

CALLING POWER TO ACCOUNT: LAW, REPARATIONS, AND THE CHINESE CANADIAN HEAD TAX CASE, David Dyzenhaus & Mayo Moran, eds. (Toronto: University of Toronto Press, 2005)

French historian Ernest Renan once suggested that “forgetting” is an integral feature of nation-formation and that honest historical inquiry will bring to light the violence upon which all political formations are founded.¹ “Unity,” he argued, “is always effected by means of brutality ... the essence of a nation [being] that all individuals have many things in common, and also that they have forgotten many things.”² Truth be told, liberal democracies, typically so quick to condemn the inequities of non-liberal societies, have more than their share of illiberal skeletons in their closets, and Canada is no exception. This collection of thoughtful, compelling essays excavates one of the darker moments of our collective past, one of many such moments often obscured beneath self-congratulatory historical narratives of a nation founded on openness, tolerance, and diversity.³

From 1885 to 1923, all immigrants to Canada of Chinese origin were required by the Federal Government to pay a head tax. Before the government abolished the tax in 1923 in favour of an outright ban on Chinese immigration, it had risen to an amount equal to two years’ wages for its payers. The ban was not lifted until 1947, and monies that had been paid were never returned to the payers. The essays in this volume revolve around the Ontario Court of Appeal’s 2002 decision in the case of *Mack v. Canada (Attorney General)*,⁴ which was brought by the surviving payers of the head tax, their spouses, and descendants. The plaintiffs sought recovery of the head tax, arguing that the impugned legislation could not withstand the scrutiny of either the *Canadian Charter of Rights and Freedoms*⁵ or customary international law as it had developed at the time of its enactment, and therefore, the government had no legal basis for retention of the monies collected. They brought the suit under the private law doctrine of unjust enrichment. The Court rejected the appeal, arguing that the legislation, long since repealed, could not give cause of action, and that the plaintiffs’ contention that the equality provisions of the *Charter* could not permit retention of the revenues garnered through the head tax would amount to a retroactive application of the *Charter*.

Despite the relative brevity of the decision, the range of themes implicated in it are sweeping, and the contributions to this collection are equally far-reaching. After the editors’ introduction, the book is divided into four substantive sections, followed by appendices containing the texts of the Appellants’ Factum and the decision of the Ontario Court of Appeal that was upheld by the Supreme Court of Canada.

¹ Ernest Renan, “What is a nation?” in Homi K. Bhabha, ed., *Nation and Narration* (London: Routledge, 1992) 8 at 11.

² *Ibid.*

³ David Dyzenhaus & Mayo Moran, eds., *Calling Power to Account: Law, Reparations, and the Chinese Canadian Head Tax Case* (Toronto: University of Toronto Press, 2005).

⁴ [2002] 217 D.L.R. (4th) 583 [*Mack*].

⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

The first section of the book does a solid job of situating the case in both its historical and contemporary social and legal contexts. A brief essay by Avvy Go, one of the co-counsel for the plaintiffs in the *Mack* decision, chronicles the decades-old struggle for reparations for losses incurred through the operation of the head tax.⁶ Essays by Constance Backhouse⁷ and John McLaren⁸ offer characteristically thorough and compelling legal-historical treatments of the case's background. Backhouse casts the history of the head tax against dominant narratives of national myth-making, uncovering some of the more sordid and too-little known elements of Canada's racist pass. McLaren's essay identifies the existence of clear jurisprudential strains that highlight the fact that while A.V. Dicey's⁹ view of the rule of law prevailed over common law jurisprudence during the time the legislation was active, that dominance was not absolute. Audrey Macklin offers a compelling critique of the tax, but pushes our attention beyond those who had to pay the tax, to those who were disallowed entry, and to the disturbing presence of similarly discriminatory elements in Canadian immigration policy today.¹⁰

The second section casts the case against more strictly contemporary concerns, focusing on institutional impediments to the righting of historical wrongs and the competence and appropriateness of pursuing such ends through the courts. Mary Eberts, lead counsel for the plaintiffs in the *Mack* decision, offers a poignant rebuke of the McLachlin Court's withdrawal from the developmental trajectory opened up by earlier Supreme Court of Canada jurisprudence on the principles of equality and human dignity.¹¹ While not rejecting such compensation, Catherine Lu challenges the assumed adequacy of monetary restitution for historical injustices.¹² Inspired by American philosopher John Rawls's concern that liberal societies secure conditions essential to fostering individual self-respect,¹³ she casts her sights beyond monetary restitution, calling instead for "moral regeneration" aimed at ameliorating the present and future effects of past discrimination.¹⁴ Picking up on Lu's reticence about the appropriateness of the judicial forum to such pursuits, Jeremy Webber poses the collection's most direct assault on the adequacy of judicial relief in such cases, arguing that the sort of rectificatory — or "prospective" — justice sought in such cases is most appropriately the province of legislatures.¹⁵ Moving back from this institutional reticence, Lorne Sossin casts aside the limits of formalist categories, suggesting much is to be learned from transcending the public/private distinction and moving toward a notion of public trust akin to that of

⁶ Avvy Go, "Litigating Injustice" in Dyzenhaus & Moran, *supra* note 3, 20.

⁷ Constance Backhouse, "Legal Discrimination against the Chinese in Canada: The Historical Framework" in Dyzenhaus & Moran, *ibid.*, 24.

⁸ John McLaren, "The Head Tax Case and the Rule of Law: The Historical Thread of Judicial Resistance to 'Legalized' Discrimination" in Dyzenhaus & Moran, *ibid.*, 92.

⁹ *Ibid.* at 93, citing A.V. Dicey, *Introduction to the Study of Law of the Constitution*, 5th ed. (London: Macmillan, 1897).

¹⁰ Audrey Macklin, "Can We Do Wrong to Strangers?" in Dyzenhaus & Moran, *supra* note 3, 60.

¹¹ Mary Eberts, "The Limits of Constitutionalism: Requiring Moral Behavior from Government" in Dyzenhaus & Moran, *ibid.*, 115.

¹² Catherine Lu, "Delivering the Goods and the Good: Repairing Moral Wrongs" in Dyzenhaus & Moran, *ibid.*, 147.

¹³ *Ibid.* at 154, referring to John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, Mass.: Harvard University Press, 1999).

¹⁴ *Ibid.* at 154-55.

¹⁵ Jeremy Webber, "Rights and Wrongs, Institutions and Time: Species of Historic Injustice and Their Modes of Redress" in Dyzenhaus & Moran, *ibid.*, 165.

fiduciary responsibility, whereby a breach of that trust renders such action both justiciable and subject to judicial remedy.¹⁶

The two chapters comprising part three ostensibly turn their attention to legal-theoretical treatments of gross statutory injustice, although few of the essays in the book actually stray far from those fields. But of particular concern for Julian Rivers¹⁷ and David Dyzenhaus¹⁸ is the quite specific set of issues raised by counsel for the plaintiffs in the *Mack* decision and the latter's indirect implication of the "Radbruch Formula" as a basis for establishing that the head tax's enabling legislation must have exceeded properly *legal* competences.¹⁹ The "Radbruch Formula," the notion that "gross statutory injustice is not law,"²⁰ arose out of post-Nazi German efforts to determine the legal force of laws promulgated in the Nazi era. Rivers suggests liberal democracies may find valuable lessons in the logic of the Radbruch Formula in their efforts to contend with the more illiberal excesses of their own pasts. Dyzenhaus, on the other hand, takes us a step further, arguing that we should reach beyond the positivist limitations inherent in Radbruch's formulation, and look rather to Fuller's internal morality of law as a basis for jurisprudential grounding of the plaintiffs' claims.

The final substantive section focuses principally on the points of intersection and divergence between private and public law implicated in the case. Essays by Lionel Smith²¹ and Dennis Klimchuk²² explore some of the intricacies of the private law doctrine of unjust enrichment and its implications for cases of restitution for historical injustices. Anthony Sebok walks readers through the intersections of unjust enrichment and mass restitution in the United States, drawing lessons from struggles for restitution for a range of historical wrongs including slavery, the duplicity of the tobacco lobby's misconstruction of the health implications of their products, and enrichment arising from non-return of Holocaust victims' property.²³ In the final essay of the collection, Mayo Moran²⁴ offers a powerful set of reflections on the apparent "sovereignty" with which we regard the past in law — how we treat the past as "another country" — and argues that in this case the Court has effectively given contemporary legal significance to a law fundamentally at odds with its principal (*Charter*) values.

A couple of prominent themes emerge through these essays. Perhaps the most poignant of these turns around the moral and political limits thrown up by the intersection of justice,

¹⁶ Lorne Sossin, "Redress for Unjust State Action: An Equitable Approach to the Public/Private Distinction" in Dyzenhaus & Moran, *ibid.*, 196.

¹⁷ Julian Rivers, "Gross Statutory Injustice and the Canadian Head Tax Case" in Dyzenhaus & Moran, *ibid.*, 233.

¹⁸ David Dyzenhaus, "The Juristic Force of Injustice" in Dyzenhaus & Moran, *ibid.*, 256.

¹⁹ Dyzenhaus & Moran, *supra* note 3 (Factum of the Appellant at paras. 96-106).

²⁰ *Supra* note 17 at 236, referring to the work of Gustav Radbruch. See Ralf Dreir & Stanley L. Paulson, *Gustav Radbruch — Rechtsphilosophie* (Heidelberg: C.F. Müller, 1999); Barend van Niekerk, "The Warning Voice from Heidelberg — The Life and Thought of Gustav Radbruch" (1973) 90 S.A.L.J. 234.

²¹ Lionel Smith, "The Timing of Injustice" in Dyzenhaus & Moran, *supra* note 3, 287.

²² Dennis Klimchuk, "*Mack v. Attorney General of Canada* and the Structure of the Action in Unjust Enrichment" in Dyzenhaus & Moran, *ibid.*, 307.

²³ Anthony J. Sebok, "A Brief History of Mass Restitution Litigation in the United States" in Dyzenhaus & Moran, *ibid.*, 341.

²⁴ Mayo Moran, "Time, Place, and Values: *Mack* and the Influences of the *Charter* on Private Law" in Dyzenhaus & Moran, *ibid.*, 378.

space, and time, limits no less salient today than they were through the years of the head tax. In a late-modern world of heightened transnational migrations confronting new barriers to the free flow of populations, the question "Who gets in?" and the factors underlying this determination raise the same moral and ethical challenges today as they did more than a century ago.

The second theme engages the perennial problem of delimiting the appropriate scope of judicial action in liberal democracies. The authors vary quite widely on this problem, and some are more compelling than others. The essays by Rivers²⁵ and Dyzenhaus,²⁶ however, are particularly problematic. Whether in the former's advocacy of the importance of Radbruch or in the latter's common law constitutionalism, each seems bent on rewriting the legal past. The tenuousness of this approach is perhaps most evident in the logical outcome of Dyzenhaus's line of argumentation: the entrenchment of liberal rights in common law constitutional jurisdictions is rendered essentially redundant. Thus, the sort of legal and constitutional watershed that marked the advent of the *Charter* seems little more than the teleological unfolding of the inner logic of liberalism. This is an all-too-common outcome of "juridocentric" analyses that fail to appreciate the historically overdetermined and inherently political character of constitution making. But despite these problems, all of the essays here reflect a deep seriousness of engagement and offer a myriad of points of departure for addressing some of the most pressing constitutional dilemmas of our time.

The one conspicuous absence in the book is any sustained attention to the quite problematic arguments from customary international law raised by the appellants in *Mack*. This is an odd omission given the weight these arguments were accorded in both the Appellant's Factum and the Court of Appeal's response thereto.²⁷ That being said, this was undoubtedly the weakest component of the appeal. To suggest international law had achieved some sort of enlightened consensus on issues of racial discrimination by 1947 is to push the bounds of credulity. In a world where the *jus cogens* character of torture and genocide seem once again open to debate, legal and political energies are better spent on redressing the inadequacies of the legal present than trying to re-write the past.

This is a powerful, important, and timely set of essays. The authors offer valuable contributions to the fields of jurisprudence, legal history, and political theory, as well as offering slightly more specialized introductions to the doctrine of unjust enrichment. The contributions are compelling, thought-provoking, and deserve both a wide audience and sustained debate. The collection is no less timely for the government's decision of 22 June 2006 to finally issue a full apology to the few remaining survivors of the head tax, offering "symbolic payments" of \$20,000 to each.²⁸ Far from losing either their force or relevance, these essays offer us multiple vantage points from which to assess this "resolution." Beyond its obvious contribution to critical thinking about race and law, it should prove of enormous

²⁵ *Supra* note 17.

²⁶ *Supra* note 18.

²⁷ Dyzenhaus & Moran, *supra* note 3 (Factum of the Appellant at paras. 28-70); *Mack*, *supra* note 4 at paras. 18-33.

²⁸ The Right Honourable Stephen Harper, "Address by the Prime Minister on the Chinese Head Tax Redress" (22 June 2006), online: Office of the Prime Minister <<http://www.pm.gc.ca/eng/media.asp?category=2&id=1220>>.

interest to students of Canadian public policy, politics, and history, and makes an equally valuable contribution to the growing field of international scholarship concerned with issues of restitution for historical injustices. Its contents should shake readers of any complacency about our own racist past, while helping us to perhaps identify better the racist character and implications of our present.

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