

WAIKATO LAW REVIEW

TAUMAURI

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INTRODUCTION

It is my pleasure to present the 2018 edition of the Waikato Law Review and the riches within. As is customary, the Norris Ward McKinnon Lecture takes pride of place on the first page of the Review. In this edition the Hon Justice Fisher takes the opportunity to convey the clear message that “the defining characteristic of great lawyers is their ability to simplify” and outlines ideas as to how lawyers, not noted for simplicity, might achieve this aspiration when drafting legal documents and legislation, when expressing legal views, and when teaching law.

The Review then presents papers from a lecture series that celebrated the 25th Anniversary of Te Piringa, our Faculty of Law. Each lecture focussed on one of the founding principles of the Faculty: our bicultural commitment, professionalism, and teaching and researching law in context. In his lecture, the Hon Justice Whata acknowledges the commitment that Te Piringa – Faculty of Law has made to biculturalism from its inception and traces how the common law, after a lengthy period of glacial motion, has moved significantly in recent years to embrace a genuinely bicultural narrative. He concludes that while there is some distance to travel to achieve that goal, there is reason for optimism.

Professor Margaret Wilson, the founding Dean of Te Piringa, explained why the Faculty’s goal of teaching law in context is still relevant in the face of contemporary challenges. Professor Wilson reminds us that legal rules are the output of a complex variety of factors. Teaching law in context allow students to recognise this complexity in order for them to fully appreciate the role and influence of law within a society. The Hon Justice Christine Grice, former President of the New Zealand Law Society, delivered a lecture on professionalism, emphasising the need for more diversity in the legal profession, and acknowledging the contribution that Te Piringa – Faculty of Law has made to diversity.

An innovation in this edition is the publication of two interconnected articles by the same author, Alberto Alvarez-Jimenez. The first article contains the essential human context for the second, which provides a legal analysis of how international humanitarian law and international criminal law could be interpreted in order to make civilian ordeals visible to the opponent. Without the powerful human content in article one, the legal analysis in article two would not have the level of understanding and impact that it does. The publication of the articles in this way reflects the unique culture at Te Piringa – Faculty of Law as demonstrated by its founding principles.

Paul Scott, in his article on s 36 of the Commerce Act 1986, discusses New Zealand’s antimonopolisation provision and the usefulness of legitimate business rationale analysis in determining whether a firm’s conduct breaches s 36.

It is always a pleasure to publish student work. In this edition, Aaron McIlroy investigates the development of a “quality of life approach” in human rights instruments, and Season Mary Downs reviews *New Treaty, New Tradition: Reconciling New Zealand and Māori Law*, by legal academic Carwyn Jones, Victoria University Press, 2016.

I take this opportunity to whole-heartedly thank the editorial team and the peer reviewers for your valuable contributions. Publishing these important journals would not be possible without you.

Ngā mihi me ngā manaakitanga, nā

Linda Te Aho

Editor in Chief

THE NORRIS WARD MCKINNON LECTURE

AIMING FOR SIMPLICITY

BY THE HON JUSTICE ROBERT FISHER*

I. INTRODUCTION

This lecture has been given annually by current or former Governors-General, Prime Ministers, Ministers of Justice, Chief Justices and distinguished professors and judges. Tonight, you hear from a country lad raised nearby in Te Awamutu. But my roots at least equip me to talk about the topic for this evening. The topic is simplicity.

Simplicity is an important topic for lawyers because:

- evolution has left the human brain with marked limitations in its capacity to process information;
- the only way we can work within those limitations is to keep things simple;
- simplicity is achieved by identifying the intended audience, discarding the unnecessary, organising what is left, and communicating it efficiently;
- lawyers are notorious for their failure on those fronts;
- the only way lawyers can think clearly is to simplify; and
- simplifying allows others to understand what lawyers are saying.

This paper examines those propositions. The conclusion is clear: the defining characteristic of great lawyers is their ability to simplify.

A. Limitations of the Human Brain

1. Origins of the human brain

The brains of our ancestors were shaped by the natural world around them. They needed to interpret external phenomena if they were to achieve a relatively limited range of outcomes. Assessing terrain and vegetation would lead them to game and edible plants. Clouds, wind and temperature were a guide to expected weather. Interpreting the behaviour and expressions of others would promote the formation of extended families, the cooperative hunting of animals and the joint defence of territories.

That was the environment in which our brains evolved. In evolutionary terms it was yesterday. Insufficient time has passed for our brains to evolve significantly since then. The point can be illustrated by the following facts:

* Hon Robert Fisher QC, LLD, FAMINZ, arbitrator and mediator, Auckland, author, appellate judge Samoa and Cook Is, former NZ High Court Judge, Fulbright Scholar. My thanks are due to Auckland law graduate, Isabelle Boyd, for her research assistance.

- The current sapiens brain size (about 1200 ml) was reached about 300,000 years ago.¹
- The current sapiens brain shape and organisation was reached about 35,000 – 100,000 years ago.²
- The Stone Age ended about 10,000 years ago.³

2. *The modern world*

That is still the brain with which we wake up each morning to take on the 21st century. Your smart phone will tell you when to rise (the alarm app), how warmly to dress (the weather app), how smartly to dress (the calendar app), whether the neighbour's child needs a lift to school (texting), what happened to your extended family overnight (Facebook), Trump's latest altruism (a media app) and what must be done urgently before your meeting at 9.00 am (email).

What your smart phone will not tell you is how to deal with glitches in its own operating system, your cellular network, your home Wi-Fi, the underfloor heating timer, the electronic dishwasher controls, the oven clock, your multiple TV remotes, or your telecommunications provider. You are not up to helping with trigonometry homework. Over breakfast you and your spouse come to the pleasing, if uncharacteristic, agreement that neither understands your teenager's language. On the way to work you cannot listen to your favourite music because you do not yet know how to programme your car's audio system. On arrival at the office your IT technician points out, with asperity, that all your computer needed was rebooting. You wish it had not been rebooted when it enables you to read an email requiring you to peruse a colleague's impenetrable debenture trust deed by lunchtime. Taking refuge in a daily newspaper, you wonder whether the draft was so bad when you read the following:⁴

As science struggles to overcome the challenges around making lithium-ion batteries more efficient while still keeping up with global demand, the questions around how will we power all of these new electric vehicles, what can we do to reduce our dependence on rare earth metals and how we should recycle lithium-ion batteries once they run out still need to be answered.

Such is modern life; such are the demands placed on our Stone Age brains.

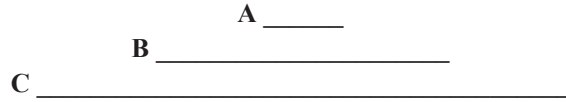
3. *Why humans need simplicity*

Our Stone Age brains have finite processing capacity. When we receive too much information at once our brains stall. The elaborate mathematical equation dances beyond reach. The over-long sentence evades comprehension. Psychologists call this condition "cognitive overload".

Life in the 21st century teems with cognitive overload. Negotiating a way through requires some understanding of the point at which it is likely to occur. The threshold is surprisingly low. The first to point this out was an American psychologist, George A Miller, in his 1956 paper "The Magical Number Seven, Plus or Minus Two – Some Limits on Our Capacity for Processing Information".⁵

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- 1 Simon Neubauer, Jean-Jacques Hublin and Philipp Gunz "The evolution of modern human brain shape" (24 January 2018) Science Advances <www.advances.sciencemag.org>.
 - 2 "Modern human brain organization emerged only recently" (24 January 2018) Max-Planck-Gesellschaft <www.mpg.de>.
 - 3 "Stone Age" Wikipedia <<https://en.wikipedia.org>> at [3.1].
 - 4 Michelle Dickinson "Nanogirl Dr Michelle Dickinson: Race against battery burnout" *The New Zealand Herald* (Auckland, 4 August 2018) at A12.
 - 5 George A Miller "The Magical Number Seven, Plus or Minus Two: Some Limits on our Capacity for Processing Information" (1956) 63(2) *Psychological Review* 81.

Miller pointed to three capacity limits encountered when humans try to absorb and process information. The first arises when attempting to exercise what Miller referred to as “absolute judgment”. “Absolute judgment” can be measured by asking a subject to place an incoming stimulus into one of a number of previously learned categories. In a typical experiment the subject learns line categories A, B and C:

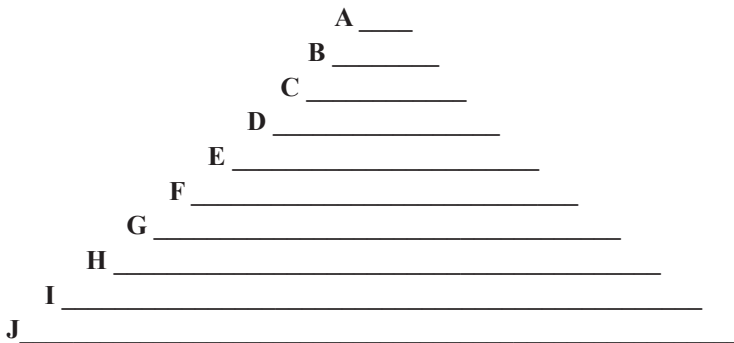


The three categories of line length are removed from sight. The subject is then shown a single line thus:



The subject is asked to allocate the single line to one of the known categories.

The task is easy where the known categories are confined to the three shown previously. It becomes increasingly difficult as the number of known categories is increased, for example:



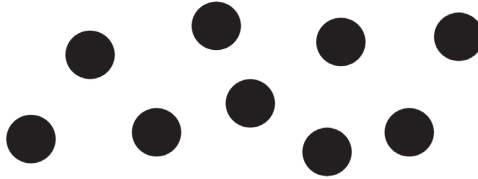
The same process can be followed for other stimuli such as auditory signals of different pitches. Miller found that whatever the nature of the stimulus, the maximum number of known categories humans can cope with is normally about seven. If they try to go beyond that number they suffer cognitive overload.

A second mental limitation is encountered during a form of information processing known as “subitising”. Subitising is the ability to instantaneously recognise the number of objects in a small group without counting them. Recognising the number of dots on the upper surface of dice is an example.

For experimental purposes the subject may be asked to assess at a glance, without counting, the number of beans that have been dropped in a heap on the floor. Again the task is easy with few items:



and more difficult with many:



As with absolute judgment, Miller found that most people cannot subitise more than about seven items at a time.⁶

A third limitation is encountered when trying to hold items in working memory.⁷ “Working memory” is the temporarily heightened availability of information about a small number of recent events or thoughts.⁸ It has something in common with the buffer used by a computer while live-streaming a video. In a computer the buffer holds the information in active memory (RAM) during the period between receiving and playing.

For humans, working memory holds a number of items of information for a short period so that they can be processed by the conscious mind in a single mental exercise. For example when readers encounter a subordinate clause like this one at the beginning of a sentence, they must hold that clause in working memory until they reach the end of the sentence.⁹ Only when they reach the end of the sentence is it possible to understand how the subordinate clause was intended to affect the sentence as a whole.

A simple test of working memory is to show the subject a series of letters on a screen. The subject is asked to memorise the letters. After the image has been removed the subject is asked to repeat the letters in reverse order. Tasks of this kind can be performed only if the original letters are held in working memory until the task is complete.

This is easy if the number of items is few:

C C S H

The difficulty grows as the number of items is increased:

U I I C L I I B L I I N P A Z L I I S T L A A I

Miller concluded that the maximum items that could be held in working memory was again roughly seven.

⁶ If one accepts the theme of the film *Rain Man* (1988), starring Dustin Hoffman, autistic savants have no such limitation.

⁷ Also known as “short term” or “immediate” memory.

⁸ Nelson Cowan “George Miller’s magical number of immediate memory in retrospect: Observations on the faltering progression of science” (2015) 122(3) *Psychological Review* 536.

⁹ Pushing the limits of working memory is the following masterpiece from an actual tenancy agreement: “The tenant hereby agrees ... to immediately any litter or disorder shall have been made by him or for his purpose on the staircase or landings or any other part of the said building or garden remove the same” – Ernest Gowers “Splitting that Infinitive” [1984] *NZLJ* 279.

Psychologists have since questioned the precise number that people can cope with in tests of this kind. Some argue for as few as four.¹⁰ Much apparently turns on the nature of the information and its context.¹¹ But for present purposes the exact number is immaterial. Everyone agrees that the number is no more than a handful.

The contrast with computers is humbling. A computer's equivalent of working memory is its RAM (random access memory). A computer holds current use data in RAM so that it can be rapidly accessed and used by the processor. A single exercise in processing information by a computer might be regarded as the equivalent of a single mental exercise by a human. A computer's most basic unit of data is a bit ("binary digit"). A byte, which might be regarded as the broad equivalent of an item of information from a human viewpoint, is eight bits. A megabyte is a million bytes and a gigabyte a thousand megabytes. A typical desktop computer can hold about 16 gigabytes in RAM. This means that for the purpose of carrying out a single exercise in processing information, the number of items of information an ordinary computer can hold in working memory is about 16 billion. We can hold about seven.

B. How to Work within Our Limitations

Fortunately what Miller also found was that the capacity of working memory could be greatly increased by combining individual bits of information into one or more meaningful combinations. Psychologists refer to these combinations as "chunks".

Take the string of letters referred to earlier:

U I I C L I I B L I I N P A Z L I I S T L A A I

The 24 items of information (letters) are beyond the working memory of ordinary people. But suppose the same letters are reorganised into four chunks:

NZLII AUSTLII PACLII BAILII

Most people carrying out online legal research today are familiar with the online Legal Information Institutes. Those readers will have little difficulty holding all of the 24 letters in working memory. All they have to remember is that there is a Legal Information Institute for New Zealand, for Australia, for the Pacific and for Britain and Ireland combined.

What is more, a series of chunks can be usefully combined into an overarching chunk. That overarching chunk can in turn be combined with others to form a still higher overarching chunk. In the present example the result of building a hierarchy of that kind is as follows:

SELECTED NZ LEGAL SOURCES

LII DATABASES NZ LAW JOURNALS

NZLII AUSTLII PACLII BAILII NZLJ NZFLJ NZRLR

U I I C L I I B L I I N P A Z L I I S T L A A I

JNLLFJZNRZLZRN

¹⁰ Nelson Cowan "The magical number 4 in short-term memory: A reconsideration of mental storage capacity" (2001) 24 *Behavioural and Brain Sciences* 87 at 91.

¹¹ Cowan, above n 8, at 539.

So long as the hierarchy remains meaningful to users, they can find their way back from one high level chunk to all the individual bits of information (in this case letters). One of the principal ways of overcoming the capacity limits of working memory is therefore to organise low level items of information into higher level chunks. This will work so long as the chunks remain meaningful to the user. So the chunking example given would be useful to someone familiar with the name and existence of the Legal Information Institutes but not otherwise.

To summarise, limitations in the structure of our brains restrict the number of items of information we can process at any one time. This limitation affects absolute judgment, enumerating without counting, and reliance on working memory. Items must be retained in working memory until completion of the mental exercise in question. In general the fewer the items or chunks that have to be simultaneously held in working memory, the better. Chunking is one important means by which multiple items can be remembered and retrieved.¹²

C. *Ways of Achieving Simplicity*

Those are the psychological principles which explain why humans need simplicity. They are also the clues to its achievement. At a practical level, four steps are required (“the IDOC approach”):

- (a) Identify the intended audience.
- (b) Discard clutter.
- (c) Organise what is left in a way that will be meaningful to that audience.
- (d) Communicate the result in a way that will be understood by that audience.

Each requires explanation.

- (a) Identify the intended audience

Identifying the recipients makes it possible to estimate their levels of comprehension and the concepts with which they will be familiar.

We do not speak to a class of six-year-olds in the way we would address a panel of scientists. Nor would we try to impart the same quantity and complexity of information. The nature of the audience dictates all that follows.

- (b) Discard clutter

The fewer the items that have to be held in working memory, the more chance there is that the brain can process those that remain. It follows that information that is not essential to a mental exercise should be discarded. If the sole object is to compute the product of 3 and 4, gratuitous advice that 3 is green and 4 is red is an unwelcome distraction. The same applies to information that would be beyond the needs or understanding of the intended audience. There is normally no point in analysing case authorities in an opinion. Information that does not add to a message detracts from it.

This was anticipated long before modern psychology. In the 13th century St Thomas Aquinas considered that “[i]f a thing can be done adequately by means of one, it is superfluous to do it by means of several; for we observe that nature does not employ two instruments where one suffices.”¹³ The Chinese author Lin Yutang considered that “[b]esides the noble art of getting things

12 Other ways of organising information include recoding, association and compressing. In the interests of simplicity these have been omitted but see further Jacob Feldman “The simplicity principle in perception and cognition” (29 July 2016) National Center for Biotechnology Information <www.ncbi.nlm.nih.gov>.

done, there is a nobler art of leaving things undone ... the wisdom of life consists in the elimination of non-essentials."¹⁴ Discarding clutter underlay 20th century minimalism in art, architecture and design. It has recently re-emerged as an enthusiasm for removing unnecessary items from one's house and personal effects.¹⁵

Discarding the things that do not matter is essential for efficient reasoning. The 19th-century philosopher Henry David Thoreau put it this way:¹⁶

When the mathematician would solve a difficult problem, he first frees the equation of all encumbrances, and reduces it to its simplest terms. So simplify the problem of life, distinguish the necessary and the real.

A modern psychologist would have said that Thoreau was advocating cognitive fluency by eliminating those items that would otherwise overload the working memory. If ordinary consumers are to understand an insurance policy, the first step is to excise all terms that the insurer can live without.¹⁷

(c) Organise what is left in a way that will be meaningful to the intended audience

Unless the subject is a particularly simple one, the information will need to be organised into chunks that are meaningful to the intended audience. The chunks themselves can then be layered in a hierarchical structure. Family trees and corporate wiring diagrams are examples.

A textbook is an extreme example of hierarchical chunking. If all the letters in a book were laid end to end in a row, the reader would have no prospect of understanding them. The reverse is true if the letters are combined into words, the words into sentences, the sentences into paragraphs, the paragraphs into sections, the sections into chapters, and the chapters into a book. Although George Miller was content to rely on an inner stream of consciousness, he never tried to write a legal textbook, draft a debenture trust deed, or persuade a judge.

(d) Communicate the result to the intended audience

The final step in the process is to communicate the result. Effective communication begins by identifying the intended audience. The object is to deliver the information in a way that will avoid cognitive overload for that audience. The steps by which this is achieved are as follows:

-
- 13 Anton Pegis (ed) *Basic Writings of St. Thomas Aquinas: (Volume 2) Man and the Conduct of Life* (Hackett Publishing, Indianapolis, 1997) at 129.
 - 14 Lin Yutang, as quoted in Jerome Agel and Walter D Glanze *Pearls of Wisdom: A Harvest of Quotations From All Ages* (William Morrow Paperbacks, New York, 1987) at 46.
 - 15 Marie Kondo *The Life-Changing Magic of Tidying Up: The Japanese Art of Decluttering and Organizing* (10 Speed Press, Berkeley, 2014).
 - 16 Robert N Hudspeth (ed) *The Correspondence of Henry D. Thoreau: volume 1: 1834-1848* (Princeton University Press, New Jersey, 2013) at 360.
 - 17 Aaron Gilbert, Associate Professor and head of the finance department at Auckland University of Technology, recently studied the life insurance policies of New Zealand's major life insurers. The average length of the policies was 6000 words. He considered them to be virtually unreadable due to long sentences and multiple syllables. About one in every five words had at least three syllables. See further Tamsyn Parker "Life insurance docs 'unreadable' for average Kiwi, says academic" *The New Zealand Herald* (online ed, Auckland, 31 January 2019).

1. *Summarise.* The summary sits at the apex of the information pyramid. It draws together the logic of the message as a whole (something which will often be as much a revelation to the author as it is to the reader). Whether the summary is described as an “executive summary”, “summary of submissions”, “introduction”, “road map” or simply “table of contents” is immaterial.
2. *Communicate through layers of information.* The multi-layered chunks referred to earlier inform the way in which the material is communicated to others. By reference to a table of contents or its equivalent, the reader will have a road map by which to beat a path through the material. Layering of chunks also makes it easier to cater for multiple audiences. Where there are layers to choose from, business leaders can confine themselves to the executive summary while their staff and professional advisers go on to study the detail.
3. *Use multiple short exercises instead of one long one.* Wherever possible a single large mental exercise should be broken down into multiple short ones. Smaller exercises reduce the number of items that need to be held in working memory at any given time. That is why the information in a long and complex sentence is more readily grasped if divided into several short sentences. The same is true of computations.
4. *Discard expressions that do not advance the message.* In the course of preparing their material writers often fall in love with their own eloquence (“an orchestrated litany of lies”). If these advance the message, well and good. But if not, the temptation to include them must be resisted. Anything that fails to promote the message distracts from it. Film directors refer to the process of excising their own superfluous creations as “killing their babies”.¹⁸
5. *Simple language.* As far as possible communications should be expressed in short sentences with simple everyday words. The extent to which that has been achieved is objectively measurable. The most well-known measure is the Flesch Readability Scale.¹⁹ Writers should avoid ambiguous pronouns and double negatives. They should keep subordinate clauses and the passive voice to a minimum. These are underlying aims of the Plain English movement. The movement supports language that is easy to understand, emphasises clarity and brevity, avoids technical jargon and complex vocabulary, and is appropriate to the audience’s development, education and familiarity with the topic.²⁰
6. *Clear visual layout.* For most people information is more readily understood if displayed in clear visual terms. The human eye seeks out visual stimuli that are easy to recognise and distinguishable from the rest. The visual dimension may amount to no more than careful formatting (font sizes, page positions, bullet points etc) used to distinguish between headings, subordinate headings, main text and lists. Ideally it extends to graphics such as flow charts, family trees and corporate wiring diagrams. An Auckland Queen’s Counsel uses highly effective

18 Alan Siegel and Irene Etkorn *Simple: Conquering the Crisis of Complexity* (Twelve, New York, 2013) at 82.

19 Rudolf Flesch *Say What You Mean* (Harper & Row, New York, 1972). But for criticism of the Scale see “Christmas Reading” [2006] NZLJ 401. Microsoft Word has recently made it possible to apply the Scale to documents created in Word and further Alan Siegel “Let’s Simplify Legal Jargon!” Ted Talk (February 2010) <www.ted.com>. See also the “Gunning fog index” used by Gilbert, above, n 17.

20 “Plain English” Wikipedia <<https://en.wikipedia.org>>. The Plain Language Bill, published on 12 December 2017, would have promoted the use of plain English in New Zealand official documents and websites, and require the Government to make plain English the standard for all official public and private communication in New Zealand.

flow charts to outline his argument. Data visualisation (“data viz”) promotes understanding of data through graphics and other visual tools.²¹

7. *Check reader’s perception.* Familiarity breeds myopia.²² The more time authors devote to creating a document, the more difficult it becomes for them to see it through the eyes of a stranger. Ideally a final draft is put to one side in order to re-read it later with fresh eyes. If time and cost permit, it should be tested on a stranger with the background of the intended audience. To summarise, simplification is achieved by identifying the intended audience, discarding the unnecessary, organising what is left, and communicating it in clear and simple terms. The next question is how lawyers measure up in reality.

D. How Do Lawyers Rate?

1. Triumphs of obscurity

Lawyers are not noted for simplicity. Three examples will suffice.

First, a jury direction to a New Zealand jury on the so-called co-conspirator rule:²³

The normal rule is that a conversation to which an accused is not a party does not represent evidence against that accused. The co-conspirator rule is an exception. The rule says that in some circumstances in a conspiracy case the Crown can, as against a particular accused such as [Mr Smith], rely on a conversation in which [Mr Smith] did not participate. But before you could rely on that rule you would have to be satisfied of three things. First, you would have to have accepted on the balance of probabilities, and without reliance on conversations between other alleged co-conspirators, that [Mr Smith] was party to a conspiracy. If so, the conversations between other alleged co-conspirators may be relied on by the Crown as evidence capable of elevating its case from proof on the balance of probabilities to proof beyond reasonable doubt. Secondly, the rule is confined to conversations in which one or more of the accused’s co-conspirators took part (although the co-conspirators need not be co-accused in the current trial). Thirdly, remarks may be relied on only where they were made for the purpose of furthering the common design of the conspiracy. It is not enough if the conversation was a mere narrative of past events. So to summarise, before you could use against [Mr Smith] a conversation to which he was not a party you would need to be satisfied of three things – (i) for other reasons you already think he was probably a party to a conspiracy, (ii) the conversation included one of his co-conspirators and (iii) the purpose of the conversation was to further the conspiracy.

Needless to say, much of what judges tell juries passes them by.²⁴

21 “Data Visualisation” Wikipedia <<https://en.wikipedia.org>>.

22 Siegel and Etzkorn, above n 18, at 168.

23 An actual direction in a jury trial given by the writer.

24 James Hartley “Legal Ease and ‘Legalese’” (2000) 6 *Psychology, Crime and Law* at 14; and in New Zealand see S Blackwell and F Seymour “Jurors’ knowledge and understanding of child sexual abuse issues” (paper presented at Joint Conference of the Australian Psychological Society and New Zealand Psychological Society, Auckland, 1 September 2006).

Second, a clause taken from a lease guarantee:²⁵

NOW THIS AGREEMENT WITNESSES that in consideration of the Lessor at the request of the Guarantors (which request is evidenced by their execution of this Agreement) continuing at its discretion and during its pleasure the provision of a forbearing to sue for the repayment of leasing accommodation already granted to the Debtor or presently or at any time or from time to time hereafter at its discretion and during its pleasure granting further leasing accommodation advances a financial accommodation to the Debtor the Guarantors jointly and severally HEREBY GUARANTEE to the Lessor the due and punctual payment to the Lessor of all moneys now or hereafter to become owing or payable to the Lessor by the Debtor (including but not limited to interest or any sum or sums so owing and payable calculated at any specified increased rate due to the default of the Debtor) either alone or jointly with any other person on any account whatsoever including all moneys which the Lessor pays or becomes actually or contingently liable to pay to for or on behalf of or for the accommodation of the Debtor either alone or jointly with any other person whether or not such payment is made or liability arises by way of loans, advances or other accommodation of whatever nature by reason of the Lessor having already or hereafter become a party to any negotiable or other instrument or entered into any bond, indemnity or guarantee or, without restriction, under or by reason of any transaction or event whatsoever whereby the Lessor is or becomes or may become a creditor of the Debtor (all of which moneys and liabilities as aforesaid are intended to be secured by this Guarantee and are hereinafter referred to as 'the Moneys Hereby Secured').

The clause uses 180 words to say that in return for the Lessor probably not suing the lessee, the Guarantor guarantees performance of the lessee's monetary obligations under the lease.

Third, a distinguished law professor's description of his own article on entrapment:²⁶

However, entrapment is examined primarily to demonstrate the need for a rule shift in overseer focus from citizen to authority and not to detail what might constitute appropriate police conduct.

The best that can be said of this passage is that it achieved economy of language. Meaning something to the reader was evidently a step too far.

Those examples of lawyer obscurity are scarcely atypical. Unsurprisingly, American simplification experts advise companies that if they want to simplify their documents they should exclude their lawyers:²⁷

... simplification is almost impossible to achieve if lawyers are calling the shots. For companies to simplify, they must empower the right people, not those who contributed to the complexity in the first place. In fact, it may be necessary to wrest control from those who are inclined to foster complexity. And when we talk about people prone to complicating things, we refer to Exhibit A: company lawyers. Obviously, companies need lawyers— just not as much as they think they do. Because so many business leaders are risk averse and perceive their biggest risk to be lawsuits, they elevate lawyers to a position of unchallenged authority, meaning the legal department has the last word. And lawyers, for the most part, have an aversion to simplicity.

For example, lawyers often contend that simplified language is not sufficiently precise; many argue that legislation and court decisions have given precise meanings to the most arcane terms used in consumer contracts so that they will stand up in court. As a practical matter, the legal profession's case for exacting language that will "stand up in court" rests on increasingly shaky ground. Judges in many

25 Example given by Law Commission of Victoria in *Plain English and the Law* (Report No 9. 1987) at 10.

26 Quoted by Irving Younger "In Praise of Simplicity" [1984] NZLJ 277 at 278.

27 Siegel and Etkorn, above n 18, at 170–171.

states are applying the doctrine of *reasonable expectations*, meaning that if you screw your customers, all the boilerplate language in the world may not protect you anyway.

2. *What caused legal obscurity?*

Obscurity in legal expression had a number of causes:²⁸

- (a) *The legacy of earlier languages.* Latin, and a form of Anglo-French, were used in statutes, writs, court records, and courts until the Middle Ages. As English became the official language it borrowed terms and phrases from earlier sources. In addition it was thought that there would be less room for ambiguity if documents catered for speakers of both English and the foreign equivalents. That gave rise to the tautologous double or triple expressions loved by lawyers (“null and void”, “fit and proper”, “will and testament”, “give, devise and bequeath” and “goods and chattels”).
- (b) *Fear of omission.* It was thought that as a legal document should leave nothing to chance, every conceivable possibility should be catered for.
- (c) *Payment by the page.* Legal fees used to be calculated on the number of sheets or folios produced by lawyers.
- (d) *Fear of departing from precedent.* Over time judicial interpretation gave particular meanings to standardised expressions (“quiet enjoyment”, “current market value”, “brought into hotchpot”, “give, devise and bequeath”) and commonly used standard forms (agreements for sale and purchase, leases and wills). This gave lawyers a rationale for continuing to use expressions long after they had passed from general usage.
- (e) *Maintaining the status of lawyers.* It has been suggested that lawyers have a vested interest in fostering technical jargon, complex sentence structures, and their own mystique, in order to preserve their monopoly over legal activities.

3. *Analogical reasoning*

To those sources of legal obscurity one must add the common law’s traditional use of analogical reasoning.

Reasoning by analogy required a comparison between the current fact situation, on the one hand, and a previously decided case, on the other. Provided there were sufficient similarity between the two, the outcome reached in the earlier case was applied to the current one.²⁹

The problem with that kind of reasoning was that it combined an infinite potential for differing fact situations with infinite opportunity for debate over comparability with the current one. Although one of the strengths of the common law was undoubtedly its foundation in actual experience,³⁰ the experience needed to feed into principles, not a multitude of factual outcomes from which one selected an analogy.

Lawyers and judges who cannot rise above analogical reasoning continue to contribute greatly to the law’s complexity.³¹ Faced with a case in which a driver carelessly drove his truck into a

28 Most of the reasons were collected in Law Commission of Victoria, above n 25, at 12–19.

29 Dan Hunter “No Wilderness of Single Instances: Inductive Inference in Law” (1998) 48 J Legal Educ 365 at 367.

30 “The life of the law has not been logic; it has been experience” Oliver Wendell Holmes Jr *The Common Law* (The Lawbook Exchange, New Jersey, 2005) at 1.

31 Hence the need for 224 pages to explain the judge-made hearsay rule in John Huxley Buzzard, Richard May and MN Howard *Phipson on Evidence* (13th ed, Sweet & Maxwell, London, 1982) (“Phipson”) compared with three pages for the legislative substitute in the Evidence Act 2006.

farmer's letterbox, some lawyers persist in scouring databases for cases answering to the search terms "truck", "farm", "letterbox" and "damage". Having collected all the decisions that result, they regurgitate the facts and dicta of each, untroubled by any unifying general proposition. Deductive reasoning or, in psychological terms, chunking, passes them by. In the result they never arrive at the simple proposition that those who negligently cause loss by damaging the property of another must compensate the owner.

The United States was fortunate to escape that trap early. The sheer multiplicity and diversity of state and federal decisions forced them to turn to unifying themes and principles. These were collected in secondary sources such as the *Restatements*, treatises, and law reviews.³² As Justice Cardozo said of the American scene:³³

An avalanche of decisions by tribunals great and small is producing a situation where citation of precedent is tending to count for less, and appeal to an informing principle is tending to count for more.

In 18th-century England Tennyson described the problem in the following terms:³⁴

Mastering the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances,
Through which a few, by wit or fortune led,
May beat a pathway out to wealth and fame."

Our job is to ensure that the law rises above a wilderness of single instances. As my predecessor, Justice Gault, said when giving this annual lecture 26 years ago:³⁵

The outcome of a particular case should be determined by the application of principle rather than because there does, or does not, happen to have been a case some time over the past 400 years in which the facts may be said to have been materially the same.

In a few areas (for example sentencing, family protection, and defamation damages) past decisions can contribute to quantitative standards. It is precedent that shows the sentencing starting point for rape to be eight years' imprisonment. But with the exception of quantitative standards of that kind, past decisions are of no interest unless they give rise to a principle of general application. The law is a collection of principles, not a collection of factual precedents. It is through deductive reasoning alone that we can usefully apply a principle to the next case.

4. *Our report card overall*

To summarise, lawyers typically fail to take the opportunity to simplify. Unnecessary complexity abounds in our documents, judgments, academic articles, advice to clients and communications with the public. The causes are traceable to the foreign languages in which the law was originally expressed, fear of overlooking something important, payment by the page, fear of departing from hallowed precedents and perhaps a subconscious wish to exclude others from an exclusive preserve.

32 For full discussion see Robert Fisher "New Zealand Legal Method: Influences and Consequences" in Rick Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) 25 at 34–35.

33 CG Weeramantry *Law in Crisis: Bridges of Understanding* (Littlehampton Book Services, Worthing, 1975) at 82.

34 Lord Alfred Tennyson "Aylmer's Field" (1793).

35 TM Gault "Development of a New Zealand Jurisprudence" (Harkness Henry Inaugural Lecture, University of Waikato School of Law, Waikato, 26 March 1992).

To those causes one must add the love affair some lawyers continue to have with analogical reasoning.

The next question is whether we should do something about it.

E. Should We Change?

Unlike medicine and science, which must respond to the complexities of the natural world, the law is a social construct. It is a set of rules invented by people. There are three reasons for keeping it as simple as possible:

- efficient reasoning;
- efficient communication; and
- the rule of law.

1. Efficient reasoning

Advocates for simplicity include one of the greatest scientists of all time, Isaac Newton. He considered that “truth is ever to be found in the simplicity, and not in the multiplicity and confusion of things.”³⁶ In 1960 the U.S. Navy adopted the “KISS principle”. “KISS” is an acronym for “Keep It Simple, Stupid”. The principle holds that as most systems work best if they are simple rather than complicated, simplicity should be a key goal in design. The principle is now taught in American schools and universities.³⁷

The more complicated a legal topic becomes, the more difficult it is to maintain its coherence. We have already seen this with analogical reasoning. Without an overarching principle, the law diverges into anomalous differences. We finish up with one approach to truck drivers who damage letterboxes and another for bus drivers who damage gate posts. The only way of keeping the law coherent is to keep returning to the overview. The overview must be simple if it is to be held in working memory.

Simplification of that kind is achievable. In some cases it may have to come from Parliament. Hearsay is an example. Central to the law of evidence is the general rule that hearsay is inadmissible. To this there used to be major statutory and common law exceptions. Each of these had its own subset of exceptions to the exception. Explaining the result required about a fifth of a typical textbook on the law of evidence.³⁸ In New Zealand, the Evidence Act 2006 swept away this accumulation of common law principles. It required less than three pages to replace the whole of the common law of hearsay.³⁹ It is widely accepted that the Act as a whole brought clarity and simplicity to a judge-made labyrinth.⁴⁰

36 Cited in *Rules for methodizing the Apocalypse*, Rule 9, from a manuscript published in Frank E Manuel *The Religion of Isaac Newton* (Clarendon Press, Oxford, 1974) at 120, as quoted in Martin Mulso and Jan Rohls *Socinianism And Arminianism: Antitrinitarians, Calvinists, And Cultural Exchange in Seventeenth-Century Europe* (Brill, Leiden, 2005) at 273.

37 “Kiss Principle” Wikipedia <<https://en.wikipedia.org>>.

38 In Phipson, above n 31, 224 of the 1064 pages (excluding appendices) were devoted to the hearsay rule and its qualifications.

39 Evidence Act 2006, ss 16–22A.

40 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013).

Equally, simplification can come from judges. New Zealand courts contributed greatly to the simplification of administrative law. The movement began in 1986 with Lord Cooke's article "The Struggle for Simplicity in Administrative Law".⁴¹ Lord Cooke rejected the "superfluous complications of principle" and use of "phrases of somewhat arcane concepts, in the nature of catchwords or half truths" such as "quasijudicial", "nullity", "jurisdiction", "jurisdictional fact" and "the face of the record".⁴² He reduced fundamental administrative law principles to the need for decision-makers to "act in accordance with the law, fairly and reasonably."⁴³ A New Zealand emphasis on administrative law simplicity has continued since.⁴⁴

2. *Efficient communication*

Simplifying the content of the law is a worthy end in itself. But it must also be communicated to others. Here lawyers could learn from politicians. Politicians are nothing if they cannot make themselves understood by their public. This was well understood by Mahatma Gandhi, Winston Churchill, Nelson Mandela, Robert Muldoon, and Jimmy Carter. One may or may not agree with what they said, but their message got through.

The same has been true of great judges. Oliver Wendell Holmes, Benjamin Cardozo and Lord Denning were well-known for it. What marked out these leaders was their ability to take seemingly complex subjects and reduce them to simple terms that people could understand.

Simplicity is also a strong selling point. Whatever you might think of Donald Trump's message, you cannot deny that it is understood by his supporters. One reason is the child-like simplicity of his ideas ("lock her up", "make America great again", "build a wall and make them pay for it", "fake news"). The other is the sheer poverty of his vocabulary ("horrible, horrible", "very, very, large brain", "very good man", "very bad deal"). Trumpian simplicity clearly strikes a chord with many Americans.

The Australian Law Reform Commission described the widespread failure of lawyers to communicate efficiently in the following terms:⁴⁵

Many legal documents are unnecessarily lengthy, over written, self-conscious and repetitious... They suffer from elaborate and often unnecessary cross-referencing. They continue to use tautologies... They retain archaic phrases... They use supposedly technical terms and foreign (Latin) words and phrases... even when English equivalents are readily available ... Language which suffers from some or all of these defects is called 'legalese'. Linguists regard it as an identifiably different dialect or class of Language."

Legalese has been described as a "fog" and a "barrier to trust".⁴⁶ Complicated legal language distances lawyers from their clients. We live in a high-information, highly connected society, where clients often want to read and understand their own legal documents.

41 Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) 1.

42 At 5.

43 At 17.

44 The relevant authorities and commentaries have been collected by Dean Knight in "Ameliorating the Collateral Damage Caused by Collateral Attack in Administrative Law" (2006) 4 NZJPIL 11.

45 *Plain English and the Law*, above n 25, at 9.

46 Lynda Harris "From legalese to reader ease" (8 November 2016) Law Society <www.lawsociety.org.nz>; Tania McAneaney "Why you should kick the legalese habit" Law Society <www.lawsociety.org.nz>.

Forty years ago a lawyer, James Redish, reduced these problems to seven propositions:⁴⁷

1. Many legal documents cannot be read and understood by laypersons.
2. People without legal training have to read and understand legal documents.
3. Much legal writing is unintelligible even to lawyers.
4. Tradition, not necessity – and a lack of understanding of the audience – are the major reasons that legal language is so obscure.
5. Legal language can be made clear without losing its precision.
6. It is not the technical vocabulary but the complex sentence structure that makes legal writing so difficult to understand.
7. Clarity is not the same as simplicity, brevity or ‘Plain English’.

In 2000 a psychologist, James Hartley, reviewed the current evidence and broadly agreed.⁴⁸ The indictment is scarcely a source of satisfaction for lawyers.

3. *The rule of law*

The final reason for simplifying is to reinforce the rule of law.

People are deterred from using their own legal institutions if they are regarded as “too slow, expensive and hard to understand”.⁴⁹ It is estimated that although half of all Australians will experience a legal problem throughout a given year, most will not get legal assistance or come into contact with their courts and other legal institutions.⁵⁰

Some laws must be simple enough for the public to understand and remember. Drivers do not have time to consult a lawyer before deciding whether to give way at a left-turning corner. Nor do parents on the point of smacking their children. Laws of this kind must be simple if they are to be understood, remembered and acted upon.

At another level there are laws which need to be accessible to the lay person in case of need. Examples are family law, social welfare, neighbour relations, resource management requirements and building codes. A growing proportion of non-lawyers seek direct access to the law. They see no need for lawyers as intermediaries. To a degree this has been facilitated by online access to legislation. But disappointment often lies in store for those who take the trouble to go directly to the source. Understanding legislation can be difficult.

There is a growing view that the current level of difficulty presented by legislation is unacceptable. Richard Heaton, First Parliamentary Counsel and Permanent Secretary of the Cabinet Office, UK, considers that legislative complexity “hinders economic activity, creating burdens for individuals, businesses and communities ... It obstructs good government ... It undermines the rule of law”.⁵¹ John-Paul Boyd, Executive Director of the Canadian Research Institute for Law and the Family, has a similar view, arguing that no-one should have to hire a lawyer to find out which

47 J Redish “How to draft more understandable legal documents” in DA MacDonald (ed) *Drafting Documents in Plain Language* (Practising Law Institute, New York, 1979).

48 Hartley “Legal Ease and ‘Legalese’”, above n 24.

49 *Access to Justice Arrangements: Inquiry Report* (Australian Government Productivity Commission, draft report, April 2014) discussed in James Farrell “‘Slow, expensive, complicated’ legal system must be improved” (10 April 2014) *The Conversation* <<http://theconversation.com>>.

50 Productivity Commission Report, above n 49.

51 Richard Heaton (First Parliamentary Counsel and Permanent Secretary of the Cabinet Office, UK) “When laws become too complex” (16 April 2013) *Gov UK* <www.gov.uk>.

laws apply to them. In his view, in a democratic society laws should be written for the people most affected by them, not for lawyers and judges. He concludes that “If we had laws that were clear and comprehensible, as citizens we would have a better understanding of our individual functions in society, how we relate to other people in society, and how government relates to us.”⁵²

Boyd goes too far. It would be naive to think that we could make all laws understandable to the average person in the street. That must be the aim for laws impacting on their day to day conduct (road code, crimes, consumer law, basic family law). But even where laws impact at a more rarefied level (commercial law, intellectual property, revenue laws) there is a major opportunity to simplify, a point to which I will return shortly.

4. *Why simplify?*

In summary, lawyers have strong reasons for simplifying. The law is not exempt from the wider intellectual principle that progress in thinking is progress towards simplicity.⁵³ So lawyers cannot avoid simplification if they want to be effective thinkers. Parliament and the Courts can assist in that regard, an opportunity not always taken. But lawyers must also simplify if they want to be understood by others. Consumers and clients demand transparency. Transparency is meaningless if the information disclosed cannot be understood. Simplicity is also essential to the rule of law. Individuals cannot obey a law that they do not understand.

The next question is what techniques lawyers might use in order to simplify.

F. *How Could We Change?*

1. *Use of recognised psychological techniques*

We saw earlier that simplification could be achieved through an understanding of psychological principles. The principles suggested four steps (the “IDOC” approach):

1. Identify the intended audience.
2. Discard clutter.
3. Organise what is left into a coherent structure.
4. Communicate the result in a way that will be understood by that audience.

These steps can be applied to various fields of legal activity. But before turning to them a note of reservation: things cannot be simplified beyond a certain point.

2. *The limits of simplicity*

No matter how hard one tried, it would not be practicable to explain the conflict of laws *renvoi* doctrine to a six-year-old. For lawyers, simplifying can go only so far. There are three limits.

First, the law has little choice but to grapple with external complexities. Participants in modern companies, finance, banking, arbitrage, stock exchanges, insurance, and freight-forwarding, inhabit an inherently complex world. The same is true of inventors, filmmakers and trade mark owners. Commercial and intellectual property laws are a response to external demands. Revenue laws need to tax the real world, however complex or anomalous it may be. That is not to say that simplification ceases to be an important goal. But in drafting laws or documents it is reasonable to

52 John-Paul Boyd, Executive Director of the Canadian Research Institute for Law and the Family, quoted in “Is the law too complicated? A call to write laws in plain English” (9 January 2016) CBC Canada <www.cbc.ca>.

53 Sigmund George Warburg cited in Joseph Wechsberg *The Merchant Bankers* (Dover Publications, New York, 2014) at 164.

assume that business professionals will seek legal advice or be experts in their own field. The law must be responsive to the real world, however complex.

The second limitation is that some legal concepts will forever remain beyond the comprehension of some people.⁵⁴ As the Australian Law Reform Commission on Plain English conceded, “[t]he Plain English Movement does not require that laws always be drafted in such a way as to make them intelligible to the average citizen. However, it does require that every effort be made to make them intelligible to the widest possible audience.”⁵⁵

Thirdly there are some situations in which simplicity might need to cede priority to certainty. For lawyers drafting documents, a central aim is to foresee and cater for situations and disputes that might arise in the future. This cannot always be achieved with brevity. The complexity of New Zealand’s Copyright Act 1994 stems from its nine protected subject matters, nine exclusive rights, and more than 80 exceptions to infringement.⁵⁶ Discussing reform, a commentator recognised that simplification would need to be balanced against the loss of certainty that could result if too many detailed exceptions were eliminated.⁵⁷

With those limitations in mind, we can turn to the particular legal activities of drafting documents, drafting legislation, expressing legal views and teaching law.

3. *Drafting documents*

Drafting documents requires application of the IDOC principles discussed earlier. The first step is to identify the audience to whom the document is addressed. A document drafted for consumers will look very different from one intended for legally assisted parties.

The intended audience governs the quantity and complexity of the document. It is increasingly recognised that if an insurer is to attract business from consumers it must sacrifice some of the more detailed terms it would otherwise prefer. The same applies to tenancies. No attempt is made to include all possible terms in a residential tenancy agreement. Consumer documents require particular emphasis on simple language, a clear visual layout and the highlighting of key provisions. Comprehensibility should be tested on typical readers.

Documents of that kind may be contrasted with the detailed provisions normally required in a commercial lease. For a lengthy legal document, a bare minimum is a table of contents and the grouping of like concepts by way of “chunking”. For example all clauses associated with termination of the agreement should be brought together so that their interrelationship is understood. For similar reasons there should be layering through the use of main headings, subordinate headings, and sub-subordinate headings.

Plain English is required regardless of the type of document. The following illustrates what can be achieved in the redrafting of a bank loan agreement:⁵⁸

54 Masson and Waldron concluded that replacing words and simplifying the text was not enough to increase readers’ comprehension. They felt that some legal concepts were too complex to convey to some people – even with simple language. Hartley “Legal Ease and ‘Legalese’”, above n 24, at 8.

55 *Plain English and the Law*, above n 25 at 45; Hartley “Legal Ease and ‘Legalese’”, above n 24, at 17.

56 Andrew Christie “Making it simple: how copyright legislation can be simplified” (2011) 6 NZIPJ 783 at 786.

57 At 785.

58 Original taken from David Crystal *The Cambridge Encyclopaedia of the English Language* (2nd ed, Cambridge University Press, Cambridge, 1997) at 17.

4. *Original Text (Barclays Bank)*

16. No assurance security or payment which may be avoided under any enactment relating to bankruptcy or under section 127, 238 to 245 (inclusive) of the Insolvency Act 1986 or any of such sections and no release settlement discharge or arrangement which may have been given or made on the faith of any such assurance security or payment shall prejudice or affect your right to recover from the undersigned to the full extent of this Guarantee as if such assurance security payment release settlement discharge or arrangement (as the case may be) had never been granted given or made. And any such release settlement discharge or arrangement shall as between you and the undersigned be deemed to have been given or made upon the express condition that it shall become and be wholly void and of no effect if the assurance security or payment on the faith of which it was made or given shall be void (as the case may be) shall at any time thereafter be avoided under any of the before-mentioned statutory provisions to the intent and so that you shall become and be entitled at any time after any such avoidance to exercise all or any of the rights in the Guarantee expressly conferred upon you and/or all or any other rights which by virtue and as a consequence of this Guarantee you would have been entitled to exercise but for such release settlement discharge or arrangement.

5. *Revised version*⁵⁹

16. IF you or someone on your behalf gives us anything for our benefit

AND insolvency law later requires us to give back the benefit

THEN you will be liable as if we had never received the benefit.

Features of the revised version are that without any loss of substantive content, the 241 words used in the original have been reduced to 37, the meaning is clearer, the words used are simpler, and the layout is easier to read.

6. *Drafting legislation*

Most legislation must cater for a variety of readers. A minimum requirement is that the meaning be clear to lawyers. Ideally this will extend to non-lawyers as well.

To achieve readability the first step is that the proposed legislation must be organised into a logical framework. Among other things this will throw up opportunities for simplification through chunking. When a series of particular items are found to fall within the same general category, they can be replaced with a higher level concept. The point of high level concepts is that the legislative purpose can be applied to an infinite variety of situations without the need to define all the fact situations to which the legislation was intended to apply.

Chunks are easier to assimilate than a list of specifics. The drafters of the Matrimonial Property Act 1976 fell into the trap of trying to divide property according to defined asset-types (matrimonial home, household furniture, household appliances, tools, garden equipment, motor vehicles, caravans, trailers, boats, household pets, life insurance policies, superannuation). Overlooked were other conceptually identical asset-types (building society shares, family bank accounts, family holiday homes, land yachts, private aeroplanes). It was a failed attempt to define

⁵⁹ The revised version is the writer's.

relationship property at a low level of particularity. The result was a series of obvious anomalies⁶⁰ and litigation over arbitrary labels.⁶¹ Missing altogether was conceptual analysis stemming from a stated rationale.

An example of a conceptual approach to relationship property – albeit only one of many – would be to direct that capital created by the efforts of either or both parties during their relationship (for example earnings) be divided equally while capital derived from sources external to the operations of the partnership (for example pre-relationship assets, external gifts and inheritances) be retained by its original recipient. Whatever the philosophy adopted, one hopes that new relationship property legislation will be expressed in the form of concepts stemming from an articulated rationale.⁶² Conceptual simplicity is particularly important where legislation governs the day to day relationships between ordinary people.

Two other examples suffice. One concerns the evolution of breath and blood alcohol testing in this country. The Land Transport Act 1962 set out to define with great particularity the steps that a law enforcement officer would have to follow when administering breath and blood alcohol tests. In the earlier years of the legislation, entire legal practices were built on the art of pointing to some pin-pricking omission or error in the steps taken by the hapless officer or the evidence provided on that topic.⁶³ This banquet for defence lawyers was progressively diminished by statutory amendments in 1970, 1978 and 2001. The 2001 introduction of section 64(2) to the Land Transport Act completed the journey. If the result could be relied on in substance, it did not matter whether the intricacies of the prescribed procedure had been followed.⁶⁴ These amendments moved the focus from low level particulars to the conceptual end that the Act had always been designed to achieve.

Another example is the Copyright Act 1994. Speaking of copyright, the Director-General of the World Intellectual Property Organization commented:⁶⁵

We risk losing our audience and public support if we cannot make understanding of the system more accessible. Future generations are clearly going to regard many of the works, rights and business agents that we talk about as cute artefacts of cultural history.

An Australian commentator, Professor Andrew Christie, identified structural complexity in the Copyright Act as the root problem. Urging simplification, he suggested a radical restructuring of the Act as a whole. This would include identifying the conceptual basis for each exclusive right

60 As originally enacted. But why include life insurance in relationship property and exclude building society shares, an existing interest in a superannuation fund and exclude term deposits, a boat and exclude a land yacht?

61 Can a corner dairy amount to a matrimonial home if the family occasionally lives there? Do tools that are used mainly by a builder amount to family chattels? Can a family-friendly sheep dog qualify as a family pet? How many angels can dance on the head of a pin?

62 Compare Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach* (NZLC IP44, 2018).

63 *Hope v Transport Department* [1971] NZLR 449 (SC).

64 *Bennetts v Police* [2003] DCR 609; *Police v McCutcheon* [2000] DCR 589; *Ariki v Police* HC Auckland CRI-2007-404-174, 6 November 2007; *Police v Wi* HC Auckland CRI-2007-404-32, 18 June 2007; *Kavanagh v Police* HC Wellington CRI-2005-409-231, 27 February 2006; *Becroft and Hall's Transport Law* (online ed, LexisNexis) at [LTA64.3(c)].

65 Francis Gurry "The Future of Copyright" (2011) 6 NZIPJ 781.

and conflating into more generalised categories those which share, or ought to share, the same conceptual basis.⁶⁶ This is an excellent description of simplification through chunking.

7. *Expressing legal views*

Much of the job of lawyers, judges, academics and arbitrators is to explain or argue the law to others. Attempts to do so sometimes founder. When they do, the problem is nearly always due to one or more of the following:

- lack of a clear and logical framework (inadequate chunking of the raw material);
- failure to summarise (and thus bring the overall message within the limits of working memory); and/or
- discussion in the language of individual decisions rather than higher level principles (another form of inadequate chunking).

As to the first, all forms of legal expression require a clear and logical framework. In its simplest terms, the raw material must be combined into chunks that will be meaningful to the user. And unless the subject is unusually simple, the chunks themselves need to be layered in a hierarchical structure. Submissions and judgments are essentially theses with a set of conclusions founded on individual chapters, chapter sections, and sub-sections.

The second requirement is a summary. The summary is the most important part of the document. It draws together the logic of the message as a whole. It allows the reader to hold the whole of the message in working memory, albeit at a high level of abstraction. That is why an initial summary of the argument is mandatory in the Court of Appeal.⁶⁷ There is no topic or dispute so complicated that it cannot have a concise summary. The summary sits at the apex of the information pyramid. It may take the form of an executive summary, summary of submissions, introduction, table of contents, or road map. But it cannot exceed one page if the whole is to be held simultaneously in working memory. The greatest beneficiary of a summary is the author.

The third requirement is that the law be discussed in the currency of propositions or principles, not individual authorities. Articulating propositions is relatively easy where the source is legislation. A set of rules can be deductively applied to individual fact situations. Even there, it is usually necessary to summarise the material effect of legislation before applying it to the circumstances of a particular case. Less obvious is the way in which to discuss the effect of prior authorities. For the reasons expressed earlier, the law is a collection of principles, not a collection of factual precedents.⁶⁸

The great majority of legal principles are uncontroversial. For the most part legal discussion can be confined to those principles, relegating the authorities from which they are drawn to footnotes.⁶⁹ In that situation quotations from, or descriptions of, authorities is clutter. Information that does not add to the message distracts from it. In psychological terms, it places an unnecessary burden on the working memory. It is different if the law is novel or uncertain. There may be conflict between authorities or a challenge to their reasoning. Of course in that situation the authorities themselves become part of the discussion.

⁶⁶ Christie, above n 56, at 784–786.

⁶⁷ Court of Appeal (Civil) Rules 2005, r 41(1)(a).

⁶⁸ See above nn 28–33.

⁶⁹ Recently endorsed in NZ Court of Appeal Practice Note 1 February 2019 at [4(j) and (k)].

Genuine legal debates arise in only a minority of cases. But when they do, one of the responsibilities of courts is to clarify. Appellate courts, in particular, have that duty. Clarity is promoted by single judgments of the court. The rationale usually offered for multiple judgments – that a multiplicity of diverse ideas represents a resource for future development – is unconvincing. It overstates the responsibility of the courts, rather than the legislature, to provide for future development. It undervalues appellate courts’ duty of clarifying the law as it stands.⁷⁰ Only when the law has been defined in clear and simple terms can citizens safely plot their course.

In summary, there is much scope to simplify opinions, submissions, judgments, legal publications and arbitration awards. The key requirements are a clear and logical framework, a summary, and discussion in the language of propositions and principles rather than individual decisions.

8. *Teaching law*

At least some of the responsibility for legal obscurity can be traced to the way in which law is taught. Here there are two related problems. One is the failure to provide an overview. The other is over-reliance on the case method of study.

We have already seen the importance of summaries or overviews in opinions, submissions, judgments, legal publications and arbitration awards. Recipients need a road map before embarking on the detailed journey. If Court of Appeal judges need such an overview,⁷¹ there is no reason for thinking students would not. An American professor of law, W David Slawson, put it this way:⁷²

A lawyer seeking to learn an unfamiliar area of the law would not begin by reading cases. That would waste the lawyer’s time, as much as it would waste the time of a person who wanted to learn the history of a country to begin by researching in the historical archives. The lawyer would begin by reading one or more of the hornbooks, treatises, or practice manuals that exist on the subject, just as the person who wanted to learn the history of a country would begin by reading a history book about that country. The lawyer would begin to read cases only after reading enough in these other sources to know which cases to read, or at least what kinds of cases to read, and how to understand them. Surely this is also the way we should teach the law to students. Students are at least as unfamiliar with the subjects they must learn as a lawyer would be with a new and unfamiliar area of law.

An overview is not only a necessary introduction to a course. It is the legacy graduates take away with them when they leave university. The details will be quickly forgotten; ideally not the big picture.

What law teachers may not realise is that for most law students, law school is their last and only opportunity to acquire a bird’s eye view. Piecemeal teaching selects particular sub-topics, treats them in depth, and ignores the rest of the topic. Teaching of that kind is usually followed by either an examination confined to the sub-topics that had been selected or vehement protests from students that not all questions had been taught or foreshadowed.

70 Lord Neuberger suggests that appellate judges should “park their egos outside the courtroom” noting that “[t]he desire to write your own judgment, particularly in an interesting and important case, can be quite considerable” but commenting that this can make things more confusing and complex than they need to be: Siobhain Butterworth “Master of the Rolls to Judges: Keep Your Judgments Simple” *The Guardian* (online ed, London, 23 March 2011). To similar effect see the Chief Justice of Australia, Kiefel CJ, quoted in Jeremy Gans “The Great Assenters” (1 May 2018) Inside Story <<http://insidestory.org.au>>.

71 Court of Appeal (Civil) Rules 2005, r 41(1)(a).

72 W David Slawson “Changing how we teach: a critique of the case method” (2000) 74 *SCLR* 343 at 344–345.

A fragmented understanding of selected parts of the law does not equip a lawyer to undertake legal practice. Clients do not announce that they have a problem turning on “frustration of contract” or “restitution”. All they can say is that they paid a deposit on a painting which was burnt before delivery. It is for the lawyer to recognise the legal topics that might engage. This is possible only if the topics already reside in the lawyer’s head. No treatise on earth can perform that initial categorisation for the lawyer.

It is not necessary to carry round a detailed knowledge of the law. That is what textbooks, legal databases and legislation are for. But it is necessary to know where to start looking. One cannot turn to the right textbook (contract, tort or restitution?), let alone the right chapters within the book (offer and acceptance, frustration and/or remoteness of damage?) without an overview of the law as a whole. Lack of that overview explains why plaintiffs frequently fail to plead causes of action drawn from a different branch of the law altogether (restitution needed rather than contract), and defendants fail to plead available defences (estoppel needed rather than variation of contract).

The opportunity to impart an overview at law school is unique and precious. Precisely how it is taught is a matter for individual teachers. However “bar charts” have proved popular among students in the United States. Bar charts are double-sided A4 sheets of laminated cardboard, each setting out in graphical form the whole of a subject such as torts, criminal law, or constitutional law.⁷³ In the writer’s view they are masterpieces of simplification.

The antithesis of a principled overview is the case method of study. Despite its early adherents,⁷⁴ the method has come in for much criticism.⁷⁵ The problem lies in confusion between teaching case analysis (a skill undoubtedly required for its own sake) and teaching substantive topics (for which there are far more efficient techniques). Case method is a laborious way of learning substantive law. The focus of a course on land law is surely land law, not case analysis. To spend a whole year learning land law by case method⁷⁶ wastes time that ought to be spent on land law. Nor am I alone in this. In the view of one American professor:⁷⁷

[d]espite these seemingly strong points in favor of the case method, my experience has led me to believe that it is ineffective. Indeed, I think it *prevents* most students from learning the law. Probably much of the shock, fear, and confusion that besets most law students for at least the first few weeks of their first year is not a result of something inherent in the law, but a result of this method of teaching it. Of course, lawyers must know how to extract the law from cases and how to identify and exploit an opinion’s ambiguities and vaguenesses; therefore, we must teach these skills to law students. But it does not follow that this is how we should teach the law itself.

The ultimate problem with the case method of study is not the time it wastes. It is the fact that it keeps the focus down in the trenches. There is no chunking. What students need is a distillation of principles culminating in an overview of the topic as a whole.

73 Published by Barcharts, Inc, cost in 1994 \$4.95 each.

74 RO McGechan “The Case Method of Teaching Law” (1953) 1(1) VUCLR 9.

75 Transcript of remarks by Warren E. Burger, Chief Justice of the United States, “The Future of Legal Education” [1970] NZLJ 108 at 109, “To a large extent this failure [the failure of legal education methods to meet societal needs] flows from treating Langdell’s case method of study as the ultimate teaching technique”.

76 As was the writer’s own experience at law school.

77 Slawson, above n 70, at 344–345.

9. *What should we now do?*

In summary, whenever lawyers are preparing a legal document or presentation they should break the preparation down into four steps:

- identify the intended audience;
- discard clutter;
- organise what is left into a coherent structure; and
- communicate the result in a way that will be understood.

Those four steps will be necessary whether drafting a transactional document, drafting legislation, expressing legal views or teaching law. That is not to pretend that all legal documents or presentations can be confined to a few bullet points. The law has little choice but to respond to external complexity. Sometimes simplicity must be sacrificed in the interests of certainty. But those limitations are rarely the problem. The problem lies in our failure to strive for simplicity in the first place.

II. CONCLUSION

The simple expressions of great minds may seem effortless. One suspects that even there, appearances are deceiving. But for the rest of us, simplicity is hard work.

The first draft of a document is usually little better than a collation of raw materials. It includes everything that seemed relevant on the first time through. There is a strong temptation to stop at that point. Many do. The draft is served up as the finished product. An undigested mass of statutory references and authorities is presented as an opinion. A summary of each witness's evidence is presented without relating each assertion to the facts in issue. A contract is left as a disorganised ramble through pages of legalese. No attempt is made to simplify.

Faced with undigested raw material, the recipient is left with two choices. One is to take over the job of organising and simplifying that ought to have been undertaken by the original author. This occupies much of the time of judges. The other is to give up and remain in a state of confusion. This is the path often taken by clients and consumers. Neither leaves the recipient warmly disposed towards the author.

What lifts the material to a higher plain altogether is simplification. Simplification requires repetitive revision. Haste engenders prolixity.⁷⁸ The object of revision is to weed out the unnecessary and bring simplicity to the rest. Simplifying is essentially a product of the time devoted to the first draft.

Fortunately, the rewards of simplification far outweigh the cost. It earns the everlasting gratitude of clients, students, judges, and the public. It reveals to us what we really think. The defining characteristic of great lawyers is their ability to simplify.

⁷⁸ Hence the cliché that the writer of a letter lacked the time to write a short one.

LECTURE SERIES CELEBRATING THE 25TH ANNIVERSARY OF TE PIRINGA – FACULTY OF LAW

BICULTURALISM IN THE LAW: THE *I*, THE *KUA* AND THE *KA*

BY THE HON JUSTICE CHRISTIAN WHATA*

I. PREAMBLE

... the common law nowhere stands still

Lord Cooke

This judicial whakatauki captures the key theme of my lecture tonight; namely that the common law, after a very lengthy period glacial motion, has moved significantly in recent years to embrace a genuinely bicultural narrative. While it has some distance to travel to achieve that goal, there is reason for optimism.

A. An Acknowledgement

Before I go further I wish to acknowledge the Dean of the Law School for giving me the opportunity to present tonight on a topic of considerable personal interest to me.

More importantly, I want to acknowledge the commitment of the University and the Law School to biculturalism, one it made from its inception.

This is exemplified by the report of the Law School Committee in 1988, Te Matahauariki, seeking the establishment of a law school. The report has the following observation:¹

... the law school provides the opportunity to give meaning to the notion of a partnership of good faith that is essential to the Treaty of Waitangi. The Treaty provided a meeting point for Māori and Pakeha. It sought to encourage the integration of Māori lore and English law, a confluence of two streams of thought.

This confluence has since found expression in the work of leading academics of the University and the Law School. To illustrate, the various works of Te Matahauariki Research Institute remain a rich source of material on tikanga Māori as custom and law, and the relationship between tikanga and Pākehā law. Subsequent work by its authors and other academics of the Law School can be rightly regarded as seminal.

* Judge of the High Court of New Zealand.

1 University of Waikato *Te Matahauariki: Report of the Law School Committee* (Te Whare Wānanga o Waikato, Hamilton, 1988) 1.

Indeed, had I known the full extent of the work produced by them I would have chosen something far less formidable, like the “History of Income Tax Law in the United Kingdom” or the “Law of Restitution”, as my lecture topic.

In any event, as will shortly become apparent, their work, among others from the University of Waikato, rightly forms part of my lecture.

B. Introduction

As the title of my presentation suggests, I want to talk with you tonight about the law’s bicultural narrative: its past, more recent past, the present and the future.

I will not dwell too long on the past – that is well tilled soil – including most recently by my tuakana, Justice Joe Williams, in his recent Harkness lecture “Lex Aotearoa: An Heroic attempt to Map the Māori dimension in Modern New Zealand Law”.²

Rather I want to focus on the *present and future* of biculturalism in the law; and by “law” I mean the common law. To this end my lecture will be in three parts.

The first part will address what I mean by biculturalism in the law and respond to critics of the common law as a vehicle for biculturalism. The second part will provide a short history of the bicultural narrative, which in turn will lay the platform for the third part, biculturalism in the law today and the direction it might take in the future.

C. Overview

By way of overview, for the first 140 years of our common law, a seemingly entrenched monocultural narrative prevailed. But in the last 15 years, there has been what I recently described as a Cambrian explosion in Māori issues jurisprudence.³ A Cambrian explosion is what environmental biologists refer to as a rapid appearance on the fossil record of all forms of animal life. Three recent decisions of Te Kooti Mana Nui: *Paki*,⁴ *Takamore*⁵ and *Wakatū*,⁶ exemplify a change in perspective, one that appears more sympathetic to Māori claims and the emergence of a genuinely bicultural narrative.

But against this apparently bright point in our legal history, there remains the stark reality presented by Māori interaction with the law at its coal face, illustrated by the brute statistics (as one academic recently put it) of Māori incarceration. This reveals a bicultural narrative of a completely different kind: a depauperate one. The Waitangi Tribunal recently described one aspect of the problem in these terms:⁷

2 Justice Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai L Rev 1.

3 Justice Christian Whata “Evolution of Legal Issues Facing Māori” (Legal Research Foundation, 2013) at [8]. I wish to gratefully acknowledge the permission of the Legal Research Foundation to reproduce some of the observations made in the 2013 presentation in this speech.

4 *Paki v Attorney-General* [2012] NZSC 50; [2012] 3 NZLR 277 [*Paki No 1*] and *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 [*Paki No 2*].

5 *Takamore v Clarke* [2012] NZSC 116; [2013] 2 NZLR 733.

6 *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423.

7 Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 36.

We are faced with an urgent situation of grossly unequal reoffending rates, including reimprisonment rates, which have serious impacts on thousands of Māori men, women, and children and their communities.

It has been recently suggested that this is not a Māori issue per se but a symptom of social inequity. I will respond to this claim suggesting that whatever its source, the issue is a Māori one.

I will also discuss how the common law might assist in the remedy. The Court of Appeal in *Iti*,⁸ *Mason*⁹ and *Mika*¹⁰ has made clear that tikanga processes cannot easily be incorporated into the criminal process and that ethnicity is not a basis for a sentencing discount.

But the central thesis of my presentation is that the foundations for a bicultural narrative in criminal law have been laid by the civil common law, and the opportunity to recognise tikanga values and to take into account relevant effects of ethnicity is within our grasp.

As Dr Joseph said:¹¹

The future of Aotearoa-New Zealand must lie in a single legal system which nevertheless recognises and respects the world views, values, customary laws and institutions of the two great founding cultures of this country, Māori and British, as well as ‘others’ where appropriate. The existing legal framework must be modified thereby permitting the first law of this country, tikanga Māori customary law, to operate effectively.

II. PART 1: WHY BICULTURALISM?

It is necessary first to define what I mean by biculturalism in the law for the purpose of this presentation.

In our context, it involves a basic two objectives:

- (a) recognition of tikanga Māori; and
- (b) equality before the law.

No legal discourse can claim to be bicultural when the law of one of the cultures is ignored. That, I think, is a truism and needs no further comment (at least for present purposes).

Equality before the law is a more complex proposition; one that jurists have been debating for some time. For my part, it has two, I think, unassailable components in the present context:

- (a) the first is that, as stated by the authors of Wade and Forsyth, the government must not enjoy unnecessary privileges or exemptions from the ordinary law (in relation to Māori rights);¹² and
- (b) second, as Elias CJ stated in her recent Hamlyn Lectures, there must be minimum standards of fairness, both substantive and procedural, in criminal justice.¹³

I propose to examine the common law in a diagnostic way against these two imperatives.

8 *R v Iti* [2007] NZCA 119, [2008] 1 NZLR 587.

9 *Mason v R* [2013] NZCA 310, (2013) 26 CRNZ 464.

10 *Mika v R* [2013] NZCA 648.

11 Robert Joseph “Re-Creating Legal Space for the First Law of Aotearoa-New Zealand” (2009) 17 *Waikato L Rev* 74 at 96.

12 HWR Wade and CF Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 25–27.

13 Dame Sian Elias “Golden Threads and Pragmatic Patches: Fairness in Criminal Law” (Hamlyn Lectures, 2016) at 32.

But in preparing for this lecture I have found it necessary first to address a preliminary issue, namely whether biculturalism in the law remains a good thing, that is, something worth protecting.

There are cogent arguments that a commitment to biculturalism in the law is:

- (a) antagonistic to the rule of law, insofar as it seeks to predispose the law to a particular set of norms and values (as argued by Jeremy Waldron for example);¹⁴ and/or
- (b) obversely, antithetical to Māori claims to rangatiratanga – insofar as it seeks to subjugate tikanga to a pakeha legal paradigm or the rule of “Pākehā” law (Moana Jackson,¹⁵ Ani Mikaere,¹⁶ and Natalie Coates,¹⁷ among others, raise this idea).

These are difficult issues, worthy of separate lectures. But I think it perhaps right for a common law judge to speak briefly in defence of biculturalism in the common law.

A. Antagonistic to the Rule of Law?

I deal first with the claim that biculturalism is antagonistic to the rule of law. The common law is and has always been the law of the community – it is the first point of contact for the community with legal process and it mirrors of the values of the community it serves.¹⁸ As Elias CJ stated in *Takamore*:¹⁹

Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case. ... Maori custom according to tikanga is therefore part of the values of the New Zealand common law.

McGrath J speaking for the majority also put it this way:²⁰

... the evolution of the common law in New Zealand reflects the special needs of this country and its society. ... our common law has always been seen as amenable to development to take into account custom.

It is also important to appreciate that the common law is not epiphanic. The classic example is the law of negligence. It represents the accumulation of centuries of case law and a response to the needs of the community for redress for a particular type of harm according to the prevailing values of the community at that time.

It is accepted orthodoxy that the common law must not be inconsistent with legislation (as in *Takamore*);²¹ and it is true that some of the values protected by the common law are tested and the

14 See for example Jeremy Waldron “Indigeneity: First Peoples and Last Occupancy” (2003) 1 NZJPL 55.

15 Moana Jackson “Where does Sovereignty Lie?” in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 196.

16 Ani Mikaere “The Treaty of Waitangi and Recognition of Tikanga Māori” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) 330.

17 Natalie Coates “The Recognition of Tikanga in the Common Law of New Zealand” [2015] NZ L Rev 1.

18 R Mulgan “Commentary on Chief Judge Durie’s Custom Law Paper from the Perspective of a Pakeha Political Scientist” (Unpublished Paper, Law Commission, 1997) at 2.

19 *Takamore v Clarke*, above n 5, at [94].

20 At [150].

21 At [150].

rules based on them reshaped and sometimes set aside by that legislation. But the basic premise remains that the common law is values-based, and rather than antagonistic to the rule of law, its capacity to reify these values into rules without legislative intervention is essential to its day to day operation, and in my view, its legitimacy.

To the extent, then, that the common law recognises and over time reifies tikanga values, it is consistent with the rule of law, particularly where to do so serves the principle of equality before the law.

B. A “Pākehā” Rule of Law?

The obverse issue was eloquently framed by Natalie Coates in this way:²²

Should [Māori] attempt to carve out a small space within the whare of the state legal system if the whenua and foundations upon which it is built are defective?

This issue has two components. First, it proceeds from the assumption that the courts act as agents of a Pākehā state. That view is, I accept, premised on experience (as I will later explain); but it is not a legal or constitutional norm. In fact the opposite is true, as exemplified by the sharp criticism made by the Privy Council in *Wallis v Solicitor-General* of the approach taken by the Court of Appeal in deferring to the Crown’s assertion of breach of trust:²³

The proposition advanced on behalf of the Crown is certainly not flattering to the dignity or the independence of the highest Court in New Zealand... Surely it is for the Court, not for the executive, to determine what is a breach of trust.

The second, perhaps more difficult, element is the claim that the common law is inherently anglocentric and individualistic.²⁴ It is true that the common law is rooted in English law. But this is an over simplification.

First, as McGrath J put it in *Takamore*:²⁵

The English common law has always applied only insofar as it is applicable to the circumstances in New Zealand ...

Second, the common law has long recognised collective interests – hence protection afforded to the commons, public access to water and the formulation of customary rights from the stand point of the indigenous perspective.²⁶

Third, the result in the “iwi” fisheries litigation is testament to the common law Judge’s amenability to collective rights and values over individual claims.²⁷ In that case the Privy Council preferred to interpret the fisheries settlement as allocating fishing quota to iwi as in tribes, rather

²² Coates, above n 17, at 30.

²³ *Wallis v Solicitor-General* [1903] AC 173 (PC) at 188.

²⁴ See Moana Jackson, above n 15; Ani Mikaere, above n 16; Moana Jackson “Justice and Political Power: Reasserting Māori Legal Processes” in Kayleen M Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Avebury, Sydney, 1995) 243.

²⁵ *Takamore v Clarke*, above n 5, at [150]. This comment built on similar observations in *Paki No 1*, above n 4, at [18] per Elias CJ and at [105] per McGrath J.

²⁶ For example see: *Amodu Tijani v Southern Nigeria Secretary* [1921] 2 AC 399 (PC).

²⁷ *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2002] 2 NZLR 17 (PC).

than Māori generally, in recognition of the inherent implausibility of the fisheries being returned to any group other than the iwi who had traditional tikanga-based claims to them.

So while the “Pākehā” based law criticism is valid – tikanga is forced to work within an alien structure where it can – like Coates, I think its implications are not immutable. The common law whare, for all its alien origin, has left the door open to an indigenous interior design.²⁸

Significantly, as Lord Cooke’s statement attests, the common law moves with context and circumstance. Indeed, the common law continues to respond to the New Zealand Bill of Rights Act 1990, international rights instruments, and the growing presence of the Treaty of Waitangi. This should give those most worried about the defective foundations of the common law whare some heart as to the prospect of ongoing recognition of tikanga Māori and the right of Māori to equal treatment before the law.

III. PART 2: I – PAST ACTIONS

It is now trite that the first law of Aotearoa was tikanga Māori.²⁹ As Dr Robert Joseph has explained:³⁰

Although Māori values, customs and norms were largely idealised, they were “law” in a jurisprudence context and they constituted a legal system, given that the application or neglect of customs and norms would have provoked a predictable response.

Linda Te Aho put it this way:³¹

“Tikanga Māori” and “Māori customary law” are terms (not necessarily interchangeable) that embody the values, standards, principles, or norms that indigenous Māori have developed to govern themselves.

But judicial recognition of tikanga Māori, independently of legislation, was (until recently) sketchy at best. Joseph, citing the well-known *Wi Parata* judgment, opined that the judges of the time:³²

... evaded the obligation to continue the application of Māori customary law and usage until customary title was extinguished.

He also observed that:³³

Māori rights under the Treaty and many of their values, customary laws and institutions were marginalised and lay legally dormant following *Wi Parata* [for] almost a hundred years.

While I prefer not to describe the actions of my judicial tīpuna as evasive, I accept there are two resilient threads within the common law (as distinct from “State law”) concerning Māori which have underpinned an essentially monocultural common law narrative for more than 140 years:

- (a) tikanga cannot be law; and
- (b) the Crown is the arbiter of its own justice as it relates to Māori.

28 Coates, above n 17, at 34.

29 See *R v Mason* [2012] NZHC 1361; [2012] 2 NZLR 695 at [28].

30 Joseph, above n 11, at 83.

31 Linda Te Aho “Tikanga Māori, historical context and the interface with Pākehā law in Aotearoa/New Zealand” (2007) 10 Yearbook of New Zealand Jurisprudence 10.

32 Joseph, above n 11, at 80.

33 At 81.

I also agree the genesis of this appears to be *Wi Parata*.³⁴ While it will be well known to many in this audience, it is helpful to briefly recall what it was about.

It was relatively simple case about a school, gifted to the Church of England. At that time any transfer of Māori land could only be achieved via Crown grant. The grant stated:

Whereas a school is about to be established at Porirua under the superintendence of the Right Rev George Augustus, Bishop of New Zealand, for the education of children of our subjects of all races, and of children of other poor and destitute persons, being inhabitants of islands in the Pacific Ocean ...

The plaintiff, *Wi Parata*, sought to have the grant set aside claiming that:

- (a) the Crown grant was flawed as it recorded that the purpose of the grant was to enable a school for all races; and
- (b) the land was not being used for the purpose it was given and that it should be held on trust for the native owners.

Prendergast CJ responded with a well-known tripartite proposition that the treaty was a simple nullity, there was no cognisable *tikanga* and the Crown was the arbiter of its own justice.

Less infamous, but no less significant, is the decision of the Court of Appeal in *Hohepa Wi Neera v Bishop of Wellington*,³⁵ the first of the sequels to *Wi Parata*. The case involved the same facts as *Wi Parata*, but the claim in this instance was that the grantors did not have authority in *tikanga* to grant the land.

The Court resolved:³⁶

If the question arose in any particular case whether Native rights had been ceded to the Crown ... No Court would have had jurisdiction to consider the question.

The underlying premise that the Crown was beyond judicial reach on things Māori would linger in the common law deep into the 20th century, emerging as guiding principle. To illustrate, the extent to which the *Wi Parata* dicta still held sway nearly 100 years on is recorded in TA Gresson J's judgment in *Ninety Mile Beach*, wherein the Judge approves the *Wi Parata* principle that it is for the executive government to:³⁷

... acquit itself as best it may, of its obligation to respect Native proprietary rights, and of necessity it must be the sole arbiter of its own justice.

It would be wrong to say this principle underpinned the reasoning in *Ninety Mile Beach*, wherein the Court concluded any Māori claim to the foreshore was extinguished on allocation of title to the adjacent land and that title could only be conferred by operation of the Harbours Act 1876. But I think it is fair to observe that the assumption, implicit in the affirmation of the *Wi Parata* dicta, set the start point for the interpretative exercise that followed.

Following *Ninety Mile Beach*, Māori rights jurisprudence appears to have fallen into a period of stasis, until what is now recognised as a period of renaissance.

34 *Wi Parata v Bishop of Wellington* (1877) 1 NZLRLC 14 (SC).

35 *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655 (CA).

36 At 671.

37 *Re the Ninety Mile Beach* [1963] NZLR 461 (CA) at 475.

A. Kua: Recent Action

By the 1980s the narrative was being reframed on a number of fronts resulting in a “pepper potted” revolution of sorts, and the emergence of a genuine bicultural narrative.

In summary:

- (a) with the emergence of the Waitangi Tribunal, a different, Māori, worldview takes hold;
- (b) judicial review awakens as an effective check on Executive discretion;
- (c) Treaty principles are recognised in legislation, and Crown assets devolved, which spawns actionable claims: the Lands,³⁸ Forests³⁹ and Mahuta coal cases;⁴⁰
- (d) incorporation of Māori factors as matters of national significance into planning law;
- (e) affirmation of customary fishing rights in *Te Weehi*, dealing with legislative recognition of Māori fishing rights, which were mooted as a defence to prosecution;⁴¹ and
- (f) obiter observations in *Te Ika Whenua* relating to customary rights to water, and the prospect of a fiduciary duty.⁴²

But in all of this, recognition of tikanga as an independent source of rules and rights was context-specific and dependant on the legislative frame. This is exemplified in the *Trout Fishing* case, which involved the application of a provision to the effect that nothing in the relevant legislation affected Māori fishing rights.⁴³ The Court held that as regulation of trout coincided with its introduction, there was no customary right to fish trout.

It was not until the twenty first century, and *Ngāti Apa*⁴⁴ dealing with the foreshore and seabed, that we had the first unequivocal *non-legislative* affirmation of customary rights:⁴⁵

The transfer of sovereignty did not affect customary property. They are interests preserved by the common law until extinguished in accordance with law.

But, exemplifying both the vulnerability and the resilience of Māori rights, extinguishing and reincarnating legislation both followed within 10 years. It is a case study about the evolution of the law as it relates to Māori rights and the permeating tensions within the bicultural narrative.

IV. PART 3: KA – PRESENT AND FUTURE ACTION

There are now clear themes from a trilogy of recent judgments of Te Kooti Mana Nui as it relates to the civil common law:

- (a) affirmation of customary proprietary rights and uses (unless extinguished by legislation), in *Paki*;

38 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

39 *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA).

40 *Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA).

41 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC). This case may also be seen as a precursor to *Te Rūnanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) [*Sealords*].

42 *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA).

43 *McRitchie v Taranaki Fish & Game Council* [1999] 2 NZLR 139 (CA).

44 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

45 At [13].

- (b) recognition of tikanga Māori as a set of norms and values that may inform the common law, in *Takamore*; and
- (c) confirmation that Crown conduct in relation to Māori property is actionable in defined circumstances, in *Wakatū*.

I propose to discuss these cases briefly. But before doing so, I note there are a number of recent High Court judgments which show a growing awareness of tikanga as informative – the most recent example being *Leef v Bidois*⁴⁶ where the Court preferred to interpret an agreement reached between competing hapū in light of tikanga.

I also wish to mention that the High Court also recently made a declaration as to customary title in *Re Tipene*.⁴⁷ With respect, it is an exemplary application of the orthodox customary law framework. Unfortunately, time does not permit consideration of these cases.

I turn then to the first to the judgments of Te Kooti Mana Nui:

A. Customary Title – Paki

This case involved a claim for breach of fiduciary duty by Crown when taking land adjacent to the Waikato River. The central thesis was that, assuming the *ad medium filum aquae* presumption applied, the Crown acquired the title to the riverbed in breach of its duties to the customary owners. In the first decision, the Court accepted that the claim was not excluded by legislation.

Most significantly, the underlying premise stated in *Ngāti Apa*, that customary property rights based on tikanga Māori subsist until lawfully set aside, was equivocally affirmed and applied in relation to riverbeds. The Chief Justice noted:⁴⁸

... Presumptions of Crown ownership under the common law could not arise in relation to land held by Māori under their customs and usages, which were guaranteed by the terms of the Treaty of Waitangi.

In the second substantive *Paki* decision the Court rejected the claim, though the judges adopted different approaches to the answer. But significantly for present purposes, the overarching theme of the judgments is: that customary iwi rights must be interpreted through the lens of the iwi, that is through the tikanga of that iwi; and that the *ad medium filum aquae* rule only applied to the extent the tikanga was consistent with that rule.

B. Non-property Tikanga based Claims – Takamore

Takamore, in contrast to *Ngāti Apa* and *Paki*, was not about property rights per se. The contest was essentially whether tikanga Tūhoe, as it relates to the burial, assumed primacy over existing common law.

Prior to *Takamore*, the assertion of tikanga within the general civil jurisdiction was rare (compared with litigation in the Environment Court). The decision in *Public Trustee v Loasby*,

⁴⁶ *Leef v Bidois* [2017] NZHC 36. This decision was overturned in *Bidois v Leef* [2017] NZCA 437, but the Court of Appeal did not comment on this approach.

⁴⁷ *Re Tipene* [2016] NZHC 3199, [2017] NZAR 559. See also *Re Tipene* [2017] NZHC 2990, [2018] NZAR 150, in which the final orders were made.

⁴⁸ At [18].

dealing with tangi expenses, was one of them.⁴⁹ The Court there adopted an orthodox customary property claim approach, holding the payment of the fees had to accord with custom, because it was satisfied:

- (a) a custom existed;
- (b) it was not contrary to statute; and
- (c) it was reasonable in the circumstances.

While favoured by Fogarty J in the High Court, this approach was not adopted by the Supreme Court (though it was in a part applied by the Court of Appeal).

To fully understand the significance of *Takamore*, it is necessary first to explain the approach of the majority in the Court of Appeal. The key points to that approach are:

- (a) the majority framed the central issue as whether tikanga Tūhoe could form part of the common “law”;
- (b) it resolved, in short, that tikanga Tūhoe should be “integrated” where possible, as this approach was consistent with the Treaty of Waitangi and international convention; but
- (c) the majority rejected as tikanga Tūhoe as binding rule, because elements of the tikanga, including the forceful removal of the body, were not *compatible* with other entrenched common law norms; and
- (d) in the result, the Court held the executrix could exercise discretion to retain the body and bury it where Mr Takamore lived rather than return it to his haukāinga.

By contrast, in the Supreme Court:

- (a) the Court addressed recognition of tikanga as a “value” not as a rule of law;
- (b) the Chief Justice and the majority affirmed that our common law has always been amenable to taking into account custom;
- (c) but as a matter of discretion, the Court rejected tikanga Tūhoe as a decisive factor in favour of burial at urupā; and
- (d) while the Court accepted that the tikanga was a deeply held view, it unanimously resolved in favour of the spouse’s view.

The approach taken by the Supreme Court has come under academic criticism, in short, for failing to extend the *Loasby* approach of incorporating tikanga as law and then by preferring the interests of the spouse over the tikanga of Tūhoe.⁵⁰

I agree that it is difficult to reconcile the affirmation of customary title in such clear terms in *Paki*, which is based on the same tikanga values, with a decision not affirming the ongoing legal status of a tikanga rule of equal, and indeed connected, heritage. The opportunity to incorporate tikanga as a rule was lost.

Balanced against this, the values-based approach favoured by the Supreme Court does not preclude reification in other cases. As Lord Steyn famously said, context is everything.⁵¹ There is nothing in *Takamore* that purports to prevent the reification process in relation to tikanga. Furthermore, the move away from the customary property model enables a more expansive approach to recognition, and a move away from a frozen tikanga perspective, to adopt the language of Robert Joseph. This more expansive approach will become more significant as iwi

49 *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).

50 See, for example, Coates, above n 17.

51 *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [28].

tikanga-making institutions gain formal recognition post settlement. I am thinking, for example, of the bodies established under the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

C. *Fiduciary Duty* – Wakatū

I begin by providing a condensed summary of the background facts in *Wakatū*:

- (a) 1839 – the New Zealand Company enters into deeds with Ngāti Toa and Te Atiawa to purchase extensive areas of land, including in the Nelson region, subject to reserves being set aside for iwi.
- (b) 1840 – The Treaty of Waitangi is signed, recognising customary title; and agreement is reached between Colonial Office and New Zealand Company, under which the Crown will take responsibility for setting aside reservations for the benefit of Māori.
- (c) 1841 – Land Claims Ordinance is passed, also recognising customary title and giving the Governor the power to appoint commissioners to investigate purchases before 1840. Their validity is to be assessed according to the “real justice and conscience of the case”.
- (d) 1841 – Commissioner Spain’s inquiry commences.
- (e) 1845 – Commissioner Spain reports that the New Zealand Company is entitled to a Crown grant in respect of Nelson purchases, subject to one tenth of the lands being reserved for iwi. Māori occupation lands are also excluded. Later that year, Governor Fitzroy executes the Crown Grant on terms which mirrored Spain’s determination. The New Zealand Company rejected the terms of the grant for Nelson.
- (f) 1848 – Governor Grey issues a new grant for the top of the South Island. Excluded from it were reserves for public purposes, the occupation lands and the tenths reserves shown in plans. The rural tenths reserves were not excluded from the grant.
- (g) 1850 – The New Zealand Company becomes insolvent and the balance of Company land reverts to the Crown.
- (h) From 1948 the tenths reserves were managed by Crown appointees and from 1856 pursuant to various statutes until 1977, when the Proprietors of Wakatū Incorporation was established and legal title vested in it.
- (i) The plaintiffs made claims of loss for multiple breaches of fiduciary duty, including failure to reserve the rural tenths, treating the occupation lands as part of the tenths reserves, and participation in various transactions which diminished the tenths that had been reserved.
- (j) The key point to be gleaned from the *Wakatū* judgments is that, with the affirmation of a fiduciary duty toward Māori, last limb of the *Wi Parata* orthodoxy has been rejected: namely that the Crown is the arbiter of its own justice in so far as concerns Māori. Indeed, the observant among you may have noticed the similarities between the facts in *Wi Parata*, *Hohepa* and *Wakatū*: they all consider the Land Claims Ordinance of 1841, arrangements made with third parties, and Crown grants.

I do not have time to canvas the judgments of the Supreme Court Justices in detail. But some observations are worth noting. The Chief Justice drew on Canadian authority, *Guerin*, in support of identifying a fiduciary duty:⁵²

In both cases the Crown undertook control of the surrender of existing interests of property it had undertaken to protect and in which it was of necessity acting on behalf of the native owners.

⁵² *Proprietors of Wakatū v Attorney-General*, above n 6, at [384], citing *Guerin v The Queen* [1984] 2 SCR 335.

The Chief Justice found the equitable terms of purchase included reservation of land for the benefit of former proprietors, or exclusion of land intended to be retained in their possession according to custom. She also found the Māori proprietors were dependent on the Crown, in whom the land vested, to protect their interests. This gave rise to an obligation in the nature of a trust, for which no particular formality was required. Rather, the finding of trust was simply on the basis that equity may compel a person to hold property over which he has control for the benefit of others so that the benefit accrues to them, and not to the trustee.

The Chief Justice was also however careful to circumscribe the effect of the judgment:⁵³

None of this is to suggest that there is a general fiduciary duty at large owed by the Crown to Māori. It is to say that where there are pre-existing and independent property interests of Māori which can be surrendered only to the Crown (as under the right of pre-emption) a relationship of power and dependency may exist in which fiduciary obligations properly arise.

As to breach, the Chief Justice observed that absent lawful authority for executive interference, the Crown's failure to reserve the lands was a breach of its fiduciary duty to iwi and was:⁵⁴

On its face ... contrary to fundamental principles of law described in ancient charters such as the Magna Carta, which applied in New Zealand.

There are also several obiter statements addressing ancillary issues, particularly on the issue of competing equities and change of position. These affirm the requirement to consider the conscionability of the behaviour of the Crown in light of its broader obligations to Māori.⁵⁵

Glazebrook J found that there had been a breach of express trust, and in the alternative was happy to adopt the Chief Justice's reasoning as to fiduciary duty. Arnold and O'Regan JJ, by comparison, found on the facts that the Crown was in the position of fiduciary (emphasising in particular the agreement in November 1840 between the New Zealand Company and the Crown), giving rise to an actionable claim. On this basis, they decided it was unnecessary to make any findings about whether a trust had been established.

While limited to its facts, to my mind the outcome in *Wakatū* exemplifies the observation by Lord Cooke that the common law never stands still. It might be said that it moves very slowly – indeed it has taken 150 years to expressly depart from *Wi Parata* in unequivocal terms. But it nevertheless marks a historic moment in the commitment to the second limb of a genuinely bicultural narrative, namely equality before the law.

D. Criminal Law

A very different picture however emerges in relation to the criminal law. To illustrate I am going to refer to another trilogy of cases: *Iti*, *Mason*, and *Mika*.

1. *R v Iti*

In *R v Iti*, Mr Iti was charged with unlawful possession of a firearm in a public place. Mr Iti had discharged the firearm as part of a haka. He claimed he had discharged the firearm for a lawful purpose, that is, in accordance with tikanga Tūhoe.

53 At [391].

54 At [436].

55 At [465] and [467].

The first issue was whether the Marae ātea was a public place. The Court dealt with this fairly briefly. While accepting that it may be a sacred place not to be accessed by visitors, it was still a public place within the meaning of the legislation.

On the issue of lawful purpose, the central issue was whether Mr Iti had reasonable cause to carry the firearm in a public place. The defence raised tikanga Tūhoe. The Court of Appeal addressed this defence by applying a four-step process:⁵⁶

- (a) the custom must be immemorial;
- (b) it must have continued without interruption;
- (c) it must be certain; and
- (d) it must be reasonable.

The Court concluded the tikanga could not provide reasonable cause, because the cause of the possession, discharging a firearm in a public place, is not reasonable as it is expressly prohibited by statute. That express prohibition was said to extinguish any tikanga-based right to discharge the weapons. Mr Iti was however successful on his appeal because there was no evidence that the purpose was to commit a criminal act.

2. Mason

In *Mason*, the defendant sought a tikanga-based process on a charge of murder. The High Court judgment provides a thorough review of the relevance of tikanga and explanation of applicable tikanga based on expert evidence of Moana Jackson and the writings of Dr Robert Joseph. Heath J concluded:⁵⁷

... I have no doubt that before the Declaration of Independence in 1835 and the Treaty of Waitangi of 1840, Maori operated (on the basis of tikanga applicable to particular iwi and hapu) a customary system that could deal, for the social purposes of the time, with alleged breaches of societal norms of a type we would now characterise as “serious crime”.

In the High Court and the Court of Appeal, it was affirmed that tikanga may be extinguished by clear statutory language, with or without the consent of the affected iwi.⁵⁸ In the result, the Courts found the Crimes Act 1961 was a clear code which precluded an alternative tikanga-based system.

On sentencing, the High Court identified how tikanga values might have a role to play, though subject to four important observations:

- (a) the more serious the offending, the more difficult it is to make a case for a parallel sentencing process only to one sector of the community;
- (b) nothing should be done to move away from a core criminal justice system that is applicable to all New Zealanders;
- (c) referring to Mr Jackson’s evidence, rebuilding a tikanga-based system when so much damage has been done to it will be as long-term a project as rebuilding the language; and
- (d) tikanga values, for example of reconciliation, will not necessarily achieve the communities’ wider goals in sentencing, such as ensuring that those guilty of serious criminal offending are sentenced appropriately.

⁵⁶ *R v Iti*, above n 8, at [47].

⁵⁷ *R v Mason*, above n 29, at [28].

⁵⁸ At [31]; *Mason v R*, above n 9, at [30].

The Court of Appeal appeared to go further, suggesting that the Sentencing Act 2002 fills the space otherwise available for a parallel system.⁵⁹ But there are also obiter statements that on the evidence:⁶⁰

... tikanga is not presently a viable legal process for serious crime even if continuity of custom could be demonstrated.

The Court also found that there was no need for consent for the purpose of extinguishment, as consent is given through the authorisation of a properly constituted Parliament.

3. Mika

In *Mika*, defence counsel, citing Canadian and Australian authorities, sought a 10 per cent discount based on the fact that Mr Mika was of Māori heritage and thus socially disadvantaged. The defence emphasised the systemic factors leading to the appearance of Māori offenders in Court, social deprivation affecting Māori and the fact that longer sentences may be imposed on Māori for the same offending.⁶¹

The Court of Appeal dealt with these arguments briefly, making the following points:

- (a) only Parliament could sanction a discount based on ethnicity; and
- (b) Parliament could not have intended that a discount based on ethnicity should be applied indiscriminately by the Courts, irrespective of whether that factor related to the offender's culpability for a crime.

The Court, however, endorsed the approach taken in *Nishikata v Police*, where a discount was given because a nexus between the offending and heritage was established. In that case the offender was Japanese and had been goaded by the victim's abuse of a Japanese elder. The Court concluded though:⁶²

Judges in all jurisdictions are acutely conscious of [disproportionate representation] and its reflection of the economic, social and cultural disadvantages suffered by many Māori. We accept that those circumstances frequently contribute to offending. But it does not logically follow that a person is more likely to be at a disadvantage and to offend simply by virtue of his or her Māori heritage. To some such a proposition may appear offensive.

The observant may have noted the familiar themes in the judicial reasoning of this trilogy: that tikanga claims are non-justiciable because they are either not legislatively provided for, excluded by statute, and/or because there is no viable tikanga system in place.

There are good reasons why the criminal law has not followed the advances made in the civil jurisdiction. The criminal law and sentencing process, to a greater extent than the civil realm we have already canvassed, engages issues of procedural and substantive fairness that demand uniformity of approach. The common law is not yet ready for claims for an alternative process for very serious offending.

59 *Mason v R*, above n 9, at [35].

60 At [41].

61 *Mika v R*, above n 10, at [6]. The approach in *Mika* should be compared to the approach taken in Canada (*R v Ipeelee* [2012] 1 SCR 433; *R v Gladue* [1999] 1 SCR 688) and in Australia (*R v Fernando* (1992) 76 Crim R 58; *Bugmy v R* [2013] HCA 37, (2013) 302 ALR 192; and *Munda v Western Australia* [2013] HCA 38, (2013) 302 ALR 207).

62 At [12].

But these more generalised (largely obiter) statements about the relevance of ethnicity at sentencing, the viability of tikanga and the requirement for consent, do not purport to exclude altogether the relevance of tikanga and ethnicity to criminal process and sentencing. As Val Toki noted:⁶³

Tikanga Māori is not dependent on a statute for its existence. The failure of [the] current criminal system, or legislative framework, to not recognise tikanga Māori does not minimize or detract from its existence.

Toki notes further:⁶⁴

Had the Court turned its mind to the principles that underpin tikanga Māori, such as balance and reciprocity that share similarities with the developing “main stream” initiatives such as therapeutic jurisprudence ... then perhaps the Court may have had a different perspective.

I will return to this proposition later, but before doing so I want to address the suggestion that Māori incarceration is a social equity issue rather than a Māori one.

4. *Brute statistics*

In *R v Taylor*, the High Court posited that over representation of Māori in prisons was “happenstance” and a product of social circumstances.⁶⁵ The Court of Appeal did not explicitly endorse this comment, and couched its analysis in different terms, but it did comment that “other groups in addition to Māori are overrepresented in prisons”.⁶⁶ It is not for me to doubt the cogency of this reasoning on the facts of that case. But it is not clear from the High Court judgment that the Judge was given an in depth account of the scale and depth of the overrepresentation. Because whatever the cause, the number of Māori in our prisons on all relevant measures is disproportionate. This basic fact was recently accepted by the Crown in the Waitangi Tribunal hearings on reoffending. Indeed, the fact of disproportionality was cited in a 1987 decision of the Court of Appeal, referencing Justice Department submissions on the Criminal Justice Act 1985:⁶⁷

One of the striking features which emerges from a consideration of the imprisonment statistics is the high rate of imprisonment of Māoris (ten times that of the general population). The disparity between Māori and non-Māori imprisonment rates remains marked even when a comparison is drawn between persons of similar socio-economic status.

I have assembled statistical data over the period 1991–2013 to illustrate this disproportionality. This data demonstrates that Māori over-representation in the criminal system is systemic and intergenerational:

- (a) Māori, while representing about 15 per cent of the total population in New Zealand, have composed between 46 and 55 per cent of persons sentenced to a term of imprisonment since 1991;
- (b) between 1983 and 2013, the percentage of prisoners starting a prison sentence who are Māori increased from 47 per cent to 56 per cent;

⁶³ Valmaine Toki “Tikanga Māori in criminal law” [2012] NZLJ 357 at 358.

⁶⁴ At 358.

⁶⁵ *Taylor v Attorney-General* [2016] NZHC 355, [2016] 3 NZLR 111 at [147].

⁶⁶ *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [138].

⁶⁷ *Wells v Police* [1987] 2 NZLR 560 (CA) at 569.

- (c) one third of prisoners serving a life sentence in 2013 identified as Māori, and over 37 per cent of those sentenced to life imprisonment in that year were Māori; and
 - (d) in the Youth jurisdiction, almost 60 per cent of all youth charged in 2013 were Māori.
- These trends persist: as at December 2016, Māori made up 50.8 per cent of all sentenced prisoners in New Zealand's corrections system.

More recently, in its Report on the Crown and Disproportionate Reoffending Rates, *Tū Mai Te Rangi*, the Waitangi Tribunal noted:⁶⁸

- (a) some 65 per cent of youth in prison (under 20 years old) are Māori;
 - (b) 63.2 per cent of sentenced Māori prisoners are reconvicted after release from prison after two years (compared to 49.5 per cent of non-Māori); and
 - (c) 80.9 per cent of Māori are reconvicted after five years (compared to 67.7 per cent of non-Māori).
- Selwyn Fraser in a recent insightful article, "Māori qua what? A Claimant-Group Analysis of *Taylor v Attorney-General*", accurately describes the statistics of Māori incarceration as "brute", but opines that the disenfranchisement effects addressed in *Taylor* are not discriminatory, applying a claimant group comparator analysis.⁶⁹ Fraser supposes that such analysis would have assisted the Court in *Taylor* by clarifying in what sense the prohibited ground was operating in the case. Indeed, this approach was endorsed by the Court of Appeal. The comparator analysis compares the claimant with another person or group that reflects the claimant group perfectly. The only material characteristic not shared is the prohibited ground. Fraser then observes that Pasifika and other minorities, males and youth, appear to share the overrepresentation faced by Māori.⁷⁰ This, he says, dilutes the discriminatory claim and then concludes that by itself "mere numerical overrepresentation is thus not enough to sustain the discrimination claim".⁷¹

This is not the place for a wholesale response to this thesis. But I want to make three short points:

- (a) First, the reference to Pasifika, male and youth reinforces, rather than detracts from, the discrimination claim. After all, Māori are Pasifika, and the vast majority of Māori within the prison population are male and young (though I note in percentage terms that the overrepresentation of Māori females is even greater).⁷²
- (b) Second, I doubt that there is a statistically valid comparator group. No supporting statistics are mentioned in the article (except a global reference to a source of statistics).
- (c) Third, it is not necessary to shoehorn the Māori claim within the rubric of human rights jurisprudence.

Rather, the law is fundamentally concerned with procedural and substantive fairness.⁷³ As Fraser also observes, research suggests that police are four to five times more likely to apprehend,

68 Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 10–11.

69 Selwyn Fraser "Māori qua what? A Claimant-Group Analysis of *Taylor v Attorney-General*" [2017] NZ L Rev 31.

70 At 47–48.

71 At 48.

72 Waitangi Tribunal, above n 68, at 8.

73 *R v Secretary of State for the Home Department, (ex parte) Pierson* [1998] AC 539 (HL) at 591; *Boddington v British Transport Police* [1999] 2 AC 143 (HL) at 161.

prosecute or convict Māori than non-Maori. He also points to evidence suggesting that bias exists during stages of prosecution, conviction and sentencing. He concludes:⁷⁴

Whether one prefers the language of bias or oppression, the fact of ethnically-orientated structural discrimination [in practice] is beyond serious contention.

While Fraser dismisses disproportionate imprisonment, offending and deprivation as mere proportions and not sufficiently connected to ethnicity for the purposes of a discrimination claim, these outcomes, he concludes, reveal systemic unfairness.

E. The Task Ahead

If, as appears largely indisputable, Māori are subject to structural discrimination, then a principled basis for common law intervention is established.

An alternate system of criminal justice is not currently available within the existing statutory frame. But some advances to change the interior design have been made, exemplified by the work of Ngā Kooti Rangatahi. It is an example of therapeutic justice mentioned by Toki.⁷⁵ As stated in the 2012 report on these Courts:⁷⁶

Judges involved in the establishment of Ngā Kooti Rangatahi consider that rangatahi offending is related to lack of self-esteem, a confused sense of self-identity and a strong sense of resentment which in turn leads to anger and ultimately leads to offending.

The same report concluded that:⁷⁷

... the cultural relevance of the marae venue and the inherent cultural processes were critical success factors that increased the likelihood of positive engagement by rangatahi and whānau. These factors increased the view of rangatahi and whānau of the legitimacy of the court and engendered respect.

Several leading Māori academics, such as Moana Jackson and Ani Mikaere, have written extensively on the infusion of tikanga based process into the criminal system, some criticising it as patronising and others noting that for some Māori it is more alien than the normal Courts.⁷⁸ I am not competent to speak to these criticisms; but one reported outcome of Ngā Kooti Rangatahi that stood out for me is that many of the rangatahi no longer associate with their usual peer group. This might sound like a small point; but the fact that, as the report noted:⁷⁹

A lot of the young ones end up in the kapahaka programme ...

is very significant.

To illustrate I am going to refer to an altogether too familiar story. I have changed the name of the defendant and the location of the events. James was brought up in a small town in the Bay of Plenty. He was brought up in a settled whānau environment and has strong whānau connections. He

⁷⁴ Selwyn Fraser, above n 69, at 51.

⁷⁵ Valmaine Toki, above n 63.

⁷⁶ Ministry of Justice *Evaluation of the Early Outcomes of Ngā Kooti Rangatahi* (17 December 2012) at 8.

⁷⁷ At 11.

⁷⁸ See for example Khylee Quince “Māori Disputes and their Resolution” in Peter Spiller (ed) *Dispute Resolution in New Zealand* (2nd ed, Oxford University Press, Melbourne, 2007).

⁷⁹ Ministry of Justice, above n 76, at 41.

had cousins and friends in gangs, but was not part of the gang. At the age of 18, while out one night he got into a fight with another local and injured him. He was charged and convicted with assault with intent to injure. It was his first offence. He was sentenced to nine months' imprisonment. No discount was given for his youth and no recognition made of his Māori background. While in prison, he joined a gang and got his patch. Shortly after his release he was walking with his girlfriend to the local shopping mall when he was attacked by members of another gang – one of them a friend from his old school. He was badly injured. Later that night, rather than going to the hospital, he called together other young members of his gang and sought out his old friend from school. He found him at his home with a number of his gang mates. Predictably, untold violence broke out. James was arrested, charged with numerous offences, and sentenced after a guilty plea to six years' imprisonment. His injury later required surgery and he still suffers from headaches and mental fatigue.

We cannot know whether a Ngā Kooti Rangatahi type process would have made a difference. But in terms of the success factors identified by the 2012 report, James was a prime candidate for a very different outcome.

As an aside, the vulnerability of Māori to gang influence is plainly a factor to consider at every stage of the criminal process. In a recent s 27 report prepared for me in respect of Māori male facing an indefinite sentence for murder, it was observed that in his adolescent years the whanaungatanga of gangs replaced the whanaungatanga of his family and hapū. That desire to be part of a tribe, particularly in a prison environment, is a powerful risk factor to be considered.

This then leads me to the final part of my lecture. I want to lay down a wero to those gathered here today. Contrary to popular belief, judges are not immune to the systemic incarceration of Māori and the structural discrimination underpinning it. But as I noted at the outset, changes to the workings of our criminal law are not made in judicial epiphanic episodes. Our decisions mirror the values that are important to the community. Changes are in fact collectively made by the decisions of police, prosecutors, defence counsel, judges and Corrections. Decisions such as whether to charge, to prosecute, how to defend, how to sentence and then how to rehabilitate all cumulatively contribute to the outcome.

As trite as all of this may sound, the message is still not getting through. Recently the Court of Appeal has noted that there is evidence of racial bias in the police force.⁸⁰ The Chief Justice also recently noted in her Hamlyn lectures the same Independent Police Conduct Authority report finding inconsistency in use of pre-charge warnings and disparity between the treatment of Māori and non-Māori.

So returning to my wero: make decisions that are conscious of challenges that are faced by Māori in the criminal justice system; be aware that there may tikanga-based processes and values that may apply to help meet these challenges, be cognisant of the powerful influence of the whanaungatanga of gangs in prison and do not be afraid to invite outcomes that take into account relevant cultural factors in any decision to charge, prosecute, defend, sentence or rehabilitate a Māori offender.

80 *Kearns v R* [2017] NZCA 51, [2017] 2 NZLR 835.

On this the last case I want to leave you with is an old one with a simple message. In *R v Watson*, two sons were facing charges associated with their father’s cannabis enterprise.⁸¹ The Court of Appeal had little trouble in endorsing an approach that took into account cultural imperatives that contributed to the offending. The Court said:⁸²

The Judge was invited to recognise that their situation was governed to a degree by the whanau aroha (or family loyalty and affection) of the strong characteristic of Maori communities. In his sentencing remarks the Judge expressly noted that he accepted this was a proper factor to be brought into account, as we do. It was, as he said, a matter making it harder for the two “to say no” to their father’s request for help.

Finally, I want to conclude with a whakatauki shared with me by my tuakana, Judge Heemi Taumaunu of Ngā Kooti Rangatahi:

Ko te pae tawhiti, whaia kia tata

Ko te pae tata, whakamaua kia tīna

As for the distant horizon, pursue it and bring it closer

As for the close horizon, grasp hold of it and make it secure

Nō reira tēnā koutou, tēnā koutou, otīrā, tēnā tātou katoa.

81 *R v Watson* CA360/90, 19 April 1991. For recent examples of sentences taking into account broader social and cultural factors see: *R v Rakuraku* [2014] NZHC 3270; *Keil v R* [2017] NZCA 563; *R v Jolley* [2018] NZHC 93; *Oneroa-Hill v District Court at Tauranga* [2017] NZHC 2471; and *Solicitor General v SC* [2017] NZHC 2252.

82 At 5.

LECTURE SERIES CELEBRATING THE 25TH ANNIVERSARY OF TE PIRINGA – FACULTY OF LAW

LAWYERS: THE PROFESSION INTO THE 21ST CENTURY

BY THE HON JUSTICE CHRISTINE GRICE*

I. INTRODUCTION

The theme I have chosen for tonight is the importance of diversity in the profession. A diverse profession provides a greater pool of talent for not only the judiciary but appointments to positions in government, business and all sectors of the community.

Waikato Law School has been important in promoting diversity in the profession. At the Hamilton law firm Harkness Henry, where I was a partner, in the first year that Waikato produced law graduates, our recruits came from here. They were a talented group of lawyers. Most had taken up law as a second career. There had been a pent-up demand in the mid-North Island for a law school for those who simply could not get to Wellington, Auckland or Christchurch. These graduates had done other things and they needed to find a law school that suited them. They found that at Waikato.

The legal profession is wrestling with diversity. Many lawyers are concerned about technology and what that will do to the profession. Better access to justice is a constant concern. But if we can get diversity right those issues will benefit from not only more available legal talent but different approaches.

I am going to pause for a moment to consider why the profession is so important and therefore why a diverse profession is crucial.

A. The Lawyers' Role According to Philip Wood

In a recent article Philip Wood talks about lawyers and the law.¹ He starts the article by saying:

The law is the most important ideology we have. You can have a society without a philosophy or a religion – and many countries have secularised. But you cannot have a society without law. Like many platitudes, the statement may at first seem outrageous until it dawns that it is true. Just as the platitude that the earth goes around the sun was at first shocking, but then obviously correct.

The law is fundamental to survival and prosperity. It is potent as to whether it restricts us or liberates us – or restricts us so as to liberate us.

By the law, I mean the whole of the law, including the grand edifices of wholesale financial and corporate law.

* Judge of the High Court of New Zealand and the Court of Appeal of the Cook Islands.

1 Philip Wood “Philip Wood, CBE, QC (Hon) on the Rise of the Lawyers” (21 April 2016) The Bar Council <www.barcouncil.org.uk>.

We have seen that that is so true. An illustration is found in the causes of the global financial crisis. If there had been more lawyers in finance companies the risks might have been identified earlier. It is the legal profession that is responsible for the stewardship of the law and for its wellbeing. We are entrusted with its administration. Whether as an officer of the court appearing before the court, or as a trusted advisor.

The courts have often referred to the important role of the lawyer. In *Bolton* the Law Lords said the client must be able to trust their lawyer “to the ends of the earth.”² Sadly, that is not always true. But that trust is the foundation of our profession.

II. REGULATION

Lawyers occupy a privileged and essential place in New Zealand. We have a key role in the administration of justice and the smooth workings of government.

Lawyers’ responsibilities in New Zealand have been codified. Every lawyer is subject to specific fundamental obligations which are set out in the Lawyers and Conveyancers Act 2006. These obligations are: to uphold the rule of law and to facilitate the administration of justice in New Zealand; to be independent in providing regulated services to their clients; to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients; and to protect, subject to their overriding duties as an officer of the High Court and to duties under any enactment, the interests of their clients.³

Some lawyers are surprised when you point out that there is no contracting out of these provisions. They are fundamental obligations. They are why there are lawyers and so we are here. They are actually why we can charge fees.

Judges rely upon lawyers to conduct cases properly. Lawyers assist their clients and guide them on a daily basis through all sorts of processes from Landonline and conveyancing to the court process and litigation. Lawyers make the system of government in New Zealand work smoothly. There is a significant risk of harm to consumers when a lawyer does not meet those obligations.

There are also direct consequences that impact on access to justice and the administration of our whole justice system if lawyers are not well regulated.

The model of regulation in New Zealand is said to be a co-regulatory model. The regulation of the profession is undertaken using different models in every jurisdiction internationally.

In the dry economic era of the early 2000s in some jurisdictions there was a separation of the frontline regulation from the legal profession by itself and the regulation was vested in other agencies. England and Wales had 17 independent regulators each trying to regulate different parts and activities of the legal provision and legal services as well as an overarching regulator. In my view we benefit from the co-regulatory model. Many Bar leaders have looked at our model with a view to attempting to emulate it. Important is the profession’s frontline regulation but with appropriate independent supervision, and an independent disciplinary tribunal. The model preserves the independence of the profession but with oversight.

² *Bolton v Law Society* [1994] 1 WLR 512 at [15].

³ Lawyers and Conveyancers Act 2006, s 4.

III. CHANGE

Twenty-five years ago, Sir Tim Berners-Lee launched the first live website.⁴ I had then been a partner at Harkness Henry for 10 years. I had come up to Hamilton, from the largest firm in Nelson with four partners. It had recently installed a facsimile machine (fax). Harkness Henry was much more modern, as well as larger. Harkness Henry had a young partner called Alan Henry (now retired). Alan's father, who had founded the firm, was still coming in to the firm at the age of 100. Alan had gone off to the USA to study as a postgraduate student to study modern management techniques. He returned a few years before I joined the team. He had brought back some "newfangled" notions including time cost billing. Until then billing had been done by carefully weighing the file usually after about 15 years of litigation without billing and then estimating the fee.

If you were doing conveyancing, you had a red book called the Scale of Charges. That told you what to charge based on a sliding percentage of the value of the property and then you added a bit of uplift. The amazing thing about scale fee charging was that it was mandatory. If you did not charge those fees, you could be disciplined. The scale was abolished about 1981.

The introduction then of time billing, accounting machines and the fax was really little different to what we are facing now with the introduction of more and more sophisticated technology. While it may be more fun and faster, it is just part of the continuum. Change never stops.

I have no fears for the future of the profession from technology. We must embrace it. Some find it a bit harder than others. But the millennials coming up (as long as we promote a diverse profession and we make sure they stay) have grown up with technology. It may be for the good – it will certainly benefit consumers, but it will not benefit the leveraged law partner model. We are just going to have to adapt.

In all respects I was delighted to join the partnership of Harkness Henry. Having the then Silvia Cartwright⁵ at the firm was a big attraction. It was most unusual to have a woman partner in a law firm, especially one of any size. Sadly, Silvia left the firm as I arrived, to take up an appointment to the bench. But she left her legacy in the very egalitarian firm that I joined. I was supported by Harkness Henry in all my pursuits in the law, for which I am grateful.

I was also relieved to find out when I joined the firm, that the Hamilton District Law Society, as it was then, allowed women lawyers to attend Bar dinners. Thanks to Silvia Cartwright. In Nelson, the Bar dinners were held at the Nelson Club. Women weren't allowed in the dining room. We were allowed in the ladies' bar for drinks beforehand, but then we had to go home so the chaps could have dinner. I thought Hamilton was wonderfully progressive and gleefully accepted the offer of partnership.

IV. WOMEN IN THE LAW

We have had women graduating in the same numbers from law school as men for the past 20-plus years. So, it seems obvious that the profession must change. The time has come. In 1990 there were about 5000 lawyers in New Zealand. That is about one per 660 head of population. Women lawyers made up 46 per cent of those admitted to the legal profession that year. The numbers

4 He was the inventor of the World Wide Web.

5 Now Dame Silvia Cartwright.

reached 50 per cent in 1995. Then there were less than 10 per cent of lawyers practising in-house (in corporate, government or academic posts) and 4.5 per cent of the profession were barristers.

In 1990 the women who stayed in the profession were predominantly practising in property and family work. Only two women were QCs. The first appointed in 1988 was Dame Sian Elias (now our Chief Justice). There were 13 women District Court Judges and one woman Master of the High Court. No High Court judges were women. Silvia Cartwright was elevated to the bench of the High Court three years later. Of the District Court, the few women judges were mainly in the family jurisdiction. The stereotype average of a lawyer in 1990 was a male named John aged 38 years working as a solicitor in a law firm in Auckland.

Sadly, that hasn't changed much. But 2017 is a special year. First it is 120 years since Ethel Benjamin became the first woman to practise law. She was admitted in 1897. Many of you will know her story. She was a feisty young woman who caused awful headaches to the gentlemen of the Otago District Law Society council. She wasn't allowed to read in the law library but was given a permit to read in the judges' chambers. This ensured that the Bar did not become distracted by her. She practised in Dunedin and Wellington for a short time, and then left practice and went to England.

Ethel's influence in Dunedin did linger. Sixty-five years later, Miss Silvia Poulter applied for work as a law clerk while in her second year of study for a law degree. She was declined because her prospective employer, still preoccupied with Ethel Benjamin, did not want the inevitable problems associated with women law clerks. Miss Poulter is now Dame Silvia Cartwright.

The second reason this year calls for celebration is that we are creeping toward the watershed of 50 per cent of women lawyers in practice. We do not have that yet. The number is at about 47 per cent, despite the fact for 25 years we have had 50 per cent of women graduating from our law schools. This year I think we will hit the magic number.

Women appointments to the judiciary have increased in all courts. Of particular note is the appointment of Dame Ellen France to the Supreme Court, to give us a 50/50 female/male Supreme Court. As far as we can determine there is no other common law jurisdiction which has that equal gender balance in its highest court. That is encouraging.

There are nearly 13,000 lawyers now in New Zealand. That is one per 384 people. There are about 10 million lawyers in the world, which is about one per thousand when equalised out. So, growth since 1990 of the legal population in general has been huge and it is continuing at an exponential rate. About a thousand young lawyers will be admitted this year. So, we have a lot of lawyers. But they are doing many more things now than they were in 1990.

Of 47 per cent of practicing lawyers who are women the highest percentages show up Wellington and Queenstown. 61 per cent of in-house lawyers are women. Nearly one quarter of all lawyers (21 per cent practice in-house). That is a big change from 1995.

Women make up about 60 per cent of employed lawyers in multi-lawyer practices, but only 24 per cent of partners in multi-lawyer practices. A much smaller percentage are QCs. Our judiciary has seen a steady flow of women judicial appointments. About 30 per cent of our judges across the courts are women.

However, we are still not seeing our women lawyers in the higher echelons of the profession – particularly in the parts of the profession which are well paid.

In terms of the economic aspects of the practice of law, most who practise law want to make money. If they don't they won't last practising law. In New Zealand 16 per cent of women lawyers spend more than 50 per cent of their time in family law. However, women are not showing up in

the areas of the law that are well paid. That is a high percentage. Family law is now, though it has not always been, one of the worst paid areas in which to practice.

The Law Society has done some research on the salaries of women lawyers. There are still some significant gaps between the salaries of men and women lawyers. The average salary for a lawyer two years out of law school in a small firm is \$52,000. In comparison a senior secondary school teacher many years out of training earns around \$71,000. We know that male and female lawyers, in the first five years of practice, are paid at similar levels. But after that the difference becomes marked. In general terms the difference by year 10 is that women lawyers earn more than 30 per cent less. We are doing more research in that area to understand the factors at play.

Charge-out rates of women in law firms are an important indicator because in firms the rewards are largely based on the fees you make. Your charge-out rate is crucial to the possible fees you can earn. The average charge-out rate for women was \$285.54 in 2016 for employed lawyers, compared to \$306.12 per hour for men. The average charge out rates for men therefore was about 7–10 per cent higher. This translates to the bottom line. I note Hamilton lawyers were the notable exception with a much smaller difference.

Those statistics tell us is that there are some systemic problems that regardless of all the band-aid solutions that we are trying, nothing seems to be making a difference. If we don't do something to close the gap we will lose those women who are often the best and the brightest.

Is a lack of women a problem? I say "yes". We want to keep the best and the brightest, whether they are male or female, and whatever their background. We need to keep that talent and diversity to nurture a strong profession. Furthermore, the research is clear that diversity in decision-making leads to much better decisions. Most of that research is based on businesses and on boards. Much of it came out of the financial crisis following analyses of the decision-making of finance company boards. The so-called 'Lehman Sisters effect' (a reference to the Lehman Brothers bank collapse)⁶ indicates financial company boards with at least one-third women on the board were much more likely to have survived the crash.⁷

An article by Irene van Staveren in the Cambridge Journal of Economics looks at gender difference on Board's financial behaviour, risk aversion, and response to uncertainty as well as in relation to ethics and moral attitudes and leadership.⁸ The article argues that gender stereotypes are influential in finance. They constrain women reaching the top positions where a strong masculine culture still exists. But the analysis indicates that on average, boards with more women (it takes about a third to make a difference) perform better in almost all cases than boards dominated by men. Particularly during times of uncertainty and complex decision-making. That is apparently explained by a combination of gender beliefs, stereotypes, gender identity and flexible biological processes. The research supports the case for more senior women in business, on boards. That case is readily transferable into the legal sector. Lawyers are constantly making judgement calls. For instance in litigation complex decision-making is essential: how to run a case, what strategy to employ, how to cross-examine, and how to advise the client. The skills needed are those in which women excel.

Demographic trends will also affect the legal profession. We have a bulge of aging baby boomers who are trying to sell their legal practices to the younger lawyers coming through. We

6 Irene van Staveren "The Lehman Sisters hypothesis" (2014) 38 Cambridge Journal of Economics 995.

7 Irene van Staveren, above n 6.

8 Irene van Staveren, above n 6.

have been warned about a looming crisis as the baby boomer lawyers leave, particularly in rural and disadvantaged communities. In Australia it is much worse. The Australian Law Council is warning of a huge shortage of lawyers in general. Forty-two per cent of rural lawyers there say they don't expect to be in the profession in five years' time.

In New Zealand the trends indicate there will be a shortage of lawyers in the provinces over the next 10–15 years. So, any law students here who are going to be looking for a job, the provinces may be where to go. They are also the best place to learn your profession.

On the bright side, we do have a woman holding the role of Chief Justice, Dame Sian Elias; a woman Minister of Justice, Amy Adams; a woman Chief District Court Judge, Jan-Marie Doogue, and Kathryn Beck is the President of the New Zealand Law Society. We have got some great role models there.⁹

Women leaders in the profession such as like Dame Sian Elias are highly regarded. They were not token appointments. Dame Sian never ceases to amaze me. Wherever I go internationally, people know and respect her. Her legal acumen is held in high regard by judges across the world. She is a world-famous jurist. She has recently delivered the Hamlyn lecture in the United Kingdom, which is one of the most prestigious lectures in the common law world.

Turning to the international scene, this year saw the appointment of the first woman Lord Chancellor of England with the appointment of Liz Truss. She is the first woman to hold the role since it was established in 1066. She used her first address as Justice Secretary at the Conservative Party Conference in 2016 to attack the lack of diversity in the English Bar and the legal profession. She told the conference that a modern justice system was not just reflected in practices and processes, but in the people. In the United Kingdom at the time: one in seven women were QCs; one in three partners in law firms were women (slightly better than in New Zealand) and one in 10 judges came from ethnic minorities.

The issue of diversity of ethnicity, culture and sexual orientation is a significant area that needs attention. New Zealand is well behind in terms of where it should be to reflect its diverse population. Liz Truss said, "this is modern global Britain, we can do better than that".¹⁰ New Zealand can do much better too.

A. Diversity

We haven't even started on the larger issue of diversity in general. We have no reliable statistics on the profession as it was 25 years ago, so we can't make any useful comparisons. Nevertheless, the information we have now indicates that the legal profession is nowhere near reflective of the diversity of New Zealand's population. In particular we fall short in Māori, Pasifika, and Asian lawyers.

9 Since the lecture, Dame Sian Elias has retired. At the time of publication, Justice Helen Winkelmann has been appointed to the role of Chief Justice; Ms Tiana Epati is the President of the New Zealand Law Society; David Parker is Minister of Justice, and Jacinda Ardern is New Zealand's Prime Minister.

10 Liz Truss, Lord Chancellor of England "Speech to Conservative Party Conference 2016" (Birmingham, 4 October 2016).

B. Initiatives

We now know, from work related to promoting gender diversity, there is no silver bullet. Initiatives tried from mentoring to education have been small steps but the Law Society intends to make diversity a priority over the next few years. Some initiatives didn't have quite the effect we had hoped for. I was part of a group set up by the Law Society to look at gender diversity about 20 years ago. One idea was to give women judges the option of working part-time to provide them with more flexibility. We thought that the women could then have flexibility for family responsibilities. So, we spoke to the then Chief Judge and the District Court subsequently brought in arrangements to allow part-time judges. Anecdotally it does not seem to have been as effective as thought. In hindsight it is a difficult option for both the system and the judge to implement.

The evidence does suggest that if we could deal with our own unconscious biases, many obstacles to promoting women lawyers and those from more diverse backgrounds would disappear. Training lawyers to recognise and deal with these biases and how to counter them apparently has been successful in other jurisdictions. We are looking at profession-wide training on that.

An ongoing debate is whether we should be looking at quotas or soft targets to boost numbers of women in senior positions. These measures are very controversial. Some would say they are the only things that work. In Australia, quotas for ASX boards are being looked at again. There have been soft targets for ASX boards in place for some years. While driving some change, it has not been effective to the extent hoped for. There is some interest internationally to relook at quotas. The topic is also attracting interest in the United Kingdom. A suggestion from a university study in the UK was that legislative quotas should be introduced. The London School of Economics report *Confronting Gender Inequality* says quotas backed by legislation are more effective than soft company initiatives and represent a minimal condition for securing change.¹¹

Lawyers are often briefed and get their work from company boards, and management. Therefore, more diversity in business is likely to lead to a demand for more diversity in the profession.

Professor Nicola Lacey, Professor of law, gender and social policy at the London School of Economics said that “in the context of the failure of existing policies effectively to tackle the over-representation of men ... in the upper echelons of the legal profession”, we should be looking very closely at quotas.¹² She said that “anyone seriously committed to ... gender justice and equality must be prepared to consider a more radical approach.”¹³

V. TECHNOLOGY

Technology will commoditise some legal services. We may have fewer teams of junior lawyers doing discovery, poring over documents in dark basements, or teams of lawyers doing conveyancing transactions. Things will be done differently. We need to embrace technology and use it properly rather than be scared of it. Some people are going to win from it and some are going to lose.

11 Diane Perrons and others *Confronting Gender Inequality: Findings from the LSE Commission on Gender, Inequality and Power* (London School of Economics, 3 June 2016).

12 Jonathan Owen “Quota for female and ethnic minority judges would be ‘demeaning,’ says Lord Justice Leveson” *The Independent* (online ed, United Kingdom, 13 October 2015).

13 Owen, above n 12.

But technology does not herald the end of the law as we know it. Machines are better at some things, but they are not better at lawyering.

Last week some of you would have seen in the *Herald*, there was an article about the 10 things we can expect by 2040 from technology.¹⁴ It referenced a report produced by software company MYOB. That company has already taken significant amounts of routine accounting work from accountants. Accountants are no longer just doing tax returns. They are now positioning themselves as “trusted advisors”.

I had expected the report would be about the end of lawyers. Rather the report says that lawyers are at the top of a list of five occupations which will prove their usefulness in the era of the machine. The difference will be that lawyers must be more available and accessible. Instant communication will be commonplace. There will be little paperwork; it will all be in the cloud. But more than ever the role of trusted advisor, the role that lawyers have always played in society, will be more important.

VI. ACCESS TO JUSTICE

Another issue that is going to threaten the sustainability of our whole legal profession and system is access to justice. We have a responsibility to promote access. Technology will assist access in some respects. But the people who need access to justice, for example ACC claimants, often can't use technology. They don't have the internet and they need to be able to find good legal advice. However, that is not today's topic.

VII. WHERE TO FROM HERE?

We have to grasp the changes. The legal profession will last. It is sustainable, but it is up to us here in this room to make sure it is. Diversity is the key to sustainability for the profession.

We have to embrace diversity, embrace technology, and understand that the way we do things is not going to remain the same. But our role as a trusted advisor, our role in the machinery of government, and our role as officers of the court, will not disappear unless we really muck it up.

Ngā mihi nui.

14 Jamie Morton “10 things we can expect in 2040” *The New Zealand Herald* (online ed, Auckland, 19 October 2016) <www.nzherald.co.nz>.

LECTURE SERIES CELEBRATING THE 25TH ANNIVERSARY OF TE PIRINGA – FACULTY OF LAW

TEACHING LAW IN CONTEXT: IS IT STILL RELEVANT?

BY PROFESSOR MARGARET WILSON*

I. INTRODUCTION

This presentation is the third in a lecture series to celebrate the 25th Anniversary of Te Piringa – Faculty of Law. Each lecture has focussed on one of the founding principles of the Faculty. The previous lectures have addressed professionalism and the bicultural commitment of the Faculty. This lecture will therefore focus on the third founding principle, namely, teaching and researching the law in its context. The notion of including the societal context within which law is taught arose in the 1960s and has been associated with the critical studies movement. The deconstruction of legal rules to expose how laws reflect the values of those who have the power in society to make laws required an understanding of economic, social and cultural systems within society.

Legal rules are in reality the output of a complex variety of factors and if students were to fully appreciate the role and influence of law within a society, they needed to recognise this complexity. More pragmatically if students were to advise clients, they needed more than technical knowledge of what is “the law”. Clients require answers to problems and the lawyer is expected to provide not only the legal answer but how to achieve a resolution. In effect lawyers are problem solvers so we must teach our students how you go about problem solving.

I have titled this presentation – is teaching law in context still relevant? I pose this question because current tertiary education policy is presenting a real challenge to critical legal education. This challenge presents itself in the form of universities being reconstructed within the corporate model of governance characterised by central control of decision-making through a managerial system with a focus on financial efficiencies and delivery of a form of education to conform with government economic policy objectives. Under such a regime it becomes increasingly more difficult to maintain disciplinary distinctiveness and to deliver an education that challenges the assumptions of government policies.

II. DEVELOPMENT OF THE WAIKATO PROGRAMME

The Waikato Law School¹ was established with the objective of challenging the existing form of legal education delivered by the other Law Schools. Although individual academics within those

* Founding Dean of the Waikato Law School.

¹ The Law School officially changed its name in 2012 to Te Piringa – Faculty of Law.

Schools pursued a critical approach in their teaching, legal positivism was the standard form of teaching with emphasis on rules as determined through appellate case law. The role of legislation and policy were unknown in most law courses.

The fact that the Waikato Law School was established to provide a different sort of legal education that reflected the community within which it operated was at the time a radical development that was not without its critics. It is important to recall that in New Zealand, the LLB did not become a full-time degree until the mid-1960s and like all change it took time for the legal profession to accept this was the preferred method of legal education. The legal profession was concerned that the Law Schools were producing graduates who were “too academic” and not fit for the practicalities of legal practice. The result of this debate was the establishment of the Legal Professionals courses undertaken after graduation. The compromise also included the profession monitoring key professional courses within the LLB degree through the Council of Legal Education.

This solution enabled greater freedom to the Law Schools to develop their curriculum. Interestingly, however, the law schools maintained a traditional legal positivist approach. New courses were introduced but teaching and research remained traditionally conservative with the greatest innovation being the introduction of the United States case method approach to teaching. Few teachers successfully used this method and for most of us who endured this form of teaching it was a form of torture that did very little to advance our legal knowledge.

By the 1980s, it was obvious that the change in the public policy to a more competitive economic model was having an impact on legal practice. At the same time the social activism of the 1970s was beginning to be reflected in public policy. The Crown’s recognition of its obligations under the Treaty of Waitangi required a new stream of legal knowledge, as did the enactment of the New Zealand Bill of Rights Act. The environment through the Resource Management Act was becoming big business for legal practitioners. Throughout 1980s there was an increasing number of women entering law schools that required law schools to rethink their methods of teaching. Pauline Tapp and I taught the first Women and the Law course at Auckland Law School in the 1980s. Importantly there was also a change in policy towards tertiary education policy that I shall address later in the talk.

Just how the Waikato Law School was mandated to develop a new approach to legal education is worth briefly reviewing. The formal establishment of the Waikato School of Law on 1 July 1990 marked not only New Zealand’s fifth School of Law but the first to be opened in over 90 years. The School did not emerge from existing programmes within the University of Waikato, but was planned as a deliberate new development by both the University of Waikato and the Council of Legal Education.

Since the establishment of the University of Waikato in 1964, there had been a lobby led by members of the legal profession in the region to establish a law school. It is sometimes easy to forget the value provincial New Zealanders place on education. It is not only a way to increase the prosperity of the region but it also made a contribution to the cultural and intellectual life of the community. The dedication of a few advocates in Hamilton for a law school started to be rewarded when the unfulfilled market demand for lawyers in the region in the 1980s became too obvious to ignore. The Waikato/Bay of Plenty region had found it difficult to attract young lawyers to legal practice. The case for a fifth law school at Waikato University was formalised in Te Matahauariki, a report prepared by a committee representing Waikato and Auckland Universities and the Auckland

and Hamilton District Law Societies, and was supported by the Council of Legal Education *Report of the Fifth Law School Working Party* (1989).

What emerged was support for a new School with three specific goals. First, to provide legal education that included the professional courses required by the Council of Legal Education; secondly, to provide an opportunity for a greater number of Māori students to qualify in law, and to develop a bicultural approach to legal education through the School's curriculum and research; and thirdly, to develop a curriculum that stressed the importance of studying law within its societal context. It was also clear that the LLB degree was intended to draw on the expertise in the University's social sciences. At that time, Waikato was known for its expertise and innovation in this field. In fact, the University was established in the 1960s with the intention of providing a critical approach to tertiary education and in particular to recognise the development of the social sciences.

The School's first corporate plan stated the overall purpose of the Law School was to contribute to the development of a New Zealand jurisprudence that supports the principles of justice, democracy, equality and a sustainable environment, and respects and reflects the rights and responsibilities of all peoples and cultures. The goals of the School included the provision of a legal education that gave students the skills of legal reasoning and analysis; as well as an understanding and awareness of the relationship between the law and society that would enable them to contribute to the development of New Zealand jurisprudence distinguished by its recognition of Māori culture and laws as a full and legitimate part of the New Zealand legal system. It is interesting to reflect on the relevance of these objectives today given the changes in tertiary education policy.

The story of how Waikato University nurtured and supported a radically new form of legal education is the story of key individuals who had the vision and courage to understand change was needed in legal education. Sir Ivor Richardson, the then Chair of the Council of Legal Education, Professor Wilf Malcolm, Vice Chancellor of the Waikato University at the time and Sir Robert Mahuta, Tainui Treaty Claim negotiator and visionary, were three individuals without whom it is unlikely the law school would have become a reality. Other key supporters were Gerald Bailey and Sir Ross Jansen who provided support from the legal profession and the community.

It is also the story of how timing in life is important when it comes to challenging the status quo. Te Piringa was established a year after the Education Act 1989 that signalled a radical change to universities in terms of funding, structure and the type of education to be delivered. The fact the new government in 1990 withdrew funding from the new enterprise clearly signalled a different approach to public funding of tertiary education. The decision, while it felt personal at the time, was part of an intention to radically rethink the delivery of all public services including tertiary education. From the outset then Te Piringa was faced with a serious challenge to its very existence. It is in such circumstances that individuals and institutions have to carefully examine what is important enough to be worth fighting for, even if it is against the government. The University at the time faced the challenge and continued to deliver an LLB degree to the students. Over 1000 students had applied for entry into the LLB programme in 1991.

This initial challenge was the first of many that have confronted staff and students of the Faculty. I have often thought law is an uncomfortable fit within the university. We strive to present a professional education that is also critical and academic. We are advocates and we train advocates to question and contest accepted knowledge. I acknowledge we can be the proverbial pain to any

management and so I think we have demonstrated in our short history. I recall the early arguments to fight for 25 courses and not the university norm of 28 so we could compete with other law faculties. We argued for a direct entry into law to facilitate the objectives of the school to provide opportunities for students often denied access, in particular Māori students. That is why no quota for Māori students was imposed. I like to think our challenges were never personal but motivated by a genuine desire to maintain the programme of study.

The degree was designed to promote interdisciplinary study by students with an emphasis on progression of non-law courses. Without Sir Ivor's support, I doubt we could have won the contested battles in the Council of Legal Education from other law faculties. The inclusion of jurisprudence as a compulsory course, along with corporate entities and dispute resolution, was contested yet ironically other faculties over time adopted some of the characteristics of the Waikato degree. In an effort, however, to allay fears that the Waikato programme was not academically credible, the Waikato Faculty hosted an Inter-University Law Teachers Conference in May 1991. The conference was held in conjunction with the official opening of the Law School. The purpose of the conference was to look at future challenges for legal education and research with the keynote address being given by Sir Kenneth Keith, examining the competing demands on legal academics. The Conference identified many of the issues that would accompany the full impact of neoliberalism on legal education. Although these issues remain the same within all law faculties, the competitive model of universities has made it impossible for law faculties to join forces to collectively protect and promote legal education.

I mention these examples to demonstrate that each and every battle that appeared to be about structure or administration was really about maintaining academic integrity in the provision of a critical legal education. For me, however, the most important challenge was how to translate the notion of teaching law in context into reality. At first sight it appeared the three principal expectations of the school, namely, to provide a professional, bicultural and interdisciplinary legal education contained internal contradictions. The most obvious contradiction was the requirement to meld within one programme the professional courses and skills, with the interdisciplinary approach. Although there are some difficulties in trying to incorporate the two perspectives into the one degree, they are not fatal to the enterprise. They did require, however, a careful rethinking not only of the content of the courses but also the way in which they are taught. The overriding approach to the development of the curriculum was that it had to be conceptual, contextual, critical and constructive.

One of the intentions of the programme was to illustrate that legal education need not be either interdisciplinary or professional in its approach but that it can be both, with each perspective enhancing the other to produce the ultimate objective of a good general education in the discipline of law. In this the School concurred with William Twining's early work on the interrelationship between legal skills and legal education. His more recent work stresses the importance of teaching law in a global context and in particular pursuing a comparative legal approach when developing legal concepts that reflect the reality of globalisation.

Just as important as the structural elements of the degree was the approach to teaching. I offer just two examples of how innovative the teaching programme was at the outset of the degree. The first was that the opening week of the degree in 1991 included a week long introductory programme to the study of law in the context for students that focussed on the issue of surrogacy and the Baby M case. The purpose of this exercise was to present students with a problem and then work through that problem from different perspectives of professionalism, biculturalism and law in

context. This experiment is recorded in the Waikato Law Review by Nan Seuffert, Stephanie Milroy and Kura Boyd, a student who participated in the exercise.² There was a consciousness from the outset then for the Waikato programme to demonstrate that the law can and should be taught in all its contexts.

The second example was the development of a course on Professional Responsibility by Kaye Turner in 1994. Kaye helpfully records the development and experience of this course in an article in the Waikato Law Review. The importance of this course was to give the students an understanding of the concept of professionalism in theory and practice. The course dealt with the relationship between professional responsibility and commercial performance and prepared students how to navigate the challenges that were to evolve under the neoliberal public policy approach. Integrity and service were seen as the essence of legal professionalism. This course was timely given the dominance of competitive markets in public policy design that attempted to replace notions of professionalism with those of managerialism.

It may be appropriate at this point to note that in light of the public exposure of sexual harassment in some law firms and law faculties that law faculties should consider consciously introducing students to the notion of professionalism. I am aware that managerialism now trumps professionalism as the preferred governance model but an observance of professional ethics in our work relationships with staff and clients would be a good place to start. It would enable an emphasis to be placed on institutional culture that would appear to be urgently required at the moment rather than the emphasis being on specific cases of sexual harassment.

I digress, so to return to the values and principles underlying the Waikato degree. I reflected on those principles when the University recently undertook a curriculum review that resulted in the requirement to develop courses to provide a “Waikato distinctive” education. While I could understand the importance of such an approach as a marketing tool, its academic merit would lie in the ability of the central course requirements in all degree courses to meld with different specific disciplinary and professional values. This is something the law faculty has had some experience with implementing.

Another major challenge for the school was how to provide a conceptual and professional legal education which is firmly rooted within the culture and common law legal traditions of the United Kingdom, while including on the basis of parity, the laws/lore of Māori. The policy of the Government at the time of establishment supported biculturalism. Precisely what was meant by biculturalism was not so easy to describe. In the context of Te Piringa biculturalism was interpreted to mean that the School had the responsibility to create the conditions to enable an equal partnership to be achieved both within legal education and within the wider legal system. The School accepted the reality that biculturalism did not exist at that time but that it was seen as the desired objective or outcome of the School.

It would be misleading to assume that the School did not have its critics over its commitment to biculturalism. Criticism came from both the Pākehā and Māori communities. The main Pākehā criticism relates to the relevance of the inclusion of material relating to Māori, while some of the Māori criticism relates to the fact that the School is not bilingual. To assist with the integration of Te Reo amongst staff, classes were provided and answering exam questions in Te Reo was

2 Nan Seuffert, Stephanie Milroy and Kura Boyd “Developing and Teaching an Introduction to Law in Context: Surrogacy and Baby M” (1993) 1 Wai L Rev 27.

introduced. It was the right of students to answer questions in Māori that provoked controversy when students questioned the grade given to questions written in Te Reo. This raised the practical question of access to examiners skilled in Te Reo and the law. Eventually the issue was resolved by seeking examiners outside the University. The issue remains today, however, as I observe the increasing burden on Māori staff to deliver a Te Reo legal education to an increasing number of students.

The above brief review of some of the issues faced by the new law school demonstrates that considerable thought and energy went into designing the degree programme that was consistent with the founding values. It also demonstrates a real commitment by the academic staff to a different type of legal education. There is not time nor is it appropriate to record the often-vigorous debates amongst the staff, students and university administrators to achieve the structure and content of the various courses. These debates continue today as we face another restructuring. The fact the Waikato approach has been sustained over the past 25 years despite many challenges is due in large part to the commitment of law staff.

This commitment was tested in 1998 when the University embarked on another restructuring. Every new Vice Chancellor has launched some form of restructuring that has required the Law Faculty to accommodate it. All the restructurings have been designed to adjust to less public funding through some form of institutional changes. In 1998, it was proposed that the seven Schools of Study be reduced to four Faculties. Both the Law School and the School of Māori and Pacific Development were targeted for merger with the Management School and the School of Education respectively. The purpose for the restructuring was to reduce administrative costs. A similar restructuring is being proposed by the current Vice Chancellor. Although the Vice Chancellor held forums for staff to explain the proposal and meetings were arranged with staff including the Law School staff, it was apparent that he intended to proceed with the proposed restructuring.

Both the School of Māori and Pacific Development and the Law Faculty did not oppose change but feared the merging with other Faculties would result in a loss of programme distinctiveness. Meetings with the Dean of Management left law staff with the impression the law school would become an enhanced commercial law department. While law staff talked the language of federation, management talked of a merger. After discussions, both SMPD and Law consulted the union, which agreed to commence proceedings against the University, challenging the lawfulness of the restructuring decision. The proceedings against the University and the Vice Chancellor sought a declaration that the Vice Chancellor and the University Council did not have the power to make such a decision under the provisions of the Education Act. It is important to stress this decision was not taken lightly but was an indication of the tension in many tertiary institutions between administrative efficiency and academic control of education.

This is not the place for an analysis of the High Court decision to grant a declaration though I recommend it to those interested administrative law and tertiary education policy.³ Fundamentally, however, the Plaintiffs argued while the Vice Chancellor and the Council had the power to make administrative decisions, if the decision involved academic matters then under the Education Act the Academic Board had to be consulted as part of the process. The defendants argued that the decisions were administrative only and did not involve academic matters.

³ *The Association of University Staff of New Zealand Inc v The University of Waikato* [2002] NZAR 817.

In cross examination, the Vice Chancellor did admit there was an academic as well as an administrative rationale for the restructuring the Law School, namely, “It rests, he said, on a view that “law” is moving in the direction of the kinds of matters which are taught in management schools.” This view accurately reflected the dominant neoliberal policy approach, but ignored the foundation principles and values of the School. The judgment also noted that the School of Māori and Pacific Development had a distinctive role that Professor Milroy stated would be unduly hobbled by being tied into the School of Education. There was also the question of whether the restructuring was consistent with the principles of the Treaty of Waitangi.

The result was that both Schools maintained their separate identity for the time being. The case, however, highlighted the pressure on universities to become administratively more efficient and that the preferred method of achieving this objective has been centralisation of services. Universities have also been required to seek alternative forms of funding through international students and attracting research funding. There is therefore a continuing tension between administrative efficiencies and academic quality and innovation. The current University structures prioritise centralised administration with academic issues still being largely dependent on the effectiveness of the Academic Board and participation within the various university committees. It is this structure that is also under review at the moment with a proposal similar to that in 1998 to create a new management structure.

It is worth trying to explain the impact of managerial change on academics’ core business of teaching and research. A recent example of administrative intervention into the delivery of academic teaching and research has been through a curriculum review that has substantially changed the various university degree structures. It is important to note the law degree has so far survived this latest restructuring relatively intact but a change in teaching hours will have an impact on some courses. The review also required degrees to include three “distinctively Waikato” courses including cultural perspectives papers in their degrees. The tension, however, between institutional managerial and administrative practices and the delivery of innovative and relevant legal education remains a constant reality for legal academics.

The delivery and structure of the programmes, however, is more directly affected by changes in funding and policy. As the universities are funded less to do more, compromises must be made in the delivery of the courses. An early example of this process was the requirement to teach full year core legal courses in three semesters. This practice is now taken as normal as are the intensive courses of two to three or six weeks. Lack of resources has also been a factor in the reduction of the amount of small group teaching that was once what distinguished the Waikato Law degree. The current encouragement for online or blended teaching that is made possible by technology is increasingly being embraced by academic staff. The issue is, however, how to reconcile this cost saving practice with the students’ desire for face to face contact with their teachers.

The point I am trying to make is that an understanding of the evolving public policy context within which Waikato law School has developed is essential in any assessment of the Waikato approach to legal education. Te Piringa – Faculty of Law has acquired in 25 years some experience in how to adapt to change while maintaining the integrity of its distinctive approach to legal education. Apart from losing its initial funding; successfully legally challenging an attempt to merge the institution with Management; the various initiatives to restructure the delivery of degrees in shorter time spans; and the attempt to introduce open plan communal office space that placed a barrier between staff and students; and attempts to change assessment to accommodate technological change, the Waikato LLB degree remains distinctive. The question is, however, does it remain relevant and how does one assess relevance?

III. IS LAW IN CONTEXT STILL RELEVANT?

Overall, the objectives of Te Piringa as outlined in *Te Matahauariki* are still reflected in the degree programmes 25 years later. The School has endeavoured to reflect the changes demanded by the economic, social and cultural context. This is seen in both the content and delivery of the programmes. The academic staff are still primarily responsible for the courses offered and the content of those courses. It is their academic experience and judgement that enables some level of intellectual independence to remain. In this context, the Council of Legal Education still retains an important element of quality control in the teaching of law.

The answer to the question lies in whether the degree is relevant to both the student and the society as a whole. An answer also lies in whether we take a long-term or short-term perspective. While public policy takes a short-term perspective, I would argue a long-term perspective is required. Currently the Faculty still fulfils its quota of students. How useful, however, is the legal education to the student in terms of both employment, quality of their lives and contribution to society. The answer to these questions becomes more urgent in the current age of digital disruption when survival depends on an integration of technical skills and traditional liberal values of critical analytical thinking in a social democratic context. The Law Faculty is responding to these challenges through its focus on technology in teaching and research, developing work and international experiences for students, while continuing to focus on developing legal analytical skills, and the integration of an inter-disciplinary approach in all courses.

It is also useful to remind ourselves of how society has changed. Amongst the criticism of the Waikato Law School in 1990 was that its focus on Māori and feminists was not relevant in a law degree. It is obvious today that advice on the Treaty of Waitangi and issues related to the interests of Māori is part of mainstream legal practice and Waikato graduates have contributed to that development. So-called feminist issues such as pay equity, property relationships and sexual violence are now recognised as legal as well as policy issues. An increasing number of Māori and women graduates are consciously and unconsciously influencing the nature of legal practice. Also from the outset, an emphasis on dispute resolution foreshadowed this development in legal practice. The current challenge for graduates is the lack of positions in traditional legal practice as technology is changing the nature of much legal work. Waikato graduates, however, have traditionally sought opportunities outside conventional legal practice and the inter-disciplinary programme has assisted in opening up opportunities.

I do not wish to make this lecture sound like a marketing presentation. The reality is, however, marketing is now an institutional priority. It is therefore important the Faculty find that balance between self-promotion and academic achievement that makes a long-standing contribution to New Zealand jurisprudence and society. In the Faculty's short history, it has demonstrated that sticking to the foundational principles while having the capacity to adapt to current policy has enabled its educational experience to become more relevant than ever.

Some parts of the legal profession were also critical that the School's programme is "too feminist and Māori" and therefore will not adequately prepare students for the practice of "real" law. Whatever the rationale or justification for the criticism, the School once established embarked upon an active strategy of liaison with the local District Law Society and individual law firms and practitioners. It is also true that there has been tangible support from the local profession. For example, the Hamilton District Law Society donated \$40,000 for a computer laboratory for the Law School. Waikato was the first law school to provide this facility to students. Support from the legal profession also came through the inclusion of students in their intern programmes.

Ironically, the Waikato law degree was designed to achieve both a market objective, that is, prepare students for employment, and an intellectual objective, that is, teaching students to think analytically and independently, which are professional characteristics of the lawyer. Although the Waikato approach to legal education was criticised by some in 1990, it was well suited to prepare the students for the new environment. Teaching law in context and placing an emphasis on emerging areas such as environmental law and the Treaty of Waitangi, and making courses such as corporate entities and dispute resolution compulsory prepared students for the reality of the consequences of the new policy environment.

It may also be argued that as public funding in the 1990s was withdrawn from public services and previously regulated services were de-regulated, people sought new ways to resolve their disputes and advice on how to negotiate their way through a constantly changing regulatory environment. For example, employment law became part of mainstream legal practice after the Employment Contracts Act 1991; the decision in 1986 to recognise land claims under the Treaty of Waitangi from 1840 created a new area of legal practice as public funds were made available to fund the claims; the regulation “lite” approach to the construction industry contributed to a leaky building problem that consumes many legal services; the changing nature of relationships and the incorporation of all relationships within a legal regime such as the Property Relationships Act has changed the nature of family law; and so the list could continue as New Zealand has experienced a period of rapid legal change to accommodate the changing economic, social and cultural environment. This accommodation is evidenced in the rise of courses on human rights, reflecting the increasing emphasis on individual rights as the state redefines its responsibility as being primarily economic management; courses relating to international trade and institutions as New Zealand endeavours to compete internationally to improve economic growth; and intellectual property courses that highlight the dominance of technology in restructuring relationships.

While more than a knowledge of legal rules has always been expected from lawyers, the regulatory scrutiny of legal services now requires a much more professional approach by lawyers as is seen in the provisions of the Lawyers and Conveyancers Act 2006. The events surrounding the passage of this legislation that took over 10 years are an interesting case study of the struggle between traditional notions of professionalism and the new managerial practices that are now required in all law firms. The government inquiry into legal aid and the provision of legal services is another example of more changes to come that will impact on the delivery of legal services.⁴ The changing nature of the legal profession itself is reflected in the number of students who undertake double degrees to prepare themselves for an ever-changing market place. The necessity for legal firms to hire compliance managers is a practical illustration of the changing nature of legal practice and the opportunities it provides. The general point I am making is that while the Waikato degree in 1990 anticipated many of the legal developments that accompanied the fundamental shift in public policy, it has to continue to remain relevant as we face a period of digital disruption that will be like the revolutions of the past that fundamentally changed societies and relationships.

4 Dame Margaret Bazley *Transforming the Legal Aid System – Final Report and Recommendations* (prepared for the Ministry of Justice, April 2010) and Simon Power, Minister of Justice “Government Details Further Changes to Legal Aid” (press release, April 2010).

IV. CONCLUSION

In conclusion then, the commitment to an education that recognises the value of understanding the role of law in a societal context is likely to face future challenges. Although neoliberalism is being replaced by well-being economics, there is little sign that the current policy's primary focus on market ideology with the undervaluing of a liberal tertiary education is likely to change. The challenge for legal academics will therefore continue to be to respond to the market but also instil longer term social democratic values and skills. Martha Nussbaum, Professor of Law and Ethics at the University of Chicago, recently commented in the context of research funding schemes in the United Kingdom and the United States that are similar to New Zealand PBRF scheme that "[r]esistance to the bureaucratisation of academic scholarship and teaching will be difficult, but it is essential if the culture of the mind and heart that protects both knowledge and citizenship is to survive."⁵

It may be some comfort to New Zealand legal academics to know we are not alone in facing the constant pressure of reconciling the demands to publish in terms of PBRF values and at the same time delivering a high quality professional education and service the legal profession. The challenge is for the universities and their academic and administrative managers to create the environment that produces both quality research and teaching, while negotiating with governments a funding policy for universities that is accountable to governments and the people. The key in this negotiation is for universities to be accountable but not controlled by governments and their various policies. This is the reality of the struggle to preserve academic freedom and independence.

For me the grounding principle for the existence of universities was summed up by Ruth Butterworth and Nicholas Tarling in their seminal book on the changes to tertiary education in the 1980s, when they wrote "Universities are for thinking."⁶ There is nothing more challenging to those who exercise power than people thinking for themselves and it's our job to teach people to think. No wonder the task is not always an easy one.

5 Martha Nussbaum "Critical Faculties" *New Statesman* (31 May 2010) at 40.

6 Ruth Butterworth and Nicholas Tarling *A Shakeup Anyway: Government and the Universities in New Zealand in a Decade of Reform* (Auckland University Press, Auckland, 1994) at 251.

LETTERS TO THE SECURITY COUNCIL BY TWO PRISONERS OF WAR, ISRAEL AND PALESTINE (I)

BY DR ALBERTO ALVAREZ-JIMENEZ*

Yarom was the name of a student from Israel whom the present author had at the University of Ottawa. His roommate in the distant Canadian capital was a Palestinian, and while the Israeli flag hung on one side of the wall that separated the two rooms, the Palestinian flag was affixed to the other. Yarom mentioned that he and the Palestinian student got along well. Their story is short but rich in humanity. At almost the same time, Israel and Palestine were running their separate stories before the United Nations (UN) Security Council. These two narratives, on the contrary, were long and monotonous in their brutality.

Israel and Palestine are among the most frequent letter-writers to the UN Security Council. They do so in order to report, often on a weekly basis, on the scale of suffering their civilians endure. This article deals with almost 50 communications forwarded from August 2013 to July 2014 – the 65th and 66th years of the conflict.¹ It shows the concern that each state has expressed for the other's civilians: none.²

A fundamental legal question emerges from these accounts: how to reinterpret international humanitarian law, human rights law, or international criminal law in a way that alters adversaries' calculations and makes each other's civilian tragedy visible to them in this armed struggle or in any other in which the parties are behaving likewise? Answering this question should concern scholars in these domains after decades of their development aimed at protecting the dignity of humankind. These bodies of law properly interpreted or reinterpreted in isolation or in conjunction should offer not one but several answers to this single question. This is the undertaking that the narrative below should prompt.

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1 Sarah Thomson painstakingly read and ably summarised the letters. Her research assistance was always timely and outstanding. Tomer Broude and two anonymous reviewers offered important suggestions and much needed criticism. The author thanks all of them and assumes total responsibility. The financial support of Te Piringa – Faculty of Law made this project possible. Finally, the present author is grateful to Linda Te Aho, editor of the Waikato Law Review, for accepting this article for publication.

It is dedicated to Eliana, Leticia, Aluna, and Alberto Sr, and to Concha (in memoriam).

The length of the Israeli-Palestinian conflict is not easy to establish. Although the narrator in Tolstoy's *War and Peace* states that there "can be no *beginning* to any event, for one event always flows uninterruptedly from another," the creation of Israel in 1948 is undeniably a crucial date, and the one chosen here. (Leo Tolstoy *War and Peace* (1869) at book 11, ch 1.)

2 This article does not claim, for instance, that all segments of Israeli society are indifferent to the Palestinian suffering. This is not certainly the case. For an example of concerns for such ordeal, see "B'Tselem Petitions Israel's High Court to Oblige Israel Broadcasting Authority to Broadcast Names of Gazan Children Killed" (29 July 2014) The Israeli Information Center for Human Rights in the Occupied Territories <www.btselem.org>.

It can be claimed that there is no reason to attempt to make Israeli and Palestinian civilians' suffering visible to the other party, because such suffering is already quite visible or will be so in the future. The list of arguments of this character is long: ample media coverage, UN frequent condemnation of Israel's actions and policies, a peace process that at the end will address civilian suffering on both sides, and the ongoing International Criminal Court Prosecutor's preliminary investigation.³ No doubt Israeli and Palestinian suffering does not go ignored all the time. However, the fact is that it has been so in the letters forwarded to the Security Council by both Israel and Palestine. Any effort to alter this state of affairs for the benefit of civilians on both sides is not superfluous, and neither are attempts to draw on this long conflict to suggest other ways to interpret international humanitarian law, international human rights law, and international criminal law in protracted conflicts.

There is another argument of a more general application: making civilian suffering visible is inconvenient because it galvanises the conflict instead of humanising it. Talion law is, to be sure, a reality and a fundamental explanation for the protracted nature of the given conflict too. The whole body of international humanitarian law is aimed at preventing or mitigating this reaction, which offers little comfort to many victims.

This article has two parts. The first is the chronicle of the Israeli and Palestinian conflict over the period August 2013–July 2014. Combining art, literature, music and photography, part I's purpose is to make readers feel, not just be aware of, the civilian suffering that is going ignored, so that they see the urgency of novel legal analyses. There is also a word of warning: part I is not pleasant, and out of respect to those Israeli and Palestinian civilians affected, the present author has made a very limited attempt to make the readability of the text smooth. Further, the text is to be read while listening to some pieces of music that relate to it. They are included not for entertainment purposes but just to give a slight idea of the human sorrow the letters portray.

The second part is an open conclusion and a proposal for future collective research. There is a reason for the open format. No legal analysis can match the complexity of the text below summarising the letters, its multiple legal dimensions, and the magnitude of the Israeli and Palestinian silences. It is then important to separate the narrative and the urgent questions it raises from the present author's suggested answers. Thus, controversies on their merits do not affect the significance of the narrative and of its traumatic supporting reality. Another article in this volume by the current author explores new ways in which international humanitarian law and international criminal law could be interpreted in order to make civilian ordeal visible to the opponent, be it Palestine or Israel or any other state acting likewise.⁴ In this sense, the two articles cannot be seen as disconnected. This piece offers the human context for the next one containing a strict legal analysis.⁵

3 "Preliminary Examination: Palestine" International Criminal Court <www.icc-cpi.int/palestine>.

4 See: Alberto Alvarez-Jimenez "Protracted Armed Conflicts, Invisible Civilian Suffering and International Law" (2018) 26 Wai L Rev 77.

5 The text below could not just be an appendix with a list of casualties. Such structure does not create "emotional knowledge", to draw on the notion that a contemporary artist uses to refer to her work. This kind of knowledge is the purpose of the narrative in part I next. See Randy Kennedy "Tania Bruguera, an Artist in Havana, Has a Great New York Week" *The New York Times* (online ed, New York, 13 July 2015).

Iannis Xenakis “Metastasis”
or
 György Ligeti “Lux Aeterna”⁶

I. THE PALESTINIAN AND ISRAELI LETTERS TO THE SECURITY COUNCIL DURING THE 65TH AND 66TH YEARS OF THE CONFLICT⁷

Israel informed the multilateral organ on 13 August 2013 that Palestinian terror attacks had grown by 50 per cent between 2011 and 2012, and that in 2012 Israelis had been the targets of 2,736 shootings, rockets, improvised explosive devices and other terror attacks.⁸ The Council, on 23 August, was advised by Palestine that 22-year-old Majd Lahlouh had been killed when a Palestinian refugee camp was raided by Israeli forces. Shootings carried out by them had resulted in the final day of Hussein Abdul-Hadi Awadallah, age 30.⁹ Three days later, Palestine let the UN body know that Robeen Zayed, age 34; Yunis Jameel Jahjough, age 22; and Jihad Aslan, age 20, all civilians, had died in a raid on a refugee camp.¹⁰ On 20 September 2013, Palestine notified the Council; that Kareem Sobhi Abu Sbeih, age 17, had departed in perpetuity from wounds suffered in an earlier raid; and that three women had been injured in a raid on Al-Aqsa Mosque.¹¹

Israel brought to the international organ’s attention, on 9 October, the fact that a rocket fired from central Gaza had exploded inside Israel. A new school year had started, and Israeli parents

6 The author thanks Martin Lodge of the School of Arts of the University of Waikato, for his musical advice. Both pieces are readily available online.

7 The text in this part has been inspired by Vernon Ah Kee’s work of art, “austracism” (2003) National Gallery of Australia, Canberra <<https://cs.nga.gov.au>>.

There is an imbalance in the description of the letters, due to the letters themselves. Israel writes to the Council less frequently than Palestine, and the former’s communications are shorter than the latter’s.

Finally, death is widespread in the narrative below, and different expressions are used throughout it to ease the reading. They have been taken from literature, and their authors, Miguel de Cervantes, Gabriel Garcia Marquez, Toni Morrison, James Joyce, Jorge Luis Borges, Orhan Pamuk, Philip Roth and Primo Levi, among others, are not explicitly mentioned. Many are immortal and do not need further recognition in a footnote here.

8 Letter from the Permanent Representative of Israel to the President of the Security Council “Regarding Letter Dated 13 August 2013 from the Permanent Representative of Israel to the United Nations Addressed to the President of the Security Council – S/2013/484” (13 August 2013).

9 Letter from the Permanent Observer Mission of the State of Palestine to the Secretary-General and others “Identical Letters Dated 23 August 2013 from the Permanent Observer Mission of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/601 – S/2013/505” (23 August 2013).

10 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others “Identical Letters Dated 26 August 2013 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/602–S/2013/509” (26 August 2013).

11 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others “Identical Letters Dated 20 September 2013 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/603–S/2013/567” (20 September 2013).

had worried for the safety of their children.¹² The UN body was notified at the end of October that two rockets had been fired from Gaza, targeting the towns and cities of southern Israel.¹³ Subsequently, on 13 November, Israel wrote to the Council after a nine-year-old Israeli girl had been stabbed by Palestinian terrorists while playing in her yard and four Israeli civilians had been injured in a stabbing attack.¹⁴

On 10 December 2013, Palestine reported to the multilateral organ that Wajih Wajdi Al-Ramahi, age 14, had been shot dead by an Israeli sniper.¹⁵ The next day, the international body received a new letter from Palestine: an attack on a refugee camp had resulted in the death of Nafei Al-Saadi, age 22.¹⁶ The Council was informed by Palestine on 24 December 2013, that Israeli military strikes and artillery bombardments on the Gaza Strip had caused the eternal departure of Odeh Hamad, age 27, and Hala Abu Sbeikha, age three, and injured her mother and two brothers, Bilal, age four, and Mohamed, age six.¹⁷ Two days later, Israel replied to tell the UN organ that a bomb that exploded on a civilian bus had injured one Israeli and that 22-year-old Saleh Abu Latif, had been killed by a Palestinian sniper.¹⁸

Getting killed was easy, but that understanding was hard.

AB Yehoshua *Mr Mani*

On 14 January 2014, the 66th year of the conflict, Israel informed the multilateral body that, as Israelis and foreign dignitaries had gathered to pay tribute to former Prime Minister Ariel Sharon,

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- 12 Letter from the Permanent Representative of Israel to the Secretary-General and the President of the Security Council “Identical Letters Dated 9 October 2013 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council – S/2013/600” (9 October 2013).
- 13 Letter from the Permanent Representative of Israel to the Secretary-General and the President of the Security Council “Identical Letters Dated 28 October 2013 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council – S/2013/632” (28 October 2013).
- 14 Letter from the Permanent Representative of Israel to the Secretary-General and the President of the Security Council “Identical Letters Dated 13 November 2013 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council – S/2013/665” (13 November 2013).
- 15 Letter from the Permanent Observer Mission of the State of Palestine to the United Nations to the Secretary-General and others “Identical Letters Dated 10 December 2013 from the Permanent Observer Mission of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/608–S/2013/729” (10 December 2013).
- 16 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others “Identical Letters Dated 19 December 2013 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/609–S/2013/752” (19 December 2013).
- 17 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others “Identical Letters Dated 24 December 2013 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/610–S/2013/767” (24 December 2013).
- 18 Letter from the Permanent Representative of Israel to the United Nations to the Secretary-General and the President of the Security Council “Identical Letters Dated 26 December 2013 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council – S/2013/771” (26 December 2013).

rockets had fallen a short distance from the funeral service.¹⁹ Two days later, the Council got a new letter: Israel told the UN body that a barrage of rockets had been fired towards 113,000 citizens of the southern Israeli city of Ashkelon and that it was practicing self-restraint.²⁰

Palestine advised the UN organ on 6 February that five people had been injured in a shooting in northern Gaza and that Israeli airstrikes injured another 11 Palestinians.²¹ On 18 February, Israel reported to the international body that, since 31 January 2014, eight rockets had been fired from the Gaza Strip towards the towns and cities of southern Israel and that it was practicing self-restraint.²² Palestine answered back 48 hours later, letting the Council know that Palestinian civilian Ibrahim Suleiman Mansour, age 26, had been killed by Israeli forces while out collecting gravel to sell.²³ The organ received another missive on 25 February: Israeli forces had stormed the holy Al-Aqsa Mosque, attacking and injuring Palestinian worshippers with rubber-coated steel bullets and tear gas canisters.²⁴ Early in March, Palestine informed the Council that a 57-year-old Palestinian woman, Amneh Qudeih, had been shot dead near Gaza's "security buffer zone."²⁵

On 12 March 2014, Palestine notified the UN body that the lives of 38-year-old Ra'ed Alaa'eddin Zuaiteer and 18-year-old Saji Sayel Darwish had been taken by Israeli occupying forces.²⁶ A week later, the Council was again briefed: Yousef Nayif Al Shawamreh, age 14, had been shot and killed

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- 19 Letter from the Permanent Representative of Israel to the United Nations to the Secretary-General and the President of the Security Council "Identical Letters Dated 14 January 2014 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council – S/2014/23" (14 January 2014).
- 20 Letter from the Permanent Representative of Israel to the United Nations to the Secretary-General and the President of the Security Council "Identical Letters Dated 16 January 2014 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council – S/2014/28" (16 January 2014).
- 21 Letter from Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 6 February 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council A/ES-10/615-S/2014/82" (6 February 2014).
- 22 Letter from the Permanent Representative of Israel to the United Nations to the Secretary-General and the President of the Security Council "Identical Letters Dated 18 February 2014 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council – S/2014/107" (18 February 2014).
- 23 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 20 February 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/616-S/2014/118" (20 February 2014).
- 24 Letter from the Chargé d'affaires a.i. of the Permanent Observer Mission of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 25 February 2014 from the Chargé d'affaires a.i. of the Permanent Observer Mission of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/617-S/2014/128" (25 February 2014).
- 25 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 5 March 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/619-S/2014/154" (5 March 2014).
- 26 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 12 March 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/620-S/2014/180" (12 March 2014).

by Israeli occupying forces;²⁷ and once more, on 24 March of the same year: Hamza Abu Al-Haija, age 22; Mahmoud Abu Zeina, age 17; and Yazan Jabarin, age 22, had perished in a raid on a refugee camp carried out by Israeli forces.²⁸

Any kiddie in school can love like a fool,
But hating, my boy, is an art.

Ogden Nash “A Plea for Less Malice Toward None”

On 16 April 2014, Palestine notified the international organ that Haram al-Sharif, which houses the holy Al-Aqsa Mosque and Qubbat Al-Sakhra, had been raided by over 1,000 occupying forces backed by Israeli border police. At least 25 Palestinians were injured.²⁹ Seven days had passed and a new letter to the Council arrived, reporting to it that Israeli forces had stormed the Al-Aqsa Mosque compound and attacked Palestinian worshippers.³⁰ On 25 April, Israel replied and informed the multilateral body that, since 13 April 2014, eight rockets had been fired from the Gaza Strip, directed at civilian areas in the towns and cities of southern Israel, and that it was restraining itself in its response.³¹

On 15 May 2014, Palestine told the UN organ that two Palestinians, Muhammed Odeh Abu Al-Thahir, age 15, and Nadim Siyam Nuwarah, age 17, partaking in demonstrations, had started their journey into the unknown as a result of Israeli military action.³² At the end of the month, the Council was informed that a 68-year-old Palestinian man had been severely beaten in a clash

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- 27 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others “Identical Letters Dated 20 March 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/621–S/2014/205” (20 March 2014).
- 28 Letter from the Chargé d’affaires a.i. of the Permanent Observer Mission of the State of Palestine to the United Nations to the Secretary-General and others “Identical Letters Dated 24 March 2014 from the Chargé d’affaires a.i. of the Permanent Observer Mission of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/622–S/2014/214” (24 March 2014).
- 29 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others “Identical Letters Dated 16 April 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/624–S/2014/280” (16 April 2014).
- 30 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and the President of the Security Council “Identical Letters Dated 21 April 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General and the President of the Security Council – A/ES-10/625–S/2014/289” (21 April 2014).
- 31 Letter from the Permanent Representative of Israel to the United Nations to the Secretary-General and the President of the Security Council “Identical Letters Dated 25 April 2014 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council – S/2014/301” (25 April 2014).
- 32 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and the President of the Security Council “Identical Letters Dated 15 May 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/628–S/2014/347” (15 May 2014).

between Palestinian worshippers and Israeli border police.³³ Israel responded on 2 June. It drew to the multilateral body's attention that, over the past four weeks, four separate rocket attacks had been launched at Israel from the Hamas-controlled Gaza Strip. Israel also announced that it was practicing self-restraint.³⁴

On 17 June 2014, Israel informed the international organ that three Israeli boys – Gilad Sha'er, age 16; Naftali Frenkel, age 16; and Eyal Yifrah, age 19 – had been kidnapped by Hamas terrorists and had been missing for five days.³⁵ A Palestinian reply reached the Council on the very same day: Ahmad Al-Sabarin, 20 years old, had been killed during an Israeli military raid on the Al-Jalazun refugee camp.³⁶ Palestine advised the UN body a few days later that Palestinian civilians Mustafa Hosni Aslan, age 22, and Mahmoud Jihad Muhammad Dudeen, 14 years old, had died as a result of an Israeli military operation.³⁷ On 30 June 2014, Israel let the Council know that the three Israeli teenagers kidnapped by Hamas had been found dead after an 18-day search, and that, since 2 June, more than 70 rockets had been fired from Gaza into Israel.³⁸ On the same day, Palestine answered back and reported that Israeli tanks had bombarded the town of Al Qarara: as a result, Mohammed Zayed Obeid had had his last hour in this world. Other casualties included Sakhr Burhan Daraghmeh, age 18, who saw his life prematurely ended while tending his sheep; Mohammed Mahmoud al-Toraifi, age 30; and Ahmed Sa'eed Khaled, age 27.³⁹

Day and night he thinks, why Kenny, why Chip, why Buddy, why them and not me?
Sometimes he thinks they're the lucky ones. It's over for them.

Philip Roth *The Human Stain*

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- 33 Letter from the Chargé d'affaires a.i. of the Permanent Observer Mission of the State of Palestine to the United Nations and the Secretary-General "Identical Letters Dated 29 May 2014 from the Chargé d'affaires a.i. of the Permanent Observer Mission of the State of Palestine to the United Nations Addressed to the Secretary-General and the President of the Security Council – A/ES-10/629–S/2014/381" (29 May 2014).
- 34 Letter from the Permanent Representative of Israel to the United Nations to the Secretary-General and the President of the Security Council "Identical Letters Dated 2 June 2014 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council – S/2014/385" (2 June 2014).
- 35 Letter from the Permanent Representative of Israel to the United Nations to the Secretary-General and the President of the Security Council "Identical Letters Dated 17 June 2014 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council – S/2014/416" (17 June 2014).
- 36 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 17 June 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/631–S/2014/418" (17 June 2014).
- 37 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 20 June 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/632–S/2014/429" (20 June 2014).
- 38 Letter from the Permanent Representative of Israel to the United Nations to the Secretary-General and the President of the Security Council "Identical Letters Dated 30 June 2014 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council – S/2014/454" (30 June 2014).
- 39 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 30 June 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/633–S/2014/455" (30 June 2014).

On 3 July 2014, the Council was informed by Palestine that 20-year-old Yousef Ibrahim Ahmed Ibn Gharra had been shot by Israel and had departed this world forever while returning to his home in the Jenin refugee camp.⁴⁰ Palestine wrote again four days later to report that, over the last three weeks, military assaults had led to the taking of life of at least 25 Palestinians and the wounding of at least 250 civilians. Recent information revealed that 16-year-old Mohammed Abu Khdeir was burnt alive. Fifteen-year-old Tariq Abu Khdeir, cousin to Mohammed, had also been brutally beaten.⁴¹ Israel responded advising the international organ that rockets continued to fall relentlessly on major Israeli cities and that Israelis would spend the night sleeping in bomb shelters.⁴² On 8 July 2014, Palestine replied: Israeli occupying forces had launched more than 150 military airstrikes on the previous day: Mohammed Habib and his son Mousa, age 19; Fakri Saleh Ajjouri; Abdullah Kaware; Mohammad Ashour, age 13; Riyad Kaware; Mahmoud Judeh; Bakir Mahmoud Judeh, age 22; Ammar Mohammad Judeh, age 22; and Hussein Mohammad Kaware, age 14, had succumbed there.⁴³

On 9 July 2014, Palestine reported to the Council the names of more Palestinians who had been infected by the presence of death during Israeli airstrikes: Abdel Nasser Abu Kwaik, age 60, and his son Khaled Abu Kwaik, age 29; Nayfa Farajallah; Abdel Hadi Al-Soufi, age 24; Hatem Mohammed Abu Salem, age 25; a baby girl, Raneem Abdel Ghafour, age one; Mohammed Malakeh, age two, and his mother, Hanaa' Malakeh, as well as Hatim Abu Salim; Saher Hamdan, age 40, and her son Ibrahim, age 14; a mother from the Al-Nawasreh family and her two children; several members of a family, including Ibrahim Mohammed Hamad, age 26; Mahdi Mohammed Hamad, age 46; Fawzia Khalil Hamad, age 62; Mehdi Hamad, age 16; Suha Hamad, age 25; Hani Saleh Hamad, in his sixties, and his son Ibrahim, in his twenties; an elderly woman, Salmiyya Al-Arja, and a child, Miryam Al-Arja.⁴⁴

On 11 July 2014, Palestine advised the UN organ that, since Monday, 7 July, Israeli air strikes had sent more than 100 Palestinians to the bottom of nothingness, among them: Salem Qandeel, Amer Al-Fayouni and Bahaa Abu Elail; Mahmoud Al-Haj, Tariq Saad Al-Haj, Saad Mahmoud Al-Haj, Omar Al-Haj, Najla Mahmoud Al-Haj and Amina Al-Haj – all from the same family; Raed Shalat, age 30, whose wife and their three children were injured; Ibrahim Khalil Qanan, age 24, and

40 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 3 July 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/635-S/2014/471" (3 July 2014).

41 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 7 July 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/636-S/2014/473" (7 July 2014).

42 Letter from the Permanent Representative of Israel to the United Nations to the Secretary-General and the President of the Security Council "Identical Letters Dated 7 July 2014 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council – S/2014/474" (7 July 2014).

43 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 8 July 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/637-S/2014/479" (8 July 2014).

44 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 9 July 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/638-S/2014/483" (9 July 2014).

his brother Mohammed Khalil Qanan, age 25; Ibrahim Swali, age 33, and his brother Mohammed Swali, age 28; Salem Al-Astal, age 55; Mohammed Al-Ackad, age 24; Abdullah Abu Ghazl, age four; Hussein Abu Jamei, age 57, and his son Ismail, age 19; Mohammed Ihsan Farawneh, age 19; Mahmoud Wloud, Hazem Baalousha and Alaa Abdel Nabi; Yasmeeen Al-Mutaweq, age four; Ahmed Zaher Hamdan, age 22; Mohammed Al-Kahlout; Sami Adnan Shildan, age 25; Shahd Helmi Al-Qarnawi, age five; Abdel Halim Ashra, age 54; Abdallah Abu Mahrouq; Anas Rizq Abu Al-Kas, age 30; Adnan Salem Al-Ashhab, age 40; Mazen Aslan and Shahraman Abu Al-Kas; Mohammed Rabii Abu Hmaidan, age 65; Wisam Abdel Razeq Ghannam, age 23; Mahmoud Abdel Razeq Ghannam; Kifah Shehada, age 20; Ghalia Deeb Ghannam, age seven; Mohammed Mounir Ashour, age 25; Nour Marwan Al-Najdi, age 10; Saber Sukkar, age 80; and Hussein Mohammed Al-Mamlouk, age 47.⁴⁵

As I left the house behind, I left my childhood behind too. I realized that our life had ceased to be pleasant ... Things had reached the point where the only solution was a bullet in the head of each of us.

Ghassan Kanafani (Palestinian writer) *Men in the Sun*

On 14 July 2014, Palestine brought to the Council's attention that, on the previous day, 18 members of the Al-Batsch family had been killed in an Israeli airstrike. Those who died were:

Nahed Nai'im Al-Batsch, age 41; Bahaa Majed Al-Batsch, age 28; Qusai Issam Al-Batsch, age 12; Mohammed Issam Al-Batsch, age 17; Ahmed Nu'man Al-Batsch, age 27; Yehya Ala Al-Batsch, age 18; Jalal Majed Al-Batsch, age 26; Mahmoud Majed Al-Batsch, age 22; Marwa Majed Al-Batsch, age 25; Majed Subhi Al-Batsch; Khaled Majed Al-Batsh, age 20; Ibrahim Majed Al-Batsch, age 18; Manar Majed Al-Batsch, age 13; Amal Hasan Al-Batsch, age 49; Anas Alaa Al-Batsch, age 10; Qusai Alaa Al-Batsch, age 20; Zakariya Alaa Al-Batsch and Aziza Youssef Al-Batsch, age 59. The Palestinian note also mentioned that, on 12 July 2014, an Israeli airstrike had killed, Ola Washahi, age 31; Suha Abu Saada, age 47; Mounir Al-Badarin, age 21, and Al-Khalil; and seriously wounded several others in a centre for disabled persons.⁴⁶

On 16 July 2014, Israel responded and informed the UN body that, on 14 July, Hamas had fired 47 rockets towards the towns and cities of Israel, prompting it to carry out self-defensive actions, which were announced in advance through leaflets, text messages and telephone calls.⁴⁷ The next day, Palestine let the multilateral organ know that Israeli forces had killed a further 23 Palestinians. Among the dead were brothers and cousins, nine-year-old Ismail, 10-year-old Ahed, 10-year-old Mohammed, and 10-year-old Zakariya, who were fired at while playing on the beach in Gaza City. Yasmin Al-Astal, age four; Osama Al-Astal, age six; and Raqiyya Al-Astal, age 70, passed

45 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 11 July 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/639-S/2014/489" (11 July 2014).

46 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 14 July 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/640-S/2014/491" (14 July 2014).

47 Letter from the Permanent Representative of Israel to the United Nations to Secretary-General and the President of the Security Council "Identical Letters Dated 16 July 2014 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council – S/2014/499" (16 July 2014).

away when Israeli strikes targeted them. A missile attack killed several members of a Palestinian family – Ibrahim Ramadan Abu Daqqa, age 10; his brother Amro Ramadan Abu Daqqa, age 25; their sister Madeline Abu Daqqa, age 27 – a pregnant mother of three – and their grandmother, Khadra Abu Daqqa.⁴⁸

You have suffered so much that even the devils fled from such pain.

Mario Vargas Llosa *The War of the End of the World*

On 21 July 2014, Palestine advised the Council of the following Palestinian casualties resulting from an attack on Gaza: at least 26 members of the Abu Jami family and 13 victims identified so far as Jawdat Tawfiq Ahmad Abu Jami, age 24; Tawfiq Ahmad Abu Jami, age five; Haifa Tawfiq Ahmad Abu Jami, age nine; Yasmin Ahmad Salamah Abu Jami, age 25; Suhaila Bassam Abu Jami; Shahinaz Walid Muhammad Abu Jami, age one; Rayan Tayseer Abu Jami, age eight; an elderly woman, Fatima Mahmoud Abu Jami; Rozan Abu Jami, age 14; and Ahmad Salhoub, age 34.

The Palestinian communication also stated that the Siyam family had lost 11 members to Israeli shelling: Sumud Nasser Siyam, age 26; Muhammad Mahrous Salam Siyam, age 25; Badir Nabil Mahrous Siyam, age 25; Ahmad Ayman Mahrous Siyam, age 17; Mustafa Nabil Mahrous Siyam, age 12; Ghayda Nabil Mahrous Siyam, age eight; Sherin Muhammad Salam Siyam, age 32; Dalal Nabil Mahrous Siyam, eight months old; and Kamal Mahrous Salamah Siyam, age 27. Five members of the al-Yaziji family, including Yasmin Nayif al-Yaziji; Mayar Nayif al-Yaziji, age two; Wajdi al-Yaziji; Safinaz al-Yaziji, and Anas al-Yaziji, age five, had also died.

The above-mentioned letter also advised the UN organ that, on Sunday, 20 July, Israeli forces had killed at least 72 Palestinians in the Shujaiya area of Gaza, 17 children would never grow up: Ibrahim Ammar, age 13, his brother Assem, age four, and their sister Iman, age nine; Saji Hasan Al-Hallaq, age four, his brother Kinan, age six, and their sibling Mohammed, age two; Shadi Isleem, age 15, and his siblings Alaa, age 11, and Fadi, age 10; Samia Al-Sheikh Khalil, age three, and her sister Hiba, age 13; Khalil Al-Hayyeh, age seven, and his sister Umama Al-Hayeh, age nine; Dima Isleem, age two; Mohamad Ayyad, age two; Rahaf Abu Jumaa, age four; Tala Al-Attawi, age seven; Dina Hamada, age 15; Omar Hamouda, age 10; Ghada Ayyad, age nine; Marah Al-Jammal, age 11; and Marwa Al-Sirsawi, age three. Other children killed by Israeli occupying forces since 17 July 2014 were Afnan Shuheiber, age eight, Jihad Issam Shuhaibar, age 10, and Wasim Issam Shuaibar, age nine, who died in an airstrike on their family home; Ahmad Ismail Abu Musallam, age 10, his sister Wala, age 12, and their brother Muhammad, age 15, who found his premature death when a shell hit their bedroom; Rahaf Khalil Al-Jbour, age four, killed by an airstrike; Yassin Al-Humaidi, age four, dead from injuries sustained in a strike; and Mohammad Shadi Natiz, age 15, and Mohammed Salim Natiz, age four, who departed eternally owing to Israeli tank shelling. On 18 July, death knocked on the door of the Abu Jarad family eight times, five of them for children: 1. Siham Mousa Abu Jarad, age 15; 2. Ahlam Na'im Abu Jarad, age 13; 3. Haniyeh Abdelrahman Abu Jarad, age three; 4. Samih Na'im Abu Jarad, 12 months old; and 5. Mousa Abdelrahman Abu Jarad, six months old. On 19 July, five Palestinian civilians were

48 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 17 July 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/641–S/2014/506" (17 July 2014).

killed by shelling, including Mahmoud Al-Zuwedi; his wife Dalia and their two children, Nagham, age two, and Ro'ya, age three; as well as Mohammad Al-Zuwedi, age 20.⁴⁹

There are in life such hard blows ... I don't know!
Blows seemingly from God's wrath; as if before them
the undertow of all our sufferings
is embedded in our souls ... I don't know!

Cesar Vallejo "Black Messengers"

On 23 July 2014, Palestine informed the Council that, in the last 24 hours, 60 more Palestinians had been killed by Israeli occupying forces. The events reported included the following: on 22 July, Israeli forces killed four members of the Hajjaj family – Rawan Ziad Hajjaj, age 15; Yousef Muhammed Hajjaj, age 28; Muhammad Shehadeh Hajjaj, age 31; and Fayzeh Saleh Hajjaj, age 66; and two elderly women, Hakema Nafe Abu Odwan, age 75, and Najah Nafe Abu Odwan, age 85. On 21 July, 10 members of the Al-Qassas family were killed when their home was shelled, including six children – three-year-old Saman, four-year-olds Arwa and Mohamad, seven-year-olds Isra' and Nesma, and 13-year-old Layma. Eleven people, including six members of the Kelani family – Ibrahim Kelani and his wife and their four children – gave up their soul and 40 others were injured in an attack by Israeli warplanes. On 20 July, a young Palestinian man, searching for family members in the rubble was killed by an Israeli sniper.⁵⁰

On 24 July 2014, Palestine reported to the Council that, in less than 24 hours, more than 120 Palestinians had been killed. Israeli forces targeted a school of the UN Relief and Works Agency for Palestine Refugees (UNRWA), resulting in the death of 17 Palestinians and injuries to more than 200 others sheltering there. Other casualties included at least 10 members of the Al-Astal family, including three children – Amin Tha'er Al-Astal, age three; Nada Tha'er Al-Astal, age five; and Mohammed Ismail Al-Astal, age 17. Israeli forces ended the existence of five members of the Abu Aita family: Ibrahim Abdullah Abu Aita, age 67; Jamila Salim Abu Aita, age 65; Ahmad Ibrahim Abdullah Abu Aita, age 30; and Adham Ahmad Abu Aita, age 11. The communication also stated that 13-year-old Baker Al-Najjar had been killed by a missile; Yazid Sa'ed Al-Batsh, age 23, had died from wounds caused by Israeli shelling; and that Amir Adel Siyam, age 13, and Hadi Abdulhamid Abdunabia, age one, had seen their last day after an Israeli raid.⁵¹

The UN organ was informed by Palestine on 25 July 2014 that Palestinians taking part in a peaceful civilian demonstration in the West Bank were met with lethal force by Israeli occupying

49 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 21 July 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/642–S/2014/513" (21 July 2014).

50 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 23 July 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/643–S/2014/519" (23 July 2014).

51 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others "Identical Letters Dated 24 July 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/644–S/2014/530" (24 July 2014).

forces. Among those who had lost their lives were Hashem Abu Maria, age 47; Tayeb Abu Shehada, age 22; Sultan Al-Zaaqiq, age 30; Mohammed Eyad Al-Araj, age 19; Abdelhamid Ahmed Ebreighith, age 39; Mahmoud Saleh Hamamrah, age 36; Majd Sufyan, age 27; and Eid Rabah Fdeilat, age 28. Amidst those killed in Israeli airstrikes and bombings in Gaza were Jihad Hassan Hamad, age 20; Imad Abu Kamil, age 20; Tariq Zahad, age 22; Samer Abu Kamil, age 26; Maram Fayyad, age 26; Walid Said Al-Harazin, age five; Najat Ibrahim al-Najjar, age 35; Sharif Muhammad Hassan, age 27; Muhammad Khalil Hamad, age 18; Mamdouh Ibrahim Al-Shawwaf, age two; Rasmiya Salama, age 24; Abdelhadi, age nine, Salah Ahmad Abu Hassanain, age 45, and his son, Abdel Aziz, age 14. The 25 July communication also revealed that Shayma Hussein Abdelqader Qannan, age 23, who had died in Israeli shelling on her family home in Deir Al-Balah, was pregnant, and doctors at Al-Aqsa hospital were able to save her baby.⁵²

He told me about his 8-year-old daughter, Zeina, who refuses to speak
to God since her grandmother was killed and tells her father:
“God is a weak one. I will never say God again. He can’t change anything.”

Roger Cohen (non-fiction)⁵³

On 30 July 2014, Palestine reported to the Council that at least 15 Palestinian civilians were killed and almost 100 wounded when Israeli tanks shelled a UN school. On 29 July, the Abu Jabber family lost 16 members, and the Al-Agha family, 13. On 28 July, 40 people were wounded, and there was no sense in invoking tomorrow for 10 Palestinian people, including eight children, when Israel shelled a park in Gaza City. On 27 July, a 22-year-old man and a four-year-old child were killed when their house was shelled. The letter also mentioned that one hundred and forty-seven people had been pulled from the rubble of flattened homes on Saturday, 26 July, during the period of the humanitarian ceasefire, including the bodies of 11 members of the Hilo family. Finally, the note indicated that life ended for approximately 20 members of the Al-Najjar family, including 11 children, and many others were wounded when their home was attacked, and that, lastly, Israel had heavily shelled Beit Hanoun hospital, injuring 60 paramedics and patients.⁵⁴

in the act of survival he lived a dozen lives and saw more death than he ever thought he would see.

John Hersey *Hiroshima*

52 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others “Identical Letters Dated 25 July 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/645–S/2014/539” (25 July 2014).

53 Roger Cohen “Gaza Is Nowhere” *The New York Times* (online ed, New York, 30 December 2014) <www.nytimes.com>.

54 Letter from the Permanent Observer of the State of Palestine to the United Nations to the Secretary-General and others “Identical Letters Dated 30 July 2014 from the Permanent Observer of the State of Palestine to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/646–S/2014/551” (30 July 2014).

The narrative just summarised repeats itself in its violence and civilian suffering in the letters received by the Council from August 2012 to June 2013,⁵⁵ as well as in those randomly chosen backwards: in the communication sent by Israel on 12 March 2011⁵⁶ and replied to by Palestine on 22 March 2011;⁵⁷ in the letter forwarded by Israel on 18 March 2010⁵⁸ and answered by Palestine on 23 March 2010.⁵⁹ Thus, the narrative presented here is not an isolated event.

The letters to the Security Council share a stunning pattern: in all of them Israel and Palestine have ignored each other's civilian casualties and civilian suffering.⁶⁰ That such a situation is taking place at a time when the armed conflict is close to reaching its seventh decade should vex both.

It is important to mention that the narrative contained in the previous part is, to be sure, a fraction of the reality of the Palestinian and Israeli civilian suffering, since the letters themselves do not include all of it. Further, can the Palestinian notes be overstating civilian casualties? There is no need to assume that all the Palestinian casualties were civilians who were entitled to protection according to international humanitarian law. Although the present author has excluded in most cases those casualties in which Palestine states that the person was directly targeted by Israeli forces – since the civilian nature was contested by the latter⁶¹ – it is also possible that some of the Palestinian casualties were civilians taking direct part in hostilities, according to art 51 of the Additional Protocol I. Finally, it is also possible that some of the Palestinian casualties were lawful according to international humanitarian law, in particular the principle of proportionality. Such possibilities still leave intact a great deal of the Palestinian civilian tragedy reported to the Council.

But there is an additional question: do the communications always tell the truth? Although Churchill once said that “the first casualty in war is the truth,” there is evidence that the letters are genuine: neither Israel nor Palestine refuted what the other expressed in its notes to the Council. To be sure, rebuttals may be made in different fora, but they were not made to the Council and the General Assembly and, in general, to the international community. Furthermore, there is no need to assume that the letters are always accurate, because there is a fundamental truth regarding both

55 The author has reviewed all of the letters from Israel and Palestine reported by the Council as having been received during the said period in its annual report to the General Assembly. As to them, see *Report of the Security Council 1 August 2012–31 July 2013* (General Assembly Official Records, 68th Session, Supplement No 2) at 119–125.

56 Letter from the Representative of Israel to the Secretary-General and the President of the Security Council “Identical letters from the representative of Israel to the Secretary-General and the President of the Security Council – S/2011/136” (12 March 2011).

57 Letter from the Observer of Palestine to the Secretary-General and the President of the Security Council “Identical letters from the observer of Palestine to the Secretary-General and the President of the Security Council – S/2011/173” (22 March 2011).

58 Letter from the Representative of Israel to the Secretary-General and the President of the Security Council “Identical letters from the representative of Israel to the Secretary-General and the President of the Security Council – S/2010/137” (18 March 2010).

59 Letter from the Observer of Palestine to the Secretary-General and the President of the Security Council – S/2010/155 “Identical letters” (23 March 2010).

60 In legal terms, the letters to the Council are unilateral declarations. See in this regard, International Court of Justice *Nuclear Tests Case (New Zealand v France)* [1974] ICJ 457 at [46]–[49]; and International Law Commission *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto* (2006) Principle 7 at 378.

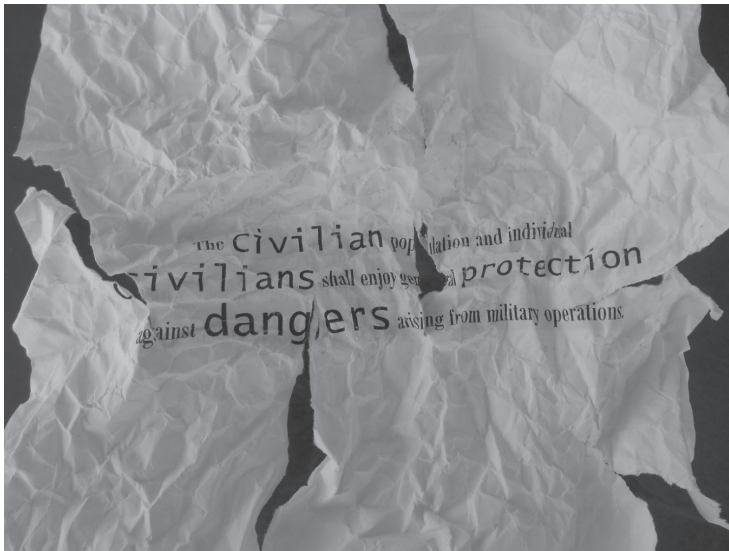
61 The communications sent by Palestine on the following dates mentioned Israeli operations against Palestinians. In 2012, 6 September, 8 October, 24 October, 24 October, 1 November, 12 November, 14 November and 20 November. In 2013, 24 January, 14 March, 23 August, 27 November and 19 December. Finally, in 2014, 23 January, 27 February, 5 March, 17 June, 30 June, 8 July, 14 July, 17 July, 24 July and 25 July.

Israel and Palestine: neither expressed regret for the other's civilians' suffering during the 65th and 66th years of the conflict.

In addition, it can be claimed that letters to the Council may have practical limitations in terms of being suitable to recognise the other's civilian suffering. This would be the case of those communications in which Israel had invoked the right of self-defence under art 51 of the UN Charter and notified the Council of its use of force for the said purpose, and according to this provision.⁶² The argument would go on to state that, under this circumstance, these kinds of communication had a specific objective, that of complying with a legal requirement of the UN Charter, and room for these considerations would be narrow in practice. It could also be said that, in other situations, the letters could be forwarded to the Council in order to make it aware of a threat to international peace and security and to request its action under ch VII.

While this argument may be based on practical considerations, the limitations the argument refer to are not legal. In effect, in legal terms, there is nothing preventing UN members from invoking art 51 and from informing the Council of situations that constitute threats to international peace and security and, at the same time, recognising civilian suffering other than their own. A letter to the Council by Israel suffices to prove this. On 11 January 2005, Israel forwarded to the Council a communication related to the situation in Lebanon. Responding to an attack, Israel killed a French national and UN officer and expressed "sorrow at the death of Jean-Louis Valet, and offers its condolences to his family and loved ones."⁶³

II. OPEN CONCLUSION



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62 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits [1986] ICJ 14 at [200].

63 Letter from Permanent Representative of Israel to the United Nations to the Secretary-General "Letter Dated 11 January 2005 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General – A/59/667–S/2005/14" (11 January 2005).

64 Concept and photography by Alberto Alvarez-Jimenez.

As Thomas Franck said:⁶⁵

The effectiveness of the rules in influencing difficult decisions implicating the national interest inevitably must depend, at least in part ... on the calculations of the parties regarding the likelihood that bad consequences will follow a finding that they have acted unlawfully ...

By analogy with Umberto Eco's *The Open Work*, in which he highlights the existence of deliberately unfinished works of art,⁶⁶ this is an open international law article. It proposes scholars to answer a fundamental legal question for the benefit of civilians: how to *reinterpret* international humanitarian law or international criminal law in a way that alters adversaries' calculations and makes each other's civilian tragedy visible to them in this armed struggle or in any other in which the parties are behaving likewise? Franck calls for bad consequences for governments. However, could different branches of international law be reinterpreted in a way that creates instead *incentives* for any of the parties to acknowledge the other's civilian suffering?

The answers to these questions should be several and the outcome of individual or collective efforts. The present author, to be sure, has his. They are part of another piece in this volume. Here, it is more than enough to focus all the lights on the *scale* of Israeli and Palestinian civilian tragedy, on the *shameful* silences of their respective governments, and on the *need* to offer answers to the foregoing questions. Decades of the evolution of international law aimed at strengthening the dignity of human beings should not allow this silence to happen.

65 Thomas M Franck "On Proportionality of Countermeasures in International Law" (2008) 102 *American Journal of International Law* 715 at 728.

66 Umberto Eco *The Open Work* (Harvard University Press, Cambridge (Mass), 1989) at 4.

PROTRACTED ARMED CONFLICTS, INVISIBLE CIVILIAN SUFFERING AND INTERNATIONAL LAW (II)

BY DR ALBERTO ALVAREZ-JIMENEZ

The United Nations Security Council receives communications from Israel and Palestine almost weekly, telling the story of their civilians' indescribable affliction. Fifty were sent from August 2013 to July 2014 – the 65th and 66th years of the conflict.¹ In one letter after another, both states expressed not a single word of concern for the other's civilians.

Reacting to this appalling reality, this article seeks to find novel ways in which international humanitarian law and international criminal law could be reinterpreted in order to make the civilian ordeal visible to the adversary, be it Israel or Palestine or any other state behaving likewise.

The first way is to establish, on the adversary, the duty to provide an explanation after attacks with apparently excessive civilian casualties or significant risk to civilian populations. Its contents would include, among others, what commanders estimated as being the expected civilian casualties of a particular attack and of the concrete and definite military advantage that was pursued by it. Such duty would be derived from the principle of distinction or the principle of proportionality interpreted in light of the Martens clause. The second way is to interpret the Rome Statute in ways that commanders could place themselves in a better legal position in criminal proceedings if commanders explained post-attack the reasons for the apparently excessive civilian casualties or significant risk to civilians.

In addition, this article makes a more general claim and suggests that the protracted nature of an international conflict could prompt innovative interpretations of international humanitarian law provisions, the principle of distinction and the principle of proportionality among others, aimed at offering higher degrees of protection, under certain circumstances, to those specific civilians who have already been casualties in the prolonged armed struggle and are about to be so again in a forthcoming military operation. The aggregation of civilian misery throughout decades-long conflicts would be at the root of this proposal.

Are these suggestions the solution for the civilians in Israel and Palestine, or in any other countries facing protracted conflicts, whose suffering is being overlooked? Certainly not. Much, much more is required. However, making massive civilian affliction visible for the other party could be the starting point of an incremental process aimed at providing temporary or permanent solutions, and in any case, it is better than the sheer invisibility of civilian suffering for the other party reigning today.

Neither can it be expected that explanations given by parties to armed conflicts be appreciated by all the affected civilians. The suffering of some may be so overwhelming that the explanation may be just too little or plainly irrelevant to them. However, the situation may be different for others, who, thanks to the justification, may be able to grasp at least some understanding of the

¹ See Alberto Alvarez-Jimenez "Letters to the Security Council by Two Prisoners of War, Israel and Palestine" (2018) 26 Wai L Rev 61.

reasons for their particular suffering in relation to specific military operations by the adversary. This possibility is enough for the validity of the proposal in general terms.

A third caveat: acknowledgement of civilian suffering does not necessarily equate to admission of international wrongful acts. Proper wording of the given unilateral statement may avoid this effect. For instance, regrets for civilian casualties can be made by a state claiming that an operation against a military target was proportionate under international humanitarian law.

A final caveat: there is a measure of hope, not naiveté, in the proposals here. Although happily not a victim himself, the present writer has first-hand experience spanning a few decades living in a country with a non-international armed conflict with limited visibility for the victims.

I. HOW TO INTERPRET INTERNATIONAL LAW TO MAKE CIVILIAN ORDEALS VISIBLE TO ADVERSARIES IN ARMED CONFLICTS

The first question is, what can international law do in order to influence politics and introduce changes aimed at making Israel and Palestine more aware of each other's civilians' suffering? The first way is to carry out interpretations of international humanitarian law that help alter the calculations of both parties in a way that achieves this purpose.²

Before starting, it is important to highlight that the purpose of this endeavour is not to make each and every civilian casualty visible to the adversary. Such objective would plainly ignore practical military and political considerations. The suggestions are limited to particular events in which the principle of distinction³ or the principle of proportionality⁴ seems to have been violated by the apparently excessive number of civilian casualties or by the massive alteration of the ordinary lives of millions of civilians. The second clarification is that the topics explored should not be seen as the only ones possible to make civilian suffering visible to the other party. Much more can and, in fact, should be done in the future to this aim.

A. *The Duty to Explain as Part of the Principle of Distinction and the Principle of Proportionality in International Humanitarian Law*

Civilians affected by what appears to be a violation of the principle of distinction deserve a clear explanation for their suffering, when there seems to be no expected military advantage. The principle of distinction is so fundamental to International Humanitarian Law that a party blamed

2 Thomas M Franck "On Proportionality of Countermeasures in International Law" (2008) 102 *American Journal of International Law* 715 at 728.

3 The principle of distinction, as a customary international law, is so defined by the International Committee of the Red Cross (ICRC):

The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.

The principle applies to both international and non-international armed conflicts.

4 The principle of proportionality in customary international law has the following formulation: "Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, damages to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited." See Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (International Committee of the Red Cross, Cambridge, 2005) Volume I: Rules at 46; See Also Jason D Wright "'Excessive' ambiguity: Analysing and refining the proportionality standard" (2012) 94 *International Review of the Red Cross* 819 at 837.

for failing to comply with it should be compelled to explain what went wrong at the end in the given military operation.

The duty to explain in the event of apparent violations of the principle of proportionality is equally important, even though the protection to civilians that this principle affords is lower than that of the principle of distinction. Loss of civilian life and property is lawful under the principle so long as it is not excessive in light of the anticipated military advantage.

However, violations of the principle of proportionality may be much more significant in terms of civilian suffering than those of the principle of distinction in certain events. Targeting a single civilian who is not taking part in hostilities is by itself a violation of the principle of distinction: there will be civilian suffering for the victim and his relatives. But a violation of the principle of proportionality would usually be more substantial, because appearance of the violation will occur when there have been seemingly excessive civilian casualties or damages to civilian property in light of the expected military advantage. For this reason, the duty to explain as part of the latter principle is equally important.

Explanations of this character have occurred. Take, for example, the North Atlantic Treaty Organization (NATO) attack on a hospital run by Doctors Without Borders in Kunduz, Afghanistan, on 3 October 2015. The United States acknowledged a mistake hours later, started an investigation,⁵ apologised to Afghanistan and to the non-governmental organisation (NGO),⁶ and announced compensation for the victims and their families.⁷

A second telling example is the recent military attack carried out by Saudi Arabia in Yemen in October 2016, targeting what was supposed to be a meeting attended by several Houthi military leaders. The attack was based on intelligence requesting an immediate attack on a valid military target. The decision to carry out the operation did not follow standard procedure, and as it turned out, the meeting was a funeral. Close to 150 people were killed and hundreds were injured. The Saudi-led coalition shortly after the operation deemed it regrettable and sad, acknowledged the mistake in the targeting, ordered an internal investigation of the personnel involved, and offered to compensate the victims.⁸

The value of the explanation for the affected civilians was highlighted, an encouraging fact supporting the claim made in this article. According to media reports, “Mohammed Atbukhaiti, a senior Houthi official, welcomed the findings but said they showed how the coalition is “disorganized and reckless” and treats “the lives of the Yemeni people in a careless and disrespectful manner.”⁹

Apologies offered to civilians harmed by military mistakes carried out by a guerrilla group in a non-international armed conflict have also taken place. An example is the acknowledgement made by the National Liberation Army (ELN), a Colombian rebel group, on its website after killing two

5 Missy Ryan and Tim Craig “Top US general in Afghanistan: Hospital was ‘mistakenly struck’” *Washington Post* (online ed, Washington (DC), 6 October 2015).

6 Roberta Rampton and Stephanie Nebehay “Obama apologizes for Kunduz attack, MSF demands independent probe” *Reuters* (online ed, United States, 7 October 2015).

7 Sandra Maler “US to make payments to families of Kunduz air strike victims: Pentagon” *Reuters* (online ed, United States, 10 October 2015).

8 Sudarsan Raghavan “US-backed, Saudi-led coalition found responsible for Yemen funeral attack that killed more than 100” *Washington Post* (online ed, Washington (DC), 15 October 2016).

9 Raghavan, above n 8.

civilian workers in a military operation against a public oil pipeline. The ELN asked for forgiveness from the relatives and friends of the victims.¹⁰

1. *Elements of the duty to explain*

(a) Contents and limitations

In the event of apparently excessive civilian casualties, a duty to explain after the specific attack¹¹ should exist for the party that carried it out and for the benefit of the civilians that survived the attack or were affected by it, whose physical or psychological traumas would likely be severe and long lasting. The content of the duty would be based on information that could be disclosed in relation to the decision-making process, pursuant to the domestic military rules of engagement, that took place before the attack.¹² The duty should start with an explanation of what kind of information commanders had about the concrete and definite military advantage¹³ that was pursued and about the expected civilian casualties of a particular target before the attack, if this was the case. Commanders should also explain why the collected information was the reasonable one to have available in light of the circumstances.¹⁴ They should also provide information about the precautions that were taken pursuant to art 57 of Additional Protocol I, if any, and of the possible causes of the significant civilian casualties that took place.¹⁵ In the event of mistaken targeting that

10 See “Eln reconoce error por el asesinato de dos contratistas de Ecopetrol y pide perdón” *Pulzo* (online ed, Colombia, 20 September 2014).

11 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), International Committee of the Red Cross (ICRC) 1125 UNTS 3 (adopted 8 June 1977), art 49(1) defines attacks as “acts of violence against the adversary, whether in offence or in defence.”

12 For illustrative purposes, Beer so described the United States decision-making process:

[T]he wartime decision-making model used in the US army consists of six steps, including intelligence preparation and mission analysis, the development of friendly courses of action (COA), the analysis of these COAs, comparison of the relevant alternative courses and decisions, the development of plans-orders and transition. It requires the commander in the field to develop and present several relevant alternatives and choose the best course of action.

Yishai Beer “Humanity Considerations Cannot Reduce War’s Hazards Alone: Revitalizing the Concept of Military Necessity” (2015) 26 *Eur J Int Law* 801 at 805–806 (footnotes omitted). Other elements to be considered, if they were available, could be life patterns of the civilian population, timing of the operation, weather, and the reliability of the intelligence.

13 According to the ICRC, “A military advantage can only consist in ground gained and in annihilating or weakening the enemy armed forces.” See International Committee of the Red Cross (ICRC) “Comment No 2218 to Article 57 of Additional Protocol I” <www.icrc.org>.

14 As to the standard of the reasonable commander in the application of the principle of proportionality, see Enzo Canizzaro “Proportionality in the Law of Armed Conflict” in Andrew Clapham and Paola Gaeta (eds) *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, Oxford, 2014) at 332 and 338–339.

15 Attacks with extensive civilian casualties would not be proportionate even if the direct and concrete military advantage were significant. See International Committee of the Red Cross “Comment No 1980 to Article 51 of the Protocol I” <www.icrc.org>. The International Committee of the Red Cross in its Commentary to art 57 of Protocol I mentions some of the elements that can have a bearing on incidental civil losses.

The danger incurred by the civilian population and civilian objects depends on various factors: their location (possibly within or in the vicinity of a military objective), the terrain (landslides, floods etc.), accuracy of the weapons used (greater or lesser dispersion, depending on the trajectory, the range, the ammunition used etc.), weather conditions (visibility, wind etc.), the specific nature of the military objectives concerned (ammunition depots, fuel reservoirs, main roads of military importance at or in the vicinity of inhabited areas etc.), technical skill of the combatants (random dropping of bombs when unable to hit the intended target).

puts in question compliance with the principle of distinction, commanders would have to explain what the error was and why it took place. If, on the contrary, there was a valid military target, then the duty to explain should include an explanation of whether the attack was still proportionate under international humanitarian law.¹⁶ There is no contradiction in this analysis: the civilian casualties were ex post significant, and compliance with the principle of proportionality was in doubt.¹⁷ The attacking state or party would have to explain why the civilian casualties were so high and why, in its view, the attack was still lawful in light of the ex ante information.

The duty to explain would exist even if civilians received warnings from the opponent before the attack was launched, pursuant to art 57(2)(c) of Additional Protocol I.¹⁸ In effect, the significant extent of civilian suffering in the wake of the attack puts in question compliance with the principles of distinction and proportionality as well as the effectiveness of the said warnings, a requirement of the said provision. In addition, warnings say nothing about the reasons for the attack. Thus, explanations should also be given.

The letter sent by Palestine to the Council on 21 July 2014 would illustrate these particular points. The note informed of the death of 26 members of the Abu Jami family as a result of an Israeli operation.¹⁹ The extent of the civilian casualties and suffering in this particular event calls for an explanation, since there appears to be a violation of the principle of distinction or proportionality. Israel would need to explain all of the above-mentioned elements and the reasons for the regrettable outcome.²⁰ Likewise, Palestine would need to explain Hamas's launching of

16 There are other important benefits of the duty to explain, such as gaining insight into commanders' decision-making process and creating a data set of indicators to be used for the purpose of proportionality assessments. These benefits deserve to be explored and are left for future research.

17 Although, specifically, compliance with the principle of proportionality regarding an attack cannot be carried out with the benefit of hindsight, debates on such compliance can be made on the basis of the effects of the attack, and "a plain and manifest breach of the rule [the principle] will be recognizable." – Michael Bothe "War Crimes" in Antonio Cassese, Paola Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002) at 352.

18 International Committee of the Red Cross "Comments 2223–25 to Article 57 of Additional Protocol I" <www.icrc.org>. This provision had its origin in art 26 of the 1907 Hague Regulations and is also a rule of customary international law. See: International Committee of the Red Cross "Rule 20 Advance Warning" Customary IHL <<https://ihl-databases.icrc.org>>.

19 Thirteen victims had been identified at the time of the letter: Jawdat Tawfiq Ahmad Abu Jami, age 24; Tawfiq Ahmad Abu Jami, age five; Haifa Tawfiq Ahmad Abu Jami, age nine; Yasmin Ahmad Salamah Abu Jami, age 25; Suhaila Bassam Abu Jami; Shahinaz Walid Muhammad Abu Jami, age one; Rayan Tayseer Abu Jami, age eight; an elderly woman, Fatima Mahmoud Abu Jami; Rozan Abu Jami, age 14; and Ahmad Salhoub, age 34. See Email from the Permanent Observer of the State of Palestine to the United Nations, the Secretary-General, the President of the General Assembly and the President of the Security Council "Identical letters dated 21 July 2014 from the Permanent Observer of the State of Palestine to the United Nations addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/642–S/2014/513" (21 July 2014).

20 Israel is not party to Protocol I, but the duty to explain would derive from the principle of proportionality under customary international law. See above n 4.

rockets into Israeli civilian areas,²¹ affecting the life of thousands of Israeli civilians of all ages and genders.²² This action puts in doubt compliance with any of the said principles by Palestine. In sum, the Palestinian and Israeli civilians deserve *at least* an account from the adversary to make some sense of the reality they have faced or will face as a result of the attacks.

The duty to explain could face some limitations in the event of ongoing internal investigations against the commanders and military personnel that planned or executed the military operation in question or when there was sensitive information that could not be disclosed for national security reasons. Indeed, while a full explanation is the ideal, ongoing investigation might not make such explanations possible. However, it does not follow from the existence of such investigations or of national security reasons that they should always prevent the acknowledgment of the other's civilian suffering, nor could it be said that these reasons should always preclude the existence of a partial explanation for the benefit of the other's affected civilians or, at a minimum, some acknowledgement and regret for such suffering.²³ In the end, affected civilians need an explanation of the reasons behind their suffering, and it might not be indispensable for them to know whether or not and on which grounds the military personnel involved acted contrary to their domestic law. Nor could it be necessary for the civilians to get all of the relevant facts divulged.

The duty to explain also presupposes that some of the facts on which the claim of violation of the principles of distinction or proportionality have taken place, and their existence has been either admitted by the attacking party, or corroborated or deemed credible by independent actors either public or private, such as NGOs, media outlets, or the International Humanitarian Fact-Finding Commission, established by Additional Protocol I to the Geneva Conventions, or other fact-finding missions created by the UN General Assembly or the Security Council. To be sure, there is no duty to explain until some facts have been verified, and there will be no duty if the claim of violation of the principles of proportionality and distinction is rooted in falsehoods.

There are connections between the duty to explain as part of the principles of distinction and proportionality in international humanitarian law and the so-called right to the truth in human rights law, as defined by several international treaties.²⁴ Both compel states to submit information to victims or their relatives aimed at offering explanations for state actions that have directly or indirectly harmed them. There are, nonetheless, some differences. First, the right to truth usually,

21 The status of Palestine within the United Nations as a non-member state brings up the question of whether or not Hamas's actions can be attributed to Palestine. Although Hamas and Fatah, which is the domestic authority that represents Palestine internationally, have fought each other, Hamas also functions as a political party, has participated in elections in the West Bank and the Gaza Strip, and has been the administrative authority in the latter and employer of Palestinian civilian servants. See AFP "Hamas employees in pay protest at unity govt Gaza HQ" *YAHOO News* (online ed, United States, 14 January 2015). All these elements combined could lead to the initial conclusion that Hamas is a Palestinian public entity and not merely a non-state actor whose actions, to be attributed to Palestine, would need to meet the requirements of art 8 of the International Law Commission's Articles on State Responsibility.

22 According to the ICRC, Palestine acceded to Additional Protocol I on 2 April 2014. See International Committee of the Red Cross "Treaties, States Parties and Commentaries: Palestine" <<https://ihl-databases.icrc.org/>>; Prior to this accession, Palestine was bound by customary international law. See above n 3.

23 Lack of explanations may have a more arcane reason: the need to avoid making military incompetence evident. Obviously, such incompetence could not be justification for further dehumanisation of armed conflicts. On the connection between violations of the principle of proportionality and military ineptitude, see Beer, above n 12, at 805–806.

24 See, for instance, art 32 of Protocol I to the Geneva Conventions and art 3 of the European Convention on Human Rights. On the right to truth, see Yasmin Naqvi "The Right to the Truth in International Law: Fact or Fiction?" (2006) 88 *IRRC* 245; Dermot Groome "The Right to Truth in the Fight against Impunity" (2011) 29 *Berkeley J Int'l L* 175.

although not exclusively, deals with persons who have disappeared while under the custody of a state, while the duty to explain as part of the principles of distinction and proportionality does not obviously presuppose such custody. Second, the right to the truth includes, under certain human rights treaties, the obligation to investigate and prosecute those who committed the forced disappearance and to compensate for the harm done.²⁵ The duty to explain suggested here as part of the principles of distinction and proportionality does not explicitly go that far, although it is not unlikely that the explanation the duty puts forward might lead to domestic or international proceedings in which investigation, prosecution and compensation would take place.²⁶

(b) Timing, medium of explanation, and benefits of the duty to explain

Additional elements of the duty to explain are the following: its timing, who would make the explanation, the medium to be used, and what states gain by offering explanations to the other's affected civilians.

As to the timing, regret for the other's civilian casualties would not need to wait until after a full investigation is carried out. Without prejudice for an investigation, the duty to explain can exist independently. This would be so because compliance with the principles of distinction and the principle of proportionality is assessed on the basis of the information available before the attack, some of which could be disclosed. This was in fact what happened with the above-mentioned NATO attack in Kunduz. The explanation came first and the investigation followed it.²⁷ Nor would regret always have to take place shortly after the given attack, although the sooner the better for the victims.

As to the medium to transmit the explanation, it would be one that makes it possible for the other's affected civilians to be aware of the acknowledgment. The statement could be made easily available to the public, through websites, Facebook, or Twitter accounts, among others; transmitted to a reliable third state or the International Committee of the Red Cross; or forwarded to UN organs, such as the Security Council itself. It would be a unilateral declaration by any authority chosen by the given state, lacking specific formalities, and it would be expected that the recipient of the declaration would, at a minimum, transmit the declaration to the other state or the affected civilians, or both.

An additional question is, what would states gain by acknowledging civilian suffering through the duty to explain? In general, respect for civilians in armed conflicts stands to benefit the parties' own population. This applies also to the acknowledgment of the other's civilian suffering: the

25 *Blake v Guatemala* (United States Inter-American Court of Human Rights 24 January 1998) (ser C) No 36, para 97, referring to art 1(1) of the American Convention on Human Rights; See also Pablo de Greiff *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence* (A/HRC/21/46, 2012) at [23].

26 For a clear example, see events related to the above-mentioned NATO attack on a Doctors Without Borders hospital in Afghanistan and the attack on a funeral in Yemen by a Saudi-led coalition. See Ryan and Craig, above n 5; Raghavan, above n 8.

27 According to media reports, American Defense Secretary Ashton B Carter said he would hold those responsible accountable: see Ryan and Craig, above n 5.

It is worth noting that there is an explicit obligation to investigate grave breaches of the Geneva Conventions. See, for instance, Article 146 of the Fourth Geneva Convention. Article 87 of Additional Protocol I contains a wider obligation regarding any breach of the Convention and the Protocol. See: Amy ML Tan "The Duty to Investigate Alleged Violations of International Humanitarian Law: Outdated Deference to an International Accountability Problem" (2016) 49 *New York University Journal of International Law & Politics* 181 at 200–203.

acknowledgment by one party may create incentives for similar behaviour by the other, when both are ignoring such suffering. Reciprocity, then, may be one of the outcomes of the duty to explain in international armed conflicts, although much less so in non-international conflicts. A second could well be that of commanders' avoiding international criminal responsibility in close cases of violation of the war crimes provided for in art 8(2)(b)(i) and (iv) of the Rome Statute.²⁸ And last but not least, states would be making a contribution to the humanisation of the conflict, certainly not a minor gain in the long run and with a view to ending the given conflict.

2. *Legal grounds of the duty to explain*²⁹

The duty to explain should not be regarded as a free-standing obligation, but as an additional duty to those already incorporated within the principles of distinction and proportionality. In effect, upon looking carefully at these two principles, it is possible to identify that each of them comprises a set of duties.

First, compliance with the principle of distinction by any party to an armed conflict demands as a key duty that before any attack the party carry out actions aimed at identifying the targets as military. The duty to explain would be added if, in the aftermath of operations, the target ended up being exclusively of a civilian nature. Second, compliance with the principle of proportionality includes several duties: the duty to identify the military advantage to be gained, the duty to identify and estimate the expected civilian casualties, and the duty to assess whether or not the latter are excessive in light of the military benefit. The duty to explain would be an additional element of this principle, to be carried out after the operation if the civilian casualties appear to be excessive.

There is no explicit duty to explain within the contents of the principles of distinction and proportionality. However, the duty could emerge as a result of an interpretation of any of these principles in light of elemental considerations of humanity and the Martens Clause, which provides:³⁰

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

In effect, according to the late Antonio Cassese, the Clause has been used to advance innovative interpretations of certain rules of international humanitarian law. For this purpose, the Clause has been interpreted in many ways over the years. In relation to the legal bases of the duty to explain,

28 More on this in part I B below.

29 The duty to explain is, in terms of policy and reality, a good starting point to acknowledge the other's civilian suffering. Its legal bases can certainly be controversial. This article offers some below that follow in the footsteps of a prominent international law judge and commentator. The present author does not claim that these bases are the only ones. Whether or not they are entirely plausible is an issue that should be separated from the pertinence and the need of the duty to explain as a matter of humanity.

30 Article 1.2 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. The customary nature of the Martens clause was emphasised by the International Court of Justice. See International Court of Justice *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion, ICJ Rep 226, 1996) at [79].

this part will follow Cassese's methodology, which in turn is based on the approach taken by the Conseil de guerre de Bruxelles in the *KW* case.³¹ According to Cassese:³²

By virtue of the clause, reference should not be made to vague principles of humanity, but rather to those human rights standards that have been laid down in international instruments ... They may, among other things, be used as guidelines for determining the proper interpretation to be placed upon ... insufficiently comprehensive international principles or rules.

What to do when a state keeps ignoring the other's monumental civilian suffering is a new question for international humanitarian law, calling for the use of the Martens Clause to arrive at a new interpretation, since, to use Cassese's words, the existing principles or rules, in particular the principles of distinction or of proportionality as currently understood, are insufficiently comprehensive to address this issue. Those civilians affected by military operations in which the said principles seem not to have been complied with deserve an explanation for their suffering, and it is the use of the clause that allows international humanitarian law to offer a response to this important situation.

The question then is, what principle of humanity in particular can be invoked as a basis for the new interpretation of the customary rule of distinction and proportionality on the basis of the application of the clause? Avoiding unnecessary suffering. In its advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice expressed this view:³³

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

Although related to the choice of weapons and methods of war and therefore relevant to the planning and execution phases of military operations, avoiding unnecessary suffering is a principle that explicitly covers military personnel but also, implicitly, civilians. That avoiding unnecessary civilian suffering is also part of the principle is evident in the sense that this dimension is itself at the core of the principles of distinction and proportionality. In fact, attacking civilian targets or

31 A different approach adopted by the International Criminal Tribunal for the Former Yugoslavia will be followed when assessing another proposal aimed at protecting civilians in protracted armed conflicts. See International Criminal Tribunal for the Former Yugoslavia *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (undated).

32 *KW Case* Conseil de guerre de Bruxelles, Brussels, 8 February 1950, discussed in A Cassese "The Martens Clause: Half a loaf or simply pie in the sky?" (2000) 11 *Eur J Int Law* 187 at 207; For a similar argument, see Jean Simon Pictet *Development and Principles of International Humanitarian Law* (Martinus Nijhoff Publishers, Geneva, 1985) at 59–60; See also on the application of the clause Theodor Mero "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience" (2000) 94 *American Journal of International Law* 78 at 87–88; Emily Crawford "The Modern Relevance of the Martens Clause" (2006) 6 *ISIL YB Int'l Human & Refugee L* 1; "Terrorism and Asymmetrical Conflicts: a Role for the Martens Clause" in *A Wiser Century?: Judicial Dispute Settlement, Disarmament and the Laws of War 100 years after the Second Hague Peace Conference* (Duncker & Humblot, Berlin, 2009); *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (3rd ed, ICRC) vol 1 at 159–161.

33 International Court of Justice, above n 30, at [78].

population leads to unnecessary suffering – no military advantage is gained – and so do military operations with expected disproportionate civilian casualties: the casualties will go well beyond what is required to gain the expected military advantage. There is no need for these two kinds of suffering.

International humanitarian law, as currently understood, offers protection to civilians before and during military operations, but the protection is limited in their aftermath for the benefit of those wounded or the relatives of the deceased. Ignoring their suffering by not offering an explanation is a way of further increasing it with no military advantage to be gained. To prevent this reality, as has been said, the Martens Clause becomes available to support a novel interpretation in which the principle of prohibiting unnecessary suffering is the vehicle to incorporate the duty to explain as part of both the principle of distinction and the principle of proportionality whenever compliance with any of them is in question.

Finally, recognising the duty to explain would also be consistent with the trend in place since the 19th century to expand the relevance of humanitarian considerations and to delimit military necessity.

3. *Who could establish the duty to explain as part of the principles of distinction and proportionality*

The next issue to address is, who could introduce the duty to explain for the benefit of the other's civilians as an additional duty to those already in place to comply with the principles of distinction and proportionality. Obviously, the primary actors for the introduction of the duty to explain in general would be states either through treaty law or state practice transformed into customary international law. Hard law would then be an option, but not necessarily the first option to be expected. States could also start the process of introducing the duty to explain through soft-law instruments. For instance, in UN General Assembly resolutions dealing with a given conflict, that between Israel and Palestine, for instance; or through regional organisations' decisions or declarations, with the expectation that hard law would emerge in the future.³⁴ The soft-law process can be developed by some states in a learning-by-doing process;³⁵ the intervention of all of them, a significant majority, or the most powerful at the beginning may not even be necessary, although it would certainly be desirable.³⁶

However, the creation of international law has had actors other than states, as Judge Rosalyn Higgins noted,³⁷ and they could play a role in introducing and developing the duty to explain. Paramount among them is the International Committee of the Red Cross, whose mission includes “to work for the understanding and dissemination of knowledge of international humanitarian law

34 When describing the different relationships that can exist between hard law and soft law, Shaffer and Pollack, highlight political science scholarship positing that non-binding law can pave the way for binding law. See S Gregory Shaffer and Mark A Pollack *Hard and Soft Law: What Have We Learned?* (University of Minnesota Law School Legal Studies Research Paper Series, Research Paper No 12-17, 2012) at 11.

35 David G Victor and others “Conclusions” in *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (MIT Press, Cambridge (Mass), 1998); as highlighted by Shaffer and Pollack, above n 34.

36 To be sure, this process would not be lineal. States have different preferences and objectives, which would have an impact on the evolution of soft-law norms, generally, and of creation of the duty to explain, specifically. On the issue of varied preferences, see, for instance, Shaffer and Pollack, above n 34.

37 Rosalyn Higgins *Problems and Process: International Law and How We Use It* (Oxford University Press, Oxford, 1994) at 230.

applicable in armed conflicts and to prepare any development thereof.”³⁸ But other NGOs – Amnesty International, Human Rights Watch, for example – could also address the issue of consistently ignoring monumental civilian ordeal and promote the duty to explain.

A third actor potentially able to introduce the duty to explain as part of the principles of distinction and proportionality is international courts or fact-finding missions and other quasi-judicial bodies charged with the task of assessing particular events within international or non-international armed conflicts.³⁹ Although any finding and conclusion are formally binding or relevant to the given states or state involved, the reality is that the influence of these decisions or pronouncements can go well beyond the parties involved. Decisions of this kind can be used by other states and NGOs to support their own effort to introduce the duty to explain in a virtuous circle.

To be sure, whether or not a soft-law process would crystallise into a hard-law provision linking the duty to explain as part of the principles of distinction or proportionality cannot be anticipated, and it might not be strictly necessary. Indeed, the duty may not require new formal law to be operative, since it can be attached to the principles through interpretation, since, as was mentioned, the duty would not be a free-standing obligation but one attached to both principles.

4. *Consequences of the failure to explain*

The next issue to address is what happens if a state does not explain after attacks in which compliance with the principles of distinction or proportionality is in question. A definite answer would depend on how creation and development of the duty evolved, as a soft-law or hard-law process or both. However, there is a set of hypotheses to explore. If the duty to explain is developed through soft-law, once the military operation becomes known, the given state, first, will not get the benefit of the humanisation of the conflict to the point that the other party will have incentives to do the same. Second, the ignoring state will suffer reputational costs in the short, medium and long terms,⁴⁰ to be imposed by other states or important segments of the international community, since compliance with basic principles of international humanitarian law is in question. But the given government could also incur domestic costs, in the way of internal condemnations for its military operations and increasing political opposition – not minor costs in states with functioning democratic systems. A related point is the relevance that these reputational costs might have on the silent party. It all depends on the specific facts and context of the operations. Sometimes the reputational costs might not be significant enough, and sometimes they might, as some examples provided above evidence.

Third, if a result of an operation’s compliance with the principle of distinction or proportionality is in doubt and the party to the conflict responsible for the attack remains silent and does not explain, the inference is that the operation did not comply with international humanitarian law, and if the party is a state, it could incur international state responsibility; and the issue of reparation would be dealt with at some point in the future as part of any peace negotiations or before and

38 Statutes of the International Committee of the Red Cross (adopted 21 December 2017, entered into force 1 January 2018), art 5(2)(g).

39 Human Rights Council *Human Rights in Palestine and Other Occupied Arab Territories – Report of the United Nations Fact Finding Mission on the Gaza Conflict* (Doc A/HRC/12/48 2009) at [29]–[31].

40 As to reputation costs as a result of lack of compliance with soft law, see Shaffer and Pollack, above n 34, at 4.

under any of the traditional forms highlighted by the International Law Commission in arts 34 to 37 of the Draft Articles on State Responsibility: restitution, compensation or satisfaction.⁴¹

In the event of non-international armed conflict, and depending on the nature of the conflict, the failure of non-state actors to explain would bring about domestic costs in the form of loss of support by segments of the civilian population.

B. Creating Incentives in the Interpretation and Application of International Criminal Law for Military Commanders to Not Ignore Civilian Casualties

In addition to deriving international duties from existing provisions of international humanitarian law in order to make civilian suffering visible, a second path that could be pursued to this end would be to bring about incentives in international criminal proceedings that improve the chances of acquittal of military commanders charged before the International Criminal Court (ICC) with the commission of the war crimes contemplated in art 8(2)(b)(i) and (iv) of the Rome Statute. The provisions set forth:⁴²

For the purpose of this Statute, “war crimes” means: ...

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; ...
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;⁴³

The third element of the war crime of attacking civilians is the mental element:

The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.

For its part, the third element of the war crime contemplated in art 8(2)(b)(iv) is defined as follows:

The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects ... and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

41 Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, International Law Commission (adopted 2001).

42 Rome Statute of the International Criminal Court A/CONF183/9 (adopted 16 January 2002, entered into force 1 July 2002).

43 Another applicable provision is art 30. It defines the notion of mental element:

- 2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
- 3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ...

On art 30 see Mohamed Elewa Badar and Sara Porro “Rethinking the Mental Elements in the Jurisprudence of the ICC” in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press, Oxford, 2015) 649.

Footnote 37 to this third element of art 8(2)(b)(iv) is more explicit on the knowledge requirement and provides:⁴⁴

... this knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of that value judgement must be based on the requisite information available to the perpetrator at the time.

As can be seen, the assessment to be made for the purpose of these crimes is at the time of the attack and on the basis of the information available then.⁴⁵ Thus, apparently, subsequent behaviour by military commanders would not play any role in such an assessment. However, a different question also arises: what role can commanders' conduct *after* the attack play in assessing their intentions before the operation took place?

The existence of the *ex post* explanation should be regarded, in principle, as evidence of the accused's concern for the adversary's civilians and of lack of intent. Indeed, a commander arguing that he or she lacked intent might make his or her case stronger before the ICC if he or she showed an explicit concern for civilian casualties after the attack, by offering a well-supported explanation for it. There is a logical track of events: a commander intended to attack a valid military target only with no civilian casualties or made a judgment that excessive civilian casualties would not result. So, if they did occur, the *ex post* explanation should be seen as the continuation of such concern. On the contrary, a commander accused of having intended the outcome in terms of civilian casualties should have a much weaker case if he or she ignored them afterward. Ignoring them in the wake of the attack would be a consideration to take into account when assessing the intentions before it.

Certainly, there being an explanation afterward does not necessarily mean that there was no crime at the time of the attack. The veracity of the explanation still needs to be confirmed with the use of other sources,⁴⁶ and other elements that show lack of knowledge under art 8(2)(b)(i) and (iv) must be assessed. Among them are the extent of information collected before the operation, its reliability, the precautions taken, and other decisions made during the operation, such as its suspension once significant civilian casualties became evident and by virtue of art 57.2(b) of Protocol I.⁴⁷

Finally, it is important to highlight that the explanation that counts for the purpose of this analysis is the one made by the commander shortly after the attack took place, not the one he or

44 The principle of proportionality under the Additional Protocol I and the war crime set forth in art 8(2)(b)(iv) of the Rome Statute have different thresholds. A state might incur international responsibility for an attack without its commanders or soldiers having committed the said crime. Indeed, the Statute speaks of "overall military advantage" and "clearly excessive" incidental damage to civilians, qualifications that do not exist in Protocol I. See in this regard, Bothe, above n 17, at 379 and 398–399; Yutaka Akai-Takasashi "Excessive Collateral Civilian Casualties and Military Necessity: Awkward Crossroads in International Humanitarian Law between State Responsibility and Individual Criminal Liability" in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press, Cambridge, 2015) 325 at 325–326.

45 See in this regard, Knut Dörmann *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge University Press, Cambridge, 2003) at 164.

46 International Criminal Tribunal for the Former Yugoslavia, above n 31, at [90].

47 Article 57.2(b) of Protocol I provides as follows: "With respect to attacks, the following precautions shall be taken: an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

she could give during trial before the ICC. If commanders got incentives for offering explanations at this stage, they would not likely be genuine and would come very late, taking into account the substantive delays in ICC prosecution. Affected civilians should get an explanation sooner.

Past practice supports the approach suggested here to a certain extent, although not in the context of the Rome Statute. Indeed, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (ICTY/NATO Committee) was created by the prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY) under art 18 of the ICTY Statute, to assess allegations that senior political and military figures from NATO countries had violated international humanitarian law during the campaign. The mandate of the Committee was to advise the Prosecutor on whether or not there was a sufficient basis to proceed with an investigation into some or all the allegations related to the NATO bombing.⁴⁸

The Committee was faced with a discussion of the existence of an element of recklessness with regard to the NATO attack on a civilian passenger train at the Leskovac railway bridge in Serbia on 12 April 1999. Thus, compliance with the principles of either distinction or proportionality was in doubt after the operation. The bridge was deemed a military target since it was used by Serbian forces to resupply its troops.⁴⁹ NATO regretted the attack, and a day later, on 13 April, a detailed explanation of its circumstances was offered by NATO's Supreme Allied Commander for Europe.⁵⁰ Although it was divided, the majority of the Committee relied on the explanations offered by NATO after the attack and concluded that no investigation was required.⁵¹

A similar approach was taken in relation with the bombing of the Chinese Embassy in Belgrade, in which compliance with the principle of distinction had been in question. The United States offered an apology to China and paid compensation to the Chinese government and to families of the victims.⁵² The collection of information was deeply flawed,⁵³ and the Embassy was thought to have been the Yugoslav Federal Directorate for Supply and Procurement, a valid military target. The ICTY/NATO Committee concluded:⁵⁴

It is the opinion of the committee that the aircrew involved in the attack should not be assigned any responsibility for the fact they were given the wrong target and that it is inappropriate to attempt to assign criminal responsibility for the incident to senior leaders because they were provided with wrong information by officials of another agency.

As can be seen, it may not be impossible to make a connection between the swift recognition by the United States and its commanders of their mistakes, the identification of their origin, and the Committee's recommendation that the Office of the Prosecutor should not start an investigation regarding the bombing of the Chinese embassy.

In sum, the ICC should get some inspiration from what the ICTY/NATO Committee did. By considering commanders' subsequent explanations admitting civilian suffering as an element of the assessment of their intention prior to attacks in the context of criminal proceedings under

48 International Criminal Tribunal for the Former Yugoslavia, above n 31, at [3].

49 At [58].

50 At [59].

51 At [62].

52 At [84].

53 At [81]–[84].

54 At [85].

art 8(2)(b)(i) and (iv), the ICC would be creating incentives for this kind of positive action towards affected civilians by the other party's military commanders.

A similar analysis in terms of recognition of explanations by the ICC could also take place in the event of the invocation of grounds for the exclusion of criminal responsibility in connection with alleged commission of the crimes contemplated in art 8(2)(b)(i) and (iv) of the Rome Statute. Article 32 establishes the exclusion of mistakes of fact or law and its limits,⁵⁵ and art 31 consecrates the exclusion of actions taken as a result of self-defence, duress or necessity, among others.⁵⁶ When assessing the existence of a ground for exclusion invoked by the accused, the ICC should pay particular attention at the existence of explanations shortly after the given military operation. One would expect commanders and other military personal to disclose as soon as possible after the event the potential existence of a ground excluding any criminal responsibility.⁵⁷ In other words, giving an explanation shortly after the given military operation in which the facts supporting the exclusion of criminal responsibility have been made public would be an important element at the time the existence of the ground for exclusion was assessed by the ICC. On the contrary, a lack of explanation would constitute evidence against the existence of the ground for exclusion.

The final issue is whether the creation by the ICC of incentives for commanders' ex post explanations to affected civilians in military operations in which significant civilian casualties occurred constitutes a novel interpretation that, if triggering a dispute between two or more parties to the Statute, would require a decision by the Assembly of the State Parties under art 119.2 of the Rome Statute. It seems to the present author that the creation of incentives to explain does not alter the elements of the crime in art 8(2)(b)(i) and (iv) nor the conditions for the application of grounds for exclusion of criminal responsibility. Consequently, creating incentives to explain would not require the Assembly's intervention to be implemented by the ICC.

C. *Aggregation of Civilian Suffering and the Interpretation of International Humanitarian Law in Protracted Conflicts*

Attempts should be made to find ways in which civilians are given, as a matter of law, a higher level of protection in this type of conflict, not only after attacks, as was discussed in the previous part, but before them.

The mere persistence of protracted conflicts reveals that the layers of civilian suffering have been accumulating year after year. Past civilian casualties are quickly ignored by detached observers. However, victims hardly go through a similar process. So, for societies in conflict, the suffering brought about by new civilian casualties might add to that of the old ones: the stories of civilian suffering for the warring parties accumulate.

The notion of aggregation of civilian suffering – which would be at the root of the proposal for new forms of interpretation of international humanitarian law in protracted conflicts – is grounded

55 On the topic of mistakes in fact and law, see Albin Eser "Mental Elements – Mistake of Fact and Mistake of Law" in Antonio Cassese, Paola Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002) at 934–948; A Caesius "The Statute of the International Criminal Court: Some Preliminary Reflections" (1999) 10 *Eur J Int Law* 144 at 155–156.

56 For an analysis of art 31, see Kai Ambos "Other Grounds for Excluding Criminal Responsibility" in Antonio Cassese, Paola Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court: a Commentary* (Oxford University Press, Oxford, 2002) at 1003.

57 To be sure, the accused has to prove all of the requirements of self-defence.

on the Indian approach to history highlighted by the French historian Michel de Certeau. He pointed out:⁵⁸

“new forms never drive the older ones away”. Rather, there exists a “stratified stockpiling” ... A “process of coexistence and reabsorption” is ... the “cardinal fact” of Indian history.

The analogy of the reabsorption of civilian ordeals may create a certain type of factual situation in which the protracted character of a conflict would play a role in the interpretation of some provisions of international humanitarian law, such as the principle of proportionality.

Let’s take the case of the Israeli attack that led to the death of 18 members of the Al-Batsch family, which was the subject of Palestine’s letter to the Council of 14 July 2014. According to the letter, the following Palestinian relatives died as a result of a military operation carried out by Israel: Nahed Nai’im Al-Batsch, age 41; Bahaa Majed Al-Batsch, age 28; Qusai Issam Al-Batsch, age 12; Mohammed Issam Al-Batsch, age 17; Ahmed Nu’mān Al-Batsch, age 27; Yehya Ala Al-Batsch, age 18; Jalal Majed Al-Batsch, age 26; Mahmoud Majed Al-Batsch, age 22; Marwa Majed Al-Batsch, age 25; Majed Subhi Al-Batsch; Khaled Majed Al-Batsch, age 20; Ibrahim Majed Al-Batsch, age 18; Manar Majed Al-Batsch, age 13; Amal Hasan Al-Batsch, age 49; Anas Alaa Al-Batsch, age 10; Qusai Alaa Al-Batsch, age 20; Zakariya Alaa Al-Batsch and Aziza Youssef Al-Batsch, age 59.⁵⁹

The communication stated that the attack was aimed at Tayseer Al-Batsch, a police chief in Gaza,⁶⁰ who was moderately injured and survived. Let’s assume that Israel has again identified his location: he is again home with what is left of his family. Can the two operations be totally disconnected? Should the proportionality assessment be made only in light of the factual conditions of the second attack? No, the concept of excessive civilian casualties, at least in this particular event, should take into consideration the protracted nature of the conflict and the fact that the same individual had been previously targeted, with significant civilian casualties of an identical character: his relatives.

The term excessive should have a different connotation: a stricter approach should be required, and the proportionality test would be more difficult to meet for the second operation. In other words, expected excessive civilian casualties could be found more easily in the second phase of the attack, as a result of its links with the first one in terms of the identical target and the identical character of civilian casualties.⁶¹ Given the facts that the target is the same individual and that the civilians affected have the same nature – the surviving relatives of the first attack, whose suffering will be cumulative – it would be possible to treat the two operations as being parts of a single

58 Michel de Certeau *The Writing of History* (Columbia University Press, New York, 1988) at 4.

59 Letter from the Permanent Observer of the State of Palestine to the United Nations the Secretary-General the President of the General Assembly and the President of the Security Council “Identical letters dated 14 July 2014 from the Permanent Observer of the State of Palestine to the United Nations addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council – A/ES-10/640-S/2014/491” (14 July 2014).

60 At 2.

61 This argument would apply, in principle, only to planned operations. It would not apply to targets of opportunity in which intelligence on civilians may not be widely available.

attack.⁶² Consequently, art 57.2(a)(iii) and (b) of Protocol I on precautions would play a role at the moment of planning or execution of the second operation and prevent it.⁶³

The situation is similar, although not identical, to the approach taken by the Trial Chamber of the ICTY in *Prosecutor v Kupre[ki]*. There, the Trial Chamber opened the door for the possibility of assessing repeated attacks against *different* targets in a cumulative way. It relied on the Martens Clause to arrive at this conclusion, worth quoting at length:⁶⁴

However, this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates. In the case under discussion, this would entail that the prescriptions of Articles 57 and 58 (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.

As an example of the way in which the Martens clause may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.

Here the ICTY Trial Chamber interpreted the Martens Clause in a different way from that advocated by Cassese.⁶⁵ The Trial Chamber did not seek a specific principle of humanity, as Cassese advocates, to make use of the Clause but relied on it to guide the Chamber's application of the principle of

62 This situation can take place in any type of conflict, which does not diminish the need to further protect civilians when the situation occurs in those conflicts of a protracted nature.

63 These provisions establish:

With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

...

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that ... the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

See in this regard Canizzaro, above n 14, at 335.

64 *Prosecutor v Zoran Kupre[ki], Mirjan Kupre[ki], Vlatko Kupre[ki], Drago Kupre[ki], Dragan Kupre[ki], and Vladimir [Anti]* [2000] IT-95-16-T (International Criminal Court) at [525]–[526].

65 Cassese, above n 32, at 207; For a similar argument, see Pictet, above n 32, at 59–60; See also on the application of the clause Mero, above n 32, at 87–88; Crawford, above n 32; “Terrorism and Asymmetrical Conflicts: a Role for the Martens Clause”, above n 32; *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, above n 32, at 159–161.

proportionality in order to recognise the cumulative effect of the attacks and “expand the protection accorded to civilians.”

The *Kupre[ki]* interpretative approach of the principle of proportionality recognising the cumulative effect of different operations in order to expand the protection of civilians can be sometimes useful in the event of protracted conflicts. This would be so in relation to those civilians who had already been casualties of the conflict as a result of a previous attack and are at risk of being so again as a result of a forthcoming military operation.

The issue, then, is whether the notion of “expected civilian casualties” in the principle of proportionality and in art 51.5(b) of Additional Protocol I can be lawfully understood to include the first casualties when the proportionality assessment of the second operation against the same target is carried out. Apparently not; what is certain is no longer expected. However, if the attack is seen as a single operation against the same target, all of the civilian casualties of an identical nature – the certain ones of the first phase plus the expected ones of the second – do not become certain. In other words, the incorporation of the first civilian casualties does not prevent an assessment of the expected casualties of the second and an evaluation of whether the two combined are proportionate in light of the concrete military advantage to be obtained at the end. Consequently, the proposal suggested here does go against this constitutive element of the principle of proportionality.⁶⁶ Taking the two attacks as separate may be “contrary to the demands of humanity,” to use the words of the ICTY Trial Chamber.

The Martens clause would then guide, as in *Prosecutor v Kupre[ki]*, the interpretation of the principle of proportionality in protracted conflicts to expand the protection accorded to those civilian relatives who could again be casualties in the second phase of the operation against the same target.

When carrying out this kind of analysis of the principle of proportionality in certain circumstances in protracted conflicts, there is also another dimension that it is important to consider. Although the individual may be the same, the military advantage to be obtained may have increased or decreased over the months or years separating the two military operations. Such an increase or decrease would also need to be included within the proportionality analysis at the time of the second phase of the attack.

However, it is worth admitting that the application of this interpretation has its limits. First, the interpretation would be valid only when the planners of the second operation were or should have been aware of the existence of the first one against the same target, of the civilian casualties in it, and when the commanders had reasons to believe that some of the expected civilian casualties of the second operation would again be those of the first one. If any of this information was unknown before the attack but subsequently became public, there would not be a violation per se of the principle of proportionality as formulated here, for, as was illustrated, the assessment was carried out on the basis of the information available prior to the military operation. Second, the suggested approach would not be applicable when the valid target was not in a similar situation and was surrounded by other kinds of civilians. Certainly, the test of proportionality to be applied is the usual one centred on the expected civilian casualties of the new attack.

66 Finally, it is important to state that the recognition of a protracted conflict may not always influence the interpretation of international humanitarian law. There are countless examples in which such recognition should not take place. For instance, valid military targets located at the same place can be destroyed time after time, since such attacks will lead to gaining definite military advantages.

Thus, the proposal suggested here does not create an unrealistic limitation on military operations against the targeted individual and affords a very important protection to a particular group of affected civilians who urgently require it. The proposal achieves a balance, a clear objective of the negotiations of Protocol I.⁶⁷

II. CONCLUSION

This article is a response to 50 communications forwarded by Israel and Palestine to the Council from August 2012 to July 2014 – the 64th, 65th and 66th years of the conflict – reporting on its impact on Israeli and Palestinian populations. Regrettably, both parties have ignored each other's indescribable civilian tragedies. Such an appalling reality calls for a reinterpretation of international law in order to alter adversaries' calculations and make their opponents' civilian tragedies visible to them in this armed struggle or in any other in which the parties are behaving likewise. This article puts forward some suggestions.

The first suggested way is to establish, on each adversary and its government, the duty to explain after attacks with apparent excessive civilian casualties or significant risk to civilian populations in which compliance with the principles of distinction and proportionality is in question. When the principle of distinction seems to have been violated, parties to the conflict should explain why the target was deemed military and lawful. On the contrary, when compliance with the principle of proportionality is in doubt, the content of the duty should be an explanation of what commanders believed about the expected civilian casualties of the attack on a particular target before the operation; of the concrete and definite military advantage that was pursued by it; of the possible causes of the significant civilian casualties that occurred; and why, if this was the case, the attack was proportionate under international humanitarian law.

The article has illustrated that such duty, which would not be a free-standing obligation, could be derived from the above-mentioned principles of international humanitarian law interpreted in light of the Martens clause.

The second way to interpret international law in ways that makes an opposing party's civilian suffering visible is by interpreting the Rome Statute in ways in which accused commanders could strengthen their legal positions in criminal proceedings under art 8(2)(b)(i) and (iv) if they explained after attacks the reasons for the excessive civilian casualties or significant risk to civilians. This manuscript has shown that the ICC should follow the approach that the ICTY/NATO Committee adopted when it took into account NATO's explanations after three attacks as evidence supporting the commanders' assessment before or at the time of these operations to conclude that their decision did not merit criminal investigations by the ICTY.

In addition, and on the basis of events described in the narrative of the Israeli and Palestinian letters and on the protracted nature of this conflict, this article has shown that some provisions of international humanitarian law should be interpreted in different ways under certain circumstances in this kind of conflict. This would be so in situations in which those civilians who have already been harmed in a previous military operation face the risk of being so again in a subsequent one. Their suffering will accumulate; therefore, there is a need to accord those civilians a higher level of protection. One way to do so, it has been suggested here, is by incorporating the first casualties in the proportionality assessment of the second operation.

67 Michael Newton and Larry May *Proportionality in International Law* (Oxford University Press, Oxford, 2014) at 23.

Being “blind with pain”, in the words of Primo Levi, is a dominant reality for parties to protracted armed conflicts. Its expression, in ignoring the other’s civilian suffering, enhances the ordeal on both sides. International Humanitarian Law and International Criminal Law should prevent this from happening.

LEGITIMATE BUSINESS RATIONALE AND SECTION 36 OF THE COMMERCE ACT 1986

BY PAUL G SCOTT*

Section 36 of the Commerce Act 1986¹ is New Zealand's antimonopolisation provision. It prohibits firms that have substantial market power from taking advantage of that power for a number of proscribed purposes. The key issue in relation to s 36 is how to distinguish between a firm's procompetitive behaviour and its anticompetitive behaviour. This depends upon whether the firm has taken advantage of its substantial market power. This article discusses the usefulness of legitimate business rationale analysis in determining whether a firm's conduct breaches s 36.

I. BACKGROUND

The New Zealand Supreme Court dealt with this issue in *Commerce Commission v Telecom Corp of New Zealand Ltd (Telecom 0867)*.² In deciding *Telecom 0867*, the Court set out its test for "take advantage", which it called the "comparative exercise".³ In essence a firm will not take advantage of its substantial market power if it would have acted the same way in a competitive market.⁴ This

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1 Section 36(2) provides:

- (2) A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of—
- (a) Restricting the entry of a person into that or any other market; or
 - (b) Preventing or deterring a person from engaging in competitive conduct in that or any other market;
or
 - (c) Eliminating a person from that or any other market.

2 *Commerce Commission v Telecom Corp of New Zealand Ltd* [2010] NZSC 111, [2011] 1 NZLR 577 [*Telecom 0867*]. For discussions on the case see Oliver Meech "Taking Advantage of Market Power" [2010] NZLJ 389; Paul G Scott "Taking A Wrong Turn? The Supreme Court and Section 36 of the Commerce Act" (2011) 17 NZBLQ 260; Matt Sumpter "Competition Law" (2012) NZL Rev 113; Andrew I Gavil "Imagining a Counterfactual Section 36: Rebalancing New Zealand's Competition Law Framework" (2015) 46 VUWLR 1043.

3 At [32].

4 At [32] and [34].

is a version of what case law has called the counterfactual test from *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd*.⁵

Under this test there must be a connection between the market power and the conduct in issue. In *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd* French J pointed out the need for a causal connection and how one could demonstrate this by showing the contravener “relied upon its market power to insulate it from the sanctions that competition would ordinarily visit upon its conduct.”⁶ His Honour observed:⁷

The conduct must ... constitute a use of that power. It is not sufficient to show that a corporation with market power has engaged in conduct for [one of the prohibited purposes] ... If a corporation with substantial market power were to engage an arsonist to burn down its competitor’s factory and thus deter or prevent its competitor from engaging in competitive activity, it would not thereby contravene s46.

Requiring a causal connection is the essence of counterfactual reasoning.⁸ Any time we say that X caused Y, we are implicitly asserting that in the absence of X, Y would not have occurred. To assess such claims, it is helpful to consider what the world would look like in the absence of X. With monopolisation, X is substantial market power. Y is the conduct. In the counterfactual (that is, a market without substantial market power) if the defendant would still have engaged in the conduct in question then the market power did not cause the conduct. The requisite causal connection is missing. The Supreme Court has said that the key is whether the defendant would have acted the same way in a hypothetical competitive market. Thus,⁹

Anyone asserting a breach of s 36 must establish there has been the necessary actual use (taking advantage) of market power. To do so it must be shown, on the balance of probabilities, that the firm in question would not have acted as it did in a workably competitive market; that is, if it had not been dominant.

This involves constructing a hypothetical competitive market by denying the defendant firm all aspects of its substantial market power. One achieves this by positing “in the hypothetical market as well as the alleged contravener (company X) at least one other firm (company Y) in effective competition with company X.”¹⁰ First, one constructs the hypothetical competitive market (the

5 *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* (1989) 167 CLR 177. This was decided under s 36’s Australian counterpart, s 46 of the Competition and Consumer Act 2010 (Cth). Before 1 January 2011, it was known as s 46 of the Trade Practices Act 1974 (Cth). Section 46 provided:

- (1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:
 - (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
 - (b) preventing the entry of a person into that or any other market; or
 - (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

6 *Natwest Australia Bank Ltd v Boral Gerrard Strapping Systems Pty Ltd* (1992) 111 ALR 631 (FCA) at 637.

7 At 637.

8 Cento Veljanovski “Market Power and Counterfactuals in New Zealand Competition Law” (2013) 9 JCL&E 1.

9 *Telecom 0867*, above n 2, at [34].

10 At [36].

counterfactual) where the defendant lacks substantial market power and then asks whether the defendant would have engaged in the same conduct in the counterfactual. The Court observed:¹¹

In order to produce a meaningful comparison between the market in which a company said to have used its dominance for an anticompetitive purpose was actually operating and a workably competitive hypothetical market in which the comparator company [company X] is posited as operating, it is necessary to attribute to the hypothetical market and to company X any special features which existed in the actual market other than those which gave rise to the dominance in the first place. This is done by stripping out or neutralising the features which gave rise to the dominance in the actual market.

It may seem from this observation that constructing a hypothetical competitive market is necessary for assessing whether s 36 has been contravened. However, in discussing the comparative exercise,¹² the Supreme Court referred to Heerey J's comments in *Australian Competition and Consumer Commission v Boral Ltd*.¹³ There, his Honour observed:¹⁴

If the impugned conduct has a business rationale that is a factor pointing against any finding that conduct constitutes a taking advantage of market power. If a firm with no substantial degree of market power would engage in certain conduct as a matter of commercial judgment, it would ordinarily follow that a firm with market power which engages in the same conduct is not taking advantage of its power.

The Supreme Court said that these comments “captured the essence of the comparative exercise necessary to determine whether use had been made of market power.”¹⁵ Other courts have also cited Heerey J's comments with approval.¹⁶ While it appears on one reading of the *Telecom 0867* case that legitimate business rationale is a component of traditional counterfactual reasoning, this article argues that courts can use legitimate business rationale to establish the necessary causal connection and that constructing a hypothetical competitive market is not compulsory. The *Telecom 0867* Court did not define legitimate business rationale. It did say that when assessing whether a firm did “take advantage”, a question arises as to whether the defendant was acting in a “commercially rational way”.¹⁷ This was essentially a “commercial judgment”.¹⁸ The question was a “practical one”¹⁹ of “rational commercial judgment”.²⁰ The Court also seemed to limit economic analysis to constructing the hypothetical competitive market.²¹

Because the *Telecom 0867* court did not explicitly define legitimate business rationale, questions arise as to its scope, and its relationship with economic analysis. For example, is efficient economic

11 At [38].

12 At [26]. The Court did not apply it in the case.

13 *Australian Competition and Consumer Commission v Boral Ltd* [1999] FCA 1318, (1999) 166 ALR 410.

14 At [158].

15 *Telecom 0867*, above n 2, at [26].

16 *Boral Messer Masonry Ltd v Australian Competition and Consumer Commission* [2003] HCA 5, (2003) 215 CLR 374 at [170]; *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2004] UKPC 37, [2006] 1 NZLR 145 at [54].

17 *Telecom 0867*, above n 2, at [35].

18 At [35].

19 At [35].

20 At [35].

21 At [23].

behaviour a legitimate business rationale? Are non-economic factors relevant? Part II of this article discusses these issues in the context of the origins of legitimate business rationale.

While the Supreme Court cited Heerey J in *Boral*, part II will show how he had first mentioned it in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*.²² It will discuss relevant case law from Australia and the United States (US) that does not require constructing a hypothetical market.

Part III argues that economic efficiency is central to the test of whether conduct constitutes taking advantage. Ultimately, this article concludes that legitimate business rationale should be a central part of the test for monopolisation. Part IV assesses the benefits and detriments of legitimate business rationale.

Part V compares the legitimate business rationale test with the Australian test of substantial lessening of competition. Part VI offers some conclusions.

II. ORIGINS OF LEGITIMATE BUSINESS RATIONALE

A. Australian Origins

While the Supreme Court cited *Boral* on legitimate business rationale,²³ Australian courts had previously discussed it. The High Court mentioned it in *Queensland Wire* which involved a refusal to supply.²⁴ Mason CJ and Wilson J observed that the defendant “did not offer a legitimate reason for the effective refusal to sell”.²⁵ Heerey J first mentioned the concept in *Melway*.²⁶ He accepted that “take advantage” required a causal connection between the substantial market power and the conduct.²⁷ He applied traditional counterfactual reasoning in showing the defendant would have engaged in the conduct in a competitive market and had not taken advantage. He did not need to posit a hypothetical competitive market as the defendant had engaged in the same conduct when it lacked market power. This was direct evidence of what Melway would have done without market power.²⁸ However, he continued to say that one could also ask whether the conduct had an efficiency justification. If so, there will be no taking advantage.²⁹ Heerey J cited judicial comments about the *Queensland Wire* defendant failing to offer a legitimate reason for its conduct and noted:³⁰

... the existence of a legitimate business reason which would explain the impugned conduct irrespective of the degree of market power necessarily points against a conclusion that such conduct in fact involved taking advantage of that power.

22 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [1999] FCA 664, (1999) 90 FCR 128 at [20].

23 *Telecom 0867*, above n 2, at [26].

24 *Queensland Wire*, above n 5.

25 At 193.

26 *Melway*, above n 22.

27 At [17].

28 At [18]–[20].

29 At [22].

30 At [25].

His Honour then examined *Aspen Skiing Co v Aspen Highlands Skiing Corp* which involved a refusal to supply.³¹ He noted the absence of a legitimate business reason for the defendant's conduct was key to the defendant breaching s 2 of the Sherman Act.³² (Section 2 is the US monopolisation provision.³³)

In *Boral*, which involved predatory pricing,³⁴ Heerey J again noted that if the firm has a legitimate business rationale then that points against a finding of take advantage.³⁵ In finding the defendant had not taken advantage, he considered whether the defendant's conduct was a rational business decision.³⁶ On appeal, the *Boral* High Court majority endorsed this. Gleeson CJ and Callinan J said "[t]he reasoning of Heerey J on the question of market power, and taking advantage of market power, was in accordance with the evidence and the statute."³⁷ Gaudron, Gummow and Hayne JJ said:³⁸

The reasoning of the trial judge with respect to the question of substantial degree of market power was in accordance with the evidence, the statute and the decisions of this Court. So also, to the extent that it truly arose, was his Honour's conclusion with respect to the question of the taking advantage of that power.

This suggests the High Court considers that constructing a hypothetical competitive market is not compulsory. Legitimate business rationale suffices.

Heerey J returned to legitimate business rationale in *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd*.³⁹ The Full Federal Court found the defendant had taken advantage. Heerey J observed "it is necessary to look at not only what the firm did, but why the firm did it. That is why a business rationale for the conduct, independent of the question of market power, is relevant."⁴⁰ The conduct involved the defendant deleting a particular baker's brand from its stores. Heerey J observed:⁴¹

Safeway did not delete simply for the sake of doing so or because of any problems with quality of product, reliability of supply or other legitimate business considerations. It is clear that ... Safeway's deletion of the plant baker's products was directed to the plant baker's conduct in supplying discounted bread to Safeway's retail competitor. A firm without market power would not have pursued a policy of deletion because to do so would have produced harm for itself without countervailing benefit. A firm

31 *Aspen Skiing Co v Aspen Highlands Skiing Corp* 472 US 582 (1985).

32 *Melway*, above n 22, at [26]–[27].

33 15 USC §2. Section 2 provides:

Every person who shall monopolise or attempt to monopolise or combine or conspire with any other person or persons to monopolise any part of the trade or commerce among the several States, or foreign nations, shall be deemed guilty of a felony ...

34 *Boral*, above n 13, at [157].

35 At [158].

36 At [175].

37 *Boral*, above n 16, at [157].

38 At [196].

39 *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* [2003] FCAFC 149, (2003) 129 FCR 339, (1999) 198 ALR 657.

40 At [329].

41 At [330].

without market power would commercially be compelled to stock the full range of products in order to satisfy consumer demand. The only consequence of the deletion would be the adverse reaction of customers, of which there was ample evidence.

So, while Heerey J used legitimate business rationale to determine how a firm would behave in a competitive market he did not construct a hypothetical market.

Australian Federal Court decisions have adopted legitimate business rationale following *Safeway Stores*. In *Pacific National (ACT) Ltd v Queensland Rail* Jacobsen J said it was one of the principles of properly interpreting take advantage.⁴² He observed:⁴³

... in answering the question of whether a firm has taken advantage of market power it is necessary to look not only at what the firm did but why the firm did it. That is why a business rationale for the conduct ... independent of the question of market power, is relevant ... That is what lies at the heart of the assessment of whether the firm has taken advantage.

Thus, under Australian law one can use legitimate business rationale to establish a taking of advantage. It is not necessary to construct a hypothetical market. Given that the *Telecom 0867* Court noted the importance of consistency “on both sides of the Tasman,”⁴⁴ it should not be necessary to construct a hypothetical competitive market in New Zealand.

As the concept derives from US law it is useful to examine what the concept means there.

B. United States Supreme Court Law

The US Supreme Court first mentioned the concept of legitimate business rationale in *Otter Tail Power Co v US*.⁴⁵ The defendant company generated power and transmitted (wheeled) power over long-distance lines it owned and then distributed it (sold at retail) locally to homes and businesses. A number of cities owned power companies (utilities) that distributed electricity to individual homes. These utilities could buy power from Otter Tail. However, Otter Tail refused to sell at wholesale prices. When utilities sought to buy power from other generators, Otter Tail refused to wheel the power over its lines. The Court held the refusal to wheel breached the equivalent US provision. It rejected Otter Tail’s business justification that it needed to keep its lines free to serve its own retail customers and observed “there were no engineering factors that prevented Otter Tail from selling power at wholesale ... or wheeling that power”.⁴⁶ It held the refusals to wheel were solely to prevent municipal power systems from eroding its monopolistic position.⁴⁷ This suggests that had Otter Tail’s justification been valid it would not have been liable.

The Court revisited legitimate business rationale in *Aspen*.⁴⁸ The defendant operated three of four mountain ski areas in Aspen. It had cooperated with the owner of the fourth area in offering a combined four area ski pass, but it refused to continue offering the combined pass. The Court held this breached s 2 and said a court must consider not only the conduct’s effect on its rival but also

42 *Pacific National (ACT) Ltd v Queensland Rail* [2006] FCA 91, (2006) ATPR (Digest) 46-268 at [1024].

43 At [1025]; see also *RP Data Ltd (ACN 087 759 171) v State of Queensland* [2007] FCA 1639 at [198].

44 *Telecom 0867*, above n 2, at [31].

45 *Otter Tail Power Co v United States* 410 US 366 (1973).

46 At 378.

47 At 378.

48 *Aspen*, above n 31.

“its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way”.⁴⁹ The Court looked at whether the defendant had valid business reasons for refusing to continue operating the combined pass. It observed that the defendant did not show that any normal business purpose justified its conduct.⁵⁰ Accordingly, the defendant breached s 2. This suggested that if a defendant justified its refusal to deal then no liability resulted.

In *Eastman Kodak Co v Image Technical Services Inc* the Court dealt with a claim involving services and parts for Kodak copying equipment.⁵¹ The defendant, Kodak, allegedly breached s 2 by limiting the availability of parts to independent service organisations and adopting other policies, which made it difficult for those organisations to compete. The Court focused on the defendant’s business justifications, noting that “as a general matter, a firm can refuse to deal with its competitors”.⁵² That right “is not absolute; it exists only if there are legitimate competitive reasons for the refusal”.⁵³ It stated that “liability turns ... on whether ‘valid business reasons’ can explain [the defendant’s] actions”.⁵⁴

In these cases, the Supreme Court distinguished between monopolistic conduct which breaches and conduct with a legitimate business rationale, which does not.

In a later case, the Court chose not to apply legitimate business rationale. *Verizon Communications v Trinko LLP* involved the defendant’s failure to share its local telephone network with rivals as the Telecommunications Act 1996 required.⁵⁵ In an amicus brief the US Department of Justice and Federal Trade Commission urged the Court to apply a version of legitimate business rationale in assessing the defendant’s conduct.⁵⁶ It did not. Despite the defendant not attempting to justify its conduct, the Court found no liability. Similarly, in a price squeeze case, *Pacific Bell Telephone Co v LinkLine Communications Inc*, the Court did not discuss whether the defendant had a legitimate reason for lowering its retail price.⁵⁷

C. Circuit Court of Appeals Law

Various US Circuit Courts of Appeal adopt legitimate business rationale in various ways. The Third Circuit Court of Appeals in *LePage Inc v 3M* observed: “a monopolist will be found to violate the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification”.⁵⁸ In *US v Dentsply* it observed: “even if a company exerts monopoly power, it may defend its practices by establishing a business justification”.⁵⁹ The First Circuit in *Data General Corp v Grumman Systems Support Corp* held: “a monopoly may rebut an inference of exclusionary

49 At 605.

50 At 608.

51 *Eastman Kodak Co v Image Technical Services Inc* 504 US 451 (1992).

52 At 483.

53 At 483.

54 At 483.

55 *Verizon Communications Inc v Law Offices of Curtis v Trinko LLP* 540 US 398 (2004).

56 *Brief for the United States as Amici Curiae Supporting Petitioner Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004) at 16 and 19.

57 *Pacific Bell Telephone Co v linkLine Communications Inc* 555 US 438 (2009).

58 *LePage Inc v 3M* 324 F3d 141 (3rd Cir 2003) (en banc) at 152.

59 *United States v Dentsply International Inc* 399 F3d 181 (3rd Cir 2005) at 196.

conduct by establishing legitimate competitive reasons for the refusal”.⁶⁰ In *Delaware & Hudson Railway Co v Consolidated Rail Corp* the Second Circuit said “a monopolist would not be liable merely because its actions adversely affected a competitor, if such actions were motivated by a valid business justification”.⁶¹ The Fifth Circuit in *Multistate Legal Studies Inc v Harcourt Brace Jovanovich Legal and Professional Publications Inc* held the defendants’ conduct “would qualify as anticompetitive conduct unless [they] could demonstrate a legitimate business justification for it”.⁶² In *Illinois ex rel Burris v Panhandle & Pipe Line Co* the Seventh Circuit observed monopolisation law “excuses refusals to provide access justified by the owner’s legitimate business concerns”.⁶³

The DC Circuit in setting out a multipronged test for monopolisation in *US v Microsoft* said:⁶⁴

... if a plaintiff successfully establishes a prima facie case under s 2 ... then the monopolist may proffer a “procompetitive justification” for its conduct. If the monopolist asserts a procompetitive justification – a non-pretextual claim, that conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal – then the burden shifts back to the plaintiff to rebut that claim ...

In *Eastman Kodak Co v Image Technical Services Inc* the Ninth Circuit held that the defendant’s conduct “may not be actionable if supported by a legitimate business justification. When a legitimate business justification supports a monopolist’s exclusionary conduct that conduct does not violate s 2”.⁶⁵

While the Supreme Court cases concerned refusals to supply, the Circuit Courts covered more behaviour including: exclusive dealing,⁶⁶ tying,⁶⁷ bundled discounts,⁶⁸ loyalty discounts,⁶⁹ scheduling conflicts⁷⁰ and refusals to licence copyright works.⁷¹

The cases referred to above do not flesh out what constitutes a legitimate business rationale. However, some Circuit Courts have said conduct lacks a legitimate business rationale if it involves sacrificing profit or makes no economic sense.⁷² These are the “profit-sacrifice” and “no economic sense” tests. The reasoning is that conduct only breaches s 2 where the defendant sacrifices short-term profits and that sacrifice only makes sense if it helps the defendant maintain monopoly

60 *Data General Corp v Grumman Systems Support Corp* 36 F3d 1147 (1st Cir 1994) at 1183.

61 *Delaware & Hudson Railway Co v Consolidated Rail Corp* 902 F2d 174 (2nd Cir 1990) at 178.

62 *Multistate Legal Studies Inc v Harcourt Brace Jovanovich Legal and Professional Publications Inc* 63 F 3d 1540 (10th Cir 1995) at 1553.

63 *State of Illinois ex rel Burris v Panhandle & Pipe Line Co* 935 F2d 1469 (7th Cir 1991) at 1481.

64 *United States v Microsoft Corp* 253 F3d 34 (DC Cir 2001) at 59.

65 *Image Technical Services Inc v Eastman Kodak Co* 125 F3d 1195 (9th Cir 1997) at 1212.

66 *Dentsply*, above n 59; *LePage*, above n 58; *Microsoft*, above n 64.

67 *Eastman Kodak*, above n 65; *Microsoft*, above n 64.

68 *LePage*, above n 58; *SMS Systems Maintenance Inc v Digital Equipment Corp* 118F3d (1st Cir 1999).

69 *Virgin Atlantic Airways Ltd v British Airways PLC* 257 F3d 256 (2nd Cir 2001).

70 *Multistate*, above n 62.

71 *Microsoft*, above n 64; *Eastman Kodak*, above n 65.

72 *Covad Communications Co v Bell Atlantic Corp* 398 F3d (DC Cir 2005); *Morris Communications Corp v PGA Tour Inc* 364 F3d 1288 (11th Cir 2004); *General Industries Corp v Hartz Mountain Corp* 810 F2d 795 (8th Cir 1987); See United States Department of Justice, “Competition and Monopoly: Single Firm Conduct under Section 2 of the Sherman Act” (2008) at 39–42. (Withdrawn May 2008); Ernest Gellhorn, William E Kovacic and Stephen Calkins *Antitrust Law and Economics in a Nutshell* (5th ed, Thomson West, St Paul. 2004) at 177.

power. This principle derives from *Aspen*, where the defendant's willingness to forsake short-term profits to achieve an anticompetitive end was important to s 2 liability.⁷³ The no economic sense test asks whether the defendant's conduct makes any economic sense apart from eliminating or lessening competition. If not, then it breaches s 2.⁷⁴

If conduct involves sacrificing profits or makes sense only because it harms rivals, it has no legitimate business rationale. The test therefore asks whether the conduct would be profitable and would make business sense for the defendant, even if it did not harm rivals. If not, then the conduct lacked a legitimate business rationale.⁷⁵

Assessing whether conduct makes economic sense often involves economic analysis. The New Zealand Supreme Court downplayed the economic approach, saying the question was a practical one.⁷⁶

III. THE UTILITY OF ECONOMIC ANALYSIS

In Australia economic analysis is central to determining "take advantage".⁷⁷ Dawson J said in *Queensland Wire*:⁷⁸

The difficulty in determining what conduct constitutes taking advantage of market power and what conduct does not, stems inevitably from the need to distinguish between monopolistic practices, which are prohibited and vigorous competition, which is not.

Toohy J said s 46 distinguished between predatory conduct and superior skill and efficiency. His Honour observed:⁷⁹

These distinctions have been drawn because Part IV of the Act, which is designed to promote and preserve competition, must confront the problem caused by a competitor who is so successful as to eliminate rivals and thus defeat the legislative aim of promoting competition. If success is due to no more than superior skill and efficiency, little criticism can be made of the conduct involved. Not so, if there has been unfair business practice. And so constraints have been placed on competition. The nature of those constraints has been influenced by this distinction between predatory conduct and conventional business practice.

Whether conduct enhances efficiency requires economic analysis.

⁷³ *Aspen*, above n 31, at 608 and 610-611.

⁷⁴ A Douglas Melamed "Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice and Refusals to Deal" (2005) 20 Berkeley Tech LT 1247; Gregory J Werden "Identifying Exclusionary Conduct Under Section 2: The 'No Economic Sense' Test" (2006) 73 Antitrust LJ 413; Thomas E Kauper "Section Two of the Sherman Act: The Search for Standards" (2005) 93 Georgetown LJ 1623.

⁷⁵ *Bell*, above n 72, at 675; *Neumann v Reinforced Earth Co* 786 F2d (DC Cir 1985) at 427; *William Inglis & Sons Baking Co v ITT Continental Baking Co* 668 F2d 1014 (9th Cir 1981) at 1030-1031; *Morris Communication*, above n 72, at 1295.

⁷⁶ *Telecom 0867*, above n 2, at [35].

⁷⁷ Philip Williams "The Counterfactual Test in s46" (2013) 41 ABLR 93.

⁷⁸ *Queensland Wire*, above n 5, at 202.

⁷⁹ At 213.

In *Melway*, Heerey J linked legitimate business rationale to efficiency.⁸⁰ Where a firm engages in conduct to perform its business more efficiently, and it would have engaged in that conduct irrespective of market power, such efficiency enhancing conduct is not a “taking advantage”.⁸¹ The *Aspen* Supreme Court also linked legitimate business justification to economic efficiency saying that conduct is monopolisation “if a company has been attempting to exclude rivals on some basis other than efficiency”.⁸² It observed how consumers preferred the four mountain pass and noted how the defendant discontinuing the pass harmed the plaintiff. The Court explained that the defendant had not produced enough evidence to persuade the jury that its conduct was justified by any normal business purpose.⁸³ It concluded that the defendant:⁸⁴

was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.

By way of comparison, while the *Eastman Kodak* Court spoke of “valid business reasons” and “legitimate competitive reasons”⁸⁵ it did not link these to efficiency. Some Circuits link legitimate business rationale and efficiency. In *Microsoft*, the DC Circuit talked of the defendant asserting a procompetitive justification that involves greater efficiency or enhanced consumer appeal.⁸⁶ The First Circuit in *Data General Corp* held “in general, a business justification is valid if relates directly or indirectly to the enhancement of consumer welfare”.⁸⁷ This included “the pursuit of efficiency” or “quality control”.⁸⁸ The reference to consumer welfare suggests allocative efficiency. However, the cases demonstrate that efficiency means productive efficiency: enhancing the defendant’s efficiency by reducing its costs or increasing its output.⁸⁹ Other conduct which courts have held has a legitimate business rationale and involves economic analysis include: preventing free riding,⁹⁰ reducing or avoiding costs⁹¹ and providing superior products to customers.⁹² While these are commercial justifications, one can only assess their validity through economic analysis. With respect, this shows how the New Zealand Supreme Court erred in deprecating economic analysis. Having said that, such analysis is not a panacea because not all legitimate business rationale is efficiency enhancing. By way of example, some courts allow a firm with substantial market power to set price below cost if the defendant is matching its rival’s prices. In *Boral*

80 *Melway*, above n 22, at [22]; Frances Hanks and Phillip Williams “Implications of the High Court in *Queensland Wire*” (1990) 17 MULR 437.

81 *Melway*, above n 22, at [22].

82 *Aspen*, above n 31, at 605.

83 At 608.

84 At 610–611; See Frank Easterbrook “On Identifying Exclusionary Conduct” (1988) 61 Notre Dame L Rev 972 at 975 where he writes “[*Aspen* concludes that] a dominant firm that imposes large costs on its rival must have a good business justification (one consistent with efficiency)”.

85 *Eastman Kodak*, above n 51, at 483.

86 *Microsoft*, above n 64, at 59.

87 *Data General*, above n 60, at 1183.

88 At 1183.

89 *Data General*, above n 60; see also the Hanks and Williams example in *Melway*, above n 22 at [22].

90 *Morris Communication*, above n 72; *Eastman Kodak*, above n 51.

91 *Bell*, above n 72.

92 *Aspen*, above n 31; *Microsoft*, above n 64.

Heerey J noted “[s]elling below avoidable cost, even for a prolonged period, can be a rational business decision.” The High Court of Australia observed that predatory pricing in response to changed market circumstances including a drop in demand may require some new strategy if the firm in question is to survive. Such pricing is usually assumed to be lawful, simply because it is a competitive response.⁹³

The Privy Council majority in *Carter Holt Harvey* also recognised a price matching defence. There the defendant matched a rival’s price – albeit in doing so it priced below cost.⁹⁴ The Court characterised the defendant’s behaviour as a “response to competition”.⁹⁵ Had the defendant not matched price it “was at risk of losing its market share”.⁹⁶ The Court also favourably cited Heerey J’s comment on business rationale.⁹⁷

Some US authority is the same. The Sixth Circuit in *Richter Concrete Corp v Hilltop Concrete Corp* said:⁹⁸

It is not anticompetitive for a competitor to reduce prices to meet the lower prices already being charged by competitors. Indeed, [t]o force a company to maintain non-competitive prices would be to turn the antitrust laws on their head.

The minority in *Carter Holt Harvey* opposed a price matching defence.⁹⁹ In the US the Tenth Circuit in *US v AMR* declined to endorse a price matching defence.¹⁰⁰ Some commentators disfavour such a defence.¹⁰¹ A price matching defence does not enhance efficiency. Pricing below cost does not improve a firm’s productive efficiency. Allocative efficiency also falls. However, price matching has a legitimate business rationale: to stay in business.

Another legitimate area not involving efficiency are the reasons a firm may have for refusing to supply a rival. These may include the rival being a bad credit risk, previous unsatisfactory dealings with the rival, the rival having a history of deceptive conduct or inability to keep records, and concerns about the rival’s after sales services or lack of capacity.¹⁰²

93 *Boral*, above n 16, at [171]; see also *Safeway*, above n 39, at [329].

94 *Carter Holt Harvey*, above n 16.

95 At [68].

96 At [68].

97 At [54].

98 *Richter Concrete Corp v Hilltop Concrete Corp* 691 F2d 818 (6th Cir 1982) at 826.

99 *Carter Holt Harvey*, above n 16, at [84].

100 *United States v AMR Corp* 335 F3d 1109 (10th Cir 2003) at 1120 n 5.

101 Michal S Gal “Below-Cost Price Alignment: Meeting or Beating Competition” (2007) 28(6) *European Competition Law Review*; Phillip E Areeda and Donald F Turner “Predatory Pricing and Related Practices Under Section 2 of the Sherman Act” (1975) 88 *Harvard L Rev* 607; Joseph F Brodley, Patrick Bolton and Michael H Riordan “Predatory Pricing: Strategic Theory and Legal Policy” (2000) 88 *Georgetown LJ* 2239 at 2275.

102 Brenda Marshall and Rachael Mulheron “Access to Essential Facilities under Section 36 of the Commerce Act 1986: Lessons from Australian Competition Law” (2003) 9 *Canterbury L Rev* 248; Brenda Marshall “The Relevance of a Legitimate Business Rationale under Section 46 of the Trade Practices Act” (2003) 8 *Deakin L Rev* 49; Brenda Marshall “Refusal to Supply under Section 46 of the Trade Practices Act: Misuse of Market Power or Legitimate Business Conduct?” (1996) 8 *Bond L Rev* 182, Patrick J Ahern “Refusals to Deal after *Aspen*” (1994) 63 *Antitrust LJ* 153 at 170–173.

A. Previous Authority

The New Zealand High Court in *New Zealand Magic Millions Ltd v Wrightsons Bloodstock Ltd* used economic analysis in dealing with a scheduling conflict.¹⁰³ In that case, the defendant conducted auctions of thoroughbred yearling horses for 60 years in Wellington. It held these at the same time in conjunction with the Wellington Racing Club's summer carnival over anniversary weekend. The defendant then decided to move its auctions to Auckland and also changed the date from Wellington anniversary. The plaintiff then leased the Wellington auction premises. It announced it was going to hold yearling auction sales there over Wellington anniversary. The defendant then changed its auction dates for its Auckland sales to clash with the plaintiff's sale dates. Buyers could not attend both. The defendant subsequently announced auction dates for the future which it knew clashed with the plaintiff's Wellington dates. The plaintiff alleged the intentional schedule conflict breached s 36.

The Court held the plaintiff's expert economic evidence was crucial in assessing purpose. It said the defendant's conduct was hard to justify in economic terms unless it had an anticompetitive purpose.¹⁰⁴ The evidence would have been relevant if the Court was asking if the conduct had a legitimate business rationale. So, economic analysis is useful.

The Court observed:¹⁰⁵

It must, in my view, have been equally obvious that [the defendant] was risking incurring a significant loss of goodwill by the irritation which he would cause in the industry. The fight was likely to be an expensive one and very time consuming. That loss and the likely loss of goodwill must have had as their justification the proposition that short-run costs were worth the long-run gain in eliminating Magic Millions from the market or at least preventing it from holding a viable sale and thus engaging in competitive conduct in the market.

This is the US profit-sacrifice/no economic sense test. As in *Aspen* the conduct (here scheduling a conflict) involved loss of short-term benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival. As in *Aspen* the defendant gave no efficiency justification for its conduct.¹⁰⁶

Focusing on the defendant sacrificing short run profits in the aim of recouping those losses by either eliminating or hobbling a rival is classic economic analysis. The *Magic Millions* Court not only used economic analysis but also found it useful in determining the justification of the defendant's conduct. *Magic Million's* author was Tipping J who co-authored the Supreme Court's *Telecom 0867* decision.

Other cases have adopted economic analysis. In *Clear Communications Ltd v Sky Network Television*¹⁰⁷ the High Court found a defendant had not used market power when it sought to take advantage of efficiencies arising from enhanced economies of scale and scope.

103 *New Zealand Magic Millions Ltd v Wrightsons Bloodstock Ltd* [1990] 1 NZLR 731 (HC).

104 At 762.

105 At 763.

106 The High Court did not cite the Supreme Court in *Aspen*. It cited the Tenth Circuit's decision in that case on another point: *Aspen Highlands Skiing Corp v Aspen Skiing Co* 738 F2d 1509 (10th Cir 1984).

107 *Clear Communications Ltd v Sky Network Television Ltd* HC Wellington CP19/96, 1 August 1997.

In *Telecom v Clear*¹⁰⁸ Telecom offered Clear access to its Public Switch Telephone Network on the basis of the Efficient Component Pricing Rule¹⁰⁹ (ECPR). This pricing rule requires entrants to be equally as efficient, or more efficient than the incumbent. The High Court approved access on the basis of the ECPR as it was more likely than the alternatives to improve efficiency in New Zealand telecommunications.¹¹⁰ Similarly the Privy Council held the rule did not breach s 36 as it had the result that “the superior efficiency of one or the other [Clear and Telecom] in the only sector in which Clear has chosen to compete ... will dictate commercial success in that area.”¹¹¹ Determining whether a pricing rule improves efficiency and whether one firm has superior efficiency requires economic analysis.

In these cases, the economic evidence was on whether the defendant had taken advantage. It was not limited to constructing the hypothetical competitive market. It appears in *Telecom v Clear* that the expert economists did not set out what the hypothetical competitive market looked like.¹¹² Williams has claimed that this limiting of economic analysis seems to be: “inconsistent with the kinds of evidence and arguments that courts have accepted in other monopolisation cases.”¹¹³

As seen above, a number of courts use legitimate business rationale as a test for monopolisation. The question then arises as to how useful such a test is. A monopolist’s anticompetitive behaviour must not go unchecked, but neither should procompetitive conduct be wrongfully punished. Any test that limits a monopolist’s incentive to compete or that enables the elimination or deterrence of rivals harms competition.

IV. THE BENEFITS AND DETRIMENTS OF LEGITIMATE BUSINESS RATIONALE

A. Benefits

Using legitimate business rationale helps resolve a tension of competition law. While the law should outlaw anticompetitive conduct and encourage procompetitive conduct, it is not always easy to differentiate between types of conduct.¹¹⁴ The prime benefit of a legitimate business rationale test is that it is an objective standard.¹¹⁵ It aims to show how conduct harms the competitive process. If conduct makes economic sense, irrespective of whether it harms rivals, it is procompetitive. Conversely, if the conduct only makes economic sense because it harms rivals, it is anticompetitive. A second advantage is that it is simple to apply. Asking whether conduct has a legitimate business rationale is easier than classic counterfactual analysis. This can be complex as often cases involve disputes on identifying the correct counterfactual among a myriad of possibilities. Parties can genuinely differ on defining the counterfactual.¹¹⁶ This does not lead to certainty.

108 *Telecom Corporation of New Zealand v Clear Communications Ltd* [1995] 1 NZLR 385 (PC).

109 William J Baumol & J Gregory Sidak “The Pricing of Inputs Sold to Competitors” (1994) 11 Yale J Reg 171.

110 *Clear Communications Ltd v Telecom Corp NZ Ltd* (1992) TCLR 166 at 217.

111 *Telecom*, above n 108, at 407.

112 Williams, above n 77, at 104.

113 At 105.

114 Easterbrook, above n 84, at 972.

115 Department of Justice, above n 72, at 43; Werden, above n 74, at 418.

116 *Commerce Commission v Telecom Corp of New Zealand Ltd* (2009) 12 TCLR 457 (CA) at [78]–[79].

One of the courts' main concerns is that the interpretation of s 36 enables a monopolist, before he or she enters upon a line of conduct, to know with some certainty whether or not it is lawful.¹¹⁷ It is easier to assess the legality of the proposed conduct under the legitimate business rationale test. Firms should know whether their conduct has a legitimate rationale.

B. Detriments

As mentioned, s 36 requires a causal connection between the defendant's substantial market power and the conduct. On its face, legitimate business rationale does not require a causal connection. Arson and other criminal behaviour do not require substantial market power. Any firm, regardless of market power, can do it. Accordingly, it cannot be a taking advantage. Yet such behaviour lacks a legitimate business rationale.

So before asking whether conduct had a legitimate business rationale one must first ask whether there is a link between the substantial market power and the conduct. If any firm could engage in the conduct, there will be no taking advantage irrespective of the conduct's rationale. Thus, legitimate business rationale alone cannot be a definitive test. Here Australasian law differs from the US where antitrust does not require a causal connection. Arson can breach s 2.¹¹⁸

A second criticism of the concept is that it focuses on the monopolist.¹¹⁹ It considers whether conduct makes sense from the monopolist's point of view rather than considering the conduct's effect on consumers.

A third weakness is that sometimes legitimate business rationale provides no help. An example is *Telecom Corporation of New Zealand v Clear Communications Ltd*.¹²⁰ That involved a question as to whether the interconnection charges charged by a telephone network owner were too high. The defendant charged according to an economic model that potentially included monopoly profits. Using a legitimate business rationale test would not have determined whether the model is anticompetitive.

Some commentators argue the Privy Council rejected any business rationale test.¹²¹ Gault J in the Court of Appeal said it was helpful to ask if the defendant had acted "reasonably or with justification".¹²² The Privy Council disagreed, saying such a test would mean the monopolist would have little idea what a court might find reasonable or justifiable. Different minds could reach different conclusions.¹²³ Yet, the Privy Council subsequently endorsed Heerey J's business rationale comments in *Boral*.

117 *Telecom*, above n 108, at 403.

118 Herbert Hovenkamp *Federal Antitrust Policy: The Law of Competition and its Practice* (4th ed, West Publishing Co, St Paul, 2011) at 366–367; *Conwood Co v United States Tobacco Co* 290 F3d 768 (2nd Cir 2002).

119 Jonathan M Jacobson and Scott Sher "No Economic Sense Makes No Sense for Exclusive Dealing" (2003) 73 *Antitrust* 779 at 786; Steven C Salop "Exclusionary Conduct, Effect on Consumer and the Flawed Profit – Sacrifice Standard" (2006) 73 *Antitrust* LJ 311 at 345–347 and 357–363.

120 *Telecom*, above n 108.

121 Marshall and Mulheron, above n 102, at 265; Mark N Berry "The Uncertainty of Monopolistic Conduct: A Comparative Review of Three Jurisdictions" (2001) 32 *Law and Policy in Int Bus* 263.

122 *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd* (1993) 5 *TCLR* 413 (CA) at 430.

123 *Telecom*, above n 108, at 403.

A fourth criticism is that the test is difficult to apply in other cases.¹²⁴ This is especially so when one asks whether the conduct involves profit sacrifice or makes no economic sense. Some conduct such as exclusive dealing makes economic sense for a firm because it lessens competition from rivals. The monopolist may also have legitimate efficiency reasons for the exclusive dealing such as preventing free riding. One cannot in other words separate the conduct's economic benefits to the defendant from its harmful effects. So, the exclusive dealing often makes economic sense to a defendant but also has anticompetitive effects. Arguably, a legitimate business rationale test cannot distinguish pro- and anticompetitive exclusive dealing.¹²⁵

The main criticism is that the test makes it too easy to escape liability. It allows too many false negative results.¹²⁶ The first reason is that it cannot account for conduct, such as exclusive dealing, that may have a legitimate purpose but also an anticompetitive effect. The second reason is that it is too easy for lawyers and economists to invent justifications for anticompetitive conduct. They can always plausibly justify conduct.¹²⁷ Case law shows that this is not a problem. Courts have found defendants liable for exclusive dealing and rejected defendants' spurious justifications. They have found claimed justifications to be pretexts. Both *Dentsply*¹²⁸ and *Microsoft*¹²⁹ involved the US government alleging the defendants breached s 2 by exclusive dealing. In *Dentsply*, the Third Circuit found the defendant breached s 2 as it had not shown a procompetitive justification. It noted:¹³⁰

... Dentsply's asserted justification for its exclusionary policies are inconsistent with its announced reason for the exclusionary policies, its conduct enforcing the policy, its rival suppliers' actions, and dealers' behaviour in the marketplace ...

It continued:¹³¹

The record amply supports the District Court's conclusion that Dentsply's alleged justification was pretextual and did not excuse its exclusionary practices.

In *Microsoft*, the DC Circuit noted Microsoft's only justification for its exclusive dealing contract with internet access providers was to preserve its market power. This was not a procompetitive justification.¹³² There was also a s 2 breach via various licence restrictions Microsoft imposed on original equipment providers. Microsoft justified its restrictions by saying it was "simply exercising

124 Jacobsen and Sher, above n 119; Einer Elhauge "Defining Better Monopolization Standards" (2003) 56 Stan L Rev 253 at 293; Andrew I Gavil "Exclusionary Distribution Strategies by Dominant Forms: Striking a Better Balance" (2004) 72 Antitrust LJ 3 at 55; Salop, above n 119, at 321 and 323; Department of Justice, above n 72 at 41–42.

125 Jacobsen and Sher, above n 119, at 781; Marks S Popoksky "Defining Exclusionary Conduct: Section 2, The Rule of Reason and the Unifying Principle Underlying Antitrust Rules: (2006) Antitrust LJ 435; Melamed, above n 74, at 1261; Werden, above n 74, at 421.

126 Gavil, above n 124, at 71; Jacobsen and Sher, above n 119, at 786; Salop, above n 119, at 345–346 and 357–363; Department of Justice, above n 72, at 41.

127 Department of Justice, above n 72, at 42.

128 *Dentsply*, above n 59.

129 *Microsoft*, above n 64.

130 *Dentsply*, above n 59, at 196–197.

131 At 197.

132 *Microsoft*, above n 64, at 71.

its rights as the holder of valid copyrights.”¹³³ The Court held the restrictions breached observing “Microsoft’s primary copyright argument borders upon the frivolous.”¹³⁴

The Third Circuit found a defendant liable for exclusive dealing in *LePage*.¹³⁵ This also involved bundled rebates. The defendant had a monopoly in the transparent tape market through its branded Scotch tape product. The defendant started selling its own private label transparent tape and introduced two forms of bundled rebates. First, if consumers bought the defendant’s Scotch and private label tape, they received a rebate. Second, it set targets for consumers across several product lines. If consumers bought products across product lines they received a rebate and if they missed the target they lost the rebate for that line.

The Court found the defendant offered no evidence of any procompetitive justification for its conduct. It “alluded” to the rebates’ effect being that it sent only one invoice to consumers. It claimed this enhanced efficiency. However, it had no evidence of this. Rather the evidence was that the defendant wanted to “kill” the plaintiff’s private label product. It noted the exclusive dealing had a “synergistic effect” on the bundled rebates. The defendant only wanted to maintain its monopoly. The Court observed “[m]aintaining a monopoly is not the type of valid business reason that will excuse exclusionary conduct”.¹³⁶

Courts have rejected defendants’ proffered justifications. In *Aspen*, one of the issues was whether the defendant had a legitimate business purpose for discontinuing the All-Aspen ticket.¹³⁷ The defendant claimed it did because the system for monitoring usage and allocating revenue was unreliable. It also said that it did not want to be associated with the plaintiff’s inferior services. However, the evidence showed the defendant used the same type of joint multi-area tickets in other ski resorts where it operated. As for being cumbersome, the evidence showed it took no longer to process an all-Aspen ticket than to accept payment by credit card at the defendant’s ticket windows. As for the plaintiff’s inferiority, the defendant’s executives sent their children to the plaintiff’s ski school. The Supreme Court rejected these purported justifications. They lacked credibility.

Eastman Kodak is another example.¹³⁸ There the Ninth Circuit rejected three claimed business justifications as pretextual.

So legitimate business rationale test does not provide a free pass to a monopolist introducing exclusive dealing and engaging in other conduct. If a defendant fails to offer any justification for its conduct or if the justifications are a pretext then the test captures exclusive dealing. But critics are correct that where a firm has a legitimate reason for exclusive dealing but the contracts also cause anticompetitive harm, the test could bless anticompetitive conduct. So, while the test is not a panacea, it is useful. An issue is whether it captures more anticompetitive behaviour than other monopolisation tests, in particular a substantial lessening of competition test which proscribes a monopolist’s conduct which has the purpose or effect, or likely effect, of substantially lessening competition in a market.

133 At 62.

134 At 63.

135 *LePage*, above n 58.

136 At 164.

137 *Aspen*, above n 31, at 609.

138 *Eastman Kodak*, above n 65.

V. COMPARISON WITH OTHER TESTS FOR MONOPOLISATION

This is relevant because in 2017 the Australian Government amended its monopolisation provision to a substantial lessening of competition test.¹³⁹ In New Zealand, the Ministry of Business Innovation and Employment is undertaking a targeted review of the Commerce Act 1986. This includes examining and possibly reforming s 36.¹⁴⁰ Underlying the reform (particularly in Australia) is the view that the way courts have interpreted the monopolisation provisions has let too many firms off,¹⁴¹ that ss 36 and 46 are not deterring anticompetitive behaviour. If legitimate business rationale is part of Australasia's jurisprudence on monopolisation, an unarticulated major assumption of the reform must be that legitimate business rationale is too lenient on monopolists.

However, in some areas Australasian monopolisation law captures more conduct than overseas jurisdictions. This is so with refusals to supply. US courts, for example, would decide Australian cases, such as *Queensland Wire*¹⁴² and *NT Power Generation Pty Ltd v Power and Water Authority*¹⁴³ differently. Following *Verizon*,¹⁴⁴ the Australian cases are incompatible with US jurisprudence.

In *Verizon*, the defendant was the incumbent local telephone network that allegedly failed to share its network with rivals. The Telecommunications Act 1996 required sharing. The Supreme Court held Verizon's conduct was not an illegal refusal to supply. First, requiring supply would decrease the incumbent's incentive to invest, especially in infrastructure.¹⁴⁵ Second, forced supply turns courts into regulatory bodies¹⁴⁶ as they would have to set access terms. Courts lack the requisite expertise. Third, forced sharing requires firms to cooperate rather than compete. This could facilitate collusion.¹⁴⁷ Furthermore, Verizon had never supplied nor marketed the services to anyone.¹⁴⁸ The Supreme Court held a duty to supply could not arise where the defendant had never supplied the service and where it had used it solely for itself.

Conversely, the High Court of Australia found the defendant monopolist in *Queensland Wire* liable for its refusal to supply. There, the defendant had never supplied the product in question, to anyone. Unlike *Verizon*, the Court found this relevant in finding the refusal breached s 46.¹⁴⁹ The Court was unconcerned about whether ordering supply would reduce monopolists' investment incentives. Nor did it worry about the terms of supply. Furthermore, in *Verizon*, the defendant never

139 Section 46(1) provides:

(1) A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect of substantially lessening competition in [a market]

140 Ministry of Business, Innovation and Employment "Targeted Review of the Commerce Act 1986".

141 Frank Zumbo "The High Court's *Rural Press* Decision: The End of s46 as a Deterrent against Abuses of Market Power?" [2004] TPLJ126; Rex Ahdar "Escaping New Zealand's Monopolisation Quagmire" (2006) 34 ABLR 260.

142 *Queensland Wire*, above n 5.

143 *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48, (2004) 219 CLR 90.

144 *Verizon*, above n 55; The same is true for price squeezes in New Zealand where the law is tougher on defendants than United States law. Compare *linkLine*, above n 57, with *Telecom Corp of NZ Ltd v Commerce Commission* [2012] NZCA 278.

145 At 407–408.

146 At 407–408.

147 At 407–408.

148 At 410.

149 *Queensland Wire*, above n 5, at 193, 197, 202 and 216.

gave a reason for not supplying, yet escaped liability. In *Queensland Wire*, the defendant never gave a reason for not supplying and this was crucial to liability.

NT Power involved the defendant refusing a rival access to its transmission and distribution infrastructure to sell electricity. The High Court held the defendant breached s 46 as it “denied access to its infrastructure not because of a lack of capacity or technical difficulty or safety, but simply to protect its electricity sales revenue.”¹⁵⁰ Unlike *Verizon*, the Court was unconcerned about the effect on incentives to invest in infrastructure and courts acting as regulators. It suggested *Verizon* was irrelevant.¹⁵¹

While the High Court did not expressly use legitimate business rationale in either *Queensland Wire* or *NT Power*, its reasoning is consistent with it as both defendants never gave a legitimate rationale for refusing to supply and both were liable. With refusals to supply, any criticism that Australasian law is lenient is misplaced.

A. Is an SLC Test (in Particular an Effects Test) Any Better?

The Australian Parliament followed the Harper Review recommendation to replace s 46 with a new provision that added an “effects” test.¹⁵² This removed the “take advantage” requirement and adopted a “substantial lessening of competition” (SLC) test. Conduct breaches s 46 if it has the purpose, effect or likely effect of substantially lessening competition in a market.¹⁵³

As for the effect of SLC, presumably this is the same analysis as s 45 of the Competition and Consumer Act 2010. It is not the same analysis as s 27 of the New Zealand Commerce Act because Australian and New Zealand law differ on SLC. In Australia courts only take account of efficiencies to a limited degree in determining whether an agreement has the effect of SLC. *Universal Music Australia v ACCC* noted s 45:¹⁵⁴

... does not contain any “rule of reason” or any scope to permit a substantial lessening of competition because it is balanced by claimed pro-competitive effects elsewhere.

Conversely, New Zealand courts take account of efficiencies in determining whether an agreement has the effect of SLC.¹⁵⁵ A court compares the state of competition in the market with the conduct in question with the state of competition without that conduct.¹⁵⁶ Courts call this “counterfactual

150 *NT Power*, above n 143, at [72].

151 At [121].

152 “The Competition Policy Review” (Final Report, 31 March 2005) (the Harper Review).

153 For a discussion of the reform see Katharine Kemp “The Big Chill”? A Comparative Analysis of Effects-Based Tests for Misuse of Market Power” (2017) 40(2) UNSWLJ 1.

154 *Universal Music Australia v ACCC* (2003) 131 FCR 529 at [273]; for Australian Law see *SG Coronas Competition Law in Australia* (6th ed, Thomson Reuters, Sydney, 2016) at [7.140]–[7.145].

155 *Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731 (HC) at 740 and 741; *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 51 (CA) at [249]; *Shell (Petroleum Mining) Co Ltd v Kapanui Gas Contracts Ltd* (1977) 7 TCLR 463 (HC) at 528–531; for a discussion on New Zealand law see Lindsay Hampton and Paul G Scott *Guide to Competition Law* (LexisNexis, Wellington, 2013) at 75–110.

156 *ANZCO Foods*, above n 155, at [245]–[246].

analysis”.¹⁵⁷ A court weighs up the pro- and anticompetitive effects and decides on balance the conduct’s effect.¹⁵⁸ This includes evaluating any efficiencies.

Australian courts also compare competition in the market with and without the conduct in question. They call this a “with and without” analysis.¹⁵⁹ However, they have little or no regard to efficiencies. Efficiencies are not regarded as procompetitive effects and not part of the balancing exercise. This is similar to how US courts determine liability under s 1 of the Sherman Act¹⁶⁰ (the equivalent to s 27) using a rule of reason analysis. This article considers the effect of any amendment to an SLC test in New Zealand only.

Any SLC effects test involves constructing a hypothetical market. This is counterfactual analysis, which has caused so much angst. So, some of the problems of the current jurisprudence will remain with an SLC test.

US law has some lessons for an SLC effects test. There with legitimate business rationale a defendant can be liable for monopolisation even though its conduct did not breach s 1 of the Sherman Act. *Microsoft* is an example.¹⁶¹ One of the issues was whether Microsoft’s exclusive dealing contracts with internet access providers breached s 2. The District Court held imposing the contracts was monopolisation. However, it held the contracts did not breach s 1. On appeal Microsoft argued this no s 1 liability finding necessarily precluded it being liable under s 2. The DC Circuit rejected this:¹⁶²

Appellant argues that the District Court’s holdings of no liability under s1 necessarily precludes holding it liable under s2 ... we nonetheless reject Microsoft’s contention ... we agree with the plaintiffs that a monopolist’s use of exclusive contracts, in certain circumstances, may give rise to a s2 violation even though the contracts foreclose less than the ... share usually required in order to establish a s1 violation.

This arose in *Dentsply*.¹⁶³ The trial Court held the defendant’s exclusive dealing did not breach s 1. The Third Circuit held the exclusive dealing breached s 2, despite the s 1 finding. It observed: “[a]lthough not illegal in themselves, exclusive dealing arrangements can be an improper means of maintaining a monopoly.”¹⁶⁴

The Court followed another Third Circuit case, *LePage*.¹⁶⁵ The exclusive dealing did not breach s 1. On appeal:¹⁶⁶

157 *ANZCO Foods*, above n 155; *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV-2001-485-917, 13 December 2007 at [349].

158 *ANZCO Foods*, above n 155, at [249].

159 Hampton and Scott, above n 155, at 97.

160 Hovenkamp, above n 118, at chs 4–5; Andrew I Gavil, William E Kovacic and Jonathan B Baker *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* (2nd ed, Thomson West, St Paul, 2008) at ch 2; Gellhorn, Kovacic and Calkins, above n 72, at ch V; Section 1 provides: “Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal”.

161 *Microsoft*, above n 64.

162 At 70.

163 *Dentsply*, above n 59.

164 At 187.

165 *LePage*, above n 58.

166 At 157.

3M argues that because the jury found for it on LePage's claims under s1 of the Sherman Act ... these payments should not be relevant to the s2 analysis. The law is to the contrary. Even though exclusivity arrangements are often analysed under s1, such exclusionary conduct may also be an element in a s2 claim.

Those findings could not happen under monopolisation law with an SLC effects test because a court would have to find the conduct had no effect of SLC (conduct that does not breach s 1 will not breach s 27). Thus, any SLC effects test will not inevitably increase liability. The counter may be that these examples did not deserve liability as they had no anticompetitive effect. However, if a monopolist's conduct made no economic sense apart from harming competition, why should it endure?

In any case, US law requires an anticompetitive effect. As *Microsoft* said conduct "must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice."¹⁶⁷ Conduct harms the competitive process when it obstructs the achievement of competition's basic goals of lower prices, better products and more efficient production methods.¹⁶⁸ That harm is not the same as finding conduct had the effect of SLC after a counterfactual analysis. Furthermore, New Zealand law under s 36 also requires harm to the competitive process as distinct from mere harm to individual competitors.¹⁶⁹

But in some situations, such as in *Microsoft*, *Dentsply* and *LePage*, current law using a legitimate business rationale analysis will capture more conduct than any test involving asking whether the conduct had the effect of SLC.

An SLC test would be friendlier to defendants than US law in some other circumstances. The *Microsoft* test has four steps.¹⁷⁰ First, the conduct must have an anticompetitive effect that harms the competitive process. Second, the plaintiff must show the defendant's conduct harmed competition, not just a competitor. Third, if the plaintiff shows an anticompetitive effect the defendant may proffer a procompetitive justification for the conduct. The plaintiff can then rebut the justification. Fourth, if the monopolist's procompetitive justification is not rebutted the plaintiff must show that the anticompetitive harm of the conduct outweighs the procompetitive benefit.

This final stage is equivalent to the balancing approach under New Zealand's s 27. However, as a matter of practice US courts do not reach that stage. Like the *Microsoft* Court they avoid it. They stop at asking whether the conduct had a legitimate business rationale. As with s 36 law if the defendant lacked a legitimate business rationale, courts condemn it irrespective of any anticompetitive effect. An SLC test requires the balancing exercise and allows a defendant to escape liability if the plaintiff could not show the anticompetitive effects outweighed the procompetitive effects. This is so even if the conduct lacked a legitimate business rationale. Thus, an SLC test can be friendlier to monopolists than the status quo.

Perhaps courts could decide such cases under the purpose limb of the SLC test. However, New Zealand law favours an objective approach to purpose under s 27 and uses counterfactual

167 *Microsoft*, above n 64, at 58.

168 *Town of Concord v Boston Edison Co* 915 F2d 17 (1st Cir 1990).

169 *Boral*, above n 16 at [261]; *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 (HC) at 706; *Telecom*, above n 108, at 403.

170 *Microsoft*, above n 64, at 58–59.

analysis in determining purpose.¹⁷¹ Given this, if conduct did not have the effect of SLC then it will be rare for it to have the purpose of SLC. It is ironical that Australia amended its law to a test that captures less conduct than a legitimate business rationale test that is part of the current law.

VI. CONCLUSION

Legitimate business rationale analysis is useful in determining whether a firm's conduct breaches s 36. Economic analysis, while not always relevant, helps in assessing whether conduct has a legitimate business rationale.

An SLC effects test will result in less liability for some behaviour than relying on legitimate business rationale analysis. However, legitimate business rationale analysis is not a panacea. It provides no answer with conduct that not only has a procompetitive rationale but also causes anticompetitive harm. Neither does it help in cases where courts have to set an access price. However, it is useful and should remain part of s 36 analysis not least of all because it engages with economic reasoning which lies at the heart of competition law.

171 *ANZCO Foods*, above n 155; Paul G Scott "The Purpose of Substantially Lessening Competition: The Divergence of New Zealand and Australian Law" (2011) 19 Wai L Rev 168.

THE NEW ZEALAND BILL OF RIGHTS ACT 1990: A PROPOSITION FOR A RIGHT TO A QUALITY OF LIFE PROTECTION

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When the New Zealand Bill of Rights Act 1990 was enacted it was deliberately limited to civil and political rights and contained no rights of liberty and security, due to a lack of public appetite for a comprehensive rights-based document and reticence in relation to the potentially broad application and uncertainty of economic, social and cultural rights. This article investigates the development of a “quality of life approach” that includes a “right to a quality of life” that has occurred through constitutional right to life provisions, and in the right of private and family life provision in the European Convention on Human Rights. It argues that the comparative omission of a “quality of life protection” in the New Zealand Bill of Rights Act has left a gap that may require the development of a broader concept of the right to life in the Act, to ensure conformity with approaches in human rights instruments containing rights based on the International Covenant on Civil and Political Rights. A part of the courts’ institutional role is to fill gaps and develop legislation in an evolutive manner, and the New Zealand courts have shown willingness to do this with the Bill of Rights Act by developing remedies for breaches of the Act and statements of inconsistency, which have been heralded as giving rights in the Act meaning. Courts have used techniques to work around institutional tensions with Parliament and this article problematises the conception of rights as positive or negative rights to offer a theoretical foundation to develop a “right to a quality of life” in New Zealand. It offers a conclusion that the s 8 right to life in the Bill of Rights Act could be re-imagined as including a “quality of life protection” by conceptually adjusting the positive and negative conception of rights.

I. INTRODUCTION

The ability of the New Zealand Bill of Rights Act 1990 (BORA) to provide for a “quality of life protection” is a subject that has been largely overlooked since the Act’s enactment. It is widely perceived that BORA was deliberately limited in its scope by only containing civil and political rights and no economic, social, and cultural rights at the time it was enacted.¹ The s 8 right to life in BORA contains no rights to liberty and security of the person, nor a separate provision protecting a right to private and family life, and there has been a general consensus that the right to life at

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1 Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] 1 AJHR A6.

s 8 of BORA is directed to providing protections against threats of death.² There has been one recent suggestion of the possibility of s 8 being interpreted more generously.³ However, the concept remains under-theorised, and under-developed in the face of lawmakers' intentions that the scope of the Act be limited at the time of its inception.

The European Court of Human Rights (the Strasbourg Court) has developed a jurisprudence of a "quality of life protection" under art 8 of the European Convention on Human Rights. This approach by the Strasbourg Court follows wider trends of development of a "right to a quality of life", as a distinct, but connected, protection to the right to life protection, in constitutional human rights instruments that implement the International Covenant on Civil and Political Rights (ICCPR) protections. This approach has led to a development in the Strasbourg Court's jurisprudence of engaging with a broader range of Convention protections and examining a wider range of questions about how those various rights protections can require states to take positive policy action to comply with rights. In contrast, consideration by the New Zealand courts of whether the s 8 right to life in BORA contains a "quality of life protection" has been sparse. While the Supreme Court, in *B (SC 60/2016) v Waitemata District Health Board*, has suggested that BORA could possibly provide "liberty" and "home or private life" protections,⁴ there has been no development of a "right to a quality of life"; these rights protections being provided for generally in New Zealand by tacit executive and legislature compliance, and judicial review processes.

Part II of this paper theorises the development of a "quality of life approach" in human rights instruments with a right to life protection and a distinct "quality of life protection". Part III compares the development of the "quality of life approach", containing the "quality of life protection", in the Convention to the more narrow single right treatment of BORA's s 8. This is followed by exploration of the role of courts using techniques to fill gaps in BORA, and evolve it as an instrument, suggesting this role as one to apply the "quality of life approach" in BORA. Part IV returns to previous analysis in Parts II and III and reflects on "right to a quality of life" and right to life protections as being conceived as positive (economic, social and cultural) and negative (civil and political) protections. It problematises the concept of rights as positive or negative opposites and uses this analysis to provide a theoretical foundation for the deployment of a "right to a quality of life" in BORA. It is argued that a conceptual adjustment to the positive or negative conception of rights provides a foundation for deploying the broader range of protections, contained in the "right to a quality of life", in New Zealand where there is no express application of these protections. The argument concludes that the s 8 right to life in BORA is not limited to a constrained putatively civil and political rights interpretation of a protection against threats of death but can be re-imagined as including a "quality of life protection" that contains a wider range of policy action requirements. An interpretation of the right to life in this way would recognise the wider context of development

2 Paul Rishworth and others *The New Zealand Bill of Rights Act* (Oxford University Press, Melbourne, 2003); Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005), although it should be noted that in the second edition to this text it is suggested that a more inclusive "purposive" and "rights friendly" interpretation should be taken to s 8, which includes promoting an environment where rights can also be enjoyed. In the White Paper to BORA it is noted that the right to life provision would be relevant to issues of continuing life: abortion, capital punishment, self-defence, and the use of deadly force. See Palmer, above n 1.

3 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015).

4 *B (SC 60/2016) v Waitemata District Health Board* [2017] NZSC 88, [2017] 1 NZLR 823.

of a “quality of life approach” in constitutional human rights instruments containing ICCPR rights, that BORA sits within.

II. THE RIGHT TO LIFE AND THE “RIGHT TO A QUALITY OF LIFE” IN HUMAN RIGHTS INSTRUMENTS

There is no express “right to a quality of life” in BORA, the ICCPR, or any of the various domestic and regional instruments that contain ICCPR protections. However, a “quality of life protection” is now commonplace in human rights instruments, and courts have deployed a “quality of life approach” in human rights provisions to protect both a right to life protection and a “quality of life protection”. Although a “right to a quality of life” is regularly provided for, there is little discussion of what a “right to a quality of life” is, with discussion generally revolving around each individual interest that engages this protection.

The distinction between the right to life and “right to a quality of life” has received little theoretical attention, but can be understood as two distinct protections: (1) a constrained protection of continued life, protecting against threats of death (the right to life protection);⁵ and, (2) a protection of autonomy and enjoyment of life and physical and psychological wellbeing (the “quality of life protection”).⁶ Writers and courts have noted the symmetry between the right to life protection of continuing life and the “quality of life protection” of interests that make life worth living. The value of a right to continue to live is reduced if it is not underpinned by a quality of life that provides life with meaning and dignity.⁷ Therefore, although there is a theoretical distinction between the right to life and the “right to a quality of life”, there is also a generally acceptable connection in the protections they provide. It also is worth noting at this point that the distinction of right to life and “right to a quality of life” protections is conceptualised, in legal discourse and praxis, as a positive or negative application of these rights. The protections provided by the right to life protection are considered to impose a negative obligation on the state to refrain from implementing structures that cause or allow death to occur; the protections contained in the “quality of life protection” are

5 This protection has also been referred to as a protection of physical or bodily integrity or a “right to physical life”: See *Carter v Canada (Attorney-General)* 2015 SCC 5; Butler, above n 3; and RS Pathak “The Human Rights System as a Conceptual Framework for Environmental Law” in Edith Brown Weiss (ed) *Environmental Change and International Law: New Challenges and Dimensions* (United Nations University Press, Tokyo, 1992).

6 This protection has been described as “qualitative aspects of life”, a “qualitative approach to the right to life”, and rights of existence and survival. See Richard Desgagné “Integrating Environmental Values into the European Convention on Human Rights” (1995) 89 AJIL 263; *Carter v Canada (Attorney-General)*, above n 5; Rein Müllerson “Right to Survival as Right to Life of Humanity” (1990) 19 Denv J Int’l L & Pol’y 47; BG Ramcharan “The Concept and Dimensions of the Right to Life” in BG Ramcharan (ed) *The Right to Life in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1985).

7 In Butler, above n 3, it is stated that the jurisprudence demonstrates that the right to life encapsulates not only physical wellbeing but also what makes life worthwhile living; Marius Pieterse “A Different Shade of Red: Socio-Economic Dimensions of the Right to Life in South Africa” (1999) 15 SAJHR 372; see also *Rodriguez v British Columbia (Attorney-General)* 1993 3 SCR 519, dissent of Cory J; *Carter v Canada (Attorney-General)* 2013 BCCA 435, dissent of Finch CJBC. An extreme example of a right to life being reduced to a negligible level, by a lack of quality of life, can be observed in the *Airedale NHS Trust v Bland* [1993] AC 789, [1993] 1 All ER 821 where the court considered suffering of an individual in a persistent vegetative state: the Court observed the person was alive but no longer living in any meaningful way; Müllerson, above n 6; Jon Yorke “Introduction: The Right to Life and the Value of Life: Orientations in Law, Politics and Ethics” in Jon Yorke (ed) *The Right to Life and the Value of Life: Orientations in Law, Politics and Ethics* (Ashgate Publishing, Surrey, 2010).

said to compel a degree of positive action by a state to create and maintain circumstances in which a life may be lived to its fullest capacity, where individuals are able to make decisions about their lives and choose activities to take part in.⁸ However, this conceptual distinction is problematic, because the two protections cannot be neatly divided into positive or negative opposite protections as a rule. A more convincing explanation of these protections is that they simultaneously contain both positive and negative requirements. Part IV returns to this point and reflects on the concept of negative and positive requirements of the two protections to provide a theoretical foundation for a more expansive “right to a quality of life” application in BORA.

How, then, has the “quality of life approach” – recognising a “right to a quality of life” as a distinct protection from the right to life – been deployed by courts? The “quality of life protection” is episodically provided for in constitutional rights provisions in various ways including: under the liberty and security parts of a right to life provision (Canadian Charter of Rights and Freedoms, United States 14th Amendment⁹); under the right to life part of a right to life provision (India¹⁰); and in two different rights provisions within the same instrument (arts 2 and 8 of the Convention). The divide in the deployment of these two protections is illustrated well in two recent Canadian Supreme Court cases applying s 7 of the Canadian Charter of Rights and Freedoms. Section 7 is multi-layered and protects the right to life, liberty, and security of the person. There is a distinction between the protection of life, and the protection of liberty and security which follows the above theoretical distinction between the right to life protection and the “quality of life protection”. The position is summarised in the Canadian assisted dying case of *Carter v Canada (Attorney-General)*, in which the Supreme Court of Canada explained that “the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly” while, in contrast, “concerns about autonomy and quality of life have traditionally been treated as liberty and security rights”.¹¹ The distinction can also be observed in *Chaoulli v Quebec (Attorney-General)*, where the Supreme Court in a case concerning delays in public health care services stated:¹²

Where the lack of timely health care can result in death, the s 7 protection of life is engaged; where it can result in serious psychological and physical suffering, the s 7 protection of security of the person is triggered.

Under the Canadian Charter the right to life protection only is engaged by narrow protections against threats of death, while the liberty and security rights extend to providing protections for autonomy and wellbeing interests. The divide in the Canadian provision reflects the divide in the right to life protection and the “quality of life protection” – a divide between a narrow protection

8 Butler, above n 3; Pieterse, above n 7; *National Legal Services Authority v Union of India* 2014 AIR SCW 2285; Yorke, above n 7.

9 See for example: *Roe v Wade* 410 US 113 (1973); *Griswold v Connecticut* 381 US 479 (1965); and *Obergefell v Hodges* 576 US __ (2015) where the protections of autonomy of choice in abortion decisions, decisions to use contraceptives, and autonomy of choice in identity and the right of same-sex couples to marry have engaged the right of liberty part of the 14th Amendment provision of life, liberty and security of the person.

10 See *Kumar v State of Bihar* AIR 1991 SC 420 and *MC Mehta v Kamal Nath* (2000) 6 SCC 213 where a protection of a quality of life in connection with the environment has been recognised under the “life” part of the right to life in art 21 of the Constitution of India.

11 *Carter v Canada (Attorney-General)*, above n 5, at [62].

12 *Chaoulli v Quebec (Attorney-General)* 2005 SCC 35, [2005] 1 SCR 791 at [123]–[124].

against threats of death (the former protection), and a wide protection of all other autonomy and wellbeing interests, that do not involve a direct or indirect threat of death, but are concerned with life being worth living (the latter protection). The “quality of life protection” is very broad, and can potentially cover all manner of things; it has been deployed by the Canadian courts to protect: parental status, autonomy in parental choices, autonomy in abortion decisions, autonomy in end of life decisions, autonomy in decisions about where to live, and physical and psychological wellbeing.¹³

The same quality of life approach, with a divide in protections of the right to life and a “right to a quality of life”, has been followed in international law by the Strasbourg Court deploying art 2 and art 8 in the Convention. The art 2 right in the Convention is the instrument’s right to life provision and protects the above (and this will appear tautologous) right to life protections (protections against threats of death). The art 2 right states:

Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Although the art 2 right is regularly conceived as imposing positive and negative obligations, the provision has been applied narrowly¹⁴ and the protections that derive from the provision reflect the approach in the right to life part of the Canadian s 7 right concerned with threats of death.¹⁵ The positive obligations in art 2 are considered to protect against threats of death that are indirect.¹⁶ In contrast to art 2, however, the Strasbourg Court has deployed art 8 to provide the protections contained in a “right to a quality of life”. Article 8 states:

Everyone has the right to respect for his private and family life, his home and his correspondence.

The art 8 right to respect for private and family life has been deployed to provide for protections of autonomy and wellbeing interests that do not concern threats of death. Accordingly, the right has been applied similarly to the liberty and security parts of the Canadian s 7 provision; however instead of dividing the rights between life and liberty/security, the rights in the Strasbourg setting are conceived as rights that are positive (art 8) or negative (art 2). Despite the discursive difference, the result is very similar because the art 8 provision provides protections of: physical and social

13 Kent Roach and Robert J Sharpe *The Charter of Rights and Freedoms* (4th ed, Irwin Law, Toronto, 2009); *Carter v Canada (Attorney-General)*, above n 5; *Chaoulli v Quebec (Attorney-General)*, above n 12.

14 Desgagné, above n 6, the author notes that case law on the provision has been “sparse” and it has usually been applied to provide protections concerning a “right to physical life”.

15 See *Osman v the United Kingdom* (1998) 29 ECHR 245 (Grand Chamber); *Kiliç v Turkey* ECHR 22492/93, 28 March 2000; *Edwards v the United Kingdom* ECHR 46477/99, 14 March 2002.

16 Although this is arguably wider than what is envisaged by indirect threats of death described in *Carter*, where art 2 has provided wider protections including: a requirement to have a proper legal and administrative framework to define when law enforcement authorities may use force: *Nachova v Bulgaria* Grand Chamber, ECHR 43577/98 and 43579/98, 6 July 2005; and to conduct a proper investigation into a death that has occurred where the investigation may lead to criminal proceedings: *Öneryıldız v Turkey* Grand Chamber, ECHR 48939/99, 30 November 2004. See also Human Rights Committee *Draft General Comment no 36 on Article 6 of the International Covenant on Civil and Political Rights – Right to life* CXX (2017) where the ICCPR art 6 right to life is discussed as providing a protection against direct and indirect threats of death with discussion of this protection in a wider sense as providing multiple putatively positive and negative requirements on states to prevent death.

identity;¹⁷ physical and psychological autonomy;¹⁸ personal development, the establishment and development of relationships with other human beings;¹⁹ paternity;²⁰ childcare;²¹ autonomy concerning assisted dying;²² and the environment where it concerns human wellbeing.²³ Articles 2 and 8 have been deployed consistently with the theoretical divide of the right to life and the “right to a quality of life”, with a divide between protections against threats of death (direct or indirect), and protections of autonomy and wellbeing interests. The conception of art 8 protections imposing positive obligations²⁴ also is consistent with the distinction of negative or positive that is used to classify the right to life and “right to a quality of life” protections.

III. THE QUALITY OF LIFE APPROACH AND BORA

The “quality of life approach” has not been adopted in New Zealand and there has not been development of a “quality of life protection” in BORA. In considering assisted dying in the New Zealand context, the New Zealand High Court confirmed that the s 8 right to life provision in BORA provides a right to life protection against threats of (premature) death, but did not address the question of whether there was a “quality of life protection” of autonomy in choice in ending life in BORA.²⁵ Nor have other cases addressed questions of whether autonomy of choice protections, or physical and psychological wellbeing protections, are contained in BORA, in claims concerning autonomy and wellbeing interests that normally engage these protections.²⁶

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- 17 *Mikulić v Croatia* ECHR 53176/99, 7 February 2002; *B v France* ECHR A 232-C, 25 March 1992; *Burghartz v Switzerland* (1994) 18 EHRR 101; *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Gaskin v the United Kingdom* (1989) 12 EHRR 36.
- 18 *X and Y v the Netherlands* (1985) 8 EHRR 235 (ECHR).
- 19 *Burghartz v Switzerland*, above n 17; *Friedl v Austria* ECHR A 305-B, 31 January 1995.
- 20 *Tysiqc v Poland* (2007) 45 EHRR 42; *Evans v the United Kingdom* (2007) 46 EHRR 728 (Grand Chamber).
- 21 *X, Y and Z v the United Kingdom* (1997) 24 EHRR 143 (Grand Chamber); *Berrehab v the Netherlands* (1988) 11 EHRR 322.
- 22 *Haas v Switzerland* (2011) 53 EHRR 33; *Gross v Switzerland* ECHR 67810/10, 14 May 2013; *Pretty v the United Kingdom* (2002) 35 EHRR 1.
- 23 *Lopez Ostra v Spain* (1995) 20 EHRR 277; *Guerra v Italy* (1998) 26 EHRR 357; *Hatton v United Kingdom* (2003) 37 EHRR 28.
- 24 It is also worth noting that rights of autonomy that could be protected under art 8 are also protected at other parts of the Convention, for example art 12 protects the right to marry and found a family and art 2 of the first protocol deals with the rights of parents in relation to their children. For discussion see Claire Ovey and Robin CA White *The European Convention on Human Rights* (5th ed, Oxford University Press, New York, 2010).
- 25 See *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556, following the reasoning in *Carter*, it was confirmed that if the law caused premature death this engaged s 8. The court noted that art 8 of the Convention contains a protection of autonomy of choice in end of life decisions, but considered there was not a requirement to examine the correlation between the provisions of BORA and art 8.
- 26 *Lawson v Housing New Zealand* [1997] 2 NZLR 474 was a case about issues concerning the effect of government policy on the interest of autonomy of a decision about where to live. The High Court explained that the right to life under s 8 of BORA did not include a right to affordable accommodation having regard to the impact on a tenant’s living standards. The Court noted that it was possible that s 8 could include social and economic factors. In *B (SC 60/2016) v Waitemata District Health Board*, above n 4 the Supreme Court explained that a protection concerning autonomy of choice concerning an ability to smoke was not engaged in that case and consideration of these types of protections could be left to another case.

The most recent case, in New Zealand, to consider the theoretical possibility of BORA providing protections ordinarily provided for in the “right to a quality of life”, was the Supreme Court in *B (SC 60/2016) v Waitemata District Health Board*.²⁷ However, the Court did not recognise a “right to a quality of life” in BORA. In the case the Court considered whether a smoke-free policy of the Waitemata District Health Board, prohibiting smoking on the Board’s premises, was inconsistent with the BORA s 23(5) right of a person who is deprived of liberty to be treated with humanity and respect for their dignity. The Court considered whether the Board’s policy, preventing patients from smoking, was inconsistent with the protection of respect for dignity by examining the manner that the policy managed patient’s nicotine withdrawal while preventing them from smoking. It examined the background and content of the policy in detail and found that because the policy had been carefully implemented, and provided nicotine replacement therapy to patients, it did not breach the s 23 right. The Supreme Court also considered a “right to home or private life”, but explained that it would leave “consideration of the place of concepts of liberty and of the right to a home or private life [in BORA] to another case”, and this question would require consideration of BORA’s purpose to affirm New Zealand’s commitment to the ICCPR.²⁸ The Court did not discuss, or recognise, an autonomy of choice protection in connection with smoking, and explained that it did not need to consider whether the policy was inconsistent with protections of liberty and home and private life because it was satisfied that the “right to smoke” of a patient lawfully held in an ICU was not included in these concepts, however they could be construed. In reaching this conclusion the Court relied on the reasoning in a decision of the Supreme Court of British Columbia holding that a bylaw preventing smoking in a courthouse did not breach the Canadian Charter’s s 7 right of security on the grounds that it did not involve a “basic choice” but a “life-style choice”.

In comparison with other constitutional human rights documents, the approach to the right to life protection in BORA has therefore remained constrained. The wording of the right to life provision in the Act is similarly conservative. Section 8 of BORA reads:

No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

Should the quality of life approach applied in the Convention be applied to BORA? Answering this question requires comparing the Convention’s arts 2 and 8 to s 8 of BORA. The two instruments, and their provisions, can be compared using the following comparative method: (1) investigating the similarities and differences between BORA s 8 and the Convention arts 2 and 8, and their application; and (2) examining the functional equivalence where there are differences between the instruments and their provisions, and the points of departure in each instrument.²⁹ The following analysis will reflect on the provisions themselves, the protections provided under the provisions, and the background and context of the two instruments.

The wording of s 8 of BORA is similar to the Convention art 2, a requirement that a person should not be “deprived” of life except in accordance with law. All three provisions, art 2, s 8, and art 8, are framed in a similar manner as negative rights. BORA and the Convention diverge in that

²⁷ *B (SC 60/2016) v Waitemata District Health Board*, above n 4.

²⁸ At [113].

²⁹ See generally John C Reitz “How to do Comparative Law” (1998) 46 Am J Comp L 617; and Ran Hirschl “The Question of Case Selection in Comparative Constitutional Law” (2005) 53 Am J Comp L 125, where types of comparative method are generally discussed including methods of examining similarities and differences in systems, and exploring how those different systems functionally address the same dilemmas, challenges, or issues.

BORA contains no right to private and family life³⁰ and there is no functional equivalent to the Convention art 8 in BORA. As outlined in Part II, the quality of life approach has been deployed in arts 2 and 8 of the Convention providing two distinct protections of a right to life protection and “quality of life protection”. In the Convention context the protections that derive from the “quality of life protection” have been conceived of as positive protections. In contrast, the “quality of life approach” has not been followed in BORA, with the s 8 provision providing right to life protections against threats of death, but not the “right to a quality of life” protections that provide for a wider range of interests. The Convention protections and the BORA protections therefore diverge at the point of providing for a “quality of life protection”. The functional equivalent, in the New Zealand context, of a “quality of life protection” is the custom of the courts to provide more space to Parliament in matters concerning polycentric issues and policy choices, leaving these issues in the realm of Parliament’s ambit of responsibility.³¹ This rights culture is built on the premise that BORA is applied by the courts as only providing a narrow set of rights protections, based on a constrained understanding of BORA as a rights instrument.³² There are two problematic assumptions in this approach to BORA. The first is that it assumes that a wider set of rights protections are able to be left to the executive and legislature to recognise through political processes, and the second is that it assumes that for the most part the executive and legislature will comply with the requirements that derive from those protections. This rights culture relies on a degree of assumption, reducing the courts’ engagement with the “quality of life protection” to a more general role of judicial review, assessing executive action for maladministration and failure to comply with public law duties in decision-making.

The other constitutional process that plays a role in ensuring executive and legislative compliance with rights protections in New Zealand, in place of the courts, is the vetting of proposed legislation for compliance with BORA by the Attorney-General. The monitoring of compliance with rights in Attorney-General vetting procedures is based on the idea of BORA being a supervisory document, which can be contrasted with other jurisdictions’ rights documents that provide judicial powers to

30 Nor does BORA contain a right of liberty or security of the person.

31 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014); Andrew Butler and Petra Butler “Protecting Rights” in Jonathan Boston, Petra Butler and Caroline Morris (eds) *Reconstituting the Constitution* (Springer, Heidelberg, 2011). An example of this deference in the context of “right to a quality of life” protections can be observed in *M (CA587/11) v Minister of Immigration* [2012] NZCA 489, [2013] 2 NZLR 1. In that case the Court preferred to leave protections of family values, provided by a right to family life, in the hands of the executive, explaining that family values may be recognised in executive policy and a consideration of executive decision making – in that case immigration family reunification policy. In *Lawson v Housing New Zealand*, above n 26, it was observed that “there are strong policy arguments in favour of their exclusion” referring to “a right not to be charged market rent for accommodation without regard to affordability”.

32 See MB Rodriguez Ferrere and Andrew Geddis “Judicial Innovation under the New Zealand Bill of Rights Act – Lessons for Queensland?” (2016) 35 UQLJ 251 where the authors describe a constrained approach by the New Zealand courts to rights protection under BORA as a cautious approach to the application of BORA, based on a “deflationary understanding of what the BORA was intended to achieve”. The authors compare this to an inflationary account of a rights instrument, which involves “innovative judicial action” in imposing and developing restraints on “all branches of government”.

strike down legislation, with lesser emphasis on enactment vetting.³³ However, the Attorney-General procedures only provide for the rights-based protections that are contained in BORA and do not provide for a “quality of life protection”, which is not expressly contained in BORA. Therefore, the only process that exists in New Zealand to perform the functional role of providing for a “quality of life protection” is tacit executive and legislature compliance with rights through political processes.

The Convention is an international human rights treaty and a regional counterpart of the ICCPR, performing a role akin to a human rights document governing Europe. It was adopted in 1950 in response to atrocities of global war, and also to expound on wider notions of autonomy, dignity and equality. The drafting and implementation of the Convention at this time is widely considered to be focused on providing protections from negative interferences with fundamental human rights – to prevent states from conducting unlawful killings, torture, and slavery – in contrast with requiring positive state actions. Authors contend that the intention at the time of drafting was for its application to be limited, with concerns of economic, social and cultural rights being problematic, and economic, social and cultural rights were left for separate and later treatment.³⁴ This later treatment eventuated with rights in the instrument having been developed to recognise a wider range of protections, considered to be positive, to a point where it is now contended that the Strasbourg Court has applied provisions generously and contiguously, without specifying application of each right, allowing for wide breadth and for rights to develop in line with social changes.³⁵ This expansion of the Convention has been linked to its philosophy that it is to be treated as a “living instrument which, ... must be interpreted in the light of present day conditions”.³⁶ Authors claim that, based on this philosophy, the Convention is to be interpreted in an evolutive manner, and not to be “locked into a moment in history following the Second World War”.³⁷ It is similarly claimed that the Convention should be interpreted on the basis of current standards accepted in society

33 See Paul Rishworth “Human Rights” [2015] NZ L Rev 259 where the author explains that when exercising the s 7 vetting function Attorneys-General express the same view that would be required of a constitutional court applying a supreme bill of rights. The difference being that the s 7 function is a pre-enactment exercise. This vetting function is compared with a less substantive “plausible arguments” vetting function in Canada where there have been a lower number of reports of inconsistency. Rishworth, above n 2. BORA is also structured towards Parliament being the guardian of rights, in contrast to the courts, Claudia Geiringer argues that BORA was constructed as a “parliamentary” bill of rights with Parliament’s responsibilities advanced by Attorney-General vetting procedures, see Claudia Geiringer “The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament’s Power to Legislate?” (2007) 11 Otago L Rev 389.

34 David Harris and others (eds) *Law of the European Convention on Human Rights* (Oxford University Press, New York, 2009) at 361.

35 Ursula Kilkelly “Article 8: The Right to Respect for Private and Family Life, Home, and Correspondence” in Harris and others (eds) *Law of the European Convention on Human Rights* (Oxford University Press, New York, 2009) at 361. Rights relating to a quality of life containing positive obligations generally gained momentum in the late 1970s under the art 8 right to private and family life, see Ovey and White, above n 24. *Kroon v the Netherlands* (1994) 19 EHRR 263 at [31]. This application of protections can be observed in the Court’s development of describing protections as “positive”. See *X and Y v the Netherlands* above n 18; *Marckx v Belgium* (1979) 2 EHRR 330. In *Guerra v Italy*, above n 23, the Court outlined that even though art 8 is worded to protect individuals from arbitrary interference, there may be positive obligations inherent in the effective respect for the right. See also *Gross v Switzerland*, above n 22, where it is stated that there may be positive obligations inherent in a right to respect for private life under art 8. The Court stated this could include the adoption of measures including the provision of a regulatory framework.

36 *Tyrer v the United Kingdom* (1978) 2 EHRR 1 at [31].

37 Ovey and White, above n 24 at 4.

and not prevalent standards at the time the Convention was adopted.³⁸ The Strasbourg Court's judgments are of a supervisory nature and subject to the principle of subsidiarity, and, when the Court makes judgements applying rights that are considered to be positive in nature, the court provides a margin of appreciation to a state.³⁹

The timing of the inception and enactment of BORA in New Zealand was in general conformity with the emergence of domestic rights instruments and rights development internationally. BORA was enacted to enable New Zealand to comply with its international law obligations and implement the ICCPR into domestic law, and it is explained in its Long Title that it is an Act to affirm New Zealand's commitment to the ICCPR. Aside from the international context of the proliferation of rights instruments at the time of the enactment of BORA, at a domestic level impetus for a rights document in the 1970s and 1980s can be attributed to an increasing number of public law cases coming before the courts, and concern about wide-reaching use of executive power. BORA was enacted in 1990 and had its genesis in a White Paper presented to the House of Representatives in April 1985.⁴⁰ From the time of the first proposals in the White Paper BORA was constrained: the White Paper proposal that BORA have supreme law status was not adopted due to perceptions of unpopularity with the public; the Act was designed to influence the interpretation of statutes, in contrast with invalidation. At the time of BORA's enactment it did not include putatively economic, social and cultural rights or a right to liberty and security due to perceptions of uncertainty that would be created by these kinds of rights, and a concern to vest rights with greater specificity.⁴¹ BORA has not fully implemented ICCPR obligations: many rights guaranteed in the ICCPR are not protected in BORA⁴² and the United Nations Human Rights Committee has expressed concern about these omissions and about the fact that BORA does not have "higher status than ordinary legislation".⁴³

The Convention and BORA therefore contain similarities in that the rights they contain both have symmetries to the rights in the ICCPR. Both instruments were implemented in a wider context of the development of other international and domestic human rights instruments, and had conservative beginnings of providing recognition of basic rights protections with a concern to protect only rights that were perceived to be negative, when rights were still at comparatively nascent levels of development in the international and domestic situations into which they were introduced. Both instruments had their genesis in response to respective international and domestic constitutional and political conditions, without necessarily intending wider reform beyond this.

38 Harris, above n 34.

39 Ovey and White, above n 24; David Harris and others "The European Convention on Human Rights in Context" in *Law of the European Convention on Human Rights* (Oxford University Press, New York, 2009) 1.

40 Palmer, above n 1.

41 For a comprehensive discussion of this historical background to BORA see Butler, above n 3. Also see Butler, above n 31; Paul Rishworth "Human Rights" [2012] NZ L Rev 321; Geiringer, above n 33; Justice and Law Reform Select Committee "Interim Report on the Inquiry into the White Paper – A Bill of Rights for New Zealand" [1986-1987] X AJHR I 8A 22. The formation of BORA can be contrasted with the Canadian Charter of Rights and Freedoms where courts were given a power to strike down laws for inconsistency. See also generally Rishworth, above n 2, and where it is stated that this limitation appears to have been a deliberate choice by drafters "calculated to vest the rights with greater specificity and restrict the scope for judicial review of policy choices".

42 See Butler, above n 3, for discussion on the various rights omitted from BORA.

43 *Report of Human Rights Committee A/57/40* (Vol I) (2002); *Concluding Observation of the Human Rights Committee on New Zealand's Fifth Periodic Report CCPR/C/NZL/CO/5* (2010).

While the Convention is an international instrument that supervises state compliance with rights protections and BORA is a domestic instrument, there is functional equivalence in the instruments in that they are both supervisory instruments in their respective contexts and provide an operational discretion to lawmakers without striking down laws. The point of divergence in the two instruments is the evolutive approach in the application of the Convention protections which has led to a “quality of life approach”, and recognition of a “right to a quality of life” in that instrument, in contrast with the limited evolution of BORA with no development of the “quality of life approach”.

It could be argued that the functional equivalent of the evolutive Convention jurisprudence, deploying a “quality of life protection”, in the New Zealand context, is providing for the protection in the executive’s ongoing tacit compliance with rights obligations in political processes, along with judicial review. However, this is probably not entirely true, because there is no way of measuring whether the “quality of life protection” is being recognised or not, in political processes of tacit executive and legislature compliance, and this manner of protection is largely based on assumed compliance by the executive and legislature. Judicial review processes will also be based on administrative law standards, and be episodic in nature when it comes to the provision of the types of standards that could possibly be considered to be contained in a “quality of life protection”. Provision for the “quality of life protection” in ongoing executive compliance and judicial review processes therefore do not provide the same tangible measure of protection as the deployment of a “right to a quality of life” as a protection, which provides a wider category of express protections with a wider range of requirements, considered to be positive requirements.

The point is highlighted in the *B (SC 60/2016) v Waitemata District Health Board* case, where the Court did not recognise an autonomy of choice protection in New Zealand, leaving the question of a “quality of life protection” in BORA undecided. The language of the decision, that a “right to smoke” of a patient in an ICU definitively did not engage autonomy protections, however construed, could be interpreted as meaning that autonomy of choice protections concerning “lifestyle” choices – or choices to do unhealthy things – have a general lower level of protection in all cases. This would be problematic. It can also be surmised that the result, reflecting on the facts of the case with a “quality of life protection”, would probably have been the same because the Board’s policy was comprehensive and probably would not have affected an autonomy of choice protection, in the same way that the bylaws in the Canadian case did not breach the s 7 right. However, there were key differences in the cases, one being that the Canadian case involved a “temporary prohibition” on a defendant in a criminal proceeding, from being able to smoke, only while detained at the courthouse to attend the court hearing, and the defendant was not compelled to “quit smoking”.⁴⁴ In contrast, in *B (SC 60/2016) v Waitemata District Health Board* patients were unable to smoke at any time on any of the Board’s internal or external property, and the policy was a permanent prohibition which had the effect of requiring patients to quit smoking. It would have provided more certainty for the “right to a quality of life” in New Zealand if an autonomy of choice protection had been recognised in the *B (SC 60/2016) v Waitemata District Health Board* case, so we would know how the different circumstances in the case engaged the protection. We can therefore observe the gap that absence of the protection creates, where there is not a functional equivalent protection in New Zealand, even in the face of likely executive compliance. We can also observe the utility that a “quality of life protection” would have in setting some boundaries around certain rights protections, which provides a justificatory foundation, in juridical analysis, for why a

44 *R v Denison* (1999) 70 WCB (2d) 758 (BCSC) at [22] and [41].

claimed interest is or is not covered by the protection, on a case by case basis. An express “quality of life protection” would also provide a justificatory foundation for determining when executive and legislative actions comply with the protections contained in the “right to a quality of life”, in political processes and Attorney-General vetting procedures.

The functional similarities in BORA and the Convention, as supervisory instruments protecting ICCPR rights, make BORA a suitable instrument to be applied in an evolutive manner, not locked into a moment of political history when the White Paper was debated.⁴⁵ The courts’ role would be to apply s 8 in an evolutive manner, deploying the “quality of life approach”, with both its existing right to life protection and a “quality of life protection”. Arguments against judicial extension of human rights provisions in this way go something like this: by extending rights judges are reading a new right into the existing right that was not intended by the legislature at the time the legislation was written and the court is therefore creating, instead of interpreting, law. Following this reasoning, similar arguments are deployed that extension of the right is judicial legislation and judicial originalism, judges are unelected and therefore this approach to extension of a right is inappropriate and amounts to judicial activism and politicising the judiciary.⁴⁶ However, one should not underestimate the role of the courts in deploying a quality of life approach under the BORA right to life provision. Phillip Joseph argues that concepts of judicial activism are inimical to the institutional roles of courts in a Westminster constitution such as New Zealand. For Joseph, courts have roles of developing legislation to new circumstances and filling gaps in statutes that are open-ended and incomplete.⁴⁷ The New Zealand courts have demonstrated an understanding of these concepts in BORA. In 1994 the Court of Appeal in the *Baigent’s case* established remedies for contraventions of BORA rights that were not provided for in the Act.⁴⁸ Similarly in 2000, in *Moonen v Film and Literature Board of Review*, when faced with no provision in BORA providing for declarations of inconsistency to be made, in contrast with the recently enacted United Kingdom Human Rights Act 1998, the Court of Appeal paved a road for the courts to indicate that a statutory provision was inconsistent with BORA.⁴⁹ Seven years following *Moonen*, in 2007, the Supreme Court consolidated the point further in *R v Hansen*, explaining that the courts had a “constitutional responsibility” to indicate inconsistencies with protected rights to serve the important function of bringing a law that “infringes protected rights” to the attention of the executive.⁵⁰ The point has continued to evolve over time with the courts continuing to engage with the issue of whether

45 In Butler, above n 31, the authors state that broadening and enhancing the protection of fundamental rights should be undertaken for the benefit of all New Zealanders and is consistent with honouring New Zealand’s international obligations. This is also consistent with the general proposition that New Zealand human rights statutes should be interpreted using international human rights provisions and jurisprudence: for discussion see Andrew S Butler and Petra Butler “The Judicial Use of International Human Rights Law in New Zealand” (1999) 29 VUWLR 173. Also see Constitutional Advisory Panel *New Zealand’s Constitution: A Report on a Conversation* (November 2013) where the panel suggested expanding rights to include economic, social and cultural rights and environmental rights.

46 See generally Joseph, above n 31; Butler, above n 31; Rishworth, above n 2; and see Harris, above n 39, for discussion in the context of the Convention.

47 Joseph, above n 31; in Butler, above n 31, the authors also describe these arguments as misplaced in the context of the courts not having a power to invalidate legislation.

48 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent’s case*].

49 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

50 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [253] and [259].

a jurisdiction to issue formal declarations of inconsistency exists under BORA.⁵¹ Writers have described such steps as giving BORA rights meaning.⁵² Although developments by the courts have been episodic, the courts' understanding of what is happening should not be underestimated either. Both declarations and remedies have filled gaps in BORA,⁵³ but we also witness restraint by the courts in developing statements of inconsistency, with incremental discussion on the issue of a power to make a declaration of inconsistency occurring between 2000 and 2017. An interpretation of what is happening here is a technique of the courts to provide a forewarning to Parliament of judicial developments and to give Parliament an opportunity to implement the development itself. This is something distinct from judicial activism and can be more productively considered as the courts developing BORA as a rights instrument through their institutional position.

The Strasbourg Court has developed the application of art 8 to apply the "quality of life approach" and apply a "quality of life protection" by providing for more, putatively positive, requirements over time in an evolutive manner. A similar technique of development, although more episodic, can be observed in the New Zealand courts' approach to filling gaps in BORA. However, providing for the "quality of life protection" concerns application of a wider range of protections with more requirements that derive from them, which requires the courts to engage with matters of policy, which is traditionally the domain of the legislature and executive. This is an approach that the New Zealand courts are less familiar with under New Zealand's rights arrangements. But right to life protections and the "quality of life protection" cannot be neatly categorised as distinct positive or negative opposite concepts either, and an institutional balance providing a wide scope of rights protection to lawmakers does not prohibit the application of a "right to a quality of life" on the basis that the protections contained in it have traditionally been perceived as positive.

IV. THE QUALITY OF LIFE APPROACH: MORE THAN POSITIVE OR NEGATIVE

Techniques used by the courts to provide for a BORA remedy, and incrementally develop a "dialogue" tool with Parliament, have been used to evolve jurisprudence under BORA. It is this development by the courts that has filled gaps in BORA when these matters were not provided for in the Act. It is this same role that provides a foundation to evolve BORA as a rights instrument and to apply the "quality of life approach" containing a "right to a quality of life". However, BORA is a supervisory instrument and New Zealand has its own rights protection culture which has a bearing on the institutional limits on how far the courts can expand a right. But this is not a prohibition. We have seen the Strasbourg Court take these steps with a functionally similar, supervisory, instrument. Is there a justificatory basis for deploying these techniques to apply a "right to a quality of life" in the New Zealand context? This question can be answered by unravelling the positive or negative opposite conceptions of these rights and examining the different requirements that derive from right to life protections and the "quality of life protection". This analysis also concerns the conception of these rights as being civil and political, or economic, social and cultural rights.

51 In *Attorney-General v Taylor* [2017] NZCA 215 the Court of Appeal confirmed this power as a declaration of inconsistency. At the time that this article was written the point was before the Supreme Court.

52 Bev Clucas and Scott Davidson "Taking Human Rights Seriously: United Kingdom and New Zealand Perspectives on Judicial Interpretation and Ideologies" in Roger Brownsword (ed) *Global Governance and the Quest for Justice Volume IV: Human Rights* (Hart Publishing, Portland, 2004) 153.

53 For discussion see Clucas and Davidson, above n 52.

Civil and political, and economic, social and cultural are now common referents for two categories of human rights, with rights first receiving significant formal categorisation in this way in early international human rights instruments: the ICCPR and the ICESCR,⁵⁴ and the Universal Declaration of Human Rights. However, the two groups of rights have been linked, by theorists, to earlier conceptions; civil and political rights to natural rights philosophy of late 18th-century Europe, and economic, social and cultural rights to socialist governments of the early 20th century.⁵⁵ Civil and political rights are considered to be absolute rights emphasising freedom from state interference, grounded in possessive individualism, and creating a negative obligation. These rights are described as immediate protections that prevent interferences with life, liberty (particularly in relation to arbitrary arrest and detention) and bodily integrity. Economic, social and cultural rights are considered to be rights involving a claim on the state for protection, creating positive obligations. These rights are described as rights that are programmatic, budgetary, and realised progressively. It is claimed that these rights involve resource allocation, are political in nature, and provide access to welfare services, health treatment, education and housing. Based on the assumption that economic, social and cultural rights are progressively realised over time, they are perceived to be better addressed through political processes than through courts, which are not institutionally designed to deal with them. In contrast, because civil and political rights are believed to be immediate they are considered to be justiciable and well suited to being determined in a court.⁵⁶

In proposing that the right to life in South Africa be construed to include socio-economic entitlements, Marius Pieterse argues that the distinction between civil and political (negative) and economic, social and cultural (positive) rights can be artificial and lacking accuracy in relation to the nature of human rights. For Pieterse, characteristics used to define civil and political rights can be found in economic, social and cultural rights and vice versa, and he points out that both types of right are interdependent and symbiotic.⁵⁷ Pieterse follows with an analysis of how application of socio-economic rights applied through the constitutional right to life could enhance protection of socio-economic interests. Pieterse's analysis represents a wider view about the problematic

54 International Covenant on Economic, Social and Cultural Rights.

55 Harris, above n 39.

56 See Asbjørn Eide "Economic, Social and Cultural Rights as Human Rights" in Asbjørn Eide, Catarina Krause and Allan Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (Kluwer Law International, the Netherlands, 2001) 9; Philip Alston and Gerard Quinn "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 9 Hum Rts Q 156; Joss Opie "A Case for Including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990" (2012) 43 VUWLR 471. Civil and political rights are often also defined as first generation rights, and economic, social and cultural rights as second generation rights; rights in relation to self-determination and the environment are considered as third generation rights: see Asbjørn Eide "Economic, Social and Cultural Rights: A Universal Challenge" in Asbjørn Eide, Catarina Krause and Allan Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (Kluwer Law International, the Netherlands, 2001) 3; Harris, above n 39; Ellie Palmer *Judicial Review, Socio Economic Rights and the Human Rights Act* (Hart Publishing, Portland, 2007); Butler, above n 31.

57 Pieterse, above n 7.

definitions between civil and political, and economic, social and cultural rights,⁵⁸ however he does not provide an explanation on how these characteristics can be deconstructed to define the nature of rights. Civil and political, and economic, social and cultural rights, and positive and negative requirements deriving from them, are not a neat opposite binary, and as Pieterse argues, protecting one type of right often involves protecting another. However, it does not follow that the characteristics that have been used to define civil and political rights and economic, social and cultural rights should be wholly discarded. The negative or positive construct can enable rights to be understood by conceptualising how a right provides a certain protection against an interference of the state, by defining the requirements that are imposed on the state by the right protection. The extent that a requirement is more positive, and less negative, can be used to define the extent that the requirement requires more or less policy action.⁵⁹ But right protections will also contain various requirements and so each requirement should be examined separately. The positive or negative construct can be used here too in examining how each requirement, separately, requires more or less policy action, and the extent that policy actions in each requirement oppose, or are consistent with, each other. An understanding of the extent that a protection requires various policy actions by the state will in turn provide an idea of balance between the courts and the executive in protecting the right.⁶⁰ In contrast, a binary positive or negative treatment of rights overlooks these layers in protection and is problematic because each protection simultaneously contains several requirements that can be conceived as both positive and negative with overlapping positive and negative requirements in each protection.

For Asbjørn Eide, negative and positive protections are conceived of as three tiers of state obligation: to respect; to protect; and to fulfil. The primary level of obligation is the civil and political obligation not to interfere and to allow individuals to satisfy their needs. The second level of obligation requires a state to take more positive action to prevent harms from powerful economic interests; for example, fraud, unethical trade behaviour, or hazardous and dangerous products. The tertiary level of obligation requires a state to facilitate and provide for individuals' needs and to allocate resources for provision of those needs; for example, provision of food or resources for production of food.⁶¹ Eide's three levels of obligation still oversimplify the situation, placing a distinction between negative at one end and positive at the other, treating the two concepts as opposites. This overlooks the complexity of these protections, where each protection can simultaneously contain several requirements, those requirements can be considered as both

58 In Eide "Economic, Social and Cultural Rights as Human Rights", above n 56, the author argues that the distinction between civil and political and economic, social and cultural rights was based on several assumptions that have been overstated and mistaken and that there are considerable similarities and overlap in state obligations under both rights. See also Peter Bailey *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths, Chatswood (NSW), 2009) where the author describes the distinction between civil and political and economic, social and cultural rights as illusory. In Palmer, above n 56 at 2 it is argued that there is a "moral and existential overlap and indivisibility" of civil and political, and economic, social and cultural rights. Also see *Draft International Covenant on Human Rights and Measures of Implementation: Future work of the Commission on Human Rights* GA Res 421, V (1950) at 43E in which civil and political and economic, social and cultural rights are described as "interconnected and interdependent".

59 In Palmer, above n 56, comprehensive analysis is carried out of negative and positive rights, and intersections of the two rights and treatment in various jurisdictions. The extent of resource allocation is used by the author in analysis of positive obligations.

60 For in depth discussion of courts' roles in protecting economic, social and cultural rights see Palmer, above n 56.

61 Eide "Economic, Social and Cultural Rights as Human Rights", above n 56.

positive and negative, and they may have opposing requirements.⁶² Eide's schema, however, can provide a useful way to conceptualise the extent that a certain requirement in a protection requires more facilitative policy action at each level. But the analysis is still not complete in explaining the level of policy action in each protection requirement, because it fails to consider complexity and polycentricity elements of policy action. A tier one or two requirement could require equal or more polycentric action than a tier three requirement, despite the tier three requirement requiring more facilitative steps. Therefore each protection requirement can also simultaneously be framed as positive and negative in different ways.

In the case of the right to life protection and the "quality of life protection", the mixed nature of positive and negative requirements, deriving from both protections, can be observed in the case of assisted dying. In these situations there is both a right to life protection protecting against a threat of premature death and a "quality of life protection" to have autonomy in decisions concerning ending life. Following traditional positive or negative conceptions of these protections, the right to life protection can be described as a negative right because it requires the state not to cause death to occur prematurely and will prevent the state from interfering with a person's continued life. In contrast, the "right to a quality of life" protection can be described as a positive right requiring action by the state to allow for autonomy in decisions around ending life, which would require the state to take positive steps to have laws and systems in place providing a framework for autonomous decisions to be made in appropriate situations. However, describing the negative right as preventing the state from interfering with a person's continued life oversimplifies the situation. The negative requirement on the state, not to cause death to occur, arguably will require equal state action to put in place laws and systems to regulate when it will prevent death from occurring and when it will not interfere with situations to ensure a threat of death is not caused. These considerations will engage with the same question of when the state will allow end of life decisions to occur so the state does not cause premature death. This requires a similarly complex policy action to the perceived positive right requirement concerned with end of life choice. In this situation the two distinct right to life and "right to a quality of life" protections are engaged, providing distinct protections, but requiring the same level of policy action by the state. Accordingly a positive or negative binary concept as a theoretical reason for dividing right to life and "right to a quality of life" protections (and providing for one protection and not the other) distorts the situation, creating a false distinction between the protections.

The extent that a right engages with more or less policy action, containing more or less detailed polycentric considerations, or more or less facilitative steps to be taken, corresponds to traditional concepts of institutional roles between courts and legislators. It is this basis upon which ideas of deference and justiciability are built, along with the willingness of courts to adjudicate on certain protections.⁶³ We have seen, however, that a protection that is considered to be negative, and is

62 In Andreas Philippopoulos-Mihalopoulos "Actors or Spectators? Vulnerability and Critical Environmental Law" (2013) 3 *Oñati Socio-Legal Series* 854 and Vito De Lucia "Beyond Anthropocentrism and Ecocentrism: A Biopolitical Reading of Environmental Law" (2017) 8 *JHRE* 181 the authors explain that placing concepts as two distinct, linear, opposites (for example: human/natural or artificial/technological) with a centre, from which to know, oversimplifies the complexity in problems and avoids exposure which is necessary to engage with a subject. To avoid this, in considering environmental problems, Philippopoulos-Mihalopoulos suggests new semantics are needed of a surface of acentric continuum where distinctions are blurred and concepts fold into one another.

63 For full discussion of the limits and extent of courts' ability to adjudicate on economic, social and cultural protections see: Palmer, above n 56. Also see Joseph, above n 31; Butler, above n 3.

perceived as appropriate for a court to adjudicate on, may involve the same amount of policy action and expense to recognise⁶⁴ as a putative positive protection. To recognise the negative “non-interference right”, a court should be prepared to engage with protections that require policy action. In this way rights protections cannot be recognised in a manner that entirely avoids requirements of policy action on states. Providing for right to life and “right to a quality of life” protections will inherently involve a degree of engagement with requirements of policy action by the courts⁶⁵ and the two types of right should not be conceived as strictly positive or negative opposite concepts following the same general binary treatment of rights as economic, social, and cultural/civil and political, positive/negative, rights – negative rights being dealt with by the courts, and positive rights being dealt with by lawmakers.

Despite the institutional balance between the courts, and the executive and legislative branches in protecting rights in New Zealand, there is evidence of the courts in New Zealand engaging in rights protections that require policy action concerning polycentric considerations and facilitative steps. In discrimination claims under the Human Rights Act 1993 the courts have engaged with polycentric issues of policy concerning family support frameworks and disability support services which have concerned government expenditure and resource allocation.⁶⁶ The engagement in complex policy can also be observed in BORA itself, with the Court in *B (SC 60/2016) v Waitemata District Health Board* performing a substantive analysis of the extent that the Waitemata Health Board’s smoke-free policy operates in a facilitative way in the way it was implemented and in managing nicotine withdrawal. The ongoing development in New Zealand courts of statements of inconsistency and “dialogues” to highlight issues for Parliament, while respecting institutional roles,⁶⁷ has a role to play in developing the judicial approach to engaging in policy action through rights protections. When deploying these statements to influence legislative and executive processes around rights protections, the “dialogue” tool should include consideration of the extent that the inconsistency between the law and the right would require positive policy action by the state to remedy the inconsistency with the right. The more or less that a right will require policy action, requiring facilitative steps or involvement in detailed or polycentric subject matter, will

64 In Palmer, above n 56 there is discussion of civil and political rights requiring expenditure of state resources in the same way as economic, social and cultural rights require.

65 See generally Opie, above n 56, in which the author argues for economic, social and cultural rights being protected under BORA and it is argued that the courts are well positioned to protect these rights.

66 *Ministry of Health v Atkinson* [2012] NZCA 184; and *Child Poverty Action Group Inc (CPAG) v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729. It is also worth noting that in Palmer, above n 56, the author observes a similar phenomenon in the Human Rights Act 1998 (UK) which gives the courts the ability to scrutinise legislation and public authority decisions relating to social services and provision of welfare.

67 The Court in *Attorney-General v Taylor*, above n 51 at [150] explained that law reform occurs through all three branches of the legislature, executive and judiciary performing their roles, but the courts’ role is “more pointed” in the case of declarations. At [149] the Court expressly recognised that Parliament ultimately decided “whether to modify an incompatibility”. See also *R v Hansen*, above n 50, and *Moonen v Film and Literature Board of Review*, above n 49 where these roles are described as institutional roles that are a “responsibility” on the Court, and an “important function” to bring to the executive’s attention that legislation infringes a right. Joseph, above n 31, describes the respective roles of the courts and Parliament as “power sharing”.

engage issues of institutional appropriateness and affect the form of a statement or declaration.⁶⁸ Mechanics aside, we can observe the statement of inconsistency as an existing tool that can be used by the courts to deploy rights protections that require positive policy action.

The Strasbourg Court has used a certain language to describe situations when recognition of a rights-based protection requires more policy action, and institutional considerations may make it more appropriate for lawmakers to address the requirement of the right protection. The Strasbourg Court has engaged with the policy actions required by the “quality of life protection” by describing the court’s supervisory role as a “review in fine” and acknowledging the state’s lawmaking and executive roles as requiring a “margin of appreciation”. These processes use a different language, but with the same result of making statements of inconsistency under a rights instrument, accepting a supervisory role while recognising the appropriateness of lawmakers applying more complex policy action to ensure compliance with rights requirements.

In *Haas v Switzerland*, the Strasbourg Court dealt with an applicant’s art 8 right protecting an end of life decision.⁶⁹ The state law engaged the right because, although the law provided for access to a lethal substance to exercise the right (and did not interfere with the freedom to make an end of life choice), the law restricted access to lethal medication in regulations by requiring a person to have a medical certificate. The applicant was unable to access the substance he sought because he was unable to obtain the medical certificate which was required in the regulations, and the case concerned the restriction this imposed on the manner in which an end of life choice could be made. The Court found that the art 8 right protecting autonomy in end of life situations required positive policy action, requiring the state to take measures to ensure a certain manner of end of life choice to ensure a dignified suicide, and also to take preventative measures to protect individuals. The Court recognised that a right requirement will require more or less policy action, explaining that the requirement of a right protection will vary “in accordance with the nature of the issues and the importance of the interests at stake”.⁷⁰ The Court explained that a requirement for a state to take measures to ensure a dignified suicide, and protection of individuals, is one that will require “weighing of the different interests at stake”, or, in other words, the protection requires a more polycentric policy action.⁷¹ It also noted the complexity of the policy action by observing that there had been different approaches to balancing the protection of life and the protection of a choice to end life, in laws allowing end of life decisions, with no consensus reached by member states of the Council of Europe. The Court recognised its role, applying the Convention as a supervisory instrument, explaining that the state will enjoy “a certain margin of appreciation” and the Court accepted that its role will be to “review in *fine*” the consistency of the state law with the right protection.⁷² The Court explained that a wider margin of appreciation should be provided to the state in the case (or extent that the state should be provided space to implement

68 In *Attorney-General v Taylor*, above n 51 the Court explained that when deciding whether to issue a declaration of inconsistency under BORA, an evaluation of policy be needed. The Court also adopted language used in *Hansen* to describe this process as considering “legislative fact” to determine the content of law and determination of policy. The Court explained that consideration in these situations will need to occur of whether the matter should be deferred to another branch of government.

69 *Haas v Switzerland*, above n 22.

70 At [53].

71 At [53].

72 At [53].

this policy action) because of the complexity. The Court found that the protective element of the law was legitimate and complied with the policy action requirements of the right protection. In the context of the state's legal regime that allowed assisted dying, protective policy action was necessary because of the particular risk of abuse in the system, including preventing organisations that provide assistance in dying from acting unlawfully. Examining the case in Eide's three tiers of analysis, to understand the level of facilitative policy action the protection required, we observe both a requirement at the second tier, to protect individuals from abuse from third parties (with potentially powerful economic influence), and a requirement at the third tier to take measures to allocate resources to ensure a person can satisfy their end of life choice needs. We can also observe positive polycentric policy action considerations at play in that the policy action concerned a complex issue of balancing individual protection and ensuring dignified end of life choices. It was for this reason that the Court provided more space to the state to comply with the requirement of the right protection.

Examining the protection and reasoning in *Haas* one can see how the application of the "quality of life approach" in BORA will involve protection of a wider range of rights protections that will require a wider range of positive policy action requirements. The Strasbourg Court has used its own language to engage in these requirements. Removing rights protections from the concept of positive or negative opposites, and conceiving of positive and negative obligations as protection requirements of different types and levels of policy action, provides a justificatory foundation for applying a "right to a quality of life" in BORA, while maintaining the institutional balance that exists in New Zealand's rights culture. The application by the Strasbourg Court, using its own language, but with essentially the same supervisory structure as BORA, provides an example of this balance in action.

V. CONCLUSION

BORA and the s 8 right to life were constrained at the time of its enactment in 1990. Since this time both the international and domestic landscape has evolved with a "quality of life approach" being developed in constitutional human rights instruments that recognises both a right to life and a "right to a quality of life". The "quality of life protection" has substantially expanded the instruments it has been applied in, recognising a new and wider range of interests that contain a wider range of policy action requirements. The "quality of life approach" has been followed by the Strasbourg Court in the art 2 right to life and art 8 right to a private and family life provisions in the European Convention of Human Rights. Like the Convention, BORA is a supervisory instrument that protects ICCPR rights and it is capable of evolving in a way that provides a "right to a quality of life" protection, and a failure of BORA to evolve to deploy the "quality of life approach" will leave it trailing behind rights-based developments.

Courts have institutional roles to develop and fill gaps in rights instruments, and the New Zealand courts have demonstrated an understanding of this role by using techniques to perform these functions while respecting the institutional roles between the judiciary and Parliament and working around tensions that exist in the courts performing this role. Use of these techniques has played a role in developing jurisprudence under BORA. A conception of negative (civil and political) and positive (economic, social and cultural) requirements, as simultaneous and mixed concepts, requiring different levels and types of policy action in both positive and negative ways, sits at the intersections of expanded rights protection and institutional roles between courts and

lawmakers. Understanding the problems of the positive or negative opposite concepts of rights protections is therefore crucial in understanding the nature of the right to life protection and “quality of life protection”. A conceptual adjustment to the positive or negative concepts, deployed in rights discourse, would therefore provide a theoretical foundation to deploy the “quality of life approach” to expand BORA protections, while respecting institutional roles in protection of rights in New Zealand. There should not be any barriers to recognition of a “quality of life protection” in BORA on the basis that it is a putatively positive protection. This is because requirements of right to life and “right to a quality of life” protections are more complex than the positive or negative opposite conception – popularly deployed in rights-based discourse – reveals. Recognition of the right to life protection, which is considered to be negative, and already exists under BORA, can require an equal amount of policy action as the “quality of life protection”, which is perceived as positive.

Following the “quality of life approach” deployed in the Canadian Charter and European Convention would bring BORA more in line with other instruments implementing ICCPR rights and arguably with its stated purpose of implementing ICCPR rights. There are still more questions than answers for the application of the “quality of life approach” in New Zealand, and the extent that this can occur under s 8 will need to be tested in New Zealand’s rights setting. A conceptual adjustment to the conception of rights-based protections as positive or negative protections will provide a theoretical foundation for testing the expansive capacity of the s 8 right to life provision.

BOOK REVIEW

NEW TREATY, NEW TRADITION: RECONCILING NEW ZEALAND AND MĀORI LAW by Carwyn Jones, Victoria University Press, Wellington, 2016, recommended retail price \$50. Carwyn Jones is a senior lecturer at the Faculty of Law at Victoria University in Wellington and has professional experience across Treaty of Waitangi claims processes.

“Papa”

“Yes, e Tama?”

“Are all these stories about my tīpuna true? Did these things really happen?”

“That’s what the stories say.”

“Yes, but are they the truth.”

“They tell us truths”

“What kinds of truths?”

“All kinds – qualities we ought to value, ways we ought to behave, principles that are important, consequences of our actions, who we are, how to live together and fulfil our aspirations.”¹

Each of the six chapters of this book start with storytelling between a father and son; Papa and Tama. Tama is inquisitive and eager in questioning the old stories being told by Papa. Papa is patient and deliberate, using waiata (songs), karakia (prayers), and whakatauki (proverbs) to convey to Tama the important teachings contained in the traditions. One story is of Ruawharo, a great chief who voyaged from Hawaiki on the Tākitimu waka to Aotearoa. From his ancestors, Ruawharo had gained knowledge and expertise that would enable him to traverse the Pacific Ocean and to sustain his people in a new land. The teaching for Tama is that, like Ruawharo, he too is connected to his tīpuna and has within him the wisdom of his ancestors to create pathways for himself and his people.²

The author’s challenge to the reader is to identify what they themselves will do to ensure Māori traditions and law are respected in contemporary contexts. For the author, that context is treaty settlement negotiations, but more broadly the transformation of the colonial relationship between Māori and the state, and the recognition of the legitimate place of Māori law in Aotearoa. *New Treaty, New Tradition* is an important part of that transformation.

New Treaty, New Tradition examines how the Crown’s treaty settlement negotiations process affects the exercise of Māori law today. The focus is on whether aspirations for reconciliation and self-determination (tino rangatiratanga) can be achieved through the Crown’s settlement negotiations process.³ Jones’ conclusion is that the treaty settlement negotiation process fails to provide for reconciliation and self-determination because the process does not respect Māori law and values as expressed in Māori traditions and law. By referring to the experience of settled tribes

1 Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 51.

2 At 32.

3 Jones argues that reconciliation and self-determination are objectives envisaged in the Treaty of Waitangi and treaty negotiations process itself.

like Ngāi Tahu and Waikato-Tainui, Jones cites issues at all phases of the settlement process which highlight that the Crown's settlement policy is based on Western legal thought that conflicts with Māori legal traditions. For example, the Crown's requirements for certainty of mandate, "symbolic reparation" and quantum caps, finality of settlements, specific requirements for post settlement governance entities, and recognition of Crown sovereignty do not align with reconciliation and self-determination.

Jones argues that if the treaty settlement process is to achieve its objectives of increased Māori reconciliation and self-determination between Māori and the state, then the treaty settlement framework must change to recognise the legitimate place of Māori law and traditions. Change, in his view, requires that the state move away from processes and structures that subordinate Māori law and traditions, including the assertion of Crown sovereignty. He promotes the reframing of the settlement negotiations process to reflect both Māori and state legal traditions. This reframing would occur through negotiation and collaboration by both treaty partners.

A. *The Treaty of Waitangi*

The first two chapters of the book discuss Māori legal history, and establish the theoretical framework used for examining treaty settlements. The author's overview of tikanga, Māori law, the Treaty of Waitangi, and interaction of Māori and Western law after the Treaty was signed is particularly informative. The theoretical framework is a heavy read, and the discourse lends itself to a targeted audience with a substantial prior knowledge of indigenous legal theory and critical methodologies.

The Treaty of Waitangi is central in Jones' analysis of the issues, and he argues that the Treaty frames the relationship between Māori and the state. As mentioned, a key theme examined in his research is how Māori can express political aspirations of self-determination or tino rangatiratanga, and the impact the settlement negotiations process has on their ability to do so. That requires defining what tino rangatiratanga is, and that in turn falls on the agreement reached by the chiefs and the Crown when they signed te Tiriti in 1840. The Treaty is rendered in two languages and there has been considerable contention about the nature and legal status of the treaty agreement. That contention centres on whether sovereignty was ceded by Maori, and the legitimacy of the government which was formed off the back of that cession. These difficulties are acknowledged by Jones and he says that while there are significant differences between the Māori and English texts, and that some key matters may be irreconcilable, the essential agreement in both versions of the Treaty is that:⁴

the Crown has authority to establish some form of government in New Zealand and that Māori property rights and other rights and the authority of chiefs is protected.

Jones references the Tribunal's 2014 report *He Whakaputanga me te Tiriti* which considers the meaning and effect of the Treaty in its northern context. That report clarifies past treaty jurisprudence which has not necessarily been strong on the point of cession, and clearly finds that the chiefs who signed te Tiriti on 6 February 1840 did not cede their sovereignty to the Crown.⁵ The Tribunal sets out the fundamental agreements reached by Māori and the Crown under the treaty agreement; in

4 At 7.

5 Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty – The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, October 2014) at xxii and 529.

essence, rangatira retained their authority over their hapū and territories, while the Governor was given authority to control Pākehā.⁶ The Tribunal also defines tino rangatiratanga as “the right to make and enforce laws”; an authority akin to sovereignty.⁷

Self-determination, or the exercise of tino rangatiratanga, is not discussed in Jones’ research in terms of its definition in *He Whakaputanga me te Tiriti*. More engagement with the Tribunal’s findings on sovereignty and tino rangatiratanga and how those findings may or may not affect the relationship between kawanatanga and rangatiratanga in the context of settlement negotiations would have added another important layer of analysis. Questions are raised by the Tribunal’s findings in the Wai 1040 report which are relevant to Jones’ research. For example, does the irreconcilability of the key matters like sovereignty and tino rangatiratanga in the two texts have implications for the Crown’s settlement policy and the exercise of tino rangatiratanga today? If it is accepted that sovereignty was not ceded, does the legitimacy of the Crown’s sovereignty affect the legitimacy of treaty settlements today? In addition, does the finding that sovereignty was not ceded by the chiefs have a bearing on the Crown’s requirement that groups who finalise treaty settlements must acknowledge the Crown’s sovereignty on the intituling of the settlement legislation? Or in other words, is it consistent with tino rangatiratanga for Māori to recognise and accept Crown sovereignty?

Jones’ clear intent is that *New Treaty, New Tradition* is a starting point and foundation for new stories to be told and a space for the expression of tino rangatiratanga through a framework that recognises Māori law and traditions.⁸ Just as Papa encourages Tama to keep telling stories, Jones encourages the reader to tell their own stories, and to speak their own truths. By telling our stories we can achieve reconciliation and self-determination as Māori, and as Māori together with the state.

SEASON MARY DOWNS*

6 At xxii.

7 At xxii.

8 *New Treaty, New Tradition*, above n 1, at 28.

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