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THE MEMBERSHIP DECISIONS OF RELIGIOUS ORGANISATIONS: EQUALITY, RELIGIOUS LIBERTY AND FREEDOM OF ASSOCIATION

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ABSTRACT:

The merit of a provision that regulates the membership decisions of religious organisations is typically assessed according to the right to equality and religious liberty. Although such rights are of central importance in assessing such a provision, it is necessary to also consider other relevant considerations in order to reach an informed conclusion on the appropriateness of the provision. Freedom of association is a right that is often neglected in this context. This article argues that any assessment of the merits of a provision that impacts on the membership decisions of religious organisations should have a strong focus on freedom of association considering the importance of this right.

I INTRODUCTION

The acceptability of an organisation making a membership decision according to characteristics commonly protected by anti-discrimination legislation is a complex and controversial issue. Such a decision to exclude a person on the basis of a protected characteristic will often result in the decision being labelled as an act of discrimination that should be prohibited by the State. This issue has become particularly controversial

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when the relevant organisation is a religious entity and the decisions regarding membership are made according to the person's compatibility with the organisation's religious commitments.

In these situations the standard approach to assessing the appropriateness of the membership decision is to approach the issue as a conflict between equality and religious liberty. The right to religious liberty is typically recognised as an important right given extensive recognition by international human rights instruments and must be shown substantial respect.¹ However, the right to religious liberty is not absolute and can be limited in a range of circumstances especially when it conflicts with other rights. The limitation clause in the *International Covenant on Civil and Political Rights* (the 'ICCPR') is typically quoted which holds that the '[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.²

The right to equality is similarly affirmed as being of great importance and receives similarly strong support under international human rights

¹ Some of the instruments that are typically relied upon to support the importance of religious liberty are the *Universal Declaration of Human Rights*, G.A. Res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, U.N. Doc A/810 (10 December 1948) art 18; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocol No 14bis to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) art 9; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18 and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, 36 UN GAOR, 36th sess, Supp No 51, UN Doc A/36/684 (25 November 1981).

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(3).

instruments.³ Once it is accepted that religious liberty is important but can be limited when it conflicts with other rights such as the right to equality, attention is then directed to the specific circumstances in which the decision was made. A conclusion will then be reached about the acceptability of the religious organisation's decision on the basis of an assessment of the relative importance of the equality claim and the religious liberty claim in the particular context of the matter.⁴

Although such an approach is commonly adopted by courts, human rights bodies and individuals it often fails to adequately address the complexity of the issues raised in a consideration of the merits of a religious organisation's decision. Importantly, both the right to religious liberty and the right to equality are capable of being used to support the positions of both a religious organisation and the persons excluded from the organisation. The religious liberty claim will predictably be made by the religious organisation to support the acceptability of their decision.

³ Some of the instruments that are typically relied upon to support the importance of equality are the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 7; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) art 14, Protocol No 12 art 1 and the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 3, 26.

⁴ A useful illustration of the exclusive focus on equality and religious liberty that many individuals adopt in determining how the law should resolve a controversy concerning the conduct of a religious individual or body are the submissions of individuals and organisations to government inquiries. For example, in 2017 the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill sought submissions from individuals and organisations regarding the protections, if any, that should be granted to those with a conscientious objection to facilitating same-sex marriages. There were over 400 submissions made to the Select Committee and overwhelmingly the authors of these submissions focused exclusively on equality and religious liberty in arguing for their preferred position regarding how the law should regulate those with a conscientious objection: Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill Parliament of Australia, *Submissions*

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Same_Sex_Marriage/SameSexMarriage/Submissions>.

However, in many situations the membership decision may result in a person being excluded because of their religious beliefs. A Hindu charity, for example, may want to only employ Hindus so that the charity can more effectively address the needs of the Hindu community and also to allow the organisation to serve as a venue for Hindus to socialise and learn more about their faith. A decision by such a charity to exclude a Buddhist applicant for an advertised employment position can understandably be regarded as a discriminatory decision as it involves an adverse decision being made on the basis of a person's religion, which is a characteristic typically protected by anti-discrimination legislation.⁵

Similarly, the right to equality will be relied upon by the person excluded from the religious organisation especially when the decision is based on a ground protected by anti-discrimination legislation. However, the religious organisation will also be able to rely upon an equality claim to support their position as the right to equality protects a range of relevant grounds including religion. Article 26 of the *ICCPR*, for example, declares that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law ... the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, *religion* ... or other status'.⁶

⁵ See, eg, *Anti-Discrimination Act 1998* (Tas) s 16; *Anti-Discrimination Act 1996* (NT) s 19; *Equal Opportunity Act 1984* (WA) s 53; *Equal Opportunity Act 2010* (Vic) s 6; *Anti-Discrimination Act 1991* (Qld) s 7; *Discrimination Act 1991* (ACT) s 7.

⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26 (emphasis added). See also *International Covenant on Economic Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) art 2(2); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) arts 1, 24; *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) arts 3, 19; *Declaration on the Rights of Persons Belonging to National or*

Any legislation or court decision that undermines the ability of religious individuals to establish organisations to serve the needs of the religious community can be understood as violating the right to equality as it will impose a detriment on the individuals that they only experience because of their religion. This position is affirmed by Iain Benson who argues that as religion is protected by the right to equality ‘placing equality and non-discrimination over against religion or placing some forms of non-discrimination (say, sexual orientation) as things more important than the religious person’s freedom against non-discrimination is an error — though an all too common one’.⁷ Similarly Thomas C Berg notes that

equality interests appear on the religious objectors’ side too. Gay-rights laws (in marriage or other contexts) may be facially neutral and generally applicable, but like other generally applicable laws their effects fall disproportionately on those religious individuals and groups — in this case, religious traditionalists — whose practices conflict with them.⁸

In addition to the need to appreciate that the right to equality and religious liberty may be able to be relied upon by both the religious organisation and the individuals excluded, it is also important to recognise that there are many other considerations in addition to equality and religious liberty that need to be considered in determining the merits of the membership decision. These additional factors may include considerations such as the right to privacy, the welfare of children, parental rights, minority rights, multiculturalism, and freedom of association. Such factors are often given

Ethnic, Religious and Linguistic Minorities, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, Supp No 49, UN Doc A/47/49 (18 December 1992) arts 2–4.

⁷ Iain Benson, ‘Taking Pluralism and Liberalism Seriously: the Need to Re-understand Faith, Beliefs, Religion and Diversity in the Public Sphere’ (2010) 23 *Journal of the Study of Religion* 17, 31.

⁸ Thomas C Berg, ‘What Same-Sex-Marriage and Religious-Liberty Claims Have in Common’ (2010) 5(2) *Northwestern Journal of Law and Social Policy* 206, 225.

little, if any, consideration by courts and human rights bodies in their reasons justifying their conclusions on the merits of membership decisions by religious organisations.⁹

A consideration of the importance of all of these additional factors in determining the merits of membership decisions made by religious organisations is beyond the scope of this article. The specific focus of this article is on the freedom of association, the importance of the freedom and the need for decision making bodies to more carefully consider the importance of freedom of association in reaching conclusions about the merits of the decisions of religious bodies.¹⁰

Part II of the article focuses on the substantial protections that have been provided to freedom of association under international human rights law.

⁹ Although these factors are often not considered by courts and human rights bodies there are nevertheless a significant number of cases where at least some of these considerations are taken into account by decision makers. For example, in *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518 the Court of Appeal for Ontario gave brief consideration to the relevance of freedom of association and freedom of expression in assessing the merits of membership criteria that had a disproportionate impact on gay individuals: [53]. There was also more detailed consideration of the freedom of association in related cases concerning Trinity Western University such as the decision of the Court of Appeal for British Columbia which held that the attempt to restrict the ability of the University to determine its members was a violation of its ‘fundamental religious and associative rights’: [190]. However, even when the relevance of additional rights is acknowledged the rights are often considered to be of limited importance compared to the rights of equality and religious liberty. Such an approach can be observed in the submission by the Australian Human Rights Commission to a Senate Inquiry on the related topic of balancing the rights of participants in same-sex marriages with the rights of those who have a conscientious objection to facilitating such marriages. The Commission advised that the issue ‘arguably engages other human rights, although to a much lesser extent than the rights to equality and non-discrimination and freedom of thought, conscience and belief’: Australian Human Rights Commission, ‘*Inquiry into the Commonwealth Government’s Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*’ (25 January 2017) <https://www.humanrights.gov.au/sites/default/files/AHRC_170117_Submission_to_Marriage_Amendment_Exposure_Draft.pdf>.

¹⁰ For additional information on the ability of both religious institutions and the excluded individuals to rely on equality and religious liberty to support their position as well as on the importance of the additional considerations mentioned see Greg Walsh, *Religious Schools and Discrimination Law* (Central Press, 2015). The importance of freedom of association in the context of religious schools is also addressed in this text and material from this section has been included in this article in a modified and updated format.

Part III addresses the major justifications for why freedom of association should be understood as a right of fundamental importance. Part IV considers the harm that can often be caused by religious organisations and whether religious organisations should be supported by rights such as freedom of association considering the gravity of the harm that they can cause others to suffer. Part V assesses the claim that freedom of association can also be understood as a right that protects individuals who may be excluded from organisations and this this understanding needs to be taken into account in determining the support, if any, provided to religious associations on the grounds of freedom of association.

II INTERNATIONAL LAW AND FREEDOM OF ASSOCIATION

The need to show substantial respect for the liberty of individuals to establish and join mutually beneficial associations is affirmed by a wide range of international human rights instruments. The *Universal Declaration of Human Rights*, for example, holds that '[e]veryone has the right to freedom of peaceful assembly and association' and that '[n]o one may be compelled to belong to an association'.¹¹ Similarly the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* affirms that '[p]ersons belonging to minorities have the right to establish and maintain their own associations' and 'the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group'.¹² The *ICCPR* expands on the nature of the freedom of association emphasising the importance of the freedom but also the ability of the State to regulate the

¹¹ *Universal Declaration of Human Rights*, G.A. res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, U.N. Doc A/810 (10 December 1948) art 20(1).

¹² *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, Supp No 49, UN Doc A/47/49 (18 December 1992) art 2(4)–(5).

operation of associations in appropriate circumstances. Article 22 declares that

[e]veryone shall have the right to freedom of association with others ... No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.¹³

Similarly strong support for the importance of freedom of association can be found among international human rights bodies. The Human Rights Council, for example, adopted a resolution affirming the importance of freedom of association.¹⁴ In the resolution the Council emphasised the key role of freedom of association in securing ‘the full enjoyment of civil and political rights, and economic, social and cultural rights’.¹⁵ Freedom of association, the Council declared, is an essential component in a democracy providing individuals with invaluable opportunities to ‘express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances

¹³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 22(1), (2). For additional instruments that affirm the importance of freedom of association see *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocol No 14bis to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) art 11(1); *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 16(1); *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 10(1); *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, Supp No 49, UN Doc A/47/49 (18 December 1992) art 2(4); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 93 (entered into force 1 July 2003) art 26(1)(a).

¹⁴ Human Rights Council, The Rights To Freedom of Peaceful Assembly and of Association, 15th sess, UN DOC A/HRC/RES/15/21 (6 October 2010).

¹⁵ Ibid Preamble.

or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable'.¹⁶

The broad support provided to freedom of association under international human rights law places government bodies under a strong obligation to recognise the importance of freedom of association and ensure that the freedom is only limited in circumstances where it can clearly be justified. The strong support under international law for freedom of association should also be a factor taken into account by individuals and private organisations in their own assessments of the merits of membership decisions taken by religious organisations.

III THE IMPORTANCE OF FREEDOM OF ASSOCIATION

In determining the importance of freedom of association in the context of assessing provisions that may undermine the autonomy of associations it is helpful to understand the central reasons why freedom of association should be protected. The value of the freedom can be understood through considering the essential role associations can play in promoting liberty and individual fulfilment, producing just States, supporting cultural diversity and promoting the common good. The provision of these benefits will often be a significant factor against undermining the autonomy of associations in relation to their membership decisions on the basis that this might jeopardise the ongoing provision of these benefits.

¹⁶ Ibid.

A *The Promotion of Liberty and Individual Fulfilment*

Religious and non-religious organisations provide valuable opportunities for individuals to explore personal interests, increase knowledge and skills, develop their character, expand social networks, and discuss and express their opinions. As Lenta states: ‘Associational freedom is an essential part of individual freedom: associations represent the choices of their members about how to live’.¹⁷ Garnett expands on the importance of associations to individuals arguing that they ‘are not only conduits for expression; they are also the scaffolding around which civil society is constructed, in which personal freedoms are exercised, loyalties are formed and transmitted, and individuals flourish’.¹⁸ While Ahdar and Leigh warn that ‘[t]he things we treasure from civil or intermediate associations generally, and religious groups especially—new ways of thinking, the development of concepts of the good life, the inculcation of virtue, respect, loyalty, sacrifice, and so on—may be jeopardized by state conformity to public juridical norms of behaviour’.¹⁹

The United States Supreme Court addressed the importance of this aspect of freedom of association in *Roberts v United States Jaycees* (‘Jaycees’).²⁰ The case concerned whether a mentoring organisation called the ‘United States Jaycees’ should be permitted to continue as a male only organisation.²¹ The purpose of the organisations was to help young men

¹⁷ Patrick Lenta, ‘Taking Diversity Seriously: Religious Associations and Work-Related Discrimination’ (2009) 126 *South African Law Journal* 827, 832.

¹⁸ Richard W Garnett, ‘Religious Freedom and the Nondiscrimination Norm’ in Austin Sarat (ed), *Legal Responses to Religious Practices in the United States: Accommodation and Its Limits* (Cambridge University Press, 2012) 194, 225.

¹⁹ Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013) 390.

²⁰ (1984) 468 US 609.

²¹ *Ibid* 612–4.

with their ‘personal development and achievement and [provide] an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations.’²² Although the Supreme Court ultimately did not resolve the matter in the favour of the United States Jaycees, the Court did strongly emphasise the importance of freedom of association declaring that ‘individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty’.²³

B The Development of Just States

A further reason justifying the importance attributed to freedom of association is that strong support for the freedom produces more stable, cohesive societies. As Brady states: ‘Autonomous religious groups and other voluntary associations ... play an essential role as spaces for retreat for the losers in democratic political processes, and by doing so, they help to maintain the stability of majoritarian political systems’.²⁴ Lenta similarly affirms that

²² Ibid 612–3.

²³ Ibid 619. Although affirming the importance of freedom of association the Supreme Court held that the obligation imposed on Jaycees under the Minnesota Human Rights Act to admit women into their organisation was lawful: 631. The Court relied on a range of grounds in reaching this conclusion including the large size of Jaycees, its membership criteria being limited to age and gender, the absence of any inquiry into applicants or their history, and the ongoing involvement of women in a range of activities organised by Jaycees despite the membership restrictions: 620–2.

²⁴ Kathleen A Brady, ‘Religious Group Autonomy: Further Reflections About What is at Stake’ (2006–2007) 22 *Journal of Law and Religion* 153, 203.

States that permit their citizens to live their lives in accordance with their deeply held convictions are more likely to attract gratitude and command support. Sensitivity by the government towards group practices is likely to engender political unity, whereas devaluing citizens' culture and beliefs is likely to be met with resentment and political dissatisfaction. Moreover, the existence of civil institutions that operate in accordance with norms at variance with those reflected in government policy may strengthen democracy by providing a competing source of values and fostering debate.²⁵

Freedom of association is also an important safeguard against oppressive States, and assists in ensuring that other valuable rights such as freedom of speech are appropriately respected. Along these lines, Gedicks argues that associations 'protect the individual freedom of their members against government encroachment by providing an effective vehicle for challenging government power'.²⁶ Similarly, Gaudron J in *Australian Capital Television Pty Ltd v Commonwealth* argued that the 'notion of a free society governed in accordance with the principles of representative democracy may entail freedom of movement [and] freedom of association'.²⁷ The United States Supreme Court relevantly held in *Jaycees* that '[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed'.²⁸ Chaput expands on this point arguing that

²⁵ Patrick Lenta, 'Religious Liberty and Cultural Accommodation' (2005) 122 *South African Law Journal* 352, 353 n 2.

²⁶ Frederick Mark Gedicks, 'Toward A Constitutional Jurisprudence of Religious Group Rights' (1989) *Wisconsin Law Review* 99, 158.

²⁷ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 212.

²⁸ *Roberts v United States Jaycees* (1984) 468 US 609, 619, 622.

[m]ediating institutions such as the family, churches, and fraternal organizations feed the life of the civic community. They stand between the individual and the state. And when they decline, the state fills the vacuum they leave. Protecting these mediating institutions is therefore vital to our political freedom. The state rarely fears individuals, because alone, individuals have little power. They can be isolated or ignored. But organized communities are a different matter. They can resist. And they can't be ignored.²⁹

C *The Protection of Cultural Diversity*

Social diversity is also promoted through an appropriate respect for freedom of association as it protects the ability of minorities to form organisations where they can socialise with other members of the minority group, meet the common needs of members, and cooperate in addressing threats to their community. Religious organisations are significant institutions that support social diversity through providing essential services to individuals within and outside of the religious community especially spiritual activities, charitable works, the provision of education, and events where adherents and non-adherents of the religion can socialise.

On the important role that freedom of association plays in promoting diversity the Supreme Court held in *Jaycees* that '[a]ccording protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity, and in shielding dissident expression from suppression by the majority'.³⁰ Similarly, Lenta argues that associations should not always be expected to 'conform to public

²⁹ Charles Chaput, 'Building a Culture of Religious Freedom', *Public Discourse: Ethics, Law and the Common Good* (Online), 27 July 2012

<<http://www.thepublicdiscourse.com/2012/07/6013>>.

³⁰ *Roberts v United States Jaycees* (1984) 468 US 609, 622.

principles, including non-discrimination, when those principles clash with the convictions of members, and the state should refrain as far as possible from interfering with the internal affairs of associations. This is what the protection of diversity requires'.³¹ While De Freitas asserts in the specific context of religious organisations that '[w]hen appointments by, and membership to, religious associations are not carried out in accordance with the wishes of a collectivity of persons believing in the same core views on reality, existence, and purpose, then we find some or other negative effect countering the eternal pursuit of an ideal attainment of diversity'.³²

D The Promotion of the Common Good

Many associations make an important contribution to the common good through providing individuals with training and opportunities for volunteering so they can effectively assist others in the community in need. These associations have extensive social benefits including helping the recipients of the charitable work, assisting the members of the organisation develop valuable character traits (such as compassion and altruism), expanding social networks and promoting good will throughout the community. The operation of religious charitable associations in Australia, for example, has a long history. Anglicare Sydney observed that 'Christians in Australia have organised themselves into faith-based charities since 1813 with the establishment of the Benevolent Society in Sydney. District nursing services followed in 1820, followed soon by a

³¹ Lenta, above n 17, 126. Although the promotion of diversity is a significant benefit of appropriately protecting freedom of association, the importance of respecting diversity is considered in greater detail in the subsequent section of the chapter addressing the promotion of multiculturalism.

³² Shaun de Freitas, 'Religious Associational Rights and Sexual Conduct in South Africa: Towards the Furtherance of the Accommodation of a Diversity of Beliefs' (2013) 3 *Brigham Young University Law Review* 421, 427–8.

wide range of services from maternity hospitals to palliative care'.³³ Similarly, the Catholic Archbishop Julian Porteous reported that there are

6,600 people employed through our 63 member organisations and 500 different services which cared for 1.1 million people in 2010. The St Vincent de Paul Society is the largest and most extensive volunteer welfare network in the country, four times larger than the Salvation Army. ... [T]here are 66 Catholic hospitals, with 8,900 beds. The Catholic Church manages 19 public hospitals and 47 private hospitals, with 20 of these opening in the last 20 years. ... In Church-owned aged care facilities there are 21,458 residential aged care beds. ... Across Australia the Catholic Church operates eight dedicated hospices with palliative care services. ... Catholic homes for the elderly manage 5,393 retirement and independent living units and serviced apartments for seniors and low income residents. In the education sector 29% of all children in Australia are educated in our 1,690 Catholic schools. There are 1,238 primary schools, 340 secondary schools, 95 primary/secondary schools combined, and 17 special schools. These Catholic schools employ 58,979 staff, 43,778 lay teachers and specialist staff, 14,836 general staff, 365 religious. In the area of overseas disaster relief and development aid Caritas Australia is the fourth largest development agency in the nation, with the smallest margin spent on administration costs — only 12 cents in every dollar, compared with 31 cents as the next best. Through agencies such as Catholic Mission and many religious congregations, the Catholic Church in Australia is the largest provider of trained personnel for the developing world.³⁴

In addition to the practical benefits organisations provide through the services they deliver to their members and the wider community, many organisations make important contributions to developing social capital within a State. Social capital was defined by Robert Putnam as the '[f]eatures of social life—networks, norms and trust—that enable

³³ Anglicare Sydney, Submission No 153 to the Commonwealth Attorney-General's Department, *Inquiry Into The Consolidation of Commonwealth Anti-Discrimination Laws*, 1 Feb 2012, 12.

³⁴ Julian Porteous, 'Christianity's essential role in civilising our society' 25(3) *AD2000* 1, 10.

participants to act together more effectively to pursue shared objectives ... [s]ocial capital, in short, refers to social connections and the attendant norms and trust'.³⁵ The World Bank adopts a similar definition stating that

[s]ocial capital refers to the institutions, relationships, and norms that shape the quality and quantity of a society's social interactions' and explains the importance of social capital stating that '[i]ncreasing evidence shows that social cohesion is critical for societies to prosper economically and for development to be sustainable. Social capital is not just the sum of the institutions which underpin a society – it is the glue that holds them together'.³⁶

Associations are a major source of social capital within a State as they play a key role in building and strengthening social networks between individuals. The social capital created by associations, including religious associations, is not only created between the members of the association, but also between members and others in the community assisted by the organisations. A failure to provide adequate legal protections so that associations can manage their membership and the conduct of their members has the potential to impair the various benefits that associations provide to the community, undermine their objectives and culture, and, in the worst case, cause associations to disband. On the importance of providing appropriate legal protections to associations Woolman states that

[w]ithout the capacity to police their membership policies, as well as their internal affairs, associations would face two related threats. First, an association would be at risk of having its aims substantially altered. To the extent the original or the current *raison d'être* of the association matters to the extant members of the association, the association must possess the ability to regulate the entrance, voice

³⁵ Robert Putnam, 'Tuning in and Tuning Out: The Strange Disappearance of Social Capital in America' (1995) 28(4) *Political Science and Politics* 664, 664–5.

³⁶ World Bank, *What is Social Capital* (2011) <<http://go.worldbank.org/K4LUMW43B0>>.

and exit of members. Without built-in limitations on the process of determining the ends of the association, new members, existing members and even outside parties could easily distort the purpose, the character and the function of the association. Second, an association's very existence could be at risk. Individuals, other groups or a state inimical to the beliefs and practices of a given association could use ease of entrance into and the exercise of voice in an association to put that same association out of business.³⁷

E The Protection of Religious Liberty and Equality

Freedom of association is also an essential aspect of ensuring that the rights to religious liberty and equality are adequately protected. The relevance of freedom of association to the protection of the right to religious liberty is recognised by a range of international human rights instruments and bodies. The *Universal Declaration of Human Rights*, for example, declares that '[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, *either alone or in community with others and in public or private*, to manifest his religion or belief in teaching, practice, worship and observance'.³⁸ The European Court of Human Rights addressed the relevance of freedom of association to religious liberty in *Hasan and Chaush v Bulgaria*, in which the Court held that the Bulgarian government had inappropriately intervened in a leadership dispute among Bulgarian Muslims.³⁹ The Court held that the protection of the associational dimension of religious liberty is essential to ensuring that the religious liberty of individuals is appropriately respected stating that

³⁷ Stu Woolman, 'On the Fragility of Associational Life: A Constitutive Liberal's Response to Patrick Lenta' (2009) 25 *South African Journal of Human Rights* 280287.

³⁸ *Universal Declaration of Human Rights*, G.A. res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, U.N. Doc A/810 (10 December 1948) art 18 (emphasis added).

³⁹ *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55 [125].

the autonomous existence of religious communities is ... at the very heart of the protection which [the right to religious liberty] affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected ... all other aspects of the individual's freedom of religion would become vulnerable.⁴⁰

The important role that religious organisations play in protecting an individual's right to religious liberty was affirmed by the Supreme Court of Canada in *Loyola High School v Quebec (Attorney General)*.⁴¹ The case concerned whether an exemption should be granted to a Catholic school to allow it to teach about Catholicism and other religions from a Catholic, rather than a neutral, perspective.⁴² McLachlin CJ and Rothstein and Moldaver JJ declared that the

individual and collective aspects of freedom of religion are indissolubly intertwined. The freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith.⁴³

Similarly, freedom of association plays an important role in ensuring that the right to equality is adequately protected. Many individuals with characteristics typically protected by anti-discrimination legislation form associations to allow them to cooperate in addressing common concerns faced by members. This importance of freedom of association to the protection of the right to equality is appropriately recognised under

⁴⁰ Ibid [62]. See also *Sindicatul "Păstorul Cel Bun" v. Romania* (European Court of Human Rights, Grand Chamber, Application No 2330/09, 9 July 2013) where the Grand Chamber held at [137] that '[i]n accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members'.

⁴¹ [2015] SCC 12.

⁴² *Loyola High School v Quebec (Attorney General)* [2015] SCC 12 [26]–[27].

⁴³ Ibid [94].

international human rights law. The *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, for example, explicitly affirms that '[p]ersons belonging to minorities have the right to establish and maintain their own associations'. Similarly Article 27 of the *ICCPR* declares that in 'those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, *in community with the other members of their group*, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'⁴⁴ Such a provision is clearly aimed at ensuring that a range of minority groups that will often suffer from discrimination are able to create supportive organisations to help them ensure that their right to equality is effectively safeguarded.

The associational rights of individuals are also often protected by legislation and government bodies. Under the *Anti-Discrimination Act 1977* (NSW), for example, a registered club established with the object of providing benefits to a particular race is able to exclude persons not of that race from becoming members of the club.⁴⁵ A similar protection is also provided under the Act to registered clubs where membership of the club is only available to a particular gender.⁴⁶ The *Equal Opportunity Act 2010* (Vic) provides protection for the employment decisions of political parties permitting an employer to 'discriminate on the basis of political belief or activity in the offering of employment to another person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment'.⁴⁷

⁴⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art 27 (emphasis added).

⁴⁵ *Anti-Discrimination Act 1977* (NSW) s 20A(3).

⁴⁶ *Ibid* s 34A(3).

⁴⁷ *Equal Opportunity Act 2010* (Vic) s 27.

In addition to these protections specified in anti-discrimination legislation specific exemptions from the operation of anti-discrimination provisions are also often granted to organisations. The New South Wales Anti-Discrimination Board, for example, granted an exemption from the *Anti-Discrimination Act 1977* (NSW) to an arts organisation to allow them to consider the race of the applicants in making employment decisions so that they could employ Indigenous staff members.⁴⁸ A similar commitment was also demonstrated by the Victorian Civil and Administrative Tribunal, which granted an exemption from the *Equal Opportunity Act 1995* (Vic) to allow a gay club to refuse entry to persons who did not identify as homosexual males so that the club could preserve its distinct identity and create an environment where it could meet the needs of its patrons.⁴⁹ Such exemptions demonstrate an understanding by these bodies that both the establishment of associations and the ability to manage the membership of these associations is often an important aspect of ensuring that the right to equality is adequately protected.

IV THE HARM THAT CAN BE CAUSED BY RELIGIOUS ORGANISATIONS

Although it is important to acknowledge the various benefits that can be provided through freedom of association, it is also necessary to note that not all organisations make a positive contribution to society with some organisations being particularly harmful to the common good. In relation to religious associations, Hamilton notes that although religious

⁴⁸ Anti-Discrimination Board of New South Wales, *Current section 126 exemptions* (7 October 2014)

<http://www.antidiscrimination.justice.nsw.gov.au/adb/adb1_antidiscriminationlaw/adb1_exemptions/exemptions_126.html>.

⁴⁹ *Peel Hotel Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 916; *Peel Hotel Pty Ltd (Anti Discrimination Exemption)* [2010] VCAT 2005.

organizations ‘have the capacity to contribute to increasing social justice ... [and that] [r]eligious organizations can be an important challenge to government... it is simply willful ignorance to believe that they are always benign contributors to society’.⁵⁰ Religious organisations, Hamilton argues, are ‘no different than large corporations. The whole range of destructive behavior can be seen in both: fraud, extortion, misappropriation of funds, lying, deceit, covering up scandals like child abuse or doctoring financial records for the sake of the organization's image, and the list goes on’.⁵¹ Bilchitz expands on the possible harmful impact of religious organisations in the context of discrimination arguing that

discrimination may undermine the very social cohesion of society ... associations such as the Nazi party and exclusionary religious groups may lead to a sense of solidarity amongst members but may be extremely harmful to the project of creating a tolerant, egalitarian, multi-cultural community. A liberal society has a very strong interest in ensuring that the associations that develop within it create an ‘overlapping consensus’ in favour of values such as dignity, equality and freedom. In turn, allowing discrimination to continue unabated in religious communities may ultimately undermine efforts to create a wider political community founded upon equality and that values diversity.⁵²

It is clearly the case that many individuals have suffered grave physical, psychological, financial and sexual harm from individuals belonging to religious organisations. Although the harm that may be experienced by exclusionary membership decisions of religious organisations will often be on the lower end of the scale of gravity it will still typically involve the individual excluded suffering significant injury to their emotional

⁵⁰ Marci A Hamilton ‘Church Autonomy Is Not a Better Path to “Truth”’ (2006-2007) 22 *Journal of Law and Religion* 215, 223.

⁵¹ Ibid 215–6.

⁵² David Bilchitz, ‘Should Religious Associations Be Allowed to Discriminate?’ (2011) 27 *South African Journal of Human Rights* 219 222, 240.

wellbeing and dignity. Further, in some rare situations a person excluded from a religious organisation may suffer grave harm from the membership decision. Such a result can be seen in *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*,⁵³ which involved a Christian arts academy that dismissed a music teacher when it was discovered that he was living in a same-sex relationship.⁵⁴ The judge found that ‘his dignity was impaired when his contract was terminated on the basis of his sexual orientation. ... [H]e suffers from depression and was unemployed due to the publicity his case has resulted in. He also had to sell his piano and house’.⁵⁵

The harm that may be caused by membership criteria that can exclude individuals with protected characteristics from religious organisations was also addressed by a number of Canadian courts in relation to the membership requirements of Trinity Western University (‘TWU’). TWU is a Christian university that requires its staff members and students to commit to a ‘Community Covenant’, which is a code of conduct based on an evangelical Protestant understanding of Christian faith and ethics. The Community Covenant states that in

keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions:

- communication that is destructive to TWU community life and inter-personal relationships, including gossip, slander, vulgar/obscene language, and prejudice
- harassment or any form of verbal or physical intimidation, including hazing
- lying, cheating, or other forms of dishonesty including plagiarism
- stealing, misusing or destroying property belonging to others

⁵³ [2009] 4 SA 510.

⁵⁴ Ibid [6].

⁵⁵ Ibid [25], [33].

- sexual intimacy that violates the sacredness of marriage between a man and a woman
- the use of materials that are degrading, dehumanizing, exploitive, hateful, or gratuitously violent, including, but not limited to pornography
- drunkenness, under-age consumption of alcohol, the use or possession of illegal drugs, and the misuse or abuse of substances including prescribed drugs
- the use or possession of alcohol on campus, or at any TWU sponsored event, and the use of tobacco on campus or at any TWU sponsored event.⁵⁶

The provision requiring community members to abstain from ‘sexual intimacy that violates the sacredness of marriage between a man and a woman’ has been the central issue of concern in the cases heard by Canadian courts.⁵⁷ The appropriateness of the membership criteria of TWU was recently considered by the Canadian judiciary when TWU sought accreditation for its law school. The law societies of British Columbia, Ontario and Nova Scotia ruled that they would not accredit the law degree due to the membership provision concerning sexual activity

⁵⁶ Trinity Western University, *Community Covenant Agreement* <<http://www.twu.ca/student-handbook/university-policies/community-covenant-agreement>>.

⁵⁷ *Trinity Western University v British Columbia College of Teachers* [2001] SCR 772, 811–6. The implications of the membership criteria were first significantly considered by the Canadian courts in the context of an application by TWU to have its education degree fully accredited. The British Columbia College of Teachers declared that it would not approve the degree as the University appeared to follow discriminatory practices due to the restrictions on sexual activity that it required its members to accept. However, the Supreme Court of Canada in *Trinity Western University v British Columbia College of Teachers* [2001] SCR 772 held that the decision to not approve the degree was invalid on the grounds that it failed to adequately consider the various rights involved especially the right to religious liberty: 774–6. The relevant provisions in this case were contained in an earlier version of the ‘Community Covenant’ which was referred to as a ‘Community Standards’ document. This document required members to commit to refraining from practices that were considered to be biblically condemned including ‘drunkenness (Eph. 5:18), swearing or use of profane language (Eph. 4:29, 5:4; Jas 3:1-12), harassment (Jn 13:34-35; Rom. 12:9-21; Eph. 4:31), all forms of dishonesty including cheating and stealing (Prov. 12:22; Col. 3:9; Eph. 4:28), abortion (Ex. 20:13; Ps. 139:13-16), involvement in the occult (Acts 19:19; Gal. 5:19), and sexual sins including premarital sex, adultery, homosexual behaviour, and viewing of pornography (I Cor. 6:12-20; Eph. 4:17-24; I Thess. 4:3-8; Rom. 2:26-27; I Tim. 1:9-10). Furthermore married members of the community agree to maintain the sanctity of marriage and take every positive step possible to avoid divorce’: *ibid* 785 (the phrase ‘homosexual behaviour’ was underlined in the judgment).

which would prevent those with legal qualifications from TWU practising in those jurisdictions.⁵⁸

The essence of the position adopted by the law societies was that the provision is discriminatory as it has a particularly harmful impact on gay individuals by requiring all members of TWU to commit to abstaining from sexual activity except in the context of a heterosexual marriage.⁵⁹ In upholding the decision of the Ontario law society to deny accreditation, the Court of Appeal for Ontario held that the provision ‘is deeply discriminatory to the LGBTQ community, and it hurts’.⁶⁰ The Court further affirmed the submission of a gay rights organisations that argued that the ‘Covenant is a document that discriminates against LGBTQ persons by forcing them to renounce their dignity and self-respect in order to obtain an education ... LGBTQ persons applying to TWU, or who come out while at TWU, will experience the stigma of not belonging and other destructive effects of regulating queer sexuality’.⁶¹

These cases support the understanding that religious organisations may cause significant emotional, dignitary and, in some cases, serious

⁵⁸ *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518 [7]–[10].

⁵⁹ See, eg, *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 [92]–[125].

⁶⁰ *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518 [119].

⁶¹ *Ibid* [118]. The decision by the British Columbia law society to deny accreditation was overruled by the Supreme Court of British Columbia: *Trinity Western University v Law Society of British Columbia*, 2015 BCSC 2326 with the Court’s finding upheld on appeal by the Court of Appeal for British Columbia: *Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423. The same decision was reached in Nova Scotia with the law society’s decision overruled by the Supreme Court of Nova Scotia: *Trinity Western University v. Nova Scotia Barristers’ Society*, 2015 NSSC 25 and affirmed by the Nova Scotia Court of Appeal: *The Nova Scotia Barristers’ Society v Trinity Western University*, 2016 NSCA 59. Trinity Western University has declared that it plans to appeal the decision of the Court of Appeal for Ontario to the Supreme Court of Canada: Trinity Western University, ‘Trinity Western University Law School Receives Positive Ruling in British Columbia’ (1 November 2016) <<https://www.twu.ca/news-events/news/trinity-western-university-law-school-receives-positive-ruling-british-columbia>>.

psychiatric and physical harm to individuals within and outside of their organisations.⁶² However, the possibility that religious (and non-religious) organisations may harm others is the key reason why freedom of association and freedom of religion are not absolute rights. Religious organisations can legitimately be regulated, and even abolished, if it is necessary in order to protect the rights of others. Although the failures of many religious organisations have been profound, these failures should not be understood as undermining the support that freedom of association provides to religious institutions especially considering that the freedom can be limited when necessary to protect the welfare of others.

V FREEDOM OF ASSOCIATION AS AN INDIVIDUAL AND COLLECTIVE RIGHT

An alternative criticism of an attempt to rely on freedom of association to support the autonomy of religious groups is that their membership decisions can often be regarded as violations of freedom of association rather than as acts that are protected by the right. Religious organisations will often contain members committed to substantially different theological positions who are in conflict with each other on a range of issues including the religious identity of the organisation, spiritual practices and membership criteria. Any adverse action taken against members or applicants to join the organisation can be met with claims by those adversely affected that the action violates their freedom of

⁶² For further resources exploring the harmful impact that discriminatory practices can have on individuals, see, eg, Ilan H Meyer, 'Prejudice, Social Stress, and Mental Health in Lesbian, Gay and Bisexual Populations: Conceptual Issues and Research Evidence' (2003) 129 *Psychological Bulletin* 674; Vickie M. Mays, 'Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States' (2001) 91 *American Journal of Public Health* 1869.

association.⁶³ Bilchitz uses the example of a gay Anglican priest who is dismissed from his position because of his sexuality to explain how the right to association can be used to support different positions. Bilchitz argues that the example

demonstrates the difficulty for the state of avoiding taking sides in such a dispute as well as the clash between the freedom of association of differing groups *within* a religious association. If it were to uphold the dismissal of the priest, it would respect the freedom of association of those who believe that a gay priest may not hold a position within the Anglican church. If it prevents the dismissal, it would be defending the freedom of association of gay Anglicans to belong to the church and hold leadership positions therein. In such circumstances, the question is not one of simply defending the freedom of association of a religious grouping ... there is a rather an internal clash within the group. Courts thus are required to decide upon whose side they should intervene. Both the presumption of equality, and the harmful nature of discrimination ... require the state to favour the group against which discrimination is being perpetrated.⁶⁴

Although the State intervening to limit an organisation's ability to exclude individuals may be justifiable in a range of situations, allowing individuals to rely on the freedom of association to justify a law that requires an organisation to include or retain a person involves a distorted interpretation of the freedom of association. As the United States Supreme Court stated in *Jaycees*: 'There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire ... Freedom of association therefore plainly presupposes a freedom not to associate'.⁶⁵ Michael McConnell makes a similar argument in an educational context:

⁶³ Bilchitz, above n 52, 230.

⁶⁴ Ibid 230–1.

⁶⁵ *Roberts v United States Jaycees* (1984) 468 US 609, 623.

Individual teachers who deviate in theory or practice (or both) from the teachings of the community should not be allowed to use litigation to pressure the community to accept alternative versions of how its beliefs should be taught and exemplified. The rights of such individuals to withdraw and pursue their own beliefs and lifestyles must be respected, but such protection does not include the right to erode religious autonomy and authenticity by coercing the religious community to structure itself and its understanding of how (and by whom) its beliefs should be taught in a manner that is at odds with those beliefs.⁶⁶

To show appropriate respect for freedom of association the State should as far as possible avoid intervening in the internal disputes of religious groups and allow the religious adherents to determine for themselves membership decisions and other issues relevant to the organisation. The resolution of these issues could involve a range of outcomes including some adherents of the religious group deciding to alter their views on issues such as membership, the religious group agreeing to formally divide, or the individuals who disagree with the current position of the religious group leaving the religious group and joining another religious community or establishing their own religious association. On the appropriateness of the last option Spinner-Halev argues: ‘The proper liberal response surely is not that the state should pressure or force the group to change its practices, but that the disgruntled members should leave the group and form or join another’.⁶⁷ Similarly Aroney warns that ‘if any individual can decide whether he or she qualifies for membership

⁶⁶ Michael McConnell, ‘Fernández Martínez v Spain—Written Comments of Third-Party Interveners—Chair for Law and Religions of the Université Catholique de Louvain and the American Religious Freedom Program of the Ethics and Public Policy Center’ <<http://religiousfreedomnews.org/wp-content/uploads/2013/01/Third-Party-Comments-in-Fernandez-Martinez-v-Spain-Final.pdf>> 4–5.

⁶⁷ J Spinner-Halev, ‘Liberalism and Religion: Against Congruence’ (2008) 9 *Theoretical Inquiries in Law* 533, 566 quoted in Ahdar and Leigh, above n ! 390.

of an organisation, no organisation will be able to maintain its distinctive identity'.⁶⁸ Ahdar and Leigh expand on this point:

Freedom to associate with others of like mind necessarily involves freedom to exclude people who do not share the beliefs in question. In a liberal society, those so excluded are free to join other religious groups (or to form their own group) and so this should not be seen as harmful. On the contrary: if the state were to prevent exclusivity through its non-discrimination laws, this would amount to denial of a basic aspect of religious liberty. Paradoxically, perhaps, exclusive societies add to the diversity of society.⁶⁹

VI CONCLUSION

A restricted approach focused exclusively on the rights to equality and religious liberty is often taken in assessing the merits of membership decisions made by religious organisations. Although such rights are of fundamental importance they are not the only factors that should be considered in evaluating the conduct of religious organisations. Freedom of association is one of the additional rights that should be considered and which will normally be of central importance in assessing the merits of membership decisions. International human rights instruments appropriately affirm both the importance of this right and that it can justifiably be limited when necessary to protect the rights of others. Such strong support of freedom of association is justified considering the important role that associations play in promoting liberty and individual fulfilment, acting as a safeguard against oppressive States, supporting cultural diversity, contributing to the common good and protecting religious liberty and equality. Any proposal that may limit the autonomy

⁶⁸ Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *University of Queensland Law Journal* 153, 184.

⁶⁹ Ahdar and Leigh, above n 19, 360.

of religious organisations regarding their membership decisions should be closely examined to determine the impact that it may have in undermining the ability of that organisation and other religious and non-religious organisations to continue to make these valuable contributions.

Religious organisations have undeniably been responsible for causing many individuals to suffer grave physical, psychological, financial and sexual harm. However, the possibility that religious (and non-religious) organisations may harm others is the key reason why freedom of association and freedom of religion are not absolute rights. Religious organisations that harm others can legitimately be regulated or abolished if this is necessary to protect the rights of others. Although the real potential for harm from religious organisations needs to be acknowledged, freedom of association should still be understood as being an important right to consider when assessing the conduct of these groups considering the many benefits that are provided to the community by religious organisations and the adverse impact that a failure to respect freedom of association can have on these religious organisations. Although the right to equality and religious liberty are of central importance to any assessment of the membership decisions made by religious organisations it is essential to also consider other rights, such as freedom of association, so that an informed conclusion can be reached on the merits of the conduct of religious organisations.

SECULARISM AS A RELIGION: QUESTIONING THE FUTURE OF THE 'SECULAR' STATE

ALEX DEAGON*

ABSTRACT:

Section 116 of the Australian Constitution states that the Commonwealth shall not make a law establishing any religion. This is commonly understood in the literature as equivalent to the establishment of a secular state. However, the implicit dichotomy between religion and the secular is questionable when neither term is clearly defined in an establishment context. Some constitutional jurisprudence appears to explicitly or implicitly view the 'secular' as a type of religion. This understanding has important implications for High Court jurisprudence surrounding non-establishment. In particular, this article argues that if the secular is a kind of religion, like all other religions it is conceivably subject to the prohibition against state establishment. It follows that the 'secular state' is not a constitutionally coherent approach to the relationship between religion and the state.

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I INTRODUCTION: DEFINITIONS, DISTINCTIONS, DICHOTOMIES

A... thing I want to know about a work on the establishment clause is how the author distinguishes religion from nonreligion. Is Marxism a religion? Transcendental meditation? What are the necessary and sufficient conditions for something's being a religion, and how do these conditions relate to the clause's original meaning and to doctrine?¹

Though this question relating to criteria for identifying a religion is posed by Alexander from the US perspective of establishment, it is equally relevant in the Australian constitutional milieu. Australia too has experienced issues with defining religion in the context of a dichotomy between religion and nonreligion, or 'secularism'. Despite some differences, both Australia and the US have an 'establishment clause' which prohibits the establishment of a religion as part of the state.² A fundamental problem is there are no clearly accepted general criteria for distinguishing religion from secularism. If no such criteria exist or they are underdeveloped, this leads to another problem. Where it is difficult to determine when a particular perspective is religious, it is unclear whether that perspective is illegitimately made part of the state apparatus.³ This article questions whether the

¹ Larry Alexander, 'Kent Greenawalt and the Difficulty (Impossibility?) of Religion Clause Theory' (2008) 25 *Constitutional Commentary* 243, 243.

² The High Court has articulated the differences in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120. See also Gabriel Moens, 'Church and State Relations in Australia and the United States: The Purpose and Effect Approaches and the Neutrality Principle' (1996) (4) *Brigham Young University Law Review* 787.

³ See e.g. John Knechtle, 'If we don't know what it is, how do we know if it's established?' (2003) 41 *Brandeis Law Journal* 521; Mary Mitchell, 'Secularism in Public Education: The Constitutional Issues' (1987) 67(4) *Boston University Law Review* 603; Derek Davis, 'Is Atheism a Religion? Recent Judicial Perspectives on the Constitutional Meaning of "Religion"' (2005) 47 *Journal of Church and State* 707; Dmitry Feofanov, 'Defining Religion: An Immodest Proposal' (1995) 23 *Hofstra Law Review* 309.

‘secular state’ is an appropriate framework for regulating the relationship between religion and the state in the Australian context. The basis for this questioning is the literature which indicates that secularism has some characteristics of religion, or is even a type of religion.

If this understanding is accepted, it has significant implications for jurisprudence on the establishment clause contained in s 116 of the Australian Constitution, because many commentators and judges view the establishment clause as operating to, in effect, establish a secular state. In particular, this article argues that if secularism can be viewed as a type of religion, like all other religions it is conceivable that the secular is subject to the constitutional prohibition against state establishment. The notion of a ‘secular state’ would involve state establishment of religion – namely, the ‘religion’ of secularism. It follows that state secularism is not a coherent approach to regulating the relationship between religion and the state in Australia, because such an approach would be in conflict with s 116.

Part II of the article outlines traditional notions of secularism as involving the separation of religion from other ‘nonreligious’ (secular) areas of life and compares it with the idea of secular humanism, providing the contextual framework for understanding what it means to be a ‘secular state’. Part III examines the typical structure of the secular state and challenges the idea that it is a genuinely ‘neutral’ approach. It explains how a secular state may intentionally or unintentionally undermine the influence of traditional religions, even where such religions have argued for the secular state. Such a process indicates that rather than secularism being a neutral ‘nonreligion’, it may actually be a kind of religion in competition with traditional religions. Part III proceeds to consider the specifically Australian iteration of the secular state in terms of the establishment

clause, which is a necessary component to the argument that a secularist approach to religion and state conflicts with s 116.

In Part IV, the High Court's views on the relationship between the secular and the religious and its definition of religion is outlined. These perspectives are contrasted with literature which indicates that secularism has attributes similar to that of the typical religions and therefore should be considered as a type of religion. This claim is supported in the Australian context by considering establishment clause jurisprudence and applying the High Court's definition of religion to secularism, with the result that secularism may be considered as a religion for constitutional purposes. It follows that if the secular can be viewed as a type of religion, the secular would be subject to the prohibition against establishment. The corollary is that state secularism is not a coherent constitutional conception of non-establishment due to its conflict with s 116. Finally, Part V briefly considers legal and political implications of saying that secularism is a religion and cannot be established, suggesting an alternative approach is required.

II DEFINING THE SECULAR

A *Traditional and Contemporary Notions of the Secular*

Proposing the more controversial conception of the secular as a religion entails an outline of the traditional and contemporary notions of the secular. There are many varieties of secularism which exist in the world and continuing contestation and change regarding the secular.⁴ The word is 'notoriously shifty, sometimes used descriptively, sometimes predictively, sometimes prescriptively, sometimes

⁴ Elizabeth Hurd, *The Politics of Secularism in International Relations* (Princeton, 2007) 12.

ideologically, sometimes implying hostility to religion, sometimes carrying a neutral or positive connotation'.⁵ Hurd claims that 'secularism refers to a public resettlement of the relationship between politics and religion', and 'the secular refers to the epistemic space carved out by the ideas and practices associated with such settlements'.⁶

Specifically, Norris and Inglehart consider the secular to be the 'systematic erosion of religious practices, values and beliefs'.⁷ A secular society is one which lacks belief or faith in the supernatural, mysterious or magical.⁸ It includes the division of church and state in the form of the 'modern secular democratic society'.⁹ Somerville observes some of the different meanings of the term, including 'the separation of religious activities, groups or ideas from others characteristic of the society', a focus on 'proximate' or 'worldly' concerns rather than 'ultimate' or 'religious' concerns, and 'the [non-religious] rules under which a society operates'.¹⁰ Benson agrees, stating that the term 'secular' has come to mean a realm that is 'neutral' or 'religion-free'; it 'banishes religion from any practical place in culture'.¹¹

⁵ Daniel Philpott, 'Has the Study of Global Politics found Religion' (2009) 12 *Annual Review of Political Science* 183, 185.

⁶ Hurd, above n 4, 12-13.

⁷ Pippa Norris and Ronald Inglehart, *Sacred and Secular: Religion and Politics Worldwide* (Cambridge, 2011) 5.

⁸ Ibid 7.

⁹ Ibid 8, 10.

¹⁰ John Somerville, 'Secular Society/Religious Population: Our Tacit Rules for using the term "Secularisation"' (1998) 37(2) *Journal for the Scientific Study of Religion* 249, 250-251.

¹¹ Iain Benson, 'Notes Towards a (Re)Definition of the "Secular"' (2000) 33(3) *University of British Columbia Law Review* 519, 520.

Kosmin argues that secularity may refer to individuals and their social characteristics while secularism refers to the realm of social institutions. In particular, secularism covers organisations and legal constructs which reflect institutional expressions of the secular in a nation's political realm and public life. Forms of secularism may vary depending on the religious context of a state, but in all cases the secular refers to a distancing from the sacred, eternal or otherworldly.¹² Kosmin provides a typology of secularism based on a binary model of 'hard' and 'soft' secularism. The softer secularisms of the Western liberal democracies which formally (or conventionally in the case of the UK) separate religious and political power but do not explicitly regulate (particularly private) religion are contrasted with the harder secularisms of more 'authoritarian' regimes such as Russia and China, which tightly regulate both public and private religion and are specifically non-religious societies.¹³ A 'soft' secularism could then be defined as 'legal recognition of individual liberty and autonomy, freedom of thought and religion, peaceful coexistence of social groups, aspiration for consensus in much of the public space, respect for the civil contract, and a general acceptance that religious laws should not take precedence over civil ones'.¹⁴ This also entails the rejection of 'hard' secularist regimes which demand that individuals and social institutions be anti-religious and promote atheism.¹⁵

¹² Barry Kosmin, 'Contemporary Secularity and Secularism' in Barry Kosmin and Ariela Keysar (eds), *Secularism and Secularity: Contemporary International Perspectives* (ISSSC, 2007) 1-2.

¹³ Ibid 3, 5-7.

¹⁴ Ibid 12.

¹⁵ Ibid.

The traditional ‘secularisation thesis’ of the 1960s refers to the process by which religious influence through institutions and symbols is removed from culture. Instead, secular understandings ‘become authoritative, legitimated and embedded in and through individuals, the law, state institutions, and other social relationships’.¹⁶ This process is both descriptive in terms of outlining the process and normative in the sense that secularisation was thought to produce democracy and tolerance. The tension between the descriptive and normative elements has become more problematic with the recent resurgence of religion.¹⁷ This has resulted in the principle of secular power, which refers not to the privatization of religion and its exclusion from power in the sense of distinguishing the religious and political spheres, but rather to the state’s right to determine and manage the boundaries of religion in politics.¹⁸

Felderhof similarly claims secularisation refers to the process where society and institutions gain increasing autonomy and independence apart from ecclesial control or influence. More extreme secularisation involves actively seeking to limit or prevent religious contributions to public life or policy, relegating religious belief and practice to a purely private sphere. Therefore, the ‘secular’ might refer (as it did historically) to a civil society which operates independently of a church or monastic community, or to a world may people can live their lives free of

¹⁶ Hurd, above n 4, 12-13.

¹⁷ Peter Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Doubleday, 1967) 107; Peter Berger, *The Desecularisation of the World: Resurgent Religion and World Politics* (William B. Eerdmans, 1999). See also Philip Gorski and Ates Altinordu, ‘After Secularization?’ (2008) 34 *Annual Review of Sociology* 55.

¹⁸ Rachel Scott, ‘Managing Religion and Renegotiating the Secular: The Muslim Brotherhood and Defining the Religious Sphere’ (2014) 7 *Politics and Religion* 51, 54; c.f. Hussein Ali Agrama, ‘Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or a Religious State’ (2010) 52(3) *Society for the Comparative Study of Society and History* 495.

church control while religion maintains important social presence and influence, or it might 'refer to a situation where the state has devised an independent value system that impinges on religious life so that individuals and institutions are constrained, or straightforwardly prevented, from operating according to their own standards and purposes in the public square'.¹⁹

Other commentators have re-examined traditional positions on secularity and secularisation. Talal Asad argues that in the sense of the modern 'secular' nation-state, the secular can be considered as the 'lowest common denominator among the doctrines of competing religious sects', and 'the attempt to define a political ethic independent of any religious convictions altogether'.²⁰ For the modern state (or legal community) then, secularism is a method of uniting people of different class, gender and religion through common human experience.

In his seminal work *A Secular Age*, Charles Taylor examines the question of this age as 'secular' in terms of 'conditions of belief'.²¹ He argues that 'the shift to secularity in this sense consists... of a move from a society where belief in God is unchallenged and... unproblematic, to one in which it is understood to be one option among others, and frequently not the easiest to embrace'.²² It is a change which 'takes us from a society in which it was virtually impossible not to believe in God, to one in which faith, even for the staunchest believer, is one human possibility among others'.²³ Taylor proceeds to identify this problem of faith and

¹⁹ Marius Felderhof, 'Secular Humanism' in L. Phillip Barnes (ed), *Debates in Religious Education* (Routledge, 2011) 146-147.

²⁰ Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, 2003) 2.

²¹ Charles Taylor, *A Secular Age* (Harvard University Press, 2007) 2-3. For an excellent series of commentaries with various perspectives on this imposing work, see Michael Warner 'et al' (eds), *Varieties of Secularism in a Secular Age* (Harvard, 2010).

²² Taylor, above n 21, 3.

²³ Ibid.

reason in a secular culture, stating that where there is the identity of a reason without faith and the passions, an ‘autonomous’ or ‘disengaged’ reason – ‘disenchantment and instrumental control go together... this disengaged, disciplined stance to self and society has become part of the essential defining repertory of the modern identity’ and is a ‘central feature’ of secularity.²⁴

John Milbank, commenting on Taylor, expands and states that the ‘secularised space’ is the space

... that allows no sacramental mediation, that renders the divine will remote and inscrutable, that sharply divides nature from supernature, itself engenders an impermeable, drained, meaningless immanence that can readily be cut off from any transcendent relation whatsoever.²⁵

Milbank argues that ‘secularisation is not inevitable’, but has occurred as ‘the result of a self-distortion of Christianity’ (in the sense of Christianity embracing a disengaged governing reason through the Middle Ages and Enlightenment).²⁶ This ‘self-distortion’ or ‘shift’ presumes a separation of faith and the sacramental from reasonable belief in God.²⁷ The agents who engage in this ‘acquire knowledge by exploring impersonal orders with the aid of disengaged reason’, which is ‘the massive shift in horizon’ that has been ‘identified as the rise of modernity’.²⁸ ‘The development of the disciplined, instrumentally rational order of mutual benefit has been the matrix within which the shift could take place. This shift is the heartland

²⁴ Ibid 136. Taylor defines disenchantment as a ‘denial of the sacred’ (77), a secular position which stands ‘in contrast to a divine foundation for society’ (192).

²⁵ John Milbank, ‘A Closer Walk on the Wild Side: Some Comments on Charles Taylor’s *A Secular Age*’ (2009) 22 *Studies in Christian Ethics* 89, 94.

²⁶ Ibid 90.

²⁷ Taylor, above n 21, 294.

²⁸ Ibid.

and origin of modern “secularization” – and the contingency of this shift implies that it can be critiqued.²⁹

Asad consequently concludes that one can no longer assume that secular and religion are fixed categories which can be easily defined. Secular and religious frameworks are superimposed to an extent, particularly in non-Western contexts.³⁰ But in Western contexts, the secular proclaims itself as neutral and distinguishes between the neutral public sphere of reason and the private sphere of faith, placing religion in the latter category.³¹ In short, secularity and secularism are highly contested and complex terms. For the purposes of this article, we can propose an orthodox understanding of the secular as a separation between the religious and non-religious, with some versions imposing a uniquely ‘secular’ set of allegedly neutral values in the place of religious values. Secularisation is the process of society and culture separating religious values from ‘secular’ values and shifting from a foundation in religious values to a foundation in secular values.

A *Secularism and Secular Humanism*

Adding to the difficulty of definition is an existing literature on the issue of US establishment which considers the possibility of defining the secular or ‘secular humanism’ as a religion for establishment purposes.³² According to Greenawalt and Freeman, there is no settled definition of what constitutes religion, and no

²⁹ Ibid 295.

³⁰ See e.g. Maia Hallward, ‘Situating the “Secular”’: Negotiating the Boundary Between Religion and Politics’ (2008) 2(1) *International Political Sociology* 1.

³¹ Asad, above n 20, 8, 25.

³² See e.g. Craig Mason, ““Secular Humanism” and the Definition of Religion: Extending a Modified “Ultimate Concern” Test to *Mozert v Hawkins County Public Schools* and *Smith v Board of School Commissioners* (1988) 63 *Washington Law Review* 445; Steven Lee, ‘*Smith v Board of School Commissioners*: The Religion of Secular Humanism in Public Education’ (1988) 3 *Notre Dame Journal of Law, Ethics and Public Policy* 591.

single characteristic or essential feature of religion. Instead, an impugned religion should be compared with the indisputably religious in light of the particular legal problem in order to decide whether an entity is a religion.³³ For example, Greenawalt notes that the US Supreme Court has held that Buddhism, Taoism, Ethical Culture and Secular Humanism can be classified as (non-theistic) religions for the purposes of the US establishment clause, and state preference for theistic over non-theistic religions constitutes a breach of that clause.³⁴

Potentially classifying secular humanism as a non-theistic religion requires that it be defined and related to our definitions of secularity and secularisation stated above. Defining secular humanism in this context is not straightforward.³⁵ Many (but not all) prominent accounts of secular humanism originate from those who oppose it, and there is bound to be disagreement due to diverse and entrenched views.³⁶ This section outlines the common themes and attempts a working definition for the purposes of this article. Secular humanism has its historical roots in the ‘alienated clergyman’ or ‘disaffected church members’, who rejected ecclesiastical authority and emphasis on faith in God and the transcendent to focus on the immanent power of human reason. They sought a more ‘rational’ approach to life while maintaining a religious veneer including worshipping communities, rewritten liturgies and hymns, and christening, marriage and funeral ceremonies.³⁷

³³ Kent Greenawalt, ‘Religion as a Concept in Constitutional Law’ (1984) 72(5) *California Law Review* 753,

753; George Freeman, ‘The Misguided Search for the Constitutional Definition of Religion’ (1983) 71 *Georgetown Law Journal* 1519. See also Ian Ellis-Jones (2008) ‘What is Religion?’ 13(3) *LGLJ* 168.

³⁴ Greenawalt, above n 33, 759. See *Torcaso v Watkins* 367 US 488 (1961).

³⁵ See e.g. Joseph Blankhom, ‘Secularism, Humanism, and Secular Humanism: Terms and Institutions’ in *The Oxford Handbook of Secularism* (UC, 2016).

³⁶ See e.g. Martha McCarthy, ‘Secular Humanism and Education’ (1990) 19(4) *Journal of Law and Education* 467, 467-471.

³⁷ Felderhof, above n 19, 150-151.

‘Humanism’ refers to a philosophy which regards the rational individual as the highest value and the ultimate source of value, and is ‘dedicated to fostering the individual’s creative and moral development in a meaningful and rational way without reference to concepts of the supernatural’.³⁸ The term ‘secular’ further explicitly modifies humanism by emphasising its separation from and rejection of all things supernatural, and emphasising the way humanism possesses a ‘confidence’ in reason (instead of ‘god’) as the foundation for existential improvement and the ethical life.³⁹ Some secular humanists have also defined themselves specifically in terms of a ‘creed’:

- 1. the determination of truth through free inquiry;*
- 2. the separation of church and state;*
- 3. a commitment to freedom and against totalitarianism;*
- 4. ethics based on intellectual choice and independent of religious proclamation;*
- 5. moral education-the teaching of values and methods of making moral decisions;*
- 6. religious skepticism;*
- 7. the importance of reason;*
- 8. the importance of science and technology;*
- 9. belief in evolution;*
- 10. the importance of education.*⁴⁰

³⁸ Eric Freed, ‘Secular Humanism, the Establishment Clause and Public Education’ (1986) 61 *New York University Law Review* 1149, 1154.

³⁹ Ibid 1155-1156.

⁴⁰ Ibid 1155. See also John Whitehead and John Conlan, ‘The Establishment of the Religion of Secular Humanism and its First Amendment Implications’ (1979) 10 *Texas Law Review* 1, 37-54.

This version of secular humanism possesses a unique set of values which corresponds to the ‘secular’ values referred to as part of the earlier definition of secularity and secularisation. On that basis it could be said that secular humanism is the systematic outworking of the secular position put in the form of a worldview which directly challenges religious worldviews. Others go even further than this definition, characterising secular humanism as itself a religion.

For example, McGhehey defines secular humanism, or ‘atheistic or naturalistic humanism’, as a ‘philosophical, religious, and moral system of belief’ which ‘denies the existence of the supernatural or transcendent’.⁴¹ Whitehead and Conlan define secular humanism as a ‘religion whose doctrine worships Man as the source of all knowledge and truth’.⁴² They assert that secularism is a ‘doctrinal belief that morality is based solely in regard to the temporal well-being of mankind to the exclusion of all belief in God, a supreme being, or a future eternity’.⁴³ The secular refers to the physical and temporal rather than the spiritual and eternal, and humanism is a philosophy which focuses on the achievement and interests of human beings and the quality of being human, as opposed to abstract beings and problems of theology.⁴⁴ Finally, they claim secularism is not only indifferent to religious belief systems, but actively seeks to impose its own ideology on the state and through the state.⁴⁵

⁴¹ Kathleen McGhehey, ‘The Public School Curriculum, Secular Humanism, and the Religion Clauses’ (1989) 28 *Washburn Law Journal* 380, 389-390.

⁴² Whitehead and Conlan, above n 40, 30-31. See also Steven Lee, ‘*Smith v Board of School Commissioners*: The Religion of Secular Humanism in Public Education’ (1988) 3 *Notre Dame Journal of Law, Ethics and Public Policy* 591.

⁴³ Whitehead and Conlan, above n 40, 29-30.

⁴⁴ *Ibid.*

⁴⁵ *Ibid* 31.

However, Freed argues that it is inconclusive whether secular humanism can be regarded as a religion. If one focuses on the fact that secular humanism ‘manifests functional analogues’ to belief in God and the supernatural ‘in its belief in reason and focus upon the natural world’, possessing a system of beliefs about ultimate questions ‘that could function as the belief in God does in traditional religions’, then ‘secular humanism should be considered a religion’.⁴⁶ If secular humanism then becomes a defining feature of a state, this could be viewed as a kind of ‘sacralisation of politics’ which is problematic from an establishment perspective.⁴⁷ However, if one focuses on ‘external characteristics and typical beliefs’, secular humanism is ‘clearly nonreligious in nature for establishment clause purposes’.⁴⁸ Moreover, Freed claims, secular humanism’s ideas could be viewed as philosophical rather than religious.⁴⁹

Perhaps the only clear outcome is that categorising the secular or secular humanism (they will now be used interchangeably based on the definitions provided) as a religion has some merit, but will be inevitably controversial and contestable. Notwithstanding that caveat, the arguments in this article and particularly in Parts III and IV are intended to suggest that secular humanism is religious in nature, not merely philosophical. These arguments occur in the context of questioning the propriety of the ‘secular state’ as a neutral approach for structuring the relationship between religion and politics, particularly in the Australian establishment context. The next part turns to consider this approach.

⁴⁶ Freed, above n 38, 1168-1170.

⁴⁷ See e.g. Emilio Gentile and Robert Mallett, ‘The Sacralisation of politics: Definitions, interpretations and reflections on the question of secular religion and totalitarianism’ (2000) 1(1) *Totalitarian Movements and Political Religions* 18.

⁴⁸ Freed, above n 38, 1170.

⁴⁹ Freed, above n 38, 1171-1172.

III THE SECULAR STATE

A *Secularism as a Structure for Religion/State Relationships*

In addition to what has already been discussed above, there is a voluminous literature on the issue of characterising the structural relationship between religion and the state, including several diverging positions on secularism. There is room here to only very briefly summarise. Some leading scholars have characterised our societies as ‘post-secular’, by which they mean that social states of religiosity are shifting and the trend of secularisation is reversing, resulting in academic commentators seeking to make sense of religion and its place in a so-called ‘post-secular’ society where belief is in vogue again.⁵⁰ In this context Habermas argues that the secular and the religious (in particular Christianity) have a shared intellectual, social and political heritage, and it is therefore both imprudent and impractical to exclude religious influence from the intellectual, social and political spheres.⁵¹ Other scholars have re-interrogated the secular, secularisation theories and secular-liberal politics from various philosophical and theological perspectives, especially with a view to undermining the classical secular position which claims that secularism is a neutral approach to theories of state without any religious characteristics.⁵² Finally, still others have restated and vigorously

⁵⁰ See e.g. the collection of essays in Philip Gorski (ed), *The Post-Secular in Question: Religion in Contemporary Society* (New York University Press, 2012).

⁵¹ See e.g. Jurgen Habermas, ‘Religion in the Public Sphere’ (2006) 14(1) *European Journal of Philosophy* 1; Jurgen Habermas, ‘Notes on Post-Secular Society’ (2008) 25(4) *New Perspectives Quarterly* 17; Jurgen Habermas et al, *An Awareness of What is Missing: Faith and Reason in a Post-Secular Age* (Polity Press, 2010).

⁵² See e.g. Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, 2003); William Connolly, *Why I Am Not a Secularist* (University of Minnesota Press, 1999); Craig Calhoun et al (eds), *Rethinking Secularism* (Oxford, 2011); Charles Taylor, *A Secular Age* (Harvard University Press, 2007); John Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People* (Wiley-Blackwell, 2013); Alex Deagon, *From Violence to Peace: Theology, Law and Community* (Hart, 2017).

reasserted particular versions of political liberalism and secularism, arguing that a ‘secular’ or ‘neutral non-religious approach’ is necessary for a properly functioning democracy in terms of equality, freedom and participation.⁵³

The traditional and most popular narrative of secularist theories of state in modern liberal Western democracies is the idea of a formal separation of church and state, where the secular identifies a sphere known as the religious, and distinguishes that (private) sphere from public institutions like the state, politics and law.⁵⁴ There are two main traditions of secularism in this context. The first is ‘laicism’, a separationist narrative which seeks to expel religion from politics, and the second is ‘Judeo-Christian’, a more accommodationist position which recognises Judeo-Christianity as the unique foundation for secular democracy.⁵⁵ The object of laicism is to create a ‘neutral’ public space in which religious beliefs and institutions lose their political significance and their voice in political debate, or exist purely in the private sphere. ‘The mixing of religion and politics is regarded as irrational and dangerous’.⁵⁶ Laicism argues that a state is either religious and authoritarian or secular and democratic, while adopting and expressing a ‘pretense of neutrality’ regarding the assumption that a fixed and final separation between

⁵³ See e.g. See e.g. Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Vintage, 1994); Bruce Ackerman, *Social Justice in the Liberal State* (Yale, 1980); John Rawls, *Political Liberalism: Expanded Edition* (Columbia, 2011); Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford, 1991); Robert Audi, *Religious Commitment and Secular Reason* (Cambridge, 2000); Brian Leiter, *Why Tolerate Religion?* (Princeton, 2013).

⁵⁴ Hurd, above n 4, 13-14; Carl Hallencreutz and David Westerlund, ‘Anti-Secularist Policies of Religion’ in David Westerlund (ed) *Questioning the Secular State: The Worldwide Resurgence of Religion in Politics* (C. Hurst and Co, 1996) 3.

⁵⁵ Hurd, above n 4, 5. See also Semiha Topal, ‘Everybody Wants Secularism – But Which One? Contesting Definitions of Secularism in Contemporary Turkey’ (2012) 25(1) *International Journal of Politics, Culture and Society* 1.

⁵⁶ Hurd, above n 4, 5.

religion and politics is both possible and desirable.⁵⁷ Judeo-Christian secularism does not attempt to expel religion from political discourse or starkly distinguish between religious and secular but instead argues that traditional Judeo-Christian beliefs and culture form the ground and framework for a liberal democracy. It produces a set of common assumptions which will remove sectarian division and allow moral consensus through democratic deliberation.⁵⁸

Bhargava articulates at least three different models of political secularism in the West. The first is ‘one-sided exclusion’ or the French model, where the state can intervene in all religious matters but no corresponding power was available to any other religion. The second is ‘mutual exclusion’ or the US model, which consists of the strict separation of the affairs of the state from religious affairs and vice versa. This is designed to promote religious liberty by preventing the state or other religions using the state apparatus to restrict religious freedom. Third is the European or UK ‘moderate secularism’, where the public or official monopoly of religion remains intact even as its social and political influence declines.⁵⁹ The US model appears to correspond closely to the laicist account and the UK model reflects a Judeo-Christian account.

Benson also provides a useful taxonomy, specifically from an establishment perspective in the US context:

At least three definitions of a “secular” state seem to be most frequently used:

1. The state is expressly non-religious and must not support religion in any way (neutral secular);

⁵⁷ Ibid.

⁵⁸ Ibid 6.

⁵⁹ Rajeev Bhargava, ‘How Secular is European Secularism?’ (2014) 16(3) *European Societies* 329, 330-332.

2. The state does not affirm religious beliefs of any particular religious group but may act so as to create conditions favourable to religions generally (“positive” secular);
 3. The state is not competent in matters involving religion but must not act so as to inhibit religious manifestations that do not threaten the common good (“negative” secular).
- In all three of these the state is viewed as “outside” the “faith-claims” represented by “religious views.” This “external” aspect is largely implicit.⁶⁰

These three definitions fall roughly into the three main frameworks for interpreting the religion/state relationship through an establishment clause, as articulated by Cornelius: ‘Wall of Separation or absolute separation theory’, ‘Strict Neutrality theory’, and the ‘Accommodation theory’.⁶¹ Wall of Separation theory creates a complete and permanent separation of the spheres of civil and religious authority, prohibiting the use of public funds to aid religion and the interference of religion in state affairs.⁶² This is the ‘hard secularist’ or ‘laicist’ position. Strict Neutrality involves the state being ‘religion-blind’ in the sense of not using religion as a standard for action or inaction, and not creating a benefit for religion or imposing a burden on religion.⁶³ Although not as explicit, this is also in effect a laicist position. Finally, Accommodation theory allows government cooperation with and assistance to religions, as long as there is no preferential treatment for particular religions and no religious compulsion for non-believers.⁶⁴ This is a non-discriminatory approach which corresponds to the Judeo-Christian account.

Given these multifaceted definitions, it is important to be clear about what precisely is meant when this article says that a ‘secular state’ is not truly ‘neutral’,

⁶⁰ Benson, above n 11, 530.

⁶¹ William Cornelius, ‘Church and State – the Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality’ (1984) 16(1) *St. Mary’s Law Journal* 1, 10.

⁶² Ibid 12.

⁶³ Ibid 12-13.

⁶⁴ Ibid 13-14.

or that it is not an appropriate approach to theories of state. This article supports a Judeo-Christian/Accommodationist view which means that a particular religion should not be identified with the state, but the state can still facilitate and support different religions equally. This only means the state is non-discriminatory, not that it occupies some neutral, non-religious position called ‘the secular’. The problem this article identifies is when a laicist secular state approach excludes ‘religion’ under the rationale of neutrality, but in its place imposes the values of secular humanism, which is itself arguably a religion. If the secular is a kind of religion, the laicist approach is not actually neutral and not an appropriate approach to theories of state.

Freed intends to bypass the problem of the allegedly religious characteristics of secular humanism by using a ‘neutrality standard’ rather than focusing on the definition of religion.⁶⁵ He advocates for state neutrality in the sense that the state only supports those ideas which can be classified as ‘nonreligious (or truly secular)’, as opposed to that which is religious or antireligious.⁶⁶ Where the state only supports the nonreligious, this will not constitute establishment. This neutrality approach might form the basis for an objection that there really is no conflict between laicist secularism and traditional religions such as Christianity. Indeed, there are some biblical passages which can be interpreted as advocating some kind of separation between religion and the state.⁶⁷ Many scholars who advocate for separation support religious freedom and encourage a secularist

⁶⁵ Freed, above n 38, 1171-1173.

⁶⁶ Ibid.

⁶⁷ See e.g. Jesus’ claim that his followers and his kingdom are not of this world (John 18:36), or the injunctions to submit to the civil authorities (Romans 13:1-10).

approach for the sake of neutrality, equality, freedom and non-discrimination between religions – that is, to preserve religion.⁶⁸

However, this proposed solution of the neutrality standard merely reinscribes the problem. The preceding outline of secular humanism suggests that there is no ‘nonreligious’ or ‘truly secular’ neutrality in the sense that Freed and others contend for. According to Alexander, Greenawalt recognizes that there is no neutral position in relation to the various metaphysical and normative views, and these views cannot be neatly delineated into secular and religious, especially given Greenawalt’s view that religion cannot be conclusively defined.⁶⁹ More importantly, Benson notes that states cannot be truly neutral towards metaphysical or religious claims because the inaction towards some claims constitutes an affirmation of others.⁷⁰ Treating the secular sphere as neutral unofficially sanctions atheistic or agnostic beliefs with their own faith affirmations, such as ‘there is no God’ or ‘God cannot be known’; these claims cannot be empirically proven, rendering them the default faith position for this ‘secular’ state.⁷¹ As Somerville explains, ‘some might see an irony in the fact that secularism betrays

⁶⁸ See e.g. Rawls, above n 53, 207-208; Audi, above n 53, 6, 34, 36; Robert Audi, ‘The Place of Religious Argument in a Free and Democratic Society’ (1993) 30 *San Diego Law Review* 677, 687, 694. This was the case for Australia’s establishment clause, as will be explained below.

⁶⁹ Alexander, Religion Clause Theory, above n 1, 244.

⁷⁰ Benson, above n 11, 520. C.f. the ‘Benign Neutrality’ of Cornelius which possesses a ‘harmless and favourable disposition’ towards religion as long as compulsion and preferential treatment are avoided: Cornelius, above n 61, 35-39.

⁷¹ Benson, above n 11, 545-546. See also Robert Melnick, ‘Secularism in the Law: The Religion of Secular Humanism’ (1981) 8 *Ohio Northern University Law Review* 329. C.f. Wojciech Sadurski ‘Neutrality of Law Towards Religion’ (1989) 12 *Sydney Law Review* 420 who advocates a strict separationist view on the basis that neutrality is not preserved when preference is given to religious over non-religious views. However, this assumed dichotomy between religious and non-religious is precisely what this article questions.

the marks of a quasi-religious ideology, on any functional definition of the religious.⁷²

Leigh and Ahdar note that the modern, secularist liberalism which arises out of an expanding state ‘rightfully deserves criticism’ because it is ‘not neutral’ when it comes to approaching religion; rather neutrality is a mirage which masks the taming of religious passions and the treatment of religious views as mere subjective preference which does not require attendance by the state.⁷³ In particular, this expansive and activist state focuses on consequential equality and substantive ends rather than individual procedural rights, has ‘definite views about the good life’, and the ‘coercive apparatus to enforce it where necessary’.⁷⁴ In other words, the secular liberal state is not neutral, but has its own set of values which it imposes in competition with the values of traditional religions while simultaneously claiming legitimacy through neutrality.

Benson develops these contentions in some detail. He observes that the secular as an implicit faith position can use its false claim of neutrality to establish a state hegemony against explicit faith traditions, marginalising them and restricting their involvement in the public sphere.⁷⁵ When the faith assumptions of the non-religious are acknowledged, this will lay the platform for a proper engagement which recognises that we as humans always operate on some basis of faith.⁷⁶ This is not to advocate for a theocracy, but to expose the deceptive way in which people consider the secular as entirely free of faith claims. Again, there should be a

⁷² Somerville, above n 10, 251.

⁷³ Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford, 2013 2nd ed) 17-18.

⁷⁴ Ibid 16-17.

⁷⁵ Benson, above n 11, 521-522.

⁷⁶ Ibid 529.

separation of church and state in the sense that the state is non-discriminatory when it comes to religion, but this does not mean that the state is free of faith or religiously neutral in the sense that it contains no faith claims and must silence religious voices and insights.⁷⁷ Hence ‘...the secular cannot be a realm of “non-faith”. For there is no such realm. The question, then, is *what kinds of faith* are operative, not *whether or not* there is faith at work.’⁷⁸

This contention converges with the conclusions drawn from an analysis of the Australian constitutional jurisprudence which is to follow. For example, Mortensen identifies potential problems with the strict separation involved in a ‘wall of separation’, ‘because it is potentially anti-religious... separating the religious from the sphere of government action privileges the non-religious or the antireligious in the public square’.⁷⁹ The idea of state neutrality (as advanced by Patrick) embeds a distinct preference for particular types of religion and religious expression, is therefore ‘not one of neutral evenhandedness’, and neutrality itself is problematic in an arena of moral pluralism.⁸⁰ To contextualise these claims, an explanation of Australia as a secular state is required.

⁷⁷ Ibid 542-543.

⁷⁸ Ibid 531-532.

⁷⁹ Reid Mortensen, ‘The Establishment Clause: A Search for Meaning’ (2014) 33(1) *University of Queensland Law Journal* 109, 124.

⁸⁰ Ibid 124-125; c.f. Jeremy Patrick, ‘Religion, Secularism, and the National School Chaplaincy and Student Welfare Program’ (2014) 33(1) *University of Queensland Law Journal* 187.

B *Australia as a Secular State*

The traditional idea of Australia as a secular state arises from Section 116 of the Constitution, which states that:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.⁸¹

The first phrase of s 116 is known as the ‘establishment clause’. In *Attorney-General (Vic); Ex rel Black v Commonwealth* or the ‘Defence of Government Schools’ (*DOGS*) case, the High Court took a narrow view of what it means to ‘establish any religion’.⁸² It held that the establishment clause prohibits the ‘statutory recognition of a religion as a national institution’ or a ‘state church’, and prohibits a ‘deliberate selection of one [religion] to be preferred before others’ which creates a ‘reciprocal relationship imposing rights and duties on both parties’.⁸³ Establishment may include the ‘entrenchment of a religion as a feature of and identified with the body politic’, and the ‘identification of the religion with a civil authority so as to involve the citizen and the Commonwealth in the observance and maintenance of it’.⁸⁴

⁸¹ For an overview and consideration of the legal and historical context of s 116, see Anthony Blackshield, ‘Religion and Australian Constitutional Law’ in P Radan et al (eds) *Law and Religion* (Routledge, 2005). For the Establishment clause specifically see Mortensen, Establishment Clause, above n 79.

⁸² (1981) 146 CLR 559; Joshua Puls, ‘The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees’ (1998) 26 *Federal Law Review* 139, 143-145.

⁸³ *DOGS* (1981) 146 CLR 559 at 582 per Barwick CJ; at 604 per Gibbs J; at 612 per Mason J; at 653 per Wilson J; see also Luke Beck, ‘Clear and Emphatic: The Separation of Church and State Under the Australian Constitution’ (2008) 27(2) *University of Tasmania Law Review* 161, 174-176; Mortenson, Establishment Clause, above n 79, 115-119.

⁸⁴ *DOGS* (1981) 146 CLR 559 at 582 per Barwick CJ; at 604 per Gibbs J; at 612 per Mason J; at 653 per Wilson J; see also Beck, Clear and Emphatic, above n 83, 174-176.

These notions could be more colloquially summarised as a separation between Church and State. However, as Stephen J noted in *DOGS*, s 116 ‘cannot readily be viewed as the repository of some broad statement of principle concerning the separation of Church and State, from which may be distilled the detailed consequences of such separation.’⁸⁵ Beck usefully clarifies that ‘in Australia, at the federal level, the constitutional “separation of Church and State” means only the legal effect of s 116’.⁸⁶ Nevertheless, many commentators assume that the separation of church and state which is the legal effect of s 116 is also, in fact, the establishment of a secular state.⁸⁷

This may partly be because of the religious arguments which undergirded the inclusion of s 116. One of the main arguments for the inclusion of s 116 as a limit on Commonwealth legislative was that the preamble recognition of ‘God’ would transform the Australian identity into a religious identity, therefore allowing the Commonwealth to pass religious laws.⁸⁸ The Adventists, supported by the secularists, advocated for a limiting provision to prevent the passing of Sunday observance laws. In their view, religion and the state should be kept completely separate to prevent unsound government and religious persecution by the state.⁸⁹

This separation narrative also appears to encapsulate what is meant by the scholarly assumption that Australia is a secular state. Mortensen says explicitly that the establishment clause is ‘one of our most important institutions of liberal

⁸⁵ *DOGS* (1981) 146 CLR 559 at 610-612.

⁸⁶ Beck, Clear and Emphatic, above n 83, 164.

⁸⁷ In the US context, see e.g. Steven Smith, ‘Separation and the “Secular”’: Reconstructing the Disestablishment Decision’ (1989) 67(5) *Texas Law Review* 955.

⁸⁸ Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth, 1891-1906* (Melbourne University Press, 1976) 21-31.

⁸⁹ Luke Beck, ‘Higgins’ Argument for Section 116 of the *Constitution*’ (2013) 41 *Federal Law Review* 393, 397-398. See also Reid Mortensen, Establishment Clause, above n 79, 111-113.

secularism’.⁹⁰ Going back to Locke’s distinction between belief and knowledge, Mortenson argues for the state to be disinterested and skeptical when it comes to religious issues to prevent the state from defining permissible religious belief and practice. In other words, religion is irrelevant to legal and political status such that there is an effective separation between church and state.⁹¹

Beck also acknowledges the ‘received wisdom that Australia’s system of government is secular and religiously neutral’.⁹² In this context Commonwealth law should not advocate for or protect any one religion above others. Australia is a ‘modern, multicultural and secular state’ with ‘secular institutions of government’.⁹³ Here Beck is arguing that s 116 should prevent particular religious laws from operating. The idea of secular means separation; that is, Commonwealth laws should not contain or advocate particular religious content. In addition, Commonwealth laws should not protect particular religions from criticism by other religions or nonreligions (i.e. through blasphemy laws). Australia as a secular state means that religion should not be regulated by the state. The recent New South Wales Court of Appeal decision of *Hoxton Park Residents Action Group Inc v Liverpool City Council* is an example of judicial commentary assuming that Australia is a secular state.⁹⁴ Acting Justice Basten explicitly states that s 116 ‘establishes the Commonwealth as a secular polity’, and the justification given is the content of s 116.⁹⁵ The assumption is clearly that it is the legal effect of s 116 which makes Australia a secular state. Here a secular polity is defined to

⁹⁰ Reid Mortenson, ‘Blasphemy in a Secular State: A Pardonable Sin?’ (1994) 17(2) *UNSW Law Journal* 409.

427.

⁹¹ *Ibid* 426-427.

⁹² Beck, Clear and Emphatic, above n 83, 195.

⁹³ *Ibid* 187, 182.

⁹⁴ [2016] NSWCA 157 (Basten JA).

⁹⁵ *Ibid* [249].

mean ‘separation’ between the state and religion, or state ‘neutrality’ towards religion. Advocating separation assumes that only state neutrality will avoid sectarian division on religious issues, producing true freedom of religion.⁹⁶ Acting Justice Basten refers to the *DOGS* definition of ‘establish’, which involves the ‘preferential treatment’ of one religion to the exclusion of others. Acceptable legislation must be ‘neutral and non-discriminatory as between secular and other religious institutions and as between different faiths’.⁹⁷ Therefore, a secular polity with state neutrality means avoiding discriminatory or preferential treatment, including genuine neutrality with regard to the secular (as opposed to ‘other religions’).

There is a subtle difference between the secularity articulated by Basten JA, and that articulated by Mortensen and Beck. Acting Justice Basten views the Australian secular polity as non-discriminatory between religion – more of an accommodationist view which acknowledges the presence of religion and allows the state to regulate religion, as long as it is done equally (and within the scope of all the other requirements in s 116). Acting Justice Basten also effectively equates the secular with religion by referring to ‘secular and other religious institutions’, acknowledging the requirement for genuine neutrality in terms of equal treatment between all faiths, including both secular humanism and the traditional religions. Conversely, in the works cited Mortensen and Beck appear to be advocating for a strict separation or laicist approach, where the state and religion are completely separate. A secular state regards religion as irrelevant and is religiously neutral in the sense of non-religious – or at least that is what is claimed. For as has been

⁹⁶ Ibid [253].

⁹⁷ Ibid [279].

already indicated and will be explained further, secularism in this strict separationist sense is not truly neutral, for the secular is actually a kind of religion. State secularism as lacking neutrality is more explicit in some other commentators. Thornton and Luker question the ‘intimate liason’ between religion and government in the sense that Christianity in particular is allowed to have an influence on public affairs and discourse, which ‘compromise[s] the commitment to state secularism’.⁹⁸ Their basis for this, they claim, is the philosophy of state secularism which eschews the privileging of one religion over others. There is perhaps an element here of the accommodationist approach to s 116 in terms of law not privileging a particular religion, but Thornton and Luker go even further, decrying religious influence and effectively advocating an idea of state secularism as a separation not only between religion and law, but also religion and politics – i.e. religions are not allowed to ‘influence’ ‘public affairs and discourse’. This seems very far removed from the original purpose of s 116 as simply providing a non-discriminatory approach to religion for prevention of sectarian division, and implies not a true neutrality in the sense of the state not advocating for a particular religion, but a deliberate exclusion of religion from the public domain and the consequent dominance of ‘secularism’.

For the framers who constructed s 116 and inserted it into the Constitution, rather than a strict insistence on the state as a secular entity which excluded public religion, what was important was the state avoiding the promotion of religion

⁹⁸ M Thornton and T Luker (2009) ‘The Spectral Ground: Religious Belief Discrimination’ 9 *Macquarie Law Journal* 71, 72, 74.

which would cause sectarian division in the community.⁹⁹ It was actually felt that the community as a whole should have a religious character, but this religious character would be hindered by explicit state involvement.¹⁰⁰ For example, both Higgins and Barton were careful to emphasise that the mention of God in the preamble on one hand did not mean that people's rights with respect to religion would be interfered with on the other, and that there would be 'no infraction of religious liberty' by the Commonwealth.¹⁰¹ There should be a state impartiality towards religion, reflected both in the avoidance of religious preference and the protection of individual and group autonomy in matters of religion as participants in the wider community.¹⁰² Symon states that through s 116, the framers are 'giving... assertion... to the principle that religion or no religion is not to be a bar in any way to the full rights of citizenship, and that everybody is to be free to profess and hold any faith he [sic] likes'.¹⁰³

Many of the framers did not desire a secular society which rejected the public display and discourse of religion. The historical and cultural context of the development of s 116 was a general endorsement of religion and a climate of tolerance based on a concern for the advancement of religion.¹⁰⁴ Consequently, the purpose undergirding s 116 was 'the preservation of neutrality in the federal government's relations with religion so that full membership of a pluralistic

⁹⁹ S McLeish (1992) 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' 18 *Monash University Law Review* 207, 221–22.

¹⁰⁰ Ibid 222.

¹⁰¹ 1898 *Australasian Federation Conference Third Session Debates*, Melbourne, 17 March 1898, 2474 (H B Higgins and Hon Edmund Barton).

¹⁰² McLeish, above n 99, 223.

¹⁰³ 1898 *Australasian Federation Conference Third Session Debates*, Melbourne, 8 February 1898, 660 (J H Symon).

¹⁰⁴ Puls, above n 82, 140.

community is not dependent on religious positions’.¹⁰⁵ This is reflected in Symon’s statement that ‘what we want in these times is to protect every citizen in the absolute and free exercise of his own faith, to take care that his religious belief shall in no way be interfered with’.¹⁰⁶

Thus, it seems to be assumed that the establishment clause, at least formally, implies the approach of state secularism or a state ‘establishment’ of the secular in the sense that secularism is viewed as an established feature of the Australian polity.¹⁰⁷ Some commentators interpret this as laicism or strict separation where religion is irrelevant to the state and should be kept in a private context, while others take a more accommodationist view which allows public religion and the state to regulate religion in a non-preferential and non-discriminatory way.

The argument for a secular state in terms of loosely separating religion from the state as a means of preventing one religion dominating others, or preventing a state-enforced orthodoxy, is a persuasive one and consistent with the original purpose behind s 116 as articulated by the framers and later in *Hoxton Park Residents*. It is not that conclusion which is really contested in this article. Rather, the article questions the premise that the ‘secular’ state is actually a neutral arbiter between different religions when this premise forms part of an argument for a secular state in terms of laicist strict separation. It is precisely this problem which Mortensen later cites for rejecting the equivalent framework of a ‘wall of

¹⁰⁵ Ibid 151; C.f. Gabriel Moens, ‘The Menace of Neutrality in Religion’ (2004) 5(1) *Brigham Young University Law Review* 525.

¹⁰⁶ 1898 *Australasian Federation Conference Third Session Debates*, Melbourne, 8 February 1898, 659 (J H Symon).

¹⁰⁷ See also Puls, above n 82; McLeish, above n 99; Sadurski, *Neutrality of Law*, above n 71, 421. This is despite Sadurski’s persuasive critique of the High Court’s reasoning regarding the narrow interpretation of establishment at 448-451.

separation' in the sense of a complete separation between religion and the state, coming down in favour of Australia as non-discriminatory between religions.¹⁰⁸

As the next part will examine in the Australian context, if the secular is actually a type of religion, a laicist secular state merely reinforces one 'religion' dominating others and produces a different kind of state-enforced orthodoxy. This has significant consequences for Australian High Court interpretation of the establishment clause and the definition of religion; for if it is the case that the secular is a kind of religion, the idea that Australia can be straightforwardly called a 'secular state' is called into serious question from a constitutional perspective.

IV THE SECULAR AND THE RELIGIOUS

A *The High Court on the Secular and the Religious*

What the Australian debate about the establishment clause lacks is an analysis of the relationship between the secular and the religious. The discussions which do occur focus on the definition of religion generally without exploring the question of whether the secular or secular humanism could fit within the various proposed definitions, or focus on the nature and scope of establishment without considering whether the secular could be established.¹⁰⁹ Consequently, there is significant ambiguity regarding the extent to which the secular can be considered as a religion for Australian constitutional purposes, and following from that whether or not a secular state can be viewed as in conflict with the establishment clause. Part IV

¹⁰⁸ Mortensen, Establishment Clause, above n 79, 123-126.

¹⁰⁹ See e.g. Wojciech Sadurski (1989b) 'On Legal Definitions of Religion' (1989) 63 *Australian Law Journal* 834, 837-840; McLeish, above n 99, 224-226; Puls, above n 82, 154-156; Beck, Clear and Emphatic, above n 83, 194; Luke Beck, 'The Establishment Clause of the Australian Constitution: Three Propositions and a Case Study' (2014) 35 *Adelaide Law Review* 225; Mortensen, Establishment Clause, above n 79.

therefore specifically considers whether the secular can be viewed as a type of religion in the Australian establishment context.

According to the High Court, the definition of religion in the Australian constitutional context extends beyond monotheistic or even theistic religions, and includes belief in a supernatural thing or principle, where supernatural means that which is beyond perception by the five natural senses. Religion need not include any form or code of conduct, only a few specific beliefs. More generally, the category of religion is not closed.¹¹⁰ In *Jehovah's Witnesses*, Latham CJ indicated the broad and dynamic nature of what constitutes religion, and the consequent reluctance of the High Court to impose a precise definition.¹¹¹ He stated that religion may include a set of beliefs, code of conduct, or some kind of ritual observance. Religion is not restricted to mere variations of theism, but includes non-theistic religions such as Buddhism. Religion for the purposes of s 116 and the establishment clause is to be regarded as operating with respect to all these factors, and it is not for the High Court to 'disqualify certain beliefs as incapable of being religious in character'.¹¹² However, in *Church of the New Faith* (the 'Scientology' case), the High Court clarified this general position and articulated more specific indicia to be referenced in the determination of whether particular conduct and/or beliefs is classified as religion.¹¹³

Acting Chief Justice Mason and Brennan J observed that humanity has sought answers to fundamental questions such as the existence of the universe, the meaning of human life, and human destiny, and some believe that an adequate solution to these issues 'can be found only in the supernatural order, in which man

¹¹⁰ Beck, Clear and Emphatic, above n 83, 164-167.

¹¹¹ *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116.

¹¹² *Ibid* 123-124.

¹¹³ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120.

[sic] may believe as a matter of faith, but which he [sic] cannot know by his [sic] senses and the reality of which he [sic] cannot demonstrate to others who do not share his [sic] faith'.¹¹⁴ This faith may be revealed or confirmed through some supernatural authority or it may be based in reason alone; 'faith in the supernatural, transcending reasoning about the natural order, is the stuff of religious belief'.¹¹⁵ Religious belief 'relates a view of the ultimate nature of reality to a set of ideas of how man [sic] is well advised, even obligated, to live'.¹¹⁶ They concluded:

We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief...Those criteria may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion. The tenets of a religion may give primacy to one particular belief or to one particular canon of conduct.¹¹⁷

Justices Wilson and Deane stated similar principles, though they provided more detailed criteria. They agreed that religion should not be limited to the theistic religions, and also agreed with Latham CJ's view that there is no single characteristic of religion which may be formalised as a legal criterion to be analysed using logical structures. Instead, the question will usually be determined 'by reference to a number of indicia of varying importance', or 'guidelines' which are 'derived from empirical observation of accepted religions'.¹¹⁸ They summarise what is, in their view, five of the more important indicia in this way:

¹¹⁴ Ibid 134.

¹¹⁵ Ibid.

¹¹⁶ Ibid 135.

¹¹⁷ Ibid 137.

¹¹⁸ Ibid 171-173.

One of the more important indicia of “a religion” is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has “a religion”. Another is that the ideas relate to man's nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial, indicium is that the adherents themselves see the collection of ideas and/or practices as constituting a religion.¹¹⁹

Justices Wilson and Deane emphasise that the indicia do not determine the question, and are to be used as an aid. However, they note that all the indicia are satisfied by most or all leading religions, and it is therefore unlikely that an impugned ‘religion’ would be classified as such if it lacked all or most of the indicia. Conversely it would be unlikely that any impugned ‘religion’ which satisfied the indicia would be denied classification as a religion.¹²⁰ Hence, the definition of religion in Australia is broad and dynamic for constitutional purposes; a definition has not been explicitly prescribed by the High Court and will be largely dependent on the flexible application of the indicia in each unique circumstance.

As mentioned previously, the primary Australian legal authority on the establishment clause is the *DOGS* case.¹²¹ Both the majority and dissenting judgments in *DOGS* appear to assume the traditional dichotomy between religious and secular, at least as far as it was relevant in the case (which considered whether

¹¹⁹ Ibid 173-174.

¹²⁰ Ibid 173-174.

¹²¹ *DOGS* (1981) 33 ALR 321.

Commonwealth grants to non-government schools, including ‘religious’ schools, constituted establishment of a religion). For example, Barwick CJ for the majority argued that ‘church schools impart education in ordinary secular subjects’ and also ‘give religious as well as secular instruction’.¹²² He continued:

If it be assumed that in some schools religious and secular teachings are so pervasively intermingled that the giving of aid to the school is an aid to the religion, and if it be further assumed that some religions, which conduct more schools than others, will receive more aid than others, it still does not follow that any religion is established by the legislation.¹²³

The fact that religious schools educate on both religious and secular subjects, and that religious and secular teachings may be intermingled, implies that there is a fundamental distinction between the secular and the religious. Similarly, Murphy J in dissent states that ‘the general picture is that as well as secular instruction each of the church schools engages in instruction in its particular religion’.¹²⁴ Furthermore, Murphy J compares the ‘secular purpose’ of using school buildings to educate to the ‘religious goal’ of instruction in that particular religion. The fact that the school is primarily an educational institution outweighs its nature as a ‘religious’ school.¹²⁵ Again, there is a clear and unmistakable demarcation between the secular and religious. It follows from this categorisation that characterising the secular as religious or as a type of religion would be quite foreign to the way the High Court expressed itself in *DOGS*.¹²⁶

¹²² Ibid 332.

¹²³ Ibid 346.

¹²⁴ Ibid 359.

¹²⁵ Ibid 389.

¹²⁶ A distinct but importantly related discussion is the scope of ‘religion’ in the context of the establishment clause, and particularly whether and how s 116 may regulate ‘non-religions’. This issue and the position of various commentators will be analysed in the section ‘Secularism and Establishment’ later in this part.

This approach was also followed in *Church of the New Faith*, which considered the definition of religion more specifically with implications for the relationship between the religious and the secular.¹²⁷ Acting Chief Justice Mason and Brennan J explicitly rejected the US Supreme Court criteria for defining religion, which included an analysis of the kinds of questions the impugned religion asks. If those questions are of a fundamental nature, relating to origin, purpose, destiny and humanity's place in the universe, this lends support to considering the 'worldview' as a religion.¹²⁸ On that basis, the Supreme Court included Secular Humanism as a religion. However, Mason ACJ and Brennan J argued that that the focus should be not be on the kinds of questions that are asked, but whether the answers are expressed in terms referring to the supernatural as earlier defined:

To attribute a religious character to one's views by reference to the questions which those views address rather than by reference to the answers which they propound is to expand the concept of religion beyond its true domain... such an approach sweeps into the category of religious beliefs philosophies that reject the label of a religion and that deny or are silent as to the existence of any supernatural Being, Thing or Principle.¹²⁹

It seems straightforward that the Justices had in mind here the notion of, for example, secular humanism being defined as a religion. Their argument would entail the conclusion that the secular is not a type of religion because it rejects the label of a religion and explicitly eschews a supernatural being, thing or principle. The argument firstly assumes that no worldview which rejects the label of religious is in fact religious. However, there is reason to doubt the validity of this assumption, or at least its status as anything more than a single and relatively insignificant factor to be taken into account. It is conceivable that a worldview which appears to be religious may not express itself as religious, and so a

¹²⁷ *Church of the New Faith* (1983) 49 ALR 65.

¹²⁸ *Ibid* 76.

¹²⁹ *Ibid*.

consideration of other more significant indicative factors may be necessary to determine whether the worldview is in fact a religion. This is the approach taken by Wilson and Deane JJ, and such an approach is far less reductionist.¹³⁰

The other claim is that a worldview which denies or is silent as to the existence of the supernatural cannot be a religion. An equivalent statement would be that a worldview which explicitly or implicitly eschews the supernatural cannot be a religion. Such a statement assumes that religion must embrace, rather than eschew, the supernatural. This is plain enough, but a further assumption is that embracing the supernatural necessarily involves ascription of or to the supernatural. For example, secular humanism cannot be a religion because its answers to the fundamental questions of life are not framed explicitly in supernatural terms. This objection is actually quite similar to the labelling objection because it relies on intentionality and explicit terminology rather than the characteristics of the belief. It again is conceivable that a worldview may explicitly eschew the supernatural while implicitly embracing it, and this article's position is that applying the indicia outlined by Wilson and Deane JJ may be enough to suggest an implicit religion, if not an explicit one. For example, as the indicia are applied to secular humanism later in this part, the article suggests that the secular humanist reliance on reason occupies the category of supernatural in the sense that reason is not perceptible by the natural senses. If such a contention is successfully made out, it supports the position that the secular is a type of religion.

Furthermore, though Mason ACJ and Brennan J appear to very much reject the idea that the secular is a kind of religion, they make one statement which implicitly (and possibly unconsciously) supports the idea that the secular is a kind of religion.

¹³⁰ C.f. Puls, above n 82, 154.

The Justices claim that ‘under our law, the State has no prophetic role in relation to religious belief; the State can neither declare supernatural truth nor determine the paths through which the human mind must search in a quest for supernatural truth’.¹³¹ At first glance it seems patently absurd to argue that this is endorsing a view that the secular is a kind of religion. It seems to be merely giving expression to the accepted view that Australia is a secular state. Let us, however, examine the quote more closely.

It is assumed by the Justices that the State cannot declare supernatural truth and Australia is a secular state. As previously discussed, a traditional view of the secular rejects the existence of the supernatural. This raises an important and fundamental question. If the State is secular and cannot declare supernatural truth, does this mean it cannot declare itself as secular, which traditionally entails the rejection of supernatural truth? In other words, the rejection of supernatural truth could itself be seen as a type of supernatural truth. One might claim that it is rather a truth about the supernatural, and not a supernatural truth in terms of a religious doctrine of some type. However, this is just to redefine supernatural as religious, when the nature of religion is to be defined, according to the more detailed approach of Wilson and Deane JJ, by multiple indicia – only one of which is the supernatural nature of the view. Furthermore, ‘supernatural’ is itself defined as not perceptible by the five natural senses, and on the face of it the secular claim that the supernatural does not exist (or the rejection of supernatural truth) cannot be verified by the natural senses. Thus, the problem of the State declaring itself as secular (where secularism is arguably a supernatural truth) could be read as suggesting that the secular is a type of religion.

¹³¹ *Church of the New Faith* (1983) 154 CLR 120 at 134; Beck, Clear and Emphatic, above n 83, 175.

Clarifying the argument for this rather radical claim, the initial premise is that the State declares itself as secular. The secular, or secular humanism, claims that the supernatural does not exist. This (as asserted) fact that the supernatural does not exist cannot be perceived by the natural senses; it is impossible to empirically verify, for example, whether ‘God’ or a ‘supernatural realm’ exists. This inability to be perceived by the natural senses is precisely the definition of supernatural, according to the High Court. Therefore, bearing in mind that belief in some form of the supernatural is one of the criteria for religion, it follows that the secular is a kind of religion, because it, paradoxically, believes in a supernatural claim that there is no supernatural. It further follows from this that the secular is not a truly ‘non-religious’ or ‘neutral’ view for the State to hold or be. It also suggests incongruence foundational to the concept of a ‘secular state’ which is addressed later in the context of the establishment clause.

Mortensen could be seen as alluding to that same incongruence from a different angle. He states:

Certainly, a “free market in all opinions” does not leave it open to Christians, Muslims, Hindus or Secular Humanists to define through the coercive powers of the state spheres of orthodoxy and permissible religious and anti-religious discourse.¹³²

Though the sentiment of this quote is beyond dispute, the most interesting thing about it is the inclusion of Secular Humanists in a category also consisting of Christians, Muslims and Hindus. The argument appears to be that allowing a robust democracy and free speech where all opinions can be heard does not extend to allowing various individual views to dictate these debates through the state

¹³² Mortensen, *Blasphemy*, above n 90, 431.

apparatus. Mortensen does mention religious and anti-religious discourse, and so it may be that Secular Humanism is viewed as anti-religious and the Christians, Muslims and Hindus are viewed as religious, but their combined grouping does yield ambiguity. Even assuming that Mortensen did not intend to put Secular Humanism in a religious category, it does at least open the possibility that a secular state, presumably governed by secular humanism, is not the best approach to regulating different views because it is not truly neutral.

More explicitly, Whitehead and Conlan argue that in the US establishment context, secularism or secular humanism (which they equate) can be considered as a ‘belief’ and therefore a ‘religion’ for establishment purposes.¹³³ ‘It is clear that secular humanism is a religious belief system subject to first amendment protection and prohibition’.¹³⁴ Thus, if the religion of secular humanism is entrenched in government policy and programs, this should be deemed unconstitutional.¹³⁵ The religious aspect of secular humanism focuses upon humanity and its concerns and is consequently restricted to what is physically observable or knowable through the intellect. McGhehey notes that Secular Humanism has ‘organisational structures, ‘revered leaders’, and adherents who proselytize.’¹³⁶ Since secular humanism denies the existence of God and the supernatural without a scientific basis, it is in effect a faith position. She concludes:

The tenets of Secular Humanism which, for example, deny the existence of the supernatural and advance a position concerning the nature of the universe, the nature and purpose of man, and the source of morality are faith-based. This aspect of Secular

¹³³ Whitehead and Conlan, above n 40, 1-2. See also Steven Lee, ‘*Smith v Board of School Commissioners: The Religion of Secular Humanism in Public Education*’ (1988) 3 *Notre Dame Journal of Law, Ethics and Public Policy* 591.

¹³⁴ Whitehead and Conlan, above n 40, 13.

¹³⁵ Ibid 17-18. But see the strident critique by Robert Davidow, “‘Secular Humanism as an “Established Religion”: A Response to Whitehead and Conlan’ (1980) 11 *Texas Law Review* 51.

¹³⁶ McGhehey, above n 41, 390.

Humanism supports the argument that it should be considered a religion for constitutional purposes. As such, materials espousing the underlying beliefs of Secular Humanism should be analyzed as any other religion.¹³⁷

Apart from this, there is further literature which critiques secularism generally and the specific idea of secular law, arguing that secularism is actually a type of religion. The next section briefly outlines that literature to support the argument that the secular is a type of religion which can be evaluated as such when addressing the problem of secularism potentially being established in the form of the secular state.

B *Secularism as a Type of Religion*

The first kind of analysis is a purely theological/philosophical analysis which is characteristic of someone like John Milbank. Milbank's argument is that the secular is not actually an 'autonomous discipline', but borrows 'modes of expression from religion' – in this sense, secular reason (reason allegedly separated from faith) is actually 'heresy in regard to Christian orthodoxy'.¹³⁸ This means the governing assumptions of the secular are bound up with the modification or rejection of orthodox Christian positions, and these are no more rationally justifiable than the Christian positions themselves in the sense that they are equally based in faith.¹³⁹ The claim is that 'behind the *politics* of modernity (liberal, secular) is an *epistemology* (autonomous reason), which is in turn undergirded by

¹³⁷ Ibid 390-391.

¹³⁸ John Milbank, *Theology and Social Theory: Beyond Secular Reason* (Blackwell Publishing, 1990) 1. For a full version of the ensuing arguments with detailed explanations see Deagon, above n 52.

¹³⁹ John Milbank, 'The Double Glory, Or Paradox Versus Dialectics: On Not Quite Agreeing with Slavoj Žižek' in C Davis (ed), *The Monstrosity of Christ: Paradox or Dialectic?* (MIT Press, 2009) 216.

an *ontology* (univocity and denial of participation)'.¹⁴⁰ In short, according to Milbank there are at least two reasons why the secular can be viewed as religion. First, the secular was contingently invented out of a theological framework and is based on theological assumptions; second, the secular has faith in autonomous reason. These reasons are considered in turn.

Milbank argues that Duns Scotus' univocity of Being (that God and creation exist in the same way) and separation of theology from philosophy are related since the univocal nature of Being implies an *a priori* notion of being which is then applied to God, rather than considering God the very paradigm or distinctive pinnacle of being. This notion of Being detached from the divine nature and revelation therefore fundamentally separates ontology from theology, or metaphysics from revelation. Being can be apprehended by pure reason apart from faith.¹⁴¹ In place of a Thomist participatory framework which understands the immanent as 'suspended from' the transcendent, Duns Scotus assumed an ontology based on a univocal or 'flattened' being, one which denied the depth of being and 'unhooked' it from the transcendent, allowing the emergence of a 'secular' plane and 'secular' reason which are completely independent of the transcendent.¹⁴²

This admittedly dense summary is designed to demonstrate one key claim: the secular contingently originated from within the Christian theological framework, and is predicated on theological assumptions surrounding the nature of being and knowledge. The secular is not inevitable; rather, like many religious sects, it was in effect created as a result of theological and philosophical disagreement. This

¹⁴⁰ James Smith, *Introducing Radical Orthodoxy: Mapping a Post-Secular Theology* (Baker, 2004) 99-100.

¹⁴¹ John Milbank, *Theology and Social Theory: Beyond Secular Reason* (Blackwell, 2nd ed., 2006) 305-306.

¹⁴² Smith, above n 40, 88-89.

indicates that the secular can be viewed as a type of religion in the sense that it is composed of particular assumptions and beliefs which are heterodox rejections or alterations of Christian theology.

The fact that the secular elevates or has faith in pure, autonomous reason also indicates that it can be viewed as a type of religion. The idea of faith assumed by Milbank comes from the New Testament use of the Greek term *pistis*, which means to have a conviction or trust in, and its root means to be persuaded. Milbank specifically defines faith and trust interchangeably: to trust is to have faith in, and to have faith is to trust. Faith includes both the affective element of trust, and the intellectual element of persuasion through reasons.¹⁴³ Perhaps counter-intuitively, this kind of faith is central to the legal context of the secular state. There is a type of religious soteriology implied in law, even its most ‘secularised’ iterations:

Great hope is placed in law, properly understood and administered, as a vehicle for the transformation of society. Most movements for modern reform accept without question law’s account of itself as autonomous, universal, and above all, secular – meaning, in the first instance, religiously neutral, but also, more strongly, paradigmatically rational... law’s claim to the universal resembles – indeed arguably derives its power from – the universalism that is claimed by... Christianity.¹⁴⁴

Similarly, it might even be claimed that every legal system needs a transcendent source to give authority to its contents – even if, in lieu of a ‘higher source’, that transcendent source is law itself.¹⁴⁵ If it is accepted that there is no transcendent

¹⁴³ John Milbank, *The Future of Love: Essays in Political Theology* (Cascade Books, 2009) 150-153.

¹⁴⁴ W Fallers-Sullivan, R Yelle, and M Taussig-Rubbo, ‘Introduction’ in W Fallers-Sullivan, R Yelle, and M Taussig-Rubbo (eds), *After Secular Law* (Stanford, 2011) 2-3.

¹⁴⁵ Ibid 3. Perhaps this allows law to be considered in terms of the mythic or pagan – see e.g. P Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992).

source attracting people's trust, law becomes the entity that people trust. 'To work effectively law must rely on more than coercive sanctions... it must attract people's trust and commitment. Quite simply, citizens must... place their faith in it'.¹⁴⁶ Law encourages belief in its own sanctity in order to encourage obedience.¹⁴⁷ Hence, the notion of faith may be viewed as essential to the effective functioning of law, especially from a secular perspective. The secular assumption is that there is nothing transcendent, particularly when it comes to the functioning of the state. However, the secular state creates a *de facto* 'God' by placing its faith in the 'god' of law together with its attributes of reason and rationality. As such, even secular reason, which claims to be pure reason or autonomous reason apart from faith, is actually a type of faith, similar to 'religious' faith. Such faith is not necessarily apart from reason or unreasonable, but faith is involved nonetheless. Since faith is an intrinsic part of religion, if this claim that the secular operates on the basis of faith is sustained, it would support the argument that the secular is actually a type of religion.

Aquinas also attempts to demonstrate that the process of the natural sciences and the process of sacred doctrine both rely on faith, for both are either self-evident or reducible to the knowledge of a higher science which is self-evident, and simply accepted on the basis of that authority.¹⁴⁸ On this interpretation, though reason is distinguished from faith, both are ultimately based in faith. Both matters of reason (science) and matters of faith (doctrine), though operating on different planes, necessarily involve faith.

¹⁴⁶ Rex Ahdar, 'The Inevitability of Law and Religion: An Introduction' in R Ahdar (ed), *Law and Religion* (Ashgate, 2000) 5.

¹⁴⁷ Ibid.

¹⁴⁸ Thomas Aquinas, *Summa Theologica* (William Benton, 1952 vol 1) 4.

It may even be contended that faith is actually a presupposition of reason, which implies that the very notion of reason apart from faith is problematic. For if reason is viewed as independent of or autonomous from faith, and reason has no absolute foundations based in faith, then argument between different positions is precluded and pragmatically absurd. Any arguments which seek to go beyond tautology have to ‘assume areas of given agreement’, and to ‘win an argument means to show the contradiction of alternative positions’ – outside a ‘horizon of shared faith’ (or ‘common feeling’) no arguments would get off the ground.¹⁴⁹ Beyond the level of formal logic there is no single ‘reason’ without presuppositions, there are only many different, complexly overlapping traditions of reason (such as practical reason or speculative reason).¹⁵⁰ Though this does call into question the objective certainty of ‘reason’, it does not mean faith is a ‘trump card’ which may be played so as to end all discussion. Rather, acknowledging the different faith perspectives of participants and establishing commonly acceptable ground rules is the beginning of discussion. To suggest that reason is ultimately based in faith does not lead to the end of pursuing knowledge, but provides the means by which more nuanced and circumspect questioning and investigation can continue, leading to more moderate and therefore more convincing conclusions.

Discursive reason operates within strict limits and is therefore not competent to pronounce judgment against other metaphysical or religious positions. A certain stance of faith is always involved.¹⁵¹ Milbank further argues that any sharp separation of reason and faith is ‘dangerous’, because it implies that ‘faith at its core is non-rational and beyond the reach of argument’, while simultaneously

¹⁴⁹ John Milbank, ‘Hume vs Kant: Faith, Reason and Feeling’ (2011) 27 *Modern Theology* 276, 276, 278.

¹⁵⁰ Milbank, *Future of Love*, above n 143, 35.

¹⁵¹ Milbank, *Hume vs Kant*, above n 149, 276-277.

implying that ‘reason cannot impact on issues of substantive preference’.¹⁵² But in reality, reason and faith are always intertwined in a beneficial way. Reason has to make certain assumptions and trust in the reasonableness of reality. Faith has to continuously think through the coherence of its own intuitions in a process that often modifies these intuitions. Thus, ‘critical faith becomes a more reflective mode of feeling’, and ‘reason has always to some degree to feel its way forward’.¹⁵³ So secular reason, despite its claims to the contrary, is actually based in faith. The structure of the secular, in the sense that it intrinsically has faith in reason, expresses itself in a religious mode and this indicates that it can be viewed as a type of religion.

Asad takes a more anthropological approach which identifies that this strict version of secularism involves the attempt to define a state independent of religion such that citizens can be united as members of a state despite religious differences. Asad ultimately argues that secularism is a ‘transcendent mediation’ which paradoxically attempts to remove references to the transcendent real of religion.¹⁵⁴ Moreover, Asad rejects the claim that this strict version of secularism is neutral and tolerant. Despite claims of negotiation and persuasion being the methods used in such a secular society, ultimately there is recourse to the violence of law to impose particular values. Indeed, negotiation with the threat of forced legal compliance in the event of disagreement is simply an exercise of power, for ‘the

¹⁵² Ibid 277.

¹⁵³ Ibid.

¹⁵⁴ Asad, above n 20, 5. For more on the way in which it is said that Christianity invented the ‘secular’ and distinguished it from the ‘religious’ (secularising itself?) and the interplay of the secular and the religious, see Gil Anidjar, ‘Secularism’ (2006) 33(1) *Critical Inquiry* 52. For jurisprudential implications of this contingent distinction see e.g. A Sarat, L Douglas and M.M. Umphrey (eds), *Law and the Sacred* (Stanford, 2007).

law does not deal in persuasion', but always 'works through violence'.¹⁵⁵ He further argues that 'a secular state does not guarantee toleration; it puts into play different structures of ambition and fear'.¹⁵⁶ In other words, the secular is not truly neutral and not always rational – it can involve coercion and imposition of state perspectives.

Therefore, there are at least two reasons why the secular is a type of religion according to Milbank. First, the secular is a contingent invention based in a religious framework and operates on the basis of religious assumptions, and second, the secular has a faith in reason. It possesses a faith object similar to the way that many religions possess a faith object. In addition, Asad's analysis suggests that the secular is a type of religion in the way that it can attempt to impose its own perspective through the state apparatus. This literature and analysis of the High Court judgments indicate that the High Court's definition of religion can be challenged, particularly its explicit stark contrast between religion and secular.

It specifically raises the question of whether the religious indicia proposed by the High Court ought to be accepted by law and religion scholarship. Acting Chief Justice Mason and Brennan J only very sparsely cite scholarly non-legal (theological or sociological) sources to justify their development of the concept of religion and criteria for defining it; Wilson and Deane JJ appear to cite no such literature at all. Given the controversial nature of such proclamations and the relative lack of expertise on the part of judges making them, there is certainly

¹⁵⁵ Asad, above n 20, 6.

¹⁵⁶ Ibid 8.

scope for challenging the High Court's concept of and criteria for religion.¹⁵⁷ However, this article will not attempt to do that here. For the purposes of determining whether the secular is a religion in the context of the establishment clause, these definitions and indicia must be used whether they are justified or not and whether one agrees with them or not. As Beck insightfully observes, 'mimicking the High Court's approach is methodologically useful in any attempt to predict the course of legal development'.¹⁵⁸ The object therefore is not to question these definitions and indicia, but to see whether the secular (as unpacked in this article) fits within them, and consequently whether Australia could be establishing a secular state in conflict with the establishment clause.

C *Secularism and Establishment*

There is a preliminary question as to whether secularism can truly be viewed as a 'recognised' state religion 'preferred before others', which is entrenched 'as a feature of and identified with the body politic'; in other words, whether the secular is truly 'established' given the High Court's narrow interpretation of 'establish'.¹⁵⁹ It is curious that in *Hoxton Park Residents* Basten JA referred to s 116 as 'establishing' a 'secular polity', and if establish is given its constitutional meaning that would appear to answer the question.¹⁶⁰ However, it is also possible that Basten JA was merely using the term 'establish' in its dictionary sense, so this should not be viewed as determinative.

¹⁵⁷ See also e.g. Sadurski, *Legal Definitions of Religion*, above n 109, 837-840; Puls, above n 82, 154-156.

¹⁵⁸ Beck, *Establishment Clause*, above n 109, 226.

¹⁵⁹ *DOGS* (1981) 146 CLR 559 at 582 per Barwick CJ; at 604 per Gibbs J; at 612 per Mason J; at 653 per Wilson J.

¹⁶⁰ *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2016] NSWCA 157 [249] (Basten JA).

The Court of Appeal in *Hoxton Park Residents (No 2)* noted that given the ability of the High Court to now examine the convention debates in construing Constitutional provisions (which was not allowed when *DOGS* was decided), there is scope for the possibility of a more flexible and less restrictive interpretation of what it means to ‘establish’ a religion.¹⁶¹ The Court of Appeal did not expand on this proposition, but more recent High Court authority supports the idea that s 116 might be amenable to a more flexible interpretation than the one adopted in *DOGS*, or even the idea that the *DOGS* approach is too restrictive.¹⁶² Beck proposes that a less restrictive interpretation of the establishment clause would involve operation in cases where the impugned law is supported by a head of power and understanding the term establishment more broadly and in multiple ways; it would also affirm that non-organised or non-institutional religions may be established.¹⁶³

Beck also considers the idea that terms in s 116 have a centre and circumference of meaning. In this sense ‘establishing a religion’ possesses the narrow meaning articulated in *DOGS* (the centre) but does not exhaust that meaning (the circumference).¹⁶⁴ One could also apply this methodology to the meaning of religion in terms of the secular being a religion. Beck does note that there must be a boundary to conception of the terms, but given the argument that the secular is a type of religion and the idea that establishing a religion is a question of degree more open to flexible interpretation, it is possible that the secular could be an established religion for the purposes of s 116.

¹⁶¹ See *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* (2011) 256 FLR 156, 166 [32]; Luke Beck, ‘Dead DOGS? Towards a Less Restrictive Interpretation of the Establishment Clause: *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)*’ (2014) 37 *University of Western Australia Law Review* 59, 65.

¹⁶² Beck, *Dead DOGS*, above n 161, 66-68; Beck, *Establishment Clause*, above n 109, 227-230. See also Mortensen, *Establishment Clause*, above n 79, 119-120.

¹⁶³ Beck, *Dead DOGS*, above n 161, 70-71.

¹⁶⁴ Beck, *Establishment Clause*, above n 109, 234-235.

Beck further argues that the definition of establishment by Barwick CJ in *DOGS* is problematic because the Church of England may not even meet the definition. Beck proposes a less restrictive definition which accords with the tenor of the judgments: that ‘a relationship or association between state and religion... amounts to an identification of the state with a religion’.¹⁶⁵ This effectively means the establishment clause ‘prohibits the Commonwealth from establishing programs that result in a religion or multiple religions becoming identified with the Commonwealth’.¹⁶⁶ Given Beck’s own characterisation of Australia as a ‘secular state’ with ‘secular institutions of government’, and Thornton and Luker’s assertion that the Australian polity is committed to ‘state secularism’, if it is accepted that the secular is a kind of religion, this gives even greater support to the proposition that Australia structured as a laicist secular state breaches the establishment clause.¹⁶⁷ If, for example, the terms ‘Christian’ or ‘Islamic’ were substituted for ‘secular’, any reasonable reading of these comments would interpret them as saying that Australia is a Christian State or an Islamic State – in other words, a religious state in contravention of the establishment clause.

This is commensurate with the US establishment position. It is likely the US Supreme Court would hold that specific government sponsorship of traditionally nonreligious or antireligious ideas (i.e. secularism or secular humanism) may be incompatible with the prohibition against religious establishment.¹⁶⁸ If that is the case, it does not seem implausible that a government preference for so-called ‘nonreligions’ over ‘religions’ could also be held to be a breach of non-

¹⁶⁵ Ibid 240.

¹⁶⁶ Ibid.

¹⁶⁷ Beck, Clear and Emphatic, above n 83, 182, 187, 195; Thornton and Luker, Spectral Ground, above n 98, 74.

¹⁶⁸ See Greenawalt, above n 33, 754-755, 793-794.

establishment in the Australian context. This would, at least, be consistent with interpretation of the free exercise clause. In *Jehovah's Witnesses*, Latham CJ noted that s 116 'protect[s] the right of a man [sic] to have no religion', and Beck alludes to the notion of a 'denial of religious freedom for an atheist'.¹⁶⁹ If protection of free exercise of religion includes the exercise of non-belief and non-religion, it is not a great stretch to say that the prohibition against establishment of religion includes a corresponding prohibition against the establishment of no religion or non-belief – what is traditionally known as secularism.

Against this view, Puls contends that McLeish (and presumably Beck, though Beck is writing subsequent to Puls) incorrectly extends Latham CJ's sound principle that s 116 protects the 'right to not exercise a religion' to make it equivalent to 'a freedom to exercise a non-religion'.¹⁷⁰ Puls argues that these are two very different things: Latham CJ was merely pointing out that there should be no state sanction for choosing not to exercise a religion, and it does not follow that s 116 protects this as a freedom. More generally, Puls claims that 'it is contrary to logic and the plain text of s 116 to ask what kind of non-religion is protected by s 116. The answer must surely be none.'¹⁷¹

However, Sadurski asserts that there is no basis in a secular state for distinguishing between religious and other non-religious but deeply moral beliefs, because the privileging of one over the other calls state neutrality into question.¹⁷² Thus Sadurski agrees with the contention that the free exercise clause could protect non-religions but his framework is fundamentally incompatible with the argument of

¹⁶⁹ (1943) 67 CLR 116 at 123; Beck, Clear and Emphatic, above n 83, 194; McLeish, above n 99, 224-226.

¹⁷⁰ Puls, above n 82, 153.

¹⁷¹ Ibid.

¹⁷² Sadurski, Neutrality of Law, above n 71, 444.

this article. In particular, the assumption of a neutral secular state is the very issue which this article is addressing. This assumption entails a dichotomy between the secular and the religious which is problematic for the argument that the secular is a type of religion.

In any case, Sadurski's claim is also persuasively refuted by Puls. Puls reasons that Sadurski may well be right that there is no distinction between religious views and moral views in a general sense, but when specifically considering the religious clauses 'one cannot assert that there is no basis for the distinction when the basis is found in the constitutional provisions themselves'.¹⁷³ As Sadurski admits, the clauses themselves explicitly put religion in a preferred position over other moral beliefs and forms of conscience. Puls concludes that it is only religion which should attract the constitutional protection of free exercise and the constitutional prohibition against establishment.¹⁷⁴ This conclusion need not be challenged. The position that only religion falls within the scope of the establishment clause is compatible with the argument of this article, for the argument is not that the secular should be prohibited from establishment as another deeply held moral view.¹⁷⁵ Rather, the argument is that the secular should be prohibited from establishment according to its character as a type of religion. This is entirely consistent with Puls' responses to Sadurski and McLeish on the issue.

Finally, to circumvent this contested issue, Sadurski proposes that since non-establishment and freedom of exercise target different types of problems, religion should be given a different scope for each clause. In particular, he argues that the non-establishment clause 'attacks a non-neutral merger of secular regulatory

¹⁷³ Puls, above n 83, 153.

¹⁷⁴ Ibid 153.

¹⁷⁵ C.f. McLeish, above n 99, 226-227.

concerns and the religious motives’ and therefore should be given a narrow scope, while the free exercise clause eliminates state coercive pressure on the exercise of one’s religious or moral choices and therefore religion should have a broad scope to include moral choices and issues of conscience.¹⁷⁶ If this proposal is accepted, it would present an objection to this article’s argument that a secular state constitutes establishment of religion, because religion in the establishment context would most likely be defined narrowly to exclude the secular.

There are problems with the proposed solution. The argument is largely framed in the US context of establishment and free exercise, and does not engage with the different circumstances of the Australian constitutional context. In particular, given the High Court’s uniform interpretation of religion as broad across both clauses (yet generally non-inclusive of moral choices or issues of conscience), in conjunction with their conversely uniform narrow interpretation of establishment and free exercise, the implication is that such a bifurcated solution is not realistically compatible with the Australian context. Puls agrees, contending that Sadurski’s solution is ‘at best counter-intuitive’, ‘logically unsound’, and ‘unnecessary’.¹⁷⁷ The reason there is sometimes tension between the establishment clause and the free exercise clause is because both principles may need to be called upon to address the same problem. It is untenable to have a different definition of religion for each principle in these kinds of circumstances, especially when there is no apparent difference in use of the term ‘religion’ between the clauses.¹⁷⁸ Hence, there is no *a priori* reason for defining religion so narrowly as to exclude secular humanism, and so it could still potentially come within the scope of the establishment clause.

¹⁷⁶ Sadurski, Legal Definitions of Religion, above n 109, 841.

¹⁷⁷ Puls, above n 83, 159.

¹⁷⁸ Ibid.

If the arguments that the secular is a type of religion are accepted, important implications follow. The most pertinent is that conditional on the assumption that s 116 establishes a laicist separation of church and state with the legal effect of implementing state secularism, this would mean that the Australian polity is implementing a type of religion as part of the structure of the state itself. If, as Beck states, the separation of church and state or the secular state is just the legal effect of the establishment clause in s 116, a strict separationist interpretation of this aspect of s 116 is predicated on an incongruity where the section which is intended to prevent the state establishment of religion in fact operates to establish a state religion.¹⁷⁹ More specifically, this kind of state secularism can be viewed as invalid due to breaching the establishment clause in s 116.

As mentioned earlier, McLeish has argued that ‘religion’ ought to be considered very broadly for the purposes of the establishment clause:

Section 116... must... protect against the establishment of religion in general (as distinct from any single religion).... Equally, establishment of all religions would contravene s 116. Further, the “establishment” of non-religion of some kind is bound to prohibit the free exercise of religion. It is therefore convenient to speak loosely of a prohibition on the establishment of non-religion also.¹⁸⁰

The particular claim that there is a prohibition on the establishment of non-religion is subject to McLeish’s questionable assumption that s 116 regulates non-religions as well as religions. However, even if it is instead assumed that s 116 only covers religions, the distinct claim that s 116 must protect against the establishment of religion in general as distinct from any particular religion remains valid, because

¹⁷⁹ Beck, Clear and Emphatic, above n 83, 164.

¹⁸⁰ McLeish, above n 99, 225.

the latter claim is not dependent on the former claim. The fact that s 116 only regulates religions does not mean that s 116 only regulates particular religions. It can also regulate religion in general. Chief Justice Latham agrees, stating that ‘the section [116] applies in relation to all religions, and not merely in relation to some one particular religion’.¹⁸¹

Therefore, to make a law characterising Australia as a ‘religious state’ would be incompatible with the establishment clause because it is establishing religion in general, if not any religion in particular. So McLeish’s point that ‘nonreligion itself has aspects which are quasi-religious, which it is the purpose of s 116 to protect’ could be refined to say generally that so-called ‘nonreligion’, or what is traditionally known as secularism, is actually religious in nature or a type of religion.¹⁸² In other words, it is not that s 116 protects nonreligions, but that s 116 protects religion generally, and the secular is a kind of religion. However, this general categorisation is really insufficient to sustain the argument that Australia is establishing the ‘secular religion’ in contravention of the establishment clause. That would only follow specifically where the secular meets the criteria for religion in the Australian constitutional context. If it does, establishing Australia as a ‘secular state’ could effectively amount to a breach of s 116.

D *Secularism and the Religious Indicia*

The remaining issue then is whether or not the secular or secular humanism actually qualifies as a religion for the purposes of the establishment clause. Analysing this issue requires that a comparison be made between the character and tenets of the secular humanism this article has contended for, and the indicia for

¹⁸¹ *Jehovah’s Witnesses* (1943) 67 CLR 116 at 123.

¹⁸² McLeish, above n 99, 226-228.

identifying a religion outlined by Wilson and Deane JJ with supporting material from the similar though less detailed criteria outlined by Mason ACJ and Brennan J. To the extent that the indicia are satisfied, such a comparison will lend strong support to the contention that the secular can be viewed as a religion for constitutional purposes. The first indicium is that the secular must be a collection of ideas which involve belief in a supernatural being, thing or principle, where supernatural refers to a reality which extends beyond that which is capable of perception by the senses. The article has already proposed that the secular's rejection of the supernatural may itself be a belief in the supernatural. In addition to this, despite Mason ACJ and Brennan J's apparent view that calling secular humanism a religion would be to expand the definition outside of its proper boundary, as mentioned previously the secular belief or faith in reason articulated by Milbank could be viewed as an idea which involves belief in a supernatural principle. 'Reason' and the exercise of it cannot be perceived by the senses or measured empirically; it is transcendent in that all people in all cultures possess it and use it in varying degrees. It seems possible then to view reason as a transcendent, non-physical (supernatural) principle believed in by the secular.

Perhaps this is not a fair characterisation of reason. The process of reason can be observed by the natural senses through articulation and critique of arguments and reasoning; the nature and tenets of reason can be explained and defined such that it can be apprehended and perceived by the senses. However, the same might just as fairly be said of 'God' (conceived in the most general sense) as the paradigmatic supernatural being, thing or principle. The nature and actions of God may be delineated by theological and metaphysical inquiry, written or spoken in such a way as to be perceived by the senses. To say that the concept of 'God' can be expressed in a way capable of perception by the natural senses is not the same as

saying that the concept of ‘God’, or ‘God’ itself, is capable of perception by the natural senses. It is, by its very nature, transcendent. Similarly, although the nature and process of reason may be expressed in a way amenable to perception by the senses, it does not follow that the concept of reason or reason-in-itself is capable of perception by the senses. As such, the secular belief in reason as a supernatural reality, beyond perception by the senses, plausibly satisfies the first indicium.

The second indicium is the ideas relate to people’s nature and place in the universe and in relation to the supernatural. Again, Mason ACJ and Brennan J emphasise that the focus should be on the supernatural content of the answers, not the fundamental nature of the questions. Such an exclusive emphasis should be rejected based on the above arguments addressing this point, considering that the secular reliance on reason involves the supernatural, the secular rejection of the supernatural is actually a supernatural claim, and the fact that both questions and answers may equally relate to fundamental ideas and the supernatural.

Furthermore, Mason ACJ and Brennan J seem to implicitly acknowledge that secular ideas relate to people’s nature and place in the universe when they discuss how humanity has sought answers to the fundamental questions of existence, meaning and destiny, and ‘some’ believe these can be resolved through faith, or what might be termed ‘traditional’ religion. In particular, they acknowledge that religious belief ‘relates a view of the ultimate nature of reality to a set of ideas of how man is well advised, even obligated, to live’.¹⁸³ The fact that some believe these issues may be solved by faith or traditional religion implies that there are others who believe these problems may be solved (or not solved) by reason or non-

¹⁸³ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at 134-135.

traditional religion; that is, through a secular perspective. These others are nevertheless still discussing these issues and formulating different solutions, presumably based on reason, and relating their view of the ultimate reality to a set of ideas of how we are obligated to live. In this sense, the secular faith or belief in reason as the standard for addressing the fundamental questions of life and how to live may well satisfy the second indicium.

The third and fourth indicia require adherence to canons of conduct which give effect to the relevant beliefs, and that the adherents constitute an identifiable group. It seems straightforward that these indicia would be satisfied in terms of the secular humanist ‘creed’ mentioned in Part II, as this contains codes of belief and canons of conduct adhered to by an identifiable group of secular humanists in the US. Even if there is no equivalent group in Australia, the systematic outworking of the secular perspective would presumably be governed by a universal code and associated rules of reason and ethics disconnected from religious doctrine, and such a group would be relatively simple to identify in terms of ascertaining their secular beliefs. The existence of interest groups and associations such as the Council of Australian Humanist Societies, and operating political parties such as the Secular Party of Australia, supports the idea that the adherents of secularism are an identifiable group, at least as much as the traditional religions constitute an identifiable group.

Furthermore, there is a developing trend of secular assemblies, which have all the indicators of traditional church organisations, including services, without the so-called ‘religious’ aspects.¹⁸⁴ However, Mason ACJ and Brennan J rejected this US-style element as an indicator of religion:

¹⁸⁴ See for example the ‘Sunday Assemblies’: <https://sundayassembly.com/>

[Another] indicia is the existence of “any formal, external, or surface signs that may be analogised to accepted religions”, such as formal services, a clergy or festivities. No doubt rituals are relevant factors when they are observed in order to give effect to the beliefs in the supernatural held by the adherents of the supposed religion. Thus ceremonies of worship are central to the Judaic religions manifesting their belief in and dependence on God. Mere ritual, however, devoid of religious motivation, would be a charade.¹⁸⁵

It might be claimed that these secular assemblies are mere ritual devoid of religious motivation. But this is just to *define* the secular as non-religious. Such a claim assumes that the secular is not religious, which is precisely the question being determined. It is therefore not a compelling argument to reject this element in the context of Wilson and Deane JJ’s indicia. In addition, the foregoing analysis suggests that the secular has supernatural aspects through its emphasis on reason, such that secular assemblies are not mere ritual in the purely natural sense that Mason ACJ and Brennan J appear to be espousing. All this indicates potential satisfaction of the third and fourth indicia. The final indicium is that the adherents see the collection of ideas and practices as constituting a religion. This is the one which is probably the least likely to be satisfied as it is unlikely that secular humanists would consider themselves a religion. However, because Wilson and Deane JJ note this indicium as more controversial, it could be dispensable.¹⁸⁶

Therefore, the secular potentially satisfies most, if not all, of the indicia which may be used in the determination of whether it is in fact a religion for constitutional purposes. Though it does not answer the question irrefutably, Justices Wilson and Deane emphasise that it would be unlikely that any impugned ‘religion’ which

¹⁸⁵ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 49 ALR 65 at 76.

¹⁸⁶ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at 173-174. C.f. Puls, above n 83, 154 who asserts this kind of indicium as a decisive factor, but without any justification.

satisfied the indicia would be denied classification as a religion.¹⁸⁷ In conjunction with the arguments that identify the secular or secular humanism as a religion or as containing religious aspects, there is therefore good reason to think that the secular is a type of religion for constitutional purposes, and it follows that state secularism breaches the prohibition against the state establishment of religion in s 116. It is an incoherent approach to the relationship between church and state in Australia, because the assumption that the establishment clause establishes a laicist secular state effectively yields the conclusion that the clause intended to prevent establishment of a state religion in fact establishes a state religion. Consequently, in the limited space left the article suggests a different model should inform the relationship between church and state and High Court interpretation of s 116 – one which is a better fit within the constitutional and democratic context.

V IMPLICATIONS OF ‘DISESTABLISHING’ SECULARISM

It is useful to consider what an actual establishment of secular humanism would look like in order to suggest a different model. Establishing secularism would involve the state proclaiming itself as secular in the sense of being non-religious and neutral towards religions while actually adopting policies and legislation which privilege non-religion in a public context. In particular this is identifying the Australian Commonwealth as a secular state through passing legislation which entrenches secular/secularist (secular humanist) programs which discriminate against or undermine other religious programs. There does not appear to be any explicit legislation of this kind currently in existence, but there is legislation which could be perceived as implicitly discriminating against religion in favour of a

¹⁸⁷ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at 173-174.

secular agenda.¹⁸⁸ More pertinent at this point is the conceptual problem identified in relation to the scholars and judges which understand Australia to be a secular state, leading to an incongruent framework for interpreting the establishment clause.

Articulating a feasible alternative is a task of formidable difficulty, and that too has been acknowledged in the US situation where the definition of religion may well include fundamental convictions of conscience deriving from moral frameworks. Alexander argues that the central norm in an anti-establishment clause is the forbidding of government acts premised on theological views. However, our views about the rights and wrongs of social actions and correlating government policies will always rest on the entire web of our beliefs, including religion. Our convictions are a product of our fundamental views, which is just what religious views are.¹⁸⁹ ‘Christianity is a religious view, but so too is Marxism or utilitarianism. The latter are non-theistic, but many “religions” one finds in representative lists of “religions” are also non-theistic.’¹⁹⁰ If we suppose that a person’s view of upholding human rights is premised on a religious conviction and that person is a government official implementing this as government policy, is that person able to support human rights? Or would that support rest on a religious view, rendering it unconstitutional? This is the fundamental problem of religious non-establishment clauses.¹⁹¹ He drives home the point:

¹⁸⁸ See e.g. Alex Deagon, ‘Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage’ (2017) 20 *International Trade and Business Law Review* 239-286.

¹⁸⁹ Alexander, Religion Clause Theory, above n 1, 245-246.

¹⁹⁰ Ibid 246.

¹⁹¹ Ibid. C.f. the difficulties in the US situation identified by Cornelius and his solution of ‘Benign Neutrality’, which involves a harmless and favourable disposition towards religion while avoiding compulsion and preferential treatment: William Cornelius, ‘Church and State –

If political theory justifies religious accommodations, however, then when government acts on the basis of political theory, is it establishing a religion?... If claims of conscience derived from a moral theory can qualify for exemptions under the Free Exercise clause [this is specifically in the US context], then when the government acts to establish a moral theory and its commands, why is it not establishing a religion? For if I have a deep seated belief that some civil policy is wrong, and my belief is one equivalent to a religious belief, then why should I not regard the government as establishing a religion, and a false one at that?¹⁹²

Returning to the Australian context, given the broad definition of religion (perhaps including secularism) and the real possibility of establishment through government policy, does this mean that all ‘religious’ and ‘secular’ (insofar as the ‘secular’ is a type of ‘religion’) policy reasons are unconstitutional by virtue of contravening non-establishment? Moreover, how does a government justify any policy at all without confronting this problem? While admitting the complexity of the issue and acknowledging the lack of space to give it due consideration and proper development here, this article tentatively suggests that the resolution could be found in prioritising democracy. This view argues that all religious, philosophical and scientific voices (like votes) should be considered equally when it comes to decision-making.¹⁹³ As Bader contends:

Instead of trying to limit the content of discourse by keeping all contested comprehensive doctrines and truth-claims out, one has to develop the duties of civility, such as the duty to explain positions in publicly understandable language, the willingness to listen to

the Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality’ (1984) 16(1) *St. Mary’s Law Journal* 1, 6-10, 35-39.

¹⁹² Larry Alexander, ‘Galston on Religion, Conscience and the Case for Accommodation’ (2014) 51 *San Diego Law Review* 1065, 1068.

¹⁹³ See e.g. V Bader (1999) ‘Religious Pluralism: Secularism or Priority for Democracy?’ (1999) 27 *Political Theory* 597.

others, fair-mindedness, and readiness to accept reasonable accommodations or alterations in one's own view.¹⁹⁴

One may of course disagree with what is expressed, but such is the nature of democratic discourse. This implies that a priority for democracy model should explicitly allow for all religious or non-religious arguments compatible with the democratic process.¹⁹⁵ It provides the freedom for religious and non-religious alike to express their views in a public space and contribute to public policy. It also allows a government to genuinely (neutrally) consider these different views as it articulates and implements policy, without establishing, promoting or excluding particular views. This, presumably, is what Mortenson means when he talks about a free market of opinions not leading to individual opinions (Christianity, Judaism, Buddhism or Secular Humanism) using the coercive powers of the state to establish those particular opinions and define state orthodoxy.¹⁹⁶

Thus, having an authentically neutral approach would paradoxically involve acknowledging the competing religious and non-religious perspectives and allowing the state to support religion and non-religion in a non-preferential and non-discriminatory way through prioritising democracy. Rather than being read in the laicist 'secular state' sense, the establishment clause could be read in the more accommodationist sense of preventing state adoption or promotion of religion in general or any particular religion (including secularism or secular humanism), instead allowing the presence and influence of all different perspectives through reasonable policy debate. Prioritising democracy in terms of non-discrimination between religion/s is a more coherent framework for the establishment clause, and it accords with the original purpose of s 116 as articulated by the framers in Part

¹⁹⁴ Ibid 614.

¹⁹⁵ Ibid 617.

¹⁹⁶ Mortensen, *Blasphemy*, above n 90, 431.

III. This reading would also complement the operation of the free exercise clause such that different religions could freely practice their beliefs in a way which is compatible with democracy.¹⁹⁷

The actual process of this requires more detailed engagement than the brief summary here, but the general idea is as follows. In the Australian democratic system, voters form political opinions on religious, philosophical, moral or other bases, and vote based on this. The elected government then, in principle, implements that policy platform from a representative democracy perspective. Thus, although the opinions undergirding the policy may well be religious in nature, the implementation or ‘establishment’ of that policy occurs as part of the Australian democratic system which informs the Constitution. It is therefore truly ‘neutral’ in the sense that it is just democracy in action, rather than the state deliberately or actually identifying with or preferring ‘Christianity’ or ‘Secular Humanism’, or any religion. Though the sketch here is crude, the fundamental point of the priority for democracy approach is to avoid state preference of or discrimination against any particular religious or ‘secular’ view by means of explicit establishment or restricting free exercise, either one of which would tend to stifle different or opposing views and undermine democracy.

Again, from the US context, Benson provides some perspective:

The state must not be run or directed by a particular religion or “faith-group” but must develop a notion of moral citizenship consistent with the widest involvement of different faith groups (religious and non-religious). This... does not view the state as outside a variety of competing faith-claims but situates the state as itself inside and, therefore, concerned with the questions of faith in society. The focus is not on “religion” only, but

¹⁹⁷ See Alex Deagon, ‘Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage’ (2017) 20 *International Trade and Business Law Review* 239-286.

on “faiths” of a variety of kinds. It is this...understanding that best suits the development of a free and democratic society animated by a meaningful (moral) pluralism consistent with intelligible notions of freedom, respect, and responsibility-essential to the coherence of the constitution itself... [and] permits a better grounding for citizenship as a shared moral enterprise and for the adjudication of competing faith claims as just that, competing “faith claims.”¹⁹⁸

This article has argued that the secular is a type of religion, and when this is combined with the assumption that Australia is a laicist secular (meaning allegedly neutral and non-religious) state, the result is that this notion of state secularism could be viewed as breaching the establishment clause. To avoid this impasse, the article suggests that Australia not be a laicist ‘secular’ state or a theocratic ‘religious’ state, but a truly neutral ‘democratic’ state which incorporates and implements the many and varied religious and non-religious views of its citizens in a non-discriminatory and non-preferential way in order to produce a constitutionally coherent space for open discussion of different perspectives for policy implementation.

¹⁹⁸ Benson, above n 11, 530-531.

SHOULD RELIGIOUS CONFESSION PRIVILEGE BE ABOLISHED IN CHILD ABUSE CASES? DO CHILD ABUSERS CONFESS THEIR SINS?

KEITH THOMPSON*

ABSTRACT:

This article interrogates the suggestion that abolishing the seal of confession will protect children from abuse. It deconstructs the evidence John Cornwell used in The Dark Box to assert that Catholic priests do in fact confess child abuse in the face of contrary Irish research, and compares the current idea that child sex abusers cannot be rehabilitated against modern scientific evidence. But the heart of the article is a survey of the legal and practical reasons why it is correct to say that abolishing confession privilege would not help child abuse victims. In doing so, it considers the application of evidence law to this issue, as well as the tension between the right to religious freedom established by the International Covenant on Civil and Political Rights and the needs of victims.

I INTRODUCTION

Several of the contributors to a recent Oxford University Press book entitled *Wrongful Allegations of Sexual and Child Abuse*¹ suggest that changes in our criminal evidence laws have

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led to an increasing number of unjust allegations...through the court...and...in the conviction of innocent defendants of crimes they did not commit.²

In part they trace these changes to a culture that demands that “those who make allegations of child abuse” should be presumed to be telling the truth.

One of the criminal evidence laws that some child protection advocates suggest needs to be changed to ensure that a higher percentage of alleged child abusers are convicted of crime,³ is the law that privileges members of the clergy from the need to disclose religious confessions.

In this article I will review the utility of the suggestion that religious confession privilege laws should be abolished from several perspectives, but with particular discussion of child sexual abuse by Catholic priests. In Part I, I begin by defining the terms that are used in this space. Members of the public generally recognize that there is a difference between child abuse and child sexual abuse, but most think the terms child sexual abuser and paedophile are synonyms. They are not, and the difference is important since not all paedophiles sexually abuse children. I therefore explain the difference as well as what the less familiar term hebephile means. I then review Gerald Risdale’s confession of his child sex abuse to the Australian Royal Commission into institutional responses to child sex abuse (the Royal Commission) and those of Michael Joseph McArdle

¹ Ros Burnett (ed), *Wrongful Allegations of Sexual and Child Abuse* (Oxford University Press, 2016).

² Sir Henry Brooke, ‘Wrongful Allegations of Sexual and Child Abuse’, book review < <https://sirhenrybrooke.me/2016/11/21/wrongful-allegations-of-sexual-and-child-abuse/>>.

³ Ibid.

referred to in John Cornwell's book, *The Dark Box*.⁴ In Part II, I will reconsider Jeremy Bentham's historical argument, despite his opposition to privilege in general, that the abolition of religious confession privilege will not result in additional convictions of crime but will rather remove an institution that serves society's greater interest in the rehabilitation of offenders. Though Bentham took for granted that criminal offenders can be rehabilitated, I will survey the current literature to determine whether such rehabilitation is possible since significant elements in contemporary society do not accept Bentham's assumption where child sex abusers are concerned.

In Part III, I will consider legal objections to the abolition of religious confession privilege to test whether it creates the risk of unsafe convictions to which Ros Burnett's contributors have referred, and I will also discuss the practicality of abolishing religious confession privilege since the Australia state legislatures are not bound by s 116 of the *Australian Constitution* where the free exercise of religion is concerned.

I will conclude on balance that while the abolition of religious confession privilege by states in Australia may be a theoretical possibility, it would achieve no long term practical good and would further offend Australia's international human rights commitments.

PART I – DO CHILD SEX ABUSERS CONFESS THEIR ABUSE?

In this part I discuss the abuse perpetrated by two of the most notorious child sex abusers in recent Australian history – George Risdale and

⁴ John Cornwell, *The Dark Box: A Secret History of Confession* (Basic Books, New York, 2014).

Michael Joseph McArdle. One of the reasons they are notorious is because both were Catholic priests and compounded their crimes by their utter disregard of the sacred trusts that were reposed in them as priests.⁵ But I will not discuss their abuse in a prurient way. Rather, I will review the contrasting things they said about their use of Catholic religious confession and I will compare their comments with what other researchers have said to assist understanding whether this Catholic sacrament facilitated or encouraged their abuse, or whether it is irrelevant. John Cornwell has suggested that Catholic religious confession encouraged McArdle's abuse, but Risdale said he never once confessed to his child abuse crimes. While Risdale's candour would not surprise Marie Keenan, eight out of nine of her informants said that while they did use the confessional to ease their consciences, they did not provide enough detail to identify their criminality.⁶ Because Keenan suggests that such confessions do not qualify for absolution in Catholic theology, I set out that theology.

⁵ Michael Coren says that child abuse within the Catholic Church was never any worse than in other Christian churches, faith communities, swimming clubs and even UN peacekeepers. But he suggests the venom reserved for the churches and the Catholic Church in particular is a consequence of perceived hypocrisy since "the Church speaks with a moral authority not claimed by a sports club" (Michael Coren, *Why Catholics are Right*, Toronto: McClelland and Stewart, 2011) 12, 23 and 24). Graham Glancy and Michael Saini also say that while "[p]erpetrators of child sexual abuse...can be found among the clergy of various denominations and in various countries", the Catholic Church is singled out for the criticism because of its "perceived secrecies and inner workings" and because "the media has cast [it] as being unable or unwilling to deal with clergy abuse within the Church". These authors also note that "men who work...[in] close contact with children such as Boy Scout leaders, sports coaches and teachers have the same proportion of sexual perpetrators as the clergy" (Graham Glancy and Michael Saini, 'Sexual Abuse by Clergy' in Fabian M. Saleh, Albert J. Gruzinskas Jr., John M Bradford and Daniel J. Brodsky (eds.), *Sex Offenders, Identification, Risk Assessment, Treatment, and Legal Issues* (Oxford University Press, 2009), 324 and 326).

⁶ Marie Keenan, *Child Sexual Abuse and the Catholic Church: Gender, Power and Organizational Culture* (Oxford University Press, 2012).

But before I begin, a short word about my use of the phrase ‘child abusers’ rather than paedophiles. I have chosen ‘child abusers’ because paedophiles is technically incorrect. While paedophile is the name given to adult human males and females who are sexually attracted to children, not all persons so attracted act on their attractions, just as not all homosexual or heterosexual human adults acts on their attractions in either a violent or non-violent way. Hebephiles are adult human male and females who are sexually attracted to pubescent or early adolescent youths, but again not all hebephiles act upon their attractions. Hence I have preferred the term ‘child abuser’ because it identifies criminal conduct rather than sexual orientation as the evil which contemporary law is passed to stigmatize and punish.⁷

In his testimony before the the Royal Commission on May 27, 2015, George Risdale infamously

said he never told anyone about his sexual abuse of boys, even during confession, because the ‘overriding fear would have been losing the priesthood’.⁸

But in his book, *The Dark Box*, John Cornwell referred to the 1,500 confessions of child sexual abuse that defrocked priest Michael Joseph McArdle swore that he made to a variety of confessors when he was seeking mitigation of his sentence at the Brisbane District Court on 8th

⁷ Marie Keenan notes a number of psychiatric classifications for child sexual offenders including regressed offenders, fixated offenders, paraphilia including pedophilia, ephebophilia and hebephilia. She also says that “not all child molesters are pedophiles, and not all pedophiles are child molesters” (ibid, 90-93 (93)).

⁸ < <http://www.news.com.au/national/courts-law/vile-paedophile-gerald-risdale-will-give-evidence-at-royal-commission-today/news-story/63054c92d762e9c3d53629b8da59ccab>>.

October 2003.⁹ John Cornwell explained McArdle's confessions in this way:

A priest in Queensland, Australia, went to confession some 1500 times to admit sexually abusing boys. In a 2003 affidavit, the then sixty-eight year old Michael Joseph McArdle, who was jailed for six years beginning in October of that year, claimed to have made confession about his paedophile activities to about thirty different priests over a twenty-five year period. He noted: 'As the children would leave after each respective assault, I would feel an overwhelming sense of sadness for them and remorse, so much so that so it would be almost physical. I was devastated after the assaults, every one of them. So distressed would I become that I would attend confessionals weekly and on other occasions fortnightly and would confess that I had been sexually assaulting young boys.' He said the only assistance or advice he was given was to undertake penance in the form of prayer. He claimed that after each confession 'it was like a magic wand had been waved over me'. McArdle's affidavit would appear to contradict a widespread view in Ireland that child sexual abusers are unlikely to admit their abuse to a priest in the confessional.¹⁰

Cornwell's reference to Irish opinion was to Marie Keenan's book, *Child Sexual Abuse and the Catholic Church: Gender, Power and Organizational Culture*, Oxford University Press, 2012.¹¹ However, Cornwell's suggestion of inconsistency between McArdle's self-serving affidavit and Keenan's evidence in nine more detailed post conviction case interviews is not convincing.

McArdle's affidavit was part of an extended plea in mitigation by his lawyer when seeking a lighter sentence after a delayed confession to the

⁹ *R v McArdle* [2004] QCA 7.

¹⁰ John Cornwell, above n4, 189.

¹¹ Marie Keenan, above n6, 163.

Police. In the Court of Appeal four months later, McMurdo P recounted the detail of that plea:

The applicant pleaded guilty on the 8th of October 2003 to 62 counts of indecent dealing. He was sentenced to an effective term of imprisonment of six years with a recommendation for eligibility for post-prison community based release after two years, a penalty imposed only on the most serious of the offences. He contends that the sentence was manifestly excessive...

He has not offended for 17 years and, as his lawyer points out, but for his less serious offending against one female complainant he would not have offended for 25 years. The defence contends this demonstrates self-rehabilitation. The applicant resigned from active ministry in the church in 1988 and general faculties were withdrawn by the Bishop in September 1999 prior to the applicant's resignation from the priesthood in October 2000.

The applicant contends that the sentence was manifestly excessive in that the learned primary Judge failed to give proper weight to the circumstances surrounding the offending conduct, the timely plea and cooperation with the administration of justice, the applicant's remorse, age, poor health, the delay in prosecution, the maximum penalty, the applicant's efforts at rehabilitation and the absence of any prospect of re-offending and relevant comparable cases.¹²

Her Honour then opined that the McArdle's submission did not adequately acknowledge the severity of the offending or how the evidence came to light. While McArdle had said the reason he did not tell the Police about his offending earlier was because he did not wish to further abuse the victims who might not want to "go through the pain of making a public complaint",¹³ the only reason his offending had come to light at all was because of *Courier-Mail* reporting. Her Honour then summarized the affidavit sworn by McArdle and upon which Cornwell

¹² *R v McArdle* [2004] QCA 7 (2-4).

¹³ *Ibid* 5.

relied for his statement that ‘McArdle’s affidavit...appear[ed] to contradict [Keenan’s view] in Ireland that child sexual abusers are unlikely to admit their abuse to a priest in the confessional.’¹⁴ Her Honour’s summary of McArdle’s affidavit is as follows:

Defence counsel tendered at sentence an affidavit from the applicant in which he referred to his hope that in speaking to the media his publicised acceptance of wrong doing would assist the healing process for the complainants. He emphasised that he had been shamed and vilified by his exposure and virtually became a prisoner in his own home, which he had been afraid to leave. Completely unfairly, his family, especially his brother, was forced to share this vilification. He said he first suffered a heart attack in 1981 and a second heart attack in August 2003 which necessitated his more recent surgery. He said that on three occasions during his ministry with the church he was summonsed to meetings with the Bishop to discuss his offending and was candid in disclosing what he did. After the first two occasions he was moved to another provincial centre. After the third occasion in early 1990, having already ceased active ministry in the church, he attended counselling in New South Wales, which he found helpful in giving him insight into the effect of his conduct on the children. This encouraged him to refrain from any future contact with children. In the early 1990s he was approached by one complainant, openly discussed what had occurred and sought the complainant's forgiveness. Since he left the ministry in 1988 he said he has ceased all contact with children and has concentrated on personal devotion and prayer.¹⁵

Her Honour then compared McArdle’s sentence with others and refused the application for leave to appeal against sentence. She explained:

After balancing the very serious aspects of the applicant's lengthy and multiple offending with the numerous mitigating features, I am satisfied that the

¹⁴ Above n10 and supporting text.

¹⁵ *R v McArdle* [2004] QCA 7 (6-7).

sentence imposed here, which I emphasise includes the early recommendation for parole after two years, adequately reflects the mitigating circumstances, and is within the proper range.¹⁶

Justice McMurdo and her two colleagues on the Queensland Court of Appeal upheld McArdle's sentence because of the gravity of his offence and did not need to consider his effort to pass the blame on to the Church in his affidavit. But it does not require great perception to question McArdle's assertion that he had told thirty priests that he had sexually assaulted children and only ever been told 'to undertake penance in the form of prayer.'¹⁷ That one priest in a church that insists of frank disclosure of sin and restitution before absolution would condone such grievous offending is possible though unlikely, but thirty?

Rather than accept McArdle's testimony at face value as rebutting Keenan's careful research,¹⁸ Cornwell, ought to have considered what she actually discovered more closely.

Though Keenan rails against Catholic Church infrastructure as part of the reason why so much child abuse has been perpetrated within its walls,¹⁹ she recognizes that labeling,²⁰ blaming²¹ and feminist critical studies²²

¹⁶ Ibid 11-12.

¹⁷ Cornwell, above n4, 189.

¹⁸ Marie Keenan, above, n 6. Keenan is an experienced systemic family therapist and reports she sought "to understand and analyze child sexual abuse by Catholic clergy in its individual and systemic dimensions" (ibid ix).

¹⁹ Ibid xxv, xxx, 23-25, 42-43, 46-47, 51-53, 172-174.

²⁰ Ibid 96-97, 104-105.

²¹ Ibid 12-14, 16, 59, 63-64 where she says that neither pedophilia nor homosexuality are the cause of sexual abuse by Catholic clergy and thus that these labels do not assist analysis. At 15 she observes that "[i]n some cases the pattern of abuse was opportunistic in nature; in others it was more planned and occurred on a number of occasions." At 22, she observes that "it is humanly attractive to have someone to blame" there are no "neat linguistic solutions...to significantly complex problems".

²² Ibid 115-118.

have not provided solutions. Child abuse cannot be explained with templates. Each abuse and each abuser is unique. She studied nine separate child abusers who cooperated while they were in prison.²³ She sought to understand how those lonely repressed, but privileged²⁴ men gave themselves permission to engage in this behaviour. She reports that none of them ever grew up emotionally.²⁵ While the confessional was a place of support,²⁶ each man chose the priests to whom he confessed carefully and not one of them ever disclosed the whole story in those confessions.²⁷ ‘Confessions’ were minimalistic and only ever reached the penance level.²⁸ There was never enough disclosure to invite guidance, counsel or reproof.²⁹ Though one of her subjects said he never disclosed anything at all, those who ‘confessed’ knew that genuine repentance could never be reconciled with repetitive behaviour,³⁰ and only one of her subjects acknowledged the criminal nature of what he had done.³¹

Keenan’s analysis suggests that like her subjects, McArdle never told his confessors what he had done though he may have convinced himself that he did. The irony is that like the priests who received ‘confessions’ from Keenan’s subjects, Cornwell, and perhaps even the Queensland Court of Appeal did not ask additional questions either. In that context, it is difficult to criticize the priests who received confessions from Keenan’s subjects. For even though further questions might have exposed the offending and led to counsel or other action that could have protected

²³ Ibid ix.

²⁴ Ibid xxi, 94, 158-162.

²⁵ Ibid 55-57, 64, 67, 75-76

²⁶ Ibid 61, 163-164.

²⁷ Ibid 162-163.

²⁸ Ibid 164.

²⁹ Ibid.

³⁰ Ibid 164-165.

³¹ Ibid 166.

future victims, that depends on whether there was enough information in what was confessed to reasonably lead to further questions. Nor does Keenan opine as to why priests, authors and even judges do not naturally ask those follow-on questions which look so easy with the benefit of hindsight.

Despite Cornwell's suggestion that some child abusers do frankly and fully confess their abuse, simple reflection informed by Keenan's analysis, says that Cornwell's conclusion is unreliable. But what if Cornwell was right? What if better-trained clergy were able to elicit detailed confessions from child abusers? Would society benefit from compelling them to report those disclosures to the police or other civilian authorities?

PART II – WOULD SOCIETY BENEFIT FROM THE ABOLITION OF RELIGIOUS CONFESSION PRIVILEGE?

Despite his general aversion to all forms of privilege,³² social engineer and legal reformer Jeremy Bentham answered this question with an unequivocal 'no' early in the early nineteenth century. He reasoned that religious confession privilege was justified by the need for freedom of conscience and belief.³³ He explained:

[A] coercion...is altogether inconsistent and incompatible [with any idea of toleration]....The advantage gained by the coercion – gained in the shape of assistance to justice – would be casual, and even rare; the mischief produced by it, constant and extensive...this institution is an essential feature of the

³² J.H. Wigmore, *Evidence in Trials at Common Law*, Revised by John T McNaughton, Boston, Little Brown, 1961, Vol. 8., 877.

³³ Jeremy Bentham, *Rationale of Judicial Evidence* (New York and London: Garland Publishing, Inc, 1978) (Reprint of the 1827 edition published by Hunt and Clarke, London), Vol. IV, 586-592.

catholic religion, and...the catholic religion is not to be suppressed by force...Repentance, and consequent abstinence from future misdeeds...are the well-known consequences of the institution.³⁴

Bentham went on to suggest that the secrets harvested by forcing the clergy to disclose confessions would be short-lived since people would cease confessing their sins the moment the confidentiality of their confessions was compromised.³⁵

The Supreme Court of Canada more recently considered whether there should be a religious confession privilege or even a more far reaching religious communications privilege in *R v Gruenke* in 1991.³⁶ Even though all nine judges found that no religious confession or communications privilege applied in that case since the admissions made to pastors of an evangelical Christian fellowship had not been made for purposes of spiritual absolution or with an expectation of confidentiality, seven of the nine judges nonetheless found that an ecumenical religious communications privilege should be recognized on a case-by-case basis in accordance with John Henry Wigmore's 1904 canons.³⁷ Wigmore had said that confidential communications should not be disclosed if:

- confidentiality was essential to maintenance of the relationship between the parties
- the relationship was one which the community wanted to support, and

³⁴ Ibid 589-590.

³⁵ Father Frank Brennan made similar observations in his article entitled 'Breaking the seal of the confessional a red herring that will not save one child' in *The Weekend Australian*, December 3-4, 2016.

³⁶ *R v Gruenke* (1991) 3 SCR 263.

³⁷ Ibid 286-290 referring to J.H. Wigmore, *Evidence in Trials at Common Law*, (Revised by John T McNaughton, Boston/MA: Little Brown, 1961) Vol. 8, 527.

- the injury to that relationship would outweigh the advantage that might be gained by allowing the relevant evidence into court.³⁸

In her concurring minority judgment, L'Heureux-Dubé J went further. She recommended that religious communications privilege should be recognized in Canada on the same basis as legal professional privilege. She was concerned that the majority's case-by-case analysis ruling would leave penitents up in the air and chill religious freedom generally in Canada.³⁹ She also identified other reasons why confidential religious communications should not be adduced as evidence in court proceedings. Those reasons included Sir Robin Cooke's idea that no "person should suffer temporal prejudice because of what is uttered under the dictates or influence of spiritual belief";⁴⁰ Chief Justice Warren Burger's recognition of

the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return";⁴¹

as well as

(a) society's interest in religious communications; (b) freedom of religion; and (c) privacy interests.⁴²

She also wrote of "practical considerations" that recommended a religious communications privilege. Trying to compel priests to disclose confidential religious communications in breach of sacred vows would bring the justice system into disrepute.⁴³ Admitting confessions made to

³⁸ Wigmore, *ibid.*

³⁹ *R v Gruenke* [1991] 3 SCR 263, 311-312.

⁴⁰ *R v Howse* [1983] NZLR 246, 251.

⁴¹ *Trammel v United States* 445 U.S. 40 (1980), 51.

⁴² *R v Gruenke* [1991] 3 SCR 263, 297.

⁴³ *Ibid* 303-304 citing Professor Seward Reese for his observation that the clergy would still refuse to testify even if the courts tried to compel them (Seward Reese, 'Confidential Communications to the Clergy' (1963) 24 *Ohio State Law*

priests was so like ‘admitting confessions made under duress to police that the idea should be expressly condemned by the common law’.⁴⁴

Professor Suzanne McNicol has made similar arguments including her idea that recognizing in law the particular determination of Catholic priests not to disclose confessional confidences would ‘reduce...unnecessary friction between church and state’.⁴⁵ She has also argued that

the arguments against the creation of a priest-penitent privilege are few and...far from compelling. First, there is the general argument...[that] the withholding of relevant evidence from a judicial tribunal...would be an impediment to the search for the truth and the administration of justice....Secondly,...the creation of a priest-penitent privilege would discriminate against other confidential relationships, such as doctors and patients, accountants and clients, journalists and their sources, anthropologists and their subjects etc., where one of the parties to the relationship is also under an ethical, professional or moral obligation not to disclose confidences. Thirdly,...the creation of such a privilege would involve serious definitional problems, leading to the discrimination in favour of some religions over

Journal 55, 81); Best CJ in *Broad v Pitt* (1828) 3 Car. & P. 518, 519; 172 E.R. 528, 529 for his unwillingness to ever compel an unwilling clergyman to give evidence from confidential communications; and Professor Lyon for the idea that the admission of confessional evidence is so similar to the admission of confessions made to the Police under duress as to merit express common law condemnation (J.N. Lyon, ‘Privileged Communications – Penitent and Priest’ (1964-1965) 7 *Criminal Law Quarterly* 327).

⁴⁴ *R v Gruenke* [1991] 3 SCR 263, 304 citing Professor Lyon (above n 43). This idea also has antecedents in the historical origins of the privilege against self-incrimination. For example, Henry E. Smith has stated that the privilege against self-incrimination “had its effective origins in a mid-nineteenth-century analogy between one rule, the witness privilege, and another, the confession rule.” The confession rule at that time held that “[s]tatements made [on oath before a magistrate at pretrial] under the hope of favor or fear of consequences were inadmissible at trial” (‘The Modern Privilege: Its Nineteenth-Century Origins’, in R.H. Helmholz, C.M. Gray, J.H. Langbein, E. Moglen, H.E. Smith, and A.W. Alschuler (eds.), *The Privilege Against Self-Incrimination, Its Origins and Development* (Chicago and London: The University of Chicago Press, 1997), 145-146.

⁴⁵ S. Nichols, *Law of Privilege* (Butterworths, 1992) 337.

others....Finally, there is...[no] need for the law to intervene...to bring the law into line with practice.⁴⁶

Others who have considered the matter objectively in recent times have all come to the same conclusion as Bentham early in the nineteenth century.⁴⁷ Though clergy other than Catholic priests might occasionally disclose confessional communications if the privilege was abrogated, that already happens in jurisdictions where the privilege is recognised.⁴⁸ As in Bentham's time, abrogating statutory privileges for confidential religious communications presents as an institutional effort to discriminate against Catholic religious practice with no golden pot of evidence at the end of rainbow.⁴⁹

Bentham however, assumed that sinners including sinners who were also criminals, could be rehabilitated by the pastoral work of clergy. But twenty-first century Australian penal practice appears to assume that sex offenders including child sex abusers are irredeemable and should never

⁴⁶ Ibid 331.

⁴⁷ See for example, W.H. Tiemann, and J.C. Bush, *The Right to Silence - Privileged Clergy Communication and the Law* (2nd ed, Nashville: Abingdon Press, 1983), 23; M.H. Mitchell, 'Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion' (1987) 71 *Minnesota Law Review* 723; W.A. Cole, 'Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis' (1988) 21 *Columbia Journal of Law and Social Problems* 1; C.A. Wright and K.W. Graham, *Federal Practice and Procedure: Evidence* (3rd ed, St Paul/MN: West Publishing Co, 1992), § 5612; G.J. Zubacz, *The Seal of Confession and Canadian Law* (Montreal: Wilson & Lafleur, 2009), 212-217.

⁴⁸ See for example, *R v Howse* [1983] NZLR 246 and *R v Gruenke* [1991] 3 SCR 263.

⁴⁹ Note that although Australia has not yet honoured its 1980 promise to implement the *International Covenant on Civil and Political Rights* (arguably including the protection of religious confession) in domestic law, s 116 of the Commonwealth Constitution likely forbids federal legislation that abrogated religious confession privilege. While the states are not prohibited from such action by the Commonwealth Constitution, such state action would still breach the promise to implement the *ICCPR* throughout the country.

be released back into society.⁵⁰ Is that assumption correct? What does contemporary research say about the prospects of rehabilitating child sex abusers?

A Can Child Sex Abusers Be Rehabilitated?

In this section, I do not address the question whether indefinite sentencing offends the independent judicial process required under Chapter III of the Australian Constitution. Nor do I address the moral question of whether detaining anyone after they have completed a properly adjudicated criminal sentence morally offends the prohibition of cruel and unusual punishment recognized in the Bill of Rights in England since 1689 and adopted in the US Bill of Rights a century later. Those questions are beyond the scope of this article. All I will do here is survey contemporary literature about the prospects of child sex offender rehabilitation.

In their article in Beech, Craig and Browne's 2009 text – *Assessment and Treatment of Sex Offender: A Handbook*⁵¹ - Ward, Collie and Bourke assert 'that it is possible to reduce reoffending rates by treating or rehabilitating sex offenders as opposed to simply incarcerating them'⁵² though they acknowledge 'some dissenting views'. Though 'western

⁵⁰ Though Patrick Keyzer and Bernadette McSherry do not directly address the question of whether child sex offenders can be rehabilitated in their Latrobe University Research paper about the practice and constitutionality of indefinite detention of sex offenders, they document indefinite detention laws in Queensland and South Australia as well as post-sentence preventive detention and supervision schemes "in four Australian states and in the Northern Territory" (Patrick Keyzer and Bernadette McSherry, 'The Preventive Detention of Sex Offenders: Law and Practice' (2015) 38(2) *University of New South Wales Law Journal* 792).

⁵¹ A.R. Beech, L.A. Craig, Keving D. Browne, *Assessment and Treatment of Sex Offenders: A Handbook* (West Sussex/UK: Wiley-Blackwell, 2009).

⁵² Tony Ward, Rachael M. Collie and Patrice Bourke, 'Models of Offender Rehabilitation: The Good Lives Model and The Risk-Need-Responsivity Model', *Ibid.*, Chapter 16, 293.

societies are becoming risk averse’ and are ‘imposing severe sentencing regimes’⁵³ to protect the community,⁵⁴ ‘sophisticated and powerful interventions’⁵⁵ that are tailored to individual offenders, can enable them to live “offence-free”⁵⁶ lives in the community. But these researchers are emphatic:

Deterrence-based approaches and diversion do not appear to provide any kind of significant treatment effect. The evidence suggests that deterrent type approaches which include intensive supervision programming, boot camps, scared straight, drug testing, electronic monitoring and increased prison sentences are ineffective in reducing recidivism.⁵⁷

What does work is identifying offenders learning styles and motivations,⁵⁸ teaching them “how they [can] live better lives” and identifying for them, “the positive rewards” they will enjoy as they “desist...from crime”.⁵⁹ But this instruction requires intensive engagement with a therapist,⁶⁰ and developing a relationship of trust⁶¹ so that the offender learns to see him/herself as a different person. “Focusing *only* on the reduction of risk factors”⁶² does not work. Offenders need to identify “the kind of person they wish to be”⁶³ and then they must be assisted to “live more fulfilling lives”.⁶⁴

⁵³ Ibid 308.

⁵⁴ Ibid 300.

⁵⁵ Ibid 308.

⁵⁶ Ibid 303.

⁵⁷ Ibid 294.

⁵⁸ Ibid 302.

⁵⁹ Ibid.

⁶⁰ Ibid 301. “[H]igh-risk sex offenders should receive the most treatment, typically at least 200 hours of cognitive behavioural interventions”

⁶¹ Ibid 303.

⁶² Ibid 305.

⁶³ Ibid.

⁶⁴ Ibid 306.

Professor Karen Terry from the John Jay College of Criminal Justice in New York, does not directly address the question of whether child sexual abusers can be rehabilitated, but she agrees with Ward, Collie and Bourke's conclusion that every sexual offender is unique and that 'there is no single typology that can account for all offenders.'⁶⁵ While 'child sexual abusers are more likely to specialize than rapists, and incarcerated child sexual abusers are two times more likely to have another conviction of child molestation than other offenders',⁶⁶ most child sexual offenders were not violent, were 'usually seek[ing] a mutually comforting relationship with a child', and chose children who were "easy to manipulate" because the abusers were "socially inept in adult relations".⁶⁷

Intrafamilial abusers were a little different. Once the abuse was identified, they were less likely to reoffend. In Terry's view, extrafamilial offenders and "are...more receptive to treatment than other offenders".⁶⁸ However nearly all child abusers had been sexually victimized themselves as children, experienced depression and many abused alcohol.⁶⁹ Intrafamilial offenders were more likely to have grown up

feeling distant from their parents,...experienced unstable childhoods...and did not have sexual relations with their partners as often as they wanted and had become dissatisfied with the relationship.⁷⁰

Despite her view that all sex offenders need to be treated individually, Terry does distinguish between fixated and regressed offenders.⁷¹ Fixated offenders 'exhibit persistent, continual, and compulsive attraction to

⁶⁵ Karen J. Terry, *Sexual Offenses and Offenders, Theory, Practice and Policy*, 2nd edition, Wadsworth Cengage Learning, 2013, 93.

⁶⁶ Ibid 94-95.

⁶⁷ Ibid 101-102.

⁶⁸ Ibid 102.

⁶⁹ Ibid 103-104.

⁷⁰ Ibid 102-103.

⁷¹ Ibid 105-108.

children’⁷² whereas regressed offenders ‘have a primary attraction to agemates’ and regress to victimize available adolescents and children ‘when they are having negative thoughts and feelings...commonly...at times of unrest with marital relations’.⁷³

But ‘not all child sexual abusers are motivated by sexual needs to commit their offenses.’⁷⁴ Intrafamilial offenders look for additional relationships when their primary relationship is not going so well, whereas extrafamilial offenders ‘show a strong level of attraction to...erotic material involving children.’⁷⁵

Female child sexual abusers are different again. They ‘usually have young victims’ and their offending can ‘often [be] linked to abusive backgrounds and/or psychological disorders’.⁷⁶ Many have “male co-offenders” and female victims, and they ‘are more likely than their male counterparts to use alcohol and illegal drugs’ which Terry says makes them similar to regressed male offenders in that they are ‘seeking a loving relationship’.⁷⁷ But they are also more likely than males ‘to be rearrested for a sexual offense.’⁷⁸ Terry’s considered summary is thus that:

Reducing recidivism of sexual offenders is best accomplished by understanding and identifying the characteristics of offenders and the situations in which they offend...Understanding the interpersonal and

⁷² Ibid 105.

⁷³ Ibid 106

⁷⁴ Ibid 107.

⁷⁵ Ibid.

⁷⁶ Ibid 112

⁷⁷ Ibid 112-113.

⁷⁸ Ibid 113.

situational characteristics that are the basis of offending behavior will lead to a greater likelihood of controlling such behavior in the future.⁷⁹

Like Ward, Collie and Bourke above, Terry does not accept the premise underlying the Australian legislation identified by Keyzer and McSherry in their paper about post-sentence preventive detention and supervision schemes, which is that such offenders cannot be rehabilitated.⁸⁰

In their article entitled ‘Sexual Abuse by Clergy’,⁸¹ Graham Clancy and Michael Saini observe many of the same correlations that the researchers above have drawn together. Despite greater media coverage, Catholic clergy are no more likely to sexually abuse children than others “serving children, in...schools, nursery schools, sports...voluntary organizations” and other churches.⁸² ‘[G]eneral framework[s] for sex offenders oversimplif[y] the complexity’ of identifying and treating sexual abuse, and many existing studies of clerical sexual abuse ‘suffer from methodological flaws, including small sample sizes, lack of comparison groups, and the employment of study designs that lack scientific rigor.’⁸³

The research literature none-the-less reveals that

sexual deviance...the presence of a sexual disorder...accompanied by ...substance abuse, antisocial personality disorders, psychotic mental illness, criminality, neuropsychological impairment and endocrine disorders predispose individuals to sexually offend.⁸⁴

⁷⁹ Ibid 93.

⁸⁰ Above n 50.

⁸¹ Graham Clancy and Michael Saini, ‘Sexual Abuse by Clergy’ in Fabian M. Saleh, Albert J. Grudzinskas Jr., John M. Bradford and Daniel J. Brodsky (eds), *Sex Offenders, Identification, Risk Assessment, Treatment and Legal Issues* (Oxford University Press, 2009), Chapter 23.

⁸² Ibid 324-326.

⁸³ Ibid 325. They are specific that “[n]o single factor alone can determine the likelihood of clergy committing a sexual offence against a child” (ibid 331).

⁸⁴ Ibid 327.

The clergy are no different, though they are ‘statistically older, more educated, and predominantly single as compared to other’ sex offenders. They are just as likely as all other sexual offenders to be alcohol abusers.⁸⁵ Clancy and Saini report conflicting evidence as to whether child sexual abusers including clergy ‘were predominantly pedophile[s]’.⁸⁶ Clerical sexual offenders were more likely than others to be hebephilic and ‘to have been sexually abused in childhood.’⁸⁷ While some researchers had suggested that celibacy should be investigated as a possible cause of sexual abuse by clergy, there was no convincing evidence of such correlation or that allowing them to marry would reduce child sexual offending by clergy.⁸⁸ They summarized research suggesting that child sexual abuse in the Catholic Church could be reduced by making church processes more transparent. The Canon Code against child sexual abuse should also be translated into clear ethical rules about interaction with youth and children, and those clear ethical rules needed to be systematically taught in seminaries.⁸⁹ Gonsiorek had suggested that ethical training around “boundary crossings” particularly needed to identify when priests should reduce their level of pastoral care even when young parishioners sought them out. ‘Boundary crossings [needed] to become boundary violations’ in seminary teaching.⁹⁰

After reviewing a variety of treatment programs for clergy who sexually abuse children, Glancy and Saini also affirm ‘that restoration is possible.’⁹¹ Bryant’s *Victim Sensitive Offender Therapy* impressed them

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid 328-331.

⁸⁹ Ibid 329-330.

⁹⁰ Ibid 331-332.

⁹¹ Ibid 335 citing Irons and Lassers’ large clinical study in 1994.

because it caused ‘the perpetrator [to] accept...responsibility for his actions and the harm that it caused to his victims.’⁹² Other practitioners had also reported significant redemptive success from a variety of programs tailored to sexually addicted clients. While

further empirical studies are needed...researchers need to be aware of the political, religious and social implications of their work and should guard against these forces to ensure that future work remains uncontaminated.⁹³

Subliminal anxiety about the political contamination of empirical research can be discerned in much of the recent research. Though expert scientific researchers are sure that child sexual abusers can be reformed with tailored therapy, they are anxious that their work is being counteracted by societal obsession with total security. Hence offenders remain locked up forever in accord with inhumane post-sentence detention laws. While ‘mental health professionals should become more involved with the prevention, screening and treatment of clergy who sexually abuse’,⁹⁴ such intervention is ironic if the offenders are never to be given “tickets of leave” or are branded by inhumane legislators who have forgotten our seventeenth century resolutions against cruel and unusual punishment.⁹⁵

⁹² Ibid 335.

⁹³ Ibid 336.

⁹⁴ Ibid. In their 2013 article detailing offender rehabilitation programmes in prison and community settings in Australasia, Andrew Day and Rachael M. Collie note successes with the *Risk-Needs-Responsivity* therapy model which dominates officially approved program design in Australia and New Zealand, but would like to see more resources allocated to test the *Good Lives Model* and other programmes more closely matched to offender needs and character (Andrew Day and Rachael M. Collie, ‘An Australasian Approach to Offender Rehabilitation’ in Leam A. Craig, Louise Dixon and Theresa A. Gannon (eds.), *What Works in Offender Rehabilitation* (West Sussex/UK: Wiley-Blackwell, 2013), Chapter 22.

⁹⁵ The ‘cruel and unusual punishment’ phrase most famous from the American Bill of Rights that forms part of the US Constitution, was originally drafted by the English Parliament as part of the English *Bill of Rights Act* in 1688 and was supposed to end arbitrary and capricious punishment.

The conclusion of the lawyers and philosophers who have carefully considered the utility of abolishing the confidentiality of all religious communications in the face of any judicial search for evidence of crime has been not only that it is futile as regards Catholic priests, but also that it is neither worth the effort or the aggravation that it would cause. Though Australia may not be as committed to protecting religious freedom as it has asserted it is to the UN,⁹⁶ it is not so uncommitted as to abolish this bulwark of religious practice for purely symbolic purposes. Similarly, the researchers who have scientifically addressed the question of whether child sexual abusers can be redeemed, are unanimous in answering “yes”.

In the final part of this article, I will nonetheless discuss the “what if” question. “What if” Australian legislators decided to abolish evidential privilege for confidential religious communications despite the evidence I have cited which suggests it would be futile? Does it matter that such abolition might interfere with the religious liberty promised to Australians under the federal Constitution and under various United Nations human rights instruments?

PART III - LEGAL OBJECTIONS TO THE ABOLITION OF RELIGIOUS CONFESSION PRIVILEGE

⁹⁶ For example, by being a Charter member of the UN and a promoter of the *Universal Declaration of Human Rights 1948 (UDHR)*, by ratifying the *International Covenant on Civil and Political Rights 1966 (ICCPR)* and by declaring the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 (Religion Declaration)* to be “an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*” on February 8, 1993.

Since I have discussed the alleged futility of such laws in Part II, I will not dwell on philosophical objections to such abolition, but I will consider two further quasi-philosophical objections, namely; the idea that admitting confidential religious communications breaches the hearsay and self-incrimination rules in the law of evidence, and that such evidence ought not be admitted as evidence since admitting it would be the same as admitting confessions made to police under duress. Admitting such evidence in court, or encouraging enforcement agencies to search for it, may also prejudice the long term interests of child abuse victims since it would reduce the availability of pastoral counseling to persons trying to identify wise ways to assist them.

Since the question of whether religious confession privilege should be abolished arises because the Royal Commission is authorized to recommend legal changes that would achieve best practice in child abuse reporting, I will also review the Commission's terms of reference and discuss whether Commonwealth or state laws abolishing religious confession privilege would offend the Australian Constitution's prohibition of Commonwealth laws that prohibit the free exercise of religion. Since it is elementary that s 116 of the Constitution does not bind the states which can theoretically pass such laws though they are forbidden to the Commonwealth,⁹⁷ I will also consider whether such abolition would offend international law and Australia's commitments under international human rights instruments.

⁹⁷ Tasmania is an exception since it does protect "[f]reedom of conscience and free profession and practice of religion...subject to public order and morality" under s 46 of the *Constitution Act 1934* (Tas). However, since this legislation is not entrenched in any way, it can be repealed by simple majority processes in the Parliament without any special procedure.

I conclude this part by again suggesting that legislation to abolish religious confession privilege would be futile.

I then conclude that on practical balance, that there are many reasons why we should leave religious confession privilege alone. Not least among those reasons is that child sexual abusers, whether priests or not, do not confess information to clergy that would be useful in a court of law. First, that is because to the extent that they do confess, child abusers do not provide information that would enable their conviction or the protection of child sexual abuse victims. Secondly, abrogating religious confession privilege would breach Australia's obligations under international law and would offend the federal Constitution to the extent that such legislation engaged Commonwealth legislative power. And thirdly, it would be futile. The reasons why any such laws would be futile include that Catholic priests would disobey such law; because the legislation of such law would dry up any information about child abuse that confessor clergy do hear and which they already use to protect children;⁹⁸ and also because such disclosure would prejudice the long term interests of the victims supposed to benefit by any amendment to religious confession privilege law.

A *The Hearsay and Self-Incrimination Rules*

In simple terms, the hearsay rule holds that evidence which cannot be cross-examined in a court, should not be admitted as evidence in that court. The underlying idea is that evidence must be tested by cross-examination to determine its reliability and its probative value. If a

⁹⁸ In the Louisiana Court of Appeal's October 2016 decision in *Mayeux v Charlet et ors* (2016-CA-1463), that Court observed that Catholic priests are at liberty to and do act to protect abused children when relevant information comes to them as "non-privileged communication... outside the confessional" (ibid 4).

witness relates a conversation had with someone else, and that third party is not available for cross-examination, the witness' account of what the third party said may not be tested for credibility and so should not be admitted as evidence in court.

When an accused person wishes to admit her own religious confession in court by waiving religious confession privilege, those admissions against interest are an exception to the self-incrimination rather than the hearsay rule because the accused can be cross-examined about such statements. But if the prosecution wishes to adduce confessional evidence from the member of the clergy who heard the confession, the admission of such evidence would breach the hearsay rule. The hearsay rule would be breached in such a case because the member of the clergy could not be cross-examined about the details of the admission because those details were beyond personal knowledge. The admission of such evidence would also arguably pre-empt the accused's self-incrimination privilege. If an accused person proposed that some aspect of her evidence should be admitted as evidence, she would also be able to assess whether she should waive her self-incrimination privilege for herself.

Some may interpret the hearsay and self-incrimination rules of traditional common law jurisprudence as the prudish reservations of a less efficient age. In such context, these rules present as a minor barrier with no enduring social utility. I highlight their philosophical history so that dispassionate observers can understand that these rules were developed during a harsh period in English criminal law history when judges were concerned about capital punishment in an era of unsafe convictions. Such historical concern about unsafe convictions and harsh punishment may well be irrelevant in an age when convicted felons are not executed but

incarcerated by the state for a maximum of the rest of their natural lives. In such an era it may be appropriate that the long-term security concerns of those who are never charged with crime should outweigh the liberty interests of those who suffer in consequence of an unsafe conviction.

B *Confessions Obtained Under Duress*

The concern expressed by Baron Alderson in 1853 and Professor J. Noel Lyon in 1964⁹⁹ may doubtless be similarly dismissed. Baron Alderson was considering admissions made by a woman to a workhouse chaplain in a child abuse case. The workhouse chaplain “was called to prove certain conversations he had had with [the prisoner] with reference to [the alleged injuries she had inflicted upon her infant child].”¹⁰⁰ Even though that chaplain was not bound by the vows which seal the mouth of a Catholic priest, Baron Alderson said

I think these conversations ought not to be given in evidence. The principle upon which an attorney is prevented from divulging what passes with his client is because without an unfettered means of communication the client would not have proper legal assistance. The same principle applies to a person deprived of whose advice the prisoner would not have proper spiritual assistance. I do not lay this down as an absolute rule; but I think such evidence ought not to be given.¹⁰¹

⁹⁹ J. Noel Lyon, ‘Privileged Communications – Priest and Penitent’ (1964-1965) 7 *Criminal Law Quarterly* 327.

¹⁰⁰ *R v Griffin* (1853) 6 Cox Cr Cas 219.

¹⁰¹ *Ibid.*

Professor Lyon said that the best reason for a religious confession privilege is to prevent police and prosecution using evidence extracted by any form of duress.¹⁰² This principle follows from the rule that

[a] confession of crime made to a person in authority will not be admitted in evidence unless it is shown to have been made voluntarily...Voluntary...means without fear of prejudice or hope of advantage exercised or held out by a person in authority. By this standard confessions to priests would never be voluntary since the very basis of the priest's authority is fear of purgatory and hope of redemption.¹⁰³

This logic did not prevent the admission of the evidence of Richard Gilham's repeated confession to the Gaoler, Mayor and Town Clerk in 1828 supposedly induced by the counsel of a chaplain.¹⁰⁴ But Lyon would have distinguished that case since the officials who received the confession had not extended inducements. In any event, Lyon points to two subsequent decisions in England where bancs of judges considering similar appellate questions, confirmed that simple encouragements by surgeons to tell the truth rendered the confessions to them that followed, inadmissible.¹⁰⁵ And indeed in *R v Kingston* decided just two years after *R v Gilham*, two of the same judges as were involved in the *Gilham* decision¹⁰⁶ found that the surgeon's admonition to "tell all you know"¹⁰⁷ since "you are here under suspicion of this" did constitute¹⁰⁸ "an inducement to confess untruly"¹⁰⁹ and the conviction was overturned.

¹⁰² Lyon, above n 99.

¹⁰³ Ibid 328.

¹⁰⁴ *R v Gilham* (1828) 1 Moody Cr Cas 186; 168 ER 1235.

¹⁰⁵ *R v Kingston* (1830) 4 Car & P 387; *R v Garner* (1848) 3 Cox C.C. 175.

¹⁰⁶ Parke and Littledale as noted by Patterson J in *R v Garner*.

¹⁰⁷ As quoted by Patterson J in *R v Garner*.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

Henry E. Smith has followed Wigmore in stating that the idea that compulsion was unacceptable, evolved in response to the excesses of the prerogative courts of the Tudors and Stuarts including Star Chamber. By the late eighteenth century Courts had accepted that ‘a confession forced from the mind by the flattery of hope, or by the torture of fear, c[a]me...in so questionable a shape when it is to be considered as the evidence of guilt that no credit ought to be given to it’.¹¹⁰

Another antiquarian idea with a defensive spirit, which argues against the abolition of religious confidentiality, is the notion that the confidentiality of counseling relationships may encourage timid souls with information about crime but who were not involved in its commission, to protect victims by speaking with enforcement authorities. Such evidence avoids the duress, hearsay and self-incrimination protective evidentiary labels above, but may lie untapped without clerical encouragement. But this may also be a fanciful idea which is wisely discarded since criminal convictions are so much safer in the twenty-first century and because capital punishment has been outlawed.

C *Free Exercise of Religion Under the Australian Constitution*

Though the Commonwealth letters patent which established the Royal Commission in 2013 are said to have been supported by “all Australian

¹¹⁰ Henry E. Smith ‘The Modern Privilege: Its Nineteenth-Century Origins’, in Helmholz et al, above n 44, 154 citing *Warickshall’s Case* (1783) 1 *Leach* 263-264; 168 ER 234, 235. However note that Smith thinks that the decision of the court in *R v Gilham* (1828) 1 Moody Cr Cas 186; 168 ER 1235 is difficult to understand in the context of *Warickshall’s Case* since though the prisoner’s confessions in *Gilham* were not made to a member of the clergy, they were ‘compelled’ by religious influence and the court did not explicitly say that that the “cautions” given the prisoner outweighed that influence (ibid 155).

Governments”;¹¹¹ and though the Commission was, inter alia, directed to inquire into...

a. what institutions and governments should do to better protect children against child sexual abuse and related matters in institutional contexts in the future;

b. what institutions and governments should do to achieve best practice in encouraging the reporting of, and responding to reports or information about, allegations, incidents or risks of child sexual abuse and related matters in institutional contexts¹¹²

Even the *Royal Commissions Act 1902* (Cth) cannot empower the Commonwealth government to pass legislation which abrogates the confidentiality of religious communications if that confidentiality is protected by the Australian Constitution. And absent a successful referendum under s 128 changing the terms of s 116, it is doubtful that any referral of state power could overcome the prohibition in s 116 against ‘[t]he Commonwealth [making laws] ... prohibiting the free exercise of any religion’.

What law abrogating religious confession could the Commonwealth pass that could avoid challenge by a member of the clergy? Though there are churches where the confidentiality of religious communications is not protected by seal and ecclesiastical discipline, few would suggest the Roman Catholic Church had not followed such a practice since its relevant canons can be documented back to the Fourth Lateran Council in

¹¹¹ Terms of reference of the Royal Commission, <<http://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference>>.

¹¹² Ibid.

1215 A.D. And what referral of state power could disenable the prohibition in s 116?

Certainly the states could pass laws abrogating religious confession privilege because s 116 does not bind them even though the prohibition appears in Chapter V of the Commonwealth Constitution which is headed “The States”. But Australia states proposing to pass such laws would need to avoid any suggestion that their legislation was part of a cooperative Commonwealth scheme to avoid the s 116 prohibition since the High Court has struck down schemes designed to end run the Constitution in the past¹¹³ and has intoned that it may do likewise in the future.¹¹⁴ The States may also be wary of passing such legislation since it is unlikely to convince Catholic priests and others to disclose confessions as discussed in Part II. However Australia’s moral obligations under international human rights instruments may give prudent state legislators pause before abolishing religious confession privilege,¹¹⁵ particularly since existing measures to protect children from child abuse in institutions appear to have been almost entirely effective since 1998.¹¹⁶

¹¹³ *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382

¹¹⁴ *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 170 per French CJ, Gummow and Crennan JJ, where they said that ss 96 and 116 of the Constitution must be read together just as Gibbs CJ had said in *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559, 592.

¹¹⁵ Note that there are only three Australian states which have not passed religious confession privilege statutes. They are Queensland, South Australia and Western Australia. However, religious confession privilege may well exist at common law in these states for the reasons set out in A.K. Thompson, *Religious Confession Privilege at Common Law* (Leiden and Boston: Martinus Nijhoff, 2011), Chapter 7.

¹¹⁶ Though the Royal Commission into Institutional Responses to Child Sexual Abuse was commissioned by the Gillard government in 2013, to the date of this writing, the Royal Commission has only uncovered one case of child sexual abuse in an institution (a case in Families SA where a state government employee had abused a number of children between 2011 and 2014) since the Queensland Government passed its ‘child protection card’ laws in 1998 – laws which have proven so effective that they have been closely followed by all the other Australian states in subsequent years.

*D International Human Rights Instruments Which Morally Bind
Australia to Respect Religious Confession Privilege*

Though it is elementary that international human rights norms are not binding in Australia until they have been implemented by follow-on domestic legislation,¹¹⁷ Australia's ratification of the underlying instruments does invoke moral criticism within Australia and around the world when they are ignored. The international instruments relevant to the practice of religious confession include the *UDHR* itself, the *ICCPR*, and the *Religion Declaration*.

Since the relevant Article of the *UDHR* has been replicated in covenant form in the *ICCPR* considered below, I will not labour its message. It is however relevant to observe that Australia was one of the seven charter member countries which promoted freedom of religious practice around the world, and Herbert (Dr.) Vere Evatt a former Australian Leader of the Opposition and High Court Judge who became the President of the United Nations General Assembly, was prominent in that effort.

Australia ratified the provisions of the *ICCPR* which turned the declaratory pronouncements of the *UDHR* into binding covenantal commitments in 1980.¹¹⁸ Under Article 18, she promised

¹¹⁷ In *Chow Hung Ching v The King* (1948) 77 CLR 449, Dixon J said that the ratifying of a treaty only committed externally and had "no legal effect upon the rights and duties of the subjects of the Crown" (ibid 477-478). The High Court has followed this view in many subsequent cases including *Dietrich v The Queen* (1992) 177 CLR 292 (per Mason CJ and McHugh J) and *Kiao v West* (1985) 159 CLR 550 (per Gibbs CJ).

¹¹⁸ Australia agreed to be bound by the *ICCPR* on 13 August 1980 subject to reservations. She ratified the first Optional Protocol on 25 September 1991. This protocol means that the UN Human Rights Committee can hear complaints from

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect to have respect for the liberty of parents, and where applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

To suggest that this article does not protect religious confession privilege is to quibble. The international promise is to protect freedom of religious practice including religious confession unless it is necessary to limit that practice “to protect public safety, order, health or morals or the fundamental rights and freedoms of others.” Certainly arguments can be made that laws abrogating religious confession privilege may protect “public health or morals or the fundamental rights and freedoms of others”, but for the reasons I have already outlined, such laws are not objectively necessary as required in the *ICCPR*. Religious confession privilege does not harm the victims of child sexual abuse nor would its abolition protect them. And the evidence that the Royal Commission has

people who allege that Australia has violated their rights under the *ICCPR*, though the Human Rights Committee's findings are not binding or enforceable. The second Option Protocol, concerning the elimination of the death penalty, was ratified earlier on 2 October 1990 (<https://www.humanrights.gov.au/human-rights-explained-fact-sheet-5the-international-bill-rights>>).

adduced around Australia confirms that institutional child abuse all but ended with Queensland's innovative child protection card legal system in 1998. Certainly child abuse within families continues, but the evidence discussed in Parts I and II, suggests that even in family cases, child sexual abusers do not confess their crimes to clergy in any evidentially probative way.

The *Religion Declaration* goes further than the *ICCPR*. It is more explicit that the ratifying state will take active steps to implement the practical free exercise of religion in its domestic law. Articles 4 and 7 provide as follows:

Article 4

1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.
2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

Article 7

The rights and freedoms set forth in the current Declaration shall be accorded in national legislation in such manner that everyone shall be able to avail himself of such rights and freedoms in practice.

Though these articles were proclaimed by the General Assembly of the United Nations on 25 November 1981 and Australia did not immediately ratify them, they were eventually ratified and then declared "an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act*

1986 (Cth) by Michael John Duffy as Commonwealth Attorney-General on February 8, 1993.

While Australia's commitment to the *ICCPR* norms was similarly late,¹¹⁹ she also made commitments there to implement practical free exercise of religion which includes laws that respect religious confession privilege. For example, in Article 2 she and the other state parties made the following promises:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies

¹¹⁹ The *ICCPR* was opened for signature in 1966 and Australia agreed to be bound to it on 13 August 1980 < <https://www.humanrights.gov.au/human-rights-explained-fact-sheet-5the-international-bill-rights>>.

when granted.

Even though Australia's Article 2 promise to implement these domestic laws was made subject to her constitutional processes and the agreement of the Australian States and Territories since the Commonwealth government could not decide for them, the Commonwealth advised that it

been in consultation with the responsible State and Territory Ministers with the object of developing co-operative arrangements to co-ordinate and facilitate the implementation of the Covenant.¹²⁰

Sadly, such consultations as there were have produced very little state or territory legislation that protects religious liberty, and such legislation as there has been, does not respect the *ICCPR* requirement that only

¹²⁰ < <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>>. The full text of the reservation reads as follows:

Articles 2 and 50

Australia advises that, the people having united as one people in a Federal Commonwealth under the Crown, it has a federal constitutional system. It accepts that the provisions of the Covenant extend to all parts of Australia as a federal State without any limitations or exceptions. It enters a general reservation that Article 2, paragraphs 2 and 3 and Article 50 shall be given effect consistently with and subject to the provisions in Article 2, paragraph 2.

Under Article 2, paragraph 2, steps to adopt measures necessary to give effect to the rights recognised in the Covenant are to be taken in accordance with each State Party's Constitutional processes which, in the case of Australia, are the processes of a federation in which legislative, executive and judicial powers to give effect to the rights recognised in the Covenant are distributed among the federal (Commonwealth) authorities and the authorities of the constituent States.

In particular, in relation to the Australian States the implementation of those provisions of the Covenant over whose subject matter the federal authorities exercise legislative, executive and judicial jurisdiction will be a matter for those authorities; and the implementation of those provisions of the Covenant over whose subject matter the authorities of the constituent States exercise legislative, executive and judicial jurisdiction will be a matter for those authorities; and where a provision has both federal and State aspects, its implementation will accordingly be a matter for the respective constitutionally appropriate authorities (for the purpose of implementation, the Northern Territory will be regarded as a constituent State).

To this end, the Australian Government has been in consultation with the responsible State and Territory Ministers with the object of developing co-operative arrangements to co-ordinate and facilitate the implementation of the Covenant.

objectively necessary limitations on religious freedom be allowed.¹²¹

The Commonwealth's unwillingness to pass a domestic Religious Freedom Act can no longer be excused by its 1980 statement, when ratifying the *ICCPR*, that it did not have the constitutional power to enact religious freedom laws that would bind the whole country including state and territory legislatures. To the extent that Australia believed that even in 1980, subsequent jurisprudential development has confirmed beyond reasonable doubt that the Commonwealth government can pass legislation required to honour international treaty and other commitments despite state and territory resistance.¹²² There are now many examples of

¹²¹ In a report entitled *Article 18, Freedom of religion and belief*, in 1998, the Human Rights and Equal Opportunity Commission strongly advised the Commonwealth government that it needed to pass a Religious Freedom Act. No federal government has been prepared to act on that recommendation and the need for the recommended legislation is arguably greater now because anti-Muslim bigotry has escalated in the wake of the September 2001 terror attacks and the rise of Al Qaeda and ISIS. Tasmania has provided a general form of constitutional protection for religious freedom of citizens since 1934 (see above n 98). The Australia Capital Territory and the State of Victoria have respectively passed the *Human Rights Act 2004* and the *Charter of Human Rights and Responsibilities Act 2006*. Both provide protection for "[f]reedom of thought, conscience, religion and belief" in section 14, but that protection has been criticized because the "limitation provisions...bear little resemblance to *ICCPR* Article 18(3)" (see for example Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 83, 98-101 (99), quoting a submission by the Presbyterian Church of Australia to the National Human Rights Consultation in 2010). The problem is that both Acts allow derogation from freedom of religion on grounds of subjective reasonableness rather than objective necessity as required in the *ICCPR* standard. Neither that Act nor Victoria's additional *Racial and Religious Vilification Act 2001* protected the religious expression of the Pastors who were subjected to extended tribunal and court proceedings in the *Catch the Fires Ministry* saga of cases (*Catch the First Ministry Inc v Islamic Council of Victoria Inc* [2006] VSCA 284). Arguably those cases would not have proceeded if the *ICCPR* objective standard had applied.

¹²² For example, litigation which tested the constitutional validity of the *Racial Discrimination Act 1975* (Cth), and the *Industrial Relations Act 1988* (Cth), has been decided in the Commonwealth's favour. In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, the Queensland government's unsuccessfully challenged the validity of the *Racial Discrimination Act 1975* (Cth) which had prevented their veto of a transfer of a lease of lands to the Wik aboriginal nation. And while some provisions in the *Industrial Relations Act 1988* (Cth) were beyond the scope of the international treaty they purported to implement, the legislation as a whole was valid since a law

the power of the Commonwealth legislature to create legislative codes which ‘cover the field’, but the best human rights examples in this religious freedom context must be the *Racial Discrimination Act 1975* (Cth), the *Sexual Discrimination Act 1984* (Cth), and the *Industrial Relations Act 1988* (Cth). The success of these codes have all been affirmed in subsequent High Court decisions.¹²³ The legislative power to protect religious freedom across the length and breadth of Australia thus exists, but her political leaders lack the courage to protect religious minorities for the same reasons as her framers resisted racial equality at federation and why Queensland continued to resist it through the *Koowarta*, *Mabo* and *Wik* period. While the Commonwealth government can find the money to educate Australia with extensive radio and television advertising when she wants to,¹²⁴ bi-partisan parliamentary leadership yields to political opportunism when entrenched bigotry and xenophobia identify opportunity for an electoral point of difference.

Though Australia has not kept her general commitment to protect free exercise of religion as she might have done, she still has more than a moral obligation to do so since these *UDHR*, *ICCPR* and *Religious Declaration* norms are widely recognized enough that they constitute

implementing an international treaty or recommendation only needed to “be reasonably capable of being considered appropriate and adapted to implementing the treaty” (*Victoria v Commonwealth (Industrial Relations Act Case)* 1996 187 CLR 416, 486).

¹²³ Ibid. Unlike the *Racial Discrimination Act 1975* (Cth) and the *Industrial Relations Act 1988* (Cth) (and its successor legislation, the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) and the *Fair Work Act 2009* (Cth)), the *Sexual Discrimination Act 1984* (Cth) has not been the subject of a significant validity challenge in litigation. However, it is fair to say that the Commonwealth’s power to pass legislation implementing international treaties under the external affairs power (*Australian Constitution*, s 51 (xxix)) is now well established.

¹²⁴ For example, the Commonwealth government successfully resisted litigation contesting its right to fund promotion of its *Work Choices* legislation in *Combet v Commonwealth* (2005) 224 CLR 494.

customary international law.¹²⁵ However that criticism cannot be fairly directed at her protection of religious confession privilege. While Queensland, South Australia and Western Australia have not passed legislation to prevent the adduction of religious confession as evidence in litigation, such legislation has been passed in all other Australian jurisdictions¹²⁶ to answer suggestions that religious confession privilege was not protected at common law.¹²⁷ That protection, coupled with Australia's accession to the Second Optional Protocol to the *ICCPR* means that if a member of the clergy practicing religious confession were sanctioned by an Australian law passed to interfere with or abrogate that practice, that member of the clergy could appeal to the United Nations Human Rights Committee (UNHRC) for redress when all domestic avenues for legal redress had been exhausted.

Thus while the Australian states and territories may not be prevented from passing laws abrogating religious confession privilege as the Commonwealth government arguably is under s 116 of the Constitution,

¹²⁵ In her text, *International Law: Contemporary Principles and Practice* (LexisNexis Butterworths, 2006), Gillian Triggs has written that "many of the provisions of the ICCPR" have achieved "customary law status" including the "rights of minorities to enjoy their own culture, profess their own religion [and] to use their own language" (ibid 14.5 and 14.8).

¹²⁶ Religious confession privileges were first passed in the following states on the dates indicated: Victoria (1890), Tasmania (1910), Northern Territory (1939), New South Wales (1989), Commonwealth (1995), Australian Capital Territory (1995), Norfolk Island (2004). The statutory provision which was adopted by the Commonwealth when it passed the Uniform Evidence Act in 1995, was originated in New South Wales by the *Evidence Amendment (Religious Confessions) Amendment Act 1989* which inserted section 10(6) into the then *Evidence Act 1898*. Section 127 of New South Wales, the Commonwealth and the ACT *Evidence Acts* have affirmed since 1995 that "[a] person who is or was a member of the clergy ... is entitled to refuse to divulge [even] that a religious confession was made, ... [and not just] the contents of a religious confession made". Tasmania adopted the same uniform Evidence legislation in 2001, Norfolk Island in 2004, Victoria in 2008, and the Northern Territory in 2012.

¹²⁷ For discussion of the protection of religious confession privilege at common law, see Thompson AK, above n115.

wise state solicitors general may counsel against the passage of anti-religious-confession privilege legislation at the state level rather than attract such criticism. While Australian popular opinion may currently be superficially set against ‘this privilege of Catholic priests’, it is doubtful that anti-religious rhetoric will yield legislation enabling the complete abrogation of such privilege and the penalizing of non-compliant clergy. While a specific law requiring Catholic priests to report confessions of child sexual abuse by pedophiles might avoid criticism by the UNHRC, for the reasons explained in Parts I and II, it is unlikely that such a case would ever be considered by the UNHRC. That is because in practice, child sexual abusers do not confess their crimes to clergy, and even if they did confess, their admissions would not be used in criminal litigation since the clergy would rarely disclose them. Self-serving disclosure of alleged religious confessions by child sex abusers when pleading guilty to crime and seeking mitigation of penalty as in the McArdle case discussed in Cornwell’s *Dark Box* book, are also unlikely to lead to the prosecution of priests who did not report because prosecuting authorities are unlikely to be impressed with the probative value of such allegations.

V CONCLUSION

In Part I of this article, I explained that despite the self-serving assertions of Michael Joseph McArdle when he was seeking to have his term of imprisonment reduced, that he confessed his child sexual abuse crimes to more than thirty priests over twenty-five years, the weight of research authority confirms that child sex abusers do not confess their crimes to the clergy. Australia’s most notorious child sex abuser gave evidence to the Royal Commission that he never did, and Marie Keenan’s

psychological research in Ireland confirms the fact.

In Part II, I reviewed legal and philosophical authority that suggested that legislation abrogating religious confession privilege is impractical for a number of reasons. In the early nineteenth century, Jeremy Bentham explained that unfettered religious confession privilege was essential to any conception of religious freedom worthy of the name, and he said that abrogating religious freedom would be a waste of time since it would not yield any useful evidence and would dry up religious confession in an instant. Bentham's philosophical arguments were confirmed by review of the jurisprudential foundations of the hearsay and self-incrimination rules in evidence law. Clerical confessional evidence has always been suspect as hearsay and also engages the public policy which is still set against forcing those accused of crime to incriminate themselves. I also noted academic opinion suggesting that attempts to force Catholic priests to disclose confessions would be futile given their commitment to their vows and would bring the justice system into disrepute.

In Part III, I explained that s 116 of the Australian Constitution likely prevents the passage of any federal law in Australia abrogating religious confession privilege and that the passage of such laws at a state level would also offend customary international law protecting freedom of religious practice.

My final conclusion is therefore that abrogating religious confession privilege would serve no good purpose, would harvest no probative evidence for any criminal trial and would breach Australia's commitments in constitutional and customary international law. Since the Royal Commission has only identified pre-1998 cases of child sexual

abuse within institutional contexts, Australian law reform focus would be more wisely focused on how we eliminate continuing child abuse within families and how we heal the psychological injuries of victims.

ONE EYE OPEN: ADMINISTRATION OF PRIVACY IN CHILD SUPPORT CASES

JOANNA SLATER*

ABSTRACT

The Child Support (Assessment) Act 1989 and the Child Support (Registration and Collection) Act 1988 confer broad powers upon the Child Support Program (CSP), within the Commonwealth Department of Human Services (DHS), to collect and disclose personal information regarding Australian families. Against the background of the historical intentions of Parliament for the protection of privacy in the administration of child support cases, this paper evaluates the privacy practices currently employed by the CSP, the contemporary requirements informing the duty to accord procedural fairness, and demonstrates that current practices relating to the collection and disclosure of personal information in child support matters are not aligned with the intentions of Parliament, are not informed by a full reading of the statutory context, and lead to unwarranted interferences with the privacy of Australian families. Finally, this paper will propose a framework to guide administrators in the establishment of the boundaries of procedural fairness in the administration of individual child support cases.

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I INTRODUCTION:

PARLIAMENTARY INTENTIONS FOR THE ADMINISTRATION OF PRIVACY IN CHILD SUPPORT MATTERS

In 1986 the Commonwealth Government Cabinet Sub-Committee on Maintenance published a discussion paper (the “Howe Report”) outlining ‘the Government’s broad proposals for reform of Australia’s existing child maintenance system.’¹ The paper identified various issues for community consultation including a number of key principles that were held to be essential to any reform of the child support system as it then stood, namely that:²

- a) non-custodial parents share in the cost of supporting their children according to their capacity to pay;*
- b) adequate support is available for all children not living with both parents;*
- c) Commonwealth expenditure is limited to the minimum necessary for ensuring those needs are met;*
- d) work incentives to participate in the labour force are not impaired; and*
- e) the overall arrangements are non-intrusive to personal privacy and are simple, flexible and efficient.*

¹ Australia. Cabinet Sub-Committee on Maintenance, and Howe, Brian. and Australia. *Child support: a discussion paper on child maintenance, October 1986 / Cabinet Sub-Committee on Maintenance*. Australian Govt. Pub. Service Canberra 1986. 14.

² Ibid 3.

The paper drew specific attention to the importance of privacy in the administration of child support, and from the outset the Government's stated intention was 'to keep any intrusions on privacy to the absolute minimum necessary to ensure parental obligations are fulfilled' ³ and that '[a]ny compromise of the objective of privacy would be to the minimum necessary and with adequate safeguards against abuse.'⁴

This concern for non-intrusiveness upon personal privacy recognised the sensitivities surrounding separated families and was intended to place an obligation upon the agencies involved in the design and administration of child support processes. Throughout the development and passage of the child support bills⁵ into law draft legislation, explanatory memoranda and parliamentary statements reiterated this key principle. For example, with the introduction into Parliament of the *Child Support Bill 1987* on 9 December 1987 (which would ultimately lead to passage of the *Child Support (Registration and Collection) Act 1988*), the associated Explanatory Memorandum⁶ emphasized the intention to ensure attainment of the privacy principle stated in the Howe Report:⁷

³ Ibid 20.

⁴ Ibid 14.

⁵ Child support legislation is comprised of two Acts (and associated Regulations), *Child Support (Assessment) Act 1989* (referred to throughout this paper as the *CSA Act*) and the *Child Support (Registration and Collection) Act 1988* (referred to throughout this paper as the *CSRC Act*).

⁶ *Explanatory Memorandum, Child Support Bill 1987*. Accessed at: http://www.austlii.edu.au/cgi-bin/download.cgi/au/legis/cth/bill_em/csb1987180.txt, page 2.

⁷ Ibid.

The overall objectives of the reform are to ensure that: [...] the overall arrangements are simple, flexible and respect personal privacy.

The Explanatory Memorandum provides an additional explicit statement of “*the intention of Parliament*”, stating that the privacy obligation was to apply to the administration and interpretation of the Act by the Child Support Program (CSP) within the Department of Human Services (DHS), the courts and the Administrative Appeals Tribunal (AAT):⁸

*Clause 3: Objects of Act Subclause (2) of this clause demonstrates the intention of the Parliament that recognition be given, in both the **administration** of the Bill by the Child Support Registrar and the **interpretation** of the provisions of the Bill by the courts or the Administrative Appeals Tribunal, to the need to protect individuals’ rights to privacy.*

The Explanatory Memorandum to the *Child Support (Assessment) Bill 1989*, presented to the House of Representatives on 1 June 1989, restated the privacy principle:⁹

Objects of Reform

The overall objects of the Bill are to ensure that: [...] access to child support is simple, timely and flexible and respects personal privacy.

⁸ Ibid 9. Throughout this paper the concerns described in relation to the CSP are relevant to the practices employed by the AAT. Author’s emphases added.

⁹ Explanatory Memorandum, *Child Support (Assessment) Bill 1989*, 16.

These Objects were ultimately codified in, respectively, section 3(2) of the *Child Support (Registration and Collection) Act 1988*¹⁰ and section 4(3)(b) of the *Child Support (Assessment) Act 1989*.¹¹

Child Support (Registration and Collection) Act 1988

3 Objects of Act

(2) It is the intention of the Parliament that this Act shall be *construed and administered*, to the *greatest extent* consistent with the attainment of its objects, to *limit interferences with the privacy of persons*.

Child Support (Assessment) Act 1989

4 Objects of Act

(3) It is the intention of the Parliament that this Act should be *construed*, to the *greatest extent* consistent with the attainment of its objects:

- (a) to permit parents to make private arrangements for the financial support of their children; and
- (b) to *limit interferences with the privacy of persons*.

¹⁰ *Child Support (Registration and Collection) Act 1988*. Accessed at: <<https://www.legislation.gov.au/Series/C2004A03596>>. Author's emphasis added.

¹¹ *Child Support (Assessment) Act 1989*. Accessed at: <<https://www.legislation.gov.au/Series/C2004A03872>>. Author's emphasis added.

The words of the Bills, Acts and Explanatory Memoranda make clear that the interpretation of child support legislation was intended to lean toward protection of the privacy of individuals rather than, in contrast, the development of administrative processes allowing unrestricted disclosure of information or the prioritization of the administrative convenience of the CSP or the AAT.

In addition to specific concern for the limitation of interferences with the privacy of persons in the interpretation and administration of the child support Acts, the statutory framework surrounding administration of child support is augmented, and subject to, the requirements of the *Privacy Act 1988*. That Act permits **collection** of personal information where ‘the information is reasonably necessary for, or directly related to, one or more of the entity’s functions or activities’¹² or if ‘the collection of the information is required or authorised by or under an Australian law or a court/tribunal order.’¹³ The Act also permits **disclosure** of that information if, inter alia, ‘the individual has consented to the use or disclosure of the information’¹⁴ or if ‘the use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order.’¹⁵

¹² *Privacy Act 1988*, Australian Privacy Principle 3.1. Accessed at: <<https://www.oaic.gov.au/agencies-and-organisations/app-guidelines/>>.

¹³ Ibid, Australian Privacy Principle 3.4.

¹⁴ Ibid, Australian Privacy Principle 6.1(a).

¹⁵ Ibid, Australian Privacy Principle 6.2(b).

II INFORMATION COLLECTION AND DISCLOSURE METHODS

A *Collection Methods*

A common reason for which the CSP will collect personal information is to assist in the administration of requests that may be made by a parent to change a current child support assessment.¹⁶ This assessment is formally known as a “departure assessment”¹⁷ (and colloquially as a “change of assessment” (COA)) and is intended to enable the *ad hoc* adjustment of child support transferrable between parents should the circumstances warrant, such as the income of a payee increasing or the relative percentage of care of the children between the parents changing due to altered care arrangements. Departure assessments operate to enable one of the particular objects of the child support scheme to be met, namely ‘that the level of financial support to be provided by parents for their children is determined according to their capacity to provide financial support.’¹⁸

When an application is submitted to the CSP to request a departure assessment the applicant completes the *Application to Change your Assessment - Special Circumstances* form provided by the CSP under s98D of the *CSA Act*.¹⁹ This one form covers the various “Grounds for departure order” provided for by

¹⁶ A more detailed list of the circumstances in which information is collected or disclosed is provided in the CSP’s document *The collection, use and disclosure of personal information for Child Support purposes*. Accessed at:

<<https://www.humanservices.gov.au/sites/default/files/2017/04/child-support-purposes.docx>>

¹⁷ The word “departure” is employed because in the ordinary course changes in assessment take place on an annual basis after the income tax returns of the parents are processed by the Australian Taxation Office and notification of the taxable incomes of each parent is transmitted to the CSP.

¹⁸ *Child Support (Assessment) Act 1989*, section 4(2)(a).

¹⁹ Department of Human Services, *Application to Change your Assessment - Special Circumstances form*. Accessed at:

<<https://www.humanservices.gov.au/customer/forms/cs1970>>.

section 117(2) of the *CSA Act*, and gathers these together under the headings of ten *Reasons* in the form. The form requires an applicant to provide a variety of personal details regarding their personal and financial circumstances and is accompanied by a statement that “A copy of your application and all supporting documents will be given to the other party who may respond in writing. An open exchange of information means all parties have the opportunity to respond and comment on the information used by the decision maker.”²⁰

Where medical considerations may be relevant to an application, the CSP may issue a “Request for medical information” form²¹ asking a medical practitioner to voluntarily provide information to ‘help the Australian Government Department of Human Services make a Change of Assessment decision under the *Child Support (Assessment) Act 1989*.’²² This form also states that information provided in the forms ‘must be given to the other party if it is going to be considered as part of the Change of Assessment application.’²³

Other collection mechanisms available to the CSP, generally used outside the change of assessment process and more usually to probe into the financial circumstances of a party (and which will be given only brief consideration in this paper), are CSP’s ‘proactive information gathering powers’ (i.e. to compel provision of information, where failure to do so is punishable on conviction by imprisonment for a period not exceeding 6 months), namely under section 161 of the *CSA Act* and section 120 of the *CSRC Act*:²⁴

²⁰ Ibid.

²¹ Department of Human Services, *Request for medical information*. Accessed at: <<https://www.humanservices.gov.au/sites/default/files/documents/cs4597-1412en.pdf>>.

²² Ibid.

²³ Ibid.

²⁴ Department of Human Services, *Child Support's information gathering powers 277-04210000*. Accessed at: <<http://operational.humanservices.gov.au/public/Pages/separated-parents/277-04210000-01.html>>.

- *section 161 is used to seek information about incomes to amend a formula assessment - it cannot be used to seek information about collection to help collection action because collection action falls under the Registration and Collection Act*
- *section 120 is used to seek information about collection to help collection action - it cannot be used to seek information about incomes to amend a formula assessment because formula assessments fall under the Assessment Act*

Where a parent disagrees with the decision made following submission of a change of assessment application, they may lodge an objection under Part VII of the *Child Support (Registration and Collection) Act 1988*. This process may involve the collection of further information provided by the objector in support of their objection. If at the conclusion of the objection process either party is dissatisfied with the outcome (either allowing or disallowing an objection), a review may be sought via the AAT. When an application for review of an objection decision is submitted to the AAT, an applicant is provided with the *Statement of Financial Circumstances* form.²⁵ This form collects information regarding the personal and financial circumstances of the applicant and states,

Please note that any information collected by the tribunal will be made available to all other parties to the review, including the Child Support Registrar.²⁶

B *Disclosure Methods*

²⁵ Administrative Appeals Tribunal, *Child Support Forms*. Accessed at: <<http://www.aat.gov.au/social-services-child-support-division/forms/child-support-forms>>.

²⁶ Ibid.

The primary provisions upon which the CSP relies when sharing information between parties in a change of assessment process is section 98G(1) of the *CSA Act*, in change of assessment applications, and section 85 of the *CSRC Act*, in objections to decisions made by the child support Registrar. Under these provisions, all information provided in support of a change of assessment or objection application will be disclosed to the other party.

98G - Other party to be notified

- (1) If section 98E or 98F or subsection 98J(2) does not apply, the Registrar must cause a copy of:
 - (a) the application; and
 - (b) any document accompanying it;to be served on the other party to the proceedings.
- (2) The Registrar must, at the same time, inform the other party to the proceedings in writing that he or she may make any representation (a reply) regarding the application that he or she considers relevant.
- (3) If the other party to the proceedings makes a reply, the Registrar must serve a copy of the reply and any accompanying documents on the applicant for the determination.

If an application for review is made to the AAT, the CSP will also cause a copy of all relevant records held within DHS to be transferred to the AAT ‘to assist with an AAT hearing of an appeal from a Child Support customer’.²⁷

Another disclosure practice routinely utilised by the CSP on a large scale occurs under section 76 of the *CSA Act* when the CSP issues a notice of assessment to each party and ‘discloses some personal information about one parent to the other parent in child support assessment notices. This information can include the parent's name and income, the number and age ranges of any dependent children the parent has, and the number and age ranges of any other children the parent is assessed to pay child support for.’²⁸

The information collection and disclosure practices outlined above will be explored in more detail below; specifically, in relation to the requirements given explicit expression in the child support legislation to “limit interferences with the privacy of persons”.

III - CURRENT PRACTICE IGNORES

THE INTENTIONS OF PARLIAMENT

In articulating the principle that privacy of individuals must be respected in the administration of child support, the intention expressed by Parliament was enlivened by both sensitivity to the personal circumstances in which separated and divorced couples find themselves and by a desire to introduce a child support scheme that would aid families to meet their obligations with the least intrusion by government through the employment of arrangements that are “simple, flexible and efficient.”

²⁷ Department of Human Services, *The Collection, Use and Disclosure of Personal Information for Child Support Purposes*, p. 3. Accessed at: <https://www.humanservices.gov.au/sites/default/files/2017/04/child-support-purposes.docx>.

²⁸ Ibid 4.

The member for Curtin Allan Rocher, on 3 March 1992, observed during his second reading speech for the *Child Support Legislation Amendment Bill 1992* (the bill which introduced section 98G, et al):²⁹

In cases where there have been acrimonious separations, [...] breaches of privacy can result in serious embarrassment, and even pose a threat to the safety of the parents, and maybe the children concerned. Thus we have every reason to demand the highest standards of administrative propriety from the Child Support Agency. This is true not just of the Child Support Agency, but also of the many other Government departments that regularly deal in confidential information.

The intention of Parliament that the administration and interpretation of child support legislation “limit interference with the privacy of persons” has repeatedly been affirmed in the years following the commencement of the Acts.

At regular intervals throughout the development, passage and amendment of the various child support bills and Acts over the past thirty years or more, numerous parliamentary documents and eminent persons have affirmed successive governments’ bi-partisan intentions for the treatment of personal information in child support matters. For example, the principle of non-disclosure of private information, due to the sensitivity of that information, was addressed in relation to the SSAT, the precursor to the AAT’s Social Services & Child Support Division:³⁰

Given the sensitive nature of child support proceedings, it is important that private information is treated confidentially and not disclosed.

²⁹ Commonwealth of Australia, House of Representatives. *Official Hansard No. 182, 1992 Tuesday, 3 March 1992*. Accessed at:

<http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/1992-03-03/toc_pdf/H%201992-03-03.pdf;fileType=application%2Fpdf#search=%22chamber/hansardr/1992-03-03/0056%22>.

³⁰ Explanatory Memorandum, *Child Support Legislation Amendment (Reform of the Child Support Scheme -- New Formula and Other Measures) Bill 2006*, page 121. Accessed at: <http://www.austlii.edu.au/au/legis/cth/bill_em/cslaotcssfaomb2006974/>.

As the following discussion will demonstrate, the administrative practices that have developed and are currently in use, are **blunt**, **intrusive** and **arbitrary**. By making unfettered disclosures, even in the face of objections by the persons whose information is disclosed, the CSP's information disclosure practices appear not to be informed by a full reading of the relevant privacy provisions within each Act. This leaves the agency operating at odds with the intentions of Parliament.

The full intentions of Parliament in articulating and emphasising the boundaries of privacy protection, and relevant administration under the *CSA Act* and the *CSRC Act*, are pertinent to the information collection and disclosure practices employed by the CSP and the AAT. Disclosures of information for a purpose, or to persons, that cannot assist the Registrar in being satisfied that circumstances warrant a departure assessment arguably are not permitted by a full reading of the "limit interferences" provisions of the Acts. Those provisions arguably narrow and limit the disclosure of personal information to only that information which the Registrar requires in aid of decision-making (such as for a change of assessment or an objection).

The *CSA Act* requires that the Act be 'construed, to the greatest extent consistent with the attainment of its objects, to limit interferences with the privacy of persons.' This statement is one of only four instances in the Act in which the intentions of Parliament are singled out for explicit articulation and particular directive emphasis.

In making disclosures of personal information under section 98G of the *CSA Act* and section 85 of the *CSRC Act*,³¹ the CSP, its parent agency DHS, and

³¹ Throughout the remainder of this paper, reference to s98G of the *CSA Act* is taken to be analogous with s85 of the *CSRC Act* given that the provisions operate with similar effect.

policy owner (the Department of Social Services (DSS)), contend³² that the Acts *require* disclosure of *all* information to the other party. The CSP's internal operational guidance to staff states, 'Information used to make these decisions must be exchanged with both customers to ensure a transparent, fair and reasonable decision-making process.'³³ Indeed, the use of the word "must" in the context of section 98G would appear to be unequivocal. However, in relying upon sections 98G (*CSA Act*) and 85 (*CSRC Act*) *alone* of all the relevant provisions relating to the protections of privacy afforded by child support legislation, the CSP overlooks the directive sections in each Act regarding the limits placed on the operation of administrative processes in relation to privacy.

While section 98G of the *CSA Act* requires the CSP to forward documents to the other party, section 4 of the same Act effectively limits the operation of section 98G in a manner not reflected in current practice. The disclosure of information may be permitted under section 98G, to the extent that section 98G withstands scrutiny,³⁴ but must be tempered by a full reading of the legislation.

The *CSRC Act* uses almost identical wording as appears in section 4 of the *CSA Act*, reinforcing the consistent view of Parliament that administration of child support matters must limit intrusion upon the privacy of persons.

In the *CSRC Act* the use of the wording "shall be construed *and administered*" implies a greater imperative upon the CSP (and the AAT) than even the use of the word "should" does in the same context in the *CSA Act*. Again, this section

³² Department of Social Services, *Child Support Guide*, "2.6.5 Change of Assessment Process - Application from Payer or Payee". Accessed at: <<http://guides.dss.gov.au/child-support-guide/2/6/5>>.

³³ Department of Human Services. *Open exchange of information for Child Support customers 277-09190000*. Accessed at:

<<http://operational.humanservices.gov.au/public/Pages/separated-parents/277-09190000-03.html>>.

³⁴ See section below for discussion in consideration of the very existence of section 98G.

is one of only four instances in the CSRC Act in which intentions of Parliament are singled out for explicit articulation and particular directive emphasis.

Against the backdrop of administrative best-practice, as it was then understood, the addition of section 98G in 1992 was intended to ensure that procedural fairness was accorded to the parties affected by the outcome of the departure assessment decision-making process. The passage into law of the *Child Support Legislation Amendment Bill 1992* introduced section 98G into the *CSA Act* some three years after the Act first came into effect. The Explanatory Memorandum provided an explanation of the intent behind this amendment:³⁵

2.6. The Registrar may refuse to make a determination, if in the application, the grounds have not been addressed or it would be otherwise not just, equitable and proper to make a determination. If the grounds have been properly established in the application, the other party is to be advised that a valid application for review has been lodged and will be provided with a copy of the application to show the grounds relied upon. They will be invited to reply and make any representations they think relevant.

The intention, as expressed, was to disclose information to the other party only if grounds for a departure determination had been met. If those grounds were met, disclosure was intended to convey the *grounds* relied upon (and for which disclosure of source documentation provided by the applicant in support of those grounds would not necessarily be the only, or most appropriate, means available). The implication of limited disclosure of information would appear to be consistent with the requirements expressed in section 4 and stands in contrast with the “total disclosure” practices currently employed. As will be demonstrated in detail in the following section, the translation of the principle of procedural fairness into practice, as it is currently administered, represents a

³⁵ Explanatory Memorandum, *Child Support Legislation Amendment Bill 1992*, page 10. Accessed at <http://www.austlii.edu.au/cgi-bin/download.cgi/au/legis/cth/bill_em/cslab1992372.txt>.

superficial reading of the contemporary understanding of procedural fairness as expressed by the courts.

Against this statutory backdrop, consideration now turns to evaluation of current practice in relation to the “limit interferences” requirements imposed by child support legislation. While collection and disclosure of personal information is permitted within the constraints imposed by section 4 of the *CSA Act*, those constraints are routinely and consistently disregarded by the CSP in the interpretation of the Acts and in the administration of child support cases.

The limitations on practice created by section 4 require the CSP to avoid collection or disclosure of information unless necessary or where such collection or disclosure would not contribute to administrative decision-making in each case.

C *Collection Examples*

Through the mechanism of the *Application to Change your Assessment - Special Circumstances* form used by the CSP the agency requests a range of information that extends beyond the confines of the specific Reason(s) under which a change of assessment application might be made. The form requests a wide variety of information, extending across the ten Reasons and into other areas potentially not relevant to the reason under which a change of assessment is sought.

Parties to a change of assessment would likely be comfortable providing information relevant to the specific reason under which they seek a change of assessment through the CSP. Additionally, an applicant is less likely to be comfortable providing irrelevant information knowing that such information will be forwarded to other party, an ex-partner with whom an applicant may not enjoy cordial relations.

This raises concerns for individuals who may be experiencing high conflict—including a history of domestic violence—and low trust with an ex-partner; concerns regarding potential use of personal information for identity theft, fraud, or other unauthorized or vexatious purposes to which information so collected and disclosed might be turned.

The generic ‘one-size-fits-all’ omnibus form used by the CSP might represent administrative convenience for the CSP by collecting a range of information *just in case* it becomes necessary in the evaluation of a child support case; however, that convenience comes at a cost to the privacy of the individuals from whom a disproportionate amount of personal information is thereby collected *and* shared with other parties, often with disregard for the objections raised by one or both parties.

The information collection form is presented at the outset of a change of assessment process but before the circumstances of the case have been considered by the CSP, and before information has been identified as relevant to the decision-making of the CSP. To request detailed financial information, information that will be shared *unredacted* with the other parties to a review, and *before* the utility of that information in a case has been determined, or before the existence of grounds for a departure assessment have been confirmed by the CSP, is premature and inconsistent with the *Privacy Act 1988*, the privacy constraints articulated in the *CSA Act*, and guidance provided by the OAIC. These constraints in relation to information collection activities are considered below.

Collection of information by the AAT is authorised by section 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act), and it is upon this section of the Act (and the President’s Directions under section 18B which

follow from section 33(1)(c)) that the AAT relies in requiring each party to a review to complete the *Statement of Financial Circumstances* form.³⁶

33 Procedure of Tribunal

- (1) In a proceeding before the Tribunal:
 - (a) the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal;
 - (b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and
 - (c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

However, the President's directions must be given consistent with the requirements to which the Tribunal is subject under section 33(1)(a), namely "any other enactment", which would introduce into the practices of the AAT the requirement to "limit interferences with the privacy of persons" as articulated by child support legislation. The AAT currently adopts a similar stance to the CSP in that the collection and disclosure practices are total rather than limited.

³⁶ *Administrative Appeals Tribunal Act 1975*. Accessed at: < <https://www.legislation.gov.au/Series/C2004A01401> >.

In 2015–16 the number of parents applying to the CSP for a change of assessment was 17,232 and the number of objections to change of assessment decisions in this same period was 2,888.³⁷ During the same financial year 2,136 applications were lodged with the AAT for review of decisions made by the CSP.³⁸ Each application will have required an applicant to complete the forms described above. Therefore, under current practice, in 2015-16 alone 22,256 applications may have been exposed to inappropriate collection and disclosure of personal information.

D *Power to Compel Provision of Information*

The broad collection powers provided by section 161 of the *CSA Act* and section 120 of the *CSRC Act* enable the CSP to obtain information directly from financial institutions in aid of the evaluation of the financial circumstances of parties to a child support assessment. Such evaluations might be undertaken as a precursor to child support debt collection action under a section 72A notice (*CSRC Act*):³⁹

The Registrar can issue a section 72A notice to any person who holds money for, or on behalf of, a child support debtor, or to any person who may hold money for the child support debtor in the future. A notice issued to a person under section 72A of the CSRC Act requires that person to pay the money to the Registrar.

³⁷ Department of Human Services, *Annual Report 2015-16*, p69. Accessed at: <<https://www.humanservices.gov.au/sites/default/files/8802-1610-annualreport2015-16.pdf>>.

³⁸ Administrative Appeals Tribunal, *Annual Report 2015–16*, 32. Accessed at: <<http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201516/AAT-Annual-Report-2015-16.pdf>>.

³⁹ Department of Social Services, “5.2.9 Collection from Third Parties”. Accessed at: <<http://guides.dss.gov.au/child-support-guide/5/2/9>>. It is worth noting that section 72A is a word-for-word transposition from section 218(1) of the *Income Tax Assessment Act 1936* (section 218 of that Act is no longer in force yet remain in child support legislation).

However, a notice under section 72A cannot be effective against a joint bank account for the reason that it is not possible to identify any portion of the funds as belonging solely to either of the account owners (per the judgment in *DFC of T v Westpac Savings Bank Ltd* 87 ATC 4346).⁴⁰ It follows that if no portion of a joint bank account can be attributed to any one of the account holders, section 161 and section 120 notices should not be issued with respect to joint bank accounts as the financial resources of a child support customer cannot be ascertained from information obtained in relation to a joint account. Accordingly, any information obtained erroneously via section 161 and section 120 notices should not be disclosed to the other party in a child support case. Such intrusions, were they to occur, would be unwarranted and inconsistent with the explicit direction from Parliament that administration of child support limit interferences with privacy. Additionally, such intrusions would expose all other owners of a joint account to unwarranted intrusion upon privacy, particularly where those other owners are not the subject of a relevant child support case.

E *Concerns Re Legislative Constraints of APP 3.1 and 3.5
in the Context of “Limit Interferences”*

In relation to the collection of solicited personal information the *Privacy Act 1988*, under Australian Privacy Principle 3.1, requires that an agency:

... must not collect personal information (other than sensitive information) unless the information is reasonably necessary for, or directly related to, one or more of the entity’s functions or activities.⁴¹

⁴⁰ Ibid.

⁴¹ *Privacy Act 1988*, Australian Privacy Principle 3.1. Accessed at: <<https://www.oaic.gov.au/agencies-and-organisations/app-guidelines/>>.

The *APP Guidelines* published by the Office of the Australian Information Commissioner (OAIC) provide the following guidance in the interpretation of this principle:

Factors relevant to determining whether a collection of personal information is reasonably necessary for a function or activity include: whether the entity could undertake the function or activity without collecting that personal information, or by collecting a lesser amount of personal information.⁴²

The totality of information sought via the CSP's *Application to Change your Assessment - Special Circumstances* form is more than the information ordinarily required for the CSP and the AAT to undertake their functions in individual cases. The CSP and the AAT could reasonably collect a lesser amount of financial information than is called for by the forms and still be able to effectively review a case (i.e. they could limit collection to information directly related to the reason under which an applicant seeks reassessment). Under APP 3.1 the full range of information sought by the CSP, information that strays into areas not applicable to the Reason under which a change of assessment is sought (or is sought in dragnet fashion under a section 161 or 120 notice), is not 'reasonably necessary for one or more of the entity's functions or activities.' If a broad view of "the entity's functions or activities" is taken, virtually any collection activity would be permitted (which would, arguably, not be in the spirit of the *Privacy Act*); however, the "limit interferences" requirements of child support legislation narrow the meaning such that collection (and subsequent disclosure) of a wide range of information on a 'just in case it is required' basis does not meet the "reasonably necessary" test. Current practice stretches the capacity of "a reasonable person who is properly informed to agree that the collection is necessary."⁴³

⁴² Office of the Australian Information Commissioner, op cit, 3.19.

⁴³ Ibid 3.18.

F *Privacy Act 1988: Australian Privacy Principle 3.5*

In relation to the collection of solicited personal information the *Privacy Act 1988*, under Australian Privacy Principle 3.5, requires that an agency:

... must collect personal information only by lawful and fair means.⁴⁴

The *Explanatory Memorandum to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012* and the *APP Guidelines* provide clarification:

The concept of fair would also extend to the obligation not to use means that are unreasonably intrusive.⁴⁵

The forms and notices used by the CSP and the AAT represent a generic “catch-all” method to conveniently obtain information from parties to a review *just in case* that information becomes necessary for a review of a case. It is open to question whether, within the meaning of APP 3.5, it is fair for the CSP to solicit a broad range of information whose relevance to a review has not been determined (and with APP 3.1 implications) and where, as stated on the form, that information will be wholly shared with the other party. Is it fair to gather irrelevant information only to disclose that information? This approach to information collection, and with its subsequent disclosure, represents a degree of intrusion that is not required at an early stage in a case (if it is required at all), as more information than is necessary for a functional conduct of a reassessment will be collected by the form and shared with other parties. Upon review of an application, should additional information become relevant in aid of decision-making, the CSP could request/compel provision of that information through appropriate mechanisms.

⁴⁴ *Privacy Act 1988*, Australian Privacy Principle 3.5. Accessed at: <<https://www.oaic.gov.au/agencies-and-organisations/app-guidelines/>>.

⁴⁵ Explanatory Memorandum, *Privacy Amendment (Enhancing Privacy Protection) Bill 2012*, 77. Accessed at: <http://www.austlii.edu.au/au/legis/cth/bill_em/pappb2012476/>. And Office of the Australian Information Commissioner, *op cit*, 3.62.

Additionally, the terms of a change of assessment application are such that, “If the third party or parent providing the information does not want the details provided to the other parent, the Registrar will not consider the statement when making a decision,” and also states, “The Registrar will ... not imply that any person is obliged to provide information to the Registrar.”⁴⁶ Is it fair to require consent to disclosure—against a party’s preference/will—of personal information to an ex-partner? Where personal information is in the form of a medical report, and is key to the establishment of grounds for reassessment, such obligations are problematic: refuse to allow disclosure, and the application may fail; consent to the disclosure (however reluctantly), and expose personal medical information of the applicant and/or third parties to an ex-partner.

G *Disclosure Examples*

In addition to the concerns raised by the CSP’s collection practices the disclosure practices employed by the CSP raise more pressing concerns. A party seeking reassessment of their child support case would be eager to provide any information that may assist the CSP. In that context, appropriate collection practices are essential to the attainment of a fair outcome. Most customers, however, would be very reluctant to have their personal information disclosed to the other party without good reason.

In the context of changes of assessment, current disclosure practice employed within the CSP considers almost no limit upon disclosure other than the wording of section 98G.⁴⁷ The “limit interferences” requirement is not readily apparent in the practices currently employed; and when taken in the context of

⁴⁶ Department of Social Services, *op cit*, ‘6.3.4 Collection & Use of Third Party Information’. Accessed at: <<http://guides.dss.gov.au/child-support-guide/6/3/4>>.

⁴⁷ The CSP identify a limited list of information that must not be sent to the other party in Department of Human Services, *Open exchange of information for Child Support customers* 277-09190000. Accessed at <<http://operational.humanservices.gov.au/public/Pages/separated-parents/277-09190000-01.html>>.

the nuanced articulation of the boundaries of procedural fairness to be discussed in the following section, that omission is all the more concerning – not least for its impact upon the privacy of families.

H Section 98G

The key wording within section 98G affecting the disclosure practices of the CSP in the administration of change of assessment applications is *‘the Registrar must cause a copy of the application and any document accompanying it to be served on the other party to the proceedings.’* When the wording is taken on its own the intention would appear to be clear: everything provided by the applicant must be disclosed to the other party. However, when taken in the context of the requirement to “limit interferences with the privacy of persons” the practice appears arbitrary and without consideration of what would constitute a reasonable degree of interference with the privacy of the parties involved. The CSP takes an absolute view of the requirement of section 98G: the word “must” is total; all information provided by an applicant is disclosed to the other party. However, when section 4 is given due consideration, this totalitarian construction of section 98G is capable of moderation (options for which are discussed in the following section).

Section 4 places express limits on the interference with privacy of individuals. The statute does not prescribe specific processes that must be employed in giving effect to those limitations; however, the wording of section 4 is broad enough as to require application to all processes administered by the CSP or the AAT in relation to child support. Therefore, the intention of section 4 can be taken to place limits on every section within the Act that involves administrative engagement with the personal information of individuals.

The apparent inconsistency between sections 4 and 98G has obtained since the introduction of section 98G in 1992. It is clear by the wording of section 4

(“this Act should be construed”) that parliament intended that such inconsistency be resolved in the favour of protection of privacy and not in the favour of unfettered disclosure (a “privacy first” principle). The primacy of section 4 is further enhanced by consideration of procedural fairness, the boundaries of which in the context of child support will be explored in the following section. Without a full reading of procedural fairness, administrative procedures employed in the name of ‘procedural fairness’ have the effect of overriding the intended protections of privacy required by section 4.

I *AAT: Client Information Provided to All Parties by CSP*

When a child support customer appeals to the AAT, the customer’s entire file held by CSP is provided unredacted to the AAT and each parent, as parties to a review. Those documents could, depending on the records of conversation between the customer and CSP, include highly sensitive correspondence of only indirect relevance to a review and that a parent would reasonably believe to be confidential and not for disclosure to the other parent (e.g. correspondence on the topic of domestic violence experienced by the parent, and requests for CSP to treat such information with care). No consent for disclosure is obtained, and no redaction of information takes place prior to disclosure to the AAT and other parties.

J *Concerns Re Legislative Constraints Of APP 6.1 in The Context of “Limit Interferences”*

1 *Privacy Act 1988: Australian Privacy Principle 6.1*

Without due consideration and proper application of section 4 in the design and administration of departure assessments and objections, the CSP and AAT are arguably in breach of *Australian Privacy Principle 6: Use or disclosure of personal information*. Under the *Privacy Act 1988*, in relation to the use or disclosure of personal information, Australian Privacy Principle 6.1 requires that:

If an APP entity holds personal information about an individual that was collected for a particular purpose (the primary purpose), the entity must not use or disclose the information for another purpose (the secondary purpose) unless:

- (a) the individual has consented to the use or disclosure of the information; or
- (b) subclause 6.2 or 6.3 applies in relation to the use or disclosure of the information.⁴⁸

The *primary purpose* for which information is collected by the CSP under a change of assessment application is for the purpose of assisting the child support Registrar (or a delegate), under section 98C (*Matters as to which Registrar must be satisfied before making determination*), to be satisfied that the grounds for administrative reassessment exist and enable the Registrar to make a determination affecting an assessment.⁴⁹

⁴⁸ *Privacy Act 1988*, Australian Privacy Principle 6.1, Accessed at: <<https://www.oaic.gov.au/agencies-and-organisations/app-guidelines/>>. APP6.2 and APP6.3 relate to circumstances in which an individual would reasonably expect the information to be disclosed for the secondary purpose or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order.

⁴⁹ The powers of the Registrar also enable collection of data from other sources, and by other means, including searches made of data sources such as Centrelink and ATO records: the change of assessment form is not the only avenue available to the Registrar in meeting section 98C obligations under the Act. The form is but one tool assisting the Registrar in this purpose.

Disclosures of personal information to a third party person are made under section 98G ostensibly to enable that third party to “respond and comment”⁵⁰ on the information provided by the applicant.⁵¹ However, the CSP makes such unfettered disclosures without first establishing whether grounds for a departure assessment exist or whether the third party is in a position to assist the Registrar’s s98C obligations by corroborating or contradicting that information (see below for a real-world case study relating to the disclosure of third-party medical records).

The CSP releases information to the other party without establishing whether that disclosure, and the involvement of that third party, will assist the Registrar in attaining the primary purpose of reaching the satisfaction required under section 98C. The other party may no longer have close, if any, contact with the individual and therefore will be limited in their ability to corroborate/contradict information to a sufficiently high standard as to warrant setting aside the assertions of an individual about their own circumstances as contained in the information provided with their application. But for the registrar collecting and disclosing information for a change of assessment application such information would not be available to the other party.

The proposition that disclosure of personal information regarding an individual in such circumstances is a permitted *secondary purpose* under APP 6 is questionable. Furthermore, it is debatable whether disclosure of that information, under section 98G, to a third party who cannot influence or correct that information can be deemed to be a secondary purpose for which disclosure is anticipated under APP 6.2 or APP 6.3. Disclosure of irrelevant information is

⁵⁰ Department of Human Services, *Application to Change your Assessment - Special Circumstances form*, p4.

⁵¹ There is no reciprocal requirement for the third party to provide evidence of their circumstances for the consideration of the Registrar. However, if the third party does make a reply the Registrar must serve a copy of the reply and any accompanying documents on the applicant for the determination.

not permissible; therefore, a fundamental question arises: for what purpose toward attainment of the Objects of the Act does the CSP disclose information to a third party unable to effectively comment?

This calls into question the continued existence of section 98G, as it is currently worded and administered. If collection is permitted for the primary purpose of enabling the Registrar (or Registrar's delegate, the decision-maker)—alone—to be satisfied of the circumstances in a reassessment, no disclosure to a third party is required – particularly where that third party can add no value to the process. A third party cannot claim to be denied procedural fairness in circumstances where they cannot add value to the deliberations of the Registrar. If disclosure of material to a third party is not a secondary purpose, such disclosure is not permitted and therefore not required. Given that section 98G was introduced to provide parties an understanding of the grounds upon which a COA is made, the process as it is currently administered goes too far in interfering with the privacy of persons.

Ostensibly, section 98G was intended to aid the decision-maker in evaluating the circumstances of each party to a child support assessment: the decision-maker does not know the truth of any unsupported assertion made in any application or response. Therefore, it appears the administrative process has been constructed to attempt corroboration of information by the other party for the benefit of the decision-maker, despite the fact that the other party may not be any better informed than the decision-maker as to the circumstances of the party. Sound decision making requires that a decision-maker must be assured that the information provided by a party is reliable; this can be achieved by requiring the provision of independently verified information: a standard of evidence. This collection and disclosure practice appears to be of long standing and not subject to critical scrutiny or review over time: a common occurrence—and risk—in government agencies administering large programs over long

durations where inherited practice can continue unquestioned for a significant length of time (reflecting the maxim ‘We’ve always done it this way’) even where the operating context has evolved such as, for example, here through the introduction of the *Australian Privacy Principles* in March 2014.⁵²

It is worth noting that the DSS *Child Support Guide*, which is relied upon by DHS CSP decision-makers, is silent with regard to the “limit interferences” requirement articulated in the *CSA Act* and the *CSRC Act*. For example, *1.3.1 Objects of the CSA Act* includes the statement, “The CSA Act contains a statement of Parliament's intention in enacting that legislation”⁵³ and itemises all items provided in section 4 *except* for the specific provision to “limit interferences.” The *Child Support Guide* also addresses the role of the *Privacy Act 1988* within the statutory framework surrounding child support legislation, “The Privacy Act must be read in conjunction with other legislation, such as the secrecy provisions in the Child Support and Tax Acts. The secrecy provisions of those Acts are more stringent than the Privacy Act in regards to the disclosure of information”⁵⁴ however, it is apparent from the administrative practices currently employed that the CSP has not structured its administrative procedures to reflect a full reading of these associated Acts.

The limitations on practice created by section 4 would reasonably require the CSP to avoid collection or disclosure of information unless demonstrably necessary in aid of administrative decision-making in each case. Current collection and disclosure practices employed by the CSP in the administration of change of assessment applications appear to be a laudable (yet partial)

⁵² Section 98G of the *Child Support (Assessment) Act 1989* has not been amended in any consequential way since 1992, see *CSA Act* ‘Endnote 3—Legislation history’. Perhaps the operation of privacy in child support legislation should be reviewed in light of the 2014 introduction of the APPs.

⁵³ Department of Social Services, op cit, “1.3.1 Objects of the CSA Act”. Accessed at: <<http://guides.dss.gov.au/child-support-guide/1/3/1>> on 28 July 2017.

⁵⁴ Department of Social Services, op cit, “6.3.1 Privacy Act”. Accessed at: <<http://guides.dss.gov.au/child-support-guide/6/3/1>>.

attempt to accord procedural fairness. This partial construction risks potentially harmful disclosure of personal information, itself a denial of procedural fairness.

IV THE BOUNDARIES OF PROCEDURAL FAIRNESS IN CHILD SUPPORT MATTERS

The current administrative processes employed by the CSP arguably place generic provision of procedural fairness above the requirement to limit interferences with the privacy of customers, perhaps representing confusion in the minds of administrators between these competing demands upon administrative design. Practical limitations upon the disclosure of information would represent a means to address the requirements of section 4; however, this approach would appear at first glance to represent an erosion of procedural fairness (which perhaps explains why limitations on disclosure have not made their way into practice). This section will discuss the contemporary formulation of procedural fairness, as expressed by the courts, and will consider the relevant procedural boundaries that follow and which delimit a practical way forward—an Ariadne’s thread—through the maze of considerations relevant in the fair and accountable administration of child support. The framework thus articulated enables greater specificity in the articulation of procedural fairness in child support matters than currently exists in practice and provides a potential solution to the apparent conflict between the dual requirements of procedural fairness and “limit interferences” in the interests of attainment of the intentions of Parliament as expressed in legislation.

A *Procedural Fairness*

The duty to accord procedural fairness in judicial and administrative decision-making is a long-standing and well-established principle of natural justice. This paper does not propose to explore in detail the principles and consideration

documented at length in other sources;⁵⁵ rather, an outline of the elements considered essential to procedural fairness will be considered within the context of child support administration.

The *Australian Administrative Law Policy Guide 2011* encapsulates the principle succinctly:⁵⁶

Broadly, procedural fairness requires that the decision maker be, and appear to be, free from bias and/or that the person receives a fair hearing. *'The precise contents of the requirements... may vary according to the statutory context; and may be governed by express statutory provision'.*

This principle receives expression in the CSP's administration of child support through the practice of Open Exchange of Information, supported by the statement, 'Sections of the child support legislation require that *some* documents and information are provided to the other party in a child support case. Such disclosure is permitted by the secrecy and privacy provisions that apply.'⁵⁷ As we have seen above, the permissibility of *total* disclosure is questionable and there is little evidence to suggest that the CSP has adequately considered the intentions of Parliament in relation to treatment of personal information in child support cases.

⁵⁵ Mark Aronson & Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 2013). See also 'Traditional Rights and Freedoms: Encroachments by Commonwealth Laws', *Australian Law Reform Commission*, Sydney, NSW. Accessed at: <<https://www.alrc.gov.au/publications/freedoms-alrc129>>.

⁵⁶ Attorney-General's Department, *Australian Administrative Law Policy Guide 2011*. Accessed at:

<<https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/Australian-administrative-law-policy-guide.pdf>>. and cites Administrative Review Council, *The Scope of Judicial Review* Report No. 47 (2006) 13 and *tiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 489 (Gleeson CJ).

⁵⁷ Department of Human Services, *Open exchange of information for Child Support customers 277-09190000*. Accessed at:

<<http://operational.humanservices.gov.au/public/Pages/separated-parents/277-09190000-04.html>>. Author's emphasis added to the word 'some'.

The following example from an actual case involving the disclosure of medical records is illustrative of the process employed by the CSP, the horror it elicited from the persons whose information was disclosed, and the justifications provided by the CSP and OAIC in defence of such egregious disclosures.

A current child support client (a payer)⁵⁸ submitted a change of assessment application to the CSP owing to the fact that the payer's partner was soon to give birth to multiple children and the payer would be required to provide care for a time to the newborn children and partner. During that period providing parental care, the payer's income would be significantly reduced, rendering inaccurate (and unaffordable) the income used as the basis of the current child support assessment. During the change of assessment process the CSP required the payer to provide medical reports proving that the payer's partner was indeed due to give birth to multiple children. Those medical records were provided to the CSP with a strong request that they not be disclosed to the payee in the case: the medical reports also contained other personal information relating to the pregnant partner of the payer. Importantly, those records were the records of a person not a party to the child support case. The CSP provided the documents in full to the payee stating that section 98G of the *CSA Act* required the CSP to make the disclosure. When the payer raised these concerns with the CSP and the OAIC, and highlighted the implications of section 4, both agencies responded to state that the CSP was permitted to make such disclosures in aid of procedural fairness. Notably, both agencies' responses ignored section 4 altogether.

The disclosure actions taken by the CSP under section 98G were inconsistent with section 4 of the *CSA Act* and *APP 6*, for the following reasons:

⁵⁸ The names of the parties have been withheld from publication in the interests of privacy.

- Section 98G is intended, if the widest reading is taken, to ensure that all parties to an assessment have an opportunity to review and correct information relied upon by the other party where a reassessment is sought. However, medical documents cannot be corrected by the payee for they are the objective and professional reports of a medical practitioner.
- Section 98C states that it is the Registrar alone who must be satisfied that grounds exist for a departure from an administrative assessment (i.e. the change of assessment). That is, the decision-maker is not required to defer to any other person or opinion in making a determination. It is the role of the decision-maker to review relevant documents; it is not an ex-partner's role. In the case of the provision of medical reports upon which one party relies for a change of assessment application *only the Registrar* need be satisfied that the document is true and correct. No other party to an assessment need be provided with such sensitive personal information, especially where the particular information relates to a medical condition that is not contestable by the other party, such as pregnancy and multiple-birth in this example.
- Therefore, withholding those documents from the payee would be appropriate and would not amount to a denial of procedural fairness. Such withholding would support procedural fairness by supporting the parties' right to a process that limits interference with privacy to only such interference as is absolutely necessary. Instead of full disclosure of source documents, the payee could be informed by the decision-maker that (1) a medical condition formed the grounds of the application, and (2) documentation was presented to the

decision-maker certifying the veracity of the claims made in the application.

If we contrast this example with the privacy practices surrounding medical conditions experienced by employees in the workplace, we see that employers have no right to demand access to the particulars of a medical condition suffered by employees (an employee may choose to disclose details to an employer). In child support matters a party is not permitted to withhold from the other party information about a medical condition if they wish to have that medical condition taken into account by a decision-maker.⁵⁹ Non-consensual disclosure of information is, therefore, a prerequisite for a party access to the change of assessment process under the current formulation of administrative procedures. In any other context, this process would amount to a serious breach of privacy, not only by the disclosure itself but also by the compelled nature of the disclosure.

The impact of the disclosures made in the case of the example described above placed significant strain on the relationship between the payer and the payer's partner highlighting the fact that the current treatment of privacy in the administration of child support matters fails to meet the needs or expectations of Australian families. Existing information management practice, disclosures in particular, is clearly at odds with community expectations – particularly as public attention and concern increasingly turns to the ease, and potential impact, with which personal information may be abused.

The clear disconnect between the intentions of Parliament and the practices employed by the CSP raises the question of how best to resolve the impasse.

⁵⁹ Department of Human Services, *Open exchange of information for Child Support customers* 277-09190000. Accessed at:

<<http://operational.humanservices.gov.au/public/Pages/separated-parents/277-09190000-04.html>>.

How can the requirement to “limit interferences” be reconciled with the duty to accord procedural fairness? By closely examining and applying the boundaries of procedural fairness as expressed by the courts, the duty is found not to be as fixed a proposition as the CSP would appear to believe. There are shades of grey that emerge from consideration of various aspects pertinent to a case: the specific circumstances of the parties and the information, the statutory framework guiding administration, and other considerations. These shades and considerations, when taken together as a whole, resolve to clarify a framework that may be used to establish the boundaries of procedural fairness in individual child support cases. This framework would assist child support decision-makers in their duty to limit the scale of disclosures where those disclosures represent an intrusion upon the privacy of individuals. The framework, drawn from contemporary judicial articulation of the boundaries of procedural fairness, provides a proactive process to guide consideration of procedural fairness and the determination of appropriate practice applicable to the administration of child support.

Before detailed discussion of the framework takes place, a question with bearing on the existence of such a framework must be addressed: is the content of procedural fairness most effectively determined through fixed rules or via flexible principles?

B *The Content of Procedural Fairness:*

Fixed Rules or Flexible Application of Procedural Fairness?

The precise content of procedural fairness has long represented a challenging point of legal theory, with Australian courts “reluctant to reduce that content to fixed rules, preferring instead to use the intuitive standard of fairness that is moulded by reference to the statutory framework and the factual circumstances of each case.”⁶⁰

In *Kioa v West* (1985) 159 CLR 550 at 585 per Mason J, the view was expressed that the term “procedural fairness”:⁶¹

... conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e., in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations.

The consideration of the necessity to adapt procedures “to the circumstances of the particular case” strongly suggests that a fixed approach to procedural fairness is undesirable. The views expressed by Mason J support the assertion that section 4 requires administrative processes to be flexible to the circumstances of each case due to the fact that the degree of “interference” required would necessarily vary with the circumstances obtaining in each case.

⁶⁰ Aronson and Groves, above n 56, 491.

⁶¹ Justice Alan Robertson, Federal Court of Australia (2015), *Natural Justice or Procedural Fairness*, paragraph 4. Accessed at: < <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-robertson/robertson-j-20150904>>.

The fundamental rules of procedural fairness, namely a fair hearing and freedom from bias, form a broad umbrella under which all other considerations of a decision-maker fall. These rules are informed by the principle that persons are entitled to challenge information that has the potential to adversely affect them. The rules “address the manner in which a decision is made and not the merits of the decision itself”⁶² and are “concerned with the fairness of the procedure adopted, not the fairness of the decision produced by that procedure.”⁶³

The CSP’s current approach to procedural fairness is closer to the fixed approach than a flexible approach. On every occasion all information provided in support of a change of assessment application is released to the other party. This approach has the advantage of reducing the workload of decision-makers in assessing and making decisions on the quality of the information; however, it has the distinct drawback of ignoring the specific circumstances of each case that might otherwise warrant specific attention. A fixed-rule approach will, by its very nature, ignore the particulars in specific cases. In child support matters, this places fixed-rule processes at risk of abrogating some rights in the name of according other rights. For example, and with section 4 in mind, the total release of information in the name of procedural fairness creates an unfair process by dint of the fact that information a customer would reasonably expect to remain confidential is instead disclosed. Consideration of the specific circumstances of each case would enable the CSP to deliver an administrative process that meets the full requirements of the legislation while also according an appropriate measure of procedural fairness.

⁶² Aronson & Groves, above n 56, 399.

⁶³ *Ibid.*

In a fixed-rule environment there would be no need for a framework to establish the boundaries of procedural fairness: no considerations beyond total release would be necessary. This would represent an administratively lean approach to the administration of child support cases but, as the existence of section 4 demands, this option is not properly available to administrators. The intent expressed in section 4 requires that all administrative processes employed by the CSP must be sensitive to, and respect, the privacy of persons (echoing the requirement expressed in the Howe Report for simplicity, flexibility and efficiency⁶⁴) lest unwarranted, unnecessary and potentially injurious disclosures are made.

With the clear requirement in mind to “adopt fair procedures which are appropriate and adapted to the circumstances of the particular case,”⁶⁵ rather than a fixed rule as to the content of procedural fairness, we may turn to the details of the framework referred to above in providing practical articulation of the requirement.

C *A Provisional Framework To Establish The Boundaries Of Procedural Fairness In Child Support Matters*

Considerations informing the primary rules of procedural fairness:

- (1) Full reading of the statutory framework
- (2) Consider the circumstances of each case:
 - a. Consider the nature of the information and parties:

⁶⁴ Australia. Cabinet Sub-Committee on Maintenance. and Howe, Brian. and Australia. op cit. 3.

⁶⁵ Justice Alan Robertson, above n 61, paragraph 4.

- i. The nature of the information: can the recipient challenge or corroborate the information?
 - ii. The nature of the party to whom the information would be disclosed: can the decision-maker rely upon a response provided by the recipient (the hearsay risk)?
- b. Consider limitations on disclosure:
 - i. Total versus sufficient disclosure
 - ii. Consider the perception that information may adversely affect a person
 - iii. Legitimate expectations
- c. Nature of the decision-maker and the width of discretion
- d. Avoidance of self-interest of an agency in guiding administrative processes: privacy first

Each element within this framework will be outlined below in relation to the views expressed by the courts and the relevance to CSP practice.

D *Considerations informing the primary rules:*

1 *Full reading of the statutory framework*

The statutory framework within which the CSP operates primarily includes, amongst others, the *CSA Act*, the *CSRC Act*, the *Privacy Act 1988*, the *Administrative Appeals Tribunal Act 1975*, the *Freedom of Information Act 1982*, and Taxation Acts (from which many child support provisions have been transposed verbatim). In determining the requirements for procedural fairness where decision-makers exercise statutory powers “the wider statutory framework within which that power is located is of crucial importance.”⁶⁶ Aronson and Groves highlight reference made by Kitto J in *Mobil Oil Australia Pty Ltd v FCT (1963)* 113 CLR 475 to “the necessity of allowing full effect in every case to the particular statutory framework within which the proceeding takes place. By the statutory framework I mean the express and implied provisions of the relevant Act and the inferences of legislative intention to be drawn from the circumstances to which the Act was directed and from its subject-matter.”⁶⁷ In the context of child support matters the statutory framework arguably contemplates that all administrative procedures derived from the provisions of the Act (and any other procedure devised via implication) must be designed and delivered so as to place a very high premium on the protection of privacy of persons. Accordingly, the apparently clear imperatives of section 98G are modified by inclusion of section 4 in the reading of the operation of section 98G. The requirement to “limit interferences with privacy” is expressed clearly, whereas the requirement for procedural fairness implied by section 98G is not as clearly articulated. The statutory framework, when taken as a whole, would require limitations upon the disclosures where those disclosures are demonstrably intrusive upon privacy.

⁶⁶ Aronson & Groves, above n 56, 501.

⁶⁷ Ibid.

E *Considerations informing the primary rules:*

2 *Consider the circumstances of each case*

In evaluating how most effectively to approach the balance between the limits of section 4 and the duty to accord procedural fairness, various elements can be defined in support of consideration of the circumstances of each case:

- **(2)a - Consider the nature of the information and parties**
 - i. The nature of the information: can the recipient challenge or corroborate the information?
 - ii. The nature of the party to whom the information would be disclosed: can the decision-maker rely upon a response provided by the recipient (the hearsay risk)?
- **(2)b - Consider limitations on disclosure:**
 - i. Total versus sufficient disclosure
 - ii. Consider the perception that information may adversely affect a person
 - iii. Legitimate expectations
- **(2)c - Nature of the decision-maker and the width of discretion**
- **(2)d - Avoidance of self-interest of an agency in guiding administrative processes: privacy first**
 - (2)a. Consider the nature of the information and parties:**

i. Can the recipient challenge or corroborate the information?

The suggestion that certain considerations and types of information cannot be challenged, corroborated or influenced by a party is articulated in *Jarratt v Commissioner of Police for New South Wales* [2005] HCA 50 224 CLR 44:

It is conceivable that there may be cases of a valid exercise of the power for reasons, or on the basis of considerations, that are of such a nature that there would be nothing on which a Deputy Commissioner could realistically have anything to say.

The disclosure of personal information to a party who cannot contest or in any way challenge, corroborate or otherwise influence that information is unlikely to serve any purpose in aid of decision-making. Disclosure in such circumstances would be unnecessary and would amount to an interference with the privacy of the person whose information is disclosed. This type of information would be relevant for the deliberations of a decision-maker; however, in child support cases it is readily demonstrable that there may be nothing that a party can say to challenge information relied upon by a decision-maker in some types of information, by the very nature of that information:

- Medical documents and reports: the facts contained in a medical document are the product of professional inquiry and reporting; neither the other party nor the decision-maker (unless medically trained) will be able to challenge the facts reported in such documents. In *any* other situation medical documents of one parent would not be disclosed to the other parent; stringent privacy rules attend to medical information. Unnecessary disclosure of medical documents by decision-makers untrained in medicine introduces

the risk of inadvertent revelation of information about a person to another person.

- Bank statements: as an official record of past transactions those transactions cannot be altered by the other party. Nor might the other party have any specific knowledge to draw upon regarding the circumstances of the transactions contained in a statement.
- Taxable income as disclosed in assessment notices issued under section 76 of the *CSA Act*: when the Registrar makes an administrative assessment, current practice requires that a notice must immediately be given in writing to each parent and any non-parent carer applicant.⁶⁸ These notices would number in the hundreds of thousands each year. The type of information included in a notice of assessment includes the adjusted taxable income of both parents: information about each party that cannot readily be contested and which would not in the ordinary course of events be available to the other party. Generally, a parent's taxable income is the figure assessed by the ATO for the relevant year of income. An amended taxable income is taken into account only in certain limited circumstances.⁶⁹ An income figure determined by the ATO cannot be readily or reliably disputed by the other parent (nor by the CSP). In any case, the child support formula is transparent enough that a party could independently estimate to within a reasonable margin the income of the other party by entering their own income and care arrangements into the online child support

⁶⁸ Department of Social Services, *op cit*, “2.9.2 Assessment Notices”. Accessed at: <<http://guides.dss.gov.au/child-support-guide/2/9/2>>.

⁶⁹ Department of Social Services, *op cit*, “2.4.4.10 Adjusted Taxable Income”. Accessed at: <<http://guides.dss.gov.au/child-support-guide/2/4/4/10>>.

estimator,⁷⁰ taking an educated guess at the income of the other parent.

These, and many other, categories of document cannot reasonably be contested by a third party who knows little of the other party's circumstances. Under current practice, the CSP makes no effort to establish the level or quality of insight into, or knowledge of, one party about the circumstances of the other party. A common frustration expressed by families in the child support system is that the CSP leaves investigations in the hands of unskilled parties who have little or no contact with, or contemporary knowledge of each other, while the CSP has access to DHS and ATO data sources and investigative powers that could be turned to practical use in reaching an objective determination of circumstances. Given that the CSP has, in its own words, "broad powers to seek information and require third parties to provide information"⁷¹ it should use those powers *where it has a reasonable justification for doing so* rather than rely on parents not resourced to undertake such investigative work. Under current practice information is simply disclosed by the CSP to the other party in the hope that the other party will be able to offer some intelligence of relevance to the decision-maker (calling into question the utility of section 98G and raising concerns with regard to the Commonwealth's obligations under Article 17 of the *International Covenant on Civil and Political Rights*⁷²). The CSP appears to be acting on the assumption that the parties are able to respond effectively (and honestly) to information disclosed to them for comment. The information is disclosed "just in case" and *inviting* a challenge from the parties.

⁷⁰ Department of Human Services, *Child Support Estimator*. Accessed at: <<https://processing.csa.gov.au/estimator/About.aspx>>.

⁷¹ Department of Human Services, *Child Support's information gathering powers 277-04210000*. Accessed at: <<http://operational.humanservices.gov.au/public/Pages/separated-parents/277-04210000-01.html>>.

⁷² "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." Accessed at: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>>.

This approach does not assist in lowering the likelihood of conflict between separated parents.

The CSP presents this disclosure practice as an exemplar of procedural fairness but doesn't consider whether the practice is fair to either party in a child support case. It is only as a result of the current loose reading of relevant privacy provisions in child support legislation that the other parent can obtain access to such information. Accordingly, disclosure of such information by the CSP is, arguably, inconsistent with the "limit interferences" requirement of section 4.

ii. Can the decision-maker rely upon a response provided by the recipient?

(the hearsay risk to procedural fairness)

A procedurally fair decision must be based on information whose content is reliable and (preferably) verifiable, not upon hearsay. A CSP decision-maker is unlikely to have firsthand knowledge of the parties to a child support case; and were the circumstance to arise where the parties were known to a decision-maker probity would require the decision-maker to be removed from the decision-making process lest a perception of bias or conflict of interest enter (one of the two basic rules of procedural fairness: freedom from bias). Without personal knowledge of the parties a decision-maker must be informed by facts that are accountable as facts. Where a type of information about a party is deemed by the decision-maker to be open to commentary or challenge, the following questions must be considered. Can a response by the other party reasonably be determined to be objective? Can the decision-maker rely on the content of the response? Is the information sufficiently factual as to warrant consideration? Is there probative value in disclosing information about one party to the other party? In most cases the answer is likely to be a resounding "no" as the parties would be asked to provide commentary on specific

information about a person with whom they may no longer maintain sufficient contact to know with any certainty whether the information is accurate. Unreliable commentary on information cannot form the basis of a procedurally fair process.

Disclosures that are made in the *hope* of documentary corroboration or to test credibility and consistency represent a speculative approach to procedural fairness and as such would represent an intrusion upon privacy. Where the personal information of a party is at stake, speculation is not an appropriate or fair use of such information and can hardly be described as “rationally” probative. Unless documentary evidence could reasonably be considered already available to the other party outside the change of assessment process, and which the other party could reasonably be able to present to the decision-maker, the other party is unlikely to be able to provide any advice to the decision-maker that could be considered reliable and devoid of bias or agenda. In current CSP processes no consideration is made of the ability of each party to provide reliable commentary on the information disclosed under section 98G. If hearsay was received from a party, “it may ultimately be given little or no weight if it is thought to be unreliable because it cannot be tested by cross-examination.”⁷³ How can a decision-maker determine the truth of an assertion made by either party (other than by guesswork, or their “personal sense of it”) that is in any way robust, transparent or accountable? They cannot. This once again calls into question the existence, or at least the current operation, of section 98G.

For the sake of accountability, a procedurally fair process should rely on verifiable information, not upon hearsay. The CSP has access to a range of data sources on parents. Rather than consideration being given to speculative responses from a party with a financial stake in the result (and therefore a

⁷³ Aronson & Groves, above n 56, 581.

conflict of interest rendering responses inherently unreliable), the decision-maker could instead use verified data sources to collect the necessary information to corroborate assertions made by a party without the need to pass information on to the other parent. In the interests of “limiting interferences” a search of data sources (perhaps with the consent of the parties) would represent less of an intrusion than does sharing information between parties ill-placed to reliably comment.

(2)b. Consider limitations on disclosure

This leads to discussion of whether a procedure may be devised to enable reasonable limitations upon disclosure while remaining consistent with the requirement to accord procedural fairness to each party. Such consideration is not intended to create a contest between the elements of procedural fairness and privacy in which element one must take absolute dominance over the other (as occurs under current administrative practice).

In procedural fairness terms the matter is one of balance between procedural fairness and privacy, and depends on the circumstances of each case. The courts have taken the view that limitations on procedural fairness could safely be imposed only by “plain words of necessary intendment”⁷⁴ within the relevant statutory framework. From this perspective, the wording of the child support Acts would appear to require administrators to place limitations on the collection and disclosure of information under those Acts. Section 4 of the *CSA Act* uses the words “it is the intention of Parliament that this act should be construed, to the greatest extent consistent with the attainment of its objects to limit interferences with the privacy of persons.” This wording accords with the requirement for “plain words of necessary intendment” in placing limitations upon the disclosure of information.

⁷⁴ *Annetts v McCann* (1990) 170 CLR 596

From the words, the salient consideration would be whether such limitations would be “consistent with the attainment of” the objects of the Act. The relevant objects of the Act spelled out in section 4 are the principal object “(1) to ensure that children receive a proper level of financial support from their parents” and the particular object “(2)(a) that the level of financial support to be provided by parents for their children is determined according to their capacity to provide financial support and, in particular, that parents with a like capacity to provide financial support for their children should provide like amounts of financial support.”

In making assessments of child support liability in the ordinary course of a child support assessment, the CSP relies in most cases upon official income information provided annually by the ATO. Where circumstances change, and a party seeks reassessment on the basis of those changed circumstances, the CSP may conduct an investigation or inquiry into the circumstances of each party to a child support case. In determining a level of child support to be transferred between the parties, it is reasonable to expect that the information upon which the CSP relies is reliable, verifiable and relevant. As outlined above, if a party cannot aid the decision-maker then there is likely little value to be found in making disclosures to that party as such disclosures would not be in aid of assisting the CSP to ensure that the parties meet their obligations under the Act. Therefore, reasonable limitations upon the disclosure of information would be consistent with the restrictions imposed by section 4 and the objects of the Acts.

In meeting the requirement to “limit interferences” any restriction placed upon disclosure would necessarily need to be made to the least degree possible that is consistent with the intention to limit interference with privacy while at the same time ensuring that procedural fairness is afforded to all parties to the greatest extent consistent with the circumstances of a case.

To the extent that the act of withholding information from a party is taken to be a reduction in procedural fairness such a reduction would be viewed more correctly, with the section 4 imperative in mind, as a limitation on the interference with the privacy of the other party rather than a denial of procedural fairness. Such limitations would trace a direct line from the intentions of Parliament (as expressed in legislation) to procedural conduct. A decision-maker would be required to determine the extent of the limitation, which brings us to discussion of ‘total’ versus ‘sufficient’ disclosure.

(2)b. Consider limitations on disclosure:

i. Total versus sufficient disclosure:

In seeking a reasonable balance between the disclosure and “limit interferences” requirements attendant upon a decision-maker in considering the degree of disclosure of confidential information required in a case, it is worth quoting at length from Aronson and Groves regarding the views expressed by the High Court in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72. While the High Court declined to provide ‘all encompassing rules about how administrative decision-makers’ should deal with confidential information’⁷⁵ the Court ‘accepted that the competing values of disclosure and confidence should be “moulded according to the particular circumstances ...”.’⁷⁶ Additionally, ‘The Court concluded that fairness, in the form of sufficient disclosure, would be satisfied in the case at hand if the decision-maker disclosed the substance of the allegations and gave an opportunity to respond to them’ without necessarily requiring release of source documents.⁷⁷ In consideration of the necessity to accord procedural fairness to all parties, ‘The Court noted that the balance struck by a statutory

⁷⁵ Aronson & Groves, above n 56, 538.

⁷⁶ Ibid.

⁷⁷ Ibid.

regulation of confidential information “affords to visa applicants a measure of procedural fairness and protection to informants ...”. Those remarks recognise that statutory restrictions upon disclosure necessarily limit the extent to which fairness can be provided to the party denied full disclosure.⁷⁸

Current CSP practice appears to have construed the disclosure requirement under section 98G as “total” rather than “sufficient” and, in so doing, ignores the “limit interferences” requirement of section 4. The total disclosure approach also ignores the impact of such disclosures upon a party and instead chooses, in the name of procedural fairness, to give priority to the provision of documents to the other party (who receives information on the applicant but is under no obligation to respond with any information regarding their own circumstances).⁷⁹ Sufficient disclosure, rather than total disclosure, in child support matters would accord procedural fairness to both parties, while at the same time respecting the privacy of each party. This limited-disclosure approach would also enable decision-makers to consider all documents relevant to decision-making, by removing the non-disclosure disqualification currently in place, in aid of the attainment of the objects of the Act.⁸⁰

Procedural fairness for one parent should not come at the expense of procedural fairness for the other parent. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6 the understanding of fairness within the Australian judicial context was expressed by Gleeson CJ via the suggestion that “Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to

⁷⁸ Ibid.

⁷⁹ In this way, the operation of the change of assessment process could be employed by a party as an inexpensive, efficient and one-sided method of discovery.

⁸⁰ Under the current CSP process, if a party refuses to allow disclosure of a document to the other party the decision-maker cannot consider that document regardless of the relevance of the document to the circumstances of the case.

avoid practical injustice.”⁸¹ Disclosure of information to a person who cannot aid the decision-maker in any objective sense (especially where the relevance of that information to decision-making has not been determined) would represent a practical injustice. Such injudicious disclosures by government agencies would unreasonably intrude upon the privacy of a party and opens a party to the risk that information will be used for vexatious purposes by the other party (particularly in the context of separation and divorce where a high degree of animosity between separated parents may exist for prolonged periods). As Aronson and Groves point out, “In some circumstances disclosure may have the potential to cause harm to some person or to the public interest. In such cases, disclosure of the substance, but not the detail, of the material will often achieve a satisfactory compromise between the demands of disclosure and confidentiality.”⁸² The protection of privacy by Commonwealth agencies is increasingly regarded as important⁸³ as information pertaining to individuals may readily be put to unauthorised and damaging use. With regard to the public interest, the current CSP approach to collection and, particularly, intrusive disclosure of personal information acts as a deterrent to families who might otherwise seek access to the administrative reassessment process afforded by child support legislation. Without effective access to the reassessment process the object of the Act to ensure that the level of financial support provided by parents for their children is determined according to the capacity of the parents to provide financial support is undermined.

⁸¹ Quoted in Aronson & Groves, above n 56, 491, and in speech by Justice Alan Robertson, above n 61, Paragraph 23.

⁸² Aronson & Groves, above n 56, 537.

⁸³ See the 18 May 0217 joint statement by the Department of the Prime Minister and Cabinet and the Office of the Australian Information Commissioner, that an Australian Public Service (APS) Privacy Governance Code will be developed. Office of the Australian Information Commissioner, *Developing an APS-wide Privacy Code*. Accessed at: <<https://www.oaic.gov.au/media-and-speeches/statements/developing-an-aps-wide-privacy-code>>.

Across the statutory framework surrounding administration of child support, inconsistencies are apparent in the approach taken to the limitations placed upon disclosure of information. If we compare the information protection practices under section 98G and the *FOI Act* this inconsistency becomes apparent.

A party to a child support case might provide a verbal opinion to the CSP about the other party to the case, and that opinion might be recorded in the CSP's internal records pertaining to the first party. If that party seeks a copy of the record of conversation via the *FOI Act*, that same opinion will be withheld from the applicant under section 38 of the *FOI Act* (and with reference to the secrecy provisions of child support legislation) as "protected information" concerning a third party obtained by the CSP for the purposes of the child support Acts. Despite the opinion being just that—an opinion, hearsay—and not a verified fact or a fact provided by the other party, the first party will be denied access to that portion of their own record in which their opinion about the other party is documented. The opinion is not personal information owned by the other party; it is an opinion *about* the other party provided to the CSP by the first party (the term "concerning a party" is taken perhaps too broadly, encompassing the multiple definitions of that word which might also include "about"). The person who can be said to "own" that particular piece of information is the opinion-holder, not the other party to whom the opinion refers (and who may be unaware that such an opinion is held). Therefore, it would follow that the opinion is more properly "protected information" of the party who provided the opinion (and is not "protected information" of the other party as the information "concerns" an opinion held by the first party and is not a fact "concerning" the other party): the opinion of the first party about the other party is rightly

protected from viewing by the other party as release of the opinion to the other party would have the potential to cause a breach of confidence. Accordingly, the information provided by the opinion-holder, and held within that person's records, could reasonably be released to that person under FOI as the opinion is not "protected information" concerning the *other* party. Yet, under the strict rules of FOI, a simple opinion which may not be factual about another party cannot be released to the very same person who provided that opinion if the FOI decision-maker decides to withhold under section 38 that portion of the record containing the opinion.

In contrast, under current disclosure practices employed by the CSP and the AAT, total disclosure of information takes place, whether factual records of a medical or financial nature, or records of conversation between a party and the CSP, *inter alia*. The statutory context on the one hand (under the *FOI Act*) mandates non-disclosure of information containing even a passing, opinionate reference to another party but on the other hand (under the current interpretation of the CSA and AAT Acts) requires disclosure of that same information. This is at distinct odds with the intention of Parliament to "limit interferences."

Given the sensitivities surrounding transfer of information between separated parents, perhaps the methodology utilised in the administration of FOI requests could be extended in some measure to the processes employed by the CSP, for the protection of privacy. Under the FOI Act, this process may be summarized as:

- Information is gathered and considered by the decision-maker.
- The decision-maker reaches a decision regarding which information must be withheld from the applicant (where the FOI Act requires such withholding).

- The decision-maker informs the applicant of the outcome, providing such documents (or portions thereof) as can be disclosed under the Act, describing the withheld documents where appropriate.

The protections of privacy accorded by the statutory framework surrounding child support require construction of administrative procedures that are both fair and reasonable. In that context limitations upon the disclosure of information would provide a reasonable balance between the requirements to “limit interferences with the privacy of person” and to provide procedural fairness to all parties. In place of the current practice of total disclosure a decision-maker could withhold the source documents provided by one party and, instead of full disclosure, provide a summary to the other party describing the grounds upon which the application relies as expressed in the withheld documents.

(2)b. Consider limitations on disclosure:

ii. Consider the perception that information may adversely affect a person

The deliberations of a judicial decision-maker may require the evaluation of information provided about a party, or a party’s conduct, that is negative or incriminating in nature. Given that such information could influence a decision-maker to take a decision with adverse consequences for the party in question the courts have sought to define the rights of parties, including the right to contest information that may adversely affect the interests of a party. Where the seriousness of the effects of a decision⁸⁴ may be severe, for example in criminal cases potentially attracting the death penalty, this right can easily be seen to be essential for the avoidance of unjust outcomes. The entitlement to make submissions to a decision maker was addressed in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576:⁸⁵

⁸⁴ Aronson & Groves, above n 56, 406.

⁸⁵ Justice Alan Robertson, above n 61, Paragraph 26.

Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker.

In the administrative decision-making context of child support cases, however (as discussed above), one party may not be capable of providing any rebuttal or qualification to information provided by another party. Additional clarification was provided in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152:⁸⁶

What is required by procedural fairness is a fair hearing, not a fair outcome whereby “the reviewing court is concerned with the fairness of the procedure adopted, not the fairness of the decision produced by that procedure.”⁸⁷ These considerations have found articulation within the “fair hearing” rule of procedural fairness.

Operational information within the CSP makes the following statement in support of this rule:⁸⁸

Information must be exchanged with parties to a decision to ensure a customer who may be adversely affected by the information has an opportunity to respond and comment on the information before the decision is made.

Within the context of child support matters distinction must be made between two definition(s) of “adverse”; these distinctions are pertinent to the design of

⁸⁶ Ibid, paragraph 8.

⁸⁷ Ibid.

⁸⁸ Department of Human Services, *Open exchange of information for Child Support customers* 277-09190000. Accessed at: <http://operational.humanservices.gov.au/public/Pages/separated-parents/277-09190000-03.html>.

fair administrative procedures surrounding exchange of information between parties. Not only is the seriousness of any adversity relevant, the context of that adversity is critical in confining the definition within the boundaries of procedural fairness required by the “limit interferences” intention expressed by Parliament. Two facets of the notion of “adverse” are apparent:

- 1. material provided by one party may be “adverse” in its characterisation of the other party; and*
- 2. the outcome of a decision for a party may be perceived to be “adverse” based on the material provided by the other party.*

For the sake of procedural fairness in child support matters it is essential to consider whether adversity lies in the material (and whether the material is about a party or about the other party) or in the outcome of a decision based on material relied upon by a decision-maker. For example, a medical report regarding the health of one party cannot be held to be “adverse” with respect to the other party; the detail contained within the report simply documents the diagnosis of a medical practitioner and can be treated as a statement of objective fact. However, the outcome of a decision made on the basis of a medical report may be perceived as “adverse” by the other party, especially where that outcome negatively impacts the financial position of the other party through reassessment of child support.

In the case of the first facet of “adverse”, a party might reasonably wish to challenge subjective information provided by one party as that material may contain errors of fact or unsupported assertions designed to sway a decision-maker in their deliberations. Where a party makes an unsubstantiated adverse statement purporting to be factual about the other party the decision-maker should seek evidence from that party in support of the adverse assertions. If the party refuses to provide evidence to the objective satisfaction of the decision-

maker, those assertions should be ignored (for they could not form the basis of accountable decision-making). The decision-maker should also grant the other party (the subject of the adverse assertion) an opportunity to challenge or corroborate those assertions.

However, where a party makes an unsubstantiated statement purporting to be factual about their own circumstance the decision-maker, instead of seeking advice from the other party by disclosing information to that other party, should seek evidence from the party in support of the assertions. If the party refuses to provide evidence to the objective satisfaction of the decision-maker, those assertions should be ignored (for they could not form the basis of accountable decision-making). The responsibility for corroboration of assertions would rest with the party making those assertions. Disclosure of information to the other party would not be required. Information that is actually or potentially adverse in its characterization of a party, insofar as that information could influence a decision-maker in their perception of the facts of a case, would warrant a procedure that ensures the adverse information or material is provided to the party for challenge.

In the case of the second facet of “adverse”, an outcome might very well be deemed by a party to be adverse to their interests; however, the requirement to accord procedural fairness is concerned to ensure, per *SZBEL*, that the *process* which leads to that outcome is demonstrably fair. Procedural fairness is not concerned with the perception by any party that the *outcome* is fair. Accordingly, the second question of adversity is defeated and must not influence the design of information exchange processes employed in changes of assessment.

In reaching an outcome in the assessment of child support the CSP employs a mathematical formula provided by the *CSA Act*. This formula, operating as

intended, takes into account all aspects considered relevant by Parliament (by inclusion in the formula). Aspects such as income and the percentage of care attributable to each parent will, through the formula, produce an objective outcome with which both parents are obliged to comply. These aspects can be reduced to points of fact which, during the process of information exchange in a change of assessment, may be verified via objective and independent sources. In the context of the child support formula “adverse” could be taken to include an outcome where a reassessment leads to a reduction in the financial resources available to a party; for example, via reduction in child support received by a payee or an increase in child support paid by a payer. However, such an outcome is not necessarily “adverse” for the purposes of procedural fairness if the outcome was achieved via the proper and fair operation of the child support formula; such an outcome would meet the object of the Acts that the financial capacity of each parent is reflected in the assessment. The distinction lies in “the fairness of the procedure adopted, not the fairness of the decision produced by that procedure.”⁸⁹

Before a final decision is made regarding an application for change of assessment section 98C(1)(b)(ii)(A) of the *CSA Act* requires a decision-maker to consider the relative hardship a decision may cause the parents and children under an assessment. This contemplation properly takes place *after* facts have been gathered and considered in a case. Concern for the welfare of either party should not be considered during the information exchange stage of the process as no decision can be reached until all relevant facts are before the decision-maker. Premature characterisation of one party as potentially more adversely affected than the other could introduce a perceptual bias into the cognitions of the decision-maker, risking a failure to adhere to the fundamental rule of procedural fairness that decision-making be free of bias. Information must,

⁸⁹ Justice Alan Robertson, above n 61, Paragraph 8.

therefore, not be exchanged on the presumption that an *outcome* may be adverse to either party. Where speculative assertions are made by either party regarding facts pertaining to the other party, a decision-maker must carefully consider whether there is substance to those facts. The potential for a person to experience an adverse outcome from a fair process does not require disclosure of documents during the information exchange stage of the process. The perception that a financially adverse outcome is equivalent to a procedurally adverse outcome is just that: a perception.

Conflation of the distinct notions of “*adverse*” *due to an unfair procedure* and “*adverse*” *due to a perception of the impact of the outcome* into a generalised notion of “adverse” could lead an agency to design information disclosure protocols in the name of procedural fairness that are themselves not procedurally fair. Such protocols could see information exchanged for the *sake* of procedural fairness, not *in the service of* procedural fairness.

(2)b. Consider limitations on disclosure:

iii. Legitimate expectations

In considering the boundaries of procedural fairness in changes of assessment, administrators charged with the responsibility of designing information exchange protocols must consider whether the statutory framework creates legitimate expectations regarding the processes that give effect to the statute and whether “the existence of a legitimate expectation may enliven an obligation to extend procedural fairness.”⁹⁰ The existence of “limit interferences” provisions, and the *Privacy Act 1988*, could be argued to create a legitimate expectation that the procedures used in the administration of change of assessment applications, and other processes involving the collection and disclosure of information in

⁹⁰ Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6, cited in Justice Alan Robertson, above n 61, Paragraph 18.

child support matters, would proactively limit interferences with the privacy of persons subject to child support assessment. Most reasonable parties would expect that sensitive personal information would not be shared with ex-partners without express consent.

When the “what is the harm?” test is applied, the expectation of privacy protection is arguably elevated above the expectation of full disclosure. Consider the risks of disclosure and the uses to which information may be put; information provided to a party unnecessarily could be used by that party against the other party for vexatious or abusive purposes. In contrast, consider the relative harm of withholding material from a person who cannot corroborate or challenge the information contained therein. It is clear that the procedures surrounding exchange of information must preference protection of personal information over unnecessary (but superficially “necessary”) disclosure.

(2)c. Nature of the decision-maker and the width of discretion

Where parties have not come to a private arrangement to manage child support matters, participation in the child support system is mediated via the CSP. Parties to a child support assessment have no option other than to appeal to the CSP for a change of assessment when the personal situation of a party is altered. The powers of the CSP and the AAT have the force of law and as such must, therefore, be exercised with restraint and propriety. As a matter of natural justice, procedural fairness thus becomes “prophylactic in character, for which the power of the courts to right a wrong after it has been done is not an adequate substitute,”⁹¹ and provides protection from the government overreach.⁹²

⁹¹ McPherson J.A. in *Queensland Police Credit Union Ltd v Criminal Justice Commission* [2000] 1 Qd R 626. Accessed at: <http://archive.sclqld.org.au/qjudgment/1998/QCA98-233.pdf>.

⁹² Aronson & Groves, above n 56, 407.

The courts are clearly eager to rely upon the rules of natural justice to impose procedural requirements upon the exercise of statutory and other official powers. That enthusiasm is due partly to the immense power of modern government and the role the courts feel they may play in protecting individuals from government action.

Furthermore, the discretion provided to a decision-maker in a change of assessment process to “act on the basis of the reply (if any) to the application and the documents (if any) accompanying it”⁹³ must be undertaken with care and consideration given to the reliability of any information thus provided in response to an application. As Gleeson CJ reasoned in relation to the nature of discretionary powers in *Jarratt v Commissioner of Police for NSW* “the very breadth of the statutory power seems to me to be an argument for, rather than against, a conclusion that it was intended to be exercised fairly.”⁹⁴

Where decision-making powers are conferred by legislation, procedural fairness requires such powers to be exercised fairly. The statutory imperative placed upon the CSP and the AAT to “limit interferences with the privacy of persons” is a key protection for separated parents yet is not fully-integrated into the administrative practices of the agencies. The question of why this remains the case some 29 years after the *CSRC Act* came into effect may be explained as a consequence of administrative convenience.

(2)d. Avoidance of self-interest of an agency in guiding administrative processes: privacy first

As the preceding discussion has demonstrated, the effective application of procedural fairness to child support matters requires a comprehensive reading of the circumstances and nature of each case. In the exchange of information protocol currently employed by the CSP the shorthand approach to procedural

⁹³ *CSA Act*, section 98H(1)(a)(ii)

⁹⁴ Aronson & Groves, above n 56, 504.

fairness represented by the total-disclosure method may provide a degree of convenience for the decision-maker by disguising the need for evaluation of the particular circumstances of a case and thereby reducing the associated administrative burden; however, that convenience should not take precedence over determination of the full requirements of procedural fairness applicable to each case. The function of a public service agency is not to prioritise delivery of administrative efficiency to the agency itself; rather, the function is to deliver services to the public in the most efficient way consistent with the obligations attendant upon the agency. Delivery of services comes at a financial cost to an agency, and the pressures upon public service agencies to minimise costs is significant. Aronson and Groves highlight a central problem faced by the courts (and public service agencies) in determining “fair and appropriate procedures for all circumstances”:⁹⁵

The courts have obvious expertise in adversarial adjudication but traditionally little experience of other forms of decision-making. The Executive may be better placed to explore the range of non-adjudicative procedures and their benefits, but is hampered by its own “self interest” in minimising the procedures it is required to observe.

In terms of the costs associated with the delivery of procedural fairness in child support matters, the avoidance of the requirement to provide administrative processes that “limit interferences with the privacy of persons” to the greatest extent could be seen to be operating in the “self interest” of the CSP. However, paraphrasing Aronson and Groves, it would be undesirable for public sector agencies to prioritise the economic costs of the procedures they are required to employ without also having regard to the economic, moral and social costs of not imposing such procedures.⁹⁶ In child support matters greater regard for the

⁹⁵ Ibid 405.

⁹⁶ Ibid 505.

full range of processes and limitations articulated by Parliament would lead to improved outcomes for the community.

V CONCLUSION

This article has demonstrated that the processes currently employed by the various Commonwealth agencies charged with the administration of child support are not informed by a full reading of the statutory context. The intentions of Parliament with regard to privacy are not adequately reflected in practice; nor are the sophisticated and well-documented requirements for procedural fairness as articulated by the courts.

The modern facility with which information can be turned to ill use, and the desire of separated parents to move peaceably on with their lives *for the benefit of their children*, requires the elevation of privacy in child support administration to a higher level of regard than is currently the case.

Effective administration of child support would be improved by (1) a *comprehensive* review of policy and procedures surrounding the protection, collection and disclosure of personal information and (2) the institution of measures to ensure the compliance of all information collection and disclosure practices with section 4 of the *Child Support (Assessment) Act 1989* and section 3 of the *Child Support (Registration and Collection) Act 1988*. The provisional framework for establishing the boundaries of procedural fairness in child support matters proposed in section four above may be of assistance to such an endeavour. These steps would improve the privacy protections afforded to Australian families and the administration of child support.

The adoption of a “privacy first” approach, as per the intentions of Parliament expressed in child support legislation, would not only facilitate greater attainment of the objects of the child support Acts; such consideration in line

with community expectations would also increase the standing of the Child Support Program and the important position the organization holds within the fabric of Australian society.

“WHEN IS WASTE, WASTE?”

Tim Houweling* and Lyndsay Barrett**

ABSTRACT

*Clean fill and processed materials were never intended to be subject to the levy regime in Western Australia. In *Eclipse Resources Pty Ltd v The State of Western Australia* [No. 4] [2016] WASC 62 (*‘Eclipse’*) (upheld on appeal in *Eclipse Resources Pty Ltd v The Minister for Environment* [No. 2] [2017] WASCA 90) Beech J adopted an expansive interpretation of ‘waste’ whereby the classification of material is determined from its source, irrespective of its later use.*

Under this broad definition, operators who use clean fill and processed materials may be liable to pay a landfill levy, notwithstanding that the material can be subsequently re-processed or re-used. This decision has widespread implications for the recycling sector. Significant concerns are raised for industries that have previously undertaken integrated activity and landfilling on the basis that clean fill and processed materials were not ‘waste’, and are now liable to pay backdated levies and penalties.

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I INTRODUCTION

In Western Australia, the recycling industry is governed by a convoluted statutory regime whereby levies are payable for all ‘waste’ ‘received at landfill premises in the metropolitan region’,¹ and ‘all waste collected within the metropolitan region ... and received at landfill premises outside the metropolitan region from 1 July 2008’.² Under this regime, the Chief Executive Officer of the Department of Water and Environmental Regulation (‘**DWER**’) is entitled to estimate the amount of waste ‘received’ and ‘disposed of to landfill’,³ and may seek to recover unpaid landfill levies.

Urgent reforms are necessary to confirm the legislative intent of the landfill levy and its application. Particularly, by amending the definition of ‘waste’ to ensure that the landfill levy does not apply in respect of clean fill and uncontaminated materials, which are properly regarded as a valuable resource and not ‘waste’.

II WASTE CLASSIFICATION AND THE RECYCLING SECTOR

According to the Environmental Protection and Heritage Council, on November 2009, the recycling and waste sector was valued at between \$7 and \$11.5 billion.⁴ Despite this, waste management strategies are failing to adequately account for Australia’s waste streams. With statistics demonstrating a rapid growth in waste generation in Australia (due to population increases and various other factors), recycling is becoming one of Australia’s fastest growing

¹ *Waste Avoidance and Resource Recovery Levy Regulations 2008* (WA) (‘**Levy Regulations**’) reg 4(1)(a).

² *Ibid* reg 4(1)(b).

³ See, *Waste Avoidance and Resource Recovery Levy Regulations 2008* (WA) reg 11.

⁴ Environmental Protection and Heritage Council, *National Waste Overview 2009* (November 2009) 1 <<http://www.scew.gov.au/system/files/resources/cc88088d-e2a3-449e-9a04-f87f46e3d2e1/files/wastemgt-nat-waste-overview-print-ver-200911.pdf>>.

industries. In Australia, ‘waste generation, resource recovery and landfill’ are comprised of four major waste streams: construction and demolition waste (**‘C&D waste’**); commercial and industrial waste (**‘C&I waste’**); municipal solid waste; and hazardous waste. In addition to this, DWER extends the definition of ‘waste’ to include clean fill that is no longer required.⁵

A Waste Diverted to Landfill

In recent times there have been significant increases in the amount of waste generated in Australia. The current rate of waste generation is increasing at an average rate of 4.5% per annum. Of the 5,247,000 tonnes of waste generated in Western Australia during this period, approximately 3,539,000 tonnes of waste disposed of to landfill, while only 33% of waste (or 1,700,000 tonnes) was recycled.⁶ Between 2006-2007 Western Australia recorded the lowest waste recycling percentages across all Australian jurisdictions. Other States are performing significantly better, with the Australian Capital Territory recycling approximately 75% of waste, South Australia 66%, Victoria 62% and New South Wales diverting 52% of waste from landfill.⁷ Recycling is thus a major waste management strategy in diverting waste from landfill.⁸

The Australian Government Department of Sustainability, Environment, Water, Population and Communities has identified a growing commercial drive for ‘business and industry to invest in activities that will create profit and improve environmental outcomes by extracting valuable resources from the C&D waste stream’. This involves the ability to turn unwanted or surplus material into

⁵ Environmental Protection and Heritage Council, *National Waste Overview 2009* (November 2009) 2 <http://www.scew.gov.au/system/files/resources/cc88088d-e2a3-449e-9a04f87f46e3d2e1/files/wastemgt-nat-waste-overview-print-ver-200911.pdf>>.

⁶ Ibid 2.

⁷ Ibid 2.

⁸ Ibid 1.

‘valuable resources to supply the construction industry, which has traditionally been adverse to behavioural change’.⁹

B *Recycling Targets*

In the blueprint the *Western Australian Waste Strategy: Creating the Right Environment*,¹⁰ the State is endeavoring to divert 75% of construction and demolition waste from landfill by 2020. Notwithstanding this, in March 2016 Environmental Minister Albert Jacob observed that ‘Western Australia's use of recycled construction and demolition materials is significantly lower than in other States and we need to change this’ and further that ‘each year we generate three million tonnes of construction and demolition and WA sends two million tonnes to landfill. This is a valuable resource that we could be using in everyday construction projects’.¹¹ Urgent reforms are required to give effect to the purpose of the levy regime and objects of the landfill levy.

The purpose of the levy is to reduce the amount of material diverted to landfill by encouraging recycling and re-use.¹² The current construction of the levy regime set out in *Eclipse*, undermines this intent by imposing liability on operators that re-use and recycle clean fill and uncontaminated material. As a consequence, industries are actively discouraged from recycling material and instead resort to disposing of material at licensed landfill facilities, to avoid liability for significant levies.

III *ECLIPSE* DECISION

⁹ Australian Government Department of Sustainability, Environment, Water, Population and Communities, *Construction and Demolition Waste Guide – Recycling and Re-use Across the Supply Chain* (2012) 4 <<http://www.environment.gov.au/system/files/resources/b0ac5ce4-4253-4d2b-b001-0becf84b52b8/files/case-studies.pdf>>.

¹⁰ Waste Authority WA, *Western Australian Waste Strategy: Creating the Right Environment* (March 2012).

¹¹ Government of Western Australia, ‘\$10m for councils to recycle construction waste’ (10 March 2016) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2016/03/10m-for-councils-to-recycle-construction-waste.aspx>>.

¹² See, *Eclipse* [562], [613].

On 9 March 2016, Beech J determined that the definition of ‘waste’ extends to clean fill and processed material that is surplus to the needs of the owner.¹³ The activities undertaken by the plaintiff, Eclipse Resources Pty Ltd (**‘Eclipse’**) included compacting and depositing various materials (such as clean fill and processed materials) into voids during 1 July 2008 and 30 September 2014. In the first instance, Eclipse submitted that it was not liable to pay a waste levy on any of its three sites on the basis that:¹⁴

1. the materials accepted at the sites were not ‘waste’ under category 63 of the *Environmental Protection Regulations 1987* (WA) (**‘EP Regulations’**) and the Levy Regulations;
2. if they were, Eclipse did not accept them for burial; and
3. the materials that were deposited and compacted in the void were not waste. Rather they are ‘a resource from which, through processing, re-use or recycling ... can produce resalable or reusable commodities’.¹⁵

Justice Beech ultimately determined that Eclipse had ‘received waste’ and ‘accepted waste for burial’, and ordered Eclipse to pay backdated landfill levies and penalties of approximately \$21.5 million in respect of its resource recovery operations.

A When Does Material Become ‘Waste’?

A significant development for recovery operators was Beech J’s expansive interpretation of ‘waste’ and the levy regime. His Honour confirmed that material is ‘waste’ when it is ‘unwanted by or excess to the needs of the source

¹³ See, *Eclipse Resources Pty Ltd v The Minister for Environment* [No. 2] [2017] WASCA 90.

¹⁴ *Eclipse* [3].

¹⁵ *Ibid* [54].

of that material', irrespective of its later use.¹⁶ Under this classification, it is irrelevant whether the material is capable of being subsequently recycled and sold for commercial value. Consequently, material remains the status of 'waste' even if the supplier can establish a demand to re-sell the product to a third party such as a property developer.

B First Instance Decision

In determining that the material received and accepted at the sites was 'waste received' and 'waste accepted for burial', primary judge Beech J made the following observations in respect of the levy regime:¹⁷

1. in the context of 'waste received' and 'waste accepted for burial', 'waste' is any material that is unwanted by or excess to the needs of the source of that material.
2. clean fill, including sand and soil, and what Eclipse calls Natural Earth Material, received from a source for whom they are unwanted, are waste.
3. material that is received with the intention that it will be or is likely to be put into the ground and buried is 'accepted for burial'.
4. that applies equally to sand and soil.
5. in the context of 'waste disposed of to landfill', whether material is waste is not determined by reference to whether it is excess to the requirements of the licensee who is said to be disposing of it. Material that was waste when received will be waste in this context, unless, (perhaps) it has been substantially transformed.

¹⁶ Ibid, [560], [627], [630].

¹⁷ Ibid [627].

6. any material, including sand or soil, clean fill or what Eclipse calls Natural Earth Material, that is placed into the ground and buried at a licensed landfill is 'waste disposed of to landfill'.
7. the intention with which material is buried does not control or influence whether material is 'waste disposed of to landfill'.

His Honour Beech J rejected Eclipse's construction of the levy regime and held that the material received by Eclipse at the three sites during the relevant period was 'waste accepted for burial'¹⁸ and that at all relevant times Eclipse's sites were category 63 prescribed premises,¹⁹ within the meaning of the Levy Regulations.²⁰ Eclipse ceased operations and faces threat of liquidation as a result of its liability for unpaid levies.²¹

C Appeal

In *Eclipse Resources Pty Ltd v The Minister for Environment [No. 2]* [2017] WASCA 90 Eclipse unsuccessfully appealed His Honour's decision on the following grounds:²²

1. in determining whether 'waste' 'is accepted for burial'²³, the purpose for which the material is accepted must be taken into account;
2. the material used by Eclipse to fill the voids on its sites does not constitute 'waste disposed of to landfill';

¹⁸ Ibid [629]-[630].

¹⁹ Within the meaning of Schedule 1 to the EP Regulations.

²⁰ *Eclipse* [10].

²¹ On 1 July 2016, the Supreme Court of Appeal (Buss and Newnes JJA) dismissed an application by Eclipse for orders suspending judgment pending the outcome of the appeal. See, *Eclipse Resources Pty Ltd v Minister for Environment* [2016] WASCA 110.

²² *Eclipse Resources Pty Ltd v The Minister for Environment [No 2]* [2017] WASC 90 [111]-[116].

²³ Under Category 63 in Schedule 1 to the EP Regulations

3. the CEO's estimates were invalid because the CEO did not discriminate between the material measured; and
4. the tax imposed on Eclipse constituted an excise under section 90 of the *Commonwealth of Australia Constitution Act* (1900) (Cth) and was therefore invalid.

The Supreme Court of Appeal dismissed the appeal on all four grounds and ordered Eclipse to pay backdated levies and penalties from 1 July 2008 and 30 September 2014.²⁴ On 14 September 2017 Eclipse was refused special leave to appeal to the High Court of Australia.²⁵ As a consequence, Eclipse is now liable to pay backdated levies in excess of \$20million.

IV DISTINGUISHING *ECLIPSE*

It has been argued that *Eclipse* is distinguishable on the following grounds:

1. type of material – His Honour Beech J found that Eclipse accepted a variety of materials at its sites, including: motor vehicle tyres; glass; plasterboard; corrugated metal sheeting; bicycles; plastic; carpet; acid sulfate soils; wrapped asbestos; material containing asbestos; and other unwanted materials.²⁶ This provides a basis to distinguish processed materials such as C&D material.
2. material undergoes a 'substantial transformation' – Applying Beech J's construction of the levy regime, material may cease to have the character

²⁴ *Eclipse Resources Pty Ltd v The Minister for Environment* [No. 2] [2017] WASCA 90, 9 [1].

²⁵ See, *Eclipse Resources Pty Ltd v The State of Western Australia & Ors* (P22/2017) [2017]

HCASL 234. See also, High Court of Australia, 'Results of Applications Listed for Determination' (Melbourne, 14 September 2017)

<<http://www.hcourt.gov.au/assets/registry/special-leave-results/2017/14-09-2017Determin.pdf>>

²⁶ See especially, *Eclipse* [91]-[99].

of ‘waste’ it undergoes a ‘substantial transformation’.²⁷ In other words, operators who screen and process waste stream materials (such as C&D material) for re-sale or re-use, can potentially change the nature of the material so that it is no longer ‘waste accepted for burial’ and ‘disposed of to landfill’.

3. monetary value – In *Eclipse* Beech J was ‘not satisfied that the materials received ... at the Sites during the Relevant Period were saleable’.²⁸ There is scope to distinguish *Eclipse* in circumstances where operators are paid to accept materials and/or have the potential to re-sell the surplus materials. This includes, for example, reprocessing C&D material for re-use as road aggregate and building materials, so that it attributes commercial value.

Justice Beech accepted that a relevant consideration is whether the materials received by the plaintiff were ‘a valuable commodity or article of commerce’.²⁹ Oddly, clean fill was not regarded as a valuable commodity. This is because the construction adopted by Beech J requires the classification of material to be determined from ‘the perspective of the person who is the source of the material, not from the perspective of the party receiving or accepting it’.³⁰ As a result of the Supreme Court of Appeal decision, it is now increasingly difficult to distinguish *Eclipse*. This further reinforces the urgent need to reform the levy regime.

²⁷ Ibid [613]

²⁸ Ibid [734].

²⁹ Ibid [734].

³⁰ Ibid [560]. According to Beech J, reg 5(1)(a) of the Levy Regulations reveals a clear intention that uncontaminated soil or other clean fill received at premises is waste’ (at [577]).

V STATUTORY FRAMEWORK

In Australia, management of waste is governed by each of the States and Territories through their respective environmental regulations and policies. The landfill levy was introduced in Western Australia in 1998 under the *Environmental Protection (Landfill) Levy Act 1998 (WA)*,³¹ to encourage recycling and divert waste from landfill, and is imposed under the Levy Regulations.³² According to the Department of Environment Regulation ('DER') (as it then was), '[t]he landfill levy is intended to discourage waste disposal to landfill and to encourage resource recovery'³³ by:³⁴

1. acting as an economic instrument to reduce waste to landfill by increasing the cost of landfill disposal; and
2. generating funds for a range of environmental purposes.

A Operation of the Levy Regime

Under the *Waste Avoidance and Resource Recovery Levy Act 2007 (WA)* ('**Levy Act**') and the Levy Regulations, a levy is payable to the Minister for the collection and receipt of waste at landfills.³⁵ The Levy Regulations, subject to

³¹ See, Municipal Waste Advisory Council, 'WALGA Background Paper Landfill Levy' (February 2012) 10 <[http://www.wastenet.net.au/Assets/Documents/Content/Information/Background_Paper_L
_Final_amended_March_2012.pdf](http://www.wastenet.net.au/Assets/Documents/Content/Information/Background_Paper_L Levy_Final_amended_March_2012.pdf)>.

³² Made pursuant to the *Waste Avoidance and Resource Recovery Act 2007 (WA)* ('**WARR Act**') and the *Waste Avoidance and Resource Recovery Levy Act 2007 (WA)* ('**Levy Act**'). See *Eclipse* at [445]-[446].

³³ Department of Environment Regulation, 'Exemptions from the Landfill Levy', Landfill Levy Fact Sheet 2 <<https://www.der.wa.gov.au/images/documents/your-environment/waste/landfill-levy/fs-exemptions-from-the-landfill-levy-for-asbestos-containing-material.pdf>>.

³⁴ Department of Environment Regulation, Review of Waste Avoidance and Resource Recovery Act 2007 Discussion Paper (1 December 2014) 9. See also WARR Act and Waste Authority WA, 'Levy' <<http://www.wasteauthority.wa.gov.au/about/levy/>>.

³⁵ A levy is payable in respect of waste received at 'disposal premises'. See especially, Levy Act s 4(1), s 5, s 3 and Levy Regulations reg 4.

certain exemptions under regulation 5, apply to all waste received at metropolitan landfills and metropolitan waste received at landfills outside the metropolitan area.³⁶ Section 4 of the Levy Act establishes the power to prescribe an amount by way of a levy that is to be payable in respect of ‘waste’ ‘received’ at ‘disposal premises’.³⁷ ‘Disposal Premises’ is defined in section 3 of the Levy Act to mean premises:

- (a) which are used for the purpose of receiving waste; and
- (b) in respect of which the occupier is required to hold a licence [under section 56 of the *Environmental Protection Act 1986* (WA) (**‘EP Act’**)], whether or not such a licence is in force.³⁸

The primary purpose of the landfill levy, as stated in the Second Reading Speech to the Waste Avoidance and Resource Recovery Bill 2007 is:³⁹

... to provide resources to fund projects for advancing waste reduction and recycling... In many respects, the arrangements for the levy and account continue unchanged. However, they have also been updated....Levy funds are to be used only for purposes provided for in the legislation. Specifically, the funds will be applied to programs relating to the management, reduction, reuse, recycling and monitoring of waste. The funds could be used by DEC [Department of Environment Conservation (now DWER)] only for administration of the account and developing or coordinating the implementation of programs consistent with the purposes of the legislation. The levy is not to be used to fund other normal ongoing operations of DEC.

³⁶ Levy Regulations reg 4.

³⁷ See also, *Eclipse* [449]-[450].

³⁸ For a further discussion of the legislative framework see *Eclipse* [444]-[518].

³⁹ Waste Avoidance and Resource Recovery Bill 2007, Second Reading Speech, 7.

B Levy Liability For ‘Prescribed Premises’

The EP Act makes it an offence for an occupier⁴⁰ to carry out work, or cause an emission or discharge on premises that is prescribed, unless done so in accordance with a works approval, a notice (such as a closure notice or an environmental protection notice) or a licence.⁴¹ The categories of ‘prescribed premises’ are specified in Schedule 1 of the EP Regulations.⁴² This includes, relevantly, a category 63 (Class I inert landfill site) on which more than 500 tonnes of ‘waste is ‘accepted for burial’ each year.’⁴³

C Landfill Levy Rates

The *Waste Avoidance and Resource Recovery Act 2007* (WA) (**‘WARR Act’**) and the *Waste Avoidance and Resource Recovery Regulations 2008* (WA) (**‘WARR Regulations’**) provides for when a levy is payable and in what manner.⁴⁴ Landfill levy rates were increased from January 2015 in an attempt by the Western Australian government to ‘help divert the amount of waste being dumped at tips in the metropolitan area and encourage investment in alternative waste treatment options and other government initiatives to support increased recycling’.⁴⁵ The objects of the WARR Act include ‘promoting the most

⁴⁰ See EP Act s 6. ‘The person liable to pay the landfill levy is the holder of a licence in respect of disposal premises ... or occupier required under the EP Act to hold such licence’.

⁴¹ EP Act Part V ss 52, 53, 56.

⁴² EP Regulations reg 5. See also EP Regulations Schedule 1.

⁴³ EP Regulations schedule 1.

⁴⁴ See WARR Act s 73.

⁴⁵ Department of Environment Regulation, <<https://www.der.wa.gov.au/about-us/media-statements/112-landfill-levy-rates-to-rise-from-january-2015>>.

efficient use of resources, including resource recovery and waste avoidance; and reducing environmental harm, including pollution through waste'.⁴⁶

D Exemptions

The levy exemptions in regulation 5 of the Levy Regulations apply in a limited range of circumstances. Relevantly, regulation 5(1)(b) of the Levy Regulations provides an exemption for 'waste that is not disposed of to landfill but is collected and stored at a licensed landfill for reuse, reprocessing, recycling or use in energy recovery'. The Chief Executive Officer has a broad discretion to grant or refuse to grant an exemption, grant an exemption subject to conditions, or limited to circumstances, specified in the notice; or revoke an exemption.⁴⁷

The commercial risk is that should DWER determine that the activity does not constitute an exempt activity, it follows that a landfill levy is payable. There is no basis then to argue that the material does not constitute 'waste'. Similarly, the exemption under regulation 5(3) provides that licensee of a category 63 licensed landfill may by application in an approved form claim an exemption from the requirements of regulation 10(5) and (6) in respect of a return period if no 'waste' has been disposed of landfill on the licensed landfill. The DER adopts a broad definition of the term 'waste' than previously had been thought would be caught by the Levy Regulations.

E Backdated Levies

If an occupier is found to have received waste and accepted waste for burial, they may be liable to pay backdated levies for the return periods, as well as penalties for contravening the levy requirements under the Levy Act and Levy Regulations. For the return period, the Chief Executive Officer may make

⁴⁶ WARR Act s 5(1).

⁴⁷ Levy Regulations reg 5(4).

estimations under regulation 11(2) of the Levy Regulations based on the volume of 'waste disposed of to landfill'. Section 76 of the WARR Act imposes a penalty of 20% per annum on unpaid levies, calculated from the time the levy becomes payable.

VI MEANING OF 'WASTE'

Liability under the levy regime depends on a fundamental question of whether 'waste' is accepted for burial and disposed of to landfill.⁴⁸ One of the most controversial aspects of the levy regime is the construction of the term 'waste'. Section 3 of the EPA and the WARR Act defines 'waste' as:

1. whether liquid, solid, gaseous or radioactive and whether useful or useless, which is discharged into the environment; or
2. prescribed by the regulations to be waste.

Section 44 of the *Interpretation Act 1984* (WA) requires that expressions used in the regulations are, unless the contrary intention appears, to have the same meaning as in the Act. In another words, if the term 'waste' is defined in the Waste Recovery Act, the same definition should apply under the Waste Recovery Regulations. However, the Levy Act and Levy Regulations do not define the word 'waste'.

There is a long line of cases stating that the correct approach to statutory interpretation requires that the words of a statutory definition be given their ordinary meaning unless the contrary is clearly intended.⁴⁹ The ordinary

⁴⁸ See, Levy Regulations reg 4, reg 10-12. See also, *Eclipse* [514]-[518] and Levy Act ss 4-6.

⁴⁹ See, eg *Coast Ward Ratepayers Association (Inc) v Town of Cambridge* [2016] WASC 239 [56]; *Kennedy Cleaning Services Pty Limited v Petkoska* (2000) CLR 286, [53] (Gaudron J),

meaning of ‘waste’ is broad and is capable of numerous meanings. The Macquarie Dictionary lists a large number of possible meanings, including:

1. anything left over or superfluous, as excess material. By-products etc not of use for the work in hand;
2. anything unused, unproductive or not properly utilised;
3. not used or in use;
4. left over or superfluous;
5. having served a purpose and no longer of use;
6. rejected as useless or worthless, or refuse;
7. relating to material unused by or unusable to the organism.

Section 18 of the Interpretation Act provides that a construction that is consistent with the purpose of the statute is to be preferred over one that is not. The proper approach to construing the term waste is that set out in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. There, the High Court observed that:

The duty of the court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, the meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.⁵⁰

⁵⁰ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [78].

The explanatory notes to the Waste Avoidance and Resource Recovery Levy Bill 2007 states:

[Section 4] enables the making of regulations to impose a levy on waste received at disposal premises. **It is intended that the levy be imposed on waste going to landfill and not on recycled materials** (emphasis added).

This note distinguishes waste from usable materials and recyclable materials. The primary purpose of the landfill levy is to provide resources to fund projects for advancing waste reduction and recycling, by encouraging recycling and re-use. The purpose is not to generate revenue, nor to deter operators from recycling and re-using materials. Taking into account the purpose of the legislation, as required by section 18 of the Interpretation Act, it is clear that ‘waste’ was never intended to extend to valuable resources such as clean fill and C&D material. Applying these principles, the term ‘waste’ should be read in light of legislative purpose by rewarding licensed landfills or premises for recycling materials that do not present environmental harm.

VII WASTE CLASSIFICATION AND ITS IMPACT ON INDUSTRY

Under the Supreme Court of Appeal’s expansive interpretation of ‘waste’, industries are liable to pay a landfill levy for material that is excess to operational requirements, irrespective of whether the material can be processed, re-used or recycled at a later date. In other words, if the material is surplus to the needs of the original owner, use of that material may fall within the levy regime if it is ‘received’ or ‘accepted for burial’ at a disposal premises.⁵¹ Businesses that receive and deposit clean fill into a quarry or void for environmental rehabilitation purposes will be caught by the levy regime.

⁵¹ See, Levy Act ss 3-4.

A Valuable Resources Are 'Waste'

Adopting this broad definition of 'waste', it is irrelevant whether the material has a commercial value. This is inconsistent with the ordinary meaning of the word waste which refers to something that is disused and unwanted. DWER adopts a similar approach to clean fill and construction and demolition material that used for rehabilitation and environmental remediation purposes. *Eclipse* is being applied as authority for the proposition that clean fill is 'waste', and therefore attracts a landfill levy. This results in an absurd position that effectively undermines the Western Australian Government's attempts to promote recycling. Curiously, 'limited evidence has been presented that the landfill levy is directly effective as a disincentive for landfill or as a way to take account of the full environment and/or social costs for landfill'.⁵² As noted by the Municipal Waste Advisory Council in its *WALGA Background Paper Landfill Levy* observed that in Western Australia, '[t]he effect of the Levy increase, without the accompanying investment in waste management, has had a negative impact in relation to waste diversion activities'.⁵³

DER (as it then was) has applied *Eclipse* as a basis for recovering a landfill levy from sites within the Metropolitan Region that deposit more than 500 tonnes of clean fill per annum, since 1 July 2008. The occupier in that instance is alleged to have contravened the EP Act and EP Regulations, and may be assessed for unpaid levies. The levy regime was never intended to extend to materials that are a valuable commodity (such as those which have the potential to be used in building and construction, as road aggregate, or for use in environmental

⁵² Municipal Waste Advisory Council, 'WALGA Background Paper Landfill Levy' (February 2012) 13
<[http://www.wastenet.net.au/Assets/Documents/Content/Information/Background_Paper_L
_Final_amended_March_2012.pdf](http://www.wastenet.net.au/Assets/Documents/Content/Information/Background_Paper_L Levy_Final_amended_March_2012.pdf)>.

⁵³ Ibid.

rehabilitation and remediation). Rather, its purpose was to increase recycling and recovery in Western Australia,⁵⁴ and ‘provide resources to fund projects for advancing waste reduction and recycling’.⁵⁵

The broad interpretation of ‘waste’ in *Eclipse* has widespread implications for recovery and construction and demolition industries, as well as developers. Eclipse identified a number of unintended consequences arising from the broad construction of ‘waste’, such as the potential for property developers who accept or purchase clean fill or sand (in order to build up the levels of land to use as fill for earthworks to raise soil levels for subdivision and development) to become a licensed landfill.⁵⁶

B *Clean Fill*

Traditionally clean fill has been accepted by landfill operators without charge, being regarded as ‘an integral part of landfill operations’.⁵⁷ Under the current waste regime, clean fill is classified as ‘waste’ notwithstanding that there is a demand for clean fill for use in rehabilitation and environmental remediation. Clean fill is also commercially valuable to satisfy obligations under a development approval, whereby it is common to include a condition for environmental remediation of the subject land.⁵⁸ Notwithstanding that there is a supply and demand for clean fill (and it therefore has a commercial value), DWER insists on the position that clean fill is ‘waste’ to which a landfill levy applies.

⁵⁴ See, Waste Avoidance and Resource Recovery Amendment (Validation) Bill 2014, Second Reading Speech, 2-3.

⁵⁵ Waste Avoidance and Resource Recovery Bill 2007, Second Reading Speech, 7.

⁵⁶ Eclipse [572].

⁵⁷ Resource Recovery News, ‘Eclipse Loses Final Appeal Over Levy Challenge’ (14 July 2016) <<http://www.resourcerecovery.biz/news/eclipse-loses-final-appeal-over-levy-challenge>>.

⁵⁸ See, Eclipse [728].

The position adopted by DER (now DWER), and subsequently confirmed in *Eclipse*, is that a levy is payable by persons who deposit material into the ground. As an analogy, if clean fill is used for construction and residential purposes (such as the foundation for a residential dwelling) then it is not waste. However, if the same fill is deposited into the ground for rehabilitation purposes, it attributes the status of 'waste', and attracts payment of a landfill levy. This interpretation is inconsistent with ordinary definition of waste, which refers to something that is unwanted. The result is an absurdity in the legislation where valuable resources are characterised as 'waste' if they are surplus to the requirements of the original owner.

C Construction and Demolition ('C&D') Material

Under the current licencing regime, operators are required to obtain a licence if they intend to 'receive' and 'accept waste for burial'. This applies even in situations where C&D material undergoes processing and screening prior to being deposited as fill. C&D waste stream recovery operators are processing and screening material for re-use and recycling. However, under the current regulatory system, they are being subject to liability to pay a landfill levy. Business are faced with little, if any, incentive to go through the extensive and costly process of recycling material, with little certainty that they will be rewarded for their efforts. Or worse, they may be effectively punished for their efforts by subsequently being faced with levy liability.

As a consequence, businesses are more inclined to simply dispose of material to approved landfill facilities for a tipping fee, rather than risk a significant pecuniary penalty and commercial loss at a later date. DWER is assessing licence applications on a case by case basis, and there is little certainty that operators will be rewarded for the time and finance incurred with screening and processing C&D material or other waste streams for re-use and re-sale. In

practical terms, operators are required to refrain from undertaking any landfilling or integrated activities while DWER makes a determination about whether a category 63 licence is required. This is causing extensive delays in obtaining necessary licencing to carry out operations, while recovery operators have extensive capital tied up in inventory.

By assessing licence applications on a case-by-case basis, DWER maintains a broad discretion to approve or refuse licence applications. Due to what appears to be an inconsistent application of the licencing regime, certain operators are purporting to overcome the levy requirements by transporting materials outside of the metropolitan area, to rural landfill sites, thus subverting the purpose of the legislative framework.

VIII THE FUTURE OF THE AUSTRALIAN RECYCLING INDUSTRY

Clean fill and uncontaminated material were never intended to be caught by the levy regime in Western Australia. Legislative amendment and administrative changes need to be implemented by DWER to clarify the scope of the landfill levy regime, and to promote recycling. On 8 August 2016 an article was published in *The West Australian* entitled 'Landfill levy surge fails to aid recycling'. There it was reported that of Western Australian Government's target to recycle 60% of all C&D waste, only 42% of C&D waste was diverted from landfill.⁵⁹ Western Australia has fallen short of its recycling targets that were forecasted in the *West Australian Waste Strategy: Creating the Right Environment*, notwithstanding the significant increase in landfill levy payment

⁵⁹ Daniel Mercer, 'Landfill levy surge fails to aid recycling' *The West Australian* (8 August 2016) <<https://au.news.yahoo.com/thewest/wa/a/32262872/landfill-levy-surge-fails-to-aid-recycling/#page1>>.

since 2009.⁶⁰

Reforms are necessary to amend the licencing regime, taking into account the type of material used, its value, and the activity for which the material is being used. Broadly speaking, this requires two elements:

1. the definition of 'waste' should be afforded its natural meaning of materials that are unwanted and discarded (and expressly exclude clean fill and uncontaminated material); and
2. activities that facilitate environmental rehabilitation and remediation should be excluded from the requirement to obtain a licence.

A Amending The Definition Of 'Waste'

Firstly, and arguably most importantly, it is essential to amend the definition of 'waste' in the EP Act and the WARR Act so that it is given its ordinary meaning of unwanted or excess material.⁶¹ Under that definition, uncontaminated fill and clean fill should be regarded not as 'waste', but as a valuable resource for use in recycling, reprocessing and rehabilitation. Similarly, then the meaning of 'prescribed premises' in the EP Regulations should be re-classified so that operators are not required to pay a levy if they are using clean, uncontaminated material.

B Drafting Proposals

In 2016 proposals in respect of the classification of 'prescribed premises' were submitted to Parliamentary Council's Office for drafting. According to former Director General of DER (now DWER), Mr Jason Banks:

⁶⁰ For some categories of waste, the landfill levy has increased 800 per cent since 2009. See, Daniel Mercer, 'Landfill levy surge fails to aid recycling' *The West Australian* (8 August 2016) <<https://au.news.yahoo.com/thewest/wa/a/32262872/landfill-levy-surge-fails-to-aid-recycling/#page1>>.

⁶¹ See, *Eclipse* [557]-[558].

the proposed amendments will seek to revise the description of a prescribed premises category 63 (class I inert landfill) to allow the use of uncontaminated fill and clean fill for development without being subject to the licensing provisions in Part V of the EPA or the landfill levy.

Urgent action is required by industry to implement these proposals into the EP Regulations. If the proposed changes are made to the legislation, DWER will be required to revise its waste framework in a prompt manner to avoid persons being unjustly prejudiced as a consequence of the DWER's reliance on *Eclipse*. These proposals represent a step in the right direction for Western Australian recycling operations, but do not fully realise the purpose of the levy regime. Additional amendments are required to re-define 'waste' and re-classify the meaning of 'waste derived materials'.

C Re-Classifying Waste Derived Materials

One of the recommendations suggested by the Waste Management Association of Australia ('WMAA') in its submissions to DER (now DWER) Guidance Statement: Regulating the Use of Waste Derived Materials was '[t]hat [DWER] give consideration to classifying waste derived material, that is compliant with the relevant Guidelines, as a 'product' [as opposed to 'waste']'.⁶² In addition, the WMAA argued that a clear statement as to the benefits of a material no longer being classified as a waste needs to be developed into DWER's material guidelines. A further advantage of the 'product' classification, as noted by WMAA, is that the material would be brought under regulation of the Australian Consumer Law.⁶³ If the levy regime is not amended to provide certainty about

⁶² Waste Management Association of Australia Submission on the Department of Environment Regulation Guidance Statement: Regulating the Use of Waste Derived Materials <<https://www.der.wa.gov.au/images/documents/our-work/consultation/submissions/eow/waste-management-association-of-australia-submission.pdf>>.

⁶³ Ibid.

the materials and its use, recovery operators may be disinclined to engage in recycling.⁶⁴

D State Grants To Recovery Operators

Economic funding is required to promote recycling and achieve the desired outcomes of diverting waste from landfill. A suggested reform is for the Western Australian Government to provide economic grants to recovery operators and businesses that engage in re-use and recycling activities. This can be achieved by directing funds from the landfill levy into recycling facilities and operations. The State has received approximately \$187 million in levies and penalties since the commencement of the Levy Regulations in July 2008, and is estimated to receive further \$104 million in 2015-2016.⁶⁵ The WARR Act requires that at least 25% of the forecast levy amount in each year be allocated by the Minister for Environment to the WARR Account.⁶⁶ The WARR Act requires funds from the levy collection to be applied to ‘fund programmes relating to the management, reduction, reuse, recycling, monitoring or measurement of waste’.⁶⁷ Funds from the landfill levy are currently being used to fund programs supporting the Waste Strategy through the Business Plan⁶⁸ together with operations of the Waste Authority and the implementation of the WARR and WARR Levy Acts and Regulations.⁶⁹ The balance of funds from the landfill levy are not directly funding recycling, but are being attributed to purposes such as: supporting the Waste Strategy through the Business Plan;

⁶⁴ Ibid.

⁶⁵ Waste Avoidance and Resource Recovery Amendment (Validation) Bill 2014, Second Reading Speech, 3.

⁶⁶ WARR Act Part 7, Division 2, especially s 79(2) and s 79(3B).

⁶⁷ WARR Act s 80(1)(a) and s 80(1)(d).

⁶⁸ Ibid s 80.

⁶⁹ Ibid s 80(1).

supporting operations of the Waste Authority; and the implementation of the WARR Act and the Levy Act, and regulations.⁷⁰

In March 2016 former Environmental Minister Hon. Albert Jacob MLA announced that '[u]p to \$10 million in State Government funding is now available for local councils to use recycled construction and demolition waste in their civil engineering projects such as building roads, car parks and drains'.⁷¹ Similar grants should be made to private enterprises in the recycling sector to provide an incentive to increase recycling and recovery and divert waste from landfill. This is consistent with the purpose of the levy to promote recovery of valuable resources and 'significantly increase the recycling rate in Western Australia'.⁷²

IV CONCLUDING REMARKS

The purpose of the licencing regime is to reduce the volume of material diverted to landfill, by encouraging recycling and re-use.⁷³ There is no direct evidence that high landfill levies have a correlation with high levels of recycling. Rather, the increased levy rate in Western Australia has been counterproductive in encouraging resource recovery⁷⁴ and is discouraging industries from using processed and uncontaminated materials.⁷⁵ Uncertainty has arisen as to when

⁷⁰ Waste Authority WA, 'Levy' <<http://www.wasteauthority.wa.gov.au/about/levy/>>.

⁷¹ See, Government of Western Australia '\$10m for councils to recycle construction waste' (10 March 2016) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2016/03/10m-for-councils-to-recycle-construction-waste.aspx>>

⁷² Waste Avoidance and Resource Recovery Amendment (Validation) Bill 2014, Second Reading Speech, 2-3.

⁷³ See *Eclipse* [562], [613].

⁷⁴ Municipal Waste Advisory Council, 'WALGA Background Paper Landfill Levy' (February 2012) 15 <http://www.wastenet.net.au/Assets/Documents/Content/Information/Background_Paper_Levy_Final_amended_March_2012.pdf>.

⁷⁵ Municipal Waste Advisory Council, 'WALGA Background Paper Landfill Levy' (February 2012) 15

materials are properly regarded as 'waste'. Amending the definition of 'prescribed premises' in category 63 to remove uncontaminated and clean fill from the licensing regime presents a positive step forward for industry. To give effect to the purpose of the EP Act, the definition of 'waste' requires amendment so that it expressly excludes clean fill and other uncontaminated material. 'Waste' should be afforded its ordinary meaning so that material that has a commercial value does not attract payment of a landfill levy. The Western Australian recycling industry must make clear that these amendments are urgently required.

SHOULD INTEREST RATES BE REGULATED OR ABOLISHED?

THE CASE FOR THE ABOLITION OF USURY

JOANNE LEE*

ABSTRACT:

This article makes the normative case against usury, defined in the article as any interest on a loan. It argues that usury legitimises bondage of the borrower to the lender through debt. Based on this radicalised understanding of usury, it is further argued that usury facilitates debt accumulation, as well as fosters irresponsible lending and borrowing. It considers the counter-arguments of moral hazard, adverse selection and efficiency, concluding that it remains that the better view is that usury should be prohibited altogether. The article proposes a law to criminalise usury, as well as critically examining this proposed law and its rationale.

I INTRODUCTION

Usury has historically been defined as any interest on a loan, not just excessive interest on a loan. Usury was absolutely prohibited in Medieval Europe, on the grounds that it was morally wrong.¹ However, as Europe transformed from an agrarian to a commercial economy, usury became increasingly seen as a necessity, and viewed as unacceptable only when in excess, rather than being

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¹ JM Ackerman, 'Interest Rates and the Law: A History of Usury' (1981) 27 *Arizona State Law Journal* 61, 72-77.

morally wrong *per se*.² As such, the role of usury law gradually evolved from one based on morality, to one which serves mainly economic purposes. Modern usury law in the West serves a regulatory and disclosure function,³ reflecting the modern conception of usury as an economic rather than moral issue.

The debate on interest in the modern Western world is concerned with the best interest rate for all the parties, one which both borrowers and lenders are willing to accept, reflects a tension between the interests of consumer protection, and the profitability of lenders.⁴ Therein lays the age-old tension between debtors and creditors. However, with loans being made a commodity to profit out of, this tension is heightened as debtors seek to borrow at the most affordable available rate, and creditors seek the rate which optimises their profits, all while diminishing the ability of debtors to repay loans.⁵

This article will be divided into two parts. The first part will make the normative case against usury, applicable to both personal and commercial lending. This is because the case made in this article will be against the essence of usury itself which is the same in both personal and commercial lending, rather than the ways in which the charging of usury is practiced, which are different in personal and commercial lending.

It will begin by examining the philosophical underpinnings and relationship between usury, credit and debt, and argue that debt confers bondage to the borrower. This bondage to debt facilitates long-term debt accumulation, leading to the ever-increasing credit spiral in the economy. As such, this encourages irresponsible lending and borrowing in which loans are taken out even when

² Ackerman, above n1, 77-79; John T Noonan, *The Scholastic Analysis of Usury* (Harvard University Press, 1957).

³ Ackerman, above n1, 101.

⁴ Iain Ramsay, 'To heap distress upon distress?' Comparative reflections on interest-rate ceilings' (2010) 60(2) *University of Toronto Law Journal* 707, 729.

⁵ Banks et al., 'In a perfect world it would be great if they didn't exist': How Australians experience payday loans' (2015) 24 *International Journal of Social Welfare* 37.

they cannot be repaid in full owing to the profits from such indebtedness which usury provides.

The second part of the article will draw on this normative case against usury to propose a new law to effectively criminalise usury. It will critically examine the physical elements, mental elements and defences, and elaborate on how a usurious charge should be distinguished from a non-usurious charge relating to a loan.

This article uses the term ‘usury’ to mean any interest on a loan, as this definition more accurately captures the moral dimension of usury.

II ARGUMENTS AGAINST USURY

Borrowing is often thought to be an exercise of liberty. As such, it is assumed that loans are mere commodities, which can be bought and sold like ordinary goods.⁶ Usury, it follows, is therefore a price on such a commodity, justified as a price of goods bought and sold.⁷ However, this conceptualisation of a loan is problematic as it fails to distinguish between the risk and ownership of a loan and a good respectively.⁸ This section will begin by examining this conceptualisation of a loan by drawing on philosophical underpinnings of credit, debt and usury. It will then critically examine how debt accumulation, leading to financial crises is facilitated by usury, and how usury encourages

⁶ DB Furnish and WJ Boyes, ‘Usury and the Efficiency of Market Control Mechanisms: A Comment on “Usury in English Law” Revisted’ (2013-14) 30 *Arizona Journal of International and Comparative Law* 115, 119.

⁷ Ibid.

⁸ ‘A Natural-Law Case Against Usury’ in John T Noonan, *The Scholastic Analysis of Usury* (Harvard University Press, 1957) 38, 56-57; Jongchul Kim, ‘Identity and the hybridity of modern finance: how a specifically modern concept of the self underlies the modern ownership of property, trusts and finance’ (2014) 38 *Cambridge Journal of Economics* 425, 428-435; Joan Lockwood O’Donovan, ‘The Theological Economics of Medieval Usury Theory’, (2001) 14(1) *Studies in Christian Ethics* 48, 55-57.

irresponsible borrowing and lending, in that loans are taken out even when unrepayable.

A History of Usury in the West

Historically, the argument made against usury was that it oppresses the poor.⁹ However, this argument held limited, if any weight at all, when money-lending was increasingly practiced among merchants.¹⁰ The question then became whether usury was against charity or equity, not whether usury was inherently wrong.¹¹ This implied that usury was acceptable where it was not uncharitable or inequitable between the parties. With the increasing growth of trade and commerce in Europe during the 16th century, usury became gradually regarded as acceptable and even necessary for prosperity. The question then yet again became what the appropriate interest rate was.¹² By the mid 19th century, most countries in Europe repealed all acts against usury, defined as excessive interest, on that basis that is limiting or prohibiting usury was unnecessary.¹³ This reflected the attitude towards usury of West in the mid 19th century and onwards until the 21st century.¹⁴

⁹‘The Philosophical Framework’ in John T Noonan, *The Scholastic Analysis of Usury* (Harvard University Press, 1957) 21, 30-31.

¹⁰‘The Scholastic Theory of Usury’ in John T Noonan, *The Scholastic Analysis of Usury* (Harvard University Press, 1957) 193, 194-195; ‘A Countertheory of Usury’ in John T Noonan, *The Scholastic Analysis of Usury* (Harvard University Press, 1957) 365, 365-367.

¹¹ ‘A Countertheory of Usury’ in John T Noonan, *The Scholastic Analysis of Usury* (Harvard University Press, 1957) 365, 365-367.

¹² Ackerman, above n1, 80.

¹³ Ibid 84.

¹⁴ Joseph Persky, ‘Retrospectives: From Usury to Interest’ (2007) 21(1) *Journal of Economic Perspectives* 227.

B Usury Legitimises Bondage to Debt

Where there is a loan between a borrower and lender, the borrower in entering a loan agreement with the lender implicitly promises to repay the loan in full.¹⁵ The lender lends to the borrower an asset that he or she owns, and ownership of the loaned property remains with the lender. Thus, the loaned property is not owned by the borrower under the loan. It follows, therefore, that a failure to repay the loan in full would amount to a failure to return the property to the lender. This would be akin to theft, as it would amount to taking away the property of another without authorised transfer by the owner.¹⁶ In addition to this, failure to return the whole of the loan money would also amount to breaking of an implicit promise to repay.¹⁷ Thus, it follows that the lender has a just claim against the borrower for the value of the property loaned to the borrower since ownership remains with the lender. The borrower, on the other hand, is obliged to satisfy the just claim for repayment of the loan by the lender.¹⁸

It is clear then that debt gives rise to a relationship between the debtor and creditor. In having a justified demand for repayment of debt owed, irrespective of the borrower's ability to repay the debt, the lender has power over the borrower. Usurious loans are not analogous to the sale of goods at a price as the modern conceptualisation of credit implies, in which the parties are simply

¹⁵ 'Games with Sex and Death' in David Graeber, *Debt: The First 5000 Years* (Melville House, 2011) 127, 144.

¹⁶ Jordi Coral, 'Anxious householders: theft and anti-usury discourse in Shakespeare's Venetian plays' (2015) 30(3) *The Seventeenth Century* 285, 287-288.

¹⁷ 'A Brief Treatise on the Moral Grounds of Economic Relations' in David Graeber, *Debt: The First 5000 Years* (Melville House, 2011) 89, 104-108; 'The Great Experiment' in Charles R Geisst, *Beggar Thy Neighbour* (University of Pennsylvania Press, 2013) 137, 139.

¹⁸ 'On the Experience of Moral Confusion' in David Graeber, *Debt: The First 5000 Years* (Melville House, 2011) 1, 13.

engaged in a transaction involving only the buying and selling of goods.¹⁹ Unlike the sales of goods, debt confers an obligation to the borrower to repay the debt to which the lender has a just claim.²⁰ Since the borrower has no claim against the lender for an obligation owed to him or her, the borrower is therefore subject to the lender. Thus, it can be said that the borrower in ‘bondage’ to the lender, the source of which is the debt.

A loan, however, is distinguishable from an employment contract. In an employment contract, there is a reciprocal relationship of obligations between the employee and employer. While the employee is obliged to do work for the employer, the employer is also obliged to give the employee remuneration for the work done. A loan, however, does not confer any remuneration or its equivalent to the debtor. Rather, it imposes an obligation on a borrower to the lender, while no reciprocal obligation is imposed on the lender to the borrower.²¹ Although it could be argued that the borrower benefits by obtaining capital which could not otherwise be obtained, and the lender incurs a risk of loss,²² the lender nevertheless has a right to demand repayment of the debt, regardless of the borrower’s circumstances or ability to repay.²³ It is this right which gives power to the lender over the borrower through debt.

However, the question that remains is what makes usury wrong or illegitimate in the moral sense such that it should be prohibited. It may be argued that usury

¹⁹ Alyssa Labat and Walter E Block, ‘Money Does Not Grow on Trees: An Argument for Usury’ (2012) 106 *Journal of Business Ethics* 383, 386.

²⁰ Graeber, above n17, 121.

²¹ Ibid 109.

²² Sally J Scholz, ‘Rousseau on Poverty’ in Helen M Stacy and Win-Chiat Lee (eds), *Economic Justice: Philosophical and Legal Perspectives* (Springer, 2013) 13, 19; Campbell et al., ‘The Regulation of Consumer Financial Products: An Introductory Essay with a Case Study on Payday Lending’ in Nicolas P Retsinas and Eric S Belsky (eds), *Moving Forward: The Future of Consumer Credit and Mortgage Finance* (Brookings Institution Press, 2011) 206, 225-226.

²³ ‘Saints and Sinners’ in Charles R Geisst, *Beggar Thy Neighbour* (University of Pennsylvania Press, 2013) 13, 32-33.

is wrong on the grounds that it increases the chances a borrower will end up being trapped in a cycle of debt. Usury, as such, is exploitative of the debtor, and therefore wrong.²⁴ This argument, however, runs the risk of being defeated by the contention that where it is not exploitative to the borrower, such as a business, usury would not be illegitimate,²⁵ just as the traditional argument that usury is morally wrong because it exploits the poor, which eventually held no weight as money-lending among merchants became normal.²⁶

While trapping a person in a debt cycle is exploitative, this argument fails to capture the real essence of usury. A stronger argument would be that usury is inherently unjust as it seeks to charge the borrower for obtaining a loan, to which he or she is made bondage by the obligation to repay the debt.²⁷ Usury, it follows, is profit made off the indebtedness of others through which they are in bondage to the lender. Rather than being a charge for the sale of goods, it is a charge for borrowing the lender's property whereby risk of loss is transferred to the party obliged to make payments, but where ownership remains with the party to whom payments are due.²⁸ It is that the lender has a claim to profit from the loan which itself confers bondage to the borrower, while the lender incurs no risks of being unable to repay by remaining the owner of the loaned property, that makes usury inherently unjust.

²⁴ R Mayer, 'When and Why Usury Should be Prohibited' (2013) 116 *Journal of Business Ethics* 513, 520.

²⁵ Kenman Wong and Donovan Richards 'Commercialization and Microfinance Interest Rates: Usury or Just Prices?' (2014) 17(2) *Journal of Markets & Morality* 381, 387-389.

²⁶ 'The Scholastic Theory of Usury' in John T Noonan, *The Scholastic Analysis of Usury* (Harvard University Press, 1957) 193, 194-195; 'A Countertheory of Usury' in John T Noonan, *The Scholastic Analysis of Usury* (Harvard University Press, 1957) 365, 365-367.

²⁷ Steven W Bender, 'Rate Regulation at the Crossroads of Usury and Unconscionability: The Case for Regulating Abusive Commercial and Consumer Interest Rates under the Unconscionability Standard' (1994) 31(3) *Houston Law Review* 721, 728-730.

²⁸ Simone Westerfeld and Frithjof Weber, 'Selecting credit portfolios for collateralized loan obligation transactions: a heuristic algorithm' (2009) 5(4) *Journal of Credit Risk* 65, 66.

Yet, it may be asked is whether usury is justifiable on the grounds of the need to compensate for inflation, as lenders lose money on the principal, owing to decrease in the value of money.²⁹ Where inflation occurs, the value of money is decreased.³⁰ As a result, the value of debt based on the initial monetary value would be lower than that based on the final monetary value. It would follow that repayment based on the initial value would amount to not a full repayment of the debt owed. The inflation-adjusted value of debt would need to be paid to fully repay the debt.³¹ Usury, however, is a charge on a loan, for the use of the loan, rather than an adjustment tool.³² Although it may be argued that it may in practice serve as an adjustment tool, the inflation-adjustment value of debt is the value of only the principle which accounts for the decrease in value due to inflation to ensure that the lender does not lose debt repayments owed due to inflation.³³

This analysis of debt and credit radicalises the current understanding of loans and usury, laying the foundation for understanding how usury perpetuates debt accumulation by providing an incentive for irresponsible lending and borrowing. In the backdrop of the recent global financial crisis perpetuated by irresponsible lending and borrowing, leading to debt accumulation, a renewed understanding of the fundamental concepts of debt and credit is needed to understand how

²⁹ Joseph A Burke, 'The Scholastic Analysis of ZIRP: Justice, Usury, and the Zero Interest Rate Policy' (2014) 17(1) *Journal of Markets & Morality* 105, 107-113.

³⁰ 'Why Study Money, Banking and Financial Markets?' in Frederic S Mishkin, *The Economics of Money, Banking and Financial Markets* (Pearson, 10th ed, 2013) 44, 50.

³¹ 'Why Do Interest Rates Change?' in Frederic S Mishkin and Stanley G Eakins, *Financial Markets and Institutions* (Pearson, 7th ed, 2012) 104, 128.

³² There is no single factor which drives interest rates, such adjustment for inflation, but rather many factors which drive interest rates: Maureen Were and Joseph Wambua, 'What factors drive interest rate spread of commercial banks? Empirical evidence from Kenya' (2014) 4 *Review of Development Finance* 73, 79-81; Dorfleitner et al., 'What determines microcredit interest rates?' (2013) 23(20) *Applied Financial Economics* 1579, 1595-1596.

³³ Mishkin and Eakins, above n31.

usury has been responsible for the debt crises of the modern globalised economy.

C Usury Facilitates and Perpetuates Debt Accumulation

Usury reduces the ability of the borrower to repay debts, by increasing debt owed to the lender. As a result, it increases the chances that a borrower will become trapped in the cycle of debt.³⁴ This is particularly obvious in the case of a bank loan which incurs compound interest. However, the effects of usury need not be as extreme. By holding people in debt bondage, it facilitates and perpetuates debt accumulation in the economy.³⁵ As more individuals become trapped in the cycle of debt, lending institutions will themselves become indebted.³⁶ As a result, an ever-increasing credit spiral occurs, in which the debt continues to accumulate, rather than be written off.³⁷ This cycle is problematic in itself because debts are increasing, rather than being written off, while credit continues to expand, leading to the collapse of the economy.³⁸

There have been many solutions proposed for dealing with the spiral of debt and ever-increasing credit expansion. They range from quantitative easing,³⁹ to

³⁴ Edward L Glaeser and Jose Scheinkman, 'Neither A Borrower Nor a Lender Be: An Economic Analysis of Interest Restrictions and Usury Laws' (1998) 41(1) *The Journal of Law and Economics* 1, 19.

³⁵ Juan Vega Vega, 'The International Crime of Usury: The Third World's Usurious Foreign Debt' [1987] 29 *Crime and Social Justice* 45, 54-55.

³⁶ Anna Gelpern, 'Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt' (2012) 121(4) *Yale Law Journal* 888.

³⁷ 'Financial Crises in Advanced Economies' in Frederic S Mishkin, *The Economics of Money, Banking and Financial Markets* (Pearson, 10th ed, 2013) 227, 231; S Keen, 'Household Debt: The Final Stage in an Artificially Extended Ponzi Bubble' (2009) 42(3) *The Australian Economic Review* 347, 353; Graeber, above n18, 3.

³⁸ Michael Hudson 'US "Quantitative Easing" Is Fracturing the Global Economy' (Working Paper No. 639, Levy Economics Institute of Bard College, November 2010) 5.

³⁹ David Cobham and Yue Kang, 'Financial Crisis and Quantitative Easing: Can Broad Money Tell Us Anything?' (2012) 80(1) *The Manchester School* 54, 68; Bowman et al. 'Quantitative easing and bank lending: Evidence from Japan' (2015) 57 *Journal of International Money and Finance* 15, 25-27; Eric Girardin and Zakaria Moussa, 'Quantitative easing works: Lessons from the unique experience in Japan 2001-2006' (2011) 21 *Journal of International Financial Markets, Institutions & Money* 461, 479; Thomas I Palley, 'Monetary Policy at the Zero Lower Bound and After: A Reassessment of Quantitative Easing and Critique of the Federal Reserve's Proposed Exit Strategy' (2015) 66(1) *Metroeconomica* 1, 16-17.

credit easing,⁴⁰ and to bailouts.⁴¹ Yet, some propose the more radical solution of debt forgiveness.⁴² However, the question that remains is what facilitates and perpetuates debt accumulation over the long-term.

This section proposes that usury facilitates long-term indebtedness by increasing debt incurred. Where usury is not charged, borrowers will be able to more easily repay their debt in full.⁴³ This is not to suggest that borrowers will not possibly be trapped in a debt cycle by not having to pay usury, but rather that there will be a lower chance that this will occur. Neither is it to suggest that borrowers against whom usury is charged will necessarily be trapped in a debt cycle. Rather, it is to explain using empirical evidence, the effect of usury on debt, and how it has lead to the problematic expansion of credit, in which the demand for credit continues to increase, in spite of the accumulation of debt.⁴⁴

Conventional neo-liberal macroeconomics has neglected the role of private debt in the economy.⁴⁵ It is often assumed that debt is merely a redistribution of spending power between borrower and lender.⁴⁶ This is in stark contrast to post-Keynesian economics which purports that debt has a significant macroeconomic

⁴⁰ Carlson et al., 'Credit Easing: A Policy for a Time of Financial Crisis' [2009] *Economic Trends* 7, 10-13.

⁴¹ Randall D Guynn, 'Are Bailouts Inevitable?' (2012) 29(1) *Yale Journal on Regulation* 121; Emiliano Grossman and Cornelia Woll, 'Saving the Banks: The Political Economy of Bailouts' (2014) 47(4) *Comparative Political Studies* 574.

⁴² Professor Michael Hudson, *The Lost Tradition of Biblical Debt Cancellations* (1992) <<http://michael-hudson.com/wp-content/uploads/2010/03/HudsonLostTradition.pdf>>; Bob English, Interview with Professor Steve Keen, Professor of Economics (Media Interview, 18 July 2013).

⁴³ S Keen, 'Bailing out the Titanic with a Thimble' (2009) 39(1) *Economic Analysis & Policy* 3, 3-5.

⁴⁴ I Fisher, 'The debt-deflation theory of great depressions', (1933) 1(4) *Econometrica* 337, 344, quoted by S Keen, 'Bailing out the Titanic with a Thimble' (2009) 39(1) *Economic Analysis & Policy* 3, 5.

⁴⁵ S Keen, 'Household Debt: The Final Stage in an Artificially Extended Ponzi Bubble' (2009) 42(3) *Australian Economic Review* 347, 347; S Keen, 'Post Keynesian Theories of Crisis' (2015) 74(2) *American Journal of Economics and Sociology* 298, 299.

⁴⁶ S Keen, 'Post Keynesian Theories of Crisis' (2015) 74(2) *American Journal of Economics and Sociology* 298, 308.

effect.⁴⁷ Its analysis is based on the underlying premise that debt which has not been written off is still of effect, and cannot be eliminated simply by reversing the direction of the economy.⁴⁸ It recognises that debt creates more debt,⁴⁹ and also that the financial crises continue to occur on a cyclic basis, owing to accumulated debt preceding the boom being the cause of both the boom and the bust in a debt-based economy.⁵⁰ As such, private debt has been shown to be pivotal to the financial crises, and therefore, neglecting the role of private debt in the economy will result in a somewhat incomplete and even faulty analysis of the credit-based modern economy.⁵¹

Arguably, one of the key assumptions of mainstream economics is that the accumulated private debt can be diminished simply by reversing the effect of debt. Monetary policies based on this assumption, such as quantitative easing in response to deflation have been shown to have only a short-term, rather than a long-term overall benefit.⁵² Evidence has shown that the impact of deleveraging, the reduction of debt relative to equity, is the cause of the increase in proportion of debt of the aggregate demand,⁵³ and unemployment.⁵⁴ This indicates that wealth is financed by debt, such that where debt is attempted to be paid off, it

⁴⁷ Keen, above n 45, 347-348.

⁴⁸ Domenica Tropeano, 'Quantitative Easing in the United States after the crisis: conflicting views' in Louis-Philippe Rochon and Salewa 'Yinka Olawoye, *Monetary policy and central banking: new directions in post-Keynesian theory* (Edward Elgar Publishing, 2012) 227, 231-235.

⁴⁹ S Keen, 'Bailing out the Titanic with a Thimble' (2009) 39(1) *Economic Analysis & Policy* 3, 9-10.

⁵⁰ Keen, above n 49, 9; Keen, above n 45, 351-352.

⁵¹ Aldo Barba and Massimo Pivetti, 'Rising household debt: Its causes and macroeconomic implications – a long-period analysis' (2009) 33(1) *Cambridge Journal of Economics* 113, 130-131.

⁵² Gern et al. 'Quantitative Easing in the Euro Area: Transmission Channels and Risks' (2015) 50(4) *Intereconomics* 206, 210; Robert Jarrow and Hao Li, 'The impact of quantitative easing on the US term structure of interest rates' (2014) 17(3) *Review of Derivatives Research* 287, 315.

⁵³ Thomas I Palley, 'Debt, aggregate demand, and the business cycle: An analysis' (1994) 16(3) *Journal of Post Keynesian Economics* 371, 384; Keen, above n 49, 12-13.

⁵⁴ Keen, above n 49, 12-13.

leads to increased debt,⁵⁵ thereby facilitating the continual accumulation of debt.⁵⁶

However, the question that remains is the precise role which usury plays in the modern debt-based economy. It is clear that usury imposes additional costs of lending to the borrower, increasing indebtedness of the borrower to the lender. Where the controversy lies, however, is the particular form of usury, in terms of whether it is fixed or compounding interest, and the amount of usury. As such, this may lead some to conclude that a moral distinction needs to be made between fixed and compounding interest, as well as what is a reasonable interest rate.⁵⁷ Indeed, much of modern usury law is concerned with what is the optimum rate which provides for the greatest economic efficiency for businesses, and is not excessive, but fair to the borrower.⁵⁸ The question which still remains is why usury should be absolutely prohibited. This question concerns principles of morality. The general effects of usury can be argued to be manifestations of what usury is, in the moral sense.

The effect of usury can be more clearly seen in the ‘euphoric economy’ phase where both lenders and borrowers are assured that most investments will succeed, such that neither party incurs an unacceptable risk of loss.⁵⁹ Owing to

⁵⁵ I Fisher, ‘The debt-deflation theory of great depressions’, (1933) 1(4) *Econometrica* 337, 344, quoted by S Keen, ‘Bailing out the Titanic with a Thimble’ (2009) 39(1) *Economic Analysis & Policy* 3, 5 (same as above I Fisher)

⁵⁶ Serkan Arslanalp and Takahiro Tsuda, ‘Tracking Global Demand for Advanced Economy Sovereign Debt’ (2014) 62(3) *IMF Economic Review* 430; 457-458; Silvia Federici, ‘From Commoning to Debt: Financialization, Microcredit, and the Changing Architecture of Capital Accumulation’ (2014) 113(2) *The South Atlantic Quarterly* 231, 233.

⁵⁷ Constant J Mews and Ibrahim Abraham, ‘Usury and Just Compensation: Religious and Financial Ethics in Historical Perspective’ (2007) 72 *Journal of Business Ethics* 1, 9.

⁵⁸ S Mercatante, ‘The Deregulation of Usury Ceilings, Rise of Easy Credit, and Increasing Consumer Debt’ (2008) 53 *South Dakota Law Review* 37; Paige Marta Skiba, ‘Regulation of Payday Loans: Misguided?’ (2012) 69(2) *Washington and Lee Law Review* 1023; Stephanie Ben-Ishai, ‘Regulating Payday Lenders in Canada: Drawing on American Lessons’ (Research Paper No. 16, Comparative Research in Law & Political Economy, 2008).

⁵⁹ Keen, above n 45, 352.

asset price inflation, the only way to profit is by trading assets on the rising market, which is called ‘Ponzi financing’ which makes its gains through interest on credit.⁶⁰ Ponzi financing during this period is willing to incur debt, despite servicing costs being higher than the profits from assets because it is confident that assets can be sold for profit.⁶¹ However, the rising interest-servicing costs incurred eventually force all investors to sell capital assets so as to be able to repay all debts. Additional sellers enter into the asset market, which sharply reduces the exponential rise in prices on which the Ponzi financiers depend.⁶² As a result, the Ponzi financiers become bankrupt, bringing the euphoric phase to an end, and causing another debt-induced systemic crisis.⁶³

The economic system both with and without Ponzi financing can be modelled. The model of the system without Ponzi financing shows that a debt crisis can occur at extreme conditions, but near equilibrium, the model is stable.⁶⁴ This is in contrast to Ponzi financing, which model shows a series of boom and bust cycles, with debt levels ratcheting up over time, until the debt incurred in the final cycle overwhelms the debt-servicing capacity, followed by a depression.⁶⁵ Therefore, these models provide evidence for the claim that usury traps debtors into a cycle of debt, leading to the bust which occurs as a result of continual debt accumulation until the point where lenders no longer have credit to provide.⁶⁶

⁶⁰ A Profile of The Con Artists and Their Victims’ in Tamar Frankel, *Ponzi Scheme Puzzle: A History and Analysis of con Artists and Victims* (Oxford University Press, 2012) 110, 130-149.

⁶¹ Keen, above n 45, 352.

⁶² Ibid.

⁶³ Ibid .

⁶⁴ Keen, above n45, 353.

⁶⁵ ‘Background and Tools for Understanding and Dealing with Recurrent Financial Crises’ in Lester D Taylor, *Capital, Accumulation: An Integration of Capital, Growth and Monetary Theory* 181, 188-189; Keen, above n45, 353.

⁶⁶ Keen, above n45, 355.

It may be argued that debt accumulation in a debt-based economy will still occur even without Ponzi financing,⁶⁷ and therefore that it is not debt accumulation in the long-term *per se* that is relevant, but rather *excessive* debt accumulation in relation to the debt-servicing capacity.⁶⁸ Since it is excessive debt accumulation in the long-term which is the cause of the financial crisis leading to the collapse, the question is what maximum private debt level should be permitted, rather than how to prevent long-term debt accumulation itself.⁶⁹ This question, however, is based on the assumption that debt itself is a necessity for economic growth. Thus, the question as to whether debt should be the basis of economic growth arises. As such, it can be argued that because Ponzi financing worsens, by means of usury, rather than creates debt accumulation, the case against usury is strengthened.⁷⁰ It is the debt itself from which wealth is generated which leads to market crashes when debt levels reach a certain point. Usury facilitates such debt accumulation over the long-term.

The apparently simple reality of usury has profound implications. Usury has significant impacts on the economy, from the macroeconomic to the individual level. The debt crises in the 20th and 21st centuries are fruits of long-term debt accumulation which is the driving force of the modern Western economy. Such effects are exacerbated by Ponzi financing, rather than caused by Ponzi financing. Therefore, eradicating Ponzi financing would not prevent the cyclic debt crises. Rather it is long-term debt itself, facilitated by usury which needs to be eradicated to do so.

⁶⁷ Anastasia Nesvetailova and Ronen Palan, 'Minsky in the Shadows: Securitization, Ponzi Finance, and the Crisis of Northern Rock' (2013) 45(3) *Review of Radical Political Economics* 349, 352-353; Javier Bianchi, 'Credit Externalities: Macroeconomic Effects and Policy Implications' (2010) 100(2) *American Economic Review* 398, 400-401.

⁶⁸ Keen, above n45, 353.

⁶⁹ Francisco Covas and Wouter J Den Hann, 'The Role of Debt and Equity Finance Over the Business Cycle' (2012) 122 *Economic Journal* 1262, 1283; Federici, above n 56, 234-240.

⁷⁰ 'Capital Values, Wealth, and Related Topics' in Lester D Taylor, *Capital, Accumulation: An Integration of Capital, Growth and Monetary Theory* 79, 87-88.

D Usury Encourages Irresponsible Lending and Borrowing

Usury, being a charge on a loan, can provide huge profits for lending businesses.⁷¹ This is indeed the case with payday lending businesses, which provide credit to individuals for consumption.⁷² Payday lending has not been without controversy. Some criticise payday lending as exploitative and predatory.⁷³ On the other hand, some argue that payday lending is necessary for low- or average- income individuals or families, without which their welfare would be worse.⁷⁴ Yet others are more ambivalent on the issue of payday lending, arguing that while payday lending can be exploitative and predatory, it need not necessarily be exploitative and predatory, but rather that its merits depend on how each individual customer is affected.⁷⁵ This section will consider the competing arguments for and against payday lending by drawing on empirical evidence of the impact of payday lending. On the other hand, the question as to whether loans taken out for basic sustenance are owing in part to poor management of personal or household finance arises, and will also be examined in the context of payday lending.

⁷¹ Osman Uluyol and Samiye Ekim, 'A Study of the Relationship Between Banking Sector's Profitability and Interest Rates on Deposits Using Johansen Cointegration and Granger Causality Test' (2015) 2(1) *Pressacademia* 58; S Samuel Ogunbiyi and Peters O Ihejirika, 'Interest Rates and Deposit Money Banks' Profitability Nexus: The Nigerian Experience' (2014) 3(11) *Arabian Journal of Business and Management Review* 133, 145.

⁷² Diane Standaert and Brandon Coleman, 'Ending the Cycle of Evasion: Effective State and Federal Payday Lending Enforcement' (Policy Brief, Centre for Responsible Lending, November 2015) 1; Susanna Montezemolo and Sarah Wolff, 'Payday Mayday: Visible and Invisible Payday Lending Defaults' (Report, Centre for Responsible Lending, March 2015) 2; Leslie Parrish and Uriah King, 'Phantom Demand: Short-term due date generates need for repeat payday loans, accounting for 76% of total volume' (Report, Centre for Responsible Lending, 9 July 2009) 27.

⁷³ Michael A. Stegman and Robert Faris, 'Payday Lending: A Business Model that Encourages Chronic Borrowing' (2003) 17(1) *Economic Development Quarterly* 8; Uriah King and Leslie Parrish, 'Payday Loans, Inc: Short on Credit, Long on Debt' (Report, Centre for Responsible Lending, 31 March 2011) 11-12.

⁷⁴ Skiba, above n 58, 1045; William M Webster, 'Payday Loan Prohibitions: Protecting Financially Challenged Consumers or Pushing Them over the Edge?' (2012) 69(2) *Washington and Lee Law Review* 1051, 1080-1090.

⁷⁵ Noreen Byrne, Olive McCarthy and Michael Ward, 'Money-Lending and Financial Exclusion' (2007) 27(1) *Public Money & Management* 45, 50; Banks et al., above n 5, 41-42.

Since this article focuses on individual and household debt, rather than corporate or national debt, the dynamics of payday lending will be analysed to provide insight into how usury encourages irresponsible lending, by encouraging individuals to consume credit on a regular long-term basis, and also irresponsible borrowing, by borrowing irrespective of the ability to repay all debts owed. This section will provide an analysis of the dynamics of borrowing and lending, to examine the relationship between debt, credit and usury in the context of personal and household debt.

The literature on the impact of payday lending on consumers is often ambiguous and riddled with apparent conflicts.⁷⁶ However, these ambiguities and apparent conflicts could be explained by the different methodologies employed by various studies to measure financial distress or well-being, leading to different conclusions on the impact of payday loans.⁷⁷ In addition to this, these studies generally tend to have a focus on the short-term impact of obtaining a loan, rather than the long-term impact on the customer's ability to repay loans.⁷⁸ Since the purpose of this section is to examine the impact of usury in terms of indebtedness, it will draw on data concerning the impact of payday lending in terms of long-term indebtedness, rather than the ability to receive a loan in the future, or short-term purchasing power. The rationale of this approach is to highlight the impact of usury on indebtedness, which is more marked in the long-term.

⁷⁶ Richard Hynes, 'Payday Lending, Bankruptcy, and Insolvency' (2012) 69(2) *Washington and Lee Law Review* 607, 614-618.

⁷⁷ See Brian T Melzer, 'The Real Costs of Credit Access: Evidence from the Payday Lending Market' (2011) 126 *The Quarterly Journal of Economics* 517, 547-550; Jim Hawkins, 'Regulating on the Fringe: Reexamining the Link Between Fringe Banking and Financial Distress' (2011) 86 *Indiana Law Journal* 1361, 1399-1402; Neil Bhutta, Paige Marta Skiba and Jeremy Tobacman, 'Payday Loan Choices and Consequences' (Working Paper No. 12-30, Vanderbilt University Law School, 25 January 2013) 20-22; Montezemolo and Wolff, above n 72, 11-12.

⁷⁸ For example Adair Morse, 'Payday lenders: Heroes or Villains?' (2011) 102 *Journal of Financial Economics* 28, 42.

Evidence has shown that payday lending can either reduce⁷⁹ or increase financial distress.⁸⁰ Where credit structures are designed so that borrowers will be able to repay, it may be argued that overall long-term indebtedness is reduced.⁸¹ Unlike credit cards, payday loans are short-term, non-revolving and have tight constraints,⁸² where the maximum credit that can be taken out is the customer's weekly income.⁸³ As such, it can be argued that because of these credit restraints posed to customers, and that indebtedness is inevitable when borrowing money, there is no reason to claim that such loans necessarily increase indebtedness over the long-term or are intended to trap customers into a debt cycle.⁸⁴ Thus, it may be argued that payday lending, and more generally loans, can either reduce economic constraint by providing a temporary source of credit, despite the charging of usury, or increase debt burdens in the long-term.⁸⁵ Although payday lending does not necessarily cause long-term indebtedness, however, it has been shown that access to payday loans increases the difficulty of paying bills and the delay of required health care.⁸⁶ These findings taken together may indicate that the indebtedness of individual resulting from such loans depends on the extent to which an individual manages to live within one's means.⁸⁷

⁷⁹ Melzer, above n 77.

⁸⁰ Hawkins, n 77, 1394-1399; Skiba, n 58, 1038-1041.

⁸¹ Hawkins, n 77, 1399.

⁸² Ibid.

⁸³ Hawkins, n 77, 1374.

⁸⁴ Annie Schafter, Shee Wong and Stephen B Castleberry, 'Payday Lending: Perfunctory Or Predatory?' (2009) 5(6) *Journal of Business Studies* 98-99.

⁸⁵ Ibid 99.

⁸⁶ Melzer, above n 77.

⁸⁷ Michael D Carr and Arjun Jayadev, 'Relative Income and Indebtedness: Evidence from Panel Data' (2015) 61(4) *Review of Income and Wealth* 759, 770-771; John Gathergood, 'Self-control, financial literacy and consumer over-indebtedness' (2012) 33 *Journal of Economic Psychology* 590, 600; Cristina Ottaviani and Daniela Vandone, 'Impulsivity and household indebtedness: Evidence from real life' (2011) 32 *Journal of Economic Psychology* 754, 759-760.

There has been evidence that indebtedness of individuals or households is in some part caused by a lack of sound financial management.⁸⁸ Amadi (2012) documents the research of various studies, several of which found that materialism was a significant factor in predicting the chances of a consumer incurring debt.⁸⁹ A typology of consumers identified two types of consumers, classified as either rational or hyperbolic discounters. Hyperbolic discounters were characterised as preferring current consumption over future consumption, more likely to use credit cards for borrowing rather than transacting, consume too much on a monthly basis, thereby accumulating high levels of credit card debt, and less likely to commit to constraining future choices.⁹⁰ In addition to this, White (2007) reports that in a study conducted by Panel Study of Income Dynamics, one-third of respondents said that high debt/misuse of credit was their primary reason for filing for bankruptcy. Two-thirds of respondents before filing for bankruptcy in a survey conducted by the National Foundation for Credit Counselling regarded 'poor money management/excessive spending' as their reasons for experiencing financial difficulty.⁹¹

While it may seem that all responsibility for indebtedness may lie on borrower, it appears that lenders may also be partially responsible for such indebtedness, by providing loans in such a way as to keep individuals in debt, to generate

⁸⁸ CW Amadi, 'An Examination of the Adverse Effects of Consumer Loan' (2012) 7(3) *International Journal of Business and Management* 22.

⁸⁹ G Jacobs and EVD M Smit, 'Materialism and indebtedness of low income consumers: Evidence from

South Africa's largest credit granting catalogue retailer' (2010) 41(4) *South African Journal of Business Management*, 11 cited in CW Amadi, 'An Examination of the Adverse Effects of Consumer Loan' (2012) 7(3) *International Journal of Business and Management* 22, 26.

⁹⁰ MJ White, 'Bankruptcy reform and credit cards' (2007) 21(4) *Journal of Economic Perspectives* 175 cited in CW Amadi, 'An Examination of the Adverse Effects of Consumer Loan' (2012) 7(3) *International Journal of Business and Management* 22, 27.

⁹¹ MJ White, 'Bankruptcy reform and credit cards' (2007) 21(4) *Journal of Economic Perspectives* 175 cited in CW Amadi, 'An Examination of the Adverse Effects of Consumer Loan' (2012) 7(3) *International Journal of Business and Management* 22, 26.

profit. Long-term studies such as that conducted by the Centre for Responsible Lending from 2009-2015 confirm that consumers of payday loans fall into the debt cycle, creating a 'loan churn', in which the borrower has to continually repay the principal from the previous loan, owing to the failure to completely repay the debt from the previous term.⁹² This is indeed one factor which increases the chance that an individual files for bankruptcy.⁹³ In 2009, the Centre for Responsible Lending reported that 76% of payday loan value was caused by loan churning.⁹⁴ A more recent report by the Consumer Financial Protection Bureau (2014) found that 80% of loan value is due to loan churn.⁹⁵ In a 2015 report, the Centre for Responsible Lending also found that the majority of payday lending revenue is generated by loaning churning.⁹⁶ That payday lenders make majority of profit from loan churning perhaps provides strong evidence that payday lenders have an incentive to design their business so as to keep customers in long-term debt.⁹⁷

The assumption that there is no cause of concern for borrowers in regularly seeking loans, whether it be for financing necessities or non-necessities, appears to underlie many studies examining the impact of payday lending on consumers'

⁹² Montezemolo and Wolff, above n72, 2.

⁹³ A Mechele Dickerson, 'Consumer Over-Indebtedness: A U.S. Perspective' (2008) 43(2) *Texas International Law Journal* 135, 152.

⁹⁴ Montezemolo and Wolff, above n72, 2; Parrish and King, above n72.

⁹⁵ CFPB Office of Research, 'CFPB Data Point: Payday Lending' (Report, Consumer Financial Protection Bureau, March 2014) 16 cited in Susanna Montezemolo and Sarah Wolff, 'Payday Mayday: Visible and Invisible Payday Lending Defaults' (Report, Centre for Responsible Lending, March 2015) 2.

⁹⁶ Consumer Financial Protection Bureau, 'Payday Loans and Deposit Advance Products' (Whitepaper, Consumer Financial Protection Bureau, 24 April 2013) cited in Diane Standaert and Brandon Coleman, 'Ending the Cycle of Evasion: Effective State and Federal Payday Lending Enforcement' (Policy Brief, Centre for Responsible Lending, November 2015) 1.

⁹⁷ Paul Sergius Koku and Sharan Jagpal, 'Do payday loans help the working poor?' (2015) 33(5) *International Journal of Bank Marketing* 592, 600; Rob Aitken, 'Finding the Edges of Payday Lending' (2013) 12 *Perspectives on global development and technology* 377, 400-401.

welfare.⁹⁸ This focus on only the effect of the loan itself, rather than also considering the motivations of the borrower themselves for taking out such loans appears to be unable to capture the full extent of the problem of consumer debt. There is also much focus on responsible lending, rather than both responsible lending and borrowing.⁹⁹ Debt and credit, however, involve both borrower and lenders as actors. Thus, it follows that the impact of lending and borrowing may be more properly assessed by also examining consumer behaviour which may in large part provide an explanation for long-term consumer debt.

There is strong evidence that payday lending can and does lead borrowers into a debt trap. Despite credit constraints that may be imposed by payday lenders on loans made to the consumer, it appears that such constraints are not made to protect the consumer from long-term indebtedness, but rather to reduce its risk of loss owing to non-repayment.¹⁰⁰ As such, consumers face a conundrum as to whether to borrow in the short-term, and risk remaining indebted over the long-term, or to live off credit to maintain sustenance.¹⁰¹ This demonstrates the nature of debt which confers a continuing obligation to repay to the borrower, which

⁹⁸ Banks et al., above n 5; Stegman and Faris, above n 73; King and Parrish, above n 73; Skiba, above n 58; Noreen Byrne, Olive McCarthy and Michael Ward, 'Money-Lending and Financial Exclusion' (2007) 27(1) *Public Money & Management* 4; Melzer, above n 77; Montezemolo and Wolff, above n 72; Parrish and King, above n 72 cf. CW Amadi, 'An Examination of the Adverse Effects of Consumer Loan' (2012) 7(3) *International Journal of Business and Management* 22

⁹⁹ Standaert and Coleman, above n 72; Montezemolo and Wolff, above n 72; Parrish and King, above n72.

¹⁰⁰ Been-Lon Chen and Shian-Yu Liao, 'Capital, credit constraints and the comovement between consumer durables and nondurables' (2014) 39 *Journal of Economic Dynamics & Control* 127, 132; Orlando Costa Gomes, 'Constraints on Credit, Consumer Behaviour and the Dynamics of Wealth' (2009) 54(182) *Economic Annals* 119, 130.

¹⁰¹ See Shawn Cole, John Thompson and Peter Tufano, 'Where Does It Go? Spending by the Financially Constrained' in Nicolas P Retsinas and Eric S Belsky, *Borrowing to Live: Consumer and Mortgage Credit Revisited* (Brookings Institution Press, 2009) 65; Edna R Sawady and Jennifer Tescher, 'Financial Decisionmaking Processes of Low-Income Individuals' in Nicolas P Retsinas and Eric S Belsky, *Borrowing to Live: Consumer and Mortgage Credit Revisited* (Brookings Institution Press, 2009) 92.

only ends when it is all repaid in full. It is one that does not appear to be of liberty, but of bondage. Usury not only adds to this bondage. It provides an incentive to profit of the indebtedness of others. This in turn encourages irresponsible lending, which provides an incentive for lenders to encourage borrowers to borrow irresponsibly, that is, irrespective of the ability to pay off the debts incurred.

E Conclusion

The dominant understanding of debt and credit in the modern Western world is that charging interest in a loan is simply akin to the sales of goods or services. However, unlike the sale of goods, a loan confers an obligation on the borrower to repay the lender. Usury, by charging a person for a loan which holds the borrower in bondage to the debt, amounts to profiting of the indebtedness of another. This is unlike the sales of goods where the buyer is charged for the goods to which he or she becomes the owner. Therefore, treating loans as akin to a sale of goods leads to a problematic understanding of debt, credit and usury. Usury facilitates the accumulation of debt, as it reduces the ability to repay debt by charging a price on it. Such debt accumulation leads to credit spirals, leading to creditors not being able repay their debts themselves. This was demonstrated by the Global Financial Crisis in 2008-2009 in which the economy crashed owing to a lack of credit supply created by ever-increasing debt. In addition to this, usury provides an incentive for lenders to profit of the indebtedness of borrowers, leading to loans being taken out regardless of ability to repay.

III. COUNTER-ARGUMENTS AGAINST THE TOTAL PROHIBITION OF USURY

The case against usury itself raises many questions. Although the negative effects of usury may be acknowledged, such as a decrease in economic growth,

the question that remains is why usury should be absolutely prohibited, rather than simply restricted or limited. Legitimate charges relating to the loan may be confounded with charges on the loan itself. Business efficiency could also become significantly compromised. As such, this section will examine the moral hazard, adverse selection and efficiency counter-arguments, by evaluating each of their rationales respectively.

A Moral Hazard

Moral hazard is the risk posed to a party in a transaction after the transaction occurs.¹⁰² In the context of a loan, it is the risk of loss owing to non-repayment which lies on the lender once the loan has been taken out.¹⁰³ As such, it is often argued that usury is necessary to protect against such loss, and therefore, lenders should be at liberty to do so.¹⁰⁴ Owing to this increased risk of loss, lending will be significantly discouraged, resulting in a decrease in business activity.¹⁰⁵ Indeed, Arkansas' strictly enforced 10% cap on usury lead to a decrease in business activity during the 1970s.¹⁰⁶ Therefore, it follows that although usury is undesirable to consumers, it is necessary for lenders to compensate for actual or potential loss.

¹⁰² 'An Overview of the Financial System' in Frederic S Mishkin, *The Economics of Money, Banking and Financial Markets* (Pearson, 10th ed, 2013) 67, 82.

¹⁰³ Will Dobbie and Paige Skiba, 'Information Asymmetries in Consumer Credit Markets: Evidence from Payday Lending' (2013) 5(4) *American Economic Journal: Applied Economics* 1, 23.

¹⁰⁴ Donato Masciandaro, 'In Offence of Usury Laws: Microfoundations of Illegal Credit Contracts' (2001) 12 *European Journal of Law and Economics* 193, 210-212.

¹⁰⁵ Stegman and Faris, above n 73, 27-28; Paul Ali, Cosima McRae and Ian Ramsey, 'The Politics of Payday Lending Regulation in Australia' (2013) 39(2) *Monash University Law Review* 411, 449.

¹⁰⁶ Ackerman, above n1, 104.

However, moral hazard is inherent in all transactions.¹⁰⁷ This inherent risk arises from the reality that in any transaction, each party gains at the loss of the other.¹⁰⁸ Owing to the difference in amount of information about the deal, the party with better information is in a position to ensure either that the loss it incurs is reduced, or that the gain it incurs is maximised.¹⁰⁹ This is inevitably at the expense of the other party because the gain of one party necessarily requires the loss of another.¹¹⁰ For example, when an insurance company gives a car insurance premium to a buyer, the buyer may engage in more risky driving behaviours, thereby incurring more risk of loss to the insurance company.¹¹¹

Although the concern of risk of loss is a legitimate one, it need not necessarily follow that usury must be charged to protect against risk of loss. Alternatives such as collateral could be used as a means of security against such risks, such as in the case of pawn-broking.¹¹² Collateral would replace the interest the borrowers pay. Nonetheless, that such alternatives to usury exist does not mean that lenders should be prohibited from charging usury. However, that alternatives exist provides lenders a weaker reason to charge usury. It may also indicate that the charging of usury serves a means of making profit,¹¹³ rather than a means of security against risk of loss.

¹⁰⁷ Joseph E Stiglitz and Andrew Weiss, 'Credit Rationing in Markets with Imperfect Information' (1981) 71(3) *American Economic Review* 393, 407-408; Karl S Okamoto, 'After the Bailout: Regulating Systemic Moral Hazard' (2009) 57 *UCLA Law Review* 183, 204.

¹⁰⁸ Kevin Dowd, 'Moral Hazard and the Financial Crisis' (2009) 29(1) *Cato Journal* 141, 142-143.

¹⁰⁹ Stiglitz and Weiss above n 105, 393-394.

¹¹⁰ Eva I Hoppe and David J Kusterer, 'Conflicting tasks and Moral Hazard: Theory and Experimental Evidence' (2011) 55 *European Economic Review* 1094, 1105-1106.

¹¹¹ Mahito Okura, 'The relationship between moral hazard and insurance fraud' (2013) 14(2) *Journal of Risk Finance* 120; Giovanni Millo and Giacomo Pasini, 'Does Social Capital Reduce Moral Hazard? A Network Model for Non-Life Insurance Demand' (2010) 31(3) *Fiscal Studies* 341.

¹¹² Hawkins, n 77, 1388-1393.

¹¹³ Alejandro Valle Baeza and Ivan Mendieta Munoz, 'What is the Relationship Between the Rates of Interest and Profit? An Empirical Note for the US Economy, 1869-2009' (2012) 71(280) *Investigación Económica* 163, 168-177; Peter W Roberts, 'The Profit

Owing to the reduced choice of security, the absolute prohibition on usury may discourage business activity.¹¹⁴ However, alternatives such as profit-loss sharing,¹¹⁵ and shareholding contributions¹¹⁶ could be employed. Profit-loss sharing requires that the loan being made is used for business activity, and the profit is generated from that business, and not for the loan itself.¹¹⁷ Shareholding contributions involve contributions of capital by individuals to the business, which then use it to conduct business. The company lends money to other parties for use, without charging interest on a loan.¹¹⁸

B Adverse Selection

Adverse selection is the risk posed to a party in a transaction before the transaction occurs.¹¹⁹ In the context of a loan, it is the risk of non-repayment by less creditworthy customers, resulting in an increase in loan purchase price,

Orientation of Microfinance Institutions and Effective Interest Rates' (2013) 41 *World Development* 120, 127.

¹¹⁴ Ali, McRae and Ramsey, above n 105, 449; Ackerman, above n1, 104; Edward L Glaeser and Jose Schienkman, 'Neither A Borrower Nor a Lender Be: An Economic Analysis of Interest Restrictions and Usury Laws' (1998) 41(1) *The Journal of Law and Economics* 1, 19-26.

¹¹⁵ Yeo Hwee Ying, 'Of Profit Sharing and Partnerships' [1995] *Singapore Journal of Legal Studies* 404; Rasem N Kayed, 'The entrepreneurial role of profit-and-loss sharing modes of finance: theory and practice' (2012) 5(3) *International Journal of Islamic and Middle Eastern Finance and Management* 203.

¹¹⁶ Emilio Barucci and Fabrizio Mattesini, 'Bank shareholding and lending: Complementarity or substitution? Some evidence from a panel of large Italian firms' (2008) 32 *Journal of Banking & Finance* 2237; David Bholat, Alison Dunn and Joanna Gray, 'Share and Share Alike? Hedge Funds, Human Rights, and Owing Enterprise in Britain' (2012) 39(2) *Journal of Law and Society* 185.

¹¹⁷ Nico P Swartz, 'Risk Management in Islamic Banking' (2013) 7(37) *African Journal of Business Management* 3799, 3807.

¹¹⁸ Jannie Rossouw and Adele Breytenbach, 'Identifying Central Banks with Shareholding: A Review of Available Literature' (2011) 26(S1) *Economic History of Developing Regions* S123, S127-S129.

¹¹⁹ An Overview of the Financial System' in Frederic S Mishkin, *The Economics of Money, Banking and Financial Markets* (Pearson, 10th ed, 2013) 67, 81.

which is undesirable to the lender.¹²⁰ It is argued that usury will protect lenders from this risk of loss, by serving as a form of guarantee, and therefore prevent costs from being passed to consumers.¹²¹ It has been shown that lending to borrowers for a mortgage who have little or no chance of repaying the debt in full facilitates the debt accumulation which leads to the credit spiral of the economy.¹²² Although the impact of debt accumulation for mortgages are larger than that of small loans such as payday loans, it could likewise be argued that permitting the mass lending of such loans may facilitate a debt crisis that will have a significant impact on the economy.¹²³ This raises the question of lending only to consumers who have a reasonable chance of repay all debts in full.

Lending to borrowers only when they can repay all debts due has been criticised as unfair.¹²⁴ Since those who are denied loans tend to rely on it for their welfare, it is argued that denying such individuals' access to loans is unfair.¹²⁵ However, it could be argued that although this may seem discriminatory, this practice of exclusion is not against the person him or herself, but rather on the basis of his or her borrowing behaviour.¹²⁶ Since discouraging irresponsible lending and borrowing is of paramount importance owing to the impact it has on the

¹²⁰ Will Dobbie and Paige Skiba, 'Information Asymmetries in Consumer Credit Markets: Evidence from Payday Lending' (2013) 5(4) *American Economic Journal: Applied Economics* 1, 19-20.

¹²¹ R Mayer, 'When and Why Usury Should be Prohibited' (2013) 116 *Journal of Business Ethics* 513, 518-520.

¹²² S Keen, 'Bailing out the Titanic with a Thimble' (2009) 39(1) *Economic Analysis & Policy* 3.

¹²³ Stephen Morris and Hyon Song Shin, 'Contagious Adverse Selection' (2012) 4(1) *American Economic Journal: Macroeconomics* 1, 18-19.

¹²⁴ Above n 4, 710.

¹²⁵ Family Welfare Association, 'The Poverty Premium: How poor households pay more for essential goods and services' (Briefing, 2007) 1, cited in Greg Marston and Lynda Shevellar, 'In the Shadow of the Welfare State: The Role of Payday Lending in Poverty Survival in Australia' (2014) 43(1) *Journal of Social Policy* 155, 169.

¹²⁶ Jonathan Cook and John Banasik, 'Forecasting and explaining aggregate consumer credit delinquency behaviour' (2012) 28 *International Journal of Forecasting* 145, 154; Stephen Meier and Charles Sprenger, 'Present-Biased Preferences and Credit Card Borrowing' (2010) 2(1) *American Economic Journal: Applied Economics* 193, 208.

economy,¹²⁷ it can be argued that lending only when the borrower can repay all debts is justifiable.

In the broader context, the concern as to how to ensure the welfare of those who are excluded from credit remains. It could be argued that this could be resolved by implementing policies to encourage individuals and households to get off debt.¹²⁸ Alternatively, non-government organisations or charities may have a role in helping such individuals and households break the debt cycle and assist in providing for their basic means of sustenance.¹²⁹ Individuals and households could also be educated on how to live within their means so as to reduce the amount of debt incurred by an individual or household.¹³⁰

Despite the apparent harshness or unfairness of credit exclusion, it has been found that being denied credit access may be beneficial for such individuals. By forcing individuals to reduce their spending, it may enable them to gradually repay their debts.¹³¹ As a result of not continuing to accumulate debt, but reducing it, all the debt will eventually be paid off.¹³²

C Efficiency

¹²⁷ Frederic S Mishkin, 'Over the Cliff: From the Subprime to the Global Financial Crisis' (2011) 25(1) *Journal of Economic Perspectives* 49, 65-68.

¹²⁸ CW Amadi, 'An Examination of the Adverse Effects of Consumer Loan' (2012) 7(3) *International Journal of Business and Management* 22, 29-30. See also debt counselling organisations such as StepChange at <<http://www.stepchange.org/>> and Christians Against Poverty at <<https://capuk.org/>>.

¹²⁹ CW Amadi, 'An Examination of the Adverse Effects of Consumer Loan' (2012) 7(3) *International Journal of Business and Management* 22, 29-30.

¹³⁰ Banks et. al, 'Caught Short' (Final Report, August 2012, Social Policy Unit, University of Queensland) 68, quoted in Paul Ali, Cosima McRae and Ian Ramsey, 'The Politics of Payday Lending Regulation in Australia' (2013) 39(2) *Monash University Law Review* 411, 421.

¹³¹ CW Amadi, 'An Examination of the Adverse Effects of Consumer Loan' (2012) 7(3) *International Journal of Business and Management* 22, 28; R Mayer, 'When and Why Usury Should be Prohibited' (2013) 116 *Journal of Business Ethics* 513, 523.

¹³² CW Amadi, 'An Examination of the Adverse Effects of Consumer Loan' (2012) 7(3) *International Journal of Business and Management* 22, 28.

Given that usury can protect against risk of loss,¹³³ its prohibition may reduce business efficiency.¹³⁴ Since risk of loss leads to the increase in loan purchase price, it is argued that usury which reduces this risk of loss will reduce the overall loan purchase prices.¹³⁵ As such, usury is a price control measure, the value of which is determined by the market supply and demand.¹³⁶

However, the question which arises is whether something should be permitted because it is efficient. For example, businesses reduce working hours for individuals to enable them to fulfil family commitments, or permit holiday leave for individuals as a reward for their service to the company, which can reduce the efficiency of a business.¹³⁷ Likewise, it can be argued that although prohibiting usury may reduce efficiency, the moral consideration of prohibiting usury outweighs the interests of efficiency.

In addition to this, efficiency can be increased by alternative means, such as by maximising the efficiency of allocation of credit to each individual consumer.¹³⁸ For example, a business could improve its knowledge about its customer to more accurately determine the chances of repayment and the extent of repayment in determining which individuals to provide credit to.¹³⁹ This would enable the decrease in risk of loss owing to non-repayment, and therefore may help to increase overall efficiency.

D Conclusion

¹³³ Giuseppe Coco and David de Meza, 'In Defence of Usury Laws' (2009) 41(8) *Journal of Money, Credit and Banking* 1691, 1701.

¹³⁴ *Ibid* 1694.

¹³⁵ Bender, n 27, 748-749.

¹³⁶ Furnish and Boyes, above n 6 119-121.

¹³⁷ Lisa Giddings, Donna Anderson and Kathryn Birkeland, 'Is it profitable to offer paid leave? A case study of the legal profession' (2013) 16(1) *Journal of Legal, Ethical and Regulatory Issues* 73, 85-86.

¹³⁸ Emil Slazak, 'Credit market imperfections in the theory of credit rationing' (2011) 7(4) *eFinance* 76.

¹³⁹ David Canning, Clifford W Jefferson and John E Spencer, 'Optimal Credit Rationing in Non-for-profit Financial Institutions' (2003) 44(1) *International Economic Review* 243, 246-247.

That moral hazard, adverse selection and reduction in efficiency occur does not necessarily demand that usury should be permitted. Moral hazard can be addressed by non-usurious means, such as collateral. Similarly, adverse selection also can be addressed by non-usurious means, such as profit-loss sharing. The reduction in efficiency owing to prohibition of usury can be compensated for by alternative ways of allocating credit so as to reduce risk of loss and minimise credit exclusion. The gravity of usury greatly outweighs these competing arguments, and therefore, the better view remains that usury should be prohibited.

IV PROPOSAL FOR A NEW LAW

History has shown that where an absolute prohibition on usury was imposed, varied financial devices were employed to disguise usury.¹⁴⁰ As such, any law attempting to criminalise usury will need to anticipate the ways in which usury can be disguised, to ensure these forms of covert usury are covered by the prohibition.¹⁴¹

A Methodology

Since usury can function as a means of protection against risk of loss,¹⁴² which is a legitimate concern, legitimate steps to minimise risk of loss will be demarcated from usury to ensure that lenders can still protect themselves from loss, but also protect borrowers from being charged usury.¹⁴³ One of the main

¹⁴⁰ Ackerman, above n 1, ES Tan ‘An Empty Shell? Rethinking the Usury Laws in Medieval Europe’ (2002) 23(3) *Legal History* 177, 183-185; G Seabourne ‘Controlling Commercial Morality in Late Medieval London: The Usury Trials of 1421’ (1998) 19(2) *Legal History* 116.

¹⁴¹ Tan above, n 140; Seabourne, above n 40, 118-122.

¹⁴² Masciandaro, above n 104, 210-213; Joakim Sandberg, ‘Mega-Interest on Microcredit: Are Lenders Exploiting the Poor?’ (2012) 29(3) *Journal of Applied Philosophy* 169, 180.

¹⁴³ See Section II.B above

forms of protection is security.¹⁴⁴ As such, the proposed law will propose a definition of usury and security respectively, to distinguish between them. However, since facts do not always fall within the boundaries of legal definitions, criteria to distinguish between security and usury will be proposed to ensure that the two can be distinguished from each other when facts do not fall within the boundaries of the definition of usury and security respectively. The other main concern is the decrease in value of debt due owing to inflation.¹⁴⁵ While it is a legitimate concern that the full value of debt is repaid, an allowance for it could be circumvented to disguise usury.¹⁴⁶ Therefore, a definition of inflation will be proposed, and its application will be set out to ensure that the prohibition of usury is not circumvented by inflation-adjustment.

B Definitions of the Proposed New Law

The definitions of usury, security and inflation will be proposed in this section. Each definition will be interpreted and explained.

1 Usury

Usury is any interest charged on a loan.

This adopts the classical dictionary definition of usury, as the proposed law seeks to draw on the economic and moral dimensions of usury with the aim of addressing the root problem of debt.¹⁴⁷ The significant word is ‘any’ preceding the phrase ‘interest charged on a loan’, indicates that all interest would be prohibited, and therefore, that the interest does not exceed a certain amount is

¹⁴⁴ Wim Voordeckers and Tensie Steijvers, ‘Business collateral and personal commitments in SME lending’ (2006) 30 *Journal of Banking & Finance* 3067, 3068; Aivazian et al., ‘Loan collateral, corporate investment, and business cycle’ (2015) 55 *Journal of Banking & Finance* 380; ‘Security Rights’ in Robyn Smith, *Personal Property: Selected Issues* (3rd ed. Thompson Reuters, 2015); ‘Personal Property Security’ Robyn Smith, *Personal Property: Selected Issues* (3rd ed. Thompson Reuters, 2015).

¹⁴⁵ Burke, above n 29, 108-111.

¹⁴⁶ Burke, above n29, 114-115.

¹⁴⁷ See Section II.C above.

irrelevant. The word ‘interest’ refers to a price paid for a loan.¹⁴⁸ Therefore, this definition of usury refers to any price paid for a loan, distinguished from a charge relating to a loan, but not on a loan itself. This shall be discussed below in Section IV.D of this article.

2 Security

Security is any item or asset of value, which is provided to the lender by the borrower, for the purposes of guaranteeing repayment of the loan to which the security relates.

The above definition of security can be broken down into three elements. The elements shall be explained as below:

(a) Item or asset of value

This refers to any tangible or intangible thing which people would ordinarily be willing to pay for, thereby giving it its economic value.¹⁴⁹

b) Provided to lender by borrower

The security must be provided by the borrower or an agent of the borrower to the lender, and not by the lender to the borrower. This is to reflect that it is the borrower who is responsible for repaying all debts to the lender in any lending relationship.¹⁵⁰ It is anticipated that this will prevent lenders from being driven to charge usury as security, and also provide little to no excuse for lenders to charge usury owing to risk of non-repayment.¹⁵¹ The possession, but not the ownership of the collateral is transferred to the lender upon giving the collateral. Possession reverts to the borrower upon repaying all debts due to the lender.

¹⁴⁸ Definition from Free Dictionary by Farlex, proposed by Professor Campbell R Harvey of Duke University, North Carolina, US.

¹⁴⁹ ‘Income and Output’ in Thomas Piketty, *Capital in the 21st Century* (Cambridge, 2014) 26, 31.

¹⁵⁰ See Section II.B above.

¹⁵¹ See Section III.A above.

Where the borrower declares that he or she cannot repay all debts, or is regarded by the law as not being able to do so, the ownership of the collateral is transferred to the lender.¹⁵²

c) Purpose of guaranteeing repayment of the loan to which the security relates

Securities have been employed since ancient times to guarantee repayment of loans. The item is given to the lender only for the purpose of guaranteeing repayment of loan. Once the repayment has been fully made, the collateral shall be returned to the borrower. This definition does not apply to a loan to which the security does not relate since the purpose of security is to guarantee repayment of the loan to which it relates.¹⁵³

3 Inflation

Inflation is the decrease in value of items or assets owing to decrease in monetary value.

The economic definition for inflation¹⁵⁴ is adopted to recognise the effect of inflation on the value of debt, which is critical in determining whether a charge relating to a loan amounts to usury.¹⁵⁵ However, it also recognises that inflation could be exploited by lenders to charge covert usury by manipulating figures.¹⁵⁶ Therefore, it is proposed that inflation adjustment can be applied only to the principal, and that the value of the principal can only be adjusted to the final date of repayment to be agreed upon by the lender and borrower before entering

¹⁵² See Section II.B above.

¹⁵³ See Section III.A above.

¹⁵⁴ 'Introduction' in Frederic S Mishkin, *The Economics of Money, Banking and Financial Markets* (Pearson, 10th ed, 2013) 44, 50.

¹⁵⁵ Section II.B above.

¹⁵⁶ Ackerman, above n1, 96-99.

the loan transaction. This is to ensure that the value of the inflation-adjusted principal accounts only for inflation of the principle.¹⁵⁷

C Elements of Usury

Like all criminal offences, the proposed usury offence will be broken down into physical elements, mental elements and defences.¹⁵⁸ Defences are available where the law regards a person who satisfies all physical and mental elements as one who should not be found guilty.¹⁵⁹ This section will propose a provision which criminalises usury as defined in Section IV.B.1 above. It will set out the physical and mental elements, as well as the defences, and critically examine each element.

The proposed usury offence provision is that:

A person who charges any interest on a loan or receives any interest shall be guilty of an offence;

But shall not be guilty of this offence for:

- a) Making a charge in relation to a loan which does not amount to interest; or*
- b) Adjusting for inflation for only the principal and for only the period of the loan from when it is taken out to the final payment date.*

1 Physical Elements

a) Person who charges or receives interest is the lender, an agent of the lender or an independent third party

¹⁵⁷ Burke, above n 29, 114-115.

¹⁵⁸ 'Elements of Criminal Responsibility' in Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed., Oxford University Press, 2013), 54, 55.

¹⁵⁹ Schloenhardt, above n 158, 61-62.

To ensure that the proposed law targets all usury, it covers lenders, persons who charge, collect, or facilitate the charging or collecting of usury, or its proceeds on behalf of the lender (agent), or a third party. The phrase ‘on behalf of the lender’ is intended to be construed so as to effectively ensure that this provision covers usury or its proceeds which the lender channels to another party for the lender’s benefit. This includes the channelling of usury or its proceeds to the businesses’ customers where such customers profit, for the company’s benefit, or to an anonymous shell company.¹⁶⁰ The provision also covers the charging of usury where the proceeds are to be given to a third party to ensure that no usury charged can be legally channelled off to a third party, such as a beneficiary of a trust.¹⁶¹ This is to prohibit the charging or receiving of usury itself, by making it irrelevant as to whether the charger or receiver is a lender, an agent of the lender, or a third party.

A charge arising from business activity which utilises the loan does not amount to usury because it is a price paid for services which utilise the loan, not the price paid for the loan itself.¹⁶²

b) The loan is provided, or will be provided by a lender to a borrower

The charge must be on the loan, not merely relating to the loan. Any price the lender charges to the borrower in exchange for the loan amounts to interest, whether it is called a fee, surcharge, or any other name given to the charge on the loan. It is irrelevant for the purposes of establishing this element as to whether the charging of usury is actualised. As long as the lender holds out that

¹⁶⁰ JC Sharman, ‘Shopping for Anonymous Shell Companies: An Audit Study of Anonymity and Crime in the International Financial System’ (2010) 24(4) *Journal of Economic Perspectives* 127, 137.

¹⁶¹ Similar to phoenix activity, or perhaps a type of phoenix activity as described in Australian Crime Commission, ‘Organised Crime in Australia’ (Public Report, 2015), 25.

¹⁶² Abdul-Rahman et al., ‘Failure and potential of profit-loss sharing contracts: A perspective of New Institutional Economic Theory’ (2014) 28 *Pacific-Basin Finance Journal* 136, 137-140.

a charge applies to lending, this element is satisfied since the provision covers interest charged on loans which are to be provided, but not yet provided to a borrower. The rationale is that it is the charging of usury itself which is to be criminalised, which includes potential usury not yet actualised.

2 Mental Elements

a) Knowledge of charging interest on the loan

‘Knowledge’ refers to knowledge of the facts.¹⁶³ It is appropriate that knowledge is an element of the usury offence because it is possible that a person may charge or receive interest on a loan without knowing that this is so. This is because it is contrary to the principles of criminal law to criminalise a person who was unaware of what his or her actions were at the time it was done.¹⁶⁴

b) Intention to charge or receive usury

‘Intention’ is the will of the person in carrying out the act.¹⁶⁵ Objective intention is determined according to the standard of the reasonable person imposed by the law.¹⁶⁶ This is in contrast to the subjective intention, which is intention of the individual person.¹⁶⁷ Where objective intention applies, the law determines whether a person intended to charge or receive usury according to the standard of a reasonable person. The subjective intention, on the other hand, is determined according to whether the individual intended to charge or receive usury. As the nature of usury is an objective one in that a person either charges or receives usury, or does not, it is more fitting that objective, rather than subjective intention applies.

¹⁶³ Schloenhardt, above n 158, 85-86.

¹⁶⁴ Douglas Husak, ‘Mistake of Law and Culpability’ (2010) 4(2) *Criminal Law and Philosophy* 135, 140-142.

¹⁶⁵ Schloenhardt, above n 158, 82-83.

¹⁶⁶ Schloenhardt, above n 158, 89.

¹⁶⁷ Schloenhardt, above n 158, 81.

3 Defences

a) Mistake of fact

It is possible that it is not actually or constructively known to the person receiving or charging usurious money that it amounts to usury in the factual sense. Since the underlying rationale of the mistake of fact defence is that a person who did not know, or has no reason to know that his or her actions amounts to the acts satisfying an offence, should not be guilty, the mistake of fact defence would be appropriate.¹⁶⁸

D Distinguishing between Usury and Non-usurious Charges Relating to a Loan

Usury is the price paid to obtain the loan itself. Therefore, it follows that a charge relating to a loan which is not for obtaining the loan itself, would not amount to usury. Such an example would be late penalty fees which are imposed to penalise late repayments, and not for obtaining the loan.¹⁶⁹ However, distinguishing between late penalty fees and usury is problematic in practice, as late penalty fees are often used as a substitute for usury.¹⁷⁰

However, the line between charging for the loan itself and not charging for the loan itself is a thin one. This is because a charge relating to a loan may be imposed by a lender for multiple reasons, some of which may be legitimate, but also for the purpose of charging usury. Therefore, determining whether a charge is for a loan itself requires not only determining the reason or reasons for the charge, but also whether legitimate reasons are justifiable in light of a possible motive to charge usury.

¹⁶⁸Kenneth W Simons, 'Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact' (2012) 9(2) *Ohio State Journal of Criminal Law* 487, 516; Kenneth W Simons, 'Mistake of Fact or Mistake of Criminal Law? Explaining and Defending the Distinction' (2009) 3(3) *Criminal Law and Philosophy* 213, 216-222.

¹⁶⁹ See Section II.B above.

¹⁷⁰ Nadia Massoud, Anthony Saunders and Barry Scholnick, 'The cost of being late? The case of credit card penalty fees' (2011) 7 *Journal of Financial Stability* 49, 57-58.

This difficulty highlights the need for usury law to be broad in scope, so as to recognise any attempt to disguise usury, based on its essence. It also indicates the importance of permitting a charge relating to a loan, only when it can be demonstrated that a lender could not reasonably have had a motive for charging usury, in light of the circumstances.

V FUTURE RESEARCH

The questions of how the proposed usury law can be circumvented and enforced arise. Since empirical evidence is needed to examine such questions, it is beyond the scope of this article to do so.

VI CONCLUSION

Since usury is inherently extortionate, as a profit made of the indebtedness of others, so as to subject them to debt bondage, there is reason to treat usury as a criminal act. Although circumstances may justify changes as to how to interpret the law, the act of usury itself is fundamentally exploitative, and thus changes in circumstances are not enough to justify its decriminalisation.

THE INCOMPATIBILITY OF PROSTITUTION LAWS WITH INTERNATIONAL HUMAN RIGHTS

ANDREA TOKAJI*

ABSTRACT:

This paper looks at the States due diligence obligation of preventing harm from occurring to the common person, but particularly for victims of human trafficking, and how under international human rights law, the considerations of harm have shifted from only public to also the private spheres, and how this may be relevant to a commercial transaction of purchasing a sexual service, especially if that service is fraught with gender based violence.

I INTRODUCTION

In this paper I will first cover the extent of human trafficking, with a focus on how human trafficking is a gendered violation of rights. I will be looking at women as victims in the sex trade, how the legalisation and decriminalisation of prostitution are incompatible with international human rights law, women's rights and gender equality, and I will be proposing the Nordic Model as a fourth option solution to prostitution laws moving forward - as an alternative to the current legislative

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approaches of criminalisation, legalisation and decriminalisation regulated models of prostitution laws, which are all fraught with problems.¹

This will be looked at in the context of the States due diligence obligations to prevent women from violence and protect them from future harms, as understood by, especially the *Convention on the Elimination of all forms Discrimination Against Women* and the *Declaration of the Elimination of Violence Against Women*.

In looking at the Nordic Model as a solution moving forward, I will also propose that this model applies the principles of due diligence, and reduces the harms of exploitation, slavery and trafficking of vulnerable women and girls, especially in the sex industry.

II THE EXTENT OF SLAVERY, TRAFFICKING AND EXPLOITATION

The majority of the slaves in the world today are women and girls, trafficked predominantly for sexual servitude.

We know from studies such as the Global Slavery Index that 85% of the 45.8 million known slaves in the world today are women and girls exploited in ways that men are often not.

Vulnerable women and girls are often exploited through the prostitution industries globally.

In allowing legalised and decriminalised prostitution to continue, Australia is expressly encouraging this trade for human flesh, and Australia are in direct violation

¹ Julie Bindel and Liz Kelly, “A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden” Child and Woman Abuse Studies Unit, London Metropolitan University, 2003, at:<http://www.glasgow.gov.uk/CHttpHandler.ashx?id=8843>

of their obligations under international human rights law to prevent harms of exploitation and sexual abuse, and to protect those who are victim to it.

It is well known that sexual slavery, servitude, exploitation and trafficking exists within the pornography, prostitution and adult industries as a whole. Many survivors have powerfully attested to this fact.

Pornography, prostitution and sexual exploitation through slavery, trafficking and through the commodifying of flesh have two major traits in common: gender based violence and demand.

It is in addressing the prevalence of gender based violence in pornography, prostitution and the sex trade, and through curbing it's demand that we know the Nordic Model policy approach has been successful in cutting human trafficking by half, and almost eradicating prostitution altogether - in several countries already.

There is also evidence to suggest that violence decreases overall under the Nordic Model which impacts social normalisation behaviours towards women in a positive way.²

The Nordic Model policy approach criminalises the demand for the purchase of flesh, while at the same time decriminalising its victims. It also provides exit rehabilitation programs for the women getting out of the sex trade, and provides law enforcement, community and 'Johns' education awareness training of this gender equal human rights standard.

If we are to abolish human trafficking and slavery in our world today, we need to look at exploitation in the sex industry more closely, for the greatest form of human trafficking and slavery exists within the sex industry.

² For a summary of the data and reporting on this, go to the Feminist Current Blog titled: New research shows violence decreases under Nordic model: Why the radio silence? at:<http://www.feministcurrent.com/2013/01/22/new-research-shows-violence-decreases-under-nordic-model-why-the-radio-silence/>

III THE EXTENT OF THE CRIME OF HUMAN TRAFFICKING AND THE PREVALENCE OF EXPLOITATION

Human trafficking has been declared as one of the greatest human rights challenges of this century.³ According to the Global Slavery Index, there are 45.8 million slaves in the world today, and 85% of those slaves are women and girls, and 50% of them are children!⁴

78% of these 45.8 million slaves live in the Asia region, including Australia.⁵

Whether a person is trafficked for labor, as a child bride, through adoption, or for sexual exploitation, they often all experience sexual violence and exploitation.

In fact, sexual exploitation makes up 79% of identified forms of human trafficking, including forced prostitution, stripping, massage services and pornography.⁶

Not only are most of the slaves today trafficked into the sex industry for sexual exploitation and abuse, an estimated 30,000 victims of sex trafficking die each year from abuse, disease, torture, and neglect⁷. It is estimated that there are over 4,300 people living in modern day slavery in Australia today⁸, with the majority trapped in the sex trade.

³ Cited by the United Nations, as well as global leaders such as Hilary Clinton.

⁴ Global Slavery Index 2016 Findings Report, at:
<https://www.globalslaveryindex.org/findings/>

⁵ Global Slavery Index 2016 Findings Report, at:
<https://www.globalslaveryindex.org/findings/>

⁶ United Nations Office on Drugs and Crime Global Initiative to Fight Human Trafficking 2009.

⁷ Allison Chawal, *The Disturbing Reality of Human Trafficking and Children*, Huff Post - The Blog, 18 December 2016, at: http://www.huffingtonpost.com/allison-chawla-/disturbing-reality-human-trafficking_b_8831834.html

⁸ Global Slavery Index - Country Study, State Findings at:
<http://www.globalslaveryindex.org/country/australia/>

According to United Nations Children's Fund (UNICEF), over the past 30 years, over 30 million children have been sexually exploited through human trafficking.⁹

The youngest child known to be trafficked for sexual servitude was a mere 5-month-old!¹⁰

So, whether it is pornography, prostitution or human trafficking, there are often two common denominators present: gender based/sexual violence and demand.¹¹

IV WOMEN AS VICTIMS OF EXPLOITATION IN THE SEX TRADE

Melissa Farley's research tells us that 89% of women in prostitution if asked, would do anything else. The reality is: the majority of women working in prostitution want to get out.¹²

So, why are we as a society not facilitating the exit of vulnerable women who are abused and degraded daily, and have expressed they do not want to be there - from their circumstances of trauma, exploitation - and slavery?

Calling sexual exploitation and slavery 'work' therefore becomes problematic.

⁹ United Nations Children's Fund, Child trafficking, at: https://www.unicef.org/ceecis/protection_3974.html

¹⁰ Known from conversations had with the Australian Federal Police Child Protection Team and intel from NGO's.

¹¹ Pornography drives demand for sex trafficking, End Sexual Exploitation, at: http://endsexualexploitation.org/articles/pornography-drives-demand-for-sex-traffickingoption=com_content&task=view&id=31&Itemid=74&jumival=14917

¹² Melissa Farley and Dorchen A. Leidholdt, Prostitution and Trafficking in Women: An Intimate Relationship, *Journal of Trauma Practice* (The Haworth Maltreatment & Trauma Press', an imprint of The Haworth Press, Inc.) Vol. 2, No. 3/4, 2003, at: <http://www.prostitutionresearch.com/Leidholdt%20Prostitution%20and%20Trafficking%20in%20Women.pdf>

We know from media reports and from survivors' stories that women in prostitution experience abuse, assault, bashings, degradation, rape and threats on a weekly basis - which would never be acceptable in any other "work place".

We also know that prostitutes live with Post Traumatic Stress Disorder and are deeply traumatised by experiencing daily physical and sexual abuse and violence in their 'workplaces'.¹³

When society legalises prostitution, we do not facilitate and support women who want to get out of the industry - in fact - we facilitate their entrapment and discriminate against them when they try to leave.

According to survivors of the sex trade, for a lack of a Resume and a lack of experience working in an office, women wanting to exit the industry are time and time again discriminated against by not only potential employers but also potential landlords.¹⁴

How are they meant to get out of the cycle of abuse and trauma they face daily?

For the approximately 20,000 women in prostitution in Australia¹⁵, the legalised, decriminalised or regulated systems of prostitution does not work, for we know that the majority of women do not want to be there.

There is an undeniable link between the legalisation of prostitution and the rate of trafficking of persons¹⁶ - which has been discussed and proven by evidence in various international academic, legal and social research papers, conferences and forums.¹⁷

¹³ Melissa Farley, PhD Howard Barkan, Dr PH, *Prostitution, Violence and Post Traumatic Stress Disorder*, Women 8: Health, Vol. 27(3), 1998 by The Haworth Press, Inc. at: [http://www.prostitutionresearch.com/Farley%26Barkan %201998.pdf](http://www.prostitutionresearch.com/Farley%26Barkan%201998.pdf)

¹⁴ Known from personal stores of victim survivors of the sex trade accessing Project Respect services in Victoria - wanting to transition out of prostitution.

¹⁵ State Institute of Criminology, The State sex industry, at: http://www.aic.gov.au/publications/current%20series/rpp/121-140/rpp131/05_aus_industry.html

The demand for such a service is predominantly what allows the trafficking, exploitation, slavery and gender based violence and abuse in the industry to keep occurring.

Australia is currently out of step with international norms as well as international policy developments in prostitution law reform.

A truly progressive society encourages the equality and dignity of all women, not the purchase and renting of women's bodies - who are then abused and often tortured¹⁸.

Legally, the definition of torture under international human rights law refers to¹⁹ severe pain or suffering at the hands of a public official for a specific purpose.²⁰ Although this is a narrow definition, the principle still applies. It could also be argued that the definition of torture extends to sexual slaves, as they are clearly persons

¹⁶ Seo-Young Cho; University of Marburg - School of Business & Economics, Axel Dreher; University of Heidelberg, Eric Neumayer; London School of Economics and Political Science (LSE), *Does Legalised Prostitution Increase Human Trafficking?* World Development, 41 (1), 2013, pp. 67-82, Date Written: January 16, 2012 at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986065

¹⁷ See Melissa Farley, CATW International, Nordic Model Now Paper and presentations.

¹⁸ The definition of torture as: "*the action or practice of inflicting severe pain on someone as a punishment or in order to force them to do or say something*" may refer to the rape, sexual abuse/assault, slavey, exploitation and gender based violence that women and girls may face in prostitution or the sex trade in general.

¹⁹ Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is the internationally agreed legal definition of torture:

"Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

²⁰ This definition contains three cumulative elements:

- the intentional infliction of severe mental or physical suffering
- by a public official, who is directly or indirectly involved
- for a specific purpose.

subjected to severe pain or suffering for a ‘specific purpose’ - being commercial exploitation. The ‘public official category is not satisfied here legally, although ‘public officials’ legalese the industry that holds them captive.

V THE LEGALISATION AND DECRIMINALISATION OF PROSTITUTION IS INCOMPATIBLE WITH INTERNATIONAL HUMAN RIGHTS LAWS, WOMEN’S RIGHTS AND GENDER EQUALITY PRINCIPLES

There is clear evidence that the legalised models of prostitution in New South Wales and the decriminalised model of prostitution in Victoria have simply not worked. In fact, evidence shows us that the decriminalisation and legalisation models of prostitution have created a safe harbour for traffickers, it has encouraged criminality throughout the industry, including links to bkie gangs, it has entrapped many vulnerable women and girls into debt bondage, it has further victimised vulnerable women and it has encouraged gender based and sexual violence in our communities.²¹

This is reinforced by the multiple accounts of violence, rape and even murder experienced by women who have worked in prostitution, and the stories of various survivors.²²

Studies have shown that 78% of women working in the brothels of Victoria as single mothers trying to feed their babies, 50% are there because of homelessness like circumstances and 80% have experienced childhood sexual abuse and assault.²³

²¹ See NSW Inquiry into Brothels and into Human Trafficking Submissions here: <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=250#tab-submissions>

²² Including from the recent Book published by survivors of the sex trade in prostitution: Caroline Norma and Melinda Tankard Reist (Eds) *Prostitution Narratives - stories of survival in the sex trade*, Spinifex Press, 2016.

Where is voluntariness and the choice to enter the sex trade of any of these women?

Where is their voluntariness exercised to exit an industry that leaves them abused, traumatised and exploited?

Through violent pornography, male sexual entitlement behaviours, through coercion, force, fraud and debt bondage, women are being groomed and subjected to a life of gender based and sexual violence in the sex trade - facilitated by legalised and decriminalised policy approaches to prostitution laws.²⁴

The current legalisation and decriminalisation models of prostitution are incompatible with Australia's said National agenda to combat violence against women²⁵ and it is totally out of step with our international obligations to the rights of women and as signatories to the *Convention on the Elimination of all forms of Discrimination Against Women*²⁶.

Australia's current prostitution laws are out of step with international best practices, they are not compliant with international human rights standards and in fact - they are

²³ Project Respect - a support and referral service for women trafficked for sexual exploitation and women in the sex industry, at: <http://www.projectrespect.org.au> as well as stories of survivor recorded in *Prostitution Narratives - stories of survival in the sex trade*, Caroline Norma and Melinda Tankard Reist (Eds), Spinifex Press, 2016.

²⁴ Project Respect - a support and referral service for women trafficked for sexual exploitation and women in the sex industry, at: <http://www.projectrespect.org.au>

²⁵ The National Plan to Reduce Violence against Women and their Children 2010 – 2022 at: <https://www.dss.gov.au/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022>

²⁶ The CEDAW at: <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

in direct violation of the *Declaration of the Elimination of Violence Against Women*.²⁷

Article 2 of the *Declaration on the Elimination of Violence Against Women* clearly States that violence against women is understood to include not only the trafficking of women but also forced prostitution.²⁸

The *Trafficking Protocol*²⁹ explicitly States that prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community.³⁰

Article 16 of the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others*³¹ calls member States to adopt a human rights approach to preventing, protecting and redressing trafficking in persons, including providing an exit program for women working in brothels who wish to access other forms of employment and require rehabilitation and support.

²⁷ Article 2 of the *Declaration on the Elimination of Violence Against Women* clearly states that violence against women is understood to include not only the trafficking of women but also forced prostitution.

²⁸ Art. 2, DEVAW, A/RES/48/104, 85th plenary meeting, 20 December 1993, 48/104., at: <http://www.un.org/documents/ga/res/48/a48r104.htm>

²⁹ The *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, supplementing the United Nations Convention against Transnational Organised Crime at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>

³⁰ 'United Nations Convention Against Transnational Organised Crime and the Protocols Thereto', at: <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

³¹ 'Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others', Approved by General Assembly resolution 317 (IV) of 2 December 1949, Entry into force: 25 July 1951, in accordance with article 24, at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx>

In fact, the international community's standards in relation to gender equality is that States have a due diligence obligation to protect and prevent harm from occurring, as a part of their mandate for equal protection to both men and women under the law.³²

VI. THE GENDERED DIMENSIONS OF SEX TRAFFICKING

It is important to acknowledge and identify violence, especially sexual violence in pornography, prostitution and human trafficking as a gender based violence issue - it requires a human rights preventative and diversionary approach for all of community.

The *World Health Organisation* cites that 1 in 3 women throughout the world experience physical and/or sexual violence by a partner or sexual violence by a non-partner.³³ Australia is no different, with women victims of domestic violence being murdered weekly - on record last year.³⁴

Violence against women and their children affects us all - we all need to focus on prevention as a community. Australia needs to take the lead on this important human right and womens rights agenda in light of our *Sustainable Development Goals*³⁵ and international obligations.

It is incompatible to say that as a Nation, we seek to have a zero-tolerance approach to domestic violence - which is an expression of gender based violence, and ignore a commercialised industry that perpetuates it.

³² The *Convention on the Elimination of All Forms of Discrimination against Women*, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, at: <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

³³ The *World Health Organisation Violence Against Women* Journal Article, at: <http://www.who.int/reproductivehealth/publications/violence/articles/en/>

³⁴ Our Watch - Facts and Figures here: <https://www.ourwatch.org.au/Understanding-Violence/Facts-and-figures>

³⁵ SDG 5: gender Equality; SDG 10: Reduce Inequality, and SDG 16: Peace, Justice and Strong Institutions, at: <http://www.un.org/sustainabledevelopment/sustainable-development-goals/>

As noted above, because the majority of human trafficking victims (85%) are women and girls, human trafficking becomes a gendered issue - with sexual exploitation in the sex trade as the major form of trafficking for the purposes of exploitation - the gender based violence prostitutes experience daily cannot be ignored. Neither can the States due diligence obligation to prevent the harms of sex trafficking, and protect its victims be ignored in a society that facilitates this international crime through the legalisation and decriminalisation of prostitution.

The trafficking of human beings is widely recognised as a human rights issue³⁶, it is transnational in nature, and it is often linked to international organised crime, within the context of exploitation and gender based violence, perpetuating male sexual entitlement behaviours.

In 1979, the *Convention on the Elimination of Discrimination Against Women* (CEDAW)³⁷ was adopted by the United Nations General Assembly and heralded as

³⁶ See for instance, Reports of the Secretary General on Trafficking in Women and Girls, E/CN.4/2002/80 and E/CN. 4/2003/74; Informal Note by the United Nations High Commissioner for Human Rights, A/AC.254/ 16; and Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organisation for Migration on the Draft Protocols Concerning Migrant Smuggling and Trafficking in Persons, A/AC.254/27; Global Alliance Against Trafficking in Women (GAATW), Human Rights and Trafficking in Persons: A Handbook (Bangkok:GAATW) (2001); S. C. Inglis, 'Expanding International and National Protections against Trafficking for Forced Labour Using a Human Rights Framework' (2001) 7 Buffalo Human Rights Law Review 55; K. Corrigan, 'Putting Brakes on the Global Trafficking of Women for the Sex Trade: An Analysis of the Existing Regulatory Schemes to Stop the Flow of Traffic' (2001) 25 Fordham International Law Journal 151; K. C. Ryf, 'The First Modern Anti- Slavery Law: The Trafficking Victim Protection Act 2000' (2002) 34 Case Western Reserve Journal of International Law 45; T. Hartsough, 'Asylum for Trafficked Women: Escape Strategies Beyond the T Visa', (2002) 13 Hastings Women's Law Journal 77; T. Obokata, 'Human Trafficking, Human Rights, and the Nationality, Immigration and Asylum Act 2002', (2003) EHRLR 410; and J. Murray, 'Who Will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of the United Nations Civilian Police in Trafficking of Women in Post-Conflict Bosnia and Herzegovina' (2003) 34 Columbia Human Rights Law Review 475.

³⁷ The *Convention on the Elimination of All Forms of Discrimination against Women*, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, at: <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

the "*international bill of rights for women*," containing provisions meant to end discrimination toward women.³⁸

It was not until several years later that international bodies began to acknowledge the connection between violence against women and discrimination, acknowledging also that the CEDAW did not explicitly address the issue of violence against women. More needed to be done.

Statements and resolutions on violence in the family were issued by the UN *Economic and Social Council*, the *UN General Assembly*, and a *UN Expert Group Meeting on Violence in the Family*³⁹ held in 1986. These documents drew attention to the international character of violence against women, asking States to develop action plans to address domestic violence, which led to further studies.

In 1989, the UN released a report on *Violence Against Women in the Family* which argued that domestic violence is not random, but "*associated with inequality between women and men*."⁴⁰

In 1992, thirteen years after CEDAW's adoption, the Committee on the *Elimination of Discrimination Against Women* incorporated violence against women into its reading of the CEDAW by adopting General Recommendation 19. This

³⁸ See *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, at pt. 1, art. 1, U.N. GAOR, 34th Sess., 107th plen. mtg., U.N. Doc. A/RES/34/180 (Dec. 18, 1979) [hereinafter CEDAW] (defining "discrimination" as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field"). See also U.N. Div. for the Advancement of Women, Dep't of Econ. & Soc. Affairs. <http://www.un.org/womenwatch/daw/cedaw/> (last visited Dec. 7, 2008) (referring to the Convention on the Elimination of All Forms of Discrimination Against Women as an international bill of rights for women).

³⁹ See, e.g., U.N. Econ. & Soc. Council [ECOSOC] Res. 1984/14, 19' plen. mtg., U.N. Doc. E/RES/1984/14 (May 24, 1984); G.A. Res. 40/36, TT 1-7, U.N. Doc. A/RES/40/36 (Nov. 29, 1985).

⁴⁰ The U.N. Work on Violence Against Women, available at <http://www.un.org/womenwatch/daw/news/unwvaw.html>

recommendation established a robust definition of violence against women and mandated that;

*full implementation of the Convention required States to take positive measures to eliminate all forms of violence against women.*⁴¹

In so doing, there was a shift in the acknowledgement of gender based violence in not only public, but also private - as the due diligence obligation of States to prevent and protect.

The document also identified the "*due diligence*" standard for determining whether States have fulfilled the objectives of the Recommendation. This standard, recognised as international customary law - suggests that CEDAW's Member States have a particular obligation to ensure the elimination of violence against women.

The 2002 *Special Rapporteur Recommendation* articulates the due diligence standard, noting that Member States should; “[r]ecognise that States have an obligation to exercise due diligence to prevent, investigate and punish acts of violence, whether those acts are perpetrated by the State or private persons, and provide protection to victims”, identifying several "*necessary*" provisions, including public education, media training, treatment and assistance for victims, intervention for the perpetrators

⁴¹ *Commission on the Elimination of Discrimination Against Women*, General Recommendation No. 19: Violence Against

Women, 11th Session, 4, U.N. Doc. A/47/38 (1993), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>; see also id 7 ("Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include: (a) The right to life; (b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; (c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict; (d) The right to liberty and security of person; (e) The right to equal protection under the law; (f) The right to equality in the family; (g) The right to the highest standard attainable of physical and mental health; (h) The right to just and favourable conditions of work").

of violence, as well as particular reforms to criminal law, civil law, and judicial proceedings.⁴²

In the same way, gender based violence experienced by women in the sex trade, through human trafficking and in legalised and decriminalised prostitution gives rise to Australia's due diligence obligation to preventing these crimes, and a responsibility within a human right framework to protect the victims of sexual abuse, assault, trafficking, slavery, exploitation in the sex trade - to the full extent of their rights under the law.

VII. AUSTRALIA'S DUE DILIGENCE OBLIGATION TO PREVENT GENDER BASED VIOLENCE AND SEXUAL VIOLENCE

Australia's due diligence obligation to prevent the existence of gender based violence within the context of exploitation in the sex trade and the crime of human trafficking under international law is well recognised.

The obligation to protect from the crime of human trafficking is evident and explicitly stipulated in the *Convention for Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* 1949⁴³ and the *Optional Protocol on Sales of Children, Child Prostitution and Child Pornography* 2000⁴⁴ of the *Convention on the Rights of the Child*⁴⁵.

⁴² U.N. Econ. & Soc. Council, Comm'n on Human Rights, Special Rapporteur on Violence Against Women, its Causes and Consequences, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, 29 (Jan. 20, 2006) (prepared by Yakin Erturk in accordance with Commission on Human Rights Resolution 2005/41) [hereinafter 2006 Due Diligence Report], at 6-49.

⁴³ Articles 16, 17 and 19, 96 UNTS 271.

⁴⁴ Articles. 8, 9, and 10, A/RES/54/253 (2000).

⁴⁵ The United Nations *Convention on the Rights of the Child* at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

The concept of "due diligence" regarding State responsibility for non-State acts was first developed in case law in *Velasquez Rodriguez v. Honduras*⁴⁶ a case heard by the Inter American Court of Human Rights (IACHR) in 1988.

For the first time, the Court considered State responsibility for enforced disappearances under the *American Convention on Human Rights*⁴⁷.

The Court found that an illegal act "*which violates human rights and which is initially not directly imputable to a State ... can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American Convention on Human Rights]*"⁴⁸, and that the existence of a legal system is not enough; the government must also "*conduct itself so as to effectively ensure*" the enjoyment of rights.⁴⁹

The cases of: *Bevacqua and S. v. Bulgaria*⁵⁰ and *Opuz v. Turkey*⁵¹ held national governments responsible for failing to exercise due diligence to adequately protect individuals from domestic violence.

The decisions in these cases not only affirm the use of the due diligence standard as a tool for assessment, but also clarifies the practical obligations of protecting victims from domestic violence and preventing, investigating, and prosecuting such violence.

⁴⁶ *Velasquez Rodriguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, T 172 (July 29, 1988).

⁴⁷ The *American Convention on Human Rights* at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

⁴⁸ *Velasquez Rodriguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, T 172 (July 29, 1988), at 172.

⁴⁹ *Velasquez Rodriguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, T 172 (July 29, 1988), at 167.

⁵⁰ *Bevacqua v. Bulgaria*, App. No. 71127/01, Eur. Ct. H.R. (2008), available at: <http://cmiskp.echr.coe.int/tkpl97/view.asp?item=1&portal=hbkm&action=html&highlight=Bevacqua%20%7C%20v>

⁵¹ *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009), available at <http://cmiskp.echr.coe.int/tkpl97/view.asp?action=html&documentId=851046&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

The *European Court of Human Rights* highlighted the need for enforceable measures of protection and a legislative framework that enables criminal prosecutions of domestic violence in the public interest in its decision making of these cases.⁵²

Significantly, the decision in *Opuz v. Turkey* recognised that a State's failure to exercise due diligence to protect women against domestic violence is gender-based discrimination, violating women's right to equal protection of the law.⁵³

The obligation to protect derives from a general duty to ensure rights and provide remedies⁵⁴.

Article 2(3)(a) of the *International Covenant on Civil and Political Rights* stipulates in this regard that States are under an obligation to ensure that '*any person whose rights and freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity*',⁵⁵.

This human rights shift occurred in the 1980's and 1990's in international human rights law in understanding that a States due diligence obligation to protect and

⁵² As per the Article by Lee Hasselbacher titled: State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection, 2010 by Northwestern University School of Law Northwestern Journal of International Human Rights, Volume 8, Issue 2 (Spring 2010).

⁵³ *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009), available at <http://cmiskp.echr.coe.int/tkpl97/view.asp?action=html&documentId=851046&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, at 191.

⁵⁴ J. Moore, 'From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents', (1999) 31 Columbia Human Rights Law Review 81, at. 92, 93 and 96.

⁵⁵ It is worth noting that the Human Rights Committee, in relation to prohibition against torture, Stated that '*it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against acts prohibited by Art. 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity*'. General Comment No. 20 (Torture, Inhuman or Degrading Treatment and Punishment) (1992), para. 2, Compilation of General Comment 999 UNTS 171.

prevent harms from occurring extended to the ‘private spheres’, including domestic violence, wife rape and other ‘private’ matters.

It is under this basis upon which the State can, under international human rights law intervene in matters such as female genital mutilation, child marriage, wife rape and domestic violence in the ‘private sphere’. This development in law is necessary to protect the vulnerable “behind closed doors”, and this principle logically therefore also extends to the private contract between a prostitute exchanging money for sex behind the closed doors of a brothel.

The development in case law in various human rights jurisdictions led to creating customary international law to cite that when a States due diligence obligation to protect and prevent harm from occurring is not realised, it is seen as not only a violation of obligations, but that it is also gender-based discrimination, and a direct violation of women’s rights to equal protection of the law.

This is an extremely significant shift in placing the burden onto a State to not legalise an industry that is fraught with gender based violence, trafficking, slavery and exploitation - namely, the legalisation and decriminalisation of prostitution.

These international human rights standards and customary law have unfortunately not been implemented in domestic and state-based legislation - where prostitution laws vary significantly from jurisdiction, to jurisdiction in Australia. These inconsistencies in laws also enables domestic trafficking to thrive in Australia - without the authorities being alerted, as there are no records kept of where vulnerable women in the sex trade have been forced to work as they are moved around from state to state.

The *Special Rapporteur on Sales of Children, Child Prostitution and Child Pornography*⁵⁶ went further to argue that ‘international human rights law has long

⁵⁶ More about the Special Rapporteur here:

<http://www.ohchr.org/EN/Issues/Children/Pages/ChildrenIndex.aspx>

imposed direct obligations on the private sector'.⁵⁷ This private sector would extend to traffickers, brothel owners, pimps and 'Johns' - those purchasing flesh - whether it be 'legally', illegally or otherwise.

This is consistent with *Article 2 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others* 1949⁵⁸ which criminalises anyone who keeps, or manages or knowingly finances or takes part in the financing of a brothel, or knowingly lets or rents a building or other place for the purpose of the prostitution of others.

VIII AUSTRALIA'S DUE DILIGENCE OBLIGATION TO PROTECT WOMEN FROM EXPLOITATION, SLAVERY AND TRAFFICKING

Existing principles and jurisprudence offer a foundation on which to build a due diligence standard of protection for trafficked women. Most obviously, general guiding principles can be found in ECOSOC's *Recommended Principles and Guidelines on Human Trafficking*.⁵⁹ This United Nations document explains that "*States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.*"⁶⁰

⁵⁷ Report of the *Special Rapporteur on Sales of Children Child Prostitution and Child Pornography*, E/CN.4/ 2001/78, para. 52.

⁵⁸ *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, Approved by General Assembly resolution 317 (IV) of 2 December 1949, Entry into force: 25 July 1951, in accordance with article 24, at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx>

⁵⁹ U.N. Econ. & Soc. [ECOSOC], Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add. 1, 13 (May 20, 2002).

⁶⁰ U.N. Econ. & Soc. [ECOSOC], Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add. 1, 13 (May 20, 2002), at 2.

While the UN Protocol advances some notions of protection for trafficked women, it leaves the decisions and actions to be taken to the State's discretion. This is clearly seen in Article 6 of the *Protocol* regarding "assistance to and protection of victims of trafficking in persons," which reads in part:

*Each State Party shall consider implementing measures to provide the physical, psychological and social recovery of victims of trafficking in persons.*⁶¹

And:

*In addition to taking measures pursuant to Article 4 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in person to remain in its territory, temporarily or permanently, in appropriate cases.*⁶²

Vivian Waisman argues that a due diligence standard to protect trafficked women starts with legal residency as a minimum threshold.⁶³

Examining legal obligations under this scheme demonstrates that States must have a framework in place to offer legal residency so that women who have been trafficked - and thus are vulnerable to severe human rights violations - ensuring that they have access to remedies and to protection from further human rights violations.

Of course, Australia's 45-day maximum protection visa for trafficked persons⁶⁴ falls way short of the minimum international standard of six months.

⁶¹ Article 6, *United Nations Convention against Transnational Organised Crime: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25/Annex II (Nov. 15, 2000) [hereinafter UN Protocol on Trafficking].

⁶² Article 7, *United Nations Convention against Transnational Organised Crime: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25/Annex II (Nov. 15, 2000) [hereinafter UN Protocol on Trafficking].

⁶³ Viviana Waisman, 'Human Trafficking: State Obligations to Protect Victims' Rights, the Current Framework and a New Due Diligence Standard, (2010) 33 *Hastings International & Comparative Law Review* 385, at 411.

⁶⁴ More about Australia's Visa regimes for trafficked persons at our Parliamentary website [here](#):

This analysis of human rights in human trafficking reaffirms one of the fundamental principles that all human rights are indivisible and interdependent. The practice affects economic, social, cultural as well as civil and political rights. At a theoretical level, this calls for a comprehensive analysis of trafficking which embraces all human rights.

Australia is a demand nation for trafficked persons and consumers of child sexual exploitation material both online and as sex tourists, as consumers of pornography, live sex shows via webcam and prostitution - and Australia's demand is on the rise.

The international best practice model for curbing human trafficking, addressing gender based violence through a human right compliant framework - the Nordic Model - is the only legislative solution to address these serious crimes, in step with the due diligence obligation of governments to preventing harm, abuse and the crime of trafficking from occurring - and to protect the victims thereof.

The Nordic Model is the best alternative to the failed legalised and decriminalised policy approached of prostitution that has seen an increase in criminality, exploitation, abuse, trafficking and slavery in the industry.

IX. AUSTRALIA'S SOLUTION MOVING FORWARD - THE NORDIC MODEL

Australia has no other option but to implement the international best practice model which has seen a reduction of human trafficking by half, an abolition of

involuntariness in prostitution and has turned criminal enterprise in the industry away.⁶⁵

It has been so successful in fact, that this policy approach to prostitution has been implemented by: Sweden, Norway, Iceland, Finland, Korea, Canada, France, Northern Ireland and endorsed by the European Parliament, and is being considered by: Italy, Israel, Luxemburg and Scotland.⁶⁶

Australia has no other option but to implement the Nordic Model that curbs the demand of human trafficking and addresses gender based violence from a human rights and women's rights perspective, by criminalising demand and providing preventative and exit pathways for vulnerable women, while at the same time providing education to community, law enforcement and front line organisations as to the standards of respecting and protecting women as having freedoms and rights.

For the approximately 20,000 women in prostitution in Australia⁶⁷, the legalised, decriminalised or regulated systems of prostitution does not work, for we know that the majority of women do not want to be there, that they do not have exit pathways out of the industry, and that they are faced with extreme forms of gender based violence on a daily basis.

Are we to continue buying and selling flesh like an archaic people from the Stone Age? Will we continue to commodify women that enables, encourages and facilitates violence and especially sexual violence against women and girls? *As survivors have said: "prostitution is paid rape"*.

⁶⁵ For a comprehensive analysis of the Nordic Model, it's benefits, impacts and reforms, refer to the *Coalition Against Trafficking in Women 2017 Report* here: <http://www.catwa.org.au/wp-content/uploads/2017/03/NORDIC-MODEL-2017-booklet-FINAL-single-page.pdf>

⁶⁶ Mentioned also in the *Coalition Against Trafficking in Women 2017 Report* here: <http://www.catwa.org.au/wp-content/uploads/2017/03/NORDIC-MODEL-2017-booklet-FINAL-single-page.pdf>

⁶⁷ State Institute of Criminology, The State sex industry, at: http://www.aic.gov.au/publications/current%20series/rpp/121-140/rpp131/05_aus_industry.html

X IT IS A CRIMINAL ACT TO TAKE PART IN MANAGING BROTHELS UNDER INTERNATIONAL LAW

Furthermore, *Article 2 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others* 1949⁶⁸ criminalises anyone who keeps, or manages or knowingly finances or takes part in the financing of a brothel, or knowingly lets or rents a building or other place for the purpose of the prostitution of others.

The Australian Government has a due diligence obligation to uphold these standards and cease from engaging in the criminal act of allowing the buying and selling of persons, in facilitating brothel ownership, pimping and facilitating the sex trade.

In considering the States' due diligence obligations under international human rights standards and principles, the Australian Government is called upon to consider and implement the *Coalition for the Abolition of Prostitution Report on Prostitution under International Human Rights Law: An Analysis of State's Obligations and the*

⁶⁸ *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, Approved by General Assembly resolution 317 (IV) of 2 December 1949, Entry into force: 25 July 1951, in accordance with article 24, at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx>

*Best ways to Implement them*⁶⁹ in order to move towards a more gender equal, human rights compliant practice of industry and standards for all women in the workplace.

As a matter of urgency, Australia has to recognise its due diligence obligation under international human rights law and customary law to prevent the harms of gender based violence to women in prostitution, to cease from facilitating these violations of their rights through the legalisation and decriminalisation of prostitution - which facilitate their harms, and to implement protection through exit programs, rehabilitation pathways, re-skilling options, compensation schemes and residency rights.

Of course, prevention is always better - and more cost effective than the cure.

It goes without saying that the prevention of human trafficking, sexual slavery, exploitation and the prevalence of gender based violence through the commercialisation of prostitution by implementing the Nordic Model that protects victims, curbs demand and provides exit pathways and community education is the preferred approach.

If Australia wants to be a part of the solution to human trafficking in our vulnerable developing region, and to the predominantly vulnerable women and girls trafficked for the purpose of sexual exploitation, it needs to implement the Nordic Model to address the growing demand of gender based violence in prostitution, which develops and affects social and behavioural norms outside of one transaction in the brothels.

If Australia wants to reduce gender based violence, it needs to seek to curb the demand for it, through legalised and decriminalised prostitution. As the Swedish Minister at the most recent United Nations Security Council meeting in March 2017

⁶⁹ The *Coalition for the Abolition of Prostitution Report on Prostitution under International Human Rights Law: An Analysis of State's Obligations and the Best ways to Implement them at:* <http://www.cap-international.org/wp-content/uploads/2017/01/CAP-HR-paper-EN.pdf>

has declared: “*Prostitution can never be regarded as a job. Prostitution is exploitation.*”⁷⁰

In our conclusions, we have to take into consideration the evolving definition of the States due diligence obligations of preventing gender based, and especially sexual violence against women from occurring as including private relationships and question whether this extends to private transactions, such as the sexual service purchased by men, especially if that service is fraught with violence against predominantly women.

If indeed this development of international human rights law to protect women were to extend to the transaction of a man purchasing sex from a prostitute, this would lead a major reform of Australia’s various approaches to prostitution laws across our jurisdictions.

If indeed it is a criminal act to take part in managing brothels under international human rights law and the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others*, States such as Victoria who have decriminalised prostitution, and New South Wales who have legalised it - would have to review their legislative approach, including giving due consideration to the fourth option approach to prostitution laws - which is the Nordic Model.

XI CONCLUSION

There is evidence to the fact that the criminalisation, legalisation and decriminalisation models of prostitution have not worked, and a fourth alternative needs to be considered. In ignoring these realities, Australians will find themselves

⁷⁰ Swedish Minister Asa Regner, United Nations Security Council, during 7898th meeting, 15 March 2017, at: <http://webtv.un.org/meetings-events/security-council/watch/part-1-trafficking-in-persons-in-conflict-situations-forced-labour-slavery-and-other-similar-practices-security-council-7898th-meeting/5360604475001>

with a continued growth in gender based violence, a demand for women in the adult industries, which in turn fuels the business of traffickers.

In the words of former Secretary-General Kofi A. Annan, sexual exploitation is one of the most egregious violations of human rights that the United Nations confronts⁷¹. The reality is, this egregious violation of human rights confronts us all - and not just the United Nations.

Addressing this human right violation has to include dealing with the demand for an industry that fuels the trafficking of vulnerable women and girls. This is the due diligence obligation of all persons who care about their fellow human, and see them as having inalienable rights and dignity.

⁷¹ Full text: *"I believe the trafficking of persons, particularly women and children, for forced and exploitative labour, including for sexual exploitation, is one of the most egregious violations of human rights that the United Nations now confronts. It is widespread and growing. It is rooted in social and economic conditions in the countries from which the victims come, facilitated by practices that discriminate against women and driven by cruel indifference to human suffering on the part of those who exploit the services that the victims are forced to provide. The fate of these most vulnerable people in our world is an affront to human dignity and a challenge to every State, every people and every community. I therefore urge the Member States to ratify not only the United Nations Convention against Transnational Organised Crime, but also the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which can make a real difference in the struggle to eliminate this reprehensible trade in human beings."* Kofi A. Annan Secretary-General, UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME AND THE PROTOCOLS THERETO United Nations, New York, 2004.

PRELIMINARY RULINGS - ARTICLE 234 TEC NICE (ARTICLE 267 TFEU LISBON)

JOSEPH GERSTEN*

ABSTRACT:

An example of the treaty article's practical application in respect of the court of justice determining what law is to be applied by the courts of a member state.

I INTRODUCTION

Article 267 of the Treaty on the Functioning of the European Union – (hereinafter “Lisbon Treaty”) – is the current version of Article 234 of the Treaty Establishing the European Community (Nice); and deals with one of the European Court of Justice’s (“ECJ”) enforcement procedures referred to as Preliminary Rulings. This paper will refer to Article 234 (“the Article”) because virtually all of the relevant case law and procedure used to date refers to Article 234; the Lisbon Treaty having come into effect in December 2009.

It should be noted however the there are some changes in the wording of Article 234 (Nice) and Article 267 (Lisbon); the differences being noted below.

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Nevertheless, the main thrust of Article 234 (Preliminary Rulings) continues mainly intact in Article 267 of the Lisbon Treaty: to permit the ECJ alone to determine, *inter alia* what law the national courts of a Member States should apply in a matter being heard by that national court that involves an interpretation of Community (now Union) law.

The ECJ determines whether a Member States' national legislation or case law is in conflict with Union legislation *viz* Regulations, Directives, and acts as well as EU Treaty provisions.

II. PURPOSE OF THE ARTICLE (234 NICE, 267 LISBON)

The Article is a mechanism by which the ECJ distinguishes and gives effect to “public” versus “private” enforcement of Union law. It is an example of a Treaty Article giving “Direct Effect”, or “enforceable rights” to individuals. In 1963, the case of *Van Gend en Loos*¹, the ECJ recognized the principle of “direct effect” of certain Union legislation. Advocate General Roemer in that case observed that Preliminary Rulings dealt only with the ECJ’s interpretation of Community (now Union) law, while the national court applied that Union law to National case law² in national litigation.

¹ *Van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62) [1963] ECR 13.

² Paul Craig, Gráinne de Búrca, *EU Law Text, Cases and Materials* (Oxford University Press, 4th Ed, 2008) 433.

Once the principle of the “Supremacy” of Union law over national law was established by the ECJ in 1964 in the *Costa* case³ and the concomitant abrogation of full state sovereignty by Member States, the stage was set for intervention by the ECJ into the judicial systems of the Member States. This point is succinctly put by the ECJ in *Costa*:

The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights against which a subsequent unilateral act incompatible with the concept of the community cannot prevail.⁴

The Preliminary Ruling procedure articulated in Article 234 (Article 267 Lisbon) found a pre-eminent role in the functioning of the Court of Justice: currently over 50%; or about 8,000 of the Court judgments since 1952 being in respect of Preliminary Ruling matters⁵.

An obvious reason and an essential effect of the Supremacy Doctrine is that the national law of all of the Union’s Member States is consistent with Union legislation and in harmony with each other’s legislation on subjects covered by Union legislation.⁶

A further aspect of the harmony principle is to require internal consistency of all national law within an individual Member State, where such national

³ *Flaminio Costa v ENEL* (Case 6/64) [1964] ECR 585.

⁴ *Ibid.*

⁵ Marc-André Gaudissart, ‘Professor at University of Gent’, (Lecture on Judicial Enforcement delivered at University of Gent, 13 February 2009).

⁶ Craig and Ed Burca, above n 2, pp344 – 354, 282 – 291, 461 – 462.

law is subservient to Union legislation.⁷ The *Pffeifer case* is of particular interest in respect of this principle:

The principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law.⁸

Craig and de Burca observe:

The obligation to harmonise applies even in a 'Horizontal' case between private parties⁹

The obligation [to harmonise] applies to all National law, and not only to legislation implementing a Directive¹⁰

A Article 234 (Nice)

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) *the interpretation of the Treaty;*
- (b) *the validity and interpretation of acts of the institutions of the Community and of the ECB*

⁷ *Pffeifer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Cases C-397-403/01) [2004] ECR I-8835.

(see also *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1989] I-4135.

⁸ *Ibid.*

⁹ Craig and Ed Burca, above n 6, 288.

¹⁰ *Ibid* 289.

- (c) *the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.*

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision of the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that or tribunal shall bring the matter before the Court of Justice.¹¹

B Article 267 (*Lisbon*)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

¹¹ The Treaty Establishing the European Community (2002) done at Nice (2002/C 325/01) Consolidated Version, Article 234

Where such a question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.¹²

C Distinctions Between Nice and Lisbon:

While minimal, there are changes to the Lisbon version of the Preliminary Ruling Article (Article 267 Lisbon) when compared with the wording of the Article 234 Nice. As succinctly stated by Vassilis Hatzpulos,

The ECJ is the body whose institutional role is to benefit most from this ‘depolarisation’, possibly more than that of the European Parliament. However spectacular this formal boost of the Court’s competence, the changes in real terms are not going to be that dramatic.¹³

Hatzpulos goes on to opine that certain changes found in Article 267 (Lisbon) are important; and comments specifically on the new (last) paragraph inserted in Article 267 of the Lisbon Treaty in respect the ECJ

¹² The Treaty on the Functioning of the European Union (done at Lisbon) Consolidated Version (2008/C 115/01, Article 267

¹³ Vassilis Hatzopoulos, ‘Casual but Smart: The Courts new clothes in the Area of Freedom Security and Justice after the Lisbon Treaty’ (Research Papers in Law, College of Europe, European Legal Studies, February 2008).

making decisions with the “minimum of delay” in cases of persons held in custody:

Article 267 TFEU now provides for a single preliminary procedure covering all issues of the current first and third pillar. This is compulsory for all Member States and for all jurisdictions and does not require any prior declaration [a Member State’s agreement] or other formality. Further, both primary and secondary law may be subject to the Court’s interpretation. A special fast-track procedure is provided for in the last paragraph of Article 267 [Lisbon], for cases stemming from the AFSJ, where ‘a person in custody’ is involved.¹⁴

The ECJ requirement to act with minimum delay in cases where there is party in custody is also considered noteworthy by the UK Parliament.¹⁵

It is arguable that the new final paragraph in Article 267 is merely a specific mandatory application of the accelerated (“Fast-Track”) procedure that was discretionary with the ECJ; and rarely used (as of 2009 it was used on only three occasions since 2001).¹⁶

Alternatively, the insertion of the “minimum delay” paragraph into Article 267 Lisbon, may have been in response to the Lisbon Treaty’s formal recognition of fundamental human rights.

¹⁴ Ibid 9.

¹⁵ Library of the House of Commons, “The *Treaty of Lisbon* amendments to the *Treaty Establishing the European Community*”, Research Paper 07/86 (6 December 2007), 93.

¹⁶ Professor Van Den Hende, ‘Delivered at Lecture on Judicial Enforcement, (University of Gent, 3 April 2009).

*D An Example Of The Use Of Article 234 Nice (Article 267 Lisbon) By
Private Parties To Litigation In A National Court*

The following is a hypothetical example of how the Preliminary Ruling procedure found in Article 234 of TEC (Nice) (now 267 TFEU) (Lisbon) can be utilised by a private party to litigation in the national court of a Member State.

In this hypothetical example, the Member State is the United Kingdom (“UK”).

1 The Facts of The Hypothetical Case

The facts of the hypothetical case involve the issue dealing with one of the Four Freedoms: the free movement of goods, that is Article 28 Nice (now Article 34 Lisbon) and its enforceability of that right by recourse to Article 234. The facts of the case may also invoke Competition law provisions of the TEC Nice *viz* Article 81 and Article 82.

The Defendant, Christie Ltd, alleges as a defence to a suit for a debt said to be owed to Movement Ltd that Movement Ltd engaged in actions that distorted the “internal market” of the EU in breach of Article 28 of the Nice Treaty that prohibits measures that inhibit the free movement of goods within the Internal Market of the EU. Article 28 TEC (Nice)¹⁷ is discussed in more detail below.

¹⁷ See Above n 11, Article 28.

The matter is being heard in a superior court of the UK: the High Court of England and Wales (“the High Court”), which is not a court from which no recourse is available. Thus, the High Court has the discretion to refer (or not refer) Questions to the ECJ for a Preliminary Ruling; it is not required by TEC Article 234 that the High Court do so.

Transport Ltd (a large international transport corporation) says that the case is solely based on the simple fact that it provided transportation services to Christie Ltd pursuant to a contract with Christie Ltd that, without dispute by either party, contains “standard term” clauses. Transport Ltd says that no issue of EU law applies to the case. Christie Ltd says that the contract it entered into with Transport Ltd included “fine print”, that is “standard term” clauses of which Christie Ltd was not aware, and that were never specifically agreed to by Christie Ltd.

In addition to breaching TEC Article 28 with the effect of distorting the Internal Market, Christie Ltd says that the effect of these particular “standard term” clauses may also be to breach TEC (NICE) Competition Law: Articles 81 and 82.

2. The Relevant Legislation (Union and National)

There is a relevant Council Directive (the 1993 Directive on “Unfair Contract Terms”)¹⁸ which has been transposed into UK national legislation

¹⁸ Council of the European Communities Directive on Unfair Contract Terms, 93/13/EEC, 5 April 1993.

(the 1999 UK Regulation on Unfair Contract Terms)¹⁹ which became law in 1999 by the UK's fast track rule-making procedure. There is also a pre-existing 1977 Act of the UK Parliament dealing with "Unfair Contract Terms" ("the UCTA 1977").²⁰

3. The Key Community (Union) Law Issue To Be Decided By The ECJ

The "fine print" (or "Standard Term" clauses) in the contract between Transport Ltd and Christie Ltd state that the contract between the parties to a transport contract cannot (in any effective way) be reviewed by a court. Christie Ltd says that such Standard Terms in a contract are "unfair contract terms" and that those terms in its contract with Transport Ltd are in breach of the intent of Community legislation, that is Directive 93/13/EEC on unfair contract terms; and because of the Supremacy principle, Community (Union) law takes precedence over National legislation in overlapping areas. But there is a "catch".

While the UK *Unfair Contract Terms Act 1977* applies its protection to both "consumers" and "businesses", the Council Directive as well as the transposed *Unfair Contract Terms Regulation 1999*) applies only to private persons who are consumers.

However, the UK *Unfair Contract Terms Act 1977*, which does apply to Christie Ltd, contains a narrow definition of an "unfair contract term", thus

¹⁹ Statutory Instrument: 1999 No. 2083 on Consumer Protection, The Unfair Terms in Consumer Contracts Regulation 1999

²⁰ *Unfair Contract Terms Act 1977* (UK) c 50.

excluding Christie Ltd from its ambit; while the *1993 Council Directive on Unfair Contract Terms* (and the transposed 1999 UK *Regulation*) does not cover Christie Ltd, a business, but does contain an a broad definition (extensive list) of “unfair contract terms” which applies to and prohibits the Standard Term clauses such as the impugned terms in the contract between Christie Ltd and Transport Ltd.

Christie argues that the High Court should, by statutory interpretation, apply the *Unfair Contract Terms Act 1977* to the case between Christie Ltd and Transport Ltd, but interpret the *UCTA 1977* in light of the broad definition of an “unfair contract term” contained in the 1993 Council Directive (and its UK transposition: the 1999 UK Regulation); in other words The High Court should read down or strike the narrow definition found in the 1977 statute and substitute the broad definition found in the 1993 Council Directive and transposed 1999 UK Regulation. It is this judgment that Christie Ltd seeks from the ECJ in a Preliminary Ruling.

Summarised, the issues are:

1. The claim by Christie Ltd that certain of the Standard Term clauses in its contract with Transport Ltd is are “unfair contract terms”;
2. That the unfair contract terms in its contract with Transport Ltd “distorts” the Internal Market of the EU and thus breaches TEC Nice Article 28 (now Article 34 Lisbon);

3. The UK *Unfair Contract Term Act 1977* applies to Christie Ltd, but has a narrow definition of an unfair contract terms that does not apply to the contract between Christie Ltd and Transport Ltd. The UK *UCTA 1977* applies to the contract between Christie Ltd and Transport Ltd because the 1977 Act applies to “business to business” contracts as well as business to consumer contracts.
4. The *1993 Council Directive* (and transposed *1999 UK Regulation*) contains a broad definition of an unfair contract term; but they do not apply to “business to business” contracts; they only apply to private persons who enter into a “consumer contract” under the definition of that term contained in the *1993 Council Directive* and the transposed *1999 UK Regulation*.
5. Christie Ltd also claims that certain Standard Term clauses in its contract Transport Ltd breach Article 81 and/or Article 82 of the Nice Treaty (now Article 101 and Article 102 of the Lisbon Treaty), which Articles deal with EU Competition Law.

Thus the ECJ is asked by the English High Court (at the request of Christie Ltd) what law the High Court should apply, should the ECJ find that the impugned “standard term” clauses in the contract between Christie Ltd and Transport Ltd “distort” the Internal Market of the EU in breach of Article 28 of the Treaty (Nice); and/or breach Articles 81 or 82 of the Nice Treaty relating to Competition Law.

Christie Ltd says that if there is a conflict between National law and Community (Union) law, then the ECJ should find that the principle of the Supremacy of EU legislation applies and require the High Court to determine the case in conformity with EU legislation *inter alia* reading into the UK *Unfair Contract Terms Act 1977* the definition of an unfair contract term found in the *1993 Council Directive on Unfair Contract Terms*, which had been transposed into the UK *Unfair Contract Terms Regulation 1999*.

Under English Rules of Court (Practice Direction supplement to CPR Part 68)²¹ any party to a law suit has the right to ask the court which is hearing its case to make a referral to the ECJ, if issues are raised in that law suit that involve an interpretation of Community (Union) legislation or Treaty. If the court is not a court of last resort, it may do so. If the UK court is a court of last resort, that is a court from which no appeal may be taken, then that court shall make a referral to the ECJ. This English Practice Direction is complies with the ECJ's Information Note on National courts referring matters to the ECJ.²²

²¹ Practice Direction Part 68 on References to the European Court (supplement to Civil Procedure Rule Part 68.

²² Court of Justice Information Note on references from national courts for a preliminary ruling, (2005/C 143/01) 11.6.2005, Official Journal of the European Union.

4. *Community Law Relied on By Christie Ltd*

(a) *Dassonville*

Christie Ltd relies, firstly (but not exclusively)²³ on what is referred to as the *Dassonville* Principle.²⁴ This seminal judgment by the ECJ dealt with the free movement of goods within the Internal Market of the Community (Union). The ECJ was interpreting the predecessor Article to TEC Nice Article 28; and what constitutes a prohibited activity, that is an activity (“measure”) that hinders the free movement of goods within the Union’s Internal Market.

(b) Article 28 TEC (Nice)

Article 28 TEC (Nice) prohibits *inter alia* activities (measures) that have the effect of hindering the free movement of goods within the Internal Market:

*Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.*²⁵

In *Dassonville* the ECJ considered the meaning of “measures that have equivalent effect” (“MEEs”). The ECJ defined MEEs as:

²³ *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (C-120/78) [1979] ECR 649.

²⁴ *Procureur du Roi v Benoît and Gustave Dassonville* (C-8/74) [1974] ECR 837.

²⁵ See above n 11, Article 28.

*All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.*²⁶

Christie Ltd submits that certain clauses in the Standard Terms of its contract with Transport Ltd's fall within the meaning of the above definition because they have the effect of distorting the Internal Market and are protected by UK State action, that is UK legislation that exempts such clauses from judicial review (or materially hinders judicial review). Christie Ltd says that in this case, this occurs in two ways: first, the narrow definition of an unfair contract term in the *Unfair Contract Terms Act 1977*, and secondly because that Act exempts "shipping contracts" from its ambit. Christie Ltd's contract with Transport Ltd is a "shipping contract".

E The Questions Christie Ltd Submits To The English High Court For Reference To The European Court Of Justice For A Preliminary Ruling

Pursuant to Article 234 Nice (Article 267 Lisbon), Christie Ltd's lawyers make a submission to the High Court (as required by the Supplement to Practice Direction Part 68) in respect of why is it necessary for that court to refer the following Questions to the ECJ for a Preliminary Ruling. The Questions include relevant ECJ case law:

²⁶ See, above n 24.

1 Example of Preliminary Ruling Questions

- I. Whether Article 28²⁷ of the Treaty Establishing the European Community (Nice version) (“the TEC”) prohibits the “shipping exemption” (“the shipping exemption”) to the United Kingdom’s *Unfair Contract Terms Act 1977* (“the 1977 Act”)²⁸ described in Schedule 1 of the 1977 Act because the shipping exemption distorts or has the potential to distort the free movement of goods within the Internal Market of the European Union in that traders of similar goods in several of the Member States other than the UK are offered protection from such an exemption; and
- II. Whether under the *Dassonville*²⁹ principle the UK Government should repeal the shipping exemption to the 1977 Act or whether the shipping exemption should be judicially struck down under the *Dassonville* principle by the national courts of the UK; and
- III. Whether Article 28 of the TEC prohibits Standard Form Contract Terms such as Clause 21 and 27 of the British Industry Freight Forwarders Association (“BIFA”)³⁰ because such Standard Terms distort or have the potential to distort the free movement of goods

²⁷ See above n 11, Article 28.

²⁸ See above n 20.

²⁹ *Rewe Zentrale v Bundesmonopolverwaltung für Branntwein* (C-120/78) [1979] ECR 649.

³⁰ British International Freight Association (BIFA), *Standard Trading Conditions*, 2005 Edition, Clauses 21 and 27.

within the Internal Market of the European Union in that traders of similar goods in several of the Member States other than the UK are offered protection from such Standard Terms, viz s36, *Nordic Code*³¹ and ss305 – 310 BGB, and s242 BGB³².

- IV. If the Court answers Question III in the affirmative, whether the national courts of the UK should interpret the definition of an “Unfair Contract Term” in the 1977 Act by having regard to the definition of an “Unfair Contract Term” in *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* (“the 1993 Directive”)³³ and the transposition of the 1993 Directive into UK national law viz the *Unfair Terms in Consumer Contracts Regulations 1999*, Statutory Instrument 1999 No 2083 (“the 1999 Regulations”)³⁴, especially the non-exhaustive “black list”³⁵ (see esp *Marleasing*³⁶, and *Pffeifer*³⁷); alternatively
- V. Whether the *1993 Directive per se* distorts the Internal Market in breach of Article 28, ETC in that it affords protection from Unfair Contract Terms only to natural persons who are consumers defined as such by the *1993 Directive* and not natural persons who engage in certain business undertakings or businesses *per se*; and

³¹ Law of contracts and other legal transactions in the law of property and obligations, s36, Sweden, Denmark, Norway and Finland.

³² *Bürgerliches Gesetzbuch* [Civil Code] (Germany) s242 and ss 305 – 310.

³³ See above n11.

³⁴ See above n 19.

³⁵ See above n11 and *ibid*.

³⁶ See above n 7.

³⁷ *Ibid*.

- VI. If the Court answers Question V in the affirmative, then whether the UK Government should repeal the 1999 Regulations or whether the 1999 Regulations should be judicially struck down; and/or
- VII. Whether Article 81 of the TEC renders void pursuant to Article 81 (2) TEC³⁸, agreements such as that between Transport Ltd and Christie Ltd which include BIFA Standard Terms³⁹ because such Standard Terms breach ss (1) (a) of Article 81 in that they “directly or indirectly fix purchase or selling prices or any other trading conditions”⁴⁰; and/or
- VIII. Whether Article 81 of the TEC renders void pursuant to Article 81 (2) TEC, agreements such as that between Transport Ltd and Christie Ltd which include BIFA Standard Terms because such terms breach ss (1) (d) of Article 81 in that they “... apply dissimilar conditions to equivalent transactions with other trading parties [in different member states], thereby placing [one or more of] them at a competitive disadvantage”⁴¹; and/or
- IX. Whether Article 81 of the TEC, pursuant to ss (2), renders void (in whole or in part) contracts between freight forwarders and their

³⁸ See above n 11, Article 81 (2).

³⁹ See above n 26.

⁴⁰ See above 11, Article 81.

⁴¹ See above 11, Article 81 (2).

clients, which contracts contain Standard Terms similar to BIFA's Standard Form Contract; and/or

- X. Whether Article 82 of the TEC prohibits pursuant to Article 82 (a) TEC⁴², agreements such as that between Transport Ltd and Christie Ltd which include BIFA Standard Terms because such terms breach ss (a) of Article 82 in that they “directly or indirectly [impose] unfair purchase or selling prices or other unfair trading conditions”⁴³; and/or
- XI. Whether Article 82 of the ECT prohibits pursuant to Article 82 (c) TEC⁴⁴, agreements such as that between Transport Ltd and Christie Unique Ltd which include BIFA Standard Terms because such terms breach ss (c) of Article 82 in that they [apply] dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”⁴⁵.

The above example of hypothetical Questions referred to the ECJ by the English High Court conforms with the Treaties' (Nice and/or Lisbon) essential requirements for what can be considered by the ECJ, that is:

⁴² Ibid, Article 82 (a).

⁴³ Ibid.

⁴⁴ See Above n 11, Article 82 (c).

⁴⁵ Ibid.

- Nice, Article 234 (a) (b) and (c)⁴⁶; and
- Lisbon, Article 267 (a) and (b).⁴⁷

While the English High Court is not obliged under Nice or Lisbon to refer the above Questions to the ECJ, because the Questions are not “raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law”,⁴⁸ Christie Ltd submits that the interests of British justice are best served by a timely, expeditious and cost effective referral of the Questions by the High Court to the ECJ; rather than waiting for an appeal by either party from an adverse judgment of the High Court to the English Supreme Court or Judicial Committee of the House of Lords; and then asking that court to refer the relevant Questions to the ECJ.

The High Court does not have the competence to decide the issues raised by the Questions because they involve interpretation of Community (Union) law; and only the ECJ, or possibly the Court of First Instance (post Lisbon referred to as the General Court) as determined by the ECJ in the *Foto-Frost case*⁴⁹.

In this example, there is no ECJ case law on the subject Questions, that is the Questions are not precluded by the *Acte Clair Doctrine*⁵⁰: the Questions

⁴⁶ See above at n 11.

⁴⁷ See above at n 12.

⁴⁸ See above at n 11.

⁴⁹ *Firms Foto-Frost v Hauptzollamt Lubeck-Ost* (C- 314/85) [1987] ECR 4199.

⁵⁰ *Srl Cilfit and Lanificio di Gavardo SpA v Ministry of Health* (C-283/81) [1982] ECR 3415.

have not already been so clearly answered that the High Court not need seek the guidance of the ECJ to decide the Questions by way of a Preliminary Ruling.

III SUMMARY

The case being heard before the English High Court in this hypothetical example includes Questions that properly may be referred to European Court of Justice; the purpose of Article 234 Nice (267 Lisbon) being served by the High Court making the reference to the ECJ. The Questions raise issues that can only be decided by the ECJ. There is no existing case law subject to the *Acte Clair Doctrine*.

IV CONCLUSION

Article 234 Nice (Article 267 Lisbon) is an effective method of direct action by private parties who wish to seek the intervention of the ECJ to give effect to rights conferred on private parties by the Treaties (and relevant ECJ case law interpreting the Treaties and Community/Union legislation); notwithstanding the general rule of no horizontal direct effect of Council Directives. The development by the ECJ case law in respect of “indirect effect” and “harmonious interpretation” has been central in this regard.⁵¹

⁵¹ *Von Colson and Kamann v Land Nordrhein-Westfalen*, (C-14/83) [1984] ECR 1891; see also *Marleasing*, above at n 7; and *Pfiffefer*, above at n 7.

THE CORRELATION BETWEEN NAZI IDEOLOGY AND RADICAL ISLAMIC THEOLOGY IN JURISPRUDENTIAL THOUGHT

JOHNNY M. SAKR*

ABSTRACT:

The Nuremberg Trials were a sequence of trials during 1945 – 1949.¹ In the course of these trials, 24 key Nazi leaders were charged with crimes against humanity. In defence, the Nazi leaders argued that they had simply followed orders of a superior and made decisions in accordance with the framework of their own legal system;² this defence is labelled the ‘superior orders defence’.³ This defence was denied.⁴ Interestingly, as an illustration of radical

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1 Wolfgang Merkel and Sonja Grimm, *War and Democratization: Legality, Legitimacy and Effectiveness* (Routledge, 2013) 122. See also; Hasia Dinerm, *We Remember with Reverence and Love: American Jews and the Myth of Silence After the Holocaust, 1945-1962* (NYU Press, 2009) 232; J. Martin Rochester, *Between Peril and Promise: The Politics of International Law* (CQ Press, 2011) 115 and Michael Robert Marrus, *The End of the Holocaust* (Walter de Gruyter, 1989) 583.

2 Nicholas Doman, 'The Nuremberg Trials Revisited' (1961) 47 *American Bar Association Journal* 263; John Kekes, *The Roots of Evil* (Cornell University Press, 2014) 91; Lawrence Raful, Herbert R. Reginbogin, and Christoph Safferling, *The Nuremberg Trials: International Criminal Law Since 1945: 60th Anniversary International Conference* (Walter de Gruyter, 2006) 33; John Rodden, *Walls That Remain: Eastern and Western Germans Since Reunification* (Routledge, 2016) 196; Guénaél Mettraux, *Perspectives on the Nuremberg Trial* (Oxford University Press, 2008) 527 and Hiromi Sato, *The Execution of Illegal Orders and International Criminal Responsibility* (Springer Science & Business Media, 2011) 149.

3 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2016) 388. See also; Geert-Jan G. J. Knoops, *Defenses in*

*Islam, the Islamic State of Iraq and Syria (ISIS)*⁵ demonstrate this radical ideology. A study between these two ideologies brings to light many similarities in their philosophical worldview. This could be identified as the 'Triad of Similarity'. The Triad consists of the following categories: the Superior, the Exemplar and the Source (SES). To the Nazis, the Superior and Exemplar was Adolf Hitler whilst the Source for which their philosophical perspective was derived was from the works of Friedrich Nietzsche. However, it has been said that the Nazis had misinterpreted Nietzsche's philosophy and claimed that he was an anti-Semite, thereby justifying and building upon this philosophical foundation to further their agenda. This falsification made Nietzsche's philosophy attractive to the fascist ideology.⁶ In comparison, the

Contemporary International Criminal Law (BRILL, 2008) 32; M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Martinus Nijhoff Publishers, 1999) 469; Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History* (Palgrave Macmillan, 2007) 50; Richard Falk, 'Telford Taylor and the Legacy of Nuremberg' (1999) 37(3) *Columbian Journal of Transnational Law* 693 and Hugo Adam Bedau, *Making Mortal Choices: Three Exercises in Moral Casuistry* (Oxford University Press, 1997) 108.

4 Guénaél Mettraux, *Perspectives on the Nuremberg Trial* (Oxford University Press, 2008) 527. See also; Guenter Lewy, Prior Orders, 'Nuclear Warfare and the Dictates of Conscience: The Dilemma of Military Obedience in the Atomic Age' (1961) 55(1) *American Political Science Review* 6; Richard A. Falk, *The Vietnam War and International Law: The Widening Context* (Princeton University Press, 2015) vol 3 201; Albert Lulushi, *Donovan's Devils: OSS Commandos Behind Enemy Lines: Europe, World War II* (Skyhorse Publishing, Inc., 2016) 3; John C. Watkins and John Paul Weber, *War Crimes and War Crime Trials: From Leipzig to the ICC and Beyond: Cases, Materials and Comments* (Carolina Academic Press, 2006) 108 and Great Britain Parliament House of Lords, *The Parliamentary Debates (Hansard): Official Report* (H.M. Stationery Office, 1949) 28.

5 Jacqueline S. Ismael, Tareq Y. Ismael and Glenn Perry, *Government and Politics of the Contemporary Middle East: Continuity and Change* (Routledge, 2015) 591. See also; Annyssa Bellal, *The War Report: Armed Conflict in 2014* (Oxford University Press, 2016) 269; Joseph J. Hobbs, *Fundamentals of World Regional Geography* (Cengage Learning, 2016) 245 and Beth Bailey and Richard H. Immerman, *Understanding the U.S. Wars in Iraq and Afghanistan* (New York University Press, 2015) 15.

6 Weaver Santaniello, *Nietzsche, God, and the Jews: His Critique of Judeo-Christianity in Relation to the Nazi Myth* (SUNY Press, 2012) 149. See also; David Wootton, *Modern Political Thought: Readings from Machiavelli to Nietzsche* (Hackett Publishing, 1996) 895; David Roberts,

Superior for radical Islam is Allah, the Exemplar is Mouhammad and the Source of their philosophical (and theological) perspective is from the Quran, Hadiths (a collection of traditions containing sayings of the Prophet Muhammad) and tafsirs (Quranic commentary). This paper endeavours to identify the similarities between the philosophical ideologies between the Nazis and radical Islam and to identify the sources used to derive these principles. As a disclaimer, this paper does not imply nor assert that the actions of the Nazis and radical Islamic militants are justified. Nor does it assert or imply that the use of their sources was appropriately used without misrepresentation. Rather, this paper looks to give a descriptive account of the sources. Whether these sources are authentic, misused or reliable is not the topic of discussion. Rather, this paper seeks to inform the audience of the sources to which their ideologies derive to gain a deeper understanding for their justification.

I INTRODUCTION

Islam, once again, is under scrutiny concerning its self-proclaimed title, ‘the religion of peace’.⁷ This due diligence has been fuelled by the recent suicide bombing that was carried out at the Manchester Arena in Manchester, England by Salman Ramadan Abedi, a 22-year-old British Muslim. This attack followed a concert by American singer Ariana Grande

The Totalitarian Experiment in Twentieth Century Europe: Understanding the Poverty of Politics (Routledge, 2006) 150; Robert C. Holub, *Nietzsche's Jewish Problem: Between Anti-Semitism and Anti-Judaism* (Princeton University Press, 2015) 17 and Donald D. Wall, *Nazi Germany and World War II* (West Publishing Company, 1997) 6.

⁷ Maulana Muhammad Ali, *The Religion of Islam* (Ahmadiyya Anjuman Ishaat Islam Lahore USA, 2011) 1. See also; Bassam Tibi, *The Challenge of Fundamentalism: Political Islam and the New World Disorder* (University of California Press, 2002) 54; Ralph H. Salmi, Cesar Adib Majul and George Kilpatrick Tanham, *Islam and Conflict Resolution: Theories and Practices* (University Press of America, 1998) 22 and Jeff Morton, *Two Messiahs: The Jesus of Christianity and the Jesus of Islam* (InterVarsity Press, 2011) 3.

on the 22 May 2017.⁸ Subsequently, days following this horrific attack, another terrorist attack took place on London Bridge on the 3rd June 2017 by three Muslim men. Two who have been identified as Rachid Redouane and Khuram Shazad Butt.⁹ One witness reported that the attackers shouted "This is for Allah" and stabbed customers with knives.¹⁰

8 Anne Summers, 'Manchester Bombing Was A Hate Crime Against Women and Girls', *The Sydney Morning Herald* (online), 26 May 2017 <<http://www.smh.com.au/comment/manchester-bombing-was-a-hate-crime-against-women-and-girls-20170525-gwdjxb.html>>. See also; Georgina Mitchell and Megan Levy, 'Live: 22 Killed, Including Children, in Manchester Arena Explosion After Concert', *The Sydney Morning Herald* (online), 24 May 2017 <<http://www.smh.com.au/world/fatalities-in-manchester-arena-explosion-after-ariana-grande-concert-20170522-gwatx7.html>> and Martin Evans et al., 'Everything We Know About Manchester Suicide Bomber Salman Abedi', *The Telegraph* (online), 26 May 2017 <<http://www.telegraph.co.uk/news/2017/05/26/everything-know-manchester-suicide-bomber-salman-abedi/>>.

9 Lee Hsien Loong, 'London Attacks: President Tony Tan, PM Lee Send Condolences to Queen Elizabeth, PM Theresa May', *The Straits Times* (online), 5 June 2017 <<http://www.straitstimes.com/singapore/london-attacks-president-tony-tan-pm-lee-send-condolences-to-queen-elizabeth-pm-theresa>>. See also; Steve Johnson, 'Police Scotland: No Specific Information That Scotland Is At Risk Of Attack', *ITV* (online), 4 June 2017 <<http://www.itv.com/news/border/update/2017-06-04/police-scotland-no-specific-information-that-scotland-is-at-risk-of-attack/>> ; News Desk, 'British Police Reveal Two of London Bridge Terrorist Attack Perpetrators', *Intelligencer Post* (online), 5 June 2017 <<http://www.intelligencerpost.com/british-police-reveal-two-london-bridge-terrorist-attack-perpetrators/>> and Angela Dewan, Ben Westcott and Holly Yan, 'London Bridge Attack: 2 of 3 Killers Identified', *CNN* (online) 5 June 2017 <<http://edition.cnn.com/2017/06/05/europe/london-terror-attack-raids/index.html>>.

10 Steve Almasy and Natalie Gallon, 'Police: Reports Of 'Multiple' Casualties In 2 Terror Incidents In London', *CBS Philadelphia* (online), 4 June 2017 <<http://philadelphia.cbslocal.com/2017/06/03/london-bridge/>>. See also; Leon Watson et al., 'London Bridge Attack Latest: Terrorists Named As Police Say They Were Not Under Surveillance As They Posed "Low Risk"', *The Telegraph* (online), 4 June 2017 <<http://www.telegraph.co.uk/news/2017/06/05/london-bridge-attack-latest-gunshots-heard-police-launch-fresh/>> and Robert Mendick, 'London Attacks: Six People Killed; Three Terror Suspects Shot Dead By Police', *The Guardian* (online), 3 June 2017 <<https://www.theguardian.com/uk->

With the rise of secularism¹¹ and philosophical relativism as the inherit ideology,¹² relative morality is under examination. Characteristically speaking, when discussion surrounding relativistic morality is under way; to exemplify the absurdity of this ideology, the Nazi Regime is at the forefront of discussion.¹³

news/live/2017/jun/03/london-bridge-closed-after-serious-police-incident-live>.

11 Gannon Murphy, *American Theological Inquiry: A Biannual Journal of Theology, Culture, and History* (Wipf and Stock Publishers, 2014) vol 7(2) 50. See also; Dave MacQuarrie, *Acedia: The Darkness Within* (AuthorHouse, 2012) 174; Ann E. Towns, *Women and States: Norms and Hierarchies in International Society* (Cambridge University Press, 2010) 55; Jan van Lin, *Shaking the Fundamentals: Religious Plurality and Ecumenical Movement* (Rodopi, 2002) 86 and David H. Kamens, *Beyond the Nation-state: The Reconstruction of Nationhood and Citizenship* (Emerald Group Publishing, 2012) 241.

12 Mark P. Cosgrove, *Foundations of Christian Thought: Faith, Learning, and the Christian Worldview* (Kregel Academic, 2006) 82. See also; Donald G. Bloesch, *The Christian Witness in a Secular Age: An Evaluation of Nine Contemporary Theologians* (Wipf and Stock Publishers, 2002) 24; Émile Durkheim and W. S. F. Pickering, *Durkheim: Essays on Morals and Education* (Taylor & Francis, 2006) vol 1 116; Dom Alcuin Reid, *Sacred Liturgy: The Source and Summit of the Life and Mission of the Church* (Ignatius Press, 2014) 380; Dick Houtman, Stef Aupers and Willem de Koster, *Paradoxes of Individualization: Social Control and Social Conflict in Contemporary Modernity* (Ashgate Publishing Ltd., 2011) 144 and Ambrose Ih-Ren Mong, *Dialogue Derailed: Joseph Ratzinger's War against Pluralist Theology* (Wipf and Stock Publishers, 2014) 146.

13 Sources that use the Nazi Regime as an example of the dysfunctional coherence of relativism is as follows:

Claudia Koonz, *The Nazi Conscience* (Harvard University Press, 2003) 7. See also; Wolfgang Bialas and Lothar Fritze, *Nazi Ideology and Ethics* (Cambridge Scholars Publishing, 2014) 368; Peter J. Haas, *Morality After Auschwitz: The Radical Challenge of the Nazi Ethic* (Wipf & Stock, 2014); J. P. Moreland, *Scaling the Secular City: A Defense of Christianity* (Baker Academic, 1987); Philip J. Kain, *Hegel and the Other: A Study of the Phenomenology of Spirit* (SUNY Press, 2005) 236; David K. Clark and Robert V. Rakestraw, *Readings in Christian Ethics: Theory and Method* (Baker Academic, 1994) 26 and John Warwick Montgomery, *The Law Above the Law* (Bethany House, 1976).

Whilst reflecting upon the correlation between the Nazi fascist ideology and relativism, one cannot help but ascertain its association between the corresponding ideology of radical Islamic theology and jurisprudential thought. This is not to say the philosophy behind radical Islam was influenced by fascist ideology but rather, its corresponding similarity is worth investigation.

In this article, I will endeavour to demonstrate the corresponding similarities between the Nazi fascist ideology and radical Islamic theology and jurisprudential thought. This could be identified as the ‘Triad of Similarity’. The Triad consists of the following categories: the Superior, the Exemplar and the Source (SES).

To the Nazis, the Superior and Exemplar was Adolf Hitler whilst the Source for which their philosophical perspective was derived was from the works of Friedrich Nietzsche. However, it has been said that the Nazis had misinterpreted Nietzsche’s philosophy and claimed that he was an anti-Semite, thereby justifying and building upon this philosophical foundation to further their agenda. This falsification made Nietzsche’s philosophy attractive to the fascist ideology.¹⁴

In comparison, the Superior for radical Islam is Allah, the Exemplar is

14 Weaver Santaniello, *Nietzsche, God, and the Jews: His Critique of Judeo-Christianity in Relation to the Nazi Myth* (SUNY Press, 2012) 149. See also; David Wootton, *Modern Political Thought: Readings from Machiavelli to Nietzsche* (Hackett Publishing, 1996) 895; David Roberts, *The Totalitarian Experiment in Twentieth Century Europe: Understanding the Poverty of Great Politics* (Routledge, 2006) 150; Robert C. Holub, *Nietzsche's Jewish Problem: Between Anti-Semitism and Anti-Judaism* (Princeton University Press, 2015) 17 and Donald D. Wall, *Nazi Germany and World War II* (West Publishing Company, 1997) 6.

Mouhammad and the Source of their philosophical (and theological) perspective is from the Quran, Hadiths (a collection of traditions containing sayings of the prophet Muhammad) and Tafsirs (Quranic commentary).

II THE NAZIS

A The Nazi Regime

During the Nuremberg Trials (1945 – 1949), 24 key Nazi leaders were charged with crimes against humanity.¹⁵ The effectiveness of the Nazis' defence team in arguing against these charges was rather appealing.. John Warwick Montgomery, Professor of Law,¹⁶ states that the most telling defence offered by the Nazis was the argument that they had simply followed orders of a superior and made decisions in accordance with the framework of their legal system.¹⁷ The former defence is regarded as the

15 Ellis Washington, *The Progressive Revolution: Liberal Fascism through the Ages Vol. I: 2007-08 Writings* (University Press of America, 2007) 218. See also; Roza Pati, *Due Process and International Terrorism: An International Legal Analysis* (BRILL, 2009) 129; Stephanie Wolfe, *The Politics of Reparations and Apologies* (Springer Science & Business Media, 2031) 130; Frederick Betz, *Societal Dynamics: Understanding Social Knowledge and Wisdom* (Springer Science & Business Media, 2011) 97 and Paul R. Bartrop and Steven Leonard Jacobs, *Modern Genocide: The Definitive Resource and Document Collection* (ABC-CLIO, 2014) 1222.

16 Dallas R. Burdette, *Old Texts Through New Eyes* (Xulon Press, 2009) 94. See also; Dallas Willard, *A Place for Truth: Leading Thinkers Explore Life's Hardest Questions* (InterVarsity Press, 2010) 321.

17 Nicholas Doman, 'The Nuremberg Trials Revisited' (1961) 47 *American Bar Association Journal* 263; John Kekes, *The Roots of Evil* (Cornell University Press, 2014) 91; Lawrence Raful, Herbert R. Reginbogin, and Christoph Safferling, *The Nuremberg Trials: International Criminal Law Since 1945: 60th Anniversary International Conference* (Walter de Gruyter, 2006) 33; John Rodden, *Walls That Remain: Eastern and Western Germans Since Reunification* (Routledge, 2016) 196; Guénaél Mettraux, *Perspectives on the Nuremberg Trial*

‘superior orders defence’.¹⁸

This defence was subsequently denied.¹⁹ Mark J. Osiel states, “The superior order defence remains very much alive wherever the criminality of the defendant’s conduct cannot convincingly be categorised as immediately obvious”.²⁰ Even after the Nuremberg tribunal, Hilaire McCoubrey declares that, the ‘superior orders will still operate as a defense if the subordinate had no good reason for thinking that the order concerned was unlawful’.²¹

The truth of McCoubrey’s proposition is exemplified by the justification

(Oxford University Press, 2008) 527 and Hiromi Sato, *The Execution of Illegal Orders and International Criminal Responsibility* (Springer Science & Business Media, 2011) 149.

18 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2016) 388. See also; Geert-Jan G. J. Knoops, *Defenses in Contemporary International Criminal Law* (BRILL, 2008) 32; M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Martinus Nijhoff Publishers, 1999) 469; Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History* (Palgrave Macmillan, 2007) 50; Richard Falk, 'Telford Taylor and the Legacy of Nuremberg' (1999) 37(3) *Columbian Journal of Transnational Law* 693 and Hugo Adam Bedau, *Making Mortal Choices: Three Exercises in Moral Casuistry* (Oxford University Press, 1997) 108.

19 Guénaél Mettraux, *Perspectives on the Nuremberg Trial* (Oxford University Press, 2008) 527. See also; Guenter Lewy, Prior Orders, ‘Nuclear Warfare and the Dictates of Conscience: The Dilemma of Military Obedience in the Atomic Age’ (1961) 55(1) *American Political Science Review* 6; Richard A. Falk, *The Vietnam War and International Law: The Widening Context* (Princeton University Press, 2015) vol 3 201; Albert Lulushi, *Donovan's Devils: OSS Commandos Behind Enemy Lines: Europe, World War II* (Skyhorse Publishing, Inc., 2016) 3; John C. Watkins and John Paul Weber, *War Crimes and War Crime Trials: From Leipzig to the ICC and Beyond: Cases, Materials and Comments* (Carolina Academic Press, 2006) 108 and Great Britain Parliament House of Lords, *The Parliamentary Debates (Hansard): Official Report* (H.M. Stationery Office, 1949) 28.

20 Mark J. Osiel, *Obeying Orders* (Transaction Publishers, 1998) 97. See also; Gregory S Gordon, 'Hong Kong's War Crimes Trials: Review Essay' (2014) 15(2) *Melbourne Journal of International Law* 15..

21 Hilaire McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflicts* (Darmouth, 1990) 221.

provided by those who adhere to radical Islamic theology as will be demonstrated in this article.

B *Superior and Exemplar*

One of the superiors that ordered the Nazi soldiers to perform these war crimes was Adolf Hitler (1889 – 1945),²² German politician and leader [*Führer*] of the Nazi Party, an authoritative figure.²³ Hitler was admired by the Nazi's²⁴ and was viewed as a role model²⁵ during the Nazi Regime from 1933 – 1945.²⁶ Hitler had committed extreme atrocities, one of which was his decree for the exterminations of Jews.²⁷

22 Avner Falk, *Anti-Semitism: A History and Psychoanalysis of Contemporary Hatred: A History and Psychoanalysis of Contemporary Hatred* (ABC-CLIO, 2008) 81. See also; Michael Eckert, *Arnold Sommerfeld: Science, Life and Turbulent Times 1868-1951* (Springer Science & Business Media, 2013) 347 and Susan Ratcliffe, *Oxford Dictionary of Quotations by Subject* (OUP Oxford, 2010) 90.

23 Mary Beth Norton, Jane Kamensky and Carol Sheriff, *A People and a Nation* (Cengage Learning, 2014) vol 2 660. See also; David Nicholls, *Adolf Hitler: Biographical Companion* (ABC-CLIO, 2000) 93. See also; Martin Collier and Philip Pedley, *Germany 1919-45* (Heinemann, 2000) 64; Martin Blinkhorn, *Fascists & Conservatives Europe* (Routledge, 2012) 71; Michael Lee Lanning, *Battle 100: The Stories Behind History's Most Influential Battles* (Sourcebooks Inc., 2005) 76 and Helen Tierney, *Women's Studies Encyclopedia* (Greenwood Publishing Group, 1999) vol 2 979.

24 Linda Zagzebski, *Exemplarist Moral Theory* (Oxford University Press, 2017) 47. See also; Christian B. Miller, R. Michael Furr and Angela Knobel, *Character: New Directions from Philosophy, Psychology, and Theology* (Oxford University Press, 2015) 262;

25 Ian Aitken, *Encyclopaedia of the Documentary Film* (Routledge, 2013) 568. See also; Detlef Mühlberger, *Hitler's Voice: Organisation & Development of the Nazi Party* (Peter Lang, 2004) 29; Charles Hamilton, *The Hitler Diaries: Fakes that Fooled the World* (University Press of Kentucky, 2015) and Curt Butz, *The World I Dream of* (John Hunt Publishing, 2010) 168.

26 S.L. Fisher, *The Minor Parties of the Federal Republic of Germany: Toward a*

When questioned by interrogators if orders for the extermination of Jews were delegated in writing by Heinrich Himmler,²⁸ Adolf Eichmann (1906 - 1962),²⁹ *SS-Obersturmbannführer* (lieutenant colonel),³⁰ testified that in the summer of 1941, Reinhard Tristan Eugen Heydrich (1904 – 1942),³¹ *SS-Obergruppenführer und General der Polizei* (Senior Group Leader and Chief of Police)³² had told him that Hitler, ‘ordered the physical

Comparative Theory of Minor Parties (Springer Science & Business Media, 2012) 40. See also; also; Sarah Ferber, *Bioethics in Historical Perspective* (Palgrave Macmillan, 2013) 49 and Peter Staudenmaier, *Between Occultism and Nazism: Anthroposophy and the Politics of Race in the Fascist Era* (BRILL, 2014) 101.

27 Sarah Ann Gordon, *Hitler, Germans, and the Jewish Question* (Princeton University Press, 1984)

138. See also; Donald M. McKale, *Nazis After Hitler: How Perpetrators of the Holocaust Cheated Justice and Truth* (Rowman & Littlefield, 2012) 281; Donald E. Schmidt, *The Folly of War: American Foreign Policy, 1898-2005* (Algora Publishing, 2005) 200 and Louis P. Pojman and Peter Tramel, *Moral Philosophy: A Reader* (Hackett Publishing, 2009) 55.

28 (1900 - 1945) Reichsführer of the Schutzstaffel (Protection Squadron; SS). See; Terence O'Reilly, *Hitler's Irishmen* (Mercier Press Ltd, 2008) 18. See also; John Michael Steiner, *Power Politics and Social Change in National Socialist Germany: A Process of Escalation Into Mass Destruction* (Walter de Gruyter, 1976) 53.

29 Alexander Mikaberidze, *Atrocities, Massacres, and War Crimes: An Encyclopedia* (ABC-CLIO, 2013) 159. See also; Cyprian Blamires and Sara E. Karesh and Mitchell M. Hurvitz, *Encyclopaedia of Judaism* (Infobase Publishing, 2005) 130 and David S. Kidder and Noah D. Oppenheim, *The Intellectual Devotional Biographies: Revive Your Mind, Complete Your Education, and Acquaint Yourself with the World's Greatest Personalities* (Rodale, 2010) 331.

30 Gerald Fleming, *Hitler and the Final Solution* (University of California Press, 1987) 160. See also; Robert Charles Reimer and Carol J. Reimer, *Historical Dictionary of Holocaust Cinema* (Scarecrow Press, 2012) 59 and Daniel H. Magilow and Lisa Silverman, *Holocaust Representations in History: An Introduction* (Bloomsbury Publishing, 2015) 60.

31 Klaus Hentschel, *Physics and National Socialism: An Anthology of Primary Sources* (Springer Science & Business Media, 2011) 175. See also; Roderick Stackelberg, *The Routledge Companion to Nazi Germany* (Routledge, 2007) 208.

32 Abraham J. Edelheit and Hershel Edelheit, *History of the Holocaust: A Handbook and Dictionary* (Westview Press, 1994) 440. See also; Gerhard Köpernik, *Faschisten im KZ: Rumäniens Eiserne Garde und das Dritte Reich* (Frank & Timme GmbH, 2014) 254 and Hanno Ballhausen,

extermination of Jews'.³³

C SOURCE

It is important to note that the positivistic traditions of the German legal profession were not the only facilitators for the denial of ethics and metaphysics in the application of law.³⁴ In brief, Germany had adopted, to a degree, a legal positivist approach³⁵ whereby 'law is based exclusively on the will of the State'.³⁶

Despite the positivistic traditions that influenced the Nazi Regime, one of the major sources of influence upon the ideology of the Nazi society was Friedrich Nietzsche's (1844 – 1900)³⁷ philosophy.³⁸

Chronik des Zweiten Weltkriegs (Wissenmedia Verlag, 2004) 526.

33 (unpublished transcripts of tape 5, 31 May 1960, 169; Israel National Archives; photocopy in author's possession). Cf. Jochen V. Lang, *Eichmann Interrogated* (New York, 1983) 5. Frank McDonough, *The Holocaust* (Palgrave Macmillan, 2008) 54. See also; Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Publishing, 1994) 83; Gerald Fleming, *Hitler and the Final Solution* (University of California Press, 1987) 67 and George Pattison, *Kierkegaard and the Quest for Unambiguous Life: Between Romanticism and Modernism: Selected Essays* (OUP Oxford, 2013) 228.

34 Kenny Yang, 'The Rise of Legal Positivism in Germany'(2012) 3 *The Western Australian Jurist* 250.

35 Geoffrey Sawer, *Studies in the Sociology of Law* (Australian National University, 1961) 227.

36 Kurt Von Schuschnigg, *International Law: An Introduction to the Law of Peace* (The Bruce Publishing Co., 1959) 28.

37 Jürgen Georg Backhaus and Wolfgang Drechsler, *Friedrich Nietzsche (1844-1900): Economy and Society* (Springer Science & Business Media, 2006) 87. See also; Hyam Maccoby, *Antisemitism and Modernity: Innovation and Continuity* (Routledge, 2006) 73, David LaRocca, *Estimating Emerson: An Anthology of Criticism from Carlyle to Cavell* (A&C Black, 2013) 273 and Matthew Calarco and Peter Atterton, *The Continental Ethics Reader* (Psychology Press, 2003) 64.

38 Kimberly Ann Blessing and Paul J. Tudico, *Movies and the Meaning of Life:*

The debate regarding Nietzsche's influence on Nazi ideology has been firmly established that he was neither an anti-Semite,³⁹ a rabid nationalist,⁴⁰ nor a believer in racial purity.⁴¹ Nevertheless, Nietzsche's genealogy of moral assigns to Christianity and Judaism the less than flattering label of "slave" morality and holds them responsible for Western cultural weakness.⁴²

Philosophers Take on Hollywood (Open Court Publishing, 2005) 173. See also; Geoffrey Cocks, *The Cocks, The State of Health: Illness in Nazi Germany* (Oxford University Press, 2012) 70; Solomon Lipp, *Three Chilean Thinkers* (Wilfrid Laurier University Press, 1975) 131; Crane Brinton, *Nietzsche* (Harper Torchbooks, 1965) 206; Richard Shorten, *Modernism and Totalitarianism: Rethinking the Intellectual Sources of Nazism and Stalinism, 1945 to the Present* (Springer, 2012) 244 and Daniel W. Conway, *Nietzsche and the Political* (Psychology Press, 1997) 120.

39 Giles Fraser, *Redeeming Nietzsche: On the Piety of Unbelief* (Routledge, 2013) 133. See also; Jacob Golomb, *Nietzsche and Jewish Culture* (Routledge, 2002) 39; Jennifer Ratner-Rosenhagen, *American Nietzsche: A History of an Icon and His Ideas* (University of Chicago Press, 2011) 230; Walter Arnold Kaufmann, *Nietzsche, Philosopher, Psychologist, Antichrist* (Princeton University Press, 1974) 298 and Tina Chanter and Pleshette DeArmitt, *Sarah Kofman's Corpus* (SUNY Press, 2008) 79.

40 Randall Halle, *Queer Social Philosophy: Critical Readings from Kant to Adorno* (University of Illinois Press, 2010) 200. See also; Joanne Faulkner, *Dead Letters to Nietzsche, or the Necromantic Art of Reading Philosophy* (Ohio University Press, 2010) 61; Gareth Southwell, *A Beginner's Guide to Nietzsche's Beyond Good and Evil* (John Wiley & Sons, 2009) 170 and Warren J. Samuels, Jeff E. Biddle and Ross B. Emmett, *A Research Annual* (Emerald Group Publishing, 2008) 128.

41 Dirk R. Johnson, *Nietzsche's Anti-Darwinism* (Cambridge University Press, 2010) 118. See also; James I. Porter, *Nietzsche and the Philology of the Future* (Stanford University Press, 2000) 282; Douglas Burnham, *Reading Nietzsche: An Analysis of 'Beyond Good and Evil'* (Routledge, 2014) 49; Martine Prange, *Nietzsche, Wagner, Europe* (Walter de Gruyter, 2013) 196; Ben Macintyre, *Forgotten Fatherland: The Search for Elisabeth Nietzsche* (A&C Black, 2013) 30 and Jacqueline Scott and A. Todd Franklin, *Critical Affinities: Nietzsche and African American Thought* (SUNY Press, 2012) 159.

42 Nietzsche, *Anti-Christ* 56. See also; Jacob Golomb, *Nietzsche and Jewish Culture* (Routledge, 2002) 94; Ken Gemes and John Richardson, *The Oxford Handbook of Nietzsche* (OUP Oxford, 2013) 345; Dean Moyer, *The Routledge Companion to Nineteenth Century Philosophy* (Routledge, 2010) 390; Simon May, *Nietzsche's On the Genealogy of Morality: A Critical Guide*

Nietzsche rejected sympathy for the weak in favour of a willingness to trample on them.⁴³ Unsurprisingly, some of his ideas were congenial to the Nazis who admired a highly selected and distorted version of his work.⁴⁴

The Nazis misinterpreted Nietzsche's philosophy and claimed that he was an anti-Semite, thereby justifying and building upon this philosophical foundation to further their agenda. This falsification made Nietzsche's philosophy attractive to the fascist ideology.⁴⁵

(Cambridge University Press, 2011) 139; Brian Britt and Alexandra Cuffel, *Religion, Gender, Culture in the Pre-Modern World* (Springer, 2007) 31; Christa Davis Acampora, *Nietzsche's On the Genealogy of Morals: Critical Essays* (Rowman & Littlefield, 2006) 283 and Steven E. Aschheim, *The Nietzsche Legacy in Germany, 1890-1990* (University of California Press, 1992) 100.

⁴³ Henry Louis Mencken, , *The Philosophy of Friedrich Nietzsche* (See Sharp Press, 2003) 80. See also; Christine Swanton, *The Virtue Ethics of Hume and Nietzsche* (John Wiley & Sons, 2015) 85 and Jonathon Glover, *Humanity: A Moral History of the Twentieth Century* (Yale University Press, 1999) 11.

⁴⁴ Weaver Santaniello, *Nietzsche, God, and the Jews: His Critique of Judeo-Christianity in Relation to the Nazi Myth* (SUNY Press, 2012) 43. See also; Dan Stone, *Breeding Superman: Nietzsche, Race and Eugenics in Edwardian and Interwar Britain* (Liverpool University Press, 2002) 25; Daniel Chapelle, *Nietzsche and Psychoanalysis* (SUNY Press, 1993) 12; Steven E. Aschheim, *The Nietzsche Legacy in Germany: 1890 - 1990* (University of California Press, 1994) 315 and Graham Parkes, *Nietzsche and Asian Thought* (University of Chicago Press, 1996) 20.

⁴⁵ Weaver Santaniello, *Nietzsche, God, and the Jews: His Critique of Judeo-Christianity in Relation to the Nazi Myth* (SUNY Press, 2012) 149. See also; David Wootton, *Modern Political Thought: Readings from Machiavelli to Nietzsche* (Hackett Publishing, 1996) 895; David Roberts, *The Totalitarian Experiment in Twentieth Century Europe: Understanding the Poverty of Great Politics* (Routledge, 2006) 150; Robert C. Holub, *Nietzsche's Jewish Problem: Between Anti-Semitism and Anti-Judaism* (Princeton University Press, 2015) 17 and Donald D. Wall, *Nazi Germany and World War II* (West Publishing Company, 1997) 6.

To this detriment, the Nazis interpreted Nietzsche's work to suggest that he was in favour of Eugenics and breeding a master race.⁴⁶ This ideology was one of the concepts that justified the slaughter and extermination of the Jewish race along with mentally and physically handicapped personnel.⁴⁷ This event was the catalyst for the catastrophic result of the murder of an estimated 6 million Jews.⁴⁸

The one idea that the Nazis had rightly incorporated was Nietzsche's old fashioned ideology of women, 'man shall be trained for war and woman for the procreation of the warrior, all else is folly'.⁴⁹ This perspective indeed

46 Hyam Maccoby, *Antisemitism and Modernity: Innovation and Continuity* (Routledge, 2006) 76. See also; Marvin Perry et al., *Western Civilization: Ideas, Politics, and Society: From 1600* (Cengage Learning, 2012) vol 2 671; Mark Bevir, *Encyclopyedia of Political Theory: A - E* (SAGE, 2010) vol 1 975; Harry Davis, *The Palace of Crystal: A World Without War* (Arena books, 2007) 29 and Jonathan Rose, *The Holocaust and the Book: Destruction and Preservation* (University of Massachusetts Press, 2008) 241.

47 Philip Herbst, *Talking Terrorism: A Dictionary of the Loaded Language of Political Violence* (Greenwood Publishing Group, 2003) 16. See also; Jack Fischel, *The Holocaust* (Greenwood Publishing Group, 1998) xxxv; Michael Brenner, *A Short History of the Jews* (Princeton University Press, 2010) 338; Peter McFarre and Fadrique Iglesias, *The Devil's Agent: Life, Times and Crimes of Nazi Klaus Barbie* (Xlibris Corporation, 2013) 548; Mordecai Schreiber, *Explaining the Holocaust: How and Why It Happened* (Wipf and Stock Publishers, 2015) 49 and MCarol Mason, *Killing for Life: The Apocalyptic Narrative of Pro-life Politics* (Cornell University Press, 2002) 38.

48 Richard Bulliet, Pamela Crossley and Daniel Headrick, *The Earth and Its Peoples: A Global History* (Cengage Learning, 2010) vol 2 816. See also; Joseph W. Bendersky, *A Concise History of Nazi Germany* (Rowman & Littlefield, 2007) 202; Doris L. Bergen, *War and Genocide: A Concise History of the Holocaust* (Rowman & Littlefield Publishers, 2009) vii and Corona Brezina and Rose McCarthy, *Dictatorship: A Primary Source Analysis* (The Rosen Publishing Group, 2005) 27.

49 Nietzsche, *Zarathustra's Prologue* I 18. See also; William L. Shirer and Ron Rosenbaum, *The Rise and Fall of the Third Reich: A History of Nazi Germany* (Simon and Schuster, 2011) 100; David Ross, *The Flesh of Being: On Nietzsche's Thus Spoke Zarathustra* (Cambridge Scholars Publishing, 2008) 87; William Crookes and George Shadbolt, *The British Journal of Photography*

unified with the Nazi world-view at least in terms of the social role of women, ‘stupidity in the kitchen; woman as cook; the terrible thoughtlessness with which the feeding of the family and the master of the house is managed!’⁵⁰

Nietzsche’s work, *Will to Power* was grafted into the Nazi philosophy to justify their territorial quests and their ‘will for power’ to take control over neighbouring countries.⁵¹ The phrase ‘the will to power’ was adapted metaphorically for the Nazi ambition to expand territorially, also known as *Lebensraum*.⁵²

Übermenschen was a concept coined by Nietzsche, a term used to identify

(Henry Greenwood & Company Limited, 1980) vol 127 528 and Katrin Froese, *Nietzsche, Heidegger, and Daoist Thought: Crossing Paths In-Between* (SUNY Press, 2012) 205.

50 Friedrich Nietzsche, *Beyond Good and Evil* 234. See also; Susan G. Bell and Karen M. Offen, *Women, the Family, and Freedom: 1880-1950* (Stanford University Press, 1983) 48; Shannon Sullivan, *Living Across and Through Skins: Transactional Bodies, Pragmatism, and Feminism* (Indiana University Press, 2001) 120 and Jacob Golomb, Weaver Santaniello and Ronald L. Lehrer, *Nietzsche and Depth Psychology* (SUNY Press, 1999) 80.

51 Robert C. Solomon, *From Rationalism to Existentialism: The Existentialists and Their Nineteenth-century Backgrounds* (Rowman & Littlefield, 2001) 125. See also; Ian Marsh, *Theory and Practice in Sociology* (Routledge, 2014) 165; John Marmysz, *The Path of Philosophy: Truth, Wonder, and Distress* (Cengage Learning, 2011) 294 and Leonardo Avritzer, *Democracy and the Public Space in Latin America* (Princeton University Press, 2009) 19.

52 Stephen Houlgate, *Hegel, Nietzsche and the Criticism of Metaphysics* (Cambridge University Press, 2004) 4. See also; Jorg Brechtefeld, *Mitteleuropa and German Politics: 1848 to the Present* (Springer, 1996) 34; Linda L. Williams, *Nietzsche’s Mirror: The World as Will to Power* (Rowman & Littlefield Publishers, 2002) 1; George Lachmann Mosse, *Nazi Culture: Intellectual, Cultural and Social Life in the Third Reich* (University of Wisconsin Press, 2003) xxvii and Stan Laurysens, *The Man Who Invented The Third Reich* (The History Press, 2011) 128.

a goal.⁵³ It is what man should strive to become. Nietzsche argued that, ‘man is a rope stretched between animal and the Superman’.⁵⁴ *Übermenschen*, translated Superman, is debated as to its precise meaning⁵⁵ nonetheless; the Nazis had misinterpreted this concept.⁵⁶ The concept was utilised to suit their philosophy of ‘Aryan-supremacy’. The Nazi’s idolised the *Übermenschen* for being racially pure and racially superior to all other

53 Kathleen Marie Higgins, *Nietzsche's Zarathustra* (Lexington Books, 2010) 53. See also; Ofelia Schutte, *Beyond Nihilism: Nietzsche Without Masks* (University of Chicago Press, 1986) 121; Linda L. Williams, *Nietzsche's Mirror: The World as Will to Power* (Rowman & Littlefield Publishers, 2002) 111 and Michael Grantham, *The Transhuman Antihero: Paradoxical Protagonists of Speculative Fiction from Mary Shelley to Richard Morgan* (McFarland, 2015) 172.

54 Friedrich Nietzsche, *Thus Spoke Zarathustra* s 4. See also; Peter France, *The Oxford Guide to Literature in English Translation* (Oxford University Press, 2000) 327; Ellis Sandoz, *The Politics of Truth and Other Untimely Essays: The Crisis of Civic Consciousness* (University of Missouri Press, 1999) 133; V. Vycinas, *Our Cultural Agony* (Springer Science & Business Media, 2012) 22 and Julian Young, *Friedrich Nietzsche: A Philosophical Biography* (Cambridge University Press, 2010) 368.

55 Gareth Southwell states that the *Übermensch* will go ‘beyond good and evil’ and establish a new set of values and a new philosophy. See; Gareth Southwell, *A Beginner's Guide to Nietzsche's Beyond Good and Evil* (Wiley-Blackwell, 2009). Alain de Botton believes that the *Übermensch* is more of an artistic uprising in man. De Botton says that the *Übermenschen* are rare people who have lived a life of fulfilment by surpassing themselves with art, literature or music. He refers to people of society who are rich and influential, individuals of high-class German society. De Botton puts forward whom Nietzsche might have considered *Übermenschen* or Supermen. Montaigne, Goethe, Abbé Galiani and Henri Beyle, four individuals Nietzsche admired would have been men that surpassed themselves with art, literature and music. See; Alain De Botton, *The Consolations of Philosophy* (Penguin Books, 2001) 210.

56 Elza Adamowicz and Simona Storchi, *Back to the Futurists: The Avant-garde and its Legacy* (Oxford University Press, 2015) 28. See also; Richard T. G. Walsh, *Thomas Teo and Angelina Baydala* (Cambridge University Press, 2014) 196; Alan F. Meades, *Understanding Counterplay in Video Games* (Routledge, 2015) 35; Friedrich Nietzsche, Maudemarie Clark and Alan J. Swensen, *On the Genealogy of Morality* (Hackett Publishing, 1998) xi and Donald Lazere, *American Media and Mass Culture: Left Perspectives* (University of California Press, 1987) 125.

racess and ethnics.⁵⁷

On the opposing view; non-*Übermenschen*'s such as the Jews, were called *Untermenschen*⁵⁸ which means under-human or subhuman.⁵⁹ The Nazis had twisted Nietzsche's ideology of the *Übermenschen* into a race of superiority which lead to the slavery, slaughter and abuse⁶⁰ of those to whom were considered *Untermenschen*.⁶¹

57 Matthew Feldman, Marius Turda and Tudor Georgescu, *Clerical Fascism in Interwar Europe* (Routledge, 2013) 181. See also; Gregory J. Howard and Graeme R. Newman, *Varieties of Comparative Criminology* (BRILL, 2001) 45; Joseph Pearce, *Race with the Devil: My Journey from Racial Hatred to Rational Love* (Saint Benedict Press, 2013) 126; Jacob Golomb, *Nietzsche and Zion* (Cornell University Press, 2004) 200; Gordon Graham, *Eight Theories of Ethics* (Psychology Press, 2004) 29 and Edmund Jan Osmańczyk and Anthony Mango, *Encyclopedia of the United Nations and International Agreements: T to Z* (Taylor & Francis, 2003) 2567.

58 Philip Sauvain, *Key Themes of the Twentieth Century* (Nelson Thornes, 1996) 84. See also; Alan E. Steinweis and Daniel E. Rogers, *The Impact of Nazism: New Perspectives on the Third Reich and Its Legacy* (University of Nebraska Press, 2003) 83; Michael Mann, *The Sources of Social Power: Global Empires and Revolution, 1890–1945* (Cambridge University Press, 2012) vol 3 448 and Sander L. Gilman and Karen Remmler, *Reemerging Jewish Culture in Germany: Life and Literature Since 1989* (NYU Press, 1994) 176.

59 Wolfgang Sofsky, *The Order of Terror: The Concentration Camp* (Princeton University Press, 2013) 119. See also; Avner Falk, *Franks and Saracens: Reality and Fantasy in the Crusades* (Karnac Books, 2010) 5; Michael Robertson and Garry Walter, *Ethics and Mental Health: The Patient, Profession and Community* (CRC Press, 2013) xix and Michael Shahan, *A Report from the Front Lines: Conversations on Public Theology: A Festschrift in Honor of Robert Benne* (Wm. B. Eerdmans Publishing, 2008) 43.

60 Samuel Totten and Stephen Feinberg, *Teaching and Studying the Holocaust* (IAP, 2009) 35. See also; Michael Kort, *The Soviet Colossus: History and Aftermath* (M.E. Sharpe, 1996) 257; C. Crane, *Divided Lives: The Untold Stories of Jewish-Christian Women in Nazi Germany* (Springer, 2000) 124 and Hannelore Brenner, *The Girls of Room 28: Friendship, Hope, and Survival in Theresienstadt* (Knopf Doubleday Publishing Group, 2009) 18.

61 Junius P. Rodriguez, *Slavery in the Modern World: A History of Political, Social, and Economic Oppression* (ABC-CLIO, 2011) vol 2 469. See also; Peter P. Hinks and John R.

Nietzsche's philosophy partially formed the foundation of the Nazis agenda to eradicate the Jews, conquer land and fulfil the objective to form the Aryan supremacy. However, it is important to understand that the Nazis believed this perspective was objectively right – this was their subjective view.

1 *The Justification Behind the Nazi Regime: The Superior Orders Defence*

In order to justify the actions taken by the Nazi combatants, the Nazi legal counsel appealed to the superior orders defence. Two arguments were provided. Firstly, the Nazi soldiers acted in accord the philosophy undermining their legal system and secondly, they followed the imperatives given by their superiors. Therefore, the Nazi soldiers could not rightly be condemned because they deviated from the alien value system of their conquerors.⁶²

The *ratio decidendi* in the Nuremberg Trials could be interpreted as 'what is utterly immoral cannot be law'⁶³ or as expressed in Latin, *lex iniusta non est lex*.⁶⁴ The Court rejected the idea that the moral standing of law is

McKivigan, *Encyclopaedia of Antislavery and Abolition* (Greenwood Publishing Group, 2007) vol 2 2007) vol 2 568; William Pick, *The Slave Has Overcome* (William Pick, 2007) 264; Alexander Mikaberidze, *Atrocities, Massacres, and War Crimes: An Encyclopaedia* (ABC-CLIO, 2013) 43 and Tadeusz Szocik, *Persecuted by M15 Security Service* (Lulu.com, 2011) vol 1 241.

62 John Warwick Montgomery, *The Law Above the Law* (Bethany Lutheran Fellowship, 1975) 24.

63 Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593.

64 Colin Harte, *Changing Unjust Laws Justly: Pro-life Solidarity with "the Last and Least"* (CUA Press, 2005) 99.

purely based upon the subjective perspective of the State.⁶⁵ Rather, the Court favoured utilising natural law as the objective standard to determine the moral legitimacy of law and the actions of the accused.⁶⁶ In so doing, the Nazi atrocities reduced the appeal of positivist law.⁶⁷ Kurt Von Schuschnigg states, 'If the positivists are right, then man has no rights and the States have no rights; there is no freedom and no basic equality of men and nations'.⁶⁸

Dr. Otto Stahmer, the defense attorney for Hermann Goering,⁶⁹ articulated the Nazi defence on July 4, 1946 at the Nuremberg Trials in Nuremberg, Germany:

65 Richard A. Posner, *The Problems of Jurisprudence* (Harvard University Press, 1993) 229. See also; Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 3rd ed., 2012) 58; Joseph I. Omoregbe, *Philosophy of Law: An Introduction to Philosophical Jurisprudence* (Joja Educational Research and Publishers, 1994) 147 and Russell A. Miller and Rebecca M. Bratspies, *Progress in International Law* (BRILL, 2008) 621 - 622.

66 Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law* (Cambridge University Press, 2010) 220. See also; Howard P. Kainz, *Natural Law: An Introduction and Re-examination* (Open Court Publishing, 2004) xiii; Illtud Evans, *Light on the Natural Law* (Helicon, 1965) 17; April Carter, *Direct Action and Liberal Democracy* (Routledge, 2013) vol 6 97; William Sweet, *Philosophical Theory and the Universal Declaration of Human Rights* (University of Ottawa Press, 2003) 20; Gabriel Moran, *Both Sides: The Story of Revelation* (Paulist Press, 2002) 145; Ellen Frankel Paul, Fred D. Miller Jr. and Jeffrey Paul, *Natural Law and Modern Moral Philosophy: Social Philosophy and Policy* (Cambridge University Press, 2001) vol 1 i and Roger D. Citron, 'The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism and the Revival of Natural Law' in Lawrence Raful, *The Nuremberg Trials: International Criminal Law Since 1945* (Walter de Gruyter, 2006) 139.

67 Peter Papadatos, *The Eichmann Trial* (Frederick A. Praeger, 1964) 2.

68 Kurt Von Schuschnigg, *International Law: An Introduction to the Law of Peace* (The Bruce Publishing Co., 1959) 38.

69 Antonio Cassese, *The Oxford Companion to International Criminal Justice* (Oxford

What is the standard by which to decide about justice and injustice in a legal sense? In so far as such standards exist by International Law, valid up to now, further statements are not required. That a special court for the trial was created by the Charter of this Tribunal I also do not object to. I must, however, vigorously protest against its use, in so far as it is meant to create a new material law by threatening punishment for crimes which, at the time of their perpetration, at least as far as individuals are concerned, did not carry any punishment.... Can one expect that hereafter punishment will be recognized as just, if the culprit was never aware of it, because at the time he was not threatened with such punishment, and he believed to be able to derive the authorisation for his way of acting solely from the political aims pursued?...Because internationally recognized standards outside the positive International Law by which the legitimacy of States and of their aims could have been judged did not exist, any more than did an international community as such. Slogans about the legitimacy of one's own and of the illegitimacy of foreign aspirations served only the formation of political fronts just as the efforts to brand political adversaries as disturbers of the peace. In any case they did, indeed, not create law.⁷⁰

In his final argument, Dr. Stahmer further asserted that Germany was operating under a dictator.⁷¹ The Tribunal held that the Nazis were not innocent because, even though Hitler made use of them, they knew what they were doing. The fact that they were assigned to their tasks by a dictator did not absolve them from responsibility for their acts.⁷²

University Press, 2009) 698.

70 The Trial of German Major War Criminals (1946b), 187th Day: Thursday, 4th July, 1946, (Vol. 18, 106 – 107, Part 7 of 8), (London: His Majesty's Stationery Office), <http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-18/tgmwc-18-171-07.shtml>.

71 The Trial of German Major War Criminals (1946b), 187th Day: Thursday, 4th July, 1946, (Vol. 18, 111, Part 7 of 8), (London: His Majesty's Stationery Office), <http://www.nizkor.org/hweb/imt/tgmwc/tgmwc-18/tgmwc-18-171-07.shtml>.

72 Guénaél Mettraux, *Perspectives on the Nuremberg Trial* (Oxford University Press, 2008)

A similar statement was made in the opening remarks by Robert Jackson, U.S. Supreme Court justice and U.S. Chief of Counsel, ‘the Charter of this tribunal evidences a faith that the law is not only to govern the conduct of little men, but that even rulers are, as Lord Chief Justice Coke [said] to King James, “under God and the law”’.⁷³

To paraphrase, Robert Jackson queried, ‘But is there not a law above our laws?’⁷⁴ “A law above the law” transcends culture and applies to all states.⁷⁵

In conclusion, the Nazis used the superior orders defence in order to justify their actions. Hitler, being the Nazis’ superior, commanded the extermination of Jews along with many other atrocities. Consequently, the Nazis followed suit. Coupled with the adoption of a disfigured view of Nietzsche’s Philosophy grounded upon a legal positivistic framework, this combination was the catalyst for one of the world’s most historic atrocities.

The following section will assess the philosophical underpinnings of radical Islam. This section will outline the Superior, the Exemplar and the Sources from which radical Muslims derive their theological and philosophical ideologies. This section will also outline how such sources are used in order to justify their attacks by providing sources that were used

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⁷³ James Ryan and Leonard Schlup, *Historical Dictionary of the 1940s* (Routledge, 2015) 511.

⁷⁴ Craig Boyd, ‘Participation Metaphysics, The Imago Dei, and the Natural Law in Aquinas’ Ethics (2007) 88 (2015) *New Blackfriars* 282.

⁷⁵ James Moreland, *The God Question: An Invitation to a Life of Meaning* (Harvest House Publishers, 2009) 85.

within extremist materials as well as other pieces of information that could be used to justify that radical Islam is ‘Islam’ as per their view. This article does not assert that radical Islam is, nor is not, a representative of Orthodox Islam.

III RADICAL ISLAM

A Superior: Islam and Radical Islam

According to Islamic theology, Allah is the Supreme Being.⁷⁶ In Islam, Allah is given 99 names such as; “The All-Compassionate”, “The Source of Peace” and “The Sustainer”.⁷⁷ Islamic theology, whether nominal or radical, demands that Muslims follow the imperatives given by Allah and Muhammad.⁷⁸ This is why many Muslims claim that an act is done “in the

76 Hazrat Mirza Ghulam Ahmad, *Commentary on the Holy Quran: Surah Fatiha* (Islam International, 2004) 58. See also; Elijah Muhammad, *Theology of Time - Abridged Indexed by Subject: God-Science of the Time* (Elijah Muhammad Books, 2006) 134; Maulana Abdul Haq Vidyarthi, Allah, *The Unique Name of God* (Ahmadiyya Anjuman Lahor Publications, 1999) 2; M. R. Bawa Muhaiyaddeen, *The Resonance of Allah: Resplendent Explanations Arising from the Nūr; Allāh's Wisdom of Grace* (The Fellowship Press, 2001) 556 and Shamim Akhter, *Faith & Philosophy of Islam* (Gyan Publishing House, 2009) 55.

77 Brahma Singh Brahma, *Hazrat Mian Mir and the Sufi Tradition* (Publication Bureau, Punjabi University, 1994) 44. See also; Jocelyne Cesari, *Encyclopaedia of Islam in the United States* (Greenwood Press, 2007) 54; M. R. Bawa Muhaiyaddeen, *Gems of Wisdom Series: Beyond Mind and Desire* (Fellowship Press, 1993) 19 and Gbola Aderibigbe and Deji Ayeboyin, *Religion, Medicine and Healing* (The Association, 1995) 87.

78 Kamaruzzaman Bustamam-Ahmad, *From Islamic Revivalism to Islamic Radicalism in Southeast Asia: A Study of Jamā'ah Tablīgh in Malaysia and Indonesia* (Cambridge Scholars Publishing, 2015) 143. See also; Don Swenson, *Society, Spirituality, and the Sacred: A Social Scientific Introduction* (University of Toronto Press, 2009) 73; Dennis C. Mueller, *Reason, Religion, and Democracy* (Cambridge University Press, 2009) 119; Juan Eduardo Campo, *Encyclopedia of Islam* (Infobase Publishing, 2009) 73 and Daniel W. Brown, *Rethinking Tradition in Modern Islamic*

name of Allah”.⁷⁹ The Quran presents multiple verses that present this theme.⁸⁰ It is Muhammad in particular who is to be followed, for the Quran declares:

Surah 4:80

*He who obeys the Messenger has obeyed Allah; but those who turn away - We have not sent you over them as a guardian.*⁸¹

The Quran also proclaims:

Surah 64:12.

*And obey Allah and obey the Messenger; but if you turn away - then upon Our Messenger is only [the duty of] clear notification.*⁸²

Therefore, the commands given by Allah, as revealed within the Quran⁸³

Thought (Cambridge University Press, 1999) 76.

79 Saif Ataya, *Islam: Peace & Terrorism, Brief History, Principles and Beliefs* (Lulu Publishing, 2015) 124. See also; Dennis J. Dunn, *A History of Orthodox, Islamic, and Western Christian Political Values* (Springer, 2016) 189; Sebastian Gorka, *Defeating Jihad: The Winnable War* (Regnery Publishing, 2016) 110; Anat Berko, *The Smarter Bomb: Women and Children as Suicide Bombers* (Rowman & Littlefield, 2016) 184; Remy Low, 'Making up the Ummah: The Rhetoric of ISIS as Pulic Pedaogy' (2016) 38(4) *Review of Education, Pedagogy, and Cultural Studies* 305 and A.B Al-Baghdadi, *A Message to the Mujahidin and the Muslim Ummah from Amirul-Mu'minin Abu Bakr al-Husayni al-Qurashi al-Baghdadi* (1 January 2014) Al-Hayat Media

<https://ia902501.us.archive.org/2/items/hym3_22aw/english.pdf>.

80 Surah 3:31 - 32, 3:132, 4:13, 4:59, 4:64, 4:69, 4:80, 5:92, 8:1, 8:20, 8:46, 9:71, 24:52, 24:54, 24:56, 33:21, 33:33, 33:71, 47:33, 48:17 and 59:7.

81 Surah 4:80.

82 Surah 64:12.

83 This is commanded in Surah 9:6.

Fateh Ullah Khan, *God Created the Universe with the Purpose to Serve Humankind:*

and the commands and lifestyle of Muhammad, as revealed in the Quran and Hadiths;⁸⁴ ought to be followed by *all* Muslims.

B Exemplar: Mouhamad

According to Islam, Mouhammad is the last prophet,⁸⁵ who died in the year 632AD.⁸⁶ Surah 33:4 states:⁸⁷

Muhammad is not the father of [any] one of your men, but [he is] the Messenger

God Created Humankind to Worship Him and Appointed Him as Viceroy in Earth to See how He Behaves (Fateh Ullah Khan Gandapur, 2009) 60. See also; Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press, 2005) 21; Maḥmūd ibn Aḥmad ibn Ṣāliḥ Dawsarī, *The Magnificence of the Qur'an* (Darussalam, 2006) 302; Mahebbūba Desāī, *Islam and Non-violence* (Gyan Publishing House, 2009) 31; Sultan Ahmad, *Islam in Perspective* (AuthorHouse, 2011) 203 and Abū al-Faḍl 'Izzatī and A. Ezzati, *The Spread of Islam: The Contributing Factors* (ICAS Press, 2002) 345.

84 Chanfi Ahmed, *West African 'ulamā' and Salafism in Mecca and Medina* (BRILL, 2015) 60 - 61. See also; Greg Fealy, *Voices of Islam in Southeast Asia: A Contemporary Sourcebook* (Institute of Southeast Asian Studies, 2006) 189; M. B. Hooker, *Indonesian Syariah: Defining a National School of Islamic Law* (Institute of Southeast Asian Studies, 2008) 247; Arshad Khan, *Islam, Muslims, and America: Understanding the Basis of Their Conflict* (Algora Publishing, 2003) 188 and Helen McCue and Abdullah Saeed, *Family Law and Australian Muslim Women* (Melbourne University Publishing, 2013) 11.

85 S. Athar Husain, *Prophet Muhammad and His Mission* (Asia Publishing House, 1967) vi. See also; Muhammad Sharif Chaudhry, *Prophet Muhammad: As Described in the Holy Scriptures* (S.N. Foundation, 2007) 61; Naeem Ahmad, *Philosophy in Pakistan* (CRVP, 1998) 89 and Shaykh Nazim Adil Al-Haqqani, *Liberating the Soul: A Guide for Spiritual Growth* (Islamic Supreme Council of America, 2005) vol 3 26.

86 Francis E. Peters, *Muhammad and the Origins of Islam* (SUNY Press, 1994) 257. See also; Charles L. Geddes, *Books in English on Islām, Muhammad and the Qur'ān: A Selected and Annotated Bibliography* (American Institute of Islamic Studies, 1976) 45; Serena Parekh, *Hannah Arendt and the Challenge of Modernity: A Phenomenology of Human Rights* (Routledge, 2008) 202 and Ingvild Flakerud, *Visualizing Belief and Piety in Iranian Shiism* (A&C Black, 2010) 273.

87 All quotes from the Quran will be from the Saheeh International translation.

of Allah and last of the prophets. And ever is Allah, of all things, Knowing.⁸⁸

In expounding Surah 33:4, a commentary (*tafsir*) attributed to Muhammad's first cousin and renowned Muslim scholar, 'Abdullah Ibn Abbas⁸⁹ (ca. 619 - 687 AD)⁹⁰ articulates:

(Muhammad is not the father of any man among you) i.e. Zayd, (but he is the messenger of Allah) but Muhammad is the Messenger of Allah (and the Seal of the Prophets) with him Allah has sealed the advent of prophets, such that there is no prophet after him; (and Allah is Aware of all things) of your words and works.⁹¹

The Hadiths record that Muhammad claimed to be the last Prophet:

Narrated Abu Huraira:

The Prophet said, "The Israelis used to be ruled and guided by prophets: Whenever a prophet died, another would take over his place. There will be no prophet after me, but there will be Caliphs who will increase in number." The

⁸⁸ Surah 33 Ayah 40.

⁸⁹ Shujiang Li and Karl W. Luckert, *Mythology and Folklore of the Hui, A Muslim Chinese People* (SUNY Press, 1994) 89. See also; Imam Warith-Deen Umar, *Judaology: A Study of the Science of Judaism: The Most Misunderstood Religion in the World* (Xlibris Corporation, 2009) xxiii; Abdulkader S. Thomas, *Interest in Islamic Economics: Understanding Riba* (Psychology Press, 2006) 29 and Ismā'īl ibn 'Umar Ibn Kathīr, *Tafsir Ibn Kathir* (Shaykj Safiur-Rahman Al-Mubarakpuri trans., Darussalam, 2003) vol 1 30.

⁹⁰ Ibrāhīm 'Abd Allāh Marzūqī, *Human Rights in Islamic Law* (University of Michigan, 1st ed., 2000) 23. See also; Oliver Leaman, *The Qur'an: An Encyclopaedia* (Routledge, 2006) 323; Ludwig W. Adamec, *Historical Dictionary of Islam* (Scarecrow Press, 2009) 134 and Dale Hoiberg and Indu Ramchandani, *Students' Britannica India: A to C: Abd Allah ibn al-Abbas to Cypress* (Encyclopaedia Britannica (India), 2000) 1.

⁹¹ Ibn 'Abbās, Tanwīr al-Miqbās min Tafsīr Ibn 'Abbās (20th March 2017) Al-Tafsir <http://altafsir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=73&tSoraNo=33&tAyahNo=40&tDisplay=yes&UserProfile=0>>.

people asked, "O Allah's Apostle! What do you order us (to do)?" He said, "Obey the one who will be given the pledge of allegiance first. Fulfil their (i.e. the Caliphs) rights, for Allah will ask them about (any shortcoming) in ruling those Allah has put under their guardianship."⁹²

Throughout the Qur'an, Muhammad is referred to as "Messenger", "Messenger of God" and "Prophet". Some of such verses are Surah 2:101, 2:143, 2:151, 3:32, 3:81, 3:144, 3:164, 4:79-80, 5:15, 5:41, 7:157, 8:01, 9:3, 33:40, 48:29, and 66:09.

Muhammad was said to be sent to guide humanity the right way⁹³ as outlined in Surah 7:157:

Those who follow the Messenger, the unlettered prophet, whom they find written in what they have of the Torah and the Gospel, who enjoins upon them what is right and forbids them what is wrong and makes lawful for them the good things and prohibits for them the evil and relieves them of their burden and the shackles which were upon them. So they who have believed in him, honored him, supported him and followed the light which was sent down with him - it is those who will be the successful.

Islam teaches that Muhammad is the best example of proper ethical and moral behaviour for mankind.⁹⁴ This is illustrated in Surah 33:21:

⁹² *Sahih al-Bukhari*, Volume 4, Book 56, Number 661. See also; *Sahih al-Bukhari*, Volume 4, Book 56, Number 732.

⁹³ Oliver Leaman, *Controversies in Contemporary Islam* (Routledge, 2013) 8. See also; Fethullah Gülen, *The Messenger of God Muhammad: An Analysis of the Prophet's Life* (Tughra Books, 2000) 251; Hamid Dabashi, *Authority in Islam* (Transaction Publishers, 1989) 44; Djaka Soetapa, *'Ummah: Komunitas Religijs, Sosial Dan Politik Dalam Al Qur'an: Dalam Konteks Masyarakat Indonesia* (Kerjasama antara Duta Wacana University Press dan Mitra Gama Widya, 1991) 151 and Dr. S.M. Mohiuddin Habibi and Syed Ahsan Habibi, *Prophet Muhammad (Peace Be Upon Him) in the Bible* (Expertini Limited, 2016) 501.

⁹⁴ Susanne Olsson and Carool Kersten, *Alternative Islamic Discourses and Religious*

There has certainly been for you in the Messenger of Allah an excellent pattern for anyone whose hope is in Allah and the Last Day and [who] remembers Allah often.

Islamic theology teaches that one must follow the Sunnah (or Sunna).⁹⁵ The Sunnah refers to the actions, sayings, and approvals of Muhammad.⁹⁶ This is also known as the Hadiths. Therefore, Muslims are informed to follow the conduct of Muhammad as revealed in the Quran and the Hadiths.

With this in mind, one must wonder whether those who support radical Islamic philosophy believe that they are following the conduct of Muhammad and commands given in the Quran. If such conduct, as demonstrated by the likes of ISIS, can be found in either the Quran or

Authority (Routledge, 2016) 112. See also; Fethullah Gülen, *The Messenger of God Analysis of the Prophet's Life* (Tughra Books, 2000) 195; Afzal-ur-Rahman, *Muhammad: Encyclopaedia of Seerah* (Seerah Foundation, 1992) vol 8 345; Shabbir Akhtar, *Islam as Political Religion: The Future of an Imperial Faith* (Routledge, 2010) 204 and Nuraan Davids and Yusef Waghid, *Ethical Dimensions of Muslim Education* (Springer, 2016) 7.

95 Yusuf Al-Qaradawi, *Approaching the Sunnah: Comprehension & Controversy* (International Institute of Islamic Thought, 2007) xviii. See also; Talib Jaleel, *Notes On Entering Deen Completely* (EDC Foundation, 2015) 861; Muhammad Saed Abdul-Rahman, *Islam: Questions and Answers - Basis for Jurisprudence and Islamic Rulings* (MSA Publication Limited, 2003) 112; Ahmad ibn 'Abd al-Halīm Ibn Taymīyah et al., *Kitab Al-Iman: Book of Faith* (The Other Press, 1999) 54 and Shaykh Adil Al-Haqqani et al., *Liberating the Soul: A Guide for Spiritual Growth* (ISCA, 2002) vol 1 181.

96 'Alī Nāṣirī, *An Introduction to Hadith: History and Sources* (MIU Press, 2013) 11. See also; Hisham M. Ramadan, *Understanding Islamic Law: From Classical to Contemporary* (Rowman Altamira, 2006) 12; Dilip Mutum, *Mohammad Mohsin Butt and Mamunur Rashid, Advances in Islamic Finance, Marketing, and Management: An Asian Perspective* (Emerald Group Publishing, 2016) 160; Joel Diederik Beversluis, *Sourcebook of the World's Religions: An Interfaith Guide to Religion and Spirituality* (New World Library, 2000) 66 and Andrea C. Paterson, *Three Monotheistic Faiths - Judaism, Christianity, Islam: An Analysis and Brief History* (AuthorHouse, 2009) 126.

Hadiths; those who perform such atrocities are merely replicating the actions of their Prophet, Muhammad. In the following section, this article will reveal the conduct of Muhammad as revealed in the Quran and Hadiths. These are sources that extremists have, or may have, utilised to justify their conduct and beliefs. This article does not argue whether these Hadiths are unanimously agreed to be 'authentic' or the Quranic exegesis performed by extremists is correct. The point of this article is to identify the sources that a radical Muslim could use, or have used; to justify their beliefs.

C SOURCES

1 The Quran

According to Islam, the Quran is the Word of Allah.⁹⁷ The Quran was sent down to confirm what was sent before i.e the Torah and the Gospel. As per Surah 3:3:

He has sent down upon you, [O Muhammad], the Book in truth, confirming what was before it. And He revealed the Torah and the Gospel.

Surah 10:37:

And it was not [possible] for this Qur'an to be produced by other than Allah , but

97 Malek Bennabi, *The Quranic Phenomenon* (International Islamic Federation of Student Organizations, 1946) 13. See also; Hisham M. Ramadan, *Understanding Islamic Law: From Classical to Contemporary* (Rowman Altamira, 2006) 150; Abū al-Faḥr 'Izzatī and A. Ezzati, *The Spread of Islam: The Contributing Factors* (ICAS Press, 2002) 345; Aaron W. Hughes, *Muslim Identities: An Introduction to Islam* (Columbia University Press, 2013) 74; Muhyiddin Ibn 'Arabi, *Contemplation of the Holy Mysteries and the Rising of the Divine Lights* (Anqa Publishing, 2008) 16 and Rein Fernhout, *Canonical Texts. Bearers of Absolute Authority. Bible, Koran, Veda, Tipitaka: A Phenomenological Study* (Rodopi, 1994) 296.

[it is] a confirmation of what was before it and a detailed explanation of the [former] Scripture, about which there is no doubt, from the Lord of the worlds.

The Quran was sent down for guidance, Surah 31:2 - 3:

These are verses of the wise Book [The Quran], as guidance and mercy for the doers of good.

The “*doers of good*” is defined in Surah 2:2 – 3:

2 This is the Book about which there is no doubt, a guidance for those conscious of Allah 3 Who believe in the unseen, establish prayer, and spend out of what We have provided for them.

The Quran was sent down to bring Truth and to benefit the souls to whom who will follow it, Surah 39:11:

Indeed, We sent down to you the Book for the people in truth. So whoever is guided - it is for [the benefit of] his soul; and whoever goes astray only goes astray to its detriment. And you are not a manager over them.

And Surah 13:1:

Alif, Lam, Meem, Ra. These are the verses of the Book; and what has been revealed to you from your Lord is the truth, but most of the people do not believe.

The Quran was sent down for truth and ought to be follows as per Surah 39:41:

Indeed, We sent down to you the Book for the people in truth. So whoever is guided - it is for [the benefit of] his soul; and whoever goes astray only goes

astray to its detriment. And you are not a manager over them.

The Quran self-promotes that it is clear (Arabic: *mubinun*) as per Surah. 5:15:

O People of the Scripture, there has come to you Our Messenger making clear to you much of what you used to conceal of the Scripture and overlooking much. There has come to you from Allah a light and a clear [*mubinun*] Book.

2 The Hadiths

The Hadiths are narratives, accounts and biographies of Mouhamad's life.⁹⁸ Hadiths are categorised based upon reliability. In order of reliability, the categorisation of Hadiths is as follows; *Ṣaḥīḥ*, *Ḥasan*, *Da'īf* and *Mawḍū'.*⁹⁹

Ṣaḥīḥ (translated 'authentic') is information that has been narrated by a *ma'sum*, an individual who has sound character and memory; and has been transmitted through an unbroken chain from these individuals.¹⁰⁰

98 Coeli Fitzpatrick and Adam Hani Walker, *Muhammad in History, Thought, and Culture: An Encyclopaedia of the Prophet of God* (ABC-CLIO, 2014) 274. See also; Gunnar Norlén, *Islam and Its World* (Research Institute of Makumira University College, 2001) 136; Stanford Research Institute and American University Foreign Area Studies, *Area Handbook for the Peripheral States of the Arabian Peninsula* (U.S. Government Printing Office, 1971) 13; A.E.J. Morris, *History of Urban Form Before the Industrial Revolution* (Routledge, 2013) 374 and Arthur Goldschmidt, *A Concise History of the Middle East* (Westview Press, 1979) 97.

99 Mazhar U. Kazi, Mazharul Haq Qazi and Anis Ahmad, *Hadith and Sunnah* (Dawah Academy, 1999) iv. See also; Grolier Incorporated, *The Encyclopaedia Americana* (Grolier, 1992) vol 15 496; Hamid R. Kusha, *The Sacred Law of Islam: A Case Study of Women's Treatment in the Islamic Republic of Iran's Criminal Justice System* (Ashgate, 2002) 104 - 105 and M. Ayo Ajomo, *Fundamentals of Nigerian Law* (Nigerian Institute of Advanced Legal Studies, 1989) 177.

100 Alī Nāṣirī, *An Introduction to Hadith: History and Sources* (MIU Press, 2013) 31. See also; James Wynbrandt, *A Brief History of Saudi Arabia* (Infobase Publishing, 2014) 42; S. G. A. Onibere and M. P. Adogbo, *Selected Themes in the Study of Religions in Nigeria* (African Books

Hasan (translated ‘good’) is information that has been transmitted through an unbroken chain of narrators all of whom are of sound character, except for one. This hadith is one which excels the *da’if* but nevertheless does not reach the standard of a *Ṣaḥīḥ*.¹⁰¹

Da’if (translated ‘weak’) is information that is classified as weak as "either due to discontinuity in the chain of narrators or due to some criticism of a narrator".¹⁰²

Mawḍū (translated ‘theme’) is information that has been fabricated.¹⁰³

In order to present the most historically accurate accounts of Muhammad and Islamic history, this article will only look into the Hadiths that are part

Collective, 2010) 93; Muḥammad Ibn-Ismāʿīl al- Buḥārī and Muḥammad Muḥsin Ḥān, *The Translation of the Meanings of Ṣaḥīḥ Al-Bukhārī : Arabic - English. 9. Ahādith 6861 to 7563* (Darussalam, 1997) 408 and Muslim ibn al-Ḥajjāj al-Qushayrī and Abdul Hameed Siddiqui, *Ṣaḥīḥ Muslim* (Kitab Bhavan, 1994) vol 1 v.

101 Mahmūd Tahhān, *Taysīr Mustalīh al-Hadīth* (Islamic Publishing House, n.d.) 45. See also; Muhammad Tahir-ul-Qadri, *The Ghadir Declaration* (Minhaj-ul-Quran Publications, 2002) 81; Al-ʿAsqalānī and Aḥmad ibn ʿAlī, *al-Nukat Ala Kitāb Ibn al-Salāh* (Maktabah al-Furqan, 6th ed., nd.d) 91 - 92; Hamid R. Kusha, *The Sacred Law of Islam: A Case Study of Women's Treatment in the Islamic Republic of Iran's Criminal Justice System* (Ashgate, 2002) 105 and Ibn Warraq, *The Quest for the Historical Muhammad* (Prometheus Books, 2000) 529.

102 Al-ʿAsqalānī and Aḥmad ibn ʿAlī, *al-Nukat Ala Kitāb Ibn al-Salāh* (Maktabah al-Furqan, 6th ed., nd.d) 108. See also; Mahmūd Tahhān, *Taysīr Mustalīh al-Hadīth* (Islamic Publishing House, n.d.) 62.

103 Talib Jaleel, *Notes On Entering Deen Completely* (EDC Foundation, 2015) 382. See also; Mohammad Omar Farooq, *Toward Our Reformation: From Legalism to Value-Oriented Islamic Law and Jurisprudence* (International Institute of Islamic Thought, 2011) 29; Hisham M. Ramadan, *Understanding Islamic Law: From Classical to Contemporary* (Rowman Altamira, 2006) 150 and Aḥmad ibn Shuʿayb Nasāʾī, *Sunan Nasāʾī: ch. 1-532, Adādhith 1-878* (Kazi, 1994) 87.

of the *Sahih* collection. It is important to note that not all of the information contained within the *Sahih*'s categorised Hadiths is unanimously considered to be authentic. Particularly disagreement is amongst the Shia and Sunni Islamic sects.¹⁰⁴

The Sunni Hadith collection consists of *Sahih Bukhari*, *Sahih Muslim*, *Sunan al-Sughra* [*Sunan An-Nasa'i* or *Al-Mujtaba*], *Sunan Abu Dawud*, *Sunan al-Tirmidhi* and *Sunan Ibn Majah*.¹⁰⁵

The Shia Hadith collection consists of *Kitab al-Kafi*, *Man la yahduruhu al-Faqih*, *Tahdhib al-Ahkam* and *Al-Istibsar*.¹⁰⁶

104 Cenap Çakmak, *Islam: A Worldwide Encyclopaedia* (ABC-CLIO, 2017) vol 4 485. See also; Erwin Fahlbusch and Geoffrey William Bromiley, *The Encyclopaedia of Christianity* (Wm. B. Eerdmans Publishing, 2008) vol 5 231; Adel Safty, *Value Leadership and Capacity Building* (Universal-Publishers, 2004) 155; Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* (International Institute of Islamic Thought, 2008) 86 and Dana Zartner, *Courts, Codes, and Custom: Legal Tradition and State Policy Toward International Human Rights and Environmental Law* (Oxford University Press, 2014) 132.

105 Philip K. Hitti, *Descriptive Catalogue of the Garrett Collection* (Princeton University Press, 2015) 427. See also; Alpha Mahmoud Bah, *Scientific Research and Scholarly Writing in Islam: An Academic and Religious Guide for Researchers and Writers* (iUniverse, 2001) 227; Abdool Kader Hoosen, *Imam Tirmidhi's Contribution Towards Hadith* (A.K. Hoosen, 1990) 19; Johan Meuleman, *Islam in the Era of Globalization: Muslim Attitudes Towards Modernity and Identity* (Routledge, 2005) 282; I. M. N. Al-Jubouri, *Islamic Thought: From Mohammed to September 11, 2001* (Xlibris Corporation, 2011) 240; David Patterson, *Anti-Semitism and its Metaphysical Origins* (Cambridge University Press, 2015) 83; David Patterson, *A Genealogy of Evil: Anti-Semitism from Nazism to Islamic Jihad* (Cambridge University Press, 2010) 50; Sayyid Abul A'la Mawdudi, *First Principles of Islamic Economics* (Kube Publishing Ltd, 2013) 282 and Ram Swarup, *Understanding the Hadith: The Sacred Traditions of Islam* (Prometheus Books, 2002) 6.

106 Harold G. Koenig and Saad Al Shohaib, *Health and Well-Being in Islamic Societies: Background, Research, and Applications* (Springer, 2014) 31. See also; Daniel Akbari Paul Tetreault, *Honor Killing* (Author House, 2014) 16; Jonathan E. Brockopp, *The Cambridge Companion to Muhammad* (Cambridge University Press, 2010) 92; Florin Curta and Andrew Holt, *Great Events in Religion: An Encyclopaedia of Pivotal Events in Religious History* [3 volumes] (ABC-CLIO, 2016)

Diagram 1.0

Sunni Hadith Collection	Shia Hadith Collection
Sahih Bukhari	Kitab al-Kafi
Sahih Muslim	Man la yahduruhu al-Faqih
Sunan al-Sughra	Tahdhib al-Ahkam
Sunan Abu Dawud	Al-Istibsar
Sunan al-Tirmidhi	
Sunan Ibn Majah	

Despite the debate regarding the authenticity of these hadiths, it commonly accepted that the two most authentic hadiths are *Sahih Al-Bukhari* and *Sahih Muslim* (202 or 206-261 A.H./817 or 821-875 A.D.).¹⁰⁷

As mentioned earlier, Muslims are commanded to follow the conduct of Muhammad as outlined in the Hadiths and as taught in the Quran. It is also important to note that this article will also quote from the earliest biographies of Muhammad in order broaden the sources that help illustrate the conduct and life of Muhammad. The following section will outline Muhammad's conduct as presented in the Hadiths in order to provide an

421 and D. A. Carson, *The Enduring Authority of the Christian Scriptures* (Wm. B. Eerdmans Publishing, 2016) 1077.

107 Abdul Basit, *The Global Muslim Community at a Crossroads: Understanding Religious Beliefs, Practices, and Infighting to End the Conflict* (ABC-CLIO, 2012) 29. See also; James Wynbrandt, *A Brief History of Saudi Arabia* (Infobase Publishing, 2014) 42; Sheikh Ramzy, *The Complete Guide to Islamic Prayer* (Author House, 2012) 336; Yushau Sodiq, *An Insider's Guide to Islam* (Trafford Publishing, 2010) 177; Abdullah Saeed, *The Qur'an: An Introduction* (Routledge, 2008) 54; Gerhard Böwering, Patricia Crone and Mahan Mirza, *The Princeton Encyclopaedia of Islamic Political Thought* (Princeton University Press, 2013) 211; Mir Zohair Husain, *Global Studies: Islam and the Muslim World* (McGraw-Hill, 2006) 15; Ian Richard Netton, *Al-Farabi and His School* (Routledge, 2005) 31; Ignai Goldziher, *Muslim Studies* (Transaction Publishers, 1971) vol 1 xiii and Muslim ibn al-Ḥajjāj al-Qushayrī and Aftab Shahryar, *Sahih Muslim Abridged* (Islamic Book Service, 2004) 414.

understanding as to why those who hold to a radical view of Islam claim that they are mimicking the actions of their Prophet.

3 *Tafsir*

The term *tafsir* literally means interpretation.¹⁰⁸ This term is usually used by scholars as synonymously or interchangeably to denote Qur'anic interpretation or exegesis.¹⁰⁹ A *tafsir* is used to grasp the understanding of a particular verse of the Quran.¹¹⁰

A Muslim, whether they are radicalised or modernised; will utilise a *tafsir(s)* in order to obtain an understanding of the Quran in its totality. The question arises as the whether there are *tafsirs* written by notable Muslim scholars that are used by extremists in order to justify their understanding of Islam.

108 John Richard Bowen, *Muslims Through Discourse: Religion and Ritual in Gayo Society* (Princeton University Press, 1993) 66. See also; Fethi Benslama, *Psychoanalysis and the Challenge of Islam* (University of Minnesota Press, 2009) 24; Camilla Adang, *Muslim Writers on Judaism and the Hebrew Bible: From Ibn Rabban to Ibn Hazm* (BRILL, 1996) 11 and Thameem Ushama, *Methodologies of the Qu'ranic Exegesis* (A.S. Noordeen, 1995) 5.

109 Ali Suleiman Ali, *A Brief Introduction to Qur'anic Exegesis* (International Institute of Islamic Thought, 2017) 2. See also; Abdullah Saeed, *Approaches to the Qur'an in Contemporary Indonesia* (OUP, 2005) 67; ElSayed Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (Kube Publishing Ltd, 2015) 170; Abdelkader Cheref, *Gender and Identity in North Africa: Postcolonialism and Feminism in Maghrebi Women's Literature* (I.B.Tauris, 2010) 197 and Alamin M. Mazrui, *Cultural Politics of Translation: East Africa in a Global Context* (Routledge, 2016) 36.

110 Noritah Omar, Washima Che Dan and Jason Sanjeev Ganesan, *Critical Perspectives on Literature and Culture in the New World Order* (Cambridge Scholars Publishing, 2012) 95. See also; Jenny Berglund, *Teaching Islam* (Waxmann Verlag, 2010) 66; Ahmad Von Denffer, *Ulum al Qur'an: An Introduction to the Sciences of the Qur'an* (Kube Publishing Ltd, 2015) 95; Badmas 'Lanre Yusuf, *Sayyid Quṭb: A Study of His Tafsīr* (The Other Press, 2009) 42 and Robert Spencer, *Onward Muslim Soldiers: How Jihad Still Threatens America and the West* (Regnery Publishing, 2013) 155.

Primarily, this article will quote from the *tafsir* of Ibn Kathir, 14th Century historian and Islamic scholar.¹¹¹ Ibn Kathir was used to support offensive *jihad* in the following extremist publications. *39 Ways to Serve and Participate in Jihād* written by Muhammad bin Ahmad as-Salim,¹¹² *In Pursuit of Allah's Pleasure* written by Dr. Naajeh Ibrahim, Sheikh 'Aasim 'Abdul Maajid and Sheikh 'Esaam-ud-Deen Darbaalah,¹¹³ *Millat Ibrahim* by Abu Muhammad Al-Maqdis,¹¹⁴ *The Ruling on Jihad and It's Divisions* by Sheikh Yusuf al-Uyaari,¹¹⁵ and *Fundamental Concepts Regarding Al-Jihad* written by Abdul-Quadir Ibn Abdul.¹¹⁶

4 Biographies of Muhammad

The earliest biography written about Muhammad, *Sirat Rasul Allah*, was written in the 8th Century¹¹⁷ by a man named Ibn Ishaq (ca. 704-768).¹¹⁸

111 Ahmad Ghabin, *Hisba, Arts and Craft in Islam* (Otto Harrassowitz Verlag, 2009)
109. See also; Vardit Rispler-Chaim, *Disability in Islamic Law* (Springer Science & Business Media, 2006) 136; Abdelfattah Kilito, *Auteur Et Ses Doubles* (Syracuse University Press, 2001) 89; J. Halverson, S. Corman and H. L. Goodall, *Master Narratives of Islamist Extremism* (Springer, 2011) 4 and Jonathan Riley-Smith, *The Oxford Illustrated History of the Crusades* (Oxford University Press, 2001) 217.

112 Muhammad bin Ahmad as-Salim, *39 Ways to Serve and Participate in Jihād* (At-Tibyān Publications, 2011).

113 Dr. Naajeh Ibrahim, Sheikh 'Aasim 'Abdul Maajid and Sheikh 'Esaam-ud-Deen Darbaalah, *In Pursuit of Allah's Pleasure* (A. Ibrahim and Al-Arabi Ben Razzaq trans.)

114 Abu Muhammad Al-Maqdis, *Millat Ibrahim* (At-Tibyan Publications, 2nd ed.)

115 Aheikh Yusuf al-Uyaari, *The Ruling on Jihad and It's Divisions* (Abu Osama trans., Bismillah ar-Rahman ar-Raheem) <www.islambase.tk>.

116 Abdul-Quadir Ibn Abdul, *Fundamental Concepts Regarding Al-Jihad* (At-Tibyan Publications, 2004).

117 Randall L. Pouwels, *The African and Middle Eastern World: 600-1500* (Oxford University Press, 2005) 27. See also; Richard Maxwell Eaton, *The Rise of Islam and the*

However, the book itself has actually been lost.¹¹⁹ Ibn Ishaq taught a man named al-Bakkai, who made his own edition of Ibn Ishaq's book, and al-Bakkai taught man named Ibn Hisham, who edited al-Bakkai's edition, and it is this edition that we have today. Why did these men each make their own editions? Ibn Hisham tells us in his introductory remarks:

Things which it is disgraceful to discuss, matters which would distress certain people, and such reports as al-Bakkai told me he could not accept as trustworthy—all these things I have omitted.¹²⁰

In other words, the earliest biography of Muhammad's life was reputed to contain fabrications, disgraceful material and distressing facts.¹²¹ What we

Bengal Frontier: 1204-1760 (University of California Press, 1996) 286; William E. Phipps, *Muhammad and Jesus: A Comparison of the Prophets and Their Teachings* (Bloomsbury Publishing, 2016) 13; Ira M. Lapidus, *A History of Islamic Societies* (Cambridge University Press, 2014) 3 and Julie Scott Meisami and Paul Starkey, *Encyclopaedia of Arabic Literature* (Taylor & Francis, 1998) vol 1 51.

118 Lenn E. Goodman, *Islamic Humanism* (Oxford University Press, 2003) 167. See also; Erich Kolig, *Conservative Islam: A Cultural Anthropology* (Rowman & Littlefield, 2012) 15 and Diane Morgan, *Essential Islam: A Comprehensive Guide to Belief and Practice* (ABC-CLIO, 2010) 100

119 Allen Kent, Harold Lancour and Jay E. Daily, *Encyclopaedia of Library and Information Science* (CRC Press, 1975) vol 13 104. See also; Solomon A. Nigosian, *Islam: Its History, Teaching, and Practices* (Indiana University Press, 2004) 6; Irving M. Zeitlin, *The Historical Muhammad* (Polity, 2007) 2; Bernard Lewis, *Islam and the West* (Oxford University Press, 1994) 93 and Cenap Çakmak, *Islam: A Worldwide Encyclopaedia [4 Volume]* (ABC-CLIO, 2017) 647.

120 Found in Ibn Hisham's notes. Ibn Ishaq, *The Life of Muhammad: A Translation of Ibn Ishaq's Sirat Rasul Allah* (Alfred Guillaume trans, Oxford University Press, 2002) 691. See also; Muḥammad Ibn Ishāq and Gordon Darnell Newby, *The Making of the Last Prophet: A Reconstruction of the Earliest Biography of Muhammad* (University of South Carolina Press, 1989) 9; James E. Lindsay, *Ibn 'Asākir and Early Islamic History* (Darwin Press, 2001) 50; Ibn Warraq, *The Quest for the Historical Muhammad* (Prometheus Books, 2000) 453 and Ibn al-Rawandi, *Islamic Mysticism: A Secular Perspective* (Prometheus Books, 2000) 45.

121 We can be sure the disgraceful material and distressing facts are related to Muhammad,

have today has been filtered many times, both for fabrications and for difficult truths.¹²²

Another one of the earliest biographies of Muhammad was written by Ibn Sa'd¹²³ (ca. 784 – 845 AD).¹²⁴

Thus far, this article has listed some of sources utilised in Islamic theology. By identifying the sources that are fundamental to understanding Islamic theology and theology, we are able to identify Muhammad's teachings in order to understand how a radical Muslim extremist justifies their position.

5 *The Conduct of Muhammad*

Radical Islam: Replicating the Conduct of Their Prophet

(a) *Muhammad and Ka`b bin al-Ashraf*

The story of Muhammad and Ka`b bin al-Ashraf was used in a Radical Islamic source to promote terrorism or in other words, offensive *jihad*. This

since Ibn Hisham had already discussed excising material that was not related to Muhammad in his list of omissions.

122 Nabeel Qureshi, *No God But One: Allah or Jesus? A Former Muslim Investigates the Evidence for Islam and Christianity [Kindle Edition]* (Zondervan, 2016) 3666 - 3667.

123 Norman Calder, Jawid Mojaddedi and Andrew Rippin, *Classical Islam: A Sourcebook of Religious Literature* (Routledge, 2004) 30. See also; Margaretta Jolly, *Encyclopaedia of Life Writing: Autobiographical and Biographical Forms* (Routledge, 2013) 48; F. E. Peters, *Jesus and Muhammad: Parallel Tracks, Parallel Lives* (Oxford University Press, 2010) 32 and Sarah Bowen Savant, *The New Muslims of Post-Conquest Iran: Tradition, Memory and Conversion* (Cambridge University Press, 2013) 90.

124 Eerik Dickinson, *The Development of Early Sunnite Ḥadīth Criticism: The Taqdima of Ibn Abī Ḥātim Al- Rāzī (240/854-327/938)* (BRILL, 2001) 101. See also; Walter Werkmeister, *Quellenuntersuchungen zum Kitāb al- 'Iqd al-farīd des Andalusiers Ibn 'Abdrabbih (246/860-328/940)* (K. Schwarz, 1983) 107; John R. Hinnells, *Who's Who of World Religions* (Springer, 1991) 172 and Josef W. Meri, *Medieval Islamic Civilization: An Encyclopaedia* (Routledge, 2005) 366.

source was written by Abu Muhammad Al-Maqdis titled, *Millat Ibrahim*.¹²⁵

In order to understand the historical context of this event, we look to *Sahih Al-Bukhari* which describes the events that occurred between Muhammad and Ka`b bin al-Ashraf.

Sahih Al-Bukhari Volume 5, Book 5, Number 369 notes:

Allah's Apostle said, "Who is willing to kill Ka'b bin Al-Ashraf [hereon 'Ka'b'] who has hurt Allah and His Apostle?" Thereupon Muhammad bin Maslama [hereon 'Maslama'] got up saying, "O Allah's Apostle! Would you like that I kill him?" The Prophet said, "Yes," Muhammad bin Maslama said, "Then allow me to say a (false) thing (i.e. to deceive Kab)". The Prophet said, "You may say it." ...

The above quote from Al-Bukhari is only a fragment of the entire account, for the purposes of space and time; a summary of this passage is as follows.

Maslama went to Ka`b and claimed he needed money in order to pay taxes to Muhammad. Ka`b would provide the financial support to Maslama upon the condition that a mortgage of some kind was provided. After negotiation, it was agreed that Maslama and his companions would mortgage 'their arms'. Following negotiations, Maslama and his companions promised to return to Ka`b. After their return, Maslama and his companions killed Ka`b and then reported his death to Muhammad.

In order to obtain a greater understanding of this event, we read in one of the earliest biographies of Muhammad written by Ibn Sa'd, that Maslama and his companions had cut off the head of Ka`b's and had given his head to Muhammad all the while Muhammad had praised Allah for Ka`b being

¹²⁵ Abu Muhammad Al-Maqdis, *Millat Ibrahim* (Unknown Publication, 2nd Ed., No Specified Date) 77 – 78.

slain.¹²⁶

There are two themes that can be taken from this event. Firstly, Muhammad allowed Maslama to lie in order to bring through to succession the murder of Ka' b and secondly, Muhammad sought help from a third party in order to slay someone who had offended him rather than performing the deed himself.

In *Al-Bukhari*, it was noted that Muhammad declared that Ka'b had 'hurt Allah and His Apostle'. Unfortunately, *Al-Bukhari* does not specify the events that led up to this assertion. Nonetheless, the earliest biography of Muhammad written by Ibn Ishaq provides the context on how Ka'b "hurt Allah and His Apostle" as argued by Muhammad.

According to Ibn Ishaq, Ka'b had gone to Mecca after the battle of Badr (624 CE)¹²⁷ and inveighed against Muhammad.¹²⁸ Due to the grief of witnessing the catastrophic effects performed by the Muslim's onslaught of his fellow companions at the Battle of Badr; Ka'b wrote upsetting poems regarding the victims of Quraysh. Ka'b had also written insulting poems

126 Ibn Sa'd and Moinul Haq, *Kitab al-Tabaqat al-Kabir* (Pakistan Historical Society, 1967) vol 2 37.

127 James E. Lindsay, *Daily Life in the Medieval Islamic World* (Greenwood Publishing Group, 2005) 60. See also; *Muhammad Husayn Haykal, The Life of Muhammad* (The Other Press, 1994) 260; Richard A. Gabriel, *Muhammad: Islam's First Great General* (University of Oklahoma Press, 2014) xxiii; J. Halverson and S. Corman, H. L. Goodall, *Master Narratives of Islamist Extremism* (Springer, 2011) 49 and Mike Kuhn, *Fresh Vision for the Muslim World* (InterVarsity Press, 2009) 204.

128 Muhammad Siddique Qureshi, *Foreign Policy of Hadrat Muhammad* (Kitab Bhavan, 1991) 256. See also; Alfred Guillaume, *Sīrat Rasūl Allāh* (Oxford University Press, 1955) 365.

about Muslim women.¹²⁹

This portrayal of events is also presented in *Sahih Muslim*.¹³⁰ It could be understood that Muhammad did not appreciate Ka'b for inveighing him and writing poems against Muslim women thus, asserting that such acts

129 Ibn Ishaq, *The Life of Muhammad* (A. Guillaume trans, Oxford UP, 2004) 548 – 583]. See also; Tabari, *The History of al-Tabari*, Vol. VII, trans. W. Montgomery Watt (SUNYP, 1987) 94-98 / 1368-73; Sahaja Carimokam, *Muhammad and the People of the Book* (Xlibris Corporation, 2010) 306; Antonie Wessels, *A Modern Arabic Biography of Muḥammad: A Critical Study of Muḥammad Ḥusayn Haykal's Ḥayāt Muḥammad* (Brill Archive, 1972) 183 and Gary Paul Nabhan, *Cumin, Camels, and Caravans: A Spice Odyssey* (University of California Press, 2014) 120.

130 *Sahih Muslim* vol. 3, no. 4436.

It has been narrated on the authority of Jabir that the Messenger of Allah (Peace be upon him) said: Who will kill Ka'b b. Ashraf? He has maligned Allah, the Exalted, and His Messenger. Muhammad b. Maslama said: Messenger of Allah, do you wish that I should kill him? He said: Yes. He said: Permit me to talk (to him in the way I deem fit). He said: Talk (as you like). So, Muhammad b. Maslama came to Ka'b and talked to him, referred to the old friendship between them and said: This man (i. e. the Holy Prophet) has made up his mind to collect charity (from us) and this has put us to a great hardship. When he heard this, Ka'b said: By God, you will be put to more trouble by him. Muhammad b. Maslama said: No doubt, now we have become his followers and we do not like to forsake him until we see what turn his affairs will take. I want that you should give me a loan. He said: What will you mortgage? He said: What do you want? He said: Pledge me your women. He said: You are the most handsome of the Arabs; should we pledge our women to you? He said: Pledge me your children. He said: The son of one of us may abuse us saying that he was pledged for two wasqs of dates, but we can pledge you (cur) weapons. He said: All right. Then Muhammad b. Maslama promised that he would come to him with Harith, Abu 'Abs b. Jabr and Abbad b. Bishr. So they came and called upon him at night. He came down to them. Sufyan says that all the narrators except 'Amr have stated that his wife said: I hear a voice which sounds like the voice of murder. He said: It is only Muhammad b. Maslama and his foster-brother, Abu Na'ila. When a gentleman is called at night even it to be pierced with a spear, he should respond to the call. Muhammad said to his companions: As he comes down, I will extend my hands towards his head and when I hold him fast, you should do your job. So when he came down and he was holding his cloak under his arm, they said to him: We sense from you a very fine smell. He said: Yes, I have with me a mistress who is the most scented of the women of Arabia. He said: Allow me to smell (the scent on your head). He said: Yes, you may smell. So he caught it and smelt. Then he said: Allow me to do so (once again). He then held his head fast and said to his companions: Do your job. And they killed him.

constitute “hurt[ing] Allah and His Apostle”. According to Muhammad, those who inveigh against him and write poems against Muslim women deserve to be put to death by any means necessary.

Muhammad also ordered the onslaught of other individuals for a similar reason. Namely, writing poetry against him. This article will provide four examples.

Firstly, Asma’ bint Marwan was killed for opposing Muhammad with poetry and for provoking others to attack him.¹³¹ Secondly, Abu' Afak was killed for opposing Muhammad through poetry.¹³² Thirdly, Al Nadr Ibn Al-Harith was killed for mocking and harassing Muhammad and for writing poems and stories criticising him¹³³ and fourthly, Uqba Bin Abu Muayt was killed because he had thrown dead animal entrails on Muhammad and Muayt had wrapped his garment around Muhammad's neck whilst Muhammad was praying.¹³⁴

131 William Muir, *The Life of Mahomet* (Smith, Elder and Co., 1861) 130. See also; Ibn Ishaq, *The Life of Muhammad: A Translation of Ibn Ishaq's Sirat Rasul Allah* (Alfred Guillaume trans, Oxford University Press, 2002) 675 - 676 and Ibn Sa'd, *Kitab Al-Tabaqat Al-Kabir* (Pakistan Historical Society, 1967) vol 2 35.

132 Yvonne Yazbeck Haddad and Ellison Bnaks Findly, *Women, Religion and Social Change* (SUNY Press, 1985) 24. See also William Muir, *The Life of Mahomet* (Smith, Elder and Co., 1861) 133; De Mahdi Rizquallah Ahmad, *Darussalam: A Biography of the Prophet of Islam* (Vol 1 & 2) 433; Ibn Ishaq, *The Life of Muhammad: A Translation of Ibn Ishaq's Sirat Rasul Allah* (Alfred Guillaume trans, Oxford University Press, 2002) 675 and Ibn Sa'd, *Kitab Al-Tabaqat Al-Kabir* (Pakistan Historical Society, 1967) vol 2 31.

133 Muhammad Husayn Haykal and Isma'il R. Al-Faruqi, *The Life of Muhammad* (North American Trust Publications, 1976) vol 2 223. See also; Ibn Ishaq, *The Life of Muhammad: A Translation of Ibn Ishaq's Sirat Rasul Allah* (Alfred Guillaume trans, Oxford University Press, 2002) 136l 236; 262 and 458.

134 Muhammad Husayn Haykal and Isma'il R. Al-Faruqi, *The Life of Muhammad* (North American Trust Publications, 1976) vol 2 223. See also; *Sunan Abu Dawud* No. 2680

The theme, it seems, is that one should not to make fun of the Prophet Muhammad as the consequences of such actions is death as orchestrated by Muhammad himself. With this in mind, one cannot help identify the corresponding similarity of the actions of Muhammad and his companions with the Charlie Hebdo shooting.¹³⁵ The Charlie Hebdo shooting involved the death of 12 people who were killed in a terrorist attack that occurred in Paris on the 7th January 2015.¹³⁶

Brothers, Said and Cherif Kouachi, sought revenge upon the headquarters of the French magazine, *Charlie Hebdo*, for lampooning the Islamic faith by publishing satirical cartoons of the Prophet Muhammad.¹³⁷

(with commentary from Awnil Mabud 3/12); Sahih Al-Bukhari 1:9:499, vol 4 2934; *Sahih Muslim Muslim* 3:442, 4424 and Ibn Ishaq, *The Life of Muhammad: A Translation of Ibn Ishaq's Sirat Rasul Allah* (Alfred Guillaume trans, Oxford University Press, 2002) 458.

135 Gian Paolo Cimellaro, *Urban Resilience for Emergency Response and Recovery: Fundamental Concepts and Applications* (Springer, 2016) 12. See also; Šarūnas Paunksnis, *Dislocating Globality: Deterritorialization, Difference and Resistance* (BRILL, 2015) 37 and Elizaveta Gaufman, *Security Threats and Public Perception: Digital Russia and the Ukraine Crisis* (Springer, 2016) 194.

136 Jarmila Mildorf and Bronwen Thomas, *Dialogue across Media* (John Benjamins Publishing Company, 2011) 141. See also; Alessandro Zagato, *The Event of Charlie Hebdo: Imaginaries of Freedom and Control* (Berghahn Books, 2015) 57; Ursula Smartt, *Media & Entertainment Law* (Routledge, 2017) 58 - 59 and Steve Pickering, *Understanding Geography and War: Misperceptions, Foundations, and Prospects* (Springer, 2016) 87 - 88.

137 Nataša Bakić-Mirić and Davronzhon Erkinovich Gaipov, *Going Forward: Recent Developments in Higher Education* (Cambridge Scholars Publishing, 2016) 150. See also; Mark Connelly, *The Sundance Reader* (Cengage Learning, 2014) 452; Marijke Meijer Drees and Sonja de Leeuw, *The Power of Satire* (John Benjamins Publishing Company, 2015) 62; Mike Hardy, Fiyaz Mughal and Sarah Markiewicz, *Muslim Identity in a Turbulent Age: Islamic Extremism and Western Islamophobia* (Jessica Kingsley Publishers, 2017) 198 and Katherine Smits, *Applying Political Theory: Issues and Debates* (Palgrave Macmillan, 2016) 150.

During this ordeal, a witness heard the gunmen shout, “we have avenged the Prophet Muhammad; we have killed Charlie Hebdo. You can tell the media its al-Qaeda in Yemen”.¹³⁸

The rationale behind the Charlie Hebdo shooting presents the identical principle underlying the imperatives given by Muhammad. Namely, those who mock the Prophet shall be slain. Muhammad ordered people to be slain for writing satirical content about him. Likewise, two brothers sought revenge for drawing satirical content about Muhammad. In one instance, Muhammad gave the command to slaughter those who wrote satirical content against him. The Charlie Hebdo shooting was rationalised upon the same basis. The two brothers, Said and Cherif Kouachi, seemed to replicate the submissiveness to Muhammad’s command; to kill those who hurt Allah and His apostle, as did Muhammad’s followers.

At the time of Muhammad’s takeover of Mecca (629 AD),¹³⁹ the Prophet ordered the execution of two singing girls belonging to Abd Allah b. Khatal

138 Edward Mickolus, *Terrorism, 2013–2015: A Worldwide Chronology* (McFarland, 2016) 308. See also; Patrick Duggan and Lisa Peschel, *Performing (for) Survival: Theatre, Crisis, Extremity* (Springer, 2016) 244; Brigitte L Nacos, *Terrorism and Counterterrorism* (Routledge, 2016) 109; John William Tate, *Liberty, Toleration and Equality: John Locke, Jonas Proast and the Letters Concerning Toleration* (Routledge, 2016)xiii; Eliot Dickinson, *Globalization and Migration: A World in Motion* (Rowman & Littlefield, 2016) 2 and Sathianathan Clarke, *Competing Fundamentalisms: Violent Extremism in Christianity, Islam, and Hinduism* (Westminster John Knox Press, 2017) 82.

139 Helaine Selin, *Encyclopaedia of the History of Science, Technology, and Medicine in Non-Western Cultures* (Springer Science & Business Media, 1997) 172. See also; Sayed Khatab, *The Power of Sovereignty: The Political and Ideological Philosophy of Sayyid Qutb* (Routledge, 2006) 129; Andrew Petersen, *Dictionary of Islamic Architecture* (Routledge, 2002) 142; Niaz A Shah, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan* (Taylor & Francis, 2011) 40 and Robert P. Barnidge Jr., *The Liberal Way of War: Legal Perspectives* (Routledge, 2016) 217.

who ridiculed him in their songs, as well as of a female *mawla*¹⁴⁰ of the Banü Abd al-Muttalib who seems to have been guilty of a similar transgression.¹⁴¹ *Sunan Abu Dawud* demonstrates this event:

Narrated Sa'id ibn Yarbu' al-Makhzumi:

The Prophet said: on the day of the conquest of Mecca: There are four persons whom I shall not give protection in the sacred and non-sacred territory. He then named them. There were two singing girls of al-Maqis; one of them was killed and the other escaped and embraced Islam. Abu Dawud said: I could not understand its chain of narrators from Ibn al-'Ala' as I liked.¹⁴²

According to the primary sources, Muhammad commanded that these individuals be slain for mocking him. If this event is true, then when radical Muslims slaughter individuals in defence of mocking their Prophet; they are merely replicating the commands ordained by Muhammad himself.

Evidently, Muhammad's stance towards those who mocked him was quite hostile and in many cases, ordered them to be killed. Another perspective to understand is Muhammad's treatment of apostates. Once we recognise Muhammad's treatment of apostates, it will allow us to determine whether

140 Guardian, trustee, helper. See A.J. Wensinck, *Encyclopaedia of Islam* (Brill, 2nd ed., 1927) vol 6 874.

141 Ibn Taymiyya and Muhammad Muhyi al-Din Abd al-Hamid (ed.), *al-Sarim al-Maslul 'ala shatim al-rasul* (Maktabat al-Taj, 1960) 404. See also; Ibn Ishaq, *The Life of Muhammad: A Translation of Ibn Ishaq's Sirat Rasul Allah* (Alfred Guillaume trans, Oxford University Press, 2002) 550; Ibn Sa'd, *Kitab al-Tabaqat al-Kabir* (Pakistan Historical Society, 1967) vol 2 174; Rizwi Faizer (ed.), *The Life of Muhammad: Al-Waqidi's Kitab al-Maghazi* (Routledge, 2013) 406; Maulana Wahid Khan, *Muhammad: A Prophet for All Humanity* (Goodword, 2002) 327 - 333; Saifur Rahman Al Mubarakpuri, *The Sealed Nectar* (Darussalam Publications, 2005) 254 and Hussain Haykal, *The Life of Mohammed* (Islamic Book Trust, 1994) 440.

142 *Sunan Abu Dawud* Book 14, Hadith 2678.

those who adhere to radical Islam act in a manner that Muhammad did or whether they are conducting themselves as Muhammad commanded. This view will be assessed in the next section.

(b) *Muhammad's Treatment of Apostates*

There is much debate surrounding the topic of the Qurans stance on the punishment for apostasy. Some believe that the Quran does not affirm the killing of apostates,¹⁴³ whilst others disagree;¹⁴⁴ citing Surah 4:89¹⁴⁵ for justification. Regardless of the position, it is clear that Muhammad, from the sources of the Hadiths, expressed affirmation of the death penalty for those who leave Islam. This is seen in *Sahih Al-Bukhari* Vol. 9, Book 83, Hadith 17:

Allah's Messenger said, "The blood of a Muslim cannot be shed except in three cases: the one who reverts from Islam (apostate) and leaves the Muslims".

143 Mustansir Mir, *The Dictionary of Quranic Terms and Concepts* (Garland Publishing Inc., 1987) 16. See also; Roy Jackson, *What is Islamic Philosophy?* (Routledge, 2014) 98; Maulana Muhammad Ali and Dr Zahid Aziz, *A Handbook of Islam: An Abridged Edition of 'The Religion of Islam'* (Ahmadiyya Anjuman Lahore Publications, 2015) 334; Jeroen Temperman, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (BRILL, 2010) 184 and Hisham M. Ramadan, *Understanding Islamic Law: From Classical to Contemporary* (Rowman Altamira, 2006) 178.

144 Abul Ala Mawdudi, *The Punishment of the Apostate According to Islamic Law* (The Voice of the Martyrs, 1994). See also; Ayatollah Imam Khomeini, *Tahrir al-Wassilah* (CreateSpace Independent Publishing Platform, 2014) vol 2 196; Rebecca Joyce Frey, *Fundamentalism* (Infobase Publishing, 2010) 217 - 218 and Maulana Mufti Muhammad Shafi, *Maariful Qur'an* (Idaratul Maarif, 2007) vol 1 536.

145 They wish you would disbelieve as they disbelieved so you would be alike. So do not take from among them allies until they emigrate for the cause of Allah . But if they turn away, then seize them and kill them wherever you find them and take not from among them any ally or helper.

And *Sahih Al-Bukhari* Vol. 9, Book 84, Hadith 57

I would have killed them according to the statement of Allah's Messenger:
"Whoever changed his Islamic religion, then kill him".

Other references that present this theme in *Sahih Al-Bukhari* are as follows
9:84:58; 4:55:656; 4:52:260; 5:59:632; 9:84:58; 9:89:271; 9:83:17; 9:83:37
and 9:84:64.

The following *Sahih* Hadiths also present this principle; *Sahih Muslim*,¹⁴⁶
Sunan an-Nasa'i,¹⁴⁷ *Sunan Ibn Majah*¹⁴⁸ and *Sunan Abu Dawud*.¹⁴⁹

The act of killing apostates is viewed to be a radical view of Islam rather than a 'moderate' view. The radical Islamic group *Hizb ut-Tahrir* was, according to former Australian Prime Minister Tony Abbot, "actively, publicly calling on death to apostates - in other words, people who leave Islam should be killed".¹⁵⁰ However, it was well known, according to radical Islamic theologian Muhammad 'Abd al-Salam Farag, that apostates must suffer the punishment of death according to Islamic law.¹⁵¹ According

146 *Sahih Muslim* Book 001, Number 0029; Book 016, Number 4152; Book 016, Number 4154 and Book 20 Number 4490.

147 *Sunan an-Nasa'i* Vol. 5, Book 37, Hadith 4064, 4066 - 67, 4070.

148 *Sunan Ibn Majah* Vol. 3 Book 20, Hadith 2632; 3:20:2533; 3:20:2534 and 3:20:2535.

149 *Sunan Abu Dawud* Book 38 Hadith 4341 and Book 39 Hadith 4487.

150 Hannah Moore, 'Hate Preaching Centres Must Be Closed Down': Tony Abbott Demands Three-Step Action Plan To Tackle Rising Islamic Threat In Australia', *Dailymail* (online), 6 June 2017 <<http://www.dailymail.co.uk/news/article-4575440/Tony-Abbott-demands-action-tackle-Islamic-threat.html>>.

151 Jacqueline G. Brinton, *Preaching Islamic Renewal: Religious Authority and Media in Contemporary Egypt* (University of California Press, 2015) 118.

to Muslim jurists, apostates may be killed unless they repent.¹⁵² There is also a consensus by all four schools of Sunni Islamic jurisprudence (i.e., Maliki, Hanbali, Hanafi, and Shafii), as well as classical Shiite jurists, that apostates from Islam must be put to death.

The following section will demonstrate Muhammad's view of *Jihad* and how extremists use primary Islamic sources to justify performing offensive *jihad*.

(c) Muhammad's View of Jihad

(i) *What is Jihad?*

Unfortunately, those unfamiliar with the doctrine of Jihad, believe that the term '*jihad*' only refers to offensive fighting in the name of Allah. Thus, *jihad* is synergistic with terrorism. However, this is incorrect. Jihad literally means, to 'strive', 'struggle' and even, to fight; in certain contexts.¹⁵³

152 Of course, many contemporary Muslims have opposed the execution of the apostate, and pointed out that the tradition is based on insufficient evidence. Majid Khadduri, *Islamic Conception of Justice* (John Hopkins University Press, 1984) 238; Mohamed El Awa, *Punishment in Islamic Law* (American Trust Publications, 1993) 49 -56, 61 - 62; Mahmud Shaltut, *Al-Islam: Aqid'a wa Sharicah* (Dar al0Shuruq, 17th ed., 1991) 280 - 281; Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press, 2006) 32; S. Sardar Ali (ed.) et al., *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (Martinus Nijhoff Publishers, 2013) 90; Jonathan E. Brockopp, *Islamic Ethics of Life: Abortion, War, and Euthanasia* (University of South Carolina Press, 2003) 109; James Turner Johnson and John Kelsay, *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press, 1990) 162 and Thomas Scheffler, *Religion Between Violence and Reconciliation* (Ergon-Verlag, 2002) 103.

153 John L. Esposito, *The Oxford Dictionary of Islam* (Oxford University Press, 2004) 159 - 160. See also; Ira G. Zepp, *A Muslim Primer: Beginner's Guide to Islam* (University of

There are two types of *jihad*; inner *jihad* and external *jihad*.¹⁵⁴

(a) Inner Jihad

Inner *jihad* reflects the struggle of the self with evil; the struggle to control the body's members.¹⁵⁵

The inner is the jihad of the soul, the passion, the nature, and Satan. It involves repentance from rebelliousness and errors, being steadfast about it, and abandoning the forbidden passions.... The inner jihad is more difficult than the outer jihad because it involves cutting the forbidden customs of the soul, and exiling them, so as to have as one's example the Divine commands and to cease from what it forbids.¹⁵⁶

(b) External Jihad

Arkansas Press, 2000) vol 1 95 and Natana DeLong-Bas, *Jihad: Oxford Bibliographies Online Online Research Guide* (Oxford University Press, 2010) 3.

154 Abd al-Qadir al-Jilani, *Al-Fath Al-Rabbani Wa-l-fayd Al-Rahmani* (Cairo, 1988) 83. See also; David Cook, *Understanding Jihad* (Univ of California Press, 2015) 45; Jyoti Bhusan Das Gupta, *Science, Technology, Imperialism, and War* (Pearson Education India, 2007) 597; Anthony Parel and Ronald C. Keith, *Comparative Political Philosophy: Studies Under the Upas Tree* (Lexington Books, 2003) xx and Onder Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law* (Routledge, 2014) 70.

155 Farahat AlKindy, *The Comprehensive Guide For Da'wah In Mosques (Masjids)* (Farahat Mohammed Nassor Al-Kindy, 2005) 19. See also; Ron Geaves, *Islam Today: An Introduction* (A&C Black, 2010) 108; K. Robinson, *Asian and Pacific Cosmopolitans: Self and Subject in Motion* (Springer, 2007) 150; Sayyid Haydar Amuli and Ḥaydar ibn 'Alī Āmulī, *Inner Secrets of the Path* (Element Books in association with Zahra Publications, 1989) 290 and David Cook, *Understanding Jihad* (Univ of California Press, 2015) 45.

156 Abd al-Qadir al-Jilani, *Al-Fath Al-Rabbani Wa-l-fayd Al-Rahmani* (Cairo, 1988) 83. See also; David Cook, *Understanding Jihad* (Univ of California Press, 2015) 45.

External *jihad* involves physical struggle which is often associated with fighting and killing.¹⁵⁷

The outer is the jihad of the infidels who resist Him and His Messenger [Muhammad] and to be pitiless with their swords, their spears, and their arrows—killing and being killed....Whoever takes God's command as his example with regard to the two types of jihad will gain a reward in this world and the next. Bodily wounds on the martyr are just like someone cutting their hand—there is no real pain in it—and death with regard to the soul of a *mujahid* [is one who struggles for the sake of Allah and Islam]¹⁵⁸ who repents from his sins is like a thirsty man drinking cold water.¹⁵⁹

However, there are two sub-forms of jihad, *Jihād Al-Talab* (offensive *jihad*), seeking an enemy and battling in their state¹⁶⁰ and *Jihad Al-Dafa'a*

157 Frances L. Flannery, *Understanding Apocalyptic Terrorism: Countering the Radical Mindset* (Routledge, 2015) 85. See also; Michael Bonner, *Jihad in Islamic History: Doctrines and Practice* (Princeton University Press, 2008) 22; Brian P. Bennett, *Understanding, Assessing, and Responding to Terrorism: Protecting Critical Infrastructure and Personnel* (John Wiley & Sons, 2007) 23; Richard Schechner, *Performance Studies: An Introduction* (Routledge, 2012) 270 and Muhammad-Basheer .A. Ismail, *Islamic Law and Transnational Diplomatic Law: A Quest for Complementarity in Divergent Legal Theories* (Springer, 2016) 145.

158 A.H. Qasmi, *Islamic Government* (Gyan Publishing House, 2008) 31. See also; John Ralph Willis, *In the Path of Allah: 'Umar, An Essay Into the Nature of Charisma in Islam* (Routledge, 2013) 230 and Alastair Finlan, *The Test of Terrorism: Responding to Political Violence in the Twenty-First Century* (Routledge, 2016) 64.

159 Abd al-Qadir al-Jilani, *Al-Fath Al-Rabbani Wa-l-fayd Al-Rahmani* (Cairo, 1988) 83. See also; David Cook, *Understanding Jihad* (Univ of California Press, 2015) 45.

160 Radical Islamic Source: Sheikh Dr. Abdul-Qādir Ibn 'Abdul-'Azīz, *Fundamental Concepts Regarding Al Jihad*, Muslimcreed.com, JW, 20 September 2005. See also; Line Khatib, *Islamic Revivalism in Syria: The Rise and Fall of Ba'thist Secularism* (Routledge, 2012) 152; Sayed Khatib, *Understanding Islamic Fundamentalism: The Theological and Ideological Basis of Al-Qa'ida's Political Tactics* (Oxford University Press, 2011) 151; Joseph Morrison Skell, *Political Islam from Muhammad to Ahmadinejad: Defenders, Detractors, and*

(defensive jihad), fighting in self-defence.¹⁶¹

The modern Muslim would confer that *Jihad Al-Dafa'a* is permissible however; *Jihād Al-Talab* is not.¹⁶² Evidently, those who adhere to the radical ideology of Islam disagree and look to the three sources for justification.

(ii) Which Jihad is Best?

As mentioned above, there are two different types of Jihad, *Jihād Al-Talab* and *Jihad Al-Dafa'a*. With that in mind, the question was posed to Muhammad which form of Jihad is best. *Sunan Ibn Majah* provides us with Muhammad's answer:

It was narrated that Amr bin Abasah said:

Definitions: Defenders, Detractors, and Definitions (ABC-CLIO, 2009) 116 and A. Ahmad, *Islam, Islam, Modernity, Violence, and Everyday Life* (Springer, 2009) 135.

161 Mehdi Faridzadeh, *Philosophies of Peace and Just War in Greek Philosophy and Religions of Abraham: Judaism, Christianity and Islam* (Alhoda UK, 2004) 95. See also; Keith B. Payne, *Understanding Deterrence* (Routledge, 2014) 53; Michael Cromartie, *Religion, Culture, and International Conflict: A Conversation* (Rowman & Littlefield, 2005) 121; Line Khatib, *Islamic Revivalism in Syria: The Rise and Fall of Ba'thist Secularism* (Routledge, 2012) 152 and Muhammad Qasim Zaman, *Modern Islamic Thought in a Radical Age: Religious Authority and Internal Criticism* (Cambridge University Press, 2012) 262.

162 Line Khatib, *Islamic Revivalism in Syria: The Rise and Fall of Ba'thist Secularism* (Routledge, 2012) 152. See also; Vesselin Popovski, Gregory M. Reichberg and Nicholas Turner, *World Religions and Norms of War* (United Nations University Press, 2009) 265; Aref M. Al-Khattar, *Religion and Terrorism: An Interfaith Perspective* (Greenwood Publishing Group, 2003) 64; Justin Jones, *Shi'a Islam in Colonial India: Religion, Community and Sectarianism* (Cambridge University Press, 2011) 169 and Chiragh Ali, *A Critical Exposition of the Popular 'Jihad': Show That All The Wars of Muhammad Were Defensive and That Aggressive War Is Not Allowed in the Koran* (Calcutta, 1885).

[Question]: "I came to the Prophet and said: 'O Messenger of Allah, which Jihad is best?'"

[Mouhammad]: He said: '(That of a man) whose blood is shed and his horse is wounded.'"¹⁶³

So, the best form of Jihad, since there are multiple forms; is the one where "blood is shed and his horse is wounded" as per Muhammad's stated in the Hadith.

The next question is to ask why, according to Mouhammad, should fight in Jihad? What is the goal?

Muhammad tells us in *Sahih Al Bukhari* Volume 4, Book 52, Number 65:

A man came to the Prophet and asked, "A man fights for war booty; another fights for fame and a third fights for showing off; which of them fights in Allah's Cause?" The Prophet said, "He who fights that Allah's Word (i.e. Islam) should be superior, fights in Allah's Cause."

This theme is also reflected in *Sahih Al Bukhari* Volume 4, Book 52, Number 48.¹⁶⁴

¹⁶³ *Sunan Ibn Majah* 2794

¹⁶⁴ Narrated Abu Huraira:

The Prophet said, "Whoever believes in Allah and His Apostle, offer prayer perfectly and fasts the month of Ramadan, will rightfully be granted Paradise by Allah, no matter whether he fights in Allah's Cause or remains in the land where he is born." The people said, "O Allah's Apostle ! Shall we acquaint the people with the is good news?" He said, "Paradise has one-hundred grades which Allah has reserved for the Mujahidin who fight in His Cause, and the distance between each of two grades is like the distance between the Heaven and the Earth. So, when you ask Allah (for something), ask for Al-firdaus which is the best and highest part of Paradise." (i.e. The sub-narrator added, "I think the Prophet also said, 'Above it

According to the Hadiths, the best type of *jihad* is the one that involves bloodshed whilst fighting for the superiority of Islam; this is condoned as fighting in Allah's cause. The recompenses for fighting in Allah's cause are paradise,¹⁶⁵ rewards,¹⁶⁶ war booty¹⁶⁷ and the sins of the *jihadi* will be blotted out.¹⁶⁸ Though this may seem salient to some, it is recorded in numerous Hadiths that Muhammad commanded his followers to fight until they, the unbelievers; recite the *shahada*,¹⁶⁹ establish prayer and pay *zakat*.¹⁷⁰ It is upon this condition that they, the 'former' unbeliever; will be

(i.e. Al-Firdaus) is the Throne of Beneficent (i.e. Allah), and from it originate the rivers of Paradise.")

165 *Sahih Muslim* 19:4314. See also; Surah 9:19-20.

166 *Sahih al-Bukhari* 4:52:44, 63. See also; *Sahih Muslim* 20:4639; Surah 22:58; Surah 4:95 and Surah 4:100.

167 *Sahih al-Bukhari* 4:52:46. See also; *Sahih al-Bukhari* 4:52:65.

168 *Sahih Muslim* 20:4646. See also; Surah 3:157-158.

169 The *shahada* is an Islamic creed declaring belief in the oneness of God (tawhid) and the acceptance of Muhammad as God's prophet. See Dan Scott, *Faith to Faith* (arvest House Publishers, 2008) 116. See also; Ludwig W. Adamec, *Historical Dictionary of Islam* (Scarecrow Press, 2009) 94; Daria Mitchell, *Daring to Embrace the Other: Franciscans and Muslims in Dialogue* (Franciscan Institute Publications, 2008) 52; Simon Cottey, *The Apostates: When Muslims Leave Islam* (Oxford University Press, 2015) 225 and Vincent J. Cornell, *Voices of Islam: Voices of Tradition* (Greenwood Publishing Group, 2007) 217.

170 *Zakat* is a form of alms-giving treated in Islam as a religious obligation or tax.

See Mehdi Salehi, 'A Study on the Influences of Islamic Values on Iranian Accounting Practice and Development' (2014) 10 (2) *Journal of Islamic Economics, Banking and Finance* 154–182; Zulkipli Lessy, 'Zakat Management in Indonesia: Whose Job Should It Be?' (2009) 3(1) *La Riba Journal Ekonomi Islam* 106 - 119; Vincent J. Cornell, *Voices of Islam* (Greenwood Publishing Group, 2006) 201; Robert W. McGee, *The Philosophy of Taxation and Public Finance* (Springer Science & Business Media, 2003) 67 and Delmus Puneri Salim, *The Transnational and the Local in the Politics of Islam: The Case of West Sumatra, Indonesia* (Springer, 2015) 82.

Some classical jurists have held the view that any Muslim who consciously refuses to pay *zakat* is an apostate, since the failure to believe that it is a religious duty (*fard*) is a form of unbelief

protected.

I note the phrase ‘former unbeliever’ because one is only spared from being slain if they become Muslim. According to Islamic theology, you revert back to Islam¹⁷¹ once you recite the *shahada* in sincere belief.¹⁷² This declaration should be witnessed by two reliable Muslim witnesses. If the witnesses are male, only two are required. However, if only one male witness is available, then two female witnesses’ are needed. That is, either the witnesses present consist of two males or one male and two females;¹⁷³

(*kufir*), and should be killed. See Abdullahi Ahmed An-Na'im Na, *Islam and the Secular State: Negotiating the Future of Shari'a* (Harvard University Press, 2010) 58–63; Mustafa Koylu, *Islam and its Quest for Peace: Jihad, Justice and Education* (Council for Research in Values & Philosophy, 2003) 88–89 and Nicolas Prodromou Aghnides, *Mohammedan Theories of Finance* (Columbia University Press, 1916) 205.

171 Islamic theology teaches that everyone is born a Muslim. Lewis R. Rambo and Charles E. Farhadian, *The Oxford Handbook of Religious Conversion* (Oxford University Press, 2014) 669. See also; Jan N. Bremmer et al., *Cultures of Conversions* (Peeters Publishers, 2006) 161; J.D. Woodberry, 'Conversion in Islam' in H. Newton Malony and S. Southard (ed.) *Handbook of Religious Conversion* (Alabama, 1992) 23, 25; Clinton Bennett, *The Bloomsbury Companion to Islamic Studies* (Bloomsbury Publishing, 2014) 336; Ousseina D. Alidou, *Muslim Women in Postcolonial Kenya: Leadership, Representation, and Social Change* (University of Wisconsin Press, 2013) 13 and M. Diouf and M. Leichtman, *New Perspectives on Islam in Senegal: Conversion, Migration, Wealth, Power, and Femininity* (Springer, 2009) 147.

172 Kambiz Ghanea Bassiri, *Competing Visions of Islam in the United States: A Study of Los Angeles* (Greenwood Publishing Group, 1997) 3. See also; Esra Özyürek, *Being German, Becoming Muslim: Race, Religion, and Conversion in the New Europe* (Princeton University Press, 2014) 112; John Azumah and Lamin Sanneh, *The African Christian and Islam* (Langham Monographs, 2013) 229; Scott Flower, *Islam and Cultural Change in Papua New Guinea* (Taylor & Francis, 2016) 133 and Nasser Abufarha, *The Making of a Human Bomb: An Ethnography of Palestinian Resistance* (Duke University Press, 2009) 150.

173 John Azumah and Lamin Sanneh, *The African Christian and Islam* (Langham Monographs, 2013) 229. See also; Lewis R. Rambo and Charles E. Farhadian, *The Oxford Handbook of Religious Conversion* (Oxford University Press, 2014) 669; Vincent J. Cornell,

for the testimony of a women is half that of a man in Islam (Cf. Surah 2:282¹⁷⁴).¹⁷⁵ This is because of, according to *Sahih Al-Bukhari*; “the deficiency of a woman’s mind”.¹⁷⁶

Sahih Muslim 1:33 provides Muhammad’s command to fight the unbelievers, to slay them and only desist if they recite the *shahada*, pay the *zakat* and establish prayer:

Voices of Islam (Greenwood Publishing Group, 2006) 9; Rudolph Peters, *Crime and Punishment in Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge University Press, 2005) 12; Jakob Skovgaard-Petersen, *Defining Islam for the Egyptian State: Muftis and Fatwas of the Dār Al-Iftā* (BRILL, 1997) 87 and Adamu Abubakar, *Islamic Law Practice and Procedure in Nigerian Courts* (Malthouse Press, 2017) 92.

174 O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice. Let no scribe refuse to write as Allah has taught him. So let him write and let the one who has the obligation dictate. And let him fear Allah, his Lord, and not leave anything out of it. But if the one who has the obligation is of limited understanding or weak or unable to dictate himself, then let his guardian dictate in justice. And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses - so that if one of the women errs, then the other can remind her. And let not the witnesses refuse when they are called upon. And do not be [too] weary to write it, whether it is small or large, for its [specified] term. That is more just in the sight of Allah and stronger as evidence and more likely to prevent doubt between you, except when it is an immediate transaction which you conduct among yourselves. For [then] there is no blame upon you if you do not write it. And take witnesses when you conclude a contract. Let no scribe be harmed or any witness. For if you do so, indeed, it is [grave] disobedience in you. And fear Allah . And Allah teaches you. And Allah is Knowing of all things.

175 Carolyn Fluehr-Lobban, *Islamic Law and Society in the Sudan* (Routledge, 2013) 56. See also; Peri Bearman et al., *The Ashgate Research Companion to Islamic Law* (Routledge, 2016) 144; Theodore M Ludwig, *Sacred Paths of the West* (Routledge, 2015) 242; E. Ann Black, Hossein Esmaeili and Nadirsyah Hosen, *Modern Perspectives on Islamic Law* (Edward Elgar Publishing, 2013) 119; Rôn Šaham, *Law, Custom, and Statute in the Muslim World: Studies in Honor of Aharon Layish* (BRILL, 2007) 49; Rubya Mehdi, *The Islamization of the Law in Pakistan* (Routledge, 2013) 217 and Aftab Hussain, *Status of Women in Islam* (Law Publishing Company, 1987) 280.

176 *Sahih Bukhari* Volume 3, Book 48, Number 826. See also; Volume 1, Book 6, Number 301 and 2:24:541.

... The Messenger of Allah said: I have been commanded to fight against people till they testify that there is none worthy of worship (in truth) but Allah, that Muhammad is the messenger of Allah, and they establish prayer, and pay Zakat and if they do it, their blood and property are guaranteed protection on my behalf except when justified by law, and their affairs rest with Allah.

This event is also recorded in *Sahih Al-Bukhari* Volume 1, Book 8, Number 387:

Allah's Apostle said, "I have been ordered to fight the people till they say: 'None has the right to be worshipped but Allah.' And if they say so, pray like our prayers, face our Qibla and slaughter as we slaughter, then their blood and property will be sacred to us and we will not interfere with them except legally and their reckoning will be with Allah." Narrated Maimun ibn Siyah that he asked Anas bin Malik, "O Abu Hamza! What makes the life and property of a person sacred?" He replied, "Whoever says, 'None has the right to be worshipped but Allah', faces our Qibla during the prayers, prays like us and eats our slaughtered animal, then he is a Muslim, and has got the same rights and obligations as other Muslims have."

Other Hadiths that further signify these principles are as follows; *Sahih Muslim*,¹⁷⁷ *Sunan Abu Dawood*,¹⁷⁸ *Sunan Ibn Majah*,¹⁷⁹ *al-Nasaa'I*,¹⁸⁰ *Sahih Al Bukhari*¹⁸¹ and *At-Tirmidhi*.¹⁸²

177 Vol. 1 Book 1 Hadith 29 – 32; Vol. 6, Book 31, Hadith 5917; Book 19, Hadith 429; Book 31, Hadith 5917 and Book 31, Hadith 5918.

178 Book 21 Hadith 3188 and Vol. 3, Book 15, Hadith 2634 – 2636.

179 Vol. 1, Book 1, Hadith 71 – 72 and Vol. 5, Book 36, Hadith 3927 – 3928.

180 Vol. 3, Book 23, Hadith 2445; Vol. 4, Book 25, Hadith 3092 – 3096; Vol. 5, Book 37, Hadith 3971 – 3792; Vol. 5, Book 37 Hadith 3794 – 3982; Vol. 5, Book 37 Hadith 3984 and Vol. 5, Book 37 Hadith 3987 – 3988.

181 Volume 2, Book 23, Number 483; Volume 9, Book 84, Number 59; Volume 9, Book 92, Number 388; Volume 1, Book 2, Number 24; Volume 4, Book 52, Number 196 and

Not only do the Hadiths express this contention that offensive jihad consists of slaughtering unbelievers until they recite the *shahada*, pay *zakat* and perform prayer; but Islamic scholars also agree.

The Moslems are agreed that the aim of warfare against the People of the Book, with the exception of those belonging to the Quraysh-tribe and Arab Christians, is twofold: either conversion to Islam, or payment of poll-tax (*djizyah*).¹⁸³

Muhammad Sa'id Ramadan Al-Buti (1929 – 2013),¹⁸⁴ a contemporary Al-Azhar University Islamic scholar,¹⁸⁵ wrote that Surah 9:5¹⁸⁶ speaks about offensive *jihad* and that Islamic law demands offensive jihad to exalt the word of Allah, the construction of an Islamic Society and the establishment of God's kingdom on earth.¹⁸⁷ Surah 9 will be expounded upon later on in

Volume 1, Book 8, Number 387.

182 Vol. 5, Book 38, Hadith 2606 – 2608.

183 *Bidayat al-Mudjtahid*, *Jihad in Medieval and Modern Islam: The Chapters on Jihad from Averroes' Legal Handbook "Bidayat al-mudjtahid"* (Rudolph Peters trans., Brill, 1977) 9-25.

184 Joas Wagemakers, *Salafism in Jordan: Political Islam in a Quietist Community* (Cambridge University Press, 2016) 65. See also; Sadek Hamid, Sufis, *Salafis and Islamists: The Contested Ground of British Islamic Activism* (I.B.Tauris, 2016) 76.

185 Joel Richardson, *Antichrist: Islam's Awaited Messiah* (Pleasant Word, 2006) 161. See also; Richard Gauvain, *Salafi Ritual Purity: In the Presence of God* (Routledge, 2013) 3; Randall Price, *Fast Facts on the Middle East Conflict* (Harvest House Publishers, 2003) 156 and Stanley D. Brunn, *The Changing World Religion Map: Sacred Places, Identities, Practices and Politics* (Springer, 2015) 3506.

186 *And when the sacred months have passed, then kill the polytheists wherever you find them and capture them and besiege them and sit in wait for them at every place of ambush. But if they should repent, establish prayer, and give zakah, let them [go] on their way. Indeed, Allah is Forgiving and Merciful.*

187 Majid Khadduri, *Islamic Jurisprudence: Shafi'i Risala* (Baltimore, 1961) 333-52, notes: 33-9.

this article.

An extremist source written by Abdul-Quadir Ibn Abdul titled, *Fundamental Concepts Regarding Al-Jihad* provides verses from the Quran to justify offensive *jihad*.¹⁸⁸ His justification is as follows. In this world, there are two parties; believers and disbelievers. Abdul refers to Surah 27:45¹⁸⁹ to prove this point. Citing Surah 22:19;¹⁹⁰ Abdul dictates that believers and disbelievers fight over their Lord. Abdul then utilises Surah 4:101¹⁹¹ to claim that disbelievers are open enemies therefore, Allah could punish them (the disbelievers) however; Allah allows the Muslims to fight the disbelievers to test His Muslim followers. Abdul cites Surah 47:4¹⁹² and 47:31¹⁹³ in order to justify his position of offensive *jihad*.

Abdul-Quadir Ibn Abdul continues in his work and claims that there are

188 Abdul-Quadir Ibn Abdul, *Fundamental Concepts Regarding Al-Jihad* (At-Tibyan Publications, 2004) 21 – 22.

189 And We had certainly sent to Thamud their brother Salih, [saying], "Worship Allah," and at once they were two parties conflicting.

190 These are two adversaries who have disputed over their Lord. But those who disbelieved will have cut out for them garments of fire. Poured upon their heads will be scalding water

191 And when you travel throughout the land, there is no blame upon you for shortening the prayer, [especially] if you fear that those who disbelieve may disrupt [or attack] you. Indeed, the disbelievers are ever to you a clear enemy.

192 So when you meet those who disbelieve [in battle], strike [their] necks until, when you have inflicted slaughter upon them, then secure their bonds, and either [confer] favor afterwards or ransom [them] until the war lays down its burdens. That [is the command]. And if Allah had willed, He could have taken vengeance upon them [Himself], but [He ordered armed struggle] to test some of you by means of others. And those who are killed in the cause of Allah - never will He waste their deeds.

193 And We will surely test you until We make evident those who strive among you [for the cause of Allah] and the patient, and We will test your affairs.

four stages of *jihad*.¹⁹⁴

Stage one consists of an invitation to Islam. The purposes this invitation is to separate the believers from the disbelievers (Cf. Surah 3:30).¹⁹⁵ Abdul quotes *Sahih Muslim* 1:0028; "... and Muhammad is a divider between people".¹⁹⁶

Stage two involved the renunciation from the disbelievers, whether they are alive or dead. If the disbeliever is alive, the Muslim is to show them hate and hostility, unless they believe there is no God but Allah as per Surah 60:4.¹⁹⁷ However, if the disbelievers are dead, the Muslim is commanded to abide by the command given in Surah 9:113.¹⁹⁸ It is forbidden to ask for Allah's forgiveness for a non-believer, alive or dead.

Stage three involves withdrawing from the disbelievers and their land and

194 Abdul-Quadir Ibn Abdul, *Fundamental Concepts Regarding Al-Jihad* (At-Tibyan Publications, 2004) 36 – 46.

195 The Day every soul will find what it has done of good present [before it] and what it has done of evil, it will wish that between itself and that [evil] was a great distance. And Allah warns you of Himself, and Allah is Kind to [His] servants."

196 This theme is also evident in *Sahih al-Bukhari* Vol. 9:92:385 and *Jami` at-Tirmidhi* 41:2860 {at-Tirmidhi's report was verified to be authentic by al-Albani (Silsalat al-Hadith as-Sahihah no. 3595)}.

197 There has already been for you an excellent pattern in Abraham and those with him, when they said to their people, "Indeed, we are disassociated from you and from whatever you worship other than Allah . We have denied you, and there has appeared between us and you animosity and hatred forever until you believe in Allah alone" except for the saying of Abraham to his father, "I will surely ask forgiveness for you, but I have not [power to do] for you anything against Allah . Our Lord, upon You we have relied, and to You we have returned, and to You is the destination.

198 It is not for the Prophet and those who have believed to ask forgiveness for the polytheists, even if they were relatives, after it has become clear to them that they are companions of Hellfire.

to then emigrate as Muslims. This is commanded in Surah 18:16¹⁹⁹ and Surah 19:48.²⁰⁰

The final stage consists of committing *jihad* in the path of Allah. Abdul cites Surah 9:5²⁰¹ and Sahih Muslim 1:29 – 30, 32 – 33 to justify killing those who refuse to accept Islam. Further, Abdul cites Surah 9:123²⁰² in which this verse commands Muslims to fight disbelievers who are close to them. Abdul then uses Ibn Kathir's *tafsir* on Surah 9:123 to justify slaughtering disbelievers in offensive Jihad:²⁰³

The Order for Jihad against the Disbelievers, the Closest, then the Farthest Areas

Allah commands the believers to fight the disbelievers, the closest in area to the Islamic state, then the farthest. This is why the Messenger of Allah started fighting the idolators in the Arabian Peninsula. When he finished with them and Allah gave him control over Makkah, Al-Madinah, At-Ta'if, Yemen, Yamamah, Hajr, Khaybar, Hadramawt and other Arab provinces, and the various Arab tribes entered Islam in large crowds, he then started fighting the People of the Scriptures

...²⁰⁴

199 [The youths said to one another], "And when you have withdrawn from them and that which they worship other than Allah, retreat to the cave. Your Lord will spread out for you of His mercy and will prepare for you from your affair facility."

200 And I will leave you and those you invoke other than Allah and will invoke my Lord. I expect that I will not be in invocation to my Lord unhappy."

201 *And when the sacred months have passed, then kill the polytheists wherever you find them and capture them and besiege them and sit in wait for them at every place of ambush. But if they should repent, establish prayer, and give zakah, let them [go] on their way. Indeed, Allah is Forgiving and Merciful.*

202 O you who have believed, fight those adjacent to you of the disbelievers and let them find in you harshness. And know that Allah is with the righteous.

203 Ibn Qudamah al-Maqdisi, *Mughni': Sharh al-Kabir* vol 10 372 – 373 is also referenced.

204 Ibn Kathir, The Order for Jihad against the Disbelievers, the Closest, then the

The above quote is not the totality of Ibn Kathir's commentary on this verse. The link to view his entire commentary is referenced below.

The document, *The Ruling on Jihad and its Divisions* written by Sheikh Yusuf al-Uyaari also promotes offensive jihad and justifies it by citing *Sahih Al-Bulkari* Volume 1, Book 2, Number 24,²⁰⁵ *Sahih Muslim* Book 19, Hadith 4294 amongst other *tafsir* sources.²⁰⁶

Shaykh Abu Mas'ud Al-Awlaki wrote an article in Al-Qaeda's Magazine, *Inspire Magazine* titled, 'Why Did I Choose Al Qaeda?'.²⁰⁷ In this article, Al-Awlaki cites from Sheikh An-Nadhāry's book, *The Word of Tawheed* to promulgate that Muslims are commanded to perform offensive *jihad*. Sheikh An-Nadhāry specifies conditions that should be fulfilled by Muslims. One condition involves protecting one's blood in *dunyā* (the life of this world). That is, a Muslim is commanded to slay the unbelievers unless the unbelievers meet one of the conditions. Al-Awlaki declares that in order for the victim's life to be spared they must verbally pronounce and

Farthest Areas (No Date) *Alim* <<http://www.alim.org/library/quran/AlQuran-tafsir/TIK/9/123>>. See *tafsir/TIK/9/123*>. See also; Muhammad Saed Abdul-Rahman, *The Meaning and Explanation of the Glorious Qur'an* (MSA Publication Limited, 2009) vol 4 196 and Shaykh Safiur-Rahman Al-Mubarakpuri, *Tafsir Ibn Kathir (Abridged)* (Dar-us-Salam Publications, 1st ed., 2000) vol 4 546.

205 Narrated by Ibn 'Umar: Allah's Apostle said: "I have been ordered (by Allah) to fight against the people until they testify that none has the right to be worshipped but Allah and that Muhammad is Allah's Apostle, and offer the prayers perfectly and give the obligatory charity, so if they perform a that, then they save their lives and property from me except for Islamic laws and then their reckoning (accounts) will be done by Allah."

206 *Sharh Fath ul-Qadeer* Vol. 5/437. See also; *Tafsir al-Jasaas* Vol. 3/116; *Tafsir Ibn Atiya* Vol. 2/43; *Tafsir Ibn Kathir* Vol. 4/97; *Al-Isabah* Vol. 1/567; *Fath al-Bari* Vol. 6/28; *Zaad al-Ma'ad* Vol. 3/72 and *Tafsir Qurtubi* Vol. 8/293 – Commenting on Surah 9:122.

207 Shaykh Abu Mas'ud Al-Awlaki, 'Why Did I Choose Al Qaeda?' in *Inspire Magazine* (2014) 1435(12) 32 - 35.

acknowledge the *shahada*. To justify this practise, Al-Awlaki quotes from *Sunan Ibn Majah*; one of the sources mentioned above.²⁰⁸ Al-Awlaki writes:

Conditions for protecting one's blood in *dunya*:

There are only two conditions:

1) The verbal pronouncement and acknowledgment of "*lā ilāha illallāh, Muhammadur rasūlullāh*" (There is none that has the right to be worshiped except Allāh and Muhammad is His Messenger.) Those who are unable to speak are exceptional in this condition. [Quoting from *Sunan Ibn Majah* Vol. 1, Book 1, Hadith 71 – 72] It was reported by Abūhurairah - radhiallāhu 'anh, that the Messenger of Allāh ﷺ said: "I have been commanded to fight the people until they say "*lā ilāha illallāh*". Whoever says "*lā ilāha illallāh*" his wealth and his life are protected from me except for a right that is due, and his reckoning will be with Allāh."²⁰⁹

Al-Awlaki also cites from the work of Sheikh Ahmad Ibn Taymiyyah (1263 - 1328 AD),²¹⁰ medieval Muslim theologian²¹¹ titled, *Majmoo'al-Fatawa of*

208 Shaykh Abu Mas'ud Al-Awlaki, 'Why Did I Choose Al Qaeda?' in *Inspire Magazine* (2014) 1435(12) 34.

209 *Sunan Ibn Majah* Vol. 1, Book 1, Hadith 71 – 72

210 Sheikh Ahmad, *In Their Own Words: Voices of Jihad- Compilation and Commentary* (Rand Corporation, 2008) 45. See also; Abdul Hakim I Al-Matroudi, *The Hanbali School of Law and Ibn Taymiyyah: Conflict Or Conciliation* (Routledge, 2006) 1; Muhammad Mojlum Khan, *The Muslim 100: The Lives, Thoughts and Achievements of the Most Influential Muslims in History* (Kube Publishing Ltd, 2009) 103 and M. Perry and Howard E. Negrin, *The Theory and Practice of Islamic Terrorism: An Anthology* (Springer, 2008) 21.

211 G. Carbonnier, *International Development Policy: Religion and Development* (Springer, 2016) 132. See also; Hamid Dabashi, *Islamic Liberation Theology: Resisting the Empire* (Routledge, 2008) 40 and Muhammad M. Yunis Ali, *Medieval Islamic Pragmatics: Sunni Legal Theorists' Models of Textual Communication* (Routledge, 2013) 87.

late Scholar Ibn. Bazz.

Al-Awlaki argues that the Hadiths and the Quran dictate that Muslims who love Allah are required to be jealous and angry for Allah's sake. Al-Awlaki declares that although many Muslim forbid offensive *jihad* in the way of Allah, this is required both in the Quran and the Haddiths:

Many who claim to love Allāh, are far from following Sunnah, enjoining good and forbidding evil and Jihād in the Way of Allāh. They claim that this way is more complete than other ways. They claim that loving Allāh does not require jealousy nor anger for the Sake of Allāh.²¹² This contradicts the method of the Qurān and Sunnah.²¹³

Al-Awlaki dictates that if a Muslim loves Allah, it is necessary that they hate and show hostility to His enemies:

A heart filled with the Love of Allāh and His Messenger, requires allying with His allies, and showing hostility towards His enemies.²¹⁴

Al-Awlaki cites from Surah 8:22 and Surah 5:81 to justify the proposition that Muslims should not befriend disbelievers. Thus, justifying his position that the Quran commands Muslims to hate and demonstrate hostility towards the disbelievers.

{You (O Muhammad) will not find any people who believe in Allāh and the Last

212 Shaykh Abu Mas'ud Al-Awlaki, 'Why Did I Choose Al Qaeda?' in *Inspire Magazine* (2014) 1435(12) 33.

213 Shaykh Ibn Baz, *Majmoo'al-Fatawa of late Scholar Ibn. Bazz* (www.alifta.net, 2nd ed., 2001) vol 10 83.

214 Shaykh Ibn Baz, *Majmoo'al-Fatawa of late Scholar Ibn. Bazz* (www.alifta.net, 2nd ed., 2001) vol 10 60. See also; Shaykh Abu Mas'ud Al-Awlaki, 'Why Did I Choose Al Qaeda?' in *Inspire Magazine* (2014) 1435(12) 33.

Day, making friendship with those who oppose Allāh and His Messenger (Muhammad), even though they were their fathers or their sons or their brothers or their kindred} [Surah 8:22]

{And had they believe in Allāh, and in the Prophet (Muhammad) and in what has been revealed to him, never would they have taken them (the disbelievers) as Auliya (allies)} [Surah 5:81]

Therefore, this correlation is a necessity.²¹⁵

The rationale behind quoting radical Muslims is to demonstrate and outline the sources from which they use to justify their views on offensive *jihad*. Just as the Nazis justified their views by appealing to a superior, radical Muslims also use the same justification as prescribed in the Quran and Hadiths.

Muhannad J. S., also writing in Al-Qa'eda's magazine,²¹⁶ reflects upon a conversation he had with Al-Qa'eda in the Arabian Peninsula's military commander, Sheikh Qasim al-Raymi,²¹⁷ on the ongoing conflict between the *Mujahideen* and America. *Muhannad* comments that he had asked Sheikh Qasim al-Raymi, "Why do you think the Americans fear *Jihād* and *Mujahideen* that much?"²¹⁸

Sheikh Ar-Reimy responded by declaring that those who fight in *jihad*

215 Shaykh Ibn Baz, *Majmoo'al-Fatawa of late Scholar Ibn. Bazz* (www.alifta.net, 2nd ed., 2001) vol 7 645.

216 Muhannad J. S, '24/7 Terrorism' in *Inspire Magazine* (2014) 1435(12) 34 - 35.

217 Hussein Solomon, *Islamic State and the Coming Global Confrontation* (Springer, 2016) 48. See also; James DeShaw Rae, *Analyzing the Drone Debates: Targeted Killings, Remote Warfare, and Military Technology* (Springer, 2014) 34 and V. G. Julie Rajan, *Al Qaeda's Global Crisis: The Islamic State, Takfir and the Genocide of Muslims* (Routledge, 2015) 307.

218 Muhannad J. S, '24/7 Terrorism' in *Inspire Magazine* (2014) 1435(12) 35.

(*Mujahideen*) are following the way of Muhammad. In justification of his view, Sheikh al-Raymi cites from *Sahih Al-Bukhari*.

Because the *Mujahideen* follow the *manhaj* of the Prophet Muhammad ... who said, [Citing from *Sahih Al-Bukhari*] "Allah made me victorious by terror (by His frightening my enemies) for a distance of one month's journey."²¹⁹ Therefore, any Muslim following the way of the Prophet ... will be feared by the enemies of Islam. [Emphasis Mine]

*Sahih Al-Bukhari*²²⁰ is not the only Hadith that reports Muhammad declaring that "Allah made me victorious by terror". This assertion is also found in *Sahih Muslim*.²²¹

The Qur'an also presents the theme of striking terror to the unbelievers, as seen in Surah 3:151:

We will cast terror into the hearts of those who disbelieve for what they have associated with Allah of which He had not sent down [any] authority. And their refuge will be the Fire, and wretched is the residence of the wrongdoers.

This theme is also depicted in Surah 8:12-13;²²² 8:59-60;²²³ 33:26²²⁴ and

219 *Sahih Al-Bukhari* Volume 1, Book 7, Number 331. *Sahih Al-Bukhari* Volume 1, Book 8, Number 429 also reflects the same principle: Narrated by Jabir bin 'Abdullah

Allah's Apostle said, "I have been given five things which were not given to any amongst the Prophets before me. These are: 1. Allah made me victorious by awe (by His frightening my enemies) for a distance of one month's journey...

220 Other citations from this Hadith that present this theme can be found in *Sahih Al-Bukhari*, Volume 4, Book 52, Number 220.

221 *Sahih Muslim* Book 004, Number 1062, 1063, 1066, 1067

222 12 [Remember] when your Lord inspired to the angels, "I am with you, so strengthen those who have believed. I will cast terror into the hearts of those who disbelieved, so strike [them] upon the necks and strike from them every fingertip." 13 That is because they opposed Allah and His Messenger. And whoever opposes Allah and His Messenger - indeed, Allah is severe in penalty.

223 59 And let not those who disbelieve think they will escape. Indeed, they will not cause

59:2.²²⁵

Sheikh Yusuf al-Uyaari agrees with Sheikh al-Raymi that Muslims ought to participate in offensive *jihad*. Sheikh al-Uyaari quotes from Imam Surkhasi's *tafsir*:

This type of Jihad (that of conquering) is a duty of sufficiency for if a group of people went out and accomplished what they aimed for, the duty is removed from the others. The purpose of Offensive Jihad's is to break the back of the *Mushrikeen* and give honour to the *Deen* [religion of Islam]. For if it was made an individual obligation at all times and for everyone then it would violate its very subject matter. The rationale of Jihad is to give safety and security for the Muslims such that they may establish their interests both religious and material. If all the people were busied with Jihad then there would be no time for them to establish their material interests.²²⁶

The prime definition of *Mushrikeen* is as described by the jihadist ideologue, Abu Ahmad Abd Al-Rahman Al-Masri in his discourse, 'Stance on the Positions regarding Expelling the *Mushrikeen* from the Arab

failure [to Allah]. 60 And prepare against them whatever you are able of power and of steeds by which you may terrify the enemy of Allah and your enemy and others besides them whom you do not know [but] whom Allah knows. And whatever you spend in the cause of Allah will be fully repaid to you, and you will not be wronged.

224 And He brought down those who supported them among the People of the Scripture from their fortresses and cast terror into their hearts [so that] a party you killed, and you took captive a party.

225 It is He who expelled the ones who disbelieved among the People of the Scripture from their homes at the first gathering. You did not think they would leave, and they thought that their fortresses would protect them from Allah ; but [the decree of] Allah came upon them from where they had not expected, and He cast terror into their hearts [so] they destroyed their houses by their [own] hands and the hands of the believers. So take warning, O people of vision.

226 Imam Surkhasi, *Kitab al-Mabsut* Vol 3/10.

Peninsula':²²⁷

What is the intention with the *mushrikeen*? They are not Muslims. That is what the Prophet ... said just as 'Umar ... bequeathed: 'To expel the Jews and Christians from the Arab Peninsula until only Muslims are there! (*Sahih Muslim* 3313; *Sahih Abu Dawud* 2635; *Sahih Al-Tirmidhi* 1532). And likewise what he said in the hadith of 'A'isha ... "Do not permit two religions on the Arab Peninsula" (*Ahmed* 25148; *Al-Tabari fi l-awsat* 1116).²²⁸

As mentioned earlier, Muhammad claimed that greatest form of *jihad* is when a man's blood is shed and horse is wounded. Muhammad further declared that in order to perform *jihad* in Allah's cause, one must fight that Islam is superior namely; one must fight for the spread of Islam. Therefore, according to Muhammad; the greatest form of *jihad* occurs when one spills blood in order to spread Islam.

Sahih Al-Bukhari further proclaims that if a Muslim helps another Muslim perform *jihad* in the spread of Islam, they too receive the reward equal to that of the *ghazi* (fighter).

Narrated by Zaid bin Khalid

Allah's Apostle said, " He who prepares a *ghazi* (fighter) going in Allah's Cause is given a reward equal to that of) a *ghazi*; and he who looks after properly the dependents of a *ghazi* going in Allah's Cause is (given a reward equal to that of) *ghazi*".²²⁹

In fact, Muhammad declared that he would love to fight in Allah's cause

227 Rüdiger Lohker, *Jihadism: Online Discourses and Representations* (V&R unipress GmbH, 2013) 186.

228 Abu Ahmad Abd Al-Rahman Al-Masri, 'Waqfat ma al-waqdat hawla "ikhraj al-mushrikeen min jazirat al-'arab" (Al-Ansar Mailing List Newsletter, 2009) 3.

229 *Sahih Bukhari* Volume 4, Book 52, Number 96.

and then get martyred and then resurrected and then get martyred again. This is found in numerous places in *Sahih Al-Bukhari*. For example, *Sahih Al-Bukhari* Vol. 9, Book 90, Hadith 333 states:

Narrated Al-A'raj:

Abu Huraira said, Allah's Messenger (ﷺ) said, "By Him in Whose Hand my life is, I would love to fight in Allah's Cause and then get martyred and then resurrected (come to life) and then get martyred and then resurrected (come to life) and then get martyred, and then resurrected (come to life) and then get martyred and then resurrected (come to life)." Abu Huraira used to repeat those words three times and I testify to it with Allah's Oath.

This principle is also repeated in *Sahih Al-Bukhari* Vol. 9, Book 90, Hadith 332²³⁰ and Vol. 4, Book 52, Hadith 54.²³¹

Whilst one could, for the sake of argument, concede that Muhammad ordered the slaughter of non-Muslims, what about Muslims? It has been recorded that ISIS have also slaughtered Muslims too.²³² If they are

230 Narrated Abu Huraira:

I heard Allah's Messenger (ﷺ) saying, "By Him in Whose Hands my life is! Were it not for some men who dislike to be left behind and for whom I do not have means of conveyance, I would not stay away (from any Holy Battle). I would love to be martyred in Allah's Cause and come to life and then get, martyred and then come to life and then get martyred and then get resurrected and then get martyred.

231 Narrated Abu Huraira:

The Prophet (ﷺ) said, "By Him in Whose Hands my life is! Were it not for some men amongst the believers who dislike to be left behind me and whom I cannot provide with means of conveyance, I would certainly never remain behind any Sariya' (army-unit) setting out in Allah's Cause. By Him in Whose Hands my life is! I would love to be martyred in Allah's Cause and then get resurrected and then get martyred, and then get resurrected again and then get martyred and then get resurrected again and then get martyred.

232 Mohammad Fawzi, *Jewish-Christian 2000 Years War Against Jesus Christ* (Xlibris Corporation, 2014) 12. See also; Emma Spiro and Yong-Yeol Ahn, *Social Informatics*

Muslim, why are they killed?

We read in Surah 9:73:

Prophet, fight against the disbelievers and the hypocrites and be harsh upon them.
And their refuge is Hell, and wretched is the destination

In this Surah, there are two different groups that should be fought; the disbelievers and the hypocrites. A disbeliever is self-explanatory however, in order to understand who a hypocrite is, one must turn to the Hadiths and *tafsirs* for its meaning.

For the purposes of this article, one type of hypocrite will only be assessed and that is, a Muslim who does not express the desire to fight in *jihad* in the way of Allah. This definition of a hypocrite is expressed in *Sahih Muslim* 20:4696:

It has been narrated on the authority of Abu Huraira that the Messenger of said:
One who died but did not fight in the way of Allah nor did he express any desire
(or determination) for Jihad died the death of a hypocrite...²³³

Other Hadiths also express this idea.²³⁴ Therefore, one reason for extremist who attack innocent Muslims is because they view them as hypocrites and are thus, as ordered by Surah 9:73;²³⁵ justified in killing them.

Those who completely disagree that Islam promotes offensive *jihad* are swift to quote, in part – Surah 5:32:

(Springer, 2016) Part 1 177.

²³³ *Sahih Muslim* 20:4696.

²³⁴ *Sunan an-Nasa'i* Vol. 1, Book 25, Hadith 3099; *Sunan Abu Dawud* Book 14, Hadith 2496 and *Sahih Muslim* Book 12 Hadith 1341.

²³⁵ O Prophet, fight against the disbelievers and the hypocrites and be harsh upon them. And their refuge is Hell, and wretched is the destination.

... whoever kills a soul unless for a soul or for corruption [done] (*Mischief*) in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely. And our messengers had certainly come to them with clear proofs. Then indeed many of them, [even] after that, throughout the land, were transgressors.

However, many fail to quote the phrase that precedes; “whoever kills a soul unless for a soul” and that is “Because of that, We decreed upon the Children of Israel” thus reading as Because of that, We decreed upon the *Children of Israel* that *whoever kills a soul unless for a soul or for corruption [done] (Mischief) in the land ...*

Whilst one can make the argument that this verse is only applicable to the ‘Children of Israel’, this article will not provide an exegesis of this verse in order to prove either proposition. Rather, for the sake of argument; let’s assume that Surah 9:32 applies to Muslims. Before looking at this verse further, it is important to also read verse that comes after Surah 5:32. Surah 5:33 states:

33 Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption (Mischief) is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment

Surah 5:32 – 33 provides a justification for killing another human being. Namely, a person is justified in taking the life of another if the victim appeared to be spreading corruption (mischief) or waging war against Allah.

The punishment for these crimes is illustrated in Surah 5:33 that is, the

offender is either killed, their hands or feet are cut off or they are exiled.

The word 'corruption' or 'mischief' is the Arabic word *fasad*. *Fasad* in Qur'anic terminology, means creating disorder and corruption on earth by following a path other than God's.²³⁶

Islam maintains that true peace and happiness emanate only through the observance of God's commands and through making a conscious effort to see that His laws alone are implemented in every sphere of life. *Fasad* occurs when man violates God's laws and disobeys Him. *Fasad* may therefore be partial as well as total partial when one disregards God's law in one aspect of life while acknowledging his sovereignty in other spheres. If a society is based on the denial of God, that society is bound to be a corrupt and exploitative society - hence, full of *Fasad*.²³⁷

According to Ibn Kathir, *fasad* includes a variety of acts that constitute to mischief this includes disbelief and disobedience to Allah.²³⁸ This is demonstrated in his *tafsir* on Surah 2:11 – 12:²³⁹

In his Tafsir, As-Suddi said that Ibn `Abbas and Ibn Mas`ud commented:

236 Ramesh Chopra, *Encyclopaedic Dictionary of Religion* (Gyan Publishing House, 2005) vol 1 279. See also; Thomas Irving, Khurshid Ahmad and Muhammad Ahsan, *The Qur'an: Basic Teachings* (Kube Publishing Ltd, 2015) 265.

237 Ramesh Chopra, *Encyclopaedic Dictionary of Religion* (Gyan Publishing House, 2005) vol 1 279. See also; Thomas Irving, Khurshid Ahmad and Muhammad Ahsan, *The Qur'an: Basic Teachings* (Kube Publishing Ltd, 2015) 265.

238 Ibn Kathir, *The Meaning of Mischief*. See also; Muhammad Saed Abdul-Rahman, *Tafsir Ibn Kathir Juz' 1 (Part 1): Al-Fatihah 1 to Al-Baqarah 141* (MSA Publication Limited, 2nd. Ed., 2013) LXXXIV; Muhammad Saed Abdul-Rahman, *The Meaning and Explanation of the Glorious Qur'an* (MSA Publication Limited, 2nd ed., 2009) vol 1 77; Ibn Kathir, *Tafsir Ibn Kathir* (Lulu Press Incorporated, 2016) vol 1 95 and Ibn Kathir, *Tafseer Ibn Kathir* (ULU Press, 2015) 95.

239 11 And when it is said to them, "Do not cause corruption on the earth," they say, "We are but reformers." 12 Unquestionably, it is they who are the corrupters, but they perceive [it] not.

(And when it is said to them: "Do not make mischief on the earth", they say: "We are only peacemakers".) They are the hypocrites. As for, ("Do not make mischief on the earth"), that is disbelief and acts of disobedience. Abu Ja'far said that Ar-Rabi' bin Anas said that Abu Al-'Aliyah said that Allah's statement,

(And when it is said to them: "Do not make mischief on the earth,)", means, "Do not commit acts of disobedience on the earth. Their mischief is disobeying Allah, because whoever disobeys Allah on the earth, or commands that Allah be disobeyed, he has committed mischief on the earth.

Peace on both the earth and in the heavens is ensured (and earned) through obedience (to Allah). Ar-Rabi' bin Anas and Qatadah said similarly.²⁴⁰

One can also perform *fasad* if they support those who deny Allah, His Books and His Messengers.

They give as much aid as they can, against Allah's loyal friends, and support those who deny Allah, His Books and His Messengers. This is how the hypocrites commit mischief on earth, while thinking that they are doing righteous work on earth'.²⁴¹

Fasad is also performed if a Muslim takes the disbelievers as friends.

240 Muhammad Saed Abdul-Rahman, *Tafsir Ibn Kathir Juz' 1 (Part 1): Al-Fatihah 1 to Al-Baqarah 141* (MSA Publication Limited, 2nd. Ed., 2013) LXXXIV. See also; Muhammad Saed Abdul-Rahman, *The Meaning and Explanation of the Glorious Qur'an* (MSA Publication Limited, 2nd ed., 2009) vol 1 77; Ibn Kathir, *Tafsir Ibn Kathir* (Lulu Press Incorporated, 2016) vol 1 95 and Ibn Kathir, *Tafseer Ibn Kathir* (ULU Press, 2015) 95.

241 Tafsir Ibn Kathir, *Types of Mischief that the Hypocrites Commit*. See also; Muhammad Saed Abdul-Rahman, *The Meaning and Explanation of the Glorious Qur'an* (MSA Publication Limited, 1st ed., 2009) vol 2 78; Muhammad Saed Abdul-Rahman, *Tafsir Ibn Kathir Juz' 1 (Part 1): Al-Fatihah 1 to Al-Baqarah 141* (MSA Publication Limited, 2nd. Ed., 2013) LXXXIV; Ibn Kathir, *Tafseer Ibn Kathir* (ULU Press, 2015) 95 and Ismā'īl ibn 'Umar Ibn Kathīr and Şafī al-Raḥmān Mubārakfūrī, *Tafsir Ibn Kathir* (Darussalam, 2000) 132.

The statement by Ibn Jarir is true, taking the disbelievers as friends is one of the categories of mischief on the earth. Allah said [quoting Surah 8:73,²⁴² 4:144²⁴³ and 4:145²⁴⁴] Since the outward appearance of the hypocrite displays belief, he confuses the true believers. Hence, the deceitful behavior of the hypocrites is an act of mischief, because they deceive the believers by claiming what they do not believe in, and because they give support and loyalty to the disbelievers against the believers.²⁴⁵ [Emphasis mine].

In sum, *fasad* is performed if one disbelieves in Allah, disobeys Allah, supports those who deny Allah, His books and His Messengers and if a Muslim befriends disbelievers. It is upon these grounds that justify radical Muslims to attack their own kind. In fact, *Sunan Abu Dawud* declares that punishment for Mischief under Islam applies to Muslim and non-Muslims alike and that Muslims too can perform mischief.

Narrated Abdullah ibn Abbas:

The verse [referring to Surah 5:33] "The punishment of those who wage war against Allah and His Apostle, and strive with might and main for mischief through the land is execution, or crucifixion, or the cutting off of hands and feet from opposite side or exile from the land...most merciful" was revealed about polytheists. If any of them repents before they are arrested, it does not prevent

242 And those who disbelieved are allies of one another. If you do not do so, there will be fitnah on earth and great corruption.

243 O you who have believed, do not take the disbelievers as allies instead of the believers. Do you wish to give Allah against yourselves a clear case?

244 Indeed, the hypocrites will be in the lowest depths of the Fire - and never will you find for them a helper.

245 Tafsir Ibn Kathir, *Types of Mischief that the Hypocrites Commit*. See also; Muhammad Saed Abdul-Rahman, *The Meaning and Explanation of the Glorious Qur'an* (MSA Publication Limited, 1st ed., 2009) vol 2 78; Muhammad Saed Abdul-Rahman, *Tafsir Ibn Kathir Juz' 1 (Part 1): Al-Fatihah 1 to Al-Baqarah 141* (MSA Publication Limited, 2nd. Ed., 2013) LXXXIV; Ibn Kathir, *Tafseer Ibn Kathir* (ULU Press, 2015) 95 and Ismā'īl ibn 'Umar Ibn Kathīr and Ṣafī al-Raḥmān Mubārakfūrī, *Tafsir Ibn Kathir* (Darussalam, 2000) 132.

from inflicting on him the prescribed punishment, which he deserves.²⁴⁶
[Emphasis Mine].

Sahih Bukhari,²⁴⁷ and *Sahih Muslim*,²⁴⁸ also declares that Muslims can perform *fasad*.

*Sunan Abi Dawud*²⁴⁹ and Ibn Kathir's *tafsir*, "The Punishment of Those Who Cause Mischief in the Land" confirms the penalty for *fasad* is execution or crucifixion.²⁵⁰

As mentioned earlier, not only are individuals justified in taking the life of another if they one whom they slayed caused *fasad*; but they are also justified if the victim is waging war against Allah. Commenting on Surah 5:32, Ibn Kathir expounds upon what it means to 'wage war':

'Wage war' mentioned here means, [to] oppose and contradict, and it includes disbelief, blocking roads and spreading fear in the fairways. Mischief in the land refers to various types of evil.²⁵¹

In conclusion, the Quran allows the killing or execution of individual who

246 *Sunan Abu Dawud* Book 38 Number 4359. See also; Book 14 and Number 2509.

247 Volume 4, Book 52, Number 45.

248 Volume 5 Book 20 Numbers 4652 – 4653; Volume 1 Book 1 Numbers 149 and Volume 1 Book 4 Number 890.

249 *Sunan Abi Dawud* Book 39, Hadith 4357.

250 Ibn Kathir, *The Punishment of those Who Cause Mischief in the Land*. See also; Muhammad Saed Abdul-Rahman, *The Meaning and Explanation of the Glorious Qur'an* (MSA Publication Limited, 2007) vol 2 411; Ibn Kathir, *Tafsir Ibn Kathir* (Shaykh Safiur-Rahman Al-Mubarakpuri trans, Darussalam, 2003) vol 3 161.

251 Shaykh Safiur-Rahman Al-Mubarakpuri, *Tafsir Ibn Kathir* (Darussalam, 2003) vol 3 161. See also; Muhammad Saed Abdul-Rahman, *The Meaning and Explanation of the Glorious Qur'an* (MSA Publication Limited, 2nd ed., 2009) vol 2 392 and Muhammad Saed Abdul-Rahman, *Tafsir Ibn Kathir Juz' 6 (Part 6): An-Nisaa 148 to Al-Ma'idah 81* (MSA Publication Limited, 2nd ed., 2009) CXLVIII

either commit mischief (*fasad*) or wage war against Allah. Since Muslims too can be guilty of such crimes, if the radical Muslim believes that the Muslim victim had disobeyed Allah by committing either of those two crimes; they are justified in taking their life.

(iii) Surah 9: The Verse of the Sword

Surah 9, the verse of the Sword; is under much contention between radical Muslims and moderate Muslims given the explicit language used. The radical perspective reads this verse within the context of offensive *jihad* whilst the moderate Muslims reads this verse in the contest of defensive *jihad*. This article will present the radical interpretation of this verse and how they justify their hermeneutic.

This article will not posit the entirety of Surah 9.²⁵² However, I urge the audience to take the time to read the chapter to have a proper understanding of this Surah. This article will focus on the following passages from Surah 9:

(i) Surah 9:5:

And when the sacred months have passed, then kill the polytheists wherever you find them and capture them and besiege them and sit in wait for them at every place of ambush. But if they should repent, establish prayer, and give zakah, let them [go] on their way. Indeed, Allah is Forgiving and Merciful.

(ii) Surah 9:29 – 30:

Fight those who do not believe in Allah or in the Last Day and who do not consider unlawful what Allah and His Messenger have made unlawful and who do not adopt the religion of truth from those who were given the Scripture [Jews and

²⁵² Surah 9 can be read here - <https://quran.com/9>.

Christians]* - [fight] until they give the jizyah willingly while they are humbled.
 30 The Jews say, "Ezra is the son of Allah "; and the Christians say, "The Messiah is the son of Allah ." That is their statement from their mouths; they imitate the saying of those who disbelieved [before them]. May Allah destroy them; how are they deluded? [* Emphasis Mine]

(iii) Surah 9:111. Note: Allah defines ‘believers’ as those who kill and are killed.

Indeed, Allah has purchased from the believers their lives and their properties [in exchange] for that they will have Paradise. They fight in the cause of Allah , so they kill and are killed. [It is] a true promise [binding] upon Him in the Torah and the Gospel and the Qur'an. And who is truer to his covenant than Allah ? So rejoice in your transaction which you have contracted. And it is that which is the great attainment.

To properly interpret a passage of scripture, it is important to understand its historical context.²⁵³ In order to do so, this article will assess the earliest biography of Muhammad written by Ibn Ishaq, *Sirat Rasul Allah*. The context of Surah 9 is detailed in pages 617 – 619²⁵⁴ of Ibn Ishaq’s biography. A summary of the historical context of Surah 9 is as follows.

At the time Surah 9 was written, there was an agreement between Polytheists, the Arab tribes and Muhammad. During the sacred months, there was a truce agreement between the parties. However, after the sacred

253 Hatem Elliesie, *Beiträge Zum Islamischen Recht VII: Islam und Menschenrechte* (Peter Lang, 2010) 546. See also; Onder Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law* (Routledge, 2014) 16; Hisham M. Ramadan, *Understanding Islamic Law: From Classical to Contemporary* (Rowman Altamira, 2006) 168 and Mark Woodward, *Java, Indonesia and Islam* (Springer Science & Business Media, 2010) 199.

254 Ibn Ishaq, *The Life of Muhammad: A Translation of Ishaq's Sirat Rasul Allah* (Alfred Guillaume trans., Oxford University Press, 1955) 617 - 619.

months had ended, the truce treaty was revoked. In order to nullify the truce treaty, Allah revealed Surah 9:1 as a discharge.

Surah 9:1

[This is a declaration of] disassociation, from Allah and His Messenger, to those with whom you had made a treaty among the polytheists.

After the discharge was revealed, Muhammad gave orders to fight the polytheists who had broken the special agreement as well as those who had a general agreement after the four months which had been given them as a fixed time, save that if any one of them showed hostility he should be killed for it.²⁵⁵ Ibn Ishaq notes:

No unbeliever shall enter Paradise, and no polytheist shall make pilgrimage after this year, and no naked person shall circumambulate the temple. He who has an agreement with the apostle has it for his appointed time (only).²⁵⁶

This narrative is also presented in *Sahih Al Bukhari* Volume 1, Book 8, Number 365:

On the Day of Nahr (10th of Dhul-Hijja, in the year prior to the last Hajj of the Prophet when Abu Bakr was the leader of the pilgrims in that Hajj) Abu Bakr sent me along with other announcers to Mina to make a public announcement: "No pagan is allowed to perform Hajj after this year and no naked person is allowed to perform the Tawaf around the Ka'ba. Then Allah's Apostle sent 'All to read out the Surat Bara'a (At-Tauba) to the people; so he made the announcement along with us on the day of Nahr in Mina: "No pagan is allowed to perform Hajj after this year and no naked person is allowed to perform the Tawaf around the Ka'ba."

255 Ibn Ishaq, *The Life of Muhammad: A Translation of Ishaq's Sirat Rasul Allah* (Alfred Guillaume trans., Oxford University Press, 1955) 619.

256 Ibn Ishaq, *The Life of Muhammad: A Translation of Ishaq's Sirat Rasul Allah* (Alfred Guillaume trans., Oxford University Press, 1955) 617.

Ibn Sa'd's biography of Muhammad, *Kitab al-Tabaqat al-Kabir* only contains a small section related to the event of 9:5:

Then (occurred) the Pilgrimage of Abu Bakr al-Siddiq with the people in Dhu al-Hijjah of the ninth year from the hijrah of the Apostle of Allah.

They (narrators) said: The Apostle of Allah appointed Abu Bakr al-Siddiq to be in charge of the hajj. He set out with three hundred persons from al-Madinah... Thereupon Abu Bakr said to him: Has the Apostle of Allah given you charge of the pilgrimage? He said: No, But he has sent me to read to the people "Freedom from obligation" and the dissolution agreements of all parties. Then Abu Bakr proceeded and performed Hajj with the people. Ali Ibn Abi Talib read to the people: "Freedom from obligations," on the day of sacrifice, near al-Jamrah, and revoked the covenant of every party; and he said: After this year no polytheists will make a pilgrimage nor a naked person will circumambulate (the Ka'bah).²⁵⁷

Well known Scholar of Islam, Sir William Muir²⁵⁸ based his book titled, *Life of Muhammad* upon the work of Ibn Ishaq, Ibn Sa'd, Wackidi, Tabari, and the collections of Sahih Hadiths. Sir Muir notes, in relation to the context of the peace treaties nullified in Surah 9:

Whosoever hath a treaty with the Prophet, it shall be respected till its termination. Four months are permitted to every tribe to return to their territories in security. After that the obligation of the Prophet ceaseth.²⁵⁹

257 Ibn Sa'd's, *Kitab al-Tabaqat al-Kabir* (S. Moinul Haq trans., Pakistan Historical Society, 1972) vol 2 208 – 209.

258 Clinton Bennett, *Muslims and Modernity: Current Debates* (A&C Black, 2005) 4. See also; Gerhard Böwering, Patricia Crone and Mahan Mirz, *The Princeton Encyclopaedia of Islamic Political Thought* (Princeton University Press, 2013) 212; Feryal Salem, *The Emergence of Early Sufi Piety and Sunnī Scholasticism: 'Abdallāh b. al-Mubārak and the Formation of Sunni Identity in the Second Islamic Century* (BRILL, 2016) 4 and D. Varisco, *Islam Obscured: The Rhetoric of Anthropological Representation* (Springer, 2005) 85.

259 Sir William Muir, *Life of Muhammad* (London, 1861) 210.

Notable Islamic scholar, Ibn Kathir; also proclaimed that all the peace treaties were abrogated by Surah 9.

The verse of the Sword ‘abrogated every agreement of peace between the Prophet and any idolater, every treaty, and every term.’²⁶⁰

Ibn Juzayy, another world renowned Islamic scholar²⁶¹ states re-iterated the effects of Surah 9, “abrogating every peace treaty in the Qur’an”.²⁶²

In summary, the historical context of Surah 9 demonstrates that Muhammad was the aggressor as per Surah 9:2 – 3; 5:

So travel freely, [O disbelievers], throughout the land [during] four months but know that you cannot cause failure to Allah and that Allah will disgrace the disbelievers. 3 And [it is] an announcement from Allah and His Messenger to the people on the day of the greater pilgrimage that Allah is disassociated from the disbelievers, and [so is] His Messenger. So if you repent, that is best for you; but if you turn away - then know that you will not cause failure to Allah . And give tidings to those who disbelieve of a painful punishment. ... 5 And when the sacred months have passed, then kill the polytheists wherever you find them and capture them and besiege them and sit in wait for them at every place of ambush. But if they should repent, establish prayer, and give zakah, let them [go] on their way. Indeed, Allah is Forgiving and Merciful.

260 Shaykh Safiur-Rahman Al-Mubarakpuri, *Tafsir Ibn Kathir (Abridged) Volume 4* (Dar-us-Salam Publications, 1st ed., 2000) 375, 377.

261 Juan Eduardo Campo, *Encyclopaedia of Islam* (Infobase Publishing, 2009) 330. See also; Yasin Dutton, *The Origins of Islamic Law: The Qur'an, the Muwatta' and Madinan Amal* (Routledge, 2013) 240; L. P. Harvey, *Ibn Battuta* (I. B. Tauris, 2007) 54 and M. Pabst Battin and Margaret Pabst Battin, *The Ethics of Suicide: Historical Sources* (Oxford University Press, 2015) 235.

262 Shaykh Safiur-Rahman Al-Mubarakpuri, *Tafsir Ibn Kathir (Abridged) Volume 4* (Dar-us-Salam Publications, 1st ed., 2000) 376. See also; Robert Spencer, *Onward Muslim Soldiers: How Jihad Still Threatens America and the West* (Regnery Publishing, 2013) 134.

Muhammad instructed his followers to defend themselves if they were attacked but they were also commanded to attack all Pagans once the sacred months were completed. Muhammad was a truce breaker. The Pagans did not break all the truces. Instead, Muhammad claimed that God gave him a 'revelation' allowing him to lie and break his word, i.e. the truces as recorded in Surah 9:1. Finally, Muhammad compelled people to convert to Islam as mentioned in Surah 9:5 and as revealed through other notable hadiths previously mentioned in this article. Therefore, even though peace treaties existed between the Muslims, Polytheists and Arab tribes; Muhammad commanded that they be dissolved.²⁶³

The law of abrogation is another very important doctrine in order to understand how Surah 9, not only abrogated the peace treaties between Muslims and other parties; but also the abrogation of other peaceful verse of the Quran such as Surah 2:256:

There shall be no compulsion in [acceptance of] the religion. The right course has become clear from the wrong. So whoever disbelieves in Taghut and believes in Allah has grasped the most trustworthy handhold with no break in it. And Allah is Hearing and Knowing.

However, before we understand how the law of abrogation affects Quranic exegesis and in particular, how the reading contextual reading of Surah 9 is affected; it is crucial to understand what the law of abrogation is in relation to Quranic exegesis.

The term 'abrogation' is the Arabic word, *naskh* which means to 'repeal'.²⁶⁴

²⁶³ Ibn Sa'd's, *Kitab al-Tabaqat al-Kabir* (S. Moinul Haq trans., Pakistan Historical Society, 1972) vol 2 208 – 209.

²⁶⁴ Jane Dammen McAuliffe, *The Cambridge Companion to the Qur'ān* (Cambridge

Mahmoud M. Ayoub explains how the law of abrogation aids in Quranic exegesis:

What we [that is, God] abrogate regarding the precept of a verse which we change, or for which we substitute another, so that what is lawful may become unlawful and what is unlawful may become lawful; what is permitted may become prohibited and what is prohibited may become permitted.²⁶⁵

Ibn Kathir explains, “This [abrogation] also involves changing the permissible to prohibited and vice versa”.²⁶⁶ Medieval Islamic scholar, Mahmud Al-Zamakhshari²⁶⁷ (d. 1143 AD)²⁶⁸ dictates, “To abrogate a verse means that God removes (*azala*) it by putting another in its place”.

There is much disagreement as to the precise nature of abrogation. As

University Press, 2006) 307. See also; M. Darrol Bryant, *Pluralism, Tolerance and Dialogue: Six Six Studies* (University of Waterloo Press, 1989) 7; Hamid Naseem Rafiabadi, *World Religions and Islam: A Critical Study* (Sarup & Sons, 2003) vol 2 266; Mahmoud Ayoub, *Contemporary Approaches to the Qur'an and Sunnah* (International Institute of Islamic Thought, 2014) 4 and Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse University Press, 1996) 21.

265 Mahmoud M. Ayoub, *The Quran and Its Interpreters* (State University of New York Press, 1984) 139. See also; At-Tabari, *Tarikh al-Rasul Wa al-Muluk* (Leiden, 1991) vol 2 407, 471 – 472.

266 Sheikh Muhammad Nasib Ar-Rafa'i, *Tafsir Ibn Kathir* (Al-Firdous Ltd, 2nd ed., 1998) 203 – 204.

267 Andrew J. Lane, *A Traditional Mu'tazilite Qur'an Commentary: The Kashshāf of Jār Allāh Al-Zamakhsharī* (BRILL, 2006) 142. See also; Hussein Abdul-Raof, *Schools of Qur'anic Exegesis: Genesis and Development* (Routledge, 2013) 52; Shari Lowin, *Arabic and Hebrew Love Poems in Al-Andalus* (Routledge, 2013) 111 and Ali Suleiman Ali, *Al-Tafsīr bi Al-Ma'thūr* (University of Michigan, 1996) 59.

268 Zeki Majeed Hassan and Barry Heselwood, *Instrumental Studies in Arabic Phonetics* (John Benjamins Publishing, 2011) 4. See also; Yasir Suleiman, *Living Islamic History: Studies in Honour of Professor Carole Hillenbrand: Studies in Honour of Professor Carole Hillenbrand* (Edinburgh University Press, 2010) 196 and Jonathan Owens, *Arabic as a Minority Language* (Walter de Gruyter, 2000) 94.

demonstrated by Muslim scholar Ahmad Von Denffer:²⁶⁹

According to some scholars the Qur'an abrogates only the Qur'an. They base their view on Surah 2:106 and 16:101. According to them the Qur'an does not abrogate the Sunna nor does the Sunna abrogate the Qur'an. This is, in particular, the view held by Shafi'i [one of the four schools of Islamic law in Sunni Islam]. Others are of the opinion that the Qur'an may abrogate the Qur'an as well as the Sunna [Hadiths]. They base their view on Surah 53:3-4. There is also the view that there are four classes of *naskh*: 1 Qur'an abrogates Qur'an. 2 Qur'an abrogates Sunna. 3 Sunna abrogates Qur'an. 4 Sunna abrogates Sunna.²⁷⁰

The point of this article is not to assess which particular view of abrogation is correct but rather, to demonstrate the existence of abrogation in regards to Quranic exegesis. In other words, a verse that is revealed later in time abrogates any preceding verse that seems to contradict it.

The law of abrogation is also present in the Quran as per Surah 2:106:

We do not abrogate a verse or cause it to be forgotten except that we bring forth [one] better than it or similar to it. Do you not know that Allah is over all things competent?

This is also evident in Surah 16:101²⁷¹ and Surah 13:39.²⁷²

269 Robert Spencer, *Islam Unveiled: Disturbing Questions about the World's Fastest-Growing Faith* (Encounter Books, 2003) 24. See also; Khalid Mahmood Shaikh, *Islam in Modern Age* (National Book Foundation, 1999) 29 and Laurence Galian, *The Sun at Midnight: The Revealed Mysteries of the Ahlul Bayt Sufis* (Quiddity, 2003) 375.

270 Ahmad Von Denffer, *Ulum al Qur'an: An Introduction to the Sciences of the Qur'an* (Kube Publishing Ltd, 2015) 82.

271 And when We substitute a verse in place of a verse - and Allah is most knowing of what He sends down - they say, "You, [O Muhammad], are but an inventor [of lies]." But most of them do not know.

272 Allah eliminates what He wills or confirms, and with Him is the Mother of the Book.

Ibn Kathir, commenting of Surah 2:106; confirms the use of abrogation in Quranic exegesis, "... Ibn Abi Najih said that Mujahid said that: "We keep the words, but change the meaning" ..."²⁷³

Other *tafsirs* that also agree with Ibn Kathirs rendering of Surah 2:106 are Tafsir Al-Jalalain²⁷⁴ and Tafsir Maariful.²⁷⁵ Helmut Gätje quotes from the *tafsirs* of Zamakhshari and Baidawi.²⁷⁶ Mahmoud M. Ayoub further provides commentaries from other various scholars.²⁷⁷

Surah 9 is central to the topic of the law of abrogation because it was received in 631 AD,²⁷⁸ one year before Muhammad's death. Due to its late revelation, the law of abrogation claims that verses that are revealed latter nullify verses that derived previously.

Regarding how abrogation should be used when interpreting Surah 9, Ibn

273 Muhammad Saed Abdul-Rahman, *The Meaning and Explanation of the Glorious Qur'an* (MSA Publication Limited, 2nd ed., 2009) vol 1 195. See also; Muhammad Saed Abdul-Rahman, *Tafsir Ibn Kathir Juz' 1 (Part 1): Al-Fatihah 1 to Al-Baqarah 141* (MSA Publication Limited, 2nd ed., 2013) cclxi; Ismā'īl ibn 'Umar Ibn Kathīr and Şafī al-Raḥmān Mubārakfūrī, *Tafsir Ibn Kathir* (Darussalam, 2000) 324 and Ibn Kathir, *Tafseer Ibn Kathir* (LULU Press, 20156) 278.

274 Jalal ad-Din al-Maḥalli and Feras Hamza, *Tafsir al-Jalalayn: Al-Baqarah 106* (1 Jan 2016) Altafsir
<<http://altafsir.com/Tafasir.asp?tMadhNo=1&tTafsirNo=74&tSoraNo=2&tAyahNo=106&tDisplay=yes&UserProfile=0&LanguageId=2>>.

275 Maulana Mufti Muhammad Shafi, *Ma'Ariful Qur'an* (Makatba-e-Darul-Uloom Karach, 2nd ed., 2005) vol 1 281 - 284.

276 Helmut Gätje, *The Qur'an and its Exegesis* (Oneworld Publications, 1997) 58.

277 Mahmoud M. Ayoub, *The Quran and Its Interpreters* (State University of New York Press, 1984) 139.

278 Ibn Ishaq, *The Life of Muhammad* (Alfred Guillaume trans., Oxford University Press, 1955) 617- 619; Yusuf Ali, *The Glorious Qur'an* (The Islamic Foundation, 1978) 435; Neal Robinson, *Islam: A Concise Introduction* (Routledge, 2013) 131; Reuven Firestone, *Jihad: The Origin of Holy War in Islam* (Oxford University Press, 1999) 59 and Tabari, *The History of Al-Tabari* (Oxford University Press, 1987) vol. 8 160-87.

Kathir, commentating on Surah 9:5;²⁷⁹ states:

This honorable Ayah (9:5) was called the Ayah of the Sword, about which Ad-Dahhak bin Muzahim said, "It abrogated every agreement of peace between the Prophet and any idolater, every treaty, and every term".²⁸⁰

In Ibn Kathir's commentary of Surah 9:5, he asserts that Abu Bakr used this verse to fight those who refrained from paying the *zakat* and embraced Islam.²⁸¹

Dr. Muhammad Taqi-ud Din Al-Hilali and Dr. Muhammad Muhsin Khan's, *Holy Quran Translation in English* states that Surah 9:29 abrogates Surah 2:109, "(V. 2:109) The provision of this verse has been abrogated by the (V. 9:29)" whilst citing the Tafsir of At-Tabari for their justification.²⁸²

Surah 2:109 reads:

Many of the People of the Scripture wish they could turn you back to disbelief after you have believed, out of envy from themselves [even] after the truth has become clear to them. So pardon and overlook until Allah delivers His command. Indeed, Allah is over all things competent.

This command has been abrogated therefore, Muslims must now follow the command of Surah 9:29:

279 *And when the sacred months have passed, then kill the polytheists wherever you find them and capture them and besiege them and sit in wait for them at every place of ambush. But if they should repent, establish prayer, and give zakah, let them [go] on their way. Indeed, Allah is Forgiving and Merciful.*

280 Shaykh Safiur-Rahman Al-Mubarakpuri, *Tafsir Ibn Kathir (Abridged) Volume 4* (Dar-us-Salam Publications, 1st ed., 2000) 375, 377.

281 Ibn Kathir, *Tafsir of Ibn Kathir* (Darussalam, 2000) vol 4 369.

282 Dr. Muhammad Taqi-ud Din Al-Hilali and Dr. Muhammad Muhsin Khan's, *Holy Quran Translation in English* (King Fahd Complex For the Printing of the Holy Qur'an, Madinah, K.S.A.) 21.

Fight those who do not believe in Allah or in the Last Day and who do not consider unlawful what Allah and His Messenger have made unlawful and who do not adopt the religion of truth from those who were given the Scripture - [fight] until they give the jizyah willingly while they are humbled.

Dr Muhammad Taqi-ud Din Al-Hilali and Dr. Muhammad Muhsin Khan's further specify that Surah 9:36 abrogates Surah 2:217 and Surah 45:14, "(V. 2:217) The provision of this verse has been abrogated by Surah 9:36. Jihad cf., (V. 2:216)"²⁸³

Surah 2:217

They ask you about the sacred month - about fighting therein. Say, "Fighting therein is great [sin], but averting [people] from the way of Allah and disbelief in Him and [preventing access to] al-Masjid al-Haram and the expulsion of its people therefrom are greater [evil] in the sight of Allah . And fitnah is greater than killing." And they will continue to fight you until they turn you back from your religion if they are able. And whoever of you reverts from his religion [to disbelief] and dies while he is a disbeliever - for those, their deeds have become worthless in this world and the Hereafter, and those are the companions of the Fire, they will abide therein eternally.

Surah 45:14

Say, [O Muhammad], to those who have believed that they [should] forgive those who expect not the days of Allah so that He may recompense a people for what they used to earn.

With Surah 2:217 and 45:14 abrogated, Surah 9:36 is now commanded to

²⁸³ Page 677 declares that Surah 45:14 has been abrogated. Dr. Muhammad Taqi-ud Din Al-Hilali and Dr. Muhammad Muhsin Khan's, *Holy Quran Translation in English* (King Fahd Complex For the Printing of the Holy Qur'an, Madinah, K.S.A.) (fn. 2, 46; see also fn. 1, 677).

be followed:

Indeed, the number of months with Allah is twelve [lunar] months in the register of Allah [from] the day He created the heavens and the earth; of these, four are sacred. That is the correct religion, so do not wrong yourselves during them. And fight against the disbelievers collectively as they fight against you collectively. And know that Allah is with the righteous [who fear Him].

Dr Muhammad Muhsin Khan,²⁸⁴ commenting on the impact that abrogation has upon Quranic exegesis of Surah 9; declares:

So, at first aggressive fighting was forbidden; it later became permissible (Surah 2:190)²⁸⁵ and subsequently obligatory (Surah 9:5). "This "verse of the sword" [Surah 9] abrogated, cancelled, and replaced 124 verses that called for tolerance, compassion, and peace. [Emphasis mine]²⁸⁶

One may argue that Muhammad never performed or ordered the performance of offensive *jihad* but only defence *jihad*. Thus, rendering any interpretation of Surah 9 to be evidence of offensive *jihad*; false. However, as mentioned earlier, Muhammad declared that anyone who leaves Islam should be killed. Ibn Ishaq records Muhammad's invasion of Mecca declaring that Muhammad ordered his followers to attack those who resisted them. It is not clear what exactly signifies as 'resisting' however, due to this terms ambiguity, it would be superfluous to claim that this is proof of defensive *jihad*. To resist could simply mean to refuse to submit

284 translator of the Sahih Al-Bukhari and the Quran into English.

285 Fight in the way of Allah those who fight you but do not transgress. Indeed. Allah does not like transgressors.

286 Ibn Hazm, *An-Nasikh wal-Mansukh* (Dar al-Ma'arif, 1966) 19, 27; Muhi al-Din Ibn al-'Arabi, *Tafsir al-Qur'an al-Krim* (Dar al-Andalus, 1978) 69; Burton, *The Encyclopedia of Islam* (Brill, 1960) vol 71010 and Abu al-Kasim Hibat-Allah Ibn Salama, *An-Nasikh wal-Mansukh* (Dar al-Ma'arif, 1966) 130, mentioned only 114.

ones will to the will of Muhammad's companions. In fact, a greater case could be made that this was a command for offensive *jihad* given that one may refuse to convert to the will of the Muslim combatants to convert to Islam thus, consequently suffering the penalty of death. Nonetheless, Muhammad also commanded his followers to kill a certain group of individuals even if they did not demonstrate any resistance. Ibn Ishaq does not specify why these individuals were ordered to be slain, except for one individual; Abdullah Sa'd, for leaving Islam.

The apostle had instructed his commanders when they entered Mecca only to fight those who resisted them, except a small number who were to be killed even if they were found beneath the curtains of the Kaba. Among them was Abdullah Sa'd, brother of the B. Amir Luayy.

The reason he ordered him to be killed was that he had been a Muslim and used to write down revelation; then he apostatized ...²⁸⁷

This article has provided the sources that justify those who adhere to extremist Islamic ideologies and those who support and promulgated the Nazi movement. The sources utilised by both parties both shared the common theme, they were viewed as authoritative because they were either supported by their superior, or these sources expressed the command of their superior. The following section will demonstrate the corresponding similarities between the philosophy of the Nazi movement and the radical Islamic movement and the common justification for both.

IV THE 'SUPERIOR ORDERS DEFENCE: THE COMMON DENOMINATOR

²⁸⁷ Ibn Ishaq, *The Life of Muhammad* (A. Guillaume trans, Oxford UP, 2004) 550.

This article has demonstrated that, in the view of radical Islam;²⁸⁸ Allah and Muhammad command them to act in a specified manner. The imperative given by their superiors justifies their actions. Likewise, the Nazi leaders too argue that the reason they performed the actions they did was simply because they were following the orders of their superior. To the Nazis their superior was Adolf Hitler, to radical Islamic militants, Allah and Muhammad.

Both parties make decisions in accordance with the framework of their own legal system. The Nazi fascist ideology was influenced by the philosophy of legal positivism whilst incorporating a distorted version of Friedrich Nietzsche's philosophy. Radical Islam on the other hand, derives the source of their ideology from the Quran, Hadiths and *tafsirs* which are expounded within some of the earliest biographies of Muhammad.

In sum, both the Nazi leaders and radical Islamic combatants utilise the superior orders defence. Though the 'superior' to whom they are subject to is distinguishable on a metaphysical level, the *ratio* nonetheless remains quite similar.

288 Radical Islam and 'normal' Islam, however, present Muhammad in a different light.

NATIONAL SOCIALISM AND MARXISM: A COMPARATIVE LEGAL ANALYSIS

HEATH HARLEY-BELLEMORE*

ABSTRACT

Marxism as a concept of legal theory has given birth to a number of subsequent theories, such as communism, socialism and the various forms those ideologies have taken. Curiously, what is seen as the polar-opposite of the children of Marxism, National Socialism or more commonly Nazism, has its roots in, and owes its very existence to the ideas and works of Marxism and its ilk.

I FIRST CONSIDERATIONS

Marxism as a concept of legal theory has given birth to a number of subsequent theories, such as socialism and communism, and the various forms those ideologies have taken. Curiously, what is often seen as the polar-opposite of Marxism, National Socialism (or more commonly ‘Nazism’) has its roots in, and owes its very existence to, the ideas and works of Marxism and its ilk. This paper outlines the historical underpinnings leading to, and the birth of Marxism and National Socialism, their philosophical underpinnings and how National Socialism leans on many of the ideas of Marxism. Additionally, it suggests that whilst being allegedly opposite-ends of the political spectrum, Marxism and National Socialism have a remarkable amount in common – Thus an example of the horse shoe theory.

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II PRE-MARXIST LEGAL PHILOSOPHY

Neither Marxism nor National Socialism appeared overnight. Like many philosophies these were built on, or were at least highly influenced by, the legal and social philosophy of the time, most notably evolutionary legal theory, and legal historicism.

A Evolutionary Legal Theory

In the mid-19th century, Charles Darwin published his masterwork *On the Origin of Species by Means of Natural Selection*. The historical and scientific bombshell that was this work is no doubt axiom in modern minds. However, perhaps due to legal culture adopting an increasingly scientific approach during this period in history,² Darwin's work would have a great influence on the emerging legal culture and jurisprudence of the time.

Evolution, in terms of legal theory had a great effect in reshaping the law. It seems to have diverted the historic approach from a search for 'absolute principles' to a hunt for processes which generate the 'right kind' of change.³ This meant something of a paradigm shift from the structured limits of constitutional law to a more 'organic' approach of legal evolution.⁴ The result was a bolstering of the idea that constitutions were 'living documents' and should be interpreted to reflect the changing needs of a society. Indeed both the Nazis and Marx used this concept for their own means.

² Michael G. Roskin, *19th-century roots of contemporary political science* (12 July 2014) Encyclopaedia Britannica, <<http://www.britannica.com/EBchecked/topic/467721/political-science/247905/19th-century-roots-of-contemporary-political-science>>.

³ Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) 123.

⁴ Scott Dodson, 'A darwinist view of the living constitution' (2008) 61(5) *Vanderbilt Law Review*.

1 *Marx*

Both Karl Marx and his frequent co-author Friedrich Engels read *On the Origin of Species* and agreed with its contents, using it as something of an explanation for the supremacy and validity of their theories. Marx stated that despite the book's 'crude English style' it 'contain[ed] the basis in natural history of our view'.⁵ Engels similarly stated, 'just as Darwin discovered the law of evolution in organic nature, so Marx discovered the law of evolution in Human History'.⁶

This is perhaps best noted in Marx's theory of history.⁷ As Engels stated, Marx believed there was an evolution of society in human history. Marx believed that communism would be the final result of this evolution,⁸ the steps of this process roughly being:

- 'The tribal form' – Society having no social classes but kinship relationships.⁹
- 'Primitive communism',¹⁰ – 'the ancient communal and State ownership which proceeds especially from the union of several tribes into a city by agreement or by conquest',¹¹
- 'Feudal or estate property',¹² – 'Like tribal and communal ownership, it is based again on a community; but the directly producing class standing over against it is not, as in the case of the ancient community, the slaves, but the enserfed small peasantry'.¹³

⁵ P Blackledge and G Kirkpatrick, *Historical Materialism and Social Evolution* (Palgrave Macmillan, 2002) 32.

⁶ Friedrich Engels, *Selected Works, Vol 3* (International Publishers, 1950) 153.

⁷ Andrey D Maidanky, 'The Logic of Marx's Theory of History' (2012) 51(2) *Russian Studies in Philosophy*, 44-82.

⁸ Ibid.

⁹ Dino Felluga, *Modules on Marx: On the Stages of Economic Development Introductory Guide to Critical Theory* (31 January 2011) Purdue University, <<http://www.purdue.edu/guidetotheory/marxism/modules/marxstages.html>>.

¹⁰ Ibid.

¹¹ Karl Marx and Frederick Engels, *The German Ideology Part One, with Selections from Parts Two and Three, together with Marx's "Introduction to a Critique of Political Economy"* (International Publishers, 2001).

¹² Felluga, above n, 8.

¹³ Marx and Engels, above n, 10.

- ‘Capitalism’¹⁴ – Birthed from the growth of human populations and commerce, feudal society evolved from its ‘capital’ into capitalism. Societies then became structured around commodities and profit. This society would alienate the working classes and lead them to socialism.¹⁵

This evolution into socialism was one of the final steps in the process, the final and ultimate form evidently being communism, which curiously, was never defined by Marx.¹⁶

2 Nazis

It is a well-known fact that the Nazis used evolution as a basis for scientific-racism and as a reason to persecute those deemed of being from ‘lesser races’.¹⁷ However, evolutionary theory was not used solely for this purpose. First, it may be of use to outline how Nazis legally achieved and maintained power using these concepts of evolutionary law and living constitutions.

On February 27th 1933, or precisely 6 days before the election, was the infamous Reichstag fire.¹⁸ The Nazis, claiming the fire was the pretext to a communist revolution, convinced President von Hindenburg to sign the *Reichstag Fire Decree*, on the basis of Article 48 of the Weimar Constitution.

Article 48 of the Weimar Constitution allowed the German President (Paul von Hindenburg, who was succeeded by Adolf Hitler in 1934), under certain circumstances, to take emergency measures without the prior consent of the *Reichstag*.

¹⁴ Felluga, above n, 8.

¹⁵ Ibid.

¹⁶ Bertell Ollman, *Marx's Vision of Communism*, New York University (undated), <https://www.nyu.edu/projects/ollman/docs/vision_of_communistism.php>.

¹⁷ Richard Weikart, ‘*The Role of Darwinism in Nazi Racial Thought*’ (2013) 36(3) *German Studies Review* 537-556.

¹⁸ Michael E. Tigar and John Mage, ‘*The Reichstag Fire Trial, 1933-2008: The Production of Law and History*’ (2009) 60 (10) *Monthly Review*.

As a consequence, under the decree, the Nazi party was able not only to silence political opponents but was able to curtail almost all constitutional rights of citizens. As now, under law, ‘People’s Courts’ were to be set up to prosecute those who were not loyal to the regime,¹⁹ a concept not at all dissimilar to those set up by Lenin in the Soviet Union in 1918.²⁰

The March 5 elections gave the Nazis a majority in the Reichstag allowing them to pass the *Enabling Act* of 1933 which essentially removed all power from the Reichstag and invested it in the authority of the cabinet (in effect, the Chancellor Adolf Hitler) meaning laws were no longer subject to scrutiny in the Reichstag.²¹ On this basis the Nazis effectively used the valid law of the time to achieve power.

For the Nazis, the legal-Darwinian view of a living constitution, particularly its flexibility, would become an important foundation within the Nazi legal structure.²² As a constitution was considered a ‘living documents’,²³ Nazi judges were able to, and often did, interpret them this way to stay in line with the regime.²⁴

3 *Post-Evolutionary Theory*

Evolutionary legal theory would heavily support and influence other legal viewpoints such as German legal historicism, most notably the works of academics such as Friedrich Carl von Savigny, ‘the Darwin of the science of law’.²⁵ This was yet another stepping-stone on the road to Marxist, and National Socialist thought, and highly influential on both ideologies.

¹⁹ Ibid.

²⁰ Orlando Figes, *A People's Tragedy: The Russian Revolution 1891-1924* (Jonathan Cape 1996), 533-540.

²¹ Above, n 17.

²² Ibid.

²³ Ann Munster, ‘Current publications in abstract – Hitler’s Justice: *The Courts of the Third Reich* by Ingo Muller and translated by Deborah Lucas Schneider’ (1992) 20(4) *Journal of Criminal Justice* 378-379.

²⁴ Ibid.

²⁵ John Macdonell, *Great Jurists of the World* (Forgotten Books, 2013) 586.

B German Legal Historicism

At the end of the Napoleonic wars emerged the German School of Historical law.²⁶ Founded by Gustav Hugo and perhaps best represented by the work of Friedrich Carl von Savigny,²⁷ the philosophical school of German legal historicism was very Darwinian in nature, (although not entirely)²⁸. This theory, much like evolutionary legal theory, disregarded the ‘natural law’ philosophy. German legal historicists looked at the law as a product of the *Volksgiest*, or ‘spirit of the people’.²⁹

The historicist idea sat very comfortably alongside evolutionary legal theory, taking the viewpoint that the organic evolution of law is generated by a continuous process of growth throughout the history of the people – That is to say it treated the nation as a living organism,³⁰ a concept both Marx and the Nazis were well acquainted with and influenced by.

1 Marx

Karl Marx while a student at the University of Berlin attended Savigny’s lectures regularly for two terms.³¹ Marx had read and appreciated the contents of Savigny’s book, *Right of Possession*.³² In the book Savigny argues that in place of property as a ‘natural right’ of the individual, the vast majority of humanity had lived in societies which possession of land was communal and conditional in nature.³³

²⁶ Zimmermann, *Western Legal Theory*, above, n 2, 157.

²⁷ Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2013) 310.

²⁸ Ibid.

²⁹ Zimmermann, *Western Legal Theory*, above, n 2, 156-158.

³⁰ Ibid.

³¹ Isaiah Berlin, *Karl Marx: His Life and Environment* (Oxford University Press, 4th ed, 1996) 51.

³² Augusto Zimmermann, ‘Marxism, Communism and Law: How Marxism Led to Lawlessness and Genocide in the Former Soviet Union’ (2011) 2 Western Australian Jurist 19-20.

³³ Ibid.

The ideas expressed in Savigny's book appear to have influenced Marx significantly, as there are parallels between it and Marx's ideas about law in the Communist Manifesto,³⁴ perhaps most notably the historical concept of communal property being similar to Marx's supposed timeline of human societal evolution.³⁵

In his book, *Dominion and Wealth: A Critical Analysis of Karl Marx' Theory of Commercial Law*, D.C. Kline points out more common themes between the work of Savigny and Marx. He writes:

Marx' rejection of law as a phenomenon independent of history seems to be echoed in Savigny's statement in 'Of the Vocation of Our Age for Legislation and Jurisprudence', where he said that law, like language, was simple the historical expression of the "kindred consciousness" of a particular people. The idea that law is a historical phenomenon, a product of the historical condition of a given people, also occurs in Marx' work. For example, in *The German Ideology*, Marx said: "It must not be forgotten that law has just as little an independent history as religion." [...] Marx argued that when an ideology is scientifically examined, it will be seen to be the product of actual people's "material life-processes". "Morality, religion, metaphysics and all the rest of ideology as well as the forms of consciousness corresponding to these, thus no longer retain the semblance of independence." Law and language as the products of history, thus were linked by Marx as they were by Savigny. Both Savigny and Marx rejected the premise that the laws of a given society reflected universal normative truths, and both held that a society's laws reflected its particular historical situation.³⁶

Ultimately the influence of Savigny's work enabled Karl Marx to surmount that 'private ownership is the original cause of social inequality',³⁷ and arguably Savigny's influence laid the foundation of Marx's ideas.³⁸

³⁴ Ibid.

³⁵ Felluga, above n, 8.

³⁶ D.C. Kline, *Dominion and Wealth: A Critical Analysis of Karl Marx' Theory of Commercial Law* (Springer Science & Business Media, 2012) 48.

³⁷ Augusto Zimmermann, 'The 'Darwin' of German legal theory – Carl von Savigny and the German School of Historical Law' (2013) 27(2) *Journal of Creation* 122.

³⁸ Ibid.

Of course the influence of the historical school is not limited to just the work of Savigny. While Marx was evidently largely influenced by Savigny,³⁹ another historicist would be his primary philosophical interest; Georg Wilhelm Friedrich Hegel.⁴⁰

Indeed a great deal of ink has been spilt with regard to Hegel's influence on Marx and Marx becoming a 'Young Hegelian'.⁴¹ While the full influence of Hegel on Marx is beyond the scope of this paper, it is important to note some aspects of this influence nevertheless.

Sean Sayers in his paper *Individual and Society in Marx and Hegel: Beyond the Communitarian Critique of Liberalism* brings Marx and Savigny together in the following abstract:

Marx's concepts of individual and society have their roots in Hegel's philosophy. Like recent communitarian philosophers, both Marx and Hegel reject the idea that the individual is an atomic entity, an idea that runs through liberal social philosophy and classical economics. Human productive activity is essentially social. However, Marx shows that the liberal concepts of individuality and society are not simply philosophical errors; they are products and expressions of the social alienation of free market conditions. Marx's theory develops from Hegel's account of "civil society," and uses a framework of historical development similar to Hegel's. However, Marx uses the concept of alienation to criticize the liberal, communitarian and Hegelian conceptions of modern society and to envisage a form of individuality and community that lies beyond them.⁴²

Of course Savigny, Hegel and historical law were not influential to Marx exclusively. The Nazis also found a similar use for these ideas.

2 Nazis

³⁹ Zimmermann, *Marxism, Communism and Law*, above n, 31.

⁴⁰ Kline, above n 35, 41-48.

⁴¹ Lewis S. Feuer and David T. McLellan, *Karl Marx* (14 March 2016) Encyclopaedia Britannica <<https://www.britannica.com/biography/Karl-Marx>>.

⁴² Sean Sayers, 'Beyond the Communitarian Critique of Liberalism*' (2007) 71(1) *Science & Society* 84-102.

The concept of viewing a society as a living organism was of great influence in the Nazi ideology.⁴³ One pillar of the Nazi ideal was to erode capitalism and replace it with a system whereby every member of society would be granted equal economic opportunity, so that biological ability and talent would prevail.⁴⁴ A concept such as this, in the minds of the Nazi leaders, would allow those who are biologically superior to succeed economically and contribute to evolutionary progress.⁴⁵ This is a prime and clear example of how these two ideologies (legal historicism and evolution) complimented one another, particularly in the Nazi framework.

In 1944 Adolf Hitler commissioned a booklet entitled *Why Are We Fighting?* In this booklet there is an important link between not only socialism and Darwinism, but legal historicism too;

Socialism means for us not the solution of the labor question, but rather the ordering of all *German racial comrades* into a *genuine living community*; it means the preservation and *further evolution of the Volk* [people] on the basis of the *species-specific laws of evolution*⁴⁶ [emphasis added]

The reference to a ‘living community’ and the ‘further evolution of the *Volk*’ appears to be somewhat influenced by the historicist’s viewpoint of society being a living organism. The mention of ‘species-specific laws of evolution’, (whilst somewhat historicist in nature) makes a blatant remark in regard to evolution, and what influenced this ideology is obvious. Coupled with the reference to ‘German racial comrades’, it is clear that a Darwinian ‘survival of the fittest’ viewpoint had taken root. Adding these ideas to the Nazi prediction that in a system of equal economic opportunity, the gifted would thrive is a clear example of this Darwinian-historicist viewpoint in action. These two

⁴³ Ibid.

⁴⁴ Zimmermann, *Western Legal Theory*, above, n 2, 137.

⁴⁵ Ibid.

⁴⁶ Richard Weikart, *Hitler's Ethic: The Nazi Pursuit of Evolutionary Progress* (Palgrave Macmillan, 2011) 110.

theories alone did not give the Nazis law authority per se, but they did provide a strong legal positivist foundation on which their laws stood.

Like Marx, the Nazis too found solace in the work of another Historicist, and again, this person was Hegel. Hegel's views were largely 'legal positivist',⁴⁷ and historicist⁴⁸, in nature. He too believed the state to be a living entity,⁴⁹ going so far as to publish that the state is a 'living organism [...] the manifestation of the Divine on earth, and [...] the march of God through the world'.⁵⁰ That is to say that the state, this 'living entity' (a historicist viewpoint), is essentially a 'god of being',⁵¹ meaning that based on this, all law is positive law.⁵² What can be taken from this is that if the state is god, when Hitler gained absolute power as Fürher, he essentially became this so-called god.

3 Conclusions

While there are indeed notable differences in the influences behind Marx and the Nazis, there is an observable pattern between the two which has been outlined above.

The influences of the age of discovery had on the legal fraternity, and the work of Charles Darwin set the wheels in motion. To Marx this was the evolution of society, to the Nazis the evolution of man.

The historicists, particularly Savigny and Hegel, demonstrate this 'living society' in action and further the concepts that would fuel Marxist and Nazi thought. With Marx the state would evolve beyond capitalism, into socialism (or another form), and for the Nazis a similar concept, capitalism would be

⁴⁷ Richard J Bernstein, 'Reviewed Works: *Hegel's Theory of the Modern State* by Shlomo Avineri; *Hegel* by Raymond Plant' (1975) 3(3) Political Theory.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Zimmermann, *Western Legal Theory*, above, n 2, 131.

⁵¹ Ibid, 187.

⁵² Ibid, 131.

eroded and economic equality would bring out the best people. It is from these bases in which we see the emergence of Marxism, and later Fascism and National Socialism.

III MARXISM

Marxism is primarily a social, political and economic theory that interprets human history through a progressive prism.⁵³ As noted above, Marx ‘discovered’ a dialectical pattern which controls human development, which would ultimately lead to a communist society of classless individuals.⁵⁴ In short, Marxism is essentially the vehicle which leads to communism. As Zia Akhtar writes;

The ideology of communism is part of a specific political and economic doctrine of state organisation. This legal system rests upon socialist legality which provides a mandate that addresses the structural changes in society on the path to creating a workers state. The vanguard of the ideological imperative to enact socialism is the Communist Party which is entrusted to carry out the transformation that abolishes the state based on the capitalist norms where industrial is a commodity.⁵⁵

A Marx and Law

Marx’s ideas regarding law are primarily expressed in the Communist Manifesto, published in 1848 with his frequent co-author Freidrich Engels.⁵⁶ It is there he writes that law (as well as morality and religion) are ‘so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois

⁵³ Zimmermann, *Marxism, Communism and Law*, above n 32, 1-2.

⁵⁴ Ibid.

⁵⁵ Zia Akhtar, ‘Law, Marxism and the State’ (2015) 28(3) International Journal for the Semiotics of Law 661-685.

⁵⁶ Zimmermann, *Marxism, Communism and Law*, above n 32, 18-20.

interests'.⁵⁷ He continues in this vein critiquing the constitutional traditions of the west, such as the right to life, liberty and property, stating:

Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all; a will, whose essential character and direction are determined by the economic conditions of existence of your class [...] The selfish misconception that induces you to transform into eternal laws of nature and of reason, the social forms springing from your present mode of production and form of property – this misconception you share with every ruling class that has preceded you.⁵⁸

Essentially, Marx saw law as primarily an instrument of class domination which was influenced by economic relationships between groups.⁵⁹ Marx believed that there can be nothing that could be considered intrinsically good in the existence of law, going so far as stating in the *Gotha Critique* that lawlessness would be the final stage of communism. Which must '[...] predate a period in which the state can be nothing but the revolutionary dictatorship of the proletariat'.⁶⁰

Of course, the most noteworthy example of this is Soviet Russia. The Russian Revolution of 1917 was a 'critical moment when a Marxist party acceded to power and implemented reforms to transfer the ownership of the means of production from the bourgeois to the working class,'⁶¹ and it is from here we see the attempt to put Marxist theory into practice.

IV MARXISM IN PRACTICE: THE USSR

⁵⁷ J.M. Kelly, *A Short History of Western Legal Theory* (Oxford: Oxford University Press, 2007), 329.

⁵⁸ Ibid.

⁵⁹ Zimmermann, *Marxism, Communism and Law*, above n 31, 19-22.

⁶⁰ Karl Marx, *Critique of the Gotha Programme*, cited in Maureen Cain and Alan Hunt, *Marx and Engels on Law* (London Academic Press, 1979), 163.

⁶¹ Akhtar, above, n 55, 661.

Soviet legal theorists considered the legal systems of capitalist societies as ‘designed to oppress the working classes that the Bolshevik Revolution was supposed to liberate’.⁶² For them ‘the idea that there was any higher legal morality that transcended historical change and stood above the state was rejected as an idealist fantasy: states made and enforced law on behalf of particular class interests, and had always done so’.⁶³ In a normative sense the Soviet jurists believed the existence of law was a ‘theoretically inconvenient fact’.⁶⁴ This can be observed in Soviet constitutionalism, the role of the judiciary in the Soviet era, and how criminal law was handled during this period.

A Constitutionalism in the Soviet Union

The first Soviet constitution is dated from 1918, the second constitution from 1924, the third in 1936, and the final in 1977, which remained in force until the collapse of the Soviet Union in 1991.⁶⁵ Dr Zimmermann writes:

The first constitution explicitly stated that the Soviet Union was a ‘dictatorship of the proletariat’ and that human rights were guaranteed only to the ‘workers.’ In all subsequent constitutions, the people were declared to enjoy fundamental rights to free speech, free press, free assembly, and so on. However nobody really expected to enjoy any of these rights. There were conditions, derived from the constitution itself, which determined that these rights could only be enjoyed if they were exercised in absolute conformity with the general interests of the socialist state.⁶⁶

A further check, he continues ‘lay in the fact that the special police was immune from respecting the law. So it is argued that all these constitutional rights were merely a façade to deceive naïve foreigners and to advance the

⁶² Zimmermann, *Western Legal Theory*, above, n 2, 200.

⁶³ Richard Overy, *The Dictators: Hitler's Germany and Stalin's Russia* (Penguin Books, 2005) 209.

⁶⁴ Igor Grazin, ‘The Role of Ideas in Political Change’, in Suri Ratnapala and Gabriel Moens (eds), *Jurisprudence of Liberty* (Butterworths, 1996), 249.

⁶⁵ Zimmermann, *Western Legal Theory*, above, n 2, 205.

⁶⁶ *Ibid*, 205.

cause of communism worldwide'.⁶⁷ As Raymond notes in regard to Stalin's 1936 constitution:

Because Westerners consider constitutional regulations important, [the Soviet rulers] must be shown that they have no reason to feel superior even in this respect... One of the reasons for the 1936 constitution was possibly to convince world public opinion that the Soviet regime was close in spirit to western constitutional practice and opposed to fascist tyranny or Nazism. The regime wanted foreigners to see the distinction between the party and the state. Without this juridical distinction, relations between the Soviet Union and other states would be compromised.⁶⁸

To a very limited extent, the Soviet legal system created some institutional safeguards for the individual citizen, whoever these safeguards were either nominal at best or a mere façade.⁶⁹ In actuality, despite these so-called safeguards, the Soviet regime had no interest in complying with the rule of law.⁷⁰ By and large, the Soviet legal system played hardly any role in the actions of the regime as the real power lay with the leaders of the Bolshevik Party.⁷¹ French philosopher Raymond Aron sums this up in the following statement:

The proletariat expressed in the Party and the latter being possessed of absolute power, is the realization of dictatorship of the proletariat. Ideologically the solution is satisfactory and justifies the monopoly of the party. The party possesses and should possess supreme power, because it is the expression of the proletariat and the dictatorship of the proletariat.⁷²

Building upon this follows naturally the role of the Judiciary in the Soviet Union.

B The Judiciary in the Soviet Union

⁶⁷ Ibid.

⁶⁸ Raymond Aron, *Democracy and Totalitarianism* (Weidenfeld and Nicolson, 1968) 166.

⁶⁹ Zimmermann, *Western Legal Theory*, above, n 2, 204-205.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Aron, above n 68, 168.

In Soviet era Russia, the power of the state was undivided. The concept of judicial independence and neutrality were passed off as myths of the bourgeois. Instead ‘Soviet courts had two basic functions: to advance socialism and destroy all the real or imagined enemies of the state’.⁷³ A member of The People’s Commissariat, I M Reisner said:

The separation of powers in legislative, executive and judicial branches corresponds to the structure of the state of the bourgeois [...] The Russian Soviet Republic [...] has only one aim, the establishment of a socialist regime, and this heroic struggle needs unity and concentration of power rather than separation.⁷⁴

In a very similar vein, Lenin, a lawyer himself, too believed the judiciary to be ‘an organ of state power and therefore cannot be outside of politics’.⁷⁵ He believed the only take of the judiciary is to ‘a principled and politically correct ... essence and justification of terror. The court is not to eliminate terror ... but to substantiate it and legitimise it in principle.’⁷⁶

True to this notion, in 1918 Lenin established the infamous ‘People’s Courts’.⁷⁷ Orlando Figes writes:

The Bolsheviks gave institutional form to the mob trials through the new People’s Courts, where ‘revolutionary justice’ was summarily administered in all criminal cases. The old criminal justice system, with its formal rules of law, was abolished as a relic of the ‘bourgeois order’... The sessions of the People’s Courts were little more than formalised mob trials. There were no set of legal procedures or rules of evidence, which in any case hardly featured. Convictions were usually secured on the basis of denunciations, often arising from private vendettas, and sentences tailored to fit the mood of the crowd, which freely voiced its opinions from the public gallery [...]

⁷³ Zimmermann, *Western Legal Theory*, above, n 2, 205.

⁷⁴ Raoul Von Caenegem, *An Historical Introduction to Western Constitution Law* (Cambridge University Press, 1995), 266.

⁷⁵ Julian Towster, *Political Power in the U.S.S.R.: 1917-1947* (Oxford University Press, 1948) 304.

⁷⁶ Richard Pipes, *A Concise History of the Russian Revolution* (New York Knopf, 1995) 220.

⁷⁷ Zhengyuan Fu, *China’s Legalists: The Earliest Totalitarians and Their Art of Ruling* (An East Gate Book, 1996) 141.

The People's Courts judgements were reached according to the social status of the accused and their victims. In one People's Court the jurors made it a practice to inspect the hands of the defendant and, if they were clean and soft, to find him guilty. Speculative traders were heavily punished and sometimes even sentenced to death, whereas robbers – and sometimes even murderers – of the rich were often given only a very light sentence, or even acquitted altogether, if they pleaded poverty as the cause of their crime. The looting of the 'looters' had been legalized and, in the process, law as such abolished: there was only lawlessness.⁷⁸

The People's Courts however were only a mere step. In 1919 Lenin introduced the Revolutionary Tribunals. The first Soviet Commissar of Justice Dmitry Kursy stated that these tribunals were not intended to be 'real courts' in the 'normal' bourgeois sense, but 'courts of the dictatorship of the proletariat and weapons in the struggle against the counter-revolution' the main purpose of which was the eradication of its enemies, rather than that of justice.⁷⁹

Much to Lenin's dismay, he found these courts were inefficient and many magistrates could be easily bribed. So to combat this he established the Cheka, an entity which became a 'state within the state'. The Cheka had near unlimited power, most notably the power to exterminate anyone deemed to be 'undermin[ing] the foundations of the socialist order'.⁸⁰ Vladimir Gsovski quotes Martin Latsis (one of the chiefs of the Cheka)⁸¹:

Not being a judicial body the Cheka's acts are of an administrative character. . . It does not judge the enemy but strikes. . . The most extreme measure is shooting. . . The second is isolation in concentration camps. The third measure is confiscation of property. . . The counterrevolutionaries are active in all spheres of life. . . Consequently, there is no sphere of life in which the Cheka does not work. It looks after military matters, food supplies, education [. . .] etc. In its activities the Cheka

⁷⁸ Figes, above n 19, 534.

⁷⁹ Stéphane Courtois et al, *The Black Book of Communism: Crimes, Terror, Repression* (Harvard University Press 1999) 55

⁸⁰ Zimmermann, *Western Legal Theory*, above, n 2, 207.

⁸¹ Internet Encyclopedia of Ukraine, 'Cheka'

<<http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CC%5CH%5CCheka.htm>>.

has endeavored to make such an impression on the people that the mere mention of the name Cheka will destroy the desire to sabotage, to extort, and to plot.⁸²

Finally, in 1923 the Soviet Authorities enacted a Judiciary Act which created a uniform judicial system until the fall of the regime. However much like its predecessors, this new court system was still intended to be used as ‘obedient instruments of the policy of the government and the Communist Party’.⁸³

C Soviet Criminal Law

The first Soviet Criminal Code came into force on 01 June 1922. However, this code did nothing to alleviate the common practice of arbitrary imprisonment.⁸⁴

Peter Maggs writes:

Criminal procedure was weighted heavily in favour of the state and party. Although the system generally followed the continental European model, which called for extensive preliminary investigation, the investigator in cases of serious crimes was not a judicial official, as in western Europe, but instead was an official of the procuracy, which also was in charge of prosecution. The investigator could hold a suspect without contact with legal counsel for months. From time to time, high party officials initiated campaigns against particular types of crimes, telling prosecutors whom to prosecute and forcing the courts to convict defendants. Starting in the late 1940s, there was severe pressure from the party hierarchy to secure a 100 percent conviction rate, with the result that thereafter there were almost no acquittals.⁸⁵

The criminal codes legislated during the Soviet era provided for arrest, conviction and imprisonment on ideological grounds. For example Article 58 of the first Criminal Code classified ‘counter-revolutionary’ as any form of participation in the ‘international bourgeoisie’, a definition which provided for

⁸² Vladimir Gsovski, ‘*Preventive and Administration Detention in the USSR*’ (1961) 3(1) Journal of the International Commission of Justists 137.

⁸³ Ibid, 139.

⁸⁴ Zimmermann, *Western Legal Theory*, above, n 2, 211.

⁸⁵ Peter B Maggs, ‘*Soviet Law*’ Encyclopedia Britannica (09 June 2011) <<https://www.britannica.com/topic/Soviet-law>>.

the exile of many. For example, some who committed the apparent ‘political crime’ of establishing a committee to fight against the famine 1921-1922 were exiled.⁸⁶

Further, Article 58 provided for the prosecution of anyone considered a threat to the socialist regime. Anyone considered ‘socially dangerous’ and/or ‘counter-revolutionary’ was likely to find themselves imprisoned, even without the presence of guilt. This is because, as Pointowski states, ‘[S]ometimes for consideration of a political nature [...] it is necessary to apply compulsory measures to persons who have not committed any crime but who on some basis or another are socially dangerous.’⁸⁷

In conjunction to the Criminal Code was the Soviet Code of Criminal Procedure of 1926. This Act broadened the definitions of ‘counter-revolutionary and ‘socially dangerous person’. Any comment, for example, about the ‘political and economic achievements of the revolutionary proletariat’ was deemed to be counter-revolutionary.⁸⁸ In addition to these broadened definitions, the Act instructed provincial courts to refuse to ‘admit as counsel for defence any formally authorized person if the court considers such person not appropriate for appearance in the court in a given case depending upon the substance or the special character of the case’.⁸⁹

In 1958 a new Penal Code was adopted. The code abandoned terms like ‘enemy of the people’ and ‘counter-revolutionary crimes’ and apparently did away with the use of violence and torture. However, similar to the constitutional safeguards these words did little.⁹⁰ The state of (criminal) law in Russia during this period is perhaps best summed up by Amnesty International in their 1975 report:

⁸⁶ Courtois, above n 78, 128.

⁸⁷ Amnesty International, ‘*Prisoners of Conscience in the USSR: Their Treatment and Conditions*’ (1975) (Amnesty International London) 15.

⁸⁸ Courtois, above n 78, 135-136.

⁸⁹ Gsovski, above n 81, 140.

⁹⁰ Zimmermann, *Western Legal Theory*, above, n 2, 214.

There has never in Amnesty International's experience been an acquittal of a political defendant in the USSR. No Soviet court trying a person charged for his political activity has rejected the prosecution's case on grounds of procedural violations committed during the investigation period or on grounds of insufficient evidence.⁹¹

IV FASCISM: THE FATHER OF NATIONAL SOCIALISM

As an economic system, fascism is socialism with a capitalist veneer writes Sheldon Richman.⁹²

[F]ascism was seen as the happy medium between boom-and-bust-prone liberal capitalism, with its alleged class conflict, wasteful competition, and profit-oriented egoism, and revolutionary Marxism, with its violent and socially divisive persecution of the bourgeoisie. Fascism substituted the particularity of nationalism and racialism—"blood and soil"—for the internationalism of both classical liberalism and Marxism.⁹³

Where socialism would seek totalitarian control of the economic processes of a nation through state operation, fascism sought to control them indirectly through domination of 'nominally private owners'.⁹⁴

Where socialism nationalized property explicitly, fascism did so implicitly, by requiring owners to use their property in the "national interest"—that is, as the autocratic authority conceived it. (Nevertheless, a few industries were operated by the state.) Where socialism abolished all market relations outright, fascism left the appearance of market relations while planning all economic activities.⁹⁵

A Benito Mussolini

⁹¹ Amnesty International, above n 86, 32.

⁹² Sheldon Richman, 'Fascism' The Concise Encyclopedia of Economics (2008) <<http://www.econlib.org/library/Enc/Fascism.html>>.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

Benito Mussolini introduced Fascism to Italy after the First World War. Mussolini was the son of an anarchist father and a Marxist mother. By 1912, at the age of 29 Mussolini was considered ‘one of the most effective and widely read socialist journalists in Europe’.⁹⁶

In that same year Mussolini had taken over the Italian Socialist Party at the Congress of Reggio Emilia. Being opposed to the ‘bourgeoisie’ parliaments as well as ‘proposing that Italian socialism should be thoroughly Marxist’.⁹⁷ Mussolini in *Opera Omnia* wrote ‘Marx is the father and teacher [...] he is the magnificent philosopher of working-class violence’.⁹⁸ Further he wished for Italy to have the ‘greatest bloodbath of all, when the two hostile classes will clash in the supreme trial’.⁹⁹

Mussolini predicted that in World War Two ‘[w]ith the unleashing of a mighty clash of peoples, the bourgeoisie is playing its last card and calls forth on the world scene that which Karl Marx called the sixth great power: the socialist revolution’.¹⁰⁰

Mussolini noticed that the Marxist belief of ‘international socialism’ failed to work as the Communists had anticipated. It did not prevent World War One, nor did it work when Lenin called for the worldwide ‘proletarian revolution’ in 1919.¹⁰¹ As Barbara Tuchman writes:

When the call came, the worker, whom Marx declared to have no Fatherland, identified himself with country, not class. He turned out to be a member of the national family like anyone else. The force of his antagonism which was supposed to topple capitalism had found a better target in the foreigner. The working class went

⁹⁶ Paul Johnson, *Modern Times: The World from the Twenties to the Nineties* (HarperPerennial, 2001) 57.

⁹⁷ Zimmermann, *Western Legal Theory*, above, n 2, 135.

⁹⁸ Johnson, above n 95, 37.

⁹⁹ Ibid, 57.

¹⁰⁰ Ibid, 37.

¹⁰¹ Zimmermann, *Western Legal Theory*, above, n 2, 136.

to war willingly, even eagerly, like the middle class, like the upper class, like the species.¹⁰²

The coming of this new war, coupled with Mussolini's determination to bring his country into it, resulted in him losing his position within the Italian Socialist Party. He had become a 'heterodox socialist',¹⁰³ – a national socialist.¹⁰⁴

B *The German Model: National Socialism*

In Germany the Nazis followed the lead of the Italian Fascists. Of course, the Nazis famously added to their platform greater elements of racism, anti-Semitism in particular, concepts not part of Italian Fascism.¹⁰⁵ The party's name reflects this; 'The National Socialist German Workers' Party' was founded as a movement to bring together the ideas of socialism and nationalism.¹⁰⁶

In 1920 Adolf Hitler and Anton Drexler published the *25 Points Manifesto*, a document which described their 'unalterable and eternal' objectives. It was the first and only manifesto of the party.¹⁰⁷ Apart from the well-known denunciation of the Versailles Treaty and its anti-Semitism, the manifesto also supported the 'expropriation of land without compensation, nationalisation of industry, abolition of market-based lending, confiscation of income unearned by work' and so on.¹⁰⁸

The intellectual forerunners of Nazism were socialists who firmly believed that capitalism favoured the 'unproductive classes' of industrialists at the expense

¹⁰² Barbara Tuchman, *The Proud Tower: A Portrait of the World Before the War: 1890-1914* (Ballantine Books, New York, New York, 1993), 462.

¹⁰³ Zimmermann, *Western Legal Theory*, above, n 2., 136.

¹⁰⁴ Johnson, above n 95, 96.

¹⁰⁵ Zimmermann, *Western Legal Theory*, above, n 2, 136-137.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Jonah Goldberg, *Liberal Fascism: The Secret History of the American Left, From Mussolini to the Politics of Change* (Three Rivers Press, 2009) 410-413.

of the ‘honest working man’. These intellectuals believed that capitalism should be eroded as it lowered the birth rate of the working class. National Socialism was therefore founded on the view that those on equal economic footing would allow for biological talent and ability to prevail.¹⁰⁹

V NATIONAL SOCIALISM

The Nazi legal system in many ways echoed its Soviet sibling. Indeed its constitution was hailed as a great work (as it used its predecessors’),¹¹⁰ its legal fraternity were loyal to the regime,¹¹¹ and special courts were established for ‘enemies of the state’.¹¹²

A Constitutionalism in Nazi Germany

Constitutionalism in Nazi Germany is a strange beast as Constitutional law didn’t change much during the Nazi era; it merely manipulated the existing constitution from the previous government, the Weimar Republic.¹¹³

After forming a coalition with the Nationalists in 1933, Hitler called for an election. On February 27th 1933, 6 days before the election, was the infamous Reichstag fire.¹¹⁴ The Nazis, claiming the fire was the pretext to a communist revolution, convinced President von Hindenburg to sign the Reichstag Fire Decree.¹¹⁵

¹⁰⁹ Weikart, *Hitler’s Ethic*, above n 45, 120.

¹¹⁰ Gerald Strauss and Karl Schleunes, *Germany: The Weimar constitution* (19 August 2016) Encyclopaedia Britannica, <<https://www.britannica.com/place/Germany/World-War-I#ref297631>>

¹¹¹ Ralf Beste et al, *From Dictatorship to Democracy: The Role Ex-Nazis Played in Early West Germany* The Spiegel Online (2012) <<http://www.spiegel.de/international/germany/from-dictatorship-to-democracy-the-role-ex-nazis-played-in-early-west-germany-a-810207.html>>.

¹¹² United States Holocaust Memorial Museum, *Law and Justice in the Third Reich* (Undated) Holocaust Encyclopedia <<https://www.ushmm.org/wlc/en/article.php?ModuleId=10005467>>.

¹¹³ Alan Steinweis and Robert Rachlin, *The law in Nazi Germany: ideology, opportunism, and the perversion of justice* (Berghahn Books, 2013) 108.

¹¹⁴ Tigar and Mage, above n 17.

¹¹⁵ Ibid.

As stated above, under the decree on the basis of Article 48 of the Weimar Constitution, the Nazi party was able not only to silence political opponents but was also able to curtail almost all constitutional rights of citizens. The March 5th elections gave the Nazis a majority in the Reichstag allowing them to pass the *Enabling Act* of 1933, an Act which essentially removed all power from the Reichstag and invested it in the authority of the cabinet (in effect, the Chancellor – Adolf Hitler) meaning laws were no longer subject to scrutiny in the Reichstag.¹¹⁶ The Nazis had achieved power via the constitution, which they never bothered to repeal.¹¹⁷

2 The Nazi Legal Fraternity and Judiciary

Many lawyers were hostile to the Weimar Republic as over time it had ‘handed lawyers a humiliating political defeat that reduced their incomes, their prestige, and their power’.¹¹⁸ The German legal community (generally speaking) welcomed Hitler’s appointment as Chancellor in 1933 with open arms,¹¹⁹ with 10,000 lawyers swearing ‘by the soul of the German people [they] will strive to course of our Führer to the end of [their] days’.¹²⁰

Judges became particularly important in terms of legitimising ‘Nazi legal theory’ and its application in the regime.¹²¹ The effect of evolutionary theory when applied to law found a welcoming home here. As evolution had influenced the practice of law to enable the concept of ‘living constitutions’,¹²² it is clear that it would not be at all difficult for German judges who were sympathetic to the regime to perpetuate the Nazi philosophy by interpreting the

¹¹⁶ Ibid [27]-[28].

¹¹⁷ Grant Hushcroft and Paul Rishworth, *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002) 184.

¹¹⁸ Kenneth F. Ledford, ‘*German Lawyers and the State in the Weimar Republic*’ (1995) 13(2) *Law and History Review* 317-349.

¹¹⁹ Munster, above n 22, 378-379.

¹²⁰ Zimmermann, *Western Legal Theory*, above, n 2., 167.

¹²¹ Ibid.

¹²² Dodson, above n 3.

constitution to fit the political climate (that is, the constitution would be interpreted as a living document),¹²³ which oftentimes they did.¹²⁴

3 Nazi Criminal Law

Law and justice in the Third Reich were eerily similar to that of Soviet Russia; a police state with arbitrary arrest and imprisonment of political and ideological opponents in concentration camps. E. A. M. Wedderburn writes:

In the National Socialist state criminal law is an instrument used by the nation "to cleanse and protect itself." The need for this cleansing is due to the fact that the nation considers itself defiled by the objectionable conduct of its members, while the need for protection is nothing but the national organism's instinct of self-preservation. Hence for National Socialism it is more important to ensure that there should be true substantial justice than that the provisions of the criminal law should be clear. This does not mean that the law does not appear important to the National Socialist criminal legal system. On the contrary, it represents the supreme form of the Fuehrer's will, and hence the supreme expression of the national consciousness, and the needs of the individual cannot prevail against it. The nation, not the individual, must have its rights.¹²⁵

In 1933 'protective custody' essentially became arrest without judicial review. This was used as a tool against any real or potential enemies or opponents of the regime. Protective custody prisoners were not 'confined within the normal prison system but in concentration camps under the exclusive authority of the SS' (*Schutzstaffel*; the elite guard of the Nazi state).¹²⁶ The United States Holocaust Memorial Museum writes:

The Third Reich has been called a dual state, since the normal judicial system coexisted with the arbitrary power of Hitler and the police. Yet, like most areas of

¹²³ Munster, above n 22, 378-379.

¹²⁴ Ibid.

¹²⁵ Ernest Alexander MacLagan Wedderburn, '*Criminal Law in the Third Reich*' (1936) 48 Judicial Review 376.

¹²⁶ United States Holocaust Memorial Museum, above n 111.

public life after the Nazi rise to power in 1933, the German system of justice underwent "coordination" (alignment with Nazi goals). All professional associations involved with the administration of justice were merged into the National Socialist League of German Jurists. [...] Judges were enjoined to let "healthy folk sentiment" guide them in their decisions.¹²⁷

Not unlike the Soviets, the Nazis further tried to increase the 'political reliability' of the courts. Dissatisfied with the decision of the Supreme Court in the Reichstag Fire Trial, in 1934 Hitler ordered the creation of the People's Court. The court's primary function was to try treason and 'other important political cases'.¹²⁸ Between 1933 and 1945, German judges, both civilian and military, handed down an estimated 50,000 death sentences, most of which were carried out.¹²⁹

VI CONCLUSION

Attributed to French philosopher Jean-Pierre Faye is the horse shoe theory. The horse shoe theory is the idea that rather than being at opposite ends of a linear political spectrum, the far-left and far-right are more accurately displayed as either end of a horse shoe. What this means is that two (or more) seemingly polar-opposite ideas bend back around on this spectrum to be closer to each other than they are to the centre.

As Friedrich Hayek in *The Road to Serfdom* argued, National Socialism (and fascism generally) were not capitalist reactions against socialism, but were in fact remarkably similar doctrines as they both required economic planning and empowering the state over the individual.¹³⁰

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Beste above n 110.

¹³⁰ Friedrich Hayek, *The Road to Serfdom* (University of Chicago Press, 2007).

Marxism and National Socialism are indeed different beasts in a number of ways. However, as can be observed from arguments above, they are remarkably similar in terms of philosophical and political influences, and how their governments and court systems worked, which lends to the idea that Marxism and National Socialism fall upon this horseshoe theory as famous examples.

THE GLORIOUS REVOLUTION AND THE IMPACT ON AUSTRALIAN CONSTITUTIONAL LAW

LAURA JACKSON*

I INTRODUCTION

It has been proposed that ‘The Glorious Revolution is irrelevant to Australian Constitutional Law.’ This statement is far from accurate. This essay will explain how the events leading up to, and following the Glorious Revolution, assisted in the development of the *Australian Constitution*, and the implementation of the current principles of constitutional law. I will be examining the creation of a constitutional monarchy, the doctrine of parliamentary sovereignty, and the concept of responsible and representative governments in both the United Kingdom and Australia. By critically examining the background of constitutional law in England and Australia, it will be found that there are unequivocal links between the two.

II THE GLORIOUS REVOLUTION

The Glorious Revolution was one of the most notable events in development of the United Kingdom’s system of government. In the early part of the 17th century, King James I of England (who was the monarch at the time) believed

in the ‘divine right of kings’.¹ This is the idea that a monarch should have absolute power, that they should only be accountable to God, and that any resistance to the King should be considered a sin.² King James I believed that a monarch should have absolute power over the government. He therefore involved himself in cases that were being tried before the court, and proclaimed new laws without parliaments consent.³ The idea of the ‘divine right of kings’ was also adopted by King James I’s son, King Charles I, who attempted to raise money through the use of a ‘forced loan’, without the Parliaments consent.⁴ These practices were not accepted by the Parliament, leading to the civil war of 1642. Between 1642 and 1651, there were three civil wars between the forces of King Charles I, and the Parliament.⁵ Ultimately, the Parliament was victorious, and a republican form of government was created.⁶ This however, soon collapsed, which lead to the anointment of King Charles II in 1660.⁷

Between 1660 and 1684, Charles II reigned over the United Kingdom; however his methods were in short, disastrous. He not only believed in the ‘divine right of kings’ as his predecessor’s did, but was a devout catholic, who was known to not only ignore the Parliament and their advice, but to pardon

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¹ John Neville Figgis, *The Divine Right of Kings* (Cambridge University Press, 2nd ed, 1914) 5-6.

² Ibid.

³ Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks’ Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 8th ed, 2009) 73 [1.4.5].

⁴ Ibid.

⁵ Paul L. Hughes, Robert F. Fries (eds), *Crown and Parliament in Tudor-Stuart England: A Documentary Constitutional History 1485-1714* (G.P. Putnam’s Sons, 1959) 223.

⁶ Ibid.

⁷ Clarke, Keyzer and Stellios, above n 3.

Roman Catholics who had committed crimes.⁸ James II, Charles II's successor, took a similar approach, creating two 'Declarations of Indulgence', which were to be read from every stage for two Sunday's.⁹ Those who tried to oppose him were put on trial for 'seditious libel'.¹⁰ In 1688, the people of England had finally had enough. One bishop, along with six prominent politicians, wrote to the Princess of Royal England Mary (the daughter of King James II) and her Dutch husband, Prince William III of Orange, Netherlands.¹¹ This letter invited the pair to bring an army to London to invade. In November 1688, William's army began their slow advance to London. After realising that his army had made a run for it and that he was now left defenceless, James II fled to France.¹²

William II called the first 'Convention Parliament' on 22 January 1689 at the request of the Parliament.¹³ It was then that it was decided the departure of James II could be taken as an abdication of the throne.¹⁴ The crown was then offered to William and Mary as joint sovereigns, rather than following the usual procedure of going to the previous monarch's oldest son (in this case James II's oldest son, James Francis Edward). This offer however came with various conditions, including that if Mary defaulted, the crown would be passed on to her sister Anne.¹⁵ These conditions were contained in the Declaration of Rights, which later came to be England's Bill of Rights.¹⁶ This

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Bill of Rights 1688 (1 Will & Mary sess 2 c 2).

agreement made between the Parliament and William and Mary, forms the basis of the doctrine of parliamentary sovereignty to this day.

III THE UNITED KINGDOM

So, what did the Glorious Revolution actually mean for England? As explained above, by 1689 England had a new crown, and a new document called the Bill of Rights. This is considered to be one of the most important stages in the development of the United Kingdom Government. The Bill of Rights was a document that was created as a restatement of the Declaration of Rights. It is an Act of Parliament that deals with constitutional matters and sets out the basic civil rights of citizens.¹⁷ Law LJ explained in *Thoburn v Sunderland City Council*,¹⁸ that he believes a constitutional statute (such as the Bill of Rights) is one which ‘contains the legal relationship between citizens and state in some general, overarching manner, or... enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights’.¹⁹ The creation of the Bill of Rights was a landmark moment for the United Kingdom Parliament.

A Constitutional Monarchy

The introduction of the Bill of Rights meant the transition for the United Kingdom from an absolute monarchy, to a constitutional monarchy. A constitutional monarchy is defined as ‘a form of government established under a constitution which retains a monarch as the head of state’.²⁰ This new system

¹⁷ Ibid.

¹⁸ [2003] QB 151.

¹⁹ *Thoburn v Sunderland City Council* [2003] QB 151 [186].

²⁰ LexisNexis, *Concise Australian Legal Dictionary* (LexisNexis Butterworths, 5th ed, 2015) 132.

of government was the first step in the Parliament gaining more power, and thereby reducing the absolute power of the monarch.

B Parliamentary Sovereignty

One of the main concepts this new system of government brought about was the introduction of the doctrine of parliament sovereignty. This doctrine meant that the Parliament had the right to make (or unmake) any law should they choose to.²¹ As well as this, it was established that no person or body (including the court) has the right to override or remove a law of Parliament.²² This idea is one of the most fundamental rules of English constitutional law. It was outlined in section 1 of the Bill of Rights, following the Glorious Revolution of 1688,²³ and was one of the conditions that was proposed to William and Mary before they accepted the role of joint sovereigns. The relevant section outlined that William and Mary's rights and privileges would be limited by law, and that they must recognize the supremacy of parliament. As well as this, it reaffirmed the condition that there must be freedom from royal interference with the law. This was done by placing limits on the sovereign's powers, by forbidding them to establish their own courts or to act as a judge.²⁴

C Responsible and Representative Government

²¹ Ibid 459.

²² A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1885) 39; *Pickin v British Railways Board* [1974] AC 765.

²³ Bill of Rights 1688 (1 Will & Mary sess 2 c 2).

²⁴ Ibid.

Another idea that the Glorious Revolution brought about for England is the idea of responsible and representative government. This development occurred gradually, but was seen to have been initiated when the Privy Council extinguished the King's power to choose his own ministers.²⁵ The effect of this was that the Crown was no longer able to have the same influence over the Parliament as it once did. As this system of representative government developed, the idea of responsible government followed, until the Crown's role was eventually diminished to a purely ceremonial role.²⁶

III AUSTRALIA

It is important to examine how the Glorious Revolution impacted the government of the United Kingdom, as Australia's system of government was greatly influenced by the British Westminster system.²⁷ In 1788, Great Britain founded several colonies in Australia. When these colonies were initially established, English laws applied to them (providing that these laws were appropriate to the local conditions of the colonies).²⁸ In 1901, the *Australian Constitution* was created, which established the Commonwealth of Australia as a federation. However, the preamble to our *Constitution* outlines that the States of Australia have united '...under the Crown of the United Kingdom of Great Britain and Ireland...'²⁹ It is here that we are able to see exactly how much of an influence the United Kingdom had on Australian constitutional law. Their influence was so great that the United Kingdom still had constitutional

²⁵ Patrick Parkinson, *Tradition and Change in Australian Law* (LBC Information Services, 3rd ed, 2005) 101-102.

²⁶ *Ibid.*

²⁷ Clarke, Keyzer and Stellios, above n 3, 41 [1.2.3].

²⁸ Dicey, above n 22.

²⁹ *Australian Constitution*.

authority, which was set out in writing at the creation of the *Australian Constitution*. The *Constitution* itself is one of the major parts of Australian constitutional law in which we can see not only the influence of the United Kingdom, but the direct relationship between our two governments. The *Constitution of the Commonwealth of Australia* is actually contained in a British statute, titled the *Commonwealth of Australia Constitution Act 1900*.³⁰ The ninth section of this act contains the 128 sections that make up our current *Constitution*.³¹

A Constitutional Monarchy

Our nation has a system of representative democracy, as well as a constitutional monarchy. A representative government is one in which the members of parliament are chosen directly by the people.³² Australia is also considered a constitutional monarchy, as we have a constitution which sets out our basic laws and civil rights, and our head of state is the Queen of England (who is represented in Australia by the Governor-General).³³ The system of constitutional monarchy is arguably the most important aspect of the British Westminster system that Australia adopted.

B Parliamentary Sovereignty

The doctrine of parliament sovereignty is another doctrine that was influenced by the Bill of Rights that is still present in Australia today. However, A V

³⁰ *Commonwealth of Australia Constitution Act 1900* (UK).

³¹ *Australian Constitution*.

³² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

³³ LexisNexis, above n 20, 293.

Dicey proposed that there are various limits to this concept of parliamentary sovereignty.³⁴ At the time of the drafting of the *Australian Constitution*, this doctrine held that the British Parliament had authority to make laws.³⁵ This sovereignty of Parliament extended to the making and implementing of laws in all of the Queen's colonies including Australia.³⁶ The authority of Britain was one of the most crucial elements in the *Constitution* when it came to the enactment of it. The preamble stated that the Federation of Australia would be enacted under the power of the Crown.³⁷ This meant that Australia would continue to derive their legal validity for both Commonwealth and state level institutions from the British Parliament and Crown.³⁸ However, it was demanded that a provision be included in which the Australian Parliament (by way of their citizens) could alter the *Constitution* through the process of a referendum.³⁹ As well as this, under s 51(xxxviii) of the *Constitution*, it was established that the states could agree to refer a matter to the Commonwealth Parliament to legislate.⁴⁰ This ensured that Australia had not only the legal authority derived from the United Kingdom, but their own power as well.

C Responsible and Representative Government

The effects of the Glorious Revolution can still be seen in Australian constitutional law today. The principles and doctrines that were created with the implementation of the Bill of Rights, have translated across into our

³⁴ Dicey, above n 22.

³⁵ Jeffrey Goldsworthy, *The Sovereignty of Parliament* (Clarendon Press, 1999) ch 2.

³⁶ Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 8.

³⁷ *Australian Constitution*.

³⁸ Aroney et al, above n 36.

³⁹ *Australian Constitution* s 128.

⁴⁰ *Australian Constitution* s 51(xxxviii).

government. The idea of responsible and representative government especially, is present in Australia. A representative government requires that members of both levels of houses be elected by the citizens of the states,⁴¹ and the Commonwealth.⁴² The *Constitution* also created a system of responsible government. A responsible government embodies the principle of accountability, and requires the government to be responsible to the parliament rather than the head of state.⁴³ Examples of where this principle is shown, is seen in the requirement of retirement when ministers lose the confidence of the parliament, and how the parliament has gained control of government expenditure.⁴⁴

IV CONCLUSION

The Glorious Revolution of 1688 is not irrelevant to Australian constitutional law. The Glorious Revolution was a crucial point in history for the United Kingdom Government, and signalled a change from an absolute monarchy to a constitutional monarchy. It brought about the introduction of the doctrine of parliamentary sovereignty, and the concept of a responsible and representative government in the United Kingdom. These ideas can all be seen in Australia to this day. The Westminster model of government was one of the biggest influences on Australia's *Constitution*, so much that our system of government has been named the 'Washminster Model', a play on words combining both the United Kingdom and the United States of America's government system. As

⁴¹ *Australian Constitution* s 7.

⁴² *Australian Constitution* s 24; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁴³ Clarke, Keyzer and Stellios, above n 3, 102 [1.6.1].

⁴⁴ *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421.

shown, there is a clear and direct link that can be found between the events of the Glorious Revolution, leading all the way through to the creation of the *Australian Constitution*.

THE DIVORCE OF LAW AND MORALITY

JASMIN ANGEL*

I INTRODUCTION

John Austin said ‘the existence of law is one thing; its merit or demerit another... A law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text.’¹ Considered by many as the founder of legal positivism,² Austin argued against the natural law proposition of law and morality being inherently bound, instead insisting on a strict separation.³ This paper will address morality to mean Christian morality. Through analysis of the moral standards of our legal system, it is clear that they have been informed by Christian morality. ‘Inextricably’ means impossible to disentangle, however the history of slavery and the Nuremberg Trials clarify that law and Christian morality have indeed been separated. Natural law theorists claim morality is objective. However, the inevitable and observable subjectivity of morality confirms that law and morality are not inextricably joined.

II MORAL STANDARDS

Both legal positivists and natural law theorists acknowledge that morality derived from Christianity and that it contributed considerably to the moral standards reflected in our legal system. Sir Matthew Hale described such a

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¹ John Austin, *The Province of Jurisprudence Determined*, (Cambridge: Cambridge University Press, 1995) 157.

² Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspective*, (Australia: LexisNexis Butterworths, 2013) 67.

³ Ibid.

connection between the law and Christian morality in *Taylor's Case*:⁴ 'blasphemous words, were not only an offense to God and religion, but a crime against the laws, State and Government, and therefore punishable in this Court... Christianity is parcel to the laws of England.'⁵ Australia inherited its legal system from England, therefore this is applicable to Australia too.

Henry de Bracton, known as the 'Father of the Common Law'⁶ stated that '[t]he king shall be under God and the law, because the law makes the king. For there is no king where will rules rather than the law.'⁷ Every person, even the King, is subject to the Rule of Law. This vital statement was reiterated by Sir Edward Coke during his infamous conflict with King James, reminding the King that 'the king shall be under God and the law, for the law makes him king'.⁸ This also has been seen as where the separation of powers originated.⁹ By making the King answerable to a higher power, it created a system of checks and balances.¹⁰ Christianity has also had an immense influence on the development of the Court of Equity, the Magna Carta and the United States Declaration of Independence. Sir Anthony Mason, former Chief Justice of the High Court of Australia agreed that with Christianity's profound influence, saying that 'the Ten Commandments are reflected in the principles of the criminal law, the civil law and family law, though the nature of the sanctions vary from time to time

⁴ (1676) 86 ER 189.

⁵ Ibid.

⁶ H W Titus, 'God's Revelation: Foundation for the Common Law' in H W House (ed), *The Christian and American Law: Christianity's Impact on America's Founding Documents and Future Directions*, (Grand Rapids: Kregel Publications, 1998) 13.

⁷ Henry De Bracton, *On the Laws and Customs of England* (Cambridge: Harvard University Press, 1968) 25.

⁸ Augusto Zimmermann, 'A Law above the Law: Christian Roots of the English Common Law' (2013) 1 *Glocal Conversations* 85, 88.

⁹ Charles Denecke, *Review: Summa Theologica by S. Thomas Aquino* (Speculum, Vol 23, 1948) 331-332.

¹⁰ Ibid.

and from jurisdiction to jurisdiction.’¹¹ Mason stated that decisions of the High Court from the mid 1980s to 1995 follow the long-standing criminal law principles of liability and punishment shaped by Christian morality. Criminal intent is vital,¹² and a sentence should be proportionate to the crime.¹³ Even HLA Hart, a legal positivist, when asked ‘Has the development of law been influenced by morals?’ he responded with ‘[t]he answer to this question is plainly “Yes”’.¹⁴ Fellow positivists, like John Austin agreed that there was a ‘frequent coincidence’ of positive law and morality.¹⁵ Jeremy Bentham and those following his philosophy also agree that parts of the legal system are formed based on moral principles.¹⁶

Hart separated legal positivism into hard and soft. Hard legal positivists contend that moral standards cannot be incorporated in the law, whereas soft legal positivists argue the alternative. Hard legal positivists believe that judges who base reasoning on morality are violating their legal duty by acting outside the law.¹⁷ Soft legal positivists present the more commanding argument however. They believe that moral criteria aids in the validation of positive law. Just because there is a debate as to whether law and morality are inextricably joined, does not mean that Christian morality does not inform our legal system.

¹¹ Sir Anthony Mason, ‘Law and Morality’ (1995) 4(2) Griffith Law Review 147, 148.

¹² Ibid, 152.

¹³ Ibid; *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 472.

¹⁴ Mason, above n 4, 148.

¹⁵ Austin, above n 1, 162.

¹⁶ HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1957) 71 *Harvard Law Review* 593, 599.

¹⁷ Ibid.

III MORALITY AND LEGAL THEORIES

The debate centred around whether law and morality are inextricably joined has traditionally been argued by natural law theorists and legal positivists. How do we explain ‘morality’? There is no single definition, but it can be seen as ‘guiding one’s conduct by reason...giving equal weight to the interests of each individual’ to make a distinction between right and wrong, or good and bad.¹⁸ Lord Patrick Devlin addressed how to best describe morality by arguing that:

No society has yet solved the problem of how teach morality without religion. So the law must base itself on Christian morals and to the limits of its ability enforce them (...) without the help of Christian teaching the law will fail.¹⁹

Christian morality is guided by Divine law, however there is debate as to whether law and morality are fused.

Natural law theorists assert that the existence of a law is dependent on its morality; that morality and law are inextricably joined. Some natural law theorists, including St Thomas Aquinas, accredit natural law’s authority to God, arguing that it is instilled in human nature by God directly.²⁰ Aquinas added the notion that an ‘eternal law’ is intrinsically connected to the common good.²¹ Theorists in agreement with Aquinas, hold that all just positive law is derived

¹⁸ James Rachels, *The Elements of Moral Philosophy*, (New York: McGraw-Hill, 4th ed, 2003) 14.

¹⁹ P Devlin, *Morals and The Criminal Law* in R A Wasserstrom (ed.), *Morality and the Law* (Belmont: Wadsworth, 1971) 25.

²⁰ C E Rice, *50 Questions on the Natural Law: What Is It and Why We Need It*, (San Francisco: Ignatius Press, 1999) 51.

²¹ Zimmermann, above n 2, 2.

from natural law.²² As such, if a positive law deviates from the natural law, it is invalid or not a true law.²³ ‘We must obey God rather than men’.²⁴ In modern times, natural law theorists including Immanuel Kant, and Hugo Grotius, advocate that natural law is based on ‘objective ethical principles, which are accessible to humans by virtue of their rational capacities’.²⁵ They are not denying that God can reveal moral truths, but believe that many moral truths can be understood by ethical reflection other than revelation.²⁶ Agreeing with St Paul, they believe that there is a law ‘written on the hearts’ of human beings and that fundamental laws against murder and theft are knowable without God’s special revelation.²⁷ Grotius argued that ‘natural law would retain its validity even if God did not exist’.²⁸ Kant, a German philosopher and atheist, argued that reason alone could discover the ethical truth.²⁹ Kant, in contrast to Aquinas, separated reason from nature.³⁰ Therefore, natural law theorists believe that moral principles are objectively valid and are discoverable through reason and by Divine law.³¹

Legal positivists on the other hand argue that the only element dependent on whether a law is in fact binding is that it was created by an appropriate

²² Jonathan Crowe, ‘Clarifying the Natural Law Thesis’, (2012) 37 *Australian Journal of Legal Philosophy* 159, 159.

²³ Ibid.

²⁴ *Holy Bible: New Living Translation* (Illinois: Tyndale House Publishers, 1996) Acts of the Apostles 5:29.

²⁵ Jonathan Crowe, ‘Existentialism and Natural Law’ (2005) 26(1) *Adelaide Law Review* 55.

²⁶ Robert P George, ‘Natural Law’ (2007) 52 *American Journal of Jurisprudence* 55, 63.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Robin Gill (ed.), *The Cambridge Companion to Christian Ethics* (Cambridge: Cambridge University Press, 2001) 159.

³⁰ Ibid, 86.

³¹ Philip Soper, ‘Some Natural Confusions about Natural Law’ (1992) 90(8) *Michigan Law Review* 2393, 2405.

apparatus and appropriate legal authority.³² The legitimacy of law is not dependent on its morality or immorality, and law in fact needs to be kept separate from moral judgements.³³ Positivists insist that the status of law as legally compelling is not effected by whether or not it is just.³⁴ 'Law may very well be moral, and certainly should be moral, but rather is not necessarily moral'.³⁵ HLA Hart, described as the most influential legal theorist of the 20th century, argued that just because a rule violated standards of morality or was not morally desirable, does not make it an invalid law.³⁶ Therefore, legal positivist can be seen to maintain a strict separation of law and morality.

IV LAW AND MORALITY

A Examples of Separation

1. *Slavery*

Everyone has a moral right to be free from slavery, and at the same time, everyone has the obligation to ensure that slavery practices do not take place.³⁷ Government is no exception.³⁸ One of the Two Great Commandments is 'love thy neighbour as thy self'.³⁹ Christianity also teaches that every person has equal worth as we were created in the image and likeness of God.⁴⁰ These teachings are strongly contradicted by slavery. Thus, slavery was outlawed upon

³² Zimmermann, above n 2, 54.

³³ Brian Bix, *Jurisprudence: Theory and Context* (North Carolina: Carolina Academic Press, 6th ed, 2009) 33.

³⁴ Norman Barry, *An Introduction to Modern Political Theory* (London: Palgrave MacMillan, 2nd ed, 2000) 31.

³⁵ Frederick Schauer, 'Constitutional Positivism' (1993) 25 *Connecticut Law Review* 797, 801.

³⁶ Hart, above n 15, 599.

³⁷ George, above n 21, 58.

³⁸ *Ibid.*

³⁹ *Holy Bible*, above n 23, Matthew 22:35-40.

⁴⁰ *Ibid.*, Genesis 1:27.

recognising this inconsistency. In the United States the controversy over slavery contributed to the Civil War. Those in favour of slavery relied heavily on the argument that no higher law can be enforced preventing a citizen from having the ‘constitutional right’ to retain their property.⁴¹ Their property including other human beings.⁴² The argument against slavery was that ‘no man nor set of men can have any natural or inherent right to rule over the rest’.⁴³ The British Empire was the first modern nation to outlaw slavery.⁴⁴ Natural law theorists would therefore argue that regardless of how long it took to outlaw slavery, upon recognising it violated natural law, it was made illegal. Therefore, law and morality are joined. A legal positivist with a more compelling argument would contend however, that for much of history such an immoral act was in fact law, even though the basic Christian moral teaching is to treat others as you wished to be treated. How can it be that something so fundamental as the human right to freedom was allowed to be violated for so long if morality and law are inextricably joined? It couldn’t be, therefore law and morality are not inextricably joined.

2. Nuremberg Trials

The resurgence of natural law’s popularity owes much to the Nuremberg Trials prosecuting the Nazi’s conduct from The Second World War. The defence appealed to legal positivism, arguing that there was a strict separation of law and morality.⁴⁵ They argued that the conduct was legal according to Nazi law

⁴¹ *Dred Scott v Sandford* (1857) 60 US 393.

⁴² *Ibid.*

⁴³ St. George Tucker, ‘Blackstone’s Commentaries’, (1970) 70 *Columbia Law Review* 1475.

⁴⁴ Zimmermann, above n 2, 40.

⁴⁵ *Ibid.*, 43.

and only violated a retroactive law.⁴⁶ The prosecution argued that no such separation existed, appealing to the universal jurisdiction and the universal nature of the crime.⁴⁷ They applied natural law stating that positive law must be based on principles of justice in order to be valid.⁴⁸ The Trials established the Nuremberg Principle which enforces a responsibility upon the individual to defy a law infringing a higher moral principle.⁴⁹ Even though the Trials established that law and morality should be inextricably joined, and reinstated that they were, the fact remains that when the Nazi's committed the crimes against morality, they were not crimes against positive law. As was the case for slavery, just because the conduct was immoral at the time, it was not illegal. There was in fact a separation. Inextricably joined means that they are impossible to separate, however it can be demonstrated that they have indeed been separated.

3. Contemporary Law

Sodomy was illegal for an extended period of time which reflected the Christian belief that it was immoral to engage in homosexual intercourse.⁵⁰ Homosexuals can no longer be prosecuted on the basis of their sexuality showing how law and morality are no longer joined. Ronald Dworkin a natural law theorist, believed that any behaviour that is a Basic Liberty should never be taken away regardless of a person having a different way of doing it.⁵¹ As sex can be seen as a Basic Liberty, Dworkin is condemning the illegality of homosexuality. Sir John Fortescue, former Chief Justice of the King's Bench believed that

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ *Holy Bible*, above n 23, Leviticus 20:13; Romans 1:27.

⁵¹ *R v Brown* [1994] 1 AC 212.

‘freedom was instilled into human nature by God... So he who does not favour liberty is to be deemed impious and cruel.’⁵² Adultery is another example which was once regarded as serious misconduct, but in Australia today is not regarded with the same legal consequences or public disfavour.⁵³ Traditionally, it was regarded as highly immoral and so evil it was a criminal offence.⁵⁴ However, the law in Australia is no longer in keeping with the Christian teaching that ‘thou shalt not commit adultery’.⁵⁵ This shows that law and Christian morality have separated.

B. *Subjective Morality*

1. *Judicial Interpretation*

An argument that positivists have supporting their notion that law and morality are separate is the concept that morality is subjective. Traditionally, Christian natural law theorist’s asserted that objective morality from Divine law was laid out in the Scriptures given directly from God. The purpose of courts and judges is to interpret and apply the law. The Divine law therefore is still open to human interpretation which leads to subjectivity. This presents a further argument between natural law theorists and positivists. Are judges, as part of their job, allowed to consider the morality of legal rules?⁵⁶ If law and morality are inextricably joined, then a judge must ignore an immoral law and only apply just law.⁵⁷ If two judges have differing interpretations of Divine law and what is

⁵² John Fortescue, *De Laudibus Legum Anglie* (c 1470), (Cambridge: Cambridge University Press, 1949) 105.

⁵³ Mason, above n 10, 148.

⁵⁴ Ibid.

⁵⁵ *Holy Bible*, above n 23, Exodus 20:14.

⁵⁶ Soper, above n 19, 2409.

⁵⁷ Ibid.

moral, then this will remove consistency from our courts. This highlights how ultimately morality is subjective, therefore, law and morality cannot be inextricably joined as what is moral differs.

2. Government Institutions

Natural law theorists oppose the idea that ‘human fiat’ determines the ‘legal’ obligations of a society.⁵⁸ Instead, they believe that the rule is to be tested against ‘true morality’ and laws are only enforceable if they conform with morality.⁵⁹ However, the argument against this is that only human institutions can test whether it is moral.⁶⁰ The claims of objectivity do not withstand the argument that it is government institutions and representatives who must assess what true morality requires.⁶¹ Between 1910 and 1970, Australian government policy allowed the forcible removal of Indigenous children from their families and homes.⁶² These children, known as the Stolen Generations, suffered psychological, physical and sexual abuse while in state care or with their adoptive white families.⁶³ One such victim, Ruth Hegerty, who was four years old when she was taken from her mum said, ‘people would say that it was for your own good, but my own good was to stay with my mum.’⁶⁴ They were forced to assimilate based on ‘black inferiority and white superiority.’⁶⁵ Only on February 13 2008, Prime Minister Kevin Rudd apologised on behalf of ‘successive Parliaments and governments’ for the mistreatment of ‘our fellow

⁵⁸ Ibid, 2412.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Australians Together, *The Stolen Generations*, Discover Stories (2014)

<<http://www.australianstogether.org.au/stories/detail/the-stolen-generations>>.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

Australians.’⁶⁶ This demonstrates that the morality of human institutions determines which laws are implemented. In the Philippines, like many countries in the world, there is a war on drugs. Reports allege that police have killed close to 6,000 people and shot many dead in the street.⁶⁷ They are justifying these murders by saying that they are drug dealers. This is a subjective interpretation of morality as there is never a justification for killing people. Thus, a law will be enforced because human institutions say so based on subjective morality.

3. *Same-Sex Marriage*

As it currently stands, Australia is divided on the ‘same-sex marriage’ debate. Much of the population believes that it is immoral to discriminate against any two individuals based on their sexual preference, prohibiting them to wed. At the same time, many believe it to be moral to forbid ‘same-sex marriage’ as marriage is a religious sacrament intended by the Scriptures to be between a man and woman. This highlights how regardless of both sides having their morality guided by reason, they have reached different judgements of what morality is. Morality is subjective, and a homosexual couple may believe it moral for them to get married but as law and such morality are not inextricably joined, legally this is impossible in Australia.

V CONCLUSION

⁶⁶ Australian Government, *Apology to Australia’s Indigenous peoples*, <<http://www.australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples>>.

⁶⁷ Marnie O’Neill, ‘Death toll in Philippines drug crackdown nears 6000 as shocking new photographs of street executions are published’, *news.com.au*, (online) 14 December 2016, <<http://www.news.com.au/lifestyle/real-life/death-toll-in-philippines-drug-crackdown-nears-6000-as-shocking-new-photographs-of-street-executions-are-published/news-story/98e0b3341e7430156cce2acb39b5733c>>.

According to the soft legal positivist approach, law and morality are not inextricably joined, but Christian morality does inform the legal system. Slavery, the Nuremberg Trials and contemporary law illustrate that law and morality have indeed been separated throughout history and aspects remain estranged today. The ultimate subjectivity of morality, shown through the Stolen Generations, the 'same-sex marriage' debate and our court system where judges are entrusted to interpret and apply the law, highlight how law and morality are not inextricably joined.

**GREG WALSH,
RELIGIOUS SCHOOLS AND DISCRIMINATION LAW
(Central Press, 2015)**

AUGUSTO ZIMMERMANN*

Written by Greg Welsh, *Religious Schools and Discrimination Law* discusses the merits of regulating the ability of religious schools to make employment decisions based on an employee's compatibility with the religious ethos of the school. The different approaches are tested according to seven distinct criteria: the promotion of equality; the right of religious freedom; the welfare of children; the basic rights of parents and minorities; the right to privacy; and the right to freedom of association.

A substantial part of this book is devoted to explaining why an approach that provides only minimal protection, or none at all, to the employment decisions of religious schools is not appropriate. Dr Walsh explains that only the "opt-in model" approach can more completely satisfy the rights-based criteria mentioned in the book. This "opt-in model", he says, works more satisfactorily in the regulation of employment decisions of religious schools in New South Wales than those which are termed the "general exception approach" and "the inherent requirement test".

The author argues that the diminishment or removal of protection for employment decisions of religious schools is inconsistent with a broad range of fundamental rights, especially religious freedom, freedom of association, parental rights and the rights of minority groups. Accordingly, the inherent

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requirement test is found to be inconsistent with a vast range of such important rights. This requirement would permit schools to select employees for mission fit although only for the positions where compatibility with the doctrines of the school's religion becomes an "inherent requirement." As Dr Walsh explains, the obvious result is an unreasonably excessive interference in the role of schools to provide religious education, since secular courts will be required to determine the doctrines by which the schools are based on, as well as the relevance to the employment decisions made by the religious schools.

Dr Walsh goes on to state that a society that is committed to equality is one that effectively protects the fundamental right to religious freedom. The democratic state must therefore demonstrate a satisfactory level of support to religious groups wanting to create and manage their schools so as to meet their specific needs and requirements. That being so, introducing an inherent requirement test wouldn't lead to an appropriate respect for religious liberty. To the contrary, such test would require secular bodies to address complex doctrinal issues which are inherently theological in nature, thus attempting to determine the appropriateness of the school's private conduct.

There are considerable problems with having secular courts determining complex issues of an intrinsically theological nature. Such decisions interfere with the determination of religious doctrines, inevitably forcing judges with no theological expertise to provide legal resolutions to complex theological issues. As such, Dr Walsh advocates the adoption of the opt-in model approach, since such model apparently does not require secular courts to determine these theological issues, including the school's religious identity as well as the beliefs that should be attributed to the religion in particular.

In the same way, the opt-in model appears to afford a higher degree of legal protection to religious schools so this can be tailored to the specific needs of each school. This should increase the rights of parents to have their children educated in full conformity with their religious convictions. Therefore, it is suggested by the author that the NSW government should adopt the opt-in model approach and to amend their present Act in order to ensure that employment decisions of religious schools are satisfactorily regulated.

By discussing the role of religious schools in the context of employment decisions, the author notes that Article 18 of the *International Covenant of Civil and Political Rights* (ICCPR) openly acknowledges the central importance of religious education to its religious adherents. Notwithstanding the legal acknowledgement, this book laws in a more critical analysis of the rights of parents to direct and control the upbringing of children. According to U.S. constitutional-law professor, William Wagner, our western legal tradition upholds the natural-law idea that ‘parents are vested with the responsibility and authority to decide matters concerning the raising of their children.’¹

To disqualify anyone acting according to their religious convictions from political life is tantamount to promoting an intolerant form secular government. However, I was a bit disappointed that the author apparently endorses Reid Mortensen’s controversial argument that ‘legislators exercising a public trust *are not free* to rely on their own religious convictions when crafting legislation for the State as a whole’. He states that Mortensen would have ‘appropriately expressed’ a ‘correct approach’ to the matter. I dare to disagree in this particular respect.

¹ William Wagner et al, ‘Revisiting Divine, Natural, and Common Law Foundations Underlying Parental Liberty to Direct and Control the Upbringing of Children’ (2014) 5 *The Western Australian Jurist* 1, 24.

As an academic who writes articles on religious freedom and religious vilification laws, I am particularly interested in the issues addressed by Dr Walsh. His review of the case law is comprehensive, thoroughly elaborating on the relevant cases and the judicial contributions. Undoubtedly, Dr Walsh's *Religious Schools and Discrimination Law* provides a timely contribution to very topical debate in this country – namely, the regulation of employment decisions of religious schools under anti-discrimination laws in Australia.

Dr Augusto Zimmermann
Perth, 03 June 2017