

WAIKATO LAW REVIEW

TAUMAUURI

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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.

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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.

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EDITORIAL: ACCESS TO JUSTICE

The 2022 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. This issue also celebrates the 30th anniversary of the first publication of *Taumauri* in 1993, and the commitment of *Te Piringa* to exploring the political, economic, and social background to legal decisions and the development of statute law in modern-day Aotearoa New Zealand – and the role of law in delivering justice.

Chief Justice Helen Winkelmann in her 2022 McKenzie Elvin lecture sets the scene with her influential analysis of access to justice and the vital societal role required from tomorrow's lawyers in underpinning this basic civil and political right. This theme is continued from a comparative indigenous law perspective by Maddison Russell who comments on the potential for expansion of the political purpose doctrine in charity law to enable Māori entities to gain charitable status and advocate more easily for social justice. From a constitutional perspective Margaret Courtney-Tennent considers the impact of political finance on New Zealand democracy.

While internationally in a time of increasing global uncertainty, Connor Michael Gordon and Grier Gardyne explore international crimes and economic sanctions from the perspective of the war in the Ukraine, and Rebekah Te Rito and Jack Chaplow interrogate the response of international criminal law to piracy and consider the vital role of carbon farming for reducing greenhouse gas emissions by 2050.

The former Principal Youth Court Judge John Walker in his 2022 Norris Ward McKinnon lecture continues the powerful *Te Ao Mārama* vision for a more enlightened world that provides wrap-around youth justice, articulated previously by Chief District Court Judge Heemi Taumaunu in his 2021 Norris Ward McKinnon lecture.

Finally, this issue of *Taumauri* pays tribute to *Te Piringa* alumnus Robert Makgill who sadly passed away in December 2022. True to the Waikato spirit, Robert was a very different kind of lawyer in every positive sense of the word, and his legacy will continue to provide an inspiration for future generations of Law students.

Dr Trevor Daya-Winterbottom FRSA FRGS

Editor in Chief

Te Piringa Faculty of Law

University of Waikato

THE MACKENZIE ELVIN LECTURE

ACCESS TO JUSTICE: WE NEED MORE (THAN) LAWYERS

BY DAME HELEN WINKELMANN*

I. INTRODUCTION

I am delighted to be here in Tauranga this evening and honoured to be speaking as part of this lecture series.

It was suggested that I revisit the topic of my 2014 Ethel Benjamin lecture, “*Access to Justice: Who Needs Lawyers?*” Convention suggests revisiting things on a decimal basis – at the 10 or 20-year mark. But I agreed to the topic for several reasons. First because I believe the need to preserve social cohesion makes securing access to justice more pressing today than it was then. Secondly, because as Chief Justice I have had many opportunities to reflect upon access to justice issues within a broader framework. I would like to share these perspectives with you tonight. And finally, because recent developments give real cause for optimism that we can make progress in this area.

When I spoke in 2014, I made the case for ensuring access to justice in the civil arena in Rule of Law terms. I said that access to justice was the critical underpinning of the Rule of Law: in a society ruled by law, everybody – the good, the bad, the weak and the powerful – exists under and is bound by the law. And I said that condition cannot exist without access to courts.

The focus of my 2014 address was on access to courts and access to lawyers. I was speaking at a time when access to the courts was being framed by Government in market terms. Rather than portraying them as a critical democratic institution, civil courts were depicted as a luxury service for which users should pay. I noted some of the language used at the time – people who came before the courts were referred to as “customers”, District Court centres were referred to as “franchises” and judges and lawyers were “stakeholders”.¹

I spoke at a time when lawyers were framed as a barrier to, rather than enabling, access to justice – a framing which led to Family Court reforms curtailing the right to legal representation in some proceedings.² There was also, at the same time, a reduction in legal aid funding and an effective freeze on legal aid thresholds and rates.

A lot has changed over the last eight years. The reforms in the Family Court which limited access to lawyers have been repealed.³ There have also been some improvements in connection with civil legal aid – a point I return to shortly.

* Chief Justice of New Zealand; “Access to Justice: We Need More (Than) Lawyers” (Mackenzie Elvin Lecture, Tauranga, 2022).

1 Helen Winkelmann “Access to Justice – Who Needs Lawyers?” (2014) 13 Otago LR 229 at 232.

2 At 236. See also Mark Henaghan and Meghan Nicholson “Family Law” (2014) 2 NZ L Rev 321 at 350.

3 Family Court (Supporting Families in Court) Legislation Act 2020.

The consumerist language in respect of the civil courts has largely disappeared. The Ministry of Justice has identified access to justice, including civil justice, as an enduring priority. This commitment has found expression in many ways, including through the Secretary for Justice joining with me in sponsoring the development of a strategy to facilitate civil access to justice, entitled “Wayfinding for Civil Justice”, which reaches beyond the courts. I will return to this strategy later.

These are all important developments. But they are not what I speak of when I say that things have changed a lot since 2014. With hindsight, 2014 was a relatively benign period for the institutions that support liberal democracy throughout the world. There was a broad consensus in the West as to the political legitimacy of democracy, and (by today’s standards) little serious challenge to the legitimacy of the institutions that support it.

As Geoffrey Palmer has recently observed, that benign period has come to an end.⁴ The political legitimacy of democracy is under challenge in many places throughout the world. He quotes the 2020 report produced by the Centre for the Future of Democracy at the University of Cambridge which concluded:⁵

We found that dissatisfaction with democracy has risen over time, and is reaching an all-time global high, in particular in developed democracies.

Associated with this dissatisfaction or driving it – the cause and effect is difficult to unravel – is the growth of populism. The characteristics of populism are an appeal to the wisdom and power of the people and a questioning of the legitimacy of institutions by characterising them as elitist and not of the people. Populism typically presents the world as divided into good (the will of the people as expressed through populist leaders) and evil (anybody who is not entirely in agreement with the will of the people so expressed). In this black and white world, compromise is impossible.⁶

Given these characteristics, the rise of populism is often associated with the undermining of democratic institutions and perhaps even the rise of authoritarianism. Sir Geoffrey notes the very many countries in which a tendency toward authoritarianism is now discernible.⁷

Populism is not a new phenomenon. Whether we think of it as a political strategy or a political theory, it has been democracy’s persistent shadow.

As long ago as the time of Cicero, some candidates for Consulship were described as “populare” – meaning that they appealed to the people for their votes, by decrying the self-serving elite.

A study of history shows that populism ebbs and flows. Today, it is fair to say that it is at full flood in many countries.

New Zealand has stood apart from the worst of this. I believe we are lucky in our institutions. New Zealand ranks highly in Rule of Law measures – a fact largely built on the integrity, standing and ability of our judiciary.⁸ But we cannot be complacent. As Cass Sunstein has said:⁹

4 Geoffrey Palmer “Rethinking Public Law in a Time of Democratic Decline” (2021) 52 VUWLR 413 at 415.

5 At 415.

6 Cas Mudde “The Popular Zeitgeist” (2004) 39 *Government and Opposition* 541 at 543.

7 Palmer, above n 4, at 415.

8 For example, New Zealand is regularly ranked as one of the least corrupt nations in the world by Transparency International and was ranked the least corrupt nation in six of the last eight rankings.

9 Cass Sunstein *Designing Democracy: What Constitutions Do* (Oxford University Press, New York, 2001) at 240.

In all democracies, however, there is a constant source of deliberative trouble: Political disagreement can be heightened simply by virtue of the fact that like-minded people are talking mostly with one another. It is a simple social fact that if people tend to agree and spend some time in conversation with one another, they are likely to end up thinking a more extreme version of what they thought before. It follows that if like-minded people are talking mostly with one another, social fragmentation is highly likely. New technologies, including the Internet, increase this risk ... In the worst cases, hatred and even violence are possible consequences.

One of the critical features of populism is the sense amongst those captured by its appeal that democratic institutions do not respond to their needs. This is both a cause and effect of populism.

Democratic institutions anticipate this risk by ensuring that they tend to the source of their legitimacy. The legislative branch does this by responding to the vote of the electorate. The judicial branch maintains its legitimacy through the process of fair hearing – in other words, through the provision of forums in which conflicting views and claims are able to be explored in a solemn and dignified manner and resolved through the equal application of the law as evidenced in the giving of reasons. The performance of this role demonstrates, in a tangible way, equality before the law as an ideal to which our society adheres.

Although each society inevitably falls short of the ideal, a society whose institutions no longer work toward it, and whose people no longer believe that there is equality before the law, is a society in which social cohesion will be loosening and civil society deteriorating.

Eight years on from 2014, I therefore believe that the case for focusing upon – and indeed fighting for – access to justice in order to support the Rule of Law is more pressing than ever.

Access to justice has two strands: ensuring that people have access to the institutions and procedures that will uphold and enforce their rights, and ensuring that people have access to the content of the law – that is that they understand their rights and how to access and enforce them. Tonight, I address both of these but broaden my focus beyond the courts. There are two key themes I explore.

The first is that those involved in the work of administering justice in its broadest sense must listen to the voices of those who need to access justice or who have experience of trying to do so. This is the best source of information about how services should be structured.

This is an approach that also ensures that the institutions involved in the administration of justice remain connected to their communities.

The second theme is the need for a systemic focus upon supporting access to knowledge of rights and duties, and to lowering the barriers to being able to enforce them. By systemic, I mean across the courts, across the profession and across government. In short, that we need more than just lawyers.

My address will therefore be wide ranging, and (inevitably, I am afraid) superficial in its treatment of some issues. It forms something of a to-do list – although some of the tasks on the list will not be, indeed cannot be, done by judges.

A good starting point is the nature of the obstacles that stand in the way of these two aspects of access I have described. We are helped in understanding these obstacles by the Access to Justice review recently undertaken by the Rules Committee. That Committee embarked on this work in 2019. The review was initially focused on improving access to civil justice in the District Court and in the High Court through rule reform. Although the focus was at first upon rules, the consultation threw up broader issues so that, with the agreement of the Attorney-General and Minister for

Justice, the review expanded to address some questions of policy and legislative reform. The Committee released its report at the end of 2022.¹⁰

The submissions the Rules Committee received are a rich source of information to assist in understanding the barriers in the way of accessing courts and tribunals and the barriers in the way of obtaining information about the law.

I am very grateful to all who submitted (which included many law firms and individuals and academics) and in particular to the Community Law Centres and Citizens Advice Bureau for their submissions.

The Law Society described a justice gap which has been building for decades.¹¹ Many submitters described the obvious barriers created by cost – the substantial costs of court fees and hearing fees, and the still more substantial costs of legal representation. As Dr Bridgette Toy-Cronin has highlighted, the increase in cost of legal services has far outstripped the increase in median weekly income.¹²

The cost of legal representation before a court or tribunal is such that civil litigation is beyond the reach of even middle-income New Zealand without the assistance of civil legal aid. I do not need to cite anything for that proposition – it follows inevitably from legal charge-out rates well north of \$300 per hour. Legal Aid is therefore critical. But the eligibility rates for legal aid are still, notwithstanding recent increases, set far too low – falling well short of the level of middle income.¹³ Moreover, as the New Zealand Law Society documents, very few lawyers are prepared to take on work from legally-aided civil clients because of very low rates combined with a very high administration load imposed by the legal aid regime.¹⁴

The submissions we received from Community Law Centres provide powerful insights into how courts, the legal profession, and the law are seen by those who have pressing justice needs.

The themes identified echo the results of various surveys and research. Both quantitative and qualitative assessments come to the same conclusion. But the qualitative results provide a narrative that tells the human cost. Those making these submissions are expert not only in the operation of the justice system but also in the difficulties that the marginalised experience on a daily basis. For this reason, it is information we need to pay close attention to.

Porirua Kāpiti Community Law Centre highlighted the cultural barriers to interacting with the courts, noting that many of its clients experience *whakamā* – feelings of shame, inferiority, inadequacy, embarrassment and self-doubt. The Waitemātā Community Law Centre highlighted that this is particularly problematic for Māori, who find the current court system alien. Given the historical impacts of colonisation, their expectation is that they will not be listened to or respected in the justice system, so they figure, “why bother?”

The Porirua Kāpiti Community Law Centre observed that for the centre’s clients – not only those of Māori descent, but also Pasifika, migrants, refugees and others for whom English is a

10 Rules Committee *Improving Access to Civil Justice* (23 November 2022).

11 New Zealand Law Society “Submission to the Rules Committee on Initial Consultation Paper: Improving Access to Justice” (25 August 2020) at 2.

12 Bridgette Toy-Cronin “Explaining and Changing the Price of Litigation Services” (2019) NZLJ 310.

13 The current income threshold for eligibility for a single person with no dependents is \$23,820, which is just over half the salary of a full-time worker on minimum wage. This is set to rise by 15 per cent in January 2023 but will still be well below full-time minimum wage.

14 *Access to Justice Research 2021* (New Zealand Law Society, October 2021) at 6.

second language or who lack formal education – the court system is difficult to engage with. They noted:¹⁵

The eurocentrism and bureaucracy which dominates the legal sphere does not reflect [Aotearoa New Zealand's] population. Accessing justice can therefore be an alienating experience for those whose culture(s) do not reflect the dominant values of [Aotearoa New Zealand's] legal system.

Community Law Centres generally reminded us that many of their clients with very real civil justice needs are living with mental health problems or experience ongoing mental illness. Many who come into the court system have disabilities, but the court system makes little provision for disabled people in the information we provide and in the processes we use. This makes it difficult to access or participate in civil justice.

The submitters also highlighted the importance of better assistance to access courts or, indeed, tribunals. Lack of knowledge of these processes often leads to significant prejudice. One example is a failure to respond early enough to debt claims.

Community Law Waikato said that their clients are generally marginalised, vulnerable, and are living on low incomes. Often, they have had limited education. But they have pressing justice needs. Even the few who do manage to engage with the processes often come out the other end not understanding what has happened.

Community Law Centres, including Community Law Canterbury, emphasised the absence of accessible and comprehensible information about rights in the areas in which their clients' problems often arose, including debt arising from interactions with finance companies and door to door sellers, or from an inability to access benefit and accident compensation entitlements. Many submitters referred to the technical "jargon-driven" way in which information is presented in all aspects of the court process – rules, court forms, and even judgments. The use of inaccessible language makes engaging with the courts, and understanding what is required of the litigant, difficult and daunting. There was an obvious need for accessible, clear, and "to the point information" to enable their clients to understand their rights and how to access them.

These submissions are all available on the Rules Committee website.¹⁶ What emerged for me when reading them is how important Community Law Centres and Citizens Advice Bureaus are in enabling access to justice. I am humbled by the service those who volunteer or work in these centres provide. What is critical for my purposes tonight is that these submissions provide evidence of serious barriers to accessing our courts for those with the most pressing justice needs. They describe a court system which is alien to their clients, which remains Eurocentric even though we live in a country in the South Pacific, and in which communication occurs in complex and obscure language and processes.

The alienation of the vulnerable in our society risks a weakening of social cohesion, allowing populist ideas to take hold in the spaces left by the justice gap. If people do not see the courts and tribunals as institutions that will respond to them, they will look elsewhere.

The submissions present a daunting list of issues to address. The submitters describe the complex interplay between procedural and substantive law, and the vulnerabilities of many in our society which leaves them unable to seek the protection of the law. We cannot expect Community

15 Porirua Kāpiti Community Law Centre "Submission to Rules Committee on Improving access to Civil Justice" at 3.

16 See Courts of New Zealand "Improving Access to Civil Justice" (23 November 2021) <www.courtsofnewzealand.govt.nz>.

Law Centres or Citizens Advice Bureaux to close the justice gap, no matter how vital their work is. The Rules Committee too can only be a part of the solution.

We have a judiciary which sees and is committed to addressing these challenges. But many of the issues that exist are beyond the power of the judiciary.

We need the Ministry of Justice working alongside us (and I am pleased to say that we have that), and the profession alongside us – but we need more than the profession. The government as a whole needs to be alive to these issues.

I therefore turn to highlighting the work that is underway to address these concerns, and the work yet to be done to achieve the systemic response I believe is necessary.

II. COST

The cost of accessing justice – the cost of legal representation and even the cost of filing and hearing fees – is beyond my powers as Chief Justice. As some of you may know, I have been outspoken regarding the deficiencies of our present legal aid settings. In early August, the Government announced extra funding to raise the eligibility threshold, reduce the numbers subject to repayment obligations, and increase legal aid rates for lawyers.

While I was pleased to see this, it is obvious that with only a 15 per cent increase to eligibility thresholds, and with legal aid rates for lawyers still nowhere near Crown rates, this is not the reset the system needed. Having said that, I must acknowledge that all jurisdictions struggle with the delivery of a sustainable, fair, just and accessible legal aid system. The United Kingdom House of Commons Justice Committee, acknowledging a similar reality, recently suggested the review of its legal aid framework to enable aid to be targeted to areas most in need, and best calculated to improve the effectiveness of the courts and justice system.¹⁷

I also suggest that our legal aid system needs such a review, with a similar strategic focus. The system has developed over time, often in response to various historic events. A strategic review could ensure that funding is targeted in the areas in which it is the most effective in achieving equitable access to justice. It could also untangle some of the outdated assumptions about the model of legal services that are baked into the current scheme and which currently hinder the provision of effective and efficient services. Such a review cannot be mere tinkering at the margins and must have access to justice, rather than cost management, as its focus.

As much as the funding levels are an issue, so too are the administrative systems. I am told that many would rather do the work for free than subject themselves to the form-filling requirements to be approved for legal aid and then to have their invoices paid.

We can all share the blame for the administrative system we have today. The profession and the judiciary – for good reason – did not wish to bear it. But I think placing all the responsibility upon the Ministry of Justice is to ask too much of them. Without up-to-date, practical experience of files, law offices, legal practice and courts, it is difficult to maintain an administrative system that is responsive and light-touch. That is another area I suggest that a strategic review could address.

¹⁷ See House of Commons Justice Committee *The Future of Legal Aid* (HC 843, 27 July 2021).

III. SUPPORTING INDIVIDUAL AND COMMUNITY PARTICIPATION

The Community Law and Citizens Advice submissions I have outlined raise issues as to the alienating nature of court processes and the difficulty of engaging with the formal justice system.

The courts (the judiciary, with the support of the Ministry of Justice – the Crown agency charged with supporting the judiciary with the operation of the courts) are developing processes (and even courthouses) that are more in keeping with a country in the South Pacific, founded upon Te Tiriti o Waitangi, and that reconceptualise the courthouse as a community space. These changes are directed at reducing the alienating impact of the 19th-century procedure and getup of our courts.

I do not for a moment suggest that we will abandon all the traditions we have inherited from England – there is value in much of that process and tradition. Rather, we are allowing those processes and traditions to evolve to meet the particular needs of Aotearoa New Zealand. We are also accepting that new ways of doing things – new at least for the courts – derived from this time and place can enhance the concept of the fair hearing and the administration of justice.

Relevant to this development is Te Ao Mārama, the model of justice currently being introduced in the District Court Criminal and Family jurisdictions. Te Ao Mārama has two focuses. The first upon creating hearing environments that support engagement and comprehension for the people who are the subject of the proceeding – not just the lawyers. This objective is pursued by using plain English, through whānau and community presence and support for the parties, and by using communication assistance where appropriate.

The second aspect of Te Ao Mārama utilises the court process as an opportunity to address the conflict or the harm that underlies the court proceeding through, as appropriate, community engagement or the support of government agencies or other service providers.

Both features of Te Ao Mārama pick up judge-driven innovations that have been used in pilot courts now for over a decade. Although developed in the criminal and now family jurisdictions, this model has obvious relevance to many other areas of the courts' civil jurisdiction.

Te Ao Mārama is supported by the Ministry of Justice. I expect that these aspects of Te Ao Mārama will have their impact on civil justice beyond the area of family law over time.

IV. UNDERSTANDING OUR COMMUNITIES

It is also necessary that judges and the profession understand the communities they serve and are adequately grounded in te reo and tikanga Māori.

Across all courts, judges receive education in te reo and in tikanga. They also receive education that enables them to deal with the full diversity of people who come to court and who need to be supported to full participation in the proceeding. These are educational initiatives that have now been in place for several years, and I suspect that the profession is only just beginning to catch up. But catch up they must.

Recently, the Supreme Court issued a decision in a case called *Deng v Zhang* which addressed the importance of counsel being aware of important cultural context in civil proceedings and being prepared to assist the court with those issues – a judgment which repays reading.¹⁸ That shows how important an awareness of cultural context can be to the substantive outcome – to substantive access to justice, if you will. But it fundamentally highlights how important it is for the profession

18 *Deng v Zheng* [2022] NZSC 76.

to be sensitive to different cultural contexts, and perhaps to be educated in it. It was pleasing to see the New Zealand Law Society, New Zealand Bar Association and New Zealand Asian Lawyers respond so promptly to the educational imperative in that judgment.

The focus of this work is first upon ensuring that courts remain connected to their communities and are able to meet the community's justice needs. And secondly, on ensuring that people see and feel that the justice administered by the courts is accessible to them. This work is critical to ensuring access to the courts in the sense I have described – the ability to bring proceedings and the ability to fully participate in them. It is critical work to ensure the courts are not, and are not seen to be, an elite serving only the interests of a part of society.

V. ACCESS TO JUSTICE BEYOND THE COURTS – TRIBUNALS AND DISPUTE RESOLUTION

Just as in my 2014 speech, to this point my focus has been upon access to courts. But in our society, the reality is that most access to civil rights occurs in tribunals or through other statute-based dispute resolution processes.

Aside from relieving the court system of what would otherwise be a crushing workload, these bodies and processes are typically set up to allow resolution of proper entitlements and disputes using more informal processes than are possible in the court system. Tribunals can, and often do, use inquisitorial processes. Statutory review processes often use alternative dispute resolution.

Given the volume of civil disputes and entitlements resolved through these means, we are wrong to keep our focus solely upon the courts and lawyers when we think of access to justice issues. Barriers to access to justice can arise just as surely when these processes are not understood or are difficult to engage with.

I offer an example of the system responding to this challenge. In July of 2015, the Accident Compensation System was about to undergo statutory reform of dispute resolution processes – replacing appeals to the District Court with a specialist tribunal. But that proposed reform was put on hold when the then Ministers of Accident Compensation and of Justice received a report from Acclaim Otago (Inc).¹⁹

Acclaim is a support group for injured New Zealanders and their families which advocates for systemic change to improve the lives of injured people. With the help of funding and support from the Law Foundation and the University of Otago Faculty of Law Legal Issues Centre, Acclaim described the barriers that some people face when challenging ACC decisions. The report was based upon a wide-ranging review of case law and case studies but drew upon the report writers' extensive experience in the field. It provided a detailed account of the process by showing how obstacle-strewn and distressing engagement with the dispute resolution processes was for those who wished to challenge ACC decisions.

The report's conclusions were compelling, reflecting the authors' expertise in the system they criticised, and detailed knowledge of the difficulties faced by those who had to interact with it.

The legislative reforms proposed at that time did not go ahead. Instead, the relevant Ministers committed to consulting with injured people to understand their experience of the system.

¹⁹ Acclaim Otago (Inc) *Understanding the Problem: An analysis of ACC appeals processes to identify barriers to access to justice for injured New Zealanders* (July 2015).

Following an independent review which confirmed most of Acclaim’s criticisms, ACC and MBIE have worked to address those obstacles.

They have invested in providing better and more accessible information, in the creation of alternative dispute resolution pathways, and in a free Navigation service providing support capable of advocating for claimants’ interests and assisting them to raise disputes or complaints where appropriate.

This is an example of engagement and responsiveness – a redesign informed by the unique insights provided by Acclaim. In a more recent report, Warren Forster, one of the authors of the original Acclaim report, observed the significance and early promise of this work in transforming the way people experience disputes with ACC.²⁰

Several things can be taken from this example. First, it demonstrates how effective it can be when the system listens to and engages with the voices of those who must use it – and, to link back to my earlier discussion of populism, how this can provide an opportunity for people to be engaged with their institutions.

Secondly, it highlights how vital it is to have organisations or advocacy groups with the knowledge and expertise to collect and channel those voices and so enable this engagement. Those who operate the system, as experts in it, struggle to understand what it is like for the novice to engage with it. Feedback – such as ACC received from Acclaim, and such as the Rules Committee received from Community Law Centres – is to be treasured.

Thirdly, which is perhaps a digression – the Acclaim report and the more recent report by Mr Forster demonstrate how important funding for this research has been.

And finally, this a useful example for me to springboard to my next point: how effective, and indeed vital, a focus on access to justice within government departments is.

VI. ACCESS TO JUSTICE – A WHOLE OF GOVERNMENT FOCUS?

Traditionally it is judges, lawyers and the Ministry of Justice who are the advocates for, and guardians of, access to justice. I believe that access to justice is a concern with which all government agencies should actively engage. Most rights and obligations are sourced from statute and accessed through government departments. There is a compelling case for making access to justice a structural focus for all government departments. Access to the benefits of English citizenship guaranteed to Māori under Te Tiriti included the benefit of the law. Moreover, as I have set out above, access to justice is vital to social cohesion and, as study after study has recorded and observed, to the economic growth and prosperity of a nation.²¹ Attending to access to justice is a democratic imperative.

It is a positive innovation that MBIE has now established a Government Centre for Dispute Resolution Principles. The purpose of this Centre is to provide principles and information to assist government departments to design dispute resolution processes. The information it provides is a fascinating read. I would like to see a similar agency supporting access to justice across government

20 Warren Forster *Removing Disabling Experiences: a vision for the future of our people* (The Law Foundation New Zealand, April 2022).

21 See for example OECD *Access to Justice and the COVID-19 Pandemic: Compendium of Country Practices* (September 2020); Rule of Law Working Group *Rule of Law, Economic Growth and Prosperity* (Americas Society and Council of the Americas, July 2007). See also United Nations “Access to Justice” (February 2019) United Nations and the Rule of Law <www.un.org/ruleoflaw>.

which would focus on both of the aspects of access to justice I mentioned earlier – access to knowledge of the law, and access to the means to enforce those rights.

A government-wide focus of this nature could be transformative in terms of access to justice, and toward building a more just and equal society.

There are two obvious areas for it to focus upon. First, the content of legislation. When we create legislation to protect the rights of tenants, employees, the injured and so on, we do so because as a society we wish those rights to be protected. When drafting critical “rights heavy” relationships – legislation such as the Residential Tenancies Act, Employment Relations Act or Accident Compensation Act – an early focus upon how ordinary people will be able to understand those rights seems sensible. It would be valuable for such legislation to be written for those who use it. Each of these pieces of legislation is complex – with lawyers and judges working hard to construe them. Some of this complexity is surely avoidable.

Great strides would be made toward access to justice were legislation designed to facilitate not only comprehension but also enforcement of statutory rights. How rights and obligations are described and enforced impacts directly upon how easily understood and how easily enforced they are. Expressing rights in complex or vague terms sets up the likelihood of dispute. Rights which are only enforceable through the courts will be out of reach for many. And many more may not even be aware of their rights.

I am not sure if a legislative design principle is currently used which focuses upon how statutory rights will be understood and enforced by lay (non-legal) people of limited means – if it is not, it should be. Certainly, there have been similar recommendations made in the past, including in a 2008 Law Commission report which called for accessible legislation built on principles of availability, navigability and clarity for users.²² Enforceability should be added to this list.

The lessons which have obviously been learnt from ACC will be useful here. In his book “Making Laws That Work”, Justice David Goddard gives other examples of simplified low-cost mechanisms that allow people to challenge determinations, but which do not remove the right ultimately to resort to the courts.²³

Another critical area of focus must be on providing easy access to information about rights and dispute resolution pathways. Community Law and Citizens Advice have led the way in this in Aotearoa. Several government departments and agencies now also make considerable and commendable efforts to provide online legal information. But this is information typically provides only a part of the information needed to navigate through to resolution of the issue – understandable given the very many different factual and procedural permutations the information needs to cater for. In 2020, David Turner and Bridgette Toy-Cronin released a report “Online Legal Information Self-Help in Aotearoa: An agenda for action” which identified this difficulty with existing resources and emphasised the need, drawing on lessons from other jurisdictions, to take a whole of jurisdiction approach. They concluded that a strategy of cooperation and user engagement is necessary to achieve this, and that this cooperation would require the coming together of people from across the judiciary, legal profession and community.²⁴

22 Law Commission *Presentation of New Zealand Statute Law* (NZLC R104, 2008)

23 David Goddard *Making Laws that Work: How Laws Fail and How We Can Do Better* (Hart Publishing, Oxford, 2022).

24 David Turner and Bridgette Toy-Cronin “Online Legal Information Self-Help in Aotearoa: An agenda for action” (2020).

I suggest, however, that real progress will not be made until government agencies are also engaged in this work, because it is that engagement that will create the opportunity for simplification of both process and information and to the design of user-focused legislation.

VII. HOPE FOR THE FUTURE

And so, onto my last point tonight. There are signs that institutions and systems are responding to the calls for better access to justice. There are many green shoots in this area. Access to justice is now a focus within the profession.

The New Zealand Law Society recently led a large-scale review in the area which provided vital data, including information that helped inform the recent legal aid funding shifts.²⁵

The measure of what legal excellence is, as expressed through the criteria for appointment as King's Counsel, has been amended to include the work the lawyer does to facilitate access to justice. The 2021 establishment of Te Ara Ture – the pro bono clearing house, launched as a subsidiary of Community Law Centre Aotearoa – brings together a database of lawyers willing to offer pro bono services. This important initiative is funded by the Ministry of Justice.

So too is the “Wayfinding for Civil Justice” strategy I mentioned at the outset. The draft strategy, which is currently out for consultation, proposes the establishment, or alternatively the strengthening, of an existing body to coordinate reporting of access to justice initiatives and the sharing of information.²⁶

The draft strategy document states that Wayfinding will be successful if everyone is aware of each other's efforts and all the efforts are contributing to meeting the strategy's goals. The goals are stated to be to:

1. increase community access to legal information and self-help tools;
2. increase the availability of affordable legal services and increase lawyers' knowledge and understanding of communities and their needs;
3. increase the availability of information about the range of dispute resolution mechanisms that are available and ensure equitable access to the courts; and
4. finally, increase knowledge of how the system is currently operating, and evaluate and monitor innovation and change.

The working group responsible for the creation of the strategy has provided a model of cross-sector thinking and leadership. Through information-sharing, the strategy aims to make the significant efforts of individuals and organisations more effective by creating the opportunity to learn from each other and by creating opportunities for coordination.

VIII. CONCLUSION

To conclude, although there are challenges to improving access to justice, we must rise to meet them. Doing so is a democratic imperative. Improving access to justice has never been more pressing than it is today, given the need to maintain social cohesion in the face of rising populism throughout parts of the Western world.

25 New Zealand Law Society *Access to Justice Research 2021* (October 2021).

26 Bridgette Toy-Cronin and others *Wayfinding for Civil Justice: Strategy consultation document* (Ministry of Justice, April 2022).

There is much to be done. Judges and lawyers have their role to play in this work. But more than lawyers are needed if we are to make meaningful progress. A structural focus on access to justice across government, across the judiciary and across the profession is required. And as we do this important work, we must continue to listen to the voices of the community. We must listen to the community if we are to meet the needs of those we serve.

INTERNATIONAL CRIMES THROUGH THE LENS OF THE RUSSO-UKRAINIAN WAR

BY CONNOR MICHAEL GORDON*

I. INTRODUCTION

Like a man coming upon a fork in the road, the international community sits – and has sat for too long – unable to choose between decisive action and the practicability of collective intervention towards the prosecution of those who commit international crimes. With the world ever globalizing and the very nature of war and conflict changing with it, it seems ever more apparent that the innocent, the true victims of war, get lost within the supposed grandeur of the offending act itself. These crimes have become so wicked that the sheer scale of those victims often become numbers for media to tout or world leaders to publicly lament while little action is taken on the global stage to provide relief. Instead, the world plays this part of the indecisive man at the crossroads and watches. He may debate with others around him about the necessity that the right path be chosen and declare outrage and solidarity when, after many years of waiting, more lives are lost despite his indecisiveness, however at the crossroads he remains and all the while more people suffer.

I begin this article with this metaphor to personify a theme within the international community's response to international crimes – a response to which the man at the crossroads represents: stagnation. Stagnation even as news breaks daily about the veracity of evidence of international crimes having been committed by Russian forces in Ukraine where little meaningful justice can be done – in terms of deterrence or practical sentencing – in response to mounting aggression. This article will approach these issues through the lens of the Russo-Ukrainian war, evaluating the jurisdiction of the International Criminal Court (ICC) to prosecute Vladimir Putin for his alleged international crimes committed in Ukraine, coming to posit that the stagnation that has plagued that man at the crossroads is the result of multifaceted issues in relation to the ICC caused by a toothless jurisdictional ambit, half-hearted committals and politicization of court functions from the ICC's beginnings that continue to slow international progress even today.

This stagnation of meaningful development towards effective systems and procedure to prosecute international criminals has led to many of the issues this article will be covering in the following pages, however, to do so, the historical context of international prosecution must be examined.

Drafted in 1998 the Rome Statute was a product of a century of brutality on the international stage.¹ Following the First and Second World Wars, regional and civil conflicts began to occur

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1 Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002).

with greater prevalence; conflicts started and ended with little international oversight regarding the punishment of those committing crimes within those conflicts, as Kenneth Roth states:²

The cause of this century's brutality is not simply the evil that lies in some men's hearts. It is also our collective failure to build on the Nuremberg precedent by ensuring that all such killers are brought to justice. Too often since the Holocaust, the cries of victims have gone unanswered. The pleas of survivors fell on unresponsive ears. The signal was sent to would-be murderers that there is no price to be paid for such horrendous crimes. This failure of justice bred further slaughter, in a vicious cycle of impunity and violence.

As Roth highlights, the phantom of the types of atrocities carried out during the Second World War echoed into such regional and civil conflicts, while separate from the major European sphere for the most part, still leading to egregious loss of human life with no justice, punitive or otherwise, being done where those who committed such heinous acts still walked free. This is a phenomenon observable wherever war is waged in the modern era. At least 929,000 people have been killed as a result of war in Iraq, Afghanistan, Syria, Yemen, and Pakistan, with more than 387,000 civilians making up that number since 2001.³ A further 300,000 people have been killed in Sudan over fighting in the Darfur region, and many more deaths are being tallied globally from conflicts too exhaustive to list in this article alone.⁴

It is precisely these conflicts that the Rome Statute, and thus the ICC, is supposed to be aimed at. However, tangible results in pursuing those individuals under indictment from the ICC prove allusive, with the United Nations General Assembly's report on the ICC self-admitting that executions of outstanding warrants have proven to be significant challenges, leaving some to become stale and unpursued.⁵ It is apparent from this that Kenneth Roth's words are emblematic even of today's international criminal environment, leaving much left to be desired for the ICC to prove effective at just prosecution of international criminals globally.

We move, then, to the war in Ukraine from which it seems this failure to build upon the Nuremberg precedent once again rears its head. With this stagnation of the ambit of international criminal law as his background, Putin invaded Ukraine in 2014 and annexed the Crimean Peninsula as a precursor to his current invasion beginning in February 2022.⁶ This invasion has led to accusations of war crimes being carried out by Russian forces against the Ukrainian people, with accusations of torture and murder as well as the crime of aggression being among those arising out of the ongoing conflict.⁶ These alleged crimes, while suffered by those individuals in Ukraine, are carried out with a callousness that only those unafraid of consequence would hold. Bodies with

2 Kenneth Roth "Endorse the International Criminal Court" in Alton Frye (project director) *Toward an International Criminal Court? A Council Policy Initiative* (Council on Foreign Relations, 1999) 19.

3 "Human Costs" (November 2021) Costs of War, Watson Institute International and Public Affairs, Brown University. <<https://watson.brown.edu/costsofwar>>.

4 "Fresh Clashes in Darfur Kill Dozens of Civilians, UN-Africa Union Mission Reports" (7 September 2010) UN News Centre <un.org>.

5 *Report of the International Criminal Court to the United Nations* UN Doc A/64/356 (17 September 2009) at [71].

6 "Annexation of Crimea by the Russian Federation" (1 October 2022) Wikipedia <<https://en.wikipedia.org/>>.

7 Yaroslav Lukov "Ukraine War: 21,000 alleged war crimes being investigated, prosecutor says" (7 July 2022) BBC News <<https://www.bbc.com>>.

signs of torture are being found in shallow graves in recently recaptured areas such as Izyum, and reports of systematic killings and rape are under investigation in Bucha among others.⁸

These crimes are the focal point of this article to which the jurisdiction of the ICC will be evaluated and brought into question regarding the practical applicability of indictment and prosecution of Putin for alleged international crimes committed in Ukraine. To do this, this article will first analyse the jurisdiction of the ICC and how it interacts with national bodies, continuing to then to evaluate sovereignty in relation to said jurisdiction as well as moving to consider claims of politicization in the actions of the ICC to date.

II. JURISDICTION

The preamble to the Rome Statute in establishing the ICC emphasizes that the Court established shall be complimentary to the national criminal jurisdictions of those states party to the statute. This principle of complementarity is unique, being that as Johan D van der Vyver notes, emphasisization of the complementary nature of jurisdiction for the purposes of the ICC redefined the term to denote seniority of jurisdiction to national courts, stating that:⁹

[ICC deliberations] added a new word to the English language: ‘complementarity’ – or a new meaning to the word as defined by American English. ... Within the meaning of ICC usage, ‘complementarity’ denotes a secondary role - not in importance but in the sequence of events. In other words, national courts have the first right and obligation to prosecute perpetrators of international crimes, and because ICC jurisdiction is complementary to national courts, ICC jurisdiction can only be invoked if the national court is unwilling or unable to prosecute.

This jurisdictional hierarchy denotes a tonal shift away from the *ad hoc* International Tribunals for the former Yugoslavia and Rwanda during which domestic lawmakers within affected states or successor states were overridden by the primacy of the international jurisdiction in enacting proceedings.¹⁰

It may, however, be arguable that even if the Rome Statute’s provisions had been in place for these tribunals, the international jurisdiction may have taken primacy regardless due to the respective judicial capabilities of both the Yugoslavian successor states and Rwanda at the time of these tribunals (being unable or unwilling to carry out proceedings domestically).¹¹ With this, while the policy of complimentary jurisdiction may retrospectively be intact in those pre-Rome Statute tribunals, the codification of this rule denotes a change in relationship between the international and domestic jurisdictions for criminal proceedings.¹² This change has contributed to a narrowing of the scope of the ICC’s applicable jurisdiction to which the enforceability of such court policies may be difficult when applied to the example of the Russo-Ukrainian war.

8 “Outraged by Izyum massacre, UWC calls for tribunal to prosecute Russian war crimes” (23 September 2022) Ukrainian World Congress <www.ukrainianworldcongress.org>.

9 Johan D van der Vyver “Personal and Territorial Jurisdiction of the International Criminal Court” (2000) 14 EILR 1 at [66].

10 SC Res 827 (1993); SC Res 955 (1994).

11 Karl A Hochkammer “The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics, and International Law” (2021) 28 Vanderbilt Law Rev. 119 at [122].

12 Jennifer J Llewellyn *A Comment on the Complementary Jurisdiction of the International Criminal Court: Adding Insult to Injury in Traditional Contexts?* (2001) 24(2) Dal LJ 192.

As it stands it is evident that the ICC's jurisdictional ambit exists in a secondary position to the national jurisdictions of those countries party to the Rome Statute, to which the ICC can assert jurisdiction over where states are either unwilling or unable to investigate or prosecute international criminals. This enforcement of the ICC's complimentary jurisdiction is also, however, one that relies on the cooperation of member states to ensure decisions are enforced and suspects arrested.¹³ The necessity for cooperation underpins the judicial capability of the ICC and draws many questions regarding the actual authority of the ICC as a standing court.

The war in Ukraine, for example, has been the source of many reports of war crimes to which the word "alleged" has seemingly become just a formality. Yet when analysing the jurisdiction of the ICC to prosecute Putin for said crimes, the thought of the Russian Federation, to which Putin himself is the dictator, cooperating with the ICC to prosecute their leader is laughable. We can see this perspective reflected in the historical actions of the Russian Federation towards the ICC declarations regarding its occupation of the Crimean Peninsula in 2014, from which, after the initial invasion of Crimea, Putin pulled out as a signatory of the Rome Statute in response to the ICC's finding that the annexation was, in fact, an occupation.¹⁴

We see from this example a display of the issues intertwined with the establishment of an international criminal court in an environment where both national sovereignty is coveted in a higher regard than the authority of the Court and where non-party states in utilizing said national sovereignty can directly undermine the Court's rulings where convenient.¹⁵ It stands that such loopholes would not be allowed to exist in any national criminal jurisdiction, where those criminals when sentenced could simply "opt out" of their participation in relevant legislation – concepts such as rule of law and social contracts exist with authority for the purpose of avoiding such things.¹⁶ However as has been displayed time and again, the international stage has no such arrangement.¹⁷ Rather to the contrary it appears that a state's signature to critical legislation such as the Rome Statute only exists as an enforceable document so long as the whim of that nation's leading body deems it to be so, with little effective consequence arranged to combat the flouting of international agreements in such a manner as Putin has done.¹⁸ To put it plainly, morality is not an enforceable metric from which those leaders already committing international crimes can be held to, to which concepts such as state sovereignty and jurisdictional issues regarding non-party states are used as a shield for the wicked acts the ICC's ambit is supposed to defend against.

This prioritising of national jurisdictions is a symptom of post-Cold-War understandings that sovereignty and international law are adversarial concepts, with one being in direct conflict with the interests of the other: "Generally, international criminal law scholars see sovereignty as the enemy ... thwarting international criminal justice at every turn".¹⁹ This relationship between state

13 Rome Statute, above n 1, at [86–90].

14 "Russia withdraws from International Criminal Court treaty" (16 November 2016) BBC News <<https://www.bbc.com>>.

15 Christa-Gaye Kerr "Sovereign Immunity, the AU, and the ICC: Legitimacy Undermined" (2020) 41 Mich J of Intl L 195.

16 Brian Skyrms *Evolution of the Social Contract* (Cambridge University Press, Cambridge, 2014).

17 Heike Krieger, Georg Nolte, Andreas Zimmermann *The International Rule of Law: Rise or Decline?* (Oxford University Press, Oxford, 2019).

18 Jeffrey Gedmin "Beyond Crimea: What Vladimir Putin Really Wants" (2014) 177 World Affairs 8.

19 Robert Cryer "International Criminal Law vs State Sovereignty: Another Round?" (2005) 16 EJIL 979.

and international court is widely characterised as a restricting factor on the ICC's jurisdiction to which point Robert Cryer continues the above thought to outline that:²⁰

Sovereignty can also be used to pre-empt fuller debate on the advisability of developing the law. At Rome, for example, 'this would intrude on our sovereignty' was often used as a euphemism for 'we don't like this' per se.

This quote aptly illustrates the approach taken by states in the development of the Rome Statute, to which sovereignty can clearly be identified as a tool utilized by state representatives to negotiate the jurisdiction of the ICC into a comfortable position. While comfortable, this unyielding prioritisation of state sovereignty appears to be a foundational crutch to any actionable processes available regarding enforcement of ICC policies, punishment for non-compliance, or any other deterrence put in place to avoid callous loopholes or work arounds (such as pulling out as a signee) to the ICC's jurisdiction.²¹ The relationship between sovereignty and international precedent in this context is critical for the evaluation of how said jurisdiction applies in relation to Vladimir Putin's alleged international crimes in Ukraine, with such insights providing an understanding of the mindset state parties had in negotiating the invasiveness of the ICC's ambit and how the outcome of those negotiations now applies to Putin utilising sovereignty as a shield to commit international criminal acts.

These facts compiled as they are raise many questions regarding the ICC's jurisdiction and how it can be exercised to prosecute Putin for alleged international crimes in Ukraine. Implications regarding the Russian Federation pulling out as a signatory of the Rome Statute call into doubt the ICC's prescribed jurisdiction regarding states not party to the statute and furthermore posit questions regarding the specific international crimes committed by Putin, such as the crime of aggression, and how those crimes are legislated for. Additionally, it is apparent that theorists perceive an adversarial relationship to exist between sovereignty and international criminal prosecution to which modern understandings of state and international law may prove critical in enabling a sense of malleability in both concepts to allow for effective means of international criminal prosecution to occur. These considerations will constitute the main focuses of this article when analysing the jurisdiction of the ICC through the lens of the Russo-Ukrainian war.

III. IMPLICATIONS OF NON-MEMBER STATES

Article 87(5) provides the Rome Statute's provision regarding the cooperation of non-party states with the ICC within which the article states that the Court:²²

may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

This provision presents cooperation as optional for non-party states which, conversely, acts as an obligation to those states who are signatories of the Rome Statute in correspondence with the general principals of treaty law.²³ Scholars and state officials alike in analysing this interaction

²⁰ At [2].

²¹ J Crawford "The drafting of the Rome Statute" in P Sands (ed) *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge University Press, Cambridge, March 2003) 109.

²² At [87.5].

²³ Zhu Wenqi "On co-operation by states not party to the International Criminal Court" (2006) 88 IRRC 87.

attribute its existence to “fundamentally important” principles of state consent in enforcing international law, to which the ICC is no exception.²⁴

From this, we can understand two things about the jurisdiction of the ICC and how it interacts with non-member states. The first being that the ICC’s jurisdiction is not universal, which may seem obvious but confers significant implications when considering the Russo-Ukrainian conflict as neither of the parties are members of Rome. And the second, in relation to the non-universality of jurisdiction, being that the ICC’s jurisdiction may not be exercised in absence of a state’s consent.

On the point of jurisdiction, the restrictive nature of the ICC is evident not only within the articles of the statute at art 12(2)(a) but also in the existence of the process of becoming a signatory in the first place. In other words, the very purpose of the treaty is entirely defeated if art 12 is interpreted to have such a broad and sweeping ambit to afford the ICC universal jurisdiction. We see here these jurisdictional requirements superseding the purposive approach of the ICC as a deterrent and a retributive tool against those willing to commit international crimes in the modern era. Zhu Wenqi highlights this dichotomy between the intent behind the ICC and its actual jurisdictional ambit with the following:²⁵

The original idea in establishing the ICC was to put an end to “the culture of impunity”. In other words, it is designed to try those who have committed crimes within its jurisdiction when the relevant national authorities would be unwilling to prosecute their own officials and especially their national leaders ...

Zhu then continues to elaborate that, in terms of states outside of said mentioned jurisdiction, “The ICC naturally hopes that all states will cooperate fully and unconditionally with it”.²⁶ In short, the ICC was formed to combat the impunity enjoyed by international criminals since the closing of the Second World War even where said criminals are officials or national leaders of nations while affording itself jurisdiction only where non-party states are consenting as well as refusing to hold trials *absentia* where states are protecting those with warrants outstanding.²⁷ The potential for any prosecution for the likes of Putin appear stark in light of this understanding, with little to no recourse apparent to avoid any prosecution stalling at the pre-trial stage like the fourteen active cases still at large today.²⁸

Furthermore, it is made apparent from Zhu’s writings that the only legal consequence available where a non-party state refuses to cooperate lies within the charter of the United Nations (UN) if the matter was referred to the ICC via the UN Security Council in the first instance.²⁹ Where this is the case, the Security Council has access to remedies such as sanctions as potential consequences for non-cooperation; however, the Russian Federation is a permanent member of said council with veto power, making this avenue an impossibility for genuine efforts either as deterrence or as a

24 Lee A Casey and David B Jr Rivkin, “The Limits of Legitimacy: The Rome Statutes Unlawful Application to Non-State Parties” (2003) 44 *VaIntlL* 63.

25 At [94].

26 At [106].

27 *The Prosecutor v Abdallah Abakaer Nourian* [2009] ICC-02/05-03/09. See also Trial Chamber IV “Prosecution’s submissions on trials in *absentia* in light of the specific circumstances of the *Banda* case” (13 December 2019) ICC-02/05-03/09-673Conf-Exp within which the Court goes in depth into the reasoning behind its refusal to prosecute in *absentia*, citing art 63(1) which requires the accused presence at trial as a clear defining factor in its decision.

28 “About the Court” International Criminal Court < www.icc-cpi.int>.

29 At [107].

reactive mechanism to enable stronger sanctions on Russia in light of their likely non-cooperation with ICC investigations.³⁰

When a state is uncooperative, art 17 of the Rome Statute itself provides insight into the mechanisms at work where a case will be considered inadmissible for the ICC to enforce jurisdiction to which art 17.1 reads as follows:³¹

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.

Article 17 is inherently important when considering any potential prosecution of Putin for crimes committed in Ukraine due to the likelihood that Russia, especially if it is still lead by Putin after the war, would challenge the jurisdiction of the ICC regarding any prosecutions of Russian citizens that may arise from the conflict (let alone the head of state). Were this to occur, art 17 would empower the ICC to determine whether attempts to investigate and prosecute as an internal matter in Russia would be genuine – which would be very unlikely given the intentionality apparent in alleged war crimes carried out so far.³² As such, it would likely take very drastic changes in the governmental regime for a genuine prosecution under the ICC to occur, to which even if, in an entirely hypothetical scenario, a change of government was to occur leading to an end of the war, said new government would likely prosecute Putin within their own jurisdiction to reinforce its own legitimacy if a prosecution were to occur at all.³³

Historically, the ICC has many cases in which the Court attempts to prosecute state leaders which can be used as precedent to analyse potential prosecution of Putin. The case against Omar Al Bashir, for example, holds particular relevance as an example of the ICC's failures when it comes to the prosecution of state leaders.³⁴ In the first instance, the political implications of the case reaffirm earlier statements regarding the motivation of governments after a coup (or otherwise) seeking to prosecute previous leaders as (after Al Bashir's government was overthrown) the new Sudanese government elected to prosecute him in national courts on corruption charges as opposed

30 Michelle Nicols and Humeysa Pamuk "Russia vetoes U.N. Security action on Ukraine as China abstains" (2022) Reuters <www.reuters.com>.

31 Above n 1, art 17.1.

32 Philip Wang and others "Russia using rape as 'military strategy' in Ukraine: UN envoy" (15 October 2022) <<https://edition.cnn.com>>.

33 Dave Lawler and Ivana Saric "Former leaders have been jailed or charged all over the world" (25 August 2022) Axios <www.axios.com>.

34 *The Prosecutor v. Omar Hassan Ahmad Al Bashir* [2009] ICC-02/05-01/09.

to handing him over to the ICC per outstanding arrest warrants.³⁵ Consequently, the ICC's case against Al Bashir for alleged international crimes will remain in pre-trial until cooperation with the ruling Sudanese government occurs and he can be physically present in the courtroom.³⁶ In the second instance, failure of the ICC to execute its warrant against the leader of a much smaller state in terms of economic, population and even military metrics than Russia indicates disillusionment with the ICC in a much broader sense and outlines an apparent inability on the ICC's part to enforce its summons though political pressure, sanctions or otherwise.³⁷

For example, the ad hoc Yugoslavian tribunals found success in ascertaining the physical presence of those alleged to have committed war crimes largely due to their ability to enforce arrest via the presence of the North Atlantic Treaty Organisation (NATO) or UN peacekeeping troops already operating in the area.³⁸ Critically, there were no such forces available in countries such as Sudan, or in those other countries to which the ICC has outstanding warrants like Uganda, in *The Prosecutor v Joseph Kony and Vincent Otti*, or Kenya, in the *Barasa* and *Bett* proceedings, among others.³⁹ Applying this trend in case law to the scenario of the war in Ukraine, a severe escalation would have had to occur for NATO or UN troops to be in any position to carry out arrest warrants on Putin himself – implying a much broader conflict with equally broad consequences on a global scale. Without government cooperation or wild circumstance, it appears that the situation regarding any potential arrest or enforcement of an ICC indictment against Putin would be carried out much in the same way as Al Bashir and other “at large” suspects who the ICC lack the teeth to reliably summon.

Case law precedent and independent texts referenced above demonstrate the fact that those who should be held responsible for crimes committed are able in some scenarios to evade trial punishment by way of state non-compliance. State non-compliance, or even non-compliance of parties contesting state governance, as a shield to the ICC's jurisdiction is frankly disastrous to the legitimacy of the ICC as an actionable court, with cases stalled due to non-compliance being all too common amongst the ICC's case lists.⁴⁰ The case of *The Prosecutor v Saif Al-Islam Gaddafi*,⁴¹ for example, while not a head of state but head of military intelligence, has been stagnated in pre-trial having been released from his capture by an anti-government militia in Libya rather than being transferred to the ICC for prosecution, with a militia spokesperson stating that “We are not concerned with the international tribunal as the ICC did not ask us to hand him over”.⁴²

35 Abdi Latif Dahir “Sudan’s Ousted Leader is Sentenced to Two Years for Corruption” (12 August 2021) New York Times <www.nytimes.com>.

36 “Al Bashir Case” (4 March 2009) International Criminal Court <www.icc-cpi.int>.

37 “GDP per capita” (2021) The World Bank <<https://data.worldbank.org>>.

38 “On compliance and co-operation by the parties in the former Yugoslavia”, status report by the office of the prosecutor (3 June 1996).

39 *The Prosecutor v Joseph Kony and Vincent Otti* [2005] ICC-02/04-01/05; *The Prosecutor v Walter Osapiri Barasa* [2013] ICC-01/09-01/13; and *The Prosecutor v Philip Kipkoech Bett* [2015] ICC-01/09-01/15.

40 “Cases” International Criminal Court <www.icc-cpi.int/cases>.

41 *The Prosecutor v Saif Al-Islam Gaddafi* [2011] ICC-01/11-01/11.

42 “Libya’s Saif al-Islam survives ‘assassination attempt’ in Zintan” (9 May 2017) The New Arab <www.newarab.com>.

Here we once again see the ICC perceived as a tool for legitimacy and, as such, rendered unable to carry out its primary directive as an international body, further damaging the authority of the Court in the eyes of non-party states.⁴³

In terms of how this reflects on the ICC's jurisdiction to prosecute Putin, the case law discussed above only continues to reinforce the idea that the ICC would be powerless to conduct a substantive prosecution of Putin where Russia is uncooperative with ICC efforts. The ICC itself in its inability to capitalise on its arrest warrants and prosecutions undermines its own legitimacy as an international court, opening the door for those in opposition such as Putin to claim politicization of the ICC as a not truly independent body (which will be considered in more depth later in this article).⁴⁴

We now turn to consider the implications of state consent to proceedings and how that reflects on the ICC's jurisdiction to prosecute state citizens and national leaders. While the principals of international law are no doubt important, articles outlined in the Rome Statute and how they reflect onto established international law indicates a dichotomy between the ICC and previous understandings of prosecution on the global stage. The Rome Statute itself raises questions regarding the importance of a state's consent before one of its nationals (having committed an international crime on another nation's territory) can be prosecuted, to which customary international law provides no such unfettered authority regarding a state's control of its citizens while within the borders of another. As is the case with international law generally, a person travelling to another country is bound by and subject to the law of the country they are in regardless of the country they are from – with no issue of “consent” towards state prosecution in that scenario.

Customary law does, rather, source precedent regarding the prosecution of heads of state and senior state officials, which, under said precedent, provides immunity from prosecution for individuals of said offices in foreign domestic courts.⁴⁵ Under art 27(1) of the Rome Statute, however, this provision is legislated over to include sitting heads of state as eligible to be prosecuted by the ICC. This change from customary to codified international law indicates a significant divergence from traditional norms (a theme that is apparently common from the ICC's founding) as well as a “ping pong” between the rights state leaders have where international crimes are concerned and the rights held generally under customary international law regarding non-Rome crimes.

Where, then, does this leave us in terms of prosecution of Putin for those crimes allegedly committed in Ukraine? It is apparent that neither the Russian Federation nor Ukraine are signatories of the Rome Statute; however, recourse is available under art 87 for non-member states to come agreement for cooperation with the ICC. Additionally, the ICC itself reports that the situation in Ukraine has been referred to it by a total of 43 state parties after the prosecutor of the ICC announced that they would be seeking permission to begin investigations into war crimes having been committed in Ukraine.⁴⁶ The process, then, involves this period of ICC investigation into which examining evidence, questioning parties under investigation and questioning victims and

43 *Modernizing the International Criminal Court: Crimes against the Environment, Trafficking in Human Beings, Hybrid Justice, and Corporate Accountability* (Harvard Law School Advocates for Human Rights and Parliamentarians for Global Action, March 2022).

44 Benjamin Duerr “Twenty Years On: The ICC and the Politicization of its Mechanisms” (7 August 2018) IPI Global Observatory <<https://theglobalobservatory.org/>>.

45 *Democratic Republic of Congo v Belgium* Arrest Warrant issued on 11 April 2000.

46 Karim AA Khan QC “Statement of ICC Prosecutor, Karim AA Khan QC, on the Situation in Ukraine: “I have decided to proceed with opening an investigation.” (28 February 2022) International Criminal Court <www.icc-cpi.int/>.

witnesses will all be carried out by impartial investigators for the purpose of ascertaining evidence of a suspect's innocence or guilt.⁴⁷

These pre-trial investigations have typically taken from one month to four years to complete,⁴⁸ with work starting on the Ukrainian investigation as of 2 March 2022.⁴⁹ This investigation will be carried out in Ukraine, who is cooperating with the ICC in this venture, and will span the length and breadth of all allegations that war crimes, crimes against humanity, genocide or the crime of aggression have occurred on the territory of Ukraine from the initial invasion date (21 November 2013) and onwards. Once completed, this investigation will inform the ICC prosecutor if evidence is found of crimes under the ICC's jurisdiction, and trials will be initiated against those individuals who bear the greatest responsibility for them.

In terms of the current situation in Ukraine and how this applies to any potential prosecution of Putin, the crime at the forefront of the war and most relevant to Putin himself is the crime of aggression. On July 16, 2018, the ICC's assembly of state parties agreed to legislate against crimes against peace, thereby allowing the ICC to prosecute the crime of aggression under its charter. Within the statute, the crime of aggression is defined as follows:⁵⁰

[The] "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

The statute then continues to further define "act of aggression" as the "use of armed force by one state against the sovereignty, territorial integrity, or political independence of another", continuing to define a non-exhaustive list of acts that qualify under this definition. Applying this statutory definition to the war in Ukraine, it is apparent that the criteria appear to be met sufficiently to incriminate Putin as having committed the crime of aggression. On its face, whether characterised as a "special military operation" or not, Putin's utilisation of military forces in a planned, prepared and executed assault on Ukraine's sovereign territory directly relates to the definition provided by the statute.⁵¹

Other crimes under the ambit of the ICC have also been alleged to have occurred within Ukraine to which evidence may suggest higher or lower levels of responsibility afforded personally to Putin.⁵² Examples include murder of innocents, wanton destruction of settlements, hostage taking and torture, unlawful deportation, attacks against religion and culture, rape, and genocide – with UN investigators stating plainly that Russia has committed war crimes in Ukraine.⁵³ Whether these crimes may be actionable as cases will depend heavily on the findings uncovered by investigation

47 "ICC investigations" (2022) Coalition for the International Criminal Court <www.icc-cpi.int>.

48 "Eight questions about the International Criminal Court" (21 May 2014) Syria Justice and Accountability Centre <<https://syriaaccountability.org>>.

49 "Ukraine: Situation in Ukraine ICC-01/22" <www.icc-cpi.int/ukraine>.

50 Rome Statute, above n 1, art 8.

51 Rebecca J Hamilton *Ukraine's Push to Prosecute Aggression: Implications for Immunity Ratione Personae and the Crime of Aggression* (2023) 55 *CaseWResJIntL* (forthcoming).

52 "Independent International Commission of Inquiry on Ukraine" United Nations Human Rights Council <www.ohchr.org>.

53 Lorenzo Tondo "Russia has committed war crimes in Ukraine, Say UN investigators" (23 September 2022) *The Guardian* <www.theguardian.com>.

efforts across liberated areas, however reports indicate increasingly undeniable evidence that a myriad of international crimes have been committed in the name of Putin's expansionism: "Given the gravity of the identified violations, there is an undeniable need for accountability".⁵⁴

The prosecution of individuals alleged to have committed these crimes remains a challenge, however, with debate regarding how trials are to be proceeded with increasing as the war continues. In terms of jurisdictional complementarity regarding the Ukrainian Jurisdiction, it is likely that the ICC will play a supporting role to the Ukrainian judiciary in the prosecution of those alleged to have committed war crimes as a result of the invasion.⁵⁵ Ukraine itself has already begun prosecutions of captured Russian soldiers alleged to have committed international crimes befitting of the ICC's jurisdiction, with the first prosecution beginning as early as May 2022.⁵⁶ Questions have been raised, however, regarding the capacity of the Ukrainian justice system in taking this influx of high-profile cases. It is evident that the Ukrainian justice system is best positioned to deal with the job of criminal prosecutions due to their obvious proximity to evidence, witnesses and victims as well as inherent understandings of language and culture held by those most affected by the ongoing war. As Gaiane Nuridzhanian outlines, it is apparent that the majority of Ukrainian courts are still operational despite the ongoing war to which she suggests the international community and ICC make serious efforts to strengthen the national Ukrainian jurisdiction as opposed to sourcing prosecution from exterior courts.⁵⁷ This understanding is in line with previous international humanitarian law with r 158 empowering states to prosecute suspects of war crimes within their own jurisdiction.⁵⁸

In terms of Putin himself, however, the jurisdiction of the ICC appears limited to an investigatory capacity from which a declaration that international crimes have been committed may occur enabling pre-trial mechanisms to be put in place and a case opened against Putin himself.⁵⁹ Will this amount to the prosecution and potential sentencing of Putin by the ICC for said alleged crimes committed in Ukraine? All precedent points to no.⁶⁰ Putin's evident callousness in committing alleged international crimes indicates a distinct lack of care or perhaps lack of fear of consequence in doing said acts in a blatant manner such as he has. Whether a consequence of "the man at the crossroads" or not, the ICC's prescribed ambit and how that has been applied in previous prosecutions clearly holds little sway over Putin's actions in invading Ukraine, with the thought of personal liability being ethereal for the time being.

Treaties as a source of law are binding only in principle and do not confer rights or responsibilities beyond how those state parties choose to entrench provisions into their national legislation. While a broad ambit remains for cooperation of non-party states in regard to the Rome

54 "‘Undeniable need for accountability’ in Ukraine as violations mount" (18 October 2022) UN News <<https://news.un.org>>.

55 Above n 1 at arts 1 and 87.

56 Sarah Rainsford "Russian soldier pleads guilty in first war crimes tribunal of Ukraine conflict" (18 May 2022) BBC <www.bbc.com>.

57 Gaiane Nuridzhanian "Prosecuting war crimes: are Ukrainian courts fit to do it?" (11 August 2022) European Journal of International Law <www.ejiltalk.org>.

58 IHL Database "Rule 158. Prosecution of War Crimes" International Committee of the Red Cross: International Humanitarian Law Databases <<https://ihl-databases.icrc.org>>.

59 John Braithwaite "Putin's war: restorative reflections" (2022) 5 International Journal of Restorative Justice.

60 Aghem Hanson Ekor and Paul S Masumbe "Putin on Trial: The Reality of Heads of State Immunity before International Criminal Courts" (2022) 2 *Politi Journal: Scientific Journal of Politics* 29.

Statute's open-endedness of art 87's "any appropriate basis", the fact remains that consent and accord are critical roadblocks to the effective jurisdiction of the ICC. Purposively, the "principal of complementarity" laid out in the Rome Statute reflects the intent of the ICC to combat impunity enjoyed by international criminals, an effort which the secondary nature of the Court aims to encourage whether criminals are tried in the ICC's jurisdiction or in a state's national jurisdiction instead. It is apparent, however, in analysing the status of non-party states and how consent interacts between them and the jurisdiction of the ICC, that without the unlikely cooperation of Russia the ICC remains toothless to enforce these principals to achieve justice.

The only manner made apparent in my research to enable the ICC to prosecute Putin would be the softening of staunchness displayed in the *Abdallah Abakaer Nourian* case regarding prosecution in absentia.⁶¹ There are murmurings of precedent regarding this change to which, in the Court's ruling in the *Gbagbo and Ble Goude* case, the Court empowered itself to continue in absentia if those convicted failed to appear for any future trial hearings.⁶² Consequently, some international law scholars interpret this ruling as a tonal shift in interpretation of the Rome Statute's art 63(1) which previously prohibited trials in absentia, stating that:⁶³

The Appeals Chamber's decision, written by Judge Eboe-Osuji, construes the accused's right to be present at trial as a limited right, meant to protect an accused who wishes to attend their trial, but who is unable to do so through no fault of their own ... In the opinion of the Appeals Chamber, that aim is "perverted" when an accused is deliberately absent from trial and seeks the protection of Article 63(1).

This claim is further reinforced by a dissenting opinion in the *Kenyatta* case, within which interpretation of art 63(1) was suggested to impose an obligation on the accused to be present during trial, the violation of which would permit the Court to continue considerations in absentia.⁶⁴

If this were to be applied to a scenario where the ICC is blocked from proceeding with prosecution due to the non-cooperation of the Russian state and Putin, this precedent may prove invaluable to enable the carrying out of justice even where states and their leaders utilise weaknesses in the ICC's jurisdiction to avoid consequence for such heinous acts. For now, however, proceedings appear to indicate much of the same regarding the ICC's weak jurisdiction to which Putin will likely be no exception.

IV. SOVEREIGNTY CONFLICT

Antonio Cassese, former President of the now dissolved International Criminal Tribunal for Yugoslavia and Special Tribunal for Lebanon states rather plainly that, in his view, "either one supports the rule of law, or one supports state sovereignty. The two are not ... compatible".⁶⁵ This view, while founded on undeniable experience, presents sovereignty as an absolute, being of foremost importance and primacy for states dealing on the international stage. However, as

61 Above n 27.

62 *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé* [2015] ICC-02/11-01/15.

63 Caleb Wheeler "The ICC Appeals Chamber Signals a Possible Change in Approach to the Permissibility of Trials in Absentia" (3 July 2020) European Journal on International Law < www.ejiltalk.org>.

64 *The Prosecutor v Uhuru Muigai Kenyatta* [2011] ICC-01/09-02/11.

65 Antonio Cassese "On the Current Trends towards Criminal Prosecution and Punishment of Breach of International Humanitarian Law" (1998) 9 EJIL 2.

this article intends to posit, a middle ground between these terms may be necessary to promote effectiveness within global institutions such as the ICC for the future.

Viewing sovereignty as cemented, unchanging and non-negotiable presents an equally unmoving international landscape from which lawmakers must then traverse to which the idea of attributing flexibility to sovereignty is not new.⁶⁶ The case of *Wimbledon* held in 1923, for example, tackled sovereignty as a flexible notion ultimately constituted by an international legal order such as we have today, setting a precedent regarding understandings of sovereignty to which some scholars now prescribe.⁶⁷

Critically, the attributing of malleability to state sovereignty may be necessary to enable an effective jurisdiction for international criminal institutions such as the ICC. Surely, in a world facing an ever-increasing number of world-wide issues such as modern war and climate change, the understanding that states as entities are among a global community holds some authority considering the many trans-national issues faced by the world today. Rigid understandings of sovereignty must be questioned not only in terms of a state's duty to its people but also in a state's duty to all the other states in our global community. As Andrew Clapham states:⁶⁸

Sovereignty ... is a changing notion which adjusts to the developing nature of international law ... in the end the debate turns on what one chooses to understand by the term sovereignty and who should be protected ... the rule that there should be no interference in state sovereignty simply begs the question: what are the rights and duties associated with sovereignty?

So, what is sovereignty? And how does it conflict with efforts to form an effective international court like Antonio Cassese claims? Historically, national primacy over international law is standard where state parties enter into treaties, agreements or other such sources of international law, with state lawmakers holding the final legislative say during ratification of any international agreement.⁶⁹ For example, the New Zealand Parliament as a constitutional monarchy has final internal say on how international agreements are codified into New Zealand law as its Parliament has "supreme legislative power" over the country.⁷⁰ This same sentiment translates into the complimentary nature of the ICC, with state parties ensuing their judiciaries preserve the primary means for prosecution of their own citizens to maintain consideration and punishment in line with the laws codified within their own legislative bodies.

This historical understanding of the exercising of state sovereignty prioritises those individual states despite the collective where international policy and treaties are ratified and enforced.⁷¹ From this we must accept two things, being that international law does overlap with state sovereignty where international institutions such as the ICC would legislate over the authority of individual

66 Bruce Broomhall *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, Oxford, 2004) at [56].

67 *SS Wimbledon UK v Japan* [1923] PCIJ (ser A) No 1 (Aug 17).

68 Mark Lattimer and Philippe Sands (eds) *Justice for Crimes Against Humanity* (Hart Publishing, Oregon, 2004) at [305], [312] and [313].

69 Dag Hammarskjöld *International Law Handbook* (United Nations, New York, 2017).

70 "Parliament Brief: What is Parliament?" (27 January 2016) New Zealand Parliament <www.parliament.nz>.

71 Dieter Grimm (translated by Belinda Cooper) *Sovereignty: The Origin and Future of a Political Concept* (Columbia University Press, New York, 2015) at 82.

nations (where said acts are not the concern of one state alone) and that the ability of states to self-legislate is fundamentally critical for that state to properly cater to the needs of its population.⁷²

In accepting these points, we gain an understanding of the dichotomy between sovereignty and international institution as well as the effect said dichotomy would have had in the negotiation and reduction of the jurisdictional ambit of the ICC. Johan D van der Vyver's previous quote demonstrates this well regarding negotiations on states participation in Rome having created a new meaning of "complimentary" – showing substantive change from the jurisdictional considerations in Yugoslavia and Rwanda to how jurisdictions of member states interact with the ICC under the Rome Statute. This change likely stemmed from modern misunderstandings by state representatives regarding the term "sovereignty" and "control", with states wishing to maintain jurisdictional primacy to prosecute their own citizens where the ICC may have had overriding jurisdiction if this reduction in scope had not occurred.

Here we see the conflict described by Cassese actualised, reinforcing his idea that no accord can be found between these two seemingly diametrically opposed ideas of sovereignty and rule of law. To this, however, Cryer finds a modicum of criticisms, commenting that while this approach to the prevention of international crimes cannot occur without violation of sovereignty to some degree, it also cannot occur without sovereignty either.⁷³ In his works, Cryer highlights examples such as Somalia and Sierra Leone where weak governments or the collapse of government all together lead to frequent violations of international criminal law, continuing to state that:⁷⁴

The state (and its powers) have a protective role that cannot be ignored here, at the very least unless and until the UN or another body chooses to take it over.

Cryer's point here is well made, arguing that the very existence of healthy governance – an exercise of sovereignty – deters the happening of international crime. This idea is echoed similarly by JE Nijman, to which she correctly identifies the individual as both the origin and subject to the law of nations, stating that:⁷⁵

Yes, states are international legal persons, but they are secondary persons; individual human beings are the primary legal persons in international law... International legal personality forms the cords between the individual human being and the universal human society, and because of it, the international community and international law must guarantee the right to have rights, the right to political participation.

In her writing Nijman reframes the sovereignty debate, describing international law less as an umbrella and more of a connector to which everything from the individual human, the universal human society and the "cords" connecting them are fluid. Here, Nijman strikes a notch against the likes of Cassese, building upon the fundamental philosophy that a state should coalesce to the benefit of its people and furthering said sentiment to apply those beliefs to the international context. It is worth mentioning to this point that, as an entity, the ICC itself is the result of an exercise

72 Above n 23, at [10].

73 Above n 19 at [2.C].

74 At [2.C].

75 JE Nijman *The Concept of International Legal Personality, An Inquiry into the History and Theory of International Law* (2007) 18 EJIL 775 at [473].

of sovereignty to which the member states in Rome collectively decided that an international framework should exist to protect those individuals from international crime – furthering the idea that the ICC or an international court like it is not mutually exclusive with state sovereignty.

This article accepts these standpoints, recognising the necessity of sovereignty and the individual both in terms of domestic and international precedent as well as the necessity that said sovereignty be malleable in the face of international institutions whose goal is to deal with collective problems on the global stage. The question then turns to how far this malleability must go for an effective international body (in this case the ICC) to exist and what that looks like in terms of state liberty and the rule of law on the international stage.

The case of *Island of Palmas* as early as 1928 provides commentary on this interaction between state and international jurisdictions to which the point was stressed that states are required to exercise their sovereignty in accordance with international law rather than despite it.⁷⁶ This ruling clearly indicates early in modern jurisprudence that sovereignty has limits in the face of international law, with an expectation being placed on states to conduct themselves as sovereign nations within the bounds of the permit of sources of international law. Additionally, scholars analysing the origins of sovereignty have explicitly noted that from the very development of sovereignty as a backbone to dealings between states, sovereignty has always been subject to limitations, with Stephen Krasner identifying that “in Western Europe, the area that generated the notion of Westphalian sovereignty, most rulers have never enjoyed full autonomy with regard to the treatment of their own subjects”.⁷⁷

This interpretation appears to have been lost in the way that states interact with international mechanisms in the modern era. Misunderstandings regarding the way sovereignty relates to international agreements, be they intentional or not, have warped previous “good faith” systems of international governance into the collection of apparently optional and unenforceable agreements that dominate the world stage today. Whether a symptom of political polarisation or otherwise, it is apparent that the shield of sovereignty is an easy and all too accessible excuse for leaders such as Putin to hide behind to further their own personal goals despite consequence. It seems logical that, even though the world is not one culture and many perspectives are held on how peoples should be governed, the idea that killing civilians or eradicating ethnicities is bad and should be protected against should not be controversial or too difficult a conclusion to reach. Yet, the man at the crossroads remains until this jurisdictional conflict is dealt with to which a limit must be struck between these two traditionally opposed concepts.

Karima Bennoune, in her book *Sovereignty vs Suffering*, examines the fallacy some scholars have made attributing binary opposition to sovereignty and international law, characterising sanctions and warfare as “fundamental violations of sovereignty” through the lens of the Iraq war.⁷⁸ Within her book, Bennoune highlights the effects globalisation has had on sovereignty, identifying transnational hazards, such as AIDS, and other legal constructs as driving factors towards changes in how states interact with international instruments:⁷⁹

76 *United States v Netherlands* [1928] II RIAA 829.

77 Steven Krasner *Sovereignty: Organized Hypocrisy* (Princeton University Press, New Jersey, 1999).

78 Karima Bennoune “Sovereignty vs Suffering? Re-examining Sovereignty and Human Rights Through the Lens of Iraq” (2002) 13 EJIL 243.

79 At [243–262].

In the last decades of the 20th century, limits on states' sovereignty have increasingly narrowed the power which the holder of sovereignty (a now contested agent) may exercise and have shrunk the borders in which those powers may be exercised ... This has led to the development of what has alternatively been posited as a relativizing of sovereignty or its disaggregation.

Bennoune continues to bring to light further views on this topic, articulating the thoughts of political scientist Kathryn Sikkink on taking a contemporary view of sovereignty, stating that "sovereignty is a set of intersubjective understandings about the legitimate scope of state authority, reinforced by practices".⁸⁰

From these writings it is clear that sovereignty in the modern era is coined by scholars as a limited attribute, utilising terms such as "scope" and "borders" to demonstrate a restricted ambit generally afforded to a state in exercising its sovereignty on the world stage. While the texts referenced above suggest a somewhat ambivalent role that sovereignty plays within international law (being that if sovereignty is interpreted too strongly that in itself can lead to international crimes as well as the converse), it is also apparent in each of these works that the belief that international justice can work is still optimistic. The question remains, however, regarding what methods of enforcement of international law are available to generate the effective jurisdiction necessary for such optimism to be realised to which the example of Putin's actions in Ukraine finds particular relevance.

Utilising Putin as an example for this analysis of sovereignty, general conclusions can be drawn from his actions and applied to a scenario where a state is unwilling to cooperate with ICC provisions. Critically, in the modern era it is apparent that states within this context would be all too unwilling to forgo their own ability to use force to enable the implementation of a legitimate international criminal body especially where said body is seen as politicised or a tool to be used against them.⁸¹ As Cryer highlights, even states party to the Rome regime are likely to prosecute their own nationals (even going so far as to amend their own legislation to facilitate this) to avoid the ICC stepping in.⁸²

With Putin's pulling out of the Rome accord, we see demonstrated a leader attempting to remain in control not only in a jurisdictional sense but also in terms of policy and use of force. Putin's rhetoric, if believed, would lead one to see the war in Ukraine as a Russian excision of authority in line with principals defined by the previous Soviet Union, either through his overall justification of Nazism in Ukraine (designed to rally the echoes of Soviet efforts during the Second World War) or his rhetoric regarding the return of Soviet borders to the Russian Federation to make the nation a power once again.⁸³ We see here not only Putin's rhetoric amounting to justification based on false understandings of sovereignty as demonstrated above but also the imposition of such a misunderstanding on another, sovereign, nation.

Ultimately, Putin is an Autocrat to which strong controls over media and other such sources of information are necessary to ensure public consensus towards his regime, a factor to which the ICC presents direct opposition.⁸⁴ Putin's signature on the Rome Statute legitimises whatever

80 At [246].

81 Sean D Murphy *Aggression, Legitimacy, and the International Criminal Court* (2009) 20 EJIL 1147.

82 At [4].

83 Yuliya Talmazan "Putin seeks to justify Ukraine war in Victory Day speech" (9 May 2022) NBC news <www.nbcnews.com>.

investigation or potential prosecutions, no matter how toothless, the ICC may come peruse, presenting a definitive threat to the political hegemony required for leaders like Putin to stay in power.⁸⁵ Elimination of such threats, maintaining control, and exerting sovereignty are all actions in the best interests of a leader in the position we now see Putin in to which delegitimising the ICC as perhaps the progenitor to an international environment which follows this flexible view on sovereignty is paramount to disengage the Russian Federation as a state following the value base from which the ICC is built, therefore minimising criticism (threats to power) that may affect the internal workings of the state. In other words, to Putin sovereignty is a bubble within which an echo chamber of media control and police intimidation exists to support the bubble's structure and ensure those individuals living inside said bubble remain in consensus that the bubble is good and protects from "them".⁸⁶ This idea of flexible sovereignty, to which the ICC through many of its flaws could represent, is a needle able to pierce that veil only so far as to prosecute a Russian citizen to which Putin understands the threat to his power to be all too real.⁸⁷

Perhaps then, in the situation where state sovereignty is held in higher stead moving forward, the ICC's role is to play this "phantom" which states will have to suffer piercing their coveted sovereignty lest they effectively incorporate those ICC values into their own domestic jurisprudence. In other words, the ICC *could* exist as a motivational body for states to incorporate the values and judicial practices of international criminal law into their domestic legislation or else face the ICC's stepping in to prosecute their own nationals instead. This would, of course, still require a form of incentive for states not willing to participate to which economic "carrots and sticks" may be able to be used as motivation to keep states in line with Rome Statute principles.

Unfortunately, it is apparent from both the understandings presented by scholars in this article as well as the actions Putin has taken during his Ukrainian conflict that this dichotomy is actively taken advantage of by those leaders most likely to commit international crimes as a means to whatever benefit said states may be pursuing – proving to only further the divide between the international community and effective implementation of modern sovereignty going forward.⁸⁸

To analyse this, we return to Broomhall to which he presents key ideas regarding the use of force in terms of a traditionally "criminalised" international law and comments on how the international landscape can react to unwilling agents in this context. In his writings, Broomhall indicates a deeper dichotomy within the sovereignty debate, highlighting that there is an "inextricable link" between international criminal law as a concept, the call for the reduction of sovereignty and an increase in the use of force in order to support international criminal law.⁸⁹ From this, Broomhall sees little movement within the modern international framework towards effective systems of international

84 Erin Baggott Carter and Brett L Carter "Propaganda and Protest in Autocracies" (2020) 65 *Journal of Conflict Resolution* 919.

85 Yvonne Dutton and Milena Sterio "The war in Ukraine and the Legitimacy of the International Criminal Court" (30 August 2020) *Just Security* <www.justsecurity.org>.

86 Fredrik Erixon and Hosuk Lee-Makiyama *Digital authoritarianism: Human rights, Geopolitics and Commerce* (European Centre for International Political Economy, ECIPE Occasional Paper 5/2011, 2011).

87 캐더린 "Limitations of International Law in Confronting the Rise of Authoritarian Power and Protecting Human Rights: A Proposal for the Development of an International Constitutional Court" (Master's thesis, Seoul National University, 2017).

88 Christian Marxsen "Putin is abusing international law" (18 March 2022) *MAX-PLANCK-GESELLSCHAFT* <www.mpg.de>.

89 At [56].

criminal law, instead positing that concepts such as the ICC should be seen as stepping stones to this ultimate goal, continuing to reinforce the idea of “entrenchment” of ICC values into domestic jurisdictions, stating that:⁹⁰

... the best remaining hope for the entrenchment of international criminal law as a regular feature of the international system is the development of a deeply rooted culture of accountability that leads to a convergence of perceived interests and of behaviour on the part of the States responsible for enforcing this law. The ICC and related developments may in fact contribute to the emergence of such a culture, although present signals are not uniformly positive.

Here, Broomhall presents a quietly optimistic view for eventual change within international culture, attributing value to the ICC and other such efforts not in their effectiveness at current but as the beginning stages of the international community moving from that crossroads and starting down the path towards effective prosecution of those who commit international crimes.

While the ICC in its current form is largely insufficient as an effective mechanism for international prosecution (let alone for the prosecution of the leader of a world power such as Putin) it may, as Broomhall suggests, be the first step towards a culture change regarding a solution to the clash between sovereignty and international jurisdiction.⁹¹ While this may take time and will certainly not arrive soon enough to help those embroiled in the many international crimes being carried out in Ukraine or elsewhere, the ICC in its very existence shows that states at some level are willing to take action on this matter.

Additionally, while legal theorists are certainly critical to the solution of this jurisdictional “clash,” it is apparent that the issue of international law is as much grounded in politics as it is in legal theory, with progress towards an effective international criminal system also hampered by international division as well as failures of lawmakers to develop on the Nuremberg precedents.⁹² As Lattimer and Sands highlight, “international politics, rather than judicial innovation ... (are) likely to remain the key driver” in developing international law into an effective mechanism for the future.⁹³ Whatever the cause, jurisdictional barriers to effective international justice must be broken if the lives of the innocent are to be truly protected from those evils willing to commit such acts. At the very least, humanity deserves it.

In this section the very nature of the ICC’s jurisdiction and its perceived rivalry with sovereignty has been examined to which case law and legal texts have been utilized to argue that the creation of a more flexible relationship between sovereignty and international institutions is an effective and worthwhile venture for the international community to undertake. This section has highlighted the mutually beneficial relationship between strong governance and the implementation of international values into domestic criminal courts to ensure uniform prosecution of those willing to commit crimes on an international level. Additionally, issues regarding this “sovereignty conflict” and how it has manifested into the current ICC were analysed, highlighting the effects cold-war understandings of sovereignty has had on the limiting of the jurisdictional ambit of the ICC and coming to conclude that while the ICC is ineffective in terms of being able to prosecute the likes of Vladimir Putin for alleged international crimes committed in Ukraine, it may be the beginning of a change in international culture for a more effective institution in the future.

90 At [3].

91 Above n 66.

92 Mervyn Jones “International Law and Politics” (1955) 41 *Problems of Public and Private International Law* 5.

93 Above n 68, at [13].

V. CLAIMS OF IMPERIALISM

Throughout my research for this article, insights into both the ICC's previous prosecutions and those prosecutions the ICC has not taken on began to show a pattern that this last section will now focus on. While within this text the jurisdiction of the ICC has been analysed through the lens of Putin and his alleged international crimes committed in Ukraine, the "politicization" of the ICC as a national court began to become increasingly relevant in considering state perspectives on cooperation with the Court. Factors such as structural flaws in the Rome statute, states abilities to "opt out" of Rome provisions and an apparent focus of proceedings towards Sub-Saharan African nations have all contributed to some scholars viewing the ICC as being inherently politicized, with some going as far to claim the ICC as a tool for soft-power imperialism in the modern era.⁹⁴

Perhaps, under this understanding, the man at the crossroads has remained stagnant so long not out of rigid definitions of sovereignty, jurisdictional roadblocks or any other obstacles to the prosecution of international criminals but rather due to inherent agendas that undermine the purposive approach to the ICC as a functional court. This section will explore claims regarding this possibility, linking efforts from African advocates to the overall politicization of the ICC and applying said considerations to the example of Putin and how claims of imperialism, whether rightful or not, further undermine the ICC's jurisdiction to prosecute world leaders.

To do so, I will begin with an analysis of relevant states' stance on the ICC and how said stances impact the legitimacy of the ICC as an international court. Although historically a strong supporter of international justice, the United States of America is not a party to the Rome Statute, with former president Donald Trump vehemently denying that the ICC held any authority over United States citizens, stating in a speech to the UN that "As far as America is concerned, the ICC has no jurisdiction, no legitimacy, and no authority".⁹⁵ This is after the passing of the American Service-Members' Protections Act in 2002 which, soon after the enactment of the Rome Statute and the ICC, prohibited the prosecution of United States military personnel by the ICC and authorising the United States President to utilise "all means necessary and appropriate" to bring about the release of United States or allied personnel detained under ICC charter, including invasion of The Hague itself.⁹⁶

This staunch rebuke of committal by the United States is interesting due to the nation's intimate participation in negotiation and creation of the permanent international criminal tribunal.⁹⁷ This "180" by the United States in terms of policy towards the ICC is significant in the eyes of those who wish to discredit the Court as a falsely impartial international body, with some scholars likening the United States' attitude to that held by the nation during the Cold War:⁹⁸

94 Frederick Cowell "Inherent Imperialism: Understanding the Legal Roots of Anti-imperialist Criticism of the International Criminal Court" (2017) 15 JICJ 557.

95 "Q&A: The International Criminal Court and the United States" (2 September 2020) Human Rights Watch <www.hrw.org>.

96 American Service-Members' Protections Act Pub L No 107-206 116Stat 821 (2002).

97 David Scheffer *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, New Jersey, 2011).

98 Mark D Kielsgard *Reluctant Engagement: U.S. Policy and the International Criminal Court* (Brill, the Netherlands, 2010) at ch 7.

Many of the U.S. arguments against the ICC reflect Cold War mentalities and resort to realpolitik, when economic and military supremacy and its efforts to halt Soviet expansionism provided for the U.S. to remain exempt from the type of scrutiny that other states endured.

This approach by the United States towards the ICC confers significant consequence when considering Putin's claims of partiality of the ICC.⁹⁹ The Kremlin in 2020 deemed the Russian Federation the "de jure and de facto legal successor to the USSR", a self-prescribed status as the successor state responsible for the United States' opposition during the Cold War.¹⁰⁰ These Cold War sentiments reflect onto the ongoing conflict in Ukraine, with Putin himself in speaking to then President George W Bush stating: "You don't understand, George, that Ukraine is not even a country".¹⁰¹

Here, we see on display the residue of Cold War mentalities both by the United States and Russia in terms of how they conduct themselves regarding foreign policy. For one, the United States in its less than welcoming reaction to the Rome Statute, and the ICC demonstrates the rather backward belief that a special set of rules apply for the United States regarding international obligations than the rest of its allies. This, reflected in the expansionist views of Putin in which as early as 2008 he expressed his idea that "Ukraine is not even a county", indicates a distinct lack of growth from Soviet expansionist sentiments in the mind of the now autocratic leader of the USSR's "successor state".¹⁰²

While the end of the Cold War is popularly claimed to be at the fall of the Soviet Union, sentiments remain within the way states conduct themselves on the international forum as echoes of international policy from that era. As outlined above, it is apparent that both the United States and Russia (as the proclaimed successor state of the USSR) both approach policy regarding international efforts such as the ICC, which in itself represents the international communities shift away from Cold War policymaking, in terms of restrictions on their ability to use force as they see fit.¹⁰³ This separation from obligation in the eyes of two of the leading nations in their respective geopolitical areas only serves to delegitimise the ICC when accepting how today's power realities reflect onto international law. As Sarah Sewall outlines, "You cannot have a court of universal jurisdiction without the world's major military powers on board".¹⁰⁴

Furthermore, this politicization is argued to be built in from a "ground up" perspective, with international criminal justice becoming inherently politicized by its failure to separate itself from political organs such as the UN and its Security Council, further lending to the erosion of legitimacy of the Court in the existence of said relationships.¹⁰⁵

99 Above n 14.

100 Mikhail Metzler "Kremlin deems Russia de jure and de facto legal successor to USSR" (18 February 2020) TASS <<https://tass.com>>.

101 Rajan Menon and Eugene Rumer *Conflict in Ukraine: The Unwinding of the Post-Cold War Order* (The MIT Press, Cambridge, 2015).

102 Charles G Cogan "You Have to Understand George, Ukraine Is Not Even a Country" (16 March 2014) The Huffington Post Harvard Kennedy School: Belfer Center <www.belfercenter.org>.

103 Above n 81.

104 Sarah Sewall "Nation States and the International Criminal Court" in Joseph Rotblat *48th Pugwash Conference on Science & World Affairs: The Long Roads to Peace* (World Scientific Publishing Company, Singapore, 2001) 224.

105 Neha Jain *A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court* (2005) 16 EIJL 239.

Grounded in conflict, these sentiments open the door for the likes of Putin to undermine the ICC's jurisdiction in claiming that leaders in the west will not subject themselves to the provisions which the world now expects Putin to be held accountable to.¹⁰⁶ This is amplified by a lack of ICC investigation into reports of western nations having committed international crimes as well, leading to claims that the ICC displays an inherent bias towards African nations under the aforementioned claims of imperialism.¹⁰⁷

For example, stark evidence was unearthed regarding the conduct of Australian forces in Afghanistan, sparking an internal investigation by Australian authorities to ascertain the veracity of claims that war crimes may have been committed by Australian special forces between 2006 and 2016. This report culminated in the 2020 release of the inquiry, which found evidence of Australian forces planting weapons on dead civilians, murdering prisoners and knowingly covering up said crimes to avoid scrutiny.¹⁰⁸ From this report, however, no prosecutions have been undertaken to date regarding any of those involved in said crimes, with the Australian Department of Defence planning to implement reforms over a period ending in 2025.¹⁰⁹

As a member to the Rome Statute, ICC officials under art17 are empowered in situations such as these to investigate a state party where unwillingness of a state to genuinely prosecute is a factor in a country's decision to not pursue sentencing of its own international criminals, however no attempts have been made in relation to the given example.¹¹⁰ This is a common element across many prosecutions held within western jurisdictions, with little to no intervention or comment afforded by the ICC to demonstrate impartiality regarding jurisdictions outside of developing nations. Internal investigations in the United States provide much the same conclusions. Incidents in the city of Bagram, for example, concerned potential offences by 28 soldiers for the killing of civilians in custody to which only six soldiers were eventually convicted with punishments ranging from reduction of rank to short terms of imprisonment.¹¹¹ These punishments have been criticised as too light given the gravity of the crimes committed however no referral or comment from the ICC has been issued in relation to these proceedings.¹¹²

Additionally, the case of *United States v Lorraine* shows the United States blurring the line in separation of powers in order to pardon a soldier under investigation for the killings of two men, with United States President Donald Trump unconditionally pardoning Lorraine after being sentenced under a guilty plea in United States domestic courts.¹¹³

Operation Burnham, this time in the New Zealand jurisdiction, led to the killing of several civilians, including a three-year-old girl, to which an internal inquiry conducted by the New Zealand

106 Geoff Dancy and others "What Determines Perceptions of Bias toward the International Criminal Court? Evidence from Kenya" (2020) 64 *Journal of Conflict Resolution* 1443.

107 Emily Rowe *The ICC-African Relationship: More complex than a simplistic dichotomy* (2021) 11 *Flux International Relations Review* 51.

108 *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report* (Australian Defence Force, 2020).

109 Anthony Galloway "'Serious failings': Defence quietly releases war crimes inquiry response plan" (3 August 2021) *The Age* < www.theage.com.au >.

110 Verity Bowman "International Criminal Court defers war crimes investigation" (31 July 2022) *Daily Telegraph* <www.dailytelegraph.com.au>.

111 *United States v Gibbs* [2018] CCA Lexis 343.

112 Laura L Myers "Charges dropped against U.S. Soldier in Afghan Murder" (5 February 2021) *Reuters* <www.reuters.com>.

113 *United States v Lorraine*, Army 2130679, 2017 WL 2819756 (A Ct Crim App, June 27, 2017).

Supreme Court concluded to recommend internal assessments into record keeping and operational structures, establishment of independent inspectors of general defence, and effective detention policies and procedures, with no actual convictions taking place as a result.¹¹⁴

No ICC investigations under art 17 have arisen in light of the apparent unwillingness to prosecute any of the cases presented here, with many more “western” nations, being Rome signatories or not, either shoddily investigating or affording light sentences to those of its soldiers who have committed international crimes within the ambit of the jurisdiction of the ICC.¹¹⁵ This is made all the more deplorable in light of the majority of ICC investigations and prosecutions targeting Africa – with situations of concern being highlighted by the ICC in Sudan, Democratic Republic of Congo, Kenya, Central African Republic, Libya, Cote D’Ivoire, Mali and Uganda.

Selectively prosecuting cases stemming from former colonies in Africa while choosing not to hold western states – even where they are parties to Rome as outlined above – to account further exasperates the international communities’ trepidations regarding the legitimacy of the ICC as a functioning global court and sparks criticism of the ICC from a fundamental level going forward.¹¹⁶

Critics to this perspective would cite the complementarity of the ICC’s jurisdiction as a defence to lack of court action regarding cases prosecuted to dubious standards in national jurisdictions, reasoning that no western nations have been investigated because they have rigid internal justice systems capable of supporting these cases without the help of an international body.¹¹⁷ However, international criminals enjoying impunity or limited punishment for international crimes as a result of dubious state prosecution or otherwise is an affront to the purposive approach to the Rome Statute laid out in its preamble and therefore confers greater responsibility than can be waived away by the ICC’s complementarity principal.¹¹⁸

It is apparent that the ICC only serves to undermines its own jurisdiction by allowing those such as Putin to claim politicization of the Court by ignoring injustices being carried out in western nations on a domestic level.¹¹⁹ Claims that the ICC is a vehicle for western imperialism characterise the ICC as an inherently “western” court and further alienate those states the ICC is supposed to be protecting from those willing to commit these heinous acts, with the African Union itself lodging accusations against the ICC for bias against African rulers.¹²⁰ As Westen K Shilaho states:¹²¹

114 Sir Terence Arnold QC and Sir Geoffrey Palmer QC *Report of the Government Inquiry into Operation Burnham and related matters* (Inquiry into Operation Burnham, July 2020).

115 Ayesha Kuwari “Government Bill Makes It Difficult To Prosecute British Soldiers And Veterans For War Crimes Committed Overseas” (26 October 2020) Human Rights Pulse <www.humanrightspulse.com>.

116 Hans Kochler *Global Justice or Global Revenge? The ICC and the Politicization of International Criminal Justice* (Springer, New York, 2004).

117 Laurel Hart “The International Criminal Court: Biased or simply misunderstood?” (28 October 2018) UK Action <<https://una.org.uk/>>.

118 Everisto Benyera “Is the International Criminal Court unfairly targeting Africa? Lessons for Latin America and the Caribbean States” (2018) 37 *Politeia* 1.

119 Brendon J Cannon, Dominic R. Pakalya and Bosire Maragia “The International Criminal Court and Africa” (2016) 2 *African Journal of International Criminal Justice* 6.

120 Westen K Shilaho “The International Criminal Court and the African Union: A Bulwark against Impunity or an Imperial Trojan horse?” (2018) 18 *African Journal on Conflict Resolution* 119.

121 Above n 120.

Historically, *realpolitik*, self-preservation and geopolitics have marred international criminal justice, and Africa's relationship with the West is steeped in humiliation making some African rulers suspicious of Western-dominated institutions. The perception that the ICC dispenses lopsided justice stems from this history.

Claims like these not only serve to delegitimize the ICC as an impartial international court but also conversely legitimise claims made by those seeking to abuse international politics, as Putin is known to do, by debasing the ICC as a trustworthy solution to the plight international criminals have caused in the modern era.

Here, another enemy to the progression of international criminal law is unsurfaced, with Cold-War attitudes to international politics undermining the legitimacy of the ICC in the eyes of nations all too familiar with the scars of imperialism. A crisis of reputation has embroiled the ICC from the beginning, leading to further stagnation of the man at the crossroads as said Cold-War sentiments hold those nations at the peak of the modern power balance back from truly supporting the Court and its efforts for international justice and rule of law. As GAM Strijards, a Dutch delegate to the Rome Conference, puts it: "I won't say we gave birth to a monster, but the baby has some defects."¹²²

VI. CONCLUSION

This article has tackled the analysis of the ICC's jurisdiction to prosecute Putin for alleged international crimes in Ukraine in three distinct parts. The first part dealt with the implications on the jurisdiction of the ICC in relation to non-party states to the Rome Statute to which case law precedent and scholarly articles were used to emphasise the key obstacles to tangible ICC prosecution, such as state consent, conflicts between jurisdictional considerations and the purposive approach to ICC proceedings, and the implications of specific international crimes alleged to have been committed. In this section, criticism was drawn onto the lack of enforceability of ICC provisions, with previous ICC cases being utilized as precedent to support the argument that the Court is toothless in its goal to prosecute leaders where state consent has not been given – which is a distinct unlikelihood considering the actions of the Russian government in its complicity with alleged international crimes to date.¹²³ Recourse for this may be available by way of indications of changing precedent regarding trials in absentia; however, major policy changes within the ICC would have to occur for this to be a genuine consideration. Otherwise, the creation of a special tribunal may provide another option for recourse, however doing so would only further delegitimise the ICC's jurisdiction as an admittance of its incapability to prosecute national leaders within the confines of its prescribed ambit.¹²⁴

The second section of this article concerned the conflict between the ICC's jurisdiction and state sovereignty and how said dichotomy fits into the rule of law on the international stage. Within this section, I argued that rigid definitions of sovereignty have lent to an equally unmoving framework

122 Alessandra Stanley "U.S. Dissents, but Accord Is Reached on War-Crime Court" (18 July 1998) *New York Times* <www.nytimes.com>.

123 Julia Crawford "Will Russia's leaders be brought to justice for Ukraine war crimes?" (10 March 2022) *Swiss Info* <www.swissinfo.ch>.

124 Jennifer Trahan "The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part III)" (26 September 2022) *Just Security* <www.justsecurity.org>.

from which the jurisdiction of the ICC could interact with, continuing to reason that the attributing of malleability to these concepts may improve the effectiveness of the ICC in prosecuting those using sovereignty as a shield to maintain impunity for international crimes. States' desire to maintain control over the use of force without international oversight was identified as a key factor working against development of the relationship between international law and sovereignty to which it was suggested that the ICC could exist as a source of values for states to ratify into their national jurisdictions under the "threat" of the ICC piercing said nations' sovereignty where impunity for international crimes is allowed to continue. Furthermore, political progress was identified as much of a driving factor in the advancement of international law than international legal jurisprudence, highlighting that the issue of sovereignty is multifaceted in the modern era.

Finally, claims regarding the politicization of the ICC as a tool for modern day soft-power imperialism were analysed as well as how said observations undermine the ICC's jurisdiction to prosecute Putin. In this section, the ICC's unwillingness to investigate and prosecute western nations was evaluated in light of the disproportionate number of ICC cases held out of Sub-Saharan Africa. This factor was then elaborated on in the context of the ICC's jurisdiction to prosecute Putin for alleged international crimes committed in Ukraine, with clear links established between these imbalances and Putin's attempts to delegitimise the ICC as an biased "western" court.

Ultimately, the fact remains that while this issue can be understood through metrics and debated on accordingly as outlined above, the issue holds personal importance for those unfortunate enough to be subject to the whim of those willing to commit international crimes. I leave you, then, with a simple question: do they not deserve better than this?

NAVIGATING INTERNATIONAL CLAIMS IN THE MIDST OF WAR: AN ANALYSIS OF THE IMPACT OF ECONOMIC SANCTIONS ON INTERNATIONAL INVESTMENT ARBITRATION

BY GRIER GARDYNE*

I. INTRODUCTION

This paper considers how widescale economic sanctions against Russia, implemented due to the invasion of Ukraine, have impacted foreign investors and their ability to bring claims through international investment arbitration. Since the war in Ukraine is an ongoing conflict it is difficult to explicitly quantify the impact of the war and subsequent sanctions on investment and the global economy. This impact is expected to increase and change as the conflict evolves. This paper provides a brief overview of the conflict between Ukraine and Russia, highlighting that the invasion is the culmination of a decades-long political conflict between the two states.¹ This analysis necessitates an understanding of the history and types of economic sanctions, which are expected to be a catalyst for international arbitration claims. This paper evaluates the current economic sanctions imposed on Russia and Russia's countersanctions, considering the legality of sanctions under international law. Evaluating the impact of these sanctions on investors demonstrates the need for international investment arbitration. Considering the impact of sanctions on international investment arbitration necessitates an understanding of whether Russian countersanctions breach bilateral investment treaties (BITs), the scope of international arbitration claims, potential defences Russia may rely on and the challenges of enforcing arbitral awards. This analysis demonstrates the difficulties investors will face when seeking recourse for BIT breaches noting that the main barrier to settling disputes is Russia's political hostility and unwillingness to cooperate.

A. *A Brief Overview of the Russia–Ukraine Conflict*

On 24 February 2022 Russia's declaration of war and the subsequent bombing of Ukraine launched arguably the most intense fighting in Europe since World War II.² The war is a consequence of historical tensions resulting from the dissolution of the Soviet Union.³ In 1990 Ukraine stated its intention to leave the Soviet Union and develop a democratic legal state that would protect human rights and freedoms and ensure the development of Ukraine's people.⁴ Ukraine has been recognised

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1 Elisabeth Tretthahn-Wolski and Marija Dobrić "Russia's Narrow Arbitration Clauses – Can Foreign Investors Bring BIT-Claims For Expropriation under MFN Clauses?" (5 July 2022) Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com>>.

2 "Russia's invasion of Ukraine" *The Economist* (online ed, 26 February 2022) [RIU].

3 Marina Tegipko "Foreign Investments in Ukraine: Venture Factors and the Ways of Their Diminution" <www.nato.int>.

4 Tegipko, above n 3.

internationally as an independent state since its 1991 declaration of independence and the collapse of the Soviet Union.⁵ Upon the dissolution of the Soviet Union, Russia sought to be a continuing state.⁶ President Putin's aspiration to "restore Russia to [...] a great power in northern Eurasia" has led to the invasion of Ukraine as Russia attempts to reclaim historic Soviet Union territory.⁷ Russia's justification for the invasion is its claim to "ownership" of two Ukrainian oblasts, Donetsk and Luhansk which it is attempting to reclaim to restore "the unity of a Slavic, orthodox Russian homeland".⁸ Putin rejects Ukraine's identity as a nation-state claiming it is "historic Russian land" that was separated by the Bolsheviks during the Russian Revolution and unlawfully seized under Stalin's reign.⁹ These beliefs illustrate Russia's narrative that Ukraine and eastern Ukrainian regions are Russian.¹⁰

A key factor of this conflict is the use of "lawfare", the weaponization of private and public international law to damage an opponent's economy and reputation.¹¹ Ukraine has filed claims with the International Court of Justice, the European Court of Human Rights, and the International Tribunal for the Law of the Sea and has encouraged investor-state arbitrations against Russia to undermine Russia's argument of legitimacy and "bolster" its diplomatic position.¹² Russia's use of the energy industry to constrain Ukraine's economy and international use of economic sanctions demonstrates the importance of economic coercion in modern grey zone warfare.¹³ The economic sanctions on Russia are unprecedented in scale as Russia's financial and banking systems have all been targeted.¹⁴ Russia is internally divided as anti-war protests continue, with many fleeing the country to escape conscription.¹⁵ Some countries like the United Arab Emirates, Turkey and India are supporting Russia by "welcoming the sanctioned Russian rich".¹⁶ With tensions only continuing to rise, it is unlikely that the war will conclude soon indicating that economic sanctions and "lawfare" will continue.¹⁷

5 Tegipko, above n 3;"The legal fallout from the Russia sanctions" *Financial Times* (online ed, 5 March 2022).

6 "The legal fallout from the Russia sanctions", above n 5.

7 Delicia Getzi Surendher "The Concept of 'Grey Zone's' in Public International Law: With Special Reference to the Russian-Ukrainian Conflict in Crimea" (2021) 4 *IJLMH* 1033.

8 RIU, above n 2.

9 RIU, above n 2.

10 Surendher, above n 7.

11 Jill Goldenziel "Ukraine Is Weaponizing Corporations Against Russia—Using Lawfare" *Forbes* (online ed, 20 February 2022).

12 Goldenziel, above n 11.

13 Surendher, above n 7.

14 "The legal fallout from the Russia sanctions", above n 5.

15 The Associated Press "Russians avoiding military service reach Alaska, seek U.S. asylum" *CBC* (online ed, 7 October 2022).

16 Rana Moustafa Essawy "Is There a Legal Duty to Cooperate in Implementing Western Sanctions on Russia?" (25 April 2022) *European Journal of International Law* <www.ejiltalk.org>.

17 Douglas Beath "How Russian sanctions affect portfolios and the dollar" (26 April 2022) *Wells Fargo* <www.wellsfargo.com>.

II. ECONOMIC SANCTIONS

This section will discuss what economic sanctions are, considering the history and types of sanctions, and will evaluate the current economic sanctions connected to the invasion of Ukraine and the legality of sanctions under international law.

A. *What are Economic Sanctions*

There is no universally accepted legal definition of sanctions.¹⁸ Sanctions are not referred to in the International Law Commission's rules on international responsibility and the Charter of the United Nations uses the term measures rather than sanctions.¹⁹ Sanctions have been broadly defined as actions and threats undertaken by states or international organisations that influence, constrain or punish the behaviour of targets.²⁰ Sanctions can be utilised across various sectors but those that cause the greatest financial impact are economic sanctions.²¹ Sanctions on non-state actors or states can specifically target assets, trade or investments.²² Economic sanctions, a common foreign policy tool, are politically motivated economic controls used by states as a reaction to violations of international law.²³

1. *History of Sanctions*

Sanctions have always been a reaction to warfare. Economic measures and sanctions have been used throughout history, most notably during both World Wars I and II.²⁴ Blockade measures were utilised as an "economic weapon" in World War I to target the axis powers and made a resurgence during World War II.²⁵ These measures sought to bring aggressors to their knees "without a drop of blood" and some suggest that the blockades won the war for the allies.²⁶ Economic measures allowed the United States of America to freeze Japan's foreign assets and prevent the purchase of Japanese gold during World War II.²⁷ The United States has continued to use the "economic weapon"

18 Iryna Bogdanova *Unilateral Sanctions in International Law and the Enforcement of Human Rights* (Koninklijke Brill, Leiden, 2022); and Andrea Spagnolo "Entering the Buffer Zone Between Legality and Illegality: Eu Autonomous Sanctions Under International Law" in Stefano Montaldo and others (ed) *EU Law Enforcement: The Evolution of Sanctioning Powers* (Routledge, London, 2021) 215.

19 Spagnolo, above n 18.

20 Thanh Ha Le and Ngoc Thang Bach "Global sanctions, foreign direct investment, and global linkages: evidence from global data" (2022) 31(3) *J Int Trade Econ Dev* 427.

21 Anna Yu Kosobutskaya, Annie V Ravohanginirina and Natalia A Amosova "The Impact of Anti-Russian Sanctions on the Regional Investment Climate of Russia" (2019) 85 *Advances in Economics, Business and Management Research* 27; and Ha Le and Thang Bach, above n 20.

22 Tom Ruys and Cedric Ryngaert "Secondary Sanctions: A weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions" (2020) *The British Yearbook of International Law* 1.

23 Bogdanova, above n 18; Spagnolo, above n 18; Kosobutskaya, Ravohanginirina and Amosova, above n 21; Ruys and Ryngaert, above n 22.

24 "When central banks face sanctions" *The Economist* (online ed, 20 April 2022); Nicholas Mulder *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War* (Yale University Press, New Haven, 2022).

25 Mulder, above n 24.

26 Mulder, above n 24.

27 "When central banks face sanctions", above n 24.

in foreign policy targeting Iranian assets in response to the Iranian nuclear weapons programme.²⁸ This demonstrates how sanctions are an “influential instrument in coercive foreign diplomacy”.²⁹ Despite the continued use of economic sanctions to prevent inter-state wars, economic sanctions have increasingly been utilised in response to a state’s human rights violations.³⁰ European Union (EU) sanctions against Russia for the annexation of Crimea were made on the foundation of human rights violations.³¹ Increased reliance on economic sanctions on foreign policy demonstrates a “conscious choice” to avoid military intervention.³²

2. Types of Sanctions

Sanctions imposed by the United Nations Security Council, as provided by the United Nations Charter can only be passed when all states with veto powers vote affirmatively.³³ Affirmative votes are particularly difficult to obtain and Russia has “vetoed” sanctions proposed to address the conflict between Russia and Ukraine.³⁴

Non-United Nations (UN) sanctions or unilateral sanctions are economic measures imposed by individual states on targets without prior authorisation from international organisations.³⁵ States can implement unilateral sanctions under customary international law.³⁶ Unilateral sanctions can fall into several categories including retorsion, targeted sanctions, punitive measures, and countersanctions.³⁷ The differences between these categories typically require that the legality of sanctions is considered on a case-by-case basis.³⁸ The main issue with unilateral sanctions is whether they contravene international law as “coercive measures”.³⁹ This unsettled issue centres on the principles of non-intervention and the prohibition of the use of force.⁴⁰ A key issue when considering how the recent unilateral sanctions on Russia have impacted investors is the legality of sanctions as Russia vehemently asserts that unilateral sanctions are illegal.⁴¹

28 “When central banks face sanctions”, above n 24.

29 Ha Le and Thang Bach, above n 20.

30 Ioana Knoll-Tudor “Paris Arbitration Week Recap: The Impact of Russian Sanctions on International Commercial Arbitration – From Arbitrability to Enforcement” (13 April 2022) Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com>>.

31 Knoll-Tudor, above n 30.

32 Mergen Doraev “The ‘Memory Effect’ of Economic Sanctions against Russia: Opposing Approaches to the Legality of Unilateral Sanctions Clash Again” (2015) 37(1). *Univ Pennsylvania J Int Law* 355.

33 Kanishka Sewak “Legality of economic sanctions imposed by the United States” in Shveta Dhaliwal (ed) *Indo-US Relations: Steering through the Changing World Order* (Routledge, London, 2021) 36.

34 Sewak, above n 33.

35 Bogdanova, above n 18; Sewak, above n 33; and Alexandra Hofer “The ‘Curiouser and Curiouser’ Legal Nature of Non-UN Sanctions: The Case of the US Sanctions against Russia” (2018) 23(1) *Journal of Conflict & Security Law* 75.

36 Doraev, above at n 32.

37 Bogdanova, above n 18; Doraev, above at n 32; and Hofer, above n 35.

38 Hofer, above n 35.

39 Bogdanova, above n 18; Ruys and Ryngaert, above n 22; and Doraev, above at n 32.

40 Bogdanova, above n 18; Ruys and Ryngaert, above n 22; and Doraev, above at n 32.

41 Bogdanova, above n 18; and Doraev, above at n 32.

B. Current Economic Sanctions

Russia's invasion of Ukraine triggered an unprecedented international policy response as many countries implemented economic sanctions targeting Russia and its associated entities and persons.⁴² In response to these widespread sanctions, Russia has implemented several countersanctions that target "unfriendly" countries.⁴³

1. Sanctions on Russia

As many countries had already sanctioned Russia and Russian individuals and companies for the annexation of Crimea, the initial response of the international community was a continuation of these measures.⁴⁴ Russia vetoed the United Nations Security Council's recommended UN sanctions which would have bound all member states.⁴⁵ This veto led to the United Nations General Assembly demanding a complete and unconditional surrender and enforcing the territorial integrity of Ukraine.⁴⁶ Widespread affirmation of the United Nations General Assembly resolution and the number of countries, including traditionally neutral Switzerland, which have implemented sanctions against Russia demonstrates the support for Ukraine and political isolation of Russia.⁴⁷ Russia's veto of the UN sanctions necessitated that other legal foundations were relied upon to implement sanctions.⁴⁸

The EU has implemented sanctions on Russia and Russia's supporter Belarus, relying on its foreign direct investment (FDI) screening regulations to coordinate member states' approaches.⁴⁹ FDI regulations prohibit investment that threatens public order or security.⁵⁰ Some member states also have national screening mechanisms.⁵¹ FDI screening considers whether investors are directly or indirectly involved in activities that affect public order or security and if there is "a serious risk that the foreign investor engages in illegal or criminal activities".⁵² The EU considers that there is a significant risk that Belarusian and Russian investors are a threat to public order and security.⁵³ Therefore, the EU requires member states to actively cooperate with screening and authorities responsible for sanctions, international financial institutions and promotional banks to ensure the effective implementation and enforcement of EU sanctions.⁵⁴

42 *International investment implications of Russia's war against Ukraine (abridged version)* (OECD, May 2022) [OECD]; Tretthahn-Wolski and Dobrić, above n 1.

43 "International Law considerations for foreign investors with business interests in Russia" (21 March 2022) Allen and Overy <www.allenoverly.com>; Tretthahn-Wolski and Dobrić, above n 1; and Knoll-Tudor, above n 30.

44 Hofer, above n 35; and Kalman Kalotay "The War in Ukraine Deals a Blow to Russia's Foreign Direct Investment Links" (2022) Institute of World Economics CERS.

45 Kalotay, above n 44; and Nanaia Mahuta "New Zealand passes historic Russia Sanctions Act" (press release, 9 March 2022) [NZPHRSA].

46 Kalotay, above n 44.

47 Kalotay, above n 44; and OECD, above n 42.

48 Kalotay, above n 44.

49 "Information From European Union Institutions, Bodies, Offices And Agencies" (2022) 65 OJ L.

50 "Information From European Union Institutions, Bodies, Offices And Agencies", above n 49.

51 "Information From European Union Institutions, Bodies, Offices And Agencies", above n 49.

52 "Information From European Union Institutions, Bodies, Offices And Agencies", above n 49.

53 "Information From European Union Institutions, Bodies, Offices And Agencies", above n 49.

54 "Information From European Union Institutions, Bodies, Offices And Agencies", above n 49.

The sanctions implemented by the international community target Russia and its associated entities and persons.⁵⁵ Generally, the sanctions prohibit transactions and trading with Russian banks and state-owned enterprises, ban investments in the Russian energy sector, control the exports of dual-use goods and prohibit the sale and exportation of specific goods and the listing of Russian state-owned enterprises shares.⁵⁶ Many sanctioned individuals have had their assets frozen as the sanctions prohibit deposits and holding of accounts by Russian and Belarusian nationals, entities and legal persons.⁵⁷ Russian and Belarusian banks have been removed from the SWIFT banking system which restricts their ability to participate in international payments.⁵⁸

(a) New Zealand

The legal foundation for New Zealand's sanctions upon Russia is the Russian Sanctions Act 2022 (RSA) which empowers New Zealand "to impose and enforce sanctions in response to military actions by Russia".⁵⁹ The Russian Sanctions Regulations 2022 (RSR) support the RSA by setting out the specific prohibitions and sanctions to be enforced.⁶⁰ The passing of the RSA and RSR is justified by Russia's veto of the UN Security Council's proposed UN sanctions and is a significant divergence in international law as previously New Zealand has worked within the UN framework when implementing sanctions.⁶¹

The RSA sets the threshold for imposing sanctions when a country's territorial integrity or sovereignty is threatened or if the actions taken by the United Nations Security Council are insufficient.⁶² The RSA:⁶³

1. permits the freezing of Russian assets in New Zealand;
2. prohibits the transfer of assets or money into New Zealand;
3. implements a 35 per cent tariff on Russian imports;
4. prohibits dealing with assets and securities of sanctioned persons; and
5. prohibits sanctioned individuals, ships and aircrafts from entering or remaining in New Zealand.

New Zealand's sanctions target key individuals like President Putin, members of the Security Council of the Russian Federation and of the State Duma, disinformation actors and military and political elite as well as Russia's core government financial institutions, banks and state-owned

55 OECD, above n 42.

56 OECD, above n 42; "Information From European Union Institutions, Bodies, Offices And Agencies", above n 49; and "A Close Look at the Russia Sanctions Act" (18 March 2022) Chapman Tripp <<https://chapmantripp.com>> [Chapman Tripp].

57 "Information From European Union Institutions, Bodies, Offices And Agencies", above n 49; and OECD, above n 42.

58 "Information From European Union Institutions, Bodies, Offices And Agencies", above n 49; and OECD, above n 42.

59 Russia Sanctions Act 2022, s 3.

60 Russia Sanctions Regulations 2022.

61 Alexander Gillespie "How will NZ's law targeting sanctions against Russia work – and what are the risks?" (7 March 2022) The University of Waikato <www.waikato.ac.nz>.

62 RSA, s 8(3).

63 Gillespie, above n 61; RSR, s 10 and 10A; Chapman Tripp, above n 56; Sarah Salmond "Government sanctions first tranche of Russian individuals and entities" (21 March 2022) MinterEllisonRuddWatts <www.minterellison.co.nz>; "Russia sanctions regulations expanded" (26 April 2022) Chapman Tripp <<https://chapmantripp.com>> [RSRE]; and "Russia Sanctions" New Zealand Foreign Affairs and Trade <www.mfat.govt.nz> [NZFT].

enterprises that provide key export revenue for Russia.⁶⁴ The sanctioned companies are strategically important to Russia for their provision of infrastructure, weapons, funding and raw materials.⁶⁵ These sanctions demonstrate New Zealand's condemnation of Russia's war with Ukraine, and its support for the International Criminal Court's investigation into the situation in Ukraine and are aligned with the sanctions and measures taken by other countries.⁶⁶ New Zealand's sanctions are intended to prevent New Zealand's financial system from being used by Russians to avoid sanctions and to ensure that New Zealanders do not inadvertently support the Russian invasion.⁶⁷ The sanctions imposed by the international community seek to enforce an economic and political cost upon Russia for the invasion by undermining Russia's ability to finance the war by diminishing Russia's economic base.⁶⁸

2. *Russian Countersanctions*

In response to the sanctions imposed by the international community, Russia has implemented many countersanctions. Russia has implemented capital controls that ban Russian institutions from transferring assets abroad, to keep capital in the country and has adopted measures to prevent divestment in Russia, including preventing bids to sell Russian Securities.⁶⁹ Other Russian countersanctions include:⁷⁰

1. the nationalisation of companies' property that "unfriendly countries" have over 25 per cent ownership interest in, if the company decides to permanently exit Russia;
2. restricting disinvestment from foreign investors by preventing the sale of Russian securities and dividends to foreigners and banning foreign investors from selling Russian assets;
3. limiting cash and wire transfers in a foreign currency out of Russia and requiring government approval for transactions involving foreign investors from sanctioned countries; and
4. proposing criminal and administrative liability on foreign companies for compliance with western sanctions.

C. *The Legality of Sanctions under International Law*

Typically, sanctions are legitimate if they are imposed by international organisations or binding instruments like the UN charter.⁷¹ Article 41 of the UN charter permits economic sanctions that address threats to peace and acts of aggression.⁷² However, Russia's Security Council veto has

64 Mahuta, above n 45; NZFT, above n 63; Nanaia Mahuta "New round of sanctions announced targeting Russian oligarchs" (press release, 4 April 2022).

65 Mahuta, above n 45.

66 RSA, s 8(1); Salmond, above n 63; Nanaia Mahuta "Russian state companies sanctioned" (press release, 7 June 2022); Mahuta, above n 45; and "New round of sanctions announced targeting Russian oligarchs", above n 64.

67 Salmond, above n 63; "Russian state companies sanctioned", above n 66; Michael Neilson "Russia war on Ukraine: NZ applies more sanctions to Putin's 'cadre of warmongers'" *New Zealand Herald* (online ed, 2 May 2022); and "Russian state companies sanctioned", above n 66.

68 Nanaia Mahuta "Russian banks targeted under latest round of sanctions" (press release, 19 April 2022); Hofer, above n 35; Mahuta, above n 45; and Neilson, above n 67.

69 Philip Stafford "Ukraine war cuts foreign investors off from their Russian assets" *Financial Times* (online ed, 9 May 2022); OECD, above n 42.

70 Allen and Overy, above n 43.

71 Sewak, above n 33.

72 Doraev, above at n 32.

meant that sanctions were not implemented under the UN charter and unilateral sanctions have been applied individually by states rather than under the UN framework.⁷³

Whilst countries like the United States of America frequently use unilateral sanctions, it has been argued that unilateral sanctions are coercive and that they undermine the UN prerogatives.⁷⁴ Russia insists that unilateral sanctions are an inadmissible means of exerting pressure.⁷⁵ Others believe that the enforcement of economic sanctions conflicts with the principle of non-intervention as prescribed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (DPIILFRC) and the Charter of Economic Rights and Duties of States (CERDS).⁷⁶ An international law principle, non-intervention restricts a state's ability to interfere with another state's internal affairs.⁷⁷ This principle is an extension of states' territorial jurisdiction.⁷⁸ Importantly, whilst Russia contends that unilateral sanctions are illegal, the Soviet Union recognised that the principle of non-intervention allowed the use of coercive economic measures.⁷⁹

Sanctions not adopted under the UN framework require broad international support.⁸⁰ In the case of unilateral sanctions on Russia, this support is evident in the large number of countries that have levied sanctions against Russia and the continued support of the wider international community. Whilst Russia argues that only the UN can authorise the imposition of economic sanctions, academics affirm that sanctions against Russia are justifiable as countermeasures in response to the invasion of Ukraine.⁸¹

Courts have not yet clarified the legality of autonomous or unilateral sanctions.⁸² Despite this, it is contended that they are justifiable under the principles of international law or the General Agreement on Tariffs and Trade (GATT).⁸³

1. International Law Norms

Violations of international law norms have traditionally been considered as justification for the imposition of economic sanctions.⁸⁴ Additionally, there is no international law norm that prevents the use of unilateral sanctions.⁸⁵ The sanctions against Russia may be justified by international

73 Spagnolo, above n 18.

74 Sewak, above n 33.

75 Spagnolo, above n 18.

76 Doraev, above at n 32; *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* GA Res 2625, A/Res/25/2625 (1970), at preamble; and *Charter of Economic Rights and Duties of States* GA Res 3281, A/Res/3281 (1974), at ch 1.

77 Carolyn Dubay "A Refresher on the Principle of Non-Intervention" *International Judicial Monitor* (online ed, 2014).

78 Dubay, above n 77.

79 Doraev, above at n 32.

80 Spagnolo, above n 18.

81 Doraev, above at n 32.

82 Spagnolo, above n 18.

83 Sewak, above n 33; General Agreement on Tariffs and Trade 55 UNTS 194 (opened for signature 30 October 1947, entered into force 1 January 1948).

84 Spagnolo, above n 18; Doraev, above at n 32.

85 Doraev, above at n 32.

norms for breaching the sovereignty of other states and threatening the military security of Europe.⁸⁶ Customary international law is comprised of the consistent practice of states and a sense of legal obligation.⁸⁷ It is contended that the international community's endorsement of sanctions against Russia demonstrates the consistent practice of states and that the widespread sanctions are a valid response arising out of a sense of legal obligation to preserve Ukraine's sovereignty.

Whilst it is contended that western sanctions may be justified as third-party countermeasures, the use of these measures is not yet firmly established in international law.⁸⁸ Countermeasures are often imposed due to the violation of the international norm of prohibition against the use of force.⁸⁹ The legality of countermeasures is founded upon an intentionally wrongful act carried out by the sanctioned party.⁹⁰ It is contended that this intentionally wrongful act includes a breach of international law norms, such as *erga omnes*.⁹¹ *Erga omnes* obligations are owed to the international community as a whole and include the prohibition of genocide and outlawing of acts of aggression.⁹² Countermeasures are only justifiable under the obligation of *erga omnes* if there was a grave breach.⁹³ The international community has justified sanctions on Russia by asserting invasion of Ukraine infringed upon Ukraine's territorial integrity and sovereignty, which is a clear violation of international *erga omnes* obligations.⁹⁴ In the case of Russia, the legality of sanctions depends on whether the violation of Ukraine's rights is an *erga omnes* obligation or that sanctions are in the community's interest.⁹⁵ It is contended that Russia's invasion of Ukraine is a breach of *erga omnes* obligations, as it is an act of aggression and raises concerns of genocide.⁹⁶ Despite protesting the legality of western countersanctions Russia has enforced countersanctions on states that have implemented measures that disserve Russia's political and economic interests, including measures that discriminate against Russian nationals.⁹⁷

Despite concerns that reactive unilateral sanctions undermine inter-state relations by allowing powerful states to act unilaterally, it is asserted that third-party countermeasures are the only way to protect community interests and ensure the enforcement of *erga omnes* obligations.⁹⁸ Additionally, as GA Resolution 68/262 calls on states to refrain from disrupting the territorial integrity of

86 Łukasz Gruszczyński and Marcin Menkes "The Legality of the EU Trade Sanctions Imposed on the Russian Federation under WTO Law" in W Czaplinski and others (ed) *The Case of Crimea's Annexation Under International Law* (Scholar Publishing House, Totem, 2017).

87 Doraev, above at n 32.

88 Spagnolo, above n 18.

89 Essawy, above n 16.

90 Spagnolo, above n 18.

91 Spagnolo, above n 18.

92 Yoshifumi Tanaka "The Legal Consequences of Obligations Erga Omnes in International Law" (2021) 68 NILR 1; and Ardit Memeti and Bekim Nuhija "The concept of erga omnes obligations in international law" (2013) 14 New Balkan Politics Journal of Politics 32.

93 Spagnolo, above n 18.

94 Hofer, above n 35.

95 Spagnolo, above n 18.

96 George Wright "Ukraine war: Is Russia committing genocide?" (13 April 2022) BBC <www.bbc.com>; and Ashish Kumar Sen "Is Russia Committing Genocide in Ukraine?" (21 September 2022) United States Institute of Peace <www.usip.org>.

97 Doraev, above at n 32.

98 Spagnolo, above n 18.

Ukraine, it could be argued that this demonstrates the UN's endorsement of the sanctions against Russia.⁹⁹ It is contended that New Zealand's sanctions must be targeted, effective and proportionate to prevent anti-Russian hysteria and that evidence used to justify sanctions needs to be transparent and secure.¹⁰⁰

2. *International Treaties*

The Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA) require that EU countermeasures are proportionate to their objectives.¹⁰¹ Some states targeted by sanctions purport that they violate the GATT and the principle of non-intervention.¹⁰² Russia claims that sanctions breach the World Trade Organisation rules in particular the rule of non-discrimination.¹⁰³ Presently, no case law explicitly addresses these purported conflicts.¹⁰⁴ It is argued that economic sanctions are justifiable under the GATT when used to protect human life and public morals.¹⁰⁵ It is contended that the sanctions are justifiable under the GATT security clauses, particularly subs (b) of art XXI.¹⁰⁶ Security exceptions were previously relied upon to justify trade sanctions implemented by Australia, Canada and the United States of America on Argentina for the invasion of the Falklands.¹⁰⁷ It is contended that Russia's war with Ukraine would meet the requisite level of seriousness needed for the emergency justification and that sanctions against Russia are justified security exceptions.¹⁰⁸ Academics contend that since trade is a matter of national security, states under the rules of state responsibility should be free to adopt unilateral sanctions.¹⁰⁹

It is contended that the widespread sanctions imposed on Russia are legal as they are a justifiable response to Russia's breach of international law norms and may be justified under the security exemptions of key international treaties. The legality of sanctions against Russia undermines arguments about the legality of Russia's countersanctions, which would need to be founded upon a breach of international law. As the legality of sanctions on Russia is likely to be upheld, Russia lacks the requisite foundation to support the legality of its countersanctions.

III. THE IMPACT OF WIDESPREAD ECONOMIC SANCTIONS

Economic sanctions and countersanctions implemented as a result of the invasion of Ukraine will impact Russian investors overseas and foreign investors in Russia and will have ramifications for the global economy.

99 Gruszczyński and Menkes, above n 86; and *Territorial integrity of Ukraine* GA Res 68/262, A/RES/68/262 (2014).

100 Gillespie, above n 61.

101 Spagnolo, above n 18; and *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (International Law Commission, Supplement No 10 (A/56/10) chp.IV.E.1, November 2001).

102 Spagnolo, above n 18.

103 Gruszczyński and Menkes, above n 86.

104 Gruszczyński and Menkes, above n 86.

105 Doraev, above n 32.

106 Gruszczyński and Menkes, above n 86.

107 Gruszczyński and Menkes, above n 86.

108 Gruszczyński and Menkes, above n 86.

109 Doraev, above at n 32.

A. *Impacts on the Investment Environment*

The war in Ukraine has increased economic uncertainty due to decreases in real GDP growth and increases in inflation.¹¹⁰ This shows how the global economy has “darkened” due to the threat of increased oil prices and decreased trade.¹¹¹ Countries geographically close and with tighter financial ties to Russia are expected to experience the direct effect of the war through disruption to trade although the long-term effects are expected to be global.¹¹²

Russian and Ukrainian FDI has been negatively impacted by the invasion, as companies have reduced Russian operations due to sanctions and an uncertain investment environment.¹¹³ Russia’s investment environment is less appealing as sanctions increase the economic risk of investing in Russia and reflect the environment’s political and social instability.¹¹⁴ Sanctions against Russia directly affect the ability to borrow and have decreased the inflow of foreign capital.¹¹⁵ Russia’s investment environment is unattractive to investors as the freezing of assets and Russia’s exclusion from the SWIFT system has made Russian transactions more costly and inconvenient.¹¹⁶ The sanctions have increased the cost of doing business with Russia, declining Russia’s share of FDI and making it more difficult for Russian firms to gain finance.¹¹⁷ The invasion and subsequent sanctions indicate that Russia is heading towards a deep economic crisis, that is anticipated to result in numerous bankruptcies across a variety of industries.¹¹⁸

As intended the sanctions against Russia impact the country’s ability to facilitate international trade.¹¹⁹ This reduction in exports will negatively impact vulnerable Russian firms, which are already struggling to attain external financial services due to the sanctions on Russian banks.¹²⁰ Analysis of previous sanctions on Russia shows that whilst initially, sanctions have a significant impact on investment, over time the market recovers and orientates towards countries that have not enforced sanctions.¹²¹ Due to the scale of sanctions enforced it is expected that Russia will be negatively impacted in both the short and long run.¹²²

110 *How bad is the Ukraine war for the European recovery?* (European Investment Bank, Luxembourg, 2022) [EIB].

111 Victoria Masterson “These 3 charts show the impact of war in Ukraine on Global Trade” (26 April 2022) World Economic Forum <www.weforum.org>.

112 EIB, above n 110.

113 Alex Irwin-Hunt “OECD warns of ‘enormous’ eventual reconstruction of Ukraine” (6 May 2022) FDI Intelligence <www.fdiintelligence.com>.

114 Kosobutskaya, Ravohanginirina and Amosova, above n 21; and Stafford, above n 69.

115 Kosobutskaya, Ravohanginirina and Amosova, above n 21.

116 Kalotay, above n 44; and Kosobutskaya, Ravohanginirina and Amosova, above n 21.

117 Kalotay, above n 44.

118 Kalotay, above n 44.

119 Dave Curran and Brad Karp “Russia–Ukraine War Triggers New ESG Considerations” (2022) Treasury and Risk.

120 EIB, above n 110.

121 Kosobutskaya, Ravohanginirina and Amosova, above n 21.

122 Kalotay, above n 44.

B. Impact of Sanctions on Investors in Russia

The implementation of sanctions on Russia meant that investors had to decide whether to comply with sanctions and divest from Russia or remain and retain assets that are now worth significantly less.¹²³ This decision was more difficult for those involved with firms that produce necessities.¹²⁴ Foreign investors' ability to divest depends on the agility of the firms, with certain less agile sectors presenting more of a challenge.¹²⁵ The sanctions on Russia have cut foreign investors off from their assets and have forced them to withdraw from joint ventures and projects.¹²⁶ As a result of sanctions on Russia and Russian countersanctions, foreign investors have restricted access to the Moscow exchange and this decline in activity has made it hard for investors to sell shares, indicating that investors may have lost or had their investment devalued.¹²⁷

Since foreign investors had little time to divest and because many Russian firms' shares have been suspended, pursuing any resulting claims is expected to be difficult.¹²⁸ Additionally, investors must be cautious of the risk of criminal and civil prosecution and penalties for breaching sanctions.¹²⁹

C. Other Implications

Globally, sanctions are expected to decrease Russia's GDP and lead to food insecurity.¹³⁰ Sanctions are disrupting global supply chains and are likely to lead to revenue losses and higher costs for firms.¹³¹ Yet the impacts of the sanctions are far-reaching as sanctions on Russian financial institutions have meant some New Zealanders are unable to access Russian Pension payments.¹³² New Zealand's sanctions have implications for commercial contracts as investors may be required to terminate or suspend obligations under the Contract and Commercial Contract Act 2017.¹³³ However, there is no guarantee that Russian courts will accept this outcome.¹³⁴ Additional concerns arising from these measures are companies' human rights obligations and potential criminal liability that may arise from remaining in Russia.¹³⁵

123 Stafford, above n 69.

124 Curran and Karp, above n 119.

125 Jacopo Dettoni and Alex Irwin-Hunt "Ukraine war jeopardises \$500bn in foreign investment" (24 February 2022) FDI Intelligence <www.fdiintelligence.com>.

126 Stafford, above n 69; and Steven F Hill and others "Between A Rock And A Hard Place: The Sanctions Climate For Foreign Investment In Russia" (19 April 2022) K and L Gates <www.klgates.com>.

127 Stafford, above n 69.

128 Stafford, above n 69; and Alastair Hercus, Tony Dellow and Susie Kilty "Sanctions against Russia – impacts for New Zealand businesses" (4 March 2022) Buddle Findlay <www.buddlefindlay.com>.

129 Hill and others, above n 126.

130 Cristiane Derani "Economic sanctions in Russia risk breaking international law if they lead to global food shortages" (8 April 2022) University of Cambridge <www.cam.ac.uk>; and Beath, above n 17.

131 Beath, above n 17.

132 Thomas Manch and James Halpin "Government considering sanctioning New Zealand-linked Russian oligarch" *Stuff* (online ed, 17 May 2022).

133 "Sanctions against Russia and commercial contracts in New Zealand" (4 April 2022) Dentons Kensington Swan <www.dentons.co.nz> [DKS].

134 DKS, above n 133.

135 Allen and Overy, above n 43.

IV. THE IMPACT ON INTERNATIONAL INVESTMENT ARBITRATION

This section discusses whether sanctions breach bilateral investment treaty requirements analysing how most-favoured nation and fair and equitable treatment provisions may have been breached. Considering the impact of sanctions on investment claims requires an appreciation of the scope of Russia's dispute resolution clauses, together with analysis of defences that Russia may rely on and the challenges of enforcing investment arbitration awards.

A. Do Sanctions Breach Bilateral Investment Treaty Requirements?

Russia is already facing and defending several investment arbitration claims from Ukrainian investors over the seizing of assets in Crimea.¹³⁶ It is expected that many investment claims will be made due to breaches by Russian countersanctions.¹³⁷ BITs are agreements between two sovereign states that encourage investment flows, grant investors' protections and set out how disputes are settled by creating arbitration tribunals.¹³⁸ Russia has over 60 BITs that afford foreign investors including those affected by Russian countersanctions protections.¹³⁹ Russia has BITs with "unfriendly" countries including Canada, Japan and the United Kingdom.¹⁴⁰ Investors impacted by economic sanctions may be able to bring claims under BITs through investor-state dispute mechanisms.¹⁴¹ Under BITs, investors can file claims against sovereign states as if they "were any ordinary party in a commercial dispute".¹⁴² Investors may also attain commercial damages through domestic litigation or a future mass claims tribunal.¹⁴³ It is contended that investors in these "unfriendly" countries whose BITs have been breached as a result of economic sanctions and countersanctions may be able to seek recourse through investment arbitration.¹⁴⁴ Russia's BITs with "unfriendly" countries afford investors protection from discrimination under most-favoured nation clauses, the right to fair and equitable treatment and the right to freely transfer funds.¹⁴⁵ Importantly,

136 Goldenziel, above n 11.

137 Goldenziel, above n 11.

138 Goldenziel, above n 11.

139 "Russia and Ukraine: The Next Wave of International Disputes" (18 March 2022) Crowell <www.crowell.com>; and Goldenziel, above n 11.

140 Crowell, above n 139; Yulia Levashova and Mercédeh Azeredo da Silveira "Investment Claims Against Russia in the Economic Sanctions Era" (31 May 2022) Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com>>; Agreement Between The Government Of Canada And The Government Of The Union Of Soviet Socialist Republics For The Promotion And Reciprocal Protection Of Investments, The Government of Canada and the Government of the Union of Soviet Socialist Republics 31 CTS 1991 (signed 20 November 1989, entered into force 27 June 1991) [Canada–Russia BIT]; and Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments, Russia–United Kingdom 3 Cm 1791 (signed 6 April 1989, entered into force 3 July 1991) [UK–Russia BIT].

141 Crowell, above n 139; and Tretthahn-Wolski and Dobrić, above n 1.

142 Goldenziel, above n 11.

143 Crowell, above n 139.

144 Levashova and Azeredo da Silveira, above n 140.

145 Levashova and Azeredo da Silveira, above n 140; Tretthahn-Wolski and Dobrić, above n 1; and Agreement concerning the promotion and reciprocal protection of investments (with protocol). Federal Republic Of Germany–Union Of Soviet Socialist Republics 1707 UNTS 171 (signed 13 June 1989, entered into force 5 August 1991) [Germany–Russia BIT].

several of Russia's BITs also provide for "obligations of general consumption for losses caused by war and armed conflict", as seen in art 4 of the UK–Russia BIT.¹⁴⁶ The scope of protections afforded to investors depends on the particular terms of the BIT.¹⁴⁷ Foreign investors' ability to claim against states plays a key role in investment protection.¹⁴⁸ Since the investors targeted by Russia's countersanctions are those who are likely already impacted by their own nations' sanctions on Russia, the main conflicts are expected to occur where investors from "unfriendly" countries, who are exempt from their own nations' sanctions have been impacted by Russia or when investors have been impacted by Russian countersanctions before their own nations' sanctions.

1. Potential BIT Breaches

It is contended that Russia's countersanctions may breach most-favoured nation clauses, fair and equitable treatment provisions, provisions prohibiting expropriation and the right to freely transfer funds.¹⁴⁹

(a) Most-Favoured Nation Clauses

Several of Russia's BITs afford investors most-favoured nation treatment including Germany–Russia, Canada–Russia and UK–Russia.¹⁵⁰ Russia's BITs afford foreign investors treatment that is no less favourable than the treatment given to third state investors.¹⁵¹ To establish a violation of the most-favoured nation clause claimants must be subject to a less favourable treatment due to their nationality.¹⁵² This clause is breached if the level of treatment offered to investors differs from the treatment offered to other investors.¹⁵³ Establishing a breach requires comparing treatment "in like circumstances".¹⁵⁴ It is contended that Russian countersanctions that target "unfriendly" countries breach Russia's most-favoured nation clauses as they discriminate based upon nationality and objectively afford "unfriendly" investors a lower level of treatment than the level offered to "friendly" investors.¹⁵⁵ This is demonstrated by Russia's treatment of China, which is subject to most-favoured nation treatment under the China–Russia BIT but is not subject to the Russian countersanctions.¹⁵⁶ It is contended that sanctions against Russia do not constitute a breach of these

146 Crowell, above n 139; and UK–Russia BIT, above n 140.

147 "Russia's Recent Actions Against Foreign Investors Will Give Rise to Claims Under International Investment Treaties" (7 April 2022) King and Spalding <www.kslaw.com>; and Levashova and Azeredo da Silveira, above n 140.

148 Faraz Alam Sagar and Samiksha Pednekar "International Investment Arbitrations and International Commercial Arbitrations: A Guide to the Differences" (15 May 2015) Cyril Amarchand Mangaldas <<https://corporate.cyrilamarchandblogs.com>>.

149 Allen and Overy, above n 43; Tretthahn-Wolski and Dobrić, above n 1; and King and Spalding, above n 147.

150 UK–Russia BIT, above n 140 at art 3; Germany–Russia BIT, above n 145 at art 3; and Canada–Russia BIT, above n 140.

151 Germany–Russia BIT, above n 145 art 3; Canada–Russia BIT, above n 140 at art 3 and UK–Russia BIT, above n 140 art 3.

152 *Most-Favoured Nation Treatment* (United Nations Conference On Trade And Development, UNCTAD/DIAE/IA/2010/1, November 2010).

153 *Most-Favoured Nation Treatment*, above n 152.

154 *Most-Favoured Nation Treatment*, above n 152.

155 Allen and Overy, above n 43; and *Most-Favoured Nation Treatment*, above n 152.

156 "Russian government approves list of unfriendly countries and territories" (8 March 2022) TASS <<https://tass.com>>; and Agreement Between The Government Of The Russian Federation And The Government Of The People's Republic Of China On The Promotion And Reciprocal Protection Of Investments, China–Russia, 9.XI.2006 (Signed 9 November 2006, entered into force 1 May 2009) [China–Russia BIT] at art 3.

provisions under the Germany–Russia BIT they are “measures taken in the interests of law and order and security” and do not amount to discriminatory measures prohibited by the treaty.¹⁵⁷

(b) Fair and Equitable Treatment Provisions

Many of Russia’s BITs have fair and equitable treatment provisions that afford investors protection from unreasonable and unfair measures.¹⁵⁸ Fair and equitable treatment is “an absolute standard of protection” that is intended to prevent the genuine mistreatment of foreign investors and investments.¹⁵⁹ This protection against discriminatory treatment means Russia has a positive obligation to create a favourable investment environment.¹⁶⁰ This provision does not prevent legitimate policies that are implemented in good faith and are not used to “disguise” discriminatory and arbitrary measures.¹⁶¹ It is argued that legitimate expectations may have been frustrated as Russia’s investment framework is not as stable as it was before the invasion of Ukraine.¹⁶² It is contended that Russia’s countermeasures on “unfriendly” countries violate fair and equitable treatment provisions by discriminating against specific countries.¹⁶³

(c) Other breaches

Many of Russia’s BITs also contain provisions prohibiting expropriation.¹⁶⁴ “Indirect expropriation involves total or near-total deprivation of an investment but without a formal transfer of title or outright seizure.”¹⁶⁵ It is contended that Russia’s countersanctions that target “unfriendly” countries may indirectly lead to the expropriation of investors as investor’s assets are “nationalised”, giving investors grounds to argue that Russia’s countersanctions amount to unlawful expropriation.¹⁶⁶ It is contended that sanctions excluding Russia from SWIFT, which restricts the movement of funds, breach investors’ right to freely transfer funds as provided in many of Russia’s BITs.¹⁶⁷

B. *Scope of Claims within Investment Arbitration*

Whilst some investors of “unfriendly” origins may be able to seek remedies for a breach of a BIT with Russia, many of Russia’s BITs have narrow dispute resolution clauses that may limit the jurisdiction of arbitral tribunals and require that disputes should attempt to be amicably settled

157 Germany–Russia BIT, above n 145.

158 Allen and Overy, above n 43; King and Spalding, above n 147; UK–Russia BIT, above n 140 at art 2; Germany–Russia BIT, above n 145 at art 2; Canada–Russia BIT, above n 140 at art 3(1); and Agreement concerning the reciprocal promotion and protection of investments (with protocol), Belgium, Luxembourg and Union Of Soviet Socialist Republics 33361 UNTS 312 (signed 9 February 1989, entered into force 18/08/1991) [Belgium/Luxembourg–Russia BIT] at art 4.

159 *Fair and Equitable Treatment* (United Nations Conference On Trade And Development, UNCTAD/DIAE/IA/2011/5, February 2012).

160 King and Spalding, above n 147.

161 *Fair and Equitable Treatment*, above n 159.

162 Allen and Overy, above n 43.

163 King and Spalding, above n 147.

164 King and Spalding, above n 147; Germany–Russia BIT, above n 145 at 4; Canada–Russia BIT, above n 140 at art 6; and China–Russia BIT, above n 156.

165 *Expropriation* (United Nations Conference On Trade And Development, UNCTAD/DIAE/IA/2011/7, July 2012).

166 Tretthahn-Wolski and Dobrić, above n 1.

167 Allen and Overy, above n 43; and Canada–Russia BIT, above n 140 at art 7.

in the first instance.¹⁶⁸ It is argued that these narrow clauses limit the jurisdiction of tribunals considering expropriation claims to ruling on payment or compensation barring consideration of whether expropriation has actually occurred.¹⁶⁹ These narrow clauses may cause tribunals to decline jurisdiction, leaving investors without recourse or access to justice. Despite these narrow jurisdiction clauses, *Sedelmayer v The Russian Federation* found that under the narrow Germany–Russia BIT that expropriation had occurred.¹⁷⁰ However, the interpretation and application of dispute resolution clauses is inconsistent as in *Berschader v The Russian Federation* a similarly narrow dispute resolution clause in Belgium/Luxembourg–Russia BIT lead to the rejection of jurisdiction.¹⁷¹ This inconsistency of application creates uncertain precedent and fails to give investors’ confidence about their ability to bring claims.¹⁷² It is contended that most-favoured nation treatment clauses could be utilised to find jurisdiction under a broader Russian BIT clause. This was the case in *Rosinvestco UK Ltd v Russia* where in an expropriation dispute jurisdiction was asserted through the use of a most-favoured nation clause, allowing the tribunal to find jurisdiction over the claims under the broader Denmark–Russia BIT rather than the narrower UK–Russia BIT.¹⁷³ Historically, a similar approach was taken in *Maffezini v Spain* to bypass an unfavourable procedural waiting period.¹⁷⁴ It is contended that arbitral tribunals have jurisdiction over disputes involving economic sanctions, as a Russian company subject to sanctions was deemed able to participate in international investment arbitration.¹⁷⁵

It is contended that Russia will challenge the jurisdiction of many BIT claims and the reliance on most-favoured nation clauses in favour of its own national jurisdiction. Russia’s Commercial Procedure Code 2020 (RCPC) states that disputes concerning Russian entities subject to foreign sanctions are automatically within the jurisdiction of Russian courts.¹⁷⁶ Effectively, the RCPC enables sanctioned parties to bring claims at their place of residence regardless of whether contracts have arbitration clauses, as long as the dispute has not previously been before a foreign court or tribunal.¹⁷⁷ The RCPC, upheld in a recent Russian Supreme Court decision gives Russia exclusive jurisdiction over disputes involving Russian companies and individuals that are subject to foreign sanctions.¹⁷⁸ Russia implemented the RCPC to address concerns that Russian entities would not

168 Trethahn-Wolski and Dobrić, above n 1; and Germany–Russia BIT, above n 145 at art 10.

169 Trethahn-Wolski and Dobrić, above n 1; and Germany–Russia BIT, above n 145.

170 Trethahn-Wolski and Dobrić, above n 1; and *Franz Sedelmayer v The Russian Federation (Arbitration Award)* Staffan Magnusson, Jan Peter Wachler, Ivan S Zykin, Hakun Sandesjö 7 July 1998.

171 Trethahn-Wolski and Dobrić, above n 1; *Berschader v The Russian Federation (Award)* SSC 080/2004, 21 April 2006; and Belgium/Luxembourg–Russia BIT, above n 158.

172 Trethahn-Wolski and Dobrić, above n 1.

173 Trethahn-Wolski and Dobrić, above n 1; UK–Russia BIT, above n 140; *Rosinvestco UK Ltd v Russia (Final Award)* SCC, 079/2005, 12 September 2010 at [600]–[601]; and Agreement between the Government of the Kingdom of Denmark and the Government of the Russian Federation concerning the Promotion and Reciprocal Protection of Investments, Denmark–Russia 34468 UNTS 429 (signed 4 November 1993, entered into force 26 September 1996).

174 Trethahn-Wolski and Dobrić, above n 1; and *Emilio Agustín Maffezini v Spain (Award)* ICSID, ARB/97/7, 13 November 2000.

175 Knoll-Tudor, above n 30.

176 “Anti-suit injunctions in Russia may prevent overseas proceedings in respect of sanctioned entities” (9 February 2022) Linklaters <www.linklaters.com>.

177 Knoll-Tudor, above n 30.

178 Linklaters, above n 176.

be treated fairly or impartially by the states that had imposed sanctions.¹⁷⁹ Russian courts may also issue anti-suit injunctions to prohibit claims from taking place in foreign jurisdictions.¹⁸⁰ A key concern for international investment arbitration in this circumstance is the large scale of the conflict and the tense political environment where the settling of investor claims is unlikely to be a priority within the context of the war in Ukraine.

1. *Potential Defences*

Russia is likely to rely on the international law defences of self-defence and necessity to justify its counter-measures and defend against claims.¹⁸¹ Russia may invoke the defence of necessity claiming that the “risk of economic and social disruption resulting from the sudden cessation of many businesses left it with no choice but to take over the foreign-owned companies to avoid economic and social catastrophe”.¹⁸² Necessity requires showing that the actions taken were the only option to avoid imminent peril.¹⁸³ The necessity defence requires a high standard.¹⁸⁴ It is contended that this defence is unlikely to succeed as “Russia has contributed to the situation of necessity by invading Ukraine”.¹⁸⁵ This is indicated by the International Court of Justice’s order that there was no evidence to justify Russia’s invasion of Ukraine.¹⁸⁶

C. *The Enforcement of Awards*

Investors may be able to seek redress for losses resulting from Russia’s countersanctions through international investment agreements with Russia.¹⁸⁷ Arbitral tribunals measure compensation by considering “the fair market value” of the investment before the breach occurred.¹⁸⁸ International arbitration awards may be enforced by jurisdictions that have signed up to the Convention of the Recognition and Enforcement of Foreign Arbitral Awards (CREFAA).¹⁸⁹ Under the CREFAA arbitral awards are binding.¹⁹⁰ When enforcing awards courts are not permitted to reconsider the merits of the case and the key to enforcement is identifying Russian assets that are not protected by sovereign immunity.¹⁹¹ Enforcement proceedings are inevitable as, despite Russia’s recognition of the convention in specific BITs and position as a contracted state to the convention, the country continues to systematically fail to honour awards.¹⁹²

179 Linklaters, above n 176.

180 Linklaters, above n 176.

181 Allen and Overy, above n 43.

182 King and Spalding, above n 147.

183 King and Spalding, above n 147.; and Allen and Overy, above n 43.

184 King and Spalding, above n 147.

185 Allen and Overy, above n 43; and King and Spalding, above n 147.

186 King and Spalding, above n 147.

187 King and Spalding, above n 147.

188 King and Spalding, above n 147.

189 Allen and Overy, above n 43; and *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ESC Res 604, XXI (1958).

190 Levashova and Azeredo da Silveira, above n 140; and CREFAA, above n 189 at art 3.

191 Allen and Overy, above n 43.

192 Allen and Overy, above n 43; King and Spalding, above n 147; and Germany–Russia BIT, above n 145 at art 10(4).

Economic sanctions are expected to impact the enforcement of arbitral awards, as debtors are prevented from making interest on awards and debtors are unable to pay with frozen funds, the number of which widespread sanctions have increased.¹⁹³ Enforcement proceedings against Russia will be more complicated due to the difficulties of enforcing awards against frozen assets.¹⁹⁴ To address this some countries have begun to legislate statutes that would facilitate the seizure and repurposing of frozen assets.¹⁹⁵ It has been suggested that due to “the severity of crimes committed by Russia” some courts would be willing to circumnavigate the issue by piercing the “corporate veil of state-owned enterprises” to enforce awards.¹⁹⁶ Investors may be able to obtain licences to allow the enforcement of awards against frozen assets.¹⁹⁷ If Russia does not voluntarily pay arbitral awards investors will need to enforce awards against Russian state-owned enterprises located outside of Russia.¹⁹⁸ The RCPC is also expected to hinder the enforcement of arbitral awards.¹⁹⁹ Russia’s non-enforcement of awards will be subject to the Vienna Convention which regulates inter-state treaties and requires that international treaty disputes are settled peacefully and in a manner that conforms with international law.²⁰⁰

To address the challenges associated with not only the enforcement of arbitral awards but the jurisdictional challenge of claiming under Russian BITs it is suggested that a commercial claims tribunal is established, as was done after the 1979 Iranian Revolution.²⁰¹ However, due to Russia’s position on the UN Security Council, creating such a tribunal will be difficult.²⁰² Affected states could potentially establish their own claims tribunals to independently compensate investors, however as the situation in Ukraine continues to unfold and escalate this recovery option is likely to be far away.²⁰³

D. Alternatives to International Investment Arbitration

Investors not subject to BITs may be able to invoke diplomatic protection, an international law mechanism, as an alternative to international investment arbitration.²⁰⁴ Traditionally, the right to diplomatic protection is vested in the state as an injury to a national is an injury to the state.²⁰⁵ The Draft Articles on Diplomatic Protection states that:²⁰⁶

193 Knoll-Tudor, above n 30.

194 Levashova and Azeredo da Silveira, above n 140.

195 Levashova and Azeredo da Silveira, above n 140.

196 Allen and Overy, above n 43.

197 King and Spalding, above n 147.

198 King and Spalding, above n 147.

199 Linklaters, above n 176.

200 Vienna Convention on the Law of Treaties Vol 1155 (opened for signature 23 May 1969, entered into force 27 January 1980).

201 Crowell, above n 139.

202 Crowell, above n 139.

203 Crowell, above n 139.

204 John Dugard “Articles On Diplomatic Protection” (2006) Audiovisual Library of International Law <<https://legal.un.org/>>; and Hofer, above n 35.

205 Dugard, above n 204.

206 *Draft articles on Diplomatic Protection* (International Law Commission, Supplement No 10 (A/61/10), 2006) at art 1.

diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

The exercise of the right to diplomatic protection is a discretionary right and applies to nationals and corporations.²⁰⁷ However, states willing to exercise diplomatic protection need to prove “a genuine connection of existence” between the state and the protected national, as determined by the facts of the case.²⁰⁸ In the matter of corporations there needs to be a “permanent and close connection” between the corporation and the state exercising diplomatic protection.²⁰⁹ To implement diplomatic protection local remedies are expected to be exhausted unless no local remedies are available or the state has waived the right to local remedies.²¹⁰ The United States of America is considering whether its investors would be able to bring investment claims arising from the countersanctions as a subsidiary of another BIT.²¹¹

V. CONCLUSION

The invasion of Ukraine has inadvertently triggered an international investment arbitration minefield as investors have to navigate sanctions, countersanctions and an increasingly tense political environment. The nature of the longstanding political conflict between Ukraine and Russia and its global significance rationalises the wider international community’s response and economic sanctions. Russia’s veto of the UN Security Council has complicated arbitration as states have been forced to enforce unilateral sanctions rather than relying on the legally sound UN framework. It is contended that the sanctions against Russia are legally justified due to the breach of erga omnes obligations, notably the acts of aggression and breach of Ukraine’s sovereignty and are further justified as security exceptions under key international treaties. The sanctions have impacted foreign investors in Russia as they have had to divest assets or have had assets devalued or nationalised. Russian investors have been impacted by sanctions as they have had their assets frozen and have restricted access to international markets. The war and sanctions are also expected to impact investment globally due to the increased uncertainty and due diligence requirements for international trade and investment. Russian countersanctions, which are arguably less justifiable under international law norms, are likely to lead to several international investment claims as they conflict with Russia’s BITs. It is contended that claims may be made for breaches of the most-favoured nation and fair and equitable treatment provisions and for expropriation and the restrictions on the right to free transfer of funds. It is contended that, despite uncertain precedent and narrow dispute resolution clauses, arbitral tribunals do have jurisdiction to consider investment claims related to sanctions and countersanctions. The main obstacle to navigate when dealing with international investment arbitration arising from this conflict is the political tension, as Russia has asserted its jurisdiction over these matters and is unlikely to accept decisions and uphold its award enforcement obligations.

207 Dugard, above n 204; and *Draft articles on Diplomatic Protection*, above n 206, arts 4 and 9.

208 Dugard, above n 204.

209 Dugard, above n 204.

210 Dugard, above n 204; and *Draft articles on Diplomatic Protection*, above n 206, at arts 14 and 15.

211 Crowell, above n 139.

PIRACY AND TRANSNATIONAL CRIMINAL LAW

BY REBEKAH TE RITO*

I. INTRODUCTION

Boister asserted that:¹

Piracy is arguably a prototype transnational crime designed to respond to threats to the commercial interests of states that occur on the high seas, an area beyond the territorial jurisdiction of every state.

It is submitted that although piracy is a transnational crime it is not a *prototype* transnational crime. Customary international law characterises pirates as *hostis humani generis* and subject to universal jurisdiction, but the absence of any central international arbitration mechanism commonly frustrates any concrete determination.² However, it is submitted that its universal jurisdiction is attributable to the location in which the crime is committed – *beyond the territorial jurisdiction of every state* – rather than the characterisation of the crime itself.³

Differentiating piracy into transnational criminal law (TCL), rather than leaving it within international criminal law (ICL) generally, requires an understanding of the distinction between the two systems, thus, this distinction will be explored in the first section of this paper. To understand the transnational elements of piracy one must then explore both the horizontal and vertical dimensions which exist to criminalise it. Therefore, the second section of this paper will explore the horizontal development of the criminalisation of piracy through suppression conventions, treaties and codes of conduct, analysing the international legal framework created to combat piracy. Finally, the third section of this paper will explore the jurisdictional boundaries of criminalising piracy and evaluate the vertical integration of piracy laws into domestic legal systems to understand whether states' commitment to combating piracy is credible or their conduct is defective.

II. INTERNATIONAL VS TRANSNATIONAL CRIMINAL LAW

Differentiating TCL from ICL is an important first step in justifying the crime of piracy as transnational.⁴ It is also important to understand that TCL is a subset-of ICL, rather being independent of it.⁵ ICL is a *direct* system of liability which bypasses national law and criminalises

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1 Neil Boister *An Introduction to Transnational Criminal Law* (2nd ed, Oxford University Press, Oxford, 2018) at 47.

2 *SS Lotus (France v Turkey)* [1927] PCIJ Reports (series A) No 10 at [236].

3 *United States v Layton* 509 F Supp 212 (ND Cal 1981) at 223.

4 See Neil Boister "Further Reflections on the Concept of Transnational Criminal Law" (2015) 6 *Transnational Legal Theory* 9 at 10.

5 See Robert Cryer and others *An Introduction to International Criminal Law and Procedure* (3rd ed, Cambridge University Press, Cambridge, 2014) at 6.

individuals directly for core crimes set out in the Rome Statute of International Criminal Court, consisting of: genocide, crimes against humanity, war crimes and the crime of aggression.⁶ In contrast, TCL is an *indirect* system of liability which obliges states to criminalise an individual.⁷

Significantly, TCL differentiates crimes which are not under the jurisdiction of a central arbitration mechanism and for which state sovereignty is paramount;⁸ consequently, TCL relies on both the horizontal international cooperation and the vertical integration of international law into states' own domestic legal systems.⁹ The horizontal origins of the criminalisation of piracy within TCL come from multiple sources of unilateral and multilateral suppression conventions, treaties and codes of conduct. The agreements evidence the formalisation of the "horizontal distribution of authority and power among independent states" which then enables the "vertical settlement to an international dispute",¹⁰ relying on domestic legal systems "for the prosecution of transnational crimes".¹¹ The multiple sources of TCL also reflect the fact that certain offences are not universally considered serious.¹² Piracy is a particularly favourable example considering the failed state of Somalia pursues piracy as a legitimate economic opportunity considering its own economic insecurity;¹³ conversely, developed states have a "desire to protect shared national interests, such as safety at sea and international commerce" which prompts cooperation amongst states to "safeguard these interests" by criminalising piracy.¹⁴ Significantly, two of the most important conventions criminalising piracy, the United Nations (UN) Convention on the Law of the Sea (UNCLOS) and the International Maritime Organization's (IMO) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) bind 166 and 168 parties respectively, which evidences the fact that piracy is not *universally* considered serious.

Appreciating the reliance on states' own domestic legal systems and the importance of cooperation in the absence of an international arbiter, this paper will show that piracy must not be left within ICL "in an undifferentiated sense".¹⁵

6 Rome Statute of the International Criminal Court, art 5; Charles Jalloh "The Distinction between 'International' and 'Transnational' Crimes in the African Criminal Court" in Harmen Van der Wilt and Christophe Paulussen (eds) *Legal Responses to Transnational and International Crimes* (Edward Elgar Publishing, Cheltenham, 2017) 272 at 276; and see Marta Bo "Piracy at the Intersection between International and National: Regional Enforcement of a Transnational Crime" in Harmen Van der Wilt and Christophe Paulussen (eds) *Legal Responses to Transnational and International Crimes* (Edward Elgar Publishing, Cheltenham, 2017) 71 at 72.

7 Jalloh, above n 6.

8 Boister, above n 4.

9 Richard Falk "International Jurisdiction: Horizontal and Vertical Conceptions of Legal order" (1959) 32 *Temple Law Quarterly* 295 at 295.

10 Falk, above n 9, at 296 and 298.

11 Cryer, above n 5, at 330.

12 Neil Boister "Responding to Transnational Crime: The Distinguishing Features of Transnational Criminal Law" in Harmen Van der Wilt and Christophe Paulussen (eds) *Legal Responses to Transnational and International Crimes* (Edward Elgar Publishing, Cheltenham, 2017) 27 at 30 and 36; Bo, above n 6, at 73.

13 See UNODC *Counter-Piracy Programme* (UNODC Counter-Piracy Programme, Issue Six, June 2011) at 3; see also Douglas Guilfoyle "Policy Tensions and the Legal Regime Governing Piracy" in Douglas Guilfoyle (ed) *Modern Piracy: Legal Challenges and Responses* (Edward Elgar, United Kingdom, 2013) 325 at 325–326.

14 Bo, above n 6, 73–74.

15 Boister, above n 4.

III. HORIZONTAL CRIMINALISATION OF PIRACY

In the absence of a central arbitration mechanism, the decentralisation of authority requires a “horizontal distribution of authority and power among States”.¹⁶ Suppression conventions are the formalisation of multilateral cooperative efforts to combat piracy and together construct the international legal framework to criminalise it. Central to the international legal framework is UNCLOS, which is ultimately the codification of customary international law.¹⁷ However, its definitional ambiguities have led to impunity, meaning the international legal framework relies on piracy’s extension to maritime terrorism under the IMO’s SUA Convention.¹⁸

Importantly, both conventions require all state parties to cooperate in the repression of piracy. Under art 100 of UNCLOS, it is mandatory to “cooperate to the fullest possible extent in the repression of piracy”. Similarly, in the SUA Convention, under arts 12–13 it is mandatory for state parties to cooperate in both the prevention and prosecution of offences. Fundamentally, these provisions highlight the importance of cooperation and consequently the interdependence between states to combat piracy, as an indirect system of liability exists. The provisions oblige states to cooperate in the criminalisation of piracy rather than having a direct system which bypasses national legal systems and criminalises offenders directly.

A. UNCLOS

The first definition of piracy “considered to reflect customary international law” was art 15 of the Geneva Convention of the High Seas in 1958 which was later replicated in art 101 of UNCLOS in 1982.¹⁹ UNCLOS defines maritime piracy as an illegal act of violence, detention or depredation committed for private ends “by the crew or passengers of a private ship ... against another ship or against persons or property on board” on the high seas or outside the jurisdiction of any state.

UNCLOS’s definition of piracy has long been regarded as ineffective given three main gaps within its definition: firstly, whether *for private ends* excludes maritime terrorism; secondly, the practical consequences of the jurisdictional limitation to the *high seas* and *outside the jurisdiction of any state*; and thirdly, whether piracy requires the involvement of a second ship. It is important to analyse UNCLOS’s definitional ambiguities as this makes evident the transnational dimensions of piracy which act as what Nadelmann would define as *hooks* which provoke and justify “external intervention in the internal affairs of other states”.²⁰

16 Falk, above n 9, at 300.

17 Richard L Kilpatrick *Borrowing from Civil Aviation Security: Does International Law Governing Airline Hijacking Offer Solutions to the Modern Maritime Piracy Epidemic off the Coast of Somalia?* (Working Paper, Oceans Beyond Piracy, August 2011) at 5 and 7.

18 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994); International Maritime Organization Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1678 UNTS 221 (signed 10 March 1988, entered into force 1 March 1992); and see Jan Van Hauwaert “The Importance of the SUA Convention in the Fight Against Violence at Sea” (Master of Science in Maritime Science Dissertation, Universiteit Gent, 2018) at 18.

19 United Nations Convention of the High Seas 450 UNTS 11 (opened for signature 29 April 1958, entered into force 30 September 1962); United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994); and Boister, above n 1.

20 Ethan Nadelmann “Global Prohibition Regimes: The Evolution of Norms in International Society”(1990) 44 International Organization 479 at 524.

1. *Maritime piracy vs maritime terrorism*

UNCLOS restricts piracy to acts which are committed for *private ends* which many scholars believe limits UNCLOS's reach so "that politically motivated acts of terrorism ... cannot be acts of piracy".²¹ Barrios suggests that this reflects the states' fundamental concerns about commercial shipping "and underscores the states' general unwillingness to assert jurisdiction over politically motivated acts".²² In contrast, Bahar asserts that the UNCLOS provision does include terrorist acts as the term "*for private ends* must be understood to distinguish between state-sponsored piracy or privateering, which could be redressed under the laws of war, and piracy, which could not".²³ This assertion is also largely supported by the United States Supreme Court decision in *Harmony v United States*, where Story J stated that a pirate is considered *hostis humani generis* "[b]ecause he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretence of public authority" where an act of hostility is "committed by a vessel not commissioned and engaged in lawful warfare".²⁴

With the SUA Convention extending the criminalisation of maritime piracy to acts committed with political motives,²⁵ discussion on UNCLOS's restrictive definition seems unwarranted. However, the extension of the criminalisation of piracy under the SUA Convention to politically motivated acts not only supports Bahar and Story J's contentions but it also evidences the fact that the international community sought to differentiate piracy from international law by distinguishing piracy to be acts which occur outside of state-sponsored war and consequently outside the auspice of international law. Regardless, even Barrios' contentions allude to the transnational characteristics of piracy as states' fundamental concerns are commercial rather than universal.

2. *Jurisdictional limitations*

UNCLOS establishes that a state's territorial limits can extend to twelve nautical miles from the low-water line along the coast which is an area that is not subject to universal jurisdiction due to territorial sovereignty.²⁶ However, UNCLOS also establishes an intermediate zone between a state's territorial waters and the high seas known as the *exclusive economic zone* (EEZ) which

21 Yvonne Dutton "Maritime Piracy and the Impunity Gap: Domestic Implementation of International Treaty Provisions" in Michael Struett, Jon Carlson and Mark Nance (eds) *Maritime Piracy and the Construction of Global Governance* (Routledge, New York, 2013) 71 at 74; see Erik Barrios "Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia" (2005) 28 *Boston College International and Comparative Law Review* 149 at 153; and see also Tina Garmon "International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th" (2002) 27 *Tulane Maritime Law Journal* 257 at 274.

22 Barrios, above n 21, at 153.

23 Michael Bahar "Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations" (2007) 40 *Vanderbilt Journal of Transnational Law* 1 at 30.

24 *Harmony v United States* 43 US 210 (1844) (SC) at [106]; see *United States v Bass* 24 F Cas 1028 (1819) (SC) where the defendant was not guilty of piracy "because there was sanction from a sovereign power": Bahar, above n 23, at 31; see *In re Marianna Flora* 24 US 1 (1825) (SC) at 41; and see also *In re Piracy Jure Gentium* [1934] AC 586 (PC) at 594.

25 Notably, the SUA Convention never explicitly mentions *piracy*, however, recent Security Council resolutions suggest that the SUA does extend the crime of piracy to terrorist acts: Helmut Turek "Piracy and the Law of the Sea" in Harry Scheiber and Jin-Hyun Paik (eds) *Regions, Institutions, and Law of the Sea: Studies in Ocean Governance* (BRILL, ebook, 2013) 493 at 494; *Resolution 1846* SC Res 1846, S/Res/1846 (2008); and *Resolution 1851*, SC Res 1851, S/Res/1851 (2008) at [5].

26 Articles 3 and 5.

expands a state's territorial jurisdiction to 200 nautical miles from the state's territorial limits.²⁷ Ultimately, as an extension of a state's territorial sovereignty, this easily frustrates the applicability of UNCLOS's universal jurisdiction as the apprehension of pirates within an EEZ would require states "to do so without interfering with the rights of the state claiming that EEZ".²⁸ Although scholars such as Bahar claim that states should continue have territorial sovereignty over their territorial seas, as "few nations, if any, would appreciate, or tolerate foreign militaries policing their maritime" zones, leaving it up to a states' own domestic legal systems and institutions to repress such behaviours is overly optimistic.²⁹ Somalia as a failed state with a lack of enforcement mechanisms coupled with the Gulf of Aden's "relatively narrow body of water", making it both physically and legally difficult to patrol, means the extension of territorial waters under UNCLOS's leaves ample room for impunity.³⁰

Significantly, the conflict over the applicability of UNCLOS's universal jurisdictional boundaries highlights the paramouncy of state sovereignty while also exposing the importance of mutual dependency and reciprocity in combating piracy – principles which underpin the interstate relationships within TCL.³¹ Although efficiency demands a central international arbitration mechanism, in absence of such an institution, states must work together to avoid impunity.³²

3. *Two-ship requirement*

The practical application of UNCLOS's art 101(a)(i) "against *another* ship" has also been contentious.³³ Bahar suggests that although a "plain reading" of UNCLOS would "indicate that two ships are required for piracy", an analysis of its legal history suggests that once offenders have "rejected the authority of any state ... they become lawless actors and enemies of all mankind" and are therefore pirates, whether or not another ship is involved.³⁴ Bahar contends that the intention of this phrase was to exclude offences "by one passenger or crewmember against another" which would not be the concern of international law, but rather the domestic legal system of the ship's flag state. As Azubuike contends, "a ship is considered the floating island of the flag State", therefore an "offence committed on board a ship is subject to the domestic laws of the flag State".³⁵ Noticeably,

27 Articles 57–58, and 105.

28 Article 56; and Dutton, above n 21, at 74–75; Jing Jin and Erika Techera "Strengthening Universal Jurisdiction for Maritime Piracy Trials to Enhance a Sustainable Anti-Piracy Legal System for Community Interests" (2021) 13 *Sustainability* 7628 at 7636.

29 Bahar, above n 23, at 19 and 21–22.

30 Milena Sterio "The Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution" (2010) 59 *American University Law Review* 1449 at 1450–1451; and see also Milena Sterio "Piracy Off the Coast of Somalia" (2012) 4 *Amsterdam Law Forum* 104 at 108.

31 Falk, above n 9, at 307–309.

32 See Yvonne Dutton "Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court" (2010) 11 *Chicago Journal of International Law* 197.

33 Samuel Menefee "The New Jamaica Discipline: Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea" (1990) 6 *Connecticut Journal of International Law* 127 at 144.

34 Bahar, above n 23, at 38–39; see also *In re Tivnan* (1864) 122 ER 971 (QB) at [677].

35 Lawrence Azubuike "International Law Regime Against Piracy" (2009) 15 *Annual Survey of International & Comparative Law* 43 at 53.

the *two-ship* term was not used in art 101(a)(ii), which Bahar suggests is an indication that the two-ship requirement may not be mandatory.³⁶

This issue evidences the transnational characteristics of piracy from a practical perspective. Although the SUA Convention has excluded the two-ship requirement, discussion on its utility in criminalising piratical offences under UNCLOS highlights how the crime of piracy transcends national boundaries, as piracy requires actors from a state outside the flag state of the ship to commit the requisite piratical offences. Additionally, piracy is a threat to a collective interest in maritime safety in some of the most important global shipping lanes, and “[n]o government possesses sufficient resources to police effectively all of the high seas” or is comfortable to “unilaterally persecute a criminal when doing so involves a blatant affront to another state’s external sovereignty”.³⁷ Accumulatively, this justifies the external intervention – horizontal international cooperation – in the internal affairs of another state – the transnational *hook*, as Nadelmann would put it.

B. SUA Convention

Unfortunately, the politically motivated hijacking of the Italian cruise ship, the MS Achille in 1985 exposed UNCLOS’s limitations and the impunity enjoyed by the offenders.³⁸ In response, the IMO’s SUA Convention was drafted in 1988 and entered into force in 1992.³⁹ Notably, the SUA Convention never explicitly mentions *piracy*; however, subsequent Security Council (SC) Resolutions suggest that the SUA Convention does extend the criminalisation of maritime piracy to include maritime terrorism. The SC “first established a link between the SUA Convention and piracy” in *Resolution 1846* (2008) which urged state parties to the SUA Convention to fully implement its obligations criminalising offences and establishing jurisdiction “for the successful prosecution of persons suspected of piracy”;⁴⁰ with *Resolution 1851* (2008) more explicitly affirming the SUA Convention’s application to piracy.⁴¹

The SUA Convention’s extension of the criminalisation of maritime piracy to maritime terrorism was an important addition to the international legal framework criminalising piracy. Advantageously, its scope was not restricted by linguistic ambiguities as it did not require motives to have *private ends* or require the involvement of *two ships*;⁴² and it also expanded the jurisdictional boundaries of piracy’s criminalisation by applying the Convention to ships scheduled for international waters although an attack occurred “within territorial or archipelagic waters or in a port”.⁴³ However, unlike UNCLOS, the SUA Convention “does not give states a basis upon which to exercise universal jurisdiction over acts of piracy”;⁴⁴ however, given its availability in UNCLOS

36 Bahar, above n 23, at 39.

37 Nadelmann, above n 20, at 526.

38 Barrios, above n 21, at 154.

39 International Maritime Organization Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1678 UNTS 221 (signed 10 March 1988, entered into force 1 March 1992).

40 Turek, above n 25, at 504; and *Resolution 1846*, above n 25, at [15].

41 *Resolution 1851*, above n 25.

42 Article 3; Dutton, above n 21, at 75; Barrios, above n 21, at 157; and see Malvina Halberstam “Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety” (1988) 82 *American Journal of International Law* 269 at 295.

43 Articles 4 and 6; Dutton, above n 21, at 75.

44 Dutton, above n 21, at 75.

and its association with piracy for centuries,⁴⁵ and states' unwillingness to utilise it,⁴⁶ it is unclear whether its absence is fatal or favourable.⁴⁷

C. Regional Agreements

There are also three notable regional agreements which are also important in combating piracy: the Djibouti Code of Conduct which is a multilateral agreement between 20 states in the West Indian Ocean and Gulf of Aden;⁴⁸ the Yaoundé Code of Conduct, which is a multilateral agreement between 25 states in West and Central Africa;⁴⁹ and the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia,⁵⁰ which is a multilateral agreement between 20 contracting parties from states in Asia, Europe, Australia and the United States;⁵¹ and importantly, all seek to improve co-operation *to the fullest possible extent* amongst state parties to repress piracy.

It is the regional nature of these agreements that shows the fragmentation of the laws associated with criminalising piracy rather than any sense of universality, as states within the locality of some of the most dangerous piracy regions seek to deal with the issue themselves rather than tackle the issue universally.⁵² Reciprocally, the agreements also evidence the fact that no one state has the capacity to successfully monitor their maritime area alone, which requires the sharing of information, coordinated action and the improvement of states' capacity to "close down areas of vulnerability".⁵³

D. Conclusion

The conventions, treaties and codes of conduct which formalise the horizontal relationships between states – where mutual dependency, reciprocity and state sovereignty are paramount – along with an analysis of UNCLOS exposing that states' interests as selfish rather than selfless, the primacy of territorial sovereignty and piracy's transcending of national boundaries all support Boister's

45 Eugene Kontorovich "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation" (2004) 45 *Harvard International Law Journal* 183 at 184 and 190; Layton, above n 3; Devika Hovell "The Authority of Universal Jurisdiction" (2018) 29 *European Journal of International Law* 427 at 441; Matthew Garrod "The Emergence of 'Universal Jurisdiction' in Response to Somali Piracy: An Empirically Informed Critique of International Law's 'Paradigmatic' Universal Jurisdiction Crime" (2019) 18 *Chinese Journal of International Law* 551 at 552.

46 Kilpatrick, above n 17, at 3.

47 Joseph Isanga "Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes" (2010) 59 *American University Law Review* 1267 at 1270–1271.

48 International Maritime Organization *Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden* (Annex) C 102/14 (3 April 2009) (Report of the IMO Council); and IMO "The Djibouti Code of Conduct" (2019) <www.imo.org>.

49 International Regional Coordination Centre *Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa* (adopted March 2013, entered into force 25 June 2013) (Adopted in Yaoundé, Republic of Cameroon); Dryad Global "Yaoundé Code of Conduct Taking Shape in the Gulf of Guinea" <www.channel16.dryadglobal.com>.

50 *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia* (adopted 11 November 2004, entered into force 4 September 2006).

51 Nahush Paranjpye "Combating Piracy in Asia" Steamship Mutual <www.steamshipmutual.com>.

52 See Guilfoyle, above n 13, at 331.

53 Dryad Global, above n 49.

assertion that piracy is a transnational crime, as states attempt to balance collective interests while respecting state sovereignty.

IV. VERTICAL INTEGRATION – STATES’ COMMITMENT

As a transnational crime, piracy has an *indirect* system of liability – obliging states to criminalise an individual; rather than *directly* criminalising the individual through a central international arbitration mechanism. This means piracy’s international legal framework relies on the efficacy of states’ own domestic legal systems to repress piracy.⁵⁴ Subsequently, state’s capacity to repress piracy relies on the extent of their national jurisdictional boundaries as well as the adoption of the relevant provisions from the international legal framework into their own domestic legal systems. Therefore, this section of the paper will examine states’ jurisdictional boundaries which enable states to prosecute offenders; analyse the implementation and enforcement of the international legal framework into states’ own domestic legal systems; and explore the institutions encouraging greater vertical commitment.

A. Jurisdiction

The criminalisation of piracy has “limited practical effect unless the state enacting the crime establishes an adequate criminal jurisdiction over” piracy.⁵⁵ This requires national criminal law’s jurisdiction to expand beyond its own territorial boundary given that piracy occurs on the high seas – *an area beyond the territorial jurisdiction of every state*. A seminal discussion on states’ jurisdictional competence in *Lotus* established that states have extraterritorial jurisdiction “to acts which have taken place abroad” unless prohibited by international law.⁵⁶ However, in reality, the establishment of jurisdiction is not so straightforward given the importance of sovereign equality, territorial sovereignty and non-intervention which subsequently requires states to establish a sufficient nexus between itself and the crime.⁵⁷ The SUA Convention explicitly extends a state’s jurisdictional competence via the *active* and *passive personality principles* which form a nexus between the state and the offence either through the fact that a national of the state committed the offence or the victim was a national of the state,⁵⁸ along with the quasi-territorial competence because an offence occurs on board a ship flying the flag of the state.⁵⁹ Nevertheless, the expansion of states’ extraterritorial jurisdiction beyond these principles is a lot more indicative of the transnational nature of the crime of piracy.

54 Yvon Dandurand and Vivienne Chin “Implementation of Transnational Criminal Law: Issues and Challenges” in N Boister and RJ Currie (eds) *The Routledge Handbook of Transnational Criminal Law* (Routledge, Abingdon, 2015) 437 at 439.

55 Boister, above n 1, at 245.

56 Bahar, above n 23, at 18–19.

57 Boister, above n 1, at 247; *SS Lotus*, above n 2, at [44]–[46]; and United Nations Charter, arts 2(1), (4) and (7); *Libman v Queen* [1985] 2 SCR 178 at 183; Bo, above n 6, at 84.

58 Articles 6(1)(c) and (2)(b); Boister, above n 1, at 257 and 260.

59 Article 6(1)(a); Boister, above n 1, at 252–253.

1. *Universal jurisdiction – practical utility not global solidarity*

Contentiously, under customary international law and subsequently under UNCLOS, piracy is a universal jurisdiction crime.⁶⁰ *Universal jurisdiction* “confers jurisdiction on all states ... regardless of where the offence was committed, who committed it, and where the alleged offender is located”.⁶¹ The justification for universal jurisdiction is based on two rationales: firstly, to suppress offences which “shock humanity’s shared conscience or disturb international order”; and secondly, to suppress offences otherwise outside an effective jurisdiction.⁶² However, these rationales for justifying universal jurisdiction are a modern interpretation of the universality principle and are distinct from the rationale which originally made piracy a universal jurisdiction crime.⁶³

The source of piracy’s universal jurisdiction is properly attributable to the location in which the crime is committed rather than its being attributable to some universal moral distaste which contemporarily justifies universal jurisdiction crimes;⁶⁴ consequently, many scholars warn against justifying universal jurisdiction over crimes based on a comparative analysis with piracy.⁶⁵ Thus, although piracy was the paradigmatic universal jurisdiction crime, its *universality* has never been attributable to the modern construct of the universality principle. Accordingly, piracy must be distinguished from the contemporary ICL universal jurisdiction crimes, as its universality is *sui generis* because it is not associated with “a desire to develop global solidarity” but was rather developed in the interests of practical utility.⁶⁶

Strikingly, the contemporary rationale for universal jurisdiction is in no way concerned with respecting sovereign equality, territorial sovereignty and non-intervention, which have become evidently important within the horizontal development of the criminalisation of piracy and paramount within TCL. The contemporary universal jurisdiction requires states to act “as ‘agents of the international community’ to promote exclusively international community values”.⁶⁷ Conversely, when it comes to piracy, states are acting selfishly rather than selflessly, which is particularly evident upon an analysis of states’ implementation and enforcement of their jurisdictional competencies, discussed later.

2. *Aut dedere aut judicare*

The SUA Convention obliges⁶⁸ states to establish extraterritorial jurisdiction “based on the *aut dedere aut judicare* (extradite or prosecute) principle” which establishes jurisdiction because an offender is in a state’s territory and it has not extradited them.⁶⁹ Interestingly, the *aut dedere*

60 Article 105; and Garrod, above n 45, at 552.

61 Boister, above n 1, at 268; see also Princeton University *The Princeton Principles on Universal Jurisdiction* (Princeton University, New Jersey, 2001) at 23 and 28.

62 Boister, above n 1, at 268.

63 See Kontorovich, above n 45, at 205–207 and 210–211; see Hovell, above n 45; at 443.

64 Cryer, above n 5, at 57; Hovell, above n 45, at 441–443; Azubuike, above n 35, at 53; and *Layton*, above n 3, at 223.

65 Garrod, above n 45, at 562.

66 Boister, above n 1, at 269.

67 Garrod, above n 45, at 564.

68 See Makoto Seta “A Murder at Sea Isn’t Just a Murder! The Expanding Scope of Universal Jurisdiction Under the SUA Convention” in Patrick Chaumette (ed) *Espaces Marins: Surveillance et Prévention des Trafics en Mer* (Université de Nantes, France, 2016) 15 at 23.

69 Article 10; Boister, above n 1, at 264.

aut judicare principle can be recognised as a subsidiary universal jurisdiction based on the fact that if the treaty is universally adopted “it can close all jurisdictional gaps in the system” but is subsidiary because it is subsidiary “to another state’s jurisdiction”.⁷⁰ Though distinctively, if a state chooses not to extradite or prosecute there is no delegation to an international arbitration mechanism “which is what distinguishes this form of jurisdiction from absolute universality jurisdiction”.⁷¹ Consequently, states are very much dependent on the credibility of other states’ commitment to repressing piratical offences, which highlights how mutually dependent states are in combatting piracy as there is no other opportunity to penalise pirates beyond states’ own arbitration mechanisms.

3. *Protective personality*

Both UNLCOS⁷² and the SUA Convention⁷³ also extend states’ jurisdiction via the protective personality principle which permits states to establish jurisdiction over offences which violate the national interests of a state with the rationale behind this jurisdiction being primarily concerned with a state’s opportunity to help itself.⁷⁴ Advantageously, the protective personality principle provides “a practical solution to deal with jurisdictionally difficult offences” of which piracy is a paradigmatic example and given the importance of territorial sovereignty, it provides states with a more justifiable nexus to piratical offences outside of their own territorial jurisdiction.⁷⁵

B. *Implementation and Enforcement*

The efficacy of the international legal framework to repress piracy relies on the states’ adoption of the necessary sanctions.⁷⁶ Although the ratification of a convention can seem like credible commitment to the repression of piracy, this is just a starting point.⁷⁷ Notably, neither UCLOS nor the SUA Convention “have a legislative requirement in their framework”⁷⁸ which has meant that most states have not incorporated much of the international legal framework into their domestic laws which has been largely left to the UN General Assembly, SC and the IMO to encourage “States to incorporate piracy in their respective legislation”.⁷⁹

70 Boister, above n 1, at 266.

71 Boister, above n 1, at 266.

72 See *United States v Bravo* 489 F 3d 1 (1st Cir 2007) at 7–8.

73 Article 6(2)(c).

74 Boister, above n 1, at 262.

75 Boister, above n 1, at 264.

76 Dandurand and Chin, above n 54.

77 Dandurand and Chin, above n 54, at 441.

78 Waseem Qureshi “The Prosecution of Pirates and the Enforcement of Counter-Piracy Laws Are Virtually Incapacitated by Law Itself” (2017) 19 San Diego International Law Journal 95 at 115; and Ashley Roach “Countering Piracy off Somalia: International Law and International Institutions” (2010) 104 American Journal of International Law 397 at 414.

79 See *Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships* IMO Res 1025, A/26/Res/1025 (2010) at [5]; *Piracy and Armed Robbery against Ships in Waters Off the Coast of Somalia* IMO Res 1044, A/27/Res/1044 (2010) at [7]; *Oceans and the Law of the Sea* GA Res 65/37, A/Res/65/37 (2011) at [5]; *Resolution 1918* SC Res 1918, S/Res/1918 (2010) at [2]; *Resolution 1851*, above n 25, at 2: recognises domestic legislation’s lack of capacity hindering “more robust international action against pirates off the coast of Somalia”.

With a number of large states adopting the relevant piracy-legislation including the United States,⁸⁰ United Kingdom,⁸¹ Canada,⁸² New Zealand,⁸³ Australia,⁸⁴ few states have ever actually prosecuted piracy.⁸⁵ It is submitted that the impunity enjoyed by pirates is not borne from “significant jurisdictional obstacles in international law in prosecuting pirates” but rather arise from states’ lack of credible commitment to repressing piracy.⁸⁶ When the responsibility to prosecute belongs to every state, no state wants to burden the costs of combating such behaviour unless it has “immediate national interests at stake” highlighting the importance of states’ own interests rather than their concerns being on behalf of the international community as a whole.⁸⁷ This is consistent with Hallwood’s contentions that the international legal framework developed to criminalise piracy is “not beholden to moral obligation[s]” but is rather the careful calculation of the minimum level of cooperation which achieves optimal deterrence.⁸⁸ Therefore, due to the overlapping criminal jurisdictions, states can free-ride off the positive externalities – maritime safety – of another state’s enforcement of piracy laws, as enforcement is ultimately a public good.⁸⁹ This situation is particularly evident in terms of piracy off the coast of Somalia, when pirates that are captured (and not released⁹⁰), they are sent to “Kenya for trial pursuant to separate arrangements between Kenya and the European Union, the United Kingdom, and the United States”, which ultimately violates the cooperative basis which is crucial to the criminalisation of piracy and seems exploitative rather than collegial.⁹¹

C. Institutions

The contemporary lack of commitment by states to prosecute pirates has led to the development of international institutions to improve states’ strategy, capacity and commitment to combating piracy. International institutions such as the IMO, UN Office on Drugs and Crime (UNODC) and the SC

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- 80 See Crimes and Criminal Procedure 18 USC §§ 1651–1653 and 2280; Mazyar Ahmad “Maritime Piracy Operations: Some Legal Issues” (2020) 4 *Journal of International Maritime Safety, Environment Affairs, and Shipping* 62 at 65.
- 81 Aviation and Maritime Security Act 1990, pt II; Merchant Shipping and Maritime Security Act 1997, s 26; and Arabella Thorp *Preventing and Prosecuting Piracy at Sea: Legal Issues* (House of Commons Library, Standard Note 6237, February 2012) at 14.
- 82 Criminal Code RS C 1985 c C-46, ss 74–75.
- 83 Crimes Act 1961, s 92.
- 84 Crimes Act 1914, s 51; Crimes at Sea Act 2000; see Australian Border Force *Guide to Australian Maritime Security Arrangements* (Maritime Border Command Canberra, September 2020) at 111.
- 85 Thorp, above n 81, at 13; *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia* UN Doc S/2011/30 (2011); and *Report of the Secretary-General on the Modalities for the Establishment of Specialized Somali Anti-Piracy Courts* UN Doc S/2011/360 (2011).
- 86 Douglas Guilfoyle “Prosecuting Pirates: The Contact Group on Piracy off the Coast of Somalia, Governance and International Law” 4 *Global Policy* 73 at 74.
- 87 Isanga, above n 47, at 1271.
- 88 Paul Hallwood “Piracy and the Law of the Sea: An Empty Vessel?” (2013) 33 *SAIS Review of International Affairs* 117 at 119 and 121.
- 89 Hallwood, above n 88, at 121 and 124.
- 90 See Roach, above n 78, at 403.
- 91 Roach, above n 78, at 403–404; and Rebecca Fantauzzi “Rascals, Scoundrels, Villains and Knaves: The Evolution of the Law of Piracy from Ancient Times to the Present” (2011) 39 *International Journal of Legal Information* 346 at 380.

have all been instrumental in the development and support of the international legal framework to combat piracy.⁹²

The IMO acts as “the global standard-setting authority for the safety, security and environmental performance of international shipping”.⁹³ With a “mandate to make trade and travel by sea as safe as possible”, the IMO has developed a number of anti-piracy measures such as the SUA Convention and continues to assist “Member States seeking to develop their own national or regional measures to address the threat of piracy”, which has also seen the development of the Djibouti Code of Conduct.⁹⁴ Similarly, UNODC’s Global Maritime Crime Programme’s (GMCP) works “to improve the capabilities and capacity of the criminal justice systems of states” so the prevention and prosecution of maritime crimes are effective.⁹⁵ With teams in the Horn of Africa, Indian Ocean, Pacific Ocean, Latin America and the Caribbean and Atlantic and partnerships with the European Union and Japan, UNODC’s GMCP has significant global reach as it too helps to facilitate greater cooperation and capacity within its regions.

The SC’s role has also been incredibly important in terms of the normative development of piracy laws.⁹⁶ Its involvement in the suppression of piracy, focussing on the coast of Somalia in 2008, through its resolutions under Chapter VII, have required states to actively improve their capacity to credibly commit to the suppression of piracy.⁹⁷ Pursuant to *Resolution 1851*, the Contact Group on Piracy off the Coast of Somalia (CGPCS) – an ad hoc international forum – was established, seeking “to coordinate international efforts in the fight against piracy off the coast of Somalia”.⁹⁸ Bringing together nearly 80 states and international organisations, it “has acted as a lynchpin in a loosely structured counter-piracy coalition of governments, international organisations, military alliances and the private sector” to support the monitorisation, defence, legal capacity and establishment of capacity-building programmes.⁹⁹

Admittedly, as much as these institutions’ work seems universal, the fragmentation of the regions in which they cover, along with the efforts to facilitate more meaningful horizontal cooperation amongst states and the support provided to improve states’ vertical capacity to penalise offenders is quintessential of TCL, as the institutions work on the coordination amongst the dimensions as well as states.

92 Roach, above n 78, at 409.

93 IMO “Introduction to IMO” <www.imo.org>.

94 IMO “Maritime Security” <www.imo.org>.

95 Peter Allan and others *Mid-term Cluster Independent In-depth Evaluation: Global Maritime Crime Programme* (UNODC, October 2020) at x.

96 See *Resolution 1816*, SC Res 1816, S/Res/1816 (2008); *Resolution 1838*, SC Res 1838, S/Res/1838 (2008); *Resolution 1844*, SC Res 1844, S/Res/1844 (2008); *Resolution 1846*, above n 25; *Resolution 1851*, above n 25; *Resolution 1897*, SC Res 1897, S/Res/1897 (2009); *Resolution 1950*, SC Res 1950, S/Res/1950 (2010); *Resolution 1918*, above n 79; and *Resolution 1872*, SC Res 1872, S/Res/1872 (2009).

97 See *Resolution 1816*, above n 96; *Resolution 1846*, above n 25; and *Resolution 1851*, above n 25; *Resolution 1897*, above n 96; *Resolution 1918*, above n 79 (not adopted under ch VII but encourages states to cooperate); see also Roach, above n 78, at 413.

98 Multi-Partner Trust Fund Office “TF to Support Initiatives of States Countering Piracy off the Coast of Somalia” <www.mptf.undp.org>; and *Resolution 1851*, above n 25, at [4].

99 Henk Swartouw and Donna Hopkins “The Contact Group on Piracy off the Coast of Somalia: Genesis, Rationale and Objectives” in Thierry Tardy (ed) *Fighting Piracy off the Coast of Somalia: Lessons Learned from the Contact Group* (EU Institute for Security Studies, Paris, 2014) 11 at 14.

V. CONCLUSION

A collective, though not universal, interest in improving maritime safety is reliant on international cooperation and states' independent commitment. Cooperation requires the horizontal distribution of authority and power among states through suppression conventions, treaties and codes of conduct which formalise multilateral cooperative efforts to combat piracy. However, alone cooperative efforts do not suffice to repress piracy, with piracy's repression largely contingent on the credibility of states' own commitment in adopting the necessary provisions from the international legal framework to prosecute offenders in the absence of a central international arbitration mechanism. Both UNCLOS and the SUA Convention formalise the horizontal interstate relationships, developing not only criminal offences but also the appropriate jurisdictional boundaries, as they balance state sovereignty with collective maritime safety interests, notwithstanding piracy being the paradigmatic universal jurisdiction crime based on practical utility rather than any sense of solidarity. Consequently, with states' interests being selfish rather than selfless, a subsequent lack of credible commitment in repressing piracy has meant that international institutions play an important role in repressing piracy as they work both between states' and piracy's horizontal and vertical dimensions, facilitating greater cooperation between states and capacity within states. Ultimately, Boister's assertions are correct as piracy is a transnational crime, which responds to states' selfish interests in a locality which justifies external intervention in the internal affairs of a state.

THE PUBLIC BENEFIT OF INDIGENOUS CHARITIES: WHAT CAN NEW ZEALAND LEARN FROM THE AUSTRALIAN AND CANADIAN APPROACHES?

BY MADDISON RUSSELL*

I. INTRODUCTION

At their core, charities provide “services that fulfil social and economic needs” not otherwise met.¹ This is especially true when novel public needs arise; charities are often the most efficient means to adequately address them.² The significance of this cannot be undervalued. In New Zealand, non-profit institutions contributed \$8.1 billion to GDP for the financial year ending March 2018.³ But despite charities’ substantial contributions to society, important discussion arises when it comes to indigenous altruism and how it interplays with Western notions of “charity”. Legal charity “does not align with the traditional worldviews of [indigenous] communities, according to which there is no sharp distinction between family and public life”.⁴ However, indigenous groups are some of the most socially, politically and economically disadvantaged peoples, stemming from colonisation and institutional oppression. Generally, Aboriginal peoples will experience lower levels of education, lower average income, poor general health and higher unemployment rates.⁵ The question thus arises whether indigenous organisations are likely to meet the legal requirements of charity; namely, can the public benefit of their purposes be adequately established under law?

Relationships between the state and indigenous groups are comparable in New Zealand, Australia and Canada, yet they also share similar charity law common law principles. Australia has a plethora of case law regarding indigenous charities, which show a pattern of progressiveness. Although Canada is generally viewed as conservative in its approach to charity law,⁶ Canadian courts have adopted a relatively broad interpretation of indigenous charities and the public benefit of such organisations in the limited cases available on this content matter. New Zealand has

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- 1 Fiona Martin “The Legal Concept of Charity in the Context of Australian Taxation Law: the Public Benefit and Commercial Activity, Important Issues for Indigenous Charities” (2010) 25 *Austl Tax F* 275 at 275.
- 2 Deborah Lewis “A Principled Approach to the Law of Charities in the Face of Analogies, Activities and the Advancement of Education” (2000) 25 *Queen’s LJ* 679 at 680.
- 3 Charities Services “Research into charities” <www.charities.govt.nz>.
- 4 Matthew Harding “Charity and Law: Past, Present and Future” (2020) *Singapore J Legal Stud* 564 at 574–575.
- 5 See Kerry O’Halloran, Myles McGregor-Lowndes and Karla Simon *Charity Law and Social Policy: National and International Perspectives on the Functions of the Law Relating to Charities* (Springer, New York City, 2008) vol 10 at 421; and Kerry O’Halloran *Charity Law and Social Inclusion: An International Study* (Routledge, Oxford, 2006) at 17.
- 6 See Bruce Chapman, Jim Phillips and David Stevens (eds) *Between State and Market: Essays on Charities Law and Policy in Canada* (McGill-Queen’s University Press, Kingston, 2001).

recognised the importance of adapting charity law to the needs of Māori, yet has arguably halted its progress in the registration of Māori charities within the past decade.

In a broader sense, New Zealand and Australia's perceivably progressive nature are portrayed by their tendency to adapt when social expectation demands it.⁷ This has been exemplified by developments to the political purposes doctrine. The doctrine has evolved in New Zealand (and Australia to an even greater extent), to consider that political purposes and charitable purposes can no longer be viewed as mutually exclusive.⁸ Australia has gone so far to say that free political expression in the context of charity law is of great public benefit for constitutional reasons.⁹

Thus, this essay will comparatively examine the New Zealand, Australian and Canadian approaches to indigeneity within charity law, and how developments to the political purposes doctrine may broaden the scope for certain indigenous organisations to obtain charitable status. Firstly, the historical context of New Zealand's charity law will be discussed, followed by an examination of how New Zealand's two-fold public benefit test has been interpreted by the courts and Charities Services with regards to Māori charities. There will then be analysis of the relative approaches of Canada and Australia to indigeneity within charity law. New Zealand's approach will be comparatively discussed throughout, in reference to relevant and analogous Canadian and Australian cases. The essay will end with discussion of recent changes to the political purposes doctrine and how this may be beneficial to indigenous organisations seeking charitable status, when their purposes include advocating for political change. Ultimately, it will be argued that New Zealand can learn from both the Australian and Canadian approaches; whilst Canada and Australia have noted the "special role" of indigenous peoples within society, New Zealand's focus on the concept of "racial harmony" and benefit to *all* New Zealanders potentially hinders Māori-specific organisations' charitable purposes. Evolution of the political purposes doctrine may broaden the scope of indigenous organisations' charitable purposes, however New Zealand's approach to advocacy may not yet be developed enough to ameliorate the likelihood of Māori entities obtaining charitable status.

II. NEW ZEALAND'S CHARITY LAW

A. *Historical Context and the Heads of Charity*

As a commonwealth state, New Zealand's charity law originates in the common law of England and Wales. It can be traced back to the preamble to the Statute of Elizabeth 1601 (formally known as the Statute of Charitable Uses of 1601), which contains a non-exhaustive list of charitable purposes including the relief of aged people, schools of learning, and repair of bridges, ports and highways.¹⁰ The preamble is a flexible construct,¹¹ however its purposes were later condensed in the *Pemsel* case, giving rise to four heads of charity: the advancement of education; advancement of religion; relief of poverty; and any other purposes beneficial to the community not falling under the

7 See Juliet Chevalier-Watts "The Operation of Public Benefit in New Zealand – Meeting Contemporary Challenges?" (2015) 17 *The Charity Law and Practice Review* 173; and Harding, above n 4.

8 Chevalier-Watts, above n 7, at 187.

9 Harding, above n 4, at 573.

10 Statute of Charitable Uses 1601 (Eng) 43 Eliz 1 c 4, preamble.

11 Chevalier-Watts, above n 7, at 174.

preceding heads.¹² These heads remain good law in New Zealand, codified in s 5(1) of the Charities Act 2005. All charitable entities' purposes must fall within one of the four heads, and as such, they are "still the very foundation of charitable trust law in contemporary times".¹³

In order to determine whether a charity's purpose falls under the fourth head (any other matter beneficial to the community), a two-stage test is applied: is the purpose beneficial to the community; and do the purposes fall within the spirit and intendment of the preamble to the Statute of Elizabeth?¹⁴ For the purposes of the present essay, the majority of case law will fall under this fourth head. Indigenous charities often present novel purposes, and so the fourth head operates as a "catch-all" category for purposes not previously addressed by the courts.¹⁵ However, the relief of poverty and advancement of education are often relevant too, due to the disproportionate likelihood of indigenous communities to be affected by social and political disadvantages. These disadvantages can manifest as experiences of poverty or educational limitations, whilst social services and support can often be harder for indigenous peoples to access.¹⁶ For this reason, the relief of poverty, the advancement of education and any other charitable purposes tend to underly most indigenous-based charities.

B. *The Assessment of Public Benefit*

Even where an entity's purposes fall within the recognised heads of charity, this does not qualify the entity as a charity by law. Charities are awarded benefits, most notably tax exemptions, on the basis that they "exist to benefit the public and relieve governments of the obligation to provide services".¹⁷ As such, all registered charities must operate for exclusively charitable purposes,¹⁸ which in turn must be of actual benefit to the public.¹⁹ An entity that awards "private pecuniary profit" to any individual does not operate exclusively for charitable purposes at law.²⁰

The public benefit test is two-fold: whether the purposes confer a benefit on the public or a section of it (the qualitative aspect); and whether the persons eligible to benefit constitute the public or a sufficient section of it (the quantitative aspect).²¹ There is a presumption of public benefit for the first three heads of charity, unless the contrary can be shown.²² This stems from recognition that the public benefit of relieving poverty and advancing education or religion will be

12 *Commissioners for Special Purposes of Income Tax v Pemsell* [1891] AC 531 (HL) [*Pemsell*] at 583.

13 Juliet Chevalier-Watts "Charitable Trusts and Political Activity: Time for a Change?" (2011) 19 Wai L Rev 145 at 145.

14 *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA) at 157; affirmed in *Re Tennant* [1996] 2 NZLR 633 (HC) at 638.

15 Gino Dal Pont *Charity Law in Australia and New Zealand* (Oxford University Press, Melbourne, 2000) at 172.

16 John Coates and others *Indigenous Social Work Around the World: Towards Culturally Relevant Education and Practice* (Taylor & Francis Group, Oxfordshire, 2018) at 50–51.

17 Donald Poirier *Charity Law in New Zealand* (Department of Internal Affairs, Wellington, 2013) at 121.

18 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 691.

19 Fiona Martin and Audrey Sharp *The Family Connection when a Charity is for the Advancement of Indigenous Peoples: Australia and New Zealand Compared* (Native Title Research Unit Volume 4, Issue Paper No 4, November 2009) at 7.

20 Charities Act 2005, s 13(1)(b).

21 *New Zealand Society of Accountants*, above n 14, at 152.

22 *Re Education New Zealand Trust* (2010) 24 NZTC 24,354 at [24]; *Re Greenpeace of New Zealand Inc* [2014] NZSC 105 at [26].

“prima facie apparent”.²³ On the other hand, the fourth head has no presumption so public benefit must be explicitly demonstrated under the test.

1. The qualitative aspect of “public benefit”

As charities must operate exclusively for charitable purposes, the qualitative branch will fail if non-charitable purposes are more than merely ancillary to a charitable purpose.²⁴ New Zealand courts have established that non-charitable ancillary purposes constituting more than 30 percent of a charity’s services will mean the purposes are no longer considered of public benefit.²⁵ Nonetheless, there is an “open recognition of a presumption ... in favour of charity” in New Zealand.²⁶ That is to say, the courts lean in favour of finding entities charitable at law, due to their “distinct importance in socio-economic terms”.²⁷ This is, of course, unless the public benefit of such entities is too remote.²⁸

2. The quantitative aspect of “public benefit”

The vague nature of the term “public” or a “sufficient section of it” has long been criticised.²⁹ However, it is well established that although the number of beneficiaries need not be substantial, “mere numbers cannot raise a family or private benefaction into the class of charitable gifts”;³⁰ a group of beneficiaries connected by familial or personal relationships will not constitute a public section of the community. This principle was applied and extended in *Oppenheim v Tobacco Securities Trust Co Ltd*, where Lord Simonds held that when beneficiaries are distinguished from the community by virtue of their relationship to a particular individual, the public benefit test will fail; the blood tie rule.³¹ In other words:³²

[a] group of persons may be numerous, but, if the *nexus* between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.

Those beneficiaries will be regarded as private individuals, or at the very least a “privileged and closed group to which one is admitted either by birth, employment or some other privilege”.³³ The *Oppenheim* principle was affirmed in New Zealand in *Molloy v Commissioner of Inland Revenue* and thus remains good law.³⁴ Nevertheless, as will be discussed below, exceptions have been made.

23 Gino Dal Pont *Law of Charity* (Lexis Nexis, New South Wales, 2010) at 68.

24 Charities Act 2005, s 5(3).

25 *Re Education New Zealand Trust*, above n 22, at [43]; affirmed in *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20,032 at [61]–[62].

26 *Re Collier (Deceased)* [1998] 1 NZLR 81 (HC) at 95.

27 At 95.

28 See *Canterbury Development Corp v Charities Commission* [2010] 2 NZLR 707 (HC).

29 See *Re Compton* [1945] 1 All ER 198 (CA) at 201; “No definition of what is meant by a section of the public has, so far as I am aware, been laid down”.

30 At 200.

31 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, [1951] 1 All ER 31 (HL) at 34.

32 At 34.

33 *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 (HC) at [55], citing *Strathalbyn Show Jumping Club Inc v Mayes* [2001] SASC 73, [2001] 79 SASR 54.

34 *Molloy v Commissioner of Inland Revenue*, above n 18.

III. INDIGENEITY IN NEW ZEALAND CHARITY LAW

Māori, as the indigenous peoples (tāngata whenua) of New Zealand, are subject to the traditional common law principles of charity law.³⁵ However, the blood tie relationship test as per *Oppenheim* has been a notable barrier for Māori-based charities. This was exemplified in *Arawa Māori Trust Board v Commissioner of Inland Revenue*.³⁶ The Arawa Māori Trust's purposes were to promote health, social and economic welfare, and education for its beneficiaries, by aiding the installation of water supplies and sanitation works; making grants for the "relief of indigence";³⁷ establishing Māori meeting houses and maraes; establishing hostels for temporary or permanent accommodation; and aiding the establishment of schools and the promotion of Māori practices such as the arts, language and Māori lore. Although theoretically falling under the fourth head of charity, the court held the purposes were "so wide and vague" that the exercise of them would not necessarily be restricted to charitable purposes, whilst purposes such as the establishment of hostels and maraes, to name a few, were "clearly not charitable" nor ancillary.³⁸

The beneficiaries were members of the Arawa tribe who could trace their ancestry back to someone living in the defined area (ranging from the Bay of Plenty down to Reporoa) as far back as the 19th century. Following *Oppenheim*, the court noted that the "nexus between the beneficiaries is 'their personal relationship to the several propositi'" within the defined area.³⁹ The beneficiaries were regarded as a "fluctuating body of private individuals" and thus the public benefit test was not satisfied.⁴⁰ No consideration was given to the fact Māori communities are traditionally centralised by their ancestral ties.

However, the seminal case of *Latimer v Commissioner of Inland Revenue* addressed this concern directly, whilst also recognising the qualitative public benefit of a Māori-centric entity.⁴¹ Tree crops were sold to third party commercial purchasers, as per an agreement between the Crown, the New Zealand Māori Council and the Federation of Māori Authorities Incorporated. The revenue from sales was then fed into a fund administered by a Trust, which would use the fund's interest to aid Māori in the "preparation, presentation and negotiation of claims before the Waitangi Tribunal".⁴² In application of the public benefit test's qualitative branch (under the fourth head of charity), Blanchard J emphasised that the trust need not have been established for charitable purposes, "merely that the income in question be received for such purposes".⁴³ The purpose for which the funds would be used was "high-quality historical research" needed to present a case before the Waitangi Tribunal.⁴⁴ Such research is not only educational, but integral to successfully

35 Juliet Chevalier-Watts *Law of Charity* (Thomson Reuters, Wellington, 2014) at 66.

36 *Arawa Māori Trust Board v Commissioner of Inland Revenue* (1961) 10 MCD 391.

37 At 394.

38 At 395–396.

39 At 396, citing *Oppenheim v Tobacco Securities Trust Co Ltd*, above n 31 (emphasis omitted).

40 At 397.

41 *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA).

42 At 195.

43 At [28].

44 At [37].

settling grievances held by a significant portion of New Zealanders. This would in turn benefit New Zealand society at large through aiding “racial harmony”.⁴⁵

With regard to the quantitative branch of the public benefit test, Blanchard J held the House of Lords in *Oppenheim* could not have “had in its contemplation tribal or clan groups of ancient origin” when forming the blood tie rule.⁴⁶ The Court made reference made to *Dingle v Turner*’s criticism of *Oppenheim*; namely, that whether a group constitutes a sufficient section of the public is a “question of degree” and dependent on the trust’s purposes and context.⁴⁷ Considering New Zealand’s context, Māori relationships of common descent present a natural exception to the rule that beneficiaries with familial links cannot constitute a sufficient section of the public. For this reason, the Court affirmed that Māori can form a section of the public for the purposes of charity law, “both together and in their separate iwi or hapū groupings”.⁴⁸

The importance of the *Latimer* decision was and is significant; it indicates that the “law had moved from the relatively clear position that had existed under [*Re Compton* and *Oppenheim*]”,⁴⁹ by separating indigenous claims from English jurisprudence.⁵⁰ This is not only consequential for how the courts may approach Māori matters, but is also demonstrative of the courts’ ability to adapt to social conditions and evolve with social changes.⁵¹ In doing so, a “special class” of beneficiaries was created,⁵² giving explicit recognition to the diversity of communities within New Zealand. Fundamentally, the public benefit requirement was “insufficiently responsive to values emanating from outside the mainstream of the English common law”,⁵³ and as such, *Latimer* provided attention to the significance of Māori communities and their place within New Zealand society more generally.

Following *Latimer*, the Charities Act 2005 now stipulates that where a trust would fail the public benefit test only on the basis that the beneficiaries are related by blood, the public benefit test may indeed be met.⁵⁴ The provision thus underpins the *Latimer* approach and codifies the *Oppenheim* exception.⁵⁵

A. Post-*Latimer* Registration Decisions: Has Anything Changed?

Naturally, numerous Māori entities have applied for charitable status with the Department of Internal Affairs – Charities Services (Charities Services) since *Latimer*. The registration decisions, made by the Charities Registration Board (the Board) (including decisions made by Charities

45 At [37] and [40].

46 At [38].

47 At [38], citing *Dingle v Turner* [1972] AC 601 at 624.

48 At [38].

49 Audrey Sharp “The Taxation Treatment of Charities in New Zealand with Specific Reference to Maori Authorities including Marae” (2010) 16 NZJTL 177 at 186.

50 Chevalier-Watts, above n 7, at 178.

51 At 179.

52 Audrey Sharp and Fiona Martin “Charitable Purpose and the Need for a Public Benefit: A Comparison of the Tax Treatment of Australian and New Zealand Charities for Indigenous Peoples” (2009) 24 Austl Tax F 207 at 216.

53 *Latimer v Commissioner of Inland Revenue*, above n 41, at [38].

54 Charities Act 2005, s 5(2)(a).

55 Chevalier-Watts, above n 7, at 180.

Services' predecessor, the Charities Commission), are not binding on the courts. They do, however, provide crucial insight into how the common law is applied by Charities Services to its applications received from entities seeking charitable status.

1. *Unsuccessful registrations*

By and large, many Māori charities in recent years have not managed to attain charitable status. In 2010, the Korako Karetai Trust applied to the Charities Commission for registration. Its objects included the negotiation and return of lands and taoka to Korako Karetai's descendants (102 living ancestors at the time), as well as provision for the "wellbeing of the descendants of Korako Karetai through the administration, guidance, and management of the spiritual, cultural, moral, social educational and economic affairs of the whānau".⁵⁶ In consideration of the purposes' charity, it was held there was no "evidence of a disadvantage suffered" by the beneficiaries⁵⁷ under relief of poverty, nor was the negotiation of land pursuant to the "advancement of education". The Charities Commission cited *Latimer's* assertion that presenting a case before the Waitangi Tribunal is of public benefit, yet distinguished it on the basis that the Korako Karetai Trust was instead disputing a legislated Deed of Settlement. This was held to be beyond the "spirit and intentment" of the preamble to the Statute of Elizabeth, whilst conferring a private benefit only.⁵⁸ In terms of the quantitative aspect of the public benefit test, the Charities Commission held the Trust would only provide benefit to "a limited number of people who are descendants of one individual" – an insufficiently open section of the public.⁵⁹ For these reasons, the public benefit test failed on both limbs.

Similarly, the Nga Uri O Wharetakahia Waaka Whānau Land Trust's objects were to hold and administer the Trust's land, money and assets, for the purposes of promoting the health, social, cultural and economic welfare of the descendants of Wharetakahia (Piwikipi) Waaka.⁶⁰ The beneficiaries would include around 20 immediate whānau members, as well as rural and urban Tuhoe community members.⁶¹ The Board held the purposes were not exclusively charitable, with the promotion of "social welfare", "economic welfare" and "general advancement of life" not generally considered charitable nor of sufficient public benefit unless specific circumstances existed.⁶² In particular, the Trust's housing scheme subsidisations and establishment of hostels were not in pursuit of charitable purposes unless the beneficiaries were clearly defined and in particular need of assistance.⁶³ The Board further held that the blood tie relationships among the whānau meant they did not constitute a sufficient section of the public, and any benefits conferred upon the wider community were not "exclusively altruistic".⁶⁴ Thus, as with the Korako Karetai Trust, the beneficiaries did not constitute a "sufficient section of the public".

56 *Registration Decision: Korako Karetai Trust* Decision No: 2010-18, 23 September 2010 at [2].

57 At [47].

58 At [72].

59 At [86].

60 *Registration Decision: Nga Uri O Wharetakahia Waaka Whānau* NGA42808 Decision No: 2012-4, 19 November 2012.

61 At [7].

62 At [19].

63 At [21]–[22]. Please note, the Commission did note that the establishment of hostels may be charitable if coupled with the purpose of relieving poverty (or another relevant purpose).

64 At [40].

Unlike the Nga Uri O Wharetakahia Waaka Whānau Land Trust’s clarification that beneficiaries were both whānau and the wider community, the Korako Karetai Trust referenced “descendants” more broadly. *Latimer* identified that hapū and iwi may constitute a sufficient section, but did not mention the place of “whānau” in such considerations. Despite its ambiguity, it appears the Board interpreted “descendants of Korako Karetai” to be whānau rather than hapū, although this analysis was not provided in the decision. Furthermore, it is unclear whether the Board would have regarded the wider community beneficiaries in the Nga Uri O Wharetakahia Waaka Whānau Land Trust as constituting a “sufficient section of the public”, had the benefits conferred been “exclusively altruistic”. Compare this with the Mokorina Whānau Trust, deregistered by the Charities Commission in 2011. This Trust had only provided benefits to five whānau members within the last few years of its operation, whilst the only need identified was that the “whānau was having a difficult time”.⁶⁵ It was held that the class of beneficiaries did not constitute a sufficient section of the community.⁶⁶ This decision appears to be more in line with *Oppenheim* and the *Latimer* exception; the number of beneficiaries was negligible and only consisted of five immediate whānau members. Comparatively, the Nga Uri O Wharetakahia Waaka Whānau Land Trust identified the wider community within its beneficiaries, yet little consideration was given to the effect this may have on meeting the quantitative branch of the public benefit test.

In closer examination of the qualitative branch of the public benefit test, the Te Awe (Wellington Māori Business Network) Incorporated’s stated purpose was to “promote, assist and encourage Māori in business, particularly in the greater Wellington region”,⁶⁷ under the heads of advancement of education, relief of poverty, and any other purpose beneficial to the community. This would aim to minimise Māori welfare dependency and aid micro-businesses (which research shows more often than not will fail). The provision of mentoring, networking opportunities and educational training programmes were central activities for this purpose. Nevertheless, the Charities Commission held the beneficiaries did they possess an “identifiable need” nor were in need of relief.⁶⁸ No “disadvantage” experienced by Māori business owners or potential owners had been clearly identified by the organisation, and as such, the first limb of the public benefit test could not be met; the benefit was “private” and the public benefits of encouraging Māori in business were regarded as “too remote”.

A comparable result occurred in the Te Kaporangi Charitable Trust registration decision. This Trust aided a small, elite group of Māori and Pacific Island athletes in their pursuit of professional sports careers through the establishment of a “customised high performance training program” that centres on preparing young athletes to excel in their relative sports.⁶⁹ The Charities Commission noted that while sport and leisure may be charitable when furthering other charitable purposes, the Te Kaporangi Charitable Trust only conferred health benefits on private individuals, not to the advancement of “the health and physical well-being of Māori and Pacific Island populations”.⁷⁰

65 *Deregistration Decision: Mokorina Whānau Trust* CC40304 Decision No: D2011-4, 25 May 2011 at [26].

66 At [39]–[41].

67 *Registration Decision: Te Awe (Wellington Māori Business Network) Inc* Decision No: 2010-22, 20 October 2010 at [3].

68 At [31].

69 *Registration Decision: Te Kaporangi Charitable Trust* Decision No: 2011-9, 16 August 2011 at [5].

70 At [44].

As such, both the Te Awe and Te Kaporangi organisations provided benefit to a certain group of individuals, to indirectly benefit the wider Māori community. The Charities Commission disagreed in both instances. The public benefit in Te Kaporangi Charitable Trust is arguably more remote, as the Trust specified it would not focus on community benefits until the high performance training programme was successfully implemented.⁷¹ However, the Te Awe organisation's purposes acknowledged that Māori often experience economic disadvantage, either through dependency on welfare or lack of access to knowledge on business start-ups. Perhaps the organisation should have provided further research pertaining to such systemic disadvantages whilst noting that aiding Māori businesses will benefit Māori more generally. Nonetheless, the Charities Commission was quick to note that Māori business owners do not face an identifiable disadvantage.

2. Successful registrations

Despite the unsuccessful applications, there are several Māori charities that have met the public benefit test. The Aotea Māori Trade Training Charitable Trust is one such example. Although no registration decision is available, there is information available pertaining to its summarised charitable purposes; namely, to advance education and thereby reduce poverty through providing training, apprenticeship development and the like under a kaupapa Māori framework.⁷² This is for the purpose of aiding further education and training (and encouraging entrepreneurship) for any participants who wish to learn within a kaupapa Māori program. It is comparable to the Te Awe's business mentorship purpose, yet a key distinguishing feature is that the Aotea Māori Trade Training Charitable Trust does not explicitly require that beneficiaries are Māori whilst Te Awe does. Aotea Māori also focuses on young people entering the workforce and who may feel like traditional tertiary education is less accessible, yet Te Awe focuses on adults who wish to progress with their personal business. At face value, it is evident that Aotea Māori is of greater public benefit, but both Trusts ultimately strive for the same ends.

Another successfully registered Māori charity is the Manukorihi Pā Reserve Trust. Its purpose is to advance the education of visiting groups to the Pā, who are hosted "to hui and ... experience tikanga and mātauranga (knowledge) Māori".⁷³ Charities Services only provides limited information on the Trust's charitable purposes and beneficiaries (although those listed in a general sense include children; migrants; refugees; and religious groups⁷⁴). Nonetheless, its educational benefit is open to *all* peoples interested in learning about Māori, rather than providing educative services to Māori themselves.

On balance, these registration decisions appear to favour entities that have the potential to benefit *all* New Zealanders, rather than Māori specifically. In 2019, Te Hunga Rōia Māori o Aotearoa (Māori Law Society) submitted recommendations regarding possible modernisation of the Charities Act 2005. Notably, they held the narrow definition of charitable purpose presents severe limitations for Māori activities that address particular needs within Māori communities,

71 At [5].

72 Charities Services *Aotea Māori Trade Training Charitable Trust Application Record* (Registration No: CC58011, 1 July 2020).

73 Charities Services *Sector Showcase: Manukorihi Pā Reserve Trust* (August 2020) <www.charities.govt.nz>.

74 Charities Services "Charity Summary – Manukorihi Pā Reserve: Purpose and Structure" <www.register.charities.govt.nz>.

including housing initiatives, language revitalisation and economic development programs.⁷⁵ Ultimately, Te Hunga Rōia Māori argued that these limitations reflect an attempt to “fit Māori into a Pākehā framework”.⁷⁶

It is unclear why Charities Services have not always striven to find public benefit in post-*Latimer* Māori-centric entities. However, it is arguable that it indicates a failure to account for systemic and institutionalised disadvantages faced by Māori. These are inequalities that, historically speaking, have stemmed from the alienation of land and resources, as well as Māori migrations to urban areas where poor housing and low employment opportunities have often hindered development.⁷⁷ That is not to say all Māori are in an inherent need of aid, but since the 1980s, the notion of ‘biculturalism’ cemented its place in New Zealand government (formally acknowledging Māori and Pākehā cultural differences).⁷⁸ The registration decisions above, however, reflect a restrictive approach (on balance) that considers charities and their purposes in the wider New Zealand context, without particular consideration given to Māori-specific experiences and socio-political contexts. Registration decisions that follow this approach thus appear to somewhat neglect New Zealand’s commitment to Te Tiriti o Waitangi and its principles of partnership, participation and protection.⁷⁹ In other words, Māori and Māori needs ought to be a consideration in their own right.

IV. CANADA’S APPROACH TO CHARITY LAW

Unlike New Zealand’s Charities Services (established under the Department of Internal Affairs and independent from the Inland Revenue Department), Canadian charity decisions are made by the Canada Revenue Agency (CRA),⁸⁰ in accordance with the Income Tax Act 1985 (ITA).⁸¹ The ITA provides tax exemptions to registered charities,⁸² compliant with s 149.1(1) of the ITA,⁸³ namely, that they are constituted and operated exclusively for charitable purposes, and the resources of which are devoted to charitable activities carried out by the organisation in question. However, the ITA does not define the word “charitable”.⁸⁴ Thus, the CRA is guided strongly by the English common law, despite being a tax-based government agency.⁸⁵ This results in an “integrated relationship between tax policy and charity regulation” under common law.⁸⁶

75 Te Hunga Rōia Māori o Aotearoa *Submissions on Modernising the Charities Act 2005* (30 May 2019) at 2.

76 At 5.

77 Evan Te Ahu Poata-Smith “Inequality and Māori” in Max Rashbrooke (ed) *Inequality: A New Zealand Crisis* (Bridget Williams Books, Wellington, 2013) 153 at 153–154.

78 Agnes Brandt *Among friends? On the dynamics of Māori-Pākehā relationships in Aotearoa New Zealand* (Vandenhoeck & Ruprecht, Göttingen, 2013) at 17.

79 See New Zealand Royal Commission on Social Policy *Report of the Royal Commission on Social Policy* (April 1988).

80 Peter Broder *The Legal Definition of Charity and Canada Customs and Revenue Agency’s Charitable Registration Process* (Canadian Centre for Philanthropy, August 2001) at 18.

81 At 2 and 27.

82 Income Tax Act RSC 1985 c 1, s 149.1(1).

83 Section 248(1).

84 Kathryn Chan “The Function (Or Malfunction) of Equity in the Charity Law of Canada’s Federal Courts” (2016) 2 Can J Comp & Contemp L 33 at 35.

85 O’Halloran, McGregor-Lowndes and Simon, above n 5, at 426.

86 Juliet Chevalier-Watts *Charity Law: International Perspectives* (Routledge, Abingdon, 2018) at 130.

Crucially, the CRA still relies on the preamble to the Statute of Elizabeth.⁸⁷ This was affirmed in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [*Vancouver Society*], which held the ITA clearly envisages a “resort to the common law for a definition of ‘charity’ in its legal sense as well as for the principles that should guide us in applying that definition”.⁸⁸ As such, the four heads of charity (as summarised in the *Pemsel* case) remain the “starting point for the determination of whether a purpose is charitable”⁸⁹ in Canadian courts (advancement of education, advancement of religion, relief of poverty and any other purpose beneficial to the community). Purposes under the fourth head have no presumption of public benefit, and “must be beneficial to the community ‘in a way which the law regards as charitable’ by coming within the ‘spirit and intendment’ of the [Statute of Elizabeth]”.⁹⁰

A. Public Benefit Test

Once a charitable purpose(s) has been established, the public benefit test must be satisfied. As with New Zealand’s approach, the Canadian public benefit test is two-fold: firstly, there must be an “objectively measurable and socially useful benefit conferred”, and it must be “a benefit available to a sufficiently large section of the population”.⁹¹ The qualitative aspect of this test is more specific than the New Zealand equivalent; the clarification of a “socially useful” benefit appears to speak to the requirement for the public benefit to assuage an identifiable need. Non-charitable purposes that are “merely ancillary or incidental to the fulfilment of the primary, charitable, purposes of an organisation” will not prevent registration as a charitable entity,⁹² and any benefits conferred on private individuals will be acceptable only if incidental to the pursuit of the charitable purposes in question.⁹³ In terms of the quantitative branch, the *Oppenheim* test is authoritative.⁹⁴ The CRA has stated that the law is unclear in this regard, however has noted that those in need of a particular service may be appropriate classes of beneficiaries.⁹⁵

B. The Court’s Approach to Indigeneity

As stated, Canada’s approach to charity law is considered conservative.⁹⁶ Despite the fairly high contribution that charities make to the “social and economic fabric of Canada”,⁹⁷ there has been an

87 Broder, above n 80, at 4.

88 *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* 1999 1 SCR 10 at [28], citing *Positive Action Against Pornography v MNR* 1988 2 FC 340.

89 *Vancouver Society*, above n 88, at [144].

90 At [175].

91 *Vancouver Society*, above n 88, at [41] per Gonthier J (dissenting). Please note, Iacobucci J affirmed this test in his majority judgment in the same case.

92 At [40].

93 Canada Revenue Agency *Guidelines for registering a charity: Meeting the public benefit test* (CPS-024, 10 March 2006) at 3.2.4.

94 See Canada Revenue Agency *Guidelines for registering a charity: Meeting the public benefit test*, above n 93.

95 At 3.2.1.

96 Chevalier-Watts, above n 86, at 129.

97 Kerry O’Halloran *Charity Law and Social Inclusion: An International Study* (Routledge, Oxford, 2006) at 343.

unwillingness in the courts (and government, by extension) to “expand the meaning of charity”.⁹⁸ Instead, the courts favour an “adherence to an analogous approach for determining charitable purposes” that limits the expansion of charitable purposes.⁹⁹ This is exemplified by Canada’s appeals process. All appeals of CRA charity decisions go directly to Canada’s “charities’ court”,¹⁰⁰ the Federal Court of Appeal.¹⁰¹ However, the Court has tended to decide CRA registration decision appeals in favour of the CRA, despite the general perception that common law “has always weighted the odds heavily in favour of charity in judicial proceedings”.¹⁰² With little incentive for applicants to appeal and no records of registration decisions, there is a discernible lack of case law in the realm of charity law.¹⁰³ By extension, there are also limited cases that address indigenous charities and their public benefit, although the CRA has recognised that organisations whose purposes are “restricted to the needs of Aboriginal Peoples of Canada are charitable”.¹⁰⁴ Two significant cases do exist, however, and will be discussed below.

1. Gull Bay Development Corporation v The Queen

This case, heard before the Federal Court, signified a milestone in Canadian charity law by being the first to recognise the “special role” of Aboriginal people.¹⁰⁵ It concerned a corporation in the Gull Bay Indian Reserve, Ontario, which hired and trained employees from within the Reserve for a “viable commercial logging operation”.¹⁰⁶ The operation and its revenue was used to “promote the economic and social welfare of persons of native origin who are members of the Gull Bay Indian Reserve” with measures such as the provision of work itself, and funding Reserve programs that provide food, clothing and other necessities to needy members of the Reserve.¹⁰⁷ The Reserve faced many social and economic problems at the time, including scarce commercial fishing and trapping, alcoholism and a prevalence of vandalism and rape. Not to mention, any government money or aid was slow to come in.

The question was whether the organisation fell under the s 149.1(1) requirements for charitable entities. It was held the primary motivation for setting up the corporation was to raise funds for the charitable purposes within the community. The directors of the company did not themselves benefit monetarily, and any profits were used proactively to engage “in social objectives for

98 Jim Phillips “The Federal Court of Appeal and the Legal Meaning of Charity: Review and Critique” in Jim Phillips, Bruce Chapman & David Stephens (eds) *Between State and Market: Essays on Charities Law and Policy in Canada* (McGill-Queen’s University Press, Kingston, 2001) 219 at 219.

99 Lewis, above n 2, at 681.

100 Phillips, above n 98, at 219.

101 Income Tax Act RSC 1985 c 1, s 172(3).

102 Kathryn Chan “The Role of the Attorney General in Charity Proceedings in Canada and in England and in Wales” (2010) 89 Canada Bar Review 373 at 374.

103 Phillips, above n 98, at 219.

104 Canada Revenue Agency *Policy Statement: Benefits to Aboriginal peoples of Canada* (CPS-012, 6 November 1997) at [3]–[5].

105 O’Halloran, McGregor-Lowndes & Simon, above n 5, at 436.

106 *Gull Bay Development Corporation v The Queen [Gull Bay]* 1984 2 FC 3 at [3].

107 At [1] and [3].

which [the corporation] was formed”.¹⁰⁸ The corporation merely provided an efficient means to generate the revenue needed to engage in “very worthy social and charitable activities required on the Reserve”.¹⁰⁹ Furthermore, the court noted it was in the interest of the Department of Indian Affairs to encourage self-reliance among Indian Bands and the improvement of living and social conditions. For this reason, the corporation’s charitable purposes conferred sufficient public benefit upon the members of the Gull Bay Indian Reserve.

2. *Native Communications Society of British Columbia v Minister of National Revenue*

This case was the second within Canadian charity law that addressed indigeneity directly. Here, the appellant seeking registration had the purposes of organising and developing a non-profit communications program (that is, radio and television productions) for the native people of British Columbia (BC). The program delivered information on subjects relevant to BC native peoples through measures including a non-profit newspaper called Kahtou, and training native peoples as communication workers. These activities would in turn “promote ... the image of native people in the national scene”, “deliver information on subjects relating to the social, educational, political and economic issues facing native people of [BC]”, and “broaden social interactions among other native groups from various parts of the world”.¹¹⁰

Stone J considered the fourth head of charity had the broadest applicability across all stated purposes. In determination of whether the purposes fell within the “spirit and intentment” of the preamble to the Statute of Elizabeth, the Court referenced *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* where Lord Wilberforce held “the law of charity is a moving subject” that has and will continue to evolve.¹¹¹ With this in mind, the communication of news and information which increases knowledge of cultural activities “going on elsewhere in the wider Indian community” (including the likes of native languages, ancient crafts and music)¹¹² was seen not only to “deepen and appreciation of Indian culture and language”, but also “promote a measure of cohesion among the Indian people of [BC] that might otherwise be missing”.¹¹³

Thus, Stone J held the purposes’ charitability could not be decided without “taking account of the special legal position in Canadian society occupied by the Indian people”,¹¹⁴ as protected by the Canadian Constitution Act 1982. Further still, Stone J referenced the Australian case of *Re Mathew*, which stipulated that “Australian aborigines are ... a class which, generally speaking, is in need of protection and assistance”.¹¹⁵ By way of analogy, indigeneity in a more generalised sense was linked directly to the preamble of the Statute of Elizabeth and its reference to the “aged, impotent and

108 At [19].

109 At [26].

110 *Native Communications Society of British Columbia v Minister of National Revenue* [*Native Communications*] 1986 3 FC 471 at [2].

111 At [8], citing *Scottish Burial Reform and Cremation Society Ltd v Glasgow Corporation* [1968] AC 138, [1967] 3 All ER 215 at 223.

112 At [10].

113 At [10].

114 At [9].

115 At [11], citing *Re Mathew* [1951] VLR 226 at 232.

poor people; and support aid and help of people decayed”.¹¹⁶ This assertion affirms the cruciality of considering social context in “reasonably innovative” way.¹¹⁷ Although Stone J was careful not to suggest that all organisations concerning native people would be charitable,¹¹⁸ in the present case the organisations’ purposes were good charitable purposes “beneficial to the Indian community of [BC]”.¹¹⁹ The qualitative branch of the public benefit test was thus satisfied, impliedly. Unlike *Gull Bay*’s establishment of a clear need within the Reserve, *Native Communications* addressed the general welfare of BC native peoples broadly, yet public benefit was still found.

It is arguable that generalising Aboriginal people to be broadly in a state of need, portrays them as “objects of charity”¹²⁰ and diminishes their self-determination. This argument is a strong one. However, for the sake of this essay, what must be noted is that the link drawn between the preamble to the Statute of Elizabeth and indigeneity in the contemporary context is something the courts failed to do in *Latimer* and subsequent New Zealand registration decisions. New Zealand’s arguable disregard of indigenous needs in their own right (without consideration of the wider benefit to Pākehā and non-Māori) has meant the public benefit test’s qualitative limb has a higher threshold in New Zealand than in Canada. Although falling within the spirit and intendment of the preamble does not mean the first limb of the public benefit test will be satisfied, *Native Communications* demonstrated that recognition of native peoples’ relative position within the state as a separate culture, with separate needs, does provide clearer links between legal notions of “charitability” and an organisation’s purposes, given Canada’s history and constitutional provisions.¹²¹

In cases where New Zealand applicants had broad purposes of improving the welfare and/or socio-political/socio-economic position of Māori, Charities Services was quick to determine that such purposes were not charitable unless a more explicit need could be shown. As such, New Zealand could learn from the Canadian approach by considering the historical context and position of Māori in society, irrespective of whether it appears Pākehā and Māori are “equal” at face value.

It ought to be noted that *Gull Bay* and *Native Communications* both failed to analyse the “public” element of the public benefit test. As such, both cases have little to offer as to how a “sufficient section of the community” has been determined in reference to indigenous peoples. The CRA has, however, clarified that “limiting beneficiaries to a particular nation that excludes members of other nations does not meet the necessary element of public benefit” (a “class within a class”), unless the organisation in question can demonstrate that it addresses a “charitable need particular to that limited group, for example, a problem faced only by the Métis”.¹²² *Native Communications* benefitted all nations within BC, whilst *Gull Bay* addressed specific needs faced by the Gull Bay Indian Reserve. Both decisions are thus in accordance with the CRA’s policy guidelines.

116 At [11].

117 Phillips, above n 98, at 224.

118 Ellen Zweibel “A Truly Canadian Definition of Charity and a Lesson in Drafting Charitable Purposes: A Comment on *Native Communications Society of BC v MNR*” (1987) 26 ETR 41.

119 *Native Communications*, above n 110, at [13].

120 Phillips, above n 98, at 225.

121 At 235–236.

122 Canada Revenue Agency *Policy Statement: Benefits to Aboriginal peoples of Canada*, above n 104, at [7].

V. AUSTRALIAN CHARITY LAW

Australia's charity sector has been governed by the Australian Charities and Not-for-profits Commission (ACNC) since 2012, brought about after long-standing calls for regulatory reform.¹²³ Its objects are to “maintain, protect and enhance public trust and confidence” in the not-for-profit sector, whilst also supporting a “vibrant, independent and innovative Australian not-for-profit sector”.¹²⁴ The Charities Act 2013 was introduced at the same time as the ACNC. It defines “charity”, unlike New Zealand's Charities Act 2005, which in turn has introduced a degree of uniformity to federal-level determinations of charitable status under the ACNC's administration.¹²⁵

The roots of the Charities Act 2013 are in the common law,¹²⁶ with charity defined as a not-for-profit entity, of which the purposes are charitable for the public benefit and/or ancillary to the entity's charitable purposes.¹²⁷ The charitable purposes, stemming from those contained in the Statute of Elizabeth and their subsequent summarisation in *Pemsel*,¹²⁸ are listed in s 12(1). There are 12 heads of charity, including the four heads as per *Pemsel*, as well as the likes of advancing health; advancing social or public welfare; advancing culture; and the purpose of promoting reconciliation, mutual respect and tolerance amongst groups of individuals within Australia. The latter purposes essentially serve to be an expansion of the fourth head of charity.

The Charities Act 2013 has also codified the requisite public benefit test, derived from common law.¹²⁹ Section 6(1) stipulates an entity is for the public benefit if the achievement of its purpose would be of public benefit; and is “directed to a benefit that is available to the members of” the general public or a sufficient section of it. The benefits may be tangible or intangible,¹³⁰ and relevant factors may include locality, conditions of people, disabilities, or any other such attributes.¹³¹ Entities that generate or distribute private benefits to individuals will negate public benefit, however.¹³² Determination of a “sufficient section of the public” will consider the numerical size of the section,¹³³ and the relationship between the entities to whose benefit the purpose is directed.¹³⁴ This is essentially a summary of the *Re Compton/Oppenheim* test, whereby a numerically negligible, closed group of beneficiaries may not constitute the “public”. As such, the public benefit test preserves the “pre-existing common law principles” of charity law.¹³⁵

123 John Vaughan-Williams “The Future of Charity Regulation in Australia: Complexities of Change” (2016) 37 *Adel L Rev* 219 at 219.

124 Australian Charities and Not-for-profits Commission Act 2012 (Cth), s 15-5.

125 Vaughan-Williams, above n 123, at 223.

126 Fiona Martin “Has the Charities Act 2013 changed the common law concept of charitable ‘public benefit’ and, if so, how?” (2015) 30 *Austl Tax F* 65 at 66.

127 Charities Act 2013 (Cth), s 5.

128 Martin, above n 126, at 67. Please note, prior to the Charities Act 2013, the *Pemsel* heads of charity were affirmed in common law; see *Royal National Agricultural Assoc v Chester* (1974) 48 ALJR 304 at 305.

129 Ian Murray *Regulating Charity in a Federated State: The Australian Perspective* (Nonprofit Policy Forum, 2019) at 7.

130 Charities Act 2013 (Cth), s 6(2)(a).

131 Martin, above n 126, at 72; citing *Thompson v FCT* (1959) 102 CLR 315 at 321.

132 Dal Pont, above n 23, at [3.23].

133 Charities Act 2013 (Cth), s 6(4).

134 Section 6(3)(b).

135 Murray, above n 129, at 7.

It ought to be noted that Australia's Charities Act 2013 stipulates if an entity's purpose is directed to the benefit of indigenous individuals and relates to native title or traditional land ownership rights, the public benefit test may be satisfied if the relationship between the indigenous individuals is the only negating factor.¹³⁶ Although this addresses indigeneity with regards to the quantitative aspect of the public benefit test, it is not only a partial exception to the *Oppenheim* rule as it relates specifically to cases concerning native title.

Under s 7 of the Charities Act 2013, there are five charitable purposes presumed to be of public benefit (an extension of New Zealand's presumed benefit for three of the heads). They are: the prevention and relief of sickness; advancement of education; relief of poverty or disadvantage of individuals or families; care for the aged or disabled; and advancement of religion. For the other heads of charity, public benefit must be demonstrated.¹³⁷

A. Indigeneity in Australian Charity Law

Generally speaking, the marginalisation of indigenous Australians has been extensive. They were excluded from official population figures until 1967, whilst processes like the removal of Aboriginal children from their homes and cultural areas occurred throughout the early to mid-20th century also.¹³⁸ These traumas (and others) have resulted in increased rates of "suicide, mental illness and family breakdown",¹³⁹ and indigenous Australian life expectancy (both male and female) is 17 years lower than for other Australians.¹⁴⁰ It is perhaps for these reasons and inherent disadvantages faced by indigenous Australians, that there has been a wide scope and special consideration provided to charities that address Australian Aboriginal needs specifically.

A key case is *Aboriginal Hostels Ltd v Darwin City Councils*, where the court examined whether Aboriginals were a class of themselves in a charitable sense.¹⁴¹ Aboriginal Hostels Ltd operated not-for-profit hostels (and other services including health-related, welfare, recreational facilities and canteens) for the purpose of assisting Aboriginal people. Under the fourth head of charity, the overall objective was to "meet the special needs of Aboriginals and Torres Strait Islanders",¹⁴² although non-Aboriginal residents could reside when the hostels were not at full capacity. Nader J noted that "[t]he fact that the purposes of accommodation are in respect of Aboriginal persons gives a special character to [the corporation's] purposes which renders an otherwise neutral purpose, charitable".¹⁴³ Aboriginal persons are more likely to face alienation by non-Aboriginal places of accommodation,¹⁴⁴ and whilst many Aboriginal people in Northern Australia "are on an equal footing with non-Aboriginals", this is irrelevant in consideration of the "potential benefit" the hostels will provide to the great majority of Aboriginal people.¹⁴⁵

136 Charities Act 2013 (Cth), s 9.

137 Martin, above n 126, at 66.

138 O'Halloran, McGregor-Lowndes & Simon, above n 5, at 233.

139 At 233.

140 At 240.

141 *Aboriginal Hostels Ltd v Darwin City Council* (1985) 33 NTR 1 (NTSC).

142 At 8.

143 At 16.

144 At 16, in reference to *Re Mathew*, above n 115.

145 At 17.

In consideration of the quantitative aspect of the public benefit test, it was held “[t]he mere fact that only a limited number of persons can benefit from the trust does not preclude the purpose from being a public one”.¹⁴⁶ In applying the *Re Compton/Oppenheim* test, the court stated the beneficiaries in question were distinguished as a class not by “arbitrary rules” of exclusion, nor by their blood relations. Instead, through a fairly orthodox reading of the *Oppenheim* principle,¹⁴⁷ the court held the class of beneficiaries constituted a sufficient section of the public by virtue of benefitting an open group of peoples in need. Thus, the Aboriginal Hostels Ltd satisfied both limbs of the public benefit test.

The *Aboriginal Hostels* case may be viewed comparatively with *Arawa Māori Trust Board*, in which the court held the establishment of hostels for Māori was “clearly not charitable”.¹⁴⁸ It is unclear why the court did not consider Māori hostels as charitable, however the reason may be attributable to New Zealand’s focus on defining exact, identifiable “needs”, rather than looking at the broader socio-economic positions of Māori when compared to Pākehā. That is not to say that Māori are consistently in need, or that Pākehā are not. It does mean, however, that it appears New Zealand is apprehensive in recognising any inherent “unequal footing” experienced by Māori. This is a significant area where New Zealand can learn from Australia.

Australia’s comprehensive and non-restrictive approach to indigenous cases was acknowledged by the ACNC, which stated that “the unique situation of Australian’s Indigenous peoples” is “likely to continue for some considerable time”.¹⁴⁹ These are systemic disadvantages which cannot be adequately addressed and rectified in the short-term. This statement reflects the court’s approach in the case of *Trustees of the Indigenous Barristers’ Trust v Commissioner of Taxation*. Here, the applicant wished to establish a trust fund to relieve poverty, suffering, helplessness, misfortune, or “other disability of indigenous persons [that] may constitute an obstacle in the way of their being able to practice at the New South Wales [(NSW)] Bar”.¹⁵⁰ At this time, only two barristers in NSW were Aborigine, despite the fact the indigenous population was growing. Evidence was provided as to the disadvantages “suffered by indigenous persons insofar as practice at the Bar was concerned”,¹⁵¹ so, the Trust would carry out activities such as meeting the costs of legal education, paying immediate living expenses, providing necessary books and other materials, and paying for certain costs necessary for an individual to practice.

The court held that although non-indigenous Australians may suffer similar disadvantages, this was irrelevant; what was important was that this Trust addressed an area of society where the general disadvantages of Aboriginal peoples were apparent.¹⁵² The “pitifully small number” of indigenous peoples practicing in the NSW Bar indicated that even if an indigenous person had “academic ability and ... perseverance above the norm”, it did not mean the person could

146 At 14.

147 As affirmed in *Groote Eylandt Aboriginal Trust Inc (NT 00142C) v Deloitte Touche Tohmatsu* [2017] NTSC 4, (2017) 169 NTR 1 at [164] per Hiley J.

148 *Arawa Māori Trust Board*, above n 36, at 396.

149 Australian Charities and Not-for-profits Commission “Indigenous Charities – Commissioner’s Interpretation Statement” <www.acnc.gov.au>.

150 *Trustees of the Indigenous Barristers’ Trust v Commissioner of Taxation* [2002] FCA 1474, (2002) 127 FCR 63 at [2].

151 At [6].

152 At [22]. Please note, the court held this conclusion was consistent with *Re Mathew*, above n 115.

“take [their] rightful place in the world”.¹⁵³ The Trust was established “for the relief of persons in Australia who are in necessitous circumstances”.¹⁵⁴

In terms of the quantitative branch of the public benefit test, the court considered the only “restriction” to the class of beneficiaries was to those who are indigenous and disadvantaged. Even if very few people sought the aid of the Trust to begin with (numerically-speaking), this was of “little relevance”; what was important is that the Trust’s benefit was open to a sufficient section of the public.¹⁵⁵

The Trustees of the Indigenous Barristers’ Trust case may be compared to the Te Awe (Wellington Māori Business Network) registration decision. In both instances, the entities’ main concern was aiding indigenous peoples in business or career pursuits. The only discernible difference is that the Indigenous Barristers’ Trust had clarified the exact effects that political and economic factors had had on dwindling numbers of indigenous peoples entering the legal profession. It is arguable Te Awe ought to have provided further evidence of whether the numbers of Māori-owned small businesses and/or their success rates were disproportionately lower, compared to Pākehā or non-Māori-owned small businesses. To do so would speak to the necessity of increasing Māori representation in the business sector. As articulated in the *Indigenous Barristers’ Trust* case, increasing indigenous representation in underrepresented sectors has wider impacts and influence on other indigenous people who feel marginalised by these sectors. If this had been established in the Te Awe registration decision, it would be interesting to examine whether this would negate the perceived remoteness of the public benefit to Māori as a section of society.

1. *Advancement of culture and native land rights*

In addition to considerations of socio-political needs, several Australian cases have examined culture and land rights in the context of charitable purposes. In *Toomelah Co-operative Ltd v Moree Plains Shire Council*, the non-profit Co-operative in question acquired land for the “use, benefit and development of members, the society and the Aboriginal community in general”;¹⁵⁶ the provision of accommodation for needy Aboriginal families; and carrying out agricultural, fishing, forestry, and other primary producing activities for the benefit of its community members. In the Toomelah area, 95 percent of the 900-strong Aboriginal population were unemployed. Stein J held the Co-operative fell within the spirit and intendment of the preamble to the Statute of Elizabeth by virtue of Aboriginal needs being analogous to purposes such as the relief of poverty¹⁵⁷ (similarly to *Native Communications*). As such, public benefit could be found under the relief of poverty, but also due to the fact that “strengthening and fostering the development of Aboriginal and Islander identity and culture” was of benefit in its own right,¹⁵⁸ as was the promotion of Aboriginal land rights under the fourth head of charity.¹⁵⁹

153 At [43].

154 At [43].

155 At [13].

156 *Toomelah Co-Operative Ltd v Moree Plains Shire Council* (1996) 90 LGERA 48 at 50.

157 At 53–54.

158 At 58.

159 At 59. This was later affirmed in *Northern Land Council v Commissioner of Taxes* [2002] NTCA 11 at [75].

Similarly, *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation and others* examined whether the establishment of “town camps” on leased land was a charity.¹⁶⁰ The stated purposes included the relief of poverty, helplessness and distress of Aboriginal people living in Central Australia, through the provision of housing and community facilities; programs in accordance with Aboriginal law that advanced living conditions and economic status; and developing relationships with relatable groups.¹⁶¹ The court held the beneficiaries were not required to be related through blood ties, and thus formed a sufficient and indefinite section of the community.¹⁶² In terms of the qualitative public benefit, the court noted the corporation was established for the purpose of relieving poverty. In this sense, “poverty” is defined as “having little wealth or material possessions” rather than destitution,¹⁶³ and as such, the land was indeed used for the charitable purpose of providing benefit to any and all Aboriginal peoples who wished to stay there or use the facilities.

Both *Toomelah Co-operative* and *Alice Springs Town Council* refer specifically to the significance of Aboriginal land rights and the use of such land for charitable purposes. It does not appear that there is an equivalent case in New Zealand where Māori land rights have been considered in a charitable sense. There are, however, similarities between the *Alice Springs Town Council* and *Toomelah Co-operative* cases, and the Korako Karetai registration decision in New Zealand. The Korako Karetai Trust sought the return of Māori land which had been settled in a negotiation between the Crown and Ngai Tahu (an iwi in the South Island) without input from Korako Karetai’s descendants. The court held the return of negotiated land is not charitable, only the settlement of land not yet negotiated (as in *Latimer*). Yet, the core of both the *Latimer* and Korako Karetai Trust disputes was the question of whether the removal of native title over Māori land had been justified. Following the Australian cases in this field, the New Zealand courts and Charities Services ought to have regard to the specific role of land and the rights it confers to indigenous peoples, as a charitable purpose in its own right. In failing to do so, the New Zealand courts have neglected to recognise the inherent cultural value and significance of an integral feature of Māoridom.

VI. EVOLUTION OF THE POLITICAL PURPOSES DOCTRINE: BROADENING THE SCOPE FOR INDIGENOUS CHARITIES?

As demonstrated above, the law of charity has (and will continue) to adapt to social demands and novel charitable purposes. Indigenous communities’ needs have been interpreted differently in New Zealand, Canada and Australia, yet all have “made room” where tradition is unaccommodating. This has been exemplified further in consideration of political purposes, and how and where they sit within charity law.¹⁶⁴

160 *Alice Springs Town Council v Mpweteyerre Aboriginal Corp* (1997) 115 NTR 25 (NTSC).

161 At 37 per Mildren J.

162 At 41.

163 At 39.

164 Susan Glazebrook “A Charity in All but Law: The Political Purpose Exception and the Charitable Sector” (2019) 42 *Melb L Rev* 632 at 637.

Although not mentioned in the Statute of Elizabeth, it was long-held that political purposes are not charitable.¹⁶⁵ Such purposes include furthering the interests of a political party; procuring changes to laws; and procuring reversals to government policy.¹⁶⁶ The political purposes doctrine stems from Lord Parker's dicta in *Bowman v Secular Society Ltd*, where he held that "a trust for the attainment of political objects has always been invalid ... because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit".¹⁶⁷ Treated as the "origin of the political purpose exception",¹⁶⁸ this rule has been applied in New Zealand, Australia and Canada respectively;¹⁶⁹ setting a strong precedent until relatively recently.

A. Australia: Leading the Way

Generally speaking, Australia has long been critical of the political purposes doctrine. In *Public Trustee v Attorney-General of New South Wales*, Santow J considered that "[p]ersuasion directed to political change is part and parcel of a democratic society", although the charityability of political objects is dependent on circumstances.¹⁷⁰ It was not until the seminal case of *Aid/Watch v Commissioner of Taxation* that the *Bowman* rule was reversed in Australia; signalling a complete rejection of the political purpose doctrine.¹⁷¹ *Aid/Watch*'s purpose was to promote "the effectiveness of Australian and multinational aid in foreign countries [with] investment programs, projects and policies".¹⁷² Its primary aim was to influence government, and as such, the *Bowman* principle would have rendered the organisation non-charitable. The High Court of Australia instead held that the "remarks of Lord Parker in *Bowman* were not directed to the Australian system of government established and maintained by the Constitution itself".¹⁷³ The Court ruled that "in Australia there is no general doctrine which excludes from charitable purposes 'political objects'";¹⁷⁴ thus, political advocacy may indeed be of public benefit.¹⁷⁵ This has since been codified in s 12(1)(l) of the Charities Act 2013, by stipulating that promoting or opposing a change to a legal matter is charitable if done in furtherance of another state charitable purpose.

B. New Zealand's Political Purposes Evolution

New Zealand's progression away from the *Bowman* principle has been incremental. Cases like *Re Collier (deceased)* had cast doubt, noting that the freedom to publicly debate issues perhaps ought

165 At 637.

166 *McGovern v Attorney-General* [1982] 1 Ch 321 at 340.

167 *Bowman v Secular Society Ltd* [1917] All ER Rep 1 at 18.

168 Glazebrook, above n 164, at 637.

169 See *Molloy v Commissioner of Inland Revenue*, above n 18, at 695; *Royal North Shore Hospital of Sydney v Attorney-General* (NSW) (1938) 60 CLR 396; and *Positive Action Against Pornography v Minister of National Revenue* [1988] 2 FC 340 at [15].

170 *Public Trustee v Attorney-General of New South Wales* (1997) 42 NSWLR 600 at 621.

171 Juliet Chevalier-Watts "Charitable Trusts and Political Purposes: Sowing the Seeds of Change? Lessons from Australia" (2013) 19 Canterbury Law Review 52.

172 *Aid/Watch v Commissioner of Taxation* [2010] HCA 42 at [5].

173 At [40].

174 At [48].

175 Stephen Kós *Murky Waters, Muddled Thinking: Charities and Politics* (Opening Address, Charity Law Association of Australia and New Zealand Conference, 4 November 2020) at [14].

to be recognised in the law of charities.¹⁷⁶ However, it was the Supreme Court in *Re Greenpeace of New Zealand Inc* that ruled charitable and political purposes are not mutually exclusive, so political purposes may be charitable if they satisfy the public benefit test.¹⁷⁷ The court further stated that the exclusion of political purposes is not necessary nor beneficial,¹⁷⁸ particularly when advocacy is “analogous to other good works within the sense the law considers charitable”.¹⁷⁹ Instead, the court favoured an “ends, means and manner” test, whereby the assessment of the charity of advocacy will depend on:¹⁸⁰

... the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit.

This approach was adopted from the dissenting judgment in *Aid/Watch*, where it was held determination of public benefit “may be difficult where activities of an organisation largely involve the assertion of its views”.¹⁸¹ As such, *Re Greenpeace* noted the importance of the *ends* that entities seek to achieve, whilst the majority in *Aid/Watch* focused on the *means* of advocacy.¹⁸²

On this basis, there is an ambiguity within the Supreme Court’s *Re Greenpeace* decision, and a lack of evidence to suggest it will be a “victory for charities”.¹⁸³ It did not rule definitively on how specific purposes will have to be with regard to abstract political goals (for example, “peace”),¹⁸⁴ and several decisions concerning political purposes since *Re Greenpeace* have been interpreted restrictively.

In *Better Public Media Trust v Attorney-General*, the purpose in question was the advancement of public media in New Zealand, as well as promotion of informed debate about public media issues.¹⁸⁵ The Court considered that the “ends, means and manner” test requires complex considerations as to whether the cause being advocated for is charitable of itself, as well as whether the advocacy is undertaken in a “charitable way”.¹⁸⁶ The court held that advancement of public media was “overly wide” and thus there was difficulty in defining whether the purpose’s end was of public benefit.¹⁸⁷ Similarly, in the registration decision for the Society for the Protection of Auckland Harbours, Charities Services found that while some of the Society’s “ends” could be charitable, the means of achieving these ends was not of public benefit.¹⁸⁸

176 *Re Collier (deceased)*, above n 26, at 89–90.

177 *Re Greenpeace of New Zealand Inc*, above n 22, at [3].

178 At [59].

179 At [62].

180 At [76].

181 At [73], citing *Aid/Watch*, above n 172, at [69].

182 Kós, above n 175, at [21].

183 Sue Barker “Charity Regulation in New Zealand: History and Where to Now” (2020) 26 Third Sector Review 28 at 35.

184 Kós, above n 175, at [18].

185 *Better Public Media Trust v Attorney-General* [2020] NZHC 350 at [1].

186 At [54].

187 At [86].

188 *Registration Decision: Society for the Protection of Auckland Harbours* SOC51367 Decision No: 2016-2, 1 September 2016 at [3].

C. Canada's Recent Developments: Room for the Australian Approach?

Developments to the political purposes doctrine have not yet taken place wholly in the Canadian courts. A “chilling effect” on considerations of advocacy within charity law¹⁸⁹ occurred after the Federal Court of Appeal in *Scarborough Community Legal Services v The Queen* ruled that proposed changes to a social benefits program were political purposes (more than ancillary) and thus not charitable.¹⁹⁰

However, the Minister of National Revenue recommended in its May 2017 report that the CRA should permit charities “to engage in public policy dialogue and development, if it furthers a charity’s charitable purposes ... and is non-partisan”.¹⁹¹ This perspective was cemented in the 2018 case of *Canada Without Poverty v Canada*, which openly criticised the CRA’s existing policy regarding ancillary political purposes.¹⁹² At this time, s 149.1(6.2) of the ITA held that where a charitable organisation devotes part of its resources to ancillary or incidental political activities, this may not negate the organisation’s charitability at law. “Part” of an organisation’s resources was deemed to be 10 per cent.¹⁹³ Morgan J in *Canada Without Poverty* considered that an inability to engage in public policy advocacy when in pursuit of charitable purposes is inconsistent with the freedom of belief and expression codified in the Canadian Charter of Rights and Freedoms¹⁹⁴ and should not be limited arbitrarily.¹⁹⁵ Like *Aid/Watch*, advocacy was linked with fundamental rights of a person, however Canada did not revoke the *Bowman* principle.

The ITA was amended in late 2018 to account for criticisms to political purposes policy. Sections 149.1(6.1) and (6.2) now state that charitable foundations and organisations that devote any resources to the support or opposition of political parties or candidates will not be operating for exclusively charitable purposes.¹⁹⁶ This has removed the “ancillary” test, in favour of excluding any political activity that is expressly partisan. It is silent with regards to other advocacy.

D. How Can Indigenous Charities Benefit?

Even today, pressures are often placed on indigenous groups with the “intention of marginalising and othering”, whether consciously or not.¹⁹⁶ These conditions are the breeding ground for social and political disadvantages to disproportionately affect indigenous peoples.¹⁹⁸ Although states have largely progressed since colonial times, certain policies often inadvertently affect indigenous

189 Samuel Singer “Charity Law Reform in Canada: Moving from Patchwork to Substantive Reform” (2020) 57 *Alta L Rev* 683 at 691.

190 *Scarborough Community Legal Services v The Queen* 1985 2 FC 555.

191 Canada Revenue Agency *Report of the Consultation Panel on the Political Activities of Charities* (31 March 2017), section F.

192 Glazebrook, above n 164, at 641.

193 *Canada Without Poverty v Canada* 2018 ONSC 4147 at [4].

194 At [41]–[42] and [47].

195 At [57].

196 Budget Implementation Act 2018 (No 2) SC c 27, s 17.

197 Danielle Duguid “How Political Engagement Helps Indigenous Communities in their Fight for Rights” (2020) 34 *Political Science* 1 at 1.

198 Burke A Hendrix *Strategies of Justice: Aboriginal Peoples, Persistent Injustice, and the Ethics of Political Action* (Oxford University Press, Oxford, 2019) at 1.

groups, even if this is unintended.¹⁹⁹ A current example is health services in New Zealand; the Whakamaia Māori Health Action Plan 2020–2025 aims to address how the health and disability system can be more inclusive and protective of Māori, as these systems have not adequately met Māori needs.²⁰⁰ To do so requires advocating for changes to existing policies and government structures. In particular, advocacy for changes to public policy undertaken by community groups is playing an increasingly important role in “health, education and social welfare”.²⁰¹

Within this context, necessary space is created for indigenous groups to engage in political action in the pursuit of “escaping persistent injustice”.²⁰² For many indigenous peoples, political action must be “careful, strategic, and eternally self-aware – always cognizant of its larger social context” whilst grappling with the ultimate task of addressing state institutions.²⁰³

Political purposes have been addressed in some of the case law above. In *Latimer*, the pursuit of a general “racial harmony” was held to be non-political in nature,²⁰⁴ whilst the Charities Commission in the *Korako Karetai* registration decision noted that challenging a settled Deed amounted to a political purpose.²⁰⁵ It thus seems that in New Zealand, the general pursuit of “harmony” for all New Zealanders has been of benefit, whilst the acknowledgement of a specific injustice (whether that be a Deed of Settlement regarding Māori land, or addressing a particular government policy) has been politicised. It is arguable that recent developments to the political purposes doctrine may broaden the scope for Māori entities whose purposes include challenging disputed land settlements, government policies, or other political means. They will, however, need to establish that both their means of procuring change and their end goal will produce a public benefit to Māori, as a sufficient section of the community.

In Canada, the *Native Communications* case similarly specified that the Kahtou newspaper would need to be “politically non-aligned” in order to be charitable.²⁰⁶ If the organisation were to engage in political debate, this would “disqualify [the organisation] from continued registration as a ‘charitable organisation’”.²⁰⁷ As such, Canadian charities cannot yet openly criticise certain parties’ policies, only general political ideals. Although indigenous cases in the future may engage in non-partisan political activities, the law has not yet considered a reversal of the *Bowman* principle.

As such, New Zealand and Canada could both learn from Australia in its recognition of the inherent value of voicing opinion over political matters. Even non-partisan political purposes are not necessarily excluded from charitable status, and charities are not faced with an unnecessarily complicated legal test as in New Zealand.

199 Hendrix, above n 198.

200 See Ministry of Health “Whakamaia: Māori Health Action Plan 2020–2025” (12 August 2020) <www.health.govt.nz>.

201 Fiona Martin “What’s Public Benefit Got to Do with It: How the Law in Australia Relating to the Public Benefit Requirement of Charitable Applies to Charities for the Benefit of Australian Indigenous People” (2006) 21 Aust Tax F 331 at 343.

202 Hendrix, above n 198, at 3.

203 At 4.

204 *Latimer*, above n 41, at 209.

205 *Registration Decision: Korako Karetai Trust*, above n 56, at [68].

206 *Native Communications*, above n 110, at [4].

207 At [14].

VII. CONCLUSION

By and large, charity law in New Zealand, Australia and Canada demonstrates an evolution with the times. Indigeneity is a fundamental feature of these commonwealth states, setting them apart from the context of England's common law. As providers of necessary services, charities play a crucial role in both recognising and addressing indigenous needs in the modern context. Traditional forms of Aboriginal altruism, although still important, do not fit within the framework of Western charity law.

As such, indigeneity in the modern charity law context requires an examination of charity law's limitations to indigenous public benefit. *Latimer* addressed a significant hurdle for Māori by providing an exception to the blood tie relationships rule that excluded Māori communities with ancestral links from constituting a "section of the public". Nonetheless, Charities Services registration decisions have since demonstrated that the qualitative branch of the public benefit test is unlikely to be satisfied when entities only address Māori needs specifically. This restrictive approach not only reflects a non-committal to New Zealand's biculturalism, but also to the principles of Te Tiriti o Waitangi.

On the other hand, both Canada and Australia have demonstrated a propensity to value indigeneity and indigenous communities' needs, in consideration of the colonial context and "special place" of Aboriginal peoples in society. In doing so, the courts have acknowledged that indigenous altruism provides specific benefits to indigenous communities (such as the promotion of cultural practices and the establishment of land rights), whilst also constituting a sufficient section of the public. New Zealand can learn from the Australian approach in particular (but also from the limited Canadian case law), by having closer regard to historical context. Disadvantages to Māori may not be apparent at first glance, but it is an error to assert that Māori and Pākehā are on an equal footing in every sense. As articulated in the *Indigenous Barristers' Trust* case, there are certain areas where indigenous individuals' perseverance and hard work will still produce disproportionate outcomes. If New Zealand considered institutionalised disadvantages more closely, it is arguable that certain Māori entities would have a higher likelihood of meeting the public benefit test.

Developments to the political purposes doctrine will likely broaden the scope for indigenous charities to establish their charitable purposes, and in turn, meet the public benefit test. The nature of certain disadvantages faced by indigenous groups means that political activity of some kind is the only real option available to produce beneficial outcomes. Canada has work to do in this area, but has made partial changes for now. However, Australia's progressive developments have affirmed that advocacy can play an important role in their charity law sphere. New Zealand has followed suit in a similar manner, yet has not "opened the door" in such a way as to ensure advocacy purposes of a Māori charitable entity will indeed be considered charitable at law. On balance, New Zealand can ultimately learn from Australia both in its application of the public benefit test to Māori, and in making space for advocacy to play a meaningful role in carrying out charitable purposes of public benefit.

POLITICAL FINANCE AND GOVERNMENT LEGITIMACY IN NEW ZEALAND: A REVIEW OF NEW ZEALAND'S ELECTORAL FINANCE REGULATIONS FROM A CONSTITUTIONAL PERSPECTIVE

BY MARGARET COURTNEY-TENNENT*

I. INTRODUCTION

A. Background

There are currently court proceedings on foot in respect of Serious Fraud Office (SFO) investigations into payments made to or for political parties.¹ Court proceedings regarding donations made in relation to the National Party and the Labour Party are to be heard together.² Both proceedings are in respect of allegations regarding the splitting of donations into smaller tranches to avoid disclosure requirements.³ Proceedings are also ongoing in respect of allegations regarding undeclared funds paid to the New Zealand First Foundation but used for the payment of expenses by the New Zealand First Party.⁴

The Ministry of Justice has advised that it is considering changes to disclosure rules and thresholds and reporting requirements in respect of political donations.⁵ The amendments under consideration include lowering public disclosure thresholds, requiring public disclosure of financial statements and potentially banning anonymous donations.⁶

This article outlines the constitutional role of electoral finance regulation in New Zealand. Against that backdrop, this article reviews New Zealand's current political finance regulations and the proposed reforms and assesses whether and to what extent they would address the identified problems in a manner appropriate for New Zealand's constitutional framework and culture. This

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1 Sam Hurley "SFO's National and Labour Party donations cases to be heard together, High Court rules" *The New Zealand Herald* (online ed, Auckland, 29 November 2021).

2 Hurley, above n 1.

3 Hurley, above n 1.

4 Sam Hurley "NZ First Foundation investigation: SFO's political donations case against accused duo heads to High Court" *The New Zealand Herald* (online ed, Auckland, 26 January 2021); Sam Hurley "NZ First Foundation case: Accused pair slowly edge to trial, suppression appeal to be heard in June" *The New Zealand Herald* (online ed, Auckland, 24 February 2021).

5 Ministry of Justice "Proposed changes to political donations rules in our electoral law" (December 2021) <<https://consultations.justice.govt.nz/policy/political-donations/>>.

6 Ministry of Justice, above n 5.

article also considers what other amendments to New Zealand's political finance regulations might better address the identified problems in a constitutionally appropriate way.

B. Research Question and Thesis Statement

The research question is: how should the regulation of political finance be developed to balance the competing tensions of equal opportunity for political influence and freedom of expression in a manner appropriate for New Zealand's constitutional culture and framework? The sub-questions are:

- (a) What are the aims and requirements of political finance regulations in New Zealand?
- (b) To what extent do New Zealand's current political finance regulations, or the amendments proposed by the Ministry of Justice, fulfil the aims and requirements of political finance regulation in New Zealand?
- (c) How should New Zealand's political finance regulations be developed to support government legitimacy by balancing the competing tensions of freedom of expression and equal opportunity for political influence in a way that aligns with New Zealand's constitutional framework and culture?

The thesis statement is: that the legitimacy of New Zealand's government would be enhanced by the amendment of its political finance regulations to incorporate more equitable opportunity for participation in the practice of giving private political donations while ensuring adequate funding of political parties and maintenance of freedom of expression.

C. Objectives, Significance and Limitations

The process of regular democratic elections provides the government with its representative quality that functions to legitimate the government's authority.⁷ The law regarding political donations is part of the framework by which we impart legitimate authority to our government.⁸ Regulation of political finance requires the balancing of the competing democratic ideals of political equality and freedom of expression.⁹ This article aims to identify and consider New Zealand's constitutional requirements in balancing the competing tensions of political fairness and freedom of expression to support the development of electoral finance regulations that strengthen the legitimacy of New Zealand's government.

Political finance regulations that permit the actual or perceived undue influence of wealth have the potential to undermine government legitimacy.¹⁰ Accordingly, appropriate political finance regulations are vital for the health of democracy.¹¹ The allegations of donation splitting referred to

7 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 312.

8 Jonathan Boston and Alec Mladenovic "Political Equality and the Regulation of Election Spending by Parallel Campaigners" (2010) 45 *Aust J Polit Sci* 623 at 635, 639 and 640; Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at 135–136.

9 Boston and Mladenovic, above n 8, at 623 and 631; Geddis (2014), above n 8, at 136.

10 Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal* (Victoria University Press, Wellington, 2018) at 231.

11 Boston and Mladenovic, above n 8, at 640.

above have the potential to undermine New Zealand's democracy.¹² As this article aims to identify problems within New Zealand's political finance regulations and consider how they might best be developed to support government legitimacy, its significance lies in its potential to strengthen New Zealand's democracy.

Due to time and length constraints, this article focuses on the broad structural requirements of New Zealand's electoral finance regulations. Although it also notes other more discrete aspects of New Zealand's political finance regulations that are deserving of attention and may benefit from reform, it does not propose specific reforms in these areas.

D. Overview of Parts

Part II of the article aims to answer the sub-question: what are the aims and requirements of political finance regulations in New Zealand? It begins by outlining the aim of political finance regulations in democracies in general. It then considers how the various elements of New Zealand's constitutional framework impact upon how political finance ought to be regulated in New Zealand. It also outlines existing commentary regarding New Zealand's constitutional culture and considers how that constitutional culture impacts upon how political finance ought to be regulated in New Zealand.

Part III aims to answer the sub-question: do New Zealand's current political finance regulations, or the amendments proposed by the Ministry of Justice, fulfil the aims and requirements of political finance regulations in New Zealand? It begins by outlining New Zealand's current political finance regulations. It then describes problems with New Zealand's current political finance regulations. It then outlines the solutions proposed by the Ministry of Justice and considers whether and to what extent those proposals address the identified problems in a constitutionally appropriate manner.

Part IV aims to answer the sub-question: how should New Zealand's political finance regulations be developed to support government legitimacy by balancing the competing tensions of freedom of expression and equal opportunity for political influence in a way that aligns with New Zealand's constitutional framework and culture? It begins by considering the role of public funding in the regulation of political finance, and outlines the way in which Germany, Australia and Canada incorporate public funding into their political finance regulations. It then considers how those public funding models might inspire the development of political finance regulations that appropriately balance the competing tensions of equal opportunity for political influence and freedom of expression in accordance with New Zealand's constitutional requirements. It then proposes that New Zealand consider the development of reforms that incorporate a means-tested rebate for political donations and sets out how the incorporation of this component would align with New Zealand's constitutional framework and culture.

Part V comprises a summary and conclusions.

12 Andrew Geddis "Funding New Zealand's Election Campaigns recent stress points and potential responses" (2021) 17(2) PQ 9 at 11–12.

II. THE AIMS AND REQUIREMENTS OF POLITICAL FINANCE REGULATIONS IN NEW ZEALAND

A. *The Aim of Political Finance Regulations in Democracies*

Constitutional liberal democracies require the essential components of free and fair elections, freedom of speech and association and the rule of law.¹³ Elections are the process by which citizens in a democracy impart legitimate authority to their government.¹⁴ Freedom of expression plays a critical and valuable role in a legitimate representative democracy.¹⁵ It allows members to voice opinions in the process of reaching community consensus or compromise and its protection is required to ensure government in the interests of the entire population rather than the a select portion of it.¹⁶ Freedom of expression is supported by the New Zealand Bill of Rights Act (NZBORA).¹⁷

Election spending is a democratic public good supported by the principle of freedom of expression as it facilitates the transfer of information such as policy platforms from electoral contestants to the public.¹⁸ If political actors cannot fund themselves they need to solicit donations from supporters.¹⁹ Accordingly, political donations can enhance freedom of expression in democracies by facilitating election spending.²⁰

Elected representatives receive their authority to govern upon the understanding that they will govern in accordance with the best interests of the governed.²¹ Citizens in a democracy should have equal opportunity for influence over decisions made by the government as it would not be reasonable to expect citizens to accept government legitimacy in a system that allocates political influence unevenly.²² Accordingly, citizens should be entitled to a fair opportunity to participate in the electoral process.²³ It will inevitably be difficult to measure the impact of political donations upon the electoral process; however, such donations have the potential to impact upon both election outcomes and policy platforms.²⁴

13 Aziz Huq and Tom Ginsburg “How to Lose a Constitutional Democracy” (2018) 65 *UCLA Law Review* 78 at 87.

14 Joseph, above n 7, at 312.

15 Boston and Mladenovic, above n 8, at 631.

16 Alexander Tsesis “Free Speech Constitutionalism” (2015) 2015 *U Ill L Rev* 1015 at 1021–1022.

17 New Zealand Bill of Rights Act 1990, s 14; Boston and Mladenovic, above n 8, at 631.

18 Geddis (2021), above n 12, at 10.

19 Geddis (2021), above n 12, at 11.

20 Boston and Mladenovic, above n 8, at 630–631.

21 Geddis (2021), above n 12, at 11.

22 Boston and Mladenovic, above n 8, at 634 and 638; Joshua Cohen “Money, Politics, Political Equality” in Joshua Cohen *Philosophy, Politics, Democracy: Selected Essays* (Harvard University Press, Cambridge (Mass), 2009) 268 at 271–272 and 301; Geddis (2021), above n 12, at 11.

23 Boston and Mladenovic, above n 8, at 631.

24 Andrey Tomashevskiy and Christine Cahill “Private Donations and Policy Ambiguity” (2019) 52 *Comparative Political Studies* 754 at 754–757; Boston and Mladenovic, above n 8, at 639; Cohen, above n 22, at 284.

Inequality of resources can translate to inequality of citizens' ability to effectively communicate their views.²⁵ Potential exists for those with greater wealth to exercise disproportionate political influence and this may marginalise some citizens in the democratic process.²⁶ Ultimately, political donations potentially represent a "channel of influence" that is open to some members of society but not others.²⁷ Lack of regulation on the ability of wealthy corporations and individuals to make political donations can undermine democracy by creating the appearance of a "quid pro quo" arrangement.²⁸ Accordingly, political donations have the potential to undermine government legitimacy by undermining the democratic principle of equal opportunity for political influence.²⁹

It is widely accepted that political finance ought to be regulated to uphold the integrity and the legitimacy of a democratic system.³⁰ Regulation is contentious as it involves the conflict between the democratic ideals of freedom of expression and of political equality or fairness.³¹ It is inevitable that democratic values will come into conflict, and this is provided for in the NZBORA.³² It is important to acknowledge this tension in order to determine where the "equilibrium" ought to lie.³³

Regulation of the political donation "channel of influence" can uphold political fairness as a normative ideal that provides legitimacy within an electoral system.³⁴ Measures introduced in an effort to balance the competing tensions of freedom of expression and equality of influence include: supply-side controls (including disclosure requirements, donation caps and limits on who may donate); demand-side controls such as regulation of the amount parties may spend; and public funding measures.³⁵ Supply-side controls aim to make opportunities for political influence more equal by placing limits on the capacity for wealthier citizens to use their resources.³⁶ Demand-side controls limit spending on election-related activities by limiting the amount that may be spent, what funds may be spent on and by whom.³⁷ Disclosure rules have the potential to "illuminate" the appearance of corruption and work in tandem with other regulations in order to limit the potential for inappropriate political influence and limit the need for parties to seek large donations.³⁸

25 Boston and Mladenovic, above n 8, at 631; Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (NZ Government Printer, Wellington, 1986) at 183.

26 Boston and Mladenovic, above n 8, at 631 and 638–639; Royal Commission on the Electoral System, above n 25, at 183.

27 Boston and Mladenovic, above n 8, at 639; Cohen, above n 22, at 284.

28 Palmer and Butler, above n 10, at 231.

29 Boston and Mladenovic, above n 8, at 635 and 639–640; Cohen, above n 22, at 284.

30 Boston and Mladenovic, above n 8, at 640.

31 Boston and Mladenovic, above n 8, at 623 and 631; Geddis (2014), above n 8, at 136.

32 Boston and Mladenovic, above n 8, at 631; New Zealand Bill of Rights Act, s 5.

33 Boston and Mladenovic, above n 8, at 640.

34 Boston and Mladenovic, above n 8, at 639; Cohen, above n 22, at 284.

35 Geddis (2014), above n 8, at 136; Ron Johnston and Charles Pattie "Money and votes: a New Zealand example" (2008) 27 *Polit Geogr* 113 at 114.

36 Boston and Mladenovic, above n 8, at 635 and 638–639; Andrew Geddis "Democratic Visions and Third-Party Independent Expenditures: A Comparative View" (2001) 9 *Tul J Intl Comp L* 5 at 20; Geddis (2014), above n 8, at 136.

37 Geddis (2014), above n 8, at 136.

38 Johnston and Pattie, above n 35, at 114.

However, regulations have the potential to constrain the democratic good of parties' expressing their message to the electorate.³⁹ Regulations that place limits on freedom of expression can also cause citizens to disengage from the democratic process and therefore be detrimental to democracy.⁴⁰ The "shared public space" of democracies facilitates the type of group decision-making upon which democracy is based.⁴¹ The "contraction or distortion of a shared public space" has been identified as a contributing factor in democratic decline.⁴² However, lack of such regulation can cause undue risk of oppression and discrimination that could ultimately undermine the legitimacy of government focussed on protecting equal enjoyment of rights by citizens.⁴³ Accordingly, public funding measures may be used to remove or reduce the need for political parties to rely on private funding and, in doing so, to reduce inequalities in electoral funding.⁴⁴

As set out above, political funding regulations typically seek to limit the potential for unequal opportunity for political influence by seeking to restrain the impact of well-resourced groups.⁴⁵ However, there is also potential to explore subsidising the political donations of less well-resourced groups to provide more equitable access to the political donation channel of influence. This option emerges out of an analysis of the marketplace of ideas doctrine. This doctrine suggests that freedom of expression "creates a competitive environment in which good ideas flourish and bad ideas fail."⁴⁶ A criticism of this doctrine suggests that, due to factors such as inequality of resources, the marketplace of ideas is likely to "reflect and justify the positions of powerful speakers".⁴⁷ The marketplace of ideas provides "no means for weaker forces to prevent those with greater resources and access to media to stifle opposition."⁴⁸ Upon this basis, Alexander Tsesis suggests that government regulation of speech aimed at balancing this inequality is justified.⁴⁹ Tsesis' suggested regulations are in the form of regulations that restrict hate speech.⁵⁰ However, Daniel Farber suggests that the marketplace of ideas will tend to under-produce rather than overproduce.⁵¹ This is because "free riders" are overlooked by market demand.⁵² In accordance with this observation, Farber suggests subsidies that aim to create more speech are preferable to regulations that restrict speech.⁵³ Combining Tsesis' justification of regulations aimed at addressing the lack of representation of under-resourced groups in the marketplace of ideas, and Farber's suggestion that

39 Johnston and Pattie, above n 35, at 114.

40 Boston and Mladenovic, above n 8, at 636; Cohen, above n 22, at 296–297.

41 Huq and Ginsburg, above n 13, at 130–131.

42 Huq and Ginsburg, above n 13, at 117–118.

43 Tsesis, above n 16, at 1021–1023.

44 Geddis (2014), above n 8, at 136; Johnston and Pattie, above n 35, at 114.

45 Geddis (2014), above n 8, at 136; Johnston and Pattie, above n 35, at 114; Boston and Mladenovic, above n 8, at 635, 638 and 639.

46 Joseph Blocher "Institutions in the Marketplace of Ideas" (2008) 57(4) *Duke L J* 821, at 824.

47 Blocher, above n 46, at 832–833.

48 Tsesis, above n 16, at 1057.

49 Tsesis, above n 16, at 1066–1067.

50 Tsesis, above n 16, at 1066–1067.

51 Daniel A Farber "Free Speech Without Romance: Public Choice and the First Amendment" (1991) 105 *Harv L Rev* 554 at 558–561.

52 Farber, above n 51, at 559.

53 Farber, above n 51, at 558–561.

regulations that subsidise and therefore promote speech are preferable to those that restrict speech, it appears that subsidies targeted at under-resourced groups should also be considered as an option to enhance political equality in the context of political donations.⁵⁴

B. The Impact of New Zealand's Constitutional Framework upon How Political Finance Ought to be Regulated in New Zealand

Constitutions determine who may exercise public power and how they may do so.⁵⁵ New Zealand has an unwritten constitution.⁵⁶ This does not mean that New Zealand's constitution is not written; it means that it does not possess the elements of fundamental law and higher law.⁵⁷ Fundamental law establishes the components of government and provides them with their authority while higher law protects the constitution from ordinary repeal or amendment by Parliament.⁵⁸ As New Zealand's written documents with constitutional significance do not contain both of these elements, New Zealand's constitution is said to be unwritten.⁵⁹ New Zealand's constitution is comprised of an evolving array of legal instruments, judicial pronouncements and customary understandings and beliefs that are not unified or comprehensively constructed under one framework.⁶⁰ New Zealand's constitution contains a degree of flexibility that allows it to evolve over time as required.⁶¹

New Zealand has a Westminster system of government, with government wielding streamlined, concentrated power, as its legislative authority is not formally limited by higher law.⁶² The executive government dominates Parliament.⁶³ New Zealand has had a highly centralised form of government since provincial governments and their legislatures were abolished in 1876.⁶⁴ Unlike federal states, the simplicity of New Zealand's structure as a unitary state limits its need for the entrenched, legislative apportioning of authority.⁶⁵ Local and regional authorities have only those devolved powers that the central government has provided to them, which powers may be revised or revoked by that central government.⁶⁶

54 In the context of political finance regulation, this appears to be the rational implication from the ideas expressed by Tsesis (above n 16, at 1066–1067) and Farber (above n 51, at 558–561), however the author has not found it expressed elsewhere at this time.

55 Matthew S R Palmer “New Zealand Constitutional Culture” (2007) NZULR 565 at 565.

56 Andrew Geddis “From People’s Revolution to Partisan Reform: Recent Electoral Change in New Zealand” (2017) 16(1) *Elect Law J* 222 at 228.

57 Joseph, above n 7, at 127.

58 Joseph, above n 7, at 127.

59 Joseph, above n 7, at 127.

60 Andrew Geddis “Parliamentary government in New Zealand: Lines of continuity and moments of change” (2016) 14(1) *I-CON* 99 at 99; M Palmer, above n 55, at 589–590.

61 M Palmer, above n 55, at 592.

62 Geddis (2016), above n 60, at 99, 102 and 104.

63 Geddis (2016), above n 60, at 99 and 104.

64 Geddis (2016), above n 60, at 103.

65 Noel Cox “Proposed Constitutional Reform in New Zealand: Constitutional Entrenchment, Written Constitutions and Legitimacy” (2013) 102(1) *Round Table* 51 at 53.

66 Geddis (2016), above n 60, at 103.

New Zealand has a unicameral Parliament with its upper house, the Legislative Council, abolished in 1951.⁶⁷ New Zealand has strongly adopted the doctrine of parliamentary sovereignty.⁶⁸ Under New Zealand's unwritten constitution, Parliament has "complete legislative supremacy."⁶⁹ Parliament enacts the highest form of law, unchecked by external sources such as the judiciary.⁷⁰ Parliament has sole authority over the law, including electoral law, despite that electoral law providing the government with its strong executive and legislative authority.⁷¹

As set out above, New Zealand's constitution is not entrenched. Section 268(1)(a) of the Electoral Act partially entrenches section 17(1) of the Constitution Act.⁷² Section 17(1) of the Constitution Act relates to factors regarding elections such as electoral districts, voting age and the parliamentary term.⁷³ Demonstrating the vital importance of elections in New Zealand's constitutional arrangements, this is the only example of entrenchment in New Zealand legislation.⁷⁴ However, in line with New Zealand's dedication to parliamentary sovereignty, the legislation supporting this entrenchment is itself only subject to the ordinary process of amendment.⁷⁵ It is demonstrative of the importance of elections in legitimising the authority of the New Zealand government that the only aspects of New Zealand law that are entrenched to a degree (even then only partially) are core elements of New Zealand's electoral system.⁷⁶

New Zealand's commitment to parliamentary sovereignty in its constitutional arrangements mean that the judiciary has a limited role in the constitutional context.⁷⁷ A judicially enforceable Bill of Rights was suggested upon the rationale of supporting electoral fairness by protecting democratic liberties such as freedom of speech.⁷⁸ However, the suggestion was interpreted as elevating the judiciary above Parliament and was widely viewed as giving judges, who are not within the electorate's control, too much power and thereby restricting the power of electoral choice, and the suggestion was rejected.⁷⁹ Ultimately the NZBORA was enacted as ordinary law.⁸⁰ Recently the courts issued a "declaration of inconsistency" in respect of legislation regarding banning prisoners voting.⁸¹ This was a novel ruling with an underlying sentiment that such expression of judicial criticism may influence Parliament to reconsider legislation.⁸²

67 Andrew Sharp "This is My Body: Constitutional Traditions in New Zealand" (2014) 12 NZJPIL 41 at 50.

68 Gay Morgan "Constitutional Cookbook: Seeking Palatable Ingredients for Constitutional Reform in New Zealand" (2015) 23 Wai L Rev 82 at 84.

69 Geddis (2017), above n 56, at 228.

70 Geddis (2017), above n 56, at 222–223.

71 Geddis (2017), above n 56, at 223.

72 Joseph, above n 7, at 131. Electoral Act 1993, s 268(1)(a); Constitution Act 1986, s 17(1).

73 Janet McLean "The Political, the Historical and the Universal in New Zealand's Unwritten Constitution" (2014) 12 NZJPL 321 at 327; Constitution Act, s 17(1).

74 McLean, above n 73, at 327.

75 McLean, above n 73, at 327.

76 Geddis (2016), above n 60, at 106.

77 Geddis (2017), above n 56, at 228.

78 McLean, above n 73, at 337.

79 McLean, above n 73, at 337; M Palmer, above n 55, at 585.

80 McLean, above n 73, at 337; New Zealand Bill of Rights Act, s 4.

81 Geddis (2017), above n 56, at 228. *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [77]–[79].

82 Geddis (2017), above n 56, at 228. *Taylor v Attorney-General*, above n 81, at [30] and [77(d)].

The Treaty of Waitangi is viewed by many as New Zealand's founding document but does not have juridical standing within New Zealand's courts.⁸³ There is also dispute as to the meaning of the Treaty.⁸⁴ The terms of the Treaty also conflict with the concept of parliamentary sovereignty.⁸⁵ However, ultimately, the terms of the Treaty are not implemented within New Zealand's constitutional arrangements in a way that limits Parliament's powers.⁸⁶

The written elements of New Zealand's constitution are underpinned by conventions.⁸⁷ Constitutional conventions are political rules of practice that are regarded as binding, but are not enforceable by the courts.⁸⁸ The most significant convention of New Zealand's constitution is the rule of law, meaning "what is done officially must be done in accordance with the law."⁸⁹ Conventions are enforced by "political consequences, either from within the "arena" of fellow constitutional actors, or, ultimately, from the polity at election time."⁹⁰ In relying on conventions, New Zealand citizens rely on politicians to comply with conventions that protect human rights and the rule of law and ultimately preserve government legitimacy.⁹¹

New Zealand's electoral system is Mixed Member Proportional (MMP), which it adopted following a two-stage referendum process in 1992 and 1993.⁹² It adopted this system after the recommendation in 1986 Report of the Royal Commission on the Electoral System (the 1986 Royal Commission Report) that it be adopted on the basis that it was fairer and more democratic than the first past the post electoral system that New Zealand had at that time.⁹³ Parliamentary seats are allocated in accordance with a party's overall support.⁹⁴ However, parties must first obtain a minimum representation threshold, which is set as an achievable level, or an electorate seat.⁹⁵ As a result, MMP is strongly proportional in nature and has operated to diversify the range of parties and individuals in Parliament.⁹⁶

New Zealand's three-year parliamentary term also supports the representative quality of government as it provides a degree of acknowledgement of the limitation of the authority granted by the electoral process.⁹⁷ However, electoral success in New Zealand provides the winning party (or parties) with near absolute authority for that three-year term.⁹⁸ Given the high stakes of electoral success, it is important that elections produce representative outcomes.⁹⁹

83 Joseph, above n 7, at 132.

84 Cox, above n 65, at 54.

85 Morgan, above n 68, at 93.

86 Morgan, above n 68, at 84.

87 Cox, above n 65, at 52.

88 Cox, above n 65, at 52.

89 Cox, above n 65, at 52.

90 Morgan, above n 68, at 90.

91 Joseph, above n 7, at 149.

92 Geddis (2016), above n 60, at 108.

93 McLean, above n 73, at 326; Royal Commission on the Electoral System, above n 25, at 63–65.

94 Geddis (2016), above n 60, at 109.

95 Geddis (2016), above n 60, at 109.

96 Geddis (2016), above n 60, at 109.

97 McLean, above n 73, at 327.

98 McLean, above n 73, at 325.

99 McLean, above n 73, at 325.

Democracy is of fundamental importance within New Zealand's constitutional arrangements.¹⁰⁰ Political rather than judicial methods are used to enforce the constitution.¹⁰¹ The process of regular democratic elections provides the government with its representative quality, which functions to legitimate the government's authority.¹⁰² This legitimacy is based upon the people's consent to be governed, and the government's accountability to the people.¹⁰³ The New Zealand people provide their government with condensed executive and legislative power via elections upon the basis that the government will employ that power for the general public good.¹⁰⁴ The power gains legitimacy from its democratic origins, with elections playing a critical role in New Zealand's constitutional arrangements.¹⁰⁵

As set out above, political donations have the potential to undermine electoral processes by either creating the perception of the undue influence of wealth or facilitating actual undue influence of wealth. As stated in the 1986 Royal Commission Report, "if elections are to be fair and our democracy is to prosper, it is important that the effects of inequalities are minimised."¹⁰⁶ The constitutional importance of fairness and representation in New Zealand's democratic processes is heightened due to the strong power of its Parliament.¹⁰⁷ Given the lack of other constraints on government action, the factual and perceived fairness of New Zealand's electoral processes is particularly important for the legitimacy of New Zealand's government.¹⁰⁸ It is therefore particularly vital for the legitimacy of New Zealand's government that political finance regulations in New Zealand support equal opportunity for political influence in those elections.

C. The Impact of New Zealand's Constitutional Culture upon How Political Finance Ought to Be Regulated in New Zealand

Constitutions face the challenging task of creating the framework that gives the government its power to govern, while also placing restraints on that power so that a government uses that power to protect the people that it governs.¹⁰⁹ Some constitutions work successfully and some fail.¹¹⁰ The United States' constitution has been largely viewed as a successful constitution that has stood the test of time.¹¹¹ Japan adopted a similar constitution based on the United States model after World War model and it has been successful.¹¹² However, comparable attempts to transplant similar

100 M Palmer, above n 55, at 582; Royal Commission on the Electoral System, above n 25, at 7.

101 Morgan, above n 68, at 83.

102 Joseph, above n 7, at 312; Geddis (2016), above n 60, at 106.

103 Morgan, above n 68, at 88.

104 Geddis (2016), above n 60, at 107.

105 Geddis (2016), above n 60, at 107.

106 Royal Commission on the Electoral System, above n 25, at 180.

107 McLean, above n 73, at 323.

108 Geddis (2017), above n 56, at 223.

109 Nikolai G Wenzel "Judicial Review and Constitutional Maintenance: John Marshall, Hans Kelsen, and the Popular Will" (2013) 46 PS Polit Sci Polit 591 at 591.

110 Nikolai Wenzel "From contract to mental model: Constitutional culture as a fact of the social sciences" (2010) 23 Rev Austrian Econ 55 at 58 and 70–71.

111 Wenzel, above n 110, at 69.

112 Nikolai G Wenzel "Constitutional Culture in Japan and the Philippines: Success and Failure in Post-War Constitutional Choice" (2010) 25(3) Pacific Focus 396 at 406.

constitutions in the Philippines after World War II and in Argentina in 1853 proved unsuccessful.¹¹³ The Philippines suspended the constitution after 30 years and is still recovering from the subsequent 13-year dictatorship.¹¹⁴ That Argentinian constitution worked successfully for about half a century, but was then rejected “as Argentina fell into string of military coups, populism, and ravaging of the economy by both military and civilian governments.”¹¹⁵

As demonstrated by these examples, whether a constitution will be successful is not entirely determined by its content.¹¹⁶ Constitutional authority is derived from legitimacy.¹¹⁷ The essential component for a successful constitution is not for it to be entrenched or in written form; it is for it to be broadly accepted as correct and authoritative.¹¹⁸ In order for a constitution to work effectively and enduringly, in order for it to “stick”, it is essential that the citizens accept it as binding.¹¹⁹ This has been described as the “Tinkerbelle Principle” in relation to constitutions.¹²⁰ They do not work “unless enough relevant people believe in them and their authority.”¹²¹ For this to occur, for constitutions to maintain their legitimacy and authority, they need to conform with the current constitutional culture of the jurisdiction to which they apply.¹²²

A complete view of any constitution incorporates not only the structures, processes and principles that affect the exercise of public power but also the cultural norms that affect that exercise of public power.¹²³ Constitutional culture incorporates conscious and subconscious elements, including mind-sets, attitudes, beliefs, norms, behaviours and expectations, regarding the organisation and exercise of public power.¹²⁴ Martin Heidegger encapsulates the challenge present in attempting to describe cultural components with his theory of the Background, explaining that people are moulded within their surrounding cultural practices, and those practices form a background that defies clear expression.¹²⁵ Constitutional culture changes over time, although generally slowly.¹²⁶ This evolution of constitutional culture occurs with the emergence of theories and through interactions, both within groups and between groups.¹²⁷

Constitutions need to reflect constitutional culture.¹²⁸ Reforms that are consistent with constitutional culture and norms are more likely to be accepted and effective than reforms that are

113 Wenzel, above n 112, at 406; Wenzel, above n 110, at 65.

114 Wenzel, above n 112, at 406.

115 Wenzel, above n 110, at 65.

116 Wenzel, above n 110, at 65.

117 Morgan, above n 68, at 82.

118 Morgan, above n 68, at 83.

119 Wenzel, above n 110, at 56–57.

120 Morgan, above n 68, at 82.

121 Morgan, above n 68, at 82.

122 Morgan, above n 68, at 82.

123 M Palmer, above n 55, at 566.

124 M Palmer, above n 55, at 569; Wenzel, above n 110, at 61.

125 Brian Letter “Heidegger and the theory of adjudication” (1996) 106(2) Yale Law J 253 at 262–263.

126 M Palmer, above n 55, at 568.

127 Wenzel, above n 110, at 59.

128 Wenzel, above n 110, at 68–69.

not.¹²⁹ Constitutional reform has been identified as a risk factor that has the potential to contribute to democratic decline.¹³⁰ If constitutional change is to be considered, it is vital that constitutional culture is understood.¹³¹ As set out above, elections play an integral role in New Zealand's constitutional framework. If the legitimacy of the electoral process is undermined, then the justification for New Zealand's constitutional arrangements are threatened.¹³² Balancing the competing ideals of freedom of expression and equal opportunity for political influence in the context of political finance regulation requires a value judgment about their respective importance.¹³³ The amendment of laws relating to New Zealand's electoral framework ought to identify and conform with New Zealand's constitutional culture.¹³⁴ Accordingly, the development of successful political finance regulations requires consideration and agreement of the fundamental democratic ideals to be upheld.¹³⁵

As set out above, norms form part of constitutional culture.¹³⁶ Hans Kelsen has suggested that each jurisdiction contains a "grundnorm", or core norm, upon which the entire legal system is based.¹³⁷ Core norms that conform with constitutional culture can be identified by analysing "constitutional evolution and history" to identify the norms that have consistently been respected and adhered to.¹³⁸ The following three events or characteristics of New Zealand's political and legislative history are examples that are enlightening in this regard. Firstly, the vote in New Zealand was initially restricted to male property owners, but New Zealand was early to widen access to the vote with universal Māori male suffrage in 1867, universal non-Māori male suffrage in 1879 and universal suffrage for women in 1893.¹³⁹ New Zealand was the first country to provide universal suffrage for women.¹⁴⁰ Secondly, New Zealand has strictly adopted parliamentary sovereignty, with a representative legislature established after the Constitution Act 1852, lack of any upper house after the abolition of the Legislative Council in 1951 and refusal to entrench legislation showing a refusal to bind any future majorities.¹⁴¹ The fact that New Zealand's only laws with any degree of entrenchment are those relating to elections further demonstrates the extent to which the principle of representative democracy is highly regarded in New Zealand.¹⁴² Thirdly, New Zealand has responded to moments of constitutional significance, not by restricting the power of Parliament with judicially enforceable legislation, but by enhancing the control of the electorate over Parliament with electoral reform.¹⁴³

129 M Palmer, above n 55, at 567.

130 Huq and Ginsburg, above n 13, at 78, 117 and 118.

131 Morgan, above n 68, at 93.

132 Geddis (2017), above n 56, at 223.

133 Boston and Mladenovic, above n 8, at 631, 634 and 635; Royal Commission on the Electoral System, above n 25, at 183; Cohen, above n 22, at 272–273.

134 Boston and Mladenovic, above n 8, at 624 and 632; Geddis (2017), above n 56, at 223.

135 Boston and Mladenovic, above n 8, at 640.

136 M Palmer, above n 55, at 569; Wenzel, above n 110, at 61.

137 M Palmer, above n 55, at 567; Joseph Raz "Kelsen's Theory of the Grundnorm" (1974) 19 *Am J Juris* 94 at 94.

138 Morgan, above n 68, at 93–94.

139 Maori Representation Act 1867; Qualification of Electors Act 1879; McLean, above n 73, at 326; Morgan, above n 68, at 94.

140 M Palmer, above n 55, at 581.

141 Morgan, above n 68, at 94, 95 and 97; Sharp, above n 67, at 50; Legislative Council Abolition Act 1950, s 2.

142 M Palmer, above n 55, at 582.

143 Morgan, above n 68, at 97–98.

An example of this is its adoption of MMP.¹⁴⁴ New Zealand governments carried out a number of reforms between 1984 and 1993 in what was termed a “rolling back” of the state.¹⁴⁵ This led to widespread public discontent, with a large portion of New Zealanders determining that voters did not have appropriate amount of control over Parliament or government.¹⁴⁶ During this time of constitutional concern, rather than restricting government power by providing judges with the power to strike down laws, New Zealand adopted MMP with the aim of supporting government legitimacy by making Parliament more representative.¹⁴⁷

Through an analysis of these characteristics and events, Gay Morgan has observed commitment to the reliance on fair representation to maintain the legitimacy of New Zealand’s constitutional culture.¹⁴⁸ With respect to New Zealand’s core norm, Morgan identifies a continuing theme of deep commitment to “proper democratic processes establishing the legitimate democratic authority of Parliament rather than any rights-based restrictions on the possible outcomes of those processes.”¹⁴⁹ Alongside pragmatism, fairness also forms a key component of Matthew Palmer’s analysis of New Zealand’s constitutional culture.¹⁵⁰ He observes that New Zealand constitutional culture values authoritarianism, with citizens expecting and trusting the government to exercise power effectively in a way that is both firm and fair.¹⁵¹ This expectation is accompanied a belief in social equality or egalitarianism that is valued highly in New Zealand’s constitutional culture.¹⁵²

It has also been observed that New Zealand has tolerated greater government intrusion over civil liberties due to its tradition of favouring fairness over freedom.¹⁵³ As set out above, the NZBORA was enacted as ordinary law and expressly recognises parliamentary sovereignty.¹⁵⁴ Human rights protections are not part of New Zealand’s constitutional arrangements.¹⁵⁵ New Zealand has been the target of criticism by the United Nations Human Rights Committee for its failure to entrench human rights protections.¹⁵⁶ However, although the NZBORA may not have been as effective as some had hoped, it has introduced “rights-consciousness” in New Zealand.¹⁵⁷

This emerging awareness of the importance of individual rights and freedoms can be observed in the response to the Labour government’s 2007 attempt to reform electoral finance regulations. A number of concerns arose in relation to the 2005 election campaign, including concerns regarding

144 Morgan, above n 68, at 97–98.

145 Geddis (2016), above n 60, at 105, 107–108.

146 Geddis (2017), above n 56, at 223; M Palmer, above n 55, at 581; Geddis (2016), above n 60, at 108; Raymond Miller and Pierce Lane “Future of the MMP Electoral System” in Raymond Miller (ed) *New Zealand Government and Politics* (5th ed, Oxford University Press, Melbourne, 2010) at 181.

147 M Palmer, above n 55, at 581; McLean, above n 73, at 327.

148 Morgan, above n 68, at 96–97.

149 Morgan, above n 68, at 97.

150 M Palmer, above n 55, at 575–578.

151 M Palmer, above n 55, at 575–576.

152 M Palmer, above n 55, at 576.

153 Geddis (2016), above n 60, at 105.

154 McLean, above n 73, at 337; Geddis (2016), above n 60, at 110; New Zealand Bill of Rights Act, s 4.

155 McLean, above n 73, at 340.

156 *Report of the Human Rights Committee A/50/40* (3 October 1995) at 34–35; McLean, above n 73, at 324.

157 McLean, above n 73, at 338.

unregulated campaigning by third party campaigners.¹⁵⁸ In an attempt to remedy those concerns, Labour enacted the Electoral Finance Act.¹⁵⁹ Among other things, the Electoral Finance Act introduced spending caps for third party campaigners.¹⁶⁰ Particularly in this respect, the Electoral Finance Act was controversial and largely unpopular, being criticised for placing excessive constraints on freedom of expression.¹⁶¹ The Electoral Finance Act was repealed and replaced by the National government with the Electoral (Finance Reform and Advance Voting) Amendment Act.¹⁶² Although some measures from the Electoral Finance Act were retained, the requirement for third parties campaigners to disclose donors was removed and spending controls for third party campaigners were substantially reduced.¹⁶³

A further element of note within New Zealand's constitutional culture is the tendency for constitutional change to occur in a gradual way, occurring after it becomes apparent that change is required, but not before an adequate consensus has been reached.¹⁶⁴ This was reflected in the 1986 Royal Commission Report, which recommended a referendum upon the basis that MMP should not be adopted unless it was understood and supported by the public.¹⁶⁵

III. THE EXTENT TO WHICH NEW ZEALAND'S CURRENT POLITICAL FINANCE REGULATIONS, OR THOSE PROPOSED BY THE MINISTRY OF JUSTICE, FULFIL THE AIMS AND REQUIREMENTS OF POLITICAL FINANCE REGULATION IN NEW ZEALAND

A. New Zealand's Current Political Finance Regulations

New Zealand attempts to limit the impact of wealth on election campaigns and thereby enhance the fairness of elections by restricting candidates' and parties' demand for money by limiting election spending rather than tightly controlling the supply of funds.¹⁶⁶ The laws governing election donations, loans and expenditure are set out in the Electoral Act.¹⁶⁷

158 Geddis (2014), above n 8, at 138, 189–190; Boston and Mladenovic, above n 8, at 623 and 625; Geddis (2017), above n 56, at 226.

159 Boston and Mladenovic, above n 8, at 623–624 and 626–627; Geddis (2014), above n 8, at 139; Geddis (2017), above n 56, at 226; Electoral Finance Act 2007.

160 Geddis (2014), above n 8, at 139.

161 Boston and Mladenovic, above n 8, at 623–624 and 627–628; Geddis (2017), above n 56, at 226–227; Geddis (2014), above n 8, at 139.

162 Boston and Mladenovic, above n 8, at 627–628; Geddis (2014), above n 8, at 139 and 157; Electoral (Finance Reform and Advance Voting) Amendment Act 2010.

163 Geddis (2017), above n 56, at 227.

164 M Palmer, above n 55, at 577; Silvia Cartwright "The Role of the Governor-General" (NZCPL Occasional Paper 6, 2001) at 15.

165 Royal Commission on the Electoral System, above n 25, at 65.

166 Andrew Geddis "The Regulation of Campaign Funding in New Zealand: Practices, Problems and Prospects for Change" in K D Ewing and Samuel Issacharoff (eds) *Party Funding and Campaign Financing in International Perspective* (Hart Publishing, London, 2006) at 14; Boston and Mladenovic, above n 8, at 626.

167 Electoral Act, pt 6A and 6B.

There is no limit on election spending outside the regulated period.¹⁶⁸ The amount that parties and candidates may spend on election expenses during the regulated period is prescribed by the Governor-General in accordance with the provisions of the Electoral Act.¹⁶⁹ The regulated period commences on the earlier of “default day” (two years and nine months after the last election) or three months prior to polling day (when the Prime Minister announces an election date prior to default day) and ends with the close of the day before polling day.¹⁷⁰ For the 2020 election each registered political party contesting the party vote had a total spending limit for election expenses of \$1,199,000 (including GST) plus \$28,200 (including GST) per contested electorate.¹⁷¹ Parties not contesting the party vote were limited to \$28,200 (including GST) per electorate contested.¹⁷²

For parties, “election expenses” means advertising expenses incurred in relation to party advertisements published during the regulated period that are promoted by the party secretary or a person authorised by the party secretary.¹⁷³ It excludes the costs paid for by funds allocated by the Electoral Commission pursuant to the Broadcasting Act, which are explained in more detail below.¹⁷⁴ For candidates, “election expenses” refers to advertising expenses incurred in relation to candidate advertisements published during the regulated period and promoted by either the candidate or a person endorsed by the candidate.¹⁷⁵ Only expenses that directly relate to efforts to persuade voters fall within the definition of election expenses.¹⁷⁶ Expenses such as focus groups, campaign consultants and travel are not included in election expenses.¹⁷⁷ Depending on who or what the advertising relates to, expenses may be apportioned between parties, between a party and a candidate or between candidates as applicable.¹⁷⁸

An “election advertisement” is an advertisement that may reasonably be regarded as encouraging or persuading voters to vote or not vote for a party or candidate “by reference to views or positions that are, or are not, held or taken”.¹⁷⁹ Election advertising is required to include a “promoter statement”.¹⁸⁰ Parties and candidates are prevented from entering into agreements with third parties for the purpose of “circumventing” the election expense limits.¹⁸¹ The restriction is aimed at preventing electoral candidates from supporting third party parallel campaigns that support their own campaign.¹⁸² This restriction is combined with the requirement for election

168 Geddis (2014), above n 8, at 146.

169 Electoral Act, ss 205C, 206C and 266A.

170 Electoral Act, s 3B; Geddis (2014), above n 8, at 146.

171 Electoral Commission “Party Secretary Handbook – General Election and Referendums 2020” <<https://elections.nz>> (2020 Party Secretary Handbook) at 13; Electoral Act, ss 205C, 206C and 266A.

172 2020 Party Secretary Handbook, above n 171, at 13; Electoral Act, ss 205C, 206C and 266A.

173 Electoral Act, s 206.

174 Electoral Act, s 206(1)(c); Broadcasting Act 1989, ss 74(1) and 79.

175 Electoral Act, s 205.

176 Geddis (2014), above n 8, at 171; *Peters v Clarkson* [2007] NZAR 610 (HC) at [142]–[144].

177 Geddis (2014), above n 8, at 171–172.

178 Electoral Act, ss 205, 205E, 206CB and 206CC.

179 Electoral Act, s 3A(1).

180 Geddis (2014), above n 8, at 153; Electoral Act, s 204F.

181 Electoral Act, s 206D; Geddis (2014), above n 8, at 173.

182 Geddis (2014), above n 8, at 172–173.

advertisements to be authorised by the electoral contestant.¹⁸³ However, there is no prohibition on negative advertising, negative campaigning or “issue advocacy”, which means that third parties may still support electoral contestants in these ways.¹⁸⁴

The amount any New Zealand person or entity may donate to a political party or candidate is not limited.¹⁸⁵ An overseas person may not donate more than \$50.¹⁸⁶ The previous cap on donations by overseas persons was \$1,500, however this was amended in 2019.¹⁸⁷ This amendment was passed under urgency.¹⁸⁸ The definition of a donation includes money or “the equivalent of money or of goods or services or of a combination of those things”.¹⁸⁹

Donations that are not money are known as in-kind donations.¹⁹⁰ The value of an in-kind donation is calculated as the difference between the “reasonable market value” of any goods or services provided and, if an amount was paid, that amount.¹⁹¹ However, labour provided free of charge does not constitute a donation.¹⁹² Goods or services provided to candidates free of charge with a reasonable market value of \$300 or less, and goods or services provided free of charge to a party with a reasonable market value of \$1,500 or less also do not constitute a donation.¹⁹³ Goods or services provided by an overseas person to either a candidate or a party that have a reasonable market value of \$50 or less do not constitute a donation.¹⁹⁴ Contributions are money or services provided to someone in the knowledge that they will later become part of a political donation.¹⁹⁵ Parties may also receive funding via loans; however, only the party secretary may enter into loans on behalf of the party and they are required to keep a record of all such loans.¹⁹⁶

The 1986 Royal Commission Report recommended that political parties be provided with general public funding, however this recommendation was not implemented.¹⁹⁷ Instead the Electoral Commission allocates funds to parties for broadcast and internet advertising (the Broadcasting Allocation).¹⁹⁸ The Broadcasting Allocation is apportioned by the Electoral Commission upon the basis of a number of factors showing party support such as votes, number of incumbent members of Parliament, relationships between parties, indications of public support such as polls and

183 Electoral Act, ss 204G, 204H, 205A, 205EA, 206A and 206CC.

184 Geddis (2014), above n 8, at 153.

185 Timothy K Kuhner “Representative Democracy in an Age of Inequality” (2021) 17(2) PQ 21 at 21; Graeme Orr and Andrew Geddis “Islands in the Storm? Responses to Foreign Electoral Interference in Australia and New Zealand” (2021) 20(1) Elect Law J 82 at 89.

186 Geddis (2014), above n 8, at 159–161; Electoral Act, s 207K.

187 Electoral Amendment Act 2019, s 9; Electoral Act, s 207K; Kuhner, above n 185, at 26.

188 Orr and Geddis, above n 185, at 90.

189 Electoral Act, s 207; Geddis (2014), above n 8, at 157–159.

190 Ministry of Justice “Package of potential changes to political donation settings prior to 2023 General Election” (5 August 2021) <<https://consultations.justice.govt.nz>>.

191 Electoral Act, s 207; Geddis (2014), above n 8, at 157–159.

192 Electoral Act, s 207.

193 Electoral Act, s 207.

194 Electoral Act, s 207.

195 Geddis (2014), above n 8, at 162; Electoral Act, s 207.

196 Electoral Act, ss 213 and 214B.

197 Geddis (2014), above n 8, at 137.

198 Broadcasting Act, s 74.

membership numbers and “the need to provide a fair opportunity for each party ... to convey its policies to the public by the broadcasting of election programmes on television.”¹⁹⁹

If parties wish to purchase party broadcast (television or radio) election advertising, this must be paid for out of the Broadcasting Allocation; they must not use other funds to pay for party broadcast advertising.²⁰⁰ Parties may use either their own funds or the Broadcasting Allocation to pay for production costs for broadcast election advertising for the party or candidate,²⁰¹ and party or candidate internet election advertising.²⁰² Parties may also use the Broadcasting Allocation to pay for a candidate’s broadcast election advertising, however this will fall within the candidate expenditure cap and is considered a donation from the party to the candidate regardless of whether using the Broadcasting Allocation or party funds.²⁰³

The disclosure threshold for party donations is \$15,000.²⁰⁴ For candidates, the donation disclosure threshold is \$1,500.²⁰⁵ These thresholds cover cash, in-kind donations and contributions.²⁰⁶ New Zealand’s disclosure requirements aim to prevent the making of political donations in exchange for political influence.²⁰⁷ The theory is that this will allow any questionable policy decisions to be investigated for bias in favour of reported donors and thereby both prevent such policy decisions from occurring and provide information to support investigations where it appears that political donations have been traded for political influence.²⁰⁸ The disclosure requirements regarding contributions are intended to prevent the creation of trusts or similar to disguise donors’ identity.²⁰⁹ The 1986 Royal Commission Report recommended that political parties be prohibited from receiving anonymous donations, however this recommendation was not introduced.²¹⁰

People who wish to donate over \$1,500 and remain anonymous may donate under the protected donations regime.²¹¹ Protected donations are paid directly to the Electoral Commission, then passed on to the relevant party and there are strict rules preventing the disclosure of the details of protected donations.²¹² A party may receive up to 10 per cent of its maximum permitted expenditure by way of protected donations and individual donors may contribute up to 15 per cent of that figure.²¹³ A donor who makes donations protected from disclosure is also entitled to make additional donations, subject to the ordinary disclosure requirements.²¹⁴

199 Broadcasting Act, s 78(2).

200 Broadcasting Act, s 74 and 80.

201 Broadcasting Act, s 74(1)(c).

202 Broadcasting Act, s 74(1)(d); 2020 Party Secretary Handbook, above n 171, at 20.

203 Broadcasting Act, s 74(1)(b) 80; Electoral Act, s 205C; 2020 Party Secretary Handbook, above n 171, at 21.

204 Electoral Act, s 210.

205 Electoral Act, s 209.

206 Electoral Act, ss 209(1)(a), (1)(b), (2), (3), 210(1)(a), (1)(b), (2) and (3).

207 Geddis (2021), above n 12, at 11.

208 Geddis (2021), above n 12, at 11.

209 Geddis (2014), above n 8, at 162–163.

210 Geddis (2014), above n 8, at 137.

211 Geddis (2014), above n 8, at 163; Electoral Act, ss 208–208G.

212 Geddis (2014), above n 8, at 164; Electoral Act, s 208F.

213 Geddis (2014), above n 8, at 163; Electoral Act, s 208B.

214 Geddis (2014), above n 8, at 164.

Disclosure occurs by way of various reports to the Electoral Commission. Donations of over \$30,000 are to be reported to the Electoral Commission within 10 days.²¹⁵ The details of other donations are to be set out on the party's annual return and individual candidates return of candidate donations, both of which are to be filed with the Electoral Commission.²¹⁶ The individual candidate return sets out the names and addresses of all donors and contributors who have donated over \$1,500 that year and the total of their donations (including cash, in-kind donations and contributions).²¹⁷ To the extent possible, it sets out the details of anonymous donors and foreign donors who have donated in excess of the applicable thresholds and the amounts returned to either the donor or the Electoral Commission as applicable.²¹⁸ The party annual return discloses the names and addresses of all donors or contributors who have donated over \$15,000 that year and the total of their donations (including cash, in-kind donations and contributions).²¹⁹ It also includes the details (to the extent possible) of both foreign donors and anonymous donors who donated amounts in excess of the applicable thresholds and the amounts returned to the Electoral Commission or donor.²²⁰ It also sets out required details of other anonymous donations, protected donations, and party donations below the disclosure threshold.²²¹ The party annual returns, individual candidate returns of donations and reports of donations over \$30,000 are published on the Electoral Commission's website.²²²

A party is required to file a return of the party's election expenses within 90 working days after polling day.²²³ A party is also required to file a return of its expenses funded by the Broadcasting Allocation.²²⁴ A candidate is required to file a return of election expenses within 70 working days after polling day.²²⁵ The party secretary is also to file with the Electoral Commission annual returns of loans setting out details, including the lender's details, for every loan over \$15,000, including loans from previous years with an unpaid balance over \$15,000.²²⁶ There are immediate reporting requirements for loans over \$30,000.²²⁷ The Electoral Commission publishes the loans and expenses returns on its website.²²⁸

The Electoral Commission receives parties' and candidates' various returns.²²⁹ There are requirements for auditor's reports in respect of the party's various reports including the election

215 Electoral Act, s 210C.

216 Electoral Act, ss 209 and 210.

217 Electoral Act, ss 209(1)(a), (1)(b), (2) and (3).

218 Electoral Act, ss 209(1)(c), (1)(d), (4) and (5).

219 Electoral Act, ss 210(1)(a), (1)(b), (2) and (3).

220 Electoral Act, ss 210(1)(c), (1)(d), (4) and (5).

221 Electoral Act, ss 210(1)(f), (1)(e), (6), (6A)(a), (6A)(c) and (6A)(d).

222 Geddis (2014), above n 8, at 165 and 166; Electoral Commission "2020 General Election and referendums Candidate expenses and donations for the 2020 General Election" <<https://elections.nz>>.

223 Electoral Act, s 206I.

224 Broadcasting Act, s 80E; Electoral Act, s 206IA.

225 Electoral Act, 205K.

226 Electoral Act, s 214C.

227 Electoral Act, s 214F.

228 2020 Party Secretary Handbook, above n 171, at 36 and 39, Electoral Commission, above n 222.

229 Geddis (2014), above n 8, at 259; Electoral Act, s 205K, 206I, 206IA, 209, 210 and 214C.

expenses return, Broadcasting Allocation return, annual return of party donations and annual return of loans.²³⁰ If the Electoral Commission believes a report is false, it is required to make a report to the police.²³¹ The Electoral Commission has the power to make inquiries, but does not have the power to compel any person to assist it or respond to it.²³² It has developed the practice of not instigating an inquiry unless there is an obvious discrepancy or it receives a complaint.²³³ As set out above, it publishes returns on its website.²³⁴

B. Problems with New Zealand's Current Political Finance Regulations

Historically, mass party memberships formed a large portion of political donations in New Zealand.²³⁵ However membership numbers have declined and it has been suggested that parties that have low membership numbers combined with high costs are particularly susceptible to the influence of wealthy, powerful interests.²³⁶ As party membership numbers have decreased, the funding of political parties in New Zealand from corporations and wealthy individuals has increased.²³⁷ The most significant portion of political donations in New Zealand is now made by corporations and wealthy individuals.²³⁸ Trade unions also form a substantial portion of donations, but significantly less than that donated by corporations and wealthy individuals in line with the reducing trade union coverage of the workforce.²³⁹ New Zealand's lack of a maximum permitted donation and its high disclosure threshold permit the risk of inequality of political influence and the potential for corruption.²⁴⁰

In January 2020 four people were charged in relation to the alleged splitting of a 2018 donation of \$100,000 and a 2017 donation of \$100,050, to the National Party into tranches below \$15,000 to avoid the disclosure of the true identity of the donor or donors and the full size of the donations.²⁴¹ In May 2021 six people were charged by the SFO in relation to the alleged splitting of a 2017 donation of at least \$34,840 to the Labour Party into tranches below \$15,000 to likewise avoid the disclosure of the true identity of the donor and the full size of the donation.²⁴² There are also High Court proceedings on foot in respect of allegations regarding undeclared funds paid to the

230 Electoral Act, ss 206L, 206LA, 210A and 214D.

231 Geddis (2014), above n 8, at 250; Electoral Act, ss 205P, 206P, 206ZG, 207O.

232 Electoral Act, s 6(1)(b); Geddis (2014), above n 8, at 259.

233 Geddis (2014), above n 8, at 259.

234 Geddis (2014), above n 8, at 175 and 259.

235 Palmer and Butler, above n 10, at 230.

236 Kuhner, above n 185, at 23.

237 Geoffrey Palmer "Rethinking Public Law in a Time of Democratic Decline" (2021) 52 VUWLR 413 at 456; Palmer and Butler, above n 10, at 230.

238 Simon Chapple and Thomas Anderson "Who's donating? To whom? Why? Patterns of party political donations in New Zealand under MMP" (2021) 17(2) PQ 14 at 18.

239 Chapple and Anderson, above n 238, at 18.

240 Palmer and Butler, above n 10, at 230 and 233–234; Geddis (2014), above n 8, at 135.

241 Sam Sachdeva "Mystery Delay to National Party donations trial" *Newsroom* (online ed, Auckland, 5 August 2021).

242 George Block and Catrin Owen "Labour Party Donations: Six in court on Serious Fraud Office charges over 2017 election donations" *Stuff News* (online ed, Wellington, 24 May 2021).

New Zealand First Foundation but used for the payment of expenses by the New Zealand First Party.²⁴³ These allegations have prompted concern about the integrity of New Zealand's democratic processes.²⁴⁴

Allowing unlimited private donations to candidates and parties is a form of political influence that may have an impact similar to or perhaps in excess of that of a vote.²⁴⁵ New Zealand's political finance regulations rely on disclosure to prevent the making of political donations in exchange for political influence.²⁴⁶ As set out above, political donations can undermine government legitimacy by impacting upon election outcomes and policy platforms, enabling the wealthy to exercise undue political influence and creating the perception of a quid pro quo arrangement.²⁴⁷ If the charges laid by the SFO regarding donations made to Labour and National are proven, those charged have breached New Zealand's electoral finance laws.²⁴⁸ However, these events also demonstrate that New Zealand's disclosure threshold is set too high to deter attempts to hide the identity of large donors.²⁴⁹ This means that New Zealand's current political finance regulations fail to adequately support the legitimacy of New Zealand's government and do not align with New Zealand's core constitutional norm of fair representation in democratic processes.

In respect of the alleged improper donations to the New Zealand First Foundation, National and Labour, these events were uncovered by the actions of whistle-blowers rather than identified by the Electoral Commission.²⁵⁰ The records of the donations made to the New Zealand First Foundation show that related entities controlled by one person made a number of donations just under the \$15,000 disclosure threshold within a short space of time.²⁵¹ However, charges filed by the SFO relate to "a general failure to transmit any of the party donations received by the foundation to the New Zealand First party's secretary, as required by law."²⁵² There was potential for charges to have been laid in relation to the splitting of donations to avoid disclosure requirements but this did not occur.²⁵³ The Electoral Commission's lack of power to compel information from electoral contestants and the fact that there is no independent auditing by the Electoral Commission have been identified as weaknesses in the system.²⁵⁴

The Broadcasting Allocation has been described as "hopelessly outdated" with there being no reason for broadcast advertising to be regulated differently to any other form of advertising.²⁵⁵ The allocation criteria is challenging for the Electoral Commission to apply, with the conflicting

243 Hurley (January 2021) and Hurley (February 2021), both above n 4.

244 Orr and Geddis, above n 185, at 91.

245 Geddis (2021), above n 12, at 11.

246 Geddis (2021), above n 12, at 11.

247 Boston and Mladenovic, above n 8, at 631 and 638–639; Royal Commission on the Electoral System, above n 25, at 183; Palmer and Butler, above n 10, at 231.

248 Geddis (2021), above n 12, at 11–12.

249 Geddis (2021), above n 12, at 11–12.

250 Geddis (2021), above n 12, at 12.

251 Geddis (2021), above n 12, at 12.

252 Geddis (2021), above n 12, at 12.

253 Geddis (2021), above n 12, at 12.

254 Geddis (2021), above n 12, at 12.

255 Geddis (2021), above n 12, at 13; Geddis (2014), above n 8, at 204–206.

requirements to give the larger parties a larger portion of the Broadcasting Allocation, while also considering “the need to provide a fair opportunity for each party ... to convey its policies to the public by the broadcasting of election programmes on television”.²⁵⁶

In addition to these significant structural problems, a number of other more discrete problems relating to various definitions within the Electoral Act have also been identified. The inherent difficulty in valuing in-kind donations means the current requirements permit the potential for large in-kind donations not requiring disclosure.²⁵⁷ Andrew Geddis points out three potential gaps: membership fees, selling access to party leaders at events, and sponsorship arrangements.²⁵⁸ The short length the “regulated period” has been criticised for failing to account for the emergence of permanent campaigning and it has been suggested that spending limits should apply continuously.²⁵⁹ Furthermore, incumbent parties and candidates may be advantaged by the narrow definition of “election spending”, which captures only election advertising that falls during the regulated period, and excludes activities “such as opinion polling, running focus groups, candidate travel, hiring campaign advisors, renting campaign offices and the like”.²⁶⁰ Funding arrangements that allow incumbents to use parliamentary funds for certain activities that fall outside the definition of “election spending” may also lead to an electoral advantage.²⁶¹

Other discrete rather than structural problems relate to foreign funding, the timing of the filing of returns and the regulation of third-party campaigners. Concern exists in relation to foreign funding and the potential for undue weight to be given to foreign interests.²⁶² In 2019 the government attempted to address these concerns by reducing the foreign donation limit to \$50.²⁶³ However, as set out above, this amendment was passed under urgency.²⁶⁴ The amendments failed to address the inadequacy in the definition of “overseas person”.²⁶⁵ Concern still exists that inadequacies in those reforms permit the risk that foreign donors may set up trusts or companies to avoid the \$50 limit.²⁶⁶ As there is no prohibition on foreign donations to third party campaigners, there is also concern that overseas persons can fund domestic advertising with the aim of influencing election outcomes without any disclosure requirements.²⁶⁷ The relatively tight regulation of political contestants compared with the minimal controls placed on third party campaigners who face constraints on election spending, but not on negative advertising and issue advocacy has also been identified as a concern.²⁶⁸ The requirement for the party and candidate returns to be filed after the election

256 Geddis (2021), above n 12, at 13; Broadcasting Act, s 78; Geddis (2014), above n 8, at 205–206.

257 Geddis (2014), above n 8, at 158.

258 Geddis (2014), above n 8, at 158.

259 Geddis (2021), above n 12, at 10; Palmer and Butler, above n 10, at 233.

260 Geddis (2021), above n 12, at 10.

261 Palmer and Butler, above n 10, at 232; Geddis (2014), above n 8, at 189.

262 Palmer and Butler, above n 10, at 230.

263 Orr and Geddis, above n 185, at 90; Electoral Amendment Act 2019, s 9.

264 Orr and Geddis, above n 185, at 90.

265 Orr and Geddis, above n 185, at 90.

266 Kuhner, above n 185, at 26.

267 Orr and Geddis, above n 185, at 90.

268 Boston and Mladenovic, above n 8, at 625.

means that there is the potential for donors and contributors to remain undisclosed until after the election.²⁶⁹

C. Solutions Proposed by the Ministry of Justice and Whether They Will Appropriately Address the Problems with New Zealand's Electoral Finance Laws

The Ministry of Justice has released a package of seven potential changes to New Zealand's electoral finance framework (the Proposals).²⁷⁰ Pending review, the Proposals could be implemented prior to the 2023 election.²⁷¹ The Proposals are as follows:

- (a) Proposal 1 is to lower the public disclosure threshold for donations to parties to \$1,500.²⁷² Projected benefits include improving the transparency of donations and bringing the party disclosure threshold into alignment with the candidate threshold, thereby removing the incentive to miscategorise candidate donations as party donations.²⁷³ However, this could also cause a reduction in the amount donated.²⁷⁴
- (b) Proposal 2 is to increase the frequency of donation reporting, with the suggestions being either every three or every six months, instead of the current annual reports.²⁷⁵ This aims to improve transparency and enhance compliance.²⁷⁶
- (c) Proposal 3 is to remove the immediate reporting requirements for donations over \$30,000 and to have such donations instead reported in the reports suggested in Proposal 2.²⁷⁷ This aims to reduce inadvertent non-compliance by reducing administrative complexity and also to remove an incentive for donation-splitting.²⁷⁸ Proposal 3 may delay the disclosure of large donations, but it is suggested that this could be mitigated by retaining immediate reporting requirements in the pre-election period.²⁷⁹
- (d) Proposal 4 is to introduce requirements for the disclosure of more details about in-kind donations.²⁸⁰ Proposal 4 does not specify what details would be required to be disclosed. The aim is to improve the transparency of in-kind donations and thereby enhance compliance in the context of in-kind loans.²⁸¹

269 Geddis (2014), above n 8, at 165; Andrew Geddis "Regulating the Funding of Election Campaigns in New Zealand: A Critical Overview" (2004) 10 Otago LR 575 at 590.

270 Ministry of Justice, above n 190, at 7.

271 Ministry of Justice, above n 190, at 2.

272 Ministry of Justice, above n 190, at 7.

273 Ministry of Justice, above n 190, at 5–7.

274 Ministry of Justice, above n 190, at 7.

275 Ministry of Justice, above n 190, at 7.

276 Ministry of Justice, above n 190, at 7.

277 Ministry of Justice, above n 190, at 7.

278 Ministry of Justice, above n 190, at 7.

279 Ministry of Justice, above n 190, at 7.

280 Ministry of Justice, above n 190, at 7.

281 Ministry of Justice, above n 190, at 7.

- (e) Proposal 5 is to require reporting of the number and total volume of non-anonymous donations under \$1,500.²⁸² This aims to improve transparency and compliance and bring reporting requirements for total non-anonymous donations into alignment with reporting requirements for total anonymous donations.²⁸³
- (f) Proposal 6 is to require parties to publicly disclose their audited annual financial statements.²⁸⁴ This aims to increase transparency and compliance.²⁸⁵
- (g) Proposal 7 is to introduce a requirement for candidates to report on loans.²⁸⁶ This is to align with the requirement regarding party loans and is projected as having the benefits of improving transparency and increasing compliance.²⁸⁷
- (h) A ban on anonymous donations is also being considered.²⁸⁸

The majority of the Proposals appear to be aimed at enhancing transparency and encouraging compliance. The exception to this is the removal of the immediate reporting requirement for donations over \$30,000, which appears to be aimed at reducing administration for the parties and does not appear to have a benefit for the general public. However, the risk associated with Proposal 3 could be mitigated with the suggestion to maintain this requirement during the regulated period.²⁸⁹

Recent allegations regarding improper donations show that New Zealand's disclosure threshold is set too high to deter attempts to hide the identity of donors and have prompted concern about the integrity of New Zealand's democratic processes.²⁹⁰ Accordingly, the current political finance regulations fail to prevent the undue influence of wealth.²⁹¹ Proposal 1 substantially lowers the current threshold for the disclosure of party donations. Lower disclosure thresholds would require the splitting of large donations into a larger number of tranches and with enhanced potential for detection and therefore potentially be a greater deterrent.²⁹² However, although enhanced disclosure requirements may lead to increased compliance and reduce the potential for the undue influence of wealth, they do not address the potential for inequity in a system that contains a private donation political channel of influence that is effectively open to some but not to others.²⁹³ Therefore, the Proposals fail to appropriately uphold New Zealand constitutional culture's strong commitment to fair representation in democratic processes.

282 Ministry of Justice, above n 190, at 7.

283 Ministry of Justice, above n 190, at 7.

284 Ministry of Justice, above n 190, at 7.

285 Ministry of Justice, above n 190, at 7.

286 Ministry of Justice, above n 190, at 7.

287 Ministry of Justice, above n 190, at 7.

288 Ministry of Justice, above n 5.

289 Ministry of Justice, above n 190, at 7.

290 Geddis (2021), above n 12, at 11–12; Orr and Geddis, above n 185, at 91.

291 Kuhner, above n 185, at 21; Geddis (2021), above n 12, at 11–13; Palmer and Butler, above n 10, at 230–235.

292 Geddis (2021), above n 12, at 11–12.

293 Geddis (2021), above n 12, at 12–13; Cohen, above n 22, at 284.

Lowered thresholds for the reporting of donations also have the potential to decrease the overall amount that is donated.²⁹⁴ Election spending facilitates political speech which is a democratic good and the means by which electoral contestants advocate “for their best views of society and its future”.²⁹⁵ Regulations that restrict the flow of private funding may decrease political spending and therefore political speech.²⁹⁶ Excessively tight regulations also have the potential to encourage “rule-bending”.²⁹⁷ As set out above, contraction or distortion of a public space and constitutional amendment both have the potential to contribute toward democratic decline.²⁹⁸ Accordingly, there may be a need to compensate for a potential decrease in private donations.²⁹⁹ This is not addressed by the Proposals. The potential for the Proposals to decrease the funding of political speech without any mitigating features is not in accordance with New Zealand’s emerging appreciation of the value of individual rights and freedoms.

The Proposals also do not address the concerns outlined above regarding the Broadcasting Allocation. Given the potential for the Proposals to reduce private donations, the failure to simultaneously incorporate a public funding component presents a risk. Pending review, the Proposals could be implemented prior to the 2023 election.³⁰⁰ Although these concerns may be addressed subsequently, as set out above, elections have a heightened importance in providing government legitimacy in New Zealand in the absence of other measures to limit government’s powers.³⁰¹ Accordingly, it is important that this risk is considered alongside the benefits of the Proposals in assessing whether they ought to be adopted without additional measures prior to the 2023 election.

In relation to the more discrete rather than structural concerns outlined in III.B. above, it appears that the Proposals have the potential to resolve or minimise the concerns outlined above regarding in-kind donations, candidate loans and reporting delays. They do not address concerns outlined above regarding the regulated period, the definition of “election spending”, the potential advantage of parliamentary funds or the influence of third-party campaigners. They also do not address the concerns regarding potential donations by foreign-owned companies. The Proposals also do not address the role of the Electoral Commission. However, Proposal 6 which would require parties to publicly disclose their audited reports, alongside other increased disclosure and reporting requirements, has the potential to enhance compliance. Consideration should also be given as to whether the Electoral Commission should be given increased investigative powers, such as the power to compel the production of information or to compel people to testify.³⁰²

294 Ministry of Justice, above n 190, at 7.

295 Geddis (2021), above n 12, at 10 and 13.

296 Geddis (2021), above n 12, at 10 and 13.

297 Geddis (2021), above n 12, at 13.

298 Huq and Ginsburg, above n 13, at 78, 117 and 118.

299 Geddis (2021), above n 12, at 13.

300 Ministry of Justice, above n 190, at 2.

301 McLean, above n 73, at 323; Geddis (2017), above n 56, at 223.

302 Geddis (2021), above n 12, at 12; Kuhner, above n 185, at 27.

IV. THE DEVELOPMENT OF NEW ZEALAND'S POLITICAL FINANCE
REGULATIONS TO SUPPORT GOVERNMENT LEGITIMACY BY BALANCING
THE COMPETING TENSIONS OF FREEDOM OF EXPRESSION AND
EQUAL OPPORTUNITY FOR POLITICAL INFLUENCE IN A WAY THAT ALIGNS
WITH NEW ZEALAND'S CONSTITUTIONAL FRAMEWORK AND CULTURE

A. The Incorporation of Public Funding into the Regulation of Political Finance in Germany, Australia and Canada

As set out above, there are a number of reasons to consider tightening regulations regarding private funding in New Zealand. Some reduction in election spending may be justified upon the basis of enhancing political equality, however excessive restrictions may not be justified.³⁰³ Excessively tight regulations that reduce donations can limit freedom of expression and create a less informed electorate.³⁰⁴ Spending by political parties can be a democratic good as it facilitates the transfer of information to the electorate.³⁰⁵ Introducing public funding alongside tighter regulations on private donations aims to reduce the potential for corruption and foster political equality.³⁰⁶ Incorporating public funding into the regulation of political finance can reduce the potential for corruption, create more competitive elections, support diversity and encourage election campaigns that are centred on voters.³⁰⁷

In order to compensate for a potential decrease in private funding, New Zealand should consider increasing the type and amount of public funding allocated in circumstances where it is considering tighter regulations.³⁰⁸ The Broadcasting Allocation could be repurposed for a more general support for electoral contestants.³⁰⁹ However, public funding schemes can have unintended consequences and there is the risk that such funding can favour major parties over minor parties by directing funds toward established parties.³¹⁰ Accordingly, consideration needs to be given as to what method of allocating public funding would be appropriate for New Zealand.³¹¹ Geddis has suggested that a public funding model that distributes funds in accordance with criteria that supports “a diverse and competitive electoral environment” would be appropriate and referred to the German allocation criteria as an example.³¹²

303 Geddis (2021), above n 12, at 11.

304 Geddis (2021), above n 12, at 10–11.

305 Geddis (2021), above n 12, at 10.

306 Geddis (2021), above n 12, at 13; Mimi Murray, Digby Marziani and Adam Skaggs “More than Combatting Corruption: The Other Benefits of Public Financing” (7 October 2011) Brennan Centre for Justice <www.brennancenter.org>.

307 Marziani and Skaggs, above n 306.

308 Geddis (2021), above n 12, at 13.

309 Geddis (2021), above n 12, at 13.

310 Anika Gauja “The Public Funding of Election Campaigns and Political Parties” in Anika Gauja *Political Parties and Elections: Legislating for Representative Democracy* (eBook ed, Routledge, London, 2016) 131, at 131–132.

311 Geddis (2021), above n 12, at 13.

312 Geddis (2021), above n 12, at 13.

In Germany, public funding of political parties is allocated according to a calculation based on electoral success, membership contributions, and donations raised.³¹³ Parties are required to obtain at least one per cent of the vote in a state election, or 0.5 per cent of the vote in a European or federal election to be entitled to funding.³¹⁴ Public funding for political parties is calculated by combining:³¹⁵

- (a) €1 for the first four million valid list votes and €0.83 for each valid list vote in excess of that;
- (b) €1 for the first four million valid constituency votes and €0.83 for each valid constituency vote in excess of that; and
- (c) €0.45 for every euro that they have received in membership contributions and donations (excluding donations larger than €3,300).

The increased funding rate for the first four million votes aims to compensate for the advantage enjoyed by incumbents.³¹⁶ Public funding must not exceed parties' income generated from other sources.³¹⁷ In 2019, state funding comprised approximately 36 per cent of total income for parties represented in Federal Parliament, while membership contributions totalled 27 per cent and donations 14 per cent.³¹⁸

Australia's public funding system adopted a different model. At the federal level in Australia in both the House of Representatives elections and the Senate elections, public funding is provided in the form of reimbursement after the election, calculated on the basis of votes received.³¹⁹ To be eligible for the reimbursement, candidates in the House of Representative elections must receive at least four per cent of first preference votes, while parties contesting the Senate election must receive at least four per cent of the vote.³²⁰ Following recent legislative amendment, the funding provided is currently an automatic payment of \$10,000 with additional funding provided on the basis of proven expenses capped at a per-vote rate.³²¹ In addition, individuals may claim income tax deductions of up to \$1,500 in respect of donations made in their personal capacity to both political parties and candidates.³²² Public funding in Australia is combined with disclosure rules regarding donations, with the disclosure threshold indexed and currently set at \$14,500.³²³ There is also a \$1,000 cap on foreign donations.³²⁴ However, these rules have been described as inadequate,

313 Political Parties Act 1967 (Germany), s 18(1); Nette Nöstlinger and Cornelius Hirsch "Political party funding in Germany explained" *Politico* (online ed, Brussels, 29 July 2021).

314 Political Parties Act 1967 (Germany), s 18(4); Ian Bateson and Mark Hallam "German election: Party and campaign financing" *Deutsche Welle* (online ed, Germany, 9 August 2021).

315 Political Parties Act 1967 (Germany), s 18(3); Federal Minister of the Interior and Community "Funding of Political Parties" (2021) <www.bmi.bund.de>.

316 Federal Minister of the Interior and Community, above n 315.

317 Political Parties Act 1967 (Germany), s 18(5); Federal Minister of the Interior and Community, above n 315.

318 Nöstlinger and Hirsch, above n 313.

319 Commonwealth Electoral Act 1918 (Australia), s 293(1); Gauja, above n 310, at 135.

320 Commonwealth Electoral Act 1918 (Australia), s 293(1); Gauja, above n 310, at 135.

321 Commonwealth Electoral Act 1918 (Australia), ss 293(1) 293 and 297; Damon Miller "Political finance" Parliament of Australia <www.aph.gov.au>.

322 Income Tax Assessment Act 1997 (Cth), subdivisions 30-242 to 30-245.

323 Commonwealth Electoral Act 1918 (Cth), ss 287(1) and 321A; Australian Electoral Commission "Disclosure Threshold" (18 June 2021) <www.aec.gov.au>.

324 Commonwealth Electoral Act 1918 (Cth), s 302D.

with more than \$68 million in unexplained funds in the 2020–2021 financial year, comprising approximately 40 per cent of all funding.³²⁵

An additional alternate model of public funding is used in Canada. In relation to elections for the Canadian House of Commons, the political funding model requires donors to be Canadian citizens or residents and caps the amount a person may donate to those contesting the House of Commons elections at \$1,500 to both parties and candidates.³²⁶ There are also funding disclosure requirements.³²⁷ Public funding is provided for candidates who comply with reporting requirements and receive at least 10 per cent of the vote (or are elected), the amount of funding provided is a reimbursement calculated based on the amount spent by the candidate.³²⁸ Public funding is provided for parties who comply with reporting requirements and receive at least two per cent of the vote nationally, or five per cent of votes in districts where they endorsed candidates, the amount of funding provided is a reimbursement calculated based on the amount spent by the party.³²⁹ The amount that candidates and parties are permitted to spend is also regulated based on the number of voters in the electorate.³³⁰ In addition, an individual can claim tax credits up to \$650 for federal political contributions calculated as follows: 75 per cent credit on first \$400 donated (\$300 credit); 50 per cent credit on portion of donation from \$400 to \$750 (\$175); and 33.33 per cent credit on portion of donation from \$750 to \$1,275 (\$175).³³¹

B. Incorporating Public Funding into New Zealand's Political Finance Regulations in a Way That Appropriately Balances the Competing Tensions of Equal Opportunity for Political Influence and Freedom of Expression in New Zealand's Constitutional Context

As set out above, the Broadcasting Allocation is outdated and the allocation method is unclear.³³² It could be repurposed to support a general public funding model.³³³ The amount to be funded and how it ought to be allocated requires consideration.³³⁴ The Australian model of allocating public funding is calculated based on spending but capped purely on the number of votes received.³³⁵ As this system does not incorporate a method to mitigate the advantage to incumbents, the Australian method of allocating public funds to electoral contestants has been criticised for its tendency to favour the two major parties.³³⁶ The Canadian model of allocating public funding based on the

325 Katrina Curtis “Hidden Money: Political parties rake in \$68 million from mystery sources” *The Age* (online ed, Melbourne, 4 February 2022).

326 Canada Elections Act SC 2000 c 9, ss 363 and 367.

327 Canada Elections Act, ss 432–435.

328 Canada Elections Act, ss 477.73, 477.74 and 477.741; Elections Canada “The Electoral System of Canada” <www.elections.ca>.

329 Canada Elections Act, s 444; Elections Canada, above n 328.

330 Canada Elections Act, ss 384, 430–431, 477.49 and 477.5.

331 Income Tax Act RSC 1985 c 1, s 127(3).

332 Geddis (2021), above n 12, at 13.

333 Geddis (2021), above n 12, at 13.

334 Geddis (2021), above n 12, at 13.

335 Commonwealth Electoral Act 1918 (Cth), ss 293 and 297.

336 Gauja, above n 310, at 135.

amount spent is combined with both spending limits and donations caps.³³⁷ Noting the absence of donation limits in New Zealand, this method may favour those parties who have more to spend within New Zealand's regulatory environment and therefore be inappropriate.

The German system of allocating a higher amount of funding for the first portion of votes and a lower amount of funding for subsequent votes appears clearer to apply than the Broadcasting Allocation and has potential to reduce any unfair advantage to incumbents.³³⁸ However, the German allocation method is also based on membership donations and private donations.³³⁹ This may be appropriate in Germany as it has high levels of membership donations, with 27 per cent in membership donations in 2019 in comparison with 14 per cent for private donations in the same period.³⁴⁰ However, as set out above, New Zealand has experienced a decline in mass party membership and a corresponding rise in private donations by wealthy individuals and corporations.³⁴¹ Accordingly, this part of the German model has the potential to exacerbate inequalities present in the private donation channel of influence and may not be appropriate to incorporate into New Zealand's public funding allocation methods at this time. However, a public funding model that allocates a higher amount of funding for the first portion of votes and lower amount of funding for subsequent votes would appear to align with New Zealand's strong commitment to fairness and representation in the electoral processes.

However, although public funding can help to address corruption or the perception of it, it has the potential to "de-link" parties from their supporters.³⁴² Broad-based citizen funding, rather than state funding or funding from large donors, is typically viewed as the least troublesome source of party funding.³⁴³ As set out above, enhanced disclosure requirements such as those set out in the Proposals are likely to reduce the potential for inequality in New Zealand's political donations scheme.³⁴⁴ However, they do not address the inequity present in having a private donation channel of influence that is effectively open to some but not to others.³⁴⁵ If private funding is to be retained alongside public funding, consideration should be given to how private funding itself can be made more equitable and therefore become more broad-based.

Some countries provide tax incentives to donate to political parties, however the impact of such schemes is not clear.³⁴⁶ Rebate schemes are based upon the rationale that they will encourage donations from a wider range of sources.³⁴⁷ Therefore they aim to widen the range of participants in the political donation "channel of influence" referred to by Joshua Cohen.³⁴⁸ Sir Geoffrey Palmer

337 Canada Elections Act, ss 384, 430–435, 444, 477.49, 477.5, 477.73, 477.74 and 477.741; Elections Canada, above n 328.

338 Geddis (2021), above n 12, at 13; Federal Minister of the Interior and Community, above n 315.

339 Political Parties Act 1967 (Germany), s 18(3); Federal Minister of the Interior and Community, above n 315.

340 Nöstlinger and Hirsch, above n 313.

341 G Palmer, above n 237, at 456; Palmer and Butler, above n 10, at 230.

342 Aldo F Ponce and Susan E Scarrow "Who Gives? Partisan Donations in Europe" (2011) 34 West Eur Politics 997 at 998–999.

343 Ponce and Scarrow, above n 342, at 997.

344 Geddis (2021), above n 12, at 11–13.

345 Boston and Mladenovic, above n 8, at 639; Cohen, above n 22, at 284.

346 Ponce and Scarrow, above n 342, at 1001.

347 Gauja, above n 310, at 144.

348 Cohen, above n 22, at 284.

has expressed support for the concept of rebates by suggesting that “[i]ndividual donations below \$5000 could be given tax credits and matched by state funding to encourage small donors.”³⁴⁹ As set out above, both Australia and Canada incorporate rebates into their political funding models. The Australian model provides a complete tax deduction up to \$1500, but this is provided by way of a tax deduction.³⁵⁰ The Canadian model operates as only a partial rebate and, like the Australian scheme, is provided in the form of a tax credit.³⁵¹ Accordingly, a donation may only be made to the extent that a person can afford it at the time that they make the donation. These rebate schemes do not appear to be targeted at less well-resourced groups.

Whether a person is willing to donate is determined more by whether they can afford to donate rather than by whether they are politically interested in donating.³⁵² Although these tax credit rebate models may operate to increase the portion of people who can afford to make political donations, they do not admit those who do not have the ability to afford “up front” donation payments to participate in the political donation channel of influence. Accordingly, the Australian and Canadian models do not adequately widen access to the political donation channel of influence. Allowing a democratic channel of influence to exist without making provision for all to participate facilitates inequality in the electoral system and therefore has the potential to undermine government legitimacy.³⁵³

Wealth is unevenly distributed in New Zealand.³⁵⁴ As at 2020, the wealthiest 10 per cent of New Zealanders owned 59 per cent of national wealth and the poorest 50 per cent owned just two per cent.³⁵⁵ On average, New Zealanders spend nearly all of their earnings each year, with the “equivalent of each occupied household ... earning about \$412 more a year than they spend.”³⁵⁶ In contrast, the average donation amount of the National party’s 231 above-threshold donations between 1996 and 2019 was \$55,732, the equivalent figure for Labour was \$40,717.³⁵⁷ The portion of New Zealand’s population that can afford to make such donations is very small.³⁵⁸

As set out above, by combining Tsesis’ justification of regulations aimed at addressing the lack of representation of under-resourced groups in the marketplace of ideas, and Farber’s suggestion that regulations that subsidise speech rather than restrict it, it appears that subsidies targeted at under-resourced groups should also be considered as an option to enhance political equality in the context of political donations.³⁵⁹ To put this into practice, a means-tested element could be incorporated into a political donation rebate scheme. The aim of such a scheme would be to subsidise less well-resourced members of society to participate in the private donation channel of political influence. In order to ensure that no person in New Zealand who wants to donate is

349 Palmer and Butler, above n 10, at 233.

350 Income Tax Assessment Act 1997 (Cth), subdivision 30-242 to 30-245.

351 Income Tax Act RSC 1985 c 1, s 127(3).

352 Cohen, above n 22, at 280.

353 Cohen, above n 22, at 270–271 and 283–285.

354 Kuhner, above n 185, at 23.

355 Kuhner, above n 185, at 23; Max Rashbrooke “New Zealand’s astounding wealth gap challenges our ‘fair go’ identity” *The Guardian* (online ed, 31 August 2020).

356 Statistics New Zealand “Household saving only just positive” 20 November 2020 <www.stats.govt.nz>.

357 Chapple and Anderson, above n 238, at 17.

358 Geddis (2021), above n 12, at 11.

359 See above n 54.

excluded from this political channel of influence, the lowest income earners could be provided with a complete rebate at the time of the donation.

The 1986 Royal Commission Report briefly considered the concept of tax credits for political donations but dismissed it upon the basis that it may operate to reduce donations to charities and that it may operate to provide tax benefit to political donors, which would undermine “neutrality and equity in the tax system”.³⁶⁰ However, these problems could be addressed by having a political donation credit scheme supported by public funding that operates separately to income tax rebates for charitable donations. This would counter any disincentive to donate and neutrality and equity in the tax system would not be impacted as it would be a separate system.

C. Whether a Means-tested Rebate Would Align with New Zealand’s Constitutional Culture and Framework

As set out above, in order to support government legitimacy, electoral finance regulations need to appropriately balance the competing tensions of equal opportunity for political influence and freedom of expression within their constitutional context.³⁶¹ In New Zealand, this balancing act needs to consider New Zealand’s constitutional culture, which highly values fair electoral representation and has an emerging appreciation of the importance of fundamental rights and freedoms.³⁶² Electoral finance regulations also need to account for the vital importance of elections in New Zealand’s constitutional framework, with heightened importance of factual and perceived fairness and representation.³⁶³

New Zealand’s current political finance regulations are inadequate as they have not evolved to account for the decline in mass party membership and they either permit either the undue influence of wealth or the perception of it.³⁶⁴ The Proposals address these concerns to some extent, but they fail to adequately address the lack of fairness present in the private donations regime, which is effectively a channel of political influence open to some but not others. Accordingly, the Proposals do not adequately support New Zealand’s core value of fair representation in democratic processes. They also have the potential to cause a decrease in donations which may translate to a reduction of political speech. This shows that they also do not accord with New Zealand’s emerging appreciation of the value of individual rights and freedoms, such as freedom of expression.

In order to address the potential for under-funding, and as a method to reform the inappropriate and outdated Broadcasting Allocation, New Zealand should consider adopting public funding alongside the Proposals. New Zealand should consider a scheme inspired by Germany’s allocation model that allocates funding based on votes received, but at a higher rate for the first portion of votes to mitigate the advantage received by incumbents in systems based purely on votes received. Such an allocation method would align with New Zealand’s highly held value of fair democratic representation. The specific per vote allocation and the portion of votes to receive higher funding levels would require amendment to be made appropriate for the New Zealand political funding requirements and context. It appears necessary to disregard the portion of

360 Royal Commission on the Electoral System, above n 25, at 221.

361 Boston and Mladenovic, above n 8, at 632–632 and 639–640.

362 Morgan, above n 68, at 97; M Palmer, above n 55, at 575–578; McLean, above n 73, at 338.

363 McLean, above n 73, at 323; Geddis (2017), above n 56, at 223.

364 Palmer and Butler, above n 10, at 233–234; Geddis (2014), above n 8, at 135.

the allocation method that relies on private donations and membership contributions in light of New Zealand's decrease in mass membership and increase in private donations by wealthy individuals and corporations.

However, public funding can de-link parties from their supporters, and it would be preferable to establish more broad-based citizen funding rather than focus solely on public funding.³⁶⁵ The Proposals also retain the private donation channel of political influence without any attempt to widen access. New Zealand could consider the option of addressing the inequity in the private donations scheme and the limitations of public funding by incorporating a means-tested rebate for political donations into its political finance arrangements. To ensure that all individuals have access to this political channel of influence, the scheme should incorporate capacity for the lowest income earners to receive their rebate at the time that their donation is made. The aim of this feature would be to ensure that those who cannot afford to make a political donation without the rebate are able to participate and not required to have the "up-front" funds available. As set out above, the scheme could operate and be funded separately to the tax system, to address the concerns set out in the 1986 Royal Commission Report relating to a reduction in charitable donations. A means-tested rebate operating separately to the tax system could also address the Royal Commission's concerns regarding tax benefits for donors.

The extent to which such a scheme may operate to mitigate the undue influence of wealth may depend on the extent to which it is used. If unpopular, it may have little impact. If popular, the potential for a donation cap or more specifically targeted subsidies could also be explored to further reduce inequality. Timothy Kuhner has suggested the setting of a donation limit of five per cent of average yearly individual income.³⁶⁶

As set out above, New Zealand constitutional culture has also demonstrated a preference for slow change.³⁶⁷ In line with the recommendation of the 1986 Royal Commission in relation to MMP,³⁶⁸ a means-tested political donation rebate should not be adopted unless it is understood and supported by the public. Potential reforms should be given adequate time for debate. There may perhaps be some hesitancy toward incorporating equalising reforms to the arena of political donations. However, New Zealand already has similar measures in the context of healthcare with the community services card scheme.³⁶⁹ There is also justified concern about the potential impact of wealth upon our electoral processes.³⁷⁰ Political finance reforms that address inequality are not "socialism in disguise".³⁷¹ They are essential for the health of our democracy in a time of stark and increasing inequality.³⁷²

A means-tested rebate would enhance equal opportunity for political influence and freedom of expression, while the general public funding allocation would ensure the adequate funding of

365 Ponce and Scarrow, above n 342, at 997–999.

366 Kuhner, above n 185, at 26.

367 M Palmer, above n 55, at 577; Cartwright, above n 164, at 15.

368 Royal Commission on the Electoral System, above n 25, at 65.

369 New Zealand Public Health and Disability Act 2000, s 25 ; Health Entitlement Cards Regulations 1993, regs 8 and 12; Felicity Goodyear-Smith and Toni Ashton "New Zealand health system: universalism struggles with persisting inequities" (2019) 394 *Lancet* 432 at 434–435.

370 Kuhner, above n 185, at 27.

371 Kuhner, above n 185, at 23.

372 Kuhner, above n 185, at 24.

political speech in the event that private donations were inadequate. Such a means-tested rebate would conform with New Zealand's constitutional culture. In terms of the value of fair political representation, expansion of access to the private donation channel of political influence mirrors New Zealand's early expansion of the voting franchise. In addition, as this type of funding has the potential to increase political speech rather than restrict it, it appears to support New Zealand's emerging recognition of the value of individual rights and freedoms such as freedom of expression.

V. CONCLUSION

The general aim of political finance regulations is to support the legitimacy of democratic governments by appropriately balancing the competing tensions of freedom of expression and equal opportunity for political influence that are inherent in political donations. In New Zealand, the regulation of political finance needs to account for the heightened importance of fair and representative elections in providing government legitimacy as New Zealand heavily relies on elections to limit government's power in the absence of other measures in its constitutional framework. Regulation of political finance in New Zealand also needs to be consistent with New Zealand's constitutional culture, which demonstrates a strong commitment to fair representation in its democratic processes while also recognising an emerging appreciation of the value of individual rights and freedoms.

New Zealand's current political finance regulations incorporate disclosure requirements, spending limits and public funding in the form of a Broadcasting Allocation. New Zealand has not developed its political finance regulations to account for the decline in mass party membership and the increase in funding from wealthy donors. The current disclosure thresholds permit either the actual or the perceived undue influence of wealth on elections, which has the potential to undermine the legitimacy of New Zealand's democratically elected government. The Broadcasting Allocation is outdated and inappropriate. The Proposals have the potential to reduce the undue influence of wealth by reducing the potential for avoidance of the donation disclosure requirements. However, they do not adequately address the potential for the actual or perceived undue influence of wealth arising out of private donations and they may introduce the problem of the underfunding of political speech. Accordingly, they do not appropriately balance the ideals of freedom of expression and equal opportunity for political influence in the context of New Zealand constitutional culture's strong commitment to fair representation and emerging recognition of the importance of individual rights and freedoms. They also fail to appropriately consider the core importance of fair and representative elections in New Zealand's constitutional framework.

Public funding can be incorporated into political finance regulations to address funding shortfalls caused by the regulation of private funding. There are different methods to distribute public funding. The German method of allocating public funding would be more equitable and less outdated than the Broadcasting Allocation but still permits inequality through its partial reliance on private donations in its allocation method. The Australian and Canadian rebate systems have the potential to widen access to the private campaign donation channel of influence, but do not widen access sufficiently. Alongside the Proposals, New Zealand should consider adopting a general public funding model, based on the portion of the German allocation method that relies on votes, but excluding the portion that relies on membership contributions and private donations. In addition, New Zealand should consider the introduction of a means-tested political donation rebate, provided at the time of donation for the lowest income earners. This has the potential to enhance equal opportunity for political influence in the private donation "channel of influence"

without undermining freedom of expression. It conforms with the heightened importance of fairness and representation in New Zealand's electoral processes in the absence of other measures to limit the government's power in its constitutional framework. It also aligns with New Zealand's constitutional culture, which highly values fair representation in democratic processes, while also supporting New Zealand's emerging recognition of the value of individual rights and freedoms. A prerequisite to its adoption would be understanding and acceptance of it by the people of New Zealand.

This article has considered broad structural changes that could be incorporated into New Zealand's political finance regulations to enhance their constitutional suitability. As set out above, there are a number of other areas that require and are deserving of attention but, due to time and length constraints, fall outside the scope of this article. Potential areas for reform deserving of further attention include: review of the role and powers of the Electoral Commission, consideration of a ban on foreign, anonymous and corporate donations, consideration of the appropriate length of the regulated period, review of the definition of "election spending" and review of the adequacy of regulation of third-party campaigners.

In addition, as set out above, if the Proposals are passed in their current form, there is a risk of underfunding at the 2023 election. Consideration of the entire framework of political finance regulation would be preferable to amending aspects of it, which has the potential to cause unintended consequences. However, given the current significant concerns in relation to the potential undue influence of wealth, and the limited time available to introduce reforms prior to the 2023 elections, the risks and benefits of the Proposals ought to be weighed in the timeframe available to determine the least risky course of action in terms of a reform timeline.

CARBON FARMING AND CARBON NEUTRALITY

BY JACK CHAPLOW*

I. INTRODUCTION

A recent article by Serena Solomon in the *New York Times* explains how New Zealand’s “climate fight is threatening its iconic farmland.”¹ The article highlights how carbon farming has become imperative to New Zealand’s goal of carbon neutrality by 2050. This is a result of the New Zealand Emissions Trading Scheme, which allows carbon-intensive industries to offset emissions by purchasing credits from forestry owners. As the price of credits under the Emissions Trading Scheme begins to soar, forestry investors are purchasing masses of pastoral land to convert into forestry land for carbon farming. While the price of credits is a contributing factor, the NZ Emissions Trading Scheme also allows companies to offset 100 per cent of their emissions through forestry.² The reason for the mass reliance on forestry is that New Zealand is not doing enough to reduce emissions, partly in fact to agriculture (New Zealand’s largest greenhouse gas emitter) not yet being included in the Emissions Trading Scheme.³

New Zealand has already experienced a seismic shift in land usage. In 2017, pastoral farms sold in their entirety to forestry totalled about 10,000 acres.⁴ Just two years later, this figure had increased to 90,000 acres.⁵ Importantly, domestic and international investors from places such as Australia, Malaysia, and the United States of America undertake the conversion of pastoral land.⁶ In the first six months of 2021, 29 per cent of pastoral land purchased to conduct a forestry conversion was approved for sale through the Overseas Investment Office.⁷ Pastoral lands suitable for carbon farming operations have further seen mass appreciation in their value. The *New York Times* article takes the example of Horehore Station, a sheep and beef farm in Gisborne, New Zealand, that in 2013 was purchased for \$1.3 million (in New Zealand dollars) and now, in 2022, sold for \$13 million. Current modelling provided by New Zealand’s Climate Change Commission suggests that to meet 2050 emission targets, 2.7 million acres of carbon forests are needed. Additional

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1 Serena Solomon “How New Zealand’s Climate Fight Is Threatening Its Iconic Farmland” *The New York Times* (online ed, New York, 11 August 2022).

2 Solomon, above n 1.

3 Solomon, above n 1.

4 “New report confirms trend of land-use change from pastoral farming to carbon farming” Beef + Lamb New Zealand (16 December 2021) <<https://beeflambnz.com>>.

5 Solomon, above n 1.

6 Solomon, above n 1.

7 Orme & Associates Limited *Independent validation of land-use change from pastoral farming to large-scale forestry* (Beef + Lamb New Zealand, November 2021) at 3.

modelling has increased this number to 13 million acres, or about 70 per cent of New Zealand's farmland.⁸

At face value, uninformed people may believe that forestry conversions immensely benefit New Zealand. As pastoral land contributes significantly to New Zealand's greenhouse gas emissions, creating carbon farms (and subsequently planting trees) on pastoral land reduces emissions and aids in reducing the severity of climate change. Furthermore, some may believe that international investment in changing land use benefits the economy and the environment. This belief soon wanes with an in-depth examination of the issue at hand. Firstly, the plantation of a carbon forest locks in a land use change. This is because to procure the maximum allotment of carbon credits in a commercial forest, the trees are required to be growing for nearly three decades. Secondly, farming is the foundation of New Zealand's economy. As of March 2022, meat and dairy exports (traditional "farm" exports) made up 39.5 per cent of New Zealand's total exports, whereas "logs, wood, and wood articles" (forestry) made up only 5.7 per cent.⁹ At the current Climate Change Commission modelling, losing 2.7 million acres of pastoral land will equal a loss of \$2 billion a year in exports.¹⁰ With the immense export loss and no industry to pick up the slack, the exchange rate would come under tremendous pressure, weakening the New Zealand dollar and increasing import costs for New Zealanders.¹¹ Thirdly, carbon farms create "green deserts" of trees that provide few jobs to rural communities. Carbon forestry provides one job a year per 2500 acres; this number is increased exponentially when it comes time to harvest or replant the forest. However, this only occurs every few decades.¹² On the other hand, beef and sheep farming provides regular employment: 13 full-time jobs per 2500 acres.¹³ Lack of employment decimates rural economies. Finally, the impact of foreign investors buying up New Zealand pastoral land and planting carbon farms with no consideration towards the detrimental effect on New Zealand's economy and environment is an area of concern. Most importantly, international investors are more concerned with the profits received from the investment rather than the significant ramifications to the environment or the national economy. Foreign investors earning money from these investments also take profits offshore instead of reinvesting and spending within New Zealand's economy.

To understand how this problem has occurred, an in-depth examination of the New Zealand Emissions Trading Scheme and the carbon sequestration process will occur. This will be followed by an analysis of what attracts foreign investors to this form of investment in New Zealand. Next, the applicable legislation will be outlined, including a description of the process undertaken, should a foreign investor wish to make this investment. Finally, an opinion-based analysis will determine whether the legislation goes far enough to solve the problem. This analysis will include potential recommendations, followed by a conclusion.

8 Solomon, above n 1.

9 Statistics New Zealand "International trade: March 2022 quarter" (2 June 2022) <www.stats.govt.nz>.

10 Solomon, above n 1.

11 Solomon, above n 1.

12 Solomon, above n 1.

13 Solomon, above n 1.

II. NEW ZEALAND EMISSIONS TRADING SCHEME

The global emission of greenhouse gases, such as carbon dioxide from human activities, has been the most significant driver of observed climate change since the mid-20th century.¹⁴ The impacts of climate change are global and diverse. When considering the environment, climate change directly equates to “intense droughts, water scarcity, severe fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity”¹⁵. The negative effects on humanity include “[adverse] health [effects], [reduced] ability to grow food, [and poor] housing, safety and work”.¹⁶ To reduce the disadvantageous consequences of climate change, global governments have come together under the purview of the United Nations to take action. The United Nations Framework Convention on Climate Change (UNFCCC) was created from this action. The UNFCCC was enacted to aid countries’ understanding of how they can mitigate the global effects of climate change. One hundred and eighty-five countries, including New Zealand, adopted the framework.¹⁷ The framework now has near-universal adoption. Within New Zealand, it was entered into force on 21 March 1994.¹⁸ The initial UNFCCC recognised a problem and put the onus on developed nations to solve the problem. Since the initial UNFCCC framework, there have been three further iterations: the Kyoto Protocol (1997), the Doha Amendment to the Kyoto Protocol (2012) and the Paris Agreement (2015).¹⁹ The first commitment to greenhouse gas emissions reductions was made under the Kyoto Protocol; New Zealand agreed to limit or reduce its net greenhouse gas emissions to 1990 levels by 2013.²⁰ New Zealand achieved its Kyoto Protocols commitments. The current commitment to reducing greenhouse gas emissions falls under the Paris Agreement. Under the Paris Agreement, New Zealand has agreed to reduce net greenhouse gas emissions to 50 per cent of gross 2005 levels by 2030.²¹ The Emissions Trading scheme is the most effective tool New Zealand has to meet its prescribed targets and reduce its greenhouse gas emissions.²²

Established in 2008, the New Zealand Emissions Trading Scheme (NZ ETS) is a “key tool for meeting [New Zealand’s] domestic and international climate change targets, including the 2050 target set by the Climate Change Response Act 2002”.²³ The Climate Change Response Act 2002 has the specific purpose of “provid[ing] for the implementation, operation, and administration of

14 Jim Skea and others *Climate Change 2022: Mitigation of Climate Change* (Intergovernmental Panel on Climate Change, Working Group III, Sixth Assessment, 2022).

15 United Nations “What is Climate Change?” (14 October 22) Climate Action Fast Facts <www.un.org/en/climatechange>.

16 United Nations, above n 15.

17 Ministry for the Environment “New Zealand and the United Nations Framework Convention on Climate Change” (17 June 2022) <<https://environment.govt.nz>>.

18 Ministry for the Environment, above n 17.

19 Ministry for the Environment, above n 17.

20 Ministry for the Environment “About the net position under the Kyoto Protocol” (17 June 2022) <<https://environment.govt.nz>>.

21 New Zealand Government *Submission under the Paris Agreement New Zealand’s first Nationally Determined Contribution* (November 2021) at 1.

22 Solomon, above n 1.

23 Ministry for Environment “About the New Zealand Emissions Trading Scheme” (17 June 2022) <<https://environment.govt.nz>>.

a greenhouse gas emissions trading scheme in New Zealand that supports and encourages global efforts to reduce the emission of greenhouse gases”.²⁴ This purpose is included within the Act to aid New Zealand in achieving “its international obligations under the Convention, the Protocol, and the Paris Agreement; and assisting New Zealand to meet its 2050 target and emissions budgets”.²⁵ The NZ ETS assists New Zealand in promoting environmentally responsible business practices that reduce the emittance of carbon dioxide and other greenhouse gases. By placing a price on the emittance of greenhouse gases into the atmosphere,²⁶ businesses that emit greenhouse gases and wish to remain profitable must find alternatives or face an additional cost. The NZ ETS is a market-based approach to reducing emissions of greenhouse gases.²⁷ In any market, there is a price on a product. In the case of the NZ ETS, the product is the ability to emit greenhouse gases.

Under the NZ ETS, a “carbon credit” represents one tonne of carbon dioxide or greenhouse gas equivalent; within the NZ ETS, a carbon credit is known as a New Zealand emission unit (NZU). Businesses that must participate under Schedule 3 of the Climate Change Response Act 2002 will purchase NZUs to “offset” emissions emitted during their business activities. The Schedule 3 participants are required once a year to report to the Government their total amount of emissions for that year and, subsequently, surrender to the Government the equivalent number of NZUs to offset the emissions.²⁸ Importantly, some participants listed under Schedule 3 of the Act have been allowed “transitional provisions for surrender obligations”. Participants allowed this transitional period are highlighted in s 219 of the Climate Change Response Act 2002. The participants allowed a transitional period under the Act operate in agriculture – namely, a “fertilizer-processor activity”²⁹ or an “animal-processor activity”.³⁰ Activities covered by this legislative provision include meat processors, dairy processors, nitrogen fertiliser manufacturers and importers and live animal exporters.³¹ Although agriculture contributes to nearly 50 per cent of New Zealand’s greenhouse gas emissions,³² the industry’s position within New Zealand’s economy (making up approximately five per cent of New Zealand’s gross domestic product)³³ lends itself to a grace period in the NZ ETS where alternatives can be considered and implemented before significant costs associated with the NZ ETS are incurred. Activities that the agricultural sector can undertake to limit greenhouse gas emissions are the establishment of forests to offset emissions (known as carbon sinks) or the

24 Climate Change Response Act 2002, Section 3(b).

25 Section 3(b).

26 New Zealand Carbon Farming “Getting to know The New Zealand Emissions Trading Scheme” (8 September 2020) <<https://nzcarbonfarming.co.nz>>.

27 Environmental Protection Agency “About the Emissions Trading Scheme” (13 October 2022) <<https://www.epa.govt.nz>>.

28 Marc Daalder “Emissions Trading Scheme: NZ’s carbon market explained” *Newsroom* (online ed, Auckland, 23 March 2021).

29 Climate Change Response Act 2002, s 219(1)(a).

30 Climate Change Response Act 2002, s 219(1)(c).

31 Ministry for Primary Industries “About the Emissions Trading Scheme” (17 August 2022) <www.mpi.govt.nz>.

32 Hamish Cardwell “Agriculture big winner in emissions plan despite farmers not paying into ETS” (16 May 2022) Radio New Zealand <www.rnz.co.nz>.

33 The Law Foundation New Zealand “Agriculture” (19 February 2018) Environment Guide <<https://www.environmentguide.org.nz/activities/agriculture/>>.

effective use of fertiliser.³⁴ The transitional period ceases on January 1, 2025.³⁵ This date is subject to change to an earlier date.³⁶

Emissions trading schemes such as the NZ ETS are known as cap-and-trade schemes. Placing a “cap” on the maximum number of NZUs in the scheme subsequently restricts the allowable number of emissions for that calendar year. The “trade” aspect of the scheme is that should too few NZUs be available for the predicted number of emissions in a calendar year, NZUs can be traded between businesses on the secondary market.³⁷ Evidently, the NZU’s price rises following the rules of supply and demand. Depending on the price of an NZU, businesses involved in the scheme must undertake a cost-benefit analysis and determine which option is more economically viable: purchase NZUs or implement low-emission alternatives. When there is a surplus of NZUs, and the price is low, emitters face a low cost to emit and are not as driven to find low-emission alternatives. This situation reverses when NZUs become scarce. In many instances, businesses subject to the scheme pass the cost of the NZU onto consumers. Following the inception of the NZ ETS, the Government eased Schedule 3 participants into the scheme. This was done to allow time for participants to find alternatives to emitting or determine how they would afford to cover the cost of an NZU. Measures undertaken by the Government to ease participants into the NZ ETS were allowing the acceptance of international units (CERs) and allowing some emitters (such as liquid fossil fuels, stationary energy, industrial processes, and waste) to surrender one NZU to the Government for two tonnes of carbon emissions or a greenhouse gas equivalent.³⁸ As scarcity of NZUs is critical to driving emitters to find alternatives and meet legislative targets, the Government slowly phased out these measures and declined to accept CERs.

Under the NZ ETS, there are four ways Schedule 3 participants can acquire NZUs: quarterly auctions, free allocation from the government, purchase on the secondary market or carbon sequestration (carbon farming).³⁹ Of most importance to this research are the two latter means of acquiring NZUs. Due to price changes in NZUs affecting the economy, the Government has enacted price controls into the NZ ETS. The initial measure was a fixed price option (FPO). However, this was discontinued in 2020. Following the FPO, the auction price floor, confidential reserve, and cost containment reserve were implemented into quarterly auctions.⁴⁰ The auction floor is self-explanatory: it is the minimum price that an NZU will sell at auction. Although there is an auction price floor, participants can still purchase NZUs on the secondary market for a lower price. The floor price is a critical marker by which the Government acknowledges the future value of NZUs to be higher than the set reserve price.⁴¹ The confidential reserve price ensures that NZUs are not sold at quarterly auctions for significantly less than secondary market prices. A confidential calculation is undertaken, where consideration is given to secondary market

34 Ministry for Primary Industries “Agriculture and greenhouse gases” (14 October 2022) <www.mpi.govt.nz>.

35 Climate Change Response Act 2002, s 219.

36 Section 219(4).

37 Ministry for Environment “ETS Auctions and how to buy New Zealand Emissions Units (NZUs)” (17 June 2022) <<https://environment.govt.nz>>.

38 Ministry for Environment “The NZ ETS – an introduction” YouTube <www.youtube.com>.

39 Daalder, above n 28.

40 Ministry for the Environment “The role of price controls in the NZ ETS” (17 June 2022) <<https://environment.govt.nz>>.

41 Ministry for the Environment, above n 40.

prices and market volatility. This information is kept confidential to ensure there is a limitation on strategic bidding behaviour.⁴² Finally, the cost containment reserve (CCR) is “a reserve of NZUs which are available for sale only if a trigger price is reached in the auction”.⁴³ The purpose of this is to ease the demand for NZUs. The effectiveness of the CCR in diminishing the overall auction price of NZUs depends on the volume of units and the demand for the units.⁴⁴ Any NZU that is sold from the CCR is required to be backed by the Government. A sale of an NZU from the CCR causes the Government's emissions budget to be exceeded. To cover this exceedance, the Government must outsource equivalent emissions reductions. Procurement of equivalent reductions can occur through purchasing international emissions units or investing in activities that reduce emissions.⁴⁵

III. CARBON SEQUESTRATION

Under the NZ ETS, one of the ways NZUs can be acquired is through carbon farming. Carbon farming is “any land use in which landowners capture economic benefit from carbon sequestration.”⁴⁶ Carbon sequestration is a process by which carbon dioxide is absorbed from the atmosphere during photosynthesis and stored as carbon in biomass.⁴⁷ Of particular interest to this paper is the ability of a forest to undertake this process. As forests can capture carbon dioxide and produce oxygen as a by-product, they are considered one of the most effective strategies to limit the amount of carbon dioxide within the earth's atmosphere.⁴⁸ It is for this reason forests are known as a “carbon sink”; anything that absorbs more carbon from the atmosphere than it releases.⁴⁹ Each unit of carbon dioxide sequestered by a forest has credited a unit of carbon emissions.

To receive NZUs from forestry, a forest must be registered under the NZ ETS. To register a forest, the definition of “forest land” in the Climate Change Response Act 2002 must be met. Under the NZ ETS, trees within a forest must:⁵⁰

1. cover an area of at least one hectare;
2. be a species of tree that can reach at least five metres in height when mature;
3. have (or be expected to reach) canopy cover of more than 30 per cent in each hectare; and
4. be at least (or expected to reach) 30 metres across on average.

A forest which has not yet reached maturity but is expected to fulfil the requirements can still be registered under the NZ ETS.⁵¹ Forest land that is harvested is still considered forest land within the NZ ETS if:⁵²

42 Ministry for the Environment, above n 40.

43 Ministry for the Environment, above n 40.

44 Ministry for the Environment, above n 40.

45 Ministry for the Environment, above n 40.

46 Jason Funk “The Practice of Carbon Farming in New Zealand” (PhD Thesis, Stanford University, 2009) at 4.

47 Forest Owners Association “Carbon sequestration and emissions trading” <www.nzfoa.org.nz>.

48 Jean-Francois Bastin and others “The global tree restoration potential” (2019) 365 *SCI* 76 at 76.

49 Client Earth Communications “What is a carbon sink?” (22 December 2020) <www.clientearth.org>.

50 Ministry for Primary Industries “Forest land in the Emissions Trading Scheme” (12 September 2022) <www.mpi.govt.nz>.

51 Ministry for Primary Industries, above n 50.

52 Ministry for Primary Industries, above n 50.

1. it will be replanted or seeded naturally with forest species within four years of harvesting;
2. it will meet specific stocking requirements when replanted; and
3. the land is not converted to a use other than forestry (such as pasture).

Forest land eligibility under the NZ ETS depends on when and where the forest was established. The Climate Change Response Act 2002 sets out key differences between pre-1990 and post-1989 forest land. As the purpose of this paper is situated on foreign investors purchasing pastoral land and converting it into production forestry under the NZ ETS, an emphasis will be placed on post-1989 forestry land requirements.

Post-1989 forestry land includes regenerating and planted native (indigenous forests), forests planted with exotic tree species, and mixed-species forests.⁵³ Trees within post-1989 forests were planted or established after 31 December 1989. However, the history of the land also plays a part in determining whether the land is a post-1989 forest.⁵⁴ The forest may be a post-1989 forest if it was established on land with a history that meets one of the following conditions:⁵⁵

- (a) The land was not forested land on 31 December 1989.
- (b) The land was forest land on 31 December 1989 and was deforested between 1 January 1990 and 31 December 2007.
- (c) The land was originally pre-1990 forest land that was deforested after 31 December 2007. Any NZUs owed as a result of this were paid in full.
- (d) The land was originally pre-1990 forest land and was deforested more than eight years ago and was not forested during this time. The owners successfully applied for an exemption to deforest without any liability to pay units. The owners have since repaid the units that would have been owed without the exemption.

Once post-1989 forest land is registered in the NZ ETS, certain carbon reporting requirements must be adhered to. Furthermore, NZUs may have to be paid in the advent that the forest is harvested, deforested or deregistered from the NZ ETS.⁵⁶

Not all forests are grown for commercial reasons such as harvesting; from 1 January 2023, a forest owner can choose to register post-1989 forest land as a “permanent post-1989 forest”.⁵⁷ By registering as a permanent post-1989 forest, the land must not be clear-felled for at least 50 years after it enters the NZ ETS.⁵⁸ If eligible, this form of forestry can earn NZUs for as long as the forest is in the ground. Owners of a permanent post-1989 forest can undertake limited selective harvesting without penalty if the canopy does not drop below the 30 per cent threshold.^{59,60} The new permanent post-1989 forest scheme replaces the Permanent Forest Sink Initiative (PFSI). After 2023, any PFSI that has not switched to the ETS as a permanent or standard post-1989 forest land will automatically become a permanent post-1989 forest.⁶¹

53 Ministry for Primary Industries, above n 50.

54 Ministry for Primary Industries, above n 50.

55 Ministry for Primary Industries, above n 50.

56 Ministry for Primary Industries, above n 50.

57 Ministry for Primary Industries, above n 50.

58 Ministry for Primary Industries, above n 50.

59 New Zealand Agricultural Greenhouse Gas Research Centre “Planting trees” (18 October 2022) AgMatters <www.agmatters.nz/actions/planting-trees/>.

60 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

61 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

A. *Earning NZUs with Post-1990 Forestry Land*

To use forestry to earn NZUs under the NZ ETS, forest owners must “account” for the increases and decreases in carbon within their forests.⁶² Under the NZ ETS, forestry participants, utilise “stock change accounting”.⁶³ This method of accounting factors in the short-term change in the carbon stored in their forest. As the forest matures, the NZ ETS participant can earn NZUs from the Government, which they can keep or sell on the secondary market. When the time comes to harvest the mature forest, approximately 60 to 70 per cent of the carbon leaves the land on which the forest was on.⁶⁴ The remaining carbon is tied up in the remanets of the forest (such as stumps and roots), and this remainder takes a further ten years to decay.⁶⁵ To cover the emissions emitted from the forest felling, NZUs must be paid back to the Government. With a felled forest, two options arise: either the forest is replanted, or there is a change in land use. If a change in land use occurs, the carbon stock of the forest will return to zero, and all NZUs earned will need to be repaid.⁶⁶ If new forestry stock is planted, the growth from the second rotation would overtake the decay from the first rotation, and the forest would begin to earn NZUs again.⁶⁷ As the carbon stock does not return to zero due to the secondary rotation, a portion of NZUs do not need to be repaid to the Government.⁶⁸ These credits are known as “low risk” credits.

From 2023 onward, “average accounting” will change the way participants account for carbon and earn NZUs under the NZ ETS. Rather than accounting for the actual increase and decrease in a forest’s carbon, participants will account for the long-term average amount of carbon stored in the forest.⁶⁹ Within the average accounting system, participants will earn NZUs on the first rotation of forestry until their forest reaches maturity (known as its average long-term carbon stock) over several rotations of growth and harvest.⁷⁰ The maturity of the forest is dependent on factors such as the species of tree and when the forest is typically harvested. Once the forest has reached maturity for carbon absorption, no further NZUs will be earned.⁷¹ Furthermore, when this forest is harvested, no NZUs will be required to be paid back to the Government.⁷² Under this system of accounting, participants will earn more “low risk” credits and will only earn additional NZUs or need to pay them back if the forest is harvested significantly early or unusually late, or if it is deregistered.⁷³

The addition of “average accounting” to the NZ ETS occurs on 1 January 2023. Until then all newly registered forests will continue to utilise the “stock change” method for calculating carbon storage.⁷⁴

62 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

63 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

64 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

65 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

66 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

67 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

68 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

69 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

70 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

71 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

72 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

73 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

74 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

B. *The Trees within the Forest*

Without trees, there is no forest. Opportunities within the NZ ETS apply to any tree that can fulfil the statutory definition of “forest land” and “forest species”. Namely, a tree that can grow in excess of five metres in height and can reach a canopy cover of 30 per cent.⁷⁵ The only trees that are excluded are “tree species grown or managed primarily for the production of fruit or nut crops”.⁷⁶ Importantly, the NZ ETS allows for forests to be diverse, allowing both native, exotic, and mixed forests. Currently, radiata pine makes up 90 per cent of New Zealand’s forestry industry.⁷⁷ As a result of this, radiata pine is the most common tree utilised for carbon sequestration within New Zealand. Radiata pine is also the most profitable, earning approximately two to three times more NZUs than an indigenous forest under the NZ ETS.⁷⁸ In 2022, at an average NZU price of \$65, 10 hectares of radiata pine could generate 221 NZUs a year up until the year 2050.⁷⁹ This would equate to \$14,365 per year on average. At the same average NZU price, a native forest would earn around 76 credits per year on average and generate \$4,940 per year until the year 2050.⁸⁰ This has been the cause of much controversy, as research suggests that vast plantations of native forests far outperform plantations of commercial monocultures in carbon sequestration.⁸¹ Yet, governments globally have pledged 45 per cent of land for carbon sequestration to commercial forestry.⁸² When comparing long-term carbon sequestration rates between natural forests and commercial monocultures, it is clear that natural forests remove a substantially larger amount of carbon dioxide.⁸³ Planting natural forest on 350 million hectares of land removes 42 billion tonnes of carbon from the atmosphere by 2100,⁸⁴ whereas planting a commercial monoculture on the same amount of land only manages to sequester one billion tonnes of carbon.⁸⁵ Dr Charlotte Wheeler of the University of Edinburgh who co-authored the aforementioned research, states that the reason “plantations are so poor at storing carbon is that they are harvested every decade or so, meaning all the carbon stored in the trees goes back into the atmosphere”.⁸⁶

Within New Zealand, a disdain is growing for the use of radiata pines in “lock up and leave” carbon sequestration farms. As Dame Anne Salmond outlined in an opinion piece for *Newsroom*, New Zealand meeting its emissions targets “relies on covering our landscapes with short-lived, shallow rooting, highly flammable monocultures of pine trees.”⁸⁷ Pine trees are detrimental to

75 Climate Change Response Act 2002, s 4.

76 Section 4.

77 Ministry for Primary Industries “About New Zealand’s Forests” (5 May 2022) <www.mpi.govt.nz>.

78 CarbonCrop “Which tree species earn the most carbon credits?” (10 October 2022) <www.carboncrop.nz>.

79 CarbonCrop, above n 78.

80 CarbonCrop, above n 78.

81 Simon Lewis and others “Restoring natural forests is the best way to remove atmospheric carbon” (2 April 2019) *Nature* <www.nature.com>.

82 Lewis and others, above n 81.

83 ScienceDaily “Restore natural forests to meet climate change goals” (2 April 2019) <www.sciencedaily.com>.

84 ScienceDaily, above n 83.

85 ScienceDaily, above n 83.

86 ScienceDaily, above n 83.

87 Anne Salmond “Anne Salmond: The folly of carbon farming with pine trees” *Newsroom* (online ed, Auckland, 15 February 2022).

New Zealand. The greater the number of pine trees, the more prevalent wilding conifers become across New Zealand's landscape. They are a weed that, without control, can "form dense forests that have environmental consequences on our native ecosystems, use up scarce water, and alter iconic landscapes."⁸⁸ Furthermore, having a national policy tied heavily to one type of tree causes immense risk for national biosecurity.⁸⁹ Many advocates now push for native afforestation within the permanent post-1989 forest category of the NZ ETS. Although indigenous species only sequester around 30 per cent of carbon per year when compared to radiata pine, they sequester carbon for over 200 years.⁹⁰ This far exceeds radiata pine which only sequesters carbon for 20 years.⁹¹ Another factor that contributes to the proliferation of radiata pine is cost. On average, pine plantations cost approximately \$1500 per hectare to establish, whereas indigenous species can cost between \$5,000 and \$60,000 per hectare to establish.⁹² Although there is a higher cost to native afforestation, economic returns can be achieved through a variety of co-benefits. For example, planting a Manuka forest can generate NZUs from the NZ ETS and produce sought-after Manuka honey.⁹³ Other co-benefits to native afforestation exist in erosion control grants, improved water quality payments and tourism.⁹⁴

IV. THE ATTRACTION TO FORESTRY CONVERSION INVESTMENTS WITHIN NEW ZEALAND

Like all investors, investors in forestry conversion are driven to maximise profit whilst exerting the least amount of physical effort into the investment. This is what many consider a "passive investment". For both foreign and domestic investors, a conversion of New Zealand pastoral land to a production forestry operation, registered under the NZ ETS, directly fulfils this definition.

Firstly, in this current climate, "on the sheep and beef lands of New Zealand there is nothing that can touch the economics of carbon farming."⁹⁵ As outlined in the New York Times article, as the price of an NZU reaches \$80 each,⁹⁶ an acre of pastoral land converted to an NZ ETS registered forest can earn \$1,000 an acre annually, whereas utilising that same land for sheep and beef farming will only return \$160 per acre annually.⁹⁷ The commodification of carbon and the need for emitters of greenhouse gases to purchase NZUs to offset their own emissions has led to substantial price increases in NZUs. Furthermore, when the trees have matured and their period of carbon sequestration has ended, they are able to be harvested and sold. In second quarter of 2022,

88 Department of Conservation "Wilding conifers" <www.doc.govt.nz>.

89 Di Lucas and Larry Burrows "Radiata pine plantations – a band aid to nowhere" Pure Advantage <<https://pureadvantage.org>>.

90 New Zealand Agricultural Greenhouse Gas Research Centre, above n 59.

91 Lucas and Burrows, above n 89.

92 Hannah Tuahine *Supporting native plantation forestry in the NZ ETS: Combining revenue from carbon, native timber, and co-benefits* (Motu Economic and Public Policy Research, February 2018) at 22.

93 Tuahine, above n 92.

94 Tuahine, above n 92.

95 Keith Woodford "Nothing matches carbon-farming economics on sheep and beef land" (16 August 2022) <www.interest.co.nz>.

96 Jarden "NZUs – Spot" Commtrade <<https://www.commtrade.co.nz/>>.

97 Solomon, above n 1.

a pruned radiata pine log sold for an average of \$190 per cubic metre.⁹⁸ The implementation of the new “average accounting” method for carbon calculation will further increase the profits of NZ ETS registered forest owners. This is due to the fact that forest owners will earn more “low risk” NZUs and not have to repay any NZUs for harvesting as they would have under the “stock change” accounting method (as shown by the diagram in Figure 2). In summary, while the forest is growing, the forest owner earns NZUs from the NZ ETS which it can sell on the secondary market to greenhouse gas emitters to generate revenue. Additionally, when the forest is harvested, the owner can sell the wood, such as radiata pine logs, to make additional income. This process is then able to be constantly repeated over decades.

Secondly, as the forest has to grow, expenses towards the forestry investment can be spared for decades. Initially, an investor must pay for set-up costs associated with beginning a forestry operation. Costs include the fee for an application through the Overseas Investment Office, the purchasing of the land, the acquiring and subsequent planting of the desired tree species and the registration costs associated with the NZ ETS.⁹⁹ After the initial setup costs, in most cases, it will likely be over a decade before a significant cost is incurred regarding the investment. As the forest needs to grow to be harvested, forest owners can earn money from the sale of NZUs for decades before a significant expense needs to be spared to harvest and replant the crop.

A combination of both significant potential profit and minimal regular expense makes forestry conversions an attractive investment opportunity for foreign investors. It is a direct result of the policy implemented within the NZ ETS that makes forestry conversions within New Zealand extremely lucrative.

V. RELEVANT LEGISLATION

As a country, New Zealand believes in the benefits of foreign investment. Welcoming and facilitating productive, sustainable and inclusive overseas investment supports new employment opportunities and the adoption and development of new technologies, increases human capital, and grants New Zealand increased access to global markets.¹⁰⁰ In the instance that any foreign investor wishes to make an investment in New Zealand forestry, their investment will be governed by the Overseas Investment Act 2005. As mentioned above, the Act regulates how foreign investment occurs within New Zealand. The Act states that it is a “privilege for overseas persons to own or control sensitive New Zealand assets”¹⁰¹ and to obtain this privilege, they must “meet certain requirements or adhere to certain conditions”.¹⁰² The Act is required to maintain a careful balance between “supporting high-quality investment whilst also ensuring that the Government has tools to manage risks”.¹⁰³ Gendall J in *Winton Property Investments v Minister of Finance* expanded on the legislative purpose stating, “[t]he purpose of the Act is generally to facilitate and regulate

98 Ministry for Primary Industries “Historic indicative New Zealand radiata pine log prices” (17 August 2022) <www.mpi.govt.nz>.

99 Ministry for Primary Industries “Service fees for forestry in the ETS” (28 September 2022) <www.mpi.govt.nz>.

100 Treasury “Foreign Investment Policy and National Interest Guidance” (8 June 2021) <www.treasury.govt.nz>.

101 Overseas Investment Act 2005, s 3.

102 Overseas Investment (Forestry) Amendment Bill 2022 (134-2) (introduction).

103 Treasury, above n 100.

investment in New Zealand by overseas persons and generally not to discourage or prevent it.”¹⁰⁴ In late 2021, the Government completed the “Phase Two” reforms of the Overseas Investment Act 2005.¹⁰⁵ This reform overhauled changes to the benefit to New Zealand test. Furthermore, as this is a developing area of the law, limited applications have been subject to the judicial process. As a result, there is a significant lack of case law within this space.

Within the Act, a foreign investor is known as an “overseas person” and is “an individual [that] is neither a New Zealand citizen nor ordinarily resident in New Zealand”¹⁰⁶ An overseas person is required to obtain consent from the Overseas Investment Office before purchasing “sensitive land”.¹⁰⁷ Consent for “sensitive” non-urban land is compulsory when the land exceeds five hectares.¹⁰⁸ As the average size of a farm in New Zealand is 274 hectares,¹⁰⁹ this provision covers almost all pastoral land in New Zealand. Primarily should a foreign investor want to purchase sensitive non-residential land, the criteria in s 16 of the Act must be met. Firstly, the “investor test” in s 18A must be met, followed by the “Benefit to New Zealand” test in s 16A of the Overseas Investment Act. In 2018, the Government implemented a new test for foreign investors to satisfy regarding forestry. The special forestry test was implemented for overseas investors who wanted to purchase “sensitive” land to plant a forest on or purchase existing forestry land.¹¹⁰ Under the Act, consent for an application concerning land is given by the Minister of Finance¹¹¹ and the Minister for Land Information.¹¹²

A. *Investor Test*

The investor test determines whether investors are not suitable to own or control sensitive New Zealand assets. The investor test sets out types of behaviour and history that New Zealand considers show that the overseas person is likely to pose a risk to New Zealand.¹¹³ The primary aspects of the test considered by the Overseas Investment Office are centred around character and capability.¹¹⁴ Aspects of character that are considered include convictions resulting in imprisonment or significant fines, corporate fines both in New Zealand and overseas, and ineligibility to come to New Zealand.¹¹⁵ The capability factors include prohibitions on being a director, promoter or manager of a company, penalties for tax avoidance and evasion, and unpaid tax of \$5 million or more.¹¹⁶ The test will be met if either: none of the investor test factors are established; or one or

104 *Winton Property Investments v Minister of Finance* [2022] NZHC 638 at [5].

105 Treasury “Phase 2 Overseas Investment Act Reform Information Release” (28 June 2022) <www.treasury.govt.nz>.

106 Overseas Investment Act 2005, s 7.

107 Section 10.

108 Schedule 1 pt 1.

109 Statistics New Zealand “Farm numbers and size” (15 April 2021) <www.stats.govt.nz>.

110 Rachel Brown and Dan Williams “Special forestry test under the Overseas Investment Act 2005 to end for overseas investors planning to convert farm to forest” (2 March 2022) AndersonLloyd <www.al.nz>.

111 Land Information New Zealand “Legislation, ministers and delegated powers” <www.linz.govt.nz>.

112 Overseas Investment Act 2005, s 24.

113 Land Information New Zealand “Meeting the investor test” <www.linz.govt.nz>.

114 Overseas Investment Act 2005, s 18A(4).

115 Land Information New Zealand, above n 113.

116 Land Information New Zealand, above n 113.

more of the investor test factors are established, but the decision-maker is satisfied that this does not make the overseas person unsuitable to own sensitive New Zealand assets.¹¹⁷

B. Special Forestry Test

The Overseas Investment Amendment Act 2018 altered the way in which foreign investments in forestry are considered. The Act introduced a streamlined, “special forestry test”, that contained a less exhaustive list of standards that an overseas investor had to meet if they wanted to pursue an investment into production forestry within New Zealand. To further the Government’s goal of generating greater investment in the forestry sector, the amendment set out:¹¹⁸

To facilitate overseas investment in forestry, by streamlining consent pathways for investments, and [improving] the coherence of the screening regime by ensuring all types of investments in forestry are screened.

Implemented within the 2018 Amendment was a review provision. This stipulated that the “operation and effectiveness” of the special forestry test was to be reviewed two years after its implementation.¹¹⁹ This review process began in 2020. Since the introduction of the special forestry test, the Overseas Investment Office has approved 40 change of land use applications, resulting in 57,827 acres of pastoral land being changed into production forestry.¹²⁰

To utilise the special forestry test, a set of requirements outlined in s 16A(4) of the Overseas Investment Act 2005 must be met. Firstly, the application cannot include any residential land or land that is likely to be used for residential land in the future.¹²¹ Applications including minor or insignificant amounts of residential land that may be used for the residential purpose of onsite workers can still be accepted at the decision maker’s discretion. Secondly, after the harvest of the forest, the applicant must have plans to establish a new crop.¹²² Finally, the applicant is required to maintain or protect “things that exist when or before the overseas investment transaction is entered into”.¹²³ This includes “the maintenance of existing arrangements relating to historic heritage, biodiversity, environmental matters, public access, or the supply of logs”.¹²⁴ In the advent that an applicant is able to satisfy all of the aforementioned requirements, then the applicant is not required to demonstrate the far more exhaustive benefit to New Zealand test.¹²⁵

C. Benefit to New Zealand Test

The benefit to New Zealand outlines that an investment in sensitive land within New Zealand must benefit New Zealand. The test is outlined in s 16A of the Overseas Investment Act 2005, with the factors for assessing a benefit to New Zealand contained within s 17 of the Act. The test

117 Land Information New Zealand, above n 113.

118 Treasury “Overseas Investment Act 2005: Forestry Review” (6 October 2022) <www.treasury.govt.nz>.

119 Treasury, above n 118.

120 Brown and Williams, above n 110.

121 Brown and Williams, above n 110.

122 Overseas Investment Act 2005, s 16A(4)(e).

123 Section 16A(6)(b).

124 Section 16A(6)(b).

125 Brown and Williams, above n 110.

works by assessing the likely benefits of a proposed overseas investment against seven broad categories.¹²⁶ Depending on the nature of the investment, likely benefits in each category may be present; however, there is no statutory requirement that an investment must show a benefit in every category. The seven categories/factors are as follows:

1. Economic benefits

It must be determined whether an overseas investment is likely to result in economic benefits for New Zealand. This includes, but is not limited to, the production of jobs, the introduction of technology or business skills, increased productivity, increased export receipts or a reduced risk of illiquid assets.¹²⁷

2. Benefits to the natural environment

Foreign investment can benefit New Zealand if it provides benefits to the natural environment. Benefits of this nature include the protection and preservation of native wildlife and plants, the controlling of erosion and the improvement of the quality of waterways.¹²⁸

3. Access

The Act considers access to sensitive land as an important aspect that can benefit New Zealanders. The investment will be considered against whether there is continued or enhanced access by the public over the sensitive land. This access may be for the purpose of recreational activities such as fishing or walking, exercising stewardship of important historical or spiritual sites, or whether the investment limits access to other sensitive lands important to New Zealanders.¹²⁹

4. Heritage

Heritage is highlighted as an important factor when determining whether an overseas investment benefits New Zealand. Consideration will be given to whether investment results in continued or enhanced protection of a heritage site that is historically important to Māori and other New Zealanders, in or on the sensitive land.¹³⁰

5. Government policy

Another way a proposed overseas investment can benefit New Zealand is if it gives further effect to or advances a significant Government policy.¹³¹

6. Oversight

Further consideration is given to whether a potential overseas investment will be overseen by New Zealand citizens or involve the significant participation of New Zealand citizens.¹³²

¹²⁶ Land Information New Zealand “Benefit to New Zealand” (August 2022) <www.linz.govt.nz>.

¹²⁷ Overseas Investment Act 2005, s 17(1)(a).

¹²⁸ Section 17(1)(b).

¹²⁹ Section 17(1)(c).

¹³⁰ Section 17(1)(d).

¹³¹ Section 17(1)(e).

¹³² Section 17(1)(f).

7. *Consequential benefits*

The designated decision-makers will give thought to whether there will be further direct benefits to New Zealand because of the overseas investment.¹³³

Section 17(2) of the Act sets out the process for how the relevant Ministers are to consider the factors. The Ministers must determine which factors are relevant and important to the proposed investment.¹³⁴ The benefit must then be considered within each factor relevant to the proposed investment. The Ministers are required to deduct any directly comparable aspect of the current state and any negative impact of the proposed investment.¹³⁵ It is imperative that the deduction is stopped at zero.¹³⁶ The legislation provides an example of a directly comparable benefit:¹³⁷

If a company is generating \$10 million in export receipts at the time that the overseas investment transaction is entered into and the overseas investment will result in a total of \$15 million in export receipts, the net benefit in respect of export receipts under the economic factor is \$5 million.

A non-directly comparable benefit is one where an overseas investment will result in the introduction of new technologies but a decrease in export receipts. The decrease in export receipts cannot be deducted from any benefits arising from the introduction of new technologies.¹³⁸ Furthermore, the Act requires a proportionate approach to considering the benefit to New Zealand test.¹³⁹ The likely benefit from the proposed investment must be proportionate to the sensitivity of the land and the nature of the overseas transaction.¹⁴⁰ The “sensitivity of the land” considers features of the land and the consequent level of public interest. The “nature” of the transaction considers whether the interest is temporary or permanent.¹⁴¹

D. *Farmland Benefit Test*

When an overseas investment includes “farmland” that is greater than five hectares in area, a modified benefit test is applied to the investment.¹⁴² “Farmland” means “land used exclusively or principally for agricultural, horticultural, or pastoral purposes, or for the keeping of bees, poultry, or livestock”.¹⁴³ This definition does not include “forestry activities”, which are defined in s 16A(9).

The modified benefit test places high importance on the economic benefits factor outlined in s 17(1)(a) of the Overseas Investment Act and the oversight factor stated in s 17(1)(f). Importance is placed on “the creation or retention of jobs, introduction of technology or business skills, increased

133 Section 17(1)(g).

134 Section 17(2)(a).

135 Land Information New Zealand, above n 126.

136 Overseas Investment Act 2005, s 17(2)(b)(i).

137 Section 17 example of “directly comparable”.

138 Section 17 example of “non-directly comparable”.

139 Land Information New Zealand, above n 126.

140 Land Information New Zealand, above n 126.

141 Land Information New Zealand, above n 126.

142 Overseas Investment Act 2005, s 16A(1C).

143 Section 6.

export receipts, and increased processing of primary products”¹⁴⁴ and the participation or oversight of someone who is not an “overseas person” in the investment.^{145,146}

An instance where the farmland benefit test does not apply occurs when the Ministers are satisfied that “as a result of the overseas investment, the farmland will, or is likely to, be used exclusively, or nearly exclusively, for forestry activities”.¹⁴⁷ Two further requirements must be met for the test to not apply. Namely, “whenever a crop of trees is harvested on the farmland, a new crop will be ... established on the farmland to replace the crop that is harvested”, and “that the non-occupation outcome will, or is likely to, occur in relation to the farmland”. The “non-occupation outcome” refers to occupying the land for residential purposes and is contained in cl 17(3) to (5) of sch 2 of the Act.

E. The Overseas Investment (Forestry) Amendment Act 2022

As a part of the two-year review stipulation to assess “the operation and effectiveness of [the] changes” within the Overseas Investment Amendment Act 2018,¹⁴⁸ the Overseas Investment (Forestry) Amendment Bill 2022 was introduced. The aim of this Bill was “to ensure that overseas investments that result in the conversion of farmland or other land to forestry benefits New Zealand, and that any risks can be better managed.”¹⁴⁹ To fulfil the aim, the Bill (now the Overseas Investment (Forestry) Amendment Act 2022) removed the ability for overseas investors to rely on the special forestry test when converting farmland or other land to forestry, instead processing the application under the less permissive benefit to New Zealand test. Under the purview of the amendments, the special forestry test can only be applied to land which is already being used “exclusively, or nearly exclusively, for forestry activities”.¹⁵⁰ The amendment Act also added the stipulation that if farmland is to be converted to production forestry, the stricter farm benefit test does not apply. The reason for this stipulation was stated by the Finance and Expenditure Committee:¹⁵¹

... forestry applications may struggle to satisfy the farmland test because of its focus on economic benefits. For many forestry investments, the investor makes long-term projections about economic benefits. However, these could only be realised several years after a crop of trees was planted.

If the farmland benefit test was applied to forestry conversions, the attraction for foreign investors to invest in New Zealand forestry would dissipate.¹⁵² Although it is evident that the implementation of the benefit to New Zealand test will reduce the attraction of foreign forestry investors, it will further reduce the risk of losing highly productive farmland to forestry. The reason for this situates in the fact that benefit to New Zealand test “requires investors to demonstrate benefits that are

144 Section 16A(1C)(a)(i).

145 Section 7.

146 Section 17(1)(f).

147 Section 16A(2).

148 Treasury, above n 118.

149 New Zealand Parliament “Overseas Investment (Forestry) Amendment Bill” <www.parliament.nz>.

150 Brittany Montague and Dan Williams “Overseas Investment (Forestry) Amendment Bill” (20 June 2022) AndersonLloyd <www.al.nz>.

151 Overseas Investment (Forestry) Amendment Bill 2022 (134-2) (commentary).

152 Overseas Investment (Forestry) Amendment Bill 2022, above n 151.

proportional to the land's sensitivity. For example, highly productive farmland would require a correspondingly high benefit."¹⁵³

The amendment Act also amended the definition of "forestry activities". Under s 16A(9) of the Overseas Investment Act 2005, "forestry activities" means "any trees (whether exotic or native) that are to be harvested to provide wood". This change directly excludes permanent carbon farms, planted with no intention of being harvested, from the definition of "forestry activities" within the Act. If an overseas person wishes to invest in a permanent carbon farm on farmland within New Zealand, it is likely that the application will have to meet the stricter farmland benefit test.

The imposition of the aforementioned amendments places a far stricter test on farmland forestry conversion. Prior to the implementation of the benefit to New Zealand test, a foreign investor merely had to prove three elements that were directly applicable to forestry (the special forestry test). Under the benefit to New Zealand test, seven factors are now considered against investment in the forestry sector. This legislative action by the New Zealand Government shows that to convert high-production pastoral land to forestry, there needs to be a significant benefit to New Zealand. Clearly, the Government was concerned about the sheer amount of productive pastoral land that was being converted to forestry under the special forestry test. As traditional sheep and beef exports make up a significant amount of New Zealand's export market, the ramifications of the loss of productive pastoral land over time are seriously detrimental to the economy. Evidently, pastoral farming produces export income, whereas carbon farming does not. The implementation of the stricter less permissive benefit to New Zealand test will result in some applications for foreign investments being denied due to the inability to fulfil the benefit threshold and will also result in foreign investors being less attracted to the investment opportunity. Evidently, a balance needs to be struck between encouraging foreign investment, protecting productive pastoral land, and meeting emissions reduction policies.

VI. THE PROCESS FOR A FOREIGN INVESTOR

Following the Overseas Investment (Forestry) Amendment Act 2022, the process for an overseas person to invest in forestry within New Zealand is dependent on both the land to be purchased and the type of forestry operation to be undertaken. The following will outline the legislative tests that are required to be met depending on the investment circumstance:

1. An overseas investment into an established production forestry operation that is situated on over five hectares of non-urban land.

An investment of this nature is covered under the "sensitive land" provision of the Overseas Investment Act 2005, due to its exceedance of five hectares of non-urban land. Furthermore, due to there being no conversion of farmland and the s 16A(9) definition of "forestry activities" within the Act being fulfilled, this foreign investment would still fit under the purview of the special forestry test implemented by the Overseas Investment Amendment Act 2018. As such, for a foreign investor to make an application to purchase a property as mentioned, both the investor test in s 18A of the Act¹⁵⁴ and the special forestry test in s 16A(4) would be required to be met.

153 Overseas Investment (Forestry) Amendment Bill 2022, above n 151.

154 Overseas Investment Act 2005.

2. *An overseas investment into pastoral land that exceeds five hectares with the intention to create a production forestry operation.*

Again, as the non-urban land size exceeds five hectares, the Overseas Investment Act has jurisdiction over this investment. As the land is pastoral and not already engaged in forestry activities as defined by s 16A(9) of the Act, the benefit to New Zealand test in s 16A is required to be met. However, because the land is to be used for production forestry, the application for the investment will not be applied against the more stringent farmland benefit test. With this in consideration, an investment of this nature would be applied against the investor test in s 18A and the benefit to New Zealand test in s 16A.

3. *An overseas investment into pastoral land that exceeds five hectares with the intention to create a permanent carbon sequestration farm.*

Once again, this investment is covered by the Overseas Investment Act due to its fitting the definition of “sensitive land”. However, as this land is pastoral and will not be turned into a production forestry operation, as outlined under the “forestry activities” definition in s 16A(9), this investment is required to meet the investor test within s 18A, the benefit to New Zealand test in s 16A and the more stringent farm benefit test in s 16A(1C).

A. *Application Timeline and Costs*

Although the Overseas Investment Office has not specifically outlined timelines and costs for forestry conversions, it is expected that these applications will be similar to the current timelines and costs associated with benefit to New Zealand test applications. All of the following costs and timeline information concerns standard decisions:¹⁵⁵

- A benefit to New Zealand test application can cost between \$68,200 and \$74,000 and take approximately 70 days to complete.
- A farmland benefit test application can cost between \$74,000 and \$82,700 and take approximately 100 days to complete.
- A one-off special forestry test application costs the applicant \$33,800 and takes approximately 55 days to complete.

As well as having to meet a more exhaustive test, increased prices and lengthy application times create a larger burden on the foreign investor. This may result in foreign investors being dissuaded from undertaking a forestry conversion on farmland within New Zealand.

VII. IS THIS THE CORRECT COURSE OF ACTION?

Upon analysis of the problem intended to be solved by the Overseas Investment (Forestry) Amendment Act 2022, it becomes abundantly clear that the problem was not caused by foreign investment legislation, but instead, the conditions created by the regulation surrounding the NZ ETS. The culmination of an over-reliance on the ETS due to climate inaction (allowing 100 per cent of offsets to be procured through forestry), the subsequent dramatic increase in the price of NZUs due to the ETS over-reliance, and the implementation of a simplified path for foreign forestry investors created an attractive investment opportunity. It is this investment opportunity that began threatening the land that contributes to New Zealand’s biggest export market. Through the enforcement of a

¹⁵⁵ Overseas Investment (Forestry) Amendment Bill 2022, above n 151.

less permissive test on overseas investors, productive pastoral land is more greatly protected, and profits made using New Zealand land largely remain in the domestic economy.

In my opinion, the adoption of the benefit to New Zealand test in the 2022 amendment sufficiently stems the flow of foreign investors converting productive pastoral land into production forestry. The legislative test maintains a balance between protecting productive pastoral land, by setting a higher benefit threshold, and still procuring foreign investment by imposing the benefit to New Zealand test, and not the stricter farmland benefit test. Under the benefit to New Zealand test, a forestry conversion can still fulfil multiple of the test factors. Namely, benefits to the natural environment (carbon sequestration, changing land usage from carbon negative to carbon positive), the furtherance of Government policy (achieving New Zealand's goal of becoming carbon neutral by 2050), and oversight by a New Zealand citizen (if this is chosen by a foreign investor). The consideration of economic benefits is dependent on the land that is being converted: is the pastoral land integral to a highly productive sheep and beef operation; or is the land considered marginal for sheep and beef farming and would it make more economic sense to New Zealand as an NZ ETS-registered production forestry operation? The loss of marginal or insignificant pastoral land would hardly have an immense effect on New Zealand's primary sheep and beef exports. Although conversions by overseas investors still see profits realised elsewhere, there is an argument that converting marginal pastoral land to forestry has greater benefits for New Zealand in the realisation of lower carbon emissions and the subsequent meeting of internationally set emission reduction targets. It is for these reasons, and the additional imposition of extended application timelines and greater costs, that the legislative amendment achieves a balanced approach to still procuring foreign investment into forestry and protecting productive farmland.

Although many key changes reside in altering the legislation that contains the NZ ETS, I believe in the implementation of a simplified pathway for foreign investors who wish to plant long-rotation forestry on marginal unproductive pastoral land. An investment of this nature would fall under the newly imposed permanent post-1989 forest category of the NZ ETS. As NZ ETS legislation is not the focus of this paper, it is important to consider amendments to foreign investment legislation. An implementation of a provision with these characteristics would involve legislatively defining "marginal pastoral land", mapping the location of this land within New Zealand and subsequently zoning it for forestry investments. A sufficient way to legislatively define "marginal pastoral land" would be utilising the "Land Use Capability Classification" or LUC, which is a system that "classifies all of New Zealand's rural land into one of eight classes, based on its physical characteristics and attributes."¹⁵⁶ Class one land is suitable for a wide range of land uses whereas class eight land has many physical limitations. The Government could determine a sufficient class of land that is suitable not for pastoral farming, but instead for long-rotation forestry, and input this into legislation as a definition for "marginal pastoral land". Landowners who possess areas of "marginal pastoral land" greater than five hectares should then be able to offer this land to foreign investors under the purview of a simplified investment pathway. A pathway of this nature would greatly benefit New Zealand. Firstly, as mentioned above (at III.B), long-rotation forestry far exceeds short-rotation forestry in terms of environmental benefit. By planting more long-term rotation forestry, New Zealand has a greater chance of achieving carbon neutrality. Secondly, the relinquishing of unproductive pastoral land will have a minimal effect on the New Zealand sheep and beef export market. This can be attributed to the fact that marginal pastoral lands are rarely

156 Hawkes Bay Regional Council "Land Use Capability Tool" <www.hbrc.govt.nz>.

integral to procuring successful export products. Finally, a simplified pathway into this sector will make the investment attractive to overseas persons. Foreign capital flowing into this form of forestry will result in the faster completion of legislative goals surrounding carbon emissions. A potential legislative instrument that encompasses these characteristics should involve a simplified test much like the special forestry test, a definition of “marginal pastoral land”, a stipulation that long-rotation exotic hardwood or native trees be planted, and a mandated minimum time limit between afforestation and crop harvest (much like the 50-year provision in the permanent post-1989 forest category).

As New Zealand has shown a continuing reluctance or inability to implement low carbon emission alternatives, pathways for foreign investment into positive forestry operations, such as the one outlined, would both benefit the environment through carbon sequestration and ease pressure on the economy. Foreign investment into projects that sequester carbon from the atmosphere but do not impact primary sheep and beef exports would generate a surplus of NZUs and as such, reduce demand and prices in the process. This would result in lower costs for New Zealand consumers as businesses would face a lower cost to emit. The Government could also incentivise this form of foreign investment through the payment of grants to investors who set up permanent carbon forests on marginal pastoral land. With agriculture's entry into the NZ ETS imminent, the Government needs to implement more pathways into carbon sequestration and subsequent NZU generation.

VIII. CONCLUSION

In conclusion, the Overseas Investment (Forestry) Amendment Bill 2022 has achieved its purpose of inflicting a more stringent test for foreign investors to fulfil if they desire to change productive pastoral land into forestry. This change was important to protect productive pastoral land, which contributes immensely to New Zealand's export market, from being converted to production forestry land, which has much less of an impact on New Zealand's export market. Although much of this problem arose from the legislation surrounding the NZ ETS, foreign investors were taking advantage of a simplified consent system to generate immense profits in New Zealand. Some may argue that imposing the benefit to New Zealand test on foreign investor-led forestry conversions is a step too far; however, I disagree. I believe the Government needs to make a distinction between productive and marginal pastoral land. In the instance a foreign investor wishes to convert productive pastoral land to forestry, there should be a high benefit standard. However, the Government should incentivise forestry conversions on marginal pastoral land by enacting simplified pathways for foreign investors to plant sustainable long-rotation forestry operations. While the over-reliance on the NZ ETS continues, the Government's failure to implement carbon-neutral alternatives, and now making it harder for foreign investors to create carbon sequestration farms, will lead to a further price increase in NZUs. As the price increase in NZUs trickles down to consumers, the cost of living will continue to rise. Again, this rise in NZU prices will only be exacerbated by agricultural activities entering the NZ ETS. Subsequently, this increases the demand for NZUs. To meet the goal of carbon neutrality in 2050, alternatives to foreign investment in the forestry sector, such as the ones suggested, need to be considered. Failure to do so will result in significant effects on both the environment and the economy.

THE NORRIS WARD MCKINNON LECTURE

TE AO MĀRAMA: IT'S A MATTER OF FAIRNESS

BY JUDGE JOHN WALKER

I. INTRODUCTION¹

A time traveller from Victorian England arriving in a mainstream District Court in New Zealand in 2022 would recognise the general set up and process. Sure, the clothing would be different, and methamphetamine would be a puzzle, likewise harmful digital communications. But a person's name would be called, the person would enter a dock, a charge would be read, a plea taken, a prosecutor and a defence lawyer would make submissions and the judge would pronounce a decision. Participation by anyone else, including the defendant, would be minimal. That much they would recognise.

My proposition is that this unchanged process cannot be supported when we know about the barriers that stop that person in the dock participating in the case about them, that stop victims understanding what is happening, that stop supportive whānau understanding and participating in a case that affects the whole whānau.

The repeated calls for transformative change in our courts in report after report, decade after decade, are calls for removal of those barriers, and for a court process that ensures that people who come to court are seen, heard, understood and are enabled to meaningfully participate in the hearing.

They call for a court process that would not be recognised by our time traveller.

II. TE AO MĀRAMA

Today the District Court, in all its jurisdictions, stands ready for transformative change. This time two years ago, on this very occasion, Chief District Court Judge Heemi Taumaunu announced his vision for the District Court: a journey to Te Ao Mārama, or the enlightened world. Chief Judge Taumaunu articulated the vision as ensuring that all those appearing in court – whether they be defendants, whānau, victims or others – are seen, heard, understood and are able to meaningfully participate in the case that is about them.

Most people may think that the courts achieve that anyway – they would rightfully expect that as a matter of fairness. The reality does not, however, meet that expectation. But, we, all of us, can make it so.

I begin by describing the Youth Court experience. The Youth Court has been on a journey to a more enlightened world since its inception in 1989. There is, I suggest, much to be learned from the way the Youth Court has developed, from its responses to the legislative directions that have been

¹ I am indebted to my Clerk, Katherine Werry, for her very substantial assistance in the preparation of this paper.

given and how these have been taken as licence for innovation. Much of what I discuss tonight about the way all courts could operate has its origin in the way the Youth Court already works.

If we look back to 1989, the youth justice system could, with hindsight, be described as being in a state of pō, or darkness. Young people, and young Māori in particular, were being incarcerated at staggering rates, often being removed from their whānau and communities. The number of young people in court and in custody was high and looked set to continue climbing.

In 1988, the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare in New Zealand was commissioned to advise the Minister of Social Welfare on the approach necessary to meet the needs of Māori in policy, planning and service delivery in the Department of Social Welfare. The committee was chaired by John Rangihau and the members and staff list reads, in retrospect, as a who's who of influential thinkers and emerging leaders. The report which emerged, *Puao-te-Ata-tu* (Daybreak), resulted in the Children, Young Persons, and their Families Act 1989 (now the Oranga Tamariki Act) and creation of the Youth Court. It was a call for change that resulted in, at least, a platform for change.

When that report is read it could well have been written yesterday. The issues remain relevant today. Justice Sir Joseph Williams describes this report, and its aftermath, as “the great awakening of the law”.² The youth justice system was given the tools to begin to transition from a state of darkness to one of enlightenment.

Some of the principles and tools did lie dormant for decades. For example, Lay Advocates, those appointed to bring a whānau and cultural perspective to the court, were provided for in the 1989 Act, but it is only in the last 10 years or so that they have become commonplace in the Youth Court. It was through the innovation of judges that life was breathed into those provisions. Youth Court Judges drove the establishment of a process to appoint Lay Advocates, encouraged the use of cultural reports and established Rangatahi and Pasifika Courts. These judge-led initiatives gave life to the words of the statute and the words of *Puao-te-Ata-tu*. The 2019 amendments to the Act sent a clear signal from Parliament that the changes needed in 1989 were still needed 30 years later.

In 1989, the new Act was instantly seen as something different: a “new paradigm”, a way to respond to the calls for change and do something different.³ The consequences of this new approach are evident in the immediate statistical changes.

In the year prior to the introduction of the Act, there were 10,000 young people in the youth justice system in New Zealand and 900 young people in some form of custody.⁴ The year after the Act was passed, the number in the youth justice system dropped to around 2000 – one fifth of what it was just one year before.⁵ Today, the numbers are the lowest they have ever been. At present, there are about 880 young people total in the youth justice system today, and approximately 120 in lock-up custody.⁶

2 Sir Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai L Rev 1 at 24.

3 Dr Allison Morris and Dr Gabrielle M Maxwell “Juvenile Justice in New Zealand: A New Paradigm” (1993) 26(1) Australian and New Zealand Journal of Criminology 72.

4 Andrew Becroft “Access to Youth Justice in New Zealand: ‘The Very Good, the Good, the Bad and the Ugly’” (2012) 18 Auckland U L Rev 23 at 27.

5 At 27.

6 Statistics provided internally by the Ministry of Justice.

This ongoing trend down in numbers is no comfort to the retailers who have the front of their stores rammed in, but the Youth Court process, with its multi-disciplinary approach, will continue to concentrate on the multiple underlying causes of this behaviour to reduce such offending.

If you imagine the graph of the Youth Justice figures and the dramatic and ongoing drop in numbers, it is the opposite of the graphs that would reflect the adult system. I would suggest that examination of the differences in process is justified – there are lessons to be learned.

So, what enabled this dramatic drop in numbers? The foundational principles of the 1989 Act help paint the picture. At the core of the youth justice system in New Zealand, since 1989, is diversion away from formal court settings. One of the guiding principles in the Act states unequivocally that criminal proceedings are to be a matter of last resort and should not be instituted where there are alternative means of dealing with the matter.⁷ A child or young person who commits an offence should be kept in the community so far as is practical and consonant with public safety. As a result, around 75 to 80 per cent of all those children and young people who come to the attention of Police never come before a Youth Court judge.⁸ Instead, they are diverted away from court to one of many alternative pathways, fulfilling the guiding legislative principle. The constant unwavering work of Police Youth Aid Officers in this diversionary work continues to be a key pillar of the youth justice system.

A. Profile of Young Offenders

The emphasis on diversion means that young people who do come before the Youth Court are the most complex young people, with challenging and intersecting needs. I will explore this in more depth later, but it is useful for now to give a brief overview of the profile of young offenders in court. What we see is a high prevalence of neuro-disability, fetal alcohol spectrum disorders (FASD), dyslexia, autism, head injury, early onset of mental illness and alcohol and other drug dependency.

Dr Ian Lambie released a report in 2020 titled “What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand”. In the report, he notes that:⁹

Research is increasingly showing that a range of brain and behaviour differences, disorders and injuries are prevalent in both youth and adult justice populations, and potentially keep them in that system and hamper rehabilitation.

Many of these young people have suffered exposure to childhood trauma through sexual and physical abuse and witnessing repeated family violence. That is all still raw and may be their current situation.

In New Zealand every year there are more than 160,000 call outs by Police to a family harm incident.¹⁰ A call to Police about family harm is made every four minutes.¹¹ In two thirds of those

7 Oranga Tamariki Act 1989, s 208(2)(a).

8 Becroft, above n 4, at 27–28.

9 Dr 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, June 2018) at 4.

10 “Daily Occurrences of Crime and Family Violence Investigations” (31 August 2020) New Zealand Police < www.police.govt.nz >.

11 Dr Ian Lambie *Every 4 minutes: A discussion paper on preventing family violence in New Zealand* (Office of the Prime Minister’s Chief Science Advisor, November 2018) at 4.

call outs, children are present in the home.¹² When we consider that only 20 per cent of family harm is reported we know we have a very large number of children affected by family harm. It is not surprising that studies have shown that about 80 per cent of child and youth offenders have witnessed or been the victims of family violence in their homes.¹³

Young people in the justice system are also frequently disengaged from school. In the years before a young person's first contact with the youth justice system, around half have been truant from school.¹⁴ This has been exacerbated by Covid lockdowns. Children who already had a tenuous connection with school were sent home for a lengthy period and never returned. The homes they come from could not connect to school remotely.

B. *Solution-Focused Judging*

Against this backdrop, the Youth Court system is premised on a solution-focused approach, aimed at addressing the underlying causes of offending.¹⁵ The Youth Court has operated as a solution-focused court long before that term came into being. In this approach, the question that is asked is what has caused this person to come to court – what has happened to this person to bring them to this point in their life – not simply what happened in the event, which is a much easier question.

Once that question is answered then a response that addresses those causes can be fashioned. One thing is certain, unless the underlying causes are addressed then the offending behaviour will continue.

There are many statutory requirements in the Oranga Tamariki Act 1989 that reflect a solution-focused approach: judges engaging with young people and their whānau, encouraging and assisting them to participate, ensuring approaches taken recognise the particular vulnerabilities of the young and facilitating interagency cooperation.¹⁶ The Youth Court process has the Family Group Conference as a cornerstone providing for the involvement of victims in restorative justice processes. The focus is on meeting the needs of young people in court in a highly personalised way, identifying and addressing the underlying causes of their offending behaviour.

The purposes of the Act, which apply to the Care and Protection jurisdiction of the Family Court as well as to the Youth Court, are to promote the well-being of children, young persons *and* their families, whānau, hapū, iwi and family group by complying with an extensive list of obligations.¹⁷ These obligations include assisting families, whānau, hapū, iwi and family groups to fulfil their responsibility to meet the needs of their children and young people. A central principle under the Act is that the primary responsibility for caring for the child or young person lies with their family, whānau, hapū, iwi and family group. Finally, a guiding youth justice principle is that

12 "Family harm statistics" (New Zealand Police National Headquarters, data supplied on request, 3 October 2018).

13 Lambie, above n 11, at 4.

14 Sarah Richardson and Dr Duncan McCann *Youth Justice Pathways: an examination of wellbeing indicators and outcomes for young people involved with youth justice* (Oranga Tamariki – Ministry for Children, April 2021) at 8.

15 Katey Thom "New Zealand's Solution-Focused Movement: Development, Current Practices and Future Possibilities" in Warren Brookbanks (ed) *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomson Reuters, Wellington, 2015) 325 at 326.

16 Judge A J FitzGerald "Ko te rongoā, ko te aro, ko te whai kia tika ai, mo ngā rangatahi: Solution-focused justice for young people" (unpublished paper, 2021) at 4-5.

17 Oranga Tamariki Act 1989, s 4(1).

measures for dealing with offending by children and young people should be designed in a way that fosters the ability of families, whānau, hapū and iwi to deal with the offending.

There is a kind of reciprocity at play here. The foundational purposes and principles of youth justice led to the decreasing numbers of young people in court, and the low numbers then enable courts to fulfil those purposes and principles to a greater degree.

Today, with the lowest caseload we have ever had, there is the ability for intensive monitoring by the court and for the multi-disciplinary team in the Youth Court to bring a focussed approach to the relatively small number of cases that do come before the court. It is astounding, yet surprisingly commonplace, that judges, court staff and youth justice stakeholders will know individual young people in custody or in a particular court by name and know about their background and circumstances. There is no faceless, amorphous mass of defendants. The low numbers enable individualised, and greater, attention to be paid to young people and their whānau.

Looking back in the time since 1989, we can see the journey that the Youth Court has been on to its own form of an enlightened world. Would I say that we have achieved a state of Te Ao Mārama? I don't believe that is the case, well not yet, but nor do I believe that we remain in a state of pō.

The dedicated work that is done every day by everybody working in youth justice has placed us firmly on a journey towards Te Ao Mārama. We will always be on a journey, bringing the distant horizon closer with every step.

I have detailed what the Youth Court is seeing and how it seeks to respond to the challenges facing the young people who come before it and the procedural adaptations that are seen in the Youth Court as necessary to comply with legislation and international conventions.

But here is the thing, the underlying causes of offending, the neuro-disabilities, the exposure to trauma and so on, do not have an expiry date. They do not disappear when a young person comes into the District Court. Yet, we treat these young people as fully functioning adults when demonstrably they are not. The reasons for the accommodations we make in the Youth Court continue to exist.

The Youth Court, with its emphasis on identifying the underlying causes of offending, its use of a multi-disciplinary team of professionals in court, its processes encouraging participation and recognising the barriers to participation, the emphasis on plain language, bringing whānau into the process, giving victims a voice, is a court where those involved are seen, heard, understood and are enabled to meaningfully participate – the key features of Te Ao Mārama.

I would say that these features are essentially about fairness, procedurally and substantively, and so they should be a minimum standard of process for all our courts.

III. PROCEDURAL FAIRNESS

There have been various attempts to define the elements of procedural fairness. Some commentators write that procedural fairness has four key elements: voice, neutrality, respectful treatment and trustworthy authorities.¹⁸ Voice is the ability to participate in a case by expressing your own view. Neutrality is having unbiased decision-makers who consistently apply legal principles and whose decision-making process is transparent. Respectful treatment involves individuals being treated

18 Kevin Burke and Steven Leben "Procedural Fairness: A Key Ingredient in Public Satisfaction" (2007) 44 Ct Rev 4 at 6.

with dignity and having their rights protected. Trustworthy authorities envisage authorities who care, sincerely try to help litigants, listen to individuals and explain their decisions.¹⁹ Others have defined procedural fairness as having two interlinked aspects: concerns about procedures, including whether they are unbiased and whether the litigant has the opportunity to give their view, and concerns about how decision-makers treat participants and whether such treatment is respectful.²⁰

The importance of procedural fairness cannot be overstated. Studies have consistently shown, even though it may seem counterintuitive, that “[m]ost people care more about procedural fairness – the kind of treatment they receive in court – than they do about...winning or losing the particular case”.²¹ This is particularly true when it comes to losing parties.²² Losing parties are more likely to accept the outcome if they perceive the method by which the decision was reached as being fair.²³ Conversely, the opposite is true – if the losing party feels as if the decision-making process was not fair, this will be a greater source of frustration than the negative outcome itself. Defendants in our criminal courts, the majority of whom plead guilty, cannot really be described as the losing party. They do however submit to an outcome, and they need to understand how that outcome has been reached.

An increased perception of procedural fairness enhances the legitimacy of the court, as well as public trust and confidence in the justice system. Richard L. Wiener writes:²⁴

If offenders perceive that the...court is procedurally fair, produced a balanced outcome, resulted in respect for the offenders, and reconnected them to the positive aspects of their lives, they will view the law as legitimate. As a result, they will comply with judicial orders and ultimately choose healthier behaviours.

A. *Procedural Fairness in the Law*

The importance of procedural fairness is enshrined both in domestic legislation and international instruments.

Under the New Zealand Bill of Rights Act 1990, all people have the right to a fair and public hearing by an independent and impartial court.²⁵ The elements of procedural fairness contained within this right are clear – transparency, independence and impartiality.

Similarly, the Universal Declaration of Human Rights provides that everyone is entitled to a fair and public hearing by an independent and impartial tribunal.²⁶

Procedural fairness is particularly crucial for those with a disability. Article 13.1 of the Convention on the Rights of Persons with Disabilities says this:²⁷

19 At 6.

20 Francine Patricia Timmins “Therapeutic Jurisprudence, Justice and Problem-Solving” in Warren Brookbanks (ed) *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomson Reuters, Wellington, 2015) 121 at 127.

21 Burke and Leben, above n 18, at 5.

22 Timmins, above n 20, at 126.

23 Burke and Leben, above n 18, at 6.

24 Richard L Wiener and others “A testable theory of problem solving courts: Avoiding past empirical and legal failures” (2010) 33 *Int’l J & Psychiatry* 417 at 423.

25 New Zealand Bill of Rights Act 1990, s 25(a).

26 Universal Declaration of Human Rights GA Res 217A 1948, art 10.

27 Convention on the Rights of Persons with Disabilities GA A/RES/61/106 2007, art 13.1.

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants...in all legal proceedings ...

That sounds like a justification for the Te Ao Mārama approach.

One of the International Principles and Guidelines on Access to Justice for Persons with Disabilities is that people with disabilities have the right to appropriate procedural accommodations.²⁸

Persons with disabilities are defined in the Convention on the Rights of Persons with Disabilities as including “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.²⁹

The theme running through these documents is that sometimes, to ensure fairness, we have to change the processes of the courts.

The courts are an institution which privileges certain groups in society and disadvantage others. Not everyone has the same starting point. Some groups, including those with a disability, will face barriers in accessing justice that others may not.

To give some idea of the scale of these barriers, 60 to 90 per cent of young people in custody have a communication disorder, compared to only one to seven per cent of the general population.³⁰ Another study into 42 international prisons found that 30 per cent of young offenders, and 26 per cent of adult offenders, had clinically diagnosable ADHD.³¹ While there has been no prevalence study of FASD amongst the youth offender population in New Zealand, a comparative study in Australia showed that more than one in three youth in custody had FASD, all of which was undetected before the study.³² In the District Court, almost 50 per cent of offenders have a traumatic brain injury. This is likely an underestimation, as the data is based on those who go to A&E and/or make an ACC claim. From what we know of those people in court, it is likely that a large number do neither of these. Furthermore, ACC has recognised that Māori are less likely to make successful claims, which will likely have a corresponding effect on these figures.³³

Unless accommodations are made to remove these barriers, how can we say that our court process is fair?

At the core of Te Ao Mārama is the idea that the processes in the specialist courts which enhance participation and procedural fairness should be mainstreamed and not be available just in certain courts or locations to prevent what could be described as “postcode justice”.

Ensuring that people are seen, heard, understood and able to meaningfully participate in cases about them requires accommodations to be made and processes adjusted, in all of District Courts, Adult Criminal Court, Youth Court, Family Court and in Civil cases so that our time traveller wonders what this place is.

28 *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (United Nations Human Rights Special Procedures, Geneva, August 2020), principle 3.

29 Convention on the Rights of Persons with Disabilities GA A/RES/61/106 2007, art 1.

30 New Zealand Police, above n 10.

31 S Young and others “A meta-analysis of the prevalence of attention deficit hyperactivity disorder in incarcerated populations” (2015) 45 *Psychological Medicine* 247.

32 Lambie, above n 11.

33 Anusha Bradley “ACC biased against women, Māori and Pasifika, agency’s own analysis shows” (21 June 2021) Stuff <www.stuff.co.nz>.

IV. SEEN, HEARD, UNDERSTOOD, PARTICIPATED MEANINGFULLY

With the background of the vulnerabilities facing those we see in court, I hope the importance of the Te Ao Mārama principles – that everyone who comes to court will be seen, heard, understood and enabled to meaningfully participate in the case about them – becomes clear.

Many of the changes I suggest are not radical, nor are they difficult to implement. For example, using plain language comes up again and again as a simple step to ensure that people can understand what is being said in court and are therefore more able to effectively participate. As one young man in prison said to me about language in court, “it would be good if you just talked normal”.

A. *Seen*

The first element of Te Ao Mārama is that defendants, victims, whānau and others are seen when they are in court. This has two main facets. First, there is being seen in the ordinary sense of the word – the ability to physically appear in court. Second, there is the deeper sense of being seen and acknowledged for who you are.

During the Covid-19 lockdowns, protocols were put into place to allow for more virtual appearances via audio visual links (AVL). This was a move made out of necessity, and I do not deny that the use of technology, including AVL, has a place in our justice system. However, a defendant appearing via AVL may not feel seen to the same extent as if they were physically in the courtroom. The concern with the use of technology is that “the human connection may be degraded”.³⁴ The ability to read somebody’s expression and non-verbal cues is especially diminished.³⁵ In the book *The Pixelated Prisoner*, Carolyn McKay describes the difficulties that can occur with video appearances, including blurred or distorted images, lack of eye contact, inability to judge body language and facial expressions.³⁶ McKay argues that video appearances threaten procedural justice – it “generates feelings of disconnection and isolation from the remote courtroom, subtly rendering prisoners as spectators to their own legal proceedings”.³⁷ She goes on to say that defendants are “further disempowered verbally and physically, silenced and physically absent”.³⁸ To uphold procedural justice and fulfil Te Ao Mārama, a face-to-face connection, or *kanohi ki te kanohi*, is best practice and should remain the standard approach for substantive proceedings. The benefits of efficiency or cost must be weighed against the defendant’s right to be physically present and their right to a fair process. We have learned that we can conduct court hearings remotely. Just because we can does not mean that we always should.

Even where physically present, many people in court, including both defendants and victims, describe their experiences as not being truly seen but instead being viewed as a case, a number, an object, something to be dealt with.

A young man in Remutaka Prison said to me: “I am more than just a piece of paper”. He felt that all the Judge had seen was the piece of paper with his previous convictions and had not seen who

34 Michael Legg and Anthony Song “Commercial Litigation and COVID-19 – the Role and Limits of Technology” (2020) 48 ABLR 159 at 166.

35 Tania Sourdin and others “COVID-19, Technology and Family Dispute Resolution” (2020) 30 ADRJ 270 at 278.

36 Carolyn McKay *The Pixelated Prisoner: Prison Video Links, Court ‘Appearance’ and the Justice Matrix* (Routledge, New York, 2018) at 157.

37 McKay, above n 36, at 174.

38 McKay, above n 36, at 174.

he truly was as a person. It can be easy to fall into the trap of judges and lawyers talking directly to one another, to deal with the matter expeditiously, without engaging with the defendant before the court. Judges experience high caseloads – we are bursting at the seams in the District Court in particular – and the additional time taken to engage with defendants, whānau and victims may seem only to make the time pressures greater. But it cannot be right to say that we have not the time to be procedurally fair. The time resource has to be provided if we are to be effective in our courts.

The steps to “see” a defendant are not difficult, nor are they revolutionary. The positive effects of eye contact and other non-verbal cues are considerable. Greeting somebody by name, pronouncing their name correctly, acknowledging them and their whānau respectfully, continuing to refer back to them – all of these can make someone feel seen and acknowledged. One defendant has noted his positive experience in court as the following: “[the Judge] looked at me as an individual and not as some person being accused of something”.³⁹ They felt that they were seen as more than just a piece of paper. In other words, they felt that their dignity and mana were upheld.

Dignity is an integral component of being “seen”. It is a right which “provides each of us with equal moral standing under the law”.⁴⁰ The theme of dignity is threaded throughout domestic and international law. The first line of the preamble of the Universal Declaration of Human Rights recognises “the inherent dignity and...the equal and inalienable rights of all members of the human family”.⁴¹ Article 1 of the Declaration states that “all human beings are born free and equal in dignity and right”.⁴² In the Convention on the Rights of Persons with Disabilities, promoting respect for the inherent dignity of persons with disabilities is found in both the purpose and the principles.⁴³

A similar concept exists in Te Ao Māori – that of mana. The Oranga Tamariki Act, in the 2019 reforms, introduced explicit recognition of mana tamaiti – defined as “the intrinsic value and inherent dignity derived from a child’s or young person’s whakapapa...and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person”.⁴⁴ Recognising mana and mana tamaiti is an integral part of Te Ao Mārama. It is to ensure that people are “seen”.

B. Heard

Of course, it is not enough to merely be physically present in court to feel that justice has been done. The four elements of Te Ao Mārama increase in the difficulty and effort required to fully uphold them – from being seen, to being heard, to being understood and finally to meaningfully participating, arguably the most difficult to achieve.

I turn now to the right to be heard in court. Again, this has two main meanings. The more surface-level meaning is the ability to speak in court and be heard without being silenced or

39 Rachel Swaner and others *What Do Defendants Really Think? Procedural Justice and Legitimacy in the Criminal Justice System* (Center for Court Innovation, September 2018) at 28–29.

40 Grant Hammond “Beyond Dignity?” (paper presented to the Second International Symposium on the Law of Remedies, Auckland, 16 November 2007).

41 *Universal Declaration of Human Rights*, above n 26, preamble.

42 At article 1.

43 *Convention on the Rights of Persons with Disabilities*, above n 27, arts 1 and 3.

44 Oranga Tamariki Act 1989, s 2(1). For sections in the Act that refer to mana tamaiti, see ss 4(1)(a)(i), 4(1)(g), 5(1)(b)(iv), 7AA(2)(b), 13(2)(b)(ii) and 13(i)(iii)(C).

interrupted. Following on from this is the opportunity to tell your side of the story and voice your perspective.

Various studies have shown that being unable to speak in court, or being cut off when speaking, is a major source of frustration for participants in court proceedings. Participants have reported feeling disrespected when court personnel did not give them an opportunity to speak and feeling silenced when cut off by a judge.⁴⁵ On the other hand, they experienced feelings of respect and fairness when they felt like the judge was listening to them, and the judge asked if they had any questions.⁴⁶

I must emphasise again that making a court participant feel heard – and in fact actually hearing them – is not difficult. Many judges have been doing so their whole careers. Traditionally participants are heard through their lawyers. Providing participants with the opportunity to speak directly, where this can be done without prejudicing their position, enables them to feel empowered and respected.

The right to be heard is more than just the ability to physically speak – it also involves telling your side of the story. A consistent theme of the calls for transformative change at the heart of Te Ao Mārama is the frustration and disempowerment that occurs when courts determine a sentence without taking into account the views of a particular group, such as victims.⁴⁷ People want to tell the court what has happened to them, from their perspective, and why. The right to express your views freely and have the views given due weight is recognised as important internationally and is included in conventions such as the United Nations Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

The concept of dignity ties into the right to be heard as well. David Luban uses dignity as a justification for the role of a lawyer. His argument is that the right to counsel is connected with dignity in the following two respects: “first, that human dignity requires litigants to be heard, and second, that without a lawyer they cannot be heard”.⁴⁸ Navigating the courts is difficult, as is presenting a legal argument without any legal training. The lawyer is therefore crucial in enabling their client to present their side of the story and be heard.

Lawyers play a critical role in a solution-focused court process. Once guilt has been accepted or established and the identification of the underlying causes becomes the focus, lawyers can see their role as assisting their client to avoid reoffending and driving the process towards that end. In all of this, they never cease being the protector of their clients rights.

Being heard implies a two-way relationship, involving one person speaking and another person listening. That is crucial – that the judiciary actively listens to what those in the courtroom are saying and that defendants, whānau and victims feel as if they have been listened to. This ties back to procedural fairness. Defendants or victims who have a chance to tell their side of the story, and who feel that their arguments have been considered, will have a positive perception of the process,

45 Swaner, above n 39, at vi–vii.

46 Swaner, above n 39, at 35.

47 *He Waka Roimata: Transforming Our Criminal Justice System* (Te Uepū Hāpai i te Ora – Safe and Effective Justice Advisory Group, 2019) at 16.

48 David Luban, “Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)” (2005) 2005(3) U Ill L Rev 815 at 819.

regardless of the outcome.⁴⁹ The White Paper of the American Judges Association on procedural fairness put it this way:⁵⁰

from a litigant's point of view, if the judge does not respect litigants enough to hear their side or answer their questions, how can the judge arrive at a fair decision?"

C. Understood

I turn now to the next element of Te Ao Mārama – that court participants feel, and in fact are, understood by judges and others in court proceedings. Being understood requires more, arguably, than being heard and being seen.

So, what does it mean to be understood? It means that the judge fully comprehends the participant's background and any underlying issues or factors that may be relevant. It means that the judge has knowledge of the participant's unique needs. It means that the judge has a solid knowledge basis from behavioural science on relevant areas, such as family violence and neuro-disabilities, that can lead to greater understanding of the person standing before them. It means that the participant feels that they have been listened to and understood. It means that the judge has knowledge of what life is like for the those who are overrepresented in our justice system.

In order to achieve this understanding, the courts and the communities they serve must become connected. Courts are seen by communities as something separate and unapproachable, yet the authority given to courts to decide cases comes from the community. That is where courts derive their legitimacy, much like the Peelian principle of policing by consent. Of course, judges must be independent in terms of decision making but that does not mean that judges need to be detached from the communities they serve. In addition, much of the resource needed to deliver effective interventions for a court to operate in a solution-focused way is found in communities.

Where there is that connection between a court and its community and judges are knowledgeable about the current issues facing those in the community, it is more likely that those people will feel – and in fact be – understood.

One vehicle that is being increasingly used to bring information before the court, thus increasing the ability of a defendant to feel understood, is s 27 cultural reports.⁵¹ Section 27 of the Sentencing Act 2002 allows any person to speak to the court about an offender's personal, family, whānau, community and cultural background. While originally intended to provide for an oral speaker to present to the court,⁵² the section has been interpreted in recent years to allow for written reports by independent report writers, including extensive information about an offender's background and how this relates to their offending. Importantly, however, as Whata J noted in *Solicitor-General v Heta*, "recognition of deprivation and personal trauma does not involve condoning the offending. Rather it helps to explain it".⁵³ While s 27 reports are an important way in which defendants feel understood, there are imperfections in their current working. Financial constraints and a lack of report writers limit the ability for all defendants to have a comprehensive report presented to the

49 Tom Tyler "Procedural Justice and the Courts" (2007) 44 Court Review: The Journal of the American Judges Association 26.

50 Burke and Leben, above n18, at 12.

51 Oliver Fredrickson "Re-thinking Systemic Deprivation Discounts" (2021) August Māori LR 1.

52 (12 June 1985) 463 NZPD 4759.

53 *Solicitor-General v Heta* [2018] NZHC 2453 at [66].

court.⁵⁴ This perpetuates what I have already referred to as “postcode justice”, with regions having differing availability of report writers.

One feature of Te Ao Mārama is to restore the original intention of s 27 and encourage whānau and community members to engage with the sentencing process and provide this information orally in court. A statutory provision enabling this engagement with the court is not a prerequisite for a judge to invite or allow such information to be put before the court.

Our specialist courts have developed practices that provide alternative ways for information to be brought before the court. Judges in specialist courts have access to detailed information about addiction, mental health, financial, social and cultural issues.⁵⁵ Often there is extensive information available in the youth and family jurisdictions, including psychological reports. In the Young Adult List, an information sharing protocol allows a judge in the Young Adult List to request information from the Youth Court and the Family Court. Te Ao Mārama envisages that practices such as these are not confined to individual courts but are mainstreamed across all District Courts.

Of course, it is not only defendants who must feel understood but also others in the courtroom, including victims. Reports such as *He Waka Roimata* express the frustration and disempowerment that victims feel in the courtroom, where they feel misunderstood and as if their views are not taken into account.⁵⁶ A study in the United Kingdom found that only 55 per cent of victims or witnesses in criminal proceedings would be prepared to take part in criminal proceedings on a future occasion.⁵⁷ This means that almost half of all victims or witnesses have had such a negative experience in the criminal justice system that they would not be prepared to do it again. As the anonymous author of *The Secret Barrister* writes:⁵⁸

If they witnessed your daughter being mugged, they would not assist in bringing her assailant to justice. If you were falsely accused of assault, they would not come forward to say that they saw you acting in self-defence. If they were themselves a victim, they would not entrust the justice of that crime to the state, preferring, one infers, that the miscreant go unpunished, or be subject to a more immediate, possibly divine, form of retribution.

For victims to have a more positive perception of the criminal justice system, they need to be included more in the process. They, also, need to be understood.

D. Meaningful Participation

The final component of Te Ao Mārama involves meaningfully participating in court proceedings. This is particularly affected by the brain and behaviour differences, including neuro-disabilities, that I have mentioned earlier.

These brain and behaviour differences act as barriers to participation and engagement in court. The statistics I mentioned earlier mean that it is more likely than not that a person appearing before a judge in court will have some kind of disability that will interfere with their ability to fully participate. The formal and sometimes archaic nature of the court system can make it difficult

54 Oliver Fredrickson “Getting the Most Out of Section 27 of the Sentencing Act 2002” (2020) November Māori LR.

55 Chief Judge Heemi Taumaunu “mai te pō ki te ao mārama: the transition from night to the enlightened world: Calls for transformative change and the District Court response” (Norris Ward McKinnon Annual Lecture, 2020) at 24.

56 Te Uepū Hāpai i te Ora, above n 47, at 16.

57 *The Secret Barrister* (Macmillan, London, 2018) at 136–137.

58 At 137.

for anyone to participate, let alone those with additional barriers. The language used in court is complicated and often meaningless to those who have not been legally trained.

Bail conditions include terms such as “not to associate with”, “not to reside at” or “not to consume” drugs and alcohol – these are not words which are used in everyday life. It is difficult to participate in proceedings if you are not able to understand them in the first place. The court process is reliant on written documents which can put groups such as those with dyslexia at an immediate disadvantage.

Judge Carlie J. Trueman from British Columbia said the following:⁵⁹

The cognitively challenged are before our Courts in unknown numbers.

We prosecute them again, and again, and again.

We sentence them again, and again, and again.

We imprison them again, and again, and again.

They commit crimes again, and again, and again.

We wonder why they do not change.

The wonder of it all is that we do not change our expectations rather than trying to change them.

This eloquently describes the need for procedural accommodations in court – to change our practices, procedures and expectations, rather than trying to change the people themselves.

I compare this to what we automatically do when someone in court cannot understand English. That person is, without question, provided with an interpreter so that they can understand the proceedings. In fact, the right to free assistance of an interpreter in court is enshrined in our Bill of Rights Act 1990.⁶⁰ When someone does not understand proceedings because of a neuro-disability, they should also be provided with assistance to ensure that they understand what is being said and are able to participate.

The Oranga Tamariki Act 1989 goes some way toward this, requiring that children and young people are given reasonable assistance to understand what is being said in court.⁶¹ However, the rights and protections for those with neuro-disabilities are nowhere near as great as for those who do not speak or understand English. Te Ao Mārama aims to address this by ensuring that everybody in court, regardless of their means or ability, is able to understand and meaningfully participate in court proceedings.

This involves everyone in court speaking in plain language that is able to be understood by all, taking breaks if needed and explaining any necessary legalese or complicated procedures.

These ideas have been influenced to a great extent by the Young Adult List in Porirua, which began in early 2020 and was predicated on the need to change procedures in court to ensure procedural fairness for young adults who, by virtue of their age, have demonstrably different brain architecture than adults.⁶² Many principles of Te Ao Mārama reflect the principles and processes of the Young Adult List and so I would like to take the time to discuss the establishment of this list.

59 *R v Harris* 2002 BCPC 0033 at [167].

60 New Zealand Bill of Rights Act 1990, s 24(g).

61 Oranga Tamariki Act 1989, s 11(2)(aa).

62 Elise White and Kimberly Dalve *Changing the Frame: Practitioner Knowledge, Perceptions, and Practice in New York City's Young Adult Courts* (Center for Court Innovation, 2017).

The Young Adult List stemmed from the idea that jurisdictional age limits in the New Zealand justice system are arbitrary and do not reflect actual brain development.⁶³ A young person appearing in the Youth Court is provided with wrap-around support from a multi-agency team specifically trained in dealing with adolescents. The judges speak to the young people in plain language, the courtroom is arranged in a less formal manner and the young person is assisted to help understand and participate in court proceedings. Yet when that same young person, with the high prevalence of disability I talked about earlier, turns 18, they are treated as a fully-functioning adult who is suddenly able to fully understand court processes and participate. Add to this that the brain of the young person will not be fully developed.

Research now consistently indicates that a person's brain doesn't fully develop until they are at least in their mid-twenties. Underdeveloped parts of the brain include those that affect executive functioning and assessment of risk and consequences. In addition to this, we must consider the high rates of neuro-disabilities that I have already discussed. These two overlapping factors justify a court process that recognises the limited executive functioning and the need for a different approach.⁶⁴

The Young Adult list in Porirua seeks to address this fairness issue. Every person charged with any offence in the Porirua District Court who is aged 18 to 25 years old is separated out from the existing list court and placed in their own list, held every Friday. There, they appear in court with a dedicated multidisciplinary team that provides the young adults with wrap-around, specialist support. This includes services such as Bail Support Officers, Adolescent Specialist Probation Officers, Adolescent Mental Health Nurses and Māori, Pacific and Ethnic Services. The architecture of the courtroom is changed to engender participation, allowing the defendant to be closer to their lawyer, and there is a great emphasis placed on avoiding legal jargon and using simple language. Information sharing protocols are in place and there is consistency of judiciary to enable connection between the young adults and the judge. To a large part, the Young Adult List mirrors practices in the Youth Court.

When Chief Judge Taumaunu talks about court participants being able to meaningfully participate in cases concerning them, I suggest that the Young Adult List sets the standard for what that entails. Of course, the Young Adult List is still on a journey and there is work to be done, but it is a step in the right direction.

Meaningful participation is the cornerstone of procedural fairness. If a person is merely a bystander in their own proceedings, how can it be said that those proceedings are fair? A fair hearing requires that those involved in proceedings are able to engage – with the judge, and others in the courtroom. In a way, meaningful participation is the culmination of being seen, heard and understood, as well as the participant themselves understanding the proceedings. When these elements are fulfilled, the person in court can understand and appreciate the reasons for any court decision, rather than feeling that the decision was unfair because they were not a part of it.⁶⁵

63 See Stephen Woodwark and Nessa Lynch “‘Decidedly but Differently Accountable?’ Young Adults in the Criminal Justice System” [2020] 1 NZ L Rev 109.

64 Judge Jan-Marie Doogue and Judge John Walker “Proposal for a trial of Youth Adult List in Porirua District Court” (29 August 2019) The District Court of New Zealand <www.districtcourts.govt.nz>.

65 Antoinette Robinson and Mark Henaghan “Children: heard but not listened to? An analysis of children’s views under s 6 of the Care of Children Act 2004” (2011) 7 NZFLJ 39 at 43.

V. CONCLUSION

This pursuit of fairness in the process of the court underpins the vision of Te Ao Mārama. It does seem to be a rather basic aim. In one sense it ought not be revolutionary to ensure that all who come to our courts are seen, heard, understood and are enabled to meaningfully participate in the case, but it will require all of us to come together to achieve it – judges, lawyers, police, court staff, all the agencies in court and, importantly, the communities being served. Our courtrooms should be unrecognisable to our Victorian time traveller.

“No army can withstand the strength of an idea whose time has come” – Victor Hugo.

A TRIBUTE: ROBERT MAKGILL – THE ACADEMIC

Robert Makgill graduated from the new Waikato Law School with a Bachelor of Laws (LLB) degree in 1994. The school had been established in 1990 based on the foundation objectives of professionalism, biculturalism, and the study of law in context. It was designed to produce a very different kind of lawyer – change makers for the 21st century. A highlight of Robert’s final year of legal studies at Waikato was the Environmental Law paper taught by Professor Barry Barton, which reflected Robert’s early passion for the field.

He was clearly destined for great things, and Robert subsequently enrolled in the first cohort of Master of Laws in Environmental Law (LLM) students at the University of Auckland in 1996. Vernon Rive, formerly Associate Professor and Deputy Dean at the AUT Law School, recalls his good memories of Robert as an enthusiastic, supportive, and collegial fellow LLM student.

Associate Professor Kenneth Palmer supervised Robert’s LLM dissertation, “Artificial Reef development and the RMA”, and records that it was an original subject which related to the legal procedures for obtaining approval for the artificial reef at Mount Maunganui to benefit surfing, based on his academic collaboration with Hamish Rennie and others at Waikato (which was to be the start of an enduring and successful research collaboration with Hamish that later resulted in Robert becoming a Research Fellow at Lincoln University). The reef was subsequently successfully installed. Kenneth Palmer was impressed by Robert’s vision and impressive academic ability.

Robert’s LLM dissertation was assessed by Professor David Grinlinton who notes that Robert was always a committed lawyer and a hard driver in everything he did, and often took a unique and innovative approach to applying rules and principles of law in the marine and environmental context.

Robert was a staunch alumni of Waikato and in between completing his LLM at Auckland and starting his doctoral studies at Ghent University he was instrumental in establishing international links between the Law Faculties at the Universities of Bremen, Ghent, and Waikato (that were finalised via formal memoranda of understanding) while completing a research scholarship at the Maritime Institute in Ghent in 2005 with Professor Frank Maes and the team that led the European development of marine spatial planning.

David Grinlinton notes that passion for the Law of the Sea at the international level resulted in Robert successfully leading the team for the International Union for the Conservation of Nature (IUCN) and the World Commission on Environmental Law (WCEL) before the International Tribunal for the Law of the Sea in 2011, that had an influential impact on the Tribunal’s advisory opinion on state liability for deep seabed mining. This was a rare distinction for a New Zealand academic lawyer.

Robert’s co-counsel before the Tribunal, Professor Cymie Payne of Rutgers University, recalls Robert’s great skill, intelligence, and humour – and that he was the best team leader that she has ever worked with, especially under the pressure of tight deadlines and high visibility. Cymie Payne also reflects on Robert as the friend who brought together the unique combination of a brilliant mind, vast energy, and a physical love for the sea. Professor Christina Voigt of the University of Oslo and Chair of the WCEL also notes that Robert was a wonderful scholar and an active and dedicated WCEL member.

David Grinlinton also notes that Robert subsequently became an authority on maritime law and environmental law, authoring many publications, including articles in both New Zealand and overseas journals, such as the *International Journal of Marine and Coastal Law*, *Environmental Policy and Law*, *Resource Management Theory and Practice*, and the *Resource Management Journal*. He was also an active and generous supporter of the New Zealand Centre for Environmental Law based at the University of Auckland's Faculty of Law, while continuing to bring his immense intellect and academic credentials to bear as a very successful litigator at the highest levels, and that most recently Robert appeared as legal counsel before the New Zealand Supreme Court for a number of commercial fisheries interests and organisations in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127.

Professor Klaus Bosselmann, the founding Director of the New Zealand Centre for Environmental Law, also remembers Robert an outstanding student with a keen interest in environmental and social justice. His skills earned him the LLM with First Class Honours paving the path for his career as an environmental lawyer and highly regarded barrister and expert in both New Zealand and international environmental law. Robert also kept in contact with the New Zealand Centre for Environmental Law, where he worked with Klaus Bosselmann and other colleagues on several projects, most recently on a submission to the Government's resource management law reform he published in the *New Zealand Journal of Environmental Law*, participated in many events, and employed students in his legal practice.

The link with the Ghent University also remained a constant part of Robert's life, and he gained his Doctor of Laws (LLD) degree from the International Public Law & Maritime Institute at Ghent University in 2019. The topics covered by his LLD thesis included sustainable management, the international Law of the Sea, and New Zealand state practice. His thesis was supervised by Professor Frank Maes and Professor An Cliquet from Ghent University, and Associate Professor Hamish Rennie from Lincoln University.

Associate Professor Hamish Rennie of Lincoln University observes that the hallmark of Robert's research and academic studies was always its applied nature – and his ability to contribute clear, often critically challenging and innovative thinking to research teams.

Outside the academy, Dr Royden Somerville KC observed from the legal profession that Robert thoroughly enjoyed working with members of the academy in New Zealand and overseas, and that he made a notable contribution to his specialist field, writing numerous journal articles, book chapters, conference papers, and submissions to Parliamentary Select Committees.

Robert will be remembered as an engaging professional and brilliant mind with a deep commitment to protecting our natural environment, in particular the marine and coastal environment.

True to the spirit of Waikato, Robert was clearly a very different kind of lawyer in every positive sense of the word, and his legacy will continue to provide an inspiration for future generations of Law students. His contribution to the development of the law in New Zealand and internationally – both as a litigator and as an academic - was immense and enduring, and he will be greatly missed. May he rest in peace.

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BOOK REVIEW

ENEMIES OF THE PEOPLE: HOW JUDGES SHAPE SOCIETY by Joshua Rozenberg, Bristol University Press, 2020, 227pp, recommended retail price £11.99.

Enemies of the People: How Judges Shape Society by Joshua Rozenberg, the former BBC legal correspondent is a tour de force. Taking its title from the *Daily Mail* headline on 4 November 2016 in response to High Court decision in *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768,¹ challenging the executive decision of the British government to start the process of withdrawing from the European Union without Parliamentary authority, the book interrogates judicial activism – the power of common law judges to make law.

Chapter 1 provides an overview of the common law constitutional framework that will be familiar to New Zealand readers in terms of the sovereignty of Parliament, the separation of powers between (in particular) the executive government and the judiciary, and the principle of legality. The chapter then turns to the main thesis of the book, the development of the common law by judges noting both narrow formalistic approaches to exercising judicial discretion and wider theories (based on the work of John Griffiths) regarding the politics of the judiciary. In particular, the chapter introduces readers to concept of restraint regarding the exercise of judicial discretion, including the influence of human rights and procedural remedies available via judicial review on executive power. It concludes with overriding question – “to what extent is it appropriate for judge to develop the common law in accordance with general principles of law and justice, as they see them, and to what extent should they defer to parliament in the matter of law reform”.²

Chapter 2 deals with the *Miller* case and the question of the legality of the British government’s decision to start the process of withdrawing from the European Union without parliamentary authority, which took place against the politically charged environment of the Brexit referendum. In particular, chapter 2 explains the difference in the public reaction to the High Court³ and Supreme Court⁴ decisions, that in the meantime the public had understood that the issue before the Courts was not the political question of whether Brexit “was a good idea or bad idea” but the more “boring” procedural question about the limits of prerogative power.⁵

Chapter 3 turns to the criminal law and the Court of Appeal decision in *R v R* which upheld the conviction of a husband for the attempted rape of his wife,⁶ which overturned the common law doctrine set out in Sir Matthew Hale’s *History of the Pleas of the Crown* published posthumously in 1736 that a man could not be convicted of this offence against his lawful wife. However, the Court of Appeal was careful to explain that this sea change did not create a new criminal offence, but merely removed an anachronistic defence.⁷

1 *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768.

2 Joshua Rozenberg *Enemies of the People: How Judges Shape Society* (Bristol University Press, 2020) 23.

3 *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768.

4 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

5 Rozenberg, above n 2, at 24.

6 *R v R* [1992] 1 AC 599.

7 Rozenberg, above n 2, at 55.

Chapter 4 considers family law and the Supreme Court decision in *Owens v Owens*,⁸ where Lady Hale deftly applied judicial deference when considering whether unreasonable behaviour in the context of divorce should be interpreted objectively (by requiring the wife to prove in *Owens* that her husband had behaved unreasonably) or subjectively (by proving that the effect of his behaviour on her satisfied the unreasonableness test), by stating the judges do not change the law but merely interpret statutes passed by Parliament.⁹

Chapter 5 explains the rationale of the Courts in assisted suicide or end of life decisions. For example, in *R (Nicklinson) v Ministry of Justice*,¹⁰ the Supreme Court declined to make a declaration that s 2 of the Suicide Act 1961 (which provides that anyone who intentionally encourages or assists suicide commits an offence) was incompatible with art 8 of the European Convention on Human Rights 1950 (ECHR) (which provides for the right to respect for private and family life). Mr Nicklinson had suffered a catastrophic stroke and wished to end his life via euthanasia rather than by “refusing all nutrition, fluids and medical treatment”.¹¹ Lord Neuberger explained that assisted suicide or end of life decisions were controversial and involved sensitive moral and religious views that warranted caution by the Courts, and the issue of law reform therefore required “anxious consideration” by Parliament which had been “actively considering” reform.¹² Effectively, the *Nicklinson* decision provided Parliament with an opportunity to change the law, but did not close the doors on the Courts making a declaration of incompatibility in a future case.¹³

Chapter 6 considers discrimination. For example, in *Re McLaughlin’s Application for Judicial Review*,¹⁴ Siobhan McLaughlin and John Adams were in a stable 23-year de facto relationship, they had four children together, but Siobhan McLaughlin was not entitled to claim a widowed parent’s allowance when John Adams died. Ultimately, her application for judicial review was heard by the Supreme Court on appeal. The question before the Supreme Court was whether Siobhan McLaughlin was the victim of discrimination contrary to art 14 of the ECHR because the Department of Social Development and the Courts below had declined to interpret the statutory reference to spouse in s 39A of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 as including a person living in a de facto relationship. Put simply, was the purpose of the allowance to provide for the children from the relationship “to compensate for the loss a breadwinner” or merely a benefit for the survivor of a legal marriage.¹⁵ The Court declared (by a majority) that the decision which prevented the unmarried partner of a deceased person from claiming the allowance was discriminatory.

Chapter 7 discusses gay marriage. In *Lee v Ashers Baking Co Ltd*, Graham Lee ordered a cake from the bakery with a slogan that promoted gay marriage. Mr Lee was gay. The bakery declined to produce the cake on religious grounds. While the Supreme Court found that there had not been any discrimination on the grounds of sexual orientation because the bakery would have declined to produce the cake irrespective of the sexual orientation of the person who placed the order – it was

8 *Owens v Owens* [2018] UKSC 41.

9 Rozenberg, above n 2, at 71.

10 *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38.

11 Rozenberg, above n 2, at 93.

12 *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 at 116.

13 Rozenberg, above n 2, at 95, 97.

14 *Re McLaughlin’s Application for Judicial Review* [2018] UKSC 48.

15 Rozenberg, above n 2, at 119.

the message on the cake that concerned the bakery owners not the person who placed the order.¹⁶ However, the remarkable aspect of the decision in *Lee* was the support given for gay marriage by emphasising that “gay rights were of benefit to society as a whole”.¹⁷ Put simply, law is contestable and it matters from a values perspective who the judges are.¹⁸

Chapter 8 essays the development of the right to privacy, focusing (inter alia) on the Supreme Court decision in *R (Privacy International) v Investigatory Powers Tribunal*.¹⁹ Privacy International, a United Kingdom based charity, that promotes the right to privacy across the world challenged the decision of the Investigatory Powers Tribunal regarding the issue of themed warrants which authorised computer hacking by the British security services. The Tribunal was established by the Regulation of Investigatory Powers Act 2000 which provided that decisions of the Tribunal could not be subject to appeal or questioned in any court.²⁰ However, the activist majority found that s 67(8) did not preclude the Senior Courts from reviewing the Tribunal’s decision for excess or abuse of jurisdiction, or error of law.²¹

Chapter 9 concerns access to justice. For example, in *R (UNISON) v Lord Chancellor*,²² the Supreme Court when interpreting the statutory power to charge court fees held that this did not allow fees to be set at a level that would prevent potential litigants from enforcing their rights via the courts.

Chapter 10 answers the question posed by the book regarding the power of common law judges to make law, affirmatively – by emphasising the delicate counterweight provided by the judiciary in the common law constitutional framework, and concludes that rather than being the enemies of the people – “judges are just about the only friends we have”.

Overall, the book provides an excellent introduction to the common law and highlights both the cautious incremental approach of the Senior Courts and their bold activist defence of rights and liberties. It is highly commended and recommended for all Legal Method classes in New Zealand law schools.

DR TREVOR DAYA-WINTERBOTTOM²³

16 Rozenberg, above n 2, at 126.

17 Rozenberg, above n 2, at 126.

18 Rozenberg, above n 2, at 25.

19 *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

20 Regulation of Investigatory Powers Act 2000, s 67(8).

21 Rozenberg, above n 2, at 152.

22 *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

23 FRSA FRGS, Editor in Chief, *Te Piringa* Faculty of Law, University of Waikato.