

# WAIKATO LAW REVIEW

TAUMAURI

VOLUME 29, 2021

---

<b><i>Editorial: The Rule of Law</i></b>	<b>1</b>
Trevor Daya-Winterbottom	
<b><i>The Rule of Law: Guiding Principle or Catchphrase?</i></b>	<b>2</b>
Hon Justice Susan Glazebrook	
<b><i>Judicial Abeyances in New Zealand's Unwritten Constitution</i></b>	<b>20</b>
Edward Willis	
<b><i>Proportionality in Theory and Practice: An Analysis of the Concept of Proportionality Broadly and in Application to the 2010 NZ Defence Force Operation Burnham</i></b>	<b>40</b>
Ben Wilkins	
<b><i>Refreshing Human Rights for Our Time and Place</i></b>	<b>60</b>
Paul Hunt	
<b><i>Humanity Worth Defending? Accountability for Queer and Trans Persons under International Criminal Law</i></b>	<b>70</b>
Vinod Bal	
<b><i>Aquifer Management and the Law: An Application of Maslow's Hierarchy of Needs and Sustainable Development Goal Six</i></b>	<b>92</b>
Dannielle Graham	
<b><i>Calls For Transformative Change and the District Court Response</i></b>	<b>115</b>
Chief Judge Heemi Taumaunu	

---

**Editor in Chief:** Dr Trevor Daya-Winterbottom FRSA FRGS

First published in 1993, *Taumauri* – the Waikato Law Review provides authoritative and critical analysis on a broad range of legal issues. The journal is hosted by *Te Piringa* Faculty of Law at the University of Waikato and reflects the Faculty's founding objectives of biculturalism, the study of law in context, and professionalism.

This issue may be cited as **(2021) 29 Wai L Rev.**

### **Submissions**

Articles, case notes, and book reviews should be emailed (as Microsoft Word attachments) to the Editor in Chief by **31 October**.

Submissions should comply with either the New Zealand Law Style Guide (3rd Edition) or OSCOLA (4th Edition), and should conform with the general layout of articles, case notes, and book reviews published in previous issues of the Waikato Law Review. Articles should be within the range of 8,000 to 12,000 words (maximum) including footnotes, and other submissions should be within the range of 4,000 to 8,000 words.

**Contact details for submissions:** Dr Trevor Daya-Winterbottom FRSA FRGS, Editor in Chief, Waikato Law Review. Email: [wlreditor@waikato.ac.nz](mailto:wlreditor@waikato.ac.nz).

### **Subscriptions**

Annual subscriptions for the Waikato Law Review are NZ\$40 per copy within New Zealand, and NZ\$45 international. Subscription prices are inclusive of any GST and postage.

**Contact details for subscriptions:** Waikato Law Review Administrator, Te Piringa Faculty of Law, University of Waikato, Private Bag 3105, Hamilton, New Zealand.

Email: [lawpublications@waikato.ac.nz](mailto:lawpublications@waikato.ac.nz).

Contact details for North American subscriptions: William W Gaunt & Sons Inc, 3011 Gulf Drive, Holmes Beach, Florida 34217-2199, United States of America.

All rights reserved. No part of this publication may be produced or transmitted in any form or by any means electronic or mechanical, including photocopying, recording or any retrieval system, without permission of the Editor in Chief.

ISSN 1172-9597 (Print) ISSN 1179-3848 (Online)

## EDITORIAL: THE RULE OF LAW

The 2021 issue of *Taumauri*, the Waikato Law Review, reflects the founding goals of *Te Piringa* Faculty of Law: professionalism, biculturalism, and the study of law in context – and its wide-ranging contribution to creating a distinctive New Zealand jurisprudence since its establishment 30 years ago in 1991.

Justice Susan Glazebrook in her inaugural 2021 McKenzie Elvin lecture sets the scene with a magisterial analysis of the Rule of Law, questioning whether it is a guiding principle or merely a political catchphrase. She concludes that respect for human rights, access to justice for all, providing redress for historical disadvantage are essential ingredients for the Rule of Law if it is to operate as a guiding principle with normative effect across the legal system and transform society.

Continuing with the broad theme of the Rule of Law, Edward Willis interrogates the reasons why the New Zealand courts appear to be reluctant to address constitutional law issues. He considers whether the reluctance to grapple with constitutional issues merely reflects a tradition of political deference but concludes that judicial practice may be more nuanced and tempered by a last resort approach to determining constitutional issues only where required to do so to decide the case at hand. Willis suggests that judicial equivocation fits well with New Zealand's unwritten constitutional framework by preserving the ability for the courts to determine constitutional questions if and when required to do so at some future point. He also suggests that leaving constitutional questions open for legal determination in this way acts as a check and balance on political power similar to the influence that can be exerted under a written constitutional framework. While on the international plane, he considers the role of proportionality in the context of armed conflict.

Paul Hunt in his powerful Honorary Doctoral address surveys the broad field of human rights and concludes that beyond combating discrimination, human rights have a legitimate role to play in safeguarding human dignity and guaranteeing the right to a decent home. Human rights guarantees are considered further by Vinod Bal in relation to queer and transgender persons in the sphere of international criminal law. He concludes that international criminal law plays a critical role by ensuring that queer and transgender persons are treated with dignity and protected from persecution. While Danielle Graham considers the right to clean drinking water from the theoretical concept of Maslow's hierarchy of needs and SDG6 to demonstrate the current gaps in the law and policy relating to aquifer management under the framework of the Resource Management Act 1991.

Finally, Chief Judge Heemi Taumaunu in his 2020 Norris Ward McKinnon lecture sets out a powerful vision for access to justice for all in the District Court founded on a Māori worldview for the future: *Te Ao Mārama* – a more enlightened world, that provides wrap-around services to address the underlying causes of crime from the establishment of the Youth Court in 1989 to the Alcohol and Other Drug Treatment Court in 2021, and rehabilitate offenders.

Dr Trevor Daya-Winterbottom FRSA FRGS  
Editor in Chief  
*Te Piringa* Faculty of Law  
University of Waikato

# THE RULE OF LAW: GUIDING PRINCIPLE OR CATCHPHRASE?

BY HON JUSTICE SUSAN GLAZEBROOK\*

The question I pose in my title is whether the rule of law is a guiding principle or a mere catchphrase.<sup>1</sup> For the United Nations at least the answer appears to be not just a guiding principle but *the* guiding principle. The United Nations website says that the rule of law is the foundation of friendly and equitable relations between states and the base of fair societies. It is fundamental to international peace and security and political stability; to economic and social progress and development; and to protect people's rights and fundamental freedoms.<sup>2</sup> An all-embracing concept.

In his 2004 book on the rule of law, Professor Brian Tamanaha said that, despite all the divisions in the world, there was worldwide agreement on one point, and one point alone: that the rule of law is a good thing.<sup>3</sup> Support for the rule of law had long been orthodox among the Western states he says,<sup>4</sup> but other supportive statements have come from President Vladimir Putin of Russia, various Chinese leaders, former Presidents Robert Mugabe of Zimbabwe, Abdurrahman Wahid of Indonesia, Mohammed Khatami of Iran, and a notorious Afghan warlord.<sup>5</sup>

It does not take much imagination to realise that this disparate group of supporters must either have a very different view of the rule of law from that espoused by the United Nations or it is indeed a mere catchphrase. But, even if it is just a catchphrase for some of those people, the fact that they see it as necessary to profess allegiance to the concept is significant in itself. If the statements of support for the concept represent a different view of the rule of law, the differences are no doubt reflected in the academic debate as to whether the concept of the rule of law should be formal (thin) or alternatively substantive (thick).<sup>6</sup>

---

\* Judge of Te Kōti Mana Nui o Aotearoa/Supreme Court of New Zealand and President of the International Association of Women Judges (IAWJ).

1 This article is based on the University of Waikato & Mackenzie Elvin Law 2021 annual public lecture given in Tauranga on 26 May 2021. I thank my clerk, Don Lye, and my associate, Rachel McConnell, for their assistance in preparing this paper. I also thank McKenzie Elvin Law for sponsoring the lecture and for their hospitality. A live recording of the speech, as originally given, can be accessed at Mackenzie Elvin Law "The University of Waikato & Mackenzie Elvin Law 2021 annual public lecture with Justice Glazebrook" (May 2021) <[www.mackenzie-elvin.com](http://www.mackenzie-elvin.com)>.

2 United Nations "What is the Rule of Law" <[www.un.org](http://www.un.org)>. The rule of law has also been described as "a concept at the very heart of the [United Nations] mission": *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General* UN Doc S/2004/616 (23 August 2004) at [6].

3 Brian Z Tamanaha *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2004) at 3.

4 At 1–2. See for example, the Declaration on Democratic Values by the G7 countries at the 1984 London Summit: G7 Research Group "Declaration on Democratic Values" <[www.g7.utoronto.ca](http://www.g7.utoronto.ca)>.

5 Tamanaha, above n 3, at 2. The Chinese leaders referred to were former PRC Presidents, Jiang Zemin and Hu Jintao. The Afghan warlord referred to was Abdul Rashid Dostum.

6 A leading article on this distinction is: Paul P Craig "Formal and substantive conceptions of the rule of law: an analytical framework" (1997) PL 467. Professor Joseph Raz is a proponent of a (thin) approach: Joseph Raz *The Authority of Law* (2nd ed, Oxford, Oxford University Press, 2009) at 221. An advocate of a substantive (thick) approach is Lord Bingham: Tom Bingham *The Rule of Law* (London, Penguin Books, 2010) at 67.

The thin or formal notions<sup>7</sup> of the rule of law include requirements such as the manner in which laws are promulgated, that they are clear, not retrospective and that nobody is above the law.<sup>8</sup> Proponents of the thin view generally do not pass judgement on the content of laws. The thick or substantive views of the rule of law include all the thin formal requirements but, engrafted onto the concept, are other requirements, such as democracy, human rights, an independent judiciary and access to justice.<sup>9</sup>

So into which camp do I fall? To answer that question, first, a bit of history. I start with the United States which prides itself on being the oldest democracy in the world and the land of freedom.<sup>10</sup> Looking first at freedom, Isabel Wilkerson in her recent book, *Caste*, points out that, for the first 246 years of what is now the United States, the vast majority of African-Americans were slaves who, as she puts it, lived under the terror of people who had, by law, absolute power over their bodies and who faced no sanction for any atrocities they could and did conjure up.<sup>11</sup> Of the 4.4 million African Americans in the United States in 1860, approximately four million were slaves.<sup>12</sup> So, if you were African American in 1860, there was an almost 90 per cent chance you were a slave and, therefore, legally classed not as human but as property. Wilkerson points out that it took a civil war, the deaths of three-quarters of a million soldiers and civilians, the assassination of a president and the passage of the Thirteenth Amendment in 1865 to bring the institution of slavery in the United States to an end.<sup>13</sup>

Or was it in fact at an end? After an all too brief period of twelve years, known as Reconstruction, the federal government withdrew from the South and left the liberated slaves in the hands of those who had enslaved them. And, as Wilkerson says, these people designed a labyrinth of laws to put black citizens into indentured servitude, to take voting rights away, to control where they lived and how they travelled and to seize their children for labour purposes.<sup>14</sup> These laws became known from the 1880s as Jim Crow laws, after a character devised in the 1830s by Thomas Dartmouth Rice, supposedly modelled on a slave.<sup>15</sup> As Jim Crow, Rice performed a very popular song and

---

7 “Notions” is deliberately used in the plural because there are many different formulations of the rule of law which could be described as “thin”: Tamanaha, above n 3, at 91–94.

8 Professor Tamanaha identifies three themes as running through the rule of law tradition: government limited by law, formal legality (as in public, prospective, general, certain and equally applied) and rule of law and not by man: at ch 9.

9 See for example, the “rights” conception coined by Dworkin: Ronald Dworkin “Political Judges and the Rule of Law” (1978) 64 *Proceedings of the British Academy* 259 at 262. The “rights” conception takes rights as part of the rule of law and posits that there is no distinction between the rule of law and substantive justice.

10 See below at n 30 and the national anthem, the Star-Spangled Banner.

11 Isabel Wilkerson *Caste: The Lies That Divide Us* (Penguin Books, London, 2020) at 47. Isabel Wilkerson is the first woman of African American heritage to have won the Pulitzer Prize in journalism.

12 Aaron O’Neill “Black and slave population in the United States 1790-1880” (19 March 2021) Statista <[www.statista.com](http://www.statista.com)>.

13 Wilkerson, above n 11, at 48.

14 At 48.

15 Leslie V Tischauer *Jim Crow Laws* (ABC-CLIO, Santa Barbara, 2012) at 1–2.

dance routine in blackface, acting like a buffoon and speaking with an exaggerated and distorted imitation of African American Vernacular English.<sup>16</sup>

The Jim Crow laws spread throughout the South and even to a degree in the North and basically legalised racial segregation. They were backed up by extreme violence against African Americans by individuals and organisations such as the Ku Klux Klan. While that violence was not legal, it may as well have been as the perpetrators operated with impunity and often to large crowds of onlookers and souvenir hunters.<sup>17</sup> A very different fate of course awaited any black person accused of any crime (whether rightly or wrongly) even if they avoided lynching. Acquittals were rare and prisons provided another form of forced labour.<sup>18</sup>

Segregation was present in every aspect of society. African Americans were excluded from railway cars, buses, steamboats, sat in secluded and remote corners of theatre and lecture halls, could not enter most hotels, restaurants and restaurants except as servants.<sup>19</sup> They prayed in specific pews designated for them, were educated in segregated schools, punished in segregated prisons, nursed in segregated hospitals and buried in segregated cemeteries.<sup>20</sup>

The Courts were complicit right to the top. The segregation laws were given the seal of approval in 1896 by the notorious United States Supreme Court decision of *Plessy v Ferguson* which concerned a Louisiana law segregating carriages on railways.<sup>21</sup> The Supreme Court upheld the constitutionality of racial segregation under the “separate but equal” doctrine.<sup>22</sup> There was a minority voice but a lone one and ironically from a former slaveholder from Kentucky who had

---

16 This was an early example of what were known as minstrel shows, popular from the 1830s to the early 1900s where white entertainers in blackface performed song and dance routines designed to mock black people and to perpetuate damaging racial stereotypes: see generally Stephen Johnson (ed) *Burnt Cork: Traditions and Legacies of Blackface Minstrelsy* (University of Massachusetts Press, Baltimore, 2012).

17 Wilkerson, above n 11, at 90–96. See generally Ralph Ginzburg *100 Years of Lynchings* (Black Classic Press, Baltimore, 1988). For an example of the complicity of the courts with regard to impunity: see *United States v Harris* 106 US 629 (1883) where the United States Supreme Court ruled that the federal government could not prosecute a sheriff and others for conspiring to lynch four black prisoners in Tennessee. The lone dissenter was Justice John Marshall Harlan.

18 See generally Douglas A Blackmon *Slavery By Another Name: The Re-enslavement of Black Americans from the Civil War to World War II* (Anchor Books, New York, 2009). Tens of thousands of Black Americans were arrested on arbitrary charges, then “leased” by state and county governments to various companies and compelled to work in coal mines and other forced labour: at 4.

19 C Vann Woodward *The Strange Career of Jim Crow* (2nd ed, Oxford University Press, New York, 1974) at 18–19.

20 At 19.

21 *Plessy v Ferguson* 163 US 537 (1896).

22 The 7:1 majority opinion was written by Justice Henry Billings Brown. The majority held that the Constitution of the United States was only intended to secure the legal equality of African Americans and not their social equality: “If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane”: at 552.

opposed abolition.<sup>23</sup> Justice John Marshall Harlan famously wrote in his dissent “Our constitution is color-blind” and that:<sup>24</sup>

The arbitrary separation of citizens on the basis of race while they are on a public highway is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.

Self-evident I would have thought. The majority decision to the contrary, however, ensured the survival and expansion of Jim Crow laws.

And it appears that the extent of those laws in the “land of the free” astonished even the Nazi policy makers who were, in the 1930s, helping design the laws to subjugate the Jewish people, using the United States laws as their model.<sup>25</sup> Wilkerson points out (no doubt somewhat for rhetorical effect) that, even for the Nazis, some of the American laws went too far. She notes that the rule where one drop of African American blood meant classification as black was considered too harsh for the Nazis to emulate.<sup>26</sup>

It is important to remember that these Jim Crow laws were not just a temporary aberration.<sup>27</sup> They remained in place for some 100 years, mostly disappearing only as a result of the civil rights movement after World War II.<sup>28</sup> Their dismantling has not, however, meant equality.<sup>29</sup> And some of the restrictive laws have resurfaced more recently but in another form.

---

23 Regarding his reversal from his earlier position on slavery, Justice John Marshall Harlan famously said, “Let it be said that I am right rather than consistent.” He would go on to become the single most consistent champion of black civil rights on the United States Supreme Court of his day: see generally Alan F Westin “Mr Justice Harlan” in Allison Dunham and Phillip B Kurland (eds) *Mr Justice: Biographical Studies of Twelve Supreme Court Justices* (2nd ed, University of Chicago Press, Chicago, 1964) 93. I do note, however, that Justice Harlan harboured a seeming animosity towards Chinese litigants: see generally Gabriel J Chin “The Plessy Myth: Justice Harlan and the Chinese Cases” (1996) 82 Iowa L Rev 151.

24 *Plessy v Ferguson* 163 US 537 (1896) at 559 and 562.

25 The Nuremberg Laws consisted of two pieces of legislation: Das Reichsbürgergesetz [the Reich Citizenship Law] (Germany) and Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre [the Law for the Protection of German Blood and German Honor] (Germany). For an account of the influence of American race law on Nazi Germany, see James Q Whitman *Hitler’s American Model: The United States and the Making of Nazi Race Law* (Princeton, Princeton University Press, 2017). There was also an active back-and-forth traffic between American and Nazi eugenicists until the late 1930s: see Stefan Kühl *The Nazi Connection: Eugenics, American Racism, and German National Socialism* (Oxford University Press, New York, 1994) at ch 4.

26 Wilkerson, above n 11, at 88. See for example, Virginia’s Racial Integrity Act 1924 which, besides prohibiting interracial marriage, defined a white person as one “who has no trace whatsoever of any blood other than Caucasian”: Wilkerson, above n 11, at 125.

27 In 1691, Virginia was the first colony to outlaw inter-racial marriages. Alabama was the last state to repeal its endogamy laws in 2000: Wilkerson, above n 11, at 111.

28 The Civil Rights Act of 1964 and the Voting Rights Act 1965 are generally taken to have formally put an end to Jim Crow laws. See also *Brown v Board of Education of Topeka* 347 US 483 (1954) in which the United States Supreme Court declared state-sponsored segregation of public schools unconstitutional and *Loving v Virginia* 388 US 1 (1967) which declared unconstitutional criminalisation of inter-racial marriages. More about the Voting Rights Act 1965 below.

29 For example, the median wealth of white families (USD 171,000) is more than 10 times greater than that for black families (USD 17,000), while the unemployment rate for black Americans (six per cent) is approximate twice that of white Americans (3.1 per cent): Don Beyer *The Economic State of Black America 2020* (United States Congress Joint Economic Committee, 14 February 2020) <[www.jec.senate.gov/public/](http://www.jec.senate.gov/public/)> at 2.

I focus on voting rights because of the importance of democracy in some conceptions of the rule of law. According to the World Economic Forum, the United States is classified as the oldest democracy in the world, clocking up some 219 years as at 2019.<sup>30</sup> Democracies have to be continuous in order to count. This rules out France, which otherwise would have had a good claim. Contenders also have to be nation States.<sup>31</sup> This rules out Iceland which, despite a 1000-year tradition of parliamentary democracy, only became independent from Denmark in 1944.<sup>32</sup>

The definition of democracy, for the purposes of the league table, requires an executive directly or indirectly elected in popular elections and responsible either directly to voters or to a legislature. The legislature (and the executive if elected directly) must be chosen in free and fair elections and a majority of adult men must have the right to vote. Note men only. If universal suffrage were required New Zealand (currently third) would jump to the top of the list.<sup>33</sup> The United States only granted the vote to women in 1920.<sup>34</sup>

But let us have a closer look at the United States claim to continuous democracy, even disregarding the lack of women's suffrage. For a start slaves could not vote, although, given the relative population numbers, the United States could still claim that a majority of men could vote.<sup>35</sup> The passage of the Fifteenth Amendment in 1870 did guarantee the right to vote to men of all races, including former slaves. During the Reconstruction era, black voter turnout in many elections exceeded 90 per cent.<sup>36</sup> Indeed, black voter registration rates surpassed white registration rates in Louisiana, Mississippi and South Carolina.<sup>37</sup> In States such as Alabama and Georgia, black citizens made up nearly 40 per cent of all registered voters.<sup>38</sup>

---

30 Jeff Desjardins "Mapped: The world's oldest democracies" (8 August 2019) World Economic Forum <[www.weforum.org](http://www.weforum.org)>. The article referred to data from Carles Boix, Michael Miller and Sebastian Rosato "A Complete Data Set of Political Regimes, 1800–2007" (2013) 46 *Comp Pol Stud* 1523.

31 While Ancient Athens arguably had the first instance of democracy, allowing landowners to speak at the legislative assembly, it was not a national State in the modern sense of the word.

32 This also rules out the Isle of Man, which has a parliamentary body over 1,000 years old, but which is a self-governing British Crown Dependency and therefore not a nation State.

33 In 1893, New Zealand gave the right to vote to all women and ethnicities: Electoral Act 1893. For a full account of the women's suffrage movement in New Zealand, see Patricia Grimshaw *Women's Suffrage in New Zealand* (Auckland University Press/Oxford University Press, Auckland, 1987).

34 Mary Margaret McKeown and Kelsey L Matevish (eds) *The Nineteenth Amendment Centennial Cookbook: 100 Recipes for 100 Years* (online ed, American Bar Association, 2020) at 4. The cookbook is free to access online at <[19thamendmentcookbook.com](http://19thamendmentcookbook.com)> and includes recipes contributed by Lady Brenda Hale, Justice Rosalie Abella, the late Justice Ruth Bader Ginsburg as well as my New Zealand contribution.

35 Just after the signing of the Constitution of the United States in 1790, there were almost 700,000 slaves in the United States which was approximately 18 per cent of the total population: Aaron O'Neill "Black and slave population in the United States 1790-1880" (19 March 2021) Statista <[www.statista.com](http://www.statista.com)>. Despite slaves not being able to vote, they were nevertheless counted for electoral purposes due to the infamous Three-Fifths Compromise whereby three-fifths of each state's enslaved population would count towards the state's total population for the purpose of apportioning seats in the House of Representatives.

36 United States Commission on Civil Rights *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Enforcement Report* (12 September 2018) <[www.usccr.gov/reports/annual-statutory-enforcement/](http://www.usccr.gov/reports/annual-statutory-enforcement/)> at 16.

37 At 16.

38 At 16.

At the end of the Reconstruction era, however, Southern states began implementing policies to suppress black voters. This led to a dramatic reduction in black voting.<sup>39</sup> One of the main ways of disenfranchising voters was poll taxes, requiring eligible voters to pay a fee before casting a ballot. Another was literacy tests.<sup>40</sup> Needless to say, these measures were designed largely to affect black voters and succeeded in almost total disenfranchisement for black women. And the laws were only finally outlawed with the Voting Rights Act in 1965.

But is there truly voter equality in the United States even now? A 2018 statutory report of the United States Commission on Civil Rights, an independent, bipartisan agency established by Congress in 1957, would suggest not.<sup>41</sup> The report concluded that in states across the country, there are voting procedures that wrongly prevent some citizens from voting – including but not limited to: voter identification laws, voter roll purges, proof of citizenship measures, challenges to voter eligibility, and polling places moves or closings.<sup>42</sup> These measures have had a disparate impact on voters of colour and poor citizens. Some of the Commissioners in their statement annexed to the report put it as follows:<sup>43</sup>

Voting discrimination has merely assumed seemingly benign, modern forms enacted often with discriminatory intent in the guise of election integrity, just as was happening before the passage of the Voting Rights Act over 50 years ago.

Threats to voting rights continue. Various laws have been introduced by Republican-dominated state legislatures since the last election purportedly to deal with voter fraud, despite it being clear that voter fraud is in fact very rare.<sup>44</sup> As of June 2021, in this year alone, 17 states have enacted 28 such laws.<sup>45</sup> Take for example, the provision in Georgia prohibiting any individual other than a worker at a polling place from handing out water within 150 feet of a polling place or within 25 feet of the line.<sup>46</sup> This is purportedly designed to ban soliciting for votes but the consensus seems

---

39 For example, in Mississippi, fewer than 9,000 of the original 147,000 voting age African Americans remained registered after 1890: at 17, n 38.

40 At 291.

41 United States Commission on Civil Rights, above n 36.

42 At 83–198.

43 Commissioner Karen K. Narasaki's Statement with which Chair Catherine E. Lhamon, Vice Chair Patricia Timmons-Goodson and Commissioner David Kladney concurred: at 301.

44 At 102–121. Also to be noted is that, in an interview with the Associated Press, Trump-appointed United States Attorney General, William Barr, stated that there was no evidence of widespread voter fraud that could have changed the outcome of the 2020 election: Michael Balsamo "Disputing Trump, Barr says no widespread election fraud" *Associated Press* (online ed, Washington DC, 2 December 2020).

45 Brennan Center for Justice "Voting Laws Roundup: May 2021" (28 May 2021) <[www.brennancenter.org](http://www.brennancenter.org)>. The article was updated for June 2021.

46 The Justice Department has commenced legal action against Georgia over its new voting laws: Barbara Sprunt "In Suing Georgia, Justice Department Says State's New Voting Law Targets Black Voters" *National Public Radio* (online ed, Washington DC, 25 June 2021). In response to Republican state legislatures that have initiated private audits of voting records, the Justice Department has also warned that such auditors could face criminal and civil penalties for tampering with election records: Katie Benner "Justice Dept Warns States on Voting Laws and Election Audits" *New York Times* (online ed, New York, 28 July 2021).

to be that the provision is not so limited.<sup>47</sup> Further, long queues to vote are the norm largely only in black and poor neighbourhoods.<sup>48</sup> There are other disenfranchising measures.<sup>49</sup> For example, felony disenfranchisement in the United States is estimated to deprive 6.1 million voting-age United States citizens of the right to vote, disproportionately impacting African Americans and other persons of colour.<sup>50</sup>

Commentators point out that then-president, Donald Trump made the discriminatory intent of many voter restriction laws clear in dismissing a Democrat-led push for vote-by-mail, same-day registration and early voting, proposed in order to keep voters safe during the COVID-19 pandemic. He said:<sup>51</sup>

The things they had in there were crazy. They had things, levels of voting that, if you'd ever agreed to it, you'd never have a Republican elected in this country again.

And then there is gerrymandering. The name was coined in reaction to an 1812 bill which redrew the Massachusetts state senate election districts to benefit a particular party. This had been signed by Governor Elbridge Gerry, later Vice President of the United States, who in fact personally disapproved of the practice. One of the contorted districts in the Boston area was said to resemble a salamander. On March 1812, a political cartoon ran by the *Boston Gazette* depicting a dragon-like animal that supposedly resembled the oddly shaped district was instrumental in making the term gerrymander stick.<sup>52</sup>

To date, gerrymandering remains a thorny issue in the United States, especially with the upcoming redistricting cycle this year in which seats in the House of Representatives are allocated based off population numbers in States.<sup>53</sup> The Supreme Court, however, has refused to deal with the issues, holding partisan gerrymandering a political question beyond the reach of the federal courts.<sup>54</sup>

---

47 Tim Carman “New limits on food and water at Georgia’s polls could hinder Black and low-income voters, advocates say” *The Washington Post* (online ed, Washington DC, 10 April 2021).

48 Charles M Blow “Mr President, You’re Just Plain Wrong on Voter Suppression” *The New York Times* (online ed, New York, 25 July 2021).

49 See generally Erin Kelley *Racism & Felony Disenfranchisement: An Intertwined History* (Brennan Center for Justice, 9 May 2017) <[www.brennancenter.org](http://www.brennancenter.org)>.

50 At 1. It has been said that there has been an insidious resurfacing of the Three-Fifths rule (see above n 35) by the combined operation of federal head count rules and prisoner disenfranchisement legislation. The former counts prisoners as residents of the particular location they are incarcerated for the purposes of House of Representatives seat apportionment, but the latter deprives those same prisoners of the right to vote: see Hansi Lo Wang and Kumari Devarajan “‘Your Body Being Used’: Where Prisoners Who Can’t Vote Fill Voting Districts” *National Public Radio* (online ed, Washington DC, 31 December 2019).

51 Aaron Blake “Trump just comes out and says it: The GOP is hurt when it’s easier to vote” *Washington Post* (online ed, Washington DC, 30 March 2020). See also a similar comment made by a Georgia legislator in the response to early voting: United States Commission on Civil Rights, see above n 36, at 288.

52 Becky Little “How Gerrymandering Began in the US” (20 April 2021) History <[www.history.com](http://www.history.com)>.

53 Michael C Li *The Redistricting Landscape, 2021–22* (Brennan Center for Justice, 11 February 2021) <[www.brennancenter.org](http://www.brennancenter.org)>. See also Joseph Ax “How the battle over redistricting in 2021 could decide control of the US Congress” *Reuters* (online ed, United States, 19 February 2021).

54 *Rucho v Common Cause* 18–422, 18–726, 27 June 2019 (United States Supreme Court) slip op. The Court split along ideological lines with the five Republican-appointed judges in the majority and the four Democratic-appointed judges in dissent.

For a country that lauds itself as the oldest democracy in the world, the current state of affairs in the United States is worrying.<sup>55</sup> Little headway has been made with voting rights reform at the federal level.<sup>56</sup> And once again Courts have been accused of being complicit, with a number of Supreme Court decisions neutralising aspects of the Voting Rights Act 1965.<sup>57</sup>

But before we get too complacent, let us look at New Zealand's historical record. New Zealand too has prisoner disenfranchisement laws.<sup>58</sup> These laws disproportionately affect Māori too as they are overrepresented in prisons.<sup>59</sup>

New Zealand also had a poll tax.<sup>60</sup> This was not designed to suppress voting but to restrict Chinese immigration. It was passed in 1881 pandering to anti-Chinese sentiment and followed the lead of Australia and Canada. We used literacy tests too. From 1907 up until 1952, all arrivals were required to sit an English reading test as part of a suite of other measures targeted at restricting Chinese immigration.<sup>61</sup> The poll tax was not repealed until 1944,<sup>62</sup> although its use had diminished in the 1920s because the other restrictive measures sufficed. It is only some consolation that the New Zealand government formally apologised to the Chinese community in 2002 for the injustice of this tax.<sup>63</sup>

---

55 A statement of concern detailing the breaking down and deterioration of democracy in the United States has been issued by 100 political scholars in the United States: "Statement of Concern: The Threats to American Democracy and the Need for National Voting and Election Administration Standards" (1 June 2021) New America <[www.newamerica.org](http://www.newamerica.org)>. See also Aziz Huq and Tom Ginsburg "How to Lose a Constitutional Democracy" (2018) 65 *UCLA Law Review* 78.

56 See the For the People Act 2021: Brennan Center for Justice "Annotated Guide to the For the People Act of 2021" (January 2021) <[www.brennancenter.org](http://www.brennancenter.org)>.

57 See *Brnovich v Democratic National Committee* 19–1257, 1 July 2021 (Supreme Court of the United States) slip op; and *Shelby County v Holder* 570 US 529 (2013). See also *Rucho v Common Cause*, above n 54. For a commentary on *Brnovich*, see Michael C Dorf "What Was/Is at Stake in *Brnovich*?" (1 July 2021) Dorf on Law <[www.dorfonlaw.org](http://www.dorfonlaw.org)>.

58 The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 amended the Electoral Act 1993 so that the prohibition on voting was extended to any person detained in prison pursuant to a sentence of imprisonment. Prior to 2010, only some prisoners who were convicted on the most serious offences were disqualified from voting. On 29 June 2020, Parliament passed the Electoral (Registration of Sentenced Prisoners) Amendment Bill which allowed prisoners serving a sentence of less than three years to enrol to vote.

59 As of June 2021, Māori constitute 53.1 per cent of the total prison population while making up about 16.5 per cent of the population: see Ara Poutama Aotearoa/Department of Corrections "Prison facts and statistics – June 2021" <[www.corrections.govt.nz](http://www.corrections.govt.nz)>. The legislative amendment was challenged as disproportionately affecting Māori who are overrepresented in prisons, and hence, indirectly discriminating against Māori on the basis of race: see *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643. However, the case was unsuccessful in the Court of Appeal and the Supreme Court declined to grant leave to appeal because it would be approaching the issues of disproportionate imprisonment rates from a very particular angle: *Ngaronoa v Attorney-General* [2017] NZSC 183 at [2].

60 Chinese Immigrants Act 1881, s 5. Section 3 of the Act also provided for a tonnage restriction of one Chinese passenger per ten tons of cargo.

61 Chinese Immigrants Amendment Act 1907, s 3. Section 3 provided that it was not lawful for any Chinese to land in New Zealand until they could prove to an official that they could read a printed passage of not less than 100 English words which were selected at the discretion of the Collector or Principal Officer.

62 Finance Act 1944. The poll tax and tonnage restriction were waived in 1934 by the Minister of Customs.

63 Helen Clark, Prime Minister of New Zealand "Address to Chinese New Year celebrations" (12 February 2002, Parliament, Wellington). See also George Hawkins "Poll tax apology marks new beginnings" (13 February 2002) Beehive <[www.beehive.govt.nz](http://www.beehive.govt.nz)>.

Turning now to the treatment of Māori, the law again has a lot to answer for, despite the guarantee to Māori of unqualified exercise of their chieftainship over their lands, villages and all their treasures as well as that of protection and the conferral of rights and duties of citizenship in arts 2 and 3 of the Treaty of Waitangi/Te Tiriti o Waitangi (the Treaty).<sup>64</sup> These guarantees all gave way in the face of the rapacious hunger for land from the colonising English settlers. Substantial areas of Māori land were confiscated after the Land Wars under the New Zealand Settlements Act 1863, including in the Waikato and Tauranga.<sup>65</sup> In confiscating land, the government did not discriminate between tribes who had fought against the government and those who had fought as government allies.<sup>66</sup>

Nor did the inroads into Māori land stop with the confiscations. The process was continued with the establishment of the Native Land Court under the Native Lands Acts of 1862 and 1865 to investigate titles to Māori land and convert that interest into a fee simple interest.<sup>67</sup> It was not compulsory for Māori to bring their land before the Native Land Court. They were theoretically free to leave their lands in customary title if they wanted to. In practice, however, virtually all land still in Māori ownership in 1865 was brought before the Court and converted to freehold title. And the result was individualised titles that took little or no account of the collective nature of Māori society and that could be, and were, readily sold.<sup>68</sup> This was contrary to the view of land in traditional Māori society: land was not something that could be owned or traded. Instead, Māori

---

64 The language used here is from Sir Hugh Kawharu's English translation of the te reo Māori text of the Treaty which aims to show how Māori would have understood the meaning of the text at the time it was signed: Te Rōpū Whakamana i te Tiriti o Waitangi/Waitangi Tribunal "Translation of the te reo Māori text" <waitangitribunal.govt.nz>. The Treaty was initially signed at Waitangi on 6 February 1840 by Captain William Hobson and about 46 Māori rangatira (chiefs) before brought around the country to obtain further Māori signatures. The apparent divergence between the Māori and English texts as well as the fact that most rangatira signed the Māori text has led to controversy on what was actually agreed. It has, however, been suggested that the colonial understanding of the English text and the Māori text reconcile: Ned Fletcher "Foundation" in Simon Mount and Max Harris (eds) *The Promise of Law: Essays marking the retirement of Dame Sian Elias as Chief Justice of New Zealand* (LexisNexis, Wellington, 2020) 67.

65 The Land Wars were a series of wars in the 19th century between Māori and British colonial forces: see further Vincent O'Malley *The New Zealand Wars Ngā Pakanga O Aotearoa* (Bridget Williams Books, Wellington, 2019).

66 See for example, the occupation of Tikorangi which was on Ngāti Rahiri land, despite the fact that Ngāti Rahiri had been a government ally: Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996) at 117.

67 See Tom Bennion "Māori Land" in Elizabeth Toomey (ed) *New Zealand Land Law* (3rd ed, Thomson Reuters, Wellington, 2017) 441 at [5.3.05].

68 In contravention of Native land legislation, early Native Land Court judges applied a 10-person rule in which large blocks of land would be vested in 10 owners; this made sales to private purchasers relatively easy to complete: at [5.3.06(1)]. Although this was subsequently changed in 1867, the result was title documents with lists of hundreds of persons with interest in the land. Through subsequent generations, land interests became increasingly fragmented as the intestacy law provided that the interests should be distributed equally among the children of the deceased (which was generally contrary to Māori custom). Consequently, retained land became of little value for development as hundreds of owners would have to be consulted and private finance became impossible to obtain. This phenomenon has been described as the twin forces of individualisation and fragmentation which effectively stymied Māori efforts to retain and develop Māori freehold land: at [5.3.06(2)].

belonged to the land.<sup>69</sup> It formed an essential part of their collective identity, with a spiritual link between the land and the people. This remains true today.<sup>70</sup>

By 1860, about two-thirds of Aotearoa had already passed out of Māori hands (including virtually the entire South Island) primarily through the pre-emptive purchases by the Crown.<sup>71</sup> Although in 1860, the majority of the North Island was still held by Māori, confiscations and later land policies were to have a dramatic effect. By 1939, only scattered fragments remained.<sup>72</sup> Today, Māori freehold land comprises slightly over 1.4 million hectares which is approximately five per cent of New Zealand's land mass.<sup>73</sup> Treaty settlements have only restored a tiny fraction of Māori land.<sup>74</sup> In fact, total Māori land appears to have decreased over the last few years.<sup>75</sup>

Māori women, if anything, fared worse than Māori men in the native titles debacle. As explained by the Law Commission, the role of Māori women in society was gradually undermined in the period of colonisation by the colonial view of men as heads of the family, while the role of women of rank as leaders was challenged by the colonial view of the subordinate role of women to men.<sup>76</sup> The relationship of women with the land was also challenged by the colonial concept of the role of men as property owners.<sup>77</sup> The Native Land Act 1873 provided that husbands had to be party to all deeds executed by married Māori women. Husbands, on the other hand, were free to dispose of their Māori wives' land interests without their wife being a party to the deed.<sup>78</sup>

---

69 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia, Wellington, 2016) at 289–290. See also Eddie Durie “The Law and the Land” in Jock Phillips (ed) *Te Whenua Te Iwi: The Land and the People* (Allen & Unwin, Wellington, 1987) 78 at 78.

70 For Māori, land is the foundation of the social system and their tūrangawaewae (a place for one to stand): Mead, above n 69, at 288. Māori have been consistent in placing a high value in ancestral land and have engaged in protests and occupations to defend it, for example, the 506-day long occupation of Bastion Point in the 1970s: see generally Sharon Hawke (ed) *Takaparawhau: The people's story—1998 Bastion Point 20 year commemoration book* (Moko Productions, Auckland, 1998).

71 Richard Boast “Maori and the Law, 1840-2000” in Peter Spiller, Jeremy Finn and Richard Boast (eds) *A New Zealand History* (2nd ed, Brookers, Wellington, 2001) 123 at 144. The right of pre-emption meant that any land had to be sold to the Crown and not directly to private purchasers.

72 For maps illustrating the difference in the land held by Māori from 1860–2000, see Manatū Taonga/Ministry for Cultural & Heritage “Māori land loss, 1860-2000” (21 April 2021) NZ History <nzhistory.govt.nz>.

73 This is according to the most recent Māori Land Update (June 2020) which is updated annually: Te Kooti Whenua Māori/Māori Land Court “Māori Land Data Service” <maorilandcourt.govt.nz>.

74 Matthew Wynyard “‘Not One More Bloody Acre’: Land Restitution and the Treaty of Waitangi Settlement Process in Aotearoa New Zealand” (2019) 8(11) MDPI Land at 1 (open access journal available at <www.mdpi.com>). Treaty settlements are agreements between Māori and the Crown seeking to provide redress to Māori for historical grievances arising from breaches of the Treaty.

75 At 10.

76 Te Aka Matua o te Ture/Law Commission *Dividing relationship property – time for change?/Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [2.10]. The significant role of Māori women is illustrated by the fact that a number signed the Treaty: Ani Mikaere “Cultural Invasion Continued: The Ongoing Colonisation of Tikanga” (2005) 8 Yearbook of New Zealand Jurisprudence 134 at 154.

77 Te Aka Matua o te Ture/Law Commission *Justice: The Experiences of Māori Women—Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 11.

78 See the Mana Wāhine claim: Te Rōpu Whakamana i te Tiriti o Waitangi/Waitangi Tribunal “Mana Wāhine Kaupapa Inquiry” <waitangitribunal.govt.nz>.

Land alienation had profound effects on Māori society, and in particular Māori women, as it destroyed the collective relationship of the whānau/hapū<sup>79</sup> unit to the land.<sup>80</sup> It thus had serious impacts on Māori social organisation, the effects of which are still being felt today, with serious inequalities in health, education, socio-economic status and massive overrepresentation in the criminal justice system.<sup>81</sup>

All of which goes to highlight that the law can really be a terrible thing. To me, this clearly means that a definition of the rule of law that limits itself to merely formal requirements cannot be supported. In my view, the concept of the rule of law must at the least require laws that recognise basic human rights. As Lord Bingham said:<sup>82</sup>

A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if ... [the 'laws' it uses to achieve its ends are] duly enacted and scrupulously observed.

It is true that proponents of the formalised or thin concepts of the rule of law, recognise that the rule of law is only one of the virtues by which a legal system may be judged. So the thin concepts do not rule out human rights or other considerations but say that these should be separate from the concept of the rule of law.<sup>83</sup> They argue that it would be difficult to achieve a consensus on a more substantive definition and that compliance would be difficult to measure.<sup>84</sup>

This, in my view, fails to acknowledge the weight of the rhetoric that the rule of law possesses in the public consciousness. Regimes that do not respect and protect fundamental freedoms should not be granted the legitimacy associated with “complying with the rule of law” by merely formal compliance. Given the way the phrase “rule of law” has been used in public discourse, describing a genocidal regime as “complying with the rule of law” would be both misleading and baffling to the public who generally understand the phrase in its substantive sense. It is also questionable whether an “evil” regime would really have good prudential reasons to comply with the rule of law in the

---

79 The hapū is the primary political unit in traditional Māori social organisation. There is generally understood to be a hierarchy of descent groups, with hapū intermediate between whānau (extended families) and iwi (groupings of hapū sharing a common ancestor): Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 71.

80 One of the aims of the Native Land Act has been described as destroying the principle of collectivism in Māori society, the other aim being to access Māori land for settlement: Mikaere, above n 76, at 152.

81 Māori are statistically overrepresented in virtually every index of socio-economic marginality: see Te Manatū Whakahiato Ora/Ministry of Social Development *The Social Report 2016: Te pūrongo oranga tangata* (June 2016) at 259–271.

82 Bingham, above n 6, at 67.

83 Craig, above n 6, at 468.

84 Robert S Summers “A Formal Theory of the Rule of Law” (1993) 6 *Ratio Juris* 127 at 136–137. However, for an example of some international consensus around a substantive definition: Organisation for Security and Cooperation in Europe “Rule of law” <[www.osce.org](http://www.osce.org)>. The OCSE’s definition encompasses not only formal legal frameworks but also aims at developing justice systems that guarantee respect for fundamental rights and freedoms in a fair and independent manner. The OCSE has 57 participating States from Europe, Central Asia and North America. See also the definition adopted by the United Nations, above n 2.

formal sense.<sup>85</sup> It has been suggested, at least as an empirical matter, that it is highly unlikely that an “evil” regime would be incentivised to comply with the formal rule of law.<sup>86</sup> I agree.

In New Zealand, it seems clear that the rule of law is understood to have at least some substantive content.<sup>87</sup> Section 3(2) of the Senior Courts Act 2016 provides that “Nothing in this Act affects New Zealand’s continuing commitment to the rule of law and the sovereignty of Parliament.” The use of the phrase, “rule of law” in this statutory provision would have very little meaning if it only meant the rule of law in a formal sense. Another statutory reference to the rule of law is contained in s 4(a) of the Lawyers and Conveyancers Act 2006 which provides that lawyers have a fundamental obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand. The New Zealand Law Society certainly does not see its duty to uphold the rule of law as being confined to a formalised conception. One of the terms of reference of its Rule of Law Committee is to assist the Law Commission in its goal to achieve laws that are just, principled and accessible.<sup>88</sup>

As to the contention that it would be difficult to get worldwide consensus on a thick definition of the rule of law, it is true that the rule of law cannot be viewed purely in the abstract and that the content of the law will depend on the socio-political, constitutional and historical context of a particular jurisdiction. However, the point about human rights, as enshrined in the main human rights covenants, is that they are indivisible and universal.<sup>89</sup> Bills of Rights are included in many national constitutions, especially modern ones. There are also regional bills of rights with regional enforcement mechanisms in Europe, Africa and the Americas. In 2012, the ASEAN Human Rights Declaration for South East Asia was promulgated.<sup>90</sup> So inclusion of human rights should not in fact cause major definitional problems. Compliance with human rights obligations is of course another matter, but all countries, including New Zealand, have issues on that front.

There remain many academic arguments as to exactly what should be included in the ideal substantive definition of the rule of law. There is not time to go into these. I just note that I have a soft spot for the very thick conception of the rule of law used by the World Justice Project, probably because I was involved with that project in its early stages.<sup>91</sup> The definition is based on

---

85 This question has been heavily debated by Matthew Kramer and Nigel Simmonds. For a selection of their work, see Matthew Kramer “On the Moral Status of the Rule of Law” (2004) 63 CLJ 65 and NE Simmonds “Straightforwardly False: The Collapse of Kramer’s Positivism” (2004) 63 CLJ 98.

86 Hamish Stewart “Incentives and the Rule of Law: An Intervention in the Kramer/Simmonds Debate” (2006) 51 Am J Juris 149 at 150.

87 The view that the substantive approach has been generally taken in New Zealand is also shared by Sir Kenneth Keith, a former judge of the New Zealand Supreme Court and International Court of Justice: Kenneth Keith “The International Rule of Law” (2015) 28 LJIL 403 at 413.

88 Te Kāhui Ture o Aotearoa/New Zealand Law Society “Rule of Law Committee” (4 March 2020) <[www.lawsociety.org.nz](http://www.lawsociety.org.nz)>.

89 See the statements of the then United Nations High Commissioner for Human Rights: Navanethem Pillay “Are Human Rights Universal?” (2009) 45 United Nations Chronicle 4 <[www.un.org](http://www.un.org)>.

90 Association of Southeast Asian Nations “ASEAN Human Rights Declaration” (19 November 2012) <[asean.org](http://asean.org)>. See also the Arab Charter of Human Rights adopted in 2004 by the Council of the League of Arab States. However, the Arab Charter has been criticised by the then United Nations High Commissioner of Human Rights, Louise Arbour, for its approach towards the death penalty for children, the rights of women and non-citizens, as well as equating Zionism with racism: “Arab rights charter deviates from international standards, says UN official” *United Nations News* (online ed, 30 January 2008). See also International Commission of Jurists *The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court* (April 2015).

91 World Justice Project *Rule of Law Index 2020* (11 March 2020) at 9.

four principles: accountability under the law, just laws, open government and access to justice.<sup>92</sup> Under the umbrella of its definition the project uses eight particular factors in an index designed to measure adherence to the rule of law throughout the world.<sup>93</sup> While one could quibble at the margins as to inclusions in the index and the methodology, the fact the index exists gives the lie to the formalists who say a substantive conception of the rule of law would be difficult to measure.<sup>94</sup> I note incidentally that the World Justice Project principles do not include democracy,<sup>95</sup> although many of the features it outlines are more likely to exist in democracies than in other forms of government.

Returning now to the concrete as against the theoretical, I am not going to attempt a comprehensive assessment of New Zealand's adherence to the rule of law. Rather I concentrate on what might be considered the current underpinnings of the law as that is an important first step in the analysis.

The first point is that New Zealand does not stand alone. It is part of the world and is subject to international law obligations, including international human rights obligations. Some of these have been incorporated into our domestic law including, for example, through the New Zealand Bill of Rights Act 1990. They are, thus, directly enforceable in the courts.

Even where that is not the case, there is a presumption that Parliament intends to legislate consistently with New Zealand's international obligations, and this means that legislation will be interpreted consistently with treaties to the extent that the words and purpose of the statute allow.<sup>96</sup> Further, where there is a broad discretion given to the executive, the courts will require this to be exercised consistently with New Zealand's international obligations, again including international human rights obligations.<sup>97</sup> And the courts require, through the principle of legality, that any incursions into fundamental rights be clearly expressed by Parliament.<sup>98</sup>

International obligations are also necessarily part of the values, norms and principles to be taken into account when developing the common law. An example of this can be found in the decision in *Hosking v Runting*, where the majority recognised a tort of privacy in New Zealand.<sup>99</sup> The fact that the right to privacy recognised in the International Covenant on Civil and Political Rights was not included in our Bill of Rights did not prevent the common law from being developed to protect particular aspects of privacy.<sup>100</sup> All this shows that human rights form an important part of our current legal framework.

---

92 At 10. Rights would only exist on paper without access to justice – for example, through the courts with the necessary institutional actors to enforce them.

93 The eight factors are constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice and criminal justice: at 11.

94 See also European Commission “2021 Rule of law report” (20 July 2021) <ec.europa.eu> which monitors rule of law developments in European member States.

95 Leaving out democracy was a deliberate choice by the World Justice Project to enable the Index to apply to different types of social and political systems: World Justice Project, above n 91, at 9.

96 I discuss this further in Susan Glazebrook “Do they say what they mean and mean what they say? Some issues in statutory interpretation in the 21st century” (2015) 14 Otago LR 61 at 82–84.

97 *Tavita v Minister of Immigration* [1994] 2 NZLR 257, (1994) 11 FRNZ 508 (CA).

98 See for example, *D v New Zealand Police* [2021] NZSC 2.

99 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

100 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR]. New Zealand ratified the ICCPR on 28 December 1978.

New Zealand's law is also necessarily a function of local conditions.<sup>101</sup> In this regard, I want to return to the theme of the law and its effect on our indigenous people, concentrating in particular the position of the Treaty and tikanga in our law.<sup>102</sup> There has been a clear shift in the view of the relevance of the Treaty to our law in Aotearoa. When I was at law school, the Treaty must have been mentioned as I was taught legal system by Professor David Williams but, even in the history department which was my other home, it was seen as something of historical interest only. Outside of the university context, the Treaty was used as a focus of protest and rhetoric, but not with any view of it actually having current legal force. Little wonder as it had been described by Chief Justice Prendergast in *Wi Parata* in 1877 as a “simple nullity”.<sup>103</sup>

Fast forward to 1987 and the *Maori Council* case where Cooke P said that s 9 of the State Owned Enterprises Act 1986, which provides that nothing in the Act permits the Crown to act in a manner that is inconsistent with the principles of the Treaty, has “the impact of a constitutional guarantee”.<sup>104</sup> That the Treaty is a constitutional document, at least when given statutory force in that manner, was confirmed by the Supreme Court in 2013.<sup>105</sup> Even where the Treaty is not specifically incorporated in legislation, there is a requirement, as with international law, to interpret statutes consistently with the Treaty where possible.<sup>106</sup> And the Treaty, given its constitutional force, must also be very relevant to the development of the common law.<sup>107</sup>

The other major change has been with regard to the position of tikanga. Theoretically tikanga, as custom, was part of the common law from 1840. However, the incorporation of tikanga in the common law was subject to strict tests, such as a requirement that the custom be certain, reasonable, observed as of right from time immemorial and not contrary to an Act of Parliament.<sup>108</sup> There was an added requirement for the colonies. Custom could not be part of the common law

---

101 I discuss this further in Susan Glazebrook “Custom, human rights and Commonwealth constitutions” (Sir Salamo Injia Lecture, University of Papua New Guinea, Port Moresby, 29 November 2018) <[www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)>.

102 The origin of the word “tikanga” comes from “tika” which means “straight, direct, keeping a direct course” and has moral connotations of justice and fairness, including notions such as “right, correct”: Benton, Frame and Meredith, above n 79, at 429. For a discussion of the then position of tikanga in New Zealand law, see generally Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

103 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 (SC). It has been suggested that Justice Richmond was actually the author of the judgment and that Chief Justice Prendergast’s involvement was actually quite minimal: David V Williams *A Simple Nullity? The Wi Parata case in New Zealand law and history* (Auckland University Press, Auckland, 2011) at 142–150.

104 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 658. I note that Ani Mikaere has heavily criticised the notion of the principles of the Treaty outlined in this case as judicial rewriting of the Treaty at the expense of what was actually agreed: Ani Mikaere “Seeing Human Rights Through Māori Eyes” 10 Yearbook of New Zealand Jurisprudence 53 at 57.

105 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [55]–[59]. See also Lord Woolf, writing for the Judicial Committee of the Privy Council, who characterised the Treaty generally as being of the “greatest constitutional significance to New Zealand”: *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 516.

106 See also Legislation Design and Advisory Committee *Legislation Guidelines: 2018 Edition* (March 2018) at 27.

107 For a discussion of how the Treaty has influenced the development of the common law, see Paul Rishworth “Writing things unwritten: Common law in New Zealand’s constitution” (2016) 14 ICON 137 at 147–153.

108 The foundation case for these requirements is *The Case of Tanistry* (1608) Dav Ir 28 at 32.

if it was “repugnant to justice and morality”.<sup>109</sup> Custom would be deemed repugnant if it clashed with the core principles or foundations of the legal system.<sup>110</sup> In other words, in cases of conflict, the superior laws of the imperial power were to prevail. As Professor Peter Fitzpatrick has put it:<sup>111</sup>

... to the imperial eye law was pre-eminent among the ‘gifts’ of an expansive civilization, one which could extend in its abounding generosity to the entire globe ... Looked at another way, the violence of imperialism was legitimated in its being exercised through law.

Fast forward to the current day where references to tikanga have started appearing in a range of statutes.<sup>112</sup> In addition, tikanga has been recognised by the Supreme Court as a relevant factor to be considered by an executor in deciding on the burial place of a person with Māori whakapapa and without even commenting on the old common law tests for incorporation of custom, let alone applying them.<sup>113</sup> The Supreme Court also recently heard submissions on tikanga with regard to whether the appeal of Peter Ellis against his convictions should proceed despite his death.<sup>114</sup> While the Court has not yet issued its reasons for its decision that the appeal should continue,<sup>115</sup> there is force in the view that, whatever the place of tikanga in the reasons for that decision, the important point is the fact that submissions were called for and argument heard on tikanga, even though neither Mr Ellis nor the victims are Māori.<sup>116</sup>

---

109 This was a general requirement applied by colonial tribunals: PG McHugh “The Aboriginal Rights of the New Zealand Māori at Common Law” (PhD thesis, University of Cambridge, 1987) at 182. See also New Zealand Constitution Act 1852 (UK) 15 & 16 Vict c 72, s 71 which limited the preservation of Māori law and custom “so far as they are not repugnant to the general principles of humanity”.

110 See for example, *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 [*Takamore CA*] at [166] per Glazebrook and Wild JJ. The judgment, however, suggested a more modern approach to the incorporation of customary law: at [254]–[258].

111 Peter Fitzpatrick “Terminal legality: imperialism and the (de)composition of law” in Diane Kirkby and Catharine Coleborne (eds) *Law, history, colonialism: The reach of empire* (Manchester, Manchester University Press, 2001) 9 at 19.

112 See for example, Resource Management Act 1991; Te Ture Whenua Maori Act 1993; Marine and Coastal Area (Takutai Moana) Act 2011; and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

113 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 [*Takamore SC*] per Tipping, McGrath and Blanchard JJ at [152] and [156]. The minority (Elias CJ and William Young J each giving separate reasons), would have afforded a more central role, but still not determinative, role for tikanga: at [101]–[108] per Elias CJ and [175] per William Young J. The majority of the Court of Appeal in that case had suggested that a process of consultation should be undertaken by an executor with issues of tikanga being properly explained and explored in the course of that process: *Takamore CA*, above n 110, at [259]–[260] per Glazebrook and Wild JJ. No order was ultimately made by the Court for such a process of consultation given the entrenched position of the parties: at [261].

114 Peter Ellis was convicted on 16 charges of sexual offending in 1993. Subsequently, three convictions were quashed in an appeal but the remaining 13 conviction were upheld: *R v Ellis* (1994) 12 CRNZ 172 (CA). Those remaining 13 convictions were again upheld by the Court of Appeal when the case was referred to the Court by the Governor-General pursuant to s 406(a) of the Crimes Act 1961 (now repealed): *R v Ellis* [2000] 1 NZLR 513 (CA). The Supreme Court granted leave to appeal against the second decision of the Court of Appeal in *Ellis v R* [2019] NZSC 83. Mr Ellis passed away on 4 September 2019 before the appeal could be heard in the Supreme Court.

115 A results judgment was issued allowing the appeal to continue, with reasons to be provided in the decision on the substantive appeal: *Ellis v R* [2020] NZSC 89. The substantive appeal is being heard by the Supreme Court in October 2021.

116 See Professor Jacinta Ruru’s comments in Martin Van Beynen “The Peter Ellis case and Māori customary law” *Stuff* (online ed, Auckland, 9 July 2020).

So far so good, but there remain a number of issues still to be worked out. I list a few of these without making any attempt at being comprehensive. I am not to be taken as making any comment on any of them, apart from recognising that there may be issues to resolve in the future. I also recognise that resolution of some of the issues may not lie with the courts.

First, there is the issue of what Associate Professor Claire Charters calls the indigenous peoples' collective rights to authority and, therefore, whether it is even appropriate for institutions like the mainstream courts to be delving into tikanga.<sup>117</sup> This is related to the tino rangatiratanga guarantee in art 2 of the Treaty. It also relates to the right to self-determination in art 3 of the UN Declaration on the Rights of Indigenous Peoples.<sup>118</sup> This right is included in art 1 of both of the two main international human rights treaties.<sup>119</sup> The issue is tied up with the concept of legal pluralism, where two or more legal systems exist in the same State, raising conflict of law issues that might thereby arise and how they should be handled.<sup>120</sup>

Second, there is the concern that incorporation in the common law may end up distorting tikanga and in fact mean not decolonisation of the law but a re-colonisation.<sup>121</sup> Tied up with this is the concern that incorporation could end up stultifying the organic development of tikanga and its links with the community.<sup>122</sup> There is also the unease which derives from the fact that tikanga in this context would draw its authority from the Crown and not Māori rangatiratanga.<sup>123</sup>

---

117 See generally Claire Charters "Finding the Rights Balance: A Methodology to Balance Indigenous Peoples' Rights and Human Rights in Decision-making" [2017] NZ L Rev 553.

118 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007) [UNDRIP]. The *He Puapua* report recommends a staggered approach for Aotearoa/New Zealand to realise the UNDRIP by 2040: *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand* (Te Puni Kōkiri/Ministry of Māori Development, NRC-104358-1-128-V1, 1 November 2019). For a personal perspective from a Pākehā on the significance of the *He Puapua* report, see Richard Shaw "The Conversation: From Parihaka to He Puapua – it's time Pākehā New Zealanders faced their personal connections to the past" *New Zealand Herald* (online ed, Auckland, 15 July 2021). There has been no official government response to the report as yet.

119 ICCPR, art 1; International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICESR], art 1. New Zealand ratified the ICESR on 28 December 1978.

120 See generally Val Napoleon "Legal pluralism and reconciliation" (November 2019) Māori LR 1.

121 This has been said to be particularly problematic where our justice system seeks to incorporate tikanga Māori while at the same time denying Māori the power to control how that occurs: Annette Sykes "The myth of tikanga in the Pākehā law" (7 February 2021) E-Tangata <e-tangata.co.nz>. For a discussion of how customary justice systems have been distorted by colonial administrations internationally, see generally Ross Clarke "Customary Legal Empowerment: Towards a More Critical Approach" in Janine Ubin and Thomas McInerney (eds) *Customary Justice: Perspectives on Legal Empowerment* (International Development Law Organisation, Legal and Governance Reform: Lessons Learned No 3/2011, 2011) 43.

122 Contrast Napoleon's view that indigenous law will not be so easily damaged – after all, it has withstood colonisation: Val Napoleon "Did I Break It? Recording Indigenous (Customary) Law" (2019) 22 PER/PELJ 2 at 28–29.

123 Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Oxford, 2005) 330 at 342.

Third, there is the issue, which arises with the international human rights system generally, of working out the proper approach to reconciling collective and individual rights.<sup>124</sup> This is echoed in cases around the world involving constitutions which recognise both custom, by its nature collective, and human rights, most of which are (or have, to date, been interpreted as) individualistic. A clear mechanism for balancing individual and collective interests, especially in indigenous settings, is still a work in progress for the international human rights framework and for Aotearoa.<sup>125</sup>

Fourth, there is the issue of distortion of tikanga having already been distorted through the effects of colonisation and in particular related to the place of women.<sup>126</sup> It has been argued very strongly, however, that any such distortions should be for Māori women to address in a tikanga-appropriate manner rather than being a matter for the courts.<sup>127</sup>

Finally, there is the issue of how issues of tikanga can be decided in a mainstream court. For a start, it would need a wholly different education and mindset, taking into account sources well removed from the traditional written sources.<sup>128</sup> It would (at the least) require facility in te reo, and even then tikanga would not be a lived experience for non-Māori judges.<sup>129</sup> There is also the danger of such judges seeing superficial parallels between the values and customs of tikanga and the values and rules of the common law and ending up distorting both. There is also the question of whether the orthodox adversarial method is well-suited to evaluate tikanga.<sup>130</sup>

It is true that there are mechanisms available to assist. Where any question of tikanga arises in the High Court, that Court may state a case and refer it to the Māori Appellate Court and the decision is binding on the High Court.<sup>131</sup> Another mechanism is for the court to appoint independent

---

124 For a view that human rights treaties are a Western construct, see Mikaere, above 104, at 57–58. She suggests that the question should be not “how well does tikanga fit with human rights concepts?” but “what do human rights principles have to offer by way of useful adaptation to or development of tikanga Māori in a contemporary context?”

125 Glazebrook, above n 101, at 25.

126 Mikaere, above n 76, at 143–155.

127 Claire Charters “Te Tiriti o Waitangi, the UN Declaration on the Rights of Indigenous Peoples and constitutional issues” (Speech to the IAWJ 15th Biennial Conference, Wellington, 7 May 2021).

128 One method suggested by Napoleon and Friedland is the careful and conscious application of adapted common law tools such as case method and legal analysis to existing indigenous resources such as stories, narratives and oral histories: Val Napoleon and Hadley Friedland “An Inside Job: Engaging with Indigenous Legal Traditions through Stories” (2010) 61 McGill LJ 725.

129 The indigenising of legal education and our universities will have a major part to play in decolonisation: see generally Joe Williams “Decolonising the law in Aotearoa: Can we start with the law schools?” (FW Guest Memorial Lecture 2021, University of Otago, Otago, 22 April 2021). A first-of-its-kind degree program which aims to provide law students a lived experience in indigenous law is University of Victoria (Canada)’s Joint Indigenous Law Degree which combines a study of Canadian common law with the laws of Indigenous peoples: University of Victoria (Canada) “Joint Degree Program in Canadian Common law and Indigenous Legal Orders (JD/JID)” <www.uvic.ca>. The program combines classroom learning with field studies conducted in collaboration with indigenous communities.

130 Christian Whata “Evolution of legal issues facing Maori” in *Maori Legal Issues* (Legal Research Foundation conference, 29 November 2013) 1 at [47]. Justice Whata suggests that an inquisitorial methodology may be better suited to dealing with tikanga issues.

131 Te Ture Whenua Maori Act 1993, s 61; Marine and Coast Area (Takutai Moana) Act 2011, s 99.

expert witnesses or pūkenga.<sup>132</sup> However, I do note that hearing evidence on tikanga is treating it as a question of fact rather than law in the same manner as foreign law is proved in New Zealand courts.<sup>133</sup> If tikanga is directly applicable as law, this may not be appropriate (although it is difficult to see a viable alternative especially where the tikanga is contested).

So what does all this say about Aotearoa and the rule of law? I would suggest that, until we complete the process of decolonisation,<sup>134</sup> the rule of law can only be considered a work in progress. The new place of the Treaty and tikanga in the law is a start. There are of course other initiatives underway, including within and outside the courts, but these are beyond the scope of this paper.<sup>135</sup>

And as an overall conclusion on the rule of law generally, I finish where I began with my title. The rule of law is a guiding principle as long as it includes human rights, access to justice, and I would add, redress for historical disadvantage. If that is the case, it is also an appropriate catch cry for a better and more just world.<sup>136</sup>

---

132 Marine and Coast Area (Takutai Moana) Act 2011, s 99(1)(b); High Court Rules 2016, r 9.36. In *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025 (Churchman J), the Judge appointed two independent pūkenga who adopted a poutarāwhare (which they described as a construct) in response to the questions posed to them: at [313]. The pūkenga report was also attached as an appendix to the judgment. By contrast, the High Court in *Ngāti Whātua Ōrākei Trust v Attorney-General (No 1)* [2020] NZHC 3120 (Palmer J) declined to appoint an independent pūkenga, considering that it was unclear how much additional utility there would be in doing so given the significant amount of expert tikanga evidence already adduced: at [39]–[40]. Annette Sykes has praised the former case and criticised the latter arguing that it is necessary that judges (non-experts in tikanga Māori) have the assistance of a tohunga (specialist knowledge-keeper) to guide the assessment of tikanga: Sykes, above n 121. See also Ben Leonard “‘Judgment for the decade’ in landmark foreshore and seabed case” *Newsroom* (online ed, Auckland, 17 May 2021).

133 *Takamore SC*, above n 113, at [95] per Elias CJ.

134 See Williams, above n 129, for a discussion of decolonisation. It has been suggested that at a fundamental level, decolonisation involves the taking back by indigenous people of power and control: Eesvan Krishan “Decolonising the Common Law: Reflections on Meaning and Method” (2020) 26 *Auckland U L Rev* 37 at 39 citing Moana Jackson “Where to next? Decolonisation and the stories in the land” in Rebecca Kiddle and others *Imagining Decolonisation* (Bridget Williams Books, Wellington, 2020) 133 at 135.

135 For example, the Waitangi Tribunal investigates claims that government legislation, policies or practices prejudicially affect Māori and breach the principles of the Treaty: Treaty of Waitangi Act 1975, s 6. Also relevant is the treaty settlements claim process and the various specialist courts – Te Whare Whakapiki Wairua/Alcohol and Other Drug Treatment Court; Te Kooti o Timatanga Hou/New Beginning Court; Te Kōti Rangatahi/Rangatahi Court. I refer also to the transformative Te Ao Mārama model for the District Court and the new Māori Health Authority.

136 Catch cry is deliberately used here to capture the concept of the rule of law as a call to action. I do, however, recognise that while law can effect and does affect social change, it is not the whole answer to societal ills.

# JUDICIAL ABEYANCES IN NEW ZEALAND'S UNWRITTEN CONSTITUTION

BY EDWARD WILLIS\*

## I. INTRODUCTION

The New Zealand courts regularly decline to address issues of constitutional law that come before them. In *Ngaronoa v Attorney-General*,<sup>1</sup> for instance, it was anticipated that the Supreme Court would offer a view on the legal enforceability of the manner and form restrictions in s 268 of the Electoral Act 1993. Section 268 purports to restrict Parliament's ability to enact amending or repealing legislation in respect of certain provisions relating to the holding of democratic elections unless certain procedural requirements (which are more cumbersome than for the ordinary passage of legislation) are met. Legal enforceability of the manner and form restrictions was essential to the appellants' case, and the Crown conceded in argument that such restrictions are effective as a matter of law.<sup>2</sup> However, the Court declined to express any general view on the issue. As a result, the legal effectiveness of the manner and form restrictions in s 268, with its important implications for the nature and effect of parliamentary sovereignty and constitutional protection of the electoral process, remains unresolved.

This judicial approach seems odd. We expect courts to decide questions of law fearlessly, independently and definitively. This expectation reflects the courts' authoritative role with respect to legal questions, including questions that relate to constitutional matters. This article is motivated by an instinct that judicial refusals to engage with constitutional questions reveal something important about New Zealand's constitutional practice. It has two key aims. The first aim is to identify deliberate non-engagement with constitutional issues as a particular phenomenon of New Zealand's constitutional jurisprudence. This analysis begins in Part II, which explains the expectation that the courts will provide definitive answers to questions of constitutional law. Part III then identifies specific examples of the courts failing to determine questions of constitutional law fully and with certainty. It is suggested that these "judicial abeyances" may involve the court refusing to determine an issue of obvious constitutional importance, but may equally involve the resolution of the substantive issue before the court without engaging in explicitly constitutional reasoning.<sup>3</sup> While I do not survey New Zealand case law exhaustively, I identify a number of examples of this phenomenon suggesting that judicial abeyances are an aspect of constitutional practice worthy of scholarly attention.

The article's second aim is to offer an explanation for this phenomenon, which is presented in Part IV. My analysis here is more speculative, and I offer two broad frameworks for consideration.

---

\* Faculty of Law, University of Auckland.

1 *Ngaronoa v Attorney-General* [2018] NZSC 123, [2019] 1 NZLR 289.

2 *Ngaronoa v Attorney-General* (NZSC 102/2017; [2018] NZSC Trans 6) at 55.

3 The term is adapted from Michael Foley *The Silence of Constitutions: Gaps, "Abeyances" and Political Temperament in the Maintenance of Government* (Routledge, Abingdon (UK), 2011).

The first is judicial deference to political actors on constitutional questions. While there are doctrinal and theoretical arguments in support of this view, it is not obvious on the face of the examples identified that the courts wish to empower other actors to take determinative positions on these issues. Further, given the risks long identified in the liberal constitutionalist tradition associated with political actors determining their own limitations, I argue that we should be slow to attribute this view to the courts.

The second possible explanation is styled as a “last resort” principle, where questions of constitutional law are left open until they must be resolved. On this approach, constitutional determination of legal questions remains a matter for the courts but the jurisdiction is exercised sparingly. There is doctrinal support for this approach in United States constitutional law,<sup>4</sup> but in that context the principle is motivated by concern with the potential overuse of the judicial struck-own power. I suggest instead that a similar judicial practice in New Zealand might well be motivated by our own constitutional idiosyncrasies. I argue that equivocating on the answers to questions of constitutional law preserves New Zealand’s unwritten constitutional structure while leaving the option of legal resolution available if required in future circumstances. The possibility that a more definitive legal position will be enforced in the future also conditions the exercise of political power in a way reminiscent of the written constitutional tradition, albeit without the same reliance on a conceptual of fundamental law. These considerations potentially explain why the courts can be more circumspect with respect to deciding live constitutional issues than they otherwise might be.

One caveat is in order before the substantive analysis begins. While I seek to describe and explain the phenomenon of judicial abeyances in the New Zealand constitution, I do not attempt to justify or defend that practice. If my argument is accepted, judicial abeyances may well be desirable in some circumstances. However, there are always trade-offs to be made when eschewing definitive, enforceable constitutional limits. Normatively assessing these trade-offs is complex, and lies beyond the scope of the present analysis. The initial task is simply to identify the relevant practice and supply a possible explanation for it.

## II. EXPECTING CERTAINTY FROM CONSTITUTIONAL LAW

Why do we expect certainty from the courts with respect to the resolution of issues of constitutional law? There are two broad answers to that question. The first answer is that legal certainty is desirable. The rule of law requires that law is prospective, coherent and clear in its expression, and relatively predictable in its application. Courts need to actually decide cases for these objectives to be achieved. The second answer is that constitutional certainty is desirable. Liberal theories of constitutionalism in particular place considerable value on the limitation of government power through law. The implicit assumption here is that constitutional law is sufficient certainty and clear to supply enforceable standards. These two answers are distinct but mutually reinforcing.

---

4 See *Ashwander v Tennessee Valley Authority* 297 US 288 (1936).

### A. *Legal Certainty*

The rule of law stands against both absolute power and arbitrary government decision-making.<sup>5</sup> In doing so it implicitly endorses and supports a preference for certainty and predictability. Different accounts of the rule of law render this implicit support more or less explicit.

We can see this emphasis on certainty and predictability with some clarity in liberal formulations of the rule of law in particular. Hayek, for example, placed “fair certainty” at the very centre of his vision of the rule of law:<sup>6</sup>

Stripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.

A concern with the arbitrary or otherwise unconstrained exercise of government power is evident here. Hayek seeks to employ rule of law certainty as ballast to offset the risk that the unpredictable use of government authority will amount to abuse. But Hayek’s version of the rule of law also specifically highlights the benefits of certainty and predictability for those who are subject to the law. When taking a particular action or arranging one’s affairs, “[t]he law tells [the individual] what facts he [or she] may count on and thereby extends the range within which he [or she] can predict the consequences of his [or her] actions”.<sup>7</sup> Controlling and focusing the power of the state through law helps to maximise the liberty of the individual. On this view of the rule of law, certainty and predictability are vital touchstones for freedom.

On other interpretations of the rule of law, certainty and predictability emerge as a consequence of more fundamental requirements. Fuller’s influential account of the “internal morality of law” identifies a number of requirements necessary for both the efficacy of law and to secure law’s normative value.<sup>8</sup> These requirements include standards of accessibility, prospectivity, intelligibility, consistency and stability, which each contributing to a certain and predictable legal framework. On this account, certainty and predictability are not always mentioned explicitly as primary rule of law requirements. However, these properties do emerge from the essential requirements of a just and functioning legal system. A legal system founded on laws that are accessible, prospective, intelligible, consistent and stable will be a system where laws are reasonably predictable and certain.

Fuller’s account is a useful touchstone because his version of the rule of law is one of the few to directly acknowledge the important role of the courts in determining legal issues. Nestled in his discussion of the problems with retrospective law and the need for a legal system to promote prospectivity, Fuller confirms that judicial determination of legal questions is a necessary requirement for satisfying his version of the rule of law:<sup>9</sup>

---

5 See, for example, TRS Allan “The Rule of Law” in David Dyzenhaus and Malcolm Thorburn (eds) *Philosophical Foundations of Constitutional Law* (Oxford University Press, Oxford, 2016) 201.

6 FA Hayek *The Road to Serfdom* (Routledge, London, 1944) at 72.

7 FA Hayek *The Constitution of Liberty* (Routledge, London, 1960) at 156–157.

8 Lon L Fuller *The Morality of Law* (Yale University Press, New Haven (CT), 1964).

9 At 56.

When a dispute arises concerning the meaning of a particular rule, some provision for the resolution of the dispute is necessary. [...] Obviously the judge must decide the case. If every time doubt arose as to the meaning of a rule, the judge were to declare the existence of a legal vacuum, the efficacy of the whole system of prospective rules would be seriously impaired.

This gives expression to what is often only an instinct.<sup>10</sup> A mechanism for clearly resolving disputes about what the law requires is a feature of any functioning legal system that takes seriously the control of government power and the liberty of the individual. Where the courts fail to determine a question of law that comes before them for decision, they are failing in some aspect of their basic function in a system of law that ought to trend towards certainty and predictability. This makes securing the benefits of the rule of law more difficult.

For example, a clear risk flowing from the judicial failure to determine a question of law is that other parties with no legitimate authority will push their preferred interpretation with impunity. Susan Koniak has neatly demonstrated this risk in her analysis of two contrasting decisions dealing with the obligations on lawyers to report the fraudulent activities of their securities clients.<sup>11</sup> In *SEC v National Student Marketing Corp*,<sup>12</sup> the Court ruled that lawyers are subject to obligations make to official reports where they become aware of fraudulent activities. While this finding technically constituted a win for the regulator, the Court expressly refused to specify the actual reporting obligations on lawyers with any precision.<sup>13</sup> As a result, the ruling in the case failed to displace the view held by the advising lawyers that the duty of client confidentiality was the controlling factor in such cases. This absolutist view of confidentiality requirements continued in the face of strong protests from the securities regulator, who interpreted the relevant legal requirements very differently in light of its concerns to identify and address fraudulent conduct. Without clear endorsement from the courts, however, the regulator lacked any legitimate authority beyond its own assertions of state power to seriously challenge the legal profession's view with its own interpretation.<sup>14</sup> In absence of a definitive ruling, "the court abdicated its responsibility, leaving the state and the bar to battle over the shape of law".<sup>15</sup> An issue that should have been determined in accordance with the rule of law was left to the arbitrary outcome of a battle of wills.

Later, in *Ackerman v Swartz*,<sup>16</sup> a contrasting approach was adopted when the Court addressed substantially similar issues in more definitive terms. In this second case, the Court:<sup>17</sup>

[...] asserted that courts have the power to control the dispute. Moreover, the court articulated the law. It asserted that confidentiality must yield when a lawyer discovers, after issuing an opinion letter that the lawyer knows will be included with other offering documents disseminated to third parties, that statements made in that opinion are materially misleading.

---

10 The idea is perhaps under-emphasised in modern scholarship because it is simply accepted, along with Locke, that a "known and indifferent Judge, with Authority to determine all differences according to the established Law" is a feature of any constitutional state: John Locke *Two Treatises of Government* (Peter Laslett (ed), Cambridge University Press, Cambridge, 1963) at 396.

11 Susan P Koniak "When Courts Refuse to Frame the Law and Others Frame it to Their Will" (1992–1993) 66 Southern California Law Review 1075.

12 *Securities and Exchange Commission v National Student Marketing Corporation* 457 F Supp 682 (DDC 1978).

13 At 713.

14 See Koniak, above n 11, at 1082.

15 At 1083.

16 *Ackerman v Swartz* 947 F 2d 841 (7th Cir 1991).

17 Koniak, above n 11, at 1088.

As the Court had determined a clear rule that despite obligations of confidence there was a duty to report fraudulent statements, and legal advisors were forced to change their practice as a result. In Koniak's assessment, "[t]he court took responsibility for articulating the law [...] It stepped into the fray. It acted like a court".<sup>18</sup> It is not hard to see that underlying Koniak's assessment is a view that it is dereliction of the courts' basic duty to the legal system to fail to fully resolve the question of law before it in definitive terms. The *Ackerman* Court discharged this basic duty, whereas the *National Student Marketing Corp* Court did not.

### B. Liberal Constitutionalism

The rule of law requirement that courts determine legal questions takes on special prominence in a constitutional context. Liberal theories of constitutionalism in particular turn on a concept of fundamental law,<sup>19</sup> which provides a shared framework for politics and seeks to limit state action. This fundamental law must be applied clearly and robustly in order to maintain the constitutional legitimacy of the government. Under orthodox separation of powers principles, it is the role of the courts to determine whether government has acted lawfully and therefore constitutionally.

The most celebrated moment in this constitutional tradition is still the decision of the United States' Supreme Court in *Marbury v Madison*.<sup>20</sup> When confirming the Supreme Court's jurisdiction to strike down legislation inconsistent with the Constitution, Marshall CJ famously held that it is "emphatically the province and duty of the Judicial Department to say what the law is".<sup>21</sup> This finding melded "constitution" and "law", so that constitutional prescriptions could be enforced as legal imperatives. It becomes a necessary function of the judiciary to determine constitutional and unconstitutional conduct on this approach.

While *Marbury* can sometimes be seen an example of United States exceptionalism, its influence is broad. Time and again the courts in different jurisdictions take on the role of providing definitive legal rulings on constitutional questions. The High Court of Australia, for example, has accepted this position as "axiomatic" in its own constitutional context,<sup>22</sup> suggesting that there is nothing inherent to the Westminster constitutional tradition preventing the courts from taking on an active and definitive constitutional role. The *Marbury* precedent has also been influential in unwritten constitutional jurisdictions, with the Israeli Supreme Court drawing directly on *Marbury* when asserting its own constitutional authority.<sup>23</sup> The judgment in *Marbury* is a standard in the liberal constitutionalist tradition of fundamental law that reaches above and beyond its place in the cannon of United States Supreme Court decisions.

It is the particular framing of the courts' constitutional role as a *duty* on which I place some emphasis. This embeds into the jurisdiction to determine the application of constitutional law a commensurate responsibility to do so on appropriate occasions. In *Marbury* itself, Chief Justice Marshall makes this abundantly clear:<sup>24</sup>

---

18 At 1089.

19 See, for example, Dieter Grimm *Constitutionalism: Past, Present and Future* (Oxford University Press, Oxford, 2016).

20 *Marbury v Madison* 5 US 1 Cranch 137 (1803).

21 At [141].

22 *Attorney-General (WA) v Marquet* [2003] HCA 67 at [66], (2003) 217 CLR 545 at 570.

23 *United Mizrahi Bank v Migdal Cooperative Village* [1995] IsrSC 49(4) 221 at 416.

24 *Marbury v Madison*, above n 20, at [142].

[...] if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

The judicial function with respect to constitutional law is not just an exclusive jurisdiction, but a necessary function for ensuring the constitutionality of government actions. *Marbury* is not a licence for the courts to overstep their acknowledged boundaries. Some matters – even some constitutional matters – may properly be considered political questions in respect of which political remedies are the most appropriate.<sup>25</sup> But questions of constitutional *law* do require answers – and judicial answers at that.

This idea is pervasive, and although its origins lie in liberal constitutional theory its influence is much wider. Arch-political constitutionalist Adam Tomkins rests his own constitutional theory on an overtly republican vision that empowers government institutions, rather than liberal account of constitutional morality that might seek to constrain government action.<sup>26</sup> When addressing the role of the courts in his constitutional theory, Tomkins is clear that clear judicial determination of the law still matters:<sup>27</sup>

A core function of the courts in constitutional law is to declare what legal powers the government has. It is a fundamental rule of constitutional law that the government has only such powers as are clearly conferred upon it by the law. Where the government has acted without legal authority, the courts should be robust in declaring such action unlawful.

Government does not include Parliament on this account, which is why Tomkins' argument does not amount to a liberal justification of judicial power in the constitution. Parliament remains supreme, determining the law that the courts must then apply. But the value of a judicially robust application of constitutional law is still very much apparent, as this is required to ensure that the government is in fact acting in accordance with Parliament's intent.

Given these different constitutional threads in favour of judicial determination of constitutional law, it is unsurprising that this same idea that the courts should definitively speak on matter of constitutional law has received recognition from the New Zealand courts. In *Attorney-General v Taylor* the Court of Appeal went as far as to suggest that questions of constitutional law relating to Parliament's legal authority "recourse must be had to the courts ... for an authoritative answer".<sup>28</sup> While not mentioned explicitly, the parallels here with *Marbury* have been noted by commentators.<sup>29</sup> There are also connections to be found with the Westminster constitutional tradition. Geiringer argues that the decision reveals a preference for "Diceyan notions of the supremacy and objectivity of law" and "the independent role of judges in finding, declaring and enforcing it".<sup>30</sup> The judicial

---

25 At [75]–[77].

26 See especially Adam Tomkins *Our Republican Constitution* (Hart, Oxford, 2005).

27 Adam Tomkins "The Role of the Courts in the Political Constitution" (2010) 60 UTLJ 1 at 1.

28 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [56].

29 Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*" (2017) 48 Victoria University of Wellington Law Review 547 at 555–556.

30 At 556.

function is understood here as being directly concerned with answering questions of law in constitutionally significant cases.<sup>31</sup>

I conclude this section with a final New Zealand example. In *Ngāti Whātua Ōrakei Trust v Attorney-General*,<sup>32</sup> the appellant sought recognition of its rights to challenge a Ministerial decision to transfer land to other iwi interests as part of the settlement of historical Treaty grievances. Legal recognition of those rights potentially sit at odds with the political nature of settlement negotiations, and risked offending the principle of non-interference in parliamentary proceedings given the practice of finalising settlements through legislation. The conventional legal position is that such matter are not amenable to review by the courts.<sup>33</sup> The High Court and the Court of Appeal struck out Ngāti Whātua’s claim on precisely these grounds.<sup>34</sup> However, the Supreme Court found much more weight could be given to the rights possibly impugned. The majority stated in its judgment that it could not ignore “the function of the courts to make declarations as to rights”.<sup>35</sup> Elias CJ, writing in the minority, put the point more forcefully: “[w]here claims of right or legal interest are made in our constitutional order, it is the function of the courts to determine them”.<sup>36</sup> I think this is precisely how we imagine the courts discharging their function in our constitution. Legal questions should be addressed directly and fully, providing resolution of the dispute before the court and clarifying the constitutional position. We do not need a theory of judicial supremacy to recognise the important role played by principled inquiry into, and resolution of, constitutional disputes in accordance with the law.

### III. IDENTIFYING JUDICIAL ABEYANCES

Despite these rule of law values and constitutional expectations, the New Zealand courts do not always resolve issues of constitutional law that fall before them for resolution. This may occur because the court explicitly refuses to offer any view on the constitutional matters at all, in which case the deliberate act of placing engagement with such matters into abeyance is apparent. In other cases a lack of constitutional engagement may occur because the court resolves the dispute before it with reference to non-constitutional doctrines and principles – that is, with an exclusive reliance on ordinary law. We might term this under-determination of constitutional matters a “constructive abeyance”. This Part III sets out examples of each type of judicial abeyance in New Zealand constitutional decision-making.

---

31 *Attorney-General v Taylor* (CA), above n 28, at [62].

32 *Ngāti Whātua Ōrakei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.

33 *Milroy v Attorney-General* [2005] NZAR 562 (CA) at [18]; *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318.

34 *Ngāti Whātua Ōrakei Trust v Attorney-General* [2017] NZHC 389, [2017] 3 NZLR 516; *Ngāti Whātua Ōrakei Trust v Attorney-General* [2017] NZCA 554, [2018] 2 NZLR 648.

35 *Ngāti Whātua Ōrakei Trust v Attorney-General*, above n 32, at [46].

36 At [78].

### A. Why Judicial "Abeyances"?

But first, a note on terminology. I have labelled the lack of judicial engagement on constitutional matters an "abeyance" following Michael Foley's analysis of deliberate ambiguities and gaps in constitutional practice.<sup>37</sup> Foley's thesis is that all constitutional practice relies on the conscious deferral of answers to legal and political questions. Foley describes this constitutional practice in the following terms:<sup>38</sup>

[...] those implicit understandings and tacit agreements that could never survive the journey into print without compromising their capacious meanings and ruining their effect as a functional form of genuine and valued ambiguity. It is not just that such understandings are incapable of exact definition; rather their utility depends upon them not being subject to definition, or even to the prospect of being definable.

Foley identifies constitutional abeyances as part of a larger argument that institutional accommodation within any political system requires a degree of mutual deference and respect, and that in many circumstances abeyances fulfil that role more completely and effectively than definitive resolution of constitutional questions. My purpose is not to defend Foley's account of constitutional practice specifically. Instead I take up the more general notion that the gaps in our constitutional understanding left by the courts are perhaps deliberate, and as such may serve a constitutional function. The language of "abeyances" seems to capture the essence of this notion of deliberate gaps serving a genuine constitutional purpose.

I also adopt the term to conceptually separate deliberate refusals to engage in constitutional issues, leaving them un- or under-determined, from a determination of the court that, properly understood, there is no legal or constitutional question falling for resolution. The function of the courts is resolve genuine disputes that give rise to questions of law. If resolution of the legal questions before the court is moot,<sup>39</sup> or the dispute has not crystallised as between the parties,<sup>40</sup> the court will not consider the issues. The New Zealand courts also do not offer advisory opinions, and so must be seized of a genuine dispute.<sup>41</sup> Judicial abeyances are qualitatively different from these scenarios in that it is clearly open to the court to provide some constitutional guidance if it is minded to do so.

### B. Direct Abeyances

I have already foreshadowed an important recent example of the Supreme Court refusing to engage with a constitutional issue. *Ngaronoa v Attorney-General* concerned the issue of prisoner voting rights. The appellants contended that a legislative amendment imposing a blanket disqualification on voting affecting all prisoners was enacted unlawfully.<sup>42</sup> The qualifications for electors are set

---

37 Foley, above n 3.

38 At 9.

39 *Folwer & Roderique Ltd v Attorney-General* [1987] 2 NZLR 56 (CA) at 78.

40 See Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 841.

41 *Gazley v Attorney-General* (1995) 8 PRNZ 313 (CA) at 315.

42 Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.

out in s 74 of the Electoral Act 1993, which is subject to manner and form protections against amendment or repeal by virtue of s 268 of the Electoral Act. Section 268(1) identifies a number of “reserved provisions”, including:<sup>43</sup>

[...] section 74, and the definition of the term adult in section 3(1), and section 60(f), so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:

Section 268(2) then provides that the identified reserved provisions may only be amended or repealed if passed by a 75 per cent super-majority of the members of the House of Representatives or if supported by a majority of electors in a national referendum. The appellants argued that the legislative amendment imposing the blanket disqualification engaged s 268 and, because it was enacted by a bare majority of the members of the House, it was invalid and of no effect.

Because the appellants’ argument implicated the legal effectiveness of s 268’s purported manner and form entrenchment, it carried important implications for the doctrine of parliamentary sovereignty in New Zealand. It is currently unclear whether Parliament’s legislative sovereignty is best understood as “continuing”, which would render any attempt at manner and form restrictions ineffective, or “self-embracing”, which would allow manner and form restrictions to take effect.<sup>44</sup> However, the Supreme Court determined that properly construed, s 268(1) only protected the minimum voting age. There was, therefore, no legislative disability to disqualify prisoners from voting. While the case ultimately turned on this relatively discrete point of statutory interpretation, *Ngaronoa* is also the first time the courts have been called upon to consider directly the manner and form protection of the reserved provisions in New Zealand’s constitutional framework. There are some statements in obiter that suggest the courts take such requirements seriously.<sup>45</sup> A firm decision one way or another would have significant implications for the competing theories of the nature of parliamentary sovereignty in the New Zealand constitution as well as the relationship of comity between the political and judicial institutional branches of government. It would also clearly signal the strength of the protection afforded by s 268 to the reserved provisions more generally, which are considered essential to a fair electoral process. While the Court resolved the issue before it without finding it necessary to directly consider the larger constitutional issues, the Crown conceded in its argument that such restrictions were likely to be legally effective.<sup>46</sup> This concession served as an invitation to the Court to make a formal finding on this crucial constitutional point. However, after noting that the issue was a live one, the majority refused to engage with the substantive issue stating simply that “we would prefer that issue to be resolved after argument on the point”.<sup>47</sup> In other words, the Court made a deliberate decision to leave this important constitutional issue unresolved.

Perhaps some will question the significance of the decision to avoiding addressing the constitutional issues raised by the case on the basis that the immediate dispute raised before the court was successfully resolved. Following McIntyre, I prefer the view that this narrow focus on mechanical dispute resolution overlooks the “inherent duality” of the judicial function,

---

43 Electoral Act 1993, s 268(1)(e).

44 The classic account of the distinction is HWR Wade “The Basis of Legal Sovereignty” (1955) 13 CLJ 172.

45 *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at [13]; *Carter v Police* [2003] NZAR 315 (HC) at 325; *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [91].

46 *Ngaronoa v Attorney-General*, above n 2, at 55.

47 *Ngaronoa v Attorney-General*, above n 1, at [70].

which distinguishes courts from other bodies that might settle disputes.<sup>48</sup> Courts necessarily resolve disputes in the context of constitutional government, and so are intimately engaged in norm creation and application when discharging their dispute resolution role. Non-decisions on constitutional matters can frustrate this norm creation and application process, which in part may explain the rule of law and constitutionalist imperative to engage more definitively with such issues. In *Nagornoa*, however, the Court recognised that there is live constitutional issue to be determined, and that it could offer an authoritative view on that issue, effectively resolving it and providing significant clarity to New Zealand constitutional practice, but ultimately refused to do so. Indeed, it is arguable that the Court would not be making a controversial decision by engaging with this issue. The balance of academic opinion is now firmly in favour of the view that manner and form entrenchment is valid and effective under New Zealand's constitutional arrangements.<sup>49</sup> At the crucial moment however, the Court has elected not to seize the opportunity available to it. Giving only the briefest of justificatory reasons, it has preferred to perpetuate the uncertainty of the current legal position. The limited academic commentary available since the decision expresses some scepticism over whether avoiding the matter in this way was a meritorious approach.<sup>50</sup> It is unlikely that the Court would have been unaware of these potential criticisms. What that seems to suggest is that the Court saw some value in deliberately perpetuating the uncertainty that continues to shroud the application of manner and form provisions in the New Zealand constitution. When provided with an opportunity to choose between the continuing or self-embracing theories of parliamentary sovereignty, the Court has elected to sit on the fence.

*Ngaronoa* is not an isolated example. In *Shaw v Commissioner of Inland Revenue* the Court of Appeal faced a challenge in respect of an individual's tax assessment.<sup>51</sup> While the appellant accepted that the relevant provisions had been duly enacted by Parliament and that there was no issue of interpretation on the face of those provisions, he rather boldly argued that the provisions themselves were invalid by virtue of Magna Carta's prohibition on extraordinary taxation. The Court determined there was no merit in the claim, but the matter of potential limits on Parliament's legislative sovereignty was clearly put in issue by the case. The Court was, however, happy to leave the matter unresolved:<sup>52</sup>

[The Court is relieved] from venturing into what happily remains in New Zealand an extra-judicial debate, which the good sense of parliamentarians and Judges has kept theoretical, as to whether in any circumstances the judiciary could or should seek to impose limits on the exercise of Parliament's legislative authority to remove more fundamental kinds of substantive rights.

---

48 Joe McIntyre *The Judicial Function: Fundamental Principles in Contemporary Judging* (Springer, Singapore, 2019) at 71.

49 JL Robson *New Zealand: The Development of its Laws and Constitution* (Stevens, London, 1967) at 66–69; GWR Palmer and Matthew SR Palmer *Bridled Power* (4th ed, Oxford University Press, Melbourne, 2004) at 156; Matthew Palmer, Claudia Geiringer and Nicola White "Appendix F: Parliamentary Sovereignty" in Constitutional Arrangements Committee *Inquiry to Review New Zealand's Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee I 24A* (House of Representatives, Wellington, 2005) 146 at 147; Paul Rishworth "New Zealand" in Dawn Oliver and Carlo Faruso (eds) *How Constitutions Change: A Comparative Study* (Hart Publishing, Oxford, 2011) 235 at 245; Joseph, above n 40, at 576.

50 Andrew Geddis and Marcelo Rodriguez Ferrere "New Zealand" in Richard Albert and others (eds) *2018 Global Review of Constitutional Law* (I-CONnect-Clough Center, 2019) 209 at 211–212; Leonid Sirota "Breaking the Silence: New Zealand's Courts and Parliament after *Attorney-General v Taylor*" (2019) 30 PLR 13 at 14.

51 *Shaw v Commissioner of Inland Revenue*, above n 45.

52 At 158, citing *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC) at 484.

This reasoning seems to suggest even more directly that the basic constitutional issues involved should deliberately remain undetermined. The opportunity to provide some principled guidance on the matter is left to pass by.

One final example will serve to illustrate my point. In *Te Rūnanga o Wharekauri Rekohu Inc v Attorney-General*,<sup>53</sup> iwi challenged the ability of a Minister to introduce to the House proposed legislation that would give effect to a deed of settlement between the Crown and Māori in respect of pan-Māori claims to fisheries assets. The Court of Appeal confirmed the orthodox interpretation that parliamentary sovereignty admits a principle of non-interference by the courts in parliamentary proceedings. However, the Court went out of its way to point out that the “exact scope and qualifications” of this principle “are open to debate, as is its exact basis”.<sup>54</sup> The Court, it seems, was content to acknowledge this uncertainty within the constitutional framework (indeed, has deliberately drawn attention to it) and simply left it to continue. While the immediate issue was squarely addressed, the larger constitutional questions that inform that issue and imbue it with greater significance were left unresolved.

### C. Constructive Abeyances

Sometimes judicial abeyances do not result from a direct refusal to engage with constitutional questions. Instead, the courts treat constitutional issues as ordinary matters of legal analysis. Rather than openly acknowledging the constitutional significance of the principles in play or the implications of any decision for the wider constitutional order, judicial decisions are presented as simple matters of ordinary statutory interpretation or incremental development of the common law. I argue that these “constructive abeyances” have much the same effect as more expressly and outrightly declining to address legal questions of constitutional significance.

An interesting feature of these constructive abeyances is that alternative approaches that engage more explicitly with constitutional principles are usually available to provide a counterpoint for more straightforward analysis. In *Attorney-General v Taylor*,<sup>55</sup> another recent case concerning prisoner voting rights, the Supreme Court was asked to consider whether the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2012 was inconsistent with the right to vote as protected by the New Zealand Bill of Rights Act 1990.<sup>56</sup> The High Court and Court of Appeal in the same case had recognised the inconsistency, and for the first time had granted a formal declaration to that effect. Jurisdiction to grant a formal declaration in this way is controversial, however, in part because the New Zealand Bill of Rights Act does not address the issue of judicial remedies. Other examples of such declarations tend to be underpinned by express statutory authorisation,<sup>57</sup> or else such remedies may be excluded.<sup>58</sup> It fell to the Supreme Court to provide clarity on this important issue.

While the court by majority did confirm jurisdiction to provide a declaration remedy for legislative breaches of protected rights, my primary is not the result but the reasoning the plurality

---

53 *Te Rūnanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA).

54 At 307–308.

55 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.

56 New Zealand Bill of Rights Act 1990, s [12].

57 Human Rights Act 1998 (UK), s 4; Human Rights Act 1993, s 92J.

58 *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1.

adopted to justify its decision. For such a dramatic constitutional moment, the plurality's reasoning was expressed in quite straightforward terms. The issue was framed as one of implied statutory jurisdiction, and so largely turned on ordinary questions of statutory interpretation. The fact that the New Zealand Bill of Rights Act expressly applies to acts of the legislative branch of government is therefore of particular moment.<sup>59</sup> The plurality was assisted in this approach by the fact that an implied remedial jurisdiction with respect to executive breaches of protected rights has been a longstanding feature of the New Zealand Bill of Rights Act jurisprudence.<sup>60</sup> The plurality's reasoning was defended both as an ordinary application of legislative intention and an incremental development of the existing case law concerning remedies for rights simply a "logical step" from a "settled position" in the law.<sup>61</sup>

Here the Court of Appeal judgment in the same case supplies a fascinating counterfactual in terms of the approach to judicial reasoning. The unanimous bench preferred to rest their justification on "the common law jurisdiction of the higher courts to answer questions of law".<sup>62</sup> This required extensive engagement with first principles concerning the balance of authority between the legislature and judiciary in New Zealand's constitution and an unambiguous assertion of the judicial function to determine the law. While acknowledging the Parliament's legislative supremacy renders it sovereign,<sup>63</sup> the Court defended judicial obedience to Parliament is an independent principle of the common law.<sup>64</sup> On this theory of the constitution, Parliament cannot exercise arbitrary power free from judicial scrutiny.<sup>65</sup> Instead:<sup>66</sup>

When issues arise affecting the legislature's legal authority, recourse must be had to the courts, both for an authoritative answer and as a practical necessity.

The stark difference in styles of reasoning between the Court of Appeal and Supreme Court has also been noted by others. Bookman notes that the Supreme Court decision "eschews questions of constitutional first principle, which had been central to the Court of Appeal's reasoning".<sup>67</sup> Ip similarly compares finds that the Supreme Court manages to "steer clear of any claims of constitutional grandiosity".<sup>68</sup> I would only add that the Supreme Court's approach to its task, in the face of an obvious alternative, is clearly a deliberate choice. Making that specific choice not to justify its decision with reference to grand constitutional conclusions must say something about the judicial function in our constitution.

Again, I am less concerned with the substantive argument than I am with the decision to analyse the extent of the Court's remedial jurisdiction in such expansive constitutional terms. Explicitly engaging in constitutionally driven reasoning has clear implications for the balance of authority

---

59 *Attorney-General v Taylor* (SC), above n 55, at [43]. See New Zealand Bill of Rights Act 1990, s 3(a).

60 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA). See also *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462; *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

61 *Attorney-General v Taylor* (SC), above n 55, at [38].

62 *Attorney-General v Taylor* (CA), above n 28, at [109].

63 At [44].

64 At [47].

65 At [53].

66 At [56].

67 Sam Bookman "Decoding Declarations in *Taylor*: Constitutional Ambiguity and Reform" [2019] NZ L Rev 257.

68 John Ip "*Attorney-General v Taylor*: A Constitutional Milestone?" [2020] NZ L Rev 35 at 56.

between Parliament and the courts in the New Zealand constitutional order. In the face of the Court of Appeal's eloquent account of the courts' inherent constitutional function, however, the Supreme Court judges were largely unmoved. The lead judgment specifically noted that:<sup>69</sup>

... in its reasoning towards the conclusion that there was power for the higher courts to make a declaration of inconsistency, the Court of Appeal canvassed the relationship between the political and judicial branches of government and the role of the higher courts under the New Zealand constitution. As is apparent, we have not found it necessary to undertake a similar exercise. We are accordingly not to be taken as endorsing the Court of Appeal's approach towards these matters.

The experience of the Court of Appeal and Supreme Court in the *Taylor* litigation is not unprecedented. In the *Lange v Atkinson* litigation,<sup>70</sup> the Court of Appeal (then New Zealand's final domestic appellate court) considered a defamation suit by a former Prime Minister against the author of a piece of news media critical of the Prime Minister's political performance. The nature of the claim squarely raised constitutional issues – in particular the scope of the freedom of expression in the context of political communication. The Court simply declined to engage with the issue of the relevance of constitutional protections for freedom of expression when resolving the matter, relying instead on a cautious and incremental development of the common law doctrine of qualified privilege. In fact, the Court went as far as to deliberately distance itself from the constitutional approach to the issue by stating that it considered that its judgment was “not the occasion for a history of the right to freedom of expression”.<sup>71</sup>

As noted by one commentator, “[i]n contrast to significant debate in other jurisdictions over the proper relationship between bills of rights and the common law, the relative silence of our Court is deafening”.<sup>72</sup> Another lamented the lack of serious engagement with rights instruments:<sup>73</sup>

One of the most striking features of *Lange* is the minimal extent to which the [New Zealand] Bill of Rights [Act] features in the various judgments. Clearly, the Court has opted for incremental reform of the common law, as though the [New Zealand Bill of Rights Act] does not require anything more than this, or cannot be invoked to support wider-reaching reform in any event. [...] *Lange* is best viewed as a modest reform: it expands the circumstances in which an existing common law defence may be available, but only in a limited range of cases.

A primary point of comparison here is the celebrated decision of the United States Supreme Court in *New York Times v Sullivan*.<sup>74</sup> The case concerned a libel suit by an Alabama police official in respect of an advertisement critical of the role of the police and other public officials in resisting the efforts of civil rights activists. On appeal, the Supreme Court expressly emphasised the importance of the constitutional issues involved,<sup>75</sup> and where the balance ought to be struck was expressly considered by the majority “against the background of a profound national commitment to the

---

69 *Attorney-General v Taylor* (SC), above n 55, at [66].

70 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) and *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

71 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 460.

72 Geoff McLay “*Lange v Atkinson*: Not a Case for Dancing in the Streets” [2000] NZ L Rev 427 at 428.

73 Grant Huscroft “Freedom of Expression” in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 308 at 319–320.

74 *New York Times Co v Sullivan* 376 US 254 (1964).

75 At 264.

principle that debate on public issues should be uninhibited, robust, and wide open".<sup>76</sup> Ultimately, the Court viewed the constitutional commitment to the freedom of expression in such high regard that it virtually outweighed all competing interests:<sup>77</sup>

Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. [...] The interest of the public [in maintaining the right to freedom of expression] outweighs the interest of appellant or any other individual. [...] Whatever is added to the field of libel is taken from the field for free debate.

The approach of the United States Supreme Court in *New York Times* can be seen to be engaging with manifestly constitutional issues. In contrast, the New Zealand Court of Appeal saw no need to engage in this kind of explicit constitutional reasoning. Instead it placed emphasis on the balance of competing factors and a preference to develop the common law incrementally. When given the option to address constitutional questions as constitutional questions, a senior court has elected to follow an alternative path.

Both direct abeyances such as *Ngaronoa*, *Shaw* and *Te Rūnanga o Wharekauri Rekohu*, and constructive abeyances such as *Taylor* and *Lange* seem to have a similar effect. They avoid resolving questions of constitutional law, and so perpetuate a degree of uncertainty with respect to the precise constitutional position. This strategy of constitutional avoidance appears deliberate and occurs sufficiently regularly that it is a feature of judicial decision-making that warrants scholarly attention. As yet, however, the rationale for such avoidance is not immediately obvious. In Part IV below I turn to consider some possible explanations for these constitutional abeyances.

#### IV. EXPLAINING JUDICIAL ABEYANCES

Part III demonstrated that judicial abeyances are a feature of New Zealand's constitutional practice. This Part seeks to explain that practice particularly in light of the expectation, outlined in Part II above, that courts should determine questions of constitutional law. It suggests that there are two broad types of explanation that may be offered. The first is an explanation based on judicial deference to political processes and actors, while the second type of explanation is a kind of "last resort" principle where non-constitutional analysis is preferred for prudential reasons. It is suggested that this second explanation is the more compelling.

##### A. Deference to Politics

One possible explanation for judicial abeyances on constitutional matters is that the courts prefer that such matters are resolved by political rather than judicial mechanisms. As such, when constitutional questions come before them for resolution the courts demure, leaving space for the executive and legislative branches of government to address the issue.

We can see this type of thinking in the political questions doctrine as applied in the United States. Despite the celebrated assertion of the judicial role in constitutional law articulated in *Marbury*, it has long been recognised that there are some constitutional matters that are best left for political resolution. Early application of this principle concerned the proper manifestation of political

---

76 At 270.

77 At 272, citing *Sweeny v Patterson* 128 F 2d 457 (1942) at 458.

authority as required by the constitutional guarantee of republican government.<sup>78</sup> The quintessential case is *Luther v Borden* where the Supreme Court held:<sup>79</sup>

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantees to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government and could not be questioned in a judicial tribunal.

This was the starting point for fashioning a more general principle of avoidance based on institutional capacity and the limits of the judicial function. Later decisions extending the application of the doctrine concerned the validity of formal constitutional amendment procedures,<sup>80</sup> and selection of electoral candidates.<sup>81</sup> But framing the issue in terms of the nature and limits of state authority has particular resonance with some of the New Zealand examples of judicial abeyances discussed above. *Shaw v Commissioner of Inland Revenue* in particular represents a very similar kind of challenge, in that the applicant contested that there are limits (in this case imposed by Magna Carta) on government inherent to the constitutional nature of the New Zealand state. While not explained in these terms, the reluctance of the Court of Appeal to engage with the constitutional argument presented in the case is understandable when approached from the perspective that non-judicial institutions and processes have the core responsibility for determining the state's basic political nature.

Modern applications of the political questions doctrine have, however, departed significantly from this original understanding. The willingness of the United States Supreme Court to intervene in ostensibly political matters is now much greater.<sup>82</sup> There are even indications that the early cases on the Constitution's Guarantee Clause might be revisited at an appropriate opportunity.<sup>83</sup> This perhaps reflects the gradual accretion of the Court's authority under a constitutional system accepting of judicial supremacy, suggesting that the political questions doctrine is a poor fit for New Zealand.

In our own constitutional context deference to political actors and processes is more likely to be justified with reference to theories of political constitutionalism. Political constitutionalism posits, broadly, that representative institutions making use of deliberative and participatory processes can and should be sites of constitutional contestation and resolution.<sup>84</sup> Modest versions

---

78 United States Constitution, art IV, section 4.

79 *Luther v Borden* 48 US (7 How) 1 (1849) at 42. See also *Pacific States Telephone & Telegraph Co v Oregon* 223 US 118 (1912).

80 *Coleman v Miller* 307 US 433 (1939).

81 *O'Brien v Brown* 409 US 1 (1972).

82 See, for example, *Bush v Gore* 531 US 98 (2000); *Citizens United v Federal Election Commission* 558 US 310 (2010); *Shelby County v Holder* 133 S Ct 2612 (2013).

83 *New York v United States* 505 US 144 at 184–86 (1992).

84 See Graham Gee and Grégoire CN Webber "What is a Political Constitution?" (2010) 30 Oxford Journal of Legal Studies 273; Richard Bellamy *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge, 2007); Tomkins, above n 26; JAG Griffith "The Political Constitution" (1979) 42 MLR 1.

of political constitutionalism mirror aspects of the political questions doctrine by claiming that some constitutional matters are political in their orientation and so are not suitable for judicial resolution. We see this idea take on particular prominence in Commonwealth systems with respect to the question of judicial enforcement of constitutional convention.<sup>85</sup> Stronger versions of political constitutionalism content that, in the final analysis, political mechanisms are superior to judicial forums for resolving almost all constitutional questions including personal liberties and human rights.<sup>86</sup>

If theories of political constitutionalism provide some explanation for judicial abeyances, this requires accepting a normative preference for the electoral accountability of politicians to the independent judgement exercised by the courts. In my view, however, this would be a somewhat strained reading of the examples of judicial non-engagement discussed in Part III. Those examples seem to take the form of questions about the legal limitations on political actors and institutions, whether based in claims to recognition of protected legal rights such as in *Taylor*, or competing theories of parliamentary sovereignty as in *Ngaronoa*. As explained in Part II, there are attendant risks from both a rule of law and constitutionalist perspective where political actors and institutions can determine the scope and limits or their own authority. But perhaps more simply, there is no real indication from the courts that declining to engage with these issues because they fall outside the ambit of the judicial function as the courts themselves understand it. Indeed, as a descriptive position it is a difficult one to reconcile with those other occasions when the courts do find it appropriate to assert their judicial authority.<sup>87</sup>

Rather than an invitation to other constitutional actors, the examples of judicial abeyances that we have discussed seem to leave constitutional questions open and unresolved in *legal* terms. It would be odd, for example, for Parliament to determine the legal effect of the enacted manner and form provisions put in issue in *Ngaronoa*, for example. Of course, the appropriateness of enacting those provisions may be brought into question by theories of political constitutionalism but once enacted the matter of the provision's precise legal effect is squarely one for the courts to resolve. If a constitutional role for politics was intended by the courts in cases of judicial nonengagement, it is fair to expect that a substantive explanation would be provided from the court as to why deference to political actors and mechanisms is appropriate. It is revealing, in my view, that no such substantive explanation has yet been supplied.

### B. Last Resort Principle

An alternative explanation for judicial abeyances is an approach that might conveniently be label a "last resort" principle. At its broadest, this approach simply counsels that where there is an opportunity to dispose of a case other than on constitutional grounds, the deciding court should adopt that alternative approach.

---

85 See *R (Miller) v Secretary of State for Exiting the European Union* (2017) UKSC 5; *Reference re: Resolution to Amend the Constitution* (1981) 1 SCR 753 at 880; Colin R Munro "Laws and Conventions Distinguished" (1975) 91 LQR 218.

86 Jeremy Waldron *Law and Disagreement* (Oxford University Press, Oxford, 1999).

87 See, for example, *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC); *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

Once again the key doctrinal influences for this approach are American. In *Ashwander v Tennessee Valley Authority*,<sup>88</sup> the United States Supreme Court set out a number of overlapping reasons for “constitutional avoidance”. These reasons included matters such as leave and standing, but it also articulated the rule the Supreme Court must determine a case before it on non-constitutional rather than constitutional grounds if it is possible to do so.<sup>89</sup> This was not a new idea, and can even be traced back to *Marbury*.<sup>90</sup> But the principle has taken on special prominence since *Ashwander*.

The motivating concern in *Ashwander* is an abiding respect for the separation of powers. The Supreme Court was acutely aware that its power to invalidate congressional and executive acts has the potential to interfere with the proper operation of government. That power should be used sparingly to avoid any unnecessary interference. As Justice Brandies put the matter in the lead judgment: “One branch of the government cannot encroach upon the domain of another, without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule”.<sup>91</sup> On the basis of this reasoning, if other grounds present themselves to dispose of the issues in the case, then those other non-constitutional grounds should be relied on to determine the issue.

Of the New Zealand examples discussed in Part III, the last resort doctrine does appear to reveal certain parallels with the New Zealand Supreme Court’s *Taylor* decision. Recall that in *Taylor*, the lead judgment in the Supreme Court preferred to resolve the question of jurisdiction to provide declarations of inconsistency with reference to an implied statutory jurisdiction. This contrasted with the Court of Appeal’s judgment, which rested on the constitutional role of the courts to determine the law. While there are obvious constitutional implications with issuing declarations of inconsistency, relying on an implied statutory jurisdiction is the more constitutionally conservative approach. The Supreme Court’s approach suggests greater respect for legislative authority (at least superficially), which remains a key feature of New Zealand’s constitutional arrangements. There is no need to test the boundaries of the relationship between the courts and Parliament on this approach, as the primary justification for the court’s declaratory jurisdiction is rooted firmly in a plausible conception of parliamentary intent.

However, there are also differences between *Ashwander* and *Taylor* given the distinctive constitutional context in which each was decided. *Ashwander* was motivated by a concern with the inappropriate overuse of the constitutional strike down power. This judicial power is significant in the United States’ constitutional order, with the potential to cause dramatic interference with the conduct of the other branches of government. That same concern is not evident in *Taylor*, which addressed the question of the availability of only a declaratory remedy. Under New Zealand’s constitutional framework there is no question of directly invalidating properly enacted legislation. Indeed, one of the arguments against jurisdiction to issue declarations of inconsistency is that they may not serve any legal purpose.<sup>92</sup> There is no need to show substantive deference to Parliament on this approach – respect for Parliament’s legislative sovereignty is already an embedded feature of the New Zealand constitution.

---

88 *Ashwander v Tennessee Valley Authority*, above n 4.

89 At 347.

90 *Marbury v Madison*, above n 20, at [75]–[77].

91 Quoting *Sinking-Fund Cases v US Central Pacific Railroad Co* 99 US 700 (1871) at 718.

92 *Attorney-General v Taylor* (SC), above n 55, at [52]–[65].

If we view the *Ashwander* doctrine more broadly as directed at maintaining the proper institutional balance within the United States' distinctive constitutional arrangements, then I think some kind of last resort principle can be defended with reference to New Zealand's own idiosyncratic constitutional context. In New Zealand, ultimate constitutional authority lies with Parliament. This precipitates the opposite concern from the United States position that it is the legislative body, rather than the courts, that may exercise its constitutional power in a manner that upsets the traditional balance of constitutional functions between the political and judicial branches of government. Here I draw in particular on Ted Thomas' insight that placing constitutional questions into abeyance may, somewhat counter-intuitively, condition the exercise of political power. Thomas relies in particular on the deliberate avoidance of the question of limits on Parliament's sovereignty raised in *Shaw v Commissioner of Inland Revenue*. In Thomas's view:<sup>93</sup>

... the Court's answer [of leaving the constitutional question unresolved] was precisely right. ... Uncertainty as to whether the courts will intervene to strike down legislation perceived to undermine representative government and destroy fundamental rights must act as a brake upon Parliament's conception of its omnipotence; and uncertainty as to the legitimacy of its jurisdiction to invalidate constitutionally aberrant legislation must act as a curb upon judicial usurpation of power. A balance of power between these two arms of government is more effectively achieved by the unresolved doubt attaching to the question than would be the case if the question were to be resolved affirmatively in either Parliament's or the judiciary's favour. The inconclusiveness begets a cautious forbearance, one or the other.

Thomas is describing here the kind of distribution and curtailment of power that might usually be achieved in a written constitution with hard legal rules. But here the same result is achieved in a uniquely unwritten way – the creation of “negative space” in the form of a constitutional abeyance that leaves the precise limits of government authority open for the time being. The option for the courts to determine more precise legal limits is left open for the future, but for now the matter can be “left up in the constitutional air”.<sup>94</sup> It is this absence of a definitive answer on the constitutional question that preserves a modest role for the courts appropriate to New Zealand's unwritten constitutional framework, while at the same time counselling restraint in the exercise of political power. The judicial abeyance at the heart of the case seems to preserve New Zealand's basic constitutional arrangements, both in respect of its unwritten structure and the balance between judicial and political institutions.

The target of Thomas' analysis is the doctrine of parliamentary sovereignty. By postulating only the future possibility that Parliament's legislative supremacy may be found to be less than absolute, Thomas is able to retain a high degree of fidelity to the reality of New Zealand's contemporary constitutional arrangements where parliamentary supremacy is still widely accepted while suggesting that there remains an effective constitutional constraint on the exercise of legislative authority. I consider that is basic idea that unanswered questions of constitutional law condition constitutional practice is a powerful one, because it seems to help reconcile the rule of law and constitutionalist values explored in Part II with the practice of judicial abeyances. If uncertainty over the constitutional position can condition political power in the way Thomas claims, then the

---

93 EW Thomas “The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium” (2000) 31 VUWLR 5 at 7–8.

94 At 7.

risk of arbitrary or abusive government power is greatly mitigated. A legally-based by at times undefined constitutional structure addresses these basic principles and values more neatly than an appeal to political authority over constitutional matters.

I also think this Thomas's thinking has broader resonance within New Zealand's constitutional system. Let me illustrate this by returning the constitutional question at the heart of *Ngaronoa* – should the Court confirm the legal effectiveness of manner and form entrenchment? A decision on this point either way comes certain trade-offs. Rishworth argues that acceptance or rejection of the manner and form theory of legislation requires the resolution of a deep-seated tension.<sup>95</sup> If, on the one hand, the manner and form theory is accepted, then a government could entrench legislation promoting partisan policy preferences. This is clearly an unacceptable position. On the other hand, if the manner and form theory is rejected, then fundamental values are more vulnerable to parliamentary override. The tension between these contrasting approaches currently remains because it cannot be resolved in the abstract. Accepting or rejecting manner and form provisions turns on a value judgement about the constitutional importance of any entrenched provisions in the context of any particular legal challenge.<sup>96</sup> Judicially confirming either the continuing or self-embracing theories of parliamentary sovereignty ahead of a particular challenge that calls for a definitive choice to finally be made risks an uncomfortable constitutional outcome that can, for now at least, be avoided. While the option of enforcing manner and form restrictions remains a future possibility, the most prudent course for the moment is to perpetuate the uncertainty on whether the courts would uphold any such restrictions.<sup>97</sup> A definitive finding either way remains a constitutional last resort.

What, then, to make of the preponderance of academic opinion and smattering of obiter that manner and form entrenchment is legally effective? The consensus view here now appears to be tolerably clear and unambiguous in favour of accepting manner and form theory.<sup>98</sup> I would argue that it is perhaps it is better to view this settled discourse as contributing to the uncertainty over competing theories of parliamentary sovereignty rather than as an effort to resolve it. At the time the precursor to s 268 was enacted, Diceyan notions of continuing sovereignty still held firm. That the debate has shifted to the point where the possible enforcement of manner and form is even a genuine constitutional question is itself a remarkable achievement based on changes in the normative basis of our collective constitutional thinking. Until the courts rule definitively, however, the latent potential in that shifting normative discourse remains unfulfilled. This could also explain the anecdotal frustration with the Supreme Court's decision not to engage with the underlying constitutional issues in *Ngaronoa*. Judicial views are authoritative in a way the normative discourse over our constitutional arrangements is not. My argument here is than an

---

95 Paul Rishworth "Affirming the Fundamental Values of the Nation: How the Bill of Rights and the Human Rights Act affect New Zealand Law" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 71.

96 See Joseph, above n 40, at 594–595.

97 See JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 21.

98 For discussion of the evolution of the views on the effectiveness of manner and form provisions see Timothy Shiels and Andrew Geddis "Tracking the Pendulum Swing on Legislative Entrenchment in New Zealand" (2020) 41 Stat LR 207.

absence of a final judicial view also carries with it some constitutional authority. It reserves to the courts the future power to articulate New Zealand's constitutional law more definitively, ensuring it is fit for those future circumstances. In the meantime, our fundamental constitutional law remains distinctively, and unmistakably, unwritten.

## V. CONCLUSION

This article has advanced two arguments. The first is that judicial abeyances with respect to questions of constitutional law are a feature of New Zealand constitutional practice that is worth paying attention to. Judicial abeyances seem to frustrate our expectations, derived from the rule of law and theories of liberal constitutionalism, that the courts should determine questions of constitutional law clearly and definitively. The second argument seeks to provide a suitable explanation for this phenomenon: that uncertainty with respect to fundamental constitutional questions performs a constitutional function. This uncertainty maintains a balance between legal authority and judicial modesty, potentially conditioning the exercise of political power in a way that preserves the basic structure of our unwritten constitution. Undoubtedly, understanding New Zealand's constitutional law in terms of ambiguity and uncertainty presents certain conceptual challenges. Confronting those conceptual challenges may be necessary to better understand the role of the judiciary and its articulation of constitutional law within our distinctive constitutional arrangements.

# PROPORTIONALITY IN THEORY AND PRACTICE: AN ANALYSIS OF THE CONCEPT OF PROPORTIONALITY BROADLY AND IN APPLICATION TO THE 2010 NZ DEFENCE FORCE OPERATION BURNHAM

BY BEN WILKINS\*

The following paper holds twofold objectives. A detailed overview of the concept of proportionality in the laws of armed conflict. The origin, relevant considerations, and legal test to be applied. Essentially asking for a calculable balance between military advantage and civilian impact, the concept requires detailed analysis to understand how two disparate and incalculable variables can be weighed against one another.<sup>1</sup>

In addition, this study aims to utilise a case study as to the 2010 Operation Burnham, a New Zealand Defence Force (NZDF) operation conducted in Afghanistan as viewed through the lens of the proportionality principle. An operation that exists not without controversy – allegations of war crimes and indiscriminate attacks have given way to a Government Inquiry almost a decade after the event.<sup>2</sup> With the conclusion of the Inquiry approaching, now is the time for an independent and academic review of the available and declassified material coming to light.<sup>3</sup>

## I. THE CONCEPT OF PROPORTIONALITY

### A. *Legal Framework*

The *Protocol Relating to the Protection of Victims in International Armed Conflicts* (“Protocol I”) of the Geneva Conventions contains the most structured and definitive understanding of the protection of civilians in armed conflict.<sup>4</sup> Whilst the Protocol itself is only applicable to international armed conflicts, the majority of the provisions contained within are reflective of customary international law.<sup>5</sup>

---

\* LLB Hons, University of Waikato.

1 International Criminal Tribunal for the former Yugoslavia (ICTY) *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (Advisory Opinion)* (2000) at 48.

2 N Hager and J Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017) at 39.

3 Inquiry into Operation Burnham “Minute no 22 of Inquiry” (25 February 2020) <[www.operationburnham.inquiry.govt.nz](http://www.operationburnham.inquiry.govt.nz)>.

4 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict* (Protocol II) 1125 UNTS 609 (8 June 1977).

5 Jean-Marie Henckaerts “Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict” (2005) 87 IRRC 175 at 188.

The law pertaining to non-international armed conflicts, Additional Protocol II, outlines at art 13(1) that civilians are entitled to “general protection against the dangers ... [of] military operations”.<sup>6</sup> This encompasses customary international law and therefore proportionality applies to both non-international and international armed conflicts.<sup>7</sup> As a result, this research will consider the relevant provisions of the more detailed Protocol I despite the non-international nature of the Afghanistan Conflict at the time of Operation Burnham.<sup>8</sup>

The provisions in the New Zealand Defence Force Manual of Armed Forces Law effectively mirror that of customary international law.<sup>9</sup> The New Zealand approach tends to conflate actions in IACs and NIACs.<sup>10</sup> This is useful for context, but the relevant law is that of the international protocols.<sup>11</sup> Despite this, many international military manuals take a similar approach.<sup>12</sup>

### 1. Proportionality

The principle of distinction is one of the primary tenets of International Humanitarian Law (IHL) whereby a military commander is obligated to distinguish military objectives from civilian persons and objects.<sup>13</sup> This principle is underpinned by the concept of proportionality. Barber identifies that proportionality arises from the prohibition of ‘indiscriminate attacks’ in Protocol I.<sup>14</sup> Article 51(4) and the subsequent discussion in art 51(5)(b), provide that an attack is indiscriminate where it:<sup>15</sup>

... may be expected to cause incidental loss to civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

To consider this in the inverse, an attack holds military legitimacy under the principle of proportionality where *anticipated military advantage* is greater than *expected civilian loss*.

In the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (“the Report”) discusses the practical application of proportionality in detail. Crucially, it identifies that “the main problem with the principle of proportionality *is not whether it exists, but what it means and how it is to be applied*”.<sup>16</sup>

---

6 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) 1125 UNTS 609 (8 June 1977).

7 Henckaerts, above n 5, at r 14.

8 R J Barber “The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan” (2010) 15(3) *Journal of Conflict & Security Law* 467 at 474.

9 New Zealand Defence Force (NZDF) *Manual of Armed Forces Law, Volume 4: Law of Armed Conflict* (New Zealand Defence Force, Wellington, 2017).

10 Alexander Gillespie “Operation Burnham: inquiry underway to determine any wrongdoing by New Zealand troops in Afghanistan” (19 September 2019) *The Conversation* <[www.theconversation.com](http://www.theconversation.com)>.

11 Gillespie, above n 10.

12 Ian Henderson and Kate Reece “Proportionality Under International Humanitarian Law: The “Reasonable Military Commander” Standard and Reverberating Effects” (2018) 51(3) *Vand J Transnatl L* 835 at 839.

13 Barber, above n 8.

14 Barber, above n 8.

15 Additional Protocol I, above n 4, at 51(4), 51(5)(b).

16 ICTY, above n 1, at 49 (emphasis added).

The Report outlines clear cut hypothetical applications of this rule – identifying:

... bombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. Conversely, an air-strike on a munitions dump should not be prohibited merely because a farmer is plowing a field in the area.

The Report laments that it is easier to discuss proportionality in such general hypotheticals than to apply the rule to specific circumstances. In part because the circumstances of a specific action will differ in each application, and to a greater degree because the test requires weighing of values and quantities that are very difficult to assign comparable values to. The crux of the difficulty arises because by nature the test requires apportioning comparable values to two drastically different concepts – the value of human life compared to that of a military objective.

Ultimately, the Report identifies the unresolved questions that will need to be addressed when considering proportionality.<sup>17</sup> This guidance has been taken to be the starting point for proportionality analysis by many academics.<sup>18</sup>

It is worth including these questions as posited by the report in full:<sup>19</sup>

The questions which remain unresolved once one decides to apply the principle of proportionality include the following:

- a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and or the damage to civilian objects?
- b) What do you include or exclude in totaling your sums?
- c) What is the standard of measurement in time or space? and
- d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?

The Report goes on to detail the issues that arise in application, identifying that it “may be necessary” to resolve answers on a “case-by-case basis” reflecting that the answers must arise from understanding of the specific circumstances from which they arose.

## 2. *Reasonable military commander standard*

To what standard must the evaluation of military advantage and civilian impact be made? There are three possible standards: subjective (what that specific person believed in the specific moment); objective but unqualified (the reasonable person); or objective but qualified (the reasonable doctor).<sup>20</sup>

The report suggests the scope, stating: “determination of relative values must be that of the “reasonable military commander”.”<sup>21</sup> This has been accepted as the appropriate standard.<sup>22</sup>

---

17 ICTY, above n 1, at 49 (emphasis added).

18 Barber, above n 8, at 476; and Henderson and Reece, above n 12, at 841.

19 ICTY, above n 1, at 49.

20 Henderson and Reece, above n 12, at 841.

21 ICTY, above n 1, at 50 (emphasis added).

22 *Prosecutor v. Galić, (Judgment)* ICTY Appeals Chamber IT-98-29-T, 5 December 2003 at 170. See also Henderson and Reece, above n 12, at 841.

The obligation to assess military advantage against expected civilian casualties requires understanding of the nature of military advantage. The training and experience necessary to attain command is suited to recognition and assessment of such advantage.<sup>23</sup> Military commanders are those most able to infer military gain by virtue of experience and training.<sup>24</sup> That is not to say that appointment to command automatically results in proportionate actions, but rather to stress the importance of analysis from the military viewpoint rather than a non-military perspective. It was for these reasons that the report made a “deliberate decision to not adopt a “reasonable person” standard”.<sup>25</sup>

The “reasonable military commander” standard therefore becomes the lens through which the weighing of military advantage and civilian casualties must be viewed. Article 57(2)(a)(iii) is clear that the decisions to be evaluated are those of “those who plan or decide upon an attack, or those who execute an attack”, and as such the reasonable military commander is not the person to whom the obligation to comply with proportionality belongs, but rather the standard against which decisions must be measured.<sup>26</sup>

The International Criminal Tribunal for the former Yugoslavia (ICTY) discussed this concept in *Galić*, approaching proportionality from the perspective of “a reasonably informed person in the circumstances of the [actual decision maker], making reasonable use of the information available”.<sup>27</sup> Reflecting the “reasonable military commander” standard, but crucially imputing a requirement to consider actual circumstances.

Consideration is not only to be given to the actual information that the decision maker had, but also to the information they could reasonably be expected to have had. The deliberate use of the words “available to him or her”, and discussion as to information “reasonably available to them” in the judgment confirms this.<sup>28</sup>

This includes, per art 57(3) of Protocol I, consideration of different objectives with similar levels of military advantage.<sup>29</sup> This can also mean different approaches to the same objective – for example, capturing instead of neutralising an insurgent leader.

#### (a) Relevant considerations

Once the standard has been set, what considerations must the standard be applied against? The test itself asks only for a balance of “expected military advantage” and “anticipated civilian impact”, therefore in application, an understanding of the extent to which these concepts are defined is crucial.

#### (b) Anticipated military advantage

Noting the word anticipated, the actual results of an attack are irrelevant. Barber notes that weapons or plans for insurgent attacks found during an attack are not relevant to anticipated advantage

---

23 Henderson and Reece, above n 12, at 845.

24 At 845.

25 At 841; ICTY, above n 1, at 49, 50.

26 At 840.

27 *Galić*, above n 22 at 58. Note: omitted word was “perpetrator” as this was a criminal case – amendment made to reflect analytical rather than criminal interpretation.

28 At 58 and n 110.

29 Additional Protocol I, above n 4, at 57(3).

unless they were outcomes envisaged prior to the operation itself.<sup>30</sup> Whilst such findings may confer military advantage, they cannot be considered in the application of a test for proportionality unless they were *anticipated*.

In the process of ratifying Protocol I, many states made declarations that “anticipated military advantage” referred to the military advantage gained (or rather, anticipated) from the attack as a whole – not isolated parts thereof.<sup>31</sup>

Military advantage must come from military objectives. This is identified in art 52(2) which identifies military objectives as being:<sup>32</sup>

... limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Direct interpretation of the term military advantage from a legal standpoint, discussed by Beran identifies that:<sup>33</sup>

“Military” as a legal term means “pertaining to war or to the army; concerned with war.” “Advantage” is “superiority of position or condition; benefit, gain.” Taken together, “military advantage” should be defined as a “more favourable position pertaining to war.”

As such, the anticipated military advantage, which may be gained through total or partial destruction, capture or neutralisation of legitimate military objectives, must result in a more favourable position pertaining to the conflict itself.<sup>34</sup>

This interpretation of art 52(2) is reflective of International Customary Law, and therefore applicable to the situation in Afghanistan to which this research refers.<sup>35</sup>

Prima-facie, the wording of art 52(2) identifies objects, but military objectives also include armed forces, their members, buildings and supplies.<sup>36</sup> So too are logistical routes or production facilities which by their very nature are able to provide military benefit to combatants, provided that they are verifiable as a military objective.<sup>37</sup>

The Report identifies that the definition is designed to provide a mechanism through which the observers (and thereby decision makers) in a conflict, are able to discern whether a particular

---

30 Barber, above n 8, at 486 in reference to; Michael Callan *Executive Summary of AR 15-6 Investigation into the New Information Relative to Civilian Casualties from Engagement by US and Afghan Forces on 21-22 AUG 2008 in Azizabad, Shindand District, Herat Province, Afghanistan* (US Central Command, 2008).

31 Barber, above n 8, at 481.

32 Additional Protocol I, above n 4, at 52(2).

33 Commander Matthew L Beran “The Proportionality Balancing Test Revisited: How Counterinsurgency Changes Military Advantage” [2010] 8 *Army Law* at 7. Definitions from BA Garner, and HC Black *Black’s Law Dictionary* (6th ed, West Publishing Company, St Paul MN, 1990) at 7, 8.

34 At 7.

35 Henarkets, above n 5, at r 14.

36 Bruno Zimmermann and others, Yves Sandoz, Cristophe Swinarski, Bruno Zimmerman (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff Publishers, Geneva 1987) at 620 stating: “obviously military objectives also include, indeed principally so, the armed forces, their members, installations, equipment and transport”.

37 M Bothe, KJ Partsch and WA Solf (eds) *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Convention of 1949* (Martinus Nijhoff Publishers, Geneva, 1982) at 311326 2.5.1.

objective is a legitimate military objective.<sup>38</sup> This is a key element to the forward facing aspect of this rule – on the one hand, academic assessment made, often years later, is able to conclude if a single instance falls within this principle, but on the other, the rules do not exist for the purposes of an “ivory tower” assessment - they exist to protect civilians in armed conflicts. Consequently, there must exist a mechanism where those on the ground are able to make assessments as to whether an objective is legitimate based on the information they reasonably have. Especially more so in non-international armed conflicts where identification of those directly involved in conflict is more difficult.<sup>39</sup>

When considering the underpinning principle of this aspect of International Humanitarian Law is limitation of the effects of combat on the civilian population, a test which can only be successfully applied ex-post-facto undermines the ability to offer protection.

### (c) Intangible military advantage

The above identifies military advantage in the tangible. Measurable through understanding what the objective is and the advantageous outcome that successful destruction, capture, or neutralisation will be reasonably expected to bring.

Military advantage can too be determined from the intangible. For example, it has been established that security of the attacking force can be accounted for but in discussion on art 51, Bothe and others address that security of the attacking forces may also be considered specifically regarding the military advantage of an operation.<sup>40</sup>

In counterinsurgency operations, the overall objective turns not to “partial or complete submission of the enemy”, as in conventional warfare, but to the provision of safety and security to the local population.<sup>41</sup> In July 2009, ISAF Commander General Stanley McChrystal issued a tactical directive identifying that the ISAF role in Afghanistan at that time was a counter insurgency operation, and that operations must “scrutinise and limit the use of force like close air support (CAS) against residential compounds).<sup>42</sup>

As a result, a key component of counterinsurgency is to ensure the safety of civilian population as well as preserve the trust of that population in the ability of the military force to provide such security.<sup>43</sup> Protection of civilian lives, buildings and livelihoods can therefore be viewed not only as a balancing factor *against* military advantage, but rather a military advantage unto itself.<sup>44</sup>

---

38 ICTY, above n 1, at 37.

39 New Zealand Defence Force (NZDF) *Legal Brief: Law of Armed Conflict Rules of Engagement Other Legal Issues* (31 August 2010) at 5, 7, 10.2 from <[www.operationburnham.inquiry.govt.nz](http://www.operationburnham.inquiry.govt.nz)>.

40 Bothe, above n 37, at 36.

41 Beran, above n 33; At 33, at 4, 5.

42 General Stanley McChrystal *Tactical Directive 6 July 2009* (Headquarters, International Security Assistance Force 2009).

43 McChrystal, above n 42.

44 Beran, above n 33, at 6; see also David Galula *Counterinsurgency Warfare: Theory and Practice* (2006, Praeger Security International, Westport, Connecticut) at 4, which states: “The population, therefore, becomes the objective for the counterinsurgent as it was for his enemy. Its tacit support, its submission to law and order, its consensus ... have been undermined by the insurgent’s activity.”

(d) Expected civilian impact

Once again, the *actual* impact is irrelevant when assessing proportionality. If an attack causing destruction of a school resulted in no casualties because it was empty, *but command was unaware of that fact* and believed it to be occupied, the lack of casualties would not automatically result in a finding of proportionality.

The proportionality principle ought not to be treated as an equation where an objective can be taken if the possible civilian casualties drops below a set number, but rather where a proposed attack is likely to be disproportionate, alternate options to achieve the same objective must be considered.<sup>45</sup>

Possible civilian deaths naturally fall under the notion of civilian casualties or impact.<sup>46</sup> Factors that increase such possibilities even more so. An attack on a military compound has a lower risk of incurring civilian casualties, whereas an attack on a village with mixed civilian and enemy forces will have a greater impact on civilians.

Choice of approach must also be considered to mitigate casualties or impact, for example a high-altitude bombing run on village at night will increase that chance.<sup>47</sup> These possible deaths, injuries and forms of property damage to civilians are immediate or “first order” effects.<sup>48</sup>

The reality of warfare must be considered. Operating from mixed civilian and insurgent villages was a staple tactic for insurgents, creating an ever-present risk of possible civilian casualties, which must therefore have been accounted for in the planning of operations in the wider context of the deployment.<sup>49</sup>

The question of knock on, or “second order” effects may also be required to be considered.<sup>50</sup> The UK Manual of Armed Conflict posits a scenario about an attack on an enemy fuel depot, with risk of burning fuel flowing into neighbouring civilian areas. Such indirect effects need to be counted in the assessment of collateral damage.<sup>51</sup>

Reverberating effects that are reasonably foreseeable in the eyes of the reasonable military commander should therefore be a factor. These “second order effects” become important in the context of growing interconnectedness of military and civilian infrastructure.<sup>52</sup> Many international warfare manuals discuss in their doctrinal definitions of collateral effects that second order effects should be considered.<sup>53</sup> Of course doctrine does not always reflect accurately the totality of the law, but as a point of consideration it is worth noting. Acceptance of indirect effects in the training of military commanders reflects acceptance that they be considered as part of the “civilian impact” aspect of the proportionality equation.

---

45 Additional Protocol I, above n 4, at 57(3).

46 Henderson and Reece, above n 12, at 847.

47 Barber, above n 8, at 489.

48 Henderson and Reece, above n 12, at 848, 849.

49 Thomas Johnson and Chris Mason “Understanding the Taliban and Insurgency in Afghanistan” (2007) 51 1 *Orbis* 71 at 87.

50 At 87.

51 United Kingdom Ministry of Defence *The Manual of the Law of Armed Conflict* (2004, Ministry of Defence, London) at 5.33.4.

52 Henderson and Reece, above n 12, at 847.

53 Beran, above n 33, at 4; and UK Manual of Armed Conflict above n 51.

Yet there must exist a limit as to what extent an effect can be considered a reverberating effect and therefore a factor in totalling these sums. Remoteness becomes the touchstone at this point – an impact cannot be counted as a reverberating effect where too remote or not reasonably foreseeable.<sup>54</sup> The standard for this, as always, becomes impacts that are not remotely foreseeable by the reasonable military commander in the position of the decision maker.

(e) Weight to be given to safety of friendly forces

When considering alternate courses of action to achieve a military advantage, how far must a commander go to protect civilians when weighed against their own forces? Barber's analysis of NATO's 1999 bombing campaign in Kosovo, a campaign which resulted in zero own-side casualties – and one that “many regarded as violating the proportionality rule” identifies that “it is generally agreed that complying with the proportionality equation requires a willingness to accept *some* own-side casualties”.<sup>55</sup>

Much analysis on this topic turns to bombing campaigns, how low an aircrew is expected to fly in order to minimise the risk to civilians with the understanding that each foot an aircraft descends, the proportion of risk to the aircraft and crew increases.<sup>56</sup> The reality of warfare in Afghanistan, with a high level of mixed civilian and insurgent targets, in conjunction with the shift towards counter-insurgency operations leans away from bombing as a primary strategic option.<sup>57</sup> This can be seen as a willingness to expose troops to further risk.

(f) Scope

Once the components of the test are understood, consideration can be given to the point at which the test is to be applied. As the test speaks to “anticipated” and “expected” outcomes, it is not ex-post-facto, but how far removed must analysis be?

Fenrick discusses that the appropriate measurement “must be one that is practicable to use in advance”.<sup>58</sup> It is not a measurement that must be conducted after a war or long campaign, yet so too is it impractical to apply the test for proportionality on a “bullet-by-bullet basis”.<sup>59</sup> Barber considers that the approach must be somewhere in the middle.<sup>60</sup> Reflecting the case-by-case basis for assessing proportionality in the ICTY Report.

There is a difference between decisions made in the planning phase of an operation, and those decisions made on the ground. The question that arises is – does the test for proportionality recognise this distinction? Can the “fog of war” be accounted for?

---

54 Program on Humanitarian Policy and Conflict Research at Harvard University (2013) “Commentary to the HPCR Manual on International Law Applicable to Air and Missile Warfare” In *HPCR Manual on International Law Applicable to Air and Missile Warfare* (Cambridge, Cambridge University Press, 2013) 104 at r 14.

55 Barber, above n 8 at 482.

56 APV Rogers “Zero-casualty Warfare” (2000) 837 *Int Rev Red Cross* 165.

57 McChrystal (ISAF), above n 42.

58 WJ Fenrick “Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia” (2001) 12 *3 EJIL* 489 at 499. It is worth noting that Fenrick was Senior Legal Advisor, Office of the Prosecutor for the ICTY and was instrumental in posing the questions used in the ICTY Final Report to the Prosecutor (above n 1) relied upon heavily in this analysis.

59 At 499.

60 Barber, above n 8.

The “reasonable military commander” standard, objective though it is, is taken to be in the position of the actual decision maker with access to all information they have or reasonably should have had.<sup>61</sup> Available information and ability to consider alternate options at length is far greater in a meeting room than in a command helicopter.

Discussing the principle of proportionality, Georg Nolte raises the point that at its core, the rule exists to proactively protect the rights of civilians in war, and where too many considerations enter the analysis of proportionality, the calculability aspect is lost – undermining the ability of the rule to protect.<sup>62</sup>

The solution, Nolte contends, is the concept of “thin or thick” proportionality.<sup>63</sup> In this way, consideration is able to be given to *actual* circumstances. Where decisions are made in an adapting battlefield scenario, the considerations of the test reflect that reality. This allows the rule to be consistently applied in the context of requiring the standard to be assessed from the position of the actual decision maker and avoids imposing too abstract considerations upon military commanders where decisions must be made in timely situations under pressure.

The distinction between the two is described as:<sup>64</sup>

The thick version is appropriate if the question can be asked; What is necessary to ... [discern] a ‘right’ outcome? The thin version must be used if it can only be asked; What is necessary to [determine] that a particular outcome is the best possible, given the presumed differences of opinion concerning the possibility to verify certain facts and agree on specific standards?

It may appear that these are separate questions, but in application they can be viewed as two ends of a spectrum – the closer a decision is made under battle conditions or the greater the “fog of war” is, the thinner the analysis may be.

### 3. *The test*

As such, the test for establishing the legitimacy of an attack in accordance with this principle of international humanitarian law is:

In the eyes of the *reasonable military commander*, with accord to *all information reasonably available* to them at the time of planning or undertaking the attack, *anticipated military advantage* must exceed *expected civilian casualties or impact*.

## II. CASE STUDY: OPERATION BURNHAM

### A. *Background and Overview*

New Zealand Defence Force (NZDF) troops were deployed in the Bamyán Province of Afghanistan in August 2003 as a part of the Provincial Reconstruction Team (PRT).<sup>65</sup> The goal of which was to provide training and support to Afghan forces and increase security in that province.

---

61 *Galić*, above n 27, at 58 and footnote 110.

62 Georg Nolte “The Principle of Proportionality and International Humanitarian Law” (2010) 42 LEHR 244.

63 Nolte, above n 62.

64 Nolte, above n 62.

65 Cabinet Paper *Proposal to Continue New Zealand’s Contribution to Afghanistan Army Training* (11 June 2018) at 16 (Obtained under Official Information Act 1982 Request to Minister of Defence, Ministry of Defence).

On 3 August 2010, Lieutenant Tim O'Donnell, a member of the PRT was killed on routine patrol by a roadside bomb.<sup>66</sup> The first combat death in Afghanistan for New Zealand forces.

The NZDF considered that this was a “major success” for insurgent forces operating in the area and that they would be “well positioned to [attack] again”.<sup>67</sup> This insurgent group had previously attacked Afghan Security forces and well as German and Hungarian PRT's.<sup>68</sup> Further, they considered that the NZ PRT were not positioned to deal with this level of insurgency, and that the threat level to NZDF and allied forces was high due to the location of the insurgent forces.<sup>69</sup> Operation Burnham was conceived as a means to deal with this growing security risk.

Early on 22 August 2010, the New Zealand Special Air Service (NZSAS), in conjunction with the Afghan Crisis Response Unit (CRU) conducted an operation in the Tirigan Valley, Afghanistan.<sup>70</sup> The operation included coalition air assets in the form of transport Chinooks, a command helicopter, and close air support (CAS) provided by two Apache helicopters and an AC-130.<sup>71</sup> The operation, broadly under the banner of the International Security Assistance Force (ISAF) was known as Operation Burnham.<sup>72</sup>

Formally, operations of this kind were conducted with an understanding that the CRU leads such operations, but the ISAF (including in this instance NZSAS) would provide “personnel, intelligence gathering and planning”.<sup>73</sup>

Practically, the operation was planned by NZDF receiving approval from the Chief of the Defence Force (CDF) and the ISAF. The operation was led by a Ground Force Commander (GFC), an NZSAS Major “responsible for the conduct of the operation and, in particular, providing clearance for any engagements”.<sup>74</sup>

The primary objectives of Operation Burnham were two insurgent commanders, Abdullah Kalta (Objective Burnham) and Maulawi Naimatullah (Objective Nova).<sup>75</sup> Neither were located during the operation.<sup>76</sup>

---

66 Derek Cheng “NZ Soldier in Afghanistan Named” (4 August 2010) New Zealand Herald <www.nzherald.co.nz>.

67 New Zealand Defence Force (NZDF) *Speech Notes for Press Conference on Operation Burnham* Chief of Defence Force Lieutenant General Tim Keating (27 March 2017) at 1 from <www.nzdf.mil.nz>.

68 New Zealand Defence Force (NZDF) *Unclassified Unreferenced Account of Events at Issue* (7 November 2018) at 5. Hungarian, German and Afghan PRT members had been killed.

69 Above n 67, at 1.

70 New Zealand Defence Force (NZDF) *Operation Burnham Information Pack* (August 2018) at 9, from <www.nzdf.mil.nz>.

71 New Zealand Defence Force (NZDF) *4 x contacts during Obj BURNHAM* (6 March 2018) at 6, from <www.operationburnham.inquiry.govt.nz>.

72 NZDF, above n 68, at 3.

73 NZDF, above n 68, at 3.

74 NZDF, above n 68, at 7 para 3.

75 Inquiry into Operation Burnham “Public accounts of events during Operation Burnham and Operation Nova given by the New Zealand Defence Force and the authors of *Hit & Run: A comparative analysis*” (17 May 2019) at 4 from <www.operationburnham.inquiry.govt.nz>.

76 Interview with Jon Stephenson, co-author of *Hit & Run* (Corin Dann and Susie Ferguson, Morning Report, Radio New Zealand, 20 June 2019). Available from <www.stuff.co.nz> “Insurgent leaders admit they were in Afghanistan village raided during NZSAS’s Operation Burnham”.

### 1. *Civilian casualties*

During and after the operation, NZDF members maintained that there had been no civilian casualties.<sup>77</sup> After civilian allegations that such casualties had occurred, a joint ISAF and Afghan investigation was initiated on 25 August.<sup>78</sup>

The investigation determined that one of the gunsights on an Apache 30mm Autocannon was misaligned, and that rounds falling short from this weapon hit a building and likely caused civilian casualties.<sup>79</sup>

Despite this, NZDF press releases continued to call allegations of civilian casualties “unfounded” – in a later document, the NZDF would contend that this referred to allegations that *NZDF personnel* were directly responsible for casualties.<sup>80</sup> That same document confirms that the NZDF accepts the findings of the ISAF investigation.<sup>81</sup>

### 2. *Hit & Run*

In 2017, investigative journalists Nicky Hager and Jon Stephenson released *Hit & Run*, a book alleging that the events of Operation Burnham were drastically different to the NZDF account.<sup>82</sup> The book suggests the operation was a revenge attack for the death of Lt O’Donnell, and that neither Objective Burnham or Objective Nova were present at all.<sup>83</sup>

The book suggests that the attack was excessive and indiscriminate – conducted without regard for civilian lives. Going so far as to allege war crimes had been committed.<sup>84</sup>

*Hit and Run* identifies that the Operation took place in the villages of Naik and Khak Khuday Dad, whereas NZDF documents refer to a village identified as Tirigan. However, the operation took place in Tirigan Valley and the term in the context of such documents refers to the two villages collectively. Both the NZDF and the authors have since accepted that they are in agreement as to the location of Operation Burnham.

There are several points where the positions diverge. One notable point is that the book states that the two targets were not in the village at the time of the operation. Interviews with those men contradict that fact, identifying that they were present that night.<sup>85</sup> This led to one of the authors retracting the allegation.<sup>86</sup>

---

77 NZDF, above n 70, at 18.

78 New Zealand Defence Force (NZDF) *Operation Watea: HQ ISAF Civilian Casualty Investigation into Operation Burnham 22 August 2010* (25 August 2010) from <[www.operationburnham.inquiry.govt.nz](http://www.operationburnham.inquiry.govt.nz)>. Document provided to the Minister of Defence.

79 NZDF, above n 70, at 18.

80 NZDF, above n 70, at 18.

81 NZDF, above n 70, at 18.

82 Hager and Stephenson, above n 2.

83 Hager and Stephenson, above n 2, at 39.

84 Hager and Stephenson, above n 2, at 109.

85 Stephenson, above n 77.

86 Stephenson, above n 77.

### 3. *Inquiry*

A government inquiry (“the Inquiry”) was announced in April 2018.<sup>87</sup> The Inquiry comprises of Sir Terrence Arnold QC and Rt Hon Sir Geoffrey Palmer QC, both highly experienced in constitutional law and judicial proceedings.<sup>88</sup>

The terms of reference for the Inquiry identify that it does not exist to verify or disprove the events as given in *Hit & Run*, rather to assess the conduct of the NZDF forces in conducting Operation Burnham, including at the planning stages.<sup>89</sup>

In addition, further terms include assessment as to whether Afghan Nationals engaged as a part of the operation were legitimate targets, and the knowledge of the NZDF regarding civilian casualties.<sup>90</sup>

This research does not aim to emulate the Inquiry, but to assess the conduct of Operation Burnham exclusively through the principle of proportionality. To conclude whether the operation complied with this requirement of the Laws of Armed Conflict – in order to do so, the above-mentioned Inquiry terms of reference will be the primary considerations.

The scope, therefore, of this research becomes: *Was the conduct of the NZDF prior to and during Operation Burnham legitimate in accordance with the principle of proportionality as contained within the larger rules of war?*

### B. *Application to the Operation*

As noted by Fenrick, the scope of the proportionality assessment must be “one that is practicable to use in advance”.<sup>91</sup> As discussed above, the scope must be a case-by-case determination.<sup>92</sup>

Noting that military advantage is taken to be from the operation as a whole, not segmented and analysed in parts, the process for analysis will be to identify the military advantage as a whole – this will become the benchmark which the countervailing factors of expected civilian casualties will be weighed against. Anticipated Military Advantage becomes a “fixed” value to which the expected civilian impact will be cumulatively applied.

In order to do so, analysis of “civilian impact” factors from the planning stage and in the process of the operation will need to be made. In this case, there are two major points in time where such factors will arise, as indicated by the wording of Protocol I – at the point of planning, and at the time of execution.<sup>93</sup>

#### 1. *Anticipated military advantage*

As noted, the two primary objectives were the two Insurgent Leaders, designated as Objectives Burnham and Nova.<sup>94</sup> ISAF and CDF briefing documents show detailed intelligence identifying

---

87 Inquiry into Operation Burnham, above n 3, at “Home”.

88 Inquiry into Operation Burnham, above n 3, at “about the inquiry – inquiry members”.

89 Inquiry into Operation Burnham, above n 3, at “about the inquiry – terms of reference”.

90 Inquiry into Operation Burnham, above n 3, at “about the inquiry – terms of reference”.

91 Fenrick, above n 58, at 499.

92 Fenrick, above n 58, at 499.

93 Additional Protocol I, above n 4, at 57(2)(a)(iii).

94 International Security Assistance Force (ISAF) *Concept of Operations Operation Burnham* (6 August 2010) at 1, from <[www.operationburnham.inquiry.govt.nz](http://www.operationburnham.inquiry.govt.nz)>.

the status of the two men and their links to other attacks including the one that resulted in the death of Lt O'Donnell.<sup>95</sup>

Declassified GCSB emails indicate that both targets were placed on the Coalition Joint Prioritisation Effects List prior to the operation indicating their importance in the hierarchy of the insurgent forces.<sup>96</sup>

Objectives Burnham and Nova were legitimate military objectives in line with Additional Protocol I, art 52(2).<sup>97</sup> Their capture or neutralisation would provide a direct military advantage to NZDF (and broadly ISAF) troops by virtue of providing a military loss to insurgent forces.

The ISAF Concept of Operations document, created prior to the operation identifies that intelligence identified that one of the targets, Kalta, was “likely to command 15–20 ... fighters in his village”, also identifying that “Tirigan Village also operates a night guard force conducting armed roving patrols”.<sup>98</sup> On this basis, it can be seen that expected military objectives included insurgent forces and although not a primary objective for the mission, advantage would be gained by their “total or partial” capture or destruction.<sup>99</sup> Whilst this does not conclude that Afghan nationals engaged as a part of Operation Burnham were legitimate military targets, it does indicate that armed response was expected and, by dual virtue of defending the ground force and weakening the insurgent forces, a military advantage was anticipated.

An official NZDF account of events identifies that removal or destruction of insurgent weapons was also an objective.<sup>100</sup> As this report was written after the Operation, it is of diminished value for application of the test prior to the operation. However, the concept of operations contains reference to destruction of weapons – (although much information is redacted).<sup>101</sup> In addition, the NZSAS troops included an Explosives Ordnance Disposal technician who conducted the destruction.<sup>102</sup> Their inclusion in the mission indicates a prior intention to dispose of any weapons located. It is reasonable to interpret that removal and destruction of any insurgent weaponry was likely an objective prior to the operation, and indeed one that provided a secondary military advantage through the viewpoint of the reasonable military commander.

## 2. *Intangible military advantage*

The obligation for military advantage to be “direct and concrete” renders discussion of the intangible difficult.<sup>103</sup> Nonetheless, there remains direct advantages that are harder to quantify than that of a single objective. As discussed above, security of the attacking forces can be considered a

---

95 New Zealand Defence Force (NZDF) *Task Force 81 Command Brief* (6 May 2010) at 27, 29, from <www.operationburnham.inquiry.govt.nz>. See also ISAF, above n 94, at 6, 7: note: much is redacted, but contains explanations as to what has been redacted without specifics.

96 New Zealand Defence Force (NZDF) *Op Burnham public release GCSB email chain* (August 2010) from <www.operationburnham.inquiry.govt.nz>.

97 Additional Protocol I, above n 4, at 52(2).

98 NZDF, above n 96, at 6.

99 Beran, above n 33, at 5.

100 NZDF, above n 68 at 5.

101 ISAF, above n 94, at 15.

102 NZDF, above n 68 at 11.

103 Beran, above n 33, at 4.

military advantage, in this case the security of the ground troops present in the village.<sup>104</sup> Further, the operation originated due to concerns of growing insurgent forces attacking PRT's in the province. As a result, it can be interpreted that in doing so, the security of NZ and allied PRT's would be a direct and concrete, albeit intangible, anticipated advantage.

### 3. *The counterinsurgency argument*

As identified, where an operation has a counterinsurgency element such as the ISAF involvement in Afghanistan post late 2009, the traditional perspectives on priorities shift.<sup>105</sup> Counterinsurgency has a focus on the protection and trust of the local population.<sup>106</sup> This shifts impacts upon civilians to be considered in both columns of the proportionality equation, as ensuring civilian protection (and the ability to be trusted to continue to provide such protection) *is* therefore a part of the mandate.

It becomes a military advantage by remaining in line with the ISAF directive: "gaining and maintaining that support must be our overriding operational imperative".<sup>107</sup> When viewed through the lens of the reasonable military commander, protection of the civilians embroiled in the operation *must* be counted not only as a balancing factor but also as a part of the advantage anticipated prior to Operation Burnham.

### 4. *Expected civilian impact*

#### (a) Prior to the operation

Analysis will be applied concerning the decision to launch an operation, the means in which the operation was decided, the intelligence relied upon. This will focus on the NZDF HQ decisions from Kabul, as well as the CDF decision to authorise the mission. In this instance, applying the test will be done strictly – the "thick" end of the proportionality spectrum due to the fact this stage of an operation turns on the ascertainment of a "right" outcome against all other possible options.<sup>108</sup>

The primary document to be relied upon in this instance is the ISAF Concept of Operations.<sup>109</sup> Produced prior to the operation as a part of the approval process, this document contains detailed information on the intelligence relied upon and actions taken to minimise risk to civilians and maximise likelihood of achieving the intended outcomes.

To begin, analysis of the reasoning behind electing for a night raid should be undertaken. Under the heading "justification for night raid" it is identified that a night raid would lessen risk to civilians as they will likely be indoors.<sup>110</sup> Further, analysis shows that for these same reasons, an operation conducted at night lessens the risk of a "large scale insurgent response" which has the dual effect of increasing the chance of successful detention of the primary targets and minimising the risk to civilians by decreasing the chance of combat.<sup>111</sup>

---

104 Bothe, above n 37.

105 Beran, above n 33, at 5.

106 Beran, above n 33, at 6.

107 Mchrystal (ISAF), above n 42.

108 Nolte, above n 62.

109 ISAF, above n 94.

110 ISAF, above n 94, at 2.

111 ISAF, above n 94.

Given the nature of the location – a mixed civilian and insurgent area, it is reasonable to conclude that in the eyes of the reasonable military commander this reasoning minimises the risk to civilians by reducing the overall risk of combat and by ensuring that they will likely be in their homes if any combat occurred.

This was further mitigated by the use of interpreters and callouts in order to ensure civilian safety – despite the fact that this would provide prior warning to the targets and reduce the ability to complete the objective.<sup>112</sup> This is a clear instance where reduction of civilian loss was put ahead of anticipated military advantage.

There is a slight increase in risk at night generated by the fact civilian houses are more likely to be occupied and therefore air support weaponry hitting such a building would have a more devastating effect. The test is to be applied prior to the operation so the *actual* fact that this consequence arose is not relevant – but the possibility that it could occur was at all times present.

#### (b) Air Support

At any given point, the decision to involve air support increases the risk of civilian impact. Due to the fact that weapon platforms are further away from their targets, and that their weapons have a larger impact zone than small arms fire. The directive issued by General McChrystal further imposed a requirement that operations “scrutinize and limit the use of force like close air support”.<sup>113</sup>

But as discussed previously, proportionality does not impute a total requirement that own-side forces be put completely at risk.<sup>114</sup> Official Information Act (OIA) Requests from April 2018 state that air support was provided in order to ensure that the ground team would be better positioned to complete the primary objective – the capture of the two insurgent leaders.<sup>115</sup> This is especially pertinent when consideration is given to prior intelligence of roaming patrols and armed insurgents. Small, special operations teams covered by CAS was standard procedure for operations of this type at the time.<sup>116</sup> Given the terrain and difficulty to get to the location of the Operation, smaller ground forces covered by CAS to allow ground forces protection to obtain the military advantage was reasonable at the planning stage. The technology available to those aircraft allow their inclusion at night to not drastically increase risk to civilians.

#### (c) During the operation

There were several individual engagements authorised by the GFC and the JTAC.<sup>117</sup> These can be assessed individually by nature of the chain of command inherent in each engagement, approval from ground command was required in each instance. The approval decision can be considered by virtue of the requirement for proportionality to be assessed prior to actual engagements.<sup>118</sup>

---

112 New Zealand Defence Force (NZDF) *Summary of Incident* (22 August 2010) from <[www.operationburnham.inquiry.govt.nz](http://www.operationburnham.inquiry.govt.nz)>.

113 Mchrystal (ISAF), above n 42.

114 Barber, above n 8 at 482.

115 New Zealand Defence Force (NZDF) *April 2018 Responses* (19 April 2019) at 3 (Obtained under Official Information Act 1982 Request to Headquarters New Zealand Defence Force, Ministry of Defence) from <[www.nzdf.mil.nz](http://www.nzdf.mil.nz)>.

116 Lara M Dadkhah “Close Air Support and Civilian Casualties in Afghanistan” (2008) *Small Wars Journal* from <<https://smallwarsjournal.com/index.php/>>.

117 NZDF, above n 112.

118 Additional Protocol I, above n 4, at 51(5)(b).

At this stage, the principle is applied in a “thin” manner, reflective of the rapidly developing nature of the theatre of war. This adjustment of the application is reflective of the requirement for the test to be applied “in the shoes of the actual decision maker”. The determinative requirement becomes determination that “a particular outcome is the best possible” in the context of the “possibility to verify certain facts”.<sup>119</sup>

(d) Individual engagements

We can turn now to discussion of individual engagements as a part of the Operation. This is not outside the scope of the test as a “bullet-by-bullet” analysis, nor does it shift to an ex-post facto analysis, but rather analysis of the decision to engage prior to the engagement itself.<sup>120</sup>

As discussed, military advantage is taken as a fixed component – so application will not be made as to the military advantage and civilian impact of each engagement, but rather the *increase* to civilian danger that each engagement provided. This can be taken cumulatively and added to the countervailing factors against proportionality.

Shortly after the arrival of the first Chinook, insurgents were seen retrieving weapons, including rocket propelled grenades (RPG’s) from a previously unknown cache house.<sup>121</sup> Accordingly the second Chinook was advised to refrain from landing. The GFC, still in transit at this time, advised (through the JTAC) that the Apache’s had clearance to engage *provided they had explicit visual confirmation that there was not likely to be damage to civilian persons or objects*, and that the terms of the rules of engagement remained operable.<sup>122</sup> This two-stage requirement remained in effect for the entirety of the operation.<sup>123</sup> CAS did not engage immediately due to the proximity of friendly ground troops.

At approximately 0054, upon positive identification that targets were direct participants, air support engaged, killing a number of insurgents.<sup>124</sup> One insurgent had broken away from this group. It was when the Apache fired at this individual that rounds have been determined to have fallen short and hit the building causing civilian casualties.<sup>125</sup>

As the test for proportionality deems that actual results are not relevant, this does not weigh against the outcome unless the risk to civilians was too great immediately prior to engagement. Based on the outcome of the previous and later engagements, it can be said that had the weapon not been misaligned, the risk to civilians would have been within the acceptable range for legal engagement.

However, because the test for proportionality requires adjustment in the light of available information, had the GFC, JTAC or Apache Crews become aware of this misalignment after this engagement they would have been aware of the increase in expected civilian impact.

---

119 Nolte, above n 62.

120 Fenrick, above n 58, at 499; and ICTY, above n 1 at 50.

121 NZDF, above n 68, at 7, 8.

122 NZDF, above n 68, at 8.

123 Keating (NZDF), above n 67, at 4, per Leon Fox.

124 NZDF, above n 68, at 9. See also: Nicky Hager “Operation Burnham FIOA Documents” from <[www.nickyhager.info/foia/](http://www.nickyhager.info/foia/)>. These videos were seen by the Inquiry, but not published, stating it would not be inappropriate for Hager to publish. Review positively identifies the group carrying weapons.

125 NZDF, above n 70, at 18.

NZDF and ISAF documents indicate that this information did not come to light until after the operation.<sup>126</sup> If, for example, the CAS crews had attempted to contact the JTAC with this information and failed, it could then be said that this would be information should have been known, becoming relevant in analysis of proportionality. This was not the case, and the error only became brought to light during the subsequent ISAF investigation.<sup>127</sup>

Subsequent engagements were made by CAS, once again only authorised where clear visual identification indicated direct participation in hostilities, and that there was no risk to civilians.<sup>128</sup> One engagement took place at 0123. Subsequently another group of insurgents was identified, but as both requirements to engage were not met, they remained merely observed.

A final aerial engagement took place at 0238.<sup>129</sup> Analysis of video footage indicates direct involvement by all targets by virtue of visible weaponry and tactical movement, although it is difficult to consider wider civilian impact due to the limited scope of footage compared to the location as a whole.<sup>130</sup>

It is worth noting at this point that several other engagements were requested, but not approved due to risk to civilians.<sup>131</sup> An indication of serious consideration of the principle of distinction.

Regarding the shots fired by the NZSAS sniper, narratives differ. The NZDF position is that the individual killed in this engagement was an armed insurgent, making his way along the ridgeline toward the position of the command team.<sup>132</sup> The *Hit & Run* position, however, is that the individual killed was an unarmed schoolteacher named Islamuddin.<sup>133</sup>

Two points must be raised. The first, the location of where the deceased was shot was on a ridgeline to the west of the village, a location which would be considerably difficult to get to.<sup>134</sup> In addition the footage from the PSR vehicle recording the operation would be able to confirm the presence of a weapon – although that footage is not available for the purposes of *this* research, it has been made available to the inquiry and therefore is an easily verifiable fact.

But, for these purposes, the question arises – does the status of this individual matter when the test must be applied in advance? It can only matter where we are using the facts to verify information that the sniper (and the GFC who authorised the engagement) reasonably should have known.

If the individual was not armed or verifiable as a direct participant in the hostilities, there would be a direct breach of the rules of engagement. Evidence exists as to the high level of training NZDF troops were given by Legal Officers on this topic.<sup>135</sup>

Engagement of a single individual can only be said to hold potential civilian loss of one person. That is not to say that the killing of a single civilian outside of the rules of engagement is *justified*

---

126 NZDF, above n 68, at 8.

127 NZDF, above n 68, at 8.

128 NZDF, above n 68, at 8.

129 NZDF, above n 68, at 10.

130 Hager, above n 124.

131 NZDF, above n 71.

132 NZDF, above n 68, at 9; and Keating (NZDF), above n 67, at 4, per Leon Fox.

133 Hager and Stephenson, above n 2, at 56.

134 NZDF, above n 70, at 8.

135 NZDF, above n 39 at 27, 29. See also NZDF, above n 68, at 2.

under proportionality, but rather that this should be treated as a separate issue. It cannot alone be found to shift the balance of the operation, as a whole, to being indiscriminate and excessive.

There is not sufficient information available to make a definitive conclusion on this matter, nor does that influence the outcome of this research, being application of the proportionality principle.

On the facts available, the NZDF position (and the verifiability via the PSR) it seems reasonable that the target was verified as a direct participant – however as no biometric data was able to be taken from the deceased there is no way to confirm the identity.<sup>136</sup> Furthermore, it should be considered that the individual alleged to have been killed by *Hit & Run* may have been the actual individual killed, being a schoolteacher may not necessarily preclude insurgent activity. However, this runs in to the realm of speculation and cannot be verified. Ultimately, this is something that the inquiry will be better placed to speak to.

#### (e) Weapon malfunction

Fenrick posits that where civilian casualties arise where “weapons hit the wrong object because of weapon malfunction” regard must be given to more than what happens during one attack.<sup>137</sup> This is directly applicable to the Apache’s misaligned gunsights.

He suggests that the standard measurement should be analysis of that particular weapon (or weapons platform) over an extended period of time – perhaps a portion of the campaign itself.<sup>138</sup> It can then be seen where a particular weapon has a higher than expected chance at misfiring (and therefore a higher risk of civilian impact) that the proportionality principle has potentially been breached.

This has a logical basis in the case-by-case approach, as well as a practical basis. To impart a requirement for those making decisions to factor the statistical probability of a weapon malfunction across all weapons used in a particular operation would be too onerous an obligation and fundamentally undermine the ability of the test to protect proactively.

The consideration of the Apache weapon platform in Afghanistan is not within the scope of this research. There could, however, be a basis for future analysis of the proportionality principle in this scope.

### *C. Limitations to this Study*

This study does not seek to emulate the Inquiry, however in applying the law to Operation Burnham, a natural parallel can be seen. This study conducted entirely “on the papers” requiring some assumptions to be made.

A large amount of the information relied upon, authored by the NZDF or by the Inquiry, has redacted sections. In fact, there will be other documents and information that remain entirely classified and unavailable for review. There is, therefore, a requirement for veracity to be assumed in many cases. This was achieved in two ways; the first being that the documents published by the Inquiry are likely to reflect the information under review in totality, as well as by cross referencing certain information against other documents from other sources – the more consistent an indicated fact was, the greater the ability to rely upon it.

---

136 NZDF, above n 68, at 12.

137 Fenrick, above n 58, at 499, 500.

138 Fenrick, above n 58, at 500.

There too, must be an assumption that the NZDF has cooperated fully in preparing and producing these documents. The fact that documents “went missing” and only surfaced later in the process indicates that this may not have been the case.<sup>139</sup> Once again this required cross referencing of fact. More weight was placed on documents produced *prior* to the operation – especially given the relevant time for conducting the test.

Not only was the Inquiry provided with greater, and less redacted information, so too did they have the opportunity to question, cross examine, and evaluate the weight of evidence based on traditional features of testimony. This was not an option in conducting this research. It must be noted that while care was taken to cross reference all facts relied upon, there was no way to emulate these conditions.

As a result, whilst thorough, this analysis may only be taken as an application as to the information *as publicly available* at the time of conducting this study. Serious concerns do not exist that the information relied upon is entirely false or unreliable, but the caveat must be acknowledged.

### III. CONCLUDING REMARKS

Discussing proportionality is difficult for two reasons. The first, that the equation asks for the balancing of two inherently difficult to define concepts. Military advantage is an abstract concept influenced by context. Differing military doctrines will consider advantages in different lights.<sup>140</sup> Reconciling these differences when considering the appropriateness of military action becomes a difficult necessity.

Civilian impact carries the same issues, what value does one place on a human life? The law does not ask for a certain ratio or number of expected casualties – nor should it. The case-by-case approach is the appropriate metric for such a balancing act, but this too brings difficulties.<sup>141</sup> Each time an application of this test is made, different and fact specific considerations must be accounted for.

This highlights the broader nature of international law when compared to domestic legislation. The very nature of the proportionality rule arises from a single sentence, it is not a step by step black letter approach that one must take, but rather an informed and academic understanding of both the broader concept and the specific scenario.

It is undeniable that Protocol I allows for *some* civilian casualties.<sup>142</sup> But even at the very origin of the discussion, the NATO Report identifies that:<sup>143</sup>

... it is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values.

In the hypothetical, the principle can be clearly seen to be met or breached– it would be an almost unanimous understanding that a high value target would not be prohibited from attack just “merely

---

139 Thomas Manch “Crucial evidence suddenly upsets Burhnam inquiry” (19 September 2019) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

140 ICTY, above n 1, at 50.

141 ICTY, above n 1, at 50.

142 Barber, above n 8, at 499.

143 ICTY, above n 1, at 48.

because a farmer is plowing a field in the area”.<sup>144</sup> When it comes to actual application of the principle however, the questions to be asked and indeed their answers, exist in a grey area where proportionality (or lack thereof) is not immediately obvious.

It is this abstract application that this report finds itself regarding Operation Burnham. The realities of warfare are such that these questions do not find themselves easily answered. Consideration must be given to the intricacies of actual and anticipated military advantage, to the effects of the decision to involve air support, to conduct the operation at night, and a thousand other factors that shift the balance for and against a finding of proportionality.

Yet the conclusion of this research in consideration of the factors envisaged by those who planned or decided upon the operation, as well as those who executed it, identifies the following:

*In the eyes of the reasonable military commander, the anticipated military advantage of Operation Burnham was greater than expected civilian impact to a sufficient degree for a finding of proportionality under the laws of armed conflict.*

---

144 ICTY, above n 1, at 48.

# REFRESHING HUMAN RIGHTS FOR OUR TIME AND PLACE

BY PAUL HUNT\*

## I. INTRODUCTION

Human rights have made a major contribution to society in Aotearoa New Zealand, but they urgently need refreshing for our time and place. In this Country, human rights are mainly associated with combatting discrimination. This struggle is of huge importance and, in the Human Rights Commission, most of our work is devoted to fighting discrimination. But human rights are not only about discrimination, they also include a range of other rights, including the right to a decent home grounded on Te Tiriti o Waitangi.<sup>1</sup>

Successive governments of Aotearoa New Zealand have legally agreed to implement these “other human rights”, but they have failed adequately to do so. Moreover, some of these human rights are almost unknown and invisible in Aotearoa New Zealand. Agreeing fundamental standards in the United Nations (UN) in New York and Geneva and giving them negligible explicit attention in Wellington is disgraceful and undermines trust and confidence in government.

Human rights in Aotearoa New Zealand have other elemental problems, too. They need refreshing because human rights talk has become excessively legalistic and often divorced from everyday lives. Also, most people think that human rights only place responsibilities on governments, whereas human rights place responsibilities on governments, business, and individuals.

Further, in relation to human rights, we have yet to strike a healthy balance between “I” and “we”, that is between individual and community. In 2020, two pillars of the British establishment, Sir Paul Collier and Sir John Kay, published a slim volume called *Greed is Dead: Politics After Individualism*.<sup>2</sup> The authors are leading economists and, after reading the book, I was left wondering what they had been doing for the last 40 years. Nonetheless, the book makes important points about what has been called “destructive individualism”.<sup>3</sup>

---

\* In 1995, Paul Hunt graduated from the University of Waikato with a Masters of Jurisprudence (First Class Honours). In 2011, he was made an Honorary Professor in Te Piringa – Faculty of Law at the University. In 2021, the University of Waikato awarded him an Honorary Doctorate, on which occasion he gave a public lecture. This article is closely based on his public lecture. In 2019, Professor Hunt was appointed New Zealand’s Chief Human Rights Commissioner. His lecture, and this article, are given in his private capacity.

1 New Zealand Human Rights Commission Framework Guidelines on the right to a decent home in Aotearoa (August 2021) <[www.hrc.co.nz/files/7416/2784/4778/Framework\\_Guidelines\\_on\\_the\\_Right\\_to\\_a\\_Decent\\_Home\\_in\\_Aotearoa\\_FINAL.pdf](http://www.hrc.co.nz/files/7416/2784/4778/Framework_Guidelines_on_the_Right_to_a_Decent_Home_in_Aotearoa_FINAL.pdf)>.

2 Paul Collier and John Kay *Greed is Dead: Politics After Individualism* (Penguin Random House UK, 2021).

3 Helen Lewis “Paul Collier and John Kay v Destructive Individualism” (BBC, 19 September 2020). <[www.bbc.co.uk/programmes/m000mkv4](http://www.bbc.co.uk/programmes/m000mkv4)>.

Community is vital to human beings because it brings a sense of belonging. The Norwegian Prime Minister Erna Solberg, who has been forced to confront violent white supremacists, recently observed, “you don’t attack what you feel you belong to”.<sup>4</sup>

So, how can we address these and other constraints which are holding back human rights? How can we refresh human rights for our time and place? We have to begin by reflecting on the relationship between values and human rights.

## II. THE RELATIONSHIP BETWEEN VALUES AND HUMAN RIGHTS

Prime Minister Ardern often talks about values. When she addressed the UN General Assembly in the shadow of 15 March 2019, she affirmed the Universal Declaration of Human Rights and said:<sup>5</sup>

What if we no longer see ourselves based on what we look like, what religion we practice, or where we live. But by what we value. Humanity. Kindness. An innate sense of our connection to each other. And a belief that we are guardians, not just of our home and our planet, but of each other.

In June 2021, at the Government’s turbulent hui on countering terrorism and violent extremism, she emphasised:<sup>6</sup>

We are seeking guidance and ideas on strengthening our counter terrorism strategy in a uniquely New Zealand way – recognising our treaty relationship, our diversity, and our values.

The Prime Minister is right to emphasise the critical importance of values. They are the “glue” that holds a society together.

Values inform human rights. Crucially, human rights embody values. Human rights are designed to ensure that our values are not inadvertently overlooked, or deliberately sacrificed on the altar of political expediency. Human rights help to ensure that, confronted by a national crisis, global pandemic, or other emergency, our values are not unfairly compromised.

Human rights are a check on what Alexis de Tocqueville called “the tyranny of the majority”.<sup>7</sup> They are not only a check on “the tyranny of the majority”, they are also a check on the tyranny of the powerful. At root, human rights provide a check on the abuse of public power. Their primary purpose is to protect our values.

## III. WHICH VALUES?

If values inform human rights, and human rights embody values, which are among the values esteemed in Aotearoa New Zealand?

---

4 As quoted by Jacinda Ardern, Prime Minister of New Zealand “Speech to inaugural Countering Terrorism Hui” (He Whenua Taurikura, Christchurch, 15 June 2021) <[www.beehive.govt.nz/speech/speech-inaugural-countering-terrorism-hui](http://www.beehive.govt.nz/speech/speech-inaugural-countering-terrorism-hui)>.

5 Jacinda Ardern, Prime Minister of New Zealand “New Zealand National Statement to United Nations General Assembly 2019” (UN General Assembly, New York, 25 September 2019) <[www.beehive.govt.nz/speech/new-zealand-national-statement-united-nations-general-assembly-2019](http://www.beehive.govt.nz/speech/new-zealand-national-statement-united-nations-general-assembly-2019)>.

6 Ms Ardern, “Speech to inaugural Countering Terrorism Hui”, above n 4.

7 Alexis de Tocqueville *Democracy in America* (Joseph Epstein, revised edition, Bantam Classic, 2000) (first published in France by Sever and Francis, 1835).

Te Ao Māori is underpinned by whanaungatanga (kinship) and whakapapa, which I understand to mean more than genealogy but an expansive network in which all life is included. In this worldview, relationships between people – past, present, and future – are of central importance. Also, the relationship between people and the natural world is crucial.

Kaitiakitanga (stewardship), a system of reciprocal rights and responsibilities, arises from these relationships. Kaitiakitanga includes intergenerational responsibilities and it also has spiritual dimensions. Mana (authority, power, leadership) requires the maintenance of these relationships and responsibilities.

Te Ao Māori reflects an indivisible relationship between Māori and whenua, which is reinforced by Te Tiriti o Waitangi. It includes an abiding sense of love for Papatūānuku (the earth) to which tangata whenua belong.

In Aotearoa New Zealand, our values encompass Te Ao Māori and the worldviews of other communities. These values not only include whakapapa, whanaungatanga, kaitiakitanga and mana (as already outlined), they also include manaakitanga (respect), dignity, decency, fairness, equality, freedom, wellbeing, safety, autonomy, participation, partnership, community, and responsibility.

These are the values that provide the bedrock of society in this country. They are the values embodied in human rights. If human rights become estranged from these values, human rights lose their legitimacy, authority, currency, and relevance.

#### IV. DYNAMIC VALUES AND THE GOLDEN RULE

Values – like culture – are not set in stone. Values evolve as generations come and go. Because values evolve, so must human rights, but without compromising their essence.

What is the “essence” of human rights? This question bears upon some of the most profound ethical issues which have tormented moral and political philosophers since time immemorial. Here I cannot do the question justice, instead I provide two brief responses.

First, the “essence” of human rights coalesces around kaitiakitanga (stewardship), manaakitanga (respect), dignity, wellbeing, and the fair treatment of individuals and communities.

Second, the “essence” of human rights is encapsulated in the Golden Rule which, arguably, is found in all major world religions and informs all major cultural ethical systems. The Golden Rule has a negative and positive form. The negative form is, “Do *not* do to others what you do not want done to you”. The positive form is, “Do to others what you would have them do to you”. The Golden Rule might have an important role to play as we journey towards a multicultural society based on Te Tiriti o Waitangi.<sup>8</sup>

However, my main point is that human rights are inalienable. They belong to everyone by virtue of their humanity, and they cannot be expunged. But human rights are *not* unchanging. They are dynamic. As UN Secretary-General Boutros Boutros-Ghali put it in his opening address to the World Conference on Human Rights held in Vienna in 1993, “human rights are ... in constant movement”.<sup>9</sup>

---

8 For an interesting introduction to the Golden Rule see James Liu and Matthew MacDonald “Towards a Psychology of Global Consciousness Through an Ethical Conception of Self in Society” (2016) 46 *Theory of Soc Behav* 310.

9 Steven L B Jensen *The Making of International Human Rights: The 1960s, Decolonization and the Reconstruction of Global Values* (Cambridge University Press, 2016) at 1.

If human rights become static, they are relics from the past, and run the risk of hindering progress.

In Aotearoa New Zealand, the dynamism of human rights enables them to play a constructive role as we confront our colonial past and build a multicultural society based on Te Tiriti o Waitangi, in which everyone can meaningfully participate with dignity and respect.

### *A. Relationships, responsibilities, and rights*

In 2020, conscious of the values New Zealanders esteem, I re-framed human rights as the “three Rs”.<sup>10</sup>

#### *1. Relationships*

At the heart of human rights and Te Tiriti o Waitangi are respectful relationships between individuals and communities. I often hear inspiring stories about our rich multiculturalism grounded on Te Tiriti. But I also hear about communities talking past each other. We need to give more attention to thoughtful relationship-building between communities.

#### *2. Responsibilities*

Although this provision is often overlooked, the Universal Declaration of Human Rights confirms that individuals have “duties to the community”.<sup>11</sup> Of course, responsibilities are integral to Te Tiriti. The response to COVID-19, such as social distancing, self-isolation and, whenever possible, getting vaccinated, shows that most of us understand we have responsibilities to our communities. Most of us grasp that we have a responsibility not to discriminate on any of the prohibited grounds, such as disability, gender, and sexual orientation. Many of us accept we have some sort of responsibility to safeguard the environment.

We need to be much clearer that human rights not only grant entitlements to, but also place responsibilities on, all of us.

Nonetheless, I acknowledge we must be very careful about the idea of placing human rights responsibilities on individuals. If a society is plagued by systemic disadvantage, as ours is, and we then place responsibilities on disadvantaged individuals and communities, this runs the risk of reinforcing their disadvantage. Also, there is a risk that those in authority will try to make individuals’ human rights *conditional* upon the discharge of their responsibilities, which would be a travesty.

Working in the UN, I always avoided saying individuals have human rights responsibilities because I knew this argument would be misused by authoritarian and feudal regimes.

Here in Aotearoa New Zealand, for several reasons, it is appropriate to talk about individuals’ human rights responsibilities, but the argument needs careful attention to ensure it does not accidentally do more harm than good.

#### *3. Rights*

As we have seen, human rights are about fairness and manaakitanga. They dignify individuals and empower communities. In the UN, successive governments of Aotearoa New Zealand have

---

10 For example, see Paul Hunt “How to resist those who roll their eyes at mention of human rights” Stuff.co.nz (16 October, 2020) <[www.stuff.co.nz/national/politics/opinion/123104180/how-to-resist-those-who-roll-their-eyes-at-mention-of-human-rights](http://www.stuff.co.nz/national/politics/opinion/123104180/how-to-resist-those-who-roll-their-eyes-at-mention-of-human-rights)>.

11 *Universal Declaration of Human Rights* A/RES/217(III) (1948) (UDHR), Article 29(1).

promised to advance civil, political, workers', social and cultural rights, and the rights of indigenous peoples.<sup>12</sup> This broad understanding of human rights reflects what humans value. It also chimes with Te Tiriti.

Understood as the “three Rs”, human rights have to be brought home. They must be situated and implemented within our unique historical, demographic, environmental and legal context, including Te Tiriti o Waitangi. There are signs this is going to be very challenging.

## V. “DON’T WORRY, WE IMPLICITLY DELIVER HUMAN RIGHTS”

I have often been told by diplomats, some of them representatives of authoritarian, racist, misogynistic, homophobic States, “Don’t worry, our laws and policies may not explicitly mention human rights, but they *implicitly* shape all that we do.”

More surprising, I have heard the same argument from diplomats of liberal, democratic States. Since my appointment to the Human Rights Commission, I have heard versions of this argument on Lambton Quay and in the Beehive.

This self-serving, patronising argument masks human rights. It drains power away from individuals and communities to those in authority. It means only those in authority know whether and when human rights are being taken into account and, if they are, how they are interpreted and applied. Such arbitrariness is deeply objectionable and inconsistent with human rights.

*Explicitly* framing something as a human right, matters: without the status of a human right, it is shorn of its transformative, emancipatory, and relational promise.

How can we make explicit human rights more operational and relevant to the everyday lives of everybody?

## VI. HUMAN RIGHTS IN THE “ERA OF IMPLEMENTATION”

In 2005, UN Secretary-General Kofi Annan made a speech on human rights in which he emphasised that “the era of declaration is now giving way, as it should, to the era of implementation.”<sup>13</sup>

What he meant was that since 1945 the international community has negotiated – or “declared” – an impressive and extensive battery of international human rights instruments, and now the time has come to take the treaties and other instruments off the shelves and make them real – or “implement” them – in everyday lives.

This major shift – from declaration to implementation – has dramatic implications for the UN, which I have written about elsewhere.<sup>14</sup>

In brief, what I call the UN human rights “mainland”, such as the UN Human Rights Council, can draft and *declare* human rights but it is not designed to *implement* them. UN human rights implementation must take place in UN operational agencies, such as the World Health Organisation.

---

12 Notably, the right to a healthy environment is beginning to cement its place in the international code of human rights, e.g., see *The human right to a safe, clean, healthy and sustainable environment* A/HRC/48/L.23/Rev.1 (2021).

13 Kofi Annan, UN Secretary-General “Address to the UN Commission on Human Rights” (UN Commission on Human Rights, Geneva, April 7 2005) <[www.un.org/sg/STATEMENTS/index.asp?nid=1388](http://www.un.org/sg/STATEMENTS/index.asp?nid=1388)>.

14 Paul Hunt “Configuring the UN Human Rights System in the ‘Era of Implementation’: Mainland and Archipelago” (2017) 39 Hum Rights Q 489.

In other words, in the era of implementation, the UN needs both its human rights “mainland”, such as the UN Human Rights Council, *and* an “archipelago” of human rights initiatives spread across UN operational agencies.

The shift from declaration to implementation also has dramatic implications at country-level. The “mainland” and “archipelago” analogy applies in Aotearoa New Zealand.

In Aotearoa New Zealand, the human rights “mainland” includes the Ministry of Justice, Crown Law and Ministry of Foreign Affairs. But, for the most part, they are not designed to *implement* human rights. Human rights implementation must take place in local and central agencies, such as the Ministries of Health, Education and Social Development.

So, in the era of implementation, Aotearoa New Zealand needs its human rights “mainland”, such as the Ministry of Justice, *and* an “archipelago” of human rights initiatives across central agencies. Human rights implementation will be impossible without the positive engagement of “mainland” and “archipelago” in Aotearoa New Zealand.

## VII. COMPLIANCE AND IMPLEMENTATION

It’s important to distinguish compliance and implementation. Put simply, *compliance* is usually a tick-box exercise, late in a policy process, to check whether there’s conformity with a law or rule. *Implementation* is totally different: it refers to interventions and initiatives that are designed to make something happen on the ground in real-life.

So, if the government wishes to implement the rights to healthcare and health protection and reduce rheumatic fever, it turns to the Ministry of Health, District Health Boards, and Ministry of Housing and Urban Development.

Lawyers, probably from the Ministry of Justice, are likely to undertake a human rights *compliance* check. But *implementation* must be done by sectoral professionals working in central agencies, such as health professionals, housing experts, educationalists, environmental experts, town planners, economists and so on, working hand-in-glove with local communities and respecting the credo “nothing about us, without us”.

During the era of human rights declaration, lawyers were indispensable. They are trained to draft treaties and other international instruments. But they cannot “do” implementation, except in relation to courts and prisons. During the era of human rights implementation, a wide range of sectoral professionals have to step-up. If we depend on lawyers to *implement* the right to health, for example, we will all die prematurely.

## VIII. HUMAN RIGHTS CAPABILITY

Successive governments in Aotearoa New Zealand have not adjusted to the “era of implementation” heralded by Kofi Annan in 2005.

In Aotearoa New Zealand, human rights – which embody our values – should be on the policy table early in the policy making progress. That’s what’s needed in the “era of implementation”: human rights-shaped policies. The “era of implementation” is less about going to court, it is more about integrating human rights into policies.

International human rights law is legally binding in Aotearoa New Zealand. Whether it is brought into our *national* law or not, international human rights law is legally binding, in international law, in Aotearoa New Zealand.

But integrating human rights into policies, depends upon public officials having some familiarity with human rights. Regrettably, with some honourable exceptions, central agencies lack the human rights capability required for this new “era of implementation”. The exceptions are largely associated with disability rights, women’s rights, and racism and, to a limited degree, children’s rights

As you would expect, the Ministry of Justice and Crown Law have human rights capability in relation to the New Zealand Bill of Rights Act 1990, but this capability does not extend across the spectrum of international human rights that are legally binding on Government.

Political leadership is needed to elevate the importance of human rights in the public sector. It’s not rocket science: each central agency needs to have one or two human rights officers who help and support policy makers within their agency. The human rights officers would help their agency colleagues to integrate human rights into policies and other initiatives. In their turn, agencies’ human rights officers should be supported by the Ministry of Justice, the Human Rights Commission, and similar organisations.

If governments are unwilling to enhance human rights capability within the public service, if they are unwilling to bring international human rights to bear upon policy making initiatives, why bother to draft and ratify human rights treaties in the first place?

What’s the role of the Human Rights Commission in all this?

## IX. THE MISNAMED HUMAN RIGHTS COMMISSION

The Human Rights Commission is misnamed. Its primary focus is non-discrimination and civil and political rights, such as the prohibition against torture and freedom of speech. Its primary focus is not the full range of human rights set out in the UN: civil, political, workers’, social and cultural rights, and indigenous peoples’ rights.

The report of the Royal Commission of Inquiry into the terrorist attacks in Christchurch on 15 March 2019 wrote:<sup>15</sup>

“Despite its name, the Human Rights Act [which establishes the Human Rights Commission] only focuses on one human right, the right to be free from discrimination.”

One of the leading international authors on national human rights institutions discusses the New Zealand and Canadian human rights commissions and says:<sup>16</sup>

... as antidiscrimination bodies, their focus has been largely on civil and political rights. While the commissions could promote compliance with the full range of international human rights treaties that these countries have ratified, they remain first and foremost antidiscrimination agencies.”

---

15 Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019 *Ko tō tātou kāinga tēnei Report of the Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019* (Volume 1, Part 2, published 26 November 2020) <<https://christchurchattack.royalcommission.nz/the-report/download-report/download-the-report/>> at 81.

16 Sonia Cardenas *Chains of Justice: The Global Rise of State Institutions for Human Rights* (University of Pennsylvania Press, 2014) at 86.

Three leading New Zealand human rights scholar-practitioners describe the predecessor of the Human Rights Act as “primarily an anti-discrimination statute”.<sup>17</sup>

The earlier legislation to which the authors refer has now been greatly improved but, in my view, the amendments did not alter the DNA of the Human Rights Commission which continues to lean towards non-discrimination.

I am being critical of neither my predecessors, nor my fellow commissioners, nor Commission staff. I am simply pointing out an institutional bias that is rooted in legislation.

## X. WHO PAYS THE PIPER CALLS THE TUNE?

The perennial problem facing all national human rights institutions across the globe is how to ensure their independence from Government. So far as I am aware, no country has solved this problem.

The New Zealand Government has done well to put in place several safeguards to ensure the Commission’s independence, for example, an *independent* panel advises on Commissioner appointments, all political parties are then consulted, and the final decision is made by the Governor-General, following advice from the Government.

As Chief Commissioner, I have never been subjected to any inappropriate pressure and I have made decisions without fear or favour. On one occasion, I took a position which deeply angered a high-ranking political figure. Later I discussed this with a Minister. He brushed it off with “Paul, you were doing your job”.

Sometimes difficult questions arise, and I need a wide range of views, including from government. The government’s views will not be determinative, but I need to know what they are. In this situation, officials will sometimes decline to give a view on the grounds that I am independent! I often find myself saying, “I know I am independent, nonetheless I would very much welcome your views, and I reserve the right not to adopt them.”

Despite the devices put in place to safeguard the Commission’s independence, at the end of the day the Commission, as an independent Crown Entity, reports to, and is funded by, Government. There is no *perfect* alternative but there is a *better* alternative.

A recent Ministerial Review favoured consideration of the Commissioners becoming Officers of Parliament, like the Ombudsman, Auditor-General, and Parliamentary Commissioner for the Environment.<sup>18</sup>

In my opinion, this option should be considered, in light of Te Tiriti o Waitangi, art 1 (kāwanatanga), art 2 (rangatiratanga) and art 3 (understood as a pledge of equality and balance).

---

17 Judy McGregor, Sylvia Bell and Margaret Wilson *Human Rights in New Zealand: Emerging Faultlines* (Bridget Williams Books, 2016) at 33. Human Rights Act 1993, s 5(1) sets out the Commission’s “primary functions” which are weighted towards non-discrimination, see ss 5(1)(c), (d) and (e). Parts 1A (discrimination by Government), pt 2 (unlawful discrimination), pt 3 (resolution of disputes about compliance with pts 1A and 2), and pt 4 (establishing the Human Rights Review Tribunal) are primarily about non-discrimination. The Human Rights Act 1993 requires the Commission to provide two free public services: one is for mediation/dispute resolution, the other is legal advice via the Office of Human Rights Proceedings. Both of these immensely valuable free public services are primarily about non-discrimination. In other words, the label on the tin says “human rights” but inside is primarily one (very important) component of human rights: non-discrimination.

18 Judge Coral Shaw *Ministerial Review of the Human Rights Commission in relation to the internal handling of sexual harassment claims and its organisational culture* (May 2018) <[www.beehive.govt.nz/sites/default/files/2018-05/180515-HRC-Review.pdf](http://www.beehive.govt.nz/sites/default/files/2018-05/180515-HRC-Review.pdf)> at 5.

## XI. UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights, adopted by the UN in 1948, is one of the most important documents of the 20th century. It provides the foundation for all international human rights. For the first time in human history, over 50 nations agreed a code of conduct for how States must treat everyone within their territory.

The Declaration sets out what States must not do (e.g., no torture) and what they must do (e.g., ensure that everyone has access to a fair trial, food, a decent home, and healthcare and health protection.) By any stretch, this is remarkable.

Of course, the Declaration is a very easy target. For example, the State drafters were not remotely representative of the people of the world and many of their States were dreadful human rights abusers. Also, the Declaration reflects a highly individualistic worldview. But it is simplistic to dismiss the Declaration – and international human rights law that was built on it – as western.

In 2016, Steven Jensen wrote a fine book called *The making of international human rights: the 1960s, decolonization, and the reconstruction of global values*.<sup>19</sup> Following a meticulous study of the archives, he concludes that the Global South – in particular Jamaica, Ghana, the Philippines and Liberia – were in the vanguard of human rights universalism during the 1960s. He argues that these countries “brokered the breakthrough of international human rights law and laid foundations for what has been called ‘the human rights revolution’ in the 1970s”.<sup>20</sup> He says that, in the 1970s, the West took over the human rights baton from the Global South. Jensen teasingly concludes, “the Global South civilized the West”.<sup>21</sup>

I spent about 20 years working on human rights at the global level and during that time I heard a lot of criticism of human rights. Some States complained that human rights are western. But non-governmental organisations (NGOs) complained that human rights are too weak. It was rare for any NGO, from any region of the world, to complain that human rights are western. Today, I don’t hear protestors in Myanmar dismissing human rights as a western construct.

Dismissing the Universal Declaration of Human Rights – and international human rights generally – plays into the hands of those in power and diminishes individuals and communities.

But should our understanding, and implementation, of the Declaration be refreshed for our time and place? Absolutely.

## XII. CONCLUSION

Over the last year or so, the New Zealand Human Rights Commission has joined forces with the National Iwi Chairs Forum, and an NGO called Community Housing Aotearoa, and prepared *Framework Guidelines on the right to a decent home in Aotearoa*.<sup>22</sup>

The *Guidelines* aim to bring home to Aotearoa New Zealand the right to a decent home grounded on Te Tiriti o Waitangi. They take into account New Zealand’s unique social, demographic, historical and legal context, including settler colonisation and Te Tiriti.

---

19 Jensen, above n 9.

20 At 277.

21 At 279.

22 *Framework Guidelines*, above n 1.

The *Guidelines* aim to raise the profile of the right to a decent home among local and national government, and among individuals, communities, hapū and iwi. Adopted by the Commission's Board, the *Guidelines* were publicly launched in August 2021.

More recently, the Commission has established a housing inquiry in accordance with its powers under the Human Rights Act 1993.<sup>23</sup> In December 2021, the inquiry published its first report which is called *Strengthening Accountability and Participation in the Housing System*.<sup>24</sup> The inquiry applies the *Guidelines* to the housing and human rights crisis confronting Aotearoa New Zealand.

It is hoped the *Guidelines*, together with the housing inquiry, will help policy makers strengthen their efforts and help rights-holders hold local government, central government, and the private sector to account for their human rights responsibilities.

This is one way of refreshing human rights for our time and place. It may be summarised like this:

- Convey that human rights embody important and dynamic values.
- Emphasise they are for *everyone*, not just some people, while giving careful attention to disadvantaged individuals and communities.
- Bring human rights home, for example, contextualise them within Aotearoa New Zealand's history of colonisation and the country's foundational document: Te Tiriti o Waitangi.
- Place human rights at the disposal of communities.
- Make them as operational as possible.
- Insert them in policies and other initiatives.
- Insist that human rights are not just about "me", they are also about "us" i.e. belonging and community.
- They are not just about entitlements, they are also about responsibilities and building harmonious relationships.
- Hold duty-bearers accountable for human rights promises, but not necessarily accountable before the courts.
- Maintain the wide vision of human rights set out in the Universal Declaration of Human Rights. Not just non-discrimination and civil and political rights, but also workers' rights, social rights, cultural rights, indigenous peoples' rights, and the fast-evolving human right to a healthy environment.
- All underpinned and reinforced by Te Tiriti o Waitangi.

---

23 Human Rights Act 1993, specifically art 5(2)(h).

24 New Zealand Human Rights Commission *Housing Inquiry First Report: Strengthening Accountability and Participation in the Housing System* (December, 2021) <[www.hrc.co.nz/files/2716/3944/7313/Housing\\_Inquiry\\_Strengthening\\_Accountability\\_and\\_Participation\\_FINAL-compressed.pdf](http://www.hrc.co.nz/files/2716/3944/7313/Housing_Inquiry_Strengthening_Accountability_and_Participation_FINAL-compressed.pdf)>.

# HUMANITY WORTH DEFENDING? ACCOUNTABILITY FOR QUEER AND TRANS PERSONS UNDER INTERNATIONAL CRIMINAL LAW

BY VINOD BAL\*

## I. INTRODUCTION

In February 2017, an “anti-gay purge” was unleashed by Chechnya.<sup>1</sup> At least 150 persons, targeted due to their homosexuality were arrested and subjected to sexual violence, torture and extrajudicial killing.<sup>2</sup> Victims’ were taken by police who noted “[y]ou were brought here because you are faggots. You bring shame ... you shouldn’t exist.”<sup>3</sup> The latter part of this quote demonstrates the purpose of this campaign; the regional erasure of homosexuals. The victims were held for weeks without access to their families and legal counsel.<sup>4</sup> Left without food and water, they were electrocuted and beaten.<sup>5</sup> Some survived, others succumbed to the fatal effects of torture or once released, honour killings by families.<sup>6</sup> The persecution of queer and trans persons is a trend of history. From Roman codes prescribing execution, to Nazi Germany’s extermination of homosexuals, queer and trans persons have been persecuted since the beginning of ancient civilisation through to present.<sup>7</sup> It is incontestable that persecutory harm has been done to the queer and trans community. However, what is subject to debate is if international criminal law provides accountability for this harm. This paper will consider this *problematique* and answer the question: can queer and trans persons be considered a “protected group” under art 7(1)(h) of the *Rome Statute*?

---

\* LLB (First Class Honours) / BSocSci, University of Waikato; Co-Founder, Adhikaar Aotearoa. The author would like to thank Senior Lecturer Dr Anna Marie Brennan for her indefatigable support, supervision and encouragement.

1 Katy Steinmetz “A Victim of the Anti-Gay Purge in Chechnya Speaks Out: ‘The Truth Exists’” (26 July 2019) Time Magazine <<https://time.com/5633588/anti-gay-purge-chechnya-victim/>>.

2 Philip Oltermann “German NGO files legal case against Chechen officials over anti-gay purges” (19 April 2021) The Guardian <[www.theguardian.com/world/2021/apr/18/german-ngo-files-legal-case-against-chechen-officials-over-anti-gay-purges](http://www.theguardian.com/world/2021/apr/18/german-ngo-files-legal-case-against-chechen-officials-over-anti-gay-purges)>.

3 Wolfgang Benedek *OSCE Rapporteur’s Report under the Moscow Mechanism on alleged Human Rights Violations and Impunity in the Chechen Republic of the Russian Federation* (OSCE, ODIHR.GAL/76/18/Corr.1, December 2018) at 8.

4 At 13.

5 At 8.

6 At 12.

7 Theodosian Code 9.8.3; Rüdiger Lautmann, Erhard Vismar and Jack Nusan Porter *Sexual Politics in the Third Reich: The Persecution of the Homosexuals During the Holocaust* (Spencer Press, Newton MA, 1991).

Persecution is defined by the *Rome Statute* as the intentional deprivation of human rights due to membership in a collectivity.<sup>8</sup> The substantive nature of this crime is beyond the purview of this paper; this paper will consider the definitional characteristics of art 7(1)(h). This article posits that persecution must occur “against any identifiable group or collectivity on [...] gender [...] or other grounds that are universally recognised as impermissible under international law.”<sup>9</sup> This paper works from the thesis that accountability can be afforded to queer and trans persons under the grounds of “gender” and “universally recognised as impermissible under international law.”<sup>10</sup> As such, a conception of international criminal law that promulgates equality can be realised. This is in the collective interest that humanity has in expanding the reach of international criminal law, under the enduring and universal threat that “politics will turn cancerous and the indispensable institutions of organised political life will destroy us.”<sup>11</sup>

This matter is topical and as such, many are exploring the ambit of art 7(1)(h).<sup>12</sup> This paper offers a contribution. The gender and international law grounds provides the option of accountability to queer and trans persons. Such an argument is not new. However, the gender ground has been strengthened by recent jurisprudence that synergises sexuality and gender expression.<sup>13</sup> Furthermore, recent developments in international affairs operationalise to necessitate a contemporary assessment of the protection international law provides to queer and trans persons.<sup>14</sup> This paper intends to draw upon this new knowledge to propel this argument.

## II. STORIES OF HARM – PERSECUTION OF QUEER AND TRANS FOLX

### A. Introduction

International criminal law is concerned with punishing those who perpetrate the most heinous of crimes. It aims to protect the “peace, security and the well-being the world ...” and historically, has provided redress to those victims who have endured the worst of humanity.<sup>15</sup> In spite of these principles, international criminal law has allowed persecution against queer and trans persons to go unaddressed. This state of affairs materialises notwithstanding the numerous calls for redress from victims. This chapter notes that an expansive interpretation of art 7(1)(h) of the *Rome Statute* is necessary in light of the regulatory gap that allows impunity for perpetrators of persecution against queer and trans persons. This chapter will provide the contextual framework of queer and trans

8 *Rome Statute of the International Criminal Court* 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), art 7(2)(g). Also see Leila Nadya Sadat “Crimes Against Humanity in the Modern Age” (2013) 107 *American Journal of International Law* 334 at 352.

9 *Rome Statute of the International Criminal Court*, above n 8, art 7(1)(h).

10 Now referred to as the “gender” and “international law” grounds.

11 David Luban “A Theory of Crimes Against Humanity” (2004) 29 *Yale J Int Law* 85 at 91.

12 Valerie Oosterveld “Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court” (2014) 16 *International Feminist Journal of Politics* 563.

13 *Bostock v Clayton County* 590 US \_\_\_ (2020).

14 Samar Habib “Arab regimes’ sympathy over the Orlando massacre may seem hypocritical. But it’s a start.” (17 June 2016) *The Washington Post* <[www.washingtonpost.com/news/monkey-cage/wp/2016/06/17/arab-regimes-sympathy-over-the-orlando-massacre-may-seem-hypocritical-but-its-a-start/](http://www.washingtonpost.com/news/monkey-cage/wp/2016/06/17/arab-regimes-sympathy-over-the-orlando-massacre-may-seem-hypocritical-but-its-a-start/)>.

15 *Rome Statute of the International Criminal Court*, above n 8, preamble. Also see Gerhard Werle and Florian Jeßberger *Principles of International Criminal Law* (4th ed, Oxford University Press, Oxford, 2020) at 45.

persecution and a theoretical anchor on persecution; it contains purely contextual analysis that will support later legal analysis. As Desmond Tutu notes, “[e]xamining the painful past, acknowledging it and understanding it, and above all transcending it together, is the best way to guarantee that it does not-and cannot-happen again.”<sup>16</sup> One cannot transcend the harm of persecution until redress is achieved; international criminal law can provide this.

### B. *Persecution: A Brief Legal Framework*

Persecution was first identified as an international crime after the Armenian Genocide of 1915.<sup>17</sup> It belongs to the “crimes against humanity” subset of international crimes in that it damages the innate humanity of individuals. Crimes against humanity inarguably form part of customary international law.<sup>18</sup> As the International Criminal Tribunal for the Former Yugoslavia noted, it is the “concept of humanity as victim, which essentially characterizes crimes against humanity [...] because of their heinousness and magnitude they constitute an egregious attack on human dignity, on [...] humaneness ...”<sup>19</sup> Persecution was only codified in the wake of World War II.<sup>20</sup> The International Military Tribunal noted persecution was “a record of consistent and systematic inhumanity on the greatest scale ...”<sup>21</sup> However, it was not until the crimes of the former Yugoslavia that the substantive elements of persecution were enumerated.<sup>22</sup> The actus reus of the crime “consists of an underlying act which discriminates in fact and must deny a fundamental human right ...”<sup>23</sup> The mens rea of persecution is discrimination on the basis of prohibited grounds.<sup>24</sup> An act is discriminatory “when a victim is targeted because of the victim’s membership in a group defined by the perpetrator on specific grounds ...”<sup>25</sup> It is important to note that an act is also discriminatory if it discriminates against those that the perpetrator *perceives* as carrying the identity it wants to target.<sup>26</sup>

The *Rome Statute* notes that persecution is “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity...”<sup>27</sup> However, the Statute is reductive in applicability as it notes the particular groups within its ambit.<sup>28</sup> As scholar Andrew Hagopian provides, persecution within the *Rome Statute* intends to redress “the

---

16 David Bloomfield, Teresa Barnes and Luc Huyse *Reconciliation After Violent Conflict: A Handbook* (International Institute for Democracy and Electoral Assistance, Stockholm, 2003) at foreword.

17 Fausto Pocar “Persecution as a Crime Under International Criminal Law” (2008) 2 Natl Secur Law J 355 at 356.

18 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal [1950] vol 2 YILC 190 at [40].

19 *Prosecutor v Erdemović (Judgement)* ICTY Appeals Chamber IT-96-22-A (7 October 1997) at [21].

20 Caroline Fournet and Clotilde Pegorier “Only One Step Away from Genocide: The Crime of Persecution in International Criminal Law” (2010) 10 Int Crim Law Rev 713 at 713.

21 Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part XXII (22 August 1946 to 31 August 1946, 30 September 1946 and 1 October 1946) at [436].

22 Ken Roberts “Striving for Definition: The Law of Persecution from its Origins to the ICTY” in Hiram Abtahi and Gideon Boas (eds) *The Dynamics of International Criminal Justice* (BRILL Publishers, Leiden, 2005).

23 Pocar “Persecution as a Crime Under International Criminal Law,” above n 17, at 358.

24 *Prosecutor v Krnojelac (Judgement)* ICTY Appeals Chamber ICTY-95-25-A, 17 September 2003 at [185].

25 *Prosecutor v Kaing Guek Eav alias Duch (Judgement)* ECCC Trial Chamber 001/18-07-2007/ECCC/TC (26 July 2010) at [377].

26 *Prosecutor v Naletilic and Martinovic (Judgement)* ICTY Trial Chamber IT-98-34 (31 March 2003) at [636].

27 *Rome Statute of the International Criminal Court*, above n 8.

28 See Introduction.

specific harm that is caused when individuals are targeted for the simple fact of their membership within a group.”<sup>29</sup>

*1. Historical persecution and impunity: queer and trans persons under the Nazi Regime*

The Nazi regime represented a modern iteration of persecution against queer and trans persons.<sup>30</sup> In 1935, the regime decreed the “compulsory sterilisation [...] of homosexuals along with [...] other ‘degenerates.’”<sup>31</sup> Utilising Paragraph 175 of the German Criminal Code, which criminalised consensual male same-sex relations, the Nazi’s ramped up their persecution and sentencing of gay men.<sup>32</sup> In 1942, the Nazi’s instituted the death penalty.<sup>33</sup> Between 1933 and 1945, at least 100,000 gay men were arrested. Many of these men spent time in regular prisons, however, an estimated 5,000-15,000 men were incarcerated in concentration camps.<sup>34</sup> The death rate for gay men in such camps was as high as 60 per cent.<sup>35</sup> The persecution that gay men faced was particularly brutal. In one case, five homosexual prisoners at Sachsenhausen Concentration Camp were rounded up and immobilised by guards. The guards proceeded to put water hoses down the victims’ throats and turned the tap on full; the victims drowned.<sup>36</sup> They were then turned upside down and had their throats slit to drain the water.

Instead of redress for the victims, there was an effacement of their suffering. The Nuremberg Tribunal did not charge Nazi generals for their crimes against homosexuals; “[t]his omission, in effect, silently legitimized these crimes.”<sup>37</sup> The lack of justice “served to continue victims’ silence and humiliation”.<sup>38</sup> The harm committed against and queer and trans community was left unaddressed; justice can never be achieved when victims are window-picked for redress. It was only in 2006, 61 years after the end of the Nazi regime, that the European Parliament acknowledged the atrocities committed towards the homosexual community.<sup>39</sup> When impunity reigns, deterrence is not realised and persecution is more likely to be repeated. The Nuremberg omission tacitly sent a message: queer and trans persons did not possess humanity worth providing accountability for. In

---

29 Andrew Sumner Hagopian “Persecution and Protection of Sexual and Gender Minorities under Article 7(1)(h) of the Rome Statute” (2016) 3 SOAS LJ 55 at 56.

30 The author notes that although the main reference of Nazi persecution is to “gay men,” lesbians, transgender persons and gender-nonconforming folx were also subject to persecution. This paper recognises that gay men were the predominant victims, however it does not intend to reproduce the erasure that the gay community was initially inflicted with; see Clayton Whisnant *Queer Identities and Politics in Germany: A History, 1880–1945* (Harrington Park Press, New York, 2016).

31 Heinz Heger *The Men with the Pink Triangle: The True Life-and-Death Story of Homosexuals in the Nazi Death Camps* (Alyson Books, New York City, 1994) at 12.

32 German Criminal Code §175 StGB.

33 Alycia T Feindel “Reconciling Sexual Orientation: Creating a Definition of Genocide that Includes Sexual Orientation” (2005) 13 Mich State J Int Law 197.

34 Erwin J Haeberle “Swastika, Pink Triangle and Yellow Star – The Destruction of Sexology and the Persecution of Homosexuals in Nazi Germany” (1981) 17 J Sex Res 270.

35 Lautmann, Vismar and Porter *Sexual Politics in the Third Reich: The Persecution of the Homosexuals During the Holocaust*, above n 7.

36 Geoffrey J Giles *Why Bother About Homosexuals? Homophobia and Sexual Politics in Nazi Germany* (United States Holocaust Memorial Museum, Washington D.C., 2001) at 3.

37 At 198.

38 At 198.

39 *European Parliament resolution on homophobia in Europe* P6 TA(2006)0018 at [14].

a world hostile towards the will of queer and trans persons to live authentically, letting perpetrators of persecution have impunity adds the last touch to their work. Therein lies the necessity of an expansive interpretation of art 7(1)(h); ensuring those most vulnerable have recourse to justice.

## 2. *Contemporary persecution and a missed opportunity: queer and trans persons under the ISIS Regime*

Armed with digital savviness and influenced by an anachronistic interpretation of religion, ISIS, a terrorist group based in Syria, had a special hatred of queer and trans persons. The group situates itself in opposition to “America and Western Europe,” which they characterise by “bestiality, transgenderism, sodomy, pornography, feminism, and other evils.”<sup>40</sup> According to the group, “sodomites” represent sexual perversion and are consequently worthy of death.<sup>41</sup>

ISIS’ persecution of queer and trans persons is founded in their conflation of gender expression with sexuality; “LGBT persons or those perceived as such [...] those [...] perceived as stepping outside of traditional gender roles were targeted ...”<sup>42</sup> For example, wearing skinny jeans or tight clothing, attires attributed with homosexuality was criminalised.<sup>43</sup> Furthermore, the group forbid men shaving their beards because “no one does this except men who are effeminate.”<sup>44</sup> In any case, real or perceived homosexuality for females and males was punished via execution.<sup>45</sup> On 19 April 2016, the group threw a blindfolded victim off a building due to alleged homosexuality.<sup>46</sup> One month later, ISIS arrested, raped and executed three under-16-year-olds by immolation, on “charges” of homosexuality.<sup>47</sup> Later, the group put four men into a “rectangular hole [...] and tied [them] to each other with metal chains. They then put benzene on them and burned them.”<sup>48</sup>

There is no lacuna of evidence to disprove ISIS’ persecution of queer and trans persons. In spite of this, there has been no redress. Furthermore, while the Prosecutor of the ICC, Fatou Bensouda noted that “[t]he atrocities allegedly committed by ISIS undoubtedly constitute serious crimes of concern to the international community ...” the Court has been inert, reproducing the same erasure

---

40 “The Fitrah of Mankind and the Near-Extinction of the Western Woman” *Dabiq* 15 (ISIS-occupied Syria) at 20.

41 At 20.

42 *Violence and Discrimination based on Sexual Orientation and Gender Identity in Iraq: A submission to the United Nations Human Rights Council for the Universal Periodic Review of IRAQ, Thirty-fourth Session of the UPR Working Group of the Human Rights Council* (IraQueer, MADRE and OutRight Action International, March 2019) at [17].

43 Morgan Winsor “ISIS Bans Skinny Jeans: Islamic State Arrests Men Caught Wearing Tight Pants in Raqqa” (4 March 2015) *International Business Times* <[www.ibtimes.com/isis-bans-skinny-jeans-islamic-state-arrests-men-caught-wearing-tight-pants-raqqa-1869358](http://www.ibtimes.com/isis-bans-skinny-jeans-islamic-state-arrests-men-caught-wearing-tight-pants-raqqa-1869358)>.

44 Johnlee Varghese “Isis Bans Men from Shaving, Says Those Without Beard are Effeminate” (30 April 2015) *International Business Times* <[www.ibtimes.co.in/iraq-isis-bans-men-shaving-beard-mosul-says-those-who-do-so-are-effeminate-630922](http://www.ibtimes.co.in/iraq-isis-bans-men-shaving-beard-mosul-says-those-who-do-so-are-effeminate-630922)>.

45 Michael Lavers “Report: Islamic State Executes Teenager for ‘Homosexuality’” (3 January 2016) *Washington Blade* <[www.washingtonblade.com/2016/01/03/report-islamic-state-executes-teenager-for-homosexuality/](http://www.washingtonblade.com/2016/01/03/report-islamic-state-executes-teenager-for-homosexuality/)>.

46 “Timeline of Publicized Executions for Alleged Sodomy by the Islamic State Militias” (June 30 2016) OutRight International <<https://outrightinternational.org/content/timeline-publicized-executions-alleged-sodomy-islamic-state-militias>>.

47 *Communication to the ICC Prosecutor Pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of: Gender-Based Persecution and Torture as Crimes Against Humanity and War Crimes Committed by the Islamic State of Iraq and the Levant (ISIL) in Iraq* (CUNY School of Law, MADRE and OWFI, 2017) at 29.

48 At 30.

of suffering that Nuremberg did.<sup>49</sup> This paper appreciates the challenges to prosecuting ISIS, namely issues of collective responsibility, however, “[t]he complete lack of criminal accountability sends a clear message to ISIS forces that there will be no repercussions for the widespread, directed, and documented commission of barbarous acts...”<sup>50</sup> The non-prosecution of ISIS members is a missed opportunity to expand the ambit of the *Rome Statute*. The inaction of the ICC calls into question the effectiveness of the institution as an enterprise of international justice.

### 3. *Ongoing persecution and a chance for redress: queer and trans persons under the Chechnyan regime*

Chechnya has been highlighted for their vicious persecution of queer and trans persons. Since the 15th century, the region has been irredentist. Masculinity exhibited through brute force has been instrumental in securing the region; to not be masculine is to not be Chechen. As such, hypermasculinity is the prescribed form of patriotism.<sup>51</sup> As the Chechen head of police notes, “[a]s a people, we don’t like softness [...] it is a really terrible disgrace.”<sup>52</sup> The official posits that to be gay is to be “soft” and this is opposition to the hypermasculinity that is prescribed.

The persecution of queer and trans persons in Chechnya has been state practice since 2017. In February of that year, reports came out of the region noting “persecution, unlawful arrests, torture, sexual violence and incitement to murder ...” had been perpetrated against at least 150 queer and trans folk.<sup>53</sup> The police tortured victims via electric shocks and beatings. Some survived while other succumbed to their injuries. Those who did survive were taken to their families, some of whom, committed “honour killings” at the behest of the state; a 17-year-old gay teenager was fatally thrown by his uncle from a ninth-story window to “salvage the family’s honour.”<sup>54</sup> In the words of one witness, the message of the police was clear: “[e]ither you kill your kid or we will do it for you.”<sup>55</sup> The centrality of media focus on gay men is due to the fact that “they had the ability and freedom to leave the country that the women are not afforded”.<sup>56</sup> There are many reports that state forces raped and killed lesbians in the country, however, “the main punishment seems to have been” male family members raping the victims in the hope that they would become heterosexual.<sup>57</sup> Such persecution is ongoing and extraterritorial. In April of 2021, Chechnyan agents kidnapped two gay men who escaped to a safehouse in central Russia. In a concerning twist, Chechnya has

49 Office of the Prosecutor of the International Criminal Court *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS* (Statement, 8 April 2015).

50 *Communication to the ICC Prosecutor Pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of: Gender-Based Persecution and Torture as Crimes Against Humanity and War Crimes Committed by the Islamic State of Iraq and the Levant (ISIL) in Iraq*, above n 47, at 3.

51 Dominic Scicchitano “The “Real” Chechen Man: Conceptions of Religion, Nature, and Gender and the Persecution of Sexual Minorities in Postwar Chechnya” (2019) 68 J Homosex 1545.

52 James Longman “Nightline: Am I Next? Gay and Targeted in Chechnya” ABC News (24 October 2019).

53 Oltermann “German NGO files legal case against Chechen officials over anti-gay purges,” above n 2.

54 “Chechnya accused of ‘gay genocide’ in ICC complaint” (16 May 2017) BBC <[www.bbc.com/news/world-europe-39937107](http://www.bbc.com/news/world-europe-39937107)>.

55 Benedek *OSCE Rapporteur’s Report under the Moscow Mechanism on alleged Human Rights Violations and Impunity in the Chechen Republic of the Russian Federation*, above n 3, at 14.

56 Masha Gessen “The Year Russian L.G.B.T Persecution Defied Belief” (29 December 2017) *The New Yorker* <[www.newyorker.com/culture/2017-in-review/the-year-russian-lgbt-persecution-defied-belief](http://www.newyorker.com/culture/2017-in-review/the-year-russian-lgbt-persecution-defied-belief)>.

57 Benedek *OSCE Rapporteur’s Report under the Moscow Mechanism on alleged Human Rights Violations and Impunity in the Chechen Republic of the Russian Federation*, above n 3, at 14.

granted the two men “state protection,” rather ironically considering the threat comes from the state.<sup>58</sup>

In 2017, the ICC received communications from NGOs asking the Court try state leaders for their role in the persecution.<sup>59</sup> There has been no action, however the opportunity for redress still exists; negating impunity is imperative. Considering the ongoing nature of such persecution, only more evidence will be yielded. All that is required for action to be taken, is for the prosecutor to uptake a case based upon the legal assessments that will be provided in subsequent chapters.

### C. Conclusion

Judge Posner of the US District Court for the District of Massachusetts held “persecution of LGBTI people constitutes a crime against humanity...”<sup>60</sup> The temerity of the Court in pronouncing this is not reflected in the international arena. The failure to allow accountability for queer and trans persons under art 7(1)(h) provides “disparate protection to victims of massive human rights violations on arbitrary grounds.”<sup>61</sup> If international criminal law wants to provide a “free pass merely because the group [persecuted] consists of gays [...] rather than Jews or Tutsis...” then that calls into question whether or not the world should be looking to the ICC as an avenue of international justice.<sup>62</sup>

## III. ACCOUNTABILITY FOR QUEER AND TRANS FOLX UNDER “GENDER”

### A. Introduction

Article 7(1)(h) of the *Rome Statute* provides that “gender” is an “identifiable group or collectivity” that international criminal law enables accountability for.<sup>63</sup> This chapter proposes gender, as defined by art 7(3) of the *Rome Statute*, can encompass gender and sexual minorities.<sup>64</sup> In doing so, it argues that queer and trans persons, currently afflicted by a lack of accountability mechanisms, will be afforded one. The chapter relies upon the notion that art 7(3) is a result of “constructive ambiguity” and as such, alternative meanings can be posited and accepted by the ICC. Furthermore, the chapter uses knowledge from gender studies to make the argument that to persecute on the basis of queerness or being transgender, one must first persecute on the basis of gender. The result of such an argument is gender and sexual minorities being subsumed under art 7(1)(h) and afforded accountability.

---

58 “Chechnya Grants State Protection to ‘Kidnapped’ Gay Men – Reports” (29 April 2021) The Moscow Times <[www.themoscowtimes.com/2021/04/29/chechnya-grants-state-protection-to-kidnapped-gay-men-reports-a73779](http://www.themoscowtimes.com/2021/04/29/chechnya-grants-state-protection-to-kidnapped-gay-men-reports-a73779)>.

59 “Chechnya accused of ‘gay genocide’ in ICC complaint,” above n 54.

60 *Sexual Minorities Uganda (SMUG) v Lively* 960 F 2d 304 (D Mass 2013).

61 Beth Van Schaack “The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot” (1997) 106 Yale LJ 2259 at 2268.

62 Luban “A Theory of Crimes Against Humanity,” above n 11, at 106.

63 *Rome Statute of the International Criminal Court*, above n 8, art 7(1)(h).

64 *Rome Statute of the International Criminal Court*, above n 8, art 7(3): “[f]or the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.”

### B. Accountability for Queer and Trans Folx Under “Gender:” The Argument

The argument that “gender” includes sexual and gender minorities is not without debate. One scholar notes that “[d]ebates in Rome resulted in [the adoption of] a limit[ed] definition.”<sup>65</sup> Another scholar notes this definition means “homosexual provisions are excluded.”<sup>66</sup> In the opposite, another notes that the definition does not “implicitly preclude “gender” from encompassing sexual orientation” a nod to the *ejusdem generis* nature of art 7(1)(h).<sup>67</sup> The scholarly disagreement regarding the meaning of “gender” is in line with the negotiating strategy adopted by states during the drafting of the *Rome Statute* that scholar Valerie Oosterveld terms “constructive ambiguity.”<sup>68</sup> Such a tactic refers to the use of “compromise[d] language [which is] crafted to appease two irreconcilable points of view, both sides may assert that the definition as adopted reflects their understanding of the term.”<sup>69</sup> As is the case with any international agreement, drafting is a process of appeasing both liberal and conservative states. The drafting of the *Rome Statute* was no different with “indefinite language used to resolve disparate points of view.”<sup>70</sup> The Vatican, several Arab states and conservative NGOs attempted to remove “gender” totally during drafting.<sup>71</sup> The concern here was that the term “gender” would be used to encompass sexual orientation and that the term “evoked thoughts of gender roles and each genders’ place in society.”<sup>72</sup> These were considerations that conservatives wished to exclude from the *Rome Statute*.<sup>73</sup> In the end, art 7(3)’s reference to “the two sexes, male and female” was a compromise intended to placate conservative states while the reference to gender “within the context of society” was a concession to feminist groups who wanted “gender” to include sociological considerations.<sup>74</sup> The result of this ambiguity is that “the issue remains under the purview of the Court” and as such, the Court has the power to subscribe to the reasoning proposed below.<sup>75</sup>

- 
- 65 Stephanie Farior “The Rights of Women in International Human Rights Law Textbooks: Segregation, Integration, or Omission?” (2003) 12 CJGL 587 at 589.
- 66 Rana Lehr-Lehnardt “One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court” (2002) 16 BYU J Pub L 317 at 340 and 351.
- 67 Valerie Oosterveld “The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?” (2005) 18 Harv Hum Rights J 55 at 77.
- 68 Oosterveld “Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court,” above n 12.
- 69 Leila Nayda Sadat *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Martinus Nijhoff Publishers, Leiden, 2002) at 160.
- 70 Oosterveld “Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court,” above n 12, at 563.
- 71 Joydeep Sengupta “How the UN Can Advance Gay Rights” (2002) Nov–Dec Gay & Lesbian Rev at 32.
- 72 Charles Barrera Moore “Embracing Ambiguity and Adopting Propriety: Using Comparative Law to Explore Avenues for Protecting the LGBT Population under Article 7 of the Rome Statute of the International Criminal Court” (2017) 101 Minn L Rev 1987 at 1290-1291.
- 73 Rhonda Copelon “Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law” (2000) 46 McGill Law J 217 at 236.
- 74 Brian Kritz “The Global Transgender Population and the International Criminal Court” (2014) 17 Yale HR & Dev LJ 1 at 36.
- 75 Hagopian “Persecution and Protection of Sexual and Gender Minorities under Article 7(1)(h) of the Rome Statute,” above n 29, at fn 26.

Gender as defined by art 7(3) of the *Rome Statute* is described as “stunningly narrow,”<sup>76</sup> while others have argued that it erroneously “elides the notions of ‘gender’ and ‘sex.’”<sup>77</sup> There is no agreed-upon meaning. This presents an opportunity to provide an alternative explanation. The proposition of this chapter is simple: that gender, as per art 7(3) can be conflated with being queer and/or trans. In essence, being persecuted against based upon being queer and/or transgender, is to be persecuted against based upon transgressing normative gender expectations. Therefore, a persecutor inadvertently persecutes on the basis of gender and thus, the ambit of the *Rome Statute* is extended.

It is contended that the alternative meaning opined above is given credence by its elucidation in the case of *Bostock v Clayton County* decided by the United States Supreme Court.<sup>78</sup> Justice Neil Gorsuch, regarding whether federal anti-discrimination laws apply to transgender and homosexual persons, utilises such reasoning; “[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.”<sup>79</sup> Such a rationale speaks to the link that homosexuality or being transgender has with ascribed gender roles and modalities of gender expression. To persecute against someone based upon them being homosexual and/or transgender, first, one must make an assessment of their victim’s gender expression and role. If they are transgressing such expression and their gender role, by for example, wearing tight clothes or speaking effeminately, characteristics commonly stereotyped to queerness or being transgender, they would be considered homosexual and/or transgender (even if they are not) and subjected to persecution. To elucidate further, one must interrogate gender roles. For example, “in most if not all societies, the role of women is primarily based on their ascribed functions as wives and mothers.”<sup>80</sup> Women who diverge from this ascribed role often face prejudice; this is gender-based discrimination. The same rationale is applied to queer and trans folk. The key consideration around whether one is queer and/or transgender comes from if the person commits a “gender role violation,” in essence, acting beyond what is expected of their gender identity. The result of this is categorisation, either correct or not, as a homosexual or transgender individual; “[w]hen people violate certain social role norms, they risk [...] categorization into a stigmatized group.”<sup>81</sup> For clarity, it is submitted by this paper that when one commits a “gender role violation,” they then are identified as queer and/or transgender and subjected to persecution. Anthropologist Geoffrey Gorer notes “[a]ny interest or pursuit which is identified as [...] feminine [...] becomes deeply suspect for a man.”<sup>82</sup> In Nazi Germany, in ISIS-occupied territory and in Chechnya, such a pursuit, was and is not just suspect, but causative of persecution. Gender must be considered when one persecutes queer and/or transgender persons. As this argument was promulgated by the United States Supreme Court it needs to be considered by the ICC with the highest deference. This is especially so considering the “infant nature of the

---

76 Brenda Cossman “Gender Performance, Sexual Subjects and International Law” (2002) 15 Can JL & Jur 281 at 283.

77 Hilary Charlesworth “Feminist Methods in International Law” (1999) 93 Am J Int Law 379 at 394.

78 *Bostock v Clayton County*, above n 13.

79 At 2.

80 Barbara Bedont “Gender-Specific Provisions in the Statute of the International Criminal Court” in Favlia Lattanzi and William Schabas (eds) *Essays on the Rome Statute* (il Sirente, Ripa di Fagnano Alto, 1999) 183 at 187–188.

81 Jennifer K Bosson, Jenel N Taylor and Jennifer L Prewitt-Freilino “Gender Role Violations and Identity Misclassification: The Roles of Audience and Actor Variables” (2006) 55 Sex Roles 13 at 13.

82 Geoffrey Gorer *The American People: A Study in National Character* (Norton, New York, 1948) at 129.

ICC” necessitating it to “look to human rights courts that have encountered cases involving ... the LGBT community.”<sup>83</sup>

The applicability of such reasoning lies in its application to circumstances of persecution against queer and trans persons. As noted in chapter one, ISIS’s persecution of queer and trans folx was based upon their eddying of gender expression with sexuality and gender identity. For example, those who wore skinny jeans, adorned western haircuts and who did not or could not grow their beards, were considered to be homosexual and persecuted. Cardinal in ISIS’s persecution of queer and trans persons were rigid standards of prescribed gender expression and expectations. It is the transgression of such standards that triggered the group’s persecution of a queer or transgender individual.<sup>84</sup> This reasoning is also applicable to Chechnya’s ongoing persecution of homosexuals. As one victim of persecution in the region notes, “[t]hey have to be warriors, straight, sportsmen. Being gay is just not acceptable for them.”<sup>85</sup> Implicit in Chechnya’s persecution of homosexuals is the transgression of masculinity as defined by warriorship and heterosexuality. Derogation from this masculinity speaks to possible homosexual tendencies in the mind of persecutors; persecution of queer and trans persons, is persecution on the basis of gender.

### C. Realising the Argument: Ameliorating Challenges and Recognising Strengths

While “gender” can provide accountability for queer and trans persons, such an assessment would be incomplete without ameliorating the challenges to this assertion and recognising its strengths. First, the drafting history of the *Rome Statute* will be assessed. Article 32 of the *Vienna Convention on the Law of Treaties* notes that if interpretation renders the meaning of a passage ambiguous then the drafting history can be used as a supplementary means of interpretation.<sup>86</sup> The drafting history of art 7(3) is indicative of the strategy of “constructive ambiguity” noted above. Some states argued that the *Rome Statute* should have adopted the United Nations (UN) definition of gender.<sup>87</sup> This definition has three characteristics: 1) gender is socially constructed; 2) it is influenced by culture and gender roles; and 3) gender varies temporally and geographically.<sup>88</sup> However, conservative states opposed such a move as “they feared it could be interpreted to mean that laws outlawing homosexuality would be criminal.”<sup>89</sup> Beyond this consternation, conservative states had reservations regarding the definition that was agreed upon. The Azerbaijan delegate was concerned about “the use of the word “gender”” and asked if it “impl[ied] that a conviction

83 Moore “Embracing Ambiguity and Adopting Propriety: Using Comparative Law to Explore Avenues for Protecting the LGBT Population under Article 7 of the Rome Statute of the International Criminal Court,” above n 72, at 1290–1291.

84 *Violence and Discrimination based on Sexual Orientation and Gender Identity in Iraq: A submission to the United Nations Human Rights Council for the Universal Periodic Review of IRAQ, Thirty-fourth Session of the UPR Working Group of the Human Rights Council*, above n 42, at [17].

85 “Chechnya gay rights: Putin backs inquiry into hate crimes” (5 May 2017) BBC <[www.bbc.com/news/world-europe-39823237](http://www.bbc.com/news/world-europe-39823237)>.

86 *Vienna Convention on the Law of Treaties* 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 32.

87 Sadat *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, above n 69.

88 Oosterveld, “The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?,” above n 67, at 67–70.

89 Sadat *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, above n 69, at 160.

by a national court for homosexual acts might be regarded as persecution and thus fall within the jurisdiction of the Court as a crime against humanity?”<sup>90</sup> In the view of Qatar’s delegate, “gender” referred to “both males and females” and excluded any abstraction of queer and trans persons.<sup>91</sup> These conservative states were apprehensive towards the use of “gender,” however, the reference to the “two sexes” placated them. The drafting history of the *Rome Statute* offers no challenge to the assertion that “gender” can encompass sexual and gender minorities. In fact, it supports the notion that “constructive ambiguity” was the result. As such, alternative meanings can be founded and ICC judges can determine the quagmire at a later stage; “the drafting history does not offer any findings”.<sup>92</sup>

International legal positivists assert that as the *Rome Statute* does not explicitly note queer and trans persons within art 7(1)(h), that they are to be excluded from its reach.<sup>93</sup> Such an assertion is incorrect. There is precedent for non-enumerated categories to be brought into the purview of criminal tribunals. The Trial Chamber of the International Criminal Tribunal for Rwanda noted that rape and sexual violence constituted genocide, despite these two concepts not being enumerated in the relevant instrument.<sup>94</sup> What the Chamber noted was necessary, was a nexus between the harm and the specific intent, a key characteristic of the crime of genocide. This rationale can be applied here. Take the circumstance of persecution of homosexuals in Chechnya. The harm against them, inclusive of torture and summary execution, has a direct nexus with the key characteristic of the crime of persecution, the denial of fundamental human rights due to membership within a group. The nexus between the two is evident and as such, the same rationale applied in *Akayesu* can be applied here.

To provide credence to the “gender” argument, one must look to how the Office of the Prosecutor considers sexual orientation in the Office’s *Paper on Sexual and Gender-Based Crimes*. First of all, it is important to note that the Office views gender in the same way that the argument proposes; inclusive of sociological considerations. They note gender as per art 7(3) “acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men”.<sup>95</sup> This holistic view of gender enables the transgression of gender roles, in lieu of sexuality, to be considered. The Office provides further deference to this argument when noting that “gender-based crimes are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles.”<sup>96</sup> Evident in this statement is that gender-based crimes, which are included in the ambit of art 7(3), can be used as guise

---

90 *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Summary records of the plenary meetings and of the meetings of the Committee of the Whole* A/CONF.183/13 (15 June –17 July 1998) at [61].

91 At [84].

92 Valérie V Suhr “Rainbow Jurisdiction of the International Criminal Court? Gender-based Persecution of Gays, Bisexuals and Lesbians as a Crime Against Humanity” (12 March 2018) *Völkerrechtsblog* <<https://voelkerrechtsblog.org/de/rainbow-jurisdiction-of-the-international-criminal-court/>>.

93 *Sexual Orientation, Gender Identity and International Human Rights Law* (International Commission of Jurists, Practitioners Guide No. 4, 2009) at 29.

94 *Prosecutor v Jean-Paul Akayesu (Judgement)* ICTR Trial Chamber I ICTR-96-4-T (2 September 1998) at [731].

95 The Office of the Prosecutor of the International Criminal Court *Paper on Sexual and Gender-Based Crimes* (International Criminal Court, June 2014) at 3.

96 At 3.

when prosecuting those who persecute on the basis of “socially constructed gender roles.”<sup>97</sup> By considering gender beyond the binary of male and female, the Office of the Prosecutor opens up the possibility to prosecute the likes of Chechnya where the main impediment is considered to be a lack of jurisdiction. The Office also posits that the Prosecutor must understand “the intersection of factors such as gender ... sexual orientation, and other status or identities which may give rise to multiple forms of discrimination and social inequalities”.<sup>98</sup> The Office’s support of gender as including sociological considerations gives credence to the argument. While the *Paper on Sexual and Gender-Based Crimes* only guides the Prosecutor, it does show the understanding of the Office regarding gender and this is of scholarly use.<sup>99</sup>

A substantial barrier to the gender argument is the *nullum crimen sine lege* principle as prescribed by art 22. Saliently for the purposes of this paper, it prohibits unwritten criminal provisions by extension by analogy. It may be considered that gender encompassing queerness and being transgender is extension by analogy and therefore, would be prohibited. This paper does not argue for persecution to be prosecuted on the basis of queerness or being transgender; these are groups not within the ambit of the *Rome Statute* and the Prosecutor would be acting *ultra vires* if these were the grounds of prosecution. Article 22 would prevent this also. What this paper argues is that persecution against sexual and gender minorities involves the transgressing of normative gender roles. As such, prosecution would occur on the basis of gender and therefore, analogy is not required; “[t]he prohibition of analogy poses no problem where crimes committed based on sexual orientation will be prosecuted as gender-based persecution.”<sup>100</sup>

It is important to tease out the significance of this argument to those who are of lesser-known sexual and gender minorities such as non-binary, agender or intersex persons. Scholars note that as art 7(3) explicitly refers to “the two sexes” that only those sexual and gender minorities that identify within the binary are afforded a mechanism of accountability. Under such a conception, homosexuals, lesbians and transgender persons are afforded such a mechanism, however who “do not have a gender identity or refuse to be classified as male or female” are not.<sup>101</sup> This paper disagrees with this assertion. First and foremost, if a strategy for queer and trans persons is to be conceptualised, scholars must endeavour to be as inclusive as possible. The same academic exercise of attempting to expand accountability for queer and trans persons from art 7(1)(h) should not have to occur again for lesser-known identities. It is contended that considering the lack of understanding that such lesser-known identities possess in society, “[t]o be transgender or gender non-binary is to be ‘gay’.”<sup>102</sup> Obviously, counsel must ascertain from the persecutor, the target group of persecution, however, the eddying of non-binary identities with queerness presents an opportunity to such groups to fall within the ambit of the *Rome Statute*. For the purposes of

---

97 At 3.

98 At [27].

99 Valerie Oosterveld “The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law” (2018) 24 *Wm & Mary J Women & L* 443 at 446.

100 Suhr “Rainbow Jurisdiction of the International Criminal Court? Gender-based Persecution of Gays, Bisexuals and Lesbians as a Crime Against Humanity,” above n 92.

101 Kritz “The Global Transgender Population and the International Criminal Court,” above n 72, at 36.

102 Chloe Schwenke “A Transgender Perspective on Human Rights: The Case of the World Bank and the United States Agency for International Development” in J Michael Ryan (Ed) *Trans Lives in a Globalizing World: Rights, Identities, and Politics* (Routledge, Abingdon-on-Thames, 2020) 128 at 133.

international criminal law, it is the perpetrator who defines their victim's status as a member of a certain collectivity. As the ICC noted in the *Kenya Situation*, attacks on ethnic groups based on their "assumed political allegiance ... does not diminish the fact that the identification of the targeted population was essentially on political grounds."<sup>103</sup> As such, it is contended that, based upon the proviso that a persecutor has defined a non-binary person as gay, lesbian or transgender, that an accountability mechanism can be afforded to them. Such an argument is qualified; however, it works to fill the lacuna that currently exists.

#### D. Conclusion

As one scholar notes, "[w]ithout action from the Office of the Prosecutor... it is unlikely that any case will be brought in front of the ICC seeking to prosecute persecutors of the LGBT community ..."<sup>104</sup> This represents an affront to the suffering of queer and trans persons. However, action from the Office of the Prosecutor will enable victims to achieve a sense of justice. As outlined above, it is well within the powers of the Prosecutor to conflate gender with queerness and being transgender, and expand the ambit of art 7(1)(h). It is important to note that this is only a stepping stone; a remedial measure to ameliorate impunity. Using gender as a guise to provide justice to queer and trans folx is an insult to their true identities and reproduces the erasure they have already been subjected to. Furthermore, conflating gender expression and sexual identity does nothing to assist those who wish to express their gender in non-normative ways but who still identify as heterosexual. This solution is a band-aid; longer lasting reform that appreciates the true identities of victims is needed.

### IV. ACCOUNTABILITY FOR QUEER AND TRANS FOLX UNDER "INTERNATIONAL LAW"

#### A. Introduction

Article 7(1)(h) of the *Rome Statute* notes that an "identifiable group or collectivity" is "other grounds that are universally recognized as impermissible under international law."<sup>105</sup> Essentially, this enables other non-listed collectivities to fall within the ambit of the *Rome Statute* – if the collectivity falls within the protectory ambit of international law. This chapter proposes that queer and trans persons are a collectivity that international law, has afforded protection. As such, this collectivity will be covered by art 7(1)(h) of the *Rome Statute* and validate the central thesis of this paper; queer and trans persons can be afforded accountability by international criminal law.

---

103 *Prosecutor v Uhuru Muigai Kenyatta (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* ICC Pre-Trial Chamber II ICC-01/09-02/11-382-Red (29 January 2012) at [144].

104 Moore "Embracing Ambiguity and Adopting Propriety: Using Comparative Law to Explore Avenues for Protecting the LGBT Population under Article 7 of the Rome Statute of the International Criminal Court," above n 72, at 1289.

105 *Rome Statute of the International Criminal Court*, above n 8, art 7(1)(h).

### B. Accountability for Queer and Trans Folx under “International Law:” The Argument

As the International Commission of Jurists notes “[t]here is a radical positivist assertion that no protection of “sexual orientation” or “gender identity” exists in international human rights law”.<sup>106</sup> Such an argument would have had credence in the nascent stages of international law. However, international law has developed and protection has been afforded to queer and trans persons. It is a domestic court that provides the clear and explicit noting of this. Referring to an evangelical’s “actions in aiding and abetting efforts to demonize, intimidate, and injure LGBTI people,” Judge Posner in *Sexual Minorities Uganda (SMUG) v Lively*, poses a rhetorical statement of whether such actions “constitute violations of international law.” He answers, “[t]hey do.”<sup>107</sup> It is in the esprit of Judge Posner’s assertion that international law provides protection to queer and trans persons that this paper argues upon.

It must be noted that in conjunction with art 7(1)(h), the *Rome Statute* itself, is “friendly” towards international law. Essentially what this means is that interpretation of articles in the Statute *should* concur with the general principles of international law. Provisions of the Statute note this. For example, art 21(1)(b) provides that after the *Rome Statute* and its corresponding documents, “applicable treaties and the principles and rules of international law” are to be applicable to the Court.<sup>108</sup> Furthermore, art 21(3) provides that interpretation of the Statute in congruence with “internationally recognised human rights” and without “adverse distinction” to a variety of categories, saliently “gender . . . or other status,” must occur.<sup>109</sup> As has been shown, the *Rome Statute* relies heavily upon international law and non-discrimination; this reliance provides credence to the argument. The explicit mention of arts 21(1)(b) and 21(3) synergise to instruct judges of the ICC to ensure international law, human rights and the principle of non-discrimination are instruments of statutory interpretation and construction. This starting point affirms art 7(1)(h) and provides that if international law, human rights and the principle of non-discrimination protect queer and trans persons, so does the *Rome Statute*.

Numerous scholars have argued that international refugee law is a body of law that is most applicable to questions relating to art 7(1)(h).<sup>110</sup> This is in light of the fact that persecution is often a key cause of refugee movements. As such, international refugee law has considered whether persecution on the basis of being queer and/or trans, comes within its protectory ambit. International refugee law is clear; it does. The United Nations High Commissioner for Refugees (UNCHR) Gender Guidelines notes that persecution on the basis of sexual orientation necessarily is persecution on the basis of gender.<sup>111</sup> As such, the UNCHR noted that those persons persecuted due to their sexual orientation can be afforded protection under international refugee law. In 2012, the UNCHR expanded this protection to trans persons, noting that persecution against them can

---

106 *Sexual Orientation, Gender Identity and International Human Rights Law*, above n 93, at 29.

107 *Sexual Minorities Uganda (SMUG) v Lively* 254 F 2d 262 (D Mass 2017).

108 *Rome Statute of the International Criminal Court*, above n 8, art 21(1)(b).

109 *Rome Statute of the International Criminal Court*, above n 8, art 21(3).

110 Valerie Oosterveld “Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution” (2006) 17 DJCIL 49.

111 *UNHCR Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Statutes of Refugees* HCR/GIP/02/01 (7 May 2002) at [16].

occur because they challenge normative expectations of their sex.<sup>113</sup> Hence, international refugee law has enabled queer and trans persons to be protected. If the ICC does not take the same interpretation, it would be in violation of the *Rome Statute*'s explicit reliance on principles of international law and providing disparate accountability. Those who are fleeing their countries due to persecution on the basis of being queer and/or trans are afforded redress in the form of being accepted refugees. However, those same people would not be able to claim against the persecutors on the very same ground that enabled them freedom in the first place. Such a conception is nonsensical. It is contended that this interpretation is accepted by the Office of the Prosecutor who, in their *Paper on Sexual and Gender-Based Crimes* made explicit reference to the UNHCR and its interpretation of "persecutions on the basis of gender in refugee law."<sup>113</sup>

Reference to international human rights law also amplifies the argument. Firstly, the International Covenant on Civil and Political Rights (ICCPR) provides that the laws of countries must be applied in line with the principle of non-discrimination.<sup>114</sup> While there is no explicit mention of queer and trans persons, the Human Rights Committee decided in *Toonen v Australia* that "other status" in arts 2(1) and 26 of the treaty includes sexual orientation.<sup>115</sup> Furthermore, the principle of non-discrimination affords protection to queer and trans persons. This principle is one that is non-derogable.<sup>116</sup> As the Committee on Civil and Political Rights notes "[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights."<sup>117</sup> To decide that queer and trans persons cannot be afforded accountability but others can, violates not only substantive provisions of international law (namely international human rights law and the principle of non-discrimination), but also the *Rome Statute* reliance on international law. This would make a mockery of the will of states as expressed via arts 21(1)(b) and 21(3).

Many instruments have been promulgated that provide credence to the assertion that international law provides protection to queer and trans persons. The Committee on Economic, Social and Cultural Rights (CESCR) has noted sexual orientation and gender identity as a prohibited ground of discrimination.<sup>118</sup> This interpretation is shared by other bodies such as the Committee on the Elimination of Discrimination against Women that found that states "must legally recognize and prohibit such intersecting forms of discrimination," referring to gender's intersection with sexual

---

112 UNHCR *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* HCR/GIP/12/09 (23 October 2012).

113 The Office of the Prosecutor of the International Criminal Court *Paper on Sexual and Gender-Based Crimes*, above n 95, at [33].

114 *International Covenant on Civil and Political Rights* 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 2(1) and art 26.

115 *Toonen v Australia (Judgement)* (1994) UN Doc CCPR/C/50/D/488/1992.

116 CCPR *General Comment No 29: Article 4: Derogations during a State of Emergency* CCPR/C/21/Rev.1/Add.11 (31 August 2001) at [8].

117 CCPR *General Comment No 18: Non-discrimination* (10 November 1989) at [1].

118 CESCR *General Comment No 22 on the right to sexual and reproductive health* (Article 12) E/C.12/GC/22 (2 May 2016) at [9], [19] and [23] and CESCR *General Comment No 20: Non-discrimination in economic, social and cultural rights* (art 2, para 2) E/C.12/GC/20 (2 July 2009) at [32].

orientation.<sup>119</sup> Furthermore, the Committees on the Rights of the Child and the Rights of Persons with Disabilities also situate gender identity and sexual orientation within prohibited grounds of discrimination.<sup>120</sup> The fact that majority of the UN committees protect sexual and gender minorities speaks to the growing apprehension of non-discrimination within international human rights law. This understanding expands the ambit of art 7(1)(h). The cited treaties have been ratified by 83 per cent to 99 per cent of all UN Member States thus evidencing state practice and behaviour.<sup>121</sup> State practice contributes towards an understanding of customary international law. The ICC must have reference to such law as expressed via art 21(1)(b).

The Human Rights Council, in 2011 passed Resolution 17/19 that noted the UN has an obligation to “promote universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.”<sup>122</sup> The UN General Assembly has also noted that sexual orientation is a protected class against summary executions.<sup>123</sup> Furthermore, the Special Rapporteur for Sexual Orientation and Gender Identity has noted that killings on the basis of being queer and/or trans are violations of international human rights law.<sup>124</sup> While the aforementioned is highly descriptive, it serves to prove the central test of art 7(1)(h), whether international law protects queer and trans persons. It does. Of saliency to this paper, the UN General Assembly has asserted that killings on the basis of queerness or being transgender “may under certain circumstances amount to genocide, crimes against humanity or war crimes, as defined in international law, including in the Rome Statute of the International Criminal Court.”<sup>125</sup> The killings noted in chapter one, in the opinion of the UN, have the character of being able to be tried by the ICC. This is a significant assertion that further supports the argument.

Measures such as the Yogyakarta Principles also support the assertion that sexual orientation and gender identity are encompassed by international human rights law.<sup>126</sup> Principle two of the Yogyakarta Principles notes that the rights of equality and non-discrimination apply universally to queer and trans folk.<sup>127</sup> While by themselves, the Principles may seem like an academic folly, they

---

119 CEDAW *General recommendation No 28 on the core obligations of States parties under article 2 CEDAW/C/GC/28* (16 December 2010) at [18].

120 CRC *General Comment No 15 on the right of the child to the enjoyment of the highest attainable standard of health* (art 24) CRC/C/GC/15 (17 April 2013) at [8] and CRPD *General comment No 3 (2016) on women and girls with disabilities* CRPD/C/GC/3 (25 November 2016) at [4].

121 *Communication to the ICC Prosecutor Pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of: Gender-Based Persecution and Torture as Crimes Against Humanity and War Crimes Committed by the Islamic State of Iraq and the Levant (ISIL) in Iraq*, above n 47, at 40.

122 *Human rights, sexual orientation and gender identity* UN Doc A/HRC/RES/17/19 (14 July 2011).

123 *Extrajudicial, summary or arbitrary executions* GA Res 57/214 (25 February 2003) at [6].

124 *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender sensitive approach to arbitrary killings* UN Doc A/HRC/35/23 (6 June 2017) at [20] and [110].

125 *Extrajudicial, summary or arbitrary executions* GA Res 69/182 (18 December 2014), preamble.

126 Kelly Kollman and Matthew Waites “The global politics of lesbian, gay, bisexual and transgender human rights: an introduction” (2009) 15 *Contemporary Politics* 1 at 5.

127 Yogyakarta Principles - principles on the application of international human rights law in relation to sexual orientation and gender identity (International Commission of Jurists, March 2007), principle two <[www.icj.org/yogyakarta-principles/](http://www.icj.org/yogyakarta-principles/)>.

have been successfully invoked in courts in countries such as Nepal.<sup>128</sup> Furthermore, they have been cited by the Supreme Court of India, the supreme legal body of the world's largest democracy.<sup>129</sup> The invocation by such countries speaks to the growing movement towards what international law has already noted, human rights frameworks apply to sexual and gender minorities.

Domestic jurisdictions also recognise the human rights of queer and trans persons. The Lobatse High Court in Botswana have allowed updates of gender markers for trans people while the Colombian Constitutional Court has enabled trans persons to self-identify on documents.<sup>130</sup> The Guiyang Intermediate People's Court in China held that workers must not face discrimination due to their gender identity while the Mombasa Court of Appeal in Kenya noted that anal examinations (a form of homosexual "confirmation") were unconstitutional.<sup>131</sup> Judiciaries are making strides for queer and trans folk; this indicates state practice and as such, contributes to the argument. Furthermore, this movement has occurred across both time and geographic region which also contributes to the notion that queer and trans persons are "universally recognisable" as being deserving of protection from international law.

International case law also affirms the human rights of queer and trans persons. In conjunction with *Toonen*, the Human Rights Committee has noted that differential treatment for the awarding of pensions on the basis of sexual orientation was discrimination for the purposes of the ICCPR.<sup>132</sup> The European Court of Human Rights has found in favour of applicants who have been discriminated against on the basis of their sexual orientation.<sup>133</sup> The European Court of Justice have found in favour of a transexual employee; the Court noted that to tolerate discrimination would be "a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard."<sup>134</sup> It is contended the ICC has the same duty for queer and trans folk. Furthermore, the African Commission protects sexual and gender minorities through its Resolution 275 which urges states to "prevent and prosecute violence committed on the basis of real or perceived sexual orientation or gender identity."<sup>135</sup>

While all of the aforementioned domestic and international case law is convincing enough, the Inter-American Court of Human Rights provides the most avid assertion of the argument:<sup>136</sup>

This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of jus cogens.

---

128 Anirban Roy "SC directs Govt to safeguard gay rights" (23 December 2007) Hindustan Times <<https://widgets.hindustantimes.com/world/sc-directs-govt-to-safeguard-gay-rights/story-SUN7GTfzqzWwoydelSnE2J.html>>

129 *National Legal Services Authority v Union of India* [2014] WP (Civil) No 400 of 2012 (India) at 18-28.

130 *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity* UN Doc A/HRC/38/43 (11 May 2018) at [82].

131 At [83].

132 *Young v Australia (Judgement)* (2000) UN Doc CCPR/C/78/D/941/2000 at [10].

133 *X v Turkey* ECHR 24626/09, 9 October 2012 and *Kozak v Poland* ECHR 13102/02, 11 March 2010.

134 *Case C-12/64 P v S and Cornwall County Council* [1996] ECR I-02143 at [21]-[22].

135 *Resolution on the Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation of Gender Identity* ACHPR/Res.275(LV)2014 (28 April to 12 May 2014).

136 Inter-American Court of Human Rights, Advisory Opinion OC-18/03 "Juridical Condition and Rights of Undocumented Migrants" (17 September 2003) at [101].

This judgement builds upon international legal and diplomatic developments that note international human rights includes queer and trans persons. Non-discrimination being considered *jus cogens*, makes it universally applicable, non-derogable and creates obligations *erga omnes* meaning that *all* states have the right to enforce them in the event of non-compliance. It would be an awfully circumscribed position for the Court to be in to act against the principle. It would be a violation of *jus cogens* for the Court not to expand art 7(1)(h) to include sexual and gender minorities and such a circumstance is one that an international court could not in good conscience, be in. If the Court acts against this *jus cogens*, it calls into question its competence when dealing with such matters.

### C. Realising the Argument: Ameliorating Challenges and Recognising Strengths

The argument that international law provides protection to queer and trans folk is not without challenges. However, it would be “difficult for a court to hold that such an egregious crime [persecution] is permissible under international law”<sup>137</sup> especially when considering the “object and purpose” of the *Rome Statute*.<sup>138</sup> The first challenge to this argument presents itself in the wording of art 7(1)(h) in that the group deserving accountability must be “universally recognized... under international law.”<sup>139</sup> This is a narrow category and places a significantly higher burden compared to the alternative “internationally recognized” category.<sup>140</sup> The phrase “internationally recognized” is utilised elsewhere in the *Rome Statute* and therefore, the language used in art 7(1)(h) suggests a higher threshold.<sup>141</sup> Scholars have contended that this universal standard was used to avoid an interpretation that could violate the principle of legality.<sup>142</sup> If this “universally recognized” standard is the proper reading of art 7(1)(h) it is likely that queer and trans persons *would not* fall within the protectory ambit of international law. This is especially the case considering that 67 UN member states criminalise consensual same-sex conduct and 10 institute the death penalty for this “crime;” hardly universal recognition.<sup>143</sup>

It is submitted that the “universal” standard is not to be read in a literal sense; “the standard itself is probably influenced by a combination of positive law, customary law and international norms.”<sup>144</sup> A reading in this light would more accurately represent political realities. It is contended that for matters of sexual orientation and gender identity, there will always be opposition because “political homophobia is [...] used as a means for constructing national identity against a permissive Western other.”<sup>145</sup> Queer and trans persons should not pay the price because of such malevolent national identity-building strategies; this is the exact harm that international law was

---

137 Pam Spees “Women’s Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power” (2003) 28 *Signs* 1233 at 245.

138 *Vienna Convention on the Law of Treaties*, above n 86, art 31(1).

139 *Rome Statute of the International Criminal Court*, above n 8, art (7)(1)(h).

140 George E Edwards “International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy” (2001) 26 *Yale J Int. Law* 323 at 337.

141 *Rome Statute of the International Criminal Court*, above n 8, arts 21(1)(c), 21(3) and 69(7).

142 Darryl Robinson “Defining “Crimes Against Humanity” at the Rome Conference” (1999) *Am J Int Law* 43 at 54.

143 *State-Sponsored Homophobia: Global Legislation Overview Update* (ILGA, 2020) at 25.

144 Hagopian “Persecution and Protection of Sexual and Gender Minorities under Article 7(1)(h) of the Rome Statute,” above n 29, at 65–66.

145 Dennis Altman and Jonathan Symons “International Norm Polarization: Sexuality as a Subject of Human Rights Protection” (2015) 7 *International Theory* 61 at 85.

conceptualised to protect against. Furthermore, considering the jus cogens nature and therefore, universal applicability of non-discrimination, the “universal” standard is of lesser concern.

Scholars also note that the lack of enforcement of antigay laws evidences that persecution of queer and trans persons is impermissible.<sup>146</sup> While the author of this paper understands the impetus behind such an assertion, it cannot be used as a defence. In *Norris v Ireland*, the European Court of Human Rights noted that antigay laws rendered the applicant, a homosexual, a victim, despite the law not being enforced; a law “even though [...] not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time”.<sup>147</sup> The implication of this judgement means that the lack of enforcement of anti-gay laws, unfortunately, do not speak to the assertion that persecution of queer and trans persons is impermissible. Another defence must be found.

A key defence against the charge of queer and trans persons not being “universally recognized” under international law comes from the tragic events of the 2016 Orlando terror attacks. In response to the attacks, diplomatic and international legal efforts were galvanised and the United States led the UN Security Council to offer a statement that condemned the attack for “targeting persons as a result of their sexual orientation.”<sup>148</sup> This statement was joined by Russia and Egypt, countries not known for their friendliness to queer and trans persons.<sup>149</sup> Furthermore, diplomatic statements were released by the main bloc of countries who typically promote opposition to queer and trans rights. Saudi Arabia noted that they “pray for the recovery and the healing of all those injured in the attack [and] condemn in the strongest terms the attack on innocent people in Orlando.”<sup>150</sup> The United Arab Emirates promulgated that “such criminal acts that target innocent civilians contradict all moral principles and human values.”<sup>151</sup> Qatar and Egypt offered up similar statements.<sup>152</sup> It is the words of Saad Hariri, the Prime Minister of Lebanon that, for the purposes of this paper, speak the most volume. He described the attack as “a significant crime against humanity.”<sup>153</sup> This paper agrees. These promulgations demonstrate sexual and gender minorities as people with the right to life and the right not to be targeted due to their membership within a collectivity. They also recognise that acts of harm against sexual and gender minorities are, at a minimum, wrong. This is all that is required for the “universally recognised” standard to be met. While such countries still have antigay laws on their statute books, these statements and diplomatic actions “define the victims of the Orlando massacre as people deserving of life” and the injured victims as “innocent civilians.”<sup>154</sup>

---

146 Josh Scheinert “Is Criminalization Criminal?: Antisodomy Laws and the Crime Against Humanity of Persecution” (2005) 24 *Law & Sexuality: A Review of Lesbian, Gay, Bisexual & Transgender Legal Issues* 99 at 130.

147 *Norris v Ireland* ECHR 10581/83, 26 October 1988.

148 Somini Sengupta “After Orlando, Gay Rights Moves off Diplomatic Back Burner” (14 June 2016) *New York Times* <[www.nytimes.com/2016/06/15/world/united-nations-gay-rights-diplomacy.html](http://www.nytimes.com/2016/06/15/world/united-nations-gay-rights-diplomacy.html)>.

149 Sengupta, n 148.

150 David Pollock and Mahamed Abdelaziz “Arab Government and Media Reactions to the Orlando Attack” (15 June 2016) *The Washington Institute for Near East Policy* <[www.washingtoninstitute.org/policy-analysis/arab-government-and-media-reactions-orlando-attack](http://www.washingtoninstitute.org/policy-analysis/arab-government-and-media-reactions-orlando-attack)>.

151 Pollock, above n 150.

152 Pollock, above n 150.

153 Pollock, above n 150.

154 Pollock, above n 150.

Considering these states constitute the main bloc of opposition to queer and trans persons, these statements speak to the growing universality of the protection of queer and trans persons. This diplomatic and international legal U-turn cannot be explained away; it is contended that it can be used to support the argument.

A further challenge to this argument lies in the opinion that “[t]he LGBT community itself has not received recognition to the level that their protection can be considered a *jus cogens* norm,” and therefore not afforded protection in light of the “universally recognized” standard.<sup>155</sup> It is submitted that such an opinion is an erring of international law. It is generally accepted that there is a *jus cogens* prohibition on torture.<sup>156</sup> This assertion is supported by international case law.<sup>157</sup> Furthermore, there is a *jus cogens* prohibition on crimes against humanity; “the perpetration of that act on a widespread or systematic basis amounting to crimes against humanity would also have the character of *jus cogens*.”<sup>158</sup> Hence, it is indisputable that crimes against humanity (including persecution) and torture, both of which queer and trans persons have been subjected to as noted in chapter one, are of a *jus cogens* character. *Jus cogens* apply to everyone; there is no circumventing their universality just because some states do not accept queer and trans persons. As the Inter-American Court of Human Rights notes *jus cogens* “have a universal vocation in being applicable in all and any circumstances, conforming an imperative law... and bringing about obligations *erga omnes* of protection.”<sup>159</sup> Hence, the assertion that “the LGBT community itself has not received recognition to the level that their protection can be considered a *jus cogens* norm” is incorrect. *Jus cogens* apply to an act; they do not exclude anyone from their protectory ambit.

The ICC has also cited sexual orientation as a prohibited ground of adverse distinction. It noted that “[u]nder Article 21(3) of the Statute, reparations shall be granted to victims without adverse distinction on the grounds of gender [and...] sexual orientation...”<sup>160</sup> The Court did not explain why sexual orientation was included in their reasoning, however, they cited principle 25 of the UN Basic Principles of Reparations which notes that reparations must be “consistent with international human rights law” and be “without any discrimination of any kind or on any ground, without exception.”<sup>161</sup> It is important to note that principle 25 does not explicitly note sexual orientation as a grounds of adverse distinction. Therefore, it is the Court’s interpretation that sexual orientation

---

155 Moore “Embracing Ambiguity and Adopting Propriety: Using Comparative Law to Explore Avenues for Protecting the LGBT Population under Article 7 of the Rome Statute of the International Criminal Court,” above n 72, at 1306.

156 Mahmoud Cherif Bassiouni “International Crimes: ‘Jus Cogens’ and ‘Obligatio Erga Omnes’” (1996) 59 *Law and Contemporary Problems* 63 at 68.

157 *Prosecutor v Furundžija (Judgement)* ICTY Trial Chamber IT-95-17/1-T (10 December 1998) at [114].

158 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgement)* [2012] ICJ Rep 2012 at [99].

159 *Pueblo Bello Massacre v Colombia (Judgement – Merits, Reparations and Costs)* IACHR Series C no 159 [2006] Inter-American Court of Human Rights at [64].

160 *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Thomas Lubanga Dylio (Decision establishing the principles and procedures to be applied to reparations)* ICC Trial Chamber I ICC-01/04-01/06 (7 August 2012) at [191].

161 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* GA Res 60/147 (2005), principle 25.

is encompassed by art 21(3).<sup>162</sup> The judges of the ICC posit that international law protects queer and trans persons. All that is needed is action from the Prosecutor to initiate a case based upon this assessment.

#### D. Conclusion

William Schabas, a leading scholar of international criminal law has previously suggested that noting the “relatively primitive stage of international law in the area” it is likely that queer and trans persons are not a “universally recognized” group.<sup>163</sup> He elaborates further; “the situation will undoubtedly change with the progressive development of international human rights law.”<sup>164</sup> There are numerous international instruments that both explicitly and tacitly provide protection to queer and trans persons, even more so after the Orlando terror attacks. Domestic and international case law also support this assertion. Even the judges of the ICC have cited sexual orientation as a prohibited ground of adverse distinction. As such, this strategy is the best chance to enable full and fair justice to be achieved and redress for the queer and trans victims to be gained. As Schabas notes above, the progressive development of international human rights law will lead to a time where queer and trans persons are protected by international law. That time is now.

### V. CONCLUSION: MOVING FORWARD AND ENDING IMPUNITY

In the same year his country began their vicious persecution of queer and trans persons, Ramzan Kadyrov stated “[t]hey are devils. They are not people.”<sup>165</sup> These views create and proliferate actions of persecution and they are not going away anytime soon. Right-wing populist leaders use queer and trans persons as an easy scapegoat, a diversionary tactic to orientate public opinion away from their shortcomings. In light of this growing threat and the impunity that has marked the persecution of queer and trans persons, a mechanism of accountability needs to be provided. As one scholar notes, “international criminal law need[s] to provide an answer to the failure of traditional mechanism for protecting human rights.”<sup>166</sup> Part II affirms this notion by providing examples of impunity and demonstrating the necessity of an expansive interpretation of art 7(1)(h).

Part III argued the first thesis of this paper, that “gender” as defined in art 7(3) can be conflated with sexual orientation and gender identity. As such, sexual and gender minorities will be brought into the ambit of the *Rome Statute* and an accountability mechanism afforded to them. This chapter relied upon the notion of “constructive ambiguity” that enabled alternative meanings to be drawn. Furthermore, the challenges to the “gender” ground were overcome to allow this ground more credence in its push for application.

---

162 Rosemary Grey “Hate Crime Against Humanity? Persecution on the Grounds of Sexual Orientation under the Rome Statute” (21 February 2014) Beyond the Hague <<https://beyondthehague.com/2014/02/21/hate-crime-against-humanity-persecution-on-the-grounds-of-sexual-orientation-under-the-rome-statute/>>.

163 William Schabas *The International Criminal Court: A Commentary on the Rome Statute* (1st ed, Oxford University Press, Oxford, 2010) at 177.

164 At 171, fn 309.

165 Neal Broverman “Chechen President on Gays: ‘They Are Devils. They Are Not People’” (14 July 2017) Advocate <[www.advocate.com/world/2017/7/14/chechen-president-gays-they-are-devils-they-are-not-people](http://www.advocate.com/world/2017/7/14/chechen-president-gays-they-are-devils-they-are-not-people)>.

166 Nevenka Đurić and others “Legal Protection of Sexual Minorities in International Criminal Law” (2018) 6 Russian Law Journal 28 at 31.

Part IV argued the second thesis of this paper, that international law “universally recognises” and affords protection to queer and trans persons. As such, they will be brought into the meaning of art 7(1)(h). This chapter relied upon numerous instruments and case law to support the proposition that international law protects queer and trans persons. Furthermore, the challenges to this ground were overcome, namely the notion that queer and trans persons need to be and are not “universally recognised.” It was contended that developments after the Orlando terror attacks made this the case.

This paper appreciates that the arguments above do nothing to validate the true identities of those who are subjected to persecution. By using gender and international law as a guise for sexual and gender minorities, this paper is merely buying into the notion of providing “tolerance” rather than “justice.”<sup>167</sup> However, the law has to start somewhere. It is better to have legal propositions that enable accountability for queer and trans persons, than not. With that being said, this paper is not concerned with mere tolerance. Legal reform that enables affirmation of the true identities of victims is what is needed. The arguments provided above are just band-aids; temporary solutions to impunity. The fact that scholars need to look for loopholes in an instrument intended to end impunity just to gain accountability for queer and trans persons, is inane. Reliance on art 7(1)(h) speaks to the innate weakness of the *Rome Statute* when it comes to providing accountability for queer and trans persons. Reliance on this article is not enough. Queer and trans individuals could be targets of genocide but because they are not mentioned within the prohibited groups, redress for them is left to the imagination.<sup>168</sup> It is expected that the international community should work together to explicitly mention queer and trans identities within art 7(1)(h) and all other relevant substantive articles of the *Rome Statute*. In the meantime, the Office of the Prosecutor needs to bring a case or numerous cases on the basis of the legal arguments above. It is within their power to do so; they can end impunity.<sup>169</sup> Furthermore, it is contended that art 7(1)(k) should be given further scholarly attention to fill the regulatory gap.

Queer and trans persons are brought up in a world that tells them from the very outset, that they are abnormal and to some degree, deserving of the harm society afflicts upon them. They internalise it. They believe it. When the world lets crimes of the greatest magnitudes against queer and trans persons go unaddressed, they believe it a little more. For the queer and trans persons subjected to persecution, it is not just the thought of abnormality that afflicts them. It is torture, it is rape, it is extra-judicial killing and it is state-sponsored criminalisation of their very being. As such, the promises of equality and accountability are a fallacy. It does not have to be this way. With action from the International Criminal Court, the impunity that has been perennial in such circumstances can begin to disappear. Queer and trans persons can start to believe they are deserving of a world that values them and importantly for those subjected to persecution, a world that provides justice. This is what international criminal law was conceptualised for.

---

167 Jasbir Puar *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, Durham, 2007).

168 *Rome Statute of the International Criminal Court*, above n 8, art 6.

169 Allison Marston Danner “Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court” (2013) 97 *Am J Int Law* 510.

# AQUIFER MANAGEMENT AND THE LAW: AN APPLICATION OF MASLOW'S HIERARCHY OF NEEDS AND SUSTAINABLE DEVELOPMENT GOAL SIX

BY DANNIELLE GRAHAM\*

## I. INTRODUCTION

The Havelock North drinking water campylobacteriosis incident in 2016 highlighted various issues in relation to aquifer management in New Zealand. The report of the Havelock North Drinking Water Inquiry found that the campylobacteriosis among the affected Havelock North residents was caused by their drinking water being contaminated with campylobacter bacterium.<sup>1</sup> The Report stated that the likely source of the campylobacter bacterium was sheep faeces.<sup>2</sup> Ultimately, sheep faeces had contaminated the water supply at Brookvale Road's bore 1 and 2.<sup>3</sup>

The Report found that there were no criticism to be attributed to the farmers who had sheep grazing in the paddocks near these neighbouring contaminated bores.<sup>4</sup> This was because having their sheep grazing in this area was a permitted activity and therefore did not require a resource consent.<sup>5</sup> Essentially, this finding highlights the issue of classifying the land use activity of sheep grazing in paddocks in close proximity to groundwater used for drinking water supply as a permitted activity. This will be termed the "first issue". This first issue raises the question of whether the land use activity of sheep grazing should be something other than a permitted activity, when there is potential for the activity to adversely affect the quality of groundwater used for drinking water purposes in near proximity.

The Report further stated that the Te Mata aquifer, where the contaminated drinking water was drawn from, was not a "source of aged water".<sup>6</sup> It was noted that this can indicate that pathogens are entering into the aquifer through surface water.<sup>7</sup> This finding highlights the issue of abstracting groundwater that is not a source of aged water for drinking water purposes. This will be referred to as the "second issue". This second issue raises the question of whether groundwater that is young in age should be used for drinking water sources at all.

---

\* LLB Hons, University of Waikato.

1 Government Inquiry into Havelock North Drinking Water *Havelock North Drinking Water Inquiry: Stage 1* (Department of Internal Affairs, May 2017) at [10].

2 Government Inquiry into Havelock North Drinking Water, above n 1, at [10].

3 At [33].

4 At [221].

5 At [221].

6 At [17].

7 Government Inquiry into Havelock North Drinking Water *Havelock North Drinking Water Inquiry: Stage 2* (Department of Internal Affairs, December 2017) at [221].

Paul White has suggested that Maslow's Hierarchy of Needs could potentially be used to improve aquifer management legislation frameworks and policies in New Zealand.<sup>8</sup> This is an interesting proposition in light of the two identified issues relating to aquifer management. In view of these two issues and White's thesis, this article will explore how Maslow's Hierarchy of Needs can be used as a lens to identify aquifer management issues and gaps within current law and policy.

There are six substantive parts. Part II will explain Maslow's Hierarchy of Needs (Maslow's HON). It will provide a brief overview of the different needs encompassed within the hierarchy including the physiological, safety, love, esteem and self-actualisation needs. Part III will discuss Sustainable Development Goal Six (SDG6) The goal's targets and its relevance to aquifer management will be examined in this section. Part IV will explore the state of New Zealand's groundwater and aquifers. It is submitted in this section that New Zealand is arguably not meeting their goals in SDG6 with respect to groundwater. Part V will identify the relevant law and policy associated with the two specified issues. Part VI will utilise Maslow's HON and SDG6 as a lens to identify the gaps within law and policy associated with the two specified issues. In this section it is suggested that there are various gaps within law and policy that need to be addressed in relation to the two issues. Part VII will discuss what the law ought to look like in regard to addressing the issues and gaps identified as a result of using SDG6 and Maslow's HON as a lens. In essence, this section proposes that sheep should not be allowed in paddocks that are in close proximity to underground aquifer sources used for drinking water, or alternatively, the activity should require a resource consent, rather than be a permitted activity. Furthermore, it is recommended that the abstraction of young groundwater used for drinking water purposes should not be allowed. Lastly, this section recommends that Maslow's HON and SDG6 be integrated into New Zealand law and policy associated with aquifer management, particularly in terms of the management of drinking water sources. This supports White's thesis in terms of Maslow's HON.

The findings that are made are significant because they identify where law and policy can be improved in terms of addressing the two specified issues relating to sheep grazing and young groundwater abstraction. Ultimately, the findings can help ensure that Maslow's HON are met, and that SDG6 is achieved in terms of aquifer management.

## II. MASLOW'S HIERARCHY OF NEEDS

In relation to White's thesis, it is submitted that Maslow's Hierarchy of Needs can be related to aquifer management law and policy. How it can be used to address aquifer management legislation and policy gaps and issues will be explored at a later stage. A brief overview of Maslow's HON will now be presented.

Abraham Maslow proposed a theory of human motivation in 1943.<sup>9</sup> In his positive theory, he argued that there are five sets of basic needs, namely: physiological, safety, love, esteem, and self-actualisation needs, which are ordered in a prepotency hierarchy.<sup>10</sup> The prepotency aspect of the hierarchy means that the most prepotent needs, such as physiological needs, must be "fairly well satisfied" before other needs will emerge and "dominate the conscious life".<sup>11</sup> This concept has also

---

8 Paul White "Maslow's Hierarchy of Needs and water management" (2020) 59(1) *Journal of Hydrology* 1.

9 Abraham Maslow "A Theory of Human Motivation" (1943) 50 *Psychological Review* 370.

10 At 394.

11 At 395.

been referred to, by Maslow, as the “principle of relative potency”.<sup>12</sup> It is important to mention that the emergence of these other needs is not always sudden, and the satisfaction of the most prepotent needs may be taking place at the same time as the satisfaction of other needs, demonstrating that partial satisfaction of all the basic needs can sometimes occur simultaneously.<sup>13</sup> These five basic needs are not necessarily determinants of behaviour, however, humans may be motivated to want the “most prepotent needs” in the hierarchical framework, rather than other needs when deprived of all needs.<sup>14</sup> This theory is referred to as Maslow’s Hierarchy of Needs. Each set of basic needs will now be considered in turn starting with physiological needs.

Maslow proposed that physiological needs are the “most prepotent needs” of all human needs and they are a major motivator in comparison to other needs.<sup>15</sup> The list of physiological needs is not exhaustive.<sup>16</sup> Physiological needs are not necessarily homeostatic.<sup>17</sup> They fall under the category of “lower” needs as opposed to “higher” needs.<sup>18</sup> An example of a physiological need is food.<sup>19</sup> This is because no other interests exist but food when a man is extremely hungry, according to Maslow.<sup>20</sup>

After the physiological needs have been satisfied to an extent, safety needs become relevant. According to Maslow, depending on the circumstances, safety needs may be more important than physiological needs once physiological needs have been satisfied.<sup>21</sup> The need for safety can be demonstrated through an observation of children’s or infants’ behaviour.<sup>22</sup> For example, infant’s and children’s need for safety is evident through their reaction when they feel endangered due to reasons such as “rough handling” or “inadequate support”.<sup>23</sup> In regard to adults, the need for safety can be drawn from the general preference for “familiar rather than unfamiliar things”.<sup>24</sup> Safety needs in adults can be satisfied through the availability of a society that is peaceful, good and running smoothly.<sup>25</sup>

Love needs are concerned with love, affection and belongingness.<sup>26</sup> After the lower physiological and safety needs have been gratified in some regard, a person will experience a “hunger for affectionate relations with people in general”.<sup>27</sup> Maslow proposed that to have a place in this world is something that a person wants more than anything else at this love needs level.<sup>28</sup>

---

12 Abraham Maslow “‘Higher’ and ‘Lower’ Needs” (1948) 25 *The Journal of Psychology* 433 at 433.

13 Maslow, above n 9, at 388.

14 At 387.

15 At 373.

16 At 372.

17 At 372.

18 Paul White, above n 8, at 2.

19 Maslow, above n 9, at 373.

20 At 375.

21 At 376.

22 At 376.

23 At 376.

24 At 379.

25 At 378–379.

26 At 380.

27 At 381.

28 At 381.

In relation to esteem needs, in order to avoid the production of weakness, inferiority, and helplessness feelings, people generally have a need for self-respect and a “high evaluation of themselves” once other needs have been somewhat satisfied.<sup>29</sup> These esteem needs can be achieved through the gratification of the achievement, strength, confidence, freedom, independence, prestige, and reputation desires.<sup>30</sup>

The final need for self-actualisation relates to the individual's need to do “what he is fitted for”, and the desire to be self-fulfilled.<sup>31</sup> This need arises out of the development of “discontent and restlessness” after the other needs have been satisfied.<sup>32</sup> The need for self-actualisation is a “higher” need.<sup>33</sup> People who have achieved a self-actualisation level of living are the ones who most love mankind.<sup>34</sup>

### III. SUSTAINABLE DEVELOPMENT GOAL SIX

It is submitted that no examination of aquifer management would be complete without considering the United Nations' Sustainable Development Goals. This is because the New Zealand Government has committed to the Sustainable Development Goals, including Sustainable Development Goal 6 (SDG6) concerned with clean water and sanitation.<sup>35</sup> In 2015, the United Nations General Assembly adopted the 2030 Agenda for Sustainable Development.<sup>36</sup> Within this Agenda is a list of seventeen Sustainable Development Goals.<sup>37</sup> The goals and targets set out in the Agenda aim to build on and achieve what the Millennium Development Goals did not accomplish.<sup>38</sup> The former Millennium Development Goal Seven relating to environmental sustainability was modified into SDG6 in the 2015 Agenda.<sup>39</sup> SDG6 is explicitly related to aquifer management law and policy. An overview of SDG6 and the relevant targets within this goal will now be given. It will be demonstrated why these targets are relevant, thus briefly highlighting the relationship between the target and aquifer management.

The overall goal of SDG6 is to “ensure availability and sustainable management of water and sanitation for all”.<sup>40</sup> Within this overarching goal are certain targets which are aiming to be achieved within specific time frames. Target 6.1 is aimed at achieving “universal and equitable access to safe and affordable drinking water for all” by 2030.<sup>41</sup> This target is relevant to aquifer management because underground aquifers are often a source of drinking water for populations, as

---

29 At 381–382.

30 At 381–382.

31 At 382.

32 At 382.

33 Maslow, above n 12, at 434.

34 At 436.

35 United Nations “Goal 6” <<https://sdgs.un.org>>.

36 *Transforming our world: the 2030 Agenda for Sustainable Development* GA Res 70/1 (2015).

37 At 14/35.

38 At Preamble.

39 Sukanya Som and Bimal Prasanna Mohanty “The road from Millennium Development Goals to Sustainable Development Goals: A Transition in Need Hierarchy” (2018) II RDWU Bulletin of Science 24 at 33.

40 *Transforming our world: the 2030 Agenda for Sustainable Development* GA Res 70/1 (2015) at 18/35.

41 United Nations “Goal 6”, above n 35.

demonstrated in the Havelock North case example. Target 6.3 is concerned with improving water quality through specific methods by 2030.<sup>42</sup> These methods include “reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally”.<sup>43</sup> This target is relevant to the quality of water embodied within an underground aquifer, like the Te Mata aquifer. Target 6.4 relates to increasing efficiency in water-use and working towards the reduction of people suffering from water scarcity by 2030.<sup>44</sup> This target is relevant to underground aquifer water usage and allocation. Target 6.6 is aimed at water-related ecosystems’ protection and restoration.<sup>45</sup> This includes “mountains, forests, wetlands, rivers, aquifers and lakes”.<sup>46</sup> This target has a direct relationship with the protection and restoration of underground aquifers. Target 6.a focuses on developing countries in regard to the expansion of international cooperation and capacity building support.<sup>47</sup> This target is relevant to aquifer management in the sense that the need for coordinated and joined up government at all levels is essential. Target 6.b aims at improving sanitation and water management through the participation of local communities in sanitation and water management being supported and strengthened. This target is relevant to the new freshwater planning process and limited appeal rights in New Zealand. Accordingly, SDG6 is relevant to aquifer management in a variety of ways.

It should be noted that governments individually decide on how their national strategies, policies, planning and processes will incorporate the targets in relation to the Sustainable Development Goals.<sup>48</sup> In 2019, the New Zealand Government released a report detailing their progress towards the Sustainable Development Goals.<sup>49</sup> With reference to SDG6, the report stated that a clear priority for New Zealand was the “sustainable development of freshwater” and freshwater quality improvement.<sup>50</sup> Specific key goals of the New Zealand Government, in regard to SDG6, were to “reduce key sources of pollution” from urban land use and farming in relation to water ecosystems, and to create a system which facilitated the meaningful engagement of well-informed communities in “integrated catchment planning” and the “management of water services”.<sup>51</sup> The report also identified that the New Zealand Government had already implemented various initiatives in order to address the targets under SDG6. For example, initiatives included the “review of the Three Waters service regulation”, the creation of a policy development taskforce, the “Essential Freshwater Policy Programme”, and the “Freshwater Improvement Fund” and more.<sup>52</sup> These initiatives and their effectiveness in relation to the two issues will be considered at a later stage.

---

42 United Nations “Goal 6”, above n 35.

43 United Nations “Goal 6”, above n 35.

44 United Nations “Goal 6”, above n 35.

45 United Nations “Goal 6”, above n 35.

46 United Nations “Goal 6”, above n 35.

47 United Nations “Goal 6”, above n 35.

48 *Transforming our world: the 2030 Agenda for Sustainable Development*, above n 40, at [55].

49 New Zealand Government *He waka eke noa Towards a better future, together: New Zealand’s progress towards the SDGs – 2019* (July 2019).

50 New Zealand Government, above n 49, at 49–53.

51 At 49.

52 At 51–52.

#### IV. AQUIFERS AND GROUNDWATER

It is briefly worth discussing aquifers and groundwater. This is because according to Raewyn Peart “there is a poor understanding of groundwater resources” in New Zealand, and this is despite the reliance on groundwater resources for drinking water purposes by a third of the people living in New Zealand.<sup>53</sup> In essence, basement or sedimentary aquifers are where groundwater is primarily sourced from.<sup>54</sup> Groundwater around the world is under threat from climate change, contamination and human development.<sup>55</sup> This is concerning because approximately half of all drinking water globally is sourced from groundwater.<sup>56</sup>

In New Zealand, the Ministry for the Environment has identified in the *Our Freshwater 2020* report that many groundwater aquifers around New Zealand are polluted with “unnaturally high levels of nutrients, chemicals, disease-causing pathogens, and sediment”.<sup>57</sup> However, it should be noted that the results regarding groundwater quality are mixed.<sup>58</sup> The Ministry for the Environment has stated that there cannot be an estimation on the “specific effects of land use on groundwater quality”, however, there is an indication that groundwater in certain monitored locations had been “influenced by industrialised agriculture”.<sup>59</sup> This finding is supported by Connie Bollen who found that groundwater in the Waikato region of New Zealand is “subject to higher levels of nutrients than what would normally occur” due to the 3000 dairy herds in the region creating “as much waste as 5 million people”.<sup>60</sup> The Ministry for the Environment has submitted that groundwater pollution “comes from the mosaic of cities, farms, and plantation forests” thus not attributing blame for groundwater pollution and contamination to one single land use activity.<sup>61</sup> Ultimately, the current groundwater quality findings by the Ministry for the Environment indicate that New Zealand has not achieved its goals yet in terms of meeting SDG6, due to an array of reasons.

#### V. RELEVANT LAW

The current relevant law administered by local authorities in the context of the two issues will now be identified. The relevant law will then be applied to the two issues. The Hawke's Bay region will be used as a case example to demonstrate the relevant law in a practical context. Overall, this

---

53 Raewyn Peart “Innovative approaches to water resource management: A comparison of the New Zealand and South African approaches” (2001) 5 *New Zealand Journal of Environmental Law* 127 at 149.

54 Chihurumanya Belema Nwankwo and others “Groundwater Constituents and Trace Elements in the Basement Aquifers of Africa and Sedimentary Aquifers of Asia: Medical Hydrogeology of Drinking Water Minerals and Toxicants” (2020) 4 *Earth Systems and Environment* 369 at 369.

55 Upmanu Lall, Laureline Josset and Tess Russo “A Snapshot of the World's Groundwater Challenges” (2020) 45 *Annual Review of Environment and Resources* 171 at 171.

56 Daniel Smith and others “A multi-approach assessment of land use effects on groundwater quality in a karstic aquifer” (2020) 6 *Heliyon* 1 at 1.

57 Ministry for the Environment *Our Freshwater 2020* (April 2020) at 29.

58 At 39.

59 At 39.

60 Connie Bollen “Managing the Adverse Effects of Intensive Farming on Waterways in New Zealand – Regional Approaches to the Management of Non-point Source Pollution” (2015) 19 *New Zealand Journal of Environmental Law* 207 at 211.

61 Ministry for the Environment, above n 57, at 29.

section will consider a variety of pieces of legislation and policy, beginning with the Resource Management Act 1991.

### A. *Resource Management Act 1991*

Section 9 of the Resource Management Act 1991 (RMA) is a good starting point in terms of the relevant law because it sets out certain restrictions in relation to the use of land.<sup>62</sup> Taking into account s 9, provided that a person does not contravene a national environmental standard, regional rule or district rule in relation to the use of land, essentially “any use of land is allowed” in accordance with the RMA.<sup>63</sup> However, a resource consent may expressly allow a person to use land in a manner that contravenes a national environmental standard, regional rule or district rule.<sup>64</sup> A resource consent is not required for activities described as “permitted” in Acts, regulations, national environmental standards, plans or proposed plans.<sup>65</sup> A resource consent is required for activities described as “controlled”, “restricted discretionary”, “discretionary” or “non-complying”.<sup>66</sup> When an activity is described as “prohibited”, no resource consent can be granted.<sup>67</sup> In relation to the information required in an application for a resource consent, s 88 and sch 4 of the RMA sets out that an “assessment of the activity’s effects on the environment” is required.<sup>68</sup> These aspects of the RMA can be applied to the first issue because, if sheep grazing in a paddock near groundwater is categorised as a permitted activity, like what happened in the Havelock North incident, then essentially the activity is allowed and no assessment of environmental effects or resource consent application is required under s 88 and sch 4 of the RMA. This arguably leaves groundwater in near proximity open to being adversely affected by the consequences associated with sheep grazing.

Sections 30 and 31 of the RMA are worth considering in terms of relevant law because they set out the jurisdiction of regional councils and territorial authorities in relation to land use, among other things.<sup>69</sup> Under s 30 of the RMA, regional councils have “limited responsibility for land use”.<sup>70</sup> Essentially, s 30 stipulates that regional councils have the function of controlling the use of land for the purposes set out in s 30(1)(c) of the RMA in relation to the “purpose of giving effect to” the RMA in its own specific region.<sup>71</sup> Regional councils can “control the use of land” for the purpose of “the maintenance and enhancement of the quality of water in water bodies”<sup>72</sup> and “the maintenance of the quantity of water in water bodies”.<sup>73</sup> These functions relate to groundwater and aquifers because the RMA defines “water body” as “fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof, that is not located within the

---

62 Resource Management Act 1991, s 9.

63 Derek Nolan (ed) *Environmental and Resource Management Law* (online ed, LexisNexis) at [4.2].

64 Derek Nolan (ed), above n 63, at [4.2]; Resource Management Act 1991, s 9.

65 Resource Management Act 1991, s 87A.

66 Section 87A.

67 Section 87A(6).

68 Schedule 4.

69 Section 30; Section 31.

70 Derek Nolan (ed), above n 63, at [4.4].

71 Resource Management Act 1991, s 30.

72 Section 30(c)(ii).

73 Section 30(c)(iii).

coastal marine area”.<sup>74</sup> Therefore, this function includes aquifers. In the Government Inquiry into the Havelock North drinking water incident, it was recommended, that within s 30 of the RMA, there should be a specific function of regional councils to protect and manage sources of drinking water.<sup>75</sup> This recommendation has not been implemented. Section 30 can be applied to the first issue because in terms of the maintenance and enhancement of groundwater quality, as per s 30, Regional councils can control the use of land. This means that Regional councils can control the land on which sheep graze, in order to maintain and enhance the groundwater in the area, as per s 30 by including rules in regional plans.

Under s 31 of the RMA, territorial authorities have the function of “the control of any actual or potential effects of the use, development, or protection of land”.<sup>76</sup> Essentially, territorial authorities are “responsible within their respective districts for land use”.<sup>77</sup> Evidently, there is some overlap regarding the jurisdiction of land use between regional councils and territorial authorities. Ultimately, this section relates to the first issue in terms of land use and sheep grazing.

Section 15 of the RMA deals with discharges of contaminants into the environment.<sup>78</sup> Under this section, no person is allowed to discharge contaminants into the environment unless the discharge is expressly allowed by resource consents, rules in regional plans or national environmental standards or regulations.<sup>79</sup> This section is applicable to the first issue because there may be diffuse discharges, like animal waste, that result from sheep grazing in paddocks. These diffuse discharges may then enter groundwater and adversely affect its quality. This raises the question of whether s 15 adequately deals with the first issue in terms of discharges of animal waste into the environment absent rule making or enforcement by regional councils.

The RMA additionally sets out the requirements regarding the preparation of regional plans, and the rules within the regional plans. This explicitly relates to regional councils. Sections 66, 67, 68, 69 and 70 are relevant sections relating to regional plans. In terms of s 66, this section outlines that a regional plan must be prepared and changed by a regional council “in accordance with its functions under section 30”.<sup>80</sup> This includes the previously mentioned s 30 functions relating to land use and groundwater. Section 68 specifies that when a regional council makes a rule in a regional plan, they “shall have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect”.<sup>81</sup> Section 3 of the RMA defines what the meaning of “effect” is.<sup>82</sup> The scope of “effect” includes any “positive”, “adverse”, “temporary”, “permanent”, “past”, “present”, “future”, and “cumulative” effect, along with any “potential effect of high probability” and “potential effect of low probability which has a high potential impact”.<sup>83</sup> Furthermore, s 69 stipulates requirements around regional rules relating to water quality.<sup>84</sup> These

---

74 Section 2(1).

75 Government Inquiry into Havelock North Drinking Water, above n 7, at [622].

76 Resource Management Act 1991, s 31(1)(b).

77 Derek Nolan (ed), above n 63, at [4.4].

78 Resource Management Act 1991, s 15.

79 Section 15.

80 Section 66(1).

81 Section 68(3).

82 Section 3.

83 Section 3.

84 Section 69.

sections of the RMA are relevant to the first issue because the regional council could have regard to these sections to justify including the rules regarding sheep grazing in paddocks in their plan. Likewise for the second issue.

The RMA additionally deals with water takes and abstraction, which relates to the second issue being young groundwater abstraction for drinking water purposes. Section 14 of the RMA is relevant.<sup>85</sup> The basic position under the RMA is that prior consent is required unless one of the s 14(3) exceptions apply or the take is permitted by a plan rule or regulation.<sup>86</sup> In light of this section of the RMA, questions should be raised. For example, why either consent is granted for young groundwater abstraction, or why young groundwater abstraction is permitted by plan rules or regulations, as was demonstrated in the Havelock North incident, especially since young groundwater can be an indication of contamination of the groundwater source. Ultimately, s 14 can be applied to the second issue because it sets out parameters regarding water abstraction that can be regulated by (inter alia) regional plan rules.

### *B. Health Act 1956*

The Health Act 1956 (HA) is relevant to local authorities in relation to their role as suppliers of drinking water.<sup>87</sup> In particular, pt 2A of the HA is relevant because it deals specifically with drinking water and drinking-water suppliers.<sup>88</sup> Under 69A(2)(c) of the HA, there are a range of duties imposed on drinking water suppliers, including the duty to “take all practicable steps to comply with the drinking-water standards”.<sup>89</sup> The provisions set out in pt 2A of the HA can be applied to the identified issues because these provisions relate to the safety of drinking water and ultimately both the first and second issue pose a risk to the safety of drinking water. It should be noted that the Water Services Act 2021 (WSA) was enacted on 4 October 2021, and therefore will change the law relating to drinking water and drinking-water suppliers. The WSA and its applicability to the two overall issues will now be examined.

### *C. Water Services Act 2021*

The WSA has a purpose of ensuring that safe drinking water is provided by drinking water suppliers to consumers under s 3.<sup>90</sup> The WSA therefore imposes an array of obligations and duties on drinking water suppliers in relation to drinking water. A few notable differences between the HA and the WSA are as follows. The WSA under s 22 imposes a duty on drinking water suppliers to comply with the drinking water standards, whereas the HA merely imposes a requirement that the drinking water suppliers take all practicable steps to comply under s 69A.<sup>91</sup> The WSA imposes a duty on drinking water suppliers to prepare and implement source water risk management plans under s 43 as part of their overall drinking water safety plan, whereas the HA did not impose this

---

85 Section 14.

86 Section 14(3).

87 Health Act 1956.

88 Health Act 1956, pt 2A.

89 Health Act 1956, s 69A(2)(c)(ii).

90 Water Services Act 2021, s 3.

91 Water Services Act 2021, s 21.

duty.<sup>92</sup> The WSA also requires regional councils to publish source water information under s 46, whereas the HA did not.<sup>93</sup> Overall, the statutory duties and water planning requirements imposed on water suppliers and regional councils could affect the current situation relating to drinking water in a variety of ways. However, arguably, the WSA imposes more stringent requirements on local authorities in relation to drinking water safety, and thus more resources may need to be allocated in this area. Like the HA, the WSA can be applied to the two overall issues because it deals with drinking water safety, and therefore is relevant to the management of the two issues.

#### *D. Essential Freshwater Package*

As mentioned, initiatives that the Government have undertaken as part of SDG6 include the review of the Three Waters service regulation, and the Essential Freshwater Policy Programme.<sup>94</sup> Included within the Essential Freshwater package are new rules and regulations, such as the National Policy Statement for Freshwater Management 2020,<sup>95</sup> Resource Management (National Environmental Standards for Freshwater) Regulations 2020,<sup>96</sup> Resource Management (Measurement and Reporting of Water Takes) Amendment Regulations 2020,<sup>97</sup> and the Resource Management (Stock Exclusion) Regulations 2020.<sup>98</sup> These policies and regulations can be applied to the identified issues because they are associated with freshwater, and some groundwater is freshwater.

In relation to the National Policy Statement for Freshwater Management 2020 (“NPSFM”), this policy statement is applicable to groundwater.<sup>99</sup> Under pt 3 of the NPSFM, local authorities are supplied with a “non-exhaustive list of things” that they must do in order “to give effect to the objective and policies in Part 2” of the national policy statement.<sup>100</sup> A notable requirement of local authorities under paragraph 3.5 of the NPSFM is for local authorities to manage freshwater and land use in an “integrated and sustainable way” and this is for the purpose of avoiding, remedying or mitigating “adverse effects” on water bodies’ “health and well-being”.<sup>101</sup> Taking into account this requirement, the NPSFM is applicable to the first issue because essentially the NPSFM tries to deal with this first issue through local authorities in an “integrated and sustainable way”, as per paragraph 3.5. Under pt 4 of the NPSFM, as soon as reasonably practicable, every local authority must give effect to the NPSFM.<sup>102</sup>

In terms of the Resource Management (National Environmental Standards for Freshwater) Regulations 2020, these regulations are associated with the already specified functions of regional councils under s 30 of the RMA.<sup>103</sup> These regulations do not refer to groundwater aquifers

---

92 Water Services Act 2021, s 43.

93 Water Services Act 2021, s 46.

94 New Zealand Government, above n 49, at 51–52.

95 National Policy Statement for Freshwater Management 2020.

96 Resource Management (National Environmental Standards for Freshwater) Regulations 2020.

97 Resource Management (Measurement and Reporting of Water Takes) Amendment Regulations 2020.

98 Resource Management (Stock Exclusion) Regulations 2020.

99 National Policy Statement for Freshwater Management 2020 at [1.5].

100 At [3.1].

101 At [3.5].

102 At [4.1].

103 Resource Management (National Environmental Standards for Freshwater) Regulations 2020, reg 5.

specifically, despite referring to other kinds of freshwater bodies, such as rivers. This is arguably a gap within the law. However, they do refer to discharges of contaminants onto land and then into water from feedlots under reg 9.<sup>104</sup> This could include groundwater. Unfortunately reg 9 deals with cattle feedlots and not sheep feedlots, so these regulations as part of the Essential Freshwater Package do not address the first issue regarding sheep grazing in paddocks near groundwater aquifers.

The Resource Management (Stock Exclusion) Regulations 2020 deal with stock exclusion from various water bodies including lakes, wide rivers, and natural wetlands.<sup>105</sup> They do not deal with the exclusion of sheep from land near groundwater, and therefore are *prima facie* not applicable to the two identified issues. This is ostensibly a gap within the current law. However, they provide an analogy in favour of exclusion of sheep from freshwater bodies and land near groundwater aquifers. Essentially, the regulations impose a three-metre setback of stock from lakes and rivers under reg 8.<sup>106</sup>

Overall, after considering various components of the Essential Freshwater Package, it is argued that the package does not adequately address the two issues relating to sheep grazing and young groundwater abstraction. Recommendations will be made at a later stage.

#### *E. Resource Management (National Environmental Standards for Sources of Human Drinking Water) Regulations 2007*

The Resource Management (National Environmental Standards for Sources of Human Drinking Water) Regulations 2007 are applicable to the identified issues. These regulations deal with water permits, discharge permits and permitted activity rules in relation to “activities with potential to affect certain drinking-water supplies”.<sup>107</sup> This is applicable to the first issue relating to sheep grazing because this activity has the potential to affect groundwater drinking-water supplies.

Regulation 10 stipulates that a regional council must not include in its regional plan “a rule or amend a rule” that allows a permitted activity which is “upstream of an abstraction point” under ss 9, 13, 14 or 15 of the RMA.<sup>108</sup> In terms of aquifers and groundwater, “upstream of an abstraction point” means “up-gradient of the abstraction point”.<sup>109</sup> They must not include these rules unless the regional council can be “satisfied” that the permitted activity is not likely “to introduce or increase the concentration of any determinands in the drinking water” and in which results in the drinking water not meeting the “health quality criteria” after “existing treatment”.<sup>110</sup> This regulation is applicable to the first issue because sheep can excrete determinands onto land that are then introduced into drinking water, as demonstrated in the Havelock North drinking water incident. If the sheep grazing is up-gradient of the groundwater abstraction point, this regulation could apply.

---

104 Regulation 9.

105 Resource Management (Stock Exclusion) Regulations 2020.

106 Regulation 8.

107 Resource Management (National Environmental Standards for Sources of Human Drinking Water) Regulations 2007.

108 Regulation 10.

109 Regulation 3.

110 Regulation 10.

### F. *Drinking-water Standards for New Zealand 2005*

The DWS 2005 were revised in 2018.<sup>111</sup> As per s 69A of the HA, drinking water standards can be issued or adopted by the Minister of Health.<sup>112</sup> The DWS 2005 operate on a "secure" and "non-secure" classification system when it comes to the treatment of groundwater in bores used for drinking water purposes.<sup>113</sup> If bore water supplies are classified as "secure", then no treatment is required.<sup>114</sup> Essentially, bore water supplies are classified as "secure" when the "bore water is not directly affected by surface or climate influences" and therefore, "it can be demonstrated that contamination by pathogenic organisms is unlikely".<sup>115</sup> Ultimately, this secure classification system relates to both confined and unconfined aquifers in the sense that interim bore water security is applicable to confined aquifers and unconfined aquifers more than 30 metres deep for the first 12 months of operation.<sup>116</sup> Essentially, both confined and unconfined aquifers can be classified as secure, provided that certain conditions are met.

The DWS 2005 sets out three criteria that must be met in order to demonstrate that a groundwater bore water supply is secure. In essence, the first criterion mandates that in order to demonstrate that "bore water is not directly affected by surface or climate influences", it must be shown that "water younger than one year" is not detectable within the aquifer or "the lack of significant variability in determinands that are linked to surface effects".<sup>117</sup> The second criterion stipulates that there must be satisfactory protection provided to the bore head.<sup>118</sup> A point to note is that under this category, "animals must be excluded from within 5 m of the bore head".<sup>119</sup> The third criterion is that "Escherichia coli must be absent from bore water".<sup>120</sup> The DWS 2005 sets out "ongoing monitoring compliance requirements" for secure bore water sources.<sup>121</sup> If bore water supplies are classified as "non-secure" then treatment is required because, according to the DWS 2005, it is likely that micro-organisms have contaminated the water.<sup>122</sup> It is worth noting that the Government Inquiry into the Havelock North drinking water incident found that "the concept of a "secure" supply of drinking water was "unsafe and unsound" and further concluded that in relation to drinking water, "universal treatment is necessary".<sup>123</sup> The DWS 2005 is applicable to the first issue because it sets out a small exclusion zone of sheep from the bore head in order to impose "secure" status of the water extracted from the bore. This relates to regulating land use around the groundwater bore head. The DWS 2005 relates to the abstraction of young groundwater for drinking water purposes,

---

111 Ministry of Health *Drinking-water Standards for New Zealand 2005 (Revised 2018)* (19 December 2018) <[www.health.govt.nz](http://www.health.govt.nz)>.

112 Health Act 1956, s 69A(2)(b).

113 *Drinking-water Standards for New Zealand 2005 (Revised 2018)*, above n 111.

114 At [10.3.2.2].

115 At [4.4.1].

116 At 115.

117 At [4.4.2].

118 At [4.4.3].

119 At [4.4.3].

120 At [4.4.4].

121 At [4.4.1].

122 At [10.3.2.2].

123 Government Inquiry into Havelock North Drinking Water, above n 78, at [145].

being the second issue, because it allows the abstraction of young groundwater provided that there is a “lack of significant variability in determinands that are linked to surface effects” under the first criterion.<sup>124</sup>

### G. Reforms to the RMA

It should be mentioned that in June 2020, the Resource Management Review panel, chaired by Hon Tony Randerson QC, published the report titled *New Directions for Resource Management in New Zealand*.<sup>125</sup> Based on this review, the Government has made the decision to repeal and replace the Resource Management Act 1991.<sup>126</sup> The three proposed new pieces of legislation arising out of the reform are the Natural and Built Environments Act, Strategic Planning Act and the Climate Change Adaptation Act.<sup>127</sup> These reforms are applicable to the two issues because ultimately the new legislation may influence whether or not these issues are addressed. The *New Directions for Resource Management in New Zealand* report did not recommend many changes to the consenting and approval process, which indicates that these issues may not be addressed despite the RMA reforms.<sup>128</sup>

### H. Case Example: Hawke’s Bay

The Hawke’s Bay region will now be used as a case example to demonstrate how local authorities within a region of New Zealand have or have not integrated the relevant law into regional and district plans in order to address the two issues. For this case example, the local authorities of the Hawke’s Bay Regional Council (HBRC) and the Hastings District Council (HDC) will be utilised.

#### 1. HBRC regional plan

In terms of resource planning documents under the RMA for the Hawke’s Bay region, the Regional Resource Management Plan (RRMP) is the “most extensive resource planning document”.<sup>129</sup> It became operative on 28 August 2006.<sup>130</sup> In relation to groundwater, the RRMP stipulates that groundwater is relied upon “as a dependable and safe supply for domestic” purposes.<sup>131</sup> The RRMP notes at paragraph 1.4.6 that groundwater within the region is “at risk from various activities” including “intensive primary production” among other activities.<sup>132</sup>

A rule in the RRMP prevails over a standard if it is more stringent than a standard.<sup>133</sup> In regard to land use activity rules under the RRMP, there are certain rules that relate to groundwater, contamination and aquifers. For example, under r 5 of the RRMP, the use of land for feedlots is

---

124 At [4.4.2].

125 Resource Management Review Panel *New Directions for Resource Management in New Zealand* (June 2020).

126 New Zealand Government “RMA to be repealed and replaced” (10 February 2032) <[www.beehive.govt.nz](http://www.beehive.govt.nz)>.

127 Ministry for the Environment *Overview of the resource management reforms* (June 2021) <[www.environment.govt.nz](http://www.environment.govt.nz)>.

128 *New Directions for Resource Management in New Zealand*, above n 125, at 292.

129 Hawke’s Bay Regional Council “About policies, plans and strategies” <[www.hbrc.govt.nz](http://www.hbrc.govt.nz)>.

130 Hawke’s Bay Regional Council *Regional Resource Management Plan* (14 August 2021) <[www.hbrc.govt.nz](http://www.hbrc.govt.nz)>.

131 At [1.4.6.4].

132 At [1.4.6.6].

133 At 119.

a permitted activity if it meets the condition of being “managed in a manner that prevents any seepage of contaminants into groundwater”.<sup>134</sup> If the feedlot does not comply with r 5, under r 6 it is a restricted discretionary activity.<sup>135</sup> The RRMP defines a “feedlot” as an “an area of land upon which animals are kept and fed, for more than 15 days in any 30 day period” and “where the stocking density or feedlot structure (e.g. a concrete pad) precludes the maintenance of pasture or ground cover”.<sup>136</sup> Drawing on this definition, it can be inferred that some paddocks can fit within the definition of feedlot and thus can be considered as feedlots for sheep. Essentially, this rule would then be applicable to the first issue regarding sheep in paddocks close to groundwater used for drinking water sources, if the area was consistent with the definition of feedlot in the RRMP. Arguably, the rule would work towards addressing the issue. It should be noted that the definition of “feedlot” is not consistent across regional council plans in New Zealand.<sup>137</sup>

There are seemingly no other rules that explicitly restrict land use in close proximity to aquifers, such as restricting sheep grazing in paddocks other than feedlots. Therefore, it seems that the first issue is not comprehensively addressed in the RRMP rules. However, footnote 23 of the RRMP does state that the “discharge of contaminants associated with the operation of a feedlot” such as “the runoff of manure during heavy rainfall” is covered under “Rules in Sections 6.4 and 6.6” of the RRMP.<sup>138</sup> These sections regulate discharges to air, land and water and relevant will now be considered.

In relation to the discharge rules under the RRMP, some rules are associated with groundwater, contamination and aquifers. One notable rule is r 14 dealing with animal effluent.<sup>139</sup> Whilst this rule only deals with animal effluent, being animal excreta, that is collected and managed by humans, it is considered a controlled activity, and there is a stipulated condition that there “be no discharge within 30 m of any bore or well”.<sup>140</sup> This rule deals with point source regulation, but in terms of the first issue, this is to do with diffuse discharge, so this rule is not extremely applicable to the first issue.

The discharge of animal effluent that is collected and managed by humans into sensitive catchments such as the Heretaunga Plains unconfined aquifer is captured under r 15. Here, the discharge is a discretionary activity.<sup>141</sup> This rule categorises the Heretaunga Plains unconfined aquifer as a sensitive catchment. The Te Mata aquifer is not captured under this rule as a sensitive catchment. Ultimately, it is questionable whether this rule is applicable to the first issue.

Another notable rule relating to discharges is r 49. This rule deals with discharges to land that may enter water.<sup>142</sup> This is a permitted activity, however, there are certain conditions associated with groundwater aquifers in the rule. One condition is that “there shall be no discharge within 30 m of any bore drawing groundwater from an unconfined aquifer into which any contaminant may

---

134 At 124.

135 At 124.

136 At 124.

137 Jesse Brennan *Feedlots and Intensive Winter Grazing* (Horizons Regional Council, 2017) at 2.

138 At 124.

139 At 133.

140 At 133.

141 At 134.

142 At 173.

enter as a result of the discharge”.<sup>143</sup> It is unfortunate that this condition is restricted to unconfined aquifers, however the rule does state that “for other aquifers, the discharge shall not cause or contribute to a breach” of the DWS 2005. This rule is applicable to the first issue because it could be associated with the discharges and contaminants released from sheep grazing in paddocks near groundwater bores, as the rule is located under the “generic discharges” section.

In regard to water takes and uses of water rules under the RRMP, minor takes and uses of groundwater are covered under r 53.<sup>144</sup> They are a permitted activity.<sup>145</sup> Under this rule, the minor take cannot exceed “10 l/s”.<sup>146</sup> In regard to take volumes, it was difficult to locate the current statistics regarding takes for Havelock North, and so it cannot be stated whether the Havelock North incident take was minor, and under this permitted category. Other takes of groundwater are covered under r 55 and are classified as a discretionary activity.<sup>147</sup> Rule 55 does not specify any restrictions, conditions or terms relating to the abstraction of young groundwater. These rules are applicable to the second issue regarding groundwater abstraction because they deal with what type of consent may be required for groundwater abstraction, dependent on take volume.

## 2. *HDC District Plan*

The Hastings District Council’s District Plan (DCDP) is partly operative.<sup>148</sup> Within the DCDP, it states that the purpose of the DCDP is to guide and control “how land is used, developed or protected in order to avoid or lessen the impact of any adverse effects”.<sup>149</sup> In relation to land use activities and the aquifer zone, the DCDP provides seemingly limited information on this topic, for example, the DCDP does discuss riparian land management rules, but this is more related to surface water.<sup>150</sup>

It is worth noting that the DCDP does discuss hazardous substances rules in areas other than within the Heretaunga Plains unconfined aquifer under rule HS1.<sup>151</sup> For example, rule HS1 states that “The Storage, Handling or Use of Hazardous Substances in areas other than within the Heretaunga Plains Unconfined Aquifer Overlay” is a permitted activity.<sup>152</sup> However, this is not necessarily relevant to the two issues because it is associated with the “storage, handling and use” of substances which are classified as hazardous, and not necessarily the discharge of sheep faeces in paddocks. It is additionally seemingly vague whether “hazardous substances” could include sheep faeces within this rule anyway because under the plan “hazardous substances” can include “organic matter which contains animal waste” but only where the provision relates to the Heretaunga Plains Unconfined Aquifer.<sup>153</sup> Therefore, arguably this rule does not address the two issues.

---

143 At 173.

144 At 176.

145 At 176.

146 At 176.

147 At 178.

148 Hastings District Council “2003 Hastings District Plan” <[www.hastingsdc.govt.nz](http://www.hastingsdc.govt.nz)>.

149 Hastings District Council *Hastings District Plan* (March 2020) at [1.1.1].

150 At [19.1.5].

151 At [29.1.5].

152 At [29.1.5].

153 At [33.1.2].

Overall, no DCDP rules relating to regulating land use around the aquifer zone in the context of the first issue could be identified. Therefore, since there are seemingly no relevant rules, it seems that sheep grazing in paddocks in close proximity to groundwater used for drinking water supply is a permitted activity, and no consent is required under the DCDP, taking into account s 9 of the RMA. No DCDP rules relating to young groundwater abstraction could be identified.

### *I. Concluded View of Relevant Law*

Under existing relevant law, it seems that there are currently limited legal restrictions placed on sheep grazing in paddocks in close proximity to groundwater used for drinking water supply, and the abstraction of young groundwater for drinking water purposes. In terms of the Hawke's Bay case example, under the RRMP it was identified that consent is only required in terms of land use, discharges, and water takes in limited circumstances. Furthermore, under the DCDP it seemed that this plan was silent in terms of addressing the two issues. Evidently, in the Hawke's Bay area, under existing law, it is likely that generally consent is not required for sheep grazing in paddocks in close proximity to groundwater used for drinking water supply. It is also likely that the abstraction of young groundwater for drinking water purposes is a permitted activity in certain circumstances, such as if the take is minor under r 53 of the RRMP.<sup>154</sup> In relation to the Havelock North incident, perhaps a different outcome may have resulted if consent was required in relation to the sheep grazing in the paddocks close to the contaminated bores, and consent was required or conditions were imposed in regard to the abstraction of the young groundwater. Ultimately, the relevant law as it currently stands does not really address the two issues effectively. Gaps within the law in the context of the two issues will now be explored.

## VI. ANALYSIS

In this section, there will be an analysis of the current gaps within the identified relevant law relating to the two specified issues. As mentioned previously, Maslow's HON and SDG6 are arguably related to aquifer management law and policy. Therefore, these two concepts will be utilised as a lens to assess where the gaps and issues are located within the current law and policy in the context of the two specified issues.

### *A. Resource Consent Gap*

Resource consents may not be required for sheep grazing in paddocks in close proximity to groundwater used for drinking water supply, and the abstraction of young groundwater for drinking water purposes. This is because they may be considered permitted activities under the RMA and local authority plans. Taking into account the safety needs within Maslow's HON and Target 6.3 of SDG6, the lack of resource consents required is arguably a gap within the current law because these two issues both could adversely affect the quality and safety of drinking water that is consumed by people. It has been submitted by Rob Collins and others that "grazing livestock are considered to be the dominant source of faecal contamination to New Zealand's freshwaters", and therefore

---

<sup>154</sup> *Regional Resource Management Plan*, above n 130, at 176.

this specific issue is very concerning.<sup>155</sup> Not requiring resource consents for these activities could essentially pose a threat to the satisfaction of the safety needs within Maslow's HON. Requiring resource consents would ensure that an assessment of the activity's effects on the environment is undertaken, which would mean that the discharges of contaminants associated with the first issue, and its relationship with groundwater, are considered. Additionally, requiring resource consents or permits in relation to young water abstraction would ensure that there is more regulation in place to ensure safety. Interestingly in other jurisdictions, such as India, the courts have held that it is a violation of the right to life for the state to fail to provide safe drinking water.<sup>156</sup> Since there can be either negative or positive rights under law, this could explain the differences in approaches.<sup>157</sup> To summarise, consent requirements could help to ensure that the safety needs in Maslow's HON are met, and that the issues are addressed.

### B. RMA Gap

In 2012, Ezekiel Hudspith submitted that in New Zealand "land use has not been adequately managed in order to account for its effect on adjacent water bodies".<sup>158</sup> Hudspith dealt with surface water, but an analogy can be drawn for groundwater due to the statistics provided by Stats NZ in relation to groundwater quality. According to Stats NZ, in relation to the period of 2014–2018 "68 percent of 364 sites failed to meet the E.coli drinking water standards" in regard to groundwater quality.<sup>159</sup> In terms of the period of 2009–2018, 50 percent of sites had worsening trends in relation to E.coli.<sup>160</sup> Taking into account these statistics, an argument can be made that E.coli in groundwater sources, such as underground aquifers used for drinking water purposes, is still a current, and ongoing issue in New Zealand. When E.coli is detected in samples of groundwater, this indicates "a connection with a nearby surface environment that is contaminated with animal faeces".<sup>161</sup> These statistics raise the question regarding whether land use is currently being adequately managed in terms of the functions of local authorities under the RMA. Perhaps the functions under the RMA are in need of reform, and need to be more explicit in terms of land use effects on groundwater quality, such as the effects from animal discharges. Adequate management of land with respect to effects on adjacent water bodies would be beneficial for both the physiological and safety needs under Maslow's HON and Targets 6.1 and 6.3 in SDG6.

---

155 Rob Collins and others "Best management practices to mitigate faecal contamination by livestock of New Zealand waters" (2007) 50 *New Zealand Journal of Agricultural Research* 267 at 268.

156 Phillipe Cullet "Groundwater law in India: Towards a framework for ensuring equitable access and aquifer protection" (2014) 26 *Journal of Environmental Law* 55 at 70.

157 Paul Rishworth "Human rights: The background" (June 2012) *Te Ara – the Encyclopaedia of New Zealand* <www.TeAra.govt.nz>.

158 Ezekiel Hudspith "Freshwater management in New Zealand: A challenge for ecology, equity, and economic efficiency" (2012) 16 *New Zealand Journal of Environmental Law* 277 at 289.

159 Stats NZ "Groundwater quality" (16 April 2020) <www.stats.govt.nz>.

160 Stats NZ, above n 159.

161 PF Callander, C Steffans, N Thomas, S Donaldson and M England *E.Coli contamination in "secure" groundwater sourced drinking water supplies* (Water New Zealand, September 2014) at [3.3].

### C. *SDG6 Gap*

It was submitted that certain government initiatives have not been successful in addressing the two issues relating to sheep grazing and young water abstraction. The first issue relates to the quality of groundwater embedded within an aquifer. Using SDG6 as a lens, essentially by not addressing this first issue relating to sheep grazing, Targets within SDG6 are not being met. For example, the first issue can potentially lead to contaminants entering into groundwater, and this means that Target 6.1 relating to access to safe drinking water, and Target 6.3 relating to improving water quality are not being reached. Furthermore, by not addressing the second issue relating to young groundwater abstraction, Target 6.1 relating to access to safe drinking water is not being met because young groundwater may indicate that pathogens are entering into the aquifer through surface water, therefore not making the drinking water safe to drink. Consequently, not taking action to address these issues under SDG6 also ties in with the safety needs in Maslow's HON. By aiming to implement initiatives under the SDG6 with a focus on both of the two issues, progress can be made to ensure that the Targets within SDG6 are achieved, and the issues are addressed.

### D. *Health Gap*

When using Maslow's HON as a lens, one identified health gap is that under s 69A(2)(c)(ii) of the HA, drinking-water suppliers only have a duty of taking "all practicable steps to comply with the drinking-water standards".<sup>162</sup> Essentially, it is not mandatory for drinking-water suppliers to comply with the drinking-water standards; they merely have to demonstrate that they took "all practicable steps" to do so.<sup>163</sup> The relationship between practicability and knowledge is questionable. Although the WSA imposes a more stringent requirement regarding compliance with the DWS 2005, the current s 69A(2)(c)(ii) of the HA is still of concern. This is because the DWS 2005 provide for the "minimum quality standards for drinking-water in New Zealand".<sup>164</sup> Additionally, when pairing this duty with the current Stats NZ data on groundwater quality, the compliance standard seems even more of a concern. Ultimately, s 69A(2)(c)(ii) of the HA is a gap within the current law and is a risk to the safety needs, when using Maslow's HON as a lens to assess this section.

### E. *DWS 2005 Gap*

In relation to the current drinking water standards, it is important to note that the DWS 2005 sets out that in order for bore groundwater to be classified as "secure" that there must be an exclusion of animals "from within 5 m of the bore head".<sup>165</sup> The question should be raised around whether this 5 metre exclusion of animals from a groundwater bore head is enough to ensure that groundwater for drinking water purposes is "secure" from potential contaminants derived from animal discharges in close proximity to the bore head. This is relevant in light of the RRMP where it specifies that "there shall be no discharge within 30 m of any bore drawing groundwater from an unconfined aquifer into which any contaminant may enter as a result of the discharge" under r 49.<sup>166</sup> In order to gain more

---

162 Health Act 1956, s 69A(2)(c)(ii).

163 Health Act 1956, s 69A(2)(c)(ii).

164 *Drinking-water Standards for New Zealand 2005 (Revised 2018)*, above n 111, at [1.1.1].

165 *Drinking-water Standards for New Zealand 2005 (Revised 2018)*, above n 111, at 38.

166 *Regional Resource Management Plan*, above n 130, at 173.

consistency in relation to the distance of the exclusion of animals, and their associated discharges from groundwater bore heads, it would perhaps be wise to include one specific exclusion distance within national legislation (and all subsidiary instruments) which is based on scientific evidence. This could be tied in with the requirement for consents. This would help to ensure that Maslow's safety needs are met, and the targets within SDG are achieved because it would be a preventative measure regarding contaminants entering into groundwater.

#### F. Taumata Arowai Gap

Under s 50 of the WSA, Taumata Arowai may issue "acceptable solutions or verification methods for drinking water".<sup>167</sup> In September 2021, Taumata Arowai released a working draft titled *Drinking Water Acceptable Solution for Spring and Bore Drinking Water Supplies*.<sup>168</sup> In relation to bore sources for drinking water supplies, this working draft stipulates that "farm animals must be excluded (e.g. with a fence) from within 5 metres of the headworks" and furthermore, "the headworks must be constructed so water cannot flow towards the bore casing or pond around a spring".<sup>169</sup> Arguably, this is a slightly more stringent requirement than what is briefly set out in the DWS 2005, however, it still continues with the five metre standard, and is arguably not consistent with r 49 in the RRMP. If the recommendation mentioned above was implemented, it could provide more consistency in relation to Taumata Arowai acceptable solutions as well.

#### G. Age of Groundwater Gap

Currently, the DWS 2005 provides guidance in terms of the age of water that should be drawn from "secure" bore water supplies. Under security criterion 1, there is an option for demonstrating that there is a "lack of surface or climate influences" on secure groundwater.<sup>170</sup> Essentially, proving that "water younger than one year" is not detectable in an aquifer is optional in order to establish secure bore water supplies under the DWS 2005.<sup>171</sup> It is argued that this should not be an optional standard, and that it should be possibly be mandatory that young groundwater is not abstracted from an aquifer for drinking water purposes. This is because, as demonstrated by the Havelock North drinking water incident report, young groundwater in an aquifer indicates that there is a risk of contamination from surface water.<sup>172</sup> Furthermore, under the DWS 2005, water abstracted from "secure" bore water supplies does not require treatment, so this could potentially pose a risk to public safety if young groundwater is in fact contaminated and consumed.<sup>173</sup> When using Maslow's HON as a lens, this optional standard is ultimately a threat to the safety needs in the hierarchy. Ultimately, this is arguably a gap with current law and policy.

Interestingly, it has been submitted by Uwe Morgenstern and Christopher J Daughney that there are issues with monitoring groundwater quality using age techniques in wells within

---

167 Water Services Act, s 50.

168 Taumata Arowai *Drinking Water Acceptable Solution for Spring and Bore Drinking Water Supplies* (September 2021).

169 Taumata Arowai, above n 168, at [6.2].

170 *Drinking-water Standards for New Zealand 2005 (Revised 2018)*, above n 111, at [4.4.2].

171 *Drinking-water Standards for New Zealand 2005 (Revised 2018)*, above n 111, at [4.4.2].

172 *Government Inquiry into Havelock North Drinking Water*, above n 7, at [221].

173 *Drinking-water Standards for New Zealand 2005 (Revised 2018)*, above n 111, at [3.1].

agricultural areas.<sup>174</sup> This is because the monitored “well would not yet reflect impacts from later land-use activities” and there could be “significant fractions of old water that was recharged before land-use intensification”.<sup>175</sup> In light of this argument, the question should be asked why there is so much reliance placed on the age of groundwater within the DWS 2005 in order to determine secure bore water status. This area of law could be reviewed.

## *H. Classification Gap*

The DWS 2005 currently operates on a “secure” and “non-secure” classification system in relation to treating groundwater for drinking water purposes. In the Government Inquiry into the Havelock North drinking water incident it was found that this system should be abolished.<sup>176</sup> This was on the grounds that this system is “inherently unsafe”.<sup>177</sup> It is submitted that this argument is important in light of the safety level in Maslow’s HON and Target 6.1 of SDG6. Arguably, there are currently gaps within current law and policy if an official Government Inquiry deems this system “unsafe” and yet it still operates. The Government Inquiry suggested that universal treatment be given to all networked drinking water supplies.<sup>178</sup> This would be beneficial as it would ensure that the safety level of Maslow’s HON is met, and also that SDG6 is achieved with respect to access to safe drinking water.

## *I. NPSFM Gap*

As mentioned above, under the current NPSFM, cl 3.5 stipulates that local authorities are to manage freshwater and land use in an “integrated and sustainable way” and this is for the purpose of avoiding, remedying or mitigating “adverse effects” on water bodies’ “health and well-being”.<sup>179</sup> The question should be asked whether local authorities are currently managing groundwater and the land use activity of sheep grazing in an “integrated and sustainable way” under clause 3.5 because as demonstrated by the Stats NZ statistics, many groundwater sites have failed to meet E.coli drinking water standards, and animal waste is a common source of E.coli.<sup>180</sup> It has been proposed by Abraham J Melloul and Martin L Collin that the planning of groundwater management and land-use can help maintain the sustainability of resources, and so if groundwater and land use can be managed in this “integrated and sustainable way”, as per the NPSFM, then the self-actualisation level of Maslow’s HON maybe achieved.<sup>181</sup> This is because water resource sustainability sits at the top of Maslow’s HON, according to Melloul and Collin.<sup>182</sup>

---

174 Uwe Morgenstern and Christopher J Daughney “Groundwater age for intensification of baseline groundwater quality and impacts of land-use intensification – The national groundwater monitoring programme of New Zealand” (2012) 456-457 *Journal of Hydrology* 79 at 80.

175 At 80.

176 Government Inquiry into Havelock North Drinking Water, above n 7, at [688].

177 At [689].

178 At [158].

179 At [3.5].

180 Land Air Water Aotearoa “Factsheet: Faecal Indicators” (September 2021) <[www.lawa.org.nz](http://www.lawa.org.nz)>.

181 Abraham J Melloul and Martin L Collin “Prioritization of sustainable groundwater management needs: the case of Israel’s stressed coastal aquifer” (2002) 4 *Environment, Development and Sustainability* 347 at 360.

182 At 353.

### J. *Changes in New Zealand*

Water reforms in New Zealand are moving the management of drinking water to four new regional entities.<sup>183</sup> There have been an array of concerns presented in relation to this change.<sup>184</sup> Ultimately, it is unlikely that this reform will make a difference in terms of the two specified issues. Arguably, it will not make too much of a difference who the regulator is. Rather, amendment of the relevant substantive law and policy is a better solution to the identified issues relating to sheep grazing and young groundwater abstraction. Law amendment will help address the safety needs in Maslow's HON along with SDG6, and so the focus should be on this, rather than on who the regulator may be.

### K. *RMA Reform*

There are aspects of the RMA that could be reviewed and amended in order to address the two specified issues. As mentioned, the RMA is undergoing reform. Interestingly, the Report *New Directions for Resource Management in New Zealand*, leaves the subject of groundwater fairly much alone.<sup>185</sup> In fact, it only mentions groundwater once and this is in relation to New Zealand's heavily reliance on the resource.<sup>186</sup> Further research could be pursued in regard to the place of groundwater within the RMA reforms, and how the reforms could address the two issues relating to sheep grazing and young groundwater abstraction.

### L. *Concluded View*

Accordingly, when using Maslow's HON and SDG6 as a lens, various gaps within current law and policy can be identified in the context of the two issues relating to sheep grazing and young groundwater abstraction. Amendments to both law and policy are required in order to address both issues, and ensure consistency with Maslow's HON and SDG6 Targets. Recommendations to law and policy are made below with respect to the gaps identified.

## VII. RECOMMENDATIONS

This section will discuss what the law ought to look like, in regard to addressing the issues and gaps identified by using SDG6 and Maslow's HON as a lens. Various recommendations will now be explored.

The first overall recommendation is perhaps quite obvious. In essence, the recommendation is to not allow sheep to be in paddocks that are in close proximity to underground aquifer sources used for drinking water. Alternatively, if sheep are allowed in paddocks in close proximity, it should be a land use activity that requires a resource consent, rather than merely be a permitted activity. This recommendation could mitigate the potential for contaminants from sheep faeces to make its way into underground aquifer water sources used for drinking water. Logically, if sheep are not in close proximity to underground aquifer sources used for drinking water then there is

---

183 Russell Palmer "Three waters: what you need to know" (4 October 2021) Radio New Zealand <[www.rnz.co.nz](http://www.rnz.co.nz)>.

184 Christopher Luxon "Three waters, four entities, several problems" (15 September 2021) Stuff NZ <[www.stuff.co.nz](http://www.stuff.co.nz)>.

185 *New Directions for Resource Management in New Zealand*, above n 125.

186 At 15.

limited opportunity for contamination to occur as a result of sheep faeces. If the activity is allowed but requires a resource consent, then the effects of the sheep being in the paddock on groundwater can be controlled. Arguably, this recommendation could address the first issue relating to sheep grazing.

The second overall recommendation is to not allow the abstraction of young groundwater for drinking water purposes. This would eliminate the potential for sickness due to consuming contaminated non-aged drinking water, like in the Havelock North incident. It is submitted that this recommendation could address the second issue.

In relation to law change in general, the following is recommended. First, regulations like the Resource Management (Stock Exclusion) Regulations 2020 could be implemented to control sheep grazing in paddocks in near proximity to aquifers used for drinking water sources. This is because arguably, s 360 of the RMA regulations are more appropriate than using the National Environmental Standard route for all nationally directed regulation. Second, amendment could be made regarding the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 in order to incorporate standards for farming activities that involve sheep grazing in paddocks in near proximity to aquifers used for drinking water sources. Third, further initiatives in relation to SDG6 could be implemented in order to ensure that the two issues are addressed, and New Zealand is on track to achieving the targets within SDG6 in the specified timeframe. Fourth, one exclusion distance within national legislation which is based on scientific evidence could be included to ensure consistency across the board with respect to sheep grazing in paddocks near aquifers used for drinking water sources and their associated discharges. Fifth, the "secure" and "non-secure" classification system in relation to treating groundwater for drinking water purposes could be abolished as it has been found that this system is "inherently unsafe".<sup>187</sup> Last, there should be a focus on addressing the issues in substantive legislation and policy, rather than changing who the regulator may be.

It has been demonstrated that Maslow's HON and SDG6 are relevant and can be used as a lens to assess current law and policy relating to aquifer management. In view of this finding, the final recommendation is that Maslow's HON and SDG6 be integrated into New Zealand law and policy associated with aquifer management, particularly in terms of the management of drinking water sources. Both Maslow's HON and SDG6 and their link to water management have been examined within academic literature.<sup>188</sup> Therefore, it would be worth exploring how Maslow's HON and SDG6 could be used as tools within law and policy to ensure that New Zealand is both meeting their obligations with regards to SDG6, and ensuring that Maslow's HON is met.

---

187 Government Inquiry into Havelock North Drinking Water, above n 7, at [689].

188 See Abraham J Melloul and Martin L Collin "A hierarchy of groundwater management, land-use, and social needs integrated for sustainable resource development" (2001) 3 *Environment, Development, Sustainability* 45; Abraham J Melloul and Martin L Collin "A proposal for sustainable groundwater management as influenced by a pyramid of social needs: the case of Israel's coastal aquifer" (2000) 42 *Water Science and Technology* 249; Abraham J Melloul and Martin L Collin "Harmonizing water management and social needs: a necessary condition for sustainable development" (2003) 67 *Journal of Environmental Management* 385; and Abraham J Melloul and Martin L Collin "Prioritization of sustainable groundwater management needs: the case of Israel's stressed coastal aquifer" (2002) 4 *Environment, Development and Sustainability* 347.

### VIII. CONCLUSION

When using Maslow's HON and SDG6 as a lens, it is proposed that law and policy regarding aquifer management in its current form is inadequate in terms of addressing the issues associated with sheep grazing in paddocks near aquifers used for drinking water sources and the abstraction of young groundwater for drinking water purposes. It is submitted that there are various gaps in law and policy relating to resource consents, the RMA, SDG6, health legislation, the DWS 2005, Taumata Arowai, the NPSFM in terms of addressing the two issues and meeting Maslow's HON and SDG6. It is suggested that law and policy be amended in order to address the two issues. The first overall recommendation is to not allow sheep to be in paddocks that are in close proximity to aquifer sources used for drinking water and alternatively, if sheep are allowed in paddocks in close proximity, to make the activity one that requires a resource consent. The second overall recommendation, is to not allow the abstraction of young groundwater for drinking water purposes as this would eliminate the potential for sickness due to consuming contaminated non-aged drinking water. Lastly, it is recommended that Maslow's HON and SDG6 should be integrated into New Zealand law and policy associated with aquifer management, particularly in terms of the management of drinking water sources and groundwater quality.

# CALLS FOR TRANSFORMATIVE CHANGE AND THE DISTRICT COURT RESPONSE

BY CHIEF JUDGE HEEMI TAUMAUNU\*

... mai te pō ki te ao mārama ...  
... the transition from night to the enlightened world ...

## I. INTRODUCTION

E aku nui, e aku rahi, e aku whakatamarahi ki te rangi, tēnā koutou katoa.

Towards the end of the 19th century, in the later years of his life, after he had experienced arrest without charge, imprisonment, armed conflict with the Crown, an official pardon and the formation of the Ringatū religion, Te Kōti-Arikirangi uttered these famous expressions:

*Ko te waka hei hoehoenga mā koutou hei muri i au, ko te ture.*

*Mā te ture anō te ture e aki –*

*The canoe for you to paddle after me is the law.*

*Only the law can be set against the law.*

He also said:<sup>1</sup>

*Ka kuhu au ki te ture, hei matua mō te pani –*

*I seek refuge in the law as a parent for the oppressed.*

These powerful words continue to resonate and provide a relevant historical context for the modern-day vision of the District Court. That vision is simply expressed. The District Court should

---

\* His Honour Judge Heemi Taumaunu was appointed Chief District Court Judge in September 2019, and leads a bench of 172 permanent judges, 39 acting warranted judges, and 18 community magistrates. Born in Gisborne, he is the first Māori to be appointed to the role and is a fluent te reo Māori speaker. His tribal affiliations are Ngāti Pōrou, Ngāti Konohi, and Ngāi Tahu.

He was appointed a District Court Judge in 2004 after practising law mainly in Gisborne and a previous career in the New Zealand Army. He studied law at Victoria University, where he was awarded the Quentin Baxter Memorial Scholarship and the Ngā Rangatahi Toa Scholarship. As a barrister, he gained experience as counsel in jury trials, as a Youth Advocate in the Youth Court and as a lawyer for child and counsel to assist in the Family Court.

Through various leadership roles in the District Court, Judge Taumaunu has encouraged a wider appreciation for the value of culturally responsive justice. He led development of the Rangatahi Courts, and his leadership was recognised internationally in 2017 when he received the Veillard-Cybulski Award.

Chief Judge Taumaunu has also served as a Judge of the Court Martial of New Zealand since 2012, and currently serves as the Deputy Judge Advocate General and Deputy Chief Judge of the Court Martial of New Zealand.

1 Judith Binney *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Bridget Williams Books, Wellington, 2016) at 337.

be a place where all people can come to seek justice, no matter what their means or ability and regardless of their culture or ethnicity, who they are or where they are from.

The title of this address touches on three related topics. The first topic concerns a Māori worldview about Te Ao Mārama that has helped to shape this vision for the District Court. The second topic touches on the multiple calls for transformative change that have been directed towards our Court. The third topic relates to the District Court response in terms of what we have done so far and what we propose to do in the future. In this regard, I intend to discuss the District Court generally and I also intend to specifically address the Hamilton District Court and the Alcohol and Other Drug Treatment (AODT) Court that is to be established there in 2021.

In doing so, I make it clear that the pathway forward is one that is intended to include all New Zealanders who are affected by the business of our Court. It is a pathway that will respect the independence of judicial officers who will continue to decide cases on their individual merits. Our ultimate intention will be to ensure to the maximum extent possible that the best available information is presented to our judges and other triers of fact to assist them to make well-informed decisions about the people who appear before them.

These remarks are framed within the applicable constitutional framework. Criminal justice policy and legislation reform in the criminal justice system are matters for the executive and the legislature. Examples that come to mind are the legislation that established the Youth Court in 1989 and in more recent times the Government funding that has been allocated for specialist services to support the AODT Court.

As Chief District Court Judge I have a statutory responsibility to ensure the orderly and efficient conduct of the business of the Court. This includes duties around rostering of judges, scheduling of work, setting standards for best practice in the District Court and to oversee and promote the professional development and education of judges. Nothing discussed in this address will necessarily require legislative change. Clearly, both the judiciary and the executive have a role to play in the important task of transforming the courts – and both branches of government have to respect the prerogatives and constitutional boundaries of the other. I look forward to working in an appropriate and careful partnership with the executive – both Ministers and officials – as this important work continues to be progressed.

## II. THE “TE AO MĀRAMA MODEL”

The District Court response to the calls for transformative change has been shaped by reference to the concept of Te Ao Mārama (which means “the world of light” or, for the purposes of this address “the enlightened world”). The title of this address, “Mai te pō ki te ao mārama”, literally means “from the night to the world of light (the enlightened world)”. This concept draws on several different Māori worldview threads including the well-known expression:

Ka pō, ka pō, ka ao, ka awatea.

Tīhei mauri ora ki te whei ao!

Tīhei mauri ora ki te ao mārama!

The first rays of dawn herald the transition from night to day.

Behold it is the living environment!

Behold it is the world of light!

The expression “... mai te pō ki te ao mārama ...” is also a reference to the Māori creation myth. In the beginning of creation, Ranginui, the Sky Father and Papatuanuku, the Earth Mother, were bound together in an eternal embrace. A state of perpetual and intense darkness (“te pō”) existed in the space between the two parents. The children of Ranginui and Papatuanuku lived in that space. In that state of perpetual darkness the children were unable to fulfil their potential. Tane Mahuta, the god of the forest, eventually separated his parents by pushing them apart. This created the world of light (“te ao mārama”) and allowed the children to move “mai te pō ki te ao mārama”, from the darkness to the enlightened world. The children then commenced their tasks creating forests, oceans, fish, animals, and people.<sup>2</sup>

Although the general theme of moving from “the darkness of night to the world of light (or to the enlightened world)” is a universal and easy to understand pan-cultural concept, the theme provides a relevant Māori cultural lens that can be used to consider the past, present and future development for all people and cultures of our nation, Aotearoa New Zealand, and more particularly for the purposes of this address, the future direction of the District Court of New Zealand.

When my paternal great, great, great grandfather, Rangiuia, signed the Treaty of Waitangi at Tolaga Bay in May 1840, I do not know exactly what his thoughts were at the time. On an objective assessment, the promises exchanged between the parties to the Treaty, at least on their face, created a vision of hope for the future. On one view of it, the Treaty imagined the creation of an enlightened world, te ao mārama, where Māori and Pākehā could live peacefully alongside one another and both parties could have opportunities to prosper.

When Tūta Nihoniho, one of the leading chiefs of my tribe, Ngāti Pōrou, composed his famous haka, Te Kiringutu, in the 1870s, he was furious that large tracts of Māori land were being sold to Pākehā settlers and he was concerned about the future problems this would cause for Māori people. The haka begins with the opening verse:

Pō ngā rā, i pō ngā rā  
Ka tataki mai te whare o ngā ture  
Ka whiria  
Te Māori, ka whiria rā  
Ngau nei ōnā tāke  
Ngau nei ōnā reiti, āhaha  
Te taea te ueue! ...

A shadow (the law) has descended upon the land  
This has been caused by the chattering in Parliament (the house that makes the laws)  
The Māori people have been bound and tied down by the law  
They have been bitten by taxes and rates  
Alas, there is no escape! ...

By the time my maternal great, great, great grandfather, Te Maiharoa, had reached an advanced stage in life in the mid-1870s, he had been deeply affected by two decades of Māori land grievances and perceived injustice. He was a prominent Ngāi Tahu tohunga and rangatira and lived in Arowhenua,

---

<sup>2</sup> See: B Mikaere *Te Maiharoa and the Promised Land* (Heinemann Publishers, Auckland, 1988) at 69.

a village located just south of Temuka. In 1877, when he was 77 years old, Te Maiharoa led more than 100 of his followers on a migration from Arowhenua to Te Ao Mārama.

Te Ao Mārama is located in the MacKenzie Basin and is now known by the name Omarama. Te Maiharoa and his followers peacefully occupied the land and lived in accordance with Māori custom and protocol for two years. This was the version of the enlightened world that he envisaged for his people. Eventually Te Maiharoa and his followers were arrested and thrown off the land.

When my Hopkinson, Sherborne, and Ferguson ancestors travelled to this country in the 1800s they were seeking a better life for themselves and their families. They settled in the South Island and at various times married my Ngāi Tahu ancestors. They came from England and Scotland and in similar fashion were in pursuit of a more enlightened world. The search for a more enlightened world, *te ao mārama*, has been a consistent theme throughout successive generations, from the time of Kupe's first voyage of discovery from the mythical Hawaiki to Aotearoa New Zealand, through until the present-day arrival of immigrants from the many and diverse cultures seeking a new life in our country.

I suggest that the calls for transformative change as they relate to the District Court could be translated as a concerted call to move towards a more enlightened world, to move towards *te ao mārama*, not just for Māori, but for all people of all ethnicities and from all cultures who are affected by the business of our Court. This is because modern day Aotearoa New Zealand is a multi-cultural and vibrant society with two founding cultures bound together by the principle of partnership based on the Treaty of Waitangi. In modern thinking, the vision of hope that is expressed in the Treaty relationship now extends to include all Māori and non-Māori New Zealanders regardless of culture or ethnicity. Hence the all-inclusive nature of the vision for the District Court as a place where all people can come to seek justice, no matter what their means or ability and regardless of their ethnicity or culture, who they are or where they are from.

The District Court response to the calls for transformative change will be known as the “Te Ao Mārama model”. Inspired by a simple idea; in essence, the Te Ao Mārama model signals a deliberate intention on the part of the District Court to move “towards a more enlightened world” for the benefit of all people of all ethnicities and cultures who are affected by the business of our Court.

This vision and move by the District Court will, of course, still mean that offenders will be held accountable and responsible, that the Sentencing Act 2002 will continue to be applied, and that principled and lawful sentences, including imprisonment, are imposed. But we hope that this occur in an environment where more well-informed decisions can be consistently made, based on better information, with better informed participants, and better understood processes.

Thus far, I have painted a backdrop for this address which is a blend of legend and the historical record. At this point I will look more specifically at history as it affects criminal justice and the District Court. This relates in particular to the repeated calls for transformative change made over the last four decades, and – by way of response to those calls —the solution-focused approach that District Court judges have developed, most notably through a series of specialist courts.<sup>3</sup>

These have a direct bearing on the proposed District Court response and the Te Ao Mārama model.

---

3 I am indebted to the judicial clerks (Oliver Fredrickson, Stephen Woodwark, Katherine Werry and Zahra Zavahir), and to Marie McNicholas and Renee Smith who all work in my chambers for their research and assistance in preparing this paper.

### III. CALLS FOR TRANSFORMATIVE CHANGE

Calls for transformative change to the justice system have been passed down through successive generations. They are not a modern phenomenon, nor just another worthy contemporary cause. They come from all corners of our society and have relevance not just for the founding cultures but also all other cultures in modern Aotearoa.

The sense of hurt and unfairness driving the calls for change is deeply felt amongst Māori. In the 19th century, these calls were primarily directed towards Māori land alienation and related issues.<sup>4</sup> When the Treaty of Waitangi was signed in 1840, Māori owned almost all of the land in Aotearoa New Zealand. By 1892, it was little more than a third, and a quarter of that was leased to Pākehā.<sup>5</sup> In the space of a generation, Māori were transformed into wage labourers with no capital base. During this period, Māori were excluded from the economic opportunities of the new colonial society and witnessed the gradual overturning of mana Māori bi-settler authority.<sup>6</sup>

As a result of a combination of factors including armed conflict with the Crown, resulting land confiscations and the devastating effects of disease on the Māori population, by the turn of the 20th century Māori were considered to be a dying race.<sup>7</sup> The Māori language was banned in schools.<sup>8</sup> Certain tikanga practices were banned by statute.<sup>9</sup> Official government policies effectively promoted the assimilation of Māori people into the dominant colonial settler culture.

In the mid-20th century, the Māori population began migrating into larger urban areas. Until this time, the rate of Māori imprisonment was generally proportionate with the Māori population percentage. However, the generation of Māori who were part of the “urban drift” became a visible and conscious minority and faced further official government policies that required Māori to assimilate into the “mainstream”.<sup>10</sup> This urban shift, and the social and economic difficulties that followed, contributed to a dramatic increase in Māori representation in the criminal justice system. Between 1950 and 1970, the number of Māori prisoners received into prisons, relative to all prisoners, doubled.<sup>11</sup>

As the statistics continued in this direction, the justice system became the target for calls for transformative change. Most notable were the seminal reports *Puao-te-Ata-tu*, *He Whaipanga Hou*, and *Te Ara Hou* drafted by John Rangihau, Dr Moana Jackson, and Sir Clinton Roper

---

4 See: PG McHugh *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, Oxford, 2011); Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011); RP Boast “The Native Land Court at Cambridge: Māori Land Alienation and the Private Sector” (2017) 25 *Waikato Law Review* 26.

5 Ministry of Culture and Heritage “Native Land Court” (September 2020) *New Zealand History* <nzhistory.govt.nz>.

6 Sir Joesph Williams, Justice of the New Zealand Supreme Court “Build a Bridge and Get Over It: The Role of Colonial Dispossession in Contemporary Indigenous Offending and What We Should Do About It” (Sir Robin Cooke Lecture 2019, Victoria University, Wellington, 4 December 2019).

7 Jane Stafford and Mark Williams *Maoriland: Literature 1872–1914* (Victoria University Press, Wellington, 2006) at 110.

8 Waitangi Tribunal *Report of The Waitangi on The Te Reo Māori Claim* (Wai 11, 1993) at 3.2.8.

9 See: Tohunga Suppression Act 1907.

10 Richard Hill “Māori Urban Migration and the Assertion of Indigeneity in Aotearoa/New Zealand, 1945–1975” (2012) 14:2 *Interventions* 256 at 257.

11 Greg Newbold *The problem of prisons: corrections reform in New Zealand since 1840* (Dunmore, Wellington, 2007) at 55–56.

respectively.<sup>12</sup> Although these reports were released more than 30 years ago, calls for transformative change have continued. During this period, a persistent wave of reports, papers, and articles have continued to criticise our justice system.

Surveying this material, one can immediately see common themes in the issues raised in the 1980s and those raised today, including within reports recently commissioned by the Government. In *Ināia Tonu Nei*, released in 2019, the hui members noted that the “true essence and kōrero of these reports published more than 30 years ago have not been fully understood or accepted by those in power”.<sup>13</sup> On the whole, contemporary commentary suggests that these calls for transformative change have largely been left unanswered.<sup>14</sup>

The depth and breadth of the issues raised over these years is considerable, spanning across all jurisdictions of the District Court. The underlying message is that our courts are failing to understand or protect those who appear before it or who are affected by the business of the Court. In essence, defendants, whānau, and victims are leaving the current system feeling unheard and unappreciated.<sup>15</sup> This is most pronounced in the criminal justice system.

Criminal justice policy and legislation are matters for the executive and legislature to address. I am aware the Government has commissioned numerous important reports over time that have helped shape our understanding of the issues that need to be addressed. Many of these reports make the point that our criminal justice system over-emphasises punishment at the expense of rehabilitation.<sup>16</sup> They argue that for many communities, prioritising punishment over rehabilitation does not make them safer.<sup>17</sup> In fact, it often has the opposite effect, bringing more individuals into the formal criminal justice system which can have a lasting effect on them and their whānau.<sup>18</sup>

A punishment-first focus is faulted as particularly ineffective where the underlying driver of the offending is actually addiction, mental or physical health issues, homelessness, whānau

---

12 John Rangihau *Puao-te-Ata-tu: The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare* (Māori Advisory Committee, September 1988); Moana Jackson *The Māori and the Criminal Justice System A New Perspective: He Whaipāanga Hou* (Department of Justice, Study Series 18, November 1988); Clinton Roper *Te Ara Hou: The New Way* (Ministerial Committee of Inquiry into Prisons System, 1989).

13 Hui Māori Participants *Ināia Tonu Nei* (Te Uepū Hāpai I te Ora – The Safe and Effective Justice Advisory Group, July 2019) at 9.

14 See: Charlotte Williams *The Too Hard Basket: Māori and Criminal Justice Since 1980* (Victoria University Press, Wellington, 2001) at 95; JustSpeak *Māori and the Criminal Justice System: A Youth Perspective* (JustSpeak, Position Paper, March 2012) at 8; Kim Workman “From a Search for Rangatiratanga to a Struggle for Survival – Criminal Justice, the State and Māori, 1985 to 2015” (2016) NZS22 *Journal of New Zealand Studies* 89 at 98; Waitangi Tribunal *Tu Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 97; Craig Linkhorn “He Waka Roimata – transforming our criminal justice” June 2019 *Māori Law Review*.

15 Te Uepū Hāpai I te Ora – The Safe and Effective Justice Advisory Group *He Waka Roimata* (First Report, June 2019) at 37; Te Uepū Hāpai I te Ora – The Safe and Effective Justice Advisory Group *Turuki! Turuki!* (Second Report, December 2019) at 3.

16 Clinton Roper, above n 12, at 1.63–1.65 and 2.3–2.4; Māori Hui Participants (*Ināia Tonu Nei*), above n 13, at 21; Te Uepū Hāpai I te Ora (*He Waka Roimata*), above n 15, at 43 and 46–49; Te Uepū Hāpai I te Ora (*Turuki! Turuki!*), above n 15, at 9, 11, 15, 39 and 54; Te Uepū Hāpai I te Ora *Summit Playbook* (September 2018) at 13.

17 Clinton Roper, above n 12, at 2.3–2.4; Sian Elias, Chief Justice of New Zealand “Blameless Babes” (Annual Shirley Smith Address, Victoria University, Wellington, 9 July 2009) at [46], citing Shirley Smith “Crime and jail” *The Dominion* (Wellington, 2 February 1999, ed 2) at 10; Te Uepū Hāpai I te Ora (*He Waka Roimata*), above n 15, at 47.

18 Te Uepū Hāpai I te Ora (*He Waka Roimata*), above n 15.

imprisonment, unemployment, cultural dislocation, or past trauma.<sup>19</sup> In such cases, there is often a “cocktail of disabilities” that may underpin the offending.<sup>20</sup> It is acknowledged that for people in these circumstances, wrap-around support services are needed to properly address the underlying causes of offending.<sup>21</sup> Presently, local communities, government agencies, and NGOs do this. However, these reports tell us that they are poorly coordinated with the Court (and with each other), which causes gaps in provision.<sup>22</sup> Defendants, victims, and whānau are left to navigate the confusing and often intimidating court process without support. As a result, they are unlikely to fully engage with the process and will often leave feeling unheard.<sup>23</sup>

The reports also remind us that a failure to adequately coordinate community support services prevents judges from receiving important information about the offender.<sup>24</sup> Most relevantly, information about the defendant’s cultural and whānau background, mental and physical health, and educational history. Without this information, it makes it more difficult for judges to effectively engage with the individual defendant and their circumstances.<sup>25</sup>

These shortcomings are said to have contributed, at least in part, to the disproportionate over-representation of Māori in the criminal justice system. Māori are both more likely to offend and more likely to be victimised.<sup>26</sup> As of June 2020 there were 9,469 prisoners in Aotearoa. 4,952 of these were Māori (52.3 percent) despite Māori making up just 17 percent of the population.<sup>27</sup>

These reports impress on us that our current system continues the oppression from colonisation by imposing British institutions, laws, processes, and values onto Māori.<sup>28</sup> This created what Dr Jackson called “monocultural myopia”, whereby the New Zealand legal system has adopted almost all aspects of the British system and almost entirely ignored the other founding culture of Aotearoa New Zealand.<sup>29</sup> As a result of this myopia, many facets of our justice system are inconsistent with te ao Māori and tikanga Māori principles.<sup>30</sup> This lack of recognition for tikanga Māori principles

- 
- 19 Sian Elias, above n 17, at [20] and [28]; Andrew Becroft, Principal Youth Court Judge, “Playing to Win – Youth Offenders Out of Court (And Sometimes In): Restorative Practices in the New Zealand Youth Justice System” (paper presented to Queensland Youth Justice Forum, Brisbane, Australia, July 2015) at 10; John Walker, Principal Youth Court Judge “When the Vulnerable offend – who fault is it?” (address given to Northern Territory Council of Social Services Conference, Darwin, 27 September 2017); Te Uepū Hāpai I te Ora (He Waka Roimata), above n 15, at 48.
- 20 Meghan Lawrence “‘Cocktail of disabilities’: Judges to develop new model for youth offenders” *New Zealand Herald* (online ed, Auckland, 16 August 2018), citing a press release by the Chief District Court Judge and Principal Youth Court Judge: see Jan-Marie Doogue and John Walker “District Court responds to high incidence of disabilities” (press release, 16 August 2018).
- 21 Māori Hui Participants (Ināia Tonu Nei), above n 13, at 28.
- 22 Te Uepū Hāpai I te Ora (He Waka Roimata), above n 15, at 58 and 62; Te Uepū Hāpai I te Ora (Turuki! Turuki!), above n 15, at 9 and 39–40.
- 23 Te Uepū Hāpai I te Ora (He Waka Roimata), above n 15, at 30.
- 24 At 40.
- 25 Te Uepū Hāpai I te Ora (Turuki! Turuki!), above n 15, at 30.
- 26 Chief Victims Advisor *Te Tangi o te Manawanui* (Te Uepū Hāpai I te Ora – The Safe and Effective Justice Advisory Group, December 2019) at 2.
- 27 Department of Corrections “Prison Facts and Statistics – June 2020” <[www.corrections.govt.nz](http://www.corrections.govt.nz)>.
- 28 Chief Victims Advisor, above n 26, at 7; Te Uepū Hāpai I te Ora (Summit Playbook), above n 16, at 13.
- 29 Moana Jackson, above n 12, at 35.
- 30 Moana Jackson, above n 12, at 35; Chief Victims Advisor, above n 26, at 7; Te Uepū Hāpai I te Ora (Turuki! Turuki!), above n 15, at 25.

still causes many Māori to feel that the justice system is a foreign entity and have “little empathy” for it.<sup>31</sup>

One of the most notable ways that our system is inconsistent with tikanga Māori is the limited role that whānau and victims play in criminal proceedings.<sup>32</sup> Unless called as a witness or as a s 27 speaker, whānau members have no substantive role in the criminal justice process. Although victims can give evidence, provide victim impact statements and participate in restorative justice processes, their role is also relatively limited. The imported British system is penal-focused and revolves around the offender. This fails to reflect tikanga Māori principles, where both whānau and victims play a pivotal role in providing support to the person harmed and to the person who has caused the harm, and to be part of the solution.<sup>33</sup>

These reports also tell us that the justice system fails to support and protect victims.<sup>34</sup> Victims say that they feel isolated and unsupported during their own trial and are often left chasing the few support services that are available to them.<sup>35</sup>

The increasing delays associated with criminal trials often force victims and their whānau to put their lives on hold and retain the traumatic details of the offending until the trial. These delays, especially on the day of the trial, prevent victims from healing.<sup>36</sup> During the trial, many victims feel unprepared, as there is often a paucity of information about the process and what can be expected at each stage.<sup>37</sup>

#### IV. DISTRICT COURT RESPONSE TO DATE

##### A. *Judicial Education and Other Initiatives*

The District Court is well aware that it is one of the primary targets of the many calls for transformative change. In response, the Court has incrementally developed several different initiatives over the past three decades.

In 1996, former District Court Judge, Jim Rota, and the Institute of Judicial Studies (“IJS”) commenced a nationwide marae visit programme designed to expose judges to the Māori world and increase cultural competency amongst the judiciary. This extremely valuable programme continues to operate annually and is now organised by Judge Louis Bidois and Judge Denise Clark in conjunction with the IJS. Attendance at the annual marae visit is now compulsory for all newly appointed District Court judges.

---

31 Moana Jackson, above n 12, *Te Uepū Hāpai I te Ora (He Waka Roimata)*, above n 15, at 3; *Te Uepū Hāpai I te Ora (Turuki! Turuki!)*, above n 15, at 25.

32 *Te Uepū Hāpai I te Ora (He Waka Roimata)*, above n 15, at 20.

33 *Te Uepū Hāpai I te Ora (Summit Playbook)*, above n 16, at 21.

34 Chief Victims Advisor, above n 26, at 2–3.

35 At 3, 7, 10 and 36.

36 At 13.

37 At 13.

In 2001, the then Chief Judge of the Māori Land Court, now Justice Joe Williams, and the IJS commenced a marae-based Māori language course for judges of the Māori Land Court bench. This programme was then extended to include District Court Judges. For well over a decade, an annual marae-based Māori language course was held at Te Herenga Waka marae at Victoria University of Wellington. This course was primarily attended by District Court judges.

On 3 October 2001, Judge Denise Clark (of Ngā Puhi descent) was the first person to be sworn-in as a District Court Judge during a ceremony held on a marae. Since that time, many District Court judges of Māori descent have chosen their own marae as the venue for their swearing-in ceremonies.

In 2008, the former Chief District Court Judge, the late Russell Johnson, formed a judicial committee designed to address kaupapa Māori issues. That committee, known as the Kaupapa Māori Advisory Group, was instrumental in the design and implementation of the Rangatahi Court, the Matariki Court and other kaupapa Māori initiatives in the District Court.

In July 2012, to coincide with Māori Language Week, court announcements in both the English and Māori languages were commenced in the District Court. This development was the result of an initial proposal made by Judge Ema Aitken to the then Chief District Court Judge, now Justice Jan-Marie Doogue. The Ministry of Justice and the Kaupapa Māori Advisory Group were heavily involved in the design and implementation of this initiative.

Since 2013, all swearing-in ceremonies for District Court Judges now commence with a mihi whakatau, a formal Māori welcome. This applies regardless of whether the new judge happens to be of Māori descent and is intended to recognise the commitment of the District Court to honour the other founding culture in the spirit of partnership under the Treaty. The Kaupapa Māori Advisory Group has been instrumental in designing and arranging the processes that are followed during the mihi whakatau.

In 2014, Justice Joe Williams and the IJS designed and commenced a tikanga Māori programme for the judiciary. Attendance at the tikanga programme is now compulsory for all newly appointed District Court judges.

Since 2015, the Institute of Judicial Studies has also developed a multi-level Māori language programme that caters for judges with different levels of competence. Attendance at a level appropriate Māori language course is now compulsory for all newly appointed District Court judges.

In addition to those courses outlined above, the Institute of Judicial Studies delivers many other programmes as part of the judicial education curriculum. As can be seen, education programmes for the judiciary and judge-led initiatives outside of the courtroom have formed an important part of the overall District Court response to the calls for transformative change.

Over the past two decades, District Court judges across Aotearoa have also sought to address some of these calls for change within the existing legal framework inside the courtroom. Often these initiatives are entirely judge-led and designed in response to perceived community needs. There has been a natural development of solution-focused judging as part of this response, but there is also extensive academic and jurisprudential theory underpinning this approach. It is not a mere trend or fad. It is both evidence-based and legally sound.

### *B. Solution-Focused Judging*

Solution-focused judging is a well-known concept both in Aotearoa New Zealand and abroad. I shall briefly traverse the origins and principles of the concept, which are reflected in the existing

judge-led initiatives currently operating within the District Court. Typically, these initiatives have not relied explicitly on academic thought. However, it is important to recognise that a solution-focused approach has, at its foundations, the weight of evidence and jurisprudence.

Courts long approached criminal law on the assumption that people make rational choices; that is to say, that people can objectively weigh the costs and benefits before choosing how to act.<sup>38</sup> Against this backdrop, judges are then seen as neutral arbiters, dispassionately determining the facts and applying the law.<sup>39</sup> Understanding the offender and their situation has rarely been part of this assessment, outside what is necessary to make decisions regarding the offence.

Therapeutic jurisprudence takes a different view. It contends that the legal process, and the actors within it, can be therapeutic or anti-therapeutic. Originally developed in the 1980s in response to concerns of mental health law, therapeutic jurisprudence is now a wider discipline that encompasses all aspects of law.<sup>40</sup>

Solution focused judging rests on these same principles. It is, in many ways, similar to another widely used term: problem-solving courts.<sup>41</sup> The difference is one of emphasis and framing. Using the term “problem-solving courts” implies that it is the court taking the lead role in resolving the participant’s issues. In contrast, solution focused judging promotes participant autonomy. It seeks to empower the individual to resolve the causes of their offending behaviour but with support and guidance of the court and associated services.<sup>42</sup> Instead of the court’s role being confined to that of decision maker, it also plays the role of facilitator.

Victims also play a central role in solution focused judging. Research shows that victims wish to have a criminal justice system where they are able to participate in their cases, they are treated respectfully and fairly, they receive more information about the processing and outcome of their cases, and they are engaged in a less formal process where their views count.<sup>43</sup> This is also reflected in the calls for change heard in Aotearoa. The key tenets of solution-focused judging aim to achieve these objectives for victims.

Solution-focused courts seek to address the wide-ranging needs of both victims and offenders to avoid a recurrence of the problem that brought these parties to court.<sup>44</sup> Victims are actively assisted to engage in the process. Features of solution focused judging, including consistent judicial personnel and toning down formalities, aim to make the courtroom a comfortable and unthreatening place where the victim feels able to participate. It is the specific aim of several

---

38 Richard Wiener and Eve Brank “Social Psychology and Problem-Solving Courts: Judicial Roles and Decision Making” in Richard Wiener and Leah Georges (eds) *Problem Solving Courts: Social Science and Legal Perspectives* (Springer, New York, 2013) 1 at 5.

39 Susan Goldberg *Judging for the 21st Century: A Problem-solving Approach* (National Judicial Institute, Ottawa, 2005) at 5.

40 Bruce Winick “Problem Solving Courts: Therapeutic Jurisprudence in Practice” in Richard Wiener and Eve Brank (eds) *Problem Solving Courts: Social Science and Legal Perspectives* (Springer, New York, 2013) 211 at 219.

41 Bruce Winick “Problem Solving Courts”, above n 40.

42 Michael King *Solution-Focused Judging Bench Book* (Australian Institute of Judicial Administration Incorporated, 2009) at 3–4.

43 Heather Strang “The Victim in Criminal Justice” in Heather Strang *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, Oxford, 2002) at 1–24; Chief Victims Advisor, above n 26, at 2–3.

44 Michael King, above n 42, at 16.

problem-solving courts to provide support to victims of crime and enhance the rights and place of victims in the sentencing process.<sup>45</sup>

The centrality of victims in solution-focused judging is best illustrated through local examples. In the Young Adult List Court in Porirua, emphasis is placed on avoiding legal jargon and using plain language to ensure that the process is conducted in a way that all participants in the courtroom can understand. Crucially, this assists victims to engage as much as it does defendants. The focus on using language that is clear and easy to understand has the effect of enabling not only the defendant, but also victims and their support people, to effectively participate in proceedings that are affecting them.

At the Mātaatua Rangatahi Court in Whakatāne, a table is covered with a whāriki (ceremonial mat) woven by the local iwi, to represent the victim. There is a permanent place set at this table for the victim, whether or not a victim chooses to attend the court proceedings. A similar process is followed at the Pasifika courts, where colourful cloths adorn all the tables, including a special cloth designated for the table where the victim sits, should they be in attendance.

In simple terms, solution-focused judging seeks to identify the drivers of offending and then address them by facilitating the provision of services and community support required.<sup>46</sup> The development of solution-focused judging in Aotearoa has included a number of ambitious and successful judge-led initiatives that have been implemented by the District Court. We have come to call these initiatives “specialist courts”. These initiatives are all essentially examples of solution focused judging in Aotearoa. They light the path ahead.

### *C. Specialist Courts in Aotearoa*

To plot the history of specialist courts in the District Court, we must go back to the 1980s. The late Judge Mick Brown was a resident judge of the then Henderson District Court (now Waitakere District Court). As the story was orally relayed to me by Sir Pita Sharples, on one occasion, Judge Brown phoned Sir Pita and told him about a particularly difficult Māori man the judge had been dealing with and requested that Sir Pita work with him and the man’s whānau at the Hoani Waititi marae. Sir Pita agreed to do so and with the marae’s assistance they engaged in a highly emotional whānau meeting that resulted in a successful resolution of the case. Its success spoke volumes about the healing power of community involvement. This then led to the establishment of the Whānau Awhina Diversion programme that continues to operate at Waitakere District Court.

Judge Brown (who later became the first Principal Youth Court Judge), with the Government of the day, was also instrumental in the development of the empowering legislation (the Children, Young Persons and their Families Act 1989) that led to the creation of the Youth Court of New Zealand in 1989. The youth justice principles contained in that legislation were, and still are, world-leading, and have formed the basis for the solution focused judging approach for all of the specialist courts that have followed.

#### *1. Family Violence Courts*

The extent of family violence in Aotearoa has long been considered a significant social issue. In 2001, the first Family Violence Court was established at Waitakere by the late Chief District

---

45 See, for example: Michael S King “Judging, judicial values and judicial conduct in problem-solving courts, Indigenous sentencing courts and mainstream courts” (2010) 19 JJA 133 at 139–140.

46 Bruce J Winick “Therapeutic Jurisprudence (and Problem Solving Courts)” (2003) 30 Fordham Urb LJ 1055 at 1061.

Court Judge Russell Johnson and Judge Coral Shaw. Family Violence Courts were subsequently expanded to other locations across the country in the following years.<sup>47</sup>

The original purpose of establishing the Family Violence Courts was to address concerns about systemic delays in responding to the high number of family violence cases. Over time, a solution focused approach has been adopted. Through these courts, family violence cases are aggregated to a single list and heard at dedicated sessions, where appropriate services and access to programmes are on hand. It has proven to be more efficient and more effective.<sup>48</sup>

## 2. Youth Drug Court

While young people are vulnerable by virtue of age alone, the Youth Drug Court established in Christchurch in 2002 addresses the particular issues of youth offending and its links with alcohol and other drug dependency.<sup>49</sup> The Youth Drug Court aims to identify these issues early and monitor the young person's process through treatment. Participants in the Youth Drug Court have the same judge each time they appear, helping to foster enhanced engagement with both the Court and the process. Where potential drug dependency has been identified in a recidivist youth offender, a clinical screening tool is used, following which a decision will be made to transfer the young person to the Drug Court. A multidisciplinary and interagency team meets before the Court sits to review cases.

The Youth Drug Court was originally established by Principal Youth Court Judge John Walker. Judge Jane McMeeken now presides over the Court.

## 3. Rangatahi Court

Many of the District Court's solution-focused initiatives were established in response to the needs of young people, doing so in a way that brings Māori and Pasifika perspectives to the fore.

Beginning in Gisborne over a decade ago, the Rangatahi Court is held on marae to support young Māori offenders and their whānau engage in the youth justice system.<sup>50</sup> The Rangatahi Court is part of the overall Youth Court and is therefore overseen by Judge John Walker as Principal Youth Court Judge and also by Judge Louis Bidois, as National Liaison Judge for Rangatahi Courts.

The Rangatahi Court route offers the option for the monitoring of a Family Group Conference plan to take place in culturally familiar surroundings, with significant guidance from kaumatua and kuia, and the integration of tikanga Māori into the court process. Rangatahi (young people) gain a better sense of who they are and where they are from, and this encourages greater respect for themselves, their heritage, and for others. These specialist courts operate within the same legal framework as all our courts, but the processes are informed by tikanga and the Māori world-view.

The 16 Rangatahi Courts now in operation demonstrate how a Māori-centred process can lead to enhanced engagement with the young people who are before the Court, their whānau and also victims who may choose to attend court sittings.<sup>51</sup> It is an example of the community actively participating in the court for these purposes in the meeting house of the marae.

---

47 Trish Knaggs, Felicity Leahy and Nataliya Soboleva *The Manukau Family Violence Court: An Evaluation of the Family Violence Court Process* (Ministry of Justice, August 2008).

48 At 64–66.

49 Sue Carswell *Process Evaluation of the Christchurch Youth Drug Court Pilot* (Ministry of Justice, November 2004).

50 Heemi Taumaunu *Te Kōti Rangatahi: Background and Operating Protocols* (1 July 2015) <[www.napierlibrary.co.nz](http://www.napierlibrary.co.nz)>.

51 Lisa Davies and John Whaanga *Evaluation of the Early Outcomes of Ngā Kooti Rangatahi* (Kaipuke Consultants Limited, December 2012).

#### 4. *Matariki Court*

Shortly after the first Rangatahi Court was established, the late Chief District Court Judge Russell Johnson took steps to initiate a specialist court in Kaikohe which shares key features of the Rangatahi Court approach. This Court was formed with the intention of increasing the use of s 27 of the Sentencing Act 2002 which enables sentencing judges to be better informed about an offender's background.<sup>52</sup> Former District Court Judge Jim Rota was involved in extensive consultation and discussions with local iwi before the model for the Court was finalised. Judge Greg Davis is now the lead judge for the Matariki Court at Kaikohe.

The Matariki Court brings the offender's iwi, hapū and whānau to the forefront of the process. Through the s 27 provisions, a chosen cultural speaker may inform the Court about the offender's community and cultural background, as it relates to the offending and available rehabilitation support. In this way, cultural reports offer sentencing judges a fuller picture of all the circumstances affecting an offender. In order to enter the Matariki Court, an offender must plead guilty and demonstrate a commitment to addressing the drivers of their offending.

#### 5. *Pasifika Courts*

Operating in a similar way, the Pasifika Courts are held in Pasifika community centres in Auckland.<sup>53</sup> Pasifika elders are involved in the process, alongside the presiding judge, reconnecting the young person with their cultural heritage. The Court adopts traditional cultural practices to create an environment that better reflects the needs of the young person and their community. Judge Ida Malosi has been instrumental in the establishment of the Pasifika Courts.

#### 6. *Te Kooti Timatanga Hou – New Beginnings Court*

Judge Tony FitzGerald launched Te Kooti Timatanga Hou, the New Beginnings Court, in 2010. Based in Auckland, it is a solution-focused court established in response to the prevalence of homelessness, mental impairment, and drug dependency amongst offenders.<sup>54</sup> The Court aims to connect offenders to social and health supports to address the underlying causes of homelessness and offending, while also delivering accountability and ensuring victims' needs are met. Evaluations of the Court have indicated that the Court significantly reduces reoffending rates and prison time.<sup>55</sup>

#### 7. *Special Circumstances Court*

Of course, the needs of many low-level offenders as seen in the New Beginnings Court are not limited to Auckland. In 2012, now-Chief High Court Judge, Justice Susan Thomas developed the Special Circumstances Court in Wellington as a result of concerns about the frequency of court appearances by repeat offenders committing low level crime.<sup>56</sup> This offending was often fuelled by

---

52 Dr Valmaine Toki "Measuring the success of Te Kooti Rangatahi and Te Kooti Matariki: If recidivism rates are a 'blunt instrument' – can the use of tikanga as common law heal our communities intrinsically reducing offending – and should the jurisdiction be extended?" (University of Waikato, 2018).

53 Lagi Tuimavave "The Pasifika Youth Court: A Discussion of The Features and Whether They Can Be Transferred" (LLM, Victoria University of Wellington, 2017).

54 Alex Woodley *A Report on The Progress of Te Kooti o Timatanga Hou – The Court of New Beginnings* (Point Research, 25 September 2012).

55 At 17.

56 Lee Edney "A court with a difference: A fresh approach to supporting the homeless in Wellington" (1 May 2013) <[www.salvationarmy.org.nz](http://www.salvationarmy.org.nz)>.

the challenges posed or exacerbated by having no stable accommodation and often accompanied by a drug dependency and mental health problems.

The Special Circumstances Court was established with no additional funding or allocated judge time. Instead it relies on the goodwill of those involved and relationships with community agencies.

#### 8. *Te Whare Whakapiki Wairua – The Alcohol and Other Drug Treatment Court*

While the majority of specialist courts have been almost exclusively judge-led, the AODT Court was established in 2012 as a joint initiative between the government and the judiciary.<sup>57</sup> It has received dedicated multi-agency funding. In December 2019, the government announced that the pilot was to be made permanent.<sup>58</sup> Additional funding to establish a new AODT Court in the Waikato was also announced, and as I have already signalled, work on that is underway. The current Labour Government's manifesto also proposes establishing a further AODT Court in the Hawke's Bay.

The AODT Court targets offenders who would otherwise be imprisoned, but whose offending is being fuelled by unresolved addiction or dependency. The candidates are those for whom previous sentences and court orders have not changed their situation, and typically they have been punished, only to offend again.

As an alternative to prison, the Court applies evidence-based best practices in case management, treatment, drug testing, monitoring and mentoring. Sentencing is deferred while participants go through a rigorous programme under judicial monitoring that may take up to two years to complete. Notably this Court has a strong tikanga Māori ethos, and features a Pou Oranga, a person with a lived experience of recovery, treatment and sound knowledge of te reo and tikanga Māori. Judge Ema Aitken and Judge Lisa Tremewan have led the development of AODT Courts in Aotearoa.

#### 9. *Sexual Violence Pilot Court*

We know from calls for change that victims, as well as offenders, can be adversely affected by their experiences in our courts. In 2015, the Law Commission recommended improving the way the justice system responds to victims of sexual violence, and the District Court took heed.<sup>59</sup>

In late 2016 the Sexual Violence Pilot Court was introduced in Whāngārei and Auckland. Judge Duncan Harvey in Whāngārei and Judge Eddie Paul in Auckland are currently the lead judges for those two courts. The aims were to reduce pre-trial delays and to improve the experience of participants. These courts feature intensive and proactive pre-trial case management by judges, extra judicial training, judge-designed best-practice guidelines and various practical measures in an attempt to reduce further trauma for complainants and vulnerable witnesses.

An independent evaluation found the pilot's approaches had considerably reduced trial wait times and that most complainants reported the way trials were managed did not cause them to feel retraumatised by the process.<sup>60</sup> That pilot has since been made permanent in those two centres.

---

57 Lisa Gregg and Alison Chetwin *Formative Evaluation for the Alcohol and other Drug Treatment Court Pilot* (Ministry of Justice, 31 March 2014).

58 Cabinet Paper "Future of the Alcohol and Other Drug Treatment Court" (Office of the Minister of Justice, 21 August 2019).

59 Law Commission Te Aka Matua O Te Ture *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015).

60 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Ministry of Justice, June 2019).

### 10. Intervention Court

More recently, in 2018, family violence cases were placed at the centre of the Intervention Court in Gisborne by Judge Haamiora Raumati.<sup>61</sup> This Court originated from a proposal by local agencies focused on responding to family violence. Participants are required to address the underlying causes of their offending. The Court's responses are directed towards defendants accessing appropriate programmes at the earliest stage and supporting the family.

Scheduling the family violence cases together in the Court allows agencies to be aware of when they are required to be present in Court. A lead agency will provide the Court with an individualised plan and progress will be taken into account at sentencing.

### 11. Personal Individual Needs Court

Close to Wellington and established by Judge Barbara Morris, the Personal Individual Needs Court (PINC) was set up in Masterton in response to recidivist, low-level offending.<sup>62</sup> As with many specialist courts, the PINC encourages cooperation between agencies and stakeholders to arrange for required support to be provided. A lead agency will coordinate provision of the required assistance and the Court will monitor each defendant's progress.

### 12. Criminal Procedure (Mentally Impaired Persons) Court

It will be evident that these specialist courts have developed in response to the needs of particularly vulnerable participants. Defendants suffering under mental health issues are highly represented in the courts.<sup>63</sup> The CP(MIP) Court started on 18 March this year, led by Judges Pippa Sinclair and Claire Ryan, and is designed to reduce the time the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CP(MIP)) process takes and avoid people being unnecessarily subjected to psychiatric reports.<sup>64</sup>

This Court has seen early successes. The streamlined approach reduces the time the CP(MIP) process takes and the number of adjournments. Unnecessary delay is an impediment to accessing justice, and the new approach will continue to reduce that delay for some of the most vulnerable people who come before the District Court.

### 13. Young Adult List Court – Porirua

Principal Youth Court Judge, John Walker, has led the recent creation of a Young Adult List Court in Porirua.<sup>65</sup> The Young Adult List Court separates 18–25-year-olds from the ordinary criminal list. This initiative represents a first step towards a model that can be adopted across the whole of the District Court in Aotearoa.

The Young Adult List Court began in March of this year and was subsequently gifted a name by local iwi Ngāti Toa, Iti rearea kahikatea teitei ka taea. The name symbolises overcoming challenges

---

61 "Violence intervention" *Gisborne Herald* (Gisborne, 11 July 2018).

62 Barbara Morris "Problem solving court: a community approach that works" *The District Court of New Zealand* (2019) <[www.districtcourts.govt.nz](http://www.districtcourts.govt.nz)>.

63 Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 29 January 2020).

64 Chief District Court Judge "Auckland District Court to streamline court processes for mentally impaired" (press release, 6 March 2020) <[www.districtcourts.govt.nz](http://www.districtcourts.govt.nz)>.

65 Principal Youth Court Judge "Trial of Young Adult List court officially launched in Porirua" (press release, 31 July 2020) <[www.districtcourts.govt.nz](http://www.districtcourts.govt.nz)>.

by applying the same determination as the little bellbird that can scale the tallest tree in the forest, the kahikatea tree (white pine).

Aotearoa has a pioneering youth justice system, which has seen the numbers of children and young people entering our courts reduce considerably over recent decades. However, the difference in approach afforded by the Youth Court ends abruptly when a young person attains the age of 18 (or 17 in some cases). There is a considerable volume of evidence to suggest that the brain continues to develop up until the mid-twenties, making this age group at increased risk of engaging in anti-social behaviour.<sup>66</sup> In addition, a significant number of these young people carry with them disabilities, such as foetal alcohol spectrum disorder or traumatic brain injury, that they have attained from birth or during their childhood.<sup>67</sup>

These features of the young adult cohort require special and continued recognition by the Court. The Young Adult List Court focuses on engaging the young person in the process and upholding procedural fairness.<sup>68</sup> In practice the aim is to:<sup>69</sup>

1. ensure that the process is conducted in a way that the participants can understand;
2. ensure that the young person is aware of what the outcome of a hearing means for them, (such as what bail conditions have been imposed); and
3. provide services at court so that the young adult can access the interventions necessary to address their offending.

The Young Adult List Court provides extra support where required to those aged 18–25 appearing before the Court, adapting the approach used in the Youth Court. Services providers are present within the courtroom. Participation of police, lawyers and other stakeholders is vital to this success.

Crucially, this list court is cost neutral. Existing resources in the Court and in the community are repurposed to provide the necessary support. An evaluation is soon to commence. It is highly likely that the approach taken in the Young Adult List Court will inform aspects of the Te Ao Mārama model.

## V. THE TE AO MĀRAMA MODEL — MAINSTREAMING SPECIALIST COURT BEST PRACTICES

I have talked about the calls for change, I have discussed the District Court’s response thus far, and I have outlined what solution-focused judging means and its various manifestations. So where to now? Do we continue to support specialist courts that deal with discrete issues, dotted unevenly about the country, and representing a small percentage of the approximately 37,000 active cases that make up the criminal caseload of the District Court? Or do we take a broader, more integrated approach? My answer is that we must do both.

---

66 See: Claire Bryan-Hancock and Sharon Casey “Young People and the Justice System: Consideration of Maturity in Criminal Responsibility” (2011) 18 *Psychiatry, Psychology and Law* 69 at 74 and Gwyneth Boswell “Young people and violence: balancing public protection with meeting needs” in Maggie Blyth, Enver Solomon and Kerry Baker (eds) *Young people and ‘risk’* (The Policy Press, Bristol, 2007) 39.

67 See: Ian Lambie, above n 63.

68 Chief District Court Judge and Principal Youth Court Judge *Proposal for a trial of Young Adult List in Porirua District Court: Procedural Fairness for the Young and the Vulnerable* (District Court of New Zealand) <www.districtcourts.govt.nz>.

69 At 1.

Specialist courts have their place as centres for excellence for best practice. They will continue to be supported and, where appropriate, they will continue to be developed and extended. However, it has become increasingly clear that the way ahead is to look to build the Te Ao Mārama model on the foundation provided by specialist courts. This will allow us to integrate, comprehensively throughout the District Court, the lessons and skills specialist courts have taught us. I see it as a common-sense next step and indeed a natural extension of the work that has already been developed by the specialist courts of the District Court.

However, the Te Ao Mārama model will be unique. It will be designed in partnership with iwi and other local communities. This partnership framework will allow each court to design the model that suits their specific location. It will also seek to invite local iwi and local communities to share in the design of the model to ensure that it best reflects the needs and special characteristics of each community.

So, what are these best practices that have enabled our specialist courts to succeed?

### *A. Best Practices from Specialist Courts*

Reflecting on these specialist courts, one can identify several important practices that amount to, or promote, best practice. These practices help enhance procedural and substantive fairness and improve access to justice. Where possible, these practices should be universally applied.

#### *1. Infusing te reo and tikanga Māori*

Te reo and tikanga Māori represent one element of best practice. The Rangatahi, Matariki, and AODT Courts infuse their processes with te reo and tikanga Māori. At a fundamental level, incorporating these aspects recognises the partnership between our two founding cultures. Allowing Māori users of the court to engage in Māori culture ensures that they are better able to engage and participate in the process, allowing them to be heard and understood more effectively. These benefits of enhanced engagement would likely extend to include, in appropriate cases, other ethnicities.

#### *2. Improving information available to judges*

Improving the detail and scope of information available is vital to ensure that judges understand each individual who is appearing before them, including their background and their particular needs. By enhancing the role of whānau, the community, and wrap-around service providers, judges in our specialist courts have access to information about addiction, mental health, financial, social, or cultural issues that the offender may face. Having access to better information that paints a fuller picture of the defendant allows the court to tailor both the process and outcomes in a way that best serves the interest of all those involved.

#### *3. Active and involved judging*

Judges across common law jurisdictions have traditionally taken a hands-off approach to their role as a “neutral umpire” in court. Solution-focused judging, however, necessarily encourages judges to take a more active role in the case, ensuring that all parties are engaged in the process.<sup>70</sup> International literature confirms that techniques including rephrasing an offender’s statement back to them, being aware of body language, and even simply ensuring an offender is always referred

---

70 Christopher Salvatore, Venezia Michalsen and Caitlin Taylor “Reentry court judges: the key to the court” (2020) 59 *J Offender Rehabil* 198.

to by their name can lead to more engagement. Better engagement from participants then leads to more robust outcomes.<sup>71</sup>

#### *4. Toning down formalities*

In line with the hands-off approach, courtrooms are traditionally places of significant and sometimes solemn formality. This applies to both demeanour and court procedure. To the uninitiated, courts have a language all of their own. Proceedings may be incomprehensible to many participants, resulting in their disengagement from the process. Reducing formalities – being less stuffy, a little more human using ordinary or familiar language, and speaking like normal people do – provides an opportunity for all in the courtroom to participate in cases which affect them. This can be achieved while still retaining the mana, solemnity and purpose of the court.

#### *5. Community involvement*

Communities have the knowledge and resources that the courts draw upon to address the needs of those coming to court. Unless there is a real presence of community – a community voice and community input – courtrooms risk appearing to be mere public spaces where an elite group of professionals conduct business about the fate of disengaged and alienated third parties. One of the key aspects of our specialist courts is how they bring the community, who usually know the parties best, into the court process, to the benefit of all. There are, of course, many different ethnic communities in modern Aotearoa New Zealand that the courts serve. Improving community engagement can ensure that the voice and perspective of these communities is present and recognised in the District Court.

#### *6. Interagency coordination*

Cooperation between court stakeholders is another key component of the specialist courts' success. Having all participants from the community and various justice services and social agencies involved allows the court process to function more efficiently and effectively and improves the quality of information reaching the judicial decision-maker.

#### *7. Focus on addressing “drivers”*

The focus of nearly all specialist courts is to understand and address the causes of offending behaviour. While there may be subtle difference in focus, all specialist courts address criminal behaviour in a more holistic way, because this is what promotes and improves rehabilitation. This requires access to programmes and services tailored to the particular offender. Crucially, agencies and service providers often attend specialist courts to offer participants on-the-spot access to support and advice.

#### *8. Consistency of personnel*

Many of these specialist courts ensure that the same judge is presiding throughout the offender's time in the court system. This allows the offender to develop a positive rapport with the judge and properly engage with the process. In certain cases it is also beneficial to have a presiding judge with expertise in the particular issues before the court.

---

71 Olivia Klinkum “Taking New Zealand’s Specialist Criminal Courts ‘To Scale’ For Better Criminal Justice Outcomes” [2019] New Zealand Criminal Law Review at 19 citing Michael S King, “The therapeutic dimension of judging: the example of sentencing” (2006) 16 JJA 92 at 99.

## *B. The Hamilton District Court*

These are many components to harmonise if we are to incorporate these approaches into the mainstream District Court – New Zealand’s biggest and busiest court – where volumes are high, resources are stretched, and time is always of the essence. But the District Court currently finds itself presented with an opportunity – perhaps a once in a generation opportunity. It comes in the form of the new AODT Court in Hamilton. The government’s commitment to this Court is based on the success of AODT Courts in Auckland and Waitakere, and is warmly welcomed. It will make a significant difference to the Hamilton community, which has been seeking an addiction treatment court for a long time.

The proposed roll out of this new AODT Court has provoked discussion and exploration within the judiciary about the sustainability and future direction of specialist courts generally. We have been inspired by the concept of moving the District Court towards Te Ao Mārama. And throughout, we have endeavoured to keep paramount the aim to bring to life the shared vision for the District Court as a place where all those coming to court (whether as defendants, complainants, victims, parties or whānau), can seek justice and will leave feeling they have been heard and understood.

We have determined that the next advance of the approach developed in the specialist courts will be far-reaching. Significantly, the Hamilton AODT Court model will include not only a criminal stream but will also extend to include a care and protection stream from the Family Court jurisdiction.

### *1. Dual AODT Streams: Criminal and Care and Protection*

In Hamilton there will be an AODT stream in the criminal jurisdiction based on the current model in Auckland and Waitakere. Additionally, there will be a distinct Care and Protection AODT stream, focusing on young mothers with addictions who have or are at risk of having a child removed from their care and so have come within the sphere of the Family Court. Notably, this means the AODT Court will for the first time include participants from both the criminal and family jurisdictions – though on separate and discrete tracks.

This expansion of the AODT Court is primarily about the best interests and welfare of children, required by the paramountcy principle outlined in ss 4A and 5 of the Oranga Tamariki Act 1989 (OTA). When exercising powers under the OTA, it is essential that the child is encouraged to participate and that their views be taken into account in making decisions affecting them.<sup>72</sup> The child’s wellbeing must also sit at the centre of decision making that affects them and their family/whānau, hapū, iwi, and community should be recognised.<sup>73</sup> In such cases involving care and protection, there is an additional focus on recognising and promoting mana tamaiti, the whakapapa of the child, and the relevant whanaungatanga rights and responsibilities of their family/whānau, hapū, and iwi.<sup>74</sup>

Before discussing the AODT Care and Protection stream, it is necessary to first canvass the legislative scheme underpinning care and protection issues. Where there are care and protection

---

72 Oranga Tamariki Act 1989, s 5(1)(a).

73 Section 5(1)(b).

74 Section 13.

concerns for a child,<sup>75</sup> which are shared by Oranga Tamariki,<sup>76</sup> the parties can be referred to a Family Group Conference (“FGC”) which must be held prior to any care and protection order being made.<sup>77</sup> If the care and protection concerns cannot be remedied at the FGC, and it is still determined that the child is in need of care and protection, an application for a Care and Protection Order can be filed by Oranga Tamariki in the Family Court. If there is a high risk of harm to the child, an interim custody order may be made.<sup>78</sup> If the application for the Care and Protection Order is unopposed, a judge will determine whether the order should be made, and if so, the matter is adjourned for filing of plans, a report, and any orders sought are identified. If the application is opposed, either mediation can be directed where an agreement or plan may be developed to deal with the concerns,<sup>79</sup> or a hearing can be directed where a judge will decide if an order is appropriate.

The Care and Protection AODT stream will be a valuable new tool for the Family Court. This comes at a time when the Family Court is forging new community partnerships for retaining whānau, hapū and iwi connections and building confidence in both achieving the safe return of vulnerable babies and children to their whānau, and lessening the need to resort to separation in the first place. This is an essential step in ensuring that the Family Court is complying with the s 5 principles of the OTA, in particular, ensuring that the well-being of the child is at the centre of decision making that affects them.

It is envisioned that the Care and Protection Stream of the AODT Court should enable mothers to retain care of their children, with the wraparound support that is required to ensure this is plausible. The sad fact is that many of the children who come to the state’s attention do so in the Family Court first.<sup>80</sup> There is more than enough evidence that children who end up in state care go on to have vastly higher incarceration rates.<sup>81</sup> Yet children and young people living with parents who are addicts are vulnerable to falling on to the wrong side of law, as well as harm and neglect. The expansion of the AODT Court into Care and Protection offers a two-pronged approach to this conundrum by opening a new path for early and better tailored intervention for mothers and their children.

This concept may be new to New Zealand, but it is certainly not a new international development. The first general drug court in the United States was established in 1989 in Miami-Dade County, Florida, with others following in quick succession. As part of this rapid growth, specialised drug courts emerged that target specific demographics or issues – including families. The first Family Drug Court was formed in Reno, Nevada in 1995. As of 2016, there were approximately 370 Family Drug Courts in the United States.<sup>82</sup> These courts were developed as a response to the high

---

75 Section 15.

76 Sections 14 and 17.

77 Section 70. Aside from an interim order.

78 Section 78.

79 Section 170.

80 Jan-Marie Doogue, Chief Judge of the District Court “Generations of Disadvantage: A View from the District Court Bench” (Ethel Benjamin Commemorative Address, Otago University, 15 October 2018) at 5.

81 Carolyn Henwood and others *Rangatahi* Māori and Youth Justice: *Oranga Rangatahi* (The Law Foundation, September 2018) at 25, citing Ian Lambie Youth justice secure residences: A report on the international evidence to guide best practice and service delivery (Ministry of Social Development, May 2016).

82 Florida Courts “Family Dependency Drug Courts” (30 April 2021) <[www.flcourts.org](http://www.flcourts.org)>.

percentage of child abuse and neglect cases that involved substance use by a parent or guardian.<sup>83</sup> While each court has unique features, most share basic components: they are all entirely voluntary, most include similar requirements for graduation (such as staying substance-free for a specified period) and the majority of participants are women.<sup>84</sup>

These Family Drug Courts achieved greater rates of reunification, family stability, and lowering rates of substance abuse.<sup>85</sup> Recognising this success, Family Drug Courts based on the United States model were developed in the United Kingdom and Australia in the late 2000s. Although they are less common in these jurisdictions than in the United States, they nonetheless show similar signs of success and positive outcomes.<sup>86</sup> The two Family Drug Treatment Courts in Australia are both found in Victoria: the first was piloted in Broadmeadow Children's Court in 2014 and expanded to the Shepparton Children's Court in 2019.<sup>87</sup> Two independent evaluations of the Broadmeadow Court found that participants were more likely to achieve reunification, especially if engaged for at least six months, and less likely to have a substantiated report made to child protection in the post-court period.<sup>88</sup>

### *C. The Te Ao Mārama Model in the Hamilton District Court*

In addition to the development of the AODT Court at Hamilton District Court, the Te Ao Mārama model will be established as the first of a staggered implementation across the country. The Te Ao Mārama model will herald the mainstreaming – normalising – of solution focused judging for the whole of the District Court, taking on the best practice lessons from our specialist courts, and integrating them to become business as usual. Where appropriate, responses will be aimed towards addressing the underlying causes of offending, and understanding the offender not just the offending. Each court location will have the flexibility to adapt their processes in a way that best reflects the needs and special characteristics of their community. The Te Ao Mārama model intends to co-ordinate and draw upon existing resources and will not necessarily require legislative change.

The principles of solution-focused judging in the Hamilton District Court will not be confined solely to the two AODT streams. They will be applied to all participants in the District Court criminal jurisdiction. While helping to identify potential AODT candidates who may need more intensive treatment and monitoring, the Te Ao Mārama model is also intended to produce vital information about all court participants.

---

83 See, for example, Florida Courts, above n 82, where it was estimated that 60–80% of children linked to substantiated child abuse and neglect cases have at least one custodial parent with a substance use disorder.

84 Office of Juvenile Justice and Delinquency Prevention “Family Drug Courts” (November 2016) <[www.ojjdp.gov](http://www.ojjdp.gov)>.

85 See: National Center on Substance Abuse and Child Welfare “Santa Clara County Family Wellness Court (FWC) <<https://ncsacw.samhsa.gov/technical/rpg-i.aspx?id=62>>; Gayle Dakof, Jeri Cohen and Eliette Duarte “Increasing Family Reunification for Substance-Abusing Mothers and Their Children: Comparing Two Drug Court Interventions in Miami” (2009) 60 *Juv Fam Ct J* 11 at 11–23; and Gayle Dakof and others “A randomized pilot study of the Engaging Moms Program for family drug court” (2010) 38 *Journal of Substance Abuse Treatment* 263 at 263–274.

86 See, for example, Professor Judith Harwin and others “After FDAC: outcomes 5 years later – Final Report” (2016) accessed at <[wp.lancs.ac.uk](http://wp.lancs.ac.uk)>; and “Family Drug Treatment Court” Children's Court of Victoria” (2021) <[www.childrenscourt.vic.gov.au](http://www.childrenscourt.vic.gov.au)>.

87 Rhiannon Tuffield “Regional-first Family Drug Treatment Court launches in Shepparton after three-year pilot” (27 March 2019) ABC News <[www.abc.net.au](http://www.abc.net.au)>.

88 “Family Drug Treatment Court”, above n 86.

Therefore, it is intended that court participants, not only those in the AODT streams, will have an opportunity to access services at the Hamilton District Court to assist in addressing their underlying needs. Focus will be placed on providing effective social, emotional and physical outcomes for offenders, victims and whānau.

In order to provide the most appropriate services for offenders, judges need to fully understand the person appearing before them. This includes their background, history of trauma and their particular needs. To achieve this, it is intended that all Hamilton judges will receive more extensive information on defendants. For most people coming before our courts, there is often a wealth of information available but it may be difficult to access or is trapped within separate jurisdictional systems. The new model will aim to develop processes that will overcome the present obstacles.

Young adults who appear in the Hamilton District Court, aged 18–25, will receive the same attention as they do in the current Young Adult List pilot in Porirua by being placed in different lists for their court appearances. Targeted services will be present in the courtroom. The plain language used in the Young Adult List Court will be adopted to ensure that all participants can understand proceedings. Easy-to-understand information about the court process will also be made available.

Local communities will also be encouraged to play a bigger part in the District Court. Iwi and community representatives will be actively encouraged to engage with the Court. An important feature of the Te Ao Mārama model will explore the creation of a co-ordination role in each court that provides a connection between the community and the Court. When appropriate, this co-ordination role would ensure that plans for defendants are submitted for approval and that the plan is properly managed between the relevant service providers and community organisations. Alongside the co-ordinator, local kaumātua, kuia and respected elders of all ethnicities will be present within our courts, having an established voice within the Court. This role will be primarily to facilitate whakawhanaungatanga, develop relationships and foster links between defendants, whānau, victims, parties to proceedings and other participants, judges and staff to help ensure that all people affected by the business of our Court are heard and understood to the greatest extent possible.

It goes without saying that victims and whānau are directly affected by the justice system. It is intended that they too will have an improved ability to engage with the Court under the Te Ao Mārama model.

Tikanga and the Māori language will play a central role in the new model. To the extent appropriate, Māori cultural concepts and protocols will be incorporated at every stage of the process. This will be done with the intent that the Court reflects our multi-cultural society with two founding cultures bound together in a spirit of partnership under Te Tiriti o Waitangi. The intention to reimagine our justice system in partnership with iwi represents a deliberate and genuine effort to recognise kāwanatanga and rangatiratanga by engaging in mana-to-mana conversations about how our local courts can best serve our local communities, and at the same time, remaining inclusive of all cultures and all ethnicities.

I expect that the implementation of the Te Ao Mārama model will mean that the journey through the court space will look very different to how it looks today.

Court design should increasingly become a joint endeavour with iwi and local communities. Courthouses should be places that reflect the area and the communities they serve, including incorporation of local art and carvings. To the extent achievable, our courts will be an environment that welcomes everyone.

Under the Te Ao Mārama model I expect that the infusion of tikanga and te reo will be explored with local iwi in each court location. A one size fits all approach will not be appropriate. When

people attend the court, they must enter through the front entrance. In a Māori context this is similar to people gathering at the waharoa (the front entrance) of a marae. In most of our courts, court security staff will search people before they are permitted to enter the building. In a Māori context this is comparable to being welcomed onto a marae with a wero (challenge). Both processes are designed to test whether the visitor's intentions are peaceful.

I expect that bilingual and where appropriate, multi-lingual, greetings by all court staff and most particularly from the time that first contact is made by security staff at the front entrance will be a natural and appropriate development under the new model.

Mainstream court sessions commencing with karakia and mihi whakatau is another useful discussion point. Some judicial officers may wish to commence the court sitting, following the current practice of bilingual announcements, by reciting their pepeha and extending a brief welcome with a mihi.

Within the physical space itself, courtrooms could be reimagined as a community and participant centred space that reflects tikanga. As some do in specialist courts, judges in mainstream courts could consider sitting on the same level as participants to reduce the overtones of hierarchy. Where appropriate, whānau might be provided an opportunity to stand with defendants and victims, representing both support as well as collective responsibility. Courthouses and courtrooms could be re-imagined as central hubs, as places for service providers to be located to provide access to wrap-around services and opportunities for healing, and as places that encourage the supportive presence of whānau.

Although alterations to mainstream courtroom design and layout are important elements, Rangatahi Court sittings held on marae have proven to be extremely successful in engaging with whānau who have struggled to engage with mainstream systems. Some court participants and whānau feel most comfortable in a marae or community space where they feel they have a real opportunity to engage with the court.

The leadership of the District Court expects that the Te Ao Mārama model will assist us to explore with local iwi how the Rangatahi Court model might be appropriately extended to include adult participants who require intensive marae-based judicial monitoring of approved plans in the criminal and family jurisdictions of the District Court.

As noted previously, solution-focused judging involves the concept of empowering an offender to make the most of an opportunity extended by the Court to address underlying issues that have driven the offending behaviour. The Court acts as a facilitator, but power of choice rests with the offender and, by extension, the whānau and wider community.

Many initiatives have recognised that not all offending necessarily must, or even should, be resolved in the formal court system. The Police Diversion Scheme and the Pae Oranga (Iwi and Community Justice Panels) are examples of decision-making authority that has been devolved in appropriate cases and responsibility has been placed into the hands of police, whānau, iwi and local communities. I expect that the expansion and increase in jurisdiction of these types of initiative are also matters that can be usefully discussed when designing the Te Ao Mārama model for each court.

The successful introduction of the Te Ao Mārama model will require a cultural shift. Focus will be centred on the people who are affected by the business of the court, understanding their whakapapa, their upbringing and the circumstances that have led them into the justice system. Stakeholders in the court will need to be encouraged to understand the rationale for the move towards a collaborative, solution-focused approach. To this end, enhanced training will need be

provided for court staff, and further judicial education will need to be provided for our judges, as part of our collective obligations to uphold cultural competency expectations. Lawyers, service providers and other stakeholders will also need to be offered educational support that will help them to uphold these expectations.

The Te Ao Mārama model will assist us to refocus on the essential purpose of courts and judges, which is ultimately to serve our communities.

### 1. *One Example: Section 27 of the Sentencing Act 2002*

Our judges already have many tools available to achieve the best outcomes for those caught up in the criminal justice system. One such example is s 27 of the Sentencing Act 2002. Section 27 allows any offender to call on any person to come to court and speak about the personal, family, whānau, community, or cultural background of the offender, the way that background may have related to the commission of the offence, or how support from the whānau or community may be available to help prevent further offending. Section 27 can act as a vehicle through which the best available information is presented to a presiding judge which, in turn, enables judges to make well-informed decisions that are appropriately tailored to the individual circumstances of the offender.

The statutory intent behind s 27's predecessor, s 16 of the Criminal Justice Act 1986, was clear – it envisaged speakers from local communities and tribes addressing the court and providing community-based options as alternatives to imprisonment.<sup>89</sup> Unfortunately, this vision never materialised. Slowly but surely, however, it has become common for defence counsel to use s 27 to provide the court with a “cultural report”, usually written by a cultural consultant, which canvases the matters outlined in s 27.

Information provided to the court through s 27 often reveals evidence of systemic deprivation. In recent years, courts have begun to award sentencing discounts to offenders where systemic deprivation had a “causative effect” on the offending. The genesis for this practice was *Solicitor-General v Heta*, where Whata J noted that evidence of systemic deprivation may inform the “actual and relative moral culpability of the offender and the capacity for rehabilitation”.<sup>90</sup> The Court of Appeal recently endorsed this practice in *Carr v R*, stating that:<sup>91</sup>

... where a cultural report provided under s 27 of the Sentencing Act contains a credible account of social and cultural dislocation, poverty, alcohol and drug abuse including by whānau members, unemployment, educational underachievement and violence as features of the offender's upbringing such matters ought to be taken into account in sentencing.

A sentencing discount on this basis will be appropriate where the information provided through s 27 “might be considered to have impaired choice and diminished moral culpability so as to establish a causative connection to the offending”.<sup>92</sup> This is a positive development that recognises that offenders' each come from different starting points. One aspect of the Te Ao Mārama model will be to explore how the system can facilitate the ability of all people to use s 27 to bring vital information before the court.

Although cultural reports can be helpful and in some cases have a substantial impact on the final sentencing outcome, they tend to be expensive and may prove to be difficult to sustain for all

---

89 See: (12 June 1985) 463 NZPD 4759 (Dr Michael Cullen).

90 *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [41].

91 *Carr v R* [2020] NZCA 357 at [60].

92 At [65].

who could potentially benefit from them in the long term. At some stage, a rationalisation of this resource may eventuate due to limitations in funding and capable report writers. The effect of this could be to deny the court valuable information about the defendant.<sup>93</sup>

Under the Te Ao Mārama model I expect that part of the discussion with local iwi and local communities will focus on how to achieve a significant increase in the use of s 27 speakers. This would involve a whānau or iwi member or member of the community who is familiar with the offender speaking directly to the court in the manner originally envisaged.

#### *D. A Parallel Project*

A parallel piece of work is currently underway which aims to improve the criminal court process more generally. A dedicated team has been established between the courts, Ministry of Justice, lawyers and other stakeholders to work through the entire criminal process. This team, with judicial oversight, is working to ensure that all appearances in the court are meaningful and, as a result, also reduce backlog.

The programme spans the criminal process from bail and administration to sentencing. Most work in each stage will focus on reducing unnecessary court events and adjournments. A distinct workstream will be dedicated to addressing our current backlog of cases.

Transforming our criminal process by improving the efficiency of the system is a significant undertaking. The timing of the commencement of the Criminal Process Improvement Programme could not have been better. It is intended that the relevant workstreams of the Improvement Programme will be implemented in Hamilton next year, in conjunction with the implementation of the Te Ao Mārama model and the twin streams of the AODT Court. The Hamilton District Court and the community it serves, stand to benefit significantly from the combination of these separate but related developments.

## VI. CONCLUSION

We intend that the Te Ao Mārama model will become the new way of doing business for the District Court. Our long-term intention is that the Te Ao Mārama model will be rolled out across Aotearoa New Zealand from Kaitiaki District Court in the far north to Invercargill District Court in the far south. Our intention is for the Te Ao Mārama model to be operational in Hamilton next year and for it to be developed across all of our courts as soon as we are able to do so. I emphasise that none of the concepts and approaches encapsulated in the Te Ao Mārama model are radical. The many components have already been trialled in various forms in specialist solution-focused courts over many years, and they have been found to be both effective and fair. And they have not required legislative change. Moreover, the model is not intended to substitute for, but should enhance, lawful and principled sentencing outcomes.

Our specialist solution-focused courts have been providing answers to questions that many people continue to ask, hoping that there is a different, perhaps easier answer. Taking the lessons learned from these courts about best practice and targeted, evidence-based responses and integrating them across the District Court, to the point they are normalised, is a considered and logical next step.

---

93 *Waikato SPCA v Tuauipiki* [2018] NZDC 17046 at [8].

We expect that the Te Ao Mārama model will help improve access to justice, and outcomes for everyone affected by the business of the District Court. It will help advance the shared vision for the Court. It will help build confidence in the court process and rule of law. And it will ultimately help to make our communities safer. The path ahead is clear, and well lit. We are confident that our new model will help move our District Court towards Te Ao Mārama, towards a more enlightened world.

To end this address, one of my grandfather's favourite whakataukī aptly describes the qualities required to successfully realise the vision and implement the Te Ao Mārama model:

*He iti te mokoroa, kahikatea teitei ka hinga!  
Even the smallest insect, the borer, can fell the tallest tree in the forest, the kahikatea.  
(To achieve a great feat, what is required is time, persistence, and commitment.)*

I commend this approach to all of us in our collective endeavour to make this vision a shared reality.

*Ko te Kōti-ā-Rohe, he wāhi e rapu ai te manatika,  
ahakoa he whai rawa, he rawa kore rānei,  
ahakoa he te ahurei me tōnā iwi, ahakoa ko wai, ahakoa nō hea.  
The District Court is a place where all people can come to seek justice,  
no matter what their means or abilities,  
regardless of their culture or ethnicity, who they are or where they are from.*

Nō reira, tīhei mauri ora ki te whai ao, tīhei mauri ora ki te ao mārama. Whanō, whana, tau mai te mauri, haumī e, hui e, tāiki e!