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Special Issue

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Yearbook of New Zealand Jurisprudence

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Introduction

Gay Morgan

The University of Waikato School of Law was founded in 1991 to provide a professional legal education, to develop a bicultural approach to legal education, and to teach law in the contexts in which it is made and applied. The *Yearbook of New Zealand Jurisprudence* is usually an annual collection of papers contributed by participants in the Staff Seminar Series of the University of Waikato School of Law or by participants in colloquia hosted by the Centre for New Zealand Jurisprudence (CNZJ), a Centre which is dedicated to the development of a uniquely New Zealand jurisprudence. The *Yearbook* is published in conjunction with the CNZJ and aims to stimulate and to contribute to the development of New Zealand jurisprudence by publishing articles, essays and other forms of analysis and comment which directly address or are relevant to issues arising in New Zealand jurisprudence. This year the Yearbook has drawn its papers from the 2005 Australasian Law Teachers Association annual conference, which had the theme of 'One Law for All'. The articles in this issue are contributed by scholars from around Australasian and Africa.

These articles canvas a broad range of contemporary issues, each tackling the problem of justice demanding a uniformity of treatment and a recognition of a fundamental sameness of those seemingly diverse while also demanding that relevant differences be recognized and accorded differential treatment. The tensions inherent in the idea of equality, treating likes alike and differents differently, are such that they push some to query whether equality has any meaning at all. Nonetheless, that concepts of universalism and equality have been a potent force for justice in law, forcing legal systems to articulate persuasively why these are indeed like persons or situations and these are different. That requirement has been a deep part of the genius of the common law.

In this issue many of the tensions inherent in the idea of equal treatment for all in the law are considered. If there is to be one law for all, which law should it be? Should it be duty-based or rights-based? Should it be a law which recognizes differences between the strong and the weak? Should duties be based on biology or acts? Why should the answer change if we are considering parents and children rather than gender? If the basis for equal treatment is equal status, how do we decide when someone is in one category or another? Is rationality the only determinate of status, or can citizenship legitimately matter? Can location legitimately matter? Size? The knotty problem of equality

and equal treatment in law requires us to determine who is equal to whom, for what purposes and in what circumstances. Do we all have equal rights? If so, how then do we justify national boundaries, differences in opportunity, differences in living conditions and so on? How do we justify treating children differently than adults? How do we determine when one becomes the other? Once we have *any* categories in law, we must justify the differing treatment that arises from having that category. The reasoning used to justify that category as demanding special or different treatment is then available to justify other categories as similarly requiring differential treatment. This inevitably leads to the questions of which categories should be recognized as legally relevant and which should be ignored as irrelevant. This sorting is a primary business of law, and ultimately raises issues about viewing people as properly categorized as primarily being members of a cultural, a religious, a financial, a professional or a political community, with identities and interests uniquely commensurate with that membership, which the law should recognize, in order to treat likes alike, or viewing people as properly categorized as relatively fungible individuals coming together to make up relatively fungible sorts of groups, all subject to like sorts of laws, be it a nation state, a corporation, a market, a religious, an ethnic or a global community, in order to treat likes alike. Which is the correct view of equality and justice, and how to balance these tensions and competing claims, are perennial questions of interest to us all, as lawyers, as legal scholars and as human beings. These are the big issues of our times, and therefore this is a big issue of the Yearbook.

The articles consider a diversity of problems raised by the idea of one law for all. In the international arena, should any boundaries or differences be recognized, between nations and citizens of nations? International 'law' encompasses national communities, some of over a billion persons, some with a few thousand, as well as mediating between those which are powerful and those which are not. Should it recognize these differences? Is it just for the criminal law to protect those it deems especially vulnerable from choices available to the robust? If so, how do we determine the vulnerable? If not, how do we justify treating children differently than adults? We see laws, whether in business, land, or governance, which treat likes differently, with unjust results, and law which treats some professions (such as law, surprise surprise) differently on the basis that they *are* different with a special public interest requiring different rules. How should law determine which claims of difference to recognize? Should the mere form of a business equate with a difference in legal treatment? It surely does now. Should different forms of dispute resolution be available, or should every dispute be decided in a uniform forum, with uniform processes, by uniformly trained people? These

questions are also inherent in the idea of 'One Law for All'. The same person that would answer yes to one of these questions may very well answer no to the next, depending on their interests and perspective.

Each of these articles engages with how law categorizes or should categorize like with like, unlike with unlike. Do borders justify different laws for different nations? Internally? Externally? Does location have any relevance for equal treatment in law with the emerging global space-time of the internet? This wonderful collection showcases a wealth of Australasian talent, and highlights the deep problems in justly developing and applying the appealing moral intuition that there should be one law for all. Which law? For which situation? For all what? Which forum for decision? Which decider? How trained? Once we open the debate, we quickly find ourselves back to Aristotle's near tautology, that justice and equality mean treating likes alike and differents differently, and the process of deciding just what that means in any given situation. Law's greatest, and perhaps eternal, challenge is to pursue that goal, through an open and ongoing conversation that engages with the competing claims of likeness and of difference that emerge from our human endeavour of being in society. The articles in this issue attempt to do just that.

Our job as law teachers is to prepare our students to engage in that ongoing conversation effectively. The last article gives us some food for thought about how we do and how we might go about doing that.

As a note to our readers, in 2007 the Yearbook will be expanding its horizons to include more consideration of the social issues inherent in law and in jurisprudence.

The Editor would like to thank the authors for their contributed articles and the referees to whom these articles were sent for their helpful contributions. The Editor would also like to thank Janine Pickering for her assistance in preparing this volume and for her absolutely steady and cool hand at the tiller, and, to thank Jane Walker and Amanda Colmer for their invaluable assistance in getting this edition print ready.

Gay Morgan
Editor
Yearbook of New Zealand Jurisprudence

One Law For All (Except for the United States of America)

Wade Mansell*

I. INTRODUCTION

About a hundred years ago when I was studying law in Wellington,¹ Public International Law was an integral part of the LLB. In those dark ages, as I remember it, the position, at least in retrospect was rather strange. The subjects of the LLB brought qualification for legal practice and admission as a solicitor and then as a barrister. Curiously one could qualify as a Solicitor with two LLB subjects yet to be taken, but it was only after the successful completion of these courses that one was eligible to be called as a Barrister. The two additional subjects were Conflicts (Private International Law) and Public International Law.

Unfortunately (or perhaps fortunately) I have not had access to the arcane archives which might have explained this rather remarkable state of affairs and its justification. But as an international lawyer I rather like the idea that no-one was worthy of call to the Bar without an appreciation of international law.

As opposed to 100 years ago, last year I was reading the book of essays produced in honour of Judge Weeramantry² – sometime Vice-President of the International Court of Justice (ICJ). I read with interest Geoffrey Palmer's contribution³ pleading for an extension of the role of the ICJ and implicitly for greater acceptance of the role of international law in international relations. I was intrigued by it on a number of levels. His piece began with his story of how surprised he was on first attending an American law school (Chicago) to discover that international law, far from being an integral subject of international study was in fact even questioned as a part of international reality. That is, the reality of international law was not an uncontested fact and it was regarded as significantly different from other legal subjects. (I may say that my experience in the United Kingdom and elsewhere in Europe did not reflect his experience, but that also is significant.)

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1 Or more precisely, from 1963.

2 Anghie & Sturgess (eds.), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (1998).

3 'International Law and the Reform of the International Court of Justice' in *ibid*, 579-600.

Perhaps of more, but related, importance was his plea for the greater role for international law in international relations. As I remember studying international law in Wellington (which I don't terribly clearly) I think the subject of international relations, as opposed to international law, was never allowed to raise its ugly head. Law was law – a real object of study, and international relations was what or how inter-state relations were carried on until the discourse could be sharpened into legal discourse. I do think that we were implicitly inculcated with a sense of the superiority of law to mere diplomacy, and if the question was asked whether international law was merely an aspect of international relations or whether international relations was merely an aspect of international law we were fairly clear about the appropriate answer. Interestingly this inculcation – which perhaps was the climax of five years legal study – was achieved without any discussion of the relationship.

I think Geoffrey Palmer's essay really raises most fundamental questions – namely, Should international law have a greater role in international relations? Could international law play a greater role in international relations? How could international law play this increased role? Is there scope for a return to the debate about extending the compulsory jurisdiction of the ICJ? In my oblique consideration of this question I bear in mind that I may tire Sir Geoffrey who unanswerably observed that he had become 'somewhat tired of international lawyers who lack political experience making conservative judgments about what is politically possible'.⁴

From a New Zealand perspective, and probably generally from a United Kingdom or a European perspective the development of international law has the appearance of what E.P. Thompson said of the Rule of Law - 'an unqualified good'. And it probably comes as something of a surprise that such a view is not universal.

I want to begin this article proper by explaining what it is not about. This hopefully will define the parameters of what it is concerned with. Firstly, contrary to the title as printed (erroneously) in the programme it is *not* about law *in* the United States, but rather the attitude of the United States to international law. Secondly, it is not about the perfidy of the United States, or indeed any other state. Thirdly, it is not about a purely academic matter. The attitude of the Bush administration to international law has already affected its actions not only in its decision to invade Iraq, but in its many considered human rights violations arising out of that war and the Afghan conflict. In other words this is an academic argument that has real consequences.

4 Ibid, 591.

II. INTERNATIONAL RELATIONS GOVERNED BY 'RULE OF LAW' OR 'OPTIONAL ETIQUETTE'?

Rather the argument this article seeks to make is that in a 'unipolar world' the concept of international law requires new appraisal and justification, with both appreciation of its limitations and its potential. The New Zealand perspective is understandable and attractive – seemingly, just as in domestic law, the development towards the rule of law in international relations, carries with it implications of moving beyond the dispute resolution system of 'trial by battle' (might is right) to situations where regardless of the physical strength of the individual protagonists, right can be seen to triumph over might. Any other perspective seems to fundamentally attack one of the very bases of international law, that of sovereign equality. I shall return to this point shortly.

It is no exaggeration to say that the New Zealand perspective finds little favour with the current American Administration. Significant academics, and especially Michael Glennon from the Fletcher School of Diplomacy, have been prepared to argue that given the new reality of a sole world super-power international law as understood in the Cold War is simply no longer relevant, or indeed real.⁵ In the face of those who optimistically repeat Louis Henkin's mantra:

It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.⁶

Glennon would reply that such observation of state behaviour, even in so far as it is accurate, says nothing about law and everything about states acting in their own interests, as perceived by themselves, regardless of so-called law.

He is not alone. Indeed in a very recent book, *The Limitations of International Law*,⁷ the American authors concluded that the purpose of 'international legal rhetoric is to mask or rationalize behaviour driven by self-interested factors that have nothing to do with international law.'⁸ States, they suggest, speak the language of obligation while following the language of self-interest. They even deny that states ever comply with international law for non-instrumental reasons. While, they say, 'Mainstream international law scholarship does not deny that states have interests and try to pursue them' it also claims 'that

5 Glennon M, 'Why the Security Council Failed' May/June 2003 Foreign Affairs 16. A slightly longer (and slightly more circumspect) version of this piece is to be found as 'The UN Security Council in a Unipolar World' (2003) 44 VirginiaInt'IL 91.

6 Henkin, L, *How Nations Behave: Law and Foreign Policy* 2nd Ed (1979).

7 Goldsmith & Posner (2005).

8 Ibid, 226.

international law puts a significant brake on the pursuit of these interests.' Such a so-called 'pull toward compliance'⁹ is completely rejected by Goldsmith and Posner. The theme of the book is, in essence, that international law is real only as a phenomenon, and that international law scholars grossly exaggerate its power and significance. Even the recognition of international law as a phenomenon carries with it few implications for its effectiveness.

Within the current American Administration such views are entirely consistent with those of the neo-conservatives who play an active part in George W Bush's government. (Under this neo-conservative label I am including Elliot Abrams, John Bolton Dick Cheney, Douglas Feith, Robert Kagan, Richard Perle, Donald Rumsfeld and Paul Wolfowitz, not all of whom remain in the administration but all of whom have played a major role in the past.) What is it that defines neo-conservatives and neo-conservatism? Here one has to be careful. While they do have a coherent philosophy and set of beliefs, with a consequent diagnosis of the world's ills and a prognosis for its recovery, it is important to observe that they are in no sense clones and not all would subscribe to the following typifications. With that caveat however it is possible to say that many 'progressed' from being active participants in the ferment of the 1960s and 1970s to the point where they enthusiastically embraced the policies (particularly the foreign policies) of Ronald Reagan, and were prepared to take them even further.¹⁰ Neo-conservatives tend to share a belief that the American victory in the Cold War (seen as a direct product of the Reagan policies) brought much less in the way of the spoils to the victor than could (and should) have been expected. The desirable spoils were not merely financial but rather ideological. Liberal democracy with liberal free-market capitalism was both the means of victory and should universally have been the reward of victory.¹¹ Certainly the right to promote these policies should have been unquestionable. Most neo-conservatives would have agreed with the argument put forward by Michael Reisman¹² in 1990 to the effect that undemocratic governments lack the sovereignty which allows them to take advantage of the sovereign equality spoken of in the United Nations Charter. If undemocratic governments are de-legitimised in this way their right to non-interference is called into question.

9 See Franck, T, *The Power of Legitimacy among Nations* (1990).

10 For a useful discussion of neo-conservatism generally see Halper and Clark, *America Alone: The Neo-Conservatives and the Global Order* (2004). Also see J.F. Murphy, *The United States and the Rule of Law in International Affairs* (2004); C.Reus-Smit, *American Power and World Order* (2004); and B.Hamm, *Devastating Society: The Neo-Conservative Assault on Democracy and Justice* (2005).

11 On which of course see Fukuyama, F. *The End of History and the Last Man* (1992).

12 Reisman, M, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 AJIL 866. See also Roth, B, *Government Illegitimacy in International Law* (2000).

As to the Middle East, the neo-conservatives are uncompromisingly among the most pro-Israel factions in the entire United States. States surrounding Israel are seen as undemocratic, threatening and aggressive while Israel's most expansionary plans are regarded with equanimity, and usually explicit support. Many of the neo-conservatives in the Bush administration have in earlier days, enjoyed employment in Washington with what are generally described as, and accepted as being right wing 'think tanks', often largely paid for by Israeli and pro-Israeli groups. These include the American Enterprise Institute, the Heritage Foundation, the Hudson Institute and Freedom House. Not surprisingly these institutions also place great emphasis upon conservative values, particularly concerning family and religion.

But it is the neo-conservatives' attitude to international affairs which is most important for this paper. Out of the Cold War victory came two rather clear conclusions. The first was that the United States really was in a position of unprecedented military superiority - superiority unchallenged, and if correct policies were pursued, seemingly unchallengeable. Secondly this superiority was of limited use unless it could be employed to not only defend the United States but to promote its interests as perceived. If the Great Satan of the Union of Soviet Socialist Republics had been slain there were yet many lesser Satans (soon to form an 'axis of evil'), countries with ideologies not compatible with American views of democracy, capitalism and free markets and which required 'attention'.

A moment's reflection will no doubt suggest to all of us that such goals, laudable though many Americans might think them, do not sit terribly comfortably with what most of us thought to be the international law basis of world order. Perhaps most problematically, neo-conservatives (and, it has to be admitted, with the support of Tony Blair) refused to rule out 'regime change' for states which did not 'enjoy' democratic legitimacy. Long before the suicidal attack upon the Twin Towers and the Pentagon on 11 September 2001, neo-conservatives had been advocating the removal of Saddam Hussein. Many of the most influential had signed a letter to President Clinton in January 1998

urging just such action.¹³ Westphalian notions of sovereignty and particularly of sovereign equality as they had developed all the way to the United Nations Charter, were seen as an impediment to the beneficial creation of a world in the United States' image.

Before considering this re-assessment of sovereignty one or two basic points need to be made about the range of neo-conservative views upon international law more generally. The views seem to range from the 'exceptionalists' (or 'exemptionalists' in Michael Ignatieff's terminology) who would argue that as a matter of fact the military (and some would argue, moral) superiority necessarily places the United States beyond the scope of international law; all the way to those who argue that international law is nothing more than international relations and thus has no *legal* effect upon any state. The first position may not be unlike that of Oppenheim, writing in 1912,¹⁴ but later quoted with approval by the international relations scholar, Hans Morgenthau, in the 1960s.

The balance of power says Morgenthau, according to Oppenheim is 'an indispensable condition of the very existence of international law.'¹⁵ And Oppenheim continued:

Six morals can be deduced from the history of the development of the Law of Nations:

- 1) The first and principal moral is that a Law of Nations can exist only if there be an equilibrium, a balance of power, between the members of the Family of Nations. If the Powers cannot keep one another in check, no rules of law will have any force, since an over-powerful State will naturally try to act according to discretion and disobey the law. As there is not and never can be a central political authority above the

13 Letter from the "Project for the New American Century" to President Clinton of 26 January 1998 urging action, unilateral if necessary, to overthrow Saddam Hussain and to ensure a new regime in Iraq. While considering that this course of action was already legitimate under existing United Nations' Security Council Resolutions the letter nevertheless stated "In any case, American policy cannot continue to be crippled by a misguided insistence on unanimity in the United Nations Security Council." The letter was signed by many who had played a part in the Administration of Ronald Reagan and/or the first Bush administration and who clearly considered that there remained unfinished business. The signatories included Elliot Abrams, John Bolton, Robert Kagan, Richard Perle, Donald Rumsfeld and Paul Wolfowitz (and indeed, Francis Fukuyama). Letter may be found at: <http://www.newamericancentury.org/iraqclintonletter.htm>

14 Oppenheim, L, *International Law* 2nd Ed (1912).

15 Morgenthau, H, *Politics Among Nations* 3rd Ed (1966) 278.

Sovereign States that could enforce the rules of the Law of Nations, a balance of power must prevent any member of the Family of Nations from becoming omnipotent.¹⁶

In other words because there is no longer a balance of power the United States has become, if not omnipotent, at least sufficiently out of equilibrium as to exempt itself from international law.

Such arguments have been analysed, not least by Harold Hongju Koh,¹⁷ and he shows that even within the concept of exceptionalism there are a range of possible interpretations, some less objectionable than others but the worst of which suggests a double standard by which it is proposed that because of power, a different rule should apply to the United States from that applicable to the rest of the world.

Recent well-known examples include such diverse issues as the International Criminal Court, the Kyoto Protocol on Climate Change, executing juvenile offenders or persons with mental disabilities, declining to implement orders of the International Court of Justice, with regard to the death penalty, or claiming a Second Amendment exclusion from a proposed global ban on the illicit transfer of small arms and light weapons. In the post 9/11 environment, further examples have proliferated: America's attitudes toward the global justice system, holding Taliban detainees on Guantanamo without Geneva Convention hearings, and asserting a right to use force in pre-emptive self-defence...¹⁸

While the difficulty inherent in these views is obvious to non-Americans, some, including John Bolton, and arguably Goldsmith and Posner, would go even further than Koh's 'worst case scenario' and state that not only is the United States to be exempted from international law but in fact international law is not to be regarded as binding on any state. Elsewhere I have described John Bolton as a member of the American Redneck School of Jurisprudence (a description that I fear might appeal to him), but certainly he remains an 'Austinian' in a sense not usually found beyond some international relations scholars. By 'Austinian' of course I mean that he takes the view that because international law lacks regularly applied sanctions in the event of non-compliance, the appellation 'law' is misapplied and the whole category is no more than international relations. Were it not for his position as the United States Ambassador to the United Nations his views might seem readily dismissable.

16 Oppenheim, *supra* n 14 at 193.

17 'On American Exceptionalism' (2003) 55 StanLR 1479.

18 *Ibid*, 1486.

Bolton's attack on international law is comprehensive.¹⁹ It is an attack on treaty law and customary international law, along with the other usually claimed sources of international law as found in Article 38 of the Statute of the International Court of Justice of 1945.

As we all know almost all international lawyers and all state governments are in agreement that at the heart of international law is the crucial principle of *pacta sunt servanda* (usually loosely translated as agreements or promises are to be honoured). Acceptance of this principle is one immediate means of distinguishing international law from international relations. It is because it is a legal principle that it is generally accepted uncritically. This, however, does not mean that a state will invariably comply with the principle, just as in domestic jurisdiction not all will obey all laws. But two obvious points need to be made. The fact of occasional non-compliance in the domestic realm does not negate the law. The same is true internationally. Secondly, internationally even if there is no direct sanction, the price of breaking treaty obligations will rarely be cost free, though it may be nothing more than a level of opprobrium from other states, or a hesitancy upon their part to enter into future international legal relations. Universally accepted though this is, Bolton disputes it. When Bolton claimed in 1997 that regardless of the United Nations Charter, the United States was not bound to pay its United Nations dues, the response from Robert F. Turner of the University of Virginia Law School was as follows:

How do we know that international treaty commitments are legally binding? Because every single one of the 185 [now more] states that are members of the United Nations, and every one of the few states that are not, acknowledge that fact. Article 26 of the Vienna Convention on the Law of Treaties recognizes the fundamental and historic principle of *pacta sunt servanda*: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

To be sure, like some of our own citizens, members of the international community of states do on occasions violate their legal obligations. But when they do, they never assert that treaty commitments are merely non-binding "political" undertakings. Stalin, Hitler, Kim Il Sung, Gadhafi and Saddam Hussein all either denied the allegations against them, pretended that their acts of flagrant international aggression were really in 'self-defence' to a prior attack by their victims, or proffered some other legal basis for their conduct.

19 See particularly Bolton, J, 'Is There Really 'Law' in International Affairs?' (2000) 10 Transnat'l L. & Contemp. Probs. 1; Bolton, J, 'Should We Take Global Governance Seriously?' (2000) 1 ChiInt'lL 205.

Not one of them asserted that treaties ‘were not binding,’ because they realized that no country would accept such a patently spurious assertion – it simply would not pass the straight-face test.²⁰

Why then does Bolton want to argue that treaties are not legally binding upon the United States and what are the implications? There are two aspects to his arguments here. The first is concerned with the status of treaties in the international world, and the second with the status of treaties within the domestic jurisdiction of the United States. Internationally it is the lack of sanction which persuades Bolton that the obligation to comply can only be moral or political (neither to be underestimated but, he says, not to be confused with the legal). If one accepts his premise that it is only the threat or use of sanctions which makes an obligation legal then his argument is irrefutable. Few would accept the premise. Legality is not in essence necessarily linked with sanction or punishment. Rather most lawyers would accept that the legal quality arises from the universal acceptance of the legal aspect. This is not as circular as it sounds. It is because of the acceptance of the legal quality of *pacta sunt servanda* that overwhelmingly most states, almost all of the time, accept their treaty obligations automatically, and only very rarely subject them to unilateral reconsideration. Bolton attempts to avoid this argument by emphasising that his position does not mean that the United States should not ordinarily comply with its treaty obligations, only that it need not do so. With this position the debate might seem to be purely semantic, arising from his understanding of the term ‘legal’. It is more than that, simply because by avoiding ascribing the term ‘legal’ Bolton hopes both to elevate the United States’ right to ignore treaties, and to downgrade the need for compliance.

Bolton effectively admits this intention when, having observed that ‘[i]n the rest of the world, international law and its ‘binding’ obligations are taken for granted,’²¹ he goes on to observe of American citizens: ‘When somebody says “That’s the law”, our inclination is to abide by that law. Thus if “international law” is justifiably deemed “law”, Americans will act accordingly.’²²

On the other hand, if it is not law, it is important to understand that our flexibility and our policy options are not as limited as some would have us believe. It follows inexorably, therefore, that the rhetorical persuasiveness of the word ‘law’ is critically important.²³

20 John Bolton’s article “US Isn’t Obligated to Pay the UN” appeared in the Wall St. J. Nov 17, 1997, at A27. Robert Turner’s response appeared in the same Journal as a letter, “US and UN: The Ties that Bind” December 1 1997. Both are quoted from J. Murphy, *The United States and the Rule of Law in International Affairs*, supra n 10 at 11.

21 Bolton, ‘Is There Really ‘Law’ in International Affairs?’ supra n 18 at 8.

22 Ibid, 9.

23 Ibid, 9.

It is manifest then, and admitted, that the argument he makes is driven by the end he wishes to achieve – the return of international law to the political world.

If therefore, his arguments about the international obligations arising from treaties are specious, what of customary international law? For Bolton ‘customary international law’ deserves, at the least, inverted commas expressing incredulity. Of course debates over customary international law are familiar and continuing²⁴ and there are problems in defining when customary international law comes into existence, there are difficulties in proving *opinio juris*, there are problems with the position of ‘the persistent objector’, and there are problems with flexibility and malleability. Such nice jurisprudential questions have no place in Bolton’s mind. He denies the very existence of customary law. For him ‘Practice is practice, and custom is custom; neither one is law.’

Again this extraordinarily extreme position is driven by the conclusion which Bolton seeks, namely the view that the United States is not, and should not be, constrained in its policy decisions or conduct by any customary international law whether in its international relations or domestically. Internationally, as explained in his discussion of the Comprehensive Test Ban Treaty, Bolton’s view is that the United States must pursue its own path. If this path should coincide with what other states regard as customary international law that is well and good, but it is coincidence, not compliance

As with treaty law, any recognition of customary international law has both international and domestic significance and implications. This is particularly true in the area of human rights. Bolton’s fear is that through means other than internal democratic approval, changes in standards created by ‘the international community’ might affect the United States. Thus internally he fears for instance, that United States Courts could (though he approves the fact that they generally do not) look to developing international customary law in determining whether the United States death penalty might constitute cruel or unusual punishment. Internationally, the effect might be to incur international legal condemnation for acts seen by the American Administration as necessary for its own security or interests.

I have spent more time on Bolton than you might think necessary. But I have done so because while his position might be almost the most extreme among the neo-conservatives, it is also acceptable in practice to John Yoo, now a

24 See especially A. D’Amato, ‘Trashing Customary International Law’ (1987) 81 AJIL 101; M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999).

Boalt Hall Professor, but before that the Government lawyer who argued that international law that did not permit the United States to ‘pressurise’ terrorist suspects and their friends need not be complied with. It is also acceptable to Alberto Gonzalez, now the United States Attorney General, but earlier the White House legal counsel who advised that the Geneva Conventions did not apply to those Al Qaeda and Taliban suspects held in Guantanamo in Cuba.²⁵ And the list could go on.

III. INTERNATIONALLY EQUAL SOVEREIGNS?

But I turn now to the other abomination in the eyes of neo-conservatives. That is the principle of sovereign equality again regarded by many as a cornerstone of the entire international legal regime. A first question arising from this neo-conservative cynicism towards sovereign equality is ‘does it matter?’. In particular why should ‘sovereign equality’ guarantee the survival of an abhorrent regime? Before attempting to answer that question I should exemplify the sort of position adopted by neo-conservatives. Michael Glennon is particularly scathing. On one occasion he observed: ‘Architects of an authentic new world order must therefore move beyond castles in the air – beyond imaginary truths that transcend politics – such as, for example... the notion of the sovereign equality of states.’²⁶ Later the sovereign equality of states is described as ‘...one particularly pernicious outgrowth of natural law.’²⁷ And, he continues:

Applied to states the proposition that all are equal is belied by evidence everywhere that they are not – neither in their power, nor in their wealth, nor in their respect for international order or for human rights. Yet the principle of sovereign equality animates the entire structure of the United Nations – and disables it from effectively addressing emerging crises, such as access to WMD [Weapons of Mass Destruction], that derive precisely from the presupposition of sovereign equality.²⁸

He exemplifies what he sees as unforgivable irrationality by considering the weight of the votes of elected members of the Security Council being for some purposes, the equal of those of the veto powers. And of course, it is because of the assertion of the United Nations Charter of sovereign equality, that Article 2(7) has been understood to proscribe forcible intervention except pursuant

25 See Danner, M, *Torture and Truth: America, Abu Ghraib and the War on Terror* (2005); Greenberg & Dratel, *The Torture Papers; The Road to Abu Ghraib* (2005).

26 Glennon, *supra* n 5 at 32.

27 *Ibid.* In fact this relationship between natural law and sovereign equality is highly problematic. It seems much more clearly derivable from the “anthropomorphosising” of states and their creation as legal persons with international personality.

28 *Ibid.*

to a Security Council decision under the Charter's Chapter VII. Believing, as Glennon does, that the Security Council was utterly wrong not to have supported United States intervention in Iraq leads him to a position of which even Bolton might have been proud: that the United Nations Charter is now no longer to be regarded, for various reasons, as a binding treaty.

The decision of the United States to ignore sovereign equality in the attack upon Iraq surely does illustrate that the American Administration has accepted Glennon's arguments.²⁹ For those who do not accept that, the utter fiasco of the Iraqi occupation answers the question as to whether sovereign equality should still be respected. A number of other points could be made but I have already made them elsewhere.³⁰

A recent book considering the question of the concept of sovereignty of direct relevance to this paper is Gerry Simpson's *Great Powers and Outlaw States; Unequal Sovereigns in the International Legal Order*.³¹ Critically for this argument Simpson takes the view that the concept of sovereign equality has three distinct aspects not all of which lead to assumptions of real equality. The first is 'formal equality', defined as no more than 'equality before the law' and which 'extends neither to forms of jurisdictional equality nor to equal capacity to vindicate rights outside the judicial context.'³² I say 'no more than' but as I shall suggest this is a truly crucial feature, necessary for any international rule of law. The second aspect is 'legislative equality', to be found for instance in the General Assembly of the United Nations with its single vote for each state. In truth, as he recognises, this is one of the few places where legislative equality is accepted and enjoyed. More typically strength and wealth will dictate legislative power as is all too clear both in the Security Council and in the deliberative bodies of the international financial institutions.³³

'Existential equality' is the third aspect of sovereign equality. This is really an equal right to existence with the accompanying corollary of the principle of non-intervention (and generally certainly not for purposes of regime change). Simpson shows that traditionally, historically as well as contemporaneously

29 Although Glennon's article came after the invasion of Iraq, he had made many of the same points in his book, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo* (2001).

30 See, in particular, Mansell, W, 'Goodbye to All That? The Rule of Law, International Law, the United States, and the Use of Force.' (2004) 31 *JLaw&Society* 433-456; Mansell & Haslam, 'John Bolton and the United States' Retreat from International Law' (2005) *Social & Legal Studies* 459-485.

31 (2004).

32 *Ibid*, 47.

33 And ironically, even in the selection of the judges of the ICJ where formal equality is important.

this has been more problematic than some might wish to believe. The claimed anti-pluralist (that is, universal) virtue of 'liberal democracies'³⁴ he suggests resonates with times of proclaimed 'Christian' 'European' or 'civilized' superiority used as a justification for intervention. Pariah or rogue states have replaced the heathen, the primitive and the uncivilized states which were historically beyond the realm of 'unintervenability'.

When analysed in this way I think that the response to Geoffrey Palmer's urge for a greater role for the ICJ becomes predictable. Formal equality for judicial purposes is exactly what the current American Administration and its neo-conservatives fear and why its acceptance of any compulsory jurisdiction will never be as it was before the case of *Nicaragua v. USA*.³⁵ The decision is that as American might always is righteous there is no need for a tribunal which might fail to grasp such an elementary principle. And while legislative equality within the General Assembly is unpalatable to the United States, it is at least almost meaningless because of the limited power to be found in that body.

IV. CONCLUSION

Where then have we got and what might we conclude? The first conclusion is that we as international lawyers should be well aware of just how great the current American regime's threat is to the edifice of international law. Exceptionalism undercuts the whole premise of equality before the law. If sovereign equality is rejected and *pacta sunt servanda* has become redundant then at the least the United States is unaccountable and free from obligation. How might such a position be resisted? At the risk of returning to a nineteenth century understanding of international law my suggestion is that the United States can only be expected to change its position when it concludes that the gains in supporting and embracing international law – even that to be found in the United Nations Charter – clearly outweighs the losses. Of course decisionmaking will be consequently constrained, but the United States has a great deal to lose if it elects to reject this position.

The United States, while supremely powerful, is clearly not omnipotent, and with regard to many international situations, such as Chechnya and Tibet it is actually impotent. Iraq has shown the immense expense and cost of going 'nearly alone', and the contrast between what the United States got out of the first Gulf War when it enjoyed international support and legality, and what the

34 On which see Fukuyama, F, *The End of History and the Last Man* (1992).

35 (1984) ICJ Rep 551 and (1986) ICJ Rep 14.

second has cost it, is astounding. The clear conclusion for neo-conservatives and other Bush personnel alike is that compliance with international law brings its own reward.

The New Autonomous Corporate Warriors and Their Implications for Humanity

Pauline Collins*

I. INTRODUCTION

The post-Cold War rise of private military contractors (PMCs) and their impact on the laws of war, in particular International Humanitarian Law (IHL), requires investigation. The need for accountability together with the repercussions for the Geneva Conventions and state sovereignty is immediate. This article is aimed at uncovering some of the implications this growing phenomenon has for society. Issues surround the sufficiency of current international law to regulate PMCs acting in war zones. The development of the laws of war from the Christian ages through Rousseau's 'social contract' to the current times of corporate privatisation of previously held sovereign state domains is considered. The likelihood of successfully subjecting PMCs to prosecution for war crimes in the current climate of regulation is minimal. The idea of states using PMCs for inappropriate gain is discussed along with the threat created by this phenomenon to the stability of national armies. The author concludes the need for investigation, review and control of the privatisation of the military is urgent.

The international community responded to World War II by outlawing war. It has obviously not been effective as an estimated 20 million people have been killed in wars, revolutions and massacres since 1945.¹ This is despite the fact that conflict is prohibited by international law, except in narrow and specific situations, namely: actions by the United Nations to restore peace, operations that are legitimate self-defence and internal conflicts which, while not under the jurisdiction of the United Nations due to the doctrine of sovereignty, are becoming increasingly subject to international obligations. Sir John Fisher, First Lord of the British Admiralty exhibited insight when he observed '[t]o humanise war is like trying to humanise hell.'²

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1 Patrick Brogan, *World Conflict* (1992) 644.

2 Sir John Fisher, First Lord of the British Admiralty and creator of the battleship 'Dreadnought' made this comment in 1907 concerning the Hague Conference in Jean Pictet, 'The nature of Humanitarian Law' in *Development and Principles of International Humanitarian Law* (1985) 79-95, 80.

The state is the recognised entity in international law.³ However, not since the 18th century has the state's monopoly over the right to use violence been so challenged.⁴ The certainty of the state's position has been undermined not only by the recognition of some international organisations and individuals as subjects with limited capacity,⁵ but the rise of the corporate entity controlling trained and well-equipped civilian armies available for hire.⁶ The partial privatisation of armies is leading the world into uncharted territory. While there have been mercenaries and soldiers of fortune before, there have never been multinational companies, on the scale seen today, pursuing wealth by recruiting forces over the Internet, ready for action wherever conflict is occurring around the globe. PMCs are non-state actors, namely corporations, who employ short-term contractors to engage in occupations such as intelligence, combat, combat training, logistics, weapons expertise, and security, previously the province of national militaries or public bodies.

The rationale behind the international community's attempt to humanise war involves balancing military desires against concern for humanity. Two fundamental principles, namely distinction⁷ and proportionality,⁸ are central to this balancing act. Distinction requires that a difference be maintained between military and civilian targets on the basis that only combatants are to be the object of military pursuit, and actions can only be undertaken where a military advantage is the result. In so doing, the principle of proportionality requires that no damage above what is required to achieve the military advantage is acceptable.

This article discusses the development of International Humanitarian Law (IHL) from the concepts of the civil-military relationship through the effects of the end of the Cold War to today. Second, the rise of PMCs is considered with particular regard to definitional problems, accountability and control,

3 James L. Brierly, *The Law of Nations* 6th Ed (1963) 34-37.

4 Ulric Shannon 'Private Armies and the Decline of the State', in Kenton Worcester, Sally Avery Bermanzohn, & Mark Ungar (eds.) *Violence and Politics Globalization's Paradox* (2002) 32-47.

5 Sam Blay, Ryszard Piotrowicz & Martin Tsamenyi, *Public International Law: An Australian Perspective*, 2nd Ed (2005) 1.

6 See e.g. Jean-Marie Guehemno 'The Impact of Globalisation on Strategy', *Survival* Vol.140, No.4 (Winter 2000) 6: 'When military powers are no longer exclusively sovereign states but include "interdependent players caught in a network of transnational transactions", familiar concepts such as the simplified "balance of power" lose some of their analytical muscle' in Peter W. Singer, 'Corporate Warriors: The Rise And Ramifications of the Privatized Military Industry' Vol. 26, No.3, Winter Int'l Security (2001/2002) 27.

7 *Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the protection of Victims of International Armed Conflicts* (Protocol I) (entered into force 7 December 1978) 1125 U.N.T.S.3, Art 48 (hereinafter Additional Protocol I).

8 Additional Protocol I art 51.

sovereignty and the impact on IHL. Finally the implications for IHL together with social, political and legal consequences are considered. While this article is concerned with the legal response to PMCs it cannot consider the phenomenon in isolation from the political and social context in which they have arisen. Sam Blay has stated:

However one chooses to construct the theoretical possibilities of the separate existence of law and politics, the practical reality is that, as international law is created principally through the political agreement and the practice of states, the law reflects more the political interests of the law makers. It is a tool for the pursuit and achievement of their political objectives.⁹

It is in the political and social context that IHL has developed over the centuries and it reflects fundamental values of humanity held across time and cultures.

II. DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

From God to Humanity

Despite the prohibition of wars after World War II and the United Nations Charter providing that 'armed conflict' can only occur in limited situations,¹⁰ we have, if anything, seen an escalation in armed conflict.¹¹ It seems the notion of self-defence provided for in the Charter permits a chink in the armour of peace such that today it can be used to support the emerging doctrine of the use of 'pre-emptive force'.¹²

The Christian ages cloaked war with the doctrine of *justa causa* meaning "just cause", that is, in self-defence or to redress a wrong.¹³ This moralising of violence led to the consequences of the crusades during the Middle Ages.¹⁴ Today, some leaders still rely on their authority being backed by God and

9 Sam Blay 'The Nature of International Law' chapter 1 in Blay, et al. Supra n 5 at 6.

10 Art 2(4) of the United Nations Charter provides four exceptions to this prohibition: art. 51 - individual or collective self-defence; Chap VII - Security Council action; arts 10, 11 & 14 - Gen. Assembly recommendation for UN force; art 53 - authorised UN regional action.

11 See, e.g., Brogan, supra n 1.

12 See, e.g., Christopher Greenwood 'International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) SanDiegoInt'l LJ 7.

13 Jean Pictet "The Development of humanitarian thought and practice of states throughout the ages" in *Development and Principles of International Humanitarian Law*, (1985), 6-27 at 11.

14 Ibid, 12.

the rhetoric of good and evil.¹⁵ The doctrine of ‘just war’ embraced by Saint Augustine and Saint Thomas Aquinas¹⁶ creates a dangerous cocktail of morals with political desires. A legitimate sovereign was said to have the authority, often from God, to establish armies and so rule. This reintroduces the notion that violence can be morally justified. The dilemma in this is that if both sides of a conflict believe their cause is morally sound, it will sustain the conflict. We appear under such notions to be rapidly regressing to the Middle Ages and the world of warlords and suzerains.¹⁷

Dutch jurist Hugo Grotius brought justification down from the level of the divine to human reason.¹⁸ It was sovereign nations, the only actors on the international plane, who determined the law of nations, which was to protect the basic rights of the individual. Nations could wage war to protect the people of the nation state, and the use of violence beyond what was necessary for victory could not be justified. It took time before Louis XIV and Frederick II began the change from armies of mercenaries to disciplined regular national armies composed of trained and paid members of the citizenry.¹⁹ Humanitarianism arose with the 17th Century’s Age of Enlightenment in which all individuals were seen to have equal and inalienable rights guaranteed by the protective apparatus of the state. The 18th Century saw this further developed, with war becoming a human game, governed by its own rules, rather than ruled by divinities and justified by gods. With this there developed the phenomenon of national armies designed to have a relationship of service with the state. The Westphalia system asserted that conflict was the province of states alone. As historian Martin van Creveld states:

It is the government that directs, the army that fights, and the people who watch, pay and suffer.²⁰

15 See, e.g., United States President George W. Bush *State of the Union Address* (2003) in which he stated ‘Americans are a free people, who know that freedom is the right of every person and the future of every nation. The liberty we prize is not America’s gift to the world, it is God’s gift to humanity. We Americans have faith in ourselves, but not in ourselves alone. We do not know – we do not claim to know all the ways of Providence, yet we can trust in them, placing our confidence in the loving God behind all of life, and all of history. May He guide us now. And may God continue to bless the United States of America.’ <<http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>> at 29 June 2004.

16 Pictet, *supra* n 13 at 13.

17 Shannon, *supra* n 4.

18 Pictet, *supra* n 13 at 19-20.

19 *Ibid*, 21.

20 Martin van Creveld, *Nuclear Proliferation and the Future of Conflict* (1993) 20 cited in Shannon *supra* n 4 at 32.

The Civil - Military Relationship

The French philosopher Jean-Jacques Rousseau, in *The Social Contract*, espoused the idea of the social contract between the state and the individual. He held the following belief in regard to the role of the citizen-soldier viz-avis their position in relation to the state and their enemies:

War is not a relation between man and man, but between state and state, and individuals are enemies only accidentally, not as men nor even as citizens, but as soldiers; not as members of their country, but as defenders ... The object of the war being the destruction of the hostile state, the other side has a right to kill its defenders while they are bearing arms, but as soon as they lay down and surrender they cease to be enemies or instruments of the enemy, and become once more merely men, whose lives no one has any right to take.²¹

It became the duty of the citizen to spend some time serving in the defence of the state in return for the guarantee of state protection. There are many advantages in this. The civilian serving in the army is part of the society which he or she is involved in protecting; their desire to return to that society and their normal life when their duty is fulfilled and not to prolong the period of conflict is strong. They are answerable and accountable through their governments directly to the whole of the society they are defending, they will not profit from the prolonging of the conflict, receiving a wage that is balanced within the context of employment available in that society.²²

Contrast this with PMCs and their contracted civilians who are trained for only one occupation, who follow only where the action is because that is where the money is, who thus have an interest in sustained conflict, and who are not part of a society to which they are necessarily morally tied and answerable. Their only obligations are to their private employer, a company. The company, in turn, is only answerable to its shareholders and the national laws of the company's registered state, when such laws can be enforced.²³

Rousseau's 'social contract' has changed. There are now new players on the international field. These are individuals and corporations whose wealth and power outstrip many states and who are no longer prepared to stand on the sidelines. The contract is now no longer between a state and its citizens, but intruding into the social contract is the corporation. The intermediary wields immense power. Here the contract is not between all the citizens of a defined

21 Jean-Jacques Rousseau, *The Social Contract* (1762) ed. & translated Maurice Cranston (1968) 57. This idea underpins much of IHL. See e.g. Additional Protocol I 1977 art 41.

22 R. Claire Snyder 'Patriarchal Militarism' in Carl Boggs (ed.), *Masters of War: Militarism and Blowback in the Era of American Empire* (2003) 261-276.

23 Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (2004) 60-84.

geographical, territorial and cultural society but between an impersonal, invisible legal entity, the corporation, and its shareholders who do not necessarily represent a cohesive group in terms of societies.²⁴

The citizen-soldier contains the tension between military drive and democratic ideals because they do not profit from war. Their desire is not to remain at war, but to return and live in their society. As Machiavelli said, the citizen-soldier 'when he was not soldiering, was willing to be a soldier, and when he was soldiering, wanted to be dismissed.'²⁵ On the other hand, Machiavelli noted professional soldiers could not be trusted because they 'are obliged either to hope that there will be no peace, or to become so rich in time of war that in peace they can support themselves.'²⁶ This rise in PMCs has come about due to changes in geo-political tensions, creating a political reality the law now has to contend with anew.

Effect of the end of the Cold War and other conflicts

The end of the Cold War between the superpowers, and the end of apartheid in South Africa, saw national armies downsized with many trained soldiers being released to return to their civilian lives. However, few had any experience outside of their military occupation and no attempt was made to prepare them for reintroduction to civilian life. This provided a ready made stable of men trained in the art of war, looking for work and a natural inclination to turn to occupations in law enforcement, security and prisons.²⁷ A booming industry has developed with PMCs recruiting personnel globally over the Internet,²⁸ for rapid deployment to the hot spots of conflict. Part of the need for PMCs in conflict zones is driven by today's military technology, for instance the

24 Singer, *supra* n 6 at 12: 'Importantly, this shift encourages the proliferation and criminalization of local warring groups. ...Warfare itself becomes self-perpetuating, as violence generates personal profit for those who wield it most effectively (which often means most brutally), while no one group can eliminate the others'.

25 Machiavelli: *The Chief Works and Others*, trans. A Gilbert (1965), *Art of War*, I 576; Snyder, 'Patriarchal Militarism' in Carl Boggs (ed.), *Masters of War: Militarism and Blowback in the Era of American Empire* (2003) 263.

26 Ibid.

27 Sam Vaknin "Analysis: Private armies -1" (2002) United Press International <<http://www.upi.com/view.cfm?StoryID=20020717-092201-5132r>> at 13 May 2004: 'More than 5 million soldiers were let go all over the world between 1987-1994, according to Henry Sanchez of Rutgers University. Professional soldiers, suddenly unemployed in a hostile civilian environment, resorted to mercenariship. A few became rogue freelancers. The role of the Frenchman Bob Denard in the takeover of the Comoros Islands is now mythical. So is the failed coup in Seychelles in 1981, perpetrated by Colonel "Mad" Mike Hoare, a British ex-paratrooper,' para 7.

28 See, e.g., MPRI L-3 Communications, 'Job Opportunities' 2004: <http://www.kpri.com/site/subchannels/job_listings.cfm> at 20 June 2004.

unmanned Predator drones, Global Hawks and B-2 stealth bombers, have such sophisticated weapon systems that the skills of civilian experts are called on for their operation. PMCs are also making profit from contracts in the umbrella of conflict, ranging from security work to training national armies and police.²⁹

Retired military have been found working for PMCs offering their services in training state's new military and police forces. Some have argued the role of the Virginia based company, Military Professional Resources Incorporated (MPRI) changed the fortunes of the Croatians in the Balkans conflict by training and advising their army and by playing such a critical role they have led to a demand for such entities.³⁰ PMCs have been involved in providing security for Paul Bremer, as Head of the CPA, Iraq, protection for Afghanistan's President, Hamid Karzai, the construction and maintenance of Camp Bondsteel, Kosovo (the biggest US military base built since Vietnam), the war games simulation training school near Hadzici Sarajevo, to name but a few examples.³¹ The emergence of a new war front, with the so-called 'Global War on Terror', since 11 September 2001 (hereafter 9/11) has seen hopes of peace as a result of a more active Security Council since the end of the Cold War dashed.

International Humanitarian Law as it Exists Today

Kofi Annan, Secretary-General of the United Nations, succinctly highlighted the shift demanded by 9/11 in the role of international law during his Nobel Peace Prize Lecture in 2001 when he stated:

We have entered the third millennium through a gate of Fire. If today, after the horror of 11 September, we see better, and we see further – we will realize that humanity is indivisible....

29 See generally, Nelson Schwartz, *The War Business: Pentagon's Private Army* (2004) <Factiva. file://C:\Documents%20and%20Settings\collins\Local%20Settings\Temporary%20Int> at 21 June 2004; Sam Vaknin, *Private Armies* (2004) <<http://samvak.tripod.com/pp160.html>> at 13 May 2004.

30 See, e.g., Deborah Avant, *The Market for Force: Exploring the Privatization of Military Services* [n.d.] <http://www.totse.com/en/politics/the_world_beyond_the_usa/ndp.html> at 15 June 2004.

31 Ian Traynor, 'The Privatization of War: \$30 Billion Goes to Private Military; Fears Over 'Hired Guns' Policy' *Guardian/UK* (London), 10 December 2003; See also The (UK Green Paper) Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation*, February 12, 2002, London.

In the twenty-first century I believe the mission of the United Nations will be defined by a new, more profound, awareness of the sanctity and dignity of every human life, regardless of race or religion. This will require us to look beyond the framework of States, and beneath the surface of nations and communities....

In this new century, we must start from understanding that peace belongs not only to States or peoples, but to each and every member of those communities. The sovereignty of States must no longer be used as a shield for gross violations of human rights.³²

This demand for the respect of the human dignity of the individual forms the bedrock of the four Geneva Conventions of 1949. Having achieved almost universal ratification they, together with the Additional Protocols I and II of 1977, are the skeletal structure on which the flesh of humanitarian law hangs. This structure, built over the last two centuries, attempts to balance state security with the preservation of life and dignity, so that the effects of violence in armed conflicts is controlled and minimised with the right to use force being limited.³³ This balance provides the backbone of IHL. However, of concern is the attitude of the only remaining superpower.³⁴ The USA has publicly declared the provisions of Additional Protocol I, that demand the protection of civilians from the hazards of war, as unacceptable militarily and a justification for refusal to ratify the Protocol.³⁵

The essential fundamentals of the laws of war (Hague Conventions) and IHL (Geneva Conventions and Protocols) is that they mandate the life, health and dignity of all persons not taking part in active hostilities. The aim is that military operations, no longer called 'wars,' are contested in a manner that minimises suffering and the impact of violence on humans, property and the environment. To reinforce these humanitarian concepts, as demanded by

32 Kofi Annan, 'Nobel Peace Prize Lecture', 10 December 2001, in Martin Dixon & Robert McCorquodale, *Cases & Materials on International Law* 4th Ed (2003) 17.

33 Additional Protocol I art 35(1).

34 See Pete Yost and Douglasin Jehl 'Memo to Bush may have led to torture' *Los Angeles Times*, *The New York Times*, May 18, 2004, para 1-4 'A memo reportedly written by the White House legal counsel Alberto Gonzales to President George Bush after the September 11 attacks advised: "In my judgment this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions." The Secretary of State, Colin Powell, "hit the roof" when he read the memo, the magazine said, and fired off a note to Mr Bush, warning that the new rules "will reverse over a century of US policy and practice" and have "a high cost in terms of negative international reaction."

35 Few of the states currently involved in conflicts have ratified Additional Protocol I 1977. Ruth Wedgwood, 'Al Qaeda, Terrorism, and Military Commissions' [2002] *AmerJInt'lL* 9, notes neither Afghanistan nor the US has ratified Protocol I along with many other states and it is sharply contested that it represents international customary law.

Annan's twenty-first century mission for the United Nations, a range of treaties have been added to the basic 'body' of laws. These include restrictions on the use of certain weapons, torture, protection of cultural heritage and most recently; the establishing of The International Criminal Court to aid in the continued development of international humanitarian law.³⁶

Unfortunately however, instead of the incorporation of the political, social and moral dimensions of the law, there is now an over-reliance on black letter law to argue that what is not forbidden is permissible. This development in the law of war has been vigorously pursued in the USA, with the argument that certain methods of interrogation such as stress and duress, isolation, sleep deprivation, application of heat, cold, and noise, fall outside the category of torture and humiliating or degrading treatment, and are legally permissible.³⁷ The use of the narrow literary construction for the interpretation of the rights and obligations contained in the Geneva Conventions, as opposed to the more commonly adopted 'purpose' or 'mischief' method of construction used in many common law jurisdictions, allows for the evasion of well intentioned humanitarian principles contained in IHL. The Martens Clause³⁸ is an attempt to overcome the evasion of the humanitarian principles underlying the Geneva Conventions by setting a minimum standard to apply to all situations of

36 See generally, Mario Profaca, 'International Criminal Tribunal. International Law: Treaties and Conventions' 2004 <<http://public.srce.hr/~mprofaca/lawsorce.html>> at 29 June 2004.

37 Additional Protocol I art 75 provides certain fundamental guarantees but has not been ratified by the USA. *The Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment* to which the USA is signatory has been rendered ineffective in that the USA has determined it is only applicable to conduct prohibited by the Fifth, Eighth and Fourteenth Amendments of the USA Constitution. For an example of this process at work refer to 'Working Group Report on Detainee Interrogations in the Global War on Terrorism, outlining the argument for torture of terrorism detainees' March 2003. <http://msnbc.com/modules/newsweek/pdf/040608_Hirsh_WorkingGroupReport.pdf> at 29 June 2004 .

38 See Common Article 3 of the *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1949, (entered into force 21 October 1959) 75 U.N.T.S. 31 (hereinafter referred to as Geneva Convention I); *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, (entered into force 21 October 1959), 75 U.N.T.S. 85 (hereinafter referred to as Geneva Convention II); *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, (entered into force 21 October 1959) 75 U.N.T.S. 135 (hereinafter referred to as Geneva Convention III); *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, (entered into force 21 October 1959) 75 U.N.T.S. 287 (hereinafter referred to as Geneva Convention IV); Additional Protocol I art 1(2) and the Preamble to *Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, (entered into force 8 December 1978) 1125 U.N.T.S.609 (hereinafter Additional Protocol II).

conflict, in which standards of civilised behaviour, deriving from custom, humanity and the public conscience, are to apply. However, achievement of such ideals still seems elusive.

Within this context, the new phenomenon of PMCs is emerging and is challenging the existing laws to grapple effectively with the issues raised. This phenomenon has historical roots dating back over 250 years.³⁹ However, the new shoots are sprouting a modified version with significant implications for all humans, as well as IHL.

III. THE NEW FORCE – PRIVATE MILITARY CORPORATIONS

The Proliferation of Private Military Corporations

The deep penetration into warfare by PMCs means they are now second only to the USA in contributors to the coalition forces in Iraq. The exact number cannot be accurately ascertained but estimates are between 10,000 –20,000 personnel.⁴⁰ This figure is a significant increase from the 1991 Gulf War, when it was estimated that there was one PMC for every 100 defence personnel, to a ratio now of one to ten.⁴¹ This change in the way war is conducted highlights significant outcomes not only for the ability of the USA to engage in conflicts, arguably now dependant on PMCs, but for the future of world security in general.

An indication of the level of activities undertaken by PMCs can be found in one such PMC's list of capabilities: MPRI, declares it is capable of providing war gaming, combat training, force deployment and management, democracy transition assistance programs, new equipment integration and training, doctrine development, anti-terrorism/force protection, investigations and consequence management. The mission statement of MPRI says it uses 'methodologies of proven effectiveness,' with no mention of legal means. MPRI also indicates that its employees 'devote their lives to *the* nation' presumably this means the USA and not the nation in which they are operating, or to whom they are contracted. Moreover while MPRI states that their employees have 'deeply-held values,' nowhere are these specified.⁴²

39 See, e.g., Shannon, *supra* n 4.

40 See, e.g., Spencer Ante, "The Other U.S Military: The private contractor biz is hot, vast and largely unregulated. Is it out of control?" Business Week Online May 31, 2004. <http://www.businessweek.com/print/magazine/content/04_22/b3885116.htm?mz> at 20 June 2004; See also Traynor, *supra* n 31.

41 See, e.g., Nelson Schwartz, *supra* n 29.

42 See, e.g., MPRI L-3 Communications 'MPRI Capabilities & Mission Statement' (2004) <<http://www.mpri.com/site/mission.html>> at 20 June 2004.

The treatment of prisoners at Abu Ghraib prison has also raised public awareness of the involvement of figures, other than national military, in the prosecution of wars.⁴³ Questions concerning the accountability of PMCs are now arising. Thirteen USA opposition senators wrote to Defence Secretary, Donald Rumsfeld, to ask for an explanation concerning civilian contractors in Iraq. The letter said 'It would be a dangerous precedent if the USA allowed the presence of private armies operating outside the control of governmental authority and beholden only to those who pay them.'⁴⁴ To date it would seem that there is only one USA civilian, an ex-Central Intelligence Agency (CIA) interrogator/contractor working in Afghanistan that has been indicted by the USA Justice Department in relation to a suspicious death.⁴⁵ The development of the PMCs raises a number of concerns. Four main areas of concern are considered in the next Part.

IV. CONCERNS

The issues raised by these new forces are many, but they are considered here in four main areas: definitional problems, accountability and control, sovereignty, and issues for IHL.

43 See, e.g., Seymour Hersh 'Torture at Abu Ghraib. American soldiers brutalized Iraqis. How far up does the responsibility go?' *The New Yorker*, October 5, 2004.

<http://www.newyorker.com/printable/?fact/040510fa_fact> at 29 June 2004.

44 ABC News Online, 'Answers sought on US 'private armies' in Iraq' *Australian Broadcasting Corporation* 2004.

<<http://www.abc.net.au/cgi-bin/common/printfriendly.pl?http://www.abc.net.au/news/n>> at 13 May 2004.

45 See, e.g., R. Jeffrey Smith 'Interrogator Says U.S. Approved Handling of Detainee Who Died' *Washington Post* Wednesday, April 13 2005, A07 <<http://www.washingtonpost.com/wp-dyn/articles/a48239-2005apr12.html>> at 10 June 2005; Conor O'Clery '35 years later, the US soldiers exposed as a gang of butchers' *The Irish Times* (Dublin) 10 April 2004, para 7 - Little outcome can be expected in relation to private contractors when defence personnel are exempted. The USA has investigated evidence of wounded Iraqi soldiers to whom the Geneva Convention applies being deliberately shot after being aired on CNN reports. An Iraqi guard was lying gravely wounded and amongst calls of glee was shot dead as he tried to move. In at least one of the investigations USA troops were cleared of any wrongdoing.

Definitions: Mercenaries, Armed Forces, Spies, Civilians and PMCs

PMCs create new definitional problems for existing IHL. Contractors working for PMCs are not to be confused with mercenaries, which have been outlawed by international law.⁴⁶ The 1989 *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, mainly follows the definition of mercenary found in Additional Protocol I Art 47 (2) –

A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of a territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Article 47(2) has been criticised as largely unworkable creating a cumulative definition of dubious specificity requiring proof of subjective motive.⁴⁷ In relation to PMCs paragraph (a) and (f) of Art 47 highlight immediate issues. The requirement that mercenaries be ‘specially recruited in order to fight in an armed conflict’ raises points of distinction that would arguably exclude large numbers of PMCs who may argue they are not recruited specifically ‘to

46 1989 *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, however few countries have ratified. The governing principle of law was stated by the General Assembly in its Declaration of 1996: ‘States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain from organising, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts. The General Assembly’s definition of aggression provides in Article 3(g) that: Any of the following acts...qualify as an act of aggression:...The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to acts listed above, or its substantial involvement therein.’ Additional Protocol I art 47.

47 UK Green Paper, *supra* n 31 at para 6.

fight' but rather are to provide defensive security or other roles in addition to fighting. PMCs being contracted by 'a state which is not a Party to the conflict on official duty as a member of its armed forces' will fall outside the definition. Further Art 5(2) of the 1989 Convention relates to states recruiting, using, financing and training mercenaries for use against peoples seeking self-determination. This clearly does not cover conflicts such as the recent Afghanistan and Iraqi conflicts. While the 1989 Convention highlights concerns by the international community to address the issue of mercenaries it has to date only been ratified by a few countries and does not address the specific problems raised by PMCs.

Armed forces are defined to include all organised armed forces, groups and units that are under a command responsible to a party to the conflict, even if the party is represented by a government or authority not recognised by the opposing party.⁴⁸ Such armed forces have to be subject to an internal disciplinary system that is bound to enforce compliance with rules of international law applicable in armed conflict. Only people so defined are legally entitled to directly participate in hostilities as combatants under international law. However, armed forces in international law are composed not only of combatants, but also non-combatants - medical, religious and civil defence personnel - who cannot take part in hostilities.⁴⁹ Civilians who accompany armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or those services responsible for the welfare of the armed forces are entitled to prisoner of war status if captured.⁵⁰ These are to be distinguished from contractors working for PMCs who operate independently of armed forces and are not civilians accompanying armed forces. With PMCs the word 'military' is highlighted in the sense that these civilians are providing, assisting or engaging in some form of military or security role in a conflict zone which involves bearing arms, whether openly or not.

Spies, terrorists, insurgents and freedom fighters have their own definitional issues and generally relate to civilians armed for reasons other than self-defence in non-international armed conflicts where there is no distinction between the various categories of persons.⁵¹ Organisations such as the Irish

48 Additional Protocol I. art.43.

49 Geneva Convention I art 13, Ch IV; Additional Protocol I. art 43 & Ch. VI.

50 Geneva Con. III art 4 (4).

51 Additional Protocol I art. 44(2); Gen Cons. Common art.3, See, e.g., Hans-Peter Gasser 'Prohibition of terrorist acts in international humanitarian law' paper given at the 11th Round Table on Current Problems of International Humanitarian Law, San Remo, 9 - 14 September 1985.

Republican Army, Palestinian Liberation Organisation, and African National Congress have all been labelled as terrorists or freedom fighters. However, Common Art 3 of the Geneva Conventions and Art 4 Additional Protocol II comprehensively covers such persons. Such definitional problems will not impact on the issue of PMCs in international conflicts. For instance spies are defined in Art 46 Additional Protocol I as ‘any member of the armed forces of a Party to the conflict,’ this immediately excludes PMCs who are not members of the armed forces and may well not be nationals of a Party to the conflict.

Terrorists have been subject to many attempts at legal definition to pin them down. However, despite the on going debate surrounding a suitable definition of terrorists they can arguably be distinguished from PMCs by the fact that they are usually motivated by ideology, rather than profit and they can act alone or in ad hoc organisational structures. PMCs operate in commercial legal structures such as companies, they are often recognised, if not contracted, by governments and seek society’s acceptance and approval.

Civilians are defined as any person not belonging to the armed forces.⁵² Where an individual is not covered by international agreements then as a civilian, at the minimum, they remain under the protection and authority of the principles of the law of nations derived from customary law, the laws of humanity and the dictates of public conscience.⁵³ Civilians of countries who are signatory to the *Rome Statute of the International Criminal Court* can be subject to prosecution for crimes under the statute. However as this is limited to a natural person over the age of 18 years then PMCs will fall outside of the ICCs jurisdiction.⁵⁴

So how are PMCs, engaged in armed conflict, to be considered under the Geneva conventions if, for instance, their contractors become prisoners or commit crimes? They are not non-combatants (within the definition of Additional Protocol I Arts. 43, 44) since they carry arms, but they can’t be considered combatants if they do not wear a uniform and do not answer to a command authority or follow the rules of IHL.⁵⁵ People, such as members

52 Additional Protocol I art 50.

53 *Hague Convention IV (18 October 1907) Convention Respecting the Laws and Customs of War on Land* (entry into force 26 January 1910) Preamble; Additional Protocol I, art 1(2).

54 *Rome Statute of the International Criminal Court* Article 25(1): The Court shall have jurisdiction over natural persons pursuant to this Statute; Article 26: The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of the crime.

Given Article 8(2)(b)(xxvi) makes it a war crime to enlist anyone under the age of 15, it begs the question what happens to persons between the age of 15 and 18 years who commit war crimes?

55 Additional Protocol I, arts 43, 44(3).

of Al-Qaida, have been denied combatant and prisoner of war status because they do not satisfy these criteria. The USA has defined them as 'unlawful or enemy combatants' for the purpose of making them legitimate targets for lethal force, with Presidential authority being given for their assassination far from traditional battlefields.⁵⁶ This begs the question whether civilian contractors working for PMCs may be seen as legitimate targets open to similar treatment by the other side.⁵⁷ Arquilla and Ronfeldt state:

The revolutionary forces of the future may consist increasingly of widespread multi-organisational networks that have no particular national identity, claim to arise from civil society, and include some aggressive groups and individuals who are keenly adept at using advanced technology, for communications as well as munitions.⁵⁸

Evidence of the fine line walked by PMCs can be seen in the case of the 70 suspected mercenaries arrested in Zimbabwe who are alleged to have been en route to Equatorial Guinea to stage a coup. The men denied the charges, stating that they were employed as security personnel to guard mining operations in the Democratic Republic of Congo.⁵⁹

These definitional problems have been subject to consideration by various bodies. Predominate among them is a British Green Paper entitled 'Private Military Companies: Options for Regulation' prepared by order of the House of Commons in 2002. The conclusion from the investigation suggested that definition is essential for regulation. However, it concluded after a thorough overview, that the terminology is often driven to 'suit the agenda of those drafting... [and is] not necessarily very useful.'⁶⁰

56 James Risen and David Johnston 'Bush has widened authority of C.I.A. to kill terrorists' *The New York Times*, Dec. 15, 2002, pp. 1 & 22. Mr Harethi and five other people were killed by an unmanned Predator drone attack in a remote part of Yemen.

57 Timothy McCormack *The Use of Force in Public International Law. An Australian Perspective*, 2nd Ed. Blay et al supra n 5 at 251-253; BBC News World Edition 2004, 'S Korean hostage beheaded in Iraq', <http://news.bbc.co.uk/2/hi/middle_east/3830843.stm> at 29 June 2004 'The beheaded body of translator Kim Sun-il, 33, was found on the road between Baghdad and Fallujah. Mr Kim was working for a security company supplying the US military when he was abducted last week,' para 1-2.

58 John Arquilla and David Ronfeldt 'Cyberwar is coming!' in J. Arquilla and D Ronfeldt (eds.) *Athena's Camp: Preparing For Conflict In The Information Age* (1997) 23 at 49.

59 Chinaview 2004 'Zimbabwe sets trial date for suspected mercenaries' <http://news.xinhuanet.com/english/2004-06/23/content_1543486.htm> at 24 June 2004.

60 UK Green Paper, see supra n 31 at para 16.

Accountability and Control

When military personnel and war criminals, for which there are clear laws regulating accountability, are seen to escape prosecution it can be argued there is an increased likelihood that the legal system will fail to render PMCs accountable.⁶¹ Indeed to date, there has been little accountability of PMCs with only one contractor of a PMC having been charged with any offence in relation to the recent conflicts in Afghanistan and Iraq.⁶²

The first concern is a lack of transparency and oversight to PMCs operations. No one can say accurately exactly how many PMCs are carrying out duties that would normally be carried out by national military personnel in conflict zones throughout the world. It is a concern that governments cannot provide this information, and yet they are the prime contractors with these companies, spending taxpayer's dollars on the services of such companies.⁶³

The current conceptions in international law are that only states have the right to maintain military forces which are controlled through a process of accountability that leads directly back to the leaders of the states and ultimately its citizens. The Geneva Conventions make all commanders legally responsible for respecting and enforcement of the Conventions; they are accountable for the dissemination of IHL and ensuring that wrongdoers are punished.⁶⁴ When even USA military personnel in Iraq claim never to have heard of the Geneva Conventions it raises greater concerns that PMCs are operating without these controls.⁶⁵

61 See, e.g., Geoff Elliot 'Mistrial as Judge rejects England's plea' *The Australian*, May 6, 2005, p 9. "The mistrial could mean...Private England ...faces fresh charges if the army seeks to have her tried again or the case is dropped entirely."

62 See, e.g., R. Jeffrey Smith *supra* n 45.

63 See, e.g., Jonathan Karl and Gaele Drevet 'Private Armies for Hire: Outsourcing Military Security to Private Companies Has Risks' ABCNEWS.com 2004 <http://abcnews.go.com/sections/WNT/World/private_armies_040401.html> at 13 May 2004. Not only is the USA Administration not able to say how many civilians are working for private contractors in Iraq but they also don't know how many have been killed, para 18.

64 Additional Protocol I art 87.

65 See, e.g., Al Tompkins 'The Story Behind the Lynndie England Interview' Poynteronline 2004 <http://www.poynter.org/content/content_view> at 29 June 2004 para. 20 'She didn't seem to recall knowing much about the Geneva Conventions rules, but Private England's lawyer who is highly experienced in military affairs said once a year, these soldiers are instructed in the provisions of the Geneva Convention. But he said it was not reinforced in any way when they were 'on the ground' in Iraq.'

Prosecutions of breaches of IHL are the responsibility of each state in relation to its own military forces. We are seeing this occur in relation to a number of the soldiers at Abu Ghraib.⁶⁶ However, the application to PMCs seems to be somewhat murkier, with unclear outcomes for prosecution compared to the immediate dealing with offending military personnel. The Abu Ghraib incidents only came to light slowly, after one soldier and the responsible officer, to whom he reported, exposed it.⁶⁷ The International Committee of the Red Cross (ICRC), whose responsibility it is to oversee the conditions of prisoners of war and report any concerns to the controlling state, seemed largely to be ignored in relation to its complaints within the Coalition Administration.⁶⁸ It is now clear that USA Secretary of Defence, Donald Rumsfeld, had authorised the use of stress positions, 30 days' isolation, 20 hour interrogations, removal of clothes (in conditions of heat and cold), and use of dogs and loud music on USA detainees.⁶⁹ A statement by Senator Edward Kennedy on the first anniversary of the Abu Ghraib incident confirms:

The Bybee Torture Memorandum was eventually repudiated by the Justice Department, but the Pentagon's Working Group Report of April 2003, which incorporated the Bybee Memorandum nearly verbatim, has still not been explicitly superseded, and no new guidance has gone to the field.⁷⁰

If this is the regard paid to IHL by senior levels of government, the question must arise as to what will happen to such principles under the cloak of privatisation, where the media and citizens do not have such ready access to information and accountability is not so immediate.

Military personnel, whether on or off duty, are subject to military discipline. However, a civilian who commits an offence is answerable only to either the national law of the state in which he or she is temporarily based or the law of the state of their nationality where that state has passed legislation, permissible under international law, to operate extraterritorial jurisdiction. If it is the former situation then as this is invariably going to be in a conflict zone operating in wartime, often in the context of a failed state, there is little likelihood of such

66 See, e.g., Richard A. Serrano, 'Dog handlers charged in Abu Ghraib abuse', *Los Angeles Times* (Los Angeles), June 3 2005; Tim Whitmire, 'Wartime Prosecutions Come under Scrutiny; Dismissals, short sentences for U.S. soldiers prosecuted for deaths of Iraqis, Indiana Printing & Publishing Co June 06, 2005, <[http://www.zwire.com/site/news.cfm?>](http://www.zwire.com/site/news.cfm?) at 09 June 2005.

67 See, e.g., Robert Scheer, 'Sadistic tactics bring out the brute in the land of the free', *Los Angeles Times* (Los Angeles), May 6 2004.

68 See, e.g., Douglas Jehl and Eric Schmitt, 'Army answered jail complaints by shutting out Red Cross', *The Sydney Morning Herald* (Sydney), Thursday, May 20 2004, World, 8.

69 SBS Newsreport 23/06/2004.

70 See, e.g., Edward M. Kennedy, 'Abu Ghraib – One Year Later', <<http://tedkenedy.com/journal/59/abu-ghraib---one-year-later>> at 6 June 2005.

a person ever being subject to the local law. In the latter case the lack of such prosecutions evidences unwillingness by states to undertake prosecutions in these circumstances.⁷¹

In the latest IHL development: the establishment of the much awaited International Criminal Court (ICC), the phenomenon of PMCs remains unaddressed, with the ICCs jurisdiction being limited to natural persons over the age of 18 years.⁷² With reparations being ordered only against parties criminally responsible, corporations will also escape any financial liability under the ICC.

To further exacerbate accountability issues, there is a developing practice in Western countries of obtaining immunity from prosecution of military forces and nationals while in another state territory.⁷³ Immunity from prosecution such as in Iraq and the Australian police serving in Papua New Guinea,⁷⁴ only further perpetuates the exemption of accountability of individuals when operating in conflict zones in other states. The fact that the USA has refused to participate in the ICC and is actively enlisting states to sign so-called 'Article 98 agreements' prohibiting the surrendering of USA war crimes suspects is a further example.⁷⁵

The second concern in regard to accountability and control is that states may find the existence of PMCs useful when wanting to implement politically unpopular foreign policies, or they might provide more efficient, cost effective services. The Australian Strategic Policy Institute (ASPI) in its 2005 report

71 See, e.g., Whitmire, *supra* n 66.

72 *Rome Statute of the International Criminal Court* above n 54; See e.g. Geoffrey Robertson, 'The International Criminal Court' Chapter 9 in *Crimes against humanity. The struggle for global justice*, 325-367.

73 See, e.g., CPA Order 17 (Revised); Ian Traynor, *supra* n 31 at para 34: Dyncorp was given the contract to train the Bosnian police force. 'However a number of its employees were implicated in a sex slave scandal, with girls as young as 12 years old, for which the employees allegedly were dismissed but were never prosecuted and with no apparent adverse repercussions for the company, who have trained the Haitian police, Afghan police and who have now been given a multi-million dollar contract to train the Iraqi police force'.

74 See, e.g., Joint Agreement on Enhanced Cooperation between Papua New Guinea and Australia on 30th June 2004 (Agreement). This agreement was held to breach the Papua New Guinea Constitution in Papua New Guinea [In the Supreme Court of Justice at Waigani] SCR N0 2 of 2004.

Special Reference Pursuant to Constitution Section 19, Special Reference by the Morobe Provincial Executive. 8 December 2004, 13 May 2005 < <http://www.paclii.org/pg/cases/PGSC/2005/1.html>> at 1 June 2005; Shane Mcleod, 'PM - Aust - PNG police talks continue' *ABC Online* 2004 <www.abc.net.au/pm/content/2004/s1066477.htm> at 08 December 2004.

75 Carl Bloggs, 'Outlaw Nation: the Legacy of U.S. War Crimes' in Carl Bloggs (ed.) *Masters of War. Militarism and Blowback in the Era of American Empire* (2003) 191-226, 194.

'War and Profit: Doing Business on the Battlefield',⁷⁶ supports the increasing use of PMCs in battle zones. However, there are implications for democracies and IHL.

Part of the accountability issue relates to governments waging war by proxy, being one step removed, media and government attention is not attracted to the activities of PMCs in the same manner that surround a state's national military being deployed into a conflict zone. Little media attention is paid to employees of PMCs killed in conflict zones, compared to the public reaction to the number of national military killed or wounded.⁷⁷ Evidence of this can be seen in the contrast between the media coverage received by three civilian contractors for California Microwave Systems, a subsidiary of Northrop Grumman Corp, who since February 2003 have been held by Colombian rebel forces after their plane crashed while on a clandestine mission,⁷⁸ compared with the publicity surrounding the hostage taking and rescue of Private Jessica Lynch in Iraq.⁷⁹ It was not perhaps until the burning and mutilation in such a publicly horrifying manner of four Blackwater employees in Iraq that the involvement of PMCs in conflict zones has begun to be understood by the public:

The four Americans killed in Fallujah were employees of Blackwater Security Consulting whose 450 employees in Iraq offer security to Paul Bremer, Head of the CPA, and convoy trucks amongst other projects. An attack on US government headquarters in Najaf was repelled by eight Blackwater commandos alone with that company's equipment being used to provide back up and remove wounded US marines.⁸⁰

This would appear to be frontline combatant involvement undertaken by PMCs.

A third concern is the consequent involvement of such companies in intelligence gathering, a domain usually the preserve of states. Many of the companies are reliant on their own intelligence gathering as there appears to be little coordination between PMCs and the national armies with no

76 Mark Thompson, 'War and Profit: Doing Business on the battlefield' *ASPI Strategy Report* 30 March 2005.

77 Christopher Bollyn, 'Mainstream Media's Sanitized War Coverage Helps Mask Carnage' 2004 American Free Press.
<http://www.americanfreepress.net/03_28_03/Mainstream_Media_s_Sanitized_/mainstream_media_s_sanitized_.htm> at 10 June 2005.

78 Max Jourdan, Foreign Correspondent, 'Colombia – The Forgotten Hostages' broadcast ABC 19 April 2005 <<http://www.abc.net.au/foreign/content/2005/s131-9302.htm>> at 20 April 2005.

79 Dante Chinni, 'Jessica Lynch: Media Myth-Making in the Iraq War' Journalism.Org <<http://www.journalism.org/resources/research/reports/war/potwar/lynch.asp>> at 10 June 2005.

80 See, e.g., O'Clery *supra* n 45 at para 10.

overall command structure. Intelligence gathering, which has been an area of controversy for governments, can only become more so with the involvement of competing PMCs.

In domestic legal systems of modern constitutional democracies, intelligence gathering is an acutely sensitive issue, precisely because it has the potential for infringing privacy and other protected rights. Hence procedures and objectives are prescribed by statute and supervised by the judiciary. Transnational intelligence gathering operates with considerably fewer legal and political constraints, yet may provoke crises when discovered - witness the disquiet caused by reports that the CIA used UNSCOM as a cover for electronic eavesdropping on Iraqi government communications.⁸¹

If PMCs have personnel in conflict zones that are operating solely in the interests of their employer, military power will be determined by the ability to pay, giving private organisations influence over government policy and public goals. Joel Bakan, professor of law at the University of British Columbia notes:

Through a process of privatisation, governments have capitulated and handed over to corporations control of institutions once thought to be inherently “public” in nature. No part of the public sphere has been immune to the infiltration of for-profit corporations.⁸²

States tolerance of the invasion of PMCs in the public domain of armed forces may be influenced by the usefulness of such companies to avoid politically sensitive activities by covert actions.

Sovereignty

Peter Singer, a security analyst from Brookings Institute,⁸³ points out that the nation state is rapidly losing one of its essential attributes, namely the monopoly on the right to use force within international law. Bakan goes further and says:

If corporations and governments are indeed partners, we should be worried about the state of our democracy, for it means that government has effectively abdicated its sovereignty over the corporation.⁸⁴

81 Michael Reisman, ‘International legal responses to terrorism’, *HoustonJInt’lL* (1999) 22 9-61 at 15.

82 See Bakan, *supra* n 23 at 113.

83 See, e.g., Singer, *supra* n 6.

84 See Bakan, *supra* n 23 at 108.

Of the \$87 billion approved by the USA Congress for the Iraq conflict, it is estimated that \$30 billion will go to PMCs.⁸⁵ Companies are motivated by profit, it is their whole *raison d'être*, they are not concerned with matters of foreign policy or security unless and until it impacts on their ability to make profits. Often, of course, this will be the case and then the concern becomes one of the impact of powerful companies (whose wealth may far exceed the gross domestic product of some nation states), in their ability to lobby and influence states to adopt policies that will advantage their profit making. Often it is humanitarian ideals, the environment and minority cultures that suffer in this process. The democratic process is meant to give voice to these concerns, but fear arises that PMCs having access to state of the art intelligence and defence hardware may drown the individual voice. Economist Milton Friedman admits that a function such as that of the armed forces is one of the few areas that should remain non-privatised in the public domain and under government control:

Nothing but the most basic functions – the judicial system, the armed forces...
Friedman says, should be within the government's control.⁸⁶

Enes Becirbasic, a Bosnian military official, highlighted a major concern when dealing with MPRI stating 'It's a conflict of interest. I represent our national interest, but they are businessmen'.⁸⁷ When the Papua New Guinea government signed a contract with the PMC, Executive Outcomes (Sandline), to train the army to contain a secessionist rebel uprising, the national army rebelled and five days of rioting and protests ensued.⁸⁸ States that hire PMCs are usually financially poor but mineral rich, and as such are vulnerable to the persuasion to use PMCs.⁸⁹

The common practice around the Western world of downsizing to improve efficiency and make a profit is impacting in the military world. USA Secretary of Defence, Donald Rumsfeld, has pledged that he will try to cut a further 200,000 jobs in the armed forces, pursuing a policy of downsizing and outsourcing, with the USA military only 60 per cent of what it was a decade ago.⁹⁰ The question is where redundant national military personnel go, given that often, their only employment has been in the army. They tend to become a ready supply for PMCs moving into the area, offering better pay and conditions. Furthermore, the price paid for services by companies like

85 See, e.g., Traynor, supra n 31.

86 Bakan, supra n 23 at 113.

87 Traynor, supra n 31 at para 41.

88 Vankin, supra n 18.

89 Avant, supra n 30; Singer, supra n 6.

90 See, e.g., Traynor, supra n 31; Singer, *ibid*.

Blackwater is causing many military personnel to leave their national armies.⁹¹ Huge implications exist for national armies around the world; whether they can compete and whether they will be able to attract enough personnel to maintain a national armed force with quality personnel.⁹² Former Rear Admiral John D. Hutson and Dean of the Franklin Pierce Law Centre has concerns about whether outsourcing has gone too far and what will be the procedure for dealing with such people, who are not accountable in the way national military are, resulting in a diminution of human rights:

I have a serious problem with people in sensitive positions, like interrogators.⁹³

The end result of permitting PMCs to equip themselves with the ability to engage in killing undermines not only state sovereignty but a key premise of international law namely the control of the state over the monopoly on the use of force. Unless the state can reassert control and show a willingness to make PMCs accountable to the democratic process democracy will fail.⁹⁴

Education in Human rights /IHL

For the humanitarian perspective to prevail and be practised in the field of conflict, it is essential that all people are educated in IHL and the laws of armed conflict. To this end the ICRC, while not engaging in public debate about the rights or wrongs of this new corporate phenomenon have undertaken an education campaign in IHL for such contractors.⁹⁵ The repercussions of the failure to understand these rules is experienced by the loss of morale and domestic support for governments engaged in conflict, the incident in relation

91 Traynor, *ibid*, para 28, 'One senior British officer complains that his driver was recently approached and offered a fortune to move to a rather "dodgy outfit". Ex SAS veterans in Iraq charge up to \$1000 a day'; Luke McIlveen, 'High Pay goes with high-risk territory', *The Courier-Mail* May 3, 2005, "The risks are great; but for former soldiers like Ahmelm, so are the rewards. Salaries of \$9,000 a week are not uncommon." 4.

92 Kim Landers, 11 March 2005 Skills Shortage Hits Defence Force, *ABC Online* 'In the last two years 31 SAS soldiers have left the Australian Defence Force to take up these lucrative private sector positions'. The Australian Defence Force Chief, General Peter Cosgrove admitted to a Joint Parliamentary inquiry that the Australian defence force is competing with 'mind-boggling sums that have been dangled in front' of defence personnel to attract them away from the Australian defence forces. <<http://www.abc.net.au/pm/co> accessed 15/03/2005> at 15 March 2005.

93 See, e.g., Ante, *supra* n 40 at para.13.

94 See, e.g., Shannon, *supra* n 4 at 40-45.

95 ICRC, 'The ICRC to expand contacts with private military and security companies' August 4, 2004 <<http://www.icrc.org/web/eng/siteeng0.nsf/html/63HE58>> at 18 May 2005.

to prisoners at Abu Ghraib being one example. A nation can only wage a war as long as it has the continued support of its people. Governments, well aware of this, must maintain huge public relations campaigns.⁹⁶

Part of the education process in IHL has occurred through the prosecution of war criminals. Since 1945 there have been some significant trials of war criminals, such as the Nuremberg and Tokyo War Crimes Tribunals and more recently the ICTY trials (of Milosevic and other lesser known individuals such as Tadic) and the not so successful Rwandan Tribunal.⁹⁷ However for all these public cases, often seen as the imposition of victors' justice, there seems to have been much impunity for the violators of IHL.⁹⁸ Some reasons for this include the camouflage of offences by the violence of conflict, and the fact that combatants on the winning side are likely to evade prosecution, as such prosecution would dissuade future combatants and weaken the victor's military morale.⁹⁹ Prosecution not only challenges the 'justice' of the 'winner', when normally everything is forgotten in victory or the desire to forget war, but is also prohibited by the sheer cost and logistics of Westernised juridified accountability, as in Rwanda.¹⁰⁰

If this is the state of successful enforcement of IHL in regard to national military personnel it is possible to imagine the impunity with which PMCs will act when such legal constraints arguably do not effectively apply. Major General Antonio M. Taguba, in his report into the torture of prisoners in Iraq found that two interrogators-for-hire, neither of which have been charged with any offences, one from CACI International Inc¹⁰¹ and the other from a subcontractor for Titan Corporation, were in conjunction with military personnel 'either directly or indirectly' responsible for the abuses at Abu Ghraib.¹⁰²

96 Nina J Easton and Susan Milligan, 'PR Blitz counters antiwar protest' *The Boston Globe*, <<http://www.boston.com/news/nation/washington/articles/2005/08/23>> at 25 August 2005.

97 Amnesty International, 'Rwanda Gacaca: A question of Justice' Amnesty International 2002 <<http://web.amnesty.org/library/print/ENGAFR470072002>> at 13 May 2004.

98 See, e.g., Matthew Moore, 'Militia chief is first to be jailed for massacres' *The Sydney Morning Herald* (Sydney), Thursday, May 20 2004, News 10: the sentencing for 8 years of Beni Ludji may well be the only imprisonment of an Indonesian for the East Timor massacres.

99 See, e.g., O'Clery, *supra* n 45; A prime example is the recent uncovering of evidence of mass slaughter in Quang Ngai province, Vietnam in 1967 by a unit called Tiger force. The massacre has been kept secret for 35 years, although known to the White House and Pentagon, and the 18 soldiers alleged to have committed the crimes have never been prosecuted.

100 See *supra* n 97.

101 Formerly named Consolidated Analysis Centre renamed CACI International Inc.

102 See, e.g., Hersch, *supra* n 43 at para 32.

Apparently well-structured societies may have trouble upholding IHL principles if the society has become overly militarised and humanitarian considerations are not given priority in the education processes. Military forces that use excessive force in their attempts to attain peace and security will only succeed in alienating peoples and minorities, often creating escalating cycles of violence rather than the peaceful outcome the use of force was meant to achieve.¹⁰³ Australia is now increasing this brutalisation process by having SAS troops trained to withstand torture:

Australian soldiers are being blindfolded, stripped naked and menaced by savage dogs for up to three hours in extreme training exercises to prepare them to resist torture.

The intensive regime, approved at the highest level of government, is about to be upgraded in response to the growing threat from enemies who do not respect the rules of the Geneva Conventions.¹⁰⁴

This failure to prosecute and diminution in application of the principles of IHL sends a clear message to those who matter most, namely personnel in conflict zones, that IHL can be disregarded.

V. IMPLICATIONS FOR IHL

The New World

The aftermath of 9/11 has seen the vultures fly around the broken carcass of human rights and IHL. The fear instilled by the word terrorism, a threat seen as being everywhere and in everything, has challenged the law and centuries of development in a progression towards the legal control of violence and protection of human rights. An example of this is the USA government's refusal to act within the constraints of the international existing regime, in refusing to accept that an appropriately established tribunal, and not the executive, is entitled to determine whether a person is to be categorised as a prisoner of war, or to be given a new name 'unlawful or enemy combatant', and placed outside the law as it is understood by the international community.¹⁰⁵

103 Since the 'success' of the coalition forces in removing Saddam Hussein thousands of people have been killed in Iraq; see, e.g., Casualties in the Iraq war CBC News Online | Updated March 23, 2005 <<http://www.cbc.ca/news/background/iraq/casualties.html>> at 30 March 2005.

104 See, e.g., Simon Kearney, *SAS naked and bound in training*, *The Australian*, 20 August 2005; David Leigh, 'UK forces taught torture methods' *The Guardian*, 8 May 2004 'There is a reservoir of knowledge about these interrogation techniques which is retained by former special forces soldiers who are being rehired as private contractors in Iraq.'

105 See, e.g., Wedgewood, *supra* n 35; 'Working Group Report on Detainee Interrogations in the Global War on Terrorism, outlining the argument for torture of terrorism detainees'.

The international community is gradually coming to acknowledge that the interests of the individual must prevail over the interests of the state in certain situations.¹⁰⁶ The establishment of the ICC is one such example. The regime of human rights has paved the way for acceptance by the international community that the sovereignty of states must yield to basic fundamental principles of human rights.¹⁰⁷ The question is will governments feel compelled to enshrine in law the need for corporations to abide by IHL. A further question is will shareholders and their legal entitlement to profits yield to the greater need of human rights and whether the deterrent of public loss of credibility of corporations will act as a sufficient motivation for such entities to show respect for human rights.¹⁰⁸ One wonders whether dismissal of an employee is a sufficient threat to ensure the observance of IHL and human rights given the ability of companies to hide behind a corporate veil and invest huge amounts in public relations damage control and spin.¹⁰⁹ With PMCs like Blackwater Consulting holding competitive 'world swat challenges' with live fire, it is hard to believe that the international community can maintain a consciousness of humanity that supports peace over war.¹¹⁰

Consequences – Politically, Socially and Legally

Humanitarian law is a law made by and for states. It is not readily applicable to corporate entities. Nietzsche's description of the 'cold monster of the state' as an 'entity that defends its subjects and is the champion of a kind of collective egoism, a powerful instrument acting for the most immediate advantages of its people in preference to all else,' could more chillingly be applied to the 'cold monster of the heartless corporation.'¹¹¹

106 See, e.g., Kessel, Jerrold, 'Israel Supreme Court bans interrogation abuse of Palestinians', CNN 1999 <<http://www.cnn.com/WORLD/meast/9909/06/israel.tortue/>> at 24 June 2004; It is encouraging to see the rule of law prevailing with the US Supreme Courts recent decision *Rasul et al. v. Bush, President of the United States, et al.* Decided June 28 2004 which found 6:3 that Guantanamo Bay and therefore the detainees held there are subject to the legal jurisdiction of the US. 'Held: Petitioners here differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.' <<http://a257.g.akamaitech.net/7/257/2422/28june20041215/www.supremecourtus.gov/opinions/03pdf/03-334.pdf>> at 18 May 2005.

107 See, e.g., Rhonda K.M. Smith, *International Human Rights* (2003) 26-28.

108 See, e.g., Bakan, *supra* n 23 at 75-79.

109 Andrew Terry & Des Giugni, *Business, Society and the Law* 3rd Ed (2003) 168-169.

110 See, e.g., Blackwater Security Consulting, 'Blackwater USA' 2004. <<http://www.worldswatchchallenge.com/welcome.htm>> at 21 June 2004.

111 See, e.g., Pictet, *supra* n 2 at 87.

With corporations, 'people' are taken out of the equation and replaced with 'profits,' pushing the world towards the inhumane abyss.¹¹² The conglomeration of defence, mining, technology and arms corporations presenting powerful lobby groups and significant power blocks mean that a new player has to be factored into IHL if any semblance of control balancing humanitarian concerns against military might is to prevail. Connections between mining and security corporations that are designed to maintain profitability, efficiency and effectiveness through complex financial arrangements result in entities that are very different to the concept of mercenaries as previously known.¹¹³

The notion of 'unlawful or enemy combatants' is likely to haunt Western governments for a long time to come. The USA justifies its treatment of Al-Qaida on the basis that they are non-contracting parties to the Geneva Conventions and Additional Protocols.¹¹⁴ However, this assumption betrays the clear and well-reasoned basis set out in the Geneva Conventions for all contracting parties to follow their obligations, irrespective of whether the enemy is a party or not.¹¹⁵ The ICRC stresses the absolute nature of the Geneva Conventions in which states solemnly bind themselves to the obligations to be observed at all times irrespective of whether there is reciprocal action by the other state or aggressor. Humanitarian law cannot afford to become a smoke screen behind which powerful nations and corporations can hide, by picking and choosing what rules are applicable to armed conflicts. 'Persons who have been put out of action on the battlefield, or kept out of the war altogether, must also be kept out of political manoeuvring.'¹¹⁶ The Honourable Sir William Deane, former Governor-General of Australia stated that the:

... denial of the fundamental responsibility of a democratic government to seek to safeguard the human rights of all its citizens, including the unpopular and the alleged wrongdoer, in the case of the two Australians indefinitely caged,

112 See, e.g., Jane Caputi, *Gossips, Gorgons & Crones The Fates of the Earth* (1993).

113 See, e.g., Shannon, *supra* n 4.

114 See, e.g., Defence, 'Working Group Report on Detainee Interrogations in the Global War on Terrorism, outlining the argument for torture of terrorism detainees' *supra* n 37 at 4. 'It should be noted, however, that it is the position of the U.S. Government that none of the provisions of the Geneva Conventions Relative to the treatment of Prisoners of War of August 12, 1949 (Third Geneva Convention) apply to Al-Qaida detainees because, *inter alia*, Al-Qaida is not a High Contracting Party to the Convention.'

115 Geneva Conventions I, II, III, IV Common arts 1 & 2.

116 Pictet, *supra* n 2 at 91.

without legal charge or process, in Guantanamo Bay jail . . . encompasses the challenge to advance truth and human dignity rather than to seek advantage by inflaming ugly prejudice and intolerance.¹¹⁷

Definitional problems need to be resolved. A new treaty dealing with this development should be considered. It may be timely to utilise the little used provisions of Art. 90 of Additional Protocol I, in a wider role than was initially envisioned, and to invite an International Fact Finding Commission to investigate the impact of PMCs. These measures would encourage respect for, and greater awareness of, the Geneva Conventions and Protocols. The use of Article 90 Additional Protocol I could provide a starting place for investigation and debate.

Most inquiry to date has been at a national level, for example the UK Green Paper.¹¹⁸ The Australian Strategic Policy Institute has supported the use of PMCs on the battlefield provided the legal regulatory framework can be tightened. The ICRC has declared that it will not engage in discussion on the rights and wrongs of PMCs but rather focus its effort on education of IHL for such organisations.¹¹⁹ The Bellagio Conference in 2002¹²⁰ considered ways of controlling resource flows, particularly financial resources to conflict zones, with a view to creating an international sanctioning regime that curtailed economic gain from conflict. Overall the responses to PMCs are piecemeal and contradictory.

Further social and political difficulties are being created by the looming world scarcity of oil and other resources, which puts a premium on extraction of such resources. Halliburton is a PMC, not unlike the British East India Company, that has used its military capacity to protect extraction of oil in Angola and now Iraq, as well as supplying petroleum to the USA military in Iraq.¹²¹ Vice President of the USA, Dick Cheney, has been involved with a number of companies such as Halliburton and Brown & Root that were contracted to supply food, water, laundry, heavy equipment and security services in

117 The Honourable Sir Deane, William, 'Address by The Honourable Sir William Deane on the occasion of the conferral of the degree of Doctor of Laws honoris causa at The University of Queensland in 2003 para 5.

<<http://by19fd.bay19.hotmail.msn.com/cgi/getmsg?curmbox=F000000001&a=473>> at 10 May 2004.

118 U.K. Green Paper, *supra* n 31.

119 ICRC, *supra* n 95.

120 International Peace Academy, 'Policies and Practices for Regulating Resource Flows to Armed Conflict', IPA Conference Report, Bellagio, Italy 21-23 May 2002.

121 For more on Halliburton see Schwartz, *supra* n 29; Singer, *supra* n 6 at 23: 'During the Balkans conflict... Brown & Root is alleged to have failed to deliver or severely overcharged the US Army on four out of seven of its contractual obligations.'

conflict zones. This mix of political and private interests is a murky area where conflicts of interest need to be thoroughly considered and leadership needs to be above reproach.¹²²

John Hari, writing for *The Independent*, London,¹²³ looks to the lessons of history and reminds us of the East India Company's disregard of explicit orders by the British government in its attack on Portuguese garrisons in pursuit of its own profit. He also refers to the fate of the Hundred Years War which was determined by private armies burning towns that refused to pay for their protection. What does a state do if a PMC decides it doesn't want to work for it any more and worse still, if the other side pays more? PMCs are making huge profits and are in demand. Computer Sciences Corp, an IT company, bought Dyncorp for almost US\$950 million and I-3 Communications obtained MPRI for US\$35 million in 2000.¹²⁴

State responses

As the main actors in international public law, states are under an obligation to enact domestic legislation and to ensure the rules of IHL are upheld.¹²⁵

States are bound to refrain from resorting to terrorism and are to do everything in their power to prevent terrorist acts from being committed by individuals in a territory under their jurisdiction. This puts a direct obligation on the persons who act on behalf of the state, including – and this is particularly important – members of the armed forces, of the police and similar organisations. International humanitarian law does not put direct obligations on individuals who do not in some way represent the state.¹²⁶

122 See, e.g., Nick Calacouras, 'A Profit Powerhouse', *The Student Leader*, 6 March 20005.

123 John Hari 'This nightmare world full of privatised armies', *The Independent* (London), 14 November 2003, para 10.

124 See, e.g., Ante, supra n 40 at 22-27 - A number of contractors working in Iraq are currently being audited by the Coalition Provisional Authority to eliminate fraud and abuse of United States domestic law.

125 For an overview of laws, see, e.g., UK Green Paper, supra n 31.

126 See, e.g., Gasser, supra n 51.

States' domestic legislation, however, has been ineffective for many reasons, including the lack of will and resources to enforce it.¹²⁷ On an international level, what is meant by a war crime is also unclear, resulting in largely unsuccessful war crimes prosecutions to date, even where international regulation applies.¹²⁸

Various attempts to control PMCs or, more commonly, mercenaries have been made by states with little success.¹²⁹ South Africa passed the *Regulation of Foreign Military Assistance Act* No. 15 of 1998 in an attempt to control its citizens when participating as combatants in armed conflict for private gain. Such legislation, however, does not appear to have prevented a number of South African PMCs from operating in Iraq in contravention of this law, with only two such companies having registered their operations in accordance with the legislation, while others have not.¹³⁰ The Australian *Crimes (Foreign Incursions and Recruitment) Act* 1978 makes it an offence to recruit mercenaries within Australian or for Australians to fight in non-governmental forces abroad. The Act excludes persons such as David Hicks; an Australian found fighting with the Taliban forces in Afghanistan. The Act is mainly of deterrence value only. Michelle Bachelet, Chile's Defence Minister, has been concerned that paramilitary training of Chilean nationals from Pinochet's regime breaches Chilean laws concerning private citizens' use of weapons.¹³¹ PMCs are not readily accountable for their actions: not being part of a military chain of command, they are subject to the law of the country in which they

127 See, e.g., Gerry Simpson, 'War Crimes: A Critical Introduction', in T.H.L. McCormack and G.L. Simpson (eds.) *The Law of War Crimes* (1997) 1-30.

128 Ibid, 12: '... the meaning of war crimes itself has given rise to a proliferation of meanings. These include (1) the generic everyday usage of the term to signify abhorrent acts carried out in war or peace and including genocide and crimes against humanity, (2) the legalistic definition of war crime as a technical breach of the laws of war, (3) the grave breaches enumerated in the Geneva Conventions and Protocols, (4) the category "violations of the laws and customs of war" contained in the Statute for War Crimes Tribunal for the Former Yugoslavia and (5) the term "exceptionally serious war crimes" used by the International Law Commission in its Draft Codes on Crimes Against the Peace and Security of Mankind. While states have laws that can apply to private corporate armies very few have ever resorted to them. Australia possibly stands as an exception with the DPP having laid charges under the *Australian Crimes (Foreign Incursions and Recruitment) Act* 1978.'

129 See, e.g., UK Green Paper, *supra* n 31 at 40-43.

130 See, e.g., Bill Berkowitz, *Mercenaries 'R' U.S.*, 'Private Pentagon contractors are paying soldiers of fortune from Chile and South Africa up to \$4,000 per month for stints in Iraq' (2004) in which Berkowitz notes that Erinys, a joint South African- British company, secured a multimillion dollar contract to protect oil wells in Iraq without registering its operations pursuant to the Regulation of Foreign Military Assistance Act, para. 20, WorkingForChange <<http://www.workingforchange.com/article.cfm?itemid=16701>> at 24 June 2004.

131 Ibid, para 5.

are temporarily located. A further problem is exemption agreements such as the Coalition Provisional Authority (CPA) agreement with Iraq where PMCs have been ensured immunity from prosecution under Iraqi law.¹³²

Some acknowledgment of the need to control this new phenomenon is occurring at national levels with the UK Green Paper investigation that looks at a number of options for regulation.¹³³ Unfortunately none of these seem entirely satisfactory. Self-regulation, a preferred option for many of the PMCs concerned,¹³⁴ has been adopted by a number of USA companies working under the umbrella of the International Peace Operations Association (IPOA).¹³⁵ Nine companies are members of IPOA and pledge to follow a code of conduct. However, like all codes of conduct, the question comes down to the nature and effectiveness of its enforcement mechanism.

VI. CONCLUSION

Law is more reactive than proactive and experiences periods of advancement and regression. However, the struggle between good and evil is in eternal opposition, *odi et amo*, and may need to be contained by more than laws. A political and social desire coming from knowledge, education and an understanding of these forces is demanded from every individual before the law can fully respond. Grieg states:

This interplay between the political and the legal must be kept in mind throughout any study of international law... [I]nternational law cannot exist in isolation from the political factors operating in the sphere of international relations.¹³⁶

To maintain the balance between military interests and human rights not only is a strong legal system and willingness to uphold the law required but also a strong political and social will.

132 The *Military Extraterritorial Jurisdiction Act of 2000*, Pub L No 106-523, 114 Stat 2488 (US) may operate in limited circumstances but has only been used once since its passage; See CPA Order 17 (Revised) on the 'Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors', which states explicitly that under 'international law... [they] are not subject to the laws and jurisdiction of the occupied territory' but rather the law of their parent countries.'

133 UK Green Paper, *supra* n 31.

134 Sandline International, 'Private Military Companies – Independent or Regulated?' 28 March 1998 <<http://www.sandline.com/white/regulation.doc>> at 16 May 2005.

135 International Peace Operations Association IPOA 2004 <<http://www.ipoaonline.org/>> at 20 June 2004.

136 D.W. Greig, *International Law*, 2nd Ed (1976) 1.

States have impacted the development of IHL through their attitudes, sometimes sadly in ways that diminish these laws. 'We are all aware that nothing is more dangerous than the legal fictions which are now so prevalent and so poisonous to international relations.'¹³⁷ The concern is that if states act with impunity, the rise of PMCs will only make the enforcement of IHL all the more difficult. The end of the Cold War has definitely led us into a New World order but unfortunately, not the one of greater peace and justice that was anticipated. It is to be hoped, however, that with all the machinery of the United Nations in place, IHL will be accepted as a universally acknowledged value and will be sustained even if certain regressive periods occur from time to time.

137 Pictet, *supra* n 2 at 91.

Human Rights, The HRA, and Asylum Seeker Regimes in the UK: The New Humanitarianism?

Emma Henderson*

How we deal with asylum seekers is one of the tests of our civilisation. It is always more difficult and more controversial to take responsibility for looking after people who come from elsewhere and the issue often engenders irrational, primeval instincts about difference and alienation and causes politicians, the media and the public to overact and become overly defensive.¹

I. INTRODUCTION

The UK Human Rights Act 1998 (“HRA”) is a fascinating development. In a nation with a history of strong commitments to civil liberties but no written constitution or bill of rights, the rapidity with which political rhetoric in the UK has shifted since 1998 to reflect an apparent acceptance of ‘rights’, is a powerful demonstration of the hegemony of human rights discourse. The HRA requires that all legislation be certified as human rights-compliant before it can be debated in Parliament. As a result, even issues where there seems to be no obvious connection with human rights – or where (as in the case of the asylum seeker regime) the legislation in question seems to be blatantly in violation of international human rights norms, are now referenced to the HRA. It is this ability for conservative forces to absorb the language of human rights without genuinely understanding or committing to the essence of rights, which provides the primary focus of this paper: far from being a shining example of the internalisation of human rights norms, the HRA provides an important example of the hidden perils in legislating rights. In light of the increasingly restrictive treatment of asylum seekers arriving in the UK, genuine questions about the effectiveness of the HRA as a mechanism of rights compliance are raised. Given that Victoria is currently searching for a legislative model for human rights reform, the UK HRA provides a cautionary tale with regard to both process and substance.

This paper provides an overview of recent legislative shifts in the UK’s asylum seeker regime, and relating these changes to the protections offered by the HRA. To that end, this paper seeks to first, provide an overview of the place

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1 Simon Hughes, *Hansard*, House of Commons, 24/11/01, at col 100WH.

of 'human rights' in the UK legal system; secondly, examine the changing regime for asylum seeker processing in the UK; and conclude considering the effectiveness of the HRA as a mechanism for human rights promotion.

II. THE HRA WAS NOT INTENDED TO BE A DOMESTIC BILL OF RIGHTS

Rather than setting out a list of fundamental freedoms in the manner of the Canadian or American Bills, the HRA authorises domestic legal proceedings against public authorities which breach (some of) the articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). After all domestic remedies have been exhausted, the Act allows claimants to appeal to the European Court of Human Rights.² In doing so, the Act gives effect to articles 1 and 13 of the ECHR:

Article 1: States must secure convention rights to everyone within their jurisdiction.

Article 13: States must provide an effective remedy where violations occur

Section 3 of the HRA provides that in so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with Convention rights. Where such an interpretation is not possible, courts do not have the power to affect the validity of the legislation in question, but instead are authorised to make a Declaration of Incompatibility. There is nothing in the Act which compels Parliament to remedy any such incompatibility.

The HRA requires UK courts to take European Court decisions and European Commission reports into account in interpreting the Convention rights (s2), thus ensuring that UK human rights practice develops alongside that of Europe. However, the "margin of appreciation" (the doctrine that each nation must be allowed some latitude in resolving conflicts between convention rights and

2 European Convention on Human Rights and Fundamental Freedoms as amended by the 11th Protocol. The ECHR has 59 articles in 3 sections and 11 protocols, of which the 1st, 4th, 6th and 7th confer further rights. (The others were procedural and are consolidated and replaced by the 11th). The UK HRA incorporates some articles from the 1st and 6th protocols (protection of property, education, free elections, and abolition of the death penalty). The HRA specifically derogates from Art 5(3) regarding terrorism, and Art 2 (1st protocol) regarding education. The UK has not ratified protocols 4, 6, 7 or 9 (9 now replaced by 11) (although plans were made to ratify article 7 - procedural safeguards for expulsion of aliens and the right of appeal in criminal matters, right not to be punished twice, compensation for wrongful conviction, equality of spouses). Protocol 4 provides, inter alia, against the expulsion of nationals and the collective expulsion of aliens.

national interest) is a settled part of European Convention law, and as such, both UK and European courts have accepted that the UK is able to go its own way to some extent in domestic policies.

Why the HRA instead of a Bill of Rights?

There lies at the heart of the HRA a contradiction. In introducing the Bill, Whitehall described its effect as “a tidal wave which will transform the legal landscape and affect every area of law.”³ However, the executive and the legislature were very clear in their intention that the Act not be seen as a domestic Bill of Rights or an instrument for rights litigation; politicians repeatedly argued that the purpose behind the Act was to change the idea of citizenship – to create a human rights culture in which litigation would become irrelevant:

... the internalisation of human rights culture is the point; all public authorities will know that their behaviour, structures and conclusions will be subject to HR review in the same way that race relations legislation and EEO legislation transformed social relations by making authorities ask ‘have we complied with’...⁴

The cultural change envisaged by the majority of Parliament (and particularly the government) was of a specific nature. In particular, Whitehall wanted to gain acceptance of a social compact which saw rights recognised in exchange for social obligations.

One of the problems which has arisen in Britain in recent years is that people have failed to understand from where rights come. The philosopher David Selbourne has commented on the generation of an idea of dutiless rights, where people see rights as consumer products which they can take, but for nothing. The truth is that rights have to be offset by responsibility and obligations. There can and should be no rights without responsibilities and our responsibilities should precede our rights. In developing that human rights culture, I want to see developed a much clearer understanding among Britain’s people and institutions that rights and responsibilities have properly to be balanced; freedoms by obligations and duties.⁵

The Home Secretary, Jack Straw, argued strongly in his second reading speech that the new Bill would not create new substantive rights but rather was focused on making existing rights more immediate and relevant through

3 Lord Woolf, MR, [1997] Denning Law Journal 1, cited in *The 1998 HRA Explained*, David Leckie and D Pickersgill, The Stationary Office 1999, at 1.

4 Lord Williams, *Hansard*, House of Lords, 3/11/01, 1307.

5 Jack Straw, *Hansard*, House of Commons, 21/10/98, 1357-59.

the introduction of a sense of social obligation.⁶ To this end, while the HRA was attached to other policies such as the teaching of citizenship in schools, effective enforcement strategies were resisted.

The HRA did not create a central authority with powers to oversee the HRA or enforce compliance.⁷ The Home Office was given the role of implementing the HRA, but this task exists in conflict with its primary law enforcement portfolio, meaning that there is no real incentive to realise the full potential of the Act. The Home Office created the Human Rights Unit but this unit was small, under resourced and not high profile, focusing on risk management strategies rather than the possibilities of the Act. The Unit created guide materials and set up an effective framework to provide guidance to departments on their preparation for the Act but this is hardly evidence of cultural change in government.⁸

The ECHR has serious limitations as a cornerstone of a HR culture. Children's rights, privacy rights, detention, asylum seekers and the administration of justice are all dealt with very weakly, if at all, in the Convention.⁹ The Convention does not deal with any collective rights and has no mechanism for dealing with endemic situations.¹⁰ Reliance on a narrow band of justiciable civil and political rights seems an oddly ineffective means of effecting cultural change. Given that the UK has a very strong record of domestic compliance with European Court rulings, simplifying access to the European Court rulings does not seem to signal a significant shift in government intention. One way to make sense of this is to understand that while the HRA was sold as a tool to effect cultural change, in reality the Act was intended more as a defensive mechanism. Overwhelmingly, when debating the HRA, parliamentarians expressed a strong desire to protect parliamentary sovereignty. Led by Home Secretary Jack Straw, politicians from both major parties argued that the authority to make decisions derives from a democratic mandate and that this primacy must be protected. The constant referral (and deferral) of UK

6 His use of the term 'existing rights' is another demonstration of the hegemony of rights discourse; strictly speaking, with no written constitution and no bill of rights, UK citizens did not have any inalienable "rights" but rather liberties recognized by the common law.

7 Jeremy Croft, *Whitehall and the Human Rights Act* (1998) [2000] Report 61: UCL Constitution Unit

8 Ibid; Jeremy Croft argues that the government sold the HR in terms of its cultural impact, rather than its progressive/obstructive impact, because it was easier to sell this way, but once passed the need or relevance of culture became obsolete.

9 Article 14, the catch-all discrimination provision, does not overcome these difficulties as it relates only to those rights set out in the other Articles and as such has no independent authority.

10 For instance in Italy the length of civil proceedings has been found consistently to breach the right to a fair trial, but, the European Court can not force the Italian government to change its procedures and, as a result, the Court deals with hundreds of individual complaints each year.

policies to the decisions of the European Court were seen as weakening the authority of the State. On the other hand, it was argued that giving UK courts the authority to set aside legislation because of their own interpretations of human rights, would confer excessive power on the judiciary and bring the courts into conflict with Parliament: indeed, even the courts did not appear to want that power.¹¹

Thus Spencer Zifcak has argued that the best way to view the HRA is as a containment strategy rather than as a springboard for pro-active change;¹² as a move to protect the sovereignty of the UK parliament from the depredations of the European Court, rather than a force for genuine cultural change. By certifying legislation under the HRA, the State acknowledges the importance of human rights, while at the same time UK courts are given just enough power to oversee that process but not enough to allow them to create their own brand of moral authority and thus set up in opposition to Parliament. Seen in this light, the shortfalls of the Act make sense.

What this means is that the HRA contains a vision of a human rights culture which is very different from the libertarian view that human rights empower individuals against executive and legislative overreach. Rather than having as its goal the UN ideal of HR as the “strengthening of respect for Human rights and fundamental freedoms and the development of the human personality and sense of dignity;”¹³ the HRA exists to defuse conflict by allowing individual citizens to protect (a few, specifically articulated,) rights, through the courts. It is in this light that we come to the asylum seeker regime in the UK and its relationship with human rights culture and the HRA. As the ECHR does not have a clearly enumerated right which speaks directly to the issue of asylum seeker protection, it will be seen that the HRA does not place any significant restrictions on government action in this area, regardless of how antithetical to a human rights culture that action may appear to be.

III. THE UK ASYLUM SEEKER REGIME

The UK’s obligations toward asylum seekers stem from Article 14(1) Universal Declaration of Human Rights:

Everyone has the right to seek and to enjoy in other countries asylum from persecution.

11 See for instance, the Lord Chief Justice speaking in the House of Lords in the 2nd reading speech in November 2000, quoted in J Cooper and A M Williams, *Legislating for Human Rights: The Parliamentary Debates on the HR Bill* (2000) 5.

12 *Supra* n 7 at 27.

13 Jeremy Croft, *supra* n 7 at 13.

This right is the subject of the UN *Convention on the Status of Refugees* 1951, and the 1967 protocol, (to both of which the UK is a signatory) which provide that a refugee is someone who is in well-founded fear of persecution on the basis of race, religion, nationality, or membership of a particular social group. The 1951 Convention responsibilities were acknowledged in immigration rules created under the *Immigration Act* 1971. Those rules prohibited action in contravention of 1951/67 responsibilities and created a determination procedure in accordance with the UNHCR Handbook, providing that someone who is:

- in the UK or who has arrived at a UK port of entry; and
- a refugee within the meaning of the 1951 Convention and the 1967 protocol; and
- able to demonstrate that if the claim were refused, he or she would suffer *refoulement* to the country of origin contrary to the provisions of Article 33 of the 1951 Convention

will be recognised as a refugee in the UK. In addition, the 1971 rules created a separate category whereby asylum seekers denied refugee status could nonetheless be granted Exceptional Leave to Remain. ELR (now abolished and replaced with a new, less discretionary category of visa) operated on a purely discretionary basis, allowing the Home Secretary to grant permission to an alien to remain in the UK on the basis of hardship (eg for stateless persons), or for other reasons (such as the fact that the applicant had successfully assimilated into the community).

This approach was relatively unproblematic at its inception, but the disintegration of borders within the European Union and difficulty controlling the movement of people coming from Eastern European countries with boundaries beyond Europe,¹⁴ meant that by the early 1990s the numbers of those in the UK seeking asylum had grown to such proportions that politicians began to question the limits of UK obligations.¹⁵

The public/media/political opinion was that the overwhelming majority of those in the UK seeking asylum were using the system to facilitate economic migration. This perception was fuelled by the fact that roughly 20% of those making claims were recognised as either being refugees under the ECHR or

14 See for instance, Jack Straw's comments: "Although the central and eastern European countries have improved their human rights record, countries further to the East may not have done, and their borders are leaky." Jack Straw, Hansard, House of Commons, 1/2/01 at col 484-5.

15 The numbers of asylum seekers rose from 17,000 in 1993, to 34,000 (1997), to 71,700 (2001) to a record high in 2002 of 110,000 applications.

as meeting the criteria for the granting of Exceptional Leave to Remain.¹⁶ The rapid increase in numbers led to genuine political problems: in 2001 the official estimate put asylum costs at half a billion pounds – 100 million on processing costs and the rest on social security expenses. In addition, these kinds of numbers were not something the 1971 asylum regime had been designed to handle: throughout the 1990s there was an enormous backlog of cases waiting to be processed by the Home Office. In May 1998 there were 52,000 AS waiting for initial decisions, 10,000 of whom had been waiting more than 5 years.¹⁷ Added to this was the large number of missing asylum seekers – the lengthy time delay between application and rejection means that by the end of the determination process, many applicants had simply disappeared into the community. Each year the number of asylum seekers removed from the UK is only a tiny percentage of the number of new arrivals.¹⁸ Politicians and commentators alike were of the opinion that the long waiting period before final determinations, and the fact that few failed applicants were removed from the country, combined with the fact that asylum seekers were entitled to work while in the UK, contributed to the international sense of the UK being

16 This figure included a small but steadily rising number of successful appeals. In 1997 there was a 6% success rate for asylum appeals; in 2001, a 19% success rate. The rapid growth in appeal success has less to do with the changing identities of asylum seekers than to do with courts acknowledging the very poor quality of original determination decisions and procedural unfairness as the government changed the legislative regime to speed up the process.

17 This backlog was dealt with by granting amnesties; in the 1999 legislation anyone who had been waiting for more than five years for an initial determination was simply granted a visa. This process was repeated again in 1999. In March 2005 there were 8,700 principal asylum seekers waiting for initial determinations – the lowest level in a decade. Roughly 5000 of them had been waiting for more than six months. Home Office press release 17/5/05: www.icburton/icnetwork.co.uk/natnews

18 For example, from January - October 2000 a total of 58,885 asylum claims were rejected; 7,610 were issued with orders to leave the UK (and presumably were removed), 18,000 were granted ELR and the other almost 30,000 continued to live in the community. In statistics released in 2004 - 2005, the Home Office reported that the total number of failed asylum seekers being removed has decreased; see HO press releases 24/8/2004 (news.bbc.co.uk/2/low/uk_news/politics/3592704.stm) and the National Statistics Online website: www.statistics.gov.uk

an easy target for faux asylum seekers.¹⁹ Thus, by the mid 1990s, at the same time that the HRA was being debated, there was also a strong sense of the need to tighten up immigration and refugee controls.

The *Asylum and Immigration Appeals Act* 1993 was the first legislative response to this changed attitude. Somewhat perversely, the 1993 Act put recognition of the 1951 Convention (s2) and the UK's obligation of *non-refoulement* under Art 33 of the 1951 Convention (s6) into statutory form for the first time:

6. During the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of the decision on the claim, he may not be removed from, or required to leave, the UK.

Section 8 and Schedule 2 (paras 7, 8, 9) gave parallel protection until the end of the appeals process.

While this was a necessary and helpful development, the main purpose of the 1993 Act was to restrict some, and remove other, elements of the informal processing system that had sprung up around the 1971 immigration rules. For instance, whereas the 1971 system had very narrow detention provisions, the 1993 Act gave immigration officials broad discretionary powers to detain asylum seekers deemed not to fall within the convention categories. Significantly, detained asylum seekers had no recourse to the courts with regard to their detention. Also, the Act provided no right to appeal against a decision to refuse asylum.

The 1993 Act provided that asylum seekers were no longer entitled to income and employment benefits (and were no longer entitled to work until their claim was resolved). However, it also provided a social security net – applicants were classed as a group of persons who were, where appropriate, entitled to “urgent cases support” – and this entitlement was the gateway to housing benefits and free school meals, prescriptions and dental treatment. Applicants were in the same position under the *House Act* 1985 as other homeless people, except that they had to be content with “any accommodation, however temporary” and any need they established was to be regarded as “temporary only.”²⁰

19 See for example comments such as those of John Bercow; “...we are principally discussing ...large scale abuse of the asylum system in our immigration laws.... Britain is a soft touch; a dozen a month are forcibly removed - so not surprising that numbers have increased from 32,500 in 1997 to 76,035 in 2000. [We need to ensure] that the centres are secure [so that] we can also guarantee that people seeking to evade immigration control are kept in one place and are unable to disappear into the wider community. They can then be speedily removed, which would have a significant deterrent effect.” John Bercow, *Hansard*, House of Commons 3/5/01, at col 331WH.

20 Section 4, *Asylum and Immigration Appeals Act* 1993.

By 1996 it was clear that these changes had not had any demonstrable effect in slowing asylum applications, and the newly elected Labour government introduced the *Immigration and Asylum Act* 1996, depriving asylum seekers of housing and income benefits.²¹ It also placed further responsibilities on airlines to screen out asylum seekers, and strengthened the detention powers of immigration officials. Nonetheless, the numbers of asylum seekers continued to grow exponentially, and in 1998, soon after the passing of the HRA, Home Secretary Jack Straw introduced an immigration white paper titled “Fairer, Faster and Firmer”. He labelled the approach “a more humanitarian approach to the UK’s obligations under the 1951 Refugee Convention.”²² He argued that the new regime fit within the doctrinal bounds of the HRA in that it sought a “new covenant” between State and asylum seeker;

[The HRA bill] is a landmark in the development of a fair and reasonable relationship between individuals and the state in this country. This is an important backdrop to the proposals in this white paper. [Asylum a]pplicants will be obliged to tell the truth about their circumstances, obey the law, keep in regular touch with authorities, leave the country if their application is rejected and in return they will be treated to a scrupulous application of the 1951 application, applications quickly resolved and not be left destitute while claims being determined.²³

The White Paper emphasis on “mutual obligation” found political and public favour, and took legislative effect in 1999. The first plank of the 1999 reforms “provid[es] incentives to asylum seekers to look first to their own means and communities for support, to create a support system separate from the welfare system.” To this end, the Act removed asylum seekers from the shield of the 1948 *National Assistance Act*, meaning that local councils had no ability to provide emergency aid for those within their boundaries. Instead of local government assistance, under the new regime the State would provide limited and strictly regulated welfare measures for asylum seekers. The total value of support was cut to 70% of basic income support levels and was only available to those who could prove themselves destitute.²⁴ If an applicant could meet this test, aid was provided by way of food vouchers, accommodation and petty cash.²⁵

21 The legislation did allow applicants to receive emergency medical treatment when required from the National Health Service.

22 Jack Straw, Introduction, *Fairer, Faster, Firmer: White Paper* (1998).

23 Ibid.

24 It was argued that those who intentionally made themselves destitute by “spending recklessly whatever money he brings into the country with him” should not be allowed to claim either. See for instance, Lord Williams, *Hansard*, House of Lords 20/10/99 at col 1158.

25 Originally eight, then ten pounds a week, cashed at a post office.

There is no sinister plot being considered or engineered... but asylum support is to be a last rather than a first resort. If there is other accommodation that meets their needs, they should not expect accommodation under the support scheme.... shared accommodation may be quite adequate.... Equally temporary accommodation can be quite satisfactory for some time during the limited period of their asylum claim....²⁶

Support was removed entirely for applicants who failed to win their appeal but went on to judicial review. When it was pointed out that that this meant that failed asylum seekers who were seeking review had no means to feed or house themselves, the government replied that the voluntary sector would come to their aid.²⁷

The accommodation scheme introduced in 1999 was described as a 'dispersal' scheme. Immigration officials were given the power to impose residence conditions on asylum seekers. These powers expanded those in the *Immigration Act* 1971 which only allowed officials to impose residence conditions to ensure departmental contact with the applicant, or to prevent absconding. By contrast the 1999 Act allowed the Home Secretary to make rules preventing asylum seekers from residing in specific areas of the country, or to require an applicant to live in certain kinds of accommodation such as Reception Facilities.²⁸ The Act also created the power to impose curfews on asylum seekers. These changes were argued not to offend the rhetoric of human rights, because genuine refugees would be grateful for any kind of support, whilst those abusing the system were not deserving of consideration:

If they are genuine refugees they will not care about [the location of accommodation]....²⁹

We do not want to be harsh... genuine asylum seekers who are fleeing persecution or a proper fear of it, could [not] object to being relocated [under the dispersal policy]... those who are using the asylum system merely as a vehicle for economic ends will not be happy but that is our purpose.³⁰

In addition to curtailing the freedoms of asylum applicants, and having set in place a scheme designed to remove incentives for economic migration (by preventing applicants from working until their claims were determined

26 Lord Williams, *Hansard*, House of Lords, 20/10/99 at col 1158.

27 See for instance, Lord Falconer, *Hansard*, House of Lords, 20/10/99, at col 1134. Lord Phillips argued in opposition that government should not be able to raid the assets of the voluntary sector against its wishes (at col 1174).

28 These continue to be the subject of much debate in the UK, with strong resistance in the rural areas where it was intended that the centres be built; local governments have sought to use the HRA to prevent the building – with some success.

29 Jack Straw, *Hansard*, House of Commons 27/7/1998, at col 51.

30 Lord Avebury, *Hansard*, House of Lords, 20/12/99, at col 1164.

and the removal of unemployment benefits), the 1999 Act also created a regime for changing what were seen as the other key reasons for the influx of asylum seekers – the lengthy waiting period before final determinations and the ineffective removal policy. The 1999 Act allowed the speeding up of initial decisions by removing procedural controls, again under the rhetoric of human rights:

The Government believes that a policy of fair, fast and firm immigration control will help to promote race equality.³¹

The measures which the government will introduce to speed up the processing of all claims will benefit genuine refugees and wherever possible these cases will be identified early and given additional priority. To that extent the human rights of refugees will be recognised more effectively than they are now.³²

The 1999 changes also increased the “manifestly unfounded” doctrine.³³ This allowed persons making “manifestly unfounded claims” to be placed in immigration processing centres, where, it was argued, they would be housed and provided with legal representation.³⁴ This policy was the subject of further amendment in 2002, with those coming from a list of designated ‘safe countries’ whose initial claims fail³⁵ unable to appeal decisions from within the UK, instead having to leave and appeal from outside. The list of countries subject to the safe countries doctrine has been expanded several times since its introduction, and forms a solid part of the UK political motivation for expansion of EU membership – citizens of one EU state will rarely, if ever, have genuine reasons for seeking asylum in the UK.³⁶

The new time limits designed to speed up the process mean that in practice an asylum seeker has ten working days to complete a 19 page statement of evidence in English and secure legal representation, even if subject to the

31 Supra n 22 at 15.

32 Ibid, 42.

33 Ibid, 9.

34 See *Hansard*, House of Commons, 24/11/01 at 96WH; provided for under regulations giving effect to section 4 of the 1999 Act.

35 These claims are highly likely to fail, given that the decision-makers have rules stating that persons from these countries are unlikely to be genuine refugees. The Oakington Processing Centre now houses those claimants who arrive from the 14 Countries in the “Non-Suspensive Appeals” list in the 2002 Act; statistics between 1997 -2004 demonstrate that removals of claimants from these countries increased by 73%; Immigration and Nationality Directorate “Asylum Fact Sheet” 1 July 2005. (www.ind.homeoffice.gov.uk)

36 See the Select Committee on Home Affairs, *First Report on Border Controls*. The Committee refers to section 11 of the *Immigration and Asylum Act 1999* which provides that all other EU countries are safe third countries of asylum, meaning asylum seekers either originating from, or transiting through, these countries are generally ineligible for asylum.

dispersal policy.³⁷ In 2000, 26,000 applications were rejected for failing to meet the time limit, regardless of the legitimacy of the substantive claims within.³⁸

Further, in a move designed to provide a disincentive to people-smugglers, the Act provides that only people lawfully present in the UK can lodge an appeal within the UK. This means that those who arrive with false documentation and do not declare themselves at the immigration counter at their port of arrival, have no right of appeal until after leaving the country.³⁹ Those who do declare their false documentation upon arrival and immediately seek asylum at the port of entry, have a right of appeal at the IAT – but not the right to legal representation for that appeal.⁴⁰

The Act gave heightened powers to immigration officials, essentially giving them police powers of search, entry and seizure, and the right to fingerprint suspected illegal immigrants.⁴¹ The 1999 legislation also required marriage registrars to report any marriages that they believe are made purely for the purposes of immigration, and are empowered to request evidence of names, age and nationality with 15 days notice. In addition, the Act increased the probationary period to two years (up from one) before an asylum seeker can marry a UK citizen, and introduced a new non-switching provision so that a person can not apply to stay in UK on the basis of marriage after entering on another ground until after two years of marriage. Government members made much in parliamentary debates of encouraging communities with a culture of arranged marriages to look to residents within the UK as marriage partners.⁴²

37 Norman Baker, *Hansard*, House of Commons WH, 11/7/01, at 262WH.

38 Ibid.

39 This provision is deliberately aimed at cutting back on people-smuggling; those who enter a country under the control of a smuggler are usually unable to approach immigration officials at the port of entry.

40 The government provides indirect funding, funding legal centres which provide free assistance to applicants. For an example of the rationale behind removing legal aid, see “It is not necessary that a claimant have legal representation at asylum interviews: all they need to do is set out their case truthfully” *Fairer, Faster, Firmer* supra n 22 at 7.

41 The 2004 legislation has expanded this project, and the Home Office reported in March 2005 that the EU Electronic fingerprint database of Asylum Seekers and other 3rd country nationals is now online. It allows the UK to require primary EU states to accept the return of asylum seekers who have lodged applications in other EU countries. It coincides with the Visa Immigration and Fingerprint Project which prevents asylum seekers who have used false IDs in their applications by matching them with any prior visas granted by UK missions abroad.

42 David Blunkett, *Hansard*, House of Commons, 7/2/02, at col 1028.

If parents [were to] arrange marriages within the UK community of Muslims... rather than by going back to the subcontinent to bring back young husbands and wives, that would help with many of [our] aims...⁴³

The next change came in 2002 with the *Nationality Immigration and Asylum Act 2002*. Amended in 2003, this Act provides that failed asylum seekers with dependants are ineligible for support once they have failed to comply with a removal direction, or where the Secretary of State certifies that such a person has failed without a reasonable excuse to take reasonable steps to leave the UK voluntarily or has placed himself in a position in which he is unable to do so.⁴⁴ Where the removal of support endangers children, then local authorities are required by the *Children's Act 1989* to provide for them – ordinarily this would be achieved by placing them in foster homes. It was suggested in Parliament that a parent who does not agree to this may be deemed to be an unfit parent and the children made wards of the State.⁴⁵

In 2004 the *Asylum and Immigration (Treatment of Claimants) Act 2004* came into effect. This Act reinforced the safe haven doctrine (mentioned above), created several new offences (arriving in UK without valid travel documents and no reasonable excuse, trafficking a person for non-sexual exploitation) and allowed the Secretary of State to set a fee for specific types of applications at a rate designed both to exceed the administrative cost of determining or processing the application and to reflect the benefits that are likely to accrue to the ultimate beneficiary of the application.⁴⁶ Immigration officials were given expanded powers of arrest, for related crimes such as bigamy and forgery. The Act also changed the appeal structure, creating a one-level review whereby the IAT can review its own decisions, conduct reviews entirely in writing, uphold its decisions or substitute another decision or order a re-hearing of the appeal. The tribunal can only substitute a decision if there was a (serious) error of law (s10(4)) and can only order a rehearing if it thinks that it is necessary and where substituting a decision would be inappropriate or undesirable. Section 10(6) means that the tribunal can not review its decisions more than once. Decisions are exclusive and final; section 10(5) read together with the new

43 Anne Cryer, *Hansard*, House of Commons 7/2/02, at col 1028.

44 For example, by failing to comply with steps to obtain travel documents. The removal of support provisions are set out in Schedule 3 of the Act; see in particular sch 3 (9) (2) (b).

45 This provision has been the subject of judicial scrutiny; see *G v Barnett* [2001], where the Court of Appeal accepted that the authorities had the right to offer a place in care for an asylum seeker's child but no obligation to house the family. The same decision was reached in *Ali & Mohammed v Birmingham* (2002).

46 See the Minister of State for Citizenship, Immigration and Counter-Terrorism, in the explanatory notes to the *Asylum and Immigration (Treatment of Claimants etc) Bill 27* November 2003.

s108A mean that there is no right of appeal, nor statutory or judicial review of the tribunal's decisions by the higher courts. Section 108A(3) is essentially an ouster of the High Court's supervisory jurisdiction over the tribunal.⁴⁷

IV. CONCLUSION

Whither the new humanitarianism?

The 1999 Act was passed and came into force in the window between the HRA coming into existence but before it had come into legal effect, meaning that the legislation was not subject to the certification process which requires the responsible Minister to table a document in Parliament stating that the legislation complies with the requirements of the HRA.⁴⁸ The post-2000 amendments to the 1999 Act, and the 2002 and 2004 Acts did fall within the bounds of the HRA, and were all certified as being HRA-compliant. That the certification process is essentially meaningless is demonstrated by the fact that these legislative instruments have been widely condemned as containing as many as thirteen potential breaches of the ECHR, ranging from religious discrimination in the sham marriages provisions, absence of legal basis for detention, absence of judicial control over detention, the low (and now, non-existent in some circumstances) level of welfare support which could (and is intended) to starve someone out of the country, thus potentially offending the *non-refoulement* provision of the UN Refugee Convention, as well as offending against the Convention on the Rights of the Child, and the right to privacy in the ICCPR. The absence of exemptions for those who bring refugees into the country when they are in imminent danger is another worrying aspect from a human rights perspective. The time limits, removal of legal aid, safe countries and save haven laws all potentially breach the Refugee Convention by making it difficult or impossible for potential convention refugees to establish their status as convention refugees.

In addition to these specific issues, there is also the bigger point about the lack of cultural change: if politicians were serious when they argued that HRA would create genuine opportunities for debate about human rights, the procedures followed in effecting change to the asylum seeker regime demonstrates an almost total failure on this count: the lack of effective debate on important issues and particularly the guillotining of readings of the Acts

47 This process can be seen at the Heathrow Airport Removal Centre, where the Harmondsworth Fast Track process is in operation; the Home Office claims that claimants are detained, put through the determination process including any appeals, and then removed, in an average of one month; see Immigration and Nationality Directorate Asylum Fact Sheet 1/7/05.

48 Section 65 provides that authorities must act in accordance with s6 of the HRA, and provides a ground of appeal if this duty is breached.

demonstrates a lack of commitment to a genuine human rights culture; for example in the 1999 debates, twenty government amendments, twelve new clauses and schedule 8 were guillotined at the committee stage and on report, which means that there was no debate on them at all. In addition, failure to consider Joint-Parliamentary Select Committee on Human Rights Reports before producing amendments, and refusing to acknowledge Human Rights Select Committee arguments that a Bill is not compatible with the HRA (in each case that this has happened, with no discussion or amendment, the Minister certified the Bill) hardly provide evidence of a new approach to human rights.

The form of the HRA is responsible for this lack of change: the ECHR does not provide any guarantees about the right to seek asylum, and the margin of appreciation means that the government has leeway in the way it provides for any of the rights that are set out in the Convention. An example of the way that this has played out in the asylum debate can be found in the removal of welfare benefits for asylum seekers. In debates in the Commons in November 2002 the Joint Committee on Human Rights published its decision that the relevant amendment was potentially incompatible with the ECHR. The Minister tabled a briefing note in opposition to this finding, stating that the Committee's concerns about the legislation leaving people destitute and thus breaching Articles 3 (inhuman and degrading treatment) and/or 8 (right to private family life) were wrong. The briefing note states that "the European Court has set a very high threshold for breaches of Article 3. The fact that a person is destitute does not inevitably mean that there is a breach of Article 3. The European Court has held that homelessness does not necessarily reach the Article 3 threshold." Such finely calibrated political indifference to human suffering does not indicate the "tidal wave which will transform the legal landscape and affect every area of law"⁴⁹ which was promised on its introduction, nor does it seem to live up to the promise of a new humanitarianism.⁵⁰

Instead what the HRA seems to have done is promote the belief that any state action involves a sense of obligation on the recipient – thus the burdens placed on asylum seekers have grown measurably, while the possibility of seeking asylum has shrunk. This is reflected in the January 2000 Council of Europe Report on Asylum, where the Council argued that the principle of freedom from persecution was in grave danger of being undermined by the climate of hostility towards refugees and AS in Europe. The Report also claims

49 Lord Woolf, MR, [1997] DenningLJ 1.

50 On the positive side, the Government has introduced the "Gateway Protection Programme" which provides a legal route for up to 500 UNHCR referred refugees, who have been given a clean health assessment and accorded refugee status by the Home Office, and offers this as evidence of the humanitarianism of the new regime.

that member state's efforts to reduce the number of refugees and increasing attempts at European harmonisation have significant implications for non-member states, and that a right of asylum urgently needs to be incorporated into the ECHRFF. It is probably unnecessary to report that this request has not be recognised by Whitehall.

The Rise of the Territorial State and The Treaty Of Westphalia

Dr Daud Hassan*

I. INTRODUCTION

Territory is one of the most important ingredients of Statehood. It is a tangible attribute of Statehood, defining and declaring the physical area within which a state can enjoy and exercise its sovereignty.¹ According to Oppenheim:

State territory is that defined portion of the surface of the globe which is subject to the sovereignty of the state. A State without a territory is not possible, although the necessary territory may be very small.²

Indispensably States are territorial bodies. In the second Annual message to Congress, December 1, 1862, in defining a Nation, Abraham Lincoln identified the main ingredients of a State: its territory, its people and its law.

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1 The term sovereignty is a complex and poorly defined concept, as it has a long troubled history, and a variety of meanings. See Crawford J, *The Creation of States in International Law* (1979) 26. For example, Hossain identifies three meanings of sovereignty:

1. State sovereignty as a distinctive characteristic of states as constituent units of the international legal system;
2. Sovereignty as freedom of action in respect of all matters with regard to which a state is not under any legal obligation; and
3. Sovereignty as the minimum amount of autonomy which a state must possess before it can be accorded the status of a sovereign state.

Hossain K, *State Sovereignty and the UN Charter* (Oxford, MSD Phil D) (1964) 3227 as quoted in Crawford, *supra* at 27. However, generally sovereignty can be defined as 'supreme authority - independent of any other earthly authority - it implies independence all round, within and without the border of the country. Oppenheim L, *International Law* 8th Ed (1955) 118-119. The learned Max Huber, Arbitrator in the Island of Palmas Arbitration, states: 'Sovereignty, in the relation between states, signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the function of a state.' (1928) 22 *AmerJInt'lL* 875. It is to be noted, although this idea about sovereignty is derived mainly from the writings of Bodin, (a French jurist of the 16th century), these assertions are to be found before Bodin's time. Examples of this are in Justinian's *Institute* and in the medieval conflicts over sovereign power between Church and State. For details, see Huntington JF, *Sovereignty: An Inquiry into the Political Good* (1959) chs 10-12.

2 Oppenheim L, *International Law* Vol - 1, 8th Ed (1955) 451-52.

He then added “the territory is the only part which is of certain durability.”³ In modern system, a successful State is a territorial Unit. As a territorial Unit, its sovereignty extends over all the individuals and other things within its given territory. According to Dunleavy and O’leary:

[A] State is sovereign or the supreme power, within its territory and that state sovereignty extends to all the individuals in a given territory.⁴

It is needless to say, in relation to supreme authority, State territory is very important. Oppenheim further observed :

[T]he importance of State territory lies in the fact that it is the space within which the State exercise its supreme authority.⁵

At present it is a recognised fact that States have sovereign power and exclusive authority within their territory. This imparts an equality between States.

The territorial sovereignty and sovereign equality of States are recognised by the international community. They are the most important phenomena in international relations as well. Territorial sovereignty and sovereign equality are also general principles of international law. But these understandings have not come in a day. There is a long history behind this achievement.

The objective of this paper is to see how the territorial State system emerged and the role of the Treaty of Westphalia in relation to the establishment of the territorial State system. The paper commences with a discussion on the significance of territoriality followed by examining the origin of and concept of territory. Territory as an Anti-Hegimonic concept and the Westphalia settlement are considered next. The paper then moves on to present Westphalia as a pioneer of territorial State practice and its importance in relation to growth of national consciousness. The changing trends of territoriality are also discussed. The paper concludes that in terms of progressive development of modern territorial State system the significance of the Treaty of Westphalia is without parallel.

3 Duchacek ID, “Components of International and National Systems” in Duchacek ID (ed.) *The Territorial Dimension of Politics Within, Among and Across Nations* (1986) 20.

4 Johnston RJ, “Bounded Places” in Johnston RJ (ed.) *A Question of Place: Exploring the Practice of Human Geography* (1991) 191-92.

5 *Supra* n 2 at 452.

II. SIGNIFICANCE OF TERRITORIALITY

Territoriality is a primary geographical expression of social power⁶ which is related to the definition and operation of States. Territoriality indicates within what physical boundaries States can legitimately act. The defining of the area provides a form of communication and of enforcement control.

Origins and Concept of Territory

Jim Gottmann has described the origin of the concept of territory.⁷ It derives from the Latin *Terra* for land and *Torium*, belonging to ruler. That is, Territory is the land belonging to a ruler or State. This meaning has been tracked back to 1494, approximately to the birth of the modern world economy.⁸

Although this concept emerged approximately at the same time as the world economy, it was finalised by the Treaty of Westphalia in 1648, which is recognised as the first treaty of modern international law. It confirmed that within its own territory, each State is sovereign. That is, interference in the internal affairs of another country was the first offence of international law.⁹ After this treaty, many sovereign States emerged in Europe. This was the original territorial basis of the modern interstate system, the first world political map.¹⁰ To ensure the internal order, the territorial State was deemed the most durable and comparatively most efficient unit.

III. ANTI-HEGIMONIC CONCEPTS AND WESTPHALIA SETTLEMENT

In the medieval Europe, under feudalism, there was a hierarchical system of power and authority instead of territorial sovereignty and sovereign equality. In the medieval period, sovereigns were divided into various categories. They were as follows:

- (i) Some sovereigns were universally recognised as independent, both de-facto and de-jure;
- (ii) Some were independent in practice but not altogether in juridical theory; and

6 Sack RD, *Human Territoriality: Its Theory and History* (1986) 5.

7 Gottman J, *The Significance of Territory* (1973) 15.

8 Taylor PJ, "Territoriality, State and Nation" in *Political Geography: World Economy: Nation State and Locality* (1985) 96.

9 Ibid, 96.

10 Ibid, 96

(iii) Some states were separately constituted with their own laws and institutions but dependent, such as Southern Netherlands and various states in Italy and around the Baltic.¹¹

As can be seen, the territorial State system was not introduced during the medieval period. In this respect, by the beginning of the seventeenth century there was a demand for the establishment of norms and rules for peaceful relations. According to Pugh:

[B]y the beginning of the seventeenth century the growing complexity of international customs and treaties had given rise to a need for compilation and systemisation. At the same time the growing disorders and suffering of war, especially of the thirty year war, which laid waste, hundreds of towns and villages, and inflicted great suffering and privation of peasants and city dwellers urgently called for some further rules governing the conduct of war.¹²

Settling the Hobbesian chaos, anarchy and destruction called for some rules for peace and order. There was a need for an alternative design to the hierarchical feudal concepts and other evils, which led to an anti-hegimomial alliance and establishing the balance of power. In this respect, the Westphalia settlement was a remarkable and significant development. It recognised the homogenous system and acknowledged all Princes or States as equally sovereign. It removed temporal power from the church. It was therefore a fundamental charter in nature. As a fundamental and comprehensive charter it established many rules and principles of the new society of states. Some of the general ideas clearly expressed by this charter have been echoed in the following international settlements and in the permanent congress of the League of Nations and United Nations.

The Westphalia settlement emphasised the separation and equality of states rather than the unity of Christendom. It rejected any idea that the Pope or Emperor had any universal authority.¹³ The Westphalia settlement established the anti-hegimonic concepts of territorial sovereignty and sovereign equality.

11 Watson, A, "Westphalia : an Anti-Hegimomial Commonwealth of States" in *The Evolution of International Society : A Comparative and Historical Analysis* (1992) 187.

12 Henkin L, Pugh G, Schachter O, & Smit W, *Cases and materials on International Law* (1980) 3.

13 Watson, supra n 11 at 188.

As a separate State the sovereign were no longer bound by the Church norms which regulated the conduct of lay rulers in medieval period. In order to function, they needed new rules and institutions in place of old ones.¹⁴ To regulate the dealings of the Princes or States with each other, there developed a new concept of International law as a substitute for such norms.

So, in the strict sense the modern International law and sovereign territorial States occurred at the same time. The history of modern International law begins with the emergence of independent nation-States from the ruins of the medieval Holy Roman empire and is commonly dated from the peace of Westphalia (1648).¹⁵

There was no short way to the transition of territorial sovereign States from the integrated medieval hierarchical system. It was very hard and difficult. This system emerged through a triangular struggle, that is, struggle between kings and Emperors, Emperors and Popes, Popes and kings. At that stage, international relations were not based on equally distributed power, either in fact or in theory. The weak were always threatened by the strong and the survival of the weak was uncertain. The idea of territorial State was related to collective security of nations and to establish rule of law for the equal protection of sovereign States from indiscriminate use of force by the higher or stronger authority.

The territorial State system originating in the swinging between war and peace, developed as a system of political control. It evolved out of the struggle between the forces supporting the then hegimonic order¹⁶ and those who were pushing the Europe towards a sort of secular independence and who intended to constitute a new Europe. Westphalia settled this. It ended thirty years of war. In practice, the Westphalia settlement added some new and significant matters in relation to territorial practice. It was the first effective general congress of Europe and this congress made a scope for individual representation of the secular sovereigns.

It gave the formal sanction of territorial and equal sovereignty of secular States and coordination between them. The Westphalia settlement legitimised a sort of commonwealth of sovereign States. This legitimisation of a commonwealth of sovereign states was marked as a victory because in general this was the ambition of the Princes, specially of the German Princes, both Protestant and

14 Ibid, 188.

15 Kennedy D, "A New Stream of International Law Scholarship" (1988) 7 *WiscInt'l LJ* 19.

16 Watson, *supra* n 11 at 182.

Catholic in relation to The Holy Roman Empire.¹⁷ At this stage, there emerged the idea that the co-existence of territorially separate and equally sovereign States afforded a better guarantee of peace than the Holy Roman Empire.¹⁸

IV. WESTPHALIA AS A PIONEER OF TERRITORIAL STATE PRACTICE

The territorial practice was legitimised and also standardised by the Westphalia settlement. It emphasised the separation of States. Therefore Christendom was divided into sovereign secular States with a thick line between them and the government were the absolute authority inside that line. This change brought a new image in every sovereign territorial limit, that is, all Governments are the exclusive authority and their decisions and arguments are exclusively carried out within their territorial limit, as the concept of Westphalian sovereignty is tied to State territory. According to territorial sovereignty, within a territory there is only one absolute temporal power, the Government of that territorial State.

This territorial division of sovereign authority, in the modern sense, was not found in the Greek city states, nor in Roman Empire, nor in Medieval Christendom. The Great Wall of China and Roman line may be an example in this context but these were not like modern times. Littimore states:

[T]he concept of a man made great wall ... was more a product of the kind of state created with in China than of the kind of pressure against China from the steppe.¹⁹

Similarly the lines conceived by the Roman Empire were not real territorial divisions. They were used as a temporary stopping places where the potentially unlimited expansion of the Pax Roman had come to a halt.²⁰ Very often they unilaterally expanded their empire and their territory was simply extended over another territory. In the context of sovereign territorial division, the Westphalia settlement is notable. As a first treaty of modern International law, it opened the door to and legitimised the territorial practice of exclusive authority and sovereign State equality.

The Treaty of Westphalia embodied some normative conceptions which were very significant in interstate relation. As these conception are significant in the international arena, they have been embodied in subsequent instruments.

17 Ibid, 186.

18 Herz JH, "The Rise and Demise of the Territorial States" (1957) 9 *WorldPolitics* 476.

19 Kratochwil F, "Of System, Boundaries and Territoriality : An Enquiry in to the formation of the State system" (1986) 39 *WorldPolitics* 35.

20 Ibid, 35-36.

Two dominant conceptions of the Treaty of Westphalia have been embedded in Article (2) of the United Nations Charter. Article 2(1) and Article 2(7) are appropriate from the perspective of their interrelation.

Article 2(1) of the Charter states:

The organisation is based on the principle of sovereign equality of all its members

and Article 2(7) states:

[N]othing contained in the present charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present charter.²¹

The ideas originating from Westphalia, that sovereign equality and exclusive domestic jurisdiction are the best guarantors of peace between peoples are formally perpetuated in the United Nations Charter.²²

V. WESTPHALIA IN RELATION TO GROWTH OF NATIONAL CONSCIOUSNESS

In relation to the growth of national consciousness, Westphalia settlement is remarkable. It paved the way to look at, or even to conceive of, the national interest. This conception was reflected in the function of the European States and even now, in the changing world context, it greatly influences the modern welfare States.

At present, the number of States has grown enormously and there have emerged many changes in inter-State relations and in the State system. We know that most of the Asian, African, and Latin American Countries were once under the control of European powers. After the Second World War there came a significant change in the world politics. Through decolonisation a large number of Asian, African, and Latin American countries became independent, equal sovereign States and became member of the United Nations, once again echoing the Westphalian understanding that recognizing a community of territorial sovereign and equal States was the best method either to attain

21 United Nations, *Charter of the United Nations and the Statute of the International Court of Justice* (1945) 4.

22 Falk R A, "The Interplay of Westphalia and Charter Conceptions of International Legal Order" in Falk R A & Black C E (eds.) *The Future of International Legal Order* (1969) Vol. 1, 49.

or to keep peace between peoples. At present the position of these States in the United Nations is significant. They are organised in their national and economic interest.

VI. THE CHANGING TREND

At present the idea of Globalization is active in the international arena. It emphasizes the interdependence of States. Similarly to the International Human Rights movement, it views solving socio-economic and political problems requires collective efforts and restrictions on State sovereignty. These movements argue that the problems of a country are not only territorial but global. Therefore, there is an argument of the need to increase the mutual cooperation among the States. Without totally abolishing the equal territorial sovereign power of States, they want to see the world, geopolitically, as a single place.²³ Ironically, this thinking has been running mainly by the developing countries and gradually they have gained some benefit in this respect. Whether a return to more centralized and hierarchical power can or will better serve promoting peace and order than the Westphalian model is an interesting question. Which model would best serve the factually less powerful, on which theorizes an equal independent sovereign status or one which centralizes power will likely not be the decided by the less powerful themselves. That is always a cause for concern.

VII. CONCLUSION

Today human race is divided into more than 200 States. The State system and International law have progressively developed. Interstate relations have rapidly grown in the various fields and these relations are governed by International law. The territorial sovereignty and sovereign equality of States is recognised in the interstate system. These are basic principles of International law.

These conceptions are rooted in the Treaty of Westphalia. Therefore in relation to modern State system the Treaty of Westphalia is a landmark. This treaty attempt to systemise the spheres of social and political life. By ending the thirty year war, it situates International law as a rational philosophy, a handmaiden of statehood and the cultural heir of religious and moral principle.²⁴

23 Brown R, "Globalisation and the End of the National Project" in J. MacMillan and A. Linklater (eds.) *Boundaries in Question : New Directions in International Relations* (1995) 55.

24 Supra n 14 at 14.

With time, and according to the demands of the world society, new thoughts about the interstate system have been and are still being introduced. New Institutions have been established to maintain the peaceful relations among the States. New International treaties have been concluded for the development of world system. Nevertheless, as a first treaty of modern international law the significance of this treaty is immortal because it introduced modern State system and enabled peaceful co-existence between equals. We should not forget its basic wisdom as we move forward to new models.

War and Peace and the Commonwealth Constitution: A Critical Review of the Prerogatives Doctrine

Dr Imtiaz Omar*

I. INTRODUCTION

In recent times the defence power of the Commonwealth Constitution has been relied upon by the Executive and Parliament in Australia for purposes of overseas troop deployment, enacting anti terrorism legislation and other measures. With reference to anti-terrorism legislation reliance has also been placed on the external affairs power for giving effect to UN Resolutions, and bilateral and multilateral treaties. The use of the executive defence power and Parliament's reliance on the defence and external affairs powers to enact specific legislation are, however, debatable.

This paper argues that the exercise of the executive power under s 61 of the Constitution in so far as it relates to the 'prerogatives' of war and peace must be accountable to Parliament. In this regard the nature of the 'prerogative powers' in the constitutional context of Australia is reviewed and it is suggested that use of these powers must always be subject to parliamentary control.

The latter part of the essay subjects the use of, and constitutional justification offered for, the use of the defence power of the Executive in Australia to a critical review. Comparative references from other constitutional systems are included in this regard. The article concludes on the note that it is imperative that legislation be adopted to control and regulate the use of the executive defence power. The broad structure and contents of such a proposed law is included at the end.

The article does not deal with the issues surrounding the justification of war and aggression in International Law. Likewise, it is also not concerned with the UN Charter and its application to armed conflicts. There are however some brief comparative references to the UN sanctioned use of force in the first Gulf War and the absence of UN approval for the Iraq War in 2003.

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II. EXECUTIVE AND LEGISLATIVE POWERS UNDER THE COMMONWEALTH CONSTITUTION TO DEPLOY TROOPS IN FOREIGN COMBAT

In 1991, the First Gulf War, Australian troops were deployed at the Iraq borders in pursuant of a UN Resolution to force Iraq to withdraw from a sovereign country, Kuwait, that it had annexed earlier by force. The executive decision then was approved by Parliament. The Executive, during the course of the combat and the continuing deployment of Australian troops in the First Gulf War, kept the Parliament informed at regular intervals about the course of events. Details of the justification for the Cabinet decision, and the decision on recalling Parliament to debate and reaffirm the decision for the deployed troops to engage in active combat were stated in Parliament by Prime Minister Bob Hawke in the following terms:

On 4 December I formed the House that following a decision of Cabinet, Australia was prepared to provide forces to participate in operations under the United Nations Security Council resolution 678, should that become necessary. On 17 January, after consulting senior Ministers, I gave effect to that decision by authorising our naval task force in the Gulf to participate in such operations. I then formally notified the Leader of the Opposition (Dr Hewson) and the Governor-General of the Government's action. I subsequently requested you, Mr Speaker, and the President of the Senate, to recall Parliament so that I can report to the Parliament and to the nation on this grave issue, and so that members of parliament can have the opportunity to express their views.¹

In 2003, Australia's decision to participate in the Iraq war by the deployment of troops and subsequent active combat by them was reached by the Prime Minister John Howard and his Cabinet in pursuance of quite controversial arguments put forward by the USA relating to the threat posed by Iraq. These included the possession of WMD, 'regime change', 'pre-emptive attack', the need for a 'coalition of the willing', and so on. Despite inconclusive debates in Parliament about participation in combat, the Executive surreptitiously reached a decision to deploy troops. It was only subsequently announced that the troops had been sent to the Persian Gulf. Prime Minister John Howard expressed in categorical terms that the decision to commit troops to foreign combat was an Executive decision, but that Parliament should be informed, and a resolution passed in support of that decision.

The government has now authorized our defence forces, which were predeployed to the gulf ... to take part in the coalition operations ... Under our system, this decision lies with the executive of government: the cabinet.

1 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 January, 1991 (Prime Minister Bob Hawke). http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=359570&TABLE=HANSARDR 21 January, 1991

Nevertheless, it is appropriate that the parliament, at first opportunity, have the chance to debate this motion. It is essential that the reason for that decision be made plain to the representatives of the people and that they have a full opportunity to debate them and to have their views recorded.²

The sequence of events were:

1. On 11 October 2002, US Congress authorizes an attack on Iraq.
2. On 23 January 2003, Australian troops leave on 'forward deployment' to the Middle East. It is to be noted here that Parliament was on recess then and was not due to sit until 4 February 2003. However, unlike the Government's decision in the 1991 Gulf War to recall Parliament, no such action was taken then.
3. 16 March 2003: Howard committed the 2,000 deployed troops to assist in the US-led invasion of Iraq.
4. The decision to deploy troops was made by the Prime Minister and his Cabinet without consultation, and prior approval of Parliament, even in the form of a prior 'parliamentary resolution' to this effect.
5. The announcement of the decision for troop deployment and Australia's participation in the Iraq war was made by the Prime Minister on 18 March 2003 at a press conference at Parliament House in Canberra.³
6. Later, on the same day, 18 March 2003, the Prime Minister informed the House of Representatives of this decision.⁴
7. The Governor-General was not involved in any way in this decision. There was only a press release on the same day, 18 March, in which the Governor-General described the action by the Government to commit members of the Australian Defence Force to support a US-led coalition to disarm Iraq.⁵
8. On 18-20 March 2003, Parliament debated the deployment of Australian troops to war.
9. On 20 March 2003, the House of Representatives passed a motion that:

2 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2003 (Prime Minister John Howard).

3 See G. Lindell, 'The Constitutional Authority to deploy Australian Military Forces in the Coalition War against Iraq' (2002) 5 ConstL&PolicyR 46, 47.

4 Ibid.

5 Lindell, *ibid*, quoting www.gg.gov.au/speeches/textonly/media/2003/mr030318.html. It is to be noted that in 1991 too, the Governor General was notified of the Government's action to commit Australian troops to war after the decision was taken.

... [endorsed] the Government's decision to commit Australian Defence Force elements in the region to the international coalition of military forces prepared to enforce Iraq's compliance with its international obligations under successive resolutions of the United Nations Security Council, with a view to restoring peace and security in the Middle East region ...⁶

10. On the same day, 19 March 2003, the Senate passed a motion to the effect that the Senate:

... believes that in the absence of an agreed UN Security Council resolution authorising military action against Iraq, there is no basis for military action to disarm Iraq, including action involving Australian Defence Force.

... opposes the decision of the Australian Cabinet and the President of the United States of America ... to commit troops to an attack on Iraq

... calls on the Government to immediately return Australia's 2000 Defence Force personnel home.⁷

11. Part of the contingent of the Australian Defence Force still remains in Iraq (24 June 2005). There were calls by the Opposition in 2004 to return the troops by Christmas, but this demand was rebuffed by the Government.

III. WAR, PREROGATIVES, EXECUTIVE AND LEGISLATIVE POWERS

The only express provisions of the Commonwealth Constitution that are relevant for an enquiry on the legitimacy and use of the defence, war, or national emergency powers of the Executive and the Legislature are ss 51(vi), 61 and 68.

Section 51(vi) is referred to as the 'defence power' of the Commonwealth. Under the provisions of s 51(vi), the Commonwealth Parliament is authorized to legislate with respect to the "naval and military defence of the Commonwealth and the several States". The laws that Parliament passes under the 'defence power' have always been held to be subject to judicial review. The High Court has in the past employed criteria including pre-war, actual war, post-war, and peacetime situations to examine the constitutionality of legislation adopted under the defence power. In *Australian Communist Party v Commonwealth*

6 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2003.

7 Commonwealth, *Parliamentary Debates*, Senate, 18 March 2003.

(*Communist Party case*),⁸ among the several justices who held the Communist Party Dissolution Act 1950 (Cth) invalid as not being connected to defence in the prevailing peacetime situation, McTiernan J held:

It is of course for Parliament to measure the emergency confronting the Commonwealth and to take the legislative measures which are required to meet it. The only question for the Court is whether the measures have a reasonable relation to the emergency, and on that question the Court naturally gives very great weight to the opinion of parliament; but it would not allow the opinion of Parliament to be the decisive factor, that is to determine the matter finally and conclusively, without deserting its own duty under the Constitution.⁹

Section 61 is in the following terms:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Under old interpretation, the Governor-General, exercising powers under s 61 was only enabled to carry out those functions as the King (Monarch) might assign to him/her. Indicative of this approach was the majority view in *Commonwealth v Colonial Combining Spinning and Weaving Co.*¹⁰

[The Governor-General] is a special agent with power to carry out the Constitution and laws, and such powers and functions as the King may assign to him.¹¹

The minority, Isaacs and Starke JJ took a broad view of s 61 as a transfer to the GG of all the 'inherent powers' of the Crown in relation to the Commonwealth of Australia. The 'inherent powers' view was continued, among other cases, by Evatt and McTiernan JJ in *R v Burgess; Ex parte Henry*,¹² and Dixon and Evatt JJ in *Official Liquidator of E O Farley Ltd v FCT*.¹³ These views were clarified in later cases beginning the decision in *Barton v Commonwealth*,¹⁴ where Mason J explained the scope of the executive power in s 61 as including "the prerogative powers of the Crown, that is, the powers accorded to the Crown by the Common law."

8 (1951) 83 CLR 1.

9 Ibid, 207.

10 (1922) 31 CLR 421.

11 Ibid, 454.

12 (1936) 55 CLR 608.

13 (1940) 63 CLR 278.

14 (1974) 131 CLR 477.

It was only beginning the decision in *Barton v Commonwealth* that the High Court has attempted to examine the constitutional and doctrinal basis of the executive power in s 61 of the Commonwealth Constitution. This is highlighted by Professor Winterton.

The executive power of the Commonwealth has largely been neglected, both by the High Court and by commentators, receiving scant attention in comparison to the Commonwealth's legislative and judicial powers. The High Court has examined executive power on fewer than 10 occasions – principally three cases in the Whitlam era: *Barton v Commonwealth* ... the AAP case ... and *Johnson v Kent* ...- most recently, in the *Bicentennial Authority Act* case in 1988 ... (The power has, of course, also arisen in several Federal Court cases, most notably the *Tampa* case in 2001.)¹⁵

In *Victoria v Commonwealth and Hayden (AAP case)*,¹⁶ although the majority justices did not explain s 61 as incorporating 'prerogatives', their reasonings were along the same lines as in *Barton v Commonwealth*. Justice Mason, for example observed that:

there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of the nation and which cannot otherwise be carried on for the benefit of the nation.¹⁷

In *Davis v Commonwealth (Bicentennial Authority Act case)*,¹⁸ three of the majority justices in their joint judgment, quoting observations in precedents, highlighted that:

s 61 confers on the Commonwealth all the prerogative powers of the Crown except those made by the Constitution except those that are necessarily exercisable by the States under the allocation of responsibilities made by the Constitution and those denied by the Constitution itself.¹⁹

The discussion now turns as to what are 'prerogatives', and whether s 61 should be explained as an embodiment of prerogatives.

15 G. Winterton, 'The Relationship Between Commonwealth Legislative and Executive Power' (2004) 25 *AdelaideLR* 21, footnotes omitted.

16 (1975) 134 CLR 338.

17 (1975) 134 CLR 338, at 396.

18 (1988) 166 CLR 79.

19 *Ibid*, at 93-94.

Nature of Prerogatives

Sir Frederick Pollock made the following observations about the basic nature of ‘prerogatives’:

Prerogative is nothing more mysterious than the residue of the King’s undefined powers after striking out those which have been taken away by legislation or fallen into desuetude.²⁰

In *AG v De Keyser’s Royal Hotel Ltd*,²¹ a similar view was followed, albeit in obscure way, that legislation overruled a common law rule or principle. The Law Lords in this decision, however, differed in their views on the relationship between the legislative and the prerogative powers. Nevertheless, *De Keyser* is taken as an authority for the conceptual bases that statute law may abrogate or regulate the prerogative power.

A distinction can be made here between the rule of a ‘common law’ prerogative being overruled by a statute and the place of ‘prerogative’ in an explicitly written Constitution, such as the Commonwealth Constitution. The issue in this regard is whether in its interpretation and application, the executive power under s 61 of the Commonwealth Constitution or for that matter any other constitutional provision should be explained in terms of the ‘common law’.

Prerogatives and Section 61 of the Commonwealth Constitution: Conventional Views

As pointed out earlier, Mason J in *Barton v Commonwealth*,²² explained the scope of the executive power in s 61 as including “the prerogative powers of the Crown, that is, the powers accorded to the Crown by the Common law”. It has however been pointed out:

The Crown’s prerogative powers, once thought to be “inherent” or “organic” are now probably best understood as arising at common law. Such powers are not readily definable.²³

In his detailed study of executive and parliamentary powers in Australia, Professor Winterton has observed:

20 Editorial Note to *V St Clair Mackenzie*, ‘The Royal Prerogative in War-time’ (1918) 34 LawQR 152, quoted in T. Blackshield & G. Williams, *Australian Constitutional Law and Theory* (2002) 518.

21 [1920] AC 508.

22 (1974) 131 CLR 477.

23 Blackshield & Williams, *supra* n 20 at 516.

All the prerogatives of the Crown, except those inapplicable to Australian conditions ... have been inherited by either the Commonwealth or the States, or both ...²⁴

Regarding the incorporation of the prerogative in the Commonwealth Constitution he points out that:

The prerogative is incorporated in s 61 of the Constitution ... by virtue of its having vested 'the executive power of the Commonwealth' in 'the Queen'. When seen against the British constitutional background, the vesting of executive power in the Crown was, in effect, a shorthand prescription or formula, for incorporating the prerogative - which is implicit in the legal concept of 'the Queen' - in the Crown in right of the Commonwealth. ...²⁵

It has also been argued that:

Certain powers held by the executive are recognized by the common law. While these powers, too, are nowadays regarded as incorporated in s 61, they may also exist independently of and antecedently to it, since the Constitution is conceived of as coming into force "under the Crown", that is, as presupposing the antecedent existence of the Crown and its powers.²⁶

Critique of the Semantics of 'Prerogatives' and their Purported Use

Since the Commonwealth Constitution is an explicitly written document detailing the powers, scope and limits of the principal organs of government - the Executive, Legislature and Judiciary - the fundamental question arises whether s 61 of the Commonwealth Constitution or for that matter any other provision should be explained in terms of the 'common law' and the 'prerogative powers'.

In this regard, Professor Sawyer has asserted that:

It is more consonant with the present status of Australia to treat the Constitution as the sole source of power, and the position of the monarch as derived from its provisions - not even partly from the prerogative - and the Constitution can be so read.²⁷

In regard to royal documents like 'Letters Patent' and 'Instructions under the Royal Sign Manual', he concluded that:

24 G Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis*, (1983) 49.

25 Ibid.

26 Blackshield & Williams, *supra* n 20 at 516.

27 (1976) 52 Current Affairs Bulletin 20, quoted in Blackshield & Williams, *supra* n 20 at 534.

It is certain that in so far as the royal documents ... conflict with provisions of the Constitution, they are invalid.²⁸

More recently, in the context of the contemporary scope of the prerogative power in Australia and its displacement by statute, French J has forcefully and persuasively affirmed that s 61 of the Commonwealth Constitution cannot be interpreted in terms of 'prerogatives': In his leading opinion in *Ruddock v Vadarlis (Tampa case)*,²⁹ French J observed:

The executive power of the Commonwealth under s 61 cannot be treated as a species of the royal prerogative ... While the executive power may derive some of its content by reference to the royal prerogative, it is a power conferred as part of a negotiated federal compact expressed in a written Constitution distributing powers between the three arms of government reflected in Chapters I, II and III of the Constitution and as to legislative powers, between the polities that comprise the federation. The power is subject, not only to the limitations as to subject matter that flow directly from the Constitution but also to the laws of the Commonwealth made under it.³⁰

Justice Beaumont agreed with French J. In the circumstances of the case, which involved a controversy on the purported use of the 'prerogative' power in the face of the statutory provisions of the *Migration Act 1958* (Cth), Black CJ, while not definitively ruling on this issue, made the following observations in the light of precedents:

This survey amply supports, in my view, the conclusion that it is, at best doubtful that the asserted prerogative continues to exist at common law. The affirmative assumed that the prerogative no longer exists may well be justified.³¹

In "All at Sea – Constitutional Assumptions and 'The Executive Power of the Commonwealth,'" ³² Bradley Selway (later Justice, Federal Court of Australia) is critical of French J's view. This critique is based first, on the argument that, save for the views of Gummow J in *Re Ditford; Ex parte Deputy Commissioner of Taxation*,³³ and *Re Residential Tenancies Tribunal; Ex parte Defence Housing Authority*,³⁴ the assertion of French J lacks substantial authority. Secondly, Selway points to precedents where it was held that that

28 Ibid.

29 (2001) 183 ALR 1.

30 Ibid, 49.

31 Ibid, 12.

32 (2003) 31 FedLR 495.

33 (1988) 19 FCR 347, 368-9.

34 (1997) 190 CLR 410, at 469-70.

the reference to 'executive power' in s 61 of the Commonwealth Constitution includes the prerogative and is subject to the common law limitations upon it.³⁵ Commentaries on s 61 are also highlighted by him.³⁶

Selway's critique of French J's position notwithstanding, what needs to be considered though is that the place of prerogatives in the Australian constitutional system has not been satisfactorily explained from a constitutional doctrinal perspective. In this regard, Professor Winterton, after considering earlier precedents and some recent decisions of the High court has commented:

More than half a century later, the High Court acknowledged that s 61 had never been defined ... Indeed, its scope was not 'amenable to exhaustive definition' ... As recently as 2000, the Court stated that the scope of the power 'remains open to some debate' ...³⁷

The attempted explanations of prerogatives is largely derived from assumptions that can only be described as arising from 'originalist' interpretation³⁸ that

35 FedLR, supra n 32 at 497. Among the precedents cited by him is the recent High Court decision in *Oates v Attorney General (Cth)* (2003) 197 ALR 105.

36 The commentators cited in this regard are Winterton, supra n 24 at 27-34; J. Thomson, 'Executive Power, Scope and Limitations: Some Notes from a Comparative Perspective' (1983) 62 TexasLR 559; L. Zines, *The High Court and the Constitution* 4th Ed (1997) 251-257.

37 G. Winterton, 'The Relationship Between Commonwealth Legislative and Executive Power' (2004) 25 AdelaideLR 21, 24, footnotes omitted. Among the older precedents, Winterton cites the views of Isaacs J in *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) CLR 421; Evatt J's views in *R v Hush, Ex parte Devanny* (1932) 48 CLR 487; and *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278. The most recent decision cited is *R v Hughes* (2000) 202 CLR 535 (per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

38 Broadly speaking, originalism is an approach to interpretation that focus on the intention of the framers of the Constitution. An allied concept is 'interpretivism'. Interpretivism as a judicial technique means that:

judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution.

J. Ely, *Democracy and Distrust* (1981) 1.

In the USA, there is a wealth of literature on the choice of originalist or non-originalist interpretation. For a general account of the debate see, e.g., J. Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 FedLR 1.

has been repeatedly disavowed by the High Court.³⁹ Originalist interpretation is also based on arguments of the antecedent existence of the Crown and its powers before the Commonwealth Constitution came into operation. The thrust of this approach is that the Constitution should be conceived of as coming into force “under the Crown”, and on the legislative supremacy of the UK Parliament at 1901. In this regard, Professor Lindell has observed that:

In 1900, the Constitution was legally binding *because of the status accorded to British statutes as an original source of law in Australia and also because of the supremacy accorded to such statutes*.⁴⁰

The issue of *legal* sovereignty highlighted here is however different from the ‘sovereignty of the people’. In this regard, Professor Zines has pointed out:

It is clear ... that the sovereignty of the people is not a substitute for the sovereign British parliament, but something quite different ... [T]he is no reason to limit the doctrine of sovereignty of the people to a period to a period when British sovereignty over Australia ceased. If ‘sovereignty’ is regarded as a wrong word to use for the people of a colony, there is no reason why the Commonwealth parliament and government could not from its beginnings, have been regarded as subject to a people that was, within the limits of colonial status, ‘supreme’, and with all the implied freedoms that representative government requires.⁴¹

The comments of Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth*⁴² are relevant in this regard.

39 In this regard, it has been observed:

From an early date the High Court refused to have regard to the Convention Debates for the purposes of ascertaining the intention of the authors: *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, at 213-14; L. Zines, *The High Court and the Constitution* 4th Ed (1997) 480 n 23.

For a discussion on the High Court’s views on originalist and other approaches to interpretation see, for example, H. Burmester, ‘The Convention Debates and the Interpretation of the Constitution’ in G. Craven (ed.), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) 25.

40 G. Lindell, ‘Why is Australia’s Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence’ (1986) FedLR 29, 32 (*italics in original*).

41 L. Zines, *The High Court and the Constitution* 4th Ed (1997) 395.

42 (1992) 177 CLR 106.

Despite its initial character as a statute of the Imperial Parliament, the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people.⁴³

In the next section, the question of the exercise of the executive power under s 61 of the Commonwealth Constitution, in the context of responsible and representative government, is explored.

IV. RESPONSIBLE GOVERNMENT AND SECTION 61 OF THE CONSTITUTION

It is accepted that in a parliamentary-executive type of government, or the system of responsible government, the Executive is accountable to Parliament, and Ministers of the ruling Government are individually and collectively responsible to Parliament. It is also accepted that the Cabinet deliberations are secret. The decisions of the Cabinet are however, put in an official legal form by the Executive Council. The functions of the Executive Council, with the Governor-General or his/her deputy presiding, is to put into legal form the decision of the Cabinet.⁴⁴ The constitutional distinction between a Cabinet decision and an Executive Council decision is important since Cabinet decisions are not judicially reviewable but an Executive Council decision can be subject to review.⁴⁵

For the sake of argument, even if s 61 can be explained in terms of the so called 'prerogatives', Professor Lindell acknowledges that:

it is clear that under the Westminster system of government Parliament may legislate to regulate the exercise and limit the exercise of prerogative powers.⁴⁶

The question that needs to be addressed in the context of this essay then is, parliamentary regulation of the so called 'prerogative' purportedly inhering in s 61 prior committing Australian troops to foreign combat can be exercised without prior parliamentary approval.

43 Ibid, 138, quoted in Justice RS French, 'The Constitution and the People', in R. French, G. Lindell & C. Saunders (eds.), *Reflections on the Australian Constitution* (2003) 60-85, 73. It should be noted here that 'popular will' of the people in establishing the Commonwealth Constitution is acknowledged by Lindell, *supra* n 40 at 30.

44 For a discussion on the powers and processes of the Executive Council see, for example, Constitutional Commission, *Final Report*, Canberra, AGPS, 1988, at 333-4.

45 In this regard, see *Minister for Arts Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218, 225 (Bowen CJ); 227 (Sheppard J); 247-8 (Wilcox J).

46 G. Lindell, 'The Constitutional Authority to deploy Australian military Forces in the Coalition War against Iraq' (2002) 5 ConstL&PolicyR 46, 47.

Parliamentary Approval for Deployment of Troops

From the sequence of events noted at the beginning, the Government sent troops for 'forward deployment' to the Middle East ('Persian Gulf') in January 2003 without parliamentary approval, and then on 16 March the Prime Minister Howard committed the already deployed troops to combat in conjunction with the US for invading Iraq. It was a Cabinet decision, and the Governor General was not involved in the decision.⁴⁷

Three issues arise for consideration in this context. First, the issue whether the Cabinet decision is an exercise of the so called 'prerogative power' that may be argued as included in s 61 (that is beyond parliamentary regulation on a pre- or post- basis). Secondly, that the Parliament was presented with a '*fait accompli*', and the House of Representatives approved the Government decision by 'Resolution'. Thirdly, although the House of Representatives being dominated by the majority party of the ruling Government approved of the troop deployment, the Senate disapproved the decision. It might be noted here that in a parliamentary-executive model of government (or responsible government) like that of Australia, the lower House is always dominated by the ruling party; thus it is not difficult to get a resolution of this nature passed. What is important, however, is that parliamentary approval was not taken prior to the deployment of troops and to committing them to combat afterwards.⁴⁸

The position of Canada can also be highlighted in this regard. It participated in the Gulf War against Iraq in 1991. Like Australia, Canada has a parliamentary-executive model of government, and the Canadian Constitution has no express provision requiring prior approval of Parliament for deploying troops in foreign combat. In the 1991 war, however, the Canadian Government sought prior approval of the Canadian Parliament to participate, even though the deployment of Canadian troops was in pursuance of UN Security Council resolutions of 1990-1991.⁴⁹

It may be accepted that, in many instances, the decision to commit troops for foreign combat can be based on 'secret intelligence reports' and other information that cannot be revealed to Parliament or be the basis of open deliberations. That was not the case in 2003 when the Executive in Australia

47 It should be noted here that, in the 1991 Gulf War too, the Governor-General was informed after the Cabinet decision authorizing Australian troops to participate in the Gulf War.

48 Prior parliamentary approval was also not taken by the Australian Government in the 1991 Gulf War.

49 This has been highlighted by Lindell, *supra* n 46 at 47.

decided to engage in the Iraq War. It can therefore be contended that prior approval of Parliament was essential in terms of the constitutional government established by the Commonwealth Constitution.

It is also a matter of concern that since March 2003 to date, no regular parliamentary approval was sought for continuation of the participation of Australian troops in combat in Iraq.⁵⁰

Section 68 and the Commander in Chief Argument

There is an argument that the Governor General plays a role in deployment of Australian troops in a war, and committing them to combat. The argument is based on s 68 of the Commonwealth Constitution. Section 68 provides:

The command in chief of the naval and military forces of the Commonwealth is vested in the Governor General as the Queen's representative.

It has been pointed out, however, that this role is essentially a formal or titular one.⁵¹

Even if s 68 were to be interpreted as a source of the exercise of the so called "prerogative power", the decision to commit troops to combat in Iraq in March 2003 was not a decision of the Governor-General in Council.

In this context, it is instructive to examine how provisions similar to s 68 of the Commonwealth Constitution are entrenched in the Constitution of the USA.

President, Congress and the War Power in the US Constitution

The Constitution of the USA establishes a presidential-executive system of government. Among the powers of the President is his/her role as Commander in Chief. Article II, s 2 of the US Constitution provides:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States ...

50 At the beginning of the 2003 Iraq War, the following comments were made in the Senate by the Senator Robert Ray:

As defence minister during the previous Gulf War ... any request by the then opposition for briefings were met. Major General John Baker, then head of DIO, briefed the then opposition leader, Mr John Hewson, on at least a weekly basis. I am sure that this government will use that as a precedent and follow suit.

Commonwealth, *Parliamentary Debates*, Senate, 19 March 2003, (Senator Robert Ray).

51 In this regard see *Coutts v Commonwealth* (1985) 157 CLR 91. The decision in *Coutts v Commonwealth* is briefly discussed in L. Zines, *supra* n 41 at 250, n 2.

Professor Tribe has explained this provision as in the following way:

The Framers, in all likelihood, thought that bestowing this title upon the Chief Executive did little more than place him at the apex of the military hierarchy ...⁵²

Although the US establishes the President as Commander in Chief, it reposes in Congress the power to declare war.⁵³ Until the *War Powers Resolution* was adopted in 1973,⁵⁴ the US Congress acquiesced in decisions of the President on foreign military campaigns. Under the provisions of the *War Powers Resolution*, the constitutional power of the Congress has been linked to the Commander in Chief clause so as to restrain executive deployment and use of US armed forces.

[I]n the War Powers Resolution of 1973 ... Congress linked its powers under the necessary and proper clause ... with the Commander in Chief clause so as to restrain executive deployment of United States armed forces. It did so by enumerating the circumstances in which deployment abroad is permitted, and by limiting such deployment in any situation to sixty days unless Congress, in the interim, passes authorizing legislation ...⁵⁵

It is because of this requirement that the US President sought prior Congress approval for deployment of US troops in the 1991 and 2003 Iraq wars. This was granted by Congress.

The Constitution of the USA establishes a presidential-executive type of government. Although under the assumptions of a presidential-executive type of government and the provisions of the US Constitution, the President and members of the Executive are 'responsible' to the Congress, the *War Powers Resolution* of 1973 explicitly requires congressional approval to deploy US troops abroad and commit them to combat. It is acknowledged that the *War Powers Resolution* of 1973 is based on this entrenched 'war power' of Congress. Nonetheless, the Executive did not seek approval for engagement in foreign combat until 1973, and there is scope for an argument that such approval is not required within the scheme of presidential-executive type of government.

The US system tends to separate the role of the Legislature and the Executive (embodied in the President) as much as possible. Still so, the *War Powers Resolution* makes the President accountable to Congress in relation of the

52 L. Tribe, *American Constitutional Law* (1988) 231.

53 Constitution of the USA, Article II, s 8.

54 87 Stat. 555, Public Law 93-148, 93d Cong H.J. Res. 542, adopted over presidential veto on 7 November 1973.

55 Tribe, *supra* n 52 at 234-235.

‘war power’. In a parliamentary-executive system of government (responsible government) like Australia where executive responsibility to the Legislature is a pivotal feature, the case for parliamentary accountability is much more persuasive.

It has already been pointed out that in the 2003 Iraq conflict, the Cabinet took recourse to dubious tactics by first ‘pre-deploying’ Australian troops and then committing them to combat. Parliament was presented with a *fait accompli* afterwards and the House of Representatives passed a resolution supporting it. Since, in the absence of express provisions in the Constitution or in any other law, it can be controversial whether parliamentary approval is a strict requirement for deployment of Australian troops in foreign combat and the timing for such approval it is imperative that there be legislation in this regard. This is considered in the next section.

V. A PROPOSED DEFENCE POWERS ACT

The discussion has persuasively indicated that are significant controversies, in terms of constitutional law and theory, about the power of the Executive in Australia to deploy troops in foreign combat. Professor Lindell, for example, has agreed that:

[I]t is true that serious doubts have been raised regarding the constitutional ability of the parliament to control the exercise of prerogatives which form part of the executive power of the Commonwealth under s 61.⁵⁶

It is best that these contentious questions are resolved by clarifying the issues in legal terms. This can be done in two ways – either by constitutional amendment or by ordinary legislation by recourse to ss 51(vi) and 51(xxxix). In view of the cumbersome procedure for amending the Commonwealth Constitution and the poor record of success of efforts in this regard, “[i]t would be more realistic to achieve the change by the passage of ordinary legislation.”⁵⁷

In this regard, while recognizing the existence of ‘prerogatives’, Professor Lindell has observed that:

56 G. Lindell, ‘Authority for War’ (May-June 2003) *About the House* 23, 24.

57 Ibid.

consistent with the traditional understanding of the British system of government, legislation can be enacted to strengthened parliamentary control over the executive branch of government in the exercise of its prerogative powers.⁵⁸

There is no disagreement therefore that legislation may be adopted to control and regulate the executive power of war and deployment of Australian troops to foreign combat. The proposed legislation may variously be called the Defence Powers Act, the Emergencies Act or the War Powers Act. With regard to the Commonwealth Parliament's role in regulating the exercise of the executive power to deploy troops in combat, some guidance can be drawn from the unsuccessful Bill that the Australian Democrats proposed on 27 March 2003, and from the *War Powers Resolution* of 1973.

In the *Defence Amendment (Parliamentary Approval for Australian Involvement in overseas Conflicts) Bill* 2003, the Australian Democrats sought to amend the *Defence Act* 1903 (Cth) by requiring a proclamation of emergency by the Governor-General and approval by Parliament for deployment of troops abroad. Among the various provisions so the Bill, parliamentary approval meant approval of both Houses of Parliament. The Bill also required that, if not in session, Parliament would be summoned to consider approval of the proclamation within 2 days of the proclamation being made.⁵⁹

The executive-legislative relationships in the Australian and US constitutional schemes are different. The entrenched provisions in the US Constitution on the Congressional power of war, and the President's commander in chief role are also at variance with the express provisions of the Commonwealth Constitution and their conventional understanding. Despite the disparateness of the executive-legislative relationships in the Australian and US constitutional schemes, some provisions of the US *War Powers Resolution* of 1973 are also instructive for a future Defence Powers Act in Australia.

Under the provisions of the US *War Powers Resolution* of 1973, there must be consultation between the President and Congress. Section 2(a), which makes provisions in this regard, has been interpreted to mean that the consultation is to occur in 'every possible instance' before American troops are introduced

58 Ibid. In this regard, the observations of L. Zines, supra n 41 at 262-263, 267 and 269-270, are highlighted. Attention is also drawn to the observation of the High Court in *Brown v West* (1990) 169 CLR 195, 202:

Whatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute.

59 Commonwealth, *Parliamentary Debates*, Senate, 27 March 2003 (Senator Bartlett).

into hostilities.⁶⁰ The President may, however, act without prior consultation in some situations. In such an event, the President is required to submit, within 48 hours, a written “report” to Congress stating:

- (a) the circumstances necessitating the introduction of United States Armed Forces;
- (b) the constitutional and legislative authority under which such introduction took place; and
- (c) the estimated scope and duration of the hostilities or involvement. [s 4]

Section 5(b) lays down that:

Within sixty calendar days after a report is submitted ... the President shall terminate any use of the United States Armed Forces unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.

Section 5(b) incorporates some flexibility by introducing provisions to the effect that the “sixty-day period shall be extended by no more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.”⁶¹

In the proposed Defence Powers Act for Australia, reference might be had to the Constitution of a newer Commonwealth country with a parliamentary executive type of government, India. After repeated ‘abuse’ by the Executive of entrenched and detailed emergency powers, the Indian Constitution has been progressively amended to strengthen legislative control of executive emergency powers, *albeit* after a proclamation of emergency has been made by the Executive. Since the incorporation of amendments to Article 352 of the Indian Constitution, it is stipulated that every proclamation of emergency made by the President (on Cabinet advice) must be approved by both Houses of Parliament within *one month*, failing which the ‘proclamation’ shall cease to operate. Provisions have also been made for situations when Parliament is not in session when a ‘proclamation’ is made, or where the dissolution of

60 Tribe, *supra* n 52 at 235, referring to the Grenada incident in 1983, and to the use of US forces to evacuate Americans and South Vietnamese from Saigon in 1975.

61 In the First Gulf War (1991), and in the 2003 Iraq War, there was prior Congressional approval under s 2(a), ostensibly to avoid the strictures of ss 4 and 5(b).

Parliament takes place during the *one-month* period. The current provisions of Article 352 also provide for periodic review of the operation of a 'state of emergency'. A proclamation of emergency once approved by Parliament can only operate for a six month period. Any continuation beyond the six-month period would require new parliamentary approval. Specific parliamentary majorities are required for approving both an original proclamation, and any subsequent extension. The President must revoke a proclamation of emergency, or its variation, or continuance, if Parliament passes a resolution to that effect.⁶²

VI. CONCLUSION

The pre-deployment, or 'forward deployment' as the Government termed it, of Australian troops to the Middle East in January 2003, the Cabinet decision to commit them to actual combat on 16 March, and the announcement of the presence of Australian SAS troops on 21 March 2003, as soon as the US-led invasion began, can be described as dubious and an 'abuse' of executive power, and contrary to constitutional rule. Parliament was faced with a *fait accompli*, and although the House of Representatives, dominated by the Government, passed a resolution supporting the action, the Senate rejected the move.

The decision of the Australian Government to enter the Iraq war was not based on secret information that could not be made public. As discovered later, the claims of WMD, the threats posed by Iraq, and similar assertions, were all conjured. There was therefore ample scope for wide parliamentary deliberations and a prior agreement between Parliament (both Houses) and the Executive to reach a decision whether it was justifiable to go to war.

In order that such instances may not be repeated in future, it is imperative that legislation like the proposed Defence Powers Act, by whatever name it may be called, be adopted. In drawing up such a law it may be instructive to look at some of the provisions of the Australian Democrats Bill of 2003, the *Defence Amendment (Parliamentary Approval for Australian Involvement in Overseas Conflicts) Bill* 2003, the US *War Powers Resolution* of 1973, and the Indian Constitution. The adoption of such an Act would put at rest the controversy and confusion over the executive and legislative powers, and their interrelationship in a war or external emergency situation. It would also put an end to the semantics of the so called 'prerogative' of war and its conclusive displacement by a statutory rule.

62 For a detailed study of emergency powers in the Indian Constitution see, for example, I. Omar, *Emergency Powers and the Courts in India and Pakistan* (2002).

In 2003, Australia was not faced with Iraqi aggression, nor was it acting in self defence. In situations like these, the proposed statute should provide for substantive consultation between the Executive and Parliament, and approval by both Houses of Parliament for deployment of troops and committing them to combat. There might be situations where secret intelligence is concerned and immediate action is required. Prior approval would not then be a pre-requisite. But like the relevant provisions of the US *War Powers Resolution* of 1973 and the Indian Constitution, the decision should be conveyed to Parliament promptly, and supported by both Houses of Parliament. The sixty-day time limit for approval of a proclamation in extraordinary circumstances required by US *War Powers Resolution*, and the thirty-day time limit for approval of an emergency proclamation under all circumstances, are sufficient time-limits for parliamentary approval. A time period along these lines should be incorporated in the proposed Act. Australian troops sent to Iraq in 2003 are still there in combat operations, and debates in Parliament about a time frame for their return have been overtly partisan and politically opportunistic. About the middle of 2004, there were stormy debates in Parliament between the Opposition, who wanted the troops back before Christmas, and the insistence of the Government on the continuing threat in Iraq justifying presence of Australian troops. This became an election issue. In the proposed Defence Powers Act for Australia, it is imperative therefore that provisions be included for a specific time frame for a war emergency to continue. These provisions can be along the lines of the US *War Powers Resolution* of 1973 and the Indian Constitution.

The Thin End of the Wedge: Executive Detention of Non-Citizens & the Australian Constitution

Jessie M. Hohmann*

I. INTRODUCTION

Since Magna Carta's great pronouncement that 'no free man shall be imprisoned ... except by the lawful judgment of his peers or by the law of the land'¹ the incarceration of individuals only by court order has been generally assumed to be a cardinal principle of the common law. In reality, the executive government has always detained certain classes of persons, absent judicial involvement – whether in wartime camps, for quarantine purposes, or for immigration and refugee processing. It is on this final aspect of the executive's power of detention that this paper focuses.

This paper charts the Australian experience of executive detention of asylum seekers, examining how the High Court has authorised, through a narrow, textual interpretation of the Constitution, the mandatory, indefinite detention of such individuals. This exclusion of non-citizens² from Australian legal protections is tracked through a close analysis of two High Court cases, *Chu Kheng Lim v MILGEA*,³ and *Al Kateb v Godwin*.⁴ In both, the High Court endorsed the mandatory, executive detention of asylum seekers. I argue that *Al Kateb* systematically withdraws the limitations placed on executive detention in *Lim*, greatly broadening the Australian federal government's power over non-citizens. The purpose of this paper is to examine the shift from *Lim* to *Al Kateb*, illustrating the potential implications of such a legal change not only for asylum seekers who are subject to the current *Migration Act*, but for everyone who lives under a system of law where the Courts are prepared to allow government to diminish protection for certain groups through narrow constitutional interpretations.

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1 9 Henry III 1225, as confirmed in 25 Edward I 1297 Cl 29.

2 This paper uses the terms non-citizen and alien interchangeably, as is congruent with current High Court jurisprudence. See *Singh v Commonwealth* (2004) 209 ALR 355, per Gleeson CJ, 357 [hereinafter *Singh*].

3 (1992) 176 CLR 1 [hereinafter *Lim*].

4 (2004) 208 ALR 124 [hereinafter *Al Kateb*].

By removing legal protections from vulnerable groups we undermine the fabric of legal protections to which we are all subject. It is not only those individuals who suffer, but all people subject to the law, which is weakened in its general attitude to the protection of cardinal common law liberties. It is this path upon which the High Court has embarked. An examination of the *Al Kateb* case shows that a majority of the High Court chose not to adopt accepted methods of constitutional interpretation that would have led the Court to decide the case with regard to the fundamental principles underlying and imbuing the Constitution, not least of which is liberty.

II. THE FACTUAL BACKGROUND

Lim was the High Court's first endorsement of the Australian Government's scheme of mandatory administrative detention for asylum seekers who had entered the country without lawful permit. The Court was called upon to consider provisions of the *Migration Act* 1958 (Cth), which compelled the mandatory detention of a class of Cambodian boat people. In the early 1990's Australia had experienced a wave of asylum seekers, displaced by conflict in their home regions, who arrived without visas or other authorisation. In response to these uninvited arrivals, the Federal government introduced a scheme of mandatory detention. The legislation dealt specifically with the designated Cambodian 'boat people'. When the detainees brought actions seeking release in the Federal Court, the Parliament rushed through legislative amendments to strengthen the detention scheme. Among these amendments were provisions specifying that a 'designated person' was to remain in detention unless and until he or she was granted a visa, left the country, or until the maximum time limit of 273 days was reached. (This limit only included days when the person's file was under active consideration by the department).⁵ Moreover, the legislation attempted to oust curial review, stating that 'the Court is not to order the release of a designated person.'⁶ The strong legislative response to the arrival of such a small number of Asylum seekers is merely one – albeit an acute – example of the disproportionate political response engendered by refugee issues in Australia.⁷

The High Court upheld all aspects of this scheme, save only the fact that the legislation could not remove judicial oversight: that would result in a breach of the separation of powers in the Australian constitution and was therefore beyond the competence of the legislature to affect, or the executive to implement.

5 See *Migration Act* 1958 (Cth) Pt 2 Div 4B [hereinafter *Migration Act*].

6 Ibid, s54R.

7 See Mary Crock, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 26 SLR 51 [hereinafter Crock, 'Judging Refugees'].

Though the judgment reflects a high level of deference to both the legislature and executive, it was nonetheless a decision that placed strict limits on the government's power to hold non-citizens through administrative processes for the purposes of refugee processing or deportation. However, when the High Court was called upon to decide the case of *Al Kateb* last year, it substantially removed the strict restrictions mandated in the earlier judgment.

Mr. Al Kateb was a stateless man of Palestinian origin who fell into a gap in the *Migration Act*. While the legislation once again authorised detention for unlawful non-citizens until removal (either at the request of the detainee, or upon exhaustion of legal appeals) or the grant of a visa, it was silent on the position of people like Mr. Al Kateb, who, having failed in his asylum claims and subsequently requested removal, could not be deported as no country could be found that would take him. Mr. Al Kateb was also one of a 'wave' of boat people fleeing to Australia due to international strife: this time, conflicts in the Middle East. Once again, Australia's reaction to the small number of asylum seekers who arrived by boat without authorisation was disproportionately hostile, resulting in rushed legislative changes, the exclusion of boats of refugees from Australian waters by Executive order, and high public sentiment against 'illegal' immigrants.⁸

Relying both on the distinguishing features of the case from those in *Lim*, as well as a Full Federal Court judgment favouring release in cases such as his,⁹ Mr. Al Kateb argued that the *Migration Act* did not authorise his continued detention. His argument relied in several respects on the restrictions discussed above in *Lim*. He argued that the purpose of the detention had come to an end, changing the character of the detention from an incident of the power to expel and deport to incarceration that was punitive in character; therefore engaging the judicial function of the Commonwealth and breaching the separation of powers.

In the result, the High Court dismissed Mr. Al Kateb's arguments. A majority of four judges – Justices McHugh, Hayne (with whom Heydon J agreed, affording his honour the distinction of writing the leading judgment) and Callinan – upheld the mandatory, and in this case indefinite, executive detention of a non-citizen. They did so based on a combination of grounds involving principles of statutory and constitutional interpretation. Of the

8 The infamous Tampa incident provides an example in microcosm of the public and governmental panic. See, for example, H Pringle & E Thompson, 'The Tampa Affair and the Role of the Australian Parliament' (2002) 13 PubLR 128, and Mary Crock 'In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 PacificL&PolicyJ 49.

9 *MIMIA v Al Masri* (2003) 197 ALR 241.

dissentients, Chief Justice Gleeson confined his decision to an examination of the *Migration Act*, Justices Gummow and Kirby wrote dissenting judgments covering both issues.

III. THE AUSTRALIAN CONSTITUTIONAL FRAMEWORK

Before turning to the cases, I will outline the constitutional framework in which the decisions were made. This background is necessary to understand the basis on which the High Court arrived at its decision. As my analysis focuses on the constitutional aspects of the judgments, rather than on the aspects dealing with statutory interpretation, it is necessary to set out the relevant aspects of the Australian Federal Constitution.

The Constitution contains no express power over citizenship. Rather, the Commonwealth government is empowered in two relevant areas: These are the powers to make laws with respect to Immigration and Emigration; under s 51(xxvii) and Naturalisation and Aliens; under s 51(xix). Because of this structural emphasis, the discussion on issues of membership of the Australian community has been framed in the negative: not who is an Australian, but who is not, so as to fall within the ambit of either of the powers. The power over emigration and immigration has been interpreted as relatively restricted,¹⁰ and is not relevant for our purposes. The power over naturalisation and aliens has been interpreted to have no such inconvenient limitations, and, as this paper demonstrates, has recently undergone a widening in its scope.

The other cardinal feature of the Constitution that must be mentioned is the separation of judicial power. This is a central issue in any discussion of executive detention. Chapter III of the Constitution invests the judicial power of the Commonwealth in the High Court of Australia. This structural decision reflected the desire of the Framers to follow the United States model of a High Court as final arbiter of the legality of government action.¹¹ The central motivation for a separate judiciary is to diffuse power and limit its arbitrary use or abuse. A separation of judicial power embodies Montesquieu's famous concept 'there is no liberty, if the judiciary power be not separated from the legislative and executive.'¹² While the High Court in Australia has insisted on a strict separation of its powers from the two other branches of government,

10 For a summary of the early cases, which continue as good law, see Tony Blackshield & George Williams, *Australian Constitutional Law and Theory* 3rd Ed (2002) 854-874 [hereinafter Blackshield & Williams].

11 Ibid, 606; and Leslie Zines, *The High Court and the Constitution* 4th Ed (2004) 154.

12 Baron de Montesquieu, *The Spirit of Laws*, T Nugent (trans) (1949) 152.

the record of the separation as a check on executive action is less clear, as the case of *Al Kateb* illustrates. Nevertheless, the separation of judicial power remains vital to the operation of the Australian federation.¹³

Inherent in this separation of powers is the idea that the judicial branch alone holds the judicial power of the Commonwealth. This power includes 'a power to make an adjudication of guilt, fine, imprison or perform similar function' and must 'affect traditional (ie criminal or civil) rights.'¹⁴ Chief Justice Griffith's 1909 statement remains the classic definition:

I am of the opinion that the words 'judicial power' as used in ... the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.¹⁵

However, it has been noted that 'the definitions of what does and does not constitute "judicial power" are sufficiently imprecise to allow a significant measure of pragmatic flexibility.'¹⁶ It is this imprecision that was addressed in the *Lim* case and it is the increased scope of the aliens power, coupled with the deferential interpretation to encroachments of executive action on the judicial power, that have allowed the *Al Kateb* judgment to expand beyond those circumscribed conditions for executive detention found in *Lim*, the case to which I will now turn.

IV. THE HIGH COURT AND THE RIGHTS OF NON-CITIZENS UNDER THE LAW

A. The Case of Chu Kheng Lim

The central principle in *Lim* revolved around the issue of judicial power: could the government introduce legislation that explicitly sought to prevent the Court from ordering the release of the specified class of persons held in immigration detention? The majority of the High Court held that the Parliament clearly could not do so. This was an inherent part of the judicial function of the Court, exercisable only by the Court. It was not the province of the executive or legislature to prevent courts from performing their constitutionally entrenched role.

13 See A.M. Gleeson, *The Rule of Law and the Constitution* (2000) 76-91 [hereinafter A. M. Gleeson].

14 RD Lumb, *Australian Constitutionalism* (1983) 105.

15 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

16 Blackshield and Williams, *supra* n 10 at 619.

Despite the ruling on the judicial power, the High Court nevertheless upheld the bulk of the legislative scheme: mandatory detention of non-citizens pending the outcome of their status determinations was constitutionally permissible. There were, however, several substantial qualifications on the Government's use of this power. These included that executive detention could only operate with respect to non-citizens; that the purpose of the detention must be tied to or incidental to the Government's power over aliens; and finally, that such executive detention could only apply in a limited set of circumstances. The subtleties inherent in these arguments are examined below.

Citizens' Rights v Non-Citizens' Vulnerabilities

It is clear in every respect of the judgment in *Lim* that administrative detention by the executive government is only authorised in relation to non-citizens. As their Honours Brennan, Deane and Dawson stated in the leading judgment, 'while an alien who is actually within this country enjoys the protection of our law, his or her status, rights and immunities under that law differ from the status, rights and immunities of an Australian citizen in a variety of respects.'¹⁷ Similarly, McHugh J wrote: 'Parliament can make laws imposing burdens, obligations and disqualifications on aliens which could not be imposed on members of the community who are not aliens.'¹⁸ On the other hand, the Constitution cannot vest legislative power to 'arbitrarily' detain *citizens* in the executive because 'the involuntary detention of a citizen in custody by the State is penal or punitive in character and ... exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.'¹⁹

The most important of an alien's legal disabilities involves his or her 'vulnerability to exclusion or deportation.'²⁰ According to *Lim*, this susceptibility flows both from the provisions of the Constitution and from the common law.²¹ In respect of the common law, the judges appealed to cases regarding a State's clear power to make laws for the detention or deportation of 'even a friendly alien.'²² Secondly, the Court accepted that the Commonwealth power over naturalisation and aliens in s 51(xix) of the Constitution authorises the government not only to make laws relating to determining the status of aliens, but also determining the way in which they may be treated. The Court was in agreement on the plenary nature of this Constitutional head of power,

17 *Lim*, supra n 3, per Brennan, Deane & Dawson JJ, at 29.

18 *Ibid*, per McHugh J, 64.

19 *Ibid*, per Brennan, Deane & Dawson JJ, 27.

20 *Ibid*, 29.

21 *Ibid*, 29-31.

22 *Ibid*, per McHugh J, 64; per Brennan, Deane & Dawson JJ, 29-30.

and the uses to which the Government could turn it,²³ although Justice Gaudron appeared to give the power a more limited reading.²⁴ Thus, Chief Justice Mason stated, for example, that 'the legislative power conferred by s 51 (xix) of the Constitution extends to conferring upon the executive authority to detain an alien in custody for the purposes of expulsion or deportation.'²⁵

Detention as 'Incidental' to the Aliens Power?

Despite the legal vulnerabilities of aliens, the majority of the Court did not interpret the executive power to detain such persons as otherwise at large. Rather, the Court interpreted the detention to be attendant on, or tied to, the power to deport or expel the alien.

Justice Gaudron was careful to point out that the power conferred by s 51(xix) does not permit laws for the detention of aliens 'merely because they are aliens.'²⁶ Rather, the Constitution authorises the detention of non-citizens as an incident of the legislative power to deport or expel an alien from Australia. In the words of the joint judgment 'authority to detain an alien in custody, when conferred upon the Executive in the context and for the purposes of an executive power of deportation and expulsion, constitutes an incident of that executive power.' They continued, stating that such detention 'takes its character from the executive powers to exclude, admit and deport of which it is an incident.'²⁷ What this means is that if the law is only incidental to the deportation or expulsion of the non-citizen, then the power of the legislature to sanction the executive's detention of non-citizens is limited by the purpose of the detention. Here, the Court clearly held that the purpose of the detention was to make non-citizens available for deportation and to facilitate their processing. As such, the aliens and naturalisation power authorised the legislation. Thus, executive detention is necessarily limited by a continuing purpose – a substantial qualification that assumed much significance in the case of *Al Kateb*.

The fact that a law must be incidental to the purpose of the power had a further consequence, and this was that the law must be reasonably necessary to affect the purpose. The joint judgment stated that laws that authorised administrative detention not only needed to be for a specific purpose, they needed to be sufficiently tailored to that purpose: in other words, the detention

23 Ibid, per Mason CJ, 10; see also Brennan, Deane & Dawson JJ at 25, Toohey J at 44 and McHugh J at 64.

24 Ibid, per Gaudron J, 55.

25 Ibid, per Mason CJ, 10.

26 Ibid, per Gaudron J, 55.

27 Ibid, per Brennan, Deane & Dawson JJ, 32.

must be 'reasonably capable of being seen as necessary for [those] purposes'.²⁸ McHugh also appeared to suggest that some sort of proportionality or necessary connection between the law and the purpose must be undertaken by the court. He wrote that 'if a law authorising detention went beyond what was reasonably necessary to effect the deportation of that person, the law might be invalid because it infringed the provisions of Ch III of the Constitution'.²⁹ Or in Justice Gaudron's words, legislation only authorises detention that the Court deems 'reasonably necessary for the purposes of deportation or for the making and consideration of an entry application'.³⁰ These statements provide a potential oversight function for the Court, which gives it a role beyond a mere examination of whether the law is 'about' aliens. As Adrienne Stone recently identified, the test of proportionality or necessity employed in *Lim* meant that 'even when considering the apparently technical question of whether a law was "with respect to" a nominated head of power, the court had latitude to incorporate rights concerns through closer scrutiny of the means chosen by Parliament to pursue a nominated end'.³¹ This approach allows the Court to undertake a 'tailoring' role to ensure the necessity, or the sufficient connection, between the aliens power and the legislation in question.

Limited Circumstances

Having determined that the law must authorise detention for a legitimate purpose, and must be reasonably necessary, proportionate or adapted, the Court went on to state clearly that such conditions would only be met in certain limited circumstances. Justice Gaudron stressed that '[d]etention in custody in circumstances not involving some breach of the criminal law ... is offensive to ordinary notions of what is involved in a just society'.³² This sentiment was echoed, albeit less forcefully, in a majority of the judgments. The joint judgment quoted Blackstone's Commentaries to the effect that 'the confinement of the person, in any wise, is an imprisonment'.³³

In recognition that liberty is a central principle of the Australian legal system, their Honours therefore stressed that executive detention could only occur in certain delimited circumstances: where the detention was incidental to the executive power to exclude or deport, where the detention was non-punitive so as not to encroach upon the Judicial power of the Court, and where it

28 Ibid, 33.

29 Ibid, per McHugh J, 65.

30 Ibid, per Gaudron J, 58.

31 Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Agreement' (2005) 27 SLR 29, 39 [hereinafter Stone].

32 *Lim*, supra n 3, per Gaudron J, at 55.

33 Ibid, per Brennan, Deane & Dawson JJ, 28. See also McHugh J at 63.

was reasonably necessary for the purpose of the detention. Each of Justices Brennan, Deane and Dawson and Chief Justice Mason pointed out that the detention of aliens was only available when these criteria were met.³⁴

What 'limited' circumstances included, was not spelled out. It is possible that the High Court did not consider that any existed. However, it is more likely that the Court did not deem it wise to speculate beyond the narrow factual situation in issue. However another inherent limitation arising from the factual situation did exist. This was the question of 'voluntary' detention raised by Justice McHugh. His Honour noted that 'a designated person may release himself or herself from the custody imposed or enforced.'³⁵ In this case, liberation could be achieved by the detainee requesting return to his or her home country. While McHugh J noted that a person applying for refugee status might not consider this a 'real choice,' he maintained that as a matter of law, it was. The qualification that detention by the executive is therefore voluntary has become a cornerstone of both judicial and governmental rationales for the legitimacy of that detention.³⁶

The judgment in *Lim* proceeded on a wide reading of the legislative power over aliens, and a narrow reading of incursions into the judicial power that will allow the High Court to scrutinise the detention of non-citizens. It was itself narrow and textual in focus; and was criticised on this basis by the United Nations' Human Rights Committee in *A v Australia*,³⁷ a complaint later brought before the UN by the *Lim* plaintiffs. However, the judgment did include significant qualifications on the executive's power to authorise administrative detention. These limitations and qualifications were put under severe pressure in the case of *Al Kateb*.

B. The Case of Al Kateb

The case of *Al Kateb* gave the High Court the opportunity to re-examine *Lim* in light of different facts, and to determine what the earlier decision meant for future challenges to involuntary executive detention. The major legal effect of the decision (other, that is, than the personal consequences for Mr. Al Kateb) was to roll back the main qualifications imposed on executive detention by the Court in *Lim*. I will address the attack on the limitations in turn: detention as 'incidental' to the aliens power; the limited circumstances

34 Ibid, per Brennan, Deane & Dawson JJ, 32; per Mason CJ, 10.

35 Ibid, per McHugh J, 72.

36 See, for example, Tania Penovic, 'The Separation of Powers: *Lim* and the 'Voluntary' Immigration Detention of Children' (2004) 29 AltLJ 222.

37 Communication No 560/1993, UN Doc CCPR/C/59/560/1993 (30 April 1997).

in which detention may occur; the ‘reasonable necessity’ of the detention; and finally the essential qualification in *Lim* that executive detention can only operate in the case of non-citizens.

Detention as an ‘Incident’ of the Aliens Power?

The majority in *Al Kateb* backed away from the idea of detention as ‘incidental’ to the power to deport or process an asylum seeker. This was done in various ways, to which not all majority judges subscribed. Among the arguments put forward by their Honours, were: reformulating the ratio in *Lim*; following a previous dissenting opinion; expanding the characterisation of ‘legitimate purposes’; and moving the consideration from one of judicial power to one of ‘connection’ with the relevant head of power.

Re-opening the Ratio in Lim

McHugh J opened his discussion of the constitutional issue by quoting the ratio in *Lim* to the effect that the power to detain takes its character from the executive powers to exclude, admit and deport of which it is an incident. However, he wrote, ‘this ... does not mean that the power to detain pending deportation is an incidental constitutional power, that is, a power that is merely incidental to the aliens power.’³⁸ Such a characterisation would limit the power in several ways, including the necessity of scrutinising the proportionality between the head of power and the law. Justice McHugh rather interpreted the statement from *Lim* to mean that the joint judgment had been discussing ‘an event that occurs in the course of the executive government’s authority to deport or expel. They were not speaking of a measure of constitutional power.’³⁹ In McHugh’s judgment, laws relating to the detention of aliens:

are not incidental to the aliens power. They deal with the very subject of aliens. They are at the very centre of the power, not at its circumference or outside the power but directly operating on the subject matter of the power.⁴⁰

In this way, McHugh J’s reasoning potentially expands the circumstances in which the executive can detain. This is achieved by removing one important test available to the Court in scrutinising the rational connection or necessity between the law and the head of power.

38 *Al Kateb*, supra n 4, per McHugh J, at 134.

39 *Ibid*, 134 -35.

40 *Ibid*, 135.

Justice Hayne ambiguously stated in his judgment that 'I would not identify the relevant power in quite so confined a manner as is implicit in the joint reasons in *Lim*.'⁴¹ While he was careful to stress that a connection with the relevant head of power was necessary to validate a law authorising detention of non-citizens, his judgment suggests that almost any law with such a connection will be valid, and that certainly, 'these laws in their exclusionary operation have that connection.'⁴² Thus, it is not just laws that are incidental to the power to exclude, admit and deport that are authorised as held in *Lim*, but also laws aimed at segregating aliens from the community and excluding them from the benefits of an Australian way of life.

Preferring a Previous Minority Opinion

Justice McHugh's reinterpretation of the ratio, set out above, is perhaps not surprising given that he had advanced that interpretation of the aliens power in *Lim*. As the only member of the Court common to both judgments, it could be argued that his Honour had a particular insight into what the majority meant in the earlier case. However, it is more persuasive to note that his Honour did not agree on this issue with the majority in *Lim*, and that here he has held with his earlier interpretation. It is not clear that his current position can be reconciled with the majority decision in the 1992 case; rather, his Honour's judgment exhibits a coherent line of reasoning developed from his earlier result.

Expanding the Characterisation of the 'Legitimate Purpose' of the Law

In *Lim*, the legitimate purpose of the law was expressed as being incidental and necessary to affect processing or deportation of the asylum seeker. No purposes beyond this were expressly contemplated in the judgment. However, in *Al Kateb*, the majority did not confine itself to these qualified purposes. Justice Hayne, for one, stated that:

the conclusion that a law requiring detention for the purposes of processing a visa application and ... for the purpose of removing the non-citizen from Australia is a law with respect to aliens and with respect to immigration, does not necessarily entail that a law requiring detention of non-citizens in other circumstances, or for other purposes, is beyond power.⁴³

In fact, all the majority judges were prepared to look beyond the purposes that were set out in *Lim*.

41 Ibid, per Hayne J, 188.

42 Ibid, 189.

43 Ibid, 185-86.

In Justice McHugh's view, the detention did not need to be tied to the purpose of the legislation in the same way the majority in *Lim* had advanced. Instead, it could extend beyond these purposes to the purpose of segregating an alien from the Australian community,⁴⁴ and to protecting the Australian community from the alien.⁴⁵ Neither of these purposes would render the law punitive so as to attract court scrutiny. This necessarily expands those situations in which the aliens power could authorise executive detention beyond those delimited by the majority in *Lim*. Justice Hayne also set out further legitimate purposes, stating that 'it is plain that unlawful non-citizens have no general immunity from detention otherwise than by judicial process'⁴⁶ and that they can therefore be detained for a variety of legitimate purposes, including excluding a non-citizen from the Australian community, preventing entry to Australia, or, after entry, by segregating that person from the community.⁴⁷ Callinan J voiced similar sentiments. Without finding it necessary to decide the issue, he hypothesised that detention could extend to segregating aliens from the community, excluding them from the right to work or 'otherwise enjoying the benefits that Australian citizens enjoy... If it were otherwise ... non-citizens would be able to become de facto citizens.'⁴⁸ He also provided an obiter statement to the effect that detention for the purposes of deterrence⁴⁹ might be constitutionally acceptable.

The change in the reasoning between *Lim* and *Al Kateb* on this issue is one of purpose versus effect. In *Lim*, the question was whether the law was one that could be seen as being for the purpose of bringing about a legitimate end – refugee detention for the purpose of status determination and/or removal. In *Al Kateb*, the legitimate end was not the focus. Rather, the purpose of the law became a question tied up with the applicability of Ch III and the separation of powers, in that laws with a punitive purpose will attract Ch III scrutiny, while laws with a punitive effect will not, at least not solely on that basis.⁵⁰

Framing the Question as Connection with the Head of Power

The central concern of the Court in *Lim* was the question of how to reconcile executive detention with the key principles of separation of judicial power; principles which recognise that:

44 Ibid, per McHugh J, 136.

45 Ibid.

46 Ibid, per Hayne J, 189.

47 Ibid, 190.

48 Ibid, per Callinan J, 196.

49 Ibid, 197.

50 For an analysis of this issue, see Arthur Glass, 'Al Kateb and Behrooz' paper presented at 2005 Constitutional Law Conference (18 February 2005) available at: http://www.gtcentre.unsw.edu.au/publications/papers/docs/2005/5_ArthurGlass.pdf

In a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature of the executive. To vest in the same body executive as well as judicial power is to remove a vital constitutional safeguard.⁵¹

Unlike *Lim*, however, the majority judgments in *Al Kateb* demonstrate insignificant attention to this question and certainly no soul searching over any implications arising from it. Rather, the Court's attention has shifted in focus to the connection between the legislation and the head of power. This has the effect of skipping over questions of fundamental principles of constitutionalism and proceeding directly to questions of interpretation and characterisation. It represents a method of constitutional interpretation lacking sufficient attention to the context in which such interpretation takes place.

As an example, take the following statement by Justice Hayne. After deciding that the executive was not confined by the purposes set out in *Lim*, but could generally make any law 'with respect to the head of power' he stated that the legislation suggested 'a test more apposite to the identification of whether the law is a law with respect to aliens' than a question of whether or not the law breached the separation of powers.⁵² This statement illustrates that his Honour's approach proceeds from the specific head of power as the first point of consideration, rather than from any overriding sense of the Constitution's function or context. Secondly, it allows his Honour to sidestep the issue of the separation of judicial power completely. This re-characterisation of the issue enables the Court, as Steven Churches has written, to 'move the debate away from the possible restrictions inherent in Chapter III.'⁵³ In other words, by focussing on the plenary nature of the power and the non-discretionary nature of the legislation, his Honour neatly minimised the argument on the Ch III issue that was so much the focus of the judgments in *Lim*.

However, Ch III issues are fundamental to the Australian system of government, and the protection of the people subject to it. Cheryl Saunders illustrates the far-reaching importance of the separation of powers:

A principle purpose of a division of power ... is to protect liberty by checking a concentration of authority that is likely to be harmful to it. ... A separation of judicial power, in a common law context, has the additional effect of protecting judicial independence, shielding courts from undue interference by the legislature or executive. It protects the perception of judicial independence as well, thus encouraging public confidence in the integrity and impartiality

51 *Attorney-General (Commonwealth) v R; Ex parte Australian Boilermakers' Society* (1957) 95 CLR 529, 540-41.

52 *Al Kateb*, supra n 4, per Hayne J, at 187.

53 See Steven Churches, (Oct 2004) Law Soc Bulletin 30, 31 [hereinafter Churches].

of judicial decisions. Institutionally, these purposes are ends in themselves. But they also serve a wider good, structuring a system of government to meet the needs of the people, for whom, in a democracy, government is deemed to exist.⁵⁴

Accordingly, the significance of a judicial shift in focus from underlying issues dependent on Ch III goes beyond the confines of immigration and refugee issues. If, as Justice Deane stated, ‘the most important [express or implied right, guarantee or immunity] is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the “courts” designated by Ch III,’⁵⁵ then any minimisation of the issues arising from this cardinal doctrine has the real potential to weaken the constitutional protections available to Australians.

Limited Circumstances of Detention?

As noted above, *Lim* consciously curtailed the circumstances in which the executive could detain. While these were not defined, it is not clear that the judges contemplated that there were *any* circumstances, other than those addressed, in which the executive could detain a non-citizen without encroaching on the judicial power. The judges were careful to point out the negative impact such detention had on liberty. The *Al Kateb* judgment explicitly rejected these inherent limitations.

Rather than beginning from the *Lim* premise that an alien at common law was not an outlaw, Justice Hayne states that ‘it is plain that unlawful non-citizens have no general immunity from detention otherwise than by judicial process.’⁵⁶ Even more explicitly, he states that the assumption that there is a limited class of circumstances in which executive detention is authorised ‘is open to doubt.’⁵⁷ Likewise, Justice McHugh expresses the view that the power is ‘unlimited unless the Constitution otherwise prohibits the making of the law.’⁵⁸ In other words, there is no limitation within the aliens power. This differs from the position espoused in *Lim*. There, while all the judges recognised that constitutional heads of power are plenary, they did not draw as a mechanical conclusion the fact that there were no limitations on such powers. And in fact, the High Court has interpreted many such ‘plenary’ heads of power as having limitations inherent upon their use, above and beyond merely that the law is

54 Cheryl Saunders, ‘The Separation of Powers’ in Brian Opeskin & Fiona Wheeler (eds.), *The Australian Federal Judicial System* (2000) 33.

55 *Street v Queensland Bar Association* (1989) 168 CLR 461, 521.

56 *Al Kateb*, supra n 4, per Hayne J, at 189.

57 *Ibid*.

58 *Ibid*, per McHugh J, 135.

‘with respect to’ the subject matter of the power. This is evident based on an examination of the jurisprudence interpreting the Commonwealth’s power over defence, for example.⁵⁹

The majority judgments in the current case also differ from *Lim* in their approach to the context in which the constitutionality of legislation is determined. Churches notes the ‘curious passivity’ of Justice Hayne’s leading judgment. He notes its acceptance of the legislation ‘at face value’ with ‘only a fleeting glance at the ... protection of core common law sacred cows, but ... no reflection on the leader of that herd: liberty.’⁶⁰ Similarly, Juliet Curtin has identified this as a ‘blinker approach to the text of the legislation.’⁶¹ This is a significant change from the judgment in *Lim*, which, however limited in its recognition of constitutional protections, nonetheless focussed the core of its judgment around exceptions to the rule that no person may be detained without due process of law provided by courts exercising separate judicial power.

The ‘voluntary’ nature of the detention had been a key qualification on the government’s power in *Lim*. But in *Al Kateb*, Justice McHugh’s statement that the possibility of ending one’s detention by requesting return to one’s home country might not seem like a ‘real choice’ had proved all too true. The issue was precisely that the detention was, if not in its term, in its effects, indefinite. The detainee could not, through his own actions, bring his incarceration to an end. However, the characterisation of the detention as self-imposed survived, most notably when Justice Callinan stated:

by their manner of entry, repetitive unsuccessful applications and litigation founded on unsubstantiated claims, or, if and when it occurs, escape from immigration detention, some aliens may attract so much notoriety that other countries will hesitate or refuse to receive them. In those ways they may personally create the conditions compelling their detention for prolonged periods.⁶²

This carry-through of a judicial sense that the detention was of the asylum seeker’s own making suggests a blurred line between the idea that executive detention is of a non-discretionary, administrative character and the impermissible imposition of punishment by the executive.

59 Section 51(xi). See, e.g., *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

60 Churches, *supra* n 53 at 31.

61 Juliet Curtin ‘Never Say Never: *Al Kateb v Godwin*’ (2004) 27 SLR 355, 364.

62 *Al Kateb*, *supra* n 4, per Callinan J, at 196.

Must the Detention be Reasonably Necessary?

In line with the interpretation of detention as incidental to the aliens power, the Court in *Lim* held that there must be some test of reasonableness, proportionality or necessity between the law and the detention. Such a test was unequivocally rejected in *Al Kateb*.

According to McHugh J:

a law requiring detention of aliens for the purpose of deportation or processing of applications would not cease to be one with respect to aliens even if the detention went beyond what was reasonably necessary to effect those objects. That is because any law that has aliens as its subject is a law with respect to them.⁶³

Hayne J also explicitly rejected any suggestion that the law must be subject to a test of reasonable necessity, that it must be appropriate and adapted, or that it must be reasonably capable of being seen as necessary.⁶⁴

The assertions of the majority in this respect directly contradict Justice Gaudron's statement in *Lim* that the power conferred by s 51(xix) does not permit laws for the detention of aliens solely because of their status as aliens. However, it should be noted that in *Re Woolley*, handed down shortly after *Al Kateb*, McHugh J noted that the majority ruling in *Al Kateb* had overruled *Lim* on this point.⁶⁵ Therefore, it appears clear from the reasoning in *Al Kateb* that provided the law is a law with aliens as its subject matter, it will be within the power of parliament to enact.

The approach adopted in the recent case may illustrate part of a wider trend. As Stone notes:

For most of its history, the High Court has employed rather deferential tests of application in the interpretation of grants of legislative power. For example, when interpreting incidental powers, the court showed a high level of deference to the means employed by the Parliament to pursue ends within its power. But for a brief period in the 1990s, the court sometimes used a test of 'proportionality' to apply closer scrutiny to Commonwealth legislation.⁶⁶

63 Ibid, per McHugh J, 135.

64 Ibid, per Hayne J, 188.

65 *Re Woolley; Ex parte Applicants M276/2003* (2004) 210 ALR 369, [55] [hereinafter *Re Woolley*]. Again, the case concerned the legality of executive detention, but focused on the detention of Children.

66 Stone, supra n 31 at 38-39 (footnotes omitted).

Stone, then, regards the proportionality test as a short lived experiment in constitutional interpretation. I would argue that attention to the defence power and the external affairs power, as well as other clauses of the Constitution, such as the limitation on Commonwealth power to interfere with religious choice, illustrates a long and thriving history for such tests of rational connection, rather than a brief flowering in the final decade of the twentieth century. For example, in the 1943 case of *Adelaide Company of Jehovah's Witnesses v Commonwealth*, the Court used what amounted to an archetypal test of proportionality, balancing the freedom of religion against reasonable legislative limits.⁶⁷ As such, the test should not be so easily laid to rest by the Court. Such an enquiry into the reasonableness or rationality of legislation by the Court provides a necessary safeguard for the rule of law, and illustrates that the Court's role as the guardian of the Constitution is alive and well.

May the Executive Detain Citizens?

While the clearest holding in *Lim* might have been the Court's explicit statement that executive detention of individuals is only authorised with regard to aliens: those people who do not enjoy the rights of liberty that inhere to citizens, making their detention other than by court order inherently punitive and thus illegal, even this limitation was under attack in *Al Kateb*.

Interestingly it was Justice Gummow, a dissenter in the case, who flagged the potential for the current interpretation of Commonwealth heads of power to authorise the executive detention of citizens. In the context of arguing that 'the administrative detention of aliens is not at large' his Honour illustrated the way in which an interpretation of heads of power as not only plenary, but as therefore having no inherent limitations, opened up the scope of executive power to detain. Thus, adopting McHugh J's analysis in the case, Gummow J wrote:

it could not seriously be doubted that a law providing for the administrative detention of bankrupts in order to protect the community would be a law with respect to bankruptcy and insolvency (s 51(xxvii)) or that a law providing for the involuntary detention of all persons within their homes on census night would be a law with respect to census and statistics (s 51(xi)).⁶⁸

This reasoning is consciously employed to illustrate the enormous breadth of the Commonwealth heads of power if the Court interprets those powers as being, indeed, 'at large.' The consequences of this reasoning are equally applicable to heads of power that have no particular operation over aliens or immigrants, but everyone within the power of the Australian law.

67 (1943) 67 CLR 116 per Latham CJ, 131; Starke J, 155.

68 *Al Kateb*, supra n 4, per Gummow J, at 158.

I am conscious of the High Court's oft quoted aphorism, stated most straightforwardly in a recent judgment by Kirby J, that 'Australian constitutional interpretation cannot take place in an environment in which horrible and extreme instances are imagined to frighten the decision maker.'⁶⁹ But I would suggest that this is not such a situation. In fact, McHugh J went on in the case of *Re Woolley*,⁷⁰ handed down shortly after *Al Kateb*, to state that detention of citizens by the executive was not always penal or punitive. Any statement to this effect in *Lim* had gone 'too far.'⁷¹ It appears, therefore, that McHugh J at least is now prepared to accept that the executive could detain citizens without the involvement of a court.

V. WEAKENING THE AUSTRALIAN CONSTITUTIONAL FABRIC

Justice McHugh's acceptance that there exist instances when the executive government can detain *citizens* without the involvement of a court illustrates clearly that there are implications for all Australians in the High Court's current approach to the interpretation of heads of power under the Constitution. The Court has turned down an opportunity of adopting legitimate and accepted techniques of Constitutional interpretation that would better protect the liberty of individuals. Instead, the Court has preferred to read the text in isolation from its context.

The shift occurring between the arrival of the Cambodian asylum seekers in *Lim*, and the attempted removal of the stateless Mr. Al Kateb has been far-reaching. There are many reasons to which the shift can be attributed. Alex Reilly identifies the changed composition of the High Court and a possible change in judicial attitude to the presence of aliens in the community in the context of the 'war on terror'.⁷² Justice Ronald Sackville has pointed to the acute political sensitivity to judicial review of refugee decisions in recent years.⁷³ However, at heart the issue is one of a shift in how the Court reads the Constitution.

The approach taken in *Al Kateb* has several elements, which have been touched on in the discussion of the case. First is the issue of the meaning of plenary power. Second is the issue of reading the text of the Constitution divorced from the context of the document, which includes the choice to ignore fundamental principles of constitutionalism that should inform debate.

69 *Singh*, supra n 2 at 431.

70 *Re Woolley*, supra n 65.

71 *Ibid*, per McHugh J, 384.

72 Alex Reilly, 'Pushing the Boundaries' (2004) 29 *AltLJ* 248, 249.

73 Ronald Sackville, 'Refugee Law: The Shifting Balance' (2004) 26 *SLR* 37.

Plenary Power as Inherently Unlimited

Justice Gummow's analogy of the breadth of the aliens power to the power over bankruptcy and insolvency and the power over census and statistics neatly illustrates the implications of approaching plenary heads of power as actually unqualified.

When called upon to interpret the Constitution, many High Court judges begin by noting that the powers under s 51 are 'plenary.' The word is defined as 'complete, entire, perfect, not deficient in any element or respect; absolute, unqualified.'⁷⁴ However, the judges are careful to note that those plenary powers are nevertheless 'subject to this Constitution.' In past jurisprudence, the plenary nature of the heads of power has not 'trumped' the requirement that the power be subject to the Constitution. This can be illustrated by the settled use of tests of proportionality. It can also be illustrated by the recognition that when a law rests upon an incidental footing, it too must be appropriate and adapted in order to be within power.⁷⁵ More fundamentally, this statement accords with the concept that the Constitution must be read in light of the common law principles which underlie and inform it. In the context set out, these are not radical or contested forms of interpretation. They operate to provide a further mechanism for judicial scrutiny of a law's validity.

What has occurred in *Al Kateb* is that the question of the plenary nature of the power has become the primary, perhaps only question. If a judge's analysis begins from the assumption that a head of power has no limitation other than the necessity that the law can be characterised as with respect to that power; and only then proceeds to examine the question of what 'subject to this Constitution' means, it is likely the judge will end up at a different place than had she begun from the position of examining the fundamental principles underlying the constitution, counting any principle of liberty contemplated by its structure – including the separation of powers: it is not inventive to suggest that the choice of where one starts one's inquiry may determine where one ends it. Recall the parable of the blind man who was asked to describe an elephant after grasping only its tail. Like that man, the High Court judges may have seized the Constitution only by the tail, and identified it as a very thin object indeed.

74 *The New Shorter Oxford English Dictionary* (1993).

75 See Blackshield & Williams, *supra* n 10 at 691.

The Constitution in Context

The Constitution is Australia's founding deed. A document of structural and legal complexity, it conveys little of the fervour and patriotism of many other written constitutions that appeal to the rights of man, the inherent liberties of the citizen and the sanctity of freedom. Rather, it concerns itself with establishing a governmental framework and creating a practical skeleton on which to build a nation. This does not mean, however, that the Australian Constitution was created in a vacuum of principle. As Joseph & Castan note, 'Australian Constitutional law is ... imbued with many fundamental doctrines and assumptions about government which find their origin in the British legal tradition.'⁷⁶ Important among these doctrines and assumptions are the rule of law, and the separation of powers. Both these doctrines have been important in the development of the common law, and both are designed to safeguard the rights of the subject as against the power of the state. As has been set out earlier in this essay, the separation of powers does this by dispersing power among various entities, who can only act in their own legitimate spheres and who oversee the actions of each other. The rule of law, though a disputed concept, is commonly appealed to as a mechanism that 'restrains and civilises power.'⁷⁷ These two underlying principles are crucial to a full interpretation of the Constitution.

Mary Crock has noted that the High Court has always tended to a narrow textual focus in refugee cases. Indeed, she cites the *Lim* case as an example in itself.⁷⁸ It is my argument that the High Court need not depart from its chosen legalistic, textualist role in order to give regard to the rule of law and the separation of powers which are inherent in the Constitution. Even the *Engineers Case*⁷⁹ – the seminal statement of legalism – recognised the importance of these principles. There, the Court stated that legitimate constitutional interpretation is 'founded on the words of the Constitution or on [a] recognised principle of the common law underlying the expressed terms of the Constitution.'⁸⁰ Thus, while the dominant method of constitutional interpretation in Australia has so often been accepted as 'a strict and complete legalism'⁸¹ this has not resulted in a constitutional jurisprudence devoid of attention to the principles upon which the Constitution rests. Writing extrajudicially, Chief Justice Gleeson has analogised the Australian Constitution to the Canadian, where 'certain

76 Joseph & Castan, *Federal Constitutional Law* (2001) 4.

77 Gleeson, *supra* n 13 at 1.

78 Crock, 'Judging Refugees' *supra* n 7 at 61-65.

79 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

80 *Ibid*, per Knox CJ, Isaacs, Rich and Starke JJ, 142.

81 Swearing in of Sir Owen Dixon as Chief Justice (1952) 85 CLR xi, xiv.

fundamental principles, which, although unstated in the text ... breathe life into it, govern its interpretation, define the role of the nation's political institutions and guide the evolution of the [nation's] system of government.'⁸²

Reading principles into the Constitution has, however, become unfashionable under the Gleeson Court, and since there is very little agreement on the exact content of those concepts that are said to underlie the document, they have not been much appealed to in recent jurisprudence. Stone identifies *Al Kateb* as a clear example of cases 'which might have lent themselves to arguments based on fundamental common law rights [but] were decided without any reference to the idea.'⁸³ But it cannot be accepted that the Court is ready to consider that fundamental principles of the common law, such as liberty, are anything but fundamental. The principle of interpretation that holds that the Constitution should be interpreted – so far as its text and structure permit – in a way that favours rights and freedoms has not gone out of favour. The Chief Justice, writing in dissent in *Al Kateb*, appealed in strong language to the fact that:

Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights and freedoms in question, and has consciously decided upon abrogation or curtailment.⁸⁴

Though written in the context of statutory interpretation, this passage clearly recognises the basic importance of liberty in Australian law, and indicates the serious consideration it should be afforded in judicial decision making. This again raises the worrying shift illustrated by *Al Kateb*'s lack of attention to the context of the case, and the questions underlying the purpose of the doctrine of the separation of judicial power; not to mention any of the other principles of constitutionalism discussed here.

VI. CONCLUSION

Constitutional provisions are constantly subject to contested interpretations, their words picked apart and put back together again in different contexts for different purposes. The Australian Constitution is no stranger to this process, nor are these methods unfamiliar to the judges whose calling it is to uphold it and pronounce upon it.

82 A M Gleeson, *supra* n 13 at 4.

83 Stone, *supra* n 31 at 35.

84 *Al Kateb*, *supra* n 4, per Gleeson CJ, at 130.

But it is precisely because of these attempts to pull the Constitution in one way or another, to suit the current needs of a government, business, individual or group that judges must keep one eye firmly on the principles which provide the foundation of the document. Without these principles, the Constitution is rootless.

The High Court of Australia's judgment in *Al Kateb* illustrates the inadequate regard which the current Court bestows upon these foundational principles. The judgment is a prime example of constitutional interpretation devoid of considerations of the key triumphs of constitutional democracies: liberty of the individual and protection against the abuse of executive power not least among them. The *Lim* case illustrates, on the other hand, the way in which judges can uphold these principles in conformity with a strict and conservative constitutional interpretation. In the short term, the *Al Kateb* judgment may only impact upon a small group of stateless detainees. In the long run, such an approach to constitutional interpretation will weaken the very foundations upon which the Australian Constitution is laid.

Conflict of Laws in International Tort Cases: The Need for Reform on Both Sides of the Tasman

Anthony Gray*

I. INTRODUCTION

The issue of which law to apply to resolve a tort case comprising elements from more than one jurisdiction is not an easy one to decide. Many different approaches have been tried and discarded by the courts. Some approaches provide for a general rule but include a flexible exception. Others provide for a completely flexible test. This article traces the Australian courts' latest attempts to deal with the matter, and documents recent developments in England, Canada and New Zealand. Reference is made to the vast North American jurisprudence in this area, in particular interest analysis, to suggest the way forward for Australian and New Zealand courts in this area, with a view to maintaining some flexibility in approach, while applying the law of the place of the wrong as the primary test. The author commends the High Court of Australia's (belated) rejection of the double actionability test and suggests that New Zealand might also consider rejecting that approach. However, it is submitted the Australian High Court should adopt a flexible exception, as have the courts in other countries, including New Zealand and Canada.

The Australian High Court in *Regie National des Usines Renault SA v Zhang*¹ (*Renault*) and *John Pfeiffer Pty Limited v Rogerson*² (*Pfeiffer*), after alluding to dissatisfaction with its previous double actionability approach in

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1 (2002) 210 CLR 491.

2 (2000) 203 CLR 503.

this area,³ decided upon an apparently simple choice of law rule in tort for both international and interstate Australian choice of law conflicts. The court decided that, generally, the law of the place of the wrong should be applied as the choice of law rule. This was the choice that eventually commended itself to the majority. The court noted this approach reflects community expectations as to the law to be applied,⁴ and was in most cases easy to apply. Citizens understood that if they went to another jurisdiction, they would be subject to the rules and regulations of that jurisdiction. Liability would generally be fixed and certain.⁵ Under this approach, liability was fixed by reference to geography,

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- 3 As to which, refer to Peter Nygh 'The Miraculous Raising of Lazarus: McKain v Miller and Co (South Australia) Pty Ltd' (1992) 22 UWestAustraliaLR 386, 394; Michael Pryles 'Of Limitations and Torts and the Logic of Courts' (1992) 18 MelbourneULR 676; Michael Pryles 'The Law Applicable to Interstate Torts: Farewell to Phillips v Eyre?' (1989) 63 AustralianLJ 158, 181; Brian Opeskin 'Conflict of Laws and the Quantification of Damages in Tort' (1992) 14 SydneyLR 340; Australian Law Reform Commission *Choice of Law* (1992) No 58, 10.13, 10.41; Anthony Gray 'Conflict of Laws – Heading in the Wrong Direction?' (1994) 24 Queensland Law Society Journal 357. Much of the jurisprudence in this area has been influenced, at least until recently, by the so-called rule in *Phillips v Eyre* (1870) 6 LR QB 1, 28–29 that in order to bring an action in one country for a wrong committed abroad, 'the wrong must be of such a character that it would have been actionable if committed in (the country where the action was brought) ... secondly the act must not have been justifiable by the law of the place where it was done'. This single comment has had a remarkable influence on choice of law rules for torts conflicts throughout the common law world.
 - 4 *Pfeiffer*, supra n 2 at 540. At least one legal philosopher would agree – since Locke thought that citizens agreed to bind themselves to the law of the jurisdiction they lived in by their presence within the jurisdiction, he would logically agree that if a citizen traveled to another jurisdiction, they would be deemed to have agreed to submit themselves to the laws of that jurisdiction by virtue of their presence: John Locke *Second Treatise of Government* (1690) 119.
 - 5 *Ibid*, 539; similar reasoning appears in the decision of the Supreme Court of Canada in *Tolofson v Jensen* [1994] 3 SCR 1022, 1050–1051. However the New York Court of Appeals in *Babcock v Jackson* (1963) 12 NY2d 473, 191 NE2d 279, 281 commented that 'despite the advantages of certainty, ease of application and predictability which it affords, there has in recent years been increasing criticism of the traditional rule (ie law of the place of the wrong) by commentators and a judicial trend towards its abandonment or modification ... (because) the theory ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues'.

making it easier to promote laws that gave a favourable outcome.⁶ The rule was simple to apply and led to certain results.⁷ The court noted however, that in some cases, it may be difficult to ascertain the 'place of the wrong'.⁸

The author has previously argued against the double actionability rule on the basis that giving primacy to the law of the forum only encourages forum shopping. It is hard to justify today, if ever it were justifiable, why the forum law should have to recognize the action in order for it to proceed in the jurisdiction. There is no general reason why a forum court cannot apply the substantive law of another country, except perhaps in the very unusual case where the foreign law is offensive to public policy.⁹ Why should forum law be applied, in cases where all or most of the links (or connective factors) are with the place of the wrong? As a result, the author would generally commend the High Court's recent moves towards adopting the law of the place of the wrong as the general rule to be applied. This move is consistent with moves in the United Kingdom and Canada. The law of New Zealand is being increasingly isolated worldwide in its adherence to the *Phillips v Eyre* approach.

II. THE FLEXIBLE EXCEPTION AND QUESTIONS OF PUBLIC POLICY

In judgments and/or legislation in other countries, different approaches have been taken to the question of a so-called flexible exception to the general rule, as well as the content of the general rule. In the United Kingdom, some members of the House of Lords, having accepted the general rule was as Willes J said in *Phillips v Eyre*,¹⁰ considered a so-called flexible exception to the rule. Referring to similar provisions in the *Second American Restatement* supporting such an approach, Lord Wilberforce declared

6 *Pfeiffer*, supra n 2 at 539.

7 This decision was confirmed by the High Court in *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575.

8 *Pfeiffer*, supra n 2 at 538; a recent example is *Dow Jones*, involving an action for defamation brought by a Victorian resident in a Victorian court in respect of material uploaded in the United States. The High Court found that Victoria, being the place of publication, was the place of the wrong in this case, but that every place in which the material was published and in which the plaintiff's reputation suffered as a result was also a place of the wrong. As a result, the plaintiff could bring suit in each jurisdiction in which his reputation had been affected by the defamatory statements; cf *Cuccioli v Jekyll and Hyde Neue Metropol Bremen Theater Produktion GMBH and Co* (2001) 150 FSupp 2d 566, involving the unauthorized use of the plaintiff's likeness to promote a CD advertised on a website created and maintained in Germany, although accessible in the United States. The court found the wrong had occurred in Germany.

9 The High Court in *Pfeiffer* gave many reasons for its abandonment of the double actionability approach.

10 *Phillips*, supra n 3 at 28-29.

I think that the necessary flexibility can be obtained through segregation of the relevant issue and consideration whether, in relation to that issue, the foreign rule ought as a matter of policy ... to be applied. For this purpose, it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it ... would serve any interest the rule was devised to meet.¹¹

Although not all Lords agreed with such a formulation, it was later unanimously adopted by the Privy Council in *Red Sea Insurance Co Ltd v Bouygues SA*¹². Later codification of United Kingdom law in this area also recognized that a flexible exception applies to the general rule.¹³

This has also been the case in Canada, where the Supreme Court reconsidered the issue in *Tolofson v Jensen*.¹⁴ While favouring the inflexible application of the law of the place of the wrong in that case, La Forest J took a different view of international torts conflicts:

Because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining discretion in the court to apply our own law to deal with such circumstances.

Similarly, recent cases in New Zealand have allowed a flexible exception to apply, where one country has the most significant relationship with the occurrence and the parties. In that case, the law of that country is to be applied. For example, in *Baxter v RMC Group PLC*,¹⁵ the court found that although prima facie the law of New Zealand would be applied to resolve the case, the facts called for the application of British law, given that the wrong/s had occurred in Great Britain. New Zealand also continues to apply the *Phillips v Eyre* rule, on the basis of double actionability. If both limbs are satisfied, the law of the forum is the prima facie rule to be applied in that country.¹⁶

11 *Chaplin v Boys* [1971] AC 356, 391; to like effect Lord Hodson (378) and Lord Pearson (406)

12 [1995] AC 190, 206; confirmed more recently in *Kuwait Airways Corporation v Iraq Airways Company and Others* [2002] UKHL 19.

13 *Private International Law (Miscellaneous Provisions) Act* 1995 s12 (the legislation also changes the general rule away from double actionability to the primacy of the law of the place of the wrong).

14 [1994] SCR 1022; see generally *Unifund Assurance Co v Insurance Corp of British Columbia* [2003] 2 SCR 63 and *Wong v Wei* (1999) 65 BCLR (3d) 222.

15 [2003] 1 NZLR 304; see also *Kunzang v Gershwin Hotel* (High Court, Auckland, 19/9/2000) and *Starlink Navigation Ltd v The Ship 'Seven Pioneer'* (2001) 16 PRNZ 55 where the court applied the double actionability approach.

16 The emphasis on the law of the forum as the choice of law after applying the Phillips test as a double actionability rule is reminiscent of the High Court's decisions in *Koop v Bebb* (1951) 84 CLR 629 and *McKain v Miller* (1992).

One also refers to the American Law Institute's *Second Restatement*, which avoids a presumption in favour of either law, but instead requires application of whatever law has the most significant relationship to the occurrence and the parties. Various factors are listed to be taken into account, including the place where the injury occurred, the place where the conduct causing the injury occurred, the residence and nationality of the parties, and the place where the relationship between the parties, if any, is centred. Relevant policies of the forum and other interested States are also relevant.¹⁷

The flexible exception has also appealed to former members of the High Court of Australia. For example in *Breavington v Godleman*¹⁸ and other cases, adoption of the law of the place of the wrong as the primary rule has been accompanied for some judges by what may be termed a 'flexible exception', as it was described in *Chaplin v Boys* per Lord Wilberforce.¹⁹ This exception might apply where the place of the wrong is in some sense fortuitous.²⁰

However, in *Pfeiffer* the court rejected a flexible exception, at least in cases involving intra-Australian torts. Their conclusion was that:

[A]dopting any flexible rule or exception to a universal rule would require the closest attention to identifying what criteria are to be used to make the choice of law. Describing the flexible rule in terms such as "real and substantial" or "most significant" connection with the jurisdiction will not give sufficient guidance to courts, to parties, or to those like insurers who must order their affairs on the basis of predictions about the future application of the rule. What emerges very clearly from the United States experience in those States where the proper law of the tort theory has been adopted is that it has led to very great uncertainty. That can only increase the cost to parties, insurers and society at large.²¹

17 s6, s145.

18 (1988) 169 CLR 41.

19 Interestingly, a flexible exception was also applied by State Courts, for example *Warren v Warren* [1972] QdR 386. Matthews J applied Queensland law to litigation relating to a car accident that happened in New South Wales. Both parties were Queensland resident – the judge allowed the claim although they would have been statute barred in New South Wales, holding there was flexibility in the Phillips rule. A similar result occurred in *Corcoran v Corcoran* [1974] VR 164, allowing one Victorian resident to sue another Victorian resident in relation to an accident occurring in New South Wales.

20 *Chaplin*, supra n 11 at 389, per Lord Wilberforce: 'to fix the liability of two or more persons according to a locality with which they may have no more connection than a temporary accidental and perhaps unintended presence may lead to an unjust result', accepted in *Breavington* by Mason CJ at page 76 and Toohey J at page 162. It has also been applied to justify the exclusive application of the law of the place of the wrong: *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190.

21 *Pfeiffer*, supra n 2 at 538.

The court reconsidered the issue of the flexible exception, in relation to international torts, in the *Renault* case. Given the strenuous reasoning above for rejecting any flexibility in respect of intra-national torts, one might have expected the court to take the same approach as it took in *Pfeiffer*, rejecting (entirely) the so-called exception for the reasons above. The court did not do so. The court certainly made it clear that the choice of law rule was to be the law of the place of the wrong, without any resort to a flexible exception:

The submission ... is that the reasoning and conclusion in *Pfeiffer* that the substantive law for the determination of rights and liabilities in respect of intra-Australian torts is the (law of the place of the wrong) should be extended to foreign torts, despite the absence of the significant factor of federal considerations, and that this should be without the addition of any “flexible exception”. [sic] That submission should be accepted.²²

However, after considering the Canadian Supreme Court’s *Tolofson* decision taking a similar approach, the court added the following comment:

Questions which might be caught up in the application of a “flexible exception” to a choice of law rule fixing upon the (law of the place of the wrong) in practice may often be subsumed in the issues presented on a stay application, including one based on public policy grounds.²³

Kirby J preferred to reserve the question whether there was a flexible exception in relation to international torts, but held the exception did exist. He referred to the majority’s linking of public policy arguments with the

22 *Renault*, supra n 1 at 520.

23 *Ibid*, 519. This approach has been discarded in the United Kingdom. Writing in 1989 (i.e. pre-legislative reform in the United Kingdom) of a case brought in a United Kingdom court involving elements of a tort committed both in that jurisdiction and New York, Fentiman made the comments: ‘[The decision] ... confirms the suspicion that substantive tortious conflicts will seldom arise in England because such disputes can be disposed of at the jurisdictional stage. First, the case emphasizes how the likely substantive outcome of a dispute can govern questions of jurisdiction, turning as it did on the plaintiffs’ need to establish a good arguable case against the defendants. Second, it confirms the tendency to regard the courts of the place where a tort is (substantially) committed as the *forum conveniens* ... The theoretical importance of this tendency is that it casts further doubt on the scope of the *forum conveniens* doctrine generally’: Richard Fentiman ‘Torts – Jurisdiction or Choice of Law?’ [1989] CambridgeLJ 191, 193.

This approach was abandoned six years later when the United Kingdom Parliament passed the *Private International Law (Miscellaneous Provisions) Act 1995*, which provided for the primary of the law of the place of the wrong (where the most significant elements of the facts constituting the tort occurred or the law of the place of injury in cases of personal injury), subject to a flexible exception where it would be “substantially more appropriate” for the issues to be resolved by another law (emphasis added, and note the provision does not state that the exception will apply where it is substantially more appropriate for the issues to be resolved by another court, as the questions are, although related, distinct).

flexible exception, but noted that *Chaplin v Boys*, where the exception was applied by some judges, was not a case where public policy could have been raised as an argument.²⁴

The approach in the joint judgment suggests that the court sees the role of the flexible exception as relating more to jurisdiction, rather than the choice of law to be applied to resolve the dispute. However, this approach was specifically rejected by Toohey J in *Breavington*.²⁵ Moreover, when it was originally conceived in *Chaplin v Boys*, the 'flexible exception' was used as part of the process of deciding which law to be applied, i.e. it was a choice of law rule, and not a matter only of jurisdiction. If the parties had a merely incidental connection with the place of the wrong, its law was not applied on policy grounds. Lord Wilberforce's double actionability test in *Chaplin*²⁶ was subject to a flexible exception based on 'an account of the varying interests and considerations of policy which may arise when one or more foreign elements are present.'²⁷ The Supreme Court of Canada itself applies the flexible test not merely to questions of jurisdiction, but to the choice of law question,²⁸ as do the New Zealand courts.²⁹

If, contrary to the experience in all other common law jurisdictions, the High Court of Australia continues in future to view public policy arguments as going to jurisdiction only, it should clarify in what circumstances it would permit a stay of proceedings based on public policy grounds. The High Court in *Renault* mentioned the inherent jurisdiction of a court to stay proceedings brought

24 *Renault*, supra n 1 at 535.

25 Supra n 18 at 171. 'The argument on behalf of the appellant that if the forum chosen by him is not the natural or appropriate forum, his action may be stayed, is not sufficient. The question is not one of *forum non conveniens*; it is more deeply rooted than that.'

26 Supra n 11 at 391. This approach has been adopted at common law by the Privy Council in *Red Sea* and by the House of Lords in *Kuwait Airways Corporation v Iraqi Airways Company* [2002] UKHL 19.

27 This is also the sense in which the 'proper law' exception is used in the *Private International Law (Miscellaneous Provisions) Act 1995* (UK), as a question going to the choice of law rather than jurisdiction.

28 *Unifund Assurance Co v Insurance Corp of British Columbia* [2003] 2 SCR 63.

29 The law is as stated by O'Regan J in *Baxter v RMC Group PLC* [2003] 1 NZLR 304, 318:

(a) a tort is actionable in New Zealand only if it is actionable both in New Zealand and England. If this rule (the double actionability rule) is satisfied, then the substantive law to be applied is the law of New Zealand;

(b) However, if one country has the most significant relationship with the occurrence and with the parties, the substantive law of that country is to be applied.

before it for various reasons, including that the forum is 'inappropriate'.³⁰ This has been interpreted narrowly in Australia to mean if continuation of the proceedings in that court would be oppressive, in the sense of 'seriously and unfairly burdensome, prejudicial or damaging, or vexatious, in the sense of productive of serious and unjustified trouble or harassment.'³¹ The ends of justice were paramount. One relevant factor was whether the substantive law of the forum was the law of the cause (ie in this context, the law of the place of the wrong). Another was the presence of connecting factors between the plaintiff or the defendant, and the forum jurisdiction.

So, with respect, arguably the precise scope of the flexible exception in relation to conflict of laws in tort is unclear.³² The High Court has said it does not apply to intra-Australian torts. In relation to international torts, the Court says it does not apply to the choice of law decision, but relates to arguments about jurisdiction. Given that this is not how the exception was conceived by Lord Wilberforce in *Chaplin v Boys*, how it is now written in British legislation, or in the United States where it has been tied into the debate about the proper law of the tort (i.e. in relation to a decision about choice of law *not* jurisdiction), nor how it is applied in New Zealand, there is little support for this approach, other than dicta in one Canadian Supreme Court decision. This of itself does not mean it is incorrect, but it is suggested the High Court should elaborate on the reasons for its approach, acknowledge its departure from the United States and English jurisprudence in the area, and explain precisely how, as it has suggested, 'public policy' is relevant to questions of jurisdiction.

III. WHERE THE PLACE OF THE WRONG IS FORTUITOUS OR INCIDENTAL

Adapting the facts of *Chaplin v Boys*, assume that two Australian soldiers were involved in a collision while driving in Malta. Both soldiers had been stationed there temporarily. Assume the law in Malta regarding personal

30 The High Court's approach on forum questions has not escaped criticism from the experts. See for example Peter Nygh and Martin Davies *Conflict of Laws in Australia* 7th Ed (2002) 129, criticizing the *Voth* decision as out of step with other countries in the Commonwealth, encouraging of forum shopping, and internally inconsistent.

31 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

32 Others might suggest that the High Court in *Pfeiffer* and *Renault* have unequivocally precluded any exception in relation to the choice of tort law, though acknowledging the flexibility of courts in application of *forum non conveniens*. The Court did reject application of a flexible exception. This author argues the position remains open because of the High Court's comment in *Renault*, supra n 1 at 519 that "questions which might be caught up in the application of a 'flexible exception' to a choice of law rule fixing upon the *lex loci delicti* in practice may often be subsumed in the issues presented on a stay application, including one based on public policy grounds." The author believes this statement is an important one, in that the High Court recognizes its power to invoke public policy considerations as a basis for declining to exercise jurisdiction.

injuries remains materially different from the law in Australia. If an action were brought in an Australian court in respect of the accident, what is the Australian court to do? Should it:

- (a) hear the action and apply the now-accepted general rule that the law of the place of the wrong (here Malta) should apply, or
- (b) decline to hear the action because an Australian court is a 'clearly inappropriate forum' (as we have seen, the Court has said one relevant factor here is which substantive law is to be applied – here it would be Maltese. If the parties are Australian citizens, it is difficult to say that an Australian court is 'clearly inappropriate'), or
- (c) hear the action, but discard the now-accepted general rule that the law of the place of the wrong should apply, on the basis of public policy arguments that Australia has a closer connection with the parties, so Australian law should apply.³³

Based on what the High Court said in *Renault*, the third possibility could be discarded. The Court did not see the flexible exception as relating to the question of choice of law. Given that the 'clearly inappropriate forum' test is such a difficult one to satisfy, one would think it likely that the first possibility would be the most likely outcome.

How does the High Court's 'public-policy-in-the-context-of-jurisdiction' test apply here, if at all? Is this the kind of case where an Australian court might, on the grounds of public policy, refuse to hear the action because an Australian court is a clearly inappropriate forum?³⁴ It has been noted that this is a very difficult test to satisfy, so arguably not, at least according to participants in the joint judgment in *Renault*. The position of Kirby J is more equivocal. He considered the arguments in favour of and against a flexible exception, concluding that he would rather leave the question whether to recognize a

33 This approach would apparently be supported by the decisions of Lord Wilberforce in *Chaplin*, Mason CJ in *Breavington*, and the United States decision of *Babcock v Jackson*.

34 Canadian scholars are skeptical. In "Back to the Future! Is the New Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?" (1995) 33 OsgoodeHall LJ 35, 69 Jacqueline Castel asks: 'Can the doctrine of forum non conveniens really play a significant role as a substitute for actionability by the law of the forum or public policy if the forum is the most appropriate forum or the natural forum? Consider the case where the cause of action created by the law of the place of the wrong is not known to the forum but both parties are resident or domiciled in the forum. In such a case the court cannot declare itself forum non conveniens. It must take jurisdiction and apply the law of the place of the wrong to the exclusion of the law of the forum ... Only where the forum is not connected with the action, that is, not the appropriate jurisdiction based on all relevant factors, could it declare itself forum non conveniens.'

flexible exception “where the law of the foreign jurisdiction is such as to justify an Australian court’s declining to recognize or enforce the law of that place” (emphasis added). He reiterated:

The general rule is that stated in Pfeiffer. In international torts, there is an exception to the application of that general rule. That exception may be invoked by reference to public policy considerations that would make the enforcement by the forum of the law of the place of the wrong contrary to the public policy of the forum.³⁵

In commenting on the majority’s opinion that questions of public policy would often in practice be subsumed on questions of *forum non conveniens*, he said this ‘need not be so.’ He referred to the situation in *Chaplin v Boys* as one case, where the flexible exception applied and the law of the place of the wrong did not apply. This was not because application of Maltese law was contrary to public policy. These comments by Kirby J suggest that his Honour would consider arguments about public policy as going to the choice of law (as Lord Wilberforce did in *Chaplin*), rather than a question of jurisdiction only. It is acknowledged, however, that Kirby J expressly reserves the question for a future time.

To further support Kirby J’s observations, consider how the High Court would handle the facts of *Kuwait Airways Corporation (KAC) v Iraqi Airways Company (IAC)*,³⁶ with some variations. The actual facts involved the confiscation by an Iraq government of property owned by KAC in Kuwait. The government eventually gave them to IAC. KAC sought the return of their aircraft, suing for the tort of conversion. If we assumed that KAC was an Iraq-based company, all of the links involve Iraq – the place of the wrong and the place of residence of both parties, so this would not created many difficulties.

However, assume that KAC was actually based in Australia, so there was a substantive link between Australia and the matter. Would the High Court now still be able to decline to hear the matter on the basis of *forum non conveniens*? How would the majority apply its test?

Questions which might be caught up in the application of a “flexible exception” to a choice of law rule fixing upon the (law of the place of the wrong) in practice may often be subsumed in the issues presented on a stay application, including one based on public policy grounds

35 *Renault*, supra n 1 at 535. Another discussion of policy issues occurs in J J Fawcett, ‘Policy Considerations in Tort Choice of Law’ [1984] *ModernLR* 650.

36 [2002] UKHL 19.

It is submitted that in order to apply this test to avoid the application of Iraqi law (which would justify the confiscation) the High Court would have to strain the 'clearly inappropriate forum' test to try to argue that Australia had no connection to and thus should not hear the matter. But this doesn't really solve the problem – surely the correct result is that while we have no problem in an Australian court hearing the matter, the Australian court should decline to apply Iraqi law on the basis of public policy. (This is in fact the result achieved by the House of Lords in applying the flexible exception to the facts.) It is submitted the High Court of Australia would find it very difficult to come up with the same result by applying the awkward test is postulated in the *Regie* case, and this is reason for the court to re-think its opposition to a flexible exception *choice of law* rule.

The question of the use of policy then is debatable, and it is submitted, with respect, that the court needs to clarify its use of 'public policy'.³⁷ Again, it is acknowledged that the majority of the High Court in *Renault* indicated support of the then Canadian line that public policy is relevant only to questions of jurisdiction. However, given the Canadian courts' since-expanded use of policy considerations to include choice of law, given policy as used in the United Kingdom has been somewhat broader, the view of some High Court judges (at different times, Toohey, Mason and Kirby JJ) that policy is relevant to choice of law questions, and the turbulent history of this area of the law, it is considered

37 For the High Court's difficulties with policy issues recently in the context of recovery for personal injury, see for example *Gala v Preston* (1991) 172 CLR 243; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 and *Cattanach v Melchior* (2003) 199 ALR 131. A detailed study of this jurisprudence is beyond the scope of this paper, but they are included as an example of differences among the Court as to the use of policy in deciding negligence cases. Most recently, Callinan J in *Cattanach*, at page 209, called for judges to be explicit if they were deciding negligence claims based on policy, rather than explain decisions on other grounds.

possible that a future High Court may consider policy arguments in relation to the choice of law question, rather than merely jurisdiction. Of the current members, at least Kirby J would apparently support this expansion.³⁸

The situation where the place of the wrong has little or no connection with the parties other than the fact that the incident occurred there, is the Achilles Heel of an inflexible application of the law of the place of the wrong. Not surprisingly, it was the *raison d'être* for the flexible exception recognized by Lord Wilberforce in *Boys*:

The tort here was committed in Malta; it is actionable in this country. But the law of Malta denies recovery of damages for pain and suffering. Prima facie English law should do the same: if the parties were both Maltese residents it ought surely to do so; if the defendant were a Maltese resident the same result might follow. But in a case such as the present, where neither party is a Maltese resident or citizen, further enquiry is needed rather than an automatic application of the rule. The issue, whether this head of damage should be allowed, requires to be segregated from the rest of the case ... related to the parties involved and their circumstances, and tested in relation to the policy of the local rule and of its application to these parties ... So segregated, the issue is whether one British subject, resident in the United Kingdom, should be prevented from recovering ... against another British subject ... damages for pain and suffering which he cannot recover under the rule of the *lex delicti*.. Nothing suggests that the Maltese state has any interest in applying this rule to persons resident outside it, or in denying the application of the English rule to these parties.³⁹

Surely, the general rule needs to be applied with some flexibility to deal with the issue whether the place of the wrong has no interest in its law being applied to the matter in dispute. The need for such flexibility has been recognized in the United Kingdom, United States, New Zealand and Canada. It is ridiculous

38 Discussion of the distinction between substance and procedure is considered to be beyond the scope of this paper. However, one should note that policy considerations have also been considered relevant in making this distinction. For example, New York courts have classified statutes prohibiting recovery for wrongful death as procedural, and refused to apply them to suits brought in New York based on an accident occurring in a state with legislation barring suits for wrongful death. This was because 'for our courts to be limited by the Massachusetts damage ceiling (at least to our own (residents)) is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts law:' *Kilberg v Northeast Airlines Inc* (1961) 9 NY2d 34, 172 NE2d 526; *Miller v Miller* (1968) 22 NY2d 12 and *Tooker v Lopez* (1969) 24 NY2d 569. Based on its comments in *Renault*, it seems the High Court might agree with this reasoning and apply it in an appropriate case. On the other hand, if it continues to follow the Canadian line in this area, the Canadian court in *Tolofson* held that the limitation period of the law of the place of the wrong should not be rejected by the forum court on the basis of differing policy approaches to limitation questions.

39 *Chaplin v Boys* [1971] AC 356, 392.

for an Australian court to attempt to deny the need for such flexibility in the light of its recognition elsewhere. Such an approach might also ask whether the purpose behind the relevant rules would be furthered by their application in the particular case. Various formulations of the suggested exception will now be considered.

IV. FLEXIBILITY - OTHER APPROACHES

At the outset one should note that a variety of other approaches have been taken to resolve these difficult issues. There is not as much consistency in the use of terms, including the use of the terms 'policy', 'proper law', 'interest analysis', as one would like. Policy is used in different ways, sometimes as an exception to the general choice of law rule, sometimes in determining what the governing law should be in the first place. Sometimes interest analysis is seen as a distinct approach in itself, sometimes it is said to have been combined with a proper law approach.⁴⁰ Though there may be some relation and overlap between the two, for the purposes of this article (and for the purposes of conceptualizing the law in this area) the author thinks it better to discuss them separately.

*Proper Law of the Tort*⁴¹

It is worth bearing in mind two points in this context:

- (a) that the original *American Restatement* in the area of conflict of laws called for the strict application of the law of the place of the wrong, only to be later replaced by the revised *Restatement* which calls for an interest-weighting approach; and

40 An example of the latter is contained in the Australian Law Reform Commission's *Choice of Law* Report (1992) para 6.65. It recommended that 'in interstate torts, the court take into account the purpose and object of laws in deciding whether to replace the *lex loci* with the place of greater connection.' Nygh also conflates interest analysis with proper law thus: 'The proper law of the tort approach employed in the United States depends upon interest analysis, rather than jurisdiction selecting choice of law rules.' Peter Nygh and Martin Davies *Conflict of Laws in Australia* 7th Ed. (2002) 428-29. Lord Wilberforce in *Chaplin v Boys* also related the two, as did Mason CJ in *Breavington v Godleman*.

41 Morris, J H C 'The Proper Law of the Tort' (1951) 64 HarvLR 881.

- (b) the weighing of different interests accords with the accepted approach (including in Australia) of dealing with conflict issues in relation to contracts,⁴² thus providing a harmonized approach in the two areas of law. As James noted in relation to the *Pfeiffer* case, 'it is unfortunate that the outcome of his case may have been different had it been framed in contract'.⁴³

As indicated, The *American Restatement 2d, Conflict of Laws*,⁴⁴ embraces the theory of the 'proper law of the tort', or the tort law of the place with the closest connection with the parties (s145). Section 145(2) of the *Restatement* specifies that the following are relevant in relation to tort choice of law questions:

- (i) the place where the injury occurred;
- (ii) the place where the conduct causing the injury occurred;
- (iii) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
- (iv) the place where the relationship, if any, between the parties is centered.

42 *Merwin Pastoral Co Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565; *Rothwells Ltd (In Liq) v Connell* (1993) 119 ALR 538. See Lawrence Collins, 'Interaction Between Contract and Tort in the Conflict of Laws' (1967) 16 Int'l & ComplQ 103. Brainerd Currie used some contracts examples to demonstrate interest analysis, e.g., the classic case of *Milliken v Pratt* (1878) 125 Mass 374, involving a conflict between a Massachusetts law denying contractual capacity to married women, and the contrary Maine law, in an action by a Maine creditor against a Massachusetts married woman. Currie saw this as involving a conflict between the policy of Maine law to protect the security of transactions and its intended beneficiaries to be resident Maine creditors, and the policy of Massachusetts, involving subordinating the policy of protecting the security of transactions to that of protecting married women against economic exploitation: Currie, *Selected Essays on the Conflict of Laws* (1963) 85.

43 Elizabeth James 'John Pfeiffer Pty Ltd v Rogerson: The Certainty of Federal Choice of Law Rules for Intrnational Torts: Limitations, Implications and a Few Complications' [2001] 23 SydneyLR 145, 163. The development of interest analysis has also been connected with legal realism theory: see Michael Green 'Legal Realism, Lex Fori and the Choice of Law Revolution' (1995) 104 YaleLJ 967; per Catherine Walsh 'Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Product Liability Claims' (1997) 76 Canadian Bar Review 91, 99 'Legal realism is widely acknowledged to be the impetus behind ... a result-oriented jurisprudence under which the advancement of local policies and local concepts of justice guides choice of law adjudication in the same way as it does other categories of domestic adjudication.'

44 American Law Institute, *Restatement (Second) of Conflict of Laws* (1971), an approach referred to with approval by Lord Wilberforce in *Chaplin v Boys* [1971] AC 356, 391-392.

The Restatement provides that the above 'contacts' are to be evaluated according to their relative importance with respect to the particular case.⁴⁵

The court in *Pfeiffer* in rejecting the proper law approach, noted that usually, when applying the test, the law of the forum had been adopted.⁴⁶ There is some analogy with the concept of the proper law of the tort, and the application of the so-called flexible exception, in that some judges who apply the flexible exception approach apply the law of the place of the wrong as the primary rule, subject to an exception where another place is more closely connected with the parties and the events.⁴⁷

However, issue may be taken with the High Court's (very brief) review of the state of the United States authorities, and the conclusion drawn in the joint judgment in *Pfeiffer* that there is some trend back towards the application of the place of the wrong rather than the proper law. The proper law of the tort remains the predominant rule used in the United States.⁴⁸ The New York Court of Appeals decision of *Babcock v Jackson*, in which a balancing of interests proper law approach was taken, has never been overruled in that State.⁴⁹ A recent (1998) survey named only 11 of the United States as those applying a strict rule of the law of the place of the wrong. United States commentators have viewed the position in the United States as follows:

As the century draws to a close, the traditional theory in tort (favouring the place of the wrong) ... finds itself in a very precarious state. This assessment is based not simply on the relatively low number of states that still adhere to

45 The first version of the *Restatement* favoured the law of the place of the wrong as the sole rule to be applied. The court noted in *Pfeiffer* that the proper law approach had recently been criticized in the literature, and referred to suggestions the approach was inherently subjective rather than logical. A critique of the approach is found in Adrian Briggs 'Choice of Law in Tort and Delict' (1995) *Lloyd's Maritime and Commercial Law Quarterly* 519.

46 *Pfeiffer*, supra n 2 at 538.

47 Lord Wilberforce in *Chaplin*, Mason CJ in *Breavington v Godleman* (1988) 169 CLR 41, and the United States Supreme Court decision in *Babcock v Jackson* (1963) 240 NYS 2d 742; this issue will be considered in more detail later in the article. Lord Wilberforce pointed out in *Chaplin* that the Second American Restatement formulation 'has what is very necessary under a system of judge made law, the benefit of hard testing in concrete applications.' *Chaplin*, supra n 44 at 391.

48 Kirby J in *Renault* conceded this point, referring to States of the United States: 'Some jurisdictions that previously adhered to applying the law of the place of the wrong have tended more recently towards introducing greater flexibility in the rules ... a judicial revolution (has) resulted in the widespread abandonment of the rule of the place of the wrong.' Supra n 2 at 536 (often after legislation had been introduced, and not without its own difficulties). The United Kingdom's *Private International Law (Miscellaneous Provisions) Act* 1995 allows for a proper law exception to be invoked, whenever it would be 'substantially more appropriate' for the issue/s to be resolved by another law.

49 The approach commended itself to Mason CJ in *Breavington*, supra n 18 at 76.

that theory, but also on the shallowness of their commitment to it. Although the degree of commitment varies from state to state, it is fair to say that very few of these states are philosophically committed to the traditional theory ... in some of these states, the (law of the place of the wrong) rules remain in place only because the highest court of the particular state has yet to encounter the “right case” for seriously considering their abandonment.⁵⁰

One Australian author has concluded that ‘clearly, the High Court has misconceived any revival of support for the *lex loci* in the United States’.⁵¹

The United Kingdom’s torts choice of law legislation, the *Private International Law (Miscellaneous Provisions) Act* 1995, also may require an evaluation of connecting factors. However, this is in a different way – where a primary rule is subject to displacement based on connecting factors, rather than in the *Restatement*, where the connecting factors comprise the general rule. Its primary rule, that the law of the place of the wrong governs substantive issues, is subject to the application of another country’s law instead if, having considered the significance of the factors that connect a tort with the country in which it was committed, and the country factors that connect a tort with the other country, ‘it is substantially more appropriate for the applicable law to be the law of that other country’ for the purposes of determining the issues.⁵² The Australian Law Reform Commission proposed a similar approach be adopted in Australia, and specifically rejected a proper law approach as the general choice of law rule.⁵³

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- 50 Symeon Symeonides ‘Choice of Law in the American Courts in 1998’ [1999] 47 AmJCompL 328, 345; see generally Symeon Symeonides ‘Choice of Law in the American Courts in 2001’ (2002) 50 AmJCompL 1, 61 (Ten states continue to apply the law of the place of the wrong approach, with two of these applying a policy exception to avoid it in 2001.), Symeon Symeonides ‘Choice of Law in the American Courts in 1996: Tenth Annual Survey’ (1997) 45 AmJCompL 447. A leading authority on American choice of law, Weintraub, confirmed swift acceptance of the influential role of policy and interest analysis since cases in the 1950s and 60s: Russell Weintraub *Commentary on the Conflict of Laws* 3rd ed, (1986) 315-316. The 1991 Supplement (66) confirms ‘The courts of thirty-five states ... have displaced the place of wrong rule as the sole choice of law rule for torts’. One Australian author has concluded that ‘clearly, the High Court has misconceived any revival of support for the *lex loci* in the United States’: Elizabeth James ‘John Pfeiffer Pty Ltd v Rogerson: The Certainty of Federal Choice of Law Rules for Intrnational Torts: Limitations, Implications and a Few Complications’ [2001] 23 SydneyLR 145, 158.
- 51 Elizabeth James ‘John Pfeiffer Pty Ltd v Rogerson: The Certainty of Federal Choice of Law Rules for Intrnational Torts: Limitations, Implications and a Few Complications’ [2001] 23 SydneyLR 145, 158.
- 52 Section 12(2); the Privy Council had concluded in *Red Sea Insurance Co v Bouygues SA* [1995] 1 AC 190, 206 that ‘the law of England recognizes that a particular issue between the parties to litigation may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and with the parties.’
- 53 Australian Law Reform Commission *Choice of Law* (1992) No 58, *Choice of Law Bill*, clause 6(8).

New Zealand favours double actionability leading to the law of New Zealand as the substantive law of the forum to be applied subject to an exception if another country has the more significant relationship with the parties. However, one wonders whether this is purely an adoption of the British approach, or a real commitment to double actionability.⁵⁴

54 *Baxter v RMC Group PLC* (2003) NZLR 304, 318; in *Richards and Others v McLean and Others* [1973] 1 NZLR 521, the judge seemed, with respect, reluctant to apply the law of the forum as the substantive law – Mahon J noted that ‘the application of English law as the dominant substantive law might not in many cases be objectionable having regard to the greater interest which the foreign country might have in the commission of the tort and its consequences’ at 524, but was ‘obliged to say that the first condition in *Phillips v Eyre* (requiring actionability according to the law of the forum) was on the balance of authority a choice of law rule and not a rule of jurisdiction’ at 525. The judge did not say that he agreed with the approach; nor did he refer to much by way of support for the position. See also Nicky Richardson ‘Double Actionability and the Choice of Law’ (2002) HongKongLJ 491.

Interest Analysis ⁵⁵

Some in the United States have suggested that interest analysis may assist in the resolution of conflict of law issues in tort.⁵⁶ Though not immune from criticism,⁵⁷ including in particular Brilmayer,⁵⁸ it is submitted that Australian

55 A leading American authority on choice of law rules, Russell Weintraub, wrote in his *Commentary on the Conflict of Laws* 3rd Ed (1986) 315-316, that there had been a swift acceptance of the influential role of policy and interest analysis since the landmark decision in *Schmidt v Driscoll Hotel* (1957) 82 NW 2d 365. In that case, the court applied Minnesota law to an accident that took place in the State of Wisconsin. Minnesota law allowed a person injured as a result of the intoxication of another to sue for compensation the person who caused the intoxication, in this case the owners of a hotel in Minnesota. Wisconsin law did not recognize such an action. The parties involved were both residents of Minnesota, the defendant was licensed there, and was served alcohol there. The court found that Minnesota law applied, with Minnesota having an interest in admonishing a liquor dealer whose violation of its statutes was the cause of injuries to a local resident, and in providing for a remedy for the injured person. See also Robert Leflar, *American Conflicts Law* 3rd Ed (1977) 195, setting out a number of choice-influencing factors, including predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interests, and application of the 'better rule of law' as factors influencing choice of law.

56 Pioneering work on interest analysis is found in Brainerd Currie *Selected Essays on the Conflict of Laws* (1963) and Currie, B 'Survival of Actions: Adjudication Versus Automation in the Conflict of Laws' (1957-58) 10 *StanfordLR* 205. For more recent writing on interest analysis, see Harold Korn 'The Choice of Law Revolution: A Critique' (1983) 83 *ColumbiaLR* 772, Russell Weintraub 'An Approach to Choice of Law That Focuses on Consequences' (1993) 56 *AlbertaLR* 701; Lawrence Kramer, L 'Rethinking Choice of Law' (1980) 80 *ColumbiaLR* 277 and Russell Weintraub 'A Proposed Choice of Law Standard for International Products Liability' (1990) 16 *BrookingJInt'lL* 225.

57 See, e.g., Carter, P.B. That author argues that interest analysis proceeds upon a 'fundamental misconception concerning the ultimate purpose of civil litigation. That purpose is to do justice between the parties before the court.' It may be arguable in response that a fundamental purpose of tort law, including choice of law rules in tort, is efficient loss distribution. See Fleming, J in *Law of Torts* 9th Ed (1998) which refers to a variety of purposes tort law serves, including deterrence, compensation and loss distribution. At page 12 the learned author refers to a 'growing trend towards loss distribution'. See also Richard Posner, *The Economic Analysis of Law* 3rd Ed (1986); William Landes and Richard Posner *The Economic Structure of Tort Law* (1987), and Australian Law Reform Commission *Choice of Law* (1992) para 6.13 'The rule [double actionability] is out of touch with modern trends in tort law which are more concerned with the distribution of loss and risk than the allocation of responsibility'. Some commentators suggest a stronger limit be placed on the application of forum law than interest analysis would allow. See, e.g., Simson, G J 'State Autonomy in Choice of Law: A Suggested Approach' (1978) 52 *SoCalLR* 61; Silberman, L 'Can the State of Minnesota Bind the Nation?: Federal Choice of Law Constraints After *Allstate Insurance Co v Hague*' (1981) 10 *HofstraLR* 103.

58 Lea Brilmayer 'Interest Analysis and the Myth of Legislative Intent' (1980) 78 *MichLR* 392, 398, 407 criticizing interest analysis (at least by Currie) as pro-resident, pro-forum and pro-recovery and leading to unpredictable results. She implies interest analysis does not genuinely seek to reflect the wishes or interests of legislatures.

courts may find interest analysis to be of assistance in this area in future years.⁵⁹ There is no support for interest analysis in Australian case law, although the Australian Law Reform Commission supported considering the purpose or object of laws in applying the choice of law rules, which is considered to be similar to interest analysis.⁶⁰ The Australian High Court made a cursory and arguably misleading reference to interest analysis in its *Pfeiffer* decision.⁶¹

A clear example of interest analysis occurred in the New York Court of Appeals decision in *Babcock v Jackson*,⁶² to which reference has already been made. The case involved two New York residents, one driving the other to Canada for the weekend. While in Canada, the driver of the vehicle lost control and the car crashed. The vehicle was registered and insured in New York, and was garaged there. Both parties resided in New York, and their journey commenced, and would have ended, there. In other words, the location of the accident was merely fortuitous, similar to the situation before the House of Lords in *Chaplin v Boys*, and before the High Court in *Pfeiffer*. Ontario law would bar the action, New York law would allow it to be heard.

The court noted the general rule that the question would be governed by the law of the place of the wrong, and outlined the chief advantages of the rule as they saw them, namely certainty, predictability, and ease of application, as the High Court did in *Pfeiffer*. However, they noted the rule would sometimes lead to unfair results.

The court cited the *Kilberg* case, involving a New York resident being killed in a plane crash in Massachusetts. Massachusetts law contained a ceiling on the damages claimable by the deceased's family. In refusing to apply the Massachusetts ceiling, the New York court explained that the random chance that the event occurred in Massachusetts did not give that State a controlling interest or concern in the amount of tort recovery, due to New York's competing interest in providing full compensation for its residents or users of transportation facilities originating in New York. The deceased had bought her ticket from the defendant in New York, and the trip originated there.⁶³

59 Mason CJ referred to the debate in *Breavington* supra n 18 at 82.

60 *Choice of Law* (1992) para 6.65 'It is recommended that in interstate torts, the court take into account the purpose and object of laws in deciding whether to replace the *lex loci* with the place of greater connection'.

61 *Pfeiffer*, supra n 2 at 537. The Court stated only that 'interest analysis has been doubted' citing curiously as support for the proposition a case commonly referred to as an example of an interest analysis approach (*Alaska Packers*) and then the work of Brainerd Currie, also an advocate of the approach.

62 (1963) 12 NY2d 473, 191 NE2d 279.

63 *Kilberg v Northeast Airlines Inc* (1961) 172 NE2d 526, 527-528.

Turning its mind to this case, the court adopted a similar interest-weighting approach, in deciding whether to apply New York or Ontarian law.⁶⁴ It found New York's concern in the matter was unquestionably the greater and more direct, and the interest of Ontario at best minimal. New York was the home of the driver and passenger, the place where the car was kept and insured, and where the journey began and was designed to end. Ontario's only connection was the 'purely adventitious circumstance' that the accident occurred there. Ontario had no conceivable interest in denying such a remedy in a suit between New York litigants for injuries suffered in Ontario because of conduct tortious under Ontario law. Their law was designed to prevent fraudulent insurance claims. There was no reason to depart from the New York policy of requiring a tortfeasor to compensate a person they have injured by their negligence.⁶⁵

As well as currently being absent from Australian law, there is little reference to interest analysis being applied, at least explicitly, in the Canadian or New Zealand case law.⁶⁶ It is submitted, with respect, that the jurisprudence of both countries would benefit from a consideration of such factors, at least in some cases.⁶⁷

V. CONDUCT REGULATION AND LOSS DISTRIBUTION

United States courts have recognized that different choice of law rules can apply to different issues put before the court for consideration. Specifically, they have recognized a distinction between what is known as 'conduct

64 The approach taken is similar to that of the *Second Restatement*, which was in draft form at the time of the decision. For an excellent account of the important impact the *Babcock* decision has had on American jurisprudence, see Harold Korn 'The Choice of Law Revolution – A Critique' (1983) 83 ColumbiaLR 772.

65 However, the result would be different if one of the parties resided in the law of the place of the wrong. This was confirmed in *Neumeier v Kuehner* (1972) 286 NE 2d 454, 456 where the wife of a Canadian resident sued after her husband was killed while a passenger in a car driven by a New York resident in Canada. The court applied Canadian law to the issue, noting that although New York has a deep interest in protecting its own residents, even when they are traveling interstate, it has no legitimate interest in ignoring the public policy of a foreign jurisdiction, Ontario in this case, and in protecting the plaintiff passenger living and injured there from legislation obviously addressed to a resident traveling in a vehicle within its borders.

66 'There is no indication that the policies underlying the substantive laws of potentially interested states were examined, nor were the factual contacts weighed.' Elsabe Schoeman, 'Tort Choice of Law in New Zealand: Recommendations for Reform' [2004] New Zealand Law Review 537.

67 Schoeman suggests that in the New Zealand context, interest analysis might be particularly useful where it is impossible to determine the proper law of the tort objectively on the basis of a centre of gravity approach – 'in such cases it will be necessary to determine which jurisdiction has the greater interest in the application of its law on the basis of the policy or policies underlying the law.' *Ibid*, 560.

regulation' and 'loss distribution'. Different rules apply to these categories. Conduct regulation tends to be governed by the law of the place of the wrong, either with or without resort to interest analysis. Nevertheless, interest analysis would be readily applied to conduct regulation. A jurisdiction has a clear and strong interest in regulating conduct within its territory. It would be very difficult for another jurisdiction to claim it has a stronger interest in regulating conduct within another jurisdiction, than the jurisdiction itself would have. As the court in *Babcock v Jackson* said, 'where the defendant's exercise of due care in the operation of his vehicle is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern ... (because of) that jurisdiction's interest in regulating conduct within its borders ... it would be almost unthinkable to seek the applicable rule in the law of some other place.'⁶⁸

So recently in *Matson by Kehoe v Anctil*,⁶⁹ the issue was whether the parents of a child injured in a Vermont car accident were guilty of contributory negligence. At the time of the accident, the plaintiff's mother was holding the child in her lap in the front passenger seat. The question of contributory negligence would be answered differently according to which law applied, the defendant being from Quebec. The court applied the law of the place of the wrong, Vermont, to the issue. The conclusion was that 'because both the conduct and the injury occurred in Vermont ... [that state] ... had a strong and obvious interest in regulating the conduct of persons within its territory and in providing redress for injuries that occurred there.'⁷⁰

Loss distribution is seen as something to which interest analysis (together, in some cases, with a proper law approach) is applied. Given that conduct regulation and loss distribution are decided by different rules, different law can apply to them. This is why in the 1997 *Matson* case the law of Vermont applied to the question of contributory negligence, but in the 1998 *Matson* case when the issue arose as to whether the defendant truck driver was an independent contractor or the agent of another defendant, the court viewed this as a loss

68 (1963) 191 NE2d 284.

69 (1997) 979 FSupp 1031.

70 Ibid, 1035. Similarly in *Pittman v Maldania Inc* (2001) WL 1221704, the defendant operated a water ski rental office on the Delaware side of that State's border with Maryland. The law of both states provided it was unlawful to rent skis to a person under 16, but the law of Delaware (only) also required that the person renting to produce a valid driver's licence. The plaintiff, aged 14, obtained skis after misrepresenting his age. He was injured while riding the skis in Maryland. The court found the law of the place of the wrong (in this case Delaware, where the skis were hired) should apply. The Delaware law reflected a 'clear policy against renting skis to people who are unable to produce a valid driver's licence ... [as] part of a comprehensive statute on boating safety ... [and] a state statute regulating conduct should be enforced throughout the State.'

distribution issue and applied Quebec law to the question. Quebec law had the greater interest in and closer connection with the issue because the truck driver and the corporation were both from that jurisdiction.⁷¹

So for example in *Babcock v Jackson* itself, the court found that the law of the forum should apply to the questions of liability because that jurisdiction had a closer interest in the issue than the alternative place of the wrong. The policy underlying the law of the place of the wrong would not be disturbed, the court found, if the law of the forum governed liability compensation issues.

While *Babcock v Jackson* dealt with a situation where the court applied interest analysis to find that the law of the forum governed compensation issues, the court can also apply interest analysis to find that the law of the place of the wrong governs these issues. A good example of this situation is *Myers v Langlois*.⁷² There both of the relevant parties lived in a jurisdiction (Quebec) barring the plaintiff's action. The accident occurred in a state (Vermont) allowing the plaintiff's action. The action was brought in a Vermont court. That court concluded that the law of Quebec should apply, based on interest analysis. As the judges said:

Since the choice of law issue presented relates to allocation of post-event losses, not regulation of conduct, the goals of Vermont's system would not be realized by permitting the actions to go forward here. Quebec has demonstrated strong policy concerns by enacting a comprehensive automobile insurance act that provides no-fault compensation and allocates loss between Quebec residents. We therefore conclude that Quebec's significant interest in maintaining its no-fault insurance scheme outweigh the parties' contacts with Vermont.⁷³

It should be pointed out the writer is not aware of any reference to the distinction between conduct regulation and loss distribution in any of the Australian, New Zealand or British conflicts jurisprudence.⁷⁴ However, the joint judgment in *Renault* contains the interesting aspect that the judges expressly reserved the question whether questions on kind, and quantification of, damage should be governed by the law of the place of the wrong.⁷⁵ This is interesting because the High Court has confirmed in cases such as *Stevens*

⁷¹ *Matson v Anctil* (1998) 7 FSupp2d 423.

⁷² (1998) 721 A2d 129.

⁷³ *Ibid*, 132.

⁷⁴ However in *Boys*, some of the judges saw no difficulty with segregating issues, and applying different laws to them – for example, Lord Wilberforce ‘This issue, whether this head of damage should be allowed, requires to be segregated from the rest of the case ... and tested in relation to the policy of the local rule and of its application to these parties so circumstanced.’ *Ibid*, 389.

⁷⁵ *Supra* n 1 at 520.

*v Head*⁷⁶ that it views questions as to the heads of damage that may be recoverable as a matter of substance that should, according to the general rule adopted by the High Court in *Pfeiffer* and *Renault*, be resolved according to the law of the place of the wrong. Yet the High Court in *Renault* leaves open the question of which law to apply. This leaves open the possibility that in future cases, the High Court might adopt the distinction, in applying its conflict of law rules in torts cases, between issues of conduct regulation and loss distribution. In particular, it might confirm that the law of the place of the wrong should apply to questions of conduct regulation, but the issue of loss distribution might need a more flexible approach.

This distinction between conduct regulation and loss distribution makes strong analytical sense to the writer. There is no warrant for departing from the law of the place of the wrong regarding issues of conduct regulation. That jurisdiction has a right to regulate conduct that occurs within its boundaries. The rule meets the reasonable expectation of the parties that if they enter another jurisdiction, their conduct is subject to regulation by the government of that jurisdiction. The rule is simple to apply, certain, and unlikely to lead to anomalies.

Compared with the issue of conduct regulation, loss distribution is more difficult. No general answer can be provided as to the correct approach, given the multitude of possibilities that may present themselves. However, in the simplest case where both parties are resident in one country/jurisdiction (A) and are involved in an accident in country B, it is surely true to say that country B has no real interest in determining the issue of the respective liabilities of the parties. The policy of that country's liability laws will not be thwarted if A's laws are applied to resolve the liability issues, in the case where both parties to the litigation are from that country. This situation is common in conflicts cases, including the facts raised in *Chaplin*, *Pfeiffer* and *Babcock*.

As James suggested, in reference to the *Pfeiffer* decision, the court should have considered whether 'the New South Wales legislature had any real interest in the application of its workplace scheme to an ACT employer's liability.'⁷⁷ Similarly, one could ask whether Malta had any interest in the application of its compensation laws to decide liability between British residents (the *Chaplin* situation), or whether the province of Ontario had any interest in the application of its compensation laws to decide liability between New York residents (the *Babcock* situation).

76 (1992) 176 CLR 433.

77 Elizabeth James 'John Pfeiffer Pty Ltd v Rogerson: The Certainty of Federal Choice of Law Rules for Intrnational Torts: Limitations, Implications and a Few Complications' [2001] 23 SydneyLR 145, 159.

One might make the same comment in relation to the recent decision in *Union Shipping New Zealand Ltd v Morgan*.⁷⁸ There the plaintiff, a New Zealand resident working for a shipping company incorporated in New Zealand, was injured while the ship was unloading coal in a New South Wales port. He sued his employer at common law. New Zealand had a no-fault compensation scheme that would have prevented him bringing a common law action in that country. The New South Wales Court of Appeal found that New South Wales law applied to the action. Again, one might ask the question whether New South Wales had any interest in applying its tort law (allowing a common law action) to the claim, based as it was against a New Zealand employer, who had contributed to a compensation scheme for employees in that country.⁷⁹ Is it anomalous that had the plaintiff been unloading the coal in New Zealand, or in non-Australian territorial waters, his claim may not have been able to be brought?

It is submitted that the rule decided upon by the High Court in *Pfeiffer* (confirmed in *Renault*), while having the advantage of simplicity and certainty, cannot address this situation in an acceptable way – where the law of the place of the wrong is in a sense fortuitous, and the parties have no other connection with this place other than that fact. This problem applies both in relation to international torts, and in torts involving more than one Australian jurisdiction.

Other possibilities may present themselves. It may be that one of the parties may live in the jurisdiction where the accident occurred, with the other living in the forum jurisdiction. Some United States courts would solve this problem by applying an interest analysis to the question of loss distribution. The High Court would apparently apply the law of the place of the wrong, inflexibly if dealing with an interstate conflict. The result would be more interesting if it were dealing with an international conflict. It outlined in *Renault* that in such cases the law of the place of the wrong would continue to apply. It may adopt an exception based on public policy considerations. But what of the High Court's reservations in *Renault* on the distinction it agreed to it *Pfeiffer* between matters of substance and matters of procedure, and particularly its

78 [2002] 54 NSWLR 690.

79 It is submitted a correct application of interest analysis to this factual scenario would find New South Wales had no interest in the litigation. With respect, it is not to the point to conclude, as Heydon JA did in *Union Shipping*, that 'it cannot be said that New South Wales, whose citizens were receiving the coal, had no concern with the presence of the vessel.' *Ibid*, 731. If this was a purported application of interest analysis, it is submitted with respect not to be an accurate one. His Honour went on to say that 'it is difficult to see how anything in the nature of an onerous or disruptive burden would be created by applying New South Wales law.' *Ibid*. With respect, this is not an accepted test for deciding on questions of *choice of law*.

comments that it reserves the question whether issues regarding quantification of damages is in fact a matter for the place of the wrong, in relation to international cases?⁸⁰

Is this far from the approach of the United States which reserves the issue of loss distribution to the place with the closer connection with the parties, involving questions of policy? It was suggested earlier that the High Court in *Renault* may have been indicating it would apply questions of policy in its classification of issues, including quantification of damages, as either substantive or procedural.

The matter must remain for the moment one of conjecture only, but it is quite conceivable given the Court's comments in *Renault* that one day, it may (as a matter of policy) determine issues of quantification of damages, in relation to an action brought in Australia based on a tort committed overseas, according to the law of the forum (Australia). The policy reason for this may be that the foreign jurisdiction does not recognize heads of damage that Australian law does (the situation in *Chaplin*), together with (or as an alternative) the argument that deciding issues of loss distribution by the law of the forum (Australian law) does not, as a matter of international comity, interfere with the sovereignty, public policy or interest of the foreign jurisdiction in the matter at hand. If the Court were to take this step, it would be justified in doing so by referring to the United States distinction between conduct regulation and loss distribution.

VI. CONCLUSION

It is submitted that the Australian High Court has generally taken a very positive step recently in stating the law of the place of the wrong as the only law to be applied in relation to torts involving more than one state, and as (at least) the primary law to be applied in relation to international torts.

The author prefers this approach to the continuing adherence to the double actionability rule evident in the New Zealand law. There is surely no justification for continuing to require that the law of the forum provide recovery in the matter, *a la Phillips v Eyre*. It is submitted to be an anachronistic rule, overturned by legislation or case law in most jurisdictions. New Zealand is one of the few to continue to adhere to it. Of course, that fact alone is not grounds for it to be overturned, but when many other countries recognize the previous

80 Compare the approach of the Supreme Court of California in *Tucci v Club Mediterranee SA* (2001) 107 Cal Rptr 2d 401, where the court applied the law of the place of the wrong, the Dominican Republic, to determine what remedies were available to the plaintiff, rather than the law of the forum.

law is no longer desirable, if it ever was, it surely justifies a rethink. The *Phillips* approach may be based on an overly-parochial approach to questions of choice of law, a disdain for legal systems other than the one the judge belongs to, or a difficulty in obtaining the substantive law of other countries. Surely, none of these justifications can withstand serious scrutiny now.

However, in future the High Court may need to consider increasing flexibility in the application of its choice of law rules, as at least Kirby J on the current bench has conceded. Just as New Zealand has become isolated in its adherence to double actionability, Australia has become isolated in its rejection of a flexible exception to choice of law questions. It is an isolation which surely cannot continue. The article has pointed out that facts like those in *Kuwait Airways* would strain the High Court's newly-adopted test and hopefully make it reconsider its antipathy towards a flexible exception.

There is a rich North American jurisprudence in relation to questions of policy (albeit in a different context), including the possibility of answering different questions that may arise in a conflicts case by applying different laws, and interest analysis to weigh up competing interests in particular cases. Such an approach also commended itself to the British legislators.

The author has concluded against creating any exception to choice of law rules based only on 'policy'. As has been seen, the concept is fraught with uncertainty. It has been used in different ways by different courts. The record of the High Court in various fields in applying the concept of 'policy' has not been an envious one, creating uncertainty, and perhaps masking views and considerations that are not always expressed clearly. The author would prefer a more explicit and transparent solution.

The conclusion reached by the writer is that matters of conduct regulation should be regulated by the law of the place of the wrong, without exception. This rule should apply both in interstate and international torts cases. This result is generally consistent with the High Court's stated preference in *Pfeiffer* for rules in this area to be as simple as possible, consistent, and certain. It meets legitimate expectations that a person who is present within a jurisdiction submits to that jurisdiction's conduct regulation rules. That jurisdiction has a strong interest in developing and enforcing conduct standards that apply to all within its borders.

However, it is concluded that the question of loss distribution is a more vexed one. There is much to be said for the argument that the law of the place of the wrong should not apply to this issue in the case where that country's government (and/or law) has no interest in the allocation of responsibility between the parties. This may be because the parties do not reside in that

jurisdiction, have no interest in it, and where the policy intent of that country's relevant laws would not be thwarted by their non-application to the loss allocation decision in the case at hand.⁸¹ It is conceded here that it may be a difficult matter of evidence to determine in all cases the policy intent of the relevant legislatures. However, this should at least be a genuine exercise, and not a sham to justify applying the law of the forum, to take into account Brilmayer's forum-bias concerns with interest analysis.

As a result, it is suggested that where the issue is one of loss distribution, the court should not automatically apply the law of the place of the wrong to resolve the issue (current Australian position), nor generally apply the law of the forum (current New Zealand position). Perhaps this could be the starting point, or initial presumption, as currently occurs in New Zealand. The question should be answered by considering interest analysis, and whether the policy intent of each of the relevant legislatures in the tort field would be thwarted if their law did not apply to resolve the issue. This change to the current Australian position could be achieved through development by the courts, but perhaps the preferable approach is to legislate the exception to clarify the issue, as the United Kingdom did. The legislation could clarify the general rule subject to displacement, precisely which considerations were relevant in applying the interest analysis approach to loss distribution, and what kind of evidence might be appropriate to determine the issue. This is seen as preferable to a vague judicially crafted exception based on 'policy'.

It is also suggested that New Zealand should abandon its double actionability test, in favour of primacy being given to the law of the place of the wrong, subject to an exception in the area of loss distribution, along the lines (broadly) of the position in the United Kingdom, but allowing for a different approach to the issues of conduct regulation (inflexible) and loss distribution (flexible). Thus the author contends that an Australian court and New Zealand court should adopt similar positions on this difficult issue.

81 This is acknowledged as a hybrid of interest analysis and proper law approach, an approach certainly not without support in the literature, see *supra* n 58.

Broadening Horizons of Qualified Privilege: Desirability of One Law For All

Prof. Dr. Mohd Altaf Hussain Ahangar*

I. INTRODUCTION

Qualified privilege as a defence to defamation action has its roots in the common law. However, the scope of this defence has been amplified in recent years through judicial activism and legislative measures.

This paper endeavors to highlight the common law rules in relation to qualified privilege and its application in England and Malaysia. A detailed discussion will follow with respect to the broadening horizons of this defence in England, Australia, New Zealand and Malaysia. The supplementation of common law principles by statutory provisions in these countries will then be considered. In the end, the paper will conclude that in a secular matter like defamation, there should be no place for diverse laws in different countries and the time is opportune to have one law for all in the contemporary global village.

II. QUALIFIED PRIVILEGE AT COMMON LAW

Sometimes it is necessary for a person to make statements in order to discharge one's legal or moral obligations or to protect one's own legitimate interests.¹ On such occasions, common law confers a limited form of immunity from legal action on the maker of a defamatory statement. The immunity or defence so created is known as qualified privilege. This defence attaches more importance to the occasion or the circumstances of the publication than to the defamatory statement itself and is available despite the fact that the statement made on such occasion or in such circumstances turns out to be false.² However, the defendant should not be motivated by malice and must honestly believe in the truth of the defamatory statement.³ With regard to privileged occasion, Lord Atkinson in *Adam v Ward*⁴ stated:

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1 *Horrocks v Lowe* [1975] AC 135, 149.

2 *Ibid.*

3 *Ibid.*

4 [1917] AC 309, 334.

A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.

Thus, the duty in question need not be legal but may be social or moral.⁵ Likewise the interest relied on as the foundation of privilege must be definite. It may be direct or indirect, but it must not be vague or insubstantial. So long as interest is of so tangible a nature that for the common convenience and welfare of society it is expedient to protect it, it will come within the rule.⁶ It is necessary that the interest or duty in question must actually exist; it is generally not enough that defendant honestly believes, even on reasonable grounds, in its existence.⁷ Reciprocity of duty or interest between the maker and recipient of the statement is a pre-requisite. If either is lacking, then the occasion on which the communication is made is not privileged.⁸

The above quoted requirements for a defence of qualified privilege have been applied in infinite cases not only in England but in most countries of the world. In Malaysia, we have a long line of cases in which this defence has been applied. In *Jenni Ibrahim*⁹ the defendant was removed from the post of managing director of a medical centre and was replaced by the plaintiff. The defendant made an allegation of misappropriation of money at the medical centre against the plaintiff and wrote about it to Chief Police Officer. He made the same allegation in a letter to the Secretary of Medical Center and sent copies to the Director, Social Welfare and Registrar, Societies of Malaysia. The plaintiff filed suit for defamation and claimed damages for embarrassment, distress and humiliation. Rejecting the defence of qualified privilege, Ajaib Singh J observed:

There was no common and corresponding duty or interest between the defendant and the several persons who received and read the libelous statements.¹⁰

Recently, the High Court of Melaka had an opportunity to deal with the qualified privilege defence in *Abu Samah*.¹¹ In this case, in June 1996, the defendant appointed the plaintiff to carry out demolition and construction work in the plaintiff's house. On August 7, 1996, the defendant was informed

5 *Stuart v Bell* [1891] 2 QB 341, 350.

6 *Howe v Lees* (1910) 11 CLR 361, 377.

7 *Beech v Freeson* [1972] 1 QB 14, 24-25.

8 *Watt v Longsdon* [1930] 1 KB 130.

9 *Dr. Jenni Ibrahim v S. Pakianathan* [1986] 2MLJ 154.

10 *Ibid*, 155; See also, *Chong Siew Chiang v Chua Ching Geh* [1992] 4 CLJ 1839; *Doree Industries (M) Sdn. Bhd. v Sri Ram & Co* [2000] 1 MLJ 532.

11 *Abu Samah bin Omar v Zainal bin Montal* [2004] 5 MLJ 377.

by his wife that some money and jewelry in the house were found missing. On the same date, the defendant lodged police report suspecting one of the plaintiff's three workers. The plaintiff sued the defendant for libel on the basis of that police report. The trial court allowed the plaintiff's claim and observed that 'in making the police report, the defendant could not rely on the defence of qualified privilege, although there was no malice on the part of the defendant.' On appeal, the court allowed the defence of qualified privilege. Low Hop Bing J observed:

The learned magistrate has erred in failing to apply the defense of qualified privilege, as the plaintiff was unable to adduce any evidence of malice on the part of the defendant.¹²

The learned judge rightly relied on following observation of KN Segara in *Hoe Thean Sun*:¹³

The law clearly recognized that all statements made in police report are statements made on a privileged occasion, and the privilege is qualified, though not absolute...The primary purpose of police report is to set in motion the investigation of an offence and bring to justice the offender and perpetrators, if any, at the conclusion of the investigation by the appropriate authorities.¹⁴

The other recent case is *Puneet Kumar*.¹⁵ In this case the plaintiff brought an action on the basis that the defendant while wrongly terminating his services as a visiting consultant used certain words in the terminating letter which were defamatory to his status as a specialist. The defendant, as executive director, had sent copies of the termination letter to the chairman, chief executive, medical director and administrator of the relevant hospital. The defendant did not dispute the authenticity of the disputed letter, but argued that the termination was justified as the plaintiff's actions during an operation were a total failure of teamwork, and pleaded the defence of qualified privilege. Allowing the defence, Kamalanathan Ratnam J, while referring to, mostly local, various cases, adopted the following observation of Lord Diplock in *Horrocks*:¹⁶

Indifference to the truth of what a person publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true, the freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal

12 Ibid, 383.

13 *Hoe Thean Sun v Lim Tee Keng* [1999] 3 MLJ 138.

14 Ibid, 142.

15 *Puneet Kumar v Medical Centre Johore Sdn bhd.* [2004] 5 MLJ 573.

16 *Horrocks*, supra n 1.

or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life, it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of, its probative value. In greater or lesser degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognize the cogency of material which might cast doubt on the validity of the conclusions they reach. *But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest', that is a positive belief that the conclusions they have reached are true.* The law demands no more.¹⁷

III. THE BROADENING HORIZONS

At common law, qualified privilege was intended to serve as a defence for a person in relation to communication to a limited number of persons, i.e., persons who had a social, legal or moral duty to receive the communication. In recent years, this defence has been extended even to communications to a nation or to the whole world through mass media. The four landmark cases in four different jurisdictions deserve a detailed discussion. They are *Lange v ABC*¹⁸ in Australia, *Lange v Atkinson*¹⁹ in New Zealand, *Reynolds*²⁰ in England and *Dato Seri Anwar Ibrahim*²¹ in Malaysia.

In the Australian case *Lange v ABC*²², David Lange sued Australian Broadcasting Company in respect of a broadcast that allegedly cast aspersions on plaintiff's conduct, performance and fitness for office as a member of New Zealand's Parliament and as its Prime Minister. The defence plea included common law qualified privilege. The High Court of Australia allowed an expanded defence of qualified privilege in relation to political discussion. All the seven judges in one voice declared:

Each member of Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by

17 Ibid, 150.

18 *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96.

19 *Lange v Atkinson* [2000] 3 NZLR 385.

20 *Reynolds v Times Newspapers Ltd.* [1999] 4 All ER 609.

21 *Dato Seri Anwar Ibrahim v Dato Seri Dr Mahathir Bin Mohamad* [1999] 4 MLJ 58.

22 *Lange v ABC*, supra n 18.

discussion - the giving and receiving of information - about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege.²³

One fact that is obvious from the observation is that the common convenience and welfare of modern society²⁴ demands the broadening of the horizons of the defence of qualified privilege. In this regard the court drew the distinction between defamatory statements regarding political or governmental matters which were published to a limited number of recipients and those which were communicated to a large audience. In first type of defamation, once it is established that the matter complained of has the necessary political or governmental flavor, the publication is made an occasion of qualified privilege. However, in second type of defamation, it is necessary for the defendant to prove that his or her conduct in publishing the material complained of was reasonable.²⁵ With regard to the malice requirement, the court opined that the concept of malice was narrowed by eliminating from it those matters pertaining to defendant's mental state which he or she must establish under the rubric of reasonableness.²⁶

Prior to the Australian *Lange v ABC* case, the High Court of New Zealand had dealt with the issue of unlimited communication in *Lange v Atkinson*.²⁷ This case arose from a defamation action by former New Zealand Prime Minister David Lange against the writer and publisher of an article in the New Zealand magazine *North and South* which was critical of the plaintiff's performance as a politician. Elias J allowed the defence and observed that 'whilst a "stand-alone" defence of political expression was unknown to the law of New Zealand, the alleged facts upon which it was claimed could give rise to an occasion of qualified privilege.²⁸ On appeal, the Court of Appeal did not disturb Elias J's judgment. While rejecting the reasonableness requirement propounded in the Australian *Lange v ABC*, it made following observations:

- (1) The defence of qualified privilege may be available in respect of statement which is published generally.
- (2) The nature of New Zealand's democracy means that the wider polity may have a proper interest in respect of generally published statements which directly concern the functioning of representative and

23 Ibid, 115.

24 Ibid, 116.

25 Ibid, 116-117.

26 Ibid, 117.

27 *Lange v Atkinson*, supra n 19.

28 Ibid, 48.

responsible government, including statements about the performance or possible future performance of specific individuals in elected public office.

- (3) In particular, a proper interest does not exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.
- (4) The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern.
- (5) The width of the identified public concern justifies the extent of the publication.²⁹

New dimensions were added to the defence of qualified privilege in England by *Reynolds*.³⁰ In this case, the plaintiff was a former *Taoiseach* (Prime Minister) of the Irish Republic who sued the *Sunday Times* in respect of an alleged libel in its British mainland edition, concerning the circumstances of his resignation as leader of the Fianna Fail/Labour Coalition in 1994. He alleged that the article meant that he had allegedly misled the Dail and his cabinet colleagues over the handling of a controversial extradition case by the then Attorney General, whom he wished to appoint the President of High Court. At the Court of First Instance, and in the Court of Appeal, the publication of the article was held not privileged. Further, both the courts rejected any wide qualified privilege at common law for political speech. The Court of Appeal,³¹ however, held that, in addition to the duty and interest test, a circumstantial test had to be satisfied: 'where the nature, status and source of the material and the circumstances of the publication are such that the publication should be in the public interest, it would be protected in the absence of proof of malice.'³² In response to defendant's appeal, the House of Lords by majority rejected the plea of privilege because the article had omitted all reference to what the claimant had said in the Dail by way of explanation.³³ It rejected the 'circumstantial test' propounded by the Court of Appeal.³⁴ The starting point for Lord Nicholas was 'freedom of expression'. According to his Lordship, freedom to disseminate and to receive information on political

29 Ibid, 61.

30 *Reynolds v Times Newspapers Ltd* (1999) supra n 20.

31 *Reynolds v Times Newspaper Ltd* [1998] 3 WLR 862 at 899.

32 *Reynolds v Times Newspapers Ltd* (1999) supra n 20 at p 627.

33 Ibid, 619.

34 Ibid, 621-622.

matters was essential to the proper functioning of the system of parliamentary democracy. The media played an important role in this process. Thus, without a free press, freedom of expression would be hollow concept. However, the protection of reputation was also an important public good.³⁵ According to his Lordship, the crux of the appeal therefore lay in identifying the restrictions which are fairly and reasonably necessary in a democracy for the protection of reputation. Consequently, Lord Nicholas set out a non-exhaustive list of circumstances which would be relevant to the question of whether the media should be regarded as having a duty to convey information and the public a corresponding interest in receiving it. However, he mentioned that the weight to be given to these and any other relevant factors will vary from case to case.³⁶ The outlined ten factors were:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the claimant. He may have information others do not possess or have not disclosed. An approach to the claimant will not always be necessary.
8. Whether the article contained the gist of the claimant's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.³⁷

35 Ibid, 622.

36 Ibid, 626.

37 Ibid.

It is in the backdrop of the above three cases that, in Malaysia, the defence of qualified privilege in relation to communication to the public at large was in issue in the case of *Dato Seri Anwar Ibrahim*.³⁸ In this case, the plaintiff, the former Deputy Prime Minister brought an action in defamation against the defendant who at the material time was the Prime Minister and the Home Minister of Malaysia. The plaintiff, who was dismissed from various governmental and political positions, claimed that on 22 August 1998 the defendant falsely and maliciously spoke and published to national and international journalists about the plaintiff and accused the plaintiff of homosexuality. The defendant argued, inter alia, the defence of qualified privilege in view of an admission of sodomy by two persons earlier before the court. The defendant further contended that his statement was based on matters that were already of public knowledge and on information related to him by police. He argued that as Prime Minister of the country, he had a duty to the public who elected him and to his party to explain reasons for the plaintiff's dismissal from various positions. The defendant further contended that he was badgered by various sources for explanations on the plaintiff's dismissal from his various offices and that the alleged defamatory response he made was a direct response to a question posed by a member of the press at a press conference.³⁹

Allowing the defence of qualified privilege, the High Court, while referring to decisions in various cases from different jurisdictions, focused on three tests outlined by the Court of Appeal in *Reynolds*. Kamalanathan Ratlam J observed:

The defendant was duty bound to have disclosed the information concerning his ex-deputy. As the chief executive of the government, the defendant was under a legal, moral and social duty to inform the nation of the matters concerning the plaintiff....The defendant's words were uttered with a view to repelling the charges [charges included of a political conspiracy of the highest level] made by the plaintiff, they were made bona fide and were relevant to the accusations made by the plaintiff. The defendant's words were spoken on an occasion of qualified privilege. The defendant spoke of the words with a mind devoid of malice and has also satisfied the tests set out in *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 862 for assessing whether the defence of qualified privilege applies.⁴⁰

Further, the court was highly critical of plaintiff's case. Treating it as an abuse of judicial process, the learned judge further observed:

38 *Dato Seri Anwar Ibrahim v Dato Seri Dr Mahathir Bin Mohamad*, supra n 21.

39 Ibid, 64-68.

40 Ibid, 69-72. The plaintiff's two appeals to Court of Appeal and Federal Court were unsuccessful. See [2001] 1 MLJ 305 and [2001] 2 MLJ 65.

The 'primus inter pares' of the country and his cabinet colleagues must be protected from frivolous, vexatious and abusive suits. Otherwise, rather than running the country towards achieving peace and prosperity for its citizens, the officials of the government will forever be looking over their shoulders for fear of being dragged to court with an unwanted but heralded suit. Whilst no one is above the law, yet the court must be ever vigilant, never indolent, ever watchful, never fearful of its duty to check on the conspiratorial machinations of parties or persons motivated with the express desire of dragging top officials who run the country, to court with intent to cause nothing more than embarrassment to such officials. The plaintiff's claim was one that was frivolous, vexatious and an abuse of the process of the court and should therefore be struck out.⁴¹

After this judgment came House of Lords' observation in *Reynolds*. We already know that the House of Lords rejected the three test formula laid down by the Court of Appeal in this case. Even if the House of Lords decision in *Reynolds* had been referred to in *Dato Seri Anwar Ibrahim*, the outcome could not have been different. The insistence of the House of Lords to go back to the traditional twofold test of duty and interest would not have mattered because the devised test was sufficiently flexible to embrace, depending on the occasion and the particular circumstances, a qualified privilege in respect of political speech published at large. The essential question that had to be asked in any case was whether the public was entitled to know the particular information.

This required consideration of many matters including, but not limited to, the nature, source, tone and character of the report, any steps taken to verify the information, the urgency of the matter, whether the claimant had been given the chance to respond, and the timing of the publication. One can hardly be critical of judgment in *Dato Seri Anwar Ibrahim* because the judgment satisfies all the criteria outlined in *Reynolds*. However, one critic⁴² of the judgment argued that the defendant had no legal duty to communicate to journalists and so there was no question of relying on the defence of qualified privilege as laid down in *Reynolds*. The critic, however, does ignore two facts. Firstly, *Reynolds* does not speak about a legal duty only but also of social and moral duties. Secondly, legal matters and political matters are not same. Both have to be tackled on their own terms. The plaintiff in this case was not an ordinary person. He had immense political influence. Simply dismissing him from the post of Deputy Prime Minister would not have been acceptable to the common man of this country. So, all the communications made by the defendant need to be viewed also from the political dimensions involved in this case.

41 Ibid, 72.

42 See Abdul Aziz Bari, '*Dato Seri Anwar Ibrahim v Dato Dr Seri Mahathir bin Mohamad: The Constitutional Dimensions*' [1999] 4 MLJ cxc, p cxciii.

IV. DIVERSE STATUTORY DEFENCES OF QUALIFIED PRIVILEGE

From the above discussion it is evident that the common law defence of qualified privilege has been immeasurably broadened in relation to political discussions and media publications. But there is a need to realize that defamation is a secular issue devoid overall of religious, cultural, linguistic and other considerations. It is a human issue. So by now there should be a uniform global law on this issue, which includes the defence of qualified privilege. Unfortunately it is not so. Most countries have legislation, which differs in substance but is the same in spirit. In addition to the common law principles discussed above, in Malaysia, we have Section 12 of Defamation Act 1957 which extends the defence of qualified privilege to the following publications in a newspaper:

A fair and accurate report of proceedings –

1. of the legislature of any part of the Commonwealth other than in Malaysia;
2. of an international organization of which Malaysia or the Government therefore is a member;
3. of an international conference to which the Government sends a representative;
4. before any court exercising jurisdiction throughout any part of the Commonwealth outside Malaysia under any written law in force in Malaysia or under any Act of the United Kingdom Parliament; and
5. of a body or person appointed to hold public enquiry in the Government of Malaysia or any State thereof or by the legislature of any part of the Commonwealth outside Malaysia.
6. a fair and accurate copy of or extract from any register kept in pursuance of any written law in force in Malaysia or document which is open to inspection by the public or which members of the public are entitled on payment of a fee to a copy.
7. a notice, advertisement or report issued or published by or on the authority of any court within Malaysia or any Judge or officer of such court or by any public officer or receiver or trustee acting in accordance with the requirements of any written law.

This set of publications is at variance with publications recognized under English Defamation Act 1996. Under this Act, the statements protected by the defence of qualified privilege have been divided into two groups: statements

having qualified privilege without explanation or contradiction, and statements privileged subject to explanation or contradiction. The main peculiarity of the English statute is that it accords protection to a number of publications in newspaper at global levels rather than confining it to Commonwealth countries.⁴³

Much diversity is visible in Australia, where all the eight states have their own defamation regime. However, in order to ensure brevity and relevance, reference will be made only to the statutes of Queensland, Tasmania and New South Wales. Queensland and Tasmania are not governed by common law in relation to qualified privilege but by two codes; the Defamation Act 1889 and the Defamation Act 1957 respectively. In relation to qualified privilege both codes are in substance identical. Section 16(1) of both codes provides eight situations under which the defence of qualified privilege can be taken.

It is lawful excuse for the publication of defamatory matter if the publication is made in good faith-

- (a) in the course of a censure passed by a person on the conduct of another person over whom he has lawful authority, being conduct in matters to which that lawful authority related;
- (b) for the purpose of seeking remedy of redress for a private wrong or grievance or a public wrong or grievance from a person who has, or is reasonably believed by the person who makes the publication to have, authority over the person defamed with respect to the subject matter of the wrong or grievance;
- (c) for the protection of the interests of the person who makes the publication, or of some other person, or for the public good;
- (d) in answer to an inquiry made of the person who makes the publication in the relation to a subject as to which the person by whom or on whose behalf the inquiry is made has, or is reasonably believed by the person who makes the publication to have, an interest in knowing the truth;
- (e) for the purpose of giving information to the person to whom it is made with respect to a subject as to which that person has, or is reasonably believed by the person who makes the publication to have, such an interest in knowing the truth as to make the last-mentioned person's conduct in making the publication reasonable in the circumstances;
- (f) on the invitation or challenge of the person defamed;

43 See Sec 15 & Schedule 1 to the Defamation Act 1996.

- (g) in order to answer or refute some other defamatory matter published by the person defamed concerning the person by whom the publication is made or some other person; or
- (h) in the course, or for the purposes, of the discussion of a subject of public interest the public discussion of which is for public benefit.

However the defence will fail if the plaintiff proves that the defamatory statement was not made in good faith.

The Queensland and Tasmania legislation is different from common law in the following respects:

1. Under s 16 there is no single, universally applicable test for determining the circumstances in which the statutory defence will be available. Rather it is necessary to bring oneself within the precise terms of one or more of its paragraphs.
2. Reciprocity of duty or interest is not an invariable prerequisite for protection - the terms of each paragraph must be individually examined.
3. In paras (b), (d), and (e), proof that the recipient actually possesses the specified authority or interest is unnecessary - a reasonable belief by the publisher in its existence will suffice.
4. Paragraph (h) in particular has no direct common law ancestor.⁴⁴

In comparison the common law defence of qualified privilege remains available in New South Wales. It is, however, supplemented by ss 20-22 of Defamation Act 1974 which provide law for multiple publications, mistaken character of recipient and reasonable publication of information to interested persons.

V. CONCLUSION

One can see that the principles of common law in relation to qualified privilege have not remained lifeless in most countries of the world. Rather the courts have in recent years broadened the horizons of these principles in relation to individual communications, political discussions and media publications. What is, however, worrying is the presence of diverse statutory provisions even in one country in relation to defamation, particularly in relation to qualified privilege. Confusion and uncertainty around protected speech is further compounded, impeding the social goods both defamation and qualified privilege are supposed to further, when in a country like Australia the eight

44 Michael Gilooly, *The Law of Defamation in Australia and New Zealand* (1999) 284.

states have preferred their own regime of laws on defamation, all at variance with each other. The variance has become such an irritation that the Australian Attorney General Ruddock⁴⁵ has recently directed states to adopt a uniform law on defamation. He has even threatened imposing his own version of law on defamation although it is doubtful whether he has constitutional power to do so. Personally I agree with Ruddock because we all belong to global village, which values many of the same human and social goods. The laws governing us should be also one and the same in secular matters.

45 *Ruddock's Draft*. For details, see Commonwealth Attorney General's Page. www.gov.au

The Relation Between Public International Law And Private International Law In The Internet Context

Dr Dan Jerker B. Svantesson*

I. INTRODUCTION

The relation between private international law and public international law has gained little attention. Indeed, in legal education, the two disciplines are treated as two completely separate subjects and, in my experience, comparisons of the two ordinarily fall outside the curriculum. This practice has always been unfortunate, but is becoming untenable in light of Internet technology. When the Australian High Court had to decide whether a Victorian court could claim jurisdiction over a US publishing company based on allegedly defamatory material available online, it was faced with essentially the same dilemma as a French court was when it had to decide whether or not to claim criminal jurisdiction over a US web auctioneer – private international law and public international law face the same problems in the Internet context.

This article makes some observations as to the connections between public international law and private international law. In doing so, particular reference is made to the context of the Internet.

II. THE BACKGROUND

While they may very well originate in international instruments, rules of private international law (or conflict of laws as the area often is referred to in common law countries) are domestic. They are rules, in one way or another, decided by each State, and are in place to regulate essentially four questions: when a court may exercise jurisdiction over a dispute, when a court may decline to exercise jurisdiction over a dispute falling within its jurisdiction, which country's law the court should apply in a dispute falling within its jurisdiction, and under what circumstances a court may recognise and/or enforce a foreign judgment.

Public international law is an enormously diverse discipline. In its strictest, and now arguably outdated, sense, it could be said to be concerned with legally binding rules and principles regulating the relationships between sovereign

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States. Areas ordinarily dealt with within the scope of public international law include, for example, the law of treaties, issues relating to territory, statehood and State responsibility, international dispute settlement and international use of force. However, this fascinating area of law does also include rules regarding when a State's court can claim jurisdiction (including, prescriptive jurisdiction, adjudicative jurisdiction and enforcement jurisdiction), and it is this potential overlap, or connection, with the rules of private international law that is in focus in this paper.

III. DO THE JURISDICTIONAL RULES OF PUBLIC INTERNATIONAL LAW AFFECT THE RULES OF PRIVATE INTERNATIONAL LAW

The first, and perhaps most obvious, objection to acknowledging a connection between public international law and private international law is that civil disputes between two private parties, the core area of private international law, falls outside the scope of public international law. It is, however, submitted that this objection rests upon an oversimplification.

Sovereignty, or 'jurisdictional sovereignty' as it sometimes is referred to, is a central feature of each individual State and "pertains to a State's sovereign right to exercise authority over persons, things and events by use of its domestic law and its State organs."¹ In illustrating the type of jurisdictional sovereignty that public international law concerns itself with, Hall gives the example of a court of State A convicting a citizen of State B for exceeding the road speed limits set by State A, while driving in State B. By doing so, the learned author argues, "the court in State A would call into question the [jurisdictional] sovereignty of State B to exercise authority over persons, things and events within its own territory by use of domestic law,"² and this would be a scenario to which customary international law would be applicable. Now imagine an example where a court of State A exercises civil jurisdiction over a national of State B, who have engaged in conduct in his home country, causing harm in State A. In such a case, the court of State A is undeniably 'calling into question the [jurisdictional] sovereignty of State B to exercise authority over persons, things and events within its own territory by use of domestic law,' much the same as in the example given by Hall. While the court in the latter example may be more justified in doing so, the fact that, in this latter case, the dispute is civil rather than criminal does in no way alter the fact that the court is, in a sense, competing with the sovereignty of State B.

1 Stephen Hall, *Public International Law* (2003) 209.

2 Ibid.

Following the same line of reasoning, we can compare the task that faced a French court in the *Yahoo* case, and the task that faced the High Court of Australia in the *Gutnick* case. In *International League Against Racism & Anti-Semitism (LICRA) and the Union of French Jewish Students (UEJF) v. Yahoo! Inc.*,³ the defendant was operating a website which, amongst other things, contained an auction service where Nazi memorabilia/junk was frequently on offer.⁴ The website could be described as the Yahoo family's "flagship", and in contrast to the country-specific Yahoo sites (e.g. www.yahoo.fr), this site was said to be aimed at the world at large.⁵ When LICRA and UEJF requested that Yahoo remove the Nazi material from the auction service, in accordance with French penal Code,⁶ Yahoo refused. In *Dow Jones & Company Inc v Gutnick*,⁷ the High Court of Australia had to decide whether a Victorian businessman, Joseph Gutnick, was allowed to sue a US publishing company, Dow Jones & Company Inc, in a Victorian court over an allegedly defamatory article available in large parts of the world on Dow Jones' website. Further it was for the High Court to decide whether Victorian law would be applied.

While the *Yahoo* case related to criminal law and the *Gutnick* case related to civil law, the tasks the respective court was faced with was essentially the same – it had to decide whether it was entitled to exercise its powers in respect of a foreign company having engaged in conduct in its home country, causing harm in the State where the court was located. It is undisputed that the rules of private international law are of relevance only in relation to the *Gutnick* case, and not in relation to the *Yahoo* case. However, to conclude that the rules of public international law are of relevance only in relation to the *Yahoo* case, and not the *Gutnick* case, seems unjustified. It is submitted that the jurisdictional rules of public international law imposes limits, not only in relation to when a State can exercise jurisdiction in relation to criminal matters, but also in relation to when a State can exercise jurisdiction in relation to civil matters. After all, in both cases the court is exercising its powers over a foreigner and thereby competes with the sovereignty of the other state.

Having reached this conclusion, the need for research into what effect the jurisdictional rules of public international law have on private international law has been established. However, such an examination lies outside the scope of this paper.

3 County Court of Paris, Interim Court Order of 20th of November 2000 (English translation available at: <http://www.cdt.org/speech/international/001120yahoofrance.pdf>).

4 However, the auction service was not at all specifically designed for the purpose of auction Nazi material.

5 A notion that is backed by the fact that country-specific advertisement was provided on the site.

6 Section R645-1.

7 [2002] HCA 56.

IV. DO THE RULES OF PRIVATE INTERNATIONAL LAW AFFECT THE JURISDICTIONAL RULES OF PUBLIC INTERNATIONAL LAW

One important corollary of the conclusion that the jurisdictional rules of public international law imposes limits also in relation to when a State can exercise jurisdiction in relation to civil matters, is that also State practice relating to jurisdictional claims over civil matters is of relevance in determining the current state of customary international law. However, not all commentators would agree with this conclusion. In discussing the effect public international law has on private international law, Akehurst notes that: “when one examines the practice of States, [...] one finds that States claim jurisdiction over all sorts of cases and parties having no real connection with them and that this practice has seldom if ever given rise to diplomatic protests.”⁸ I am, however, not entirely convinced that the absence of diplomatic protests can be seen, as Akehurst does, as a definite indication of acceptance of dubious jurisdictional claims. In fact, it would seem quite possible that the absence of diplomatic protests simply is a consequence of the concerned States instead choosing not to recognise and enforce foreign judgments based on dubious jurisdictional grounds. Thus, the presence or absence of diplomatic protests may perhaps not at all be the “acid test of limits of jurisdiction in international law.”⁹ Akehurst believes it to be. In conclusion, there does not appear to be any reason why State practice relating to jurisdictional claims over civil matters would not be of relevance in determining the current state of customary international law. Thus, a need for research into what effect such practice has on customary international law relating to jurisdiction is established. However, such an examination lies outside the scope of this paper.

V. PUBLIC INTERNATIONAL LAW (IN THE SENSE OF HUMAN RIGHTS LAW) KEEPING PRIVATE INTERNATIONAL LAW UNDER CONTROL

As noted by commentators, “[i]ndividuals have increasingly become subjects of [public] international law in certain fields, as States have concluded agreements codifying and conferring human rights and establishing direct individual responsibility for international crimes.”¹⁰ Public international law is affecting the rules of private international law also in this regard.

The background facts of the Internet defamation dispute between Dow Jones and Joseph Gutnick have already been alluded to above. Interestingly enough, after the High Court of Australia had decided in Mr Gutnick’s favour, allowing him to bring his claim in Victoria under Victorian law, the

8 Michael Akehurst, ‘Jurisdiction in International Law’ (1973) 46 *BritYBInt’l* 145, 170.

9 *Ibid*, 176.

10 Hall, *supra* n 1 at 1.

author of the disputed article, Bill Alpert, petitioned to the *United Nation's Human Rights Committee* (UNHRC) in an attempt to have the Australian standpoint declared to be in violation of the *International Covenant on Civil and Political Rights* (ICCPR). This was possible due to the fact that Australia, in contrast to Mr Alpert's home country, the United States of America, has signed the First Optional Protocol (OP-1)¹¹ of the ICCPR (which amongst other things guarantees that individuals can petition to the UNHRC to hear alleged violations of the ICCPR). It may here be mentioned that the OP-1 thus does not allow Dow Jones (a business entity) to lodge an application, and an application can only be lodged against the conduct of State parties, in this case Australia (in contrast to e.g. the plaintiff of the disputed action, Mr Gutnick). The UNHRC has not yet dealt with the matter. However, a few things can be said about the likelihood of success.

Article 19(2) of the ICCPR states that: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." Mr Alpert argued that the position taken in the High Court's decision, on the extraterritorial reach of Australia's jurisdictional and prescriptive claims violates freedom of expression as established in Article 19 of the ICCPR. On an initial level it is worth noting that "international bodies responsible for scrutinising compliance with human rights standards have increasingly interpreted those obligations [e.g. freedom of expression as provided for under the ICCPR] as also having an *extraterritorial scope*."¹² So it would seem that Australia potentially is obligated to respect, for example, freedom of expression of people also outside the Australian territorial scope.¹³

To be successful, Mr Alpert needs to overcome several procedural hurdles. They are not discussed here. However, in the event of the UNHRC hearing Mr Alpert's substantive arguments, it would seem he would have a chance of being successful. In more detail, for Australia's conduct (in this case, the judgment of the High Court) to have been in line with the ICCPR, it must have been "provided by law," restricted freedom of expression in respect of one of the accepted rights and have been necessary. As to the lawfulness, the

11 The Optional Protocol to the International Covenant on Civil and Political Rights (CCPR-OP1).

12 Antonio Cassese, *International Law* (2001) 361.

13 It seems possible to argue that the phrase "to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant" (emphasis added) in Article 2 of the ICCPR expresses two separate requirements rather than a double requirement. See further, Sarah Joseph et al. *The International Covenant on Civil and Political Rights: Cases, materials, and commentary* (2000) 58-65; Manfred Novak, *U.N. Covenant on Civil and Political Rights* (1993) 26ff.

question will be whether the judgment of the High Court is in line with (i.e. provided by) Australian law¹⁴ – the answer must obviously be *yes*. Further, any restriction of freedom of expression that the High Court's decision resulted in was in respect of the reputation of another person, and thus meets the second requirement. Turning to the necessity, Mr Alpert could perhaps successfully argue that, the Australia's jurisdictional claim (the act alleged to violate ICCPR Article 19) was not in proportion, which is a component of the necessity requirement, to the resulting restrictions of freedom of expression. In the context of proportionality, a distinction between the substantive defamation law and the jurisdictional claim is necessary. While it rather easily could be argued that laws protecting individuals from severely defamatory statements are proportionate to the restriction they inevitably place upon freedom of expression, it is much more difficult to say that the global effect of Australia's wide jurisdictional claims are in proportion to the desire to protect against severely defamatory statements. After all, given the lack of limitations expressed in the High Court's decision, it would seem that potentially anybody placing information on the Internet could be subject to Australian jurisdiction. Then again, the facts of the *Gutnick* case were such that the rules of private international law of many, not to say most, countries would have provided for an extraterritorial jurisdictional claim – can the UNHRC rightfully use the ICCPR to prohibit this widespread practice? It must be questioned whether the UNHRC is the appropriate forum for the sort of pure jurisdictional questions involved in deciding whether the Australian jurisdictional claim is in proportion to the defamatory effect of a foreign publication, on one of its citizens. The ICCPR was not designed for, and was never intended for, solving purely jurisdictional disputes. A UN decision to the effect that the UNHRC finds this type of dispute to fall outside its competence would not change anything; it would merely maintain a *status quo*. If, on the other hand, the UNHRC makes an unqualified decision in Mr Alpert's favour, that would mean that the ICCPR can be used to impose an unprecedented ban on all extraterritorial jurisdictional claims affecting freedom of expression – in fact, such a decision would potentially mean that all extraterritorial claims in relation to areas such as defamation and contempt would be prohibited. Further, we must ask whether Australia would have been in breach of ICCPR Article 17(2) if the High Court had declined jurisdiction in the *Gutnick* case. Against that background, it is hoped that, if the UNHRC decides in Mr Alpert's favour, they clearly qualify, and strictly limit, their decision. A lot is riding on this question and hopefully the UNHRC realises that. In fact, what stands to be decided is nothing less than the very extent to which public international law, in the sense of international human rights law, imposes limits on the rules of private international law relating to jurisdiction and choice of law.

14 Novak, *supra* n 13 at 351; Joseph et al., *supra* n 13 at 391.

VI. CONCLUDING REMARKS

This article has illustrated that, in many ways, there are strong connections between public international law and private international law, and some research areas of future interest have been identified.

It has been submitted that, the fact that the jurisdictional rules of public international law impose limitations on the rules of private international law seems beyond intelligent dispute. Further, it has been concluded that it is clear that State practice relating to jurisdictional claims over civil matters is of relevance in determining the current state of customary international law. In additions, it was demonstrated that public international law, in the form of international human rights law, might have direct effect on rules of private international law.

Unfortunately, the identified connections between public international law and private international law have gained little academic attention and the subjects of public international law and private international law are taught separately with little if any attention being given to their respective effect on each other.

Stylized Models of Corporate Governance

Dr. Andrew Clarke*

I. INTRODUCTION

The contemporary study of corporate governance is focused around the notion of relationships between, and the influence over, certain key drivers. At a basic level, for example, there is a growing recognition that ‘the markets themselves, in particular the international securities markets, increasingly influence company law, national as well as European and international’.¹ This might suggest a simple linearity between markets and the emergent corporate form. The reality is that the study of such relationships and the power-influence binaries are far from static or agreed. Klaus Hopt and Eddie Wymeersch, for example, note that:

The inverse relationship- the La Porta et al thesis that company law is relevant for the capital and financial markets- has been observed and hotly debated, both on an empirical and theoretical level.²

The markets therefore provide another analytical entry point into the examination of corporate and employee governance. A basic categorization of national corporate governance systems based on markets is that of either ‘outsider’ or ‘insider’ systems.³ It provides a useful ‘starting point for the examination of the distinguishing features of the major models’.⁴ The models are based on the ‘significant differences between the corporate ownership structures across jurisdictions’⁵ and ‘has resulted in the evolution of two different financial systems which are referred to as the “insider system” and the “outsider system”’.⁶ This convergence of corporate governance and financial systems reveals the inexact and amorphous nature of the theoretical concepts. The models spring from seeking solutions to the set of ‘problems arising

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1 Klaus J. Hopt and Eddy Wymeersch (eds), *Capital Markets and Company Law* (2003) Preface.

2 Hopt & Wymeersch, *ibid*, Preface. See, for example, S Johnston, R La Porta, F Lopez-Silanes and A Shleifer, ‘Tunneling’ in Hopt, Klaus J and Eddy Wymeersch (eds), *Capital Markets and Company Law* (2003) 611-618.

3 Colin Mayer, ‘Stock-markets, Financial Institutions and Corporate Performance’ in N Dimsdale and M Prevezer (eds.), *Capital Markets and Corporate Governance* (1994) 179-94.

4 On Kit Tam, *The Development of Corporate Governance in China* (1999) 25.

5 Low Chee Keong (ed.), *Corporate Governance: An Asia Pacific Critique* (2002) 4.

6 Low Chee Keong, *supra* n 5 at 4-5.

from the separation of ownership and control.⁷ These are agency costs and transactions costs,⁸ and as we shall see, these points overlap. The approach to these issues depends on the system under examination.

Masahiko Aoki summarizes the long battle for supremacy of the two main forms of governance:

For decades, legal and economic scholars, as well as practitioners, have been debating regarding whether corporate governance ought to be, and will be, structured in the sole interests of investors or for a broader range of objectives including public and other stakeholders' interests. Some of them argue that the presence of different types of corporate governance structure is a sign of inefficient historical legacy and they ought to eventually converge according to the same standard of investor interests. Others argue that such convergence is not desirable or political from ethical, political, historical, and other reasons.⁹

Aoki's analysis configures the insider and outsider models against one another, and also raises the analysis of Jonathon Charkham.¹⁰ His thesis is that the ongoing tensions, dialogue and disagreement over the choice of models will be a prevailing theme of 21st century debate in the governance arena.

II. COMPARING SYSTEMS

Insider Systems

Insider systems are characterized by 'a high level of ownership concentration, illiquid capital markets and a high degree of cross-shareholding between companies within a corporate group.'¹¹ Such systems 'tend to be characterized by concentrated ownership or control.'¹² Examples include Germany, Japan and continental Europe.¹³ Such systems are 'common in continental Europe which exhibits elaborate sets of mandatory rules although its disclosure

7 On Kit Tam, *supra* n 4 at 25.

8 *Ibid.*

9 Masahiko Aoki, 'Institutional Complementarities between Organizational Architecture and Corporate Governance,' RIETI Conference on Corporate Governance, January 8-9, 2003, 1. <http://www.rieti.go.jp/em/events/03010801/report.html>

10 Jonathon Charkham, *Keeping Good Governance: A Study of Corporate Governance in Five Countries* (1994).

11 Low Chee Keong, *supra* n 5 at 5.

12 M Maher & T Andersson, 'Corporate Governance: Effects on Firm Performance and Economic Growth,' in McCahery, Joseph A, Piet Moerland, Theo Raaijmakers and Luc Renneboog (eds.), *Corporate Governance Regimes: Convergence and Diversity* (2002) 386-418, 386.

13 On Kit Tam, *supra* n 4 at 25.

requirements tend to be less stringent.’¹⁴ Typically, insider based systems do not have ‘an active market for corporate control, which is usually vested with large shareholders, including banks.’¹⁵ Such systems have also been referred to as ‘blockholder systems’¹⁶ in that they typically give rise to concentrated, and inactive, shareholdings in the hands of a few key groups such as founders, family members or banks.

As we shall see in 1.7 below, these systems make extensive formal provision for employees in their corporate governance arrangements.

Outsider systems

In contrast, outsider based systems are reliant on ‘active external markets for corporate control through mergers and takeovers of listed companies.’¹⁷ These systems include many individual investors and institutional investors quite prepared to buy and sell control of firms. They are characterized by ‘wide dispersed ownership.’¹⁸ The market is, as a result, likely to be more volatile and the shareholders will sell their stake in the company, if it is in their interests. The outsider system ‘exhibits widely-dispersed ownership structures, liquid stock markets, low levels of interlocking shareholding between members of the same corporate group and active market for corporate control.’¹⁹ Examples include the US, the UK and Australia where ‘corporate laws tend to be a set of default rules since the financial markets are subject to tight regulation and strict disclosure requirements.’²⁰ These have also been referred to as ‘market systems,’²¹ in contrast to blockholder systems. The range of labels reveals that the stylized systems of governance are still in a fluid, and somewhat embryonic stage.

The picture painted of an outsider system is of a Darwinian environment where the weak firm either implodes or is taken over. This view accords with Roe’s observation that:

14 Low Chee Keong, *supra* n 5 at 5.

15 On Kit Tam, *supra* n 4 at 25.

16 William W. Bratton & Joseph McCahery, ‘Comparative Corporate Governance and Barriers to Global Cross Reference,’ in Joseph A. McCahery, Piet Moerland, Theo Raaijmakers and Luc Renneboog (eds), *Corporate Governance Regimes: Convergence and Diversity* (2002) 23-55, 25.

17 On Kit Tam, *supra* n 4 at 25.

18 Maher & Andersson, *supra* n 12 at 386.

19 Low Chee Keong, *supra* n 5 at 5.

20 *Ibid.*

21 Bratton & McCahery, *supra* n 16 at 25.

the American-style public corporation is a fragile contraption, filled with contradictions, easy to destabilize and destroy. Although it dominates American business, due to its counter-balancing ability to agglomerate capital and efficiently spread private risk, it needs multiple preconditions to arise, survive, and prosper.²²

Outsider systems tend to make little or no formal provision for employees in their corporate governance arrangements.

II. THE PHENOMENON OF AGENCY COSTS

The genesis of the agency costs phenomenon lies in the work of Berle and Means and their 'classic text'²³ of 1932, *The Modern Corporation and Private Property*. Their thesis was that:

[O]wnership and control had become separated in America as corporations grew too large and complex to be controlled by the single dominant entrepreneurial families, such as the Rockefellers, Carnegies and Fords, on whom modern American industry was founded.²⁴

In essence, managerialist corporations had replaced entrepreneurial fiefdoms. This separation can be characterized in two ways. First it can viewed as 'an efficient arrangement for the division of labour between professional managers and investors/risk bearers to create wealth together.'²⁵

Alternatively, the very fact of separation of owner and manager creates issues of distance and potential miscommunication and hence, an agency problem. Treating the separation of ownership and control 'as a problem to be resolved ... has, however, been the main theme of the corporate governance literature.'²⁶

The shareholders, as principals, are separate from their agents, the managers. There will often be a 'misalignment of interests'²⁷ between the two groups because of the differing, postmodern perspectives they bring to bear in how the firm operates. Race Mathews notes that 'the basic agency dilemma' is a 'core problem' 'because individuals are, by nature, inclined to opportunism

22 Mark J. Roe, *Political Determinants of Corporate Governance: Political Context, Corporate Impact*, (2003) 200.

23 David Uren, *The Transparent Corporation: Managing Demands for Disclosure* (2003) 135.

24 Uren, *supra* n 23 at 135.

25 On Kit Tam, *supra* n 4 at 23.

26 *Ibid*.

27 On Kit Tam, *supra* n 4 at 25.

and the pursuit of their own self-interest.’²⁸ As John Donahue notes in relation to the agency issue, it marks a ‘difficulty in all but the simplest relationships, of ensuring that the principal is faithfully served, and the agent is fairly compensated.’²⁹ Masahiko Aoki describes the agency cost phenomenon in the following terms:

Agency theory casts the economic interaction of agents (in the generic sense) in a certain domain of the economy as a principal-agent relationship. Then it inquires into what type of self-enforceable (incentive compatible) arrangement can be established as a second-best response to environmental and incentive constraints when information asymmetry exists between the principal and the agent.³⁰

As Aoki notes ‘agency theory provides powerful partial equilibrium analysis of an institution in a particular domain of interaction between the principal and the agent(s), with institutional arrangements in other domains taken as given environments.’³¹ Whilst the theory is useful, its limits are proscribed by the fact that the results of the principal-agent model ‘may be valid only relative to an implicitly assumed institutional environment of the domain.’³²

However, the basis of agency costs will differ depending on the type of corporate governance system under review. As Maher & Andersson note, ‘each country has through time developed a wide variety of mechanisms to overcome the agency problems that arise from the separation of ownership and control.’³³ There is a basic difference between insider and outsider systems in terms of how the agency problem plays out in practice. In outsider systems, ‘the basic conflict of interest is between strong managers and widely dispersed weak shareholders.’³⁴ In contrast, in insider systems ‘the basic conflict is between controlling shareholders (or blockholders) and weak minority shareholders.’³⁵ Maher & Andersson conclude that ‘one of the most striking differences between countries’ corporate governance systems is in the ownership and control of firms, and the identity of controlling shareholders.’³⁶

28 Race Matthews, ‘The Mondragon worker co-operatives and their lessons for Australia,’ in Gollan, P & Patmore, G, (eds.), *Partnership at Work: the challenge of employee democracy, Labor Essays 2003* (2003) 151-164, 159.

29 John D. Donahue, *The Privatisation Decision: Public Ends, Private Means* (1989) 38.

30 Masahiko Aoki, *Towards a comparative institutional analysis* (2001) 18.

31 Aoki, *supra* n 30 at 18.

32 *Ibid.*

33 Maher & Andersson, *supra* n 18 at 386.

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

Beyond this basic distinction between insider and outsider systems, it is ultimately difficult to quantify the exact function of agency costs and its relationship with other influences, such as, for example, the quality of a nation's corporate law. As Mark Roe notes, 'a currently popular academic theory is that the quality of corporate law largely determines whether ownership will separate from control.'³⁷ Whilst:

this theory is quite strong for understanding why ownership separation is difficult to maintain in, say, Russia, the transition economies, and many developing nations, it does less well in explaining weak separation in richer, democratic nations, some of which have good corporate law and several of which would not have had much trouble getting good corporate law if the polity had sought to promote a stock market.³⁸

This paradox means that agency cost theory can provide a useful 'additional explanation'³⁹ for such separation. As Roe concludes, 'law might be fine, but if agency costs would be much higher after separation because weak product market competition constrains managers only mildly, the founding owners would be reluctant to push separation.'⁴⁰

Incomplete contracting

As between managers and shareholders there will also be 'incomplete contracting'⁴¹ in the sense that much of the relationship will be governed by assumptions and implied understandings. The relationship between the two groups has been governed by the articles of association that form a contract between the company and each individual shareholder and between each shareholder *inter se*. More recently in Australia, the constitution or replaceable rules have taken the place of the articles. Both forms of contract are incomplete; that is, they are not a complete code, but sketch out the basis of good relations between the two. They are generic and provide a starting point only. As Gillian Rose, the philosopher puts it, 'in professional life, beyond the terms of the contract, people have authority, the power to make one another comply in ways which may be perceived as legitimate or illegitimate.'⁴² Incomplete contracting therefore refers to the gaps in the formal contractual arrangement and refers to all those facets of the relationship that make it work smoothly or make it work at all.

37 Roe, *supra* n 22 at 142.

38 Ibid.

39 Ibid.

40 Ibid.

41 On Kit Tam, *supra* n 4 at 25.

42 Gillian Rose, *Love's Work* (1995) 54.

Contract, as forming the basis of relationships in wider society, have been highlighted by the US legal philosopher, John Rawls.⁴³ In the seminal work, *A Theory of Justice*, Rawls links societal justice with the notion of contract. His has been called a theory of 'contract ethics'⁴⁴ or the 'social contract model'.⁴⁵ For Rawls, society is just if we associate with one another on the basis of equality. He writes that 'free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association.'⁴⁶ This basic conception of justice as underpinned by equality, then forms the rationale for law-making and of the institutions that build upon it. As Rawls concludes 'our social situation is just if it is such that by this sequence of hypothetical agreements we would have contracted into the general system of rules which define it.'⁴⁷ Rawls links the notion of contract theory with rationality. He notes that 'the merit of contract terminology is that it conveys the idea that principles of justice may be conceived as principles that would be chosen by rational persons, and that in this way conceptions of justice may be explained and justified.'⁴⁸

For present purposes, Rawls' theory of the basic social contract can be extrapolated to the contract theory that links shareholders and the company, and through it, the managers. The basis of their relationship is the more formalized contract represented by the articles of association or its various replacement versions. Contract links the two groups, and forms the basis for more detailed and complex relationship building. It is nonetheless incomplete, because no contract can ever be a complete code that determines and delineates the exact boundaries of a relationship. The contractual nexus is therefore incomplete.

The contractual relationship between shareholders and the company, and by extension the board, does provide a strong foundation recognized by the common law tradition. Establishing a contract between parties has been the pre-eminent engine for growth in the commercial aspects of the common law for more than eight hundred years.⁴⁹

The situation of shareholders as contractually engaged *vis-a-vis* the company is in contrast with employees. There is no contractual nexus between owners and employees. Additionally, employees do not enjoy the group contractual rights afforded shareholders by the articles. Whereas the articles are a generic

43 John A. Rawls, *Theory of Justice* (1972) 11-17.

44 Peter Singer, (ed.), *Ethics* (1994) 363.

45 Mary Midgley, 'Duties Concerning Islands' in Peter Singer (ed.), *Ethics* (1994) 374-87, 377.

46 Rawls, *supra* n 43 at 11.

47 *Ibid*, 12.

48 *Ibid*, 16.

49 J.H. Baker, *An Introduction to English Legal History*, (3rd ed.) (1990).

public document provided to all of the same class of shareholders, employees who are not subject to an industrial award, negotiate their contracts in private, one to one with the company. This style of employment arrangement has been encouraged by the advent of Australian Workplace Agreements (AWAs).⁵⁰ We will examine this phenomenon further in Chapter 6 dealing with Australian employee provision.

The written contract of employment is essentially a private matter between the company and employee. Contract forms the basis of the relationship such that:

the majority of the working population has access to the means of production only through some contractual arrangement with their owners, by means of which the workers promise to obey all orders from management and deliver all products of their labour, receiving for their time or effort only a stipulated wage.⁵¹

Asymmetric information

The agency costs will also be determined by the degree that information is asymmetric as between the managers and the shareholders. The term 'asymmetric information syndrome' has been coined by the US economist, Joseph Stiglitz. Stiglitz refers to 'the differences in information between, say, the worker and his employer, the lender and the borrower, the insurance company and the insured.'⁵² Such asymmetries are 'pervasive in all economies.'⁵³ The perceived value of this approach is that it provides 'the foundations for more realistic theories of labour and financial markets.'⁵⁴ This model has been referred to as 'information economics.'⁵⁵ It sets up a useful dichotomy for investigating the context of employee governance provisions. In basic terms, it points to the inequality between managers who are the repository of much confidential information, and the owners whose access to the same is problematic.

The utility of the division needs to be tempered by corporate realities. For example, if information access is asymmetric as between managers as agents and shareholders as principals, this is more so the case as between managers as senior employees and the rump of general or, by definition, junior employees.

50 Breen Creighton and Andrew Stewart, *Labour Law: an Introduction* (2000).

51 Paul Singer, 'Capital and the National State: A Historical Interpretation' in John Walton (ed.) *Capital and Labour in the Urbanized World* (1985) 17-42, 17.

52 Stiglitz, J, *Globalization and its Discontents* (2002) xi.

53 Ibid.

54 Ibid.

55 Ibid, xii.

We need therefore to be cognizant of the fact that firms, especially large ones, are not simply amorphous entities where the term 'employee' has an agreed or undifferentiated status.

There may, of course, be other examples of asymmetric information. For example, as between shareholders:

[I]ndividual shareholders with relatively small holdings have little incentive to gather and bear the relatively fixed costs of collecting information to enable them to monitor and control the behaviour of the board. Alternatively, large shareholders may have sufficient incentives to obtain the information necessary to control management effectively if the benefits of such monitoring outweigh the associated costs.⁵⁶

As David Uren notes, 'the market is a deep source of information about companies; it is a judge of management's performance, it dictates the wealth of a company's shareholders and it sets the company's cost of capital.'⁵⁷ The problem with this analysis is that the information market does not act evenly as between shareholders. For example, as Uren notes, 'an emerging trend is for directors, in particular the chairman, to engage directly with institutional shareholders as a means of gaining an independent view of the company, other than that filtered through the chief executive.'⁵⁸ Under this practice, the information, access and privilege afforded to institutional shareholders, places them in a powerful and superior position as compared with individual shareholders. As Mark Roe notes in relation to contemporary US institutional shareholders:

[T]hey are no longer the 100-share individuals of the standard model. They own bigger slices of a company's stock. They are informed about corporate governance trends. And some of them are informed enough about a firm's operations and business to give serious feedback to directors and managers.⁵⁹

CalPERS (the Californian based pension fund manager ⁶⁰) is the pre-eminent example of the informed, and indeed guiding, institutional behemoth. Roe's observation appears to be borne out in practice. As David Sainsbury, the then

56 Helen Short and Kevin Keasey, 'Institutional shareholders and Corporate Governance in the United Kingdom' in Kevin Keasey, S. Thompson and M. Wright, (eds.), *Corporate Governance: Economic, Management, and Financial Issues* (1997) 18-53, 29.

57 Uren, *supra* n 23 at 241-2.

58 *Ibid*, 242.

59 Roe, *supra* n 22 at 17.

60 California Public Employees' Retirement System (CalPERS). As the website claims, CalPERS provides retirement and health benefits to more than 1.4 million public employees, retirees, and their families and more than 2,500 employers. <http://www.calpers.com/index.jsp?bc=/about/home.xml>

Deputy Chair of the UK family grocery giant Sainsbury acknowledged in 1993 'large shareholders at the top end tend to provide a greater identity between management and shareholders.'⁶¹ This identity of interests is a privilege of the large, elite, typically institutional, shareholder.

Navigating the 'moral hazards'

The term 'moral hazard' was originally used in the insurance context to refer to 'the tendency of people with insurance to reduce the care they take to avoid or reduce insured losses.'⁶² In the context of agency cost discussions, moral hazard has been explained thus:

Moral hazard arises when agents (such as managers) discover information that is valuable to the principal (such as the shareholders) after the principal has contracted for their services. The problem produces a moral conflict because morally the agent should inform the principal about the newly discovered situation and renegotiate if necessary. However, the agent stands to gain from not doing so.⁶³

The moral hazards within a company are a result of differences in role and location. They arise because of, and as part of, the broader agency problem.⁶⁴

As trading opportunities expand geographically, it may become necessary for merchants to hire agents to carry out their business on their behalf in remote. It may now be hard for the merchants to directly supervise and monitor the operational activities of their agents on a daily basis. So there arises the possibility of the agents acting dishonestly, for instance, embezzling the merchants' goods, acting opportunistically or shirking their obligations.⁶⁵

In this sense, there is a constituency of 'distant stockholders.'⁶⁶ They 'have two main worries'⁶⁷ vis-à-vis the managers. These are the misdirection of resources which affect the agency costs⁶⁸ and 'the level of insider machinations.'⁶⁹ The main context in which the moral hazard arises involves managers and their relationship with the owners. This phenomenon has been part of the historical development of companies as owners withdrew from companies due to economic imperatives. From the end of the 19th century, 'as a result

61 Richard Whittington, *What is Strategy and Does it Matter?* (1993) 52.

62 On Kit Tam, *supra* n 4 at 37.

63 *Ibid.*

64 *Ibid.*, 26.

65 Aoki, *supra* n 30 at 68.

66 Roe, *supra* n 22 at 176.

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*

of the new technologies of the Industrial Revolution, which required much larger firms to create economies of scale.⁷⁰ As a result, shareholders ceased to manage companies

directly and hired professional managers—below board level—to run them instead. As time went on the managers began to graduate to board level, and gradually came to form the majority of board members. The process of completely separating ownership and control was accelerated after the Second World War when financial institutions started to build up their industrial investment portfolios.⁷¹

We will now briefly examine relevant aspects of this agency issue.

III. TECHNIQUES TO ALIGN THE INTERESTS OF MANAGERS AND SHAREHOLDERS

The need to align interests arises as a corrective to ‘the misalignment of interests between shareholders (principal) and their agents (managers) and because of incomplete contracting.’⁷² The solutions have been founded on developing ‘mechanisms for monitoring, and accountability, and the design of ex ante managerial incentive systems.’⁷³

In particular, ‘managerial compensation potentially aligns shareholder and manager interests by maintaining a close relationship between pay and performance.’⁷⁴ This particular linkage is problematic. It assumes that shareholders will think act and vote as a block. Heterogeneity is, however, likely to dominate a company whose shareholders include individuals and institutions. The institutions are likely to wield more power in light of their larger holdings recorded in the share register. Such institutions are more likely, as a species of professional investor, to have access to better information. This profile of the typical public company means that the majority rule is likely to be concentrated in terms of the share register. This, in turn, challenges traditional notions of equality as between shares and the ideal of corporate citizenship.

Individual shareholders may get to speak at the AGM, but the company’s share register operates essentially as a behind-the-scenes device. This can mean that individual antipathy to, say, a proposed remuneration package is overcome by block voting by institutions. The problem is that ‘the diminishing marginal

70 N. Kendall & A. Kendall, *Real-World Corporate Governance: A Programme for Profit-Enhancing Stewardship* (1998) 16.

71 Kendall & Kendall, *supra* n 70 at 16.

72 On Kit Tam, *supra* n 4 at 25.

73 *Ibid*, 25-6.

74 Klaus Gugler, (ed.) *Corporate Governance and Economic Performance* (2001) 42.

utility of money makes the monetary reward required to induce good behaviour larger than the monetary penalty needed to discourage bad behaviour.⁷⁵ One suggestion is that 'one principle of efficient compensation is that managers should be rewarded for outcomes over which they have control.'⁷⁶ This raises the issue of identifying such issues. It is part of a complex and ongoing debate. As Uren notes, 'the issue of how to stop management from exploiting its position has been wrestled with for centuries.'⁷⁷

Improving communication within companies

The phenomena of incomplete contracting, asymmetric information and related concepts are, in reality, styles of inefficient communication. They are blockages between the key cohorts of the company. Corporate governance in a systemic sense is aimed at developing more complete and more efficient communication modes. In the idealized governance model, issues of control and accountability would not be problematic. There would be no gap or slippage between constituent parts of the company. In an idealized company, information (and its products, risk awareness and insight) would be shared equally, subject to the regulatory rules of the market place. Indeed, the goal of better communication can be said to be a critically important feature of better governance.

One of the aims of good governance is to keep steadily improving the communication mechanisms within companies, to reduce the asymmetries and to continue to complete the gap in matters of contract, and in so doing successfully diminish the scope of the moral hazards inherent in a wealth-generating entity.

According to recent Australian research 'failures of corporate governance weren't due to a lack of government regulation, board structure or the experience of directors.'⁷⁸ According to Cairnes 'the problem is the people. Boards fail because of the social system, the culture and the way people talk to each other.'⁷⁹ The communication test is a crucial aspect of a systems failure; 'what came out again and again is what makes boards work is a robust culture of candour, honesty and respect; strong people being prepared to put the issues out there and have the debate.'⁸⁰

75 Ibid.

76 Ibid, 43.

77 Uren, *supra* n 23 at 135.

78 Fiona Buffini, 'Boards failing the talk test,' *The Australian Financial Review*, 21 November, 2003, 16, quoting Margot Cairnes, author of 'Boardrooms that Work.'

79 Buffini, *supra* n 78.

80 Ibid.

The way that issues concerning employees are handled can be a key barometer of the effectiveness of a firm's communications. For example, 'executive pay is arguably the primary mechanism by which the board can control and monitor top executives or at least signal to management what is important to the shareholders.'⁸¹ As a result 'boards must continually evaluate the public relations impacts of their actions in addition to the pay/performance linkage.'⁸² Communication is both direct and coded, express and implied. The symbolic meaning of a company's treatment of its stakeholders is an important feature in the life of the postmodern firm.

The theory underpinning the need for good communication is that 20th century firms became so vast that they were forced to embrace decentralization. This phenomenon was recognized by Peter Drucker in 1946.⁸³ Drucker argued that:

decentralisation is the condition for the conversion of bigness from a social liability into a social asset. Bigness, if centralized – whether for lack of a policy or because the units of production have been allowed to grow too large for effective decentralization – carries with it dangers to the stability and functioning of society, just as it carries dangers to the stability and functioning of the corporation.⁸⁴

Drucker's work underpins the work of theorists such as Henry Mintzberg, who postulated the view that very large firms needed to guard against certain risks that inherently seemed to accompany large firms. That development was a network or 'system of work constellations' where 'quasi-independent cliques of individuals who work on decisions appropriate to their own level in the hierarchy.'⁸⁵ The firm, therefore, needs to provide the mechanisms for communication – whether formal or informal – that overcome the potential resistance of these self-filling constellations. There are, as a result, complex 'flows of information' within an organization.⁸⁶

Peter Drucker notes the centrality of good communication for effective managers. 'Setting objectives, organizing, motivating and communicating, measuring, and developing people are formal, classifying categories'⁸⁷ of

81 Kay, Ira T, *CEO Pay and Shareholder Value: Helping the US Win the Global Economic War* (1998) 77.

82 Kay, *supra* n 81 at 77.

83 Peter Drucker, *Concept of the Corporation* (1946) 228.

84 Drucker, *ibid*, n 83 at 228-9.

85 Henry Mintzberg, *The Structuring of Organizations: A Synthesis of the Research* (1979) 54.

86 *Ibid*, 12. See also Kolb, D. et al (eds.), *Organizational Psychology: A book of readings*, 2nd Ed (1974).

87 Peter Drucker, *Management: Tasks, Responsibilities, Practices* (1999) 22.

management. There is a direct link between effective communication and optimizing the skills and contribution of the employee. The manager, he notes,

works with a specific resource: people. And the human being is a unique resource requiring peculiar qualities in whoever attempts to work with it. 'Working' with the human being always means developing him or her. The direction which this development takes decides whether the human being – both as a person and a resource – will become more productive or cease, ultimately, to be productive at all.⁸⁸

For Drucker, a firm needs to be studied by looking at its social aspects ahead of other features. He notes that Frederick Taylor (1856-1915), the pioneer of workplace analysis started out with social rather than engineering or profit objectives.⁸⁹

This is similar to Abraham Maslow's⁹⁰ 'hierarchy of needs' approach that places a five step pyramid of needs as the blueprint for worker satisfaction, the base being physiological, and then up to safety, social, esteem and finally, self-actualization.⁹¹ For Maslow, communication was also the 'key to effective management.'⁹² This was borne out by the size of corporations governed by 'the necessity for integrating the advantages of bigness with those of smallness and for avoiding the disadvantages of bigness and those of smallness.'⁹³

IV. CONCLUSION

This paper has sought to highlight some of the rich and dynamic intersections between law and other disciplines in the ongoing development of corporate governance. As John Farrar has noted, corporate governance is too important a subject to be left to the lawyers alone.⁹⁴ It is a project informed by several sources. These include politics, economics, cultural studies and psychology. It is at these points of overlap, intersection and departure that the models will grow both nationally, and internationally. This takes the debate beyond the sometimes narrow realms of legal analysis and descriptors. As a result,

88 Ibid.

89 Ibid, 29.

90 Abraham Maslow was a US psychologist whose work embraced management theory and has since been widely influential in terms of the development of such theories.

91 Ann R. Kaplan, *The Maslow Business Reader* (2000) 153.

92 Ibid.

93 Ibid.

94 John Farrar, *Corporate Governance: Theories, Principles, and Practice* 2nd Ed. (2005) xxvi.

the debate about corporate governance architectures and their relationship with global forces, looks set to play an ever more prominent role as the 21st century unfolds.

The Response of Business to Paradigmatic Changes In Legal Systems

Noel Cox*

I. INTRODUCTION

Technology, and technological changes, affects the legal system. These effects are partly direct, and partly indirect, via changes to the economy and to society. Technological changes are altering the relationship of governed and government, and between government and government. Legal systems also affect the development of technology, and changes in legal systems, whether wrought by technological changes, or otherwise, can have significant effects upon business. This paper considers how business responds to major changes in legal systems, and attempts to identify some common elements which might serve to guide business during times of profound legal change.

Technological advances in many fields (not least the Internet) challenge the boundaries of law, science, public policy, and ethics.¹ Biological research, and in particular genetic research, is especially significant in this respect.

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1 Christine C. Vito, "State biotechnology oversight: the juncture of technology, law, and public policy" (1993) 45(2) *MaineLR* 329-383; Organisation for Economic Co-operation and Development, *Bio technology and the changing role of government* (Organisation for Economic Co-operation and Development, Paris, 1988); Robert H. Blank, *The political implications of human genetic technology* (1981); E. Donald Elliott, "The Genome and the law: Should increased genetic knowledge change the law?" (2001) 25 *HarvardJL&PubPolicy* 61.

Embryonic stem cell research² and therapeutic cloning,³ challenge perceptions of personality and society.⁴ Genetic engineering⁵ also has serious implications for the medical and health insurance field,⁶ since illness and diseases could potentially be significantly reduced in frequency or severity by human genetic engineering. In this paper we shall examine some ways in which business responds to changes in law and technology. Although the focus is on the response of business to legal changes, in reality technology and law cannot be readily separated. What is important is the controls on technology – what may be done and what may not be done. The protection accorded intellectual property is as important as the restrictions on certain types of work, for they protect the investment which is required to undertake further research and development work. Fundamental changes in technology necessitate, or cause, significant changes in legal systems.

Genetic engineering for agricultural purposes also has major legal implications – not least of which in that it is promoted as a solution to ongoing food production problems in the Third World.⁷ Biotechnicians have altered plants and animals for improved nutritional value. They have produced potatoes

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- 2 The US National Institutes of Health define a stem cell as “a cell from the embryo, fetus, or adult that has, under certain conditions, the ability to reproduce itself for long periods or, in the case of adult stem cells, throughout the life of the organism;” National Institutes of Health, U.S. Department of Health and Human Services, *Stem Cells: Scientific Progress and Future Research Directions* ES-2 (2001).
 - 3 The term therapeutic cloning refers to cloning embryos for use in medical research and therapy. Synonyms include research cloning, cloning-for- biomedical-research, somatic-cell nuclear transfer (or transplantation), and simply cloning (though, without further clarification, this last term may imply reproductive cloning). Some have rejected the term therapeutic cloning, largely for strategic reasons: the journal *Nature* “wanted to distance [human embryonic stem] cells from the term ‘cloning’ to insulate the research from the emotional valence of the cloning debate.” Paul Root Wolpe and Glenn McGee, “‘Expert Bioethics’ as Professional Discourse: The Case of Stem Cells” in Suzanne Holland, Karen Lebacqz and Laurie Zoloth (eds.), *The Human Embryonic Stem Cell Debate: Science, Ethics, and Public Policy* (2001) 185, 188.
 - 4 Janet L. Dolgin, “Embryonic discourse: Abortion, stem cells, and cloning” (2002) 31 *FloridaStateULR* 101.
 - 5 Christopher Cates, “Property in Human Tissues: History, Society and Possible Implementations” (1998) 4 *Appeal: Review of Current Law and Law Reform* 32.
 - 6 Roberta M. Berry, “The Human Genome Project and the End of Insurance” (1996) 7 *FloridaJL&PubPolicy* 205; Jennifer S. Geetter, “Coding for Change: The Power of the Human Genome to Transform the American Health Insurance System” (2001) 28 *AmerJL&Med* 1.
 - 7 See Gregory Rose, “International law of sustainable agriculture in the 21st century: The International Treaty on Plant Genetic Resources for Food and Agriculture” (2003) 15 *GeorgetownInt'lEnvirLR* 583.

with more starch⁸ and pigs with an increased protein-to-fat ratio.⁹ Researchers are also attempting to produce larger, faster growing, and more productive agricultural animals that require less feed.¹⁰ Biotechnicians are already altering plants to withstand pests and disease, and those that fix their own nitrogen and resist drought and cold.¹¹ The first genetically-altered whole food-product to appear on supermarket shelves was a tomato that spoiled less quickly than unaltered tomatoes.¹² These developments raise hopes for an increase in the world's food supply and a decrease in the use of chemicals in agriculture.¹³ Each of these potential developments – agricultural and human – also involves considerable investment and potentially large profits for businesses.

II. BACKGROUND

Biotechnology itself is a relatively old technology. The use of living organisms to make bread, wine, and cheese is a longstanding human practice. Humanity has “genetically-engineered” plants and animals, including humans, by selective breeding for desirable characteristics for thousands of years.¹⁴ From the time people first began cultivating and harvesting cereal grains, plants and their products have been a necessary component of the material foundations upon which human societies are formed.¹⁵

However, because seeds are not easily commodified, until the latter part of the twentieth century the genetics of most major crop plants have been regarded as common heritage, and comparatively little private investment has been

8 See David M. Stark et al, “Regulation of the Amount of Starch in Plant Tissues by ADP Glucose Pyrophosphorylase” (1992) 258 Science 287, 287-292.

9 Henry J. Miller, “Patenting Animals” (1988-89) Issues of Science and Technology 24.

10 Experiments are also under way to make chickens and pigs with flesh more suitable for microwaving. See Kathleen Hart, “Making Mythical Monsters” (March 1990) The Progressive 22.

11 William K. Stevens, “Bioengineering Points to Better Rice Plant”, New York Times 6 February 1990, C1.

12 For a description of Calgene Inc.'s Flavr Savr tomato, see “Union of Concerned Scientists, FDA Approves the Calgene Tomato, No Labeling Required” (June 1994) The Gene Exchange 1.

13 See Sheldon Krimsky, *Biotechnics and society: The rise of industrial genetics* (1991) 44, 88-89; William K. Stevens, “Bioengineering Points to Better Rice Plant” New York Times 6 February 1990, C1.

14 See Andrew Goudie, *The Human impact on the natural environment* 4th Ed (1990) 15-20.

15 See Jack Ralph Kloppenburg, Jr., *First the seed: The political economy of plant biotechnology 1492-2000* (1988) 1; Sheldon Krimsky and Roger P. Wrubel, *Agricultural biotechnology and the environment* (1996) 9; H. Garrison Wilkes, “Plant Genetic Resources over Ten Thousand Years: From a Handful of Seed to the Crop-Specific Mega-Gene Banks” in Jack R. Kloppenburg, Jr. (ed.), *Seeds and Sovereignty: The use and control of plant genetic resources* (1988) 67, 68.

made in plant and crop improvement.¹⁶ That is not to say there were not laws concerning intellectual property in plants and animals, but their scope and application was limited.¹⁷

The high-technology genetic engineering revolution – as distinct from breeding and cultivation – began at least by 1952 with the discovery by James Watson and Sir Francis Crick of the structure of the deoxyribonucleic acid (DNA) molecule – the molecule that contains our genetic information.¹⁸ But the pace of the revolution has accelerated most rapidly in the last ten years.¹⁹ The search for new pharmaceutical, biotechnological or agricultural applications has led to a growing interest both from the public and from the private sector in genetic resources.²⁰

The biotechnological revolution of the 1980s and 1990s enabled scientists to isolate the genetic materials of living organisms and induce precise modifications so that organisms manifest and carry desired genetic traits.²¹ Biotechnology is beginning to revolutionise agriculture by developing genetically superior plants and animals,²² and therefore has profound economic consequences. It is also offered as a solution to difficult environmental problems and challenges.²³

16 See, generally, Kloppenburg, *supra* n 15.

17 See, e.g., Plant Variety Protection Act, 7 USC § 2402 (2003) (1970) (US) [typically, its purpose is to “encourage the development of novel varieties of sexually reproduced plants” by providing their owners with exclusive marketing rights of them in the United States. The requirements of protection are that the variety be uniform, stable, and distinct from all other varieties]; Plant Variety Rights Act 1987 (NZ); Plant Varieties (Proprietary Rights) Act 1980 (Ireland); Plant Variety Act 1997 (UK).

18 It is a long linear polymer found in the nucleus of a cell and formed from nucleotides and shaped like a double helix; associated with the transmission of genetic information.

19 Jennifer S. Geetter, *supra* n 4; James Watson and Sir Francis Crick, “Genetical Implications of the Structure of Deoxyribonucleic Acid” (1953) 171 *Nature* 964.

20 J. Straus, “Biodiversity and Intellectual Property” (1998) 9 *AIPPI Yearbook* 99, 100: “Genetic resources have become an issue of high priority to scientists, industry, politicians and even the public at large.... they form a warehouse of enormous use potentials for plant and animal breeding, food, chemical and environmental industries, pharmaceuticals and medicine”.

21 W. French Anderson, “Human Gene Therapy” 256 *Science* 808, 810 (1992); see also Stephen A. Duzan, “The 1992 Biotechnology Agenda: A Message for Candidates Bush and Clinton” (1992) 9 *Healthspan* 12.

22 Approximately twenty-five percent of all the corn and forty percent of the soybeans that are grown in the US are genetically modified. See Melinda Kimble, et al., “Press Briefing of the U.S. Delegation to the Sixth Meeting of the Working Group on Biosafety Convention on Biological Diversity” 18 February 1999, cited in Jasemine Chambers, “Patent eligibility of biotechnological inventions in the US, Europe, and Japan: How much patent policy is public policy?” (2002) 34 *GeorgeWashInt’lLR* 223, 237 n 4.

23 See Duzan, *supra* n 21.

It is sometimes suggested that the new biotechnologies²⁴ are not radical departures from these historical practices. One defender of biotechnology claimed that “centuries of selective breeding have altered domestic animals far more than the next several decades of transgenic modifications are expected to alter them.”²⁵ Another of biotechnology’s defenders argued that nature routinely reshuffles genetic material by combining genes in new ways during sexual reproduction, by altering genes through mutations, and by transferring foreign genes into already existing organisms.²⁶ However, other commentators suggested that the changes in the planet resulting from the creation, use, and release of biotechnical products could dwarf the changes that have resulted from the use of petrochemical products.²⁷ The World Resources Institute, for instance, sees genetic material as the “oil of the Information Age.”²⁸

Whichever view is correct, a new legal regime has evolved, to respond to what is a paradigmatic change in technology. Partly this is because of ethical, moral and religious concerns, but economic factors have also been important, for example concerns that previous laws meant that developed countries were advantaged over Third World countries which were the source of much of the raw genetic material.²⁹ Knowledge of itself becomes valuable, as the building blocks of organisms have economic value. Therefore business seizes the opportunity offered.

24 For a description of these technologies, see Office of Technology Assessment, Congress of the US, *New developments in biotechnology: Ownership of human tissues and cells – Special Report* (Office of Technology Assessment, Washington, 1987) pub. no. OTA-BA-337.

25 Reid G. Adler, “Controlling the Applications of Biotechnology: A Critical Analysis of the Proposed Moratorium on Animal Patenting” (1988) 1 *HarvardJLaw&Tech* 1, 20 n126.

26 See Lisa J. Raines, “The Mouse That Roared: Patent Protection for Genetically Engineered Animals Makes Legal, Moral, and Economic Sense” (1988) *Issues of Science and Technology* 67.

27 Jeremy Rifkin, “Creating the Efficient Gene” in Michael Ruse (ed) *Philosophy of Biology* (1989) 222, 223.

28 See Jack Kloppenburg, “No Hunting: Scientific Poaching and Global Biodiversity” (1990) *Z Magazine* 104.

29 See Kim JoDene Donat, “Engineering Akerlof lemons: Information asymmetry, externalities, and market intervention in the genetically modified food market” (2003) 12 *MinnJGlobalTrade* 417. However, there is some room for optimism; see Mark Hannig, “An examination of the possibility to secure intellectual property rights for plant genetic resources developed by indigenous peoples of the NAFTA states: Domestic legislation under the International Convention for Protection of New Plant Varieties” (1996) 13 *ArizJInt'l&CompL* 175.

III. LEGAL AND COMMERCIAL RESPONSES TO COMMODIFICATION BOOM

In recent years, advances in biotechnology have allowed for increased commodification of seeds not only by relying on utility patent protection for bioengineered varieties, but also by taking a new route to commodification – through biotechnical processes that, among other things, render seeds sterile or insert easily recognisable “marker” genes that identify plants’ DNA strains as the intellectual property of various biotech firms.³⁰ It thus becomes possible to identify crops as the intellectual property of a particular company or individual. The translation of these innovations into the international realm of global trade and property protection has been awkward and at times controversial.³¹ Genetic engineering has business, ethical, religious, and legal ramifications.³² Thus as the investment increases so does the demand for legal protection of the associated intellectual property rights.

Business-wise, biotechnology has stimulated the creation and growth of small (and some medium and large) businesses, generated new jobs, and encouraged agricultural and industrial innovation.³³ It is one of the most research-intensive and innovative industries in the scientific fields.³⁴ But it is also carefully regulated by law – and there are detailed limits on the types of research which may be conducted, and the commercial exploitation of genetically modified organisms. So far as it is able business funds genetic research, because of its potential returns. But little research would occur – beyond the most fundamental – if no protection was accorded the results of the research. Basic research is rarely undertaken by private enterprise without some expectation of a return.

Since the 1970s much attention has been paid to the patentability of biotechnology.³⁵ In the US, the patent system played a critical role in the growth of the biotechnology industry. In the course of the 1990s biotechnology grew into a US\$13 billion industry, and the number of biotechnology patent

30 See Michael Pollan, “Playing God in the Garden” *New York Times*, 25 October 1998 § 6 (magazine) 44.

31 See Charles McManis, “The Interface Between International Intellectual Property and Environmental Protection: Biodiversity and Biotechnology” (1998) 76 *WashULQ* 255, 255-256.

32 Daniel J. Kevles & Ari Berkowitz, “The gene patenting controversy: A convergence of law, economic interests and ethics” (2001) 67 *BrooklynLR* 233.

33 President Clinton proclaimed January 2000 “National Biotechnology Month”. See Proclamation No. 7269 (2001) 3 *C.F.R.* 19, 19.

34 Stephen A. Duzan, *supra* n 21.

35 Justine Pila, “Bound Futures: Patent law and modern biotechnology” (2003) 9 *BostonUJSci&TechnologyL* 326.

applications exceeded 14,000 annually.³⁶ Patent protection is vital to the biotechnology industry, particularly because small biotechnology companies invest enormous sums of money in research and development. Often, intellectual property is the only product that a young company can show its potential investors; and patents are ideally suited to protect technology-based intellectual property.³⁷

Proponents of biotechnology patenting suggest that the new biotechnology patents, or “biopatents”, are minor and logical extensions from past practice, not radical revisions.³⁸ Thus they rely upon the pre-existing legal processes, such as intellectual property laws – specifically patent laws.

Genetic engineering is not, of course, limited to the vegetable kingdom. Harvard University received the first patent on animal life. Its patent was for a mouse genetically altered to be susceptible to breast cancer.³⁹ As the project’s major sponsor, Du Pont possesses commercial rights and the chemical company is selling the patented research animals.⁴⁰ It is in the animal kingdom that the legal response may have been most significant, because of the ethical issues which it raises.

In the 1990s, J. Craig Venter, a biologist at the National Institutes of Health (“NIH”), in Bethesda, Maryland, proposed the wholesale patenting of human gene fragments. Venter’s lab, using automated machines, had sequenced not whole genes but random fragments of cDNA derived from part of the brain.⁴¹ Such a fragment was called an “expressed sequence tag”, or EST.⁴² Although just 150 to 400 DNA coding pairs long, each was unique and served to identify the gene of which it was a part.⁴³ In June 1991, Venter and NIH filed for patents on 315 ESTs and the human genes from which they came.⁴⁴

36 See Jenna Greene, “He’s Not Just Monkeying Around” *Legal Times*, 16 August 1999, at 16, 20.

37 Chambers, *supra* n 22 at 224.

38 See Raines, *supra* n 26 at 65-66.

39 The “oncomouse,” as it is known, was developed by Harvard researchers Philip Leder and Timothy Stewart. See Sheldon Krimsky, *Biotechnics and society: The rise of industrial genetics* (1991) 44-45; Daniel J. Kevles, “Diamond v. Chakrabarty and Beyond: The Political Economy of Patenting Life” in Arnold Thackray (ed.), *Private Science: Biotechnology and the Rise of the Molecular Sciences* (1998) 65, 65-79.

40 See Elizabeth Corcoran, “A Tiny Mouse Came Forth” (1989) *Scientific American* 73.

41 Mark D. Adams et al, “Complementary DNA Sequencing: Expressed Sequence Tags and Human Genome Project” (1991) 252 *Science* 1651; Christopher Anderson, “US Patent Application Stirs Up Gene Hunters” (1991) 353 *Nature* 485.

42 *Ibid.*

43 *Ibid.*

44 Craig Venter and Mark Adams, “Sequences” USPTO No. 07/716,831, at 235-36 (applied 20 June 1991).

Venter's laboratory could produce EST sequences so quickly that NIH planned to file patent applications for 1,000 of them a month.⁴⁵ Indeed, by 1994 the number of ESTs covered by the Venter/NIH application had multiplied to almost 7,000.⁴⁶

A number of patent experts, however, insisted that ESTs were not patentable⁴⁷ – not because there was anything inherently unpatentable about genetic engineering, but because they failed to show sufficient legal grounds. Venter's initiative also provoked denunciations from scientists anxious that EST patents, if issued, would restrict research by others on human genes. The prospect of EST patenting was of serious concern to the biotechnology industry. The Association of Biotechnology Companies in Washington, DC, which represented 280 companies and institutions, endorsed EST patenting by NIH so long as it did not favour any one company over another, for example by granting an exclusive license.⁴⁸ In addition, many of the opponents of EST patenting were concerned at the prospect that the government – through NIH – would own those patents.⁴⁹ It would be beyond the capacity of private enterprise to co-ordinate and regulate the field – and a monopoly would be too restrictive.

France, Italy, and Japan announced their opposition to NIH's EST patents, fearing the patents would competitively disadvantage their budding biotechnology enterprises.⁵⁰ The French Academy of Sciences condemned "any measure which, answering purely to a logic of industrial competition, strove to obtain the legal property of genetic information data, without even having taken care to characterise the genes considered."⁵¹ However, the British Minister of Science Alan Howarth chose to join the competition, announcing in March 1992 that the Medical Research Council would also seek complementary DNA (cDNA) patents.⁵² Howarth explained that "a decision ... not to seek patents when researchers funded by public bodies in other

45 Ibid.

46 Christopher Anderson, "NIH Drops Bid For Gene Patents" (1994) 263 Science 909, 909-910.

47 See Leslie Roberts, "Genome Patent Fight Erupts" (1991) 254 Science 184, 185.

48 Rebecca S. Eisenberg, "Genes, Patents, and Product Development" (1992) 257 Science 903, 903-908; ABC Statement on NIH Patent Filing for the Human Genome Patent, Biotechnology Law Report, July-August 1992, at 408-410.

49 Ibid.

50 Norton D. Zinder, "Patenting cDNA 1993: Efforts and Happenings" (1993) 135 Gene 295, 295-298.

51 Academy of Sciences, Paris Bilingual Report No. 32, *The Patentability of the Genome* (1995).

52 Anna Maria Gillis, "The Patent Question of the Year" (1992) 42 BioScience 336, 336-339. CDNA, or complementary DNA is single-stranded DNA that is complementary to messenger RNA or DNA that has been synthesized from messenger RNA by reverse transcriptase.

countries have or may do so could place the UK at a relative disadvantage".⁵³ The role of privately funded researchers was less in the UK and elsewhere than in the US, where private business and research laboratories conducted much of the research.

However, initial fears of a monopoly were ended in August 1992; the US Patent Office rejected the Venter/NIH claims, calling them "vague, indefinite, misdescriptive, inaccurate and incomprehensible".⁵⁴

Patent laws were not necessarily unavailable however to businesses engaged in genetic engineering, provided there are properly submitted. However, they may not necessarily be the same as for other patentable inventions, due to the political and ethical considerations – including international.⁵⁵

In the summer of 1997, the European Parliament reconsidered the question of patenting biological inventions.⁵⁶ In the spring of 1998, it approved a wide-ranging directive on biotechnology designed to encourage patents while adopting explicit ethical restrictions – for the first time anywhere – on what can be patented.⁵⁷ Holding that biotechnology patents must safeguard the dignity and integrity of the person, the directive prohibits patents on human parts, human embryos, and the products of human cloning.⁵⁸ The directive also prohibits patents on animals if what they suffer by being modified exceeds the benefits that the modification would yield.⁵⁹

53 Ibid.

54 Leslie Roberts, "NIH Gene Patents, Round Two" (1992) 255 *Science* 912, 912-913; James Martinell, USPTO, Art Unit 1805, Examiner's Action on Venter et al, Patent Application No. 07/807,195, 20 August 1992, *Biotechnology Law Report*, September- October 1992, at 578-596.

55 Henrique Freire de Oliveira Souza, "Genetically Modified Plants: A Need for International Regulation" (2000) 6 *Annual Survey of International and Comparative Law* 129; Gilbert L. Carey, "The resurgence of states' rights creates new risk to intellectual property" (2000) 11 *Albany LJ Sci & Technology* 123.

56 Nigel Williams, "European Parliament Backs New Biopatent Guidelines" (1997) 277 *Science* 472; Alison Abbott, "EuroVote Lifts Block on Biotech Patents ... But Parliament Wants Closer Scrutiny" (1997) 388 *Nature* 314, 314-315.

57 Alison Abbott, "Transgenic Patents a Step Closer in Europe" (1997) 390 *Nature* 429; Alison Abbott, "Europe's Life Patent Moratorium May Go" (1998) 393 *Nature* 200.

58 European Community, Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998, On the Legal Protection of Biotechnological Inventions, 213 *Official Journal of the European Communities* 13-21 (1998).

59 For example, a mouse genetically engineered to suffer physically from birth would not be patentable if the modification did not lead to greater medical understanding, therapies, or cures.

Meanwhile basic and applied research continued, as there was no doubt that, though genetic research is expensive, great potential exists for long-term profit – provided the investment is legally protected.

The Human Genome Project (HGP), funded by the US Government, was projected to be completed in fifteen years at a cost of US\$3 billion.⁶⁰ The purpose of the HGP is to decipher the human genome, which is the master control program of human biological life.⁶¹ With knowledge gained from the HGP, diagnostic tests for genetic defects are now available,⁶² and it is hoped

60 The HGP was formally undertaken as a federal program in 1991 with an initial funding of approximately US\$135 million. Daniel Kevles, “Out of Eugenics: The Historical Politics of the Human Genome” in Daniel J. Kevles and Leroy Hood (eds.), *The Code of Codes, Scientific and social issues in the human genome project* (1992) 3, 36. The target date for completion was 2005; Victor A. McKusick, “The Human Genome Project: Plans, Status, and Applications in Biology and Medicine” in George J. Annas and Sherman Elias (eds.), *Gene Mapping: Using law and ethics as guides* (1992) 18.

61 The human genome consists of 46 chromosomes located in the nucleus of every somatic human cell. Daniel Kevles, *supra* n 60 at 16. If the HGP continues as planned, by the year 2005, HGP scientists will have mapped the human genome, assigning the approximately 50,000 to 100,000 human genes to their locations on the 46 chromosomes. Victor A. McKusick, “The Human Genome Project: Plans, Status, and Applications in Biology and Medicine” in George J. Annas and Sherman Elias (eds.), *Gene Mapping: Using law and ethics as guides* (1992) 18, 26; see also Horace F. Judson, “A History of the Science and Technology Behind Gene Mapping and Sequencing” in Daniel J. Kevles and Leroy Hood (eds.), *The Code of Codes, Scientific and social issues in the human genome project* (1992) 37, 38 (discussing how the history of genetics casts light on present attempts to map and sequence genes).

62 See Gina Kolata, “Tests to Assess Risks for Cancer Raising Questions”, *New York Times* 27 March 1995, at A1 (describing the controversy surrounding the imminent marketing of simple diagnostic tests for genetic defects that predispose individuals to breast and ovarian cancer); see also A Genetic Vulnerability to Carcinogens, (1996) 149 *Science News* 188 (stating that in the 3 February 1996 issue of *Lancet* it was reported that “those who failed to inherit a functional copy of ... [a gene that codes for a carcinogen-detoxifying enzyme] from either parent face four times the MDS [myelodysplastic syndrome] risk of those who inherited even one such gene. In the US, one in six persons lacks a working copy of this gene.”); “Epilepsy Gene Identified” (1996) 149 *Science News* 221 (“A joint U.S.-Finnish team reports nabbing a gene that, when mutated, causes an inherited form of epilepsy.”); Kathleen Fackelmann, “Forecasting Alzheimer’s Disease” (1996) 149 *Science News* 312, 313. (“Eric M. Reiman of the Good Samaritan Regional Medical Center in Phoenix and his colleagues knew that people who inherit a gene called apolipoprotein E-IV run a 27 percent chance of developing Alzheimer’s disease by age 85.”)

that cures for diseases caused by these genetic defects will follow.⁶³ This project proceeded despite uncertainties regarding patents, as the work itself would not produce patentable outputs – but would rather facilitate subject genetic work.

The difficulty for patenting the “codes of life” – and their potential risk – led to government intervention, and new laws. Indeed, for human DNA, some people question whether there should be any property rights at all.⁶⁴ Such a position would seriously inhibit privately-funded research, since little or no protection would be accorded to its findings.

The intellectual property law regime has for more than two centuries struggled to keep up with rapid technological change, yet it seems always to have managed to do so in the end. The biotechnology revolution, however, will create unprecedented challenges to our intellectual property rights system, perhaps especially in the allocation of rights to balance the interests of scientists, investors and those from whom valuable genetic material is obtained.

Intellectual property law, which includes patent law, is designed to advance knowledge and to stimulate innovation for the benefit of society.⁶⁵ To encourage this goal, a patent grants to an inventor a limited monopoly with which to profit from his or her invention.⁶⁶ But the details of patent laws vary from country to country.

63 As Leroy Hood concludes: “I believe that we will learn more about human development and pathology in the next twenty-five years than we have in the past two thousand.” Leroy Hood, “Biology and Medicine in the Twenty-First Century” in Daniel J. Kevles and Leroy Hood (eds.), *The Code of Codes, Scientific and social issues in the human genome project* (1992) 136, 163; see also C. Thomas Caskey, “Molecular Medicine: A Spin-Off from the Helix” (1993) 269 JAMA 1986, 1989-1990 (assessing current pharmacological applications and future genetic correction therapies drawing upon knowledge gained from the HGP).

64 Peter J. Gardner, “U.S. Intellectual Property Law and the Biotech Challenge: Searching for an elusive balance” (2003) 29 Vermont Bar Journal 28.

65 Linda R. Cohen and Roger G. Noll, “Intellectual Property, Antitrust and the New Economy” (2001) 62 UPittsburghLR 453.

66 Lawrence M. Sung, “Collegiality and Collaboration in the Age of Exclusivity” (2000) 3 DePaulJHealthCareL 411, 412-413 (citing U.S. Const. art. I, § 8, cl. 8 (Congress shall have power “To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”)). See also Linda R. Cohen and Roger G. Noll, “Intellectual Property, Antitrust and the New Economy” (2001) 62 UPittsburghLR 453 (the benefit of a rights regime is the inducement effect: if creators derive personal gain from their work, they are likely to produce a more creative product).

Australia and the UK, as well as most other countries (the US being a notable exception), adopt the “first-to-file” principle of patent law. This means that the person entitled to the patent is the first to file the application, even if he or she was not also the first person to have conceived the invention. The date at which the invention is assessed for both novelty and inventive step (“priority date”) is the date on which the application was filed.⁶⁷ The principle of national treatment under the Paris Convention for the Protection of Industrial Property⁶⁸ establishes the date of first filing in a member country as the priority date for subsequent filings in other states, provided that these occur within 12 months from the original filing.⁶⁹ The effect was to encourage developers to file patents as soon as possible, but it also potentially discouraged fundamental research, the economic benefits of which – if any – might be lost simply through delayed filing. In this respect biotechnology laws may have limited the potential for further research and development.⁷⁰

Existing intellectual property protection laws have been modified, and the only major legal shift has been with respect to human gene research. Research is now allowed, but with restrictions.⁷¹ For agricultural research political issues have caused even more difficulties, because in addition to ethical concerns there are differences between regions, a north-south divide, and so on.

It has been argued that there is a clear need for an international regulation on genetic engineering,⁷² because the lack of clear legislation has been creating uncertainty in terms of safety and international trade; has been making it more difficult to perceive when a country is violating the principle of state responsibility, just because its obligations under international law are not clear;⁷³ makes it more difficult for a country to observe its duty to assess environmental impacts, just because scientific findings are not absolutely conclusive in this matter, creating the possibility of discussion under World Trade Organisation/General Agreement on Tariffs and Trade (WTO/GATT)

67 Patents Act 1990, (Cth), s. 43; Patents Act 1977, (U.K.), s. 5.

68 March 10, 1883, as revised.

69 Paris Convention, Art. 4A-C.

70 Colleen Chien, “Cheap drugs at what price to innovation: Does the compulsory licensing of pharmaceuticals hurt innovation?” (2003) 18 *Berkeley Technology LJ* 853; Justine Pila, “Bound futures: Patent law and modern biotechnology” (2003) 9 *Boston UJ Sci & Technology L* 326.

71 The type of concerns commonly expressed may be seen to echo the underlying message in Mary Wollstonecraft Shelley’s *Frankenstein* M.K. Joseph edition (1980).

72 Henrique Freire de Oliveira Souza, “Genetically Modified Plants: A Need for International Regulation” (2000) 6 *Annual Survey of International and Comparative Law* 129, 172.

73 For example some actions or measures taken by an isolated state in order to protect its environment or the health of its population may violate some other international agreement.

(such as the Monarch Butterfly Case⁷⁴); on the other hand makes it more difficult to identify when a country is violating its obligation not to cause environmental harm. Further, the lack of specific international legislation has been causing the impairment of commerce, and one of the consequences here may be the limitation on research and development of new biotechnology products; and has been creating a tension between international trade law and international environmental law.

At the present time, intellectual property law is the mechanism that determines international protection and control over biotechnology innovations in plant varieties – and human and animal genetic material – and the genetic resources that form the basis for those innovations.⁷⁵ The intellectual property paradigm that is utilised employs western definitions of property in order to provide a framework in which to allocate rights. This has resulted in serious distributive problems including western-specific ideas about property, authorship, and individual creative inventors.

From the perspective of the user of technology, the indigenous peoples who possessed many of the raw materials, the failure of the legal system to adapt itself to changed agricultural technology has been costly. The benefits – such as there have been – are to the major companies which already had sufficient market penetration to effectively introduce their new products.

At a practical and normative level the issues thus raised converge on eligibility, and on whether modern biotechnology, however conceived, is a suitable subject matter for patent protection, or whether it is truly beyond the normative and doctrinal capacities of the patent system as that system currently exists.⁷⁶ This has been important at an international level, but nationally patent laws

74 Prepared Statement of Ambassador David L. Aaron Under Secretary for International Trade, U.S. Department of Commerce, 15 June 1999, <www.ogc.Doc.gov/ogc/legreg/testmon/106f/aaron0615.htm> (as at 23 December 2003)

Four varieties of US developed “Bt”, or pest-resistant corn, have been in the European Union approval process for over two years. The Commission has not approved any biotechnology products in a year and it recently announced that it was postponing the approval of Pioneer’s Bt corn application because of recent findings on the effects of genetically engineered corn on the US monarch butterfly population. These findings resulted from a study by Cornell University, and they are available at <www.greenpeace.org/geneng/reports/gmo/gmo011.htm> (as at 23 December 2003).

75 Lara E. Ewens, “Seed Wars: Biotechnology, Intellectual Property, and the Quest for High Yield Seeds” (2000) 23 *BostonCollInt’l&CompLR* 285; Keith Aoki, “Weeds, seeds and deeds: Recent skirmishes in the seed wars” (2003) 11 *CardozoJInt’l&CompL* 247.

76 Justine Pila, “Bound Futures: Patent law and modern biotechnology” (2003) 9 *BostonUJSci&TechnologyL* 326, 344.

have been used by companies to protect their intellectual property – and to enhance its value. Yet without this the western companies – who do most of the research – could be discouraged.

As the laws stands, it advantages existing established companies. One example of this is through sector capture.⁷⁷ For instance, Monsanto's "private property" in specific seed genomes, possessing genetically engineered characteristics such as drought and insect resistance, has been supplanting traditional agricultural understandings of seeds, and has accordingly changed farmers from seed saving "proprietors" into mere licensees of a patented agricultural technology.⁷⁸ When a farmer bought high-yield hybrid seed, the seeds from that crop wouldn't duplicate the high yield, so the farmer had to return to the seed company the next season if he or she wanted continued high yields.⁷⁹

Similarly, in the 2001 Canadian *Schmeiser* case patent infringement liability was found on the part of a canola⁸⁰ farmer whose fields adjoined a field planted with genetically engineered and patented canola, that outcrossed with his unpatented canola variety.⁸¹ These arrangements were of economic benefit to established suppliers, but may have a restrictive effect on others.

77 In the information technology field Microsoft was found liable for similar conduct, on a sufficiently large scale to account to a breach of anti-trust law; Samuel Noah Weinstein, "United States v. Microsoft Corp" (2002) 17 BerkeleyTechnologyLJ 273.

78 Keith Aoki, "Weeds, seeds and deeds: Recent skirmishes in the seed wars" (2003) 11 Cardozo Journal of International and Comparative Law 247, 254. Given the deeply ingrained, millennia-old tradition of seed saving, it is understandable that Monsanto has continued to have problems with farmers that don't comply with Monsanto's license terms; See *Monsanto Canada, Inc. v. Schmeiser*, T-1593-98 (March 29, 2001) [2001] FTC 256, available at <<http://decisions.fct-cf.gc.ca/fct/2001/2001fct256.html>> (as at 23 December 2003); see also Percy Schmeiser's website, "Monsanto v. Schmeiser" at <<http://www.percyschmeiser.org>> (as at 23 December 2003) There are different versions of Schmeiser's use of Roundup Ready™ canola. Schmeiser, who never bought the seeds, claims that he merely found and saved Roundup Ready™ seeds on his land. Monsanto claims he took the seeds from nearby farmer's fields.

79 The early 1990s saw the advent of patented seed technology systems, such as Monsanto's Roundup Ready™ crops, that possessed a patented genetic sequence making them resistant to Monsanto's broad band herbicide Roundup; Keith Aoki, "Weeds, seeds and deeds: Recent skirmishes in the seed wars" (2003) 11 CardozoJInt'l&CompL 247, 303.

80 "Canola" (*Brassica napus*) is also known as rape seed.

81 Keith Aoki, *supra* n 78 at 330.

The apparent economic failure in the genetically engineered crop market has been said to be because of asymmetry and the economic phenomena known as the “lemon problem”.⁸² Environmental and biological controversies have not helped either.⁸³

There is perhaps still scope for the small research firm. Generally, however, it must be said that the response of business to the advent of generic engineering has been cautious, because of the high regulatory risks and high costs, and uncertain benefits. The major legal determinant seems to be protection of ideas. The companies work around the restrictions – but only if their ideas are safeguarded. So far this has largely been through traditional intellectual property laws. Care must also be taken to ensure that there is a proper balance between protection of intellectual property – including that of indigenous peoples – and the common pool of human knowledge. Restrictions on certain types of research, and safeguards against the escape of organisms, seem less significant. In this case the paradigm shift is yet to come.

In the case of genetic engineering, business took advantage of pre-existing legal mechanisms – predominantly patent laws – in order to safeguard their investments. They also utilised licensing to achieve market capture – as in the Monsanto example. Both of these are relatively traditional uses of legal systems. However, where the difference lies is in the scale of the utilisation of these mechanisms, and of the indirect effects – such as for indigenous peoples’ property rights.

IV. CONCLUSION

The changes to the legal regime governing genetic engineering – and particularly human genetics – have been influenced more by political and ethical considerations than by economic considerations. The failure of the agricultural sector, in particular, to achieve the high returns which had been predicted, also emphasise the need for caution in dealing with high risk, high return technologies where the legal protection is relatively undeveloped.

82 George A. Akerlof, “The Market for “Lemons”: Quality Uncertainty and the Market Mechanism” (1970) 84 *Quarterly Journal of Economics* 488, 489-492; Kim JoDene Donat, “Engineering Akerlof lemons: Information asymmetry, externalities, and market intervention in the genetically modified food market” (2003) 12 *MinnJGlobalTrade* 417, 441-443.

83 Kim JoDene Donat, “Engineering Akerlof lemons: Information asymmetry, externalities, and market intervention in the genetically modified food market” (2003) 12 *MinnJGlobalTrade* 417, 439-440.

Nature of Native Land Title & Compensation for Compulsory Acquisition

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I. INTRODUCTION

This paper examines the conversion of aboriginal peoples' *allodia* title to Land in the pre-colonial times into the freehold fee simple estates during the colonial period and into the Right of Occupancy during the post-colonial independence era. It shall concentrate on the legal developments in Nigeria, Tanzania and other African countries with references to New Zealand, Australia and other Australasian jurisdictions in an attempt to evaluate the quantum and adequacy of compensation payable for compulsory acquisition and to suggest reforms.

II. HISTORICAL BACKGROUND OF LAND TITLE

In the ancient times, titles to land were acquired by the aboriginal people by the earliest original settlement on a virgin land by the patriarch¹ ancestral founder through means of cultivation or deforestation² of virgin vacant forest land not previously owned or occupied by anybody. The second method was that a war-like and stronger community could conquer weaker ones and appropriate their lands and other properties through expansion.³ In most patrilineal communities, the patriarch ancestral founder together with his household developed into families, hamlets, villages, clans, tribes and so on through gradual growth. The *allodia* titles to land acquired by the patriarchs by the two self-help methods

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1 *Ajala v Awodele* (1971) NMLR 127 at 128-129.

2 *Fadiri v Adiri* (1959) WNLR 189; *Kolapa v. Alade* (1985) 3 NWLR (pt.12) 532, 562.

3 *Mora v Nwalusi* (1962) 1 ALL NLR 681,683-684 Supreme Court of Nigeria (SCN).

then passed to successive generations. Nigeria, which was a colony of Great Britain for 99 years (Treaty of Cession 13 August 1861 to independence of 01 October 1960) and Tanzania, also a British colony for 99 years (imperial Decree 1895 to 1964) both inherited laws which had been imported from United kingdom and which transformed the system of land ownership.⁴

By virtue of treaty of cession, King Dosunmu of Lagos transferred all relevant land to the British monarch. In *Attorney General of Southern Nigeria v John Holt Ltd*⁵ the court held that only the radical titles to the land in Nigeria were transferred to the sovereign while the usufructory rights of the aborigines were preserved. The court in *Tijani v Secretary of Southern Provinces*⁶ similarly held that the legal effect of the treaty was that lands in the colonies ranked in *pari-passu* with lands in Britain subject to the use and the occupation or possessory rights of the natives.

Strictly speaking, the *allodia* title belonging to the natives were transferred to the Crown in this way. The doctrine of freehold tenure emerged, thus making the crown the ultimate owner of all land while the subjects⁷ were granted land in exchange for the performance of services to the imperial monarch. This type of feudal pyramid of landholding with the crown at the apex, the lords at the intermediate level, and the tenants as the lowest occupiers⁸ made the monarch the source of all land or paramount title thereto.

In course of time, two categories of estates, freehold and leasehold developed. The second category essentially concerns the relationship between landlord and tenant⁹ of the present era. The first category of freehold is the fee simple absolute estate of eternity in perpetuity, which is the largest estate theoretically

4 The British colonial administration converted land into Conventional freehold estates-see S. 7 (1) Land Registry Ordinance No. 15 (1923 Tanganyika) repealed by S. 115 (1) Land Registration Ordinance (Tanzania).

5 (1915) AC 599.

6 (1921) 3 NLR 24.

7 *Veale v. Brown* (1868) 1 NZ CA 152; *Re Van Enckevort (Bankrupt)* (1990) 1 NZ conv. C190 at 589.

8 Alston, Bennion, Slatter, Thomas & Toomey, *Guide to New Zealand Land Law* 2nd Ed (2000) 14-19.

9 *Pan Asian Co. limited v. National Insurance Corp. of Nigeria* (1982) 9 SC 1; Jack-Osimiri, *Modern Law of Land lord & Tenant In Nigeria* 2nd Ed (2004) 1-10.

possible in land.¹⁰ The next category is the fee tail estate, which could last or continue as long as holder, or any of his children or descendants otherwise called heirs of his own body; lived.¹¹

Consequently, if the owner or holder of the fee tail dies and leaves no heir or he is survived by a brother or relatives, the estate would come to an end and the property would pass to the remainder man next entitled under the terms of the grant or settlement.¹² The third category is the life estate which lasts throughout the duration or entire life span of the holder and shall discontinue¹³ on his death either by reversion¹⁴ to the grantor¹⁵ or possibly to the remainder man entitled under the terms of the settlement.¹⁶ In the case of *Biney v. Biney*,¹⁷ the settler by a deed of settlement conveyed his freehold land with the building thereon to three persons as life tenants thereafter to his four children as remainder men, their heirs and assigns forever. It was held that the intention was to bestow a joint tenancy on the children who are entitled to an estate in fee simple absolutely.¹⁸

10 *Alli v. Ikusabella* (1985) 1 NWLR (pt. 4) 630, 640 (per Karibi-Whyte JSC). In Ghana it is the highest estate/interest which the owner has in land, see *Total Oil Product Ltd v. Obeng* (1962) 1 GLR 228, 229; *Addai v. Bonsu* (1961) GLR 273 and the West Indian case *Noel V. Noel* (1958-59) 1 WILR 300.

11 *Okesuji v. Lawal* (1986) 2 NWLR (pt. 22) 417, aff'd by SCN (1991) 2 NWLR (pt. 170) 66 at 676, where the testatrix devised landed property to her son for life, the remainder to her grand children absolutely. The SCN held the fee simple estate was vested in the grand children and nullified a fraudulent transfer calculated to defeat reversionary interest. See also the West Indies case of *Gordon V. Burke* (1970) 16 WILR 204 (CA).

12 See supra n 11.

13 *Adebajor v. Adebajor* (1973) 4 SC 25, 46.

14 In *Ebosie v. Phil-Ebosie* (1976) 6 UILR (pt. 2) 217, the testator devised his land to his third wife under polygamous marriage. The SCN held a life estate was created. Compare *Abodurin v. Adedeji* (1976) 3 OYSHC (pt. 1) 267 at 268 where it was held that allottee of family land enjoys a life interest therein.

15 See the West Indian case of *Campbell v. Crooks* (1960) 2 IWLR 65, 69 where the court held that what was conveyed was a life estate and not a fee simple; the reversion remaining is vested in the settlor.

16 *Christian v. Mitchell-Lee* (1969) 13 WILR (CA West Indies).

17 (1974) 1 GLR 318 at 320 (Ghana CA).

18 See also *Taylor v. Coming* (1941) 7 WACA 21 (Sierra-Leone case) where West African Court of Appeal held that devise to A and his children for the term of their natural life was a gift in fee simple estate to all of them.

As we have seen above, the *allodia* title belonging to the natives/aborigines were converted into the estates of fee simple¹⁹ or to a term of years (leaseholds estates)²⁰ by virtue of the colonial rules. These two estates were the only ones that could exist at law. Fee tail was abolished and any conveyance framed or drawn to create any such interest would now pass as fee simple.²¹

The doctrine of estate is a concept Nigeria inherited from the old English land tenure system, upon becoming a common law jurisdiction, on the first of January 1900²² and Tanzania too; pre-1922.²³ It is applicable even though its historic basis is absent in Nigeria and notwithstanding the fact that English laws were made applicable subject to local variations or domestic circumstances.²⁴

III. CURRENT NATURE OF LAND TITLE IN NIGERIA AND TANZANIA

Nigeria became a republic in 1963 and the Land Use Act was enacted in 1978.²⁵ It is the fundamental property legislation which nationalized all radical title in land in each of Nigeria's thirty six states. The legal effect is that the radical title and the ultimate management of all land have been removed from individuals and vested in the State Governor, in accordance with the provisions of the Act.²⁶ Similarly under section 3 of the Land Ordinance of Tanzania (Tanganyika),²⁷ the whole land of the main land Tanzania whether occupied or unoccupied was declared public land. All freehold lands were extinguished²⁸ as of the first July 1963, and the ownership of the whole land of Tanzania became public.

19 S.3 (1) (a) (b) Property & Conveyancing Law (PCL) Cap. 100 1959 (Laws of Western Nigeria (LWN)).

20 S. 2 (2) Law of Property 1990 (Kaduna) 1994 (Imo) 1995 (Kwara) 1995 (Sokoto & Zamfara) 1996 (Taraba) 1996 (Bauchi & Gombe) 1998 (Kebbi) 1998 (Kogi), 1999 (Akwa-Ibom) 1998 (Jigawa) 2001 (Abia) etc States of Nigeria.

21 S. 3 (3) PCL 1959, S.2 (3) Law of Property 1990-2001 (36 States of Nigeria).

22 Pre-1900 rules of common law and statute of general application applicable to Nigeria subject as local circumstances could permit, see S.15 High Court Law 1963 (Eastern Nigeria) S.28 High Court law 1962 (Northern Nigeria) and S.3 Law of England. (Application) law Cap. 60 1959 (Western Nigeria).

23 Ordinance 28 (1922) Tanganyika (now Tanzania).

24 See the judicial pronouncement on the need to modify the technical English conveyancing to suit local conditions. *See British Bata Shoe Co. Ltd. v. Roura & Foregas Ltd.* (1964) GLR 190, SC Ghana (per Adumua-Bossman JSC).

25 S. 1 LUA 1978 now Cap. L5 Laws of Federation of Nigeria (LFN) 2004. See the cases of *Nkwocha v. Governor Anambra State of Nigeria* (1984) 6 SC 362, 403; *Mohammed v. Lang* (2001) 3 NWLR (pt. 700) 389 to the effect that Land Use Act nationalized all lands in Nigeria.

26 *Nnadi v. Okoro* (1998) 1 NWLR (pt. 535) 573, 579-580.

27 Cap. 113 (Laws of Tanzania) 1975.

28 Freehold Titles Conversion Act No. 24 1963.

Individuals could no longer, in a general sense, own land.²⁹ All Government leases³⁰ and any other land interests were converted to a Right of Occupancy. While the Tanzanian Land Act vests the all land in the president for the use and benefit of Tanzanian people, the Nigerian Land Use Act vests all of the land in each state in the Governor of that particular State.

The Governor is not the beneficial owner³¹ but holds the land in trust and administers the same for the benefit of all Nigerians.³² The former estate owners in fee simple were stripped of absolute³³ ownership and demoted to owners of an inferior kind of estate, called a Right of Occupancy.³⁴ This diminished estate in land, Right of Occupancy, can only be alienated with the consent of the State Governor³⁵ in Nigeria, or with the consent of the relevant Minister in Tanzania.³⁶

It is difficult to determine the quality of estate created by the Right of Occupancy. Some writers maintain it is not a lease, but a hybrid form of estate existing between real and personal property.³⁷ In line with this, it is *sui generis*, and the intention of the legislature in establishing it was to introduce an entirely new interest in land unknown to the law of England.³⁸ Other writers³⁹ are of the view that the effect of a grant of Right of Occupancy by appropriate authority is to create a lease. Many authorities support the view that a Right of Occupancy is in substance a lease, different only in name,⁴⁰ or at least it is comparable, and resembles or represents a lease.⁴¹

29 Gondwe, Z.S. (Dr.) *Manual of Transfer of Right of Occupancy in Tanzania* (2001) 3-20.

30 Government leaseholds (Conversion of Rights of Occupancy) Act Cap. 44 1969.

31 *Savannah Bank Ltd. v. Ajilo* (1989) 1 NWLR (pt. 97) 305, 309 (SCN).

32 *Abioye v. Yakubu* (1991) 1 NWLR (pt. 190) 130, 256 (SCN).

33 *Obikoya & Sons Ltd. v. Governor Lagos State* (1987) 1 NWLR (pt. 50) 285, 390 (CA); *Adenipekun v. Onigemo* (1983) 1 ODSLR 85, 88.

34 SS. 1, 2, 5, 6, 34 and 36 LUA 1978; *Otti v. Attorney General Plateau State* (1985) HCNL 787 Aff'd (1986) 3 CA (pt. 2) 235, 340.

35 SS. 21 & 22 LUA 1978; *Nitel PLC v. Rockonoh Property Co. Ltd* (1995) 2 NWLR (Pt. 378) 473.

36 SS. 11 (1) (7) Land Ordinance.

37 Omotola, J.A. (Prof.) *Essays on land Use Act* (1984) 24; James, R.W. (Prof.) *Nigerian Land Use Policy & Principles* (1987) 87-108.; Umezulike, I.A. (Prof. & Hon. Justice) *Mortgage of Right of Occupancy* (1987) 3 PLJ 22, 23.

38 *Premchand Nathu Ltd v. Land officer* (1963) EALR 941, (1963) 2 WLR (1963) AC 177 Privy Council interpreting SS. 34 etc Land Ordinance Cap. 113, Tanzania.

39 Elias, T.O. (Prof. & Hon. (CJN) *Nigerian land law & customs* (1962) 284; Onwuamegbu; M.O. Dr. & Hon. Justice *Nigerian Law of Landlord & Tenant* (1966) 216.

40 *Majiyagbe v. Attorney General of Northern Nigeria* (1957) NNLR 159, 163.

41 *Director of lands & Mines Tanganyika v. Sohan* (1952) 1 TLR 362; *Henvicksdorf v. Dodd* (1960) EALR 327, 333 (Tanzanian cases).

The view that a Right of Occupancy is a form of 'head-lease' peculiar to Nigeria and Tanzania (having identity of its own) is at least tenable, especially when a certificate of occupancy (C.O.) has been issued to the holder, as the C.O. creates a term of years or a lease for a number of years stated.⁴² This is because by virtue of the Land Use Act 1978, and the Certificate of Occupancy issuable thereunder, *only* a holding for a term of years can be created.⁴³ What is more, the greatest legal estate which can now exist; which a person of full age can hold in land located anywhere in Nigeria or Tanzania is a term of years.⁴⁴

In *Nittin Coffee Estates Ltd v. United Engineering Works Ltd*⁴⁵ the Tanzanian Court of Appeal held that a Right of Occupancy is something in the nature of a lease and a holder of the Right of Occupancy occupies the same position as of a sort of lessee, it is for a fixed term and is held under certain conditions, i.e. no disposition of said right without the consent of the superior landlord. This line of judicial reasoning is further confirmed in the case of *Savannah Bank Ltd v. Ajilo*⁴⁶ where the Supreme Court of Nigeria held:

While the interest vested in the Governor is unstated in the Act, the interest a Nigerian, can lawfully acquire is scaled down to Right of Occupancy. In terms known to land, the quantum of a Right of Occupancy remains unclear. To the extent that it can only be granted for a specific term under S.8 Land Use Act, it has the semblance of a lease. Also to the extent that a holder has the sole right to and absolute possession of all the improvement on the land during the term, a holder does not enjoy more rights than a lessee under the common law. When S.34 (2) Land Use Act converted the interest held by the owner to a mere Right of Occupancy, the Act reduced him to the position of a tenant subject to the control of the state through the Governor. As a tenant he is bound by the implied and express terms of the tenancy.⁴⁷

With the apparent abolition of the fee simple estate, and since no other estate other than Right of Occupancy can exist, leasehold is therefore the obvious term to describe the estate capable of existing. The interest of the lessee is not exactly the same as that of a holder of Right of Occupancy as the latter enjoys a larger interest than the former; although both enjoy a common denominator, which is a term of years.⁴⁸

42 *Chiroma v. Suwa* (1986) 1 NWLR (pt.19) 751, 756 (CA).

43 *Adeniran v. Dahuwa* (1980) 416 CCHCJ 209, 214; *Otti v. Attorney General Plateau State* (above).

44 See *supra* ns 41 & 42.

45 (1988) TLR 203, 211.

46 *Ibid*, 309.

47 Per Karibi-Whyte JSC, 328 (emphasis added).

48 *Osho v. Foreign Finance Corp.* (1991) 4 NWLR (pt. 184) 157, 167 & 192 (SCN); *Abioye v. Yakubu* (1991) 5 NWLR (pt.190) 130, 155 (SCN).

IV. HOLDING TITLES IN TRUST FOR THE PUBLIC GOOD

The main aim of nationalization of all lands through the Land Use Act 1978 was to foster the state policy of imposing administrative controls over all the land and to ensure a prudent and transparent system of land holding. The national land policy was intended to enhance secured land tenure, encourage optimal use of land resources and to facilitate broad based social and economic developments without an unregulated market risking upsetting or endangering the ecological balance of the environment.⁴⁹ The object was to streamline and to make acquisition of land less cumbersome.⁵⁰ In Nigeria, the major aims of vesting title in Governors were to remove the legacy of bitter controversies and conflicts over land, simplify ownership and management, and to help Government facilitate planning, zoning programmes and to assist the citizens irrespective of social status to acquire land and for self and family use.⁵¹ It was specifically designed to eradicate land speculation and to facilitate judicious and economically productive use of lands.⁵² The land reform introduced was necessary to ensure agricultural lands were productive for the benefit of the economy, to guarantee all citizens access to land⁵³ and to the mechanization of agriculture⁵⁴ and to balance the practical need to attract foreign investment with some security of land tenure.⁵⁵

V. ISSUE OF COMPENSATION FOR COMPULSORY LAND ACQUISITION

Compulsory acquisition of land as opposed to private bargaining is to prevent private selfishness, i.e. holdouts, from standing in the way of public improvement.⁵⁶ Private rights must give way to the overriding public interest; otherwise land owners will be in a position to hold up schemes beneficial to the community, therefore the element of public interest can justify compulsory acquisition.⁵⁷ In Nigeria, where land held under Right of Occupancy is acquired compulsorily by the Government, payment of compensation to the owners of

49 National land policy, Ministry of Lands, Housing & Urban Development, Dar-es Salam, Tanzania.

50 James, R.W. (Prof.) *Land Tenure & Policy in Tanzania* (1971) 11-31; Fimbo, G.M. (Prof.) *Land Law in Tanzania* (1992) 1-19.

51 Tobi, N. (Prof. & JSC) *Land Use Act, 25 years* (2003) 1-10.

52 See Zambian land policy-Kaunda, K.D. *Towards complete Independence* (1969) 36-42.

53 James, R.W. (Prof.) 'Land Reform proposals In Zambia' (1971) 2 East African Law Review 109.

54 Mulimbwa, A.C. 'Land policy and Economic Development in Zambia' (1998) 30 Zambia Law Journal pp. 79, 82-83.

55 Kaunda, Moses 'Ownership of Property Rights in Land' (1989-1992) vols. 21-22 Zambia Law Journal. 61, 66-67.

56 *Metropolitan Board of Works v. Mearthy* (1874) 31 LT 182, 184 (per Lord O'Hagan).

57 *Nwanganga v. Governor Imo State of Nigeria* (1989) 4 NWLR (pt. 92) 350.

acquired land⁵⁸ is predicated on the assumption that those being paid are the owners and occupiers of the land.⁵⁹ Where a person's title to land, i.e. Right of Occupancy is revoked, it shall be only for a public purpose, the public interest and a public benefit, and payment of compensation is governed⁶⁰ by sections 28 and 41 Land Use Act 1978.

Under Section 28 Land Use Act 1978, the Governor can revoke the Right of Occupancy for a public purpose or for an overriding public interest,⁶¹ with notices published in the official gazette and personally served on the persons affected. Public purpose must be connected with the public good, general utility, the welfare of the community and not to serve the commercial interests of a company or privileged few.⁶²

Revocation of Right of Occupancy for the purpose of the expansion of a cattle market of a local Government was adjudged to satisfy the overriding public purpose contemplated by the Land Use Act 1978.⁶³ In the era of privatization and commercialization of 1990's, the revocation of Right of Occupancy for re-granting to the multinational corporations and foreign investors to boost economic development, create employment, and induce agricultural industrialization, etc., definitely qualified as being for a public purpose and the overriding public interest.⁶⁴ Pursuant to this the Federal Government of Nigeria (FGN) granted Right of Occupancy to hectares of land to immigrating farmers who were displaced by the Zimbabwean Land Resettlement policy. To mechanize Nigerian agriculture the Zimbabwean farmers were resettled in the Kwara and Nasarawa States of Nigeria they and their households were granted automatic Nigerian citizenship. The grant of Right of Occupancy to them qualified as a public purpose within the Land Use Act 78, under the rubric of attracting investors and stimulating industrialization. A public purpose or the public interest is synonymous with the element of public benefit,⁶⁵ without necessarily the entire country deriving the largest proportion of that benefit.

58 *Ononuju v. Attorney General Anambra State of Nigeria* (1998) 11 NWLR (pt. 537) 328.

59 Tobin, N. (Prof. & JSC), *supra* n 51 at 13.

60 *Agundo v. Gberbo* (1999) 9 NWLR (pt. 617) 71; *Upper Benue Rivers Basin Development Authority v. Aika* (1998) 1 NWLR (pt. 537) 328.

61 SS. 6 (3), 28 (4) & 51 (1) Land Use Act 1978 and SS. 3 (1) (g) 10 (1) Land Ordinance Tanzania-Right of Occupancy can be revoked on good Cause & public interest, see *Patman Garment Industries Ltd. v. Tanzania Manufacturer Ltd.* (1981) TLR 308, 310.

62 *Chief Commissioner Eastern Provinces v. Ononye* (1944) 17 NLR 142; *Ereku v. Governor Mid-Western Nigeria* (1974) 10 SC 59 at 67-68.

63 *Sokoto Local Government v. Amale* (2001) 8 NWLR (pt. 714) 224, 229 (CA).

64 See SS. 1, 5, 10-22 Privatization and Commercialization Act 1999.

65 Section 75, Kenya Constitution.

The public benefit criterion is satisfied if land is redistributed⁶⁶ and the actual benefit goes prima facie only to a few people⁶⁷ and it is immaterial whether and unnecessary that everyone participates directly.⁶⁸

The owner of a Right of Occupancy to land subsequently expropriated for a public purpose is entitled to adequate and prompt payment in compensation.⁶⁹ The affected owner has a right of access to the appropriate courts or tribunal for determination of his interest in the property and of the amount of compensation.⁷⁰ What constitutes adequate compensation is not statutorily defined but it is understood to cover remuneration or satisfaction for injury⁷¹ or damage of every description.⁷²

VI. AWARD OF COMPENSATION TO HOLDERS OF REVOKED RIGHT OF OCCUPANCY

By virtue of Section 28 of the Land Use Act 1978 only the holder of Right of Occupancy (whose interest in land has been revoked by the Governor for public purpose under Section 28 and no other person) is entitled to compensation for the value of the Right of Occupancy in the land at the date of revocation, for the unexhausted improvements. Under Section 29, it appears that the holder of an empty, vacant, or bare holding,⁷³ without improvements or development in the form of buildings, walls, or structures etc, of any sort,⁷⁴ has no right to receive compensation on revocation of their Right of Occupancy as such land has no commercial value. The rationale is that compensation is not payable unless there are improvements which have not been totally exhausted by the holder at the date of revocation of the Right of Occupancy.⁷⁵ Consequently, it follows

66 See *Ona v. Otenda* (2000) 5 NWLR (pt. 656) 244, 256 where land compulsorily acquired to build new Federal Capital territory (FCT) Abuja for Nigeria satisfied public purpose.

67 Onalo, P.L., *Land law & Conveyancing In Kenya* (1986) 57-61.

68 *People of Puerto Rico v. Eastern Sugar Association* (1973) 156 2d F316.

69 S. 44 (1) (a) 1999 Nigerian Constitution. Now Cap. C. 23 (LFN) 2004. See also S. 75 Kenya Constitution 1972 which provides that the property compulsorily acquired for public development or public utility entitles the owner to prompt payment of full compensation.

70 S. 44 (1) (b) 1999 Nigerian Constitution. See Article 18, Zambia Constitution 1975 for guaranteed protection against deprivation of property and prohibited compulsory acquisition except on the ground of public purpose and payment of adequate compensation promptly.

71 *Zango v. Governor Kano State of Nigeria* (1986) 2 NWLR (pt 22) 409, 410.

72 Australian case *Netungaloo Property Ltd v. Commonwealth* (1948) 75 CLR 495, 571.

73 James, RW (Prof.), *Land Use Policy & Principles in Nigeria* (1987) 18; Adeoye, F.O. 'Use of Right of Occupancy as Security-A caveat' (1998) 2 GRBPL (No. 3) 18-22.

74 Jack-Osimiri, U. 'Award of compensation to Holders of undeveloped plots under Land Use Act; case for Reform' (1991) Vol. 2 (No. 7) Justice Journal 29-34.

75 S. 29 (1) (2) Land Use Act 1978.

from this argument that the Governor is not obliged to pay compensation or provide resettlement/alternative accommodation in lieu of the compulsorily acquired land.

It has been emphasized that the Land Use Act 1978 neither disposed anybody of his land⁷⁶ nor did it ever deprive owners of their (use) interests in land.⁷⁷ In fact it is only the radical title in respect of all the land in the State that has been transferred to and vested in the State Governor in trust for all Nigerians.⁷⁸ By virtue of sections 1 and 2 Land Use Act 1978⁷⁹ the Governor is a mere trustee or Administrator⁸⁰ of all the Land within that state, never a beneficial owner.⁸¹

Policy matters are left for the Minister of Lands in Tanzania,⁸² or the commissioner for land in the particular state of Nigeria, while the daily administrative and managerial matters are left to the Directors of Lands and Land Allocation and Advisory Committee.⁸³ Generally, the characteristics of the land tenure under which the former land owners now hold (despite not being the ultimate owner any more) remain substantially the same.⁸⁴ In spite of the vesting of the absolute ownership of the land on the Governor or President, the land owners still retain possessory title⁸⁵ as occupiers⁸⁶ vested with usufruct.⁸⁷

76 *Ogunleye v. Oni* (1990) 5 NWLR (pt. 152) 745.

77 *Ladejobi v. Shodipo* (1989) 1 NWLR (pt. 99) 596, 599; *Oke v. Salami* (1987) 4 NWLR (pt. 63) 1.

78 *Dzungwe v. Gbishe* (1985) 2 NWLR (pt. 8) 528; *Odenipekun v. Onigemo* (1983) 1 ODSLR 85, 88; *Nkwocha v. Governor Anambra State* supra n 25; *Savannah Bank Ltd v. Ajolo* supra n 32.

79 See also the equivalent S. S.4 land ordinance and SS. 3 (1) (a), 4 (1) land Act 1999 which provide that the President of Tanzania is vested with public land as a trustee for and on behalf of all citizens of Tanzania.

80 *Fayose v. Bello* (1983) 2 ODSLR 44.

81 *Savannah Bank Ltd. v. Ajilo* supra n 32.

82 SS. 11 (1) (7), 14 (1) (2) (3) Land Use Act 1999 (Tanzania).

83 SS. 3 and 4 Land Use Act 1978 (Nigeria), SS. 1, 5, 8-16 Land Use Regulations, (Lagos and other States of Nigeria).

84 *Ogunola v. Aiyekola* (1990) 4 NWLR (pt. 146) 632.

85 *Makanjuola v. Balogun* (1989) 3 NWLR (pt. 108) 192, 195, SS. 5, 6, 34 and 36 Land Use Act 1978.

86 S. 2 Land Ordinance holder or occupier of Right of Occupancy is a person entitled to an estate in land: to use and enjoy the fruits therein, see *Mateyo v. Mateyo* (1987) TLR 111, 112.

87 Usufruct is the right to use, occupation, enjoy the property, utility, advantage accruable without altering the substance, see Tanzanian land policy (above) and village land Act 1999 for customary right to use which means the same thing as usufruct under Land Act 1999 (Tanzanian).

It is necessary at this stage to evaluate the adequacy of the statutory provisions governing the assessment and award of compensation under Land Use Act 1978. A careful investigation of the acquisition of land for public purposes and appraisal of the principles enunciated prior to 1978, demonstrate that the Land Use Act 1978 is unfair to holders of undeveloped lands, as to compensation in the event of revocation of Right of Occupancy under S.28. What is more, the criteria for assessment of compensation are grossly inadequate. The criteria are enumerated under section 29 (4) (a) (b) (c) of the Land Use Act 1978, which provides that the valuation must be based on the amount of yearly rent paid by the occupier, the replacement costs of building installations or reclamation works etc, less any depreciation, and value of the crops or economically productive trees on the land. This means that the owners of undeveloped plots or without any crops or economically productive trees planted are excluded from receiving compensation. What is more, the value of the crops, economically productive trees, and buildings alone without some compensation for the site's intrinsic value may not represent the actual value of the land, which, speculation aside, does appreciate over a given period.⁸⁸

The value placed on land by Section 29 of the Land Use Act 1978 can hardly be considered adequate in this respect. It can not be denied that every land possesses some intrinsic and some prospective use value: e.g., as fertile agricultural land, as building/residential/commercial use, as industrial or storage use and site value either presently or in future. These ought to be adequately compensated in the interest of fairness, equity and justice, as the intention of the Land Use Act is not to deprive or dispossess unimproved owners of their land – their source of livelihood or subsistence. The exclusion of site value and the assessment of compensation for compulsory acquisition based entirely on unexhausted improvement without considering the value of the land itself, on which the improvements stand, is alien to our law and traditions⁸⁹ at least prior to 1978. In *Lewis v. Colonial Secretary*⁹⁰ the issue for determination was the compensation payable for unoccupied and yet utilized land. The Court was prepared to award compensation had the beneficial user of the land been proved. The most fatal piece of evidence was that the land was barren and failure of the claimant to prove any specific benefit or advantage derived from the land. Also in *Commissioner of Lands v. Adeleye*⁹¹ the Court based compensation both on the value of the land itself (site value) and the building erected thereon.

88 Land appreciates as the most valuable asset, see *Chairman Lagos State Development & Property Corporation(LSDPC) v. Ottun* (1973) 3 CCHCJ 255 at 256 per Bakare J.

89 *Salako v. Salako*, infra n 96.

90 (1881 - 1911) 1 NLR 11, 14.

91 (1938) 14 NLR 109.

Arguably, since the Right of Occupancy embraces the right to use, farm, subsist and exploit the land, therefore any deprivation of these rights/utilities without payment of compensation principally because of lack of physical improvements thereon would be unfair. Logically, assessment of compensation under the criteria laid down by section 29 Land Use Act 1978 appear grossly inadequate and needs drastic overhauling in order to sufficiently recognize and compensate for the loss of the above undisputed current utility and future interests derived from or placed on the land for which Right to Occupancy has been revoked.

This is a constitutional right for non-deprivation of right to property or any immovable or interest therein without prompt payment of due compensation.⁹² It is guaranteed by section 44(1) 1999 Constitution, which provides:

No movable property or any interest in an immovable property shall be taken ... compulsorily and no right over or interest in such property shall be acquired compulsorily except ... without prompt payment of compensation thereof. ...

Arguably, a Right of Occupancy whether bare and undeveloped, or already developed, is an interest in land and any deprivation of use owing to revocation/acquisition of that right must be adequately compensated. The general principle is that compensation must be adequate, i.e., the open market value⁹³ which if the Right of Occupancy to land is sold in the open market by a willing seller, the amount he might be expected to realize.⁹⁴ In support of this assertion is section 15(b) Public Lands Acquisition Act⁹⁵ which provides that in estimating the compensation payable for any land, or estate or interest therein, compulsorily acquired, the proper value is the amount on the open market which a willing seller might be expected to realize.

92 *Nkwocha v. Governor Anambra State*, supra n 25; *Aina & Co., Ltd. v. Commissioner of Lands & Housing* (Oyo State) (1983) 3 FNLR 113 (per Fakayode C.J.); *LS.D.P.C. v. Foreign Finance Corporation* (1987) 1 NWLR (Pt. 50) 413.

93 *Anglican Diocese of Nigeria v. Attorney-General Anambra State* (1979) ANSLR 64, 65; *Iguh J., Esi v. Warri Divisional Town Planning Authority* (1973) 11 S.C 235; *Nzekwe v. Attorney-General of East Central State* (infra); *Commissioner for Lands v. Aneke* (infra).

94 *Commissioner of Lands v. Adeleye* (1938) 14 NLR 109, 110 (per Lloyd J.); see also *Chairman LS.D.P.C. v. Ottun*, supra n 88.

95 Cap.167 (LFN 1958) and Section 15(b) Public Lands Acquisition Law Cap. 105 (Eastern Nigeria) (1963). See also Section 54(1)(a) Lagos Town Planning Act Cap.95 (LFN 1958) which provides that whenever compensation is payable in respect of any land or interests in lands taken compulsorily "... the Court shall base the value ... upon fair market value estimated at the time when the scheme was published and due regard being had to the nature and condition of the property and probable duration of the building thereof."

It was on this basis that, in *Salako v. Salako*,⁹⁶ George, J. held that compensation paid by mutual agreement between the owners of acquired land and the acquiring authorities based on comparative formula used in paying other owners of adjoining land cannot be an open market value because there was no way of knowing how this agreement was reached. Obviously it may not be what a willing seller could realize in an open market because it was based on a private contract.

Furthermore, in the light of the principle that nobody should be dispossessed of his property which was lawfully acquired or inherited, without payment of just compensation,⁹⁷ the criteria enumerated under section 29 of the Land Use Act 1978, can hardly be considered adequate. In *Zango v. Governor Kaduna State*,⁹⁸ the Supreme Court held that 'compensation' in the sense in which it is used in the Land Use Act 1978 covers remuneration or satisfaction of injury or damage of every description. Logically, compensation can hardly be adequate and just unless all the losses sustained by the holder of the Right of Occupancy on its revocation:- deprivation of the present and prospective utility of the land as to its agricultural, building, commercial, residential, or industrial etc. uses are completely made good to him or her, in the form of receiving a payment equivalent to the pecuniary detriment or compulsory sacrifice.⁹⁹ The use of this basis in the estimation of compensation had received recognition in our law. In *Nzekwu v. Attorney-General East Central State*,¹⁰⁰ the Supreme Court held that in the assessment or estimation of compensation in land compulsorily acquired, both the open market value of the land and the value of the houses erected thereon are valid criteria for the award, plus capitalization of twenty-one years' purchase. The Law Lords took into account leases granted both on the land and the adjoining lands, rents payable and, despite the fact that there was no reliable evidence as regards to the price paid in the neighbourhood in the past for land of similar quality and in similar position, reliance was additionally placed on the rent-value of comparable properties to set the value of compensation.

From the above, fairness, economic considerations, and decisions of courts show that vacant or undeveloped plots owners ought to be compensated in the event of the revocation of their Right to Occupancy, in spite of lack of improvements thereon. Section 29 of the Land Use Act 1978 therefore should be amended or possibly overhauled fundamentally in order to reflect this. It is

96 (1973) 9 CCHJ 5, 8.

97 *Ogunleye v. Oni*, supra n 76 at 750.

98 (1986) 2 NWLR (Pt. 22) 409 (1986) 9 SC 11.

99 *Horn v. Sunderland Corporation* (1941) 2 KB 26, 40 (per Scott L.J.).

100 (1972) 2 ECSR (Pt. 1) 323 at 332-3; (1973) 3 UILR 397; (1972) 1 All NLR (Pt. 2) 106; (1975) 5 SC 224, 342-3.

submitted that there should be no uncertainty that disturbances of the surface right to use, interference with future possibilities of development, commercial or business prospects and potentials traceable, ascribable or referable to the holder's of Right of Occupancy ought to be compensated. This would not be a rare or unique incident in our legal system.

VI. PROPOSALS FOR REFORM

In *Tijani v. Secretary Southern Provinces*¹⁰¹ the compensation payable was based on the disturbances of usufructuary right of the Communities owners of the land whose radical title was vested in the British Monarch. Similarly, Section 35(1) Land Tenure Law 1962¹⁰² recognises the payment of compensation for disturbances, inconveniences and potentials value of the land.¹⁰³ In *Makeri v. Kafinto*¹⁰⁴ the Court of Appeal based compensation for compulsory acquisition not only on unexhausted improvements on land, but also for inconveniences caused by the disturbances of acquisition/expropriation and compensation was further paid to the person farming the land at the relevant time. The Land Use Act 1978 should be amended in this direction. In *Maja v. Chief Secretary of the Government*,¹⁰⁵ the Court sympathized with, and accepted as a good proposition of law, the argument that an award of compensation should take into account: the development possibilities and the business prospects of the land compulsorily acquired, but rejected it as inapplicable in the case at hand because of lack of evidence that there was any future potential or value of the site as a salt manufacturing factory. But in *Nzekwu*,¹⁰⁶ the Supreme Court appeared to have overruled *Maja* as it ordered compensation to be paid for site value, i.e. the loss of building prospects of the land compulsorily acquired.

From the foregoing discussion, it is clear that bare or vacant land which is the subject matter of a Right of Occupancy, despite the absence of erected physical unexhausted improvement thereon, could be suitably utilised for one or varieties of purposes. Logically, other methods by which the land can be effectively utilized and its potential or eligibility for future development should be taken into account in the assessment and duly compensated in order for compensation to be truly adequate. All the rights enjoyable or derivable from the land, e.g. in case of swampy land; natural vegetation and advantages of

101 (1914-1922) 3 NLR 24.

102 Cap. 59 (Northern Nigeria).

103 See also Section 114 Land Clauses Consolidation Act 1845, Section 2(2) Acquisition of Land (Assessment of Compensation) Act 1919 and compulsory purchase Act 1965 (English statutes not applicable to Nigeria).

104 (1990) 7 NWLR (Pt.163) 411 at 415 & 420 decided under section 35(1) Land Tenure similar effect.

105 (1948) 12 WACA 392, aff'd by the Privy Council in (1952) 12 WACA 395.

106 *Supra* n 100.

proximity to sea breezes etc., ought to be taken into account. In *Commissioner for Lands v. Daniel*,¹⁰⁷ the West African Court of Appeal based compensation payable to owner whose property was acquired for public purposes both on the land itself and the buildings erected thereon. In order to promote fairness, adequacy of compensation and to ensure that nobody is deprived of any right derivable from his land whether developed or not, we suggest the inclusion of the following factors as the basis for valuation:

1. The amount of compensation should take account of not only the physical/visible improvements on the land in form of buildings, installations and economic trees, crops planted or growing thereon as stipulated under Section 29 of the Land Use Act 1978 but also the vacant undeveloped land¹⁰⁸ which has the future prospect of use/utility¹⁰⁹
2. Loss of present and future profits/income accruing from the land.
3. The sellable site value - the possibility of the vacant undeveloped or unimproved land being sold off in plots by the holder and its development as a potential agricultural, housing, industrial etc. estates.

The inclusion of these proposals as criteria in the assessment of compensation would no doubt enhance fairness as it can hardly be denied that all lands whether developed or undeveloped possess some degree of utility¹¹⁰ which ought to be compensated.

Equally advocated is the assessment of compensation by independent estate surveyors/surveyors as it would ensure impartiality and adequacy. The onus would be on the holder of the acquired/revoked land to prove that he is entitled to more than what the acquiring/revoking Government Authority would offer as compensation.¹¹¹ This is because the assessment by an appropriate Officer under Section 29(4) Land Use Act 1978 may not produce fair result since the Officer is a civil servant employed by the Governor - the interested/acquiring authority. The danger is that the appropriate officer would give a favourably tailored under-assessment or possibly a gross under valuation to please his master, the Governor¹¹² undermining the pecuniary interests of the holder. In

107 (1936-1937) 3 WACA 125, 127 (per Lloyd Ag. C.J.).

108 *Commissioner of Lands v. Adeleye*, supra n 94; *Chairman L.S.D.P.C. v. Ottun*, supra n 88; and *Tijani v. Secretary Southern Province*, supra n 101; *Salako v. Salako*, supra n 96.

109 *Nzekwu v. Attorney-General*, supra n 100; *Commissioner for Land v. Aneke*, infra n 117.

110 See *Commissioner for Lands v. Aneke*, infra n 117.

111 *Salako v. Salako*, supra n 96 at 9 (per George J.) in *Commissioner of Lands v. Aneke*, infra n 117.

112 See *Commissioner for Lands v. Aneke*, infra n 117, where the Government valuer deliberately under assessed the value of the property, which the Court rejected to the valuation carried out by an independent Surveyor which the Court accepted as thorough and realistic.

the same vein, making the *Land Use and Allocation Committee* rather than the Law Court the final arbiter of disputes arising around the quantum or amount of compensation due under Section 30 Land Use Act 1978 is criticised here as unjustifiable and a call is made for reform. Land Use Allocation Committee members are agents of the Government and the rules of natural justice/fundamental Rights enshrined in our *Constitution* would be breached if they were given arbitrary power to assess any amount of compensation desired. Government and agents would be judges in their own cause and therefore fairness and impartiality may not be guaranteed. One suggestion is the adoption of a specialized land court along the lines of the Maori Land Court in New Zealand.

It is suggested that the treatise; *Modern Method of Valuation*,¹¹³ which provides the use of four criteria in the valuation of land possessing prospective building value, be adopted in the proposed reform. They are as follows:

Firstly, we determine the best use/value to which the land or the property can be put into in future. This is the principle of *Deferment*. It means the estimation of the market value of the land when put into the best use in the future and deduction based on the calculations of the deferred income which would be derivable from the land if sold out in plots over a given period. In *Abiodun v. Chief Secretary of Government*¹¹⁴ their Lordships conceded this principle as a fair method of assessment of compensation applicable in England but nevertheless rejected its application in Nigeria because of the lack of previous reliable precedents. Verity C.J. Observed that:

There is no evidence of its practice in Nigeria, Courts never recognized its existence in the assessment of compensation under Public Land Acquisition Act.¹¹⁵

In spite of the above, the Supreme Court had given recognition to this principle in *Nzekwu v. Attorney-General*, which seems to have impliedly negated or overruled the West Africa Court of Appeal and Privy Council's judgment in *Abiodun's* case.

Secondly, we should also estimate the market value of the land when put into this best future use.¹¹⁶ Thirdly, we should consider again the time, which will elapse before the land can be so used i.e. the time of ripeness of the land for development. Finally, we should further estimate the costs of carrying out

113 Lawrence & May, 1st Ed. (1943).

114 (1949) 12 WACA 525 at 527 Aff'd. Ca. WACA 530.

115 Ibid.

116 The principle or basis rejected by Anya J. in *Commissioner For Lands v. Aneke*, infra n 117, and *Maja & Abiodun* cases.

works required to mature the land or to put it into the proposed best use. These modern methods of valuation were endorsed partly in *Commissioner of Lands v. Aneke*¹¹⁷ here the issues for determination was the adequacy of compensation for land compulsorily acquired by the Government for the settlement of the civil war disabled persons.

The Government relied on the valuation report of its officer to offer compensation of N24,000 as payment of capital value of the land, crops, economic trees thereon as the Government valuation officer regarded the land as exclusively agricultural with no present building potentialities whilst the three other independent valuers called by the owners testified that it is “accommodation land” presently ripe both for agricultural and building purposes. The *Court held* fair and adequate compensation is the capital valuation based on the present potentialities of the land as accommodation land possessing agricultural and building qualities. Emphasis was placed on open market value at the date of acquisition and not the future. Anya J., considered the factors to be included in the assessment as the *data of comparative land transactions in the neighbourhood, residential value, surveyor’s expert evidence that the agricultural uses would in few years disappear and that the land would completely become building land, the building activities in the vicinity*, existence of schools, churches, tenants occupying other lands, the presence of buildings constructed with asbestos roofing representing the standard for average Nigerians in the neighbourhood, presence of electric poles confirming building potentialities without which NEPA could not have extended the electricity supply to the area, the land is connected to the urban towns with motorable earth road and other landlords have building of their own with tenants living therein. His Lordship however differentiated *Aneke’s* case, which is based on present potentialities of the land as agricultural, accommodation/building qualities, from *Maja’s case*, which also involved the principle of deferment, i.e. estimation of the market value when the land is put to best use in future. This distinction would have been unnecessary had *Nzekwu’s* case been referred to. It would appear the slow pace of Law Reporting in the later 1970’s and early 1980’s made it impossible, as perhaps it may not yet have been reported then.

It is necessary to use the medium of this article to call upon our Honourable Law makers to make the necessary amendments in the interest of fairness and the spirit of adequacy of compensation and non-deprivation. These cases decided under compulsory Land Acquisition would provide illuminating

117 (1973) 3 ECSLR (Pt.1) 207, 210-21g.

basis for the reform of Section 29 of the Land Use Act 1978 and assessment of compensation thereon. Further, the following is suggested as a vital and indispensable guide for the proposed reforms:

A) Compensation Method

This entails the collection of land transactions in the neighbourhood.¹¹⁸ To determine entitlement to compensation the quantum payable, consideration should be made to surrounding lands within the area or vicinity. In *Salako v. Salako*,¹¹⁹ the Court adopted the formula used in paying owners of adjoining properties after accepting expert evidence regarding the state of affairs in the vicinity at the date of acquisition. George J. differentiated and adopted certain figures or amounts in respect of properties categorized as shops/commercial, industrial, residential and slum areas. Based on this, His Lordship awarded compensation for reversionary site value i.e. the value of the site without building on it. Similarly in *Chairman L.S.D.P.C. v. Ottun* (above) the quantum awarded by Court for compulsory acquisition was minimal because the property in question was situate at residential slum area of central Lagos where the street was un-tarred and not motorable.

B) Residual Method

This is used for the developed land. By this method, the remaining useful or economic life span of the existing building/unexhausted improvements, and the quality of the structural value are assessed. In *Salako v. Salako* the Court also applied this principle and based compensation on a useful span of life of the property for 13 years and rent accruing for the capitalized period. In *Chairman L.S.D.P.C. v. Ottun* (above) the estimated structural and economic life of the property was also assessed at 13 years at the date of acquisition.

C) Investment Method

This is the method of valuation based on the value of the site with building and without building when properly invested for a given period. In *Chairman L.S.D.P.C. v. Ottun* (above) applying this method, Bakare, J. held that the value of land appreciates and if the life span of the property had been assessed to be 13 years, the value of the land upon fair market value would have been higher at the time of the publication of the scheme of acquisition. His Lordship was

118 *Commissioner for Lands v. Aneke*, supra n 117; *Nzekwu v. Attorney-General*, supra n 52.

119 (1973) 9 CCHCJ 5,7-9 per George J.

inclined to consider and assess the capital value based on 13 years life span. In *Nzekwu v. Attorney-General*¹²⁰ the Supreme Court awarded compensation based on capitalization of 21 years purchase.

VII. CONCLUSION

In conclusion, it is submitted that the reforms should take account of the above. We equally subscribe the adoption of the present potentialities and future expectations - "deferment" as the best criteria as they would promote equity and fairness. It is submitted that for compensation to be adequate, deprivation of right of use of the land by the holder presently and in future must be accounted for and made good by the Government - the revoking/acquiring agency. This is because compensation can hardly be considered adequate unless and until all the present and future rights derivable/enjoyable over the land compulsorily acquired or revoked are paid in full. Any attempt to deprive the holder of undeveloped land would negative the very essence of the fundamental Right to property guaranteed by Section 44, 1999 Constitution. In apparent or obvious recognition of this principle of fairness in assessing and awarding compensation, Sections 6(a), 6(d)2 & 13(b) Land Use Regulations 1979 (Anambra State)¹²¹ were enacted containing the implied covenants and conditions on the part of the holder of Agricultural, grazing etc. Certificate of Occupancy *to pay compensation to* the inhabitants of the land, which is the subject of the Certificate of Occupancy as may be fixed or assessed by the Governor or his authorized agent for *disturbances to the inhabitants in their use or occupation of the land*.

This is a sensible approach as in cut-throat capitalist society like ours, it is unjust to deprive owners of undeveloped land of it without payment of due compensation. What is more, it is a matter of common knowledge that most plots owners acquired their titles to Right of Occupancy as vacant land from original vendors/landlords by virtue of sale, conveyance and other form of dispositions after the payment of sufficient consideration.¹²² before ever they would develop same after seeking the necessary consent or approval of the Governor/Local Governor respectively.¹²³ Apart from paying the agreed price for the vacant/undeveloped land, the purchaser/holder of the Right of Occupancy incurred other expenses e.g. payment of land surveyor's

120 Supra n 52.

121 ANSLN No. 38 made by the Governor pursuant to powers conferred by Sections 3 and 49 Land Use Act 1978. See also same Regulation ANSLN No. 38 (1979).

122 Based on the personal experience of the author in his real property and conveyancing practice.

123 Sections 21 and 22 Land Use Act 1978; *Savannah Bank Ltd. v. Ajilo* (1989) 1 NWLR (pt. 97) 305.

architectural/building engineers, estate Agents' professional fees, solicitor's fees for preparation of the deed of conveyance/perfection of the legal documents etc. which no doubt increase the cost/value of the land in spite of the obvious lack or absence of developments thereon.

The third stage, where the purchaser/holder improves the land by erecting building/structure thereon further increases the value of the land, which is the subject matter of Right of Occupancy hitherto classified as vacant/undeveloped. It is submitted that the first stage:- the purchase of land/performance of customary rites, second stage of payment of services charges to professionals engaged to facilitate the acquisition, perfection and transfer of title ought to be compensated in the interest of fairness. It is further submitted that the deliberate attempt by section 29 of the Land Use Act 1978 to compensate only the third stage i.e. erection of structures to the exclusion of first and second stages appears to be an unjustifiable deprivation. This would negate the very essence of the Land Use Act which was never intended deprive anybody of their beneficial interests and rights in land despite making the Governor a Trustee or Administrator, as opposed to beneficial owner, of all lands in the state. The necessary amendment should take into consideration that the value of vacant or unimproved land naturally and appropriately appreciates, rather than depreciates in course of time, in spite of lack of physical improvement, and that this real appreciation is not the same as the spiraling effects of speculation that the Land Use Act 1978 was intended to address.

One Law For All No More: The Demise of Common Law Contractual Obligations in Stock Exchange Regulation in Australia, New Zealand, the United Kingdom and Ireland

Josephine Coffey*

I. INTRODUCTION

Since the eighteenth century, the relationship between a stock exchange and its listed companies, and between the stock exchange and its members, has been regulated by the terms of a common law contract and its associated rights and obligations. This paper is a review of the approaches taken by four common law jurisdictions to the general regulation of the market place, and more specifically to the regulation of ongoing corporate disclosure of material information to the market. In all cases, the common law contractual obligations of disclosure have been supplemented to a certain extent by legislation and codes of corporate governance. In two instances, the common law is also complemented by the directives of the European Union.

Does some market regulation by black letter law, the legislation and codes, distance the obligations of the regulated party? Where there is an ongoing obligation of corporate disclosure that can influence the second by second adjustments of share prices on the market, is there a need for greater immediacy on the part of the regulator? Does the privity of the common law contract and the relationship between the company and the market regulator make the obligations to fulfil the terms of the contract more immediate?

II. UNITED KINGDOM

*'So the old Yellow Book is now and FSA Purple Book'*¹

The earliest evidence of organised trading in marketable securities dates from 1698 when John Castaing began to issue a list of stock and commodity prices called 'The Course of the Exchange and other things' from the 'Office in Jonathan's Coffee-house'. Regulation was not a strong point in those early

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1 Financial Services Authority, *Maintaining Standards*, Speech by Howard Davies, Chairman FSA, IFAC Conference Edinburgh 25 May 2000.

days, with outbursts such as the 'South Sea Bubble', but by 1801 'the first regulated exchange came into existence in London and the modern Stock Exchange is born.'²

Under the London Stock Exchange (LSE) guidelines to continuing obligations, a listed company was required to notify the exchange without delay of 'all relevant information' that was not public knowledge and 'any major new developments in the company's sphere of activity' that could be price sensitive.³ Any change in the financial condition or expected performance of a listed company should be disclosed.

The LSE's Listing Rules were commonly known as the *Yellow Book* but from December 1999 the LSE and the Financial Services Authority (FSA) cooperated to provide an approach to listing that retains the standards of the *Yellow Book* but minimises the duplication of the listing process.⁴ Consequently, HM Treasury agreed that it would be appropriate for the FSA to become the 'UK Competent Authority for Listing.'⁵

Effective 1 May 2000,⁶ the role of Competent Authority and the enforcement of the listing rules are no longer the responsibility of the LSE, which followed the ASX model and became a company listed on its own exchange. Shares in London Stock Exchange plc were listed on the main market on 20 July 2001.⁷ The FSA, as the single statutory market regulator under the Financial Services and Markets Act 2000 (UK), now has responsibility for supervising the LSE. As a result, there is a 'two-stage admission process' for companies wishing to list securities in London: the company must apply to the UK Listing Authority (UKLA), a division of the FSA, for admission to the Official List and then must apply to the LSE for admission to trading on the stock market.⁸ As the Chairman of the Financial Services Authority quipped:

2 London Stock Exchange, *Our History*: <http://www.londonstockexchange.com/>

3 London Stock Exchange, *Continuing Obligations Guide* (1999) Part 1 Disclosure of Price Sensitive Information Listing Rule 9.1, 9.2; UKLA, *The Continuing Obligations Guide*, Appendix 3, December 2003, Chapter 2 Disclosure of Price Sensitive Information.

4 Financial Services Authority, *The Transfer of the UK Listing Authority to the FSA*, Consultation Paper 37, December 1999. www.fsa.gov.uk

5 London Stock Exchange, *New Arrangements for UK Listing Authority*, Press Release 4 October 1999.

6 UK Listing Authority, *Listing Rules*, Press Release 10 April 2000.

7 London Stock Exchange, *Interim Report - Six Months ended 30 September 2001* London 6 November 2001 1-13, 3.

8 Financial Services Authority, *Introduction to the Financial Services Authority*, London, 1 December 2001 at 3, 14 and 15; London Stock Exchange Admission and Disclosure Standards, May 2001 at 1.1.

So the old *Yellow Book* is now and FSA Purple Book. The observant among you will note that the contents are almost exactly the same.⁹

The continuing obligations, discussed above, remain unchanged but are now contained in the listing rules of the UKLA.¹⁰ These obligations are also reinforced by the similar LSE disclosure standards 3.1 and 3.2.¹¹

The Listing Rules and further information is continually updated by amendments to the UKLA Sourcebook Chapter 9 concerning Continuing Obligations. Paragraphs 9.1, 9.2 state that a company must notify a Regulatory Information Service without delay of any major new developments and all relevant information which are not public knowledge but may lead to substantial movement in the price of its listed securities. A company need not disclose confidential 'impending developments or matter in the course of negotiation' as long as there is no breach of confidence that would be likely to lead to substantial movement in the price of its listed securities.¹²

The UKLA declines to define the term 'substantial movement' as a standard of the materiality of the disclosure.¹³ This decision is in line with ASX policy. The LSE had previously stated that a 'substantial movement of price' cannot be measured by a formula such as a theoretical percentage change of share value in a given time period. It is sufficient that the information is price sensitive and has the potential to have a significant effect on the share price.¹⁴ The result was LSE reluctance to impose formal sanctions on a company for a failure to disclose. One penalty for non-disclosure remains a suspension of trading in the company's securities.¹⁵

The enforcement¹⁶ powers of the UKLA are potentially stronger than those of the LSE. If a company has breached any provision of the listing rules, then the Authority can impose a financial penalty or publish a statement censuring

9 Financial Services Authority, *Maintaining Standards*, Speech by Howard Davies, Chairman FSA, IFAC Conference Edinburgh 25 May 2000.

10 UK Listing Authority, *Listing Rules*, 1 December 2001 Chapter 9 pars 9.1, 9.2.

11 London Stock Exchange, *Admission and Disclosure Standards*, May 2001 Part 2 at 3.1, 3.2.

12 UK Listing Authority, *Sourcebook*, December 2003 amendment Listing Rules, Chapter 9.

13 UK Listing Authority, *Guidance Manual*, 1 December 2001, Appendix 3 Continuing Obligations Guide, 2.3.

14 Frost CA 'Disclosure Policy Choices of UK Firms Receiving Modified Audit Reports' (1997) 23 *Journal of Accounting and Economics* 163-187, 166.

15 London Stock Exchange, *Admission and Disclosure Standards*, May 2001 Part 2, 4.4 to 4.10.

16 Financial Services Authority, *FSA Handbook of Rules and Guidance Enforcement* - Chapter 14, Sanctions for Market Abuse, 14.3, 14.7.

the company ‘subject to the provisions of the Act.’¹⁷ Similar penalties apply to a director who is knowingly concerned in the breach. This UK example was the impetus behind ASIC’s successful call for the right to impose fines on companies for market offences.¹⁸

As in Australia, any impending strategic developments or ‘matters in the course of negotiation’ must be disclosed where there is reason to believe that a breach of confidentiality has or is likely to occur. There is emphasis in the UK on a warning announcement, even if the company is unsure whether there has been or is likely to be such a breach, it should at least issue a warning to the UKLA stating the accuracy, or otherwise, of potential leaked information. The company should issue the warning announcement if any hint of the undisclosed price sensitive information appears in a press article or in a share price movement.¹⁹

These guidelines remind the recipients of confidential information that they may not deal in the company’s securities until the information is made public. There is a warning of the insider dealing provisions, contained in the Criminal Justice Act 1993 (UK), which can apply to those who trade while in possession of undisclosed price sensitive information. The LSE model code still remains as an appendix to Chapter 16 of the UKLA listing rules. The purpose of the code is to ensure that directors and officers of a listed company do not trade in securities of that company while they are in possession of undisclosed price sensitive information. The code encompasses advisers and others who are closely connected with a company. If there is any matter that constitutes unpublished price sensitive information, then directors and officers must obtain the permission of the chairman, or other designated director of the company, before selling or purchasing shares in the company. The designated director must maintain a written record of any trading permission or refusal that is given. These are the minimum requirements of the model code.²⁰

17 UK Listing Authority, *Listing Rules*, 1 December 2001 Chapter 1 paras 1.8, 1.9; Financial Services and Markets Act 2000 (UK) ss123(1)(a), 123(1)(b).

18 ASIC, *Media Release*, 01/283 13 August 2001; Knott D ‘Launch of the Australasian Investor Relations Association’ Speech by the Chairman, ASIC 13 August 2001, 3 & 4.

19 London Stock Exchange listing rule 9.4, replaced by UK Listing Authority *Listing Rules* listing rule 9.4; London Stock Exchange, *Admission and Disclosure Standards*, May 2001, Part 2, 3.4.

20 London Stock Exchange, *Model Code to Chapter 16 of the Listing Rules* (1999), replaced by Appendix to Chapter 16 of the UK Listing Authority Listing Rules 1 December 2001.

III. EUROPEAN UNION

The European Union (EU) does not directly impose a regulatory system on the European stock exchanges. Instead, the relevant organisation, the European Commission (EC) will address directives to member states, including the United Kingdom. It is the Commission that proposes a new regulatory measure. The Council of Ministers, representing the Member States, can then approve the proposal and enact it as a Directive.

The 1979 EEC Admissions Directive stated that:

The company must inform the public as soon as possible of any major new development in its sphere of activity which are not public knowledge and which may, by virtue of their effect on its assets and liabilities or financial position or on the general course of its business, lead to substantial movements in the prices of its shares.²¹

The UKLA Sourcebook Chapter 9 Continuing Obligations under the Listing Rules, discussed previously, has the notation CARD Article 68 and 81 written alongside paragraph 9.1, which replicates the directive quoted above. This notation is a reference to the Consolidated Admissions and Reporting Directive (CARD) 2001/34/EC of the European Parliament and of the Council on the admission of securities to official stock exchange listing and the information to be published on those securities.²²

It is anticipated that most of CARD will shortly be replaced by new EU directives,²³ the Prospectus Directive (PD)²⁴ and the Market Abuse Directive (MAD).²⁵ The Commission adopted the two technical regulations required to implement PD and MAD in April 2004 and the PD Regulation will apply from 1 July 2005, which is also the deadline for Member States to implement the framework for the Directive.²⁶

21 Directive 79/279/EEC: The Admissions Directive of 5 March 1979: coordinating the conditions for the admission of securities to official stock exchange listing. Annex Schedule C, 5(a) Additional Information.

22 UK Listing Authority, *Sourcebook*, February 2004 amendment Listing Rules Definitions – Directives.

23 Financial Services Authority, *Review of the Listing Regime*, Discussion Paper 14, 30 July 2002 at 15.

24 Directive 2003/71/EC.

25 Directive 2004/39/EC.

26 European Commission Securities, *Commission Adopts Two Technical Measures to Implement the Prospectuses and Market Abuse Directives*, Press Release IP/04/563, 29 April 2004: www.europa.eu.int/comm/internal_market/securities

FSA has undertaken a major review of the listing regime to 'accommodate the impact of the changes being proposed to UK Company Law and to the European regulatory framework'²⁷ and it anticipates that the main body of the Listing Review rule changes will be made in line with this timetable. The FSA has published its 'near final' and intends to make 'final Listing Rules and Prospectus Rules at the June board meeting...to come into effect on 1 July 2005.'²⁸ The Market Abuse Directive legislates for the disclosure of 'inside information' which is currently also dealt with in Chapter 9 of the Listing Rules under Continuing Obligations. The FSA 'Purple Book' has been 'restructured into the Listing Rules, Disclosure Rules – reflecting the requirements of the Market Abuse directive – and the Prospectus Rules.'²⁹

A further consideration is the role of the UKLA Listing Rules in the event of a merger between the LSE and a European exchange. The FSA says that it is indifferent to the nationality of ownership of an entity that it regulates but it considers the possibility that a new owner may decide to operate the LSE from another EU Member State. All formal regulatory control would then be transferred from the FSA to the 'home' regulator and could change the regulation of LSE's markets and the ability of FSA to enforce the UK listing regime and to pursue market abuse.³⁰ Continuous disclosure may suffer as a result, in spite of the 'over-arching requirement for listed companies to disclose information likely to affect their share price as soon as it is available:'

Whilst the basic requirements within Europe are based on the EU Admissions Directive, there is perceived to be a degree of divergence in practice across Europe. The UK is viewed by investors as having more comprehensive and regular disclosure than Continental Europe...The comparatively high incidence of disclosure in the UK market may also be attributable to the relative size and maturity of that market compared with those elsewhere in Continental Europe...the number of companies meriting analysts' research and the sophistication of the investor community drives greater demand for increased information disclosure.³¹

27 Financial Services Authority, *Review of the Listing Regime*, Update 21 March 2005.

28 Financial Services Authority, *FSA Publishes Final Rules for New Listing Regime*, Press Release FSA/PN/043/2005, 28 April 2005.

29 Ibid.

30 Financial Services Authority, *London Stock Exchange Mergers Enquiry*, FSA Submission to the Competition Commission 12 May 2005 at 9-10.

31 Ibid, Annex A: *Primary Market Comparative Regulation Study – Key Themes Report* by PriceWaterhouseCoopers, April 2002 at 22.

IV. IRELAND

*'The Listing Rules of the Irish Stock Exchange comprise the UK Listing Authority Purple Book as modified...'*³²

The Irish Stock Exchange (ISE) acknowledges that its roots go back to 1793 when stock exchange trading first began in Dublin. The legislation currently regulating the ISE is the *Stock Exchange Act 1995*, 'an Act to repeal *The Stock Exchange (Dublin) Act, 1799*.'³³ 'The Stock Exchange' was established under a Deed of Settlement of 31 December 1875 and was amended on 29 February 1972 to facilitate the amalgamation in 1973 of the Irish Stock Exchange, the Stock Exchange, London, with other regional exchanges in Ireland and 11 in Britain to form a federation that was termed the International Stock Exchange.³⁴ At this time, the ISE's official designation was the 'Irish Unit of the International Stock Exchange of the United Kingdom and the Republic of Ireland.'³⁵

The 1995 legislation, which was introduced to implement the 1993 EC Investment Services Directive (ISD)³⁶ designates the Central Bank and Financial Services Authority of Ireland as the Competent Authority for authorising stock exchanges and member firms in Ireland.³⁷ The Minister has designated the ISE as the Competent Authority for the purpose of implementing the EU Directives adopted by Ireland under the *European Communities (Stock Exchange) Regulations 1984*.³⁸ In applying the Directives, there is nothing to oppose the ISE from imposing obligations on issuers of securities that are admitted to the Official List, which are 'more stringent than or additional to the requirements of the directives'³⁹ provided they are imposed consistently.

Under Part V of the *Companies Act 1990*, the ISE undertakes reviews of relevant company announcements and unusual price movements as it is responsible for the investigation of possible cases of insider trading.⁴⁰ While

32 Irish Stock Exchange, *The Listing Rules*: www.ise.ie

33 *Stock Exchange Act 1995* – Long Title and s4.

34 *European Communities (Stock Exchange) Regulations 1984*, Reg 2, Interpretation; London Stock Exchange, *Our History*: the UK exchange adopted the 'London Stock Exchange' as its trading name in 1991. www.londonstockexchange.com

35 *Stock Exchange Act 1995* – Interpretation s4.

36 Directive 93/22/EC.

37 Irish Stock Exchange, *The Stock Exchange Act 1995*.

38 *European Communities (Stock Exchange) Regulations 1984*, Reg 7, Establishment of Competent Authority.

39 *European Communities (Stock Exchange) Regulations 1984*, Reg 3, Application of Directives.

40 Irish Stock Exchange, *Insider Dealing*.

there is a prohibition on the use of 'inside information', there does not appear to be a positive duty of continuous disclosure by listed companies under this legislation. However, the 1979 EEC Admissions Directive, quoted above,⁴¹ is implemented as part of the *European Communities (Stock Exchange) Regulations* 1984.

The ISE Listing Rules comprise the UKLA Listing Rules as modified by the 'Notes on the UKLA Listing Rules.'⁴² The Board of ISE, as the designated Competent Authority in Ireland, has adopted the UKLA rules for companies seeking admission to, or listing of securities on the Official List of the Exchange. As none of the ISE modifications to the 'Purple Book' amend UKLA listing rule 9.1 concerning the general obligation of disclosure, the two sets of rules are in unison with each other on this issue, and with the EC Directive, as discussed previously. It would be anticipated, that the ISE would adopt the Revised UKLA Listing Rules effective 1 July 2005 to implement the new EC Prospectus Directive.⁴³

V. AUSTRALIA

*'The Listing Rules are not just binding contractually...The Listing Rules create obligations that are additional, and complementary, to common law obligations and statutory obligations.'*⁴⁴

Although there were no listing rules, as we now know them, in existence in the 1890s, the stock exchange's application form, to be completed by a company requesting quotation of its securities, includes the condition that it must agree:

to give prompt notification of all calls, dividends, alteration of capital, or other material information.⁴⁵

This last phrase appears to be the first example of an Australian listing requirement demanding continuous disclosure of material information by a company. It established the principle that there is a contractual obligation⁴⁶ for

41 Directive 79/279/EEC. Note 22.

42 Irish Stock Exchange, *Notes on the UKLA Listing Rules*, 29 November 2004, Introduction at 2.

43 Directive 2003/71/EC.

44 Australian Stock Exchange Limited, *The Listing Rules*, Introduction, 13 May 2005: www.asx.com.au

45 Salsbury S and K Sweeney, *The Bull, the Bear and the Kangaroo: The History of the Sydney Stock Exchange* (1988) 203.

46 The contract is now found in ASX Listing Rules Part 3 of Appendix 1A, General Admission Application and Agreement 1 January 2003.

a listed company to release relevant information to the market on an ongoing basis. As such, it is an early forerunner of ASX listing rule 3A(1) and the present rule 3.1 and 3.1A.

At the conclusion of his history of the Sydney Stock Exchange, Professor Stephen Salsbury stated that the exchange had been surprisingly innovative. The stock exchange's listing rules had 'long run ahead of the demands of the various colonial and state company laws and so it helped instil confidence in Australian securities.'⁴⁷

Prior to the formation of ASX on 1 April 1987, a degree of unity between the various State stock exchanges meant that they were able to demand adherence to the listing rules. On occasion, large companies would fail to comply, as they were aware that any action by the exchange to suspend securities or delist the company could eventuate in lower market turnover. This rebellion risked the relevance of 'on-change' trading and even the viability of the stock exchange.

Adamson⁴⁸ points out that News Limited received a 'testy letter' from the chairman of the Melbourne Stock Exchange for announcing a new issue through the press prior to advising the exchange. It is understood that this threat of non-compliance from large or popular corporations still exists to some extent, in spite of legislative support for the listing rules (*Corporations Law/Corporations Act* 2001 ss777/793C, 1114/1101B) and particularly for the continuous disclosure rule 3.1 with separate statutory backing from the continuous disclosure provision.

The first *Securities Industry Act* 1970 (NSW) was effective 8 April 1970, just as the mining boom of the late 1960s was ending.⁴⁹ The legislation concentrated mainly on regulation of stockbrokers and their relationships with clients and the stock exchange. This was the first major encroachment on the stock exchange's self-regulation. Shortly afterwards, in July 1970, the Rae Committee⁵⁰ began its examination of the securities industry.⁵¹ The

47 Salsbury and Sweeney, *supra* n 45 at 453.

48 Adamson, GA, *Century of Change: the First Hundred Years of the Stock Exchange of Melbourne* (1984) 60. (Listing rule 15.7 states that an entity must not release information that is for release to the market until it has given the information to ASX.)

49 Poseidon NL reached a peak of \$280 per share on 12 February 1970 as cited in Salsbury and Sweeney, *supra* n 45 at 353.

50 Senate Select Committee on Securities and Exchange, chairman Senator Peter E Rae.

51 Salsbury and Sweeney, *supra* n 45 at 371.

Committee's report was released on 18 July 1974⁵² and was scathing in its criticism of the industry. As a result, revised legislation was introduced and the *Securities Industry Act 1975* (NSW) added statutory enforcement to the listing requirements from 1 March 1976.

The stock exchanges were still responsible for initiating and amending these rules but the government had a period of time in which it could disallow implementation of the rules. Provisions to prohibit market manipulation⁵³ and to extend the earlier insider trading provision⁵⁴ were introduced into the legislation. In 1980, this legislation was subsequently incorporated into the *Companies Code*, and a decade later formed the basis of Chapter 7 on Securities in the *Corporations Law* and then the *Corporations Act 2001*.

Section 674 states that a listed disclosing entity must comply with the listing rules of a securities exchange or a listing market on matters of disclosure. The securities exchange, ASX, is initially responsible for enforcing compliance with the rules. At times, the extent of the stock exchange's authority to enforce compliance has been uncertain.

The decision of Street J in the New South Wales Supreme Court in Equity, in *Kwikasair Industries Ltd v Sydney Stock Exchange Ltd*,⁵⁵ firmly based the stock exchange's right to suspend securities or remove a company on the agreement between the two parties. The rights of the parties emanate from the context in which agreements are made for the listing of securities on the stock exchange's Official List.⁵⁶ In *FAI Insurances Ltd v Pioneer Concrete Services (No 2)*,⁵⁷ in the Supreme Court of New South Wales, Kirby P supported a wider interpretation of the authority of the stock exchange than had previously been recognised. Prior to the introduction of the *Companies Code*, there was less appreciation of the power of the stock exchange to enforce its listing rules.

Under the old *Securities Industry Act 1975*, Kirby P held:

52 Parliament of the Commonwealth of Australia *Australian Securities Markets and their Regulation* Report from the Senate Select Committee on Securities and Exchange Part 1 Canberra AGPS 1974, Part 2 1974, Part 3 1975 (Rae Report); Salsbury and Sweeney, note 45 at 405; Baxt R, HAJ Ford and AJ Black *Securities Industry Law* 5th Ed (1996) 302; Redmond P *Companies and Securities Law* Sydney 2nd Ed (1992) 56.

53 Salsbury and Sweeney, supra n 45 at 422-424; Baxt *et al*, supra n 52 at 302.

54 Baxt *et al*, supra n 52 at 310; Insider trading was initially prohibited by s75A of *Securities Industry Act 1970* (NSW).

55 *Kwikasair Industries Ltd v Sydney Stock Exchange Ltd* (1968) ASLC 30,701 reprinted in *Australian Corporations and Securities Law Reporter* (1998) 303-721 to 303-753; Redmond P *Companies and Securities Law* Sydney 2nd Ed (1992) 898; Baxt *et al*, supra n 52 at 171.

56 *Kwikasair*, *ibid*, 30, 708.

57 *FAI Insurances Ltd v Pioneer Concrete Services (No 2)* (1986) 10 ACLR 801.

[I]t was necessary to establish outside the section [the former equivalent of 793C of the *Corporations Act*], a contractual or statutory obligation to observe the listing requirements...but the *Securities Industry Code* imposes its duties more clearly. By force of the section it gives statutory recognition and significance to the listing requirements.⁵⁸

Kirby P disagreed with the decision of Young J at first instance. Young J saw the listing requirements as only:

...a flexible set of guidelines for commercial people to be policed by commercial people...principles to be administered and applied by an expert body in accordance with the prevailing ethos of those chosen to administer them.⁵⁹

This approach undervalues the special statutory recognition that is now accorded to the stock exchange rules, first by the *Companies Code* and then by the *Corporations Act* under ss793C and 1101B. In a later case, *Hillhouse v Gold Copper Exploration NL*,⁶⁰ Macrossan J acknowledges the shift in emphasis of s42 of the *Companies Code*, equivalent to s793C of the *Corporations Act*, which was recognised by Kirby P in *FAI*.⁶¹

A broad interpretation of the authority of the listing rules was again recognised in *TNT Australia Pty Ltd v Poseidon Limited (No 2)*.⁶² In the Supreme Court of South Australia, Jacobs J held that a notice of meeting was invalid when it failed to give full and fair disclosure of a proposed merger. He supported the right of ASX to enforce the 'spirit' of the listing rules by demanding greater disclosure:

The Rules by which the defendant is bound, state in an introduction that the Stock Exchange, in administering the Rules, 'looks to companies to comply with the spirit as well as the letter of those Rules' and I think that in a commercial document such as this it ought to be construed and interpreted by a Court in such a way as to give effect to the spirit and the purpose of the Rule.⁶³

Courts have long acknowledged this contractual obligation to comply with the listing rules. In *Ampol Petroleum Ltd v RW Miller Holdings Ltd*,⁶⁴ Street CJ considered it:

58 Ibid, 810.

59 Ibid, 811.

60 *Hillhouse v Gold Copper Exploration NL* (1988) 14 ACLR 423, 433.

61 *FAI Insurances Ltd v Pioneer Concrete Services (No 2)* 10 ACLR 801 (1986).

62 *TNT Australia Pty Ltd v Poseidon Limited (No 2)* (1989) 15 ACLR 80.

63 Ibid, 85.

64 *Ampol Petroleum Ltd v RW Miller Holdings Ltd* [1972] 2 NSWLR 850.

...common ground that Miller was bound by contract to the Stock Exchange to observe the rule.⁶⁵

Lord Wilberforce for the Privy Council affirmed this on appeal. He held that an issue of shares to Howard Smith was in contravention of the stock exchange regulations:

...which moreover have contractual force.⁶⁶

In October 1992, ASX issued its *Exposure Draft of Proposed Listing Rule Amendments and Other Issues*.⁶⁷ One of the proposals was listing rule 3J(37). The rule would require every director and secretary of a listed company to enter into a written undertaking with ASX. This agreement would acknowledge that a company was contractually bound to comply with all aspects of the listing rules. However, the stock exchange would continue to have absolute discretion to grant a waiver of a particular rule at the request of a listed company.

Appendix 16A of the listing rules, effective 1 July 1996 and now replaced by an expanded Appendix 1A,⁶⁸ is evidence of this contractual arrangement. The secretary and a director of the company should execute the standard form agreement under the company's seal. The terms are more comprehensive than those of the original draft contract. The agreement now recognises the absolute discretion of ASX to quote, suspend and remove securities from trading on the stock exchange. The company also agrees to ASX's discretion to grant a waiver of a particular rule. There is a contractual obligation to comply with the 'spirit'⁶⁹ of the listing rules and to indemnify the stock exchange for any claim, action or expense arising from breach of the contract.⁷⁰

Emphasising a broader interpretation of the 'spirit' of the ASX listing rules is in keeping with the 'purposive' construction required by former s109H. Since the introduction of the *Corporations Act 2001*, s15AA of the *Acts Interpretation Act* replaces s109H of the *Corporations Law*. This interpretation of the provisions of the *Corporations Act* will prefer a construction that promotes the purpose or object underlying the law, whether that purpose or object is expressly stated or not.

65 Ibid, 881.

66 *Howard Smith v Ampol Ltd (PC)* [1974] AC 821 at 838.

67 Australian Stock Exchange Limited *Exposure Draft of Proposed Listing Rule Amendments and Other Issues* October 1992, 61.

68 Appendix 16A was deleted 1 July 1997 and amended to form Part 3 of Appendix 1A, General Admission Application and Agreement, ASX Listing Rules issued 1 July 2000.

69 Ibid, Appendix 1A, clause 6 (clause 4 when issued 1 July 1996).

70 Ibid, Appendix 1A, clause 3.

Some elements of the Appendix 1A agreement have led to argument that the legal framework of the relationship between ASX and the listed company is so:

...indeterminate as to raise the question of whether it creates a binding obligation upon either the ASX or the listed company.⁷¹

The traditional doctrine of contract demands certainty by both parties of the terms of the contract. A degree of uncertainty is added to an Appendix 1A agreement by the absolute discretion that ASX reserves for itself to enable it to administer the rules more effectively. The exercise of this discretion, to grant a waiver of a company's obligation under a particular rule, could be viewed as an alteration by only one party of a term of the agreement.⁷²

Prior to the legislative amendments of the 1990s, ASX saw itself as having a narrow but significant role in regulating listed companies. Its authority was based on the willingness of companies to undertake an obligation and enter into a contract with ASX to ensure compliance with the listing rules.⁷³ The principal enforcement procedures available to the stock exchange, in increasing degrees of severity, were to suspend trading in a company's securities, to seek a Court order under ss793C or 1101B of the *Corporations Act* to enforce compliance with the rules, or to remove the company from the Official List.

Where there is an infringement of an ASX listing rule, the stock exchange has the contractual right under the Appendix 1A agreement to suspend a company's securities from trading or remove the company from the Official List. However, ASX does not always wish to take this action, as it would deny market access to investors and shareholders of the company.

The *Securities Industry Act* 1975 (NSW) introduced a provision for the enforcement of the listing rules by an earlier version of s793C. Section 793C(1), (2), in Part 7.2 of the *Corporations Act* states that an application may be made to the Court by ASIC, ASX or a person aggrieved to obtain an order of compliance with, or enforcement of, the relevant operating rules, in this instance the ASX listing rules. The original provision was amended with the introduction of continuous disclosure in September 1994 to clarify the definition of a 'person aggrieved'.

71 Spender P 'The Legal Relationship between the ASX and Listed Companies' (1995) 13 Co&SecLJ 240-275, 240.

72 Ibid, 241.

73 Parliament of the Commonwealth of Australia *Corporate Practices and the Rights of Shareholders* Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs Canberra AGPS November 1991 (Lavarch Report) 17 par 2.4.11.

A company, by agreeing to have its securities included on the Official List of the stock exchange, is deemed to 'be under an obligation to comply with... a licensed market's operating rules' (s793C(1)). This obligation arises from the contractual obligation to comply with the listing rules, as discussed in the previous section.

Section 1101B(1) is a miscellaneous provision in Part 7.12 of the *Corporations Act*. A companion to s793C, it is also concerned with the power of the Court to make certain orders (s1101B(4)) for a contravention on the application of ASIC or ASX. Also effective 5 September 1994, s1101B was further amended to complement s793C by extending to a 'person aggrieved' the right of application to the Court (s1101B(1)(d)).

Both these provisions specify that the Court may direct a person, or the directors of a body corporate, to comply with the listing rules of the stock exchange (ss793C(2)(b) and 1101B(4)(b)). An infringement of the listing rules is not an offence under either provision. However, s1101B(10) states that a contravention without reasonable excuse of an order of the Court can result in a fine and imprisonment.⁷⁴

These seldom used powers of the stock exchange under the statute existed prior to the introduction of s674 penalties in 1994. They could still be utilised to penalise a company in a case of persistent non-compliance with listing rule 3.1.

VI. NEW ZEALAND

*'The Listing Rules contain the terms of a contract...'*⁷⁵

As with the forty odd Australian stock exchanges that existed at the time, NZX, formerly the New Zealand Stock Exchange (NZSE), emerged from the gold rush of the 1870s with early stock markets in Auckland, Wellington, Dunedin and Christchurch.⁷⁶ The regional trading floor were closed after the introduction of electronic trading in 1991 and following in the footsteps of ASX, the New Zealand Stock Exchange was demutualised and incorporated as a limited liability company from 31 December 2002. The transformation was completed on 30 May 2003, when the renamed New Zealand Exchange Limited, trading as NZX, listed its securities on its own exchange.⁷⁷

74 Schedule 3 Penalties: 100 penalty units or imprisonment for two years or both. Penalties for bodies corporate are five times the maximum pecuniary penalty for that offence (s1312). A penalty unit is \$110 (s4AA of the *Crimes Act* 2001 (Cth)).

75 NZSX and NZDX Listing Rules – Forward (Amended 1/5/04).

76 NZX, *History*: www.nzx.com

77 *Ibid*.

For over a century the former NZSE had ‘facilitated and regulated New Zealand’s share market’⁷⁸ However, statutory amendments were moving apace with the stock exchange and its regulatory role. In December 2002, the then acting general counsel for NZSE, Elaine Campbell commented that:

[T]he enacting of the Securities Markets and Institutions Bill coupled with the start of the revised NZSE listing rules this week has created quite a stir in the market. Media commentary has related mainly to a single aspect of the renamed Securities Markets Act 1988 and the revised listing rules introducing a continuous disclosure regime for listed companies.⁷⁹

The co-operative nature of this regulation is necessary as ‘NZSE’s proximity to the market is essential to flexible and responsive monitoring and application of the continuous disclosure framework’ and ‘this is strengthened by the Securities Commission’s legislative investigation and enforcement powers.’⁸⁰

The *Securities Markets Act 1988* (formerly the *Securities Amendment Act 1988*) regulates various activities on securities markets, including insider trading and continuous disclosure: sections 7 to 19 define insider trading and tipping with the possibility of civil liability for breach of the provisions; sections 19A to 19S provide a ‘statutory framework for continuous disclosure of information to securities markets by public issuers under the listing rules of registered exchanges, and provides remedies where this is not done.’⁸¹ Specifically, s19B states that public issuers must disclose in accordance with any applicable listing rules, while the Commission (s19G) and the Court (s19K) may make orders requiring disclosure or corrective statements and the Court may impose civil remedies such as pecuniary penalties and compensatory orders (ss19L, 19M).

This legislation also provides for the registration of securities exchanges, such as NZX, the review of the exchange’s conduct rules and supervisory responsibilities of the Securities Commission in respect of the exchanges.

In support of this co-regulatory environment, the NZSE had released a consultation paper in March 2002 concerning revisions of the listing rules to align them more closely with the continuous disclosure and directors trading disclosure requirements of the Securities Markets and Institutions Bill. One of the stated aims of these changes was ‘to reflect the formulation of the

78 NZX, *About NZX*: www.nzx.com

79 Campbell, Elaine (Acting General Counsel for NZSE) *New Disclosure System a Plus* Speech 6 December 2002, 1.

80 Ibid.

81 Securities Commission New Zealand, *The legislation we work with: Securities Markets Act 1988*: www.sec-com.govt.nz

continuous disclosure test in the [Bill] and Rule 3.1 of the [ASXLR].⁸² The continuous disclosure obligation for listed issuers to comply with section 10 of the NZX Listing Rules and the *Securities Markets Amendment Act 2002* was introduced on 1 December 2002. This ‘aligning of ‘New Zealand with Australian practice is a major change from the previous “relevant information” rule.’⁸³

NZX listing rule 10.1.1 on Material Information parallels ASXLR 3.1 and 3.1A in outlining the basic obligation and the exceptions or ‘carve-outs’ to the obligation of corporate disclosure. Rule 10.1.1 (c) requires the release of Material Information necessary to prevent the development or subsistence of a market which is materially influenced by false or misleading information.⁸⁴ The intention of this section mirrors that of ASXLR 3.1B, which was reintroduced from 1 January 2003 to correct or prevent a false market.

The Forward of the NZX Listing Rules states in section 1 that the “Rules” contain the terms of a contract under which issuers...undertake to abide by [the] rules imposed’ but, as in the other jurisdictions, this contractual obligation would have been described as inadequate in promoting the introduction of increased statutory regulation.

VII. CONCLUSION

The listing agreements for both ASX and NZX still emphasise the common law contractual relationship between the company and the exchange, the immediacy of the market place is enhanced by this. A similar contract was outlined in the Introduction to the *Yellow Book* but this did not survive the transformation to the UKLA ‘Purple Book.’⁸⁵ The LSE *Admission and Disclosure Standards* require a signed declaration that the company acknowledges it ‘obligations under the Standards’⁸⁶ and is in compliance

82 NZX, *NZSE Releases Consultation Paper on Proposed Listing Changes*, Press Release 26 March 2002: www.nzx.com

83 NZX, *Listed issuer rules – Continuous Disclosure*: www.nzx.com

84 NZSX and NZDX Listing Rules – Section 10 Disclosure and Information (Amended 1/5/04); New Zealand Stock Exchange Limited, *Guidance Note – Continuous Disclosure* – March 2005 1-17.

85 Introduction to the UKLA *Listing Rules* deleted December 2001.

86 London Stock Exchange *Admission and Disclosure Standards* April 2002 Form 1 Application for Admission of Securities to Trading, 2.11.

with the requirements of any securities regulator. A similar signed declaration acknowledging the company's 'obligations under the listing rules' is required by either the UKLA or the ISE.⁸⁷ These obligations are statutory.

ASX still maintains a direct contractual relationship with its listed companies. This is an advantage that could be more directly utilised to increase market transparency by public queries of companies when unexplained price variations occur in market trading. ASX seems unlikely to become more aggressive in this aspect of market supervision as it reviews the cost of its role as overseer of the Listing Rules. The cost of enforcing compliance of the rules also deters the Australian Securities and Investments Commission from following the UKLA model. The Federal Government has recently entered the debate with a warning to ASX 'against any attempts to offload its regulatory functions onto the...Commission'.⁸⁸ The regulatory *status quo* will be maintained, at least for the time being.

87 UK Listing Authority *Listing Rules* Schedule 3A Application for Admission of Securities to the Official List April 2002; Irish Stock Exchange *Notes on the UKLA Listing Rules* Application for Admission of Securities to the Official List Schedule 3A 29 November 2004.

88 Patten, Sally 'ASX Keeps Its Supervisory Options Open' *The Australian Financial Review* 6 June 2005, 53; The Hon. Chris Pearce MP, Parliamentary Secretary to the Treasurer 2005 *SDIA Conference* Sydney 2-5 June 2005.

The Legal Framework for the Provision of "Quotes": A Preliminary Exploration of Law and Practice in New Zealand

Dr. Philippa K. Wells*

I. INTRODUCTION

The (relatively) recent expansion of consumer-centred legal rights in New Zealand highlights the importance for those involved in providing goods and services to both be aware of their legal responsibilities involved in such provision, and to factor legal risks into their decision-making (with the cumulative outcome of such practices sometimes being referred to as compliance programmes).

The provision of "quotes" or "quotations" by those involved in the service industry sectors in particular highlights legal issues. While there is little comprehensive research that reveals how responsibility and risks are managed by those providing quotes in this context, ad hoc evidence suggests there is a growing tendency to reflect uncertainty in prices, duration and costs. This tendency challenges a belief held in some sectors that a quote can be relied upon as a fixed price, and has the potential to reduce the ability of the consumer to question the final outcome or a court or tribunal to establish a fair price.

A colleague and I are conducting empirical research (through questionnaire) into the accepted meaning(s), use and implications of "quotes" in New Zealand. This paper is an attempt to explore judicial opinion and statutory provisions of relevance as a means of establishing background and framework for that empirical research. This is achieved by way of scenario-based discussion involving questions to be considered in that analysis.

II. SETTING THE SCENE

Jim and Jane own an old villa in a good part of town. After saving for a couple of years and coping with the less than ideal living conditions, they are ready to carry out such renovations as are necessary, desirable and within their price-range to improve the surroundings and the capital value of the property. These renovations include repairs to external walls and extensive upgrading to the interior. At the local home-show they collect some brochures from builders who offer free written quotes. Several of these come round in the following

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week to give them a price. All the quotes come in well above what they were expecting to pay. Bob's is the lowest. Best of all, he can start straight away with a stated completion three months later. Once Jim and Jane persuade the bank to advance the shortfall everything is set to go.

From the beginning things go awry. Bob has taken on another job at which he seems to spend most of his time. In the meantime, with the jumps in the cost of fuels, the papers are full of doom and gloom predictions and reports of hefty increases in the prices for goods and services. In addition, Jim and Jane are put to considerable inconvenience when winter comes and the house proves too cold to stay in. Taking into account the amount needed to service the loan from the bank, they calculate that they can just afford to rent accommodation until the week the work on the house is supposed to be completed.

Things will be tight but they have worked out their budget very carefully. Even with the rent they can just manage to pay the quoted price, the fixed price for the work that was agreed to. They did not ask for or agree to anything extra or different, and therefore the quoted price is all they have to pay...right?

Not so fast. An interesting thing about quotes is that despite a commonly held understanding that the term signifies a fixed price (and its description as a "firm" offer in the standard terms and conditions published by some suppliers of goods and services) there is no legal magic associated with the term. Instead, the understanding the parties had or should have had, the words used and the circumstances surrounding the quote are all potentially subject to scrutiny.

The balance of this paper explores the legal status and treatment of a quote. The next section (section three) provides justification for the exploration, while section four makes reference to statutory and case law in considering alternative approaches to dealing with relevant legal issues.

III. JUSTIFICATION FOR SCOPE: QUOTE FOR SERVICES

Establishing means of dealing with the disparity between quotes and final price is an issue for providers both of goods and services. However, it is at least arguable that the issues are greater for providers of services than for suppliers of goods. Several reasons can be advanced as support for this claim.

Prices for goods are often easier to determine and are also likely to be more stable over time. It is also relatively straightforward to provide for price escalation clauses in pricing structures for goods. By way of contrast, services involve greater levels of price volatility and uncertainty; time allocated to execution and complexities involved may be the subject of assessments, guesstimates and calculations rather than of certainties. Comparative pricing

information available to both service provider and client may also differ from that available in the case of goods; there is greater potential for variations in the interpretation and calculation of work to be done than in specifications for product. Seeking consistency, and therefore greater levels of certainty in pricing through adherence to industry-based standard costings and guidelines for work, may be deemed price fixing and subject to scrutiny as an anti-competitive contract, arrangement or understanding (as in the case of fee schedules for law practitioners).¹

Another potential point of distinction is the project focus frequently associated with the supply of services. In a legal environment that encourages specialisation (under, for example, the Building Act 2004), a contractor in a project setting is likely to act as a clerk of works, assuming the responsibility of identifying and hiring subcontractors to provide specialist services. With increasing possibilities of uncertainty over what costs will be finally involved in this situation, a contractor is faced with the need to manage those costs, in particular establishing mechanisms whereby the legal responsibility of the contractor for overruns on the part of subcontractors may be minimised.

Duration also raises potential issues: the provision of a single service may take place over an extended period, further increasing levels of uncertainty as to the costs involved. This can be compared to the situation with goods that may involve a single supply at a specified or ascertainable date, or alternatively a series of supplies that take place either over a period or from time to time (specified or in response to demand). Either way, it would be unusual if a price or a formula for determining the price to be charged on later supplies was not included in the contract.

These characteristics of the supply of services (changing costs, complexities and extended duration) take on added significance in a legal environment in which the relative contractual powerlessness of consumers is acknowledged, where there has been a trend towards the codification or statutory clarification of various aspects of general contract law, and where there is at least some move towards a consideration of the circumstances of a contract rather than just the wording of the contract itself (eg, with the common law development of a concept of unconscionability).

With reference to three discrete variations to the above scenario, the next part of this paper incorporates an exploration of how this legal environment may impact on the nature of a quote as a fixed price on a specific contract

1 New Zealand Commerce Act 1986, ss27 and 30.

for services. The discussion then highlights legal issues and questions to be considered and provides a legal framework for the analysis of empirical data.

IV SPECIFIC SITUATIONS

Scenario Variation One

As time goes on, and after talking to people who are getting similar work done, Jim and Jane suspect that Bob pitched his price low in order to win the contract (sometimes known as low balling). At the time he provided the quote the building industry was going through a slump. Now the building industry is booming, and there is an industry-wide shortage of skilled workers. In the course of several on-site discussions with Jim and Jane, Bob makes veiled reference to the impacts wage and other increases are having on the cost of the work. In the last of these discussions he asks whether Jim and Jane have read the terms and conditions of the quote that were printed on the back. They had not, but on doing so they are dismayed to find a clause which states that “the contractor reserves the right to alter the quoted price to take account of increases in the input costs of labour, goods or overheads.” Another clause at the bottom of this page reads: “By accepting and signing the written quote, the Client indicates their acceptance of all standard terms and conditions as stated above.”

Discussion

If the [price escalation] clause provisions are clear and unambiguous, and claims for extra payment are supported by evidence of cost increases, it is prima facie reasonable to assume they would be upheld, despite Jim and Jane’s failure to read it prior to signature. However, do suspicions of low balling provide a defence to any claims Bob might put forward for extra payment?

The Fair Trading Act sections 9 (misleading and deceptive conduct in trade), 11 (misleading conduct in relation to services) and 13(g) (false or misleading representations in relation to prices) may be relevant. However, it would of course be necessary for Jim and Jane to establish their case. First, s9. The decision in *AMP Finance v Heaven*,² establishes a three-step test that must be satisfied in such a case. First, was the conduct capable of misleading? Secondly, was the reliant party misled by the relevant conduct? Finally, was it reasonable for that party to have been misled? It is arguable that Jim and Jane relied on Bob to apply his knowledge and expertise in arriving at the appropriate price for the work. However, consideration would also have to

2 (1997) 8 TCLR 144, 145.

be given to whether Bob could argue that the presence of an escalation clause refuted any suggestion that the quoted price had the potential to mislead or deceive. More specifically, it is at least arguable that the escalation clause gave Jim and Jane due warning that the quoted price was subject to fluctuation, and to that extent either they did not rely on the quote, or that it was unreasonable for them to do so.

On further analysis, section 11 appears inapplicable. Although it makes reference to misleading conduct in relation to services, its wording is similar to the Australian Trade Practices Act 1974 section 55A and is correspondingly limited to particular types of misleading conduct. Statements or representations as to price are not included. Evidence as to intent is also required before it can be successfully argued. (Perhaps this is why this section has been cited relatively rarely.)

Section 13(g) refers to false or misleading representations relating to the price for any goods or services. It has been judicially affirmed that no mental element is required to hold the representor liable³ but only the representation must be likely to mislead.⁴ However, proving a false or misleading representation is not easily done. At the very least, Bob's original pricing statements would need to be clearly out of line with the industry norm or those of other providers. It is also arguable that the success of such an action would be doubtful in the context of the escalation clause.

As well as the Fair Trading Act there is the Consumer Guarantees Act 1993. Section 31 of this Act provides that a consumer need only pay a "reasonable price" for services. However, this provision only applies where the price is not determined or left to be determined in accordance with the contract or course of dealing between the parties. These provisos together with the escalation clause in the quote would appear to deny Jim and Jane relief under this section. The only other possibility may be section 28 – a guarantee of reasonable care and skill in the supply of services (where services are defined in section 2 as including "any rights, privileges, or facilities...under...(a) a contract for...(i) the performance of work." The application is likely to turn on the question of whether a price provided in the quote is a "right, privilege or facility"... "under" the contract.

Given the above discussion, I suggest that three main questions emanate from this scenario.

3 *Commerce Commission v Noel Leeming Ltd* [1996] DCR 311; *Marcol Manufacturers v Commerce Commission* (1991) 2 NZLR 502.

4 *Commerce Commission v Telecom Corporation of New Zealand Ltd* (1990) 4 TCLR 1.

1. If the subject matter of the contract were principally labour, would increases in costs justified by increases in the labour-cost component ultimately render the quote meaningless? Does this then raise questions as to certainty of contract and consensus?
2. To what extent does the existence of a price escalation clause affect the ability of Jim and Jane to rely on the implied guarantees provided under the Consumer Guarantees Act sections 28 and 31?
3. What evidence would be needed to support Bob's claim that his price escalation clause allowed him to charge the extra costs involved in completing the contract?

Scenario Variation Two

The work does not appear to be progressing with any particular haste. Half the weatherboards are off the walls, the roof is covered with a tarpaulin and the inside has barely started. Each time Jim and Jane raise the subject of the house with Bob, he assures them things will get done by the deadline stated in the contract. Three weeks before the completion date Bob contacts them. He explains that he has lost two of his best builders to a competitor. To get the house completed by the date stated, or anything like it, he will have to pay two replacement employees 10% above what his other workers receive. As his quote was based on the rate for builders at the time he submitted it Jim and Jane will now need to pay extra.

Discussion

Two issues potentially arise; the first being the enforceability of pre-existing contractual obligations as good consideration for a fresh promise. There is plenty of precedent for the legal principle that a pre-existing contractual obligation is not good consideration to support a fresh promise (the so-called sailor cases such as *Stilk v Myrick*⁵) and more recently, *Cook Islands Shipping Co Ltd v Colson Builders Ltd*.⁶ However, the decision in *Williams v Roffey Bros and Nicholls (Contractors) Ltd*⁷ (followed by the New Zealand High Court in *Machirus Properties Ltd v Power Sports World*⁸) indicates that the courts are willing to uphold such variations in agreements if the person who agrees to pay more would either obtain a benefit or avoid a problem thereby, and provided there is no duress or any other vitiating element that may taint

5 (1809) 2 Camp 317.

6 (1975) 1 NZLR 422.

7 (1991) 1 QB 1.

8 (1987) HC, Wellington, AP 347/96, 26 May 1998.

that agreement. On the basis of these cases, and the "relaxed attitude"⁹ they reflect as to the need for further consideration, a promise by Jim and Jane to pay Bob extra to get the job completed would probably be enforced. Jim and Jane, by agreeing to pay more to get the job completed by the date for which they have planned and budgeted, would gain a benefit in getting the work completed within the time specified, allowing them to move back and stop paying rent.

The second legal issue arises from the effect of Bob's admission that he is now unable to complete on time (in accordance with the terms of the original contract). Under the Contractual Remedies Act 1979, Bob's statement could at least be deemed anticipatory breach. The date for completion is three weeks away; without a promise of more money the work will clearly not be completed by this time.

Whether or not Jim and Jane could exercise the extra-legal remedy of cancellation under section 7(4) would turn on the nature of the statement as to the time of completion. In other words, was time a term expressly or impliedly of the essence¹⁰ or alternatively, in accordance with s7(4)(b), is the effect of the declaration of Bob's (anticipated) inability to complete by that date (i) substantially to reduce the benefit, (ii) substantially increase the burden, or (iii) make the benefit or burden substantially different from that originally agreed by Jim and Jane?

Time is of itself not considered of the essence under s7(4)(a). Bob could argue that with all project-based contracts, it is reasonable for all parties to accept that the ability of the contractor to complete on time is subject to many external and unpredictable factors. Furthermore, a lack of penalty clauses for failure suggests that the specified date was more in the line of an expectation rather than an essential requirement.

Will the failure to complete then be sufficient to render the benefit or burden to Jim and Jane substantially different to what was quoted? After all, they have had to rent, a cost that will be increased should they need to remain in rental accommodation for an extended period of time. However, they did not make the decision to move until AFTER they accepted the quote. Arguably, therefore, the reduced benefit/increased detriment is not linked to the anticipatory breach but is rather a decision made independently of the contract incorporated in the quote and with the objective of increasing comfort levels.

9 Borrowdale, A (ed.) *Butterworth's Commercial Law in New Zealand* 4th Ed (2000) 35.

10 Contractual Remedies Act 1979, s7(4)(a).

In the event, there are pragmatic reasons why Jim and Jane would hesitate in exercising a right to cancel the contract anyway. They would have to locate another person to complete (and probably pay more anyway). If time was not considered of the essence or even as an important term by the Court, they may be deemed to have repudiated the contract, opening the door to Bob to cancel and claim substantial damages for consequential losses.

On that basis, affirmation and damages, or Specific Performance would appear *prima facie* more useful remedies. However, questions would also be raised both as to quantum of damages (what costs have been suffered by Jim and Jane as a consequence of the anticipatory breach) and also the benefit to be derived from an order for Specific Performance. More specifically, if Bob can show he does not have the staff and cannot afford to pay for them, is it reasonable and appropriate to order SP? Significantly in this context, *Rigby v Connol*¹¹ and *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd*¹² reflect a legal principle that any order for Specific Performance will be made only after consideration of the relative benefits and/or detriments it will bring to the parties concerned. If the detriment on the performing party is out of proportion to the benefit gained by the other party, Specific Performance will not be granted.

Given the above discussion, I suggest that the following questions emanate from this scenario:

1. What is the contractual status of the quote?
2. To what extent is it possible to vary the agreement in the interests of common sense and commercial reality, yet maintain the contractual status of the original quote?
3. Would the fact the couple qualify as consumers make any difference to this situation?
4. What courses of action are available to the contracting parties once it becomes apparent that the terms of the original quote cannot be satisfied?

Scenario Variation Three

Bob and his employees have been working on the house for some weeks. One day Bob rings and explains that at the time he submitted the quote he was under considerable stress and had not been sleeping. As a consequence, when

¹¹ (1880) 4 Ch D 482.

¹² [1978] 538.

he carried out the pricing calculations on his spreadsheet he had erroneously inserted a figure of 300 person-hours instead of 400 to complete the job. This mistake meant that the total price for labour included in the quote was some 25% less than it should have been. As labour costs presently represent 75% of the total price, a corrected figure for person-hours will add some \$80,000 to the price. He also points out that when he was discussing the job with Jim and Jane before submitting the quote, he had mentioned that he thought the job would take around 400 hours. Consequently, he believes they knew of his mistake and had taken advantage of it when accepting his quote.

Discussion

Of potential relevance to this scenario is the High Court decision in *March Construction Ltd v Christchurch City Council*.¹³ An action by March under the Contractual Remedies Act (silence amounting to misrepresentation) and the Fair Trading Act (silence amounting to misleading or deceptive conduct) failed, as a duty on the part of the Council to alert a tenderer as to a likely miscalculation was not established.

It is suggested that if Bob relied on similar arguments in seeking recovery of the extra \$80,000, Bob would fail. However, an alternative that may be open for Bob is to seek relief under the Contractual Mistakes Act 1977. This option was not available to the plaintiff in *March*, despite Williamson J's obiter remark that the "case was truly one of mistake and accordingly is governed by the provisions of ss4 to 6 of the Contractual Mistakes Act 1977,"¹⁴ because in both the Conditions of Tender and Conditions of Contract provided by the Council, March had assumed the risk of mistake. In addition, the plaintiff's claim for rectification failed as there was not a mistake in the contract itself but rather in the preliminary calculation of the tender price.

Is this option available to Bob? To obtain relief under the Contractual Mistakes Act 1977, the plaintiff has to prove two things. First, an actionable mistake that is either (i) unilateral, (ii) common or (iii) mutual, must have been made by the party making the application for relief under the Act.¹⁵ Bob has made a mistake that is arguably material to him given that a reasonable business person would not have submitted such a low tender. As there is no evidence that Jim and Jane have made any mistake, the situation would appear to fall into the first of these categories - unilateral mistake. However, such categorisation raises another issue. S6(1)(a)(i) requires knowledge of the mistake on the part of the other party. Whether Bob can prove that is uncertain.

13 (1995) 6 TCLR 394.

14 Ibid, 405.

15 Contractual Mistakes Act 1977, s6(a).

As McLauchlan¹⁶ emphasises, both the committee driving the reform of the law of mistake intended¹⁷ and the Court of Appeal has held¹⁸ that constructive knowledge on the part of another party to the contract of a mistake is not sufficient; actual knowledge is required. The Court of Appeal's rejection of the argument in *Tri-star* that constructive knowledge in a case of unilateral mistake was adequate must therefore be considered highly relevant to this scenario. Consequently, Bob would be faced with the need to prove both that the alleged oral communications took place, and that it would be reasonable to hold that Jim and Jane understood the implications of the time estimates made by him such that actual knowledge on their part of Bob's later mistake could be assumed.

Secondly, a plaintiff seeking relief under s7 must demonstrate that the mistake resulted in a substantially unequal exchange of values,¹⁹ or a benefit or burden substantially disproportionate to the consideration.²⁰ Arguably, in this regard, an \$80,000 miscalculation could satisfy both requirements. After all, it represents 25 percent of the labour component, which in turn makes up 75 percent of the total contract price. However, there remains a further two issues implicit in the wording of section 7; firstly, the Court in exercising its discretion to grant relief "shall" take into account the extent to which the party seeking the relief caused the mistake,²¹ and secondly, a subjectively determined consideration of "justice" is imported into any exercise of this discretion.²²

In relation to the first of these implications, in *Snodgrass v Hammington*,²³ the Court of Appeal upheld the High Court decision that a mistake could be brought about by negligence on the part of a contracting party, and that that negligence would therefore be material in determining the award and level of relief. In addition, both Courts rejected the arguments of the (negligent) appellants that the behaviour of the respondents (in refusing to settle on a property subject to subsidence problems) disentitled the respondents to relief. In relation to the second implication, the Court of Appeal in *Chatfield v Jones*,

16 McLauchlan, DW, "More on the Contractual Mistakes 'Code'" (2003) 9(1) New Zealand Business Law Quarterly 51, 58-59.

17 Contracts and Commercial Law Reform Committee (1976) Report on the Effect of Mistakes on Contracts, Wellington: Department of Justice, para 20.

18 *Tri-star Customs and Forwarding Ltd v Denning* (1999) 1 NZLR 33.

19 Contractual Mistakes Act 1977, s6(b)(i).

20 Ibid, s6(b)(ii).

21 Ibid, s7(2).

22 Ibid, s7(3).

23 (1995) 10 PRNZ 672.

stressed that "in administering the [Contractual Mistakes] Act the integrity of written contracts, particularly in commercial dealings, must be a cardinal consideration."²⁴

The principle of holding contracting parties to their bargain, however unattractive it has become to one of them, is a longstanding principle in the common law and is unlikely to be lightly disturbed. Consequently, a Court if called upon to consider whether it is "just" for Bob to obtain relief under the Contractual Mistakes Act would take into account not only his conduct (the negligence itself and the time-lag involved in communicating the error), but also the behaviour of Jim and Jane (the calculations, recourse to the bank for extra funds and their budgeting for accommodation). Given the above discussion, I believe that three main questions emanate from this scenario.

1. Does such a significant miscalculation in price render the quote, reflected in the contract, effectively worthless?
2. If so, would cancellation or similar remedy provide an appropriate and useful outcome to the parties concerned? Would the innocent party suffer disproportionately as a consequence of the breach or mistake?
3. Should matters of wider importance such as ruin (Bob) and relative expertise be of relevance in determining the nature and quantum of relief?

IV. CONCLUSIONS

In this paper I have sought to identify and explore legal issues and implications arising from the deceptively simple and ubiquitous area of the commercial quotation. The scenario outlined at the beginning, along with the three specific variations considered, provides a context in which to highlight these legal issues and implications, and that in turn sound a warning as to the importance for provider and client alike to be aware of their legal rights and obligations. As such, this paper establishes a legal framework in which to consider relevant management practices observed by those providing services pursuant to quoted prices and other contract terms.

24 (1990) 3 NZLR, (per Cook P) 287.

Forbidding Dwarf Tossing: Defending Dignity or Discrimination Based on Size?

Dr Julia Davis*

I. INTRODUCTION

In the last half of the twentieth century legislators began to use the idea of human dignity to supplement the traditional concepts of harm and autonomy as the source of principled controls over the state's entitlement to forbid conduct on the pain of criminal punishment. More recently, the concept of dignity has been expressly relied upon by legislators to justify imposing criminal sanctions on those who organise dwarf tossing contests. This paper examines the relative merits of the three suggested candidates for keeping the criminal law within principled boundaries, namely, the harm principle, the principle of autonomy, and the idea of human dignity. It presents a model of criminal wrongdoing that is based on protecting not only our welfare and our autonomy but also our desire to be respected by others as persons of equal dignity, worth and value. It concludes by suggesting that our primary allegiance to the principle that all human beings are equal in dignity will sometimes require us to refrain from criminalising certain controversial kinds of conduct like dwarf tossing that may at first glance appear to be supremely undignified.

II. THE CHALLENGE OF DWARF TOSSING

An important task facing any community is to find a source of principled moral limits that can be used to control the extent of the criminal law. This search is frustrated by the fact that the concept of wrongdoing, just like the contested concept of a crime itself, is open and empty of factual content. The ordinary definitions of wrongdoing, as conduct that deviates from a rule, standard or norm of conduct that is thought to be right, and of a crime as 'a legal wrong that can be followed by criminal proceedings which may result in punishment'¹ both leave undone the hard work of identifying in precise factual terms the conduct that ought to be forbidden by the criminal law and providing acceptable reasons why it is thought to be right to punish offenders who are responsible for that conduct.

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1 Williams G, *Textbook of Criminal Law* (1983) 27-28.

Legislators who have found that the meaning of these terms does not yield a universally accepted test for recognising criminal wrongdoing have sought assistance from other sources including religious teachings, moral and legal philosophy and criminology. However, despite our continuing community conversations about crime, wrongdoing and punishment, we have not agreed upon a clear test that can neatly divide the conduct that we feel compelled to act against from the conduct that we feel we must tolerate or deal with in other ways. Whenever a likely candidate is put forward by one camp, opposition from another camp points out its weaknesses. Consequently, legislators, whose allegiance to John Stuart Mill's famous 'harm principle' is challenged by the 'autonomy principle' derived from Kantian ethics, adopt compromises that open the law up to criticism that it is illogical, inconsistent, and unprincipled. Lawyers and legal theorists, aware of the pull of opposing values, respond in different ways: some hail the collapse of the harm principle and call for a new critical principle;² some smuggle aspects of one theory into another to bolster its perceived shortcomings;³ others craft hybrid theories that use different guiding principles at different stages of the criminal justice process;⁴ while sceptics argue that the law is hopelessly ambiguous, fatally contradictory and fundamentally incapable of delivering justice.⁵

Fortunately, we are often able to agree upon the content of the criminal law; the core crimes sometimes classified as *mala in se* or evil in themselves, like murder, rape, theft and wounding, are commonly viewed by most members of the community both as morally wrong and as suitable objects of criminal sanctions. By contrast, those kinds of conduct that are viewed as *mala prohibita* or regulatory crimes, which occur at the penumbra of the criminal law, do cause problems both for legislators and for citizens. In these cases where we disagree, our need for a critical principle that can assist us in deciding upon the moral limits of the criminal law is thrown into high relief. One such challenging case is the 'sport' of dwarf tossing, a form of entertainment that was invented in Australia in the nineteen eighties, and which spread rapidly to other parts of the world. Dwarf tossing is a contest of strength usually held in discotheques and bars, which rewards the person who is able to throw a willing and suitably protected dwarf the furthest onto a padded landing stage.

2 Harcourt, BE, 'The Collapse of the Harm Principle' (1999) 90 JCrL&Criminology 109.

3 For example, Joel Feinberg adopts an extended normative definition of harm as an indefensible and wrongful setback to interest, done with fault, and in violation of a person's rights in *The Moral Limits of the Criminal Law, Volume 1, Harm to Others* (1984) 105-06, 36, 214-215, 186 and *Harmless Wrongdoing* (1988) 26.

4 See, for example, Hart HLA, *Punishment and Responsibility* (1984).

5 Norrie, A, *Crime, Reason and History* (1993) 'Simulacra of Morality? Beyond the Ideal/Actual Antinomies of Criminal Justice' in Duff RA (ed.) *Philosophy and the Criminal Law* (1998) 101; and *Punishment, Responsibility and Justice: A Relational Critique* (2000).

Another variant, dwarf bowling, involves launching a helmeted dwarf who is strapped to a skateboard down a bowling alley; the winner is the contestant who knocks down the most pins.

At about the same time that dwarf tossing started to grow in popularity, legislators and legal philosophers began to use the idea of human dignity to supplement, and at times to displace, a reliance on the traditional concepts of harm and autonomy as the source of principled controls over the state's entitlement to forbid conduct on the pain of criminal punishment. Responding to the protests of citizens who were outraged by the undignified spectacle of dwarf tossing contests and who claimed that such events are disgusting, demeaning and objectify and ridicule little people, legislators in France and the USA expressly relied upon the notion of human dignity to justify imposing criminal sanctions on those who organise dwarf tossing contests. The mayor of New York, Mario Cuomo, signed into law a bill prohibiting both forms of dwarf sports in 1990, saying that he did:

... not lightly impose limits on the activities of consenting participants. But balancing all the interests affected, I am persuaded that approval of this bill respects basic human dignity and protects the safety and self respect of the special people who are the subject of this strange diversion.⁶

In France, the Conseil d'État, affirming that respect for human dignity is one of the constituents of public order, upheld a law forbidding dwarf tossing in 1995 and refused to allow dwarfs to compromise their dignity by allowing themselves to be used as mere projectiles or be treated in the same way as inanimate pieces of sporting equipment.⁷ In 2002 this action inspired a French citizen, Manuel Wackenheim, who earned his living by participating in dwarf tossing contests, to attempt to overturn the legislation by taking his case against France to the UN Human Rights Committee.⁸ He argued that the French law was an unlawful, paternalistic act of discrimination based on his size and maintained that the ban infringed his autonomy and his right to pursue

6 Abramovsky, A, 'Bias Crime: A Call for Alternative Responses' (1992) 19 Fordham Urban LJ 875, 902, n 229.

7 Conseil d'État (October 27, 1995) req nos (Commune de Morsang-sur-Orge) and 143-578 (Ville d'Aix-en-Provence).

8 The French dwarf, who lost before the Conseil d'État, supra n 7, took his case to the UN Human Rights Committee on the grounds that the French regulations banning the organisation of dwarf throwing contests violated his rights under the International Covenant on Civil and Political Rights. The case was not successful: *Mr Manuel Wackenheim v France* Communication No 854/1999, UN Doc CCPR/C/75/D/854/1999 (13 November 1996), UN Doc A/57/40 at 179 (2002) Decision of the Human Rights Committee, 75th Session, delivered 26 September 2002.

employment in a difficult job market.⁹ According to Mr Wackenheim, the bans denied his human dignity, which he equated with having employment and professional status. The UN Human Rights Committee upheld the validity of the ban on dwarf-tossing, claiming that it was necessary to protect public order and that notion of upholding human dignity was a valid basis for the laws.

I will argue in this paper that while the state is entitled to regulate the conditions under which dwarfs can be employed in these contests, it is not entitled to use the criminal law to punish those who organise safe, regulated dwarf throwing events. This conclusion is based on a model of criminal wrongdoing that aims to give a place to each of the three important principles that have been suggested as candidates for keeping the criminal law within principled boundaries, namely, the harm principle, the principle of autonomy, and the idea of respecting human dignity. The recent emergence of the notion of human dignity and its use in justifying the imposition of criminal sanctions on certain kinds of conduct generally thought to be harmless expressions of personal autonomy, forces us once again to think about the nature of the good life for human beings, to clarify the role that the criminal law should play in securing that vision and to reconsider the relative value that the state should place on our welfare and autonomy interests and our shared desire to be respected by others as persons of equal dignity and worth. The challenge posed by dwarf tossing contests offers us a useful test case to analyse the effects of each of these different approaches to setting the moral boundaries of the criminal law.

I begin in the next section by examining the relative merits of the harm principle, the principle of autonomy, and the idea of human dignity in order to see how they might be used as the basis for our decisions to criminalise conduct. The third section presents an account of a crime as conduct that threatens the foundations of the good life for human beings living together as a community. I suggest that, just like the good life which it mirrors and protects, a crime contains two distinct dimensions; a factual dimension that focuses on preventing setbacks to our welfare and our autonomy, and a normative dimension that is informed by the value that we place on being respected

9 See supra n 8. This case has attracted the following comments: Baber HE, 'The Ethics of Dwarf Tossing' (1989) *FallInt'lJAppliedPhil* 1; Becker L, 'Crimes Against Autonomy' (1999) 40 *William&MaryLR* 959, 971; Beyleveld D & Brownsword R, *Human Dignity in Bioethics and Biolaw* (2001) 25-27; Brownsword R 'Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the Dignitarian Alliance' (2003) 17 *NotreDameJLEthics&PubPol* 15; Friedman GS & Whitman JQ, 'The European Transformation of Harassment Law: Discrimination Versus Dignity' (2003) 9 *ColumbiaJEurL* 241; McGee RW, 'If Dwarf Tossing is Outlawed, Only Outlaws will Toss Dwarfs: Is Dwarf Tossing a Victimless Crime?' (1993) 38 *AmerJJuris* 335; and Owen DG, 'Products Liability: Category Liability: Product Outlaws' (2000) 10 *KansasJL&PubPolicy* 126.

by others as an equal. I argue that our criminal law contains a distinctive conception of justice that is based on our vision of ourselves as equals in dignity, worth and value, and which imposes a duty on each of us to respect others by treating their interests in welfare and autonomy as carrying a value that is equal to our own. Under this 'Good Life Model' of the criminal law, we cannot justify criminalising any conduct unless it breaches both the harm principle, which sets the factual boundaries of the criminal law, and the equal dignity principle, which provides the criminal law with its moral heart. The paper concludes by explaining why our allegiance to the principle that all human beings should be respected as persons of equal dignity will sometimes lead to an apparent paradox that requires us to refrain from criminalising certain controversial kinds of conduct – like the practice of dwarf tossing – that may appear to many in the community to be supremely undignified.

III. THE SEARCH FOR THE MORAL LIMITS OF THE CRIMINAL LAW

The Harm Principle

John Stuart Mill argued that the state should be entitled to restrict our liberty only when our conduct risks doing harm to others.¹⁰ This 'very simple' principle has strong initial appeal because the essentially factual notion of harm-doing, as conduct that makes someone or something worse off, appears to provide a straightforward test that can give content to the moral, but factually empty, concepts of wrongdoing and crime. Furthermore, the utilitarian concern with harm and human welfare sits well with the state's duty to govern for the health, safety and wellbeing of its citizens. However, three problems arise when we put the notion of harm into place as the critical principle that determines the contours of the criminal law.

The first problem is that a harm based test pushes the criminal law too far. It does not tell us how to distinguish criminal conduct from the conduct that we think would be better dealt with by the civil law. More importantly, the harm principle would extend the reach of the criminal law far beyond its current boundaries because, although it is relatively easy to identify, harm is ubiquitous. If we track the consequences far enough, almost any conduct can lead to harm and so theoretically attract the criminal sanction. Certainly, the harm principle's perceived strength (in liberal eyes at least) in ruling out the criminalisation of conduct that is essentially objected to on the grounds of offence or moralism has been weakened by politicians who use 'broken windows' arguments to

10 Mill JS, *On Liberty and Other Essays* (1998) 13-14.

extend the criminal law by finding remote harms in conduct traditionally considered to be harmless to others like prostitution, begging, selling alcohol, using drugs, and engaging in homosexual activity.¹¹

In the case of dwarf throwing, it has been argued by dwarfs who wish to participate in the contests, that provided proper safety matters are observed, the activity is not dangerous and is certainly less dangerous than many kinds of dwarf wrestling exhibitions, which are not forbidden.¹² If we compare the sport with boxing, rugby or Australian Rules football where the risk of harm cannot be eliminated because of the nature of the games, regulated dwarf tossing does not appear to be harmful enough to forbid. If we compare it with ordinary recreational pursuits like sky-diving and gliding, where we allow individuals to risk their health and their welfare and (very often) death itself, it seems that we should allow the dwarfs a similar choice. However, some commentators like HE Baber, who accept that the events can be safely carried out without harming the participants, claim that dwarf tossing contests are wrong and should be banned under the harm principle on the grounds that they cause remote harms to 'unwilling non-participants, particularly other little people.'¹³ These attempts to use the harm principle to justify forbidding dwarf tossing contests reveal the limits of the harm principle and our need either for a remoteness test for causing harm or for some other morally acceptable source of limits.

The next problem arises because equating harm-doing with wrongdoing (and reducing the moral problem to a purely factual question) leaves out something important; specifically, it does not take account of the characteristic attitude of contempt for the value of others that we read into conduct commonly seen as criminal. To solve this problem Jerome Hall posited the existence of a special kind of 'penal', 'social', or 'criminal' harm 'the essential determination of which is the moral culpability of the actor,'¹⁴ and Joel Feinberg adopted an extended normative definition of 'harm' that includes notions of fault, moral wrongdoing and the idea of violations of rights.¹⁵ In the case of dwarf tossing this extension does not lead us to criminalise those who organise dwarf tossing

11 See Harcourt BE, 'The Collapse of the Harm Principle' (1999) 90 *JCrimL&Criminology* 109; and Feinberg J, 'Harm to Others - A Rejoinder' (1986) 5 *CrimJusticeEthics* 27.

12 Such precautions may include: the wearing of helmets, the use of padding, a requirement for insurance coverage, a requirement for up to date medical certificates from recognised orthopaedic specialists, and a stipulation that no person who is drunk may be allowed to participate in the throwing. See also McGee RW, 'If Dwarf Tossing is Outlawed, Only Outlaws will Toss Dwarfs: Is Dwarf Tossing a Victimless Crime?' (1993) 38 *AmerJJuris* 335.

13 Baber HE, 'The Ethics of Dwarf Tossing' [1989] *FallInt'lJAppliedPhil* 1.

14 Hall J, *General Principles of Criminal Law* 2nd Ed (1960) 215 & 242.

15 See Feinberg, *supra* n 3.

contests because, if the dwarfs are consenting, there does not appear to be any violation of their rights or any special fault or culpability associated with the action that would lead us to think that the conduct is intrinsically criminal or morally wrong.

Unfortunately, however, these definitional manoeuvres lead to a third problem – the struggle over the meaning of harm. Once the stronger moral notions of culpability and wrongdoing are added into these extended definitions of ‘harm’, they overpower it and harm’s usefulness as a factual test is lost. In a frustrating twist, these tactics, which were designed to enhance harm’s limiting function, destroy its original meaning and we are forced back to the debates about the nature of moral wrongdoing that divided us in the first place. Adopting a definition of a crime as the culpable choice to harm another may improve upon our understanding of a crime as mere harm-doing, but it means that the harm principle ceases to be the critical principle that we had hoped for. So, although the concept of harm does appear to offer a usefully factual source of limits on the criminal law, its own limitations and our struggles over its meaning and role have led philosophers and lawyers to put forward the concept of autonomy as a necessary supplement to the harm principle.

The Autonomy Principle

Immanuel Kant’s theory of autonomy and treating persons as ends in themselves has been very influential in Anglo-American justifications of punishment. However, arguments over the relative importance of human welfare and autonomy have persisted, not only between consequentialists and deontologists, but also between unaligned theorists who attempt to find a place for both the harm principle and the autonomy principle in the criminal law. Furthermore, recent debates over autonomy’s role have moved away from Kant’s account, which grants us equal moral worth insofar as we are rational and autonomous, in favour of a more factual account of autonomy’s significance. Autonomy, defined as the exercise of control over the conduct of one’s own life by defining, choosing and pursuing a good life on one’s own terms (regardless of whether those decisions are based in morality or in rationality)¹⁶ is seen simply as another object of desire that may deserve legal protection. So conceived, it is no longer the key moral attribute justifying our duties to others. Theorists following this approach disagree not only over the meaning of autonomy and its relation to the harm principle and the matter of human welfare, but also over the priority that these aspects should have in structuring the criminal law.

16 On Joseph Raz’s account ‘a man is autonomous even if he chooses the bad.’ Raz J, *The Morality of Freedom* (1986) 411.

Andrew Ashworth and Nicola Lacey argue that autonomy and welfare represent competing values.¹⁷ They suggest that the criminal law does not (and cannot) rank one consistently over the other and argue that we must negotiate compromises between the two on a case by case basis.¹⁸ By contrast, John Gardner and Joseph Raz maintain that autonomy as the 'key ideal of human well-being for our age' is the true source of the value that we place on our welfare interests.¹⁹ However, when defining autonomy, they also give primacy to the notion of capacity or functioning, and they resolve the dilemma over autonomy's relationship to the concept of harm by classing as harmful only the adverse effects upon welfare that will reduce the prospective exercise of a person's autonomy.²⁰ Like Feinberg, who also links interferences with autonomy to the harm principle, Gardner and Raz agree that conduct causing only transitory pain, disfigurement, grief and distress, which are disliked states that 'come to us, are suffered for a time, and then go, leaving us whole and undamaged as we were before'²¹ cannot count either as harmful or as an interference with autonomy.

The insistence that adverse effects upon welfare are harmful only when they impair future capacity for chosen action seems not only to put an artificial limit upon the meaning of harm but also to underrate the importance that we

17 Lacey N, *State Punishment: Political Principles and Community Values* (1988) 103-105; and Ashworth A, *Principles of Criminal Law* 2nd Ed (1996) 24.

18 Ashworth A, *Principles of Criminal Law* 4th Ed (2003) 323-329. Lacey suggests in *State Punishment*, supra n 17 at 117, that 'it would be foolish to imagine that one always acts as an absolute constraint on the pursuit of the other'. She argues that the two are incommensurable political values and points out that trade-offs between the two must be made when a community considers both the aim and the distribution of punishment. Ibid, 180, 187. More recently, however, Lacey has argued that the values of autonomy and welfare are not necessarily in opposition: *Unspeakable Subjects* (1998) 52.

19 Gardner J, 'On the General Part of the Criminal Law' in Duff RA (ed) *Philosophy and the Criminal Law* (1998) 205, 242-243. See also Raz J, 'Autonomy, Toleration and the Harm Principle' in Gavison R (ed.) *Issues in Contemporary Legal Philosophy* (1987) 313, 327-320, and *The Morality of Freedom* (1986) 413-414.

20 Joseph Raz argues that harm has a 'forward looking aspect' that is linked directly to autonomy and that we can classify as harmful therefore only those effects that 'affect options or projects' either by depriving 'a person of opportunities or of the ability to use them' or by reducing 'his ability to act in ways that he might desire.' Raz, *The Morality of Freedom*, supra n 19 at 413-414. John Gardner also emphasises that harm is 'not the pain or lost limb or shock in itself' but is instead the consequent 'attenuation of capacity or opportunity for action, reducing the range of alternative actions and activities that are available to the person who is harmed.' Gardner J, 'On the General Part of the Criminal Law' in Duff RA (ed.) *Philosophy and the Criminal Law* (1998) 205, 243.

21 Feinberg, *Harm to Others*, supra n 3 at 45. AP Simester and Andrew von Hirsch also limit the scope of harm to those effects that impair a person's 'opportunities to engage in worthwhile activities and relationships and to pursue valuable, self-chosen goals' in Simester AP & von Hirsch A, 'Rethinking the Offense Principle' (2002) 8 *LegalTheory* 269, 281.

place on our welfare. We do appear to value an intact, unblemished body and the absence of pain, grief and distress as important aspects of the existence that we aim to secure for ourselves, and, whether these effects disable us from action or not, we do regard ourselves as being worse off or harmed if we are blighted in such ways even if it is only for a short time.

Another troubling example is the case of a 'harmless rape', described by John Gardner and Stephen Shute, where an unconscious victim is secretly violated by another without any physical damage resulting and where the event is never discovered.²² Gardner and Shute classify it as harmless because they insist that harm must have a prospective dimension that will affect the victim's future exercise of her autonomy. Again, it is difficult to agree with their assertion that the rape does no harm simply because the victim's future capacity for autonomy is unaffected. The victim's control over access to her body was diminished, and I suggest that, viewed objectively, this factual setback to her opportunity to exercise her autonomy must be seen as making her worse off and therefore be classified as harmful.²³

Giving autonomy a controlling role within the harm principle also leads to a second set of problems that arise partly because our welfare interests and our autonomy interests often conflict and partly because giving primacy to one over the other unbalances the law by leaving out something we value. Our welfare interests, defined as comprising all the things both internal and external to the person that are important for human existence, cover what we might call the *passive* aspects of wellbeing. Our interests in autonomy comprise the *active* aspects of our wellbeing or, as Mill called it, well-doing.²⁴ Even though our desires to improve our welfare and to pursue our autonomy may sometimes conflict, reinforcing links do exist between the two; an adequate welfare base lays the foundation for the exercise of our autonomy and exercising our autonomy can often improve our welfare. However, if one of these aspects is missing, no improvement or increase in the other can make up the loss. The pampered slave, whose welfare interests are completely satisfied, but whose entitlement to the free exercise of his will is denied, cannot be said to

22 Gardner J & Shute S, 'The Wrongness of Rape' in Horder J (ed.) *Oxford Essays in Jurisprudence* 4th Series (2000) 193.

23 The criminal law exists not simply to respond to subjectively experienced wrongs or the subjectively experienced harms that flow from those wrongs, but to make an objective, public, assessment of conduct. Criminal law is the external view, and consequently we are entitled to make external assessments of harm just as Gardner and Shute go on to make an external assessment of wrongdoing in this case.

24 John Stuart Mill saw the good life as composed of 'well-being' and 'well-doing': see *On Liberty*, supra n 10 at 84. The useful notions of 'passive well-being' and 'active well-being' used by John Gardner neatly match Mill's two elements: see Gardner J, 'On the General Part of the Criminal Law' supra n 19.

live well. Equally, the woman, whose entitlement to exercise her autonomy is guaranteed, but whose living conditions of deprivation and poverty mean that her choices are limited to deciding which of her children gets enough to eat, does not have a good life.²⁵

If we view welfare and autonomy as incommensurable elements of the good life and as equally worthy of the law's protection, then neither can take priority in shaping the criminal law. Because we do commonly see ourselves as worse off in a factual sense when these interests are set back, it follows that conduct that sets backs either our welfare or our autonomy could be covered by the harm principle. However, while this move improves our theory of harm, and settles the relationship between harm, welfare and autonomy (in its modern factual sense), it does not bring us any closer to resolving the other problems that arise if the harm principle sets the limits of the criminal law. Even in its modified form, it still fails to capture the message about the value of others that we object to in conduct that is commonly called criminal, and if any conduct that risks a setback either to another's autonomy interests or to their welfare interests qualifies as harmful, the boundaries of the criminal law would extend even further than they do now.

Despite these problems associated with the concept of autonomy, it clear that the test case of dwarf tossing would not be a fit subject for the criminal sanction if the autonomy principle alone were to be used to set the boundaries of the criminal law. In no case are dwarfs forced to participate, and in fact many dwarf participants claim that they enjoy the sensation of flying through the air and that they relish the fact that they are the centre of attention, not only while the event takes place, but afterwards when patrons socialise with each other and with the participants.²⁶ Furthermore, there appears to be no likelihood that participating in such events would impair the dwarfs' capacity for the future exercise of their autonomy. One solution to the theoretical dilemmas might be to return to Kant's account of our moral worth as being grounded in our rationality and our capacity to will that our maxims become universal law. Unfortunately, this vision of autonomy's special moral significance is open to the objection that it may lead us to ignore non-human animals and any non-rational or incapacitated humans,²⁷ and so, to salvage what is valuable in Kant's account of our moral worth, we must turn to the idea that has dominated modern legal thinking and examine the role that human dignity can play in the criminal law.

25 Partha Dasgupta explains how destitution creates both physical pain as well as the moral pain of having to make tragic choices over the allocation of food and health care in *Human Well-being and the Natural Environment* (2001) 37.

26 See references in n 9 *supra*.

27 Hursthouse R, *Ethics, Humans and Other Animals* (2000).

Human Dignity

The starting point for any discussion of human dignity is Immanuel Kant's famous statement in *The Metaphysics of Morals*:

Every human being has a legitimate claim to respect from his fellow human beings and is in turn bound to respect every other. Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being ... but must always be used at the same time as an end. It is just in this that his dignity (personality) consists, by which he raises himself above all other beings in the world that are not human beings and yet can be used, and so over all things. But just as he cannot give himself away for any price (this would conflict with his duty of self-esteem), so neither can he act contrary to the equally necessary self-esteem of others, as human beings, that is, he is under obligation to acknowledge, in a practical way, the dignity of humanity in every other human being. Hence there rests on him a duty regarding the respect that must be shown to every other human being.²⁸

After World War II the Kantian idea that state authorities have a fundamental duty to respect the equal dignity of all human beings began to feature in both international human rights law and the domestic constitutions of states like Germany and Israel.²⁹ Even in France and the USA where there is no express legislative recognition of human dignity (but where the concept of equality has strong constitutional support), the idea has been used to limit the law right through the criminal justice process. In addition to upholding laws banning dwarf tossing events,³⁰ courts have struck down laws criminalising homosexual

28 Kant I, *The Metaphysics of Morals* (originally published in 1797) Mary Gregor (trans) (1996) 209, see also 434-435.

29 See, England I, 'Human Dignity: From Antiquity to Modern Israel's Constitutional Framework' (2000) 21 CardozoLR 1903; Hörnle T, 'Offensive Behaviour and German Penal Law' (2001) 5 BuffaloCrimLR 255; Resnick J & Suk JC, 'Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty' (2003) 55 StanfordLR 1921. Courts in both Israel and Germany are empowered to strike down legislation that conflicts with this duty.

30 See supra ns 7 and 8.

sodomy,³¹ outlawed punishments like castration,³² prohibited routine strip searches³³ and forbidden race or gender based discrimination in jury selection,³⁴ all on the grounds that the law must recognise our equal dignity.

In the case of dwarf tossing contests, the most commonly expressed objection relates to the issue of human dignity. Because there is no equal status or reciprocity between participants as there is in harmful or risky sports like boxing, rugby or Australian football (where each participant undertakes the same risk and engages in the same conduct) the throwing of the dwarfs appears to be demeaning of the human projectiles, who in these contests are equated to the status of inanimate shot-puts or javelins. The dwarfs also shoulder an unequal risk of harm by comparison with those who launch them and they do not have an equal entitlement to toss the other participants as they themselves are tossed. On the other hand, there are many human activities that may be thought of as undignified that do not attract the sanctions of the criminal law. If we compare the case with those where we allow men and women to perform together in peep shows for the titillation of paying customers, we may well conclude that it is unreasonably discriminatory to refuse the dwarf an opportunity to engage in what may be less demeaning employment.

The emphasis on the special moral dignity of persons traces back to Aristotle and Cicero³⁵ and features in the theories of utilitarians like Mill and Bentham as well as deontologists like Kant and Hegel.³⁶ This solid core of agreement

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- 31 In *Lawrence v Texas* 123 S Ct 2472 (2003) the US Supreme Court declared unconstitutional a Texas law forbidding homosexual sodomy on the grounds that by criminalising only homosexual sodomy and unjustifiably creating a class of 'second-class citizens', the Texas legislature had failed in its duty to respect equally the dignity of those persons subject to the law.
 - 32 See Meir Dan-Cohen's discussion of *State v Braxton* 326 SE 2d 410 (SC 1985), where the appellate court withdrew the option that the lower court had given defendants between choosing 30 years imprisonment or being surgically castrated: Dan-Cohen M, 'Basic Values and the Criminal's State of Mind' (2000) 88 CalLR 759, text accompanying n 13, reprinted as the chapter on 'Defending Dignity' in Dan-Cohen M, *Harmful Thoughts* (2002).
 - 33 See the ruling by the US District Court for the Eastern District of New York in *Augustin v Jablonsky* 99-CV-3126 (DRH) (ARL) 2001 US Dist LEXIS 10276 forbidding routine strip searches upon arrest for minor offences.
 - 34 The US Supreme Court prohibited discrimination on the basis of race or gender in jury selection in: *Batson v Kentucky* 476 US 79, 90 L Ed 2d 69 (1986) on grounds of gender; and *J.E.B. v Alabama ex rel T.B.* 511 US 127, 114 L Ed 2d 89 (1994) on grounds of race.
 - 35 Wright RW, 'The Principles of Justice' (2000) 75 NotreDameLR 1859. Nicola Lacey, in *State Punishment*, supra n 17 at 144-148, traces the liberal themes of equality and 'taking persons seriously as moral agents worthy of equal respect and concern' from Kant, Bentham and Mill, to the work of HLA Hart, Ronald Dworkin, John Rawls and Peter Singer.
 - 36 See Mill's discussion of Bentham's famous aphorism 'Each is to count for one and no-one more than one' in *On Liberty*, supra n 10 at 198-199; and Kant I, *The Metaphysics of Morals* supra n 28 at 434-435.

between philosophers whose views are often opposed suggests that the equal dignity principle may be well suited to the task of justifying principled limits on the criminal law. However, before we can give dignity this crucial role, we must resolve three difficulties emerging from the dignity jurisprudence that cloud its meaning, use and significance.

The first problem is the blurring of the boundaries between dignity and harm. Just as legal philosophers have smuggled moral elements into their accounts of harm, so have lawyers fused harm with dignity as American courts use the idea of 'dignitary harms' to justify overturning legislation. 'Dignitary' or 'expressive' harms are said to be imposed on individuals by the improper messages about individual value that state laws express; they result from the attitudes expressed through government actions rather than the material consequences they cause.³⁷ These harms are a fiction designed to give legal standing to people who are not themselves threatened by the impugned laws, but who, because they wish to overturn them, must prove injury to comply with rules governing procedure. This usage should be resisted because the source of these complaints is located in the normative realm of value and not in the factual world of welfare or autonomy interests. They tell us nothing new about harm. Rather, they remind us that we see ourselves as being equal in dignity and that we feel morally outraged when the law does not do justice to that value.

The second problem arises because dignity has two senses. Dignity in the first sense refers to the inherent worth that attaches to all human beings simply because they are human beings – and in our times this worth is seen as equal worth. In its second sense dignity refers to a state of existence or conduct that is characterised by the absence of perceived indignity, humiliation or degradation. It is linked to our feelings, experiential wellbeing and self-esteem. However, because dignity is not simply the opposite of perceived indignity, there is an asymmetry between the two senses that creates problems in legal debates. Dignity as equal worth is a normative quality. It exists in the moral sphere and remains untouched by events or experience; we cannot differ in equality or have more or less of it. Conversely, dignity in the second sense is a quantitative and factual matter; we can progressively lose our dignity as more and more indignities are heaped upon us. Dignity in this factual sense cannot advance our search for moral limits. If we want protection from perceived indignities we can simply appeal to the harm principle that defends our welfare and autonomy, but this kind of dignity is too weak to do the moral

37 Pildes RH & Niemi RG, 'Expressive Harms, "Bizarre Districts", and Voting Rights' (1993) 92 MichLR 483, 506-507. See also Anderson ES & Pildes RH, 'Expressive Theories of Law: A General Restatement' (2000) 148 UPennLR 1503.

work of justifying the duties to others that the criminal law imposes upon us.³⁸ However, dignity in its normative sense offers more hope, precisely because it focuses upon the moral worth of human beings and because it is now welded to the powerful idea of equality.

The third problem casting doubt on dignity's usefulness as a limiting principle arises because dignity based arguments work both ways. This is illustrated by the French dwarf tossing case, *France v Wackenheim*,³⁹ where both parties invoked the notion of human dignity to justify opposing arguments. France (using dignity in the second sense), argued that using human beings as projectiles creates an undignified public spectacle. Mr Wackenheim, whose welfare and autonomy interests were not harmed by his participation, claimed that dignity consists in having a job and being treated without discrimination based on size (thereby using both senses). This case suggests that, on its own, the concept of human dignity does not give us enough guidance. Dignity is not an open concept like the notion of wrongdoing, but we struggle over its significance in the law because it has different senses and often points us in opposite directions. It is morally important, but factually imprecise, and so while our insistence that each person's intrinsic and equal human dignity must be respected may offer us a moral justification for our criminal laws, it cannot determine their factual content.

It seems that the search for a single controlling principle must fail. A harm based assessment offers us a usefully factual test that protects our welfare and autonomy, but it is too broad in scope and leaves out the moral dimensions of a crime. On the other hand, the normative claim that human beings are equal in dignity or moral worth may offer us a usefully moral justification for our criminal law, but it cannot tell us what kinds of conduct those laws should forbid. The challenge then, is to place these key elements into some kind of harmony by creating a model of the criminal law that not only reflects and protects the lives that we want to live and the kind of community that we want to be, but can also ensure that our criminal laws do justice to all those living within our community of equals.

IV. THE 'GOOD LIFE MODEL' OF CRIMINAL WRONGDOING

My model of the criminal law aims to reflect the value we place both on protecting ourselves from conduct that may harm us and on responding to conduct that does not respect us as persons of equal dignity. It is based on

38 This may account for a recent editorial in the *British Medical Journal* doubting the usefulness of the concept of dignity by Macklin R, 'Dignity is a Useless Concept' (2003) 327 *BritMedJ* 1419.

39 See *supra* ns 8 and 7.

the assumption that there is a logical connection between our vision of the fundamental elements of the good life for human beings and our understanding of the nature of a crime, seen as conduct which threatens those elements. I suggest that we can identify three incommensurate elements of the good life that the criminal law should protect. They are our welfare interests, our autonomy interests and our shared desire to be respected by others as persons of equal dignity and worth. The two factual elements of welfare and autonomy represent the things that we want *for ourselves* from life in general. By contrast, the third element is normative and relational; being respected as a person of equal worth is something that we want *from others* because it confirms our vision of ourselves as members of a community of equals who have recognised in each other a reciprocal entitlement to be treated as equals. These elements were discussed in Section III and appear in Table 1, which follows.

TABLE 1. THE TWO DIMENSIONS OF A CRIME

The Factual Dimension		The Normative Dimension
WELFARE Having and Being	AUTONOMY Choosing, Doing & Achieving	RESPECT Counting as an Equal
1. DEFINITION The welfare factors include all those things, both internal and external to the person, that are important to human existence. 2. FOCUS Passive states of well-being. 3. BASIS Our common needs for: • physical, emotional and mental health; • possessions and wealth; • reputation; • community services and institutions, • social support; and • a safe and secure physical environment.	1. DEFINITION Autonomy is the exercise of control over the conduct of one's own life by defining, choosing and pursuing the good life on one's own terms. 2. FOCUS Active states of well-being or 'well-doing'. 3. BASIS Our common desires to: • define the good life for ourselves; to choose when, where and how to pursue it; and to succeed in that pursuit. • This depends on both - our capacity, and - our factual opportunities for decisions and action.	1. DEFINITION Respect is an attitude which recognises that each human being is entitled to be treated as a person of equal dignity, worth and value. 2. FOCUS A relational state of being treated right by others. 3. BASIS Our shared beliefs in: • the equality of all human beings; • the ideas of justice, reciprocity, rationality and the principle that we should treat: - like cases alike, - equal cases equally, and - different cases differently.

In Table 2, the positive elements in the model of the good life are transposed into the negative elements contained in the model of a crime. Therefore, just like the good life that it reflects and protects, a crime has two dimensions: a normative or moral dimension governed by a principle that requires each person to respect others as persons of equal dignity worth and value; and a

factual dimension that protects our interests in welfare and autonomy, which is governed by the harm to others principle. Because our demand that others respect us as equals contains two sub-aspects that include both the *attitude* that others take towards us as well as their actual *conduct* towards us, the notion of equal respect can be linked both to the definition of fault and the definition of wrongdoing.

TABLE 2. THE TWO DIMENSIONS OF THE GOOD LIFE

THE FACTUAL DIMENSION The 'Harm to Others' Principle		THE NORMATIVE DIMENSION The 'Respect Others as Equals' Principle	
HARM TO WELFARE Setbacks to welfare (ie, our passive states of wellbeing) that make us worse off.	HARM TO AUTONOMY Setbacks to autonomy (ie, our active states of wellbeing) that reduce either our capacity or our opportunities for chosen action.	WRONGDOING Conduct towards others Conduct that deviates from the norm requiring each person to respect others by treating them as persons of equal dignity, worth and value.	FAULT Responses to others An attitude which fails, in the circumstances, to recognise or to respond properly to the equal dignity, worth and value of others.

The key to understanding how this model justifies transforming our reciprocal desires for respect into rules requiring respectful conduct lies in the crucial connection between our vision of ourselves as equals in dignity, worth and value and the primary principle of justice that directs that like cases should be treated alike, and equal cases, equally.⁴⁰ Once we recognise that all human beings are equals, the direction to treat equal cases equally requires more from us than a mere attitude of respect. In fact, the principle of justice is directed not to our attitudes at all, but to our conduct itself; given that we are equals, it requires us – whatever we might think of others – to treat them as equals. This connection between justice and our equal worth enables us to make laws mandating respectful conduct that apply to all within the community of equals and it suggests that the critical message is not that we see ourselves simply as possessing *dignity*, but that we see ourselves as possessing *equal* dignity.

At its moral heart, the criminal law contains a distinctive conception of justice that requires equal treatment of equals by equals. However, before we can give factual content to our moral norm of equal respect, we must return to the good life model and recognise that we are equal not only in a moral sense, but also in two essential factual ways as well. As equal human beings and as equal members of a community we also share a wide range of factual

40 Aristotle first laid down this principle of justice in Book V of *The Nicomachean Ethics* (1998 edition) 106-136.

interests in welfare and autonomy in equal measure. It follows that if our common interests in welfare and autonomy are of equal value, then no one person's interests can take priority over those of any others, because equality mandates a stand-off.

This means that the criminal law, as the law of equal justice, imposes a reciprocal duty on each of us to respect others by treating their fundamental interests in welfare and autonomy as carrying a value that is equal to our own and so, whenever the desires of two or more persons conflict, any use of fraud, force or coercion is ruled out and the only acceptable way to resolve the issue is to resort to persuasion or to let the status quo prevail. It also imposes a limited, unilateral duty on each human animal to respect the interests that we share equally with other non-human animals. Our recognition that we share interests in welfare and existence as a species with other animals, but not interests in autonomy, explains why it is lawful to kill an animal humanely and eat it, but not to torture it or neglect its welfare.⁴¹

The law of equal justice also explains why the criminal law imposes an extended duty on able-bodied adults of full capacity to make special efforts to equalise the position of any children, or non-rational, incapacitated humans who are disadvantaged by their circumstances of factual inequality. In the case of dwarfs, for example, we are obliged as a community to ensure that they are not discriminated against on the grounds of their stature. This comes about because equality is an abstract concept, which, when applied to human beings, makes sense only in circumstances of factual difference. If we must treat equal cases equally we must also treat different cases differently. Consequently we are not entitled to ignore the weak, whose identity and intrinsic worth as human beings remains unchanged by their factual incapacity, rather our duty is to make extra efforts to compensate for their reduced capacity for autonomy. So, in our encounters with other beings, there is first a moment of recognition when we realise that we are equal in our inherent worth and in our factual interests in autonomy and welfare. This is followed by a moment of acknowledgement of the consequent duty to respect that equal dignity and those equally shared interests, and finally, each time we are faced with choosing our path through life, with a moment of choice to accept or reject that duty. This takes us back to Aristotle, who said that 'if a man harms another by choice, he acts unjustly ... provided that the act violates proportion or equality.'⁴²

41 It appears that some animals may share our passion for equal justice: Brosnan SF & de Waal FBM, 'Monkeys Reject Unequal Pay' (2003) 425 *Nature* 279.

42 *The Nicomachean Ethics*, supra n 40 at 127-128.

V. CONCLUSION: THE PARADOX OF DIGNITY

The good life model of the criminal law suggests that we are not justified in criminalising any conduct unless it breaches not only the 'harm to others' principle, which gives factual content to this concept of a crime, but also the 'equal respect for others' principle which, on my account provides the criminal law with its moral justification. Under the good life model of the criminal law, the primary moral principle requiring us to respect the equal dignity, worth and value of others explains why we also need the harm principle to give factual content to the criminal law – because we cannot treat others as moral equals until we can identify the ways in which we are factually equal. Furthermore, the model's combination of the two principles also helps us to limit the spread of the criminal law that would occur if we used only the harm principle as our source of limits. The good life model, because it contains the equal respect principle that focuses on both the attitude of disrespect and the wrongful conduct that evidences that disrespect, defines a crime as conduct that is animated by a failure to recognise or to respond properly to the equal dignity, worth and value of others and their equal entitlement to pursue and enjoy their welfare and exercise their autonomy within the boundaries provided for by the state. This means that we cannot classify any and all conduct that risks harm as criminal, but only the conduct that risks harm to the equal interests of others, which we read as a conscious failure of respect.

The good life model places the duty of equal justice not only on each of us within the community as individual persons, but also upon the most dangerous of legal persons: the state itself. It not only justifies the state's punitive responses to those who have failed in their conduct to do equal justice to others but also limits the state to criminalising only conduct that both threatens harm to the equally shared welfare or autonomy interests of others and at the same time is read as a failure to respect the equal value of others. This account of the limits on the criminal law leads to an interesting paradox that results from the asymmetry feature of the meaning of dignity discussed in section III. This paradox of dignity requires the state, in the name of our equal dignity, to refrain from criminalising certain controversial or upsetting kinds of conduct like dwarf tossing events that may be perceived as supremely undignified. It arises because our vision of ourselves as equals in dignity and worth, which gives the criminal law its moral justification, grounds our duty to respect others as sovereign equals, entitled to exercise their capacity for autonomy either in ways that may be antithetical to their own welfare interests as objectively viewed by others or in ways that are perceived by others to be undignified or even offensive (always providing that their exercise of that autonomy does not itself risk harm to the welfare or autonomy of others). This means that

we must respect not only the choices of a dwarf, who enjoys being paid to fly through the air in a safe, regulated dwarf tossing event, but also the choices of those who wish to test their strength by hurling the dwarf through the air. I would argue that legislation forbidding safe, regulated and consensual dwarf tossing is impermissible under the good life model: first, because the conduct is not relevantly harmful (it neither harms the dwarfs' welfare interests, nor infringes their autonomy interests), and secondly, because it cannot be read as displaying any attitude of disrespect to the equal value of the dwarfs.

Any legislation imposing criminal sanctions on those who organise dwarf tossing contests would appear, therefore, to contain a false evaluation of the relative worth of citizens. The false evaluation contained in such a statute would be: "Because dwarfs are not equal to persons of full stature, they must be protected from autonomously choosing, as others of full stature do, to engage in these (possibly) demeaning kinds of activities and employment." Such a paternalist statute improperly treats the dwarf as a person of lesser capacity by comparison with others of full stature and amounts to impermissible discrimination based on size. Consequently, I conclude that under the good life model, the state can insist that dwarf tossing is carried out in safety, but it cannot criminalise those events within a legal system that, on my account, is itself justified because it must stand up for our equal dignity.

Should Paternity Be Linked To Sexual Intercourse?

Michael Eburn*

I. INTRODUCTION

Although issues of paternity are usually uncontroversial, the use of artificial insemination has required the law to develop rules to determine who is to be considered the father of a child. This paper will look at paternity and the important, but misplaced focus that the law places on sexual intercourse in deciding who should have paternal rights and responsibilities.¹

It is argued that the law could choose between one of three reasonable options for defining who is the father of a child, they are the genetic father, the social father or accept that children have more than one father. Under current Australian law a child can have only one father but determining who the 'father' is depends on none of these factors, instead the law's focus is on whether or not the child was conceived following an act of sexual intercourse or artificial insemination. It is argued that the current approach is misplaced and unreasonable. In developing this argument I will explore the logical implications of the various legal options available.

II. PATERNITY AND AUSTRALIAN FAMILY LAW

The *Family Law Act* 1975 (Cth) does not comprehensively define who is a father or a parent of a child. In *Tobin v Tobin* 2 the court was asked to take an expansive view of who is a parent and include a person who had been the foster father of a child and who had, therefore, voluntarily undertaken the care of a child and traditional paternal responsibilities. With respect to the obligation to pay child support, the court said 'in our view, the natural meaning of the word [parent] of a child is the biological mother or father of the child and not a person who stands in loco parentis.'³

Statutory provisions create exceptions to this rule and so give an extended definition of 'parent'. Where a child has been adopted, 'parent' means an adoptive parent of that child.⁴ Where a child has been conceived as a result of

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1 Issues can arise as to who is the mother of a child, but they are not issues I will explore here.

2 (1999) 24 FamLR 635.

3 Ibid, 645.

4 *Family Law Act* 1975 (Cth) s 60D.

artificial conception procedures, then, subject to relevant state law (discussed below), the father is the man who was married to the woman at the time and who consented to the procedure.⁵ In both of these cases, the biological father is not a 'parent' for the purposes of either the *Child Support (Assessment) Act* 1989 (Cth) or the *Family Law Act* 1975 (Cth).⁶

Paternity and State Legislation

State and Territory legislation not only defines who the father of a child is, but also who is not the father.⁷ Where a child is conceived as a result of an artificial conception procedure, the sperm donor is conclusively presumed not to be the father of the child. Where the woman is married or in a de facto relationship, (and in Western Australia and the Northern Territory, this includes a same sex de facto relationship,⁸) and her partner consents to the procedure, then her partner is presumed to be a parent of the child.

The Assumptions behind Paternity

There are a number of assumptions behind paternity law. First it is generally assumed that every child needs a father. Of course every child does require some male person to provide sperm in order for a pregnancy to occur, but this assumption is that every child needs a social father. The Prime Minister, John Howard has said:

The issue here is the right of children in our society to have the reasonable expectation, other things being equal, that they have the care and attention and love of both a mother and a father.⁹

There is also an assumption that the family is made up of two parents, the mother and father and that there is no room (except in Western Australia and the Northern Territory, where both parents may be women) for any other 'parenting' model. In most Australian jurisdictions, a child has two, heterosexual parents and no more; and anything else is seen as a departure from both the norm and the best.

5 *Family Law Act* 1975 (Cth) s 60H.

6 *Re B and J* (1996) 21 FamLR 186; *Re Patrick* (2002) 28 FamLR 579.

7 *Parentage Act* 2004 (ACT) s 11(5); *Status of Children Act* 1978 (NT) ss 5D, 5F; *Status of Children Act* 1996 (NSW) s 14(2); *Status of Children Act* 1978 (Qld) ss 15, 18; *Family Relationships Act* 1975 (SA) ss 10(d), 10e(2); *Status of Children Act* 1974 (Tas) s 10C(1) and (2); *Status of Children Act* 1974 (Vic) ss 10C, 10D, 10E and 10F; *Artificial Conception Act* 1985 (WA) ss 6 and 7.

8 *Status of Children Act* 1978 (NT) ss 5DA; *Artificial Conception Act* 1985 (WA) s 6A.

9 'Transcript of the Prime Minister The Hon John Howard MP Radio Interview With John Faine – 3L0 2 August 2000' <<http://www.pm.gov.au/news/interviews/2000/interview352.htm>> at 4 May 2005.

Artificial Insemination and the Nuclear Family

Where a child is conceived as a result of artificial conception, the majority of Australian legislative schemes assume that the child will be born into a heterosexual nuclear family of mother, father and the children. Even in Western Australia and the Northern Territory, there is no room for a 'father', other than the mother's husband. There is no expectation that the biological father, the sperm donor, will want to, or should, play any part in the child's life. Accordingly the sperm donor is expected to be an anonymous, philanthropic donor, who donates sperm for the purpose of assisting some unknown couple to achieve their dream of having children.

The presumptions in the legislative scheme governing children conceived via artificial fertilisation procedures, and in particular artificial insemination displace the 'the natural meaning'¹⁰ of the word father and replace the biological father with social father (if there is one). The aim is to ensure that the family of mother and father and child born as a result of artificial insemination is for all legal purposes equal to the family of mother, father and child conceived by an act of sexual intercourse. Further

It enables a woman to have a child using sperm obtained from a man who is not her husband, secure in the knowledge that that man will not be able to interfere in the life of her child. ...¹¹

This act of replacement may well be reasonable if we accept the view of the Prime Minister that the heterosexual nuclear family is the appropriate, and the best, place to raise children. It may also be reasonable, even without the heterosexual prejudice, to recognise that a man who is actively involved in a child's life is more appropriately described as a 'father' than a man who donates genetic material essential for the child's conception, but who is otherwise not involved in the child's life. That is, the social parent is more important than the biological parent.

The problem with all assumptions about what people want and how people will behave, is that not everyone behaves as it is assumed they will, and fixed assumptions do not give sufficient recognition to choices that people may want to make. *Re Patrick*¹² is a case in point. The social parents of Patrick were a lesbian couple, but the sperm donor was a known former friend of Patrick's biological mother. The initial assumption, that a child will be born into a heterosexual nuclear family, was clearly not met. Further, whilst the parents of Patrick may have believed the assumption that sperm donors do

10 (1999) 24 FamLR 635, 645.

11 *Ganter v Whalland* (2001) 54 NSWLR 122, 130.

12 (2002) 28 FamLR 579.

not want to be involved in the life of the child, their sperm donor did not meet their expectations and looked for ongoing contact with Patrick. He ultimately sought, and was granted, orders in the Family Court to ensure continuing contact. Contrary to the mother's expectations, the law did not guarantee that the sperm donor would not 'be able to interfere in the life of her child.'¹³

The fact that the biological father in *Re Patrick* wanted to know the child he helped create does not appear to be unique. In his judgment Guest J referred to 'a survey of 84 women attending the Sydney Lesbian Parenting Conference in 2000.' That survey found that in 12% of cases, the sperm donor had a 'sharing of parental responsibilities'; 33% of parents reported some contact between the child and the donor; 22% had regular contact and 13% had extensive contact.¹⁴

In 2004 the Auckland Family Court gave a sperm donor shared guardianship of the child produced by artificial insemination.¹⁵

A review of Australian donors advertising on 'Sperm Donors Worldwide'¹⁶ reveals 14 donors who of whom 11 indicated they would want, at least, to be identified to the child as the sperm donor. Some wanted more, they said they would:

... not be a hands-on 'father' on a day-to-day basis, but would still care for and love him/her. I would like to visit him/her occasionally and for him/her to eventually know that I am the biological father.

... like some involvement.

... like to be a known donor which could mean anything from co-parenting to regular visitation, yearly meetings, or at least meeting the child at 16 years old, or earlier if he or she requests.¹⁷

What this shows is that although the majority of sperm donors may wish to remain anonymous, a significant number want to know the children that are produced and to be involved in their lives. The assumption that all donors wish to remain anonymous is not correct for a significant number of donors and the families who bear their children.

13 *Ganter v Whalland* (2001) 54 NSWLR 122, 130.

14 *Re Patrick* (2002) 28 FamLR 579, 651.

15 'Victory for Sperm donor' *The Age* (Melbourne), 19 April 2004 <<http://www.theage.com.au/articles/2004/04/18/1082226636127.html>> at 6 June 2005.

16 <http://www.sperm-donors-worldwide.com/free_sperm_donations_australia.htm> at 4 May 2005.

17 That sample may of course be distorted by the fact that they are making sperm available via the World Wide Web whereas donors who want anonymity would go to more traditional health clinics where their privacy might be guaranteed.

In *Re Patrick* Guest J was concerned with a family created by a homosexual couple. In that context he said that the *Family Law Act* 1975 (Cth) ‘... was drafted with a heterosexual model in mind and thus fails to recognise the complexity of family forms that might be created through artificial insemination.’¹⁸ This failure ‘to recognise the complexity of family forms’ is equally true whether the family is homosexual, heterosexual or a single parent family. As family forms change with increasing numbers of single parent families and blended families it might be time to reassess all our presumptions about paternity and the ramifications of the current law.

III. CHOICES

The choice we should make

Clearly biological and social fathers are important and the law can, and sometimes does, choose between them when deciding where paternal rights and responsibilities lie. It is arguable there is no need to make a choice at all and we should accept that a child can have more than one father and that both the genetic and social fathers should be regarded as ‘fathers’ according to law. If, however, we accept for the sake of the argument, that a child can have only one father¹⁹ then the father should be either the social father or the biological father.

The choice we do make

The problem with the current law is that it recognises two essential aspects of fatherhood, the genetic and the social, but the distinction upon which paternity is based is neither of these, rather it is whether or not an act of sexual intercourse took place. Sexual intercourse is not, and should not, be the definitive test of fatherhood so the law’s criteria for distinguishing when the genetic and when the social father is to be considered the lawful father of the child is misplaced.

An example

Let us take as an example, Neville. Let us assume that Neville is the ideal man with a PhD in astrophysics and several competitive aerobics titles to his name. Assume the following scenarios occur in Neville’s life:

1. Neville’s sister, Jane is a lesbian. To assist Jane and her partner, Mary, to have a family, Neville agrees to donate sperm to allow Mary to conceive a child. They want to use Neville so there is some genetic relationship

18 *Re Patrick* (2002) 28 FamLR 579, 652.

19 *Tobin v Tobin* (1999) 24 FamLR 635, 645.

between Jane and the resultant child. Neville engages in an act of sexual intercourse with Mary as a result of which Mary falls pregnant and gives birth to Annabelle ("A"). Neville takes on his agreed role of 'uncle' with enthusiasm.

2. Neville likes the feeling of helping a couple to conceive, so he makes a donation to the local sperm bank. With Neville's good looks and intellect, he is a popular donor and very soon after his donation a child, Belinda ("B"), is born to a married couple.
3. Neville goes to a disco where he meets a young woman and they engage in an act of sexual intercourse. They use contraception which, unfortunately, fails and Neville's casual sexual partner falls pregnant. Neville indicates that he has no interest in being a father and offers to pay for, and support her through, a termination of pregnancy; an offer which she declines. She eventually gives birth to Christopher ("C").
4. Finally Jane and Mary decide to have another child. Neville again agrees to donate sperm and does so by ejaculating into a cup; the sperm is introduced to Mary's body via a syringe. Mary again falls pregnant and gives birth to David ("D"). Again Neville takes on the role of uncle to D.

Neville is the lawful father of two children, that is Mary's first child, 'A' and the child born as a result of the act of casual sexual intercourse, 'C'. He is not the lawful father of the other two children, 'B' and 'D'. The question that we need to ask is 'What makes the various cases similar or different and is that sufficient to justify the different legal position of Neville?'

Genetic issues

Clearly the genetic relationship between Neville and the four children is the same. He is the genetic or biological father of each child. Clearly it is not genetics that is decisive when determining who the 'father' is.

Social issues

The social relationships are clearly different. In the case of 'D' Neville has an ongoing relationship with the child, but it is as 'uncle'. That relationship can give rise to standing in the Family Court. Although the court could not order him to pay child support,²⁰ he would, if he can establish that he is 'concerned with the care, welfare or development of the child'²¹ have standing to apply for a parenting order to ensure ongoing contact with D. Standing depends on

²⁰ Ibid.

²¹ *Family Law Act 1975* (Cth) s 65C.

the fact that there is a relationship²² and the ultimate order would depend on the court's assessment of what is in the child's best interests²³ but the result is that there is at least the possibility of seeking the court's assistance to continue the relationship that the parties agreed to and have established.

The situation is not the same for A. With respect to A, the intention is the same; that is A will be the child of Jane and Mary and Neville will be her 'uncle'. Despite that clear intention Neville is the child's father and, again despite a clear intention to the contrary, Neville has 'parental responsibility' for A²⁴ and the primary duty to maintain A.²⁵ Should Mary apply for child support, Neville would be liable to support A even though that liability was never intended. Neville would have standing to apply for a parenting order, and in considering the child's best interests, the Family Court would have to have regard to the underlying principles that:

- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
- (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
- (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future parenting of their children.²⁶

These rights can be enforced by and against both Mary and Neville. Despite the fact that when the child was conceived, it was not intended that Neville would be a social parent he could apply to have A live with him or for contact; Mary could apply for an administrative assessment of child support²⁷ and Neville would be obliged to provide that support.

Neville's responsibilities as a parent to A may be very important if Jane and Mary were unable to care for A, for example if they were killed. In this case A would be without her social parents, and Neville, because he is her father,

22 *Family Law Act 1975* (Cth) s 65C.

23 *Family Law Act 1975* (Cth) s 65E.

24 *Family Law Act 1975* (Cth) s 61C.

25 *Child Support (Assessment) Act 1983* (Cth) s 3.

26 *Family Law Act 1975* (Cth) s 60B.

27 *Child Support (Assessment) Act 1989* (Cth) s 25.

would have an obligation to support and care for A. This is an obligation that does not apply to D even though the genetic and social relationships are the same.

With respect to child B, under State, Territory and Federal law, Neville is not the father of the child.²⁸ Regardless of what happens to that child, Neville has no standing to seek a parenting order, and no obligation to support the child.

With respect to child C, as with child A, Neville is the child's father with all the rights and responsibilities imposed by law. There is however a difference here between A and C. In the case of the conception of A, Neville intended, in fact desired, that a child would be conceived and born. It was his objective, as it was with the conception of children B and D, to see that a child was born.

With respect to child C it was clearly not his, or his partner's, intention to have a child conceived and born. In this case they used contraception to try and avoid a pregnancy. Once the child was conceived, the choice of whether or not to terminate the pregnancy was hers and hers alone. He could neither force her to have a termination, nor could he force her not to.²⁹ Her choice, however, determined his rights, obligations and liability. Once the child was born he can be liable to maintain the child as well as having parenting rights and responsibilities. These rights and responsibilities can be enforced against the wishes of either party, so he could seek orders relating to residence and contact even though she might wish him to have no contact with the child or with her. He can be forced to make a financial contribution to the welfare of the child, even though he has no contact and did not want the pregnancy to proceed. His wishes, and hers, are irrelevant in determining legal rights and responsibilities vis-à-vis the child and each other.

IV. WHAT SHOULD BE THE TEST?

The difference in the various legal positions is determined not by genetics, social role, or intention but by whether or not an act of sexual intercourse took place. With respect to children A and C the child was conceived after an act of sexual intercourse and so Neville is the child's father. In the case of children B and D there was an artificial conception procedure and so he is

28 *Parentage Act 2004 (ACT)* s 11(5); *Status of Children Act 1978 (NT)* ss 5D, 5F; *Status of Children Act 1996 (NSW)* s 14(2); *Status of Children Act 1978 (Qld)* ss 15, 18; *Family Relationships Act 1975 (SA)* ss 10(d), 10e(2); *Status of Children Act 1974 (Tas)* s 10C(1) and (2); *Status of Children Act 1974 (Vic)* ss 10C; 10D; 10E and 10F; *Artificial Conception Act 1985 (WA)* ss 6 and 7.

29 *In the marriage of F and F* (1989) 13 FamLR 189.

not the father. It does not matter that in the case of D the procedure was not medically supervised, it was an artificial conception procedure and the legal consequences follow.³⁰

Whether or not an act of sexual intercourse takes place should not be the defining test for fatherhood. The appropriate choice, if a choice has to be made, should be based on either genetics, or social responsibility and intention. The consequences of these options are considered below.

All biological fathers are fathers

We know from the experience with adopted children that children do want to know who their biological parents are. Children may have a significant interest in tracing their genetic background to determine something about who they are.

Psychologists have recognised a condition of “genealogical bewilderment” which children can experience if they are unable to discover their full geological ancestry. ... it is important for individuals to have a “sense of continuity” which derives from knowledge of their “origins”.³¹

This need has been recognised by commentators³² and in Victoria where the *Infertility Treatment Act* (Vic) permits children born as a result of artificial conception procedures to obtain information, including identifying information, about their donor parent.³³

If we adopt a biological test, then the biological father of a child, howsoever conceived, should be recognised as ‘a’ father of the child. This does not however, mean that the biological father will have instant rights and/or responsibilities. It will still be the case that families can negotiate the role for each party in the family.

Where a child is conceived by artificial insemination and born into a family that is capable of supporting that child, then there is no obligation upon the donor to be involved in the child’s life. Life would be just as it is for most artificial insemination families. Recognition of biological parenthood would do no more than give the donor standing but should a sperm donor appear after many years and demand some involvement in the child’s life, that could

30 *B v J* (1996) 21 FamLR 186; *W v G* (1996) 20 FamLR 49; *Re Patrick* (2002) 28 FamLR 579.

31 Gabrielle Wolf ‘Frustrating Sperm: Regulation of AID in Victoria under the *Infertility Treatment Act* 1995 (Vic); (1996) 10 AustralianJFamL 71, 74-75.

32 See Helen Gamble ‘Fathers and the New Reproductive Technologies: Recognition of the Donor as Parent’ (1990) 4 AustralianJFamL 131, 140-141.

33 *Infertility Treatment Amendment Act* 1995 (Vic), s 79.

be resisted by the social parents on the basis that such contact would not be in the child's best interests. Should it be necessary, the court would have to determine that issue but it can be predicted that, as is currently the case, it would be '... the social and not the genetic relationship of a parent ... [that will be] the most influential in court.'³⁴

On the other hand, recognition that biological parenthood is an important factor, then, as in Victoria, children born as a result of artificial insemination would have a right to access information about their father including identifying information. Further, if a man is a father of a child then he would have an obligation to maintain that child should that be necessary. Again that obligation would not be automatic, where the social parents are able to provide for the child's needs there would be no need to involve the biological father. If, on the other hand, the social parents fall on hard times then the child and/or his or her social parents could look to the biological father for support. Guest J said that a legislative provision that presumes a sperm donor is not a father

is readily understood [because] to encumber a donor, for example, with financial responsibility for child support pursuant to the provisions of the *Child Support (Assessment) Act* 1989 ... would be fundamentally wrong...³⁵

It is not clear, however, why it would be fundamentally wrong. Here we have a man deliberately and intentionally contributing to the birth of a child. We would think it fundamentally wrong for a man to turn his back on the needs of children born as a result of an act of sexual intercourse, including casual sexual intercourse and such an action is not permitted under current law. A man may be required to pay child support for any child conceived after an act of sexual intercourse,³⁶ regardless of any express agreement to release him from that obligation³⁷ and regardless of any clear evidence that it was not his intention to father a child. Why then should a man who knowingly contributes to the birth of a child not accept some responsibility for the welfare of that child should the child have needs that he can contribute to?

The consequences of this argument, if adopted, is that sperm donors would not be guaranteed anonymity nor freedom from financial responsibility for the children they conceive. This may well mean that less people are willing to donate sperm but if that means only men who are prepared to take some responsibilities for their reproductive decisions then that may be better.

34 Supra n 32 at 143.

35 *Re Patrick* (2002) 28 FamLR 579, 640.

36 *Child Support (Assessment) Act* 1983 (Cth).

37 *B v J* (1996) 21 FamLR 186, 195; *Re Patrick* (2002) 28 FamLR 579, 648.

Holding all biological fathers at least to some degree responsible for the children they help create would guarantee that men do not see sperm donation as a way to have ‘... an informal relationship with biological children without having legal [or financial] responsibility for them.’³⁸ As we have seen, under current law, a man can donate sperm using an artificial conception procedure with the clear intention that he will be involved in the child’s life, perhaps as an ‘uncle’ or even identified as the child’s father. That man may establish a relationship with the child that can be enforced with parenting orders,³⁹ but he is absolved from any financial obligation to maintain the child regardless of the child’s needs.⁴⁰

We would consider that a man who wanted to father as many children as possible, for whatever reason, as somewhat morally questionable, regardless of how children were conceived. The current law may well encourage men to show some degree of sexual responsibility, knowing that if their sexual partners become pregnant, that may have considerable financial and emotional consequences. We require no such responsibility from sperm donors who may donate many times, to create many children. Their motivation may be generous (as may be the man who agrees to have sex with a friend so that she may fall pregnant) or it may be a questionable desire to see his genes reproduced as much as he can. One sperm donor on ‘Sperm Donors Worldwide’ said:

I have done this before and am a regular donor at some hospitals and clinics in Melbourne, as well as some private encounters-all children are healthy and adorable...⁴¹

We would not condone as morally worthy a man who could say he had six children to six different mothers, yet here is a man quoting the number of children he has produced as a testimonial.

To allow men to knowingly contribute to the birth of children, with no accountability and with no obligation to take some responsibility for the welfare of the children they produce is, surely, more ‘fundamentally wrong’ than suggesting that they may have a responsibility to the children they consciously, and voluntarily agreed to produce, should the need arise?

38 Supra n 31 at 77.

39 As in *Re Patrick* (2002) 28 FamLR 579.

40 *W v G* (1996) 20 FamLR 49; *Tobin v Tobin* (1999) 24 FamLR 635.

41 <http://www.sperm-donors-worldwide.com/free_sperm_donations_australia.htm> at 12 April 2005, 8.

Social fathers and parenting plans

The Hon Justice Alistair Nicholson, former Chief Judge of the Family Court said ‘In my view, it is not procreation that defines a family relationship, it is the commitment and the financial and emotional interdependence of family members.’⁴² Further:

Social science research has suggested that parenthood is a psychological relationship that should be understood from the perspective of the child, and that while biology is important psychological or social attachments are of at least equal, if not more significance.⁴³

Accordingly recognising that the man who voluntarily and willingly takes on the role of ‘father’ and who forms a father/child relationship with the child that he, along with the child’s mother sought to have, gives effect to what we expect is the intention of everyone involved and reinforces the central place of the heterosexual nuclear family.

Currently the law does not allow parents of children to determine their rights and responsibilities by way of contract.

The notion that a party can by agreement contract out of a statutory right to maintenance has been rejected by High Court doctrine in the context of contracts to exclude statutory rights to maintenance on divorce in *Brooks v Burns Philp Trustee Co Ltd* and in that of agreements to forego testators’ family provision in *Lieberman v Morris*. Public policy is opposed to the surrender of such rights especially where the beneficiary becomes a charge on the public purse.⁴⁴

In *B v J* Fogarty J said:

... it is, in my view, untenable to suggest that an otherwise liable parent may contract out of liability for child support, or that an otherwise entitled parent may waive a “right” to assistance for support of his or her child.... as a matter of logic it would appear to apply equally to cases where a child is born as a result of intercourse, in the context of an agreement that one of the parties would bear no financial responsibility. The considerations said to give rise to an estoppel would exist regardless of the method of conception. Such agreements or representations would not be enforced in Australia.⁴⁵

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- 42 Alastair Nicholson ‘The Changing Concept of Family: The Significance of Recognition and Protection’ (1996) 3 Murdoch University Electronic Journal of Law [54] <<http://www.murdoch.edu.au/elaw/issues/v3n3/nicholso.html>> at 18 April 2005.
 - 43 Fiona Kelly ‘Redefining Parenthood: Gay and Lesbian Families in the Family Court – the Case of *Re Patrick*’ (2002) 16 AustralianJFamL 204, 206.
 - 44 Dorothy Kovacs ‘The AID Child and the Alternative Family: Who pays? (or Mater semper certa est – That’s easy for you to say!)’ (1997) 11 AustralianJFamL 141, 157.
 - 45 *Re B and J* (1996) 21 FamLR 186

In *Re Patrick* Guest J said:

An agreement absolving a father from the obligation to pay maintenance for a child would not be enforceable either directly or by way of estoppel. Nor would an agreement absolving the father from any other aspect of parental responsibility. Equally, a written agreement which provided for a donor to have frequent contact with a child could not prevail over a finding by the Court, in a given case, that contact was not in the best interests of the particular child.⁴⁶

Notwithstanding these rules, the decision in *Re Patrick* did at least in part, depend on a finding that the parties had agreed that the sperm donor would have ongoing contact with Patrick Fiona Kelly in her analysis of this case made the point that:

In making his decision about contact Guest J gave considerable weight to the agreement between the parties. While he stated that the agreement was not binding on him ... his decision to award contact rested heavily on his finding that the donor father had donated his genetic material upon an understanding that he was to have a role in the life of any prospective child.⁴⁷

In *W v G* the court could not order the sperm donor to pay child support for the benefit of the child as he was not, legally, the child's father. The court did however, order the mother's lesbian partner to pay child support on the basis that it would be inequitable to allow her to avoid the obligation given that she had encouraged the mother to conceive the child and had promised that she would act as a co-parent and would contribute to the raising of the child. The court was specifically giving effect to the promise between the parties.⁴⁸

The model for resolving parenting disputes in the Family Court is to encourage parents to make their own agreements as to parenting and child support⁴⁹ though agreements may be varied by the Court where that is required in the child's best interests.⁵⁰

Dorothy Kovacs argues that:

... it is too late in 1996 [and more so in 2005] to say that it is against public policy to absolve a donor from the obligation for child support, when for more than a decade state laws have provided that a donor has no rights and no obligations in respect of a child born as a result of donation. Accordingly the argument may be put that a contract between consenting adults whereby

46 *Re Patrick* (2002) 28 FamLR 579, 648.

47 Fiona Kelly 'Redefining Parenthood: Gay and Lesbian Families in the Family Court – the Case of *Re Patrick*' (2002) 16 AustralianJFamL 204, 211.

48 (1996) 20 FamLR 49.

49 *Family Law Act* 1975 (Cth) ss 63B and 63CAA.

50 *Family Law Act* 1975 (Cth) s 63F.

the man agrees to provide semen on condition that the woman will keep him safe from child support obligations should not in an appropriate case be seen as offending public policy.⁵¹

In 2005 it would be appropriate to allow clear statements of intention and express contracts to determine the legal status of family relationships. The importance of agreements has already be recognised in *W v G*⁵² and, at least in part, in *Re Patrick*. In other cases, the court's inability to give clear effect to people's clear intention has been the subject of criticism.⁵³

Kelly argues that 'child support liability in gay and lesbian families should be based on a social parenting model that reflects the child's actual family structure rather than biological ties.'⁵⁴ Arguably the same conclusion should also apply to heterosexual families. In *In the matter of an application pursuant to the Births Deaths and Marriages Registration Act*⁵⁵ and in *PJ v DOCS*⁵⁶ the courts were faced with a-typical heterosexual families where children were born via a surrogacy arrangement. Here again the court could not determine who was the child's parents using a 'model that reflect[ed] the child's actual family structure rather than biological ties.' Here legal rules surrounding conception and parenting presumptions meant that the men, who were both the social and biological fathers were not at law the fathers of their children. The legal parents in the first case were the husband's brother and his wife; and in the second case the mother's own parents. If parenting responsibilities were based on 'a social parenting model that reflects the child's actual family structure rather than biological ties'⁵⁷ then the two couples, who wanted to have a child and who were concerned with raising the child in an otherwise traditional heterosexual family would have been for all purposes, the parents of the children they were raising.

If we allow families to define their own relationships then parents, social and biological, could negotiate their degree of involvement in the lives of their families. It would allow parents, regardless of how their child is conceived, to determine how they will parent the resulting child – even if that agreement is that one party (usually the father) will have no rights or obligations.

51 Supra n 44 at 159.

52 *W v G* (1996) 20 FamLR 49.

53 *PJ v DOCS* [1999] NSWSC 340 (Unreported, Windeyer J, 6 April 1999); *In the matter of an application pursuant to the Births Deaths and Marriages Registration Act 1997* (2000) 26 FamLR 234.

54 Supra n 47 at 225.

55 (2000) 26 FamLR 234.

56 [1999] NSWSC 340 (Unreported, Windeyer J, 6 April 1999).

57 Supra n. 54.

To return to the example of Neville he has never intended to be a 'father' or have any involvement in the lives of the children 'B' and 'C'. He is not the father of 'B' as the conception was a result of artificial insemination but he is the father of 'C' even though he did not intend to be a father. Further his legal obligation to 'C' may mean an enforced relationship with C's mother even if neither of them desires that relationship. Neville may seek parenting orders and C's mother may seek, and may be forced to seek under Social Security provisions, child support from Neville.

Again, Kelly argues that in homo-nuclear families, to require the biological father to pay child support '...would undermine the independence and boundaries of the homo-nuclear family unit.'⁵⁸ This is not only true for homo-nuclear families. Where the law insists that there is a relationship between biological parents and their children, it undermines the self selected boundaries of the family, whether homo-nuclear, hetero-nuclear or single parent. If we allow parties to negotiate their own family arrangements, Neville, and his casual sexual partner, could agree that he has no obligations and she need not be forced to have an ongoing relationship with him, that neither of them want.

Some may find this consequence 'fundamentally wrong' as it would allow Neville, having engaged in an act of sexual intercourse with the inherent risk that a pregnancy will result, to avoid any responsibility for his actions. As we have already seen however, Neville has no responsibility, at least no financial responsibility, with respect to A, B or D even though in each case it was his intention that a child would be conceived and born. Is there any moral difference in these cases? In *A v C*⁵⁹

... Ormrod LJ described the relationship between an AID father and the child in a ... colloquial way when he said there was "some difference, but not much, between this case and that of a man who gets a girl pregnant in a casual act of intercourse on the way home from the pub one night."⁶⁰

If it is true that there is no significant difference between a sperm donor and a casual sexual partner, then the legal consequences for both should be the same. Either the father of a child conceived through an act of sexual intercourse may be excused from obligations to the child or the biological father should have paternal obligations regardless of the method of conception. If we allow Neville to be excused from any responsibility for his decision to be the biological father of A, B and D, then there is an equal, if not stronger case, to excuse him from responsibility toward C where he simply made a decision to have sex, not to be a father. On the other hand, Neville is the genetic father of

58 Supra n 47 at 226.

59 [1985] FLR 446.

60 Supra n 32 at 137.

all the children, so if we refuse to allow Neville to escape his responsibility for child C, on the basis that he knowingly engaged in an act of sexual intercourse and must be responsible for the foreseeable but unintended consequences of his actions, then he should be at least equally responsible in those cases where the birth of a child was not only foreseen it was intended.

Finally to give priority to the biological nature of fatherhood, ahead of the social, can lead to disturbing results. In *Magill v Magill*⁶¹ Mr Magill attempted to sue Mrs Magill in deceit when he discovered that he was not the biological father of 2 of her 3 children. The children at the time of the action were 13 and 14 years old and presumably Mr Magill, their social father, had developed an emotional relationship with the children as well as paying child support for them since his separation from his wife 3 years earlier. Notwithstanding this, his evidence was

... that it was his belief that he was the [biological] father that caused him to provide the financial and emotional support for the children ... [and] had he known their paternity he would not have maintained the two children...⁶²

We do not know what sort of relationship there was between Mr Magill and 'his' children, but there is something repugnant in thinking that a person who has been involved in children's lives, and who is, to them, their 'father' can say that he has no further obligation to them simply because of their biological paternity. Whether that consequence is desired by an estranged wife who wants to exclude her former husband from the life of the children, or an estranged husband who suddenly finds he can free himself of family demands, to sever an emotional relationship on such grounds cannot be in the child's best interests. Equally if a social father has encouraged a certain lifestyle, eg funding a private school education and/or expensive hobbies for 'his' children, to suddenly leave them destitute because you discover they are not 'your' children is to deny the lived experiences of the family and the best interests of the children concerned. Whilst it is possible to have some sympathy for a man who has been knowingly deceived by his partner, it reflects more on the husband/wife relationship than the father/child relationship. If we are offended by Mr Magill's claim that he only offered 'financial and emotional support' because of a belief in a biological relationship, then that offence is because of a belief that it is the emotional relationships and not biology that is the important aspect of 'being' a father.

61 [2005] VSCA 51 (Unreported, Ormiston, Callaway and Eames JJA, 17 March 2005).

62 Ibid, 82.

V. MUST WE CHOOSE?

Perhaps we do not need to make a choice at all. Guest J, in *Re Patrick* said:

Children conceived via artificial donor insemination may have only two mothers, others ... may have two mothers and a father, and others, may have two mothers and two fathers. In a rare number of cases a child may have only two fathers.⁶³

He argued that:

... consideration should be given to review the definition of 'parent' ... to take into account that there are varying arrangements between donors and prospective mothers, and that donors such as the father in these proceedings may not only consider themselves a 'parent', but may also be considered by the recipient of the genetic material to be a parent.⁶⁴

On this view, we can and should recognise that both the biological and social father is a 'father' but with differing degrees of involvement with, and responsibility for, the child. The law and the courts need only be involved when there is disagreement.

It would be possible, with legislative changes, to acknowledge that both biological and social parents have obligations to children that they conceive or voluntarily take responsibility for. This could be done first by retaining the presumption that a man who consents to his wife becoming pregnant via artificial insemination is 'a' father, but so, is the sperm donor.

Equally we could acknowledge that a man who has been a social father to a child has rights and responsibilities with respect to that child. That is already done with respect to parenting orders. As we have seen the donor in *Re Patrick*⁶⁵ could obtain a parenting order, not because he was the child's father but because he had an ongoing relationship with the child and it was, in the Court's opinion, in the child's best interests for that relationship to continue. The court is not limited, when it comes to parenting orders, to make orders only in favour of the biological father, but can make orders for the benefit of anyone who can show they are 'concerned with the care, welfare or development of the child'.⁶⁶ The donor in *Re Patrick*⁶⁷ could not, however, be liable to pay child support.

63 *Re Patrick* (2002) 28 FamLR 579, 651.

64 *Ibid*, 647-648.

65 (2002) 28 FamLR 579.

66 *Family Law Act* 1975 (Cth) s 65C.

67 (2002) 28 FamLR 579.

In the area of child support, recognising that it is the man who plays the role of 'father' who should be regarded as the legal father is not foreign to the law. There is an exception to the rule that only parents⁶⁸ can be required to pay child support.⁶⁹ A step-parent, or for our purposes, a step-father (a man who is not the father of the child but who is, or was married to a child's mother and who 'treats, or at any time during the marriage treated, the child as a member of the family formed with the [mother]'⁷⁰) may be liable to pay child support.⁷¹ When determining whether or not a step-parent should pay child support, the Court must have regard, inter alia, to the 'relationship that has existed between the step-parent' and the child.⁷²

To bring parental orders into line with child support orders it would be possible to give the court the power to make orders for child support against anyone who had taken on a parenting role, not just step-fathers. When exercising that jurisdiction the court could be required to take into account the factors currently considered when deciding whether a step parent should pay child support, these would include:

1. the relationship that has existed between the step-parent and the child; and
2. the arrangements that have existed for the maintenance of the child; and
3. any special circumstances which, if not taken into account in the particular case, would result in injustice or undue hardship to any person.⁷³

Should it be felt that a jurisdiction to order anyone who is 'concerned with the care, welfare or development of the child'⁷⁴ to pay child support is too wide, a more narrow jurisdiction could be given. In *Tobin v Tobin*⁷⁵ counsel argued that the Court had the power to order any person who obtained a parenting order to pay child support. The Court found that it did not have that power but it would be possible to grant that power via legislative changes. If the court did have that power any person who was not a child's biological father who

68 That is the biological parent as well as a man who has legally adopted a child (*Family Law Act* 1975 (Cth) s 60D) and the husband of a woman who, with his consent, conceives via artificial insemination using donor sperm (*Family Law Act* 1975 (Cth) s 60H.)

69 *Tobin v Tobin* (1999) 24 FamLR 635, 648.

70 *Family Law Act* 1975 (Cth) s 60D.

71 *Family Law Act* 1975 (Cth) s 66M.

72 *Family Law Act* 1975 (Cth) s 66M(3)(c).

73 *Family Law Act* 1975 (Cth) s 66M.

74 *Family Law Act* 1975 (Cth) s 65C.

75 (1999) 24 FamLR 6356.

sought parenting orders would also know that with parenting 'rights' come parenting responsibilities and the class of people who could be ordered to pay child support would be clearly defined. In terms of 'fathers' that would be:

1. The biological father;
2. The adopting father;⁷⁶
3. A man who consents to his wife becoming pregnant via artificial insemination; and
4. Any man who obtains a parenting order.

With these changes to the jurisdiction of the Family Court, it would be possible for the court to make both parenting and child support orders that took into account the actual lived experiences of children, and their parents, however conceived.

VI. CONCLUSION

This paper has argued that when it comes to fatherhood, the choices made by the law are inappropriate. If necessary, it is reasonable to hold that paternal rights and responsibilities should attach to either the biological father or the social father. It has been shown, however that the law does not allow that choice to be made. 'Fatherhood' is based on whether or not the child is conceived via an act of sexual intercourse or artificial conception procedures. This choice could be acceptable if all families fitted the heterosexual model, with mother, social father and anonymous sperm donor however it is clear that people do not always fit the mould set out for them, and so in many cases the law has been unable to give effect to the lived experiences, desires and intentions of the parties involved.

If a choice has to be made, that is if we cannot accept that children can have more than two parents of whatever gender, then we should make the choice on either biological or social grounds. If we chose biological, then all biological fathers must accept responsibility for the children conceived using their sperm. Sperm donors, like sexual partners, would have standing to seek parenting orders but would also have financial obligations to their children. As in any legal matter the extent of the responsibilities is not set in

76 It is possible to make a strong argument that where an adoption occurs the biological parent is excluded from the life of the child and is therefore no longer liable to pay child order of adoption is intended to replace the biological relationship and is an court order that takes into account the child's best interests, but developing that argument is beyond the scope of this paper.

advance; if the donor wants nothing to do with the child and the social parents are happy with that, then so be it. It is only if the parties cannot agree on the parenting arrangements, or the child is in need of financial support, that the various legal authorities such as the Family Court and/or the Child Support Agency would be involved.

If we chose the social father, then it is the lived experience that is relevant. The man who takes on the role of 'father', just as the woman who takes on the role of co-parent in a lesbian family,⁷⁷ should be accountable, and take responsibility, for the children he has 'fathered', regardless of their biological background. The promise to parent, and its impact upon the co-parent, and more importantly the children, should be paramount.

The alternative is to make no choice at all, to recognise that children can have many parents, with differing relationships with them all and, in the event of disputes, to determine where different responsibilities and obligations lie on a case by case basis looking at the equity of the particular situation and the best interests of the child.

Whatever of these three options is the best, the problem is that none of them are part of the current law. The current law says that one's paternal responsibilities are dependant upon where one ejaculates, and that makes no sense at all.

77*W v G* (1996) 20 FamLR 49.

The Legal Implications of Geo-identification*

Dr Dan Jerker B. Svantesson#

I. INTRODUCTION

Location may determine whether a person falls within the jurisdiction of a particular state, it may determine which law is applicable to a person's conduct, and it may determine whether or not a judgment can be successfully enforced. Indeed, it could be said that, as far as private international law is concerned, location almost always matters. However, until recently it was often said to be impossible to link those active on the Internet to a geographical location ("geo-identification"). This is all changing. A recent survey revealed that a large number of companies, particularly in the US, seek to identify the geographical location of those who visit their websites. Further, the courts' perception of the possibility (in some cases) or impossibility (in other cases) of geo-identification has been determinative in several court cases.

This article aims at providing a basic overview of so-called geo-location technologies, their technical structure and their legal and regulatory implications.

II. THE CONTEXT

While geo-location technologies can be used for a wide range of purposes, such as fraud detection, authentication, content targeting, security and network efficiency, this article focuses on their use for regulation compliance and for risk-exposure limitation. It is not rare for website operators to be forced to defend themselves in foreign courts under foreign laws. The reason for this is that currently many, not to say most, countries' rules of private international law are focused on the location of the effect of conduct, rather than on the location of the conduct. For example, The High Court of Australia ruled that a resident of the Australian state Victoria was allowed to sue a US based

* This article is based on Dan Svantesson, 'Geo-location technologies and other means of placing borders on the 'borderless' Internet' (2004) Vol XXIII John Marshall Journal of Computer & Information Law 101-39.

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publisher in Victoria and have Victorian law decide the dispute, based on the fact that allegedly defamatory material, on the publisher's website, was available to people in Victoria.¹

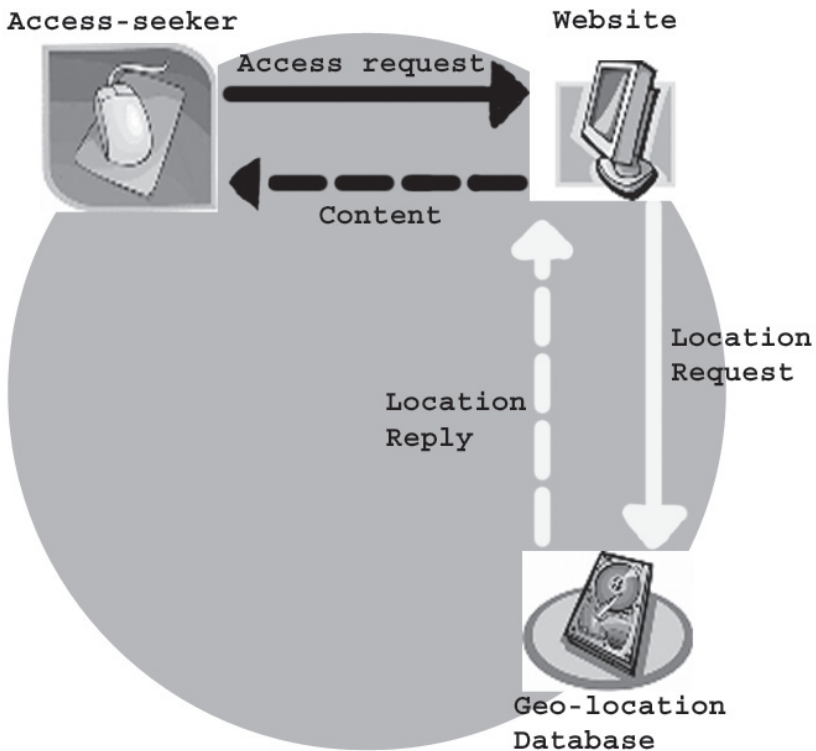
As the geographical reach of a website operator's legal risk exposure ordinarily is, at least, equal to the geographical reach of the website itself, it is obviously valuable for website operators to be aware of the geographical location of the people who access their website. If a website operator can know the location of those who access the website, he/she can, due to the reactive nature² of a webserver, control what material is presented, and indeed, accessible to each access-seeker. In addition to business advantages, such as targeted advertisement, a structure allowing for geo-identification has the advantage of providing the website operator with the means to comply with local regulations. Indeed, as the provided content can be adjusted depending on the access-seekers geographical location, geo-identification has the advantage of providing the website operator with the means to comply with multiple, varying, and even contradictory, local regulations. The value of this cannot be emphasised enough in a world where substantive laws vary considerably from state to state, but material may be accessible from every state where Internet connection is possible.

1 Similar reasoning, in the context of online defamation, can, for example, be found in the British *Harrods Ltd. v Dow Jones & Company Inc.* [2003] EWHC 1162 (QB), the Canadian *Bangoura* case (*Bangoura v Washington Post* (January 27, 2004), OSCJ 03-CV-247461CM1) and the *Investasia* case (*Investasia Ltd and Another v Kodansha Co Ltd and another* HKCFI 499 (18 May 1999)) from Hong Kong SAR.

2 A web server's function is most accurately described as *reactive* (A term, to my knowledge, first used by Roger Clarke in Clarke, R., 'Defamation on the Web: *Gutnick v. Dow Jones*' at <http://www.anu.edu.au/people/Roger.Clarke/II/Gutnick.html> (last visited May 25, 2004). The content of a website is not constantly broadcasted, or even available in any humanly comprehensible format, but at the moment the server receives an access-request, the content becomes available – the server reacts to the browser's request/action. Describing the web servers' role as reactive is, further, preferable as it indicates active steps of both the one imparting the information and the one receiving the information (i.e. the receiver acts and the sender reacts).

III. THE TECHNOLOGY

Currently, the most relevant form of geo-location technology is based on the translation of IP addresses³ into geographical locations, by the use of information stored by the provider of the geo-location service. The figure below illustrates a common model of how this form of geo-location technology is applied:



3 There is currently approximately 1.3 – 1.6 billion IP addresses in use, out of the 4.25 billion possible addresses that can be issued under the four block range from 0 to 255. See further: van Leeuwen, A., 'Geo-targeting on IP Address: Pinpointing Geolocation of Internet Users' *Geo Informatics* (July/August, 2001); Olsen, S., 'Geographic tracking raises opportunities, fears' *CNET News.com*, Nov. 8, 2000; and Spangler, T., 'They Know – Roughly – Where You Live' *eWEEK*, Aug. 20, 2001.

As the access-seeker enters the appropriate Uniform Resource Locator ("URL")⁴ into his/her browser, or clicks on the appropriate hyperlink, an access-request is sent to the server operating the requested website. As the server receives the access-request, it, in turn, sends a location request (e.g. forwards the access-seeker's Internet Protocol ("IP") address)⁵ to the provider of the geo-location service. The provider of the geo-location service has gathered information about the IP addresses in use, and built up a database of geo-location information.⁶ Based on the information in this database, the provider of the geo-location service gives the website server an educated guess as to the access-seeker's location. Armed with this information, the web server can provide the access-seeker with the information deemed suitable (e.g. a message along the lines of: "Sorry. This website is intended for the people of Sweden only,"⁷ or perhaps provide advertisement specifically targeted at people from the access-seeker's particular location). There are currently several products on the market utilising this type of systems.⁸ This technology is not necessarily prohibitively expensive for larger website operators, nor does it appear particularly difficult to operate.⁹

4 "[URL], Abbreviation of Uniform Resource Locator, the global address of documents and other resources on the World Wide Web. The first part of the address indicates what protocol to use, and the second part specifies the IP address or the domain name where the resource is located." <http://www.webopedia.com/TERM/U/URL.html> (last visited May 25, 2004). For more details, see, e.g., Chappell, Laura A. & Tittel, Ed *Guide to TCP/IP* (2002) 271.

5 See further http://searchwebservices.techtarget.com/sDefinition/0,,sid26_gci212381,00.html (last visited May 25, 2004).

6 The methods of collecting this information are discussed below.

7 For example, when using a computer at University of New South Wales (Australia), to access Showtime's website, <http://www.sho.com> (last visited May 25, 2004), I received the following message: "We at Showtime Online express our apologies; however, these pages are intended for access only from within the United States."

8 See, e.g., <http://www.quova.com/> (last visited May 25, 2004), <http://www.akamai.com/> (last visited May 25, 2004), <http://www.caida.org/tools/utilities/netgeo/> (last visited May 25, 2004) and <http://www.digitalenvoy.net/> (last visited May 25, 2004). See also the following geo-location products that can be tested for free online: <http://www.perl-studio.com/iptocountry/index.php> (last visited May 25, 2004), <http://www.activetarget.com/livedemo.asp> (last visited May 25, 2004), <http://www.ip2location.com/free.asp> (last visited May 25, 2004) and <http://www.geobytes.com/IpLocator.htm> (last visited May 25, 2004).

9 The author does not have sufficient information, and is anyhow not qualified, to independently assess the accuracy of these products. But, for example, Geobytes' product is available from \$500 US per annum, appears easy to operate (see demo: <http://www.geobytes.com/demo.htm> (last visited May 25, 2004)), and the producers argue that the product is accurate to 97% on country-level and 75-80% on city-level. See further: <http://www.geobytes.com/> (last visited May 25, 2004).

The accuracy of these products is, however, difficult to gauge. While the providers indicate the potential accuracy to be very high, “over 99% at a country level and approximately 92% at a city-level,”¹⁰ it should be remembered that they are after all trying to sell a product, and these impressive figures have been criticised.¹¹ There is a range of factors affecting the accuracy of geo-location technologies. Due to the dual nature of the geo-location process, these factors can be divided into two categories: ‘source problems’ and ‘circumvention problems’.

The source problems are the problems associated with building up and/or collecting accurate geo-location data. In relation to IP addresses, there is no real equivalent to the address registers listing physical addresses, or the phone registers listing phone numbers, at least not currently. Consequently the ones creating databases of geo-location information must rely on other, less straightforward, methods. Obviously, the accuracy of the material in the geo-location databases depend on, and can never be better than, the accuracy of the collection of that data. Common methods of collecting relevant material include, for example, gathering data from registration databases,¹² network routing information, DNS systems, host name translations, ISP information and Web content.¹³ As discussed in detail by Edelman, all of these sources may provide inaccurate information.¹⁴

Turning to circumvention problems, it can be noted that, while some circumvention techniques are technologically advanced (e.g. deep linking to streaming video content without accessing the HTTP server),¹⁵ others are easy enough to be used by virtually anyone (e.g. ‘anonymising’ techniques)¹⁶

10 Digital Envoy product sheet (on file with the author).

11 Information Technology Association of America, *ECommerce Taxation and the Limitations of Geolocation Tools*, at <http://www.ita.org/taxfinance/docs/geolocationpaper.pdf> (last visited May 25, 2004), 6.

12 I.e. Réseaux IP Européens Network Coordination Centre (<http://www.ripe.net> (last visited May 25, 2004)), American Registry for Internet Numbers (<http://www.arin.net> (last visited May 25, 2004)), Asia Pacific Network Information Centre (<http://www.apnic.net> (last visited May 25, 2004)) and Latin American and Caribbean IP address Regional Registry (<http://laenic.net> (last visited May 25, 2004)).

13 See, e.g., ‘Internet Geography Guide – A NetGeo White Paper’ (can be requested from: <http://www.netgeo.com/> (last visited May 25, 2004)).

14 Edelman, Benjamin ‘Shortcomings and Challenges in the Restriction of Internet Retransmissions of Over-the-air Television Content to Canadian Internet Users’ at: <http://cyber.law.harvard.edu/people/edelman/pubs/jump-091701.pdf> (last visited May 25, 2004) 3-7.

15 Ibid, 10.

16 Ibid, 8. For some examples of anonymising services, see e.g.: EPIC Online Guide to Practical Privacy Tools (<http://www.epic.org/privacy/tools.html> (last visited May 25, 2004)).

or even inherent in the system-structure (“tunnelling methods”).¹⁷ With this in mind, it will presumably always be possible to circumvent geo-location technologies. Having said that, it should also be noted that for most uses, these technologies do not need to be hundred percent accurate and it consequently does not always matter that they can be circumvented by a limited group of people motivated to do so. Furthermore, the accuracy is high enough to interest website operators to use geo-location technologies, and high enough for the courts to start taking notice of geo-location technologies.

IV. GEO-IDENTIFICATION IN THE COURTS

The courts have started to take notice of geo-identification. In this context, it is interesting to note the difference in approach between the the Australian Internet defamation case, *Macquarie Bank Limited & Anor v Berg*,¹⁸ on the one hand, and the French Court’s 2000 decision in *International League Against Racism & Anti-Semitism (LICRA) and the Union of French Jewish Students (UEJF) v. Yahoo! Inc.*¹⁹ on the other. In *Macquarie Bank Limited & Anor v Berg*, the plaintiffs were seeking an injunction restraining the defendant from publishing allegedly defamatory material on a particular website, and Simpson J stated that:

The limitation [to publication occurring in NSW only] is ineffective. Senior council [for the plaintiffs] acknowledged that he was aware of no means by which material, once published on the Internet, could be excluded from transmission to or receipt in any geographical area. Once published on the Internet material can be received anywhere, and it does not lie within the competence of the publisher to restrict the reach of the publication.²⁰

There can be no doubt that the technical features of the Internet played a central role in the judge’s decision not to give injunctive relief in *Macquarie Bank Limited & Anor v Berg*. In contrast, based on the expert evidence provided, Justice Gomez in the *Yahoo!* case, concluded that geo-location technologies are sufficiently effective to allow the defendant to implement them to prevent

¹⁷ Edelman, *supra* n 13 at 9.

¹⁸ *Macquarie Bank Limited & Anor v Berg* [1999] NSWSC 526.

¹⁹ *International League Against Racism & Anti-Semitism (LICRA) and the Union of French Jewish Students (UEJF) v. Yahoo! Inc.* County Court of Paris, interim court order of 20th of November 2000 (English translation available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (last visit May 25, 2005)).

²⁰ *Macquarie Bank Limited & Anor v Berg*, *supra* n 18 at para 12.

access-seekers located in France from accessing the Nazi memorabilia/junk in dispute.²¹ Here, the perceived existence of feasible technical solutions was determinative.

The fact that courts have started to take account of geo-location technologies is a huge incentive for continued technical developments. This, in turn, is likely to lead to improved accuracy, and this improved accuracy can motivate courts to place an even heavier emphasis on these technologies. To be a bit poetic, the wheels of geo-location technologies are in motion, and the consequences for Internet website operators are significant.

V. LEGAL AND REGULATORY IMPLICATION OF GEO-IDENTIFICATION

As long as the rules of private international law focus on the location of the effect rather than on the location of the acting party, there is a huge incentive for website operators to know the location of those who access their content. Having obtained the means for identifying the geographical location of the access-seekers, a website operator has the possibility of deciding what parts of his/her content is available at which locations. Once it becomes common for website operators to make access conditioned on location, the nearly global Internet of today will be replaced by an Internet taking account of geographical borders. However, it has been pointed out that reliable technology simply is not enough.²² Even if geo-location technologies were widely utilised and worked to a satisfactory degree, not all problems associated with the special characteristics of the Internet would necessarily be solved. For example, the simple fact that a website operator is aware of the access-seeker's physical location does not mean that he/she can make an informed decision as to whether imparting information to that individual might mean that he/she is at risk of being sued, for example, for defamation in the access-seeker's forum. Bearing in mind the structure of current private international law rules, the website operator would need to know both the substantive defamation laws of the location from which the access-seeker is located and that country's private international law rules to make such a decision. Further, since access-seekers may be geographically located virtually anywhere in the world, the website

21 *International League Against Racism & Anti-Semitism (LICRA) and the Union of French Jewish Students (UEJF) v. Yahoo! Inc.*, supra n 19.

22 See, e.g., Corn-Revere, Robert "Caught in the Seamless Webb: Does the Internet's Global Reach Justify Less Freedom of Speech?" Cato Institute, Briefing paper NO. 71 (July 24, 2002) 6 and Clarke, Roger "Defamation on the Web: *Gutnick v. Dow Jones*" at: <http://www.anu.edu.au/people/Roger.Clarke/II/Gutnick.html> (last visited May 25, 2004).

operator would arguably have to know all substantial and procedural laws of all the countries on earth – an unrealistic task. This has led some commentators to conclude that “[g]eographic location technology is a red herring.”²³

On the other hand, this line of reasoning appears to be based on the notion that the ‘right’ or ‘ordinary’ thing to do, is to use technology to its full potential. Maybe we must depart from such ideas? The publisher of a newspaper, for example, would ordinarily be publishing within a local area, or a country or, if very large, a region. The technology of newspaper publications is such that a newspaper will only be available at those places the publisher has targeted. It could be said that the starting point is zero percent publication-coverage, and for that number to increase the publisher must target a community, country or region with its newspaper. Web publication, on the other hand, works in exactly the opposite way. Once the material is made available on the web, it has virtually one hundred percent publication-coverage, and for that percentage to decrease, the publisher must take action by ‘dis-targeting’ undesirable forums.²⁴ As the appropriate technology becomes available, and economically and practically feasible to use, web publishers may need to change their way of thinking.²⁵ Maybe also web publishers will have to, through the use of technology, take the zero percent publication-coverage as their starting point, instead of the one hundred percent publication-coverage (which could be said to represent full utilisation of the technology)? Maybe web-publishers will need to choose the market where they feel safe, to the exclusion of all other markets?

VI. CONCLUSION

SOME THOUGHTS ABOUT THE FUTURE OF GEO-IDENTIFICATION

It seems possible, or even likely, that geo-location technologies will contribute to transforming the Internet, as we know it, into something that more closely resembles our world, so divided by borders of different kinds. In evaluating the value of geo-location technologies, we must recognise that “the use of such technologies entail a cost – a financial cost to content providers and the social cost of a network that is no longer open and neutral.”²⁶ While such a development is far from ideal, it may nevertheless be unavoidable, and

23 Eunjung Cha, Ariana ‘Rise of Internet ‘Borders’ Prompts Fears for Web’s Future’ Washington Post, Jan. 4, 2002.

24 Any proposition to the effect that Internet activities are functionally identical to offline activities fits uneasily with this observation.

25 Indeed, maybe such a change in approach is justified already today with the available technology? Perhaps even the alternatives of ‘soft protection’, discussed above, justify such a change in approach?

26 Fagin, Matthew *Regulating Speech Across Borders: Technology vs. Values*, 9 MichTelecomm&TechLR 395, 421 (2003).

perhaps even the best option. The reality that different states have different substantive laws simply cannot be ignored, and the regulation of activities on the Internet must in one way or another take account of this reality. As long as the rules of private international law focus on the location of the effect rather than on the location of the acting party, there is a huge incentive for website operators to know the location of those who access their content, and currently the most effective way of gaining such knowledge is arguably through the application of some form of geo-location technology. Thus, the Internet will inevitably transform from a relatively borderless dimension into a medium that takes account of geographical and legal borders. Furthermore, in light of such a development, current "effect-focused" private international law rules may make sense. In other words, from the perspective of Internet regulation, geo-location technologies may, to a large extent, eliminate the regulatory difficulties associated with the Internet's "borderlessness". If it can be assumed that web content being available in a particular state is an indication of the web publisher's intention to make the content available in that particular state, the application of effect-focused private international law rules make sense. While we must remain alert to their less than perfect accuracy, geo-location technologies have the potential of making such assumptions valid *prima facie*. It would thus seem that discussions of Internet regulation necessarily must take account of these emerging technological solutions. Considering the above, it is submitted that the courts now have a great responsibility in ensuring that the potential of geo-identification is recognised and appreciated.

I would like to conclude this article with a quote from Mark I. Wilson and his colleagues: "[w]hile the power of distance has been eroded, it should not be confused with the diminishing meaning of place."²⁷ Geo-location technologies 'merely' make it possible and practical to consider location, or place, also in the Internet context.

27 Wilson, Mark I., et al., 'Death of Distance/Rise of Place: The Impact of the Internet on Locality and Spatial Organization' (Paper prepared for Presentation at INET 2001, The 11th Annual Internet Society Conference (Stockholm, 5-8 June 2001).

The Role of Computers in Judicial Reasoning and Analysis

Ian Iredale*

I. INTRODUCTION

Judgments are traditionally written and delivered in narrative format and published in volumes of law reports. Occasionally judgments are delivered live via television.¹ Judgments are also stored in electronic format and can be accessed electronically online.

Computers, in this age of digital technology, are being used by students, practitioners and judges in legal research, reasoning and writing. From word processing to researching legal databases, accessing law primary and secondary materials cutting, pasting and downloading and hyperlinking. However, computers have much more to offer.

Aim

The aim of this paper is to highlight a number of ways in which computers may be used to further enhance judicial reasoning and analysis.

Flowcharts

Flowcharts are employed in many disciplines, including engineering, physics and management. They are coming to find increasing application in Law. Flowcharts can be constructed in hard copy using pen and paper. However, there are computer programs available that are more effective in constructing and manipulating flowcharts than doing it manually. Given the increasing complexity of factual situations in legal proceedings and provisions in statutes, flowcharts are being used more and more to represent the facts or to interpret statutory provisions.

Flowcharts and diagrams can be found in statutes, case law reports and law textbooks. For example, diagrams and flowcharts can be found in statutes such as, the *Income Tax Assessment Act 1997* (Cth) and the *Patents Act*

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1 I am not aware of any judgments being delivered directly online.

1990 (Cth).² Flowcharts can also be found in textbooks, such as, Turner's, *Australian Commercial Law* and Woellner et al., 2005 *Australian Taxation Law*.³ Diagrams also appear in case law reports to assist in explaining detailed fact situations.⁴

Flowcharts have been employed to assist students studying taxation law. Taxation Law is one of the most difficult subjects to teach and learn, because of the volume and complexity of the subject matter. Few academics are competent or willing to teach the subject.

Although income tax law is extensive and complex its foundation lies in two simple equations:⁵

$$\begin{aligned} \text{Tax payable} &= \text{Taxable income} \times \text{Tax rates} - \text{Tax offsets} \\ &\text{and,} \\ \text{Taxable income} &= \text{Assessable income} - \text{Deductions} \end{aligned}$$

It is possible to take both of these equations as the basis for a flowchart or tree diagram with the limbs being the various categories of income and deductions. Each limb has a number of branches with "leaves" or topic boxes that further explain the particular category of income or deduction. In hard copy format the flowchart measures 55cm x 85cm and comprises approximately 230 topic boxes. A benefit of the flowchart is that it provides an overview of income and deductions and acts as a roadmap, guiding students through the first

2 See for example:

Income Tax Assessment Act 1997 (Cth), s6-1. For the portrayal of a diagram showing relationship between the concepts assessable income, ordinary income, statutory income and exempt income.

Income Tax Assessment Act 1997 (Cth), s28-5. For a map of the Division highlighting the four alternative methods for claiming car expenses.

Income Tax Assessment Act 1997 (Cth), s100-15. For a diagrammatic overview of steps 1 and 2 in determining whether there is a taxable capital gain or capital loss.

Patents Act 1990 (Cth), s4. For a flowchart outlining the steps in getting and maintaining a standard patent.

3 Turner, C., *Australian Commercial Law* (24th Ed, 2003) contains a foldout flowchart on The Law of Contract outlining the steps from formation to discharge of a contract. Woellner, R. H., Barkoczy, S., Murphy, S. and Evans, C., 2005 *Australian Taxation Law*, includes a diagrammatic overview of alternative appeal paths in challenging an income tax assessment, at p186 and a flowchart for The Simplified Tax System- A Flowchart, at p 944.

4 In *Richard Walter Pty Ltd v Federal Commissioner of Taxation* 95 ATC 4440, at 4444-4445, a diagram is included in the report to outline a complex trust arrangement relevant to the issue being considered by the Federal Court.

In *Davis & Anor v Federal Commissioner of Taxation* 89 ATC 4377, at p 4385, a diagram is employed to illustrate the facts of the case relating to as assignment of future income payments.

5 *Income Tax Assessment Act 1997* (Cth), s4-10(3) and s4-15(1).

half of a taxation law subject. It can also be used by legal practitioners, the Federal Commissioner of Taxation and judges to formulate and structure their approach to taxation issues in legal proceedings. The skeleton of the flowchart is reproduced as Figure 1.⁶

The flowchart can be transposed into electronic format, burned onto a CD-ROM and/or accessed online. Each of the topic boxes that form the building blocks that make up the tree diagram or flowchart appear as screens online and each is able to be hyperlinked to the relevant statutory provisions, case authorities and paragraphs in Australian income taxation law textbooks.

In electronic format it is not possible to represent 55cm x 85cm flowchart on a single screen. However, it can be logically dissected into six "Roadmaps", each capable of single screen representation. The 230 topic boxes are embodied in the roadmaps and each is contained on an individual screen.⁷ Four of the roadmaps are highlighted in bold in Figure 1. The roadmap relating to Ordinary income is represented in Figure 2. Although not all the topic boxes have been reproduced in detail. An example of one of the topic boxes is shown in Figure 3. The bold type shows the hyperlinking to statutory provisions, case law authorities and paragraphs in a taxation law textbook.

How then do computer assisted flowcharts contribute to judicial reasoning and analysis?

They portray the entire law, both statute and common or case law relevant to the issue in a logical and structured format. The flowchart provides an overview of the particular area of law under consideration and shows the links and steps to be followed in analysing the legal problem. The flowchart also forms the foundation for hyperlinking.

6 A full versions is available as, *CCH Online Tax Flowchart Guide* (2005), in hard copy.

7 The flowchart has been transposed into electronic format by CCH Australia Limited. It is not possible to represent the entire flowchart on one screen so the chart is conveniently dissected into six Roadmaps, each of which for the basis of Topic Screens which make up the 230 topic boxes. Each topic box is capable of being represented on an individual screen.

I understand there is a computer program capable of representing a large, say A3, document on a single screen and allowing the reader to zoom in on a particular segment of the document or chart.

II. HYPERLINKING

Hyperlinking is being used by judges to link words in their judgment to precedent cases, statutory provisions and facts, which can include images, both still and moving.⁸ There is scope to make more effective use of this technique by delivering judgments online or on CD-ROM or DVD and storing them on these platforms.

In the context of teaching and learning, lecture notes and materials can be uploaded onto the university's intranet, for example WebCT. The lecture notes and materials can then be hyperlinked to relevant law sites, statutes or cases.

Law textbooks now make use of hyperlinking through access to the publisher's web site. This can be done as a marketing technique to encourage adoption of the book as the required textbook for the subject. The material on the web site linked to from the textbook can include additional or supplementary text and commentary, statutory provisions, cases or extracts from cases, worked examples and testing questions, with or without answers.⁹ An alternative is to have a CD-ROM shrink-wrapped to textbook, containing structured materials hyperlinked to detailed materials.

How then does hyperlinking contribute to judicial reasoning and analysis? Computers and information in electronic format are necessary for hyperlinking. The techniques assist by more effective searching for relevant authorities, downloading the material and cutting and pasting to analyse the material and integrating it to structure the legal reasoning in coming to an opinion on the issue. Judgments themselves could be much shorter with much of the supporting material, such as, statutory provisions, case law precedents and extracts from lower court judgments hyperlinked rather than reproduced in the judgment.

III. THE LEGAL PARADIGM

There is a well established legal paradigm employed by students, practitioners and judges in learning and practicing law. Facts and issues are delineated, on the one hand, and the relevant law is collected together, on the other. The law is then applied to the facts to come to a decision or holding. The law may

8 For example, see, *Mobileworld Communications Pty Ltd v Q & Q Global Enterprise* [2003] FCA (4 December 2003) at 8, which related to a trade mark image described as; MAN, CARTOON ATOP GLOBE.

9 See, for example, Gilders, F., Taylor, J., Richardson, G. and Walpole, M., *Understanding Taxation law: An Interactive Approach* 2nd Ed (2004).

embody precedents and as an outcome of the case, precedents may be created, confined, extended or distinguished. The legal paradigm can be represented in flowchart format and each box in the chart, embodying facts or law can be hyperlinked. By representing the judgment in flowchart format the judicial reasoning and analysis underlying the case is more apparent.

The legal paradigm is represented in diagrammatic format in Figure 4. It has been applied to two leading taxation law cases. In *The Commissioner of Taxation v Whitfords Beach Pty Ltd*,¹⁰ [Figure 5], the issue to be decided was whether the profits from the sub-division and sale of land constituted proceeds from the carrying on a business or were attributable to the mere realisation of an asset. According to the law (common law re-enforced by statute), on the one hand, isolated transactions can give rise to assessable income and, on the other hand, the mere realisation of an asset (according to common law) does not give rise to assessable income. The High Court decided that the sub-division and sale of land did amount to carrying on a business and extended the rule that the normal proceeds from carrying on a business constitute assessable income to state that an isolated transaction can constitute carrying on a business. The diagrammatic representation of the case makes explicit the approach and structure and logic behind the Court's reasoning in coming to a decision and laying down a precedent.

The case of *Sun Newspapers Ltd and Associated Newspapers Ltd v Federal Commissioner of Taxation*,¹¹ [Figure 6], is a foundation case on establishing a test for the distinction between losses and outgoings of a capital or revenue nature. The distinction is important because losses and outgoings of a capital nature are not deductible where as those of a revenue nature are. The case is also notable because the "players" include members of the Packer family and the test was formulated by Dixon J. The diagrammatic portrayal of the case is instructive in that it can be linked back to previous common law capital v revenue tests and projected forward to a line of cases that have applied the "Dixon J" test.

How then do computers employed to graphically portray the legal paradigm assist in contributing to judicial reasoning and analysis? The technique shows or demonstrates explicitly the steps, processes, links and logic in judicial reasoning in coming to a decision on a legal problem or issue and establishing judicial precedents.

10 (1982) 150 CLR 355.

11 (1938) 61 CLR 337.

Analysis of Evidence

Scientific analysis of evidence has been attempted over the past 200 years. Almost one hundred years separate the leading works by Bentham on evidence¹² and Wigmore on proof.¹³ More recent work on the subject has been by Professors William Twining, David Schum and Terence Anderson.¹⁴

The primary task in these works is to analyse a mixed mass of evidence available and classifying and placing each piece in its proper place in the scheme of proof and in making detailed inferences from stage to stage; finally arriving at a conclusion upon the main probandum or probanda.^{15 16}

Flowcharts are an effective technique for undertaking the task with the diagrammatic presentation of all the relations between all the relevant evidence and the ultimate probanda in a particular case. "The constituent elements are simple propositions of fact, each listed and numbered in a 'key-list' of evidence; the relations between the propositions are depicted in the chart by a system of symbols devised by the author."¹⁷ "The proposed method involves two steps: analysis, which involves the preparation of a key-list of all the relevant evidence expressed as simple propositions; and synthesis, in the form of a chart which depicts the relations between each item in the key-list with all other items."¹⁸

"In this respect the chart method is analogous to the algorithm, that is a precise set of instructions, capable of being presented in diagrammatic form, for solving a well-defined problem. By breaking down a complicated rule (or body of data) into a number of simple components and presenting each in turn in a particular order, it can enable the reader to find his way around a complex body of rules and locate the answer to his particular problem."¹⁹

12 Bentham, *Rationale of Judicial Evidence, Specially Applied to English Practice*, 5 Volumes, Edited by John Stuart Mill (1827).

13 Wigmore. *The Principles of Judicial Proof as given by Logic, Psychology and General Experience and Illustrated in Judicial Trials*.

14 See Twining, W, *Theories of Evidence: Bentham and Wigmore* (1985) 135.

15 "Evidence is always a relative term. It signifies a relation between two facts, the factum probandum, or proposition to be proved, and the factum probans, or material evidencing the proposition.... On each occasion the questions must be asked, What is the proposition (Probandum) desired to be proved? What is the Evidentiary Fact (Probans) offered to prove it?" Anderson, T and Twining, W, *Analysis of Evidence: How to do Things with Facts* (1991) 54.

16 See Twining, supra n 14 at 116, 125, 126.

17 Ibid, 126.

18 Ibid, 131.

19 Ibid, 133-4.

“The function of an algorithm is to present rules in a visually more comprehensible form than conventional prose.”²⁰ “They can be used to organise into manageable form large quantities of data or other material, for example evidence to be presented at a lengthy trial or rules of particular areas of a law such as property law, tax law....”²¹

“[T]he chart method is a rather more flexible tool than Wigmore suggests, since it may be used to chart other matters.... It is theoretically possible for the same person to apply the chart method to a case, from the point of view of the actual arguments put forward at the trial, or from the point of view of an historian trying to analyse as detached as he can all the evidence available to him for whatever purpose he specifies, or even from the point of view of a logician to reconstruct the explicit and implicit arguments about particular probanda....”²²

The flowchart technique has not met with widespread success. However, according to Twining, “like the algorithm the method [chart method] seems to offer considerable possibilities for use in connection with new information technology. This is as yet a largely unexplored field, but it seems quite possible that Wigmore’s method will come into its own in the computer age.”²³

“Wigmore categorised the main relations between evidentiary propositions in terms of assertion, denial, explanation and rival assertion.... However, he did not provide a comparable vocabulary for differentiating the principal ways in which evidentiary propositions may be combined or accumulate or otherwise be seen as allies tending to support or to negate the same conclusion, either directly or indirectly.”²⁴ Twining proposes five ways in which evidentiary propositions may be related, namely, by conjunction, compound propositions, corroboration, convergence or catenate inferences (inference upon inference or a chain of inferences).²⁵

A hypothetical illustration of Wigmore’s method, incorporating Twinings’ combining of propositions, is presented in Figure 7. To establish guilt in a criminal case the prosecution may have to prove propositions A and B and C. Defences against conviction may be establishing Not A or Not B or Not C or establishing D and/or E. Propositions F1 and F2 and F3 are compound in relation to A1. G1 and G2 both independently corroborate proposition B. H1, H2 and H3 are three independent items of circumstantial evidence which

20 Twining, *supra* n 15 at 433.

21 *Ibid*, 433-434.

22 Twining, *supra* n 14 at 134.

23 *Ibid*, 135.

24 *Ibid*, 180.

25 *Ibid*, 180.

converge to support proposition C. Finally, A1, A2 and A3 are a chain of propositions that tend to establish A. On the other hand, propositions I, J or K will tend to disprove A+B+C. In addition either proposition L or M will be a defence against conviction. Relations between propositions on the defence side can be more elaborate than shown in the illustration.

An example of an algorithm in taxation law is shown in Figure 8. It relates to the general statutory provision for losses or outgoings incurred in gaining or producing assessable income.²⁶

How then do computers employed to flowchart evidentiary propositions in pursuit of proof in judicial proceedings or employed in constructing algorithms embodying legal rules assist in contributing to judicial reasoning and analysis? In evidentiary analysis and synthesis flowcharts, being a diagrammatic format, are of great assistance in structuring and providing an overview of the inter-relationships between the various categories of propositions and the logic and pathways towards proof of the ultimate proposition to be established. Computers are of assistance in constructing and manipulating the flowcharts by adding to subtracting from or shifting the links between propositions. They are also necessary for hyperlinking to what lies behind the propositions. That may be facts, rules, statutory provisions or case law precedents, all of which go together to explain the propositions and their inter-relationships. Using computers, it is also possible to have an overview flowchart on one screen which then links to other sub-charts or screens that make up the pieces in the “jig-saw puzzle”.

26 *Income Tax Assessment Act 1997* (Cth)

Section 8-1 General Deductions

8-1(1) You can deduct from your assessable income any loss or outgoing to the extent that:

- (a) it is incurred in gaining or producing your assessable income; or
- (b) it is necessarily incurred in carrying on a business for the purpose of gaining or producing your assessable income.

8-1(2) However, you cannot deduct a loss or outgoing under this section to the extent that:

- (a) it is a loss or outgoing of capital or of a capital nature; or
- (b) it is a loss or outgoing of a private or domestic nature; or
- (c) it is incurred in relation to gaining or producing your exempt income or your non-assessable non-exempt income; or
- (d) a provision of this Act prevents you from deducting it.

In the case of algorithms, computers are more effective than manual techniques in constructing the algorithm. More importantly in electronic format the relevant statutory provisions and/or case law extracts (facts, issues, decisions or precedents) can be hyperlinked to each step in the logical chain of reasoning that underlies the algorithm.

Expert Systems

Expert systems are intended to provide “expert” problem-solving advice in some area in which they are competent. Such systems have been used in medicine to diagnose diseases and to recommend suitable treatments. Although Law is, in many ways, similar to medicine expert systems have not been extensively developed or applied in legal problem-solving. The widespread use of computers, the significant development of computer programs and the availability of the internet provide opportunities for developing and exploring the application of expert systems to legal problem- solving or judicial reasoning and analysis.

With expert systems, the computer takes over from the human as the “expert”. The human does not become redundant but is integrally involved in designing and programming the system and interacting with it.

The attributes of an expert system, posed with a legal problem include:

1. The system can ask questions of the lawyer. It can also ask successive questions in proceeding through an algorithm.
2. The system has a perfect memory. It embodies a dynamic database with links to all the materials in the database. It can call up legal information the lawyer has forgotten or is unaware of.
3. The system is flexible and non linear. Unlike a book, for example, where material is presented in a linear format, a computerised expert system can package materials drawn from a variety of sources.

“What we are after in an expert system is a means not only of representing the expert’s knowledge, but of systematically extracting it from the expert and refining it.”²⁷

²⁷ Tyree, A, *Expert Systems in Law* (1989) 10.

Judicial reasoning and analysis involves both statute and case law. It is relatively easy to build an expert legal system involving statute law only. Expert legal systems embodying case law or both statute and case law are more difficult to build because judgments involve a multitude of diverse elements.

To build a computer based expert legal system the legal information needs to be reduced to a computer program compatible format. The information can take the form of propositions relating to statutory provisions, facts, issues, decisions and precedents. The system then builds interrelationships between the propositions. The system can then be represented in diagrammatic format, known as a semantic net or frame diagram.²⁸ An example relating to negotiable instruments is portrayed in Figure 9.²⁹ The frame diagram is based on the *Bills of Exchange Act 1909* (Cth) and portrays the creation, negotiation and discharge of a bill of exchange. It can be employed in judicial reasoning an analysis to deal with issues such as, the status of the holder of the bill or the liability of various parties on the bill. Each box in the model can be hyperlinked to relevant sections in the Act and case law authorities and likewise for each transaction between parties.

Another type of expert system that may find application in the Law is the "Finite State Machine." "Such a machine is defined as follows: there are a number of different "states;" at each state, the user may be asked information and the reply together with the value of other variables of the system determines the next state that the machine enters."³⁰ Tyree uses the law relating to negligence as an example of a finite state machine.³¹ A variation of the model is reproduced in Figure 10. The machine proceeds through the four elements that need to be established in order to find a party liable for negligence. It can be used to structure legal reasoning and analysis and constructing judgments. Once again, each element in the machine can be hyperlinked to relevant principles and precedents. The model can be employed as a template for negligence cases with judges simply plugging in the law relating to each element and arriving at a decision as to liability.

Legal rules can be found in statutes and cases. In statutes they comprise sections of an act, where as in cases they constitute the *ratio decidendi* of the case. In general, the rules take the form of; if... then. "The difficulty of formulating rules which capture case law reasoning may reflect the fact that

28 See *ibid*, 43-46 for a more detailed explanation.

29 *Ibid*, 44 & 46, uses the law on negotiable instruments to provide an example of a semantic net and a frame diagram.

30 *Ibid*, 51.

31 *Ibid*, 54-57.

case law reasoning is closer to inductive than deductive reasoning. Although reasoning with case law may have some deductive components, the essence of it would appear to be to generalise from a number of instances rather than the application of logical rules.”³² One approach to formulating such rules and applying them in judicial reasoning and analysis is to employ the concept of “similarity”.

The approach involves collecting together all the relevant cases on a particular legal subject. Each case contains a number of materially relevant facts and an outcome, such as guilty or not guilty or liable or not liable or, more generally, win/lose. Each of the facts can be stated as a proposition which is either true or false and can be assigned a value “1” for true and “0” for false. Each case, on the particular subject, can then be represented by a vector of “1s” and “0s”. The range of cases x the defining attributes form a matrix. The outcome of the case can be added as a further column. A hypothetical example is shown in Figure 11, with rows of cases designated as C1 to C8 and the attributes or facts, in columns, designated as F1 to F6. The attributes or facts F1-F6 form a vector for each case, which leads to the outcome of W for win or L for lose. The next step is to assign weights to each of the facts, propositions or attributes. With the more significant facts attracting higher weights. Following this it is necessary to measure the distance between the cases. The shorter the distance between the cases the more likely that the same outcome will apply on the basis of a precedent common to those cases. The wider apart the distance between cases the more likely there are distinguishing facts and outcomes between the cases and the more likely a different precedent will apply. When a new dispute arises, judicial reasoning and analysis simply involves plugging the facts into the existing matrix, doing the calculations to see where the case in issue lies in relation to established cases and applying the decision and precedent of the closest cases. A hypothetical example of a matrix showing distances between cases is shown in Figure 12. It is up to the human expert to tease out the materially relevant facts and weight to assign to each one. The role of computers is to employ statistical techniques for determining the importance of each attribute across the range of cases and to measure the distance between cases. A worked example of this technique, applied to finders’ cases, has been demonstrated by Tyree.³³

One difficulty in building and applying computer based expert legal systems is that the information may need to be in quantitative or numerical format. Fortunately, as illustrated above, it may be sufficient to simply be able to assign values of “1” or “0” to build expert legal systems to be used in judicial reasoning and analysis.

32 Ibid, 133.

33 Ibid, 137-143.

Statistical Analysis of Interdependence

A judgement comprises a number of elements including, facts, issues, legal precedents, statutory provisions and holdings, decisions or opinions. Each of these elements are variable, in the sense that they vary from case-to-case. One role for the law is to collect together similar variables from a line of cases in order to establish principles of wider application to future cases. The statistical analysis of interdependence can assist in this regard, its goal is to give meaning to a set of variables. The statistical analysis techniques include, factor analysis, multidimensional scaling and cluster analysis. The techniques are dependant on computer programs for their implementation and they are capable of handling non-metric variables, of the type found in legal proceedings.

The techniques have been widely employed in marketing for, for example, positioning products in product space. They can also be applied to position political leaders in and along dimensions defining political space. It is suggested that the techniques could be fruitfully employed to position cases in “legal space”. The dimensions in legal space can be made up of vectors of facts derived from decided cases. New cases can then be located in legal space. Their position, in relation to clusters of decided cases will provide guidance as to the appropriate outcome and precedent to be applied.

“Factor analysis is a multivariate statistical technique that addresses itself to the study of interrelationships among a set of observed variables.... The primary purpose is the resolution of a set of observed variables in terms of new categories called factors.”³⁴ The factors can then be rotated in order to more effectively describe the variables. Factor analysis is useful in that it can:

1. Point out the latent factors or dimensions that determine the relationship among a set of observed variables or vectors.
2. Point out relationships among observed variables that were there all the time but not easy to see.
3. Be used when things need to be grouped or clustered.

In other words, “Factor analysis is basically a method for reducing a set of data into a more compact form, while throwing certain properties of the data into bold relief. The user of factor analysis focuses on the set of variables

34 William D. Wells and Jagdish N. Sheth, ‘Factor Analysis in Marketing Research’ in Aaker, DA, *Multivariate Analysis in Marketing: Theory & Application* (1971) 213.

for which information has been collected and poses the question: Can the information contained in the original variables be summarised in a smaller number of new variables.”³⁵

“The typical problem to be handled by the multi-dimensional-scaling procedures might roughly be stated as follows: Given a set of stimuli which vary with respect to an unknown number of dimensions, determine (1) the minimum dimensionality of the set and (2) projections of the set of stimuli (scale values) on each of the dimensions involved.”³⁶

“The purpose of cluster analysis is to identify objects (or variables) which are similar with respect to some criteria. The resulting object clusters should have high internal (within cluster) homogeneity and high external (between clusters) heterogeneity). Geometrically, the objects within a cluster should be close together and the objects in different clusters should be far apart.”³⁷ As mentioned above factor analysis can be used to cluster objects or variables. If a group of variables has in common high loadings on one factor (calculated by computer based statistical techniques), then they are viewed as forming a cluster.³⁸ “More formally stated, the problem is: How should objects be assigned to groups so there will be as much likeness within groups and as much difference among groups as possible.”³⁹

A hypothetical example of how these statistically based multivariate techniques might be employed to assist in judicial reasoning and analysis, without going into the statistical analysis, is as follows: Given a number of cases on a particular legal issue or topic, such as, negligent misstatement, subsistence of copyright or tax avoidance, what materially relevant facts determine that some cases are similar to others in their outcome and what materially relevant facts determine that groups of other cases are dissimilar in outcome. Further, what principle underlies each group of cases that are similar to each other but differentiated from other groups.

It has been demonstrated, above, that the facts in cases can be mathematically represented as vectors. It is now possible to represent those vectors in multi-dimensional legal space, which cannot be visualised but only operated on by statistical techniques. However, it is possible to provide a two dimensional

35 William F. Massey, ‘What is a Factor Analysis? Research’ in Aaker, D. A., *Multivariate Analysis in Marketing: Theory & Application* (1971) 241.

36 Warren S. Torgerson, *Theory and Methods of Scaling* (1958) 247-8.

37 Aaker, DA, *Multivariate Analysis in Marketing: Theory & Application* (1971) 299.

38 Ibid, 300.

39 Ronald E. Frank and Paul E. Green, ‘Numerical Taxonomy in Marketing Analysis: A Review Article’ in Aaker, DA, *Multivariate Analysis in Marketing: Theory & Application* (1971) 303.

example, in Figure 13. Each of the vectors or variables represent facts in legal space. Factor analysis will tease out a minimum number of factors that explain the variables. It is then up to the legal expert to label the factors. Established cases, from which the fact vectors have been derived are then located in legal space. The legal expert can then spell out the legal principles each clusters have in common, with the assistance of the factors in the space. This constitutes an exercise in judicial reasoning and analysis. In the example, C1+C2+C5 form one cluster, C3+C4+C6 form another cluster and C7+C8 form a third cluster. Each cluster will have a common underlying legal principle or rule. It is the task of judicial reasoning and analysis to identify the common principle or precedent. Another task for the legal expert is to identify and label the factors. If the legal issue related to tax avoidance, then Factor 1 might be a dimension designated as Tax Planning and Factor 2 might be a dimension designated as Tax Avoidance.

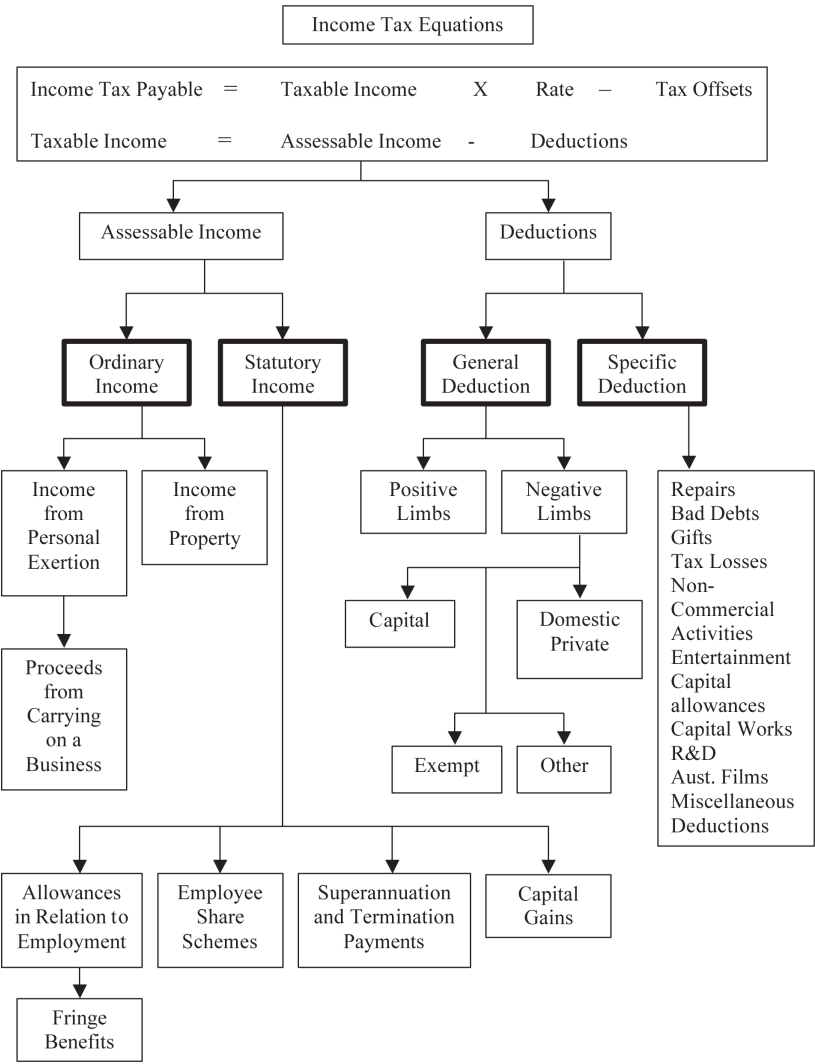


Figure 1. Simplified Representation of the Income Tax Flowchart

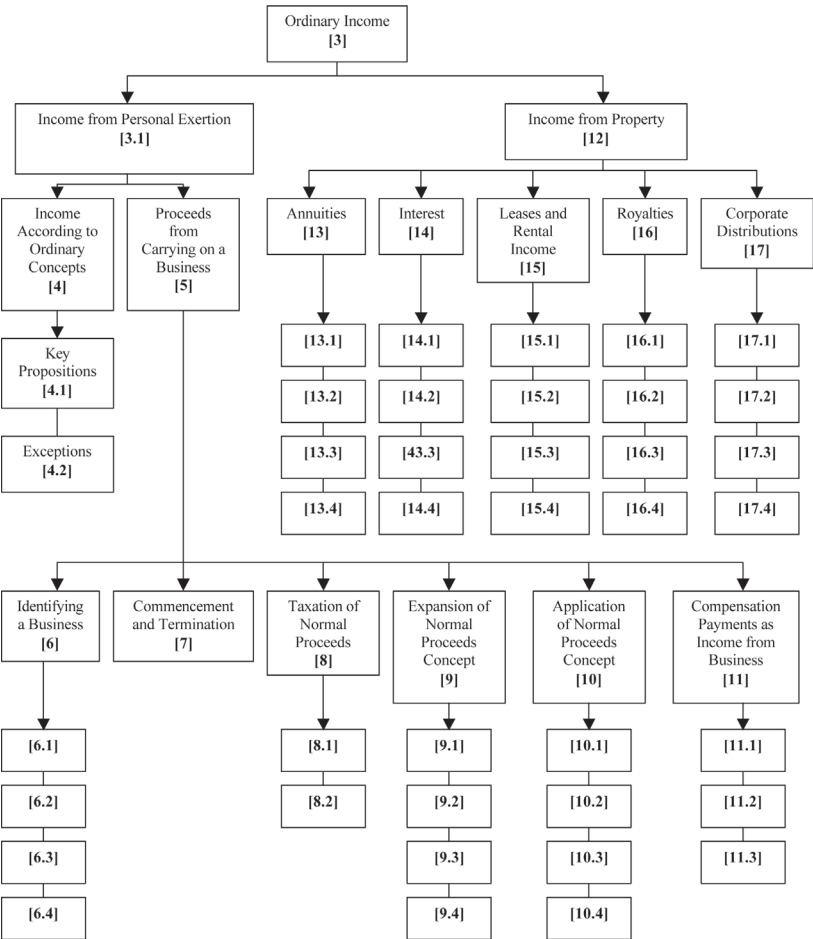


Figure 2. Roadmap: Statutory Income

3.1 Income from personal exertion

[¶6-040, ¶7-000 – ¶7-020]

Ordinary income is interpreted as income according to the ordinary concepts and usages of mankind [*Scott v C of T (NSW)*] and is categorized as income from personal exertion or income from property. [97 s6(1)]

Income from personal exertion can be further sub-divided into income from work or provision of services and proceeds from carrying on a business.

Five categories of income from property are recognized, namely: **annuities, interest, rent, royalties** and corporate distributions (**dividends**).

A number of propositions have been developed by the courts in order to determine whether a receipt constitutes income from personal exertion or income from property.

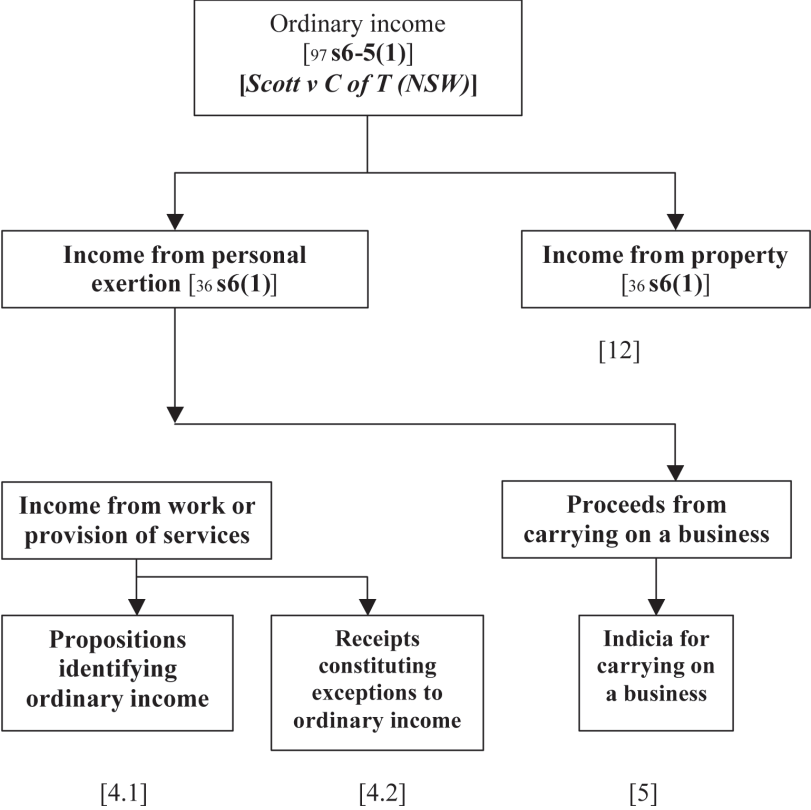


Figure 3. Topic screen: Ordinary Income – Income from Personal Exertion

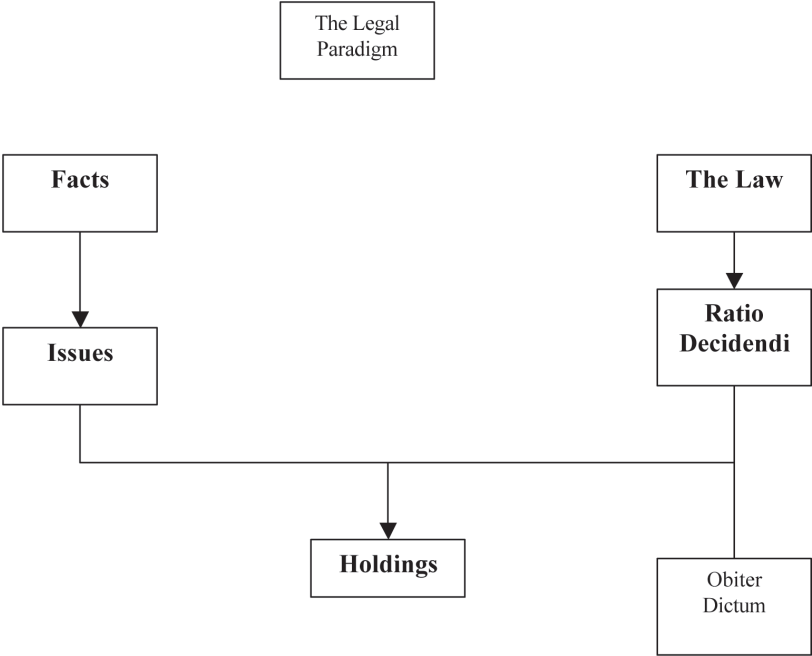


Figure 4. The Legal Paradigm

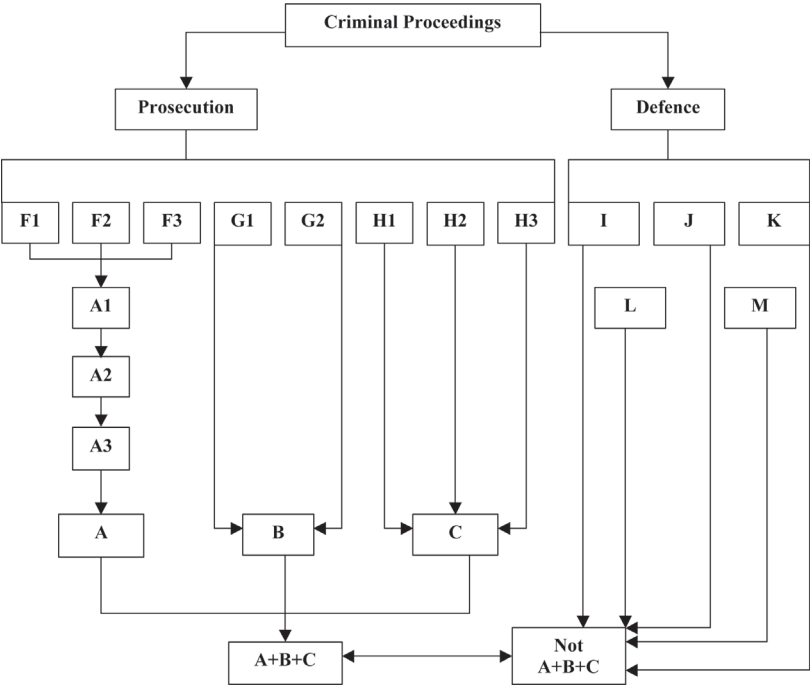


Figure 7. Hypothetical Illustration of Relations Between Evidentiary Propositions

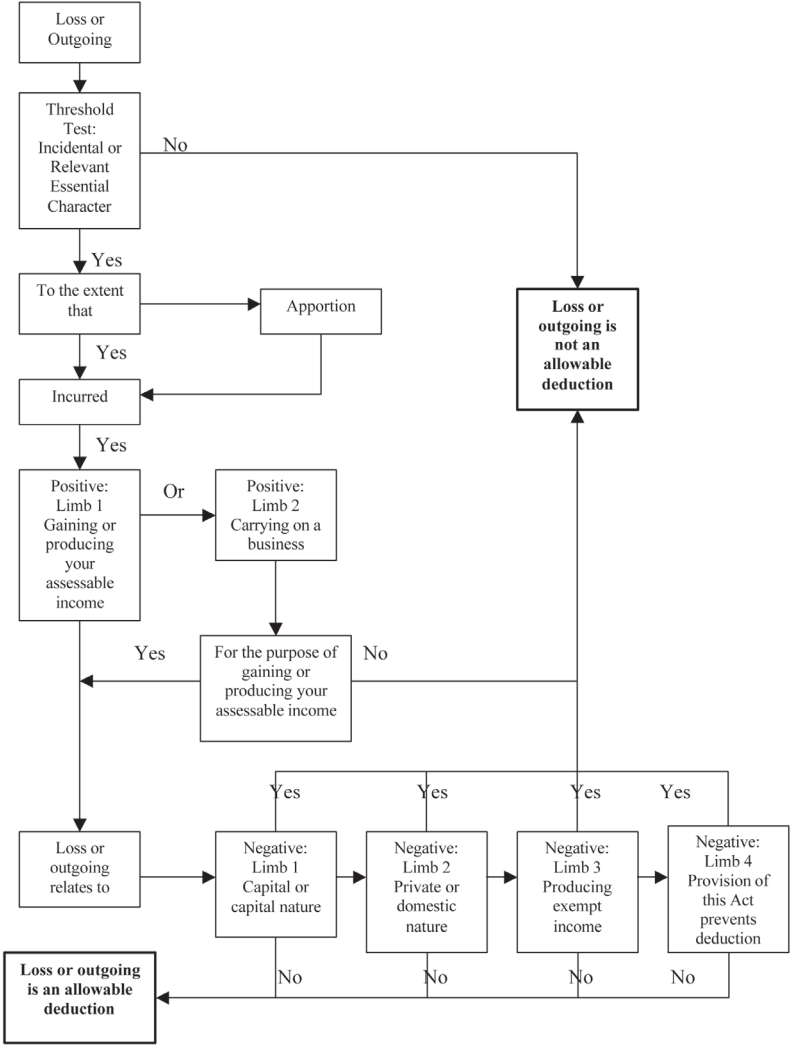


Figure 8. Algorithm for Deductibility of Losses or Outgoings under s8-1

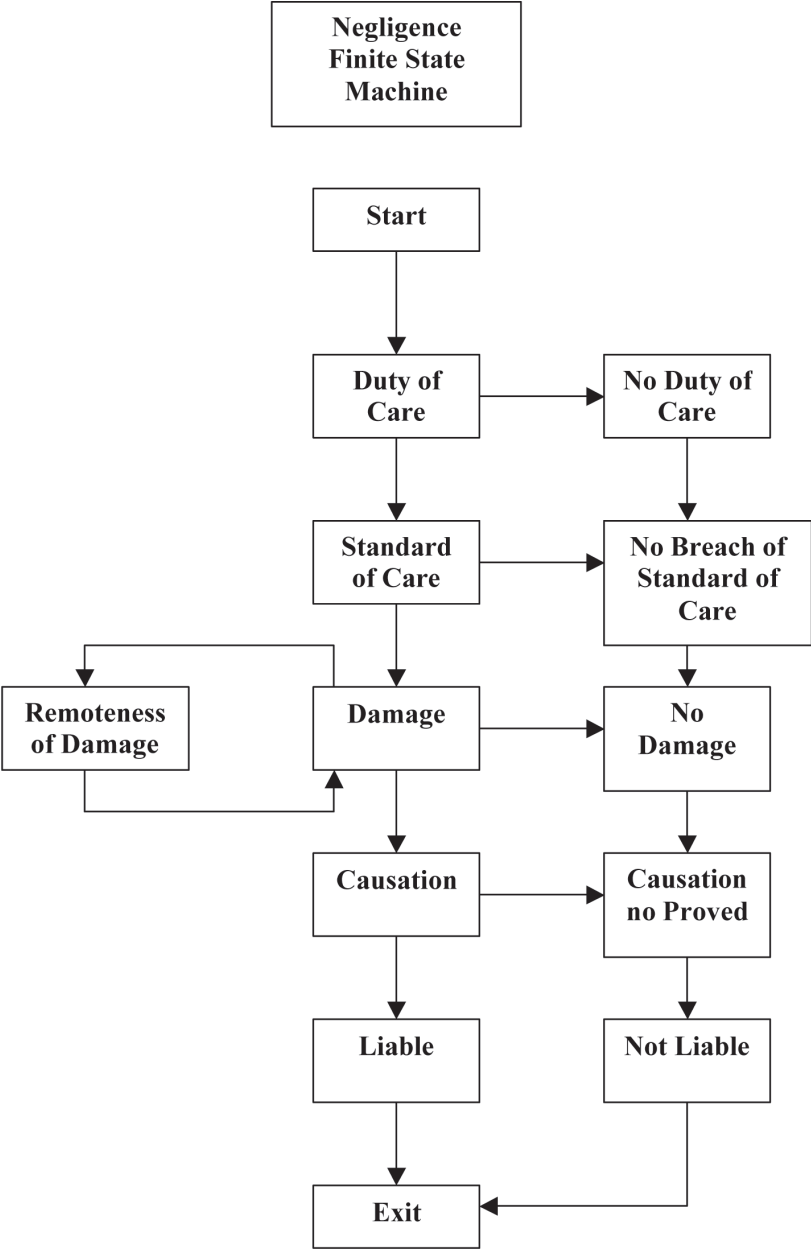


Figure 10. Negligence: Finite State Machine

Fact	F1	F2	F3	F4	F5	F6	OUTCOME
Case							
C1	0	0	0	0	1	0	L
C2	0	0	1	0	1	0	L
C3	1	1	1	0	0	1	W
C4	0	0	1	0	0	0	W
C5	1	1	1	0	1	1	W
C6	1	0	0	1	0	0	L
C7	0	1	1	0	0	0	W
C8	0	1	0	0	0	0	L
AVERAGE	.375	.5	.625	.125	.375	.25	

Figure 11. Cases x Attributes and Outcomes Matrix

CASES	C1	C2	C3	C4	C5	C6	C7	C8
C1	0	18.7	37.7	24.1	32.3	42.4	33.7	29.1
C2		0	18.9	5.3	24.3	32.2	14.7	18.9
C3			0	13.6	5.3	31.9	14.9	19.2
C4				0	18.9	26.8	9.3	13.6
C5					0	37.2	20.3	24.5
C6						0	36.2	31.9
C7							0	4.3
C8								0

Figure 12. Measurement of the Distance between Cases

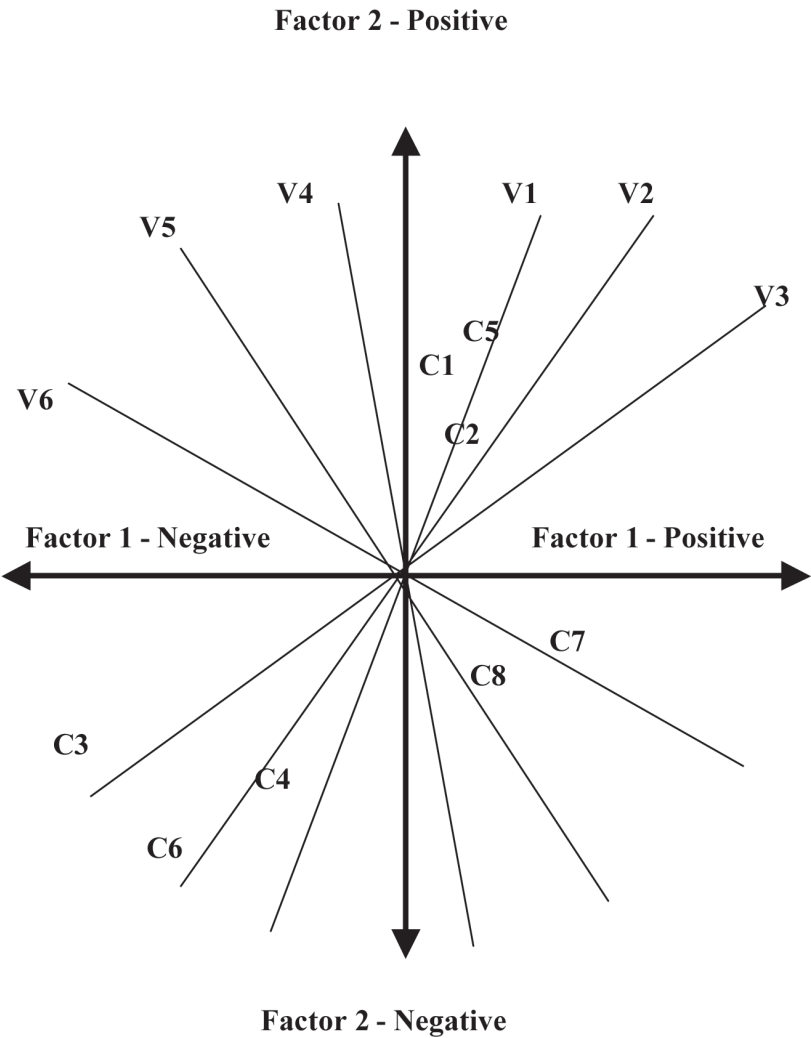
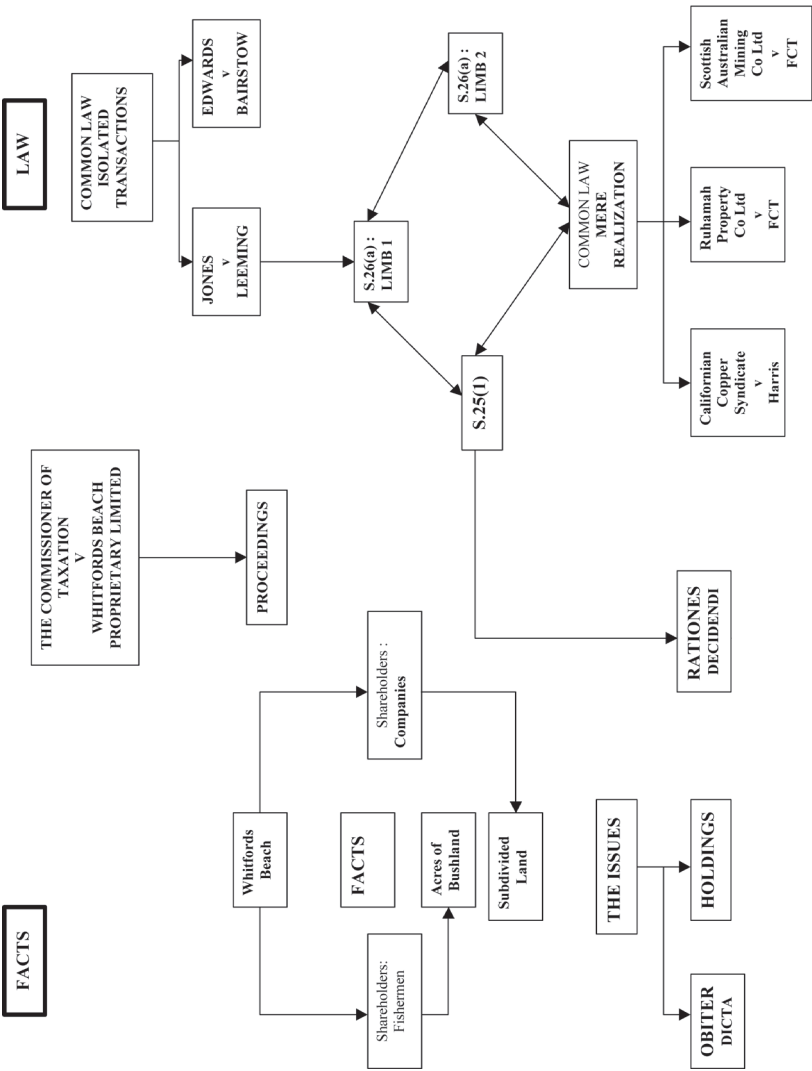
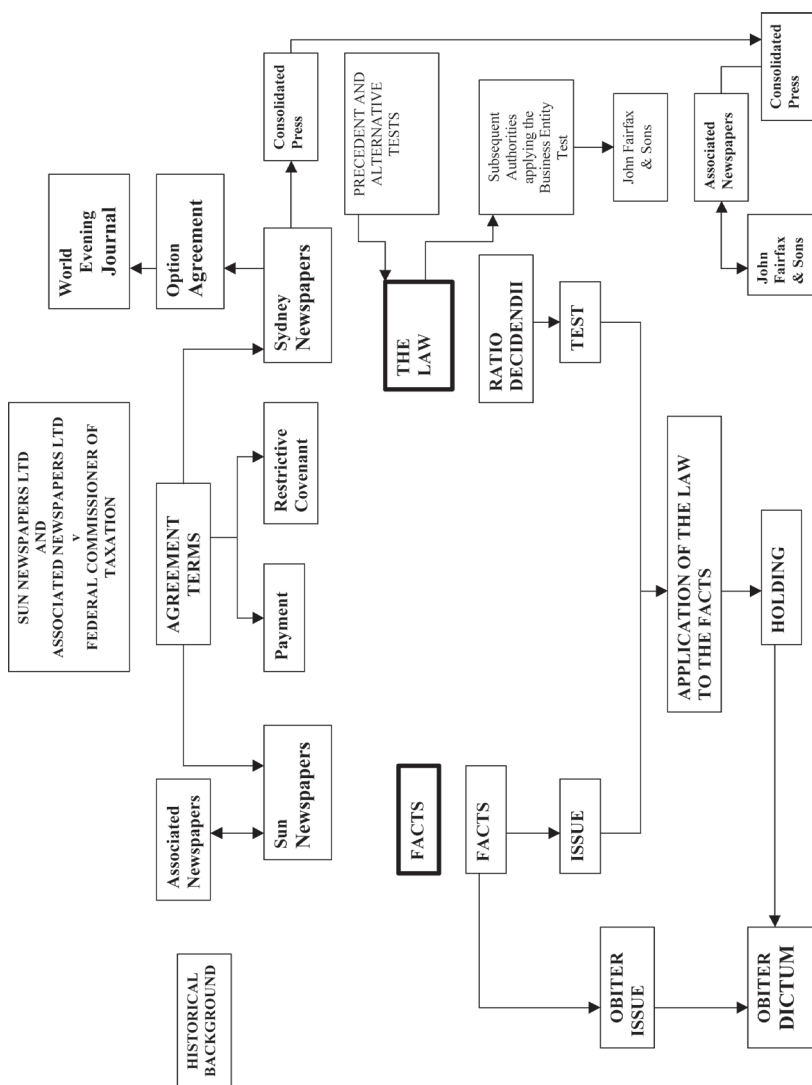


Figure 13. Fact Vectors and Location of Cases in Legal Space





Advocates' Immunity: What Makes Australian Lawyers So Special?

Julia Werren* and Amanda Williamson#

I. INTRODUCTION

In this article, we examine the nature of advocates' immunity in light of an Australian High Court decision maintaining the doctrine. That case upheld and arguably extended advocates' immunity from suit for work intimately connected with court proceedings in Australia, and is in stark contrast to the position in other comparable jurisdictions. We explore the history and extent of advocates' immunity, as well as evaluating the current justification for retaining the immunity in Australia, canvassing comparative perspectives from other jurisdictions. We argue that the justification for retaining and extending the immunity in Australia is problematic, and should be reconsidered to ensure that public confidence in the legal profession is not eroded.

Following the High Court decision of *D'Orta-Ekenaike v Victorian Legal Aid and Another*¹ ('*D'Orta-Ekenaike*'), it is clear that in the short term, advocates' immunity is to remain a doctrine of the Australian legal system. In this decision, the majority determined that advocates' immunity should be retained, affirming and arguably extending the earlier decision of *Giannarelli v Wraith*² ('*Giannarelli*'). In *Giannarelli*, it was noted that both barristers and solicitors acting as advocates enjoy common law based immunity from suit for both in-court work, as well as for out of court work that is intimately connected with the case. In *D'Orta-Ekenaike* however, this immunity was also extended to an instructing solicitor not appearing as an advocate in the trial. The majority's rationale for preserving and extending the immunity is based upon the premise that it was a 'central and pervading tenet' of the judicial system that finality of cases, once litigated, remained.³ Allowing the re-litigation of cases, it was argued, detracts from the binding nature of decisions, and furthermore, the duty of the advocate to the court.

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1 (2005) 214 ALR 92.

2 (1988) 165 CLR 543.

3 *D'Orta-Ekenaike v Victorian Legal Aid and Another* (2005) 214 ALR 92.

What is not so certain however is support for the retention of the doctrine in Australia, both from the public at large, legal commentators, and even from some members of the legal profession. Indeed, the immediate past president of the NSW Bar Association, Bret Walker, SC, argued that State parliaments should intervene to allow litigants the opportunity to appeal decisions that were made as a result of the 'flagrant incompetence of counsel.'⁴ Justice Kirby, the only dissenting judge in *D'Orta-Ekenaike*, noted that compared to other professions, lawyers are the only professionals in Australia that enjoy such an immunity, with doctors, architects and accountants held responsible for their actions with no benefit of an immunity from suit.⁵ Further, Justice Kirby pointed to the fact that in other jurisdictions, where the immunity has been abolished (such as the United States of America and Canada) there has not been a flood of re-litigation as feared by the majority in *D'Orta-Ekenaike*.⁶

It is the purpose of this paper therefore to explore firstly the history and extent of the immunity, concentrating in particular on the recent decision of *D'Orta-Ekenaike* to determine the current precise scope of the immunity. In canvassing these issues, the paper examines issues of public policy pertaining to advocates' immunity, and assesses the current justification for the retention of the doctrine. The paper concludes with a critical analysis relating to the validity of the doctrine within the contemporary Australian legal system.

II. HISTORICAL BASIS OF ADVOCATES' IMMUNITY

*Rondel v Worsley*⁷ is the chief modern authority for the doctrine of advocates' immunity, though as seen in the judgments in the Court of Appeal decision of *Rondel*,⁸ a number of earlier decisions have also highlighted the existence of the immunity. As Lord Denning notes in the Appeal case, many of these earlier decisions⁹ were based upon the premise that advocates did not have a contract with their clients, thus providing no basis for an action. However, in *Rondel*, the lack of a contract between advocate and client was deemed no longer sufficient to form the basis of advocates' immunity, as a result of the decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.¹⁰ Rather, a range of public policy grounds were proposed as underpinning the immunity, including:

4 Michael Pelly, 'Litigants should be able to appeal: SC', *Sydney Morning Herald* (Sydney) March 16 2005, 3. <<http://www.smh.com.au/articles/2005/03/15/1110649201644.html>>

5 *D'Orta-Ekenaike v Victorian Legal Aid and Another* (2005) 214 ALR 92, 169 (Kirby J).

6 *Ibid.*

7 [1969] 1 AC 191.

8 [1967] 1 QB 443.

9 *Fell v Brown* (1791) Peake 131.

10 [1963] 3 All ER 575.

1. The fact that barristers owe a duty first and foremost to the court as officers of the court.¹¹ As such, this duty to the court should not be compromised by fear of litigation on the part of a disgruntled client. Advocates' or barristerial immunity therefore operates to ensure counsel can uphold their duty to the court without concern that they would be litigated against by their clients. As noted by Lord Reid:

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. As an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. By so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him.¹²

2. The fact that other participants in the judicial process, such as judges and witnesses, enjoyed protection from suit, and that as a result of this, advocates should be afforded the same protection. The Australian case of *Cabassi v Vila*¹³ was noted, where it was held that:

...no action lies in respect of evidence given by witnesses in the course of judicial proceedings, however false and malicious it may be, any more than it lies against judges, advocates or parties in respect of words used by them in the course of such proceedings or against juries in respect of their verdicts.¹⁴

3. The existence of the cab-rank rule, which precludes barristers / advocates from selecting clients to represent. A barrister is bound to accept a brief under this rule, the operation of which the House of Lords thought would be problematic with the removal of the immunity.¹⁵
4. Lastly, to ensure finality of proceedings. The finality argument proposes that immunity should be upheld to ensure certainty in the legal system, and as noted in *Rondel*, there should be 'procedure and machinery for appeals

11 *Rondel v Worsley* [1967] 3 All ER 993, 998.

12 *Ibid.*

13 (1940) 64 CLR 130.

14 *Ibid.*, 140 (Starke J).

15 *Rondel v Worsley* [1969] 1 AC 191, 227.

and the effectiveness of appeal procedure can be kept under review, but the attainment of finality must be an aim of any legal system'.¹⁶ In *Rondel*, the undesirability of re-litigation was seen as adverse to the public interest, and therefore, another sufficient incentive to retain advocates' immunity.

These policy reasons were discussed, but not approved in full, in the later United Kingdom case of *Saif Ali v Sydney Mitchell & Co*,¹⁷ where the House of Lords upheld the immunity as stated in *Rondel* (although finding that the immunity did not extend to the activities of the barrister in question). In Australia, advocates' immunity was approved by the High Court in *Giannarelli*. The High Court in *Giannarelli*, in a similar vein to the House of Lords in *Saif Ali*, did not approve of all of the broad policy reasons used to retain the immunity in *Rondel*. Here, the majority agreed that the most relevant policy grounds were those that related to the barrister's duty to the court, the immunity that other participants in the court process enjoyed, and also, ensuring the finality of proceedings. Mason CJ in particular noted the special position of the advocate, which underpins the duty owed by the advocate to the court:

A barrister's duty to the court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice.¹⁸

Mason CJ also noted further the effect that relitigation of issues through collateral means would have on this administration of justice, with particular relevance to the issue of finality:

Exposure of counsel to liability for such negligence would unquestionably encourage litigation by unsuccessful litigants anxious to demonstrate that, but for the negligence of counsel, they would have obtained a more favourable outcome in the initial litigation¹⁹

Deane, who provided a dissenting judgement (in addition to Toohey and Gaudron), spoke forcefully against the retention of the immunity:

I do not consider that the considerations of public policy which are expounded in *Rondel v Worsley* and in the majority judgments in the present case outweigh or even balance the injustice and consequent public detriment involved in depriving a person, who is caught up in litigation and engages the professional

16 *Rondel v Worsley* [1967] 3 All ER 993, 1015.

17 [1980] AC 198.

18 *Giannarelli v Wraith* (1988) 165 CLR 543, 556 (Mason CJ).

19 *Ibid*, 558 (Mason CJ).

services of a legal practitioner, of all redress under the common law for 'in court' negligence, however gross and callous in its nature or devastating in its consequences.²⁰

The outcome of *Giannarelli* remained good law in Australia, with the immunity surviving review in the decision of *Boland v Yates Property Corporation Pty Ltd*.²¹ The United Kingdom decision in *Arthur J S Hall & Co v Simons*²² followed soon after *Boland*, where the House of Lords abolished advocates' immunity, and dismissed emphatically the public policy reasons that were used to support the immunity in *Rondel*. Lord Steyn rejected the notion of the cab-rank rule as justification for the immunity, noting that whilst a 'valuable professional rule' it was not sufficient to justify 'depriving all clients of a remedy for negligence causing them grievous financial loss.'²³ Similarly, the duty of the advocate to the court was not seen as a sufficient basis for the immunity due to the fact that many other professionals experienced conflicts with duties to clients and professional codes.²⁴ He noted further that the risk of relitigation through collateral attack would be slim if the immunity were removed, based on precedent from the case of *Hunter v Chief Constable of the West Midlands Police*,²⁵ where it was held that courts could strike out matters that were an abuse of process.²⁶ In addition to this, Lord Steyn noted that frivolous or unmeritorious claims would not be successful as litigants bringing such a claim 'will face the very great obstacle of showing that a better standard of advocacy would have resulted in a more favourable outcome.'²⁷

Lord Hoffman dismissed the argument that lawyers were in a special position due to the 'difficult' nature of advocacy, noting that other professionals in similarly complicated predicaments did not enjoy such an immunity.²⁸ With respect to the policy reasons raised in *Rondel*, Lord Hoffman noted:

In the conditions of today, they no longer carry the degree of conviction which would in my opinion be necessary to sustain the immunity. The empirical evidence to support the divided loyalty and cab rank arguments is lacking; the witness analogy is based upon mistaken reasoning and the collateral attack argument deals with a real problem in the wrong way. I do not say that *Rondel*

20 Ibid, 588 (Deane J).

21 (1999) 167 ALR 575.

22 [2000] 3 All ER 673.

23 *Arthur J S Hall & Co v Simons* [2000] 3 All ER 673, 680 (Lord Steyn).

24 Ibid, 682 (Lord Steyn).

25 [1982] AC 529.

26 *Arthur J S Hall & Co v Simons* [2000] 3 All ER 673, 681 (Lord Steyn).

27 Ibid, 683 (Lord Steyn).

28 Ibid, 690-1 (Lord Hoffman).

v Worsley was wrongly decided at the time. The world was different then. But, as Lord Reid said then, public policy is not immutable and your Lordships must consider the arguments afresh.²⁹

Clearly, this statement dealt another blow to the stability of the policy reasons used to support the immunity in contemporary times. Their Lordships were unanimous in removing the immunity in civil matters, and through a 4-3 majority also removed the immunity for criminal matters. There was clear agreement that the policy reasons previously used to justify the retention of the immunity were no longer sufficient to uphold it.

With the outcome of *Arthur Hall* removing advocates' immunity in the United Kingdom, and with a similar position enjoyed in the United States and Canada, many commentators believed that the next time the immunity came up for review before the High Court in Australia they would follow suit. The House of Lords had rendered fragile the policy arguments upon which the immunity rested, and many believed that the same reasoning would also persuade the High Court to remove the immunity. Further, many believed that *D'Orta-Ekenaike* would be the vehicle through which the revision of the immunity would be achieved.

A decision from the New Zealand Court of Appeal, *Chamberlains v Lai*,³⁰ reached immediately prior to that in *D'Orta-Ekenaike*, added weight to the assumption that the High Court would abolish the immunity. In *Chamberlains v Lai*, the New Zealand Court of Appeal, by a 4-1 majority, followed the House of Lords in *Arthur Hall* and removed the immunity in New Zealand. In following the justification set down in *Arthur Hall*, the majority noted that the policy arguments surrounding conflicting duties between client and court, re-litigation through collateral attack and the general increase in litigation, and the cab-rank rule were insufficient to justify the immunity.³¹ In response to such concerns, Hammond J, in the majority judgment, noted that the competing duties between court and client were mirrored in other professions, and that professional frameworks existed to temper such duties.³² He also noted that the cab-rank rule did not impact greatly upon the administration of justice and was therefore inadequate to support the immunity.³³ Finally, in response to the re-litigation and over-litigation policy grounds, Hammond J commented

29 Ibid, 704 (Lord Hoffman).

30 Unreported, CA (NZ) 8 March 2005.

31 *Chamberlains v Lai*, Unreported, CA (NZ) 8 March 2005.

32 Ibid, (Hammond J).

33 Ibid.

that excessive litigation was already a problem that was not related to the immunity, and that in any event, the New Zealand legal system was able to manage issues of relitigation, as other comparable jurisdictions had done.³⁴

Soon after *Chamberlains v Lai* was determined, the decision in *D'Orta-Ekenaike* was handed down, with the High Court surprising many with their decision to retain the immunity.

III. *D'ORTA-EKENAIKE*: WOULD AUSTRALIA FOLLOW SUIT?

When Ryan D'Orta-Ekenaike was charged with raping a female he retained Victoria Legal Aid to defend the charge. Victoria Legal Aid briefed McIvor, a barrister, to appear for D'Orta-Ekenaike at the committal proceedings. The applicant had two meetings with McIvor and an employee of Victoria Legal Aid, where he told them he was not guilty of the charge. Notwithstanding this information, the barrister and solicitor still advised him to plead guilty at his committal hearing, as he would receive a reduced custodial sentence if he pleaded not guilty and was subsequently convicted. Upon following their advice, he was committed for trial where he changed his plea to not guilty. His earlier plea however was entered into evidence and he was convicted and sentenced to three years' imprisonment. The Court of Appeal of the Supreme Court of Victoria sometime later quashed the applicant's conviction and ordered a retrial on the ground that the trial judge's directions in respect of the guilty plea were inadequate.³⁵ In 1998 at the retrial a jury acquitted the applicant of rape. In 2001, the applicant commenced an action for damages in the County Court of Victoria against Victorian Legal Aid, his solicitor, and Ian McIvor, the barrister. He alleged that he had suffered and continues to suffer injury, loss and damage as a result of the failure to warn by his legal advisers. The particulars of injury included loss of liberty, a psychotic illness, loss of income and the costs and expenses of the appeal and retrial.

The Majority Judgment

The majority in *D'Orta-Ekenaike* concentrated on the following three issues. Firstly, whether or not the immunity should protect both solicitors who are acting as advocates as well as barristers; secondly, whether the scope of the immunity should be reconsidered; and thirdly, whether the decision in *Giannarelli* should be reconsidered, and if so, what the current justification for either retaining or abolishing the immunity would be. The first two issues are quickly dealt with, the third is the issue to which this article is directed.

³⁴ Ibid.

³⁵ *R v D'Orta-Ekenaike* [1998] 2 VR 140.

1. To Whom Does the Immunity Apply?

In relation to the first issue the majority in *D'Orta-Ekenaike* explored the fusion of the legal profession in relation to section 5 of the *Legal Profession Practice Act 1891* (Vic) and section 10 of the *Legal Profession Practice Act 1915* (Vic). The majority justices found that even though there was legislative intention to fuse the legal profession in Victoria in 1891 this fusion was never entirely accomplished.³⁶ In line with this reasoning, it was found in *D'Orta-Ekenaike* that the immunity should cover both solicitors and barristers.

2. The Scope of the Immunity:

In reference to whether or not the 'intimate connection' test should be extended or reduced, the joint majority in *D'Orta-Ekenaike* held that there was no sufficient reason to alter the test.³⁷ The immunity was retained to include work done in court or 'work done out of court which leads to a decision affecting the conduct of the case in court.'³⁸ Interestingly, the joint majority found that the advice to plead guilty at the committal satisfied this intimate connection test as the advice led to a decision, which affected the conduct of the case at the subsequent trial.³⁹

The third issue, the 'whys' of advocates immunity, requires much more discussion.

IV. THE JUDICIAL PROCESS AS AN ASPECT OF GOVERNMENT AND FINALITY

The primary policy issue that was used to justify the retention of the immunity in *D'Orta-Ekenaike* was 'finality'. The majority held that the community has a vital interest in the final suppression of controversies, as 'the central and pervading tenet of the judicial system is that controversies, once resolved, are

36 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92, 97 (Gleeson CJ, Gummow, Hayne and Hayden JJ).

37 *Ibid*, 113 (Gleeson CJ, Gummow, Hayne and Hayden JJ).

38 *Ibid*. McHugh J also stated that:

Immunity should extend to any work, which, if the subject of a claim of negligence, would require the impugning of a final decision of a court or the re-litigation of matters already finally determined by a court. On that basis, no distinction should be drawn between the role of the solicitor and a barrister in the context of advising a client regarding the entering of a plea in criminal proceedings. If the immunity were applicable to the barrister and not the solicitor in the present case, it would not serve the public policy purpose of preventing the rehearing of the applicant's charge.

Ibid, 134.

39 *Ibid*, 113.

not to be reopened except in a few, narrowly defined, circumstances.⁴⁰ It has been suggested that public confidence in the legal system would be undermined if these principles were not adhered to, as re-litigation can undermine the earlier decision and also waste resources.⁴¹ In *D'Orta-Ekenaike*, their Honours also suggested that if allowed, a 'peculiar type of litigation would arise.'⁴² This was described as being 'relitigation of a controversy (already determined) as a result of what had happened during, or in preparation for, the hearing that had been designed to quell that controversy' which would be of a 'skewed and limited kind,' as the immunity of other actors in the judicial process (judges and witnesses) would prevent their 'contribution' to the outcome being scrutinised.⁴³ Thus, unlike the House of Lords in *Arthur Hall*, the threat of relitigation was seen by the majority to be a dominant threat to ensuring finality of proceedings, and ultimately, public confidence in the legal system.

Civil and Criminal Convictions

In particular, the majority noted that the finality issue was most pervasive in criminal cases, an issue that also arose in *Arthur Hall* (and resulted in the House of Lords only rejecting the immunity by a 4-3 majority as far as criminal cases were concerned). The main concerns here were the potential repercussions on a criminal case and conviction if the criminal plaintiff was successful in an action against his or her advocate. This finding of liability in such a case would establish that 'but for' the negligence of the barrister the criminal litigant would not be in jail. Obviously, this opens up a whole range of connected issues; should the criminal litigant be acquitted or at least receive early parole? How would the differences in onus and burden of proof be dealt with? Could lawful imprisonment constitute compensable damage?⁴⁴ Interestingly, these issues were not of importance in the *D'Orta-Ekenaike* case because *D'Orta-Ekenaike* had been acquitted of his criminal conviction. The joint majority in *D'Orta-Ekenaike* however rejected the applicant's submission that it was enough to show that he would not impugn the final result of the previous litigation.⁴⁵

40 Ibid, 100-01 (Gleeson CJ, Gummow, Hayne and Hayden JJ).

41 Matthew Groves and Mark Derham, 'Should Advocate's Immunity Continue?' [2004] 28 MelbourneULR 80, 107.

42 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92, 104 (Gleeson CJ, Gummow, Hayne and Hayden JJ).

43 Ibid.

44 Ibid, 109 (Gleeson CJ, Gummow, Hayne and Hayden JJ).

45 Ibid, 110 (Gleeson CJ, Gummow, Hayne and Hayden JJ).

The Likely Success of an Action Against an Advocate

Further to the distinction between civil and criminal matters, the difficulties of suing an advocate in negligence was discussed by McHugh J in detail, where the difficulties of proving causation in claims against advocates in particular were discussed.⁴⁶ Justice McHugh considered that the difficulties in determining causation actually provided a reason for maintaining this immunity. One of the concerns that seems to motivate this thinking was that 'unsuccessful litigants whose principal action was without much substance are those most likely to bring a later, equally unsubstantiated, claim against their representative.'⁴⁷ The concern about frivolous and vexatious claims can also be seen reflected in recent tort reform as well as many recent High Court judgments.⁴⁸

In relation to whether or not the litigation (if allowed) in *D'Orta-Ekenaike* would have been successful, Cane posits that it is at least arguable that *D'Orta-Ekenaike* would not have been found guilty if he had not originally pleaded guilty.⁴⁹ In furtherance of this argument Cane suggests that the 'more immediate cause of *D'Orta-Ekenaike's* conviction was the conduct of the judge and jury in the first trial.'⁵⁰ Therefore, Cane suggests that this rationale is not a sufficient argument to maintain the immunity, as in other professions the 'risk of being the target of weak claims' is not a stable justification to maintain any immunity.⁵¹ In other words, the solution to the predicament of unmeritorious claims 'does not involve bolting the door against meritorious plaintiffs.'⁵²

Other Policy Grounds

In proposing finality as the sole justification for retaining the immunity, the majority considered that the policy issues that had been discussed in preceding cases were no longer relevant or persuasive.⁵³ Similar justifications to those outlined in *Arthur Hall*, as far as the remaining policy grounds apart from finality were concerned, were canvassed. The connection between a barrister's immunity and an inability to sue the client for professional fees was considered

46 Ibid, 133, 141 (McHugh J).

47 Ibid, 133, 127 (McHugh J).

48 See, e.g., The Legal Profession Act 1987 (NSW) ss 198L, 198N, 198J, 198M and *Tame v New South Wales* (2002) 191 ALR 449.

49 Peter Cane, 'The New Face of Advocate's Immunity' (2005) 13 TortsLJ 93, 96.

50 Ibid.

51 Ibid.

52 Peter Hecrey, 'Looking over the Advocate's Shoulder: An Australian View of *Rondel v Worsley*' (1968) 42 AustralianLJ 3, 8.

53 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92, 98 (Gleeson CJ, Gummow, Hayne, Hayden JJ).

to only be partially relevant, as it could not support the immunity of a solicitor who was acting as an advocate.⁵⁴ The conflicts of duties an advocate owes to the court and to their client was also considered to be of marginal importance, as the duty to the court is paramount and further, because the immunity cannot support protection from liability that is not based on a duty of care to the client.⁵⁵ The desirability of preserving the cab rank rule was also dismissed, because, like the remuneration issue, this principle is only relevant to barristers and not solicitors acting as advocates.⁵⁶ The majority also disregarded the submission that advocates often need to make decisions in court quickly as a justification for the immunity.⁵⁷ In fact, the joint majority felt that this issue was 'distracting and irrelevant', and acknowledged that many others (by which one assumes to be other professionals and workers) also have the same amount of pressure to make decisions quickly.⁵⁸ Their Honours also noted that the 'chilling' effect of the threat of a civil suit was of some importance but could not constitute a justification for retaining the immunity.⁵⁹

Ultimately, the retention of the immunity had nothing to do with protecting the participants in the judicial process, but simply ensuring the 'finality' of the process itself.

Kirby: The Lone Dissent

In Justice Kirby's dissenting judgement in *D'Orta-Ekenaike*, the changing nature of the legal profession and professional liability in general, both here and in overseas jurisdictions, was highlighted as sufficient motivation to rethink the suitability of advocates' immunity in the contemporary Australian legal system. Kirby J pointed both to the lack of immunity for other professionals, including 'legal account architects, civil engineers, dental surgeons and specialist physicians and surgeons, anaesthetists, electrical contractors, persons providing financial advice, police officers, builders, pilots, solicitors (in respect of out-of-court advice) and teachers';⁶⁰ and in direct response to the concerns regarding finality, the lack of immunity in other jurisdictions, including the United States of America, Canada, the European Union, Singapore, India, Malaysia and England,⁶¹ as being a satisfactory basis for the removal of the immunity. Kirby J suggested:

54 Ibid, 99 (Gleeson CJ, Gummow, Hayne, Hayden JJ).

55 Ibid.

56 Ibid.

57 Ibid.

58 Ibid.

59 Ibid, 100 (Gleeson CJ, Gummow, Hayne and Hayden JJ).

60 Ibid, 144 (Kirby J).

61 Ibid, 145 (Kirby J); of course, this now also includes New Zealand in light of the decision in *Chamberlains v Lai* Unreported, CA (NZ), 8 March 2005.

Such disparity in a matter of legal principle does not necessarily mean that this court is wrong. But it certainly suggests the need for justification by reference to identified errors of so many other courts and legal systems or proof of such local divergencies as warrant Australian law taking its own peculiar direction.⁶²

For Kirby, the majority in *D'Orta-Ekenaike*⁶³ certainly did not make this justification. The finality argument, the sole policy argument used by the majority to support the retention of the immunity, was not sufficient to 'warrant' the High Court's decision in *D'Orta-Ekenaike*, and the retention of the immunity in the face of the position in other comparable jurisdictions was difficult to sustain.⁶⁴

V. PROBLEMS WITH FINALITY AS THE SOLE JUSTIFICATION FOR ADVOCATES' IMMUNITY

As Kirby J notes, comparable legal systems both 'within, and outside, the common law world operate perfectly well without the immunity.'⁶⁵ For the majority in *D'Orta-Ekenaike* though, a number of differences between the Australian legal system and these comparable systems warranted care in comparison between jurisdictions when considering the immunity.⁶⁶ Richard Ackland, in the Sydney Morning Herald, sarcastically recalled the majority's dismissal of the fact that other jurisdictions have abolished the immunity:

You'd be in awe at the convolutions the majority performed to cast the House of Lords decision as unworthy of being followed. The House was divided in aspects of the decision. The Poms were influenced by the European Convention on Human Rights and the Human Rights Act which, thank heavens, we don't have to worry about here because everyone has the protection of the common law and the High Court itself. The legal profession is organised differently in England. We don't have to follow the House of Lords, and particularly when English jurisprudence is now infected with a lot of foreign human rights stuff.⁶⁷

62 Ibid, 146 (Kirby J).

63 Ibid.

64 Ibid.

65 Ibid, 169 (Kirby J).

66 Ibid, 144-45.

67 Richard Ackland, 'Majority ruling gives the minnows little chance' Sydney Morning Herald, 11 March 2005, 11.

Indeed, to the public, the arguments of the majority in *D'Orta-Ekenaike*⁶⁸ in support of the immunity did seem to be along these lines. Their Honours urged that there was a necessity when comparing Australia to other jurisdictions⁶⁹ to 'look beyond the bare statement that there is, or is not, an advocates' immunity.'⁷⁰ The majority noted for example that there were exceptions to the broad assumption that no immunity exists in either Canada or the United States, as in both these jurisdictions there is protection for prosecutors, as well as immunity for judges in the United States.⁷¹ Further to this, they argued that regard must be had to the doctrine of collateral estoppel, and also the fact that principles of finality found 'different expression' in other jurisdictions.⁷² The point regarding finality, with respect to the position in the United Kingdom in any case, rested upon the United Kingdom's adherence to Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Human Rights Act 1998 (UK).⁷³ As the majority points out, the High Court is no longer compelled to follow decisions of the House of Lords, especially where such a decision is based upon judicial and social changes in the United Kingdom which could not be applied to the Australian judicial system.⁷⁴

Kirby responded to these arguments by noting that it was a 'mistake' to suggest that the removal of the immunity in the United Kingdom in *Arthur Hall* is based on the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and the *Human Rights Act 1998 (UK)*.⁷⁵ He points out that the Convention was not a key feature of the judgments of any of their Lordships in *Arthur Hall* (indeed the case was examined outside of the boundaries of the Convention in any case), and further, that the *Human Rights Act 1998 (UK)* was not even in force when the decision was made.⁷⁶ Despite these two factors, Kirby indicates that in any case, Australia is also a party to the *International Covenant on Civil and Political Rights*, which is underpinned by the same principles that inform the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁷⁷

68 *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 214 ALR 92, 144-45.

69 As raised by the Applicants and noted in the majority judgment in *D'Orta-Ekenaike* at 106: '...in particular, Canada, New Zealand or the several jurisdictions in the United States of America.'

70 *Ibid.*, 107.

71 *Ibid.*

72 *Ibid.*

73 *Ibid.*, 105-6.

74 *Ibid.*

75 *Ibid.*, 169.

76 *Ibid.*

77 *Ibid.*, 170.

With respect, the arguments concerning differences between jurisdictions as raised by the majority in *D'Orta-Ekenaike* are feeble. Interestingly, the same issue arose in *Giannarelli* after the decision in *Arthur Hall*, where once again a 'cursory dismissal' of valid empirical evidence concerning the removal of advocates' immunity in other jurisdictions took place.⁷⁸ It appeared in *D'Orta-Ekenaike* that once again the majority were willing to ignore valid evidence from overseas based upon reservations about cross jurisdictional differences that, when examined with some rigour (as Justice Kirby did), appear to be arguments that are quite weak. Given this fundamental weakness in the arguments proffered by the majority against allowing an inter-jurisdictional comparison, surely regard must be had to the evidence from other comparable jurisdictions about the operation of the relevant judicial systems post-advocates' immunity.

In *D'Orta-Ekenaike*, Kirby draws upon evidence from other jurisdictions to illustrate that re-litigation and the 'fear of floods of litigation' has not been a concern where there is a lack of finality through the abolition of advocates' immunity.⁷⁹ Kirby points out that a flood of litigation 'brought by discontented litigants against barristers and their instructing solicitors' has not occurred, for example, in the United States of America, despite being a 'most litigious country' where there has never been a blanket immunity for advocates' generally.⁸⁰ Nor has it occurred in Canada, where immunity has been removed for some time,⁸¹ a point also raised in *Arthur Hall*. In England, post *Arthur Hall*, there has not been a flood of re-litigation reported,⁸² and indeed in Victoria, where the immunity was unavailable between the initial *Giannarelli*⁸³ hearing and the Victorian Full Court determination, there was 'no objective evidence of any increase in the length of criminal trials... or evidence of a sudden rise in negligence claims against lawyers.'⁸⁴

78 The Hon George Hampel and Jonathan Clough, 'Abolishing the Advocates' Immunity from Suit: Reconsidering *Giannarelli v Wraith*' (2000) 24 MelbourneULR 1016, 1025.

79 *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 214 ALR 92, 173.

80 Ibid, citing *Ferri* 444 US 193 (1979); see also *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, 721 (per Lord Hope of Craighead).

81 Ibid, citing *Garrant v Moskal* [1985] 2 WWR 80, 82; cf A Linden, *Canadian Tort Law* 7th Ed (2001) 151.

82 Ibid, citing Seneviratne, 'The rise and fall of advocates' immunity' (2001) Legal Studies 644, 662.

83 (1988) 165 CLR 543.

84 *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 214 ALR 92, 173 (Kirby J) citing Law Reform Commission of Victoria, *Access to the law: Accountability of the legal profession* Report No 48 (1992) 35-36 [78].

Whilst some commentators have pointed to the range of malpractice suits in general in the United States of America (which currently account for US \$4 billion per year) noting that it is only a matter of time before ‘fully informed consumers target the legal profession and legal education,’⁸⁵ there is no evidence from comparable jurisdictions (and the USA in particular) that there has been a surge in re-litigation, nor a compromise in the finality of decisions, as a direct result of the removal of advocates immunity. As Kirby J notes, the existence of special rules and provisions in these jurisdictions has mitigated a surge in relitigation as a result of the removal of the immunity, and a similar range of circumstances are in fact present in Australia:

The general unavailability of legal aid in Australia to support negligence claims against lawyers; the availability of summary relief against vexatious claims; and the rules against abuse of process by relitigation (not to mention the empathy and understanding of judges for co-professionals in unmeritorious cases) makes it completely unnecessary to retain an absolute immunity of the broad, even growing, ambit propounded in this case.⁸⁶

Kirby quotes from Lord Hoffman in *Arthur Hall* who described the immunity as ‘burning down the house to roast the pig.’⁸⁷ Essentially, Lord Hoffman suggests that use of such a ‘broad-spectrum’ remedy as advocates’ immunity, which does come with side effects (especially as far as public perception of the profession is concerned), is unnecessary when a more ‘specific’ remedy can ‘handle the problem equally well.’⁸⁸ Other commentators have also evaluated the use of such sanctions which may be used as more specific remedies in line with Lord Hoffman’s suggestion above. In particular, Hampel and Clough note that since 1990 United Kingdom courts have been able to make wasted costs orders against practitioners where there has been negligence on the part of the practitioner.⁸⁹ Lord Hoffman, in *Arthur Hall*, noted that the use of such orders there had not ‘changed the standards of advocacy for the worse.’⁹⁰ Groves and Derham note that similar remedies are available in all jurisdictions in Australia, and argue that, whilst not without troubles, the wasted costs jurisdiction provides a remedy that has many benefits over a

85 Anthony Papamatheos, ‘Abolition of the Advocates’ Immunity: Stealing a Knight’s Shield?’ [2004] SOLR 5, 8, citing Manuel R Ramos, ‘Legal Law School Malpractice: Confessions of a Lawyer’s Lawyer and Law Professor’ (1996) OhioStLJ 863.

86 *D’Orta-Ekenaike v Victorian Legal Aid* (2005) 214 ALR 92, 173 (Kirby J).

87 Ibid, quoting Lord Hoffman in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, 703.

88 Ibid.

89 Courts and Legal Services Act 1990 (UK) c 41, s 4.

90 *Arthur J S Hall & Co v Simons* [2000] 3 All ER 673, 695.

separate action in negligence.⁹¹ Further, the existence of doctrines such as *res judicata* and issue estoppel also prevent the jurisdiction of the court from being attacked.⁹²

It would appear that fears concerning the finality of litigation expressed by the majority in *D'Orta-Ekenaike* are ignorant of competing evidence from overseas. True, there are differences between the systems, including, as Groves and Derham note, differences in procedural matters,⁹³ but there is nothing to suggest that the doctrines of issue estoppel and *res judicata* would be insufficient to strike matters out that were seen as an abuse of process, nor that the existence of supplementary remedies would be inadequate in providing aggrieved litigants with a resolution, in the absence of an immunity. Whilst Australia should not be tempted to conform simply because other jurisdictions have abolished the immunity, the evidence from other jurisdictions, despite being limited and somewhat pre-emptive, does provide some compelling reasons as to why the immunity should be abolished as it has been elsewhere. As Justice Kirby suggested, taking a different approach to other jurisdictions does not mean that the High Court is wrong – but it does seem a bizarre position to take in light of competing and convincing evidence from elsewhere.⁹⁴ In particular, other comparable jurisdictions have abolished the immunity and have not experienced the problems forecast by the majority in *D'Orta-Ekenaike* – there has not been a surge in re-litigation, there has not been an undermining of the finality of decisions, and most importantly, there are still a range of remedies available through other supplementary means to assuage litigants who have generally been the victim of incompetent counsel. This has ensured above all that public confidence in the legal system has been restored.

VI. CAN 'FINALITY' ENSURE PUBLIC CONFIDENCE IN THE LEGAL SYSTEM?

In the previous section, the majority's dismissal of competing evidence from other jurisdictions concerning the removal of advocates' immunity was canvassed, where the inherent weakness in the finality argument was highlighted – that is, that it simply has not been an issue in other jurisdictions where no immunity exists. The majority noted that the preservation of finality ensures above all that public confidence in the legal system will be maintained,

91 Groves and Derham, *supra* n 41 at 113.

92 *Arthur J S Hall & Co v Simons* [2000] 3 All ER 673, 681 (Lord Steyn).

93 Groves and Derham, *supra* n 41 at 107. Groves and Derham do not discuss the implications of the *Civil Procedure (Amendment) Rules* 1999 (UK), but note that under this legislation collateral attacks can be dismissed at an early stage in proceedings.

94 (2005) 214 ALR 92, 146 (Kirby J).

but it seems in light of the *D'Orta-Ekenaike* decision that the opposite has in fact occurred – the public have perceived this decision as peculiar in light of the fact that other comparable jurisdictions have removed the immunity; but most notably, they have construed the decision as a case of lawyers receiving preferential treatment under negligence law as distinct from other professionals.⁹⁵ The disdain that other professionals and the media had for the majority judgment in *D'Orta-Ekenaike* was broadcast widely, with newspaper headlines dripping in sarcasm and reminiscent of lawyer jokes published in the wake of the decision.

Many arguments have been offered by various commentaries to justify the unique position of advocates compared to other professionals. For example, Ian Harrison SC, President of the New South Wales Bar Association, drew comparisons between medical practitioners and advocates when he stated that if a doctor was to be sued as a result of alleged negligence during surgery he (or she) would be able to call his (or her) colleagues (other doctors and nurses) as witnesses whereas a barrister who is sued for alleged in-court negligence would be unable to call as a witness the judge that was hearing the case or the members of the jury.⁹⁶ This point is strongly linked to the issue that judges and members of juries have immunity from suit in relation to the relevant court proceedings. This was an issue that the joint majority and McHugh in particular emphasised in *D'Orta-Ekenaike*.⁹⁷

Another point raised to defend the retention of the immunity for advocates is that a number of other professionals also enjoy immunity from suit in some situations. McHugh J for example noted in *D'Orta-Ekenaike* that professionals, such as auditors, who don't owe a general duty of care to their investors and journalists, do not owe a legally enforceable duty to take reasonable care not to injure a person's reputation or financial position by publishing careless

95 Justice Kirby forecast this reaction when he stated that:

[In] individual cases, the professional person concerned has won or lost. But liability has been decided by the application of the general principles of the law of negligence as elaborated at the time of the decision. None of the defendants in any of the foregoing cases claimed, still less received, the benefit of an absolute immunity from liability. So why are the lawyers in this case entitled to be treated in such a special, protective and unequal way? Is this truly the law of Australia, applicable to the case? If so, what is the justification?

D'Orta-Ekenaike v Victorian Legal Aid (2005) 214 ALR 92, 144-5 (Kirby J).

96 ABC Radio National, 'Suing Your Legal Representatives', *The Law Report*, 22 March 2005, <<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1329117.htm>> at 9 June 2005.

97 It has been suggested that neither judges (*Sirros v Moore* [1975] QB 118), witnesses (*Cabassi v Villa* (1940) 64 CLR 130) nor counsel (*Munster v Lamb* (1883) 11 QBD 588) can be sued for false and defamatory statements made maliciously in the course of judicial proceedings. A witness's immunity also extends to out of court conduct that is intimately connected with the giving of evidence in court (*Cabassi v Villa* (1940) 64 CLR 130).

statements, unless it is defamatory.⁹⁸ Similarly, McHugh J also contends that medical practitioners and social workers employed by the state to examine children for evidence of sexual abuse owe no duty of care to persons suspected of being guilty of the sexual abuse.⁹⁹

Finally, in protesting that the role of the advocate in a highly pressured courtroom environment is different to the role of surgeons and others who are placed in demanding and stressful workplace situations,¹⁰⁰ Groves and Derham argue that:

A surgeon uses a scalpel and, in doing so, performs the most important aspect of surgery. Whether this function is described as responsibility, authority or power, it is the very essence of the medical procedure. By contrast, an advocate retains no such responsibility. In any judicial proceeding, the equivalent power to administer justice is in the hands of the judge, sometimes with the assistance of a jury. While an advocate may provide submissions or examine and cross-examine witnesses, he or she will never hold the responsibility, authority or power to determine the proceeding before the court. This role remains the province of the judge and jury. The scalpel is never passed to the advocate.¹⁰¹

In other words, the advocate never has complete control over the court proceedings, unlike a surgeon in surgery.

Each of these arguments, whilst they emerge as somewhat compelling, are still no competition for the public perception that advocates are receiving preferential treatment in light of the fact that these differences were not seen as salient enough to retain the immunity in other jurisdictions. No suggestion has been made that these issues pertain specifically to advocates in Australia,¹⁰² and indeed, in cases such as *Arthur Hall*, these points of difference between advocates and other professionals were disregarded as irrelevant justifications for retaining the immunity.¹⁰³ Furthermore, they were not relied upon in *D'Orta-Ekenaike* to justify the immunity, hence cementing the ideal that the immunity is not really there to protect the actors in the process but to ensure the definiteness of the process itself.

98 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92, 116 (McHugh J). See also *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

99 *Ibid* 117 (McHugh J). See *Sullivan v Moody* (2001) 207 CLR 562.

100 See, e.g., ABC Radio National, 'Suing Your Legal Representatives', *supra* n 96, where the Chairman of the Medico-legal section of the Royal Australasian College of Surgeons, Dr Tony Buzzard, was 'unsympathetic' to the courts reasoning, and suggested that surgeons are placed in just as stressful environments: 'What about someone going into an operating theatre at 2am, dragged out of bed for a ruptured aorta?'

101 Groves & Derham, *supra* n 41 at 123.

102 See *supra* n 95.

103 *Arthur J S Hall & Co v Simons* [2000] 3 All ER 673, 690-1 (per Lord Hoffman).

VII. CONCLUSION

Advocates' immunity is often perceived by the media and commentators as 'an anachronism that is out of step with modern tort law', therefore, it is most important that sufficient reasons are advanced for retaining the immunity.¹⁰⁴ The primary justification that was given for maintaining the immunity in *D'Orta-Ekenaike* was the premise that it is a 'central and pervading tenet' of the judicial system that finality of cases, once litigated, should remain unchanged.¹⁰⁵ This paper has argued that whilst the majority in *D'Orta-Ekenaike* do not cling to antiquated policy vestiges given in previous judgments, the finality justification does not strike out as compelling in its own right.

One of the main justifications that the majority gave for relying on the finality argument was that 'finality' of decisions needs to be preserved so as to uphold public confidence in the legal system. It is clear however that the upholding of the immunity based on the finality consideration has had the contrary effect and has actually undermined the public's perception of the administration of justice. This was clearly portrayed in the media and from statements that were generated from other professionals soon after the decision was handed down. Therefore, it is not the preservation of finality that will see such public confidence restored, but the ability for people to see openness and accountability demonstrated through placing lawyers on an even playing field and removing any perception that there is a system of lawyers looking after their own, or that lawyers in Australia are treated differently to other comparable common law countries. In fact, evidence from other jurisdictions has shown that the finality of decisions and the administration of justice have not been undermined without the immunity, and further, that there has not been a flood of re-litigation or a destruction of public confidence in the legal system, as feared by the majority in *D'Orta-Ekenaike*.

A remark from Seneviratne concerning the legal process post-*Arthur Hall* in the United Kingdom, perhaps best sums up the benefit of the removal of the immunity from all sides:

The decision does not appear to have caused any great problems for the legal profession. Indeed, the reaction of some in the profession is that it is to be welcomed, if it helps restore public confidence in the openness and accountability of the profession.¹⁰⁶

104 Groves & Derham, *supra* n 41 at 82.

105 *D'Orta-Ekenaike v Victorian Legal Aid and Another* (2005) 214 ALR 92. This statement does not refer to appeal processes.

106 Seneviratne, 'The rise and fall of advocates' immunity' (2001) Legal Studies 644, 662, as cited in *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 214 ALR 92, 173 (Kirby J).

However, continued retention of the immunity may well only serve to entrench attitudes such as this in the public psyche:

But note how the stars of the Bar, most adept at playing the justice game on behalf of others, skilfully avoid having to play it for themselves. They cling to their immunity from actions for negligence – an unjustified privilege which protects incompetents from being sued.¹⁰⁷

107 Robertson, G, *The Justice Game* (1999) 376.

Mediating in the Shadow of Australian Law: Structural Influences on ADR

Professor Nadja Alexander*

I. INTRODUCTION¹

Mediation has grown rapidly in many Anglophone jurisdictions such as USA, Australia, Canada, New Zealand and England. The current state of mediation practice in many of these jurisdictions can be traced back to the establishment of community justice centres in the 1970s and 1980s. Mediation is practised in the private sector as well as in a wide range of court-referred programs. In many common law jurisdictions mediation is no longer a form of alternative dispute resolution, it has become *primary* dispute resolution.

In contrast, civil law countries have displayed, until recently, a greater reluctance to embrace the practice of mediation to resolve legal disputes. Compared with the common law experience, mediation in countries such as Germany, Denmark, Belgium, Italy, France, Poland, Switzerland and Yugoslavia has travelled, and some are still travelling, a more difficult and winding path to recognition as a legitimate and valuable alternative to litigation. The European Union, however, has signalled a strong focus on ADR and, in particular, mediation. It has declared ADR a “*political priority*”, published a Green Paper on Alternative Dispute Resolution in Civil and Commercial Law² and contributed to the development of online dispute resolution infrastructure.³ At the time of writing a proposal for a European Directive on Mediation⁴ is under discussion at the European Commission in Brussels and a European

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1 Parts of this article are drawn from N. Alexander, “Global Trends in Mediation: Riding the Third Wave” in N. Alexander (ed.) *Global Trends in Mediation* (2003; see also the second edition 2006) and N. Alexander, “Mediation on Trial: 10 Verdicts on Court-related ADR” *Law in Context* (2004) with the kind permission of the publishers.

2 The Green Paper is available at: www.europa.eu.int/eur-lex/de/com/gpr/2002/com2002_0196de01.pdf

3 In 2001 the European Extra-Judicial Network (EEJ-Net) was established with the purpose of settling cross-border consumer disputes out of court using online technology. www.eejnet.org

4 Proposal for a Directive of the European Parliament and of Council on certain aspects of mediation in civil and commercial matters (SEC) (2004) 1314.

Code of Conduct for Mediators has been prepared by a number of ADR organisations with the support of the European Union.⁵ While the European mediation rhetoric is getting stronger, the reality is that mediation practice, subject to a number of exceptions, is piece-meal and very limited.

While the differences between the common law/civil law jurisdictions are very pronounced, there are significant structural differences in ADR design even amongst Anglophone jurisdictions. Understanding these differences helps to explain why mediation and other forms of alternative dispute resolution have developed differently throughout the world. In addition these differences demonstrate that the import or export of mediation services is a complex matter and cannot be undertaken successfully without an understanding of the legal, political and cultural structures of the relevant jurisdictions.

This article will explore structural issues in Australian mediation. It does not engage in a comparative analysis of jurisdictions where mediation is practised.⁶ It does, however, provide a structural framework for Australian lawyers and mediators seeking to export Australian ADR know-how to the rest of the world.

Structural issues are most valuably addressed in the context of the legal system in which the structures are embedded. They refer to the supply side of legal behaviour which Blankenburg describes as “*a set of institutional arrangements and patterns of professional interaction.*”⁷ Recurring structural issues include how aspects of the regulatory framework such as mediation referral systems, case management processes, civil procedure rules, laws on mediation and mediators, payment structures, and accreditation and training impact upon the mobilisation and actual practice of mediation. Here structural issues will be addressed in terms of: the reasons for and development of the court-referred ADR movement; types of court-referred ADR and mediation referral systems; and legalisation of ADR through case law and legislation.

5 A text of the European Code of Conduct for Mediators is available at: www.europa.eu.int/comm/justice_home/ejn/adr/adr_ec_code_conduct_en.pdf

6 For a comparative analysis of mediation, see N. Alexander, “Global Trends in Mediation: Riding the Third Wave”, *supra* n 1.

7 E. Blankenburg, “Civil Litigation Rates as Indicators for Legal Cultures” in D. Nelken (ed.) *Comparing Legal Cultures* (1997).

II. THE REASONS FOR AND DEVELOPMENT OF COURT-REFERRED ADR IN AUSTRALIA

The litigation crisis as catalyst

The emergence and development of mediation in Australia has occurred largely as a result of pressure on politicians and governments to respond to an inefficient, protracted and, for most citizens, unaffordable and highly unsatisfactory litigation process.

The common theme that emerges in many common law countries including Australia is that mediation as a movement and as an institution begins to grow only when the political voices of the day express an urgent need to overhaul and remedy the inadequacies of the existing judicial system such as excessive cost and delay. In this context, it is no surprise that mediation success in common law jurisdictions has often been measured by quantitative indicators such as settlement success rate and reduction in court waiting lists.

Trends in court-referred ADR

The establishment and development of court-referred mediation schemes in Australian jurisdictions generally follow a four-phase pattern.⁸ These four phases can also be identified in other common law jurisdictions such as the US and Canada.⁹ In terms of the Australian statistics, information for this article has been sourced from court annual reports and the website of the National ADR Advisory Council as well as secondary sources.¹⁰

8 There are, of course, exceptions to this pattern, which can generally be explained by local structural differences. See, e.g., the comments on Tasmania in N. Alexander, "Mediation on Trial: 10 Verdicts on Court-related ADR" in *Law in Context* (2004) 5.

9 On Canada: A. Prujiner, "Développements Récents en Médiation au Canada et au Québec" in N. Alexander (ed) *Global Trends in Mediation*, supra n 6 at 93; H. Genn and Hazel, "Court-based ADR Initiatives for Non-Family Civil Disputes: an Evaluation of the Ontario Mandatory Mediation Program." http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/exec_summary_recommend.pdf

On the USA: R. Birke and L. Teitz, "US Mediation in the Twenty-first Century: The Path that Brought America to Uniform Laws and Mediation in Cyberspace" in N. Alexander (ed) *Global Trends in Mediation*, supra n 6 at 359:

<http://www.caadr.org/statistics/background.htm> and <http://www.ned.uscourts.gov/mediation/medweb/page4.html>

10 See, e.g., the Supreme Court of Queensland Annual Reports, <http://www.courts.qld.gov.au/publications/annual/default.htm> and the Supreme Court of New South Wales Annual Review http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/ar_index. See also NADRAC's published statistics on ADR in Australia available at <http://www.nadrac.gov.au>. For a useful secondary source, see T. Sourdin "Mediation in Australia: The Decline of Litigation" in N. Alexander (ed) *Global Trends in Mediation*, supra n 6 at 33.

Phase 1. Initial scepticism and a slow build-up of court referrals

Phase 1 is characterised by the introduction of a court-referred mediation scheme. In most cases the scheme is introduced by legislation, sometimes through practice directions.¹¹ The use of mediation as prescribed by the legislation is typically either voluntary (that is with the agreement of the parties) or discretionary mandatory (that is at the discretion of the court). Today most of the schemes that were initially voluntary are now discretionary mandatory, although some are routine mandatory (that is without court discretion).¹² During this first phase the term 'mediation' is widely recognised by the profession and the judiciary but specific knowledge, a good understanding of how mediation works and practical experience in the process is limited to a few. Lawyers lacking personal experience in mediation are less likely to refer their clients to ADR.¹³ In short, most lawyers and judges, having had little or no exposure to mediation are reluctant to embrace a process, which they fear might impact negatively on their legal practice or judicial role. As the success of newly-minted mediation schemes is often dependent on the efforts of a minority of committed supporters in the judiciary and the legal profession, its general uptake is initially hesitant and slow.

Phase 2. A sudden surge in court referrals

As the initial scepticism retreats and the gatekeepers to mediation (particularly the case managers and judges in court-referred mediation schemes) enjoy their first success stories, the scene changes dramatically. The court experiences a rapid clearing of cases pending trial, better case management and sometimes even positive feedback from users of the justice system and the media. Politicians, court registrars and chief justices quote statistics indicating that access to justice is improving and disputants who go to mediation are satisfied with it as a speedy and less expensive alternative to court.¹⁴

Phase 3. Stabilisation in the number of court referrals

Having reached a certain critical number, court referrals seem to stabilise. One can speculate on the reasons for this development. One possible explanation is that the number at which the referrals flatten out represents the optimum number of referrals, allowing matters that are best managed by means of a

11 D. Spencer, "Mediation practice notes — around the grounds" (2004) 15 ADRJ 149.

12 On court-referral models, see L. Boule, *Mediation: Principles, Process, Practice* (2005) 377-385.

13 N. Spiegel, "Queensland Lawyer Attitudes Towards Mediation: Implications for Training and Education" (1998) NLR 1.

14 See, e.g., P. de Jersey, "Use Of Alternate Dispute Resolution in Commercial Disputes Seminar." www.courts.qld.gov.au/publications/articles/speeches/dj030999.htm

judicial decision to go to court. Another suggestion is that gatekeepers in discretionary mandatory schemes learn to distinguish between cases that are suitable for mediation and those that are not. If this hypothesis is true it would mean that the actual number of suitable referrals is increasing and the number of unsuitable cases being referred to mediation is decreasing, resulting in an overall stabilisation of numbers. Yet another explanation is that judges are not referring more matters to mediation because they fear a loss of adjudicative work and a cut in their allocated budget if they do so. There is, however, no data to support any of these reasons – only anecdotal evidence to support each.

Phase 4. Signs of a drop in court-referred mediation

In some Australian jurisdictions, there is a drop in the numbers of mandatory court referrals. In the Supreme Court of Queensland, for example, there has been a steady decrease in mandatory mediation orders without consent since 1999. Where this trend does occur, it typically follows a period of a sustained number of referrals as described in phase 3 and as such potentially indicates a future trend for jurisdictions currently experiencing phase 3. Where there is a drop in referrals, it is important to ask questions about the reasons behind it. Are courts are changing their referral patterns and, if so, how? Are courts simply referring fewer matters to mediation or are they referring parties to processes other than ADR? Specifically, questions need to be asked about the correlation between the court-referral model, the rate of usage of court mediation and settlement rates at mediation.

Alternatively, a fall in the number of court referrals to mediation could be triggered by a change on lawyer/client side rather than a change in the nature of court referrals. In jurisdictions like Australia there is growing body of case law and legislation establishing first, the professional duties of lawyers in advising clients about dispute resolution options and second, their duties within a mediation.¹⁵ Anecdotal evidence suggests that where courts have been very active in referring matters to mediation over a period of years, the legal profession is more likely to engage in the voluntary and early use mediation where appropriate. In other words, the culture of the legal profession may be changing.

This hypothesis is illustrated in the jurisdiction of Queensland, Australia. The mediation referral system in the Supreme Court of Queensland was established by the Courts Legislation Amendment Act 1995 (Qld) and is regulated by the legislation in conjunction with the Uniform Civil Procedure Rules 1999.

15 J. Wade, "Liability of Mediators for Pressure, Drafting and Advice" (2004) 6 (7) ADRB 131.

Judges possess a discretionary power to refer matters to mediation. At the same time, recent case law in Queensland and other Australian jurisdictions¹⁶ suggests that the judiciary takes into account inter alia the attitude of the parties to mediation and the likelihood of good faith participation in the mediation in determining whether to refer the matter to mediation – a kind of ‘soft mandatory’ model. The Queensland judiciary is supportive of mediation initiatives, clauses, agreements and referrals. A small number of senior barristers now earn most of their income from conducting mediations, rather than trials. A litigation lawyer was recently heard saying that the last time he was in court was more than three years ago. As indicated above there has been a fall in the number of non-consent referrals to mediation in Queensland. This has been accompanied by an increase in referrals by consent, with the result that the overall official referral rate has remained stable. An increase in consent orders may indicate that lawyers are encouraging their clients to go to mediation because they know a court referral is likely. However, it could also indicate the development of a different disputing culture, which has come to know the benefits of mediation in appropriate cases. Further, on the basis of this trend, one could speculate that if more parties and their lawyers are consenting to mediation through orders, then it is also likely that others are going to mediation before the matter is even filed in court.

III. THE NATURE OF COURT-REFERRED MEDIATION AND MEDIATION REFERRAL SYSTEMS

The nature of court-referred mediation

Most court-referred ADR schemes in Australia offer mediation as an alternative to litigation. In the legislation establishing mediation referral schemes, the mediation process in most cases is defined very broadly, if at all. In other words, mediators are free to adopt a practice model of their choice – from the one extreme of a highly evaluative mediation style to the other extreme of a committed transformative practice. Furthermore, no specific requirements are set out for training and accreditation. In most court-referred schemes, mediators can apply to be placed on a panel of court mediators. Their appointment to the panel is at the discretion of the court. As a matter of practice most applicants who have completed a 20 to 40 hour training course or otherwise have ADR experience are accepted as panel members. While

16 In this regard, see generally *Australian Competition & Consumer Commission v Collagen Aesthetics Australia Pty Ltd* [2002] FCA 1134; *Finikiotis v Sandhurst Trustees Ltd* [2002] FCA 341 (27 February 2002); *George Andrew Harrison & Anor v Delcie Joan Schipp* [2002] NSWCA 27 (15 February 2002); *Remuneration Planning Corp Pty Ltd v Fitton; Fitton v Costello* [2001] NSWSC 1208 (14 December 2001); *Trelour v J H McDonald Pty Ltd* [2001] QDC 053.

there is generally no requirement for court-appointed mediators to be legally qualified, most mediations referred out by the Supreme and District Courts in the Australian States are conducted by senior lawyers.

Australian mediators, whether or not they have undergone accreditation training, tend to mediate in a manner that reflects their previous profession, whether as lawyers, engineers, social workers, psychologists or academics. Practice models reflect:

1. the nature of training,
2. the professional background of the mediator, and
3. the legal and organisational structures within which the mediation is conducted.

Training programs in Australia and other Anglophone jurisdictions are typically too short to have a major effect on mediators' previous disciplinary training or experience. Marketplace structures such as the role of community, private and government ADR organisations respectively will impact on how mediators mediate. For example, if most mediation is court-referred under a mandatory scheme, more lawyer-mediators conducting evaluative mediations are likely to be found in practice than in a region with a history of strong community-based organisations and no formal court-referral programs. Australia enjoys a diverse marketplace for mediation services from community mediation to institutionalised court-referred mediation. Therefore, the combination of minimal training models and diverse marketplace structures means that, for the most part, Australian lawyer-mediators continue to mediate as lawyers in court-referred situations, social worker-mediators tend to mediate as social workers in family, youth and community contexts and so on.

In court-referred mediation programs, the Australian experiences warns that mediation practices, particularly in schemes that do not specify mediation values and specific process requirements, will lack a value-centred base. In concrete terms this means that there is a tendency for 'anything goes' mediation, which in turn leads to consumer and practitioner uncertainty about the nature of the mediation process and inadequate quality management of ADR processes. In the absence of a clear set of informed values upon which mediation services are based, case law and legislation have responded to the need for quality assurance and standards by increasingly legalising the mediation process. As part of the move to bridge the gap between mediation values and practice, mediation programs and organisations need to assume a greater responsibility for the service they are offering by making an informed choice about process quality and communicating this choice to their clients.

Models of court mediation referral systems

The ability of the courts in Australia and other Anglophone jurisdictions to change their court rules (which is in stark contrast to the legislative monopoly over court rules in most civil law countries) has enabled Australian courts to integrate mediation into the litigation process on a court-by-court basis. This means that there has been scope for enormous variety in court referrals.

Today all court-referred mediation schemes in Australia are legislatively based. They vary, however, according to who is qualified to mediate (judges, court staff, external mediators approved by the court or other non-approved external mediators) and the nature of party participation. In terms of the latter, the traditional voluntary/mandatory dichotomy is no longer an adequate tool for describing and analysing mediation developments. So-called 'voluntary' mediation can vary dramatically from court-recommended referrals where courts actively encourage parties to participate in 'voluntary' schemes to schemes in which parties are simply informed in writing about the option of mediation and left to pursue it of their own accord.

Despite a great deal of debate about the legitimacy of mandatory court referrals to mediation, the reality today is that mandatory mediation cases make up the collective bulk of court-referred mediation. If one surveys the mediation landscape carefully, different shades of mandatory will emerge. Consider the pre-filing mediation set out in South Australia's Rule 20A Magistrates' Court (Civil) Rules and section 27 of the Magistrates' Court Act 1991 (SA), which mandates mediation of all cases before they can be filed in the Magistrates Court and the Federal Court's routine mandatory referral to mediation by the National Native Title Tribunal for all native title claims lodged with the Court.¹⁷ Although the timing and nature of mediation is different in both these referral models, parties cannot get a hearing without first going to mediation. Compare this with the soft mandatory referral model described above, where courts will take into account the attitude of the parties towards mediation before deciding whether to 'mandate' the process.

Despite much experimentation with forms of court-referred mediation in Australia, current trends indicate a move towards the following court-referral design features in the Supreme and District Courts of the various Australian States:

1. Mandatory referrals usually at the discretion of the court;
2. External mediators, typically barristers;

17 Native Title Act 1993 (Cth), ss 86B (2), (3) and (4).

3. Parties select mediator;
4. User pays system with fees set by mediators.

These features represent a marketplace model of mediation in which the court system extends its arm into the private sector. In doing so it has contributed to the creation of a new industry – private court-referred mediation.

However, there are other courts and tribunals which do not follow this model at all. They are typically tribunals and lower courts in which the tenets of the adversarial system are not as entrenched and in some cases not required. Here the influence of civil law procedures, such as judicial case management and settlement techniques, have been the greatest and we have seen the influence civil law court mediation models which focus on the judge as mediator (justice model). In contrast to the marketplace model, the justice model contains the following features:

1. Mandatory referrals (often routine mandatory, that is all matters that meet certain specified criteria must go to mediation),
2. Internal mediators, often judges,
3. Court selects mediator, and
4. Court/ tribunal system pays the costs of the mediation.

The justice model views mediation as an extension of the service of the courts. It is consistent with the civil law notion of the settlement judge – the judge must as a matter of law attempt to settle a matter before him/her before trying the case. Two Australian examples of courts and tribunals that employ the justice model of court referral are the Queensland Commercial and Consumer Tribunal and the Commonwealth Administrative Appeals Tribunal.

The user pays principle has implications for access to justice

As indicated above, in relation to the marketplace model of court-referred mediation, litigants typically pay for mandatory mediation.¹⁸ An interesting development in the jurisdiction of Queensland has been the significant rise in litigants-in-person since the introduction of mandatory mediation schemes linked to courts and legal aid. Where litigants are required to mediate as part of a court-referred mediation scheme or as a requirement of receiving legal aid, they may not have the funds to engage legal representation to pursue the matter in court. As a result there may be increased pressure to reach a settlement at

¹⁸ Note, according to Order 29.2 Rules of Supreme Court 1971 (WA) parties cannot be ordered to go to mediation where they are responsible for mediator remuneration.

mediation. Although the courts are no longer congested, the cost of litigating with legal representation remains beyond the reach of most once-only litigants. Anecdotal evidence suggests that those who choose to litigate in person are frequently poorly advised clients or litigants with limited financial means disputing on a matter of principle, and having exhausted the legal aid funding available to them at a mandated mediation. This unintended consequence of strongly encouraging and mandating mediation creates a difficult situation for the judges, for the unrepresented litigant as well as the lawyer on the other side. Rather than increase access to justice, it hinders it.

Gatekeepers influence the type of cases that are referred to mediation, who mediates and the timing of mediation

In the context of legal disputes, court-referred mediation initiatives have been the primary vehicle for the encouragement and mobilisation of mediation. At the crossroads between 'out-of-court' and 'in-court' dispute resolution, the judiciary and the legal profession occupy an influential position as the gatekeepers of many ADR procedures and accordingly they play a key role in the mobilisation of mediation.

As a matter of practice, gatekeepers have enormous influence over who mediates and when mediation occurs. Anecdotal evidence suggests that in most cases gatekeepers within the legal system will tend to refer matters to lawyer-mediators and gatekeepers outside the legal system will refer to other professional mediators with whose work and disciplinary background they are familiar. The impact of training and disciplinary background of the mediator has been discussed above.

In Supreme Court jurisdictions in Australia, judges or registrars have the discretion to refer parties to mediation or other forms of ADR. All civil matters that fall within the court's jurisdiction are eligible for referral. In the early days of court referrals judicial discretion varied greatly. Some judges referred virtually every case to mediation, others none at all, and still others referred cases to mediation according to self-determined criteria such as lower monetary sum, family-related dispute, too expensive to litigate, straightforward, non-complex matter and so on. Over the years referral schemes have become more sophisticated in terms of their referral criteria and a body of case law has developed identifying the following criteria as relevant:¹⁹

1. Nature of relationship between the parties: bitter animosity or history of working things out,

19 See, e.g., *Rajski v Tectran Corp Pty Ltd* [2003] NSW 477 (unreported, J. Palmer, 27 May 2003).

2. Outcome of previous structured settlement attempts,
3. Complexity of litigation proceedings if matter does not settle,
4. Investment of resources – time, money, emotional – in mediation versus litigation,
5. Effect on resources of court,
6. Effect on resources of parties compared to value of dispute and to litigation,
7. Manner/attitude of the parties to litigation/ dispute resolution processes so far; attitude of parties to mediation and to mediator,
8. Health of participants, and
9. Ability to negotiate.

The type or legal classification of a legal matter has not proven to be a useful indicator of the utility of mediation.

In terms of timing, empirical evidence is mixed as to the ideal timing for mediative intervention. In Australia Supreme and District Court referrals generally occur after the close of pleadings. Mediation can occur at any stage of proceedings and as a matter of practice tends to occur after discovery, despite legislative encouragement to resolve dispute earlier rather than later.²⁰ In terms of mediation's effect on statutory limitation periods, post-filing referrals will not affect the limitation period.

IV. THE REGULATION OF ADR

There has been a proliferation of regulatory ADR instruments in Australia during the last 15 years. This section outlines the emerging law of mediation in Australia and demonstrates how it creates a framework, which regulates both the process and the participants. The regulation of ADR stems from four primary sources:²¹

1. National laws (comprising legislation and case law),

20 See, e.g., Order 29.2 Rules of Supreme Court 1971 (WA) and Section 95 of Supreme Court of Queensland Act 1991 (Qld). Both provisions encourage the early resolution of disputes in a post-filing referral scheme.

21 This categorisation is based on the *Draft Recommendation on Online Alternative Dispute Resolution* (ODR), developed by UN/CEFACT, December 2002.

2. International legal instruments such as the UNICITRAL Model Law on Conciliation insofar as it is adopted by national jurisdictions, dispute resolution agreements of bi-lateral and multi-lateral agreements, EU directives and so on,
3. Private contractual instruments, and
4. Standards, benchmarks and professional ethics insofar as legal systems draw upon them to interpret industry standards of professionalism and quality processes and performance.

These source instruments of ADR regulation outlined above can be further classified in terms of the issues they regulate.²²

1. Pre-mediation process issues,
2. Issues arising during the mediation process,
3. Post-mediation process issues, and
4. Regulation of participants in the mediation process.

Pre-mediation issues

Pre-mediation issues refer to issues that typically arise before the mediation session proper. These include the interpretation and enforceability of dispute resolution clauses and agreements to mediate, the criteria according to which courts may refer disputing parties to mediation and finally how participation in mediation affects the limitation periods on initiating legal proceedings. The last two issues have been discussed above. With respect to enforceability issues, the much cited cases of *Hooper Bailie* and *Elizabeth Bay*²³ established the principle that the court would be prepared to recognise an agreement to mediate or a mediation clause, provided contractual principles were followed.

22 Compare the classification of mediation legislation into procedural (dealing with the nature of the mediation process), regulatory (regulating the practice of mediators in mediation) and beneficial (to protect mediators and consumers) legislation: D. Clapshaw and S. Freeman-Greene, "Do we need a mediation Act?" (2003) 6 (4) ADRB 61.

23 *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194, 209; *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709. Other more recent cases include *Computershare Ltd v Perpetual Registrars Ltd (No.2)* [2000] VSC 233 [14], *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) NSWSC, 55020 OF 1999, 1 October 1999 and *The Heart Research Institute v Psiron Ltd* [2002] NSWSC 646.

Issues arising during the mediation process

In terms of issues arising during the mediation, Australian courts have focused on the scope and implications of confidentiality in mediation. In Australia the confidentiality of aspects of the mediation process may be protected by:

1. Legislation;
2. An agreement to mediate; or
3. Common law in the form of the without prejudice privilege and legal professional privilege.

Most Acts of Parliament that provide for mediation protect the confidentiality of statements made and documents prepared during the course of the mediation.²⁴ Agreements to mediate generally contain confidentiality clauses that require the parties and the mediator not to disclose to persons outside the mediation any information or document used in the mediation. Harman, referring to the case law, points out that the parties should clearly state their intentions in relation to confidentiality and privilege.²⁵ Accordingly, the agreement to mediation should specify:

1. the parts of the mediation to which the obligation of confidentiality attaches;
2. any exceptions to the confidentiality and privilege; and
3. the obligations of the mediator, during and after the mediation in relation to the confidential material received during the course of the mediation including both joint and separate sessions.

Regulation of participants in mediation

The regulation of parties, legal representatives and mediators in mediation has become an increasing focus of Australian case law.

A duty on the part of the parties and their legal representatives to participate in mediation in good faith can have a statutory or a contract law basis. Australian courts now consider dispute resolution clauses containing good faith components enforceable, although concern has been expressed as to the nature of remedies for breach and the type of evidence that could be adduced

24 See, e.g., Supreme Court of Queensland Act 1991 (Qld), ss 112-114.

25 L. Harman, "Confidentiality in Mediation" in G. Raftesah and S. Thaler (eds.) *Cases for Mediation* (1999) 29.

to prove breach.²⁶ In a number of cases, courts have defined the meaning of good faith in negotiation and mediation contexts.²⁷ Parties found not to have participated in mediation in good faith have in some cases been subject to costs orders against them.²⁸

Issues of professional liability for mediators²⁹ and legal representatives³⁰ are also the subject of an increasing amount of case law. In this context courts draw upon the standards of professional bodies and ADR organisations to assess claims of professional negligence.

Post-mediation issues

Post-mediation issues in Australia focus on mediator's reporting back duties, the enforceability of settlement agreements and the ability of mediators to be subpoenaed in this context. In terms of reporting back, mediators are typically limited to reporting on the presence of the parties at mediation and the nature of the outcome – full, partial or no settlement. In other words, mediators are not usually asked to report on the behaviour of the participants in mediation. In cases where, for example, one party does not attend the mediation, mediators' reports may result in costs implications for the non-attending party.

Settlement agreements are generally treated as private contracts and the general law of contract applies, including the ability to challenge the settlement agreement on grounds such as misleading and deceptive conduct, duress and unconscionability. In this context, mediators have been subpoenaed to give evidence in subsequent legal proceedings about what took place at the mediation. In other words, the cloak of confidentiality can be lifted to gather evidence of alleged improper conduct.³¹

National approaches to regulation

Countries such as Australia and the USA have benefited greatly from early experimentation with mediation models and marketplace structures. It would be a mistake to assume that solutions from these common law countries could be easily exported elsewhere. Despite sharing the common law system, the Australian and American responses to the diversity versus consistency debate have been dramatically different. In a move towards developing consistency,

26 *Rajski v Tectran Corp Pty Ltd* [2003] NSW 477 (unreported, Palmer J 27 May 2003).

27 See, e.g., *Australia v Taylor* (1996) 134 FLR 211, 224, 225.

28 See, e.g., *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137, 140.

29 *Tapoohi v Lewenberg* [2003] VSC 410, 21 October 2003.

30 *Studer v Boettcher* [2000] NSWCA 263, 24 November 2000.

31 See, e.g., *Quad Consulting Pty Ltd v David R Bleakly & Associates Pty Ltd* (1990-1991) 98 ALR 659.

the US Model Law Uniform Mediation Act (UMA) was approved in May of 2001 in the hope that US states would adopt its provisions creating uniformity across jurisdictions.³² The US drive towards a national uniform solution reflects the vast and complicated web of regulation relating to mediators and mediation of which Birke and Teitz write that has led to a great deal of confusion about rights and obligations of the mediator, clients, lawyers and courts.³³ However, as the Model Law represents the ultimate compromise with certain issues such as training and accreditation not canvassed at all and others dealt with very broadly, its attractiveness and utility have been the subject of much critical comment.³⁴ Will it serve to establish national standards on certain issues such as confidentiality and admissibility, while leaving other areas to continue to develop in an ad hoc fashion? The jury is still out on this question.

Australia has taken a very different approach. A report to the Commonwealth Attorney General in 2001 recommended that all Australian ADR service providers adopt a code of practice dealing with specific issues, while at the same time encouraging diversity by leaving the particular choice of standard up to specific practice areas and service providers. This is called the framework approach – developing a national framework for standards within which diversity and consistency can co-exist.³⁵

In 2006 a national mediation accreditation initiative set out to establish a national minimum standard for mediator accreditation.³⁶ Consistent with the framework approach and the promotion of diversity in quality mediation practice, the standard will be voluntary and, as a minimal standard, co-exist with more demanding or specialist standards of specific professions, organisations and industry groups. Several ADR organisations and state-based bar associations have, for example, established regular and advanced panels of mediators, with the advanced panels requiring a higher standard than the proposed national mediation standard.³⁷ In addition, Australian law societies are in the process of developing a national specialist mediator accreditation for solicitors and legal practitioners, which will comprise education and practice requirements beyond the proposed national standard.

32 The following US states have either enacted or are in the process of enacting the UMA: District of Columbia, Minnesota, Indiana, New Jersey, Ohio, Vermont, Washington, Connecticut, Iowa, Massachusetts.

33 See R. Birke and L. Teitz in N. Alexander (ed.) *Global Trends in Mediation*, supra n 6 at Part 4.

34 Ibid.

35 T. Sourdin, supra n 10 at Part 2.

36 <http://www.mediationconference.com.au/html/Accreditation.html>

37 For example, the Queensland and Victorian Bar Associations and, in terms of ADR organisations, LEADR and the Institute of Arbitrators and Mediators (IAMA).

Approaches to regulation can therefore stimulate or stifle the diverse markets for mediation training and practice. Mediators and trainers need to be aware of national policy and legislative initiatives before launching into a new market.

V. CONCLUSION

This article has demonstrated how the legislative and policy structures imposed on court-referred mediation in Australia influence its practice. With the global trend towards the institutionalisation and regulation of mediation, law and legal systems will continue to exert a greater influence on the practice of mediation. The structural framework within which mediation is embedded impacts directly on the nature and quality of process and the ability of mediation to achieve its goals whether they be improved service delivery, access to justice, self-determination, reconciliation or transformation. Understanding national structural frameworks forms the basis for comparative mediation studies and is essential for the successful export of mediation skills, services and programs.

Formal Legal Education: A Few Lessons From The Past, Useful For The Future

Professor John H. Wade*

I. INTRODUCTION

This note suggests (again) that some of the goals of legal education can be discovered helpfully by observing excellent “lawyers” (in their diverse occupations) anecdotally and/or systematically. It repeats the challenging question – what are the causes of a person becoming an excellent lawyer? There is nearly a century of criticism of formal university legal education for allegedly failing to contribute “enough” towards the production of a sufficient number of “excellent” or even “competent” “lawyers” (in the diversity of careers which “lawyers” enter). How should we respond?

The note offers a quick quiz, to be answered quickly or slowly, to help extract important educational goals and methods from the past for the future. From there, suggestions drawn from lessons of the past are presented as worthy of regular incorporation into every law school and university ecosystem.

II. WHAT IS ‘EXCELLENT LAWYERING’ (WITHIN THE DIVERSITY OF ‘LEGAL CAREERS’)?

Presumably the majority of law teachers and educational policy makers have friends who, in our opinions, are model “lawyers”. We respect them for their character, integrity, perseverance, specialised technical knowledge, breadth of knowledge, wisdom, range of skilled and accessible friends, adaptability, humility, assertiveness, humour, courage, listening, speaking and writing skills.¹ We would send our beloved relatives to them for assistance. (Do we tell our law students with pride about these model friends of ours?) These role models clearly define some of the key ultimate attributes we are seeking to inculcate in law students, and ourselves, as teachers. How often are these long terms goals invisible to both staff and students; or devoured by other intermediate goals of law school such as funding, curriculum “coverage”, grade hunt, and esteem accumulation?

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1 Note the remarkable number of top measures of excellence which are related to attitude and character. See J O Mudd and J W La Trielle, “Professional Competence: A Study of New Lawyers” (1988) 49 MontanaLR 11.

The anecdotal or systematic sociology of “lawyering”, law offices and lawyering excellence, rather than of “law”, is another wave of scholarship and teaching which has hardly touched Australia.²

Causation – what paths to excellent lawyering?

How were these ideal lawyers created? By what diversity of paths? By what combinations of nature and nurture? What positive contribution did their formal legal education have towards expert or competent knowledge, skills and character? This is an important, though humbling, and mysterious question. Probably one third of the best lawyers I know were not present at Sydney University Law School in either mind or body.³ They were leading busy lives elsewhere for four years. (I know, because they borrowed my notes.) Conversely, some of the worst lawyers I know attended nearly every class. (They also borrowed my notes.)

What standard theories on nature and nurture can be recycled from these anecdotes? For example, law school experience has only marginal influence upon the already very “bright” students; and is perhaps of only marginal influence upon the already “failed” in skill and character? If so, why do we labour? Perhaps for the inspiration and enlightenment of the nebulous in-betweens and the “late-blossomers”? Or is the law school experience largely irrelevant, as the intensive education of the market-place will quickly push the pre-ordained good, bad and in-between to higher levels of their dormant “potentials”?

III. FORMAL LEGAL EDUCATION – WHAT IS IT?

Formal “legal education” takes place in many contexts – CLE, PLT, daily workshops in law firms and government departments, amongst accountants, valuers, doctors, university law and business faculties, both undergraduate and postgraduate, some psychology, criminology, dental and medical faculties, tape, radio, TV and DVD “law” programs, the proliferation of “legal” internet sites, and a vast industry of “legal publications” for all levels of interest.

2 E.g. L M Brown and T L Shaffer, “Toward a Jurisprudence for the Law Office” (1972) *AmerJJuris* 125; C D Kelso, “Steps Toward a Lawyer Oriented Jurisprudence: Problems, Promises, Procedures and Pitfalls” (1967) 19 *U FloridaLR* 552.

3 See more systematic evidence of law student “absence” in Australia and USA in Ziegert, Stephens and the Cramton Report discussed in J H Wade “Legal Education in Australia – Anomie, Angst and Excellence” (1989) 39 *J LegalEduc* 189, 196-7.

Of course, *informal* legal education is occurring each minute in mega-blasts of observation, experience, reflected-upon-experience, questions, chats, reading of internet or hard copy snippets and tomes, TV and film soap operas, and daily newspaper, internet and TV “news” about conflict which has entered a “legal” arena.

A narrow band of formal legal education is that which takes place in universities towards JD, LLB or other degrees.

A century of criticism and perceived “failure”

This above narrow type of formal university legal education in Western countries has been subject to an onslaught of criticism for over a century.⁴ The persistent critics are both insiders and outsiders – law students, reform commissions, law faculty researchers, and government agencies. If the century of critics are even fifty percent correct, how can we hope to “advance” into the future, when on the dominant *published* historical interpretation, we are building on regularly recycled ruins? Why are the critics of this form of university legal education so persistent and harsh? Are our goals too high and too many?

If the last 100 years of university legal education have allegedly been so bleak with only momentary glimpses of light, why not the next 100 years also? What has changed? To remind you of the bleak century of comment – university law schools are criticized (even more voluminously in the last two decades):

1. On *goals*: too focussed on ephemeral rules; unnecessarily dividing theory and practice; being amateur sociologists, economists, historians, logicians and psychologists; isolated from “learned” disciplines, physically, emotionally and intellectually; uncertain what shibboleths like “thinking like a lawyer” even mean; dictated to by ignorant and ephemeral practitioner groups or “customer” students; neglect or nominalism in key areas such as ethics, service of the poor, cross cultural sensitivity, international law, and especially skills; goal platitudes copied into vision statements; student culture focussed on grades, not learning; academic culture focussed on bulk research productivity, not good teaching, or a helpful educational ecosystem.
2. On *methods*: boring after first semester; intimidating; humourless; ignorant of and disinterested in learning theory; isolated from practical experience; individualistic; minimal group or cooperative learning; neglecting insights from practitioners; replicating mistakes of the past; teacher-centred talking; insensitivity to multiple learning styles;

4 See Appendix A for a “few” of the standard references critiquing a century of university legal education.

driven by power-point and potted summaries; restricting admission to the already “bright”, thereby increasing chances of status and success; isolation of teachers and students and undue individualism; learning by anecdote, devoid of systematic data (eg the “litigation explosion”).

3. On *resources*: under-funded; trapped by the Langdellian model of large classes and cheap casebooks; a cash-cow for the university; talent diverted by “publish or perish” and the pursuit of research funding; talent lost to a highly paid private sector.
4. On *feedback*: little ongoing feedback to students; lack of resources or training for feedback; reduction to ranking by written issue-spotting exams; resistance to student feedback about “the system”; little openness to constant student feedback in order to discuss and implement changes.
5. On *educational ecosystem*:⁵ increasingly managed by short-term, top down, bonus-driven, shoot-the-messenger bureaucrats; with paying students demanding value-for-money; staffed by ageing academics; managing increasing cultural and linguistic diversity; expecting more for less; possibly widening ranges of incoming educational “talent”; institutional incentives to pursue research funding; increased expectations upon staff; more part-time staff; increased staff cynicism and distrust about “change”; constant marketing; propaganda and deception towards students and research funders; pseudo and real staff accountability to funders; competitive pursuit of “esteem indicators”; gradual and allegedly “efficient” separation of research and teaching; preoccupation with “economic rationalism, efficiency and the generation of income”; and attempted accountability on those same measures;⁶ resistance to change due in part to inertia, ageing, distrust, poor resources and perceived increasing workloads.⁷

5 The complex factors interacting in any educational environment are occasionally systematised as an “ecosystem”(pond or swamp). See outstanding translation of educational theory and practice for university teachers in P Ramsden, *Learning to Teach in Higher Education* (1992); and in J Biggs, *Teaching for Quality Learning at University* (1999).

6 R Collier, “We’re all socio-legal now? Legal education, scholarship and the ‘global knowledge economy’ – reflections on the UK experience” (2004) 26 SydneyLR 503; M Thornton, “The idea of the university and the contemporary legal academy” (2004) 26 SydneyLR 481.

7 M Keyes and R Johnstone, “Changing legal education: rhetoric, reality and prospects for the future” (2004) 26 SydneyLR 537.

IV. DESPAIR?

Is the law school glass half full, or half empty? It is certainly relative deprivation when law schools are compared around the planet.⁸ The avalanche of criticism, of course, implies multiple moderate or high expectations and possibly increasing “enlightenment” of both staff and students. Are these expectations too high? What is a realistic quota of core competencies (beyond propaganda) for a university law school? My own subjective impression is that the quality of legal education at my own law school is higher (momentarily?) on all measures, in contrast to the various law schools I attended and taught at in Australia, Canada and USA between 1960s and 1990s.

A quick quiz for legal educators

Set out below is a quick quiz to assist law teachers to clarify next semester’s or next year’s goals, methods, resources and feedback.

1. What are your current five greatest books ever written on law, which you would recommend to every law student to read several times? (How many times have you read each of these?)
2. What are your current five greatest books on legal education which you would recommend to every law teacher to read several times? (How many times have you read each of these?)
3. What are the current ten themes in each subject you teach which will be eternal, even as ephemeral case law and statutes in that subject ebb and flow? What percentage of your past or current students can recite at least 7 of these 10 themes by rote?
4. What are your current five best law journal articles written in the last 100 years which you would recommend to every law teacher and student to read multiple times? (How many times have you read each of these?)
5. What are the five classical “types” of law teachers?⁹ Where do you fit at present in those five types? Why? Do you tell your students regularly your where and why typology?

8 W Twining, “Developments in Legal Education: Beyond the Primary School Model” (1991) 2 *LegalEducR* 35.

9 Traditional legal textbook scholar; practitioner-scholar; clinical law teacher; interdisciplinarian, activist teacher – see E G Gee and D W Jackson, “Bridging the Gap: Legal Education and Lawyer Competency” (1977) *BrighamYoungULR* 695.

6. What were the features of the best personal educational experiences which you have had? Why were they so good? Which of those features are replicated in the classes which you currently teach?
7. What were the features of the worst educational experiences which you have had? Why were they so bad? Which of those features are replicated in the classes which you currently teach?
8. What did you learn from your students last semester?
9. Which parts of your current work do you love?
10. Who was the best “lawyer” you have ever worked with (in whatever capacity)? What attributes made him/her so good? Which of those attributes do your colleagues and students say are present in you?

Did you have difficulty answering these questions? You are not alone.

Another question:

11. Why are these questions so difficult to answer? Speculate – would other “disciplines” of university study have more or less difficulty in answering an equivalent quiz?

V. BASIC LESSONS FROM THE PAST FOR THE FUTURE OF FORMAL LEGAL EDUCATION

Amidst the constant babble of the critics, are there any basic lessons to give university educators and policy makers some realistic goals and methods? Here are a few lessons from the past. There are no quick fixes here, especially no technological quick fixes. Rather the hard work of implementing “old” truths. Consider each lesson ending with a “therefore....” and attempt to decide what changes or stability might be needed in your teaching, at your law school and university (i.e. the “ecosystem”). This is a form of budget-cutting, self-help, unsupervised, distance learning.

The range of law school educational experiences which are most likely to “succeed” (i.e. cause progress towards lawyering excellence) for the largest number of students:

1. Usually occur during voluntary non-assessable common tasks which involve hard work, fun and relationships – clubs, societies, mooting, sport, therefore....?
2. Usually occur during informal conversations in corridors or over meals between students, and between respected staff and students, therefore....?

3. Usually occur where teachers add to the ecosystem the following established qualities of “good teaching”, therefore....?
 - Wanting to share your love of the subject
 - Making the material stimulating
 - Working at the student’s level
 - Using clear explanations
 - Making it clear what has to be understood and why
 - Showing concern and respect for students
 - Encouraging student independence
 - Using teaching methods that require students to learn actively and cooperatively
 - Using appropriate assessment
 - Giving high quality feedback
 - Learning from students about the effects of teaching¹⁰
4. Usually occur where the following practices systematised in Africa in the fifth century AD are incorporated into the ecosystem:
 - Respect students
 - When students demonstrate ignorance, inform obliquely as though *another* asked a question
 - Offer questions – ask how they would deal with a situation
 - Hurry slowly?
 - Teacher’s life must be an example
 - NB. Begin with what student knows in his/her own life ($x + 1$)
 - *Do not* make the task too daunting ($x + 7$)
 - Do not *bore* the wise; tell them you will run quickly over what they already know
 - Each class, look for feedback from students and then adapt method and content

10 P Ramsden (1990-91) 2 LegalEducR 149, 151.

- *Enthusiasm* of a teacher is essential
- Speak in slang in order to “reach” hearers
- And yet language must also be *polished* and pleasant
- The learner’s curiosity and love for the subject should be “sparked”. Without this, teaching is useless.
- Change position, style and method regularly to combat weariness
- People learn best by “doing”
- Excellence is learned by being in the presence of excellence
- Sometimes, learning takes place best by random wandering of ideas and questions (ie *no* structure at all). This produces a certain tension and frustration, which may lead to a requested *exposition*. To expound early is to avoid the preparation of the necessary tension and frustration.
- “Do not rely too much on authority, especially mine.” “Have the confidence to find your own knowledge.”
- Informal learning, in the corridors, on walks, and while working is far more memorable than formal learning
- A teacher should express joy at intellectual liveliness of students
- A teacher should be constantly learning *as* (s)he teaches¹¹

Therefore....?

EXERCISE

Put one or more ✓ next to the above practices if you think they are already occurring; one or more ? if you think they are missing.

VI. CONCLUSION

The writer knows that regular reflection on friends and role models who are “excellent lawyers” provides some ongoing answers to the century of debate over what are appropriate goals for any law school? Of course this requires that we find, and anthropologically spend time with such excellent lawyers.

Likewise, the humbling attempt to write out answers to the questions in Section IV of this article will assist to both challenge and invigorate your teaching and learning methods for next semester.

¹¹ G Howie, *Educational Theory and Practice in St Augustine* (1969).

APPENDIX A

References to Repetitive Critiques of Legal Education

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APPENDIX B

One example set of (fluctuating) answers to the Quick Quiz in "Formal Legal Education"

1. Greatest law books?

- K. Llewellyn, *The Bramble Bush* (New York: Oceana, 1930)
- W. Twining and D Miers, *How to do Things with Rules* 4th ed. (London: Butterworths, 1999)

- T.E. Atkinson, *Law of Wills* (St Paul: West, 1953)
- D. Pruitt and S. Kim, *Social Conflict: Escalation, Stalemate and Settlement* 3rd ed. (New York: McGraw Hill, 2003)

2. *Greatest education books for legal educators?*

- P. Ramsden, *Learning to Teach in Higher Education* (London: Routledge, 1992)
- J. Biggs, *Teaching for Quality Learning at University* (Buckingham: SRHE and Open University Press, 1999)
- Cramton Report, *Law Schools and Professional Education* (Chicago: ABA, 1980)
- W. Twining, *Law in Context: Enlarging a Discipline* (Oxford: Clarendon Press, 1997)
- R.F. Mager, *Preparing Instructional Objectives* (Belmont, California: David S Lake, 1984)
- McCrane Report, *Legal Education and Professional Development* (Chicago: ABA: 1992)

3. *Ten eternal themes in your subjects?*

Eg Recurrent Themes in Family Law

- Female poverty
- Private and public obligations to support families – the shifting balance
- Commercial versus family interests
- The movement from discretion to rule (and back again)
- Violence in the home
- Self help, contempt and enforcement dilemmas
- Responding to pluralism, and the unorthodox.
- The unified Family Court – grasping a vision
- Conflict management – a smorgasbord of approaches
- Power over children's lives

4. Five best Law Journal articles?

- W. Twining, “Pericles and the Plumber” (1967) 83 *LQR* 396
- M. Galanter, “Reading the Landscape of Disputes” (1983) 31 *UCLA Law Rev* 4
- R. Mnookin and L. Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce?” (1979) 88 *Yale L J* 950
- R C Cramton, “The Ordinary Religion of the Law School Classroom” (1978) 29 *J of Legal Educ* 247
- R. E. Miller and A. Sarat, “Grievances, Claims and Disputes: Assessing the Adversary Culture” (1980-81) 15 *Law & Soc Rev* 525.

5. Five types of law teachers?

- Traditional legal text-book scholar
- Practitioner – scholar
- Clinical law teacher
- Interdisciplinary
- Activist

Practitioner – scholar because this is interesting; challenging; enables reflective writing and examples in classroom. Yes, I tell students this.

6. Best personal educational experiences?

Eccentricity; funny; jokes; weird-clothes; drama; mastery of subject; succinct; excellent memory; classical “scholar”; multi-linguist; promotes alternative views; interactive; small groups; fun; realisation of other ways to learn; student motivation (“I want to be here”); stinging comments which prompt me to achieve; make me believe I can achieve; obvious love of subject; interested in me; “opens new world to me”; casual encounters with teachers; sense of accountability; modelled what is expected; feedback and chance to try again; high expectations.

7. Worst education of experiences?

Diet of lectures; no active participation; lack of expertise of teachers; institutional pressures to give courses to inexperienced teachers; felt uncared for; no “options”; zero feedback; disinterested in subject matter and students;

kept “busy” writing notes; vastness of classes; anonymity; “coverage” of course: assumed prior knowledge which did not exist; loss of confidence cycle; failure to attach “new” knowledge to existing knowledge; constant note-taking; teacher not interested in what is being done; cynicism of other students.

(All these factors can be fitted into Biggs’ *Ecosystem of Learning*.)

8. *What did I learn from my students last semester?*

Keep summarising; giving concrete illustrations; chat in corridors; define *goals* of each class more clearly.

9. *Which parts of my current work do I love?*

Practising as a mediator; writing reflectively on these experiences; my colleagues; most of my students; finding excellent interdisciplinarians.

10. *Who was best lawyer I have worked with? Why?*

My first master solicitor; my second law dean; two commercial law partners, one family law partner in Sydney and Brisbane.

Good listeners; enjoyed people; patient; high standards of personal behaviour; energetic; good sense of humour; meticulous about detail in documents; well-connected; memorised by rote some broad legal principles; prodigious workers.

11. *Why are these questions so difficult to answer?*

Perhaps because we do not ask them frequently? Also legal studies often appear to be a mass of facts and shifting rules; isolation means little sharing of joint “themes” and little self reflection on grand themes; or classics. Perhaps some other disciplines would have more established “classic” works and stages of development to answer questions 1-4. Questions 5-11 would be equally difficult or easy in other disciplines?