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FOREWORD TO THE SPECIAL ISSUE

As the current Director of the Centre for Public, International and Comparative Law ('CPICL'), it gives me great pleasure to write this Foreword to the Special Issue of the *University of Queensland Law Journal* ('*UQLJ*') celebrating the 20th anniversary of the establishment of the CPICL. I wish to record my sincere gratitude to the editors of the *UQLJ* for agreeing to and supporting this Special Issue.

I would also like to acknowledge and thank my CPICL colleagues who served as guest editors of the Special Issue, and the authors and peer reviewers of the excellent articles that follow. The seven articles making up this anniversary edition cover the breadth of CPICL's focus on public law, international law and comparative law. These seven articles also embody CPICL's founding principles of collaboration and support for colleagues at different stages in their academic journeys. The authors include current and former CPICL Directors, and current and former CPICL Fellows, including former CPICL research scholars who successfully undertook their doctoral research under the supervision of CPICL Fellows.

Professor Ann Black and Dr Joseph Lelliott have offered a thoughtful account of CPICL's establishment in their introduction to this Special Issue. I will take this opportunity to offer some brief reflections on my early involvement in CPICL, which I think illustrate some of the 'value' that CPICL 'adds' to the life of the TC Beirne School of Law at the University of Queensland. As a junior scholar at the time of CPICL's establishment, my colleagues in the Centre provided me with both intellectual and financial support to pursue my research interests in public and international law. CPICL funded my presentation of a paper at an important conference organised by the Australian Red Cross in Adelaide. CPICL Fellows also assisted in deepening my understanding of the issues upon which I spoke at that conference, and the journal article that followed in the *International and Comparative Law Quarterly* remains one of my most regularly cited journal articles. All of this was made possible by the support offered by CPICL and by the collegial group of scholars who make up the Centre. For 20 years CPICL has provided this form of support. Long may it continue.

Professor Anthony E Cassimatis AM
Director
Centre for Public, International and Comparative Law
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INTRODUCTION TO THE SPECIAL ISSUE

ANN BLACK* AND JOSEPH LELLIOTT†

Recollections may vary…[1]

To reflect on the achievements, milestones and challenges arising in the two decades since the Centre for Public International and Comparative Law ('CPICL') was established, different recollections and interpretations of events are inevitable. As guest editors of this Special Issue of the *University of Queensland Law Journal* ('*UQLJ*'), marking CPICL's first twenty years, we share our thoughts on the Centre's establishment, its goals, evolution, and achievements under three CPICL Directors and eight Heads of School. We are grateful to the *UQLJ* for the opportunity to showcase recent and dynamic research in the fields of public, international, and comparative law through this Special Issue.

I IN THE BEGINNING

In the years preceding 2003, Suri Ratnapala,[2] a newly-minted professor in the TC Beirne School of Law, together with John Foster[3] (School of Economics), set up the Centre for Legal and Economic Study of Institutions ('CLESI'). Having secured a World Bank contract for a good governance project in Sri Lankan courts, CLESI invited ('sub-contracted') Reid Mortensen[4] to include materials on judicial ethics. When Foster left, CLESI was disbanded. Convinced of the merits of a research centre, the team of Ratnapala and Mortensen set about establishing a new centre, this time within the Law School but involving a larger number of scholars. In keeping with their research strengths, the new centre would have a

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1 Statement issued by Buckingham Palace on Behalf of Queen Elizabeth II, 9 March 2021.

2 In 2023, Professor Emeritus of Public Law, TC Beirne School of Law, see: https://law.uq.edu.au/profile/1089/suri-ratnapala.

3 In 2023, Professor Emeritus, School of Economics, see: https://economics.uq.edu.au/profile/2219/john-foster.

4 In 2023, Professor and former Dean of the School of Law and Justice, University of Southern Queensland, see: https://staffprofile.usq.edu.au/Profile/HOS-LawandJustice.

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Public and International Law focus. Nicholas Aroney[5] was brought in as a constitutional law scholar and Anthony Cassimatis[6] as an international law scholar. Jennifer Corrin[7] and Ann Black[8] were comparativists, respectively researching on the South Pacific and Southeast Asia (particularly Syariah law). Reid Mortensen recalls: 'Then we thought it would be richer with you [Ann] and Jenny in, and we all agreed to add comparative law in. Hence, CPICL'.

This was 2003. Charles Rickett, who was about to become Head of the TC Beirne School of Law,[9] was sent the concept and a draft constitution for CPICL. From Auckland, he gave his blessing to both.

A *The Motivation and Goals for Establishing CPICL: 2003–23*

One of the main CPICL architects, Reid Mortensen, recalls four motivating factors:

1. *To have a centre, it must embrace a sizeable number of academics with cognate interests*

Rather than operating as a one- or two-person entity, CPICL needed to ensure long-term viability by having an academic breadth and depth that would see succession in its leadership. From the initial six, the number of CPICL Fellows gradually increased in the first decade to 13 and, by 2023, this number had grown to 29 Fellows and 14 Research Scholars. There have been three CPICL Directors, commencing with Suri Ratnapala, followed by Jennifer Corrin, and the current Director, Anthony Cassimatis. This has brought stability, corporate knowledge, and good governance. CPICL's structure opens a range of leadership roles for both junior and senior colleagues through four positions as Executive Directors of Public Law,[10] International Law,[11] Comparative Law[12] and a Deputy Director,[13] in addition to seminar convenors and program managers.

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5 Professor of Constitutional Law, TC Beirne School of Law, and Director Public Law, CPICL, see: https://law.uq.edu.au/profile/1098/nicholas-aroney.

6 Member of the Order of Australia, Professor, TC Beirne School of Law, and Director, CPICL, see: https://law.uq.edu.au/profile/1092/anthony-cassimatis.

7 Professor Emerita, TC Beirne School of Law: https://law.uq.edu.au/profile/17495/jennifer-corrin.

8 Professor, TC Beirne School of Law. https://law.uq.edu.au/profile/1083/ann-black.

9 Professor and Head of School until 2008. In 2023, Head of School, Auckland University of Technology.

10 In 2023, Professor Nicholas Aroney.

11 In 2023, Dr Cailtin Goss.

12 In 2023, Professor Ann Black.

13 In 2023, Dr Joseph Lelliott.

2. *To provide extra means of research funding for academics in CPICL*

The idea was that, once CPICL started receiving its own income, funds could be allocated to CPICL Fellows to improve their research capacity though seed-funding for grant applications. CPICL Fellows had a slightly more onerous criteria for research output than imposed by the law school, both to raise the standard of research excellence in the area (as would be expected of a centre) and to justify the special treatment they would receive through CPICL's own research funding allocations. In 2013, for example, seed money of $1000 was available to CPICL fellows for preparation of ARC discovery and linkage grant applications. However, CPICL seed-funding ended when the Law School later established its own research-incentive funding system.

3. *To give PhD scholars a sharper research identity and provide collegial mentoring and support*

CPICL Fellows guide the next generation of scholars with 22 Higher Degree Research ('HDR') scholars currently under their supervision. The Centre boasts a dynamic mix of domestic and international HDR scholars from Africa, Europe, Asia, South and North America and the South Pacific. All are welcomed at Centre seminars and events and are supported by Fellows and each other during their HDR milestones and 3 Minute Thesis competitions. Pastoral support was a priority under Jennifer Corrin's leadership with a series of additional workshops, forums and social events.

4. *To be a low, or no, cost research centre*

Fellows were, and are, expected to carry a normal teaching load and, so, the research contribution made through CPICL would be absorbed within the Fellows' standard 40 per cent research allocation or any express buy-out available through earned income. It was a conscious decision not to ask the Law School for money. Apart from a special allocation received for two years under Charles Rickett, CPICL funds come from consultancies undertaken by its Fellows under which CPICL, not the individual consultant, is the funding recipient. The first consultancy was for Nepal's National Judicial Training Academy, with four CPICL Fellows[14] engaged in a 'train-the-trainer' scheme both in-country (Nepal) and at the Law School. Other consultancies included judicial training schemes with courts in Sri Lanka and the Republic of Maldives.

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14 Suri Ratnapala, Ann Black, Jennifer Corrin and Jonathan Crowe.

B *Over the Years*

From 2010 onwards, CPICL developed sub-specialities within the overarching legal research framework. Today there are eight programs, each coordinated by a manager. This leadership opportunity allows for internal and external collaboration within a Fellow's areas of expertise. It sustains connections with External Fellows who are based at universities across Australia and overseas. Current programs are:

(1) Legal Pluralism (with a focus on the South Pacific and Southeast Asia) (Professor Ann Black and six CPICL scholars)

(2) Federalism and Multilevel Governance (Professor Nicholas Aroney and six CPICL scholars)

(3) Disability Human Rights (Professor Paul Harpur and one CPICL scholar)

(4) Cultural Heritage Law (Professor Craig Forrest and four CPICL scholars)

(5) Korean Law (Professor Ann Black and one CPICL scholar)

(6) Indonesian Law (Professor Ann Black and six CPICL scholars)

(7) Law and Religion in the Asia-Pacific (Professor Aroney and four CPICL scholars)

(8) Cartels (Dr Barbora Jedlickova and two CPICL scholars), which is currently under re-structure as the International and Comparative Competition Law and Policy Program lead by Dr Jedlickova.

Over its twenty-year existence, CPICL as an entity has built strong links with international organisations, including the Ministry of Justice in South Korea, the Indonesian Constitutional Court, and with the courts of the South Pacific. The focus on law in the Asia-Pacific has been enhanced by a long-standing collaboration with LAWASIA, the major regional association of lawyers, judges, jurists, and legal organisations in the Asian region. From 2004–20, CPICL was responsible for the editorship of the *LAWASIA Journal.* CPICL's International Law scholars have built enduring links to the Australian and International Red Cross and with the Australian Branch of the International Law Association ('ILA') — a leading global body established in 1873 and currently based in London. In 2018, CPICL entered into a three-year agreement with the Australian branch of the ILA to edit the *Australian International Law Journal*. This agreement was extended for a further 3 years in 2021. The result of CPICL's editorial roles is that there are hundreds of refereed journal articles that are the direct consequence of editorial collaboration among CPICL affiliated researchers.

CPICL has also, over many years, attracted visiting scholars to the Law School who have enriched the intellectual life of both the Centre and the School.

Just to mention a few, these include: Professor James Buchanan, George Mason University and Nobel Prize winner in Economic Science; Professor Stanley Paulsen, Washington University in St Louis, a leading authority on Hans Kelsen's legal philosophy; Professor Viktor Vanberg, Professor of Institutional Economics of Freiburg University; Professor Hoon Phun (HP) Lee, Monash University; Professor Yuan-Chun Lan of the Chinese Culture University of Taipei, Taiwan; Professor Jimly Asshiddiqie, first Chief Justice of the Indonesia Constitutional Court; and Professor Matthias Chauchat from the University of New Caledonia.

There are many individual achievements as well. In the last decade, five CPICL Fellows were recipients of four ARC Future Fellowships and/or Discovery Grants,[15] two became Members of the Order of Australia,[16] and two received Fullbright Scholarships.[17] Over the last five years, CPICL Fellows have secured AUD2,783,886 in grants and consultancies and, in the last two years, CPICL Fellows published seven books, 83 journal articles and 46 book chapters. Of the articles that follow in this special CPICL edition marking the first 20 years of the Centre, six of the eight authors are affiliated with CPICL.

There is no doubt that CIPCL has provided a collegial environment for both established and emerging scholars to flourish. The status of the Centre having recently been endorsed by the university, there is every expectation that it will continue to do so for the next twenty years!

II Content of the Special Issue

We are delighted that Nicholas Aroney, Paul Taylor, Jonathan Crowe, Reid Mortensen, Yvonne Breitwieser-Faria, Sue Farran, Constance Lee, and Simon Miller agreed to publish their work in this special issue. The articles in this issue represent the full breadth of CPICL, spanning articles on issues concerning public, international, and comparative law. The Centre's focus on the Asia-Pacific is also well represented, with articles on Japan's Constitution, the push from pacific nations for Climate Justice, and the tension (and convergence) between the foundations of Confucianism and constitutionalism.

The Special Issue starts with an article by Professors Nicholas Aroney and Dr Paul Taylor, in which they examine the implications of inconsistencies between the *International Covenant on Civil and Political Rights* ('*ICCPR*')[18] and Australian state and territory anti-vilification legislation. As Aroney and Taylor point out, hate speech is becoming an increasingly prevalent problem in Australian society, as it is in many countries around the world, with its reach and impact amplified by social media and other digital mediums. In their article, Aroney and Taylor note

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15 Professors Heather Douglas, Jennifer Corrin, Nicholas Aroney, and Paul Harper.

16 Professors Anthony Cassimatis and Heather Douglas.

17 Professors Paul Harper and Simon Young.

18 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

that an appropriate balance must be struck between prohibited statements and the need to protect free speech. They suggest that Australia's legislation needs to do a better job of articulating and striking this balance, observing that Australia's many statutes addressing vilification lack predictability and vary too widely across different jurisdictions. They recommend a move towards conformity, with a single standard of exclusion from prohibited speech, in line with art 19(3) of the *ICCPR*.

From there, the Special Issue turns to constitutional matters with Professor Jonathan Crowe's article on s 6 of the *Australia Acts 1986* (passed respectively by the Federal Parliament of Australia and the Parliament of the United Kingdom). As Crowe explains, the Acts supplement s 128 of the *Australian Constitution* in a significant way: they allow the Commonwealth and the states, acting together, to make particular changes to the country's constitutional arrangements. Crowe proposes that this may point to a special form of sovereignty that enables Australian parliaments to make certain changes; something that he points out may seem undemocratic compared to the referendum process under s 128, but which is nonetheless consistent with parliamentary democracy.

In the next article, Professor Reid Mortensen provides an account of the High Court's decision in *Zurich Insurance Company Limited v Koper* ('Koper') and the preceding litigation in the matter.[19] *Koper* relates to the Trans-Tasman Proceedings Acts passed by Australian and New Zealand in 2013 and designed to create a single judicial area in the single economic market that spans the two countries.[20] Mortensen notes that *Koper* clarifies aspects of the trans-Tasman judicial area and the extent of jurisdiction exercised by courts in Australia in this context. While pointing out some potential problems with the majority's approach in the High Court decision, Mortensen observes that the decision in *Koper* should be welcomed, especially to the extent that it supports the continued operation and integrity of the trans-Tasman judicial area and its approach to jurisdiction for state courts.

Dr Breitwieser-Faria's article turns the Special Issue away from matters of Australian law and into the international sphere, and towards the topics of climate change, conflict, and atrocity-crime prevention. In her article, Dr Breitwieser-Faria comments on the increasing use of litigation as a means of taking action against climate change. She considers the degree to which effective climate litigation may also prevent conflicts and atrocity crimes, given the nexus between climate change and conflict. In her view, while the potential impacts of such litigation remain mostly theoretical or anecdotal in this context, these cases may, where successful, indirectly alleviate conflict risk factors and, in turn, the risk of atrocity crimes.

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19 (2023) 97 ALJR 614 ('*Koper*').

20 *Trans-Tasman Proceedings Act 2010* (Cth); *Trans-Tasman Proceedings Act 2010* (NZ).

Professor Sue Farran's article is also in the realm of climate change. In her article, Farran explores the United Nations General Assembly's *Request for an Advisory Opinion of the International Court of Justice on Obligations of States in Respect of Climate Change*.[21] She explains the Pacific-island State of Vanuatu's leading role in driving this request and its background, before further analysing the questions asked in the Request, the relevant international legal framework, and the potential response of the Court. Farran concludes her article with a consideration of how a potential advisory opinion may be received, as well as what it may achieve.

The Special Issue then moves on to an article by Dr Constance Lee. Lee's article is premised on the argument that contemporary academic definitions of constitutionalism and Confucianism are based on misinterpretations of both Confucian moral theory and constitutionalism. In turn, she explains, these misinterpretations position those concepts as incompatible and obfuscate the normative continuities between them. By using an interpretative method with a dialectical focus, Lee explores the foundational assumptions of classical Confucian thought and the Reformed natural-law tradition and challenges these misinterpretations. She concludes that similarities in these traditions point to a set of common normative underpinnings premised on the moral duty of individuals towards each other and the common good.

The special issue concludes with an exploration by Simon Miller of the (un)likelihood of amendment to the 'peace clause' in Japan's Constitution. Miller explains that the volatile situation in the East China Sea, as well as North Korean nuclear provocations, pose difficult problems for Japan as a country that continues to regard pacifism as key to both its policy positions and national identity. In his view, while there has been gradual re-interpretation of the peace clause (particularly the position that it enables collective self-defence), formal amendment to enable Japanese aggression remains improbable in the foreseeable future. Miller argues that this is particularly the case as long as Japan can rely on its alliance with the US for security in the face of external threats.

III Conclusion

The articles in this Special Issue demonstrate the diversity of research under the CPICL umbrella, as well as the many and important contributions that scholars of public, international, and comparative law continue to make to issues in Australia, the Asia-Pacific region, and around the world. We look forward to CPICL continuing to provide a forum to nurture, support, and drive this research long into the future.

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[21] UN Doc A/RES/77/276 (4 April 2023).

Building Tolerance into Hate Speech Laws: State and Territory Anti-Vilification Legislation Reviewed Against International Law Standards

Nicholas Aroney* and Paul Taylor†

United Nations ('UN') monitoring bodies frequently pose questions about Australia's compliance with the hate speech mandates of key UN conventions. Recently, the Human Rights Committee enquired about inconsistencies across Australian state and territory anti-vilification legislation, as raising issues under the International Covenant on Civil and Political Rights *('*ICCPR*'). This article examines the implications of those inconsistencies, both legal and practical, for Australia's* ICCPR *compliance. At a time when hate speech is not abating but becoming a common feature of an increasingly fragmented society, this article asks the following questions: Are the settings for anti-vilification legislation at state and territory levels appropriate in the balance achieved between applicable human rights? Can Australian state and territory legislation be better targeted to distinguish between prohibited and preserved free speech? Do Australian state and territory laws conform to the requirements of the* ICCPR *and other UN instruments? The article concludes that the inconsistencies are problematic and lead to public uncertainty, exacerbated by the unpredictable application by some competent authorities. It proposes legislative solutions that focus less on the scope of prohibition (which is dependent on terminology lacking definitional precision) and more on bringing clarity to the scope of excluded conduct, in conformity with* ICCPR *demands protecting freedom of expression.*

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I Introduction

In June 2019, the United Nations ('UN') Secretary-General, Antonio Guterres, gave renewed urgency to the pursuit of wide-ranging efforts that address the root causes of hate speech, when launching the *United Nations Strategy and Plan of Action on Hate Speech*:

> Hate speech is in itself an attack on tolerance, inclusion, diversity and the very essence of our human rights norms and principles. More broadly, it undermines social cohesion, erodes shared values, and can lay the foundation for violence, setting back the cause of peace, stability, sustainable development and the fulfilment of human rights for all.[1]

A case can be made that protective measures against 'hate speech' are necessary, but much turns on what is meant by that term and the appropriateness of the measures deployed to meet its harms. As a matter of international law, incitement to racist discrimination, as well as acts of violence or incitement to such acts must be met by criminal law sanctions. Non-criminal prohibitions are needed to meet less extreme harms. A suite of non-legislative measures should also be applied, including those directed at educating and influencing attitudes.

This article considers the different degrees of legislative intervention required by international law, and the key conditions to be met. Its focus is Australian state and territory 'anti-vilification' laws, as hate speech laws tend to be called in the Australian context. Their rationale was lucidly expressed by Katharine Gelber and Luke McNamara: '[i]n a society that aspires to embrace diversity and support the human rights of all, it is not OK to vilify someone (that is, denigrate or defame them) because of who they are, as opposed to something they might have done.'[2] This principle is attractive, and one might wish that it guided the interactions of all members of Australian society. The question is whether legal regulation is appropriate and, if so, exactly how such laws should be framed.[3] Vilifying speech at an appropriate threshold arguably warrants regulation because of its destructive capability. It usually targets the community's most vulnerable, and it can affect an individual's or entire group's ability to participate fully in the ordinary activities that most Australians take for granted. This article therefore assumes the need for some regulation of hate

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1 Antonio Guterres, 'United Nations Strategy and Plan of Action on Hate Speech' (UN Office on Genocide Prevention and the Responsibility to Protect, 18 June 2019) ('Strategy and Plan of Action').

2 Katharine Gelber and Luke McNamara, 'Why Australia's Anti-Vilification Laws Matter', *The Conversation* (online, 30 November 2018) <https://theconversation.com/why-australias-anti-vilification-laws-matter-106615>. See generally Katharine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (Federation Press, 2007); Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012); Alex Brown, *Hate Speech Law: A Philosophical Examination* (Routledge, 2015).

3 Rex Tauati Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26(2) *University of Queensland Law Journal* 293.

speech, but its focus is more confined. It asks what is fitting by way of *legislative* response to different forms of hate speech. It enquires whether state and territory statutes achieve targeted intervention against vilifying speech at the appropriate threshold, and by the best available means, with due regard for the rights affected and, if not, whether corrective steps are needed. These are aimed at bringing Australian anti-vilification legislation into closer conformity with the requirements of international law. As a former Special Rapporteur on Freedom of Religion or Belief has observed, 'failure to act on "real" incitement cases' and 'overzealous reactions to innocuous cases' tends to create 'a climate of impunity for some and a climate of intimidation for others'.[4] It is vital, therefore, that an appropriate response to hate speech is combined with a proper respect for freedom of expression.

Australia is bound by the *International Convention on the Elimination of All Forms of Racial Discrimination* ('*ICERD*')[5] and the *International Covenant on Civil and Political Rights* ('*ICCPR*').[6] It is periodically required to report and face questioning on the state of the domestic implementation of its obligations before the convention monitoring bodies, the Committee on the Elimination of All Forms of Racial Discrimination ('CERD Committee') and the Human Rights Committee. One issue recently raised by the Human Rights Committee in connection with the *ICCPR* concerns the existence of inconsistencies in anti-vilification laws across different states and territories in Australia.[7] The Committee asked why this is the case and was also keen to know whether there were plans to introduce federal legislation to reconcile the inconsistencies.[8]

This article addresses these questions by examining the extent of the inconsistencies across state and territory anti-vilification laws, and identifying key areas in which legislators should have closer regard to international standards. It concludes that it is both appropriate and necessary to consider a federal initiative, applying principles for hate speech established by the Human Rights Committee and other UN sources. A companion article addresses the corresponding question in relation to the relevant Commonwealth legislation.[9]

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4 Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/31/18 (23 December 2015) [63].

5 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*ICERD*').

6 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

7 Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of* Australia, UN Doc CCPR/C/AUS/CO/6 (16 October–10 November 2017) 19, 20.

8 Human Rights Committee, *Summary Record of the 3419th Meeting — Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant* Australia, UN Doc CCPR/C/SR.3419 (24 October 2017) 4 [21].

9 Nicholas Aroney and Paul Taylor, 'The Rights and Wrongs of 18C: An International Perspective on the Racial Hatred Provisions of the *Racial Discrimination Act 1975*' (2023) *Australian International Law Journal* (forthcoming) ('The Rights and Wrongs of 18C').

There are three main concerns. The first is the potential reach of *civil* law prohibitions at the lower end of the spectrum, closer to the threshold for liability (rather than more extreme hate speech, currently met by *criminal* measures). In particular, the legislation relies on terminology that does not lend itself to precision (such as 'offend', 'hatred', 'severe ridicule' and 'serious contempt'). The effectiveness of anti-vilification laws depends, for success, on self-censorship, but such uncertainty comes with a cost to personal and democratic freedoms. Those against whom a complaint is allowed to progress face the stigma of a hate speech accusation, as well as the spectre of considerable cost in defending themselves, even if a tribunal ultimately finds that the law has no application.

In this article we argue that this risk is best cured by an objective mechanism that excludes from prohibition conduct for which no justifiable basis exists for its restriction, according to the standards established for freedom of expression in art 19 of the *ICCPR*. Article 19 defines what should be guaranteed and gives States Parties scope to limit the freedom in upholding the rights of victims of hate speech. Article 20(2) mandates a particular form of restriction on the freedom that manifestly accords with the requirements of art 19. Legislation implementing the requirements of art 20(2) would, therefore, answer the Human Rights Committee's concerns in a manner that complies with art 19. Following this general lead, our proposed solution focuses not so much on the ambit of civil prohibitions, but rather aims to achieve greater precision in what is excluded.

The second concern is that the material divergence across state and territory civil anti-vilification legislation (in such matters as the applicable grounds for the prohibitions, the scope of prohibited conduct, and the conceptual basis for liability) can make it extremely difficult for the public, even those conscientiously contributing to matters of public debate, to know with any certainty whether their speech is unlawful. The third problem is that intervention of competent human rights commissions or other authorities, charged at state and territory level with facilitating the conciliation of complaints and taking other action, can be powerfully influential. They are generally required to dismiss a complaint if it is obvious that the law has no application in the circumstances. If complaints are not dismissed when they should be, the likely result is to place, in the public mind, the belief that the impugned conduct is unlawful, when it is not. If the legislation is not clear and predictable, it is hard for authorities to act confidently either way, without bringing themselves, and the legislation they administer, into disrepute.

The article is structured as follows. It begins in Part II by contrasting the mechanisms at international law and under Australian state and territory anti-vilification legislation for concurrently upholding freedom of expression and protecting against hate speech. Part III takes up the issue raised by the Human Rights Committee at Australia's last periodic review, to highlight specific points of divergence between different state and territory anti-vilification laws, which are such as to have a potentially serious impact on the ability of the public to

predict what they can and cannot say. Part IV considers how well Australian legislation matches guidance for implementing UN standards, for this, after all, is ultimately the issue that Australia will face at its next review before the Committee. To that end, Part V considers what might be an appropriate legislative model, in view of the requisite properties of laws, established at international law, by which freedom of expression may permissibly be restricted. It assesses the impact of certain structural aspects of domestic anti-vilification legislation, in particular the 'categorical' approach to prohibition and exclusion. It also touches on the effect on free speech of intervention by competent authorities. Part VI offers specific legislative proposals, before some observations are made by way of conclusion in Part VII.

II Hate Speech Mechanisms Under International Law and Australian Anti-Vilification Legislation Contrasted

The term 'hate speech' is used by the Human Rights Committee and the CERD Committee, in reference to *ICCPR* art 20 and *ICERD* art 4(a) respectively. It has a specific meaning, though these provisions differ from each other. *ICCPR* art 20(2) requires States Parties to prohibit the 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.[10] *ICERD* art 4(a) mandates the criminal prohibition of 'all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'.[11] Both provisions are consistent with *ICCPR* art 19, and must be implemented in such a way that preserves freedom of expression in accordance with the standards set by art 19.[12] Article 19(3) only permits restrictions on freedom of expression where necessary in support of 'the rights or reputations of others … the protection of national security or of public order … or of public health or morals'. *ICERD* art 4(a) and *ICCPR* art 20 each describe a category of speech that is so harmful in its effects that it can confidently be taken to warrant restriction in accordance with the terms of art 19(3), without individualised assessment, but in the specific terms defined in art 4(a) and 20 respectively. Hate speech restrictions may be allowed outside those categories, or

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10 On the origin of art 20(2), see Jeroen Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination* (Cambridge University Press, 2015) chs 2, 3.

11 See ibid 128.

12 UN Human Rights Committee, *General Comment No 11 (1983): Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Article 20 of the International Covenant on Civil and Political Rights)*, UN Doc CCPR/C/GC/11 (29 July 1983) [2]. See also Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press, 2020) 580; Aroney and Taylor, 'The Rights and Wrongs of 18C' (n 9), Part II.1.

at lower thresholds, but only if they meet the standards of justification set by art 19(3).[13]

One important observation should be made at this point on *ICERD* art 4(a) and *ICCPR* article 20. On their face, these provisions address very narrow grounds ('national, racial or religious hatred'), but as the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur) has indicated, the prohibitions of incitement that they embody may also be understood to apply to broader categories than race and religion, matching the prohibited grounds of discrimination now acknowledged under the *ICCPR* (covering race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, including indigenous origin or identity, disability, migrant or refugee status, sexual orientation, gender identity or intersex status, age and albinism).[14]

The civil prohibitions in Australian anti-vilification legislation are not confined to the scope of prohibitions mandated by *ICERD* art 4(a) and *ICCPR* art 20. They do not specifically target 'hate speech' as that term is used by the UN monitoring bodies. 'Vilification' is the more apt description. The legislation was not developed to preserve freedom of expression under art 19, and does not incorporate art 19(3) criteria to justify restrictions. 'Freedom of expression' is not, as such, guaranteed in Australia, as a matter of substantive law. A distinction is therefore made in this article between 'freedom of expression', referring to art 19 protection, and 'free speech', as generally available in Australia. The basis of such 'free speech' as currently exists in Australia subsists in four sources:

- The constitutionally implied freedom of political communication. This could be used to challenge the validity of a law that impermissibly burdens the implied freedom.[15] No claim on this basis has yet succeeded in impugning Australian anti-vilification legislation. The implied freedom applies particular constitutional-law criteria, primarily directed at the exercise of legislative power, and has limited capacity to correct any mis-targeting of legislation that does not transgress that freedom.[16]

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13 On the relationship between arts 19 and 20, see Nazila Ghanea, 'Expression and Hate Speech in the ICCPR: Compatible or Clashing?' (2010) 5(2–3) *Religion and Human Rights* 171; Nazila Ghanea, 'Intersectionality and the Spectrum of Racist Hate Speech: Proposals to the UN Committee on the Elimination of Racial Discrimination' (2013) 35(4) *Human Rights Quarterly* 935, 935–8.

14 David Kaye, *Report of the Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression*, Un Doc A/74/486 (9 October 2019) 6 [9] ('Special Rapporteur Report A/74/486').

15 See Nicholas Aroney, 'The Constitutional (In)Validity of Religious Vilification Laws: Implications for Their Interpretation' (2006) 34(2) *Federal Law Review* 287.

16 For example, the Supreme Court of Tasmania (Brett J) rejected a constitutional challenge to s 17 of the *Anti-Discrimination Act 1998* (Tas) in *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48.

- The common law notion that 'everybody is free to do anything, subject only to the provisions of the law' (such provisions include anti-vilification legislation).[17]
- The principle of legality, which requires courts not to impute to the legislature an intention to interfere with fundamental rights and freedoms, including freedom of speech, in the absence of an intention that is clearly manifested by unmistakable and unambiguous language.[18]
- The interpretive mandates of the human rights charters of the ACT, Victoria and Queensland. These charters require statutory provisions to be interpreted in a way that is compatible with listed human rights (approximating those in the ICCPR), so far as it is possible to do so consistently with the purpose of such statutory provisions.[19] However, they do not give substance to the ICCPR concept of freedom of expression within the categories of exclusion from the anti-vilification prohibitions.

State and territory anti-vilification statutes remain the primary basis on which vilification claims are made and contested. They strike a particular balance between the rights affected. This is achieved by closely defined categories of prohibited and excluded speech. However, it may be that too much is expected of these laws in adequately differentiating between the harmful speech that is properly its prime target, and other speech that ought to remain untouched.

The important point to note at this stage is that there are material divergences between the mechanisms in Australian law just described and the standards of justification for limitations on freedom of expression required by art 19. The *ICCPR* requires States Parties such as Australia 'to adopt such laws and other measures as may be necessary to give effect to the rights recognised in the [*ICCPR*]'.[20] This includes freedom of expression.

The absence of any substantive *ICCPR* protection for freedom of expression widens the scope for Australian jurisdictions to formulate their own anti-vilification standards. The regulation of harmful speech is a politically sensitive area in which policy responses are devised to meet the social conditions understood to exist in each jurisdiction at a particular point in time. The result is varying standards across jurisdictions. There is also the possibility that competent authorities will interpret and apply the legislation in a way that introduces further variance.

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17 See, eg, *Coleman v Power* (2004) 220 CLR 1, 97–8 [253] per Kirby J: 'everybody is free to do anything, subject only to the provisions of the law'.

18 *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

19 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1); *Human Rights Act 2019* (Qld) s 48; *Human Rights Act 2004* (ACT) s 30.

20 *ICCPR* (n 6) art 2(2).

We now turn in Part III to the detail of state and territory anti-vilification legislation so that it may be assessed in Part IV against the international standards and guidance from UN sources.

III Australian Anti-Vilification Legislation

There is significant disparity across Australian jurisdictions in their approaches to vilification. The multiplicity of statutes at Commonwealth, state and territory levels, with readily observable divergences between them, renders Australia's anti-vilification laws among the most complicated in the world. The following is an attempt to simplify matters by identifying key similarities and differences across Australian jurisdictions.[21]

There is a pattern in most states and territories of two-tiered prohibition against vilifying conduct through the establishment of criminal and civil prohibitions and sanctions. The legislation has the following prominent features.

Criminal provisions apply to what is often termed 'serious vilification'. These offences have two key elements: first, incitement of hatred against or towards, serious contempt for, or severe ridicule of, a person or group; and second, that incitement involves threats of physical harm or damage to property (or incitement of others to such harm or damage).[22] Within this category, there are variations across jurisdictions:

- as to applicable grounds: race (South Australia, Western Australia); race and religious belief or activity (Victoria); race, religion, sexuality or gender identity (Queensland); race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status (New South Wales); and disability, gender identity, HIV/AIDS status, race, religious conviction, sex characteristics, sexuality (ACT);
- as to aggravating factors required to be proved: inciting or threatening violence need not be proved in Western Australia;
- as to the conduct described: by additional terms such as 'revulsion' (ACT and Victoria); by the brevity of some offence definitions (ACT, New South Wales);[23] by added qualifications, eg to render irrelevant any

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21 A useful comparison was made between the NSW and Commonwealth models in Katharine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *University of New South Wales Law Journal* 488, 497–8. For discussion on when different grounds of prohibited vilification were introduced, and the different thresholds, see Katharine Gelber and Luke McNamara, 'The Effects of Civil Hate Speech Laws: Lessons from Australia' (2015) 49(3) *Law and Society Review* 631, 634–7.

22 *Criminal Code 2002* (ACT) s 750; *Crimes Act 1900* (NSW) s 93Z; *Anti-Discrimination Act 1991* (Qld) s 131A; *Racial and Religious Tolerance Act 2001* (Vic) ss 24–25; *Racial Vilification Act 1996* (SA) s 4; *Criminal Code Act Compilation Act 1913* (WA) ss 77–80H.

23 *Criminal Code 2002* (ACT) s 750; *Crimes Act 1900* (NSW) s 93Z.

assumptions about an attribute and whether any one was actually incited (New South Wales);[24] in terminology used (in Western Australia the key phrases are 'animosity towards' (meaning hatred of or serious contempt for), and 'harassment' (which includes to threaten, seriously and substantially abuse or severely ridicule)); and in the harm addressed (in Western Australia additional offences are committed by the possession of material for dissemination or display with that purpose);

- as to the penalties that apply: these include fines varying in severity; custodial sentences in some jurisdictions with maxima of six months (Queensland) or three years (New South Wales),[25] and in some jurisdictions no custodial sentencing.[26]

Civil provisions apply to less serious 'vilification'. These provisions target a particular form of conduct typically (but not invariably) defined as inciting hatred against, serious contempt for, or severe ridicule of, a person or group, without requiring threats of physical harm or damage to property.[27] There are much more significant variations across jurisdictions in civil than criminal provisions:

- as to grounds: race and religious belief or activity (Victoria); race, transgender, sexual orientation and HIV/AIDS (New South Wales); race, religion, sexuality or gender identity (Queensland); disability, gender identity, HIV/AIDS status, race, religious conviction, sex characteristics, sexuality (ACT); race, disability, sexual orientation, lawful sexual activity, religious belief or affiliation, religious activity, gender identity or intersex variations of sex characteristics (Tasmania's s 19);
- as to the conduct described: by additional terms such as 'revulsion' (ACT and Victoria); or a different formula ('offended, humiliated, intimidated, insulted or ridiculed' in Tasmania's s 17 'prohibition of certain conduct';[28] 'offend, insult, humiliate or intimidate' in Northern Terrritory's s 20A prohibition of 'offensive behaviour because of attribute');[29]
- as to the areas of activity to which it applies: the Tasmanian 'prohibition of certain conduct',[30] and the Northern Territory's prohibition of

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24 *Crimes Act 1900* (NSW) s 93Z.

25 See, eg, *Anti-Discrimination Act 1991* (Qld) s 131A(1) (70 penalty units or 6 months imprisonment). Cf *Crimes Act 1900* (NSW) s 93Z(1) (100 penalty units or imprisonment for 3 years, or both).

26 *Criminal Code 2002* (ACT) s 750 (maximum penalty: 50 penalty units, no imprisonment).

27 *Discrimination Act 1991* (ACT) s 67A; *Anti-Discrimination Act 1977* (NSW) ss 20C(1), 38S, 49ZT, 49ZXB; *Racial and Religious Tolerance Act 2001* (Vic) ss 7–8; *Anti-Discrimination Act 1991* (Qld) s 124A; *Anti-Discrimination Act 1998* (Tas) ss 17, 19; *Civil Liability Act 1936* (SA) s 73(1).

28 *Anti-Discrimination Act 1998* (Tas) s 17(1).

29 *Anti-Discrimination Act 1992* (NT) s 20A(1).

30 *Anti-Discrimination Act 1998* (Tas) ss 17(1), 22.

'offensive behaviour because of attribute',[31] apply to the same areas of activity as the general anti-discrimination provisions;[32]

- as to the range of eligible exclusions, which generally allow, though in different terms: fair reporting; academic, artistic, scientific or research and other purposes in the public interest (including discussion or debate); and any matter which is subject to a defence of absolute privilege in a proceeding for defamation, typically in parliamentary or court/tribunal proceedings (ACT, New South Wales, Queensland, Tasmania and South Australia), with an additional exception in Victoria for the performance, exhibition or distribution of an artistic work;
- as to the conceptual basis for liability: South Australia relies on the tort of 'racial victimisation';[33]
- as to the threshold: the Tasmanian 'prohibition of certain conduct',[34] and the Northern Territory's prohibition of 'offensive behaviour because of attribute',[35] apply a standard normally associated with sexual harassment.[36]

The jurisdictions also vary as to whether their legislation adopts:

- both civil and criminal provisions (ACT, New South Wales, Queensland, Victoria, South Australia);
- civil but not criminal provisions (Tasmania and Northern Territory);
- more than one civil vilification regime (in Tasmania, one section prohibits conduct which offends, humiliates, intimidates, insults or ridicules; the other prohibits 'inciting hatred');[37]
- criminal but not civil provisions (Western Australia).

Given all these differences, the safest approach to avoiding liability everywhere in Australia is to heed the highest standard of prohibition found in any Australian jurisdiction. In claims based on social media posts, it is likely that jurisdiction may be asserted in any state or territory in the face of evidence that the offending posts were accessed there.[38]

Like the term 'hate speech', when used generically (rather than as defined in UN instruments) the term 'vilification' lacks precise meaning, although the common ground already traversed is a starting point. 'Serious vilification' may be

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31 *Anti-Discrimination Act 1992* (NT) s2 20A(1), 28.
32 Ibid ss 17(1), 22.
33 *Civil Liability Act 1936* (SA) s 73.
34 *Anti-Discrimination Act 1998* (Tas) s 17(1).
35 *Anti-Discrimination Act 1992* (NT) s 20A(1).
36 *Anti-Discrimination Act 1998* (Tas) s 17(1).
37 Ibid ss 17, 19.
38 *Clinch v Rep* [2020] ACAT 13, 7–10 [13]–[23].

taken to denote the *criminal* standard, although this description applies to only half of the jurisdictions that have enacted criminal provisions (other descriptions rely on the phraseology 'publicly threatening or inciting violence' on specified grounds (New South Wales), racial vilification (South Australia), and 'racial animosity,' or 'racist harassment' (Western Australia)). Most of the jurisdictions that include *civil* provisions use the term 'vilification' in different ways, but alternative descriptions include 'victimisation' (South Australia) or 'inciting hatred' (Tasmania, s 19), when adopting the same civil formula of 'inciting hatred, serious contempt or severe ridicule.' Section 18C of the *Racial Discrimination Act 1975* (Cth) ('RDA') uses the term 'offensive behaviour'.[39]

Tasmania's s 17(1) is particularly difficult to characterise, as is the Northern Territory's s 20A. Section 17(1) prohibits conduct that 'offends, humiliates, intimidates, insults or ridicules' another on the basis of a qualifying attribute, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed. The Northern Territory's test is whether the act 'is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group'. Both provisions differ substantially from conventional state and territory anti-vilification legislation for including the words, 'offends', 'insults' and 'ridicules'. The terms 'hatred', 'serious contempt' and 'severe ridicule' are used in most other civil and criminal vilification prohibitions and also in s 19 of the Tasmania law. Tasmania's 17(1), and the Northern Territory's s 20A, apply in a more limited way than typical vilification prohibitions, in specified areas of activity, within the same confines as the legislation's discrimination (and harassment) provisions. For example, all that is required under the Tasmanian legislation is that the conduct occurs 'by or against a person engaged in, or undertaking any, activity in connection with' any specified areas of activity, such as employment or provision of facilities, goods or services.[40] Moreover, there is no requirement that the s 17(1) conduct must occur in public (or to similar effect), unlike all other Australian anti-vilification legislation.

Tasmania's 17(1), and the Northern Territory's s 20A, differ from conventional harassment legislation in a number of respects. All states and territories have sexual harassment legislation in similar form and with specific, elaborated meaning (including Tasmania, in s 17(2)–(3), and the Northern Territory in s 22). The general formula for sexual harassment throughout Australia has been the model established by the *Sex Discrimination Act 1984* (Cth) s 28A, of 'offended, humiliated or intimidated', which omits 'insult and ridicule' found in Tasmania's s 17(1) and 'insult' found in the Northern Territory's s 20A.[41]

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[39] See Aroney and Taylor, 'The Rights and Wrongs of 18C' (n 9).

[40] *Anti-Discrimination Act 1998* (Tas) s 22(1); *Anti-Discrimination Act 1002 (NT)* s 28.

[41] For further discussion, see Gus Bernardi, 'From Conflict to Convergence: The Evolution of Tasmanian Anti-Discrimination Law' (2001) 7(1) *Australian Journal of Human Rights* 134.

If treated as an anti-harassment measure, s 17(1) is unusual for legislating beyond the realm of sexual harassment, though some jurisdictions do so, to a limited extent.[42] Tasmania's s 17(1) thus has associations with harassment legislation but it is not confined to that realm. It also possesses characteristics linked with vilification.[43] The way it has been applied by the competent authority, as discussed in Part V below, means that it must be characterised as an anti-vilification measure (especially since ss 17 and 19 are subject to the same vilification exceptions in s 55). The Northern Territory's definition of discrimination in s 20(1) includes harassment on the basis of an attribute. As harassment provisions they are therefore broad. As vilification provisions they are the very broadest of their kind in Australia.[44]

IV Assessment Against International Standards

This Part describes the guidance provided by UN sources on implementing hate speech provisions required by *ICERD* and the *ICCPR*, ranging from the most serious categories (for which *ICERD* art 4(a) and *ICCPR* art 20(2) mandate prohibition), beyond which the general principles of art 19(3) require specific justification. Australian anti-vilification legislation is assessed against that guidance.

A ICERD *Article 4(a) Criminal Provisions*

According to the CERD Committee's General Recommendation 35, *Combating Racist Hate Speech*, criminal prohibition should be reserved only for serious cases of racist expression, while less serious conduct should be addressed by other means, taking into account such things as the nature and extent of the impact on targeted persons and groups.[45] The CERD Committee cited the Human Rights Committee's *General Comment No 34 on Freedom of Expression*, to stress that criminal sanctions should always be governed by principles of legality, proportionality and necessity. The CERD Committee also recommended (in reference to *ICERD* art 4(a)) that States Parties declare and effectively sanction as offences punishable by law:

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42 *Equal Opportunity Act 1984* (WA) ss 49A–C; *Anti-Discrimination Act 1992* (NT), ss 19–20. Sexual harassment is the subject of s 22.

43 Some anti-vilification measures describe themselves in terms of harassment (Western Australia's criminal provisions).

44 At the time of writing, the Queensland Government is considering introduction of a provision that would make a criminal offence to publicly display a prohibited symbol 'in a way that might reasonably be expected to cause a member of the public to *feel* menaced, harassed or *offended*': Criminal Code (Serious Vilification and Hate Crimes) Amendment Bill 2023 proposing insertion of a new s 52D into the *Criminal Code Act 1899* (Qld).

45 See Temperman (n 10) 128.

> (b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin;
>
> (c) Threats or incitement to violence against persons or groups on [those grounds];
>
> (d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on [those grounds], when it clearly amounts to incitement to hatred or discrimination.[46]

In Australia, the key elements of 'serious vilification' broadly correspond with the *ICERD* Committee's description, where they concern inciting hatred against or towards, serious contempt for, or severe ridicule of, a person or group, involving threats of physical harm or damage to property (or incitement of others to such harm or damage). There are no defences equivalent to the exclusions in Australian civil prohibitions (i.e., academic, artistic, scientific or research purposes, discussion or debate, and fair reporting), but so long as the offences are defined so they attach only to the most serious hate speech, involving threats of physical harm or damage to property, this poses much less of a problem than the civil prohibitions. It is, however, important to note the gloss put on the CERD Committee's recommendations by the Special Rapporteur, David Kaye, to prevent even *ICERD*'s criminal provisions from being interpreted as supporting greater restrictions on freedom of expression than is allowed under the *ICCPR*. Noting the fundamental nature of the freedom of expression, he pointed out that restrictions on the freedom 'must be exceptional, subject to narrow conditions and strict oversight'.[47] The standards of art 19(3) must therefore be strictly preserved, he said, when implementing *ICERD*'s criminal requirements.[48] Noting that the term 'ridicule' is a very broad term, he emphasised that it must only be prohibited where it 'clearly amounts to incitement to hatred or discrimination'. Indeed, ridicule is a type of speech 'generally precluded from restriction under international human rights law, which protects the rights to offend and mock'. Thus, prohibitions of such categories of expression must be limited to the most serious cases of hate speech. For this reason, 'the ties to incitement and to the framework established under article 19(3) of the Covenant help to constrain such a prohibition to the most serious category'.[49] Article 19(3) delineates an area of exclusion that should apply to all Australian anti-vilification legislation, criminal and civil, if it is to comply with the *ICCPR*.

Similar findings were made in a series of expert workshops on the inter-relationship between freedom of expression and hate speech known as the *Rabat Plan of Action*, which was firmly endorsed by the UN High Commissioner for

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46 Committee on the Elimination of Racial Discrimination, *General Recommendation No 35 (2013), Combating Racist Hate Speech*, UN Doc CERD/C/GC/35 (26 September 2-13) [12]–[13] ('GR 35').

47 Special Rapporteur Report A/74/486 (n 14) 5 [5]–[6].

48 Ibid 8 [16].

49 Ibid [16]–[17].

Human Rights when it was launched in 2013.[50] Both the *Rabat Plan of Action* and the CERD Committee in its General Recommendation identified certain factors denoting the severity necessary to criminalise 'incitement'.[51] The CERD Committee made the following observations on this element:

> Incitement characteristically seeks to influence others to engage in certain forms of conduct, including the commission of crime, through advocacy or threats. Incitement may be express or implied, through actions such as displays of racist symbols or distribution of materials as well as words. The notion of incitement as an inchoate crime does not require that the incitement has been acted upon, but in regulating the forms of incitement referred to in article 4, States parties should take into account, as important elements in the incitement offences, in addition to [the content and form of speech; the economic, social and political climate; the position or status of the speaker; the reach of the speech; the objectives of the speech], the intention of the speaker, and the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question.[52]

Australian *criminal* anti-vilification provisions may be said to match broadly these requirements of *ICERD*, though implementation in terms of *ICERD* art 4(a) offers obvious advantages by way of international law compliance and predictability through uniformity, and a means of correcting divergence from that standard where it exists.

B ICCPR *Article 20(2)*

The *Rabat Plan of Action* is especially important to our present discussion because it attempted to clarify some difficult definitions found in *ICCPR* art 20 and made specific recommendations for domestic implementation. It was influenced by the *Camden Principles on Freedom of Expression and Equality* ('*Camden Principles*') developed by the non-governmental organisation 'Article 19'.[53] The *Rabat Plan of Action* concluded that, for the purposes of art 20:

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50 Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights*, Addendum *Report of the United Nations High Commissioner for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred*, UN Doc A/HRC/22/17/Add.4 (11 January 2013) ('A/HRC/22/17/Add.4').

51 A/HRC/22/17/Add.4, n 45, Appendix, *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence* 11 [29] ('*Rabat Plan of Action*'); GR 35 (n 46) 4–5 [12]–[15].

52 GR 35 (n 46) 5 [16]. This draws on both the Human Rights Committee's *General Comment No 34, Article 19: Freedoms of Opinion and Expression*, UN Doc CCPR/C/GC/34 (12 September 2011) ('GC 34') and the *Rabat Plan of Action* (n 51).

53 Article 19, *The Camden Principles on Freedom of Expression and Equality* (Report, April 2009) <https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> ('*Camden Principles*').

- 'Hatred' and 'hostility' refer to 'intense and irrational emotions of opprobrium, enmity and detestation towards the target group.'
- 'Advocacy' is to be understood as requiring 'an intention to promote hatred publicly towards the target group.'
- 'Incitement' refers to statements which create an imminent risk of discrimination, hostility or violence against persons belonging to target groups.[54]
- 'Incitement to hatred' refers to the 'most severe and deeply felt form of opprobrium,' where relevant elements informing the severity of the hatred may include the 'cruelty or intent of the statement or harm advocated, the frequency, quantity and extent of the communication'.
- There must be 'intent' to incite; negligence and recklessness are not sufficient.[55]

It is arguable that this last requirement was not adhered to in the interpretation of the term 'incitement' in s 49ZT of the *Anti-Discrimination Act 1977* (NSW) adopted by Bathurst CJ in *Sunol v Collier (No 2)*.[56] His Honour considered that it is not necessary for a person to be incited by the words or publication, nor is it necessary to establish an intention to incite.[57] In *Cottrell v Ross*,[58] it was similarly held that, under s 8 of the *Racial and Religious Tolerance Act 2001* (Vic), 'the intention of the inciter to incite is irrelevant to the question of liability'.[59]

The *Rabat Plan of Action* supported the *Camden Principles*' recommendation that *ICCPR* States Parties 'should make it clear, either explicitly or through authoritative interpretation', that these definitions and requirements apply to any law implementing art 20 so that an appropriately high threshold for unlawful conduct is maintained.[60]

Both CERD and the *Rabat Plan for Action* treat as important the social and political setting, and the nature and extent of the impact of the conduct, which the *Rabat Plan for Action* expressed in terms of 'imminence', meaning 'the courts will have to determine that there was a reasonable probability that the speech

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54 *Rabat Plan of Action* (n 51) 9–10 [21], n 5.

55 Ibid 11 [29].

56 (2012) 260 FLR 414 ('*Sunol v Collier*').

57 Ibid 424 [41(a)] (Bathurst CJ). See also *Margan v Manias* [2015] NSWCA 388 [11]–[15]. As Temperman observes, the element of 'incitement' in art 20(2) requires that the speaker *intends to incite* a third party to engage in discrimination, hostility or violence against a target group: Temperman (n 10) 180–1, 209–14, 237–8.

58 [2019] VCC 2142.

59 Ibid 8 [42]. See also *Catch The Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284, 9–10 [23]–[24].

60 *Rabat Plan of Action* (n 51) [21], n 5, citing Camden Principle 12. See also Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Engel, 2nd ed, 2005) 475; Temperman, (n 10) 164; Aroney and Taylor 'The Rights and Wrongs of 18C' (n 9).

would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.' Other factors include the status of the speaker, the extent to which the speech was provocative and direct, and the size of the audience.[61]

Although the *Rabat Plan for Action* is directed to legislation specifically implementing art 20(2), it provides authoritative guidance concerning the kinds of measures addressing hate speech that will conform to art 19(3) requirements. When measured against art 20(2), it is apparent that the Australian state and territory civil prohibitions do not include the element of 'incitement to discrimination, hostility or violence'. The Victorian civil provisions, for example, require that the conduct 'incites hatred against, serious contempt for, or revulsion or severe ridicule' of another person or class of persons.[62] They were considered by the Victorian Court of Appeal in *Catch The Fire Ministries Inc v Islamic Council of Victoria Inc.*[63] Whereas the *Rabat Plan for Action* understands hatred and hostility to refer to 'intense and irrational emotions of opprobrium, enmity and detestation', there was no consideration in the appeal judgment of the seriousness of the hatred required by the Victorian law except to draw attention to the statutory language itself and Neave JA's observation that the law is concerned with incitement of 'extreme responses'.[64] The *Rabat Plan for Action* says that incitement refers to statements that create an *imminent risk* of discrimination, hostility or violence; Neave JA appeared to consider it sufficient that the conduct be merely capable of causing hatred.[65]

C ICCPR *Article 19(3)*

In his 2019 report on the regulation of online hate speech, the Special Rapporteur expressed some caution about adopting even the established terminology of *ICCPR* art 20(2) and *ICERD* art 4(a) in anti-vilification legislation, because of its uncertainty. He considered the language of these convention provisions to be ambiguous, dependent on difficult-to-define language of emotion (hatred, hostility) and highly context-specific prohibition (advocacy of incitement). They lack precision and require interpretation. His point was to emphasise that, quite apart from the requirements of arts 4(a) and 20(2), whenever a State limits expression, even when implementing art 20(2), it must always 'justify the prohibitions and their provisions in strict conformity with article 19'.[66]

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61 *Rabat Plan of Action* (n 51) 9–10 [29].

62 *Racial and Religious Tolerance Act 2001* (Vic) ss 7–8.

63 *Catch The Fire Ministries* (n 59).

64 Ibid 54 [174].

65 Ibid 50 [154], 58 [194], although elsewhere her Honour seemed to indicate that the impugned conduct must be 'likely to incite hatred': at 57–8 [190].

66 Special Rapporteur Report A/74/486 (n 14) 7–8 [12]–[13], referring to GC 34 (n 52) 12–13 [50]–[52].

Australian anti-vilification prohibitions certainly recruit the phraseology of 'incitement' and 'hatred', with their attendant uncertainty, but with nothing as effective as art 19(3) to save the prohibitions from excess.

The recent *United Nations Strategy and Plan of Action on Hate Speech*, quoted at the outset, reasoned similarly. It opened by noting that the characterisation of what is 'hateful' is controversial and disputed. It proposed as a working definition for hate speech 'any kind of communication … that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor'. But it went on to explain that international law does not prohibit hate speech as such, only *incitement* to discrimination, hostility and violence, an especially dangerous form of speech because it explicitly and deliberately aims to trigger discrimination, hostility and violence, which may also lead to or include terrorism or atrocity crimes.[67]

Commenting on this, the Special Rapporteur accepted that the description given to 'hate speech' in the *Strategy and Plan of Action* is appropriate as a basis for political and social action to counter discrimination and hatred. However, given its vagueness it would be problematic as the basis for legislative prohibitions, on legality grounds (discussed further below). There is a crucial distinction between conduct deserving a political, social or educative response, and conduct warranting legislative curtailment. To the Special Rapporteur, it remained essential that the State demonstrate the necessity and proportionality of legislative action restricting freedom of expression. The harsher the penalty, the greater the need to demonstrate the necessity for the measure in exacting terms.[68] Of particular relevance to the civil prohibitions in anti-vilification legislation, the Special Rapporteur also stressed that:

> expression that may be offensive or characterized by prejudice and that may raise serious concerns of intolerance may often not meet a threshold of severity to merit any kind of restriction. There is a range of expression of hatred, ugly as it is, that does not involve incitement or direct threat, such as declarations of prejudice against protected groups. Such sentiments would not be subject to prohibition under the [*ICCPR*] or [*ICERD*], and other restrictions or adverse actions would require an analysis of the conditions provided under article 19 (3) of the Covenant.[69]

The main lesson to be applied to Australian anti-vilification provisions is that concepts that defy precise definition may be tolerated in prohibitions, *provided* their ill-effects can be rescued by the operation of principles that give substance to art 19(3).

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67 *Strategy and Plan of Action* (n 1) 2.

68 Special Rapporteur Report A/74/486 (n 14) 9–10 [20].

69 Ibid [24].

V Legislative Modelling

In this Part, we identify the properties that laws must possess if they are to restrict freedom of expression permissibly under art 19(3). We raise concerns about the administration of the law by equal-opportunity, anti-discrimination and human-rights commissions in Australia (remembering that the requirements of art 19(3) attach to restrictions imposed by courts, public authorities and others when interpreting and applying the law in practice), and we discuss the impact of particular legislative models, particularly the shortcomings of the 'categorical' approach taken in Australia to legislative prohibition and exclusion.

A *Requisite Properties of the Law*

The expectations set by art 19(3) may be summarised in this way. All restrictions on freedom of expression are to be 'provided by law' and must be 'necessary' for a specified purpose, namely to protect 'the rights and reputations of others', 'national security or … public order (ordre public), or … public health or morals'. Any such restriction must be directly related to the specific purpose on which it is predicated, and it must not be overly broad. The restriction must be appropriate to achieve its protective function, it must be the least intrusive means of achieving it, and it must be proportionate to the interest to be protected. This principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities that apply the law.[70] The law must provide sufficient guidance to those charged with its execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.[71] The law must not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.[72]

When reporting in 2013 on the *Rabat Plan of Action*, the UN High Commissioner for Human Rights acknowledged that '[p]roperly balancing freedom of expression and the prohibition of incitement to hatred is no simple task,' and he continued, '[l]et me state clearly that any limitations to this fundamental freedom must remain within strictly defined parameters flowing from the international human rights instruments, in particular the [*ICCPR*] and [*ICERD*]. Article 19, paragraph 3, of the [*ICCPR*] lays down a clear test by which the legitimacy of such restrictions may be assessed'.[73]

The *Rabat Plan for Action* itself observed that the broader the definition of incitement to hatred in domestic legislation, the more it opens the door for arbitrary application of the law. It noted an increasing trend towards vagueness

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70 GC 34 (n 52) 6 [22], 8 [34].
71 Ibid 6–7 [25].
72 Ibid.
73 A/HRC/22/17/Add.4 (n 50) 4 [9].

in the terminology used in hate speech legislation, and the creation of new categories of restrictions not supportable by reference to art 19(3), or art 20. The limitation of speech effected by such laws must remain an exception to the general principle of freedom of expression.

The requirements of art 19(3) are of general application. They are that:

> restrictions are clearly and narrowly defined and respond to a pressing social need; are the least intrusive measure available; are not overly broad, so that they do not restrict speech in a wide or untargeted way; and are proportionate so that the benefit to the protected interest outweighs the harm to freedom of expression, including with respect to the sanctions they authorize.[74]

The greatest risk of Australia's civil prohibitions is that they are capable of restricting speech 'in a wide or untargeted way'.[75] In part, their breadth is a function of definitional uncertainties that cannot be avoided. At the same time, the Australian exclusions are narrow, admitting only fair reporting, academic, artistic, scientific or research, and other purposes in the public interest, including discussion or debate. These descriptions represent particularised forms of expression in contrast to the comprehensive protection of freedom of expression that should be secured by Australian law. As noted, to the Special Rapporteur 'the freedom of expression defined in article 19(2) involves expansive rights embodied by active verbs (seek, receive, impart) and the broadest possible scope (ideas of all kinds, regardless of frontiers, through any media)'.[76]

B *Legal Certainty*

What matters for *ICCPR* compliance is whether Australia's civil prohibitions are appropriately targeted to prevent the harms of hate speech and give sufficient scope to freedom of expression. State and territory civil prohibitions appear to have been effective in addressing obvious harms in the many extreme instances of status-based vilification, which fully demand enforcement by state and territory authorities, as attested in the extensive tribunal case law. There are many illustrations in decided cases of supremely fatuous, hate actuated speech, without any justification, by those intent on inflicting harm on targeted individuals on the basis of particular attributes. Those who engage in speech of this kind do not have to be well-versed in the law to know that their speech will and should get them into trouble. However, while the professed aims and aspirations of anti-vilification legislation are laudable, it is questionable whether the full scope of the civil prohibitions is warranted having regard to art 19. For example, the Tasmanian legislation rightly 'seeks to prevent and redress conduct

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74 *Rabat Plan of Action* (n 51) [15]–[18].

75 Ibid.

76 Special Rapporteur Report A/74/486 (n 14) 7 [12].

which is seen as unjust, divisive and anathema to modern society.'[77] However, s 17 of the *Anti-Discrimination Act 1998* (Tas) is of special concern, particularly in the light of the recent action by Equal Opportunity Tasmania against Tasmanian senator Claire Chandler, following her comments in an opinion piece on women in sport and the use of change-rooms. These appeared in July 2020 in *The Mercury*:

> Compounding this inequity [of free speech being reserved for those such as JK Rowling who have the resources or the platform to defend themselves] is the deference that is increasingly demanded to views which ordinary people, whether on the left or right, find absurd and completely lacking in evidence. You don't have to be a bigot to recognise the differences between the male and female sexes and understand why women's sports, single sex changerooms and toilets are important. The overwhelming majority of the world's population grew up understanding these concepts.[78]

The next day a complaint was filed with Equal Opportunity Australia by a constituent who then contacted Senator Chandler by email and asked whether she knew the difference between sex and gender. Senator Chandler replied, 'I do understand the difference – that's why I've made the point in my article that women's toilets and women's change rooms are designed for people of the female sex (women) and should remain that way.'[79] In deciding that possible breaches were disclosed, the assessment decision of Equal Opportunity Australia referred to the email correspondence.[80] The complaint was later dropped.[81] Professor Anne Twomey commented that exchanges like this, about public policy, between a senator and a constituent 'go to the core' of the Constitution's implied freedom of political communication.[82] Senator Chandler considered that she was merely advocating the sex-based rights of women. Reflecting on what had occurred, she later commented that 'it is deeply concerning in a democracy, instead of using free speech to respond or perhaps even campaign against me in an election, some people are instead seeking to use the law to silence me and every Tasmanian who shares my concerns'.[83] If Senator Chandler's remarks are indeed caught by the Tasmanian legislation it has two major implications.

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77 *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48, [53].

78 Claire Chandler, 'Opinion Piece: Big Names Spark Turning Point against Free Speech Attacks', *The Mercury* (online, 20 July 2020) <https://www.themercury.com.au>.

79 Claire Bickers, 'Senator in Hot Water for "Humiliating" Transgender Changeroom Remarks', *The Mercury* (online, 5 September 2020) <https://www.themercury.com.au>.

80 Bernard Lane, 'Free Speech "in Play" over Women's Sport', *The Australian* (online, 11 September 2020) <https://www.theaustralian.com.au/nation/politics/constitutional-concern-on-complaint/news-story/d6978ee1042354736f0bd6fe7684f6fd>. As that article notes, to the Commissioner, the implication of the email was that it showed that Sen Chandler 'considers people who are born male and then seek to live as a female, should not have access to female toilets, facilities or sport.'

81 A conciliation process was formally commenced but was discontinued after Sen Chandler refused to sign a confidentiality agreement. Sen Chandler requested the support of a legal advisor at the meeting, but this was refused.

82 Cited by Lane (n 80).

83 Emily Jarvie, 'Discrimination Complaint Filed against Tasmanian Liberal Senator Claire Chandler,' *The Advocate* (Online, 4 September 2020).

First, s 17(1) can only apply because s 22(1) is capable of being construed very broadly. Section 22(1) is meant to confine s 17(1) to prohibited conduct 'by or against a person engaged in, or undertaking any, activity in connection with' specific areas of activity.[84]

Secondly, if the complaint was accepted at a time when the email had not been made public by Senator Chandler, this is an example of an anti-vilification prohibition applying to something said in private. Section 17(1) would then be apparently unique in Australian anti-vilification legislation in not requiring the impugned conduct to occur in public (or a non-private setting). As Professor Gillian Triggs, when President of the Australian Human Rights Council, once emphasised, Australian hate speech laws like s 18C of the *Racial Discrimination Act 1975* (Cth) only apply to speech uttered 'in the public arena'. The discrepancy between her pre-delivered and recorded speech caused some controversy of relevance here,[85] but the point is this: unless clarified, s 17(1) as applied by Equal Opportunity Tasmania to Senator Chandler, may apply to speech uttered in private contexts.

Putting that detail to one side, the chilling effect of such an uncertain law is a function of both its terms and the manner in which it is administered. Equal Opportunity Tasmania admitted the complaint as if the law it administers applied in those circumstances or, at least, that its application could not be ruled out. The 'public purpose' exception in s 55 of the Tasmanian legislation must have been construed extremely narrowly by Equal Opportunity Tasmania for Senator Chandler's comments not to benefit from it, addressing a question of public policy by an elected member of Parliament. All jurisdictions have public purpose, public interest and similar exclusions.[86] The point is that hate speech is an evil that must be addressed, but vagueness around the meaning and operation of laws targeting hate speech is likely to encourage self-censorship in areas properly to be regarded as falling within the general domain of freedom of expression. This is especially the case for individuals who do not have the capacity to defend themselves publicly in the way that Senator Chandler did, under protection of parliamentary privilege. However, even Senator Chandler was placed in the invidious position of being officially warned that 'legal action can be taken against any person who uses insulting language towards any person exercising any power under the Anti-Discrimination Act'.[87] This inevitably deters public debate about important

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84 The specific areas are: employment, education and training, provision of facilities, goods and services, accommodation, membership and activities of clubs, administration of any law of the State or any State program, awards, enterprise agreements or industrial agreements.

85 Professor Triggs' pre-delivered speech continued, '[o]f course, you can say what you like around the kitchen table.' What she is reported as having said is different: '[s]adly, you can say what you like around the kitchen table at home.' See Tim Blair, 'People Who Don't Do Their Own Research,' *The Daily Telegraph* (Online, 12 April 2017).

86 See Part III above, which identifies the relevant provisions containing anti-vilification prohibitions and exclusions.

87 Commonwealth, *Parliamentary Debates*, Senate, 6 October 2020, 5145 (Senator Chandler).

issues, including, ironically, about the appropriateness of an official warning by a public authority being directed against *her*. Even public discussion by *others* about a complaint controversially taken up by the authorities may be deterred, by the fact that it is necessary to recall the original remarks in the process, inviting possible further action.[88]

The Tasmanian legislation highlights the capacity for uncertain anti-vilification legislation to be used as a tool for attacking ideological opponents.[89] In this context it should be recalled that the freedom of opinion within *ICCPR* art 19 is violated by 'harassment, intimidation or stigmatization of a person', by reason of the opinions they may hold. Any form of effort to coerce the holding or not holding of any opinion is prohibited.[90]

C *Impact of Particular Legislative Models*

As already noted, all of the civil anti-vilification provisions in Australia demarcate the prohibitions so that they do not apply to specific categories of conduct, such as fair reporting and statements made for academic, artistic, scientific or research purposes. The prohibitions are carefully worded to avoid the epithets 'exclusion' and 'exemption'[91] (save for those in Victoria and the Commonwealth).[92] Referring to the New South Wales legislation in *Sunol v Collier (No 2)*, Allsop P explained that this

> reflects an attempt by Parliament to weigh the policies of preventing vilification and permitting appropriate avenues of free speech. Subsection (1), which contains the prohibition, and subsection (2), which stipulates that 'nothing in this section renders unlawful' certain conduct, 'should be read together as a coherent provision that makes certain public acts unlawful. Subsection (2) is not a defence; it is a provision which

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88 For criticisms of the institutional handling of complaints at federal level, see the report of the Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia: Inquiry into the Operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and Related Procedures under the Australian Human Rights Commission Act 1986 (Cth)*, 28 February 2017.

89 Most Australian jurisdictions provide for political opinion in some form as a protected attribute in their anti-discrimination provisions, but there are exceptions, notably New South Wales and South Australia.

90 GC 34 (n 52) 2–3 [9]–[10].

91 *Discrimination Act 1991* (ACT) s 67A(2) ('However, it is not unlawful to'); *Anti-Discrimination Act 1977* (NSW) ss 20C(1), 38S, 49ZT, 49ZXB ('Nothing in this section renders unlawful'); *Anti-Discrimination Act 1991* (Qld) s 124A ('Subsection (1) does not make unlawful'); *Anti-Discrimination Act 1998* (Tas) s 55 ('The provisions of section 17(1) and section 19 do not apply if the person's conduct is –'); *Civil Liability Act 1936* (SA) s 73(1) ('*act of racial victimisation* means ... but does not include...').

92 *Racial and Religious Tolerance Act 2001* (Vic) s 11 ('Exceptions—public conduct. (1) A person does not contravene section 7 or 8 if *the person establishes that* the person's conduct was engaged in reasonably and in good faith ...'); *Racial Discrimination Act 1975* (Cth) s 18D ('18D Exemptions. Section 18C does not render unlawful anything ...').

> assists in the defining of what is unlawful. It attempts to ensure that certain conduct is not rendered unlawful by the operation of subsection (1).[93]

This legislative design (a category of prohibition, with stated exclusions) entails certain legal or practical consequences.

First, ordinarily the terms that describe the exclusions are not to be construed narrowly. An approach to construction is to be adopted that recognises 'the high value that the common law (and indeed the legislature) places on freedom of expression'.[94]

Secondly, the burden of proof rests with the party claiming that their conduct falls within the stated exclusions. This is expressly stated in some legislation.[95] The rationale is that the party relying on an exclusion is better placed, and has the relevant interest, to explain and to provide evidence of their conduct. In reality, in many cases the assertions in anti-vilification claims give rise, in practice, to a strategic or evidentiary burden on the respondent to rebut the inferences raised. If this is not done, then adverse inferences may be drawn by the tribunal against the respondent. In other words, a shift in burden is, to some extent, unavoidable. However, respondents may pay an unexpected cost even though the exclusions (according to Allsop P) do not operate by way of a defence. The appellant in *Passas v Comensoli* had not specifically pleaded the exclusion and could not raise it for the first time on appeal, because of the disadvantage this would incur for the respondent who would have had the opportunity to answer the exclusion if it had been raised earlier.[96] In this sense, there is a practical separation between the vilification claim and the public interest exclusions. Until recent changes to the Australian *Human Rights Commission Act 1986* (Cth),[97] the application of exemptions in s 18D was not always considered when determining whether a complaint amounted to unlawful discrimination.[98] This may also have been a factor in the handling of the complaint against Senator Chandler by Equal Opportunity Tasmania.

A more fundamental question, however, which arises as a matter of international law, is whether the legislative models adopted by the states and territories offend the principle expressed in General Comment 34 that 'the

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93 *Sunol v Collier* (n 56) 427 [60], in reference to s 49ZT.

94 Ibid 427 [59].

95 See, eg, *Racial and Religious Tolerance Act 2001* (Vic) s 11.

96 *Passas v Comensoli* [2019] NSWCATAP 298 (18 December 2019) [52]–[57].

97 Section 46PH(1) of the *Australian Human Rights Commission Act 1986* (Cth), concerned with termination of complaints, was added in 2017 to clarify that 'consideration by the President of the question of whether an act, omission or practice is not unlawful discrimination will involve consideration of whether an exemption applies'.

98 Paul Karp, 'Bill Leak Could Have Ended 18C Complaint Earlier, Says Gillian Triggs: Human Rights Commission President Says Cartoonist Did Not Take Chance to Assert Cartoon Drawn in Good Faith,' *The Guardian* (online, 28 February 2017). ('It may very well be fair comment, it may very well be in good faith, it may well be part of an artistic exercise, it may well be accurate,' Gillian Triggs is attributed as saying. 'All of those things, however … have to be put by the respondent themselves.')

relation between right and restriction and between norm and exception must not be reversed'.[99] The most obvious example of a breach of that principle would be where a State so restricts a right that it impairs the essence of the right. (*ICCPR* art 5(1) expresses it in the most severe terms, the 'destruction' of the right, but art 5(1) also refers to less extreme action in the limitation of rights to a greater extent than the *ICCPR* allows.) To be sure, anti-vilification provisions are not destructive in this extreme sense, and free speech remains as available as ever beyond the scope of the prohibitions. This was illustrated in *Cottrell v Ross*, in a finding that only those communications that vilified were burdened.[100]

Nevertheless, this does not answer a concern recently mentioned by the Special Rapporteur when he issued the reminder that, in view of the 'exceptional nature' of limitations allowed under art 19(3), 'the burden falls on the authority restricting speech to justify the restriction, not on the speakers to demonstrate that they have the right to such speech'.[101] This requirement is difficult to square with the fact that the protection of free speech occurs by dint only of the legislative carveout, even if it avoids terminology such as 'exclusion' or 'exemption'. This draws attention to what is a radical departure of Australian domestic law from the 'rule or exception' principle, namely that the applicable *rule* — the protection of the fundamental human right in question — does not exist anywhere in substantive Australian law. The freedoms of opinion and expression are not substantively guaranteed in accordance with the requirements of art 19. All applicable convention obligations on hate speech to which Australia is bound require full protection for freedom of expression under art 19. Such protection does not exist in Australia. In its place is the free speech presupposed by the common law, a principle that, as discussed in Part II, offers only meagre protection that fails to equate with freedom of expression. Even that inadequate free speech protection is then circumscribed by statutory anti-vilification prohibitions and saved partially by exceptions. No justification is required beyond a matching of conduct with the prohibitions and exclusions. This is how the balance is fixed in Australia between fundamental rights. It requires little regard for whether the resulting restriction is justified in the circumstances.

It is a cardinal principle of international human rights law that no one human right is to be favoured over another. The *Vienna Declaration and Programme of Action* expressed it in this way:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic

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99 GC 34 (n 52) 5–6 [21].

100 [2019] VCC 2142, 30 [158].

101 Special Rapporteur Report A/74/486 (n 14) 5 [6].

> and cultural systems, to promote and protect all human rights and fundamental freedoms.[102]

The indivisibility of human rights has now become an 'official doctrine' of the UN.[103]

Freedom of expression is unfavourably relegated in state and territory, as well as Commonwealth, anti-vilification legislation. The language of prohibition is uncertain and broadly expressed. Everything depends on the limited domain secured for free speech by narrowly framed exclusions. The exclusions fail to protect freedom of expression in its plenary dimensions. The interpretation placed on anti-vilification laws by commissions, tribunals and courts is driven principally by a statutory text without regard for freedom of expression. At no stage in applying the legislation is the process of justification required by art 19(3) ever undertaken.

During her tenure as President of the AHRC, Professor Gillian Triggs made some important observations of direct relevance to our concerns in this area. She was commenting on the fact that 'Australia has not implemented the core human rights principles, set out in the [*ICCPR*], including freedom of speech' and that '[i]n the Australian Constitution, there are only minimal protections provided for basic freedoms — and no explicit protection for the right to freedom of speech'.[104] She observed that 'Australia's unique approach to human rights has produced a significant gap in legal protections for some rights, such as the right to freedom of speech ... while comprehensively preserving the right protection against certain forms of discrimination'.[105] This led Professor Triggs to an exhortation to find an appropriate balance between rights, stating,

> [b]ut let me be clear. All human rights should be protected. There is no hierarchical order amongst them. Human rights are seldom absolute. Nor are they isolated from one another. The challenge is to find a balance between rights.[106]

But then, in an inversion of her stated concern, Professor Triggs continued: 'It is not appropriate to cherry pick one's favourite right over another — such as the right to freedom of speech [for which she accepts there is inadequate protection] over the right to anti-discrimination [which is comprehensively protected]'.[107] Her statement seems to suggest that the motive of those who single out freedom of speech for remedial improvement is that this is 'their favourite right.' Advocating better protection for freedom of expression in Australia, when it is

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102 *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993, adopted 25 June 1993), 5 [5] ('Vienna Declaration').

103 James W Nickel, 'Rethinking Indivisibility: Towards a Theory Supporting Relations Between Human Rights', (2008) 30(4) *Human Rights Quarterly* 984, 985.

104 Gillian Triggs, 'We Need More Laws, Not Fewer, to Protect Our Freedoms', *The Guardian Australia*, (online, 22 January 2014) <https://www.theguardian.com/commentisfree/2014/jan/22/we-need-more-laws-not-less-to-protect-our-freedoms>.

105 Ibid.

106 Ibid.

107 Ibid.

notoriously deficient, especially compared with the protection given to other *ICCPR* rights, surely cannot be said to involve any such cherry picking. 'Trumping' is another common pejorative description. In the scheme set by *ICERD* and the *ICCPR*, there is no so-called cherry-picking or trumping of one right over another if the key texts and principles elaborated by their respective monitoring bodies are heeded.

VI Legislative Proposals

In the light of the preceding discussion, we propose certain legislative options. The fundamental aim is to adopt the balancing test required between protection against hate speech and freedom of expression established by *ICCPR* art 19(3). The options represent proper exercise of the external affairs power conferred by s 51(xxix) of the *Constitution*, as interpreted by the High Court,[108] because of their adherence to the convention standards invoked. They involve Commonwealth legislation that would specifically override the operation of state and territory vilification laws to the extent of any inconsistency by virtue of s 109 of the *Constitution*.

The enactment of overriding Commonwealth legislation is appropriate and necessary. A uniform approach is required to render existing legislation comprehensible. It would produce needed uniformity in an area of law that addresses a category of conduct (speech or expression) that, as discussed, has an inherently trans-jurisdictional character. It will also answer broader concerns of the Human Rights Committee about the inconsistencies in anti-vilification laws that currently exist across different states and territories in Australia.

A *Proposal 1: The Minimalist Application of Article 19(3)*

A minimalist approach involves the Commonwealth expressly implementing the balancing standard of art 19(3), but in a confined way. The intention is for a Commonwealth law to expressly override the operation of state and territory vilification laws in so far as their application would restrict freedom of expression to an extent contrary to the specific requirements of art 19(3).

Conformity to international standards has been achieved swiftly and simply in this manner in the past. This occurred when the Commonwealth Parliament was faced with the urgency of meeting *ICCPR* standards under art 17, following Tasmania's refusal to repeal criminal provisions concerning sexual conduct involving consenting adults acting in private. (The background to the change was a complaint brought before the Human Rights Committee in *Toonen v Australia*, a landmark case that successfully challenged Tasmania's laws criminalising

[108] *Commonwealth v Tasmania* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261; *Victoria v Commonwealth* (1996) 187 CLR 416.

consensual sex between adult males in private on the basis of violating the right to privacy in art 17 of the *ICCPR*.)[109] By a neat formula in the *Human Rights (Sexual Conduct) Act 1994* (Cth), the Commonwealth gave effect domestically to the concept of 'arbitrary interference with privacy within the meaning of article 17 of the [*ICCPR*].'[110] Its main effect was to overrule the operation of state and territory law with respect to a narrow aspect of *ICCPR* art 17, and thereby ended the most obvious aspects of Tasmania's stand against such reform. It may have been limited in its effect, but it is an example of a faithful, accurate, and economical way of adopting *ICCPR* demands in an area where it was needed and had to be addressed head-on.

An adaptation of the same legislation to present circumstances might be in the following terms, and is offered here to illustrate available options rather than as a particular model:

> No one exercising their freedom of expression, within the meaning of Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR), is to be subject, by or under any law of the Commonwealth, a State or a Territory, to any restriction that is not justified in accordance with the terms of Article 19(3) of the ICCPR.

This approach might be criticised for requiring too much judgement and regard for principles established by the Human Rights Committee. This is also true when determining 'arbitrariness' under art 17, but that was no impediment to the 1994 legislation. The proposed text would operate largely as a backstop, to ensure due regard for art 19 in those cases where it is likely that the free speech exclusions from anti-vilification prohibitions do not go far enough. It is modest as a remedial solution. The proposal would have no effect on the application of state and territory vilification laws to instances of hate speech of greater severity.

B *Proposal 2: General Effect to the Totality of Article 19(3)*

A broader alternative to Proposal 1 is an enactment that gives general effect to the totality of art 19, in substance, for all purposes. It would render inoperative (ie, 'invalid' pursuant to s 109 of the Constitution) any restriction on the freedom of expression save strictly in accordance with terms similar to art 19(3). The intention would be to entitle those on whom such restrictions are imposed to adjudication by a competent authority, and a remedy, as required by *ICCPR* art 2(3). This is no more than what the Human Rights Committee already expects from Australia given its obligation to 'adopt such laws or other measures as may be necessary to give effect to the [*ICCPR*] rights'.[111] Anti-vilification laws of states

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109 *Toonen v Australia*, *Communication No. 488/1992, Views of 31 March 1994 CCPR/C/50/D/488/1992.*

110 'Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights'.

111 *ICCPR* (n 6) art 2(2).

and territories would continue to operate subject to such Commonwealth enactment.[112]

C *Proposal 3: Prohibition on Particular Conduct with Known Article 19(3) Justification*

Proposal 3 is intended to apply in combination with whichever of the above Proposals (1 and 2) is adopted. It consists of Commonwealth enactment of hate speech provisions corresponding with the texts of *ICERD* art 4(a) and *ICCPR* art 20(2). This would represent simple implementation enabling Australia to remove its reservations in respect of both.[113] As we hope we have demonstrated, it is clear that the justifications required for the resulting prohibitions satisfy art 19(3) criteria.

The enactments could be accompanied by clarification that it is not intended to exclude or limit the operation of a law of a state or territory that furthers the objects of *ICERD* article 4(a) consistently with Australia's obligations under that provision and is capable of operating concurrently with the Commonwealth law.[114] However, to achieve that consistency by upholding freedom of expression under *ICCPR* art 19, Proposals 1 or 2 should be implemented in tandem with Proposal 3.

Within this limited scope Australia would achieve uniformity on the topic of racial and religious hate speech.

D *Proposal 4: Non-Legislative Options*

Proper regard should also be had to non-legislative options. The Special Rapporteur recently made the point in this way: 'The recognition of steps other than legal prohibitions highlights that prohibition will often not be the least restrictive measure available to States confronting hate speech problems.' Valuable alternatives include public statements by leaders in society countering hate speech, fostering tolerance and intercommunity respect, education and intercultural dialogue, enhanced access to information and ideas counter hateful messages, and the promotion of and training in human rights principles and standards.[115] Comparable alternatives are also recommended in the *United Nations Strategy and Plan of Action on Hate Speech*.[116]

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112 Another possible approach would be for the states and territories to enact cooperative legislation. However, the likelihood of achieving consensus across all the jurisdictions is, at this point in time, remote.

113 Australia's reservation did not reject art 20(2) outright, but rather reserved the right not to introduce any further legislative provisions on the topic: Temperman (n 10) 72–73.

114 See, eg, *Racial Discrimination Act 1975* (Cth) s 6A(1).

115 Special Rapporteur Report A/74/486 (n 14) 9 [18].

116 *Strategy and Plan of Action* (n 1) 4.

VII Conclusion

Hate speech is, sadly, increasingly widespread. The social climate in Australia and many other countries is becoming increasingly politicised, polarised and hostile. Social media has become a powerful channel for political and cultural influence, and has fuelled divisiveness, including by demonising individuals and groups. They may be pilloried for the views or beliefs they do not hold, as much as for those they do hold, through the stereotypical ascription of a set of negative attributes. This is the essence of much status-based phobia, but it has also become a common device of persuasion. The phenomenon is not confined to social media. It is also reflected in institutional cultures. People are called out for their vilifying speech (whether it is that or not) by those indulging in serious vilification themselves. In this environment, anti-vilification legislation is at risk of becoming weaponised. This is more likely to occur at the threshold for vilification, by interpreting it downwards, and is more likely to occur the greater the uncertainty that attends anti-vilification legislation. There is an increasing risk that speech is able to be regulated on the basis of its political content.

One legislative aim of all anti-vilification legislation is self-censorship by those who would otherwise indulge in harmful speech. Findings that the legislation is contravened reaffirm community standards and serve as a public warning against others making the same mistake. However, to win and maintain public support, the legislation needs to be predictable. It falls into disrepute where it operates at too low a threshold, or where self-censorship occurs out of uncertainty or fear of reprisal. Australian anti-vilification legislation, in its current state, is confronting. It comprises a multiplicity of statutes, prohibiting speech on different grounds, at different thresholds, for different activities, and by different means (varying by state and territory between criminal and civil, civil only, and criminal only). The legislation becomes especially intimidating when interpreted or applied by competent authorities unpredictably against public figures in the full glare of publicity. There is every reason to anticipate that those who observe this occurring will be cowed into silence.

The discussion in this article leads to recommendations for reform to prevent state and territory anti-vilification legislation being applied contrary to the dictates of *ICCPR* art 19(3). The fault is not so much in how the existing legislation affects the most serious instances of vilification, but in how it operates at the opposite end of the spectrum, closer to the threshold where uncertainty is greatest. The uncertain and varying thresholds applied across Australian jurisdictions mean that the best way of restoring certainty is to adopt a single standard of exclusion from the prohibitions, as required by art 19(3). Beyond this, the approaches proposed in this article merely aim to implement core convention hate speech obligations. After all, the purpose of international conventions that mandate the prohibition of hate speech is to address the menace it poses to

democratic values, social stability and ultimately peace. As the *Camden Principles*, which were influential in formulating the *Rabat Plan of Action*, observe:

> Pluralism and diversity are hallmarks of freedom of expression. Realisation of the right to freedom of expression enables vibrant, multi-faceted public interest debate giving voice to different perspectives and viewpoints. Inequality results in the exclusion of certain voices, undermining this. The right of everyone to be heard, to speak and to participate in political, artistic and social life are, in turn, integral to the attainment and enjoyment of equality. When people are denied public participation and voice, their issues, experiences and concerns are rendered invisible, and they become more vulnerable to bigotry, prejudice and marginalisation.[117]

Simple conformity of anti-vilification laws with *ICCPR* standards should not be so hard to achieve, surely? If not, why not?

[117] *Camden Principles* (n 53) 3.

SOVEREIGNTY UNDER THE *AUSTRALIAN CONSTITUTION*: WHY IS SECTION 6 OF THE *AUSTRALIA ACTS* BINDING ON STATE PARLIAMENTS?

JONATHAN CROWE*

Section 6 of the Australia Acts 1986 *provides that, when a State law concerns the 'constitution, powers and procedure' of the State Parliament, it must abide by any relevant 'manner and form' requirements in previous legislation. This provision is generally accepted as imposing a binding limitation on the sovereignty of State Parliaments. However, the reason why this section is binding on State Parliaments is disputed. This article begins by discussing the concept of sovereignty in philosophical terms, before turning to the history of sovereignty in Australia. It explores the role of the* Australia Acts *in the constitutional system, focusing on their implications for constitutive power in the States, then looks specifically at s 6 and its capacity to bind State Parliaments. I argue that attempts to explain the authority of s 6 by appealing to the United Kingdom or Commonwealth* Australia Acts *fail. The only satisfactory explanation appeals to the idea that the Australian Parliaments acting together have a special form of sovereignty that allows them to make certain kinds of constitutional changes. This conclusion has important implications for how constitutive power is understood in Australia today.*

I INTRODUCTION

The *Australia Acts 1986* are a truly extraordinary package of legislation. They consist of two *Australia Acts* passed by the Commonwealth and United Kingdom Parliaments, respectively, preceded by six *Australia Acts (Request) Acts* enacted by the State Parliaments. The legislation made important changes to Australia's constitutional system, particularly regarding Australia's relationship to the United Kingdom, but also concerning the powers of State Parliaments. The unique way that the *Australia Acts* were enacted was intended to harness the combined sovereignty of the eight distinct Parliaments involved. Nonetheless, questions still arise about the source of the legislation's authority to change Australia's

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constitutional arrangements. This issue holds the potential to illuminate the notion of sovereignty in Australia, including both its historical development and its current status.

Section 6 of the *Australia Acts* provides that when a State law concerns the 'constitution, powers and procedure' of the State Parliament, it must be passed in accordance with any relevant 'manner and form' requirements. This provision is generally accepted as imposing a binding limitation on the sovereignty of State Parliaments. However, the reason why this section is binding on State Parliaments is disputed. No satisfactory explanation for this conclusion has been provided, including by the High Court. This article begins by discussing the concept of sovereignty in philosophical terms, before turning to the history of sovereignty in Australia. It explores the role of the *Australia Acts* in the constitutional system, focusing on their implications for constitutive power in the States, then looks specifically at s 6 and the source of its ability to bind State Parliaments to manner and form requirements.

Why, then, does s 6 of the *Australia Acts* bind the States? Explanations based on the authority of the United Kingdom or Commonwealth versions of the *Australia Acts* are unconvincing. I argue that the only satisfactory explanation appeals to the idea that the Australian Parliaments acting together have a special form of sovereignty that allows them to make certain kinds of constitutional changes. This explanation derives from the distinctive process used to enact the *Australia Acts* themselves. The proposal might seem undemocratic when compared with the referendum process under s 128 of the *Constitution*. However, it is consistent with the role played by parliamentary bodies in the Australian system — not only as organs of representative democracy, but also as repositories of constituent power.

II The Concept of Sovereignty

The formal amendment process in s 128 of the *Constitution* tells us who may alter the text of the constitutional document. The answer it gives to this question is that the power rests with the Commonwealth Parliament acting together with the Australian voters. This reflects the democratic character of the Australian system of government. It is the Australian people, acting through and with the Parliament, who are ultimately sovereign. The nature of sovereignty in the Australian constitutional system, however, has a complicated history. The United Kingdom (or Imperial) Parliament originally enacted the *Constitution* and, for many years, retained residual power to legislate for both the Commonwealth and the States.

It is easy to forget today that the *Australian Constitution* is contained within a statute of the Imperial Parliament. The text of the *Constitution* appears within s 9 of the *Commonwealth of Australia Constitution Act 1900* (Imp). The fact that the *Constitution* was enacted in this manner, albeit following a vote of the Australian

Colonies, shows that the United Kingdom Parliament was accepted at that point as possessing sovereignty over Australia. It seems absurd, however, to regard the United Kingdom Parliament as retaining sovereignty over Australia today. This shows that sovereignty, like other aspects of the *Constitution*, changes over time. We might speak here of the *sovereign movement* of the *Australian Constitution*. This movement can only be understood by examining its history.

Sovereignty is ultimate power within a jurisdiction. On the traditional view of sovereignty, expounded by the English jurists John Austin and A V Dicey, the sovereign has three attributes.[1] First, all persons within the jurisdiction are subject to the sovereign's authority. Second, the sovereign is not bound by any other authority. Third, the sovereign is not bound by its own authority. The sovereign, in other words, is the ultimate source of legal authority within the jurisdiction. Austin's conception of sovereignty was modelled on the role of the United Kingdom Parliament, as he understood it. The formal power of the United Kingdom Parliament within the Westminster system was traditionally conceived as unlimited, including by the principles of the unwritten constitution (although the current legal position on this issue is much more complicated).[2]

It is questionable, however, whether sovereignty is ever truly unlimited. The concept of sovereignty seems to include at least three inherent limitations. First, as Austin and Dicey acknowledge, it is subject to *jurisdictional* limits: a sovereign body cannot legislate outside its jurisdiction, whether defined geographically or in some other way. Second, sovereignty is subject to *practical* limits: a sovereign body cannot impose a law it lacks the power to enforce. An example of the practical limits of sovereignty is provided by the following hypothetical legislation:

> *Eldest Child Act*: The legislature passes an enactment that requires all parents to immediately kill their eldest child or pay a nominal fine.[3]

Most parents would be extremely reluctant to do as this legislation requires. A nominal fine would not convince them to do so. It therefore seems to be outside the practical limits of sovereignty to enact such a law.

Third, sovereignty is arguably subject to *moral* limits: a sovereign body cannot validly pass a law that is repugnant to fundamental moral values. The *Eldest Child Act* also serves to illustrate this category. Ordering a parent to sacrifice their first born child is something that nobody has authority to do, because it is so morally repugnant. No sovereign, no matter how powerful, can dispense with moral duties. Sometimes, we need to weigh our ordinary moral duties against the

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1 John Austin, *Lectures on Jurisprudence* (John Murray, 5th ed, 1885) 221; A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) lect 2.

2 See, eg, the High Court's discussion of this issue in its unanimous joint judgment in *Union Steamship Co of Australia v King* (1988) 166 CLR 1, 10.

3 It is arguable that an enactment of this kind is no law at all, because it cannot play law's function of setting the boundaries of social conduct. See Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019) 173–7.

broader moral duty to follow the law of our community.[4] However, there are some actions that are so deeply wrong that we should never perform them, even if the law purports to require it. The *Eldest Child Act* is incapable of giving a parent an obligation to kill their eldest child, because they have a very strong moral obligation not to do so.

The United Kingdom Parliament was once sovereign over Australia's constitutional system. However, Australia has since gained its independence. Could the United Kingdom revoke Australia's independence and reassert its sovereignty, perhaps by amending the *Constitution Act* or the *Constitution* itself? Austin and Dicey thought that the sovereign is not bound by its own authority, implying that it can take back its past decisions, including decisions to grant independence. However, this overlooks the practical limitations on the concept of sovereignty. Australia, as a practical matter, no longer recognises the constitutive authority of the United Kingdom Parliament.[5] This implies that once independence is established, it cannot be taken back, because there is no longer any practical ability to do so.

III Sovereignty in Australia

Any history of sovereignty in Australia must begin by recognising the original sovereignty of Indigenous Peoples. Aboriginal and Torres Strait Islander Peoples lived in Australia for at least 60,000 years before Europeans arrived.[6] They had well-developed bodies of customary law that continue to be observed in many Indigenous communities today.[7] The High Court has consistently declined to recognise Indigenous sovereignty over Australia,[8] but this reflects the fact that the High Court itself derives its authority from the *Australian Constitution* and is therefore obliged to accept the *Constitution* as legitimate.[9] Indigenous sovereignty over Australia was never relinquished and is maintained by Aboriginal and Torres Strait Islander Peoples to the present day. It constitutes a parallel form of sovereignty that the *Constitution* ignores, but is incapable of erasing entirely.

The United Kingdom, upon colonising Australia in 1788, asserted sovereignty over it, ignoring the prior claims of the Indigenous inhabitants. The first

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4 For discussion, see Crowe (n 3) ch 10.

5 Cf *Sue v Hill* (1999) 199 CLR 462, 492 [64] (Gleeson, Gummow and Hayne JJ).

6 Chris Clarkson et al, 'Human Occupation of Northern Australia by 65,000 Years Ago' (2017) 547(7663) *Nature* 306.

7 See generally Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) chs 2–3.

8 See, eg, *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 31–2, 57–60, 63, 69 (Brennan J; Mason CJ and McHugh J agreeing), 78–9 (Deane and Gaudron JJ), 122 (Dawson J), 179–80 (Toohey J) ('*Mabo*'); *Love v Commonwealth* (2020) 270 CLR 152, 176–7 [25] (Kiefel CJ), 200–1 [102] (Gageler J), 227 [202] (Keane J), 249–52 [264]–[268] (Nettle J), 273 [337] (Gordon J) ('*Love*').

9 Cf *Mabo* (n 8) 78–9 (Deane and Gaudron JJ); *Love* (n 8) 273 [337] (Gordon J).

Australian Colony, New South Wales, was under the executive authority of the Governor. The Governor, in turn, was responsible to the King and the Imperial Parliament. A Legislative Council was established for New South Wales in 1823,[10] and for Van Diemen's Land (as Tasmania was then known) in 1825.[11] The role of the Legislative Council was to advise the Governor on the exercise of legislative authority. The *Australian Courts Act 1828* (Imp) made English law applicable in the Australian Colonies as it existed on 25 July 1828. It empowered the Governors and Legislative Assemblies to determine which United Kingdom laws passed after that date should apply in their jurisdiction. The statute also established the Supreme Courts of New South Wales and Van Diemen's Land as courts of record with broad jurisdiction (s 3).

The *Australian Constitutions Act 1850* (Imp) empowered the Governor and Legislative Council of New South Wales to establish, with the approval of the United Kingdom Parliament, a bicameral legislature with expanded legislative powers. This occurred with the passage of the *New South Wales Constitution Act 1855* (Imp). The other Australian Colonies received their own *Constitution Acts* in ensuing decades, establishing bicameral elected legislatures.[12] The application of Imperial statutes to the Colonies was clarified by the *Colonial Laws Validity Act 1865* (Imp). Section 1 provides that United Kingdom statutes only apply to the Colonies if extended by express words or necessary implication. Section 2 states that Colonial laws that conflict with applicable Imperial Acts are void and inoperative. This section reiterated the repugnancy doctrine that limited the legislative powers of Colonies and dominions by making them subject to override by the Imperial Parliament.

Section 5 of the *Colonial Laws Validity Act* further states that the Colonial legislatures have power to make laws with respect to the courts and the constitution, powers and procedure of the legislature. This provision had the effect of granting the Colonial legislatures power to alter their constitutional arrangements, subject to the paramount force of Imperial legislation. The Commonwealth of Australia subsumed the Colonies on 1 January 1901 following the passage of the *Commonwealth of Australia Constitution Act 1900* (Imp). However, even following the creation of the Australian Commonwealth, the United Kingdom Parliament retained the capacity to make laws for the Commonwealth and the States by exercising paramount force. The continuing ability of the United Kingdom Parliament to override Australian legislation after Federation is illustrated by the case of *Union Steamship Co of New Zealand v Commonwealth*.[13] The High Court held in that case that provisions of the *Navigation*

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10 *New South Wales Act 1823* (Imp).

11 This was done by proclamation of Sir Ralph Darling, Governor of New South Wales.

12 The Upper House of the Queensland Parliament was subsequently abolished by the *Constitution Act Amendment Act 1921* (Qld).

13 (1925) 36 CLR 130.

Act 1912 (Cth), enacted under the trade and commerce power in s 51(i) of the *Constitution*, were void for repugnancy to the *Merchant Shipping Act 1894* (Imp).

This authority continued unaltered until the passage of the *Statute of Westminster 1931* (Imp) and its subsequent adoption into Australian law in 1942.[14] Section 2 of the *Statute of Westminster* states that the *Colonial Laws Validity Act* no longer applies to the dominions (including the Commonwealth of Australia). This section abolished the repugnancy doctrine in respect of Commonwealth legislation. However, the doctrine continued to apply to State laws. Section 4 of the *Statute of Westminster* further provides that no United Kingdom statute applies to a dominion unless the dominion has requested and consented to its application. The request and consent procedure in the *Statute of Westminster* therefore replaced the paramount force doctrine in the *Colonial Laws Validity Act* as far as the Commonwealth was concerned. This was a further step in the gradual relinquishment of United Kingdom sovereignty over the Australian legal system. Nonetheless, it was still possible following the *Statute of Westminster* for the United Kingdom Parliament to legislate for the Australian Commonwealth with the latter's request and consent. Furthermore, the request and consent procedure in the *Statute of Westminster* was not extended to the States, who were still covered by the doctrine of paramount force (s 9).

The United Kingdom Parliament, by enacting the *Statute of Westminster*, voluntarily limited its own power to legislate with respect to the Commonwealth of Australia. However, we saw previously that, according to Austin and Dicey, a sovereign body is not bound by its own edicts. Could the United Kingdom Parliament therefore simply repeal s 4 of the *Statute of Westminster* and proceed to legislate for Australia without its request and consent? The answer depends, as we saw before, on the practical limits of sovereignty. The question becomes whether the Australian courts and other legal officials would recognise such an action as valid and binding. They may have done so if it had been carried out shortly after the *Statute of Westminster* was originally enacted, but it is improbable that they would do so today. Sometime between those dates, sovereignty in Australia shifted irrevocably away from the United Kingdom and towards the Australian Parliaments and people.

IV The *Australia Acts*

Sovereignty can sometimes shift abruptly, as in the case of a revolution. However, in Australia, the evolution of sovereignty was more gradual, as we saw in the previous section. It is difficult to pinpoint the exact time when Australian sovereignty ceased to recognise a role for the United Kingdom Parliament and shifted irreversibly to domestic sources. The First and Second World Wars are

[14] *Statute of Westminster Adoption Act 1942* (Cth).

often cited as contributing to a growing sense of Australian national identity, but they also reiterated Australia's continuing status as part of the British Commonwealth (particularly since Australia automatically became a party to those conflicts when war was declared by the United Kingdom). It was not until the passage of the *Australia Acts 1986* that the remaining constitutional links between Australia and the United Kingdom were severed (except for the monarchy). This legislation was therefore an important step in confirming Australia's independent sovereignty, although it is best viewed as the culmination of a gradual trend extending back to Federation.

The *Australia Acts*, as mentioned at the commencement of this article, comprise two almost identical *Australia Acts* passed by the Commonwealth and United Kingdom Parliaments, preceded by six *Australia Acts (Request) Acts* passed by the State Parliaments, incorporating the *Australia Act* in a schedule.[15] The Commonwealth had also earlier passed the *Australia (Request and Consent) Act 1985* (Cth) requesting the United Kingdom to enact its legislation. The State *Australia Acts (Request) Acts* were necessary for the Commonwealth to pass its *Australia Act*. This is because the Commonwealth Parliament relied upon s 51(xxxviii) of the *Constitution*, which allows for the exercise, with the request and consent of the affected States, of powers which at Federation belonged only to the United Kingdom Parliament.[16] Similarly, the Commonwealth *Australia (Request and Consent) Act* was needed for the United Kingdom Parliament to pass its *Australia Act*, due to the request and consent process in s 4 of the *Statute of Westminster*.

Section 1 of the *Australia Acts* provides that no United Kingdom legislation can henceforth apply by paramount force in Australia. The consent and request procedure in the *Statute of Westminster* is repealed (s 12). Sections 2 and 3 confirm that the States have full legislative power to override United Kingdom laws and that the *Colonial Laws Validity Act* no longer applies to them. State Governors also have full executive powers as representatives of the Queen (s 7) and the Queen may not personally overrule State laws (s 8). The State Governors may not be required by any United Kingdom law or instrument to withhold assent to State laws (s 9). The United Kingdom government no longer has any responsibility for the government of the Australian States (s 10). Section 11 abolishes appeals to the Privy Council from Australian courts, making the High Court the ultimate court of appeal for the nation.

Section 15 of the *Australia Acts* is a remarkable provision. It sets out a special amendment process applicable to both the *Australia Acts* themselves and the *Statute of Westminster* (insofar as they form part of the law of Australia), disallowing amendment by other methods. Section 15(1) provides:

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15 *Australia Act 1986* (Cth); *Australia Act 1986* (UK); *Australia Acts (Request) Act 1985* (NSW); *Australia Acts (Request) Act 1985* (Vic); *Australia Acts (Request) Act 1985* (Qld); *Australia Acts (Request) Act 1985* (WA); *Australia Acts (Request) Act 1985* (SA); *Australia Acts (Request) Act 1985* (Tas).

16 For further discussion, see Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) ch 5.

> This Act or the *Statute of Westminster 1931*, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States and, subject to subsection (3) below, only in that manner.

Subsection (3) makes it clear that this process does not alter the existing procedure for constitutional change under s 128. Nonetheless, s 15 supplements s 128 in an interesting and significant way. It makes it possible for the Commonwealth and State legislatures, acting together, to change Australia's constitutional arrangements, at least insofar as these depend upon the terms of the *Australia Acts* and the *Statute of Westminster*. At the same time, the provision purports to limit the powers of the Australian legislatures to amend their various *Australia Acts* without cooperation between them. Even more exceptionally, it strips the United Kingdom Parliament of any power to amend its own *Australia Act*, while handing that power over to the Commonwealth and State Parliaments.

The United Kingdom Parliament, in enacting the *Australia Act 1986* (UK), seems to voluntarily relinquish its last vestiges of potential authority over Australia. Could the United Kingdom Parliament nonetheless repeal its version of the *Australia Act*, ignoring s 15, and then proceed to change Australian law? It seems unlikely that such a step would be recognised as valid by the Australian courts, as it would go against the spirit and the letter of the *Australia Acts*, as well as running counter to the progressive devolution of sovereignty since Federation. The ultimate constituent authority in Australia, at least since 1986 (and arguably before), is no longer the United Kingdom Parliament. This raises the question of whether it was necessary to enact the *Australia Act 1986* (UK) at all. If the Australian legislatures had simply passed their own *Australia Acts*, without involving the United Kingdom, would the effect have been any different? The inclusion of the United Kingdom was arguably more symbolic and political, than practically necessary.[17]

V Constitutive Power in the States

The legislative power of the State Parliaments, unlike that of the Commonwealth Parliament, is not confined to specific subjects. This can be seen by comparing s 51 of the *Constitution*, which gives the Commonwealth enumerated powers, with s 107, which reserves to the States the powers of the Colonies, except as modified by the *Constitution*. The *Constitution Acts* granted the Colonial Parliaments wide power to 'make laws for the peace, welfare and good government' of the Colony. Section 2 of the *Constitution Act 1867* (Qld) provides an example:

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[17] Cf *Attorney General (WA) v Marquet* (2003) 217 CLR 545, 612–13 [203]–[204] (Kirby J) ('*Marquet*').

> Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Assembly to make laws for the peace welfare and good government of the colony in all cases whatsoever.

The *Colonial Laws Validity Act*, as we saw before, provided that Colonial laws must not be repugnant to Imperial legislation extended to the Colonies by express words or necessary implication (ss 1–2). However, this limitation on State legislative power, which had largely fallen into disuse, was removed by the *Australia Acts* (s 1). The *Australia Acts* also confirmed that State legislatures have plenary power 'to make laws for the peace, order and good government of the State' (s 2(1)) and that a State law will no longer be void for inconsistency with a United Kingdom statute (s 3). State laws shall also not be disallowed by the Queen or reserved for her approval (ss 8–9).

The plenary jurisdiction of the Colonial and State Parliaments traditionally extended to modifying their own constitutions, giving them both legislative and constitutive powers. Section 5 of the *Colonial Laws Validity Act* confirmed this position, while making it subject to an important limitation:

> Every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, order in council, or colonial law for the time being in force in the said colony.

This section confirms that Colonial Parliaments had power to change their constitutions by an ordinary statute. The same power was inherited by State Parliaments after Federation by virtue of s 107 of the *Constitution*. This was reiterated in *McCawley v The King*, where the Privy Council ruled that State Parliaments may make laws that are inconsistent with their constitutions without passing a formal amendment.[18] That case concerned an attempt by the Queensland Parliament to create a Court of Industrial Arbitration. The Court was designated as a branch of the Supreme Court of Queensland and judges were appointed with seven-year terms. The Supreme Court held this was invalid, as it was contrary to the *Constitution Act 1867* (Qld).[19] A majority of the High Court agreed.[20] However, the Privy Council overruled the High Court, holding that a Queensland statute that contradicts the *Constitution Act* should be construed as an implied constitutional amendment.

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18 *McCawley v The King* [1920] AC 691.

19 *Re McCawley* [1918] QSR 62.

20 *Re McCawley* (1918) 26 CLR 9.

VI Manner and Form Requirements

Section 5 of the *Colonial Laws Validity Act* also stipulates that, when a State law concerns the 'constitution, powers and procedure' of the Parliament, any relevant 'manner and form' requirements must be followed. This section has now been superseded by s 6 of the *Australia Acts*, which reads as follows:

> [A] law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament ...

This provision effectively allows the State Parliaments to prescribe special procedures that must be followed for future constitutional changes. Later State Parliaments can then not simply amend those parts of the constitution by an ordinary statute, but must follow the process in the earlier law.

Normally, a statute imposing a special process for enacting legislation would not bind future Parliaments. The general principle, as discussed previously, is that a sovereign Parliament has power to repeal or override any previous laws, so it could simply repeal the procedural limitation (either expressly or by implication). However, s 6 of the *Australia Acts*, like s 5 of the *Colonial Laws Validity Act* before it, suggests that Parliaments may bind their successors to follow special procedures in the circumstances set out in the provision. It is generally accepted that the section gives paramount force to State manner and form requirements that fall within its scope and therefore constitutes an exception to the plenary powers of the State legislatures.[21] This raises the following question: how exactly does s 6 of the *Australia Acts* override the usual powers of State legislatures?

We will return later in this article to the question whether s 6 of the *Australia Acts* is properly considered binding on State Parliaments and, if so, why. The question raises profound issues about the nature of sovereignty in Australia today. However, it is useful to begin by considering the scope of s 6 itself. The section is subject to two limitations. First, it only applies to laws concerning 'the constitution, powers or procedure of the Parliament'. Second, it raises the question of what procedures count as valid 'manner and form' requirements.

A *'Constitution, Powers and Procedure'*

Manner and form requirements under s 6 of the *Australia Acts* can only be imposed on laws relating to the 'constitution, powers and procedure' of a State Parliament. For example, the Parliament could not impose a special process for future amendments to criminal law, as that is not a matter concerning the 'constitution,

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[21] This was the view taken by a majority of the High Court in *Marquet* (n 17) 570–1 [67]–[70] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

powers and procedure of the Parliament'. 'Constitution' here means the 'nature and composition' of the Parliament.[22] It does not extend to all the matters dealt with in the constitution of the State. Changes to the powers of the executive branch, for example, do not concern the 'constitution, powers and procedure' of the Parliament and therefore cannot be made subject to a valid manner and form procedure.[23] A similar analysis would apply to legislative changes concerning the judiciary.

Gleeson CJ, Gummow, Hayne and Heydon JJ said in *Attorney-General (WA) v Marquet* ('*Marquet*') that the term 'constitution' in s 6 relates to 'features which go to give [the Parliament], and its Houses, a representative character'.[24] A change in the method of voting would therefore affect the constitution of the Parliament and could be subject to a manner and form procedure. However, their Honours seemed to accept, following the earlier authority of *Clydesdale v Hughes* ('*Clydesdale*'),[25] that a change to the qualifications of Members of Parliament does not fall into this category, without explaining their reasoning.[26] Clydesdale was a member of the Western Australian Legislative Council who subsequently because a member of the Lotteries Commission. It was alleged that this rendered him ineligible to sit in Parliament, as it was an office of profit under the Crown.

The Parliament passed a constitutional amendment while the case was pending providing that no Member of Parliament shall be disqualified for being a member of the Lotteries Commission. The High Court held that this amendment did not have to comply with s 73 of the *Constitution Act 1889* (WA), which required absolute majorities in both Houses for any change to the constitution of the Legislative Council. The judgment in *Clydesdale* is very short and its reasoning is cursory. It seems to rest on a narrow reading of the term 'constitution' in s 5 of the *Colonial Laws Validity Act*. Restrictions on who can run for the Parliament would seem to have a direct effect on its composition. It is therefore unclear why those restictions do not relate to Parliament's 'constitution'. However, the view in *Clydesdale* was affirmed in *obiter* by Wilson J in *Western Australia v Wilsmore*,[27] as well as by the majority in *Marquet*.

The majority judges in *Marquet* declined to comprehensively define the terms 'powers' and 'procedure' in s 6.[28] However, it is clear that 'powers' includes the Parliament's legislative power;[29] it would also seem to encompass Parliament's other inherent capacities, such as the power to punish for contempt, seek

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22 *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, 429 (Dixon J) ('*Trethowan's Case*); *Marquet* (n 17) 572–3 [75] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

23 *Trethowan's Case* (n 22) 429, 431–2 (Dixon J).

24 *Marquet* (n 17) 573 [76].

25 (1934) 51 CLR 518.

26 *Marquet* (n 17) 573 [77].

27 (1981) 149 CLR 79, 102.

28 *Marquet* (n 17) 572 [74].

29 *Trethowan's Case* (n 22) 430 (Dixon J).

information from Ministers or suspend its Members.[30] Any change to the scope of the Parliament's legislative power will affect its 'constitution, powers and procedure'. This means it is possible for Parliament to provide that any future imposition of a manner and form requirement must itself go through a special process, because imposing a manner and form requirement limits the Parliament's usual legislative powers. 'Procedure', meanwhile, would seem to refer to the procedural rules governing Parliament's legislative functions. It is unclear whether it extends to the rules governing subsidiary bodies, such as parliamentary committees.

B *'Made in Such Manner and Form'*

If a State statute relates to 'the constitution, powers and procedure of the Parliament', then it is necessary to ask whether its passage is constrained by a valid manner and form requirement. The Australian courts have placed various constraints on what content a manner and form requirement may have. A type of manner and form requirement adopted by some States is that future changes to fundamental aspects of the State constitution be subject to a referendum.[31] Both the High Court[32] and the Privy Council in *Attorney-General (NSW) v Trethowan* ('*Trethowan's Case*')[33] upheld the validity of this requirement, rejecting the contention that a referendum is not sufficiently related to the legislative process. *Trethowan's Case* concerned s 7A of the *Constitution Act 1902* (NSW), which provides that the Legislative Council could not be abolished or its powers altered without the approval of the State's electors. The High Court and the Privy Council found that this provision was binding on the Parliament.

The Queensland Supreme Court, by contrast, held in *Commonwealth Aluminium Corporation Limited v Attorney-General (Qld)* (the '*Comalco Case*') that a manner and form requirement is not binding if it requires future changes to be approved by a body outside the legislature (other than the voters at a referendum).[34] The *Comalco Case* concerned a requirement that any amendments to an agreement between the Queensland government and Comalco (a mining company) be approved by Comalco. The majority judges held this was not a valid manner and form provision, as it was not legislative in nature.[35] This principle was endorsed by King CJ of the South Australian Supreme Court in *West Lakes v South Australia* ('*West Lakes*').[36] Similarly to the *Comalco Case*, that case concerned

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30 For discussion of the inherent powers of the New South Wales Legislative Council, see *Egan v Willis* (1998) 195 CLR 424.

31 See, eg, *Constitution Act 1902* (NSW) s 7A; *Constitution Act 1867* (Qld) s 53.

32 *Trethowan's Case* (n 22).

33 *Attorney-General (NSW) v Trethowan* [1932] AC 526.

34 [1976] Qd R 231.

35 Ibid 236–7 (Wanstall SPJ), 260 (Dunn J).

36 [1980] 25 SASR 389, 398 (King CJ).

legislation requiring the South Australian government to consult West Lakes (a property developer) before altering an agreement between them. The Supreme Court unanimously declined to enforce the requirement.

King CJ observed in *West Lakes* that a manner and form requirement is not valid if it is so onerous as to amount to an abdication of power.[37] A requirement of that sort would be 'an attempt to deprive the parliament of powers rather than as a measure to prescribe the manner or form of their exercise'.[38] The question of whether a requirement is a limitation or an abdication of power will depend on both the nature of the procedure imposed and the subject matter of the law. Manner and form requirements relating to fundamental aspects of the State constitution may legitimately be more onerous than those concerning less important matters.[39]

A distinction was drawn by the High Court in *Clayton v Heffron* ('*Clayton*') between mandatory and directory manner and form requirements.[40] A mandatory manner and form requirement must be observed, otherwise the amending law will be invalid. However, a directory requirement will not invalidate the legislation if it is not followed. *Clayton*, like *Trethowan's Case* before it, concerned an attempt to abolish the New South Wales Legislative Council. The Bill to abolish the Legislative Council was twice passed by the Legislative Assembly and rejected by the Council itself. The government then sought to proceed to a referendum, relying on s 5B of the *Constitution Act 1902* (NSW), which allowed for the breaking of deadlocks between the Houses. However, it was alleged that the process in s 5B had not been followed, because it involved a 'free conference' of the House managers. This conference had been called, but the Legislative Council did not participate. The majority judges held that the 'free conference' process in s 5B was merely directory, since if the procedure were construed as mandatory it could be aborted unilaterally by any one party.[41]

C *Double Entrenchment*

It may be significant in assessing the effectiveness of a manner and form requirement to ask whether the provision prevents future changes to the requirement itself. Consider the following hypothetical provision:

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37 Ibid 397 (King CJ).

38 Ibid.

39 Ibid.

40 (1960) 105 CLR 214, 244–8 (Dixon CJ, McTiernan, Taylor and Windeyer JJ), 268 (Kitto J), 276–7 (Menzies J) ('*Clayton*').

41 Ibid 244–8 (Dixon CJ, McTiernan, Taylor and Windeyer JJ), 268 (Kitto J), 276–7 (Menzies J).

> (1) The Legislative Council shall consist of 50 members.
>
> (2) Subsection 1 above shall not be repealed or amended except with the approval of the people at a referendum.

Subsection (2) seems to prevent the Parliament from amending subsection (1) without a referendum. However, what stops the Parliament from repealing subsection (2)? There is nothing in the provision that prevents this from being done. This would be an indirect method of attacking subsection (1), which could then also be changed without a referendum. It is commonly accepted that manner and form requirements should be 'doubly entrenched' in order to avoid this kind of indirect attack. This would involve rewording the provision as follows:

> (1) The Legislative Council shall consist of 50 members.
>
> (2) Subsection 1 above *or this subsection (2)* shall not be repealed or amended except with the approval of the people at a referendum.

The issue of double entrenchment received extensive discussion in *Trethowan's Case.* The bulk of the argument in that case revolved around the validity of s 7A(6) of the *Constitution Act 1902* (NSW), which purported to doubly entrench the referendum requirement in s 7A. It was contended that this provision was ineffective, as it purported to fetter the plenary power of the New South Wales Parliament, granted in s 5 of the *Colonial Laws Validity Act*. However, a majority of the High Court held that a doubly entrenched referendum requirement was a valid manner and form provision for the purposes of s 5, thereby confirming the ability of State Parliaments to permanently limit their own legislative capacities.[42] The Privy Council agreed.[43] It appeared to be assumed in argument before the High Court that s 7A could have been amended or removed were it not for the double entrenchment provision, although the issue was not directly addressed in the judgments.

It is arguable, however, that double entrenchment is not necessary for a manner and form provision to be effective.[44] This is because the force of a manner and form requirement within s 6 of the *Australia Acts* comes not from the statute in which it is contained, but from s 6 itself.[45] Much of the discussion in *Trethowan's Case* revolved around whether a sovereign legislature can bind itself. However, if s 6 of the *Australia Acts* represents a higher source of sovereignty than a State legislature, then the fact that a manner and form provision falls within s 6 means the State Parliament is bound by it. This would be so, regardless of whether the provision is doubly entrenched. A singly entrenched provision covered by s 6

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42 *Trethowan's Case* (n 22).

43 *Attorney-General (NSW) v Trethowan* [1932] AC 526.

44 Gerard Carney seems to endorse this suggestion, although his discussion of the point is a little unclear: Gerard Carney, 'An Overview of Manner and Form in Australia' (1989) 5 *Queensland University of Technology Law Journal* 69, 93.

45 A similar point can be made about s 5 of the *Colonial Laws Validity Act*.

would therefore still be binding and potentially enforceable by the courts. However, to avoid doubt, it is prudent for manner and form provisions to include double entrenchment.

D *Manner and Form in Queensland*

The *Constitution Act 1867* (Qld) contains a unique provision (s 53) on manner and form issues. (The *Constitution of Queensland 2001* (Qld), which consolidates many aspects of Queensland's constitutional arrangements, leaves these parts of the earlier constitution intact.) Section 53 of the *Constitution Act* provides that any changes to the office of Governor or ss 1, 2, 2A, 11A, 11B or 53 of the Act require a referendum. The sections concern the composition and powers of the legislature and the executive. Section 53 itself is also doubly entrenched. Section 53 is a wide-ranging manner and form provision covering many fundamental aspects of Queensland's constitution. However, it is questionable whether the provision is valid in its application to the office or powers of the Governor, given Dixon J's observation in *Trethowan's Case* that changes affecting the executive branch of government do not concern the 'constitution, powers and procedure' of the Parliament.[46]

Section 2 of the *Constitution Act*, which is among the provisions entrenched by s 53, reads as follows:

> **2 Legislative Assembly constituted**
>
> Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Assembly to make laws for the peace welfare and good government of the colony in all cases whatsoever.

Section 53's application to s 2 effectively means that the Queensland Parliament cannot impose any additional manner and form requirements without holding a referendum, since doing so would limit the powers of the legislature. This appears to be an unintended consequence of s 53.

Another notable and unique feature of s 53 is the way it deals with standing. Section 53(5) gives all Queensland voters standing to enforce the manner and form requirements in the section. Normally, only those individuals directly and personally affected by a law have standing to challenge it on constitutional grounds; this can lead to serious difficulties in enforcing constitutional requirements. Section 53(5) removes this practical difficulty, thereby increasing the effectiveness of the provision. Section 53(5) further empowers the Supreme Court to grant injunctions to prevent manner and form requirements being ignored. The Supreme Court may therefore potentially grant an injunction to restrain the Parliament from voting on a Bill that violates s 53 or referring such a

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[46] *Trethowan's Case* (n 22) 429, 432 (Dixon J). For a contrary view, see Carney (n 44) 78.

Bill to the Governor for signing. It is unclear whether this would be possible in other States that lack an equivalent provision. The New South Wales Supreme Court in *Trethowan's Case* was willing to grant an injunction, but this decision has been questioned in later cases.[47]

VII Manner and Form Beyond the *Australia Acts*

Could a State Parliament (or, for that matter, the Commonwealth Parliament) bind itself to observe manner and form requirements for topics falling outside s 6 of the *Australia Acts*? Could, for example, a State statute validly require a referendum for future amendments to criminal law? An actual example raising this issue might be s 53 of the *Constitution Act 1867* (Qld), insofar as it applies to the Governor. This is really a question about the nature of sovereignty and, in particular, the ability of a sovereign to bind itself. There are essentially two possible views on this issue. The first view, suggested by Austin and Dicey's conception of sovereignty, would be that the sovereign can freely repeal its past acts, ignoring any limits it has previously placed on itself. The second view would be that a sovereign can do anything within its jurisdiction, including reconstituting itself or irrevocably limiting its own future powers. There has long been a debate about this issue throughout the British Commonwealth. The first view expressed above is the traditional position on the issue, although the second view has gained supporters in recent decades.[48]

The High Court in *Trethowan's Case* considered two possible rationales for the contention that State Parliaments may use manner and form provisions to limit their own future powers. The first rationale, which was endorsed by all three members of the majority (Rich, Starke and Dixon JJ), was that State Parliaments are bound by manner and form provisions falling within s 5 of the *Colonial Laws Validity Act*.[49] The reference to manner and form in s 5 imposed an explicit limitation on the plenary powers of Colonial legislatures conferred in the same section. The force of manner and form requirements, on this view, does not derive from a source internal to the sovereignty of the State Parliament itself. Rather, it derives from the authority of the *Colonial Laws Validity Act*, as a statute of the Imperial Parliament. It is because the powers of State Parliaments were originally granted by the Imperial Parliament that they can be limited through reference to this higher source of authority. The majority view in *Trethowan's Case* therefore

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47 See, eg, *Hughes and Vale v Gair* (1954) 90 CLR 203, 204 (Dixon CJ); *Clayton* (n 40) 234 (Dixon CJ, McTiernan, Taylor and Windeyer JJ).

48 For a useful (albeit dated) survey, see George Winterton, 'Can the Commonwealth Enact "Manner and Form" Legislation?' (1980) 11(2) *Federal Law Review* 167. See also Jeffrey D Goldsworthy, 'Manner and Form in the Australian States' (1987) 16(2) *Melbourne University Law Review* 403.

49 *Trethowan's Case* (n 22) 423–4 (Starke J), 431–2 (Dixon J).

does not contradict the traditional view of sovereignty, according to which a sovereign body cannot bind itself.

The second rationale for the binding force of manner and form requirements discussed in *Trethowan's Case* was based on the idea that a sovereign legislature may permanently reconstitute itself for particular purposes, thereby preventing later legislatures from reasserting powers contrary to the reconstitution. Rich J was the only judge to accept this principle.[50] A similar doctrine was subsequently endorsed by the Privy Council in the case of *Bribery Commissioner v Ranasinghe* ('*Ranasinghe*').[51] The Privy Council held in *Ranasinghe* that the Ceylon Parliament was bound to follow a previously imposed requirement for a two-thirds majority vote to pass certain kinds of legislation, because 'a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law'.[52] However, the reasoning given in support of this principle is brief and cursory.

More recently, the reconstitution theory was endorsed by Lord Steyn and Baroness Hale in *R (Jackson) v Attorney General* (the '*Fox Hunting Case*').[53] That case concerned a challenge to the use of the *Parliament Act 1949* (UK) to bypass the House of Lords and secure the passage of legislation banning fox hunting. Lord Steyn observed:

> But, apart from the traditional method of law making, Parliament acting as ordinarily constituted may functionally redistribute legislative power in different ways. For example, Parliament could for specific purposes provide for a two-thirds majority in the House of Commons and the House of Lords. This would involve a redefinition of Parliament for a specific purpose. Such redefinition could not be disregarded.[54]

Baroness Hale agreed, saying that, '[i]f Parliament can do anything, there is no reason why Parliament should not decide to re-design itself, either in general or for a particular purpose'.[55] However, if Parliament can do anything, it can also arguably override any previously imposed limits on its powers.

Trethowan's Case does not settle the question of whether manner and form requirements outside s 6 of the *Australia Acts* (which replaced s 5 of the *Colonial Laws Validity Act*) would be considered binding in Australia. The issue would ultimately depend on the willingness of the courts to enforce them. The absence of any clear Australian authority on the issue, as well as the lack of a well-accepted theoretical foundation, makes this appear unlikely. Five judges of the High Court in *Marquet* held that the Australian courts will yield to legislative actions, including decisions to override previous statutes, unless some higher

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50 Ibid 420.
51 [1965] AC 172.
52 Ibid 197 (Lord Pearce).
53 [2006] 1 AC 262.
54 Ibid 296 [81].
55 Ibid 318 [160].

source of authority such as the *Colonial Laws Validity Act* or the *Australia Acts* can be identified.[56] This view is consistent with the traditional analysis of sovereignty.

The question of manner and form outside s 6 also raises public policy issues. If Parliament can impose a manner and form requirement on any law, this could lead to the destruction of parliamentary democracy. Each party would potentially seek to entrench its own policies (as, indeed, occurred in *Trethowan's Case*). On the other hand, it makes more sense to entrench fundamental features of the State constitution, such as the powers of the Governor or judicial independence, even if they do not strictly concern the 'constitution, powers and procedure' of the Parliament.[57] Manner and form restrictions on these kinds of provisions could potentially be justified on democratic or rule of law grounds. However, that does not mean Australian courts would be willing to enforce them against the Parliament.

VIII Why is Section 6 of the *Australia Acts* Binding?

The preceding discussion about sovereignty raises a further issue: why exactly is s 6 of the *Australia Acts* binding on State legislatures? The High Court's reasoning in *Trethowan's Case*, as discussed above, was premised on the authority of the *Colonial Laws Validity Act* as an enactment of the United Kingdom Parliament. That reasoning made sense in 1931, but is less compelling today. Any suggestion that State Parliaments are bound by s 6 of the *Australia Act* (UK) due to the authority of the United Kingdom Parliament would be premised on the idea that the United Kingdom Parliament retains sovereign power in Australia. That is doubtful, for reasons discussed previously. Furthermore, any attempt to trace the continuing force of s 6 to the sovereignty of the United Kingdom Parliament would contradict the spirit (if not the letter) of the *Australia Acts*, which were intended to sever all remaining constitutional ties between the United Kingdom and Australia.

The continuing authority of s 6 of the *Australia Acts*, then, cannot plausibly be traced to the *Australia Act* (UK). Can it be traced instead to the *Australia Act* (Cth)? This was the view taken by the High Court majority in *Marquet*, although it was not supported by detailed reasoning.[58] This proposal encounters two main difficulties. First, ss 106–7 of the *Australian Constitution* clearly give the States power over their own constitutional arrangements. Section 106 is made 'subject to this Constitution', but that clause applies to the continuance of the State constitutions, not the States' exclusive power to alter them. The use of s 51(xxxviii) to not only amend State constitutional frameworks, but also preclude

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56 *Marquet* (n 17) 568–70 [63]–[65] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 616–17 [214]–[215] (Kirby J). For a classic exposition and defence of this approach, see HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13(2) *Cambridge Law Journal* 172.

57 Cf *West Lakes v South Australia* [1980] 25 SASR 389, 397 (King CJ).

58 *Marquet* (n 17) 571 [70].

the States themselves from making further alterations, is therefore arguably contrary to s 106,[59] particularly when read alongside s 107, which preserves the power of State legislatures unless exclusively vested in the Commonwealth or otherwise withdrawn by the *Constitution*.

Second, the Commonwealth's power under s 51(xxxviii), as discussed previously, relies upon the request and consent of the States. The concept of sovereignty, as elucidated by Austin and Dicey, suggests that a Parliament that can confer power in this way can also withdraw it, subject to practical limitations. It is unclear whether referrals of power under s 51(xxxviii) may later be withdrawn, although the High Court has held that referrals of State power to the Commonwealth under the more commonly used s 51(xxxvii) may be subject to open-ended time limits.[60] The logic of sovereignty led Latham CJ to comment that:

> [A] State Parliament could not bind itself or its successors not to legislate upon a particular subject matter, not even, I should think, by referring a matter to the Commonwealth Parliament under sec. 51(xxxvii) of the Constitution.[61]

Anne Twomey and Andrew Lynch both opine that 'it appears likely that a State could validly revoke its reference' under s 51(xxxvii).[62]

A further question is whether a State could impliedly withdraw a referral of power under s 51(xxxviii) by legislating inconsistently with it. Ordinarily, sovereign Parliaments can override a previous law either expressly or by implication.[63] Furthermore, if the provision of a later law is inconsistent with a prior law in its application to a specific case, 'then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act'.[64] This raises the prospect that a State could override its referral of power to the Commonwealth, and therefore exclude the *Australia Act* (Cth), by passing contradictory legislation. There are evidently some parts of the *Australia Act* that could not practically be overridden by a single State, such as those involving the jurisdiction of the United Kingdom Parliament. However, the possibility has important implications for the

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59 Kirby J held in *Marquet* that the *Australia Act* (Cth) was unconstitutional for this reason, although he was alone in this finding: ibid 613–14 [205]–[207].

60 *The Queen v Public Vehicles Licensing Appeal Tribunal (Tas)*; *Ex parte Australian National Airways* (1964) 113 CLR 207.

61 *South Australia v Commonwealth* (1942) 65 CLR 373, 416.

62 Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 810. See also Andrew Lynch, 'After a Referral: The Amendment and Termination of Commonwealth Laws Relying on s 51(xxxvii)' (2010) 32(3) *Sydney Law Review* 363, 381–4.

63 Lynch suggests that a State Parliament could impliedly revoke a referral of power to the Commonwealth under s 51(xxxvii), provided that the intention to do so is clear, although he sees this possibility as remote: Lynch (n 62) 384.

64 *Goodwin v Phillips* (1908) 7 CLR 1, 7 (Griffith CJ).

effectiveness of s 6 of the *Australia Acts*, which purports to limit the legislative power of State Parliaments.

Any State law that contradicts a manner and form provision falling within s 6 of the *Australia Acts* could therefore be construed as an implied amendment to the State's previous request and consent legislation. This, in turn, would deprive the Commonwealth of the power needed to support the *Australia Act* (Cth), meaning it would not apply. A Commonwealth law, once enacted, does not ordinarily survive a withdrawal of the constitutional power that supports it. This can be seen by analogy with the case law on the defence power in s 51(vi).[65] The High Court has been willing to strike down Commonwealth laws enacted under the wartime defence power following the transition to peacetime, because this change in the factual circumstances removes the power that supported them.[66]

If the capacity of s 6 of the *Australia Acts* to bind the States does not come from either the *Australia Act* (UK) or the *Australia Act* (Cth), then what explains it? There is one further possibility. This is the idea that the Commonwealth and State Parliaments, acting together, possess a special form of sovereignty, which none of them possesses alone. Section 15 of the *Australia Acts*, as discussed previously, purports to allow the Australian Parliaments to collectively amend both the *Australia Acts* and the *Statute of Westminster*. This provision, if effective, might be viewed as conferring those bodies with a special form of collective sovereignty that extends to altering Australia's constitutional framework insofar as it affects their respective jurisdictions. If so, then that sovereignty would potentially extend not only to the powers in s 15, but also to providing s 6 with the force it needs to bind the State legislatures. However, this possibility has more radical implications.

IX An Alternative Amendment Process?

Christopher Gilbert has argued that s 15 of the *Australia Act 1986* (UK) creates an alternative way of amending the *Australian Constitution*.[67] He proposes a two-step process whereby the provision can be used as an alternative to a referendum under s 128. The first step is for the Commonwealth and State Parliaments to amend s 15 of the *Australia Act* (UK) to allow amendment of the *Constitution* by the process set out in the section. This would involve inserting a reference to the *Commonwealth of Australia Constitution Act* into s 15 so it reads as follows:

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65 Lynch (n 62) 384.

66 *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43.

67 Christopher Gilbert, 'Section 15 of the *Australia Acts*: Constitutional Change by the Back Door' (1989) 5 *Queensland University of Technology Law Journal* 55. This possibility had previously been raised (and dismissed) in GJ Lindell, 'Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16(1) *Federal Law Review* 29, 40–2.

> This Act or the *Statute of Westminster 1931* or the *Commonwealth of Australia Constitution Act 1900*, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States and, subject to subsection (3) below, only in that manner.

The second step would be for all the Australian Parliaments to pass statutes amending the *Constitution*. This would be authorised by the amended s 15, as the *Constitution* forms part of the *Constitution Act*.

Does Gilbert's proposal work? The main problem with his argument is that it effectively involves the Australian Parliaments harnessing the power of the United Kingdom Parliament (by way of s 15 of the *Australia Act*) and then using that power to amend the *Australian Constitution*. The proposal relies on the fact that the *Constitution Act* is a statute of the United Kingdom Parliament; as such, by harnessing the power of the United Kingdom Parliament, the Australian Parliaments can amend it. However, this would only work if the United Kingdom Parliament still has the power to amend the *Australian Constitution*. This is unlikely, as discussed previously. The United Kingdom Parliament no longer possesses sovereignty over Australia; as such, harnessing the power of the United Kingdom version of the *Australia Act* does not enable the Australian Parliaments to amend the *Constitution*.

However, Gilbert's proposal points the way to a deeper question: could the *Australia Acts* themselves be viewed as creating a new source of constituent power? The enactment of the *Australia Acts* is premised on the idea that the Commonwealth and State Parliaments, acting together, can accomplish something that none of them could do alone. We have seen that the Commonwealth Parliament relied upon s 51(xxxviii) of the *Constitution* to enact its version of the *Australia Act*, implying that it could not have validly done so without the assistance of the States. This was required partly because of the impact of the *Australia Acts* on the State constitutions, over which the Commonwealth has no power. Each of the State Parliaments, on the other hand, would be incompetent to enact the *Australia Act* insofar as it impacts on the constitutional arrangements of the Commonwealth and the other States (not to mention the legislative power of the United Kingdom Parliament). It is nonetheless widely accepted that the *Australia Acts* are valid and effective. Their practical legitimacy seems to be due to the collaborative way in which they were passed.

Does this mean that the Commonwealth and State Parliaments, acting together, possess a special form of sovereignty in the Australian legal system? And, if so, could this be harnessed to provide an alternative method of constitutional amendment? This idea is different from Gilbert's proposal, because it does not involve utilising s 15 of the *Australia Act* (UK). Rather, it raises the possibility that the *Constitution* could be amended by all the Australian

Parliaments agreeing to do so, without first altering s 15 as Gilbert proposes. The question then becomes whether, if this occurred, the Australian courts would regard such an amendment as effective. This is a practical question about sovereignty, rather than a strictly legal one. It is a matter in which, as HWR Wade put it, the courts 'have a perfectly free choice, for legally the question is ultimate'.[68] However, the courts themselves are constrained by what other legal officials and the general public would accept as legitimate.

It seems doubtful that the Australian courts would uphold an attempt to amend the express text of the *Australian Constitution* through this process. Any such amendment would lack practical legitimacy, because it would bypass the referendum procedure in s 128. The legitimacy of that process, in the eyes of the public, lies in its democratic character. On the other hand, it seems more likely that the courts might be willing to accept a change in Australia's constitutional framework carried out by this method that falls short of amending the text of the *Constitution*, particularly one that does not abridge basic constitutional values. Indeed, this is arguably what happened with the *Australia Acts* themselves. The cursory reasoning of the majority judges in *Marquet* indicates that they accepted the *Australia Acts* as legitimate, despite the serious constitutional issues raised by their method of enactment.[69] Kirby J, the sole dissenter in *Marquet*, tacitly recognised the primacy of practical considerations in questions about sovereignty, commenting that:

> Convenience may ultimately overwhelm these legal and logical difficulties. The 'march of history' may pass by my concerns. The passage of time may accord constitutional legitimacy and respectability to what has happened.[70]

This seems intended as a lament, but it is just the way sovereignty works. The *Constitution*, for all its internal technicalities, cannot isolate itself from practical considerations. The ultimate test of constitutional validity, in the end, is what legal officials and the public will accept as valid.

X Conclusion

Sovereignty in Australia has a complicated history. It begins with the long-term sovereignty of Aboriginal and Torres Strait Islander Peoples, which was unsettled by European invasion, but never ceded. This created two parallel forms of sovereignty — Indigenous and non-Indigenous — which continue today. The colonisation of Australia by the United Kingdom created a form of government under the sovereignty of the Crown and the Imperial Parliament. The role of the Imperial Parliament persisted even after Federation, but was progressively

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68 Wade (n 56) 192.

69 *Marquet* (n 17) 570–1 [67]–[70] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

70 Ibid 614 [208].

limited by statutes such as the *Colonial Laws Validity Act* and the *Statute of Westminster*, as well as being subject at the Commonwealth level to the *Australian Constitution*. This lengthy transition culminated in the *Australia Acts* in 1986.

The most obvious source of sovereignty in Australia today is found in s 128 of the *Constitution*, which gives constitutive power to the Commonwealth Parliament acting together with the people. However, sovereignty at the State level yields a more complex picture. Historically, the State Parliaments had plenary powers, including the ability to amend their own constitutions. State laws may be overridden by Commonwealth laws under s 109, but only within areas of exclusive or concurrent Commonwealth power. There are some areas of power reserved to the States under ss 106 and 107. These areas of power are still subject to the ultimate sovereignty of the Commonwealth Parliament and the people under s 128, since the *Constitution* (including ss 106 and 107) could be amended by this process. However, on a day-to-day basis, they are controlled by the State Parliaments.

The role of manner and form requirements in State constitutional law was traditionally attributed to the sovereignty of the United Kingdom, as expressed in s 5 of the *Colonial Laws Validity Act.* However, that explanation no longer suffices. The binding force of s 6 of the *Australia Acts* is widely accepted, but difficult to explain adequately. It cannot plausibly be traced to the *Australia Act* (UK); relying on the *Australia Act* (Cth) also has serious problems. This leaves us with two practical choices. We can deny, like Kirby J in *Marquet*,[71] that s 6 of the *Australia Acts* is binding on the States. Alternatively, we can embrace the idea canvassed in this article that the Australian Parliaments acting together have a special form of sovereignty that enables them to accomplish things none of them could do alone, including making certain kinds of changes to Australia's constitutional arrangements.

The idea that the Australian Parliaments collectively enjoy a limited form of constitutive power might seem undemocratic when compared with the referendum process under s 128. However, Australia is, after all, a parliamentary democracy. Sovereignty at the State level, as we have seen, traditionally rests with the legislature — and, even at the Commonwealth level, the Parliament retains an integral role in the s 128 procedure. The democratic movement of the *Constitution* might logically seem to culminate in unfettered popular sovereignty at both Commonwealth and State levels, just as it has led the High Court to recognise a conditional guarantee of universal franchise.[72] That may, indeed, be where we are ultimately headed, as evidenced by the inclusion of referendum processes in various State constitutions.[73] However, whether we are there yet is a different question.

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71 Ibid 613–14 [205]–[207].

72 *Roach v Electoral Commissioner* (2007) 233 CLR 162.

73 See, eg, *Constitution Act 1902* (NSW) ss 5B, 7A, 7B; *Constitution Act 1867* (Qld) s 53.

A Trans-Tasman Challenge: The *Zurich Insurance* Litigation Reviewed

Reid Mortensen*

The Trans-Tasman Proceedings Acts *took effect in Australia and New Zealand in 2013, and since then have created a well-functioning trans-Tasman judicial area in which the process of all Australian and New Zealand courts can be served, and the judgments of all of those courts can be enforced, anywhere in New Zealand or Australia. The unquestioned jurisdiction that is given to all Australian and New Zealand courts in trans-Tasman cases is also limited only by principles of* forum conveniens *and the enforcement of choice of court agreements. In Zurich Insurance* Company Limited v Koper *('Zurich Insurance'), the validity of the Australian rules of jurisdiction under the* Trans-Tasman Proceedings Act 2010 *(Cth) was challenged. The New South Wales courts and the High Court of Australia all rejected the challenge. This article is an account of the constitutional considerations that were canvassed throughout the Zurich Insurance litigation, including the possibility that a High Court majority recognised a positive constitutional implication when upholding the personal jurisdictions created by the* Trans-Tasman Proceedings Act 2010 *(Cth) and the recognition of a federal power to extend the jurisdiction of state courts in all international cases. It also undertakes an analysis of the private international law issues of Zurich Insurance: the clarification of the effect of the* Trans-Tasman Proceedings Acts*; and the unsatisfactory conclusions reached on the territorial application of the* Civil Liability (Third Party Claims Against Insurers) Act 2017 *(NSW) — the issue that forced the need to consider the validity of the* Trans-Tasman Proceedings Act 2010 *(Cth) in the first place. In this respect, a plea is made for Australian state parliaments and courts to avoid extra-territorial overreach in the application of state legislation.*

I The Trans-Tasman Judicial Area

The *Trans-Tasman Proceedings Acts* were passed by the Australian and New Zealand Parliaments in 2010 to create a single judicial area in the single economic

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market that spans the two countries.[1] In doing so, the Parliaments were giving effect to the countries' bilateral *Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement* (the '*Christchurch Agreement*'), which had been signed in Christchurch in 2008.[2] Although implementing the *Christchurch Agreement*, the *Trans-Tasman Proceedings Acts* were modelled on the provisions of Australia's *Service and Execution of Process Act 1992* (Cth). This gives a 'long-arm jurisdiction' to any state court (including any territory court), allowing the service of its process beyond the state borders in any other place in Australia, and the enforcement of its judgments anywhere in the federation.[3] Long-arm jurisdiction naturally creates potential for concurrent and related proceedings in different states' courts, but the Australian interstate scheme aims to channel the *exercise* of jurisdiction to the single most appropriate court in the federation (often referred to as the *forum conveniens*) — whether by a stay of proceedings in a less appropriate court;[4] or, in the superior courts, a transfer under the *Jurisdiction of Courts (Cross-vesting) Acts* to another Australian court that is the *forum conveniens*.[5] The *Trans-Tasman Proceedings Acts*, in a broad sense, bring the New Zealand courts into that same scheme. The initiating process of all Australian courts — federal, state and territory — can, under s 9 of the *Trans-Tasman Proceedings Act 2010* (Cth), be served in New Zealand and, under s 10, service establishes an unquestioned power in the court to adjudicate.[6] Similarly, under the *Trans-Tasman Proceedings Act 2010* (NZ), the process of all New Zealand courts can be served on individuals and corporations in Australia. That Act also establishes the power to adjudicate.[7] The judgments of all Australian and New

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1 *Trans-Tasman Proceedings Act 2010* (Cth); *Trans-Tasman Proceedings Act 2010* (NZ). See generally Reid Mortensen, 'A Trans-Tasman Judicial Area: Civil Jurisdiction and Judgments in the Single Economic Market' (2010) 16(1) *Canterbury Law Review* 61; Reid Mortensen and Oliver Knöfel, 'The Australia and New Zealand Jurisdiction and Judgments Scheme: A Common Law Judicial Area' in Dieter Leipold and Rolf Sturner (eds), *Zeithschrift für Zivilprozess International* 369, 369–78.

2 *Agreement Between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement*, signed 24 July 2008, [2013] ATS 32 (entered into force 11 October 2013).

3 *Service and Execution of Process Act 1992* (Cth) ss 12, 15, 102, 109.

4 Ibid s 20(3). A stay made be granted on the condition that the parties subsequently litigate in the most appropriate Australian court.

5 See *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth); s 5 *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT) s 5; *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) s 5; *Jurisdiction of Courts (Cross-vesting) Act 1987* (NT) s 5; *Jurisdiction of Courts (Cross-vesting) Act 1987* (Qld) s 5; *Jurisdiction of Courts (Cross-vesting) Act 1987* (SA) s 5; *Jurisdiction of Courts (Cross-vesting) Act 1987* (Tas) s 5; *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic) s 5; *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA) s 5. See also *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400.

6 *Trans-Tasman Proceedings Act 2010* (Cth) ss 9–10.

7 *Trans-Tasman Proceedings Act 2010* (NZ) ss 13–14.

Zealand courts can be enforced anywhere in the market area,[8] and defendants have almost no power to resist them.[9]

In prioritising which court in the trans-Tasman market area is preferred actually to hear and determine the proceedings, the *Trans-Tasman Proceedings Acts* replicate 'the appropriate court' assessment of the *Service and Execution of Process Act* (Cth).[10] To that, they add a partial implementation of the Hague *Choice of Court Agreements Convention 2005*,[11] which provides that, if parties have made an exclusive choice of the courts of one of the countries for the determination of disputes between them, those courts should almost always exercise the jurisdiction to determine the proceedings.[12] Oddly, the *Trans-Tasman Proceedings Acts* also include a deeper ban on anti-suit injunctions between the courts of the two countries than exists between Australian courts.[13]

The trans-Tasman scheme therefore has three pillars. First, all courts in Australia and New Zealand have an unquestioned power to adjudicate when individuals or corporations are served anywhere in New Zealand and Australia. This is in contrast with the long-arm powers of courts under their rules of court to allow proceedings against defendants who are outside Australia and New Zealand, which technically only give a discretion to exercise jurisdiction.[14] The long-arm provisions of the *Service and Execution of Process Act* (Cth) and the *Trans-Tasman Proceedings Acts* make each Australian and Zealand court *forum competens* when there is service of its process anywhere in Australia and New Zealand. Secondly, the 'sorting provisions' rest on principles of *forum conveniens* or the enforcement of choice of court agreements to determine the best place in the market area where jurisdiction is actually to be exercised. And thirdly, all courts' judgments have an almost unfettered extension across the whole of the market area.

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8 *Trans-Tasman Proceedings Act 2010* (Cth) pt 7; *Trans-Tasman Proceedings Act 2010* (NZ) pt 2 sub-pt 5.

9 The defences available under the common law rules of private international law are generally not available, other than that enforcement would be contrary to public policy: *Trans-Tasman Proceedings Act 2010* (Cth) ss 72(1)(a), 79; *Trans-Tasman Proceedings Act 2010* (NZ) ss 61(2)(b), 68. The public policy defence is interpreted narrowly, and has never been successful: *LFDB v SM* (2017) 256 FCR 218; *ACW v Du Bray (No 2)* [2020] FCA 994, [46]–[56] (Wigney J).

10 *Trans-Tasman Proceedings Act 2010* (Cth) ss 17–19; *Trans-Tasman Proceedings Act 2010* (NZ) ss 22–4.

11 *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015).

12 *Trans-Tasman Proceedings Act 2010* (Cth) s 20; *Trans-Tasman Proceedings Act 2010* (NZ) s 25.

13 *Trans-Tasman Proceedings Act 2010* (Cth) s 22; *Trans-Tasman Proceedings Act 2010* (NZ) s 28. cf *Service and Execution of Process Act 1992* (Cth) s 21; *Great Southern Loans Pty Ltd v Locator Group Pty Ltd* [2005] NSWSC 438, [74]–[78] (McDougall J).

14 The requirements for granting leave to serve process outside Australia and New Zealand or to proceed against the defendant include a *forum conveniens* analysis that is an exercise of discretion: see *Agar v Hyde* (2000) 201 CLR 552, 570 [41]–[42] (Gaudron, McHugh, Gummow and Hayne JJ), 601–2 [127]–[131] (Callinan J).

The scheme is not perfect.[15] However, the trans-Tasman judicial area has functioned well in the 10 years in which it has been in place[16] — so well that neither the High Court of Australia nor the Supreme Court of New Zealand has been called on to consider the terms of the scheme. That changed in 2023, when, in *Zurich Insurance Company Limited v Koper* ('*Zurich Insurance*'),[17] a pillar of the scheme was challenged in the High Court of Australia. The constitutional questions raised by the *Zurich Insurance* litigation were ventilated throughout, from the trial in the Supreme Court of New South Wales,[18] through to the Court of Appeal,[19] and then to the High Court — with a close-to-unanimous response from every judge in the course of the litigation. In this article, those constitutional questions are considered and include the courts' clarification of implications that are *not* in the *Commonwealth Constitution.* However, requiring even greater attention are the private international law questions that were decided in a way that forced the need to decide whether ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth) were constitutionally valid. They include the courts' important reflections on the nature of 'jurisdiction' and, related to that, on the territorial reach of statutes that provide for third parties to bring actions directly against insurance companies — statutes that are notoriously ambiguous. In conclusion, an account is given as to how *Zurich Insurance* clarifies the legal profile of the trans-Tasman judicial area, but also of its unwelcome approach to the extraterritorial application of statutes.

II Insurance Claims Forum Shopping

Zurich Insurance was certainly an instance of forum shopping; an effort by the representative New Zealand plaintiff, Dariusz Koper, to secure application of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) ('*Claims Act* (NSW)') to recover damages from the tortfeasor's insurers for a tort that had occurred in New Zealand. Koper represented another 198 owners of units in Victopia Apartments in Auckland who, along with Victopia's body corporate, successfully sued KNZ International Co Ltd and Brookfield Multiplex

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15 The *forum conveniens* principles are a standard means of restricting forum shopping, but the principal kind of trans-Tasman forum shopping — New Zealanders shopping for personal injuries damages in Australian state courts — is not properly addressed by the scheme: Reid Mortensen, 'Woodhouse Reprised: Accident Compensation and Trans-Tasman Integration' (2013) 9(1) *Journal of Private International Law* 1. The unique ban on anti-suit injunctions also weakens the power of the sorting provisions to prevent concurrent proceedings in different courts.

16 The *Trans-Tasman Proceedings Acts* for both countries commenced on 11 October 2013.

17 (2023) 97 ALJR 614 (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ) ('*Zurich Insurance* HCA').

18 *Koper v Zurich Insurance plc* [2021] NSWSC 1587 (Rein J) ('*Zurich Insurance* NSWSC').

19 *Zurich Insurance plc v Koper* (2022) 110 NSWLR 380 (Bell CJ, Ward P and Beech-Jones JA) ('*Zurich Insurance* NSWCA').

Constructions (NZ) Ltd for defective manufacture of the Victopia Apartments.[20] KNZ was Victopia's developer and Multiplex was its builder; both were New Zealand companies. This was therefore a purely New Zealand case. Although the defendants paid some of the judgment, more than NZD23 million was left unpaid by Multiplex when it entered liquidation.

Multiplex was insured for its losses with several foreign insurance companies, including Zurich Insurance plc, incorporated in Ireland, and Aspen Insurance UK Limited, incorporated in the United Kingdom. The insurance policy was expressly governed by 'the law of the Commonwealth of Australia', and the parties to the policy agreed to 'submit to the exclusive jurisdiction of any competent Court in the Commonwealth of Australia'.[21] Although Aspen conducted business in New South Wales, Zurich had no business presence anywhere in Australia or New Zealand. To secure complete recovery for these losses, the unit owners sought to proceed directly against Multiplex's insurers.

The problem for the unit owners was that, despite the original proceedings having been purely internal to New Zealand, the provision for direct actions against insurers in the *Law Reform Act 1936* (NZ) would not support their claim.[22] The New Zealand courts had interpreted the *Law Reform Act* as having no extraterritorial effect.[23] In *Body Corporate 326421 v Auckland Council* ('*Body Corporate 326421*')[24] — a case again involving Multiplex, Zurich and other foreign insurance companies — the insurance policy also provided for Australian governing law and the exclusive jurisdiction of Australian courts. In the New Zealand High Court, Gilbert J held that the *Law Reform Act* did not apply because the insurers were not resident in New Zealand.[25] The reasoning in *Body Corporate 326421* rested in part on the absence of a New Zealand court's competence over a foreign-resident defendant and the likelihood that its judgment could not be enforced against them.[26] Under the *Trans-Tasman Proceedings Act 2010* (NZ), this conclusion would have differed had the defendant been in Australia,[27] but *Body Corporate 326421* itself did not involve Australian insurers.[28]

In *Zurich Insurance*, the application of the *Claims Act* (NSW) promised more. The *Claims Act* (NSW) is modelled on the *Law Reform Act 1936* (NZ), but has been

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20 *Body Corporate 346799 v KNZ International Co Ltd* [2017] NZHC 511.

21 *Zurich Insurance* NSWSC (n 18) [9] (Rein J).

22 *Law Reform Act 1936* (NZ) s 6.

23 Maria Hook and Jack Wass, *The Conflict of Laws in New Zealand* (Lexis Nexis, 2020) 23–4.

24 [2013] NZHC 753 ('*Body Corporate 326421*') (Gilbert J).

25 Ibid [23] (Gilbert J).

26 Ibid [25]–[26] (Gilbert J).

27 Gilbert J's decision in *Body Corporate 326421* (n 24) followed the Supreme Court of New Zealand's decision in *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd* [2010] 3 NZLR 713 (Elias CJ, Blanchard, McGrath, Wilson and Anderson JJ) ('*Ludgater*'), where the defendant was located in Australia. However, *Ludgater* was decided before the *Trans-Tasman Proceedings Act 2010* (NZ) came into force.

28 The circumstances of *Body Corporate 326421* (n 24) were essentially the same in *McCullagh v Underwriters Severally* [2015] NZHC 1384 (Wylie J).

updated and interpreted with slight differences — although the differences were significant for the litigation in *Zurich Insurance*. In Australia, only the territories have legislation of a comparable kind.[29] If it was applied, the *Claims Act* (NSW) would enable the unit owners to avoid the losses they would suffer as unsecured creditors in the New Zealand liquidation of Multiplex. However, the New Zealand courts' understanding of the *Claims Act* (NSW) meant that the unit owners would actually have to litigate in New South Wales. The New Zealand courts were unlikely to apply the New South Wales statute even if, as is possibly the case under New Zealand law, a New Zealand court were to conclude that the direct recovery from an insurer was a question of contract that was governed by Australian law in accordance with Multiplex's insurance policy.[30] In *Body Corporate 326421*,[31] Gilbert J had concluded that the predecessor to the *Claims Act* (NSW)[32] (which used similar language to it) was expressed in self-limiting terms. It conferred powers on a court in New South Wales to give leave to approve a direct action against an insurance company. A New Zealand court was therefore not empowered under the Act to grant leave to approve an action against the insurer.[33] In substance, Gilbert J had held that, regardless of the effect of New Zealand's choice of law rules, the predecessor to the *Claims Act* (NSW) was 'procedurally unenforceable' in New Zealand courts.[34] He reached that understanding without making any reference to the New South Wales courts' own interpretation of the Act. Nevertheless, the New South Wales Court of Appeal had already reached the very same conclusion in *Chubb Insurance Company of Australia Ltd v Moore* ('*Chubb*'):[35] 'the preferable approach is to treat [the *Claims Act* (NSW)] as applying to all claims brought in a court of New South Wales, and as not applying to a claim brought in a court that is not a court of New South Wales'.[36]

Although an insurance policy governed by Australian law and proroguing the exclusive jurisdiction of Australian courts does not necessarily direct litigation on the policy into the New South Wales courts, Aspen's business presence in New South Wales made it a sensible jurisdictional choice in Australia for the unit

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29 *Civil Law (Wrongs) Act 2002* (ACT) ss 206–9; *Law Reform (Miscellaneous Provisions) Act* (NT) ss 26–9; Ian Enright and Robert Merkin, *Sutton on Insurance Law* (4th ed, Thomson Reuters, 2015) vol 1, 875–7.

30 Hook and Wass (n 23) 469. Alternative classifications that could affect the applicable law in a cross-border claim in New Zealand are tort and property. See also *Ludgater* (n 27).

31 *Body Corporate 326421* (n 24).

32 *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) s 6.

33 *Body Corporate 326421* (n 24) [25].

34 Kirby J coined the term 'procedurally unenforceable' where, because a statute designates 'a specified tribunal' in state X as the exclusive forum for claims of a nominated kind, those claims may not be enforceable by courts in state F even when state X's law would apply through the application of state F's choice of law rules. The courts of state F are still not a 'specified tribunal' under state X's law: *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 548–9 [116]–[117]. See also *Tolofson v Jensen* [1994] 3 SCR 1022, 1049 (La Forest J).

35 *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 (Emmett and Ball JJ; Bathurst CJ, Beazley P and Macfarlan JA agreeing) ('*Chubb*').

36 Ibid [204].

owners' litigation.[37] More importantly, the *Claims Act* (NSW), with equivalent legislation only in the federal territories, made New South Wales the only Australian state in which the unit owners could escape the losses that would be suffered through Multiplex's liquidation. They therefore commenced proceedings in the New South Wales Supreme Court, where Rein J accepted that, subject to two issues, the conditions for a direct action against Zurich and Aspen were satisfied and leave could be given for the unit owners to sue them.[38] These two issues raised the *forum competens* and the sorting provisions of the *Trans-Tasman Proceedings Act* 2010 (Cth) The issue relating to the *forum competens* provisions ended up in the High Court of Australia.

Rein J did the hard work in *Zurich Insurance* by resolving the insurance questions that, ultimately, led to the need to decide a constitutional point. It is worth setting out his analysis because the issues that linger after the High Court's decision in *Zurich Insurance* rest more on its treatment of the *Trans-Tasman Proceedings Act 2010* (Cth) and the *Claims Act* (NSW) than they do on the ultimate constitutional question.

The insurance questions related to the territorial application of the *Claims Act* (NSW), and Rein J treated that as depending on the 'central concern on which the legislation is shown to "hinge"'.[39] He thought that the 'hinge' was 'the enforcement mechanism' of the *Claims Act* (NSW) — its provision for enforcing a claim against an insurer 'as if' the claim were one against the insured.[40] Rein J rejected the argument that the hinge was merely commencing proceedings in New South Wales against an insurer.[41] He would have concluded, had he been free to do so, that the *Claims Act* (NSW) had a broad territorial operation and that it should be available when: the event giving rise to liability arose in New South Wales; the insured was located in New South Wales; the insured would suffer damage in New South Wales; the insurer was located in New South Wales; or the insurance policy prorogued the jurisdiction of the New South Wales or Australian courts.[42] However, he considered that he was bound to follow the Court of Appeal's decision in *Chubb*,[43] that neither the location of the insurer nor the proroguing of jurisdiction in the insurance policy could be used to define the territorial reach of the predecessor to the *Claims Act* (NSW).[44] Rein J therefore returned to the 'hinge' on which the *Claims Act* (NSW) turned, and held that 'the Court in *Chubb* must be taken to have meant that the underlying claim against the

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37 The parties did not quibble about any difference between the law or courts of 'Australia' and 'New South Wales': *Zurich Insurance* NSWSC (n 18) [70].

38 Ibid [10]–[11].

39 Ibid [36], applying *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149, 159–60, 162 (French CJ and Gummow, Hayne, Kiefel and Bell JJ).

40 *Zurich Insurance* NSWSC (n 18) [39], [41], [72].

41 Ibid [74].

42 Ibid [70].

43 *Chubb* (n 35); see *Zurich Insurance* NSWSC (n 18) [72].

44 *Zurich Insurance* NSWSC (n 18) [70].

insured … had to be one brought in New South Wales or one that could properly have been brought in New South Wales'.[45]

This takes us to the *Trans-Tasman Proceedings Act 2010* (Cth). The New South Wales Supreme Court's personal jurisdiction over Zurich and Aspen was unquestioned. The appellants had by contract submitted to the exclusive jurisdiction of Australian courts and, further, Aspen had a business presence in New South Wales.[46] However, according to *Chubb* and Rein J, that would not define the territorial reach of the *Claims Act* (NSW). The question was whether the New South Wales court would have had jurisdiction to hear 'notional proceedings' between the Victopia unit owners and Multiplex,[47] which was not even involved in the New South Wales proceedings. And, as the insured Multiplex was a New Zealand corporation, that would depend on whether the New South Wales court would have had long-arm jurisdiction over Multiplex under ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth).[48]

Rein J held that the New South Wales court would have had jurisdiction in these notional proceedings — the claim for defective manufacture that was actually determined in the New Zealand High Court — and expressly held that jurisdiction under the *Trans-Tasman Proceedings Act 2010* (Cth) was not limited to cases with a trans-Tasman element.[49]

That being so, the judge therefore had to address the most legally significant question raised in *Zurich Insurance* — the argument that ss 9 and 10, the *forum competens* provisions of the *Trans-Tasman Proceedings Act 2010* (Cth), were unconstitutional and invalid, and so could not have given the New South Wales court jurisdiction to deal with the notional proceedings relating to the underlying claim. He also dismissed this argument, and this was the single point that was subject to the subsequent appeals.

Rein J's decision, that the *Claims Act* (NSW) applied if the underlying claim was one brought in New South Wales or that could properly have been brought in New South Wales, must be taken to have settled the question of the territorial application of the Act,[50] although there remains a policy question whether it still gives the *Claims Act* (NSW) an extraterritorial reach that is too extensive.[51] It was unquestioned in the New South Wales Court of Appeal,[52] and again in the High Court of Australia by Kiefel CJ and Gageler, Gleeson and Jagot JJ.[53] However, a minority in the High Court comprising Gordon, Edelman and Steward JJ dissented

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45 Ibid [74].
46 Ibid [69].
47 Ibid [11]. See *Zurich Insurance* HCA (n 17) 625–6 [52] (Gordon, Edelman and Steward JJ).
48 *Zurich Insurance* NSWSC (n 18) [87]–[89].
49 Ibid [89].
50 Ibid [74].
51 See below nn 125–142 and accompanying text.
52 *Zurich Insurance* NSWCA (n 19).
53 *Zurich Insurance* HCA (n 17) 618–19 [12].

on this point. They disagreed with Rein J that he was bound to follow *Chubb*,[54] and seemed to endorse his preferred broad reading of the territorial reach of the *Claims Act* (NSW).[55] Even to that broad reading, Gordon, Edelman and Steward JJ added an extension: the *Claims Act* (NSW) would apply if ever the insured or the insurer was within the personal jurisdiction of the New South Wales court.[56] That could potentially mean that the *Claims Act* (NSW) would also apply if: the insurer was located in New South Wales; the insurer had prorogued the jurisdiction of the Australian courts; or the New South Wales court had long-arm jurisdiction over the insurer under its *Rules of Court* because there were grounds for service of an insurer that was located outside Australia and New Zealand.[57] The New South Wales court did have personal jurisdiction over both insurers that were litigating, because Zurich and Aspen had prorogued jurisdiction under the insurance policy's choice of court agreement, and Aspen had a business presence in the State.[58] Further, the New South Wales court had jurisdiction under its *Rules of Court* allowing service outside Australia and New Zealand in a claim for contribution or indemnity.[59] The existence of personal jurisdiction over the insurers would secure application of the *Claims Act* (NSW). It is an unwelcome interpretation of the statute's territorial reach, to which we will return.[60] But, as a result, Gordon, Edelman and Steward JJ thought there was really no need to consider the validity of ss 9 and 10 because the *Claims Act* (NSW) applied even if the New South Wales court had not been a *forum competens* in notional proceedings against the insured.[61]

There was a second issue that Rein J had to address before granting leave for the unit owners to sue the insurers directly. This was Zurich's argument that it would 'involve an intrusion' into the administration of Multiplex's liquidation in New Zealand if the New South Wales court allowed the insurers to be sued directly in New South Wales, especially when they could not be sued directly in New Zealand. Accordingly, a 'residual discretion' should be exercised not to allow the direct action against the insurers.[62] In short, the Victopia unit owners should not recover directly from the insurers because that would give them a practical preference over Multiplex's other creditors that was not available to the unit owners in the liquidation in New Zealand.[63] Here Rein J also dismissed all of Zurich's submissions, holding among other things that there was no reason why Zurich should benefit by escaping both the effect of Multiplex's liquidation in New

54 Ibid 626 [54].
55 See above n 42 and accompanying text.
56 *Zurich Insurance* HCA (n 17) 626 [55].
57 Ibid 626 [56].
58 See ibid.
59 Ibid 626 [55]. See *Uniform Civil Procedure Rules 2005* (NSW) sch 6 cls (g)–(h).
60 See below nn 125–142 and accompanying text.
61 Ibid [54].
62 *Zurich Insurance* NSWSC (n 18) [11].
63 Ibid [38].

Zealand and direct actions by the unit owners in New Zealand and New South Wales.[64] Significantly, he also noted that Zurich had not made an application under the *Trans-Tasman Proceedings Act 2010* (Cth) for a stay of the proceedings against it on the ground that a New Zealand court was the more appropriate court — the *forum conveniens* — for deciding the claim.[65] Indeed, Rein J thought that, in asking the New South Wales court to exercise this residual discretion to refuse leave under the *Claims Act* (NSW), Zurich's approach to the second issue appeared to be a backdoor application for a stay.[66] He therefore thought that, in not making an application for a stay, the insurers were trying to evade the *Trans-Tasman Proceedings Act 2010* (Cth) because this would also enable them to avoid the application of its other sorting provision for the enforcement of exclusive choice of court agreements.[67] Given the terms of the insurance policy, this sorting provision would have seen the litigation against Zurich locked into an Australian court.[68] However, even putting the *Trans-Tasman Proceedings Act 2010* (Cth) to one side, Rein J was prepared to grant leave for the direct action against Zurich because, in the insurance policy, Multiplex and Zurich had prorogued the exclusive jurisdiction of an Australian court.[69]

III The Validity of the *Trans-Tasman Proceedings Act 2010* (Cth)

The validity of ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth) is central to the success of the whole trans-Tasman judicial area. The reasons for challenging the constitutionality of these provisions related only to the competence of the state courts, as opposed to federal and territory courts. If successful, the challenge would have led to the untenable situation in which New Zealand courts were *forum competens* for all matters in which their writs were served on defendants in Australia, and in which federal and territory courts might still be *forum competens* when service was effected in New Zealand, but in which the busiest courts in the market area — the Australian state courts — had lost any parallel jurisdictions. Further, the validity of state court judgments rendered when assuming jurisdiction under ss 9 and 10 since 2013, when the *Trans-Tasman Proceedings Act 2010* (Cth) commenced, could also have been in doubt.[70]

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64 Ibid [142].

65 *Trans-Tasman Proceedings Act 2010* (Cth) ss 17–19.

66 *Zurich Insurance* NSWSC (n 18) [142].

67 *Trans-Tasman Proceedings Act 2010* (Cth) s 20.

68 *Zurich Insurance* NSWSC (n 18) [142].

69 Ibid.

70 See above n 16. It should be recognised that it is possible that, had it become necessary, Australian state parliaments could try to salvage the scheme by uniform legislation providing for state

There were two aspects of the *Commonwealth Constitution* that had to be considered in the challenge: the federal power to support the *Trans-Tasman Proceedings Act 2010* (Cth); and any implied limitation on that federal power that might arise because ss 9 and 10 extended the jurisdiction of state courts.

A *The External Affairs Power*

The question of a federal power to support ss 9 and 10 was straightforward. The parties accepted that the external affairs power in s 51(xxix) of the *Commonwealth Constitution* would have supported these sections, unless there were relevant limitations on the exercise of the power.[71] Rein J did not even consider the external affairs power.[72] Bell CJ delivered the judgment in the Court of Appeal, with Ward P and Beech-Jones JA agreeing in full. Again, the question of the support of the external affairs power did not need much attention. Bell CJ simply noted that the *Trans-Tasman Proceedings Act 2010* (Cth) gave effect to the *Christchurch Agreement*,[73] and related to service of process outside Australia. It was therefore a valid implementation of Australia's treaty obligations and, in addition, concerned matters that were external to Australia.[74] The High Court similarly relied on those aspects of the external affairs power to support the *Trans-Tasman Proceedings Act 2010* (Cth). Kiefel CJ, Gageler, Gleeson and Jagot JJ said that:

> Each of ss 9 and 10 of the Act answers the description of a law with respect to external affairs on the basis that it is reasonably capable of being considered appropriate and adapted to implementing [the *Christchurch Agreement*]. Each also answers that description on the distinct basis that its subject matter is something geographically external to Australia, being the service of documents in New Zealand. [75]

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courts to have and exercise jurisdiction over defendants in New Zealand, although there would be a question of their constitutional power to do so if some subject-matter connection with the state was not included. A similar exercise was undertaken when it was recognised after *Gould v Brown* (1998) 193 CLR 346 and *Re Wakim: Ex parte McNally* (1999) 198 CLR 511 ('*Wakim*') that Australian federal courts could not receive state jurisdictions under the *Jurisdiction of Courts (Cross-vesting Act) 1987* (Cth), but uniform Federal Courts (State Jurisdiction) Acts were passed in every state in 1999 to render valid any federal court judgments made under the cross-vesting scheme: *Federal Courts (State Jurisdiction) Act 1999* (NSW); *Federal Courts (State Jurisdiction) Act 1999* (Qld); *Federal Courts (State Jurisdiction) Act 1999* (SA); *Federal Courts (State Jurisdiction) Act 1999* (Tas); *Federal Courts (State Jurisdiction) Act 1999* (Vic); *Federal Courts (State Jurisdiction) Act 1999* (WA). This process of salvage was upheld as constitutionally valid in *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629.

71 *Zurich Insurance* NSWSC (n 18) [91].

72 Ibid [91].

73 *Zurich Insurance* NSWCA (n 19) 391 [39]; see above n 2 and accompanying text.

74 See the aspects of *Commonwealth Constitution* s 51 (xxix) as analysed in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 528 (Mason CJ), 548–77 (Brennan J), 599–602 (Deane J), 658–61 (Toohey J).

75 *Zurich Insurance* HCA (n 17) 619–20 [19].

Gordon, Edelman and Steward JJ effectively agreed with this, merely holding that the *Trans-Tasman Proceedings Act 2010* (Cth) was enacted under the external affairs power.[76]

B *Implied Limitations on the External Affairs Power?*

It was Zurich's claim that there was an implied constitutional limitation on federal power to legislate for the jurisdiction of state courts that was the point of the challenge. Zurich argued that ss 9 and 10 were invalid because it was implicit that Chapter III of the *Commonwealth Constitution* prohibited the federal Parliament from extending the service of state court process to places outside Australia.[77] The argument proceeds like this: although the *Service and Execution of Process Act* (Cth)[78] is in substance replicated in the *Trans-Tasman Proceedings Act 2010* (Cth), the two statutes are supported by different federal powers with different capacities to invest a court with federal jurisdiction. The *Service and Execution of Process Act* (Cth) is supported by s 51(xxiv) of the *Constitution*, which provides that the federal Parliament may make laws for the service and execution of state court process and judgments 'throughout the Commonwealth'. In contrast, the *Trans-Tasman Proceedings Act 2010* purports to be supported by s 51(xxix).[79] Chapter III of the *Constitution* is limited to investing state courts with the federal jurisdictions that are set out in Chapter III,[80] and that does not include the service of process under the *Trans-Tasman Proceedings Act 2010* (Cth).[81] Zurich argued that all federal powers *other than s 51(xxiv)* were subject to Chapter III. That included the external affairs power in s 51(xxix). As a result, the federal Parliament was expressly empowered to provide for service 'throughout the Commonwealth' of state court process; service being how, at common law, the jurisdiction of courts is established. However, apart from s 51(xxiv), the federal Parliament could only confer jurisdiction on state courts in matters listed in Chapter III and — as litigation between New Zealanders, or between Australians and New Zealanders, is not a matter listed in Chapter III — the federal Parliament could not enact ss 9 and 10.[82]

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76 Ibid 625 [49].

77 Ibid 620 [24]. There was another constitutional argument that was raised only in the Court of Appeal. This invoked the doctrine of *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, that the federal Parliament cannot legislate so as to impose a special disability or burden on the exercise on state powers such that the state's ability to function as a government is curtailed. Zurich argued that it was for the state to determine what was heard in its own state courts. Bell CJ dismissed this argument as 'ambitious' and 'weak': *Zurich Insurance* NSWCA (n 19) 396–7 [59]–[62].

78 See above nn 3–4 and accompanying text.

79 See above nn 71–76 and accompanying text.

80 See the subject-matter jurisdictions set out in the *Commonwealth Constitution* ss 75–6.

81 *Zurich Insurance* NSWSC (n 18) [91].

82 Ibid.

No court and no judge accepted this argument at any point in the *Zurich Insurance* litigation but, given the significance of Australia's commitment to the *Christchurch Agreement*, Zurich was always battling uphill. The High Court addressed the argument more directly by reference to fundamental principle. Kiefel CJ and Gageler, Gleeson and Jagot JJ stated:

> What rational constitutional purpose might conceivably be served through the creation of a constitutional structure which simultaneously conceded to the Commonwealth Parliament power to make laws for the service of process of State courts throughout the geographical area of the Commonwealth but denied to the Commonwealth Parliament power to make laws for the service of process of State courts beyond the geographical area of the Commonwealth, the Insurers did not explain. None is apparent.[83]

From that point, all judges considered what was meant by 'federal jurisdiction' in Chapter III.[84] Focusing on the term 'jurisdiction' itself, the judgments variously distinguish 'personal', 'territorial' and 'subject-matter' jurisdiction. Kiefel CJ, Gageler, Gleeson and Jagot JJ's account is worth repeating. They defined 'personal jurisdiction' as:

> the amenability of a person to the service of process as a precondition to the making of a binding adjudication in a legal proceeding to which that person is a party. The amenability of a person to the service of process is a standard, albeit not invariable, procedural precondition to the exercise by a court of authority to adjudicate on a subject-matter within federal jurisdiction or State jurisdiction. But amenability to the service of process does not define federal jurisdiction. Nor does it define State jurisdiction.[85]

Gordon, Edelman and Steward JJ added 'territorial jurisdiction' to this: 'the territory over which the court's power extends'.[86] The importance of this in the constitutional context is that personal jurisdiction — 'amenability to the service of process' — does not direct what either federal or state jurisdiction amounts to.[87] Quoting Bell CJ's decision in the Court of Appeal, the majority restated that '[p]ersonal jurisdiction is not a constitutional concept'.[88] However, this does not preclude the federal Parliament from legislating for personal jurisdiction. If a federal or state court is invested with federal jurisdiction under Chapter III, Parliament can provide for the service of the court's process as a matter incidental to the vesting of the federal subject-matter jurisdiction in question.[89] The

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83 *Zurich Insurance* HCA (n 17) 620 [25].

84 In the New South Wales courts, see *Zurich Insurance* NSWSC (n 18) [94]–[128] (Rein J); *Zurich Insurance* NSWCA (n 19) 393–4 [48]–[49] (Bell CJ).

85 *Zurich Insurance* HCA (n 17) 622 [34].

86 Ibid 625 [48].

87 Ibid 622 [34].

88 Ibid; *Zurich Insurance* NSWCA (n 19) 394 [52].

89 *Zurich Insurance* HCA (n 17) 622–3 [35]. That is, in the exercise of the incidental power: *Commonwealth Constitution* s 51(xxxix).

Commonwealth Constitution expressly provides for the service of state court process or personal jurisdiction throughout Australia in s 51(xxiv), without the creation of a new subject-matter jurisdiction[90] and, it may be observed, thereby extends the state court's territorial jurisdiction. Kiefel CJ, Gageler, Gleeson and Jagot JJ then up-ended Zurich's argument by looking to s 51(xxiv) to help conclude that providing for the personal jurisdiction of state courts in the exercise of state jurisdiction was 'wholly consistent with the structure of the *Constitution*'.[91] The same could be validly done in the *forum competens* provisions of the *Trans-Tasman Proceedings Act 2010* (Cth).[92] It is possible to read this as an inference, and one explicitly drawn from constitutional structure. The observation suggests that, rather than there being a negative implication that the *Commonwealth Constitution* prohibits the federal Parliament from extending state personal and territorial jurisdictions beyond Australia, there could be a positive implication in the structure of the *Commonwealth Constitution* that federal legislation can create extraterritorial personal and territorial jurisdictions for state courts.

Gordon, Edelman and Steward JJ agreed that Chapter III dealt only with subject-matter jurisdiction.[93] They found no need to explore the question of any negative implication prohibiting laws for the service of process outside s 51(xxiv). Sections 9 and 10 did not engage the subject-matter jurisdiction of Chapter III; they provided a federal law for service of process that, if leading to the subsequent exercise of subject-matter jurisdiction, did not necessarily mean that that was an exercise of a federal jurisdiction.[94]

C Zurich Insurance *and the* Commonwealth Constitution

The decisions on the constitutional points in *Zurich Insurance* lead to three observations. The first two relate to implications in the *Constitution*, and especially in Chapter III. First, in reaching the conclusion that ss 9 and 10 were valid, the High Court addressed the circumstances in which it is possible to recognise an implied constitutional limitation on, what would otherwise be, the legitimate exercise of federal power. It is on this point that the justices divided. The majority regarded implications as structural, and that an implication in the *Commonwealth Constitution* would be recognised if it was 'logically or practically necessary for the preservation of the integrity of the constitutional structure'.[95] In contrast, Gordon, Edelman and Steward JJ required more than the necessary

90 *Zurich Insurance* HCA (n 17) 623 [36].
91 Ibid 623 [37].
92 Ibid 623 [38]. That is, in the exercise of the incidental power: *Commonwealth Constitution* s 51(xxxix).
93 *Zurich Insurance* HCA (n 17) 624–5 [47]–[48].
94 Ibid 625 [51].
95 Ibid 621 [28].

direction of the constitutional structure: they required the structure of the *Commonwealth Constitution* 'always [to be] considered together with the text'.[96] Here, the minority was adamant that the High Court had repeatedly and unanimously insisted on reference to both constitutional text and structure when considering whether an implication affecting the operation of federal power could be made.[97] In this respect, the weight of authority seems to support the minority's position.[98] The two approaches led to the same outcome in *Zurich Insurance*; the *forum competens* provisions of the *Trans-Tasman Proceedings Act 2010* (Cth) were valid. However, the significance of the difference may lie in Kiefel CJ, Gageler, Gleeson and Jagot JJ's justification of a federal power to provide for the extraterritorial personal and territorial jurisdictions of state courts. According to the majority, this was 'wholly consistent with the structure of the *Constitution*'.[99] It would be more tenuous to suggest that the text of s 51(xxiv) might also have something to do with the recognition of this power to legislate, as it is limited to the *interstate* service of state civil process.

Secondly, the High Court has previously found negative implications that affect courts' jurisdictions in Chapter III. In *Re Wakim; Ex parte McNally* ('*Wakim*'),[100] the High Court concluded that, in providing for federal jurisdiction to be invested in federal courts created by the federal Parliament, Chapter III imports a negative implication that the Parliament cannot provide for federal courts to receive state jurisdictions. The effect was to pull down much of the Cross-vesting Acts,[101] and to confound cooperative arrangements for the exercise of subject-matter jurisdictions between state and federal courts. *Zurich Insurance* might recognise a positive implication about extending state jurisdictions in the constitutional structure, but it does not add to the jurisdictional confusion that was initiated in *Wakim.*

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96 Ibid 624 [44].

97 See ibid.

98 See Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 150, 170–82; Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668, 674–5; Jeremy Kirk, 'Constitutional Implications (I): Nature, Legitimacy, Classification, Examples' (2000) 24(3) *Melbourne University Law Review* 645, 664–8; Jeremy Kirk and Adrienne Stone, 'The Freedom of Political Communication since *Lange*' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (Federation Press, 2000) 1, 3–5; Nicholas Aroney, 'Commentary' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (Federation Press, 2000) 21, 22–7; Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25(1) *Melbourne University Law Review* 24, 49–52; Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28(3) *University of New South Wales Law Journal* 842, 844–5.

99 *Zurich Insurance* HCA (n 17) 623 [37].

100 *Wakim* (n 70).

101 Invalidating *Jurisdiction of Courts (Cross-vesting Act) 1987* (Cth) s 9(2), the important provision by which state jurisdictions were received for federal and territory courts.

The third observation is that the recognition that the service of state civil process outside Australia is supported by s 51(xxix) potentially has far reaching consequences for the international jurisdiction of state courts. Putting the *Trans-Tasman Proceedings Act 2010* (Cth) to one side, state courts' personal jurisdiction over defendants who are located outside Australia is given by the relevant state rules of court. There are questions about the constitutionality of most of these rules of court, particularly when they claim personal jurisdiction on the basis of a connection with 'Australia' but not necessarily with the state in question.[102] The explicit recognition of federal power to provide for the service of state court process outside Australia would seemingly cure those lingering constitutional questions over state legislative power. *Zurich Insurance* suggests that there is federal power to set uniform rules of court for the state courts. Further, it would not require a treaty to support the legislation under s 51(xxix), as Bell CJ in the Court of Appeal and the High Court majority explicitly recognised that the *forum competens* pillar of the *Trans-Tasman Proceedings Act 2010* (Cth) was supported by the aspect of s 51(xxix) that enables the federal Parliament to legislate for matters outside Australia.[103] To reiterate Kiefel CJ, Gageler, Gleeson and Jagot JJ's conclusion:[104]

> Each of ss 9 and 10 of the Act answers the description of a law with respect to external affairs … on the distinct basis that its subject matter is something geographically external to Australia …

Presumably, then, *Zurich Insurance* supports the possibility of more general provision through federal legislation for the service of state process anywhere outside Australia.

IV Breakdown

A *The* Trans-Tasman Proceedings Acts *Clarified*

The *Zurich Insurance* litigation helps to clarify the constitutional profile of the trans-Tasman judicial area, to the extent that it relies on Australian legislation. The *forum competens* provisions are valid. They are properly classified as granting

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102 There must be some connection with the state for state legislation to be within its constitutional power, and the rules of court are state subordinate legislation. That itself creates constitutional problems for those rules, despite the decision of the Victorian Court of Appeal in *Uber Australia Pty Ltd v Andrianakis* (2020) 61 VR 580 (Niall, Hargrave and Emerton JJA): see Andrew Dickinson, 'In Absentia: The Evolution and Reform of Australian Rules of Adjudicatory Jurisdiction' in Michael Douglas et al (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing, 2019) 13, 43; Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis, 5th ed, 2023) 37–8.

103 See nn 74–76, and accompanying text.

104 *Zurich Insurance* HCA (n 17) 619–20 [19].

only a long-arm personal jurisdiction to Australian courts, and so they extend the territorial jurisdiction of state courts — as well as of federal and territory courts. If it ever became necessary to determine the validity of the service of process in a particular set of proceedings under ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth), that *is* a question that would arise in federal jurisdiction.[105] However, so far as a state court is concerned, that is also the likely point at which its federal jurisdiction ends. From that point onward, a state court may exercise any subject-matter jurisdiction with which it is already invested, whether that arises under a state or federal law.[106] And further, as Rein J clarified, that is a plenary exercise of the state court's existing subject-matter jurisdictions. If service of process was effected in New Zealand, there is no requirement that the proceedings must also have a trans-Tasman element before the Australian court had subject-matter jurisdiction to determine them.[107] It was quite within the competence of a New South Wales court to determine litigation that was exclusively between New Zealand plaintiffs and New Zealand defendants, and which related to a tort that occurred in New Zealand.[108] It also means that there is, within the trans-Tasman market area, ample opportunity for a litigant to sue in the most advantageous forum for its claim. In *Zurich Insurance*, this trans-Tasman personal jurisdiction enabled the unit owners to secure a direct action against Multiplex's insurers that was probably only available to them in New South Wales.

That allows an exorbitant personal and territorial jurisdiction to every court in the single economic market. It is the sorting provisions that bring the exercise of that jurisdiction into proportion.[109] In *Zurich Insurance*, the courts confirmed that the sorting provisions of the *Trans-Tasman Proceedings Acts* are engaged independently of how personal jurisdiction is assumed by the Australian or New Zealand court. Rein J was evidently annoyed that Zurich had submitted that he should exercise a 'residual discretion' not to allow the Victopia unit owners to sue the insurers directly, on the ground that it would interfere with the ranking of Multiplex's creditors under the New Zealand law that governed its liquidation.[110] The legitimate approach, if there was a more appropriate court in New Zealand with jurisdiction to decide the question, was to apply for a stay of the proceedings under the *Trans-Tasman Proceedings Act 2010* (Cth).[111] This would then also have to confront the Act's provision that an Australian court 'must not … stay the proceeding, if satisfied that an exclusive choice of court agreement designates an

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105 This distinction was reached by Rein J and Bell CJ by reference to the High Court's decision on the *Service and Execution of Process Act 1901* (Cth) in *Flaherty v Girgis* (1987) 162 CLR 574: see *Zurich Insurance* NSWSC (n 18) [123]; *Zurich Insurance* NSWCA (n 19) 389-90 [30].

106 *Zurich Insurance* NSWSC (n 18) [123]; *Zurich Insurance* NSWCA (n 19) 393–5 [45]-[55].

107 *Zurich Insurance* NSWSC (n 18) [88]–[89].

108 Ibid [89].

109 See above nn 10–13 and accompanying text.

110 See above nn 63–68 and accompanying text.

111 *Trans-Tasman Proceedings Act 2010* (Cth) ss 17–19.

Australian court as the court to determine those matters'.[112] In considering the notional proceedings for the purposes of the *Claims Act* (NSW), the New South Wales court would have had personal jurisdiction over the New Zealand corporation Multiplex under the *Trans-Tasman Proceedings Act 2010* (Cth). However, its personal jurisdiction over Zurich and Aspen was established on different grounds. The New South Wales court's jurisdiction over Zurich and Aspen had been prorogued precisely by the kind of choice of court agreement that would preclude a stay in favour of a New Zealand court, with Aspen also being within the court's in-state common law jurisdiction by reason of its business presence in New South Wales.[113] However, the reasoning reinforces that the sorting provisions of the *Trans-Tasman Proceedings Act 2010* (Cth) are solely applicable whenever the alternative forum is a New Zealand court. They do not require the Australian court's personal jurisdiction in the proceedings to have been assumed under the *Trans-Tasman Proceedings Act 2010* (Cth).

The analysis undertaken in *Zurich Insurance*, especially in Rein J's judgment, also highlights the internal asymmetry of the jurisdiction of courts in the trans-Tasman judicial area. That asymmetry already existed within the Australian scheme, largely because of the role that the *Jurisdiction of Courts (Cross-vesting) Acts* play in the scheme. The cross-vesting scheme provides sorting provisions for the Australian scheme through the system of transfers between superior courts to the *forum conveniens* in Australia.[114] Importantly, it also provides an extensive investing of the subject-matter jurisdictions of federal, state and territory courts in the state and territory supreme courts[115] but, because of other implied limitations that *are* recognised in Chapter III of the *Commonwealth Constitution*,[116] only the jurisdiction of the territory supreme courts in the federal courts.[117] State jurisdictions cannot flow to the federal courts. Hence, within the Australian scheme, the state and territory courts occupy an advantageous position relative to the federal courts in the possession and exercise of subject-matter jurisdictions.

The background litigation to *Zurich Insurance* reinforces that the Australian state (and territory) courts also enjoy an advantage over the New Zealand courts when it comes to the application of other Australian states' statutes. As had its predecessor, the *Claims Act* (NSW) introduces limits of procedural enforceability by which the powers to approve a third party's direct action against an insurer are given only to New South Wales courts.[118] The New South Wales Court of Appeal in

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112 Ibid s 20(1)(b).

113 *Zurich Insurance* NSWSC (n 18) [142].

114 See above n 5 and accompanying text.

115 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) s 4(1); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Qld) s 4(1) and equivalent legislation in other states and territories.

116 See above nn 70 and 100 and accompanying text.

117 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) s 4(2).

118 See above nn 30–36; *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) ss 3–4.

Chubb,[119] and later the New Zealand High Court in *Body Corporate 326421*,[120] had interpreted the predecessor to the *Claims Act* (NSW) as conferring powers only on a court in New South Wales to give leave to approve a direct action. In New Zealand, the court was therefore unable to approve a direct action against the insurer even if New Zealand choice of law rules had the New South Wales statute applying to the claim.[121] That is not a limitation on the powers of the other state supreme courts in Australia, in which the subject-matter jurisdiction of the New South Wales Supreme Court is invested and its procedures are available to them.[122] Procedural enforceability is cross-vested.[123] Accordingly, under the *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW), the Supreme Court of Victoria could consider the *Claims Act* (NSW) 'exactly as if it were the Supreme Court of New South Wales sitting "on circuit" in Victoria'.[124] The Victorian Court would have power to approve a direct action against an insurer if the question were to come before it when New South Wales provided the applicable law.

B *The* Civil Liability (Third Party Claims Against Insurers) Act 2017 *(NSW): Territorial Application*

An unsatisfactory outcome of the *Zurich Insurance* litigation was the courts' approaches to the question of the territorial application of the *Claims Act* (NSW). The question is of broader relevance than the New South Wales statute itself as the Australian Capital Territory and the Northern Territory have comparable legislation.[125] These are in the older form of the *Claims Act* (NSW)'s predecessor and, so, the *Law Reform Act 1936* (NZ).[126] This legislation is famously 'silent as to the sphere of its intended territorial operation',[127] and 'ambiguity may be its only clear feature'.[128]

However, in *Zurich Insurance*, Rein J accepted that the Court of Appeal's understanding in *Chubb* of the territorial reach of the predecessor to the *Claims Act* (NSW) applied equally to the *Claims Act* (NSW) itself.[129] As Rein J's approach to the *Claims Act* (NSW) is the position that forced the need to consider the constitutional validity of ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth), it must be treated as having been accepted by the Court of Appeal and the majority in the

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119 *Chubb* (n 35) [204].
120 *Body Corporate 326421* (n 24) [25].
121 Ibid.
122 *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) ss 4(3), 11(1)(c).
123 See, eg, *Re DEF and Protected Estates Act 1983* (2005) 192 FLR 92, 103–4 [27]–[30](Campbell J).
124 Gavan Griffith, Dennis Rose and Stephen Gageler, 'Choice of Law in Cross-Vested Jurisdiction: A Reply to Kelly and Crawford' (1988) 62(9) *Australian Law Journal* 698, 701.
125 *Civil Law (Wrongs) Act 2002* (ACT) ss 206–9; *Law Reform (Miscellaneous Provisions) Act* (NT) ss 26–9.
126 See above nn 22–29 and accompanying text.
127 *DRJ v Commissioner of Victims Rights (No 2)* (2020) 103 NSWLR 692, 696 [6] (Bell P) ('*DRJ*').
128 *McMillan v Mannix* (1993) 31 NSWLR 538, 542 (Kirby P).
129 *Zurich Insurance* NSWSC (n 18) [72]; see also *Chubb* (n 35) [197]–[205].

High Court. It can therefore also be considered the likely approach to the provisions for direct actions against insurers in the two territories.

This is not a satisfactory position. Rein J's approach and the broader approach of Gordon, Edelman and Steward JJ in the High Court rest on the same problem. They both rely, at least as an alternative determinant of the statute's territorial application, on the personal jurisdiction of the court to determine the statute's territorial reach, and this means that the statute can apply to people who, and circumstances that, have no connection with the state. In Rein J's approach, and that of *Chubb*, the *Claims Act* (NSW) applies when the court had or would have had personal jurisdiction in 'the notional proceedings' — the underlying claim that was or could be brought by the plaintiff against the *insured*.[130] In the High Court minority's approach, this was accepted as sufficient for the *Claims Act* (NSW) to apply, but it would also apply when the court merely had jurisdiction in the plaintiff's proceedings against the *insurer*.[131]

There are logical and, possibly, constitutional problems with this. In *Zurich Insurance*, Rein J rejected the idea that the *Claims Act* (NSW) would apply simply because the plaintiff had sued the insurer in New South Wales,[132] yet it seems equally difficult to justify its application when the insured is just notionally exposed to litigation there. In both approaches that have the Act applying when there is personal jurisdiction over the insured or insurer, the application of the Act is hinged on the mere bringing or — as in *Zurich Insurance* itself — the imagining of proceedings in New South Wales.

Secondly, it has potential to see the application of the *Claims Act* (NSW) in circumstances that have no connection with New South Wales. There *was* a connection with New South Wales in *Zurich Insurance* – Aspen's presence in the State and, although it could include the other states and territories, the governing law and choice of court agreement in the insurance policy. However, in both Rein J's and the High Court minority's approaches, it is recognised that the personal jurisdiction that is needed for the *Claims Act* (NSW) to apply includes long-arm jurisdiction — without reference to discretionary restraints on its exercise. The notional proceedings for Rein J, the Court of Appeal and the High Court majority relied on ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth); the actual underlying proceedings had no connection whatsoever with New South Wales. Gordon, Edelman and Steward JJ invoked the long-arm jurisdiction available to the New South Wales Supreme Court under its *Rules of Court* to show that, in addition to the common law jurisdictions that existed, there were other grounds of personal jurisdiction over the insurers.[133]

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130 *Zurich Insurance* NSWSC (n 18) [70].
131 *Zurich Insurance* HCA (n 17) 626 [54]–[56].
132 *Zurich Insurance* NSWSC (n 18) [74].
133 *Zurich Insurance* HCA (n 17) 626 [55].

And thirdly, that last aspect of Gordon, Edelman and Steward JJ's judgment reveals circular reasoning in their conclusion that the application of the *Claims Act* (NSW) could hinge on long-arm jurisdiction. The very question being decided was whether the *Claims Act* (NSW) was enforceable, but that could apparently depend on personal jurisdiction arising under the *Rules of Court* when there was an 'indemnity in respect of a liability enforceable by a proceeding in court'.[134] Therefore, personal jurisdiction can only arise under this Rule of Court when there is at least an arguable case that there is an indemnity in respect of a liability that is enforceable under the *Claims Act* (NSW), but the *Claims Act* (NSW) is only be enforceable because this Rule of Court gives the personal jurisdiction on which its application is hinged. That is bootstrapping, and illogical.

The potential application of the *Claims Act* (NSW) in circumstances that have no connection with New South Wales inevitably raises a constitutional question about the Act. Limitations on state legislative power require a statute's application to have a real connection with the state, even if a remote or general one, for the statute to be valid.[135] Alternatively, in New South Wales, the absence of a connection may see the statute read down.[136] Having a statute's application hinge on the availability of a long-arm personal jurisdiction, however, means that application may have no connection with the state. The *Service and Execution of Process Act* (Cth) can make a state court *forum competens* in proceedings in which all of the circumstances took place in another state, and all of the litigants were located there. Similarly, the *Trans-Tasman Proceedings Act 2010* (Cth) can make a state court competent in proceedings in which all of the circumstances took place, and all of the litigants were located, in New Zealand. In these proceedings, the state court can be *forum competens* because the extension of personal and territorial jurisdiction to matters that have no connection with the state is supported, respectively, by s 51(xxiv) and, as held in *Zurich Insurance*, by s 51(xxix) of the *Commonwealth Constitution*. Those federal powers do not support the application of the New South Wales *Claims Act* (NSW) in the exercise of the state court's subject-matter jurisdiction. That must be supported independently by the state's own constitutional powers.[137]

Alternatives to Rein J's and the High Court minority's approaches by no means destroy the *Claims Act* (NSW). In no court did the Act's 'silence as to location' see serious attention given to the *Interpretation Act 1987* (NSW), s 12,

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134 *Uniform Civil Procedure Rules 2005* (NSW) sch 6 cl(h)(ii).

135 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 14 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Mobil Oil Australia Pty Ltd v State of Victoria* (2002) 211 CLR 1, 22–3 [7]–[10] (Gleeson CJ), 34 [48]–[51] (Gaudron, Gummow and Hayne JJ); *DRJ* (n 127) 692, 696–7 [2]–[9] (Bell P), 723–5 [128]–[134] (Leeming JA).

136 See, eg, *Hitchcock v Pratt* (2010) 79 NSWLR 687 (Brereton J).

137 This analysis bypasses the long-arm jurisdictions that arise under the *Uniform Civil Procedure Rules 2005* (NSW) that, like equivalent rules of court in most other states, claim *inter alia* that a state Supreme Court may hear proceedings that have a connection with 'Australia' but not necessarily with the state. The constitutional problems for those Rules are noted at n 102 and accompanying text.

which brings the state's statutes within its own territorial limits, and which allow it to be read down to give it a constitutionally valid territorial application.[138] Even the more traditional approach of subjecting the application of a statute to choice of law rules,[139] rather than the approach taken in *Zurich Insurance* of the statute overriding them,[140] could still have seen the *Claims Act* (NSW) applied. A direct action against an insurer has been treated as a question of quasi-contract, which would have seen New South Wales law apply in accordance with the governing law of the insurance policy.[141] The alternative method of classifying the underlying claim would, however, have seen New Zealand law applied as it was the law of the place where the tort occurred.[142] This would render the *Claims Act* (NSW) inapplicable, and legitimately so if Australian law were to consider an action of this kind to be tortious.

In *Zurich Insurance*, all of the judges usefully sharpened the conceptual distinction between personal, territorial and subject-matter jurisdiction — distinctions that were important to explain the validity of ss 9 and 10 of the *Trans-Tasman Proceedings Act 2010* (Cth) and which are significant in many areas of the law. The complications revealed with the territorial reach of the *Claims Act* (NSW) emerge only by a failure to maintain those distinctions in treating the subject-matter jurisdiction of the Act as conditional only on the personal and territorial jurisdiction of the courts. In effect, this gives the legislation a larger territorial application than the territorial jurisdiction of the court, because it is not subject to any geographical restraints on the exercise of jurisdiction, such as those found in the sorting provisions of the *Service and Execution of Process Act* (Cth) and the *Trans-Tasman Proceedings Act 2010* (Cth).[143] *Zurich Insurance* should nevertheless be welcomed, especially since it supports the integrity of the trans-Tasman judicial area and its distinctive approach to securing proportionate personal jurisdictions for participating state courts. It should be expected that state parliaments and courts together be as equally proportionate in the territorial claims they make for the application of their statutes.

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138 *DRJ* (n 127) 709–10 [67]–[77] (Leeming JA); cf *Zurich Insurance* NSWSC (n 18) [65].

139 *Barcelo v Electrolytic Zinc Company of Australasia Ltd* (1932) 48 CLR 391, 428 (Dixon J); *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 600–1 (Dixon J); *DRJ* (n 127) 722 [125]–[126], 725–6 [139]–[141] (Leeming JA).

140 Rein J would not accept that, if the chosen governing law was that of a place other than New South Wales, the *Claims Act* would also be have to be excluded: *Zurich Insurance* NSWSC (n 18) [70].

141 *Plozza v South Australian Insurance Co Ltd* [1963] SASR 122 (Hogarth J); *Hodge v Club Motor Insurance Agency Pty Ltd* (1974) 22 FLR 473 (Bray CJ, Bright and Zelling JJ); Dimity Kingsford-Smith and Gregory Burton, 'Recent Problems with Characterization of Statutory Rights in the Conflict of Laws' (1980) 9(1) *Sydney Law Review* 190, 191–202.

142 *Ryder v Hartford Insurance Co* [1977] VR 257 (Jenkinson J); cf *Li Lian Tan v Durham* [1966] SASR 143, 149 (Chamberlain J).

143 See above nn 4–5 and 10–12 and accompanying text.

THE INDIRECT IMPACTS OF CLIMATE CHANGE LITIGATION: ITS POTENTIAL TO PREVENT CONFLICT AND ATROCITY CRIMES ELSEWHERE

YVONNE BREITWIESER-FARIA*

Climate change has been the subject of much debate as a threat multiplier to international peace and security. The risk that climate change might adversely affect conflict situations has generally been accepted. Its role towards the exacerbation of risk factors for atrocity crimes has, however, received little attention to date. As the number of climate change litigation cases increases internationally, it raises questions as to the potential impact of climate litigation, not only vis-à-vis climate action, but also beyond. This article considers whether effective climate litigation may prevent conflict and atrocity crimes elsewhere. It concludes that, where climate litigation is successful in achieving accountability for the implementation or enforcement of States' climate commitments, it may have an indirect impact on alleviating the outbreak of conflict and contributing towards the prevention of atrocity crimes.

I INTRODUCTION

The initial goal of limiting temperature increases to less than 1.5°C above pre-industrial levels seems less and less attainable.[1] Consequently, plaintiffs are taking action through international climate change and environmental protection litigation on the basis of tort law, domestic and international human rights law, international environmental law and customary international law.[2] The last

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1 *Paris Agreement under the United Nations Framework Convention on Climate Change*, opened for signature 22 April 2016, [2016] ATS 24, 3156 UNTS 79 (entered into force 4 November 2016) ('*Paris Agreement*'). See also United Nations Environment Programme, *Emissions Gap Report 2022: The Closing Window — Climate Crisis Calls for Rapid Transformation of Societies* (2022) ('*Emissions Gap Report 2022*').

2 While debates exist over definitions applied in climate change law, this article follows the definition for 'climate change litigation' (also 'climate litigation') adopted in the policy report on global trends in climate change litigation. Climate change litigation thereby includes 'cases before

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decade has seen an influx of climate litigation before both national and international bodies, which has spurred commentary and scholarly analysis on specific high-profile cases and their potential impact on international environmental law and climate change mitigation.[3] Climate litigation has been recognised for its potential to affect 'the outcome and ambition of climate governance'.[4] It has the potential to challenge States' responses and enforcement of climate commitments.[5] Cases with a strategic focus potentially enable claimants to influence a 'broader societal shift' including the advancement of government and company climate policies, challenging overall responses to climate change, and advancing public awareness and action.[6]

Climate change has been the subject of much debate as a threat multiplier to conflicts and international peace and security. Research on the impact of climate change on peace and security has also grown considerably. Climate change has been suggested as a risk for 'conflicts, geo-political rivalries, critical infrastructure, terrorism or human security'.[7] Some have identified a strong link between extreme weather events and the subsequent outbreak of violent conflict,[8] while others have expressed doubts in relation to the explanatory models utilised and stress the need for further research.[9] Although some conflict may be linked to weather events, further research is required into whether those instances were the result of climate change.

Multiple studies and reports suggest that climate change and environmental degradation have the potential to adversely affect conflict situations and also, separately, exacerbate risk factors for genocide, war crimes and crimes against humanity (referred to in combination as 'atrocity crimes') including humanitarian crises as a result of natural disasters, economic instability, and

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judicial and quasi-judicial bodies that involve material issues of climate change science, policy, or law': Joana Setzer and Catherine Higham, Grantham Research Institute on Climate Change and the Environment, *Global Trends in Climate Change Litigation: 2022 Snapshot* (Policy Report, 2022) 6 ('*Global Trends 2022 Report*'). For academic debates see, eg, Jacqueline Peel and Hari M Osofsky, 'Climate Change Litigation' (2020) 16(1) *Annual Review of Law and Social Science* 21; Benoit Mayer, 'Prompting Climate Change Mitigation Through Litigation' (2022) 72(3) *International and Comparitive Law Quarterly* 233, 233.

3 See, eg, Mayer (n 2).

4 Priyadarshi Shukla et al (eds), Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change* (Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 2022) 46 ('IPCC WGIII Sixth Report').

5 *Global Trends 2022 Report* (n 2) 1, 3.

6 Ibid 1.

7 François Gemenne et al, 'Climate and Security: Evidence, Emerging Risks, and a New Agenda' (2014) 123(1) *Climatic Change* 1, 3.

8 Solomon M Hsiang et al, 'Quantifying the Influence of Climate on Human Conflict' (2013) 341(6151) *Science* 1212.

9 Tor A Benjaminsen et al, 'Does Climate Change Drive Land-Use Conflicts in the Sahel?' (2012) 49(1) *Journal of Peace Research* 97; Andrew R Solow, 'A Call for Peace on Climate and Conflict' (2013) 497 *Nature* 179; H Buhaug et al, 'One Effect to Rule Them All? A Comment on Climate and Conflict' (2014) 127(3–4) *Climatic Change* 391.

increased scapegoating due to resource scarcity.[10] It is worth noting that, while conflict also exacerbates the risk of atrocity crimes, the commission of atrocity crimes is not limited to conflict situations, nor are atrocity crimes committed in every conflict situation. Projections nevertheless suggest that disputes and violent conflict over natural resources will increase as a result of climate change impacts such as environmental degradation and large-scale migration, which may compound the risk of atrocity crimes.[11] Environmental considerations and protections have become increasingly important to the conflict and atrocity prevention function of international human rights and humanitarian law. However, the accurate prediction of the impacts of climate change — and of climate litigation — on conflict and atrocity crimes, remains difficult due to data gaps and scant evidence of causal links.

The literature on atrocity prevention has given limited attention to the potential influence of climate litigation. This is surprising as climate change is frequently considered for its potential to worsen conflict and potentially lead to the commission of atrocity crimes.[12] As climate change can be an exacerbating and contributing factor to conflict and situations at risk of atrocity crimes, and as climate litigation is a legal tool available to address climate change, the aim and purpose of this article is to explore the potential impact of climate litigation on the alleviation of conflict based on States' obligations for climate mitigation. Section II explores the potential link between climate change, conflict, and atrocity crimes. While it has generally been accepted that climate change can adversely affect conflict situations, little research exists vis-à-vis its impact on situations at risk of atrocity crimes. The section finds that climate change may be an exacerbating risk factor for existing tensions, which may result in societal, political or violent conflict increasing the risk of the commission of atrocity crimes. Climate change appears to act as a threat multiplier rather than a direct cause of conflict and atrocity crimes. Subsequently, section III considers the potential role of climate litigation in alleviating conflict and contributing to the prevention of atrocity crimes. It does so by examining the efficacy of climate litigation generally, before drawing connections to any potential implications for conflicts and atrocity crimes. It considers specific actions required as a result of climate litigation and whether and how these actions or policy changes align with measures that may reduce the risk of atrocity crimes. The article concludes that,

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10 See, eg, Lyal S Sunga, 'Does Climate Change Worsen Resource Scarcity and Cause Violent Ethnic Conflict?' (2014) 21(1) *International Journal on Minority and Group Rights* 1; Hsiang et al (n 8); *The Environment and Human Rights (Advisory Opinion)* (Inter-American Court of Human Rights, Series A No 23, 15 November 2017); various reports by the Intergovernmental Panel on Climate Change ('IPCC'). For more exacerbated risk factors, see section II.

11 Oli Brown, 'Heating Up: Mediation and Climate Change — Oslo Forum Reflections', *Centre for Humanitarian Dialogue* (online, 8 July 2019).

12 See, eg, Sunga (n 10); Banjaminsen et al (n 9); Solow (n 9); Buhaug et al (n 9); Zorzeta Bakaki and Roos Haer, 'The Impact of Climate Variability on Children: The Recruitment of Boys and Girls by Rebel Groups' (2022) 60(4) *Journal of Peace Research* 634.

where climate litigation is successful as an instrument of achieving the accountability for the implementation or enforcement of States' climate commitments, it may have an indirect impact on alleviating the outbreak of conflict and contribute towards the prevention of atrocity crimes elsewhere.

II The Nexus Between Climate Change and Conflict and Atrocity Crimes

Concerns about climate change date back decades. However, action taken at the international level has been slow and disjointed. International bodies, such as the Intergovernmental Panel on Climate Change ('IPCC') have long warned the international community of the rising global surface temperature resulting in unexpected or exacerbated droughts and heat waves; the absorption of 80 per cent of increased heat around the globe by the ocean; changes in rainfall patterns; rising sea levels and melting glaciers and icecaps; and an increased frequency of extreme weather events, among other consequences.[13] Multiple international treaties, respective customary international law and numerous soft-law instruments exist that focus on the protection of the environment and the mitigation of climate change, yet climate mitigation action by States remains largely unsatisfactory.[14]

To fulfil climate mitigation obligations assumed by States, it is necessary for States and policy makers to develop strategies to reduce climate change and its adverse effects, including a possible nexus between climate change and increased risks of conflict and atrocity crimes. This section explores whether a potential connection between climate change on the one hand, and conflict on the other, exists, in order to determine, in turn, whether climate change and environmental degradation may be viewed as possible risk factors for atrocity crimes. Academic commentary exists that raises concerns for the exacerbation of violent conflict more generally as a consequence of climate change.[15] Limited commentary exists in relation to atrocity crimes specifically.[16] While conflict can exacerbate the risk for atrocity crimes, the commission of atrocity crimes is not limited to conflict situations, nor are atrocity crimes committed in every conflict situation. It nevertheless remains necessary to consider the adverse effects of climate change on conflict situations to appreciate its wide potential impacts and potential role in the exacerbation of situations at risk of the commission of atrocity crimes.

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13 Susan Solomon et al (eds), Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis* (Fourth Assessment Report of the Intergovernmental Panel on Climate Change, 2007) 252.

14 See, eg, *Emissions Gap Report 2022* (n 1); António Guterres, 'The State of the World' (Special Address to the World Economic Forum Annual Meeting, Davos, 18 January 2023).

15 See, eg, Banjaminsen et al (n 9); Solow (n 9); Buhaug et al (n 9).

16 See, eg, Sunga (n 10); Bakaki and Haer (n 12).

Throughout the decades, multiple resolutions and reports by international bodies have suggested a nexus and potential causal link between climate change and adverse risks, which may result in violent or armed conflict, particularly where governmental infrastructures are unable to mitigate or address environmental stresses effectively.[17] Former United Nations ('UN') Secretary-General Kofi Annan forewarned that:

> we can see real risks that resource depletion, especially freshwater scarcities, as well as severe forms of environmental degradation, may increase social and political tensions in unpredictable but potentially dangerous ways.[18]

Importantly, the Millennium Report also famously queried the complex and sensitive relationship between humanitarian intervention and State sovereignty in cases of 'gross and systematic violations of human rights that offend every precept of our common humanity' — a stepping stone towards the adoption of the political principle of the Responsibility to Protect ('R2P') and States' obligations vis-à-vis atrocity crimes.[19] Where genocide, war crimes, crimes against humanity, or ethnic cleansing, threaten a State's vulnerable population, it has the responsibility to protect its population.[20] This responsibility exists notwithstanding the underlying cause(s) for such an at-risk situation, including exacerbated risks through climate change. In accordance with the political principle, the international community, in turn, is prepared to take collective action where a State is manifestly failing to protect its population, beyond its responsibility to 'use appropriate diplomatic, humanitarian and other peaceful means'.[21] Notwithstanding its endorsement by the UN General Assembly in 2005, in practice, R2P, and any associated 'preparedness' by the international community 'to take collective action', is supported by some States and not others, with frequent reluctance by the international community to take such action in

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17 United Nations General Assembly, *World Charter for Nature*, GA Res 37/7, 37th sess, UN Doc A/RES/37/7 (28 October 1982) preamble; United Nations General Assembly, *Report of the World Commission on Environment and Development*, GA Res 42/427, 42nd sess, A/RES/42/427 (4 August 1987) Chapter 11 [5]–[6] ('*Brundtland Report*').

18 Kofi Annan, *We the Peoples: The Role of the United Nations in the 21st Century*, UN Doc A/54/2000 (27 March 2000) 32 ('*Millennium Report*').

19 Ibid 48. The Responsibility to Protect ('R2P') is a political principle unanimously adopted by 150 Heads of State and Government at the 2005 World Summit. States thereby accepted responsibility for the protection of their populations from genocide, war crimes, crimes against humanity and ethnic cleansing. The primary responsibility resides with the individual State while the international community shares this responsibility as far as providing appropriate assistance through diplomatic, humanitarian, or other peaceful means in accordance with Chapters VI and VIII of the UN Charter. Should a State be manifestly failing to protect its population, the international community is prepared to take timely and decisive collective action in accordance with Chapter VII of the UN Charter. United Nations General Assembly, *2005 World Summit Outcome*, GA Res 60/1, 60th sess, UN Doc A/RES/60/1 (16 September 2005).

20 United Nations General Assembly, *2005 World Summit Outcome*, GA Res 60/1, 60th sess, UN Doc A/RES/60/1 (16 September 2005) [138].

21 Ibid [139].

accordance with the principle.[22] In any case, the exacerbating factors for genocide, war crimes, crimes against humanity, and ethnic cleansing are irrelevant; the underlying responsibility of the individual State, and the international community's 'preparedness' as accepted within the R2P principle remains.

A more direct link between climate change and the outbreak of armed conflict was drawn in the case of Darfur, Sudan:

> It is no accident that the violence in Darfur erupted during the drought. Until then, Arab nomadic herders had lived amicably with settled farmers. … But once the rains stopped, farmers fenced their land for fear it would be ruined by the passing herds. For the first time in memory, there was no longer enough food and water for all. Fighting broke out. By 2003, it evolved into the full-fledged tragedy we witness today.[23]

Similar assessments on the nexus between climate change and the increased risk of conflict were made by the United Nations Environmental Program ('UNEP') vis-à-vis Sudan,[24] a review commissioned by the United Kingdom in relation to West Africa, the Nile Basin and Central Asia,[25] and by various non-governmental organisations vis-à-vis 'Darfur, the Sahel and elsewhere'.[26] Multiple studies exist linking environmental stresses and resource scarcity or surplus to a worsening of local conflicts and enhanced displacement risks.[27] Other academic commentary links climate change to increased societal and political instability, violent conflict, displacement or the potential of increased recruitment of children by rebel groups.[28] In 2011, the United Nations Development Programme's ('UNDP') report drew a clear connection between climate change, resource scarcity and conflict:

> An estimated 40 percent of civil wars over the past 60 years are associated with natural resources, and since 1990 at least 18 violent conflicts have been fuelled by the exploitation of natural resources and other environmental factors. … For example, greater variability in rainfall increases the risk of civil conflict, particularly in Sub-

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22 Notably, some Latin American, Arab and African delegates held in 2008 that R2P had been rejected at the 2005 World Summit and had neither been accepted or adopted by the United Nations General Assembly. See UN GAOR, 5th Comm, 63rd sess, 28th mtg, UN Doc GA/AB/3837 (4 March 2008).

23 Ban Ki-Moon, 'A Climate Culprit in Darfur', *The Washington Post* (online, 16 June 2007) <https://www.un.org/sg/en/content/sg/articles/2007-06-16/climate-culprit-darfur>.

24 United Nations Environment Program, *Sudan Post-Conflict Environmental Assessment* (Synthesis Report, 2007).

25 Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, 2006).

26 See generally International Crisis Group, 'Climate, Environment and Conflict' (Web Page) <https://www.crisisgroup.org/future-conflict/climate-environment-and-conflict>; Global Witness, 'Challenging Abuses of Power to Protect Human Rights and Secure the Future of our Planet' (Web Page) <www.globalwitness.org/campaigns/conflict>. See also Sunga (n 10) 12.

27 See, eg, in relation to Bangladesh: Parvin Sultana and Paul M Thompson, 'Adaptation or Conflict? Responses to Climate Change in Water Management in Bangladesh' (2017) 78 *Environmental Science and Policy* 149. In relation to Afghanistan: Andrej Prívara and Magdaléna Prívarová, 'Nexus between Climate Change, Displacement and Conflict: Afghanistan Case' (2019) 11(20) *Sustainability* 5586.

28 See, eg, Bakaki and Haer (n 12).

> Saharan Africa, where a 1°C rise in temperature is associated with a greater than 10 percent increase in the likelihood of civil war the same year. Recent episodes support the link. Competition over land contributed to post-election violence in Kenya in 2008 and to tensions leading to the 1994 genocide in Rwanda. Water, land and desertification are major factors in the war in Darfur, Sudan. In Afghanistan conflict and the environment are caught up in a vicious cycle — environmental degradation fuels conflict, and conflict degrades the environment.[29]

Similarly, the Inter-American Court of Human Rights ('IACtHR') concurred with previous findings of international bodies and judicial organs finding that:

> environmental threats … can affect, directly or indirectly, the effective enjoyment of concrete human rights affirming that … ii) climate change has very diverse repercussions on the effective enjoyment of human rights, like the rights to life, health, food, water, shelter and free determination, and iii) 'environmental degradation, desertification and global climate change are exacerbating poverty and despair, with negative consequences for the fulfillment of the right to food, especially in developing countries'.[30]

Such exacerbated poverty and despair may also lead to the increase of natural disasters, further affecting resource scarcity, societal conflict over resources and other factors that may increase the likelihood of conflict as well as atrocity crimes. In fact, resource scarcity and the resulting competition over resources function as a 'threat multiplier', exacerbating other risks including economic instability, corruption, and degradation of human rights, which may place vulnerable populations at an elevated risk of atrocity crimes.[31] The UN General Assembly recently reiterated that the adverse impacts of climate change disproportionately affect the most vulnerable, posing an 'ever-greater social, cultural, economic and environmental threat'.[32] A recent report on Yemen, for example, found that the State is 'facing one of the worst humanitarian crises in the world' and suffers from the commission of war crimes and crimes against humanity 'due to a combination of prolonged conflict, economic crisis and recurrent climate change-related natural hazards'.[33] Climate change is linked to the exacerbation of existing vulnerabilities within a society. While there may be many risk factors, economic and societal impacts of climate change and environmental degradation

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29 United Nations Development Programme, *Human Development Report 2011 — Sustainability and Equity: A Better Future for All* (New York, 2011) 59 ('*Human Development Report 2011*').

30 *The Environment and Human Rights (Advisory Opinion)* (n 10) [54], citations omitted.

31 *Human Development Report 2011* (n 29) 59; Sunga (n 10) 14.

32 United Nations General Assembly, *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*, GA Res 77/276, 77th sess, UN Doc A/RES/77/276 (29 March 2023). In adopting this resolution, the General Assembly requested an advisory opinion from the International Court of Justice ('ICJ') on the obligations of States with respect to climate change. See also United Nations General Assembly, *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*, 77th sess, Agenda Item 70, UN Doc A/77/L.58 (1 March 2023).

33 Kyungmee Kim et al, Stockholm International Peace Research Institute, *Yemen: Climate, Peace and Security Fact Sheet* (Fact Sheet, June 2023) ('*Yemen Factsheet*').

warrant particular consideration vis-à-vis the risk of conflict and atrocity crimes.[34] However, it is also important to note that the causal link between climate change and conflict or atrocity crimes is not predetermined, linear, or direct.

Where effective democratic avenues are available — such as remedies to channel grievances over issues caused by climate change and environmental degradation — the outbreak of conflict, civil war or atrocity crimes is less likely.[35] Resilience of a population or State may be due to the establishment of legitimate and accountable infrastructures, frameworks, and national institutions, and enactment of legislation, that provide for respect of the rule of law and human rights, without discrimination; the elimination of corruption; and the management of diversity. Whether threat multipliers contribute to and potentially exacerbate tensions that evolve into conflict and the commission of atrocity crimes depends, to a large extent, on the affected society's resilience.[36] Vulnerable societies with a lack of, or insufficient overall response to, climate change are likelier to engage in violent conflict as a result of the effects of climate change.[37] In some cases, increased tension and conflict may also lead to the degradation of environmental governance, leaving populations vulnerable to increased disputes over natural resources.[38] The IPCC suggests that '[c]limate change can indirectly increase risks of violent conflicts in the form of civil war and inter-group violence by amplifying well-documented drivers of these conflicts such as poverty and economic shocks',[39] and that its impacts may amplify or aggravate 'existing tensions within and between communities' or States.[40]

On the other hand, other authors note that a very limited number of wars have directly been caused by climate change, environmental degradation or their effects,[41] or that environmental stresses including resource scarcity play a less significant role as risk factors for conflict and atrocity crimes than economic or

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34 See remainder of this Part.

35 Sunga (n 10) 16; Sultana and Thompson (n 27).

36 Sultana and Thompson (n 27).

37 T Carleton et al, 'Conflict in a Changing Climate' (2016) 225(3) *The European Physical Journal Special Topics* 489; Dennis M Mares and Kenneth W Moffett, 'Climate Change and Interpersonal Violence: A "Global" Estimate and Regional Inequities' (2016) 135(2) *Climatic Change* 297.

38 *Yemen Factsheet* (n 33).

39 Christopher B Field et al (eds), Intergovernmental Panel on Climate Change, *Climate Change 2014: Impacts, Adaptation, and Vulnerability* (Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, 2014) 20.

40 Hans-Otto Pörter et al (eds), *Climate Change 2022: Impacts, Adaptation and Vulnerability* (Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 2022) 1190 ('*IPCC WGII Sixth Report*'); Kendra Sakaguchi et al, 'Climate Wars? A Systematic Review of Empirical Analyses on the Links between Climate Change and Violent Conflict' (2017) 19(4) *International Studies Review* 622.

41 See, eg, Simon Dalby, 'Peacebuilding and Environmental Security in the Anthropocene' in Didier Péclard (ed), *Environmental Peacebuilding: Managing Natural Resource Conflicts in a Changing World Swisspeace Annual Conference 2007* (Swisspeace Publications, 2009) 10.

political risk factors.[42] In actuality, conflict causation is multi-pronged and unlikely to be entirely attributable to a sole factor. Whether a concrete and direct causal link between climate change and the increased risk of conflict or atrocity crimes exists remains inconclusive on the basis of available evidence. Frequently, such a direct nexus appears to have only been assumed.[43]

While climate change and environmental degradation are therefore not directly identified as risk factors for atrocity crimes in commentary, the Framework of Analysis for Atrocity Crimes highlights that a 'humanitarian crisis or emergency, including those caused by natural disasters' may be a common risk factor for 'situations that place a State under stress and generate an environment conducive to atrocity crimes'.[44] Other risk factors, which may be potentially exacerbated by climate change, include 'economic instability caused by scarcity of resources or disputes over their use or exploitation' especially as they relate to food resources,[45] 'economic instability caused by acute poverty, … or deep horizontal inequalities',[46] 'economic interests, including those based on the safeguard and wellbeing of elites or identity groups', corruption, poor governmental infrastructure and planning to account for effective responses to climate change impacts,[47] or 'control over the distribution of resources',[48] degradation of human rights or increased human rights violations, and a lack of mitigating factors.[49] All these risk factors, in themselves or combined, may contribute to situations at risk of atrocity crimes.[50] The risk factors for atrocity crimes are compounded by multi-hazard risks whereby their likelihood increases for vulnerable populations who experience 'repeated and successive climatic events' as a result of climate change.[51] These risk factors are, however, more likely to lead to conflict and atrocity crimes where they occur in conjunction with other risk factors such as lack of or limited effective human rights mechanisms and

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42 See, eg, Val Percival and Thomas Homer-Dixon, 'Environmental Scarcity: The Case of South Africa' (1998) 35(3) *Journal of Peace Research* 279, 314.

43 *IPCC WGII Sixth Report* (n 40) 1190; Bakaki and Haer (n 12) 3; Buhaug (n 9); Jan Selby, 'Positivist Climate Conflict Research: A Critique' (2014) 19(4) *Geopolitics* 829.

44 United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes: A Tool for Prevention* (Framework, 2014) indicator 1.3 ('*Framework of Analysis for Atrocity Crimes*').

45 Ibid indicator 1.7.

46 Ibid indicator 1.9.

47 Jan Selby et al, 'Climate Change and the Syrian Civil War Revisited' (2017) 60 (September) *Political Geography* 232.

48 *Framework of Analysis for Atrocity Crimes* (n 44) indicator 4.2.

49 See, eg, ibid indicators 6.1–6.11. Climate change may also indirectly impact other risk factors identified in the framework document in less obvious manners.

50 Carleton et al (n 37); Nina von Uexkull et al, 'Drought, Resilience, and Support for Violence: Household Survey Evidence from DR Congo' (2016) 64(10) *Journal of Conflict Resolution* 1994; Tobias Ide et al, 'Multi-Method Evidence for When and How Climate-Related Disasters Contribute to Armed Conflict Risk' (2020) 62 (May) *Global Environmental Change* 102063.

51 *IPCC WGII Sixth Report* (n 40) 1178.

democratic governance, political instability, lack of trust in the ruling government and established infrastructures, and limited societal resilience.

Consequently, climate change may worsen existing tensions, which can lead to societal, political, or violent conflict.[52] It is therefore necessary to consider climate change in connection with (un)sustainable (governmental) practices, (in)stability and (in)security and (a lack of) societal resilience *inter alia* to understand a specific situation at risk of conflict or atrocity crimes. Climate change and environmental degradation are more accurately characterised as important threat multipliers for conflict and atrocity crimes as opposed to a direct cause.

III The Potential Impact of Climate Change Litigation on Conflicts And Atrocity Crimes

While climate change may more accurately be characterised as a threat multiplier of existing tensions for conflict and risk factors indicating at-risk situations of atrocity crimes, climate litigation may still contribute to conflict alleviation and atrocity prevention in the long term. Logically, a main focus of climate litigation is the enforcement or enhancement of climate commitments with the aim of improving a State's response(s) to climate change. Notwithstanding this purpose, this section analyses the potential role of climate litigation in driving environmental change while considering the indirect impact of climate change on conflicts and situations at risk of atrocity crimes beyond a State's own territory. It considers specific actions required as a result of climate litigation, and whether and how these actions or policy changes align with measures that may reduce the risk of atrocity crimes. Initially, doubts were raised by some in relation to the efficacy of litigating climate change cases before domestic courts as opposed to regional or international human rights dispute-settlement mechanisms,[53] or questioned the effectiveness of climate litigation to compel climate responses and overall climate policy in the first instance.[54] However, domestic climate litigation cases are now staggering in numbers and include extremely successful cases in

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52 Luca Marchiori et al, 'The Impact of Weather Anomalies on Migration in Sub-Saharan Africa' (2012) 63(3) *Journal of Environmental Economics and Management* 255.

53 Timo Koivurova, 'International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects' (2007) 22(2) *Journal of Environmental Law & Litigation* 267; Stephen Tully, 'The Contribution of Human Rights as an Additional Perspective on Climate Change Impacts within the Pacific' (2007) 5(1) *New Zealand Journal of Public and International Law* 169.

54 Sunga (n 10) 22. See, eg, Eric A Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal' (2007) 155(6) *University of Pennsylvania Law Review* 1925.

terms of requiring climate-mitigation action.[55] A recent snapshot of global trends in climate litigation identifies that, in total, 94.8 per cent of climate-litigation cases have been filed before domestic courts.[56] The remaining cases were filed before regional or international courts and tribunals including the European Court of Human Rights, the IACtHR, the European Court of Justice and the East African Court of Justice, and before quasi-judicial bodies such as the UN Human Rights Commission. The report demonstrates that most climate litigation cases are brought before domestic courts initially, while still appearing to achieve favourable outcomes.

The purposes of climate litigation are various and may include, among other things: the pursuit of accountability of States' for their failure to appropriately integrate climate change considerations into policies or facilities;[57] the enforcement of climate standards;[58] challenging governmental funding of projects not aligned with climate action and standards;[59] or compensation for damages suffered due to climate impacts.[60] Vis-à-vis its potential to contribute to the prevention of atrocity crimes, the main issue considered in this article is whether climate litigation has the potential to achieve effective climate policy and whether such policy change can be expected to reduce the risk of atrocity crimes.

'Framework' cases against States have increased in recent years. They address the 'design and overall ambition of [a State's] response to climate change and/or the adequacy of the implementation of a policy response'.[61] Cases with a strategic focus potentially result in a 'broader societal shift' through the integration of climate standards and principles into governmental policies.[62] The Global Trends 2022 Report indicates that 54 per cent of cases reviewed had

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55 See, eg, *Urgenda Foundation v State of the Netherlands* [2019] ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands) ('*Urgenda Case*'); *Asghar Leghari v Federation of Pakistan* [2018] WP No 25501/201 (The Lahore High Court) ('*Asghar Leghari Case*'); *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 ('*Rocky Hill Case*'); *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 ('*Waratah Coal Case*').

56 *Global Trends 2022 Report* (n 2) 9. Out of 2002 total cases identified as at 31 May 2022, the vast majority of cases have been filed before United States domestic courts (71.2 per cent), followed by Australia (6.2 per cent), the United Kingdom (4.2 per cent) and the European Union (3 per cent), with cases from the Global South increasing in number as well.

57 See, eg, David Markell and JB Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' (2012) 64(1) *Florida Law Review* 15; United Nations Environment Programme, *Global Climate Litigation Report: 2020 Status Review* (2020).

58 See, eg, Kim Bouwer and Joana Setzer, *Climate Litigation as Climate Activism: What Works?* (The British Academy, 2020).

59 See, eg, *Africa Climate Alliance et al v Minister of Mineral Resources & Energy et al* [2022] ZAGPPHC 946) (High Court of South Africa); *Kang et al v KSURE and KEXIM* (2022) (Seoul District Court).

60 See, eg, *Ministry of Environment and Forestry v PT Jatim Jaya Perkasa* [2017] Decision No 108/Pdt.G/2015/PN.Jkt.Utr (9 August 2017) (Supreme Court of Indonesia); Oberlandesgericht (Higher Regional Court of Hamm), 2 O 285/15 *Luciano Lliuya v RWE AG*, 27 September 2021; *Ministéro Público Federal v de Rezende* (2021) (7th Federal Environmental and Agrarian Court of the Judiciary Section of Amazonas).

61 *Global Trends 2022 Report* (n 2) 3.

62 Ibid 19.

favourable outcomes for climate-mitigation action, while another 10.5 per cent had neutral results or were withdrawn or settled.[63] However, the outcomes of climate-litigation cases may represent a more complex picture. Whether or not an outcome of a case is considered 'favourable' for the purposes of the policy report may change during the course of the proceedings as the report includes positive rulings on procedural issues as favourable as well as positive rulings on the merits of a case.[64] Additionally, where outcomes of cases may be deemed unfavourable, such cases may still have a positive outcome for the development and clarification of international environmental law,[65] or may result in more climate litigation. The report further suggests that '[e]ven cases that never make it to a full hearing may have an impact on decision-making processes' driving climate policy.[66] This may be due to an increased understanding of legal interventions, which may result in high impact for change. Other research suggests that cases in which a (quasi-)judicial body identifies specific measures to be taken to fulfil climate mitigation obligations are likelier to succeed than cases which require a (quasi-)judicial body to consider an entity's necessary level of implementation of its general mitigation obligation.[67] In fact, many climate litigation cases submitted based on the protection of human rights will have such atomistic elements allowing (quasi-)judicial bodies to consider the adoption of specific measures by States to fulfil their climate-mitigation obligations.[68]

Specific climate-mitigation actions required by climate litigation are varied. In the *Urgenda Case*, for example, the Dutch domestic courts ordered the Dutch government to reduce the State's emissions in its territory by 25 per cent by 2020 compared to 1990 levels to fulfil its international obligations.[69] Holistic judicial decisions, such as in the *Urgenda Case*, determine 'the level of mitigation action that is required from the defendant'.[70] As opposed to ordering specific measures, the decision of how a State fulfils its domestic and international obligations and judicial decisions is left to the discretion of the respective government. However, other decisions may also be limited to the determination that mitigation action

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63 Ibid 3, 26. A quantitative review of all cases in the Climate Change Laws of the World ('CCLW') database where a decision on procedural questions or the merits was made was conducted. The CCLW database excludes United States cases.

64 Ibid 47.

65 See, eg, United Nations Committee on the Rights of the Child, *Decision Adopted by the Committee Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure Concerning Communication No. 104/2019*, UN Doc CRC/C/88/D/107/2019 (22 September 2021) ('*Sacchi et al v Argentina et al*').

66 *Global Trends 2022 Report* (n 2) 3.

67 Mayer (n 2).

68 See, eg, United Nations Human Rights Committee, *Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol Concerning Communication No. 3624/2019*, UN Doc CCPR/C/135/D/3624/2019 (21 July 2022) ('*Daniel Billy et al v Australia*').

69 *Urgenda Case* (n 55).

70 Mayer (n 2) 234.

taken by a defendant were insufficient without a determination of what may constitute a sufficient level of mitigation action.

In the successful case of *Asghar Leghari v Federation of Pakistan*, the Pakistani government was found to have been in violation of domestic mitigation policies, which had direct impacts on Pakistan's resource security.[71] The court adopted a human-centred approach to environmental law and policy, and created a Climate Change Commission to oversee the effective implementation of these policies.[72] Such mitigation action strengthens the transparency and accountability of public institutions and the perceived faith in them by civil society. Where climate mitigation action ensures that all levels of government subscribe and adhere to principles of transparency, and accountability in the design and delivery of public services, it also acts as a mitigating factor for conflict and atrocity crimes.[73] Where governmental actions and political authority on climate questions is exercised in a transparent manner and subject to the rule of law, with mechanisms to counter corruption in public institutions, the risk of atrocity crimes is reduced through enhanced trust by the population generally in public institutions.

In *Gloucester Resources Limited v Minister for Planning* (the '*Rocky Hill Case*'),[74] climate change considerations and its adverse impacts led to the refusal of the 'Rocky Hill Mine Project'. In his reasoning, Preston CJ questioned the market substitution argument advanced by the defendant that developing States will approve new coal mines in Australia's stead. The approval of the mine would therefore not contribute to additional emissions. The court instead found that '[d]eveloped countries such as Australia have a responsibility, including under the *Climate Change Convention*,[75] the *Kyoto Protocol*,[76] and the *Paris Agreement*,[77] to take the lead in taking mitigation measures to reduce greenhouse gas ('GHG') emissions'.[78] Judicial decisions such as in the *Rocky Hill Case* are demonstrative of the reach domestic judicial decisions may have: on a domestic level, subsequent

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71 *Asghar Leghari Case* (n 55).

72 Ibid.

73 Asia-Pacific Centre for the Responsibility to Protect and Global Centre for the Responsibility to Protect, *A Framework for Action for the Responsibility to Protect: A Resource for States* (Report, 2023) action 1.2 ('*Framework of Action*'). The Framework for Action is a 'sister' document to the Framework of Analysis, and aims to provide for States on how to reduce or respond to risks of atrocity crimes. The Framework identifies 25 actions States may take once they have identified possible risk-factors. The Framework only makes one mention of the role of climate change on the prevention or response to atrocity crimes, climate change mitigation actions across the national, bilateral, regional, and the multilateral level have the potential to directly or indirectly contribute to the prevention of atrocity crimes through the reduction of their risk factors.

74 *Rocky Hill Case* (n 55).

75 *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

76 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005).

77 *Paris Agreement* (n 1).

78 *Rocky Hill Case* (n 55) [539].

coal mining applications have been refused on similar reasoning,[79] and internationally, the decision may also be seen as imposing necessary measures to fulfil domestic and international environmental obligations.

Similar decisions also considered human rights in addition to climate change impacts.[80] Mitigation actions in line with human rights considerations contribute to the promotion of such rights specifically affected by climate change and human rights in the State generally. Where climate-change mitigation action contributes to the promotion of social and economic equality, for example, through the consideration of the impact of climate change on resources, such policy and action can have a direct contribution to the prevention of atrocity crimes. States may do so through the review and revision of laws and policies regulating the use of land and property or the management and distribution of natural resources, as well as the development of State-sponsored infrastructure in line with their domestic and international obligations.[81] The implementation of policy reducing already vulnerable populations and at-risk States' exposure and vulnerability to adverse climate effects is beneficial.

In fact, the need for climate-mitigation action and policy has increasingly been linked to the fulfilment of human rights.[82] States may focus on the development and strengthening of inhibitors of human rights and national early-warning systems for both climate change and atrocity crimes. The development of independent public institutions in the sphere of climate change strengthens the transparency and accountability of such institutions, contributing to positive civil society engagement. Leveraging such engagement and the strengthening of human rights in a State generally contribute to the reduction of risk factors including those for conflict and atrocity crimes. Other measures include the development and strengthening of national regulations and standards vis-à-vis the activities of corporations within their jurisdiction to ensure they do not compound the impacts of climate change. Where such measures are still deemed insufficient or ineffective, international human rights systems may be utilised to address the risks of climate change (and of atrocity crimes).[83]

Judicial bodies may, however, also determine conditions, which are necessary for a State to implement, but which may not be sufficient to meet, its international mitigation obligations. Such atomistic cases may require the adoption of, or adherence to, procedural measures,[84] or substantive

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79 NSW Independent Planning Commission, '*Bylong Coal Project*', (Case Status, 24 March 2022) <https://www.ipcn.nsw.gov.au/cases/2018/10/bylong-coal-project>.

80 See, eg, *Waratah Coal Case* (n 55).

81 *Framework for Action* (n 73) action 1.1.

82 See, eg, *Daniel Billy et al v Australia* (n 68); *Sacchi et al v Argentina et al* (n 65).

83 See, eg, *Framework for Action* (n 73) action 4.2.

84 For example, the adoption of a specific and transparent national policy on climate change and its mitigation. See, eg, *Friends of the Irish Environment v Ireland* [2020] IESC 49, 2 (Supreme Court of Ireland).

measures.[85] A State's compliance with an atomistic judicial decision does not, however, necessarily result in compliance with its international obligations, particularly where the relevant measures are themselves ineffective.[86] As demonstrated above, climate change has the potential to exacerbate existing tensions and risk factors for atrocity crimes in at-risk States among vulnerable populations. It is possible for environmental policies or (in)action by a State or a collection of States to establish a causal chain to events in another State or region on the other side of the globe. It may also be possible to quantify the emissions of individual actors and therefore their contribution to extreme weather events such as floods, storms, heatwaves, and droughts, as well as gradual climate change impacts. Such attribution research may allow (quasi-)judicial bodies to determine whether the contribution of an individual State has increased the probability or the severity of a specific environmental event. For example, studies suggest that emissions from European Union Member States may have played a significant contribution towards the increased likelihood for Argentina's heatwave in 2013–14.[87]

As climate change may have an indirect impact on conflicts and at-risk situations, just so may climate litigation that leads to favourable outcomes at the merit stage have indirect positive impacts on the alleviation of conflicts and the prevention of atrocity crimes across the globe. In such cases, multilateral cooperation and collaboration vis-à-vis mitigating actions is appropriate.[88] Indeed, climate litigation is 'nuanced and can have a variety of flow-on effects'.[89]

However, more research is required to determine the effectiveness and direct and indirect impacts of climate litigation on advancing climate policy and action as well as the alleviation of conflict and prevention of atrocity crimes. Climate litigation is not only complex and faces more taxing issues in relation to the question of collective causation,[90] attribution, and potential reparation, but it also requires the formulation of a methodology to determine and assess effectiveness.[91] Due to a lack of applied methodology in the discussion of implications of climate litigation, any policy changes or impact resulting from

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85 For example, ordering a government to adhere to a cap on emissions by taking ‚all useful measures 'in adherence to a respective emissions budget': see, eg, Counseil d'État Rec Lebon [Council of State], *Grande-Synthe v France* [2021] Rec Lebon N° 427301.

86 Mayer (n 2) 234.

87 Natasa Nedeski and André Nollkaemper, 'A Guide to Tackling the Collective Causation Problem in International Climate Change Litigation', *EJIL:Talk!* (Blog Post, 15 December 2022) <https://www.ejiltalk.org/a-guide-to-tackling-the-collective-causation-problem-in-international-climate-change-litigation/>; Friederike E L Otto et al, 'Assigning Historic Responsibility for Extreme Weather Events' (2017) 7(11) *Nature Climate Change* 757.

88 See, eg, *Framework for Action* (n 73) action 4.5.

89 Joana Setzer and Rebecca Byrnes, Grantham Research Institute on Climate Change, *Global Trends in Climate Change Litigation: 2019 Snapshot* (Report, 2019) 10.

90 Nedeski and Nollkaemper (n 87).

91 Jacqueline Peel et al, Children's Investment Fund Foundation, *Review of Literature on Impacts of Climate Litigation* (Report, 27 May 2022) 28.

climate litigation may be incremental or modest.[92] Effectiveness through impact may be determined on the basis of governmental policy or behavioural change into legal compliance or observed through climate change itself. Although more research is required, recent global trends appear to suggest that climate litigation may be able to play an increasingly important role in achieving the implementation or enforcement of States' climate commitments, placing an emphasis on the importance of incorporating climate-mitigation and climate-policy decisions into policy.

While climate-mitigation action may not be an obvious choice of measures to address the risk of atrocity crimes, some may, however, nevertheless have the potential to reduce at-risk situations through a strengthening of resilience of public institutions of at-risk States. Where specific climate change mitigation actions and policy result in, for example, the reduction of emissions, which would have otherwise contributed to extreme weather conditions elsewhere, such actions or policy change may be viewed as also contributing to the reduction of risk factors for atrocity crimes where these weather conditions were expected to affect already vulnerable populations. States can therefore take specific climate-mitigation action or enact relevant policies, which can have an indirect alleviating effect on conflict and atrocity crimes. What is required is not only policy action on climate change, which may be achieved in part through climate litigation, but also mitigation efforts to prepare and bolster already vulnerable populations and at-risk States' resilience, reducing their exposure and vulnerability to adverse climate effects.

IV Conclusion

Climate change is not, and should not be, considered as an excuse or primary cause of conflict or atrocity crimes. While climate change inevitably adversely impacts environmental stresses, which may exacerbate existing tensions within and between communities and vulnerable populations, it is possible for States to take measures to build their populations' resilience through, among other things, the strengthening of political and human stability and security, the respect, fulfilment and protection of the enjoyment of human rights, the provision of democratic governance, dispute-resolution mechanisms and the rule of law.[93] Not all adverse effects of climate change therefore result in conflict or the commission of atrocity crimes. However, as climate change increases the risk of natural disasters, rising water levels, resource scarcity, and extreme-weather events so are the risk factors for conflict and atrocity crimes exacerbated. Although the risks for societal, political, or violent conflict may increase through

[92] See also ibid 13, 28, 29.

[93] Sunga (n 10) 23.

climate-change impacts in certain circumstances,[94] the responses of States to climate change and climate litigation will be critical to alleviate exacerbated risks. The nexus between climate change and conflict and atrocity crimes depends on the specific situation on the ground. The commission of atrocity crimes is also not limited to conflict situations, nor are atrocity crimes committed in every conflict situation. At the same time, conflict may also exacerbate climate change and environmental degradation. It is therefore more accurate to characterise climate change as a threat multiplier of conflict and atrocity crimes with the need to investigate every at-risk situation *in concreto.*

Notwithstanding the indirect nexus between climate change and conflict, a definite estimate of potential impacts of climate change and of climate litigation on conflict and atrocity crimes remains difficult due to lack of available evidence. More research is required to understand the impacts of climate litigation, not only on advancing climate policy and action, but also its indirect impacts on other serious issues such as conflicts and atrocity crimes. Although climate litigation has achieved some important outcomes to date including the clarification of international environmental law and in some instances achieving climate-policy development and action, it should not be relied on as a comprehensive response and solution to insufficient climate action and regulation by States and corporate actors.[95] As many cases are still ongoing, any evidence of potential impacts of climate litigation remains mostly theoretical and anecdotal. Additionally, there are limits to the political or societal change climate litigation may achieve.[96] However, climate litigation, if successful in enforcing climate standards and internationally assumed obligations, resulting in an overhaul of ineffective climate change policies and the reduction of temperature, has the potential to indirectly alleviate risk factors for conflict and contribute to the prevention of atrocity crimes. Climate mitigation action that results in the establishment or strengthening of mechanisms, ensuring their adherence to transparency and accountability, and the strengthening of a State's resilience through the adherence of human rights, have the biggest potential to contribute to the reduction of conflict and the prevention of atrocity crimes. What is required is not only policy action on climate change, which may be achieved in part through climate litigation, but also mitigation efforts to prepare and bolster already vulnerable populations and at-risk States' resilience, reducing their exposure and vulnerability to adverse climate effects.

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94 Katharine J Mach et al, 'Climate as a Risk Factor for Armed Conflict' (2019) 571(7764) *Nature* 193.

95 Felicity Millner and Kirsty Ruddock, 'Climate Litigation: Lessons Learned and Future Opportunities' (2011) 36(1) *Alternative Law Journal* 27, 32.

96 Peel et al (n 91) 24.

VANUATU LEADS DRIVE TO SECURE AN OPINION FROM THE INTERNATIONAL COURT OF JUSTICE ON STATE RESPONSIBILITIES TO TURN WORDS INTO ACTION ON CLIMATE CHANGE

SUE FARRAN*

In 2022, the Pacific-island State of Vanuatu declared a climate emergency. Though it is not the first nation to do so, the difference is that Vanuatu has been instrumental in getting the United Nations General Assembly ('UNGA') to refer the issue of climate change to the International Court of Justice ('ICJ') for an Opinion. The intention to do this was first mooted by a civil organisation of young people: 'The Pacific Island Students Fighting Climate Change'. The proposal gathered momentum with an alliance of civil society actors and subsequently other states supporting and co-sponsoring the resolution passed by UNGA. The Paris Agreement *and Paris Rulebook are steps forward but need implementation. A legal framing of international obligations could advance this. While an ICJ opinion would have no legally binding effect, it could nevertheless be of some practical benefit in a context where there is increasing recognition of the link between existing human rights and the environment and growing demand — particularly by those most adversely affected — for translating promises into action. This article considers the imperatives behind this call to the ICJ, the potential challenges that may be raised before the Court, and the possible outcomes for this initiative.*

I INTRODUCTION

Climate change impacts all countries and all people but in particular island states with limited resources to mitigate the effects of rising seas, king tides, drought and increasingly heavy tropical rainstorms, all of which aggravate the many weather-related disasters with which these places are already familiar. The vulnerability of small islands and atolls to the adverse impacts of climate change has long been recognised.[1] The Intergovernmental Panel on Climate Change

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1 See generally Maxine Burkett, 'A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy' (2013) 35 *University of Hawai'i Law Review* 633.

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('IPCC') noted this in its First Assessment Report in 1990,[2] and the 1992 *United Nations Framework Convention on Climate Change* ('*UNFCCC*') makes special reference to small island countries and those with low-lying coastal areas.[3] In 2007, the Fourth Assessment Report of the Intergovernmental Panel on Climate Change established a clear link between human activity and climate change,[4] thereby adding weight to the body of scientific research that had been suggesting this for some time.[5] The Report of Working Group III includes a chapter dedicated to small islands. Key findings highlighted that sea-level rise would 'exacerbate inundation, storm surge, erosion, and other coastal hazards, thus threatening vital infrastructure, settlements and facilities that support the livelihood of island communities.'[6] Pacific-island states were identified as among the most vulnerable countries.

In early 2022, the Pacific-island State of the Republic of Vanuatu declared a climate emergency.[7] The Prime Minister stated, '[w]e are in danger now, not just the future … Vanuatu's responsibility is to push responsible nations to match action to the size and urgency of the crisis … the use of the term emergency is a way of signalling the need to go beyond reform as usual'.[8]

While not the first country to make such a declaration, the government of Vanuatu proposed to take the climate emergency a step further by seeking to persuade other states to support a United General Assembly resolution to ask the International Court of Justice for an opinion. Impetus for this initiative originated among law students at the University of the South Pacific in 2019.[9] A group called Pacific Island Students Fighting Climate Change ('PISFCC') articulated the idea and garnered support from other civil societies, regional leaders and the then Foreign Minister for Vanuatu. In 2019, Vanuatu tabled the PISFCC proposal at the

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2 Intergovernmental Panel on Climate Change, 'Climate Change: the IPCC 1990 and 1992 Assessments' (First Assessment Report, 1992) 2.4.1.

3 *United Nations Framework Convention on Climate Change*, opened for signature on 4 January 1992, 1771 UNTS 107 (entered into force 21 March 1994) arts 4.8(a) ('Small island countries'), 4.8(b) 'Countries with low-lying coastal areas') ('*UNFCCC*').

4 Intergovernmental Panel on Climate Change, 'Climate Change 2007: Synthesis Report' (Fourth Assessment Report, 2007) ('Fourth Assessment Report').

5 The 2007 Climate Change Report was the product of three working groups looking at the physical science bases, impacts, adaptation and vulnerability, and mitigation of climate change, and was put forward as 'the standard scientific reference for all those concerned with the consequences of climate change': Intergovernmental Panel on Climate Change, 'Climate Change 2007: Impacts, Adaptation, Vulnerability (Contribution of Working Group III to the Fourth Assessment Report of the IPCC, 2007) front matter ('Impacts, Adaptation, Vulnerability').

6 Ibid 689.

7 'Vanuatu Declares a Climate Emergency', *Radio New Zealand* (online, 30 May 2022) <https://www.rnz.co.nz/international/pacific-news/468020/vanuatu-declares-a-climate-emergency>.

8 'We Are in Danger Now: Vanuatu Declares Climate Emergency', *Aljazeera* (online, 28 May 2022) <https://www.aljazeera.com/news/2022/5/28/we-are-in-danger-now-vanuatu-declares-climate-emergency>.

9 Sarina Theys, '#EndorsetheAO: Pacific Islands Students Fighting for Climate Change and the International Court of Justice' (2022) 27 *Comparative Law Journal of the Pacific* 73, 73.

Pacific Islands Forum — a regional meeting of Pacific leaders. The Forum noted the proposal within the context of 'recognising the need to formally secure the future of our people in the face of climate change and its impacts'.[10] At its 2022 meeting, the Forum went further. It commended Vanuatu on its initiative and

> called on the UN General Assembly for a resolution requesting the International Court of Justice to provide an advisory opinion on the obligations of states under international law to protect the rights of present and future generations against the adverse impacts of climate change, and looked forward to close collaboration in the development of the specific question to ensure maximum impact in terms of limiting emissions to 1.5 degrees Celsius, including obligations of all major emitters past, present and future.[11]

In May 2022, an Alliance of 1,500 civil society organisations from over 130 countries was launched in Fiji.[12] The aim of the Alliance was to persuade respective governments to support the proposal to seek an advisory opinion. PISFCC also played a key role in bringing together youth across the globe under the umbrella of World's Youth for Climate Justice ('WYCJ').[13] The focus of the WYCJ is intergenerational equity to achieve climate justice, premised on the argument that it is young people and the next generation who will suffer the most adverse effects of climate change despite having contributed the least towards it.[14]

Civil societies, and indeed individual countries, cannot request an advisory opinion from the ICJ. This has to come from the United Nations General Assembly (or, exceptionally, another United Nations ('UN') body).[15] In order to overcome this first hurdle, any request has to be put before the United Nations General Assembly in compliance with the guidelines issued for the preparation, co-sponsorship and submissions of proposals drawn up by the United Nations.[16] A delegation has to give five working days written notice to the Secretariat in line

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10 Pacific Islands Forum Secretariat, 'Fiftieth Pacific Islands Forum' (Forum Communiqué 19, 13–16 August 2019).

11 Pacific Islands Forum Secretariat, 'Fifty-First Pacific Islands Forum' (Forum Communiqué, 11–14 July 2022).

12 Theys (n 9) 76.

13 Aditi Shetye and Manon Rouby, 'Climate Justice: Advisory Opinion of the International Court of Justice and the Impact of Youth Advocacy' (2022) 27 *Comparative Law Journal of the Pacific* 79, 79.

14 Pacific youth had also been active prior to COP26, holding a hybrid Youth4Pacific Event during the COVID-19 pandemic attended by over 600 young people from 33 countries. This resulted in a Youth4Pacific Declaration delivered to the COP26 President via the British High Commission in Fiji: Alisi Rabukawaqa-Nacewa, 'A Pacific Island Perspective on COP26' (Essay, 18 March 2022, The National Bureau of Asian Research).

15 Under art 96 of the *Charter of the United Nations* and art 65(1) of the *Statute of the International Court of Justice*, advisory opinions can only be sought by five organs of the United Nations and 16 specialised agencies of the UN or affiliated organizations. But only the Security Council or the UNGA may request advisory opinions on 'any legal question'.

16 *Guidelines for the Preparation, Co-sponsorship and Submission of Proposals (Draft Resolutions, Draft Decisions and Amendments) for Consideration in the Plenary of the General Assembly*, 76th sess, UN Doc No 22-00301 (February 2022) <https://www.un.org/en/ga/pdf/guidelines_preparation_co-sponsorship_proposals_submission_GA76.pdf>.

with the rules of procedure of the General Assembly and indicate the agenda item under which the proposal is being submitted. This step cannot be taken until the wording of an acceptable proposal is negotiated with other states in order to attract co-sponsorship once the proposal is uploaded to the web portal of the United Nations General Assembly ('UNGA'). Co-sponsorship on the proposal being mooted by Vanuatu was important because, as the Prime Minister of Vanuatu pointed out in his address to the United Nations General Assembly in September 2021, individual national governments were increasingly unable to control the climate crisis: the international community needed to act together. Securing agreement on the wording of the proposed resolution took time, with legal and diplomatic representatives from numerous key nations engaged in the process, both formally and on the side-lines.

Vanuatu finally tabled the Resolution under item 70 of the Agenda at the 77th Session of the United Nations General Assembly as item number 77/276 and it was adopted on 29 March 2023, by consensus,[17] without a vote.[18] Had it not been adopted without a vote it would have been necessary to secure support from at least 97 of the 193 members of the United Nations General Assembly. The Resolution, which was co-sponsored by 107 states,[19] was referred to the ICJ as a request 'for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change' pursuant to art 65 of the *Statute of the International Court of Justice* (the 'Request')[20]

The specific questions on which an opinion are sought are:

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

    (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

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17 This means that no Member State requested a vote and explains why negotiations over the language used took some time.

18 UN GAOR, 77th session, 64th plen mtg, Agenda Item 70, UN Doc A/77/PV64 (29 March 2023).

19 Co-sponsorship is evidenced by member states signing the resolution and means they broadly accept the framing of the resolution.

20 *Request for an Advisory Opinion of the International Court of Justice on Obligations of States in Respect of Climate Change* (GA A/RES/77/276, 4 April 2023) (the 'Request'). The Request was transmitted to the ICJ by the Secretary General of the UN in a letter of 12 April 2023, which was received by the Registry on 17 April 2023. The ICJ acknowledged the Request in a Press Release on 19 April 2023. An outcome is expected within a year, that is, by the end of 2024 or early 2025.

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?[21]

This article explores the international legal context in which the Request is sought. It analyses the content of the Request and considers the potential response of the ICJ, taking into account the relevant international framework and States' existing obligations under international law. This article speculates on potential sticking points that might arise, as well as how the Request might be received by the international community.

II Climate-Related Developments in International Law

A *Background*

In the international arena, the level of attention paid to the environment and climate change has been building over a number of decades. At the United Nations Conference on the Human Environment (the 'Stockholm Conference') in 1972, for example, parties agreed to 26 principles for the sound management of the environment, including the *Stockholm Declaration*.[22] That event also led to the creation of the United Nations Environment Programme ('UNEP'), placing environment and development squarely on the international stage and highlighting the need for international co-operation. In particular, Principle 22 of UNEP declared that 'States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction', establishing unequivocally that states owe obligations beyond the boundaries of their own jurisdictions.

Twenty years later, at the 'Earth Summit' in Rio de Janeiro, the *Rio Declaration*[23] reaffirmed the *Stockholm Declaration* and sought to build on it, by working 'towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system'.[24]

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[21] *Request for an Advisory Opinion of the International Court of Justice on Obligations of States in Respect of Climate Change*, UN Doc A/RES/77/276 (4 April 2023).

[22] *Stockholm Declaration and Action Plan for the Human Environment*, GA Res 2994/XXVII, 2995/XXVII and 2996/XXII (15 December 1972), adopted by the United Nations Conference on the Human Environment, Stockholm, 16 June 1972. For background to the Stockholm Conference and discussion of the emergence of science for environment diplomacy, see Eric Paglia, 'The Swedish Initiative and the 1972 Stockholm Conference: The Decisive Role of Science Diplomacy in the Emergence of Global Environmental Governance' (2021) 8(2) *Humanities and Social Sciences Communications* 1.

[23] *Rio Declaration on Environment and Development*, UN Doc A/CONF.151/26 (Vol I) (12 August 1992) annex I ('*Rio Declaration*').

[24] Ibid, Preamble. See also David With, 'The Rio Declaration on Environment and Development: Two Steps Forward and One Back or Vice Versa' (1995) 29(3) *Georgia Law Review* 599.

One of the outcomes of the Earth Summit was the *United Nations Framework Convention on Climate Change*[25] — the parent treaty to the *Kyoto Protocol*[26] and *the Paris Agreement*[27] — which recognised climate change as a major concern of humankind, the significance of greenhouse gas emissions and the potential harm to terrestrial and marine ecosystems. A further outcome — relevant to this article — was Principle 10 of the *Rio Declaration*, which referred to environmental procedural rights, including the right to information,[28] the right to participate in decision-making and effective access to judicial and administrative proceedings. Clearly, seeking an opinion from the ICJ falls within this envelope.

The Request recalls the *UNFCCC*, the *Kyoto Protocol* and the *Paris Agreement*. The *Kyoto Protocol* was welcomed as a multilateral environmental agreement. Focussed on compliance and state commitments to the reduction of greenhouse gases, it entered into force in 2005. Though ambitious in scope, the weakness of the system lay in poor implementation: many countries did not reach the targets they committed to, and some refused to extend their initial commitment into the second commitment period in 2012.[29] While still in force, the *Kyoto Protocol* has been superseded by the *Paris Agreement*.

The *Paris Agreement* marked a significant change in commitment to curb emissions and submit National Determined Contributions ('NDCs'), not only from developed countries, but, in recognition of the international responsibility for global warming, all countries. The *Paris Agreement* brought home the huge significance of climate change and the need to accelerate positive efforts to address global warming. Under the *Paris Agreement*, parties are required to set and communicate NDCs every five years, justify these NDCs and explain measures taken to meet them (the 'transparency framework'). However, parties can unilaterally vary their targets (up or down), and of course they can withdraw from the Agreement altogether — as the United States did under Donald Trump. Considerable media attention attaches to the declaration of NDCs and parties can be named and shamed, but NDCs cannot be enforced. The Request seeks to clarify the obligations attaching to these NDCs, particularly the consequences of non-performance.

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25 *United Nations Framework Convention* (n 3).

26 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005)

27 *Paris Agreement under the United Nations Framework Convention on Climate Change*, opened for signature 22 April 2016, [2016] ATS 24, 3156 UNTS 79 (entered into force 4 November 2016).

28 Now widely recognised in the *Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters,* opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001).

29 Esmeralda Colombo, 'Enforcing International Climate Change Law in Domestic Courts: A New Trend of Cases for Boosting Principle 10 of the Rio Declaration?' (2017) 35(1) *UCLA Journal of Environmental Law and Policy* 98.

B *Current Obligations in International Law*

The United Nations Human Rights Council ('UNHRC') has adopted a number of resolutions relevant to climate change. In 2008, it adopted a Resolution in which it expressed the view that 'climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights'.[30] This has been followed by further Resolutions, all of which acknowledge and reaffirm the strong link between human rights and climate change.[31] While such resolutions are not binding, the fact that they are adopted is indicative of international support for climate change action, and perhaps a growing consensus that there is a link between climate change and human rights.

There has also been a shift away from just 'words'. In 2015, the United Nations General Assembly adopted the Resolution '*Transforming Our World: the 2030 Agenda for Sustainable Development*',[32] which was stated to be 'a plan of action, for people, planet and prosperity'.[33] Closely linked to the seventeen United Nations Sustainable Development Goals ('SDGs'),[34] and therefore wider in application than climate change, the Resolution nevertheless includes, under the heading 'Planet' in the Preamble: 'taking urgent action on climate change, so that it can support the needs of the present and future generations'. Two things stand out: the emphasis on 'action' and the date by which action must be taken: 2030. The achievement of SDGs remains a huge challenge in many countries including Small Island Developing States. Common and differentiated responsibilities are acknowledged by the Resolution,[35] alongside the overarching theme of the SDGs that no-one should be left behind. 2023 marks the mid-point in achieving SDGs and a recent report suggests that none of the countries in the Asia-Pacific region are on track to achieve the 17 goals.[36] Given that climate change impacts basic goals such as access to fresh water, health, food security, terrestrial and marine ecosystems and poverty, future resolutions from the UNGA could become more forceful on this issue.

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30 Alejando Artucio, Vice-President and Rapporteur, *Report of the Human Rights Council on its Seventh Session*, UN Doc A/HRC/7/78 (14 July 2008) 65 (resolution 7/23).

31 Specifically *Human Rights and Climate Change*, GA Res 10/4 (25 March 2009), *Human Rights and Climate Change*, GA Res 18/22, UN Doc A/HRC/RES/18/22 (17 October 2011), Human Rights and Climate Change, GA Res 26/27, UN Doc A/HRC/RES/26/27 (15 July 2014) and *Human Rights and Climate Change*, GA Res 29/15, UN Doc UN Doc A/HRC/RES/29/15 (2 July 2015).

32 *Transforming Our World: the 2030 Agenda for Sustainable Development,* GA Res 70/1, UN DOC A/70/1, 25 September 2015 (21 October 2015).

33 Ibid, Preamble.

34 The seventeen Sustainable Development Goals can be found on the United Nations website for the Department of Economic and Social Affairs: <https://sdgs.un.org/goals>.

35 See for example, paras 21, 55 and 56.

36 United Nations Economic and Social Commission for Asia and the Pacific, *Asia and the Pacific SDG Progress Report 2023*, UN Doc ST/ESCAP/3078 (1 March 2023).

In Resolution 48/13 of 8th October 2021 — which is specifically referenced in the Request — the United Nations Human Rights Council declared a human right to a safe, clean, healthy and sustainable environment.[37] The Resolution was the outcome of campaigning by civil society organisations and a 2018 Report by the UN Special Rapporteur for Human Rights and the Environment.[38] While the resolution is non-binding and is primarily directed at asking states to adopt policies that give effect to this right, it also lists climate change as one of the obstacles to the enjoyment of the right.

Recognising this, the UN Human Rights Council, at its 48th session in October 2021, agreed the mandate establishing the role of Special Rapporteur on the promotion and protection of human rights in the context of climate.[39] The first appointment was made in March 2022, with commencement on 1 May 2022. The current holder, Mr Ian Fry, was Tuvalu's Ambassador for Climate Change and Environment from 2015–19.

In its Resolution 50/9 in 2022,[40] the Human Rights Council makes a clear link between human rights and climate change, particularly through the lens of food security, and climate induced disasters. It brings together international developments relevant to climate change: the Special Rapporteur, the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (especially the work of Working Group II),[41] the *Paris Agreement*, the Sendai Framework for Disaster Risk Reduction 2015-2030,[42] the Glasgow Climate Pact, adopted at COP26, 2021,[43] commitments made by state leaders at the Climate Adaptation Summit in 2021 (in the Netherlands) and in Washington in 2021, the work of the Climate Vulnerable Forum and the work of the United Nations High Commissioner for Human Rights 'in highlighting the need to respond to the global challenge of climate change, including by reaffirming the commitments to

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37 United Nations Human Rights Council, *The Human Right to a Clean, Healthy and Sustainable Environment*, HRC Res 48/13, UN Doc A/HRC/48/13 (8 October 2021); 'Access to a Healthy Environment, Declared a Human Right by UN Rights Council', *UN News* (online, 8 October 2021) <https://news.un.org/en/story/2021/10/1102582>The resolution was passed by 43 votes in favour and 4 abstentions (Russia, India, China and Japan).

38 John Knox and David Boyd, *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment — Note by the Secretary-General*, UN Doc A/73/188 (19 July 2018).

39 United Nations Human Rights Council, *Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change*, UN Doc A/HRC/RES/48/14 (13 October 2021).

40 United Nations Human Rights Council, *Human Rights and Climate Change*, UN Doc A/HRC/RES/50/9 (14 July 2022, adopted 7 July 2022) ('*Human Rights and Climate Change*').

41 Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 2022).

42 Sendai Framework for Disaster Risk Reduction 2015–2030, GA Res 69/283, UN Doc A/RES/69/283 (23 June 2015, adopted 3 June 2015) Annex I.

43 Glasgow Climate Pact, Report of the Conference of the Parties serving as the meeting of the Parties to the *Paris Agreement* on its third session, held in Glasgow from 31 October to 13 November 2021, UN Doc FCCC/PA/CMA/2021/10/Add.1 (8 March 2022) Addendum, Decision 1/CMA.3.

ensure effective climate action while advocating for the promotion and protection of human rights'.[44]

The UNGA adopted Resolution A/76/300 in 2022, after being urged by UN experts to recognise that living in a clean, healthy and sustainable environment is a fundamental human right.[45] The Resolution recognises the right to a clean, healthy, and sustainable environment as a human right and called upon States, international organizations, businesses, and other stakeholders to 'scale up efforts' to ensure a clean, healthy, and sustainable environment for all.[46] It notes that 'the right to a clean, healthy, and sustainable environment is "related to other rights and existing international law,"' and affirms that its promotion 'requires the full implementation' of the multilateral environmental agreements ('MEA's) 'under the principles of international environmental law.'[47]

A further resolution in 2022, entitled 'Protection of Global Climate for Present and Future Generations of Humankind',[48] recognises that, 'in undertaking its work, the United Nations should promote the protection of the global climate for the well-being of present and future generations of humankind' and reaffirms that 'climate change is one of the greatest challenges of our time'. The Resolution also notes that NDCs are not sufficient to hold the increase in global warming to 1.5 degrees celsius above pre-industrial levels; that climate finance for adaptation remains insufficient and below target; and that there is an urgent need to scale up 'action and support'. The Resolution may be significant to the ICJ's opinion in two respects: first, while it falls short of recognising the rights of future generations, it does acknowledge the relevance of climate change to present and future generations; and, secondly, it clearly flags that greater delivery of promises made is needed.

Taken together, these resolutions suggest the direction in which the General Assembly (and therefore UNGA members) is travelling in terms of engaging with the challenges of climate change, at least as a matter of international concern and therefore relevant to all states.

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44 *Human Rights and Climate Change* (n 40), 5.

45 United Nations Human Rights Office of the High Commissioner, 'UN General Assembly Must Affirm Right to a Healthy Environment: UN Experts' (Press Release, 6 July 2022 <https://www.ohchr.org/en/press-releases/2022/07/un-general-assembly-must-affirm-right-healthy-environment-un-experts>.

46 *The Human Right to a Clean, Healthy and Sustainable Environment*, GA Res 76/300, UN Doc A/RES/76/300 (28 July 2022). The resolution was adopted by a recorded vote of 161 in favour and zero against. Eight Member States — Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, the Russian Federation, and Syria — abstained.

47 International Institute for Sustainable Development, 'UNGA Recognizes Human Right to Clean, Healthy, and Sustainable Environment' (online, 3 August 2022) <https://sdg.iisd.org/news/unga-recognizes-human-right-to-clean-healthy-and-sustainable-environment/#:~:text=The%20UN%20General%20Assembly%20(UNGA,and%20sustainable%20environment%20for%20all>.

48 Resolution A/77/165, 14 December 2022.

III The Request for an Advisory Opinion

The Request is framed as coming from the General Assembly, even though it is clearly drafted by the proposing delegation.[49] Before specifying the questions on which an opinion is sought, the General Assembly sets out the context, referencing in particular its own actions in this area of concern. The Request recalls Resolution 77/165 (14 December 2022), Resolution 76/300 (28 July 2022) and Resolution 70/1 (25 September 2015), and recalls the Human Rights Council Resolution 50/9 (7 July 2022) and Resolution 48/13 (8 October 2021), outlined above.

By incorporating the Resolutions of the Human Rights Council, the Request clearly places this request and the issue of climate change within the field of human rights. This may be both a strength and a weakness. It is a strength because the advocacy of human rights is universal and therefore of relevance to all. It is a weakness because human rights are notoriously difficult to enforce at an international level and widely regarded as 'soft law' instruments.

The Request then emphasises the international legal frameworks relevant to its request, citing not only the *Charter of the United Nations* and the *Universal Declaration of Human Rights*,[50] but also seven other international conventions and the *Montreal Protocol on Substances that Deplete the Ozone Layer*.[51] Basing the Request on a solid legal platform meets the fundamental requirement of any request for an opinion from the ICJ: it must raise a legal question.[52] The Court has indicated that questions 'framed in terms of law and rais[ing] problems of international law… are by their very nature susceptible of a reply based on law … [and] appear … to be questions of a legal character'.[53]

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49 *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*, GA Res 77/276, UN GAOR, 77th sess, UN Doc A/77/L.58 (1 March 2023).

50 *Universal Declaration of Human Rights* GA Res 217 A(III), UN GOAR, UN Doc A/810 (10 December 1948).

51 *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, 1522 UNTS 3 (entered into force 1 January 1989). The seven other international conventions are: *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *United Nations Convention on the Law of the Sea*, opened for signature on 10 December 1982, 1833 UNTS 3, 1834 UNTS 3, 1835 UNTS 3 (entered into force 16 November 1994), the *Vienna Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 1513 UNTS 293 (entered into force 22 September 1988), the *Convention on Biological Diversity*, opened for signature on 5 June 1992 1760 UNTS 79 (entered into force 29 December 1993), and the *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and Desertification, Particularly in Africa*, opened for signature 14 October 1994 1954 UNTS 3 (entered into force 26 December 1996).

52 *Statute of the International Court of Justice* art 65.1.

53 *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 18 [15], quoted in *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 233–4 [13].

The legal credentials of the questions being asked are further supported in The Request by including reference to 'the relevant principles and relevant obligations of customary international law', including those reflected in the *Declaration of the United Nations Conference on the Human Environment*,[54] and the *Rio Declaration*. The Request references these international instruments as 'expressions of the determination to address decisively the threat posed by climate change', urges 'all parties to fully implement them', and notes

> with concern the significant gap both between the aggregate effect of States' current nationally determined contributions and the emissions reductions required to hold the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels ...

In 2019, the potential role of international law in putting pressure on states to reduce activity or harms contributing to climate change was raised following the failure of COP25 in Madrid to arrive at any consensus of how art 6 of the *Paris Agreement* was to be implemented.[55] In particular, international lawyers were called on to sharpen their skills to revive 'the blunt edge of climate change-based national, regional or international litigation, adjudications and arbitration towards reaching sufficiency of climate pledges'.[56] The Request for an ICJ opinion provides the opportunity for international lawyers to meet the challenge and possibly shape the role of international law for future generations.

IV Potential Reaction From the International Court of Justice

The first question is whether the ICJ will give an opinion. Article 65, para one, states that it 'may' do so. The UNGA is competent to seize the court on any question on any matters within the scope of the Charter, but the request for an advisory opinion must relate to the activities and concerns of the General Assembly. As indicated above there are numerous resolutions of the UNGA that evidence the concern of the GA in regard to climate change and the obligations of states to reduce carbon emissions, address global warming and achieve the ambitions of the *Paris Agreement* and other international statements. To date, the

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54 *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF48/14/Rev1 (25 July 1995) 3–6 ('Declaration of the United Nations Conference on the Human Environment').

55 Diane Desierto, 'COP25 Negotiations Fail: Can Climate Change Litigation, Adjudication, and/or Arbitration Compel State's to Act Faster to Implement Climate Obligations?' *EJIL: Talk!* (Blog Post, December 19 2019) <https://www.ejiltalk.org/cop25-negotiations-fail-can-climate-change-litigation-adjudication-and-or-arbitration-compel-states-to-act-faster-to-implement-climate-obligations/>.

56 Ibid.

UNGA has sought 16 advisory opinions from the Court, but none of these have been directly about climate change.[57]

This should not in itself be a problem. Firstly, the ICJ in delivering opinions is not bound by precedent, so the lack of one on climate change is not an issue. Secondly, the ICJ can give an opinion on any legal question.[58] To date the ICJ has delivered 27 opinions. Once the ICJ takes the case, all states are invited to make written submissions stating their own view, either in letters or notes verbal, and may comment on those of other states. Oral arguments may also be permitted if requested by states. These are delivered to a panel of 15 judges. The decision of the Court is arrived at by a simple majority. Individual judges can give separate concurring or dissenting opinions. This procedure means that those states that both supported and/or opposed or abstained when the resolution was put before the UNGA have the further opportunity to express their views in writing, orally, or both. For those states that have co-sponsored the resolution, this is the opportunity to present their particular interpretation of the questions, to demonstrate the 'red lines' that they will not cross, and to indicate which aspects of the questions asked they may or may not support.

The ICJ is a court of general jurisdiction, not a specialist court, and its procedure allows for the tabling of expert evidence by all states and in the past it has been prepared to consider claims which raise matters of scientific or technical complexity, or both.[59] Moreover, in giving an opinion, the Court is not having to decide between competing bodies of evidence, but might give guidance on how, for example, scientific evidence can be interpreted to establish legal obligations. In this regard particular reference might be made to the most recent reports of the Intergovernmental Panel on Climate Change Report,[60] reflecting the work of its sixth cycle of assessment.

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57 Michael Gerrard, 'Taking Climate Change to the World Court' *Bloomberg Law* (online, 25 October 2021). The ICJ has, however, ruled on the importance of Environmental Impact Assessment as a duty under international law: Annalisa Savaresi, 'Environmental Impact Assessment after the International Court of Justice decisions in Costa Riva-Nicaragua and Nicaragua-Costa-Rica: Looking Backward, Looking Forward' (2017) *Questions of International Law* 1–3; Nilufer Oral, 'ICJ Renders First Environmental Compensation Decisions: A Summary of the Judgment' (Web Page, 9 April 2018, International Union for Conservation of Nature) <https://www.iucn.org/news/world-commission-environmental-law/201804/icj-renders-first-environmental-compensation-decision-summary-judgment>.

58 *Charter of the United Nations* art 96; *Statute of the International Court of Justice* art 65.

59 See *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* [2014] ICJ Rep 226 ('*Whaling Case*').

60 Intergovernmental Panel on Climate Change, 'Climate Change 2023: Synthesis Report' (Sixth Assessment Report, 2023).

V What are the Potential Sticking Points?

A *Jurisdiction*

An initial challenge may be that the ICJ considers that it lacks jurisdiction, or that those states opposed to the resolution might claim that it lacks jurisdiction. In the past, the ICJ has refused to give an opinion on the grounds of lack of jurisdiction following a request for an advisory opinion by a resolution of the World Health Assembly ('WHO').[61] While the WHO met the first two conditions that had to be satisfied to found the jurisdiction of the Court — the agency requesting the opinion was duly authorised to do so under the Charter of the Court and the request concerned a legal question — it held that the question was not one arising within the scope of the WHO. The question on which an opinion was sought related not to health consequences (which the WHO as a specialised UN agency was competent to seek an opinion on) but on the legality of using nuclear weapons (which lay beyond the competency of a specialised agency such as the WHO).[62]

The Court drew attention to the different status of states, which possessed a general competence, and specialised agencies, which only have those competences conferred by states.

While the facts are distinguishable, there has been some suggestion that a ground for challenging jurisdiction in the current case might be that any opinion would encroach on the work of the UNFCCC. The UNFCCC has its own Secretariat (in Bonn, Germany), which is tasked with supporting the global response to the threat of climate change. It also has a number of subsidiary bodies providing scientific and technological advice, and implementation of the actions agreed under the three international instruments.[63] While arguably the failure of the international community to deliver on its promises is the primary motivation for the approach to the ICJ, there may be states that seek to curtail its jurisdiction in this matter or express reservations in their written and oral submissions. The ICJ may itself reframe the questions to suit its jurisdiction, or decide that it has partial jurisdiction, for example to clarify states' obligations under question a) but lacks jurisdiction to answer question b) on the consequences of non-compliance with

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61 *Request for an Advisory Opinion by the Director General of the World Health Organisation on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict to the Registrar of the International Court of Justice* (General List No 93, 14 May 1993).

62 A subsequent Request to the ICJ following a resolution by the United Nations General Assembly — GA Res 49/75 K (adopted 15 December 1994) — was accepted by the Court.

63 United Nations Framework Convention on Climate Change, 'What Are Governing, Process Management, Subsidiary, Constituted and Concluded Bodies?' (Web Page, accessed 3 October 2023) <https://unfccc.int/process-and-meetings/what-are-governing-process-management-subsidiary-constituted-and-concluded-bodies>.

obligations. There is also a small risk that the ICJ might decide that climate change falls under *lex specialis* and is therefore outside its jurisdiction.[64]

Even if the ICJ refuses to give an opinion on the grounds of lack of jurisdiction, which will be the end of the matter as far as the ICJ is concerned, the reasons for the refusal of jurisdiction will in themselves provide fertile grounds for lawyers engaged in this area of law to consider how such questions might be better framed and presented in the future.

B *An Autonomous Human Rights Claim*

More controversial would be if the question involved an autonomous human rights' claim to a safe environment. While it is clear from the international instruments cited in The Request that there is a wide acceptance of the impact of climate change on existing human rights, there has been long-standing debate about whether there is a distinct individual right to a minimally acceptable environment. The 1981 *African Charter on Human and Peoples' Rights* (the '*Banjul Charter*'),[65] which has been signed and ratified by 54 states, states in art 24 that: 'All peoples shall have the right to a general satisfactory environment favourable to their development'. In 1987, a year after the *Banjul Charter* came into force, the R*eport of the World Commission on Environment and Development: Our Common Future* (the '*Brundtland Report*') broke new ground by adopting as a first principle a 'fundamental right to an environment adequate for health and well-being',[66] and the *Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights* (the '*Protocol of San Salvador*') states in art 11 that:

> 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The State' Parties shall promote the protection, preservation, and improvement of the environment.[67]

The *Paris Agreement* does not go quite so far. It refers to human rights in its Preambular statements: 'Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights …'. It does not, however, specify measures that should be taken to protect

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64 Juan Auz and Thalia Viveros-Uehara, 'Another Advisory Opinion on the Climate Emergency? The Added Value of the Inter-American Court of Human Rights' *EJIL: Talk!* (Web Page, March 2 2023, Blog of the European Journal of International Law).

65 *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986).

66 Gro Harlam Brundtland, *Report of the World Commission on Environment and Development: Our Common Future — Note by the Secretary-General*, UN Doc A/42/427 (4 August 1987), 38 (the '*Brundtland Report*').

67 *Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights*, OAS Treaty Series No 69 (entered into force 16 November 1999).

these rights and, because this statement is only preambular, it lacks weight, although it may be significant for establishing the normative framework.[68] It also falls short of what was hoped for on this front.[69] In particular, 'promote and consider' might be interpreted as imposing weak obligations. Other possible human rights implications are oblique, for example those relating to poverty alleviation, gender balance, food security and health. What the *Paris Agreement* does do, however, is move the dial from the human rights-environment nexus to human-rights climate change. This has been a necessary step for the grounding of this request to the ICJ.

At a national level, which may be relevant for evidence of a growing consensus among nations, the association of climate change impact on the environment and the negative consequences for a range of human rights has become increasingly common,[70] with climate-change related litigation drawing on rights-based arguments in a number of jurisdictions, including the Philippines, the United States, Austria and South Africa.[71] A 2019 Report by the United Nations Special Rapporteur on Human Rights and the Environment indicated that 110 States afford constitutional protection to the right to a healthy environment representing more than 80% of United Nations members.[72] Similarly, in 2021, the United Nations Committee on the Rights of the Child declared that 'failure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations'.[73] Although almost all UN members are signatories to the UNCRC, and therefore developments under this Convention could carry weight, not all nations yet recognise an autonomous human right to a safe and healthy environment. An opinion supporting this could, therefore, divide state support for subsequent action, such as an UNGA resolution adopting the opinion.

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68 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(2): the preamble is stated to form part of the treaty for the purposes of interpretation.

69 See Benoit Mayer, 'Human Rights in the Paris Agreement' (2016) 6 *Climate Law* 109, 114.

70 Burkett (n 1) 646–9.

71 Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation' (2017) 7(1) *Transnational Environmental Law* 37.

72 *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/43/53 (30 December 2019) 4. In the Pacific, environmental rights are included in the constitutional Bill of Rights in Fiji, and under the non-justiciable duties in the constitution of Vanuatu.

73 Committee on the Rights of the Child, *Decision Adopted by the Committee Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No 105/2019*, UN Doc CRC/C/88/D/105/2019 (9 November 2021) 12.

C *Present and Future Rights*

Question (a) and (b)ii in the Request refer to present and future generations. This is understandable especially given the focus of the WYCJ lobbying, which wanted to frame the question along the lines of 'what are the obligations of states under international law to protect the rights of present and future generations against the adverse effects of climate change?' [74]

The idea of intergenerational rights is not alien to international law. Principle 1 of the *Stockholm Declaration* declares 'a solemn responsibility to protect and improve the environment for present and future generations', while Principle 2 refers to the importance of safeguarding natural resources 'for the benefit of present and future generations.' [75] The *Brundtland Report* referred to sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs' and 'the environment's ability to meet present and future needs',[76] and Principle 3 of the *Rio Declaration* refers to the 'developmental and environmental needs of present and future generations'. Also, as indicated above in the Resolutions cited as background to the Request, present and future rights holders are increasingly referred to.

The ICJ might also refer to the Committee on the Rights of the Child's *General Comment on Children's Rights and the Environment with a Special Focus on Climate Change* ('*General Comment No 26*'),[77] which provides authoritative guidance on how children's rights are impacted by the environmental crisis and what governments must do to uphold these rights. Following an extensive period of consultation launched in November 2022, *General Comment No 26* was adopted by the Committee on the Rights of the Child in May 2023 at its 93rd session. While not amounting to expert evidence, the impact of climate change on future generations could be relevant to arguments raised before the court.

D *Collective or Individual Rights?*

While the questions mainly refer to states — as might be expected when a question is referred to an international forum — (b)(ii) refers to 'peoples'. In the main, human rights instruments rights are framed as pertaining to individuals. However, as indicated above, reference to present and future generations suggests collective rights. The ICJ has itself recognized the rights of 'peoples',

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74 Shetye and Rouby (n 13) 82.

75 Declaration of the United Nations Conference on the Human Environment (n 54).

76 *Brundtland Report* (n 66) 43.

77 Committee on the Rights of the Child, *General Comment No 26: Children's Rights and the Environment with a Special Focus on Climate Change*, UN Doc CRC/C/GC/26 (22 August 2023).

especially in the context of self-determination,[78] and in its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*,[79] it refers to the importance of the well-being and development of peoples under the League of Nations trust mandate.

VI The Significance of an ICJ Opinion

The opinion is requested by the UNGA and any opinion given is therefore expressed to the UNGA. A resolution may then be brought (as above) requesting the UNGA to adopt the opinion and pass a resolution to this effect, as it did in the *Chagos Islands Case*.[80] As with the initial applications seeking an ICJ opinion, members of the UNGA have the opportunity to express their views — reservations and support — on any such adoption, and the resolution may be passed by way of consensus or go to a vote. The outcome of this could well depend on how the ICJ frames its opinion, if it does so.

Without the follow up of a further UNGA resolution it might be thought that the ICJ opinion would be rather weak. However, as expressed in the European Union's statement supporting the resolution requesting an advisory opinion:

> Although legally non-binding, the requested Advisory Opinion of the ICJ has the potential to make a significant contribution to the clarification of the current state of international law.[81]

This raises two points. The first is the 'legally non-binding' nature of an advisory opinion. An ICJ opinion is advisory only, unlike litigation in which a decision is made in favour of one or other of the contesting parties.[82] This raises the question of how significant any advisory opinion can be, either in the short term or the longer term? The second is the role of an advisory opinion as an interpretative tool, 'clarifying' international law. In the questions to be put before the court

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78 See *Case Concerning East Timor* (*Portugal v Australia*) [1995] ICJ Rep 90; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95.

79 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1970] ICJ Rep 16.

80 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95. Failure to comply with a six-month deadline for the UK to complete the process of decolonization of Chagos Islands led to the UNGA endorsing a motion condemning Britain's occupation of the islands, with a vote of 116-6, supporting the motion, with 56 abstentions: *Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, UNGA Res 73/295, UN Doc A/RES/73/295 (22 May 2019). See Philippa Webb, 'The UK and the Chagos Archipelago Advisory Opinion' (2021) 21(1) *Melbourne Journal of International Law* 1.

81 Delegation of the European Union to the United Nations in New York, 'EU Statement — UN General Assembly: Resolution Requesting an Advisory Opinion of the International Court of Justice on Climate Change' (online, 29 March 2023).

82 Oxford University Press, *Max Planck Encyclopaedia of International Law* (April 2006) Hugh Thirlway, 'Advisory Opinions'.

there appear to be two aspects needing clarification: (1) obligations under international law; and (2) consequences of non-compliance with those obligations by acts and omissions — both generally and with specific reference to those who are most vulnerable to climate change.

VII A Non-Legally Binding Opinion

The ICJ itself claims that an advisory opinion carries 'great legal weight and moral authority'.[83] It is the main judicial organ of the United Nations. Statements made in the course of proceedings are drafted and presented by eminent international lawyers and counsel so the standard of legal expertise which it draws on is high. Although an opinion sets no precedents, it can be influential in terms of setting standards and raising ambition, in this context in terms of pledges made regarding carbon reduction targets and other promises made to address climate change. The opinion could also be referenced by domestic and regional courts confronted by climate change related cases, particularly in the context of locating domestic or regional jurisprudence in the context of international developments in this field.[84]

An opinion from the ICJ might also assist in concretizing state obligations as regards loss and damage. Although agreed in principle at COP27,[85] the operationalisation of loss and damage has yet to become clear.

VIII What are the Obligations Under International Law?

The international law here is essentially the *Paris Agreement*.[86] As indicated above, this committed nations to cap warming at 2˚C above pre-industrial levels and encouraged greater ambition to limit the increase to 1.5˚C. Subsequent frustration with progress, especially by major emitters, has been evident. While it is clear that the *Paris Agreement* is a legally binding international treaty, it is less clear whether

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83 International Court of Justice, 'Advisory Jurisdiction' (Webpage, accessed 3 October 2023) <https://www.icj-cij.org/advisory-jurisdiction>.

84 There are some precedents in the region for recognising the jurisdiction of the ICJ in disputes — see, eg, *Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice Concerning Certain Phosphate Lands in Nauru*, Australia-Nauru, signed 10 August 1993, [1993] PITSE 15 (entered into force 20 August 1993) and constitutional provision to recognise the opinions of the ICJ in determining whether laws are reasonably justifiable in a democratic society — see *Constitution of the Independent State of Papua New Guinea* s 39.

85 See 'COP27 Ends With Announcement of Historic Loss and Damage Fund' *United Nations Environment Programme* (online, 22 November 2022) <https://www.unep.org/news-and-stories/story/cop27-ends-announcement-historic-loss-and-damage-fund>.

86 Fiji, Nauru, Palau, Republic of Marshall Islands, Samoa and Tuvalu were six of the 15 countries that ratified the agreement in New York in April 2016. 'Six Pacific Islands Ratify the Paris Climate Accord' (Media Release, Pacific Community, 27 April 2016) <https://www.spc.int/updates/news/2016/04/six-pacific-islands-ratify-the-paris-climate-accord>.

its provisions impose legally binding duties on states. In particular, the language around NDCs, mitigation, adaptation, loss and damage, technology, capacity building, and implementation is not prescriptive. It sets goals which parties are required to aim for, but those goals are not framed in mandatory language, unlike the Agreement's processes. In 2018, it was agreed by the parties to the *Paris Agreement* that a Rulebook would be developed to provide practical guidelines for implementation. Negotiations for completing the Rulebook concluded in 2021 at COP26. One of the questions the ICJ may express an opinion on is the legal effect of the Rulebook on the international obligations of parties to the *Paris Agreement.*

IX What are the Consequences of Non-Observation/Non-Compliance with International Law Obligations?

As indicated above, there have been a number of expressions of concern at the lack of action (omissions) in addressing climate change and related calls to action by international bodies. Answering question (b) in the Request '[w]hat are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment' — presents challenges for the ICJ. Liability for acts that cause harm is less problematic in so far as this falls more squarely within existing law, including liability for trans-boundary harm. Legal liability for failure to act is more problematic. While it is generally acknowledged and certainly supported by the evidence of the IPCC Report that failure to take steps to reduce global warming will have catastrophic consequences, many of the instruments referred to above, which provide the legal background to the resolution, make frequent reference to 'common and differentiated' responsibilities of states. It is, therefore, difficult to see how the ICJ could provide a 'one size fits all' answer to this question. Any opinion on this question could also trigger a backlash by those countries that see themselves as falling into the category of 'developing states', including China, and therefore within the range of 'victim' states rather than climate-change perpetrator states. The ICJ may also struggle to determine the consequences of liability for omissions that contribute to climate change, not only because of problems of causation, but because the trend in international instruments has been to impose responsibility on all states to address issues of climate change, and not to single out particular states. It is difficult to see how, therefore, the ICJ can do anything other than make very general statements in this regard. If strong enough, these could provide a baseline standard against which states could either be named and shamed or incentivised to compete as 'champions'.[87]

[87] This type of competitive driver is evident in the creation of marine protected areas.

X What Else Could the Advisory Opinion Achieve?

Bodansky has suggested that an advisory opinion could be particularly helpful in establishing parameters for the liability of one state to another for damage caused by emissions, focussing particularly on issues such as due diligence expected of states towards each other, rather than laying down rules for NDCs — which, under the *Paris Agreement*, are left to the determination of states.[88] A legal opinion here could also assist negotiations elsewhere. Sands suggests that the most important thing an international court such as the ICJ could do would be 'to settle the scientific dispute' about climate change,[89] although, as Bodansky points out, if the IPCC's extensive reports cannot do this by now, such an outcome may be optimistic.[90] However, a finding of fact on matters relevant to climate change could lay the foundations for potential future actions. The ICJ has shown itself able to do this previously.[91] Sands also supports the value of the ICJ expressing an opinion on existing obligations of states under international law to prevent climate change and to address the consequences of climate change, including possibly expressing an opinion on the 2-degree celsius target.[92]

At its most optimistic, an opinion could provide the vehicle to bring human rights and climate change together in a principled way, or 'have the power to reshape positively the international approach to greenhouse gas emissions',[93] or both. An ICJ opinion could also be instrumental in shaping national and regional policies directed at addressing climate change, seeing promises and targets translated into deliverables by those most able to do so.

XI Conclusion

Pacific-island states have been key players in highlighting the adverse effects of climate change, working through alliances such as the Alliance of Small Island States ('AOSIS')[94] and the Climate Vulnerable Forum.[95] They have been frustrated by the lack of action by major emitters. President of COP26, Alok Sharma, for example, commented on the important role and contribution of the voices of

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88 Daniel Bodansky 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections' (2017) 49 (Special Issue) *Arizona State Law Journal* 1, 21.

89 Philippe Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) 28(1) *Journal of Environmental Law* 19, 29.

90 Bodansky (n 88) 20.

91 See *Whaling Case* (n 59).

92 Sands (n 89).

93 Aaron Korman and Giselle Barcia, 'Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion' (2012) 37 *Yale Journal of International Law* 35, 36.

94 This was created in 1990 and has been effective in raising the voices of Small Island States in the United Nations.

95 Timothée Ourbak and Alexandre Magnan, 'The Paris Agreement and Climate Change Negotiations: Small Islands, Big Players' (2018) 18(8) *Regional Environment Change* 2201.

Pacific-island countries to the conference, and acknowledged that the '"pulse" of what the Pacific needs for survival, a 1.5 degree world, "remains weak"'.[96]

It is little wonder, then, that there is appetite in the region to push further not only in trying to keep the 1.5-degree celsius target alive, but to get greater clarity on the legal nature of the commitments signed up to in Paris, particularly in addressing the gap between the goal of greenhouse gas emissions reduction and the actions proposed by states. The question is whether an advisory opinion will provide the solution.

Past attempts to secure the UNGA adoption of a resolution regarding climate change have not succeeded. For example, following the failure of COP15 in Copenhagen in 2009, in 2011 Palau and the Republic of Marshall Islands, both Pacific-island states, declared an intention to call on the United Nations General Assembly to seek an ICJ opinion on 'the responsibilities of States under international law to ensure that activities emitting greenhouse gases that are carried out under their jurisdiction or control do not damage other States'.[97] Palau's President, Johnson Toribiong, stated that it was time to determine what 'the international rule of law means in the context of climate change.'[98] The intention did not materialise into efforts to negotiate support in the UNGA (possibly due to threats of reprisals by the United States).[99] However, the President of Palau's words remain pertinent: 'there is only so much my country can do on its own to protect itself. We rely on our partners, the international system and the international rule of law to provide a remedy'.[100] Vanuatu has succeeded in taking this a step further by securing the adoption of its resolution by the UNGA. The next step lies with the ICJ.

The initiative of this island state to bring the matter to the attention of the international legal order will have made an important contribution to the debate about how to address climate change and whether a focus on adaptation and

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96 'Pacific's Leadership, Commitment and Amplified Voice Acknowledged by COP26 Presidency' (News Article, Secretariat of the Pacific Regional Environment Programme, 23 February 2022). In fact, few Pacific leaders were able to attend COP26 due to COVID-19 impact on borders and travel: Aniruddha Ghosal, '"Thin" Pacific Island Teams at COP26 Spark Fears of Inequity' *The Diplomat* (online, 28 October 2021) <https://thediplomat.com/2021/10/thin-pacific-island-teams-at-cop26-spark-fears-of-inequity>.

97 'Palau seeks UN World Court opinion on damage caused by greenhouse gases' *UN News* (online, 22 September 2011) https://news.un.org/en/story/2011/09/388202 ('*UN News Palau*'); Jule Schnakenberg, Brighde Watt and Aoife Fleming, 'The Potential for the World Court to Address Climate Justice: COP26 as an Opportunity to Raise the ICJ Advisory Opinion with World Leaders' *University of Aberdeen* (Blog Post, 9 December 2021) <https://www.abdn.ac.uk/law/blog/the-potential-for-the-world-court-to-address-climate-justice-cop26-as-an-opportunity-to-raise-the-icj-advisory-opinion-with-world-leaders>.

98 *UN News Palau* (above)

99 Burkett (n 1) 635, 644.

100 'Statement by the Honorable Johnson Toribiong President of the Republic of Palau to the 66th Regular Session of the United Nations General Assembly', 22 September 2011, New York <https://gadebate.un.org/sites/default/files/gastatements/66/pw_en_25.pdf>.

resilience go far enough for those countries and people already adversely affected by its consequences and who have done least to contribute to this global catastrophe. With COP29 on the horizon in 2024, small-island developing states, and others, are not going to allow the question of compensation for the losses and damages they have suffered to be swept under the carpet, nor will they ease up the pressure on all signatories to the *Paris Agreement* to convert promises into action. For these states, 1.5-degree celsius global warming is just the starting point. If those states that contribute the most to global warming cannot 'up their game' in terms of their national NCDs and deliver on meeting these targets, then the future survival of Pacific-island people remains in jeopardy, and they will continue to fight to survive and to hold others to account.

THE DUTIES THAT BIND US: AN ANALYSIS OF DUTY-BASED CONSTITUTIONALISM IN CONFUCIAN AND CALVINIAN THOUGHT

CONSTANCE YOUNGWON LEE*

This article aims to draw out some of the key continuities between Confucian and Reformed natural law traditions, the latter represented by John Calvin (1509–64). It seeks to undermine contemporary academic definitions of Confucianism and constitutionalism, which are premised on misinterpretations. The first misinterpretation occurs where Confucian moral theory is viewed overly prescriptively, as being synonymous with legalist orthodoxy. The second misinterpretation occurs where constitutionalism is defined exclusively in terms of its dominant liberal conception. These problematic definitions of the two core concepts reduce the space of convergence between Eastern and Western constitutional frameworks, giving rise to the misleading narrative that they are fundamentally incompatible. With these issues in mind, the article adopts a dialectic interpretive method to read both traditions in light of their historical context and authorial purpose, to see whether such a reading can support some form of duty-based constitutionalism. Ultimately, the article examines Eastern and Western natural law ideas to reveal deeper themes common to both and highlight the normative continuities of two prominent, albeit culturally disparate, constitutional foundations.

I INTRODUCTION

Constitutional duties are legally binding, but they also bind us to each other.[1] The duties that bind the state are sourced in, and bounded by, the duties that we owe each other. All constitutions, regardless of their context and development,

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1 Here, the term 'duty' is derived from the Latin '*ligare*' ('to bind or tie together'). From the mid-15th century onwards, *ligare* evolved to mean 'obliged by law' from Old French — '*lier*', '*liier*' ('to bind up, fasten, tether; bind by obligation') — and is also, interestingly, the root for the term, religion — '*religare*' ('that which ties believers to God') — as first used by early Christian writers. See entry for 'oblige' in Hensleigh Wedgwood, *A Dictionary of English Etymology* (Trübner and Company, 2nd ed, 1872) 451.

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commonly concern the notion of obligations.[2] That is, constitutional law is required, by its very purpose, to consider the justifications of political power and, in that scheme, what priority should be placed on normative pursuits like collective human flourishing.[3] However, doctrinal constitutional law often shies away from discussions about its normative reasons.[4] In this context, natural law theory has the real potential to fill this discursive vacuum. Natural law can consider the ontological purpose of constitutions by addressing the strong institutional link between descriptive power and the normative reasons for law. This article contends that, by introducing natural law themes into debates about Eastern and Western constitutional cultures, we shift the focus away from our differences to the commonalities that bind us together. We are all bound by the fundamental respect we owe one another in community.[5] This respect characterises every legal relationship — between rulers and their subjects, subjects and those who rule them, rulers and their peers, and each subject and their neighbour. A duty-based framework,[6] therefore, allows us to capture some of the normative continuities that exist between Eastern and Western constitutional foundations.

There is a popular view today that Confucianism necessitates an authoritarian form of government.[7] Proponents of this view argue that Confucianism is fundamentally incompatible with constitutionalism. In so doing, they potentially commit at least one of two generalisations about the objects for comparison. The first is the assumption that constitutionalism is essentially synonymous with liberal democracy. This position presupposes that the core of Western constitutionalism is the idea that humans as 'rights bearing individuals' — subsisting on the 'autonomous self'[8] — gives rise to a political system which

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2 Jonathan Crowe and Constance Youngwon Lee, 'The Natural Law Outlook' in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019) 11. On this point, the authors note that both strong and weak natural law theories view natural rights as predicates of moral duties.

3 Aristotle, *Politics*, tr Ernest Barker (Oxford University Press, 1995) I278bI5.

4 Christopher Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press, 2013) 13.

5 Hwa Yol Jung has argued, for example, that the fundamental premises of the Western liberal constitutional democracies characterised by 'rights talk' and 'individualism' are not logically derived from broadly 'Sinic' relational ontology with its emphasis on the ethics of responsibility. She argues for the undeniable parallels between Emmanuel Levinas' 'ethics of responsibility' and the transcendence of the other. See Hwa Yol Jung, 'On Confucian Constitutionalism in Korea: A Metacommentary' in Sungmoon Kim (ed), *Confucianism, Law and Democracy in Contemporary Korea* (Rowman & Littlefield Publishers, 2015).

6 Like that borne out of a strong natural law theory. See Constance Youngwon Lee, 'Calvinist Natural Law and Constitutionalism' [2014] (39) *Australian Journal of Legal Philosophy* 1, 22 ('Calvinist Natural Law').

7 A few prominent Confucian scholars who have noted this popular view include Xinzhong Yao and Shaohua Hu, to name just a few. See also James Dominic Rooney, 'The Promise of Confucian Liberty', *Law & Liberty* (Web Page, 17 May 2022) <https://lawliberty.org/>.

8 Ibid.

plausibly translates to an adherence to fundamental constitutional doctrines. In fact, the reverse may be closer to the truth: humans, as fundamentally constituted, are simultaneously fallible yet rational and, therefore, beholden to higher normative standards. The second assumption concerns the nature of Confucianism being reducible to one of its classical principles of *filial piety*. That principle holds that the basis for obligations of filial duty is that individuals' bodies belong to their parents and ancestors. This has been interpreted to mean that 'self-negation' — the setting aside of individual rights in service of collective interests — forms the basis of Confucian moral theory. Confucian philosophy may be more nuanced if viewed as an essentially relation-based framework.

This article seeks to explore a space of convergence between two ostensibly different constitutional cultures, and to systematically draw out some normative continuities shared by the constitutional theories of both. It will not attempt to argue that Confucianism is fundamentally compatible with constitutionalism, nor to advance a historical study of Confucian philosophy to show how it comports with the modern liberalist position. In this way, the article does not wade into practical manifestations of Confucianism but limits its scope of study to the normative space. The article does, however, examine the moral traditions illustrative of two distinct constitutional approaches in the East and the West, with a view to illuminating core normative continuities: (1) Confucian philosophy extant in many contemporary East-Asian countries, particularly those characterised by *Sinism*;[9] and (2) the reformed natural law tradition in the West.[10]

This article will contend that both constitutional cultures are broadly defined by a common normative framework, strongly resembling (albeit not necessarily identical to) a *strong* natural law theory,[11] which I refer to as the 'spheres-of-influence' scheme.[12] This normative framework imposes a duty on all political actors to exercise their rights in a manner that is consistent with respect for the rights of others within the intricate network of relationships characteristic of any community *polis*.[13] This duty, in turn, originates from each individual's primary allegiance to a transcendent point of value. It follows then that both normative

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9 *Sinism* possesses a relational ontology based upon the idea that everything is related to everything else in the cosmos and nothing exists in isolation. See Herrlee Glessner Creel, 'Sinism: A Study of the Evolution of the Chinese World-View' (PhD Thesis, The University of Chicago, 1929).

10 Here represented in the theology of John Calvin, a second-generation reformer recognised for his systemisation of Reformation doctrine. See John Calvin, *On the Christian Faith*, ed John T McNeill, (Liberal Arts Press, 1957).

11 Jonathan Crowe, 'Natural Law, Weak and Strong' (Seminar Paper, Maastricht Law and Philosophy Platform Seminar Series, 9 November 2020) <https://ssrn.com/abstract=3726757>.

12 This concept was first introduced at the 'Post-Liberal Christian Legal Theory Workshop' at the University of Sydney Law School on 22 April 2022 in a paper titled 'Conscience and the Continuum of Constitutionalism.'

13 Aristotle (n 3) I278bI5. For example, Aristotle uses the condition of living in *polis* as definitive of what makes humans, human.

frameworks lend themselves to a treatment of duties before any enunciation of rights takes place. To this end, the article proceeds as follows:

Part II addresses the prevailing view among Confucian scholars that constitutionalism in Sino-Confucian countries is essentially a foreign transplant and, therefore, incompatible with existing normative structures. This 'incompatibility thesis' stems from a preoccupation with the modern focus on rights and/or a conflation of constitutional moral and civic philosophy with constitutional orthodoxy. These assumptions have had the effect of facilitating superficial, if not paternalistic, views of constitutionalism in countries with a Confucian legacy.

Part III identifies the core tenets of 'Confucian constitutionalism'. This section briefly introduces Confucianism as a moral philosophy originating from the teachings of Confucius '孔夫子' (551–479 BC), which has had a significant impact on Northeast Asian countries. It examines Confucianism's central moral and civic norms, including: the two forms of the *li*[1] ('禮') (as 'rules of propriety or sacred ritual') and *li*[2] ('義') (as 'natural law'), *ren* ('benevolence'), *yi* ('righteousness'), *xiao* ('filial piety') as well as later outgrowths of political theory.

Part IV considers some core normative assumptions of Western constitutional thought attributable to John Calvin (1509–64) and his theory of government, as it derives from his theology.[14] Here, the section specifically examines the fundamental tenets of Calvin's natural law theory, namely, the principles of the sovereignty of God, conscience, and the *Imago Dei* in the context of human fallibility, and the law of love.

Part V offers an exposition of the 'spheres of influence' scheme and draws out the substantive continuities between the two normative paradigms. The idea of the common good is not absent from either normative tradition. Rather, the interests of the collective are part and parcel of the rights of individuals within a relational ontology.

II The Incompatibility Thesis and Duty-Based Constitutionalism

The popular view held by Confucian scholars today is that that the spread of constitutionalism in the East was essentially the result of foreign

[14] Here the adjective 'Calvinian' is used instead of 'Calvinism' to intentionally distinguish between ideas that can properly be attributed to Calvin directly from his writings, as opposed to the historical movement that was developed by his followers from his theology. This is thus an attempt to interpret Calvin's texts on their own terms. See also, Brian G Armstrong, *Calvinism and the Amyraut Heresy: Protestant Scholasticism and Humanism in Seventeenth-Century France* (University of Wisconsin Press, 1969) xvii.

transplantation.[15] According to this view, the institutional structures introduced to non-Western polities, as mere by-products of the foreign imposition of norms, remained fundamentally incompatible with pre-existing normative frameworks.[16] This conclusion allowed its proponents to argue for an alternative political philosophy to that of constitutionalism on the basis that the two philosophies remain inherently incompatible.[17] However, the truth may be far more nuanced.[18] As aforementioned, the proponents of the 'incompatibility thesis' potentially make assumptions on one or both fronts:

(1) The first assumption relates to a failure to differentiate core tenets of Confucian philosophy from its legalistic manifestation at certain points in Chinese history.[19] This conflation of Confucian philosophy with Confucian statism — a political orthodoxy that was instrumentally employed by certain imperialist Chinese dynasties — greatly impoverishes the discourse.[20] This is because proponents of this view dismiss Confucianism as part and parcel of the ideological underpinnings of 'Oriental despotism.'[21]

(2) The second assumption relates to the failure to distinguish between different forms of constitutionalism. In modern constitutional law, 'fundamental rights' talk' has reached near saturation point.[22] It seems to imbue every facet of political and social life. However, accepting this dominant offshoot as the whole case for constitutionalism is misleading as it denies the inherently diachronic character of constitutional theory's development. The conflation of classical (non-liberal) Constitutionalism with its modern democratic-liberalist expression results in a false equivalence,[23] which adversely skews any ensuing

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15 The 'iconoclasts' of the May Four Movement held that Confucianism was diametrically opposed to liberal ideas like human rights and democracy. Chen Duxiu and his supporters most famously connected Confucianism with despotism. See Bui Ngoc Son, 'Confucian Constitutionalism: Classical Foundations' (2012) 37 *Australian Journal of Legal Philosophy* 61, 61–2.

16 See, eg, Habi Zhang, 'What the West Got Wrong about China', *Law & Liberty* (Web Page, 11 May 2022) <https://lawliberty.org/>. Here, the author argues that Confucianism and liberalism are mutually exclusive, basing her notion of freedom on Hannah Arendt's individualistic account.

17 Jiang Qing, *A Confucian Constitutional Order: How China's Ancient Past Can Shape its Political Future*, Daniel A Bell and Ruiping Fan (eds), tr Edmund Ryden (Princeton University Press, 2012) 239.

18 The face of hybridisation means that Confucianism itself was a foreign transplant in many Northeast Asian countries from China. See Andrew M Law, 'Situating Strategic or Hybrid Confucianism(s): Issues and Problematics' (2021) 11(2) *Dialogues in Human Geography* 257.

19 For example, the most turbulent period in Chinese history known as the period of the Warring State (475–221 BCE). See Xinzhong Yao, *An Introduction to Confucianism* (Cambridge University Press, 2000) 18.

20 Ibid 271.

21 Shaohua Hu, *Explaining Chinese Democratization* (Praeger, 2000) 24.

22 Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, 1991) 76.

23 Sor-hoon Tan, *Confucian Democracy: A Deweyan Reconstruction* (State University of New York Press, 2003) 7.

comparative analysis between constitutionalism and Confucianism.[24] To avoid this fallacy, we can distinguish constitutionalism from constitutions in terms of the former's etymological genealogy.[25] In this article, I refer to constitutionalism as a political framework whereby the sovereign's power is self-constrained.

Lately, there have been incremental shifts away from this incompatibility thesis by prominent comparative constitutional law scholars.[26] The new approach holds that the normative foundations of the constitutional systems in the East and West are not so fundamentally incompatible as first thought — that, in fact, they possess key normative continuities.

A *Duty-Based Constitutionalism*

In recent decades, there has been growing support for the claim that natural-law theory can supply a solid ontological foundation for constitutionalism, minimally conceived.[27] That is, when constitutionalism is viewed *conservatively* in terms of a government's legitimacy being directly dependent on its observation of limitations to its own powers,[28] the core concepts of natural law can explain the normative necessity for upholding constitutional frameworks of political governance.[29]

In other words, when we conceive of constitutionalism in terms of limitations on government powers characterised by fundamental constitutional doctrines — such as the 'rule of law' and 'the separation of powers'[30] — we can reduce the theoretical divide that exists between the ontological foundations of Confucian and Calvinian constitutional theories. Thus, by limiting the scope of our inquiry to a conservative definition of constitutionalism, we are able to sidestep the thorny question of 'rights talk',[31] and thus, importantly, shift our

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24 Zhang (n 16).

25 Graham Walker, 'The Idea of Nonliberal Constitutionalism' [1997] 39 (Ethnicity and Group Rights) *Nomos* 154, 165 ('Nonliberal Constitutionalism').

26 For example, Professors Sungmoon Kim, Chaihark Hahm and Sor-hoon Tan.

27 More debatable is whether natural law theory supports all aspects of modern constitutionalism and, in particular, the connection between an 'arid scheme of government powers' and 'abstract rights.' See Gerard V Bradley, 'Natural Law Theory and Constitutionalism' in George Duke and Robert P George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press, 2017) 397. See also Jonathan Crowe, 'Philosophical Challenges and Prospects for Natural Law Foundations of Human Rights' in Tom Angier, Iain T Benson and Mark D Retter (eds), *The Cambridge Handbook of Natural Law and Human Rights* (Cambridge University Press, 2022) 485.

28 Charles H McIlwain, *Constitutionalism: Ancient and Modern* (Cornell University Press, 1940) 24; Carl Joachim Frederich, *Man and His Government: An Empirical Theory of Politics* (McGraw-Hill, 1963) 271.

29 Graham Walker, *Moral Foundations of Constitutional Thought: Current Problems, Augustinian Prospects* (Princeton University Press, 2014) 3–8.

30 Suri Ratnapala, 'The Idea of a Constitution and Why Constitutions Matter' (1999) 15(4) *Policy* 3.

31 Thomas C Grey, 'Constitutionalism: An Analytic Framework' [1979] 20 (Constitutionalism) *Nomos*, 189, 190. See also Jung (n 5).

focus to the space of convergence that exists between Eastern and Western moral traditions.

That constitutionalism is conceptualised as functionally and prescriptively concerned with the legal limitation of government powers, does not mean that the idea of what is 'legal' pertains exclusively to positive law.[32] In other words, the existence of formal restraints is not necessarily indicative of constitutional order.[33] The 'self-limiting character'[34] of a constitution may be highly regularised without being embodied in any formal sense.[35] As such, a 'constitution' — properly understood — must capture certain fundamental normative commitments. These constitutional commitments can, in turn, be viewed in terms of a constitution's '*telos*', which it shares with natural law, namely the advancement of the common good and collective human flourishing.[36]

Against this theoretical backdrop, natural-law theory explores the motivations of political agents. By addressing the ontological question of the moral good, that tradition examines the fundamental normative reasons for constitutional law. Systematic attempts to identify the normative motivations of legal actors have been advanced by the natural law tradition for centuries. The most influential attempt in the 20th century can be found in the revival of natural law theory in the work of Germain Grisez[37] and John Finnis[38] in the early 1980s (widely known as the 'new natural law theory').[39]

The normative foundation that constitutionalism shares with Calvinian natural law theory logically translates to a duty-based framework.[40] The natural law outlook is broadly characterised by two fundamental ideas: first, that natural law captures the basic (and timeless) regularities of life that are intrinsically good for humans given our basic natures ('the basic goods');[41] and, second, that these

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32 Charles H McIlwain, *Constitutionalism and the Changing World* (Cambridge University Press, 1939) 244.

33 Carl Joachim Frederich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Ginn and Company, rev ed, 1950) 123 ('*Constitutional Government*').

34 Walker, 'Nonliberal Constitutionalism' (n 25) 165.

35 Frederich, *Constitutional Government* (n 33) 123.

36 Nicholas Tsagourias, 'Constitutionalism' in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Models* (Cambridge University Press, 2007) 3.

37 Germain G Grisez, 'The First Principle of Practical Reason: A Commentary on the "Summa Theologiae"', 1–2, Question 94, Article 2' (1965) 10(1) *American Journal of Jurisprudence* 168, 192–3.

38 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011).

39 Contemporary natural law has been associated with the Roman Catholic tradition. Prominent natural law scholars in the last few decades have been Thomistic. See ibid; Robert P George, *In Defense of Natural Law* (Clarendon Press, 1999); Russell Hittinger, *The First Grace: Rediscovering the Natural Law in a Post-Christian World* (ISI Books, 2003). See also Lee, 'Calvinist Natural Law' (n 6). Here, I identify the differences between Thomistic and Reformed approaches to natural law theory. The first is based on a sanguine account of human nature which makes it more facilitative of a rights-based constitutional theory. In contrast, reformed approaches are premised on an anthropology that views human nature as extensively distorted, thus, fallible, resulting in a duty-based view of constitutionalism.

40 Bradley (n 27).

41 Finnis (n 38) 34.

basic forms of life translate to a set of normative principles or requirements that distinguish sound from unsound thinking and, also, provide the criteria for distinguishing reasonable from unreasonable acts.[42] It follows that these basic goods not only explain the morality of individual actions, but also play a fundamental role in explaining the nature and purpose of social, political and legal institutions.[43] In this context, for Calvin, these basic goods are identified in terms of the sovereignty of God, and moral agency is defined in terms of the universal facility of conscience, which, albeit fundamentally fallible, requires everyone to pursue higher moral standards (by virtue of the doctrine of *Imago*).[44] This produces a strong gravitational pull towards higher substantive norms as premised on every individual's moral duty.

Moreover, natural law grounds the quality of our moral thoughts and actions in objective norms, whose content depends on our fundamental human nature. Classical natural-law traditions in the West posit a direct connection between human nature and the teleological order of the universe ('the cosmos') or (in Christian accounts) God (as the divine and eternal Being).[45] Thus, it is arguable that, whether thinly or thickly conceived, natural law theories are commonly duty-based.[46] This is because, in their conceptualisation and methodology, natural law theories place priority on the duties of individual actors whose thoughts or actions are normatively judged by the extent of their adherence to objective values.[47]

To come full circle, there are strong continuities between the normative purpose of constitutionalism and the fundamental tenets of natural law theory. Indeed, one could *even* go so far as to suggest that the latter offers an ontological basis for the former. Thus, insofar as a comprehensive understanding of the motivations of political actors is concerned, the anthropological and teleological focus of natural law allows it to supply a normative foundation for constitutional law. This inquiry, however, is beyond the scope of the present discussion. Suffice it to say, there are clear conceptual continuities between the key principles of these two schools of thought, and, furthermore, their synergetic engagement may potentially be observed in other cultural and historical contexts.

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42 Ibid 23.

43 Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019) 1–12.

44 Constance Youngwon Lee, 'The Spark That Still Shines: John Calvin on Conscience and Natural Law' (2019) 8(3) *Oxford Journal of Law and Religion* 615 ('The Spark That Still Shines').

45 Russell Hittinger, *A Critique of the New Natural Law Theory* (University of Notre Dame, 1987) ('*Critique*'). Here, the author distinguishes classical natural law theories from new natural law at this conceptual point.

46 Both duty-based but with a teleological metaphysical account cf Kantian deontology. See, eg, Immanuel Kant, *Critique of Pure Reason* ed Paul Guyer and Allen W Woods, tr J M D Meiklejohn (Cambridge University Press, 1998).

47 The implications for 'weak natural law theory' may be a scheme of natural rights. See, eg, Finnis (n 38).

III Core Tenets of Confucian 'Constitutionalism'

This Part begins by elucidating the natural law ideas in Confucianism as a basis for constitutionalism. At the outset, it is important to clarify the nature and scope of inquiry as well as the methodology being used, especially the approach to interpreting primary sources. First, the specific Western term for 'natural law' (*lex naturae*) can be translated into modern Chinese as '自然''*zirán fa*'.[48] Having said that, it is also important to acknowledge that the modern Chinese term did not exist in classical Chinese jurisprudence.[49] Notwithstanding the 'absence of the term,' Ho aptly notes that this does not mean that 'we cannot ask whether natural law ideas or natural law thinking existed in Chinese tradition.'[50] Indeed, prominent Chinese legal historian, Geoffrey MacCormack, observes the clear lines of symmetry that exist between natural law theories and Confucian 'ways of thinking about law' insofar as they both appeal to an ultimate standard or objective norms grounded either in the cosmos or man's own nature.[51] A constitutional offshoot of this principle would be that the 'ultimate standard ought to form the basis for the laws enacted by the ruler for the regulation of the state.'[52]

It is also important to clarify the scope and nature of the term 'Confucianism' as used in this article. Confucianism can be broadly defined as representing a diverse tradition,[53] which can be traced back to the teachings of Confucius, but which also encompasses the works of his disciples. It has also been the subject of hybridisation with many customary and religious norms, such as those derived from Taoism, Buddhism, Shamanism, Sinism in classical times and, more recently, Feminism and Marxism.[54] In the face of this hybridisation and diversity, it is difficult to distil the fundamental tenets of Confucianism.[55] Therefore, for the purposes of present inquiry, we will focus on the traditional corpus of Confucianism (the 'Classics') as propounded by Confucius himself (551–479 BCE), and developed further by Mencius (372–289 BCE) and (to a lesser extent)

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48 Etymologically, the term '自然' 'zirán' originates from classical Chinese, a key concept in Taoism that means 'of its own, by itself, spontaneously, natural or occurring naturally.' See Guorong Yang, 'Metaphysical Principle and Principle of Value: The Way (*Dao* '道') and Natural Spontaneity (*Ziran* '自然') in the Philosophy of the *Laozi*' in Paul J D'Ambrosio et al (eds), *Philosophical Horizons: Metaphysical Investigation in Chinese Philosophy* (Brill, 2019) 238.

49 Norman P Ho, 'Natural Law in Confucianism' in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019) 164.

50 Ibid.

51 Geoffrey MacCormack, 'Natural Law in Traditional China' (2013) 8(2) *Journal of Comparative Law* 104, 104–5.

52 Ibid.

53 Kenneth Scott Latourette, *The Chinese: Their History and Culture* (The Macmillan Company, 1934) 55.

54 Daniel A Bell, *China's New Confucianism: Politics and Everyday Life in a Changing Society* (Princeton University Press, 2010) xxvii.

55 Ibid.

Xunzi (312–230 BCE).[56] The Classics is comprised of the following works: the *Four Books* (‘*Sìshū’*) — that is, the *Analects* of Confucius, the *Book of Mencius*, the *Doctrine of Mean* and the *Great Learning*, as well as the ‘Five Classics’: the *Book of Changes* (‘*I Ching’*), the *Classic of Poetry* (‘*Shu Ching’*), the *Book of Rites* (‘*Yi Li* ‘) and the *Spring and Autumn Annals* (‘*Chunqiu*’). [57] This collection of works has been associated with the Chinese concept of the supreme authority of the Canon (‘*ching’*),[58] which establishes this corpus as the sacred scripture of Confucianism.[59]

Relatedly, though this Confucian *corpus* was consolidated in the pre-Qin period of Chinese history (prior to 221 BC), it continued to be revitalised and revised in other Sino-Confucian states like Korea and Japan.[60] At this point, we may briefly comment on Confucianism as a diachronic movement. There are marked discrepancies in the way the thoughts have manifested in the context of *realpolitik* (as opposed to *moralpolitik*).[61] For example, if we consider its evolution in the Korean context, particularly the Chosun dynasty (1392–1910), this site is characterised by narrow geographical boundaries, cultural, ethnic and linguistic homogeneity. All these characteristics lend Korea to a clearer (and perhaps, more fruitful) picture of the *actual* synergetic developments that occurred between contemporaneous indigenous mores and the development of Confucian norms. [62]

In contrast, the Chinese context is complicated by the tyrannies of distance due its vast territory and its geographical location, which makes it culturally and linguistically diverse. These jurisdictional idiosyncrasies mean that the primary motivation for government, historically, was to bring about peace and harmony through the centralisation of power via philosophical orthodoxies like Confucian ‘legalism’ or ‘法家’.[63] It follows that such contextual factors invariably have the effect of muddying later synergies, which emerged through the hybridisation of customary norms with state-sanctioned Confucian ideology.[64] As such, this

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56 Ibid. Authorship remains uncertain. Though most of the core texts are attributed to Confucius and his disciples, it was perhaps subject to repeated editing and re-collection by Confucian scholars, if not Confucius himself.

57 Ibid. Later referred to as the Thirteen Classics and Four Books after the period of Song Dynasty (960–2379) in order to recognise its expansion from the Four books and Five Classics (later Six after the discovery of the *Book of* Music) to include, *inter alia*, the *Canon of Filial Duty* (‘*Xiaojing*’) (frequently attributed to Xunzi).

58 Ibid. Roughly analogous to the Bible in the West. See Michael Nylan, *The Five ‘Confucian’ Classics* (Yale University Press, 2001) 2.

59 Xinzhong Yao, *An Introduction to Confucianism* (Cambridge University Press, 2000) 52–4.

60 Ibid.

61 Sungmoon Kim, ‘Confucian Constitutionalism: Mencius and Xunzi on Virtue, Ritual and Royal Transmission’ (2011) 73(3) *The Review of Politics* 375, 375. See also SangJun Kim, ‘The Genealogy of Confucian Moralpolitik and the Implications for Modern Civil Society' in Charles K Armstrong (ed), *Korean Society: Civil Society, Democracy, and the State* (Routledge, 2002) 57–58.

62 This article serves as preliminary groundwork for future projects along these lines.

63 Rooney (n 7).

64 This legalistic offshoot of Confucian philosophy is intentionally referred to here as ‘ideology’ given the government’s clear agenda for its sanction and proliferation.

article will consider only the *moralpolitik* or substance of the accepted classical Canon of Confucianism.

Moreover, the interpretive approach adopted in this article will be a dialectical interpretive method that oscillates between at least two perspectives: the contextual historical meaning and the textual meaning represented by the linguistic signifiers.[65] This narrow oscillation occurs with a view to ultimately discerning the meaning that best reflects (insofar as that is possible) what the author intended for the text.[66] This hermeneutic approach differs from those preferred by some scholars of Chinese Confucian philosophy[67] in two main ways.

The first difference is the way in which the hermeneutic approach selects the core commitments of Confucianism. It avoids cherry-picking those concepts most conducive to the argument by undertaking a historicised assessment of the subject in the light of the structural integrity of the philosophy as a whole. This means that key tenets will be identified and interpreted with an intentional regard for the underlying religious or normative influences, or both, that feature most prominently in Confucian thought. The second way in which the hermeneutic approach differs is that it approaches Confucianism, not as contained in a single text, but constitutive of a larger collection of works bound by this common outlook. This presupposes, to some extent, a structural and conceptual integrity of thought.[68] As such, this holistic approach allows us to better capture the normative assumptions that underpin each contributor's understanding so as to arrive at a more coherent account of Confucian natural law.

In terms of relevant contextual factors, the historical period in which Confucius found himself was a tumultuous time in Chinese history, marked by frequent warfare and general cultural turmoil. Born in the Eastern Zhou dynasty, Confucius was motivated by a strong desire to address the challenges of his day by revitalising a robust moral framework within his society. Importantly, Confucius believed that the only way of re-establishing justice and order in Chinese society was through the integration of ritual practices in the culture.[69] At this time, the average Chinese individual's belief system was an eclectic mix of animism, polytheism, Buddhism, Confucianism and Taoism, without any sense of consistency.[70]

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65 Harold J Berman, *Law and Language: Effective Symbols of Community*, John Witte Jr (ed) (Cambridge University Press, rev ed, 2013) 70–7. Berman stresses the importance of considering language in terms of its cultural and historic foundations. This begins by acknowledging the ongoing synergy between linguistic signifiers and their normative referents.

66 I will be using a similar interpretive method to examine John Calvin's theology with a few variations to account for his particular legal and philosophical education. See below Part IV.

67 Ho (n 49) 164.

68 Like the one adopted by Edward Slingerland, 'Virtue Ethics, The Analects, and the Problem of Commensurability' (2001) 29(1) *Journal of Religious Ethics* 97, 97.

69 Latourette (n 53) 55.

70 Ibid.

In this context, to restore civility to human social interactions, Confucius viewed as essential the inculcation of sound moral understanding in the common people, based on the customary rules of propriety.[71] Latourette notes that 'the maintenance of the proper ceremonies including those of a religious nature, and the exhibition by the ruling classes of a good moral example', was at the fore of Confucius' mind and his efforts were directed in pursuit of an ideal society. This ideal society was to be led by a group of model citizens, who represented paragons of self-cultivation. These paragons of virtue were referred to as '*junzi* gentlemen.'[72]

This marked the emergence of classical Confucian doctrine, and a collection of canons were seen as the basis for a state-sanctioned religion.[73] Indeed, the term for the classical Canon of Confucianism — '*Ching*' — translates to mean 'the constant,' 'invariable standard,' and 'immutable law.'[74] A point of difference with Western religion, and Christianity in particular, is that Chinese religious life was marked by *this-worldliness* (unlike Christianity's *other-worldly* focus on the heavenly kingdom). The purpose of religion in the East was flourishing in the present life. However, this by no means translated to a consequentialist way of thinking. Confucius may not have believed in a heavenward bound trajectory, but he extolled reverence for the ordinances of heaven ('*Tiān*').[75]

A *Confucian Moral Norms*

As aforementioned, there are two fundamental tenets of natural law theory (as broadly defined): the first relates to our nature as humans – what norms are intrinsically valuable given the nature that we have (basic goods).[76] The second tenet relates to our obligation, motivation and capacity as moral agents to pursue these basic goods. Regarding the first aspect of natural law, then, we can ask: is there a core aspect of Confucian thought that reveals a way of thinking about law

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71 Ibid.

72 Ibid 55.

73 Phillip Ho Hwang, 'What is Mencius' Theory of Human Nature?' (1979) 29(2) *Philosophy East and West* 201, 201.

74 Hu Shih, 'The Natural Law in the Chinese Tradition' [1953] 5 *Natural Law Institute Proceedings* 119, 134 ('Natural Law in the Chinese Tradition').

75 Eirik Lang Harris 'The Nature of the Virtues in Light of the Early Confucian Tradition' in Kam-por Yu, Julia Tao and Philip J Ivanhoe (eds), *Taking Confucian Ethics Seriously: Contemporary Theories and Applications* (State University of New York Press, 2010) 163, 165.

76 Alasdair MacIntyre adds that our deontological responsibilities cannot be understood except in the context of socially constituted, cooperative practices that contain their own internal goods and standards of excellence. Written in Aristotle's nomenclatures of causality, these virtues can then be acquired through habitual training and practice which enable individuals to perceive and then act in a manner toward their realisation in the world: Alasdair MacIntyre *After Virtue: A Study in Moral Theory* (Duckworth, 1981) 178.

that tests its validity by reference to an ultimate normative system, grounded in human nature or some other transcendent or cosmic standard?[77]

To answer this question, we cannot deny that classical Confucian thought was heavily influenced by the pre-Qing influences of *Taoism* as most famously enunciated by Lao Tze.[78] The core principle of *Taoism* is the *Tao*, which translates to 'the Way of Heaven,' 'the Path' or 'Nature.' The basic notion of *Tao* entailed the attributes of self-evidence and intrinsic value as expressed by *wu wei*, which translates to 'does nothing.'[79] The basic conception of the 'Way of Heaven' can therefore be understood as representing an intrinsic and abiding truth: 'an example of the highest virtue is the water [because] it benefits all things and resists none.'[80] Here, the 'Way of Heaven' substantively resembles the notion of 'the good' in natural law thought.[81] In other words, the *Tao* represents a virtue that is both intuitively accessible, inherently authoritative and timeless. This is a re-occurring concept (whether explicit or implied) within Confucian writings and one that furnish the ideas with a teleological trajectory.[82]

Confucius articulates the importance of moral law as a foundation for formal justice. He writes:

> If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good.[83]

Confucius' reference to the people's proclivity for 'a sense of shame' resonates with natural law tenets relating to a moral agent's intuitive discernment of first principles.[84] It follows that an agent that has not acted in accordance with that

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77 Authors like Joseph Needham answer this question in the affirmative. See Joseph Needham, *Science and Civilisation in China: History of Scientific Thought* (Cambridge University Press, 1956) vol 2, 544 ('*Science and Civilisation in China*').

78 Shih, 'Natural Law in the Chinese Tradition' (n 74) 123.

79 Ibid 124.

80 Ibid.

81 CS Lewis, *The Abolition of Man* (Harper Collins Publishers, 1944) ch 2.

82 Ibid.

83 Confucius, *The Analects*, tr James Legge (Neeland Media, 2017) [2.3] ('*The Analects*, tr Legge'). Also cited in Wejen Chang, *In Search of the Way: Legal Philosophy of the Classic Chinese Thinkers* (Edinburgh University Press, 2017) 34.

84 John Calvin, *Institutes of the Christian Religion*, ed John T McNeill, tr Ford Lewis Battles and John T McNeill (Westminster Press, 1960) II.vii.10. Note here, Calvin published the first edition of the Institutes in 1539, and then went on to produce subsequent editions in 1544, 1545, 1550, 1553, and finally 1559. References to *the Institutes* throughout this article will appear in the following form: book.chapter.section number (eg I.i.1). Unless otherwise stated, citations in this article are taken from Battles's 1960 translation, based on the 1559 edition: John Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill. However, some citations will be drawn from other translations, depending on the meaning being highlighted.

intuitive knowledge would be affected by the 'discomfort' of a guilty conscience.[85] Another important point (which we shall revisit) relates to the tacit deference Confucius reserves for the separation of natural '*zirán fa*' and positive law '*fa*' ('法'). In the above passage, this is clearly evinced by the distinction between 'guided by orders' and 'guided by virtue.'[86]

A core tenet of Classical Confucianism is the principle of *li.* This term has two written forms (though the modern pronunciation is the same). The erroneous conflation between these two terms by treating the word *li* as protean as opposed to one that engenders multiple referents detracts from a proper analysis of Confucian thought as an integrated system of ideals. To some degree, these two distinct forms of *li* (*li*[1] ('禮') and *li*[2] ('義') serves to reinforce its continuity with a natural law paradigm.[87]

The first form of *li* or *li*[1] refers to rules of propriety that have been elevated as sacred rituals in Confucianism. This is written in Chinese as '禮'and holds that all individuals, social and political institutions must observe certain rules of proper conduct in line with the moral virtues. Thus, Confucius upheld reverence for enduring moral norms as best expressed through acts of observing the sacred customary rituals. He believed that this would, in turn, bring the society closer to its ideal form.

The second form of *li* or *li*[2] *('*義' or *'the rule of li')* may refer to an embodiment of the *Tao* as natural law that is binding on all humankind.[88] In this sense, *li*[2] represents, in the words of Mencius,

> the highest expression of order and discrimination, the root of strength in the state, the Way by which the majestic sway of authority is created, and the focus of merit and fame … If they [kings and dukes] proceed in accordance with the Way of ritual principles [*li],* then they will succeed; if they do not, then they will fail.

The idea here is that, unless the rule of *li* (*li*[2]) is observed in society as an objective norm, law as *fa* cannot be properly applied. At this juncture, there is a divergent view that rule of *li* represents a kind of Confucian traditionalism, representing human-made institutions and norms. Particularly for Xunzi, *li* has been understood to mean the Ways of ancient kings as recorded in the classics, which indicate the 'rightness' (*yi*) or 'what is right.'[89] Xunzi further asserts that *li* is the

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85 Tom Ginsburg recently concluded that there exists in Confucianism 'a king of higher law, constraining positive human law': See Tom Ginsburg, 'Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan' 27(4) *Law & Social Inquiry* (2002) 763, 794.

86 *The Analects* (n 83).

87 Needham, *Science and Civilisation in China* (n 77) 544.

88 Latourette (n 53).

89 Masayuki Sato, *The Confucian Quest for Order: The Origin and Formation of the Political Thought of Xun Zi* (Brill, 2003) 345–7. Here, Sato observes that in the works of Xunzi, *li* and *yi* are used interchangeably to some degree and sometimes used as compound words (*liyi*).

invention of sage kings to bind the perverse will of men.[90] Both Confucius and Mencius' were captivated by the *fa* of the ancient kings (of Zhou), viewing them as synonymous with the rules of *li*, which, they held, ought to be admired.[91] Indeed, so captivated was Confucius that he declared himself 'not a maker' but a 'transmitter' of this ancient wisdom.[92]

Whether Confucianism departs from natural law fundaments then turns on the question of whether the rule of *li* is descriptive, rather than normative in nature. The separation between *li* and *fa* in Confucian thought is not directly analogous to the dichotomy between natural and positive law in Western natural law. However, to the extent that normativity is concerned, the *fa* of the ancient Kings as embodied in the rule of *li* offers a teleological trajectory for law as social fact. Moreover, when we view *fa* and *li* within a broader framework of *Tao,* the way the canonical Confucian scholars are referring to *li* is not as a past social fact but as a present social norm.[93]

Moreover, the categorisation of law — the distinction between the two derivatives of *li* in addition to *fa* — raises the possibility of a continuum in Confucian legal thought. If li^1 is the practical embodiment through ritualisation of fundamental ethical precepts, and li^2 is the ideal form that supplies the motivation for moral action, then unless the content of *fa* comports with the rule of *li* it could potentially be deemed invalid. Li^2, by being representational of 'broad moral principles' that give the *li* validity, is predicated on the belief that these 'principles are rooted in innate human feeling' as they embody what humans intuitively discern to be right.[94] Bodde goes so far as to argue that, in this context, the notion of *li* is itself grounded in human nature. In this way, both forms of *li* present an integrated framework for natural-law-type thinking that holds that the content of positive laws ('*fa*') must pass the test of moral validity (as set by two forms of '*li*') to attain some degree of legitimacy (if only in terms of functionality).

In slight contrast to the legitimating language used in Western natural law, it is more accurate to conceive of the li^2 as pivotal to the formation of *fa.* This is partly because the Confucian scholars did not endorse the promulgation of positive law but, rather, channelled their energies in the long-term project of cultivating people's morality through ritual. Various Confucian principles upheld as fundamental attest to this endeavour. As such, these principles ('moral virtues') play a role in moderating the content of *fa.* One of the most prominent moral virtues underpinning the sacred rituals was the principle of filial piety or

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90 John Knoblock, *Xunzi: A Translation and Study of the Complete Works* (Stanford University Press, 1994) vol 3, 151–2.

91 Yu-Lan Fung, *A Short History of Chinese Philosophy* (Macmillan, 1948) 108–11.

92 *The Analects*, tr Legge (n 83) [7.1].

93 Herbert Fingarette, 'The Music of Humanity in the Conversations of Confucius' (1983) 10(4) *Journal of Chinese Philosophy* 298, 335.

94 Derk Bodde, 'Basic Concepts of Chinese Law: The Genesis and the Evolution of Legal Thought in Traditional China' (1963) 107(5) *Proceedings of the American Philosophical Society* 375, 383.

the '*xiao*.' Filial piety, as represented by the *xiao*, was more than respect between members of a family (ie between a son and his father, or children and their parents). Thus, filial piety is a representational normative attitude, best summed up by Yonglin in the following terms:

> For any individual, parents constitute an all-important link in their cosmic existence and community. They are one's ancestors: deceased ancestors after their physical death, and 'living ancestors' while alive. To recompense parents for such cosmic grace, one must practice filial piety.[95]

As such, filial piety is a moral norm that can be translated to a civic one, in the sense that it is epitomic of the way a subject ought to interact with their sovereign. The inherently reciprocal (relational) nature of filial piety means that the normative framework casts all relationships (including the one between sovereign and subject) in terms of moral obligations as opposed to rights. This core principle of classical Confucian thought reveals the groundwork for its relational ontology.

The articulation and formulation of other core moral goods are also indicative of this fundamental relational ontology upon which Confucianism is predicated.[96] What Mencius calls 'The Four Cardinal Virtues', which include: '*ren*' '仁' (meaning 'perfect virtue,' 'benevolence', 'humaneness,' 'love'[97]), the *li* '禮' (*li*[1] as 'propriety'), the *yi* '义' ('righteousness,' 'rightness' (cf 'shame'), the *zhi* '智' ('wisdom' or 'the ability to discern between right and wrong') appear to constitute the normative foundations of Confucian thought.[98] The first moral norm, *ren*, features frequently in the *Analects.* However, Confucius does not offer a definitive meaning of the term.[99] The creation of the *junzi* (or the ideal gentleman) in Confucian theory points to an inbuilt *telos* in Confucian thought. Confucius himself did not ground the rule of *li (li*[2]) in either the cosmos or human nature explicitly,[100] He did, however, see the reference to a paragon of virtuous human being based on the pursuit and mastery of *ren.* The value of any practice, whether it is 'archery' or 'charioteering',[101] only becomes meaningful to the extent that it is informed by the good of *ren.* As Confucius notes: 'A man who is not *ren* – what has he to do with music?'[102]

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95 Jiang Yonglin, *The Mandate of Heaven and the Great Ming Code* (University of Washington Press, 2011) 156 (citations omitted).

96 See MacIntryre (n 76) 178. Alasdair MacIntyre, an Aristotelean scholar, defines 'virtue' as 'an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods.' Though he argues against the commensurability of Aristotelian and Confucian ethics, there are structural similarities present here that go beyond the substance of the virtues themselves.

97 Here, it seems to indicate *agape* love (unconditional love for humanity) and not the other forms.

98 Knoblock (n 90) 150.

99 Herbert Fingarette, *Confucius: The Secular as Sacred* (Harper & Row, 1972) 37–56.

100 See, eg, Confucius, *The Analects*, tr Legge (n 83) [17.19].

101 Ibid 9.6, 9.7 and 13.4.

102 Ibid 3.3.

The *ren*, thus conceived, was seen as the overarching Confucian norm, and defined in terms of the perfection and harmony of lesser values.[103] On a holistic view, the *ren* person (*junzi*) is one who is an integrated or 'complete person' ('*cheng-ren*').[104] As such, *ren* acts as a unifying force for the other values by offering a teleological end on the one hand, and by introducing a sense of incremental progression towards this end on the other.[105]

The etymology of the Chinese character *ren* attests to the fundamental connection between the self and others in Confucian theory. As Yuen points out,

> [R]en '仁' is written in two parts, one a figure of the human being, meaning oneself, and the other with two horizonal strokes, literally meaning two, and therefore implying relationships with other persons. Thus, a person is always … situated in a social context, a self-in-relation.[106]

This means that the *telos* towards most 'perfect and complete'[107] is inherently contingent upon how harmoniously one lives in relationships with other persons. When probed by one of his disciples as to the ambit of *ren*, Confucius is recorded as having responded: it is 'to love all men ['爱人', *ai-ren*].'[108] This understanding of the self and an individual's moral potential within a relational framework also serves to explain the seamless transition that Confucian thought makes from the 'moral values' to the norms one ought to pursue in the public space.

In terms of fundamental human nature, Confucian scholars posited that the individual was endowed with an inner moral faculty from Heaven which is capable of self-perfection.[109] Mencius propounded a clearer and more comprehensive account of human nature than Confucius, in which he advanced an optimistic view of human capabilities.[110] He believed that all humans are born of heaven's decree ('*ming*') and that they are naturally endowed with the virtues of 'humanity, dutifulness, conscientiousness, truthfulness to one's word, and unending delight in what is good.'[111]

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103 Ibid 13.19, 13.27, 14.4 and 17.6.

104 Ibid 14.12.

105 Ibid 4.2: 'Merely set your heart sincerely upon ren, and you can do no wrong.'

106 Mary Mee-Yin Yuen, *Solidarity and Reciprocity with Migrants in Asia: Catholic and Confucian Ethics in Dialogue* (Palgrave Macmillan, 1st ed, 2020) 160.

107 Fingarette (n 93). For Confucius, humans are inherently social creatures: see Zhongjiang Wang, 'The "Ren" of the Unity of the "Mind and Body" and Confucian Virtue Ethics — The Structure of Confucian Benevolvence and the Guodian Manuscript's Character of "Ren"', in Zhongjiang Wang (ed), *Excavated Texts and a New Portrait of the Early Confucians*, tr Kevin Turner (Peter Lang Publishing, 2021) 30.

108 Confucius, *The Analects*, tr Legge (n 83) 22. Here, he describes the lifelong process of becoming a sage: 'At fifteen I set my heart on learning; at thirty I took my stand; at forty I came to be free from doubts; at fifty I understood the Decree of Heaven; at sixty my ear was atuned [sic]; at seventy I followed my heart's desire without overstepping the line.'

109 Ibid [7.22]: 'Heaven produced the virtue that is in me'.

110 Cf Xunzi with a more pessimistic view: Knoblock (n 90) 151–2.

111 Lee Dian Rainey, *Confucius and Confucianism: The Essentials* (Wiley, 2010) 95.

Going further than Confucius, Mencius also connected the *li* to human nature, as sanguinely conceived, and the cosmos or Heaven ('*Tiān*') as the proper ends for all human action.[112] From this anthropological position, Mencius derives the concept of '*ji zhi weiyi*' '己之威儀' ('universal human dignity').[113] It follows that, according to Mencius, every person possesses the heavenly principle that assigns to them an 'awesome' human dignity,[114] but this dignity bears the potential for further cultivation in pursuit of the complete realisation of an individual's moral character — the capacity for 'sagehood' (the embodiment of *zhi* wisdom).[115] Here, the purview of Mencius' discussion about *yi*-righteousness is limited to the individual, '[whose] intellectual capacities are bestowed from without and possessed solely within.'[116]

Xunzi later revised and expounded Mencius' anthropology.[117] And in spite of the variances in focus, neither account views the self in isolation.[118] The self is not capable of being divorced from its relationship with others. Xunzi emphasised the intrinsically relational aspect of human nature by developing Mencius' internalisation of *yi* as moral rightness to *yi*^{x}, a form of moral duty that must be cultivated through forms of internal moral rituals: 'Cultivating one's will and intention, then one will take kings and dukes lightly.'[119] The political implications of *yi* as the moral conscience[120] within every person is particularly pronounced when Xunzi places the emphasis on the agent's actions and influence in society in the light of the values of rightness, fairness, justice and influence, as well as making clear attempts to bridge the dual categories of *yi*-duty and *yi*-rightness in the promotion of an ideal form of government, which continually pursues a more harmonious socio-political order.[121]

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112 Hwang (n 73).

113 Hu Shih, *English Writings of Hu Shih: Chinese Philosophy and Intellectual History*, Chih-P'ing Chou (ed) (China Academic Library, 2013) vol 2, 211 ('*English Writings of Hu Shih*'). Mencius, *Book of Mencius*, tr James Legge (CreateSpace, 2016) 4B26.

114 Confucius, *The Analects*, tr Legge (n 83) [20.22]. See also An'xian Luo, 'Human Dignity in Traditional Chinese Confucianism' in Marcus Düwell et al (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press, 2015) 177.

115 Shih *English Writings of Hu Shih* (n 113) 211. Mencius, *Book of Mencius*, tr James Legge (CreateSpace, 2016) 4B26.

116 Yuen (n 106) 160.

117 Xunzi wrote, 'In antiquity the sage kings took man's nature to be evil, to be inclined to prejudice and prone to error, to be perverse and rebellious, and not be upright or orderly. For this reason, they invented ritual principles and precepts of moral duty': See Knoblock (n 90) 151–2.

118 The outcome of Mencius' more sanguine views of nature may translate to a weaker version of a theory of moral law as it reduces the gap between social practice and the normative ends.

119 Xianqian Wang, *Collected Exegeses on the Xunzi* (Zhonghua Shuju, 1988) [1.27]–[1.28] ('*Collected Exegeses on the Xunzi*').

120 Ibid [2.56].

121 Ibid [11.295].

B *Confucian Civic Norms*

I now turn to consider what is referred to as the 'civic norms' in classical Confucian thought, when viewed as conceptual political derivatives of its moral account. The civic norms are distinguishable from moral norms in that they are a set of attributes, primarily concerned with the creation and sustenance of a political community, and therefore have a connection once removed from the cultivation of human 'excellence.'[122] As such, though civic norms are seen as instrumental to social harmony and ritual order, their cultivation does not lead to 'sage[hood].'[123] Xunzi, in particular, noted that governance began with the ruler's moral self-cultivation.[124] He noted that sage-kingship (not unlike Plato's account of the philosopher king)[125] represents the ideal ends for governance or the Kingly Way.[126] Confucius' endorsement of the use of the rule of *li* to 'correct' the ruler can be seen in his redefining of the term government from *zheng* '政' to *zheng* '正'.[127]

Thus, though *zheng* '正' does not easily translate to a single English word, it nevertheless encapsulates a sense of 'correcting in goodness' or, as it is more popularly translated, '[moral] rectification' of the ruler and the people.[128] In the light of its moral connotations, we can consider the Confucian method of government that Confucius derives from *zheng* and coins as '*zheng-ming.*' The *Analects* state that 'social order often stems from a failure to call things by their proper names.'[129] Viewed in terms of the political and moral implications of this concept, *zheng-ming* does not literally refer to the need for nomenclatural accuracy but, rather, the importance of ensuring that the 'names' (connoting the social roles and corresponding formal titles) correctly comport with the values proper to these roles.

In other words, far from requiring definitional accuracy, 'the rectification of names' is a method for recognising that the standards for action (based on the formal definition of duties) ought to correspond to the real actions of the persons discharging those political functions.[130] As such, the *zheng-ming* method of government requires that each person act in a manner that is consistent with the

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122 Tan (n 23) 52.

123 Confucius, *The Analects*, tr Legge (n 83) [6.28].

124 Wang, *Collected Exegeses on the Xunzi* (n 119) [14:5]; [9:18] and [12:4].

125 Plato, *Republic*, tr Robin Waterfield (Oxford University Press, 2008) bk v.

126 See *Xunzi* [10:15] in Kurtis Hagen, *The Philosophy of Xunzi: A Reconstruction* (Open Court, 2007) 32–35.

127 Confucius, *The Analects*, tr Legge (n 83) [13.3].

128 Ibid.

129 Loubna El Amine, *Classical Confucian Political Thought: A New Interpretation* (Princeton University Press, 2015) 31.

130 Zhongying Cheng, *New Dimensions of Confucian and Neo-Confucian Philosophy* (State University of New York Press, 1991) 222.

standards their roles require: the ruler as ruler, the subject as subject, the father as father, and the son as son.[131]

Another fundamental civic norm that follows from the Confucian idea that there is a proper relationship between rulers and their subjects is *minben* ('民本'), which translates to mean 'the people as the root or basis.' This civic principle is found in the *Shu Jing* [or *Shu* King], which states:

> The people should be cherished and should not be debased. For the people are the country's foundation, and when the foundation is firm set the country is peacefully disposed.[132]

The propriety of every relationship based on the rule of *li* presupposes several things. The first is that the government's implementation of power is teleologically limited to what is proper according to the content of *li*.[133] The second is that the legitimacy of power through the 'mandate of heaven' is based on the common good.[134] On this basis, Mencius concludes that the root of legitimate government lies not in repression but in education towards virtue. Sage Kings Yao and Shun were admired by the Confucian sages because their rule led their subjects to 'become possessors of themselves' ('使自得之').[135] As such, the 'mandate of heaven' ('*tian-ming*') is embodied in the people and the monarch is obliged to govern his kingdom in accordance with the principle of love for the people.[136] Interestingly, the entire political framework is cast in terms of natural duties. For instance, neither the principle of *minben* nor *zheng-ming* invoke rights either for the ruler or the ruled. Rather, the *telos* of governance (and being governed) is cast in terms of one's requirement to uphold the standards that are proper to their defined roles within the broader framework of moral norms.

IV Calvinian Constitutional Theology

This Part now turns to examine our second site for normative analysis, namely John Calvin's theology, with the aim of appreciating the natural law assumptions underpinning his account of constitutionalism.[137] While Calvin's theory of

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131 Warren E Steinkraus, 'Socrates, Confucius, and the Rectification of Names' (1980) 30(2) *Philosophy East and West* (1980) 261.

132 James Legge, *The Shu King: Or the Chinese Historical Classic*, (Clarendon Press, 2016) 65 ('*The Shu King*').

133 *Liyi* '禮義' represents ritual duty, featuring in the *Spring and Autumn Annals.* See Jinhua Jia, 'From Ritual Culture to the Classical Confucian Conception of Yi' (2021) 20(4) *Dao: A Journal of Comparative Philosophy* 531.

134 Mencius, *Book of Mencius*, tr Robert Eno (Indiana University, 2016) 2A2.6 ('*Book of Mencius*, tr Eno').

135 Legge, *The Shu King* (n 132).

136 Shih, 'Natural Law in the Chinese Tradition' (n 74) 123.

137 Karl Holl, *The Cultural Significance of the Reformation*, tr Karl Hertz, Barbara Hertz and John H Lichtblau (Meridian Books, 1959) 65–6.

government is well known,[138] particularly for its role in the Reformation's fight for personal freedoms,[139] what receives less attention is his duty-based paradigm for civic life. Indeed, at the time of writing, the systemisation of theological doctrine was of critical concern to the Reformers. This urgency culminated in Calvin's seminal work, *The Institutes of the Christian Religion*, of which the most prominent exposition 'on Civil Government' is found in Book IV, Chapter xx.[140] In contrast with his political theory, Calvin's account of natural law is noticeably less systemised. I previously noted that this reticence may *not* be due to a lack of importance but owing to its foundational nature.[141]

At the outset, it serves to reiterate the historical preponderance of contradictory and uncompromising interpretations of Calvin's theology.[142] Considering this, it is particularly important to (briefly) outline the method of interpretation utilised in comprehending his works. Calvin lived during a time of major social upheaval and the forthright nature of some of his statements is best understood in terms of this climate. Calvin also uses a distinct polemical method of oscillating between a binary set of perspectives in his discussions on natural law — no doubt influenced by his extensive legal and philosophical education.[143] This oscillation between two points of view enables Calvin to draw a more nuanced meaning of the object for study, often holding in tension apparently contradictory positions. Importantly, Calvin's political and philosophical perspectives cannot be divorced from his theological framework or exegetical purpose. Therefore, a proper understanding of Calvin's meaning ultimately requires an appreciation of the dialectical, relational, and soteriological aspects of the overall purpose of the author.

This Part will first examine the core tenets of Calvin's natural law propositions by applying the dialectical method of interpretation. The second half of the Part will consider the implications of his natural law for his duty-based paradigm of political theory.

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138 Philip Benedict, *Christ's Churches Purely Reformed: A Social History of Calvinism* (Yale University Press, 2002); Richard Muller, *Calvin and the Reformed Tradition: On the Work of Christ and the Order of Salvation* (Baker Academic, 2012) 288; John Witte Jr, *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge University Press 2008); John Witte Jr, Joel A Nichols and Richard W Garnett, *Religion and the American Constitutional Experiment* (Oxford University Press, 5th ed, 2022).

139 John Witte Jr, *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge University Press, 2008) 77.

140 Calvin, *Institutes of the Christian Religion* (n 84) IV.xx.3.

141 I cover John Calvin's Natural Law Theory oriented on his account of 'conscience' at lengths in Lee, 'The Spark That Still Shines' (n 44).

142 Robinson chooses to refer to 'John Calvin' as '*Jean Cauvin*', so extensive was the impact of the caricatures. See Marilynne Robinson, *The Death of Adam: Essays on Modern Thought* (Houghton Mifflin 1998) 174–5.

143 Susan E Schreiner, *The Theater of His Glory: Nature and the Natural Order in the Thought of John Calvin* (Baker Books, 1991) ch 3.

A *Calvinian Moral Norms*

Although never the focal point of his theology, Calvin's texts, especially his references to conscience, strongly intimate a basis for natural law theory.[144] To elucidate core normative assumptions, we can first examine the formulation of 'the good' according to Calvin, which is comprised of two components: the ultimate sovereignty of God and the unwavering contemplation of His divine attributes. Calvin, in an intellectual lineage that can be traced all the way back to Augustine, premises his account of natural law on the self-evident goodness of God's character, which brings cohesion to all forms of wisdom.[145] Calvin views God as the 'transcendent good,' the first principle from which every other value is derived.[146] This conceptualisation supports the basic natural law proposition that all other positive laws *ought* to necessarily derive from this moral source.

Positing God as the starting point for natural law means that every objective norm derives from God and asserts the sovereignty of God's will. Calvin writes, '[God's] will is, and rightly ought to be, the cause of all things that are. For if it has any cause, something must precede it [and] this is unlawful to imagine.'[147] Here, like Aquinas, Calvin elevates the eternal character of God. A sovereign force that transcends the limits of time and space and has no beginning or end — the 'I Am.'[148] The significance of this for an account of natural law is that it posits an external standard by which all humans are held accountable to norms of objective goodness.

This goodness, in turn, finds unity in God's divine attributes. This unity comprises the second component of Calvin's first principles. On this point, Thomas Aquinas had borrowed Aristotle's scheme of causality to assert that everything was created by God with an in-built *telos.*[149] That is, what *is* good for the thing determines what it *ought* to pursue. The assumption inherent in this idea is that the subject should act in ways that are proper to God's will for it. How is this revealed to us? Calvin argues that God's attributes of *logos* is implanted in us through our being created in the divine image, a doctrine referred to as the *Imago Dei.*[150] It follows that reason is God-given and divinely inspired. As such, 'the proper good' is consistently determined by reference to God's divine will and divine character.[151]

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144 Calvin, *Institutes of the Christian Religion* (n 84) IV.x.3, I.xv.8.

145 William F Keesecker, 'The Law in John Calvin's Ethics and Christian Ethics' in Peter De Klerk (ed), *Calvin and Christian Ethics: Papers and Responses Presented at the Fifth Colloquium on Calvin and Calvin Studies* (Calvin Study Society, 1987) 19–20.

146 Calvin, *Institutes of the Christian Religion* (n 84) I.xvii.2.

147 Ibid III.xiv.21.

148 John Calvin, *Commentary on Exodus 3:14*, tr William Pringle (Calvin Translation Society 2005).

149 Hittinger, *Critique* (n 45) 4.

150 Calvin, *Institutes of the Christian Religion* (n 84) I.xv.4.

151 In a previous work, I refer to this as the 'unity principle': Lee, 'Calvinist Natural Law' (n 6) 22.

Like two sides of the same coin, Calvin's emphasis on the supremacy of God in the conceptualising of first principles also comes with a realistic understanding of the limitations of human nature. For Calvin, nature does not possess ontological independence but is contingent upon God's sovereign power and benevolence. The reason natural law cannot be derived from human standards, but necessarily measured according to God's divine nature, stems from Calvin's anthropology that humans are 'totally depraved.'[152] A note of caution here: traditionally, numerous misinterpretations of Calvin's texts has meant that his doctrine of 'total depravity' has been (mis)understood as removing all human potential for discerning and pursuing the good, leaving no basis for a viable natural law theory.[153]

A realistic assessment of the flawed (but not hopeless) state of human nature was essential to Calvin's natural law account. According to the doctrine of the Fall of Humanity, God originally created humans to be good, orderly and capable of perfect reasoning. However, after the Fall, nature was extensively distorted and human capacities for reason were infected with fallibility. To paraphrase the words of Calvin, even creation could not escape the disordering effects of sin, and while reason remains common to all people, it is corrupted in all respects so that even correct judgements are vitiated by a polluted will.[154] In the context of extensive human fallibility, Calvin sees the function of natural law as being God's bridle for humankind to curb its descent into bestiality.[155] Calvin's pessimistic but not fatalistic view of human nature holds particular significance for the explanatory power of his natural law theory.

So far, we see that Calvin conceives of the objective good and human fallibility in a way that preserves the relational dynamic between the moral agent and the good. This interconnectedness between human reason and knowledge of God is foundational to his anthropology.[156] The 'vertical' connection extant between human nature and God's transcendent character is evinced by the opening statement of the 1559 edition of the *Institutes*, where Calvin states that 'the entire sum of our wisdom, of that which deserves to be called true and certain … consists of … the knowledge of God, and of ourselves.'[157]

It is worth emphasising that in this relational dynamic, far from holding these two types of knowledge (of God and of ourselves) in equal favour, Calvin

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152 For more on this point, see Stephen J Grabill, *Rediscovering the Natural Law within Reformed Theological Ethics* (William B Eerdmans Publishing, 2006) 20–3.

153 Ibid 21.

154 Calvin, *Institutes of the Christian Religion* (n 84) II.xv.4.

155 Calvin, *Institutes of the Christian Religion* (n 84) II.iii.3.

156 As Torrance notes, true knowledge of human nature is reflexive of divine revelation through God's Word `about the creative action of His love'. TF Torrance, *Calvin's Doctrine of Man* (Lutterworth Press, 1949) 14.

157 John Calvin, *Institutes of the Christian Religion*, tr Henry Beveridge (Hendrickson Publishers 2008) I.i.1.

places the pre-eminence and priority on the knowledge of God.[158] Such a fundamental hierarchy between God and humans makes clear Calvin's intention to conceptualise human moral capacity as a divine endowment.[159] Moreover, this relational dynamic is not only evinced by the substance but also reinforced by the structure of the *Institutes.*[160] This intentional structure therefore offers a clearer picture of the teleology present in Calvin's account of natural law, and the distance between descriptive and normative accounts wherein human agents ought to pursue the good. Thus, the asymmetry between the sovereign good and flawed human nature casts Calvin's entire moral theory in terms of the duties we owe. In this context, the only appropriate response for any moral agent would be humility, in an attitude of reverence toward the good.

The key locus between human nature and the good lies in the doctrine of *Imago Dei.* This doctrine is significant as it presupposes the relationship between God and His human creation. As Gerrish aptly points out, 'Calvin does not seek to define the image solely by what man possesses in his nature, but also by the manner in which he orients himself [sic] to God.' In the original condition, humans, in their innocence, were able to see God's perfections and to enjoy a filial communion with the Eternal while on earth. Calvin identifies the *Imago* in terms of a continuum with an ultimately eternal and heavenward-bound trajectory. In other words, his doctrine of *Imago* necessarily encapsulates a teleology (or eschatology).

It follows that, in relation to civil life, Calvin maintains that apprehension of moral knowledge is ineradicable after the Fall. To Calvin, the limits of humans' truth-discerning capacity vary significantly with the object for examination. In respect of the heavenly things, the symptom of degenerate human reason is erroneous reasoning but the main basis for reason's futility is impiety. Impiety is distinguishable from isolated cases of human error. Its immanence in human nature invariably 'diverts reason's power of judgement from its divinely appointed end.'[161] In contrast, the shift in attitude is notably stark when Calvin speaks about human nature in respect of earthly matters.[162] He writes, the 'human mind, however much fallen and perverted from its original integrity, is still adorned and invested with admirable gifts from its Creator.[163]

Therefore, in respect of civic affairs on earth, Calvin's account of human reason posits a total perversion of the *Imago Dei but not* its total destruction. Indeed, Calvin openly acclaims human reason's ability to operate in the earthly sphere.

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158 Ibid I.xii.21.
159 Lee, 'The Spark That Still Shines' (n 44) 622.
160 Ibid.
161 Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill (n 84) II.ii.25.
162 Ibid II.ii.13, II.ii.17
163 Ibid II.ii.15

The dialectic between the heavenly and earthly perspectives is what permits Calvin to argue both for the total inability of human reason to attain piety in the heavenly kingdom but also maintain humankind's inexcusability before God. The fact that 'some sparks still shine' leaves no excuse for 'men [sic] engaging in 'ignorance' in earthly affairs.'[164] Calvin states:

> [I]f we think that any pretext for thoughtlessness, error or ignorance will serve as an excuse, we are greatly deceived; for no excuse can be admitted, since experience teaches us that there is naturally implanted in man some knowledge of God, and that these truths are engraved (*insculptum*): that God governs our life, that he alone can remove us by death, that it is his proper duty to aid and help.[165]

Such a dialectical account in the context of the spiritual and earthly kingdoms, not only establishes natural human awareness of their moral duties, but also generates the gravitational pull which motivates them towards as Calvin puts it, 'rule for the right conduct of life' in respect of civic matters.[166]

B *Calvinian Civic Norms*

In terms of an overarching framework, Calvin's discussion of civil government hinges on a deeper presuppositional question: what is the relationship between ideal and actual power? This query consistently underscores Calvin's discussions on government. Throughout Book IV, chapter xx, Calvin clearly means to distinguish between two notions: namely, *potestas* and *auctoritas.*[167] The first term, *potestas* refers to a raw, descriptive power or what we can refer to as *de facto authority.* Power in this sense describes the actual dynamics characterising the operation of political institutions or the influence parties have over the affairs or personhood of another. The thing that is absent from this first conception of authority is the lack of an appeal to an external standard of legitimacy.

In contrast to *potestas*, the term *auctoritas* not only alludes to descriptive influence of one entity over another, but also whether that influence has been legitimated. Calvin wished to fill the vacant 'secular' concept of power with a legitimate authority based on its conformity to his normative framework.[168] Accordingly, Calvin commences his discussion on civil government with the assertion that it is a manifestation of God's divine providence. By attributing civil

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164 Ibid II.ii.12

165 Ibid I.iii.1.

166 Ibid II.ii.22.

167 Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill (n 84) IV.xx.4.

168 For example, as Carl Schmitt observes, a predicate to political sovereignty is the transcendence of God. Schmitt was especially fond of invoking Hobbes' famous maxim '*auctoritas non veritas facit legem*' ('authority, not truth, makes the law'): Carl Schmitt, *The Leviathan in the State Theory of Hobbes: Meaning and Failure of a Political Symbol* (University of Chicago Press, 1938) 44. See also Benjamin A Schupmann, *Carl Schmitt's State and Constitutional Theory: A Critical Analysis* (Oxford University Press, 2018) 31.

government to God's providence in this way, Calvin holds the idea of God's sovereign rule over the universe at the core of his political theory.[169]

Calvin calls his account of law 'the perpetual rule of love.' This rule is the final measure and destination of all laws.[170] Applied to politics, the rule of love is associated with one (minimal) 'purpose' – as 'the limit of all laws.'[171] Calvin identifies the rule of love with 'divine law,' 'moral law,' and 'that conscience which God has engraved upon the minds of men.'[172] These concepts are viewed as related and overlapping (though, as aforementioned, not synonymous). He derives the substance of the rule of love from what has come to be known as the 'Greatest Commandment', '[t]he first part of the law simply commands us to worship God with pure faith and piety; the other to embrace [fellow humans] with sincere affection.'[173] Thus, the twofold requirement is the standard by which all other positive laws are to be judged.

Pursuant to this scheme, the spoken (positive) law only bears authority insofar as the magistrate's utterance remains consistent with the spirit of the law (natural law).[174] Calvin identifies the true content of law with the divine mind, but then makes a connection between the divine mind and the 'reason inherent in nature.'[175] Calvin therefore appears to introduce a continuum to the laws themselves. This continuum between divine, moral, and natural laws allows Calvin to emphasise God's superintendence of civil government in the context of human fallibility. The two realms do not occupy a disparate space for Calvin but remain part of an integral whole — within the overall realm of providence.

In terms of political theory, a government that is established on the perpetual rule of love 'provides that a public manifestation of religion may exist among Christians, and that humanity may be maintained among men [sic].'[176] The conceptualisation of moral law in terms of a nexus between us, an eternal God, and our neighbours on earth, allows Calvin's account to encapsulate laws governing both Christians and non-Christians alike. By viewing the law as unitary within a continuum and not in disparate parts, Calvin extracts evidence of a universal, collective humanity.

The orderly will of God is identifiable through natural law (via the conscience), finds expression in the Decalogue, and attains fullness in the gospel. Calvin's view of natural law as a necessary but inferior aspect of law is made evident in the way he writes about the relationship between the divine law and the magistrate, made possible through conscience. Not only is the magistrate a

169 Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill (n 84) I.xvi.2.
170 Ibid IV.x.15.
171 Ibid IV.x.3.
172 Ibid IV.x.3.
173 Ibid IV.x.15.
174 Ibid IV.xx.14.
175 Ibid II.vii.
176 Ibid IV.x.3.

guardian of peace and justice according to God's providence, but they are also bound by mutual servitude to the individuals governed. Pursuant to the perpetual rule of love, individuals and governors alike are bound by mutual servitude and are accountable to a transcendent point of reference.

V Spheres-of-Influence Scheme

In this final Part, I examine the constitutional implications that flow from the core tenets of Confucian and Calvinian normative positions. As discussed earlier, common criticisms of both Calvin's theology and Confucianism (mistaken for its orthodox offshoot) are that they align with an authoritarian form of government. Calvin's theory of government has often been charged with either attempting to unite the church with the state in a theocratic political scheme, or completely separating the two in support of a libertarian state.[177] Confucianism, on the other hand, is viewed as a derivative of legalist orthodoxy.[178] A product of its time (some of the most turbulent in Chinese history), the legalist strategy was constructed on a need's basis by placing the primacy on political stability through ideological homogeny and robust hegemony.[179]

These common positions frequently fail to appreciate the incredible sophistication of these normative traditions and their nuanced approach to fundamental questions, which include, *inter alia*: what are the basic moral values and their connection to human nature? How does the metaphysical attributes of human nature affect the development and maintenance of social and political relationships? Is there an ongoing synergetic engagement between the self and the others within a broader teleological framework? And, ultimately, how would answers to such fundamental questions inform a model of government? I will briefly consider the scheme that emerges from the normative assumptions of both before turning to draw out some key continuities and differences.

A *The Confucian Duty-Based Framework*

Given its historic diversity and complexity (through hybridisation with many indigenous customary laws), I concluded that the classical Canons of Confucianism can supply us with defined parameters for exploration of some of the key normative principles of Confucianism. When assessed on these writings, Confucian moral philosophy points strongly to a relational ontology founded upon the core values like filial piety (*xiao*) as tempered by love and empathy for the other *ren*. In the next section, I examine whether this relational ontology, far

177 Rooney (n 7).
178 Ibid.
179 Ibid.

from aligning Confucianism with hegemonic social hierarchies or a shallow liberal contract theory, most plausibly lends support to a duty-based constitutional framework. A core Confucian maxim — '修身齊家 治國平天下' — translates to mean: 'Cultivate oneself, put one's family in order, govern the state, and harmonise the world.' This shows that Confucian moral theory's emphasis on self-cultivation (to become a sage ('圣') whether citizen or ruler) lends support to the claim that the normative basis for so-called Confucian constitutional theory is premised on a primacy of one's duty to others.

1 *Vertical Relationships*

The 'spheres of influence' scheme is evident in Confucian philosophy's emphasis on self-cultivation. The first principles of Confucianism relate to the importance of self-cultivation in accordance with the rules of ritual propriety (*li,* in both senses of the term). The rule of *li* places emphasis on the other moral norms, particularly ritual-duty premised on rightness (*yi*). In every formulation of basic goods, perhaps best exemplified in the distinction between li^1 and li^2, the dichotomy between the actual and the normative is pronounced. Though of less prominence in formal texts, but latent in the normative background, is the concept of the Way of Heaven (*Tao*) paving the possibility of an overarching framework of normative teleology. This assumed teleology thus gives an overarching sense of moral duty to agents in the pursuit of basic values.

Importantly informing this overarching duty-based framework is the norm of filial piety (*xiao*), which holds respectful relationships as a matter of primacy. Unlike Calvin's continuum of norms, which realises it's full breadth by spanning both earthly and heavenly dimensions, Confucianism is grounded in the sublunary world. However, this does not necessarily detract from the possibility of an aspirational trajectory for moral action. Indeed, further to the emphasis on *xiao,* moral norms substantively derive from what is considered by the classical Confucian scholars as classical traditions. In this context, the kings of old are not emulated because they held positions of extensive political authority; rather, they are held up as paragons of virtue because their conducts align with the 'Kingly Way.'[180] In this way, tradition forms the metaphysical foundation for the normative principles everyone *ought to* follow. For example, in the words of Confucius: 'Ever think of your ancestor, [c]ultivating your virtue.'[181]

The vertical trajectory stems from an abstract concept of 'ancestor.' It is pertinent to note that, on an overly simplistic meaning, this elevates *filial piety* as the overarching ideal in Confucian moral philosophy. However, if viewed as an abstract principle, the idea of ancestor does not literally translate to ancestor worship, but rather a reference point for ultimate moral value.

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[180] See Xunzi [10:15] in Hagen, *The Philosophy of Xunzi* (n 126) 32–35.

[181] Xiaojing, *The Classic of Filial Piety*, tr James Legge (FV editions, 2020) 5.

Thus, the polarity and intimate connection between self-cultivation and the ordering of society characterises the Confucian account of human nature. Confucian anthropology holds that each person possesses the 'Heavenly Principle' that constituted the structure of the universe ('太极') and the associated capacity to become a sage ('圣').[182] Human nature is thus endowed with universal dignity that must continue to be cultivated to become a sage or 'superior man [sic]'[183] (one who embodies the fundamental ideals). Here, we see some normative seeds for finding universal human equality (reminiscent of the *Imago Dei* doctrine that all humans are created in the divine image and therefore have intrinsic worth).

However, here there is an importance placed on the concept of role-duties that derive from such a staunch commitment to filial piety. The role-duties[184] hold that actions must accord with the ethical norms, which vary with a person's role and station within a society: kinship groups, lord or subject, father or son, elder or younger and so forth. A failure to uphold these role-duties risks disrupting social harmony.[185] Part and parcel with one's private endeavours for moral self-cultivation was an awareness of the normative requirements of their position and role in society.

In the cultivation of one's moral character — characterised both by traditional and social demands — the norm of *ren*, or 'humaneness' or 'love,' is both defining and unifying. Humans are distinguishable from beasts due to their ability to have empathy for others through *ren.* This Confucian ideal emphasises the importance of reciprocity and places the priority on obligations rather than individual rights. Contemporary rights' rhetoric in Western polities is likely to be far less compelling in a state that normatively insists on the fulfilment of moral obligations both in substance and structural framework.[186] It follows that *ren* cannot be divorced from the *airen*.[187] This offers a unified principle of duty that extends outwards. The reciprocal nature of filial piety and *ren* therefore has the effect of casting all human relationships in terms of obligations as opposed to rights.[188]

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182 Mencius, *Book of Mencius*, tr James Legge (CreateSpace, 2016) 3A4 ('*Book of Mencius*, tr Legge').

183 Benjamin Schwartz, 'Some Polarities in Confucian Thought,' in Arthur F Wright (ed), *Confucianism and Chinese Civilisation* (Stanford University Press, 1964) 7.

184 Mencius, *Book of Mencius*, tr Legge (n 182) 5B7.

185 Confucius, *The Analects*, tr Legge (n 83) [16.10].

186 Several other scholars have commended the plausibility of this conclusion: WC Durham Jr and Brett G Scharffs, *Law and Religion: National, International and Comparative Perspectives* (Aspen Publihing, 2nd ed, 2019) 83–4; Qianfan Zhang, *Human Dignity in Classical Chinese Philosophy: Confucianism, Mohism, and Daoism* (Palgrave Macmillan, 2016) 45–99.

187 As aforementioned, 'empathy for all.'

188 Yongping Liu, *Origins of Chinese Law: Penal and Administrative Law in Its Early Development* (Oxford University Press, 1998) 96–7.

2 *Horizontal Relationships*

Confucianism holds that society is natural to human beings. The framework of *xiao* means that a more 'complete' person, or one who is known as *junzi* or gentleman, is one that recognises his social and political responsibilities in addition to the moral dictates of his conscience: 'It commences with the service of parents; it proceeds to the service of the ruler; it is completed by the establishment of character'[189]

Such statements lend support for claim that Confucianism facilitates a peaceful transition between the past and present, the private and public spheres. The respect one owes to parent or grandparent in their immediate spheres of horizontal influence extends horizontally outwards to benefit all society. The Confucian maxim, '修身齊家 治國平天下' begets a framework whereby influence originates with cultivation of one's own character and extend outward in concentric circles which also presumes that[190] familial ties and social relationships form the minimal foundation for human existence.[191] Here, Confucianism recognises that, not only are relationships with other humans a pre-condition to our existence (born of our parents), but we are born with a desire for certain things that ensure our continued survival.

As such, the respect a person has for their parents and grandparents (immediate family) could extend horizontally outward to benefit all society.[192] This love is grounded in *airen* or empathy for all and Confucius identifies this as the one quality that distinguishes humans from other animals. Confucius presupposes that all humans are born with the innate capacity for empathy.[193] The presence of *airen* gives rise to a moral command to act in ways that benefit the family, the community and the state.

What makes the good life? Conforming ones conduct to the rule of *li* is the Confucian standard of a good life. However, regarding the question of what constitutes the best life, Confucianism places emphasis on the collective. As the state is viewed as essential to human life, so our relations of piety must extend naturally to the government. (These positions of political office were viewed as often including a *yi*-duty to educate people on human relations.) A best life is thus defined as one which dedicates itself to the administration of government. This Confucius notes, for example:

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189 Confucius, *The Classic of Filial Piety*, tr, James Legge (FV editions, 2020) 'The Scope and Meaning of the Treatise' [12].

190 Mencius, *Book of Mencius*, tr James Legge (n 182) 4A5.

191 Jean Bethke Elshtain, *Public Man, Private Woman: Women in Social and Political Thought* (Princeton University Press, 2nd ed, 1981) 326–7.

192 Mencius, *Book of Mencius*, tr Legge (n 182) 4A27.

193 Confucius, *The Analects*, tr Legge (n 83) [15.23]: 'is not [reciprocity] … such a word? What you do not want done to yourself, do not do to others'.

> To refuse office is to fail to carry out one's *yi*-duty. If the norms between the elder and younger cannot be abandoned, how could one think of abandoning *yi*-duties between ruler and subject? This is to throw the most important human relations into turmoil in one's efforts to remain personally untarnished.[194]

Such a dichotomy, based on value principles, means that positive laws to some extent must be shaped by the moral law. By extension, institutions and law can potentially be criticised for falling short of the normative values. For example, Mencius argues that there is no difference between killing a man with a sword and doing it with government.[195] In fact, records show that Mencius went so far as to support the legitimate depositions of governments that failed to pursue the common good in advancement of selfish ends.[196]

B *John Calvin's Duty-Based Framework*

I now turn to the constitutional framework that emerges from the core tenets of Calvin's natural law theory. The opening statement of the *Institutes* is indicative of the coherence of Calvin's thoughts wherein any emerging polity holds at its core a normative system with a transcendent anchor (the vertical relationship each human has with the divine) and extends horizontally outwards in incrementally larger spheres of influence. Such a political scheme is predicated on moral principles of natural law, the divine image and the sovereignty of God, which has the effect of rendering all persons, possessors of naturally occurring moral knowledge, to be held accountable to transcendent standards of normative value. It follows that when we overlay this 'continuum'[197] onto a constitutional framework, we place the priority, not on the individual rights of the citizen, but on the responsibilities of all political actors wherein duties to others precede individual rights and the common good prevails over self-interest.

1 *Vertical Relationships*

The first principle for Calvin's political theory is the doctrine of *Imago Dei*. Humans were born into kinship with God, and therefore we are created with the

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194 Ibid 18.7. For more on the 'golden rule' *see* Yu-Lan Fung, *A Short History of Chinese Philosophy*, Derk Bodde (ed) (Macmillan, 1948) 42–4.

195 Government officials, according to classical Confucianism, must be chosen via a meritocratic system wherein all who are willing (regardless of background or class) can sit a national civil examination to test their knowledge of Confucian principles.

196 *Book of Mencius*, tr Eno (n 134) 1A4. Confucius expresses a similar sentiment but just stops shy of deposing selfish governments: Confucius, *The Analects*, tr Legge (n 83) [16.1].

197 A referent ascribed by this article to the design of constitutional theory emerging from Calvin's theology.

innate desire to form relationships.[198] This relational aspect is manifest in the conscience, which is part of every person. What are the implications of this relational design for civil government? Calvin's ontology for his political theory manifests from the *a priori* relationship individuals have with God, which renders both rulers and ruled alike beholden to a transcendent moral standard.

This mechanism for moral discernment (conscience) explains humans' proclivity toward forming relationships but also the dichotomy that exists between human political influence and the transcendent ideals we are inclined to pursue. The political implications stemming from the fact that individuals are born possessing this moral knowledge is that it displaces any excuse for political misconduct on the basis of ignorance. Conscience therefore becomes the basis for human freedom as well as the mechanism for political and moral accountability.

Calvin writes in II.ii.13 of the *Institutes* that 'certain seeds of justice abid[e] in their wit… conscience was to them a law, and by this they are abundantly convicted as guilty.'[199] He also declares in the same passage that 'there exist in all men's [sic] mind universal impressions of a certain civic fair dealing and order.'[200] These natural 'human endowments' permit us to exercise our judgement in a manner consistent with the knowledge of 'what is just and unjust … honest and dishonest' and ultimately ensure that we as political actors — whether ruler or ruled — remain first and foremost subject to God's sovereign rule in a duty-based framework.[201]

This vertical limitation resembles the unity or whole as embodied in the notion of the 'All community.' According to this logic, even the 'sovereignty of the state as a special category is itself subject to a higher legitimating standard. Viewed in terms of the *Imago Dei*, the vertical relationship between human beings and the divine precedes the individual and supersedes the 'All community'.[202] Moreover, this vertical and dichotomous link renders duty the starting point for an inquiry into the significance of individual conscience to the civil order.

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198 In Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill (n 84) III.vii.7, Calvin cites Seneca's dictum that we are 'born to help one another' ('*Homo in aditutorum mutuum genitus est*') from Seneca, *Moral Essays, Volume 1: De Providentia, De Constantia, De Ira, De Clementia*, tr John W Basore (Harvard University Press, 1928) 106 I.v.2. 118.

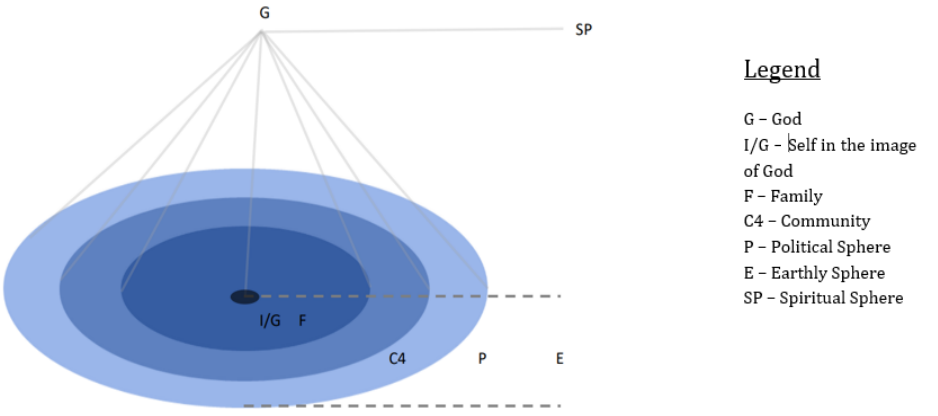
199 John Calvin, *Commentaries on the Epistle of Paul the Apostle to the Romans*, tr John Owen (Kessinger Publishing, 2010) 96–98; Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill (n 84), II.ii.22.

200 Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill (n 84) II.ii.13.

201 Ibid II.ii.22.

202 Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill (n 84) II.viii.40. Calvin statesthat we hold our neighbour sacred because of the divine 'image imprinted in' humans.

Figure 1: John Calvin's Spheres-of-Influence Scheme[203]



2 *Horizontal Relationships*

Calvin recognises that, in a political context, our natural drive for meaningful relationships as directly contributing to our self-preservation must be weighed up against the fulfilment of our communal interests.[204] Our social inclination, or what I have referred to as 'horizontal spheres-of-influence,' represents those relationships with other humans (both intimate and at arms' length) that diffuse the full reach of our social world. In this context, the more local relationships tend to be the ones to which we belong, with no or little choice, and are often determined by ties of kinships. These consanguine relationships extend to ties we form as a result of proximity or shared common interests or projects (such as, neighbours, friends, colleagues and so forth).[205]

Our sense of obligation in each of these spheres-of-influence also varies. As Aroney points out, our view of these relationships may vary from 'socially

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203 This graphic also appears in Constance Y Lee, 'Conscience and the Continuum of Constitutionalism' (2023) 12 (2) *Oxford Journal of Law and Religion* (advance).

204 Ibid II.viii.9. In discussing the ten commandments, Calvin states that 'God forbids us to hurt or harm a brother unjustly,because he wills that the brother's life be dear and precious to us.

205 Ibid III.xx.38. Here, in the context of prayer, Calvin compares the Heavenly Father with the 'best of [earthly] fathers' who embrace his family, his household and his people.

obligatory and necessary to voluntary and contingent.'[206] However, these divisions are not cut and dried. There are some relationships that fall into the latter category that may still be seen as obligatory and necessary. These 'exceptions' to the common rule of thumb are those relationships that are deemed political.'[207] These 'political' relationships are considered necessary to unite individual actions towards a negotiated, authoritative co-ordination in the most effective pursuit of the universally beneficial. These relationships are often characterised by the assertion of 'sovereignty' by the few who are legitimately recognised by the community in order to resolve co-ordination problems in the pursuit of the common good.[208]

Further to this constitutional scheme, Calvin concludes that there exists a mutuality of duties between civil rulers and their subjects. These reciprocal obligations are encased within a broader and overarching framework where there is a primacy of duty to God. Within this framework, God's ordinances and covenant of grace mean that citizens owe their rulers a general duty of obedience and, in turn, rulers are appointed with 'holy ministry' to protect and channel their power and resources in service of the welfare of the community and in pursuit of the common good.

VI Conclusion

Confucian ideas continue to have a strong hold over many cultures throughout East Asia. Against this backdrop, there is much incentive to align Confucianism with either statism at one extreme or liberal democracy at the other. However, neither of these alliances facilitate productive dialogue. Indeed, narratives

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206 Nicholas Aroney, 'Natural Law and Federalism' in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar Publishing, 2019) 371, 375.

207 As Calvin scholars such as Matthias Freudenberg and Jeannine E Olson observe, Calvin's social-ethical deliberations are grounded in the idea that all human relations and actions are equally subject to the dominion of God by virtue of His sovereignty. See Matthias Freudenberg, 'Economic and Social Ethics in the Work of John Calvin' (2009) 65(1) *Hervormde Teologiese Studies* 634; Jeannine E Olson, 'Calvin and Social-Ethical Issues' in Donald K McKim (ed), *The Cambridge Companion to John Calvin* (Cambridge University Press, 2004) 153.

208 Max Weber, 'Politics as a Vocation' in Hans Henrich Gerth and Charles Wright Mills (eds), *From Max Weber: Essays in Sociology* (Oxford University Press, 1946) 77. On the potentially conflicting claims of political-legal and religious authority, see Beverley McLachlin, 'Freedom of Religion and the Rule of Law: A Canadian Perspective' in Douglas Farrow (ed), *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (McGill-Queen's University Press, 2004) 12; Jean Bethke Elshtain 'A Response to Chief Justice McLachlin' in Douglas Farrow (ed), *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (McGill-Queen's University Press, 2004) 35. Relatedly, the understanding of the common good as collective human flourishing in classical legal tradition is bolstered and preserved by public authorities according to the ordinances of reason: See Thomas Aquinas, *Summa Theologiae*, tr Brian Davies (ed) (Oxford University Press, 2014) I-II, q. 90, art. 4.

relegating Confucianism to 'one or the other', or even as something completely singular, have been misleading and do not afford it proper appreciation on its own terms.

This article has contended that an overly prescriptive definition of Confucian philosophy detracts from an authentic study of the tradition's fundamental conceptions. Further skewing any genuine comparison is an exclusive focus on liberal conceptions of constitutionalism as representational of the whole of the Western position. This narrow conceptualisation of constitutionalism invariably leads to overlooking normative themes that may commonly underpin Eastern and Western constitutional structures.

By utilising an interpretive method with a dialectical focus, this article has sought to examine some of the foundational assumptions of classical Confucian thought. Confucian philosophy holds as its core tenets: an aspiration toward transcendent standards; the dichotomy of positive and normative law; and an emphasis on the moral cultivation of the self, within a broader relational framework which places the primacy on the duty of individuals to pursue the good of others.

We also see common themes once we turn to consider the Reformed natural law tradition (as derived from John Calvin's theology). Calvin posited that we are universally endowed with a certain measure of moral discernment (albeit limited) to pursue the transcendent good. This formulation begets a strong gravitational pull towards higher moral standards.

Both philosophies premise their normative scheme on every individual's moral duty. They hold that, by our natures, we are born with the innate drive to pursue and form relationships with others. We are also motivated by the natural desire to ensure that those relationships are meaningful. These meaningful relationships start from the individual and extend outward in a constitutional spheres-of-influence scheme bound together by the respect we have for common norms and for each other.

In this way, a study of the deeper conceptual themes in East and Western philosophical traditions reveals continuities in core normative assumptions. By highlighting the continuities between these two prominent moral traditions (Confucian and Calvinian), we start to see the traces of a common conceptual foundation for our constitutional obligations. This original viewpoint allows us to turn our minds to the normative space that we share, rather than the differences that set us apart. It thus serves as a reminder that we are united by the duties that we owe — to the good and to each other — by virtue of a shared humanity.

Japan's Pacificism as National Identity and a 'Normal' Security Option: Why Japan's Constitutional Peace Clause is Unlikely to be Amended

Simon Miller*

Japan faces its most serious and complex defence environment since the end of World War II. The country holds two significant security concerns: first, and critically, China's burgeoning military, increasingly aggressive diplomacy, and destabilising actions around the Senkaku Islands in the East China Sea; second, North Korea's continued unpredictable rhetoric and actions in its nuclear arming program and ballistic missile testing. Japan's 2022 National Security Strategy *proposes two unprecedented policy ideas to counter these threats: first, to significantly increase Japan's defence budget; second, to acquire counterstrike long-range missile capabilities in response to an attack. Nonetheless, despite these security issues and policy developments, this article argues that formal amendment of the peace clause in art 9 of the* Japanese Constitution *remains unlikely. To understand the improbability of constitutional amendment, this article first explores Japan's constitutional pacifism under the post-World War II Yoshida Doctrine and the United States–Japan cornerstone security alliance, as well as the context of North Korea's nuclear and ballistic missile threat and the emotive issue of abductions of Japanese citizens. The article then turns to Japan's historic imperial relationship with China as an avenue to understand contemporary relations, including the key issues of trade and its link to security, and the Senkaku Islands sovereignty dispute. It concludes that formal constitutional amendment of the peace clause remains unlikely in the short to medium term.*

I Introduction

Despite evolving re-interpretation of the peace clause in art 9 of the *Japanese Constitution*,[1] which is one of the most polarising issues within Japan's political elites and public debates,[2] Japan's pacifism remains key to its internal policy and

* Master of International Law (UQ, 2023).

1 *日本国憲法第9条, Nihon koku kenpō dai kyū-jō* [Constitution of Japan] (3 May 1947) ('*Japanese Constitution*').

2 Yongwook Ryu, 'To Revise or Not to Revise: The "Peace Constitution", Pro-Revision Movement, and Japan's National Identity' (2018) 31(5) *The Pacific Review* 655, 655.

DOI: 10.38127/uqlj.v42i3.8551

forms an intrinsic part of its national identity. The former Shinzo Abe administration's 2015 incremental legislative re-interpretation of art 9 of the *Constitution*, which enables collective self-defence, did not mean that Japan's pacifism was dead.[3] Moreover, and notwithstanding a deteriorating and complex security environment where confrontation and cooperation are delicately intertwined, Prime Minister Fumio Kishida's new *National Security Strategy* means Japan remains unable to commit an offensive attack.[4]

Japan's defence posture remains multilateral through its commitment to international organisations, its security alliance with the United States ('US') and deepening diplomatic relationships with other like-minded democracies in the Indo-Pacific.[5] Against this background, this article argues that formal constitutional amendment of art 9 remains extremely unlikely in the short to medium term. This is despite two significant external security concerns:[6] first, and most significantly, China's burgeoning military, increasingly aggressive diplomacy, and destabilising actions around the Senkaku Islands in the East China Sea; and second, North Korea's continued unpredictable rhetoric and actions in its nuclear arming program and ballistic missile testing.

Whilst it is for the Japanese people to decide at a national referendum whether to formally maintain or amend their peace clause, this article argues that such amendment is unlikely for two reasons. First, even though robust revision would arguably enhance the credibility, flexibility and responsiveness of Japan's internal and external security balancing,[7] former Prime Minister Abe's nationalist agenda and the evolution of current Prime Minister Kishida's security policy is unlikely in the near term to override Japan's seven-decades-long entrenched national identity as a peace-loving nation. Second, noting the strengthened US-Japan security alliance,[8] it would take a radical external event such as a declaration of war against Japan from China or North Korea, or both, to engage urgent dialogue between both political elites and the Japanese public about the sustainability of the peace clause going forward.

The article proceeds as follows. First, it introduces the *Japanese Constitution* and the context of its development following World War II, as well as the constraints on its amendment. A brief comparison to the similar non-aggression

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3 Karl Gustafsson, Linus Hagstrom, and Ulv Hanssen, 'Japan's Pacifism is Dead' (2018) 60(6) *Survival* 137, 138 ('Japan's Pacifism is Dead').

4 Ministry of Foreign Affairs of Japan, *National Security Strategy of Japan*, 16 December 2022, 1 ('*National Security Strategy*').

5 Leif-Eric Easley, 'How Proactive? How Pacifist? Charting Japan's Evolving Defence Posture' (2017) 71(1) *Australian Journal of International Affairs* 63, 79.

6 Shogo Suzuki and Corey Wallace, 'Explaining Japan's Response to Geopolitical Vulnerability' (2018) 94(4) *International Affairs* 711, 713.

7 Ibid 722.

8 The White House, 'Joint Statement of the United States and Japan' (Statement, 13 January 2023) ('Joint Statement by President Biden and Prime Minister Kishida').

provision in the *German Constitution* is also made.[9] Second, Japan's constitutional pacifism is succinctly explored in the context of the post-World War II Yoshida Doctrine, *Sakata v Japan* (the '*Sunakawa* case'),[10] and the evolution of collective self-defence. The article then turns to an analysis of Japan's cornerstone security alliance with the United States, through the twin lens of the *National Security Strategy* and the US' Indo-Pacific Strategy. It explains that, since the 1950s, the United States ('US') has pressured Japan to do more 'heavy lifting' by amending art 9 to enhance security in East Asia. Following this, the article examines key security threats to Japan from North Korea and China before setting out more fully its overarching argument. This is that Japan, with assistance from the US alliance and enhanced cooperation and engagement in the Indo-Pacific, has the diplomatic capability to manage perceived and real external threats from China and North Korea while maintaining its pacifist constitution. This, combined with the difficulty of obtaining agreement as to the scope and meaning of any proposed amendment to the peace clause make formal amendment of art 9 unlikely.

II Brief Constitutional Background

Japanese military aggression in World War II led to powerful institutional, normative, and external constraints with regards to the use of force.[11] The US-imposed[12] *Japanese Constitution* incorporates a Preamble, which strives to secure peaceful cooperation and peaceful preservation for the people, and resolves that 'never again shall we be visited with the horrors of war through the action of government.' Critically, the peace clause in Chapter II: Renunciation of War extends the Preamble as follows:

> Article 9
>
> Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
>
> In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

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9 *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] ('*German Constitution*').

10 Violation of the Special Criminal Law Enacted in Consequence of the Administrative Agreement under Article III of the Security Treaty between Japan and the United States of America, (Supreme Court of Japan, 16 December 1959, Case Number 1959 (A) 710) (the '*Sunakawa case*').

11 Alexandra Sakaki et al, *Reluctant Warriors: Germany, Japan, and Their US Alliance Dilemma* (Brookings Institution Press, 2019) 2.

12 Ellis S Krauss and Hanns W Maull, 'Germany, Japan and the Fate of International Order' (2020) 62(3) *Survival* 159, 162.

The *Japanese Constitution* is the oldest unamended constitution in the world, in part due to the difficulty of amendment. Formal amendment of the *Japanese Constitution* involves two distinct stages. First, amendment requires a concurring vote of two-thirds or more of all members of each House of the National Diet. If this is successful then the second stage requires the affirmative vote of a majority of people, either at a special referendum or specified election.[13] To date, not only have attempted amendments to art 9 failed to pass the Diet, no amendment to any part of the *Constitution* has succeeded since ratification in 1947.[14]

A comparison may be drawn between the Japanese peace clause and a similar provision in the *German Constitution*. Like the *Japanese Constitution*, the *German Constitution* was also overseen by the victorious allied powers following World War II (specifically France, the United Kingdom, and the United States).[15] The German Preamble broadly expresses peace through the words "[i]nspired by the determination to promote world peace as an equal partner in a united Europe". Importantly, art 26 relating to 'Securing International Peace', provides:

> (1) Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offence.
>
> (2) Weapons designed for warfare may be manufactured, transported or marketed only with the permission of the Federal Government. Details shall be regulated by a federal law.[16]

As such, Germany, similarly to Japan, constitutionally affirms its commitment to peaceful coexistence with nations and expressly rules out war as a sovereign right of the nation.[17] Germany declares all aggressive acts as unconstitutional but, unlike Japan, Germany criminalises preparing for a war of aggression,[18] and criminalises other acts disturbing the peaceful relations between nations.[19] While Germany may manufacture, transport or market weapons designed for war pursuant to a federal law,[20] in Japan the ability to maintain "other war potential" is forbidden.[21]

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13 *Japanese Constitution* (n 1) ch IX: Amendments, art 96.

14 Jeffrey P Richter, 'Japan's "Reinterpretation" of Article 9: A Pyrrhic Victory for American Foreign Policy?' (2016) 101(3) *Iowa Law Review* 1223, 1243.

15 Sascha Mueller, 'The Crime of Aggression under German Law' (2008) 6(6) *The New Zealand Yearbook of International Law* 183, 184.

16 *German Constitution* (n 9) art 26.

17 For analysis of the use of force under the *German Constitution*, see Anne Peters, 'Between Military Deployment and Democracy: Use of Force under the German Constitution' (2018) 5(2) *Journal on the Use of Force and International Law* 246.

18 *Strafgesetzbuch* [Criminal Code] (Germany) s 80 ('*German Criminal Code*'). See generally Mueller (n 15).

19 *German Criminal Code* (n 18) s 80a.

20 *German Constitution* (n 9) art 26(2).

21 *Japanese Constitution* (n 1) art 9.

The *German Constitution* may be amended by a law expressly amending or supplementing its text.[22] Any such law must be carried by two thirds of the members of the *Bundestag* (Representative Chamber of German Parliament) and two thirds of the votes of the *Bundesrat* (Upper Chamber of Parliament).[23] In contrast to the amendment procedure in Japan, there is no requirement for affirmative voting by the German public. Unlike the *Japanese Constitution*, the *German Constitution* has been amended numerous times since entering into force on 23 May 1949.[24]

III Evolution of Japan's Post-war Defence Posture

The *Japanese Constitution* has remained unamended since it was promulgated on 3 November 1946 and enacted under United States occupation on 3 May 1947.[25] The goals were the demilitarisation and democratisation of Japan.[26] Controversially, art 9 provides a unique peace clause forever renouncing war and the threat or use of force and prohibiting Japan from maintaining war potential. Significant debate domestically and internationally over the interpretation of art 9 and the role of Japan's Self-Defense Forces continues unabated.[27] Shortly after art 9's promulgation, the US demanded Japan's rearmament in the context of the Korean War and rising threat of communism.[28] The initial interpretation of art 9 rejected a right of self-defence,[29] and Prime Minister Shigeru Yoshida resisted the US call to rearm, favouring instead an aggressive economic recovery coupled with avoidance of international military entanglements through passive international strategic disassociation.[30] This pragmatic approach of relying on art 9 and cooperation with the US became known as the Yoshida doctrine.[31] The unanimous,

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22 *German Constitution* (n 9) art 79(1).

23 Ibid art 79(2).

24 Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 3rd ed, 2012) 42.

25 Satoshi Yokodaido, 'Constitutional Stability in Japan Not Due to Popular Approval' (2019) 20(2) *German Law Journal* 263, 263.

26 Richter (n 14) 1234.

27 Christian G Winkler, 'A Historical Analysis of the LDP's 2018 Constitutional Amendment Proposals: Mission: Moderation?' (2020) 60(5) *Asian Survey* 882, 883.

28 Richter (n 14) 1228.

29 Rosalind Dixon and Guy Baldwin, 'Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate' (2019) 67(1) *The American Journal of Comparative Law* 145, 153; Richter (n 14) 1233.

30 Michael K Connors, 'Between a Doctrine and Hard Place: Japan's Emerging Role' in Michael K Connors, Remy Davison, and Jo Dosch (eds), *The New Global Politics of the Asia Pacific: Conflict and Cooperation in the Asian Century* (Taylor and Francis Group, 33rd ed, 2017) 86; Richter (n 14) 1235.

31 Stein Tonnesson, 'Japan's Article 9 in the East Asian Peace' in Kevin P Clements (ed), *Identity, Trust, and Reconciliation in East Asia: Dealing with Painful History to Create a Peaceful Present* (Palgrave Macmillan, 2018) 256; Christopher W Hughes, 'Japan's "Resentful Realism" and Balancing China's Rise' (2016) 9(2) *The Chinese Journal of International Politics* 109, 121 ('Japan's Resentful Realism'); Easley (n 5) 69.

precedent setting, 1959 Supreme Court decision in the *Sunakawa case* did,[32] however, endorse the view that, under art 9, Japan retained a fundamental right of individual self-defence and could enter treaties for mutual security.[33] In the absence of a clear violation of the *Constitution*, the *Sunakawa* case held that courts must defer to the political branches on constitutionality matters.[34]

With the judicial branch's tenet of judicial restraint,[35] and the constitutional restriction on amendment,[36] the government's interpretation of art 9 via the advisory Cabinet Legislation Bureau ('CLB') seems particularly elastic.[37] In 1960, in an interpretation that lasted for five and a half decades, the CLB stated that, under art 9, armed force in self-defence could be used under three conditions;[38] first, when there is an imminent and illegitimate act of aggression against Japan; second, when there is no appropriate means to deal with such aggression other than by resorting to the right of self-defence; and, finally, when the use of armed force is confined to the minimum necessary level.[39] In 1967, Japan announced three additional non-nuclear principles; it would not 'manufacture, possess or permit entry of nuclear weapons into its territory'.[40]

The remaining issue of collective self-defence was arguably resolved when Japan became a member of the United Nations in 1956. Article 51 of the *Charter of the United Nations* recognises the inherent right of individual or collective self-defence if an armed attack occurs. Nevertheless, in a controversial cabinet decision,[41] which was subsequently passed into legislation,[42] Prime Minister Shinzo Abe (a conservative revisionist)[43] issued a 'reinterpretation' of art 9 whereby collective self-defence is enabled provided three requirements are met:

> (a) when an armed attack against Japan occurs or when an armed attack against a foreign country that is in close relationship with Japan occurs and as a result threatens Japan's survival and poses a clear danger to fundamentally overturn people's right to life, liberty and pursuit of happiness;

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32 *Sunakawa case* (n 10).

33 John O Haley, 'Article 9 in the Post-*Sunakawa* World: Continuity and Deterrence Within a Transforming Global Context' (2017) 26(1) *Washington International Law Journal* 1, 8; Richter (n 14) 1256.

34 Sayuri Umeda, Law Library of Congress, Global Legal Research Directorate, 'Japan: Interpretations of Article 9 of the Constitution' (September 2015); Haley (n 33) 1.

35 Yokodaido (n 25) 264.

36 See *Japanese Constitution* (n 1) art 96, which requires a concurring vote of two-thirds or more of all members of each House in the Diet and ratification by a majority of people at a referendum; Dixon and Baldwin (n 29) 146.

37 Sheila A Smith, *Japan Rearmed: The Politics of Military Power* (Harvard University Press, 2019) 131.

38 Haley (n 33) 8.

39 Japan Ministry of Defense, *Defense of Japan 2014* (Annual White Paper) 119–20.

40 Tonnesson (n 31) 262.

41 Ministry of Foreign Affairs of Japan, Cabinet Secretariat, *Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect Its People* (1 July 2014).

42 Government of Japan, Ministry of Foreign Affairs of Japan, *Japan's Legislation for Peace and Security: Seamless Responses for Peace and Security of Japan and the International Community* (March 2016). Eleven new bills passed both houses of the Diet and the new laws took effect on 29 March 2016.

43 Ryu (n 2) 656.

(b) when there is no other appropriate means available to repel the attack and ensure Japan's survival and protects its people; and

(c) the use of force is limited to the minimum extent necessary.[44]

This significant departure from previous CLB decisions did away with the constitutional prohibition against exercising the sovereign right to take part in collective self-defence.[45] Some protectionist scholars suggest the 2014 reinterpretation impermissibly strains the text of art 9,[46] calling Abe's changes unconstitutional,[47] while others conclude the 2015 security laws have emptied art 9 of most of its content.[48] On the other side, Nasu argues the distinction between individual and collective self-defence is flawed because increasing regional threats favour a broad interpretation of art 9, which permits changes to the Self-Defense Force's role.[49] In 2018, Abe, who remained committed to ridding Japanese citizens of shame and guilt for the nation's war history,[50] proposed more modest but formal art 9 amendments; however, the domestic political situation and unstable public support for art 9 amendment prevented carriage of his agenda.[51]

Concerns of increasing insecurity in the region led Japanese security planners to craft a three-tier response:[52] first, increase Japan's own military capability including by reforming the legal framework; second, deepen security cooperation within the existing US alliance; and finally, seek new regional security partners such as Australia, India and Singapore.[53] This 'proactive pacifism'[54] has shaped Japan's internal security identity, which has remained resilient because it is adaptable to regional threats.[55] The rejection of the use of force as a means of settling international disputes remains at the heart of Japanese thinking.[56]

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44 Dixon and Baldwin (n 29) 157.

45 Tonnesson (n 31) 263.

46 Ryu (n 2) 656; Yasuo Hasebe, 'The End of Constitutional Pacifism?' (2017) 26(1) *Washington International Law Journal* 125.

47 Easley (n 5) 78.

48 Tonnesson (n 31) 266.

49 Hitoshi Nasu, 'Japan's 2015 Security Legislation: Challenges to its Implementation Under International Law' (2016) 92 *International Legal Studies* 249, cited in Dixon and Baldwin (n 29) 160.

50 Ria Shibata, 'Identity, Nationalism and Threats to Northeast Asia Peace' (2018) 13(3) *Journal of Peacebuilding and Development* 86, 86.

51 Winkler (n 27) 900.

52 Andrew L Oros, *Japan's Security Renaissance: New Policies and Politics for the Twenty-First Century* (Columbia University Press, 2017) 68 ('Japan's Security Renaissance').

53 Ibid 92–93.

54 Chung-in Moon and Seung-won Suh, 'Historical Analogy and Demonization of Others: Memories of 1930s Japanese Militarism and Its Contemporary Implications' in Kevin P Clements (ed), *Identity, Trust, and Reconciliation in East Asia: Dealing with Painful History to Create a Peaceful Present* (Palgrave Macmillan, 2018) 75, 94; Ryu (n 1) 661; Andrew L Oros, 'International and Domestic Challenges to Japan's Postwar Security Identity: "Norm Constructivism" and Japan's New "Proactive Pacifism"' (2015) 28(1) *Pacific Review* 139, 139 ('International and Domestic Challenges').

55 Oros, 'International and Domestic Challenges' (n 54) 142.

56 Smith (n 37) 163.

IV The Deepening United States–Japan Cornerstone Alliance

Following the end of World War II, the rebuilding of a defeated Japan was influenced considerably by the US' political and strategic agenda of demilitarisation and democratisation.[57] The US envisioned a defensive multilateral system in Asia that was expected to reduce its security burden. Japan, however, strongly preferred security bilateralism.[58] With the implementation of the peace clause and developing norms of an anti-militaristic identity under the Yoshida doctrine, Japan focussed on the development of its economic strength,[59] and appeared unwilling to contribute militarily to security in the region.[60] Nevertheless, soon after the implementation of art 9, the US continued to pressure Japan to rearm,[61] and only after offering monetary aid did Yoshida begin to strengthen Japan's military.[62]

Japan's current defence structure and policy remains inextricably tied to the cornerstone US-Japan security alliance.[63] A key facet of this alliance has been the US rebalance to Asia after its war on terror post 9/11, first started under the Obama administration in response to China's rising economic, diplomatic, and military might.[64] Within this context, and as stated in the US Indo-Pacific Strategy, Japan remains a crucial partner in enabling 'a free and open Indo-Pacific that is more connected, prosperous, secure and resilient'.[65] This dovetails with Japan's own free and open Indo-Pacific vision of promotion of the rule of law, freedom of navigation and free trade, pursuit of economic prosperity, and commitment to peace and stability.[66]

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57 Rex Li, 'Identity Tensions and China-Japan-Korea Relations: Can Peace Be Maintained in North East Asia?' in Kevin P Clements (ed), *Identity, Trust, and Reconciliation in East Asia: Dealing with Painful History to Create a Peaceful Present* (Palgrave Macmillan, 2018) 47, 50.

58 Yasuhiro Izumikawa, 'Network Connections and the Emergence of the Hub-and-Spokes Alliance System in East Asia' (2020) 45(2) *International Security* 7, 21–3.

59 Richter (n 14) 1235.

60 Izumikawa (n 58) 46.

61 Umeda (n 34) 32.

62 Richter (n 14) 1237.

63 *Security Treaty Between the United States and Japan*, US–Japan, signed 8 September 1951, 3 UST 3329 (entered into force 28 April 1952); *Treaty of Mutual Cooperation and Security Between Japan and the United States of America (Japan–US Security Agreement)*, US–Japan, signed 19 January 1960, 11 UST 1632 (entered into force 23 June 1960); Japan Ministry of Defense, *The Guidelines for Japan–US Defense Cooperation* (27 April 2015); Jorn Dosch, 'The United States in the Asia-Pacific: Still the Hegemon?' in Michael K Connors, Remy Davison, and Jorn Dosch (eds), *The New Global Politics of the Asia Pacific: Conflict and Cooperation in the Asian Century* (Taylor and Francis Group, 33rd ed, 2017) 34; Easley (n 5) 80; Prime Minister Fumio Kishida, 'Japan's Decisions at History's Turning Point' (Policy Speech, John Hopkins University School of Advanced International Studies, 13 January 2023) <https://www.mofa.go.jp/files/100446121.pdf>.

64 The White House, *Indo-Pacific Strategy of the United States* (February 2022) 5 ('Indo-Pacific Strategy of the United States'); Rosemary Foot, 'Power Transitions and Great Power Management: Three Decades of China-Japan-US Relations' (2017) 30(6) *Pacific Review* 829, 837.

65 Ibid 6.

66 Japan Ministry of Defense, International Policy Division, *Free and Open Indo-Pacific: Japan Ministry of Defense's Approach* (Policy, 27 September 2021) 2.

Regarding the worsening security environment, the US acknowledges that China represents the greatest strategic challenge in the Indo-Pacific region and beyond[67] and strongly supports Japan's updated national security policies.[68] The US approach is integrated deterrence that counters coercion through its network of security alliances and partners.[69] Importantly, the Strategy sets out expanding US-Japan-Republic of Korea trilateral cooperation to counter China's influence, maintain peace and stability in the Taiwan Strait, and seek sustained dialogue with North Korea that engages the deepening US-Japan relationship.[70] For its own part, Japan will continue to rely on the US for force-projection capability and nuclear deterrence, while the US will continue to rely on Japan for military basing, diplomatic and financial support.[71] The alliance is a politically convenient, ideologically coherent, and economic way for Japan to pursue its defence and for the US to maintain its strategic position in the Indo-Pacific.[72] The Japanese public strongly favour the alliance and remain anti-militarist and casualty averse;[73] all factors which make formal amendment of art 9 unlikely in the short to medium term.

Nonetheless, Japan's advancement and strengthening of the US alliance has not been without vulnerability and tension.[74] Japan must balance the risks of abandonment and entrapment in designing its security policy.[75] Abandonment entails the risk that the US, as a global superpower with wider ranging strategic interests, might overlook its security treaty duties or even abdicate them entirely.[76] For example, factors such as the rise of communism in East Asia having ended with the Cold War; President Trump's 'America First' policy pressuring Japan to finance more of the cost of US troops stationed in Futenma; successive North Korean nuclear tensions and missile tests; and Washington's financial support of Ukraine, have left Tokyo's policymakers concerned about US military capability amidst rising Chinese threats and North Korean unpredictability. Tokyo must also prepare for the possibility of Trump's return to the White House.

Entrapment has been an enduring and greater fear than abandonment for Tokyo.[77] The US welcomed Abe's 2014 reinterpretation of art 9, and President Joe

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67 Japan Ministry of Defence, *Joint Statement of the Security Consultative Committee (2 + 2)* (11 January 2023) 2 ('Joint Statement of the Security Consultative Committee').

68 Ibid 1.

69 Indo-Pacific Strategy of the United States (n 64) 12.

70 Ibid.

71 Easley (n 5) 80.

72 Ibid 80.

73 Ibid 81.

74 Suzuki and Wallace (n 6) 715; Christopher W Hughes, 'Japan's Foreign Security Relations and Policies' in Saadia M Pekkanen, John Ravenhill, and Rosemary Foot (eds), *The Oxford Handbook of the International Relations of Asia* (Oxford University Press, 2014) 371, 384 ('Japan's Foreign Security Relations').

75 Hughes, 'Japan's Foreign Security Relations' (n 74) 375.

76 Foot (n 64) 833; Hughes, 'Japan's Foreign Security Relations' (n 74) 375.

77 Hughes, 'Japan's Foreign Security Relations' (n 74) 375.

Biden recently commended Kishida's bold leadership in reinforcing its defence capabilities.[78] Yet both reinterpretations are not based on a formal constitutional amendment and Washington appears to desire certainty in Tokyo's defence commitments.[79] In practical terms, Japan could theoretically join the US on a military campaign anywhere in the world.[80] For example, the US is committed to the *Taiwan Relations Act*,[81] the Three Joint Communiques[82] and the Six Assurances;[83] however, if China takes Taiwan by force,[84] then the US wants certainty that Japan would support the US in collective self-defence. Japan's reinterpretation of art 9, regardless of any future formal amendment, may entrap them in a US conflict. Contemporary Japan faces two external national security threats: first, and most significantly, China's burgeoning military, increasingly aggressive diplomacy, and destabilising actions in the Senkaku Islands in the East China Sea; and second, North Korea's continued unpredictable rhetoric, nuclear arming and ballistic missile testing. The article turns to North Korea first.

V Ongoing Security Threats

A *Japan-North Korea Relations*

The first significant external national security threat to Japanese sovereignty is North Korea. Historically, Japan's annexation and occupation of the Korean Peninsula from 1910 to 1945 created deep-seated animosities between the Korean people and Japan due to the latter's brutality, especially manifested in the thousands of Korean deaths and the exploitative use by Japan's military of Korean females as sex slaves ('comfort women').[85]

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78 Joint Statement by President Biden and Prime Minister Kishida (n 8).

79 Richter (n 14) 1259.

80 ibid 1250.

81 *Taiwan Relations Act of 1979,* Pub L No 96–8, 93 Stat 14.

82 Taiwan Documents Project, United States and People's Republic of China 'Shanghai Communique' (First Communique, 28 February 1972) <taiwandocuments.org>; Taiwan Documents Project, United States and People's Republic of China Joint Communique on the Establishment of Diplomatic Relations (Second Communique, 1 January 1979) <taiwandocuments.org>; The White House, Joint Communique of the United States of America and the People's Republic of China (Office of the Press Secretary, Third Communique, 17 August 1982).

83 Taiwan Documents Project, The "Six Assurances" to Taiwan, July 1982 <taiwandocuments.org>. This commitment is affirmed in the Indo-Pacific Strategy of the United States (n 64) 13.

84 Christopher W Hughes, Alessio Patalano, and Robert Ward, 'Japan's Grand Strategy: The Abe Era and Its Aftermath' (2021) 63(1) *Survival* 125, 147.

85 Linus Hagstrom and Ulv Hanssen, 'The North Korean Abduction Issue: Emotions, Securitisation and the Reconstruction of Japanese Identity from "Aggressor" to "Victim" and from "Pacifist" to "Normal"' (2015) 28(1) *Pacific Review* 71, 72; Anthony DiFilippo, 'Cold War Stasis: Past and Continuing Problems in the Normalization of Japan-North Korea Relations' (2018) 14(2) *North Korean Review* 64, 64.

The creation of two different Korean states in 1948 meant an ideological divide between communist Soviet-supported Kim Il-Sung and capitalist Japan, which prevented rapprochement.[86] During the Cold War, the Japanese Communist party established a relationship with North Korea, but North Korea's attempt to infiltrate Seoul and attack the presidential residence in 1968 was opposed by the Japanese Communist Party leading to a 'gradual distancing'[87] and animosity.[88] After the Cold War ended, the ruling Liberal Democratic Party (LDP) began negotiations to normalise diplomatic relations with North Korea.[89] This led to Prime Minister Junichiro Koizumi making his first visit in 2002 to meet Supreme Leader Kim Jong-il and the adoption of the foundational Japan-North Korea Pyongyang Declaration.[90]

The summit proceeded with the support of the US, China, and South Korea;[91] however, alarmingly, Kim Jong-il confessed during the Summit that North Korean agents had abducted thirteen Japanese citizens in the 1970s and 1980s.[92] By 2002, however, only four were alive and the remains of the others could not be returned, leaving Koizumi aghast[93] and calling for North Korea to return all the abductees.[94] Pyongyang apologised for the incidents, thus admitting a degree of culpability, but saved face by claiming the abductions were the unauthorised work of other elements of the state.[95] Tokyo had begun suspecting during the 1980s that Pyongyang had kidnapped Japanese nationals so that the abductees could teach DPRK agents Japanese language and cultural skills.[96] Specifically, Kim Hyun-hui, who smuggled a bomb onto a South Korean passenger plane in 1987, testified that she was a North Korean agent who had learned the Japanese language and behaviour from an abducted Japanese woman.[97] After Pyongyang indicated in 1997 that it would investigate these 'missing persons', Pyongyang reported in 1998 that it could find no trace.[98] In response, the Japanese public generated an intense anti-North Korean feeling, bordering on hysteria, and fuelled by mass-media sensationalism.[99] Meanwhile, the Japanese government approved the

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86 DiFilippo (n 85) 66.

87 Shunji Hiraiwa, 'Japan's Policy on North Korea: Four Motives and Three Factors' (2020) 9(1) *Journal of Contemporary East Asia Studies* 1, 2.

88 DiFilippo (n 85) 69.

89 Christopher Hughes, 'Japan-North Korea Relations from the North-South Summit to the Koizumi-Kim Summit' (2002) 9(2) *Asia Pacific Review* 61, 61 ('Japan-North Korea Relations').

90 *Japan-DPRK Pyongyang Declaration*, Japan–North Korea, signed 17 September 2002.

91 Michael Yahuda, *The International Politics of the Asia-Pacific* (Taylor and Francis Group, 4th rev ed, 2019) 215.

92 Hiraiwa (n 87) 9.

93 Hughes, 'Japan-North Korea Relations' (n 89) 66; Rebecca Seales and Hideharu Tamura, 'Snatched from a Beach to Train North Korea's Spies' *BBC News* (online, 7 February 2021).

94 Hiraiwa (n 87) 9.

95 Hughes, 'Japan-North Korea Relations' (n 89) 66.

96 DiFilippo (n 85) 69.

97 Seales and Tamura (n 93).

98 Hughes, 'Japan-North Korea Relations' (n 89) 71.

99 Ibid.

development of spy satellites and granted the MSDF authorisation to intercept North Korean spy vessels.[100]

The highly-emotive abduction issue was of enormous concern to the public, even over the North's development of nuclear weapons and long-range ballistic missiles, and remains unresolved after four decades. The issue goes to the heart of the sovereignty of Japan and the lives and safety of Japanese citizens.[101] The families of the abductees and the nonpartisan Abduction Parliamentary League demanded the Japanese government assume uncompromising attitudes towards North Korea.[102] After North Korea's confession, a narrative proliferated that portrayed pacifism as the root cause of Japan's inability to prevent such incidents.[103] The lesson for Japan was that protecting citizens required a departure from pacifism.[104] This has aided conservative political elites in Japan to undertake a policy-related identity shift,[105] as opposed to constitutional change. The abduction issue has tempered the public backlash[106] against changes in Japan's defence posture.[107] Under the *Stockholm Agreement*,[108] North Korea agreed to re-investigate remains of Japanese citizens and specific missing persons. Unfortunately, however, talks have stalled and the re-investigation suspended.[109] The Quad, the US-Japan Security Consultative Committee, and Japan's *National Security Strategy* have recently reconfirmed the necessity of immediate resolution of the abductions issue.[110] If there remains no positive outcome on this issue, it appears that there can be no normalisation of relations between Japan and North Korea.[111]

Another significant external security concern is North Korea's continued unpredictable rhetoric and 'abnormal' actions in its nuclear arming and ballistic missile testing program. Japan's latest *National Security Strategy* refers to

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100 Easley (n 5) 72.

101 Ministry of Foreign Affairs of Japan, *Japan–North Korea Relations (Overview)*, 3 October 2022; Ministry of Foreign Affairs of Japan, *Abductions of Japanese Citizens by North Korea: For Their Immediate Return*, November 2021; Hiraiwa (n 87) 4.

102 Hiraiwa (n 87) 10.

103 Gustafsson, Hagstrom, and Hanssen, 'Japan's Pacifism is Dead' (n 3) 151.

104 Karl Gustafsson, Linus Hagstrom, and Ulv Hanssen, 'Long Live Pacifism! Narrative Power and Japan's Pacifist Model' (2019) 32(4) *Cambridge Review of International Affairs* 502, 510.

105 Hagstrom and Hanssen (n 85) 71.

106 Smith (n 37) 155–6; Daiki Shibuichi, 'The Article 9 Association, Leftist Elites, and the Movement to Save Article 9 of Japan's Postwar Constitution' (2017) 34(2) *East Asia* 147, 148–9.

107 Easley (n 5) 81.

108 Intergovernmental Consultations Between Japan and North Korea (Stockholm, Sweden, 26-28 May 2014).

109 Sachio Nakato, 'Security Cooperation Between Japan and South Korea on the North Korean Nuclear Threat: Strategic Priorities and Historical Issues' (2020) 35(2) *Pacific Focus* 307, 319; Hiraiwa (n 87) 12.

110 The White House, *Joint Statement by President Joe Biden, Prime Minister Anthony Albanese of Australia, Prime Minister Narendra Modi of India, and Prime Minister Fumio Kishida of Japan on the Quadrilateral Security Dialogue Leader's Summit* (24 May 2022); Japan Ministry of Defence, *Joint Statement of the Security Consultative Committee* (n 67) 3; *National Security Strategy* (n 4) 9.

111 Hughes, 'Japan-North Korea Relations' (n 89) 66.

Pyongyang's nuclear capabilities in terms of quality and quantity and holds that 'North Korea's military activities pose an even more grave and imminent threat to Japan's national security than ever before.'[112] North Korea has the technology and capability to attack the entire Japanese archipelago[113] and a range extending to the US mainland.[114] Japan first recognised North Korea as a threat to its national security after the launch of the Taepodong I in August 1998.[115] While North Korea carried out its fourth nuclear test in January 2016,[116] Pyongyang launched roughly 70 missile experiments in 2022, including multiple Intercontinental Ballistic Missile (ICBM) tests.[117] Weapons development and testing at strategic times has been prioritised by the North over other domestic issues such as food insecurity. For example, in May 2022, just three days prior to new South Korean President Yoon Suk-yeol's inauguration, North Korea launched a submarine-based ballistic missile. In an immediate response, Defence Minister Nobuo Kishi resolved to drastically strengthen Japan's defence capabilities.

While Japan may not have a 'normal' security and defence position,[118] in that it cannot wage war, Japan is not 'abnormal' in its retention of art 9. Rather, an assertive, 'normalised' incremental policy shift occurred in 2014 as a result of the increasingly volatile external security environment. Prime Minister Kishida has framed the historical changes in power balances and intensifying geopolitical competitions as presenting Japan with the most severe and complex security environment since the end of World War II.[119] This requires Japan to prepare for the worst-case scenario by fundamentally reinforcing its defensive capabilities.[120] Yet, Japan retains its pacifism and is likely to do so in the medium term. On this view, neither the North Korean internal abduction issue nor the external weapons issue will cause amendment of Japan's peace clause. Only a radical material factor such as a North Korean attack or declaration of war against Japan would be sufficient to convince the Japanese people to vote for constitutional change. Japan understands that to maintain peace and stability in Northeast Asia it must normalise relations with North Korea. The development of Japan-North Korea ties and United States-North Korea discussions must also contribute to a meaningful progress of dialogue between North and South Korea.[121] Japan's dialogue strategy in North Korean relations must also acknowledge the North's

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112 *National Security Strategy* (n 4) 9.
113 Hiraiwa (n 87) 4.
114 *National Security Strategy* (n 4) 9.
115 Yahuda (n 91); Hiraiwa (n 87) 4.
116 Nakato (n 109) 320.
117 Adam Liff, 'Kishida the Accelerator: Japan's Defense Evolution After Abe' (2023) 46(1) *Washington Quarterly* 63, 68.
118 Linus Hagstrom and Karl Gustafsson, 'Japan and Identity Change: Why it Matters in International Relations' (2015) 28(1) *The Pacific Review* 1, 3.
119 *National Security Strategy* (n 4) 3.
120 Ibid 4.
121 Hiraiwa (n 87) 7.

close relationship with China,[122] and, more recently, Russia.[123] Japan's relationship with China, which is an increasingly global threat,[124] will now be examined.

B *Japan-China Relations*

Although the Korean Peninsula and cross-strait relations remain precarious, China's strengthening military, increasingly aggressive diplomacy, and disputes over history and territory with Japan have surfaced as the core of Asia's new security dilemma.[125] In terms of historical context, disputes dividing China and Japan include the revival of right-wing Japanese nationalist movements, continuing visits to the Yasukuni Shrine where Japan's war heroes (or war criminals) are buried, the Nanjing Massacre and brutal Japanese invasion, the 'comfort women' issue, and the revision of history textbooks.[126] In particular, despite numerous Japanese officials apologising for Japan's war-time aggression,[127] China argues that Japan's re-interpretation of its peace clause represents the revival of its earlier militarism.[128] Revival of 1930s geopolitical discourses, status, identity, and nationalism have been identified as potential explanatory variables for the mutual demonisation between China and Japan.[129]

Japan's dependence on the sea for its economic prosperity and security is among its oldest security concerns.[130] In terms of prosperity, Japan's leadership has reduced confidence in relying on China's economic juggernaut due to the increase in Beijing's willingness to use its economic power for diplomatic coercion.[131] Tokyo's political elites have also become increasingly concerned about China's assertion of its territorial and resource interests in the East China Sea, South China Sea, and the sea lanes for trade in both the Asia-Pacific and beyond to the Persian Gulf.[132] While China wants to secure sea lanes for trade and acquisition of resources,[133] Japan has actively contributed to peaceful regional stability through antipiracy operations in the Strait of Malacca and the Gulf of Aden. These operations ensure free passage of goods and oil through this shared

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122 Ibid 4.

123 2023 North Korea–Russia Summit (Vostochny Cosmodrome, Amur Oblast, Russia, 13-17 September 2023).

124 Hughes, 'Japan's Foreign Security Relations' (n 74) 381.

125 Moon and Suh (n 54) 76.

126 Ibid 77, 96.

127 See Oros, 'Japan's Security Renaissance' (n 52) app 3.

128 Linus Hagstrom and Chengxin Pan, 'Traversing the Soft/Hard Power Binary: The Case of the Sino-Japanese Territorial Dispute' (2020) 46(1) *Review of International Studies* 37, 48.

129 Moon and Suh (n 54) 80.

130 Oros, 'Japan's Security Renaissance' (n 52) 78.

131 Suzuki and Wallace (n 6) 715.

132 Hughes, 'Japan's Foreign Security Relations' (n 74) 378; Haley (n 33) 15.

133 Moon and Suh (n 54) 79.

maritime space.[134] Ultimately, China's hegemonic rise and ambition is fuelling Japan's sense of insecurity.[135]

The main security dispute between Japan and China, involving serious risk of militarised conflict, involves the sovereignty of the five small uninhabited Senkaku Islands in the East China Sea (known as the 'Diaoyu Islands' in China).[136] The islands are strategically important as the surrounding waters are rich in natural resources, containing valuable fishing grounds and oil and gas reserves.[137] China contends that the islands have been a part of its territory since ancient times,[138] whereas Japan's claim of sovereignty over the islands is based on the understanding that the 1951 *San Francisco Peace Treaty*[139] placed them under US administration as part of the Nansei Shoto archipelago.[140] In September 2012, after Japan purchased three of the islands from a private owner,[141] tensions rose significantly after Prime Minister Noda announced his plan to nationalise the disputed islands.[142] Vice Foreign Minister Zhang Zhijun responded that China has an unshakeable resolve, confidence and the ability to uphold its territorial integrity.[143] In January 2023, the US Joint Security Consultative Committee reconfirmed what President Obama publicly confirmed in April 2014 — that art V of the US-Japan Security Treaty applied to the Senkaku Islands.[144]

Both Beijing and Tokyo appear unwilling to compromise on their territorial claims, with each accusing the other of ignoring historical facts and defying international law.[145] In terms of soft power, Japanese policymakers represent China as a state seeking to change the status quo by coercion or force and juxtapose aggressive Chinese revisionism with peaceful Japan's allegiance to the post-war international order.[146] By contrast, Chinese soft power aims to get international audiences to empathise and identify with Chinese narratives and represent Japan as so 'militaristic' that 'history may repeat itself.'[147] This apprehension has been operationalised through physical power via the deployment of Chinese surveillance ships and Japanese Coast Guard vessels to the

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134 Oros, 'Japan's Security Renaissance' (n 52) 78.
135 Shibata (n 50) 89.
136 Richter (n 14) 1247–1248.
137 Hughes, 'Japan's Resentful Realism' (n 31) 130; Richter (n 14) 1247.
138 Richter (n 14) 1248.
139 *Treaty of Peace with Japan*, Allied Powers-Japan, signed 8 September 1951, 136 UNTS 45 (entered into force 28 April 1952).
140 Hagstrom and Pan (n 128) 49.
141 Haley (n 33) 15.
142 Moon and Suh (n 54) 87; Li (n 57) 59.
143 Moon and Suh (n 54) 88.
144 Japan Ministry of Defence, *Joint Statement of the Security Consultative Committee* (n 67) 2; Yahuda (n 91) 206.
145 Li (n 57) 59.
146 Hagstrom and Pan (n 128) 49.
147 Ibid 48.

disputed area.[148] Moreover, Beijing, responding from a position of status and strength,[149] declared an Air Defence Identification Zone including the Diaoyu Islands.[150] This soft and hard power binary has solidified a consensus among Japanese analysts that Chinese grand strategy has decisively shifted from regional cooperation and integration to one of attaining regional hegemony[151] and global power projection.[152] The Chinese no longer regard Japan as their competitor, which stokes Japan's proactive nationalist posture.[153] Furthermore, and as expected, China responded to Abe's Cabinet Decision and legislative change with widespread condemnation.[154] The complex combination of deep-seated animosities fuelled by Japanese brutality in World War II, the Senkaku Islands sovereignty dispute, and rising nationalism in both countries has increased the potential for armed conflict.[155]

C *Kishida's* National Security Strategy

In December 2022, Prime Minister Kishida's Cabinet announced a new *National Security Strategy*, together with a National Defence Strategy and Defence Buildup Program.[156] To maintain and develop a free and open international rules-based order, Japan's first pillar of comprehensive national power to prevent crises and proactively create peace and stability is vigorous diplomacy.[157] This pillar aligns with Japan's peace clause, with its focus on coexistence and coprosperity. Second, Japan's defence capabilities to deter, disrupt, and defeat threats as the last guarantee of national security include bold, interrelated policy ideas: first, a phenomenal surge in its defence budget; and second, acquisition and development of counterstrike capabilities. While some argue that China is not a threat and that Japan has embarked on a radical and dangerous departure from its former, passive policy stance,[158] such strategies aim to bolster alliance deterrence and are assertively framed through pacifist language including 'fundamental reinforcement,' 'responding,' 'continuing,' 'deterring,' and 'protecting.'[159]

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148 Li (n 57) 59.
149 Moon and Suh (n 54) 80.
150 Hagstrom and Pan (n 128) 53; Yahuda (n 91) 206.
151 Hughes, 'Japan's Resentful Realism' (n 31) 127.
152 Suzuki and Wallace (n 6) 714.
153 Moon and Suh (n 54) 80.
154 Shibata (n 50) 96; Richter (n 14) 1253.
155 Richter (n 14) 1253.
156 Ministry of Foreign Affairs of Japan, *Adoption of the New "National Security Strategy"* (Statement by Foreign Minister Hayashi Yoshimasa, 16 December 2022) ('*Adoption of the New "National Security Strategy"*').
157 *National Security Strategy* (n 4) 11; ibid.
158 Hannah Middleton, 'Japan's Dangerous Military Expansion' *The Guardian* (online, 2 February 2023).
159 *National Security Strategy* (n 4) 18–19; Japan Ministry of Defence, *Joint Statement of the Security Consultative Committee* (n 67) 1.

In terms of defence spending, Japan aims to set aside US317 billion for its defence over the next five years, representing a 57 per cent increase and bringing its annual expenditure to approximately 2 per cent of gross domestic product ('GDP'), thus matching NATO's target for member states.[160] With Japan's public debt already at more than 200 per cent of GDP, raising taxes or issuing government bonds[161] will require political negotiation and careful framing. The decision to significantly expand military spending appears to have reached a tipping point, however, with broad public support for the proposed spending after Russia's invasion of Ukraine further crystalised fears of a possible conflict in Taiwan.[162]

Critically, Japan's enhanced defence budget will provide a new capability of counterstrike to bolster deterrence and resilience amid a rapidly worsening threat environment.[163] Japan's ability to respond to an attack has evolved to include the capacity to launch strikes on military targets in adversary territory.[164] Practically, Tokyo plans to acquire Tomahawk missiles from the US, develop its own long-range cruise missiles, invest in munition and parts stockpiles, expand passive defence bases, and enhance cyber defences.[165] Counterstrike capabilities to deter any invasion of Japan comply with the 2015 Legislation for Peace and Security and the peace clause, noting pre-emptive strikes remain impermissible.[166]

While these two policy ideas are not legally binding commitments and, to date, have not been fully resourced, Kishida's administration can be seen to be incrementally building on Abe's defence and foreign-policy platform. Complicated and deteriorating geopolitical realities have also placed the administration on the front foot. While Russia may not be a direct threat to Japan, China and North Korea are watching closely to see what Russia might gain (or lose) from its invasion of Ukraine. What follows from the invasion is Japan's efforts to deepen ties with the US and US alliances to manage the complex relationship with China.

Unless China or North Korea declares war or launches an attack against Japan, formal amendment of art 9 remains unlikely in the short to medium term. Even if art 9 is considered for amendment to alter Japan's pacifism or enable limited conditions of attack, the scope of the new wording will require delicate political negotiation inclusive of public debates. Domestic and international

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160 Tsuneo Watanabe, 'Japan's Security Policy Evolution: The Interaction Between Think Tank Proposals and Government Implementation' (2022) 17(3) *Asia Policy* 107, 108; Kana Inagaki and Leo Lewis, 'Who Is Going to Pay for Japan's Military Build-up'? *Financial Times* (online, 15 December 2022).

161 Inagaki and Lewis (n 160).

162 Fumiaki Kubo, 'Japan-US Relations After Russia's War in Ukraine' (2022) 14(3) *East Asia Forum Quarterly* 8–9; Inagaki and Lewis (n 160).

163 Liff (n 117) 64.

164 Ibid 71.

165 Watanabe (n 160) 120.

166 *National Security Strategy* (n 4) 19.

politicians, think tanks, policy writers, academics, and critically the Japanese voting public, will contribute to the debate and decide Japan's militaristic future. Whatever the potential outcome, it will have an enormous impact on global defence leadership.

VI Conclusion

This article has critically analysed the likelihood of Japan amending art 9 of its *Constitution* to allow it to take a *more active* role its own defence. It has addressed the historical context of Japan's post-war reinterpretation of art 9 and the strengthening US-Japan alliance to counter a rising China. It argued that, in the light of Prime Minister Abe's previous and Prime Minister Kishida's new incremental policy-based reinterpretation, formal amendment of art 9 remains extremely unlikely in the short to medium term. This is despite external threats to Japan's national security from North Korea's unpredictable nuclear and ballistic missile testing program, as well as China's increasingly aggressive diplomacy and behaviour in relation to open sea lanes and the disputed sovereignty of the Senkaku/Diaoyu Islands.

The incremental evolution of Japan's internal defence posture is balanced towards maximising its national security, while also ensuring economic and reputational benefits in the current international system.[167] Japan stands out globally as a resilient liberal democracy compliant with the rule of law,[168] with little in the way of post-war human-rights abuses.[169] Japan's identity as a peace-loving nation remains,[170] and its contribution to peace as a reality[171] demonstrates Japan's security leadership in East Asia. Nevertheless, as the world continues to combat non-traditional security issues including terrorism, climate change, and hunger,[172] Japan is likely to have a major role to play. Whether this leads to revaluation of its peace clause in the future remains to be seen.

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167 Easley (n 5) 80.

168 Larry Diamond, 'Democratic Regression in Comparative Perspective: Scope, Methods, and Causes' (2021) 28(1) *Democratization* 22, 39.

169 Moon and Suh (n 54) 95.

170 Suzuki and Wallace (n 6) 732.

171 Tonnesson (n 31) 264.

172 Stephanie Martel, 'From Ambiguity to Contestation: Discourse(s) of Non-Traditional Security in the ASEAN Community' (2017) 30(4) *Pacific Review* 549, 553; Smith (n 37) 226.

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