



# Macquarie Law Journal

VOLUME 17, 2017



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This issue may be cited as **(2017) 17 MqLJ**

**ISSN [1445-386X]**

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# LAW REFORM IN THE 21<sup>ST</sup> CENTURY

ALAN CAMERON AO\*

*Annual Tony Blackshield Lecture, delivered at the Federal Court of Australia, Sydney, 8 November 2016.*

## I SIGNIFICANCE OF ANNUAL LECTURES

Several weeks ago, I had the honour of chairing the Tristan Jepson Memorial Lecture in this very room as chair of the Tristan Jepson Memorial Foundation, dedicated to responding to issues of mental health and wellbeing in the legal profession. Macquarie students and alumni have been actively involved in the Foundation from the start and are now.

After that, I attended the annual Charles Perkins Memorial Oration, at the University of Sydney, a regular opportunity to focus on indigenous issues. On this occasion, three of our five indigenous members of federal Parliament and a distinguished Torres Strait Islander were on a panel to discuss the significance of Charles Perkins some 50 years after the Freedom Ride, and the chances of meaningful constitutional recognition — sometime in the next 50 years? I will of course be attending the City of Sydney Peace Prize lecture on Friday night, with Naomi Klein.

Tony Blackshield reflected on the concept of the annual lecture 31 years ago, almost to the day, when delivering the Meredith Memorial Lecture at La Trobe University. He said:

An annual series of memorial lectures plays an important symbolic role in the life of a university. On the one hand such lectures are one small way in which universities can demonstrate their capacity for topical ‘relevance’, for public contribution to the fabric of community life.

On the other hand, such lectures also remind us of the values of tradition and continuity in university life. The continuity and community that we celebrate on such occasions link our generation of academics with all the earlier generations of individual men and women whose dedication to the stream of knowledge — to maintaining it, transmitting it, and if possible extending its boundaries — has defined the meaning of universities since they first came into existence. And all this reminds us even more deeply that when we, in our own generation, pursue the goals just mentioned — the goals of maintaining, transmitting and extending the stream of knowledge — we can do so only through dialogue; and that this is a dialogue not only between the men and women of our own generation but between our generation and all the generations before us.<sup>1</sup>

His message was directed at academics, but I think it is equally true of alumni — and even if you do not do what you must be thinking I do and make a habit of attending this kind of lecture, this evening may be the only time each year on which you reflect on your university days as well as catch up with your former class mates, and that has to be good. Nor is it necessary to have died to have a lecture named after you, as Tony demonstrates so well!

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\* Chairperson, New South Wales Law Reform Commission (NSWLRC).

<sup>1</sup> Anthony R Blackshield, ‘The Legitimacy and Authority of Judges’ (1987) 10(1) *University of New South Wales Law Journal* 155, 155.

## II TONY BLACKSHIELD AND I

It does seem to be obligatory for the speaker to reflect on their own acquaintance with the honouree, and it is a pleasure to do that this evening. I was a student of Tony's at Sydney Law School. Tony obviously regarded teaching me or my year as the apex of his career there, and left Sydney Law School almost immediately after. You can read the rest of his career highlights in the first Blackshield Lecture delivered by the Hon Michael Kirby.<sup>2</sup> It was a career with political overtones, of course, and not a little controversy. And he remains in the newspapers to this day — his analysis of the recent history of the laws on political speech in *The Saturday Paper* of 8 October this year is as sharp and erudite as ever,<sup>3</sup> and a delight to read, I suspect, even for lay people.

My diverse career after that did not include teaching law except for my being sent just a few years later to teach law at the law school in Medan, North Sumatra, Indonesia. The aim was to introduce teaching along the model of the Anglo-American case law system to a law school steeped in teaching based on the traditional civil law-type system based largely on the Dutch law, in combination with the local *adat* law. In preparation for that, I was encouraged to visit the new generation of law schools, UNSW, Monash and of course Macquarie Law School in 1975 — to study methods of legal education there. I was greatly impressed by what I saw — far more active involvement between staff and students than I had seen at Sydney as a general rule, excepting of course classes taught by Tony and his ilk.

## III LAW REFORM

I am not talking about law reform by judges, sometimes called judicial activism. I am talking about deliberate or deliberative reform — enacted by legislators, and the process by which that is enhanced through interactions outside the legislature. Professor Gerard Quinn from the University of Ireland in Galway said in Sydney recently:

Dean Roscoe Pound used to insist that 'all law decays inevitably.' What he meant was that, either the facts that the law was intended to address have materially altered or that the values that originally animated the law have also changed. Law reform to him meant a re-adjustment of the law to meet current exigencies with new animating values.<sup>4</sup>

I went back with his assistance to find the precise quote — '[l]egal systems have their periods in which science degenerates, in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence'<sup>5</sup> — which was the title of the celebrated 1908 *Columbia Law Review* article from which the quote is drawn. But I prefer Gerard Quinn's paraphrase, 'all law decays inevitably', as summing up the challenge to which law reformers are directed today, our *raison d'être*. Tony will be pleased at any Roscoe Pound reference.

A *Law Reform's Long History*

I recently came across in Richard Fidler's book, *Ghost Empire*, this description of law reform in Roman times:

<sup>2</sup> Michael D Kirby, 'A R Blackshield and Realism in Australian Constitutional Law' (2013) 11 *Macquarie Law Journal* 8.

<sup>3</sup> Anthony R Blackshield, 'The Constitution's Implied Freedom', *The Saturday Paper* (Carlton, Victoria), 8 October 2016, 7.

<sup>4</sup> Gerard Quinn, 'From Civil Death to Civil Life — The Decay and Re-Birth of Legal Capacity Law Around the World' (Paper presented at Australian Guardianship and Administration Council Conference, Sydney, 17–18 October 2016).

<sup>5</sup> Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 *Columbia Law Review* 605, 607.

[In 528 at] Justinian's instigation, John [the Cappadocian] set up a ten-man commission to sort through the entire corpus of Roman law. The Roman legal system was one of Rome's greatest civilisational achievements, but by the sixth century, the code had grown into a gigantic hodge-podge of conflicting and out-of-date laws that hobbled the administration of justice, which in turn undermined the authority of the state. '... the law [we have found] to be so confused that it is extended to an infinite length and is not within the grasp of human capacity.'

The commission got to work, discarding contradictory and redundant laws, reassembling what was left into a more coherent form, and introducing new ones as needed to supersede the confusion.<sup>6</sup>

This was substantive reform — not just tidying, as can be seen from the following:

Theodora [the Empress] instigated her own program of law reform to improve the status of Roman women. It became easier for women to own property, a husband could not take on a major debt without his wife giving her consent twice, the killing of a wife for adultery was outlawed, and rape became a crime punishable by death.<sup>7</sup>

That reference to women owning property triggered in me, as it may have done in some of you, a distant recollection of the *Married Women's Property Act 1882* (UK), the Act that allowed married women to own and control property in their own right. It was a model for similar legislation in Victoria in 1884, and eventually New South Wales in 1893 — a mere 1360 years later.<sup>8</sup>

And while we are on this frolic, what about that reference to husbands not taking on a major debt without the wife's consent, *given twice*? I went back to Richard Fidler's source, not the Latin admittedly. Here is the full quote — 'Before a husband could encumber an ante-nuptial donation [think dowry] with debt, the wife had to give her consent twice; this was because on the first occasion she might have been won over against her better judgement by her husband's blandishments and later changed her mind.'<sup>9</sup> These days law reformers would probably be explicit in requiring the two consents to be separated by a number of days, say, or a number of weeks, but no such requirement is obvious in the Codex.

So how did John's commission go in delivering on its brief from Justinian — Richard Fidler again:

The commission delivered its draft of the *Codex of Justinian* on 8 April 529, the first comprehensive and coherent body of Roman law in the empire's history. It had been completed in just thirteen months, an astonishingly short period. Justinian crowed as he announced its publication: 'Those things which seemed to many former emperors to require correction, but which none of them ventured to carry into effect, we have decided to accomplish at the present time, with the assistance of almighty God.'<sup>10</sup>

A stunning achievement indeed. Law Reform Commissions today rarely complete anything in less time, but then unlike the Romans, we do engage in extensive stakeholder consultation.

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<sup>6</sup> Richard Fidler, *Ghost Empire* (Harper Collins, 2016) 86.

<sup>7</sup> Ibid.

<sup>8</sup> Married Women's Property Act 1882 45 & 46 Vict c 75; The Married Women's Property Act 1884 (Vic); Married Women's Property Act 1893 (NSW).

<sup>9</sup> Lynda Garland, *Byzantine Empresses: Women and Power in Byzantium, AD 527–1204* (Routledge, 1999) 16.

<sup>10</sup> Fidler, above n 6, 86–7.

These references to Justinian provoke me into acknowledging Richard Ackland, publisher of the magazine of that title, graduate, old friend, and most recently the recipient of an honorary degree from your University. Congratulations, Dr Ackland!

### B *Establishment of NSWLRC*

It was 1417 years after Justinian, on 20 March 1946, that Lt Col Murray Robson, then the member for Vaucluse in the NSW Legislative Assembly, said about a piece of legislation:

I am certain that the Attorney-General will be the first to agree that this is a highly technical measure. There exists a need for a standing committee on law reform to deal with a measure such as this. The leader of the Country Party has mentioned the difficulty that he, in common with other hon. members who have not had the advantage, or the disadvantage, of being members of the legal profession, has experienced in studying this measure. Though I have had some legal experience, and notwithstanding the Minister's very clear explanation, I should not say that I am fully seized with the implications of the bill. That emphasises the necessity for the appointment of a standing committee to deal with a measure such as this, which affects the civil rights of every subject in New South Wales.

I am not au fait with its details, and I have a rather uneasy feeling about it. If hon. members had the advantage of the studied opinion of a law reform committee that had the imprimatur of the Attorney-General, I have no doubt that their way would be made much easier.

I would, therefore, ask the Minister to give consideration to my suggestion that whenever a measure such as this is contemplated as a matter of Government policy, it should be submitted to a committee ... a committee outside the House, composed of experienced lawyers, so that we could have the benefit of their advice when a measure comes before the House.<sup>11</sup>

Some 20 years later, the New South Wales Law Reform Commission (NSWLRC) was formally established as, what that unreliable authority Wikipedia, calls the 'first permanent body established in Australia to continually conduct and investigate law reform.'<sup>12</sup> How can you rely on Wikipedia when it so egregiously splits an infinitive? The Commission was set up initially by administrative act on 1 January 1966, and by its own Act of Parliament on 25 September 1967.<sup>13</sup> But there had been earlier versions.

The first Law Reform Commission in New South Wales was set up by letters patent in 1870 and was charged with the revision and consolidation of the statute law, the reform of the practice and procedure of the courts, and the removal of inconveniences resulting from separate law and equity jurisdictions. It is said that a lack of interest within Parliament meant that its only success was the *Criminal Law Amendment Act* of 1883 and the Commission itself soon lapsed. In 1893, a Royal Commission was appointed to consolidate the statute law, 'although it was not to make or suggest any amendments'<sup>14</sup> — I suppose you could do that, but it sounds like much effort to little avail!

<sup>11</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 March 1946, 2811–12.

<sup>12</sup> *Law Reform Commission of New South Wales* (10 March 2017) Wikipedia <[https://en.wikipedia.org/wiki/Law\\_Reform\\_Commission\\_of\\_New\\_South\\_Wales](https://en.wikipedia.org/wiki/Law_Reform_Commission_of_New_South_Wales)>.

<sup>13</sup> See William H Hurlbert, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber, 1986) 123. Those who wish to pursue the history of law reform in greater detail than this talk should consult Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) and Michael Tilbury, Simon N M Young and Ludwig Ng (eds), *Reforming Law Reform* (Hong Kong University Press, 2014).

<sup>14</sup> NSWLRC, *Precursors of the NSW Law Reform Commission (1870–1965)* (16 March 2004) <[www.web.archive.org/web/20070904135453/http://www.lawlink.nsw.gov.au/lawlink/lrc/ll\\_lrc.nsf/pages/LRC\\_history1](http://www.web.archive.org/web/20070904135453/http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_history1)>.

Skipping several iterations of little interest today, a permanent — though part-time — Law Reform Committee was established in 1961 under the chairmanship of Justice L J Herron, who soon afterwards became Chief Justice. Its charter was to recommend reforms, particularly in practice and procedure, which would increase efficiency and economy in the administration of justice. According to Professor David Benjafield, who served on the Committee, the chief deficiencies of the Committee were that it was limited to considering matters of procedure unless other matters were referred to it by the Attorney-General; that it was recruited on a part-time and purely voluntary basis, with virtually no research facilities; and that it often produced majority and minority reports which the Government felt were unsafe to implement in the absence of unanimity.<sup>15</sup>

The new government elected in 1965 had made the establishment of a commission an election promise. Under the *Law Reform Commission Act 1967* (NSW) s 10:

The Commission, in accordance with any reference to it made by the Minister:

- (a) shall consider the law, enacted or promulgated by the Legislature of New South Wales or by any person under the authority of that Legislature, with a view to, or for the purpose of:
  - (i) eliminating defects and anachronisms in the law,
  - (ii) repealing obsolete or unnecessary enactments,
  - (iii) consolidating, codifying or revising the law,
  - (iv) simplifying or modernising the law by bringing it into accord with current conditions,
  - (v) adopting new or more effective methods for the administration of the law and the dispensation of justice,
  - (vi) systematically developing and reforming the law,
- (b) shall consider proposals relating to matters in respect of which it is competent for the Legislature of New South Wales or any person under the authority of that Legislature to enact or promulgate laws, and
- (c) may for the purposes of this section hold and conduct such inquiries as it thinks fit.

Clearly the Commission had the task, at least in part, to address the same issues as John the Cappadocian did! It must have been fun in those early days to address the ‘gigantic hodge-podge of conflicting and out of date laws that hobbled the administration of justice, which in turn undermined the authority of the state’, and to sweep away the ‘ancient and irrelevant laws’.<sup>16</sup> One of the earliest reports,<sup>17</sup> was about the application of Imperial Acts in NSW, and recommended repeal of hundreds of them — you may be pleased to learn that those saved included *Magna Carta*, and the *Treason Act of 1351*,<sup>18</sup> as well as the 1688 *Bill of Rights*.<sup>19</sup>

The second part of the exercise led to Report 10 in 1971,<sup>20</sup> which addressed out-dated and anomalous NSW Statute laws. It recommended repeal of some Acts as obsolete because they dealt with a transient situation or an event long since passed, such as the *Australia’s One Hundred and Fiftieth Anniversary Celebrations Act 1936* (NSW) and others, because of social and industrial change, such as the *Coal-lumpers Baskets Act 1900* (NSW). This unlamented statute had regulated the size of baskets to be used by coal-lumpers in discharging coal from ships, a coal-lumper being a person who carries coal by manual labour. Hopefully the practice of coal lumping had stopped. Some had expired by effluxion of time, such as the *Legal Practitioners (War Service) Amendment Act 1940* (NSW),<sup>21</sup> which had been enacted to continue in force for the duration of the war between His Majesty and

<sup>15</sup> Ibid.

<sup>16</sup> Fidler, above n 6, 86.

<sup>17</sup> NSWLRC, *Application of Imperial Acts*, Report 4 (1967).

<sup>18</sup> *Treason Act 1351* 25 Edw 3.

<sup>19</sup> *Bill of Rights 1688* 1 Wm & M sess 2.

<sup>20</sup> NSWLRC, *Statute Law Revision*, Report 10 (1971).

<sup>21</sup> *Legal Practitioners (War Service) Amendment Act 1940* (NSW).

Germany and her allies and until the 30<sup>th</sup> day of June in the year next following the year in which peace is declared, and no longer.

These were the bread and butter of law reform, the Justinian-like brief — and possibly what most people assume is all we do. They probably also assume we go and find laws that need to be fixed and report on those, but in fact we act only on references given us by the Attorney-General.

#### IV CHALLENGES OF THE 21<sup>ST</sup> CENTURY?

I want to focus on some of the current challenges for law reform, with particular reference to one of our three current projects, the law of guardianship.

Before doing so I should touch on the other two. One is statutory alternative dispute resolution (ADR) in NSW — a situation Justinian would recognise — more than 50 statutes with different ways of describing ADR. We have revived this reference after a long hiatus.

Then there is s 6 of the *Law Reform Miscellaneous Provisions Act 1946* (NSW) — anyone remember that? That section is intended to protect a claimant who has a right of action against an insured defendant and wants to claim against the insurer. The protection is provided by imposing a statutory charge on the proceeds of the policy. The section has been the subject of judicial criticism for many years. The NSW Court of Appeal described the section as ‘somewhat enigmatic’ and unclear, and called for it to be ‘completely redrafted in an intelligible form so as to achieve the objects for which it was enacted.’<sup>22</sup> The very same Justice Kirby said of this section in one case that it was ‘undoubtedly opaque and ambiguous’ and in another that ‘ambiguity may be its only clear feature.’<sup>23</sup> So you may think it hardly surprising that it was referred to us for consideration.

And guess what — it was that very Act which led to Lt Col Murray Robson’s suggestion of a standing committee which I quoted earlier. So there you have it — 70 years ago, section 6 was adopted, 50 years ago the Commission was set up, and this year the Commission is asked finally to review the section. Full circle. We have made considerable progress on this reference, consulting with affected stakeholders, and expect to report shortly. It is a perfect example of essential law reform to address a well-recognised problem, where our consultation process will give the government, I hope, confidence that our solution will be acceptable, and will work.

In general terms, what are the challenges?

##### A *Adoption of Reports*

The Australian Law Reform Commission (ALRC) publishes the track record of implementation of its Reports on its website, which you may think is a brave thing to do. It shows some reports have not been responded to, and far less implemented in whole or in part, over many years. We do not do that ourselves, but I will think about doing so, perhaps when my term is about to expire!

The reluctance is for this reason. I am not myself persuaded that the adoption into law of the work of a law reform commission is the best test of our success — the best KPI. It’s a version

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<sup>22</sup> Chubb Insurance Company of Australia Ltd v Moore [2013] NSWCA 212 [5], [55].

<sup>23</sup> New South Wales Medical Defence Union v Crawford (1993) 31 NSWLR 469, 479; McMillan v Mannix (1993) 31 NSWLR 538, 542.

of a familiar problem for public authorities. In a previous life,<sup>24</sup> I argued that successful prosecutions were not the right test for law enforcement agencies. Adopting such a test would lead to risk averse behaviour by prosecutors. Similarly for law reform agencies. If enactment is the test, then the commission will strive just for that, whereas our task ought to be dispassionately and apolitically to report our best view of what the law ought to be, without regard for the politics of having that view accepted at a point in time — especially when governments often do not have control of both houses of the legislature.

## B Resources

It is the simple fact that law reform commissions are no longer well-funded — some apparently barely funded, as with ALRC itself.<sup>25</sup> Others have even been disestablished, as in Victoria, which was only revived in 2000 after 8 years in wilderness. The NSWLRC did go for 2 years without a designated chair.

It was not always thus. I played a role in the first reference of the ALRC which produced Report 2, *Criminal Investigation*. That work occupied my time and paid the mortgage while I was awaiting my visa for Indonesia in 1975. Looking at the Report again after all these years, it is clear why so many regard the work of that Commission as the high water mark of law reform in this country.

The Terms of Reference dated 16 May 1975 required ALRC to inquire into and report as to the appropriate legislative means of safeguarding individual rights and liberties in relation to the law enforcement process by the Australia Police under Australian and Territorial law and to report thereon not later than 15 August 1975. Three months.

Quoting from the Report:

Immediately upon receipt of the terms of reference, the Commission met to formulate research guidelines, appoint consultants and arrange for the invitation of submissions from the public. The Commission at this stage comprised only the Chairman, [a then barely known lawyer called Michael Kirby, fresh from a thriving practice at the NSW Bar] three part-time members and limited staff. ... A team of fourteen consultants, produced by the first week in July 1975 substantial research papers on particular aspects of the reference. ... Some tentative views were then formulated at a three-day conference at the Australian National University in Canberra on 5-8 July 1975 attended by all members of the Commission and all consultants. The Commission then held a series of advertised public hearings in the capital cities of every State and in the Northern Territory and Australian Capital Territory from 9 to 23 July 1975. In the course of these hearings, oral submissions were received from a total of 115 persons. ... The Commission met again in Canberra on 25-27 July 1975 for a further intensive three-day session to establish its conclusions and recommendations in the light of all the comment received. A draft report was then written and the Office of Parliamentary Counsel instructed to prepare draft legislation in accordance with the report. Further meetings to refine conclusions and to settle the draft legislation were held in Sydney on 16-17 and 30-31 August 1975.<sup>26</sup>

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<sup>24</sup> As Chair of the Australian Securities and Investments Commission from 1993 to 2000.

<sup>25</sup> The Chair of the ALRC:

‘ During 2015-16, the ALRC worked on only one inquiry rather than the usual practice of working on two inquiries concurrently. This change to our anticipated work plan was necessitated by a significant reduction in our budget as a MYEFO efficiency savings measure. The ALRC managed this reduction by requesting that the Attorney-General not appoint a second Commissioner and agree to our only undertaking the one inquiry.’

<sup>26</sup> ALRC, *Annual Report 2015-2016*, Report No 130, (2016) 5.

<sup>26</sup> ALRC, *Criminal Investigation*, Report No 2 (1975) [4].

The Report was dated 5 September 1975, the date to which the deadline had been extended — a law reform world speed record! Note the extent of the consultation. Note the money which had to be spent in a short period to corral 14 consultants plus part time commissioners and put them up over meetings lasting days at a time. Note the speed generally! Law Reform Commissions do not operate that way today.

### C *Technology*

It is compulsory these days to mention the effect of technology. In fact, I have little to say other than, as with legal practice, the availability of information through technology means that, whatever the subject matter, we have a mass more material to deal with than our predecessors. Information overload. Our attention is drawn in the context of the guardianship review, for example, to the latest developments in places as diverse as Texas and Bulgaria. Where should one draw the line?

### D *Approach*

So, what attitude are we supposed to bring to the task? Are we supposed to be biased, for example, towards any view such as protecting individual rights, or protecting the community by enhancing the powers of government? No guidance leaps at you from the words of the statute.

Surprisingly, you may think, I missed the opening of Law Term dinner this year. Surprising because it is another example of an annual lecture, when the Chief Justice speaks on the state of the profession. The Sydney Morning Herald reported the following day that Chief Justice Tom Bathurst had said that it was ‘questionable’ whether mechanisms for scrutinising bills in the state were ‘translating into an effective protection of fundamental common law rights’ and that ‘the only other scrutiny review mechanism in this state, beyond the [parliamentary] Legislation Review Committee, is the NSWLRC.’<sup>27</sup> I confess that I was, initially at least, taken aback to read that. It did rather sound as if the commission had an explicit role in protecting human rights generally.

In his speech, the Chief Justice drew attention to the parliamentary scrutiny processes at a Commonwealth level including the Senate Standing Committee on Regulations and Ordinances, the Senate Standing Committee for the Scrutiny of Bills, the Parliamentary Joint Committee on Human Rights, the Senate Standing Committee on Legal and Constitutional Affairs, the Parliamentary Joint Committee on Intelligence and Security and, finally, the Parliamentary Joint Committee on Law Enforcement. In contrast, at a state level in New South Wales, as he said, ‘there is the one joint standing Legislation Review Committee. This Committee was set up in response to the Legislative Council’s Law and Justice Committee’s inquiry in 2001. That inquiry recommended that instead of NSW having a bill of rights it have a committee to scrutinise bills.’<sup>28</sup>

He then noted that

obviously our state has no equivalent to the Australian Human Rights Commission, or a counterpart to the Victorian Equal Opportunity and Human Rights Commission. Admittedly, international human rights obligations bind the states as much as the Commonwealth. Nonetheless, it would appear that the only other scrutiny review

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<sup>27</sup> Tom F Bathurst, ‘The Nature of the Profession: the State of the Law’ (Speech delivered at the Opening of Law Term, Sydney, 4 February 2016); Michaela Whitbourn, ‘Chief Justice Tom Bathurst warns of Threat to Basic Legal Rights’, *Sydney Morning Herald* (Sydney), 5 February 2016.

<sup>28</sup> *Ibid.*

mechanism in this state, beyond the Legislation Review Committee, is the New South Wales Law Reform Commission.<sup>29</sup>

Our ability to perform that role is limited first, as he knew, by the requirement that we can only consider matters referred to us by the Attorney General, but as you will see, we can be and are usually given guidance in the references as to what approach we should bring to each task.

We do have the word ‘reform’ in our title. Michael Kirby, who now appears for the fourth and last time in this talk, said about this:

[Speaking in the debate on the *First Reform Bill* in 1831] Macaulay made this point by reference to the etymology of the English word ‘reform’. He urged ‘reform that you may preserve’. In other words, reform implies some degree of preservation or conservation of the object of the reform exercise. What is produced at the end of the day is ‘re-formed’. It may well be changed, with a view to improvement. But what is produced is designed to fit within the order that is being reformed, although with modifications, developments and adaptations necessary for new times, new needs, new circumstances.<sup>30</sup>

So all law decays inevitably, but we must be careful to preserve, to some extent.

## E *The Relevance of International Conventions*

Modern law reform is often triggered by, and always needs to have regard to, international conventions. I mentioned earlier the ALRC Report 2 *Criminal Investigation*. Its terms of reference included that it should have regard to

the commitment of the Australian Government to bring Australian law and practice into conformity with the standards laid down in the International Covenant on Civil and Political Rights;<sup>31</sup>

Despite that, at least according to the Report’s index, there is only one explicit reference to the International Covenant on Civil and Political Rights in the report:

The Commission’s attention is called to the International Covenant on Civil and Political Rights by s 7 of the *Law Reform Commission Act 1973*. That Covenant provides in Article 7 that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment’ and in Article 10 that ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’. It is appropriate that these general provisions should be incorporated into any Australian legislation dealing with the rights of persons in custody and the obligations of those detaining them there. Such general provisions do not, of course, exhaust the need for more explicit rules. Accordingly a number of specific rules are recommended. First, medical treatment should be obtained forthwith for any person in custody who either requests it or reasonably appears to need it. There is no reason why the cost of such treatment should not normally be borne by the person in custody. Secondly, we regard it as axiomatic – but no less necessary in statutory form for that – that persons in custody be provided with reasonable toilet facilities, food and drink. Thirdly, we recommend that persons, if held in custody for more than four hours, should be given, where reasonably possible, the opportunity to wash or shower, shave and obtain a change of clothes prior to their appearance in court.

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<sup>29</sup> Ibid.

<sup>30</sup> Michael D Kirby, *Reform the Law* (Oxford University Press, 1983) 8, citing Jean Beetz, ‘Reflections on Continuity and Change in Law Reform’ (1972) 22 *University of Toronto Law Journal* 129, 138.

<sup>31</sup> ALRC, above n 26, ix.

There is ample evidence now accumulated to show that prospects of acquittal of persons who appear in court directly from custody are substantially less than if they answer a summons or have been released on bail. Although obviously other factors play a role, part at least of the reason for this phenomenon has been thought to be the kind of physical dishevelment — crumpled clothes, unshaven faces, and the like — which is an almost inevitable concomitant of spending a night in the cells in most parts of this country. Such factors cannot fail but to create a disadvantageous impression. Physical appearance is also, of course, an important morale factor, partly determining the extent to which persons, especially those in a novel situation, can pull themselves together before their court appearance. It might be said that this recommended provision is somewhat unusual in its specificity about a somewhat undignified subject-matter. However the Commission regards it as no less desirable for that. It seems important, if practical effect is to be given to the Covenant to which the Statute [and I would add — the Terms of Reference for that Enquiry] directs our attention, that there should be no shying away from the articulation of practical consequences and explicit legislation.<sup>32</sup>

Enlightened and sensible material, if somewhat genteel, from 1975. All of these concepts and some of these precise words are awfully familiar to me, as I had then just stepped down from my role with the NSW Aboriginal Legal Service. And it strikes me as prophetic of the concerns which were to lead about 10 years later to the Royal Commission into Aboriginal Deaths in Custody — if only this Report in 1975 had been more fully accepted and adopted. And if only that Royal Commission Report had been more fully implemented, the ALRC may not have needed to be asked to review the appalling level of indigenous incarceration in Australia, as recently announced.

## V THE GUARDIANSHIP REFERENCE

So — to guardianship. First, our Terms of Reference:

To review and report on the desirability of changes to the *Guardianship Act 1987* (NSW) having regard to:

1. The relationship between the *Guardianship Act 1987* (NSW) and the *NSW Trustee and Guardian Act 2009* (NSW) the *Powers of Attorney Act 2003* (NSW) the *Mental Health Act 2007* (NSW) and other relevant legislation.
2. Recent relevant developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia and overseas<sup>33</sup>. The 2014 report of the ALRC *Equality, Capacity and Disability in Commonwealth Laws*.<sup>33</sup>
4. The UN Convention on the Rights of Persons with Disabilities.
5. The demographics of NSW and in particular the increase in the ageing population.

In particular, the Commission is to consider:

1. The model or models of decision making that should be employed for persons who cannot make decisions for themselves.
2. The basis and parameters for decisions made pursuant to a substitute decision making model, if such a model is retained.
3. The basis and parameters for decisions made under a supported decision making model, if adopted, and the relationship and boundaries between this and a substituted decision making model including the costs of implementation.
4. The appropriate relationship between guardianship law in NSW and legal and policy developments at the federal level, especially the *National Disability Insurance Scheme Act 2013*, the *Aged Care Act 1997* and related legislation.

<sup>32</sup> Ibid [135].

<sup>33</sup> ALRC, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

5. Whether the language of ‘disability’ is the appropriate conceptual language for the guardianship and financial management regime and to what extent ‘decision making capacity’ is more appropriate.
6. Whether guardianship law in NSW should explicitly address the circumstances in which the use of restrictive practices will be lawful in relation to people with a decision-making incapacity.
7. In the light of the requirement of the UNCRPD [United Nations Convention on the Rights of Persons with Disabilities] that there be regular reviews of any instrument that has the effect of removing or restricting autonomy, should the *Guardianship Act 1987* provide for the regular review of financial management orders.
8. The provisions of Division 4A of Part 5 of the *Guardianship Act 1987* relating to clinical trials.
9. Any other matters the NSW Law Reform Commission considers relevant to the Terms of Reference.<sup>34</sup>

You will have noticed the references to the United Nations *Convention on the Rights of Persons with Disabilities*. Professor Quinn, after quoting Roscoe Pound about law having decayed because ‘the facts that the law was intended to address have materially altered or that the values that originally animated the law have also changed’ commented as follows:

The facts here [with respect to disability] have not altered. Persons with intellectual disabilities continue to be persons with intellectual disabilities. What has altered – and altered very significantly – is how we see, frame and value persons with intellectual disabilities – and I would say not just because of the UN convention. In this regard, in my view at least, the convention confirms and reinforces rather than establishes profound shifts that have been happening out there for other reasons and in many domains beyond the law.<sup>35</sup>

Professor Quinn may well be right that attitudes to people with disability have been changing, which in turn led to the adoption of the convention. Nevertheless, I believe that the facts may have altered in several respects. The terms of reference note the ageing population; matters dealt with under the *Guardianship Act 1987* (NSW) used overwhelmingly to relate to people with intellectual disability. Now they are largely related to older people, due to the increasing prevalence of dementia in our community. And then there are many people who survive accidents or illness but have acquired brain injury. Even the establishment of the National Disability Insurance Scheme is a new fact with which anybody dealing with people with disability must now deal.

Conventions produce an obvious complication for Australia as a federation. As you all know, it is Australia, the Commonwealth, which signs Conventions, and it is the states and territories which have to respond in those areas which are their responsibility. Queensland, Victoria and the ACT have already completed and published reviews of their guardianship laws,<sup>36</sup> but no change has yet been enacted other than supportive power of attorney provisions in Victoria. NSW only referred the matter to the Commission when I was appointed at the end of last year. This law has always been state and territory law, and not identical, although some mutual recognition provisions do apply. Having wide divergence in these matters would be difficult in view of family members living in different states and people moving freely between states. Putting those matters aside, it is the fact of the Convention which may now require the states and territories to align their laws and practices even more closely – and that would have to be a good thing.

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<sup>34</sup> *Review of the Guardianship Act 1987* (5 May 2017) NSWLRC <[http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc\\_current\\_projects/Guardianship/Guardianship.aspx](http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Guardianship/Guardianship.aspx)>.

<sup>35</sup> Quinn, above n 4.

<sup>36</sup> Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010); Victorian Law Reform Commission, *Guardianship*, Report No 24 (2012); ACT Law Reform Advisory Council, *Guardianship Report* (2016).

It is in that context, in response to a reference from the federal Government, that the ALRC has completed a report (excellent, by the way — credit being due to your former Dean Professor Rosalind Croucher AM, and another of your graduates, Graeme Smith, the NSW Public Guardian) providing guidance for States and Territories.<sup>37</sup> I will rely heavily on the ALRC description of the Treaty and its implications, for two reasons, or perhaps three — it's excellent; I don't see any point in re-doing such excellent work even if I could; and I don't want to give away too much about what my Commission is thinking about the issues at this stage of our inquiry. The point of interest is that what the Convention means, is not necessarily clear.

Let's look at what Article 12 of the Convention says. It may not sound remarkable at first hearing.

Article 12 — Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.<sup>38</sup>

Article 12 is the main point of contention, but for completeness note Art 19.

Article 19 — Living independently and being included in the community

States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- b. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- c. Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.<sup>39</sup>

I suspect many of you are wondering what is contentious about any of that. You may not spot it unless you have been involved in some way, with a family member being subject to adult guardianship or utilising an enduring power of attorney, for example. Let me quote from the report of the UN General Committee monitoring what has been happening since the convention was adopted:

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<sup>37</sup> ALRC, above n 33.

<sup>38</sup> *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 12.

<sup>39</sup> *Ibid* art 19.

3. On the basis of the initial reports of various States parties that it has reviewed so far, the Committee observes that there is a general misunderstanding of the exact scope of the obligations of States parties under article 12 of the Convention. Indeed, there has been a general failure to understand that the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision making. The aim of the present general comment is to explore the general obligations deriving from the various components of article 12...

16. Article 12, paragraph 3, recognizes that States parties have an obligation to provide persons with disabilities with access to support in the exercise of their legal capacity. States parties must refrain from denying persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect.

17. Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making.<sup>40</sup>

Even if you have not been involved, you probably know that our system of guardianship involves what looks and sounds like substitute decision-making — other people making decisions for those who cannot make their own decisions, by reason of some disability — dementia, mental illness, brain injury or whatever, and making those decisions in the best interests of the relevant person. The UN Convention, or the Committee, or both, seem to be saying that is no longer acceptable, and that that the rights, will and preferences of the person are what counts, not what someone else thinks is their best interests. You can take it from me that in substance all Australian jurisdictions at least until very recently, have had guardianship laws which provide for substitute decision making, and for that to happen having regard to the best interests of the person concerned. Reasonably modern laws, all of them, dating from the mid 1980s — and you might think, enlightened and beneficial. So your reaction may well be — how did Australia sign up to a Convention on such a different basis?

The ALRC Report explains that when signing up to the Convention, Australia signalled an understanding about the convention in rather different terms from the General Committee

2.57 Australia has set out its understanding about art 12 in one of three Interpretative Declarations. In relation to art 12, Australia declared its understanding:

Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. *Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.*

2.58 This Declaration was made in the light of the contentiousness of guardianship in the discussions surrounding the development of the text of the *Convention on the Rights of Persons with Disabilities* (CRPD) and the criticism of what was described as ‘substituted’ decision-making. A number of other countries made similar declarations that the CRPD permits substitute decision-making in certain limited circumstances and subject to appropriate safeguards.

2.59 There are differing views about the effect of Australia’s Interpretative Declaration, particularly in relation to the role of substitute decision-making. The ALRC considers that this is driven by conceptual confusion that is impeding reform. To appreciate the significance of this tension, and to provide the context for the formulation of legal policy responses in this Inquiry, the following section explores some key concepts and the emergence of the concepts of ‘supported’ and ‘substitute’ decision making.<sup>41</sup>

<sup>40</sup> United Nations, Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition before the Law*, 11<sup>th</sup> sess, UN Doc CRPD/C/GC/1 (19 May 2014) [3], [16]–[17].

<sup>41</sup> ALRC, above n 33, [2.57]–[2.59].

I am going to save you that discussion, as my interest for tonight's purposes is in the effect of the Treaty on domestic law reform in Australia and how to interpret and apply it. The ALRC has given very helpful guidance for the states and territories as to how to do so. We can note in passing that Australia chose not to lodge what it called a reservation, but what it called an interpretative declaration, asserting how the Convention should be interpreted and how it intended to interpret it — which you might think would not have been necessary if the words had been clear. While it is beyond my scope tonight to dwell on this, I think we can work on the basis that the title does not matter — if the 'Declaration' excludes or modifies the legal effect of certain provisions of a treaty in their application to the State in question, it is a reservation.<sup>42</sup>

Apart from that piece of semantics, the lawyer in me wants to understand the status of the General Comments — are they a binding interpretation?

You will recall that the General Comment asserted that there had been a paradigm shift, from substitute to supported decision making, and that states parties (and the members of the Committee do have Australia among others, in mind), are not getting it. The ALRC discusses this in these terms:

2.56 General Comments are provided by way of guidance and are different from legally binding obligations as reflected in the CRPD itself. The Rules of Procedure of the UNCRPD provide that it may prepare General Comments 'with a view to promoting its further implementation and assisting States Parties in fulfilling their reporting obligations'. Some of the tension arising from the discussion about models of decision-making is evident in the submissions made in response to the UNCRPD's General Comment on art 12...

2.79 The UNCRPD commented on Australia's Interpretative Declaration in its concluding observations on the initial report of Australia to the Committee in September 2013. The Committee noted the referral to the ALRC of this Inquiry, but expressed concern 'about the possibility of maintaining the regime of substitute decision-making, and that there is still no detailed and viable framework for supported decision-making in the exercise of legal capacity'...

2.83 Australia welcomed the initiative [*don't you love the diplomatic language?*] to clarify the scope of States Parties' obligations under art 12 and noted 'the Committee's perception of a general failure of States Parties to recognise that the human-rights based model of disability implies a shift from the substitute decision making paradigm to one that is based on supported decision-making':

Australia acknowledges the importance of supporting decision-making where this is possible, but considers that a human rights-based model of disability does not preclude all substituted decision-making. Such decisions should only be made on behalf of others where this is necessary, as a last resort, and subject to safeguards.

2.84 Australia considered the discussion of art 12(1) and (4) 'particularly helpful', [*more diplomatic language*] but was critical of the characterisation of art 12(3) 'as never permitting substituted decision-making', and [*was critical*] that the General Comment

did not acknowledge situations where no amount of support will assist, such as where a person may have a severe cognitive or psychiatric impairment and is unable to understand, make or communicate a decision. It is unfortunate (*sic*) that the complexities of this issue are not acknowledged and discussed in the current draft.<sup>43</sup>

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<sup>42</sup> Annebeth Rosenboom, 'Reservations and Declarations in Multilateral Treaties' (Presented at Capacity-building workshop on Treaty Law and Practice and the Domestic Implementation of Treaty Obligations, Wuhan, China, 13–17 October 2009).

<sup>43</sup> ALRC, above n 33, [2.56], [2.79], [2.83]–[2.84].

So are we right to be rejecting the General Comments as being binding on us? It would seem that we are entitled to do so. A UK group of academics and practitioners in the guardianship area conduct what is known as the Essex Project, and in a report published earlier this year they devoted an appendix to the status of these Comments, concluding as follows:

We undertook a survey of published views expressed on this matter, consulting academic discussion as well as UK and UN source material. The results of the survey showed a remarkable consistency: all the published materials that we were able to identify agreed in holding that General Comments issued by UN treaty bodies are not legally binding. We were unable to identify any published statements of the contrary view. We found a range of opinion as to the proper positive characterisation of the standing of General Comments.

To summarise, while states that ratified a treaty and entrusted a UN Committee with certain functions regarding the interpretation and application of the treaty provisions have an obligation to engage with the UN Committee's views and interpretation in good faith and give it important weight, states are not bound by General Comments or their applications in concluding observations or individual complaints procedures and will not necessarily be in breach of their treaty obligations if they reject an interpretation adopted by a UN Committee.<sup>44</sup>

So we are off the hook there. My point in the context of law reform is that the meaning of international treaties is critical to the modern domestic law reform process. It does matter what the Treaty says and what it means, when we write new laws in Australia on subjects covered by those treaties. Can I remind you what Professor Quinn said?

The facts here have not altered. Persons with intellectual disabilities continue to be persons with intellectual disabilities. What has altered — and altered very significantly — is how we see, frame and value persons with intellectual disabilities — and I would say not just because of the UN convention. In this regard, in my view at least, the convention confirms and reinforces rather than establishes profound shifts that have been happening out there for other reasons and in many domains beyond the law.<sup>45</sup>

We in NSW, and indeed the rest of Australia, still have to deal with these matters, to recognise the human rights of Australians with disabilities, *and* to give effect to the convention according to its best interpretation. Those who wish to explore the subject further can find a background paper and three Question Papers on our website now. More question papers will follow. We will welcome responses.

I quoted Roscoe Pound earlier on the law decaying and requiring reform, and Michael Kirby as suggesting some degree of preservation is required. A balance must be struck. Nevertheless I am grateful, I think, to former Chief Justice Spigelman, a classmate of mine and therefore also a student of Tony's — for drawing my attention to another Roscoe. The late former US Sen. Roscoe Conkling, politely described as a notorious Tammany Hall politician, or in NSW talk, a well-known racing identity, said:

When Dr Johnson defined patriotism as the last refuge of a scoundrel, he ignored the enormous possibilities of the word reform.<sup>46</sup>

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<sup>44</sup> Wayne Martin et al, *The Essex Autonomy Project: Three Jurisdictions Report: Toward Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK*, Position Paper (2016) 53.

<sup>45</sup> Quinn, above n 4.

<sup>46</sup> Chief Justice Spigelman, 'The New Liability Structure in Australia' (Speech delivered at Swiss Re Liability Conference, Sydney, 14 September 2004) 8, citing Dorothy S Truesdale, 'Rochester Views the Third Term 1880' (1940) 2(4) *Rochester History* 1, 5.



# QUESTIONING THE UTILITY OF THE DISTINCTION BETWEEN COMMON ARTICLES 2 AND 3 OF THE GENEVA CONVENTIONS OF 1949 SINCE *TADIĆ*: A STATE SOVEREIGNTY APPROACH

MIKAYLA BRIER-MILLS\*

*The distinction between common articles 2 and 3 of the Geneva Conventions of 1949 is unsupportable in the context of contemporary armed conflict. This article argues that the distinction should be eliminated for policy and legal reasons. The differing protection offered by common article 2, which applies in international armed conflicts, compared to common article 3, which applies in non-international armed conflicts, is outlined in Parts I and II. Part III addresses the landmark Tadić Interlocutory Decision of the International Criminal Tribunal of the Former Yugoslavia (‘ICTY’), which acknowledged that there is a trend in international practice to diminish the distinction between common articles 2 and 3. Although the ICTY reasoned on the correctness of the distinction, it did not criticise its legality. Similarly, Sub-Part A of Part III reasons that the distinction between common articles 2 and 3 is wrong in policy as opposed to it being wrong in law. After analysing the International Court of Justice’s (‘ICJ’) reasoning in the Genocide Case (2007), Sub-Part B goes a step further than the Appeals Chamber did in Tadić (1999). It argues that, while the distinction is right in law, it gives rise to an incorrect application of the overall control test. Moreover, in order to apply the Geneva Conventions of 1949 to any type of armed conflict, the distinction between common articles 2 and 3 should be eliminated.*

Blurring the distinction between common articles (‘CAs’) 2 and 3 of the *Geneva Conventions of 1949*<sup>1</sup> (‘GCs’) is consonant with recent trends of general international law. In this article, the word ‘should’ appears frequently. Although it assesses general international law for what it is, the article argues that modern international law *should* seek to adopt a unified legal regime applicable to all armed conflicts. This is achievable by eliminating the distinction between CAs 2 and 3. Part I begins with a discussion on the evolution of the law regulating battlefield conduct culminating with the drafting of the GCs and the distinction between CAs 2 and 3. Part II addresses Additional Protocols (‘APs’) I and II and the lack of protection afforded by the latter in non-international armed conflicts (‘NIACs’). The relevance of the *Tadić* decision divides Part III into two sub-parts. Sub-Part A reasons why this distinction should be eliminated from a policy perspective. It delivers a human-oriented approach towards eliminating the distinction by considering the reasons provided by the *Tadić* decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (‘*Tadić*

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<sup>1</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) arts 2-3 (‘GCI’); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) arts 2-3 (‘GCII’); Geneva Convention Relative to the Treatment of Prisoners of War of August 12, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) arts 2-3 (‘GCIII’); Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) arts 2-3 (‘GCIV’). Together, these provisions will be referred to as ‘Common Article 2’ and ‘Common Article 3’.

*Interlocutory Decision*)<sup>2</sup>. In particular, it recommends that, regardless of the character of the conflict, lawful participants should be entitled to prisoner of war ('POW') status and States should support a uniform regime of war crimes in the *Rome Statute*<sup>3</sup>. Sub-Part B provides a State sovereignty-oriented approach by analysing the legal reasoning of the Trial Chamber in *Tadić (Opinion and Judgment)* (*Tadić Judgment*)<sup>4</sup> and critiquing the reasoning of the Appeals Chamber. It contends that eliminating the distinction between CAs 2 and 3 will ensure that the overall control test is not adopted into contexts unknown. Unless and until this occurs, due to the requirement in CA2 that an international armed conflict ('IAC') exists between two States, persons cannot be protected by, or prosecuted under, the GCs without first applying the overall control test like a fish out of water. This article identifies these issues through a detailed analysis of the law of armed conflict ('LOAC') and concludes that 'the full range of [LOAC] should apply in all cases of armed conflict, [even those which are] not of an international character'.<sup>5</sup> This is justified by policy, which is in the interests of human rights and is the correct approach in law, which preserves the sovereignty of States.

## I THE EVOLUTION OF THE GENEVA CONVENTIONS OF 1949 AND THE DISTINCTION BETWEEN COMMON ARTICLES 2 AND 3

### A The Lieber Code

The laws of warfare do not come without history.<sup>6</sup> Francis Lieber was the drafter of the first regulations on battlefield conduct.<sup>7</sup> After his publishing of *On Liberty and Self Government* in 1853,<sup>8</sup> he created a pamphlet about *Guerrilla Parties* with reference to the *Law and Wages of War* in 1860.<sup>9</sup> This triggered his desire to compile the customary rules of warfare. While working amongst a board of senior officers to propose a code of regulations for armies in the field, Lieber wrote the code that bears his name.<sup>10</sup> This was a significant achievement given that, by 1868, all enemies had acknowledged there were limitations on battlefield conduct.<sup>11</sup> Lieber emphasised that combatants should be commanded, disciplined, follow the

<sup>2</sup> Prosecutor v Duško Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) ('Tadić Interlocutory Decision').

<sup>3</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

<sup>4</sup> *Prosecutor v Tadić (Opinion and Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-94-1-T, 7 May 1997) 220 [615] ('*Tadić Judgment*').

<sup>5</sup> Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949* (ICRC, 1960) vol 3, 303.

<sup>6</sup> Geoffrey Best, *War and Law Since 1945* (Oxford University Press, 1994) 41; Michael Walzer, *Just and Unjust Wars* (Basic Books, 3<sup>rd</sup> ed, 2000) 42; Karma Nabulsi, *Traditions of War: Occupation, Resistance, and the Law* (Oxford University Press, 1999) 166; *Brown v United States*, 12 US (8 Cranch) 110, 122-3 (1814).

<sup>7</sup> Department of the Army, *Field Manual 27-10: The Law of Land Warfare* (GPO, 1956) 33.

<sup>8</sup> Francis Lieber, *On Liberty and Self Government* (Lippincott, Grambo and Co, 1853).

<sup>9</sup> James Childress, 'Francis Lieber's Interpretation of the Laws of War: General Orders No 100 in the Context of His Life and Thought' (1976) 21(1) *American Journal of Jurisprudence* 34, 35.

<sup>10</sup> Burriss Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (1998) 92 *American Journal of International Law* 213, 220; Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010) 45; Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (Government Printing Office, 1898) arts 56-7; Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 1995) 116; Richard Hartigan, *Lieber's Code and the Law of War* (Legal Classics Library, 1995) 24.

<sup>11</sup> UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004) 102; R R Baxter, 'The First Modern Codification of the Law of War' (1963) 25 *International Review of the Red Cross* 171, 183; Geoffrey Best, *Humanity in Warfare* (Weidenfeld & Nicholson, 1980) 172.

rules of war and distinguish themselves from civilians before they were entitled to be POWs.<sup>12</sup>

These regulations have been developed into four main principles of LOAC: the principles of distinction, military necessity, unnecessary suffering and proportionality.<sup>13</sup>

## B *The Geneva Conventions*

The four GCs protect the wounded and sick in armed forces, the shipwrecked, POWs and civilians.<sup>14</sup> They each enshrine the four main principles of LOAC.<sup>15</sup> The initial intention behind the law regulating battlefield conduct was that it would apply to all battles, whether the battle takes place within, across or between States' borders.<sup>16</sup> Ironically, this intention played no part in the drafting of the GCs as they almost entirely apply only to IACs. The application of the GCs is dependent upon how the status of a conflict is characterised, that is, whether it takes place within or between States' borders. The issue with this today is that modern armed conflicts can occur in more than two ways,<sup>17</sup> and NIACs are becoming more frequent,<sup>18</sup> cruel and protracted.<sup>19</sup>

Following the Second World War, the International Committee of the Red Cross ('ICRC') argued that the GCs should apply to all types of armed conflicts.<sup>20</sup> The ICRC's proposal was opposed by States, who were not prepared to accept an obligation to apply the fullness of the detailed and complicated provisions of the GCs in NIACs.<sup>21</sup> States feared that there would be

<sup>12</sup> G I A D Draper, 'The Development of International Humanitarian law' in Michael A Meyer and Hilaire McCoubrey (eds), *Reflections on Law and Armed Conflicts* (Kluwer Law, 1998) 70-1; Richard Hartigan, *Lieber's Code and the Law of War* (Precedent, 1983) 1; Thomas Holland, *The Laws of War on Land (Written and Unwritten)* (Clarendon Press, 1908) 72-3.

<sup>13</sup> George Schwarzenberger, *International Law: As Applied by International Courts and Tribunals, The Law of Armed Conflict* (Stevens, 1968) 10; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004) 50.

<sup>14</sup> GCI; GCII; GCIII; GCIV.

<sup>15</sup> *Legality of the Threat of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 266; Henri Meyrowitz, 'The Principle of Superfluous Injury or Unnecessary Suffering' (1994) 299 *International Review of the Red Cross* 98, 101; Geoffrey Corn, 'International & Operational Law Note: Principle 4: Preventing Unnecessary Suffering' [1998] 1 *The Army Lawyer* 50; W Hays Parks, 'Conventional Weapons and Weapons Reviews' (2005) 34 *Yearbook of International Humanitarian Law* 55, 57; William Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare' (1982) 98 *Military Law Review* 91, 102.

<sup>16</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Oxford University Press, 2005) vol 1, 3; Christopher Greenwood, 'Customary Law Status of the 1977 Geneva Protocols', in Astrid Selissen and Gerard Tanja (eds), *Humanitarian Law of Armed Conflict Challenges Ahead* (Martinus Nijhoff, 1991) 109; William Downey, 'The Law of War and Military Necessity' (1953) 42 *American Journal of International Law* 251, 253.

<sup>17</sup> G Aldrich, 'The Laws of War on Land' (2000) 94 *American Journal of International Law* 42, 62; *Prosecutor v Tadić (Appeal on Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeal Chamber, Case No 94-1-A, 15 July 1999) 34, 84. See also, Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflict* (Oxford University Press, 2012) 32; Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239, 253.

<sup>18</sup> Nils Gleditsch et al, 'Armed Conflict 1946-2001: A New Dataset' (2002) 39 *Journal of Peace Research* 615.

<sup>19</sup> For the brutality of NIAC, see Gleditsch et al, above n 18; United Nations Development Program 'Human Development Report 2005' (Report, 2005) 153-61. See also, Anthony M Helm, *The Law of War in the 21st century: Weaponry and the Use of Force* (Naval War College, 2006) 193, 199.

<sup>20</sup> Christopher Greenwood, 'Scope of Application of Humanitarian Law', in Fleck, above n 10; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press, 1999) 41-62.

<sup>21</sup> International Committee of the Red Cross, *Final Record of the Diplomatic Conference of Geneva* (Federal Political Department, 1949) vol 2B, 9-15. See also, Jean Pictet (ed), *Commentary on the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC, 1952) 38-48.

a reduction in their capacity to quell riots within their own borders.<sup>22</sup> Further opposition derived from the lack of success in which the GC regime would be complied with by non-state armed groups. Rather than leaving non-international armed conflicts unregulated, a compromise was reached by creating an article common to all armed conflicts – CA3.<sup>23</sup> After an assessment of the difference between CAs 2 and 3, however, this article will reveal that the ICRC’s proposal should either have been entirely adopted or completely ignored, so as to apply humane treatment, without distinction, to persons of the same status in conflict. This article will argue that humane treatment should not be ‘compromised’. By ‘compromise’, the author suggests that like prisoners should be treated alike. This does not prevent the possibility of applying different levels of humane treatment to prisoners who have committed varied levels of wrongdoing.

## C The Distinction

### 1 Common Article 2

CA2 sets out the application of the GCs, namely to all cases of declared war or of any other armed conflict, which may arise between two or more of the High Contracting Parties (‘States’), even if the state of war is not recognised by one of them.<sup>24</sup> In IACs, this means all four GCs and AP1.<sup>25</sup> The general principle embodied in the GCs is that nobody in enemy hands can be outside the law.<sup>26</sup> Consequently, a participant in an IAC will always have some type of status. The participant is either wounded or sick and thus covered by GCI, or a member of an armed force at sea who is wounded, sick or shipwrecked and, as such, covered by GCII. The captured participant is a POW covered by the GCIII, and GCIV protects civilians. There is no intermediate status.<sup>27</sup> What is unfortunate, however, is the requirement in CA2 that the conflict exist between two States. Armed conflicts often occur, not between two States, but within the territory of a State or between a State and a non-state actor, in which cases the minimum provisions of CA3 apply.<sup>28</sup> Therefore, CA2 is rarely applied compared to CA3.

### 2 Common Article 3

CA3 of the GCs was adopted as a self-contained ‘mini-convention’.<sup>29</sup> The name of CA3 reflects its range of minimum mandatory rules that apply in *all* armed conflicts.<sup>30</sup> It is

<sup>22</sup> Ibid; Derek Jinks, ‘The Applicability of the Geneva Conventions to the ‘Global War on Terrorism’’ (2006) 46 *Virginia Journal of International Law* 1, 20; Michael Schmitt, ‘Responding to Transnational Terrorism Under the *Jus ad Bellum*: A Normative Framework’ in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff, 2007) 157.

<sup>23</sup> Common Article 3 was explained and applied by the ICJ in *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Judgment) [1986] ICJ Rep 14, 113-4 [219] (‘*Nicaragua*’).

<sup>24</sup> Common Article 2.

<sup>25</sup> L C Green, *The Contemporary Law of Armed Conflict* (Juris Manchester University Press, 2<sup>nd</sup> ed, 2000) 65-6; Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963) 29; Solis, above n 10, 150.

<sup>26</sup> *United States v Wilhelm List et al (Trial)* (Military Tribunal V, Case No 7, 19 February 1948) 1253-4 (‘*The Hostage Case*’); Alan Sershowitz, *Shouting Fire* (Brown, 2002) 473; Fleck, above n 10, 33.

<sup>27</sup> Jean Pictet (ed), *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, 1958) 51; *The Hostage Case* (Military Tribunal V, Case No 7, 19 February 1948) 1253-4.

<sup>28</sup> Common Article 3.

<sup>29</sup> M Sassòli and A Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (International Committee of the Red Cross, 1999) 202; Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2002) 2-3; Eve La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge University Press, 2008) 35.

<sup>30</sup> *Nicaragua* [1986] ICJ 14, 113 [218].

observed, not only in IACs, but also ‘in the case of non-international armed conflict occurring in the territory of one high contracting party’.<sup>31</sup> CA3 extends protection from acts of murder, torture,<sup>32</sup> taking of hostages,<sup>33</sup> and inhumane and degrading treatment.<sup>34</sup> It provides that the wounded and sick shall be ‘collected and cared for’<sup>35</sup> and states that:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ sickness, wounds, detention, or any other cause, shall in all circumstances be *treated humanely*, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.<sup>36</sup>

The ICJ in *Nicaragua* confirmed that these rules reflect ‘elementary considerations of humanity’.<sup>37</sup> The term ‘humane treatment’ in CA3(1) has been interpreted to ‘safeguard the entitlements which flow from being a human being’.<sup>38</sup> However, these safeguards are not expressly listed.<sup>39</sup> The term is commonly known for its prohibition on what is *not* humane, rather than what *is* humane.<sup>40</sup> Therefore, rights of injured people in NIACs are only recognised once the deprivation has occurred.<sup>41</sup> This marks a significant difference between CA3 and the GCs, which define ‘what constitutes humane treatment’ in over 400 provisions.<sup>42</sup> Every person in an IAC is *as human as every other human person* in an NIAC. Thus, humane treatment should not be compromised according to the status of the conflict.<sup>43</sup> More will be said of the provision of humane treatment in Part III (in particular, how humane treatment can be accorded to people in different forms, depending on the nature of the wrong committed and the status that the person carried in the conflict). For now, a description of the Additional Protocols to the GCs will be invoked to further illustrate the variance of protection afforded to persons in IACs as compared to NIACs.

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<sup>31</sup> Common Article 3; Tadić Judgment.

<sup>32</sup> Common Article 3(1)(a).

<sup>33</sup> Ibid art 3(1)(b).

<sup>34</sup> Ibid art 3(1)(c).

<sup>35</sup> Ibid art 3(2).

<sup>36</sup> Ibid art 3(1).

<sup>37</sup> *Nicaragua* [1986] ICJ Rep 14, 112 [215], citing *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 22.

<sup>38</sup> *Prosecutor v Aleksovski (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/1T, 25 June 1999) 49; *Prosecutor v Delalić, Mucić, Delić, and Landžo (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) 525 (*‘Delalić Judgment’*); *Prosecutor v Kordić and Čerkez (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2, 26 February 2001) 269.

<sup>39</sup> Cf Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (Oxford University Press, 2010) 34–6.

<sup>40</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 220 [615].

<sup>41</sup> For example, in 1992, the UNSCR condemned the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population in the cases of Somalia and Georgia. SC Res 794, UN SCOR, 3145<sup>th</sup> mtg, UN Doc S/RES/794 (3 December 1992); (SC Res 814, UN SCOR, 3188<sup>th</sup> mtg, UN Doc S/RES/814 (26 March 1993).

<sup>42</sup> Pictet, above n 21, 39; see also Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* (ICRC, 1987) 1370 [4521].

<sup>43</sup> *Common Article 3* itself identifies the issue of providing comparatively less protection than *Common Article 2* by its recommendation that: ‘Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention’. This suggests that the rest of the GCs offer something more than *Common Article 3*. Further, that the only way in which the GCs can apply to NIAC is by voluntary agreement between the parties. This is a non-guaranteed: United Nations Development Programme ‘Human Development Report 2005’ (Report, 2005) 153–61. See also, Kenneth Watkin, ‘Chemical Agents and Expanding Bullets: Limited law Enforcement Exceptions or Unwarranted Handcuffs?’ in Anthony M Helm (ed), *International Law Studies* (Naval War College, 2006) vol 82, 193, 199.

## II THE ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF 1949

The Additional Protocols to the GCs were created to address new realities by extending further protection in modern armed conflicts.<sup>44</sup> API applies to IACs.<sup>45</sup> In addition to GCs I and II, API protects civilian medical personnel, civilian units, transports, equipment and supplies.<sup>46</sup> Articles 35-60 of API address the conduct of hostilities and reaffirm the development of the *Hague Conventions* of 1899 and 1907. API further deals with the treatment of persons in the power of a party to the conflict, relief actions and the protection of civil defence organisations.<sup>47</sup> The Protocol has wide acceptance amongst States and includes LOAC counterparts such as the principle of distinction between civilians and combatants and between civilians and military objectives,<sup>48</sup> the prohibition on indiscriminate attacks and the principle of proportionality.<sup>49</sup>

APII was created to enhance the inadequate level of protection in CA3.<sup>50</sup> However, it falls short of this mark in some major respects. Its application is limited to parties that have ratified it and to conflicts where dissident forces have exercised control over part of their Host State's territory.<sup>51</sup> Situations of internal unrest, which do not reach a level of sustained or protracted armed conflict, are not covered by APII.<sup>52</sup> As noted by Schindler and Crawford, the application of APII is 'unduly complicated', it being limited to cases of territorial control where the parties must 'implement' it.<sup>53</sup> Accordingly, APII is more restrictive than CA3. Even

<sup>44</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987) xxix; George Aldrich, 'Some Reflections on the Origins of the 1977 Geneva Protocols', in Christophe Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles, in Honour of Jean Pictet* (ICRC, 1984) 135; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('API'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) ('APII').

<sup>45</sup> API art 1(3).

<sup>46</sup> *Ibid* arts 8 – 34.

<sup>47</sup> *Ibid* arts 61-79.

<sup>48</sup> *Ibid* art 48 (1).

<sup>49</sup> Henckaerts and Doswald-Beck, above n 16, rr 1, 7, 11–4; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004) 50; William Fenrick, 'The Rule of Proportionality and Protocol I in Conventional Warfare' (1982) 98 *Military Law Review* 91, 102; International Committee of the Red Cross, 'Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts' (Report, 1972) 97–9 [2.332]–[2.350]; John Bellinger III and William J Haynes II, 'A US Government Response to the International Committee of the Red Cross Study of Customary International Humanitarian Law' (2007) 866 *International Review of the Red Cross* 443, 460–1.

<sup>50</sup> Kenneth Watkin, '21st Century Conflict and International Humanitarian Law: Status Quo or Change?' in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff, 2007) 262, 272.

<sup>51</sup> APII; International Committee of the Red Cross, 'How is the Term 'Armed Conflict' Defined in International Law?' (Opinion Paper, March 2008); Georges Abi-Saab, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Vol VIII), 2<sup>nd</sup> sess, 24<sup>th</sup> mtg, CDDH/I/SR.24 (18 February 1975) 229, 235; L Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2<sup>nd</sup> ed, 2002) 143.

<sup>52</sup> For the definition of an armed conflict, see *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 561; Robert Cryer, 'International Crimes in the Al Bashir Arrest Warrant Decision' (2009) 7 *Journal of International Criminal Justice* 283, 285. For what does *not* fall under the definition of an armed conflict see *Rome Statute* arts 8(2)(d), (f).

<sup>53</sup> Emily Crawford, 'Unequal Before the Law: The Case for the Limitation of the Distinction Between International and Non-International Armed Conflicts' (2011) No 11/28 *Legal Studies Research Paper: Sydney Law School* 1, 15.

if APII were applicable to an NIAC, its protection would be far less than that provided by the GCs and API.<sup>54</sup>

Significant humanitarian gaps exist in APII. Among other things, its provisions do not include the principle of distinction.<sup>55</sup> The law applicable to NIACs does not render a rigid distinction between civilians and combatants – as no such classifications are accorded to the participants and non-participants of non-international conflicts.

Given that API (applicable in IACs) attaches more significance to the principle of distinction, as it is recognised by customary international law,<sup>56</sup> it follows that the principle, theoretically, carries more weight in IACs.<sup>57</sup> The consequences of this are paramount, as from ignorance of the principle of distinction comes ignorance of the rights of persons who are unnecessarily targeted in conflict. As a result, the law as it currently is exposes persons in NIACs to be at greater risk of subjection to disproportionate harm than persons in IACs.

Each Protocol authorises *differing* levels of sanctioned military action. Maintaining gradations of legal protection for *different* types of armed conflict seems to be inconsistent with the purpose of LOAC: counterbalancing battlefield violence with humanitarian considerations.<sup>58</sup> There is no reason why persons engaged in NIACs should be entitled to less protection and why the civilians alongside that conflict should be subject to greater risk of attack. The importance of the principle of distinction is such that it should automatically apply in NIACs, without requiring parties to come to an agreement or establish custom.<sup>59</sup> The author therefore urges the ICRC to recognise the civilian/combatant distinction in NIACs as a necessary concomitant of applying proportionate force in such conflicts.

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<sup>54</sup> D Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (1979) 163 *Recueil Des Cours* 121, 126–7.

<sup>55</sup> This principle is essential to LOAC because a military object can only be legitimate if it is aimed at weakening the enemy: Adam Roberts and Richard Guelff, *Documents on the Laws of War* (Oxford University Press, 3<sup>rd</sup> ed, 2000) 53; Carnahan, above n 10. The only circumstance in which civilians can be targeted is if they directly participate in hostilities: International Committee of the Red Cross, 'Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2008) 872 *International Review of the Red Cross* 991, 997; Jelena Pejic, 'Unlawful/Enemy Combatants: Interpretations and Consequences', in Schmitt and Pejic, above n 50, 335.

<sup>56</sup> Moïse Tshombe, 'Public Statement of Prime Minister of the Democratic Republic of Congo' (Speech delivered at Leopoldville, Congo, 21 October 1964), quoted in Charles I Bevens, Alfred P Rubin and Bruno A Ristau (eds) 'Contemporary Practice of the United States Relating to International Law' (1965) 59(3) *American Journal of International Law* 610, 616; Jean-Marie Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 87 *International Review of the Red Cross* 175, 181.

<sup>57</sup> API art 48, provides that, 'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives'. See also, API art 51(2); Great Britain War Office, *Manual of Military Law* (London HM Stationary Office, 1907); *Prosecutor v Thomas Blaskic (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) 27; *Prosecutor v Galic (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-29-A, 30 November 2006) 38.

<sup>58</sup> Interestingly, the rules of warfare provided by the Lieber Code were designed to apply to any type of armed conflict, but the drafters of the GCs did not adopt this approach: Lieber, above n 10; *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 97; Solis, above n 10, 260.

<sup>59</sup> D Schindler and J Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher, 1988) 263-4; *Respect for Human Rights in Armed Conflicts*, GA Res 2444 (XXIII), UN GAOR, 23<sup>rd</sup> sess, UN Doc A/RES/2444 (19 December 1968); GA Res 2675, UN GAOR, 25<sup>th</sup> sess, UN Doc A/RES/2675 (7 December 1970); Humanitarian Law Conference, 'Remarks of Michael J Matheson' (1987) 2 *American University Journal of International Law and Policy* 419, 430-1.

### III THE TADIĆ DECISION

The Socialist Federal Republic of Yugoslavia ('FRY') comprised Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia.<sup>60</sup> In the early 1990s, the FRY began to disintegrate.<sup>61</sup> After Bosnia-Herzegovina declared independence in 1992, there was a civil war between all three main ethnic groups within Bosnia-Herzegovina in which more than 100,000 people died.<sup>62</sup> There was ethnic cleansing on all sides. This led to the establishment of the ICTY, which addresses humanitarian law issues relevant to the distinction between CAs 2 and 3.<sup>63</sup> In the *Tadić* decision, the ICTY was required to determine whether article 2 of the Statute of the ICTY ('*ICTY Statute*')<sup>64</sup> applied to the grave breaches of the GCs that Dusko Tadić had committed.<sup>65</sup> The main issue was whether the victims were protected persons under the GCs. Therefore, the ICTY was required to address the issue of whether the conflict was international.<sup>66</sup> The ICTY's assessment of this issue is divided into the following sub-parts A and B. This analysis will highlight how the law, as it currently is, requires an IAC to be found under CA2 before a person can be prosecuted for grave breaches under the GCs. Ultimately, it is argued that this condition is superfluous, because the status of the conflict is irrelevant to both the graveness of the crime and the responsibility of the individual who committed the crime. Accordingly, persons should be capable of being prosecuted of breaching the GCs, regardless of the status of the conflict. To remove the condition that an IAC be found, the distinction between CAs 2 and 3 should be eliminated.

#### A *Eliminating the Distinction between Common Articles 2 and 3 for Policy Reasons*

##### 1 *The definition of humane treatment in Common Articles 2 and 3 should be unified*

###### (a) *Prisoner of war protection should extend to non-international armed conflicts*

In the *Tadić* Interlocutory Decision, the ICTY referred to resolutions of the United Nations General Assembly<sup>67</sup> and Security Council, the European Union,<sup>68</sup> as well as ICJ decisions and

<sup>60</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case IT-94-1-T, 7 May 1997) 20 [56]; James Crawford, *The Creation of States in International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2006) 50; Antonio Cassese, *Self Determination of peoples: A Legal Reappraisal* (Cambridge University Press, 1995) 251; Tom Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Greenwood Publishing Group, 1999) 123; Malcolm Shaw, *International Law* (Cambridge University Press, 7<sup>th</sup> ed, 2014) 113.

<sup>61</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43, 127-8 [202] ('Genocide Case'); *Tadić* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 25 [70]; Jure Vidmar, *Democratic Statehood in International Law* (Oxford Hart Publishing, 2013) 70.

<sup>62</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 20 [55], 24 [66], 29 [83].

<sup>63</sup> C Gray, 'Bosnia and Herzegovina: Civil War or Inter-state Conflict? Characterization and Consequences' (1996) 67 *British Year Book of International Law* 155.

<sup>64</sup> SC Res 827, US SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64<sup>th</sup> sess, 6155<sup>th</sup> mtg, UN Doc S/RES/1877 (7 July 2009) ('*ICTY Statute*') art 2.

<sup>65</sup> The breaches were alleged to have been committed in the Omarska, Keraterm and Trnopolje prison camps. See *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 2-4 [6]–[9], 277 [740].

<sup>66</sup> *Ibid* 49–51; GCI arts 13, 19, 24-6, 33-35; GCII arts 13, 22, 24-5, 27, 36-7; GCIII art 4; GCIV arts 4, 18-9, 20-2, 33, 53, 57.

<sup>67</sup> *Respect for Human Rights in Armed Conflicts* GA Res 2444 (XXIII), UN GAOR, 23<sup>rd</sup> sess, UN Doc A/RES/2444 (19 December 1968); *Basic Principles for the Protection of Civilian Populations in Armed Conflicts* GA Res 2675 (XXV), UN GAOR, 25<sup>th</sup> sess, UN Doc A/RES/2675 (9 December 1970).

military codes of conduct, to conclude that the dichotomy between IACs and NIACs is becoming increasingly distorted.<sup>69</sup> This conclusion was justified on various bases, including the progression of a human-being-oriented approach to international law issues.<sup>70</sup> Whilst the ICTY acknowledged that there is a trend in international practice to diminish the distinction between CAs 2 and 3, this distinction has not yet been abolished in law.<sup>71</sup>

Currently, the minimum provisions of CA3 are inadequate compared to the treatment that GCIII affords to captured prisoners. Lawful participants in NIACs become ordinary prisoners once they are detained, whereas lawful combatants in IACs become POWs.<sup>72</sup> The difference in treatment between these two types of prisoners is undesirable. A further undesirable difference is the treatment accorded to captured civilians under GCIV compared to the treatment afforded to captured persons in an NIAC. The latter are not considered as civilians, solely because of the status of the conflict. Consequently, they are thus not entitled to the benefits of GCIV. There appears to be no purpose that validates this difference in treatment.

Neither CA3 nor APII mention POW, civilian or combatant status. By contrast, GCIII and GCIV expressly outline the positive entitlements for captured civilians and combatants. For instance, captured combatants become POWs, which is regarded as a measure of security and not of punishment.<sup>73</sup> Some privileges of POW status include bedding,<sup>74</sup> food and water,<sup>75</sup> clothes,<sup>76</sup> access to canteens,<sup>77</sup> hygiene benefits,<sup>78</sup> medical attention,<sup>79</sup> and medical

<sup>68</sup> SC Res 788, UN SCOR, 3138<sup>th</sup> mtg, UN Doc S/RES/788 (19 November 1992); SC Res 972, UN SCOR, 3489<sup>th</sup> mtg, UN Doc S/RES/972 (13 January 1995); SC Res 1001, UN SCOR, 3594<sup>th</sup> mtg, UN Doc S/RES/1001 (30 June 1995) on Liberia; SC Res 794, UN SCOR, 3145<sup>th</sup> mtg, UN Doc S/RES/794 (3 December 1992); SC Res 814, UN SCOR, 3188<sup>th</sup> mtg, UN Doc S/RES/814 (26<sup>th</sup> March 1993) on Somalia; SC Res 1193, UN SCOR, 3921<sup>st</sup> mtg, UN Doc S/RES/1193 (28 August 1998) on Afghanistan.

<sup>69</sup> 'These sources of information are the next best to the actual behavior of the troops on the battlefield. Relying on these sources prevents risking recourse to misinformation by corrupt governments': *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 83, 97. See also, Michael Scharf, 'Case Note on Tadić' (1997) 91 *American Journal of International Law* 718, 748; C Greenwood, 'International Humanitarian Law and the Tadić Case' (1996) 7 *European Journal of International Law* 265; M Sassòli and L Olsen, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case' (2000) 839 *International Review of the Red Cross* 733; C Warbrick and P Rowe, 'The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the Tadić Case' (1996) 45 *International and Comparative Law Quarterly* 691.

<sup>70</sup> Charter of the United Nations; International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'); Basic Principles for the Protection of Civilian Populations in Armed Conflicts, GA Res 2675 (XXV), UN GAOR, 25<sup>th</sup> sess, 1922<sup>nd</sup> plen mtg, Supp No 28, UN Doc A/8028 (9 December 1970); General Comment No 20: Non-Discrimination in economic, social and cultural rights (Art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/GC/20 (2 July 2009); Peace through Deeds, GA Res 380(V) UN GAOR, 5<sup>th</sup> sess, 308<sup>th</sup> plen mtg, Supp No 69 A/RES/380(V) (17 November 1950); International Commission on Intervention and State Responsibility, 'The Responsibility to Protect' (Report, International Development Research Centre, 2001); Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res 25/2625 (XXV), UN GAOR, 25<sup>th</sup> sess, UN Doc A/RES/25/2625 (24 October 1970).

<sup>71</sup> Zegveld, above n 51, 143; *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 100-126.

<sup>72</sup> Sandra Fabijanić Gagro, 'Defining and recognizing prisoners of war in contemporary armed conflicts' (2014) 2(5) *International Journal of Social Sciences* 60, 65.

<sup>73</sup> War Department, *Rules of Land Warfare – 1914* (GPO, 1914) 60 [27]; Lieber, above n 10, arts 56, 57, cited in Solis, above n 10, 190.

<sup>74</sup> GCIII art 25.

<sup>75</sup> Ibid art 26.

<sup>76</sup> Ibid art 27.

<sup>77</sup> Ibid art 28.

<sup>78</sup> Ibid art 29.

inspections.<sup>80</sup> This has been described as the greatest benefit afforded to lawful combatants in IACs.<sup>81</sup> Similar benefits are accorded to captured civilians under GCIV. However, no such benefits are accorded to captured persons in NIACs. Crawford argues that the protections afforded to POWs in GCIII are similar to the protections provided by CA3.<sup>82</sup> However, the positive entitlements that are guaranteed to prisoners in GCIII are more beneficial for the prisoners than the negative rights listed in CA3. For instance, the term 'humane treatment' is given a definitive meaning in GCIII, whereas States are only obliged *not* to commit the inhumane acts proscribed in CA3.<sup>83</sup>

State practice confirms that lawful participants in NIACs should be entitled to POW status. For example, in 1984, the Congolese Prime Minister stated:

For humanitarian reasons, and with a view to reassuring...the civilian population which might fear that it is in danger, the Congolese Government suggests that International Red Cross observers come to check on the extent to which the Geneva Conventions are being respected, particularly in the matter of the treatment of prisoners.<sup>84</sup>

This is just one example of the application of POW status to captured persons in NIAC, alongside the principles enshrined in the GCs.<sup>85</sup> The rationale for this approach is to ensure that all persons who carry the same status during the conflict are entitled to the same benefits under the GCs. On this point, it is important to distinguish between humane and inhumane treatment, and also between the status carried by combatants and civilians.

(b) *Difference between humane and inhumane treatment*

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<sup>79</sup> Ibid art 30.

<sup>80</sup> Ibid art 31.

<sup>81</sup> G I A D Draper, 'Personnel and Issues of Status', in Michael A Meyer and Hilaire McCoubrey (eds), *Reflections on Law and Armed Conflicts* (Kluwer Law International, 1998) 194, 197. Cf D Jinks, 'The Declining Significance of POW Status' (2004) 45 *Harvard International Law Journal* 367, 380; Laurie R Blank, 'A Square Peg in a Round Hole: Stretching Law of War Detention Too Far' (2011) 63(4) *Rutgers Law Review* 1169.

<sup>82</sup> Crawford, above n 39, 34–6. See also Jean Pictet, *The Principles of International Humanitarian Law* (ICRC, 1985) 33–34, 58–61; D Koller, 'The Moral Imperative: Toward a Human Rights-Based Law of War' (2005) 46 *Harvard International Law Journal* 231; A Rosas and A Eide, 'Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards' (1995) 89 *American Journal of International Law* 215; D Petrusek, 'Moving Forward on the Development of Minimum Humanitarian Standards' (1998) 92 *American Journal of International Law* 557; H P Gasser, 'A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct' (1988) 262 *International Review of the Red Cross* 38.

<sup>83</sup> That is, acts that constitute a 'systematic scorn for human values': *Prosecutor v Aleksovski (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case IT-95-14/1T, 25 June 1999) 49; *Delalić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) 525; *Prosecutor v Kordić and Čerkez (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2, 26 February 2001) 269. Although APII art 4(1) refers to 'humane treatment' using terminology in art 4 of the *Hague Regulations of 1907* to achieve uniformity between its interpretation in IACs and NIAC, APII is not guaranteed to apply in every NIAC. Furthermore, there is no guarantee that the term 'humane' in *Common Article 3* will be interpreted as it is construed in GCIII. The promotion of gradations of humanitarian concern will always leave open the possibility of favouring the lowest possible level of treatment.

<sup>84</sup> Tshombe, above n 56.

<sup>85</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 83; 97–127; M Bassiouni and P Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers, 1996) 479; Joan Sloan, 'The International Criminal Tribunal for the Former Yugoslavia and Human Rights' (1997) 2 *European Human Rights Law Review* 329, 350.

Under the GCs, ‘nobody in enemy hands is outside the law’.<sup>86</sup> Accordingly, no person captured in armed conflict should be treated inhumanely. Both CA2 and CA3 stipulate that humane treatment is mandatory.<sup>87</sup> Nevertheless, there are gaps in the law which have the effect of depriving some prisoners of the humane treatment that others are entitled to. This deprivation is dependent on the status of the conflict and without justifiable cause. For instance, if a prison cell contained three prisoners from an NIAC and three prisoners from an IAC, who were all non-participating civilians in their respective conflicts, only the latter three prisoners would be entitled to all of the benefits under GCIV, but the former three would not. Such a distinction is made solely because the statuses of their conflicts are different. This is unjustified on any policy basis, and can be most suitably remedied by eliminating the distinction between CAs 2 and 3. The only instance in which the provision of humane treatment should vary is when the prisoners or participants in the conflict have committed varying degrees of unlawful activity. This issue will now be addressed.

(c) *Difference between the level of humane treatment accorded to combatants compared to civilians*

In the contemporary justice system, a person convicted of murder is often sentenced to a longer period in detention compared to a person convicted of manslaughter. This is the reality of justice and proportionate punishment. Similarly, in international humanitarian law, a civilian who directly participated in hostilities that pose a threat to the security of the State will be subjected to a stricter punishment in detention than a captured civilian who did not so participate. This is recognised in article 5 of GCIV.<sup>88</sup> As such, the larger the threat posed by the person, the less benefit he or she will be entitled to under the GCs. That is not to say that such a person would be treated inhumanely. Rather, he or she would be treated more restrictively. At this point it is useful to discuss the consequences of being a ‘civilian directly participating in hostilities’ compared to a ‘combatant’ through the lens of the principles of distinction and military necessity.

The principle of distinction, in treaty and in customary international law,<sup>89</sup> holds that parties to the conflict must always distinguish between civilians and combatants, and between civilian objects and military objects.<sup>90</sup> Moreover, a military object can only be legitimate if it is aimed at weakening the enemy.<sup>91</sup> However, civilians are not the enemy: combatants are. Therefore, combatants are the only legitimate targets that can be killed under international humanitarian law.<sup>92</sup> In order to become a combatant, pursuant to article 4(2) of GCIII, a person must prove they:

- (a) [were] commanded by a person responsible for their subordinates;
- (b) had a fixed distinctive sign recognisable at a distance;
- (c) carried arms openly;
- (d) conducted their operations in accordance with the laws and customs of war.<sup>93</sup>

<sup>86</sup> *The Hostage Case* (Military Tribunal V, Case No 7, 19 February 1948) 1253-4; Sershowitz, above n 26; Fleck, above n 10, 33.

<sup>87</sup> Common Article 2, Common Article 3.

<sup>88</sup> GCIV art 5.

<sup>89</sup> Tshombe, above n 56; Henckaerts, above n 56, 181.

<sup>90</sup> API arts 48, 52; Henckaerts, above n 56, 181; Malcolm MacLaren and Felix Schwendimann, ‘An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law’ (2005) 6 *German Law Journal* 1217, 1239; Sabrina Balgamwalla, ‘Review of Conference: “The Reaffirmation of Custom as an Important Source of International Humanitarian Law”’ (2006) 13 *Human Rights Brief* 13, 25; *Legality of the Threat of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 78.

<sup>91</sup> Adam Roberts and Richard Guelff, *Documents on the Laws of War* (Oxford University Press, 3<sup>rd</sup> ed, 2000) 53; Carnahan, above n 10.

<sup>92</sup> Pejic, above n 55, 335.

<sup>93</sup> GCIII, art 4; API art 43.

Prima facie, authorising people to kill others seems to conflict with the fundamental human right to life.<sup>94</sup> However, once a person becomes a combatant, their human rights are limited due to the circumstance of war.<sup>95</sup> Captured combatants, as POWs, may be interned without any form of process until the end of active hostilities. They may also be criminally prosecuted for war crimes or other criminal acts committed before or during internment. Members of armed state groups are known as 'unlawful combatants' or 'civilians directly participating in hostilities'. This article does not seek to assert which is the correct term to use. Rather, it will comment on the entitlements of such captured persons in order to prove that international humanitarian law condones different levels of humane treatment depending on the status that the person held during the conflict. This is completely different to cases that are dependent on the status of the conflict. If six prisoners were sitting in the *same* prison cell and each held the same status in *different* conflicts, they should all be entitled to the same humane treatment, regardless of the status of the conflict from which they came. The requirement to give humane treatment should not be conditioned on conflict status.

(d) *Civilians directly participating in hostilities*

The level of humane treatment that will be provided to POWs depends on the status that the person carried in the conflict, rather than the status of the conflict itself. What about armed rebel groups, otherwise known as non-state actors? Are they capable of being classified as either combatants or civilians? This question has sparked much controversy.<sup>96</sup> Although the aim of this paper is not to engage in an in-depth analysis of the opposing sides, it suffices to make a passing comment on the issue. This is because it demonstrates that the higher the security concern posed by the person's wrongdoing, the more scope the State has to justifiably restrict its provision of humane treatment. Moreover, this issue underpins the cogency of proportionality in the operation of international humanitarian law.

In answering the question of whether armed rebel groups can be classified as either combatants or civilians, the United States ('US') would answer 'no'.<sup>97</sup> After the September 11 attacks, the US, under the Bush government, declared that the captured Taliban and al-Qaeda fighters were 'unlawful combatants' (so as *not* to classify the captured fighters as POWs).<sup>98</sup> The government stated that it was in a war of terror and that it did not need to treat the prisoners as either combatants or civilians, because they were unlawful combatants and hence fell outside the scope of international humanitarian law.<sup>99</sup> The existence of the notion of 'unlawful combatants' has triggered debate.<sup>100</sup>

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<sup>94</sup> ICCPR art 6.

<sup>95</sup> Crawford, above n 39, 34–6.

<sup>96</sup> J Callen, 'Unlawful Combatants and the Geneva Conventions' (2003-2004) 44 *Virginia Journal of International Law* 1025, 1050; George P Fletcher, 'The Indefinable Concept of Terrorism' (2006) 5 *Journal of International Criminal Justice* 1137, 1145; Jelena Pejic, 'Terrorist Acts and Groups: A Role for International law?' (2004) 75 *British Yearbook of International Law* 71, 75.

<sup>97</sup> Robert K Goldman and Brian D Tittmore, 'Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian Law and Human Rights Law' (Report, ASIL Task Force on Terrorism December 2002) 23-31.

<sup>98</sup> R Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs' (1951) 28 *British Yearbook of International Law* 323, 340.

<sup>99</sup> US Department of State, *The Global War on Terrorism: The First 100 Days* (10 November 2001) The Coalition Information Centres <<https://2001-2009.state.gov/s/ct/rls/wh/6947.htm>>. Notably, after the Yemen Strike in 2002, the US Government, under the Obama administration, abandoned the terms 'war on terror' and 'unlawful combatants'.

<sup>100</sup> C Greenwood, 'International Law and the "War Against Terrorism"' (2002) 78 *International Affairs* 301, 303; G Rona, 'Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"' (2003) 27 *Fletcher Forum on World Affairs* 55, 62. Knut Dörman, 'The Legal Situation of Unlawful/Unprivileged Combatants' (2003) 85 *International Review of the Red Cross* 45, 51; George P Fletcher and Jens David Ohlen, *Defending Humanity* (Oxford University Press, 2008) 183; Pejic, above n 55, 335.

The contrary argument to that of the US is that the concept of unlawful combatants does not exist, and armed rebel groups are therefore simply civilians directly participating in hostilities, who are thus covered by GCIV.<sup>101</sup> The Supreme Court of Israel offered insightful jurisprudence to support this argument in the *Detention of Unlawful Combatants Case*<sup>102</sup> and the *PCA Torture v Government Case*<sup>103</sup>. In these cases, the Supreme Court held that the concept of unlawful combatants only exists as a sub-category of civilians under GCIV. Further, the Supreme Court held that ‘civilians’ is a negative definition: it includes everyone who is *not* a combatant, so long as they fulfil the nationality criteria in GCIV. The following comment summarises the Supreme Court’s position: ‘civilians who are unlawful combatants are not beyond the law; not outlaws; and their human dignity is to be honoured – they enjoy and are entitled to protection.’<sup>104</sup>

Accordingly, participants in hostilities who do not satisfy the criteria under article 4(2) of GCIII are considered to be civilians directly participating in hostilities under GCIV.<sup>105</sup> For such time as civilians directly participate in hostilities, they can be targeted by military operations.<sup>106</sup> However, once captured, they will be treated according to the rights of civilians in GCIV. This analysis illustrates the principle that all persons are treated with at least some level of humane treatment under the GCs. The status that a person carries in conflict – whether it is as a civilian, combatant, or direct participant in hostilities – determines the level of humane treatment that he or she will be entitled to. To the contrary, it would be incorrect to say that the level of humane treatment accorded to a person should be dependent on the status of the *conflict*, rather than the status of the *person* themselves. To prevent the latter conclusion from being formed, the distinction between CAs 2 and 3 ought to be eliminated.

## 2 *The war crimes regime in Article 8 of the Rome Statute should be unified*

By the 1990s, amongst the increasing prevalence of NIAC,<sup>107</sup> reform became necessary if war crimes law was to be relevant for victims of conflict. The drafters of the *Rome Statute* acknowledged this and adopted the approach taken by the ICTY in the *Tadić Interlocutory Decision*.<sup>108</sup> A clear majority in Rome was strongly committed to the inclusion of war crimes in NIAC, with there now being four separate types of war crimes in article 8 of the *Rome Statute*.<sup>109</sup> However, for two reasons, this reform did not entirely achieve what the *Tadić* decision would have permitted. The first reason is repetition. Article 8(2)(a) lists war crimes

<sup>101</sup> T Franck, ‘Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror’ (2004) 98 *American Journal of International Law* 686, 690; J Yoo and J Ho, ‘The Status of Terrorists’ (2003-2004) 44 *Virginia Journal of International Law* 207, 231; M Hoffman, ‘Terrorists are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law’ (2002) 34 *Case Western Reserve Journal of International Law* 227, 230.

<sup>102</sup> *Iyad v State of Israel* (2008) CrimA 6659/06 (‘Detention of Unlawful Combatants Case’).

<sup>103</sup> *Public Committee Against Torture in Israel v Government of Israel* (2005) HCJ 769/02, 25, 35 (‘Targeted Killings Case’).

<sup>104</sup> *Ibid.*

<sup>105</sup> International Committee of the Red Cross, ‘Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’, reprinted in (2008) 872 *International Review of the Red Cross* 991, 997; Pejic, above n 55, 335.

<sup>106</sup> API art 51(3).

<sup>107</sup> UN Development Program, *Human Development Report 2005* (UNDP, 2005) 153–61; *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 217; Human Security Centre, *Human Security Report 2005* (Oxford University Press, 2005) 22–5;

<sup>108</sup> Antonio Cassese, *Cassese’s International Criminal Law* (Oxford University Press, 2013) 43; Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart, 2008) 37; Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press, 2005) 120.

<sup>109</sup> International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) r 74; *Rome Statute* art 8(2).

applicable in IAC, which mirror those provided in article 8(2)(e) for NIACs.<sup>110</sup> However, the applicability of war crimes law should not be dependent on the status of the conflict if the war crime in question is identical, regardless of the conflict's status. Accordingly, the inclusion of the same war crime in each type of conflict was an unsuccessful attempt by the drafters of the *Rome Statute* to achieve uniformity. This is because the applicability of some war crimes is now unnecessarily dependent on the existence of an IAC. The second reason why the drafting of the *Rome Statute* does not follow *exactly* what the *Tadić* decision would have permitted, is that there is no recognition in article 8(2)(e) of the ability to prosecute fundamental war crimes. Therefore, there are still many war crimes that should be, but are not, recognised in article 8(2)(e) for NIAC.<sup>111</sup> Each issue is now dealt with in turn.

(a) *The issue of repetition in Article 8(2) of the Rome Statute*

Approximately half of the provisions from IAC have been transplanted to NIAC.<sup>112</sup> While this was done for policy reasons,<sup>113</sup> it is inefficient to have the same war crime applicable to both IAC and NIAC. If two war crimes are similar in substance, there is no utility in drafting them differently in form. The way in which the *Rome Statute* has been drafted, however, necessitates an initial analysis of whether or not the conflict is international. This analysis is unnecessary, as the answer will not affect whether or not a war crime has been committed. For example, 'wilful killing' in article 8(2)(a)(i) equates to 'murder' in article 8(2)(c)(i); 'biological experiments' in article 8(2)(a)(ii) are similar to 'medical or scientific experiments' in article 8(2)(e)(xi); and 'wilfully causing great suffering' in article 8(2)(a)(iii) is the equivalent of 'cruel treatment' in article 8(2)(c)(i). There is no justification in making the distinction between these crimes for the purposes of maintaining the distinction between CAs 2 and 3.

(b) *The issue of non-recognition of war crimes in Article 8(2)(e) of the Rome Statute*

The International Criminal Court ('ICC') Statute is 'retrograde', as suggested by Cassese, in that it does not completely abolish the IAC-NIAC distinction.<sup>114</sup> Whilst the trend favours convergence, the two regimes have not become identical. The leader of the US delegation to the Rome Conference claimed that differences between articles 8(2)(a)-(b) and 8(2)(e) of the *Rome Statute*<sup>115</sup> reflect agreement among most delegates that 'customary international law has developed to a more limited extent with respect to NIAC'.<sup>116</sup> However, this claim should not be accepted in contemporary circumstances. Fundamental provisions with long recognition in IAC have not yet been recognised in NIAC, such as the prohibition of starvation as a means of warfare, the use of chemical weapons and launching disproportionate attacks. Further, grave breaches against persons or property protected by

<sup>110</sup> Knut Dörman, *Elements of War Crimes Under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2003) 81; Rome Statute arts 8(2)(a), (e).

<sup>111</sup> Such as willful killing and torture or inhuman treatment, including biological experiments: *Rome Statute* arts 8(2)(a)(i), (ii).

<sup>112</sup> The trend to converge the principles applicable to both types of conflict was further recognised in the 2010 Kampala Review Conference, where the ICC Statute was amended to reflect the principle of unnecessary suffering. Poisoned weapons, asphyxiating gases, and 'dum-dum' bullets became prohibited in internal armed conflicts as well as international armed conflicts: Amal Alamuddin and Philippa Webb, 'Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute' (2010) 8 *Journal of International Criminal Justice* 1219, 1230.

<sup>113</sup> The minority in opposition gave way to acceptance of a limited list of other fundamental provisions in article 8(2)(e): Cassese, above n 108, 12; Triffterer, above n 108, 75.

<sup>114</sup> Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *European Journal of International Law* 149, 150. Further, article 10 of the *Rome Statute* affirms that nothing in the *Rome Statute* limits or prejudices the development of other international law.

<sup>115</sup> *Rome Statute* arts 8(2)(a), (b), (e).

<sup>116</sup> David Scheffer, 'The United States and the International Criminal Court' (1999) 93 *American Journal of International Law* 12, 16.

the GCs are provided in article 8(2)(a) but are not recognised in article 8(2)(e) because of the distinction between CAs 2 and 3.<sup>117</sup>

All four of the GCs contain a grave breaches provision,<sup>118</sup> specifying particular breaches for which States have a duty to prosecute those responsible. Although it is open to some debate, this duty to prosecute is universal and mandatory among contracting States *only* in IACs.<sup>119</sup> State parties to the GCs did not desire to give other States jurisdiction over grave breaches committed within their own borders.<sup>120</sup> Therefore, during the negotiation of the GCs, the delegations that pressed for recognition of grave breaches in NIACs were strongly opposed.<sup>121</sup> The scope of universal jurisdiction, however, is controversial in international law.<sup>122</sup> It has rarely been applied,<sup>123</sup> and should not be a reason why States do not recognise grave breaches in NIACs.<sup>124</sup> Further, customary international law illustrates that not all States are opposed to prosecuting grave breaches within a NIAC framework.<sup>125</sup> If grave breaches were applicable in NIACs, then this would have avoided the complex issue in *Tadić* as to whether or not the conflict was international: Dusko Tadić would have been *prima facie* responsible for the grave breaches under article 2 of the *ICTY Statute* because of the nature of the crimes, rather than the nature of the conflict. To achieve this desired result, the distinction between CAs 2 and 3 should be eliminated. Upon removal of the distinction, grave breaches would be applicable without having to raise the preliminary question of whether the offences occurred in an IAC.

The issue of war crimes being dependent upon the existence of an IAC arose in *Prosecutor v Lubanga (Judgment pursuant to Article 74 of the Statute) ('Lubanga Art 74 Judgment')*<sup>126</sup>, which was the first case to be tried by the ICC.<sup>127</sup> Whilst the Prosecutor characterised the conflict as non-international,<sup>128</sup> both the Pre-Trial and Trial Chambers characterised the conflict as international from July 2002 to 2 June 2003 (the date of withdrawal of the

<sup>117</sup> Alamuddin and Webb, above n 112.

<sup>118</sup> See especially CGI art 50; GCII art 51; GCIII art 130; GCIV art 147; API arts 11, 85.

<sup>119</sup> *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 79; Solis, above n 10, 305.

<sup>120</sup> *Tadić Interlocutory Decision* (International Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 80; Sonja Boelaert-Suominen, 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards A Uniform Enforcement Mechanism for All Armed Conflicts?' (2000) 5 *Journal of Conflict & Security Law* 63, 71.

<sup>121</sup> Pictet, above n 21, 38-48; Jaques Verhaegen, 'Legal Obstacles to Prosecution of Breaches of Humanitarian Law' (1987) 261 *International Review of the Red Cross* 607, 615.

<sup>122</sup> Danielle Ireland-Piper, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine' 9(4) *Utrecht Law Review* 68, 77 [3.3.3]; Luc Reydam, *Universal Jurisdiction* (Oxford University Press, 2003) 157, 191, 201; Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge University Press, 2010) 202; M C Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) *Virginia Journal of International Law* 42, 97.

<sup>123</sup> See, eg, *Eichman v Attorney General of Israel* (1962) 136 ILR 177; *R v Bartle and the Commissioner of Police for the Metropolitan District, ex parte Pinochet* (1999) 2 WLR 827.

<sup>124</sup> Maintaining the distinction between *Common Articles* 2 and 3 will not change the fact that States always run the risk of other States prosecuting crimes committed on their own territory under the principle of nationality, the effects doctrine, the principles of subjective or objective territoriality or the protective principle: Vagias, above n 122, 22, 98, 250; Matthew Garrod, 'Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality' (2012) 12 *International Criminal Law Review* 763, 790.

<sup>125</sup> For example, in the German Military Manual, the law regulating IACs governs violations of *Common Article 3*. See, Federal Ministry of Defence for the Federal Republic of Germany (ed), *Humanitarian Law in Armed Conflicts – Manual* (1992) 16 [211].

<sup>126</sup> *Prosecutor v Lubanga* (Judgment pursuant to Article 74 of the Statute) (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) (*'Lubanga Art 74 Judgment'*).

<sup>127</sup> *Ibid*; O Bekou, 'Prosecutor v Thomas Lubanga Dyilo – Decision on the Confirmation of Charges' (2008) 8 *Human Rights Law Review* 343, 347-8.

<sup>128</sup> *Prosecutor v Lubanga (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No Case ICC-01/04-01/06-803, 29 January 2007) 230-5.

Republic of Uganda).<sup>129</sup> After this date the conflict became non-international. Accordingly, the ICC applied the distinction between CAs 2 and 3, as the conflict was only international when it occurred between two States.<sup>130</sup> Nevertheless, the ICC observed that:

Some academics, practitioners, and a line of jurisprudence from the ad hoc tribunals, have questioned the usefulness of the distinction between international and non-international armed conflicts, particularly in light of their changing nature.<sup>131</sup>

The ICC only applied the distinction because it is enshrined in the Court's statutory framework.<sup>132</sup> The conflict was characterised as international because the Ugandan Peoples' Defence Force ('UPDF') troops in occupation of the Ituri province were Ugandan forces, thus meaning that a conflict existed between two States.<sup>133</sup> Complex issues would have otherwise arisen if the UPDF were a non-state actor.<sup>134</sup> In such a case there would be an issue of whether the State of Uganda had overall control over the non-state actor of the UPDF.<sup>135</sup> This is because if an armed group is not acting on behalf of a government, in the absence of two States opposing each other, there is no IAC.<sup>136</sup> Under the current war crimes regime provided by article 8 of the *Rome Statute*,<sup>137</sup> in the absence of an IAC, the most fundamental war crimes and grave breaches cannot be prosecuted. To prevent this undesired result, the distinction between CAs 2 and 3 should be eliminated.

The overall control test is used to internationalise conflicts that occur between States and non-State actors.<sup>138</sup> This test was first enunciated by the Appeals Chamber in the *Tadić Interlocutory Decision* and applied by the ICC in the *Lubanga Art 74 Judgment*.<sup>139</sup> If the test is successfully applied, a conflict of an international character will be deemed to exist between two States pursuant to CA2. International courts and tribunals desire to apply the

<sup>129</sup> Ibid 543; *Lubanga Art 74 Judgment* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) 504, 523-4; Bekou, above n 127, 347-8.

<sup>130</sup> Common Article 2; *Prosecutor v Blaškić* (Decision on the Prosecution and Defence Motions Dated 25 January 1999 and 25 March 1999 Respectively) (International Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-14-T, 22 April 1999) 4; *Prosecutor v Al Bashir* (Warrant of Arrest) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09-1, 4 March 2009).

<sup>131</sup> *Lubanga Art 74 Judgment* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) 539.

<sup>132</sup> Rome Statute art 21.

<sup>133</sup> *Lubanga Art 74 Judgment* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) 72, 84, 541-2; In January 2001, Edison Muzoora of the UPDF seized control of the province of Ituri. Thereafter, the conflict was international. See also, *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 70; *Delalić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) 183; *Prosecutor v Branin (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-99-36-T, 1 September 2004) 122.

<sup>134</sup> Anne-Marie LaRosa and Carolin Wuerzner, 'Armed Groups, Sanctions and the Implementation of International Humanitarian Law' (2008) 870 *International Review of the Red Cross* 327, 331.

<sup>135</sup> *Lubanga Art 74 Judgment* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) 541; *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 84, 90, 131, 137-145; Sylvain Vité, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations' (2009) 91 *International Review of the Red Cross* 70, 90; Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649, 651; Jelena Pejić, 'Status of Armed Conflicts' in Elizabeth Wilmshurst (ed), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007) 92-3.

<sup>136</sup> Pictet, above n 21, 32; Claus Krieb, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15 *Journal of Conflict and Security Law* 245; Andrew Clapham, 'Extending International Criminal Law Beyond The Individuals to Corporations and Armed Opposition Groups' (2008) 6(5) *Journal of International Justice* 899, 901.

<sup>137</sup> Rome Statute art 8.

<sup>138</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 49-50.

<sup>139</sup> Ibid; *Lubanga Art 74 Judgment* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) 541.

overall control test, because it operates to internationalise what would otherwise be an NIAC and therefore triggers the application of all four GCs.<sup>140</sup> The test, however, is not otherwise desired. According to the ICJ in the *Genocide Case*, overall control is inconsistent with effective control, which is the only test that can apply to render States responsible for controlling the actions of non-state actors.<sup>141</sup> Sub-part B argues that the overall control test is not a suitable test to internationalise conflicts, as it has been adopted *ipso facto* out of context, and that the finding of criminal responsibility should not depend on the fulfilment of a test that was designed to hold States, not individuals, accountable. Therefore, the distinction between CAs 2 and 3 should be eliminated so the GCs can simply apply to all armed conflicts, without having to invoke the overly broad overall control test.

## B *Eliminating the Distinction Between Common Articles 2 And 3 for Legal Reasons*

### 1 *Application of the Geneva Conventions of 1949 should not be dependent on conflict status*

In an international criminal court or tribunal, before the prosecutor is entitled to prosecute a criminal for committing grave breaches of the GCs, the prosecutor must first establish that the conflict is international. As previously mentioned, an IAC is defined in CA2 as ‘a case of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them’.<sup>142</sup>

The overall control test can be appropriately used in the context of determining conflict status, because the result of this determination does not impact on the responsibility of the States involved in the conflict. This would be a different issue if the definition of a CA2 armed conflict involved ‘the use of force between two States’. In such a case, once the finding of an IAC is made, questions concerning the State’s responsibility would automatically follow for potentially breaching article 2(4) of the *UN Charter* (which prohibits the use of force).<sup>143</sup> However, CA2 does not require a State to use force, but rather acknowledges the possibility of a State not recognising the fact that it is in a state of war. This reinforces the fact that a State does not have to use direct force to be considered as a party to a conflict. Consequently the finding of an IAC will not necessarily entail a corollary finding of the State’s responsibility. Despite this, it is undesirable to use the overall control test to determine the status of conflicts in international humanitarian/criminal law because:

1. the test has been adopted in the context of the law of State responsibility (to circumvent the effective control test);
2. it is not necessary to invoke the overall control test in order to render a person criminally responsible; and
3. it causes international criminal law prosecutors to argue that what appears to be a non-international armed conflict by fact is an international armed conflict by law.

These three points will now be illustrated in an analysis of the ICTY’s *Tadić Judgment* and the ICJ’s decisions in the *Genocide Case* and *Nicaragua*.

#### (a) *The Trial Chamber in Tadić: An analysis of the law on State responsibility*

<sup>140</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 217; *Lubanga Art 74 Judgment* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) 541.

<sup>141</sup> *Genocide Case* [2007] ICJ Rep 43, 208 [400].

<sup>142</sup> Common Article 2.

<sup>143</sup> *UN Charter* art 2(4).

The Trial Chamber in the *Tadić Judgment* held that State responsibility should be determined pursuant to the rule of customary international law set out in article 8 of the *Draft Articles on State Responsibility*.<sup>144</sup> Under this article, if a non-state actor conducts itself under the direction, control, or instructions of a State, responsibility for the actions of the non-state actor can be attributed to the State.<sup>145</sup> The Trial Chamber further held that the concept of ‘control’ required by article 8 must be understood in light of the effective control test established in *Nicaragua*.<sup>146</sup> Effective control must be exercised in respect of each operation in which the violations occurred, not generally in respect of the overall actions taken by the non-state actor.<sup>147</sup> For example in *Nicaragua*, whilst the US supported the contras by funding, organising, equipping and training their operations, it could not be proved that the US intended to assist the contras in respect of their military operations. Accordingly, such evidence could not show that the US effectively controlled the contras’ specific actions.<sup>148</sup> Such a level of control can only be established by exceptional gravity and the proof should be such as to leave no room for reasonable doubt.<sup>149</sup>

In the *Tadić Judgment*, the Trial Chamber held that FRY did not have effective control over *Republika Srpska* in the same way the US did not have effective control over the contras in *Nicaragua*.<sup>150</sup> The Trial Chamber had no evidence before it to prove that FRY had directed or influenced the actual military operations of *Republika Srpska*.<sup>151</sup> Therefore, while various forms of assistance were provided, this was insufficient to constitute effective control.<sup>152</sup> For this reason, the victims of the unlawful acts were protected by the minimal provisions of CA3,<sup>153</sup> applicable as it is to all armed conflicts, rather than the specific protection under CA2.<sup>154</sup> Even though responsibility could not be attributed to FRY, the Appeals Chamber nevertheless found a way to internationalise the conflict.

(b) *The Appeals Chamber in Tadić: a critique on its application of the law on State responsibility*

The approach taken by the Appeals Chamber towards the issue of whether there was an IAC differed greatly from that taken by the ICTY at Trial. Rather than accepting that there was no

<sup>144</sup> *Draft Articles on Responsibility States for Internationally Wrongful Acts*, GA Res 56/83 UN GAOR, 56<sup>th</sup> sess, 85<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) art 8; James Crawford, *First Report on State Responsibility*, GA Res 52/156, 50<sup>th</sup> sess, Agenda Item 2, UN DOC A/CN.4/490 and Additional 1-7 (12 August 1998); *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 205-6 [585]; *Genocide Case* [2007] ICJ Rep 43, 207 [398].

<sup>145</sup> James Crawford, ‘Revising the Draft Articles on State Responsibility’ (1999) 10(2) *European Journal of International Law* 435, 444.

<sup>146</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 205-6 [585]; *Genocide Case* [2007] ICJ Rep 43, 206 [399].

<sup>147</sup> *Genocide Case* [2007] ICJ Rep 43, 207 [400].

<sup>148</sup> *Nicaragua* [1986] ICJ Rep 14, 57 [95]-[97], 59 [101], 62-64 [109]-[110], 63 [110], 64-5 [115], 113 [217], 129 [277].

<sup>149</sup> *Genocide Case* [2007] ICJ Rep 43, 130 [210]. For example, proof of instructions or an official statement reflecting specific intention would be enough: 214 [413].

<sup>150</sup> The Trial Chamber decision in *Tadić* was criticised in dissent and in commentary for not reflecting the reality of the situation: *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 287-299 (McDonald J, dissenting); Theodor Meron, ‘Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua’s* Fallout’ (1998) 92 *American Journal of International Law* 236, 241. However, sometimes the nuance of the law does not line up with reality: Magda Karagiannakis and James Crawford, ‘State immunity, war crimes and human rights’ [2013] *Peace & Security Global Change* 1, 8.

<sup>151</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 216 [600]-[605].

<sup>152</sup> *Genocide Case* [2007] ICJ Rep 43, 207-211 [397]-[407].

<sup>153</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 276 [733]. The ICTY Trial Chamber the same approach as the ICJ did in the *Nicaragua* [1986] ICJ Rep 14, 114 [219].

<sup>154</sup> *Ibid* 217 [607].

IAC, the Appeals Chamber formulated its own test of overall control, requiring that it must 'go beyond the mere financing and equipping of armed forces and involve participation in the planning and supervision of military operations'.<sup>155</sup> This test was held not to require evidence of specific orders or instructions relating to particular military actions.<sup>156</sup> For this reason, the overall control test differs markedly from that of effective control. Moreover, the Appeals Chamber created a way to internationalise the conflict, without making a necessary finding on the law of State responsibility. Upon revision by the ICJ in the *Genocide Case*, the majority opinion stated that the overall control test *may* be employed to determine whether or not an armed conflict is international. While true, in the sense that the status of a conflict will not necessarily invoke State responsibility, the invocation of the overall control test is to determine the status of armed conflicts is undesirable.

(c) *The ICJ's use of 'control' in the Genocide Case and Nicaragua*

It must be noted that the ICJ's comment in the *Genocide Case*, supporting the use of overall control in the context of armed conflict, was just that – a comment. The main issue for the ICJ was whether the overall control test was relevant to a determination of State responsibility, to which the Court answered in the negative. It held that the overall control test had the major drawback of broadening the scope of State responsibility.<sup>157</sup> In this regard, the overall control test was described as 'stretching too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility'<sup>158</sup>.

Though not appropriate for State responsibility, the overall control test was still considered by the ICJ to be appropriate for determining conflict status. As noted by the ICJ, 'logic does not require the same test to be adopted in resolving two different issues.'<sup>159</sup> This article, nevertheless, expresses reservation about the way in which the Court condoned use of the overall control test in the international humanitarian/criminal law context.

The overall control test was adopted and formulated by the ICTY in the context of the law of State responsibility. Yet, it has been operating ever since outside of the context of the law of State responsibility. By expressing a lower threshold, the test stretches the law of State responsibility 'almost to breaking point'<sup>160</sup> and therefore should not be invoked in other areas of law to prevent the possibility of an inconsistency arising. For example, in *Nicaragua*, before the overall control test was formulated by the ICTY, the effective control test was used to determine both questions of State responsibility and the status of conflicts. In *Nicaragua*, given the fact that the US did not have effective control over the contras, the conflict between the contras and Nicaragua was held *not* to be international.<sup>161</sup> Therefore, the same test, that of effective control, was used to resolve the issues of both State responsibility *and* the status of the conflict.<sup>162</sup> Now that the overall control test is used to determine the

<sup>155</sup> *Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 62 [145]. See also, *Prosecutor v Aleksovski (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/1-A, 24 March 2000) 131-4; *Prosecutor v Delalić, Mucić, Delić, and Landžo (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) 26; *Prosecutor v Kordić and Čerkez (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) 306-7.

<sup>156</sup> *Prosecutor v Tadić Judgment* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 62 [145].

<sup>157</sup> *Genocide Case* [2007] ICJ Rep 43, 210 [406].

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid* [405].

<sup>160</sup> *Ibid* [406].

<sup>161</sup> *Nicaragua* 114 [219].

<sup>162</sup> *Nicaragua* is also worth mentioning, as upon the finding of a NIAC, the Court decided only to apply *Common Article 3* instead of the protection afforded by CA2, illustrating the limited use to which the GCs are put due to the stringent thresholds that have to be met in order to classify the status of the conflict.

issue of conflict status, inconsistencies may arise as between what the effective control test would realise compared to that of overall control.

In any event, the overall control test was adopted in a foreign context to that of international humanitarian/criminal law. Courts and tribunals should thus exercise caution in adopting a test developed in a foreign context to apply to particular issues. The simplest point of all goes beyond 'appropriateness'. Whether or not adopting the overall control test to determine the status of a conflict is 'appropriate', the fact is that satisfying the test is not necessary in order to hold an individual criminally responsible for committing grave breaches of the GCs. A breach is a breach, whether international or non-international. Thus, criminals should be capable of being prosecuted for grave breaches of the GCs, with the prospect of such prosecutions not being conditioned on satisfaction of the excessively broad overall control test. Ideally, there should be no requirement to determine the status of a conflict in order to apply the GCs at all. This can be simply achieved by eliminating the distinction between CAs 2 and 3.

### III CONCLUSIONS TO BE DRAWN AND RECOMMENDATIONS

The regime of international humanitarian law would be more humane in its practical application if the distinction between CAs 2 and 3 were eliminated. This is justified by protective and prosecutorial reasons. There is no reason why persons of the same status in armed conflict should be accorded different levels of humane treatment. The fact that those persons came from different armed conflicts is immaterial. The status of the conflict cannot predicate the level of humane treatment provided. Justice only requires that the status of the person determine what he or she is entitled to.

While recognition of CA2 and APII was a remarkable achievement for NIACs, they both fall short of what humane treatment permits: protection by all four of the GCs.<sup>163</sup> As noted by the ICTY in the *Tadić Interlocutory Decision*:

Elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.<sup>164</sup>

This article has shown that international criminal lawyers have found a way to circumvent the law of State responsibility in pursuit of their aim to establish criminal responsibility. In order to prosecute a criminal for a grave breach of the GCs, there must first exist an IAC. Such a conflict can be determined by the overall control test, as decided by the Appeals Chamber in the *Tadić Interlocutory Decision*. This test, however, is unsupportable in the context of contemporary armed conflict and international criminal law, because: (1) it was developed in the context of State responsibility and so should not be used in foreign contexts; and (2) it is not necessary to determine criminal responsibility. On that second note, as a matter of substance and not of form, once a grave breach of the GCs is committed, the accused should be brought to justice. The mere fact that the crime was committed in an NIAC should make no difference to the prospects of prosecution for such a breach. Above all, the distinction between CAs 2 and 3 should be eliminated to ensure that LOAC maintains its

<sup>163</sup> *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 94–6; Theodor Meron, 'International Criminalisation of Internal Atrocities' (1995) 89 *American Journal of International Law* 554; Darryl Robinson and Herman von Hebel, 'War Crimes in Internal Conflicts: Art 8 of the ICC Statute' (1999) 2 *Yearbook of International Humanitarian Law* 193.

<sup>164</sup> *Tadić Interlocutory Decision* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) 121.

standard to humanise war. Moreover, the distinction should be eliminated in order to ensure that the GCs are properly applied in all circumstances; they should be applicable to *all* armed conflicts,<sup>165</sup> regardless of whether or not they are international.

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<sup>165</sup> This would only leave the definition of an 'armed conflict' being the threshold indicator of whether the Geneva Conventions of 1949 apply.

# INTERNATIONAL PARENTAL CHILD ABDUCTION AND THE FRAGMENTED LAW IN INDIA — TIME TO ACCEDE TO THE HAGUE CONVENTION?

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*Increased trans-national movement of people, and consequentially, families, has resulted in complex conflict of laws questions in family-related disputes, especially concerning the custody of children. Such questions often arise from differential criteria within the law in different jurisdictions, and not unusually, the application of differential meaning to the same criteria, resulting in prolonged and protracted custody-related disputes. The Hague Convention on the Civil Aspects of International Child Abduction has been a significant attempt to solve the jurisdiction-related questions, by emphasising the prompt return of the abducted child to the appropriate forum. However, with regard to non-signatories like India, concerns relevant to differential standards and interpretations remain. This article attempts to chronicle the existing law in India, both statutory law and judicial opinion, regarding international parental child abduction. It also reviews the recommendations of the Law Commission on India's accession to the Convention and the proposed draft legislation for such accession.*

## I INTRODUCTION

An Indian Hindu couple moved to the United States ('US') for career pursuits and started a family there. After a visit to India, the wife stayed back with the child and later refused to join the husband in the US. The husband obtained a wrongful removal of the child order from the US court and petitioned the Indian court for enforcement of the foreign custody order. The wife, citing professional reasons, as well as instances of marital discord, pleaded against enforcement of the foreign court's order. Apart from the issue of enforcement of the foreign court order, the Indian court was called upon to decide questions regarding custody of the child, and essentially to make a ruling on the welfare and best interests of the child.<sup>1</sup> Making a determination against enforcement of the foreign court's judgment, the court ordered custody of the child to the mother after an appreciation of the facts and circumstances of the case.<sup>2</sup> This decision is representative of the law in India regarding parental child removal — a combination of private international law rules and a preference for a determination of any application related to enforcement of foreign court judgments based on the facts.

One consequence of transnational interaction is the growing incidence of transnational marriages, which has led to conflict of laws issues such as the choice of jurisdiction or the applicable law in matters of divorce, judicial separation, custody of children etc.<sup>3</sup> The enforcement of custody-related orders in foreign jurisdictions has caused significant difficulty, particularly because differing personal laws (the law applicable to matters relating to family such as divorce, maintenance, custody, guardianship, succession etc., sourced from

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<sup>1</sup> *P K Srikumar v Harshitha Gopinathan* (2015) 6 MLJ 300 (4 August 2015) (High Court of Madras).

<sup>2</sup> *Ibid* 41 [63].

<sup>3</sup> See Lara Cardin, 'The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-Signatory Nations: Getting to Square One' (1997) 20(1) *Houston Journal of International Law* 141; Antoinette Sedillo Lopez, 'International Law — US/Mexico Cross Border Child Abduction — the Need for Cooperation' (1999) 29 *New Mexico Law Review* 289.

a person's religious faith) of parents have divergent opinions on custody, often influenced by individual religious law. A significant concern regarding the children of transnational marriages that arises during custody disputes is the problem of parental child abduction. International parental child abduction occurs when a parent withdraws the child across international borders to a jurisdiction that is not its own.<sup>4</sup> A parent fighting the custody dispute could withdraw the child from their habitual residence and relocate with the child to another country, leaving the left-behind parent to pursue litigation in a foreign jurisdiction. Private international law rules vary amongst nations and there is the possibility of protracted litigation for custody-related decisions across jurisdictions.

This article attempts to map the fragmented law in India, both statutory provisions and judicial opinion, applicable to international parental child removal disputes. The discussion on the Indian law is followed by a summary of the *Hague Convention on the Civil Aspects of International Child Abduction* ('the Convention'),<sup>5</sup> especially the position of the best interests of the child principle when juxtaposed against the return-centric approach within the Convention. There is also discussion of India's concerns regarding accession. The next section summarises India's draft bill, the Civil Aspects of International Child Abduction Bill 2016 (India), related to the Convention. The article concludes with a suggestion that legislative efforts should take notice of the contemporary issues related to international parental child removal.

The Convention is a significant attempt to prevent wrongful removal of the child and to ensure the return of the child to its habitual residence. It adopts a unique approach to violations of custody rights — it departs from jurisdiction rules and recognition of foreign judgments, instead preferring the 'return of the child' approach.<sup>6</sup> Silberman observed that such preference was explained by the fact that it is only a provisional remedy with no opinion delivered on the custody rights.<sup>7</sup> The provisions of the Convention ensure its application whenever there is a 'breach of rights of custody',<sup>8</sup> and not necessarily only when there is a formal custody order.<sup>9</sup> It applies to pre-decree scenarios like a breakdown of a marriage or where one of the spouses to a marriage has a reason to leave the marital residence and wishes to take the child with them. The purpose of the Convention is to discourage such unilateral action of removing a child. It aims to ensure the return of the child to the scenario that existed before the wrongful removal was affected. The Convention's objectives are to: reverse the abduction to help mitigate the psychological trauma for the child; return the child to its habitual residence, as the Convention perceives the State of habitual residence to be in the best position to address decisions on custody and visitation; and prevent similar behaviour in future by ensuring that the parent indulging in wrongful removal will not gain a new forum to address the custody dispute.

The Convention anticipates that the court in the child's habitual residence country will hear litigation of custody-related issues.<sup>10</sup> This is based upon the assumption that the child was removed from a place that they considered 'home' and removed to a jurisdiction unfamiliar

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<sup>4</sup> Noah L Browne, 'Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction' (2011) 60(5) *Duke Law Journal* 1193, 1194.

<sup>5</sup> *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983).

<sup>6</sup> Linda Silberman, 'Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence' (2006) 18 *New York University Public Law and Legal Theory Working Papers* 1, 6.

<sup>7</sup> Ibid. Silberman suggests that 'the "return" remedy can be thought of as a "provisional" remedy because it does not dispose of the merits of the custody case — additional proceedings on the merits of the custody dispute are contemplated in the state of the child's habitual residence once the child is returned there'.

<sup>8</sup> *Hague Convention*, above n 5, art 3.

<sup>9</sup> Silberman, above n 6, 6.

<sup>10</sup> Rebecca K McKelvey, 'An Overview of the International Parental Child Abduction Provisions of the Hague Convention' (2010) 7(1) *Ankara Law Review* 67, 71.

to them.<sup>11</sup> The Convention's preference for habitual residence as the connecting factor for jurisdictional determinations emanates from the understanding that contracting States agreed that forum courts hearing return applications do not have the jurisdiction to hear the merits of the underlying custody dispute — their decisional power extends to determination of the wrongful removal of the child from the abducted-from country. Upon such determination and, if the abduction does not fall within the limited exceptions, the abducted-to country's court then orders that the child be returned to the abducted-from country — a summary return mechanism. The Convention envisages direct reporting on international judicial communications and other relevant measures to prevent parental child abductions.<sup>12</sup>

The Convention thus helped shift the focus from the earlier position of 'best interests of the child', which allowed forum-shopping by a parent who had enacted the wrongful removal of the child to a country that afforded a convenient forum for adjudication.<sup>13</sup> The Explanatory Report to the Convention ('the Report') explained the shift to the return-centric approach as caused by focusing on the rights of the child, as opposed to the child being viewed as property in a parental custody dispute.<sup>14</sup> Attempting to identify the juridical nature of this principle, as distinct from its manifestation as a sociological paradigm, the Report noted the fact that forum courts have, using the best interests of the child principle, made custody-related decisions using domestic subjective value judgments to impose upon the national community from which the child has recently been abducted.<sup>15</sup> The dispositive part of the Convention, therefore, contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or detained.<sup>16</sup> The stated objective of the Convention — addressing the preventive and curative aspects of international parental child abduction — corresponds to a specific idea of what constitutes the best interests of the child.<sup>17</sup>

However, noting the existence of exceptional circumstances that might justify the removal of a child from its habitual residence, the Convention allowed for the forum courts to decide upon the existence of any of the Convention's specified exceptions to return of the child, including a 'best interests of the child' challenge to a return application.<sup>18</sup> This principle, though a vague and subjective standard, ensures that forum courts make a detailed investigation of what would be in the best interests of the abducted child, but also frustrates the return process. Article 13 encapsulates the subjective nature of this principle — for example, return to the habitual residence may be prevented if there exists a grave risk of possible exposure of the child to physical or psychological harm or otherwise places the child in an intolerable situation. Courts hearing return applications under the Convention have

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<sup>11</sup> Barbara E Lubin, 'International Parental Child Abduction: Conceptualizing New Remedies Through Application of the Hague Convention' (2005) 4(2) *Washington University Global Studies Law Review* 415, 421.

<sup>12</sup> The International Child Abduction Database (INCADAT) is a repository of material, including a case law search, related to the Convention < <http://www.incadat.com/index.cfm?act=text.text&lng=1>>.

<sup>13</sup> Lubin, above n 11, 420.

<sup>14</sup> Elisa Pérez-Vera, '*Rapport Explicatif*' (1982) [Permanent Bureau trans, *Explanatory Report* 426 < <https://assets.hcch.net/upload/expl28.pdf>>].

<sup>15</sup> *Ibid* 432 [22].

<sup>16</sup> *Ibid* 432 [23].

<sup>17</sup> *Ibid* 432 [25].

<sup>18</sup> Article 13 of the Convention allows the forum court hearing the return application to make a 'best interests of the child' examination if the return application is challenged on the basis of the grave risk exception to return.

been known to apply the best interests subjective standard.<sup>19</sup> Such application has allowed the courts to often interpret public policy concerns and domestic laws within the contours of the best interests principle.<sup>20</sup> While signatories to the *Convention on the Rights of the Child* ('CRC') also adopted a custody rule that calls for decisions according to the best interests of the child,<sup>21</sup> legal systems founded upon religious law highlight the ambiguities and concerns with the best interests principle.<sup>22</sup> Sthoeger contested the underlying assumption of the *CRC* that the interests of the child are best protected in his or her place of habitual residence believing it not to be universally correct. Sthoeger observed that such an assumption was credible only to the extent that forum courts respect the best interests of child.<sup>23</sup> Furthermore, Bruch commented that a detached view of the best interests of the child might not be a possibility where the custody rights of the parents/guardian and the practices related to religion are accorded primacy.<sup>24</sup> Referring to diverse judicial opinion,<sup>25</sup> Bruch further argued that in countries where custody is awarded according to a child's best interests, the application of this standard varies; it is dependent upon its exercise by a religious judge or a secular judge.

Schuz proposed that the underpinning assumption in the Convention, that the return of the child to its habitual residence is in its best interest,<sup>26</sup> is valid only so long as courts in the place of residence respect the best interests of the child and secondly, only when the place of

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<sup>19</sup> See, eg, *Blondin v Dubois* 78 F Supp 2d 283, 298 (2<sup>nd</sup> Cir, 2000). In a series of four successive applications before the District Court and the Court of Circuit, a return application resulted in an extensive investigation of the facts of the case. The Court of Circuit, hearing a review of the decision of the District Court affirmed the District Court's rejection of the return application on the basis of the factual record before it. See generally Marisa Leto, 'Whose Best Interest? International Child Abduction under the Hague Convention' (2002) 3(1) *Chicago Journal of International Law* 247, 249; Linda Silberman, 'The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues' (2001) 33(1) *New York University Journal of International Law and Politics* 221.

<sup>20</sup> Carol S Bruch, 'Religious Law, Secular Practices, and Children's Human Rights in Child Abduction Cases under the Hague Child Abduction Convention' (2000) 33(1) *New York University Journal of International Law and Politics* 49, 54. Bruch, citing Israel and Spain's laws, commented that the courts in these countries adopted differential standards drawing content from their domestic laws.

<sup>21</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3 ('CRC'). This article provides that:

1. 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.'

<sup>22</sup> Carol S Bruch 'The Hague Child Abduction Convention: Past Accomplishments, Future Challenges' (1999) 1 *European Journal of Law Reform* 97. See generally Peter McEleavy, 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?' (2015) 62(3) *Netherlands International Law Review* 365.

<sup>23</sup> Eran Sthoeger, 'International Child Abduction and Children's Rights: Two Means to the Same End' (2011) 32(3) *Michigan Journal of International Law* 511, 526. See, eg, *DS v VW* (1996) 134 DLR (4<sup>th</sup>) 481 (Supreme Court of Canada). In this case, the Supreme Court of Canada upheld the order to return the child to the US on the alternate ground that return was in the best interests of the child under the relevant domestic provincial law. See also, Linda Silberman, above n 19, 231-2.

<sup>24</sup> Carol S Bruch, above n 22, 111-114. Bruch, citing jurisprudence from a few legal systems, concludes that best interests of the child in these countries was contextualised with the rights of the parents and the prescriptions of the religious code – often gender selectivity with regard to exercising custodial rights prevailed.

<sup>25</sup> Bruch, above n 20, 54.

<sup>26</sup> The Preamble to the Convention states: 'The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access...'

the child's residence is the forum *conveniens* to hear the case.<sup>27</sup> Even so, Schuz argued that it does not necessarily follow that it is in the best interests of the child to actually reside in the original place of residence pending the final settlement of custody rights. The assumption that prompt return would serve the best interests of the child is also contested. Furthermore, Schuz observed that the exemptions from return could be construed narrowly not to encompass all of the situations where a return might run contrary to the best interests of that child.<sup>28</sup>

The problem concerning the interpretation of best interests of the child principle is exacerbated with regard to return applications to forum courts in non-signatory nations, India being one such nation. The fragmented nature of Indian law, a mixture of religious law and secular law within the domestic law applicable to custody/guardianship rights, coupled with its non-signatory status, has adversely affected the process of return applications. Some of the recognisable features of the law include the lack of clarity in its application to international parental child abduction, absence of a clear theoretical construct that underpins the law, inclusion of the custodial rights of the parents within the determination of the best interests of the child, and difficulties regarding enforcement of foreign court orders.

## II THE INDIAN LAW REGARDING CHILDREN AND CUSTODY

In the case of wrongful removal to a non-signatory country, the domestic law of the country to which the child was removed to applies.<sup>29</sup> Though all domestic laws are perceived to believe that custody applications are to be decided noting the 'best interests of the child', interpretation of the phraseology has witnessed diversity in interpretation in various nations.<sup>30</sup> The difficulties arising from non-signatory status are exacerbated by the fact that foreign law and foreign systems are likely to be viewed with scepticism and apprehension.<sup>31</sup> The left-behind parent therefore finds it difficult to obtain a foreign court order compelling the abducting parent to physically hand over the child. While it is possible to approach the government of the country from which the child was wrongfully removed, there are not many cases to demonstrate that parents could successfully secure their child's return in doing so. Governments have rarely intervened to provide information and direction in handling the situation to secure the return of the child.<sup>32</sup>

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<sup>27</sup> Rhona Schuz, 'The Hague Child Abduction Convention and Children's Rights' (2002) 12(2) *Transnational Law and Contemporary Problems* 393, 439.

<sup>28</sup> *Ibid.*

<sup>29</sup> McKelvey, above n 10, 67.

<sup>30</sup> Lara Cardin, 'The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-Signatory Nations: Getting to Square One' (1997) 20(1) *Houston Journal of International Law* 141, 156-7. Cardin has observed that the culture of a region, its religion and social practices have had a significant influence on the explanation of the 'best interests of the child' and that courts tend to believe, under influence of a certain cultural milieu, that it is in the best interests of the child to be raised within their respective nation or culture, rather than in another nation. Cardin also cites the example of Japan — cultural beliefs related to mother-child bonding have placed a foreign father who is a left-behind parent at a disadvantage, especially because Japanese culture believes in family disputes settled outside the court system, which could make the process complicated for a foreign parent.

<sup>31</sup> *Ibid* 157.

<sup>32</sup> *Ibid* 158. Cardin was of the opinion that it could be tentative to presume the repeated success of intervention by governments and diplomacy to secure a wrongfully removed child's return.

There has been discussion surrounding the non-signatory status of India,<sup>33</sup> with the Indian judiciary suggesting accession.<sup>34</sup> Parental child abduction cases in India have, except for a few rare exceptions,<sup>35</sup> been recognised as child custody related disputes, for which the personal law is applicable. US government data reveals that a high number of wrongfully withdrawn children are removed to India, especially in comparison to other countries. A 2016 report stated that there were 99 unresolved custody return applications in India, including 24 such applications made in 2015.<sup>36</sup>

### A Statutory Law

The Hindu law governing custody of children is closely linked with the law on guardianship. Guardianship refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor, while custody is a narrower concept regarding the upbringing and day-to-day care and control of the minor.<sup>37</sup> The term ‘custody’ is not defined in any Indian family law, secular or religious. The *Guardians and Wards Act 1890* (India) (‘GWA’) defined ‘guardian’ as a person having the care of the person of a minor or of their property or of both.<sup>38</sup> The GWA is a secular law regulating questions of guardianship and custody for all children within the territory of India, irrespective of their religion.<sup>39</sup> While issues of substantive law can still be handled under the religious law, the GWA is the applicable procedural law. It authorises district courts to appoint guardians of the person or property of a minor when the natural guardian, as per the minor’s personal law or the testamentary guardian appointed under a will, fails to discharge their duties towards the minor. Section 17(2) specifies that determinations regarding the welfare of a minor will be based on consideration of their age, sex and religion; the character and capacity of the proposed guardian and how closely related the proposed guardian is to the minor; the wishes, if any, of the deceased parents; and any existing or previous relation of the proposed guardian with the person or property of the minor. Section 17(3) states that if the minor is old enough to form an intelligent opinion, the court may consider their preference. Section 19 of the GWA then deals with cases where the court may not appoint a guardian. Furthermore, s 25 of the GWA deals with the authority of the guardian over the custody of the ward, and s 25(1) allows for the court’s order to be applied to secure the ward’s return.

The *Hindu Minority and Guardianship Act 1956* (India) (‘HMGA’) designates the father as the natural guardian of a minor, and after him, the mother.

<sup>33</sup> Foreign & Commonwealth Office, UK, *India – Child Abduction* (20 March 2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/368267/child\\_abduction\\_-\\_india.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368267/child_abduction_-_india.pdf)>. See also US House Committee on Foreign Affairs, *Hope Deferred: Securing Enforcement of the Goldman Act to Return Abducted American Children* (14 July 2016) <<http://docs.house.gov/meetings/FA/FA16/20160714/105221/HHRG-114-FA16-Wstate-AbbiR-20160714.pdf>>. The UK government upload states that while India, a non-signatory to the Convention, penalises parental child abduction, there is no obligation on the abducting parent or the Indian government to return the child to UK.

<sup>34</sup> *Seema Kapoor v Deepak Kapoor* (2016) Supreme Court Cases Online (Punjab & Haryana) 1225 [11]. The judge referred the core legal issue of wrongful removal of the child from their habitual residence and their restoration to the same to the Law Commission for suitable recommendation to the Government of India for accession to the Convention.

<sup>35</sup> *V Ravi Chandran v Union of India* (2010) 1 Supreme Court Cases 174 and *Arati Bandi v Bandi Jagadrakshaka Rao* (2013) 15 Supreme Court Cases 790 being the two instances where there was a penal law application for parental child abduction. The relevant sections of the *Indian Penal Code 1860* (India) are s 361, which deals with kidnapping a minor from the lawful custody of the guardian and s 362, which deals with abduction.

<sup>36</sup> Bureau of Consular Affairs, US Department of State, *Annual Report on International Parental Child Abduction (IPCA)* (11 July 2016) <[https://travel.state.gov/content/dam/childabduction/complianceReports/2016%20IPCA%20Report%20-%20Final%20\(July%2011\).pdf](https://travel.state.gov/content/dam/childabduction/complianceReports/2016%20IPCA%20Report%20-%20Final%20(July%2011).pdf)>.

<sup>37</sup> Sonali Abhang, ‘Guardianship and Custody Laws in India – Suggested Reforms from Global Angle’ (2015) 20(7) *IOSR Journal of Humanities and Social Sciences* 39, 41.

<sup>38</sup> *Guardians and Wards Act 1890* (India) s 4(2) (‘GWA’).

<sup>39</sup> Abhang, above n 37, 42.

1. In case of a minor boy or unmarried minor girl, [the natural guardian is] the father, and after him, the mother ...
2. The custody of a minor who has not completed the age of five years shall ordinarily be with the mother.<sup>40</sup>

In *Gita Hariharan v Reserve Bank of India*,<sup>41</sup> the court held that the term ‘after’ in the *HGMA* s 6(a) should not be interpreted to mean after the lifetime of the father, but rather that it should be taken to mean in the absence of the father.<sup>42</sup>

The *GWA* and the *HMGA*, however, differ on the welfare principle. While the former places parental authority before the welfare principle, the latter upholds the primacy of the welfare principle in determining guardianship. Therefore, the guardianship of a Hindu child is based upon the welfare principle, overriding parental authority, whereas for a non-Hindu child, the court’s authority to intervene in furtherance of the welfare principle is subordinate to that of the father, as the natural guardian.<sup>43</sup> To summarise the law applicable to custodial claims concerning children, it is arguable that the concept of best interests of the child has not become a foundational theoretical construct within the law. This is largely because the law’s content, derived from religious law, favours one parent, the father, over the mother by designating his right over the custody/guardianship. The *Gita Hariharan* judgment is a significant attempt at changing the relative position of the parents in a custody dispute,<sup>44</sup> arguably the preferential position of father for custody/guardianship has been removed.

Enforcement of foreign court orders is discussed under the *Code of Civil Procedure 1908* (India) (*CCP*).<sup>45</sup> Sections 13 and 14 enact a rule of *res judicata* in cases involving foreign judgments. These provisions embody the principle of private international law that a judgment delivered by a foreign court of competent jurisdiction can be enforced by an Indian court and will operate as *res judicata* between the parties thereto (except in the cases mentioned in s 13):

1. A foreign judgment must be conclusive.
2. Such a judgment must be by a court competent according to the law of the State which has constituted it, and must have directly adjudicated upon the ‘matter’ which is pleaded as *res judicata*. The parties must have submitted to its jurisdiction or been present or represented at the proceedings in the foreign court.<sup>46</sup>
3. A foreign judgment must have been given on the merits of the case.

In few cases within the domain of matrimonial disputes have Indian courts explained the import of s 13 of the *CCP* with regard to enforcement of foreign court orders. In *Y Narsimha Rao v Y Venkata Lakshmi*,<sup>47</sup> the Supreme Court observed that courts in India would not

<sup>40</sup> Hindu Minority and Guardianship Act 1956 (India) s 6(a) (*‘HMGA’*).

<sup>41</sup> (1999) 2 Supreme Court Cases 228 (*‘Gita Hariharan’*).

<sup>42</sup> *Ibid* [25].

<sup>43</sup> *GWA* s 17 emphasises custody issues to be decided by a combined reading of the law to which the minor is a subject with the primacy of the welfare of the minor. See also Abhang, above n 37, 43.

<sup>44</sup> (1999) 2 Supreme Court Cases 228.

<sup>45</sup> *Code of Civil Procedure 1908* (India) s 13 reads as follows:

‘A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except:

- a) where it has not been pronounced by a Court of competent jurisdiction;
- b) where it has not been given on the merits of the case;
- c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
- d) where the proceedings in which the judgment was obtained are opposed to natural justice;
- e) where it has been obtained by fraud;
- f) where it sustains a claim founded on a breach of any law in force in India.’

<sup>46</sup> Anil Chawla, *Legal Status of Foreign Decree of Divorce for Hindu Couple Married in India* (15 April 2014) India Legal Help < <http://www.indialegalthelp.com/files/foreigndivorce.pdf>>.

<sup>47</sup> (1991) 3 Supreme Court Cases 451 (*‘Y Narsimha Rao’*).

recognise a foreign judgment not founded upon merits. Interpreting s 13, the Court held that a competent court is to be identified in accordance with the matrimonial law applicable to the dispute or if the disputants have voluntarily and unconditionally subjected themselves to the jurisdiction of that court. According to the *CCP* s 13(b), a foreign judgment should be founded upon the matrimonial law of the parties and it should not be an *ex parte* decision. Section 13(c) of the *CCP* specifies that where the judgment is founded upon a refusal to recognise that Indian law is applicable, the Indian courts will not recognise such judgment given by the foreign court. In *Y Narsimha Rao*,<sup>48</sup> the court held that the applicable law ought to be the matrimonial law of the parties. If a foreign judgment is founded on a jurisdiction or on a ground not recognised by such matrimonial law, such judgment is not conclusive and therefore, unenforceable in India. Hence, it could be said that the private international law rules applicable in India for enforcement of a foreign judgment specify that forum courts ought to have taken notice of the foreign law (in this case, the Indian law) for their orders to be enforceable. In *International Woolen Mills Limited v Standard Wool (UK) Limited*,<sup>49</sup> the Supreme Court made a comprehensive analysis of s 13(b) of the *CCP*, dealing with the merits of the case. A judgment based upon an incorrect view of international law or a refusal to recognise the law of India, where such law is applicable, is not conclusive.

The statutory provisions of the *CCP* and the existing judicial opinion allows a derivation that Indian law, concerning enforcement of foreign court orders, permits an examination of the merits of the case, and the factual question of the applicability of Indian law. It could be difficult to reconcile this derivation in the context of parental child abduction and the Convention's vision of a return-focused approach,<sup>50</sup> which is based on the idea that the wrongfully removed child ought to be returned to its habitual residence, and courts at the habitual residence are in a better position to address custody of the child. The following section discusses the approach of the Indian courts in the context of international parental child abduction.

### B Judicial Opinion

Indian courts have applied the *GWA* and the *HMGA* to disputes involving custody and guardianship of minors born or residing abroad. However, the conceptual rationale explaining the judicial opinion — best interests of the child, return to the habitual residence, and welfare of the child — has focused on factual determination rather than on development of any theoretical constructs. While there have been references to foreign court opinion in a few cases and stray allusions to conceptual strands of private international law, it does not follow that such references indicate that Indian courts borrowed any theoretical constructs to develop a pattern in handling these disputes, nor has there been an attempt to develop an indigenous one.

In *Surinder Kaur Sandhu v Harbax Singh Sandhu*,<sup>51</sup> and *Elizabeth Dinshaw v Arvind M Dinshaw*,<sup>52</sup> the Supreme Court exercised summary jurisdiction to return the minor children to their habitual residence. This trend, however, did not continue. In *Dhanwanti Joshi v Madhav Unde*,<sup>53</sup> the court specified that the applicable law would be the law of the court in the country to which the child was removed. The court would hear the merits of the case and the welfare of the child would be the primary factor influencing its decision.<sup>54</sup> Noting that the custody orders were interlocutory in nature, the court specified that changes to such orders

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<sup>48</sup> Ibid.

<sup>49</sup> (2001) 5 Supreme Court Cases 265 (25 April 2001).

<sup>50</sup> Silberman, above n 6, 6.

<sup>51</sup> (1984) All India Reporter 1224 (Supreme Court of India) ('*Surinder Kaur*').

<sup>52</sup> (1987) All India Reporter 3 (Supreme Court of India).

<sup>53</sup> (1997) 8 Judgment Today 720 (Supreme Court of India) ('*Dhanwanti Joshi*').

<sup>54</sup> Ibid [31].

ought prioritise the best interests of the child.<sup>55</sup> This dictum is indicative of the fact that Indian courts prefer a review on merits of all enforcement applications related to foreign court custody orders based upon welfare of the child criteria — criteria to be decided under the law of the country to which the child is removed — in the *Dhanwanti Joshi* case,<sup>56</sup> the *GWA* and the *HMGA*.

In *Sarita Sharma v Sushil Sharma*,<sup>57</sup> the Supreme Court heard an appeal against the enforcement of a foreign court order. The husband, with a foreign court order for sole custody after the appellant's violation of her visitation rights and removing the children to India, made an application to the High Court for the custody of the children through enforcement of the foreign court order. In a later challenge in the Supreme Court by the appellant, the Court noted that the decree of divorce and the order for the custody of the children had been passed after she came to India. The Court held that in view of the facts and circumstances of the case, though the decree passed by the US was a relevant factor, it could not override the consideration of the welfare of the minor children.<sup>58</sup> The Court noted the following relevant principles regarding custody of the minor children of the couple and transnational custody disputes generally:

1. Principles of conflict of laws indicate that the court that has the most intimate contact with the issues arising in the case should exercise jurisdiction.
2. Welfare of the minor prevails over the legislative provisions in s 6 of the *HMGA*.
3. The domestic court will consider the welfare of the child as of paramount importance and the order of a foreign court is only a factor to be taken into consideration.<sup>59</sup>

Referring to the British court's dictum in *McKee v McKee*,<sup>60</sup> the Court held that forum courts in non-signatory states could decide upon the welfare of the child, making an independent appreciation of the merits the primordial guiding factor for its decision.

In *Shilpa Aggarwal v Aviral Mittal*,<sup>61</sup> the Supreme Court, hearing an appeal against an order of the High Court in connection with a foreign custody order in favour of the father observed that there are two contrasting principles of law, namely, comity of courts and welfare of the child and that, in matters of custody of minor children, the sole and predominant criterion is the interest and welfare of the minor child.<sup>62</sup> Upholding the High Court decision and ordering the appellant to return the minor to the foreign court jurisdiction, the Supreme Court opined that matters of child custody ought to be adjudicated by courts that have the closest connection with the dispute in question. Relying upon the principle of comity and the best interests of the child, it ordered the return of the child to the English courts' jurisdiction where both parents permanently resided.

In *Ruchi Majoo v Sanjeev Majoo*,<sup>63</sup> the Supreme Court heard a petition from the mother against the father wherein she challenged the High Court's interim order that quashed the guardianship order given in her favour under the *GWA* by the District Court. In this case, the appellant made the application when legal proceedings had already been initiated in a foreign court. The High Court quashed the guardianship order and also held that the issue of the child's custody ought to be decided by the foreign court because it had already passed the protective custody warrant order, and also because the child and his parents were US citizens

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<sup>55</sup> Ibid [21].

<sup>56</sup> (1997) (8) Judgment Today 720 (Supreme Court of India).

<sup>57</sup> (2000) (2) Judgment Today 258 (Supreme Court of India).

<sup>58</sup> Ibid 264-5.

<sup>59</sup> Ibid 265.

<sup>60</sup> [1951] AC 352.

<sup>61</sup> (2009) (14) SCALE 511 (9 December 2009) (Supreme Court of India).

<sup>62</sup> Ibid [23].

<sup>63</sup> (2011) 6 Supreme Court Cases 479.

who were ordinarily resident in the US. Hearing the appeal, the Supreme Court framed three questions for decision:

1. Was the child 'ordinarily resident' in India for the District Court to exercise jurisdiction?
2. Was the High Court right in declining to exercise extraordinary jurisdiction under the *Code of Civil Procedure 1908* (India) s 151, citing 'principle of comity of courts'?
3. Did the order granting custody to the mother need modification to include visitation rights to the father?<sup>64</sup>

It answered the first and the third questions in the affirmative, but the second in the negative, holding that the High Court was wrong to deny jurisdiction. The term 'ordinarily resident', the Court held, must be addressed as a factual question requiring cumulative examination of the circumstances including place of birth, duration of residence etc. On the second question, the Court made an explanatory statement on the role of Indian courts in transnational child custody related disputes:

The duty of a court exercising its *Parens Patraie* [sic] jurisdiction as in cases involving custody of minor children is all the more onerous. Welfare of the minor in such cases being the paramount consideration, the court has to approach the issue regarding the validity and enforcement of a foreign decree or order carefully. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is the mantra in such cases. That does not, however, mean that the order passed by a foreign court is not even a factor to be kept in view. But it is one thing to consider the foreign judgment to be conclusive and another to treat it as a factor or consideration that would go into the making of a final decision.<sup>65</sup>

In *V Ravi Chandran v Union of India*,<sup>66</sup> the Supreme Court heard a habeas corpus application for custody of the child by the father as he pleaded wrongful removal of the child from the US by the mother in violation of a foreign court custody order. It was held that there was nothing on record that could remotely suggest that it would be harmful for the child to return to his native country; hence, the Court directed the repatriation of the child to the jurisdiction of the foreign court. The Court attempted a summation of the law and held that a domestic court deliberating upon the best interests of the child could consider the foreign court order, though it is not conclusive.<sup>67</sup> The persuasiveness of such an order is factual and dependent upon the circumstances of each case. Welfare of the child is of paramount importance,<sup>68</sup> and the principle of comity of courts requires effective consideration of a foreign court order, not an unquestioned enforcement.<sup>69</sup> In decisions involving removal of the child to the jurisdiction of the foreign court, the domestic court could make a summary decision or conduct an elaborate inquiry. In a summary inquiry, the child would be returned to the jurisdiction of the court in the country before the removal was affected unless such return could be shown to be harmful to the child. In the event the domestic court conducts an elaborate inquiry, the court could go into the merits to determine where the permanent welfare of the child lay and ignore the order of the foreign court, or treat the fact of removal of the child from another country as only one of the relevant circumstances. The decision on the return order is based upon a determination of the best interests of the child,<sup>70</sup> and the application of the conflicts rule concerning jurisdiction of the state that has the most intimate contact with the issues arising in the case. Jurisdiction, the

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<sup>64</sup> Ibid [5].

<sup>65</sup> Ibid [33].

<sup>66</sup> (2010) 1 Supreme Court Cases 174.

<sup>67</sup> Ibid [15].

<sup>68</sup> Ibid [20].

<sup>69</sup> Ibid [24].

<sup>70</sup> Ibid [19]-[20]. In *Surya Vadanam* contact with a few principles that made an effective summation of the law on the subject. child custody rel

Court observed, ‘cannot be vested by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged’.<sup>71</sup>

In *Arathi Bandi v Bandi Jagadrakshaka Rao*,<sup>72</sup> the Supreme Court heard a challenge against a habeas corpus order for the custody of the child, and upheld the High Court order for return of the child to the foreign court’s jurisdiction. The Court held that jurisdiction vested in the courts of the state that has the most intimate contact with the issues arising in the case and could not be attracted ‘by the operation or creation of fortuitous circumstances’.<sup>73</sup> The Court cautioned against assumption of jurisdiction by another state in such circumstances as it could encourage forum shopping.<sup>74</sup>

In *Surya Vadanam v State of Tamil Nadu*,<sup>75</sup> the Supreme Court showed renewed commitment to the principle of comity of courts. It upheld the return of the disputant parties’ two minor children to the United Kingdom (‘UK’) for a determination of custody by the UK courts. The Supreme Court referred to the fact that there was a prior order from the English court, hence the ‘first strike principle’ required the decision of that court be respected, through exercise of self-restraint, if the best interests of the child have been effectively addressed by the foreign court.<sup>76</sup> It opined that a substantive order prior in point of time to a substantive order passed by another court (foreign or domestic) must be accorded due respect.<sup>77</sup> The Court held that domestic consideration of the foreign court orders/decrees in child custody disputes ought to be based upon the principle of comity of courts, and the principle of the best interests and the welfare of the child.

The Court held that though these principles appear to be ‘contrasting’ in the manner of their interpretation, leading to either a summary inquiry or an elaborate inquiry into the dispute, they nevertheless require a cumulative application to the facts of any given case.<sup>78</sup> It would not be appropriate for a domestic court with much less intimate contact with the dispute and the disputants (as against a foreign court in any given case) to make a determination on the best interests and welfare of the child.<sup>79</sup> Such determinations are, appropriately, within the purview of the courts with the closest connection with the child before its removal.<sup>80</sup> The Court preferred not to jettison the comity of courts rule, except for special and compelling reasons. It decided against such a deviation in disputes where only an interim or an interlocutory order has been passed by a foreign court.<sup>81</sup> Foreign court orders might be disregarded when such court did not have jurisdiction, for example, if the parties are not ordinarily resident within that jurisdiction. Furthermore, when there is an interim order of a foreign court, the domestic court must have special and compelling reasons to order an elaborate inquiry as against a summary inquiry. An elaborate inquiry must be preceded by an appreciation of the following:

1. The nature and effect of the interim or interlocutory order passed by the foreign court.
2. The existence of special reasons for and against repatriation of the child to the jurisdiction of the foreign court.

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<sup>71</sup> Ibid [21].

<sup>72</sup> (2013) 15 Supreme Court Cases 790.

<sup>73</sup> Ibid [21].

<sup>74</sup> Ibid [36].

<sup>75</sup> (2015) All India Reporter 2243 (Supreme Court of India) (*Surya Vadanam*).

<sup>76</sup> Ibid [50].

<sup>77</sup> Ibid [56].

<sup>78</sup> Ibid [31].

<sup>79</sup> Ibid [53].

<sup>80</sup> Ibid [53].

<sup>81</sup> Ibid [54].

3. The possible causation of physical or psychological harm to the child, or any legal harm to the parent with whom the child is in India. Domestic courts ought to make orders with due regard to this possibility.
4. The alacrity with which the parent moves the concerned foreign court or the concerned domestic court. If the time gap is unusually large and is not reasonably explicable, and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry.<sup>82</sup>

### 1 Shared Custody/Residence Orders

The concept of shared custody/residence orders is a recent occurrence in India.<sup>83</sup> In *Eugenia Archetti Abdullah v State of Kerala*<sup>84</sup> the court, pending custody proceedings in the foreign court, ordered custody of the children to the mother with the stipulation of shared custody/visitation rights until the mother left India. In *Leeladhar Kachroo v Umang Bhat Kachroo*,<sup>85</sup> the court held that it was empowered to entrust the custody of a child to a parent who resides outside its jurisdiction, if it is conducive to the welfare of the child. Owing to the absence of a statutory provision regarding shared residence orders within Indian law, the courts interpret foreign courts' shared residence orders in light of the best interests of the child.<sup>86</sup>

### C Indian Jurisprudence on Foreign Courts' Custody Orders – A Few Conclusions

The different judgments described above lead to a few conclusions.

1. The 'most intimate contact' and the 'closest concern' determinants, derived from the *Surinder Kaur* decision, remains the law.<sup>87</sup> A foreign court in a jurisdiction that has the most intimate contact and the closest concern with the child, rather than a domestic court, would be better equipped and perhaps best suited to appreciate the social and cultural milieu in which the child has been brought up.
2. The principle of comity of courts remains the preferred interpretation rule. Foreign court orders could be disregarded only when there exist special and compelling reasons to do so.
3. Best interests of the child and welfare of the child, derived from the law of the country to which the child is removed, are the criteria that the courts would apply to review on merits in an enforcement application founded upon a foreign court custody order. However, the jurisprudence in India has not developed any detailed criteria to decide the best interests of the child. As evident in the case law, while in some cases the welfare of the child alone has been the determining factor, in other matters welfare was understood along with the custody rights of the parents under the religious/secular law, which could accord the priority to the father. Thus, the decision on the best interests of the child, in those circumstances, would be dependent upon the rights of the parent under the respective religious law. The saving grace within the judicial dicta has been the reiteration of the welfare of the child as a determinant factor.
4. The habitual residence of the minor and the parents could be an important consideration, a feature that has also been adopted by the courts in contracting States.

<sup>82</sup> Ibid [60].

<sup>83</sup> Anil Malhotra and Ranjit Malhotra, *India, Inter-country Parental Child Removal and the Law* (30 September 2008) <<http://www.reunite.org/edit/files/articles/2008%20IFSL%20Contribution.pdf>>.

<sup>84</sup> 2005 (1) Himachal Law Reporter (Ker) 34 (7 April 2004) (Kerala High Court).

<sup>85</sup> 2005 (2) Himachal Law Reporter (Del) 449 (8 June 2005) (Delhi High Court).

<sup>86</sup> Malhotra and Malhotra, above n 83, 18.

<sup>87</sup> (1984) All India Reporter 1224 (Supreme Court of India).

### III THE HAGUE CONVENTION ON CIVIL ASPECTS OF CHILD ABDUCTION

Silberman viewed the Convention's return-focused approach to be remedial and preventive.<sup>88</sup> Noting the fact that enforcement of foreign custody orders could result in protracted and delayed litigation, the Convention enjoins contracting States to use the most expeditious procedures available.<sup>89</sup> Return, however, is discretionary if more than one year has passed and the child is settled in the new environment.<sup>90</sup> The court determining the return application in civil proceedings may hear proof concerning possible perceived harm to the child from return to the country of habitual residence.<sup>91</sup> The court may also take into account a child's preference if the child is determined to be of sufficient maturity to express such preference.<sup>92</sup> The abducting parent can raise defences, but these are purposely limited. The Convention aims to 'educate'<sup>93</sup> the judiciary to encourage a change in attitude that would reflect an abandonment of the practice of using the best interests of the child to justify keeping the child in the jurisdiction to which the child has been removed.<sup>94</sup>

The Convention's Explanatory Report observed that re-establishing 'the status quo [in the child's habitual residence] disturbed by the actions of the abductor'<sup>95</sup> was necessary, since to do otherwise would assist the abductor to gain an unfair advantage — and a return order prevents forum shopping.<sup>96</sup> The appropriateness of habitual residence as the sole connecting factor in the Convention cases has been explained by two main reasons. Firstly, parents who abduct their children do so with the intention of 'creating jurisdictional links which were more or less artificial'.<sup>97</sup> The purpose is to alter the existing custody status quo, and prompt summary return was seen as remedying this problem. It could, therefore, be said that the Convention's purpose is more of a forum decider, a result of ss 16 and 19: that courts upon receiving the application for return shall not decide upon the merits of the custody dispute, and that decisions under the Convention shall only be concerning the return of the child and not on any custody issue. Secondly, a child's habitual residence immediately preceding their abduction was viewed as providing the most appropriate moral and cultural framework in which to construct the best interests of the child legal standard.<sup>98</sup>

#### A *Exceptions to Return*

The exceptions articulated in art 13 of the Convention<sup>99</sup> are to be interpreted to benefit protection of the best interests of the child. The first limb provides exception when a removal

<sup>88</sup> Silberman, above n 6, 6.

<sup>89</sup> *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) art 2.

<sup>90</sup> *Ibid* art 12.

<sup>91</sup> *Ibid* art 13(b).

<sup>92</sup> *Ibid* art 13.

<sup>93</sup> Lara Cardin, above n 30, 143.

<sup>94</sup> Cornelis D van Boeschoten, 'Hague Conference Conventions and the United States: A European View' (1994) 57(3) *Law and Contemporary Problems* 47, 54.

<sup>95</sup> Pérez-Vera, above n 14, 430.

<sup>96</sup> Danielle Bozin-Odhiambo, 'Re-examining Habitual Residence as the Sole Connecting Factor in Hague Convention Child Abduction Cases' (2012) 3(1) *Family Law Review* 4, 5.

<sup>97</sup> Pérez-Vera, above n 14, 429.

<sup>98</sup> *Ibid* 431.

<sup>99</sup> 'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'

is not perceived to be wrongful — for example, when custody rights did not exist or they were not being exercised. The burden of proof is on the abductor to prove that custody rights either did not exist or were not being exercised by the dispossessed parent, otherwise the removal is deemed wrongful. The second limb specifies that the summary return mechanism may not be activated when there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place them in an intolerable situation.<sup>100</sup> The defences are coupled with discretion, founded upon a belief that, in certain situations, the child's interests may require more than its summary return.<sup>101</sup> Forum courts ought to remember that an inquiry into a plea of defence may not become a comprehensive investigation into the merits of the underlying custody case.<sup>102</sup> The defences under art 13 of the Convention include:

1. Actual exercise of custody rights.
2. Acquiescence or consent to the removal — a return need not be ordered by the court if the respondent demonstrates by a preponderance of evidence that the person having care of the child had consented to the removal or retention or subsequently acquiesced in the removal or retention of the child. Proof of consent or acquiescence by a parent to a child's residing in the foreign country rebuts a claim for 'wrongful' removal or retention. Silberman observed 'the validity of this defense turns on competing versions of whether the departing parent left with or without consent'<sup>103</sup> Further, there could be instances of the left-behind parent negotiating custodial arrangements with the abducting parent, and that could trigger an acquiescence defence.<sup>104</sup>
3. Grave risk of physical or psychological harm to the child.
4. Furthermore, art 20 of the Convention specifies that a court is not bound to order return of the child if the parent proves that the return of the child would result in a violation of fundamental principles of human rights and freedoms. However, there is no existing case law concerning art 20.<sup>105</sup>

### B *The Hague Convention – India's Concerns Regarding Accession*

Apprehension exists regarding the non-signatory status of India,<sup>106</sup> especially with regard to an elaborate inquiry into the best interests/welfare of the child. There are also a few concerns regarding the perceived gaps in the Convention. They include non-consideration of domestic violence within the exceptions, the threat of criminal law application against the abducting parent upon return with the child, and the absence of a safe harbour order for the abducting parent upon return of the child to the jurisdiction of the courts of habitual residence.

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The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

<sup>100</sup> Lubin, above n 11, 428.

<sup>101</sup> *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) art 13.

<sup>102</sup> Lara Cardin, above n 30, 148.

<sup>103</sup> Linda Silberman, 'Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis' (1994) 28(1) *Family Law Quarterly* 9, 25.

<sup>104</sup> *Ibid* 26. Silberman suggested that courts should desist from looking for generalised patterns derived from precedent, and be generally circumspect about attempts to translate negotiation into acquiescence.

<sup>105</sup> *Ibid* 29. Silberman drew attention to a suggestion that art 20 could be invoked whenever the State of habitual residence does not ensure a 'due process' hearing on the issue of custody. She however cautioned against importing any one national standards of fairness overlooking the fundamental premise of the Convention that the State of habitual residence has the strongest claim in having its procedure and its standards applied, irrespective of similarities with the law of the nationality of the parties.

<sup>106</sup> Malhotra and Malhotra, above n 83; US House Committee on Foreign Affairs, *Hope Deferred: Securing Enforcement of the Goldman Act to Return Abducted American Children* (14 July 2016) <<http://docs.house.gov/meetings/FA/FA16/20160714/105221/HHRG-114-FA16-Wstate-AbbiR-20160714.pdf>>.

Another significant concern has been the restricted interpretation of the art 13(b) grave risk exception under the Convention.<sup>107</sup> Schuz suggested a narrow construction of the exemptions as not to include all of the situations where a return might run contrary to the best interests of the child.<sup>108</sup>

The Convention seems to address the problem of parental child abduction within the context of removal from the habitual residence in contemporary times where transnational families are increasingly becoming a reality.<sup>109</sup> The changed pattern of parental child abductions could be difficult to address within the parameters of the Convention, especially when read with causes like domestic violence that trigger the wrongful removal of children.<sup>110</sup> The exceptions to return, ie grave risk of exposure of the child to physical or psychological harm,<sup>111</sup> have led to adoption of a restrictive approach — a derivation from the interpretation of this exception states that the Convention's art 13(b) exception 'was not intended to be used by defendants as a vehicle to litigate (or re-litigate) the child's best interests'.<sup>112</sup> A broadly worded exception may also undermine the purposes of the Convention to act as a deterrent against international child abductions and return of the child to their habitual residence.

However, in light of the changed profile of abductors, a narrow interpretation of art 13(b) does little to protect victims of domestic violence or their children.<sup>113</sup> Quillen argued that the overwhelming importance attached to the quick return of the child could result in a court's limited analysis of the art 13(b) defence.<sup>114</sup> The Convention prescribes the remedy of prompt return of the child to its habitual residence. A victim of domestic violence who relocated with the child to another jurisdiction to escape the violence could be placed at a higher risk of being subjected to separation violence by the abuser.<sup>115</sup> Or the abducting parent who fled from a domestic-violence scenario may be faced with an order to return the child alone. The abducting parent would, as Merle Weiner observed, return with the child rather than risk returning the child alone.<sup>116</sup> While there is no academic writing or published data concerning domestic violence-induced parental child abductions to India, there are narratives drawn from the court cases,<sup>117</sup> and reports in the media,<sup>118</sup> that suggest a pattern of violence often

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<sup>107</sup> *Freidrich v Freidrich* 78 F 3d 1060, 1069 (6<sup>th</sup> Cir. 1996) ('*Freidrich*'). See Yoko Konno, 'A Haven for International Child Abduction: Will the Hague Convention Shape Japanese Family Law?' (2016) 46(1) *California Western International Law Journal* 39. Konno commented that the art 13(b) exception is not likely to be applied to a case involving unsubstantiated domestic violence involving the mother, following the *Freidrich* opinion where the court required grave risk/harm to the child if returned.

<sup>108</sup> Schuz, above n 27, 439.

<sup>109</sup> Bozin-Odhiambo, above n 96, 12

<sup>110</sup> Carol Bruch, 'The Unmet Needs of Domestic Violence Victims and their Children in Hague Child Abduction Convention Cases' (2004) 38(3) *Family Law Quarterly* 529; Shani M King, 'The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence' (2013) 47(2) *Family Law Quarterly* 299; Brian Quillen, 'The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction' (2014) 49 *Texas International Law Journal* 621.

<sup>111</sup> *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) art 13(b).

<sup>112</sup> Browne, above n 4, 1202. Browne observes that while art 13(b) of the Convention is the common exception pleaded by the defendants, there is similarity in the opinion of the Congress, the State Department and the Convention drafters that it ought to be interpreted narrowly.

<sup>113</sup> Carol Bruch, above n 110, 532-5.

<sup>114</sup> Brian Quillen, 'above n 110, 626-7.

<sup>115</sup> *Ibid* 627.

<sup>116</sup> Merle H Weiner, 'International Child Abduction and the Escape from Domestic Violence' (2000) 69(2) *Fordham Law Review* 593.

<sup>117</sup> See, eg, *Arati Bandi v Bandi Jagadrakshaka Rao* (2013) 15 Supreme Court Cases 790 [3]. The Supreme Court of India noted the factual existence of a US court order related to pleadings of domestic violence.

preceding the wrongful removal and relocation of the child to India by the abducting parent. These reports also explain the cultural nuances that inform such patterns of violence.<sup>119</sup> Furthermore, Schuz suggested that a forum court hearing a return application could interpret the exceptions to return, especially the 'grave risk' exception, to deny return when the return cannot be reconciled with the obligation to consider the best interests of the child as a primary consideration.

In the *Surya Vadan* case,<sup>120</sup> the Indian return order included the accompaniment of the mother. However, an abducting parent could be facing a criminal law action in the country of the habitual residence to which they are ordered to return the child. Return of the child could be safeguarded by having courts in the habitual residence make a 'safe harbour' order prior to the entry of a return order in the requested-from state.<sup>121</sup> They could help ensure that courts in the requested-from state would treat return applications as such and not enter custody-related orders.

To further address the concerns arising from international parental child abduction, the Indian courts could refer to the US court decision in *Condon v Cooper*,<sup>122</sup> an interesting example of judicial craftsmanship. The Court of Appeal heard an appeal against an order permitting relocation of the mother to Australia that would adversely affect the father's non-custodial rights. The Court made a notable grafting in the order by subjecting the mother's relocation to certain conditions. The mother had consented to (and the Court accepted) continuing jurisdiction of the matter in the California courts, and the Court imposed a bond to ensure the mother's compliance with the concession, as well as the other conditions attached to the order permitting relocation. While the creativity illustrated by this dictum is interesting, a more effective and cooperative way, especially for non-signatories like India, would be to also consider accession to the *Hague Convention on Parental Responsibility and Protection of Children*,<sup>123</sup> which provides for enforcement of custody and access orders of contracting states and establish formal methods of cooperation, communication, and mutual assistance between those states.

#### IV THE 2016 BILL

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<sup>118</sup> Mridula Chari, *Why Domestic Abuse Victims Are Opposed to India's New Bill on International Child Abduction* (17 August 2016) Scroll < <http://scroll.in/article/813953/why-domestic-abuse-victims-are-opposed-to-indias-new-bill-on-international-child-abduction>>; Neeta Mishra, *International Child Abduction And Domestic Violence: Why Children Are Sent Back To Violent Homes* (1 September 2016) Business World < <http://businessworld.in/article/International-Child-Abduction-And-Domestic-Violence-Why-Children-Are-Sent-Back-To-Violent-Homes/01-09-2016-105113/>>.

<sup>119</sup> S D Dasgupta, 'Exploring South Asian Battered Women's Use of Force in Intimate Relationships' (2007) *Manavi Occasional Paper Series* 1, 13. Dasgupta traces the pattern of violence experienced by South Asian women as connected with cultural patterns of marital relationships that are taken to their life in the host country; unfamiliarity with the language, culture and the legal system and a strange society within the host country turns the women diffident to approach the law enforcement authorities; further they are dissuaded to do so by their spouses, who often preempt their effort for legal help by preempting them in approaching the law enforcement agencies.

<sup>120</sup> *Surya Vadan* (2015) All India Reporter 2243 [16], [73] (Supreme Court of India).

<sup>121</sup> Silberman, above n 6, 25. See also, Linda Silberman, 'Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA' (2003) 38(4) *Texas International Law Journal* 52, nn 71.

<sup>122</sup> 73 Cal App 2d 33 (1998).

<sup>123</sup> Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, opened for signature 19 October 1996, [2008] EC 431 (entered into force 1 January 2002) < <https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf>>.

In 2009, the Law Commission of India recommended India's accession to the Convention.<sup>124</sup> Their Report lamented the adverse effects on children caught in the fire of shattered relationships,<sup>125</sup> and cautioned that non-accession to the Convention may have a negative influence on a foreign judge's decision on custody-related matters, including permission to travel to India.<sup>126</sup> However, there is currently no legislation in place. The draft legislation concerning accession to the Convention has been opened for comments, review and parliamentary approval.<sup>127</sup> It seeks to create a central authority for responsibilities under the Convention for securing the return of removed children by instituting judicial proceedings in the concerned High Court. It outlines the following:

1. The appropriate authority, or a person of a contracting country, may apply to the central authority for return of a removed child to the country of habitual residence.<sup>128</sup>
2. The High Court may refuse to make a return order if there is grave risk of harm or if it would put the child in an intolerable situation. Consent or acquiescence may also lead to refusal for return of a child by the court.<sup>129</sup>
3. The court, if convinced of the child's age and maturity, may also consider its view on the return order.<sup>130</sup>
4. Prior to the return order the court could request the central authority to obtain information from the relevant authorities of the country of habitual residence, a decision or determination related to wrongful removal of the child.<sup>131</sup>
5. The return order could include a direction that the person responsible for removal of the child from its habitual residence pay the expenses for their return.<sup>132</sup>
6. The Secretary, Ministry of Women and Child Development, Government of India could be appealed to within fourteen days of the order of refusal by the central authority to process the return application.<sup>133</sup>
7. The High Court, on application, could make interim orders for the welfare of the child.<sup>134</sup>

## V CONCLUSION

While the need for an expeditious return mechanism cannot be gainsaid, it is imperative that the proposed accession to the Convention and the ensuing legislation take note of the contemporary profile of the abduction, especially factors such as transnational families and relocation, domestic violence and, most importantly, policy decisions recommending safe harbour orders that would ensure no harm to the abducting parent accompanying the returning child. Japan's enabling law upon accession to the Convention has an interesting version of the art 13(b) exception. The judges presiding over return cases are authorised to take a wide variety of factors into account in evaluating whether an exception is applicable,

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<sup>124</sup> Law Commission of India, *Need to Accede to the Hague Convention on the Civil Aspects of International Child Abduction* (1980), Report No 218 (2009).

<sup>125</sup> *Ibid* [2.15]-[2.16].

<sup>126</sup> *Ibid* [2.16].

<sup>127</sup> The Civil Aspects of International Child Abduction Bill 2016 (India) <[http://www.prsindia.org/uploads/media//draft/Draft\\_Implementing\\_Legislation\\_Hague\\_Convention.pdf](http://www.prsindia.org/uploads/media//draft/Draft_Implementing_Legislation_Hague_Convention.pdf)>.

<sup>128</sup> *Ibid* s 7(1).

<sup>129</sup> *Ibid* s 16(1)(a)-(b).

<sup>130</sup> *Ibid* s 16(2).

<sup>131</sup> *Ibid* s 19(2).

<sup>132</sup> *Ibid* s 20.

<sup>133</sup> *Ibid* ch 4.

<sup>134</sup> *Ibid* ch 5.

including the risk of violence (including verbal behaviour) to the taking parent or the child after a return.<sup>135</sup>

India's accession to the Convention would help ensure application of international standards when applying the best interests of the child principle. Furthermore, accession would help position this principle independent of the custody rights within the applicable domestic law. Thus, the concern that gender-selectivity between parents applicable in child custody disputes may impact an international child removal-related application, could be removed. As India charts its course to accession, legislative efforts to implement the Convention should factor in the changed profile of the abductors and the reasons prompting wrongful removal, thereby better ensuring that the child is not subjected to any unnecessary and preventable physical and psychological hardship. The legislation should also specify that a return application before the forum courts would be conducted according to the legislation alone. Furthermore, as an extended agenda for future legislative efforts, the concerns regarding gender-selectivity within the domestic custody/guardianship laws should be addressed.

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<sup>135</sup> *Act for Implementation of Convention on the Civil Aspects of International Child Abduction (the Implementation Act) 2013* (Japan) art 38(1)(4). See, Colin P A Jones, 'Towards an "Asian" Child Abduction Treaty? Some Observations on Singapore and Japan Joining the Hague Convention' (Working Paper No 31, Asian Law Institute, August 2013) 25. Jones commented that this provision could involve an evaluation of both parents' custodial capacities, a determination that is essentially prescribed by art 19 of the Convention.

# PROTECTING AUTHORITY, BURYING DISSENT: AN ANALYSIS OF AUSTRALIAN NUCLEAR WASTE LAW

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*This paper considers the Australian legal framework for a national nuclear waste repository in the context of the Commonwealth government's preference for a controversial site located near Barndioota, in South Australia's Flinders Ranges. Although the environmental, political and economic justifications for a national repository are acknowledged, the article suggests that the Commonwealth's failure, to date, to secure a site for the repository has resulted from its disregard for dissent from State and Territory governments, as well as from communities local to proposed sites. In considering whether the current framework provides for a fairer process with respect to the proposed South Australian site, the author examines the arguments and outcomes of previously litigated actions, the provisions of the National Radioactive Waste Management Act 2012 (Cth) (NRWMA), the assessment and approval process under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBCA), and the constitutionality of the Commonwealth's approach of excluding State and Territory laws from application at the repository site. The paper argues that the current law protects the Commonwealth's decision-making in relation to a repository site, but at the expense of matters important to the public interest, and with the consequence that the siting process is inherently compromised.*

## I INTRODUCTION

The regulation of nuclear waste is necessarily concerned with the imposition of boundaries for the purposes of restricting public access. Subterranean repositories are an internationally recommended solution, accepted by the Australian Radiation Protection and Nuclear Safety Agency ('ARPANSA'), for ensuring the isolation of radioactive material from the biosphere and for thereby limiting the exposure of living organisms to dangerous levels of radiation.<sup>1</sup>

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An earlier version of this paper was submitted as an Advanced Research Project thesis at Macquarie Law School, completed under the supervision of Professor Alexander Zahar, now of the Research Institute of Environmental Law at Wuhan University. The author is grateful to both Professor Zahar and Mr Paul Govind of Macquarie Law School for thoughtful comments, guidance and encouragement.

<sup>1</sup> International Atomic Energy Agency ('IAEA'), *IAEA Safety Standards Series No. SSR-5: Disposal of Radioactive Waste* (2001) 2. In planning for a national repository, the Commonwealth until very recently relied upon the National Health and Medical Research Council's *Code of practice for the near-surface disposal of radioactive waste in Australia* (1992). It has since retracted this Code, relying instead exclusively upon the 'trusted international standard' for radioactive waste disposal established by the IAEA, of which Australia is a member State: Australian Radiation Protection and Nuclear Safety Agency ('ARPANSA'), *Publications: Radiation Health Series* (12 August 2016) <<http://www.arpansa.gov.au/Publications/Codes/rhs.cfm>>.

With Australian waste currently stored in temporary facilities,<sup>2</sup> the Commonwealth has for decades proposed a National Radioactive Waste Management Facility ('NRWMF') for the near-surface disposal of the country's low level waste ('LLW')<sup>3</sup> and for secure storage of its intermediate level waste ('ILW'),<sup>4</sup> the end results of scientific research, industrial applications, and the production and use of radiopharmaceuticals.<sup>5</sup>

However, the ferocity of opposition to a nuclear waste facility – on the part of environmental non-government organisations, communities local to proposed sites, many Traditional Owners and, historically, State governments – has meant that the NRWMF has so far failed to materialise. Concerns that have typically imbued the public response to a waste dump have included 'public fear of radiation, lack of trust in experts and institutions',<sup>6</sup> and the more fundamental 'desire for local autonomy in the use of land, and freedom from outside interference'.<sup>7</sup> In light of this clash of interests between the Commonwealth and those opposed to a national repository, this paper considers how the need to isolate and shield nuclear waste from the public and from the environment has been provided for in the Australian legal framework and gauges the extent to which the Commonwealth's efforts to locate a repository are themselves shielded from challenge and dissent by that very framework. In undertaking such an inquiry, the article acknowledges, from the outset, the justifications for a national nuclear waste repository, but also examines what may be endangered or diminished under the Commonwealth's current approach of limiting or preventing public participation and litigated actions.

The Commonwealth government's recently announced preference for the newly nominated South Australian site at Wallerberdina Station near Barndioota in the Flinders Ranges has returned the search for a suitable repository site to familiar territory. The project has been met with significant local opposition, amid concerns about environmental safety, the impacts on Aboriginal remains, sites and songlines,<sup>8</sup> and the inadequacy of public consultation in the

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<sup>2</sup> Low Level Waste ('LLW') and short-lived Intermediate Level Waste ('ILW') are held in Commonwealth and in State and Territory stores, while long-lived ILW is held by the Commonwealth at the Lucas Heights reactor site: Commonwealth of Australia, *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management National Report* (2011) ('*Joint Convention 2011 Report*') 25–6. Management practices remain unchanged in 2014: Commonwealth of Australia, *Joint Convention on the Safety of Spent Fuel Management and Radioactive Waste Management National Report* (2014) ('*Joint Convention 2014 Report*') 12.

<sup>3</sup> Organisation for Economic Co-operation and Development, *Low-level radioactive waste repositories: An analysis of costs* (1999) 21. LLW, described as encompassing 'a very broad range of waste', may include 'short-lived radionuclides at higher levels of activity concentration and also long-lived radionuclides at relatively low levels of activity concentration', requires 'robust isolation and containment for periods of up to a few hundred years', and is 'suitable for disposal in engineered near-surface disposal facilities': International Atomic Energy Agency, *IAEA Safety Standards No.GSG-1: Classification of Radioactive Waste* (2009) 5.

<sup>4</sup> ILW may contain 'alpha-emitting radionuclides that will not decay to a level of activity concentration acceptable for near surface disposal during the time for which institutional controls can be relied upon' and therefore requires disposal at greater depths than that provided by near-surface disposal, in order to deter access and retrieval: *Ibid* 6.

<sup>5</sup> Gerald Nagtzaam and Andrew Newman, 'Merely Unpicking the Gordian Knot: The Ongoing Quest to Build a Federal Low Level Radioactive Waste Disposal Facility in Australia' (2015) 18(1) *Australasian Journal of Natural Resources Law and Policy* 23, 24; *Joint Convention 2011 Report* 7.

<sup>6</sup> Andrew Newman and Gerry Nagtzaam, *Decision-making and Radioactive Waste Disposal* (Routledge, 2016) 9.

<sup>7</sup> Michael B Gerrard, *Whose Backyard, Whose Risk: Fear and Fairness in Toxic and Nuclear Waste Siting* (MIT Press, 1994) 104.

<sup>8</sup> Friends of the Earth Adelaide, 'Adnyamathanha Traditional Owners Will Fight Nuclear Waste Dump Plan' (Media Release, 29 April 2016) <<http://www.adelaide.foe.org.au/adnyamathanha-traditional-owners-will-fight-nuclear-waste-dump-plan/>>.

lead up to the announced preference for the site.<sup>9</sup> Lending substance to this latter concern, the choice of Barndioota from six nominations was apparently based on ‘unambiguous and broad community support’ for the repository to be located at the site,<sup>10</sup> notwithstanding the Commonwealth’s own evidence to the contrary revealing significant indigenous opposition,<sup>11</sup> and despite South Australian legislation prohibiting any such facility.<sup>12</sup>

In justifying a site nomination, the Commonwealth may rely, as it has always done, on its environmental obligations. For the third-largest producer of uranium,<sup>13</sup> a national repository has long held value in terms of demonstrating Australia’s concrete, ethical commitment to domestic radioactive waste management within a competitive and security-conscious global market.<sup>14</sup> A law that facilitates product stewardship expresses that commitment, serves to shed a more benign light over a nuclear industry prone to attracting environmental and political controversy, and thus assists Australia’s export prospects. The economic and social benefits of supporting Australia’s burgeoning nuclear medicine industry are also persuasive. The NRWMF would allow for increased ILW storage capacity, critical to long-term implementation of the national Nuclear Medicine Project.<sup>15</sup> The Project envisions a tripling of radioisotope production for the supply of 25-30% of the global demand for nuclear medicine and concomitant export income.<sup>16</sup>

Intergenerational equity is a related, and equally compelling reason for advancing a national nuclear waste dump. Informed by the principle of sustainable development, intergenerational equity stipulates that there is a duty on the part of the present generation to manage the environmental risks created by its use of resources, including the long-term risks arising from the production of radioactive material.<sup>17</sup> Accordingly, the significant benefits Australia reaps from the nuclear industry and its contribution to the fuel cycle fosters the need for management of radioactive waste in the present, such that ‘an unfair burden is not placed on future generations’.<sup>18</sup> Further validation for a repository comes from the fact that the burden in question may, from one point of view, be described as

<sup>9</sup> Natalie Whiting, ‘Hawker Locals Reject Nuclear Dump Proposed for Wallerberdina Station at Packed Public Meeting’, *ABC News* (online), 7 May 2016 <<http://www.abc.net.au/news/2016-05-07/locals-reject-wallerberdina-nuclear-dump-at-hawker-meeting/7393082>>; Calla Wahlquist, ‘Indigenous Owners Outraged at Site Earmarked for Australia’s First Nuclear Waste Dump’, *The Guardian* (online), 29 April 2016 <[https://www.theguardian.com/environment/2016/apr/29/indigenous-elders-outraged-at-site-earmarked-for-australias-first-nuclear-waste-dump?CMP=share\\_btn\\_link](https://www.theguardian.com/environment/2016/apr/29/indigenous-elders-outraged-at-site-earmarked-for-australias-first-nuclear-waste-dump?CMP=share_btn_link)>.

<sup>10</sup> Department of Industry, Innovation and Science, *National Radioactive Waste Management Facility Questions and Answers – Phase 2* (Commonwealth of Australia, 6 May 2016) 1.

<sup>11</sup> Of local indigenous community members surveyed for their views, only 3% supported the NRWMF on the site nominated: Department of Industry, Innovation and Science, *National Radioactive Waste Management Facility Community Sentiment Survey: Wave 2 Report of Findings* (Comm of Australia, April 2016) 10 <<http://www.radioactivewaste.gov.au/sites/prod.radioactivewaste/files/files/NRWMF%20Community%20Sentiment%20Surveys%20Report.pdf>>.

<sup>12</sup> Nuclear Waste Storage Facility (Prohibition) Act 2000 (SA).

<sup>13</sup> World Nuclear Association, *Australia’s Uranium* (July 2016) <<http://www.world-nuclear.org/information-library/country-profiles/countries-a-f/australia.aspx>>.

<sup>14</sup> Clarke and Fruhling argue that Australia’s consideration of nuclear waste disposal needs to be seen through the lens of the philosophy expressed in the 1984 Australian Science and Technology Council (‘ASTEC’) Report commissioned by the Hawke government: Michael Clarke and Stephen Fruhling, *Australia’s Nuclear Policy: Reconciling Strategic, Economic and Normative Interests* (Routledge, 2<sup>nd</sup> ed, 2016) 105. The ASTEC Report recommended that ‘as an exporter of uranium, Australia has a responsibility to participate in and assist the development of all aspects of radioactive waste management’: Australian Science and Technology Council, *Australia’s Role in the Nuclear Fuel Cycle: A Report to the Prime Minister* (1984) 19 (‘ASTEC Report’).

<sup>15</sup> Australian Nuclear Science and Technology Organisation, *What is the ANSTO Nuclear Medicine Project?* <<http://www.ansto.gov.au/BusinessServices/ANMProject/AboutANM/index.htm>>.

<sup>16</sup> Australian Nuclear Science and Technology Organisation, *Going global with nuclear medicine* (26 November 2014) <<http://www.ansto.gov.au/AboutANSTO/MediaCentre/News/ACS056435>>.

<sup>17</sup> International Atomic Energy Agency, *Handbook on Nuclear Law* (IAEA, 2003) 8–9.

<sup>18</sup> South Australia, Nuclear Fuel Cycle Royal Commission, *Nuclear Fuel Cycle Royal Commission Report* (2016) 79 (‘SA Nuclear Fuel Cycle Royal Commission Report’).

environmentally ‘insignificant’.<sup>19</sup> Nuclear waste, in general, is more easily contained and controlled than other more diffuse environmental problems, with LLW containing a fraction of the radioactivity of all nuclear waste.<sup>20</sup> Also, domestic volumes are relatively small compared to other hazardous wastes produced, at least based on current outputs.<sup>21</sup> In 2011, for instance, Australia’s volume of ILW constituted the equivalent of ‘a typical house’.<sup>22</sup> The proposed site for the NRWMF, moreover, would occupy a mere 100 hectares,<sup>23</sup> and employ engineered barriers to prevent the release of radioactive material for the duration of the period necessary for radioactivity to subside.<sup>24</sup>

Notwithstanding these justifications for the NRWMF, any truncation of public participation in the site approval process would have undesirable consequences for the Commonwealth, as well as for the communities affected by the siting. As Holland notes, the danger in limiting the public’s say on a repository means opposition is inevitably augmented, leading to the failure of a site to be appropriately located.<sup>25</sup> Newman and Nagtzaam concur, arguing that the lack of an NRWMF to date results from a denial in the past of avenues for environmental justice, a concept they define as ‘the fair treatment and meaningful involvement of all people’, regardless of racial and socio-economic difference, with regard to decisions affecting their environment.<sup>26</sup>

Attempts, both within Australia and overseas, to site nuclear waste facilities on traditional lands of indigenous peoples or on rural, sparsely populated country, have met with understandable opposition where the communities impacted by proposals have felt deliberately targeted and politically disempowered on the basis of their geographic isolation or socio-economic disadvantage.<sup>27</sup> An environmentally just outcome is certainly more likely to result from a fairer siting procedure that seeks the participation of those likely to be particularly affected by siting decisions. The recent South Australian Nuclear Fuel Cycle Royal Commission condoned the notion of South Australia hosting repositories for both national and imported nuclear waste,<sup>28</sup> but also recognised that the State’s Aboriginal peoples have had to endure the negative legacy of nuclear weapons testing at Maralinga during the 1950s.<sup>29</sup> The Royal Commission therefore recommended ‘a sustained, respectful and inclusive process’ of public consultation for any waste repository proposals on land in which there are Aboriginal rights and interests.<sup>30</sup>

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<sup>19</sup> Uranium Mining, Processing and Nuclear Energy Review Taskforce, Commonwealth of Australia, *Uranium Mining, Processing and Nuclear Energy – Opportunities for Australia?* (2006) 60 (*‘UMPNER Report’*).

<sup>20</sup> *Ibid.*

<sup>21</sup> The total volume of radioactive waste held in Australia was approximately 4000m<sup>3</sup> in 2011, increasing at that time by ‘less than one shipping container a year’: Australian Nuclear Science and Technology Organisation (*‘ANSTO’*), *Management of Radioactive Waste in Australia* (2011), 4. These figures are confirmed in the *Joint Convention 2011 Report* 96, and are consistent with the updated figures in the *Joint Convention 2014 Report* 66. By comparison, in 2009-2010, a total of 3,500 kilotonnes of hazardous waste was produced in Australia, representing 6% of the total waste nationally generated: Australian Bureau of Statistics, *Hazardous Waste* (19 February 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/4602.0.55.005~2013~Main+Features~Hazardous+Waste?OpenDocument>>.

<sup>22</sup> The total volume of ILW in 2011 was a mere 636m<sup>3</sup>: *Ibid.* 4.

<sup>23</sup> Daniel Keane, ‘Proposed Flinders Ranges Nuclear Site Identified as Pastoral Property Belonging to Former Liberal Senator Grant Chapman’, *ABC News* (online), 17 November 2015 <http://www.abc.net.au/news/2015-11-16/proposed-nuclear-site-identified-as-wallerberdina-station/6944636>.

<sup>24</sup> IAEA, above n 1, 24–5; *UMPNER Report* 61.

<sup>25</sup> Ian Holland, ‘Consultation, Constraints and Norms: The Case of Nuclear Waste’ (2002) 61 *Australian Journal of Public Administration* 76, 77.

<sup>26</sup> Newman and Nagtzaam, above n 6, 13, 261.

<sup>27</sup> *Ibid.*

<sup>28</sup> SA Nuclear Fuel Cycle Commission Report 80, 170.

<sup>29</sup> *Ibid.* 124.

<sup>30</sup> *Ibid.* 125.

The extent to which the Commonwealth has accommodated these procedural ideals for the NRWMF is, in the discussion that follows, evaluated in terms of the provision for consultation, consent or court challenge under the current law pertaining to nuclear waste. Part II examines the issues cast by prior public interest litigation challenging Commonwealth waste storage arrangements, in order to understand the rationale for current legal approaches. The nomination, assessment and approval process under the *NRWMA* and the *EPBCA* is then teased apart in Parts III and IV, respectively, with a view to textually excavating the place given to public participation in each statute. In Part V, the constitutional legality of the *NRWMA*'s preclusion of State and Territory legislation is tested to ascertain whether any limits on the Commonwealth's powers exist to prevent imposition of the NRWMF on a potentially unwilling community.

The paper's findings reveal how public participation is positioned at the margins of the NRWMF approval process, its statutory minimisation or nullification being enacted in support of the Commonwealth's aspiration for an environmentally sound and efficiently assessed solution. Yet, while public interest considerations of national import – namely environmental protection, international engagement and economic imperatives – may vindicate the Commonwealth's chosen strategy, other legitimate protections also important to the public interest and otherwise safeguarded at law – such as those pertaining to the conservation of Aboriginal heritage, the consideration of environmental impacts, and the place for public participation in the development of land – are, in the process, rendered vulnerable to substantial erosion.

## II THE EVOLVING COMMONWEALTH APPROACH

### A *Cooperative Federalism – Promise and Failure*

The Commonwealth's policy of centralised consolidation of radioactive waste grew out of intergovernmental negotiation and agreement from the States and Territories in the 1970s, commenced with the initiation of a voluntary national collections program, and eventually extended to a commitment to find a repository site.<sup>31</sup> Though the radioactive waste held under State and Territory arrangements is very small by comparison with the Commonwealth's volumes,<sup>32</sup> it is stored at over one hundred disparate locations,<sup>33</sup> at universities, hospitals and institutions, and usually without the knowledge, let alone the informed consent, of the surrounding urban and suburban community.<sup>34</sup> Furthermore, though the States and Territories have long had their own radiation protection legislation in place allowing for the licensing of storage arrangements by each jurisdiction's

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<sup>31</sup> Matthew James and Ann Rann, 'Radioactive Waste and Spent Fuel Management in Australia' (Background Note, Parliamentary Library, Parliament of Australia, 2011) 11.

<sup>32</sup> In 2011, of the 4000m<sup>3</sup> of radioactive waste accumulated across the nation, the Commonwealth was responsible for 3800m<sup>3</sup>, with the States and Territories together holding a mere 200m<sup>3</sup> of LLW: ANSTO, above n 21, 3. Figures remain consistent with those provided in the *Joint Convention 2014 Report* 66.

<sup>33</sup> The Commonwealth inventory of Australian radioactive waste reveals the number and variety of sources of radioactive waste in storage and disposal facilities: *Joint Convention 2014 Report* 60–6. ANSTO cite a 2003 audit of the South Australian Environmental Protection Authority ('EPA') to state that 80 of these locations are in South Australia alone: ANSTO, above n 21, 8. The South Australian Nuclear Fuel Cycle reported on recent data from the South Australian EPA confirming these approximate numbers: *SA Nuclear Fuel Cycle Royal Commission Report* 75–6. In its 2003 audit, the EPA regarded storage practices at hospitals and laboratories to be 'satisfactory', but noted security and safety issues with regard to sealed sources arising from industrial activity: Environment Protection Authority, South Australia, *Audit of Radioactive Material in South Australia* (2003) 16–24.

<sup>34</sup> Miles Kemp, 'Radioactive Waste Stored Near South Australian Homes', *The Advertiser* (online), 26 June 2013 <<http://www.adelaidenow.com.au/news/south-australia/radioactive-waste-stored-near-south-australian-homes/story-e6frea83-1226664693898>>; Commonwealth, *Parliamentary Debates*, House of Representatives, 21 February 2011, 670 (Ian Macfarlane).

Environmental Protection Authority ('EPA'),<sup>35</sup> inconsistency in classification of waste under this legislation has been raised by the Commonwealth as an issue of concern.<sup>36</sup> So has the fact that EPA-licensed storage facilities in States and Territories were never purpose-built for LLW storage, and therefore have not been optimally designed with long timeframes and security in mind.<sup>37</sup> Notwithstanding these justifications for centralisation, individual States and Territories, as is well documented,<sup>38</sup> remained resistant to proposals of specific sites for a national repository within their respective jurisdictions.

By the 1990s, with still no repository available for the waste amassed by the Commonwealth from various sources,<sup>39</sup> the Australian Nuclear Science and Technology Organisation ('ANSTO') arranged for its transfer to the Lucas Heights reactor site. Objecting to the prospect of the site becoming the central storage location for the nation's waste, Sutherland Shire Council brought an action against ANSTO in the New South Wales Land and Environment Court ('LEC') in 1991 ('*Sutherland Shire v ANSTO*').<sup>40</sup> Cripps CJ acknowledged the failure of cooperative federalism to find a site for the NRWMF and the environmental basis for preferring alternative storage at Lucas Heights.<sup>41</sup> Nevertheless, in finding that ANSTO's actions were in 'flagrant breach' of the zoning provisions stipulated for the site under the *Environmental Planning and Assessment Act 1979* (NSW) ('EPAA'),<sup>42</sup> which provided that Council's consent would be necessary for any use of the land other than as a research station,<sup>43</sup> Cripps CJ upheld the LEC's power to provide for 'the enforcement of a public duty imposed by or under an act of the New South Wales Parliament', even against a Commonwealth agency, and supported the Council's standing 'as the proper guardian of public rights under that legislation'.<sup>44</sup> ANSTO was thus ordered to move the transferred waste to another suitable location within three years of the judgment.

*Sutherland Shire v ANSTO* became the catalyst for a profound shift in the Commonwealth's legislative and political approach to national radioactive waste management. Now aware of the possibility and implications of intergovernmental court action, the Commonwealth Parliament promptly legislated to ensure ANSTO's immunity from the application of State and Territory environmental legislation. Section 5 of the *ANSTO Amendment Act 1992* (Cth) ('*ANSTO Act*') provided that a law of a State or Territory, so far as the law related to 'the environmental consequences of the use of land or premises' or the proposed use thereof, now does not apply to ANSTO, its property or transactions, or anything done by or on behalf of it, and, moreover, is taken never to have so applied.<sup>45</sup> The amendment deferred to the LEC ruling in *Sutherland Shire v ANSTO* by providing that ANSTO's immunity was not to take effect in relation to Cripps CJ's order that the storage of radioactive waste at Lucas Heights

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<sup>35</sup> *Radiation Protection Act 2006* (ACT), *Radiation Control Act 1990* (NSW), *Radiation Protection Act* (NT), *Radiation Safety Act 1999* (Qld), *Radiation Protection and Control Act 1982* (SA), *Radiation Protection Act 2005* (Tas), *Radiation Act 2005* (Vic), *Radiation Safety Act 1975* (WA).

<sup>36</sup> Joint Convention 2011 Report 5.

<sup>37</sup> ANSTO, above n 21, 19; Commonwealth, *Parliamentary Debates*, House of Representatives, 21 February 2011, 670 (Ian Macfarlane).

<sup>38</sup> See James and Rann's detailed chronology of events, above n 31. See also Nagtzaam and Newman, above n 5, 27–36.

<sup>39</sup> This being waste consolidated under the Commonwealth collections program which came to be stored at the Department of Defence site at St Marys, NSW, along with 10,000 40-gallon drums of contaminated land from a CSIRO site at Fishermen's Bend in Victoria: Nagtzaam and Newman, above n 5, 29.

<sup>40</sup> *Shire of Sutherland v Australian Nuclear Science and Technology Organisation* (Unreported, Land and Environment Court of New South Wales, Cripps CJ, 5 February 1992) ('*Sutherland Shire v ANSTO*').

<sup>41</sup> *Ibid* 6–7.

<sup>42</sup> *Ibid* 10.

<sup>43</sup> Under the Sutherland Planning Scheme Citation Ordinance made on 24 April 1980, the 'deemed local environmental planning instrument' ('LEP') for the purposes of the *Environmental Planning and Assessment Act 1979* (NSW): *Ibid* 3.

<sup>44</sup> *Ibid* 9.

<sup>45</sup> *Australian Nuclear Science and Technology Organisation Amendment Act 1992* (Cth) s 5, now *Australian Nuclear Science and Technology Organisation Act 1987* (Cth) s 7A.

was in breach of the *EPAA*.<sup>46</sup> Nevertheless, the amendment clearly ‘was designed to avoid a repeat’ of this case in the future,<sup>47</sup> by rendering impotent the State laws which had served to frustrate the Commonwealth objective of finding a suitable storage place for its waste. In so doing, the *ANSTO Act* amendment indicated a significant change from an approach cooperative in spirit to a federal preemption coercive in effect, ruling out opportunities for ventilation of concerns where the public interest claimed conflicted with that advanced by the Commonwealth

## B *The Legacy of Intergovernmental Intransigence*

Though unreported, the judgment in *Sutherland Shire v ANSTO* had a pivotal effect on federal law and policy to follow. In compliance with the LEC’s ruling, 120 truckloads of radioactive waste were removed from Lucas Heights and taken to the Commonwealth’s Department of Defence site at Woomera in South Australia, notwithstanding the South Australian government’s vociferous criticism of the move, widespread community outcry and objections by Department of Defence officials.<sup>48</sup> The federal government’s subsequent nomination of eighteen nearby possible sites for the national repository was the result, Holland argues, of a deeply flawed public consultation process that was geared toward giving preference to the site at Woomera, where the waste transferred from Lucas Heights was now located.<sup>49</sup> Responding to public opposition at these plans, the South Australian Parliament enacted legislation to prevent such a facility and the transportation of radioactive waste through the State,<sup>50</sup> legislation that remains in place.<sup>51</sup>

Within a month of the Commonwealth’s unilateral announcement that one of the eighteen nominated sites would be the preferred location for a repository, South Australia declared that it would make the area a public park under s 42 of the *Lands Acquisition Act 1989* (Cth),<sup>52</sup> thus preventing the Commonwealth from compulsorily acquiring the site without South Australia’s consent.<sup>53</sup> The Commonwealth swiftly relied on the urgency provisions in the same Act to overcome this obstacle and force the acquisition,<sup>54</sup> a move which brought both parties to the Federal Court.<sup>55</sup> In *South Australia v Slipper* (‘the *Nuclear Waste Dump Case*’),<sup>56</sup> the Full Court of the Federal Court found that the Commonwealth had failed to follow pre-requisite steps for notice of an urgent acquisition explicitly set out in provisions of the *Lands Acquisition Act*,<sup>57</sup> its actions thereby constituting a denial of procedural fairness that compelled the acquisition to be set aside.

Both *Sutherland Shire v ANSTO* and the *Nuclear Waste Dump Case*, the latter arising as a direct consequence of the circumstances resulting from the former, were remarkable, not only for putting local and State interests firmly on the map of the federal government’s

<sup>46</sup> *Australian Nuclear Science and Technology Organisation Amendment Act 1992* (Cth) s 5(2).

<sup>47</sup> James and Rann, above n 31, 17.

<sup>48</sup> *Ibid* 20.

<sup>49</sup> *Ibid* 25–6; Holland, above n 25, 81–2.

<sup>50</sup> James and Rann, above n 31, 30–1, 39.

<sup>51</sup> *Nuclear Waste Storage Facility (Prohibition) Act 2000* (SA).

<sup>52</sup> Section 42 of the *Lands Acquisition Act 1989* (Cth) provides that the Minister may not make a declaration for compulsory acquisition of land that is a public park ‘unless the Government of the State or Territory in which the land is situated has consented to the acquisition of the interest.’

<sup>53</sup> James and Rann, above n 31, 40.

<sup>54</sup> Section 24(1) of the *Lands Acquisition Act 1989* (Cth) provides for the acquisition of land where ‘there is an urgent necessity for the acquisition and it would be contrary to the public interest for the acquisition to be delayed by the need for the making, and the possible reconsideration and review, of a pre-acquisition declaration’.

<sup>55</sup> *South Australia v Slipper* (2003) 203 ALR 473.

<sup>56</sup> *South Australia v Slipper* (2004) 136 FCR 259 (‘the *Nuclear Waste Dump Case*’).

<sup>57</sup> Section 24 of the *Lands Acquisition Act 1989* (Cth) mandates that a certificate indicating that the land is to be acquired due to urgent necessity and avoidance of delay must be served ‘on each person whom the Minister believes, after diligent inquiry, to be a person affected by the certificate.’

nuclear waste management plans, but also for holding the Commonwealth to the principles of transparency, accountability and the need for consent set out in both Commonwealth and State legislation. Again, however, litigated challenge prompted a legislative response that sought to protect federal authority by precluding any laws that could interfere with federal objectives. The *Commonwealth Radioactive Waste Management Act 2005* (Cth) ('*CRWMA*') bore the marks of past jurisdictional conflict, its extraordinarily sparse provisions succinctly ruling out the application of State and Territory environmental and heritage laws to the siting, development and operation of the NRWMF, and thus foreclosing the kind of opportunity for challenge which had brought ANSTO to the LEC in 1992.<sup>58</sup> It also nullified any application of the Commonwealth's own *Lands Acquisition Act* which, in the previous year, had afforded South Australia relief in the Federal Court.<sup>59</sup> Section 3D simply stated, 'No person is entitled to procedural fairness in relation to a Minister's approval,' which, in the context of the *Nuclear Waste Dump Case*, was aimed at preventing a recurrence of any similar contestation of the NRWMF siting process. The *CRWMA* clearly reflected the view of the majority of the Commonwealth Parliament that blanket exclusion of legislation was the approach necessary to guarantee certainty in the siting process, even if this meant sacrificing parliamentary will as otherwise expressed in the excluded laws.

### C Seeking and Circumventing Indigenous Consultation

Utilitarian rationalism has typically informed the Commonwealth's nomination of repository sites on remote country with little prospect of development,<sup>60</sup> but with tangible significance for indigenous communities who otherwise suffer endemic socio-economic disadvantage.<sup>61</sup> In order to mitigate this inherent inequity, the *CRWMA* offered one substantial inhibition on the Commonwealth's powers by requiring that the Traditional Owners be consulted in relation to nomination of a repository site by a Land Council and that they give their informed consent for the subject land's future use.<sup>62</sup> This consent was, moreover, to be given in accordance with the Owners' traditional decision-making process, or else under a process agreed to and adopted by them.<sup>63</sup> When the *National Radioactive Waste Management Act 2012* (Cth) ('*NRWMA*') later replaced the *CRWMA*, these provisions were retained for Land Council nominations,<sup>64</sup> and continued to apply to the Muckaty Station nomination by the Northern Land Council ('NLC').<sup>65</sup> By requiring consultation and consent on Traditional Owners' terms, the Commonwealth's law reflected international best practice for the location of hazardous waste repositories on indigenous land,<sup>66</sup> and offered a means of deflecting the criticism that remote locations in areas of significant indigenous disadvantage might be used 'to minimise exposure to consultation and controversy'.<sup>67</sup>

Inclusion of these explicit parameters for consultation and consent, however, did not guarantee that they would be sufficiently complied with and consequently left the nomination of the Muckaty site open to litigated challenge. In the Tennant Creek courthouse in 2014, the Federal Court heard that the NLC had relied on the consent of only one group of

<sup>58</sup> *Commonwealth Radioactive Waste Management Act 2005* (Cth) s 13 ('*CRWMA*').

<sup>59</sup> *CRWMA* ss 9–10.

<sup>60</sup> Newman and Nagtzaam, above n 6, 156.

<sup>61</sup> Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2010) 281.

<sup>62</sup> *CRWMA* s 3B(1)(g).

<sup>63</sup> In accordance with the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 77A, under the *CRWMA* s 3B(g)(iii).

<sup>64</sup> *National Radioactive Waste Management Act 2012* (Cth) s 5(2)(f) ('*NRWMA*').

<sup>65</sup> Under the *NRWMA* sch 2 cl 1 'Saving – nomination and approvals'.

<sup>66</sup> Art 29.2 of the *United Nations Declaration on the Rights of Indigenous Peoples* reflected the approach taken in the *CRWMA*, by providing that 'States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent: *United Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

<sup>67</sup> Holland, above n 25, 81–2.

Traditional Owners, thus ignoring the complex network of songlines that warranted consideration of other groups' interests in the land on which the NRWMF was proposed.<sup>68</sup> Proceedings ceased after two weeks with the withdrawal by the embattled NLC of the Muckaty nomination, leaving the Commonwealth bereft of any other potential site.<sup>69</sup>

If there is a common thread across these three cases – namely, *Sutherland Shire v ANSTO*, the *Nuclear Waste Dump Case* and the Muckaty Federal Court challenge – it is that the written law, even the Commonwealth's own laws, left federal government actions with respect to the NRWMF vulnerable to frustration and ultimately obstruction. In each case, public consultation and consent were found by the courts not to have been adequately sought and obtained, due to the pressure to secure a site. In the wake of these cases, the choices left to the Commonwealth appeared to be, on the one hand, to capitulate to requirements for public participation, and thereby commit to the more time-consuming and rigorous legitimisation of a repository site, or to continue limiting the extent to which any consultative provisions could be exercised. The following analysis of current law suggests it chose the latter approach.

### III THE NATIONAL RADIOACTIVE WASTE MANAGEMENT ACT 2010 (CTH)

#### A The Approval Process

Born out of the context of the Muckaty challenge, the *NRWMA* repealed the short-lived *CRWMA* in accordance with a 2007 Labor election commitment to accord procedural fairness to a 'consensual process of site selection'.<sup>70</sup> Although some view the *NRWMA* as fulfilling these restorative aims,<sup>71</sup> the more recent Act nevertheless deviates little from the path laid by its predecessor, with the federal Minister retaining 'absolute discretion' to approve a nomination and select a site.<sup>72</sup>

In the aftermath of the Muckaty Station withdrawal and in the absence of any other Land Council nomination, the *NRWMA* does carve new territory by opening nominations to private landowners nation-wide, for the purposes of volunteering a site for the NRWMF on their own land.<sup>73</sup> While this change toward voluntarism has been lauded as a shift from the 'top-down path' previously pursued by the Commonwealth in South Australia, 'in which sites were determined in advance and then defended from attack,'<sup>74</sup> and has suggested the possibility of the NRWMF being hosted by a willing community in line with what is regarded as international best practice, 'community' is, legislatively at least, shut out of the

<sup>68</sup> The applicants were Mark Lane Jangala, an elder of the Ngapa clan, and other elders of Muckaty Station representing four other clans: Newman & Nagtzaam, above n 6, 163-164. The issues specified in the applicants' Statement of Claim were also raised in a number of submissions from other Land Councils and indigenous community members to the Commonwealth Parliament's inquiry into the National Radioactive Waste Management Bill 2010: Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *National Radioactive Waste Management Bill 2010 [Provisions]* (2010) ('*Senate Committee Report*') 13-9.

<sup>69</sup> Newman and Nagtzaam, above n 6, 167.

<sup>70</sup> Explanatory Memorandum, *National Radioactive Waste Management Bill 2010* (Cth) 2; Angus Martin, Commonwealth of Australia, *Bills Digest*, No. 52 of 2010, 25 November 2010 <[http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1011a/11bd052](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1011a/11bd052)>.

<sup>71</sup> Newman & Nagtzaam, above n 6, 165.

<sup>72</sup> *NRWMA* s 9(1).

<sup>73</sup> *Ibid* s 7.

<sup>74</sup> As described by Dr John Loy, the former CEO of ARPANSA: John Loy, 'Community key to nuclear waste site', *The Australian* (online), 6 May 2016 <<http://www.theaustralian.com.au/opinion/community-key-to-nuclear-waste-site/news-story/836a059542e4d952c467127856fd3e77>>.

nomination process.<sup>75</sup> The requirement that a landowner must provide evidence that ‘one or more specified groups of persons’ have been consulted or have consented in relation to the nomination leaves open the possibility of merely selective consultation and consent being sought,<sup>76</sup> and is contingent, moreover, on it being prescribed in regulations which, at the time of writing, were not yet in existence.

The *NRWMA* introduces a list of procedures mandating the giving of notice on decisions and the seeking of written comments in relation to these,<sup>77</sup> and requires the Minister to take ‘any relevant comments’ into account via invitation circulated in national newspapers.<sup>78</sup> However, ‘relevance’ is not anywhere defined under the Act, comments being meanwhile limited to those only with a ‘right or interest in the land’.<sup>79</sup> In the case of the Barndioota nomination, a perpetual pastoral lease prevents a native title claim that might give rise to such an interest.<sup>80</sup> However, in acknowledging the increasingly contested nature of pastoral land,<sup>81</sup> the *Pastoral Land Management and Conservation Act 1989* (SA) nevertheless recognises ‘the right of Aboriginal persons to follow traditional pursuits on pastoral land’, and ‘the interests of the community in enjoying the unique environment of the land’,<sup>82</sup> and thus appears to afford a ‘right’ to the local Adnyamathanha peoples to have their comments considered, along with those of neighbours and locals. Be that as it may, Evans and Cowan of the Northern Territory Environmental Defender’s Office argue that requiring comments on the *NRWMA* to be written denies Traditional Owners the opportunity to be heard in a more culturally appropriate and accessible oral forum.<sup>83</sup>

Consultation with Traditional Owners is, moreover, not mandated under the *NRWMA* in relation to ‘archaeological or heritage investigations’ prior to site selection,<sup>84</sup> which may be conducted by the Commonwealth, a Commonwealth entity, a Commonwealth contractor or an employee.<sup>85</sup> Even if the Commonwealth claims elsewhere to be consulting with

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<sup>75</sup> Niepraschk points out that community consent is not a final precondition for a site to be declared under the *NRWMA* and will not have to be established at any point during the process, aspects which entirely contradict the principles of voluntarism for nuclear waste repositories advanced elsewhere: Anica Niepraschk, ‘Can Australia Learn from International Experience in Managing Radioactive Waste?’ (2015) 124 *Chain Reaction* 39, 39.

<sup>76</sup> *NRWMA* s 8(1)(f)(i)–(ii).

<sup>77</sup> The Minister must, prior to approval, invite comments on the nomination from ‘persons with a right or interest in the land’ via notices published in newspapers in each State and Territory, and in a local newspaper circulating in the area in which the land is situated: *NRWMA* ss 10(4)(b), (5)(c)).

<sup>78</sup> *NRWMA* s 10(6).

<sup>79</sup> *Ibid* s 10(5)(c).

<sup>80</sup> Pursuant to section 249C(3) and sch 1 cl 37 of the *Native Title Act 1993* (Cth), under which a perpetual pastoral lease granted in South Australia confers a right of exclusive possession on the lessee that extinguishes all native title rights and interests over the land concerned. Even with this restriction applying to pastoral properties, unbroken interests in a vast 41,000 square kilometres of land in the Flinders and Gammon Ranges have already been granted as native title to the Adnyamathanha people: Government of South Australia, ‘Historic native title determination today’ (Media Release, 30 March 2009) <[http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/News\\_SA\\_NativeTitle.pdf](http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/News_SA_NativeTitle.pdf)>.

<sup>81</sup> See, eg, Nicholas Gill, ‘The Contested Domain of Pastoralism: Landscape, Work and Outsiders in Central Australia’ in D B Rose and A Clarke (eds), *Tracking knowledge – North Australian landscapes: Studies in indigenous and settler knowledge systems* (North Australian Research Unit, 1997), 50–67.

<sup>82</sup> *Pastoral Land Management and Conservation Act 1989* (SA) s 4.

<sup>83</sup> Evans and Cowan suggest that in-person meetings or large consultations would be more appropriate, while putting the notification in the language of local Traditional Owners would enable them to understand it better: Heidi Evans and Mark Cowan, ‘The Disposal of Australia’s Radioactive Waste on Traditional Aboriginal Lands in the Northern Territory’ (2010) 1 *National Environmental Law Review* 26, 34.

<sup>84</sup> *NRWMA* s 11(3)(k).

<sup>85</sup> *Ibid* s 11(1)–(2).

Traditional Owners,<sup>86</sup> excluding a statutory requirement for consultation with Traditional Owners in respect of landowners' nominations means any inadequacy in the conduct of these site investigations is protected from litigated challenge.<sup>87</sup> This exclusion occurs at a critical juncture, the declaration of a selected site being based on these investigations.<sup>88</sup> Upon such declaration, the slate is wiped clear, with 'all or specified rights or interests' thereafter either acquired by the Commonwealth or extinguished,<sup>89</sup> and 'despite any other law of the Commonwealth, a State or a Territory (whether written or unwritten)'.<sup>90</sup>

Though the Senate Legal and Constitutional Affairs Legislation Committee recommended in 2010 that the *NRWMA* not be enacted unless mandatory provision was made for a Regional Consultative Committee ('RCC'),<sup>91</sup> closer analysis of its place within the site selection process reveals that the RCC has no power or influence over a Ministerial declaration of a selected site, its function being merely to 'facilitate communication' between the host community and the Commonwealth throughout the facility's development and operation, once the site selection process has concluded.<sup>92</sup> Consultation may be provided for under the *NRWMA*, but there is no evidence to suggest that it has anything other than a tokenistic place within a legal framework that positions site selection as an almost inevitable outcome of nomination, supported by Ministerial fiat, rather than broadly sought public consent.

## B *The Risk of Regulatory Void*

Prest has argued that the problem with excluding State and Territory environmental legislation from regulation of all activities associated with the *NRWMA* is that it could give rise to decisions being made under the *NRWMA* in a 'regulatory void or vacuum' in circumstances where Commonwealth regulatory controls are not as stringent as those at State level.<sup>93</sup> By way of illustration, State and Territory governments are rendered powerless under the *NRWMA* to regulate in the future on transport of radioactive materials through their respective jurisdictions, if these materials are destined for the *NRWMA* site,<sup>94</sup> and *ARPANSA's Code of Practice for the Safe Transport of Radioactive Materials*, being merely a code of practice and not a statute, is unenforceable.<sup>95</sup> Certainly, the exclusion of environmental legislation is so comprehensively broad, that the *NRWMA* also removes the

<sup>86</sup> The Commonwealth states 'a comprehensive and independent assessment of heritage will be undertaken in collaboration with the traditional owners': Department of Industry, Innovation and Science, above n 10, 2–3. Notably, however, indigenous participants were not given the option of 'impact on heritage', or similar concepts, to choose from among the various concerns they could nominate from a list provided in the specific 'Indigenous questionnaire' put to them in the Barndioota nomination survey: Department of Industry, Innovation and Science, above n 11, 151.

<sup>87</sup> The *NRWMA*, for instance, does not require the guidance of the Burra Charter, as an agreed standard of practice in investigations and decisions about heritage. The Charter suggests only cautious change to a place of cultural significance (Article 3. Cautious approach), and recommends that conservation, interpretation or management of a place should provide for the participation of people for whom the place has significant associations and meanings (Article 12. Participation): *The Burra Charter: The Australia ICOMOS (International Council on Monuments and Sites) Charter for Places of Cultural Significance* (2013).

<sup>88</sup> *NRWMA* s 14.

<sup>89</sup> *Ibid* s 19(1).

<sup>90</sup> *Ibid* s 20.

<sup>91</sup> Senate Committee Report 40.

<sup>92</sup> *NRWMA* s 22(1)–(2). Evans and Cowan call the establishment of the RCC a 'final deceit', given that 'the community consultation can address little more than the fact of a site already declared in their community without their consent or consultation': Evans and Cowan, above n 83, 34.

<sup>93</sup> James Prest, Submission no 229 quoted in the *Senate Committee Report* 34.

<sup>94</sup> *NRWMA* s 24.

<sup>95</sup> Australian Radiation Protection and Nuclear Safety Agency, *Code for the Safe Transport of Radioactive Material*, Radiation Protection Series No. C-2 (2014).

usual requirement for corresponding State development approval.<sup>96</sup> In the South Australian context,<sup>97</sup> this means omission of the obligation to provide a report as to the extent to which the impacts of the NRWMF proposal would be consistent with the objects of the *Environment Protection Act 1993* (SA)<sup>98</sup> and with ‘the general environmental duty’ under that Act.<sup>99</sup> It also means a civil action brought in the Environment, Resources and Development Court by any person,<sup>100</sup> with the aim of preventing environmental harm or detriment to the public interest at the NRWMF site resulting from a breach of the *Environment Protection Act*,<sup>101</sup> is out of the question.

Containing stronger provisions than the Commonwealth’s *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), the *Aboriginal Heritage Act 1988* (SA) indicates an intention to bind the Commonwealth on land within South Australian boundaries.<sup>102</sup> Exercise of rights available under the South Australian Act could result in prohibitions or restrictions on access or activities at the site,<sup>103</sup> or even the acquisition of a site by the State government for the purposes of protecting or preserving sites of significance, objects or remains.<sup>104</sup> With mandatory consultative requirements,<sup>105</sup> including that the Minister is bound to accept the views of the Traditional Owners as to the land’s significance according to Aboriginal tradition,<sup>106</sup> this Act would allow members of the Adnyamathanha people, who claim the significance of the land at Barndioota,<sup>107</sup> a voice through which to attempt to protect their tangible past. However, that voice is altogether

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- <sup>96</sup> Sophie Power and Juli Tomaras, ‘Commonwealth Environmental Regulation’ (Parliamentary Library, Commonwealth of Australia, Briefing Book, 2016) <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BriefingBook45p/EnvironmentalRegulation](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook45p/EnvironmentalRegulation)>.
- <sup>97</sup> Under the *Development Act 1993* (SA), the NRWMF would most likely be declared ‘a project of major environmental, social or economic importance’, given its national significance: s 46(1).
- <sup>98</sup> *Development Act 1993* (SA) s 46B(c). The objects of the *Environment Protection Act 1993* (SA) promote the principles of ecologically sustainable development, waste minimisation, a precautionary approach to the assessment of risk of environmental harm resulting from pollution and waste and a balanced consideration of economic, environmental, social and equity considerations in deciding all matters relating to environmental protection: s 10.
- <sup>99</sup> The ‘general environmental duty’ under the *Environment Protection Act 1993* (SA) mandates the taking of ‘all reasonable and practicable measures to prevent or minimise any resulting environmental harm’ from an activity that might pollute the environment: s 25.
- <sup>100</sup> *Environment Protection Act 1993* (SA) s 104(7)(c). The provisions reflect the open standing provided for by section 123 of the *Environment Planning and Assessment Act 1979* (NSW), which enabled the action in *Sutherland Shire v ANSTO*.
- <sup>101</sup> *Environment Protection Act 1993* (SA) ss 104(1), (8)(c).
- <sup>102</sup> Section 4 of the *Aboriginal Heritage Act 1988* (SA) states simply that ‘The Act binds the Crown.’ Orr notes that such wording in a State law is an indication, though not always conclusive, of an intention to bind the Commonwealth: Robert Orr QC, *Application of State laws to Commonwealth infrastructure projects* (10 June 2005) Australian Government Solicitor Commercial Notes No. 16 <<http://www.agps.gov.au/publications/commercial-notes/CN16.pdf>>.
- <sup>103</sup> *Aboriginal Heritage Act 1988* (SA) s 25.
- <sup>104</sup> *Ibid* s 30.
- <sup>105</sup> The Minister must take all reasonable steps to consult with any Traditional Owners and Aboriginal persons ‘who, in the opinion of the Minister, have a particular interest in the matter’: *Ibid* 13(1)(f).
- <sup>106</sup> *Ibid* s 13(2).
- <sup>107</sup> Adnyamathanha Traditional Owner Regina Mackenzie has said the land at the site (known to her people as Arngurla Yarta or ‘spiritual land’), which lies adjacent to the Yappala Indigenous Protected Area, holds the remains of her ancestors, as well as ‘countless thousands of Aboriginal artifacts’, and that her people had been working with the South Australian government for many years to have heritage sites registered there: ‘Adnyamathanha to Fight Nuclear Dump Plan’, *The Flinders News* (Online), 29 April 2016 <<http://www.theflindersnews.com.au/story/3879299/adnyamathanha-to-fight-nuclear-dump-plan/>>. See also Laura Murphy-Oates, ‘Ancient Aboriginal Skull Bone Found at Proposed Nuclear Waste Site’, *NITV* (online), 1 June 2016 <<http://www.sbs.com.au/nitv/the-point-with-stan-grant/article/2016/05/10/ancient-aboriginal-skull-bone-found-proposed-nuclear-waste-site>>.

denied by the *NRWMA*'s exclusion of both State and Commonwealth Aboriginal heritage legislation.<sup>108</sup>

Analysis of the South Australian environmental and heritage statutes demonstrates that none open the floodgates to public interest litigation, being substantially restricted in terms of any opportunities for public participation offered under their provisions.<sup>109</sup> The *NRWMA*'s exclusionary clauses are therefore arguably disproportionate. By suppressing the opportunities for public challenge under State environmental and heritage laws, in circumstances where the possibility of litigated action is already quite constrained, the Commonwealth attempts to stem any frustration of the *NRWMA*'s objectives, but in the process denies the place for legitimate concerns and the protections afforded to these by the excluded legislation.

### C *Judicial Review's Limits under the NRWMA*

The prevalence of privative clauses in the *NRWMA* – in 'no validity' clauses,<sup>110</sup> and in the attempt to cut off application of the *Administrative Decisions (Judicial Review) Act 1979* (Cth) to nominations, approvals and declarations<sup>111</sup> – renders what little consultation is mandated potentially redundant. Should non-compliance with the *NRWMA*'s procedural requirements ever be challenged, the courts would therefore face 'the necessity of resolving and reconciling two expressions of intention which appear inconsistent'.<sup>112</sup> This would entail establishing whether decisions made in the absence of genuine consultation and consent were 'bona fide' attempts to exercise the power granted under the *NRWMA*,<sup>113</sup> or exceeded limitations on that power or authority provided elsewhere in the statute.<sup>114</sup>

The *NRWMA* preempts any such challenge by providing that its procedural fairness clauses are 'taken to be an exhaustive statement of the requirements of the natural justice hearing rule'.<sup>115</sup> However, High Court authority suggests that the Federal Court would retain the power to determine whether the hearing rule had been adequately satisfied, by gauging what is fair in all the circumstances of a particular case.<sup>116</sup> With respect to statutory power, this

<sup>108</sup> The Adnyamathanha Camp Law Mob confirm that although a native title claim to the Barndioota property is excluded due to the perpetual pastoral lease arrangement, South Australian Aboriginal heritage legislation would, but for the *NRWMA*, continue to apply to the area: Bryan Littlely, Paul Starick and Meagon Dillon, 'Nuclear Waste Repository in SA: What Do the Locals Think?' *The Advertiser* (online), 22 November 2015 <<http://www.adelaidenow.com.au/news/south-australia/nuclear-waste-repository-in-sa-what-do-the-locals-think/news-story/960edbc24bc8e2285a5e67be5cb033df>>.

<sup>109</sup> The Minister's powers under the *Aboriginal Heritage Act 1988* (SA), for instance, are contingent on the owner or occupier, or a project proponent, being forthcoming about the potential impact on or discovery of Aboriginal sites, objects or remains: ss 12(1), 20. No appeals are allowed against decisions on development of declared to be of major social, environmental or economic importance: *Development Act 1993* (SA) s 48(12). Proceedings for judicial review, declaration and injunction are also ruled out for such development decisions: *Ibid* s 48E. The open standing provisions in section 104(7) of the *Environment Protection Act 1993* (SA) are limited by various qualifications to prevent an abuse of process: s 104(8).

<sup>110</sup> Failure by the Minister to consult, as provided for under the *NRWMA* ss 8(1)(f), does not invalidate site nomination, approval or selection: *NRWMA* ss 8(4), 9(6), 15(2).

<sup>111</sup> Under s 3 of the *Administrative Decision (Judicial Review) Act 1979* (Cth) ('*ADJRA*'), a 'decision' to which the *ADJRA* applies is defined as a decision made under an 'enactment', which in turn is defined to include 'an instrument' made under an Act. However, the *NRWMA* provides that nominations, approvals and declarations of sites are not 'legislative instruments': *NRWMA* ss 7(5), 8(7), 14(7).

<sup>112</sup> Report of the Commonwealth Administrative Review Committee ('the Kerr Committee'), cited by Robin Creyke and John McMillan, *Control of Government Action: Texts, Cases & Commentary* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2009) 1041.

<sup>113</sup> *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 614–5 (Dixon J).

<sup>114</sup> *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, 486 (Gleeson CJ).

<sup>115</sup> *NRWMA* ss 10(7), 18(5).

<sup>116</sup> *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 (Tucker LJ), a statement endorsed by the High Court in a number of subsequent cases: Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 519–20.

would involve giving full effect to ‘the express and implied provisions of the relevant Act and the inferences of legislative intention to be drawn from the circumstances to which the Act was directed and from its subject-matter.’<sup>117</sup> Given their place, albeit tenuous, within the requirements for site nomination, public consultation and consent were likely intended by the *NRWMA*. Nevertheless, the seriousness of the consequences of a siting decision for those with interests ‘apart from legal “rights” in the strict sense’,<sup>118</sup> would need to be balanced against other factors, such as any urgency in the need for a repository, or the avoidance of cost to the public purse by prolonging the already protracted search for a national site.<sup>119</sup> For public interest litigants, there is no certainty in this balancing process, a fact bound to discourage them.

There is likewise no stable ground on questions of standing.<sup>120</sup> Judicial review is only open to a person ‘aggrieved’ or negatively affected by a decision made by the Commonwealth under the *NRWMA*,<sup>121</sup> an objective test to establish an applicant’s special interest in a decision.<sup>122</sup> The test has been criticised for lacking sufficient clarity, being too restrictive and producing inconsistent results when applied in public interest environmental cases.<sup>123</sup> In this instance, it would require the Court to work out where the ‘ripples of affection’ across the ‘pool of sundry interest’ become ‘indistinguishable from the normal seascape’ of opposition to nuclear waste and all its negative connotations and possibilities.<sup>124</sup> For Traditional Owners with heritage concerns, this might be more easily established,<sup>125</sup> but it becomes more challenging the further out, geographically, an applicant is from the site and its operations, notwithstanding any longstanding ‘intellectual or emotional concern’ many have with regard to nuclear waste policy.<sup>126</sup> Standing is of course an intentional ‘filter’,<sup>127</sup> preventing frivolous application to courts by those with only a relatively remote interest in a matter. However, the restrictions it imposes mean, paradoxically, that in order to speak for the public interest, an applicant needs to have some private ‘self-concern’.<sup>128</sup> While this reflects the law’s historical roots, in which the primacy of individual rights is privileged,<sup>129</sup> it barricades the *NRWMA* from the judicial scrutiny its reliance on privative clauses should attract, especially given the *NRWMA*’s express and implicit intention to provide for ‘fairness’.

Perhaps the *NRWMA* demonstrates the typical clash of values at the heart of any consideration of land use for a nuclear waste repository – between a utilitarian concept of fairness, which would seek to expedite the *NRWMA* on public safety and economic grounds, and a Rawlsian conception of justice,<sup>130</sup> one that would grant more weight to the inviolable freedom of the individual to choose whether or not to have a facility imposed on their land,

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<sup>117</sup> *Mobil Oil Australia Pty Ltd v FCT* (1963) 113 CLR 475, 503–4 (Kitto J), approved unanimously in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 161.

<sup>118</sup> Such as, not only Traditional Owners, but also those at increased risk of exposure to radiation from accidents in disposal or transport, or affected by any anticipated impact on local agricultural industry and property values.

<sup>119</sup> Aronson, Dyer and Groves, above n 116, 534–5.

<sup>120</sup> *Ibid* 751–2. Aronson, Dyer and Groves note that determining standing will always ultimately depend on looking at the scope, objects and purposes of the Act, in other words, considering its context.

<sup>121</sup> *ADJRA* ss 3, 5.

<sup>122</sup> Commonwealth of Australia, *Federal Judicial Review in Australia – Report of the Administrative Review Council* (2012) 147.

<sup>123</sup> *Ibid*, citing Matthew Groves, ‘Standing and Related Matters’ (2010) 59 *Admin Review* 62, 62.

<sup>124</sup> *Re McHattan and Collector of Customs (NSW)* (1977) 1 ALD 67, 70 (Brennan J), cited with approval in *Allan v Transurban City Link Ltd* (2001) 208 CLR 167, 174, 187–8; Aronson, Dyer and Groves, above n 116, 745.

<sup>125</sup> As it was in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, in which Aboriginal applicants were granted standing to challenge the criminal interference with Aboriginal relics on private property.

<sup>126</sup> As Gibbs CJ made clear in *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493, 530–1, standing entails ‘more than a mere intellectual or emotional concern’.

<sup>127</sup> Aronson, Dyer and Groves, above n 116, 746.

<sup>128</sup> *Ibid* 748.

<sup>129</sup> *Ibid* 751.

<sup>130</sup> Gerrard, above n 7, 83.

over and above ‘the calculus of social interests’.<sup>131</sup> That aside, without sufficient mechanism for the breadth of public interests to be heard, the *NRWMA* merely clothes a business transaction between private landowner and the Commonwealth in the apparel of natural justice, leaving its procedural fairness provisions with negligible substance with which to shape the approval process, and with dubious prospect of restoration via the courts.

#### IV THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (CTH)

##### A Assessment Approaches

The Commonwealth’s *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBCA*) becomes the primary vehicle for assessment of the broader environmental impacts of the *NRWMA* following acquisition of a site and prior to licensing of the facility’s construction and operation.<sup>132</sup> Therefore, to be properly informed, an evaluation of the *NRWMA* approval process must investigate whether the *EPBCA* has the inherent capacity to rescue the siting process from the problems betrayed by the *NRWMA*’s constraints on public consultation and review.

As a designated matter of national environmental significance (‘MNES’), a ‘nuclear action’, undertaken by the Commonwealth for the purposes of establishing ‘a large-scale disposal facility for radioactive waste’,<sup>133</sup> unambiguously requires Commonwealth oversight via the *EPBCA* and referral for assessment by the Commonwealth Minister for the Environment.<sup>134</sup> Where ‘a Commonwealth agency’ is the proponent, the Commonwealth Environment Minister must invite, from the Environment Minister of the State or Territory in which a nuclear action is proposed to be established, information ‘relevant’ to deciding which approach would be appropriate to assess the ‘relevant’ impacts of the action,<sup>135</sup> and must take this information into account in making a decision as to the choice of assessment approach.<sup>136</sup> This requirement to consult promises at least some opportunity for correcting the blanket exclusion of State and Territory environmental laws under the *NRWMA*, by allowing State and Territory governments to comment on the *NRWMA*’s impacts.

The implications of the Commonwealth Minister’s decision on assessment approach are certainly critical, as far as the space accorded to consultation and public participation is concerned. Of the various assessment approaches provided for by the *EPBCA* – namely, referral information, preliminary documentation, public environment report, environmental impact statement, or inquiry<sup>137</sup> – the ‘flexible’, inquisitorial methods of assessment allowed for under inquiries,<sup>138</sup> along with a conditional requirement that these be conducted in public,<sup>139</sup> most increase the capacity for accountability and transparency in the decision-making process. Under the four other assessment approaches, written comment on the

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<sup>131</sup> ‘Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override’: John Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press, 6<sup>th</sup> ed, 2003), 3–4.

<sup>132</sup> Department of Industry, Innovation and Science, above n 10, 4; *NRWMA* s 25(2)(b).

<sup>133</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 22(1)(e) (‘*EPBCA*’).

<sup>134</sup> *Ibid* s 21(1).

<sup>135</sup> *Ibid* s 74(2)(b)(ii).

<sup>136</sup> *Ibid* s 87(3)(a). If the activity levels of the radioactive material to be stored or disposed of at the *NRWMA* site are high enough to be ‘excessive’, as provided by *EPBCA* s 22(2), by the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) regs 2.02 and 2.03, and by the *Australian Radiation Protection and Nuclear Safety Regulations 1999* (Cth) sch 2, pt 2, the *NRWMA* proposal becomes a ‘controlled action’ under section 67, which means it is not necessary to seek public comment on the choice of assessment method, as otherwise provided for under *EPBCA* s 74(3)(b).

<sup>137</sup> *Ibid* pt 8 divs 3A, 4, 5, 6, 7.

<sup>138</sup> *Ibid* s 106.

<sup>139</sup> *Ibid* s 110.

proposed action must be invited from the public prior to the action's Ministerial approval,<sup>140</sup> and, crucially, evidence must be provided within any final report that the proponent has taken these comments into account and addressed them.<sup>141</sup> Time frames for such comment – twenty business days for assessment by environmental impact statement ('EIS')<sup>142</sup> – are arguably too restrictive for the general public.<sup>143</sup> If information from locals and Traditional Owners about the social and heritage impacts of the NRWMA does not reach the Minister within the given time frame, the methodological approach to any EIS may elude criticism.<sup>144</sup> In this way, rather than cure the problems pertaining to the site investigations conducted under the NRWMA, the EPBCA effectively insulates fact-finding under the NRWMA from greater scrutiny by imposing conditions for public comment that are unrealistic and disadvantageous to those in remote locations who are likely to be the most affected by the siting.

'Relevance' is crucial to establishing whether a matter is protected by a controlling provision of the EPBCA and thus must be considered by the Minister in approving an action.<sup>145</sup> The measure for relevance with regard to nuclear actions is 'significant impact on the environment'.<sup>146</sup> However, 'relevance' remains, as it does under the NRWMA, nebulous and discretionary, its meaning unassisted by the circular definition for 'relevant impacts' given within the EPBCA.<sup>147</sup> While social interests and Aboriginal heritage are values whose materiality may be easily ascribed to the EPBCA's definition of 'the environment',<sup>148</sup> 'significance' remains undefined and ambiguous.<sup>149</sup> This uncertainty has meant that cultural and spiritual values tend to be gauged quantitatively. In the 2002 draft EIS for the national repository that was to be located at Billa Kalina in South Australia, for instance, the scope of the EIS was directed at mitigation of interference with indigenous heritage, such that physical artefacts were not 'adversely impacted to an unacceptable degree',<sup>150</sup> rather than at consultation and consent to these impacts occurring in the first place. The inherent problem with this quantitative approach is that cultural and spiritual values of a site – intangible qualities – may be dismissed as irrelevant where tangible manifestations of these, such as 'background scatters of stone artefacts', albeit detectable, are described as having an 'archaeological potential' that is 'low to negligible'.<sup>151</sup> This type of outcome has prompted

<sup>140</sup> Ibid ss 93(3)(b), 95(2)(c), 95A(3)(d), 98(1)(c)(ii), 103(1)(c)(ii).

<sup>141</sup> Ibid ss 99(2), 104(2).

<sup>142</sup> Ibid s 103(3).

<sup>143</sup> As submitted by The Wilderness Society: Commonwealth of Australia, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (Cth): Interim Report (1999)* ('*Hawke Review Interim*') 314.

<sup>144</sup> Elliott points out that 'If engagement with the community occurs too late in the environmental assessment process, the wider community will suspect that the outcome has already been determined and that the project approval is a *fait accompli*.'; Mandy Elliott, 'Understanding Environmental Impact Assessment: Law, Science or Politics?' (2012) 113, *Precedent* 32, 34.

<sup>145</sup> EPBCA s 136(1)(a) 'Mandatory considerations'.

<sup>146</sup> Ibid s 21(1). This is the 'controlling provision' for nuclear actions.

<sup>147</sup> Ibid s 82. Even within the 'Definitions' provision in section 598, the meaning of 'relevant impacts' defers to section 82, without further explication.

<sup>148</sup> Section 528 defines 'the environment' holistically, as: '(a) ecosystems and their constituent parts, including people and communities; (b) natural and physical resources; (c) the qualities and characteristics of locations and areas; (d) heritage values of places; and (e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).'

<sup>149</sup> Although Peel and Godden reason that this uncertainty 'leaves substantial scope for interpretation by the courts on a case-by-case basis', and note that the test for 'significant impact' proposed by Branson J in *Booth v Bosworth* (2001) 114 FCR 39 established that 'significant impacts' may extend to activities outside an area within Commonwealth protection, Elliott views the *Booth v Bosworth* test as more clearly denoting 'an impact that is important, notable or of consequence having regard to its context or intensity', suggesting a definition consistent with the plain meaning, case law, extrinsic material and the objects of the EPBCA: Jacqueline Peel and Lee Godden, 'Australian Environmental Management: A "Dams" Story' (2005) 28(3) *UNSW Law Journal* 668, 680–1, 683; Elliott, above n 144, 34.

<sup>150</sup> Department of Education, Science & Training, *National Radioactive Waste Repository Draft EIS: Summary* (Commonwealth of Australia, 2002) 19–20. The Billa Kalina site became the subject of the *Nuclear Waste Dump Case*.

<sup>151</sup> Ibid 19.

some to call for increased provision for consultation and consent from indigenous peoples under the *EPBCA* for any action directly or indirectly impacting them.<sup>152</sup> In having the power to grant approval for the NRWMA, consent becomes the Commonwealth's exclusive prerogative, rather than that of the people most affected by its construction and operation. Indeed, public comment will not necessarily be sought on the taking of an action, or what conditions, if any, to attach to an approval, this being, after all, merely a discretionary requirement.<sup>153</sup>

The *EPBCA* assessment calculus 'involves balancing incommensurable values',<sup>154</sup> with 'economic and social matters'<sup>155</sup> and 'the principles of ecologically sustainable development'.<sup>156</sup> In the case of Wallaberdina Station, or Arngula Yarta ('spiritual land'), impacts affecting a relatively small group of indigenous people, who lack economic clout, but whose interests are bound up with tens of thousands of years of care for the spiritual values of the land in question, are, in the absence of mandatory consent provisions, unlikely to hold much weight against the broad range of interests espoused by the Commonwealth, these being concerned with intergenerational equity for the management of current volumes of radioactive waste, the economic benefits of increasing storage capacity, and the utilitarian benefits of a remotely located site. The inequity this creates has led some to suggest that the *EPBCA*'s mandatory considerations betray inherent structural bias by requiring an arbitrarily determined standard of 'significance' that results in substantial local impacts being diminished within the 'environmental equation'.<sup>157</sup>

The *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) ('the *ARPANS Act*') may correct some failings in assessment under the *EPBCA*, with the CEO of ARPANSA, an independent regulatory body, required to widely publish an invitation to the public to provide submissions on any application for a facility licence.<sup>158</sup> The content of these submissions is required to be taken into account by the CEO in deciding to issue a licence, along with information provided by the Commonwealth in relation to the mitigated risk of radiation, 'having regard to economic and social factors'.<sup>159</sup> Though 'undue risk to the health and safety of people, and to the environment' falls within the matters to be considered,<sup>160</sup> this risk is elsewhere referred to as risk 'from the harmful effects of radiation',<sup>161</sup> while 'environment' remains undefined in the Act. Therefore, while the *ARPANS Act* provides a further opportunity for public participation, the factors considered by the CEO would not appear to address such critical issues as the social and cultural appropriateness of a selected site,<sup>162</sup> this being left to the Minister under the *EPBCA* to evaluate within a context favourable to the economic rationale for brevity in the assessment process.

<sup>152</sup> Australian Human Rights Commission, Submission to Commonwealth of Australia, *Independent Review of the Environment Protection and Biodiversity Conservation Act* (1999), 30 January 2009, 4.

<sup>153</sup> *EPBCA* s 131A.

<sup>154</sup> Susan Tridgell, 'Evaluating the Effectiveness of the Environment Protection and Biodiversity Conservation Act 1999 (Cth): 2008-2012' (2013) 30 *Environment and Planning Law Journal* 245, 248.

<sup>155</sup> *EPBCA* s 136(1)(b).

<sup>156</sup> *Ibid* s 136(2)(a). Section 3A of the *EPBCA* defines 'the principles of ecologically sustainable development' as including decision-making processes which 'effectively integrate both long-term and short-term economic, environmental, social and equitable considerations'.

<sup>157</sup> Andrew Macintosh, 'The Commonwealth' in Tim Bonyhady and Andrew Macintosh (eds), *Mills, Mines and Other Controversies: The Environmental Assessment of Major Projects* (Federation Press, 2010) 229-30.

<sup>158</sup> *Australian Radiation Protection and Nuclear Safety Regulations 1999* (Cth) ('*ARPANS Regulations*') reg 40. A 'controlled facility' under the *ARPANS Act* includes 'a radioactive waste storage or disposal facility': *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) ('*ARPANS Act*') s 13.

<sup>159</sup> *ARPANS Act* s 32(3); *ARPANS Regulations* reg 41.

<sup>160</sup> *ARPANS Regulations* reg 41(b).

<sup>161</sup> *ARPANS Act* s 3.

<sup>162</sup> In its submission to the Senate Committee on the *NRWMA* Bill, the Northern Territory Environmental Defenders Office noted that both the *EPBCA* and the *ARPANS Act* were not adequate for addressing the types of environmental, economic and social risks posed by a radioactive waste facility and its associated activities: *Senate Committee Report* 56.

## B *The Time Factor*

The 'urgency' narrative adopted by the Commonwealth is likely to have some influence over the choice of assessment approach and the way in which the time devoted to consultation might be truncated throughout the *EPBCA* process. Urgency for a national repository was argued in the *Nuclear Waste Dump Case*,<sup>163</sup> and the timeframes for the exhaustion of current storage capacities is raised as justification for the NRWMA. The repatriation of Australian-produced ILW re-processed overseas under agreements concluded with France and the United Kingdom,<sup>164</sup> for instance, has been used in arguments concerning the pressure to be placed on current storage arrangements.<sup>165</sup> Capacity issues are however perhaps not as immediately pressing as Commonwealth arguments tend to make out. The World Nuclear Association suggests that the volumes of lightly-contaminated soil stored at Woomera, constituting half of all current Australian waste,<sup>166</sup> could feasibly now be reclassified,<sup>167</sup> such that the waste would then be disposed of 'in near-surface landfill-type facilities with limited control', or even as regular waste.<sup>168</sup> Nevertheless, the Commonwealth links the imminent exhaustion of its storage capacities not only to the environmental risks posed by current arrangements, but also to the existential threat facing the nuclear medical and research industry in Australia should a site not be found for the waste produced at Lucas Heights and the corresponding loss of jobs and economic opportunity resulting from any such eventuality.<sup>169</sup> The environmental problem of managing the waste thus continues to be yoked together with the economic and social utility of not only preserving but also expanding the industry that produces the waste,<sup>170</sup> without any attendant suggestion as to whether the demands of waste management might warrant temporary limitations on industrial expansion, while thorough public consultation and site review are allowed to take their course.

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<sup>163</sup> The Commonwealth argued that the lengthy time spent identifying the sites in question for the national repository and the unsatisfactory nature of current arrangements warranted its reliance on the urgency provisions in the *Lands Acquisition Act* to prevent South Australia's frustration of the acquisition of the site: *Nuclear Waste Dump Case* 270 [40].

<sup>164</sup> Australia and France exchanged letters under their Bilateral Nuclear Safeguards Agreement in 1999 for the transfer to France of spent fuel from the Lucas Heights reactor for reprocessing at its La Hague facility and for its subsequent return to Australia: Department of Foreign Affairs and Trade (Cth), 'Australia and France Sign an Implementing Arrangement' (Media Release, 15 November 1999) <<http://dfat.gov.au/news/media-releases/Pages/australia-and-france-sign-an-implementing-arrangement.aspx>>. The waste from France was returned in 2015, amid some controversy: Emily Laurence and staff, 'Greenpeace Campaigners Descend on Port Kembla for Arrival of Nuclear Waste Ship BBC Shanghai', *ABC News* (online), 5 December 2015 <<http://www.abc.net.au/news/2015-12-05/activists-descend-on-port-ahead-of-nuclear-waste-ship's-arrival/7004088>>. Waste from the UK will be returned in 2019: *Joint Convention 2014 Report* 12.

<sup>165</sup> Dr John Loy, the former CEO of ARPANSA, argues that 'extending and extending again' waste storage capacity at Lucas Heights is 'no longer an option', because 'ANSTO is fast filling with science infrastructure, and the developable areas around it are filling even quicker (sic) with homes': Loy, above n 74.

<sup>166</sup> *Joint Convention 2011 Report* 25.

<sup>167</sup> The World Nuclear Association argues for reclassification on the basis that the amassed soil is now 'no more radioactive than many rocks and sands': World Nuclear Association, above n 13.

<sup>168</sup> International best practice procedures for the disposal of Very Low Level Waste (VLLW) and Very Short Lived Waste (VSLW), respectively: ANSTO, above n 21, 5.

<sup>169</sup> Department of Industry (Cth), *Long Term Management of Australia's Radioactive Waste: Initial Business Case* (April 2014) 3.

<sup>170</sup> In support of the *NRWMA* Bill, The Hon Josh Frydenberg, now federal Minister for the Environment and Energy, argued: 'Critically, passage of this bill is urgent and the Greens tactics to delay it should not be supported because Australian spent fuel waste, which was transported to France and Scotland, will be transported back to Australia in 2015-2016 and will need to be immediately and safely stored.' Frydenberg then went on to argue that the debate about the bill 'provides an important opportunity for...a comprehensive and immediate debate about pursuing the benefits of a civilian nuclear power industry': Commonwealth, *Parliamentary Debates*, House of Representatives, 21 February 2011, 687-8 (Josh Frydenberg).

Justice Finn in the *Nuclear Waste Dump Case* relied on established authority to conclude that ‘urgency cannot generally be allowed to exclude the right to natural justice’, noting, however, that ‘it may in the circumstances reduce its content’.<sup>171</sup> An *EPBCA* approval process that is largely intended to be supportive of ‘efficiency and timeliness’, and ‘the use of tight statutory timeframes at all stages of the process’,<sup>172</sup> from the outset favours curtailment of access to natural justice, more so if ‘urgency’ is to be argued. In upholding the approval process for the proposed Gunns pulp mill in Tasmania, a project which had also been delayed amidst controversy and where the Commonwealth’s preference for an accelerated method of approval was justified by the imminent loss of jobs dependent on the Tasmanian timber industry, the Full Court of the Federal Court confirmed that the *EPBCA*’s approach is inherently one of ‘studied haste’.<sup>173</sup> Although the Court acknowledged the *EPBCA*’s intention to provide ‘a high level of public participation and transparency’,<sup>174</sup> it also conceded that information gathering is costly and time-consuming, necessarily rendering public comment subordinate to the *EPBCA*’s twin objective of timeliness.<sup>175</sup> In this vein, Branson and Finn *JJ* reaffirmed the Commonwealth’s direction to restrict timeframes for public comment where a project is highly controversial and has been, like the NRWMF, in the public arena for a number of years,<sup>176</sup> even though this seems somewhat antithetical to the aims of public participation for projects of such public import. While restricted timeframes reduce the time in which a public interest litigant may verify information or obtain independent reports,<sup>177</sup> and may moreover affect ‘the level of public confidence’ in the *EPBCA*’s provision for public participation, Branson and Finn *JJ* found that this did not affect the legality of the opportunity for comment, where it is given.<sup>178</sup> With the fast-tracking aspect of its approval process thus validated, the marginal place afforded to expressions of dissent under the *EPBCA* appears beyond challenge for those projects, such as the NRWMF, that typically attract the most public opposition.

### C The Subjective Decision

Tridgell observes that under the *EPBCA*, ‘much of the decision-making process remains obscure’, resulting in outcomes plagued by ‘lack of transparency’,<sup>179</sup> and in circumstances where a proposed action has already been substantially negotiated with the Commonwealth bureaucracy by the time it comes to be assessed by the Minister.<sup>180</sup> Where the Commonwealth is proponent, the investment of public resources in site investigations would further drive the financial impetus for a stream-lined approval process. This, of course, raises the problem of ‘trusting the Commonwealth to regulate itself’ under the NRWMF approval process.<sup>181</sup> In the Gunns litigation, where the withdrawal of the State from the assessment process left the Commonwealth with the exclusive mandate for approval of a project whose development it had partially funded and politically defended, Justice Marshall dismissed the question of apprehended bias and relied on High Court authority to find that, as long as the Minister had taken the steps required by the *EPBCA*, the Commonwealth was not prevented from having a policy position on the project it was tasked with also approving.<sup>182</sup>

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<sup>171</sup> *Nuclear Waste Dump Case*, 280 (Finn J).

<sup>172</sup> *Wilderness Society Inc v Turnbull* (2007) 166 FCR 154, 171–2 (Branson and Finn JJ), citing the Senate debates on the *EPBCA Bill* and the *EPBCA Explanatory Memorandum’s Regulatory Impact Statement*.

<sup>173</sup> *Ibid* 176.

<sup>174</sup> *Ibid* 172, citing the *EPBCA’s Regulatory Impact Statement*.

<sup>175</sup> *Ibid* 177.

<sup>176</sup> *Ibid* 173.

<sup>177</sup> *Ibid* 174.

<sup>178</sup> *Ibid* 177.

<sup>179</sup> Tridgell, above n 154, 246–7.

<sup>180</sup> *Ibid* 249.

<sup>181</sup> Prest, above n 93, 35.

<sup>182</sup> *Wilderness Society Inc v Turnbull* (2007) 158 LGERA 134, 163 [147], citing *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 [50].

Notwithstanding the extended standing afforded to those seeking judicial review of a decision made under the EPBCA,<sup>183</sup> Keim notes that challenging Ministerial approval is notoriously difficult.<sup>184</sup> The Hawke Review of the EPBCA,<sup>185</sup> in considering judicial review as ‘an avenue for independent scrutiny of decisions made under the EPBC Act’, noted its inadequacy in light of the small proportion of successfully litigated challenges.<sup>186</sup> Even if judicial review were successful in referring a decision back to the Minister for reconsideration, frustrated public interest litigants note that as long as a decision is ‘formally and procedurally correct’,<sup>187</sup> its reasons having been ‘carefully written so that they tick all the boxes and are not irrational’,<sup>188</sup> the EPBCA’s reliance on the subjective belief of the Minister that the information before him or her is sufficient, is likely to be enough to inoculate that decision from further challenge.

#### D *The Limits to a Co-operative Approach*

In light of the constraints placed on public participation under the EPBCA, the question arises as to how these can marry with the Act’s own Objects, which include, in particular, promoting ‘a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples’,<sup>189</sup> as well as ‘the involvement of the community in management planning.’<sup>190</sup> With public participation pushed to the statutory sidelines in the approval of nuclear actions under the EPBCA, these particular Objects seem at best merely hortatory statements with little practical enforceable power.

Before this can be considered a fair evaluation of the EPBCA, however, the possibility of bilateral agreements, provided for under that statute, warrants examination. A ‘relatively novel arrangement’,<sup>191</sup> these allow a State or Territory government’s assessment and approval processes to be accredited by the Commonwealth and to be substituted for the Commonwealth’s own, for the purposes of either assessing or approving controlled actions.<sup>192</sup> The rationale for bilateral agreements is to avoid the duplication that arises from both levels of government being required to conduct EIA of proposed projects.<sup>193</sup> However, in the case of radioactive waste, the NRWMA takes care of this problem by exempting the requirement for any such assessment by a State government. Under the NRWMA, as discussed, State and Territory environmental laws and the assessment processes provided under them are expressly excluded from application at the proposed repository site. Furthermore, actions taken by the Commonwealth government or a Commonwealth agency

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<sup>183</sup> EPBCA s 487.

<sup>184</sup> Stephen Keim SC, ‘The EPBC Act Ten Years on: Lessons from the Gunns Pulp Mill Litigation’ (2009) 3 *National Environmental Law Review* 27, 33.

<sup>185</sup> Undertaken by Dr Allan Hawke, pursuant to s 522A of the EPBCA, which requires that the EPBCA be reviewed every ten years from its commencement: Commonwealth of Australia, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) (*Hawke Review*). The review itself involved an extensive consultation process entailing the invitation to the public for submissions (220 being received), 140 face-to-face consultations with stakeholders in each capital city and a further invitation for public comment following release of the Interim Report (119 written comments being received): Department of Environment and Energy, ‘Independent Review of the Environment Protection and Biodiversity Conservation Act 1999’ (Commonwealth of Australia) <<https://www.environment.gov.au/legislation/environment-protection-and-biodiversity-conservation-act/epbc-review-2008>>.

<sup>186</sup> Hawke Review Interim Report 314.

<sup>187</sup> According to the Lawyers for Forests submission to the *Hawke Review Interim Report*: Ibid 314.

<sup>188</sup> According to the Wilderness Society submission to the *Hawke Review Interim Report*: Ibid.

<sup>189</sup> EPBCA s 3(1)(d).

<sup>190</sup> Ibid s3(2)(g)(iv).

<sup>191</sup> Chris McGrath, ‘Bilateral Agreements – Are They Enforceable?’ (2000) 17(6) *Environmental and Planning Law Journal* 485, 485.

<sup>192</sup> EPBCA ss 46(1), 46(2A).

<sup>193</sup> McGrath, above n 191, 485.

preclude a bilateral agreement, unless the agreement expressly overrode the assumption that the Commonwealth would retain exclusive control over assessment and approval for its own actions.<sup>194</sup>

In the unlikely event that a bilateral agreement were proposed for the NRWMF – presumably as a gesture of political appeasement offered to a hostile State government – public participation in the negotiation of any such agreement is not mandated under the *EPBCA*, which means that ‘the bilateral agreement can be negotiated behind closed doors by Commonwealth and State public servants together with their political superiors, with no opportunity for public input’.<sup>195</sup> Furthermore, the legal status of such agreements is disputable. Citing Justice Windeyer in *South Australia v The Commonwealth*,<sup>196</sup> McGrath notes that ‘there is a line of High Court authority that political agreements between governments are not generally enforceable in a court’ and are therefore beyond the scope of judicial review.<sup>197</sup> So, while a State government may be afforded more regulatory authority under a bilateral agreement for assessment of the NRWMF site, the public interest litigant would likely be prevented from challenging any decision made under its terms.

## V THE CONSTITUTIONAL QUESTION

### A *The External Affairs Power*

In deference to the cooperative federalism on which its origins and legitimacy ostensibly rest,<sup>198</sup> the *EPBCA* itself provides that it is not intended to exclude or limit the concurrent operation of any law of a State or Territory.<sup>199</sup> This is a principle which the *NRWMA* explicitly rejects through its extraordinarily broad exclusion of any such law. Considering whether this approach is open to challenge through the avenue of public interest litigation, necessarily involves questioning the constitutional basis for the validity or otherwise of the exclusion of State and Territory laws. In the South Australian context, the constitutional question is particularly pertinent, given the State prohibits the construction of any nuclear waste facility within its borders with the object of protecting ‘the health, safety and welfare of the people of South Australia’ and ‘the environment in which they live’.<sup>200</sup> As Carney reasons, the obvious head of power the Commonwealth would seek to rely on to validate exclusion of competing State environmental laws would be external affairs,<sup>201</sup> in order to implement its international obligations under the *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management* (‘RADWASTE’).<sup>202</sup>

RADWASTE requires that the legislative and regulatory framework of a contracting party must provide for national regulations for radiation safety, for a system of ‘appropriate institutional control’ and ‘a clear allocation of responsibilities of the bodies involved’,<sup>203</sup> with the objective of ensuring that ‘individuals, society and the environment are protected from

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<sup>194</sup> *EPBCA* s 49(1).

<sup>195</sup> Laura Hughes, ‘Environmental Impact Assessment in the Environment Protection and Biodiversity Conservation Act 1999 (Cth)’ (1999) 16(4) *Environmental and Planning Law Journal* 304, 314.

<sup>196</sup> *South Australia v The Commonwealth* (1962) 108 CLR 130, 154 (Windeyer J). The case concerned an agreement between the South Australian and Commonwealth governments for the construction of railways under legislation passed at both State and Federal level.

<sup>197</sup> McGrath, above n 191, 485-486.

<sup>198</sup> Peel and Godden, above n 149, 669.

<sup>199</sup> *EPBCA* s 10.

<sup>200</sup> *Nuclear Waste Storage Facility (Prohibition) Act 2000 (SA)* s 3.

<sup>201</sup> *Constitution* s 51(xxix).

<sup>202</sup> *Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management*, opened for signature 29 September 1997, 2153 UNTS 303 (entered into force 18 June 2001) (‘RADWASTE’). Gerard Carney, ‘Constitutional Framework for Regulation of the Australian Uranium Industry’ (2007) 26 *Australian Resources and Energy Law Journal* 235, 247.

<sup>203</sup> RADWASTE arts 18.2.i, 18.2.iv, 18.2.vi. The Commonwealth government notes that although Australian States and Territories ‘fully supported’ ratification of RADWASTE, the compliance of these jurisdictions is not subject to separate Commonwealth legislation: *Joint Convention 2011 Report*, above n 2, 6.

the harmful effects of ionising radiation, now and in the future'.<sup>204</sup> Though the apportionment of national control over regulation seems implied by RADWASTE, Rothwell notes that the question at the heart of the constitutional debate in the seminal case of *Commonwealth v Tasmania*<sup>205</sup> (*Tasmanian Dams*) concerning the use of the external affairs power was ultimately one of proportionality.<sup>206</sup> Despite apparently irreconcilable differences in the approach to environmental federalism – with the minority of the 4-3 judgment arguing for preservation of the States' law-making prerogatives,<sup>207</sup> and its opponents arguing for a more progressive and evolving view of the Constitution which prioritised the role of the federal government in an increasingly globalised world<sup>208</sup> – the Court was united over the need for Commonwealth legislative provisions to be 'appropriate and adapted' to implementing a treaty or convention.<sup>209</sup> Deane J argued that in order to prevent the arbitrary arrogation to the Commonwealth of control over property or endeavour situated within a State, reliance on the external affairs power necessarily entailed the need for there to be 'a reasonable proportionality between the designated purpose or object' of a treaty and 'the means which the law embodies for achieving or procuring it'.<sup>210</sup>

Safety being among the primary foci of its Objectives,<sup>211</sup> RADWASTE also seeks to ensure that 'effective defenses' are employed with the principle of intergenerational equity in mind, 'in such a way that the needs and aspirations of the present generation are met without compromising the ability of future generations to meet their needs and aspirations'.<sup>212</sup> If the needs and aspirations, whether of present or future generations, of communities adjacent or connected to the NRWMF site, are seen as contingent on laws that increase standards of environmental protection or are intrinsically tied to laws that safeguard indigenous heritage and access to the NRWMF site where it is located on land of continuing cultural and spiritual significance, then excluding the operation of these laws, as the *NRWMA* does, may be disproportionate to the safety objectives promoted by RADWASTE and inconsistent with its foundational principle of intergenerational equity. However, countering this argument would be the internationally supported principle that securing a disposal site ensures generations of the future are protected from the burden of environmental risk that long-lived radioactivity poses,<sup>213</sup> thus justifying the assumption of plenary federal measures.

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<sup>204</sup> RADWASTE art 1.1.

<sup>205</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Tasmanian Dams*).

<sup>206</sup> Donald R Rothwell, 'The High Court and the External Affairs power: A Consideration of its Inner and Outer Limits' (1993) 15 *Adelaide Law Review* 209, 220; Peel and Godden, above n 149, 673.

<sup>207</sup> While Murphy J was particularly damning of the doctrine of the 'federal balance' in *Tasmanian Dams*, arguing that the concept of reserved powers was thrown out with the *Engineers' Case* as being a fallacy, Wilson J viewed preservation of 'the basic federal polity of the Constitution' – which is a 'Federal Constitution, not a unitary Constitution' – as fundamental to 'the survival of the indissoluble federal Commonwealth': *Tasmanian Dams* 168 (Murphy J), 197 (Wilson J).

<sup>208</sup> Mason J argued for a flexible, progressive interpretation of the Constitution on the basis that its enduring power was contingent on its capacity to evolve with the national government's increasing participation in international affairs: *Tasmanian Dams* 127 (Mason J). Murphy J predicted that the external affairs power will increasingly come to be the means by which 'Australia will harmonize its internal order with the world order' and will no longer be an 'exceptional or extraordinary' use of Commonwealth power: *Tasmanian Dams* 170 (Murphy J). Similarly, Brennan J, in interpreting the Constitution as having a 'dynamic force which is incompatible with a static constitutional balance', envisaged that 'an expanding range' of modern commercial, economic, social and political activities would be brought within 'the sphere of Commonwealth legislative competence' through the field of external affairs: *Tasmanian Dams* 221 (Brennan J).

<sup>209</sup> *Tasmanian Dams* 104 (Gibbs J), 130–13 (Mason J), citing Barwick CJ in *Airlines of NSW Pty Ltd v NSW* (No. 2) (1965) 113 CLR 54.

<sup>210</sup> *Tasmanian Dams* 253, 260 (Deane J).

<sup>211</sup> One of the Objectives of RADWASTE is 'to achieve and maintain a high level of safety worldwide in spent fuel and radioactive waste management, through the enhancement of national measures and international co-operation': RADWASTE art 1.1.

<sup>212</sup> RADWASTE art 1.2.

<sup>213</sup> IAEA, above n 1, 2; International Atomic Energy Agency, IAEA Safety Fundamentals Series No. SF-1: Fundamental Safety Principles (2006) 12.

Regardless of any doubt that might be cast on the Commonwealth's reliance on 'external affairs', the so-called 'race power'<sup>214</sup> would likely authorise the *NRWMA*'s revocation of State indigenous heritage and access provisions.<sup>215</sup> For local indigenous litigants, then, the Constitution itself appears to pose the greatest barrier to any challenge they may seek to the extinguishment by the Commonwealth of their interests in the NRWMF site.

### B *The Manufacturing of Inconsistency*

As Carney points out,<sup>216</sup> by virtue of inconsistency,<sup>217</sup> any State law purporting to prevent the transport of radioactive waste within and from outside a State,<sup>218</sup> would be invalidated by a Commonwealth law that sought to allow this activity, should it be supported by a head of power.<sup>219</sup> Less clear is the question of how State environmental legislation can be inconsistent with the *NRWMA* and validly excluded if environmental protection is intended to be a goal of both the *NRWMA* and State environmental laws. An exception to the operation of section 109, which might place the validity of the *NRWMA*'s exclusion of State environmental legislation in doubt,<sup>220</sup> lies potentially in the argument that the Commonwealth, through the *NRWMA*, attempts to 'manufacture inconsistency' in its blanket exclusion of all State environmental legislation that would otherwise apply to operations and activities connected to the NRWMF.<sup>221</sup> Crucial to establishing a challenge in this respect would be proving that the intention of these provisions of the *NRWMA* was merely to prevent State legislative action.<sup>222</sup>

In refuting such a claim, the Commonwealth would need to argue that the *NRWMA*'s exclusion of State environmental legislation 'arose from a legitimate policy choice'.<sup>223</sup> The merits of that policy would be irrelevant, for 'whether we might find the policy rationale of the law praiseworthy has nothing to do with the case; it is merely necessary that there should be such a substantive policy'.<sup>224</sup> In light of its long-standing concern about the inadequacy of State and Territory arrangements for waste storage, the Commonwealth could argue, as it did in ratifying RADWASTE, that national security concerns about the accessibility of radioactive material for use in acts of terrorism,<sup>225</sup> along with its status as an actor in

<sup>214</sup> Section 51(xxvi) of the *Constitution* provides that the Commonwealth Parliament may make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'.

<sup>215</sup> Gibb CJ considered it settled, in *Tasmanian Dams* [120], that section 51(xxvi) did not necessarily mean a law made in reliance on the power should confer a benefit on indigenous peoples.

<sup>216</sup> Carney, above n 202, 247.

<sup>217</sup> Section 109 of the *Constitution* provides that '[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

<sup>218</sup> For instance, under section 9 of the Nuclear Waste Storage Facility (Prohibition) Act 2000 (SA).

<sup>219</sup> Such as section 23(5) of *NRWMA* which allows transport of waste through a State or Territory to the NRWMF and the use of transport infrastructure for that purpose.

<sup>220</sup> Nicolas Dour and Greg Taylor, 'Manufactured Inconsistency' (2013) 39(1) *Monash University Law Review* 131, 135.

<sup>221</sup> Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5<sup>th</sup> ed, 2010) 347, quoting Evatt J in *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 686: "it is not possible for the Commonwealth to force its...legislation into direct conflict with the...laws of a State without destroying the validity of its own legislation". *Contra* Rumble, who argues that there is 'nothing in the terms of section 109 which prevents the Commonwealth from enacting such a law': Gary A Rumble, 'Manufacturing and Avoiding *Constitution* Section 109 Inconsistency: Law and Practice' (2010) 38 *Federal Law Review* 445, 451.

<sup>222</sup> Peter Hanks, "'Inconsistent' Commonwealth and State laws: Centralising Government Power in the Australian Federation' (1986) 16 *Federal Law Review* 107, 123, citing Dixon J in *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84. Dour and Taylor describe 'manufactured inconsistency' as an 'offence of intention', above n 220, 136.

<sup>223</sup> Dour and Taylor, above n 220, 137.

<sup>224</sup> *Ibid* 138.

<sup>225</sup> National Interest Analysis, Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (Parliament of Australia, 3 December 2002) 6.

international forums on nuclear non-proliferation safeguards,<sup>226</sup> warrant an exclusively federal legislative control over domestic nuclear waste management.

Though the Commonwealth's policy rationale might preserve the *NRWMA*'s exclusionary provisions and legitimise the coercive approach adopted in the aftermath of *Sutherland Shire v ANSTO*, a further indicator of bad faith on the part of the Commonwealth would be an apparent intention to 'cover the field' by an exclusion of State environmental laws, while meanwhile providing very few substantive provisions of its own to demonstrate fulfilment of this intention.<sup>227</sup> In this respect, the Commonwealth may rely on the breadth of environmental and heritage investigations it proposes to conduct under the *NRWMA* in relation to the site nomination in order to claim coverage. Even though the *ARPANS Act* stipulates very little about 'social' considerations, and the *EPBCA*, as demonstrated, contains more ambiguity than clarity with respect to the regulation of nuclear actions and their impacts on 'the environment', the Commonwealth can point to provisions in these statutes and in the *NRWMA* which indicate 'some', albeit unsatisfactory, regulation of environmental and heritage consequences.<sup>228</sup>

As discussed in Parts II and III of this paper, the coercion implicit in the *NRWMA* has clearly evolved in response to actual or possible frustration by the States of the Commonwealth's objectives.<sup>229</sup> However, a public interest challenge on the basis of manufactured inconsistency, citing a Commonwealth attempt to 'kneecap the states',<sup>230</sup> would be very difficult to mount. Any indication of bad faith is offset by the Commonwealth's commitment to RADWASTE's principles and objectives, and reliance on its own regulatory framework, however inadequate that appears to be.

### C Unlawful Incursions and Excisions

An alternative basis, one with 'a more obvious and convincing rationale',<sup>231</sup> for bringing an action arguing the Commonwealth's manufacturing of inconsistency in provisions such as the *NRWMA*'s section 24, is an application of the *Melbourne Corporation* principle,<sup>232</sup> 'which guarantees the continued existence of the States and their capacity to function as such'.<sup>233</sup> As Dour and Taylor note, 'the capacity to legislate is the most distinctive and most important function of any governmental unit',<sup>234</sup> and nowhere is this importance more pronounced geographically and territorially than in the area of environmental and planning law.

<sup>226</sup> Australia is a participant country member of the International Framework for Nuclear Energy Cooperation (IFNEC), formerly the US-led Global Nuclear Energy Partnership ('GNEP'), which formed in 2006. The Statement of Mission of the IFNEC is to 'ensure the use of nuclear energy for peaceful purposes proceeds in a manner that is efficient and meets the highest standards of safety, security and non-proliferation': International Framework for Nuclear Energy Cooperation, *Statement of Mission* (adopted 16 June 2010) <www.ifnec.org>.

<sup>227</sup> *Contra* Rumble, who argues that there is nothing to prevent the Commonwealth from legislating to exclude State law, even if does not make any positive provision for the subject matter: Rumble, above n 221, 453.

<sup>228</sup> Dour and Taylor, above n 220, 144.

<sup>229</sup> Dour and Taylor point out, citing *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, that this history, though dealing with political rather than legal considerations, would be admissible in a challenge on the grounds of manufactured inconsistency: *Ibid* 150.

<sup>230</sup> *Ibid* 142.

<sup>231</sup> *Ibid* 153.

<sup>232</sup> The High Court elucidated the principle in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ('*Melbourne Corporation*'). Of the Australian federal system, Dixon J said, 'unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorising the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority': *Ibid* 82.

<sup>233</sup> Carney, above n 202, 238.

<sup>234</sup> Dour and Taylor, above n 220, 153.

Nevertheless, there is considerable uncertainty as to the parameters of such a principle. In *Melbourne Corporation*, Dixon J said that a Commonwealth law cannot have the validity of its enactment under a constitutional head of power, such as external affairs, undermined by any intergovernmental immunity which protected the States from any particular disability or burden wrought by that law. Conversely, Latham CJ and Williams J argued that validity could be in question if a law was characterised as restricting the power of the State.<sup>235</sup> The prospect of success in such a challenge, as yet untested in respect to the States' capacities to legislate,<sup>236</sup> would therefore be highly uncertain, dependent again on submitting the dubious contention, given the multi-faceted motivations for the *NRWMA*, that its overall purpose or intention was to negate any challenge from the States that may arise in the manner of *Sutherland Shire v ANSTO* or the *Nuclear Waste Dump case*.<sup>237</sup>

In *Tasmanian Dams*, the *Melbourne Corporation* principle was applied very narrowly by Brennan J, who determined that 'a restriction on the use of land which is not devoted to the functioning of an organ of government' cannot possibly be found to result in an impairment of the State's exercise of its executive powers and invalid trespass by the Commonwealth.<sup>238</sup> Mason J also preferred an application of the principle in rather prosaic terms applied to surface area, finding that it may be 'perhaps possible' for the *Melbourne Corporation* principle to be attracted if the land that is the subject of the disputed Commonwealth law 'forms a very large proportion of the State', but not where the parcel of affected land in that case constituted a mere 14,125 hectares.<sup>239</sup> As the *NRWMA* would likely occupy 100 hectares of the 25,000-hectare *Barndioota* property,<sup>240</sup> the principle would certainly not be engaged if Mason J's reasoning on its defined, physical limits were to be accepted.<sup>241</sup>

Brown, who perceives constitutional conflict as 'embedded', though not discussed, in the *Nuclear Waste Dump Case*, questions the validity of the Commonwealth acquisition on more radical grounds. The exclusion of State laws to a Commonwealth-acquired site in circumstances where there may be no actual inconsistency with the Commonwealth law,<sup>242</sup> results, Brown argues, in the 'transfer of political dominion' over that land and, effectively, in excision of State 'territory'.<sup>243</sup> Brown notes that sections 111 and 124 of the Constitution adopt the word 'surrender',<sup>244</sup> indicating that 'the only means by which the founders

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<sup>235</sup> Blackshield and Williams, above n 221, 1107.

<sup>236</sup> Dour and Taylor, above n 220, 153.

<sup>237</sup> Dour and Taylor point out that the aim, intent or purpose of the legislation, as relied upon by Dixon J in *Melbourne Corporation*, was critical to the High Court's later application of the principle in *Austin v Commonwealth* (2003) 215 CLR 185; *Ibid* 154.

<sup>238</sup> *Tasmanian Dams* 214 (Brennan J).

<sup>239</sup> *Ibid* 141 (Mason J).

<sup>240</sup> Keane, above n 23.

<sup>241</sup> Brown suggests the Commonwealth government's 1986 decision to drop a proposal to acquire 20,000 square kilometres of land around Cobar in NSW, following an intense debate about the impact on the State, indicates the constitutionality of the proposal 'would have been a ripe issue for litigation' using the *Melbourne Corporation* principle: A J Brown, 'When Does Property Become Territory? Nuclear Waste, Federal Land Acquisition and Constitutional Requirements for State Consent' (2007) 28 *Adelaide Law Review* 113, 122. However, the area of the land in Brown's example equates to an area 80 times the size of Wallerberdina Station.

<sup>242</sup> Such as occurred in the controversial 1970 decision of the High Court in *Worthing v Rowell* (1970) 123 CLR 89, which applied a literalist reading of section 52(i) of the Constitution so as to liberate Commonwealth activities on the Richmond RAAF Base from simultaneous application of NSW building regulations, notwithstanding any actual inconsistency between the two laws: *Ibid* 128. Section 52(i) provides that the Commonwealth Parliament 'shall, subject to this Constitution have exclusive power to make laws for the peace, order and good government of the Commonwealth with respect to...the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes'.

<sup>243</sup> Brown, above n 241, 130-131.

<sup>244</sup> Section 111 provides that 'The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.' Under Section 124, '[a] new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof.'

contemplated the vacation of State legislative jurisdiction in favour of Commonwealth control, was voluntarily'.<sup>245</sup> Section 123, as Brown points out, provides the means by which consent should be given to the surrender of State territory, requiring the consent of the State's government and, moreover, its people, via 'the majority of the electors of the State voting upon the question', to a Commonwealth action which will 'increase, diminish, or otherwise alter the limits of the State'.<sup>246</sup>

Noted by Brown as the deal-breaker condition which ultimately determined the participation of New South Wales in the formation of the Federation,<sup>247</sup> section 123 certainly suggests the availability of an unconventional and, as yet, untested valve for public participation in circumstances where State environmental laws are excluded. However, as Brown himself acknowledges, this would be an 'archaic' protection, at odds with the evolution of federalism to date,<sup>248</sup> a doubt confirmed by the High Court's gradual shift away from an intransigent conception of the 'federal balance'.<sup>249</sup>

#### IV CONCLUSION

Defying balance, the Commonwealth's legal framework for the NRWMF is heavily weighted toward protection of the national interest. The broad ambit of concerns which inform this preference – these being environmental, economic and internationally legal and political in nature – are relied upon as justification for a regime tightly shut against public participation, such that there remains little opportunity for expressions of local dissent and the testing of regionally important interests that conflict with those endorsed by the Commonwealth. The *NRWMA*, with its erasure of the matrix of State and Territory environmental and heritage legislation and the opportunities for ventilation of the public interest that these afford, seals the siting process from any statutory impediment, but thereby reduces the protection available to environmental and heritage matters. The *EPBCA*, by obfuscating the considerations going toward Commonwealth decisions and by sacrificing public participation to an efficiency imperative, provides an effective shield for the *NRWMA*'s assessment processes, while the *ARPANS Act* does little to expose social and heritage concerns. A bilateral agreement under the *EPBCA* for assessment of the *NRWMF*'s environmental impacts also seems out of the question. With the High Court's conception of environmental federalism now consonant with the Commonwealth's increasing involvement in international forums on national responsibilities for the nuclear fuel cycle, the success of any constitutional challenge to the *NRWMA* seems, at best, tenuous.<sup>250</sup> The safest conclusion that can be drawn is that this is a legal framework which will very likely work to overcome the setbacks thrown up by prior litigation in order to ultimately secure a site for the NRWMF, but at the cost of other legitimate interests and with potentially self-defeating consequences.

The most obvious of these negative outcomes is political fallout, as loss of leverage in the decision-making process inevitably takes hold and results in entrenched and sustained public opposition.<sup>251</sup> Distrust of both the institution and the consultative process were central to the recent majority decision of the South Australian 'citizen juries' to reject the

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<sup>245</sup> Brown, above n 241, 133.

<sup>246</sup> Constitution s 123.

<sup>247</sup> Brown, above n 241, 134.

<sup>248</sup> *Ibid* 138.

<sup>249</sup> *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 333 (Callinan J).

<sup>250</sup> McGrath asserts that 'the Commonwealth now has virtually a plenary power to make laws with respect to the environment': Chris McGrath, 'Swirls in the Stream of Australian Environmental Law: Debate on the EPBC Act' (2006) 23 *Environmental and Planning Law Journal* 165, 166.

<sup>251</sup> As in the case of the proposed Yucca Mountain repository in Nevada: Richard B Stewart, 'U.S. Nuclear Waste Law and Policy: Fixing a Bankrupt System' (2008) 17 *NYU Environmental Law Journal* 783, 797, 805.

State government's proposal for an international repository.<sup>252</sup> Indeed, where rights are impacted or removed by the over-riding of the laws under which they would otherwise be protected, and consultation is co-opted to 'manufacture consent',<sup>253</sup> public interest litigation may seem the only remaining option for communities disproportionately affected by radioactive waste disposal, a possibility certainly ignited with respect to Barndioota.<sup>254</sup> The apparently insurmountable barriers inhibiting the success of any such action are certainly justifiable on the grounds of the national interest, but are also, this paper concludes, inherently and problematically unjust.

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<sup>252</sup> Claire Campbell, 'Nuclear Fuel Cycle Royal Commission: SA Citizens' Jury Votes Against Storing Nuclear Waste', *ABC News* (online), 7 November 2016 <<http://www.abc.net.au/news/2016-11-06/sa-citizens-jury-vote-against-storing-nuclear-waste/7999262>>. The South Australian government commissioned Democracy Co, a private consultancy run by Emma Lawson and Emily Jenke, to implement 'citizen juries' on the question of an international repository: Andrew Spence, 'Citizen Driven Governing to Shape Nuclear Waste Future', *The Lead South Australia* (online), 22 June 2016 <<http://www.theleadsouthaustralia.com.au/industries/mining-resources/citizen-driven-governing-to-shape-nuclear-waste-future/>>.

<sup>253</sup> In circumstances where 'dissent and inconvenient information are kept within bounds and at the margins, so that while their presence shows that the system is not monolithic, they are not large enough to interfere unduly with the domination of the official agenda': Edward S Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Bodley Head, 3<sup>rd</sup> ed, 2008) xii.

<sup>254</sup> Meredith Booth and Verity Edwards, 'Plan for Flinders Ranges Nuclear Waste Dump Faces Legal Battle', *The Australian* (online), 5 May 2016 <<http://www.theaustralian.com.au/national-affairs/state-politics/plan-for-flinders-ranges-nuclear-waste-dump-faces-legal-battle/news-story/f6e95412f8c8d132f153676cf2bc8940>>.



# THE UNDER-THEORISATION OF RELIGIOUS FREEDOM IN POLYNESIA – TWO CASE STUDIES

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*Most of the Pacific Island nations have constitutions that draw their understanding from international human rights instruments, including the religious liberty provisions of the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1966. This article examines aspirational religious liberty in Tuvalu and Samoa against customary expectation and practice. While violence premised in religious difference is rare, the toleration of minority belief and practice in accordance with the UN standards does not come naturally in any country, especially when culture and custom dictate majoritarian outcomes. As Martha Nussbaum has suggested in relation to religious liberty in the United States, the foundations and justifications of freedom of conscience and religion need to be relearned in each new generation if they are to protect minorities as envisaged by the framers of the UN instruments after World War II.<sup>1</sup>*

## I INTRODUCTION

The thesis in this article is that freedom of conscience and religion in Polynesia is under-theorised and that the lack of understanding of what freedom of conscience means in practice results in occasional village conflicts. However, violence premised in religious difference is rare in Polynesia. That may be because religious difference is itself a European introduction and does not engage the strongest sensibilities of the Polynesians, despite their famous church attendance in their home islands. The lack of violence is more likely because populations are small, and because lived history and European teaching have identified other means of conflict resolution. In this article I will explain my statement that freedom of conscience and religion in Polynesia is under-theorised and not well understood with two examples – Tuvalu and Samoa.

I first briefly sketch the history of the idea of freedom of conscience and religion and suggest that it does not come naturally to any culture. Rather it is the learned product of compromise and results from belligerent willingness to abide the terms of documentary peace. It is the product of constructive reason rather than of any particular culture or custom. Culture and custom generally operate to favour the most powerful opinions in any society and tyrannise minority viewpoints.

In the first example, I review the constitutional freedom of religion that has been established in Tuvalu, one of the smallest nations in the Pacific. Tuvalu features a modern constitution that ‘ticks all the boxes’ where human rights principles are concerned. These principles have

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<sup>1</sup> Earlier in his professional life, the author of this article worked for twenty years as International Legal Counsel for The Church of Jesus Christ of Latter-day Saints in the Pacific Area and then through the African Continent. At a 2016 Symposium on ‘The Politics of Religious Freedom in the Asia-Pacific’, convened by The University of Notre Dame Australia’s Institute for Ethics and Society, he was invited to reflect on the state of religious liberty in the Pacific in the light of that experience. He addressed that Symposium with a series of case studies. This article is an edited version of that paper referring only to examples from the largest and smallest countries there discussed.

clearly descended from the *Universal Declaration of Human Rights* ('UDHR')<sup>2</sup> and the two UN covenants, the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>3</sup> and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').<sup>4</sup> However, there is an interesting proviso in relation to local culture that bears the hallmarks of localisation, but which does not fully connect with local culture or guide religious freedom or practice when it is inspected closely.

In my second example, I consider freedom of religion in Samoa. Again, the Constitution bears the hallmarks of UDHR ancestry, but it is a first generation example, originating as it did in 1960 before the ICCPR and ICESCR were finalised and ratified. Only chiefly males were given the vote when Samoa became independent in 1962, and that restriction did not end until 1990, but with a quid pro quo – the passage of the *Village Fono Act 1990* (Samoa) ('VFA'), which reinstated some chiefly control of village discipline at the same time as women were given the vote for the first time to satisfy international concern. I review the context of that change and the disagreement about what village discipline meant historically and what it means in the 1990 legislation, and discuss how it has led to conflict with freedom of conscience and religion under the 1960 Constitution.

I conclude that as in Europe and the United States, freedom of conscience and religion was not a natural state in either of these countries and no existing customary dispute resolution mechanism existed to resolve dissent in a way that protected minority belief. Custom in Polynesia, as elsewhere in the world, entrenched majoritarian attitudes and was unaccepting of minority opinion and practice, including minority opinion premised in religious belief. The history of freedom of conscience and religion is the product of collective human reflection after hundreds of years of conflicts in and between European countries with large populations. While freedom of conscience and religion can provide a universal solution to religious conflict, it cannot do so unless its philosophy is understood in every place where it is implemented on paper. Even in the United States, Martha Nussbaum is correct to have observed that freedom of conscience and religion needs to be relearned in each succeeding generation.<sup>5</sup> That is because a useful understanding of freedom of conscience and religion does not come naturally to the human race.<sup>6</sup>

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<sup>2</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948).

<sup>3</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

<sup>4</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>5</sup> Martha C Nussbaum, *Liberty of Conscience: In Defence of America's Tradition of Religious Equality* (Basic Books, 2008) 361. In an American context, Martha Nussbaum has observed that the origins and wisdom of religious equality, and what she calls "the battle for equal respect...[must] be refought in each new era".

<sup>6</sup> Martin Krygier, 'The Rule of Law: Pasts, Presents, and Two Possible Futures' (2016) 12 *Annual Review of Law and Social Science* 199, 201-8. However, note that in his extensive writing about 'the rule of law', Martin Krygier has confirmed that rule of law obedience is learned behavior and that even the cultures that do learn it, can lose it easily if they do not nourish it. Recently, for example, he has said that although concern to temper the arbitrary exercise of power is millennia old, the residues of thought and practice which enable the management of arbitrary power in western culture and particularly in the common law tradition, extends through many generations and can instruct us how to develop what Montesquieu called 'moderate forms of government'. He says in particular that: Distinctive and strong rule of law traditions are not natural facts, in some times and places not facts at all. In the Russian imperial state tradition, for example, law was not a central cultural symbol, and to the extent that it counted, it did so as an arm of the central tsarist power, over which there stood no mortal superior. The notion that power should be framed and restrained by law; that law should have a power-tempering role, both horizontally among members of society and vertically between political power-holders and their subjects; or that it should do anything but transmit central orders, was for long periods unknown, then heretical, more commonly alien, and late and weak in developing.

## II THE ORIGIN OF THE IDEA OF FREEDOM OF CONSCIENCE AND RELIGIOUS LIBERTY – A HISTORICAL OVERVIEW

In this brief overview, it is not possible or appropriate to discuss all the ideas that seeded the international norms that flowed from the *UDHR*. My purpose is more limited. I acknowledge ideas of community over self that flow from Confucian and other traditions. I acknowledge the European idea, perhaps most famous in *Magna Carta* and the *Treaty of Westphalia*, that a written document can capture the terms of a peace accord that will protect and bind its signatories if they are collectively faithful to it. I also acknowledge the idea that natural rights flow from reason, a contribution made by Greek and Roman philosophers. However, what I will do in this part is identify the idea of freedom of conscience and religion that crystallised after World War II in the consensus achieved by those who framed the *UDHR*. While it is true to observe that there are many respects in which all of the *UDHR* ideas remain aspirational, I submit that those aspirations have now infected the world so thoroughly that it is unlikely any single dictator will ever succeed in suppressing them again.

The story of the evolution of the idea of freedom of conscience is not the study of the principled development of a noble dream. For the most part, it is a story of conflict and compromise, and paradoxically it is a story of selfishness and the almost complete absence of any fragment of the religious idea of reciprocity. Ancient Roman policy included a version of pluralism which included religious liberty at times, but the policy was inconsistently applied. Christianity for example, was ignored, then persecuted and finally tolerated under Constantine.<sup>7</sup> ‘Attempts had been made to incorporate...it [along with]the religions of Isis, Mithras...and others...[into] one vast polytheism, whose cult was to be maintained and controlled by the State’.<sup>8</sup> But ‘Christianity would not accept this inferior position...and from the fundamental conflict arose the problem of Church and State’.<sup>9</sup> Broadly stated, that problem was ‘that many earnest thinkers f[ou]nd it impossible to accept the State as the highest form of human society’<sup>10</sup> or the ultimate authority in their lives. In Europe, this core philosophical problem explains ‘the long conflict between the Empire and the papacy’<sup>11</sup>— and in England it explains the conflicts between Archbishop Thomas A’Becket and King Henry II and even the Puritan revolution which spilled onto American soil.<sup>12</sup> While the church could be ‘a potent ally’, it could also be a ‘vigorous rival’.<sup>13</sup>

Durham and Scharffs suggest that the ‘pattern of the persecuted becoming persecutors’<sup>14</sup> manifests ‘[a] flagrant flaw of human nature’<sup>15</sup> — ‘the tendency of a majority group to abuse its power to the detriment and suffering of minority peoples’.<sup>16</sup> The irony is that the persecuted become persecutors when ‘emboldened by the strength of their numbers’.<sup>17</sup> Christians persecuted from approximately 64 AD under Nero into the early part of the 4<sup>th</sup> century AD when Constantine and Licinius concluded the Edict of Milan, were invested with state power and became persecutors of their own dissenters.<sup>18</sup> But in the Christianised Western empire, ‘neither the church nor state could ever totally subordinate the other’.<sup>19</sup> ‘The result was a continual tension between religious and political institutions that...contributed

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7 Theodore F T Plucknett, *A Concise History of the Common Law* (Little Brown and Co, 1956) 4.

8 Ibid.

9 Ibid.

10 Ibid.

11 Ibid.

12 Ibid 5.

13 Ibid.

14 Cole Durham and Brett Scharffs, *Law and Religion: National, International and Comparative Perspectives* (Aspen Publishers, 2010) 4.

15 Ibid.

16 Ibid.

17 Ibid.

18 Ibid 7.

19 Ibid 10.

to a sense that both institutions were subject to limits'.<sup>20</sup> Though it took a long time and a lot of war, the resulting detente seeded dualistic thought and political theory. Additionally, in England and her American colony, after the efforts of the Tudors and Stuarts to once again subordinate the church, uniting the two great domains under one grand head, it led to the idea of tolerance as first a tentative, and then a confident solution.

Edwin Gaustad tributes the American religious reformer Roger Williams as the source of many of John Locke's more famous ideas concerning toleration.<sup>21</sup> But when John Locke wrote his famous 'letters concerning toleration' between 1689 and 1692, much of the 'terror' which attached to these ideas when Roger Williams wrote in 1642, had dissipated.<sup>22</sup> England now had its own Bill of Rights and William of Orange was the new king (jointly with his wife, Mary II of England) following the 'Glorious Revolution' of 1688. Durham and Scharffs list six of Locke's key ideas, and summarise that he 'rejected the prevailing notions of church and state in his time',<sup>23</sup> including the idea that 'an established homogeneous religion...could serve as a kind of social glue and...motivation for loyalty...to the regime'.<sup>24</sup> Locke's keys to effective toleration were: separation of the civil and religious spheres; ensuring that civil power does not extend to the religious sphere; ensuring that religion is not entitled to assert civil power; acknowledging that the State is incompetent to ascertain religious truth; acknowledging that plurality is a source of stability; and acknowledging that there is no civil obligation to tolerate intolerance.<sup>25</sup>

Locke argued that coercion in matters of religion had no value whatever; that the State could not force anyone to heaven; and that toleration was more likely than coercion to stabilise a political regime.<sup>26</sup> Locke had profound influence in America, but most notably with Thomas Jefferson and James Madison 'who drew upon his work in building their case for a broad understanding of religious freedom'.<sup>27</sup> Voltaire captured Locke's sentiments very well when he later wrote on the toleration that evolved in England after the American revolution:

If there were only one religion in England there would be danger of despotism, if there were two they would cut each other's throats, but there are thirty, and they live in peace and happiness.<sup>28</sup>

Much in the United States Constitution and Bill of Rights must be attributed to the spirit of compromise.<sup>29</sup> James E. Wood Jr states that 'assurances of religious liberty were needed to protect...religious diversity...[and] were an important way of building a consensus'.<sup>30</sup> Thomas Berg explained the pragmatism when he wrote:

The founding era was only a few generations removed from major religious persecutions and conflicts – Protestants versus Catholics, Puritans versus traditional Anglicans, majority churches versus dissenting sects – in England and continental Europe. America's founders knew very well that, in James Madison's words, [t]orrents of blood

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<sup>20</sup> Ibid.

<sup>21</sup> Edwin S Gaustad, *Liberty of Conscience: Roger Williams in America* (Judson Press, 1999) 196–8; See also Martha C Nussbaum, above n 5, 41.

<sup>22</sup> Gaustad, above n 21, 199.

<sup>23</sup> Durham and Scharffs, above n 14, 14.

<sup>24</sup> Ibid, quoting Cole Durham 'Perspectives on Liberty: A Comparative Framework' in Johan Van der Vyver and John Witte (eds), *Religious Human Rights in Global Perspective: Legal Perspectives*, (Martinus Nihjoff, 1996) 1, 7.

<sup>25</sup> Durham and Scharffs, above n 14, 14–17.

<sup>26</sup> Ibid 14.

<sup>27</sup> Ibid.

<sup>28</sup> Voltaire, *Letters on England* (Penguin Books, 1980) as quoted in Durham and Scharffs, above n 14, 11.

<sup>29</sup> David Little, 'The Reformed Tradition and the First Amendment' in James E Wood (ed), *The First Freedom: Religion and the Bill of Rights* (Baylor University Press, 1990) 17.

<sup>30</sup> James E Wood, 'Religion and the Constitution' in Wood, above n 29, 10.

have been spilt in the Old World, by the vain attempt of the secular arm to extinguish religious discord, by proscribing all differences of opinion in religion.<sup>31</sup>

Roger Williams had stated that ‘enforced uniformity (sooner or later) is the greatest occasion of civil war’<sup>32</sup> — the separation of state and religion was necessary to protect religion.

An understanding of the principles of toleration distilled gradually as it dawned on philosophers and politicians that coercion had not solved the problem of sectarian violence. Locke's idea that compulsion was the antithesis of any meaningful sense of worship in religion crystallised into a political understanding that coercive suppression of minority belief did not benefit government in the long term either. There was ‘consonance between a system of civil peace based on freedom of conscience and a Christian gospel conveyed freely and in peace by persuasion, admonition, and example, rather than by force’.<sup>33</sup>

For Nussbaum, Roger Williams' understanding of liberty of conscience was the root, not just of religious tolerance, but of sincere mutual religious respect,<sup>34</sup> prefigured not only Locke, Jefferson and Madison, but also Rawls' idea of overlapping consensus as the solution to peace in the liberal state in both his *Theory of Justice* and *Political Liberalism*.<sup>35</sup> Compared to Locke, and in some respects Kant, Williams has an extra measure of psychological insight. He helps us see why persecution is so attractive and what emotional attitudes might be required to resist it.<sup>36</sup> Further, he is absolutely sure that the ‘[l]aw and force have absolutely no place in the sphere of the soul and its safety, which must be governed by persuasion only’.<sup>37</sup> The result of this understanding of ‘how to live with people who are different’<sup>38</sup> is that we need to relearn and refresh our understanding<sup>39</sup> of why ‘a demand for imposed homogeneity’<sup>40</sup> is misguided and cultivates ‘an atmosphere of suspicion and fear [which leads to]...intolerance and disrespect’.<sup>41</sup>

In her seminal 2001 book *A World Made New*,<sup>42</sup> Mary Ann Glendon has explained that the large personalities in the drafting of the *UDHR* were P C Chang (China), Charles Malik (Lebanon), Eleanor Roosevelt (US), Carlos Romulo (Philippines), Henan Santa Cruz (Chile), Alexei Pavlov (USSR), John P Humphrey (Canada), Hansa Mehta (India) and Rene Cassin (France). Many other nations including Australia also assisted with this process. Dr Herbert V Evatt from Australia stressed the foundation of human rights in economic justice. At all material times, the United Kingdom and the United States were reluctant. Thus, though some saw Eleanor Roosevelt as advocating her late United States President husband's ‘four freedoms’ dream, her work was not appreciated as the United States retreated to a version of its traditional isolationism – save to the extent that its economic interests and post-war occupations dictated otherwise. United States ambivalence towards the UN is perhaps most clearly demonstrated in its failure to ratify the *ICCPR* until 1992 and the fact that it has still

<sup>31</sup> Thomas C Berg, ‘Introductory Essay’ in Thomas Berg (ed), *The First Amendment: The Free Exercise of Religion Clause: Its Constitutional History and the Contemporary Debate* (Prometheus Books, 2008) 17, quoting James Madison, Memorial and Remonstrance Against Religious Assessments (1785), reprinted in R.A. Rutland and W.M.E. Rachal (eds), *The Papers of James Madison* (University of Chicago Press, 1973) 11; See also Douglas Laycock, ‘Religious Liberty as Liberty’ in Thomas Berg (ed), above, 145–7.

<sup>32</sup> Roger Williams, *The Bloudy Tenent of Persecution, for Cause of Conscience, Discussed, in a Conference between Truth and Peace* (1644) as quoted in Durham and Scharffs, above n 14, 19.

<sup>33</sup> Little, above n 29, 36.

<sup>34</sup> Nussbaum, above n5, 34–71.

<sup>35</sup> Ibid 57–58; See also Andrew Koppelman, ‘Corruption of Religion and the Establishment Clause’ (2009) 50(6) *Mary & William Law Review* 1831.

<sup>36</sup> Ibid 58.

<sup>37</sup> Ibid 59.

<sup>38</sup> Ibid 13.

<sup>39</sup> Ibid 4, 361.

<sup>40</sup> Ibid 308.

<sup>41</sup> Ibid.

<sup>42</sup> Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2002).

not ratified the *ICESCR*. The *UDHR* was a genuinely international achievement and was largely the work of non-western philosopher diplomats reflecting on how world war could be avoided in the future. The international resonance of their achievement is demonstrated by the almost universal acceptance of the *UDHR* and the 21<sup>st</sup> century status of the *ICCPR* and *ICESCR*, recognised as legitimate customary international law.

### III RELIGIOUS FREEDOM IN TUVALU

In my introduction I stated that Tuvalu has a very modern Constitution that ‘ticks all the boxes’ so far as human rights principles are concerned. That is because it not only includes the right to change religion, which was accepted when the *UDHR* was adopted, but it also faithfully uses the words and concepts of the limitation in Article 18(3) of the *ICCPR*. Furthermore, I have also expressed the view that it is under-theorised because I do not believe that the additions to the simple *UDHR* and *ICCPR* concepts, that are a part of its structure, are faithful to those concepts. That is, the drafters of Tuvalu’s Constitution, failed to consider all the consequences of departing from UN standards.

In Article 18, the *UDHR* states:

Everyone has the right to freedom of thought, conscience and religion: this right includes the freedom to change his religion or belief, and the freedom alone or in community with others and in public or private, to manifest his belief in teaching, practice, worship and observance.

Article 18 of the *ICCPR* states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.
3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents, and where applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The concept of freedom of conscience and belief expressed in these instruments begins with the individual and is extended into the community so that individuals can worship and otherwise practice their religion together, without state intervention, except where necessary by a valid law passed ‘to protect public safety, order, health or morals or the fundamental rights and freedoms of others’.<sup>43</sup> In the Tuvaluan Constitution (1978), this non-derogable individual right is sublimated to the interests of the collective in the name of culture, and the *ICCPR* requirement that the state show necessity before it intrudes is diluted. The change is subtle and may not be appreciated unless ss 23(6) and 29 are read together, yet it is introduced by the words that have been grafted on to Article 18(3) of the *ICCPR*. The other changes are not as significant.

Section 23 of the Tuvaluan Constitution<sup>44</sup> provides for freedom of conscience and religion in a manner consistent with the requirements of Article 18(3) of the *ICCPR*, save that the requirement of necessity before national law interferes with this liberty is replaced with the

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<sup>43</sup> *ICCPR* art 18(3).

<sup>44</sup> Tuvaluan Constitution s 23.

lesser idea that such interference need only be reasonable. Moreover, in s 29<sup>45</sup> the protection afforded to freedom of conscience and religion is further reduced because it is sublimated to 'values, culture and tradition'. There is also an extended anti-discrimination provision in s 27, but it does not require analysis given my limited purpose here. I do observe, however, that the anti-discrimination provisions do not extend beyond the traditional human rights and freedoms set out in the *UDHR* and the *ICCPR* (race, ethnicity, political opinions, colour and religious belief). Discrimination on grounds of gender and sexual orientation are not protected.

The addition of the words 'including the right to observe and practice any religion or belief without the unsolicited intervention of members of any other religion or belief' at the end of s 23(6) reads like an innocuous explanation of what it means to protect the rights and freedoms of other persons. But when the explanation set out in s 29(3)-(5) is factored in, the non-derogable limitation intended by Article 18(3) of the *ICCPR* can be seen to have been extended to protect a mere claim of offence on grounds of culture. If this extension holds in law, then a claim of cultural offence can trump a claim that an individual was manifesting her religion within the meaning of Article 18(2) of the *ICCPR*, even though there was no law passed to prevent that manifestation of religion – whether it was necessary or not. The cultural addition in the Tuvaluan Constitution thus deprives the idea of 'necessity' under Article 18(3) in the *ICCPR* of all meaning. No doubt defenders of these cultural rights under the Tuvaluan Constitution would cite s 15<sup>46</sup> and deny that these qualifications of the *ICCPR* freedom are a significant derogation from the freedom that was intended by the framers of the UN instruments. But s 15(5) further undermines the *ICCPR* necessity requirement by providing that any previous decision of a Tuvaluan court, or even a decision of a court in another country, can trump the UN standard.

Though any court interpreting ss 23 and 29 is instructed to have regard to international instruments and jurisprudence, the words of the Tuvaluan Constitution will govern. Those words replace the UN requirement of 'necessity' with the lesser standard of 'reasonableness'. They also remove the UN requirement that there be a law passed before freedom of conscience and religion can be abrogated or interfered with in any way. The difficulty is exposed if one considers two simple, but likely examples. First, imagine the pastor of a new religious movement going door to door in Tuvalu to discuss religion with his neighbours. If one of his neighbours alleges cultural offence and takes the matter to court, the pastor must defend. If the UN standards alone were followed, the assertion would not be contestable. Provided the pastor was not inciting violence, his manifestation of his religious belief would be constitutionally protected in accordance with the *ICCPR* standard. Any local law passed to curtail his conscience right would be invalid as unnecessary 'to protect public safety, order, health or morals or the fundamental rights and freedoms of others'.<sup>47</sup> Second, imagine further a new religious movement convened to worship in a traditional Tuvaluan home without walls. If the small new congregation chooses to worship by singing a song that is unfamiliar to neighbours, the difference in music may alert the village to the presence of the new church. If a neighbour alleges that the non-traditional music offends because it not familiar either culturally or religiously, the members of the new congregation may have to defend themselves even though no law has been passed outlawing the music, on grounds of offence against public safety, order, health or morals or the fundamental rights and freedoms of others. Never mind that the existence of an established Christian church in the village has genealogy extending only into the 19<sup>th</sup> century. The assertion of the value leads to a contest that would not have arisen but for the qualification of the UN freedom of conscience and religion standards.

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<sup>45</sup> Ibid s 29.

<sup>46</sup> Ibid s 15.

<sup>47</sup> *ICCPR* art 18(3).

I do not deny that Tuvalu has values and culture that are foundationally important. However, I am pointing out that the primacy given to these values in the Constitution creates a contestability that would not arise if the simpler UN standards were observed. This is ironical on two fronts. The first is that Tuvaluan culture has a general aversion to confrontation, meaning that the introduction of western-style contestability may itself represent an affront to Tuvaluan culture and values.<sup>48</sup> The second is that traditional Tuvaluan architecture features few walled dwellings.<sup>49</sup> The traditional absence of walls limited privacy and enabled engagement with new ideas, but it also allowed any disagreement to be settled in the local community of ideas. To the extent that culturally sensitive drafting of the Tuvaluan Constitution departs from the UN standard of freedom of conscience and religion, it also departs from the traditional non-confrontational approach to religious dispute resolution. I explain traditional Tuvaluan dispute resolution methods below, but for my present purposes, I wish to focus on the damage done to the UN standards by the Tuvaluan culture qualifications that have been added without proper reflection on the consequences.

I suggest that the Tuvaluan constitutional version of freedom of religion and conscience is under-theorised, because the consequences of the changes to the UN standards endanger the principle of freedom of conscience and religion itself. I accept that the assertion of western legislative standards in a different culture may be colonial and paternalistic,<sup>50</sup> but the *UDHR* and the *ICCPR* are not western standards.<sup>51</sup> Thus it should not be assumed that localising the UN standards will not dilute them nor result in a loss of their integrity. In the case of the Tuvaluan Constitution, I submit that the localisation efforts were a mistake. Fortunately, Tuvaluan society is not culturally litigious and the issue has rarely been raised for consideration.<sup>52</sup>

This interference with the idea of ‘necessity’ as a precondition to the legislative limitation of freedom of conscience and religion under Article 18 of the *ICCPR*, does not stand alone. In explaining why Christian churches in Australia are skeptical about protecting human rights by charter, Patrick Parkinson has observed that the similar removal of the necessity

<sup>48</sup> Because Tuvalu is a very small country, it has not produced an extensive literature documenting its aversion to confrontation. However, the Prime Minister, Hon Saufatu Sopoanga made an oblique reference to that aversion in paragraph 7 of his 24<sup>th</sup> September 2003 address to the General Assembly of the United Nations, see Statement by Hon Saufatu Sopoanga OBE, Prime Minister and Minister of Foreign Affairs of Tuvalu, 58<sup>th</sup> Session of the United Nations General Assembly (24 September 2003) <<http://www.un.org/webcast/ga/58/statements/tuvaeng030924.htm>>; See also Patrick Safran, ‘Small is Beautiful, But Fragile in the Pacific’ on Patrick Safran, *Asian Development Blog* (13 January 2016) <<https://blogs.adb.org/blog/small-beautiful-fragile-pacific>>.

<sup>49</sup> Balwant Saini and Alison Moore have observed that ‘walls are often omitted [in Pacific Island homes] to allow good cross-ventilation in an environment where humidity is extremely high’: ‘Traditional architecture in the Pacific’, University of Queensland School of Architecture Publication UQ 13635 (<[http://espace.library.uq.edu.au/view/UQ:13635/bs\\_tradarchpac.pdf](http://espace.library.uq.edu.au/view/UQ:13635/bs_tradarchpac.pdf)>). However, there is some evidence of adobe wall construction in more recent times, see (<<http://www.encyclopedia.com/places/australia-and-oceania/pacific-islands-political-geography/tuvalu>>).

<sup>50</sup> Randall Peerenboom, *Asian Discourses of the Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries* (Psychology Press, 2004).

<sup>51</sup> Note that Mary Ann Glendon explains how the UDHR is truly an international creation partaking of and blending elements of cultures from all over the world in her book, *A World Made New*, above n 42. Brett Scharffs makes the same point with his more specific example of the concept or *ren* or ‘two-man-mindedness’ in the *UDHR*. See, eg, International Centre for Law and Religious Studies, *Scharffs at Indonesian Conference on Shari’a and Human Rights* (13 June 2011) <[http://www.iclrs.org/index.php?blurb\\_id=1302&page\\_id=1](http://www.iclrs.org/index.php?blurb_id=1302&page_id=1)>.

<sup>52</sup> See, eg, US Department of State, *Tuvalu: International Religious Freedom* (2006) <<http://www.state.gov/j/drl/rls/irf/2006/71361.htm>>, where the Department of State references the banning of a new charismatic Christian church by ‘an island council of elders’, which was upheld by the Chief Justice because of the right to restrict ‘the constitutional right to freedom of religion in cases where they contended it could threaten traditional mores and practices’. The same report also references the issue of temporary High Court injunctions to stop action against the same church when a second island council attempted to ban it in 2006.

requirement when the Victorian State Charter was drafted in that country, showed that those framers were not 'serious' in their wish to protect freedom of conscience and religion. Parkinson said:

Christians who are opposed to a Charter of Rights...would be less opposed...if they thought that the legislators and policy makers would take all human rights seriously, and faithfully protect freedom of religion and conscience in the manner required by Art 18 of the *ICCPR* and other human rights instruments. The suspicion that those advocating for a charter don't take freedom of religion and conscience nearly seriously enough – a concern which has been fuelled by the track record of the human rights lobby and the drafting of the two Charters that already exist in Australia – has certainly played a significant part in enlivening opposition to a national Charter.<sup>53</sup>

Parkinson further observed that even though churches want human rights recognised, they do not believe that charters assist.<sup>54</sup> Their concerns stem from the perception that current standard form charters 'may be used to support agendas hostile to religious freedom', do not always 'enact the grounds of limitation contained in Article 18' of the *ICCPR*, and that 'governmental human rights organisations [can be]...rather selective about the human rights they choose to support'.<sup>55</sup> Parkinson claims that:

The heart of Christian concerns...is that secular liberal interpretations of human rights Charters will tend to relegate religious freedom to the lowest place in an implicit hierarchy of rights established not by international law, but by the intellectual fashions of the day.<sup>56</sup>

While it is doubtful that a secular liberal agenda was at work in the drafting of the highlighted provisions of the Tuvaluan Constitution,<sup>57</sup> it is submitted that an undue focus on the need for localisation of the instrument may have blinded the framers to the virtue and universality of what the UN drafters had achieved in both the *UDHR* and the *ICCPR*.

#### IV RELIGIOUS FREEDOM IN SAMOA

The Samoan Constitution (1960) predates the final drafting of the *ICCPR* and so does not pick up the *ICCPR*'s precise necessity language proscribing limitations on freedom of conscience and religion, which are not based on formal laws passed to protect public safety, order, health or morals or the fundamental rights and freedoms of others. However, ss 11 and 12<sup>58</sup> do a good job of setting out freedom of religion as it was expressed 12 years earlier in the *UDHR*.

Even though this Constitution predates the *ICCPR*, a version of the familiar limitation protecting public safety, order, health or morals, or the fundamental rights and freedoms of others is present in s 11(2). However, the rights of others are extended to provide an indeterminate freedom from religion, which has not received significant judicial comment or interpretation. The meaning of the extension seems to allow proselytising, but not proselytising after rejection. If that is so, then the extension may do nothing more than codify English common law, but the absence of judicial comment leaves that issue unclear. Of more long term concern is the absence of the conjunctive 'necessity' from this early

<sup>53</sup> Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 87, 114.

<sup>54</sup> *Ibid* 83.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid* 87.

<sup>57</sup> Tuvalu's Constitution was drafted by veteran Australian draftsman Joe Lynch. Born in Albury, New South Wales in 1924 and admitted to the New South Wales Bar in 1949, Lynch worked as a legal officer and draftsman in Papua New Guinea and elsewhere in the Pacific from 1955 until his death in 1985.

<sup>58</sup> Samoan Constitution ss 11, 12.

version of the *ICCPR* limitation. In this version, freedom of conscience and religion may be abrogated if limitation in the interests of national security etc is reasonable rather than necessary. This means that the government is not prevented from passing legislation that erodes freedom of conscience and religion unless there was no other way to achieve their security objective. Instead, they can pass legislation that a simple parliamentary majority considers is reasonable, though not absolutely necessary in the circumstances. Freedom of conscience is thus less protected in the Samoan Constitution than it is in constitutional instruments that conform to the more recent *ICCPR* standard. However, to date, the cases in the Supreme Court of Samoa have not touched or turned on these interpretive subtleties. Rather, the most litigated issue has been whether the chiefs of a village, previously unified in following one of the major Christian faiths, breached the Constitution by imposing 'village discipline' on villagers who introduced another faith.<sup>59</sup>

Questions about the intersection between customary practice and constitutional interpretation that are beginning to be asked in Samoan courts,<sup>60</sup> may preview questions that will eventually be asked in every Polynesian country where majorities seek to impose cultural uniformity on dissenting minorities. While these questions are seldom asked in small countries without significant media and interaction with the outside world, it may well be that the accumulation and syndication of stories of dissent will embolden dissenters. The absence of media and questions likely also explains why such matters are only brought to court when the population of a country grows larger.

#### *A Samoan Culture (fa'a Samoa), Village Discipline and the Universal Franchise*

The island of Savaii is a 45 minute ferry ride from the island of Upolu, which is home to Samoa's capital Apia, the seat of government and the international airport, which connects Samoa with the world. But there is a sense in which that 45 minutes divides the past and present in Samoa. It certainly insulates the villages and people on Savaii from the press of first world living. The fa'a Samoa, or customary way, is more predictive of daily decisions on Savaii than the statutory laws that flow from the legislature in Apia.<sup>61</sup> In matters of religion

<sup>59</sup> Samoa Law Reform Commission, *VFA 1990*, Report 09/12, 4. In 2010, the Samoa Law Reform Commission was appointed to inquire into 'the issues that have arisen in the past involving art 11 (freedom of religion) and report to Cabinet' because the right to freedom of religion, affirmed by art 11 of the Constitution of Samoa, has been subject to controversy over the years. The courts in Samoa have dealt with cases involving the application of art 11 in the context of religious disputes in rural settings governed by Alii and Faipule ('village fono'). The prominent issues that have arisen over the years involve family members or village groups that have become part of a different church denomination separate from the prominent churches that were long established in the history of Samoa such as the Methodist Church, Catholic Church and the Congregational Christian Church of Samoa. The Commission found there was no basis for any change to Article 11 of the Constitution. Village Fonos needed to be better educated about their constitutional obligations and it was recommended that the government give consideration to including a policy section in the *VFA 1990* to provide guidance on how new churches should be dealt with.

<sup>60</sup> For example, in *Punitia v Tutuila* [2014] WSCA 1 (31 January 2014) at [33]-[35] a unanimous Court found the question of whether banishment was allowed under either the Constitution or the *VFA 1990* and been well traversed and settled in *Italia Taamale v Attorney-General* [1995] WSCA 1 (18 August 1995) and *Pitoamo Mauga et al v Fuga Leitata* [2005] WSCA 1 (4 March 2005). In the second case cited, the Court had noted the disproportionate harshness and breaches of natural justice that sometimes occurred when village discipline was meted out under the *VFA 1990* and then confirmed Va'ai J's decision in the Supreme Court that the *VFA 1990* did not include powers of banishment and that it was unthinkable that Parliament would have conferred powers that drastic by silence. In *Punitia v Tutuila* the Court added by way of summary:

[W]ithin the meaning of Article 13(1)(d) and (4) of the Constitution, the right of all citizens of Samoa to move freely throughout Samoa and to reside in any part thereof is not limited by any existing law as to any powers of a fono.

<sup>61</sup> The Encyclopedia Britannica says simply that 'cultural life [on Savaii] is considered more traditional'. In its 'General Information about Savai'i', Pacific Islands tourism guide is a little more fulsome in its description of how Savai'i is different from the rest of Samoa. It says:

(Christianity until recently), the custom has been that a Samoan belongs to the church of her village. That church was chosen at some time in the past by the village elders, and a villager is unwise to dissent because the village elders may enforce village rules. These range from discipline up to fines (normally pigs, chickens and bags of rice paid to the elders for later redistribution as the elders see fit) and banishment in the case of repeated disobedience.<sup>62</sup>

The genealogy of the history of these village allegiances to particular churches, and the authority behind the imposition of village discipline is murky.<sup>63</sup> In the case of church allegiance, the Christianity of the religion followed cannot predate the 19<sup>th</sup> century since the London Missionary Society did not bring Christianity to Samoa until 1830.<sup>64</sup> Of course that does not mean that there was no enforced allegiance to earlier traditional religion before village councils opted for one or other of the new Christian sects, but no one really knows the nature of religion in Samoa before the coming of Christianity. In Samoa, Christianity completely converted the hearts and minds of the people so that no one remembers or can prove any earlier religious observances, though the Samoanisation of some Christian practices hints at what previous practice might have been.

The history of village discipline is more controversial, although it must predate European colonisation. This is because it is clear that it was sufficiently suppressed by successive waves

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Fa'a Samoa, the unique traditional culture and way of life in Samoan society, remains strong in Savai'i where there are fewer signs of modern life and less development than the island of Upolu where the capital Apia is situated. Samoan society is communal and based on external family relationships and socio-cultural obligations, so that kinship and genealogies are important. These fa'a Samoa values are also associated with concepts of love (alofa), service (tautua) to family and community, respect (fa'aaloalo) and discipline (usita'i). Most families are made up of a number of different households situated close to each other. See The Editors of Encyclopedia Britannica, *Savai'i Island Samoa* (2017) <<https://www.britannica.com/place/Savaii>>.

<sup>62</sup> The US State Department's 2015 report on the state of religion in Samoa observes in relation to 'Government Practices':

[I]n the analysis prepared for a 2012 special commission review of the Village *Fono* Act 1990 village elders and the community at large often resisted attempts to introduce another denomination or religion into the community. Observers stated in many villages throughout the country, leaders forbade individuals to belong to churches outside of the village or to exercise their right not to worship. Villagers in violation of such rules faced fines and/or banishment from the village.

Traditionally, villages have tended to have one primary Christian church. Village chiefs have often chosen the religious denomination of their extended families. Many larger villages have had multiple churches serving different denominations and coexisting peacefully. However, new religious groups sometimes faced resistance when attempting to establish themselves in some villages. See US State Department, *Samoa International Religious Freedom Report* (2015) <<https://www.state.gov/documents/organization/256349.pdf>>.

<sup>63</sup> Malama Meleisea, 'Governance, development and leadership in Polynesia: a microstudy from Samoa' in *Culture and Sustainable Development in the Pacific* (ANU Press, 2005) 76, 78. Malama Meleisea suggests many of the practices which are now described as 'traditional' in fact have their roots in compromises settled during the colonial period. In Samoa he cites the German invention of the Lands and Title Court as an example. In section 3E of his paper presented at the Biennial Law Symposium of the Samoa Law Society December 3-4, 2015 and published in the *Samoa Observer* newspaper on December 20, 2015, Leulua'iali'i Tasi Malifa quoted the Samoan Court of Appeal in its judgment in *Pitoamoa Mauga et al v Fuga Leituala* (unreported, CA March 2005, Lord Cooke of Thorndon P, Casey & Bisson JJ) on efforts made by successive governments to 'extirpate' banishment as one of the traditional punishments that a Village Fono could impose because it could operate 'with altogether disproportionate harshness, in violation of natural justice against innocent family members'. While the Court of Appeal had not outlawed the practice, it had noted that this power had no foundation in the *Village Fono Act 1990*. To the extent that the power of banishment still existed at all, it was vested in the Lands and Titles Court. See Leulua'iali'i Tasi Malifa, 'Village Fono Act Reforms', *Samoa Observer* (online), 20 December 2015 <[http://www.samoaoobserver.ws/en/20\\_12\\_2015/sunday\\_reading/491/Village-Fono-Act-Reforms.htm](http://www.samoaoobserver.ws/en/20_12_2015/sunday_reading/491/Village-Fono-Act-Reforms.htm)>.

<sup>64</sup> The first European missionaries to arrive in Samoa were members of the London Missionary Society, John Williams and Bariff in 1830. They arrived in Sapapalii with eight teachers, six Tahitians and two Aitutakians. They were accepted into Samoa by Malietoa Vai'inupo. See Voice of Samoan People, From Darkness to Light <<https://sites.google.com/site/samoanvoice/cu/from-darkness-to-light>>.

of colonisers,<sup>65</sup> before the 20<sup>th</sup> century opened, that it had lost much of its customary authority in favour of the new central government authority.<sup>66</sup> That suppression predates 1914 when New Zealand took over the colonial administration of the country from Germany as World War I broke out. However on Savaii where life has always been more traditional and detached from central government, the idea of village discipline has been resurgent, mostly since independence in 1962. But the history of that resurgence has become intertwined with the nature of Samoan democracy.

The nature of voting and parliamentary representation in Samoa was different from other British Commonwealth countries and that difference continued after independence. The right to vote and to represent a constituency in parliament was not universal. Only persons with matai titles (chiefs) had the right to vote or stand for parliament. However, the rise of western feminism, particularly after the passage of the CEDAW Convention in 1981, saw the UN focus on the need for institutional reform in Samoa so that women would have the right to vote and be elected to the national parliament. By 1990, the pressure was intense, but it was resisted as a modern form of cultural imperialism in Samoa. The protests that Samoa functioned perfectly well without the western imposition of the universal franchise did not satisfy the critics and the pressure for institutional change intensified. Perhaps because the contest was interpreted by matai chiefs all over Samoa as the UN seeking to suppress their cultural authority (as the German, British and New Zealand colonial authorities had done before), the Prime Minister of the day worked out a compromise solution which restored some of the disciplinary authority that matai chiefs had exercised in their villages in historical times.<sup>67</sup> Since the matai chiefs were giving up the colonially invented and bestowed exclusive right to vote in the national parliamentary elections, a restoration of their customary authority at the village level was a very natural, appropriate and adapted quid pro quo – except that the restoration was not as culturally perfect or balanced as the matai chiefs understood it to be. That was because the *VFA* was just an ordinary act of parliament and was not a part of the supreme constitutional law of the land as the franchise and representation rearrangements would be. That foundational misunderstanding has seeded a lot of village conflict in Samoa ever since. The village councils composed of matai chiefs assert that they were given complete disciplinary authority in all matters pertaining to village life, but their occasional minority village opponents assert that village authority only extends to cultural issues and does not give the chiefs the right to ignore the Constitution where property and political rights are concerned. The chiefs' response is to cite the 1990 compromise. When they are told the *VFA* never meant what they thought it meant, they suggest the franchise and representation changes in the Constitution must themselves be invalid since they were induced by misrepresentation.

On the government island of Upolu, this all presents as a storm in a teacup. This is because village authority is not as important, with the national parliament buildings obvious in downtown Apia, where there is a more visible modern police presence. But things are different on Savaii. There, the *VFA* means all that it says, and more, because it was passed to ensure the matai chiefs did not have their customary authority diluted when the 1990

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<sup>65</sup> Samoa was first colonised by Germany in 1899 under a tripartite convention signed between Germany, Great Britain and the United States. See Marisa Maepu, *The German Colonisation of Samoa: Report for the Winston Churchill Memorial Trust* (June 2013) <[http://www.communitymatters.govt.nz/vwluResources/WCMT%20report%20-%20Marisa%20Maepu/\\$file/WCMT%20report%20-%20Marisa%20Maepu.pdf](http://www.communitymatters.govt.nz/vwluResources/WCMT%20report%20-%20Marisa%20Maepu/$file/WCMT%20report%20-%20Marisa%20Maepu.pdf)>.

<sup>66</sup> Meleisea, above n 63, also refers to Samoan Supreme Court and Court of Appeal discussion of the customary origins of banishment as a form of village discipline in sections 3B and C of his article. Banishment is said to be older than colonial supervision because the Germans passed legislation to suppress it.

<sup>67</sup> Justice V C Nelson of the Samoan Supreme Court has suggested to the writer that Hon Tofilau Eti Alesana was a particularly 'canny' politician. He recognised the push for the women's franchise as an opportunity for his Human Rights Protection Party, and when he coupled that franchise with the restoration of some village authority, he secured a landslide election victory 'from which the Opposition [has] never recovered' (Email from Justice V C Nelson to Keith Thompson, 28 and 29 May 2017).

franchise and representation changes were made at the insistence of the UN. The provisions in the *VFA* that the Savaii village chiefs rely on do not sustain their arguments and it is objectively difficult to see how they or their predecessors could have been deceived, as some continue to allege. Sections 5 and 6 set out the powers of the Fono (Village Council of Matai Chiefs) and the punishments they can impose. However, ss 8, 9 and 11 confirm that the nation's courts retain supervisory jurisdiction, reaffirming that aggrieved persons may formally appeal Fono decisions, and that Village Fono jurisdiction does not extend to non-residents or to imposing banishment as a punishment in serious cases. For the purposes of the discussion below it is useful to set out the disciplinary power:

6. Punishments – Without limiting the power of Village Fono preserved by this Act to impose punishments for village misconduct, the powers of every Village Fono to impose punishment under the custom and usage of its village are deemed to include the following powers of punishments:
  - a) the power to impose a fine in money, fine mats, animals or food; or partly in one or partly in others of those things;
  - b) the power to order the offender to undertake any work on village land.

For context's sake, though I stated above that village discipline can range up to 'fines (normally pigs, chickens and bags of rice paid to the elders for later redistribution as the elders see fit) and banishment in the case of repeated disobedience', it can be seen under the 1990 legislation that the Village Fono does not have power to impose banishment or any form of physical punishment. Legitimate punishments that the Village Fono can impose are limited to fines and village work. While some Village Fonos can and do impose more serious penalties, only the Lands and Titles Court has jurisdiction to impose banishment as a penalty.<sup>68</sup>

### *B Samaleulu Village Case Study*

I will now outline events at Samaleulu village on the island of Savaii in Samoa in the late 1990s and I will situate those events within the cultural and constitutional law context.

Samaleulu village might have been historically described as a Congregational Church of Samoa ('CCS') village on the island of Savaii with a small minority of Latter-Day Saint ('LDS') believers who worshipped locally in a modest open fale and whose minority worship was tolerated. The LDS congregation grew to the point where the fale was not large enough to contain those regularly attending and the international church was willing to provide funding for a larger building with assembly area, baptistry and classrooms. A senior member of the LDS community approached the Village Fono and respectfully sought to build a new and larger building, for which permission was given. However, once construction began, perhaps because the size and scale of the building indicated the future size of the LDS congregation, the village council advised the LDS church that permission was withdrawn<sup>69</sup> and that there would be consequences if construction continued, despite the advanced stage of construction and the LDS church's contractual commitments. In due course, there was a confrontation. Lio Isaia was the representative of the LDS family on whose customary land the new church was being built. When some young men came, by Village Fono direction, to damage the building and to coerce or frighten the LDS church members so that they would cease construction, Lio stood to speak with them. He had sent the other church members home because he did not want any confrontation or riot. He was soon pushed to the ground,

<sup>68</sup> Meleisea, above n 63, s 3D.

<sup>69</sup> Meleisea, above n 63, 80-1. Malama Meleisea's parable of the two-storey house in his 2005 book chapter explains the culture here at issue very well. In his parable, a wealthy self-made local man was asked to cease building his new two-storey house because none of the matai chiefs in his village had one or could afford to build one. The Lands and Titles Court ordered the wealthy man to cease construction and he obeyed because of respect.

trussed up in the traditional manner in which the Samoans prepare pigs for roasting, and hung across a pile of coconut husks and wood ready to be lit. He was told that unless he would renounce his LDS faith, agree to make sure the church ceased building the new chapel and take all the Mormon members with him out of the village, the fire would be lit.<sup>70</sup> The minister of another church with a few followers in the village pleaded with the would-be fire starters to reconsider their action and threats. They refused and, because Lio Isaia would not renounce his faith, the fire was lit. However, during the confrontation storm clouds had formed. No sooner was the fire lit than a thunderstorm broke out complete with lightning. The deluge doused the fire and, despite attempts to relight it, the intensifying storm extinguished it completely.

Perhaps because the sudden storm was interpreted by the villagers as a sign of divine disapproval, the crowd dispersed, though Lio was left trussed up until the police arrived from Tuasivi with Lio's wife, who had gone for help. However, the dust had not completely settled. In the name of the disciplinary authority vested in the Village Fono by virtue of s 6 of the VFA, Lio Isaia's house was ordered burned to the ground, and he and his extended family were banished from the village because construction on the church continued. It was several years before the validity of the Isaia family's lease of the land to the LDS church was confirmed and he could return to the village following a Lands and Title Appeal court process. That process also confirmed that the discipline imposed by the Village Fono against the Isaia family for alleged breaches of village discipline was ultra vires and it was revoked.

I was indirectly involved in less dramatic events in the adjoining Patamea village following Lands and Title Appeal Court proceedings that settled a similar dispute. In that case, the Samoan Prime Minister directed the Chief Justice of the Supreme Court to sit in his ceremonial role as President of the Lands and Title Appeals Court to send the message that constitutional freedom of religion trumped the disciplinary provisions of the VFA. While I have not been engaged in similar Samoan cases since the Patamea episode, I am doubtful that the hearts and minds of all the villagers in Savaii, Samoa understand or accept the way that village discipline and constitutional freedom of conscience and religion relate to each other in Samoan law. The 2010 government direction that the Samoan Law Reform Commission should consider whether constitutional freedom of religion should be amended to provide more accommodation of village disciplinary practices underlines the enduring dissonance.<sup>71</sup>

### *C Samoan Cultural Dispute Resolution Mechanisms*

I will now briefly explain the traditional dispute resolution mechanisms that existed at the village level in both Tuvalu and Samoa before I draw the threads of this discussion together and suggest reasonable conclusions.

Vaaulu Uele Vaaulu (Uele) is one of the LDS church's consultant experts on the fa'a Samoa. He has observed that while there is no Samoan institution that is equivalent to the elected mayor and council in a western town or city council, the Samoan Village Fono or Council functions as a ruling body in a roughly analogous way.<sup>72</sup> It is made up of the matais (or chiefs) of each family in the village. Matais function as trustees of communally held family lands and they speak for their families at Village Fono meetings. Older, more established matais normally exercise de facto control in Village Fonos by virtue of their seniority and the support of other family matais. Family matai titles are generally passed on by consent, but disputes have been settled since colonisation in the Lands and Titles Court, established during the period of German sovereignty. Though the Village Fono has no written rules or conventions, it is customary for families who wish to construct new buildings on their family

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<sup>70</sup> Ibid 82.

<sup>71</sup> Samoa Law Reform Commission, above n 59.

<sup>72</sup> Email from Uele to Keith Thompson, 18 October 2016.

lands to seek approval from the Village Fono. Those requests are formally made by their family matai chief at Village Fono meetings convened to consider such requests. Often these requests are pro forma courtesy requests because the Village Council acknowledges traditional control of the relevant lands by the family. But families are still expected to defer or abandon requests without question if the Village Fono indicates disapproval. Renewed requests can only be reconsidered when suitable overtures have been made behind the scenes to senior Village matais with confirmation that a *sua* or placatory gift will be formally provided by the requesting family at any reconvened meeting.

Traditionally, *sua* were generous in-kind gifts of fine mats, foodstuffs, pigs or other tangible commodities. Formal presentation of *sua* was visible and public. Custom required that the Village Fono received *sua* as trustees for the village as a whole and it was expected that *sua* would be redistributed to other members of the village according to need. While the advent of a cash economy has reportedly led to some non-distribution of *sua* that was unknown in historical times,<sup>73</sup> it remains unacceptable in Samoan village culture to challenge the authority of the Village Fono or its discharge of its trustee-like obligations. To peacefully enjoy their customary lands, the *fa'a Samoa* obliges all villagers to respect and defer to the Village Fono and only to 'seek Village Fono assistance' through their own family matai representative on the Village Fono.

Uele reports that there is no other way for families or members of families to seek redress when there is disagreement. Individuals can leave their village and their customary lands to join extended family in other villages, but if they move, they are accepted in the new village as coming under the care and protection of the related family matai in that village. When matai chiefs depart from a village, they do not forfeit their titles but their voice is not heard in the Village Fono when they are absent. There is no proxy or substitution process. Uele thus reports that Village Fono processes can only be regarded as superficially democratic. In fact Village Fono processes are oligarchical and are susceptible to majoritarian abuse, and even tyranny. The majority of the Village Fono cannot be challenged in the village and the idea that the National Constitution or the *ICCPR* require the Village Fono to acknowledge personal property or political rights is difficult for matais to understand and accept.

The ideas underlying the *UDHR*, the *ICCPR*, and the National Constitution are thus foreign to Samoan culture and have been ignored in Samoa at the village level from their inception in 1948. While members of Samoan families do leave their villages, to pursue opportunities overseas, there is always someone from the family left behind to occupy and enjoy family lands. But matai titles, including the right to sit as a member of the Village Fono, can only be passed along with approval obtained in the Lands and Titles Court, and that normally only occurs when a title is vacated by the death of the holder.<sup>74</sup>

The extensive international Samoan diaspora has brought Village Fonos on the island of Savaii face to face with the National Constitution and the international human rights instruments which the national government has ratified. That is because when some of the young Samoans who leave Samoa seeking international opportunities return to their village homes with new religious beliefs, advanced tertiary qualifications and changed political understanding, they are not always prepared to submit to Village Fono authority in accordance with the *fa'a Samoa*. While they understand the protocols of the Village Fono, they 'know' something is wrong and they know how to object when a Village Fono makes a decision which is disrespectful of reasonable individual autonomy, as expressed in the National Constitution or in international human rights instruments. Thus while deference to

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<sup>73</sup> See, eg, Meleisea, above n 63, 83.

<sup>74</sup> Ibid 78. Meleisea reports that:

The German administration hoped to do away with the whole basis of chiefly authority, and invented the Land and Titles Court. All these things happened such a long time ago that people today see them as features that make their society unique and different from others.

the authority of the Village Fono was the cultural mechanism that resolved every dispute in a Samoan village before 1990, it does not provide a complete solution when villagers know that the Village Fono's authority to impose discipline under the *VFA* is limited and when recourse to national courts is available under the Constitution.

In effect, Samoa's wish to be a part of the international community of nations, and pluralism in Samoan society, have practically modified traditional dispute resolution mechanisms in Samoa at the village level. That process of change has taken a long and serpentine path. It began in the 19<sup>th</sup> century when the German colonial authorities banned excessive village discipline, including the killing of dissidents and the destruction of their property. Though punishment for anyone involved in such banned crimes was not always the subject of official complaint and prosecution, the colonial authorities prosecuted enough people so that the more excessive manifestations of village discipline fell into disuse. The seeds of further philosophical challenge to Village Fono authority were sown when the UN was created in 1948 and began establishing international norms which protect property and personal rights. That philosophical challenge to Village Fono authority began to crystallise in Samoa when the 1960 Constitution was drafted and accepted as the foundational law of the newly independent Western Samoan nation in 1962. But the meaning and effect of the limitations on Village Fono authority, first imposed by the German colonial administration, was only brought into focus when the universal franchise was implemented in Samoa in 1990 at the same time as the *VFA* was passed. While there was nothing new in the *VFA* (which on one view simply recorded the established limits of Village Fono disciplinary authority), the omission of village authority over life and property served to focus the sublimation of Samoan cultural norms to the demands and norms of the international world in which the Samoan nation as a whole wished to participate.<sup>75</sup>

## V TUVALUAN DISPUTE RESOLUTION MECHANISMS

Tuvaluan cultural dispute resolution systems are much more difficult to identify than those in Samoa. In large part, that is a consequence of the country's smaller size, population and diaspora.<sup>76</sup> My informants (Popeieta Ato Raponi and Iotua Tune )<sup>77</sup> confirm that the Tuvaluan people have Polynesian (Samoan and Tongan) and Micronesian antecedents and there are some linguistic similarities. The same thing is true of the name titles they give some of their village chiefs – for example, Alikī, as opposed Ali'i in Samoa.

Raponi and Tune report that the Christian beliefs of the London Missionary Society missionaries ('LMS') were accepted and rapidly became the dominant view in the 19<sup>th</sup> century because they were new and interesting. Tune reports that the Tuvaluans were naturally curious and were attracted by the gifts of tobacco that they offered. They were not perceived as presenting a threat to existing cultural religious beliefs, which still coalesced around magic practices. It was some time after the arrival of Catholic missionaries that the

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<sup>75</sup> Ibid 78. Meleisea states:

The contradictions between these two sets of principles was not really a problem in 1962 because most people lived in villages in a semi-subsistence economy, and migration and influences from the outside world had minimal impacts on most of us. Since then we have experienced changes which have made us among the most 'globalised' of people. During the 1970s and 1980s about one third of our population moved overseas, forming communities in the United States, New Zealand and Australia. In a period of 20 years we became, in effect, a nation without geographic boundaries. Inevitably this process has had an impact on our political system because the economic impact of emigration was towards individualism.

<sup>76</sup> According to the 2012 census, the population of Tuvalu is 10,782.

<sup>77</sup> Raponi is a native Tuvaluan who earned a degree in Mathematics and now teaches senior high school students at Moroni High School in Kiribati. He is regarded as an expert in Tuvaluan history. Tune has served as Director of LDS Education in Kiribati, the Marshall Islands, Nauru and Tuvalu. He continues to serve on the Kiribati Minister of Education's Advisory Board and as a member of the Advisory Board of the University of the South Pacific, Kiribati Campus.

local islanders perceived that Protestants and Catholics ‘were not friendly to each other’.<sup>78</sup> Nor are Raponi or Tune aware of any systematic effort by LMS and Catholic teachers to eradicate these customary magic beliefs and related practices. But they report now that alternative versions of Christianity are viewed as introductions likely to disturb the peace and those who promote them are systematically run out of local villages.<sup>79</sup> Raponi and Tune also refer to the national legislation passed in 1990 to systematise the acceptable introduction of new religions in Tuvalu in the future.<sup>80</sup> No one can establish a legal entity to support a new church unless they first demonstrate, by subscription, that the new church has at least 50 members who confirm their affiliation by signature on the national incorporation documents.<sup>81</sup> While this modern documentary expedient begs the question of how any new religion can establish itself sufficiently to claim a starting membership of fifty,<sup>82</sup> Ropani’s view that it resonates with historic cultural practice has some attraction. The LMS version of Christianity succeeded because it was not resisted before it had obtained the necessary level of local acceptance. Ropani confirms that the establishment of the LDS religion on the island of Nanumea also accords with this pattern since this new faith had more than 50 adherents, and may even have attained a majority on Nanumea, before there was any objection, upon which it was suppressed by majoritarian village opinion and practice. Ropani also explains that LDS believers from Nanumea have then been relatively free to teach their message in other villages and on other islands because it was well known that the LDS religion was a major established Christian religion on the island of Nanumea.

## VI SHOULD WE LEAVE THE POLYNESIANS TO THEIR OWN DEVICES?

The religious dissonance suggested by these examples from Samoa and Tuvalu raises the question whether that dissonance is the product of international imperialism, either by 19<sup>th</sup> century Christian proselytising, or by the more contemporary insistence that disputes about religion should be settled using international human rights norms. For reasons already given above, the suggestion that international human rights norms are an example of Western cultural imperialism is flawed since these norms are not the product of Western thinking. Though that refrain has been heard occasionally from Asia when human rights are

<sup>78</sup> Email from Tune to Keith Thompson, 19 November 2016.

<sup>79</sup> Raponi cites the case of a Seventh Day Adventist preacher who came to the Tuvaluan island of Nanumea. In part because he was not a Nanumean and because he did not seek approval for his proselytism from the Nanumea village council before he began his teaching, he was run off and returned to Funafuti (the island seat of the national parliament) for his own safety.

<sup>80</sup> Religious Bodies Registration Act 1947 [Cap 54.15] (Tuvalu); Religious Bodies Registration Order 2006 [Cap 54.15.1] (Tuvalu).

<sup>81</sup> Section 2 of the Religious Bodies Registration Act 1947 required that:

Not less than 50 persons, or such greater number of persons as the Minister specifies by order, of the age of 18 years and upwards holding religious tenets in common and which has its own system of discipline and government was required before any religious body could be registered under the Act. By the *Religious Bodies Registration Order* (commenced 1<sup>st</sup> January 2006), the Minister ordered that the number of persons of the age of 18 years and above required to constitute a religious body within the meaning of section 2 of the Act, shall not be less than two per cent of the total population of Tuvalu at the last census.

The 2012 census of Tuvalu states that the total population of the country was 10,782: The Census Monograph on Migration, Urbanization and Youth, *Tuvalu National Population and Housing Census* (2015) [http://countryoffice.unfpa.org/pacific/drive/UNFPA\\_Tuvalu2012NationalPopulation&HousingCensusMigration,UrbanisationandYouthMonographReportLRv1\(web\).pdf](http://countryoffice.unfpa.org/pacific/drive/UNFPA_Tuvalu2012NationalPopulation&HousingCensusMigration,UrbanisationandYouthMonographReportLRv1(web).pdf). Note the total is 11,206 according to another website using the same data: Tuvalu Central Statistics Division, *Tuvalu Population Census* (2012) <<http://tuvalu.prism.spc.int>>. It is difficult to work out how much of the population is above 18 years of age and whether the government statistician regards the population as including the overseas diaspora or not. But 2% of the 10,782 total amounts to 217.64.

<sup>82</sup> Of course, if a group of 50 or more villagers convert to a new religion overseas as a group, then they will readily satisfy the requirement and the proof only has to be filed with national government officials on Funafuti. In practice, the 50 member requirement presents a barrier to the recognition of new religious groups since even when 50 have converted overseas, they rarely know each other, coming, as they do, from different islands and villages in their home country of Tuvalu.

advocated,<sup>83</sup> it does not objectively hold up since the *UDHR* has been shown to be a truly international enterprise, with Asia well represented with its principle of two-mindedness front and centre.<sup>84</sup> The older insight that the introduction of Christianity is an example of Western imperialism is now well accepted, but that insight contributes little to modern understanding since Polynesians are now among the most faithful adherents of Christianity in the world. In consequence, they are reluctant to disavow their Christian beliefs in favour of more recent worldviews suggested by more recent Western imperialists. There also appears to be little likelihood of a strong Polynesian resumption of traditional religious practices since there are few who claim to know what those practices were.

The title to this article suggests that freedom of conscience and religion is under-theorised in Polynesia. In light of her recommendation that freedom of conscience and religion needs to be relearned in each generation in the United States, Martha Nussbaum might suggest that freedom of conscience and religion needs to be relearned everywhere in each new generation.<sup>85</sup> Martin Krygier's insight that freedom of conscience and religion does not come naturally in any culture, affirms the need for continuing education about the meaning of constitutional freedom and international human rights in every primary school classroom of the world.<sup>86</sup> Polynesia is thus not alone in this need for freedom of conscience and minority rights education from the cradle to the grave. But the need for Samoa's Court of Appeal to reaffirm that cultural banishment is not legal under the *VFA 1990* and is also unconstitutional three times since 1995,<sup>87</sup> suggests that many of the lawyers in Samoa do not understand these basic principles. Few would counsel their clients to take the same points if they understood them given the prospect of adverse costs orders.

Carolyn Evans has noted the debate as to whether UN religious freedom norms 'can bind member States'<sup>88</sup> even if they have not signed a treaty or if the relevant norms have not achieved treaty status. She concluded that a further treaty beyond the *ICCPR* was unlikely in the foreseeable future because of Middle Eastern concerns surrounding the right to change one's religion originally expressed in the *UDHR*. But she also suggests there is not much need for a further treaty in any event since the religious freedom provisions in the *UDHR* and *ICCPR* are generally considered to have become customary international law in countries that have included these provisions in their national constitutions.<sup>89</sup> In the case of Samoa, notwithstanding the dissonance in the examples I have cited, the point is academic not only because freedom of conscience and religion is enshrined in its Constitution since Samoa ratified the *ICCPR* on 15 February 2008, coming into force three months later. However, Tuvalu has not signed nor ratified the Covenant. In practice, this means that Tuvalu is not obliged to report to the UN Human Rights Committee, which does not have power to question it about alleged human rights violations. Nor can the UN Human Rights Committee hear citizen complaints about human rights violations under the Optional Protocol to the *ICCPR* which authorises it to chastise member states about the breaches of human rights that it investigates and upholds.<sup>90</sup>

However, unlike non-signatory countries like China which actively pursue anti-religion policy and which are not bound by the principles of the *ICCPR* in customary international law,<sup>91</sup> Tuvalu probably is bound by the *ICCPR* freedom of conscience and religion principles

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<sup>83</sup> Peerenboom, above n 50.

<sup>84</sup> Glendon, above n 51; Scharffs, above n 51.

<sup>85</sup> Nussbaum, above n 5.

<sup>86</sup> Krygier, above n 6.

<sup>87</sup> *Italia Taamale v Attorney-General* [1995] WSCA 1 (18 August 1995); *Pitoamoa Mauga et al v Fuga Leitala* [2005] WSCA 1 (4 March 2005); *Punitia v Tutuila* [2014] WSCA 1 (31 January 2014).

<sup>88</sup> Carolyn Evans, 'Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms on Intolerance and Discrimination' (2007) 3 *BYU Law Review* 617, 619.

<sup>89</sup> *Ibid* 631.

<sup>90</sup> *Ibid* 623-4.

<sup>91</sup> *Ibid* 629.

because it 'generally act[s] in compliance' with them, feeling obliged to do so.<sup>92</sup> While that sense of obligation flows not from a sense of obligation under the *ICCPR* itself, it responds to the *ICCPR* since the provisions protecting freedom of conscience and religion in their national constitutions were clearly subject to its influence. It is submitted that that influence makes the *ICCPR* freedom of conscience and religion standards binding upon them. In any event, the protection of freedom of conscience and religion in both the *ICCPR* and the 1981 *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* are now binding even on countries that have neither signed or ratified them in any way, because the obligatory language about freedom of conscience and religion in these two instruments is clear, and both have 'broad, diverse support' in the international community.<sup>93</sup>

## VII CONCLUSION

My purpose in this article has been to show that UN-style freedom of conscience and religion does not come naturally to the Polynesian peoples of the Pacific. The cultural expectation of many Tuvaluans and Samoans is that it is legitimate to enforce conformity including religious unity. However, much of that coercion is inconsistent with the principle of freedom of religion and conscience in international human rights instruments and in their national constitutions.

Some commentators will suggest that it is inappropriate for the UN to impose its freedom of conscience and religion paradigm on these peoples. But my submission is that freedom of conscience and religion is not an example of Western cultural imperialism. The freedom of conscience and religion expressed in the *UDHR* and reaffirmed in the *ICCPR* is a truly universal norm and has become an established principle of international law. Further, both Tuvalu and Samoa have become subject to these obligations as part of established international law. Samoa also has an *ICCPR* treaty obligation to ensure that freedom of conscience and religion are thoroughly protected within its territory. The under-theorisation of freedom of conscience and religion in Polynesia that I have highlighted can and should be resolved with additional education in parliaments and primary schools.

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<sup>92</sup> Ibid 629-30, citing American Law Institute, Restatement (Third) of Foreign Relations Law of the United States (1987) § 102.

<sup>93</sup> Ibid 630-1.



# OSTENSIBLE CONSENT AND THE LIMITS OF SEXUAL AUTONOMY

JACK VIDLER\*

*This article theoretically and critically analyses the jurisprudential consistency of the application of the principle of sexual autonomy to, and its interplay with, consent as its index in sexual offences in England and NSW. It initially frames its investigation in the historical and inter-jurisdictional jurisprudential development of sexual offences. In doing so it traces the ascension of the principle of sexual autonomy and the use of consent as the legal determinant in sexual interactions. It then assesses the limitations of these concepts in the context of contemporary debates in critical legal scholarship – in particular sexual interactions involving the risk of HIV transmission, and transgender sexual interactions – using hypotheticals to facilitate theoretical analysis before comparing the criminal sex law’s actual treatment of the posited scenarios using real case examples. Concordant with, and drawing on, substantial existing scholarship it finds that the principle of sexual autonomy is inconsistently applied to various sexual interactions, despite being the almost universally accepted tenet at the core of sex law. Arguing further, the article employs an original touchstone of ‘ostensible consent’ to elucidate the underlying and inherent misalignment between consent and sexual autonomy and illustrates how consistent applications of sexual autonomy may still produce undesirable results.*

## I INTRODUCTION

This article demonstrates how sexual interactions involving ostensible consent reveal the limited practical applicability and theoretical desirability of the principle of sexual autonomy. In addressing this problem, it adopts a critical theoretical approach to analyse the implementation of sexual autonomy in the criminal sex law of New South Wales (‘NSW’)<sup>1</sup> and England.<sup>2</sup> The overarching purpose of this paper is to critique theoretical problems with the existing law in these contexts, as well as scholarly responses to these defects. Accordingly, the article draws heavily on theory and jurisprudence developed in other jurisdictions, predominantly the United States (‘US’), where the underlying principles or legal history are largely similar.<sup>3</sup>

As explained in Part III, the term ‘ostensible consent’ is used to refer generally to a situation wherein sexual activity was understood by the parties involved to be consensual when it occurred, with seemingly no negative outcomes and no malevolent element operating either expressly or impliedly. In this context, assertions of sexual assault or violation of sexual autonomy occur retrospectively, upon informational revelation. The fundamental enquiry here concerns the effect of *informational* constraints in sexual activity on the legal construction of sexual assault, pursuant to the principle of sexual autonomy. As such, this article does not address instances of sexual assault involving force, coercion, threats, abduction, incapacity through intoxication, age or mental illness and so on. In some sense, the concept of ostensible consent attempts to finesse the alignment of the personal experience, and the law’s delineation, of the boundary between sexual assault and a ‘negative’ sexual experience. This paper uses the terms ‘sexual assault’ and ‘rape’

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<sup>1</sup> Under the *Crimes Act 1900* (NSW) (‘NSW Act’).

<sup>2</sup> Under the Sexual Offences Act 2003 (UK) c 42 (‘UK Act’)

<sup>3</sup> Unless obviously related to a specific jurisdiction, use of phrases such as ‘the law’ and ‘the criminal sex law’ will refer generally to the shared traits of sexual offences in these various jurisdictions.

interchangeably as the degree of the sexual conduct (the precise elements of specific offences)<sup>4</sup> is not in issue, only the operation of consent.<sup>5</sup>

Part II demonstrates the jurisprudential links and operational similarities between the criminal sex law in England and in NSW. In that context, it also establishes the interplay of consent and sexual autonomy by underscoring that the former's statutory formulation attempts to embody the latter. It then summarises the relevant statutory offences and, particularly, the statutory definitions of consent in both jurisdictions. The statutes and judicial precedents that apply in England may also variously apply in other United Kingdom ('UK') jurisdictions, but for clarity of reference this paper focuses on English criminal sex law.<sup>6</sup> The term 'UK' is used to refer to jurisdictions subject to the *UK Act*.<sup>7</sup>

Part III expands on the principle of sexual autonomy by providing an account of its theoretical development and by distilling a generalised definition. Part III also establishes the two focus areas of ostensible consent — transgender sexual interactions and sexual activity involving the risk (or occurrence) of transmission of the human immunodeficiency virus ('HIV'). These contexts are established as hypotheticals to facilitate analogy and theoretical analysis. Lastly, Part III revisits the statutory consent provisions summarised in Part II to illustrate some implications for sexual autonomy that inhere in their formulations, and then theorises the relationship between (communicative) consent, sexual autonomy and ostensible consent.

Part IV analyses problems with the principle of sexual autonomy. Firstly, it summarises the law's inconsistent applications of, or adherence to, sexual autonomy. Again, analysis of inconsistencies is restricted to informational constraints regarding the obtaining of consent. It then outlines the criminal sex law's actual treatment of the hypothetical contexts established in Part III, highlighting further logical inconsistencies. Both the NSW and English approaches to HIV transmission are canvassed but, due to existing case law, only English treatment of transgender sexual interactions is considered.<sup>8</sup> Lastly, Part IV analyses the problematic construction of sexual autonomy itself in the context of transgender sexual relations, showing that consistent application may still produce undesirable results.

Part V discusses some suggested responses to the various problems identified by the preceding analysis. Part VI concludes by suggesting some guiding principles for theoretical review of sexual autonomy and its place in the criminal sex law, given the identified deficiencies.

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<sup>4</sup> The *NSW Act* no longer contains a 'rape' offence, it concerns only 'sexual assault': see *Crimes (Sexual Assault) Amendment Act 1981* (NSW). However, England retains the offence of rape (involving penile penetration) as separate from assault by (non-penile) penetration and sexual assault: *UK Act* ss 1–3.

<sup>5</sup> Generally, however, more serious forms of conduct are contemplated throughout this paper as they perhaps render the analysis more poignant than somewhat reductive considerations of what could literally constitute, for example, 'sexual touching': see, eg, *UK Act* s 3(1).

<sup>6</sup> Obviously, to the extent the law is similar, the forthcoming analysis would apply in those other jurisdictions.

<sup>7</sup> Predominantly England and Wales: *UK Act* s 142. Similarly, England and Wales share a judicial system that is (nowadays) separate from those of Scotland and Northern Ireland, although historical cases generally have wider purview.

<sup>8</sup> The comparable law in NSW has not been similarly tested; though concordant legal development and theory suggest the same approach could be taken in NSW.

## II SEXUAL ASSAULT IN NSW AND ENGLAND

### *A Legislative Reform — Rationale and Process*

The law concerning sexual assault and consent in NSW is closely related to its English equivalent. Admittedly, many common law jurisdictions (for example, Canada, New Zealand, England, various Australian states and parts of the US) have reformed their sexual offences over the past 20–30 years, generally reconceptualising consent and emphasising it as paramount.<sup>9</sup> However, the most recent NSW reform in this area directly followed, and was largely modelled on, the *UK Act*.<sup>10</sup> In order to develop jurisdictional focus, and to demonstrate the relevance of the law and legal theory in one jurisdiction to the other, the following is a brief account of the historical development of consent in English criminal sex law, and the recent statutory reforms, first in England and then NSW.

#### *1 England (and the UK)*

In 1999, the UK Home Office Sex Offences Review ('UK Review') was created to conduct a comprehensive review of the law relating to sexual offences.<sup>11</sup> The rationale for the review was the criminal sex law's haphazard and inconsistent development and its embodiment of antiquated social values.<sup>12</sup> In relation to consent and the crime of rape, historical common law development was confusing and contradictory. In early feudal England rape was a property crime against either a father, who would lose the asset of his daughter's marriageability, or a husband, who would lose certainty as to the bloodline of his wife's child; both necessary in a system of 'patriarchal inheritance rights'.<sup>13</sup> Although the concept of consent was contemplated in law as early as 1285,<sup>14</sup> its centrality to rape was not enunciated until the 1845 case of *R v Camplin*.<sup>15</sup> That case interpreted the established element of 'against her will'<sup>16</sup> to mean 'non-consensual', as opposed to requiring force.<sup>17</sup>

However, this principle was applied irregularly in successive cases as various judges reaffirmed contrary requirements of rape such as force and physical resistance.<sup>18</sup> This resulted in an 'incoherent'<sup>19</sup> legal structure (and 'patchwork' amendments to address its deficiencies)<sup>20</sup> that persisted throughout the 20<sup>th</sup> century, with statutory enactment in 1956<sup>21</sup>

<sup>9</sup> Home Office Sex Offences Review, *Setting the Boundaries: Reforming the law on sex offences* (July 2000) 13 ('Setting the Boundaries').

<sup>10</sup> Substantial reform occurred in 1981 pursuant to the *Crimes (Sexual Assault) Amendment Act 1981* (NSW), though this did not address consent: NSW, *Parliamentary Debates*, Legislative Assembly, 25 March 1981, 5182–97 (John Dowd).

<sup>11</sup> *Setting the Boundaries*, above n 9, i-ii; Home Office, *Protecting the Public: Strengthening protection against sex offenders and reforming the law on sexual offences*, Cm 5668 (November 2002) 34 ('Protecting the Public').

<sup>12</sup> *Setting the Boundaries*, above n 9, iii, 1.

<sup>13</sup> Carol E Tracy et al, 'Rape and Sexual Assault in the Legal System' (Paper presented to the National Research Council of the National Academies Panel on Measuring Rape and Sexual Assault in the Bureau of Justice Statistics Household Surveys Committee on National Statistics, Washington DC, 5 June 2012) 4; Omar Madhloom, *Protecting Autonomy in Non-consensual Sexual Offences: A Kantian Critique* (MPhil Thesis, De Montfort University, 2014) 87.

<sup>14</sup> Madhloom, above n 13, 88.

<sup>15</sup> (1845) 1 CAR & K 746, quoted in Madhloom, above n 13, 90.

<sup>16</sup> Stephen J Schulhofer, 'Taking Sexual Autonomy Seriously: Rape Law and Beyond' (1992) 11 *Law and Philosophy* 35, 36; Jed Rubinfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 *Yale Law Journal* 1372, 1396.

<sup>17</sup> Madhloom, above n 13, 90; Rubinfeld, 'The Riddle of Rape-by-Deception', above n 16, 1396.

<sup>18</sup> Madhloom, above n 13, 91–2.

<sup>19</sup> *Protecting the Public*, above n 11, 5.

<sup>20</sup> *Setting the Boundaries*, above n 9, iii.

<sup>21</sup> *Sexual Offences Act 1956*, 4 & 5 Eliz 2, c 69.

primarily incorporating 19<sup>th</sup> century common law development.<sup>22</sup> Feminist critique during the last quarter of the 20<sup>th</sup> century highlighted the prevalence of inconsistencies, discriminatory effects and outdated values embodied in criminal sex law, providing the impetus for reform discourse<sup>23</sup> and encouraging an emphasis on consent.<sup>24</sup> In accordance with such criticism, the terms of reference that guided the UK Review expressly included protection of individuals, fairness, principles of anti-discrimination and *coherency* of sexual offences.<sup>25</sup>

The UK Review published its findings in 2000 in the *Setting the Boundaries* report. Most importantly, this report stated unequivocally that the harm caused by rape, and sexual assaults more generally, is due to the *violation* of the complainant's<sup>26</sup> *right*<sup>27</sup> to *sexual autonomy*.<sup>28</sup> Such a violation occurs, it found, when sexual intercourse<sup>29</sup> or (non-penile) sexual penetration<sup>30</sup> is performed *without consent*.<sup>31</sup> The report recommended that consent should be statutorily defined as 'free agreement'<sup>32</sup> and that the definition should involve a non-exhaustive list of situations in which consent would be deemed to not be present.<sup>33</sup> Although a somewhat open process of review, *Setting the Boundaries* did not incorporate public consultation.<sup>34</sup> Its mandate was narrow in scope, designed to initiate and contextualise the reform discourse by providing preliminary recommendations to relevant Ministers.<sup>35</sup>

Accordingly, a process of public consultation followed, resulting in the 2002 *Protecting the Public* report that considered over 700 submissions responding to *Setting the Boundaries*.<sup>36</sup> As far as it pertained to the suggested need to clarify and statutorily (re)define consent, the later report's proposals were consistent with *Setting the Boundaries*.<sup>37</sup> *Protecting the Public* also proposed that the list of factors presumed to negate consent be more precisely refined into two categories – rebuttable presumptions, where the facts (if proved) would require the accused to demonstrate the presence of consent, and conclusive presumptions, where 'the [complainant] will be deemed not to consent'.<sup>38</sup> This latter model of consent presumptions was the one enacted.<sup>39</sup> The ideas and themes underlying the consent revisions took statutory form in the *UK Act*,<sup>40</sup> although their precise formulations were slightly altered in parliamentary deliberations.<sup>41</sup> *2 New South Wales*

Following suit, in 2004 the NSW Attorney General constituted the Criminal Justice Sexual Offences Taskforce ('Taskforce') to scrutinise 'issues surrounding sexual assault' from both

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<sup>22</sup> *Protecting the Public*, above n 11, 9.

<sup>23</sup> Schulhofer, above n 16, 36; *Setting the Boundaries*, above n 9, 13.

<sup>24</sup> Madhloom, above n 13, 80.

<sup>25</sup> *Setting the Boundaries*, above n 9, iii.

<sup>26</sup> Either male or female, whereas sexual offences were historically gendered – for example, many sexual offences could only be committed by a man or against a woman: see eg, *Sexual Offences Act 1956*, 4 & 5 Eliz 2, c 69, ss 1–9. However, in England the crime of rape currently requires penile penetration: *UK Act* s 1(1)(a).

<sup>27</sup> *Setting the Boundaries*, above n 9, iv, 14.

<sup>28</sup> *Ibid* 9, 14.

<sup>29</sup> *Ibid* 15.

<sup>30</sup> *Ibid* 16–17.

<sup>31</sup> *Ibid* 9, 14, 17.

<sup>32</sup> *Ibid* 18.

<sup>33</sup> *Ibid* 18–20.

<sup>34</sup> *Ibid* i–ii.

<sup>35</sup> *Ibid* i.

<sup>36</sup> *Protecting the Public*, above n 11, 34.

<sup>37</sup> *Ibid* 16–18.

<sup>38</sup> *Ibid* 16.

<sup>39</sup> Arabella Thorp, 'The *Sexual Offences Bill* [HL]' (Research Paper No 03/62, House of Commons Library, 10 July 2003) 20.

<sup>40</sup> See *UK Act* ss 1–3, 74–6.

<sup>41</sup> See eg, Thorp, above n 39, 16.

social and criminal justice perspectives.<sup>42</sup> The Taskforce particularly focused on the law surrounding consent,<sup>43</sup> which was not statutorily defined.<sup>44</sup> The *Taskforce Report*, published in 2005, recommended that consent should be statutorily defined and modelled on the definition in the *UK Act*.<sup>45</sup> While the proposed definition was only ‘partially based’<sup>46</sup> on the *UK Act*, the Taskforce also adopted the approach of outlining certain, non-exhaustive, factors that could affect a determination of whether consent was present, either evidentially or conclusively.<sup>47</sup> Although not elaborated on in-depth, the report contained considerations of sexual autonomy and its interplay with consent. The Taskforce referred to the Canadian consent definition of ‘voluntary agreement’ and its capacity to emphasise sexual autonomy.<sup>48</sup> It concluded its consent analysis by recommending a definition of ‘free and voluntary agreement’<sup>49</sup> – a ‘positive’ consent formulation designed to safeguard sexual autonomy.<sup>50</sup>

Similar to the UK Review, the *Taskforce Report* was directed to the NSW Attorney General and did not involve public consultation.<sup>51</sup> Its consent recommendations were then opened to public consultation in 2007 via a discussion paper comprised of the relevant portions of the report, prefaced with a list of pertinent issues.<sup>52</sup> The policy objective of protecting sexual autonomy outlined in this discussion paper was referred to with approval in parliamentary deliberations and the eventual consent provisions enacted were largely unchanged from the Taskforce’s recommendations.<sup>53</sup> The NSW legislature’s acceptance of the Taskforce’s recommendations and its subsequent enactment of consent provisions closely resembling the *UK Act* implies its intention to incorporate the underlying legal theory surrounding sexual autonomy that informed UK reform.

### B Current Statutory Formulations

In England, rape is penile penetration of a person where that person ‘does not consent to the penetration’ and the perpetrator ‘does not reasonably believe’ the person consents.<sup>54</sup> Assault by penetration follows the same pattern except penetration need not be penile, only sexual.<sup>55</sup> Sexual assault has the same consent requirements, but involves sexual ‘touching’.<sup>56</sup> An assessment of ‘all the circumstances’ is required to determine reasonable belief, importantly incorporating ‘any steps ... taken to ascertain consent’.<sup>57</sup> Consent is agreement by ‘choice’ where the person ‘has the freedom and capacity to make that choice’.<sup>58</sup> For all three offences, presumptions regarding consent apply.<sup>59</sup> Relevantly to this paper,<sup>60</sup> if the physical act

<sup>42</sup> Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: the way forward* (December 2005) NSW Department of Justice, iii <[http://www.justice.nsw.gov.au/justicepolicy/Documents/cjsot\\_report.pdf](http://www.justice.nsw.gov.au/justicepolicy/Documents/cjsot_report.pdf)> (*Taskforce Report*).

<sup>43</sup> *Ibid* v.

<sup>44</sup> *Ibid* 32.

<sup>45</sup> *Ibid* 2. However, this recommendation was stridently opposed by members of the Taskforce and was therefore termed a recommendation of the Criminal Law Review Division – a part of the NSW Attorney General’s department with several members in the Taskforce: at i, vi, 34–5.

<sup>46</sup> *Ibid* 2–3.

<sup>47</sup> *Ibid* 36–42.

<sup>48</sup> *Ibid* 34.

<sup>49</sup> *Ibid* 33, 35.

<sup>50</sup> *Ibid* 35.

<sup>51</sup> *Ibid* iii, iv.

<sup>52</sup> Criminal Law Review Division, *The Law of Consent and Sexual Assault* (Discussion Paper, NSW Attorney General’s Department, May 2007).

<sup>53</sup> NSW, *Parliamentary Debates*, Legislative Assembly, 14 November 2007, 4188 (Lylea McMahon).

<sup>54</sup> *UK Act* s 1(1).

<sup>55</sup> *Ibid* s 2(1).

<sup>56</sup> *Ibid* s 3(1).

<sup>57</sup> *Ibid* ss 1(2), 2(2), 3(2).

<sup>58</sup> *Ibid* s 74.

<sup>59</sup> *Ibid* ss 1(3), 2(3), 3(3).

<sup>60</sup> In England there are numerous factors that may vitiate consent, including sleep, fear of violence and ‘physical disability’: *ibid* s 75(2).

occurred where the accused ‘intentionally deceived the complainant as to the nature’ of the act, consent *and* belief in consent are conclusively presumed to be absent.<sup>61</sup>

In NSW, sexual assault is non-consensual sexual intercourse with a person where the perpetrator knew that person did not consent.<sup>62</sup> Read in conjunction with s 61H,<sup>63</sup> sexual assault is equivalent to the English offences of rape and assault by penetration — involving (penile<sup>64</sup> and non-penile)<sup>65</sup> penetration of the person’s body.<sup>66</sup> Consent is free and voluntary agreement.<sup>67</sup> It is conclusively negated when (inter alia)<sup>68</sup> the ‘consenting’ party holds ‘any ... mistaken belief about the nature of the act induced by fraudulent means’.<sup>69</sup> If the perpetrator knew consent occurred ‘under such a mistaken belief’, they are conclusively presumed to know consent was absent.<sup>70</sup>

### III ESTABLISHING SEXUAL AUTONOMY

#### *A Theoretical Development*

In the US, academic discussion and development of the principle of sexual autonomy preceded the legislative reform debate in the UK. US jurisprudence subsumed the historical development of English common law, leaving the US to address the same shortcomings as those identified above.<sup>71</sup> As noted, rape was historically a property crime.<sup>72</sup> Incrementally, the crime of rape developed away from a literal property conception, although it retained its emphasis on notions of virginal purity,<sup>73</sup> female modesty and defilement.<sup>74</sup> Although consent became increasingly central in the 19<sup>th</sup> and 20<sup>th</sup> centuries, it continued to be interpreted through a lens of violence and force in both England<sup>75</sup> and the US.<sup>76</sup> Beginning in the 1970s,<sup>77</sup> feminist legal scholars criticised the state of rape law for its then-still-extant expressions of the male proprietary interest in women and its lack of a coherent theoretical basis.<sup>78</sup> The substantive nature of the physical, criminal act had remained the same for centuries, while its core justifications changed absolutely over time.<sup>79</sup> Rape and sexual assault were perceived as grievous criminal offences, but there was no clear or consistent theoretical conception of

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<sup>61</sup> Ibid s 76.

<sup>62</sup> NSW Act s 61I.

<sup>63</sup> Ibid s 61H.

<sup>64</sup> Ibid s 61H(1)(a)(i).

<sup>65</sup> Ibid s 61H(1)(a)(ii).

<sup>66</sup> Ibid s 61H(1)(a)–(b).

<sup>67</sup> Ibid s 61HA(2).

<sup>68</sup> In NSW other factors including ‘cognitive incapacity’, unconsciousness and unlawful detainment also conclusively vitiate consent: *ibid* s 61HA(4).

<sup>69</sup> Ibid s 61HA(5)(a)–(b)

<sup>70</sup> Ibid s 61HA(5).

<sup>71</sup> Tracy et al, above n 13, 4.

<sup>72</sup> Ibid; Madhloom, above n 13, 87; Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing, 1998) 106.

<sup>73</sup> Madhloom, above n 13, 78.

<sup>74</sup> Rubenfeld, above n 16, 1388–92.

<sup>75</sup> Madhloom, above n 13, 87, 89, 91–2.

<sup>76</sup> Schulhofer, above n 16, 63; Tracy et al, above n 13, 6; Stephen J Schulhofer, ‘Rape in the Twilight Zone: When Sex is Unwanted but not Illegal’ (2005) 38(2) *Suffolk University Law Review* 415, 417–18.

<sup>77</sup> Schulhofer, above n 16, 36; Corey Rayburn Yung, ‘Rape Law Fundamentals’ (2015) 27(1) *Yale Journal of Law & Feminism* 1, 4.

<sup>78</sup> Lacey, above n 72, 106; Tracy et al, above n 13, 5.

<sup>79</sup> Rubenfeld, above n 16, 1387–8, 1392; Deborah Tuerkheimer, ‘Sex Without Consent’ (2013) 123 *Yale Law Journal Online* 335, 335  
<[http://www.yalelawjournal.org/pdf/1222\\_tajrpb6w.pdf](http://www.yalelawjournal.org/pdf/1222_tajrpb6w.pdf)>.

why this was so — of what the justifying harm or ‘wrong’ was.<sup>80</sup> Academic analysis of the developing law revealed a growing trend of placing sexual autonomy at the centre of rape and sexual assault crimes, beginning as early (albeit impliedly) as 1965.<sup>81</sup> This was expressly stated,<sup>82</sup> perhaps originally, in *Coker v Georgia*,<sup>83</sup> which recognised that the harm of rape was the ‘total contempt for the ... autonomy of the ... victim’ and was second only to murder in its ‘violation of self’.<sup>84</sup>

### B Definition

Sexual autonomy (and autonomy more generally) is a philosophical concept, so its fundamental features are relatively consistent throughout various interpretations. According to Madhloom’s Kantian analysis of autonomy, a person must have the ‘capacity ... to *decide ... and pursue* a course of action’.<sup>85</sup> This highlights the dual requirement of autonomy: possession of relevant information, and the (ideally unrestrained) ability to act in accordance with a personal assessment of that information. Lacey defines sexual autonomy as ‘the freedom to determine one’s own sexual experiences, to choose how and with whom one expresses oneself sexually’.<sup>86</sup> Schulhofer conceives of sexual autonomy as the ‘right of every person to freely choose or refuse any sexual encounter’.<sup>87</sup> He argues this right ‘must be *fully* protected’,<sup>88</sup> requiring a model of ‘affirmative *consent*’, wherein the emphasis is to look for the presence, not absence, of consent.<sup>89</sup> Further, a comprehensive review of US jurisdictions in 2012 found that the common elements of the various consent definitions were freedom and ‘capacity’, such as *acting* on free will with relevant *knowledge* of the act.<sup>90</sup> The presence of the philosophical dyad of autonomy in the operational principle of consent both suggests that sexual autonomy is simply personal autonomy in a sexual context, and reaffirms the link between sexual autonomy and consent in general. Herring similarly understands sexual autonomy as the ‘right to choose with whom we have sexual contact’.<sup>91</sup> Providing a more operational account, however, Herring posits that sexual autonomy is violated when, inter alia, consent is given in *ignorance of significant relevant facts*.<sup>92</sup> Thus, deception and informational constraints may vitiate consent and violate sexual autonomy.<sup>93</sup> Though this is a common theme in other authors’ conceptions, Herring specifically acknowledges its operational consequences — that consent is vitiated if the complainant would not have engaged in the sexual interaction if they ‘had known the truth’; that is, if they had had access to the relevant information that was previously obscured from them.<sup>94</sup> They must have knowledge of the key facts involved in making the decision to engage in sexual conduct in

<sup>80</sup> Jonathan Herring, ‘Mistaken Sex’ [2005] *Criminal Law Review* 511, 516; Tracy et al, above n 13, 6; John Gardner, ‘Reasonable Reactions to the Wrongness of Rape’ (Research Paper No 7, University of Oxford, February 2016) 2–4; Lacey, above n 72, 101.

<sup>81</sup> Rubinfeld, above n 16, 1379, 1382–4, 1387, 1392–4; Schulhofer, above n 16, 63; Lacey, above n 72, 104.

<sup>82</sup> In fact, *Coker v Georgia* literally referred to ‘personal autonomy’ as opposed to ‘sexual autonomy’. However, it was discussing autonomy in a sexual context which, as suggested in the next section, is sexual autonomy. The latter phrase was nascent at the time but grew to prominence later and, in retrospective analysis of the case, it may be accurately stated that this was among the first, express enunciations of the *concept* of sexual autonomy.

<sup>83</sup> 433 US 584 (1977).

<sup>84</sup> *Coker v Georgia* 433 US 584 (1977), 597, quoted in Madhloom, above n 13, 16–17.

<sup>85</sup> Madhloom, above n 13, 85 (emphasis added).

<sup>86</sup> Lacey, above n 72, 104.

<sup>87</sup> Schulhofer, above n 76, 420.

<sup>88</sup> *Ibid* 423 (emphasis in original).

<sup>89</sup> *Ibid* 420–1 (emphasis added).

<sup>90</sup> Tracy et al, above n 13, 19.

<sup>91</sup> Herring, above n 80, 516.

<sup>92</sup> *Ibid*.

<sup>93</sup> *Ibid* 515.

<sup>94</sup> *Ibid* 513–14.

order for their consent to properly safeguard their autonomy.<sup>95</sup> These facts have also been termed ‘material facts bearing significantly on the decision to consent’.<sup>96</sup>

Surveying these analyses, then, the two elements required for the effective exercise of autonomy are: knowledge of all the information that would significantly influence the decision, and the unfettered capacity to act on that decision. Sexual autonomy is thus applied to sexual decisions.<sup>97</sup> This conception is used throughout this paper, although only informational constraints are considered in the following discussions. A ‘constraint’ is considered to be present only when information is known by one party and not the other.<sup>98</sup>

### *C Ostensible Consent and its Interplay with Sexual Autonomy*

It is overwhelmingly clear that determining the existence of consent is the fundamental concern of rape and sexual assault offences in England and NSW and that this is connected to the protection of sexual autonomy. Consent is expressly defined in respective legislation and the definitions seek to outline a model of consent (somewhat concordant with Schulhofer’s analysis) that protects and empowers the right to sexual autonomy in societal sexual interactions.<sup>99</sup> Sexual autonomy is the right to be safeguarded and consent is the index of whether it has been exercised or violated. The two concepts have a reciprocal relationship – if consent is absent or vitiated, then sexual autonomy is violated; if sexual autonomy is violated, this means consent was not given or was vitiated. While this is a positive evolution away from violence, physical resistance, force or ‘clear-verbal-no’ elements of consent (in the sense that, by not relying on these factors, it more precisely circumscribes the core wrong or harm of *sexual* assault), this model results in a disconnect between consent and sexual autonomy that is problematic in certain contexts.<sup>100</sup>

The next two sections will establish sexual interactions involving, respectively, transgender individuals and potential HIV transmission as exemplars of ostensible consent. For the purpose of this Part, these contexts are established as hypotheticals to allow the proper analogies to be drawn and autonomy analysis to be applied. The law’s actual approach to these areas is assessed in Part IV.<sup>101</sup> While posed hypothetically, the factual progressions are relatively easy to envisage as reality.

#### *1 Transgender Sexual Relations*

Theoretical analysis of transgender sexual relations may prominently exemplify how sexual activity may violate sexual autonomy, despite seeming wholly consensual. This may occur due to a combination of: the potential lack of physical obviousness of transgender identity (the transitional nature of the presented gender may not be apparent), the non-disclosure of gender transition concordant with genuine transgender self-identification,<sup>102</sup> and the general

<sup>95</sup> Ibid 516.

<sup>96</sup> David Archard, *Sexual Consent* (Westview, 1998) 46, quoted in Herring, above n 80, 518.

<sup>97</sup> Madhloom, above n 13, 112.

<sup>98</sup> Analysis of mutual ignorance of relevant factors is reductive and outside the scope of this paper.

<sup>99</sup> Schulhofer, above n 76, 420–1; see above nn 87–88 and accompanying text.

<sup>100</sup> See, eg, Madhloom, above n 13, 90; see, eg, Tracy et al, above n 13, 4.

<sup>101</sup> See below Part IV(B).

<sup>102</sup> Danielle Poe, *Can Luce Irigaray’s Notion of Sexual Difference be Applied to Transsexual and Transgender Narratives?* (2011) University of Dayton eCommons, 122–5 <[http://ecommons.udayton.edu/cgi/viewcontent.cgi?article=1012&context=phl\\_fac\\_pub](http://ecommons.udayton.edu/cgi/viewcontent.cgi?article=1012&context=phl_fac_pub)>; Aeyal Gross, ‘Rape by Deception and the Policing of Gender and Nationality Borders’ (2015) 24 *Tulane Journal of Law & Sexuality* 1, 10–11; Aeyal Gross, ‘Gender Outlaws Before the Law: The Courts of the Borderland’ (2009) 32(1) *Harvard Journal of Law & Gender* 165, 211.

presumption that the gender a person presents aligns with the gender associated with their birth sex.<sup>103</sup>

As one example: imagine that a heterosexual, cisgender adult consents to sexual activity with a heterosexual, transgender adult who self-identifies and presents as the gender opposite to that of the cisgender person.<sup>104</sup> The consent is given in full knowledge of all information presented in, or garnered from, all previous interactions between the two people; no information available to, or accessible by, the cisgender person would disturb their decision to consent. It may even have been given after years of online, telephone, webcam and in-person, physical, interactions with the transgender person.<sup>105</sup> Accordingly, the consent may be as express, free from coercion, honest, enthusiastic, proactive (and so on) as possible. Presumably, however, a significant foundation of the cisgender person's decision to engage in sexual activity is their heterosexuality, combined with their perception of the activity as conforming to that sexuality.<sup>106</sup> That is, their consent is contingent on their perception and understanding of the transgender person's gender being opposite to their own. Similarly, the transgender person's gender identification and heterosexuality inform their perception that the sexual activity conforms to their sexuality (as defined by their gender identification).

Some time after the interaction, the cisgender person becomes aware of the transgender person's gender history. Now, if the cisgender person considers transgender identity to not be conclusively determinant of the sexuality of sexual interactions — that is, in the context of a mutual, sexual exchange they perceive the transgender person as 'in truth' having a gender corresponding to the gender associated with that person's birth sex — then their sexual autonomy has been violated.<sup>107</sup> An informational constraint relevant to their decision to consent (likely reversing it) was placed on the cisgender person. Per Herring, the person would not have consented if they knew beforehand what they later discovered.<sup>108</sup> However, given the transgender person's genuine internal understanding of their gender and sexuality, they could be said to have not known that by not disclosing their gender history they withheld information relevant to the cisgender person's decision to consent.<sup>109</sup> No amount of communication *regarding consent* to the contemplated activities (or affirmative ascertainment thereof) would alter the progression of the above facts. Discussion, or positive disclosure, of gender history could be presumed to do so but the facts provide no reason for this to occur. Auxiliary issues of intentional or active lies or deception have been eschewed to facilitate examination of the core, irreducible tension between sexual autonomy and consent. The sexual interaction was, ostensibly, as consensual as possible or desired.

## 2 HIV Transmission

The potential for such ostensible consent is similarly possible in sexual interactions between a HIV-positive adult and a HIV-negative adult. Here the analysis is essentially identical to the preceding context. Imagine a HIV-negative person consents to sexual activity with a HIV-positive person who knows they are HIV-positive but who uses protective barriers (and

<sup>103</sup> See, eg, *McNally v The Queen* [2013] EWCA Crim 1051 (27 June 2013) [33], [39] ('*McNally*').

<sup>104</sup> One-to-one mapping of heterosexuality and cisgender-transgender identification are not prerequisites to this analysis but are used to simplify illustrations, and because the real court cases tend to reflect these dyads.

<sup>105</sup> *McNally* [2013] EWCA Crim 1051 (27 June 2013) [3]–[5].

<sup>106</sup> See, eg, *ibid* [11].

<sup>107</sup> Assuming this new understanding of the sexuality of the interaction breaches the 'perception contingency' of consent, assumed above. In fact, the cisgender person's informational revelation is irrelevant to the violation occurring, it is only relevant to their awareness of the violation.

<sup>108</sup> Herring, above n 80, 513–14.

<sup>109</sup> Gross, above n 102, 211.

perhaps has an ‘undetectable viral load’) such that the risk of transmission is minimal.<sup>110</sup> The HIV-negative person consents under the mistaken belief that both parties are HIV-negative, although makes no enquiries, and receives no representations, as to the truth of this belief. Upon later becoming aware this belief was mistaken, the HIV-negative person asserts they would not have consented to the sexual activity had they known the other person was HIV-positive, due to the risk of transmission. As in the transgender context, the HIV-negative person’s ignorance of the risk of transmission is an informational constraint that violates the first requirement for effective exercise of autonomy.<sup>111</sup> Herring specifically acknowledges that, on his conception, sexual autonomy would be violated in a way sufficient to support a rape conviction where there was a failure to disclose the presence of a ‘sexually transmitted disease’, even though there was no active lie.<sup>112</sup> However, no amount of communication of *consent*, or actions to ascertain *consent*, could have uncovered the unknown information. Discussion, or positive disclosure, of HIV status could be presumed to do so but given the precautions taken this may arguably have been unnecessary or not contemplated (again, issues of active deception are ignored). The sexual interaction was, ostensibly, as consensual as possible or desired.

It is essential to recognise that the physical harm potentially resulting from actual HIV transmission is irrelevant from a sexual autonomy perspective. Sexual autonomy is violated by ignorance of factors that would influence the decision to consent. The potential harm (even lethality) of HIV is doubtless what may inform the substance of the decision, but the physical manifestation of the virus is an adjacent harm to the violation of sexual autonomy.

#### D Further Aspects of the Relationship Between Consent and Sexual Autonomy

Having established the focus areas of ostensible consent, this section illustrates the relevant implications and limitations of the statutory consent provisions summarised above<sup>113</sup> and the disconnect between communicative consent and sexual autonomy, as evidenced by ostensible consent analysis. These concepts are incorporated into the forthcoming analysis of the capacity of consent to safeguard sexual autonomy, and the desirability of sexual offences designed to do so.

##### 1 Implications of Statutory Consent Formulations

Current statutory consent provisions in England and NSW implicitly focus on ‘communicative’ issues of consent.<sup>114</sup> They are concerned with the facts of ‘*how*’ consent was expressed or ‘*sought and given*’, or why it must not have been.<sup>115</sup> The nature of this model is particularly evidenced by reform discussion that focused on notions such as ‘mutuality’,<sup>116</sup> dialogue,<sup>117</sup> conveyance and understanding;<sup>118</sup> and is exemplified by the (NSW and English)

<sup>110</sup> See, eg, Jennifer Smythe Brady, Melissa Woodroffe and Indraveer Chatterjee, *Disclosing your HIV status: A guide to some of the legal issues* (August 2013) HIV/AIDS Legal Centre, 3, 5 <<http://halc.org.au/wp-content/uploads/2012/10/Final-Version-for-distribution.pdf>>; see also *Taskforce Report*, above n 42, 40; see also Abigail Groves and Sally Cameron, ‘Criminal prosecution of HIV transmission: the policy agenda’ (Discussion Paper, Australian Federation of AIDS Organisations, May 2009) 6.

<sup>111</sup> Herring, above n 80, 518.

<sup>112</sup> *Ibid.*

<sup>113</sup> See above Part II(B).

<sup>114</sup> *Taskforce Report*, above n 42, 34, 47; NSW Department of the Attorney General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (October 2013) NSW Department of Justice, 22 <[http://www.justice.nsw.gov.au/justicepolicy/Documents/consent\\_review.pdf](http://www.justice.nsw.gov.au/justicepolicy/Documents/consent_review.pdf)>.

<sup>115</sup> *Protecting the Public*, above n 11, 16 (emphasis added).

<sup>116</sup> *Taskforce Report*, above n 42, 33, 35;

<sup>117</sup> NSW Department of the Attorney General and Justice, above n 114, 4.

<sup>118</sup> *Protecting the Public*, above n 11, 16.

consent provision mandating consideration of ‘steps taken ... to ascertain’ consent.<sup>119</sup> This model is also reflected in certain US states.<sup>120</sup> While this model effectively (at least theoretically) criminalises sexual activity in circumstances of absent or impaired capacity and where volition is reasonably in doubt, its aim of buttressing sexual autonomy is limited.<sup>121</sup> Ostensibly consensual sexual interactions reveal these limitations by showing how sexual autonomy may be violated despite the most unmistakable, enthusiastic and voluntary expressions of consent — which satisfy statutory consent requirements (all else being equal).

An adjacent, but important and related, point is the innately limited statutory protection for sexual autonomy hiding in plain sight in rape and sexual assault offences. This is the second limb of the offences; the requirement that the defendant did ‘not reasonably believe’ the complainant consented,<sup>122</sup> or knew that they did not.<sup>123</sup> This is the *mens rea* element of sexual offences.<sup>124</sup> Thus, in rape and sexual assault, consent (unusually) informs both the *actus reus* (where consent is the complainant’s subjective state of mind)<sup>125</sup> and the *mens rea* (where belief that consent has been communicated affects the perpetrator’s state of mind).<sup>126</sup> That is, perhaps true consent is the subjective mindset of the complainant, but how this mindset manifests communicatively is also termed ‘consent’.<sup>127</sup> While this manifestation might be more accurately termed an ‘expression of consent’ (as far as it relates to the mindset of the complainant), from the point of view of the defendant it is ‘consent-proper’ — the only accessible indication of consent. Criminal sex offences limit the circumstances in which non-consensual sexual conduct will be rape or sexual assault in an attempt to ensure that only defendants who are criminally guilty are subject to the provisions.<sup>128</sup> While aimed at creating the *mens rea* component, these limitations inherently allow for situations where the complainant’s sexual autonomy is violated, but where rape or sexual assault cannot be held. This compromises the ability of rape, sexual assault and consent provisions to protect sexual autonomy.

## 2 Theorising Communicative Consent and Sexual Autonomy

The disconnect between consent and sexual autonomy is the basis of the concept of ostensible consent, wherein (often exemplary) consent is present yet sexual autonomy is still violated. Although somewhat broader overall, a primary enquiry regarding the concept of ostensible consent is understanding if, when and why it may be justifiably said that consent can be validly withdrawn retroactively. While possibly applicable to any construction of consent, this is arguably most likely to occur, and the disconnect is most operative, within the model of *communicative* consent. Communicative consent places heavy emphasis on the ‘expression’ of consent, and the measurable *actions* taken to ascertain this expression, in a way that elides reference to a person’s subjective ‘consent-proper’ and the underlying principle of their sexual autonomy. It suggests that as long as some certain (non-specific or prescribed) actions occur — most generally an enquiry-response interchange of a non-trivial degree directed towards the sexual act — consent to sexual interaction has been validly obtained. While such a model clearly allows for consent to be withdrawn through

<sup>119</sup> NSW Act s 61HA(3)(d); UK Act ss 1(2), 2(2), 3(2).

<sup>120</sup> Tracy et al, above n 13, 20; Schulhofer above n 76, 419.

<sup>121</sup> See, eg, NSW Act s 61HA(4), (6); see, eg, UK Act s 75.

<sup>122</sup> UK Act ss 1–3.

<sup>123</sup> NSW Act s 61I.

<sup>124</sup> *R v Ewanchuk* [1999] 1 SCR 330, quoted in *Taskforce Report*, above n 42, 50.

<sup>125</sup> *Taskforce Report*, above n 42, 32.

<sup>126</sup> *Ibid* 42; *R v Ewanchuk* [1999] 1 SCR 330, quoted in *Taskforce Report*, above n 42, 50; Lacey, above n 72, 112.

<sup>127</sup> See eg, *R v Olugboja* [1982] QB 320 (17 June 1981) 332, quoted in Madhloom, above n 13, 93–4. This was the leading case on the common law definition of consent, and it held the jury should be directed to the subjective mindset of the complainant.

<sup>128</sup> *Setting the Boundaries*, above n 9, 11, 74.

communication during a sexual interaction, it has no scope to allow consent to be withdrawn post-factum; the consent is valid until the communicative status quo changes, something which cannot justifiably occur after the interaction because it relies on manifested, set-in-time communication. However, it is possible for the content of the enquiry-response interchange, regardless of how broad or substantial, not to have broached certain issues that would have been fundamental to a party's consent, arguably vitiating that consent and thus justifying its retroactive withdrawal. In the face of these instances, it would be facile and anachronistic to prioritise the oral or physical 'cues' between the parties over the core concern of effective exercise of sexual autonomy.<sup>129</sup>

A potential counter-argument to the implication that ostensible consent more readily encompasses such situations is to assert that, even on an ostensible consent analysis, consent is not *withdrawn retroactively* but *vitiated at the time* and all that occurs after the event is an *awareness* of the past violation. That is, that the autonomy violation and invalidation of consent is always contemporaneous with the physical interaction, regardless of awareness, in which case it would similarly apply in the communicative consent model. However, philosophically, ostensible consent survives this rebuke, but the analysis requires non-linear temporal considerations so, when applied to real-world scenarios, communicative consent remains a plausible approach and ostensible consent remains a conundrum. Theoretically, if, *at the time* of the sexual interaction, a person would not have consented had they known the informational disparity that they *later* found out, then their sexual autonomy was violated. That is, their subjective, *future*, mindset *actually influences* (in theory) the 'acceptability' of a physical interaction in the past, because it is the first point in time that they are able to fully consider the relevant information. This construction allows for a whole slew of future informational revelations (about information hidden at the time) that do *not* violate sexual autonomy, regardless of their seemingly objective significance, because it puts this determination directly into the hands of the person in question, fully empowering their sexual autonomy. To illustrate, it is hardly contentious to say that a person who discovers, for example, that a previous sexual partner had (at the time of the sexual interaction) transitioned genders or was HIV-positive is fully entitled to consider that this informational disparity did *not* violate their sexual autonomy and that they still would have consented had they known. However, the communicative consent model requires; either, that the degree and nature of the communication validates the expression of consent or, that despite the communication, the expression of consent was always invalid because it was vitiated in the first instance by the informational disparity.

Overall, communicative consent's emphasis on the enquiry-response interchange largely precludes (all else being equal) the possibility for the expression of consent to be invalid (despite possible autonomy violations), and has no scope to consider that this invalidation may occur retroactively. Contrastingly, adherence to the principle of sexual autonomy mandates that in certain situations retroactive withdrawal of consent can and should validly occur, due to the autonomy violation. For example Cowan, discussing HIV transmission in the Canadian context, argues that: only cases of non-disclosure of HIV-positivity (informational deficit) that result in actual transmission (ie actually cause the recipient to consider that they would not have consented had they known) should be prosecuted.<sup>130</sup> Accordingly, no prosecution would occur if this was not the reaction, ie if the recipient accepted the outcome). Cowan acknowledges that this will *always* mean that the duty to disclose (alternatively, the autonomy violation and consent invalidation arising from a failure to disclose) will *only* apply or manifest retroactively.<sup>131</sup> Communicative consent's failure to encompass this results in a significant shortcoming in its ability to effectively safeguard sexual autonomy. However, considerations of ostensible consent are possibly only

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<sup>129</sup> See eg, Rubinfeld, above n 16, 1408.

<sup>130</sup> Sharon Cowan, 'Offences of Sex or Violence? Consent, Fraud and HIV Transmission' (2014) 17(1) *New Criminal Law Review: An International and Interdisciplinary Journal* 135, 161.

<sup>131</sup> *Ibid* 149.

relevant or important in cases on the borderline between an informational constraint (and later revelation of that constraint) that invalidates consent, and one that does not.

#### IV PROBLEMS WITH SEXUAL AUTONOMY

##### *A Inconsistencies Relating to Informational Constraints*

Putting aside the identified limitations for the moment, this section demonstrates the criminal sex law's general failure to proscribe informational violations of sexual autonomy. Jed Rubenfeld presents a thorough and convincing account of the irregular and inconsistent embodiment of the principle of sexual autonomy in criminal sex law.<sup>132</sup> Rubenfeld highlights that sex obtained through deception is generally not criminalised (consent in these instances is held to be valid) and argues that, applying the principle of sexual autonomy, it should be.<sup>133</sup> Writing in 1992, Schulhofer identified a similar shortcoming of the criminal sex law's conception of consent — that '[a]utonomy, though analytically central, remained peripheral in practice'.<sup>134</sup> Although Rubenfeld deals predominantly with examples of deception (deliberate lies or intentional trickery as opposed to unintentional or 'innocent' non-disclosure of information), his autonomy analysis is applicable to contexts of ostensible consent. In both contexts it is the informational deficit that violates autonomy; *intention* to deceive commutes only to the deceiver's culpability, affecting neither the occurrence nor degree of the autonomy violation.

Deception was traditionally insufficient to negate consent because rape required force.<sup>135</sup> However, in the 19<sup>th</sup> century English courts developed two exceptions wherein sex achieved by deception constituted rape.<sup>136</sup> These were contexts in which someone misrepresented a sexual act as medically necessary or procured sexual activity with a woman by impersonating her husband.<sup>137</sup> Termed 'fraud in the factum', these factors vitiated consent by changing the 'core nature of the act'.<sup>138</sup> As such, the act actually participated in was considered so fundamentally different to the act contemplated and consented to, that the expression of consent could not be said to validly apply to the actual act.<sup>139</sup> All other forms of deception, termed 'frauds in the inducement', were deemed insufficient to negate consent because they only influenced the decision to consent, while the act consented to was unchanged.<sup>140</sup> These exceptions were subsequently adopted in Australian common law,<sup>141</sup> and parts of the US,<sup>142</sup> and now have (modified) statutory form in England<sup>143</sup> and NSW.<sup>144</sup>

However, Rubenfeld argues that a practically ubiquitous principle in law (other than the criminal sex law) is that deception and fraud vitiate consent as readily and fundamentally as

<sup>132</sup> Although writing from a US perspective, much of Rubenfeld's theoretical analysis is applicable to rape and sexual assault offences in England and NSW.

<sup>133</sup> Rubenfeld, above n 16, 1376, 1379, 1403. Rubenfeld further argues that the principle of sexual autonomy should be abandoned in favour of 'self-possession': at 1380.

<sup>134</sup> Schulhofer, above n 16, 64.

<sup>135</sup> Rubenfeld, above n 16, 1395–6.

<sup>136</sup> *Ibid* 1397; see also Schulhofer, above n 16, 62.

<sup>137</sup> Rubenfeld, above n 16, 1397.

<sup>138</sup> Tom Dougherty, 'No Way Around Consent: A Reply to Rubenfeld on "Rape-by-Deception"' (2013) 123 *Yale Law Journal Online* 321, 322 <<http://www.yalelawjournal.org/forum/no-way-around-consent-a-reply-to-rubenfeld-on-rape-by-deception>>.

<sup>139</sup> *Ibid*.

<sup>140</sup> Rubenfeld, above n 16, 1398–1400; Schulhofer, above n 16, 62–3.

<sup>141</sup> *Papadimitropoulos v The Queen* (1957) 98 CLR 249, cited in Rubenfeld, above n 16, 1397.

<sup>142</sup> Rubenfeld, above n 16, 1397.

<sup>143</sup> *UK Act* s 76.

<sup>144</sup> *NSW Act* s 61HA(5).

force.<sup>145</sup> He cites various examples of this in instances of ‘larceny, trespass, and contract’.<sup>146</sup> For example, misrepresentation of occupation often vitiates consent if consent was gained on the basis of that misrepresentation — ‘the false meter reader cannot claim consent when he enters a person’s home’.<sup>147</sup> Further, acknowledging fraud in the factum exceptions invites intensified scrutiny of why deception generally should not be criminalised in sex law.<sup>148</sup> Rubinfeld asserts that the distinction between factum and inducement is not as rational as it purports to be. For example, the deception in medical fraud instances ‘may concern solely the [perpetrator’s] purposes’, but there is no logical reason (on an autonomy argument) to distinguish these misrepresented purposes from any others, as long as they similarly influence a decision to consent.<sup>149</sup> While in medical fraud cases the disparity between the represented necessity and the (presumably demonstrable) unwarrantedness of the ‘procedure’ in question may evidence (false) intention or purpose; issues of proof regarding subjective intentions, thoughts or feelings may inhibit the practicability of this approach more generally. However, ‘an institutional [in]competence argument’ does not justify theoretical inconsistencies or arbitrary designations of which deceptions are criminal.<sup>150</sup>

Rubinfeld agrees with the anticipated counter-argument that not all deceptions are sufficiently relevant, or ‘material’, to negate consent.<sup>151</sup> However, whether a factor, or deception thereof, is ‘material’ depends on a determination of which factors one should consider in constructing a decision.<sup>152</sup> Rubinfeld argues that unduly restricting this determination (for example, to the facts of the physical act) risks reanimating strict and outdated operations of consent wherein the only consideration was the ‘woman’s decision to *have sex*’, ignoring contextual determinants of this decision.<sup>153</sup> Thus, materiality must be expansive enough to incorporate factors that inform a person’s decision ‘from a sexual point of view’ — though these are clearly vast and heterogeneous.<sup>154</sup> In the context of sexual activity, then, autonomy only requires a person to demonstrate that their ‘right to make an *autonomous choice* about [their] sexual activity was violated’.<sup>155</sup> Rubinfeld lucidly demonstrates that this is not the approach of the criminal sex law, and that the principle of sexual autonomy has a thoroughly inconsistent application. This inconsistency is further highlighted by the law’s treatment of sexual interactions involving possible HIV transmission.

## B *The Law’s Treatment of (the above) Instances of Ostensible Consent*

### 1 *HIV Transmission*

#### (a) *Overview – NSW and England*

In NSW and England, sexual interactions involving HIV transmission are not sexual offences, but may be offences of grievous bodily harm (‘GBH’). This stems from *R v Clarence*,<sup>156</sup> which held that consent to sex necessarily includes consent to the risk of

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<sup>145</sup> Rubinfeld, above n 16, 1376–8, 1395, 1404.

<sup>146</sup> Ibid 1398.

<sup>147</sup> Ibid 1399.

<sup>148</sup> See, eg, *Taskforce Report*, above n 42, 41.

<sup>149</sup> Rubinfeld, above n 16, 1399.

<sup>150</sup> Ibid 1400.

<sup>151</sup> Ibid 1406–7.

<sup>152</sup> Ibid 1407.

<sup>153</sup> Ibid 1408 (emphasis added).

<sup>154</sup> Ibid.

<sup>155</sup> Ibid 1407 (emphasis added).

<sup>156</sup> (1888) 22 QBD 23.

contracting a sexual disease.<sup>157</sup> Subsequent contraction of the disease could not vitiate consent, thus sexually transmitting diseases could not constitute sexual assault or rape. *R v Dica*<sup>158</sup> expressly overruled this point (in England); though the fact such a statement was needed in 2004 illustrates the entrenched effect of *R v Clarence*<sup>159</sup> in excising disease transmission from the remit of sexual offences. Limited by this precedent, public policy requiring sanction of the malicious or reckless transmission of HIV (due to its potentially severe health ramifications) manifested in the law of GBH.<sup>160</sup>

In NSW, GBH is defined to include transmission of a ‘grievous bodily disease’,<sup>161</sup> which has been interpreted and applied to include HIV.<sup>162</sup> Actual transmission is required,<sup>163</sup> and this may be intentional,<sup>164</sup> reckless<sup>165</sup> or by ‘any unlawful or negligent act, or omission’.<sup>166</sup> Notably, failure to disclose one’s HIV-positive status before sexual intercourse is an offence, regardless of actual transmission, punishable by pecuniary penalty — again, *not* a sex crime (nor even a crime).<sup>167</sup> No offence is committed if the risk was disclosed to the other person and they ‘voluntarily agreed to accept the risk’.<sup>168</sup> This suggests, rather obviously, the other person needs to *consent* to the risk of transmission, and thus the exception reflects an autonomy argument — if the person, having *knowledge* of the risk, voluntarily agrees (that is, can *freely* decide) then no offence occurs (because autonomy is exercised).<sup>169</sup> The physical, sexual acts subject to this offence are largely the same as the physical, sexual acts that may constitute criminal sexual assault.<sup>170</sup> It is irregular, then, why in these two contexts the same sexual acts are subject to the highly similar considerations of consent, yet the sanctions for consent violations (and the confluent violations of autonomy) are wholly disparate.<sup>171</sup>

Similarly in England, sexual transmission of HIV may be GBH.<sup>172</sup> Consent is a defence but it must have been ‘informed’, or given in ‘knowledge’, of the risk of contraction and must be *directed to that risk*.<sup>173</sup> Consent in the context of non-disclosure of HIV-positive status is technically possible (as knowledge is not per se required), but highly impractical and probably ‘wholly artificial’.<sup>174</sup> Thus, in the event of transmission, non-disclosure will most likely conduce to a finding of GBH precisely because ‘consent is not properly informed, and [cannot be given] to something of which [one] is ignorant’.<sup>175</sup> In *R v Konzani*<sup>176</sup> the court expressly recognised that non-disclosure is, at the very least, not conducive to the

<sup>157</sup> *R v Konzani* [2005] EWCA Crim 706 (15 Feb 2005) [38] (*Konzani*), citing *R v Clarence* (1888) 22 QBD 23.

<sup>158</sup> [2004] EWCA Crim 1103 (5 May 2004) [59]; Matthew Weait, ‘Knowledge, Autonomy and Consent: *R v Konzani*’ [2005] *Criminal Law Review* 763, 764.

<sup>159</sup> (1888) 22 QBD 23.

<sup>160</sup> See generally *Taskforce Report*, above n 42, 41; *Konzani* [2005] EWCA Crim 706 (15 February 2005) [42].

<sup>161</sup> *NSW Act* s 4(1) (definition of ‘grievous bodily harm’).

<sup>162</sup> Groves and Cameron, above n 110, 2–3.

<sup>163</sup> *NSW Act* s 4(1) (definition of ‘grievous bodily harm’).

<sup>164</sup> *Ibid* s 33(1).

<sup>165</sup> *Ibid* s 35(2).

<sup>166</sup> *Ibid* s 54.

<sup>167</sup> *Public Health Act 2010* (NSW) s 79(1).

<sup>168</sup> *Ibid* (emphasis added). It is also a defence if ‘the defendant took reasonable precautions to prevent the transmission’: at s 79(3). The substance of these has not been determined: Brady, Woodroffe and Chatterjee, above n 110, 3.

<sup>169</sup> In NSW, consent is free and voluntary agreement: *NSW Act* s 61HA(2). In England, consent is agreement by choice, with the ‘freedom and capacity to make that choice’: *UK Act* s 74.

<sup>170</sup> That is, penile penetration of the vagina, anus or mouth, or cunnilingus: *Public Health Act 2010* (NSW) s 77; *NSW Act* s 61H(1).

<sup>171</sup> 50 penalty units compared with 14 years jail-time: *Public Health Act 2010* (NSW) s 79(1); *NSW Act* s 61I.

<sup>172</sup> Prosecuted under the *Offences Against the Person Act 1861*, 24 & 25 Vict, c 100, ss 18, 20: see, eg, Weait, above n 158, 763. This is importantly distinct from the *UK Act*, which deals with sexual offences.

<sup>173</sup> *Konzani* [2005] EWCA Crim 706 (15 February 2005) [35], [39], [41]–[42], [46].

<sup>174</sup> *Ibid* [42]; Weait, above n 158, 764.

<sup>175</sup> *Konzani* [2005] EWCA Crim 706 (15 February 2005) [42].

<sup>176</sup> [2005] EWCA Crim 706 (15 February 2005).

complainant's autonomy and is most likely a deception severe enough to vitiate consent.<sup>177</sup> Although only the conclusive presumptions in statutory consent provisions<sup>178</sup> expressly address deception, deception may still contravene the general consent definition<sup>179</sup> in s 74.<sup>180</sup>

(b) *GBH vs Sexual Assault*

This melange of sex law and assault law results in an awkward theoretical approach to criminalising sexual transmission of HIV. If a person consents to sexual activity involving an undisclosed risk of HIV transmission, and transmission occurs, the person will be deemed to have consented to the sex, but the other person will have no defence to charges for the damage caused by the HIV, because that GBH was not consented to.<sup>181</sup> The real, unitary expression of consent is artificially partitioned to validly apply to the sex but not to the harm of infection.<sup>182</sup> This legal fiction is irreconcilable with the reality that the sexual activity and the risk of transmission are (in certain circumstances) inextricably concomitant and thus that, logically, consent must be given to both or neither.<sup>183</sup> Non-disclosure means no opportunity is available to consent to the sexual activity and the risk of transmission as separate elements. Thus, logically speaking, consent is given as a whole and must, if vitiated, be vitiated as a whole. Informational constraints that deny a person the ability to consent to both elements violate that person's sexual autonomy. If non-disclosure of the risk of HIV transmission vitiates consent to *sexual activity involving that risk* (taken as a whole) then sexual autonomy requires such activity to constitute sexual assault.<sup>184</sup> So, again, the law's approach to HIV transmission is contrived and incongruous with sexual autonomy theory and the operation of consent in sexual offences.

(c) *Significance of the Risk/Probability of Transmission*

It is worth briefly considering whether there is a substantive effect on this autonomy argument that flows from the probability, or level of risk, of transmission. In Canada, non-disclosure of HIV-positive status is prosecutable both when there is an unrealised risk and in the instance of actual transmission, but (in either scenario) only where there was a 'significant risk of serious bodily harm' (that is, infection with HIV).<sup>185</sup> The requirement of 'significant risk' is a non-trivial difference between Canadian law and that in England and NSW (where non-consent is the basis for liability), which requires various separate considerations beyond the scope of this paper.<sup>186</sup> However, at its simplest, it is relevant

<sup>177</sup> *Konzani* [2005] EWCA Crim 706 (15 February 2005) [42].

<sup>178</sup> *UK Act* s 76(2)(a); see also *NSW Act* s 61HA(5)(c).

<sup>179</sup> *R v EB* [2006] EWCA Crim 2945 (16 October 2006), quoted in *McNally* [2013] EWCA Crim 1051 (27 June 2013) [20]; *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) (2 November 2011) [88]–[90], quoted in *McNally* [2013] EWCA Crim 1051 (27 June 2013) [21].

<sup>180</sup> *UK Act* s 74.

<sup>181</sup> *R v EB* [2006] EWCA Crim 2945 (16 October 2006) [17].

<sup>182</sup> As a matter of principled logic, the current approach also invites the potential for persons, in full knowledge of their prospective partner's HIV-positive status and the risk of transmission, to expressly consent to sex but expressly withhold consent to infection: "yes we can have sex, but if I contract HIV then I will press charges of GBH". This would be an iniquitous, legally endorsed, power imbalance in the sex lives of all HIV-positive people; but if this is so in the case of non-disclosure, why could it not be so in the case of disclosure?

<sup>183</sup> Such reasoning seems to have been applied in *R(F) v DPP* [2013] EWHC 945 (Admin) (24 April 2013) wherein sexual intercourse, consented to on the understanding ejaculation would occur externally but actually occurred internally, constituted rape because the person 'was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based': at [26]. Given the more separable natures of intercourse and ejaculation compared to intercourse and the risk of HIV transmission, such a principle should apply even more readily in the latter context.

<sup>184</sup> See especially *R v Cuerrier* [1998] 2 SCR 371, quoted in *Taskforce Report*, above n 42, 40; see especially *R v Williams* [2003] 2 SCR 134, quoted in *Taskforce Report*, above n 42, 40; Cowan, above n 130, 152.

<sup>185</sup> *R v Cuerrier* [1998] 2 SCR 371 [128], quoted in Carissima Mathen and Michael Plaxton, 'HIV, Consent and Criminal Wrongs' (2011) 57(4) *Criminal Law Quarterly* 464, 468; Cowan, above n 130, 141.

<sup>186</sup> See, eg, Cowan, above n 130, 148–9, 153–4.

because analysis regarding the effect of the level of risk gives rise to considerations of medical treatment and management of HIV (for example, condom use, anti-retroviral treatment and pre-exposure prophylaxis medication), and how these might affect the autonomy argument regarding non-disclosure of HIV-positive status. On the strict application of the forgoing autonomy analysis non-disclosure of HIV-positive status would vitiate consent, despite a low risk of transmission, if the HIV-negative person would not have consented had they known there was a risk.<sup>187</sup>

Further, it appears difficult to soften the application of this analysis despite considerations of the risk-reduction methods stated above. In the case of condom use, Mathen and Plaxton point to the obvious theoretical shortcomings relying on condom *use* (the mere presence or absence of a condom) in accurately assessing risk — that condoms are not ‘all or nothing ... [and] may be used more or less effectively’.<sup>188</sup> In *R v Mabior*<sup>189</sup> the Canadian Court of Appeal identified numerous factors involved in assessing the effectiveness of condoms in actually decreasing the risk of transmission — for example: the expiry or manufacture date of the condom, how it was opened, how it was stored, how it was applied, whether lubricant was used and what type was used, how it was removed after ejaculation, and so on — all of which present significant evidentiary difficulties and arguably highlight the insufficiency of the theoretical bedrock in this approach.<sup>190</sup>

The relationship between viral load and probability of transmission is also a difficult yardstick by which to measure liability. While a HIV-positive person may reduce their viral load (and the probability of transmission) through anti-retroviral medication, whether their viral load is low or undetectable at the time of a sexual interaction will only be known to that person in the case of recent testing.<sup>191</sup> Given the difficulty of establishing a person’s viral load at any specific time, especially retrospectively, Grant argues that self-assessment of viral load, and a personal determination of the likelihood of transmission, is not a desirable basis on which to construct the duty of disclosure or liability for non-disclosure.<sup>192</sup> The use of pre-exposure prophylactic medication (‘PrEP’) is an interesting example because it is a risk reduction method on the part of the HIV-negative person. However, it turns out that analysis of autonomy and informational constraints in this context is somewhat reductive and circular.

The primary concern of considering risk management is to determine what (if any) level of management would reduce the probability of transmission to the point where non-disclosure of HIV-positive status does not denigrate from the other person’s sexual autonomy sufficiently to vitiate consent. However, in the case of PrEP there are arguably only two relevant scenarios, in both of which the determinative factor of valid consent will be the PrEP user’s mindset. That is, there is no need to investigate an interplay between the HIV-positive person’s actions and the effect on the HIV-negative person’s consent or sexual autonomy. In the first set of scenarios, an HIV-negative person takes PrEP in anticipation of a specific interaction, or an interaction with a specific person where the HIV-negative person understands and *accepts* that there may be (or knows that there is) a risk of transmission. In this context, the person has considered the risk of transmission and, in the fullest sense of the word, consents to it, so non-disclosure of HIV-positive status would not vitiate their consent. In the second set of scenarios, a person takes PrEP as a general precautionary measure (perhaps due to a heightened occurrence of HIV transmission in that person’s sexual subculture) but does not, in any specific instance, consent to the risk of transmission

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<sup>187</sup> Ibid 147.

<sup>188</sup> Mathen and Plaxton, above n 185, 474.

<sup>189</sup> [2011] 2 WWR 211.

<sup>190</sup> *R v Mabior* [2011] 2 WWR 211 [91]. When the case was later heard in the Supreme Court of Canada, it was held that a combination of condom use and a low viral load may render non-disclosure acceptable: *R v Mabior* [2012] SCC 27 (5 October 2012) [108].

<sup>191</sup> Mathen and Plaxton, above n 185, 475.

<sup>192</sup> Cowan, above n 130, 143; Mathen and Plaxton, above n 185, 476.

and would not, if they had the relevant information, consent to sexual activity with a HIV-positive person. In this context, non-disclosure of HIV-positive status would vitiate their consent. In either case, the PrEP user's (theoretically) directly accessible mindset is the determinative factor of valid consent, and enquiry of this nature is simply asking 'does the PrEP user consent to the risk of HIV transmission?' The answer to this will of course vary individually, but requires no analysis of interplay and is not causally influenced by the use of PrEP (and the reduction of risk).

*(d) Nature of the act*

Further, it could be argued that 'HIV status is ... fundamental to ... the *nature and quality* of the act', negating consent via the fraud in the factum doctrine (conclusive presumptions).<sup>193</sup> It seems logical that transmission of a potentially lethal and debilitating disease would sufficiently vary the nature of the act (that is, the physical elements of the conduct) in such a way as to vitiate consent given in ignorance of the risk of transmission. This proposition was the object of some express support in the Canadian Supreme Court.<sup>194</sup> Similarly, the NSW Taskforce considered the argument for criminalising non-disclosure of HIV-positive status on this basis.<sup>195</sup> However, it declined to recommend doing so, preferring the current approach in NSW to proscribe such conduct under GBH.<sup>196</sup> In doing so, it tacitly endorsed the view that the presence of HIV does *not* change the nature of the act in such a way as to conclusively negate consent, a view maintained in NSW (and English) law.

*(e) Summary*

Overall, the law's treatment of sexual transmission of HIV is another example of its inconsistent adherence to the principle of sexual autonomy. Entrenched precedent (developed well before HIV was first diagnosed)<sup>197</sup> forced jurisprudential development to sidestep the principles of sexual offences, but consent's contemporary centrality to offences involving sexual transmission of HIV demonstrates the law's flawed internal logic. This centrality constitutes recognition that sexual autonomy should, and somewhat does, apply in this context – although if this is so, its violation should occasion sexual assault, not GBH.

## 2 Transgender Sexual Relations

In stark contrast, the law's approach (at least in England) to transgender sexual relations involves a faithful application of the principle of sexual autonomy.<sup>198</sup> In England, *McNally*<sup>199</sup> established precedent to the effect that gender is a material fact sufficient to alter the 'sexual nature of the acts' and, given this, that non-disclosure of gender history may be deceit sufficient to vitiate consent.<sup>200</sup> This falls within the operation of the conclusive presumptions in s 76,<sup>201</sup> essentially recognising a third category of fraud in the factum.<sup>202</sup> The factor that changes the nature of the act is gender history, but gender transition is clearly not the 'wrong' involved. The wrong lies in the 'deliberate deception', which has been interpreted to

<sup>193</sup> *Taskforce Report*, above n 42, 41 (emphasis in original).

<sup>194</sup> *R v Cuerrier* [1998] 2 SCR 371, quoted in *Taskforce Report*, above n 42, 40.

<sup>195</sup> *Taskforce Report*, above n 42, 41.

<sup>196</sup> *Ibid.*

<sup>197</sup> See eg, The Aids Institute, *Where did HIV come from?* (2011) <<http://www.theaidsinstitute.org/node/259>>; see, eg, Avert, *Origin of HIV & AIDS* (20 February 2017) <<https://www.avert.org/professionals/history-hiv-aids/origin>>.

<sup>198</sup> Due to limited case law, the analysis in this section applies only to cases under the *UK Act*. However, given the similar legislation and jurisprudence, it is conceivable the same could occur in NSW. To illustrate this, the equivalent provisions of the *NSW Act* are cited where relevant in the forthcoming footnotes.

<sup>199</sup> [2013] EWCA Crim 1051 (27 June 2013).

<sup>200</sup> *McNally* [2013] EWCA Crim 1051 (27 June 2013) [26]–[27].

<sup>201</sup> *UK Act* s 76.

<sup>202</sup> *McNally* [2013] EWCA Crim 1051 (27 June 2013) [17].

include the *withholding of information* regarding gender history such that the complainant's 'cho[ice] to have sexual encounters [according to their sexual] preference ([their] freedom to choose whether or not to have a sexual encounter [contrary to this preference]) was removed'.<sup>203</sup> Thus it is accurately construed as a violation of sexual autonomy.<sup>204</sup>

This fraud in the factum approach to criminalising sexual HIV transmission was considered and rejected in NSW (and is not the approach in England).<sup>205</sup> However, as established in Part III, the autonomy violation in instances of undisclosed gender history is demonstrably concordant with the autonomy violation in instances of undisclosed HIV-positive status.<sup>206</sup> In both, there is a material (even physical) fact — gender history (or, the physical differences between the gender associated with birth sex and the presented gender) and HIV-positive bodily fluid — that is known by one party and not the other, and there is non-disclosure leading to ostensible consent. Yet only non-disclosure of gender history, and not HIV status, is considered to vitiate consent and violate sexual autonomy sufficiently to constitute sexual assault or rape. This is even more irregular given that the manner in which non-disclosure of gender history is held to vitiate consent is by changing the physical nature of the act, yet the physical nature of the act in the HIV context (the unavoidable presence of the virus in certain bodily fluids) is confluent with the risk of contracting a potentially lethal or debilitating disease. While Part III noted that the physical manifestation of HIV is an adjacent harm to the violation of autonomy, it is surely an important element informing the 'physical nature of the act'.<sup>207</sup>

Therefore, the strict sanction of informational violations of sexual autonomy in the context of transgender sexual relations represents a double inconsistency — it is inconsistent with the law's general treatment of sex by deception, and inconsistent with the law's approach to HIV transmission, to which it is highly analogous.

### *C Potential Solution of Strict and Consistent Autonomy*

Is it the case, then, that problems relating to sexual autonomy result only from its inconsistent application? If sexual autonomy is the right to be protected then perhaps it should be applied strictly, so all violations relating to both knowledge and capacity would conduce to sexual assault. Although writing in support of this proposition, Herring helpfully summarises a number of pertinent drawbacks often identified in this approach. These are likely obvious to the reader and include concerns such as: the rampant 'use of deceptions to obtain sex'; the fact 'sexual activity is a risky business and this is well known'; the 'enormous difficulties in proving that emotional representations are untrue'; 'weaken[ing] the stigma that properly attaches to rape'; 'too great a burden' of disclosure; and 'the difficulty ... over deciding what is "material"'.<sup>208</sup> Rubinfeld additionally argues that, if autonomy were thus applied, a person who rapes (in the current sense) another person *because* the latter represented some false quality, the former could also assert they were raped by fraud.<sup>209</sup>

However, further to these problems, centred on (in)consistent application, is the problematic construction of sexual autonomy itself. The contention that sexual autonomy is a loaded concept will now be specifically analysed in the context of transgender sexual interactions.

<sup>203</sup> Ibid [26].

<sup>204</sup> Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' [2014] (3) *Criminal Law Review* 207, 210, quoting Herring, above n 80, 517.

<sup>205</sup> *Taskforce Report*, above n 42, 41.

<sup>206</sup> See above Part III(C).

<sup>207</sup> See above Part III(C)(2).

<sup>208</sup> Herring, above n 80, 520–3.

<sup>209</sup> Rubinfeld, above n 16, 1415.

### D *The Problematic Construction of Sexual Autonomy in Transgender Sexual Relations*

It is clear the rationale for criminalising non-disclosure of gender history in sexual interactions is the violation of sexual autonomy. However, in these situations the actual harm experienced by the complainant (as opposed to the in-principle ‘wrong’) is contingent on retrospective, subjective realisations — the harm is not experienced in the actual sexual activity, but the later perception of that activity.<sup>210</sup> Sharpe more scathingly characterises the harm as ‘pleasurable sexual acts retrospectively reimagined’.<sup>211</sup> While it is not asserted here that retrospective subjectivity inherently limits the *degree* of harm that may be personally experienced, its wholly subjective *nature* invites closer analysis of the autonomy argument used to criminalise it.<sup>212</sup> Retrospective mental (subjective) changes, however dramatic, should not be an adequate basis for criminalising any conduct so severely. To justify criminalising activities that result in, *prima facie*, only subjective harm, the law must assign objectivity to those internal and personal epiphenomena — to do so in this context, the law invokes the principle of sexual autonomy.

However, the law’s fundamental index of whether sexual autonomy has been exercised or violated is *consent*. In the last four years, there have been at least six recorded<sup>213</sup> prosecutions (all successful) of a transgender person for sexual offences<sup>214</sup> on the basis of this purported ‘gender fraud’ under the *UK Act*.<sup>215</sup> In keeping with the hypothesis in Part III, some of these cases illustrate how these scenarios may exhibit almost none of the elements proscribed by statutory provisions of (communicative) consent.<sup>216</sup> They are contexts in which consent may be fully communicated, demonstrating the potential for ostensible consent as a matter of principle, though this would of course depend on the facts. In *McNally*<sup>217</sup> a romantic online, telephone and webcam relationship developed over more than three years and involved, towards the end, three in-person meetings over some months, all of which involved intimate touching.<sup>218</sup> This degree of verbal, visual and inter-personal exchange provides a strong basis for asserting that consent to the eventual sexual activity was well communicated and well informed, to the extent that it was based on significant prior contact, and also that (McNally’s) belief that consent was present was genuine and *reasonable*.<sup>219</sup> Thus, in these instances, there are almost no discernible issues of dubious consent — excepting, of course, the issue of the ‘nature of the act’.

English courts have determined that gender transition alters the sexuality of the activity (from the complainant’s perspective), and that sexuality is a fundamental aspect of sex such that the complainant should be fully aware of it when deciding whether to participate.<sup>220</sup> From a certain standpoint this may not appear problematic; perhaps it is the law’s prerogative to make this delineation and perhaps it even makes some intuitive sense.

<sup>210</sup> Gross, ‘Gender Outlaws’, above n 102, 199; see also Sharpe, above n 204, 221.

<sup>211</sup> Alex Sharpe, *Sexual intimacy, gender identity and fraud: A conversation* (10 August 2015) ANU College of Law <<https://law.anu.edu.au/event/discussion/sexual-intimacy-gender-identity-and-fraud-conversation>>.

<sup>212</sup> Cf Sharpe, above n 204, 221.

<sup>213</sup> Only McNally’s case was legally reported; other instances have been documented in general media.

<sup>214</sup> The actual charges seem to be mostly assault by penetration, under the *UK Act* s 2: LGBT Foundation, ‘Sex by deception’ — *Statement from LGBT Foundation* (17 December 2015) <<http://lgbt.foundation/news-articles/sex-by-deception/>>; Alex Sharpe, ‘The dark truth behind convictions for “gender fraud”’, *New Statesman* (online), 16 December 2015 <<http://www.newstatesman.com/politics/feminism/2015/12/dark-truth-behind-convictions-gender-fraud>>.

<sup>215</sup> Sharpe, above n 211; see also LGBT Foundation, above n 214.

<sup>216</sup> See above Part III(C)(1).

<sup>217</sup> [2013] EWCA Crim 1051 (27 June 2013).

<sup>218</sup> *McNally* [2013] EWCA Crim 1051 (27 June 2013) [3]–[9].

<sup>219</sup> See *UK Act* ss 1(1)(c), 2(1)(d), 3(1)(d).

<sup>220</sup> See, eg, *McNally* [2013] EWCA Crim 1051 (27 June 2013) [26]–[27].

However, problems arise, firstly, because a ‘nature of the act’ offence requires *intentional deceit*<sup>221</sup> and, secondly, because a finding of this deceit supports a conviction by conclusively negating *belief in consent* (as well as consent itself).<sup>222</sup>

Sharpe addresses the factors the court cited to establish deception in *McNally*<sup>223</sup> and shows each of them to be concordant with genuine transgender identification.<sup>224</sup> For example, McNally’s gender ‘confusion’ was not evidence of ‘inauthenticity’ but the personal struggle often associated with gender transition; discussions between McNally and the complainant contemplating marriage and parenthood were also not inconsistent with (McNally’s) transgender identity.<sup>225</sup> This suggests McNally’s non-disclosure was the innocent and incidental result of genuine self-identification, not intentional deceit. Further, while in *McNally*<sup>226</sup> the court’s scepticism of gender authenticity informed its finding of deceit, Kyran Lee was convicted ‘on the basis of obtaining “sex through deception” ... [or] “gender fraud”’ despite having consistently identified as a man for about 10 years before the incident.<sup>227</sup> Similarly, Chris Wilson was convicted on this basis for incidents occurring when he was 20 and 22, despite having ‘lived as a man since childhood’.<sup>228</sup> This indicates a broad construction of ‘deceit’ that ignores the effect of genuine transgender self-identification and incorporates innocent non-disclosure. Moreover, in order for an accused to be culpable they must have had no reasonable belief that consent was present.<sup>229</sup> Reasonable belief can be inferred ‘having regard to all the circumstances’ and *especially* from actions taken to ascertain consent.<sup>230</sup> Given the well-communicated (albeit ostensible) consent, an accused in this context is arguably entitled to have a reasonable belief that consent was given. However, this is inconsequential if a conclusive presumption applies.<sup>231</sup>

In summary, the courts invoke the principle of sexual autonomy to assign objectivity to the subjective harm experienced in this context. They then circumvent the (exemplary) presence of communicative indicia of consent, and the concomitant genuine and reasonable belief in consent, by characterising gender transition as changing the ‘nature of the act’. As such, only deception *as to that nature* is required in order to apply a conclusive presumption that belief was absent. However, the courts have also broadly construed deceit to include innocent non-disclosure that results from genuine gender self-identification. The law understands and accepts (as it arguably should, albeit perhaps too readily) the complainant’s claim that they would not have consented to sex with a transgender person, but it also asserts that, *objectively speaking*, the defendant would have known there was no true consent by virtue of their gender transition. This is essentially a statement that, in sexual interactions, every transgender person ‘surely knows’ their identified gender is spurious, and that it is so aberrant that no person would have sex with them (remember the *conclusive* presumption) unless they were fully aware of the gender history.

This raises numerous problematic questions of legal transphobia that are expounded on by other authors, and are beyond the scope of this article.<sup>232</sup> Still, it is apparent that a special category of fraud in the factum has been created to override considerations of actual consent

<sup>221</sup> UK Act s 76(2)(a). Or, in NSW, ‘mistaken belief about the nature of the act *induced by fraudulent means*’ and knowledge that consent was given ‘under such a mistaken belief’: NSW Act s 61HA(5)(c) (emphasis added).

<sup>222</sup> UK Act s 76(1); see also NSW Act s 61HA(5)(c).

<sup>223</sup> [2013] EWCA Crim 1051 (27 June 2013).

<sup>224</sup> Sharpe, above n 204, 217–18.

<sup>225</sup> *Ibid* 217.

<sup>226</sup> [2013] EWCA Crim 1051 (27 June 2013).

<sup>227</sup> LGBT Foundation, above n 214; Sharpe, above n 214.

<sup>228</sup> BBC News, *Sex fraud woman put on probation* (9 April 2013) <<http://www.bbc.com/news/uk-scotland-north-east-orkney-shetland-22078298>>.

<sup>229</sup> UK Act ss 1(1)(c), 2(1)(d), 3(1)(d); see also NSW Act ss 61I, 61HA(3)(c).

<sup>230</sup> UK Act ss 1(2), 2(2), 3(2); see also NSW Act s 61HA(3)(c)–(d).

<sup>231</sup> UK Act s 76(1)(b); see also NSW Act s 61HA(5).

<sup>232</sup> See eg, Sharpe, above n 204; see eg, Gross above n 102.

that do comply with the essence of the communicative model of consent — the purported champion of sexual autonomy. The creation of this category is anomalous given the close analogy shown between sexual activity involving potential HIV transmission and transgender sexual interactions. Clearly, ‘to the extent the criminal law respects or restricts autonomy, it inevitably makes judgments about the nature and context of a subject’s autonomous choices’.<sup>233</sup>

## V SUGGESTED RESPONSES TO THESE PROBLEMS

Various redresses for, or defences of, the law’s use of the principle of sexual autonomy have been suggested, though these invariably involve their own significant disadvantages. For instance, Herring and Dougherty advocate a principled and strict application of autonomy, though the shortcomings of this approach are summarised by Herring himself and incisively criticised by Rubenfeld.<sup>234</sup>

Rubenfeld posits an operational principle of ‘self-possession’, violation of which (equated with rape or sexual assault) occurs when ‘the victim’s body is utterly wrested from her control, mastered, possessed by another’.<sup>235</sup> However, this has been widely denounced for its basic reliance on force, which is considered an unacceptable normative backwards step.<sup>236</sup> Responding to Rubenfeld, Yung argues that various socio-historical (in addition to legal) rationales underpin the current state of the criminal sex law — sexual autonomy is just one utilised principle, useful for its connection to consent.<sup>237</sup> Yung argues that recognising the deficiencies of sexual autonomy theory should not lead to a revival of the force requirement. Other dominant rationales such as the ‘severity and nature of the harm caused, gender dynamics involved, and terror inflicted by widespread sexual violence on the general population’ also contribute to the modern state of rape law and condemn the force requirement.<sup>238</sup> In a similar vein, Falk argues Rubenfeld’s conception of self-possession is reductive as it only identifies acts that *must be rape* rather than effectively identifying what *rape must be*, ignoring the incremental and reasoned expansion of sexual offences over time.<sup>239</sup>

However, while the premises of such refutations are noteworthy, they possibly address an issue different in nature to that of Rubenfeld’s argument. Yung identifies various reasons that justify the *existence* of the criminal sex law and rationalise it as a body of law to deal with sexual offences in a manner different to other bodily assaults. This provides no guidance for a determinative standard, principle or device that may be utilised to adjudicate an allegation of sexual assault, which is a primary aspect of Rubenfeld’s analysis.<sup>240</sup> Yung offers a convincing value-based account of why rape law should not return to dependence on force, but this is a separate enquiry from locating a principle that can be invoked to determine whether or when sexual assault occurs.

Brennan-Marquez presents a similar response to Rubenfeld, arguing that Rubenfeld’s defence of self-possession — that it would be ‘principled, if “unappealing”’ — provides no

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<sup>233</sup> Lacey, above n 72, 105.

<sup>234</sup> Dougherty, above n 138, 333–4; Herring, above n 80, 516, 520–3.

<sup>235</sup> Rubenfeld, above n 16, 1427.

<sup>236</sup> Yung, above n 77, 4; Patricia J Falk, ‘Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud’ (2013) 123 *Yale Law Journal Online* 353, 356–7 <<http://www.yalelawjournal.org/forum/not-logic-but-experience-drawing-on-lessons-from-the-real-world-in-thinking-about-the-riddle-of-rape-by-fraud>>; Dougherty, above n 138, 324.

<sup>237</sup> Yung, above n 77, 5.

<sup>238</sup> *Ibid* 5–6.

<sup>239</sup> Falk, above n 236, 356–7.

<sup>240</sup> Rubenfeld, above n 16, 1380.

justification for abandoning sexual autonomy.<sup>241</sup> Brennan-Marquez argues sexual autonomy has equal capacity for axiomatic application that would lead to undesirable results, yet ‘polities are free to set the parameters of categories like “rape” as they see fit ... there is no maxim that conceptual purity must trump human experience’.<sup>242</sup> This again fails to grapple with Rubinfeld’s initial endeavour to locate a *measure* by which certain actions can be accurately designated as sexual assault or not, except by appealing to the ‘democratic polity’s’ prerogative to construct the law as it sees fit — the results of such a prerogative are essentially what Rubinfeld critiques.<sup>243</sup>

Further, ultimate reliance on the collective (as superior to ‘stoic rationality’) also fails to address concerns about sexual autonomy’s problematic construction, which results from latent norms and value judgments.<sup>244</sup> This is particularly pertinent given that the above issue of transgender prosecutions is recently developed and emergent from a socio-legal context that is historically transphobic. As such, in the context of transgender sexual interactions logic should be utilised because it can make a substantiated determination, buttressed despite its apparent contrariness to ‘actual values held by actual members of our polity’.<sup>245</sup> A logical comparison suggests little to separate the transgender and HIV contexts, and little reason to treat either of them as sexual assault when other forms of deception are not treated as such.

It is interesting to examine Lacey’s suggested solution to the problems of sexual autonomy because it is seemingly attractive, and because the NSW Taskforce prominently cited her analysis.<sup>246</sup> Lacey’s operational principle is ‘integrity’, which is achieved when a person’s ‘sexual imago’ aligns (is integrated with) their actual sexual experience.<sup>247</sup> On this view, rape is fundamentally harmful in that it ‘violates its victims’ capacity to integrate psychic and bodily experiences’.<sup>248</sup> While desirable for its holistic notion of the human (particularly female) experience of sexual assault,<sup>249</sup> as a point of logic, integrity is only valuably achieved if there is perfect alignment of each party’s integrated experience. If one person’s imago aligns with their bodily experience but their imago is predicated, as it presumably often is, on an understanding of the other party’s imago (how the other person understands and perceives the sexual interaction) then in order for the first person to truly have integration, their imago (including their understanding of the other’s) must be accurate. If one party perceives, for example, mutually love-filled sex and for that reason has an integrated experience, but the other person is not in love, then the first person’s imago (envisioning mutually loving sex) is, in fact, not aligned with their bodily experience (sex with unrequited love) and thus they are not integrated. This misalignment of imagoes would conceivably be pervasive in sexual interactions, rendering Lacey’s principle operationally defunct and very difficult to establish evidentially.

Tuerkheimer’s conception of ‘sexual agency’<sup>250</sup> has similar self-governance ideals as autonomy, but recognises that the ‘self is socially constructed’ and people (especially women) must ‘operate under meaningful constraints’.<sup>251</sup> It thus allows for some ‘sexual misrepresentation’ because consent ‘cannot be discounted solely by virtue of its

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<sup>241</sup> Kiel Brennan-Marquez, ‘A Quite Principled Conceit’ (2013) 80 *University of Chicago Law Review* 81, 83, quoting Rubinfeld, above n 16, 1438.

<sup>242</sup> Brennan-Marquez, above n 241, 84.

<sup>243</sup> *Ibid* 85–6.

<sup>244</sup> *Ibid* 83.

<sup>245</sup> *Ibid* 87.

<sup>246</sup> *Taskforce Report*, above n 42, 33.

<sup>247</sup> Lacey, above n 72, 118.

<sup>248</sup> *Ibid*.

<sup>249</sup> *Ibid* 118–23.

<sup>250</sup> Tuerkheimer draws heavily on Kathryn Abrams, ‘From Autonomy to Agency: Feminist Perspectives on Self-Direction’ (1999) 40(3) *William & Mary Law Review* 805.

<sup>251</sup> Tuerkheimer, above n 79, 337–8.

imperfection'.<sup>252</sup> Due to its lack of principled rigour (its failure to reliably delineate when deception vitiates consent or not) it too may lack desirability and effectiveness in the same ways as autonomy.<sup>253</sup> However, at the very least it would be a more honest starting point for the law, avoiding a situation in which legal theory promises to protect a certain right as fundamental, yet fails to do so in many cases.

## VI CONCLUSION

The purpose of this article was to critique theoretical problems with the criminal sex law's use of sexual autonomy, particularly in the context of ostensible consent. However, the preceding analysis suggests that re-evaluation and theoretical review of sexual autonomy law should be informed by tenets of logical consistency and integrity. Sexual autonomy is touted as a fundamental right that the criminal sex law will protect; yet this is patently untrue in almost all sexual interactions involving fraud, which normally vitiates consent and violates autonomy. However, a stricter implementation of sexual autonomy likely leads to additional, significant problems. Further, the recent spate of transgender prosecutions, and particularly the manner in which criminality was construed, highlights problematic value judgments in the law's construction and understanding of sexual autonomy. Given these problems, the proper response is to re-assess the construction and role of sexual autonomy in the law, not to strengthen its application.

Sexual autonomy, while doubtless fundamental and seemingly laudable, should perhaps join ranks with other normative rationales justifying the existence of the criminal sex law as opposed to being the operational principle undergirding consent. In an operational sense, it is fraught with inconsistencies and false premises. Instances of ostensible consent should not be retroactively criminalised as sexual assault precisely because they accord exceptionally with the communicative model of consent. To circumvent such compliance raises serious questions concerning the law's value judgments. In particular, considering the law's general approach of not criminalising deceptions or informational constraints in sexual activity, criminalising deception (especially innocent non-disclosure) as to gender history has a questionable basis.

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<sup>252</sup> Ibid 344–5.

<sup>253</sup> Jed Rubenfeld, 'Rape-by-Deception — A Response' (2013) 123 *Yale Law Journal Online* 389, 395–7 <<http://www.yalelawjournal.org/forum/rape-by-deceptiona-response>>.

# SIR EDWARD COKE AND THE SOVEREIGNTY OF THE LAW

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*‘What Shakespeare has been to literature, what Bacon has been to philosophy, what the translators of the authorized version of the Bible have been to religion, Coke has been to the public and private laws of England.’*

— Sir William Holdsworth, *Some Makers of English Law* (Cambridge University Press, 1938) 132.

*Sir Edward Coke is one of the most celebrated English lawyers of all time. This article explains his ‘higher law’ jurisprudence and the undeniable impact of his writings and judicial rulings. Christian philosophy underpinned Coke’s influential rulings, and his influential writings revived the Magna Carta (as a fundamental charter of individual rights and liberties) from the obscurity into which it had fallen under the Tudors. Coke’s interpretation of the law became extremely influential not just in England but in all nations of the British Empire, including Australia. For his defence of the supremacy of the law, for his advocacy of individual rights and liberties, and for his bold assertion of judicial independence, ‘few figures have deserved more honour’<sup>1</sup> in the history of the common law.*

## I INTRODUCTION

Sir Edward Coke (1552–1634) is generally recognised as the most celebrated English jurist and interpreter of the common law. He is especially celebrated for his courageous defence of the supremacy of the law against the Stuarts’ claim of royal prerogative. First published in 1628, Coke’s *Institutes of the Laws of England* (*Institutes*) is considered the classical statement of English constitutional principles in the 17<sup>th</sup> century. For his defence of the supremacy of the law, for his advocacy of individual rights and liberties, and for his bold assertion of judicial independence, ‘few figures have deserved more honour’.<sup>2</sup>

This article explains how Coke resurrected the Magna Carta after centuries of political hibernation. His second volume of *Institutes* is credited with reviving the Great Charter from the obscurity into which the document had fallen under the Tudors. His commentary became deeply influential not just in England but also in North America, and later still, in all nations under the British Empire. Thanks to Coke’s legal writing and interpretation, the Magna Carta is still recognised as a powerful symbol of the struggle for freedom against political oppression and, indeed, a constant reminder of the basic rights of the individual against arbitrary power.<sup>3</sup>

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<sup>1</sup> Allen D Boyer, ‘Introduction’ in Allen D Boyer, *Law, Liberty and Parliament: Selected Essays on the Writings of Sir Edward Coke* (Liberty Fund, 2004) vii, xiv.

<sup>2</sup> Ibid.

<sup>3</sup> Lord Denning described Magna Carta as ‘the greatest constitutional document of all times — the foundation of the freedom of the individual against the arbitrary authority of the despot’, quoted in Danny Danziger and John Gillingham, *1215: The Year of Magna Carta* (Simon and Schuster, 2003) 268.

## II THE JURISPRUDENTIAL APPROACH OF SIR EDWARD COKE

Sir Edward Coke was a barrister, a judge and a politician. The son of a Norfolk barrister, he attended Cambridge and trained for the Bar himself. In 1593, sitting in his second Parliament, Coke was made a Speaker of the House of Commons. In the next year, Queen Elizabeth appointed him Attorney-General, a post he kept when James acceded to the throne in 1603.<sup>4</sup> Three years later, the king appointed him as Chief Justice of the Court of Common Pleas. After six years in office, Coke displeased the king for his uncompromising commitment to the common law. He was transferred to the King's Bench in order to become its Chief Justice. In 1616, exasperated at his attempts to limit the royal power, James dismissed him from that judicial post.

Coke's writings on various cases in the early 1600s are the foundation stones of judicial review of legislation, anti-monopoly law, and freedom from arbitrary search or seizure of someone in their own home. '... [T]he house of every one is to him as his... castle and fortress, as well for his defence against injury and violence, as for his repose',<sup>5</sup> he famously stated. For such remarkable contributions he is deservedly called the 'Oracle of the Common Law'<sup>6</sup> and the 'Shakespeare of the Common Law';<sup>7</sup> indeed, Coke is broadly regarded as one of the most celebrated English lawyers of all time. According to his main biographer, Allen D Boyer:

Wherever the common law has been applied, Coke's influence has been monumental ... He is the earliest judge whose decisions are still routinely cited by practicing lawyers, the jurist to whose writings one turns for a statement of what the common law held on any given topic.<sup>8</sup>

In late 1608 James I decided that Coke should not adjudicate rival contentions in a legal dispute involving the Court of High Commission (a prerogative court entrusted with supervision of ecclesiastical matters) or the common law courts, as James thought it would be appropriate for him to adjudicate this matter personally (seemingly at the instigation of Bancroft, the Archbishop of Canterbury). Since he believed that the Commission's alleged power to order arrests encroached on the jurisdiction of common law courts, Coke argued that such power to arbitrarily arrest should be resisted by the courts. He was convinced that Magna Carta prohibited arbitrary imprisonment without due process. When Archbishop Bancroft asserted that the monarch could judge whoever he wished and whatever case he pleased, Coke replied that the 'Word of God' actually requires that 'the laws even in heathen countries [must] be obeyed'.<sup>9</sup> And so history tells us of that moment when Coke dared to inform an English monarch that even kings themselves ought to be 'under God and the law'.<sup>10</sup> The argument was viewed as treasonable by a monarch who believed that he, as the king, personified the law. Coke remained resolute and he boldly appealed to Lord Bracton so as to remind James that 'the King shall not be under man, but under God and the Law'.<sup>11</sup>

<sup>4</sup> During his time as Attorney-General, Coke worked to protect the integrity of the law, gaining experience of the dangers of royal authority. He attempted to restrict the abuse of royal power using the common law as a system of limitation of government power that he would continue to advance towards the bench. See David Chan Smith, *Sir Edward Coke and the Reformation of the Laws: Religion, Politics, and Jurisprudence, 1578–1616* (Cambridge University Press, 2014) 89.

<sup>5</sup> *Semayne's Case* (1604) 5 Co Rep 91, 194, 195.

<sup>6</sup> Hastings Lyon and Herman Block, *Edward Coke: Oracle of the Law*, (Houghton Mifflin, 1929).

<sup>7</sup> Sir William Holdsworth, *Some Makers of English Law* (1938) 132.

<sup>8</sup> Boyer, above n 1, xiii–xiv.

<sup>9</sup> John Lord Campbell, *The Lives of the Chief Justices of England* (Blanchard and Lea, 1851) vol 1, 231.

<sup>10</sup> *Ibid* 232.

<sup>11</sup> *Ibid*.

Written during the period of Magna Carta, Bracton's treatise *De Legibus et Consuetudinibus Angliae* amounts to the first ever systematic treatment of the common law. As such, no account of the history of the common law is complete without describing the contributions of this extraordinary 13<sup>th</sup> century jurist and churchman. His exceptional contributions to the common law even earned him the much deserved title of 'Father of the Common Law.'<sup>12</sup> Undoubtedly, the most influential proposition of Bracton's treatise is that the English king is also subject to the law.<sup>13</sup> The emphasis here is not so much on government power or authority but rather on legal responsibility. This is how the role of the king is described: 'He is called *rex* not from reigning, but from ruling well, since he is a king as long as he rules well ... but a tyrant when he oppresses by violent domination the people entrusted to his care.'<sup>14</sup> The immediate effect is to affirm the monarch's obligation to always be subject to God and the law. Undoubtedly, the book's most celebrated passage is the significant statement that the king himself ought to be 'under God and the law.' For 'the king himself', Bracton declared,

ought not to be under man but under God, and under the law, because the law makes the king ... [F]or there is no king where will, and not law, wields dominion. That as a vicar of God he ought to be under the law is clearly shown by the example of Jesus Christ ... [f]or although there lay open to God, for the salvation of the human race, many ways and means ... He used, not the force of his power, but the counsel of His justice. Thus He was willing to be under the Law, 'that He might redeem those who were under the Law.' For He was unwilling to use power, but judgment.<sup>15</sup>

These are arguably the most famous words ever pronounced in the entire history of the common law. These words were a powerful antidote against the State absolutism that the later Tudors and the Stuarts attempted.<sup>16</sup> The idea entails the view that human power is derived from God so that it is ultimately limited by the law. According to the late Owen Hood Phillips:

Writing in the thirteenth century, Bracton adopted the theory generally held in the Middle Ages, that 'the King himself ought not be subject to man but subject to God and to the law, because the law makes him King'. The same view is also expressed in the Year Books of the fourteenth and fifteenth centuries. Such superior law governed kings as well as subjects and set limits to the prerogative.<sup>17</sup>

Coke restated Bracton's most celebrated assertion that the king ought to be subject to 'God and to the law'<sup>18</sup> in his famous dispute with James I over the superiority of the common law. James asserted that as a monarch he represented the embodiment of the law. And yet, Coke was adamant and reminded him that, as Bracton stated, the king is 'under God and the law, for the law makes the king.'<sup>19</sup> In reflecting on this extraordinary moment in English history, the famous twentieth-century English judge, Lord Denning, commented:

<sup>12</sup> Herbert W Titus, 'God's Revelation: Foundation for the Common Law' in H Wayne House (ed), *The Christian and American Law* (Kregel Publications, 1998) 13.

<sup>13</sup> James Spigelman, 'Magna Carta in its Medieval Context' (Speech delivered at Banco Court, Supreme Court of New South Wales, Sydney, 22 April 2015) 16.

<sup>14</sup> Titus, above n 12, fn 77.

<sup>15</sup> *Ibid* 35.

<sup>16</sup> Theodore F T Plucknett, *A Concise History of the Common Law* (Butterworth, 5<sup>th</sup> ed, 1956) 263. Plucknett (1897-1965) was a British legal historian who was the first ever Chair of Legal History at the London School of Economics.

<sup>17</sup> Owen Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* (Sweet & Maxwell, 7<sup>th</sup> ed, 1993) 33.

<sup>18</sup> *Ibid*.

<sup>19</sup> Sir Edward Coke, *Reports* (1602) vol 2 pt iv xix.

Those words of Bracton quoted by Coke, ‘The King is under God and the law’ epitomise in one sentence the great contribution made by the common lawyers to the Constitution of England. They [the common lawyers] insisted that the executive power in the law was under the law. In insisting upon this they were really insisting on the Christian principles [of the common law]. If we forget these principles, where shall we finish? You have only to look to the totalitarian systems of government to see what happens. The society is primary, not the person. The citizen exists for the State, not the State for the citizen. The rulers are not under God and the law. They are a law unto themselves. All law, all courts are simply part of the State machine. The freedom of the individual, as we know it, no longer exists. It is against that terrible despotism, that overwhelming domination of human life, that Christianity has protested with all the energy at its command.<sup>20</sup>

In this sense, the same jurisprudential approach that appeared in Bracton’s seminal work in the 13<sup>th</sup> century was professed to govern the common law over 300 years later.<sup>21</sup> This momentous encounter of the Chief Justice with his impetuous king left an indelible mark on the development of the common law. Anthony Arlidge and Igor Judge provide a colourful account of the interaction between James and his ‘insubordinate’ judicial officer:

The King told the Chief Justice that he ‘spoke foolishly’. While relying on his prerogative, the King would also ‘ever protect the common law’. Coke responded that the ‘common law protecteth the King’. The royal rejoinder was alarming. The King exploded, ‘Then I am to be under the law, which is treason to affirm’ – the King protected the law and not the law the King. This dangerous moment for Coke is vividly brought home by the report that the King shook his fist at him, and took great offence at the suggestion that he should be subject to the law. Coke quoted from Bracton, ‘*Quod rex non debet esse sub homine, sed sub Deo et Lege*’ (the King ought not to be subject to man, but subject to God and the Law).<sup>22</sup>

Modern historians somehow tend to discount the influence of religious thinking on Coke’s jurisprudence.<sup>23</sup> In the context of 17<sup>th</sup> century England, however, ‘it is necessary to consider the intertwining of legal-constitutional and religious thinking to explain conflict between the crown and its subjects’.<sup>24</sup> As noted by Champion, Coke’s principal argument ‘was that law was immemorial, drawing from God’s reason, rather than the will of a monarchical legislator’.<sup>25</sup> He saw in God’s law the superior source of all good laws and constitutions, asserting that this law was incorporated into the country’s legal system. Thus, in *Third Reports* Coke famously stated:

For as in nature we see the infinite distinction of things proceed from some unity, as many flowers from one root, many rivers from one fountain, many arteries in the body of man from one heart, many veins from one liver, and many sinews from the brain: so without question *Lex orta est cum mente divina*, and this admirable unity and consent in such diversity of things proceeds only from God, the Fountain and Founder of all good laws and constitutions.<sup>26</sup>

<sup>20</sup> Sir Alfred Denning, *The Changing Law* (Stevens & Sons, 1953) 118.

<sup>21</sup> Jeffrey A Brauch, *Is Higher Law Common Law? Readings on the Influence of Christian Thought in Anglo-American Law* (Fred B Rothman, 1999) 34.

<sup>22</sup> Anthony Arlidge and Igor Judge, *Magna Carta Uncovered* (Hart Publishing, 2014) 122. As Arlidge and Judge point out at 122, ‘Given the King’s assertion that Coke was speaking treason, this was a remarkable response. In some accounts, Coke fell flat on his knees, and the Lord Treasurer, Lord Cecil, intervened to pacify the situation’.

<sup>23</sup> David Adam Smith, *Violence and the Law: The Making of Sir Edward Coke’s Jurisprudence, 1578–1616* (Doctoral Thesis, Harvard University, 2007) 52.

<sup>24</sup> *Ibid* 53.

<sup>25</sup> Justin Champion, ‘From *Liber Homo* to “Free-born Englishman”: How Magna Carta Became a “Liberty Document”, 1508–1760s’ in Nicolas Vincent (ed), *Magna Carta: The Foundation of Freedom 1215–2015* (Third Millennium Publishing, 2<sup>nd</sup> ed, 2015), 103, 111. Professor Champion was Head of the Department of History at the University of London between 2005 and 2010.

<sup>26</sup> Sir Edward Coke, *Reports* (1602), vol 3, cii.

There is little doubt that Coke was a deeply religious person. He surrounded himself in the Inner Temple with Christian symbols and regalia that were reminders of biblical wisdom and morality.<sup>27</sup> Indeed, Coke invoked God's blessings in both the preface and epilogue of each volume of *Institutes*. More often than not he cited the authority of Scripture to justify his opinion and rulings, taking it for granted that divine authority is behind every true law. Thus, he referred to Moses as 'a Judge, and the first writer of the Law'.<sup>28</sup> Toward the end of his impressive career Coke reflected upon his spiritual struggle, asking God's protection upon him for 'A Saving Faithe and Patience together with a Testimonye of a good conscience to the End and in the End against the Temptations and Every dartes of the Enemy'.<sup>29</sup>

Coke openly relied on biblical principles to both defend and legitimise the common law. He often cited the Bible in cases where he was directly involved as a judicial officer.<sup>30</sup> Coke believed that the rights and freedoms of the English people — in particular, the right of self-defence and impartial judgement — derive from immutable principles of natural law that no human law can ever repeal or abrogate. In *Calvin's Case* (1608), as Chief Justice of the Court of Common Pleas, Coke stated:

The Law of Nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *Lex Aeterna*, the moral law, called also the Law of Nature ... and written with the finger of God in the heart of man.<sup>31</sup>

Coke assumed that the 'law of nature' reflected God's eternal law. He described such law as 'a testimony of [...] that conscience which God has engraved upon the minds of men'.<sup>32</sup> The assumption is found in the Epistle to the Romans, where Paul states that although the gentiles (ie non-Jews) have not received the Ten Commandments, they can still do all things required by the law, 'because of the work of the law that is written in their hearts. Their conscience bear witness of this fact, with their thoughts accusing or else excusing them'.<sup>33</sup> According to the late English theologian, John Stott, what Paul is stating is:

that the same moral law, which God has revealed in Scripture, he has also stamped (even if not so legibly) on human nature. Since he has in fact written his law twice, internally as well as externally, it is not to be regarded as an alien system, which we impose on people arbitrarily, and which it is altogether unnatural to expect human beings to obey. On the contrary, there is a fundamental correspondence between the law in Scripture and the law in human nature. God's law fits us; it is the law of our own being. We are authentically human only when we obey it. When we disobey it, we are not only rebelling against God, we also contradict our true selves.<sup>34</sup>

Coke was inspired by natural law theory to assert that this law has been written by God in the heart of every human being. Ultimately, the basic purpose of the law, according to Coke, is to reveal the universal moral order which is instilled by God into the human heart through the 'law of reason'. This law, rightly understood, works as a powerful weapon against political tyranny because it must be used to combat all forms of human iniquity. 'Law should enforce God's law and counter-act the wills of the devil',<sup>35</sup> Coke says. Later in life Coke argued that

<sup>27</sup> Ibid 54.

<sup>28</sup> James R Stoner, *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (University Press of Kansas, 1992) 19.

<sup>29</sup> BL Additional MS 22591, f.289r. Quoted from Smith, above n 22, 55.

<sup>30</sup> Ibid.

<sup>31</sup> 77 ER 377, 392.

<sup>32</sup> John Calvin, *Institutes of the Christian Religion*, John T McNeill (ed); (Westminster John Knox Press, 1960) [trans of: *Institutio Christianae Religionis* (first published 1536)]. The Franco-Swiss lawyer John Calvin (1509–1564) stands alongside Luther as a great reformer of Christianity.

<sup>33</sup> Romans 2:15.

<sup>34</sup> John Stott, *The Message of Romans: God's Good News for the World* (Inter-Varsity Press, 1994) 89.

<sup>35</sup> Smith, above n 23, 55

‘[t]he highest reason is that which works for religion, and which is not any less dignified than law; give honours and glory to the one God’.<sup>36</sup>

In *First Institutes*, Coke cites the Latin maxim ‘*Lex est sanctio justa, jubens honesta, et prohibens contraria*’ [law is a just sanction, commanding what is right, and prohibiting the contrary].<sup>37</sup> Typical of such citation is the assumption that ‘law is concerned first of all with right and wrong, not simply with policy, as we tend to assume today’.<sup>38</sup> The argument bears a visible connection with the traditional understanding of jurisprudence as encompassing the ‘science’ of the right and the wrong, and of justice as a concept derived from God’s wisdom and revelation. As Coke himself stated: ‘Justice did not know a father, mother, or brother, and did not take on a personality; but it imitates God’.<sup>39</sup>

Coke speaks of crime mainly in terms of moral wrongs. He stresses ‘the importance of preventing crime as well as punishing it’, so that ‘convict felons get what they deserve’.<sup>40</sup> His approach to the judicial ruling is premised on a comprehension of the institution’s antiquity and its responsibility in upholding the supremacy of the law.<sup>41</sup> Perhaps one of the most significant aspects of Coke’s jurisprudential thinking is the constant insistence upon the equation of law and reason. Reason is not a mere discretion or logic devoid of empirical experience. Rather, reason is training in a way of thinking that is non-arbitrary and non-apodictic. Thus, Coke argues that judges do not create laws; they simply declare or enunciate the existing ones insofar as any existing law might be ‘hidden’ and so waiting to be discovered.

What Coke meant by ‘artificial reason’ is basically the delicate combination between natural reason (which is naturally inherent in the law) and the sort of reasoning learned lawyers acquire by means of their systematic analysis of the law.<sup>42</sup> This implies that laws must be endowed with internal logic, coherence, structure and proper functioning. This also implies that adjudication is primarily about the discovery of the law, not the making of law, so that there is no judicial purpose apart from discovering, revealing, and clarifying the law. This assumption is clearly expressed in Coke’s well-known statement that ‘New adjudication does not make new law, but makes plain the old; adjudication is the dictum of law, and by adjudication law which was before hidden is newly revealed’.<sup>43</sup>

### III HISTORY OF MAGNA CARTA AS A FUNDAMENTAL LAW

The 12<sup>th</sup> century marked a significant outburst of literature, art and culture in England. This outburst accompanied further developments of Christian ideals infusing the law and government. By the close of that century, certain legal tendencies were deeply ingrained in England, including those centred on the creation of laws containing features of modern written constitutions. These laws dealt with matters considered to be fundamental to the functioning of a community, providing legal rights and protections to every individual, both

<sup>36</sup> ‘Summa ratio est que pro relligione facit, qua non lex dignior ulla est; soli deo honor et gloria,’ quoted from Smith, above n 23, 55.

<sup>37</sup> Sir Edward Coke, *Institutes* (1628) 394–5.

<sup>38</sup> Stoner, above n 28, 19.

<sup>39</sup> ‘Justitia non novit Patrem, Matrem, neque Fratrem; personam non accepit, sed Deum imitatur’ quoted in Smith, above n 23, 55.

<sup>40</sup> Stoner, above n 28, 19.

<sup>41</sup> Thomas G Barnes, ‘Introduction to Coke’s “Commentary on Littleton” in Boyer, above n 1, 12.

<sup>42</sup> Harold J Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard University Press, 2006) 260.

<sup>43</sup> (1612) 10 Co Rep 42, quoted in Thomas G Barnes, *Shaping the Common Law: From Glanvill to Hale, 1188–1688* (Stanford University Press, 2008) 122.

male and female.<sup>44</sup> These laws had the primary objective of discouraging immoral behaviour and facilitating the Christian ideal of government under the law.

All these characteristics of the legal system in medieval England found their fullest expression in the agreement imposed on the monarch, John Lackland, in June 1215. King John's grant of Magna Carta in 1215 is a perfect example of the central role Christianity played in developing the common law. Constituting a major shift in the mentality of the English people, Magna Carta was a significant advancement of the law; in that the provisions found in the Charter (and its many subsequent revisions) were concerned primarily with recognising and endowing political and juridical rights. More importantly, the document was a concession from the king that he too was bound by the law, thus establishing a clear formal recognition of the rule of law.

King John desired to rule arbitrarily after inheriting the throne following King Richard's death in 1199. His ability to rule arbitrarily was soon called into question, especially when a number of failed military conflicts abroad (namely, losses to the French), combined with constant increases in taxes to fuel such conflicts, provoked a great deal of discontent amongst his subjects (most notably, the nobles and barons). Growing discontent with King John heightened after a dispute with Pope Innocent III over the appointment of the See of Canterbury.

The principles governing the election of bishops in Western Christendom were laid down at the third Lateran Council in 1179. And yet, John desired the English church to be entirely subservient to the crown. He wanted to make sure these bishops were men he knew and could trust. In 1205 two candidates disputed the election of the See of Canterbury. However, Pope Innocent III, who wished to make sure the person appointed would be faithful to Catholic dogmas and tradition, rejected both contenders and appointed instead Stephen Langton, his own candidate. For his part, John expelled the monks from Canterbury and refused an entry permit into England to the new appointee.<sup>45</sup> But Pope Innocent III would never tolerate the overturn of a perfectly valid canonical procedure in order to suit the whim of a 'mere king'. So the Great Interdict followed on 24 March 1208, to which John replied by confiscating church property. This led Rome to submit him to severe punishments, including excommunication in November 1209.

Excommunication meant the king's absolute exclusion from the consolation and fellowship of the church in this world, and the threat of eternal damnation in the world to come. In the context of medieval England, this was a tragic situation because people believed that there was allegiance to something higher than their allegiance to a personal king. Above all, the interdict released all the barons from their oaths of allegiance to the monarch, requiring them to declare war on the king until he submitted.<sup>46</sup> In the event of an interdict the barons, while mindful of their loyalty to the monarch, had to first consider their higher loyalty to God and beg the sovereign to reconcile with the Holy Church. As noted by Geoffrey Hindley,

[w]hile kings and emperors claimed to be vicars of Christ upon earth, they were also thought to hold their kingdoms from him just as men below the king held their tenure from him. Christ was the ultimate liege lord and, as such, in the last resort could demand service against the king. During the years of interdict and royal excommunication Englishmen had been reminded of this more forcibly than most people in Christendom. And, if it came to that, by John's own act of some two years back ... [they] quite literally

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<sup>44</sup> Andrew Blick, *Beyond Magna Carta: A Constitution for the United Kingdom* (Hart Publishing, 2015) 36.

<sup>45</sup> *Ibid.*

<sup>46</sup> 'Seven bishops went into voluntary exile: to remain might suggest complicity in the king's defiance. Winchester was the only see with a resident bishop — Peter des Roches, who remained true to his royal patron': Geoffrey Hindley, *A Brief History of Magna Carta: The Origins of Liberty, From Runnymede to Washington* (Robinson, 2015) 76.

acknowledged that their king had a feudal superior, namely the see of St Peter as embodied in the person of Pope Innocent III.<sup>47</sup>

In November 1208, Pope Innocent III wrote to the barons to remind them of their primary responsibilities in the event of an interdict being promulgated.<sup>48</sup> More specifically, the Pope instructed the English barons to urge their king to immediately abandon his hostility to 'our venerable brother Stephen.'<sup>49</sup> On papal orders, all the clergymen were expressly instructed to interrupt the normal ministrations of sacraments so that people were denied all the benefits of religion. The clergymen were prohibited to carry out any religious service except the baptism of infants and the administration of confession to the dying.<sup>50</sup> The idea behind these manifestly harsh measures, as Hindley pointed out:

[w]as that John's subjects, dismayed at being cut off from the benefits of religion, would urge him to refrain from 'walking in the counsel of the ungodly' and return to his senses, confident that not only would he consider them good friends for their pains but that he would also rectify his conduct and so enable the kingdom to return to the body of the church. But of course, so long as the king persisted in his stubbornness many good men and women would suffer. Year in, year out, men and women lived without the blessing of Holy Communion. They married without the full benefits of the rites of the church, and were buried in un-consecrated ground. No doubt this was felt as the most serious deprivation. There are reports of bodies left unburied in churchyards; some parishes opened new burial grounds where the dead would have to lie unsanctified until the interdict was lifted and the ground could be consecrated.<sup>51</sup>

In 1212, the Pope authorised King Philip Augustus's French invasion of the English kingdom. At the same time Stephen Langton was commissioned for England with papal letters which declared King John formally deposed.<sup>52</sup> Under the serious threat of French invasion, John finally succumbed to the Pope's demands in 1214. He resigned both the crowns of England and Ireland, receiving them back as the Pope's feudatory. He also accepted Langton's appointment as Archbishop to subject the kingdom to the Pope's lordship.<sup>53</sup>

These sources of discontent ultimately led the English barons to march into London in 1215, to force King John to sign the articles of demand encompassed in Magna Carta.<sup>54</sup> By that time Langton had become a leading figure in the struggle of the barons against the king. In those days, the influence of the church on political matters was quite significant. The clergy were responsible for holding the king to account. Thus, Langton spoke against royal injustice and about the right of bishops to reprimand the king if he violated the law. In holding the monarch to account there was no place for timidity and Langton was quite willing to take all the risks, even the death penalty if necessary.

Clergymen like Langton were the guardians of lawful government in medieval England. They provided the legal and theological expertise that was so vital to the demanding task of drafting legislation. Such religious officials could in turn heavily influence the application of the law, invariably infusing the system with biblical principles and the privileges of the church.<sup>55</sup> Their influence was crucial in facilitating the peace negotiations that brought together the two sides of the conflict in 1215. There was a remarkable degree of authority

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid 72.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid 73.

<sup>51</sup> Ibid 74-7.

<sup>52</sup> Ibid 76.

<sup>53</sup> John W Baldwin, 'Due Process in Magna Carta: Its Sources in English Law, Canon Law and Stephen Langton' in Robin Griffith-Jones and Mark Hill (eds), *Magna Carta, Religion and the Rule of Law* (Cambridge University Press, 2015) 31.

<sup>54</sup> See Magna Carta arts 39 and 40.

<sup>55</sup> Blick, above n 44, 36.

drawn on the charisma of ecclesiastical positions. Among the 27 barons who put their names to the Magna Carta, eleven were clerics who justified their action as permissible under God and the church. Archbishop Langton and Robert Fitzwalter led them, with Fitzwalter declaring himself the 'Marshal of the army of God and Holy Church.'<sup>56</sup>

Although Magna Carta signalled a significant advancement in English law, on its face it appears to be religiously motivated. First, the document was granted 'for the honour of God and the exaltation of the Holy Church.' Second, acting on the advice of two archbishops and nine bishops, the king sealed the famous document 'from reverence for God and for salvation of our soul and of all our ancestors and heirs.' Hence, thirteen original copies of the Charter were distributed among the bishops who then placed them in their respective cathedrals. These copies were written not by royal scribes working in the king's Chancery, but by the scribes who served the English bishops. Since King John obviously did not desire it to be widely publicised, the clergy took for itself the important task of proclaiming, distributing and preserving the Charter.

So it is now easy to understand why the very first clause of Magna Carta protects the church against state encroachments.<sup>57</sup> It follows that personal freedom and due process are explicit in provisions such as Clause 39 ('No freeman shall be taken or imprisoned or disseised [dispossessed] or outlawed or exiled or in any way ruined ... except by the lawful judgement of his peers or by the law of the land'); Clause 40 ('To no one will we sell, to no one will we deny or delay right or justice'); and Clause 52 ('If anyone has been disseised or deprived by us without lawful judgement or his peers of lands, castles, liberties, or his rights, we will restore them to him at once').

Other religious influences are found in Clause 8, ensuring that widows would not be compelled to marry against their will. This is a principle of freedom for marital choice. The clause was limited to the protection of widows and it is best explained by the clergy's influence. Clause 42 provides for the right to leave the realm and return without sanction. The Constitution of Clarendon confirmed this tradition so that it was not unlawful, for instance, for bishops to depart from the country without explicit permission of the king. There is also Clause 57, which deals with the restoration of land that had been taken arbitrarily by the monarch, although it also authorised delay of judicial proceedings for crusaders upon return from the Holy Land. The church wished to protect the privileges of religious institutions, including for the crusaders.

Another relevant provision is Clause 12, which provides that the king would take no taxation without the consent of those who were to be taxed. In 1215, the king was to take council with the barons and archbishops before making any such decision. The notion that a ruler should take council before making an important deliberation was a deeply held tradition. This referred to a process rather than an institution and the underlying principle was that the royal power was not absolute. This was a significant aspect of canon law, and Clause 12 makes specific use of religious language that would be familiar to any monk or bishop. This was not a coincidence. Some protection to what today can be described as 'human rights' is basically what inspired most of the principles of canon law. Roman law and canon law were the sort of thinking which dominated legal education and this particular clause functions as a principle of justice that was generally accepted as the 'common law' of Europe. There was a substantial though incomplete overlap between *Corpus Juris Civilis* and the Magna Carta so that many of the principles that can be found in the latter are derived from the former.

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<sup>56</sup> William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (James MacLehose & Sons, 1914) 5.

<sup>57</sup> In some ways, however, the provision was a failure because it was largely displaced by the popes and by the king securing the election of clergymen approved by him.

Another relevant provision of Magna Carta is found in Clause 61. It says that ‘the barons shall choose any twenty-five barons of the realm as they wish, who with all their might are to observe, maintain and cause to be observed the peace and liberties which we have granted.’ Any infringement of the Charter’s terms by the king or his officials would be communicated to any four members on the committee. If within forty days no remedy or redress were offered, then the king would have to empower the full committee to ‘distain and distress us in every way they can, namely by seizing castles, lands and possessions’ until he made amends. The king could be penalised for the breach of the Charter and also for any arbitrary behaviour that might place him at fault towards someone else. Procedures were laid down in great detail and there was no room to loophole for compromise or adjustment.<sup>58</sup> Clause 61 was therefore more radical than any other provision in the Charter. It expressly commanded the king to subject himself to a political body whose power (given the extent of what was specified in the clause) was higher than the king’s. Thus, the council aimed at taking out of the king’s hands what had so far been his royal prerogative. It sought to add an ecclesiastical voice to the process and established the right of the archbishop to take part in the process if he so desired.

At this point one might ask why, in Clause 61, the barons chose the number 25 to comprise their committee. Twenty-five is a highly symbolic number in the Bible. Twenty-five was the age in which the Levites were consecrated to God’s service. Likewise, that was the age from which many Hebrew kings had come to the throne. Further, the number 25 corresponds to ‘the law squared’ because the Pentateuch, the Bible’s first books, comprises five books. Finally, in the New Testament Christ is reported to have used five loaves to feed *five* thousand men plus all their wives and children.<sup>59</sup> These legitimising links from the Holy Scripture asserted that the Charter was created fundamentally for the sake of glorifying God.

From 1225, subsequent versions of the Great Charter ‘were reinforced by sentences of excommunication against infringers.’<sup>60</sup> Bishops pronounced the sentence of excommunication in an expression of dramatic religious ritual that was pivotal to enforcing the medieval document. Although in today’s society this seems a rather strange form of punishment, it was quite effective in those days. For instance, it was for the breaking of his oath (after 1135) that King Stephen became stigmatised as a tyrant and usurper. In an age without judicial review of constitutionally invalid legislation, oath-taking was taken very seriously and ‘the consequences of oath-breaking could prove disastrous for individuals as for nations.’<sup>61</sup> Holt described the penalties for the breach of medieval charters were to:

[r]einforce the charters by the threat of excommunication; promulgate the penalty in the most solemn assemblies of king, bishops, and nobles, as in 1237 and 1253; reinforce the threat by papal confirmation, as in 1245 and 1256; have both charters and sentence published in Latin, French, and English as in 1253, or read twice a year in cathedral churches as in 1297; display the Charter of Liberties in church, renewing it annually at Easter, as Archbishop Pecham laid down in 1279; embrace the king himself within the sentence of excommunication, as Archbishop Boniface did by implication in 1234.

To modern eyes it is all repetitive and futile. In reality it was a prolonged attempt to bring the enforcement of the Charter within the range of canon law, to attach the ecclesiastical penalties for breach of faith to infringements of promises made “for reverence for God”, as the Charter put it, promises repeatedly reinforced by the most solemn oaths to observe

<sup>58</sup> Hindley, above n 46, 241.

<sup>59</sup> Magna Carta Trust, *The 25 Barons of Magna Carta* <<http://magnacarta800th.com/schools/biographies/the-25-barons-of-magna-carta/>>.

<sup>60</sup> J C Holt, ‘The Ancient Constitution in Medieval England’ in Ellis Sandoz (ed), *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* (Liberty Fund, 1993) 32, 40.

<sup>61</sup> Nicholas Vincent, *Magna Carta: A Very Short Introduction* (Oxford University Press, 2014) 12.

and execute the Charter's terms. This was perhaps the best the thirteenth century could do to introduce some countervailing force to royal authority.<sup>62</sup>

#### IV COKE AND THE REVIVAL OF MAGNA CARTA IN THE 17<sup>TH</sup> CENTURY

After serving Parliament, Coke, aged 76, went into retirement to complete his *Institutes*, which is now widely recognised as a foundational document of the common law.<sup>63</sup> The second volume of Coke's *Institutes* covers thirty nine statutes of significance. It is broadly recognised as the classical statement of English constitutional principles in the seventeenth century. It soon became uniquely influential not only in England but also in North America, and later still, in all the other nations across the British Empire.<sup>64</sup> As noted by Champion:

Coke's commentary in the second part of the *Institutes* is the first comprehensive account contextualising Magna Carta with a variety of relevant and legal materials. Although modern historians might charge Coke with anachronism in his integration of seventeenth-century ambitions into the medieval document, his work was the starting point for regarding the Charter as laying the foundations of fundamental law (and for establishing how the judiciary and Parliament had adapted its principles to circumstances).<sup>65</sup>

Magna Carta was a medieval document forced upon a king by his rebellious barons in 13<sup>th</sup> century England. And yet, the document has acquired a much deeper symbolic meaning. Curiously, for more than a century the Magna Carta was ignored, if not considerably forgotten. In the mid-1590s Shakespeare wrote *King John*, and there is not a single mention in it of the Magna Carta. It was not until the 17th century that the document returned to prominence in England. This is only so because the parliamentary forces that opposed King Charles started searching for any historical precedent through which they could state their case against his arbitrary rule.<sup>66</sup> It is in this historical context that Magna Carta became a perfect example of legal resistance against the king. Under the early Stuarts, 'the great charter designed to restrain the Plantagenets was reborn. It was taken cheerfully out of its historical context and held up as an "original" constitution — proof that Charles was betraying not only his own people but English history at large'.<sup>67</sup> Since its purpose was to set limits on the royal power by having the courts enforce the law of the land — which can hardly be enforced against a civil ruler unless the law is defined in writing — the Great Charter became 'a sacred text, the nearest approach to an irrevocable "fundamental statute" that England has ever had... For in brief it means ... that the king is and shall be below the law.'<sup>68</sup>

The revival of Magna Carta in the 17th century, as well as the mythical status it acquired, was in great part a direct result of Coke's work.<sup>69</sup> In 1619, while condemning the abuses of the royal power, he informed the House of Commons that the Charter earned its name 'not for the largeness but for the weight'.<sup>70</sup> He argued that no monarch is allowed to tax the people without their previous consent, and that the legal basis for such opposition was found in the Great Charter. Coke's dominance of parliamentary debates and his authoritative application of the Charter transformed the medieval document into the legal forms of constitutional

<sup>62</sup> Ibid 41.

<sup>63</sup> Stoner, above n 28, 15–16.

<sup>64</sup> See H D Hazeltine, 'The Influence of Magna Carta on American Constitutional Development' (1917) XVII *Columbia Law Review* 1.

<sup>65</sup> Champion, above n 25, 106.

<sup>66</sup> Dan Jones, *Magna Carta: The Making and Legacy of the Great Charter* (Head of Zeus, 2015) 108.

<sup>67</sup> Ibid.

<sup>68</sup> Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I, Volume 1* (1898) (Liberty Fund, 2010) 184.

<sup>69</sup> Jones, above n 66, 110.

<sup>70</sup> Dan Jones, above n 66, 110.

government that were ‘mobilized to the defence of the property and liberty of free-born Englishmen’.<sup>71</sup> In both 1621 and 1624, Stephen D White explains,

Coke played an extraordinarily prominent role in Parliament’s proceedings. In terms of sheer activity, he must be reckoned the leading member of the lower house in these years, because he delivered more speeches and committee reports in both years than any other member and ranked first in 1621 and second in 1624, in the number of committees on which he served. He was not, however, merely an active member of these parliaments. He was also a highly influential leader who proposed many remedies for the Commonwealth’s grievances and who frequently bore the main burden of justifying or legitimating the commons’ actions.<sup>72</sup>

When Coke was elected for a second time to Parliament in 1628, he played a pivotal role in the drafting of the Petition of Right. For that effort he was sent to prison at the Tower of London.<sup>73</sup> Passed by both Houses of Parliament, the Petition was an attempt to prevent the king from collecting forced loans and arbitrarily imprisoning his political enemies. In other words, this was a declaration by Parliament, in the run-up to the English Civil War, that dealt primarily with the grievances of arbitrary taxation and arbitrary imprisonment. The Petition provided ‘[t]hat no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such-like charge, without common consent by Act of Parliament’; and ‘[t]hat no free man be detained in prison without cause shown’. All of these ‘rights and liberties’ were to be enforced ‘according to the laws and statutes of this realm’, without ‘prejudice’ to the people or to the Parliament.<sup>74</sup>

Above all, the Petition of Right was an attempt to bind the monarch to principles of constitutional government, ‘in precisely the same way that John had been bound by the barons in 1215’.<sup>75</sup> King Charles apparently accepted all the terms of the Petition but soon later dismissed Parliament and did not call another one for eleven years, setting both on a collision course that ended in civil war, his execution, and a short-lived republic. Charles fought hard to retain his power of imprisonment without showing cause. The middle party in the House of Lords tried to help him by proposing the addition of a saving clause to legislation, which the House of Commons ultimately rejected.<sup>76</sup> Coke led the Commons in rejecting such a compromise, arguing that it was not possible to reconcile such a saving clause with the ordinary application of Magna Carta. This saving clause was *magnum in parvo* (‘great in little’) because it would ‘weaken the foundation of law’<sup>77</sup> on which the Charter is founded, Coke said. As he pointed out,

[i]t is a matter of great weight, and, to speak plainly, will overthrow all our Petition. It trenches to all parts of it; it flies at loans, and at the oath, and at imprisonment, and at billeting of soldiers; this turns all about again. Look into all the petitions of former times: they never petitioned wherein there was a saving of the King’s sovereignty. I know that prerogative is part of the law, but ‘sovereign power’ is no parliamentary word. In my opinion it weakens Magna Carta and all our statutes, for they are absolute, without any saving of ‘sovereign power’; and shall we now add to it, we shall weaken the foundation of

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<sup>71</sup> Champion, above n 25, 112–3.

<sup>72</sup> Stephen D White, *Sir Edward Coke and the Grievances of the Commonwealth* (Manchester University Press, 1979) 27.

<sup>73</sup> Berman, above n 42, 246.

<sup>74</sup> John Witte Jr, ‘Towards a New Magna Carta for Early Modern England’, in Robin Griffith-Jones and Mark Hill (eds), *Magna Carta, Religion and the Rule of Law* (Cambridge University Press, 2015), 109, 113–14.

<sup>75</sup> Jones, above n 66, 110.

<sup>76</sup> J R Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603–1689* (Cambridge University Press, 1960) 63.

<sup>77</sup> Coke, *First Institutes*, 81 b. Quoted in William E Conklin, *In Defence of Fundamental Rights* (Sijthoff & Noordhoff, 1979) 50.

law, and then the building must need fall. Take heed what we yield unto: Magna Carta is such a fellow that he will take no 'sovereign'.<sup>78</sup>

Coke's famous assertion that 'Magna Carta is such a fellow that he will take no sovereign' reflects the opinion that this document is actually the 'Great Charter of the Liberties of England'. The Charter epitomises 'the principal ground of the fundamental laws of England'.<sup>79</sup> This goes in line with the argument that Magna Carta reflects the immutable principles of divine moral law. Indeed, Coke shared with his contemporaries the belief that God's moral law operates in as fixed a manner as the physical laws of nature. This rests on the premise that the world is governed by invariable laws of nature that determine how societies ought to be governed and structured. According to Harold Berman, such a holistic approach must be regarded as an integral part of a broader legal tradition which embraces not only a legal philosophy (in the narrow sense of the word) but which also embraces a 'religious philosophy' as well as a 'philosophy of the natural sciences'.<sup>80</sup>

In the *Second Institutes* Coke seeks to provide an account of four centuries of English statutes and cases that were built on the foundations of Magna Carta. There he states that its provisions are 'for the most part declaratory of the principal grounds of the fundamental laws of England, and for the residue it is additional to supply some defects of the common law'.<sup>81</sup> Coke holds the Great Charter second to none. To its 29<sup>th</sup> clause he provides a particularly broad meaning: that the rights declared in such clause extend to all free men and women; that it guarantees due process in all criminal proceedings — including the right to indictment by grand jury instead of accusation by information; the right to trial by jury; the right to answer one's accusers, and the privilege of *habeas corpus*; it even forbids royal grants of monopoly, for 'generally all monopolies are against this great Charter, because they are against the liberty and freedom of the Subject, and against the Law of the Land'.<sup>82</sup> In Coke's terminology 'liberties' refer not only to freedom from external interference, but they also encompass the fundamental law of the realm, meaning that Magna Carta is declared as 'the Great Charter of the Liberties of England, so called of the effect, because they make men free'.<sup>83</sup>

## V COKE AND MAGNA CARTA IN COLONIAL AMERICA

A few years ago, political theorists from the University of Houston and Louisiana State University carried out comprehensive research to identify the American Founders' most quoted sources. After a decade of research, and more than 15,000 writings from the founding era, 3,154 citations were counted.<sup>84</sup> Lord Coke's *Second Reports* were a major reference during the revolutionary period, especially his celebrated remarks on Magna Carta.<sup>85</sup> It soon became incredibly influential in America. Due in great part to Coke's writings, the Magna Carta was adopted as the basis for the first legal documents taken across the Atlantic with the first English colonists. Copies of the Great Charter were published in the American colonies as early as 1687. It was to the Magna Carta that the settlers turned for their inspiration when revolution swept through North America. No taxation without consent and no imprisonment without due process were the issues that lay beneath the 1776 Declaration of Independence as the American colonies wrenched themselves from British rule. As Dan

<sup>78</sup> John Rushworth, *Historical Collections* (1682) 562, quoted in Tanner, above n 76, 63.

<sup>79</sup> S Sheppard (ed), *The Selected Writings of Sir Edward Coke* (Liberty Fund, 2003) vol III.

<sup>80</sup> Berman, above n 42, 263.

<sup>81</sup> *Ibid.*

<sup>82</sup> Sir Edward Coke, *Institutes* (1642) vol II, 47.

<sup>83</sup> 8 Reports (1611), Pref.

<sup>84</sup> H Wayne House (ed), *The Christian and American Law* (Kregel Publications, 1998) 85.

<sup>85</sup> *Ibid.*

Jones puts it, '[t]he colonists saw themselves as English freemen, whose rights were to be afforded precisely the same protection as those in the old country'.<sup>86</sup>

Curiously, Coke was directly engaged in setting legal and commercial frameworks for the ventures in North America.<sup>87</sup> He played an essential role in the draft of the first charter of the Virginia Company in 1606. The document stated that the English settlers in North America had a fundamental right to enjoy 'all liberties, franchises, and immunities ... as if they had been abiding and born within this our realm of England'.<sup>88</sup> The liberties of Englishmen were further legally assured in the colonial charters of Massachusetts (1629), Maryland (1632), Connecticut (1662), Rhode Island and Carolina (both 1663), and Georgia (1732).

Lord Coke argued that Magna Carta 'was for the most part declaratory of the principal grounds of the fundamental laws of England, and for the residue it is additional to supply some defects of the common law'; again, that 'this statute of Magna Carta is but a confirmation or restitution of the Common Law'; and again, in Clause 29, that 'this chapter is but declaratory of the old law of England'. This view served as an inspiration for the American Bill of Rights and all its colonial predecessors.<sup>89</sup> Influenced by Coke's interpretation, the Great Charter became the fundamental statement of English liberties, a symbol and reminder of fundamental principles binding on government action.<sup>90</sup> As noted by Joyce Lee Malcolm,

Americans ... remained wedded to Sir Edward Coke's assurance that a royal command or parliamentary statute that violated a right was void. No one need, or ought to obey it. This view was especially compelling for Americans, since they opposed those parliamentary statutes infringing on promised rights and resented having no representation in that body. The American mindset, therefore, remained fixed on early seventeenth-century ideas that fundamental liberties embedded in Magna Carta and in common law needed to be jealously guarded and the appropriate means to protect them. These means included individual challenges and civil disobedience; the refusal of officials to carry out acts repugnant to rights; judges ready to declare any violation of a right against law; and finally nullification by juries.<sup>91</sup>

The influence of Coke's jurisprudence was at its height in England during the period when the American colonies were being most actively settled. The presence of Coke's doctrine led to repeated efforts by the colonial legislatures to secure for their constituencies all the benefits of the Great Charter, in particular Clause 29 which guaranteed due process and trial by jury. According to Edward S Corwin, Coke's interpretation of Magna Carta inspired the colonists to approach the 'law of the land' provision of Clause 29 as an affirmation not only of

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<sup>86</sup> Jones, above n 66, 111.

<sup>87</sup> See Hazeltine, above n 64, xvii.

<sup>88</sup> Vincent, above n 61, 93.

<sup>89</sup> Paul O Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (University of Chicago Press, 2003) 185.

<sup>90</sup> Edward S Corwin, *The Higher Law Background of American Constitutional Law* (Liberty Fund, first published 1928, 2008 ed) 69.

<sup>91</sup> Joyce Lee Malcolm, 'Magna Carta in America: Entrenched' in Nicholas Vincent (ed), *Magna Carta: The Foundation of Freedom 1215–2015* (Third Millennium Publishing, 2<sup>nd</sup> ed, 2015) 130. Joyce Lee Malcolm is the Patrick Henry Professor of Constitutional Law at George Mason University Law School. She is a historian and constitutional scholar specialising in British and Colonial American History. She focuses on the development of individual rights and has written extensively on the subject.

legislative supremacy but also of individual rights and liberties.<sup>92</sup> Further, the constant evocation of Magna Carta during the American colonial period (as a basic provider of political autonomy and the basic rights of the individual) ‘served to fix terminology for the future moulding of thought.’<sup>93</sup> Since the English colonies in North America were far from the seat of justice at Westminster and the Inns of Court, American lawyers relied on printed law books and the various abridgements that summarised the most important cases. These legal texts were primarily the works of Coke supplemented by the *Commentaries* of Blackstone.<sup>94</sup> The drafter of the Declaration of Independence, Thomas Jefferson, regarded Coke’s *Institutes* as ‘the universal book of law students, and a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British Constitution, or in what were called British liberties’.<sup>95</sup> Jefferson stated about the *Institutes*: ‘This work is executed with so much learning and judgement, that I do not recollect that a single position in it has ever been judicially denied. And ... it may still [1814] be considered as the fundamental code of English law’.<sup>96</sup>

Based on Coke’s writings, the Massachusetts colonial Legislative Assembly declared, ‘upon further consideration and the many arguments used in the publick prints to support the doctrine’,<sup>97</sup> that the Stamp Act (a tax introduced by an Act of the British Parliament on 22 March 1765) was ‘against Magna Charta and the natural rights of Englishmen, and therefore according to Lord Coke null and void’.<sup>98</sup> In other words, the colonial assembly relied on Coke’s interpretation of Magna Carta to declare that Americans were entitled to the same legal rights as Englishmen.

The American colonial judiciary often cited Coke as the primary source of authority for their interpretation of the common law. In *Trevett v Weeden* (1786),<sup>99</sup> for example, the Superior Court of Rhode Island was asked to consider the constitutionality of an Act of the local legislature that imposed penalties on anyone who refused to take the state’s paper money at its face value. The legislation empowered the Superior Court or the Court of Common Pleas to try offenders without trial by jury. Four judges, including the Chief Justice, held the Act unconstitutional while only one judge doubted the court’s jurisdiction. The majority held the law void on the grounds of the plaintiff’s argument that ‘that great oracle of the law, Lord Coke’ taught that legislative acts that are ‘repugnant and impossible’ must be declared ‘null and void’, including any statute requiring judges to proceed ‘without jury ... according to the law of the land’.<sup>100</sup>

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<sup>92</sup> Corwin, above n 90, 69. Edward S Corwin (1878–1963) was the third McCormick Professor of Jurisprudence and first chairman of the Department of Politics at Princeton University. He was also the President of the prestigious American Political Science Association and considered the leading expositor of the intent and meaning of the US Constitution. According to Corwin, Coke interpreted ‘by the law of the land [per legem terrae]’ to mean ‘by the Common Law, Statute Law, or Custom of England’. Such interpretation was given on the basis of ‘due process of law’, a term which appears for the first time in Statute 37 of Edward III, in 1344, when the English Parliament compelled the King to consent to a statute law curbing his royal prerogative. The section is worth reproducing: ‘No man of what estate or condition that he be, shall be put out of law or tenement, nor taken nor imprisoned, nor disinherited nor put to death without being brought in answer by due process of law.’ The same expression, ‘due process’, would be enshrined in the Fifth Amendment to the US Constitution, which declares that no-one ‘shall be deprived of life, liberty, or property without a due process of law’. A similar provision is later found in the Fourteenth Amendment, which was enacted after the American Civil War, in 1868. This Amendment forbids any state-member of the American Federation to ‘deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws’.

<sup>93</sup> Corwin, above n 90, 69.

<sup>94</sup> Stoner, above n 28, 13.

<sup>95</sup> Andrew Lipscomb (ed), *The Writings of Thomas Jefferson* (Thomas Jefferson Memorial Association, 1903) xii.

<sup>96</sup> Samuel E Thorne, *Sir Edward Coke, 1552–1952* (Bernard Quaritch, 1957) 3.

<sup>97</sup> Quoted in Theodore F T Plucknett, ‘Bonham’s Case and Judicial Review’, in Boyer, above n 1, 179.

<sup>98</sup> *Ibid.*

<sup>99</sup> (Rhode Island 1786).

<sup>100</sup> *Ibid* 182.

In the case of *Robin et al v Hardaway* (1772),<sup>101</sup> the Superior Court of Virginia was called to decide on the fate of several persons of Indian descent who attempted to vindicate their freedom in spite of a statute of 1682 (and others) that reduced them to slavery. Although it was found that the infamous statute had been repealed in 1705, the court provided arguments that ‘throw considerable light upon the legal thought of the period’.<sup>102</sup> These arguments reveal the profound impact of Coke’s interpretation of the common law in colonial America. Both the court and the plaintiffs relied on Coke’s reasoning in *Bonham’s Case* and *Calvin’s Case* to argue for the invalidity of an Act of Parliament:

All acts of legislature apparently contrary to right and justice are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God, whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to Him from Whose punishments they cannot protect us. All human constitutions which contradict His laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of justice ...<sup>103</sup>

In October 1774, the delegates to the first Continental Congress of the thirteen discontented colonies justified their gathering to express grievances on the grounds that the colonies were acting ‘as Englishmen, their ancestors in like cases have usually done’.<sup>104</sup> When John Adams asserted that Parliament had no authority over the colonies, and that each comprised a separate power with its own independent legislature, he quoted verbatim from Coke’s *Institutes*. His fellow Bostonian James Otis had already done so, arguing against writs of assistance via raising a case based on Coke’s assertion in *Bonham’s Case* that the courts would control certain Acts of Parliament even to the extent of voiding them.<sup>105</sup> Otis relied particularly on Coke’s writings to claim that no British policy could deprive the American people of their fundamental rights derived from Magna Carta.

Ratified in 1791 the American Bill of Rights — the first ten amendments to the US Constitution — echoes Coke’s interpretation of Magna Carta in several places. According to the Fifth Amendment to the American Constitution, ‘no person shall ... be deprived of life, liberty, or property, without due process of law’. This is a reformulation of Clause 39 of the Magna Carta, which states: ‘No free man is to be arrested, or imprisoned, or disseized, or outlawed, or exiled, or in any other way ruined, nor will we go or send against him, except by the legal judgment of his peers or by the law of the land’.

The Fifth Amendment determines that no person must be ‘deprived of life, liberty, or property ... nor shall private property be taken for public use, without just compensation’. Compare this with the second half of Clause 30 of Magna Carta: ‘No sheriff or bailiff of ours, or anyone else may take any free man’s horses or carts for transporting things, except with the free man’s agreement’. This is also true about the Sixth Amendment of the Constitution: ‘In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury’. Compare this with Clause 40 of Magna Carta 1215 — ‘To no one will we sell, to no one will we deny or delay, right or justice’. The similarities are quite striking. It is perhaps no surprise that since the earliest years of the United States’ existence, its citizens have looked upon Magna Carta with an almost ‘Cokean enthusiasm’.<sup>106</sup>

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<sup>101</sup> 1Jefferson109, 114, 1 Va Reports Ann, 58, 61 (1772)

<sup>102</sup> Ibid 181.

<sup>103</sup> Ibid 179.

<sup>104</sup> Jones, above n 66, 111.

<sup>105</sup> Barnes, above n 41, 25.

<sup>106</sup> Jones, above n 66, 112.

## VI ENDURING IMPACT OF MAGNA CARTA

When issued in 1215, Magna Carta was first and foremost a peace treaty between the king and barons. By the 1230s its defence became the main rallying point for the subjects against the arbitrary authority of the crown. The Charter initiated a series of legislative Acts such as the Provisions of Merton of 1236. In the 1620s the Charter was revived in the form of a political manifesto cited by parliamentarians as a check upon the Stuarts and their royal claim to 'absolute power'.<sup>107</sup> Yet the greatest significance of Magna Carta is found not so much in its formal provisions, but on the use made of the medieval document in subsequent history. Although its original version had a short life (King John soon obtained a papal Bill annulling it) the Charter was nonetheless confirmed on many occasions throughout the Middle Ages. According to Sir John Baker QC:

The transition to constitutional monarchy was not instantaneous. It was felt necessary to have the Charter confirmed over and over again, because its ties on the king were personal, political and moral before they were in a practical sense legal ... By the fourteenth century, at any rate, there was no room for doubt that England was a constitutional monarchy. The king could not change the law or break it. Everyone, including the king, was subject to the law; and the law could only be changed with the advice and consent of Parliament. The kings' judges were professional lawyers and their professional compass was one of independence. By the end of the fifteenth century, men trained in the common law permeated the machinery of government and were heavily represented in the House of Commons. Their cast of mind influenced the exercise of power at every level.<sup>108</sup>

Interestingly enough, the Great Charter does not possess in England the status of supreme law in the sense of limiting the sovereignty of Parliament. The Parliament is still apparently competent to override any law, even the Magna Carta. As a matter of fact, since the 1980s all but four of the Charter's original sixty clauses have been declared obsolete. What remains is the clause granting freedom to the church (clause 1); the clause guaranteeing the customs and liberties of the city of London (clause 13); and the general prohibitions disclaiming the monarch's power to order arbitrary arrest, forbidding the sale of justice, and guaranteeing judgement by a person's 'peers' (that is, the person's equals) — in other words, what we would call today 'the right to trial by jury' (clauses 39 and 40).

But the relevance of Magna Carta ought to be measured by the standards of legality provided. As time passes, the Charter continues to be held in the highest esteem by those who interpret it, providing a symbolic opposition to arbitrary government and an instrument of appeal by those who argue against the extension of royal powers. For those who adhered to the King-in-Parliament theory in the 17<sup>th</sup> century, the Charter reflected the great legacy of Archbishop Langton, Henry de Bracton, and all the first common lawyers who boldly proclaimed the

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<sup>107</sup> Vincent, above n 61, 4, 11: 'Rather than charging a swingeing fine (known as a "relief") from his barons to inherit their fathers' lands, the king would restrict himself to a legitimate and just relief. Widows would be allowed the lands set aside from them by their husbands or their families (their "dower", and "marriage portion"). They would not be forced by the king to remarry against their consent. Those fearing death should be allowed to make wills disposing of personal property. The goods of those who died interstate should be distributed by their families rather than by the king. Those who offended the king should be fined according to the gravity of their offence, rather than risk confiscation of their entire estate. In the case of certain specified royal prerogatives (the king's right to take particular taxes, his collection of debts owed to previous kings, his control over the minting of coin, his right to set aside land as "forest" or hunting reserves in which neither the animals nor their habitat could be disturbed on pain of drastic punishment), Henry I pledged himself to a degree of moderation. Finally, he agreed to confirm the law of Edward the Confessor (the "lagan Edwardi regis") and to abandon anything seized unjustly since King Edward's time, in effect establishing a mythological golden age of justice before 1066 to which the fallen standards of present times might be restored'.

<sup>108</sup> Sir John Baker, 'Magna Carta and Personal Liberty' in Robin Griffith-Jones and Mark Hill, *Magna Carta, Religion and the Rule of Law* (Cambridge University Press, 2015) 85.

principle of government under the law.<sup>109</sup> Therefore, ‘this essentially medieval document, which has survived for nearly eight centuries, provides a linkage to the past, constitutes a legitimating myth to support several fundamental legal principles and acts as a foundation document in legal tradition’.<sup>110</sup>

Although only a few clauses of Magna Carta remain in force, the document preserved its undeniable significance as the inspirational document for the opposition to despotic power. The Great Charter continues to provide a significant source for the recognition of fundamental rights and liberties. Indeed, this document symbolises a legal tradition of protection for fundamental rights that serves as an effective check on arbitrary government. Within its famous clauses it is generally accepted that the first germs of western constitutionalism resonate even to the present day – the most notable of these principles being the right to a fair trial by an independent jury through due process of law, the prohibition against cruel and unusual punishment and the right to remain silent.<sup>111</sup>

As can be seen, Magna Carta surpassed its original historical role. By the 14th century every English lawyer of standing – whether judge, magistrate or attorney – had full access to the Charter in his copy of the *Antiqua Statuta*.<sup>112</sup> The Great Charter was evoked against royal despotism in the 17th century and it justified the opposition of American colonists to parliamentary power in the following century.<sup>113</sup> By laying down legal procedures and establishing points of law which the courts are obliged to follow and enforce, ‘the Charter became more and more a myth, but nevertheless a very powerful one, and in the seventeenth century all the forces of liberalism rallied around it’.<sup>114</sup>

David Clark has argued that ‘it may be said that the emergence and persistence of Magna Carta through the nearly eight centuries since 1215 has been the story of the transformation of a feudal document into a tradition that was once called civil liberty and is now called human rights’.<sup>115</sup> Accordingly, Coke’s celebrated statement that Magna Carta is for the most part declaratory of the principal grounds of the fundamental law of England was received with great enthusiasm by the British settlers who colonised foreign lands, in particular in North America, Australia and New Zealand.<sup>116</sup> The Charter continues to be cited in English, Australian and American law courts.<sup>117</sup> Lord Irvine explains how the provisions of Magna Carta remain valid law in all these common law jurisdictions, albeit in a ‘complex way’:

The process of Federation meant that Magna Carta was given concrete legal effect in Australian jurisdictions ... Jurisdictions with Imperial Acts (the Australian Capital Territory, New South Wales, Queensland and Victoria) all chose to enact chapter 29. This was not, primarily, for its potentially salutary legal effects, but rather to recognise Magna Carta’s pivotal role in the constitutional legacy that these jurisdictions had inherited. By contrast, in the Northern Territory, South Australia, Tasmania and Western Australia, Magna Carta was received by Imperial law reception statutes. These jurisdictions find themselves in the surprising position of having almost all the provisions of Magna Carta theoretically still in force. I say surprising because ... only four chapters still remain on the statute book in the UK, but Magna Carta was largely received in these jurisdictions before this process of repeal began. The position is also theoretical because the chapters of

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<sup>109</sup> Arlidge and Judge, above n 22, 117.

<sup>110</sup> David Clark, ‘The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law’ (2000) 24 *Melbourne University Law Review* 866, 869.

<sup>111</sup> Arlidge and Judge, above n 22, 1.

<sup>112</sup> Holt, above n 60, 55.

<sup>113</sup> Arlidge and Judge, above n 22, 3.

<sup>114</sup> Plucknett, above n 16, 25.

<sup>115</sup> Clark, above n 111, 889.

<sup>116</sup> *Ibid* 872.

<sup>117</sup> Vincent, above n 61, 2.

Magna Carta would have to be suitable to modern conditions there, and many clearly would no longer be.<sup>118</sup>

An observation of court cases indicate that judges and litigants still rely on the principles of Magna Carta in Australia. Clark attributes such remarkable reliance due to four interrelated reasons: First, the retention of the 1297 version in local statutes; second, the willingness of litigants to rely on it; third, the capacity of judges to adapt it to local circumstances; and, fourth, its function in representing key values in the legal system. Thus Clark concludes:

[T]he range of matters in which Magna Carta has been referred to [in Australian courts] is testament to the continuing high regard in which the Great Charter is held, rather than to its merely being a set of practical legal principles capable of being applied in modern situations. Thus, the Charter has been invoked on the question of whether a non-lawyer might be appointed as Attorney-General, on the principles of sentencing, on the right to a trial according to law, on the prohibition of arbitrary detention, on the rights of foreign merchants, on the initial basis for the separation of the power of the judiciary from those of the other branches of government, as one basis for lawful taxation of citizens, on the rights of a shoplifter detained in a department store by private persons, and as the foundation for the prohibition of cruel and unusual punishments. While many of the propositions, such as the last, are nonsense in historical terms, the key point is that many judges have viewed the Magna Carta as a fundamental document in the history of many contemporary common law institutions and doctrines. This continued recurrence of the image of the Charter as a founding document has done much to keep it alive in legal discourse.<sup>119</sup>

Even if some of these claims rely on assertions that historical evidence might not support, it is nonetheless quite fascinating to note the continuing appeal to a medieval document in our modern society. The rewriting of doctrine to update the law is a widely accepted interpretative legal method. Throughout the history of the common law this has served to establish an important link between the past and the present, so that ancient instruments can be acknowledged (even if not necessarily comprising a direct source of validity) by the modern law. Above all, this method of interpretation is responsible for the continuing application of long-enduring principles of the common law as well as their application to contemporary circumstances,<sup>120</sup> which also implies that public officials must justify their actions according to an approach that safeguards basic rights and liberties.<sup>121</sup> As noted by Lord Irvine,

The fact that the provisions of Magna Carta rarely break the surface or provide explicit contributions to the outcome of modern cases should not obscure its contemporary importance. ... [I]n celebrating the legacy of Magna Carta in the UK and Australia we are not clinging to a constitutional relic ... without modern significance. The opposite is in fact true. Magna Carta can be truly appreciated as the foundation stone of the rule of law. Its terms continue to underpin key constitutional doctrines; its flame continues to burn in the torches of modern human rights instruments; and its spirit continues to resonate throughout the law.<sup>122</sup>

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<sup>118</sup> Lord Irvine of Lairg, 'The Spirit of Magna Carta Continues to Resonate in Modern Law' (Papers based on the inaugural Magna Carta Lecture, presented at the Great Hall of Parliament House, Canberra, 14 October 2002) 13.

<sup>119</sup> Clark, above n 111, 875.

<sup>120</sup> Ibid 891.

<sup>121</sup> Irvine, above n 119, 15.

<sup>122</sup> Ibid 18.

## VII FINAL CONSIDERATIONS

Whether one agrees or not, William Shakespeare is widely regarded as the greatest writer the English language has ever produced. Likewise, Sir Edward Coke (1552–1643) is broadly recognised as the most celebrated English jurist and interpreter of the common law of all times. Coke is particularly celebrated for his important defence of the supremacy of the law against the Stuarts' claim of royal prerogative. For his defence of the supremacy of the rule of law against the Stuarts' claim of royal prerogative, for his advocacy of basic rights and freedom, for his bold assertion of judicial independence, 'few figures have deserved more honour'.<sup>123</sup>

First published in 1628, Coke's *Institutes of the Laws of England* is broadly recognised as the classical statement of English constitutional principles in the seventeenth-century. Coke interpreted Magna Carta as a fundamental charter of individual rights and liberties. He held that document to be the basic guarantor of the right to trial by jury and the writ of *habeas corpus*. Inspired by Coke's vision of the Great Charter, the American colonists saw the English struggle against the Stuarts as part of their own history, thus embracing Magna Carta as part of their own constitutional legacy that provided the same protections enjoyed by their cousins in the mother country.<sup>124</sup>

Furthermore, Coke's writings are directly responsible for the language and the spirit of both the American Declaration of Independence and the Bill of Rights. His interpretation of the common law continues to be applied by judges and lawyers across the globe, including Australia and the United States. For this and other reasons, Sir William Holdsworth was certainly not overstating when he famously declared that '[w]hat Shakespeare has been to literature, what Bacon has been to philosophy, what the translators of the Authorized Version of the Bible have been to religion, Coke has been to the public and private laws of England'.<sup>125</sup>

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<sup>123</sup> Boyer, above n 1, xiii–xiv.

<sup>124</sup> Ralph V Turner, 'The Meaning of Magna Carta since 1215' (2003) 53(9) *History Today* <<http://www.historytoday.com/ralph-v-turner/meaning-magna-carta-1215>>.

<sup>125</sup> Holdsworth, above n 7, 132.

# WILL AUSTRALIA ACCEDE TO THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

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*Choice of court agreements are a standard and important component of modern contracts. Recent events suggest that Australian principles of private international law in respect of choice of court agreements are about to change. In November 2016, Parliament's Joint Standing Committee on Treaties recommended accession to the Convention on Choice of Court Agreements through an 'International Civil Law Act'. The Convention applies in international cases to exclusive choice of court agreements concluded in civil or commercial matters. It contains three basic rules, each subject to exclusions and exceptions. First, where a court is designated in an exclusive choice of court agreement, that court is essentially obliged to exercise jurisdiction. Second, if a court is faced with an exclusive choice of court agreement in favour of another court, the court is obliged to decline to exercise its jurisdiction. Third, judgments made in proceedings giving effect to exclusive choice of court agreements must be recognised and enforced. This note briefly considers whether Australia will accede to the Convention and how accession could impact how Australian courts address exclusive choice of court agreements.*

## I INTRODUCTION

Parties litigate about where to litigate<sup>1</sup> because 'venue matters':<sup>2</sup> the identity of the forum in which a dispute is determined can have a substantive impact on the outcome of that dispute. Parties to a commercial transaction can take account of this risk by incorporating a choice of forum into their agreement. These 'choice of court agreements' are now a standard and important component of modern contracts.

Recent events suggest that Australian principles of private international law in respect of choice of court agreements are about to change. In November 2016, Parliament's Joint Standing Committee on Treaties recommended accession to the *Convention on Choice of Court Agreements* ('Convention').<sup>3</sup> The *Convention* would be implemented through an 'International Civil Law Act'.<sup>4</sup> This note briefly considers whether Australia will accede to the Convention and how accession could impact how Australian courts address exclusive choice of court agreements.<sup>5</sup>

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<sup>1</sup> *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460, 464 (Lord Templeman).

<sup>2</sup> Andrew Bell, 'Transnational Commercial Litigation and the Current State of Australian Law', in K Lindgren (ed), *International Commercial Litigation and Dispute Resolution* (Sydney University Press, 2010) 44–63; see also Andrew Bell, *Forum Shopping and Transnational Litigation* (Oxford University Press, 2003).

<sup>3</sup> *Convention on Choice of Court Agreements*, opened for signature 30 June 2015, 44 ILM 1294 (entered into force 1 October 2015) ('Convention').

<sup>4</sup> Joint Standing Committee on Treaties, Parliament of Australia, Report 166 - Australia's Accession to the Convention on Choice of Court Agreements (2016) ('Report 166').

<sup>5</sup> Although the Convention came into force in 2015, it has been more than a decade since it was concluded. Other scholars have also considered how the Convention could impact Australian law; see, eg, Richard Garnett, 'The Internationalisation of Australian Jurisdiction and Judgments Law' (2004) 25 *Australian Bar Review* 205; Mary Keyes, 'Jurisdiction under the Hague Choice of Courts Convention: Its Likely Impact on Australian Practice' (2009) 5(2) *Journal of Private International Law* 181.

## II THE CONVENTION

The *Convention* is a product of negotiations at the Hague Conference on Private International Law — an organisation dedicated to the international harmonisation of principles of private international law. It is a piecemeal solution directed to the broader problem of the overlapping jurisdiction of courts in respect of matters with a foreign element. The more ambitious ‘judgments project’, which continues to seek harmonisation of domestic principles on the exercise of jurisdiction and recognition and enforcement of foreign judgments, has had less success at the Hague Conference. The subject matter of the *Convention* is a sub-set of the judgments project on which members could agree. Broadly speaking, it was agreed that courts ought to respect exclusive choice of court agreements.

The *Convention* applies in international cases to exclusive choice of court agreements concluded in civil or commercial matters. It contains three basic rules. First, where a court is designated in an exclusive choice of court agreement, that court is essentially obliged to exercise jurisdiction.<sup>6</sup> Second, if a court is faced with an exclusive choice of court agreement in favour of another court, the court is obliged to decline to exercise its jurisdiction.<sup>7</sup> Third, judgments made in proceedings giving effect to exclusive choice of court agreements must be recognised and enforced.<sup>8</sup>

However, these basic rules are not absolute. For one thing, the *Convention* only applies to exclusive choice of court agreements selecting courts of contracting States. Currently, contracting States include the members of the European Union (but for Denmark, and subject to the Brexit-caveat for the United Kingdom), Mexico, and Singapore.<sup>9</sup> From Australia’s perspective, the value of the *Convention* is undermined by the fact that our major trading relationships are with nations in the Asia-Pacific region, which are not contracting States. In its Report, the Joint Standing Committee noted that Singapore is the only Asian party, and that Asia is underrepresented at the Hague Conference.<sup>10</sup> It should also be noted that the *Trans-Tasman Proceedings Act 2010* (Cth) already implements aspects of the *Convention* in relation to New Zealand.

It has been argued that the International Civil Law Act should be framed so that the core aspects of the *Convention* would apply to non-contracting States.<sup>11</sup> For example, Australian courts would be obliged to suspend or dismiss proceedings in light of an exclusive choice of a court in Hong Kong.<sup>12</sup> However, other things being equal, there would be no guarantee that a Hong Kong court would do the same in respect of an exclusive choice of an Australian court; this would depend on the private international law principles applicable in that place. Arguably, Australian parties to transnational contracts would suffer detriments under such an Act — being deprived of a potential juridical home advantage — without a reciprocal benefit.<sup>13</sup> Another limitation on the *Convention’s* scope is that it only applies to *exclusive* choice of court agreements.<sup>14</sup> Non-exclusive choice of court agreements are not captured,

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<sup>6</sup> *Convention* art 5.

<sup>7</sup> *Ibid* art 6.

<sup>8</sup> *Ibid* arts 8, 9.

<sup>9</sup> Hague Conference on Private International Law, *Status Table - 37: Convention of 30 June 2005 on Choice of Court Agreements* (21 January 2016) <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>>.

<sup>10</sup> *Report 166*, above n 4, 19 [3.4].

<sup>11</sup> Brooke Adele Marshall and Mary Keyes, Submission No 1 to Joint Standing Committee on Treaties, *Inquiry on Australia’s Accession to the Hague Convention on Choice of Court Agreements*, 26 April 2016, 5; *Report 166*, above n 4, 22 [3.16].

<sup>12</sup> *Convention* art 6.

<sup>13</sup> See also Michael Douglas, ‘Choice of Court Agreements under an International Civil Law Act’ (2017) *Journal of Contract Law* (forthcoming).

<sup>14</sup> See *Convention* art 3.

although this might not be as disappointing as has been suggested.<sup>15</sup> This is because Article 3(b) provides that a choice of court agreement ‘shall be deemed to be exclusive unless the parties have expressly provided otherwise’. The enactment of this presumption of exclusivity would provide welcomed clarity to Australian private international law, which currently relies on common law principles of contractual construction for the characterisation of exclusivity. Courts have implied exclusivity into choice of court agreements lacking express language to that effect.<sup>16</sup> If this principle is communicated to parties at the negotiation stage of a deal, it could facilitate a more transparent allocation of risk in their contract.

Even when a choice of court agreement comes within the scope of the *Convention*,<sup>17</sup> there is potential for a court of a contracting State to avoid application of the basic rules through the application of a number of exceptions. For example, there is no obligation to respect choice of court agreements that are null and void according to the law of the State of the chosen court.<sup>18</sup> For courts that are not chosen, an important exception is in Article 6(c): the obligation to stay or dismiss proceedings does not apply if ‘giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised’. This exception may prove to be critical to the *Convention’s* future within Australian law.

### III WILL AUSTRALIA IMPLEMENT THE CONVENTION?

At the time of writing, it appears that an International Civil Law Act will come into existence in 2017. There seems to be strong support for accession within the Commonwealth Attorney-General’s Department and from the Assistant Secretary, Andrew Walter.<sup>19</sup> So far, the Department’s recommendations have been well-received by the Government.<sup>20</sup> At the time of writing, the Department of Prime Minister and Cabinet identifies an ‘International Civil Law Bill’ which would implement the *Convention* as legislation proposed for introduction in the 2017 Winter Sittings.<sup>21</sup>

The *Convention* provides opportunity for contracting States to make various declarations, which have the potential to alter the scope of the core obligations.<sup>22</sup> There are several areas in which Australia could make such a declaration, although it is not clear whether this will occur. Insurance contracts could justifiably be excluded from the scope of the International Civil Law Act, which would align Australia to the position of the European Union; this position was argued by Marshall and Keyes in their submission to the Joint Standing Committee’s inquiry.<sup>23</sup> Protection of the vulnerable parties to insurance contracts is already a conspicuous feature of Australian private international law, in light of the High Court’s judgment in *Akai Pty Ltd v Peoples Insurance Co Limited*,<sup>24</sup> which held that the *Insurance Contracts Act 1984* (Cth) ousted a choice of English court and English law. On the other hand, if no declaration is made in this area, Australian courts could potentially continue the *Akai* orthodoxy, even in the context of exclusive choice of court agreements within the scope of the *Convention*, by invoking the public policy exception in Article 6(c).

<sup>15</sup> Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) 529.

<sup>16</sup> See, eg, *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 (31 July 2009).

<sup>17</sup> Cf *Convention* art 2, which provides a long list of specific exclusions from the scope of the Convention.

<sup>18</sup> *Convention* arts 5(1), 6(a).

<sup>19</sup> See National Interest Analysis: Australia’s Accession to the Convention on Choice of Court Agreements [2016] ATNIA 7.

<sup>20</sup> See Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 10 October 2016; *Report 166*, above n 4.

<sup>21</sup> Department of Prime Minister and Cabinet, *Legislation Proposed for Introduction in the 2017 Winter Sittings* (2017) 2 <<https://www.pmc.gov.au/sites/default/files/publications/2017-winter-public-list.doc>>.

<sup>22</sup> *Convention* arts 19–22.

<sup>23</sup> Marshall and Keyes, above n 11, 12.

<sup>24</sup> (1996) 188 CLR 418.

## IV LOOKING FORWARD

What impact will the *Convention* have on Australian law? In the author's view, the most significant impact will be from the presumption of exclusivity. Exclusivity matters because it can have a material impact on how a court deals with an interlocutory piece of 'litigation about where to litigate'. Under common law principles, exclusive choice of court agreements in favour of foreign states, which are sometimes called 'derogation agreements', will ordinarily result in a stay of Australian proceedings in the absence of strong reasons.<sup>25</sup> This is because Australian courts are inclined to respect contracting parties' autonomy to determine their mode of dispute resolution. Accordingly, agreements which lack that quality of exclusivity are less likely to justify a stay. Conversely, in the case of an exclusive choice of an Australian court, ie, a 'prorogation agreement', an Australian forum might exercise its auxiliary jurisdiction in equity to aid the legal rights under the parties' agreement by restraining the commencement or continuation of foreign proceedings — deploying a so-called 'anti-suit injunction'.<sup>26</sup> The statutory presumption will therefore discourage costly litigation over contractual construction, and remove the courts' discretion to stay proceedings.

A question mark hangs over the manifest injustice/public policy exception in Article 6(c). In proceedings before the Joint Standing Committee, Andrew Walter adverted to the exception in the following passage:

The convention provides for certain narrow exceptions and qualifications to these three key obligations to address situations where the desirability of giving effect to a choice of court agreement might be overridden by other important considerations — for example, the convention contains safeguards to prevent the recognition of contractual clauses or the enforcement of foreign judgements that would be contrary to, or incompatible with, public policy in Australia. This approach strikes an appropriate balance between the core objective of the convention to enhance the circulation of civil and commercial judgements, and the need for contracting states to protect their fundamental sovereign rights.<sup>27</sup>

It is not clear what forum policy would engage the exception. If Mr Walter's view is correct, then the exception would align the International Civil Law Act to the common law expressed in *Akai*, where the High Court held that a choice of court agreement would not be enforced if it is contrary to the 'policy of the law'.<sup>28</sup> In contrast, an Explanatory Note to the *Convention* provides that the exception 'does not permit the court seised to hear the case simply because the chosen court might violate, in some technical way, a mandatory rule of the State of the court seised'.<sup>29</sup> It might be that European contributors to the *Convention* text share a different understanding of the role of forum policy in this context. Thus, the meaning of Article 6(c) could be a flashpoint for future litigation over the International Civil Law Act.<sup>30</sup>

If Australia accedes to the *Convention* through an International Civil Law Act, the significance of that event will depend on whether our major trading partners also accede. In an October 2016 hearing of the Joint Standing Committee on the issue of accession, the

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<sup>25</sup> *Huddart Parker Ltd v The Ship "Mill Hill"* (1950) 81 CLR 502, 508–9 (Dixon J).

<sup>26</sup> *FAI General Insurance Co Ltd v Ocean Marine Mutual* (1997) 41 NSWLR 559.

<sup>27</sup> Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 10 October 2016, 4 (Andrew Walter, Assistant Secretary, Attorney-General's Department).

<sup>28</sup> *Akai Pty Ltd v Peoples Insurance Co Limited* (1996) 188 CLR 418, 447 (Toohey, Gaudron and Gummow JJ).

<sup>29</sup> Trevor Hartley and Masato Dogauchi, *Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements* (2013) 821 [153] <<https://www.hcch.net/en/publications-and-studies/details4/?pid=3959>>.

<sup>30</sup> See also Michael Douglas, 'Choice of Court Agreements under an International Civil Law Act' (2017) *Journal of Contract Law* (forthcoming).

Chair of the Committee, Hon Stuart Robert MP, commented on the rate of uptake as follows: 'It seems like it is moving at the speed of an asthmatic ant with a heavy load of shopping'.<sup>31</sup> Mr Walter explained that this is not unusual for the Hague Conference. Even if we see an Act in 2017, it may be some time before Australia realises the full potential of the *Convention*.

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<sup>31</sup> Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 10 October 2016, 6 (Hon Stuart Robert MP).



# **WILLIAMS GROUP AUSTRALIA V CROCKER AND THE (NON)BINDING NATURE OF ELECTRONIC SIGNATURES**

JACK SKILBECK\*

## I INTRODUCTION

Commercial parties rely on the law to provide certainty in their contractual dealings. Signatures are an important aspect of contractual certainty as they help authenticate the document and provide evidence that the signing party agrees to be bound by the terms of the contract.<sup>1</sup> The expansion of e-commerce — whereby transactions are increasingly conducted through electronic media — has given rise to various legal issues. One issue is the extent to which parties can rely on electronic signatures (‘e-signatures’) where remote signings have become more common than traditional face-to-face signings.<sup>2</sup> This was demonstrated in the recent decision of *Williams Group Australia Pty Ltd v Crocker* (‘*Williams*’),<sup>3</sup> where the NSW Court of Appeal (‘the Court’) refused to enforce a personal guarantee where a company director’s e-signature was affixed to the guarantee without the director’s knowledge. Although *Williams* also dealt with issues of ratification and estoppel, this note will focus on the implications of the Court’s decision on ostensible authority. Specifically, it queries whether the principles of ostensible authority are relevant in the e-commerce age, and calls for amendments to Australia’s electronic transactions legislation to overcome issues raised by *Williams*.

## II FACTS

Crocker was one of three directors of building company IDH Modular Pty Ltd (‘IDH’). In July 2012, Williams Group Australia Pty Ltd (‘Williams’) entered into an agreement to supply building materials to IDH on credit (‘the agreement’). The agreement was accompanied by an all-moneys guarantee (‘the guarantee’), where each director of IDH personally guaranteed debts outstanding on the agreement. The agreement and the guarantee were forwarded to Williams by a facsimile transmission, both bearing the e-signatures of the IDH directors. These e-signatures were purportedly witnessed by IDH’s administration manager.

The e-signatures were affixed using the HelloFax system, put in place by IDH, which allowed the directors to upload their paper signature onto the HelloFax platform and then apply it electronically to documents. To access this system, each director was given an initial password that could then be changed. However, Crocker never changed his initial password. Accordingly, any person with access to Crocker’s initial password could affix Crocker’s e-signature to documents.

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<sup>1</sup> Electronic Commerce Expert Group, *Electronic Commerce: Building the Legal Framework*, Technical Report (1998).

<sup>2</sup> Bruce Whittaker, ‘Remote Signings under Australian Law’ (2016) 44 *Australian Business Law Review* 229, 229.

<sup>3</sup> [2016] NSWCA 265 (22 September 2016).

## III LITIGATION HISTORY

In May 2013, IDH had accrued over \$880 000 of debt under the agreement. Williams commenced proceedings in the Supreme Court of New South Wales against IDH to enforce the debt, and against the three directors to enforce their personal guarantees.<sup>4</sup> The claim against Crocker was the only substantial proceeding, as IDH was in liquidation and summary judgment was entered against the other directors. Crocker contended that he was not bound by the guarantee because his e-signature had been affixed by an unknown employee of IDH who had access to his HelloFax account. Williams argued that, by not changing his password, Crocker had given this unknown employee actual or ostensible authority to bind Crocker to the guarantee. Alternatively, Williams argued that Crocker subsequently ratified the guarantee or should be estopped from denying that he was bound by the guarantee.

Williams was unsuccessful at first instance. On the point of actual authority, McCallum J held that Crocker never expressly or impliedly gave his authority to any person to affix his e-signature to contracts.<sup>5</sup> Her Honour also held that Crocker's failure to change his password did not amount to the representational conduct required to give rise to ostensible authority.<sup>6</sup> Finally, Crocker did not have the requisite knowledge to subsequently ratify the guarantee.<sup>7</sup> No ruling was made on the estoppel issue because the argument was 'evidently abandoned' by Williams.<sup>8</sup>

IV THE DECISION AND REASONING IN *WILLIAMS*

Williams appealed the decision on three grounds. First, that the primary judge erred in finding that whoever affixed Crocker's signature did not have ostensible authority to do so.<sup>9</sup> Williams argued that the use of the HelloFax system was akin to putting in place an organisational structure within IDH that amounted to a holding out to trade creditors that the e-signatures had been authorised by the directors.<sup>10</sup> Second, that the primary judge erred by setting the knowledge threshold for Crocker's subsequent ratification of the guarantee too high.<sup>11</sup> Williams argued that Crocker did not have to make himself 'aware of the salient features of the contract',<sup>12</sup> but only needed to have 'closed his eyes to the obvious'.<sup>13</sup> Third, that the primary judge erred in not dealing substantially with the estoppel issue.<sup>14</sup> The Court dismissed Williams' appeal in a judgment delivered by Ward JA.<sup>15</sup>

A *Ostensible Authority and Estoppel*

Upon reviewing the relevant authorities, Ward JA explained the test for ostensible authority: there must be a representation from the principal (Crocker) to a third party (Williams) that the agent (whoever affixed Crocker's e-signature) was authorised to contract on the

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<sup>4</sup> *Williams Group Australia Pty Ltd v Crocker* [2015] NSWSC 1907 (23 December 2015).

<sup>5</sup> *Ibid* [16]–[18].

<sup>6</sup> *Ibid* [39].

<sup>7</sup> *Ibid* [47].

<sup>8</sup> *Ibid* [12].

<sup>9</sup> *Williams Group Australia Pty Ltd v Crocker* [2016] NSWCA 265 (22 September 2016) [36]–[37].

<sup>10</sup> *Ibid* [37].

<sup>11</sup> *Ibid* [73]–[75].

<sup>12</sup> *Williams Group Australia Pty Ltd v Crocker* [2015] NSWSC 1907 (23 December 2015) [52].

<sup>13</sup> *Williams Group Australia Pty Ltd v Crocker* [2016] NSWCA 265 (22 September 2016) [75].

<sup>14</sup> *Ibid* [141]–[142].

<sup>15</sup> *Ibid* [151]–[153] (Simpson and Payne JJA agreeing).

principal's behalf.<sup>16</sup> In applying this to the facts, her Honour drew heavily on *Pacific Carriers Limited v BNP Paribas* ('BNP'),<sup>17</sup> where BNP Paribas ('BNP') was bound by letters of indemnity signed by an employee on the basis of ostensible authority. The key to this finding was BNP's conduct in creating an organisational structure that armed the employee to deal with letters of indemnity. This acted as a representation to outsiders that the employee had authority to contract on BNP's behalf.<sup>18</sup>

In finding that there was no ostensible authority, Ward JA distinguished the current facts from *BNP*. It was important that Crocker did not establish the HelloFAX system, but simply participated in its use. Therefore, Crocker, as the putative principal, did not create the organisational structure that allowed for his e-signature to be affixed to the guarantee.<sup>19</sup> Interestingly, in obiter her Honour suggested that the outcome may have been different if the proceedings were brought against IDH, who established the HelloFAX system.<sup>20</sup> Furthermore, unlike in *BNP*, Crocker did not 'arm' any employee of IDH with a document that, if signed, would appear authentic. Her Honour held that Crocker's failure to change his password, allowing employees of IDH access to his HelloFAX account, did not constitute any holding out of authority because it did not involve any representation.<sup>21</sup> As there was no representation from Crocker to Williams, her Honour held that the estoppel ground must also fail.<sup>22</sup>

## B Ratification

On the issue of ratification, Ward JA stated the correct knowledge threshold as 'full knowledge of all the material circumstances'.<sup>23</sup> Accordingly, her Honour held there was no error of law, as the primary judge's articulation — 'aware of the salient features of the contract' — was merely a different formulation of the same test.<sup>24</sup>

## V CRITIQUE

### A Critique of Ward JA's Decision on Ostensible Authority

While Ward JA's decision may be lauded as a strict application of precedent, it raises problems about how the law of ostensible authority will apply in the digital age. Media richness theory suggests that the 'richness' of communication between two parties depends on the medium.<sup>25</sup> Understandably, parties have more difficulty conveying and understanding meaning as they move away from 'rich' face-to-face media towards electronic media for contractual negotiation and formation.<sup>26</sup> This is because face-to-face media facilitates 'equivocality reduction'—the parties are able to visually identify one another, provide each other with immediate feedback and clarify issues as they arise. On the other hand, media of

<sup>16</sup> *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480; *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146; *Pacific Carriers Limited v BNP Paribas* (2004) 218 CLR 451.

<sup>17</sup> (2004) 218 CLR 451.

<sup>18</sup> *Ibid* [40]–[44].

<sup>19</sup> *Williams Group Australia Pty Ltd v Crocker* [2016] NSWCA 265 (22 September 2016) [67].

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid* [69].

<sup>22</sup> *Ibid* [150].

<sup>23</sup> *Ibid* [120].

<sup>24</sup> *Ibid* [124].

<sup>25</sup> R. L. Draft and R. H. Lengel, 'Organizational Information Requirements, Media Richness and Structural Design' (1986) 32 *Management Science* 554.

<sup>26</sup> Terri R. Kurtzberg and Charles E. Naquin, 'Electronic Signatures and Interpersonal Trustworthiness in Online Negotiations' (2010) 3(1) *Negotiation and Conflict Management Research* 49, 50.

'low richness' (such as online negotiations) are less appropriate for resolving equivocal issues as the inability to interpret subjective meaning, such as a representor's body language or tone of voice, restricts feedback between the parties.<sup>27</sup> This issue manifested itself with significant consequences in *Williams*, because the electronic form of communication caused Williams problems in identifying and verifying Crocker's e-signature on the guarantee. As noted by Ward JA, these problems faced by Williams were caused by Crocker's omission to change his password, as opposed to a positive representation by Crocker. With e-commerce moving contractual negotiations towards less 'rich' electronic platforms, the focus of ostensible authority on representations will continue to cause problems for commercial parties.

*Williams* is a clear demonstration that, due to the communication issues inherent in electronic transactions, a party's omissions can be just as important as their representations. Ward JA touched upon this idea by stating 'in an appropriate case, [ostensible authority could] arise out of some omission on [Crocker's] part.'<sup>28</sup> Nonetheless, her Honour declined to extend the law of ostensible authority in this manner. Considering the overall context of the transaction, *Williams* may have been an appropriate case to challenge the traditional view that ostensible authority must arise from a representation. The agreement and the guarantee were not the first transactions of their kind entered into between Williams, IDH and Crocker; an analogous transaction had been entered into by the same electronic means in 2010. Accordingly, there was little reason for Williams to be put on notice or suspect that there were issues of authority with respect to Crocker's e-signature,<sup>29</sup> especially considering that the agreement and guarantee were ordinary transactions in the building supplies industry.<sup>30</sup> In this context, Crocker's omission was as dangerous as a representation as it played on Williams' seemingly reasonable assumption that the parties had an ongoing, electronic, business relationship.

There is authority suggesting that an omission can lead to ostensible authority where the omission was a 'proximate cause of the other party's adopting and acting upon the faith of [an] assumption'.<sup>31</sup> Adopting this reasoning could maintain the relevance of ostensible authority in the electronic age. It would help avoid situations like *Williams*, where a history of valid electronic transactions leads one party into a reasonable, but erroneous, assumption that the current transaction has been properly authorised.

## B The Way Forward — Amending the Electronic Transactions Act

Ward JA recognised the difficulties in applying the principles of ostensible authority to the electronic signing context. However, her Honour commented that overcoming these difficulties would require the type of reform that is better left to the legislature.<sup>32</sup> Australia already has the *Electronic Transactions Act 1999* (Cth) ('ETA'), which allows for the recognition and enforcement of e-signatures.<sup>33</sup> The purpose of the ETA is to '[promote] business and community confidence in the use of electronic transactions'<sup>34</sup> by ensuring that transactions are not invalid because they take place through electronic means.<sup>35</sup> Yet, as *Williams* demonstrated, the impediments to unauthorised use of signatures that exist in the paper world do not exist to the same extent in the electronic world. Shaw argues that this

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<sup>27</sup> Draft and Lengel, above n 25, 560.

<sup>28</sup> *Williams Group Australia Pty Ltd v Crocker* [2016] NSWCA 265 (22 September 2016) [65].

<sup>29</sup> *Pacific Carriers Limited v BNP Paribas* (2004) 218 CLR 451, [35].

<sup>30</sup> *Ibid* [41].

<sup>31</sup> *Thompson v Palmer* (1933) 49 CLR 507, 547 (Dixon J).

<sup>32</sup> *Williams Group Australia Pty Ltd v Crocker* [2016] NSWCA 265 (22 September 2016) [4].

<sup>33</sup> See also related state based legislation, such as the *Electronic Transactions Act 2000* (NSW).

<sup>34</sup> *Electronic Transactions Act 1999* (Cth) s 3(c).

<sup>35</sup> *Ibid* s 8(1).

leaves parties relying on e-signatures more exposed than those relying on ‘wet-ink’ signatures.<sup>36</sup> Therefore, it appears the ETA requires amending to achieve its stated purpose.

One area for amendment is the ‘signature’ provision in the ETA.<sup>37</sup> This provision sets a low threshold for relying on e-signatures, which does not necessarily ensure that electronic agreements are binding. For example, the use of a signatory’s name in an email, without any separate verification of the signatory’s identity, is generally enough to satisfy the ETA s 10.<sup>38</sup> As shown in *Williams*, this leads parties into the error of thinking they have a binding agreement in circumstances where the use of the signatory’s e-signature simply appears on an electronic communication. In contrast, the European Union’s ‘two-tier’ e-signature regime differentiates between a ‘simple electronic signature’ and an ‘advanced electronic signature’, with the later providing higher probative value in legal proceedings.<sup>39</sup> Importantly, an ‘advanced electronic signature’ requires that the signature be created using means under the signatory’s *sole control*. If this regime were incorporated into the ETA, parties like *Williams* would know to make further enquiries about how the e-signature was affixed to the document to ensure it could not have been affixed by someone other than the signatory. That is, *Williams* could enquire whether Crocker had sole control over his HelloFax account. If *Williams* then established that Crocker did not have sole control over his Hellofax account (as was the case), they would know that they could not rely on Crocker’s e-signature as an ‘advanced electronic signature’. Furthermore, parties would know that if they do not make such enquiries, they assume the risk that the e-signature is not an ‘advanced electronic signature’, reducing the likelihood of its enforcement.

Alternatively, the legislature could reverse the onus of proof to provide electronic transactions with more certainty. Currently, ETA s 15 places the onus on recipients of e-signatures to prove they were authorised by the signatory. Further, *Williams* suggests that recipients are not entitled to rely on e-signatures at face value, but must take further steps of verification. This seemingly undermines the validity of each individual e-signature until it is positively affirmed by a court, which holds significant consequences for e-commerce. The Australian position differs from the *UNCITRAL Model Law on Electronic Commerce*, which provides e-signature recipients with an assumption of authority.<sup>40</sup> This assumption operates like the indoor management rule in corporate law, which allows parties transacting with a company to assume that all the internal formalities needed to give the company authority to enter into the transaction have been complied with.<sup>41</sup> An amendment along these lines would both facilitate and restore confidence in electronic transactions.

### C *Limitations on the Decision in Williams*

One final, ancillary point is worth addressing. There may be an ‘elephant in the room’ in the sense that the Court in *Williams* did not deal with the generally suspicious way that personal guarantees for the debt of another are viewed. Even without the e-signature convolution in *Williams*, the validity of third party, personal guarantees are frequently subject to dispute

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<sup>36</sup> Benjamin Shaw, ‘Electronic Signatures: How Reliable are They?’ (2016) 36(4) *Proctor* 36, 37.

<sup>37</sup> Electronic Transactions Act 1999 (Cth) s 10.

<sup>38</sup> See *Claremont 24-7 Pty Ltd v Invox Pty Ltd [No 2]* [2015] WASC 220; *A-G (SA) v Corporations for the City of Adelaide* (2013) 249 CLR 1; *Legal Services Board v Forster* (2010) 29 VR 277; Diccon Loxton, ‘Not Worth the Paper They’re not Written on? Executing Documents (Including Deeds) Under Electronic Documentation Platforms’ (Part A) (2017) 91 *Australian Law Journal* 133, 148.

<sup>39</sup> Directive 1999/93/EC of the European Parliament and the Council of 13 December 1999 on a Community Framework for Electronic Signatures [1999] OJ L 13/12, art 2.

<sup>40</sup> *UNCITRAL, Model Law on Electronic Commerce*, GA Res 51/162, UN GOAR, 85<sup>th</sup> mtg, UN Doc A/RES/51/162 (16 December 1996) art 13.

<sup>41</sup> *Corporations Act 2001* (Cth) s 128. See also *Royal British Bank v Turquand* (1856) 119 ER 886; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146.

and controversy.<sup>42</sup> Perhaps the contentious status of guarantees was a silent but influential consideration of the Court. This raises the question of how *Williams* will serve as precedent. Will it be limited to situations involving personal guarantees, or will it apply to e-signatures more generally? The conclusion to be drawn from *Williams* is that legislation is needed to clarify the position of e-signatures. However, the extent of legislative reform will depend on the answer to the above question, which is deferred to future applications of *Williams*.

## VI CONCLUSION

According to *Williams*, a signatory must authorise each individual use of their e-signature for an electronic transaction to be binding. This places a heavy onus on parties seeking to rely on e-signatures. As more standard business transactions shift to the electronic world,<sup>43</sup> it appears that issues of authority will continue to undermine certainty in commercial dealings. Adopting a 'two-tier' e-signature regime, or reversing the onus of proof in the ETA could reinstate the reliability of e-signatures.

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<sup>42</sup> See, eg, *Yerkey v Jones* (1939) 63 CLR 649; *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; *Garcia v National Australia Bank* (1998) 194 CLR 395. See also Murray Brown, 'Undue Confusion Over *Garcia*!' (2009) 3 *Journal of Equity* 72; Janine Pascoe, 'Directors' Responsibilities: Now the Forgotten Factor in *Garcia* Cases' (2003) 15 *Australian Journal of Corporate Law* 246.

<sup>43</sup> Loxton, above n 38, 133.

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