dissent

REFLECTIONS

social justice journal
sydney university law society

2019

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ACKNOWLEDGMENT OF COUNTRY

Bujari gamarruwa 'Good Day' in Gadical language. We acknowledge the traditional Aboriginal owners of the land that the University of Sydney is built upon. The Gadical People of the Eora Nation. We acknowledge that this was and always will be Aboriginal Land and are proud to be on the lands of one of the oldest surviving cultures in existence. We respect the knowledge that traditional elders and Aboriginal people hold and pass on from generation to generation, and acknowledge the continuous fight for constitutional reform and treaty recognition to this day. We regret that white supremacy has been used to justify Indigenous dispossession, colonial rule and violence in the past, in particular, a legal and political system that still to this date doesn't provide Aboriginal people with justice.

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academic's foreword

DR CAROLYN MCKAY

I am honoured to write the academic Foreword for the Reflections edition of Dissent, the social justice journal of the Sydney University Law Society. As a qualitative researcher, much of my time has involved going out into the field to gather empirical data, make observations, analyse and reflect. For instance, in researching the use of audio visual link technologies that enable courtroom appearance and legal conferencing from prison, I stepped into the world of incarceration. There I conducted face-to-face interviews with prisoners, asking them to contemplate their use of these technologies. The prison interviews were a great way to elicit verbatim accounts, subjective opinions and emotional responses from people who could directly 'tell it like it is', and it was through this fieldwork interview process that I gathered rich data for my PhD and recent book, *The Pixelated Prisoner*. During this research project, I also actively observed and considered the prison video link space and reflected on my own (temporary) embodied immersion within that carceral realm. One time I sat down in front of the prison video link camera to regard the image of myself on the screen's self-view mode, framed by the bland, detention-grade furnishings of the prison video 'courtroom'. Some women prisoners had told me earlier how they used this picture-in-picture or self-view mode to see their own reflection. In prison, of course, there are no glass mirrors, only unbreakable stainless steel panels. In this world without real mirrors, it was no wonder that some prisoners had reacted strongly to seeing their uncompromised reflection on the audio visual link screen for the first time. For some, it was a welcome image providing a means to groom themselves before their remote court appearance. For others, the image of themselves, looking dishevelled and wearing a green prison uniform, intensified feelings of shame and reinforced their feelings of powerlessness. I later found one of the polished metal prison mirrors that produced an indistinct and foggy likeness of my face.

The concept of reflection evokes perception, thought and consideration and the 2019 Dissent journal holds a mirror up to contemporary society to reflect on pressing social justice issues. These papers, commentaries and proposals embrace an expansive range of ongoing and emergent social justice concerns from new technologies through to the visceral nature of death. As a collection of reflections, the journal evidences keen engagement, critical analysis and challenges to inequalities and injustices.

Two works focus on how technologies and techniques may impact issues of privacy, target particular populations and embed financial inequality in society. The creeping pervasiveness of data capture, particularly biometrics and facial identification, is examined in Rodney Blake's essay. Himath Siriniwasa's review of Katharina Pistor's *The Code of Capital* provides a means to understand how legal 'coding' and financial products heighten privilege and wealth. Issues of democratic process, rights of protest, colonialism and statehood are raised in four essays. In an environment of 'fake news' and challenges to democratic values, Joe Verity calls for a truth requirement in Australian elections. This ties nicely with Nicholas Betts' examination of draconian anti-protest laws and the relationship with Australia's historical engagement with protest. Pranay Jha focuses on the current conflict in Kashmir through the lenses of postcolonialism and international law. British colonisation is also at the forefront of Swapnik Sanagavarapu's analysis of the material harms caused to Indian society. Climate change and climate displaced populations are the subject of two essays. From the perspective of Australia's climate change policy and greenhouse gas emissions, Max Vishney scrutinises a recent judgment concerning a rejected open-cut coal mine development. The plight of climate refugees and the inadequacies of suitable legal protections are detailed in Billie Trinder's work. Discrimination in sport and misogyny in the legal system are dealt with in this volume. Linda Nixon examines the treatment of intersex athletes while Diana Lambert tackles gender inequality in the legal profession. Elder abuse and the rights of the deceased are canvassed in Reflections. Claris Foo focuses on instances of physical and financial abuse perpetrated against the elderly. Finally, the dignity and rights of the deceased are considered in Kate Scott's thoughtful essay.

Dissent provides a space for law students to actively reflect, to articulate their social justice concerns and to engage with the broader community, and I congratulate the authors, Editor-in-Chief Nina Dillon Britton and editorial team on the production of this provocative journal. Through the eyes of the next generation of young lawyers, critical thinkers and socially engaged citizens, we catch an optimistic and inspiring glimpse of a future in which inequalities and social disadvantage may be minimised. ▫

CAROLYN MCKAY

editor's

NINA
DILLON
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EDITOR IN CHIEF

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LLB IV

The founding myth of law is that it exists beyond politics. Scholars and juges alike constantly bemoan the "politicisation" of law, and the "judicialisation" of politics. This year's issue of *Dissent* reminds us that law and its practice is a site of constant conflict, it reflects back at us the power struggles that govern our society.

Centred on the theme of "Reflections" the pieces in this journal explore the way in which law reflects social struggles and the possibilities for it to be used as a progressive tool. Siriniwasa, Sanagavarapu, Scott and Lambert explore the way in law's contemporary practice is shaped by its historic function as a tool of capitalist, colonial and patriarchal domination. Nixon, Trinder and Jha explore the legal challenges arising from new debates over what constitutes a woman, a refugee and a nation.

Blake and Betts' pieces remind us that political struggles constantly shape legal developments, discussing the expansion of state power over information and protest and its relationship to "tough on crime" policies. Foo's careful study of the failure of legal reforms to address elder abuse provides a disturbing image of the suffering caused by legal and economic frameworks that privilege profit over people.

On a more hopeful note, Vishney and Verity remind us of the possibility for law to be a force for positive social change. Vishney outlines the significance of recent recognition of climate change as a factor in Environmental Court approvals, and Verity argues that a legal truth requirement could radically reshape Australian political debate.

This edition would not have been possible without the hard work of my fellow editors, Alex MacIntyre, Daniel Reede, Jessica Syed, Rohan Simpson and Shivani Sankaran. It also would not have been possible without Social Justice Officer, Justin Handisurya, who has gone above and beyond in supporting this project. We are also deeply grateful for Christina Zhang's beautiful design of this edition.

Finally, I would like to thank Dr Carolyn McKay, who has written the Academic Foreword to this edition. Her pioneering work on the audio visual representations of prisoners in court room in part inspired our choice of this year's theme.

This year's articles and commentaries explore the way in which law has been used too often to serve the interests of the powerful few. I hope that serves as a reminder to us, as students and future practitioners, that that need not be the case.

NINA DILLON BRITTON

foreword

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PART ONE

ON WHOSE TERRITORY ARE THE KASMIRIS PELTING STONES?

REFLECTING ON STATEHOOD AND SELF-DETERMINATION THROUGH THE KASHMIR CONFLICT

Current international law fails to adequately address the complexity of sovereignty of self-determination, reflecting instead the narrow understandings of statehood of colonial regimes.

PRANAY JHA
ARTS / LLB III

The Pulwama Attack, in which a suicide bomber killed more than 40 Indian Soldiers in February of this year, fanned the flames of an intense debate which has often shaped the relationship between post-independence India and Pakistan. The debate often involves threats of war and hubristic assertions of national power premised on the zeal of cultural majorities. When one looks beyond the juvenile patriotism which tends to dominate discussions on Kashmir, however, the conflict provides an important opportunity to reflect on the inadequacies of international law from the perspective of post-colonial societies.

This paper will argue that, despite being associated with a process of decolonisation, the laws of statehood and self-determination do not appropriately address the nuances of post-colonial societies. It will begin by briefly outlining the context of the Kashmir conflict and the appeals of both India and Pakistan to international law. It will then problematise the partition of India with reference to the concept of statehood, arguing that the Westphalian notion of a 'sovereign state' is incompatible with the way colonised societies organised themselves. Finally, it will examine the contemporary situation in Kashmir, contending that while international law stresses the erga omnes quality of self-determination, it does little to genuinely protect this right.

I BACKGROUND TO THE CONFLICT IN KASHMIR

Although it is beyond the scope of this paper to provide an extensive history of the Kashmir conflict, I will begin by briefly sketching the salient aspects of India and Pakistan's claims to the region.

Towards the end of World War II, the question of Indian independence from the British seemed all but resolved. What was unresolved was the form which an Independent India would take. After rounds of negotiations between the British, the Indian National Congress and the All Indian Muslim League, a two-nation theory was adopted. According to this theory, British India was divided into two separate dominions: India (primarily Hindu) and Pakistan (primarily Muslim). The two-nation theory was far from universally accepted and was viewed by many Indian leaders as an illegitimate challenge to their vision of a multi-ethnic secular democracy.

This view is described by Farrell as not only impacting the 'relations between India and Pakistan, but also…many of their third-party relations.'[1]

As per the Indian Independence Act, princely states such as Jammu and Kashmir were not incorporated into either dominion. S 7(1)(b) of the Act stated that, 'the suzerainty of His Majesty over the Indian States lapses', returning all powers to the princely states.[2] Whilst in theory this would grant princely states independence, practically speaking due to their size and inability to defend themselves most princely states acceded to either India or Pakistan. Despite this, three princely states remained independent: Kashmir, Hyderbad and Junagarh.[3]

According to the logic of the two-nation theory, were Kashmir to opt for accession, it would make the most sense for it to accede to Pakistan. Kashmir's population was primarily Muslim and it was geographically and economically tied to Pakistan's territory. Its ruler however, Maharajah Hari Singh, was a Hindu who was reticent to accede to either dominion.[4]

Pathan Tribesmen from Pakistan, Maharajah Hari Singh signed an Instrument of Accession to India in order to receive military assistance. This Instrument of Accession was accepted and, shortly after, Indian troops were deployed to the region and secured a significant majority of the territory.[5] Subsequently, both India and Pakistan brought the issue of Kashmir before the United Nations ('UN'), accusing each other of military aggression.[6] In response, the UN established the UN Commission on India and Pakistan ('UNCIP') to act as a mediating influence in January 1948. Additionally, the Security Council adopted a resolution, voicing its support for Kashmiri self-determination through a plebiscite.[7] This plebiscite was to be conducted under the oversight of a supervisor appointed by the UN Secretary General. At numerous points, however, UNCIP asserted that the withdrawal of troops from both sides was a precondition for such a plebiscite to occur. Ultimately, however, UNCIP was unable to successfully mediate negotiations between the two states leading to the existence of two separate territories:

1. Jammu and Kashmir: an Indian state with some constitutional provisions for limited autonomy; and

2. Azad Kashmir: a nominally self-governing territory administered by Pakistan.

Ultimately, however, the question of Kashmir remains unresolved giving rise to the formation of various groups which are agitating for the realisation of Kashmiri self-determination.

II THE COLONIAL GIFT OF STATEHOOD

It has been widely argued that the initial trigger for the conflict over Kashmir was the process of partition itself. The rapid withdrawal of the British from the region left numerous questions of how territory ought to be divided unanswered.[8] Most relevantly, there appears to have been no concrete resolution to India and Pakistan's contrasting interpretations of s 7(1)(b) of the *Indian Independence Act*.[9] Subsequently, the fate of princely states was determined by a series of ad hoc unilateral decisions by both nations which was bound to cause friction. While such arguments certainly hold relevance to the specific debate over Kashmir, they unduly focus on determining how/whether the creation of India and Pakistan could have been seamless. In doing so, they give rise to a problematic assumption that the imposition of a broad 'statehood' onto the colonised people of modern-day India and Pakistan was legitimate. I will now turn to displacing such an assumption.

Analyses of the Kashmir dispute which focus on the process partition, tend to rely on the idea of an organically occurring Indian 'state' which was colonised by, and then partitioned into two pieces by the British.[10] It is the division of this naturally occurring and unified India into two segments which is therefore the source of modern-day disputes. Problematically, such analyses give little attention to the ways in which societies like modern-day India and Pakistan organised themselves prior to colonisation. There is little historical support for the claim that Indian peoples had a sufficient degree of social or cultural homogeneity, such that they could be classified as one nation. There were certainly some aspects of commonality between these groups – most notably in the form of a shared religion. Even where such commonalities existed, however, the significant differences in culture, language and even the actual practice of a shared religion support the idea that pre-colonial societies had distinct identities.

In the path to decolonisation, the point of commonality between Indian societies was not shared cultural heritage but a 'common enemy' in the form of their colonisers. Subsequently, in their struggle for independence, freedom fighters from diverse backgrounds defined their cause for self-determination with reference to the boundaries of the British Raj. According to Clapham, this meant that the nation was equated with the inhabitants of a territory created by colonialism rather than with people who shared an identity.[11]

In the case of states like India and Pakistan, the status of 'statehood' being conferred onto them granted membership into the International community. This involved recognition of their legitimacy under international law, which in turn, enabled their relations with other states. To enjoy the privileges of this membership, however, Pakistan and India both needed to have a vested interest in maintaining the stability of the state system – perhaps explaining their reticence to acknowledge or facilitate the independence of Kashmir. As Clapham puts it, 'sovereignty is essentially contested because it confers power on some people, and removes it from others.'[12]

III SELF- DETERMINATION - THE COLONISED, THE COLONISERS AND NOTHING INBETWEEN

The principle of self-determination was developed in a post-colonial context to allow all peoples to "freely determine their political status and pursue their economic, social and cultural development."[13] Its importance, particularly in the contemporary context, is demonstrated by the fact that it regarded as having an era omnes character i.e. it is a right 'owed to all.' [14] The broader concept of self-determination can be understood through two frameworks:

> 1. External self determination - concerned with the right of people to undertake external roles, such as foreign policy and defense; and
>
> 2. Internal self-determination - concerned with the right of people in relation to affairs internal to the State such as participation in government, democracy and civil society.[15]

A critical challenge for the law of self-determination to resolve is which peoples are owed the right to self-determination.[16] Resolution 1514 UN General Assembly stated that self-determination rights are owed to those who are the "the subjection of peoples to alien subjugation, domination and exploitation."[17] This was raised in the context of granting independence to colonial territories and colonised people. There were two issues with this statement. Firstly, as argued above, it meant self-determination rights were functionally decided with reference only to the way people happened to fall within the boundaries of territory occupied by colonisers. Secondly, it did little to resolve the question of subjugated people living in non-colonial states. Resolution 1514 was brought in the explicit context of 'Granting of Independence to Colonial Countries and Peoples.' Subsequently, while dealing in broad terms with large groups subject to colonialism, the resolution was inadvertent to the complex internal relationships within colonised societies.

Resolution 1514 also asserted that the principle of self-determination could not be applied to disrupt the national unity and territorial integrity of a country.[18] This qualification seems absurd when considering the fact that the disruption of territorial integrity is an inherent feature of most causes for self-determination. In the case of both India and Pakistan, their very existence to begin with was premised on a massive disruption to the territorial integrity of the British Empire.

The international law has since reformed its position to qualify the aforementioned prohibition on the exercise of self-determination. Resolution 2625 of the UN General Assembly states that the prohibition only applies to states 'conducting themselves in compliance with the principle of equal rights and self-determination of peoples.'[19] This seems to expand the right to self-determination to peoples being grossly subjugated within the state. In its Reference Opinion on the secession of Quebec from Canada, the Supreme Court of Canada held that a successful claim to self-determination may be exercised in the following circumstances:

> 1. Decolonisation; or
>
> 2. Alien subjugation, exploitation or domination; or
>
> 3.When a people is blocked from the meaningful exercise of its right to internal self-determination.[20]

Kashmiris have been subjected to gross human rights violations for decades. There have been numerous reports detailing mass rapes, extra-judicial killings and the exercise of torture across Kashmir by the Indian government.[21] These instances of abuse have been at their worst during times of political protest. In addition to the subjugation wrought on ordinary citizens, political dissidents and their families have often faced arbitrary incarceration. In this way, the second and third circumstances outlined in Quebec are inter-related in the case of Kashmir. Alien domination is used to block the meaningful exercise of internal self-determination. A recent example of this was the revocation of Article 370 of the Indian Constitution which stripped Kashmir of its (often symbolic) autonomy over the internal administration of the state. [22] The Indian government coupled this constitutional change with the deployment of tens of thousands of troops to the region, strict curfews and internet blackouts. While it remains to be seen what the effects of this increased military presence may be, India's track record does not inspire much faith.

In the aforementioned context, the stagnancy of international law in addressing the rights of Kashmiris is baffling. It begs the question of how international law has failed so spectacularly to protect a group that appears to have a rather clear claim to self-determination.[23] Ultimately, however, the reticence of the international law to act on the theoretical expansion of self-determination can be explained by two reasons. First, the prioritisation of stability over minority rights. A genuine commitment to granting self-determination in the third circumstance would have massive implications for states all across the world. For example, African Americans who are gerry-mandered and other discriminatory electoral policies could quite easily make a case for being meaningfully denied self-determination. Similar arguments would apply to First Nations peoples in Australia. Second, the broader interests of the Indian state should not be understated. As argued above, India is a collection of distinct peoples with vastly different identities. It has often used brutal force to quell separatist movements such as Khalistan or Naxalbari. Given this, it is unsurprising that India's increasingly nationalist governments would push for an extremely limited conception of self-determination.[24]

IV CONCLUSION

The case of Kashmir enunciates the short-comings of international law to adequately protect marginalised groups. The granting of statehood during the post-war period may have been a well-intentioned proposal to free colonised people from the alien domination of their oppressors. Fundamentally, however, statehood defined the 'nation' with reference to the generalised views of colonisers rather than the actual identities of those its sought to emancipate. In Kashmir's case, a homogenous sovereign Indian state was simply incompatible with the complex ethno-religious demographics of the region. As demonstrated, the law of self-determination has done little to resolve that incompatibility. Regardless of its expanded scope, in practice, it is subordinate to the notion of sovereignty. Moreover, it was premised on a binary conception of the world which defined the international community into the colonisers and the colonised. Under that world-view, the rights and interests of Kashmiris (and many groups like them) have been perennially ignored. ▫

[1] Brian Farell, 'The Role of International Law in the Kashmir Conflict' (2003) 21(2) *Penn State International Law Review*, 295.

[2] *Indian Independence Act 1947* (UK) s 7(1)(b).

[3] Farell (n 1) 296; Varun Vaish, 'Negotiating the India-Pakistan Conflict in Relation to Kashmir' (2011) 28(3) *International Journal on World Peace* 53, 60.

[4] Farell (n 1) 61.

[5] Ibid 297- 298.

[6] Letter from the Representative of India to the President of the Security Council, 1 January 1948, U.N. Doc. S/628 (1948) cited in Ibid; Letter from the Minister of Foreign Affairs of Pakistan to the Secretary General (15 January 15, 1948, U.N. Doc. S/646/Corr. 1 cited in Ibid.

[7] UN Security Council, SC Res 39 ('The India-Pakistan Question') S/RES/39 (adopted on 20 January 1948).

[8] See, eg, Varun Vaish, 'Negotiating the India-Pakistan Conflict in Relation to Kashmir' (2011) 28(3) *International Journal on World Peace* 53, 55-57.

[9] Farell (n 1) 296.

[10] See eg, Sandeep Gopalan, 'From Darfur to Sinai to Kashmir: Ethno-Religious Conflicts and Legalization' (2007) 55 *Buffalo Law Review* 403, 407-409; see also Sikander Shah 'An In-Depth Analysis of the Evolution of Self-Determination under International Law and the Ensuing Impact on the Kashmiri Freedom Struggle, Past and Present' (2005) 29 *Northern Kentucky Law Review* 29, 42-44.

[11] Christopher Clapham, 'Sovereignty and the Third World State' (1999) 47(3) *Political Studies* 522, 523.

[12] Ibid 525.

[13] UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, A/RES/1514(XV) (14 December 1960) art 2; *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 31.

[14] See *East Timor (Portugal v Australia) Judgement* [1995] ICJ Rep 90.

[15] Saby Ghoshray, 'Revisiting the Challenging Landscape of Self-determination within the Context of Nation's Right to Sovereignty' (2005) 11 *International Law Students' Association Journal of International and Comparative Law International* 443, 452-453.

[16] Amardeep Singh, 'The Right of Self-Determination: Is East Timor a Viable Model for Kashmir' (2001) 8(3) *Human Rights Brief* 9, 9.

[17] UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, A/RES/1514(XV) (14 December 1960) art 1.

[18] Ibid art. 6.

[19] UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, UN Doc A/RES/2625(XXV) (24 October 1970).

[20] Reference Re Secession of Quebec [1998] 2 SCR 217.

[21] Singh (n 16) 11.

[22] See generally, *Constitution of India* art. 370

[23] Singh (n 16) 10-11.

[24] See Clapham (n 11) 524.

review:
THE CODE OF CAPITAL
BY KATHARINA PISTOR

An insight into the role of the legal system in protecting capital – from property to cryptocurrency.

HIMATH SIRINIWASA
SCIENCE (MATHEMATICS)/ADVANCED STUDIES III

Katharina Pistor's *The Code of Capital: How the Law Creates Wealth and Inequality* skilfully establishes the presence of major oversights in recent legal theory and political economy. Legal scholars and political economists have, according to the Colombia Law Professor of Comparative Law, under-theorised the relationship between law and the market. Pistor successfully remedies this with her incisive look into the legal-ontology of capital, accompanied by meticulously researched case studies and legal histories. However, to label this text as only an important theoretical work is to undersell its urgency in the midst of state-sanctioned and corporate injustice. *Code* implores us to challenge fundamental assumptions in orthodox and neoclassical economics, understand the violent role of the state in protecting wealth and promoting inequality, and pinpoint global centres of power behind the closed doors of law firms in New York and England.

Code is predicated on a largely interdisciplinary approach to political economy, blending elements from sociology, economics and legal theory. Importantly, Pistor claims that the frameworks used to address the actions of agents in both economics and sociology under-conceptualise the law in mediating norms and behaviour. In the former, an 'Autonomous Rational Actor' approach is taken to understanding human interactions, whereby agents make decisions based on what maximises their personal utility according to universal standards of rationality. In this understanding, law is reduced to a means to decrease transaction costs among agents when making exchanges in the face of uncertainty. In sociology, a less mathematical 'Socially Embedded Actor' framework aims to conceptualise human behaviour in light of complicated relations between institutions such as the family, the state and the workplace. According to Pistor, the current literature in this approach also underestimates the potential normative aspects of the law in guiding behaviour, reducing it to oppressive 'power structures.'[1]

This interdisciplinary background manifests in *Code* in the vast range of intellectual influences on the text. Mirroring the dichotomy between the Autonomous Rational Actor and Socially Embedded Actor approach, Pistor opens an extensive dialogue with both Adam Smith and Karl Marx, adding a much needed legal perspective to their insights.[2] Other towering figures in political economy such as Karl Polanyi, who proposed a cultural approach to economics, factor extensively in the text.[3] Pistor also draws from the sociological canon via Max Weber and Critical theorist and philosopher, Christoph Menke.[4] This reflects Pistor's overarching aim not only to provide a thorough understanding of the legal and financial world, but following the Marxist dictum, to change it.

However, Pistor demarcates her legal perspectives from other political economic approaches to understanding inequality in two ways. Firstly, *Code* prioritises understanding how the genesis of capital in its legal coding leads to adverse social outcomes. This is contrasted to the method in other famous text named *Capital*; namely Marx's *Capital* and Piketty's *Capital in the 21st Century*; which provide explanations for unequal patterns of wealth and social injustice as caused by exploitation of labour by capitalists, or by growth rates in advanced economies. Secondly, Pistor offers a definition of capital, based on its legal genesis that more accurately reflects its multiple uses in ordinary and academic language. Building on the ideas of American Institutionalist thinker Thornstein Veblen, capital is defined as assets with an income yielding capacity where expected future income can be realised today through exchange. Pistor discusses four essential properties of capital: (1) Priority, which orders claims to the object, (2) Universality, (3) Durability, and (4) Convertibility.[5] The first three are legal qualities that ensure some assets have stronger income yielding capacity. The latter ensures that capital can metamorphosize into income.

These properties factor heavily into the historical analysis of the forms of capital that take place, the 'big four' being land, firms, debt and knowledge.[6] Code argues that capitalism requires 'the legal privileging of some assets which gives their holders a comparative advantage in accumulating their wealth over others,'[7] meaning that market economies give rise to some assets 'on legal steroids.'[8] In this regard, Pistor challenges the neoclassical picture that decentralised private property owners led to the economic success of the West, elucidating that 'it may be more accurate to attribute this to the state's willingness to back the private coding of assets in law.'[9] Pistor explains that capital's ability to consolidate power through law rests on the 'emergence of modern rights as private rights that are dependent on state power and yet have become dislodged from the social preferences of the citizens of the states that make them.'[10] As such, private law in the liberal world has elevated protecting 'private rights', often so elevated because people in positions of power cite this for the defense of their wealth, over a more general function of using the law to advance social goals.

The legal histories of various forms of capital are traced in chapters two to five, with the recurring idea being that as new forms of capital fall into the hands of a more powerful class, legal priorities are shifted and exploited to protect the interests of key assets. Pistor first provides such a genealogy of land from colonisation, outlining the enclosure of the commons and destruction of the peasantry.[11] Breaking with classical economic understandings of private land rights, Pistor argues that private property and capital cannot be considered as a radical decentralised check on power.[12] Instead, she argues, colonial legal institutions protecting private property rights were, in many instances, primarily built for 'extracting wealth, leaving [colonised] countries far behind their peers' in terms of economic development.[13] *Code* links the historic purpose of these legal institutions to the enduring structural Indigenous people face in claiming land rights. Using the case study of Mayan tribes struggling for sovereignty of rainforest land against the Belize government, *Code* argues that the government exploited legal properties of priority rights to allow large corporations use in deforestation. As Pistor comments 'when recognising or denying claims to an asset as legally protected property rights, states often play into the hands of powerful parties [...] stripping certain protections from some assets and gratifying them onto others are actions that make or destroy wealth.'[14] Property rights, as all legal rights, are not given principles; their operation is fundamentally shaped by economic contexts.

Code applies a similar approach in analysing the legal history and form of a corporation, and in doing so, the history of firms being coded as capital. Pistor presents two theses. Firstly, that while market economies rely on contract and property rights, capital and capitalism requires that property and contract have the legal property of durability, 'which for business organisations take the form of asset-shielding devices that lock in past gains and protect asset pools from all but the direct creditors of the firm.'[15] Secondly, corporate law has a primary function of operating like a 'virtual capital mint', noting that 'separating the use of corporate law for organising a business from its capital-minting function is not always easy, and one function frequently morphs into the other.'[16] As such, *Code* warns us that ignoring corporate law as a capital mint 'risks missing a major source of private wealth in our age of shareholder value maximisation.'[17] Pistor links these factors to the practices of corporate deregulation over the last 100 years, using the collapse of the Lehman Brothers as a case in point.[18] This chapter can be read as a stand-alone piece – perhaps as a useful reading for Corporations Law units – that deals decisive blows to modern practices of corporate law, while also providing readers with a detailed genealogy of the modern corporation.

The most interesting area of analysis, however, is Pistor's discussion of the emerging legal foundations of intellectual property and new forms of e-commerce (Bitcoin, smart contracts and the like). Despite legal developments in both areas being commonly presented as motivated by promoting free market competition, Pistor argues corporations and individuals invested in these areas 'are negotiating with state regulators and they are employing intellectual property law to enclose' new scientific and technological developments for their own benefit.[19] *Code* argues that the imperatives of 'coders' in protecting their privileged access to emerging forms of capital fundamentally shapes legal developments. Ending her chapter on intellectual property developments, Pistor leaves readers with a foreboding message: 'We are now in danger of losing access to our own data and to nature's code [DNA] for the sole purpose of giving select asset holders yet another opportunity to expand their wealth at the expense of the rest.'[20]

These legal developments encoding new forms of capital is related, late in the book, to the dominance of the legal profession. Pistor argues that 'holders of global capital, with the help of their lawyers, have not only found ways to utilise the law for their own interests; they have turned the legislatures, regulators, and even courts in most countries, into agents that serve their interests, rather than those of the citizens to whom they are formally accountable.'[21] Lawyers, in this analysis are 'The Masters of the Code' –creating, deciphering and manipulating law to best serve the interests of capital. Importantly, the inherent 'incompleteness, or indeterminacy' of the law, and its 'malleability' provides the requisite flexibility for lawyers to '[facilitate] a pattern of development' that protects the interests of capital, at the expense of other citizens.[22] As Pistor writes: 'clients are hiring lawyers to have access to the empire of law, which these lawyers have stitched together over centuries and that reaches far beyond the territorial boundary of any nation-state.'[23]

Code is a remarkable work that, despite its brevity, is able to cover extraordinary ground, combining analysis of emerging legal 'technologies' with careful legal genealogies of dominant forms of capital. At times however, Pistor's analysis is not well supported by examples of specific legal or economic policies, focusing rather on large scale trends in the legal genesis of capital. It is a persuasive theoretical work that bears application to the legal and economic developments. While a departure from what was promised in the lengthy title, the focus on the origins of structural power imbalances is one of the reasons makes the text an urgent tract. ▫

[1] Institute for New Economic Thinking, 'What Finance (and Economics) Can Learn from Law', *Commentary*, 24 November 2015 (Katharina Pistor) <https://www.ineteconomics.org/perspectives/videos/what-finance-and-economics-can-learn-from-law>.

[2] Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019) 42-56.

[3] See, e.g., Ibid 24-6, 32-5.

[4] Ibid 25.

[5] Ibid 22-32.

[6] Ibid 19.

[7] Ibid 4.

[8] Ibid 11.

[9] Ibid 4.

[10] Ibid 209.

[11] Ibid 32.

[12] Ibid 68.

[13] Ibid 42.

[14] Ibid 46.

[15] Ibid 47.

[16] Ibid 48.

[17] Ibid 48.

[18] Ibid 50.

[19] Ibid 186.

[20] Ibid 131.

[21] Ibid 154.

[22] Ibid 212.

[23] Ibid 165.

commentary

LADY JUSTICE: SEEN BUT NOT HEARD

A visceral survey of the misogynistic structures embedded into the legal system, serving to undermine women's progress.

DIANA LAMBERT
JD I

'You cannot easily fit women into a structure that is coded as male; you have to change the structure.'

- MARY BEARD [1]

One of the most important lessons we learn during our law degrees – first articulated to us as fresh-faced Foundies students – is that the law is a reflection of society. Consequently, the values which underpin our society become the cornerstones of our justice system. The complement to that is, as society changes, so too must the law – though it often drags its feet.

I won't bore you by spelling out the various disadvantages that women continue to face in our day to day lives. Rather, I will assume that, as a discerning reader, you are not blind to such inequalities. I will only pose this one question: if the law is a reflection of society, why doesn't it omit this same inequality?

Our justice system aims to provide fairness to all. However, it has been designed with a patriarchal pen. The very same things that were designed to uphold justice have become barriers to it. Safeguards of the law – the cornerstones of our legal system – can serve to further diminish the rights of the very citizens they aim to protect.

In turn, I suggest that the gender inequity prevalent within the legal system, is, in part, a reflection of the continued exclusion of women from the legal profession. How can we expect the proper carriage of justice for women under the law when women have been, and continue to be, impeded from the practice and creation of the law?

If you are asking what a 22-year old middle-class white woman knows about the ways of the world, get in line. But I hope you bear with me, because as a young woman studying to be a lawyer, I cannot be immune to the very real challenges that are posed to women – challenges which temper our ambition, and diminish our role in the legal profession. Nor can I ignore the ways in which women are inherently disadvantaged in the carriage of so-called justice.

...

Many people, much smarter than I, have written extensively on the failure of the law to adequately protect women, to ensure their equality in society, or to downright perpetuate their exclusion from it. Namely, the law has historically been written in many ways to overtly disadvantage women. You need only look at the furore over the decriminalisation of abortion that put before the NSW Parliament (perhaps you are reading this from a future where a woman's control over her own body has been recognised). The Bill is being stymied by a faction of conservative Members of Parliament (read: mostly middle aged white men) who are lobbying to retain control over women's health.

But what about the more subtle perpetuation of inequality under the law? Gendered assumptions, social mores and sexist stereotypes shape legal interpretation. And when thesenegative and damaging perceptions and prejudices are carried with judges, juries, lawyers, barristers and police officers into the justice system, what justice for women can there be in a courtroom? For these arbiters of (in)justice are, first and foremost, members of our society.

Off the top of my head, there are more than a few pertinent examples to support this assertion. As one of the few rights enshrined in our Constitution, trial by jury is a cornerstone of our justice system,[2] but the right to be considered by a jury of your 'peers' was only truly realised in 1977 when women gained full jury franchise.[3] Regardless of gender, however, every member of the jury carries their preconceptions and beliefs into the courtroom, which, in turn, informs their judgements oftentimes more than the presented facts or testimony.[4]

This influence is particularly notable in sexual assault trials.[5] Juries can be quick to blame women, see them as promiscuous and deliver verdicts based on their misconceptions of sexual assault or stereotypes of victims.[6] They want to convict the 'right' attacker – a stranger, outcast, creep, certainly not from a 'good family'.[7] They want the 'right' victim – virginal, innocent, who remembers to scream – never mind most victims are attacked by friends, family, partners, acquaintances.[8]

To add insult to injury, some barristers are only too happy to exploit these perceptions. Suddenly, the victim finds herself having to defend her outfit choice or previous sexual preferences, as if that is relevant to whether she asked him to rape her in a darkened alleyway. In the infamous Lazarus trials in 2016-17, the defence counsel proved their willingness to exploit common rape myths, and play to the perception that women frequently make false complaints of rape.[9]

That general disbelief of victims' narratives resonates throughout the legal system. Even though statistics show that 1 in 6 women have experienced some sort of physical intimate partner violence in their lifetime,[10] lawyers are inclined to agree with the 53% of Australians who believe women make up claims of intimate partner violence in custody cases.[11] Despite what we may tell ourselves, lawyers are not above believing – nor exploiting – these sexist myths: often we are the propagators, and the beneficiaries, of these views.

Nor are Judges immune to the same shortcomings. In his widely publicised Rush v Nationwide News judgment, Justice Michael Wigney confessed that he did not find Ms Erynn Norville to be a credible or reliable witness; she was 'prone to embellishment or exaggeration.'[12]

All I can say is that I'd like to ask Justice Wigney what would constitute a credible or reliable witness? Someone who didn't want the limelight in the first place? Who was dragged into a legal battle she didn't want any part of? As is often said, sexual harassment and assault is not about sex, but about power. Perhaps, then, it is unsurprising that judges struggle to understand the humiliation, powerlessness, and degradation felt by victims of sexual harassment.

That the law is not always particularly sympathetic to women is unremarkable when one considers how long we have practised it. After all, it was only in 1902 that our own hallowed institution permitted a woman – Ada Evans – to graduate with a Bachelor of Laws. Unfortunately for Ada, she would have to wait another 16 years until she was entitled to practice law in NSW.[13]

Only in 1965 was Dame Roma Mitchell appointed as the first female judge in Australia.[14] It would not be until 1987, however, that Mary Gaudron would be appointed as the first female Justice of the High Court.[15]

So, why should you care? Aside from a multiple-choice question in your Foundies exam, what does it matter? Why do we need a history lesson?

If you are inclined to reflect on the past and celebrate only our progress, then you may not see the problem. Look at where we are, look how far we have come. Justice Kiefel is now our indomitable head of the High Court. Sitting alongside her are two other formidable figures, in Justice Virginia Bell AC and Justice Michelle Gordon AC.[16] Consequently, three of the seven High Court Justices in Australia are women; women outnumber men as law graduates, and are now entering the legal profession at higher rates than their male counterparts.[17] That almost sounds like reverse inequality to me – what more could you want? Women, settle down. Get your emotions in check.

Look at the bigger picture: it took 115 years from the time a woman was first permitted to graduate law school for the first female to be appointed as the Chief Justice of the High Court. How long did it take men? *Oh that's right, there was never any restriction on their practice of the law.*

The aftershocks of these traditionally restrictive gender policies in the legal profession are still felt today. While women may comprise more than fifty percent of Australian law graduates, their careers are getting lost somewhere along the pipeline. Tellingly, in NSW, approximately 37% of the Magistrates and Judges,[18] 23% of barristers,[19] 26% of partners across all law firms,[20] and only 11% of those who have received the prestigious title of Senior Counsel (or Queens Counsel), are women.[21] Of our law makers, women comprise only 35% of the Members of the House of Representatives in this 2019-elected Australian parliament, and we have only had one female Prime Minister in 118 years.

Societal pressures, the gender pay gap, violence against women, alarming bullying and sexual harassment statistics and unequal shares of domestic work conspire to keep women out of the profession. The harassment of young lawyers by (the newly disbarred) Waterstreet has always been an open secret, and yet it was only after the protests of the student Wom*n's Collective that the University of Sydney stopped promoting his job advertisements. We talk to each other about which law firm is sexist; whether they will squeeze you out if you deign to have children, or are known for senior partners that will grab your ass. Forgive me for being emotional, but sometimes being a woman studying law feels like a pig being offered up for slaughter.

Since 1902, women have been playing an almost impossible game of catch-up. As society progresses, so too do the rights of women under the law, and the participation of women in the profession. But the pace is comparatively slow, especially when power remains concentrated in the hands of people to whom it does not disadvantage. The safeguards of justice were intended to ensure that stability is maintained. They also serve to keep the law in the past.

...

All things going to plan, I will graduate my law degree in 2021; exactly 119 years after Ada Evans graduated her own law degree. Unlike Ada, I will not have to wait an agonising 16 years before I am entitled to practice law. Unlike Ada, I might even be hired by a firm as part of their gender quota. Unlike Ada, I face no formal restrictions to any ambitions I may have to become a barrister, a judge or even a Senior Counsel.

So, yes, it may be considerably easier to enter the legal profession as a woman in 2021 than it was in 1902. But, statistically, my chances of being sexually harassed during my career are higher than my chances of becoming a Silk (47% versus 11%). I am not sure about you, but I don't think we are there yet. So, I will add my voice to the din. I hope you will too. ▫

[1] Mary Beard, *Women and Power: A Manifesto* (Profile Books, 2017) 86.

[2] *Commonwealth Constitution* s 80.

[3] Women were technically granted the right to sit on a jury with the *Jury (Amendment) Act 1947* (NSW), but women were commonly refused jury service due to 'accommodation difficulties' until the *Jury Act 1977* (NSW); Andrew Choo and Jill Hunter, 'Gender discrimination and juries in the 20th century: Judging women judging men' (2018) 22(3) *The International Journal of Evidence and Proof* 192, 207.

[4] Natalie Taylor, 'Juror attitudes and biases in sexual assault cases' (2007) 344 *Trends & Issues in Crime and Criminal Justice* 1, 1.

[5] Bri Lee, 'Juries are often prejudices, just like society. Should we get rid of them?', The Guardian (online) 21 July 2018 <https://www.theguardian.com/law/2018/jul/21/juries-are-often-prejudiced-just-like-society-should-we-get-rid-of-them>.

[6] Taylor (n 4) 4.

[7] Katie Mettler, 'Judge said a teen from a 'good family' should not be tried as an adult in sexual assault' *The Washington Post* (online at 3 July 2019) <https://www.washingtonpost.com/nation/2019/07/03/judge-says-teen-good-family-should-not-be-tried-sexual-assault-an-adult/?utm_term=.3f9c473c7b5b>.

[8] Taylor (n 4) 7.

[9] Gail Mason and James Monaghan, 'Autonomy and responsibility in sexual assault law in NSW: The Lazarus cases' (2019) 31(1) *Current Issues in Criminal Justice* 30; Lazarus v R [2016] NSWCCA 52, [70] (Adams J).

[10] Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (2018) ix <https://www.aihw.gov.au/getmedia/d1a8d479-a39a-48c1-bbc2-4b27c7a321e0/aihw-fdv-02.pdf.aspx?inline=true>.

[11] Colin James and Nicola Ross, 'Did He Ever Hit You? Exploring the Attitudes of Lawyers in the Assessment of the Seriousness of Threats and Violent Histories in Domestic Violence' (2016) 30 *Australian Journal of Family Law* 205, 236.

[12] *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496, 76-78 [330] (Wigney J).

[13] The Law Society of New South Wales, 'After Ada: a new precedent for women in law' (Report, 29 October 2002) 5 <https://womenlawyersnsw.org.au/wp-content/uploads/026534.pdf>.

[14] National Library of Australia, 'Dame Roma Mitchell (1913-2000)', *Trove* (2019) <https://trove.nla.gov.au/people/555947?c=people>.

[15] Jenny Macklin, 'Retirement of Justice Mary Gaudron' (Media Release, 11 February 2003).

[16] High Court of Australia, *About the Justices* (2019) <http://www.hcourt.gov.au/justices/about-the-justices>.

[17] Tom Lodewyke, 'Women outnumber men in legal profession', *Lawyers Weekly* (online at 20 July 2017) <https://www.lawyersweekly.com.au/careers/21525-women-outnumber-men-in-legal-profession>

[18] Australasian Institute of Judicial Administration, *Judicial Gender Statistics* (6 March 2019), <https://aija.org.au/wp-content/uploads/2018/03/JudgesMagistrates.pdf>

[19] New South Wales Bar Association, *Statistics* (2019) <https://www.nswbar.asn.au/the-bar-association/statistics>

[20] Trish Mundy and Nan Seuffert, 'Advancement of Women in Law Firms: Best Practice Pilot Research Project', *Legal Intersections Research Centre University of Wollongong* (Report, 2017) 7, <https://womenlawyersnsw.org.au/wp-content/uploads/2015/03/Advancement-of-Women-in-Law-Firms-2017-WEB.pdf>

[21] NSW Bar Association (n 19).

[22] Michelle Staff, 'The 2019 election has done little to improve the representation of women in parliament', *SBS News* (online at 29 May 2019) <https://www.sbs.com.au/news/the-2019-election-did-almost-nothing-to-improve-gender-equality-in-parliament>.

[23] Kieran Pender, 'Us Too? Bullying and Sexual Harassment in the legal profession', *International Bar Association* (report, 2019) 87 <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>.

[24] Maani Truu, 'University bans Waterstreet jobs from CareerHub amid protests', *Honi Soit* (online) 26 October 2017 <https://honisoit.com/2017/10/university-bans-waterstreet-jobs-from-careerhub-amid-protests/>.

[25] Pender (n 23) 87; NSW Bar Association (n 19).

THE OPEN VEINS OF INDIA:

THE ROLE OF BRITISH COLONIAL LAW IN THE PLUNDER OF THE SUBCONTINENT

Reflections on British Colonial Law's place as the foundation of the colonial project, and its enduring effects on Indian underdevelopment.

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There has been no factor more significant in the shaping of modern India than British colonialism. Between 1757 and 1947, the Indian subcontinent found itself under the yoke of firstly the British East India Company, and then the British Crown itself. This paper will explore an oft-ignored aspect of colonial underdevelopment: law. Political economists studying the extractive functions of the British Raj have overlooked the centrality of legal instruments and law in creating the institutions of British colonialism. Where agrarian society was the centre of Indian taxation and wealth transfers, the protection of property rights in land and the securing of land taxes were fundamental to the colonial drain of wealth.

The primary imperative of British geographical expansion was surplus accumulation via parasitic transfers of capital from colony to metropole. Indian nationalists such as Dadabhai Naoroji referred to this as a 'drain', where capital extracted from India provided the basis of British industrialisation and economic supremacy.[1]

While popular discourse often frames colonialism as a humanitarian endeavour by which the British brought modern institutions and 'civilisation' to the backward peoples of the Subcontinent, anti-colonial economists have spent decades attempting to estimate the material cost of colonialism.[2] Colonialism was central to the modernisation of Continental Europe. Not only did the capital transfers sustain the industrialisation of Britain, Britain became the world's largest capital exporter and supported the industrialisation of America, Australia and its other settler colonies.[3] Surplus accumulation differed wildly over time and took on qualitatively different forms in response to the changing needs of British capital. These can be periodised into two distinct epochs characterised by different forms of accumulation: a) the rule of the British East India Company and b) the British Raj.

In each period, legal institutions and laws of the colonial state were created, transformed and even subordinated to native customs to produce an institutional environment conducive to the colonial 'drain'.Political stability took precedence over economic considerations, legal institutions lagged behind economic developments and sometimes the colonial state even impeded economic development. The following sections will consider each period of accumulation in light of their respective legal and juridical arrangements.

I COMPANY RULE (1757 - 1858)

The early stages of British colonialism were marked by the supremacy of the British East India Company. Originally set up as a trading company with a monopoly on Asian trade sanctioned by Britain, the Company began a formal conquest of India by the mid-18th century.[4] By 1813, it had overrun the weak Mughal Empire and the majority of India was under direct or indirect Company control.[5] The Company now faced a unique historical task as a corporation in assuming the role of a quasi-state, attempting to create a juridical framework to supervise the territories over which it now held dominion. Ananta Kumar Giri notes that, unlike other British colonies that were conquered by the state and simply assumed the political system of the metropole, the British had to construct an entirely new system of political and juridical administration in India.[6]

The principal source of surplus extraction in early colonial India was the levy on land revenue imposed on behalf of the Sovereign.[7] Under the Mughal regime, surplus was distributed between members of the ruling class and an intermediary class of right-holders on land known as *zamindars*. When the British East India Company took formal authority in 1765, it acquired the right to collect the same land taxes.

However, land tax was not the only form of surplus accumulation in early colonial India. Trade in primary commodities was also one of the features of colonial underdevelopment: opium to China, indigo and cotton to Britain. Trade in agricultural products accounted for about 27 per cent of Britain's exports to Africa in the 18th century and helped finance Britain's role in the Transatlantic Slave Trade. This was represented as an export surplus with the rest of the world, however India did not see any of these profits. The tax revenues collected from Indian agrarian producers, in a cruel irony, were used to fund their own exports to Britain. This drain of wealth was central to the process of British industrialisation – in 1801, the revenues from Indian taxation and trade constituted 84% of Britain's capital formation.

Legal institutions had a complex relationship with this process of surplus extraction. Specific juridical instruments utilised by colonial authorities were integral in creating an institutional environment conducive to colonial extraction.[8] The Permanent Settlement of 1793, the beginning of the body of Anglo-Indian law that ruled Bengal, aimed to create private property rights and a 'free market' in order to stimulate production and ultimately 'emancipate' the individuals from traditional barriers to market exchange. Nonetheless, there was a significant disparity between theory and practice.

Before the collection of tax revenues and market exchange could occur, the Company needed to set up a functional medium for organising revenue collection. Traditional methods of agrarian organisation were a significant impediment for the East India Company, who wanted to facilitate inter-community and inter-regional networks of

production and trade. Ananta Kumar Giri argues that in classical Indian society, legal institutions were subsumed under an ideal spiritual authority.[9] With respect to the legality of commercial transactions, mercantile and artisanal castes were religiously forbidden from interacting with other communities.[10] These divine rules had a powerful normativity, because deviation from them is assumed to lead to anarchy and retribution.

The introduction of private property rights was presumed to Westernise and deviate from the spiritual-religious basis of land ownership, thereby creating a coherent and systematic basis for revenue collection. The Permanent Settlement established an independent judiciary whose primary focus was the protection of individual claims to property and the enforcement of contracts regarding the sale and transfer of land.[11] Property rights were offered to zamindars in exchange for a fixed yearly fee and the rights were legally recognised: able to be sold and protected from arbitrary interference by the state.[12] Prima facie, it appeared as if British colonial law 'emancipated' the commercial subject from crippling religious restrictions and facilitated the development of a European style homo-economicus.

In reality, attempts to regulate commercial transactions entrenched the most rigid traditional practices. The Permanent Settlement necessarily had to integrate religious mercantile customs as law, lest they face social and political resistance from local elites whose power rested in religious authority (Brahmins) or whose interests rested in preserving the existing (caste-based) commercial order. Despite the introduction of a market in property rights, public law rules evolved to recognise 'ancestral property' as a category separate from normal private property, and validated caste-based differential tax rates. Considering that the Company's primary imperative was the maximisation of land revenues, the state tended to selectively recognise the property rights of groups who could either function as intermediaries in the collection of revenue, or groups who inherited access to productive systems. These groups were either zamindars or caste-based feudal landlords, both of whom had been central institutions of the Mughal regime. In 1819, zamindari middlemen acquired official legal status and became known as '*patnidars*.'[13] Patnidars and caste-based landlords became a bedrock of support for British colonial authorities, and it was through their collaboration that larger and larger sections of the subcontinent fell under British control.

The Company's attempts to create a novel legal arrangement for the creation of a modern, European style 'free' market were unsuccessful. However, this is not to say that law was an irrelevant factor during the early periods of British colonialism. Legal institutions were central to the collection of land revenues, economic exchange and political stability, even if they departed from their original 'ideal' purpose. The following section will consider what forms of surplus extraction were dominant during the British Raj, and how legal institutions evolved to facilitate these new modes of accumulation.

II THE BRITISH RAJ (1857 - 1947)

Until the mid-19th century, British rule in India was largely indirect. While the Company was *diwan* (the official ruler) in Bengal, in other strongholds it exerted influence via weak proxy rulers such as the Maharaja of Baroda and the Nizam of Hyderabad. This would change drastically with the First War of Independence of 1857, in which Indian soldiers of the British army incited an armed struggle that would engulf Northern India. When the mutineers were finally subdued, the British East India Company was dissolved and its holdings were brought under control of the British Crown. This was the period of the British *Raj*.

Modes of surplus extraction had changed significantly by the 1860s. Notably, there was a decline in the institutions of the mercantilist state that the Company had assumed control over. Primarily, direct taxation became less central in the process of extracting surplus from Indian agriculture. Faisal Chaudhary points to a general inflationary crisis that gripped agrarian India as the material cause of this change.[14] It was not politically expedient to regularly raise land taxes, nor could they functionally be raised regularly enough to keep up with the state's growing revenue demand. At the same time, the Raj hoped to increase Indian agricultural production for the world market and to turn India into a market for British manufacturing exports. All of these necessitated a new mode of expropriation of the peasantry: finance.

In light of declining value and inflation in rural India, inflows of foreign finance and merchant capital became central to the agrarian production process. Manufacturers in Britain wanted to increase production to boost prices and to ensure a continual supply of raw agricultural products, and they found they could directly insert themselves into the production process if they provided the initial capital for production.[15] British finance was far from just a benign attempt to boost Indian production and export revenues – debt accompanied the credit provided to Indian farmers and became a nefarious form of surplus extraction. Interest repayments could be two to three times a farmer's yearly revenue.[16] The Bengal Provincial Banking Enquiry Committee reported the existence of a kind of poverty which, 'while not amounting to insolvency, makes for precarious and uncertain living, and it is this which is the real cause of indebtedness among agriculturists in Bengal.'[17]

The state and law had an intimate relationship to this period of colonial extraction, insofar as it produced the operative conditions that enabled finance to penetrate agrarian society. The nexus of state and finance was first represented through the Raj's regular manipulation of the pound-rupee exchange rate and their intervention in currency matters to provide liquidity or curb inflation. More importantly, legislation relating to rent and revenue collection was central to the new British strategy of 'opening up' India as a market for manufactures and as an exporter of agricultural commodities. The *Rent Act* of 1859 recognised that Indians could never produce enough to export or have enough income to purchase manufactured goods if their crippling rent and land revenue burdens continued (as they had under the Company).[18] The Rent Act called for fair and equitable rents, restricted the power of Zamindars and ultimately overrode many of caste-differentiated rents. This legislation allowed for British capital penetration into the countryside, as peasants could begin accessing credit once their revenue burden was lifted.

This process continued more or less unabated until the end of the British raj. Peasant struggle saw the introduction of checks and balances into the debt system with the *Deccan Agriculturist Relief Act* of 1879.[19] But despite minor changes to the operation of the financial system and changes to which crop would be exported on the world market (opium, jute, cotton etc.), 3.2 billion GBP were extracted from India to Britain between 1871 and 1916.[20]

III CONCLUSION

It is not coincidental that so much of the Indian national liberation struggle was rooted in the struggle of the *Kisans* (peasants). The laws of colonial underdevelopment focused on extracting surplus from agrarian society, impoverishing the Indian peasantry in the process. At the same time we can see the seeds of the post-liberalisation Indian economy, marked by farmer suicides, drought, corporate land-grabs and rural impoverishment, in the legal forms and political economy of colonial India.

There can be no doubt that British colonialism was a parasitic and destructive influence on Indian society. While revisionist history in Britain seeks to revive the notion of a benevolent, paternalistic colonialism, it is important to recognise the material harms of colonialism on Indian society. ▫

[1] Dadabhai Naoroji and Chunilal Parekh, *Essays, Speeches and Writings* (Bombay, 1887) 32-33.

[2] Bruce Gilley, 'The Case for Colonialism', (2017) *Third World Quarterly* 1.

[3] Aditya Mukherjee, 'Empire: How Colonial India Made Modern Britain', (2010) 45 (50) *Economic and Political Weekly* 73.

[4] Phillip Lawson, *The East India Company: A history* (Longman, 1993).

[5] Ibid.

[6] Ananta Kumar Giri, 'The Rule of Law and Indian Society: From Colonialism to Post-Colonialism' in Pietro Costa and Danilo Zolo (eds.), *The Rule of Law: History, Theory and Criticism* (Springer, 2007) 587, 592.

[7] Irfan Habib, 'Colonisation of the Indian Economy: 1757-1900' (1975) 3 (8) *Social Scientist* 23, 24.

[8] Ibid, 25.

[9] Giri (n 6) 588.

[10] Tirthankar Roy, 'Empire, Law and Economic Growth' (2012) 47 (8) *Economic and Political Weekly* 98, 101.

[11] Peter Robb, 'Law and Agrarian Society in India: The Case of Bihar and the Nineteenth Century Tenancy Debate' (1988) 22 (2) *Modern Asian Studies* 319, 320.

[12] David Washbrook, 'Law, State and Agrarian Society in Colonial India' (1981) *Modern Asian Studies* 15 (3) 649, 652.

[13] Anand Swamy, 'Land and Law in Colonial India' in Debin Ma and Jan Luiten van Zanden (eds.) *Law and Long-Term Economic Change* (Stanford University Press, 2011) 139, 144.

[14] Faisal Chaudhary, 'A Rule of Proprietary Right for British India: From revenue settlement to tenant right in the age of classical legal thought' (2016) 50 (1) *Modern Asian Studies* 345, 362.

[15] Sugata Bose, *Peasant Labour and Colonial Capital: Rural Bengal since 1770* (Cambridge University Press, 1993) 57.

[16] Ibid 126.

[17] Ibid 123.

[18] Faisal Chaudhary, 'A Rule of Proprietary Right for British India: From revenue settlement to tenant right in the age of classical legal thought' (2016) 50 (1) *Modern Asian Studies* 345, 364.

[19] Anand Swamy, 'Land and Law in Colonial India' in Debin Ma and Jan Luiten van Zanden (eds.) *Law and Long-Term Economic Change* (Stanford University Press, 2011) 139, 149.

[20] Aditya Mukherjee, 'Empire: How Colonial India Made Modern Britain' (2010) 45 (50) *Economic and Political Weekly* 73, 77.

commentary:

Reflections on the incapacity of prevailing international legal frameworks to address the problems faced by climate refugees.

DISPARATE IMPACT: INTERNATIONAL LAW FAILS TO PROTECT CLIMATE DISPLACED POPULATIONS

BILLIE TRINDER
INTERNATIONAL AND GLOBAL STUDIES III

When Sahia was 16, she watched her first home collapse into a river. From when she noticed the widening cracks in the mud floor, she had only a few hours to retrieve her belongings before the riverbank disappeared.[1] Another Bangladeshi woman, Renu Bibi, speaks of boats passing over where her family's land once lay.[2] Their stories are not unique. While in developed nations, climate catastrophe is something we anticipate and hope to prevent, more vulnerable populations can already reflect on what has been lost.

Evidently, while climate displacement represents one of the biggest human rights and collective action challenges of the 21st century, its burdens are not borne equally. Pre-existing social and environmental vulnerabilities play a significant role in determining which populations are most likely to be displaced. That the most abject consequences are therefore felt by already disadvantaged populations of developing states like Bangladeshis is a cruel injustice. These developing states are the least responsible for greenhouse gas emissions. In this low lying state it is expected that by 2050 climate change will force one in seven people from their homes. Ironically, while anterior vulnerabilities make some populations more susceptible to displacement in the first place, in doing so they simultaneously make it more difficult to establish a legal framework for protecting them when they are forced to move. Presently, when migrants cross-borders to escape environmental hazards they fall through a gaping hole in international law, perpetuating the threat to their human rights.

Factors that compound the effects of climate displacement can be environmental, such as closeness to sea level, or social, like a weak political system. Nowhere is this more evident than in Bangladesh. In this flat, low lying state, citizens are increasingly imperilled by regular flooding. In combination with global warming and subsequent rises in sea level, this is predicted to cause the loss of up to 25% of Bangladesh's landmass in coming decades.[3] The state is also marked by a vast network of rivers, and heavier rainfall has resulted in chronic erosion. Eye witnesses recall entire villages disappearing in days.[4] The population of river islands exceeds four million people, who are immediately threatened by this phenomenon.[5]

Reliance on climate sensitive natural capital makes Bangladesh further at risk. Agriculture is the most important sector of the State's economy, making the impacts of salinity intrusion on crop production and infrastructure especially devastating, while endemic poverty and food insecurity also renders the population less adaptable. Furthermore, when migrants cross the border into India, existing frictions between ethnic groups amplify the risk of violent conflict. In the Northern Indian state of Assam, the influx of migrants from Bangladesh agitates existing ethnocultural tensions. An anti-immigrant backlash came to a head on the 20th of July 2012, when riots in Kokrajhar resulted in the destruction of approximately 500 villages by arson, and the deaths of almost eighty Bengali immigrants.

These and other migrants who traverse borders to escape the effects of climate change are offered no axiomatic protections under international law. While the term 'climate refugee' has gained recognition in the spheres of journalism and political theory, legally, climate refugees do not exist. Under the 1951 Convention relating to the status of refugees, a refugee is forced out of their country by a 'well-founded fear of being persecuted'. Therefore, though someone displaced by climate change may be able to show equivalent harm, that they are not recognised as refugees under international law leaves them without the legal protections extended to refugees – critically, the right to seek asylum.

Some argue that the definition of a 'refugee' should be expanded to include those displaced by climate change. However, the pre-existing vulnerabilities that make populations susceptible to displacement in the first place complicate this, as it is difficult to establish a direct causal link between climate change and movement. People rarely move for one isolated reason, and this is especially true in regard to climate migration. In most cases, distinguishing between climate migrants and economic migrants is difficult, and as such, the issue of whether or not a person can be classified as a climate refugee is problematic. How can someone be offered protection from the harms caused by global heating, if the fact that global heating is the cause of these harms cannot be established?

The applicability of refugee law to climate migrants is further constrained by the requirement that a state or non-state actor be responsible for their suffering. An example of this is withholding humanitarian aid from marginalised groups.[6] However, as is evident in the case of Bangladesh, the effects of climate change in combination with contextual disadvantages (not including persecution on the part of a state or non-state actor) is and will continue to be sufficient to compel the movement of a significant population. As a consequence of this, cases in which a person would be protected under international law would likely be the exception rather than the rule. Thus, existing refugee law is not likely to provide adequate protection to climate migrants as a whole.

Additionally, despite the effects of global heating and subsequent displacement having significant implications for the enjoyment of human rights by the world's most vulnerable, human rights law also offers little protection to cross-border climate migrants. That human rights lie in the balance is clear. Salinification alone could undermine access to water, which is considered implicit in the right to the highest attainable standard of health and an adequate standard of living. In addition to this, climate change threatens access to sufficient food, shelter and clean air, among other things.[7] However, international human rights law requires only that a state is held responsible for the rights of its citizens and others within its jurisdiction or effective control.

While proponents of environmental justice (those who advocate for the equitable sharing of the burdens and benefits of climate change) argue that states should be held accountable for the impacts of their greenhouse gas emissions, the multi-causal nature of climate change, and the difficulties associated with establishing a direct causal link between global heating and any specific instance of climate migration, means that the emission of greenhouse gasses is not likely to meet the standard of effective control under international human rights law. As Mayer notes, 'even if a state has, or should have, effective control over its level of greenhouse gas emissions, it surely does not have control over the remote consequences of climate change on the other side of the world, several decades later.'[8] In the absence of clear rights to enter and stay due to the consequences of climate change, states have taken action to create barriers for entry. To stymie the flow of undocumented immigrants from Bangladesh, India has constructed a militarised fence along 70% of the shared border.[9] This means that people could be trapped in the case of a sudden onset disaster like a cyclone.

A further challenge to establishing protections under international law also emanates from the inequitable nature of the problem. In a cruel irony, an asymmetry between motivation and power hinders effective negotiation between states. Since developed nations experience and therefore perceive the impacts of global heating as being less, they have less incentive to pursue solutions. Additionally, developed states are responsible for a far greater share of historical greenhouse gas emissions. This means that in accordance with the 'common but differentiated responsibilities' principle, formalised by the United Nations Framework Convention on Climate Change in 1992,[10] these states would be required to shoulder a greater portion of the costs and burdens associated with a legal framework, hence acting as a disincentive. Large costs would likely be imposed on the United States for example, which is not one of the nations most at risk.[11] It is telling that the majority of G20 countries are currently not on track to meet commitments made in the Paris agreement, and that the United States has withdrawn from it altogether.

An obvious yet vital factor that makes the impact of this even greater is the power imbalance between developed and developing nations that typifies the international order. For this reason, those with the impetus to act do not have the power to do so. On the whole, it is developed nations who wield the greatest influence over international organisations like the UN, which are key forums for negotiating the issue, with investment in diplomacy, per capita wealth and economic output being some of the strongest correlates of influence in the secretariat.[12]

As time goes on, the consequences of climate change will only worsen. Reflection on the fate of climate refugees in Bangladesh demonstrates that without a legal framework to help protect displaced populations, the negative impacts will be far greater. Any efforts to establish such a framework must somehow negotiate the tension between recognising differences in both responsibility and burden, whilst also encouraging international cooperation, especially from developed nations. The world's most vulnerable populations are counting on it. ▫

[1] Sonja Ayeb-Karlsson, *Gibika Final Research Report* (Gibika Project Report, 15 September 2018) 34.

[2] Environmental Justice Foundation, 'Climate Displacement in Bangladesh' (Report, 2018).

[3] Marcus Arcanjo, 'Climate Migration: A Growing Global Crisis' (Report, Climate Institute, 2018).

[4] Environmental Justice Foundation (n 2).

[5] Ibid.

[6] United Nations Human Rights Council, *The Slow onset effects of climate change and human rights protection for cross-border migrants*, UNHRC, 37th sess, Agenda Items 2 and 3, UN Doc A/HRC/37/CRP.4 (22 March 2018) 23.

[7] Ibid 16.

[8] Benoit Mayer, 'The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework' (2011) 22(3) *Colorado Journal of International Environmental Law and Policy* 357, 387.

[9] Megan Darby, 'What will become of Bangladesh's climate migrants?', *Climate Home News* (online at 14 August 2017) <https://www.climatechangenews.com/2017/08/14/will-become-bangladeshs-climate-migrants/>.

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

[11] Jonathan Carlson, 'Reflections on a Problem of Climate Justice: Climate Change and the Rights of States in a Minimalist International Legal Order' (2009) 18(1) *Transnational Law and Contemporary Problems* 45, 48.

[12] Paul Novostad and Eric Werker, 'Who runs the international system? Nationality and leadership in the United Nations Secretariat' (2019) 14(1) *The Review of International Organizations* 1, 3.

PART TWO

THE CAPABILITY:
THE OTHER FACEAPP

An investigation of recent technological developments putting Australians' privacy at risk, and the legal structures that facilitate them.

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ARTS (HONS) / LAWS IV

What is the difference between a Russian app developer and an Australian government?

Answer: a Russian will ask permission before walking off with facial image data.[1] As a result of the Intergovernmental Agreement on Identity Matching Services[2] and legislative changes at the State level,[3] it is now permissible for facial image data held by the government, such as your driver licence photo, to be 'repurposed' for inclusion in Australia's National Facial Biometric Matching Capability - ominously referred to as 'the Capability.'

While such a name would not be out of place on the pages of a dystopian sci-fi novel, the Capability comes to us from the pages of the Hansard; and its purpose, we are reassured, is to 'make Australians safer'.[4] These words are hardly comforting: commentators fear that the Capability will dramatically undermine the little privacy protections we currently have, or that it will be misused to prosecute 'petty crime and civil cases' in an all too familiar process of 'scope creep.'[5] Seeking to quell such worries, the Federal Government has assured us that access to the Capability's Facial Identification Service will be 'restricted to agencies with law enforcement or national security related functions',[6] and that '[i]t will not be used for minor offences such as littering or parking infringements'.[7] Nevertheless, are such statements compelling?

Council of Australian Governments, *Special Meeting of the Council of Australian Governments on Counter-Terrorism* (Communique, 5 October 2017); Michael Keenan, 'New Face Verification Service to Tackle Identity Crime' (Media Release, Minister for Justice and Minister Assisting the Prime Minister for Counter Terrorism, 16 November 2016).

I WELL-FOUNDED CONCERNS

If recent history is anything to go by, such assurances should be taken with a grain of salt. The kind of 'scope creep' that is feared by commentators has already been widely observed in the use of consorting laws in New South Wales[8] and, very recently, has reportedly occurred in relation to the Commonwealth's metadata retention laws.[9] These examples demonstrate that such laws can too easily end up targeting groups of people who were not the intended subjects of the legislation; or be applied for unintended and illegitimate purposes.[10] Nor is it fanciful to have concerns about privacy. During the recent review of the Bill to implement the Capability's *Face Identification Service*,[11] by the *Parliamentary Joint Committee on Intelligence and Security* (PJCIS), over twenty submissions were received. The vast majority of these were highly critical of the impact the FIS would have on privacy.[12] Salient among these criticisms was the issue of images being collected without consent, or repurposed without consultation. Many of these additionally expressed concern over the increasing number of exceptions being created to the Privacy Principles—these were developed in response to Australia's obligations under the International Convention on Political and Civil Rights.[13] Thirdly, they were critical of the likely chilling effect they would have on people's behaviour in public spaces by removing our 'right to anonymity.'[14]

Nearly all the submissions expressed further concerns concerning the broad discretionary powers of the Bill, the details of which will be established through delegated legislation.[15] The problem with this law-making formula is that it reduces the degree of parliamentary scrutiny and oversight that occurs. While this approach to law making is frequently necessary in a modern parliamentary democracy, this approach is misplaced in a Bill that deals with such a fundamental right, arguably a human right,[16] like the right to privacy.

II UNDER THE HOOD OF THE CAPABILITY

To better understand these, and the concerns I raise below, it would be helpful to describe the functional architecture of this system. The Capability is designed to offer two separate Identity Matching Services (IMSs). The *Face Verification Service* (FVS), implemented in 2015–16, is used for 'one-to-one' image matching to verify the identity of applicants for visas, passports and citizenship.[17] The FVS only shares data between a few Commonwealth departments with the explicit consent of the applicant. By contrast, the *Face Identification Service* (FIS) will provide a 'one-to-many' image based identification service that can match a photo of an unknown person against multiple government records to help establish their identity.[18] This means that a still image of your face can be captured from any video feed. This includes 'CCTV, police body-worn cameras (BWCs) and surveillance drones',[19] or social media images, and then checked against photographs contained in any of the States or Territories' driver's licensing databases and the Commonwealth's passport, visa and citizenship database.[20] Conversely, this also means that your photograph, which you provided for the purpose of gaining a driver's licence or proof of age card, could be included in the set of facial images that are deemed to match a person of interest, such as a perpetrator of a terrorist act.

III AVOIDING SCRUTINY: THE STATUTORY SAFETY NET

If application of the FIS was limited to the original mischief it was intended to address,—namely, counter-terrorism—then the benefits arguably outweigh the costs of the intrusion to privacy. However, the scope of the FIS is far wider. As proposed, there are five permitted purposes for requesting facial identification: a) preventing identity crime; b) general law enforcement; c) national security; d) protective security; and e) community safety.[21] Under the last category, community safety, the draft policy on the FIS states that it can be used to identify victims of disasters, missing persons or 'persons of interest' for public safety purposes.[22] This mixing of core and peripheral purposes, a conflation of the necessary with the merely useful, is legislatively dubious, to say the least. At its worst, it may have been deliberately structured in this manner to create a 'statutory safety net', one which would avoid judicial scrutiny of any uses of this power that could otherwise be deemed illegitimate and illegal.

This is because, under the community safety purpose, the FIS can be lawfully used to identify 'an individual who is *at risk of*, or who *has experienced, physical harm*'[23], or 'who is *reasonably believed to be involved with a significant risk to public health or safety*'.[24] Satisfying such minimal criteria would not be very difficult at all. Consequently, there is little at stake for the requesting agency to restrain the use of this power. If the agency gets it wrong under one purpose, they may avoid sanction because there is a much lower threshold purpose to capture it.

The problem created by the structure of the legislation is further compounded by the degree of discretion allowed. Unlike the other permitted purposes, the community safety purpose is not subject to a minimum threshold of seriousness. By way of comparison, under the category of general law enforcement, a standard request requires that there is a triggering offence which carries a maximum penalty of no less than three years.[25] The contrast that appears between the circumstances that warrant the use of the FIS for its core purpose of counter-terrorism and the peripheral purposes, such as general law enforcement and community safety seems stark. Indeed, given the breadth of the discretion involved, it is hard to see why these latter purposes should be included in the same legislation, or how the benefits could possibly outweigh the interests of privacy.

IV COLLATERAL DAMAGE: THE UNINTENDED TARGETS

When this is taken in the context of a legislative regime that requires very little reporting and review,[26] the FIS could easily slip into inappropriate and disproportionate usage. Those who are most likely to suffer its adverse consequences are people who are unable to avoid being photographed. This does not target wealthy celebrities, but rather, the homeless or the otherwise disenfranchised groups who are frequently in the public space, and are less equipped to challenge inappropriate exercise of this proposed power. This certainly has been the experience in the case of the consorting law in New South Wales, and, given the bundling of disparate purposes in the legislation, there is little reason to think that it will not result. The consorting law was passed to target criminal organisations and outlaw motorcycle gangs. However, as the New South Wales Ombudsman found, that law has been used more frequently by general duties officers than specialist crime groups,[27] and has had a disproportionate effect on Indigenous communities, the homeless and young people.[28]

There are additional reasons to be concerned with the least controversial of community safety justifications: the use of the FIS to identify missing persons. Unlike other countries, where disappearances and abductions are prevalent, in Australia the 'reasons are many and varied' as to why people go missing;[29] and it can reasonably be assumed that a high percentage of those who 'go missing' are motivated by necessity. Certainly, some do so in order to flee abusive relationships and domestic violence. Under these circumstances, it is quite likely that the abuser would seek to re-establish control by locating their victim through a missing persons' report. Under this legislation, the FIS could be invoked under the guise of a 'legitimate' report, triggering perverse outcomes. This scenario may reflect the reality for persons in witness protections schemes, who are consequently afforded explicit protections against inadvertent identification in the draft policy.[30] However, there are no equivalent safe-guards regarding the identification of missing persons generally. If some measure of protection was put in place regarding the identification of missing persons generally, it would still have a detrimental effect—merely knowing that it could be possible reproduces the abuser-victim dynamic.

Alternately, some people go missing in order to escape their past. Should we stop them from doing so? Absent a context of criminal history, there is no need to bar individuals from starting afresh. Is this not, to draw on a literary analogy, exactly why Jean Valjean is valourised in Victor Hugo's *Les Misérables*?

V WELL-FOUNDED CONCERNS

Given that the *National Facial Biometric Matching Service* came into effect through an Intergovernmental Agreement rather than boisterous debate in the parliament or the media, you might assume that Capability, and in particular its *Face Identification Service* should not trigger alarm. Indeed, this response is intended by our governments, Commonwealth and State. However, despite these reassurances and the swift passing of enabling legislation, there are well-founded grounds for concern in permitting the use of the FIS, as proposed under the Identity Matching Services Bill.

The intrusions on our rights to privacy, even in public spaces, and the repurposing of our facial image data should not be downplayed. These changes are likely to have a subtle, yet pervasive effect on our society. The potential of these powers to creep beyond the intended legitimate scope is apparent in the legislative regime, which in some respects bears a remarkable similarity to that of the highly criticised consorting laws; in other respects, it appears to be even more vulnerable to inappropriate and illegitimate use. As recent legislative history has shown, laws with broad discretion, low bars, and minimal reporting are easily abused. They can be invoked to target the most marginalised groups, such as homeless populations and our Indigenous communities. Undoubtedly, the use of FIS presents considerable benefits, particularly in what is arguably its central purpose of counter-terrorism. However, using such technology for the peripheral purposes within such a loose legislative framework is wholly unwarranted. ▫

[1] Victoria Bell, 'Security Fears Over Russian Aging App "FaceApp" As Experts Warn It Can Access ALL of Your Pictures Even If You Say Not To', *Daily Mail* (online, 17 July 2019) <https://www.msn.com/en-au/news/world/security-fears-over-russian-aging-app-faceapp-as-experts-warn-it-can-access-all-of-your-pictures-even-if-you-say-not-to/ar-AAFsFda>.

[2] Council of Australian Governments, *Intergovernmental Agreement on Identity Matching Services*, signed 5 October 2017.

[3] *Road Transport Amendment (National Facial Biometric Matching Capability) Act 2018* (NSW); *Police and Other Legislation (Identity and Biometric Capability) Amendment Act 2018* (Qld).

[4] Council of Australian Governments, *Special Meeting of the Council of Australian Governments on Counter-Terrorism* (Communique, 5 October 2017); Michael Keenan, 'New Face Verification Service to Tackle Identity Crime' (Media Release, Minister for Justice and Minister Assisting the Prime Minister for Counter Terrorism, 16 November 2016).

[5] See, eg, Professor Katina Michael as quoted in Jake Evans and Clare Sibthorpe, 'Facial Recognition: Feature Creep May Impose Government's Software in Our Lives, Expert Warns', *ABC News* (online, 5 October 2017) <https://www.abc.net.au/news/2017-10-05/facial-recognition-coag-privacy-concerns-about-the-capability/9017494>.

[6] Department of Home Affairs (Cth), 'Fact Sheet: Face Matching Services' (2017).

[7] Ibid.

[8] See, eg, Dominic Keenan, 'Law and Disorder: Populist Legislating and its Consequences' (2017) 5 *Dissent* 30.

[9] Mark Schliebs, 'Data Snooping Free-For-All: Loophole Exploited', *The Australian* (online, 31 July 2019) <https://www.theaustralian.com.au/nation/data-snooping-freeforall-loophole-exploited/news-story/be5c6c6f6c4dc095fdc70ed662814bfa?from=htc_rss>.

[10] In the case of the consorting laws, such as the homeless or indigenous persons—as opposed to the intended targets being criminal organisations or outlaw motorcycle gangs. In the case of the metadata retention laws, these have been used by a range of organisations not originally intended for minor criminal matters.

[11] Identity-Matching Services Bill 2018 (Cth).

[12] The Committee received submissions from 20 separate bodies, with the vast majority of these raising implications for privacy as a key concern: Joint Select Committee on Intelligence and Security, Parliament of Australia, *Review of the Identity-matching Services Bill 2018 and the Australian Passports Amendment (Identity-matching Services) Bill 2018* (Submissions Received, April 2019) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/IMSBill/Submissions>.

[13] Office of the Australian Information Commissioner, 'The right to privacy in the digital age: Submission to the Office of the United Nations High Commissioner for Human Rights (OHCHR),' (30 April 2018).

[14] Andrew von Hirsch, 'The Ethics of Public Television Surveillance' in Andrew von Hirsch, David Garland and Alison Wakefield (eds), *Ethical and Social Perspectives on Situational Crime Prevention* (Hart Publishing, 2000) 59.

[15] Law Reform Council of Australia, Submission No 8 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Identity-matching Services Bill 2018 and the Australian Passports Amendment (Identity-Matching Services) Bill 2018* (21 March 2018); Marcus Smith, Submission No 17 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Identity-matching Services Bill 2018 and the Australian Passports Amendment (Identity-matching Services) Bill 2018* (27 June 2018).

[16] Liz Campbell, Submission No 20 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Identity-matching Services Bill 2018 and the Australian Passports Amendment (Identity-matching Services) Bill 2018* (2 October 2018).

[17] Keenan (n 4).

[18] Department of Home Affairs (Cth) (n 6) 1.

[19] Monique Mann and Marcus Smith, 'Automated Facial Recognition Technology: Recent Developments and Approaches to Oversight' (2017) 40(1) *University of NSW Law Journal* 121, 125.

[20] Department of Home Affairs (Cth) (n 6) 1.

[21] Identity-Matching Services Bill 2018 ss 6-8.

[22] Department of Home Affairs (Cth), 'Face Identification Service (FIS) Access Policy: National Facial Biometric Matching Capability', (August 2018) [4.1.c.].

[23] Ibid [4.1.c(i)].

[24] Ibid [4.1.c(ii)].

[25] Ibid [5.9.].

[26] Identity-Matching Services Bill 2018 ss 28-29.

[27] NSW Ombudsman, 'The Consorting Law: Report on the Operation of Part 3A, Division 7 of the Crimes Act 1900' (Report, April 2016) 34-5 [6.6].

[28] Ibid 61-83 [8.1]-[8.3].

[29] 'The reasons for going missing are many and varied and can include mental illness, miscommunication, misadventure, domestic violence, and being a victim of crime': 'Why People Go Missing', *Australian Federal Police* (Web page, 2017) <https://missingpersons.gov.au/about/why-people-go-missing>.

[30] Identity-Matching Services Bill 2018 s 17(2)(d)-(e).

A MODEST PROPOSAL:

A CALL FOR TRUTH REQUIREMENTS IN AUSTRALIAN ELECTIONS

Reflections on the failures of current legislation to adequately protect the integrity of Australian elections.

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'The vote of every elector is a matter of concern to the whole Commonwealth [...] the voter shall not be led by misrepresentation or concealment of any material circumstance into forming and consequently registering a political judgment different from that which he would have formed and registered had he known the real circumstances.' [1]

The 2019 federal election provided Australians with a thorough demonstration of the potential for unregulated political discourse to devolve into a battle of fiction rather than fact. Enabled by an electoral act devoid of any requirement of truth in political advertising,[2] politicians and campaigners around the country fought a campaign that, in many cases, unfolded in a world altogether divorced from the established policies of their opponents and reasonably honest practice.

I THE NEED FOR A TRUTH REQUIREMENT

The misrepresentations which pervaded the 2019 federal election can be usefully divided into two separate categories. The first category, which dominated in the lead up to the election, was comprised of misrepresentations concerning the policies of opposing candidates and parties. For example, Liberal and One Nation candidates warned voters of Labor's 'secret' plans to introduce a 40% inheritance tax, despite no such policy existing and Labor's repeated denial of any intention to introduce one.[3] Similarly, the right-wing advocacy group Advance Australia ran a series of advertisements claiming that independent candidate for Warringah, Zali Steggall, supported Labor's franking credits policy, despite patent evidence to the contrary.[4] The second category of misrepresentation was aimed more specifically at manipulating voters in the process of casting their ballot. Perhaps the most egregious example of this was the imitation of the colour and style of Australian Electoral Commission ('AEC') signage in Chinese-language signs outside a polling booth in the seat of Chisholm, which stated that the 'correct' way to vote was by putting a number 1 next to the Liberal candidate.[5] A similar case occurred in the highly contested seat of Dickson, where how-to-vote cards purporting to promote the Greens candidate surreptitiously instructed voters to preference the Liberal candidate, Peter Dutton, second.[6]

Because Commonwealth electoral law does not prohibit either category of misrepresentation, the AEC was powerless to respond to the hundreds of complaints lodged against instances of this sort of conduct. This outcome is embraced by many conservative commentators, who have dismissed the insertion of a 'truth requirement' in Commonwealth electoral law as both unworkable and 'elitist'.[7] According to such critics, the truth is best left to be determined by the discerning voter, resting on the logic that lies will naturally fail to gain traction. This approach is clearly far from effective and overlooks the glaring vulnerability of voters alienated from the democratic process by way of language barrier or education level. Through an analysis of potential avenues for reform, this essay will argue that not only is a truth requirement in Commonwealth political advertising law workable, but urgently necessary.

II A HISTORY OF TRUTH IN POLITICAL ADVERTISING IN AUSTRALIA

As it currently operates, Commonwealth law has only one requirement in respect of truth in political advertising. Section 329 of the *Commonwealth Electoral Act 1918* (Cth) stipulates that a person shall not distribute anything that is likely to mislead or deceive an elector 'in relation to the casting of [their] vote'. The High Court endorsed an extremely narrow interpretation of this provision in *Evans v Crichton-Browne*,[8] where it held that the provision relates only to the physical act of casting a ballot and not to the preceding formation of a political judgment. Essential to the Court's reasoning was the determination that the provision would be unworkable if its application extended to predictions or statements of opinion or belief – treating political promises as legally binding guarantees, it was thought, would stifle election campaigning to the point of near redundancy.[9]

Parliament attempted to widen the effect of s 329 in 1983 with s 116(2) of the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth). The new provision prohibited the distribution of any material that was untrue and likely to be misleading or deceptive,[10] but also provided that it was a defence if the person did not know and could not reasonably be expected to have known that the statement in question was an offence under the section.[11] A few months after its assent, the new provision was hastily repealed on the recommendation of a second Parliamentary report,[12] which outlined precisely the issues foreshadowed in *Crichton-Browne*, as well as others: the provision was too wide to be workable and, problematically, would have the potential effect of rendering printers and publishers liable for their clients' mistruths.

For more than 30 years since, Commonwealth electoral law has remained static in respect of a truth requirement in political advertising, despite a pledge from former Prime Minister Julia Gillard to enact reform following Labor's election to government in 2010. The only notable deviation from the Commonwealth stance to be found in State law is confined to South Australia, in the *Electoral Act 1985* (SA). Passed in the aftermath of the tumultuous period between 1981-84, s 113 of the *Electoral Act 1985* (SA) draws from the lessons of Crichton-Browne and the subsequent attempt at reform to deliver a truth requirement unburdened by the problems that plague the issue at the Commonwealth level.[13] The provision prohibits the publication of an electoral advertisement that contains a 'statement of fact that is inaccurate and misleading to a material extent', [14] but allows for a defence if the defendant took no part in devising the content of the advertisement and could not reasonably have been expected to know that the statement was inaccurate and misleading. [15]

III REFORM OPTIONS

Though attempts to introduce truth in political advertising in Australia have been sporadic and perilous, Parliament should not be discouraged by this history. Successful reform has only three primary requirements and all are well within the bounds of feasibility.

Firstly, any new legislation must surmount the constitutional hurdle posed by the implied freedom of political communication present in the *Constitution*.[16] Secondly, new legislation must not meet the same fate as the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), meaning its operation must be confined to statements of fact, and not opinion or belief. Thirdly, the amending legislation must account for both of the two categories outlined earlier in this essay: statements of factual mistruth and deceptive statements related to the act of voting.

A Selecting the right model

If the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) hadn't been repealed so hastily, its life would likely have been cut short by judicial scrutiny and the freedom of political communication implied in the *Constitution*. Laws which burden this implied freedom will be rendered invalid if they do so without reference to a 'legitimate end' and in a 'reasonably appropriate and adapted' manner compatible with the system of representative government.[17] For that reason, anything resembling the broad and undefined language of the Federal Parliament's previous attempt at reform will likely suffer a similarly abridged existence at the hands of the High Court Justices.

Section 113 of the *Electoral Act 1985* (SA) presents a favourable model for equivalent Commonwealth law.[18] The provision survived a constitutional challenge in *Cameron v Becker*,[19] having been determined to appropriately protect the 'legitimate interest' of factual political discourse, and was used to successfully convict a political staffer responsible for attributing fabricated policy to an opponent (in a way not dissimilar to many of the examples drawn from the 2019 federal election). Of course, in the event that a similar provision is enacted at the Commonwealth level, individuals and parties may seek to evade a truth requirement by making a prediction rather than a statement of fact. An effective provision should not, however, be rendered ineffective by the simple employment of the future tense. Section 52(1) of the *Trade Practices Act 1974* (Cth), which prohibits commercial conduct that is misleading or deceptive or likely to mislead or deceive, offers a useful insight into how such behaviour might be mitigated. This provision is supplemented by s 51A, which provides that any representation with respect to future events made *without* reasonable grounds is to be taken as misleading. A similar provision in political advertising laws would prohibit unfounded claims such as those made about Labor's supposed plans to introduce a death tax. Of course, the courts would then be tasked with the difficult undertaking of separating reasonably held opinions from baseless predictions. There is nonetheless a substantial difference between the two, and the courts have proved capable of making the distinction.[20] A similar requirement would force political campaigners to make it abundantly clear when a prediction, for example one in relation to a death tax, is an opinion, rather than a statement based in concluded fact.

New laws will of course also require a provision specifically targeting the deceitful practices used to manipulate voters in the process of voting. There are already significant indications that the courts are open to prohibiting deceitful conduct designed to manipulate voters into recording a vote other than what they intended. Applying s 329 of the *Electoral Act 1918* (Cth) in *Peebles v Burke*,[21] the Federal Court suggested that the law as it stands may be interpreted to prevent conduct which may lead a voter to record a vote for a candidate other than that of the voter's actual choice. As far back as *Crichton-Browne*,[22] the High Court suggested that a statement misleading a voter about a candidate's party membership could fall within the ambit of s 329 of the *Electoral Act 1918* (Cth). Given this evidence, it seems highly likely that a provision borrowing from the language of s 52 the *Trade Practices Act 1974* (Cth) and s 113 of the *Electoral Act 1985* (SA) prohibiting the act of misleading a voter about whom to cast their vote for by way of intentional deception (such as the incidents in Chisholm and Dickson in 2019) would be well received.

IV CONCLUSION

In the era of fake news, the erosion of democratic institutions is all too often blamed on social media, television ratings, and the pursuit of advertisement revenue. While there is no doubt that these factors play a substantial role in the tainting of political discourse, the conversation surrounding this topic rarely looks to the law as a method of limiting the propagation of mistruth. Though it may be true that enforcing such laws will prove difficult, advocates should not accept that this fact negates the desirability of such laws altogether. The fact that a provision often goes unenforced is not a reason not to enact it at all – there is room in the law to enshrine the values that we believe to be important, even if their application is evasive. Almost ninety per cent of Australians agree in principle with truth in political advertising laws.[23] For the sake of those less engaged with Australia's tumultuous and at times confusing political process – for example the one third of the population born in another country,[24] or the one third with an education level of high school or below – it's time we create a national discourse more supportive of a fair and honest democracy. ▫

[1] *Smith v Oldham* (1912) 15 CLR 355, 362 (Isaacs J).

[2] *Commonwealth Electoral Act 1918* s 329.

[3] Christopher Knaus and Nick Evershed, 'False election claims spark push for truth in political advertising laws', *The Guardian* (online at 20 May 2019) <https://www.theguardian.com/australia-news/2019/may/20/false-election-claims-spark-push-for-truth-in-political-advertising-laws>.

[4] Ibid.

[5] Lisa Cox, 'Labor lodges complaint over Liberal Chinese-language signs they say 'deceived voters'', *The Guardian* (online at 18 May 2019) <https://www.theguardian.com/australia-news/2019/may/18/labor-lodges-complaint-over-liberal-chinese-language-signs-they-say-deceived-voters>.

[6] Digital Staff, 'Fraudulent how-to-vote cards told Greens voters to preference Peter Dutton', *7 News* (online at 27 May 2019) <https://7news.com.au/politics/federal-politics/federal-election-2019-fraudulent-how-to-vote-cards-told-greens-voters-to-preference-peter-dutton-c-119724>.

[7] Bernard Keane, 'Truth in political advertising: an idea whose time has gone', *Crikey* (online at 20 July 2016) <https://www.crikey.com.au/2016/07/20/truth-in-political-advertising/>.

[8] (1981) 147 CLR 169, 207-8 ('*Crichton-Browne*').

[9] Ibid.

[10] *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) s 116(2)(a).

[11] Ibid s 116(6).

[12] Joint Select Committee on Electoral Reform, Commonwealth Parliament, *Second Report* (Parliamentary Paper No 198, August 1984).

[13] (1981) 147 CLR 169.

[14] *Electoral Act 1985* (SA) s 113(2).

[15] Ibid s 113(3).

[16] *Commonwealth of Australia Constitution Act* (Cth) ('*Constitution*').

[17] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-68, as altered by *Coleman v Powers* (2004) 220 CLR 1, [92]-[96] (McHugh J), [196] (Gummow and Hayne JJ), [211] (Kirby J).

[18] See also Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *Truth in Political Advertising*, Report No 4, December 1996.

[19] (1995) 64 SASR 238.

[20] See *Hanna v Sibbons and Another* [2010] SASC 291, 191 [31-32] in which the court distinguished between a representation of fact and a representation of opinion relating to assertions that a political candidate had 'failed on crime'.

[21] (2010) 216 FCR 387, 390 [10].

[22] (1981) 147 CLR 169.

[23] The Australia Institute, *Truth in Political Advertising* (Media release, 10 July 2016).

[24] Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Catalogue No 2071.0, 28 June 2017).

A POOR REFLECTION: NSW ANTI-PROTEST LAWS UNDERMINING OF THE RIGHT TO PROTEST

NSW protest laws fail to reflect our cultural dialogue with protest and constitute an unreasonable intrusion on individual liberty.

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I INTRODUCTION

The right to protest is the ideological cornerstone of any robust democracy. Yet, in NSW, this right has been consistently marginalised by draconian anti-protest laws. This is not unique to NSW – Victoria and Tasmania have both passed laws aimed at suppressing protest, with mixed success.[1] In NSW, these laws, ostensibly aimed at curbing violent protest, significantly impinge peaceful protest. This essay shall argue that these laws are a poor reflection of our national engagement with protest, both historically and culturally. Indeed, the NSW legislative scheme reflects – as in, throws back without absorbing – our culture's negotiation of acceptable protest, encouraging passive acceptance of governmental decision-making. Before addressing the legislative scheme, we must first determine how the right manifests in Australia.

II PRINCIPLES OF PROTEST

A International Law

While the right to protest is an integral part of international law, it is of limited significance domestically, due to Australia's transformative approach. However, the right to protest, or right to assembly, is a fundamental human right elaborated by the *International Covenant on Civil and Political Rights* ('*ICCPR*'). Article 9 establishes the 'right to freedom of thought, conscience and religion'.[2] Article 19 establishes the 'right to freedom of expression' – 'orally, in writing or in print…or through any other media'.[3] Article 21 asserts that the 'right to peaceful assembly shall be recognised' without restrictions except that which is necessary for public safety, order, health, or for national security or the protection of rights and freedoms.[4] Finally, Article 22 establishes the 'right to freedom of association', similar to Article 21.[5] These collectively form a holistic 'right to protest' under international law.

However, despite Australia's ratification of the *ICCPR*, this is a largely symbolic protection. In practice, Australia's transformative approach to international law means the *ICCPR* affords no substantial protection to protestors.[6] Some jurists, such as Kirby J in *Newcrest Mining*, have suggested a larger role for international law domestically, but they are in the minority. Therefore, it is a fragile protection.

B Constitutional Law

While the Constitution provides no express right, protest is constitutionally protected insofar as it falls within the scope of the implied freedom of political communication.[8] As a corollary of the implied freedom, there are circumstances in which Parliamentary restrictions on protest are unconstitutional.

However, this is a tenuous protection. As demonstrated in *Unions NSW v NSW*, the implied freedom is not a personal right, but a restriction on legislative power.[9] Further, it only invalidates laws that burden political communication in a way that is incompatible with the constitutionally-prescribed system of representative and responsible government.[10] Moreover, the implied freedom can be limited by laws 'reasonably appropriate and adapted' to a legitimate aim. Therefore, it cannot function alone as a safeguard for the right to protest.

C The Common Law

The common law supports a robust right to protest. The common law foundations of the right are derived from the *Magna Carta* and through legislation such as *13 Henry IV* in 1412, regarding public assembly, and William Lambard's Eirenarcha, a legal commentary on the right.[11]

More substantially, the HCA and NSWSC have expressly recognised the common law right to freedom of assembly, founded on the principle of parliamentary supremacy.[12] In *Jackson*, the Court determined that freedom of assembly and speech are 'important democratic rights.'[13] Moreover, peaceful assemblies are both 'perfectly reasonable and entirely acceptable modes of behaviour in a democracy'[14] and are 'integral to a democratic system of government and way of life.'[15] As French CJ reaffirmed in *Totani*, the Court will presume Parliament legislated in accordance with common law rights, unless there is unequivocal language to the contrary.[16]

International law may mandate the right to protest, and common law may pay it lip service, but without constitutional force it is vulnerable to sustained legislative pressure. Clearly, a right founded on implications and presumptions is not a secure one.

III THE NSW SCHEME

NSW does not possess a charter of rights, unlike other States such as the ACT and Victoria. This omission means that any rights-protection must be in statutory form. However, the NSW legislative scheme governing protest has progressively confined it within ever narrower boundaries. For example, s 5 of the *Peaceful Assembly Act 1992* (Qld) provides 'a person has the right to assemble peacefully with others in a public place.'[17] By contrast, Part 4 of the *Summary Offences Act 1988* (NSW), which governs public assembly, makes no mention of any right to protest.[18] This omission, however, does not abrogate the common law right to assembly.

Part 4 of the *Summary Offences Act* is the dominant instrument providing executive and judicial control over protest, through designated 'authorised public assembly.' It is a highly stringent instrument that favours executive power over individual rights. S 23 demands written notice of intention to hold the public assembly to the Commissioner of Police, which must contain particulars.[19] This may further be authorised by the Court under s 26.[20] However, s 25 gives the Court broad scope to prohibit a public assembly, on the Commissioner's application.[21] Part 4's stringency is evident in s 27. While s 27(1) demands the Court practice the 'greatest expedition possible' to avoid frustrating the date, it also establishes the Court's decision as final and unappealable (s 27(2)), and that no more than one application can be made (s 27(3)).[22]

As such, Part 4 does the bare minimum to enable peaceful protest, while largely serving to confine protest parameters. This confinement has continued through a progression of legislation, some of which shall be analysed below.

Firstly, the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* inserted new sabotage offences into the Criminal Code, replacing the former Crimes Act sabotage offences. Ss 82.1 and 82.2 redefined 'public infrastructure' broadly, including any Commonwealth 'infrastructure, facility, premises, network or electronic system' (s 82.2(1)) that relates to 'utilities and services', is 'located in Australia', or is a 'constitutional corporation' or 'used to facilitate constitutional trade and commerce' (s 82.2(1)(e)(iii)).[23] This is an exceptionally broad categorisation – one further problematised by the breadth s 82.1 gives 'damage to public property'. Under s 82.1, damage includes destruction, interference, loss of function, limitation or prevention of access, resulting defectiveness, degradation or serious disruption.[24] This definition catches conduct as serious as arson or as banal as 'lock-in' protest. And, crucially, the amendment applies absolute liability in relation to public infrastructure (s 82.2(3)). This amendment harshly penalises even relatively harmless forms of protest.[25]

Secondly, the *Crown Land Management Regulation 2018* (NSW). Under s 13(1)'s table of offences prohibited on Crown lands, s 13(1)(4) allows police to direct or give notice for individuals to depart Crown land while 'taking part in any gathering, meeting or assembly', except for cemeteries for religious purposes.[26] As Crown lands constitute any property owned by the NSW government, this gives the police an exceptionally wide scope to redirect protest with narrow limitations.

IV THE CAUSES OF APATHY

Clearly, acceptable protest has been curtailed, but we must interrogate to what extent this reflects our cultural conversation with protest. Australia's history is built on protest. The union movement achieved the eight-hour work day; feminist movements secured universal suffrage; protest ensured Aboriginal land rights and censured the Vietnam War. For NSW, however, it may appear that these developments have been largely counter-cultural. The contemporary story of NSW is of collective rights superseding individual rights, and of society acceding to governmental pressure. Yet, how did we arrive at this apathetic state?

NSW has several characteristics distinguishing it from other States. Firstly, substantial deference to the wisdom of Parliament. Legislation is the solution to all ills: regulatory legislation increasingly governs social behaviours, as evidenced by the lockout laws and drug legislation.[29] The pervasive influence of 'law and order' campaigns is also indicative. Beyond the legislative scheme outlined above, amendments to criminal law instruments like LEPRA have aimed at broadening police power.[30] These expansions have been widely criticised as infringing on civil rights.[31] Yet, these powers have not been rolled back. In short, NSW governments have expanded governmental power and limited individual rights in the name of public safety.

Despite considerable media scrutiny of these decisions, electoral outcomes have been largely unaffected. Arguably, the impact has been lessened by certain media sources' negative characterisation of protestors as destructive political actors, as opposed to protectors of civil liberties. This is not unique – the media has historically been antipathetic towards protest.[32] What is unique is the increasing capacity of multinational media corporations like NewsCorp to shape policy – for example, the lockout laws and same-sex marriage.[33] In summary, NSW inhabits a unique ecosystem for over-regulation of individual behaviour and promotion of collective over individual rights.

What does this ecosystem produce? To understand NSW's apathy, we can apply the philosophy of Guy Debord. In *Society of the Spectacle*, Debord asserted that society shall become so saturated with 'spectacle' that they will be rendered insensate to reality – spectacle shall supplant genuine activity.[34] Genuine understanding no longer governs social relations; rather, spectacular imagery does. It is in the government's interests to perpetuate this spectacle – through spin doctoring and press – to curtail dissent, maintain public order and expand their power. NSW, and Australia more broadly, are particularly susceptible to this process, due to our substantial deference to Parliament as a bastion of respectability. Equally important is the outsized role of the media in contributing to these politics of spectacle in NSW. Spectacle – such as fearmongering about coward-punch hoons,[35] festival drug abuse and eco-fascism[36] – creates a facade that justifies governmental intervention and regulation. This facade must be challenged by protest.

Debord asserts that to dispel spectacle people must engage in radical action. Radical action, such as protest, has the effect of providing persuasive counter-images. For example, the humiliation of Fraser Anning by a teenager yielding an egg (affectionately dubbed 'Egg boy'). While technically assault, it only harmed Anning's reputation – 'Egg boy' dispelled the aura of respectability Anning cultivated. Curiously, this mirrors the 1917 egging of Prime Minister Billy Hughes by two brothers protesting his support for conscription.[37] It is clear this action, this humiliation, was effective as the egging prompted Hughes to create the Commonwealth Police Force, the precursor to the Australian Federal Police, as a Queensland policeman refused to intervene on jurisdictional grounds.[38] That is the real power behind protest – puncturing the protective aura politicians construct.

But counter-images like this cannot always be leveraged effectively. This is where the anti-protest laws are truly destructive. These laws are not simply aimed at minimising destructive protests like Anning's St. Kilda far-right protests.[39] They are also aimed at undermining everyday protest. One example is the Knitting Nannas – elderly women peacefully protesting environmental degradation.[40] They have become symbols of environmental protest, knitting peacefully while locked on to agricultural apparatuses. While clearly obstructive, they are peaceable, and in Parliament they cannot

fit the general descriptor of environmental protestors as 'eco-fascists' by political actors justifying further anti-protest legislation.[41] In general, the response to them seems to be amusement rather than the outrage some Parliamentarians crave. That is the power of radical action.

Another illustrative case is the mass secondary student environmental walkouts in March 2019.[42] A clear demonstration of civic engagement by the youth was railed against by Premier Berejiklian on the grounds that being out of school was 'grossly irresponsible.'[43] Yet again, their action seemed to be met with broad approval by Australian society. Ultimately, however, anti-protest legislation does not reflect this cultural dialogue. Rather, it delegitimises peaceful protest — they act to capture and undermine everyday protest, by individuals exercising their civil responsibility, and serve to justify ever-shrinking boundaries of acceptability under the guise of the public interest. That is why protest must be protected: this spectacle of the public interest cannot be allowed to defeat our civil rights.

V CONCLUSION

In conclusion, the legal scheme of anti-protest legislation in Australia does not reflect Australia's historical or cultural engagement with protest. Rather, it reflects the degradation of our society into apathy. Legislation now serves to privilege collective rights over individual rights. This slew of legislation can only happen in a society saturated by spectacle – rendered apathetic by the constant drip of opinion pieces and incremental legislation. Yet, as demonstrated by our history of protest and recent mass protests, this is not at all representative. To halt this degradation, NSW should, like Victoria or Queensland, adopt a bill of rights guaranteeing the right to protest. In that way, we may halt the slow undermining of individual rights and give the Courts the power of accountability, rather than that of the rubber stamp. However, as demonstrated, there is only so much the judiciary can do. Change can only occur if we are able to rise above the spectacle, to reorient around our real priorities. Protest is not a panacea for our spectacle-plagued society, but it can light our way forward. ▫

[1] *Crimes Legislation Amendment (Public Order) Act 2017* (Vic); see *Brown v Tasmania* (2017) 261 CLR 328.

[2] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9.

[3] Ibid art 19.

[4] Ibid art 21.

[5] Ibid art 22.

[6] *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273; *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 at [490]; *Kioa v Bjelke-Peterson* (1982) 153 CLR 168 at 225.

[7] *Newcrest Mining (WA) Limited v Commonwealth* (1997) 190 CLR 513.

[8] *Brown v Tasmania* [2017] HCA 44.

[9] *Unions NSW v NSW* [2013] HCA 58 at [36].

[10] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561; *Coleman v Power* [2004] HCA 39 [89] (McHugh J).

[11] Tom Gotsis, 'Protests and the law in NSW' (Briefing Paper No 7/2015, NSW Parliamentary Research Service, June 2015) 5-6.

[12] *Kable v The Director of Public Prosecutions for NSW* (1996) 189 CLR 151, 171-76.

[13] *Commissioner of Police v Jackson* [2015] NSWSC 96 [90] (Schmidt J).

[14] *NSW Commissioner of Police v Bainbridge* [2007] NSWSC 1015 [3]–[4] (Adams J).

[15] *Commissioner of Police v Rintoul* [2003] NSWSC 662 [5] (Simpson J).

[16] *South Australia v Totani* (2010) 242 CLR 1 at 31.

[17] *Peaceful Assembly Act 1992* (Qld) s 5.

[18] *Summary Offences Act 1988* (NSW) part 4.

[19] Ibid s 23.

[20] Ibid s 26.

[21] Ibid s 25.

[22] Ibid s 27.

[23] *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) ss 82.1, 82.2.

[24] Ibid s 82.1.

[25] Ibid s 82.3(3).

[26] *Crown Land Management Regulation 2018* (NSW) s 13(1).

[27] Hugh de Krester, 'Australia Has a Long History of Protests. Our Rights Should Be Better Protected', *The Guardian* (online at 15 March 2019) <https://www.theguardian.com/commentisfree/2019/mar/15/australia-has-a-long-history-of-protests-our-rights-should-be-better-protected>.

[28] Aiden Ricketts, 'Anti-protest laws: Lock up your nanna' (2017) 42(2) *Alternative Law Journal* 107.

[29] Sean Nicholls, 'Barry O'Farrell Announces 'Tough' Laws to Combat Alcohol-Fuelled Violence', *Sydney Morning Herald* (online at 21 January 2014) <https://www.smh.com.au/national/nsw/barry-ofarrell-announces-tough-laws-to-combat-alcoholfuelled-violence-20140121-315wg.html>; Ben Graham, '"It defies belief": NSW Government Cops Backlash Over Tough New Drug Law', *News.com* (online at 24 October 2018) <https://www.news.com.au/national/nsw-act/news/it-defies-belief-nsw-government-cops-backlash-over-tough-new-drug-law/news-story/1f940a76ce8f3b97f912ee3a2e70ec80>.

[30] *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99.

[31] Michael McGowan, 'Festival Deaths Inquest: Police Pushed to Release Protocols After "Unconscionable" Strip Searches', *The Guardian* (online at 18 July 2019) <https://www.theguardian.com/australia-news/2019/jul/18/music-festival-deaths-inquest-police-to-be-pushed-to-release-strip-search-protocols>.

[32] Clive Hamilton, 'What Do We Want? Charting the Rise and Fall of Protest in Australia', *The Conversation* (online at 17 November 2016) <http://theconversation.com/what-do-we-want-charting-the-rise-and-fall-of-protest-in-australia-68436>.

[33] Nadine Ezad, 'Don't Lock Out the Facts On Lockout Laws: They've Made This City Safer', *The Sydney Morning Herald* (online at 20 May 2019) <https://www.smh.com.au/national/nsw/don-t-lock-out-the-facts-on-lockout-laws-they-ve-made-this-city-safer-20190529-p51sfm.html>; Jennine Khalik, 'How the Media Created the Sydney Lockout Laws', *MSN News* (online at 29 May 2019) <https://www.msn.com/en-au/news/australia/how-the-media-created-the-sydney-lockout-laws/ar-AAC3RyS>.

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[35] 'One-Punch Alcohol Laws Passed by NSW Parliament', *ABC News* (online at 31 January 2014) <https://www.abc.net.au/news/2014-01-30/one-punch-alcohol-laws-pass-in-nsw-lower-house/5227078>

[36] Sally Rawsthorne, 'Experts Divided Over On-The-Spot Drug Possession Fines at Music Festivals', *The Sydney Morning Herald* (online at 21 January 2019) <https://www.smh.com.au/national/nsw/experts-divided-over-on-the-spot-drug-possession-fines-at-music-festivals-20190121-p50smv.html>.

[37] Patrick Buckridge, 'Pacifying Brisbane: The Muses' Magazine and the 1920s' in Peter John Kirkpatrick and Robert Dixon (eds), *Republics of Letters: Literary Communities in Australia* (Sydney University Press, 2012) 39, 41.

[38] 'The Attack on Mr Hughes', *The Argus* (online at 3 December 1917) <https://trove.nla.gov.au/newspaper/article/1667683> .

[39] Max Koslowski and Michael Koziol, 'Fraser Anning Billed Taxpayers Thousands to Attend Two More Far-Right Events', *The Sydney Morning Herald* (online at 7 January 2019) <https://www.smh.com.au/politics/federal/fraser-anning-billed-taxpayers-thousands-to-attend-two-more-far-right-events-20190107-p50q21.html>.

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[42] Ibid 110.

[43] Antonette Collins and Kevin Nguyen, 'Students Defy Warning From Premier Gladys Berejiklian and Skip School to Attend Sydney Climate Rally', *ABC News* (online at 15 March 2019) <https://www.abc.net.au/news/2019-03-15/nsw-schools-climate-change-rally-sydney-gladys-berejiklian/10904254>.

AGEING WITH DIGNITY:

ADDRESSING ELDER ABUSE

An assessment of current and proposed legal responses to elder abuse in Australia, evaluating the appropriateness of such measures to this complex and personal issue.

CLARIS FOO
ARTS / LLB II

This article contains depictions of elder abuse and neglect.

**Names changed for confidentiality.*

I INTRODUCTION

In the wake of the Australian Law Reform Commission's ('ALRC') 2017 report on elder abuse,[1] the Seniors' Rights Service published a community response criticising the report for placing a disproportionate emphasis on law reform solutions, stating, 'We need to be careful not to find legal solutions to issues that are not legal in nature'.[2] In light of the Royal Commission into Aged Care Quality and Safety, several parliamentary reports and an increase in public interest, this essay asks what role does law and regulatory reform have in eradicating elder abuse?

While elder abuse is perpetrated in many forms, this piece will focus on abuse in residential facilities and financial abuse. As elder abuse is a complex issue, interviews and survey responses are used to gain insight into the personal perspectives of those involved in the aged care sector on a daily basis.

A Abuse in residential facilities

While it could be said that nursing homes have historically had a negative reputation within society,[3] the ongoing Royal Commission into Aged Care Quality and Safety has revealed heartbreaking cases of abuse far beyond public knowledge. The evidence uncovered in the Commission's various hearings has revealed a shameful state of affairs, where abuse often occurs due to business-side issues such as insufficient resources and mismanagement.

One of the most concerning practices evinced is the extensive and inappropriate use of chemical and physical restraint, with overmedication of residents being used as a business operational strategy. An ABC 7.30 report, aired in January 2019, exposed the impact of these conditions on 72-year-old Terry Reeves after two months in western Sydney's Garden View Nursing Home. Facility records showed that he had spent 14 hours strapped to a chair within a single day, and his family became concerned after he showed signs of being chemically restrained by extreme sedation without their knowledge.[4] Unfortunately, the treatment of Mr. Reeves seems far more like a routinised, operational reality than an isolated incident. During a Sydney hearing in May 2019, the Royal Commission heard evidence from Elizabeth,* a registered nurse who was previously employed in a nursing home, on the prevalence of chemical restraining residents as a coping strategy for staff. When asked why chemical restraint was used, she replied, 'Because there's not enough staffing ... rather than give proper care, you just sedate people so then they're not annoying you ... then you go to chemical restraint, which is an anonymous way of doing it ... they're all clean and tidy and they're not crying out.'[5] This issue has been recognised in the Royal Commission, where the Commonwealth Department of Health found that there was 'substantial overprescribing on benzodiazepines and antipsychotics in RAC' [residential aged care] and some doctors feel 'under pressure to prescribe' in response to care staff's requests for chemical restraints due to 'workload issues in managing behaviourally disturbed residents.'[6]

Thus far, the vast majority of evidence heard by the Royal Commission has spoken to elder abuse through neglect in an overloaded system. Damning evidence presented at the Darwin hearing told of resident Ms. Annunziate Santoro, whose foot wounds sustained in the facility were left untreated for so long that they became infested with maggots.[7] Even in residential facilities run by the book, the sobering reality is that, to some extent, institutional abuse through neglect may be industry common practice.[8] J* was a nursing home personal carer until he began to experience doubts about the residents' strict regimen and switched to employment with a home care provider. 'It wasn't person-centred care,' he said. 'They had to take showers at 6am, even in winter, whether they liked it or not. That's why I quit – I had to plead them to do things at certain times, even when they didn't want to. I just couldn't force them.' J's concerns are reflected by the findings of the Australian Nursing and Midwifery Federation ('ANMF') National Aged Care Survey 2019, which raised major concerns about management practices which placed the safety of residents at risk and led to an 'overall lack of respect'.[10]

These incidents are symptomatic of a larger matrix of problems facing the rights of the elderly in residential care. One of the main problems is insufficient and inappropriate staffing levels. The Queensland Nurses' Union reported in their submission to the ALRC that a single registered nurse in a residential aged care facility could be accountable for the care of up to 150 residents.[11] In J's view, the decisive factor affecting the standard of care was the facility's bottom line. 'In the expensive places, they can hire more care workers, so there's no problem if a resident wants to take a shower in the afternoon instead. In more affordable facilities, there's no flexibility.'[12]

IA Legislative solutions and limitations

Given the prevalence of systemic elder abuse in aged care facilities, counteractive measures are sorely needed. Various legislative solutions, which have been presented with varying degrees of success, reveal the importance of implementing policy in concordance with other social measures to create the necessary political capital for successful legislative solutions.

The most significant legislative measures in response to elder abuse in facilities have strengthened accreditation and compliance infrastructure. An independent Aged Care Quality and Safety Commission was established on 1 January 2019 to oversee the assessment, accreditation, and monitoring of Commonwealth-funded aged care providers. This consolidated the functions of other separate agencies. Furthermore, the Single Aged Care Quality Framework was introduced, which places an emphasis on dignity and addressing individual needs. The Framework changes the accreditation requirements of a residential facility by shifting the focus of assessment standards to 'looking at care through the lens of the care recipient and their family'.[13] This has been lauded by the Aged Care Guild as a 'major shift in aged care'.[14]

However, other proposed legislative solutions' unsuccessful attempts to become enshrined in law have demonstrated the weaknesses of a legally-focused approach. A key issue is the lack of clarity in current safeguarding legislation: currently, the *Aged Care Act 1997* (Cth) ('the Act') requires residential aged care providers to maintain an 'adequate number of appropriately skilled staff to ensure that the care needs of care recipients are met',[15] but the standard of 'adequate' remains unclear, therefore reducing the accountability of aged care providers. Many ANMF survey participants indicated that this lack of accountability allowed providers to direct government funding towards promotion instead of hiring staff to ensure adequate standards of care, with one respondent stating, 'I see a great deal of [money] wasted on compliance and "selling" the product to relatives. Money is not being allocated to appropriate areas.'[16]

Two possible solutions to this problem emerged as frontrunners. The first of these was legislated mandatory minimum staff and registered nurse to resident ratios, similar to the existing minimum nurse to patient ratios in hospitals. 84% of ANMF survey participants in 2019 identified enacting a minimum ratio as an action that should be taken to improve aged care, making it the most common response to a question about what actions should be taken to improve aged care.[17] J believed that this was 'the obvious solution' to many of the problems in residential aged care facilities, and he felt that the failure of the government to enact this policy ultimately demonstrated a lack of commitment to address the issue of elder abuse.[18] However, in 2017, an amendment to the Act to prescribe a mandated ratio of skilled staff to care recipients in government-funded aged care residential facilities was proposed, but was struck down by the Senate amid facilities' concerns about the financial impacts they would feel as a result of this policy.[19]

After the failed attempt at legislating a minimum staff ratio, a second solution surfaced as the ALRC's final recommendation regarding this issue: that an independent evaluation of optimal staffing models should be carried out and used to aid statutory interpretation of the Act's requirements of 'adequacy'.[20] A 2019 parliamentary inquiry echoed this recommendation.[21] While the research has not been conducted, the ANMF's recommendations in a 2016 report indicate that there is an urgent need to act as we are likely to be falling short of any reasonable benchmarks. The report recommended that residents in aged care receive 4 hours and 18 minutes of daily care, but on average received only 2 hours and 50 minutes of care.[22] At the time of writing, there remains no progress on this research.

The failure of the minimum staff to resident ratio bill to become law is illustrative of the fundamental problem affecting a legislation-focused approach to eradicating elder abuse: that it is intrinsically tied to public sentiment and the political utility of enacting change. While it may be tempting to point the finger solely at facilities for being profit-driven and under-hiring, central to the issue is also the insufficient funding provided to government funded facilities, which generally must provide more affordable care on a larger scale while restricted by a tighter budget. In the ANMF's 2019 survey, a staggering 89.5% of respondents indicated that the level of funding received was inadequate. Essential increases in funding can only be enacted if there is increased public interest in creating change – while ongoing media coverage on the Royal Commission has succeeded in bringing elder abuse to the front pages of the news, the speed and longevity of change can only be motivated by increasing public awareness of this long-hidden issue.

The political restrictions on effective legislative change are also demonstrated by another recent legislative solution: the introduction of the *Charter of Aged Care Rights*. This document must be signed by each resident of an aged care facility and states the rights they can expect to enjoy, including safety, autonomy and the right to be respected.[23] However, in the Royal Commission evidence of email exchanges between the then-Aged Care Minister Ken Wyatt and bureaucrats, it is apparent that the final charter is a weakened version of the Minister's original intentions. As the charter was prepared in the wake of widespread public outrage from the ABC investigation into the excessive use of restraints on aged care resident Terry Reeves,[24] the Minister's initial emails clearly indicate an intention to include clauses for minimising the use of physical or chemical restraint, specifically eliminating the prescription of chemical restraint without informed consent from family.[25] However, the proposed clauses were soon stripped away by other decisionmakers, citing possible objections from doctor groups as an intrusion into the doctor-patient relationship.[26]

These examples illustrate that the process of enacting effective legislative solutions is intertwined with politics, and increased regulations are likely to be met with industry resistance. Thus, in the case of combating elder abuse in residential facilities, while a legislation-focused approach can create lasting and formalised change, its success is variable and depends on sustained public interest to create sufficient political capital.

II FINANCIAL ABUSE

Financial abuse is defined as the misuse or theft of an older person's money or assets.[27] It may manifest in ways such as using an enduring power of attorney for unintended purposes, theft of small amounts of money, or coercing older people into gifting large assets or even coercing an older person to change their will.[28]

Research suggests that financial abuse is one of the most prevalent forms of elder abuse and is often facilitated by psychological abuse.[29] It is estimated that up to 9% of older Australians experience financial abuse.[30] Nevertheless, as there is usually no visible sign or sensationalist footage of financial abuse, there is little public acknowledgement of its prevalence. This has left many to suffer in silence. Sadly, the abuse is often perpetrated at home by the older person's own family members.[31] In a survey of 209 service providers, 84.4% stated that a risk factor of financial abuse was 'a family member having a strong sense of entitlement to an older person's property or possessions'.[32]

As financial abuse is often perpetrated within the family domain, older people from culturally and linguistically diverse backgrounds are often rendered especially vulnerable. This was identified as a key area of concern in the ALRC report.[33] For some older people, there may be a language barrier blocking them from accessing information, therefore making them more dependent on adult children to manage their financial matters.[34] A lack of understanding around the way their own finances are managed may make them more vulnerable to exploitation and increase the risk of family members irresponsibly handling their assets. Furthermore, certain cultural expectations of family responsibilities and the handover of parents' assets to children may also fuel the risk factor of a family member feeling entitled to the older person's assets.[35]

One of the major factors contributing to the problem is a widespread lack of understanding of the law. For older people, the fragmented jurisdiction over financial matters legislation in Australia between the Commonwealth and state or territory levels has been identified as a major obstacle.[36] Commonwealth legislation governs aged care, superannuation, social security and veteran's entitlements, whereas state and territory governments generally regulate legislation on financial abuse, substitute decision making, guardianship, wills and probate.[37] Faced with the difficulty of navigating the complex legal landscape, older people become even more vulnerable to financial exploitation.

IIA Legislative solutions and limitations

One key legislative instrument currently safeguarding elders from financial exploitation is individual state and territories' guardianship tribunals. In NSW, the *Guardianship Act 1987* (NSW) vests the NSW Civil & Administrative Tribunal with the power to appoint the NSW Trustee & Guardian, or a person accountable to the NSW Trustee, as a financial manager for a person who is no longer capable of managing their own financial affairs.[38] This order is made pending a Tribunal hearing to decide if doing so is in the person's best interests.[39] The financial manager becomes responsible for managing and investing the person's assets and making necessary transactions.[40] This protects vulnerable elders from theft, scams and coercion, since all expenses must be reviewed by the NSW Trustee.[41]

However, the efficacy of the Tribunal as a safeguarding mechanism is also dependent on its accessibility and general awareness of its functions. This is particularly pertinent since Tribunal hearings are carried out on an application basis only, where a relevant party, often a care worker or a family member, makes an application on the older person's behalf.[42] As the system relies on others to make an application to the Tribunal on behalf of someone in vulnerable circumstances, it is likely not able to protect every person at risk of financial abuse. Furthermore, the relative lack of awareness around the Tribunal's operations means that, according to J, some older people can be 'very mistrustful' of financial managers as they are uncomfortable with a stranger handling their finances, even a government-appointed one.[43] 'Some are also fiercely independent and resent being given an allowance of their own money, even if they can't remember to pay their bills,' J said.[44] Improving community access to information is one of the priority areas of Attorney-General's *National Plan to Respond to the Abuse of Older Australians (Elder Abuse)* 2019–2023, which sets out the need to establish a centralised national online resource for elder abuse in the short term.[45]

Much like legislative policies addressing elder abuse in residential facilities, the efficacy of legislative measures combating elder financial abuse is closely intertwined with having a favourable political climate for the allocation of government resources. In one of its more controversial recommendations, the ALRC report identified the potential for those in the banking industry to take an active stance in preventing older people from being financially exploited and recommended that the Code of Banking Practice should reflect this role, as an extension of banks' existing responsibilities under industry guidelines.[46] Under this recommendation, banks would train staff to detect and report suspected abuse cases.[47] As the system for addressing elder financial abuse is based largely on cases being reported to the relevant authority, staff at financial institutions are well-placed to spot and prevent financial abuse of elders at the frontlines before it happens. However, while there is support for this proposition in the banking sector, the efficacy of this initiative depends largely on the establishment of an accessible national online register of enduring powers and tribunal appointments of guardians and financial administrators, which does not yet exist.[48] The maintenance of such a register in an accessible and secure format will require government funding. While elder financial abuse is a pressing issue, the government would have to prioritise creating this database over other initiatives for it to happen in the near future, and the relative lack of awareness surrounding financial abuse means that the initiative is likely to take a backseat to other measures with more public support.

The nature of financial abuse, however, may mean policy-makers need to look well beyond legislative solutions. As financial abuse has deep-rooted causes in social perceptions of older people and is often perpetrated in intimate familial contexts, combating it must include shifting cultural perspectives on the way society treats its elderly members. While the law has a normative function, this large-scale cultural shift is more likely to be successfully carried out through social policies focused on asserting the rights of older people and changing the negative narrative around caring for the elderly.

III CONCLUSION

In cases of abuse in residential aged care facilities and elder financial abuse, the legislature is in a distinctly unique position to act. While the prevalence and severity of elder abuse in its various contexts calls for a strict regulatory overhaul and a coordinated legal response, these legislative solutions must be accompanied by other social strategies to raise public awareness and provide support to industry workers trying their best despite limited resources. Although the situation as it stands is deplorable, the current increase in public attention on the issues faced by older people in our society is one significant step in the right direction towards ensuring that all in our society are allowed to live with respect and dignity. ▫

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[14] Evidence to Senate Standing Committee on Community Affairs, Parliament of Australia, Canberra, 15 February 2019, 2 (Matthew Richter, Chief Executive Officer of the Aged Care Guild).

[15] *Aged Care Act 1997* (Cth) s 54.1(1)(b).

[16] Australian Nursing and Midwifery Federation, *National Aged Care Survey 2019* (Final Report, May 2019) 29.

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MORE THAN A BODY:

BODILY AUTONOMY OF THE DECEASED

Reflections on the legal and moral complexities of protecting the bodily autonomy of the deceased.

KATE SCOTT
ARTS II

Content warning:
Discussions of the death of Aboriginal and Torres Strait Islander peoples.

Protecting one's moral and legal rights over their body is a task that lies at the heart of much of the civil and criminal justice system. However, the status of these rights becomes unclear upon death. What are the rights of an individual over their body when only the body remains? This essay will closely examine the circumstances surrounding Charles Byrne, 'the Irish Giant', who was renowned for his height of 7 feet 7 inches. Against his wishes, his body has been displayed in the Hunterian Museum since his death in 1783 after it was stolen from its coffin. This site of analysis will be used to situate current legal debates regarding bodily autonomy and the enduring injustices of British museums retaining stolen bodies of Aboriginal and Torres Strait Islander peoples.

I CHARLES BYRNE AND BEYOND

Despite Charles Byrne's clear unwillingness to donate his body to science, the Hunterian Museum refuses to cede rights over Byrne's body, citing its enduring educational and research value.[1] While the body has proved scientifically useful – DNA extracted from the body was used to analyse the specific gene mutation that causes Acromegalic Gigantism – this should not strengthen the museum's claim to the body. As Byrne's DNA has already been sequenced, researchers could ultimately replicate any necessary data without access to his skeleton.[2] Further, others suffering from Acromegalic Gigantism have since volunteered their bodies to the cause.[3] More importantly, the rationale of the "public good" should not extinguish Byrne's rights over his body.

However, the Hunterian Museum's acquisition and display of Byrne's body could be considered legally sound. The British Justice system clearly favours the claims of institutions over the rights of individuals. At the time of Byrne's death, a body was not classified as conventional property, and thus, could not be stolen.[4] The Hunterian Museum also abides by the British Museum Act 1963, which prohibits the de-accessioning of artefacts except under specific exemptions. The Act clearly states that an artefact can only be de-accessioned if it 'can be disposed of without detriment to the interests of students.'[5] Hence, a museum is able to maintain possession of an artefact where they can raise an inherent scientific or intellectual value.[6]

Similarly, *Williams v Williams* established that the United Kingdom legal system does not recognise an individual's personal burial instructions as legally binding.[7] Instead, the individual who is granted the right to dispose of the body may do so however they choose, provided that it is not unlawful, unreasonable or prevents family and friends from expressing affection for their deceased loved one.[8] This statute is mirrored by the Australian legal system; under the *Human Tissue Act 1983* (NSW), the right of deciding the fate of a dead body in organ donation and post-mortem examinations falls to their next of kin, rather than to the executor of an individual's will.

However, key statutory and common law developments have occurred in the United Kingdom since Byrne's death. Notably, in *R v Stewart*, Kay J held that all individuals who died in Great Britain had the legal right to a Christian burial.[9] Hence, to deny Charles Byrne of the funerary practices he desired was not only immoral, but a violation of his religious rights. More recently, *The Human Tissue Act 2004* in the UK now bars the medical use of bodies without the prior consent of the individual.[10] Byrne's body, however, is not protected; human remains that are older than 100 years are exempt from this requirement.[11] This 'older than 100 years' exception is symptomatic of the priority ascribed to museums' claims over justice for the deceased, and allows the continued dehumanisation and display of individuals against their will.

II WHY RECOGNISE BODILY AUTONOMY IN DEATH?

Throughout life, the law values an individual's right to self-determination and bodily autonomy. For example, any form of intrusion on one's body without consent violates Article 8 of the European Convention on Human Rights.[12] This extends even to the removal of a few skin cells by a researcher, which amounts to an assault and violates protections in the UK and Australia.[13] Whilst no bodily harm could arise from such action, the law protects an individual's choice to provide or deny their consent, and thus, suggests that the law recognises a sense of ownership over one's body parts.

However, this ethos becomes significantly more complex upon death. Whilst ownership of a dead body is not recognised at law, the common practices after death essentially translate to the beneficiaries having exclusive ownership over the body. This leads to several disturbing legal consequences. As outlined by Professor Loane Skene, upon the passing of an individual, their beneficiaries not only inherit the possessions of the deceased, but all of their bodily material—including severed limbs and other surgical waste.[14] Thus, a beneficiary could bar relatives from accessing genetic test results, or may even be liable for 'faulty' organs that were used for transplants. The actions of British Museums noted above are evidence of these rights existing.

Others argue that the rights of the living should be prioritised over the rights of the dead, particularly in the case of organ donation.[15] Following this vein, governments may amend legislation to enforce mandatory organ donation irrespective of the wishes of the deceased or their families. However, some religious beliefs hold that the donation of one's body to post-mortem medical research may have a profoundly negative impact upon their experience in the afterlife.[16] Thus, a forced donation may indeed be a violation of an individual's religious freedoms.

Ultimately, the practice of individuals losing their rights to bodily autonomy after death is morally and legally problematic. The ownership of ones' body during life should, at the very least, extend to their final rites. Categorically, the body should not be inherited by beneficiaries, as directed by the UK and Australian legal systems. True social justice can only be achieved once the consent of the deceased, most accurately reflecting their religious, moral, and medical beliefs, is respected.

III ABORIGINAL AND TORRES STRAIGHT ISLANDER BODIES

Whilst recent refurbishment of the Hunterian Museum has prompted debate over the fate of Byrne's body, thousands of bodies of Australian Aboriginal and Torres Strait Islander peoples remain in British museums. In circumstances more abhorrent than Byrne's, Aboriginal and Torres Strait Islanders were stolen from their graves, hospitals, and prisons throughout British colonisation until the late 1940s.[17] Due to a disturbing black market for such remains, bodies were exported to Europe and the United States, where they remained in private possession or were displayed publicly. Recognition of the language group of each human remain and adequately respecting their cultural burial customs is near impossible in many cases due to the lack of records outlining the identity of the bodies.[18] Whilst the federal government's Return of Indigenous Cultural Property program helped repatriate 1,383 ancestral remains between 2000 and 2009, over 2,000 bodies are pending their return to Australia.[19]

In other cases, museums have simply refused to repatriate remains, or have violated the wishes of those seeking repatriation. Notably, the British Royal College of Surgeons are suspected to hold the skull of Bidjigal warrior Pemulway, but claim it was destroyed in World War II.[20] Similarly, it took roughly 20 years for the Tasmanian Aboriginal Centre (TAC) to be granted repatriation of the remains of 17 Indigenous Tasmanians from the British Natural History Museum.[21] It was only granted following the TAC's recognition from the Australian Government, and an acknowledgement that procurement of these remains – primarily through the desecration of ancestral burial sites – were flagrantly unethical by modern scientific research standards.[22] Even so, the museum ascribed scientific value to these remains due to their value in exploring human diversity, and used digital imaging for future molecular analysis, despite this being against the explicit wishes of the TAC.[23] By lengthening and resisting bureaucratic repatriation processes, British Museums display a clear disregard for the cultural practises and wishes of the deceased and their relatives.

IV POSSIBLE SOLUTIONS

Without any legal obligations to repatriate, museums will most likely continue to hold human remains on display or in research catalogues, until significant political and public pressure compels them otherwise. Ultimately, to ease the process for repatriation, Aboriginal and Torres Strait Islander peoples seeking repatriation could contact The Advisory Committee for Indigenous Repatriation, which advises the government. Likewise, campaigning for the rightful burial of individuals such as the Irish Giant creates a sense of social pressure for museums to reconsider their stance on particular remains, as we are currently seeing in Hunterian Museum's reassessment of displaying Charles Byrne.

However, the most effective solution to preserve the bodily autonomy of those who have passed is legislative change. The British legal system has played an active role in reinforcing institutions' rights over such 'artefacts.' The 'older than 100 years' exemption to *The Human Tissue Act 2004* (UK) should be repealed, as it fails to protect the rights and consent of individuals.[24] Likewise, the *British Museum Act 1963* also needs to be amended; museums should not be allowed to indefinitely hold human remains on terms that they create themselves. The practices surrounding the remains no longer reflect modern conceptions of justice and ethics. Instead, museums such as the Hunterian preserve a legacy of unethical mistreatment of individuals who were insufficiently protected by the law.

V CONCLUSION

Ultimately, the absence of domestic and international laws protecting the bodily autonomy of the deceased individuals – deemed 'artefacts' – is a disappointing oversight in our modern social justice system. The historical and scientific value of researching and displaying these individuals arguably does not justify their total dehumanisation and disregard for their right to burial. ▫

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[10] *The Human Tissue Act 2004* (UK) ('*Human Tissue Act*') s 3.

[11] Ibid ss 1, 5.

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[23] Ibid.

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PART THREE

DISCRIMINATION:

NECESSARY, REASONABLE AND PROPORTIONATE

An examination of the complex role of discrimination in protecting the integrity of female sports.

LINDA NIXON
LLB IV

In recent years, intersex athletes in women's international athletics competitions have been subject to numerous rule changes. Athletics, and its governing body, the International Association of Athletics Federations (IAAF), have accidentally become pioneers in the treatment of intersex athletes in elite sport. All three medallists in the women's 2016 Olympic 800 metre final had differences of sex development (DSDs). Recently, the Court of Arbitration in Sport (CAS) held that the IAAF's *Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)* (the 'DSD Regs') discriminate against intersex athletes, but that 'such discrimination is a necessary, reasonable and proportionate means of achieving the IAAF's aim of preserving the integrity of female athletics in the restricted events.'[1] The debate around testosterone levels in elite female competition transcends questions of sport, and has implications for our wider understanding of gender, sex, genetics, fairness, and inclusivity. The issue becomes: how distinct is the sporting context, and when is discrimination that would be unacceptable in wider society permissible in sport? Ultimately, however, certain discrimination against intersex athletes who benefit from high testosterone in their performances is necessary in order to maintain the integrity of female competition.

Gender verification tests in athletics are not a new phenomenon. The first mandatory sex test was issued by the IAAF in July 1950.[2] From the 1960s the International Olympic Committee (IOC) and the IAAF conducted routine gender verification tests for three decades, which often involved female athletes parading naked before a panel of male gynaecologists.[3] After much uproar, including over the humiliation of Spanish hurdler Maria Patiño in the 1980s,[4] the practice was officially discontinued in 1999. However, less intrusive practices still prevail and the dignity and privacy of intersex athletes is regularly neglected.

It is likely that the intense scrutiny of female athletes' gender identity at least partially derives from ingrained sexism. The bodies of female athletes are scrutinised by the public more than their male colleagues. Perhaps this is because the bodies of athletic men align with ideals of manhood - lean, tall, and muscular - while the bodies of female athletes innately subvert societal norms as strength and athleticism run counter to historical feminine notions of beauty. Regardless, the need to protect the female class of competition by preventing male self-identification into the female category is widely accepted, but developing effective regulation is problematic.

The IAAF is a private body exercising private powers. As such, it is not subject to human rights instruments such as the Universal Declaration of Human Rights. Nevertheless, the IAAF is committed to equal treatment and non-discrimination, and it maintains that the DSD Regs are designed to achieve a level playing field for women.[5] Moreover, they have insisted on the need for 'a protected category for females where eligibility is based on biology and not on gender identity.'[6] As such, any resultant discrimination is unfortunate but necessary to enable females worldwide to compete without the skewing effects of greatly variant testosterone levels.

CAS' jurisdiction is usually by agreement between the parties and as the peak body for sporting disputes, its rulings are final. Nevertheless, decisions may be appealed to the Federal Supreme Court of Switzerland, but no evaluation of the merits of the case takes place on appeal. Instead, appeals consider whether procedural requirements were met and if the award is compatible with public policy.[7] As such, it would be unusual for the Swiss Supreme Court to overrule CAS' decision in Semenya's case.

Perhaps the most famous intersex athlete is Caster Semenya, a double Olympic Champion in the women's 800m and three time World Champion. Semenya has been subject to vastly different regulations over the course of her decade-long international career. The IAAF implemented restrictions on testosteorne levels in 2011,[8] and Semenya then took birth control pills to lower her testosterone levels. She suffered symptoms of feeling sick, fevers, and abdominal pain.[9] Unsurprisingly, her times were also far slower than in years when she has not been taking such medication, with her fastest time in 2014 2:02. This is 8 seconds slower than the 1:54 form she is displaying in 2018 and 2019, and 7 seconds slower than her 1:55 performance in 2009 to win the World Championships. In 2015, these regulations were suspended by CAS after an appeal from Dutee Chand.[10] The IAAF introduced the new DSD Regs in 2018, and Semenya appealed to the CAS, but lost her appeal in May 2019, as the IAAF had given CAS sufficient evidence that female athletes with higher testosterone levels enjoy a competitive advantage, and that this creates an uneven playing field in women's sport.[11] Semenya subsequent appealed to the Swiss Supreme Court who will review CAS' decision. In the meantime, the regulations stand.

The DSD Regs now require athletes with DSDs to reduce their blood testosterone levels to below five nmol/L for six months before being eligible to compete in international female competition.[12] For context, women's testosterone levels typically range from 0.5 to 2.4 nmol/L, while men's are typically 10.4 to 34.7 nmol/L.[13] The IOC requires transgender athletes to drop their testosterone levels to 10nmol/L for 12 months in order to be eligible to compete as a woman at the Olympics. Given that Semenya has stated that she will not reduce her testosterone levels again, the DSD Regs are likely to prevent her from defending her title at the 2019 World Championships in September. Given the dominance of intersex athletes over the two-lap race, the Swiss Supreme Court has a bizarrely significant role in determining the makeup of the field in the World Championships Women's 800m Final.

Semenya's management team have made several compelling arguments with the objective of allowing her to compete without reducing her testosterone levels. Firstly, Semenya's condition is naturally occurring, and there is no implication that she has at any time cheated to achieve her successes. She was born a woman, identifies as a woman, and is legally recognised in her home country of South Africa as a woman. Journalists in particular are fond of drawing the crude analogy between the naturally occurring testosterone levels in Semenya's body and other naturally occurring physical attributes of elite athletes, such as Usain Bolt's long legs or Michael Phelp's extraordinary wingspan. Any competitive advantage gained from Semenya's testosterone levels is naturally occurring, and as such it would allegedly be unfair to force Semenya to reduce it. Moreover, it goes against the notion of promoting excellence in sport to force those athletes who are most successful to curb their own natural advantages.

This point, while well made, is not without persuasive rebuttal. While natural genetic advantages such as Phelps' wingspan and Bolt's stride length are both important in competitive advantage, neither of these were relevant to the category of competition in which they were competing. High levels of testosterone, on the other hand, go to the core distinction between men's and women's sport. It is surely evidence enough that the three athletes on the podium in the 2016 Olympics women's 800m are all affected by the DSD Regulations, for an understanding that intersex athletes

(whose conditions are exceedingly rare) have a great advantage over other female athletes. This is especially significant as the incidence of DSDs is estimated to be as low as one in 5,500.[14] Phelps would never be asked to reduce his wingspan, but his competitive advantage is not gained through an advantage that exists primarily in a different competitive category. A much more apt analogy is of World Master Competitions, where athletes compete only against those in their own classifications. Much like we expect those in the 40-44 age category to perform better than those in the 45-49 age category, we expect male 800m runners to be quicker than the females. It would be unfair to allow a 40 year old to compete in an older age category, just as it is unfair to allow athletes who benefit from testosterone levels in the male range to compete in the female division.

Semenya's case is arguably discriminatory against intersex athletes, by refusing them the ability to compete in the gender classification with which they identify. Semenya points out that elite male athletes who break records are celebrated, but women who achieve similar sporting successes are immediately doubted and treated with suspicion, as if something must be unnatural about such achievement.[15] CAS agreed that the DSD Regs were discriminatory, but held that such discrimination was a necessary, reasonable and proportionate means of achieving the legitimate objective of ensuring fair competition in female athletics.[16] In this decision, CAS considered not only intersex athletes, but also non-DSD female athletes, who have arguably been denied medals by having to compete against Semenya.[17] The IAAF has also distinguished between gender identity in everyday life and 'sports sex',[18] with no pretense that the IAAF has any jurisdiction over the former.

'The IAAF fully respects each individual's personal dignity and supports the social movement to have people accepted in society based on their chosen legal sex and/or gender identity. However, the IAAF is convinced there are some contexts, sport being one of them, where biology has to trump identity.' [19]

There is no legal obligation on Semenya to reduce her testosterone levels if she does not wish to. It is only in international competition where she will be ineligible to compete in her preferred event and gender (so she can continue to compete at domestic competitions). Indeed, she is also free to compete internationally in male or open categories. A distinction must be drawn between the biology of male and female athletes, and this question is quite separate from gender identity.

Crucially, the DSD Regs only apply to events between the 400m and the mile. The reason for this is that CAS' 2015 decision implied that any IAAF regulations can apply only to events where a positive effect of testosterone on performance can be shown. The DSD Regs are therefore based on a study which used data from the 2011 and 2013 World Championships.[20] Interestingly, the IAAF's study found that testosterone also had an effect on performances in the pole vault and hammer throw. However, since there were no athletes with DSDs presently competing in these events, the IAAF saw no need to include them in the DSD Regs.[21] This in itself indicates a remarkable short-sightedness by considering only the current cohort of athletes. Perhaps most importantly, however, is that the 1500m and mile are included in the collection of events, despite the IAAF study not finding a testosterone advantage at those distances. The IAAF justified this inclusion by the fact that the 800-1500 combination is very common for middle distance athletes, and to make rules that affect 800m runners but not 1500m runners would be nonsensical.[22] While any athletics fan would understand this reasoning, it has only added fuel to the fire for those who believe the DSD Regs were targeted at Semenya. In addition, the identification of athletes with DSDs is still based primarily on physical appearance, which leaves the potential for racism against African athletes, who are more likely to be identified as appearing androgynous.[23] Overall, the somewhat precarious mix of scientific rationale and policy-based decision-making behind the DSD Regs is cause for concern.

Female sport already struggles for media coverage and financing. Threats to the integrity of female sport will only hinder progress already made to promote women's competitions. In essence, testosterone levels are a relatively simple and prudent method of distinguishing between male and female competitors. In the long term, the only completely fair solution might be to fundamentally restructure sporting institutions to allow for a third category of intersex or transgender athletes. In the meantime, however, it is unfair for all other female athletes to have to compete against intersex athletes such as Semenya who benefit from high testosterone levels. The CAS was right to say that the discrimination was necessary, reasonable and proportionate. ▫

[1] *Semenya v IAAF*, CAS 2018/O/5794 (1 May 2019).

[2] Max Dohle, *Het Verwoeste Leven van Foekje Dillemma* (2008).

[3] Professor Arne Ljungqvist et al, 'The history and current policies on gender testing in elite athletes' (2006) 7(3) *International SportMed Journal* 225-230.

[4] Professor Maria José Martínez-Patiño, 'Personal Account: A Woman Tried and Tested' (2005) 266(S38) *The Lancet* 366.

[5] IAAF, 'IAAF introduces new eligibility regulations for female classification' (Press Release, 26 April 2018).

[6] IAAF, 'IAAF submits response to Swiss Federal Tribunal' (Press Release 25 June 2019).

[7] Stephan Netzle, 'Appeals against Arbitral Awards by the CAS', CAS Bulletin 2011/2, <https://www.tas-cas.org/fileadmin/user_upload/Bulletin202_2011.pdf>.

[8] *IAAF Regulations Governing Eligibility of Females With Hyperandrogenism to Compete in Women's Competition,* in force 1 May 2011.

[9] Sean Gregory, 'Caster Semnya Won't Stop Fighting for Her Right to Run, Just as She Is', *Time* (online at 18 July 2019) <https://time.com/5629249/caster-semenya-interview/>.

[10] *Chand v IAAF*, CAS 2014/A/3759 (27 July 2015).

[11] *Semenya v IAAF* (n 1).

[12] *IAAF Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development),* in force 8 May 2019, s 2.3.

[13] Sean Ingle, 'How can we end the current impasse over transgender athletes?', *The Guardian* (online at 22 July 2019) <https://www.theguardian.com/sport/blog/2019/jul/22/current-impasse-transgender-athletes?fbclid=IwAR38TL2b1tMXJzNQfoB2lE2-WkCXX5m9uuvN6_xwTeUZ7Sa0PZYshiPt39c>.

[14] Melanie Blackless et al, 'How sexually dimorphic are we? Review and synthesis' (2000) 12(2) *American Journal of Human Biology* 151-166.

[15] Sean Gregory, 'Caster Semnya Won't Stop Fighting for Her Right to Run, Just as She Is', *Time* (online, 18 July 2019) <https://time.com/5629249/caster-semenya-interview/>.

[16] *Semenya v IAAF* (n 1).

[17] Kathryn Snowdon, 'Lynsey Sharp Defends Caster Semenya Comments After Coming Sixth in Women's 800m Final in Rio', *Huffington Post* (online at 21 August 2016), <https://www.huffingtonpost.co.uk/entry/lynsey-sharp-defends-caster-semenya-comments-after-coming-sixth-in-womens-800m-final-in-rio_uk_57b9ac1dc4b0f78b2b4a53c1?guccounter=1&guce_referrer=aHR0cHM6Ly9lbi53aWtpcGVkaWEub3JnLw&guce_referrer_sig=AQAAACg9h-qiRm5v1Hk3WCv7G7cOAIjWXmopbHsPuVAiGde2TXv5c8AIa-6z3lSxKkXk6MK8YjNHLtlIZbBu_0DCmrP6rBCMblFTbzMkgjih7F6rUyygco9hWtU08V-n_y8Zs4DUpBRb4OUDFYnw6DASO7Vllbn_j6KmN9Mxj2OJZJtc>.

[18] *Semenya v IAAF* (n 1).

[19] IAAF, 'IAAF response to Swiss Federal Tribunal order regarding DSD regulations' (Press Release, 4 June 2019).

[20] Dr Stéphane Bermon and Dr Pierre-Yves Garnier, 'Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes' (2018) 51(17) *British Journal of Sports Medicine* 52.

[21] Ibid 52.

[22] Ross Tucker and Mike Finch, 'The Caster Semenya Decision Explained', *The Real Science of Sport Podcast*, (Podcast, 3 May 2019).

[23] Andy Bull, 'IAAF accused of 'blatant racism' over new testosterone level regulations' *The Guardian* (online at 27 April 2018) <https://www.theguardian.com/sport/2018/apr/27/iaaf-accused-blatant-racism-over-new-testosterone-regulations-caster-semenya>.

A QUESTION ACROSS SPACE AND TIME:

AN OVERVIEW OF THE IMPLICATIONS OF THE *ROCKY HILL CASE*

An exploration of the broad ramifications of judicial recognition of climate change as a basis for rejecting new developments.

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In February 2019, the NSW Land and Environment Court dismissed an appeal against the rejection of development consent for an open-cut coal mine in Gloucester, NSW. While various reasons were given for the appeal's rejection, one reason in particular has attracted significant media attention: in ruling on 'the impacts of the mine on climate change,'[1] the court took a broad view of environmental impacts to include downstream greenhouse gas ('GHG') emissions as a basis on which planned developments may be rejected.[2] Recognising that the practical effect of this decision may be limited by conflicting authorities and political obstruction, this essay will consider the normative effect of this decision in echoing environmental and social theories of justice in the courts. As such, substantive analysis will cover the social implications of the normative stances adopted by the court and the legal implications of the judgment. This analysis will be preceded by summary of the decision.

I SUMMARY OF THE COURT'S JUDGEMENT

The bases on which the court dismissed the appeal were its 'impacts on existing, approved and likely preferred uses';[3] its visual impacts;[4] amenity impacts;[5] and, as stated, environmental impacts. These considerations were weighted against its economic and public benefits.[6] Contrary to what one might infer from subsequent media coverage, contemplation of environmental impacts in the *Rocky Hill Case* was not unprecedented. Previous judgments in the Land and Environment Court have included such considerations in their balancing of the benefits and costs of proposed developments, and have referred to it in similar terms of ecologically sustainable development ('ESD').[7] What is unusual in this case is the depth of analysis given to this issue. One hundred and thirty five paragraphs spanning 41 pages cover environmental impacts,[8] which concludes with a definitive statement that 'the Project's poor environmental and social performance justifies refusal.'[9] These paragraphs are rich with rebuttal to common arguments against individual accountability towards climate outcomes which the appellant relied upon. Arguably the most controversial statement made in these paragraphs is that 'both direct and indirect GHG emissions should be considered.'[10] This described emissions classified as 'scope 3' in the language of the Greenhouse Gas Protocol for carbon accounting, which refers to 'emissions that occur in the value chain of the reporting company.'[11] Under this definition, the court included emissions produced by end users combusting the coal mined at the site,[12] for which the appellant proposed no specific offset. In this section, the court also rejected the appellant's argument – that these emissions would result regardless of the mine's activities due to substitution by a third party to satisfy market demand – as unsubstantiated and logically flawed.[13] The Court also rejected the appellant's argument that the project's emissions are justifiable on the basis that it would produce specialised coking coal that is necessary to the production of steel.[14] Importantly, the court made broader normative judgements that the fact that the project's emission would be fractional of global anthropogenic GHG emissions is insufficient and that such projects create intergenerational distributive inequity.[15] It is these stances that this essay will now analyse.

II THE SOCIAL IMPLICATIONS OF THE NORMATIVE STANCES TAKEN BY THE COURT

As discussed, reference to environmental considerations have been well-established in decisions of the NSW Land and Environment Court. What is remarkable about this case is the extent to which these considerations were relied upon in the court's judgment and how the judgment is positioned within the broader public discourse on environmental sustainability, through its application of principles. In paragraphs [514] and [515], the court characterises in almost syllogistic terms the contribution of the development to anthropogenic climate change from which the rejection of the development logically follows:

> 'All of the direct and indirect GHG emissions of the Rocky Hill Coal Project will impact on the environment. All anthropogenic GHG emissions contribute to climate change … The increased GHG concentrations in the atmosphere have already affected, and will continue to affect, the climate system … ' [17]

> 'The direct and indirect GHG emissions of the Rocky Hill Coal Project will contribute cumulatively to the global total GHG emissions … It matters not that this aggregate of the Project's GHG emissions may represent a small fraction of the global total of GHG emissions. The global problem of climate change needs to be addressed by multiple local actions to mitigate emissions by sources and remove GHGs by sinks …' [18]

Throughout this reasoning, the court notably makes a firm normative judgement against the argument that the benefits of improving Australia's carbon emissions are marginal, given the scale of our contribution to global carbon emissions. This argument persists in Australia's public discourse and is a favourite of the controversial media figure Alan Jones,[19] who asserts his disbelief in climate change.[20] The persistence of this argument in the media and the recurring statements of prominent climate sceptics like Mr Jones supports reading the court's statement as apropos to the public debate on climate change in Australia. This in turn explains the heightened media attention this case received.

This judgment has significant transnational implications for the issue of global climate change. Environmental law scholars have suggested climate change is 'the greatest collective action problem the international community has yet faced.'[21] Under a collective action problem, actors' uncoordinated decisions do not deliver the best outcome.[22] The particular collective action problem in the case of climate change is that of the assurance game, best known as the prisoner's dilemma. The most optimal outcome requires cooperation by all actors, but mistrust in the cooperative solution leads actors to rationally defect in favour of less favourable, individually motivated outcomes.[23] The solution to assurance games is easily found in communication.[24] By removing actors' fears over the involvement of others, cooperation clearly becomes in every individual's best interest. Between states, this is easier said than done: states routinely undermine each other, or at best exclude each other's preferences from their own utility calculus. The sheer number of states increases the likelihood of defection from a collective response and raises the transaction cost of that such action.[25] All of this makes expressions of good faith critical to the success of collective action on climate change. The previously discussed statements of the court in the *Rocky Hill Case* are instrumental to this insofar as they are reassuring to overseas watchers.

Furthermore, the court relied upon the principle of distributive equity to justify the rejection of the development. Paragraphs [398] to [416] outline the intra and inter-generational inequities of the project.[26] The fundamental intra-generational inequities stemmed from the distribution of the project's benefits primarily flowing to individuals outside of Gloucester. In contrast, uninvolved residents of Gloucester would be affected by negative externalities, with unique socioeconomic and health harms likely to be experienced by the local Indigenous and elderly populations, respectively occupying 9% and 42.8% of Gloucester's total population.[27]

The court also acknowledged, albeit in less detail, an appreciable inequity in the distribution of benefits and burdens between current and future generations, given the persistence of the project's environmental harms beyond the two-decade timeframe of its benefits.[28] This reasoning is particularly significant compared to the other deliberations on the harms of the project that precede it, for it not only identifies the harms of the project, but provides a framework by which the benefits can be weighed against the harms.

While the court avoids making any metaethical commentary, one can infer from this discussion that the intergenerational impact of the project's harms are to be weighted higher than its present benefits. Other reasons for this weighting exist in the principle of distributive equity, namely that future generations lack the capacity to consent to the harmful consequences of present decisions, even if they might inherit some of their benefits.

In comparison to the court's remarks on the necessity of controlling Australia's emissions, its statements on intergenerational equity are unlikely to have a profound impact on the broader discourse on climate change in Australia. This is for three reasons: firstly, as previously alluded to, the judgment stopped short of conclusively stating the significance of the distributive inequity of the project. This can be contrasted with the finality of the court's statement on the significance of GHG emissions in their refusal of the development as they note that '[t]he Project will have significant and unacceptable planning, visual and social impacts ... [and] should be refused for these reasons alone. The GHG emissions of the Project ... adds a further reason for refusal.'[29] Secondly, intergenerational inequity is not solely associated with climate change in Australian political discourse. Liberal Party spokespeople frequently describe public debt as 'intergenerational theft.'[30] This makes it is unlikely that the court would have relied on it, nor would it trigger a strong media reaction. Thirdly, and perhaps most significantly, I argue that the non-identity problem – a quandary from the field of ethics – confounds the legal attribution of culpability for harms experienced by unborn individuals to actors cause the circumstances of those harms through their decisions in the present.

The non-identity problem is the disjunction between the intuitive assumption that harming unborn individuals through present actions is morally wrong and the 'seemingly sound argument that apparently demonstrates' this is not the case.[31] That argument is as follows: assuming the harm that present actors cause for the unborn individual is not so grave that it makes that individual's life not worth living, and assuming that the individuals that would be born either in a world in which the present actors did occasion that harm or a world in which they did not are not identical, it follows that the present actors' decisions does not leave the unborn individual better or worse off.[32]

This is because the individuals that are born in either world, by being non-identical, are not substitutable. This ethical problem can be easily dismissed by lay thinkers as truistic and misdirected (that *someone* is harmed and who that someone is is irrelevant), but might give pause to legal scholars who think in a rigorous framework of causal relationships between two equivalent adversarial parties.

III THE LEGAL IMPLICATIONS OF THE JUDGEMENT

It is difficult to discuss the legal implications of the *Rocky Hill Case* with the same conclusiveness as its social implications, given the controversy it has attracted and the possibility of it being overturned. However, for their part, Gloucester Resources has stated that it will not appeal the decision.[33] Nonetheless, commentators have laid out those implications as they stand currently. Christine Covington and Dr Phoebe Wynn-Pope of Corrs Chambers Westgarth note that the decision reflects a broader perspective of the impacts of development including the downstream impacts of GHG emissions, which will increasingly outweigh economic metrics such as a project's employment generation capacity.[34] In their analysis, these non-economic metrics largely centre community well-being.[35] John Watts et al. accord with this, but note in particular that social implications must be perceived to contribute to planning decisions.[36]

Critics of the decision have relied on various arguments to claim that it was made on an unfair basis. Some have gone as far to suggest that Preston J's former association with the Environmental Defender's Office has tainted the impartiality of the judgment, or that the decision could make unlawful any project that contributes to climate change.[37] The NSW Bar Association have comprehensively addressed the former claim, and needs no response here.[38] The second claim misrepresents the way in which Preston J reached his decision: firstly, the 'poor environmental and social performance' of the Project is referred to as 'the better reason for refusal,'[39] and secondly, the court states that 'similar size fossil fuel developments, with similar GHG emissions, may have different environmental social and economic impacts. Other things being equal, it would be rational to refuse fossil fuel developments with greater environmental, social and economic impacts than [those with fewer].'[40] In acknowledging this, the court clearly notes that the Project's GHG emissions alone do not justify refusal *prima facie* , but that the GHG emissions it produces have collateral disadvantages that a different project of a similar scale might not, and that managing Australia's emissions per its international obligations requires prioritisation of GHG-emitting projects in such relative terms. In the absence of any procedural unfairness, opponents of the decision may instead imply that the decision is unacceptably political. This criticism is inadequate because it mistakes the existence of political consequences of a decision with the exercise of a political function by the judiciary in making that decision. The fact that the environmental impacts of mining are a controversial political issue in Australia does not inherently 'politicise' any decision by a court that consequently impedes the mining industry.

IV CONCLUSION

The *Rocky Hill Case* is arguably unremarkable from a legal standpoint. What made it remarkable to the media – and public discourse in Australia, to the extent that the media represents it – was its relevance to the ongoing debate over Australia's contributions to climate change. The judgment ran parallel to a cultural moment of reckoning with Australia's complicity in significant GHG emissions when its coal is burned overseas. In acknowledging this very sentiment, the judgment was a touchstone between this public debate and the law, and reminds us that the law and the society do not run on parallel tracks, but are always in a discourse with each other. ▫

[1] *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257, [422] ('*Rocky Hill Case*').

[2] Justine Bell-James, 'Landmark Rocky Hill ruling could pave the way for more courts to choose climate over coal', *ABC News* (online at12 February 2019) <https://www.abc.net.au/news/2019-02-12/rocky-hill-ruling-more-courts-choose-climate-over-coal/10802930>.

[3] *Rocky Hill Case,* (n 1) [57].

[4] Ibid [90].

[5] Ibid [223].

[6] Ibid [550].

[7] See *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* (2013) 194 LGERA 347; *Kennedy v Minister for Planning* [2010] NSWLEC 240; *Australians for Sustainable Development Inc v Minister for Planning* (2011) 182 LGERA 370; *Hunter Environment Lobby Inc v Minister for Planning* [2011] 182 NSWLEC 221; *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* (2012) 194 LGERA 113; *Minister for Planning v Walker* (2008) 161 LGERA 423.

[8] *Rocky Hill Case,* (n 1) [422] - [550].

[9] Ibid [550].

[10] Ibid [486].

[11] Greenhouse Gas Protocol, 'FAQ', *ghgprotocol.org* (Web Page) <https://ghgprotocol.org/sites/default/files/standards_supporting/FAQ.pdf>.

[12] *Rocky Hill Case,* (n 1) [428].

[13] Ibid [534] - [545].

[14] Ibid [546] - [549].

[15] Ibid [17]; [398].

[16] See, (n 7).

[17] *Rocky Hill Case,* (n 1) [428].

[18] Ibid [515].

[19] ''Alan Jones is wrong': Radio commentator slammed over climate change remarks on Q&A science panel', *News.com.au* (online at 18 June 2019) <https://www.news.com.au/technology/environment/climate-change/alan-jones-is-wrong-radio-commentator-slammed-over-climate-change-remarks-on-qa-science-panel/news-story/765c558bb3a71c33a423f3458daf1572>; Sky News Australia, '@AlanJones gives us a visual representation of the carbon contribution of Australia to the global composition of carbon in the atmosphere', (Twitter, 7 May 2019, 9:12PM) <https://twitter.com/SkyNewsAust/status/1125720087510446080?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1125720087510446080&ref_url=https%3A%2F%2Fnewmatilda.com%2F2019%2F05%2F08%2Falan-jones-peta-credlin-expose-climate-hoax-with-a-bowl-of-rice-and-the-suspension-of-reason-and-accountability%2F>.

[20] 'Alan Jones on climate change', The Alan Jones Breakfast Show, *2GB.com* (Podcast, 17 June 2019) <https://www.2gb.com/podcast/alan-jones-on-climate-change/>.

[21] Daniel H Cole, 'Climate Change and Collective Action' (2008) 61 *Current Legal Problems* 229, 232.

[22] *A Concise Oxford Dictionary of Politics and International Relations* (online at 22 July 2018) 'collective action problem'.

[23] *The Oxford Dictionary of Philosophy* (online at 22 July 2018) 'assurance game'.

[24] *A Concise Oxford Dictionary of Politics and International Relations* (n 22).

[25] 'Climate Change and Collective Action' (n 21) 254.

[26] *Rocky Hill Case,* (n 1) [398] - [416].

[27] Ibid.

[28] Ibid [415] - [416].

[29] Ibid [556].

[30] Greg Jericho, ''Intergenerational theft' a Coalition favourite that ignores the long-term benefits of spending', *The Guardian* (online at 19 February 2015) <https://www.theguardian.com/business/grogonomics/2015/feb/19/intergenerational-theft-a-coalition-favourite-that-ignores-the-long-term-benefits-of-spending>.

[31] David Boonin, *The Non-Identity Problem and the Ethics of Future People* (Oxford University Press, 1st ed, 2014) 3.

[32] Ibid 2 - 4.

[33] 'Rocky Hill Coal Project will not proceed', *RockyHillProject.com.au*, (Web Page, 8 May 2019) <https://www.rockyhillprojcct.com.au/2019/05/rocky-hill-coal-project-will-not-proceed/>.

[34] Christine Covington and Phoebe Wynn-Pope, 'Environmental impact, human rights and community well-being: 'Rocky Hill' coal mine decision' (2019) 71(5) *Governance Directions* 282, 286.

[35] Ibid.

[36] John Watts et al, 'Environmental law and indigenous issues: What you didn't know about the landmark Rocky Hill judgement' (2019) 57 (July) *Law Society of NSW Journal* 72, 73.

[37] Aaron Patrick, 'Did environment court judge Brian Preston veer from justice to morality?' *Australian Financial Review* (online at 19 February 2019) <https://www.afr.com/business/legal/did-anticoal-judge-brian-preston-go-too-far-20190219-h1bffo>.

[38] Grace Ormsby, 'NSW Bar shuts down 'judicial overreach' claims' *Lawyers Weekly* (online at 14 February 2019) <https://www.lawyersweekly.com.au/wig-chamber/25026-nsw-bar-shuts-down-judicial-overreach-claims>.

[39] *Rocky Hill Case,* (n 1) [556].

[40] Ibid [555].

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