the reduction of those undesirable exclusions which are reinforced by socially biased judicial attitudes by having only objectively applicable positive rules which leave no scope for judicial bias through the leeway of interpretation provided by vague, open-ended and morally controversial terminology. But can we exclude, for instance, general moral terms from any constitutional text which is not of unbearable length and tedium? Another approach is to institute effective means of frequent constitutional amendment. Immovable constitutions put great pressure on courts to make illegal de facto amendments, which cannot be achieved by constitutionally legitimate means. Constitutional constipation is an invitation to constitutional judicial activism. This is explicable but unacceptable because of the exclusions, which it embodies, such as the exclusion of the grundnorm currently recognised by word, if not by deed, in the current consensus, that the constitution is rooted in the assent of the Australian people. Judicial activism in constitutional 'interpretation' involves the exclusion of the Australian people from the development of the constitution. Although it may be argued that it is precisely the point of constitutions to exclude the domination of majorities, the arguments in favour of constitutional revision by minorities are, perhaps, even more troublesome.

The debate about whether to pursue the ideal of governance through rules has to be conducted in the realisation that we have choices, and that there is no easy logical closure to questioning such matters as the nature of the sovereignty of the Australian state and its relationship to aboriginal peoples. But it also requires awareness that a system in which existing rules are only followed if the political or legal authorities consider it appropriate to do so has grave dangers. If we do not set up systemic constitutional exclusions there is little chance of controlling the power of brute force, wealth or sheer numbers. It is in this framework that we require to determine which exclusions we are to have and how we are to go about changing them. If we opt for the democratic approach to law reform, then judicial foreclosure is no bar to legal progress, for the reverse side of foreclosure by courts is the recognition of the right of elected legislatures to change the relationships of states and citizens to allow, for instance, for the nature and variety of social and political groupings in a pluralist society.