

Pandora's Box

2015 *Crime, Justice and the People*



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Pandora's Box

2015 *Crime, Justice and the People*



Editors

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'Criminal law should attract the best lawyers in the country. No other branch of the law is so important. It is where our commitment to fair trial and the rule of law are tested every day, in courtrooms throughout the nation. It is where fear of wrongdoers intersects with respect for basic rights.'

-- Michael Kirby, *Turbulent Years of Change in Australia's Criminal Laws*, speech delivered on 22 February 2001 at the Australia and New Zealand Society of Criminology Conference, University of Melbourne.

FOREWORD

Professor Simon Bronitt*

The quote from Justice Michael Kirby, selected by the editors to introduce this issue of *Pandora's Box*, reminds those involved in the academic study and practice of criminal law of its fundamental importance. I am well aware of that quote, as his speech was delivered at the book launch of the first edition of Bronitt & McSherry, *Principles of Criminal Law* (Lawbook Co., 2001). Our book launch provided Justice Kirby the opportunity to reflect upon the many changes he had witnessed since he first studied criminal law in Sydney law school in the early 1960s. At that time, criminal law in Australia was not widely considered to be a serious academic field, with only a handful of scholars and practitioners teaching the subject, reliant upon 'imported' English leading texts, cases and 'controversies'. The emergence of a distinctive Australian criminal law, Kirby observed, came only in the 1970s, driven by a steady increase in criminal appeals granted by the High Court, providing the necessary 'raw materials' to support a local journal (Criminal Law Journal) and a specialist law report series (Australian Criminal Reports). The subsequent decades (1980s-1990s) witnessed a flourishing of critical and socio-legal scholarship embracing a broader range of disciplinary and normative perspectives on criminal law. Gender, sexuality, race and human rights, in addition to moral philosophy, comparative law and legal history, provided fresh perspectives on the criminal law curriculum, supplements which were not always welcomed by more traditional members of the academy, profession or judiciary.

In launching Bronitt & McSherry and this (ongoing) academic partnership, Justice Kirby commended the authors for an ambitious interdisciplinary manifesto, but also offered a polite rebuke that an otherwise 'excellent' book had failed to include any discussion of some of the most serious offences, namely treason and sedition. Justice Kirby's criticism proved to be highly prescient in light of the 9/11 attacks 6 months later. Over the next fifteen years, the 'War on Terror', more than any other factor locally and globally, would leave indelible marks on criminal justice. As Ashworth and Zedner observed, the post-9/11 era has witnessed an amplification of 'preventive justice', which has come to increasingly displace the traditional 'reactive' system of criminal law and punishment.¹ The shift towards preventive justice has spread beyond terrorism law to new measures to control dangerous drugs, sexual predators and organised criminal gangs. The shift from post-crime to

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¹ Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014).

pre-crime societies prioritises the routine surveillance and risk management of dangerous persons and other 'suspect' groups. The normalisation of 'exceptional' hybrid laws (melding civil and criminal law) stands as an enduring hallmark of the post 9/11 era.²

This special issue parallels this evolution of criminal law scholarship. Gender and race remain significant themes (see Douglas; Wallis & Chrzanowski), though these are supplemented with broader perspectives on 'difference' including psychological vulnerability (see Walsh; Ryan; Goodman-Delahanty). Cherished ideas about adversarial justice are also contested (see Kirchengast), reimagined to accommodate the needs of victims, other community members and the broader goals of restorative justice. Local and parochial paradigms of criminal law, in which uncivil 'law and order' politics spawn self-help defences to combat home invasion (see Lamb), contrast with the global demands for justice before the international criminal court (see Taylor). Legitimacy in criminal law is never far from our agenda, whether framed in terms of how far the War on Terror has undermined the rule of law (see Barns), or how the continued use of the death penalty in many countries undermines both human rights and the system of global criminal justice cooperation (see Keim and Armstrong).

Reflecting on Justice Kirby's speech, the hope then expressed was that criminal law could move beyond narrow philosophical debates about the 'true' principles of mens rea that had dominated our own legal education to build a richer understanding of criminal law based upon history, philosophy, psychology and criminology. This was not just an 'academic fancy' of interdisciplinarity for its own sake, but had the purpose to create a just and humane system of criminalisation, law enforcement, trial and punishment. This special issue is testament to Justice Kirby's vision for criminal law and its scholarship, and how far we have progressed beyond those early 'turbulent years'.

² Simon Bronitt and Susan Donkin, 'Australian responses to 9/11: New world legal hybrids?' in Aniceto Masferrer (ed.), *Post 9/11 and the State of Permanent Legal Emergency Security and Human Rights in Countering Terrorism* (Springer, 2012) 223, 240.

A NOTE FROM THE EDITORS

The criminal law is both the law's grandest construct and, in more ways than one, its darkest corner. For the average citizen, and for lawyers in the halcyon days before they enter the legal world, crime is by far the most visible branch of our legal system. Every day, people from all walks of life make contact with the criminal justice system, especially those who are more disadvantaged. From shocking murders to the most trivial of fines, the criminal law is ever present.

Yet it commands far less interest and awe from within the profession. For much of the 20th century, academia was sparse with respect to crime. Out in the field it is, mostly for practical reasons, a comparatively small practice area, and Legal Aid matters form the bulk of matters. This is to say nothing of the psychological and moral hardships that arise out of the real cases. There is indeed an ever so slight hesitance towards the criminal law, with woeful tales of lawyers getting murderers and rapists 'off', the strict adherence to rules of evidence and procedure, the persistent fear of never wanting to know whether your client is actually guilty or not, and the constant defending of a career path from the pointed questions asked by peers; peers who echo sentiments, often promulgated by the media, which demonise criminals and defence counsel. This does not culminate in a welcome invitation. Whether in academia or practice, it is understandable how criminal law can be the road less travelled.

But we underestimate the criminal law at our peril. Some of the Common Law's most treasured values – fair trial, natural justice, the presumption of innocence – are at home in the criminal law. Faith in the legal system itself among the citizenry is often shaped most strongly by events in this arena. Criminalisation is used, and has been for centuries, as a tool for behavioural guidance and modification, and more and more it is looked to by governments, often as a 'quick fix' to alleviate new or perennial problems. Conversely, the criminal law has also been a tool for the rectification of deep-seated inequality. Indeed, engaging with criminal justice issues is arguably the logical end of one's profound convictions for open access to justice, the rule of law, and a system of integrity. Little else is so fundamental to the health of a society.

It is with these imperatives in mind that JATL presents *Pandora's Box 2015: Crime, Justice and the People*. Underneath the surface of the direct application of a process lies a plethora of issues to explore. Inside are a variety of pieces, dealing with many disparate elements of the criminal law. A common thread woven throughout, however, is the importance of people, both as actors and subjects of law. Bound together are victims of crime, jurors, marginalised or vulnerable groups, and criminal lawyers themselves. Altogether it has been a

quest for knowledge that we have relished and feel privileged to have undertaken. We hope this collection enlightens and inspires those who read it.

This year's *Pandora's Box* would not have come about without the help and support of others. We would like to thank our sponsors, the Queensland Law Society. We would also like to extend our thanks to Samuel Walpole for his guidance, amassed wisdom and continued contribution to this journal. Our gratitude also goes to Will Isdale for his cover design and the rest of the JATL executive, past and present, for their ongoing support. Last but not least, we would like to thank each and every one of our contributors for their quality submissions and insights shared within.

We sincerely hope you enjoy reading *Crime, Justice and the People*, and that you would agree with us that, contrary to the postulations of Ashworth,¹ criminal law is far from being a lost cause, and is in many ways the beating heart of law.

Wendy Pei and Michael Potts
Editors, *Pandora's Box* 2015

ABOUT PANDORA'S BOX

Pandora's Box is the annual academic journal published by the Justice and the Law Society (JATL) of the University of Queensland. It has been published since 1994 and aims to bring academic discussion of legal, social justice and political issues to a wider audience.

Pandora's Box is not so named because of the classical interpretation of the story: of a woman's weakness and disobedience unleashing evils on the world. Rather, we regard Pandora as the heroine of the story – the inquiring mind - as that is what the legal mind should be.

Pandora's Box journal is registered with Ulrich's International Periodical Directory and can be accessed online through *Informit* and EBSCO.

Pandora's Box is launched each year at the Justice and the Law Society's *Annual Professional Breakfast*.

Additional copies of the journal, including previous editions, are available. Please contact pandorasbox@jatl.org for more information or go online at <http://www.jatl.org/> to find the digitised versions.

¹ Andrew Ashworth, 'Is the criminal law a lost cause?' (2000) 116 *Law Quarterly Review* 225.

ABOUT THE CONTRIBUTORS

Greg Barns holds a Bachelor of Arts and Bachelor of Laws from Monash University and is a member of the Tasmanian, Victorian and Western Australian Bars practicing in various areas including criminal and administrative law. He was chief of staff and senior adviser to a number of federal and state Liberal Party leaders and ministers from 1989-99. He is also the former National Chair of the Australian Republican Movement and a director of human rights group, Rights Australia. He has written three books on Australian politics, is a Director of the Australian Lawyers Alliance, and a member of the Australian Defence Lawyers Alliance.

Simon Bronitt was appointed Professor of Law and Deputy Dean (Research) in the TC Beirne School of Law, commencing in June 2014. Previously he served as the Director of the Australian Research Council Centre of Excellence in Policing and Security, hosted by Griffith University (2009-2014). Before moving to Queensland in 2009 to take up this position, Simon was a member of the Australian National University College of Law (1991-2009). During that time he served as Sub Dean in 1997-98, and was promoted to Professor in 2005. During his time at ANU, he held a number of research leadership roles, including Director of the National Europe Centre, an EU funded Centre - in the Research School of Humanities (2003-2008) and Director of the Australian Centre for Military Law and Justice, ANU (2009). Drawing on comparative and interdisciplinary perspectives, he has published widely on criminal justice topics ranging across terrorism law and human rights, comparative criminal law, covert policing, family violence, and mental health policing. His key publications include two textbooks, *Principles of Criminal Law* (3rd ed, Thomson Reuters 2010) and *Law in Context* (4th ed, Federation Press, 2012).

Heather Douglas is a Professor of Law at the University of Queensland's TC Beirne School of Law, researching primarily in the areas of criminal justice, particularly with respect to women, Indigenous peoples, and domestic violence. In 2014 she was awarded an Australian Research Council Future Fellowship to research the way in which women who have experienced domestic violence use the legal system to help them leave violence. From 2001-2007 she was a part-time commissioner with the Queensland Law Reform Commission and in 2004 she was a visiting scholar at the Centre for Socio-Legal Studies, Oxford University. Professor Douglas was appointed a Fellow of the Australian Academy of Law in 2013. She has recently published (with Francesca Bartlett, Trish Luker and Rosemary Hunter) *Australian Feminist Judgements: Righting and Rewriting Law* (Hart Publishing, 2014) which collates historic Australian judgements, rewritten from feminist viewpoints.

Jane Goodman-Delahunty is an experimental psychologist and lawyer and Professor of Psychology at Charles Sturt University. Her empirical legal studies foster evidence-based decisions to promote social, procedural and distributive justice within organisations and the community. She practiced at the Bar in the State of Washington (1983-1992), and was an Administrative Judge for the US Equal Employment Opportunity Commission in Southern California (1992-2001) and third-party neutral with JAMS The Resolution Experts (1994-2001). She is a Member of the NSW Civil

and Administrative Tribunal (NCAT) on the Community Services and Equal Opportunity Divisions and a Member of the Criminal Justice Working Group of the Royal Commission into Responses to Institutional Child Sexual Abuse. Jane is a past President of the Australia & New Zealand Association of Psychiatry Psychology & Law and of the American Psychology Law Society. She was also the Editor of *Psychology, Public Policy and Law* (2001-2006). Previously, Jane has directed the Postgraduate Program in Forensic Psychology at the University of New South Wales.

Stephen Keim SC and Bridget Armstrong are human rights advocates and members of Australian Lawyers for Human Rights, of which Mr Keim was the President from 2010-2013. Mr Keim is a Barrister-at-Law based in Brisbane, holding a Bachelor of Arts and Bachelor of Laws from the University of Queensland, and took silk in 2004. He has a wide practice and acted for Dr Mohamed Haneef in his application for judicial review of a government decision to revoke his Australian visa. On 6 March 2015, prior to the executions of Andrew Chan and Myuran Sukumaran, Mr Keim addressed an open letter to Indonesian President, Joko Widodo, pleading for clemency. Ms Armstrong holds a Bachelor of Laws from the Queensland University of Technology. She graduated with honours and publishes online for Independent Australia.

Tyrone Kirchengast is a Senior Lecturer in the Faculty of Law at the University of New South Wales. He is admitted as a legal practitioner of the Supreme Court of New South Wales and is a barrister and solicitor of the High Court of Australia. Before joining the UNSW Faculty of Law, he lectured at the University of Newcastle from 2003-2007, and Macquarie University from 2007-2009. His principal teaching and research interests are in criminal law and procedure and his publications focus on the integration of victim interests within criminal law. Dr Kirchengast's recent work focuses on the role of victim impact statements in sentencing homicide offenders; the rise of victim lawyers and the integration of victims into adversarial proceedings; victim rights as human rights under the European Convention on Human Rights and before the International Criminal Court; changes to the criminal trial process and the emergence of enforceable victim rights.

Simon Lamb is an LLB candidate at the University of Queensland's TC Beirne School of Law. His research interests lie predominantly in the areas of criminal law, contracts law and public law, and also in the various jurisprudential theories and perspectives surrounding these fields and the broader legal system. He is currently a Minter Ellison PALS leader for the UQLS.

Soraya Ryan QC holds a Bachelor of Commerce and Bachelor of Laws with First Class Honours from the University of Queensland. She was the associate to the Honourable Justice Williams of the Supreme Court of Queensland. Ms Ryan worked briefly at a commercial law firm and then as a legal officer at the Ward 10B Inquiry. She then joined the Office of the Director of Public Prosecutions, becoming a Crown Prosecutor in 1992. From 1999 until 2001, she lectured in evidence at UQ and from 2002-2009, she was in-house counsel at Legal Aid Queensland. Ms Ryan commenced practice at the private bar in 2010, taking silk in November 2013 and has been one of

the authors of *Carter's Criminal Law of Queensland* since 1996. From 2010 until 2013, she was also a part-time member of the Queensland Law Reform Commission.

Melinda Taylor currently acts as Defence Counsel before the International Criminal Court on behalf of the former Vice-President of the Democratic Republic of the Congo, Jean-Pierre Bemba Gombo. She is also involved in human rights litigation concerning various detainees in Libya (including Saif Al-Islam Gaddafi), and is part of the legal team of Julian Assange. Ms. Taylor graduated from the University of Queensland with a Bachelor of Laws in 1997, and has a Masters of Studies in International Human Rights Law from the University of Oxford. She is admitted to practice in New York.

Rebecca Wallis and April Chrzanowski are PhD candidates in Griffith University's School of Criminology and Criminal Justice. Ms Wallis holds a Bachelor of Arts/Bachelor of Laws from the University of Queensland and completed a Master of Criminology and Criminal Justice (Honours First Class) at Griffith University in 2009. Her PhD research examines the level of social exclusion experienced by female offenders, their children, and their children's alternative caregivers. It also seeks to explore the way that mothers, carers and children experience social exclusion. Ms Chrzanowski is a Senior Research Assistant and Sessional Lecturer within the School of Criminology and Criminal Justice and has degrees in law and mathematics. Her PhD is focused on the youth justice system, and has involved the development of a microsimulation model to explore the impact of changes in youth justice policy relating to the timeliness of court procedures, bail and remand.

Samuel Walpole is an LLB BA candidate, majoring in psychology at the University of Queensland, where he is a Research Assistant within the TC Beirne School of Law and Student Editor of the *Australian and New Zealand Maritime Law Journal*. He is a former Editor of Pandora's Box (2012-13) and a past President of the Justice and the Law Society (2014).

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An Interview with Professor Heather Douglas*

PB: Heather Douglas, thank you very much for joining Pandora's Box today.

HD: My pleasure.

PB: You've done a lot of research surrounding women and the law, and criminal law more specifically. What have you observed in regards to how women use the legal system to leave situations of violence, particularly around the home? What are the biggest challenges they face in doing so?

HD: I think the biggest challenge for women leaving violence is not about the legal system, but is about the dangers of leaving violence, because we know that when women separate from their partners, that becomes a very high risk situation, and that's when they're most in danger. I think that many women understand that, so often put off leaving. There are also a lot of other reasons women struggle to leave that are not necessarily related to the criminal justice system or to the domestic violence protection order system. That revolves around women idealising a family unit, keeping the kids together with their father, economic issues, and all those kinds of things. I think those things work against leaving.

In terms of the justice system, I think a lot of women feel that it is a shameful thing to engage with the justice system in response to domestic violence. It's embarrassing, it's hard. To obtain a protection order they often have to go to the Magistrates Court and make a statement about what's going on in their home life to people that they've never met, so that's quite a challenging thing. If women want to get a protection order, in most cases they won't be legally represented. If they're lucky, the police will help them to get a protection order, but that isn't always the case. So it's a pretty daunting prospect, turning up to court, talking about your family situation when you're very nervous, and scared about what might happen to you. Those kinds of things are a problem.

* Professor of Law and ARC Future Fellow, University of Queensland, TC Beirne School of Law. This interview was conducted by Wendy Pei and Michael Potts at the University of Queensland on 17 August 2015.

The family law system is also not particularly supportive to women who want to leave violence. There's a provision that effectively requires the Family Court to make sure that kids continue to see both parents, which means that women have to facilitate access to a person who has been very violent towards them and perhaps who has been violent in front of the children. While contact may be ordered via a contact centre or other supervised context, it's a really complicated situation. There are lots of obstacles and complications for women going through the legal system.

PB: Do you think the criminal law is equipped to deal with domestic violence, or is there need for major reform to address it? Is criminal law in and of itself too blunt an instrument?

HD: I think in some ways the criminal law could be improved. The offences are usually very much action-based, and a lot of the violence that women complain of are things like economic abuse, emotional abuse, monitoring and being tracked by GPS devices. All of these kinds of things don't fit neatly into the criminal justice process. Recently, I was talking to a woman whose partner tracked her with a GPS tracking device. There was no criminal charge there, there was no stalking charge laid. In some cases I think we could do with more appropriate offences being introduced to the system that can capture this non-physical abuse that is such a concern. But in other senses, I think the problem lies more with the implementation of the criminal justice process and the failure of police to charge criminal offences.

The other issue is that these things often happen quite quickly. Sometimes the police will come to a woman's house in a situation of real tension - there's been a callout, there's been a violent interaction, and police might ask the woman, at the scene with her partner there, if she wants to make a complaint. Right at that moment it's very tense. She might say, 'Oh no, no, I just want him to go for now', whereas if she had some time and if she had proper information, she may be very willing to assist the police with that prosecution. So I don't think women are given enough time and information to make those decisions about whether they're willing to engage with criminal prosecution. I think some of these issues about the criminal justice system not responding properly to domestic violence relate to those implementation questions.

PB: So administratively, the real issue lies in things like police training, and the training of magistrates and legal officers to deal with these

psychological and social issues which they haven't really had much experience with before?

HD: That's right, I think that's true.

PB: On that note, the *Not Now, Not Ever* Report¹ into domestic violence in Queensland, headed by Quentin Bryce, was produced earlier this year, to which we understand you made a submission. What ideas did your submission put forward, and has this report charted a positive course for addressing domestic violence in this state?

HD: There are a lot of positive recommendations made by the Taskforce's report. One of the things I recommended to the Taskforce was the introduction of a charge of strangulation, a specific charge of strangulation directed at domestic violence assaults, because we know that women who've been strangled, are much more likely to be killed or seriously harmed in the weeks after a non-fatal strangulation attempt. So it's a really serious incident. It often doesn't leave any visible injuries, although some of the physical injuries that women can experience after non-fatal strangulation can be quite health threatening.

So I think it might be useful to introduce a strangulation offence. Theoretically, this is covered by assault.² But certainly if we think about fair labelling, and if we think of the offences in the Code as being partly educational, it might encourage prosecution of that kind of offence by police. That's what I suggested, and I assume other people must have suggested that as well because that is a recommendation of the Report,³ which is great.

Other things I recommended were the introduction of a provision in the *Evidence Act*⁴ similar to one in Victoria which sets out evidence of domestic violence and what it might look like, and covers some of those issues I mentioned before like all of those non-physical types of family violence, including economic abuse and coercive kinds of behaviours like monitoring and so forth. There's a very useful provision in the *Crimes Act* in Victoria which is called 'family violence evidence', which sets out the kinds of things which judges might take

¹ Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Queensland Government, 2015).

² *Criminal Code 1899* (Qld) ss 245, 246.

³ Special Taskforce on Domestic and Family Violence in Queensland, above n 2, 40.

⁴ *Evidence Act 1977* (Qld).

into account,⁵ so I think that would be a useful addition to our *Evidence Act* in Queensland, or our *Criminal Code*. There was discussion about that in the Taskforce, but there was no recommendation about it.

I talked also, in my submission, about sentencing in relation to domestic violence offenders, and how fines are a completely inappropriate response to domestic violence because they might be paid by the woman herself. They may be used as another tool to essentially continue the abuse – pushing her to pay those fines – and certainly that's another thing the Taskforce has picked up too, that that's not an appropriate outcome.⁶ So they've moved towards recommending development of perpetrator programs,⁷ which I think is potentially a positive as well.

PB: Your new book, *Australian Feminist Judgements*,⁸ written together with our own Francesca Bartlett, was released at the end of last year. What inspired you to publish this book and what do you hope to achieve with it?

HD: This is an edited collection and we have over fifty contributors to that collection. They're from academics, retired judges and lawyers from around the country, which is fantastic. We certainly saw it, more than anything, as a way of thinking about law differently. So this idea that, of course, we have a common law system in Australia and precedent is really important. But some of the cases in that collection demonstrate that the assessments of which precedents count, is a decision judges have the discretion to make in many cases. So in some cases we demonstrated that if judges had taken a different direction in terms of the precedents they selected to guide their decision-making, they might have come up with a different outcome. We wanted to demonstrate that it would be possible to be a feminist judge and to take into account the woman, to ask 'the woman question' and think about how the law might better reflect the concerns that women face.

There are cases in there about how to interpret self-defence laws, for example, and cases in terms of how to determine child contact in situations where there's family violence. There's cases about

⁵ *Crimes Act 1958* (Vic) s 322J.

⁶ Special Taskforce on Domestic and Family Violence in Queensland, above n 2, 275.

⁷ *Ibid* 25.

⁸ Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds.), *Australian Feminist Judgements: Righting and Rewriting Law* (Hart Publishing, 2014).

considering and taking into account family violence in cases involving Indigenous people, so we really covered quite a wide range of things, and demonstrated that in many of these cases a different outcome could have been reached, or a different way of setting out the reasons for decisions could have been established, even within the current parameters of the legal system. So it's basically an educative tool to show how judges might be able to do things differently.

PB: Throughout the book there are judgements from very different periods. For example, the case of *Parker v The Queen* from the 1960s, and later *Taikato v The Queen* from the 1990s. There seems to be a perennial issue in the common law of Australia where women's circumstances aren't properly accounted for in judgements. Has it improved over time? Are judges today more able to see things from the perspectives of the women they're making their judgements in relation to, or is this something that still needs to be worked on?

HD: I think we still need to be working on the issue, and it's only recently that we've had the Taskforce into domestic violence in Queensland. At the moment we've got a royal commission in Victoria, so it's clearly still an open question as to whether we're dealing with this as well as we can, and I think there's always room for improvement. Sometimes it's a bit of a case of two steps forward, one step back. We had a Victorian Law Reform Commission inquiry into defences to homicide,⁹ for example, which resulted in the development of a defence called 'defensive homicide', which turned out to really not be used in the expected way. We expected that it would be used in cases where women killed an abusive partner, but actually it was mainly used by men who killed each other in the context of provocative situations. At the same time as introducing defensive homicide, Victoria also abolished provocation, so they wanted to set up a different way of dealing with things and it didn't work.

A couple of years after that, in 2014, defensive homicide was abolished. So it's difficult to get it right, and it is a case of experimenting to some extent. I think we're just continuing with that and trying to work towards getting fair and just outcomes. If we think about the rule of thumb, this was a commonly accepted practice in family life until a hundred and fifty years ago where men could discipline members of their family with a stick no larger than the parameter of their thumb. We've obviously moved on from that, so

⁹ Victorian Law Reform Commission, *Defences to Homicide*, Report No 94 (2004).

clearly we are making progress, but I think there's certainly more to be made.

PB: Similarly you have also done a lot of research into Indigenous issues, and this is a particular interest of yours. What do you consider the biggest challenges for Indigenous Australians in the criminal justice system?

HD: Well, I think it's incarceration. We are moving towards a situation, and not in a good way, where we're reflecting US style statistics on incarceration, and that is especially the case amongst Indigenous populations. In some states, over thirty percent of the incarcerated population is Indigenous, yet they represent only two or three percent of the entire population. So clearly something is very wrong in that sense and I think that's partly because we've rolled back a lot of the alternatives to incarceration. We have less opportunity to place people on parole or supervised orders where they might be able to engage in training opportunities and so forth as part of their sentences. We've also rolled back, even within jails, various training opportunities and access to ongoing education. So there are real concerns around incarceration and we need to be trying to think of different ways to deal with people who are charged with criminal offences.

One of the radical suggestions made by Andrew Ashworth¹⁰ in the UK was that property offences generally shouldn't lead to incarceration – that we should not allow that to happen in cases of theft, for example. Many of the people that are in custody are there because of theft and burglary type offences, probably as a result of drug abuse issues and drug involvement, and we certainly need to be thinking of other ways of dealing with those individuals. I think America too is tracking this issue and realising that it's too expensive amongst other things. It may well be unjust, but it's also way too expensive.

PB: Part of the problem is that Indigenous Peoples seem to be bound up with the history of an imported legal system which has been externally imposed upon them, leading to centuries of displacement. Is there a proper resolution for this within our common law system, which has

¹⁰ Emeritus Vinerian Professor of English Law, University of Oxford. See: Andrew Ashworth, *What If Imprisonment Were Abolished For Property Offences?* (2013) The Howard League for Penal Reform

<http://d19ylpo4aovc7m.cloudfront.net/fileadmin/howard_league/user/online_publications/What_if_imprisonment_were_abolished_web.pdf>.

been externally imposed, or does true justice really lie somewhere else, with something more, ironically, indigenous?

HD: I think that is aspirational, but not realistic. There's a big debate within the research community who are looking at this issue. The division is between that position, which is that we should decolonise the criminal justice system and provide for Indigenous People some kind of alternative justice system that's more reflective of traditional ways of life, versus the less radical criminologists like Don Weatherburn¹¹ in Sydney. Weatherburn focusses on other issues that he suggests we need to be addressing. He says the issues we should be addressing are issues like substance abuse and maternal capacity. We've got a situation where many Indigenous kids have been taken away from their parents, which means they've grown up in out-of-home care and they don't have mothering or parenting skills, so we have a continuing cycle. Those are the core issues we need to deal with according to Don Weatherburn, which is outside of the criminal justice system.

I'm torn on this issue. Most Aboriginal people live in the cities. Most Australian Aboriginal people live in Sydney, Melbourne, Brisbane, and large cities like Cairns and Townsville. They don't live in rural communities where they could be subject to a segregated justice system. I'm also torn about this because a lot of women in Indigenous communities call out for proper responses to the experiences they receive, in terms of violence; they call out for more police protection and better criminal justice processes that would support their position. So I don't really have an answer to your question.

I think in some cases, alternative mechanisms can be helpful. For example, there's been an experiment that's been quite successful in Redfern with Indigenous night patrols, which are focused on kids. These Indigenous night patrols travel around, and if they see kids mucking up they talk to those kids and they try to divert them away from any police engagement. Those kinds of thing are really helpful – before the fact of engagement with the criminal justice system.

PB: Thank you very much, Heather.

HD: My pleasure.

¹¹ Director, NSW Bureau of Crime Statistics and Research. See Don Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014).

The Jury Box and the Urn: Containing Our Expectations

Jane Goodman-Delahunty*

The irony of preparing a submission for a journal bearing the name *Pandora's Box* did not escape me. This concatenation underscores the fact that construing the contemporary jury as the Pandora's Box of the criminal justice system is an apt analogy in several respects. Like Pandora's curiosity about the secret contents of her gift, academics, legal practitioners and the public are consumed with curiosity about what transpires in the minds of those seated in the jury box and behind the closed doors of the jury deliberation room. As an aside, the English translation of the Greek myth does not actually survive close scrutiny. In reality, Zeus never gave Pandora a box, but an urn instead. Nevertheless, the goal of this commentary is to lift the lid of the "box" to review common contemporary narratives about jury duty and jury behaviour, and to examine how well these narratives align with the psychological realities and available empirical evidence about jury behaviour. If the jury box is opened, are the risks to justice so considerable, that like Pandora, our curiosity will soon be overtaken by alarm, and we will hasten to close the lid to avoid the flood of misery unleashed?

In regards to the history of jury trials, the principle of a right to trial "by one's peers" originated in the English system of trial by jury in 1215, when King John of England issued the *Magna Carta*. Clause 39 of the *Magna Carta* declared that "No free man shall be seized or imprisoned ... except by the lawful judgement of his equals." In the two hundred years since juries became a feature of Australian justice within the states and territories, popular ideas about their use and function have proliferated. Some of the many dominant jury narratives which are now also common objections to jury trials are reviewed below.

I A JURY IS AN ANACHRONISM IN A CONTEMPORARY JUSTICE SYSTEM

The notion that juries have outlived their expiration date, are out of date, and out of place in a modern justice system, is a commonly espoused view that is endorsed by many, including leading Australian jurists.¹ In fact, questions

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¹ Peter McClellan, 'The Australian Justice System in 2020' (2009) 9(2) *The Judicial Review* 179, 188.

about the survival of the Australian jury are perennial. Debate has persisted about reducing or abolishing the right to a trial by jury in Australia for over fifty years, since India, Singapore and South Africa abolished the right to trial by jury in the 1960s.²

Contrary to this popular narrative, the principle of citizen engagement in the legal process is very much alive. There is a rush in modern democracies to revive juries. Even countries without any prior tradition of lay participation in the legal system have been introducing juries, such as Japan and Russia. The engagement of lay jurors in the court room is political, and is perceived to legitimise trial practices and render the justice system fairer.

In Australia, the United States of America, and the United Kingdom, criminal juries are comprised of twelve jurors. In Brazil and in Greece, juries are comprised of ten, and in Norway, seven. In a number of countries, hybrid models are used, whereby lay jurors and legal professionals collaborate to reach a verdict. In Germany, two or three laypersons work alongside a judge; in France, it is nine laypersons with a judge. Even where judges and other legal professionals are present, as in the mixed or hybrid jury systems where lay jurors and legal professionals collaborate to reach a verdict, the participation of lay jurors is persistently regarded as a significant and key feature of democratic governance.

II CITIZENS ARE RELUCTANT TO SERVE AS JURORS

Jury duty is a compulsory civic responsibility but it relies on those eligible to serve to be willing to serve.³ Calls to jettison juries in criminal trials on the grounds of presumed and increasing resistance by citizens to jury duty are often based on an assumption that because people consider jury duty to be lengthy and poorly remunerated, they are unsupportive of the jury system. These assumptions are not supported by evidence. For instance, in an Australian study, although 84% of participants either agreed or strongly agreed that jurors needed more compensation for expenses, and 75% felt the same

² Sue Vander Hook, *Democracy* (ABDO Publishing Company, 2011).

³ John P Richert, 'Jurors' Attitudes Towards Jury Service' (1977) 2 *The Justice System Journal* 233.

way about compensation for child care, 79% of participants nevertheless endorsed the view that “jury service is an important civic duty”.⁴

It is common for citizens to seek to delay their jury duty or to seek excusal for a variety of reasons, but research conducted in North America, the United Kingdom and Australia has confirmed that those who actually serve are glad they did.⁵ Increased levels of participation within the jury system were significant predictors of increased satisfaction and confidence in the jury and justice system.⁶ Importantly, in line with deliberative democracy theory,⁷ subsequent research revealed that those citizens who complete jury service not only become more ardent and committed supporters of the jury system, but their willingness to serve increased.⁸ Moreover, civic attitudes towards jury duty were more influential in affecting juror willingness to serve than the potential financial constraints or economic losses that jurors anticipated would ensue.⁹

The notion that eligible jurors are clamouring to evade jury duty must be assessed in light of the fact that relatively few Australian trials proceed before a jury. While precise statistics on jury use vary between 1 and 9% of all criminal trials,¹⁰ the bulk of Australian criminal trials are heard by a magistrate alone.¹¹ Individual citizens are not burdened by repeated summonses for jury duty.

⁴ Jane Goodman-Delahunty et al, *Practices, policies and procedures that influence juror satisfaction in Australia* (Report to the Criminology Research Council, Australian Institute of Criminology Research and Public Policy Series 87, 2007) 145 (*Practices, policies and procedures*).

⁵ Ibid; Brian L Cutler and Donna M Hughes, ‘Judging Jury Service: Results of the North Carolina Administrative Office of the Courts Juror Survey’ (2001) 19 *Behavioural Sciences and the Law* 305; Mark Findlay, *Jury Management in New South Wales* (The Australian Institute of Judicial Administration, 1994); Roger Matthews, Lynn Hancock and Daniel Briggs, *Home Office, Jurors’ perceptions, understanding, confidence and satisfaction in the jury system: a study of six courts* (2004).

⁶ Kate O’Brien et al, ‘Factors affecting juror satisfaction and confidence in New South Wales, Victoria and South Australia’ (2008) 354 *Trends & Issues in Crime and Criminal Justice* 1.

⁷ John Gastil and Michael Xenox, ‘Of Attitudes and Engagement: Clarifying the Reciprocal Relationship Between Civic Attitudes and Political Participation’ (2010) 60 *Journal of Communication* 318.

⁸ D Ebzery, *Jury willingness to serve* (Unpublished Master’s Thesis, Charles Sturt University, 2012).

⁹ Ibid 20.

¹⁰ Michael Chesterman, *Criminal trial juries in Australia: From penal colonies to federal democracy* (1999) 62(2) *Law and Contemporary Problems* 69, 74.

¹¹ Jane Goodman-Delahunty and David Tait, ‘Lay Participation in Legal Decision Making in Australia and New Zealand: Jury Trials and Administrative Tribunals’ in Martin F Kaplan & Ana M Martin (eds.), *Understanding world juries through psychological research* (Psychology Press, 2006) 47.

III COMMUNITY CONFIDENCE IN JURIES IS LACKING

A popular contention is that juries are unreliable, arbitrary and easily swayed by passion and prejudice, and that accordingly, confidence in Australian juries is low. This view is at odds with empirical findings showing extensive support for, and confidence in, the jury. For example, a study examining factors influencing jury satisfaction and confidence in the criminal justice system across three Australian states analysed convergent sources of information using three methods of data collection: archival data, qualitative data such as interviews and field observations, and quantitative data, captured from quasi-experimental surveys.¹² Participants comprised four groups: empanelled jurors, non-empanelled jurors, community members and key stakeholders in the justice system such as judges, prosecutors, members of the criminal defence bar, and jury administration staff.

The cohort of key stakeholders was asked if they would prefer a trial by jury or judge alone trial. These stakeholders in each jurisdiction expressed a greater preference for a trial by jury if they were the victim of a crime, and an even greater proportion expressed this preference if they were the criminal defendant in the trial. Furthermore, participants reported a greater confidence in the capacity of juries to do their job (84%) relative to their confidence in the capacity of judges to do their job (73%).¹³ Amongst empanelled jurors, non-empanelled jurors and the general community this pattern was replicated, with most participants expressing a preference for a trial by jury regardless of whether they were the victim or the defendant in the trial.

Calls to replace criminal trial juries with a panel of judges or advisors as a response to a perceived increase of resistance to jury duty fail to account for the fact that people in the community, including former Chief Justices, often express greater confidence in trials by jury than they do in trials by a judge alone.¹⁴ This is not to say that collaborative judge-jury models should be precluded from consideration, as these have proved successful in many other countries.

¹² Goodman-Delahunty et al, *Practices, policies and procedures*, above n 4; O'Brien et al, above n 6.

¹³ Ibid 151.

¹⁴ Jane Goodman-Delahunty, 'The Honourable James R. Wood AO QC: New South Wales Supreme Court Judge' in David Lowe and Dilip K Das (eds.), *Trends in the judiciary: Interviews with judges across the globe (vol 2)* (CRC Press, 2015) 57.

IV ALL THE ‘SMART’ JURORS EVADE JURY DUTY

A popular view is that savvy jurors know how to avoid jury service and that the average jury consists of “twelve people not smart enough to get out of jury duty”.¹⁵ The inference is that those who remain in the jury pool are less equipped for the task, and may not comprise a jury of one’s peers. That is, jury composition is overrepresented by elderly, unemployed, and under-educated citizens. This notion is rebuttable by reference to several empirical studies showing that juries are, on the whole, better educated than average members of the Australian public.¹⁶ For example, demographic analyses of 1931 excused jurors in the greater Sydney area who participated in a recent jury simulation study in New South Wales courts showed that 77% had some form of tertiary level education. Approximately three-fifths of the sample held a university degree (59.9%). A further 17.4% had completed a Tertiary and Further Education diploma. Seven percent held a trade certificate, 10.8% had completed high school, and only 5.8% reported less than 12 years of school attendance.¹⁷ These findings are reflective of the high representation of jurors with tertiary educational qualifications and are corroborated by prior multistate research.¹⁸

V THE SERIOUS CRIMINAL CASES ARE LEFT TO LEGAL PROFESSIONALS

Juries in Australia hear cases of indictable offense. With the expansion of summary jurisdiction, where less serious cases or summary offenses with lesser penalties go to a magistrate, the number of available trials for jurors to hear has been reduced. The right to a jury trial of one’s peers in cases of indictable offenses in Australia has also been eroded in the past decade by permitting applications for a judge-alone trial. In the United Kingdom since 2003, the *Criminal Justice Act* has allowed prosecutors to apply for a non-jury trial, but the first judge-alone trial was ordered under this

¹⁵ Gary Hughes, ‘Ducking your duty’ on *Gotcha with Gary Hughes Blog (The Australian Blogs)* (13 December 2006)

<http://blogs.theaustralian.news.com.au/garyhughes/index.php/theaustralian/comments/ducking_your_duty/D06/V16/P50/>.

¹⁶ Jacqui Horan and David Tait, ‘Do juries adequately represent the community? A case study of civil juries in Victoria’ (2007) 16(3) *Journal of Judicial Administration* 179; Jacqui Horan, *Juries in the 21st Century* (The Federation Press, 2012) 42.

¹⁷ Anne Cossins, Jane Goodman-Delahunty and Natalie Martschuk, *Australian jurors’ knowledge about children and child sexual abuse* (2015) (Manuscript submitted for publication).

¹⁸ Goodman-Delahunty et al, *Practices, policies and procedures*, above n 4.

provision some years later, in 2009. Most states in Australia also now allow judge-only trials for special reasons.¹⁹ Sometimes a state law may allow an accused person to elect to use a judge-only trial rather than the default jury provision.²⁰

Unlike an accused person on trial in one of the States, a person accused of a federal crime has no option to elect a judge-only trial. Commonwealth (Federal) juries in Australia are invoked by the *Constitution* of Australia which provides in section 80 that “the trial on indictment of any offence against any law of the Commonwealth shall be by jury.” The Commonwealth can determine which offences are “on indictment.” It would be entirely consistent with the *Constitution* that a homicide offence could be tried not “on indictment,” or conversely, that a simple assault could be tried “on indictment.” This interpretation has been criticised as a 'mockery' of the section, rendering it useless.²¹ In reality, the federal jury room in Canberra has remained unused. Where a federal trial “on indictment” is prescribed, it is an essential element that it be found by a unanimous verdict of guilty by twelve lay members of the public. This requirement stems from the historical meaning of “jury” at the time that the *Constitution* was written and is thus, in principle, an integral element of trial by jury.

By comparison, in various Australian states, other determinations have been made on the extent to which a jury is used, both in terms of the decision rule, and the number of jurors who serve. The use of a jury in criminal trials by unanimous verdict of twelve lay members of the public persists in some states, but in others, exceptions are permitted, such as majority verdicts (11-to-1 or 10-to-2) where a jury cannot otherwise reach consensus on a verdict.

Nonetheless, the fact remains that the most serious criminal cases are reserved in Australia to be heard by juries.

¹⁹ See *Criminal Procedure Act 1989* (NSW), s 132(2).

²⁰ See *Criminal Procedure Act 1989* (WA), s 118.

²¹ Virginia Bell, 'Section 80 – The Great Constitutional Tautology' (Speech delivered for the Lucinda Lecture at Monash University, Melbourne, 24 October 2013); *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1939) 59 CLR 556 (Dixon and Evatt JJ - dissenting).

VI JURIES DON'T TAKE THEIR ROLE SERIOUSLY AND ARE SUSCEPTIBLE TO BIAS

Like Pandora, who was instructed by Zeus not to look inside the urn, in every trial, jurors are instructed not to engage in any independent fact-finding, and to base their decisions only on the evidence presented in court.²² In some Australian jurisdictions, it is a criminal offence for a juror to engage in extra-curial enquiries. For example, a juror is forbidden “to make any inquiry during the course of a trial for the purpose of obtaining information about the accused or any matters relevant to the trial.” The offence is punishable by a maximum of two years imprisonment.²³ Like Pandora, who disobeyed the instruction from Zeus, jury failures to abide by this instruction are construed as a failure by jurors to take their role and duties seriously. Much has been written recently in legal journals about the threat to the integrity of the judicial system prompted by disobedient jurors who conduct independent internet searches and obtain extraneous and non-evidential material that may influence jury deliberations. This is acknowledged as an international phenomenon.

Jurors undertake a difficult task that is unlike other important decision making tasks in their lives. They are told that their expertise lies in finding the facts, and they strive to return the appropriate and preferred verdict. Paradoxically, jurors are advised to use their common sense and everyday experience, but are precluded from making use of everyday resources to acquire context, check their beliefs and their knowledge.²⁴ In fact with rare exceptions, juries are conscientious, but are frustrated by gaps in the evidence and by evidentiary rules that often preclude courts and lawyers from providing them with all the salient facts.

Just how susceptible juries are to bias through exposure to extra-evidential information has been the subject of some empirical inquiry. Whilst it is generally believed and has been empirically demonstrated that jurors struggle to ignore inadmissible information,²⁵ an equal measure of scepticism has not

²² Jill B Hunter, ‘Jury deliberations and the secrecy rule: the tail that wags the dog’ (2013) 35 *Sydney Law Review* 809.

²³ *Jury Act 1977* (NSW), ss 68C, 55DA.

²⁴ Ian Freckelton et al, *Expert evidence and criminal jury trials* (Oxford University Press, 2016, in press).

²⁵ See Andrew J Wistrich, Chris Guthrie and Jeffrey J. Rachlinski, ‘Can judges ignore inadmissible information? The difficulty of deliberately disregarding’ (2005) 153 *University of Pennsylvania Law Review* 1251.

been levelled at judges in terms of their ability to ignore biasing or inadmissible evidence. Since it is frequently the case that jurors are required to leave a courtroom in order that the judge may decide in their absence whether information or evidence should be admitted to court, it follows that judges frequently hear inadmissible evidence during a trial to which jurors are not exposed. The implicit assumption in such circumstances is that judges are capable of ignoring this information and are able to deliver judgments free from the influence of the inadmissible evidence. This view has come under increasing scrutiny, with a number of studies demonstrating that judges may be equally vulnerable to the unconscious influences of material that is deemed inadmissible in court.²⁶

VII CONCLUSION

The ending of the legend of Pandora is often ignored. When Pandora saw all the evils and miseries escaping from her urn, she closed it, but not until most of the contents had escaped. What was left lying at the bottom of the urn was "elpis," translated as "hope" or "expectation." What might this tell us about the jury and justice? Discussed in the scope of this article has only been a small selection of popular narratives about juries. Juries may seem risky and the source of many new and unexpected problems, but if, like Pandora, we dare to look closer, we may find that our expectations are met, and all is not lost.

²⁶ See Stephen Landsman and Richard F Rakos, 'A preliminary inquiry into the effect of potentially biasing information on judges and jurors in civil litigation' (1994) 12(2) *Behavioral Sciences & the Law* 113.

Criminal Justice Research and How I Realised I Know Nothing

Tamara Walsh*

I THE 'REVOLVING DOOR' OF THE CRIMINAL JUSTICE SYSTEM

People talk about the 'revolving door' of the criminal justice system.¹ Criminal justice practice can certainly feel like all you are really achieving is keeping someone out of prison for today. Before long, they'll be charged with other offences, and you'll try to keep them out that day. After a while, there will be so many charges that a sentence is unavoidable. And once a few penalties have been imposed, a magistrate may conclude that prison seems like the only option available.²

After over a decade of undertaking criminal justice research, there is only one thing I really know for sure – it's complicated. And the more I learn, the more complicated it becomes.

If a problem is complicated, the solution is also likely to be complicated. Of course, we are lawyers, so it is tempting for us to conclude that good laws are the answer. Better targeted offences, more appropriate penalties, therapeutic jurisprudence, a human rights Act? There is a mountain of legal literature dedicated to each one of these potential saviours. Yet, during the course of my research, I feel I have successfully illustrated that, actually, none of these things get to the heart of the problem.

In this paper, I will draw on my public nuisance research to conclude... that I don't know what the answer is.

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¹ Some classic texts on this are: Raymond Nimmer, *Two Million Unnecessary Arrests: Removing a Social Service Concern from the Criminal Justice System* (American Bar Foundation, 1971); Howard Bahr, *Skid Row: An Introduction to Disaffiliation* (Oxford University Press, 1973); Greg Berman and John Feinblatt, *Good Courts: The Case for Problem-Solving Justice* (The New Press, 2005).

² Note that Queensland experienced the largest increase in prisoner numbers in 2013/14, with an increase of 16% that year to over 7000 prisoners: Australian Bureau of Statistics, *Prisoners in Australia, 2014: 4517.0* (2014).

II THE NUISANCE OF PUBLIC NUISANCE

There are certain groups of people who are more visible to the police than others, mainly because they tend to congregate in public spaces. The most obvious examples are people experiencing homelessness,³ young people,⁴ and Aboriginal people.⁵

Our legal system criminalises certain behaviours that are associated with being in public space.⁶ These laws allow, or encourage, the police to charge these visible people with offences. In Queensland, the most common charge these people receive is 'public nuisance' – 11,595 defendants appeared in Queensland courts on public nuisance charges in 2014.⁷

If a person is charged with a public nuisance offence, they will either be issued with an infringement notice and have to pay a fine, or they will receive a notice to appear and they will have to attend court. If they attend court, they are likely to receive a penalty. This will most likely be a fine.⁸

If you speak with people who work with very disadvantaged people in Brisbane, they will tell you that public nuisance charges are the most pressing legal problem their clients face.⁹ These people experience many forms of disadvantage. They lack housing, they struggle on very low incomes, they may be under-educated, they may have mental health problems, and they may have drug or alcohol addictions. Many experience each day as a struggle. The impact of a public nuisance charge on their lives, therefore, seems disproportionate to

³ Cassandra Goldie, 'Living in public space: A human rights wasteland' (2002) 27(6) *Alternative Law Journal* 227.

⁴ See generally Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 2011); John Hagan and Bill McCarthy, *Mean Streets: Youth Crime and Homelessness* (Cambridge University Press, 1997).

⁵ One insightful study was undertaken by Memmott et al: Paul Memmott, Stephen Long, Catherine Chambers and Frederick Spring, *Categories of Indigenous 'Homeless' People and Good Practice Responses to Their Needs*, (Australian Housing and Urban Research Institute, 2003).

⁶ See *Summary Offences Act 2005* (Qld) ss 6 (public nuisance), 7 (urinating in a public place), 8 (begging in a public place), 10 (being intoxicated in a public place).

⁷ And this is the least number of charges since 2005 when the public nuisance offence was first introduced. In 2008, numbers peaked at 23,469: statistics obtained from the Department of Justice and Attorney-General.

⁸ I wrote about the irony of fining people who are unable to pay in Tamara Walsh, 'Won't pay or can't pay: Exploring the use of fines as a sentencing alternative' (2005) 17(2) *Current Issues in Criminal Justice* 217.

⁹ This comment is based on recent anecdotal evidence, but it is also borne out in the research: see Suzie Forell, Emily McCarron and Louis Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in New South Wales* (Law and Justice Foundation of New South Wales, 2005); Philip Lynch, 'Begging for change: Homelessness and the law' (2002) 26(3) *Melbourne University Law Review* 690.

the ‘nuisance’ they are alleged to have caused to the ‘community’. They suffer the indignity of being labelled a ‘nuisance’, they are issued with fines they can’t pay, they must engage with a system that seems like it is constantly against them, and many of them will ultimately end up in prison as a result.

III HOW SHOULD THE LAW RESPOND?

Looked at objectively, there are three ‘legal’ responses that are open to us.

A *Option One: Don’t charge them*

Often, people who are charged with being a ‘public nuisance’ haven’t actually caused any harm to anyone. They may have been yelling in the street, they may have said a bad word, they may have been begging, they may have been drinking in public, they may have been sleeping in a public place, but really, no one was ‘harmed’ as a result of their conduct. So, why are we charging them with criminal offences? We blame the police and say they should exercise their discretion more appropriately: don’t charge people unless they are posing a safety threat to someone or something, and if the police feel the need to intervene, why not make a referral to a community organisation who can offer the person some help?

This is the line I ran in my own work for a long time. Then I met some senior Queensland police officers in the course of my research on police powers and the Brisbane G20. And when I actually listened, I realised that it’s not that simple. Of course, it is the parliament that passes the laws. It was the Queensland parliament (Labor government, I might add) that created the public nuisance offence, and every jurisdiction in Australia has a similar offence on their statute books.¹⁰ This would tend to suggest that the community supports the existence of these laws and, by implication, their enforcement. So there is a latent pressure on police officers to implement the regime whose boundaries have been set by – ‘us’.

In addition to this, we need to be reasonable in our expectations of police officers. As much as we may want them to possess every imaginable skill required to work with disadvantaged people, police officers are trained law enforcers. They are not psychologists, social workers, mental health professionals, or addiction specialists. Indeed, I am reliably informed that, at the police academy, only half a day of the 25 week course is dedicated to

¹⁰ *Crimes Act 1900* (ACT) s 392; *Summary Offences Act 1988* (NSW) ss 4, 4A; *Summary Offences Act 1923* (NT) s 47; *Summary Offences Act 1953* (SA) s 7; *Police Offences Act 1935* (Tas) ss 12, 13; *Summary Offences Act 1966* (Vic) ss 17, 17A; *Criminal Code* (WA) s 74A.

learning how to deal with people with mental health issues. This seems inadequate when one considers the amount of time police officers spend communicating with people with mental health issues in the course of their duties.

This is not to say that there is no room for a more appropriate policing response to vulnerable people. If there is one thing the G20 taught us, it's that repressive laws do not have to be applied in a repressive manner. The G20 was a wonderful example of a 'negotiated management' style of policing,¹¹ and the police there demonstrated that exhibiting tolerance and exercising restraint is possible.¹² But the responsibility cannot begin and end with the police.

It's complicated.

B *Option Two: Change the laws*

If the laws are the problem, then perhaps law reform is the answer. We could scrap the public nuisance offence and instead rely on all the other offences we have on the books to deal with situations that threaten the safety and security of members of the public and their property.

This is the line I ran in my own work for a long time. Then I met with some politicians to discuss this as a possibility. And when I listened, I learned that the reality is there is no public support for the removal of these offences from our legislation. A good proportion of the community, perhaps even the majority, 'feel' safer when people experiencing extreme disadvantage or emotional trauma are removed from their view.¹³ This is not necessarily heartless – no doubt 'the community' wants to see people assisted, and perhaps they even assume that this will occur if police intervene. But they don't want to be approached for money (even though they have plenty), they don't want to hear people swearing on the street (even though they feel perfectly justified in swearing themselves), and they don't want to see someone sleeping on the bench at their bus stop (because they should just go home – right?).

It's complicated.

¹¹ 'Negotiated management' is a method of policing that emphasizes negotiation, communication and diffusion over arrests and use of force: in Australia, see David Baker, 'Paradoxes of policing and protest' (2008) 3(2) *Journal of Policing, Intelligence and Counter Terrorism* 8.

¹² Tim Legrand and Simon Bronitt, 'Policing and the G20 protests: "Too much order with too little law" revisited' (2015) 22(1) *Queensland Review* 3.

¹³ A classic text on this is Jeremy Waldron, 'Homelessness and community' (2000) 50 *University of Toronto Law Journal* 371.

C Option Three: Create more appropriate penalties

If the police are limited in their capacity to respond appropriately, and the laws are here to stay, then maybe the courts are the answer. We should create a range of penalties that are appropriate to this kind of offending – we could use the courts to support people to get help. We could even set up a special court list to deal with people experiencing homelessness or mental health problems, and we could staff them with understanding, wise people who could really make a difference in their lives.

This is the line I ran in my own work for a long time. And it was the one success that those of us researching and practicing in this area actually experienced. His Honour Marshall Irwin, then Chief Magistrate, established the Brisbane Special Circumstances List with no additional funding in 2006. The list had a dedicated magistrate who was empowered to adjourn matters for as long as necessary (often months) so that defendants could receive welfare support and treatment, rather than imposing a traditional sentence.

In the beginning, this list ran for a couple of hours a week. By 2011, it was running three days a week. Community organisations, defendants, lawyers and magistrates agreed that it was a success. Defendants reported that the court ‘changed their life’ and ‘the system’ felt it was making a positive difference.

But it was not without its critics. As the list grew, so did the resources required to maintain it. Some community service providers expressed concern at the large number of referrals they were receiving from the court – they were being expected to take them on with little or no extra funding. Some of the defendants felt that having to go through a lengthy ‘rehabilitation’ process was disproportionate to the very minor offence they had originally been charged with. Some resented having to describe their personal circumstances and experiences in detail to a courtroom full of people. Some of the defence lawyers felt conflicted in their role – were they the lawyer or the case manager? Ultimately, the court was abolished.

It’s complicated.

IV THEREFORE, I KNOW NOTHING

Public nuisance is not the only complicated area of criminal justice research and practice. Domestic violence is another. Of course, we support the call for police officers to support women to take out protective orders against their violent partners.¹⁴ But, what if the woman doesn't want her partner ousted from the home? Without her partner, there may be no income, no help with the kids, no transport. Of course, she has an inherent right to be free from violence, and the law can and does play a role in protecting her from it. Yet, many women who have been victims of domestic violence will tell you that they do not want an order. Where does that leave the lawyer?

Yet another is child 'abuse'. Some parents, particularly parents of children with disabilities, make questionable decisions related to their children's care. They may leave them unattended for a couple of hours because they are at breaking point, or because they need groceries and it is impossible to deal with the child in the store. They may subject them to less than ideal disciplinary practices because they are desperate and don't know what else to do. These behaviours can all lead to criminal charges.¹⁵ If parents (most often mothers) are charged with these offences, they will find it extremely difficult to regain care of their children: the children will be removed by Child Safety services.¹⁶ Maybe they are not coping, and maybe they are not providing their child with perfect care. But should they be criminalised for it? And is a stranger likely to do a better job?

The more I learn, the more I realise there is to learn. And the more certain I become that I do not have all the answers. Maybe the questions posed by these problems are unanswerable. The answers certainly cannot be found in the law. But if we are to continue to try to use our legal education and the skills we gain from it to make a difference, we cannot abandon our research and practice in these areas.

Instead, I believe we must listen more. And we must draw heavily on other disciplines. At bottom, the criminal justice system is about regulating people's lives, and responding to problems in them. A person's legal problems cannot

¹⁴ See, for example, Heather Douglas and Robin Fitzgerald, 'Legal processes and gendered violence: Cross-applications for domestic violence protection orders' (2013) 36(1) *University of New South Wales Law Journal* 56.

¹⁵ *Criminal Code 1899* (Qld) ss 326 (endangering life of children by exposure), 364 (cruelty to children under 16), 364A (leaving a child under 12 unattended).

¹⁶ See generally Tamara Walsh and Heather Douglas, 'Mothers in crisis: Mothers and the child protection system' in Lisa Raith, Jenny Jones and Marie Porter (eds), *Mothers at the Margins: Stories of Challenge, Resistance and Love* (Cambridge Scholars Publishing, 2015).

be separated from their individual circumstances – their experiences, their fears, their genes. No single solution will fit every situation. Any legal response must take this into account.

If all that my research has taught me is that I know nothing, I think that is a good thing. Because it means I will listen – and then one day I might know something.

Enforceable Rights for Victims of Crime: Shifting the State/Offender Paradigm in Adversarial Systems of Criminal Law and Justice

Tyrone Kirchengast*

ABSTRACT

Criminal law and justice has long been identified as a prerogative of the state. However, as we emerge into the twenty-first century, many common law jurisdictions have challenged the state monopoly on crime and justice by affording victims' rights that may be enforced against the state or defendant in the criminal prosecution process. Certain common law jurisdictions now allow for the representation of the victim in the pre-trial and sentencing phases of the criminal trial, in addition to other rights, such as access to an enforceable charter of rights and an evolving law of evidence that is increasingly seeking to protect vulnerable and intimidated witnesses. Drawing from the rise of private counsel for victims, this article considers the rise of enforceable rights for victims as a trend that directly challenges the conceptualisation of criminal law and justice as singularly 'public'. The recognition that criminal law and procedure now accommodates the interests of the victim provides for a reassessment of the characterisation of criminal law as state control by another name.

I INTRODUCTION

Certain common law jurisdictions now allow lawyers to represent victims during various parts of the criminal trial process, including pre-trial hearings and during sentencing. Such reforms have proven controversial and debate abounds as to the extent such lawyers may jeopardise the state's control of the prosecution process or otherwise jeopardise a defendant's right to a fair trial. While it is commonly agreed that various parts of the criminal trial process, including applications for bail, may significantly impact upon the victim and their family, the extent to which the victim ought to contribute to decision-making processes or contest substantive principles of law remains uncertain.

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This paper examines the extent to which victim lawyers may be usefully integrated into common law proceedings through a comparative analysis of the rise of victim lawyers in the United States and England. Possibilities for the integration of victim lawyers in Australia will be considered in the critical context of the ambit of the adversarial trial and the rights of the accused to a fair trial process. The role of private counsel for victims may extend to application of a law of evidence increasingly focused on the protection of vulnerable and intimidated witnesses and the upholding of rights provided under a charter of rights that is enforceable against the state or accused.

Victims have become increasingly critical of the way they are removed from the criminal justice system in favour of state processes that monopolise the policing, prosecution and punishment process. Seeking ways in which this removal could be practically redressed, victims formed social movements to lobby government in support of enhanced services for victims, such as state based compensation. Since the 1970s, various jurisdictions have responded to the needs of victims by offering compensation and modes of support to help satisfy their medical, emotional and financial needs following an offence. The need for redress, however, has now moved beyond the development of support services as adjuncts to the criminal trial towards the further integration of the victim into the criminal justice system.

Various common law jurisdictions now provide for the representation of victims in court. This representation may be supported by reference to existing law, such as bail, the law of evidence or sentencing processes calling for impact evidence, but may be extended by amendment or the introduction of new laws, including laws for the protection of witnesses or rights afforded to victims under declarations of charters of rights. While suggestions for greater victim participation are controversial, victims have long enjoyed rights of participation, albeit in limited or discrete ways. The allocation of counsel in discovery motions in sexual offence matters, allowing victims to contest the defence's request for counselling or medical notes, has long been established a right of the victim.¹ This process identifies the victim as a third party to criminal proceedings.²

The extent to which victim lawyers may limit the defendant's right to a fair trial remains controversial, however, out of adherence to an adversarial paradigm that limits victim input to representation through the public prosecutor alone. While it is understood that aspects of the criminal trial process, such as bail

¹ Kerstin Braun, 'Legal Presentation for Sexual Assault Victims: Possibilities for Law Reform' (2014) 25(3) *Current Issues in Criminal Justice* 819.

² See *Criminal Procedure Act 1996* (NSW) s 299A.

and sentencing, may impact upon the victim, the extent to which the victim ought to be able to contribute to decision-making processes remains contested. However, gradual inroads are being made across various areas of criminal practice that the inherently public character of criminal law and procedure is increasingly questioned for a nuanced offering whereby aspects of victim rights may be protected alongside those of the state.

II ENGLAND AND WALES

In 2005, the then Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer, proposed that victim interests be further accommodated in homicide trials by providing victims' families an opportunity to be represented by private counsel. This proposal led to the establishment of a pilot program whereby family victims in homicide cases were provided the option of instructing a publicly funded lawyer, called a Victims' Advocate.³ The original pilot recognised that the Victims' Advocate could be retained by family victims at any stage of the pre-trial, trial or sentencing process. The Victims' Advocate program was piloted from 24 April, 2006, to 23 April, 2008, in the Old Bailey in London and the Crown Courts in Birmingham, Cardiff, Manchester (Crown Square) and Winchester.

In June 2007, the pilot was extended for a further twelve months. The then Attorney-General, Lord Goldsmith, also announced that a variation of the pilot scheme would be made available throughout all England and Wales.⁴ The new program, titled 'Victim Focus', reverted to the earlier practice of allowing victims to inform the sentencing court, through the public prosecutor, of the harms occasioned to them. The program, which is ongoing, directs family victims to the Crown Prosecution Service ('CPS'), who submit the victim's personal statement during the sentencing hearing. Victim Focus is available to family victims where the offender has been charged with murder, manslaughter, corporate manslaughter, familial homicide, causing death by dangerous driving, causing death by careless driving while unfit through drink or drugs, and aggravated vehicle taking where death is caused.

Despite the nuances introduced under the Victims' Advocate pilot, Victim Focus reverted to the prior practice of proceeding through the public prosecutor. To this end, the CPS follows the Criminal Practice Direction of the Lord Chief Justice, which states that family impact evidence 'cannot affect

³ Department for Constitutional Affairs, *Making a Difference: Taking Forward Our Priorities* (2005).

⁴ Office for Criminal Justice Reform, *Working Together to Cut Crime and Deliver Justice: A Strategic Plan for 2008–2011* (2007) 8.

the sentence that the Judge may pass'.⁵ While this step is retrograde, it argues for greater balance between prosecution and defence in that it limits a family victim's capacity to intervene in any proceeding against the defendant by maintaining the prior practice where victim interests are only considered where they are broadly consistent with the public interest. This will likely affirm the earlier process of minimising the use of victim impact evidence in sentencing where it is out of step with the views of the prosecutor.

Although minimal ground was gained through the Victims' Advocates Pilot, greater inroads have been made for the protection of vulnerable witnesses in England and Wales through use of out of court evidence. Section 23 of the *Criminal Justice Act 1988* (UK) allows for the tenure of hearsay evidence if the witness is a 'frightened witness'. *R v Sellick and Sellick* [2005] 2 Cr App R 15 holds that where the witness is in fear of the accused, a witness statement could be tendered without the capacity to call the witness for cross-examination in court. This could be the case even where a statement became significantly determinative against the accused. While such rights do not necessarily require the victim to engage independent counsel, vulnerable victims such as child or sex offence victims, may require the added protection afforded by an independent advocate.⁶ In *Sellick and Sellick*, Lord Justice Waller, with whom Mr Justice Owen and Mr Justice Fulford agreed, dismissed the appeal challenging testimony by statement, but raised questions on the need to balance the competing demands of justice against the need to secure the vulnerability of the victim where evidence is supplied by statement (at par 57):

Our view is that certainly care must be taken to see that sections 23 and 26, and indeed the new provisions in the Criminal Justice Act 2003, are not abused. Where intimidation of witnesses is alleged the court must examine with care the circumstances. Are the witnesses truly being kept away by fear? Has that fear been generated by the defendant, or by persons acting with the defendant's authority? Have reasonable steps been taken to trace the witnesses and bring them into court? Can anything be done to enable the witnesses to be brought to court to give evidence and be there protected? It is obvious that the more "decisive" the

⁵ Crown Prosecution Service (CPS), *Victim Focus Scheme Guidance on Enhanced CPS Service for Bereaved Families* (2007) Pt 23.

⁶ Albeit conventional trial practice in common law jurisdictions does not allow for third party representation on the admissibility of out of court evidence, an especially vulnerable victim may seek counsel and potentially challenge prosecution decisions where the prosecution otherwise seeks the victim's attendance at court. Cf. above note 2; *Criminal Procedure Act 1996* (NSW) s 299A.

evidence in the statements, the greater the care will be needed to be sure why it is that a witness cannot come and give evidence. The court should be astute to examine the quality and reliability of the evidence in the statement and astute and sure that the defendant has every opportunity to apply the provisions of Schedule 2. It will, as section 26 states, be looking at the interests of justice, which includes justice to the defendant and justice to the victims. The judge will give warnings to the jury stressing the disadvantage that the defendant is in, not being able to examine a witness.

The questions raised in *Sellick and Sellick* remind us that the rights afforded to vulnerable witnesses and victims prove to challenge established trial process designed to test Crown evidence. While protecting the victim during the trial phase remains a significant step toward the protection of victim interests generally, such rights exist in a contested space against the need to maintain the public prosecution process as a publically accessible one.

III UNITED STATES

Crime victims have been provided substantive rights of participation in the United States through amendments to the United States Code ('USC'). Amendments were introduced pursuant to the *Justice For All Act 2004* (US). Victims of federal offences were afforded access to private counsel by the enactment of new rights under the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act ('CVRA'). The CVRA does not grant victims private counsel per se, but sets out a schedule of rights that give victims the ability to intervene in certain matters, to be provided with information, or to participate in key decision-making processes, across the pre-trial, trial and sentencing phases. The 2004 Act provides an example of the repeal and reenactment of a non-enforceable charter of rights for an enforceable charter that grants victims substantive and procedural rights that may be enforced in court. However, although victims are granted standing in court, they do not become a party to proceedings unless they appear in a motion asserting their rights under the CVRA. The CVRA prescribes these rights under 18 USC s 3771. This amendment requires the federal courts to ensure that victims are granted certain rights for offences prosecuted under the USC. Section 3771 replaces 42 USC s 10606, repealed by the CVRA, which included a list of non-enforceable victims' rights, such as the right to a certain level of treatment by justice officials.

The CVRA prescribes that victims may be present at public court proceedings under 18 USC s 3771(a)(2),(3), providing them the right to be 'reasonably

heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding', pursuant to s 3771(a)(4) CVRA. The CVRA, prescribed under s 3771, sets out the following rights, inter alia: to be reasonably protected from the accused; to be given reasonable, accurate, and timely notice of any public court proceeding; not to be excluded from any public court proceeding (unless special circumstances exist); to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; to confer with the attorney for the government; to full and timely restitution; and to be treated with fairness and with respect for the victim's dignity and privacy.

Cases flowing from the CVRA have considered those persons recognised as a 'victim' for the purpose of exercising rights prescribed by the USC. In *US v Sharp*,⁷ the accused pleaded guilty to conspiracy to possess with intent to distribute. The partner of one of the defendant's customers sought victim status, and thus standing in proceedings, alleging that she was abused as a result of her partner's use of drugs, sold by the accused. The court considered whether the claimant was 'directly and proximately harmed', ruling that she was not sufficiently proximate under the CVRA. The court ruled that a partner of a drug user could not be proximately connected to the supplier in a way that was reasonably envisaged by the amendments. The relevant test is whether a claimant is able to demonstrate a sufficient nexus between the acts of the accused and the harms or injuries the claimant has experienced.

*Kenna v US District Court*⁸ further determined that the right to participate in proceedings, once a claimant is recognised as a victim within the terms of the USC, includes the right to be 'reasonably heard'. In this case, the claimant argued that the right to participate included the provision of oral or written statements during sentencing. The Ninth Circuit Court of Appeals ruled that the right to be reasonably heard afforded the victim the right to allocution: to read their victim impact statement to the court. The court thus granted victims similar rights of standing and address as held by the defendant. *Kenna* affirmed the intent of Congress to provide for the participation of victims in the sentencing process. The court ruled:

... The statute was enacted to make crime victims full participants in the criminal justice system. Prosecutors and defendants already have the right to speak at sentencing, see Fed.R.Crim.P. 32(i)(4)(A); our interpretation puts crime victims on the same footing. Our interpretation also serves to effectuate

⁷ (2006) 463 F Supp 2d 556.

⁸ (2006) 435 F 3d 1011.

other statutory aims: (1) To ensure that the district court doesn't discount the impact of the crime on the victims; (2) to force the defendant to confront the human cost of his crime; and (3) to allow the victim "to regain a sense of dignity and respect rather than feeling powerless and ashamed." Jayne W. Barnard, *Allocation for Victims of Economic Crimes*, 77 *Notre Dame L. Rev.* 39, 41 (2001) ...⁹

*In re Antrobus*¹⁰ limits the right of allocation to those deemed proximate under the CVRA. In this case, the accused pleaded guilty to the transfer of a handgun to a juvenile, who, after reaching the age of eighteen, shot several people at a shopping centre. The siege ended when the assailant was killed. The parents of one of the shooting victims petitioned the court hearing the transfer of handgun offence to recognise their daughter as a victim under s 3771(e) CVRA. Such recognition would have enabled the parents of the deceased to be heard at the defendant's sentencing hearing following conviction for the transfer of handgun offence. The Tenth Circuit Court of Appeals ruled, however, that the transfer of a handgun was not directly connected to the death of their daughter. The court ruled:

If we were to hold, on this record, that petitioners' daughter is a crime victim within the meaning of the CVRA, we would effectively establish a per se rule that any harm inflicted by an adult using a gun he or she illegally obtained as a minor is directly and proximately caused by the seller of the gun ... But petitioners have directed us to no authority of any kind suggesting that harm inflicted by an adult with a gun purchased during the adult's minority is, without more, per se directly and proximately caused by the seller of the gun.¹¹

The CVRA also provides victims with the capacity to seek judicial review of plea deals made between the prosecution and the defendant. Although victims may participate in all stages of the criminal trial, many seek to participate in pre-trial decision-making processes, or in sentencing following trial. During the pre-trial period, victims have the right to be kept informed, to make representation, and to prepare for their appearance at each hearing, including the plea hearing. Where there is a clear lack of victim involvement in the plea-making process, the negotiation between prosecution and defence as to the offence charged and potential sentence of the accused, a victim may petition a

⁹ *Ibid* 1016.

¹⁰ (2008) 519 F 3d 1123.

¹¹ *Ibid* 1131.

court for a writ of mandamus quashing any previous plea deal, requiring the prosecution to include the victim in any future negotiation. *In re Huff Asset Management Co.* set the standard for the issuing of a writ of mandamus at an ordinary standard of review.¹² The test for issuing such a writ, however, was revised in *In re Antrobus*. In this case, the Tenth Circuit Court of Appeals found that a stricter standard ought to prevail over the nominal standard. Given that a writ of mandamus is only issued in extraordinary circumstances, the court determined that the relevant standard should be stricter, suggesting that a writ of mandamus 'is a well-worn term of art in our common law tradition'.¹³ *In re Dean*¹⁴ provides that a writ of mandamus ought to be issued where the petitioner has 'no other adequate means' of relief; where the petitioner has demonstrated a right to the issuance of a writ which is 'clear and indisputable'; and where the issuing court is satisfied that the writ is 'appropriate under the circumstances'.

IV AUSTRALIA

Victims do not possess the express general right to appoint private counsel under Australian criminal law. A victim may choose to participate in prescribed discovery motions or sentencing proceedings when delivering a victim impact statement, although this statement may be tendered by the public prosecutor. Victims may seek the services of a lawyer when applying for victims' compensation, although such applications are administrative and not considered an aspect of the criminal law or trial process.¹⁵ However, victims may be able to appoint private counsel in two limited respects. Firstly, through private prosecution, and secondly, by challenging the Office of the Director of Public Prosecution's ('DPP') decision to prosecute or not. Increasingly, the reserve power to seek judicial review of executive decisions is being provided for by extension of charters of rights not formerly enforceable.

The establishing of a Commissioner of Victims' Rights in South Australia, however, has provided for a broader basis for enforceable rights. The *Victims of Crime Act 2001* (SA) establishes a declaration of victims' rights as well as the office of the Commissioner. Section 16A allows the Commissioner of Victims' Rights to represent an individual victim where they complain that a right afforded to them under Pt 2 has not been maintained or upheld. This section prescribes that the remedy is limited to a written apology to the victim from the infracting party. Section 9A further requires that the victim of a serious

¹² (2005) 409 F 3d 555, 562.

¹³ *Kenna v US District Court* (2006) 435 F 3d 1011, 1127.

¹⁴ (2008) 527 F 3d 391.

¹⁵ See Tyrone Kirchengast, 'Criminal Injuries Compensation, Victim Assistance and Restoration in Australian Sentencing Law' (2009) 5(3) *International Journal of Punishment and Sentencing* 96.

offence be consulted before any decision is made. Section 9A thus provides a basis for substantive and thus enforceable rights for crime victims. Section 10A allows the victim, or their representative, to request that the prosecution considers an appeal against an outcome in a criminal proceeding.

In Australian law, the right to prosecute resides in the common informant. The common informant is any individual seeking to inform a court of an offence, albeit the common informant is usually a police officer seeking to lay charges in court. NSW procedure currently provides that an individual may seek a court attendance notice ("CAN") from the registrar of the local court. The registrar will determine whether to issue a CAN by evaluating the case in favour of the charge. Should the registrar determine not to issue the CAN, a victim may, as represented by counsel, challenge the decision before a magistrate. Should the CAN be issued, the defendant will be summonsed to court to answer the charge in the nominal way.¹⁶ Pursuant to NSW law, however, the DPP may step in at any time to take over the matter under s 9, *Director of Public Prosecutions Act 1986* (NSW). This essentially gives the DPP the ability to take over any prosecution initiated by the police, a victim, or any other person, and includes the power to discontinue proceedings by entering a *nolle prosequi* (no further proceedings). Consents to prosecute increasingly limit the common informant such that the permission of the Attorney-General is required before a matter is proceeded upon.¹⁷

The right to review a decision to prosecute is expressed by the common law, and may provide a further path for private representation. *Maxwell v The Queen*¹⁸ however, provides that decisions of the ODPP as to whether or not to proceed are generally not reviewable.¹⁹ Exceptional circumstances may exist warranting review of a decision not to proceed, but would nominally involve those circumstance that would ordinarily lead the court to reject a decision of the prosecution, the objections of the victim notwithstanding. Decisions contrary to the requirements of a fair trial would be one obvious example. *R v DPP, Ex parte C*²⁰ provides further cause to suggest that a victim may challenge the decision of the prosecutor where a decision is made contrary to law, involves jurisdictional error, or where a decision contravenes forms of subordinate legislation, such as the Code for Crown Prosecutors. *Ex parte C*

¹⁶ See s 49 *Criminal Procedure Act 1986* (NSW).

¹⁷ See, for example, s 78F *Crimes Act 1900* (NSW).

¹⁸ (1996) 184 CLR 501.

¹⁹ Compare the Australian situation with that of England and Wales, which now provides an express right to review: *R v Killick* [2011] EWCA Crim 1608. Whether the new powers afforded to victims under the charter of victim rights in SA will follow the English process is yet to be determined.

²⁰ [1995] 1 Cr App R 136.

thus provides a means by which individual victim rights may displace a decision of the prosecution. Challenging prosecutorial decision-making by victims or other interested parties allows for the intervention of a victim lawyer otherwise excluded from the criminal law. Such representation would, however, be exceptional rather than routine.

V DISCUSSION

The future role of private counsel for victims is largely dependent on the intent of parliament to afford victims actual standing in criminal law by recognising existing rights or by extending new rights by legislative intervention. Although victim rights are currently recognised under a charter of rights, flowing from the 1985 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*,²¹ such rights are generally not enforceable in court. As such, as with the modification of the USC, victims would require a change in the law in order for victim lawyers to gain routine standing in a criminal court. The potential for development in this area is substantial, albeit highly controversial; given the need to cater for victim interests in a way that respects the rights of defendants and the independence of the prosecution. Lessons may be taken from the international experience to the extent that victim lawyers ought to be given defined powers, for instance, to negotiate with the prosecution at appropriate stages. Slow inroads are being made in this regard, as with the modification of the charter of rights in SA.

Another approach may be to afford victims private counsel for discrete offences, such as sex offences, where the interests of the victim may be at odds with those of the prosecution and defence. Such reforms may be best piloted with reference to those victims already provided procedural rights that may require representation in certain circumstances. The need, for example, to provide out of court evidence or to challenge the discovery of otherwise confidential counselling notes, may justify increased private representation for victims of sexual assault. Allowing private counsel in such circumstances may provide a way of integrating such counsel into the trial, while preserving the integrity of the prosecution and defence as substantial stakeholders of justice.

Victim lawyers may be best integrated in accordance with current criminal procedure. This would address criticisms that plague the English and US experience, that the rise of private counsel detracts from the due process afforded to the defendant. It is crucial that the development of private counsel for victims respect the defendant's right to a fair process. This means that the role of counsel ought to respond to particular needs for representation, as with

²¹ UN Doc A/Res/40/53, 1986.

sexual assault victims. Victim lawyers should not be implemented out of a political imperative to grant victims wholesale access to all aspects of the criminal prosecution process. However, increased appetite for the provision of victim rights is increasingly evident across several common law jurisdictions bringing into consideration the need to characterise criminal law and procedure as essentially public. Increasingly, perspectives which were once excluded as private are now being considered as constitutive aspects of the criminal trial process, shifting our understanding of criminal law as a public enterprise.

Addressing Indigenous Over-Representation in the Australian Criminal Justice System: Some Thoughts about the Role of Legal Institutions as Stewards of a Complex System

Rebecca Wallis and April Chrzanowski*

Concern about the over-representation of Indigenous people in Australia's criminal justice system is justified. Indigenous people currently comprise 27.6% of the Australian prison population, despite representing only 3% of the total population.¹ This means that Indigenous people are 13 times more likely to be incarcerated than non-Indigenous people. A closer examination shows that over-representation appears at various other points within the system as well. Data from a Queensland cohort study shows, for example, that 57.3% of all Indigenous people had some contact with the criminal justice system by the age of 19 compared with 20.9% of all non-Indigenous people.² The criminal career trajectories of Indigenous people also differ in some key ways to those of non-Indigenous people. Indigenous offenders have higher rates of contact with the criminal justice system, and shorter periods of time elapse between additional contacts.³ There are also some important gender differences. For example, in 2012 the fastest growing imprisoned population in Australia was Indigenous women.⁴ In Queensland, the cohort study revealed that 38.6% of Indigenous women had had contact with the criminal justice system and 2.2% of all Indigenous women had spent some time incarcerated by age 19.⁵ This

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¹ Steering Committee for the Review of Government Service Provision, 'Table 8A.1 Average Daily Prisoner Population 2013/14', *Justice*, vol. C, *Report on Government Services 2015*, Canberra, Productivity Commission, 2015.

² Anna Stewart et al, 'Administrative data linkage as a tool for developmental and life-course criminology: The Queensland Linkage Project' (2015) 48(3) *Australia and New Zealand Journal of Criminology* 409. Contact here includes police caution and juvenile or adult court contact. Comparative national figures are unfortunately not available.

³ Troy Allard T et al, 'Police diversion of young offenders and Indigenous over-representation' (2010) 390 *Trends & Issues in Crime and Justice* 1.

⁴ Australian Bureau of Statistics, *4517.0 – Prisoners in Australia, 2012*, <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/5087123B0CCE48C1CA257B3C000DC7CE?opendocument>>. Women, nonetheless, still represent a tiny percentage of the overall prison population.

⁵ Stewart et al, above n 2. By age 19, only 12.5% of non-Indigenous women had been in contact with the criminal justice system, and less than 1% had been incarcerated. Of course, the touch rate for males is even more alarming: 75% of all Indigenous males had had contact with the CJS by age 19, and 10% had been incarcerated.

over-representation also has intergenerational consequences. A recent study demonstrated, for example, that Indigenous children were four times more likely than non-Indigenous children to experience the imprisonment of a parent in their lifetime.⁶ Taken as a whole, these statistics paint a bleak picture of the mass criminalisation and incarceration of Indigenous people in Australia.

In 1991, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) handed down its final report. RCIADIC was a watershed that brought attention to the issues of Indigenous over-representation in the criminal justice system. Yet, despite ongoing attention and efforts to address the problem, reform effects have made little apparent difference in the ensuing 24 years. Indeed, rates of over-representation have remained constant, and total imprisonment rates have continued to climb.⁷ Indigenous people are still over-represented within a system that has become increasingly punitive. This leads many to despair that 'nothing works' in this area. In this paper, we explore how a complex systems perspective allows us to better understand and respond to the issue of Indigenous over-representation in the criminal justice system. We examine the role and operation of legal institutions within a complex system, and we use the example of Indigenous sentencing courts to illustrate some key points. We conclude by highlighting the pivotal stewardship role legal institutions can play to achieve goals within a complex system.

I A COMPLEX SYSTEMS PERSPECTIVE

A complex systems perspective views social systems as complex ecologies which comprise multiple levels of organisation, all of which are in constant states of development both internally, and with each other.⁸ This perspective allows macro-, meso-, and micro-level dimensions of a phenomenon to be examined to uncover key mechanisms operating within and across these levels

⁶ Susan Dennison, Anna Stewart and Kate Freiberg, 'A prevalence study of children with imprisoned fathers: Annual and lifetime estimates' (2013) 48(3) *Australian Journal of Social Issues* 339.

⁷ Australian Bureau of Statistics, 4517.0 – *Prisoners in Australia 2014*, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>.

⁸ Graham Room, *Complexity, Institutions and Public Policy: Agile Decision-Making in a Turbulent World* (Edward Elgar, 2011); Richard M Lerner and Domini R Castellino, 'Contemporary developmental theory and adolescence: developmental systems and applied developmental science' (2002) 31(6) *Journal of Adolescent Health* 122; Richard M Lerner, Francine Jacobs, and Donald Wertlieb, 'Historical and Theoretical Bases of Applied Developmental Sciences' in Richard M Lerner, Francine Jacobs and Donald Wertlieb (eds.), *Applied Developmental Science: An Advanced Textbook* (Sage Publications, 2005) 3; Esther Thelen and Linda B Smith, 'Dynamic Systems Theories' in William Damon and Richard M Lerner (eds.), *Handbook of Child Psychology* (John Wiley and Sons, 6th ed, 2006) 258.

that perpetuate cycles or which offer opportunities for change.⁹ Moreover, systems have history and these legacies shape developmental trajectories towards predictable paths, but are also capable of being interrupted and redirected.¹⁰ In short, a complex systems perspective imagines the social world as a “far from equilibrium world”, where dynamic systems abrade against their environment, reshape it and tilt its subsequent development”.¹¹

Despite their complex nature, human systems have the potential to be ‘steered’ towards particular trajectories, if the right tools are employed to align the myriad individual, social and institutional factors at play.¹² Thinking and acting systematically allows issues at specific levels of a system to be targeted and appropriate responses for that issue to be tailored at that level. This helps build sensible, pragmatic, and achievable goals for specific issues. At the same time, this approach allows interactional consequences of any action taken at one level to be anticipated or mapped across each other level of the system. This ensures that steps taken at one level are not ‘ad hoc’. Instead, they should represent deliberate actions taken to address a particular problem, which also operate to achieve (or at least remain congruent with) a broader agenda. Adopting this approach also helps to avoid conflating issues by, for example, imagining that an action at one level will *directly* resolve a problem at a different level.

Nonetheless, assuming that any course can simply be set and continued upon in a linear fashion ignores the extent to which a systems perspective enshrines uncertainty. Room explains:

Human agents reflect upon their world and are agile in re-weaving its elements, contesting the attempts of policy-makers and others to exercise control, and instead seeking to drive it in their own preferred direction. In the social world, therefore, control systems are forever being imposed but also forever contested, exploited and by-passed.¹³

This highlights a key issue when viewing social phenomena from a complex systems perspective. Any attempt to ‘steer’ a trajectory cannot succeed unilaterally. Relationships and human interactions within and across levels

⁹ Ibid.

¹⁰ Ibid, and see also Alan France, Kate Freiberg and Ross Homel, ‘Beyond risk factors: Towards a holistic prevention paradigm for children and young people’ (2010) 40(4) *British Journal of Social Work* 1192.

¹¹ Room, above n 8, 29.

¹² Room, above n 8, 239.

¹³ Room, above n 8, 238-239.

matter a great deal as these create support for, or resistance to, changes in trajectory. This means that individual, community, and institutional engagement is fundamental. It is not purely symbolic or token. For this reason, Homel, Freiberg, and Branch stress the following key factors as essential prerequisites for the success of community coalition-based crime prevention strategies: legitimacy and voice; strategic vision; performance; accountability; and fairness.¹⁴ In particular, they explain *legitimacy and voice* as follows, "Power is acquired and exercised in a way that is perceived as legitimate, and all affected by decisions are heard and can have an influence. This means, amongst other things, that everyone who needs to be is at the table."¹⁵

II INDIGENOUS OVER-REPRESENTATION FROM A COMPLEX SYSTEMS PERSPECTIVE

The over-representation of Indigenous people in the criminal justice system is the product of many varied factors. The Royal Commission into Aboriginal Deaths in Custody clearly articulated this view. The Commission found that Indigenous people were not more likely to die in custody than non-Indigenous people. Instead, the pressing concern was that Indigenous people were so significantly over-represented in custody.¹⁶ The main question therefore became, 'why are Indigenous people over-represented?' There were two main lines of enquiry pursued here. The first explored whether or not the criminal justice system operated in a racist or discriminatory manner. The second focused on bringing to light underlying issues (outside of the criminal justice system) that made it more likely that Indigenous people would come into contact with the system.¹⁷

The RCIADIC engaged in an exhaustive analysis¹⁸ and made 339 recommendations for reform at various levels, ranging from specific points about the operation of watch houses and other places of custody, to broader

¹⁴ Ross Homel, Kate Freiberg, and Sara Branch, 'CREATE-ing capacity to take developmental crime prevention to scale: A community-based approach within a national framework' (2015) 48(3) *Australia and New Zealand Journal of Criminology* 367, 377.

¹⁵ Ibid.

¹⁶ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report*, vol 1 (1991).

¹⁷ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report*, vol 3 (1991). Volume 3 contains a comprehensive analysis of these 'underlying' issues.

¹⁸ See e.g. Elena M Marchetti, *Missing Subjects: Women and Gender in The Royal Commission into Aboriginal Deaths in Custody* (PhD Thesis, Griffith University, 2005). Marchetti notes that, "The archival material of RCIADIC is an extensive collection of data... The RCIADIC created or collected about 200 shelf meters of records. It produced more than 100,000 pages of transcripts, together with 97 individual case reports that were each about 100 pages long." (at 56).

recommendations about education, health, and political engagement and rights recognition for Indigenous people.¹⁹ In the 24 years since the conclusion of the RCIADIC, numerous other reports, enquiries, and commentaries have been produced, and there is a degree of constancy in the themes that arise.²⁰ Indigenous over-representation in the criminal justice system, together with other forms of over-representation and disadvantage more broadly, has its roots in colonial history and postcolonial race relations; in the form and functioning of political and social institutions and communities; and in the way that individual behaviour is shaped by and responds to these other dimensions.²¹ These themes map onto micro-, meso- and macro- level frameworks. For example, colonisation history has long-term macro-level impacts on the functioning of legal systems,²² and on the legal and social construction of Indigeneity.²³ At the same time, history has shaped meso- and micro-levels and processes. Cultural dislocation and dispossession, and experiences of trauma and abuse arising from macro-level law and policy have shaped communities, families, and individuals.²⁴

Moreover, there is a deep and perpetuating relationship between these domains; they continue to shape each other over time. Criminal justice system over-representation, and other negative outcomes like lower life expectancy, higher rates of morbidity and mortality, and over-representation in child protection systems, are produced by the reinforcing and self-perpetuating interaction of these domains. In this way, the RCIADIC and subsequent enquiries reflect a complex systems perspective. They clearly demonstrated that over-representation is not a simple problem, but a deeply complex one.

¹⁹ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report*, vol 5 (1991).

²⁰ See, for example, Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997); Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government, *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"* (2007); Paul Memmott et al, *Violence in Indigenous Communities* (Report to the National Crime Prevention Branch, Attorney-General's Department, Aboriginal Environments Research Centre University of Queensland, 2001).

²¹ *Ibid.*

²² *Ibid.* See also, for example, Janet Ransley, and Elena Marchetti, 'The hidden whiteness of Australian law: a case study' (2001) 10 (1) *Griffith Law Review* 139.

²³ Above n 20. See also, for example, Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013).

²⁴ Above n 20. See also, for example, Anna Haebich, *Broken circles: fragmenting indigenous families (1800-2000)* (Fremantle Arts Centre Press, 2000); Tony Vinson et al, Jesuit Social Services and Catholic Social Services Australia, *Dropping off the edge 2015: persistent communal disadvantage in Australia* (2015); and Troy Allard, April Chrzanowski and Anna Stewart, 'Targeting crime prevention to reduce offending: Identifying communities that generate chronic and costly offenders' (2012) 445 *Trends and Issues in Crime and Criminal Justice* 1.

Another key theme that emerges from these reports is that reform agendas need to be holistic and sustained.²⁵ They recognise that initiatives that target only one dimension of the problem will inevitably fail, and that systemic change requires time. Importantly, there is a universal cry for meaningful engagement with Indigenous people and communities in addressing issues at every level of the system and at every stage of the process; from agenda setting through to design, implementation and evaluation. This again reflects a complex systems perspective on the role and value of relationships and human interactions across multiple levels of organization, which affirm the need for system processes that support self-determination.

III THE ROLE OF THE CRIMINAL JUSTICE SYSTEM IN ADDRESSING MULTI-DIMENSIONAL PROBLEMS

Addressing Indigenous over-representation requires a justice agenda that is broader than the criminal justice system alone, or any institutions operating within the criminal justice system.²⁶ This does not, however, mean that legal institutions cannot operate as key change institutions in this arena. For the remainder of this paper, we focus on the position of law and legal institutions when viewed as a component of a complex system. We use Indigenous sentencing courts to illustrate how legal institutions can operate to achieve broader system impacts. In doing this, we hope to demonstrate that there is potential for change in the system, if we think imaginatively and systemically, but take pragmatic action.

A Institutions and complex systems theory

Institutions matter because they articulate and enforce the rules of interaction among social agents. Indeed, we may take this as a generic definition of institutions.²⁷

Law and legal institutions are a particular kind of social institution. They tend to be rigid; requiring strict conformity and adherence to immutable rules. In this respect, legal institutions are designed to be exceptionally stable and self-perpetuating. Indeed, this is a key aspect of the rule of law; the law must operate in a way that is transparent and predictable. This is produced by adherence to legal rules, such as the doctrine of precedent, that constrain discretion and produce order. The legal system also claims a pivotal position in

²⁵ Above n 20.

²⁶ There is a key role to be played in other domains, such as health and education systems; political arenas; and social policy. Indeed, the criminal justice system itself is better understood as an amalgam of various connected systems, such as police, legal, and correctional systems.

²⁷ Room, above n 8, 31.

our complex social system. It demands to be at the apex of any systems hierarchy, because of its claim to rule. For these reasons, within a complex system, legal institutions are potentially less amenable to change and can operate as strong agents of resistance. At the same time, legal institutions are also highly deliberate institutions, carefully designed, constructed and maintained. This makes them interesting institutions to examine to consider how to position them to achieve a broader systems agenda, such as addressing the over-representation of Indigenous people.

A complex systems perspective allows a legal institution to be seen as a fundamental but deeply embedded component of a complex and dynamic system. Because such a perspective would not view legal systems as sitting outside of broader systems, a complex systems approach to addressing Indigenous over-representation would potentially require a legal institution to be amenable to negotiation around both its form and content. Such a suggestion is often met with concern, because of the imperative to keep legal institutions stable. Plurality presents a risk to stability and predictability, and to the exercise of formal equality. At the same time, the democratic nature of our system requires the law and legal institutions to be adaptable and responsive to broader community change. If we instead imagine legal institutions sitting at the heart of a complex system, rather than at the apex of a hierarchy, we immediately recognise their systemic change potential. From such a position, they can be flexible and adaptive in ways that still conform to certain rules and ensure predictability. Processes within these institutions can link into, shape, and be shaped by, broader system developments and agendas. We can see legal institutions as serving important stewardship functions within a complex system; functions which utilise processes or mechanisms that are creative, knowledge-sharing, and which engage with individuals and communities within and beyond its own walls.²⁸

The development and operation of Indigenous sentencing courts provides a useful illustration of this phenomenon. Indigenous sentencing courts are creative adaptations of an existing legal institution, designed to achieve both intra- and inter-system agendas. They demonstrate the capacity of legal institutions to operate in creative ways to steer a complex system along a preferred trajectory. At the same time, they demonstrate the difficulties and uncertainties inherent in the journey, and highlight the interconnectedness of a complex system. The operation of Indigenous sentencing courts proves that

²⁸ Room, above n 8, 240-241. Here, Room provides a good description of the role of policy-makers as 'stewards' in complex systems. Of course, legal institutions operate as stewards in a different way to political actors and institutions. Importantly, adaption and dynamic process in the legal system must be seen within the boundaries and frameworks set out by adherence to separation of power principles.

one institution cannot, in and of itself, be a complete solution to a complex problem.

Indigenous sentencing courts exist in various Australian jurisdictions. Unless specific legislation dictates otherwise, they follow the same rules and apply the same law as mainstream Magistrates' Courts, but they adopt different processes to do so. They tend to adopt less formal procedures, such as placing participants at a table instead of in traditional courtroom positions; they allow a greater voice to offenders and to relevant members of the offender's community; and they work closely with Indigenous Elders to explore an offender's offending behaviour and the suitability of various penalty options. Indigenous courts also tend to take more time to consider each case, and often facilitate additional support for offenders like ensuring they attend court dates and connecting them to relevant services and programs. In the end, however, a Magistrate retains the responsibility for sentencing the offender, and will do so in accordance with relevant law and precedent.²⁹ In this way, the substance of the sentencing court remains stable, but its form has been adapted. There are various rationales underpinning Indigenous sentencing courts, but importantly, they were designed to respond to the over-representation of Indigenous people in the criminal justice system by making court processes more relevant and meaningful to Indigenous people.³⁰ This has a specific and a general dimension; courts aim to connect with Indigenous offenders more successfully, but to do this they must also connect with Indigenous leaders, communities, and families.

The importance of relationships and power-sharing processes cannot be underestimated in this context. Interestingly, although many courts are now supported and regulated by legislation, the first Indigenous sentencing courts arose from dynamic human agency operating within existing sentencing court structures. Magistrate Chris Vass established the Nunga Court in South Australia in the late 1990s without any initial formal permission from court or justice department authorities.³¹ Instead, he took this step in response to his concerns about the over-representation of Indigenous people in his courtroom, and, importantly, with the support and collaboration of Nunga leaders and other key stakeholders within and outside of the court system.³² In

²⁹ See Elena Marchetti, *Indigenous Sentencing Courts* (Brief 5, Indigenous Justice Clearinghouse, Department of Justice and Attorney-General, 2010) for a comprehensive overview of the operation of Indigenous sentencing courts across the country. Also Elena Marchetti and Kathleen Daly, 'Indigenous sentencing courts: towards a theoretical and jurisprudential model' (2007) 29(3) *Sydney Law Review* 415.

³⁰ *Ibid.*

³¹ Marchetti and Daly, above n 29, 441-442.

³² *Ibid.*

essence, he experimented with the idea that legal systems could remain stable and could adhere to formal rules whilst also employing creative mechanisms and processes to ‘steer’ trajectories. The 2010 evaluation of the Queensland Murri Court also reflects the way that these courts operate to achieve broader system goals by establishing strong relationships between relevant actors.³³ This report identified the improvement of relationships between the court and Indigenous communities as being a key success. The relational dimension of the court’s work created conduits through which services and benefits could flow. These were not only directly ‘justice-related’ services (such as support to attend court) but also more indirect supports such as connecting Indigenous offenders with community services and broader community support. At the same time, intra-system agendas were also achieved, such as improved rates of court appearance and greater opportunity to participate in rehabilitative programs. Although rates of re-offending were not yet improved, the report suggested that “the Court did appear well-placed to take on a more intervention-focused approach to dealing with Indigenous offending”.³⁴ This reinforces the idea that change takes time in a complex system.

In this way, Indigenous sentencing courts can be seen as an institution that effects change at various levels. They attempt to influence individual trajectories of individual offenders. They also, through relational connections, help to support community organisation and meso-level functioning. At a macro-level, Indigenous sentencing courts operate in a way that reinforces the authority and strength of Indigenous leaders and communities.³⁵ This demonstrates how the thoughtful deployment of a legal institution can have important intra- and inter-system effects. It also reflects the complex interactions inherent in complex systems, which make the realisation of goals slow and outcomes uncertain. Nonetheless, Indigenous sentencing courts can be seen as serving an important role in the achievement of these goals because of the critical function they play in gently guiding or steering a complex system away from established trajectories.³⁶

³³ Anthony Morgan and Erin Louis, Australian Institute of Criminology, *Evaluation of the Queensland Murri Court: final report* (2010).

³⁴ *Ibid*, iii.

³⁵ None of this is uncontroversial. The question of the institutional capture or conditionality of authority permitted by this kind of institution is the subject of ongoing debate. Certainly, authority is not permitted to be absolute in this context, and that may have its own effects at a macro-level. See, e.g. Marchetti and Daly, above n 29.

³⁶ The Murri Court was defunded in Qld in 2012. Nonetheless, the court continued to operate in a more limited fashion because of the strength and commitment of the stakeholders (esp. Magistrates and Elders). This demonstrates again the importance of relationships and human agency in system functioning. The Court was recently refunded (in July 2015).

IV CONCLUSION

A challenge of a complex systems perspective is that it is difficult to map it out in ways that are comprehensive and complete. This statement holds true for the ideas presented in this paper. We have glossed over some key dimensions; such as a thorough exploration of the nature and form of macro-, meso- and micro-level interactions driving Indigenous over-representation. We have also presented a limited exploration of the role of legal institutions and the many ways in which they currently operate to achieve (or resist) the goal of lowering rate of Indigenous over-representation. Inter- and intra-system power dynamics have been largely ignored, despite the important role that these may play in reinforcing current trajectories, and in resisting change. We have not addressed the way that law operates to regulate other institutions and processes in the criminal justice system, nor explored how this could be harmonised or understood from a complex systems perspective. Perhaps most importantly, we have not looked closely at the tools and processes required to implement change from a systems perspective.³⁷ It is clear that much remains to be done beyond the scope of this brief paper.

Nonetheless, we hope to have made one important point. A complex systems perspective allows the problem of Indigenous over-representation to be seen as multi-faceted and entrenched. This perspective clearly highlights the futility of responses that are based on reductionist arguments, or that are unilaterally imposed. Instead, it demonstrates that complex problems require complex solutions. At the same time, a complex systems perspective allows us to see that entrenched and multi-faceted problems are not impossible to resolve, nor entirely resistant to change. Complex systems exhibit patterned behaviours, despite their highly complex interactions, and these patterns can be mapped. This means that complex systems are prone to uncertainty, but not anarchy.³⁸ Existing strengths within systems and the specific desires of local communities can be drawn on and connected up in order to pursue reform agendas that are both pragmatic and holistic. For example, a complex systems perspective can drive pragmatic actions designed to address issues arising at one level of organization, but which also operate to achieve holistic goals across multiple levels. To do this, however, attention must be paid to the processes and

³⁷ This is a key issue, and there is a burgeoning interest in 'implementation science'. See, for example, the work of Ross Homel, Kate Frieberg, Sara Branch and others at <https://www.griffith.edu.au/criminology-law/griffith-criminology-institute/our-programs-of-research/creating-pathways-to-prevention>; or the toolkit provided by Graham Room at <http://people.bath.ac.uk/hssgjr/agile-policy-making-toolkit.html>.

³⁸ Above n 8, especially the chapter by Thelen and Smith. Complex systems do not behave randomly, although their complexity makes their future actions or movements harder to predict.

mechanisms that need to be created or activated in order to align a system towards a common goal.

The law and legal institutions can play a pivotal role in a complex system. Indeed, social systems that are shaped by liberal democratic principles keep legal institutions at their heart, as they are strong, predictable institutions that help to keep complex systems stable by “applying a shared normative framework and enforcing the rules of the game”.³⁹ Nonetheless, they can operate in purposeful and surprisingly creative ways. Law and legal institutions are therefore pivotal to trajectory change, making them key (but not sole) players in the task of addressing Indigenous over-representation.

³⁹ Room, above n 8, 241. Room explains that this is an important task of stewardship within a complex system, but notes that this is not the only task.

An Interview with Soraya Ryan QC*

PB: Soraya Ryan, thank you very much for joining *Pandora's Box* today.

SR: You're welcome.

PB: You began your move towards the criminal law and mental health with your involvement in the Ward 10B inquiry in 1990-1991. Can you tell us a little about that?

SR: The inquiry was in Townsville and it was an inquiry into the care and treatment of patients in the psychiatric ward of the Townsville Hospital amidst concern about their care and treatment, and about the philosophy of the doctors in charge of the ward. That philosophy meant that patients were treated in a particular way that was having adverse health outcomes. It was an unconventional philosophy about the 'therapeutic community', and wasn't quite a denial of mental illness, but something that came close to it. The drugs they were using were resulting in some life threatening situations.

We went up there as a group to conduct the inquiry. Counsel assisting were lawyers from prosecuting agencies. That's where I got my introduction to criminal law, because I met these fantastic prosecutors, and from the inquiry I went to the Office of the Director of Public Prosecutions and didn't go back into commercial practice.

So my job in the inquiry was going through medical records, hundreds of charts, looking for instances of treatment that were worth investigating. If you look at the reports there are instances that are used as examples as the basis for certain recommendations. I got to meet patients and their families and that was really my first contact with anyone who suffered from serious mental illness. And they were brave, the families were very brave, the circumstances there were very tragic. It gave me an insight into the world beyond what had been my very sheltered existence. But I was attracted from that moment to law that involved people more than that which involved corporations and taxes and things like that.

* Barrister-at-law, Queensland Bar, BComm/LLB (Hons)(Qld). This interview was conducted by Wendy Pei and Michael Potts at the University of Queensland on 30 April 2015.

I was very lucky to be able to get a job with the Office of the Director of Public Prosecutions almost flowing immediately from my work in the Ward 10B Inquiry. As a result of the inquiry the Commissioner wrote a report¹ and my understanding is that ultimately his recommendations are part of what we see in the current *Mental Health Act*.²

PB: What are your thoughts on how the contemporary criminal justice system deals with those sorts of psychological conditions that may not be very well understood?

SR: The criminal justice system has always recognised that criminal responsibility only attaches to people who have full cognitive capacity, and that means people who understand what they're doing. Criminal offences require a choice, so if the person making that choice understands the nature of the act they are about to embark upon; they can control themselves and are not compelled by, for example, hallucinations; they can reason, so their thinking is reasonably clear about the rightness or wrongness of what they're about to do - criminal responsibility attaches to their behaviour. If they are deprived of one of those capacities it's always been the case that they could raise the insanity defence. So the law recognises that if you, for example, cannot control your actions because of your illness, and it has a resolution or a solution to that issue.

Under the *Mental Health Act*, it is the Mental Health Court that primarily deals with questions to do with mental illness and defences. It has other responsibilities, but one of those is determining referrals to it about whether someone was of unsound mind or insane at the time of the commission of the offence, and determining referrals to the question of diminished responsibility which applies to murder, and also fitness for trial, so whether someone is well enough to go through a trial.

I think that it has always been the case that mental illness has been recognised as something which can rob you of choice, understanding and control, and so the compromise of the law is to ensure safety of the community; to evaluate just how dangerous a particular person is,

¹ Queensland, Commission of Inquiry into the Care and Treatment of Patients in the Psychiatric Unit of the Townsville General Hospital between 2nd March 1975 and 20th February 1988, *Report* (1991).

² *Mental Health Act 2000* (Qld).

but to recognise that the choices they made are not choices made with full capacity. In response, what the Court is required to do, assuming they find that someone is insane or of unsound mind, is to determine where they should be housed, or where they should reside, and the treatment that they need. If they become well, they can get community leave and that is gradually increased. If they don't become well then they're in an environment that protects the community from them, which attempts to alleviate the symptoms of their illness as much as it can.

As a resolution to a difficult problem, in my opinion, that's not too bad in that it recognises the illness' effect on choices and it also protects the community. But very unwell people can and do commit very serious offences and it can do nothing to repair that tragedy. We can just respond to the circumstances presented and that's what the court system tries to achieve.

PB: You mentioned that you worked at the Office of the Director of Public Prosecutions as a Crown Prosecutor. Now that you're at the private bar as defence counsel, what are some of the major contrasts between those two roles?

SR: I was defence counsel first at Legal Aid Queensland, and at the private bar I do some prosecuting work as well as defence work, though mostly defence work. So the main difference is that when you're prosecuting you have certain obligations that attach to your role as prosecutor and one of them is that you can't urge a conviction when one isn't available on the evidence. So you have an overriding duty of fairness, and I'm not saying that defence counsel can be unfair, but prosecutors have a unique role in the criminal justice system. You also have to facilitate the getting together of the case. Your role includes coordinating witnesses, thinking through the way the case will be presented, selecting exhibits, and keeping all the witnesses on the boil and ready to go. So you're dealing with and coordinating lots of people and you work very closely with the police officers who investigated everything.

When you're defence counsel, you have one person to worry about: the defendant. You usually have been in a matter for years, because it takes such a long time to resolve matters. So you can have someone as a client for two or three years. Not every client is fabulous, some are very difficult, but most, when sober and when clean, are everyday people and over time you develop a rapport with them, bearing in

mind that most people plead guilty. Your life as defence counsel is not about getting people off when they're really guilty, it's got nothing to do with that; most of the time you're just ensuring a just result and that their story is told, that you build compassion for your client. And you have a little more latitude when it comes to trial work; I think you can get a little more personality across in the way that you conduct the defence of a criminal offence. Whereas, as a prosecutor, mostly you have to be a bit more staid, you have a particular role that you have to respect. When you watch defence counsel they do have a bit of flair, they use a few jokes if the matter warrants it.

You do get very close with the family of the defendant, and you know their story. That connection with one person instead of organising a group of people is probably one of the main differences. You don't work closely with the police, of course. The other difference is the really practical one about resources, where you have a legally aided client with nothing. You need to seek money from Legal Aid to get doctors' reports, for example, if that's relevant to your case. There are very few professionals who will accept work at Legal Aid rates, so it is harder to get the evidence you need sometimes to properly defend your client, which is not a good situation. But, you will know there is currently an issue about Legal Aid funding, which has been cut even further.

PB: Has that dichotomy changed over time with respect to the growing media scrutiny of the Courts? Has that affected in any way how those roles progress?

SR: I don't think it's changed how people undertake their responsibilities to the Court. People are playing their roles in the justice system as they have always played their roles in the justice system. I think the difference lies in the attention given to court proceedings now. Courts have always been open to the public and I've been doing this for a long time. Fifteen or twenty years ago there were regulars at the courts who would watch the trials because the courts were open.

What's different now is that the tragedy that is a criminal trial - because in serious matters it is a tragedy - has now grabbed the attention of the community because of the way it's presented by the media, instead of the media just reporting on the matters in court. And back in the day there were people assigned to the courts who would go from court to court and report on the happenings without spin or bias or crazy headlines; just report. They had the language of

the courts right because that was their area of specialty and they knew what to report and what not to report.

Whereas now, I have to read the reports when they're about my case because often they're inaccurate and you need to do something about that. It's all about open justice, but justice is only open if the reports are accurate. The reports are often inaccurate, the language is wrong, and changing the language can convey a very different thing to that which actually occurred. Bail is not parole, for example, but the people writing the articles often don't understand the language or the arguments and often misrepresent them. The media now provides an opportunity for people with no connection to a case, other than interest, to be interviewed. Spectators come out of the court and they're asked their opinion when they have no particular connection to the matter. So there's been this change in how court cases are presented to the public, which has led to greater public interest and attendance.

That's been a recent change and I couldn't really put a time on when that started to change. But more significantly, to answer your question, I don't think it's changed the way that people undertake their roles in the courtroom, and for me if I'm in the courtroom, I'm in the zone – I'm sometimes not even conscious of my solicitor being there. To do your job properly you're just engaged in the moment. But I have been into courtrooms where the court is full of journalists and there's no room for other people, and my understanding is that it's because the journalists don't just come from organisations, many of them are freelance and they try to get a story so they can sell it to the major publications; they don't specialise in court matters.

The principle of open justice has always been applied, but I think it's only respected when the reports of cases are factual reports, without opinion, without spin and without salacious headlines, and that's really when you're communicating to your community what's going on in the courts. When you spin it, truncate it or distort it you show no respect for the principle of open justice.

PB: Do you feel like you have a duty to protect criminal process and the Court's integrity because of the heavy involvement of the media and the high level of scrutiny that has developed over the years?

SR: I think the best way to protect the integrity of the process is to do your job as if they're not there. You should be doing your job in

exactly the same way when the courtroom is empty as you do it when a courtroom is full. I truly believe you need to respect the process and that is manifested by giving it your all – being professional, displaying the integrity you are expected to display, showing respect for the courts, the judges, the jury, every player in the system. I think, media presence or not, if you do that consistently, then you protect the integrity of the courts.

I like to think that most members of the community appreciate that there is spin and influence that is injected into media reports. The best way I show respect for the system is by doing my best with the utmost integrity at all times.

PB: That seems to be the same sort of response to difficult clients in general. Often the best way to help them is to just do your job.

SR: Yes. The response to that is that most people, I'm not sure of the statistics, but somewhere between 85% and 90% of people plead guilty. So that's influenced by the consequences of conviction; there are a lot of mandatory penalties now that didn't exist before. When someone faces a mandatory penalty and there's no mitigation for a plea of guilty, there's also no incentive to plead guilty. So there are probably more trials in the face of mandatory penalties than there were previously.

But, my belief is that even if you think your client is guilty your role is to ensure that justice is done, that the game is played fairly. It's probably trivialising it to call it a game, but to ensure that a trial is conducted fairly and appropriately, and that the conviction is in accordance with the rules of evidence, because the system needs to operate consistently and fairly to ensure justice across the board. There will be the wholly innocent person and if you let standards drop in the case of the 'guilty' person then you're doing nothing to protect the innocent, assuming you can judge those things without the whole process.

PB: Generally the criminal bar is quite distinct, in what it deals with first of all, but also in various other ways. Is there a particular culture that runs through the criminal bar as a result of the nature of the work or the type of the law?

SR: I think that we are storytellers, because we get stories, though not in serious cases which are sad and bad. But there is the client who says

‘Miss, I wasn’t stealing that, I was putting it back’, and the fellow who has done an armed robbery and has left their wallet, helpfully, on the counter of the bank. And you have some clients who have a good sense of humour, or they’ll go off at the judge, so there are stories to tell and we are mighty fine storytellers. If you get a group of criminal barristers together they will out-story-tell each other.

Maybe the perception is that we are a bit more common because our clients are not corporations and on the whole they’re not wealthy. We visit them a lot at the jail. You are necessarily talking a different language to defendants than the language you speak to commercial clients. I think, yes, there is a culture; it’s hard to articulate what it is. It probably has a particular humour to it that still reflects the seriousness of what we’re doing but also acknowledges that from time to time there is a story to tell. There are certainly connections between all the players in the criminal justice system.

PB: It’s a smaller industry comparatively?

SR: It is smaller, and a smaller group again who go to court, and in particular courts you will get to know fairly quickly the people who appear in the Supreme Court regularly, the people who appear in the District Court regularly. It’s smaller, and that leads to camaraderie.

PB: Crime is generally seen as a more masculine area, and in a speech last year President McMurdo of the Court of Appeal pointed out that the level of female representation at the bar and in the judiciary is lacking, particularly in senior positions.³ How does this bear upon female practitioners at the criminal bar?

SR: At the criminal bar there are many more men than women, generally. I’m not sure of the statistics, but there are fewer women practicing criminal law at the bar than men. There are lots of women in the Office of the Director of Public Prosecutions. There are also lots of women at Legal Aid who work as solicitors that do court appearances, usually in the Magistrates Court. There are lots of women there who are fantastic. But Justice McMurdo would be right, there are fewer women practising criminal law at the bar than there are men.

³ Margaret McMurdo, 'Address' (Speech delivered to Queensland Women Judicial Officers and Barristers, Brisbane, 21 March 2014)
<<http://archive.sclqld.org.au/judgepub/2014/mamcmurdo210314.pdf>>.

Sometimes I get a surprise if I'm in a courtroom with only women because I am used to there being at least one man in the court there with me, and sometimes when it's a female bench and a woman prosecutor and me, just for a split second you think 'Oh, there are only women in this room'. I still notice that so I suppose it hasn't become irrelevant for me or it hasn't faded into the background for me.

PB: That being the case, how might this be changed? How might women be encouraged to take up these positions in criminal law?

SR: I don't know that they need encouragement. I like to think that women students at the moment don't feel that that path is not available to them. But, your success depends as much on your contacts and your support as much as it does on your ability. So it is naïve for anyone to go to the criminal bar, for example, without solicitors ready to brief you, or without going to a chambers where you can be assured of junior work. It's very difficult in criminal matters because when matters are legally aided there's no funds for junior counsel. It's very different to commercial work.

So I think, in terms of encouraging women, I don't know that they need to be encouraged to try. It might be, that for all sorts of complicated reasons, they don't come with the same connections that men have, and again it's hard to know why that is but maybe that's the case. Studies show that there are issues to do with confidence in the way that you present, that has something to do with how you are perceived across the board, that's not just limited to law. I'd like to think that if you're good and given a chance you will shine and your gender will become irrelevant. But people who are smarter than I am and more perceptive than I am say unfortunately, that's not the case.

There's a recent article by the Honourable Justice Atkinson, and she says "Unfortunately, I think the old adage that a woman has to work twice as hard to be regarded as half as good is still true. We are obliged to work very hard, to be utterly prepared and to be very careful in what we do... I think a constant battle for women is whether to be pragmatic and strategic or to be forthright and call a spade a... shovel."⁴ She makes that point about having to work twice as hard to

⁴ Roslyn Atkinson, 'Speech in the Women's Speakers Series' (Speech delivered at Department of Defence, 18 February 2015) 7-8
<<http://archive.sclqld.org.au/judgepub/2015/atkinson180215.pdf>>.

be regarded as half as good, and I hate hearing that, but it's not the first time I've heard it.

But if that's how it goes then I'll work twice as hard and I will do the best I can do, and hope that, by doing the best I can before a particular judge in a particular matter, any gender stereotype that might have been playing around is gone. But, as I said, people smarter than me, researchers, say that that perception still exists. I don't know how that changes, I really don't. It seems to me there needs to be a total re-socialisation around that and that's going to take a long time.

PB: On a lighter note, you've had a varied career experience, commercial, criminal including prosecuting, law reform, advocacy and university lecturing. What would your advice be to young, aspiring law students today?

SR: Anyone who emerges from this university with a law degree is incredibly privileged. It is an honour to be permitted education and to emerge with a degree that gives you an elevated social and occupational status. My advice is always respect the opportunity you've been given. Always respect the system in which you then participate – so the justice system, whether it be civil or criminal. And you respect a system by abiding by all its ethical and professional rules and by giving it your all and then taking social responsibility. If you do all of those things, then you respect the education you have received which is a real privilege that sets you apart from many others in the community, and I mean that sincerely.

When everyone in the system is honouring their professional obligations the system results in justice that is acceptable. It's only when people stop honouring and respecting, where they start to slide into sharp practices, where they show disrespect for the court, that's when justice gets disturbed. So, be grateful for it, respect it and respect the profession. I probably say that because I see many of my clients who come from families, where even though in Australia education is available to anyone, the opportunity that it provides to you can be hamstrung if you come from an environment where education isn't valued, where occupation isn't valued, where you're branded as elitist if you show any occupational aspiration.

PB: Soraya Ryan, thank you very much for joining *Pandora's Box* today.

SR: You're welcome.

Lord Bingham's Rule of Law and Australia's Anti-Terror Legislation

Greg Barns*

I INTRODUCTION

Since the tragic events of September 11 2001 (9/11) when a series of terrorist attacks occurred on American soil the Australian Parliament has passed a series of what can be described as 'anti-terror' laws. These laws, commencing with *Criminal Code Amendment (Anti-Hoax and other Measures) Act 2002*, now number almost sixty at the time of writing. The legislative activity in this area has been uniformly in the direction of undermining democratic freedoms.¹ More particularly, it is argued that the rule of law in the way it was articulated in 2010 by the late Lord Bingham, the former Lord Chief Justice and Senior Law Lord of the United Kingdom², is at risk in Australia. Lord Bingham's proposition was that "all persons and authorities in the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."³

II UNPACKING BINGHAM'S RULE OF LAW

Bingham's proposition was 'unpacked' by way of eight principles that he formulated. The eight 'suggested principles' which formed the 'ingredients' of the rule of law⁴ are:

1. The law must be accessible and so far as possible, intelligible, clear & predictable;

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¹ George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1171.

² Thomas Bingham was Lord Chief Justice of the UK from 1996-2000 and Senior Law Lord from 2000 until his retirement in 2009. He died in 2010, ironically on 11 September. The Economist said of him; "He was politically neutral, as judges had to be. He did not consider himself at odds with the Blair government; it had achieved one of the things he had fought hardest for, the incorporation into English law in the 1998 Human Rights Act of the European Convention on Human Rights. But his very passion for those rights brought him bounding to their defence at any sign of erosion: rumours of torture, arrests of hecklers, carelessness for *habeas corpus*. Vigilance was vital.": 'Lord Bingham', *The Economist* (online), 16 September 2010.

³ Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 8.

⁴ *Ibid* 37.

2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably;
5. The law must afford adequate protection of fundamental human rights;
6. Means must be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
7. Adjudicative procedures provided by the state should be fair;
8. The rule of law requires compliance by the state with its obligations in international law as in national law.⁵

All of these principles, with the possible exception of 6, are offended to some degree by the suite of anti-terror laws passed by the Australian Parliament since 9/11. It follows that the rule of law has been substantially undermined by the Australian Parliament.

III FIRST PRINCIPLE

The first principle of Lord Bingham's 'rule of law' might seem, at first blush, to be trite. However in the context of Australian anti-terror laws it is of some relevance. The former Chief Justice of the High Court of Australia, Murray Gleeson, made the point that "the content of the law should be accessible to the public".⁶ This proposition is of particular importance when the legislature provides for criminal penalties. As Andrew Ashworth has noted in the case of criminal laws, there is an obligation on the state to ensure that citizens can apply their mind to ensuring their conduct is such as to avoid criminal sanction.⁷

The anti-terrorism provisions in the *Criminal Code Act 1995* (Cth) ('the Criminal Code Act') run to some 157 pages. The offences created under Chapter 5 of

⁵ Bingham Centre for the Rule of Law, *About the Bingham Centre* (5 August 2015) <<http://binghamcentre.bii.org/about-us>>.

⁶ Murray Gleeson, 'Courts and the Rule of Law' (Speech delivered at University of Melbourne, 7 November 2001) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_ruleoflaw.htm#_edn17>. See also *Incorporated Council of Law Reporting (Q) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 672.

⁷ Andrew Ashworth, *Positive Obligations in Criminal Law* (A & C Black, 2014) section 3.4.

the Criminal Code Act that deals with 'The Security of the Commonwealth' are characterised by vagueness and complexity. Section 101.4 of the Criminal Code Act, for example, makes it an offence to possess 'a thing' that is 'connected with preparation for, the engagement of a person in, or assistance in a terrorist act.' The offence is committed even if a terrorist act does not occur or 'the thing' is not connected with a specific terrorist act. The maximum penalty for this offence is 15 years imprisonment.

In a similar vein is section 101.5 that makes it an offence to collect or make a document that is connected with preparation for, the engagement of a person in, or assistance in a terrorist act. This offence also carries a 15 years maximum term of imprisonment. These provisions lack clarity in a number of ways. There is no definition of a 'thing'. What does "connected with" mean? Section 102.8 of the Criminal Code Act which deals with the offence of associating with a terrorist organisation is also lacking in clarity. What does it mean to "associate"? This lack of clarity also infects section 102.7 that makes it an offence to "intentionally" provide to an organisation "support or resources that would help the organisation directly or indirectly engage in fostering or planning for a terrorist act". It is safe to say that it is highly unlikely the majority of Australian citizens understand the nature of the provisions outlined above and their scope. Yet these are serious criminal offences and the rule of law surely requires that citizens be able to have access to, and understand the law in relation to terrorism offences.

IV SECOND PRINCIPLE

Lord Bingham notes, in relation to his second principle, that while the rule of law does not require "official or judicial decision makers should be deprived of all discretion," it "does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered."⁸ In the context of anti-terror legislation, this plea from Lord Bingham has been ignored. The Commonwealth Attorney-General has a power to issue a 'non-disclosure' certificate if he or she thinks that disclosure of evidence "is likely to prejudice national security": *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s 26. That decision is not appealable despite the fact that it can prejudice the case for a defendant in criminal and civil proceedings.

More disturbing from the viewpoint of fettering of discretion on the part of public officials are the amendments made in 2015 to the *Crimes Act 1914* (Cth) ('the Crimes Act') that allow for senior officers of the Australian Federal Police

⁸ Bingham, above n 3, 54.

and the Australian Crime Commission to declare an investigation as a controlled operation which enables officers of those organisations to commit what would otherwise be criminal offences as part of that investigation: Part 1 AB of the Crimes Act. The Australian Parliament has also legislated to exempt a minister from being required to accord natural justice in cases where the minister is considering whether or not to cancel a migration visa in relation to persons convicted of certain criminal offences: *Migration Act 1958* (Cth), s 501 (1).

V FIFTH AND EIGHTH PRINCIPLES

Lord Bingham's fifth and eighth propositions are severely tested by the raft of anti-terror laws passed in the past thirteen years by the Australian Parliament. Australia is a signatory to, and has ratified, a number of international instruments concerning human rights. These include the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child* and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (and the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*). There are a number of aspects of Commonwealth anti-terror laws that fall foul of these international instruments.

Lord Bingham notes that “[the] interrelationship of national law and international law, substantively and procedurally, is such that the rule of law cannot plausibly be regarded as applicable on one plane but not on the other.”⁹ Unfortunately this seemingly uncontroversial proposition appears ignored in the context of anti-terror laws in Australia.

The Human Rights Law Centre (HRLC) has recently catalogued¹⁰ the inconsistencies. It argues that the following are inconsistent with international human rights protections:

1. Prohibition on disclosure of information relating to ‘special intelligence operations: *Australian Intelligence and Security Organisation Act 1979* (Cth), s 35P. This provision unjustifiably limits freedom of speech and expression.¹¹

⁹ Ibid 119.

¹⁰ Human Rights Law Centre, Commonwealth counter terror and migration Laws: a disturbing trend of unjustifiable interference with rights and freedoms (Submission), Australian Law Reform Commission, *Issues Paper: Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, 27 February 2014.

¹¹ Ibid 6.

2. Control orders made pursuant to section 104.4 of the *Criminal Code Act 1995* (Cth). These orders can be made ex parte, without the necessity of having to charge a person and can materially restrict a person's movements. These orders undermine the right to a fair trial, the right to freedom of expression, the right to privacy, the right to protection of family, the right to work, the right to equality.¹²
3. Travel bans that make it an offence to enter or remain in an area declared by the Minister for Foreign Affairs, with limited exceptions: *Criminal Code*, s 119.2. This provision impinges on the right to freedom of movement.
4. The capacity of ASIO to seek a warrant that enables it to take a person into custody for questioning for up to 7 days and which restricts the capacity to obtain legal advice and limits the capacity of their lawyer to communicate information to family members of the person: *Australian Intelligence and Security Organisation Act 1979* (Cth), s 34G. The individual is not told of the reason for their detention.

This warrant process is contrary to the right to freedom from arbitrary detention.¹³

To be added to this list could also be the criminalising of thought and word which is the effect of offences, referred to above, pertaining to support for a terrorist organisation.

VI CONCLUSION

The so called 'war on terror' in Australia has been characterised by the marked extension of the criminal law in both liability and procedural terms. Many of these legislative initiatives are antithetical to Lord Bingham's constituents of the rule of law. Lord Bingham argues that there is a "strong temptation" on the part of governments dealing with terrorism "to cross the boundary which separates the lawful from the unlawful."¹⁴ Unfortunately Australia has well and truly crossed that threshold.

¹² Ibid 9.

¹³ Ibid 11.

¹⁴ Bingham, above n 3, 158.

Fighting to the Death: Thoughts for Anti-Death Penalty Activists to make Further Progress towards the Goal of an End to Judicial and Extra-Judicial Executions

Stephen Keim SC and Bridget Armstrong*

I INTRODUCTION

The campaign against the death penalty has many participants. The United Nations has a number of officials and bodies working for abolition. There is support from the Secretary-General. On 2 July 2014, Secretary-General, Ban Ki-Moon, declared that “the death penalty has no place in the 21st century.”¹

There are reasons for optimism that progress is being made. Approximately 160 countries in the world have either abolished the death penalty, introduced a moratorium, or do not practise it. On 29 May 2015, the Office of the UN High Commissioner for Human Rights (‘OHCHR’) welcomed conservative Nebraska as the nineteenth State in the United States to abolish capital punishment.²

Australians have recently been reminded that every time the death penalty is used, it has tragic impacts on a broad group of people that extends well beyond the person being executed. Two Australian men, Andrew Chan and Myuran Sukumaran, were executed on 29 April 2015, along with six other men from various countries. Chan and Sukumaran were arrested for drug offences. One execution per year is one too many.

And there is plenty of evidence to remind us that countries’ willingness to use capital punishment is still a serious problem. Amnesty International’s annual reports indicate that nine countries carried out executions every year from 2009 to 2013: Bangladesh, China, Iran (Islamic Republic of), Iraq, the People’s

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¹ Ban Ki-Moon, United Nations Secretary-General, *Best Practices and Challenges in Implementing a Moratorium on the Death Penalty* (Webcast, 2 July 2014) <www.un.org/sg/statements/index.asp?nid=7840>.

² UN News Centre, *UN rights office welcomes Nebraska as latest US state to abolish death penalty* (29 May 2015) <<http://www.un.org/apps/news/story.asp?NewsID=51004#.VWpRWNGJjIU>>.

Democratic Republic of Korea, Saudi Arabia, Sudan, the United States and Yemen.³

Five countries have been using the death penalty with high frequency: China, Iran (Islamic Republic of), Iraq, Saudi Arabia and the United States.⁴ Human Rights Watch reported on 16 June 2015, that Saudi Arabia had carried out 100 executions since 1 January 2015, a marked increase over 2014 when 88 executions in total occurred.⁵

The executions of 29 April 2015, in Indonesia, which affected Australians so deeply, were part of a recent pattern in which, after a four year de-facto moratorium, Indonesia resumed its executions in March 2013.

The puzzle for anti-death penalty activists concerns what steps are likely to be most effective to continue the trend of abolition. What steps can persuade those recalcitrant countries⁶ to change their attitudes and practice? And what steps are likely to be effective in turning around those countries, like Indonesia, who turn back to a practice away from which they appeared to be moving? And how can the broader movement of countries edging away from capital punishment be consolidated and encouraged?

This paper does not pretend to have the answers to those important questions. A conference was held in Bangkok, Thailand on 22-23 October 2013, called "Expert Seminar on Moving Away from the Death Penalty" convened by the OHCHR and the Ministry of Justice of Thailand. The paper will seek to draw lessons from the report of that seminar (*Moving Away*), which was published early in 2015.⁷

³ Office of the High Commissioner for Human Rights Regional Office for South-East Asia, *Moving Away from the Death Penalty Lessons in South-East Asia (Moving Away)*: (Discussion Paper, Bangkok, Thailand), 7
<<http://bangkok.ohchr.org/files/Moving%20away%20from%20the%20Death%20Penalty-English%20for%20Website.pdf>>.

⁴ *Moving Away*, above n 3.

⁵ Human Rights Watch, *Saudi Arabia: 100 Executions Since January 1* (16 June 2015)
<<http://www.hrw.org/news/2015/06/16/saudi-arabia-100-executions-january-1>>.

⁶ As set out above, the People's Republic of China and the Democratic People's Republic of Korea, the United States of America and several Islamic Republics and monarchies in Asia comprise those countries who appear devoted to the use of the death penalty.

⁷ *Moving Away*, above n 3, 1-44.

II THE MEMOIR – PART 1⁸

We spend the first three weeks of the year at Angourie on the NSW North Coast. I was just back at work, in late January, when I heard of the first vigil. It was being organised by a local Amnesty International group. I was asked to speak but, since Thursday night is family dinner night, I declined.

But they were looking for an MC at the last moment and I agreed to take that role.

The first vigil was a big set piece. Ruth spoke on behalf of the Bar Association. Chris spoke on behalf of Amnesty International. There were speakers from several political parties (or messages read out on their behalf). Susan, on behalf of the City Amnesty Group, did what she would do many times over forthcoming weeks. She read out the names and countries of origin of six people who had been executed on 17 January 2015,⁹ the first executions under new President, Joko Widodo.

The execution of the Australians and others was then imminent. A small group decided that we should have another vigil, next week. I was booked.

III THE VIEW THROUGH THE PRISM OF INTERNATIONAL HUMAN RIGHTS LAW

It is not unexpected that a United Nations conference would stress international law. Since the Universal Declaration of Human Rights ('UDHR') passed the General Assembly on 10 December 1948,¹⁰ international human rights law has been part of its stock in trade.¹¹

The relationship between law and people's moral beliefs and actions is, as Bilz and Nadler point out, complex and hard to demonstrate.¹² They also point out, however, that much effort and many resources are poured, domestically,

⁸ This article is a joint effort in all respects. The "memoir" section relates, however, to the experiences of Stephen Keim SC, during the period from February to early June 2015, in Brisbane in respect of vigils opposing the carrying out of the death penalty in Indonesia. Bridget Armstrong was working away from Brisbane at that time.

⁹ Amnesty International, *Indonesia: First executions under new president retrograde step for rights* (18 January 2015) <<https://www.amnesty.org/en/press-releases/2015/01/indonesia-first-executions-under-new-president-retrograde-step-rights/>>.

¹⁰ United Nations, *History of the Document*, The Universal Declaration of Human Rights <<http://www.un.org/en/documents/udhr/history.shtml>>.

¹¹ United Nations, *Global Issues: International law* <<http://www.un.org/en/globalissues/internationallaw/>>.

¹² Kenworthy Bilz and Janice Nadler, 'Law, Psychology and Morality' (2009) 50 *Psychology of Learning and Motivation* 101.

into seeking to change the law in the firm belief that people's actions and beliefs will follow.¹³

It may also be observed that, while the consistent enforcement of international law is a major ongoing difficulty, nation States still take many steps to avoid being found to be in breach. It follows that proscriptions and restrictions in international law have a potential to influence behaviour and, to the extent that international law imposes those restrictions, there is a potential for it to be used to influence national behaviour away from the use of capital punishment.

As it turns out, international law has much to say about the use of capital punishment. If it were to be adhered to by all countries, which currently use capital punishment, it would result in fewer crimes carrying the death penalty and significant improvements in the justice systems of many of the countries involved.

International human rights law does seek to uphold a fundamental and inherent right to life:

- Article 3 of the UDHR provides: "Everyone has the right to life, liberty and security of person."¹⁴
- Article 6 of the International Covenant on Civil and Political Rights ('ICCPR') provides: "Every human being has the inherent right to life. This right shall be protected law. No one shall be arbitrarily deprived of his life."¹⁵

But neither the UDHR nor the ICCPR, expressly, ban the use of capital punishment. The approach was to permit its use by way of an exception, which amounted to a significant restriction. This comes by way of the exception in paragraph 2 of Article 6 of the ICCPR, which states that capital punishment may be imposed only for the "most serious crimes" in countries that have not abolished the death penalty.¹⁶ However, *Moving Away* argues that the drafters of the ICCPR were already paving the way for the trend towards the abolition of the death penalty through their last paragraph in Article 6:¹⁷

¹³ Ibid.

¹⁴ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), art 3.

¹⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 6.

¹⁶ *International Covenant on Civil and Political Rights*, above n 15, art 6(2).

¹⁷ *Moving Away*, above n 3, 6.

“Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment in any State party to the Covenant.”¹⁸

This movement’s object materialised in 1989, through the adoption of the Second Optional Protocol to the ICCPR which states: “No one within the jurisdiction of a State party to the present Protocol shall be executed.”¹⁹

The result is a two-tiered legal structure. The death penalty is allowed in a State that has not yet abolished it but only if it is applied restrictively and not arbitrarily. This has implications for the legal system by which the penalty may be imposed.

IV THE MEMOIR – PART 2

It just happened that the ongoing planning of the vigils became a responsibility of Australians Against Capital Punishment (‘AACP’), an organisation founded by the parents of Scott Rush, a young man from Brisbane who had, along with Chan and Sukumaran, been on death row as part of the Bali 9. I had been talked into being a patron of AACP, some years earlier.

Justine organised the permit, each week, liaising with City Hall officials. Justine also organised the table, the petitions, and the signs and posters we shared with anyone who wanted to stand with us. Despite being overworked and stressed at a busy work place, Justine was ever dependable.

Don, often, chaired the speeches, or I chaired and Don spoke. Don always had the latest news from Indonesia and around the world. Another reprieve was imminent or it was not. Someone would be spared, for the moment.

At first, my speeches said little other than that we, as a group, stood against capital punishment, everywhere and at any time. It was not just about the Australians.

But it was about Australia and two Australians. From week to week, I thought about what I could say as an Australian to the President of Indonesia, for the lives of two of my countrymen. Eventually, it crystallised. I had to take less than a high and mighty tone since the governments, in recent times, of my country had done much about which I felt ashamed. I tried to look at the situation through a mother’s eyes. I tried to see it from an Indonesian

¹⁸ *International Covenant on Civil and Political Rights*, above n 15, last paragraph of art 6.

¹⁹ *Second Optional Protocol to the International Covenant on Civil and Political Rights*, signed 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

perspective. In the end, I sent the letter off to President Widodo²⁰ and on most nights, I read out a copy of my letter.

It said what I needed to say.

We did not always have speeches. Sometimes, we just stood and invited people to sign our petition. There were always people who, as if thinking about the issue for the first time, said "Oh, Yeah" and were happy to put pen to paper. There were one or two who objected to what we did, chastising us either for the futility of our quest or that we were seeking to save the wicked.

Our band of regulars grew. Dave and Sylvia were always out at the stream of passers-by, gently challenging people to join our petition. Richard, who had just returned from an exchange semester in London and had done some volunteering with Reprieve, over there, became a regular and a consistent speaker. Richard brought his sister, Alex, one night, and our little band grew by one more.

Something else was changing. It was a quest that none of us wanted and we feared that it would end in heartbreak. Nonetheless, a sense of belonging and love was growing among us, as we sensed that what we were trying to do was bigger than all of us.

V THE RESTRICTIONS: "MOST SERIOUS CRIMES"

Among the minority of countries, 32 member States of the United Nations, who still practise the death penalty, many exceed the restrictions imposed by international law. For example, there seems a certain penchant for imposing the death penalty for drug-related offences. This is despite the fact that there is no credible evidence that capital punishment deters drug crimes any more than long-term imprisonment does.²¹

More than ever, in the context of the recent executions of Australian drug smugglers, Andrew Chan and Myuran Sukumaran, in Indonesia, it is important to call upon all States to enact a moratorium on the use of the death penalty. In its 2012 Resolution 67/176, the General Assembly asked all States "to establish a moratorium on executions with a view to abolishing the death penalty".²²

²⁰ Stephen Keim SC, *An Open Letter Pleading Joko Widodo For Clemency*, From Stephen Keim SC (6 March 2015) New Matilda <<https://newmatilda.com/2015/03/06/open-letter-pleading-joko-widodo-clemency-stephen-keim-sc>>.

²¹ ABC FactCheck, *Fact check: No proof the death penalty prevents crime* (4 May 2015) <<http://www.abc.net.au/news/2015-02-26/fact-check3a-does-the-death-penalty-deter3f/6116030>>.

²² *Moving Away*, above n 3, 7.

As with domestic law, the words of the international human rights instruments contain ambiguities and various tribunals develop commentary and case law which gives the words of the instrument an extended life. So it has been with “most serious crimes” as used in Article 6 of the ICCPR. The Human Rights Committee has provided commentary and clarification in its General Comment 6:

The Committee is of the opinion that the expression “most serious crimes” must be read *restrictively* to mean that the *death penalty should be a quite exceptional measure*. It also follows from the express terms of Article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant (emphasis added).²³

General Comment 6 places many countries that use the death penalty outside the bounds of international law. The limits of applicability for capital punishment exclude a wide range of offences including drug-related offences, economic and political crimes, adultery and offences relating to consensual same-sex relationships, making its use for those offences illegal.

United Nations Secretary-General, Ban Ki-Moon and the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns,²⁴ also have reiterated that countries which have not abolished the death penalty, are acting in breach of international law if they apply the death penalty to anything less than the “most serious crimes”, namely, the crime of murder or intentional killing.²⁵

An important strategy for reducing, drastically, the use of capital punishment is to point out, as often as is necessary, to countries concerned that they are in breach of international law. At the same time, particularly, in the case of countries like Indonesia, who are focused on their perceptions of a drug problem, one should promote alternative (and more effective) law enforcement strategies such as additional and better trained law enforcement personnel and the creation of a fair, honest and functioning criminal justice system.

²³ Ibid 9.

²⁴ Christof Heyns, *Special Rapporteur on extrajudicial, summary or arbitrary executions* <<http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx>>.

²⁵ *Moving Away*, above n 3, 10.

VI THE MEMOIR – PART 3

There are two bronze lions set on an elevated lighted plinth in front of the Brisbane City Hall. The lions have been presented differently during the years, even through my living memory. They were originally part of the King George V memorial instituted in 1938.

The lions have been separated from His Majesty and it is fair to say that they get more attention and more love than the dead monarch from visitors to the square. My children and grandchildren have each hugged, kissed and ridden upon each of the lions. Generations of other young children have done the same.

We did not always line up beside the left lion (as you face out into the Square). When we were quiet and just accosting passers-by with petitions, our preferred resort was up against the wall of the bus station on the Adelaide Street side of the square. However, when we were in full voice, we set up beside the left-hand lion.

We bought a PA system about three vigils in. I gave the job to Justine and, of course, she came through with flying colours. It was designed for karaoke but we were not put off by that. The PA went next to the lion. Our table and the left over signs went out in front. And, as time went on, candles in glass jars decorated the front of the lion and lighted the various images that people had brought and placed there.

We made our speeches from beside the lion. Just like those generations of little children, we came to believe that the lion was one of us. For each of us, that spot will carry a special meaning into the rest of our lives.

VII THE RESTRICTIONS: MOST SERIOUS CRIMES – THE RIGHT TO A FAIR TRIAL

The right to a fair trial and proper process are crucial aspects of international human rights law. Illegitimacy follows, as a matter of course, if a legal system imposes the death penalty in the absence of fair and proper procedures. The most obvious and serious mistake of any criminal justice system is to inflict the death penalty on an innocent person.

The right to a fair hearing is enshrined in Article 14, paragraph 1 of the ICCPR:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair

and public hearing by a competent, independent and impartial tribunal established by law...²⁶

The Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that it is arbitrary to impose the death penalty where the legal proceedings do not adhere to the highest standards of a fair trial.²⁷ As Article 6 of the ICCPR provides, arbitrariness deprives any judicially imposed sentence from having legitimacy in international law.²⁸ It is perhaps not at all strange, that many of the countries that carry out executions, also, have criminal justice systems that fall far short of complying with Article 14 of the ICCPR.

It follows that the great majority of executions carried out, each year, are in breach of international law, being arbitrary deprivations of the right to life for failure to provide fair, competent and independent tribunals to decide the questions of guilt and penalty.

The Death Penalty Information Center provides a list of persons who were probably innocent but, nonetheless, were convicted and executed.²⁹ These nine cases are all from the United States and all involving trials since 1983. If lack of resources for legal aid; out of control or lazy police forces and prosecutors; and racial bias in the administration of the law³⁰ can cause a sophisticated legal system like that of the United States to produce repeated injustices, it is very likely that systems which barely comprehend concepts such as independent defence counsel or an independent judiciary but carry out large numbers of executions will execute the innocent on a regular basis.

The failure to deliver due process in legal systems around the world also needs to be targeted, including by use of the fact that such failures place the countries concerned in breach of international law. The construction of a fair legal system where one has not existed for a long time is difficult to achieve. As well as persuading countries to improve court systems, proponents also need to be able to assist those countries in accessing capacity building systems by which the justice systems can be improved.

²⁶ *International Covenant on Civil and Political Rights*, above n 15, art 14(1).

²⁷ *Moving Away*, above n 3, 11.

²⁸ *International Covenant on Civil and Political Rights*, above n 15, art 6.

²⁹ Death Penalty Information Center, *Executed But Possibly Innocent* (2015) <<http://www.deathpenaltyinfo.org/executed-possibly-innocent>>.

³⁰ *Moving Away*, above n 3, 11; Amnesty International, *Death Penalty and Innocence* (2015) <<http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-and-innocence>>.

The death penalty will be much harder to impose and carry out where the strictures of the Human Rights Committee are being adhered to:

Assistance of counsel should be ensured, through legal aid as necessary, immediately on arrest and throughout all subsequent proceedings to persons accused of serious crimes, in particular in cases of offences carrying the death penalty.³¹

VIII THE MEMOIR – PART 4

On the evening of Tuesday, 28 April 2015, it was becoming increasingly evident that this might be the last chance to stand in solidarity with Myuran and Andrew and the others while they were still alive.

The vigil was held at 6pm, as usual, beside the lion.

We had not much time to get the message out but many people turned up. They came to find us, hoping and knowing that we would be there in the Square. I went around the crowd asking people if they would like to speak. I had plenty of takers. Many wanted to say, personally, what they felt about the events that, in the end, we would be unable to control or alter, at least in the short term.

The speeches continued for well over an hour. And people stayed. I had work that had to be done for the morrow and I asked if people were staying. When I came back at 10pm, all our regulars and more were still there.

The all stations media night crew (one man) arrived. He was professional and meticulous. The lion, the flowers, the posters and the candles shone out in the night. He spent an hour documenting every aspect of our little outpost of civilisation.

Then he interviewed everyone there. Long, careful, patient interviews. One by one, he persuaded us to empty our hearts. When I heard the interviews of Richard and Alex on Steve Austin's ABC morning show, the next day, they were two of the most beautiful and persuasive statements I had ever heard.

We left at half past midnight. We all had day jobs to attend. We separated with heavy hearts but with a sense of gratitude for all we had been permitted to share.

³¹ Concluding Observations of the Human Rights Committee on Trinidad and Tobago (CCPR/CO/70/TTO), p. 2, 7(c) <www1.umn.edu/humanrts/hrcommittee/tobago2000.html>.

We had handled our individual grief much better by coming together. We felt a small comfort that those in Indonesia may also have felt comforted knowing that people like us around the world had stood in solidarity with them.

The next morning I could not look up the news. Someone had to tell me that what I had feared had come to pass.

IX THE ROLE OF PUBLIC OPINION, POLITICAL WILL AND LEADERSHIP

It seems that it has always been the case that simple solutions, at least for the short term, have proved politically attractive. There is no policy more apparently simple than killing whoever is to be blamed for society's problems. Kill the symbol and the problem will disappear as well.

As a result, politicians and national leaders will be tempted to avoid taking an active stand against the use of the death penalty in their country.

The existence, however, of 160 legal or de facto abolitionist countries raises a paradox. If opposition to the death penalty is political poison, how come the steady move to abolition has occurred? Why are national leaders not being thrown from office the moment they raise the possibility of leaving capital punishment behind?

The *Moving Away* seminar focused on South-East Asia. Despite the lurching of Indonesia, the trend in South-East Asia reflects the broader trend towards abolition. Cambodia, Philippines and Timor-Leste have removed capital punishment from their national law. Brunei-Darussalam, The Lao People's Republic and Myanmar may be fairly regarded as abolitionist in practice. Thailand had not carried out an execution since 2009. Singapore, Malaysia and Vietnam have either reduced the number of offences liable to mandatory use of the death penalty or have reduced the number of offences liable to capital punishment.³²

Six countries, Cambodia, Indonesia, Lao People's Democratic Republic, the Philippines, Thailand, and Vietnam, have ratified the ICCPR, bringing them within international law requirements that capital punishment only be used in the case of the most serious crimes and where the fair trial requirements of Article 14 are met. Only the Philippines has ratified the Second Optional Protocol to the ICPPR, making any reinstatement of capital punishment a breach of international law in that country.

³² *Moving Away*, above n 3.

The *Moving Away* report points out that public opinion is a “constantly evolving aggregation of society’s views.”³³ In Australia, the mobilisation that forced abandonment of Prime Minister, Bob Hawke’s initially extremely popular proposal for an Australia Card, is often cited as an example of the way in which opinions can change in the light of public discussion.³⁴ A national leader frequently influences opinion in their country if they are prepared to provide both information and leadership.

The former UN High Commissioner for Human Rights, Navi Pillay, urged national leaders to deal with the public opinion issue by demonstrating strong political will to show how deeply incompatible the death penalty is with human dignity.³⁵ The unlawfulness in international law of many countries’ existing use of capital punishment is an argument, which can reinforce and highlight the incompatibility with human dignity.

Moving Away underlines the ephemeral nature of public opinion, by highlighting that opinion polls are often influenced by the way they are framed and how and when questions are posed.³⁶ The report also points out that, in the absence of strong political leadership, initial public opinion is often misinformed, including in respect of international human rights standards, which relate to and restrict the use of the death penalty.³⁷

There is something comforting about undertaking initiatives with people who understand your problems and share a chunk of your world view. The regional initiative may well be the kind of mechanism, which will allow President Widodo to find space away from the corner of domestic political opinion into which he has backed himself. If abolition of capital punishment can be promoted and shared as a South-East Asian way of doing things, every political leader moving towards abolition will be able to use the company of colleagues only just across the waters to support their position.

Those interested in moving away from the use of the death penalty in South-East Asia would be well advised to promote similar initiatives to *Moving Away*.

³³ *Moving Away*, above n 3, 18.

³⁴ See this 2006 editorial in *The Age* arguing against a similar proposal from that year: <<http://www.theage.com.au/news/opinion/its-on-the-card-your-life-that-is/2006/05/15/1147545259725.html?page=fullpage>>.

³⁵ Navi Pillay, the former United Nations Commissioner for Human Rights, *Moving Away from the Death Penalty: Lessons from National Experiences*, (October 2012) Foreword [7]. <http://www.ohchr.org/Lists/MeetingsNY/Attachments/27/moving_away_from_death_penalty_web.pdf>.

³⁶ *Moving Away*, above n 3, 18.

³⁷ *Ibid*.

That leaves the conundrum of Saudi Arabia, Iran and China and similar countries. We do not urge leaving them for another day. Very necessary advances on those fronts require urgent attention. Those advances will, however, require different ideas and strategies beyond the scope of this article.

X THE MEMOIR – A FINAL GLIMPSE

There was a view that people who had attended our vigils might wish to express a tribute to those 8 men who had been shot in the heart, a few hours after we left the Square, just past midnight on 29 April 2015.

So, reassemble we did.

There was a big crowd just like the Tuesday night and many people wanted to say what was in their hearts.

Usually, I speak with notes. When my turn came to speak, I spoke solely from the heart.

I revisited a difficult question I had been asked by the night crew reporter from the week before. He had asked what I would say to Andrew Chan and Myuran Sukumaran, right then, if I were able to.

It was a hard question, indeed. But I said that, if their deaths could not be prevented, I hoped that they could die the way they wished to. They had already shown great bravery and concern for those whom their deaths would touch. And I said that I hoped that knowing our solidarity with them might assist them to achieve their objective.

Having shared that with the crowd, I said that, on all the reports available to us, Andrew and Myuran had achieved their objective. The two men had led the singing of hymns in the final moments. They had refused a blindfold and looked at their executioners. And, in an act that epitomises solidarity, they had done a roll call to ensure that each of their colleagues who were to die with them was okay.³⁸

I hoped that, whenever and however my moment arrived, that I could face that moment with a fraction of the courage and wisdom shown by these two Australians.

³⁸ Tom Allard, *Bali nine duo's last wish – renewed global push to abolish the death penalty* (1 May 2015) <<http://www.smh.com.au/world/bali-nine-duos-last-wish--renewed-global-push-to-abolish-the-death-penalty-20150430-1mx9oa.html>>.

For Whom the Bell Tolls: Reflections on the International Criminal Court and the Death Penalty

Melinda Taylor*

No man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were; any man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee.

John Donne, Meditation XVII, from Devotions Upon Emergent Occasions

On 28 July 2015, a Tripoli Court in Libya sentenced nine men to death – Saif Al-Islam Gaddafi, Abdullah Al-Senussi, Abudazaid Dorda, Bagdadi Al Mahmoudi, Mansour Daw, Milad Daman, Abdel Hamid Ahmid, Munther Mahtar Al Manini, and Awidat Ghandour.¹ The trial was dubbed the trial of the ‘symbols of the former regime’ (of Muammar Gaddafi),² and it appears that the fact that detainees were thought to symbolise his regime was enough to seal their fate. Whereas most war crime trials involve the testimony of dozens of witnesses over the course of many months, the Prosecution case was comprised of a mere recitation of untested, written statements, which did not even last an hour.³ These statements were taken mostly from detainees,⁴ who claimed to have been subjected to duress and mistreatment. Abuzaid Dorda reportedly ‘fell’ from a second floor window, and suffered multiple injuries

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¹ Amnesty International, ‘Urgent Action: Death Sentences for Al-Gaddafi Officials’, UA: 166/15 Index: MDE 19/2191/2015 Libya (31 July 2015).

² Ibid.

³ Ban Ki-moon, *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc S/2015/144 (26 February 2015) [60].

⁴ *Debate on Al-Ahrar TV* (broadcast 24 March 2014)

<<http://www.youtube.com/watch?v=STkPz1uEKBo&feature=youtu.be>> (“Ahrar Debate”).

Siddique Sour [spokesperson for Office of Prosecutor-General]: “The majority of the accused have confessed to the crimes and I can tell you in full confidence that there is a lot documenting proof, statements and specific confessions including from Saif Al-Islam, Abdullah Senussi, Baghdadi Mahmoudi, Mansour Daw confessions concerning themselves and against other accused- we can not disseminate the documents to news agencies but the court will review it” [52:00 to 52:42].

after being interrogated by militia.⁵ Upon his arrest, Mansour Daw was filmed begging for “forgiveness for his actions”;⁶ he appears to have a black eye and a contusion on his forehead. A Youtube video depicts him being harassed by interrogators, whilst wearing clothes stained with blood around his rear.⁷

Videos have also recently emerged showing various detainees being beaten by guards. In one, the soundtrack to Saadi Gaddafi's interrogation is the screams of other detainees in another room as he is then presented with the ‘choice’ as to whether he prefers to be beaten on the buttocks or his feet.⁸ In another, the guard interrogating Saadi Gaddafi threatens him with sexual abuse, and is heard to boast that the ribs of Abdullah Al-Senussi were broken when Mr. Al-Senussi first arrived at the Al Hadba detention center.⁹ The ‘trial’ proceedings were conducted in a similar atmosphere of intimidation and fear.

The United Nations and most if not all of the diplomatic community fled Tripoli in June 2014, with the United Nations contenting itself with ‘monitoring’ the trial via television. Perhaps a sage choice given that one of its monitors was arrested for practicing ‘black magic’ during an early hearing.¹⁰ Where angels feared to tread, Defence counsel lawyers were compelled to rush in; any lawyers unwilling to brave the bullets and attend hearings convened in the midst of an armed conflict were either fined or replaced with a court-appointed lawyer.¹¹ The lawyer for Abuzaid Dorda and Abdullah Senussi was shot in the leg just before the commencement of the trial.¹² Other lawyers

⁵ Human Rights Watch, *Libya: Ex-Premier Needs Lawyer, Medical Care* (14 February 2012) <<https://www.hrw.org/news/2012/02/14/libya-ex-premier-needs-lawyer-medical-care>>.

⁶ The photograph of General Dao's appearance is included in this article: Channel 4 News, *'Mutaasim was in charge, not Gaddafi', says bodyguard* (21 October 2011) <<http://www.channel4.com/news/mutassim-was-in-charge-not-gaddafi-says-bodyguard>>.

⁷ *Misurata treatment of prisoner Mansour Daou*, YouTube (21 October 2011) <<http://www.youtube.com/watch?v=Fr2JiiDiw5Y&feature=youtu.be>>.

⁸ Chris Stephens, ‘Saadi Gaddafi abuse video condemned by lawyers and rights groups’ *The Guardian* (online), 4 August 2015 <<http://www.theguardian.com/world/2015/aug/04/saadi-gaddafi-abuse-video-condemned-libya-al-hadba-tripoli>>.

⁹ Ahmed Elumami, *Videos show Libyan officials threatening jailed Gaddafi son*, Reuters (20 August 2015) <<http://uk.reuters.com/article/2015/08/20/uk-libya-security-gaddafi-idUKKCN0QP1MC20150820>>; *Despicable & inhumane: Gaddafi son's interrogators threaten sexual abuse with 23mm gun bullet*, RT (20 August 2015) <<https://www.rt.com/news/312974-gaddafi-interrigation-abuse-threats/>>.

¹⁰ Chris Stephens, ‘UN observer at Gaddafi trial held on suspicion of ‘black magic’’, *The Guardian* (online), 14 May 2014 <<http://www.theguardian.com/world/2014/may/13/un-observer-gaddafi-trial-detained-suspicion-black-magic>>.

¹¹ ‘Qaddafi Henchman trial adjourned yet again’, *Libya Herald*, 30 November 2014 <<http://www.libyaherald.com/2014/11/30/saif-al-islam-qaddafi-trial-adjourned-yet-again/#axzz3Kdfnam5q>>.

¹² *Prosecutor v Gaddafi and Senussi (Pre-Trial)* (International Criminal Court, Pre-Trial Chamber I, ICC-01/11-01/11-562-Red, 7 July 2014) [20]: “Response on behalf of Abdullah Al-Senussi to

received death threats, and were prevented from attending hearings.¹³ Although most of the defendants were represented by counsel at some juncture of the proceedings, it was the legal equivalent of musical chairs. Lawyers were appointed, and withdrew in quick succession, leaving a limited pool with the daunting task of representing multiple clients with clear conflicts of interest. At one hearing, only nine defence lawyers were present in a trial involving 37 defendants.¹⁴

Given this context, it is not surprising that the United Nations expressed its ‘concern’ regarding the verdict.¹⁵ The current Libyan Minister of Justice (of the internationally recognised Government) went further, and declared in December last year that there can be no ‘justice’ in a trial conducted under the ever-watchful guns of militia.¹⁶ Before the trial started, the former Justice Minister Saleh Marghani promised the international community that he would not allow it to be a “Mickey Mouse” trial.¹⁷ Nine months later, he tendered his resignation and conceded: “I really failed. This is the reality. I could not deliver justice to Libya”.¹⁸ He has since described the verdicts as a

the ‘Application for Leave to Reply & Consolidated Reply on Behalf of the Libyan Government to Responses to the Libyan Application for Extension of Time Related to Pre-Trial Chamber I’s Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court’”.

¹³ Amnesty International, ‘Rule of law or rule of militias?’, MDE 19/012/2012 (6 July 2012) 33; Amnesty International, *Libya must seek justice not revenge in case of former al-Gaddafi intelligence chief* (18 October 2012) <<https://www.amnesty.org/en/latest/news/2012/10/libya-must-seek-justice-not-revenge-case-former-al-gaddafi-intelligence-chief/>>; Human Rights Watch, *Libya: Government Institutions at Risk of Collapse* (7 March 2014) <<http://www.hrw.org/news/2014/03/07/libya-government-institutions-risk-collapse>>; Hanan Salah, *Global Insider: Justice System on the Brink of Collapse in Libya’s Security Vacuum*, Human Rights Watch (20 March 2014) <<http://www.hrw.org/news/2014/03/20/global-insider-justice-system-brink-collapse-libya-s-security-vacuum>>; Rana Jawad (@Rana_J01), ‘Prison authorities also prevented some lawyers of defendants on trial from going in and some family members #Libya’ on Twitter (14 April 2014) <https://twitter.com/Rana_J01/status/455646214667501568> (Rana Jawad is a BBC journalist).

¹⁴ Al-Arabiya, *Libya adjourns trial of ex-Qaddafi officials and sons* (15 April 2014) <<http://english.alarabiya.net/en/News/middle-east/2014/04/15/Libya-adjourns-trial-of-ex-Qaddafi-officials-and-sons.html>>.

¹⁵ United Nations Support Mission in Libya (UNSMIL), *Concerns About Verdict in Trial of Former Qadhafi-era Officials* (28 July 2015) <<http://unsmil.unmissions.org/Default.aspx?tabid=3561&ctl=Details&mid=8549&ItemID=2099165&language=en-US>>.

¹⁶ Statement of the Interim Government’s Minister of Justice No. 2 of 2014, 4 December 2014.

¹⁷ Chris Stephen, ‘Libya prepares for its trial of the decade’, *The Guardian* (online), 17 September 2013 <<http://www.theguardian.com/world/2013/sep/17/libya-trial-gaddafi-senussi>>.

¹⁸ BBC World News, Interview with Minister of Justice, Saleh Marghani (24 August 2014) at 08:04 min to 08:11 min. Full interview from 01:50 min to 08:13 min at

“miscarriage of justice which will haunt Libya for a long time”.¹⁹

And what was the response of the Prosecutor of the International Criminal Court (ICC) to this litany of due process horrors? Did the ICC Prosecutor, therefore, join her voice to the condemnation of this criminal (in every sense of the word) process? Thus far, there has been a request for the ICC Pre-Trial Chamber to notify Saif Gaddafi's verdict to the Security Council,²⁰ but otherwise, there has been complete silence concerning the fate of Abdullah Al-Senussi and his co-defendants. This is, however, hardly unexpected. After all, both the Prosecutor and the ICC Pre-Trial Chamber and Appeals Chamber had green lit the prospect of Mr. Al-Senussi being tried in Libya; his co-defendants were mere collateral damage.

Ms. Bensouda's silence was also presaged by a motion of her predecessor, Luis Moreno Ocampo, in which he informed the Pre-Trial Chamber that “if Libya were authorised to proceed with the trial, the OTP [Office of the Prosecutor] would not monitor the fairness of the domestic proceedings, as this is not the role of the Prosecutor.”²¹ This motion was filed in 2011. Back in 2011, Mr. Senussi was supposed to be tried at the ICC. He was supposed to face international justice and not a firing squad. After all, the ICC Prosecutor's request for an arrest warrant against Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi claimed that Libyan courts lacked the capacity to bring them to justice.²² The Libyan representative to the United Nations had even welcomed the fact that the outmoded conceptions of State sovereignty had been cast aside in order to provide justice to Libyan victims.²³

<http://downloads.bbc.co.uk/podcasts/worldservice/newshour/newshour_20140824-2204c.mp3?utm_source=twitterfeed&utm_medium=twitter>.

¹⁹ Rana Jawad, *Libya death sentences cast long shadow over rule of law*, BBC (12 August 2015) <<http://www.bbc.com/news/world-africa-33855860>>.

²⁰ *Prosecutor v Gaddafi* (Prosecution Request for an Order to Libya to Refrain from Executing Saif Al-Islam Gaddafi, Immediately Surrender Him to the Court, and Report His Death Sentence to the United Nations Security Council) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11-611, 30 July 2015).

²¹ *Prosecutor v Gaddafi and Senussi* (Prosecution's Submissions on the Prosecutor's recent trip to Libya) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11-31, 25 November 2011) [12].

²² *Libya situation* (Prosecutor's Application Pursuant to Article 58 as to Muammar Mobammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-4-Red, 16 May 2011) [53].

²³ Mr. Shalgham (Libyan Arab Jamahiriya) addressing the Security Council on 25 February 2011: UN SCOR, 66th sess, 6490th mtg, UN Doc S/PV.6490 (25 February 2011)

<http://www.un.org/ga/search/view_doc.asp?symbol=S/PV.6490>; Mr. Dabbashi (Libyan Arab Jamahiriya) addressing the Security Council on 26 February 2011: UN SCOR, 66th sess, 6491st mtg, UN Doc S/PV.6491 (26 February 2011)

<http://www.un.org/ga/search/view_doc.asp?symbol=S/PV.6491>.

That was then.

Several months later, the revolution ‘won’ and the newly minted rulers of Libya had different ideas. The Head of the National Transitional Council placed a ‘bounty’ of the equivalent of one million pounds on the head of Muammar Gaddafi.²⁴ No small surprise then, that he met his end after being shot at close range and bayoneted,²⁵ rather than in a jail cell. Saif Al-Islam Gaddafi was apprehended in the desert and transferred to Zintan in November 2011. Mere days after his arrest, the then Prosecutor, Mr. Ocampo, swooped into Tripoli to declare his support for the new regime’s intention to put Mr. Gaddafi on trial.²⁶

After a protracted legal battle which lasted approximately two and half years, the Appeals Chamber confirmed the Pre-Trial Chamber’s determination that Libya had not demonstrated that it was able to prosecute Mr. Gaddafi.²⁷ The gravamen of the ruling centered on the fact that Libya had failed to wrest Mr. Gaddafi from the control of the Zintan authorities, and had thus failed to demonstrate that they possessed the requisite capacity to put him on trial in the designated forum of Tripoli.²⁸ As Libyan law did not allow *in absentia* trials for persons who were physically present in Libya, Libya was technically unable to bring him to justice as long as he was detained in Zintan. A ‘good’ ruling in a sense, but also the judicial equivalent of sitting under the sword of Damocles, as the Appeals Chamber left open the possibility that the ruling could be revisited should Mr. Gaddafi ever be transferred to Tripoli, and circumstances change. His co-defendant, Abdullah Al-Senussi, fared differently.

²⁴ Martin Evans, ‘Libya: £1 million bounty for Col Gaddafi - dead or alive’, *The Telegraph*, 24 August 2011

<<http://www.telegraph.co.uk/news/worldnews/africaandindianocan/libya/8721058/Libya-1-million-bounty-for-Col-Gaddafi-dead-or-alive.html>>.

²⁵ United Nations Commission of Inquiry on Libya, *Advanced Unedited Version: Report of the International Commission of Inquiry on Libya*, UN Doc A/HRC/19/68 (2 March 2012) 85-86 ([243], [247]).

²⁶ *Saif al-Islam Gaddafi can face trial in Libya – ICC*, BBC (22 November 2011) <<http://www.bbc.com/news/world-africa-15831241>>.

²⁷ *Prosecutor v Gaddafi and Senussi (Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”)* (International Criminal Court, Appeals Chamber, Case No ICC-01/11-01/11-547-Red, 21 May 2014).

²⁸ See *Prosecutor v Gaddafi and Senussi (Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”)* (International Criminal Court, Appeals Chamber, Case No ICC-01/11-01/11-565, 24 June 2014) [2013], where the Appeals Chamber opines that the Pre-Trial Chamber’s findings concerning the capacity of the Libyan authorities implicitly revolved around the fact that Mr. Gaddafi was detained in Zintan, and not Tripoli.

Mr. Al-Senussi was arrested in April 2012 in Mauritania, where he was detained for having a 'false passport'.²⁹ Several months (and several million dollars of 'aid' funds) later, Mauritania agreed to transfer Mr. Al-Senussi to Libya, and not the ICC, to face what Libya promised would be a 'fair trial'.³⁰ The interrogation records of Abdullah Senussi detail his complaint that:³¹

Upon my arrival in Tripoli, I was beaten on my eye, my leg, and my head while I was being interrogated by a non-judicial authority.

Libya hadn't even kept its promise for a matter of days.

When his twenty-one year old daughter tried to visit him to organise a lawyer for him, she too was detained for having a 'false passport'.³² Fast forward several months to May 2013, Mr. Senussi hasn't been brought before a judge, he doesn't have a Libyan lawyer, his ICC lawyers have been unable to see him, his daughter is still in detention, and another former Gaddafi official (Ahmed Ibrahim) has been sentenced to death.³³ These are surely grounds for considerable concern. The ICC Prosecutor nonetheless informed the Security Council that it was "commendable" that Libya was conducting its trial against Abdullah Senussi and others, and that "what happens with Libya's perpetrators is a page in the history books of international justice, no matter where those investigations and prosecutions take place".³⁴

²⁹ Afua Hirsch, 'Libya, France and ICC compete for custody of Gaddafi intelligence chief', *The Guardian* (online), 18 March 2012 <<http://www.theguardian.com/world/2012/mar/18/libya-france-icc-abdullah-al-senussi>>.

³⁰ *Prosecutor v Gaddafi and Senussi (Request to Submit Observations Pursuant to Regulation 77(4) of the Regulations of the Court)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11-204, 6 September 2012) [4], fn 8.

³¹ Libya Info Centre (@LibyaIC), '#libya signed interrogation records of #senussi show prosecutor knew he had been beaten b4 interrogation @ #alhadba' on Twitter (9 August 2015) <<https://twitter.com/LibyaIC/status/630474875401043971>>.

³² *Prosecutor v Gaddafi and Senussi (Public Redacted Version of the "Request for Reconsideration of the "Decision on the "Submissions of the Libyan Government with respect to the matters raised in a private session during the hearing on 9-10 October 2012")* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11-235-Red, 28 November 2012) [34]. See also Amnesty International, *Urgent Action: Safety Concerns for Loyalist's Daughter* (31 October 2012) <<http://www.amnestyusa.org/sites/default/files/uaa32212.pdf>>.

³³ Jonathan O'Donohue, *Libya's defining moment: justice or revenge for Gaddafi era leaders?*, Amnesty International (22 September 2013) <<https://www.amnesty.org/en/documents/MDE19/009/2013/en/>>.

³⁴ *Security Council: Libyan trials could be 'Nuremberg moment,' ICC prosecutor says*, UN News (8 May 2013) <<http://www.un.org/apps/news/story.asp?NewsID=44857#.VczKpyyqqko>>.

No matter where those investigations and prosecutions take place.... but the Prosecutor was aware that prosecutions taking place in Libya would involve the death penalty, whereas prosecutions at the ICC would not. If Abdullah Senussi was tried at the ICC, the maximum sentence would be life, but if tried in Libya, he could, and most probably, would face a firing squad. The decision as to where Mr. Al-Senussi would be tried was not one of mere policy, evidence, efficiency or diplomacy. At its heart, it concerned the question as to whether life or death of a detainee *should* matter to the judges deciding the appropriate forum for the trial. In deciding to support Libya's request to prosecute Mr. Al-Senussi, the ICC Prosecutor thus threw her weight behind the possibility (indeed, virtual certainty), that he would be executed after a trial, which already had the hallmarks of a *fait accompli*. Why? Because according to the Prosecution, neither the fairness of the proceedings nor the possibility that the defendant could face the death penalty are relevant considerations; what matters is whether the State can demonstrate that it possesses the capacity to secure a potential conviction.

The Defence teams for Mr. Gaddafi and Mr. Senussi fought tooth and nail to underscore the importance of both due process and the death penalty. With respect to the first aspect, the ICC Appeals Chamber had itself announced that "a fair trial was the only way to do justice",³⁵ and that as a consequence of Article 21(3), human rights underpin every aspect of the Statute.³⁶ The test as to whether a State was willing and able to 'bring the accused to justice' should thus be interpreted in light of these pronouncements.

In regards to the more fraught question of the death penalty, the Defence tried to attack the issue of the death penalty from every angle.³⁷ The uniform

³⁵ *Prosecutor v. Lubanga (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06-772, 14 December 2006) [37]: "Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped."

³⁶ *Ibid*: "Article 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognised human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognised human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety"

³⁷ See for example, *Prosecutor v Gaddafi and Senussi (Public Redacted Version of the Corrigendum to the 'Defence Response to the Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11-190, 31 July 2012) [58]-[66].

practice of international courts and tribunals, including the ICC, was not to have the death penalty. We referred to the requirement under international law to take steps to abolish the death penalty. The Statutes of the *ad hoc* Tribunals stipulate that the Tribunals could not send a defendant to be prosecuted in a country where they would face the death penalty (or indeed, an unfair trial). This, in turn, encouraged Rwanda to abolish the death penalty so that it would be eligible to receive defendants from the International Criminal Tribunal for Rwanda and prosecute them in local courts.

The Defence argued that the very notion of the death penalty was incompatible with international justice as its very finality would deprive the defendant and victims of a right to review, and to know the truth, if new evidence emerges (which often happens in complex war crimes cases). It would also mean that the defendant would be 'unavailable' in every sense of the word to testify in future cases or to assist future investigations. Finally, the Defence raised the fact that the death penalty acted as a barrier to the defendants' prosecution in Libya when viewed in connection with the serious due process defects in the investigation, the detention violations (including the fact that the defendants had been kept in prolonged solitary confinement), and the indicia that evidence had been procured by torture or duress.

The Pre-Trial Chamber pronounced its ruling on these arguments in October 2013. At this juncture, although Mr. Al-Senussi had been detained in Libya for over a year, he was still unrepresented in the domestic trial, and had not been able to receive any visits from his ICC lawyers. The Pre-Trial Chamber nonetheless found that Libya was willing and able to bring Mr. Al-Senussi to 'justice'. The Chamber accepted Libya's (hitherto unfulfilled) promise that it would secure Mr. Al-Senussi a lawyer.³⁸ The Chamber further found that the Defence had not adduced sufficient proof to establish that Mr. Al-Senussi – whom they had never been given the opportunity to meet – had been mistreated.³⁹ The death penalty issue is then addressed in one sentence in a passing reference to the appeal procedure which applies when the death penalty is imposed.⁴⁰

The Appeals Chamber confirmed the decision. Again, the death penalty issue was given short shrift.⁴¹ The Appeals Chamber further found that the question

³⁸ *Prosecutor v Gaddafi and Senussi (Decision on the Admissibility of the Case Against Abdullah Senussi)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11-466-Red, 11 October 2013) [233].

³⁹ *Ibid* [239].

⁴⁰ *Ibid* [205].

⁴¹ *Prosecutor v Gaddafi and Senussi (Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi")* (International Criminal Court, Appeals Chamber, Case No ICC-01/11-01/11-565,

as to whether a State was willing and able to bring the suspect to ‘justice’ should be assessed in terms of a State’s capacity to ensure that the suspect does not ‘evade’ justice.⁴² The Appeals Chamber carefully framed their findings in terms of the desire of the drafters to ‘eliminate impunity’ rather than their concern to ensure convictions,⁴³ but in application, it is a distinction without a difference. If the Appeals Chamber had maintained its 2006 stance that ‘justice’ equates to a ‘fair and impartial judgment’ rather than a ‘conviction’, then the question as to whether the proceedings were designed to assist the suspect to ‘evade’ justice would necessarily include a consideration as to whether the proceedings were fair and impartial. After all, impunity will not be eliminated and justice will have been ‘evaded’ if the wrong person has been convicted, or if the judgment is unreliable.

The Appeals Chamber nonetheless underscored that the ICC’s assessment of domestic ‘justice’ was primarily concerned with ensuring that wily defendants do not escape the clutches of the Prosecution and Judges, but are ‘dealt’ with in an efficient manner.⁴⁴ The fact that Mr. Al-Senussi had been interrogated without legal representation, the difficulty (if not impossibility) of calling Defence witnesses (given the absence of protective measures), and threats to Defence lawyers were not, *per se*, relevant to the question as to whether Libya was willing to put Mr. Al-Senussi on trial. The judgment is implicitly predicated on a two-tiered concept of justice: justice before the ICC must be fair, but justice in Libya does not.

The decision to exclude fairness from the Court’s consideration as to the State’s willingness to ‘bring the defendant to justice’ also reverses the presumption of innocence, since it assumes that justice can be achieved even if the defendant has no means to defend himself in an effective manner. The Appeals Chamber did attach the caveat that because Article 21(1)(3) of the Statute obliges the Judges to interpret its provisions in a manner which is consistent with internationally recognised human rights, the ICC would not be able to place its imprimatur on a domestic trial if:⁴⁵

... the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice.

24 July 2014) [254]. The Appeals Chamber found that the Defence had shown no error in the Pre-Trial Chamber’s approach to simply recite the provisions of Libyan law which applied in the event the death penalty was imposed.

⁴² Ibid [218].

⁴³ Ibid [217].

⁴⁴ Ibid [222].

⁴⁵ Ibid [230].

So where does this pyrrhic due process victory leave the Defence? If the defendant's rights have been violated in an 'egregious' manner, is it particularly 'fair' or 'just' to then subject the defendant to a retrial before the ICC, as opposed to simply quashing the proceedings as an abuse of process?

Even if the death penalty was not *per se* relevant to the ICC's assessment of Libya's request, it is relevant to the question as to whether it might be too late for the ICC step in if it requires the Defence to establish that the defendant's rights *have* been violated egregiously, rather than accepting indicia that it appears likely that they will be violated egregiously.

One can debate the legal niceties of State sovereignty, 'complementarity', and the role of local versus international justice *ad infinitum*, but none of these issues can hide the fact the death penalty involves an end to life. It might be right to give States a degree of deference as concerns the manner and methods used for their domestic proceedings, but this degree of deference should not go so far as to gamble with a defendant's life. Diplomatic standoffs and political sensibilities can be resolved, eventually, but once someone has been executed – that's it – they do not get a second chance. The theoretical possibility of requesting the ICC to review its decision to allow the domestic trial to go forward is meaningless if the trial has already culminated in a rain of bullets.

This proactive/preventive approach is also etched into human rights jurisprudence. For example, in cases involving the death penalty or possible risks of cruel and inhumane treatment, human rights courts require States to adopt a pre-emptive/protective approach. The European Court of Human Rights requires the State requesting the defendant's extradition to provide iron clad, enforceable assurances that a defendant's rights will be respected.⁴⁶ This therefore begs the question as to why the ICC was so quick to entrust Libya with Mr. Al-Senussi's judicial fate after his ICC co-defendant, Muammar Gaddafi, had been killed within minutes of capture. Libya's authorities could not even secure their own Prime Minister from being kidnapped, the day before the Pre-Trial Chamber referred the case back to Libya.⁴⁷

⁴⁶ *Al-Saadoon & Mufilbi v The United Kingdom (Judgment (Merits and Just Satisfaction))* (European Court of Human Rights, Fourth Section, Application No 61498/08, 4 October 2010); *Othman (Abu Qatada) v The United Kingdom (Judgment (Merits and Just Satisfaction))* (European Court of Human Rights, Fourth Section, Application No 8139/09, 9 May 2012); *Saadi v Italy (Judgment (Merits and Just Satisfaction))* (European Court of Human Rights, Grand Chamber, Application No 37201/06, 28 February 2008).

⁴⁷ In a separate declaration, Judge Van Der Wyngaert queries whether the Chamber should have perhaps postponed its decision to assess the ramification of the kidnapping of the Prime Minister: *Prosecutor v Gaddafi and Senussi (Decision on the admissibility of the case against Abdullah Al-*

Where legal answers are wanting, political realities step in. The Pre-Trial Chamber's decision to grant Libya's request was issued at a time of supposed 'crisis'; several African States threatened to withdraw from the Court, and the ICC was facing accusations of 'anti-African' bias.⁴⁸ It is perhaps understandable that the ICC wanted to show that it was not usurping African justice, or trampling on African notions of sovereignty and traditions. Except that human rights are as much (if not more) woven into the legal framework of the African Convention on Human and Peoples' Rights, to which Libya is a signatory. The whole point of international justice is that State sovereignty should not imperil the right of victims to achieve justice. The right to justice can never be achieved on the basis of a flawed and unfair trial. If State sovereignty can be pierced to remedy the rights of victims, then it should also be pierced to protect fundamental rights of defendants – the former does not exist without the latter.

Perhaps the Court's agreement that Libya should prosecute Mr. Al-Senussi might have appeased a few rambunctious States, but what about the impact this decision will have on the credibility of the Court in the long term? Will States or local communities still consider the ICC to be a beacon for justice if the ICC has given its thumbs up to a trial, which was built on the very conduct which they are calling on the Court to stamp out? In this regard, even if the ICC is not a human rights court writ large, there is a thin line between an acceptably unfair trial, and an unfair trial which might qualify as a crime under the Statute. The ICC Statute confirms that torture and cruel treatment are crimes against humanity,⁴⁹ "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law" is a crime against humanity,⁵⁰ arbitrary execution is a crime against humanity,⁵¹ and conducting an unfair trial against a prisoner of war is a war crime.⁵²

Senussi - Declaration of Judge Christine Van den Wyngaert (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11-466-Anx, 11 October 2013).

⁴⁸ The Pre-Trial Chamber's decision was issued the same week as the African Union convened a summit to decide whether its members should withdraw from the ICC. The threatened withdrawal did not eventuate, but on 12 October 2013 (two days after the Pre-Trial Chamber issued its decision), the African Union issued a resolution in which it expressed its "concern on the politicization and misuse of indictments against African leaders by ICC": Assembly of the African Union, *Decision on Africa's Relationship with the International Criminal Court (ICC)*, Ext/Assembly/AU/Dec.1(Oct.2013) (12 October 2013)

<https://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf>.

⁴⁹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 7(1) (*Rome Statute*). Article 7(1)(f) of the Statute establishes torture as a crime against humanity; Article 7(1)(k) similarly classifies "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" as crimes against humanity.

⁵⁰ *Ibid* art 7(1)(e).

The Preamble to the ICC Statute vests the Court with the duty to “contribute to the *prevention*” of crimes of this ilk. The Court has a duty not to condone or participate in international crimes, even if the ‘victim’ is an accused. The United Nations Working Group on Arbitrary Detention has underscored in this regard that:

[D]uties to comply with international human rights that are peremptory and *erga omnes* norms such as the prohibition on arbitrary detention rest not only on the Government but extend to all officials including judges, police and security officers, prison officers with relevant responsibilities. No person can contribute to human rights violations.⁵³

The ICC Prosecutor also has a corollary duty to investigate such crimes, and to acknowledge that defendants can be victims too. These defendants might be associated with the former regime of Muammar Gaddafi, but that has nothing to do with their right to be treated with dignity, and to enjoy the protection of the rule of law. Saif Al-Islam Gaddafi and Abdullah Al-Senussi have the same right to protection against arbitrary detention, and cruel and inhumane treatment as any other person in Libya, and they have the same right and expectation that the ICC Prosecutor will speak out and condemn their convictions as a travesty of justice, which must be investigated as a possible crime under the ICC Statute.

As this article goes to press, time has not yet run out for these nine men. The prospect of a fair or effective appeal in Libya might be a complete chimera, but sufficient international condemnation might help stay the hand of execution. There is a chance, a small chance, that if the Prosecutor puts the militia on notice that if they pull the trigger and execute these defendants, they too could be hauled before the ICC – then this might give them pause for thought. The ICC might never prosecute anyone for crimes in Libya but if it can even play a small role in saving the lives of these nine men, it will have brought at least a small measure of justice to Libya. And that is something worth pursuing.

⁵¹ Ibid art 7(1)(a) (“murder”).

⁵² *Rome Statute* art 8(2)(a)(vi) provides that “Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial” is a war crime within the context of an international armed conflict; Article 8(2)(c)(iv) similarly proscribes “[t]he passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable”.

⁵³ Working Group on Arbitrary Detention, *Opinion no.60/2012*, UN Doc A/HRC/WGAD/2012/60 (16 August 2013) [21].

A Critical Examination of the Defence of Dwelling in Queensland

Simon Lamb*

I INTRODUCTION

Section 267 of the *Criminal Code* (Qld) provides a defence of dwelling, crafted specifically for homeowners and occupiers who exercise force against burglars. The provision has resulted in a clash between various rights and interests. On the one hand, proponents of the defence assert that it affirms the rights of householders, is consistent with jurisprudential perspectives pertaining to moral culpability and forfeiture theory, and is in line with other jurisdictions. On the other hand, the section has been challenged on the basis that it could potentially contravene the right to life, invites excessive use of force and instils incoherence into the law.

II BACKGROUND

The defence of dwelling was contained in Sir Samuel Griffith's draft criminal code for Queensland, which later became the *Criminal Code of Queensland*.¹ At the time of its original enactment, the defence provided that:

It is lawful for any person who is in peaceable possession of a dwelling-house, and for any person lawfully assisting him or acting by his authority, to use such force as he believes, on reasonable grounds, to be necessary in order to prevent the forcible breaking and entering of the dwelling-house, either by night or day, by any person whom he believes, on reasonable grounds, to be attempting to break and enter the dwelling-house with intent to commit any indictable offence therein.²

This provision was purported to be a 'correct statement of the common law'³ that existed at the time, and was consistent with endeavours in other

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¹ *Criminal Code Act 1899* (Qld) sch 1.

² *Criminal Code* (Qld) s 267.

³ Letter from Sir Samuel Griffith to the Attorney-General of Queensland, 29 October 1897, 10.

jurisdictions to codify the criminal law.⁴ Furthermore, in constructing the Code, Sir Samuel Griffith acknowledged that he had 'frequent recourse'⁵ to the Italian and State of New York Penal Codes, and 'also freely drew upon the labours'⁶ of the authors of the Draft Criminal Law Bill in England. All three of these documents contained some type of provision for a defence of dwelling.⁷

Since its original enactment, the defence of dwelling in Queensland has been subject to one major amendment.⁸ This amendment implemented three key changes to section 267, based largely upon recommendations by the Criminal Code Advisory Working Group.⁹ Firstly, the wording of the defence was altered to replace the term 'dwelling house' with 'dwelling'.¹⁰ Secondly, the amendment broadened section 267 by providing that entering or remaining in the dwelling can be considered sufficient to attract the defence, contrary to the previous requirement of forcible break and entry.¹¹ Finally, the amendment 'permits the use of force to repel (as well as prevent) an intruder'¹² from entering or remaining in the dwelling, further widening the scope of the defence. The amendment of section 267 also coincided with the amalgamation of sections 419 and 420 of the Code into a single offence of burglary.¹³

III RATIONALE

The rationale behind the defence of dwelling can be traced back throughout history. The sanctity of one's home has been a well-known legal concept since the Roman Republic era.¹⁴ William Blackstone notes that such a sentiment is reflected in Cicero's writings: 'what is more sacred, what more strongly guarded by every holy feeling, than a man's own home?'¹⁵ In England, this

⁴ Letter from Lord Chief Justice Cockburn to the Attorney-General for England and Wales, 12 June 1879, 17-18.

⁵ *Ibid* 7.

⁶ *Ibid* 4.

⁷ Criminal Code (Indictable Offences) Bill 1880 (UK) cls 62-63; *Zanardelli Code* (Italy) 1889 s 376; *Penal Code (State of New York)* 1889 s 26(f).

⁸ Criminal Law Amendment Bill 1996 (Qld) cl 36.

⁹ Criminal Code Advisory Working Group, Parliament of Queensland, *Report of the Criminal Code Advisory Working Group to the Attorney-General* (1996) 40.

¹⁰ Explanatory Notes, Criminal Law Amendment Bill 1996 (Qld) cl 36.

¹¹ *Ibid*.

¹² Sally Kift, 'How not to amend a Criminal Code' (1997) 22(5) *Alternative Law Journal* 213, 215.

¹³ Queensland, *Parliamentary Debates*, Legislative Assembly, 4 December 1996, 4872 (Denver Beanland).

¹⁴ Numa Denis Fustel de Coulanges, *The Ancient City* (Johns Hopkins University Press, 3rd ed, 1980) 50.

¹⁵ William Blackstone, *Blackstone's Commentaries - Book the Fourth - Chapter the Sixteenth: Of Offenses Against the Habitations of Individuals* (Clarendon Press, 1st ed, 1765) 224.

notion was afforded great significance at common law.¹⁶ It was recognised by the courts that ‘the house of every man is to him as his castle and fortress, as well for his defence against injury and violence as for his repose’¹⁷ and that, in the eyes of the law, assailing another’s dwelling was equivalent to an assault on one’s own person.¹⁸ In the words of Blackstone, the law of England had ‘so particular and tender a regard to the immunity of a man’s house, that it ... will never suffer it to be violated with impunity.’¹⁹ Furthermore, the common law had its roots in Christianity,²⁰ and it has been argued that the defence of dwelling has been influenced by Biblical passages that justify the use of force in the defence of one’s home.²¹

A modern justification of the dwelling defence within Queensland can be derived from the case law: it ‘give[s] effect to a policy of the law which recognises the legitimate use of force to defend hearth and home and to prevent the commission of offences by others in one’s home.’²² It has also been argued that statutory home invasion defences not only help to clarify the rights of home-owners, but also turn ‘judge-made law into the law the community wants.’²³

IV ELEMENTS

If the prosecution is unable to rule out the following elements beyond reasonable doubt in a particular case, the defence of dwelling will apply which will exonerate the accused of liability.²⁴

A *Peaceable Possession of a Dwelling*

The first element is satisfied where the accused was in peaceable possession of a dwelling, or was lawfully assisting or acting by the authority of a person in peaceable possession of a dwelling.²⁵ Dwelling is defined inclusively in the

¹⁶ Jeannie Suk, ‘The True Woman: Scenes from the Law of Self-Defence’ (2008) 31 *Harvard Journal of Law and Gender* 237, 243.

¹⁷ *Semayne’s Case* (1604) 77 ER 194, 195.

¹⁸ *Mead and Bell’s Case* (1823) 68 ER 1006 (Holroyd J).

¹⁹ Blackstone, above n 15, 184-185.

²⁰ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 3rd ed, 2010) 59.

²¹ The Holy Bible, Exodus 22:2-3.

²² *R v Cuskelly* [2009] QCA 375 (8 December 2009) [30] (Keane JA).

²³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 September 1998, 8071 (Paul Whelan).

²⁴ *R v McMartin* [2013] QCA 339 [23] (12 November 2013) (McMurdo P).

²⁵ *Criminal Code* (Qld) s 267; *R v McMartin* [2013] QCA 339 (12 November 2013) [23] (McMurdo P).

Code as 'any building or structure, or part of a building or structure, which is for the time being kept by the owner or occupier for the residence therein of himself or herself, his or her family, or servants, or any of them, and it is immaterial that it is from time to time uninhabited.'²⁶ The word structure is capable of having a wider meaning of anything constructed out of material parts,²⁷ and the term 'dwelling' can refer to any part of the whole of the relevant structure from the roof to the ground.²⁸ A caravan used for residential purposes has been held to fall within the meaning of dwelling,²⁹ as has a motel unit occupied by a person for a week.³⁰

The term possession is defined as 'having under control in any place whatever, whether for the use or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing in question.'³¹ It has been noted that there is a lack of clear Australian authority in respect of the meaning of peaceable.³² However, Western Australian cases indicate that peaceable could mean 'free from disturbance.'³³ In addition, according to Young J in *Shaw v Garbutt*, international authorities suggest that peaceable possession is established where possession of the land is not disturbed by commencement of a suit for possession or possession is not physical interrupted..³⁴ Factors that have been taken into account by the Courts to ascertain whether possession is peaceable include whether the accused was living in the dwelling in which the events occurred, and whether there is a dispute as to his or her entitlement to be there.³⁵

B *Use of Force to Prevent or Repel*

The second element requires that the accused used force for the purpose of preventing or repelling an intruder from unlawfully entering or remaining in the dwelling.³⁶ This section is applicable where the intruder has expressed their intention to enter the dwelling,³⁷ for example to collect their possessions.³⁸ For

²⁶ *R v Bartram* [2013] QCA 361 (6 December 2013) [18] (Muir J); *Criminal Code* (Qld) s 1.

²⁷ *R v Rose* [1965] QWN 35 (Gibbs J).

²⁸ *R v Bartram* [2013] QCA 361 (6 December 2013) [20] (Muir J).

²⁹ *R v Rose* [1965] QWN 35.

³⁰ *R v Halloran and Reynolds* [1967] QWN 34.

³¹ *Criminal Code* (Qld) s 1.

³² *Etherton v Western Australia* [2005] WASCA 83 (10 May 2005) [8] (Steytler P).

³³ *O'Callaghan v MacDonald* [2000] WASCA 88 (3 April 2000) [9] (Scott J).

³⁴ *Shaw v Garbutt* (1996) 7 BPR 14,816.

³⁵ *R v MacMartin* [2013] QCA 339 (12 November 2013) [23] (McMurdo P).

³⁶ *Ibid.*

³⁷ *R v Bartram* [2013] QCA 361 (6 December 2013); *R v Spajic* [2011] QCA 232 (13 September 2011).

the purposes of this element, if the victim is lawfully on the premises, the defence of dwelling will not be available.³⁹

In regards to the degree of force used, it has been held that ‘section 267 might apply even if the accused used more force than was reasonably necessary to make an effectual defence of his person or of others in the house against [the victim].’⁴⁰ In this way, section 267 does not entrench a requirement of proportionality or reasonableness for the amount of force used. The use of lethal force within the context of section 267 will be discussed later in this paper.

C *Belief Based on Reasonable Grounds*

Thirdly, the accused must subjectively believe that the victim was attempting to enter or remain in the dwelling with intent to commit an indictable offence therein, and that the force used was necessary to prevent the intruder from entering or remaining. The law further requires that the accused’s subjective belief was founded upon reasonable grounds, thus importing a notion of objectivity.⁴¹ Relevantly, indictable offences are those for which the offenders cannot be prosecuted or convicted except upon indictment.⁴² In considering whether the belief as to necessity of force was held on reasonable grounds, the jury must look at the whole of the circumstances: this includes the degree of force used and the fact that one who is defending their home may not be in a position to weigh precisely what action should be taken.⁴³ Additionally, they must have due regard to the fact that ‘reasonable people in the accused’s situation might have held a variety of beliefs ... about the relevant state of affairs.’⁴⁴ It has been recognised that an accused person who is defending his or her home need not retreat from a threat even if retreat is a reasonable avenue of defending oneself against a threatened assault.⁴⁵

³⁸ *R v Bartram* [2013] QCA 361 (6 December 2013).

³⁹ *R v MaMartin* [2013] QCA 339 (12 November 2013) [23] (McMurdo P).

⁴⁰ *R v Spajic* [2011] QCA 232 (13 September 2011) [35] (Fraser J) citing *R v Cuskelly* [2009] QCA 375 (8 December 2009) [27].

⁴¹ *R v O’Neill* [2009] QCA 210 (24 July 2009) [16] (Applegarth J); *Murray v Griene* [2014] QDC 18 (13 February 2014) [58] (Horneman-Wren DCJ).

⁴² *Criminal Code* (Qld) s 1.

⁴³ *R v MaMartin* [2013] QCA 339 (12 November 2013) [23] (McMurdo P).

⁴⁴ *R v O’Neill* [2009] QCA 210 (24 July 2009) [16] (Applegarth J).

⁴⁵ *R v Cuskelly* [2009] QCA 375 (8 December 2009) [29], citing *R v Hussey* (1924) 18 Cr App R 160.

V ADVANTAGES AND DISADVANTAGES

A *Advantages*

1 *Rights of Householders and Community Protection*

The main advantage that section 267 confers is that it protects the sanctity of one's abode by enabling homeowners to 'defend hearth and home.'⁴⁶ To this end, the law recognises that home is part of one's personhood,⁴⁷ and thus protects an individual's right to their dignity and reputation by not mandating that they flee from their assailant.⁴⁸ Sir Matthew Hale has elaborated on this point by suggesting that if the occupant of a home were to flee, they would essentially give up their house to their adversary by their flight.⁴⁹ The provision is also consistent with the privacy of an individual. It effectively gives credence to the fact that one's home is distinguished from the public space and that therefore an intrusion necessarily places an assailant outside the scope of the law's protection.⁵⁰ An argument could potentially be made that recognition of these rights ensures that the law is in line with the values and needs of the community, thus providing a boon to society.

Relatedly, this recognition of householders' rights to defend their dwelling may be seen as necessary to protect the community. The amendment of section 267 occurred in the wake of government action that attempted to address widespread community concern surrounding an 'alarming upsurge of home invasion crime,'⁵¹ a concern that appeared to be reflected by statistics.⁵² A perception existed that the criminal justice system was manifestly inadequate in addressing home invasion and the right of occupiers to defend property,⁵³ thus necessitating a change to the law. By enshrining a safeguard regarding defence of one's household, the provision effectively empowers citizens to take matters

⁴⁶ *R v Cuskelly* [2009] QCA 375 (8 December 2009) [30] (Keane JA).

⁴⁷ Stephanie Stern, 'Residential Protectionism and the Legal Mythology of Home' (2008) 2(1) *Michigan Law Review* 193, 193.

⁴⁸ Stuart Queen, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defence of Dwellings and Vehicles' [1999] *University of Illinois Law Review* 221, 222; Eric Del Pozo, 'Retreat Does not Equal Surrender' (2008) 82(1) *St. John's Law Review* 359; Sanford Kadish, 'Respect for Life and Regard for Rights in the Criminal Law' [1976] *California Law Review* 871, 886.

⁴⁹ Sir Matthew Hale, *The History of the Pleas of the Crown* (Robert H. Small, 2nd ed, 1847) 486.

⁵⁰ Suk, above n 16, 243.

⁵¹ Karen Sampford, 'Home Invasions and the Criminal Law Amendment Bill 1996' (Research Paper No 2, Parliamentary Library, Parliament of Queensland, 1997) 23.

⁵² *Ibid*, 14.

⁵³ Kift, above n 12, 215.

into their own hands when the policing capacities of the state are ineffective.⁵⁴ Statistics indicate that between 20-30% of burglary cases involve either an assault or a threat to a person's life or physical wellbeing,⁵⁵ further reinforcing the necessity of such protection.

2 *Moral Culpability and Forfeiture Theory*

Section 267 is also in line with moral culpability and forfeiture theories. In essence, such theories postulate that the innocent need not cede any interest to the culpable.⁵⁶ Accordingly, under this approach, an aggressor forfeits approximately the same degree of rights as he or she threatens to impinge in another.⁵⁷ Section 267 is consistent with this jurisprudential argument in that it shifts the culpability from the threatened house owner to the initial perpetrator. This reflects one of the core purposes of the criminal law: to punish those who deserve it in a way that is just in the circumstances.⁵⁸

3 *In Line With Other Jurisdictions*

Another key advantage that can be ascribed to this provision is that it is in accordance with a number of other jurisdictions and the common law in conferring a right to defence of dwelling. Similar, although by no means equivalent, provisions for this entitlement are present in Canada,⁵⁹ Ireland,⁶⁰ the US, the UK, and many of the states of Australia.⁶¹

4 *Imposes Essential Limitations to Reduce Breadth of Application*

Although the defence does not contain a limitation on the use of disproportionate force, it is nevertheless limited in several ways. For one thing, it requires a subjective belief based on reasonable grounds, thus importing a

⁵⁴ Joshua Getzler, 'Use of Force In Protecting Property' (2005) 7(1) *Theoretical Inquiries in Law* 165, 165.

⁵⁵ Office of Crime Statistics and Research, *Information Bulletin* <http://www.ocsar.sa.gov.au/docs/information_bulletins/IB11.pdf>.

⁵⁶ Larry Alexander, 'Justification and Innocent Aggressors' (1987) 33 *Wayne Law Review* 1177, 1182.

⁵⁷ Whitney Kaufman, 'Is there a right to self-defence?' (2004) 23(1) *Criminal Justice Ethics* 20, 24; Getzler, above n 54, 166; Kimberly Ferzan, 'Culpable Aggression: The Basis for Moral Liability to Defensive Killing' (2012) 669 *Ohio State Journal of Criminal Law*, 669, 669.

⁵⁸ *Hoare v The Queen* (1989) 167 CLR 348, 354.

⁵⁹ *Criminal Code*, RSC 1985, c C-46, s 35.

⁶⁰ *Criminal Law (Defence and Dwelling) Act* 2011.

⁶¹ *Criminal Code* 1924 (Tas) s 40; *Criminal Law Consolidation Act 1935* (SA) s 15A, *Criminal Code* 1913 (WA) s 244.

notion of objectivity.⁶² Here, the jury considers the whole of the circumstances, which can include the degree of force used.⁶³ For another thing, the defence can only be relied upon where there was a reasonable belief that the victim would commit an indictable offence within the dwelling. As such, it can be argued that the defence will only be applicable in more serious cases. Furthermore, some commentators have contended that the lack of a proportionality of force requirement, although broadening the ambit of the defence, is reflective of the difficulty of exercising an appropriate degree of force in high-pressure home invasion situations.⁶⁴

5 *Utility of the Defence*

A further advantage that can be associated with the defence is that it is conceptually distinct from self-defence and other property defences. For example, the defence is different to other property defences in the Code in that it does not prohibit the use of grievous bodily harm.⁶⁵ Likewise, the defence of dwelling diverges from the self-defence provisions⁶⁶ as it is not informed by policy considerations pertaining to the legitimacy of proportional force used in self-protection.⁶⁷ Therefore, in certain situations the defence of dwelling enshrines a safeguard for individuals where they would not otherwise be acquitted by way of property or self-defence provisions.

B *Disadvantages*

1. *Right to Life*

One of the predominant disadvantages of section 267 is that it may accommodate a situation where property is placed above the right to life in the eyes of the law. It is not certain whether the use of force extends to unlawful homicide where the accused believes on reasonable grounds that this is necessary to repel or prevent the intruder committing the indictable offence. In *R v McKay*,⁶⁸ the Court held that defence of property does not in itself justify the use of lethal force against another person. However, this authority is in doubt following *Zecevic v DPP*,⁶⁹ which recognised that force in defence of

⁶² *R v O'Neill* [2009] QCA 210 (24 July 2009) [16] (Applegarth J); *Murray v Griene* [2014] QDC 18 (13 February 2014) [58] (Horneman-Wren DCJ).

⁶³ *R v McMartin* [2013] QCA 339 (12 November 2013) [23] (McMurdo P).

⁶⁴ Tasmanian Law Reform Institute, *Review of the Law Relating to Self-Defence*, Issues Paper No 20 (2014) 34.

⁶⁵ Cf *Criminal Code* (Qld) ss 274-279.

⁶⁶ *Criminal Code* (Qld) ss 271 and 272.

⁶⁷ *R v Cuskelly* [2009] QCA 375 (8 December 2009) [30] (Keane JA).

⁶⁸ [1957] VR 560.

⁶⁹ (1987) 162 CLR 645 (Wilson, Dawson and Toohey JJ).

one's dwelling could potentially be justified where a threat or attack caused a reasonable apprehension of death or serious harm. This possibility is also raised in a Queensland case: 'the circumstances in which Mr Atkinson met his death give rise to the distinct possibility that his homicide was authorised by s 267 of the Criminal Code.'⁷⁰

A criticism of section 267 is that its potential to justify killing in defence of one's dwelling is at odds with the common law's standpoint in criminal law that affords supremacy to the sanctity of human life.⁷¹ Furthermore, considering that 400 000 people are homeless each year in Australia,⁷² it is difficult to argue that the right to property is as inviolable and well-entrenched within Australian society as the right to life. It is also important to note that many other state jurisdictions expressly delineate whether lethal force can be utilised for the sole purpose of defending one's dwelling.⁷³ It could be argued that Queensland's Code is deficient in failing to enact 'clear and detailed rules on this subject'⁷⁴ as citizens should be entitled to expect reasonable certainty in the law.⁷⁵

2 *May Encourage Excessive Use of Force*

A credible argument could be made that section 267 may 'blur the line between persons and property,'⁷⁶ with the lack of an objective proportionality of force requirement inciting excessive, violent responses to home invasions.⁷⁷ Many academics suggest that the law should champion an individual's avoidance of conflict rather than heralding their right to stand put and fight their assailant.⁷⁸ In essence, the pro-retreat argument asserts that 'it is undoubtedly distasteful to retreat but it is ten times more distasteful to kill or inflict bodily harm on another.'⁷⁹ For the law to depart from the requirement of retreat may lead to unnecessary and violent altercations in situations where the accused could have relied upon other safer avenues of protection, such as evacuation or a phone call to the police.⁸⁰

⁷⁰ *R v Spajic* [2011] QCA 232 (13 September 2011) [44] (Chesterman J).

⁷¹ *Wilson v The Queen* (1992) 174 CLR 313, 341 (Brennan, Deane and Gaudron JJ).

⁷² Kenneth Lambeth, 'Dismantling the Purported Right to Kill in Defence of Property' (2001) 5 *Southern Cross University Law Review* 82, 114.

⁷³ See, eg, *Criminal Code* (WA) s 244(1A); *Crimes Act* (NSW) s 420; *Criminal Code* (NT) s 29(3).

⁷⁴ Stanley Yeo, 'Killing in Defence of Property' (2010) 36(2) *Commonwealth Law Bulletin* 281, 293.

⁷⁵ Lambeth, above n 73, 110.

⁷⁶ Getzler, above n 54, 165.

⁷⁷ *Ibid.*

⁷⁸ Alan Murdie, 'Self-defence and the Duty to Retreat' (2002) 166 *Justice of the Peace* 179, 180.

⁷⁹ John Beale, 'Retreat from a murderous assault' (1902) 20(3) *Harvard Law Review* 567, 578.

⁸⁰ Lambeth, above n 72, 109.

3 *Incoherency in the Law*

A third disadvantage of the defence is that it in many respects it increases the incoherency of the law. It often clashes with the different defences available to a person, such as self-defence and the defence of property provisions under sections 274-278. It has been suggested that 'It would make for neatness and facilitate the expeditious handling of cases were the law on the general plea of self-defence to expressly single out, as falling within its operation, selected types of property offences containing an element of personal violence or threatened violence.'⁸¹ Incoherency of the law is further evident in the fact that section 267 conflicts with the legal position of other states and international jurisdictions. For instance, the states have not been uniform in their views on the right to use of fatal force.⁸² There is provision for excessive self-defence in NSW, Victoria, WA and SA, but not in the ACT, Tasmania, Queensland, the Northern Territory and the Commonwealth.⁸³ Tasmania, South Australia, Western Australia and Queensland have specific home invasion defences, whereas NSW, Victoria, Northern Territory, the ACT and the Commonwealth do not.⁸⁴ This suggests that the defence of dwelling provided in section 267 is markedly inconsistent with the respective laws of other jurisdictions, putting the coherence of the law into question.

4 *Does Not Deter Criminals*

A final disadvantage to consider is that section 267 may not deter criminals. A study of 20 US states between 2000 and 2010 concluded that the presence of 'stand your ground' laws did not deter burglary, robbery or aggravated assault: to the contrary, they led to a statistically significant 8% increase in the number of reported murders and non-negligent manslaughters.⁸⁵ This data suggests that section 267 may not ultimately discourage criminals from committing indictable offences in dwellings, and therefore the utility of this provision would lie mainly in its ability to exculpate a homeowner after the fact.

⁸¹ Stanley Yeo, *Unrestrained Killings and the Law: A Comparative Analysis of the Laws of Provocation in India, England and Australia* (Oxford University Press, 1st ed, 1998) 142.

⁸² Yeo, above n 74, 192.

⁸³ Ian Dobinson and Edward Elliot, 'A Householder's Right to Kill or Injure an Intruder under the Crime and Courts Act 2013: An Australian Comparison' (2014) 78 *The Journal of Criminal Law* 80, 86.

⁸⁴ *Ibid.*

⁸⁵ Cheng Cheng and Mark Hoekstra, 'Does Strengthening Self-Defence Law Deter Crime or Escalate Violence?' (2010) 4(1) *Journal of Human Resources*, 1, 1.

VI CONCLUSION AND RECOMMENDATIONS

Debate surrounding section 267 predominantly turns upon a clash between householder rights, moral culpability theories and the like, with the right to life, the pro-retreat standpoint and the incoherency that the provision purportedly generates. Ultimately, legal certainty could be improved through a clear declaration in the Queensland Code regarding the permissibility of lethal force for the purposes of the dwelling defence. Moreover, taking measures to reduce overlap between the defence of dwelling and other defences to the person and to encourage uniformity in the law could effectively help to avert incoherency.

Book Review: Michael P. Sharf, Michael Newton and Milena Sterio (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes*

Samuel Walpole*

Acquiring widespread public attention with the hijacking of the *Maersk Alabama* in 2009, the threat to international shipping posed by Somali pirates has become particularly prominent in the past decade. The impact of these maritime crimes is significant: '[i]n the past few years pirates have seized more than 179 vessels, taken more than 1 000 crew members and passengers hostage, and extracted more than [USD] 400 million in ransom.'¹ Countermeasures taken by ship owners, along with international naval operations, have reduced piratical attacks,² but securing the criminal responsibility of pirates remains a continuing challenge.

Prosecuting Maritime Piracy – edited by US legal academics Sharf, Newton and Sterio – steps into this matrix, seeking *Domestic Solutions to International Crimes*. Aimed at 'those involved in piracy prosecutions and...the broader community interested in counter-piracy efforts',³ this edited collection focuses on the issues that arise in prosecuting an internationally focused crime in different domestic forums.⁴ Uniquely, the book is not only a consideration of relevant international and domestic law. It is also a pragmatic and at times empirical evaluation of matters pertaining to the broader criminal process in piracy matters.

As African piracy shifts to the Gulf of Guinea,⁵ and resurfaces in South-East Asia (as exemplified by the hijacking of the *Orkim Harmony* off Malaysia in June

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¹ Michael P Scharf, Michael Newton and Marina Sterio, 'Introduction' in Michael P. Scharf, Michael Newton, Milena Sterio (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge University Press, 2015) 1.

² 'The ungoverned seas', *The Economist* (online), 29 November 2014 <<http://www.economist.com/node/21635049>>.

³ Scharf, Newton and Sterio, above n 1, 10.

⁴ *Ibid* 3.

⁵ *The Economist*, above n 2; Scharf, Newton and Sterio, above n 1, 2.

this year⁶), *Prosecuting Maritime Piracy* has come at a time where an expanding number of jurisdictions may need to devise mechanisms to prosecute pirates. The book has a logical sequence that is sometimes absent in other edited works, as it is structured around the stages of the criminal process. The first of its four parts examines the international law, and domestic implementations, that defines piracy offences, with the second considering arrest and pre-trial issues. Trial problems are discussed in the third section, before the final section considers sentencing practices in piracy cases worldwide.

I PIRACY, INTERNATIONAL LAW AND DOMESTIC IMPLEMENTATIONS

The criminalisation of piracy is founded upon three key sources of international law: customary international law, the *United Nations Convention on the Law of the Sea* (UNCLOS) and the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (SUA Convention).⁷ In Chapter I, Sandra L Hodgkinson assesses these and notes the difficulties presented by UNCLOS Article 101. Whilst the Article makes piracy a crime of universal jurisdiction, the offence under it does not apply in the territorial sea, where pirates do not use a vessel or where piracy is not for 'private ends'.⁸ Although SUA ameliorates these constraints it does not, however, provide for universal jurisdiction.⁹ In consequence, Hodgkinson recommends 'States... incorporate both UNCLOS and SUA... in their own domestic criminal law' to ensure an effective statutory armoury for prosecutors.¹⁰

Hodgkinson also provides the book's well-researched second chapter, which considers how various pirate prosecuting States have implemented the international law on piracy in their domestic criminal law. She astutely notes that implementation differs – potentially quite dramatically – depending on whether a State is monist or dualist.¹¹

⁶ 'Malacca buccaneers' *The Economist* (online), 27 June 2015 <<http://www.economist.com/node/21656237/>>.

⁷ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994); *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992), see Sandra L Hodgkinson, 'The Governing International Law on Maritime Piracy' in Michael P Scharf, Michael Newton, Milena Sterio (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge University Press, 2015) 13, 15.

⁸ Hodgkinson, above n 7, 18, 20, 23-24.

⁹ *Ibid* 26.

¹⁰ *Ibid* 31.

¹¹ Sandra L Hodgkinson, 'The Incorporation of International Law to Define Piracy Crimes, National Laws, and the definition of Piracy' in Michael P Scharf, Michael Newton and Milena

Expanding on the introduction of universal jurisdiction in the first chapter, Ved P Nanda's contribution clarifies the recognition of piracy as such an offence,¹² and provides examples of prosecutions launched using universal jurisdiction in the Seychelles and Kenya.¹³ This has occurred despite ongoing debate surrounding universal jurisdiction in international law more broadly.¹⁴

The final chapter in Part I, by Marina Sterio, has similarities to Chapter 2, but considers the domestic criminal laws regarding piracy in a smaller range of pirate prosecuting States – the Netherlands, Kenya, Tanzania and South Korea – in some more detail. Read in conjunction with Chapter 2, this chapter may be valuable for legislators seeking to render their domestic piracy offences compliant with the international framework.

II ARREST AND PRE-TRIAL CONSIDERATIONS

Part II, entitled 'The Pursuit, Arrest and Pre-Trial Treatment of Pirates', is a pertinent inclusion in a book addressing piracy from a prosecutorial perspective, given the lawfulness of law enforcement actions is an integral factor towards the legitimacy of a criminal justice system.

With multi-national naval forces conducting much of the "policing" of maritime piracy, Laurie R Blank commences Part II by exploring the provisions of UNCLOS and relevant UN Security Council Resolutions¹⁵ that authorise the use of force by these personnel.¹⁶

Building upon Blank's chapter, Mark Vlastic and Jeffrey DeSousa address the capacity of private security guards to use force against pirates, which is relevant to commercial entities that utilise private actors to repel pirates.¹⁷ Although the authors conclude such private actors could lawfully use force for self-defence

Sterio (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge University Press, 2015) 32, 53.

¹² Ved P Nanda, 'Exercising Universal Jurisdiction over Piracy' in Michael P Scharf, Michael Newton and Milena Sterio (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge University Press, 2015) 54, 63-65.

¹³ *Ibid* 69-70, 72.

¹⁴ *Ibid* 63-65.

¹⁵ See SC Res 1816, UN SCOR, 5902nd mtg, UN Doc S/RES/1816 (2 June 2008); SC Res 1851, UN SCOR, 6045th mtg, UN Doc S/RES/1851 (16 December 2008).

¹⁶ Laurie R Blank, 'The Use of Force against Pirates' in Michael P Scharf, Michael Newton, Milena Sterio (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge University Press, 2015) 103, 104-111.

¹⁷ Mark V Vlastic and Jeffrey Paul DeSousa, 'The Use of Force by Private Parties against Suspected Pirates' in Michael P Scharf, Michael Newton, Milena Sterio (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge University Press, 2015) 119, 120-121.

and the defence of others,¹⁸ the chapter would have benefited from greater discussion of the actual test for the permissible level of force under international law.¹⁹ Instead, the chapter discusses two related issues significant in a US context. The first is whether the US government could, consistent with international law, issue letters of marque to authorise private actors to pursue pirates.²⁰ Though this appears somewhat arcane, and the authors conclude it would violate international custom,²¹ this policy decision was proposed by a US legislator.²² The second issue relates to the potential civil liability of private actors under primarily US tort law,²³ and the discussion of other jurisdictions could conceivably have been expanded.

Given many States are reticent to bring piracy prosecutions,²⁴ Frederick Lorenz and Laura Eshbach provide a relevant chapter discussing the complexities of transferring accused pirates from arresting States to those willing to prosecute. The complexity arises from the fact that in being captured by EU or NATO forces, pirates' rights under the ECHR, Geneva Convention or other instruments may be enlivened. This means arresting States may need to ensure the prosecuting State adheres to the requisite human rights standards.²⁵ The authors discuss the various legal instruments used to facilitate the transfer of pirate suspects,²⁶ and conclude that as Somalia remains unable to prosecute other African countries should continue to prosecute, provided that there are formal agreements with human rights oversight.²⁷

Milena Sterio then concludes Part II with a chapter on pirates' rights to a 'speedy trial'. In doing so, she considers this right in-depth under the domestic law of a selection of prosecuting States, under international conventions and in the jurisprudence of international tribunals.²⁸ As is common in this book, the author – rather usefully for those grappling with the logistics of prosecuting

¹⁸ Ibid 126.

¹⁹ Ibid 119, 126-128.

²⁰ Ibid 119, 122-124.

²¹ Ibid 124.

²² The legislator was former Congressman Ron Paul, see Ibid 125.

²³ Ibid 128.

²⁴ See Frederick Lorenz and Laura Eshbach, 'Transfer of Suspected and Convicted Pirates' in Michael P Scharf, Michael Newton, Milena Sterio (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge University Press, 2015) 150, 150-155.

²⁵ Ibid 157-158.

²⁶ Ibid 165-168.

²⁷ Ibid 169-170.

²⁸ Milena Sterio, 'Pirates' Rights to a Speedy Trial' in Michael P Scharf, Michael Newton, Milena Sterio (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge University Press, 2015) 172, 172-174, 176.

pirates – examines the reasons for delays in piracy matters, along with recommendations that may result in more expedient prosecutions.²⁹

III PIRACY TRIALS

The topics in Part III, ‘Legal Issues in Domestic Piracy Trials’, cover three distinct but important issues that may arise in piracy trials. As ‘the “principal reason” behind the release of piracy suspects...is a lack of sufficient evidence’,³⁰ Frederick Lorenz and Kelly Paradis’ chapter on the evidentiary difficulties that can plague piracy trials – with many arising from the fact these crimes occur on the high seas – is particularly valuable. Their discussion of reforms that have been implemented in prosecuting jurisdictions to reduce evidentiary difficulties, such as information sharing and evidence law harmonisation, enhances the chapter’s practical relevance.³¹

Chapter 10, by Michael Newton, proposes a substitute basis for establishing pirates’ criminal responsibility, arising out of the doctrine of ‘command responsibility’ in international humanitarian law.³² Newton’s argument is that this doctrine would allow pirate leaders to be prosecuted.³³ It would require extension of the doctrine, however, Newton notes there are movements in this direction in the jurisprudence of the International Criminal Tribunal for Rwanda and Special Court for Sierra Leone.³⁴ Despite this, it may be a proposal prosecutors could consider as a mechanism to hold pirate leaders accountable.

To close Part III, Jon Bellish addresses ‘The Issue of Juvenile Piracy’, which is especially important given ‘...it is likely that up to one third of all pirates operating off the coast of Somalia...are less than 15 years old’.³⁵ This fact activates issues relating to the sentencing and detention of apparently juvenile

²⁹ Sterio, above n 28, 198-203.

³⁰ Frederick Lorenz and Kelly Paradis, ‘Evidentiary Issues in Piracy Prosecutions’ in Michael P Scharf, Michael Newton, Milena Sterio (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge University Press, 2015) 207, 212.

³¹ Ibid 241.

³² Michael A Newton, ‘Piracy and the Problem of “Command Responsibility”’ in Michael P Scharf, Michael Newton, Milena Sterio (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge University Press, 2015) 242.

³³ Ibid 242-243.

³⁴ Ibid 261-265. For further examples of related trends in international tribunals, see Andrés Pérez, *Here to Stay? Extended Liability for Joint Criminal Enterprise as a Tool for Prosecuting Mass SGBV Crimes* (12 June 2015) American Society of International Law <<http://www.asil.org/insights/volume/19/issue/13/here-stay-extended-liability-joint-criminal-enterprise-tool-prosecuting>>.

³⁵ Jon Bellish, ‘The Issue of Juvenile Piracy’ in Michael P Scharf, Michael Newton, Milena Sterio (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge University Press, 2015) 275.

defendants in a manner consistent with international law.³⁶ Another interesting observation is that there is an obligation under Article 3 of the ILO *Convention Concerning the Prohibition and Elimination of the Worst Forms of Child Labour*³⁷ to take children out of child labour that involves illicit activity, which would obviously include involvement in piratical acts.³⁸ As Bellish notes, the consequence is that arresting States may not be able to simply 'catch and release' juvenile pirates, given they would conceivably go back to a life of piracy.³⁹

IV SENTENCING AND BEYOND

Prosecuting Maritime Piracy's last part, entitled 'Sentencing and Post-Sentence Treatment of Convicted Pirates' completes the book's comprehensive survey of piracy prosecutions. Sentencing practices are investigated in a detailed and useful empirical study by Eugene Kontorovich. Kontorovich contends that:⁴⁰

[a]lthough the outlawing of piracy by international law is well established, international law provides no standard for the appropriate punishment. This chapter suggests that there is a massive cross-national variance in sentences for Somali pirates... A lack of a "minimum of uniformity and coherence in the sentencing of international crimes" for similarly situated defendants raises basic questions of fairness.

His examination of sentences imposed upon 407 convicted pirates from 2006-2014, across fifteen prosecuting States,⁴¹ identified substantial variance in sentence length, ascending from Europe to Asia to the US mandatory life sentence. The mean was 14 years.⁴² Kontorovich's analysis concludes, however, that 'similar aggravating and mitigating factors' are contemplated.⁴³ These findings illustrate that prosecutors and judges may seek greater uniformity in sentencing, as penalties may alter substantially depending on the prosecuting State.⁴⁴

Yvonne Dutton, in Part IV's second major chapter, considers whether convicted pirates could seek asylum in the prosecuting country. She argues this

³⁶ Ibid 278-283.

³⁷ Opened for signature 17 June 1999, 2133 UNTS 161 (entered into force 19 November 2000).

³⁸ Ibid 281-282.

³⁹ Ibid 285-6.

⁴⁰ Eugene Kontorovich, 'The Problems of Pirate Punishment' in Michael P Scharf, Michael Newton, Milena Sterio (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge University Press, 2015) 299, 299-300.

⁴¹ Ibid 302.

⁴² Ibid 304-305.

⁴³ Ibid 307.

⁴⁴ Ibid 315.

concern is why some jurisdictions decline to prosecute.⁴⁵ After a detailed primer on non-refoulement obligations in various international instruments, she concludes that, under both international refugee and human rights law, a pirate could not seek asylum.⁴⁶ Under refugee law, this is because of their involvement in serious criminality.⁴⁷ If accepted, this analysis could motivate further countries to prosecute. Finally, Dutton considers the rehabilitation of pirates, which cannot be encompassed within Kontorovich's analysis of custodial sanctions. Importantly, she makes recommendations derived from other post-conflict environments that may assist international organisations in preventing Somali pirates from returning to maritime crime, which must be a critical aspect of any effective law enforcement strategy.⁴⁸

As is evidenced throughout the book, much of the complexity arises because prosecution of internationally delineated piracy offences must occur under various, diverse criminal justice systems. In the Conclusion to *Prosecuting Maritime Piracy*, Michael Scharf asks 'Is There a Case for an International Piracy Court?' A UN proposal involved a 'Lockerbie model' Court that applied Somali law, with Somali judges, outside of Somalia.⁴⁹ After identifying impediments to such a Court, Scharf suggests the international will may only exist if the Court had the capacity to pursue pirate leaders.⁵⁰ Indeed, the international appetite for a Somali-oriented Court may have waned as piracy now spreads further afield.⁵¹ Resources may be better directed toward proactive steps to prevent a new surge in Somali piracy.

V CONCLUDING REMARKS

Given its focus on the entire criminal process associated with holding pirates criminally responsible, *Prosecuting Maritime Piracy* is a welcome addition to the discourse on contemporary piracy. The work adeptly integrates relevant international law into a discussion of its implementation across diverse prosecuting States. In addition, by addressing issues regarding suspects' rights, and other matters arising under international law, it is a useful aid for domestic lawyers who must grapple with these questions in domestic piracy

⁴⁵ Yvonne Dutton, 'The Potential for Asylum Seeking by Convicted Pirates' in Michael P Scharf, Michael Newton, Milena Sterio (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge University Press, 2015) 320, 320.

⁴⁶ Ibid 323-4, 330.

⁴⁷ Ibid 325, 326-327.

⁴⁸ Ibid 338-349.

⁴⁹ Michael P Scharf, 'Conclusion: Is There a Case for an International Piracy Court?' in Michael P Scharf, Michael Newton, Milena Sterio (eds.), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge University Press, 2015) 350, 351.

⁵⁰ Ibid 355.

⁵¹ See, e.g. *The Economist*, above n 6.

prosecutions. Furthermore, the pragmatic recommendations for legal reform and harmonisation contained within many of the chapters enhance the book's value for policy makers. Some aspects of the collection do focus considerably on US law, but this is understandable given the contributors' identities and US involvement in counter-piracy. All in all, the Editors have compiled a very readable consideration of the myriad and multifaceted issues involved in combating piracy through the criminal law.

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