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EFFICACY OF INTIMATE IMAGE LEGISLATION IN WESTERN AUSTRALIA

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ABSTRACT

The practise of sending nude or sexual images, commonly termed 'sexting', within domestic relationships is growing at an extraordinary rate. As sexting and other similar practices gain popularity, the prevalence of image-based sexual abuse increases. This article critically analyses image-based sexual abuse laws across international and domestic jurisdictions and evaluates the effectiveness of Chapter XXVA — Intimate Images of the Criminal Code (WA). Chapter XXVA effectively regulates the non-consensual distribution of intimate images. The legislation also effectively regulates the creation and distribution of digitally altered intimate images, and the legislation makes it an offence to threaten to distribute an intimate image. However, the legislation is lacking in its regulation of voyeurism and 'upskirting'. This article argues that Chapter XXVA should be amended to create specific provisions to address these harmful behaviours and provide recourse and justice for victims of such abuse. This article also argues that unless the legislation is accompanied by a rigorous education program, the deterrent purpose of the legislation will be defeated.

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I INTRODUCTION

While not a new phenomenon, image-based sexual abuse ('IBSA') has increased in prevalence due to the rise of smartphones and social media platforms.[1] These platforms facilitate the mass distribution of images, a process which can cause more harm in a shorter period of time than was possible before the Internet.[2] IBSA can be split into three main categories: a nude or sexual image being taken without consent, a nude or sexual image being distributed to third parties without consent, and threatening to distribute a nude or sexual image.[3] In 2019, the Western Australian legislature inserted 'Chapter XXVA – Intimate Images' into the *Criminal Code Act Compilation Act 1913* (WA) ('*Criminal Code*').[4] The purpose of the amendments was to protect victims of IBSA by providing recourse, including rectification orders (often requiring the images be removed, forfeited or destroyed), and to impose harsh penalties to deter this conduct.[5] While no single piece of legislation addresses every aspect of IBSA and its evolving nature, this is no excuse for inaction.[6] Chapter XXVA contains comprehensive IBSA legislation which addresses deficiencies in IBSA laws identified in other Australian and international jurisdictions. Chapter XXVA effectively regulates multiple types of IBSA and is sufficiently broad to capture improvements in technology that may facilitate IBSA in the future.[7] Chapter XXVA is an important step for Western Australia and sends an

[1] Nicola Henry, Asher Flynn and Anastasia Powell, 'Image-Based Sexual Abuse: Victims and Perpetrators' (2019) 572(1) *Trends & Issues in Crime and Criminal Justice* 1, 2.
[2] Ibid 1.
[3] Anastasia Powell et al, *Image-Based Sexual Abuse: An International Study of Victims and Perpetrators* (Summary Report, February 2020) 3.
[4] Criminal Law Amendment (Intimate Images) Act 2019 (WA).
[5] *Criminal Code Act Amendment Act 1913* (WA) ('*Criminal Code* (WA)'); Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 August 2018, 4311 (Peter Katsambanis).
[6] *Criminal Code* (WA) (n 5); Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 August 2018, 4310 (Peter Katsambanis).
[7] *Criminal Code* (WA) (n 5); s 221BD; Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 August 2018, 4319 (Lisa Harvey).

'unambiguous message to the community that image-based abuse is serious and harmful and will not be tolerated'.[8]

IBSA is described in the media by reference to several problematic terms. 'Revenge porn' describes the non-consensual distribution of nude or sexual images by a jilted ex-lover.[9] 'Upskirting' and 'down-blousing' refer to the non-consensual creation of nude or sexual images, typically photographed from beneath or above a woman, without the victim's consent and in a public place.[10] These terms are narrow in scope and do not adequately describe IBSA. The term 'revenge porn' implies the victim is somehow blameworthy as it suggests that the victim must have done something to invoke the perpetrator's vengeful response.[11] Furthermore, if IBSA was limited to revenge pornography, numerous acts of non-consensual distribution which were not motivated by revenge would not fall within the definition of IBSA.[12] Similarly, upskirting and down-blousing relate to the taking of images without consent and do not cover the non-consensual distribution of images taken with consent. Unfortunately, the Western Australian legislation fails to adequately address the first category of IBSA, which includes voyeurism and other practices such as upskirting and down-blousing. Amendments should be made to Chapter XXVA to capture this form of IBSA and provide protection for victims of voyeurism, upskirting, and down-blousing.[13] Moreover, a rigorous education program outlining the types of behaviours that constitute offences, and the severe penalties that can be imposed, should accompany this legislation in order to deter IBSA. A program of this sort has

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8 Western Australia, *Parliamentary Debates,* Legislative Assembly, 22 August 2018, 5022b–5024a (Sue Ellery) 1.

9 Nicola Henry, Asher Flynn and Anastasia Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (Report to the Criminology Research Advisory Council, March 2019) 12.

10 Ibid; Tyrone Kirchengast and Thomas Crofts, 'The Legal and Policy Contexts of 'Revenge Porn' Criminalisation: The Need for Multiple Approaches' (2019) 19(1) *Oxford University Commonwealth Law Journal* 1, 5 ('The Legal and Policy Contexts').

11 Legal and Constitutional Affairs Reference Committee, Parliament of Australia, *Phenomenon Colloquially Known as 'Revenge Porn'* (Report, February 2016) 16; Kirchengast and Crofts, *The Legal and Policy Contexts* (n 10) 277.

12 Henry, Flynn and Powell, Responding to 'Revenge Pornography': Prevalence, Nature and Impacts (n 9) 12.

13 Henry, Flynn and Powell, 'Image-based Sexual Abuse: Victims and Perpetrators' (n 1) 11.

not been introduced in Western Australia, and as a result, the deterrence purpose of Chapter XXVA is largely defeated.[14]

II Why Was Chapter XXVA Introduced?

A *IBSA: A Growing Phenomenon*

IBSA is a pervasive and rapidly growing issue around the world. In a survey conducted in 2019, 1 in 3 (37.7%) people surveyed (out of a total of 6,109 participants from Australia, New Zealand and the United Kingdom) had been the victim of at least one type of IBSA.[15] These results included 1 in 3 (33.2%) reporting that someone had taken a nude or sexual image of them without consent, 1 in 5 (20.9%) reporting that a nude or sexual image of themselves had been shared without their consent, and nearly 1 in 5 (18.7%) reporting that they had been threatened with the sharing of a nude or sexual image.[16] Moreover, 1 in 7 (14.1%) respondents had experienced all three forms of IBSA.[17] These results are indicative of a steep increase in the prevalence of IBSA. In 2017, a study found that only 1 in 10 Australian adults reported having had a nude or nearly nude image of themselves distributed without their permission.[18] Similarly, the 2014 study showed that 11 percent of those surveyed had a sexually explicit image distributed without their consent while under the age of eighteen.[19] The 2019 data paints a remarkably different picture, with 45.3 percent of 16–19 year old respondents having experienced IBSA.[20] Another 2013 study of 606 private school students in Utah found that

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14 Legal and Constitutional Affairs Reference Committee (n 11) 43; Western Australia, *Parliamentary Debates,* Legislative Assembly, 28 June 2018, 4156b-4159a (John Quigley) 1.

15 Powell et al (n 3) 3.

16 Ibid.

17 Ibid.

18 Nicola Henry, Asher Flynn and Anastasia Powell, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (2018) 19(6) *Police Practice and Research* 565, 569.

19 Heidi Strohmaier, Megan Murphy and David DeMatteo 'Youth Sexting: Prevalence Rates, Driving Motivations, and the Deterrent Effect of Legal Consequences' (2014) 11(3) *Sexuality Research and Social Policy: Journal of NSRC* 245, 250.

20 Powell et al (n 3) 4-6. Also note the incidence of IBSA between genders is even (38.1% for females and 37.4% for males) However, males perpetrate IBSA more often than females (22.3 percent of men reported engaging in IBSA compared to 13.1 percent of women).

40 percent of students acknowledged receiving an intimate image and 25 percent then forwarded that image to others.[21]

Powell et al found IBSA is more prevalent in vulnerable populations: 2 in 3 (65.6%) Aboriginal and Torres Strait Islander people surveyed had experienced one or more forms of IBSA, compared to 1 in 3 non-Indigenous participants.[22] Moreover, 1 in 3 (35.9%) Indigenous participants had experienced all three forms of IBSA, while only 1 in 8 (12.2%) non-Indigenous respondents had similar experiences. One in two respondents with a disability indicated that they had been the victim of a form of IBSA.[23] Similarly, 56.4 percent of LGBTIQ+ identifying participants surveyed had been victims of IBSA, as opposed to 35.4 percent of heterosexual respondents.[24] These statistics show that IBSA is commonplace within Australia and that its effects are far-reaching. Unfortunately, IBSA statistics are inherently inaccurate as they only capture the proportion of people who have actual knowledge that their images have been distributed, meaning these statistics are likely underestimating the true proportion of Australians impacted by IBSA.[25]

The prevalence of IBSA is alarming when considering the consequences and harm suffered by the victims. A 2019 study titled *Shattering Lives and Myths: A report on image-based sexual abuse* identified the harms suffered by IBSA victims as ranging from social isolation to suicide attempts.[26] One participant was embarrassed and ashamed of the images and was so fearful of their distribution that she overdosed in an attempt to take her own life.[27] For another, the threats of distribution had a paralysing effect and he now struggles to sleep for more than two hours before checking his

21 Strohmaier, Murphy and DeMatteo (n 19) 246.
22 Powell et al (n 3) 4.
23 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 34.
24 Ibid 34; Powell et al (n 3) 3.
25 Henry, Flynn and Powell, 'Image-based Sexual Abuse: Victims and Perpetrators' (n 1) 8–9.
26 McGlynn et al (n 26).
27 Ibid 4.

phone to see if the images have been posted.[28] Other victims divulged that their partners used IBSA as a means of control.[29] They disclosed that their ex-partners' use of IBSA was not always to seek revenge after a break-up. Rather, IBSA was used as a continued means of control to degrade, humiliate, and even coerce victims into returning to the relationship.[30] Many victims experience isolation from their friends, family, and online communities, often resulting from the victim's embarrassment and shame, as well as a lack of trust.[31] Moreover, the psychological impacts of IBSA are extreme. Unlike other forms of trauma or abuse, IBSA can be enduring as the images remain online and can be shared, downloaded, and discovered by an ever-growing audience. IBSA can take an equal or even greater psychological toll than a single traumatic incident as IBSA often forms part of a perpetual cycle of abuse that is difficult to escape.[32]

B *Prior to Chapter XXVA: IBSA and Criminal Offences*

Prior to 2019, victims of IBSA had little success pursuing an action against their perpetrator within the criminal law. Some IBSA cases can be prosecuted under other provisions of the *Criminal Code* (WA), including stalking,[33] threatening with an intent to gain,[34] indecency,[35] and offences relating to the use of surveillance devices.[36] Unfortunately, these offences do not accurately capture the harm caused by IBSA,[37] nor do they provide the victim with relief, such as the removal and forfeiture of images. The circumstances in which these offences can be used to prosecute IBSA are limited as many forms of IBSA do not satisfy the requisite elements of these offences. IBSA cases are

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28 Ibid 3.
29 Ibid 4.
30 Ibid 4.
31 Ibid 8.
32 Ibid 7.
33 *Criminal Code* (WA) (n 5) s 338E.
34 Ibid ss 338A, 398
35 Ibid s 323.
36 Criminal Code 1995 (Cth) s 474.17.
37 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 65.

often successfully prosecuted based on additional facts and circumstances not directly linked to the IBSA, which satisfy the elements of the other criminal offences, for example, stalking.[38] In such cases, a conviction for IBSA is typically incidental to another offence. Where these additional circumstances do not exist, it is unlikely that IBSA victims will be able to attain justice. Consequently, these other criminal offences are not regularly used by law enforcement agencies to charge perpetrators of IBSA. As such, prior to the introduction of Chapter XXVA, victims were often unsuccessful in pursuing their matter through the criminal law.[39]

C *IBSA and Civil Remedies*

While victims of IBSA have recourse to civil remedies, the nature of IBSA means the elements of civil causes of action are often difficult to make out.[40] For example, in order for defamation to be made out, the victim would need to prove that the imputation of the image could cause them to lose standing.[41] As the consensual distribution of intimate images between partners is an increasingly commonplace activity,[42] Dr Anna Bunn suggests in her article titled *Non-consensual Online Publication of Intimate Images: Civil Remedies* that it is unlikely that a reasonable Australian would think less of the victim for taking or sharing the image in the first instance.[43] As many intimate images do not carry defamatory imputations, an action for IBSA in defamation is unlikely to succeed.

Bunn also suggests that an action for infringement of copyright is a possibility where the image that was distributed without consent is one taken

38 Ibid 50.
39 Ibid 74.
40 Anna Bunn, 'Non-consensual Online Publication of Intimate Images: Civil Remedies' (2016) 132 (1) *Precedent (Australian Lawyers Alliance)* 25, 26.
41 *Radio 2UE Sydney v Chesterton* (2009) 238 CLR 460; Defamation Act 2005 (WA) s 6.
42 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 12; *Wilson v Ferguson* [2015] WASC 15, [81] (Mitchell J).
43 Bunn (n 40) 26; *Wilson v Ferguson* (n 42) [81] (Mitchell J).

by the victim (for example, a 'selfie').[44] As such, copyright infringement may be an available cause of action in some IBSA cases dealing with sexting.[45] However, where images are taken by another person—either covertly in the case of voyeurism or overtly in a domestic relationship—an action for copyright infringement would not be available as the victim would not be the copyright owner.[46]

Historically, IBSA victims have brought civil actions against their abusers under an equitable action for breach of confidence.[47] For breach of confidence to be made out, the 'information' in question must be of a confidential nature; communicated or obtained in circumstances importing an obligation of confidence; and used without authorisation.[48] In *Wilson v Ferguson*,[49] Ferguson ('the Defendant') published 16 images and two videos of Wilson ('the Plaintiff') to the Defendant's Facebook page.[50] The images and videos showed the Plaintiff engaged in sexual activities or naked.[51] The explicit nature of the images was sufficient to suggest their confidential character, particularly when coupled with the Plaintiff's emphasis on the deeply personal nature of the content and the fact that the images were not in the public domain before the distribution.[52] The Plaintiff had instructed the Defendant to refrain from sharing the images, which implied a relationship of confidence.[53] Mitchell J found that the Defendant owed an equitable obligation of confidence to the Plaintiff to keep the images confidential.[54] By posting the images and videos to his Facebook page, the Defendant made them available to around 300 people, many of whom worked with both the

44 Bunn (n 40) 26; *Copyright Act 1968* (Cth) s 36.
45 Copyright Act 1968 (Cth) s 36.
46 Bunn (n 40) 26.
47 Ibid 27.
48 *Wilson v Ferguson* (n 42) [46] (Mitchell J).
49 Ibid.
50 Ibid [27] (Mitchell J).
51 Ibid [22]-[23] (Mitchell J).
52 Ibid [56] (Mitchell J).
53 Ibid [58] (Mitchell J).
54 Ibid [55] (Mitchell J).

Defendant and Plaintiff.[55] The Plaintiff was awarded $35,000 in damages for embarrassment, anxiety, and distress; $13,404 for lost income; and an injunction to prevent the continued dissemination of the images and videos.[56]

In cases where electronic accounts have been hacked and images posted online, Bunn suggests it would be more difficult to make out the elements of a breach of confidence as the plaintiff may not be able to identify the hacker and name them as the defendant of the action.[57] However, should this hurdle be overcome, an equitable breach of confidence may be pursued. In *Wee Shuo Woon v HT SRL,*[58] the Court of Appeal in the Republic of Singapore found that emails that were subject to legal professional privilege retained their confidential character despite being hacked and uploaded to WikiLeaks.[59] The Court concluded that as the emails were only a very small part of around 500 gigabytes of data that was pilfered, few people if any had knowledge of their existence. Although the emails were theoretically accessible to anyone intensively searching WikiLeaks, the emails and their contents were not considered to be public knowledge, nor in the public domain.[60] *Wee Shuo Woon v HT SRL* demonstrates that information which has been hacked can retain its confidential character despite being disseminated online, depending on *inter alia,* on how widely the images or videos have been disseminated.[61] As the explicit nature of intimate images suggests an inherently confidential character,[62] it is possible that hacked intimate images, although leaked into the public domain, could retain their confidential character and result in a successful action for breach of confidence. However, at the time of writing

55 Ibid [28] (Mitchell J).
56 Ibid [85] (Mitchell J).
57 Bunn (n 40) 27.
58 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94.
59 Ibid.
60 Ibid [40]-[43].
61 Ibid.
62 *Wilson v Ferguson* (n 42) [56] (Mitchell J).

this article, there is no Australian case law that confirms this position, and this area of law remains unsettled by Australian courts.

In 2007, the New South Wales Law Reform Commission recommended that provision be made for a statutory tort for serious invasions of privacy.[63] The scope of this tort would cover the misuse of private information, intrusions upon seclusion and would likely also cover the non-consensual distribution of intimate images.[64] The Commission suggested that extending the equitable doctrine of breach of confidence to include the protection of privacy would distort both principles.[65] The Commission stated that confidentiality and privacy are not co-extensive; in equity, the obligation relates to the conscience of the entrusted person, whereas privacy relates to the private information or object itself.[66] Additionally, while most confidential acts and information could be considered private, not all private acts are confidential (some private acts are considered to be in the public domain for the purposes of equity).[67] Should this tort be enacted, this cause of action may provide victims of IBSA with an accessible remedy through damages for economic loss, emotional distress, or an injunction preventing the dissemination of the private material. However, the costly and lengthy civil proceedings may still represent a barrier to victims attaining justice. A number of High Court authorities have considered whether a common law tort for invasions of privacy might be developed in Australia;[68] however, at the time of writing, no such tort has come to fruition.

The difficulties in bringing a civil action against perpetrators of IBSA highlights the importance of enshrining IBSA as a form of sexual violence

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63 New South Wales Law Reform Commission, *Invasion of Privacy* (Consultation Paper No. 1, 2007) 54 [2.79].

64 Bunn (n 40) 25, 28.

65 *New South Wales Law Reform Commission* (n 63) [2.79].

66 Ibid [2.80].

67 Ibid.

68 See, eg, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 and *Glencore International AG v Commissioner of Taxation* (2019) 265 CLR 646.

within the *Criminal Code* (WA). Doing so would help protect, and provide justice for, victims who suffer harm as a result of IBSA.[69] Prior to the 2019 amendment, Western Australia's legislation was piecemeal, and victims often fell through legislative gaps as existing remedies did not effectively address IBSA. The existing criminal offences often failed to adequately remedy the mischief, and the requirements of civil remedies remain difficult for IBSA victims to meet.[70] Even if the IBSA was within the scope of a civil remedy, litigating a civil cause of action is a lengthy and costly process that can leave justice out of reach.[71] As many IBSA victims seek judicial relief to prevent further dissemination of the intimate images, the potential length of civil litigation could render the process futile as the images would likely remain online, with distribution continuing until relief is granted.[72] Additionally, an injunction can only be granted if a legal or equitable right has been infringed, meaning that if a victim is unable to establish an arguable case, they have no recourse to an injunction.[73] Chapter XXVA targets this issue through the introduction of specific IBSA offences to effectively prosecute offenders and serve justice. Section 221BE of the *Criminal Code* (WA) states that the court may order a person charged with an intimate image offence to take reasonable steps to remove, retract, recover, delete, destroy, or forfeit to the State any intimate image to which the offence relates. This important provision curbs the perpetual nature of IBSA by preventing further dissemination of the images in a timely manner.

III CONSTRUCTION OF CHAPTER XXVA

69 *Criminal Law Amendment (Intimate Images) Act 2019* (WA); Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 47.
70 Bunn (n 40) 28.
71 Wouter De Vos and Theo Broodryk, 'Fundamental Procedural Rights of Civil Litigants in Australia and South Africa: Is There Cause for Concern? (part 1)' (2019) 3 *Tydskrif Vir Die Suid-Afrikaanse Reg* 425, 425.
72 Bunn (n 40) 26-27.
73 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (n 68).

In many Australian jurisdictions, problematic terminology, such as revenge porn (which often imputes victim blaming connotations) is avoided by encapsulating offences in specific IBSA provisions. These IBSA provisions introduce offences for distributing or threatening to distribute an intimate image in order to deter this conduct, hold perpetrators to account, and support victims through take-down measures such as rectification orders.[74] The following discussion identifies the elements that make up these provisions and provides a comparison of IBSA drafting in Australia and internationally.

A *Intimate Images*

Across jurisdictions, a variety of approaches have been taken to define images or videos that fall within the prohibition on non-consensual distribution mandated by IBSA legislation. The most common and arguably the most effective approach involves referring to the material as 'intimate images'.[75] In Canada, an intimate image is defined as a visual recording of a person made by any means including a photograph, film or video recording, in which the person is nude, exposing his or her genital organs, anal region or her breasts, or is engaged in explicit sexual activity where there is a reasonable expectation of privacy.[76] A similar approach has been adopted throughout Australia. Western Australia's definition is clear and comprehensive:

> (a) a still or moving image, in any form, that shows, in circumstances in which the person would reasonably expect to be afforded privacy —
>
> (i) the person's genital area or anal area, whether bare or covered by underwear; or
>
> (ii) in the case of a female person, or transgender or intersex person identifying as female, the breasts of the person, whether bare or covered by underwear; or

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74 Western Australia, *Parliamentary Debates,* Legislative Assembly, 28 June 2018, 1 (John Quigley).

75 *Criminal Code* (WA) (n 5) s 221BA; *Criminal Code Act 1899* (Qld) s 207A; *Summary Offences Act 1966* (Vic) s 40; *Crimes Act 1900* (ACT) s 72A; *Crimes Act 1900* (NSW) s 91N.

76 Protecting Canada from Online Crimes Act SC 2014, c 13; Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 49.

(iii) the person engaged in a private act; and

(b) includes an image, in any form, that has been created or altered to appear to show anything mentioned in paragraph (a).[77]

Not all common law jurisdictions have adopted such a thorough definition of 'intimate image', meaning some victims of IBSA have no recourse under their jurisdiction's specific IBSA legislation. The relative inadequacies arising in these definitions are explored through a comparison of IBSA legislation in Australia and overseas.

In Western Australia, Queensland, New South Wales, and the Australian Capital Territory, the definition of 'intimate images' accounts for the breasts of a female, transgender, or intersex person.[78] These broad definitions provide protection and recourse for a wider range of victims than in Victoria,[79] South Australia,[80] and international jurisdictions,[81] where the definition of 'intimate images' only extends to images of breasts belonging to a female, limiting protection to cis-gender females.

In England, Wales, and Scotland, a sexual element is required in the definition of 'intimate images'.[82] This does not capture non-sexual images or videos, such as someone showering or using the toilet.[83] Western Australia, South Australia, New South Wales, and the Australian Capital Territory avoid this outcome by including the terms 'private act' and 'circumstances in which the person would reasonably expect to be afforded privacy' to capture situations where the victim's genitals may or may not be exposed, and a sexual act may or may not be engaged in.[84] As the non-consensual taking and

77 *Criminal Code* (WA) (n 5) s 221BA.

78 *Criminal Code* (WA) (n 5) s 221BA; *Criminal Code Act 1899* (Qld) s 207A; *Crimes Act 1900* (ACT) s 72A; *Crimes Act 1900* (NSW) s 91N.

79 *Summary Offences Act 1966* (Vic) s 40.

80 *Summary Offences Act 1953* (SA) s 26A(2).

81 Protecting Canada from Online Crimes Act SC 2014, c 13; *Harmful Digital Communications Act 2015* (NZ) s 216G.

82 Legal and Constitutional Affairs Reference Committee (n 11) 10.

83 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 83; Des Butler, 'Revenge Pornography: Are Australian Laws Up To The Challenge?' (2017) 8(1) *International Journal of Technoethics* 56, 60.

84 *Criminal Code* (WA) (n 5) s 221BA; *Summary Offences Act 1953* (SA) s 26A(2); *Crimes Act 1900* (NSW) s 91N; *Crimes Act 1900* (ACT) s 72A.

distribution of non-sexual images can be just as harmful and distressing as those of a sexual nature, broadening the scope of 'intimate images' to capture non-sexual intimate images promotes the purpose of the legislation.[85] Henry, Flynn and Powell suggest in their report titled *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* that these additions exclude situations where one reasonably expects to be observed, such as sunbathing at a beach, hence limiting the scope of the provision to not over-extend the criminal law.[86]

The definition of intimate images in s 221BA(b) of the *Criminal Code* (WA) captures 'morph porn': where the victim's face is taken from an innocuous image and photoshopped onto a naked, or sexual image of someone else.[87] Queensland and New South Wales have similar provisions to provide recourse for victims of morph porn.[88] While arguably not as personal as having a nude photo of oneself distributed, morph porn can be equally—if not more—distressing, as the images can often be more graphic than those taken in a domestic relationship.[89] As the imputations are more likely to be defamatory, victims of morph porn are more likely to succeed in an action in defamation than victims of other forms of IBSA. Nevertheless, it is important that IBSA victims are protected under the *Criminal Code* (WA) in situations not sufficient to constitute defamation or breach of confidence, and to protect those who cannot afford a costly civil suit.[90]

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85 Henry, Flynn and Powell, Responding to 'Revenge Pornography': Prevalence, Nature and Impacts (n 9) 83.

86 Ibid 85; Thomas Crofts and Tyrone Kirchengast, 'A Ladder Approach to Criminalising Revenge Porn' (2019) 83(1) *The Journal of Criminal Law* 87, 94.

87 *Criminal Code* (WA) (n 5) s 221BA(b); Alyse Dickson, 'Revenge porn: A Victim Focused Response' (2016) 2 *University of South Australia Student Law Review* 42, 46.

88 *Criminal Code Act 1899* (Qld) s 207A; *Crimes Act 1900* (NSW) s 91N.

89 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 93.

90 Bunn (n 40), 26.

In 2013, South Australia was the first Australian jurisdiction to implement specific, criminal IBSA laws.[91] The legislation defines an 'invasive image' as depicting a person in a place other than a public place:

> (a) engaged in private act; or
>
> (b) in a state of undress such that —
>
> (i) in the case of a female — the bare breasts are visible; or
>
> (ii) in any case — the bare genital or anal region is visible.[92]

This terminology has not been adopted by other Australian jurisdictions, perhaps because 'invasive image' may connote creating a reprehensible image that an ordinary person would deem to be outside of the standards of morality or decency. This would encompass only a small portion of IBSA.[93] For example, under South Australian laws, a photo of a person in underwear taken in a loving relationship would not satisfy the definition of an invasive image, as statistics show that the consensual sharing of sexualised images within a relationship is common practice and likely to be within the standards of morality, decency, and propriety.[94] This could potentially leave the victim without recourse if the image was distributed without consent.[95] However, the South Australian legislation also contains a provision titled 'Indecent Filming', which covers filming another person in a state of undress in circumstances which a reasonable person would expect to be afforded privacy, which may capture a wider range of IBSA, although this remains to be seen.[96]

B *Distribute*

91 Legal and Constitutional Affairs Reference Committee (n 11) 6.

92 *Summary Offences Act 1953* (SA) s 26A(2).

93 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 60; Des Butler (n 83) 59.

94 *Summary Offences Act 1953* (SA) s 26A(2); Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 60.

95 *Summary Offences Act 1953* (SA) s 26A(3).

96 Ibid s 26D.

Under s 221BD of the *Criminal Code* (WA), it is an offence to distribute an intimate image of another person without their consent. In Western Australia, 'distribute' means communicating, exhibiting, selling, sending, supplying, offering, transmitting, or making the image available for access by electronic or other means to a person other than themselves or the depicted person.[97] This drafting does not criminalise 'sexting', but rather non-consensual distribution to third parties.[98] The definition's scope is sufficiently broad to capture improvements in technology that may facilitate IBSA. However, as with all legislation that regulates behaviour associated with technology, this definition will likely need to be amended as technology and methods of distribution change.[99]

The Australian Capital Territory legislation defines 'distribute' as including to send, supply, show, exhibit, transmit or communicate to another person.[100] The inclusion of 'show' is unique and aims to provide protection to a greater number of victims and deter all forms of IBSA.[101] While physically showing an intimate image to others does not result in widespread availability of the intimate image, sharing intimate images by showing them to others can still cause distress, embarrassment, and harm. The broad definition of 'distribute' provides protection for the highest number of victims, and creates a strong deterrent, thereby helping to fulfil the legislation's key purpose.[102] However, there exists an evidentiary issue as it is difficult to prove that an image has been shown by one person to another. As such, this form of distribution is unlikely to be prosecuted in practice,[103] likely rendering it ineffective as a means of obtaining justice for victims.[104]

97 *Criminal Code* (WA) (n 5) s 221BC.
98 Explanatory Memorandum, Criminal Law Amendment (Intimate Images) Bill 2018 (WA) 4.
99 Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 August 2018, 4311 (Peter Katsambanis).
100 *Crimes Act 1900* (ACT) s 72B.
101 Ibid.
102 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 81.
103 Ibid.
104 Ibid 83.

Despite these limitations, the inclusion of 'show' in the *Criminal Code* (WA) would likely assist in deterring the non-consensual distribution of intimate images, especially if an education program highlighted that merely showing an intimate image to another person without consent is a criminal offence.[105] Henry, Flynn and Powell state that the dominant purpose of IBSA legislation is deterrence, while prosecuting the conduct is a subsidiary aim.[106] While 'show' is not essential for the effective operation of IBSA laws, it likely would assist with the deterrent purpose of the legislation and could be a valuable addition to s 221BC of the *Criminal Code* (WA).

C *Consent*

The offence created under s 221BD of the *Criminal Code* (WA) is only satisfied if an intimate image is distributed without the depicted person's consent. The *Criminal Code* (WA) defines 'consent' as being freely and voluntarily given.[107] Aligned with sexual assault offences, a person under the age of 16 cannot consent to the distribution of an intimate image.[108] The provision also provides that consent cannot be obtained by force, threats, deceit, intimidation or fraudulent means.[109] Additionally, a person who consents to the distribution of an intimate image of themselves on a particular occasion is not, only because of that fact, to be regarded as having consented to the distribution of the image or any other image on another occasion.[110] Similarly, if a person distributes an image of themselves, this does not indicate that they have consented to any further distribution.[111]

The New South Wales and South Australian definitions of consent contain a mental element—the perpetrator must have known that the victim

[105] Ibid 83.
[106] Ibid 15, 50, 72, 83.
[107] *Criminal Code* (WA) (n 5) s 221BB(1).
[108] Ibid s 221BB(6).
[109] Ibid s 221BB(2).
[110] Ibid s 221BB(3).
[111] Ibid s 221BB(5).

did not consent, or have been reckless as to whether the victim consented.[112] As the *Criminal Code* (WA) does not have a similar mental element, the Western Australian offence is determined objectively and can be made out solely on the physical elements. This reduces the number of elements required to be proved beyond reasonable doubt by the prosecution and ultimately favours the victims as the legislation condemns the conduct in all circumstances, not just where an intention or motive to distribute the intimate image is present.[113]

In Queensland, consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent. [114] Studies show that people with disabilities are more likely to be victims of IBSA with nearly 50 percent of respondents with a disability indicating that they had been subject to a form of IBSA.[115] Queensland's inclusion of a requirement for cognitive capacity to consent is a pertinent inclusion that provides additional protection for those with a mental impairment who do not have the cognitive capacity to consent to distribution. The requirement for cognitive capacity also protects those under the age of sixteen and those who are unconscious and do not have the capacity to consent.[116] While the *Criminal Code* (WA) does not expressly require cognitive capacity to consent, s 221BC(7) states that the section does not limit the grounds on which it may be established that a person does not consent to the distribution of an intimate image, providing scope for discretion regarding capacity and consent.[117]

D *Intention to Cause Distress and Outcome of the Distribution*

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112 Tyrone Kirchengast and Thomas Crofts, 'A Critical Analysis Of The Conduct And Fault Elements In Revenge Porn Criminalisation' (2019) 43(4) *Criminal Law Journal* 274, 286.
113 Ibid.
114 *Criminal Code Act 1899* (Qld) s 223(5).
115 Henry, Flynn and Powell, 'Image-based Sexual Abuse: Victims and Perpetrators' (n 1) 34.
116 Tyrone Kirchengast and Thomas Crofts, 'A Critical Analysis of the Conduct and Fault Elements in "Revenge Porn" Criminalisation' (2019) 43 (4) *Criminal Law Journal* 274, 278.
117 *Criminal Code* (WA) (n 5) s 221BC(7).

In the United Kingdom, IBSA legislation requires that the perpetrator intended to cause distress by distributing the intimate image.[118] While there is a risk that IBSA legislation criminalises accidental acts—for example, the inadvertent attaching of a file to an email—the inclusion of a requirement that a perpetrator intend to cause distress significantly limits the operation of the legislation.[119] Intimate images are distributed for numerous reasons—bragging, boredom, recklessness—and many motives will not contain an inherent intention to cause distress (and thus will not be covered by the legislation).[120] Australian jurisdictions do not include a requirement of intention to cause harm or distress in IBSA legislation.[121] This is partly because litigation would be significantly extended while the prosecution attempts to prove this mens rea.[122] Focusing upon a mental element may act as an unnecessary red herring as it is the act of taking or distributing the intimate image that is the primary cause of the harm.[123] Additionally, where distribution is accidental, the perpetrator may be able to avail the defence of accident under s 23B of the *Criminal Code* (WA) and avoid criminal responsibility, hence removing the need for a mental element.[124]

A similar requirement is present in New Zealand and California, where 'serious emotional harm' must have resulted from the distribution.[125] This requirement focuses on the result of the distribution and only criminalises behaviour that causes serious emotional harm to the victim. The *Criminal Code* (WA) does not impose such a restriction, but rather allows for the

118 *Criminal Justice and Courts Act 2015* (UK) s 33(1); Meghan Fay, 'The Naked Truther: Insufficient Coverage for Revenge Porn Victims' (2018) 59 *Boston College Law Review* 1839, 1855.
119 Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 August 2018, 4323 (David Honey).
120 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 91.
121 Criminal Code (WA) (n 5) s 221BA; *Summary Offences Act* 1953 (SA) s 26A(2); *Crimes Act 1900* (NSW) s 91N; *Crimes Act 1900* (ACT) s 72A; *Criminal Code Act 1899* (Qld) s 207A; *Summary Offences Act 1966* (Vic) s 40.
122 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 92.
123 Ibid 12.
124 *Criminal Code* (WA) (n 5) s 23B.
125 *Harmful Digital Communications Act 2015* (NZ) s 22; Cal Pen Code §647(j)(4) (2021).

potential prosecution of any instance of IBSA to deter the conduct, opposed to only cases that result in serious emotional harm.[126] The onus of proof could be unduly shifted to the victim if they were required to prove that serious emotional harm resulted from the IBSA as it may be difficult to prove the extent of harm suffered, and some victims may be unaware of the image's distribution.[127] Henry, Flynn and Powell argue it should be assumed that harm has been caused by the image's creation, distribution or the threat of distribution without consent, rather than the victim's response.[128] Furthermore, this requirement may prejudice resilient victims who did not suffer serious emotional harm but who still desire justice. As such, where IBSA is distributed with an intention to cause harm or results in serious emotional harm, these could be aggravating factors relevant to sentencing; however, they should not form requirements or conduct elements of IBSA offences. These requirements would limit the scope of the offence, excluding some IBSA cases from prosecution and preventing victims from obtaining justice.[129]

E *Threats*

'Sextortion' is the threat of distributing an intimate image for personal gain (money, additional intimate images, sexual acts, or to coerce the victim to act or abstain from something).[130] In New South Wales, for sextortion, it is irrelevant whether the images actually existed or not and whether actual fear resulted from the threat.[131] The prosecution must show, however, that the accused intended to cause fear or apprehension from that threat.[132] Queensland, Victoria, South Australia, and the Australian Capital Territory

[126] Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 55.
[127] Ibid 90.
[128] Ibid.
[129] Ibid 12.
[130] Ibid 14.
[131] *Crimes Act 1900* (NSW) s 91R.
[132] Ibid s 91R.

all have provisions providing for the threat of distributing intimate images.[133] In Western Australia, sextortion is a crime under ss 338(e), 338A and 338B of the *Criminal Code* (WA).[134] Unlike in New South Wales, there is no need to prove the accused intended to cause fear or apprehension, just that there was a threat to distribute an intimate image.[135] This broader scope serves the purpose of the legislation by capturing all threats of IBSA and hence serving justice for more victims, including those whose threats lacked the requisite intent to cause fear or apprehension.

F *Voyeurism and Upskirting*

Voyeurism can be defined as the taking or distributing of intimate images for sexual gratification.[136] In England, voyeurism offences are limited to the classic scenario of a perpetrator with sexual motives, installing covert cameras and filming others without their consent.[137] This typically occurs in changerooms, bathrooms, bedrooms, and other places where one reasonably expects to be afforded privacy.[138] The English legislation is not broad enough to cover modern variants of voyeurism such as upskirting or down-blousing as a victim in those circumstances is not engaged in a private act such as changing clothes or showering. Instead, a victim of upskirting is typically going about their usual business in public spaces (including on public transport, in nightclubs and in shops) when the image or video of their genitalia is captured.[139]

In Victoria, upskirting legislation covers the intentional observation, electronic capture, and distribution of the genital or anal region with the aid

133 *Summary Offences Act 1953* (SA) s 26AD; *Crimes Act 1900* (ACT) s 72E; *Criminal Code Act 1899* (Qld) s 229A; *Summary Offences Act 1966* (Vic) s 41DB.
134 *Criminal Code* (WA) (n 5) ss 338(e), 338A and 338B.
135 Ibid ss 338(e), 338A and 338B; *Crimes Act 1900* (NSW) s 91R.
136 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 14.
137 Ibid 53.
138 Ibid 53.
139 Ibid 53.

of a device, without that person's consent, in a situation where a reasonable person would expect not to be observed.[140] This offence was successfully prosecuted, inter alia, in *Finley v R*,[141] and has a maximum penalty of three months' imprisonment. Unfortunately, this legislation does not cover down-blousing, a remarkably similar behaviour. The *Crimes Act 1990* (NSW) contains similar offences; however, difficulties can arise in proving a perpetrator acted for the purpose of sexual gratification.[142] This occurred in 2015 where a nurse took pictures of a patient's genitalia while they were under anaesthetic.[143] However, the patient did not have a cause of action because she could not establish beyond reasonable doubt that the images were taken to obtain sexual gratification.[144] This represents a major hurdle that prevents many perpetrators from being successfully prosecuted.[145]

Western Australia does not have specific legislation targeting voyeurism or upskirting; however, some cases have been prosecuted under s 203 of the *Criminal Code* (WA).[146] In *Wright v McMurchy*,[147] a taxi driver was convicted of performing indecent acts in public after taking photos up the skirt of an intoxicated passenger. While s 203 provides another avenue to prosecute this form of IBSA, the lack of a specific upskirting offence represents a significant gap in Western Australia's IBSA legislation and should be amended with the addition of a provision similar to s 41B of the *Summary Offences Act 1996* (Vic).[148] Such a provision would directly address these problematic and unacceptable behaviours and remedy this gap

140 *Summary Offences Act 1966* (Vic) ss 41A, 41B and 41C.
141 [2018] VSCA 202.
142 *Crimes Act 1900* (NSW) ss 91J, 91K and 91L; Henry, Flynn and Powell, Responding to 'Revenge Pornography': Prevalence, Nature and Impacts (n 9) 53.
143 Sophie Scott, 'Sydney nurse who took explicit photo of patient under anaesthetic still practising in NSW', *ABC News* (online, 6 November 2015) < https://www.abc.net.au/news/2015-11-06/sydney-nurse-takes-explicit-photo-of-patient/6916174>.
144 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 62.
145 Ibid.
146 *Criminal Code* (WA) (n 5) s 203.
147 *Wright v McMurchy* (2011) 42 WAR 113.
148 *Summary Offences Act* 1966 (Vic) s 41B.

in Western Australian IBSA law.[149] As one in three respondents from a 2019 study reported that they had been a victim of the non-consensual creation of intimate images, it is imperative that Parliament amend Chapter XXVA so that victims are afforded protection from all three categories of IBSA.[150]

IV DEFENCES

In Western Australia, it is a defence to a charge of distributing an intimate image without consent under s 221BD of the *Criminal Code* (WA) if the distribution of the intimate image was for genuine scientific, educational or medical purposes.[151] It is also a defence if the distribution was for media activity purposes and the distributor did not intend to cause harm to the depicted person, and the distributor believed it was in the public interest to distribute the image.[152] Moreover, it is a defence if the distribution was reasonably necessary for legal proceedings or if a reasonable person would consider the distribution of the image to be acceptable.[153] The exception regarding the reasonable person test gives the court capacity to consider factors that expand or reduce the criminality of a non-consensual distribution. These include, but are not limited to, the nature of the content, the circumstances in which the image was distributed, and the mental capacity or vulnerability of the person depicted.[154] For example, the distribution of nude baby photos would not be an offence as these would be considered acceptable distributions by a reasonable person.[155] Similarly, it is not an offence for a law enforcement agency to distribute an intimate image when acting in the course of their official duties.[156] This inclusion ensures that legitimate law

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149 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 61.
150 *Criminal Code* (WA); Powell et al (n 3) 3.
151 *Criminal Code* (WA) (n 5) s 221BD(3)(a).
152 Ibid s 221BD(3)(c).
153 Ibid s 221BD(3)(b) and (d).
154 Explanatory Memorandum, Criminal Law Amendment (Intimate Images) Bill 2018 (WA) 5.
155 Ibid 5.
156 *Criminal Code* (WA) (n 5)s 221BD(4).

enforcement activities are not frustrated by this offence.[157] The defence of accident under s 23B of the *Criminal Code* (WA) may also be available for an unintentional distribution.[158]

V PUNISHMENT AND REMEDIES

Similar to other Australian jurisdictions, Western Australia imposes a statutory maximum penalty of three years' imprisonment for the non-consensual distribution of intimate images to third parties, or eighteen months' imprisonment and a fine of $18,000 if tried summarily.[159] These hefty penalties are a strong deterrent and send a clear message that the non-consensual distribution of intimate images will not be tolerated.[160] In Western Australia, a conviction under s 221BD of the *Criminal Code* (WA) is subject to the protections and diversionary measures available under the *Young Offenders Act 1994* (WA), including a caution or referral to a juvenile justice team.[161] A conviction will also not result in a person under the age of eighteen being registered as a sex-offender under the *Community Protection (Offender Reporting) Act 2004* (WA). This is because the legislation recognises that young people are unlikely to have displayed the sexual deviancy necessary to pose an ongoing risk to the community and warrant sex-offender registration.[162] A 2018 study titled 'Vagaries, Anxieties and the Imagined Paedophile: A Victorian Case Study on Mandatory Sex Offender Registration for Young Adult Registrants Convicted after Non-Consensually Distributing Intimate Images' found the emotional and practical impacts of registration on the youths were immense, upending their career trajectories and

157 Ibid s 221BD(4).
158 Ibid s 23B.
159 Ibid s 221BD(2).
160 Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 August 2018, 4311 (Peter Katsambanis) 1.
161 Western Australia, *Parliamentary Debates,* Legislative Assembly, 28 June 2018, 4156b–4159a (John Quigley) 3.
162 Ibid.

compromising their mental health.[163] On top of these concerns, registration also has implications for the youths' family lives. If the youths are registered, they may not be able to live at home or in foster care as they would be in proximity to children.[164] The purpose of the IBSA legislation is to protect victims; mandatory registration of young offenders who did not display sexual deviancy nor pose a risk to the community would not further this purpose.[165] As such, Western Australia's stance of not registering minors as sex-offenders when convicted under s 221BD is an important one.

For many IBSA victims, the most important remedy is removal of images or other intimate media from the Internet.[166] In October 2017, the Office of the eSafety Commission introduced a complaints portal whereby members of the public can report IBSA and request the timely removal of images. This important service provides effective relief for victims while also referring victims to relevant support services.[167] Similarly, a court may order a person charged with an intimate image offence to take reasonable steps to remove or forfeit the image to the State.[168] Furthermore, as the court process can be lengthy and images can continue to be distributed during that time, a rectification order could mitigate further harm to the victim.[169] Rectification orders are controversial as a person need only be charged, not convicted of an offence before a rectification order can be enforced.[170] This appears to impute a presumption of guilt rather than innocence. However, on one view, if an

163 Laura Vitis, 'Vagaries, Anxieties and the Imagined Paedophile: A Victorian Case Study on Mandatory Sex Offender Registration for Young Adult Registrants Convicted after Non-Consensually Distributing Intimate Images' (2018) 7(4) *Crime Justice Journal* 115, 122–123.

164 Ibid.

165 If the youths have been found not to pose an ongoing risk to the community, being registered as a sex offender for a significant period of time will not provide additional benefit to the community as the Court has already stated that they do not display sexual deviancy or pose a future risk. Mandatory registration on a sex offender registry imposes a disproportionate punishment on those young offenders.

166 Henry, Flynn and Powell, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (n 18), 577.

167 Ibid.

168 *Criminal Code* (WA) (n 5) s 221BE.

169 Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 August 2018, 4313 (Peter Katsambanis); Western Australia, *Parliamentary Debates,* Legislative Assembly, 28 June 2018, 4156b-4159a (John Quigley).

170 Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 August 2018, 4313 (Peter Katsambanis).

offence was not committed, then the accused does not suffer any detriment by forfeiting the image.[171] Orders that assist in removing images from the public are important avenues of recourse for victims as they stop the perpetual and constant nature of the abuse that occurs while images remain online and accessible.[172] As such, the benefit derived from serving the rectification order prior to a conviction would likely outweigh the burden placed on the accused.[173] Victims of IBSA may also have recourse under the Western Australian Government Criminal Injuries Compensation Scheme, which provides compensation for loss or injury to victims of crime.[174] Victims who suffer mental or nervous shock as a result of IBSA may be able to claim compensation for pain and suffering, loss of income, loss of enjoyment of life, and medical or psychological expenses.[175]

VI EFFECTIVENESS

In July 2019, Mitchell Brindley was the first person in Western Australia to be charged under s 221BD after posting naked images on fake Instagram accounts of a former girlfriend.[176] The prosecutor advocated for a jail term to deter this behaviour. However, Brindley avoided imprisonment and was sentenced to a twelve-month intensive supervision order.[177] This case was heavily publicised in Western Australian media, showing the prosecution of an appropriate offender, which served as a first step towards deterring IBSA.

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171 Ibid.
172 McGlynn et al (n 26) 7.
173 Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 August 2018, 4311 (Peter Katsambanis).
174 Government of Western Australia, *Victims of Crime* (Web Page) <https://www.victimsofcrime.wa.gov.au/C/criminal_injuries_compensation.aspx#:~:text=The%20WA%20Government%20Criminal%20Injuries,an%20offence%20or%20alleged%20offence>.
175 Ibid.
176 Charlotte Hamlyn, 'First person convicted under new WA 'revenge porn' laws avoids jail sentence', *ABC News* (online, 22 July 2019) <https://www.abc.net.au/news/2019-07-22/mitchell-brindley-first-person-in-wa-sentenced-for-revenge-porn/11331022>.
177 David Webber, 'First Person Charged Under WA Revenge Porn Is Set to Plead Guilty Over Instagram Images', *ABC News* (online 20 May 2019) <https://www.abc.net.au/news/2019-05-20/first-person-charged-under-wa-revenge-porn-laws-to-plead-guilty/11130368>.

While the Western Australian legislation is comprehensive and captures a wide range of problematic behaviours, there is a significant risk that, if not accompanied by a rigorous education program outlining the conduct constituting offences and the relevant penalties, the deterrence purpose of the legislation will be defeated.[178] It is not the legislators' intention to incarcerate a third of the population for these offences; the harsh penalties are intended to act as a strong deterrent and convey the message that IBSA will not be tolerated. Western Australia has not implemented a sufficient education program, and without informing the public of the existence and severity of this legislation, a larger proportion than intended will be sentenced to up to three years in jail, defeating the deterrence purpose of the legislation.[179]

Western Australian legislators should also consider creating an education program for police officers and those who enforce these laws. Numerous qualitative studies report that police are ill-equipped to deal with IBSA reports and that many engage in victim-blaming or lack the sensitivity needed when addressing such distressing matters.[180] The private and embarrassing nature of the content is another barrier to the conduct being reported, meaning many cases go unheard.[181] A training program for relevant law enforcement agencies on best practice regarding IBSA reporting may increase victims' willingness to come forward.[182]

Unlike sexual assault offences, victims of IBSA are not afforded anonymity or media blackouts at trial as of right.[183] The lack of an anonymity provision is a key critique of Chapter XXVA,[184] as the intimate and private nature of IBSA warrants an automatic grant of anonymity at trial.[185] If not

178 Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 August 2018, 4311 (Lisa Harvey) 9.
179 Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 August 2018, 4322 (David Honey).
180 Henry, Flynn and Powell, 'Image-based Sexual Abuse: Victims and Perpetrators' (n 1) 13.
181 Ibid.
182 McGlynn et al (n 26) 11.
183 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 97.
184 Ibid.
185 McGlynn et al (n 26) 13.

anonymised, the publicity associated with a court hearing could lead to the images being distributed and accessed more widely as the victims' names may be published in news reports and other external sources. This lack of anonymity as of right is a significant barrier to approaching police and proceeding to court as many victims are simply not willing to engage in these processes if their name will also be published.[186] Under the *Criminal Procedure Act 2004* (WA), the court can make an order that prohibits the publication of the whole or part of the proceeding outside the courtroom if it is in the interest of justice to do so,[187] or make an order prohibiting or restricting publication of any matter which is likely to lead members of the public to identify a victim of an offence.[188] The principle of open justice requires that court proceedings be open to public and professional scrutiny to prevent injustice and to instil confidence in the integrity and impartiality of the judicial system.[189] The principle of open justice requires that any departure from this rule be both exceptional and as narrow as reasonably necessary.[190] However, s 171(4) of the *Criminal Procedure Act 2004* (WA) provides an 'unequivocal indication that it can be in the interest of justice to protect the identities of victims of crime'.[191] This protection is consistent with policy contained in the *Victims of Crime Act 1994* (WA).[192] However, victims may not be aware of these protections and may choose not to approach authorities because they are fearful of having their case publicised. In order to combat these barriers to reporting and facilitate greater access to justice for victims, the *Criminal Code* (WA) should be amended to provide victims with automatic anonymity, media blackouts or suppression orders at trial. Such an amendment would encourage more victims of IBSA to come forward and

186 Ibid.
187 *Criminal Procedure Act 2004* (WA) s 171(4)(b).
188 Ibid s 171(4)(c).
189 *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).
190 *Re Hogan; Ex part Western Australian Newspapers Ltd* [2009] WASCA 221, 298 [40] (McLure P).
191 Ibid 298 [41] (McLure P).
192 Ibid.

ultimately proceed to court as it would provide protection for the victim throughout the criminal justice process, a key aim of Chapter XXVA.[193]

Law enforcement agencies also face barriers to enforcement, namely that IBSA provisions are summary offences in a number of jurisdictions.[194] As a summary offence, law enforcement responses, including powers of arrest and the ability to obtain a warrant to seize devices, are limited.[195] In Western Australia, distributing an intimate image without consent is an indictable offence that can also be tried summarily.[196] This provides law enforcement agencies with their full range of investigation powers and provides the option to try less serious cases summarily in the Magistrates Court, side-stepping challenges faced in South Australia and Victoria.[197]

Prosecution is difficult when an IBSA offence crosses jurisdictional borders. If an image is uploaded in Victoria, for example, there is little recourse for a victim who resides in Western Australia as the cross-jurisdictional nature of the offence makes it difficult for police to establish which State has jurisdiction.[198] To effectively prosecute IBSA offences, uniform or Commonwealth legislation should be implemented.[199] In 2015, a private members bill attempting to cover IBSA was introduced but lapsed in 2016.[200] Social media does not have state boundaries, and neither should these offences.

VII FINAL REMARKS

193 McGlynn et al (n 26) 13.
194 *Summary Offences Act 1966* (Vic); *Summary Offences Act 1953* (SA).
195 Henry, Flynn and Powell, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (n 18), 570.
196 *Criminal Code 1913* (WA) (n 5) s 221BD.
197 Henry, Flynn and Powell, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (n 18), 570.
198 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 99.
199 Ibid 100.
200 Criminal Code Amendment (Private Sexual Material) Bill; Ibid 58.

IBSA is a complex phenomenon that requires equally complex regulation to effectively protect victims and deter these widespread and harmful behaviours.[201] The *Criminal Code* (WA) effectively regulates IBSA in Chapter XXVA by making express provision for the offence of non-consensually distributing an intimate image with a statutory maximum penalty of three years' imprisonment, or if tried summarily, a statutory maximum penalty of eighteen months' imprisonment and a fine of $18,000.[202] Chapter XXVA is comprehensive and makes provision for numerous forms of IBSA in order to protect as many people from IBSA as possible.[203] Although not contained within Chapter XXVA, threatening to distribute an intimate image is prohibited under ss 338(e), 338A, and 338B and carries the same penalties as distributing an image without consent under s 221BD of the *Criminal Code* (WA).

While there is some protection for victims of upskirting under s 203 of the *Criminal Code* (WA), Chapter XXVA should be amended to include specific upskirting provisions to fill this significant gap in Western Australia's IBSA legislation. The inclusion of a provision similar to s 41B of the *Summary Offences Act 1996* (Vic) would provide justice for victims of upskirting and voyeurism who currently fall through this legislative crack.[204] As with all legislation pertaining to the regulation of technology, IBSA legislation—in particular the definition of 'distribute'—must be regularly amended to keep pace with technological improvements and remain effective.[205] As cultural practices change, so too must these laws.[206] Parliament has acknowledged this need by embedding a requirement for the

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201 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 14.

202 *Criminal Code* (WA) (n 5) s 221BD.

203 This includes providing for victims of 'morph porn' (*Criminal Code* (WA) (n 5) ss 221BA and 221BD) and transgender victims whose breasts were exposed in an image that was distributed without their consent.

204 *Criminal Code* (WA) (n 5) s 203.

205 Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 August 2018, 4311 (Peter Katsambanis).

206 Henry, Flynn and Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (n 9) 58.

relevant Minister to prepare a report in 2022 to review the operation and effectiveness of the legislation within s 221BF of the *Criminal Code* (WA).[207]

Even if the most comprehensive and unambiguous IBSA laws were implemented, there would still be numerous barriers to reporting IBSA that would prevent cases from reaching the courts.[208] The private and sensitive nature of the content often makes victims reluctant to report IBSA to the police.[209] When this reluctance is coupled with victim-blaming and a lack of empathy from law enforcement agencies, it is clear why many cases never make it to court. An education program for police and other relevant law enforcement officers focusing on building empathy and providing accurate advice could aid in improving the willingness of victims to seek help and ultimately proceed to trial.[210] Additionally, the lack of anonymity as of right in court proceedings and the potential for further publicity of their intimate images is another burden that many victims are unwilling to bear.[211] As such, victims of IBSA should also be afforded automatic anonymity or media blackouts at trial to reduce these barriers to justice.[212]

Unfortunately, harsher penalties alone do not necessarily deter criminal conduct. As one of the principal purposes of IBSA legislation is deterrence, Western Australia must also invest in an extensive education program to inform the public of existence of the IBSA laws and their severe penalties.[213] Without actual knowledge of the consequences of their actions, people will continue to engage in these harmful behaviours.[214] Additionally, as the Western Australia IBSA legislation is contained within the *Criminal Code* (WA), this does not empower the victim or provide an accessible avenue to

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207 Criminal Code (WA) (n 5) s 221BF; *Criminal Law Amendment (Intimate Images) Act 2019* (WA).
208 Henry, Flynn and Powell, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (n 18), 574.
209 McGlynn et al (n 26) 6.
210 Ibid 5.
211 Ibid 13.
212 Ibid 1.
213 Western Australia, *Parliamentary Debates,* Legislative Assembly, 14 August 2018, 4311 (Lisa Harvey).
214 Ibid.

gain relief as the decision to prosecute the matter lies with the State, not the victim.[215] Should a statutory tort for serious invasions of privacy become part of Western Australian law, victims may be success obtaining compensation for their loss and suffering through this civil cause of action.[216]

As it stands, the *Criminal Code* (WA) is largely effective in regulating IBSA as it captures a wide range of potential victims within two of the three main categories of IBSA. Chapter XXVA imposes harsh penalties for offending conduct and sends a strong message that IBSA is unacceptable. However, prosecuting IBSA that traverses State borders is difficult, and victims are often unable to obtain justice.[217] Ultimately, in order to effectively regulate IBSA, the Commonwealth Government must implement uniform IBSA legislation to provide consistency across jurisdictions. [218]

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215 Bunn (n 40) 25.
216 Ibid 25, 28.
217 Henry, Flynn and Powell, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (n 18), 577.
218 Western Australia, *Parliamentary Debates,* Legislative Assembly, 22 August 2018, 5022b-5024a (Sue Ellery) 3; Ibid 577.

THE EUROPEAN UNION'S DIGITAL COPYRIGHT LAW REVIEW: MERIT THROUGH PUBLIC PARTICIPATION

NIKOS KOUTRAS*

EUROPEAN UNION LAW—PUBLIC DISCOURSE—
MULTILEVEL GOVERNANCE—PUBLIC CONSULTATION—
COPYRIGHT LAW—LAW REFORM

ABSTRACT

A multilevel consultative approach to governmental decision-making is increasingly being adopted in the European Union. On the back of this shift, it is prudent to consider the use of such consultative approaches in reforming digital copyright law. The adoption of a multilevel consultative approach has the potential to significantly benefit European Member States and increase political integration in Europe. Such an approach can address the complex dispersion of power amongst different levels of public institutions in the European Union and support effective decision-making. The 2014 Charter for Multilevel Governance ('Charter') established a sophisticated governance framework to enhance operational and institutional cooperation and decision-making mechanisms among European Member States. Subsequently, the Charter and the concept of multilevel consultation formed an important facet of the European Union's review of copyright regulation. The objective of this article is to evaluate the merits of a multilevel consultative approach by analysing its use in the European Union digital copyright law review process.

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I INTRODUCTION

Adopting a multilevel consultative model when designing digital copyright laws in the European Union could help lawmakers better calibrate competing proprietary and public interests and formulate effective governance frameworks. The process of public consultation is a critical instrument that enables various segments of society—including individuals, industry stakeholders and government institutions—to participate in public policy decision-making effectively.[1] Public consultation incentivises different societal layers to participate in discussions and form a democratic foundation for the subsequent drafting of policies.[2] 'Multilevel governance' is a form of public consultation, first developed to consider the complex dispersion of power amongst different levels of public institutions in the European Union.[3] This approach was formally adopted by the Committee of the Regions ('CoR') on 3 April 2014 and supported by the Congress of Local and Regional Authorities of the Council of Europe through the 2014 *Charter for Multilevel Governance* ('*Charter*'). The *Charter* forms, in essence, a political manifesto that invites public authorities to make multilevel governance a reality in day-to-day policymaking and delivery. This is primarily achieved by creating partnerships between the different levels of government—local, regional, national, and European—and applying a set of principles to guide efficient policymaking. These principles include participation, cooperation, openness, transparency, inclusiveness, and policy coherence.

The public consultation on the review of European copyright regulations, held between 5 December 2013 and 5 March 2014, forms an interesting example of multilevel governance. The consultation covered a broad range of issues identified in the European Commission's communication concerning the regulation of content in the *Digital Single*

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1 Rhion Jones and Elizabeth Gammell, *The Politics of Consultation* (CreateSpace Independent Publishing Platform, 2018) 41.

2 Penny Norton and Martin Hughes, *Public Consultation and Community Involvement in Planning: A Twenty-First Century Guide* (Taylor & Francis, 2017) 73, 144.

3 Knud Erik Jørgensen, *Reflective Approaches to European Governance* (Springer, 2016) 39, 89.

Market (‘DSM’).[4] Issues addressed included territoriality in internal market governance, harmonisation, limitations and exceptions to copyright in the digital age, fragmentation of the European copyright market, and ways to improve the effectiveness and efficiency of enforcement.[5] The broad objective of this public consultation was to collect input from all stakeholders regarding the European Commission’s opinion on the European copyright regulations, with particular focus on how existing copyright laws could be reformed to better address the digital age. More recently, the concept of multilevel governance has been used in all levels of government in policy design, helping entities learn from each other, share preferred practices, and advance participatory democracy.[6]

While it is widely accepted that public consultation has the potential to do public good by facilitating a two-way flow of information and opinion between civil society and governments,[7] the benefit of a multilevel governance approach in the formulation of copyright policies and laws has not been the subject of detailed analysis.[8] This article aims to analyse the copyright law review consultation process to determine the merits of adopting a multilevel governance approach. This article will begin by examining the nature of public consultation and multilevel governance and considering their conceptual underpinnings. Scaffolding on this theoretical understanding, this article will then use the above copyright public consultation process as an extended case study to analyse the merits of adopting a multilevel governance approach to public policy.

4 European Commission, ‘Communication from the Commission: On Content in the Digital Single Market’ (2012) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0789&from=EN>; Mirela Mărcuț, *Crystalizing the EU Digital Policy: An Exploration into the Digital Single Market* (Springer, 2017) 192.

5 Bernd Justin Jütte, *Reconstructing European Copyright Law for the Digital Single Market: Between Old Paradigms and Digital Challenges* (Nomos Verlag, 2017) 115, 162.

6 Carlo Panara, *The Sub-National Dimension of the EU* (Springer International Publishing, 2015) 51, 66.

7 Isabel Brusca and Juan Carlos Martínez, ‘Adopting International Public Sector Accounting Standards: A Challenge for Modernizing and Harmonizing Public Sector Accounting’ (2016) 82(4) *International Review of Administrative Sciences* 724, 726.

8 DeWayne Kurpius, ‘Consultation Theory and Process: An Integrated Model’ (2012) 56(7) *The Personnel and Guidance Journal* 18, 22.

II THE PROCESS OF PUBLIC CONSULTATION

The participation of civil society in the legislative process is advanced through the process of public consultation.[9] In contemporary times, the process of public consultation has become common practice in Europe.[10] Indeed, public consultation mechanisms constitute a significant part of the European Commission's activities, from policy-shaping prior to the creation of a proposal through to the final implementation of measures by legislatures at a Member State level.[11] Consultation provides opportunities for input from representatives of regional and local authorities, civil society organisations, as well as individual concerned citizens, academics and technical experts.[12]

The public consultation process has both benefits and potential pitfalls.[13] Its central aim is to encourage the public to have meaningful input into the decision-maker's role in the context of national drafting regulations.[14] Public participation thus provides an opportunity for enhanced communication among decision-making agencies and the public. Exchanging views can give an early warning system for public concerns, a means through which accurate and timely information can be disseminated, and contribute to sustainable decision-making.[15] Additionally, it establishes an efficient way to collect experiences and opinions from citizens, key stakeholders, and experts to get a comprehensive overview of problems and their impact on the daily lives of people and businesses in Europe. Yet, consultations too often only

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9 Patrizia Nanz and Jens Steffek, 'Global Governance, Participation and the Public Sphere' (2004) 39(2) *Government and Opposition* 314, 317; Jens Steffek and Maria Paola Ferretti, 'Accountability or "Good Decisions"? The Competing Goals of Civil Society Participation in International Governance' (2009) 23(1) *Global Society* 37, 38.

10 W Robert Lovan, Michael Murray and Ron Shaffer, *Participatory Governance: Planning, Conflict Mediation and Public Decision-Making in Civil Society* (Routledge 2017) 55, 91.

11 Kurpius (n 8), 24.

12 Keith Culver and Paul Howe, 'Calling All Citizens: The Challenges of Public Consultation' (2004) 47(1) *Canadian Public Administration* 52, 58; Christine Quittkat, 'The European Commission's Online Consultations: A Success Story?' (2011) 49(3) *Journal of Common Market Studies* 653, 660; Daniel Pop and Roxana Radu, 'Challenges to Local Authorities under EU Structural Funds: Evidence from Mixed Quasi-Markets for Public Service Provision in Romania' (2013) 51(6) *Journal of Common Market Studies* 1108, 1118.

13 Fred A De Laat, Bart van Heerebeek and Jaap J van Netten, 'Advantages and Disadvantages of Interdisciplinary Consultation in the Prescription of Assistive Technologies for Mobility Limitations' [2018] *Disability and Rehabilitation: Assistive Technology* 1.

14 Thomas A Birkland, *An Introduction to the Policy Process* (M E Sharpe, 2015) 43.

15 Denis Bouyssou et al, *Decision Making Process: Concepts and Methods* (John Wiley & Sons, 2013) 95.

encompass industry stakeholders and do not effectively involve all relevant stakeholders.[16] Research suggests that the most common respondents to invitations to participate are industry entities and Member States.[17] This serves to potentially reduce the nature and extent of participation and mitigate the value of the process. In such a context, it is helpful to consider the nature of multilevel governance and its potential to strengthen the process of public consultation.

III A Conceptual Analysis of Multilevel Governance

A *The Notion of Multilevel Governance*

The term 'governance' is associated with a wide variety of concepts and principles. Weiss defines 'global governance' as 'collective efforts to identify, understand or address worldwide problems that go beyond the capacity of individual States to solve'.[18] He suggests that global governance forms a 'complex of formal and informal institutions, mechanisms, relationships, and processes between and among States, markets, citizens and organisations, both inter and non-governmental, through which collective interests on the global plane are articulated, rights and obligations are established, and differences are mediated'.[19] Consistent with this definition of global governance, 'European governance' has been characterised as a system of rules and institutions established by the European Community and private actors to manage political, economic, and social affairs. The basic principles guiding European Governance, legally anchored in its various Treaties, are democracy, social equity, human rights, and the rule of law. This process of multilevel governance can help embed these principles in the

16 Christine Quittkat and Beate Kohler-Koch, *Involving Civil Society in EU Governance: The Consultation Regime of the European Commission* (Oxford University Press, 2013) 73.
17 Jenny Stewart, *The Dilemmas of Engagement: The Role of Consultation in Governance* (ANU E Press, 2009) 22, 32; Nathaniel Copsey and Tim Haughton, 'The Choices for Europe: National Preferences in New and Old Member States' (2009) 47(2) *Journal of Common Market Studies* 263, 372.
18 Thomas G Weiss, *Thinking about Global Governance: Why People and Ideas Matter* (Taylor & Francis, 2012) 37, 55.
19 Ibid 110.

institutions, rules, and political systems of European Union Member States, ensuring that they are respected by all sectors of society.[20]

Historically, the concept of 'multilevel governance' flowed from the study of European integration in the nineties (e.g., the *Maastricht Treaty* and its subsidiary principles) and the notion of decentralisation.[21] Scholars note that the European Union is characterised by two distinct phases of development. The first phase was dominated by international relations studies. The European Union was viewed as an international organisation alongside institutions such as NATO, the OECD, and the United Nations. In comparison, during the second phase, the European Union became a unique international organisation.[22] The adoption of the principles of multilevel governance highlights the unique political features of the European Union system, characterised by interconnected institutions that exist at multiple levels.[23] As has been frequently noted, the European Union is a political system characterised by a European layer (European Commission, European Council and European Parliament), a national layer, and a regional layer. These layers interact with each other in two ways: (1) across different levels of government (vertical dimension); and (2) with other relevant actors within the same level (horizontal dimension).[24] Accordingly, the multilevel governance model serves to strengthen the effectiveness of decision-making in the European Union.

In addition, multilevel governance supports the European Union's political objectives, including economic growth, social progress, sustainable development, and the development of the European Union as a global actor.[25] Multilevel governance reinforces the democratic dimension of the European Union and increases the efficiency of the applicability of its policies because

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20 *The Committee of the Regions' White Paper on Multilevel Governance* [2009] OJ C 211/1.

21 Yannis A Stivachtis, *The State of European Integration* (Ashgate Publishing Limited, 2013) 107–10.

22 Mark Gilbert, *European Integration* (Rowman & Littlefield Publishers, 2017) 19.

23 Ian Bache, *Europeanization and Multilevel Governance: Cohesion Policy in the European Union and Britain* (Rowman & Littlefield Publishers, 2007) 52.

24 Dermot Hodson and John Peterson, *The Institutions of the European Union* (Oxford University Press, 2017) 66.

25 Lea Pfefferle, *The EU: A Global Player?* (GRIN Verlag, 2012) 26.

it rarely applies symmetrically or homogenously.[26] It is relevant to note that there are some significant differences between multilevel governance and other integration theories. The main difference is that it breaks the grey zone between intergovernmentalism and supranationalism, leaving in its place a descriptive structure. Further, multilevel governance does not directly address the sovereignty of States but instead enables sub-national and supranational actors to contribute to the creation of policy and law. In this context, the purpose of the next section of this article is to consider in greater detail how a multilevel governance approach can contribute to European integration.[27]

B *Multilevel Governance in the European Union*

Since the emergence of the objective of European integration, there has been extensive discussion around both the underlying dynamics of the integration process and the nature of the emerging political system.[28] Within the two most important opposing schools of thought—neofunctionalism and intergovernmentalism—early discussion focused on the process of integration.[29] However, in the aftermath of the speeding-up of the integration process with the *Single European Act* (1986) and the *Maastricht Treaty* (1992), the focus of European studies shifted from aims and dynamics of the integration process to description and analysis of the actual day-to-day workings of the political system of Europe.[30]

This shift from integration to analysis of the workings of the political process in European studies has been accompanied by an opening up of this area of study to a number of sub-disciplines of political science and public

26 Erik Oddvar Eriksen and John Erik Fossum, *Rethinking Democracy and the European Union* (Routledge, 2013) 28.

27 Maurizio Carbone, *National Politics and European Integration: From the Constitution to the Lisbon Treaty* (Edward Elgar Publishing, 2010) 24.

28 Robert Thomson, Resolving Controversy in the European Union: Legislative Decision-Making Before and After Enlargement (Cambridge University Press, 2011) 78; Katrin Milzow, National Interests and European Integration: Discourse and Politics of Blair, Chirac and Schröder (Springer, 2012) 46.

29 Ilyas Saliba, *Neofunctionalism vs Liberal Intergovernmentalism: Are the Theories Still Valid Today?* (GRIN Verlag, 2010) 11; Tanja A Börzel, *The Disparity of European Integration: Revisiting Neofunctionalism in Honour of Ernst B Haas* (Routledge, 2013) 56.

30 Klaus H Goetz and Simon Hix, *Europeanised Politics? European Integration and National Political Systems* (Routledge, 2012) 134.

administration.[31] Since then, numerous studies have addressed issues that had previously not been investigated, such as the impact of the European Union on the Member States and legitimacy in Europe. It follows that local and regional governments are now effectively part of European multilevel governance.[32] Firstly, sub-national layers are directly connected with the policy process in the area of regional policy—albeit the opportunities to shape different stages of policy vary from country to country.[33] Secondly, since the *Maastricht Treaty* established the CoR, local and regional governments are now formally part of the European decision-making framework.[34] Thirdly, many European policies have a direct impact on the tasks of sub-national governments (e.g. in the areas of public environment).[35] This is reflected in the literature relating to European studies, now being an increasingly important facet of research in the field of comparative political science.[36]

Federalism and public-private partnerships reflect two distinct types of multilevel governance.[37] The first tradition adopts a state-centred view and argues that, like other international organisations, the European Union should be treated as a forum of cooperation for Member States to enhance their problem-solving capacities.[38] Based on this model, multilevel governance underpins theories on how the distribution and functioning of political authority in the world have been and are being reshaped. This type of multilevel governance theory highlights above all the changing role and relevance of the traditional nation-state. Accordingly, multilevel governance

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31 Pamela M Barnes and Thomas C Hoerber, *Sustainable Development and Governance in Europe: The Evolution of the Discourse on Sustainability* (Routledge, 2013) 30, 231.

32 Markus Perkmann, 'Policy Entrepreneurship and Multilevel Governance: A Comparative Study of European Cross-Border Regions' (2007) 25(6) *Environment and Planning C: Government and Policy* 861, 880; George C Homsy and Mildred E Warner, 'Cities and Sustainability: Polycentric Action and Multilevel Governance' (2015) 51(1) *Urban Affairs Review* 46, 58.

33 Nicholas Charron, Lewis Dijkstra and Victor Lapuente, 'Regional Governance Matters: Quality of Government within European Union Member States' (2014) 48(1) *Regional Studies* 68, 82.

34 Thomas Christiansen and Simon Duke, *The Maastricht Treaty: Second Thoughts after 20 Years* (Routledge, 2016) 88.

35 Philip Lynch et al, *Reforming the European Union: From Maastricht to Amsterdam* (Routledge, 2014) 57; Helen Wallace, Mark A Pollack and Alasdair R Young, *Policy-Making in the European Union* (Oxford University Press, 2015) 63.

36 Theofanis Exadaktylos and Claudio M Radaelli, *Research Design in European Studies: Establishing Causality in Europeanization* (Palgrave Macmillan, 2012) 34.

37 Bache (n 23) 51.

38 George Pagoulatos and Loukas Tsoukalis, 'Multilevel Governance' [2012] *The Oxford Handbook of the European Union*, 25–6.

is located among those international relations paradigms that have examined the transformations of the state-centric system over the past few decades.[39]

However, this growing body of research does not mean that it has been easy to analyse the application of the multilevel governance approach to the complex political system of the European Union.[40] As a preliminary issue, there is considerable disagreement regarding how the European Union shapes multilevel governance discussion.[41] Without doing injustice to the nuanced and detailed arguments that can be found in the literature, two broad lines of argument can be distinguished. One view is that multilevel governance theory should best be built on a broad and abstract definition, which includes Europe as the vanguard of the political change that extends beyond the European Union and contributes to global political transformation.[42] This theory pays more attention to the structural dimensions of multilevel governance rather than to its processes. This is due both to its primary focus on the state and its loss of authority and functions in the international order, and the practical need to embrace and analyse a vast range of areas and empirical phenomena. Finally, this theory prioritises the study of public and territorial levels of governance over the analysis of non-state actors.[43]

In contrast, the second model of multilevel governance focuses on delineating the creation and implementation of public policy.[44] This is a more concrete variant of multilevel governance theory, with less focus on the historical break with the Westphalian order and greater focus on the actual working of political and administrative frameworks.[45] The main focus of this

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39 Tiziana Caponio and Michael Jones-Correa, 'Theorising Migration Policy in Multilevel States: The Multilevel Governance Perspective' (2018) 44(12) *Journal of Ethnic and Migration Studies* 1995, 1996.

40 Eriksen and Fossum (n 26) 36.

41 Søren Dosenrode, *The European Union After Lisbon: Polity, Politics, Policy* (Routledge, 2016) 157–159.

42 Frank H Aarebrot, *The Handbook of Political Change in Eastern Europe* (Edward Elgar Publishing, 2014) 1–12; Maria T Grasso, *Generations, Political Participation and Social Change in Western Europe* (Routledge, 2016) 13–25.

43 Dominic Stead, 'The Rise of Territorial Governance in European Policy' (2014) 22(7) *European Planning Studies* 1368, 1368–70; Natal'ya V Buley et al, 'Public Administration and Municipal Governance and Its Significance for a Modern Democratic Society' (2016) 6(8) *International Journal of Economics and Financial Issues* 220, 220–2; Bob Jessop, 'Territory, Politics, Governance and Multispatial Metagovernance' (2016) 4(1) *Territory, Politics, Governance* 8, 18.

44 Christopher Alcantara, Jörg Broschek and Jen Nelles, 'Rethinking Multilevel Governance as an Instance of Multilevel Politics: A Conceptual Strategy' (2016) 4(1) *Territory, Politics, Governance* 33, 40.

45 Robbie Waters Robichau and Laurence E Lynn, 'The Implementation of Public Policy: Still the Missing

theoretical model is how multilevel governance frameworks function day by day.[46] This type of multilevel governance is built by combining existing partial theoretical and empirical considerations of a coherent system covering several interrelated subjects. First, the origins and dynamics of policy related political mobilisation phenomena specific to multilevel governance, including subnational lobbying and the formation of political alliances (e.g., sectoral boundaries and the divide between public and private).[47] Second, the formulation, territorial structuring, and temporal advancement of multilevel polices.[48] The use of such an approach is reflected in the public consultation surrounding the 2014 review of copyright regulations in Europe.[49] European policy networks played a central role in the formulation, deliberation, and implementation of European policies.[50] The review accumulated different copyright stakeholders' opinion and aimed to contribute to enhanced regulation. Such regulation, which results from public consultation and involves innovations of governance that trace down the lifecycle of regulations and laws, has been termed 'better regulation'.[51] The purpose of the following section is to consider in greater detail the concept of 'better regulation' and its connection to multilevel governance.

C *Innovations in Governance: Multilevel Governance as an Instrument of Better Regulation*

Multilevel consultations can be a useful tool for achieving innovations in governance. As mentioned, the use of innovations in governance to achieve better outcomes has been termed 'better regulation'. The 'better regulation'

Link' (2009) 37(1) *Policy Studies Journal* 21, 33.

46 Homsy and Warner (n 32).

47 Seong-Jin Choi, Nan Jia and Jiangyong Lu, 'The Structure of Political Institutions and Effectiveness of Corporate Political Lobbying' (2014) 26(1) *Organization Science* 158, 162.

48 Elodie Fabre and Wilfried Swenden, 'Territorial Politics and the Statewide Party' (2013) 47(3) *Regional Studies* 342, 360.

49 Tanja A Börzel and Karen Heard-Lauréote, 'Networks in EU Multi-Level Governance: Concepts and Contributions' (2009) 29(2) *Journal of Public Policy* 135, 142.

50 Michael Blauberger and Berthold Rittberger, 'Conceptualizing and Theorizing EU Regulatory Networks' (2015) 9(4) *Regulation & Governance* 367, 374.

51 Claudio M Radaelli and Anne C M Meuwese, 'Better Regulation in Europe: Between Public Management and Regulatory Reform' (2009) 87(3) *Public Administration* 639, 644.

scheme was first formally introduced through the 2001 European Commission White Paper entitled *European Governance*,[52] and expanded through a subsequent an expert group report.[53] Scholars suggest that multilevel consultation affects the way in which rules are assessed before adoption, how stakeholders intervene in rulemaking, and how the executive and parliaments should appraise the evidence-base of policy proposals, down to the level of inspections and enforcement.[54] This framing indicates that the rationale of 'better regulation' is well-aligned with the objectives of public consultation. In other words, involved participants should have a word in the policy formulation, rulemaking, rules adoption and enforcement.

Proponents of the 'better regulation' scheme articulate its threefold objective, namely to: (1) change governance and law-making processes by increasing the role of evidence in public decision making, creating opportunities for affected interests to be consulted at an early stage when options are being devised; (2) increase competitiveness by minimising regulatory burdens and providing efficient regulations; and (3) address legitimacy problems of the regulatory state by improving consultation procedures.[55] It will be suggested below that this threefold approach could be usefully adopted to the formulation of the European copyright regime.

Consideration of the 2014 copyright regulations review process can help elucidate how a multilevel governance approach can contribute to innovations in governance and a better copyright regulatory framework for Europe.[56] In examining the copyright review process, it is useful to consider

52 European Commission, *COM(2001) 428 Final: European Governance* (2001).

53 Mandelkern Group, *Mandelkern Group on Better Regulation Final Report* (Report, 13 November 2001) 91, 96.

54 Paul Cairney, *The Politics of Evidence-Based Policy Making* (Springer, 2016) 31.

55 Katherine Elizabeth Smith et al, 'Corporate Coalitions and Policy Making in the European Union: How and Why British American Tobacco Promoted "Better Regulation"' (2015) 40(2) *Journal of Health Policy Law* 325, 325–7; Morten Jarlbaek Pedersen, 'Qui Exanimis Nascitur: Can Better Regulation in the European Union Really Be a Servant of Technocracy' (2017) 8(2) *European Journal of Risk Regulation* (EJRR) 387.

56 Christophe Geiger, Oleksandr Bulayenko and Giancarlo F Frosio, *Opinion of the CEIPI on the European Commission's Copyright Reform Proposal, with a Focus on the Introduction of Neighbouring Rights for Press Publishers in EU Law* (Social Science Research Network, 5 December 2016) 9; Víctor Rodríguez-Doncel et al, 'Legal Aspects of Linked Data: The European Framework' (2016) 32(6) *Computer Law & Security Review* 799, 808; 'General Opinion on the EU Copyright Reform Package' *European Copyright Society* (Web Page, 24 January 2017) 4–6 <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-

the stakeholders who were involved. Was it a broad range of stakeholders, including individual citizens or was it largely confined to industry? It is also relevant to consider whether all levels in the multilevel governance system participated, not just the established Member States. Finally, it is necessary to consider whether and to what extent this approach impacted on the final draft of the *InfoSoc Directive*.[57] The objective of the next section of this article is to examine the 2014 copyright review process and consider these critical issues in detail.

IV THE MERITS OF MULTILEVEL GOVERNANCE: AN ANALYSIS OF THE EUROPEAN COPYRIGHT REGULATION REVIEW PROCESS

A *Overview*

The European copyright regulation review process forms a valuable case study in which a multilevel consultation approach was applied.[58] The objective of this multilevel consultation was to gather input from all relevant stakeholders on the Commission's review of the European copyright rules. As part of this review process, extensive multilevel public consultations were conducted between 5 December 2013 and 5 March 2014. These multilevel consultations were intended to provide opportunities for input from representatives of regional and local authorities, civil society organisations, the individual citizens concerned, academics, and technical experts. Arguably, this public consultation formed the first visible sign of the second track of the European Commission's attempt to modernise the European copyright regulations. The first track consisted of the Licenses for Europe stakeholder dialogue.[59] According to the European Commission, the focus of

reform-def.pdf>.

57 Péter Mezei, 'A Comprehensive Guide to the InfoSoc Directive' (2020) 15 (1) *Journal of Intellectual Property Law & Practice* 71, 71-72.

58 Rainer Eising et al, 'Who Says What to Whom? Alignments and Arguments in EU Policy-Making' (2017) 40(5) *West European Politics* 957, 970; Arthur Benz, Andreas Corcaci and Jan Wolfgang Doser, 'Multilevel Administration in International and National Contexts' in Michael W Bauer, Christoph Knill and Steffen Eckhard (eds), *International Bureaucracy: Challenges and Lessons for Public Administration Research* (Palgrave Macmillan UK, 2017) 151, 153–5.

59 Eleonora Rosatti, Originality in EU Copyright: Full Harmonization Through Case Law (Edward Elgar Publishing, 2013) 48.

the effort was on 'ensuring that the EU copyright regulatory framework stays fit for purpose in the digital environment to support creation and innovation, tap the full potential of the Single Market, foster growth and investment in our economy and promote cultural diversity'.[60]

This objective of multilevel participation is reflected in the diversity of stakeholders who were invited to participate from different Member States (see Annex 1). Significantly, among the parties responding were respondents from European Member States which entered the European Union during the last decade, including Slovakia (2004), Slovenia (2004), Latvia (2004), Hungary (2004), Estonia (2004), Bulgaria (2007), Romania (2007), and Croatia (2013). Hence, the copyright regulations review did not only attract the views of 'old' Member States, but it also attracted expressions of concerns from 'younger' Member States.[61] As such, the consultation process was inclusive and encompassed various forms of stakeholders (see Annexes 1 and 2).

A comprehensive picture of the consultation process is obtained by examining the different types of respondents involved in the consultation process. An analysis of the participants (6915 in total) illustrates that all the European Member States were involved (see Annex 2). Respondents represented different societal facets, including end-users, institutional users, authors, publishers, service providers, public authorities, and collective management organisations. Moreover, respondents expressed views on various topics, including information archiving, preserving and disseminating, and relevant licensing regimes.

It is also valuable to interpret the results of the questionnaire used for the public consultation on the review of the European copyright regulations. Of particular relevance is the section which interprets responses to research

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60 Giuseppe Vitiello, 'The Economic Foundation of Library Copyright Strategies in Europe' (2021) 31(1) *The Journal of the Association of European Research Libraries* 1, 28.

61 Marc Arbyn et al, 'The Challenges of Organising Cervical Screening Programmes in the 15 Old Member States of the European Union' (2009) 45(15) *European Journal of Cancer* 2671, 2673.

related questions (Questions 47–49). This section of the questionnaire addressed the research exception set out in art 5(3)(a) of the *InfoSoc Directive* and was intended to gather the respondents' experiences of the use of copyright-protected works in the context of research projects, including across borders, and their views on how problems—if identified—should be solved. In the present context, it is particularly relevant to examine responses by actors involved in the scholarly publishing research cycle, in particular: (1) end users (also considered as consumers); (2) institutional users; (3) authors and performers; (4) publishers, producers and broadcasters; and (5) service providers and intermediaries. The responses of these parties are discussed below.

B *End Users*

For the purposes of the responses, the terms 'end users' or 'consumers' refer to researchers. The consultation found that such researchers were generally unsatisfied with the current situation. Even though a research exception existed in some Member States, respondents still reported problems in accessing scientific publications or scholarly articles. Students and researchers highlighted that access to the greatest possible range of academic publications was key for the completeness and accuracy of their research.[62] They indicated that they were often unable to access online certain material they need for their academic work. Some respondents considered that the more reputable and high-quality scientific journals commonly made access to their content difficult, through 'paywall' restrictions.[63] The cost of subscriptions was considered disproportionate and excessive for individual researchers. Researchers considered that this situation was particularly difficult in the case of publicly funded research. They argued that publications

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62 Ana Maria Ramalho Correia and José Carlos Teixeira, 'Reforming Scholarly Publishing and Knowledge Communication: From the Advent of the Scholarly Journal to the Challenges of Open Access' (2005) 29(1) *Online Information Review* 349, 355.

63 Mikael Laakso and Andrea Polonioli, 'Open Access in Ethics Research: An Analysis of Open Access Availability and Author Self-Archiving Behaviour in Light of Journal Copyright Restrictions' (2018) 116(1) *Scientometrics* 291, 301.

which presented the results of publicly funded research should always be made available without restriction.[64]

Most respondents considered that open-access publishing was a suitable solution to increase access to research content. They noted some effective examples of open-access archives and networks. However, many respondents also argued that there were barriers that prevented open access from working in an optimal way and considered that open access should be better supported.[65] It was also mentioned that open-access journals are sometimes considered to lack prestige or have low citation index scores, making it less attractive to publish in such a journal. A frequently raised problem was that scientific publishers often require that authors of scientific publications to agree upon unduly restrictive contract conditions, for example, that their work cannot be put in open-access databases.[66]

The opinion submitted by 25 leading European research centres on the '*EC Copyright Directive*'—part of the European copyright regulations review—warrants special attention. The research centres submitted that the proposed exception for text-and-data mining in art 3 of the '*EC Copyright Directive*' would not achieve its goal to stimulate innovation and research if restricted to certain organisations. Additionally, they submitted that the proposals for a new publishers' right under art 11 would favour incumbent press publishing interests rather than innovative quality journalism, and that the proposals for art 13 could threaten the user participation benefits of the *e-Commerce Directive (2000/31/EC)*.[67]

C *Institutional Users*

64 Quan-Hoang Vuong, 'Plan S, Self-Publishing, and Addressing Unreasonable Risks of Society Publishing' (2021) 33(1) *Learned Publishing* 64, 66.

65 Andrea De Mauro, Marco Greco and Michele Grimaldi, 'What Is Big Data? A Consensual Definition and a Review of Key Research Topics' (2015) 1644(1) *AIP Conference Proceedings* 97, 101

66 See, eg, Mohashin Pathan et al, 'FunRich: An Open Access Standalone Functional Enrichment and Interaction Network Analysis Tool' (2015) 15(15) *Proteomics* 2597.

67 Arno R Lodder, 'Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market' in Arno R Lodder, Andrew D Murray (eds), *EU Regulation of E-Commerce: A Commentary* (Edward Elgar Publishing, 2017) 15.

Many institutional users reported problems in the practical implementation of the research exception at national level. Many believed that this exception had been implemented too narrowly by some Member States, which they argued had resulted in a limited use of the exception by its intended beneficiaries. Institutional users commonly further noted that only a few Member States (e.g. Estonia) had applied the exception in a technology-neutral manner.[68]

More generally, institutional users highlighted that considerable online content was only available for payment and was burdened with digital rights management tools. They stressed that remote access to university libraries collections should be further facilitated in the area of research as it formed a much more practical alternative to onsite consultation. Some respondents further noted that licenses for scientific articles often limited the number of users that could access the material at the same time. They argued that this was problematic, given that research projects often involved several researchers, sometimes from different universities or institutes, including across borders, who needed to have access at the same time. Several institutional users from Northern Europe reported their experiences with extended collective licenses. Some pointed out that such mechanisms have not been very useful in the area of research as they are cumbersome to negotiate and limited in scope. As a solution, these respondents recommended that a mandatory and technology-neutral research exception be adopted at the European level.

D *Authors and Performers*

Most authors considered that there were generally no problems with access to content for research purposes and expressed no pressing concerns in relation to the current research exception. These respondents noted that the combination of licenses and exceptions offered users considerable flexibility

[68] Brad Greenberg, 'Rethinking Technology Neutrality' (2015) 100(4) *Minnesota Law Review* 1495, 1557.

to access content for research purposes. Authors and performers generally stated that licenses are a good addition to whatever use would not be covered by a national exception. However, some authors and performers noted logistical difficulties in tracking use and receiving appropriate remuneration.

E *Publishers, Producers and Broadcasters*

Respondents in this category largely felt that the current exception worked well. Any possible shortcomings with access to research publications could be easily dealt with through licensing agreements. They considered that licenses were the preferred option in the field of research as they ensured quality and security and protected against possible abuses. Licenses terms were sufficiently broad to allow for the exchange of information necessary to carry out research, including across borders.[69]

Some respondents pointed out that scientific publishers already offered some ninety percent of their products through licensing to educational institutions, which allowed researchers, students, and teachers to have access to that content. Representative of Scientific Technical and Medical ('STM') publishers reported alternative access models were being developed, such as 'pay-per-view' or rental for online viewing, which they considered particularly useful for researchers not affiliated to an institution or requiring only occasional access. Specific market-led initiatives were also mentioned, such as one in France where textbook publishers had been making works available in digital format via certain online portals. Notable examples cited included 'Canal Numérique des Savoirs' and 'WizWiz'. Other licensing projects mentioned included the 'RightsLink' platform and 'Conlicencia' in Spain.

F *Intermediaries, Distributors and Other Service Providers*

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[69] Tomas A Lipinski, *The Librarian's Legal Companion for Licensing Information Resources and Services* (American Library Association, 2013) 153; Robert W Gomulkiewicz, *Licensing Intellectual Property: Law and Applications* (Wolters Kluwer Law & Business, 2014) 85.

Respondents in this category felt that the prevailing European copyright framework did not adequately fulfil the mission of online service providers concerning museums in the digital environment. The problems largely related to copyright issues that have formerly been frequently discussed in the context of 'Europeana' and other digitisation efforts.[70] While it was felt that there had been some progress, most notably the *2012 European Directive on Certain Permitted Uses of Orphan Works*, there were still obstacles facing memory institutions wanting to operate in the digital environment. They therefore welcomed the fact that the European Commission was reviewing the European copyright rules and that issues relating to memory institutions formed part of the review. This gave these institutions the opportunity to draw attention to the problems they were facing and present the policy outcomes that they needed in order to fulfil their public missions.[71] They further noted that new models of access and use of digital collections are needed to respond to technological innovations that reshape the role and mission of one-memory institutions such as museums.[72]

V THE CONTRIBUTION OF PUBLIC CONSULTATION TO COPYRIGHT POLICY FORMULATION AND LAW REFORM

After the public consultation was completed, the European Commission went through a lengthy process of collating and considering the findings. Subsequently, in 2016, the European Commission proposed a new Directive to update its copyright framework entitled '*Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*' ('*EC Copyright Directive*' henceforth).[73] The '*EC Copyright*

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70 Carlo Meghini et al, 'Introducing Narratives in Europeana: A Case Study' (2019) 29(1) *International Journal of Applied Mathematics and Computer Science* 7, 10.

71 Yiwen Wang et al, 'Recommendations Based on Semantically Enriched Museum Collections' (2008) 6(4) *Journal of Web Semantics* 283, 289; Graeme Were, 'Digital Heritage, Knowledge Networks, and Source Communities: Understanding Digital Objects in a Melanesian Society' (2014) 37(2) *Museum Anthropology* 133, 135.

72 Enrico Bertacchini and Federico Morando, 'The Future of Museums in the Digital Age: New Models of Access and Use of Digital Collections' (2011) 15(2) *International Journal of Arts Management* 1, 10.

73 European Commission, *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market* Doc No 2016/0280, 14 September 2016.

Directive' sought to reflect the diversity of views gathered through the consultation process.[74] Since then, there has been further negotiation and several amendments to the proposal.[75] The most controversial parts of the '*EC Copyright Directive*' are art 11 which relates to press publishers rights, and art 13 which is intended to address the so-called 'value gap'. Article 13 (use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users) is aimed at large consumer-focussed platforms like YouTube. The '*EC Copyright Directive*' creates an obligation for hosts of such services, where no licences are in place, to monitor what content is being uploaded to their platforms, in order to remove any infringing materials.

In May 2018, the European Council's permanent representative committee ('COREPER') agreed to amendments to the Commission's draft '*EC Copyright Directive*'. Further, on 29 June 2018, the European Parliament's lead committee, the Legal Affairs Committee ('JURI'), agreed to amendments to the Commission's proposal in consultation with three other parliamentary committees: the Committee on Civil Liberties, Justice and Home Affairs ('LIBE'); the Committee on the Internal Market and Consumer Protection ('IMCO'); and the Committee on Industry, Research and Energy ('ITRE'). Before progressing to the next stage of 'trilogue' negotiations, the European Parliament approved and adopted the draft proposal agreed upon by the JURI committee as the formal Parliamentary negotiating position. However, in July 2018, the European Parliament rejected the '*EC Draft Directive*. This seemed to be in response to the European citizens who rang,

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74 European Commission, Directorate General Internal Market and Services, *Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules* (July 2014) 101 <http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf>.

75 Staffan Albinsson, 'The Resilience of Music Copyrights: Technological Innovation, Copyright Disputes and Legal Amendments Concerning the Distribution of Music' (2013) 5 *Culture Unbound: Journal of Current Cultural Research* 401, 405; Ibid 101; Jeremy Fleming, 'Artists Fight Internet Users over Europe's Copyright Future', *Euractiv* (Web Page, 13 January 2015) <https://www.euractiv.com/section/digital/news/artists-fight-internet-users-over-europe-s-copyright-future/>.

emailed, and visited in significant numbers their Members of the European Parliament to ask them to oppose art 13.[76]

The European Union's internet governance rules are likely to be substantially amended in the near future.[77] The final version of the *'EC Copyright Directive'* has been under examination and discussions for the last three years and was published on 17 April 2019.[78] It is expected the '*EC Copyright Directive*' will be transposed within the next two years into the national laws of European Union Member States, once finalised.[79] The European Commission stated that the '*EC Copyright Directive*' pursues to establish the right equilibrium between stakeholders' interests—such as users, authors, creators, and press—while setting up obligations on online platforms, accordingly.[80]

Nevertheless, the proposed text of the '*EC Copyright Directive*' has been criticised by some Member States, including the Netherlands, Luxembourg, Poland, Italy and Finland, and has been characterised as conservative rather than progressive approach to the governance of the Digital Single Market.[81] The most critical and contentious facet of the '*EC Copyright Directive*' rules is the rigid liability rules concerning online content-sharing platforms, such as YouTube and Facebook.[82] Since 1998, under laws in place in the European Union and the United States, internet service providers

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76 Annemarie Bridy, 'The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform' (2020) 22(2) *Vanderbilt Journal of Entertainment & Technology Law* 323.

77 Christina Angelopoulos, 'Study on Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market' (Research Paper No 2947800, University of Cambridge, 6 April 2017) <https://doi.org/10.17863/CAM.23091>.

78 *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC* [2019] OJ L 130/92 (Directive 2019/790'). See also Vincent Ferrer, 'Right This Way: A Potential Artificial Intelligence-Based Solution for Complying with Article 13 of the EU's 2018 Copyright Directive' (2019) 948 *Law School Student Scholarship* 1.

79 Wim Voermans, 'Transposition of EU Legislation into Domestic Law: Challenges Faced by National Parliaments' in Patricia Popelier et al (eds), *Lawmaking in Multi-Level Settings: Legislative Challenges in Federal Systems and the European Union* (Nomos Verlagsgesellschaft, 2019) 243, 244.

80 Aleksandra Kuczerawy, 'EU Proposal for a Directive on Copyright in the Digital Single Market: Compatibility of Draft Article 13 with the EU Intermediary Liability Regime' (Research Paper No 3309099, Social Science Research Network, 19 December 2018) 9.

81 Council of the European Union, 'Joint Statement by the Netherlands, Luxembourg, Poland, Italy and Finland' (2019) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_7986_2019_ADD_1_REV_2&from=EN>.

82 Christina Angelopoulos and Joao Pedro Quintais, 'Fixing Copyright Reform' (2019) 10(2) *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 147, 151.

('ISPs') have enjoyed a safe place from liability for infringing only if they failed to investigate after receiving notice from copyright holders about where such materials were located.[83] Article 17 of the '*EC Copyright Directive*' (art 13 in earlier drafts) imposes severe liability on parties who use online content-sharing sites to commit acts of copyright infringements, and imposes obligations on entities to use 'best efforts to ensure the unavailability of specific works'.[84] Assuming that the European Member States will state that the concept of 'best efforts' requires platforms to use filtering technologies, this provision has been called an 'upload filter' use.[85]

The '*EC Copyright Directive*'s severe liability rules may however interfere with user freedoms relating to copyright works—especially the creation of parodies or critical commentaries—as filtering technologies are not adept at differentiating such protected uses from clear infringements. It has been suggested that the new rules will bring loss, 'damage' for freedom of expression, and information privacy interests of individual proprietors and end-users.[86] The extent of loss will depend on how '*EC Copyright Directive*' is implemented on a Member State level and how courts interpret its provisions, some of which are ambiguous. Thus, despite the long history of public consultation, and the many revisions and iterations of the ensuing '*EC Copyright Directive*', there are still areas of ongoing disagreement and debate which justifies reasoning based on which it is not yet finalised.[87]

VI Conclusion

83 Thomas Spoerri, 'On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market' (2019) 10(2) *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 173, 175.

84 Directive 2019/790 (n 78).

85 Jacob Jensen, 'Dissecting the EU's Directive on Copyright: Implications for Creative Tools, Collaboration Sites, and End-Users' (2019) 33(1) *Brigham Young University Prelaw Review* 1, 6.

86 Lorna Woods, 'Digital Freedom of Expression in the EU' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing, 2017) 394, 188–190.

87 Gerald Spindler, 'Copyright Law and Internet Intermediaries Liability' in Tatiana-Eleni Synodinou et al (eds), *EU Internet Law in the Digital Era: Regulation and Enforcement* (Springer International Publishing, 2020) 3.

As the world becomes increasingly interdependent, governments and socio-economic and civil society actors need to pursue opportunities to collaborate and explore areas of mutual concern to formulate effective laws. It is especially crucial for the European Union to be in a position to put forward, defend, and flexibly adapt its unique multilevel model of governance in this evolving multi-actor networked modern world. This article argues that a paradigm shifts away from isolated governance towards interacting and interrelated collaboration in Europe can be achieved through multilevel consultation.

The above analysis of the copyright reform multilevel consultation process suggests that the first objective of such a 'better regulation' scheme should be to change governance and law-making processes by increasing the role of evidence in public decision making and by creating opportunities for affected interests to be consulted at an early stage when policy options are being devised. Indeed, the copyright consultation process reveals how European society's perspectives and priorities on copyright can shape the formulation of policy and law. Furthermore, the examination of the copyright review process reveals the value of integrating the views of critical stakeholders—for example, the Independent Film & Television Alliance ('IFTA') and the Association of European Research Libraries ('LIBER')—at a primary stage before transposing the '*EC Draft Directive*' into national law policy making.

However, it is evident that the second objective of the above-mentioned scheme—to increase competitiveness by minimising regulatory burdens and providing efficient regulations—has not yet been fully actualised. Indeed, at this stage it is not even possible to monitor whether this objective is being pursued at a national level. It appears that European institutions are not yet fully aware of potential regulatory burdens on a national level. Additionally, even during the transposition phase, started in April 2019, it is not feasible to precisely assess how the consultations have impacted the final forms of the national copyright laws. Further, the form and content of the '*EC Copyright*

Directive' suggests that the last objective of this scheme, to address the legitimacy problems of the regulatory state by improving procedures, has also not been investigated on a national level yet. A mechanism to address legitimacy issues at a national level has not been specified as part of the public consultation process.

Thus, while multilevel consultation is a sound model of public participation, the copyright review process and the '*EC Copyright Directive*' reveal that there are a variety of practical obstacles to the successful implementation of such a process. There is at present a lack of efficient communication of the main topic of the public consultation process to national stakeholders who can potentially have an affected interest. Moreover, the public consultation process to date has led the European Commission to focus on and engage with its own discussion—termed the 'trilogue' process—rather than with the outcomes of the consultation process. Further, instruments required to support the public consultation process, such as measures to address legitimacy problems at a national level, have not been introduced. Despite such challenges, it is suggested that it is important to keep pursuing the ideal of multilevel consultation and governance. Addressing the above identified problems and refining the process of multilevel consultation has the potential to offer effective solutions for European Member States to advance public-private partnerships and strengthen collaboration towards the overarching objective of political integration.

VII ANNEX 1—TYPE OF RESPONDENTS

The following tables of statistics have been produced by the undersigned author to reflect the accentuated multilevel perspective based on participants involved from different Member States:

	Type of respondent	Number of Responses
1	End user/consumer or Representative of end users/consumers	4210
2	Institutional user or Representative of institutional users	219
3	Author/performer of Representative of authors/performers	1596
4	Publisher/producer/broadcaster or Representative of publishers/producers/broadcasters	623
5	Intermediary/distributor/other service provider or Representative of intermediaries/distributors/other service providers	75
6	Collective Management Organisation	47
7	Public authority	11
8	Member State	15
9	Other	120
	TOTAL	**6915**

VIII Annex 2—Member States

Member State	TYPE OF RESPONDENT				
	1	**2**	**3**	**4**	**5**
1. Austria	5.2%	4.1%	18.6%	10.4%	41.3%
2. Belgium	1.1%	21%	2.9%	16%	9.3%
3. Bulgaria			0,12%	0,6%	
4. Croatia	0.23%	0.9%	0.18%		
5. Cyprus					
6. Czech Republic	2.3%	3.2%	0.9%	0.6%	
7. Denmark	0.9%	2.3%	1.9%	2.2%	1.3%
8. Estonia		1.8%	0.06%		
9. Finland	1.2%	3.6%	0.7%	0.8%	
10. France	8.8%	2.3%	12%	20.9%	2.7%
11. Germany	29.7%	8.2%	14.3%	18%	6.7%
12. Greece	0.4%	0.9%	0.62%		
13. Hungary	0.23%	0.9%	0.12%		
14. Ireland	0.47%	1.8%	0.56%	0.5%	1.3%
15. Italy	1.6%	1.8%	1.62%	3%	1.3%
16. Latvia	0.23%	0.4%			
17. Lithuania	0.23%	0.9%			
18. Luxembourg					1,3%
19. Malta					
20. Netherlands	3%	11%	8.6%	4%	4%
21. Poland	6.6%	1.8%	3.3%	4%	2.7%
22. Portugal		0.9%		1.1%	
23. Romania	0.4%	1.8%	0.2%	0.5%	
24. Slovakia	0.23%		1.4%	0.2%	
25. Slovenia	0.23%	2.7%	0.4%		1.3%
26. Spain	6.9%	10.5%	2%	2.7%	
27. Sweden	5.2%	3.2	1.8%	2%	2.7%
28. United Kingdom	7.6%	11.9%	8.1%	7.4%	5.3%
29. Not mentioned/Not indicated	14.2%	2.7%	8.1%	5%	16%
TOTAL	**4210**	**219**	**1596**	**623**	**75**

Type of respondents (codification):

1. End-user/consumer
2. Institutional user
3. Author/performer
4. Publisher/producer/broadcaster
5. Intermediary/distributor/other service provided

NORTH KOREA: RISKING MORE THAN A BLOODY NOSE

CIARA NALTY*

PUBLIC INTERNATIONAL LAW—US-NORTH KOREAN RELATIONS—USE OF FORCE—THREAT TO USE FORCE—UNITED NATIONS CHARTER ART 2(4)—SELF-DEFENCE—HUMANITARIAN INTERVENTION

ABSTRACT

Between 2013 and 2018, the threat of nuclear war became far more tangible than in previous years, as actions and statements by both the Democratic People's Republic of Korea and the United States of America indicated a willingness to use force against one another. This article argues that although the Democratic People's Republic of Korea's increasing nuclearization and inflammatory statements constitute a threat to use force, the United States is restricted from engaging in a 'bloody nose' strike because of the lack of available responses under international law. The United States ultimately does not have any means by which it could independently or collectively use force against the Democratic People's Republic of Korea. Alternatively, it is apparent that the United States requires the authorisation of the United Nations Security Council before it could utilise force individually, collectively, or as a humanitarian response.

I INTRODUCTION

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The Democratic People's Republic of Korea ('North Korea') is a state that has been hostile to the outside world, at least to some extent, since the Korean War. In contemporary geopolitics, North Korea's acceleration of its nuclear weapons testing has sparked concern amongst its neighbours and other nuclear powers. The North Korean nuclear program has been a particular cause of consternation for the United States of America ('US'), leading to tenuous relations between the US and North Korea over the last few decades. In more recent years, North Korean-US relations have devolved significantly, and by early 2018, various news outlets reported on President Trump's alleged plans for a pre-emptive military strike against North Korea, labelled a 'bloody nose' attack.[1]

This article argues that although North Korea's increasing nuclearisation and inflammatory statements constitute a threat to use force, the US is restricted from engaging in a 'bloody nose' strike because of the lack of available responses under international law. In order to demonstrate how North Korea's actions and statements constitute a threat to use force, the international law framework of *jus ad bellum* will be considered before ultimately concluding that North Korea's stated readiness to use weapons for an unauthorised purpose would be considered a threat to use force. The concept of *jus ad bellum* will then be considered in relation to the US' ability to respond to North Korea's threats, with specific focus on possible avenues of individual, collective (with Japan and South Korea) or humanitarian responses. This will be achieved by considering both international law and

[1] Gerald F Seib, 'Amid Signs of a Thaw in North Korea, Tensions Bubble Up', *The Wall Street Journal* (online, 9 January 2018) <https://www.wsj.com/articles/amid-signs-of-a-thaw-in-north-korea-tensions-bubble-up-1515427541>; Mira Rapp-Hooper, 'The Cataclysm That Would Follow a "Bloody Nose" Strike in North Korea', *The Atlantic* (online, 31 January 2018) <https://www.theatlantic.com/international/archive/2018/01/the-cataclysm-that-would-follow-a-bloody-nose-strike-in-north-korea/551924/>; Michael E O'Hanlon and James Kirchick, 'A "Bloody Nose" Attack in Korea Would Have Lasting Consequences', *Brookings* (Web Page, 26 February 2018) <https://www.brookings.edu/blog/order-from-chaos/2018/02/26/a-bloody-nose-attack-in-korea-would-have-lasting-consequences/>.

the US' existing state practice and by assessing the feasibility of a proposed 'bloody nose' attack on North Korea.

A limitation to the research contained within this article is the difficulty to accurately surmise the military capabilities of North Korea, given that a substantial proportion of available information originates from highly censored North Korean state news outlets. The lack of transparency in North Korea thus affects the reliability of information derived from state news sources. This article will also be limited to an analysis of the period from 2013 (when North Korea resumed its nuclear program) until the end of 2018. The selected timeframe between 2013 and 2018 saw an end to the exchange of threats between the US and North Korea but precedes the denuclearisation talks between the US and North Korea that remain unresolved. In any event, the current state of relations between the US and North Korea is constantly developing, and North Korea continues to test its weapons capabilities today.[2]

II Contextual Background

Despite the aforementioned tensions between the US and North Korea, North Korean-US relations have not always been so fractured. In 1994, President Bill Clinton and the North Korean government entered into an Agreed Framework[3] to suspend the North Korean nuclear program in exchange for energy aid from the US.[4] However, after George W Bush's ascension to US Presidency, the US became more distrustful of North Korea because of accusations made by the Bush administration that North Korea was in possession of nuclear weapons.[5] In President Bush's State of the Union

2 Oh Seok-min and Choi Soo-hyang, '(2nd LD) N Korea Fires Barrage of Missiles on Eve of Founder's Birthday, S Korea's Elections', *Yonhap News Agency* (online, 14 April 2020) <https://en.yna.co.kr/view/AEN20200414006452325?section=nk/nk>.

3 International Atomic Energy Agency, Agreed Framework of 21 October 1994 Between the United States of America and the Democratic People's Republic of Korea, Information Circular, INFCIRC/457 (2 November 1994).

4 Niv Farago, 'Washington's Failure to Resolve the North Korean Nuclear Conundrum: Examining Two Decades of US Policy' (2016) 92(5) *International Affairs* 1127, 1129.

5 Kelly Wallace, John King and Andrea Koppel, 'Rumsfield: N Korea May Have Nuclear Weapons

address after the 9/11 attacks, he referred to North Korea as part of an 'axis of evil' and as a 'regime arming with missiles and weapons of mass destruction, while starving its citizens'.[6] By late 2002, the Agreed Framework had collapsed, with the US citing Pyongyang's covert nuclear enrichment operations as the basis for its undoing.[7]

In 2003, North Korea withdrew from the *Treaty on the Non-Proliferation of Nuclear Weapons* ('the NPT')[8] after being a state party since 1985, and the six-party talks ensued.[9] These talks were a series of multilateral negotiations between the US, North Korea, South Korea, China, Russia and Japan, which sought to negotiate a reduction in North Korea's nuclear programs.[10] The talks failed to make any lasting impact, and after an abortive attempt at renegotiating the Agreed Framework, North Korea resumed its nuclear enrichment program,[11] stating that 'the DPRK will boost its nuclear deterrent for self-defence in every way'.[12] Post-Bush, the Obama administration did not prioritise negotiating denuclearisation with North Korea. Instead, the Obama administration took the approach of 'strategic patience'—an approach which entailed not alienating North Korea, but rather focusing on United Nations ('UN') sanctions and waiting for North Korea to be willing to enter further negotiations. Pyongyang dramatically increased its nuclear testing regime during this time, conducting 74 tests from 2008 to 2016, compared to 23 tests from 1984 to 2008.[13]

Already', *CNN* (online, 17 October 2002) <https://edition.cnn.com/2002/US/10/17/us.nkorea/>.

6 George W Bush, 'The President's State of the Union Address' (Speech, United States Congress, 29 January 2002) <https://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html>.

7 Farago (n 4) 1129–30.

8 *Treaty on the Non-Proliferation of Nuclear Weapons,* opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).

9 Farago (n 4) 1135.

10 Ibid 1136–8.

11 Ibid 1138–40.

12 Democratic People's Republic of Korea Foreign Ministry, 'DPRK Foreign Ministry Vehemently Refutes UNSC's "Presidential Statement"' (Media Release, Korean Central News Agency, 14 April 2009) <https://kcnawatch.org/newstream/1451886844-302374302/dprk-foreign-ministry-vehemently-refutes-unscs-presidential-statement/>.

13 The James Martin Center for Nonproliferation Studies, 'The CNS North Korea Missile Test Database', *Nuclear Threat Initiative* (Web Page, 16 October 2020) <https://www.nti.org/analysis/articles/cns-north-korea-missile-test-database/>.

While negotiations between North Korea and the US on the potential denuclearisation of North Korea stalled in 2020,[14] the situation from 2013 to 2018 was far more tenuous, as North Korea carried out missile testing and dispensed increasingly aggressive threats towards the US. In 2018, President Trump responded to these threats in an equally hostile fashion by declaring on Twitter that the US possessed more powerful nuclear weapons.[15] With North Korea having already withdrawn from the NPT by this time,[16] Pyongyang's actions and statements appeared more credible than ever before. Overall, when considering US-North Korean relations, it is important to be conscious of the respective positions of the US and North Korea in the current geopolitical framework. The US is a state with extensive military capabilities and the largest economy in the world that upholds itself as a beacon of global security. It is this position as a global hegemon that drives the US' interventionist foreign policy and rationalises the US' desire to undertake a 'bloody nose strike' against North Korea.

III Did North Korea's Statements or Actions Constitute an Actionable Threat to Use Force?

A *What is a Threat to Use Force?*

To examine whether North Korea's actions may constitute an actionable threat to use force, it is important first to consider what a threat to use force is and when such a threat is actionable in international law. For the purposes of this article, the use of force refers to an armed attack initiated by one state against another, independent of the United Nations Security Council's

14 Josh Smith and Hyonhee Shin, 'North Korea Wasted Chance to Improve Relations Under Trump, US Envoy Says', *Reuters* (online, 10 December 2020) <https://www.reuters.com/article/us-usa-southkorea-biegun-idUSKBN28K0FN>.

15 @realDonaldTrump (Twitter, 3 January 2018, 8:49 am AWST) <https://twitter.com/realDonaldTrump/status/948355557022420992>.

16 Frederic L Kirgis, 'North Korea's Withdrawal from the Nuclear Non-Proliferation Treaty', *American Society of International Law* (Blog Post, 24 January 2003) <https://www.asil.org/insights/volume/8/issue/2/north-koreas-withdrawal-nuclear-nonproliferation-treaty>.

('UNSC') authority. An armed attack was defined in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ('*Nicaragua*')[17] as the sending of an armed band or army, provided that the scale and effects of the operation exceeded that of a mere frontier incident.[18] Furthermore, an armed attack is not an objective assessment, but rather, the victim state must itself believe that such an attack occurred.[19] For example, if North Korea were to deploy nuclear weapons against South Korea, Japan or the US, this would be considered an *actual* use of force.

The use of force is governed by the principles of *jus ad bellum*, conditions that establish what is a 'just war' and must be considered before engaging in war or the use of force. The *Charter of the United Nations* ('*UN Charter*') sets out what use of force is lawful and is the primary source of *jus ad bellum*. Article 2(4) of the *UN Charter* states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The wording of art 2(4) suggests that the use of force must have an interstate element, however, it does not otherwise go further in its characterisation of a 'threat'. The discussions in UN forums surrounding the creation of art 2(4) also provide no further insight.[20] While the prohibition on a threat to use force is explicit in art 2(4), international law jurisprudence offers little guidance as to what constitutes a 'threat' to use force, with the question being the subject of much academic debate.[21] Brownlie, a leading international law scholar,

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17 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 ('Nicaragua').
18 Ibid 195.
19 Ibid.
20 Romana Sadurska, 'Threats of Force' (1988) 82(2) *American Journal of International Law* 239, 248.
21 Kevin Jon Heller, 'The Unlawfulness of a Bloody Nose Strike on North Korea' (2020) 96 *International Law Studies Series* 1, 5; Tom Ruys, 'The Meaning of Force and the Boundaries of the Jus ad Bellum: Are Minimal Uses of Force Excluded from UN Charter Article 2(4)?' (2014) 108(2) *The American Journal of*

defines the threat of force as 'an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government'.[22] Brownlie's definition appears to be favoured throughout the literature.[23]

A seminal case in international law that assists in the interpretation of a 'threat to use force' is the advisory judgment *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* ('*Nuclear Weapons (Advisory Opinion)*'),[24] handed down by the International Court of Justice ('ICJ'). The test for the use of force in *Nuclear Weapons (Advisory Opinion)* creates a hypothetical scenario, that if a state is going to use force, this use of force must conform with the Charter to be lawful.[25] The case also pertinently notes that where there is stated readiness to use force, it is considered an unlawful threat to use such force where the intended use of force itself would be illegal.[26] A threat would only be lawful if it fell within the accepted uses of force that already exist.[27] In *Nicaragua*, the ICJ held that states are free to determine their own militarisation (including the use and possession of weapons) under state sovereignty.[28] However, in *Nuclear Weapons (Advisory Opinion)*, the ICJ subsequently held that mere possession of nuclear weapons could be an implicit threat.[29] It should be noted that international law is continually developing, and while ICJ decisions provide guidance and may be persuasive, a country is not bound to act a certain way based on a previous ICJ decision that the country in question was not a party to.[30]

International Law 158, 162; Charles J Moxley Jr, 'The Sword in the Mirror: The Lawfulness of North Korea's Use and Threat of Use of Nuclear Weapons Based on the United States' Legitimization of Nuclear Weapons' (2004) 27(4) *Fordham International Law Journal* 1379, 1478–81.

22 Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963) 364.

23 Hannes Hofmeister, 'Watch What You Are Saying: The UN Charter's Prohibition on Threats to Use Force' (2010) 11(1) *Georgetown University Press* 107, 108; Sadurska (n 20) 242.

24 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226 ('Nuclear Weapons (Advisory Opinion)').

25 Ibid 246.

26 Ibid 244–5.

27 Charter of the United Nations arts 39, 51 ('UN Charter').

28 *Nicaragua* (n 17) 135.

29 Nuclear Weapons (Advisory Opinion) (n 24) 246.

30 Statute of the International Court of Justice arts 38, 59.

In the commentary on the International Law Commission's *Draft Code of Crimes against the Peace and Security of Mankind*,[31] 'threat' was considered to mean 'acts undertaken with a view to making a state believe that force will be used against it if certain demands are not met by that state'.[32] The Special Rapporteur on the *Draft Code of Crimes Against the Peace and Security of Mankind* also included another element to the definition of 'threat', contending that threat arises from the intention expressed by a state.[33] This can manifest as an act of aggression, intimidation, blackmail or other actions intended to appear threatening, such as increasing troops near an area of conflict.[34] As will be discussed further in this article, North Korea's reinstatement of its nuclear testing program may be considered a threat to use force, as it demonstrates an intent to use nuclear weapons if its demands of other nuclear powers are not met.

B *When is the Use of Force Permissible in International Law?*

Article 2(4) creates a general prohibition on the use of force. However, art 51 of the *UN Charter* confirms an exemption to this prohibition by maintaining the inherent right of Members to use individual or collective self-defence if an armed attack occurs. Pursuant to art 51, a Member is able to act in self-defence until the UNSC has 'taken measures necessary to maintain international peace and security'.[35] Article 39 of the UN Charter empowers the UNSC to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression' and to 'make recommendations, or decide what measures shall be taken in accordance with [arts] 41 and 42, to maintain or restore international peace and security'. Such measures may include the

31 International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind (adopted 1996).

32 'Draft Code of Crimes against the Peace and Security of Mankind with commentaries' (1989) II(2) *Yearbook of the International Law Commission 1989* 50, 68 ('Draft Code of Crimes Commentary'); Hofmeister (n 23) 108.

33 Hofmeister (n 23) 108.

34 Draft Code of Crimes Commentary (n 32) 73; Hofmeister (n 23) 108.

35 *UN Charter* (n 27) art 51.

ability to authorise the use of force where there is a 'threat to the peace, breach of the peace or act of aggression'. Together, arts 39 and 51 form the only exemptions to the prohibition on the use of force; they vest extensive authority in the UNSC to authorise force which, in turn, narrows the ability for member states to use force unilaterally—states may only act before the UNSC has authorised the use of force or before the UNSC has undertaken actions to restore peace and security.[36] An armed attack for any reason other than self-defence is therefore unlawful.[37] The intention behind these articles was 'to state in the broadest terms an absolute all-inclusive prohibition; …there should be no loopholes'.[38]

C *Actions and Statements by North Korea*

In light of the above discussion, the question now turns to whether North Korea's actions and statements can be considered an unauthorised threat to use force against the US. North Korea became a member of the UN in 1991 and is a signatory to the *UN Charter*.[39] However, despite being a signatory, North Korea's state practice is inconsistent with the principles prescribed in the *UN Charter*. In particular, North Korea has displayed a questionable human rights record and an extensive and ongoing disregard for sanctions and resolutions imposed by the UN in relation to its nuclear program,[40] demonstrating its own state practice, as defined in *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark)*.[41]

Tensions between the US and North Korea were heightened in 2013 after the UNSC Resolution 2094[42] was passed, imposing economic sanctions

36 Ibid,
37 Ibid arts 2(4), 51.
38 United Nations Conference on International Organization, 11th mtg, UN Doc I/1/27 (5 June 1945) 335.
39 UN Charter (n 27).
40 Bruce E Bechtol Jr, 'North Korean Illicit Activities and Sanctions: A National Security Dilemma' (2018) 51(1) *Cornell International Law Journal* 57, 58.
41 *North Sea Continental Shelf (Federal Republic of Germany v Denmark)* [1969] ICJ Rep 3, 43.
42 SC Res 2094, UN Doc S/Res/2094 (7 March 2013).

on North Korea for conducting nuclear tests. UNSC Resolution 2094 was partially drafted by China, which particularly offended North Korea as China had been one of the few states to support Pyongyang and continues to be North Korea's strongest trading partner.[43] In response to UNSC Resolution 2094, North Korea abandoned its long-standing armistice with South Korea and resumed its nuclear development program, conducting nuclear tests in defiance of UNSC resolutions and sanctions.[44] Between 2013 and 2018, North Korea radically increased its missile testing.[45] The nuclear missile testing program expanded to include intercontinental ballistic missiles[46] and hydrogen bombs[47]—dangerous weapons that posed a more potent threat to the US than ever before. While these tests were carried out in North Korea or international waters, arguably, the most overtly threatening action by North Korea was the ballistic missiles that landed in Japanese territorial waters. These missiles were launched without the Japanese government's consent or prior knowledge and triggered public warning systems in northern Japan.[48] Despite the missiles not being armed, Japan's Prime Minister called the launch an 'unprecedented, serious and grave threat'.[49]

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43 Morse Tan, 'International Humanitarian Law and North Korea: Another Angle for Accountability' (2015) 98(3) *Marquette Law Review* 1147, 1152.

44 Additional sanctions were imposed on North Korea in response to nuclear tests: SC Res 2087, UN Doc S/Res/2087 (22 January 2013); UNSC condemned, in strongest possible terms, nuclear tests and demanded compliance with international obligations: SC Res 2270, UN Doc S/Res/2270 (2 March 2016); UNSC imposed sanctions as a reaction to North Korean nuclear tests: SC Res 2321, UN Doc S/Res/2321 (30 November 2016); UNSC condemned ballistic missile launches by North Korea: SC Res 2371, UN Doc S/Res/2371 (5 August 2017); UNSC expanded on previously imposed sanctions on North Korean economy, in response to nuclear testing: SC Res 2375, UN Doc S/Res/2375 (11 September 2017); UNSC tightened sanctions on North Korea: SC Res 2397, UN Doc S/Res/2397 (22 December 2017) ('Resolution 2397').

45 Kelsey Davenport, 'Chronology of US-North Korean Nuclear and Missile Diplomacy', *Arms Control Association* (Fact Sheet, April 2020) <https://www.armscontrol.org/factsheets/dprkchron#2000>.

46 'North Korea: Second ICBM test proves US in strike range', *Al Jazeera* (online, 29 July 2017) <https://www.aljazeera.com/news/2017/07/north-korea-icbm-test-proves-strike-range-170729042200736.html>.

47 Jack Kim and Soyoung Kim, 'North Korea Says Conducts "Perfect" Hydrogen Bomb Test', *Reuters* (Online, 3 September 2017) <https://www.reuters.com/article/uk-northkorea-nuclear/north-korea-says-conducts-perfect-hydrogen-bomb-test-idUSKCN1BD0VY>.

48 'North Korea Fires Missile Over Japan', *Al Jazeera* (online, 29 August 2017) <https://www.aljazeera.com/news/2017/08/north-korea-fires-unidentified-missile-south-170828211447636.html>.

49 'North Korea Fires Missile Over Japan' (n 48); 'North Korea Fires Ballistic Missile', *Al Jazeera* (online, 29 November 2017) <https://www.aljazeera.com/news/2017/11/north-korea-fires-ballistic-missile-reports-171128183017472.html>.

Coupled with these tests, North Korea has made various inflammatory statements, threatening to 'sink' Japan and reduce the US to 'ashes and darkness'.[50] This rhetoric was fuelled by US President Donald Trump, who labelled Kim Jong-un 'rocket man' in a speech delivered to the UN General Assembly in 2017.[51] In response, North Korea contended that Trump's comments were a declaration of war on their nation, which would justify countermeasures such as shooting down US strategic bombers outside of the North Korean airspace.[52] While it has not been expressly stated, there is also an underlying risk that North Korea will utilise its nuclear weapons, if not against the US, then against one of the US' allies, such as South Korea or Japan.

D *Analysis of North Korean Actions and Statements*

For North Korea to be able to legitimately undertake any of the aforementioned actions, it would need to establish that doing so is an act of self-defence against an armed attack.[53] North Korea has repeatedly claimed its actions are in self-defence, as it still technically remains at war with South Korea, having never signed a treaty.[54] However, no armed attacks occurred in the period 2013 to 2018, nor have any since occurred—the action that immediately precipitated North Korea's reinstatement of its nuclear development program was the implementation of sanctions by the UNSC rather than any kind of armed attack. Furthermore, the statements of the Trump Administration also could not be considered an armed attack, which

[50] Jack Kim and Kiyoshi Takenaka, 'North Korea Threatens to "Sink" Japan, Reduce US to "Ashes and Darkness"', *Reuters* (online, 14 September 2017) <https://www.reuters.com/article/us-northkorea-missiles/north-korea-threatens-to-sink-japan-reduce-u-s-to-ashes-and-darkness-idUSKCN1BP0F3>.

[51] Donald Trump, 'Remarks by President Trump to the 72nd Session of the United Nations General Assembly' (Speech, United Nations General Assembly, 19 September 2017) <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-72nd-session-united-nations-general-assembly/>.

[52] Reuters Staff, 'Update 1: North Korea Accuses US of Declaring War, Says Can Take Countermeasures', *Reuters* (online, 25 September 2017) <https://www.reuters.com/article/northkorea-missiles-minister/update-1-north-korea-accuses-u-s-of-declaring-war-says-can-take-countermeasures-idUSL2N1M60TX>.

[53] *UN Charter* (n 27) art 51.

[54] Tan (n 43) 1198.

would give rise to an argument of self-defence,[55] as it appears clear that calling the leader of state 'rocket man' and other comparatively minor actions by the US are insufficient to claim there is an imminent threat of attack. Consequently, in establishing a 'lawful act of self-defence' under art 51 of the *UN Charter*, North Korea's claims fail to satisfy that there has been an 'armed attack'.[56]

Therefore, North Korea's stated readiness to use weapons for a purpose not authorised under international law would be considered a threat to use force. This view is strengthened by a consideration of Brownlie's definition, which incorporates demands by a government.[57] North Korea's ultimate aim has been to reunite the Korean Peninsula under the Pyongyang government. As a result, much of North Korea's foreign policy has been undertaken in pursuit of this goal, for example, by attending potential peace talks with South Korea and by threatening South Korea's other allies, the US and Japan, wherever possible. The ultimate demand could be interpreted to be reclaiming South Korea and forcing US involvement out of the Korean Peninsula. Despite the missiles that landed in Japanese territorial waters being unarmed, this action does exhibit a hostile intent and an act of aggression by North Korea.[58] This argument is strengthened by the *Nuclear Weapons (Advisory Opinion)*, which states that mere possession of nuclear weapons could be an implicit threat.[59] The continued defiant possession and development of nuclear weapons by North Korea and demonstrations of nuclear capability indicate a clear example of a threat to use force rather than a mere frontier incident.

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55 *Definition of Aggression*, GA Res 3314, UN Doc A/RES/3314(XXIX) (14 December 1974) art 2 ('*Definition of Aggression*'); Ruys (n 21) 172; Heller (n 21) 9.

56 *UN Charter* (n 27) art 51; James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 748.

57 Ibid 748; Brownlie (n 22) 364.

58 Ruys (n 21) 172.

59 Nuclear Weapons (Advisory Opinion) (n 24) 246.

IV WAS THE USE OF FORCE LAWFULLY AVAILABLE TO THE US?

The US has reacted in no uncertain terms to the statements and actions of North Korea, stating in its 2018 Nuclear Posture Review that 'any North Korean nuclear attack against the United States or its allies and partners is unacceptable and will result in the end of that regime'.[60] However, as will be demonstrated, if the US were to utilise force against North Korea, relying on art 51 of the *UN Charter*, it would be difficult to justify self-defence if it were to act individually. Collective self-defence would also have limited justification. The option to use force in a lawful manner could be open to the US if it were to receive authorisation from the UNSC; however, this decision is made by the UNSC and, as such, is not technically *open* to the US. In reality, it is also likely that China (as a major trading partner with North Korea) would veto any proposal to use force, rendering the option for UNSC intervention unlikely to eventuate. In addition, as will be explored further in this article, the Responsibility to Protect could further empower the US to use force against North Korea.[61]

A *Was the Use of Force available to the US acting individually?*

The US may choose to act unilaterally against North Korea using its own nuclear or defence capabilities, citing North Korea's threats as the basis for its action. However, it is unlikely that such use of force would be permissible under international law. In carrying out the aforementioned threats, North Korea has demonstrated that it possesses weapons of mass destruction and may possess the ability to attack the US.[62] However, the US cannot attack

60 United States of America Department of Defense, 'Nuclear Posture Review: February 2018' (Review, February 2018) 33; Jina Kim and John K Warden, 'Limiting North Korea's Coercive Nuclear Leverage' (2020) 62(1) *Survival* 31, 36.

61 *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60th Sess, 8th plen mtg, Agenda items 46–120, Supp No 49, UN Doc A/RES/60/1 (24 October 2005) 138–9 ('*2005 World Summit Outcome*').

62 Josh Smith and Michelle Nichols, 'US Warns North Korean Leadership Will Be "Utterly Destroyed" in Case of War', *Reuters* (online, 29 November 2017) <https://www.reuters.com/article/us-northkorea-missiles/north-korea-says-breakthrough-puts-u-s-mainland-within-range-of-nuclear-weapons-

North Korea based on statements alone, as there must be an actionable threat to use force, prompting the US to act in self-defence.

Following the tense exchanges in late 2017, the US considered a proposal for a 'bloody nose strategy' against North Korea.[63] This strategy would involve the US to 'react to some nuclear or missile test with a targeted strike against a North Korean facility to bloody Pyongyang's nose' and make clear that the US will not tolerate threats. The overriding motive for such an attack would be to make a decisive statement without inciting a war with North Korea.[64] The US would likely describe such a strategy as self-defence, as this would be the only justification available under international law for the proposed 'bloody nose' attack, and it would mean that the US could avoid accusations of inciting nuclear war. As discussed above, there are various international statutes that prohibit the US' proposed 'bloody nose' strike; article 2(4) of the *UN Charter* and art 8 of the *Rome Statute of the International Criminal Court* ('*Rome Statute*')[65] both prevent such an action. Furthermore, art 51 of the *UN Charter* requires an armed attack to occur in order to act in self-defence, which has not in any way occurred.

In the absence of an actual armed attack, the US has utilised criteria set out in customary international law as a legal justification for the use of force, citing the need underscored in the Caroline Affair ('Caroline')[66] for an immediate necessity of response and proportionality of response.[67] However,

idUSKBN1DS2MB>; Eleanor Albert, 'North Korea's Military Capabilities', *Council on Foreign Relations* (Web Page, 20 December 2019) <https://www.cfr.org/backgrounder/north-koreas-military-capabilities>.

63 Seib (n 1); Shane Reeves and Robert Lawless, 'Is There an International Legal basis for the "Bloody Nose" Strategy?', *Lawfare* (Blog Post, 19 January 2018) <https://www.lawfareblog.com/there-international-legal-basis-bloody-nose-strategy>.

64 Reeves and Lawless (n 63); Michael Schmitt and Ryan Goodman, 'Best Advice for Policymakers on "Bloody Nose" Strikes against North Korea: It's Illegal', *Just Security* (Blog Post, 23 January 2018) <https://www.justsecurity.org/51320/advice-policymakers-bloody-nose-strike-north-korea-illegal/>.

65 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 8 ('*Rome Statute*').

66 'Correspondence between Great Britain and the United States, Respecting the Arrest and Imprisonment of Mr McLeod, for the Destruction of the Steamboat Caroline' (1840–41) 29 *British States Papers* 1137 (Daniel Webster) ('Correspondence'); *Nuremberg Trial Proceedings* (Judgment) 30 September 1946 [447].

67 Crawford (n 56) 751; Correspondence (n 66) as cited by A Aust, *Handbook of International Law* (Cambridge University Press, 2nd ed, 2010) 209.

the requirement from *Caroline* that there is an 'instant and overwhelming' necessity for self-defence would be hard to satisfy, as there has been no moment at which it appeared North Korea was imminently going to launch an attack that would be capable of reaching and causing damage to the US.

However, the US has previously engaged in state practices inconsistent with customary international law—pre-emptive self-defence.[68] This practice was used to justify the US-led invasion of Iraq, after the 9/11 terrorist attacks, on the American understanding that Iraq's alleged development of weapons of mass destruction and support for international terrorist groups constituted a threat to the US. This practice became known as the 'Bush Doctrine' and is inconsistent with art 51 of the *UN Charter*, which requires an armed attack to occur to justify self-defence.[69] The Bush Doctrine undermines the purpose of the UNSC as a means for countries to seek recourse and resolve disputes without resorting to the use of force themselves, as it circumvents the need to approach the UNSC for authorisation to use force.[70] Ultimately, to justify the use of force in Iraq, the allied forces claimed that the UNSC had consented to the campaign. However, this argument has no grounding in international law, as the UNSC did not grant consent for the use of force in this way.[71]

As a result, there is currently no lawful justification for any individual use of force by the US against North Korea. It is unlikely that even the Bush Doctrine could be utilised again, given the resistance of UNSC members, such as China, to the use of force against North Korea. For a state such as China to authorise the use of force against North Korea would be to unreasonably prejudice its own interests in favour of US interests—to

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[68] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 223–4 ('*Armed Activities*'); Crawford (n 56) 752.

[69] Christine Gray, *International Law and the Use of Force* (Oxford University Press, 3rd ed, 2008) 160–1.

[70] Crawford (n 56) 750.

[71] John D Negroponte, Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc S/2003/351 (21 March 2003) 1; Crawford (n 56) 752.

authorise force would likely sacrifice Chinese-North Korean relations, potentially irrevocably.

B *Was the Use of Force available to the US collectively with South Korea and Japan?*

Despite the US's inability to lawfully use force against North Korea individually, the question remains as to whether it is permissible to use force collectively. The option of collective self-defence is created in art 51 of the *UN Charter* and is supported by the existence of collective self-defence treaties between the US and both South Korea and Japan.[72] In *Nicaragua*, it was held that a victim state must make a request for assistance before another state can act in collective self-defence with the victim state.[73] There has been little state practice of collective self-defence,[74] despite the existence of large-scale collective self-defence treaties, such as the *North Atlantic Treaty*,[75] and bilateral treaties to this effect between states.

Given its proximity to a hostile nuclear power, South Korea exists on the brink of danger as a state. Though the Korean Armistice was signed in 1953, North and South Korea currently have no permanent peace treaty and continue to have one of the world's most heavily militarised borders.[76] Although the two states are still at war with each other, North Korea has expressed a strong intention to reunify with the South under the Pyongyang regime.[77] Even so, North Korea's missile testing in Japanese territory has

72 *Mutual Defense Treaty Between the United States and the Republic of Korea*, signed 1 October 1953, 5 UST 23602376 (entered into force 17 November 1954) art II; *Security Treaty Between the United States and Japan*, signed September 8 1951, 3 UST 3329-3340 (entered into force 28 April 1952) art I.

73 *Nicaragua* (n 17) 196–8.

74 Gray (n 69) 167.

75 *The North Atlantic Treaty*, signed 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) art 5.

76 Tan (n 43) 1151.

77 Kim Jong-un, 'New Year's Address' (Speech, Pyongyang, 1 January 2018) <https://www.ncnk.org/node/1427>.

been a cause for concern for both South Korea and Japan, given their evident proximity and North Korea's notable increase in nuclear testing.[78]

As explored in pt III, the use of force is lawful where it is carried out in self-defence prior to any intervention by the UNSC.[79] While the US does not have an individual right to self-defence, at the request of Japan and South Korea, it is possible that the US could have a legitimate right to use force against North Korea on the basis of collective self-defence.[80] The US has been invested in its relations with Japan and South Korea and has military bases in both states[81]—the annual combined training exercise, Foal Eagle, is conducted annually by South Korean and US militaries and is one of the largest military exercises in the world.[82]

In *Nicaragua*, the Court found that:

> in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the state which regards itself as the victim of an armed attack.[83]

This position was supported in *Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment)*,[84] and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda).*[85] Thus, for the US to lawfully implement a collective response to use force against North Korea, either South Korea or Japan must suffer an armed attack and request the assistance of the US. The right to engage in collective response in these circumstances fails to satisfy the initial requirement of such

78 Eitan Oren and Matthew Brummer, 'How Japan Talks About Security Threats', *The Diplomat* (online, 14 August 2020) <https://thediplomat.com/2020/08/how-japan-talks-about-security-threats/>.

79 *UN Charter* (n 27) art 51.

80 *UN Charter* (n 27) art 51.

81 Shea Cotton, 'Understanding North Korea's Missile Tests', *Nuclear Threat Initiative* (Web Page, 24 April 2017) <https://www.nti.org/analysis/articles/understanding-north-koreas-missile-tests/>.

82 Mats Engman, 'US-ROK Military Exercises: Provocation or Possibility?', *Institute for Security & Development Policy* (Blog Post, March 2018) <https://isdp.eu/publication/u-s-rok-military-exercises-provocation-possibility/>.

83 *Nicaragua* (n 17) 105.

84 [2003] ICJ Rep 161, 186.

85 *Armed Activities* (n 65) 222.

a response, as neither South Korea nor Japan suffered an 'armed attack' by North Korea between 2013–2018 to warrant the use of force by the US.[86] As noted by Ruys in his analysis of the scope of art 51, 'armed attack' has a much narrower scope than 'use of force'.[87] Therefore, not every use of force gives rise to an argument of self-defence—the requirement is that only the 'most grave forms of the use of force' qualify as armed attacks.[88] The missile tests that landed in Japanese territorial waters were unarmed, did not cause any damage to Japanese people, and functioned primarily as intimidation without causing harm. Therefore, there is not an *action* that could be considered a threat that would give rise to a response of self-defence. Similarly, South Korea has also not fallen victim to an armed attack by North Korea, despite a history of tenuous relations.

Schmitt and Goodman noted in their assessment of the feasibility of a bloody nose strike that North Korea's threats against the US and Japan could certainly be characterised as acts of aggression by North Korea under the UN's *Definition of Aggression*.[89] Under the *Rome Statute*, an act of aggression is grounds for referral to the International Criminal Court.[90] However, the threats made by North Korea lack the grave nature required to constitute an armed attack, as there has been no actual damage done to South Korea or Japan. There is a compelling argument that the continuous testing and violation of a peace agreement could provide grounds for the use of force in self-defence.[91] However, considering the chances of mutually assured destruction in response to what is essentially not a particularly grave offence, this kind of action would be exceedingly difficult to justify. Thus, unless a US ally, such as South Korea or Japan, suffers an armed attack at the hands

86 Heller (n 21) 9.
87 Ruys (n 21) 165.
88 *Nicaragua* (n 17) 191; Ruys (n 21) 165; Heller (n 21) 9.
89 Schmitt and Goodman (n 62); *Definition of Aggression* (n 54) art 2.
90 Definition of Aggression (n 54) art 2; Rome Statute (n 65) art 8.
91 Reeves and Lawless (n 63).

of North Korea, it is not permissible for the US to engage in a collective use of force on the basis of self-defence against North Korea.

C *Was the Use of Force available to the US as a form of Humanitarian Intervention?*

Humanitarian intervention represents another possible means by which force could be exercised by the US against North Korea. However, such use of force would require the authorisation of the UNSC. The Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea investigated reports of severe human rights violations occurring in North Korea and found 'systematic, widespread and gross human rights violations', some of which 'entailed crimes against humanity based on State policies'.[92] The exact extent of these crimes is unclear, given that the Human Rights Council was not provided access to North Korea and was instead forced to rely on witness testimony.[93] The UN itself has arguably contributed to the current state of human rights in North Korea, with UNSC sanctions (particularly UNSC Resolution 2397)[94] inhibiting the delivery of essential humanitarian aid.[95] UNSC Resolution 2397 has affected the population of North Korea as a whole and, in particular, has disproportionately impacted already vulnerable groups.[96]

However, the US cannot bypass the UNSC and unilaterally use force to carry out humanitarian intervention, as held in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania) (Merits)*[97] and

92 Human Rights Council, Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, UN Doc A/HRC/25/63 (7 February 2014) 6.

93 Ibid 4.

94 Resolution 2397 (n 44).

95 Final Report of the Panel of Experts Established Pursuant to Resolution 1874 (2019), UN Doc S/2019/171 (5 March 2019) [175]–[180].

96 Korea Peace Now, The Human Costs and Gendered Impact of Sanctions on North Korea (Report, October 2019) 1–2.

97 [1949] ICJ Rep 4, 35.

Nicaragua.[98] The Responsibility to Protect ('R2P') operates as an alternative to humanitarian intervention, empowering the international community to use 'collective action, in a timely and decisive manner … should peaceful means be inadequate'.[99] R2P is a global political commitment, developed at the 2005 World Summit and adopted by the UN General Assembly, that compels the international community to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[100] As the International Commission on Intervention and State Sovereignty ('ICISS') noted in its 2001 Report, military intervention on this basis requires the authorisation of the UNSC.[101] The UN General Assembly affirmed the ICISS' report but remained silent on the notion of the use of force. Therefore, this area remains untested, although the existing body of international law suggests that acting without some form of UN authorisation would be unlawful, and once again, it would be unlikely that the UNSC would consent to this kind of action as a result of the operation of the veto power.

Despite the ostensibly dire human rights situation in North Korea and the fact that there may be grounds for the international community to intervene and protect the North Korean population from its governing regime, it is still unclear whether humanitarian intervention would constitute an authorisation by the UNSC to use force. Furthermore, attempted intervention could trigger a violent reaction from North Korea that may result in retaliation against the international community and the North Korean public. Ultimately, it appears that there is currently no avenue for the US to lawfully use force against North Korea in the proposed 'bloody nose' strike, as the US is likely

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98 *Nicaragua* (n 17) 134; Young Sok Kim, 'Responsibility to Protect, Humanitarian Intervention and North Korea' (2006) 5 *International Business and Law* 74, 82–4.

99 2005 World Summit Outcome (n 61) 138–9.

100 Ibid 138.

101 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Report, December 2001) xii.

unable to use force individually, collectively, or as a form of humanitarian intervention.

V Conclusion

While there are certainly valid points to the contrary, it is clear that North Korea has indeed made threats to use force, consistent with the definitions set out in the *Nuclear Weapons (Advisory Opinion)*, Brownlie and others.[102] Acting individually, the US instituting a 'bloody nose strike' would be acting outside of what is considered a lawful use of force. For the US to use force in response to North Korea's possession of weapons of mass destruction would be outside the bounds of any acceptable use of force, and the Bush Doctrine would not be a legitimate justification. The impact of using any force against North Korea could have devastating effects for the US, Japan and South Korea, as well as any country within striking distance of North Korea.

There are also no options to use force available to the US if it were to act collectively with South Korea and Japan. Neither country has suffered an armed attack between 2013 and 2018 that would justify self-defence, given the high standard of what fulfils an armed attack, compared to what constitutes a use of force. This gap, between what is an actual or threatened use of force, and what is required for a country to use force lawfully in self-defence, is what regulates the international system, and prevents rampant and retaliatory actions by powerful states. In considering the actions and statements of North Korea as 'aggressive', rather an 'armed attack', the ability to use force is withheld, promoting the peaceful resolution of disputes instead. Furthermore, it is also unlikely that the US would be able to use force against North Korea as a form of humanitarian intervention.

[102] Brownlie (n 22) 364; Hofmeister (n 23) 108; Sadurska (n 20) 242.

Ultimately, the initiation of the 2019 summit between the US and North Korea does signal an easing of tensions between the two states. However, given the lack of success in previous negotiations, it is unclear how US-North Korean relations will eventuate in the future, particularly under a new administration in 2021.

THE ROAD TO SELF-DETERMINATION: ABORIGINAL SELF-GOVERNMENT THROUGH AGREEMENT-MAKING

JACOB HIGGINS*

ABORIGINAL SELF-GOVERNMENT—AUSTRALIAN ABORIGINAL ISSUES—SELF-GOVERNMENT AGREEMENTS—AUSTRALIA—CANADA—SELF-DETERMINATION—SOVEREIGNTY—LEGAL PLURALISM

ABSTRACT

Self-government is a foundational step towards the UN-recognised right of self-determination for First Nations peoples. It is also a significant method of resolving the continuing paternalism and effects of colonisation inflicted upon them. The positive impacts of self-government have been exemplified in Canada and the US, where Indigenous self-government has led to better economic and social outcomes for First Nations peoples. In particular, Canada's approach demonstrates a proven path toward self-government for Aboriginal Australians through agreements that confer the power to self-govern outside of historical treaties and discussions of sovereignty. The Noongar Settlement may be an example of one such agreement in Australia. The similarity between the Australian and Canadian jurisdictions, the existence of the Settlement and other movements towards Aboriginal self-government, the expanding definition of sovereignty, and legal pluralism principles indicate that there may be further scope to develop Aboriginal self-government in Australia.

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I INTRODUCTION

The *United Nations Declaration on the Rights of Indigenous Peoples* (‘*UNDRIP*’) recognised the right of Indigenous peoples across the world to self-determine to reclaim the autonomy lost by many Indigenous peoples as a result of colonisation by other nations.[1] Inherent in the right to self-determination is the right to self-government—the right to govern Indigenous internal affairs by the Indigenous peoples affected by them—through traditional and modern means.[2] Australia ratified the *UNDRIP* in 2009. However, the right of Aboriginal Australian peoples to self-govern (and, by extension, their right to self-determination) remains unrecognised in Australian law, as well as federal and state policy despite continued and renewed calls for the power to self-determine by Aboriginal Australians.[3]

The Indigenous right to self-govern is more adequately realised in the Unites States of America (‘US’) and Canada, where some First Nations peoples maintain their own courts, governmental institutions, and laws regarding internal Indigenous issues. Of particular note are the self-government agreements in Canada between First Nations peoples—such as the Nisga’a—and Canadian governments. These ‘modern treaties’[4] convey powers of self-government, including the power to make laws, and are not dependent upon the existence of a colonially recognisable sovereignty. These treaties instead recognise the continuing laws and customs of First Nations

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1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) art 3 (‘*UNDRIP*’): ‘Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’

2 Ibid art 4.

3 The Human Rights and Equal Opportunity Commission, Submission to the United Nations Committee on Economic, Social and Cultural Rights (2 December 2001) [4.5]: ‘Most notably, [the federal government] have rejected or failed to implement recommendations of the Royal Commission into Aboriginal Deaths in Custody, and *Bringing them home*, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families. Many recommendations, particularly those concerning the application of the principle of self-determination, have been actively rejected.’

4 Alice Petrie, ‘Treaties and Self-Determination: Case studies from International Jurisdictions’ (Research Note No 8, Parliamentary Library, Parliament of Victoria, June 2018) 3.

Canadians despite Canadian colonial sovereignty.[5] There are similarities between these agreements and Australian agreements that have been reached to date, such as the Noongar Settlement, which illustrates that the Australian legal system may be able to accommodate self-government agreements of a similar nature.

This article will argue that Aboriginal Australian communities can achieve the right to self-government by entering into negotiated agreements with Australia's state and territory governments. It also argues that a lack of recognised sovereignty does not preclude Aboriginal Australians from attaining the right to self-govern under the term's expanding definition and the application of legal pluralism. Part II of this article outlines the concepts of self-government and self-determination and the relationship between these respective concepts. Part III explains the benefits of self-government for Aboriginal Australians. Part IV considers the issues that may eventuate in Australia upon introducing historical Indigenous treaties. Part V examines First Nations self-governance agreements in Canada, focusing on the Nisga'a Agreement. Part VI evaluates the Noongar Settlement and other initiatives in Australia that may operate to confer self-government rights. Part VII argues that the expanding definition of sovereignty and the concept of legal pluralism demonstrate that Aboriginal self-government can coexist with Australia's colonial sovereignty against the prevailing fear of Australian courts and governments. Lastly, Part VIII will discuss the ongoing questions evoked in recognising Aboriginal sovereignty and constitutional recognition of Aboriginal peoples and explore how Aboriginal self-government can proceed while they remain unanswered. This article aims to demonstrate that the stage is set for agreements like the Noongar Settlement to create powers to self-

[5] Vanessa Sloan Morgan, Heather Castleden and Tayii Hawil, '"Our Journey, Our Choice, Our Future": Huu-ay-aht First Nations' Self-Government enacted through the Maa-nulth Treaty with British Columbia and Canada' (2019) 51(4) *Antipode* 1340, 1346.

govern for Aboriginal Australian peoples and thus help develop their right to self-determination.

II SELF-GOVERNMENT AND SELF-DETERMINATION

Self-determination and self-government have received no singular definition in international law;[6] they are, however, frequently referred to as intrinsically dependent concepts. Self-government is considered to be an indicator of, and a stepping stone to, the inherent right to self-determination for Indigenous peoples around the world.[7] As such, it is argued that self-governance is a necessary step towards self-determination will be demonstrated.

A *Self-Government*

In the absence of a definition in international law, this article refers to self-governance generally as the necessary powers to self-determine; to make rules and institutions that govern the relevant group or polity. Indigenous self-government is specifically described with reference to Indigenous people's ability to regulate internal affairs according to customary law and the ability to create, maintain, and develop legal and political institutions.[8] The concept reflects the idea, often repeated in Aboriginal policy-making, that Aboriginal communities understand their own needs better than policymakers at a national level.[9]

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6 Petrie (n 4) 1.

7 *UNDRIP* (n 1) art 4: 'Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'.

8 International Law Association, *Resolution on the Rights of Indigenous Peoples*, Resolution No 5/2012, 75th Conference of the International Law Association, (26–30 August 2012) recommendation 5.

9 See Bertus de Villiers, 'A Fresh Approach to Aboriginal Self-Government and Co-Government: Grassroots Empowerment' (2020) 47(1) *Brief* 10, 11: 'Local communities understand their own needs better than a few selected leaders at a national level … Top-down schemes affecting indigenous communities … have a poor record'; *Royal Commission into Aboriginal Deaths in Custody* (National Report, April 1991) vol 4 [27.9.2] ('*Royal Commission into Aboriginal Deaths*'): '… the resolution of the "Aboriginal problem" has been beyond the capacity of non-Aboriginal policy makers and bureaucrats. It is about time they left the stage to those who collectively know the problems at national and local levels; they know the problems because they live the problems'.

It is important to distinguish between Aboriginal institutions that exercise self-government rights and Aboriginal service providers that assist Aboriginal communities by implementing programs designed to achieve positive social and economic outcomes in communities.[10] For example, the Nisga'a Lisims Government's Council of Elders, which interprets cultural tradition and advises the Nisga'a Lisims Government,[11] is an institution of self-government. Conversely, while service providers such as Aboriginal Medical Services ('AMS') offer valuable pathways for Aboriginal participation in, and management of, their communities, they cannot be equated to institutions that exercise self-governmental rights. AMS provides health services for Aboriginal people, often administered by Aboriginal people, but it does not provide an avenue to governing the provision of health services to Aboriginal communities.[12] The difference lies in the ability to govern without external interference. Participating partially in government and community—most often under direction and policy determined by non-Aboriginal decision makers—does not equate to self-government. This distinction is important because, as will be outlined further, the right to self-determine depends heavily on the ability of Aboriginal communities to govern their internal affairs autonomously, without the explicit external direction of non-Aboriginal policy makers.

The ability of Indigenous peoples to self-govern is significantly curtailed by the continuing effects of colonisation. As such, Indigenous self-government requires continuing co-operation from the dominant colonial government to be successful.[13] Self-determination therefore requires the right

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10 Alison Vivian et al, 'Indigenous Self-Government in the Australian Federation' (2017) 20 *Australian Indigenous Law Review* 215, 222.

11 See 'Council of Elders', *Nisga'a Lisims Government* (Web Page) <https://www.nisgaanation.ca/council-elders>.

12 Bethne Hart, Miriam Cavanagh and Denise Douglas, 'The "Strengthening Nursing Culture Project": An Exploratory Evaluation Study of Nursing Placements Within Aboriginal Medical Services' (2015) 51(2) *Contemporary Nurse: A Journal for the Australian Nursing Profession* 245, 246.

13 Katie Saulnier, 'Aboriginal Self-Determination: A Comparative Study of New Zealand, Australia and the United States of America' (ISID Aboriginal Policy Study Paper No PB-2014-02, Institute for the Study of International Development, 2014) 1.

to self-government, and an effort on the part of colonial governments to provide the support needed—including material resources—to facilitate the establishment and maintenance of self-government in Australia.[14] Scholars, such as Saulnier, suggest that governments take after efforts in New Zealand to improve education and healthcare outcomes for Aboriginal peoples.[15] The New Zealand Government gave a wide degree of discretion to Indigenous groups in determining the best models of improvement and subsequently assisted the Indigenous groups in effecting these improvements.[16] Saulnier's views reflect the recommendations made by the Royal Commission into Aboriginal Deaths in Custody in Australia, which noted that empowerment of Aboriginal communities to self-govern and self-determine was dependent on governments providing 'material assistance to make good past deprivations' while also giving sufficient control to Aboriginal communities in deciding how, and for what reason, these resources were used.[17]

B *Self-Determination*

The United Nations ('UN') recognised self-determination as a right in the *International Covenant on Civil and Political Rights* ('*ICCPR*')[18] in 1966. The *ICCPR* provides that self-determination is the right of all people to, without external direction, control their own economic, social and cultural development and determine their own political status.[19] Indigenous peoples' right to self-determination is expressly recognised in the *UNDRIP*.[20] The *UNDRIP* is, at present, non-binding.[21] The *UNDRIP* described the right of indigenous peoples to self-determination as including 'the right to autonomy

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14 Ibid 32.
15 Ibid 33.
16 Ibid.
17 *Royal Commission into Aboriginal Deaths* (n 9) vol 1 [1.7.34].
18 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976).
19 Ibid art 1(1).
20 UNDRIP (n 1) art 3.
21 Law Council of Australia, *Indigenous Australians and the Legal Profession* (Policy Statement, February 2010) 6.

or self-government in matters relating to their internal and local affairs'.[22] As above, this demonstrates further that self-government is vital to achieving self-determination.

It is evident that both self-government and self-determination go beyond the right to 'self-management'. Self-management was an idea that was widely promoted by the 1983 Australian Federal government[23] and other past governments,[24] and has been a common theme in the policies of following governments.[25] Although self-management was considered a step towards self-determination; in practice, the policy only provided support to allow Aboriginal Australians to participate in colonial society on a more or less equal ground.[26] Clyde Holding, the Minister for Aboriginal Affairs in 1983, described the right to self-management for Aboriginal Australians as the right 'to make choices as to their lifestyle, to have a say in their community affairs, to provide services to themselves, to conduct businesses, and, within the law, to make their own decisions'.[27] This government pointed to the establishment of incorporated Aboriginal-controlled corporations as a measure of success in promoting self-determination.[28] However, this interpretation of self-determination was considered both at the time and, in hindsight, to be unaligned with the definition of self-determination in international law and the self-determination requested by Aboriginal communities of the time.[29] Self-determination, by agreeance from the UN and Aboriginal Australians, requires that Indigenous peoples possess the right to

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22 UNDRIP (n 1) art 4.
23 See Pamela Ditton, 'Self Determination or Self-Management' [1990] (2) *Australian International Law News* 3, 4.
24 John Gardiner-Garden, 'From Dispossession to Reconciliation' (Research Paper No 27, Parliamentary Library, Parliament of Australia, 29 June 1999) 9.
25 Patrick Sullivan, Belonging Together: Dealing with the Politics of Disenchantment in Australian Indigenous Policy (Aboriginal Studies Press 2011) 4.
26 Gardiner-Garden (n 24) 9.
27 Ibid.
28 Ibid 27.
29 Ibid 9.

self-govern their local and internal affairs, rather than simply the right to these affairs.[30]

III ABORIGINAL AUSTRALIANS AND SELF-GOVERNMENT

A *Self-Determination vs Paternalism*

It is well documented that Aboriginal Australians have not been granted access to the right to self-determine or self-govern in the more than 200 years since colonial first contact. Despite the lessons afforded by the explicit self-management policy of previous governments, modern governmental policy regarding Aboriginal Australians in more recent years remains obstructive towards the achievement of Aboriginal Australian self-determination. Instead, the theme of Aboriginal policy has consistently been one of paternalism.[31]

Existing examples of paternalism in Australia are evidenced by the current disproportionate enforcement of policies to remove children and separate families for the purpose of child protection against Aboriginal families.[32] This policy is viewed by some as a continuation of the assimilatory policies of the Stolen Generation.[33]Additionally, certain Aboriginal people are subject to income management, colloquially known as the 'cashless welfare card', and Aboriginal communities in the Northern Territory and Western Australia have been closed without the consent of, or consultation with, the communities themselves.[34] The cashless welfare card was partly the result of consultation but the broad application and mandatory nature of the program was not the version of the policy discussed in these consultations,

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30 Ibid.

31 Jessie Dorfmann, 'Undermining Paternalism: UNDRIP and Aboriginal Rights in Australia' (2015) 37(1) *Harvard International Review* 13, 13.

32 Sonia Harris-Short, Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children: Protecting the Vulnerable Under International Law (Taylor & Francis, January 2012) xvii.

33 See ibid 5–6.

34 Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jimenez, *The Neoliberal State, Recognition and Indigenous Rights: New Paternalism to New Imaginings* (ANU Press, July 2018) 14.

and Australian state governments were accused of implementing the program before consultation had begun.[35]

These examples illustrate little in terms of more overtly oppressive actions taken by governments, such as the 2007 Northern Territory Intervention ('the NT Intervention'). Here, the military was sent into Aboriginal communities in the Northern Territory (compulsorily and without consultation) to respond to allegations of child sexual abuse and neglect in these communities.[36] The closure of communities in Western Australia was effected on a similar basis to the NT Intervention, where dysfunction (including allegations of sexual and family violence) was used as a partial excuse to cease funding services that were essential to the survival of those communities.[37] External economic considerations formed the other part of this justification, with consultation coming long after colonial economic analysis, and only between a small number of elders and communities in the Kimberley and Pilbara regions.[38] The NT Intervention resulted in more expansive interventions not limited to the imposition of compulsory income management for Aboriginal people receiving welfare payments and restrictions on the sale of alcohol.[39] Certain measures, such as the alcohol and land controls, are expected to continue into 2022.[40]

The above policies have regularly been articulated as empowering Aboriginal communities to self-determine.[41] Yet, paternal policies continue

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35 Shelley Beilefeld, 'Cashless Welfare Cards: Controlling Spending Patterns to What End?' (2017) 8(29) *Indigenous Law Bulletin* 28, 28.

36 Dorfmann (n 31) 14.

37 Dennis Eggingting and Sarouche Razi, 'The Bogeyman in the Mirror: White Australia and the Proposal to Close Remote Communities in Western Australia' (2015) 8(20) *Indigenous Law Bulletin* 26, 27.

38 Ibid 28.

39 Ibid.

40 See *Stronger Futures in the Northern Territory Act 2012* (NT); Joint Committee on Human Rights, Parliament of Australia, Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 (Report No 11, 27 June 2013) 3.

41 Harris-Short (n 32) 6–7. See also Royal Commission into Aboriginal Deaths in Custody (National Report, April 1991) vol 1 [1.7.34]; Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (Report, April 1997): 'Our principal finding is that self-determination for Indigenous peoples provides the key to reversing the over-representation of Indigenous children in the child welfare and juvenile justice systems of the States and Territories and to eliminating unjustified removals of Indigenous children from their families in communities.'

to be enforced upon Aboriginal Australians without appropriate consultation. Adequate consultation is crucial to implementing Aboriginal affairs policies. Without it, how can it be said that Aboriginal communities have had a say in their affairs at all, let alone be empowered to govern them? The report that led to the NT Intervention called for 'a thoughtful consultative process' rather than the militaristic and controlling actions seen.[42] The NT Intervention was criticised for the reason that Aboriginal people are not empowered by removing control of their communities and children.[43]

Self-determination has occasionally been on the government agenda regarding Aboriginal affairs. However, this concept is often reduced to standards below international and Aboriginal understanding to suit governmental need and is enforced without consent, as was evidenced above. It is therefore evident that paternalistic policies are not effective in promoting Aboriginal empowerment and combatting the issues that Aboriginal people face. However, self-determination may provide a path forward to achieving these ends.

B *The Importance of Self-Government for Aboriginal Australians*

The importance of self-government has been widely acknowledged in the context of addressing systemic issues faced by Aboriginal Australians today.[44] One of the most prevalent themes emerging from the 1991 Royal Commission into Aboriginal Deaths in Custody ('the 1991 Royal Commission') was the need for greater Aboriginal Australian control over their own lives and communities in order to help address the rates of Aboriginal incarceration and deaths in custody and their underlying systemic causes.[45] The 1991 Royal Commission found that Aboriginal self-

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42 Melissa Sweet, 'Australian Efforts to Tackle Abuse of Aboriginal Children without Consultation Raise Alarm' (2007) 335(7622) *The British Medical Journal* 691, 691.
43 Ibid.
44 Vivian et al (n 10) 221.
45 *Royal Commission into Aboriginal Deaths* (n 9) vol 1 [1.7.6].

government was 'the most obvious route to indigenous empowerment' and, subsequently, to addressing over-incarceration and deaths in custody.[46] The Royal Commission placed significant emphasis on empowering Aboriginal Australians to identify and resolve the issues faced by their communities rather than having the government continue to enforce paternalistic policies that attempt to combat issues that Aboriginal Australians know best how to resolve.[47]

Scholarly research has largely supported the sentiments of the 1991 Royal Commission. Hunt and Smith assert that Aboriginal self-governance will provide 'a critical foundation for ongoing socio-economic development and resilience'.[48] While researching the factors that lead to positive outcomes in Aboriginal community and service-delivery organisations, Hunt identified community ownership as one such factor.[49] Hunt identified that organisations that were created and led by Aboriginal people, that solved problems identified by Aboriginal communities, were ultimately more successful and were accompanied by positive outcomes in the community.[50] These positive outcomes included a reduction in crime, an improvement in the physical and mental health of those living in the community, and the creation of employment, which then in turn fostered career progression.[51] O'Faircheallaigh further identified Aboriginal self-government as a significant factor in increasing Aboriginal economic participation, fuelled in part by improving access to education, training, health and housing, among

[46] Michael Murphy, 'Representing Indigenous Self-Determination' (2008) 58(2) *University of Toronto Law Journal* 185, 200.
[47] *Royal Commission into Aboriginal Deaths* (n 9) vol 2 [20.1.1].
[48] Janet Hunt and Diane Smith, 'Understanding and Engaging with Indigenous Governance: Research Evidence and Possibilities for Engaging with Australian Governments' (2011) 14(2-3) *Journal of Australian Indigenous Issues* 30, 31.
[49] Janet Hunt, 'Let's Talk About Success: Exploring Factors Behind Positive Changes in Aboriginal Communities' (Working Paper No 109, Centre for Aboriginal Policy Research, 2016) 5.
[50] Ibid.
[51] Ibid 4.

other things.[52] These findings suggest that self-determination is critical to improving many of the prominent issues facing Aboriginal Australians today.

The social, economic and cultural enhancements articulated by Hunt, Smith and O'Faircheallaigh are further supported by the examined outcomes of self-government policies introduced in other international jurisdictions. In the US, for example,[53] research found that First Nations societies thrived where they had 'decision-making controls over their internal affairs',[54] and where they were 'supported by effective and culturally legitimate institutions of self-government'.[55] According to Cornell and Kalt, First Nations US communities have shown 'sharp and resolute' economic progression that has led to further improvements in housing, positive health outcomes—such reduced infant mortality and infectious disease rates— and investment in infrastructure long-neglected by US governments after the transition from federal administration to tribal administration.[56]

Additionally, research by the Harvard Project on US–Indian Economic Development has shown that there has been a positive correlation between economic and social development and natural measures of non-assimilation among First Nations communities, such as the use of language and other indicators of strong adherence to cultural practice.[57] The Harvard Project isolated the move of US First Nations policy towards self-determination as the central reason for the 'significant and sustained development progress' now visible in First Nations communities, specifically through actions of 'self-rule'.[58] These actions included establishing courts and legal systems,

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52 Ciaran O'Faircheallaigh, 'Native Title, Aboriginal Self-Government and Economic Participation' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment* (The Federation Press, 2015) 158–9.

53 Stephen Cornell and Joseph Kalt, 'American Indian Self-Determination: The Political Economy of a Successful Policy' (Working Paper No 1, Native Nations Institute and Harvard Project on American Indian Economic Development, November 2010) 13.

54 Vivian et al (n 10) 221.

55 Ibid.

56 Cornell and Kalt (n 53) 8–9.

57 Ibid 11.

58 Ibid.

remaking school curricula, and generating greater revenue through First Nations-run businesses.[59]

IV Barriers To Self-determination through a traditional treaty for Aboriginal Australians

Establishing institutions that are run by Aboriginal Australians and possess the power to make policies to self-govern would assist with redressing the continuing and historical imbalance of power between Aboriginal and non-Aboriginal Australians. In the case of US and Canadian First Nations peoples, this power has been founded both from public policy and legally recognised treaties. Formal Aboriginal treaties in Australia have historically been hamstrung by a lack of colonially recognised sovereignty. However, as will be explored, other forms of negotiated agreements between Indigenous peoples and Australian governments may provide an alternative pathway to establishing these institutions.

A *Treaties and the Right to Self-Government*

The powers of self-government have traditionally been conferred upon Indigenous peoples through treaties—both historical and newly emerging.[60] Treaty-making was a staple interaction between First Nations peoples and the Federal Government of the United States since the latter's inception. These treatise conferred rights to self-government that were enforceable by the First Nations peoples.[61] The rights initially conferred commonly related to hunting, fishing, and the lands ceded by the First Nations peoples to the Federal Government.[62] 'Bad men' clauses, in which both parties agreed to punish and

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[59] Ibid 12.

[60] Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016) 104–6.

[61] William C Canby, *American Indian Law in a Nutshell* (West Academic Publishing, 6th ed, December 2014) 115.

[62] Ibid.

compensate for the acts of cross-culture criminals among their own number, were also commonly included.[63] Treaties continue to form the basis of the relationship between US First Nations and the Federal Government, and they have been construed as being made between sovereign nations,[64] albeit with the caveat that First Nations are 'domestic dependent nations'.[65]

This sovereignty entitles First Nations to self-government rights or, more accurately, entitles them to maintain their self-government rights following colonisation.[66] This includes the right to organise tribal governments and tribal courts.[67] In Canada, while Canadian First Nations did make historical treaties with Canadian colonial governments, the predominant form of agreement making between Canadian First Nations and modern Canadian governments is now a form of 'modern treaty'. These modern treaties are negotiated agreements that give rise to self-government rights and powers while, at the same time, establishing colonially recognised boundaries to First Nations lands.[68] These rights can include the formation of tribal governments, tribal law-making institutions, rights to govern land use and natural resources on tribal lands, and rights to make decisions over infrastructure and economic projects.[69] The success and prominence of treaty-making in Canada thus necessitate that it be foregrounded in Australian discussions relating to Aboriginal self-government. However, the lack of colonially recognised sovereignty presents a major barrier to the application of the Canadian treaty-making model in Australia.

B *Sovereignty*

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63 Ibid 116.
64 Ibid 73.
65 *Cherokee Nation v Georgia*, 30 US (5 Pet) 1, 17 (1831).
66 Canby (n 61) 1.
67 Ibid 63–7.
68 Morgan, Castleden and Hawil (n 5) 1343.
69 See the discussion of the Nisga'a Agreement below. See also 'Treaty Implementation' *Huu-ay-aht First Nations* (Web Page, 2017) <https://huuayaht.org/treaty-implementation/>.

Aboriginal Australians hold no recognised sovereignty under colonial law.[70] Internationally enforceable treaties are generally made between sovereign parties,[71] on the basis that sovereignty indicates an authority to make a binding agreement for a nation or polity.[72] Aboriginal Australians' lack of recognised sovereignty has frustrated their attempts at entering into a treaty with Australian governments. Former Prime Minister of Australia John Howard famously stated that 'a nation … does not make a treaty with itself' while discussing the push for recognition of Aboriginal sovereignty.[73] This reflects the dominant view in Australia, that 'implicit in the nature of a treaty is a recognition of another sovereignty, a nation within Australia',[74] which poses a predominant ideological barrier to both the making of a treaty and the recognition of Aboriginal sovereignty.

Aboriginal Australians' sovereignty may never be recognised, which impedes the likelihood of Australia adopting a formal treaty. Classifying an agreement as a conventional treaty has the potential for detractors to claim that the agreement no legal enforceability,[75] for fear it may challenge the sovereignty and legitimacy of the colonial Australian state.[76] Doing so further locks the negotiation of a treaty behind a recognition of sovereignty, where a significant avenue for Aboriginal self-determination is dismissed due to the reluctance to recognise Aboriginal sovereignty as an equal power to colonial sovereignty.[77] Formal treaties are not, however, the only form of agreement

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70 Isabelle Auguste, 'Rethinking the Nation: Apology, Treaty and Reconciliation in Australia' (2010) 12(4) *National Identities* 425–6, 428.

71 Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later…: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Feasibility of a Compact or 'Makarrata' Between the Commonwealth and Aboriginal People* (Parliamentary Paper No 107, 1983) 29–30.

72 Michael Mansell, 'Finding the Foundation for a Treaty with the Indigenous Peoples of Australia' (2001) 4 *Balayi: Culture, Law and Colonialism* 83, 86.

73 Interview with John Howard, Prime Minister of Australia (John Laws, Sydney, 29 May 2000) <www.pm.gov.au/news/interviews/2000/laws2905.htm>.

74 Robert French, 'The Constitution and the People' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 60, 78.

75 Mansell (n 72) 88; Stuart Bradfield, 'Citizenship, History and Indigenous Status in Australia: Back to the Future, or Toward Treaty?' (2003) 27(80) *Journal of Australian Studies* 165, 167, 171.

76 Aparna Jayasekera, 'The Value of Treaty-Making with Indigenous Peoples in Australia' [2018](3) *Perth International Law Journal* 33, 39.

77 Mansell (n 72) 86.

that could be used to convey rights of self-government and self-determination to Aboriginal peoples.

V Indigenous Self-Governance Agreements

The traditional definition of the term 'treaty' is beginning to expand to encapsulate agreements made between Indigenous peoples and governments that operate, in substance, in a manner similar to formal treaties.[78] Hobbs and Williams argue that the definition of treaty—being that of two sovereign nations compacting together in an international agreement[79]—is restrictive and altogether unrealistic. They argue that treaty should instead be defined to include political agreements involving Aboriginal people and governments that are binding by law.[80] They further contend that an 'Indigenous treaty' could be considered another form of agreement, outside the traditional international and sovereign context, albeit one made in the knowledge of the polity of First Nations communities.[81] They contend that a treaty, in this context, must: recognise Indigenous peoples as 'a distinct political community'; be negotiated; and be binding on both sides.[82] Such a treaty would effectively acknowledge that 'we are all here to stay'.[83] As such, agreements occasioning self-government rights and 'Indigenous treaties' will be referred to interchangeably.

Agreements are being recognised as the prominent method of conferring self-government rights upon Indigenous peoples in many jurisdictions. In Australia, research has confirmed that such agreements are critical in fostering the socio-economic development of Aboriginal

78 Marcia Langton, Maureen Tehan and Lisa Palmer, 'Introduction' in Marcia Langton et al (eds), *Honour Among Nations?: Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, 2004) 1, 2.

79 Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1, 4.

80 Ibid 5.

81 Ibid 5.

82 Ibid 7, 8, 10.

83 *Delgamuukw v British Columbia* [1997] 3 SCR 1010, [186] ('*Delgamuukw v British Columbia*').

communities.[84] Australian academics have recognised agreement-making as the 'option that could empower communities to take control of their lives', without the need for 'constitutional alteration'.[85] This is reflected in the research regarding the US First Nations peoples that came to a similar conclusion discussed above.[86] Agreement-making is, therefore, fast becoming the preferred method of interaction between Indigenous peoples and the descendant colonial nations in other international jurisdictions.[87] Given the similarities between the Canadian and Australian legal systems, the experiences of the Canadian First Nations may help direct the effective introduction of self-government agreements in Australia.

A *Self-Government in Canada*

Canadian First Nations policy has fast become intertwined with the recognition of self-government and negotiated agreements that recognise the rights to self-government and self-determination. Section 35(1) of the *Canadian Constitution* recognises and affirms the 'existing aboriginal and treaty rights' of Canadian First Nations peoples.[88] Section 35(3) further states these 'treaty rights' may exist historically or 'may be so acquired' through land claim agreements.[89]

Prior to 1973, 'treaty rights' were considered to be the rights conferred to Canadian First Nations by historical treaties made during and after the first contact between Canadian First Nations and the colonists.[90] In 1973, 'Aboriginal rights' were first recognised in the landmark case, *Calder v*

84 Vivian et al (n 10) 220.
85 Referendum Council, *Final Report of the Referendum Council* (Final Report, 30 June 2017) 14.
86 Cornell and Kalt (n 53).
87 Siegfried Wiessner, 'Indigenous Self-Determination, Culture and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples' in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, 2012) 31, 52.
88 *Canada Act 1982* (UK) sch B para 35(1) ('*Canada Act*').
89 Ibid para 35(3).
90 Petrie (n 4) 5.

British Columbia (AG).[91] It was found in this case, ultimately within a dissenting judgment, that there existed a historical recognition of 'aboriginal rights' to possession and enjoyment of land in Canadian common law outside of historical 'treaty rights'.[92] This recognition was similar, in many ways, to Aboriginal Australian native title rights, in that both rights arose from continuing, recognisable cultural rights not granted by historical agreements.[93] Modern Canadian self-government agreements were recently found to be protected by s 35 of the *Canadian Constitution* as they conferred rights that fell within the meaning of 'aboriginal and treaty rights'.[94] Such protection prevents the Canadian government from infringing upon these rights except in pursuit of a valid legislative objective, and only where the relevant First Nations are fairly compensated, and consulted or informed.[95] Although the majority of Canadian agreements reached since the amendment of the *Canadian Constitution* in 1982 have been land claim agreements in which self-government rights have been negotiated as part of a continuing cultural connection to land; independent self-government agreements have also been made.[96] As a result, negotiation and agreement have become the most prominent method of governmental interaction with Canadian First Nations.

Indigenous rights policies in Canada are far ahead of those found in Australia and represent an aspirational step in the right direction. In 1995, the

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91 *Calder v British Columbia (AG)* [1973] SCR 313.

92 Ibid 376.

93 See *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo (No 2)*') 41–2 (Brennan J): '… the common law of Australia … accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty. Those antecedent rights and interests thus constitute a burden on the radical title of the Crown' and 'Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of the territory'.

94 Ibid; see also *R v Sparrow* [1990] 1 SCR 1075 ('*R v Sparrow*').

95 *R v Sparrow* (n 94) (McIntyre, Lamer, Wilson, La Forest, L'Heureux-Dube and Sopinka JJ): 'Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented'.

96 See, eg, the Nisga'a Final Agreement, the Kwanlin Dun First Nation Self-Government Agreement, the Sioux Valley Dakota Nation Governance Agreement, and the Gwets'en Nilt'i Pathway Agreement.

Canadian government affirmed Canada's First Nations peoples' inherent right to self-government as an acknowledged and recognised right under the *Canadian Constitution*.[97] The Canadian government preferences self-government for First Nations communities over existing governing legislation, such as the *Indian Act*, RSC 1985, c I-5 ('the Indian Act'). The *Indian Act* is blanket legislation that was made before the recognition of the First Nations' inherent right to self-government, which the Canadian Government concedes 'does not take into account the specific circumstances of individual communities'.[98] In the case of the Nisga'a Nation, the *Indian Act* considered and treated the four pdeeks or clans of the Nisga'a Nation as separate political entities, rather than part of the same Nation, and did so without consultation or correct knowledge of the physical boundaries between the pdeeks.[99]

At Canadian common law, the right to self-government has been acknowledged not only as a protected right under the *Canadian Constitution*, but as a right that both existed prior to colonisation and after the 'assertion of British sovereignty'.[100] Furthermore, Canadian courts have recognised the 'desirability of concluding treaties with Aboriginal peoples'.[101] It is important to recognise that the First Nations right of self-government in Canada remains qualified with reference to *UNDRIP*, in that this right is recognised in relation 'to matters that are internal', and 'integral to their unique cultures … and institutions'.[102] While self-determination has been promoted in Australian Aboriginal policy in the past, it has been promoted as an end-goal for policies

97 'The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government', *Government of Canada* (Web Page, 15 September 2010) <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>; *Canada Act* (n 88) sch B para 35(1).

98 'Self-Government', *Government of Canada* (Web Page, 12 July 2018) <https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314>.

99 Ross Hoffman and Andrew Robinson, 'Nisga'a Self-Government: A New Journey Has Begun' (2010) 30(2) *The Canadian Journal of Native Studies* 387, 390.

100 *Delgamuukw v British Columbia* (n 83) [59].

101 See, eg, *Chief Mountain v British Columbia (Attorney General)* [2011] BCSC 1394 [99].

102 Sean Brennan, Brenda Gunn and George Williams, '"Sovereignty" and Its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments' (2004) 26(3) *Sydney Law Review* 307, 331.

that are more aptly described as promoting self-management. The importance of self-determination has further been recognised in the Final Report of the 1991 Royal Commission and the *Bringing them Home Report*.[103] Still, it has frequently been protested by governments, with no real recognition of the right beyond the signing of *UNDRIP*. Australian policy remains paternalistic and ineffective. The Canadian position on self-government is preferential, as it not only formalises the right to self-government but also recognises it as inherent, rather than one whose existence is to be negotiated and agreed upon.

B *The Nisga'a Final Agreement*

The Nisga'a Final Agreement ('Nisga'a Agreement') is a prime example of a negotiated Canadian self-government agreement. After pushing for recognition for over a century,[104] on 27 May 1998, the Nisga'a Agreement was signed and came into effect on 11 May 2000. Under the Nisga'a Agreement, between 2000–2015, the Nisga'a Nation received CAD190 million in total from both the Government of Canada and the Government of British Columbia, which consists of both a settlement benefit and the costs incurred by the Nisga'a Nation when negotiating the treaty.[105] A once-off amount of CAD40.6 million was also awarded to the Nisga'a Nation to support its transition to self-government.[106]

The Nisga'a Agreement sets out the Nisga'a Nation's right to self-govern and establishes the Nisga'a Nation as a distinct legal entity that stands apart from Canada's federal and provincial governments.[107] The Nisga'a Agreement was entered into on the basis that the Nisga'a Nation would

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[103] Human Rights and Equal Opportunity Commission, Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (Report, April 1997).
[104] Edward Allen, 'Our Treaty, Our Inherent Right to Self-Government: An Overview of the Nisga'a Final Agreement' (2004) 11 *International Journal on Minority and Group Rights* 233, 234.
[105] Hoffman and Robinson (n 99) 395.
[106] Ibid.
[107] *Nisga'a Final Agreement*, signed 27 May 1998 (entered into force 11 May 2000) ch 11 ss 1, 5 ('*Nisga'a Final Agreement*').

willingly share its lands, so long as its claim to these lands was recognised.[108] It allows for Canada's federal and provincial laws to operate concurrently with Nisga'a laws and any inconsistency is to be resolved in favour of the Nisga'a.[109] Further, the Nisga'a Agreement explicitly acknowledges its nature as both a treaty and an agreement within the meaning of ss 25 and 35 of the *Canadian Constitution*.[110]

The Nisga'a Agreement specifies that the peoples of the Nisga'a Nation no longer fall under the jurisdiction of the *Indian Act*, while remaining Aboriginal people for the purposes of the *Canadian Constitution*, and the Nisga'a people are therefore entitled to the 'aboriginal rights' specified in ss 25 and 35.[111] The claim and further agreement are explicitly stated to fall within the meaning of ss 25 and 35 of the *Canadian Constitution*.[112] Section 25 of the *Canadian Constitution* recognises that the rights and freedoms it affords to Canadians will not abrogate or derogate the 'aboriginal and treaty' rights of Canadian First Nations peoples,[113] and s 35 recognises existing and future First Nations rights that have been obtained through both negotiation and historical treaties.[114]

The Nisga'a Agreement confers significant and necessary powers that allow, inter alia, the Nisga'a People to exercise the right to self-govern.[115] The self-government rights provided through the Nisga'a Agreement are extensive, establishing Village Governments for individual communities and the Nisga'a Lisims Government for the Nation as a whole.[116] Additionally, the Nisga'a Agreement allows Nisga'a governments to make laws regarding a wide array of matters relating to Nisga'a aboriginal rights and the

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108 Ibid.
109 Ibid ch 2 s 13.
110 Ibid ch 2 s 1.
111 Hoffman and Robinson (n 99) 392.
112 Ibid 236.
113 *Canada Act* (n 88) sch B para 25.
114 Ibid sch B para 35.
115 Hoffman and Robinson (n 99) 388.
116 Nisga'a Final Agreement (n 107) ch 11 s 2.

governance of the Nisga'a people.[117] The Nisga'a Nation's right to make laws encompasses the ability to make laws in relation to administrative matters such as the establishment of Nisga'a institutions,[118] Nisga'a land management,[119] and education for Nisga'a citizens (which includes primary, secondary, and tertiary education).[120] Numerous such laws have been enacted.

For example, the Wilp Si'ayuukhl Nisga'a, the Nisga'a Lisims Government's executive arm, enacted the *Nisga'a Government Act* in 2006,[121] which sets out the various roles of the members of the new Nisga'a governments.[122] The *Nisga'a Forest Act* governs development approvals and forestry operations in Nisga'a owned forests. The Act focuses on ecological sustainability in line with traditional practice, with provisions for reforestation, employment in land management roles, and the development of Land Use Plans.[123] The *Nisga'a Forest Act* is administered by the Nisga'a Lands Department, which also governs matters that include land use planning, title registry and transfer, and subsurface and mining developments.[124] The Nisga'a Lisims Government under the Nisga'a Agreement can also make laws governing a wide range of additional matters. These matters include Nisga'a citizenship, Nisga'a language and culture, Nisga'a property in Nisga'a lands, public order, peace and safety, employment, traffic and transportation, Nisga'a marriage, and child, family, social and health services.[125] Numerous positive benefits have resulted for the Nisga'a peoples.

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117 Ibid ch 11 s 34.
118 *Nisga'a Final Agreement* (n 107) ch 11 s 34(a), sub-s (c).
119 Ibid ch 11 s 44.
120 Ibid ch 11 ss 100, 101.
121 *Nisga'a Government Act*, NLGSR 11/2006 <https://www.nisgaanation.ca/legislation/nisgaa-government-act>.
122 Hoffman and Robinson (n 99) 398.
123 'Forest Management', *Nisga'a Lisims Government* (Web Page) <https://www.nisgaanation.ca/forest-management>.
124 'Nisga'a Land Management', *Nisga'a Lisims Government* (Web Page) <https://www.nisgaanation.ca/nisgaa-lands-management>.
125 Hoffman and Robinson (n 99) 394.

In 2010, 10 years after the conclusion of the Nisga'a Agreement, the majority of the Nisga'a peoples considered that the provision of health services by self-governed institutions had improved compared to health services prior to the Agreement.[126] Eight per cent of the Nisga'a's traditional lands are now held in fee simple by the Nisga'a,[127] and while this is a small portion of the land lost through colonisation, it conveys progress. While the Nisga'a Agreement was, in part, a recognition of existing rights, these rights were defined and expanded by negotiation and further solidified and recognised in Canadian law in the process.[128] The Nisga'a Agreement also demonstrates how First Nations self-government and continuing colonial governance can coexist.[129]

Although legal challenges have been levelled at the Nisga'a Agreement, each challenge has resulted in an affirmation of the Nisga'a's right to self-govern.[130] In the process, the Nisga'a's right to self-govern has been held to be derived from multiple sources. In *Campbell v British Columbia*,[131] it was found that the right to self-government was constitutionally protected and derived from the rights enjoyed by the Nisga'a Nation prior to colonisation.[132] In *Chief Mountain v British Columbia (Attorney General)*,[133] however, the Court acknowledged that even with constitutional protection of the right to self-government, the powers granted by this right might also be validly considered to have been 'delegated to the Nisga'a Nation by the federal

126 Joseph Quesnel, 'A Decade of Nisga'a Self-Government: A Positive Impact, But No Silver Bullet' (2010) 31 *Inroads: First Nation Governance* 47, 52. It is worth noting that while Nisga'a peoples were at this time more trusting of their governments and hopeful for the future, statistically, they were split on whether education provision had improved or worsened. The majority felt that the governments were not consulting with communities enough and that the Nisga'a economic position had worsened. However, this could also be attributable to economic downturns and features such as the remoteness of Nisga'a lands. Self-government alone is not a panacea.

127 Hoffman and Robinson (n 99) 394.

128 Allen (n 104) 236.

129 Ibid.

130 See, eg, *Chief Mountain v British Columbia (Attorney General)* (n 101) and *Sga'nisim Sim'augit (Chief Mountain) v Canada (Attorney-General)* [2013] BCCA 49.

131 (2000) 189 DLR (4th) 333.

132 Ibid [124].

133 [2011] BCSC 1394.

government and provincial government'.[134] The right to self-govern can, therefore, be considered both inherent and delegable from colonial governments.

The author posits that the court's flexibility in interpreting how the right to self-government arises reflects an acceptance of the inherent Aboriginal right to self-govern. It evidences that a Westminster-based legal system can accommodate multiple sources of the right to self-government and other Aboriginal and treaty rights, despite recognition of Canadian First Nations sovereignty remaining elusive. As such, this flexibility demonstrates one of the notions of legal pluralism, being that traditional law—based on the continued observance of tradition and custom—can coexist with Western and colonial systems of law.[135]

VI THE BEGINNING OF INDIGENOUS SELF-GOVERNMENT IN AUSTRALIA

We are beginning to see agreements between Aboriginal people and Australian governments that resemble the modern treaties discussed above. Australia lags behind Canada in officially recognising a right to self-government for Aboriginal Australians. However, increasing efforts between Australian governments and Aboriginal communities to establish agreements are evident.[136] Some of these agreements can be seen to give rise to self-government rights.[137] This part will discuss the Noongar Settlement and explore the reasons that have led to it being considered by some as the first

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134 Ibid [11].

135 Jean-Guy Belley, 'The Protection of Human Dignity in Contemporary Legal Pluralism' in René Provost and Colleen Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism* (Springer, 2013) 99, 101.

136 See, generally, Aboriginal Treaty Working Group, Parliament of Victoria, The Design of the Aboriginal Representative Body (Final Report, March 2018) and *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) ('ATPAV Act').

137 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2014* (Report, 20 October 2014) [5.5]. The discussion at [5.5] relates to the Ngarrindjeri Regional Authority, which can negotiate with local governments on behalf of the Ngarrindjeri Nation. See also the Barunga Agreement and Memorandum of Understanding made between the Aboriginal Land Councils and the Northern Territory Government, which was signed on 8 June 2018.

Australian Aboriginal treaty, by virtue of the similarity of the rights it confers to those contained in modern treaties such as the Nisga'a Agreement, albeit more limited. Other current and past negotiated agreements between Australian governments and Aboriginal Australians will similarly be explored to consider how, if at all, self-government rights are being negotiated.

C *The Noongar Settlement*

The South West Native Title Settlement ('Settlement'), also known as the Noongar Settlement, is the largest, most comprehensive negotiated agreement between an Australian government and Aboriginal Australians in Australian history,[138] and has been hailed by some as the first Aboriginal treaty.[139] The Settlement was negotiated between the Government of Western Australia ('WA Government') and the South West Aboriginal Land and Sea Council ('SWALSC'), representing a number of Noongar claimant groups. The Settlement area spans 200,000 square kilometres, and it confers upon the Noongar claimant's rights to the management of land, resources, finances, and cultural heritage in exchange for the resolution of all native title claims over the area.[140] The WA Government and the SWALSC negotiated the Settlement out of court following the success[141] and subsequent overturning[142] of native title claims over Perth and its surrounding areas. The Settlement also established legislation that recognised the Noongar people as the traditional owners and occupiers of the South West region of Western Australia and acknowledged their continuing relationship with the land.[143]

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138 Robert Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 2019) 934.
139 Hobbs and Williams (n 79) 35.
140 'South West Native Title Settlement', *Western Australian Department of Premier and Cabinet* (Web Page, 11 February 2019) <https://www.dpc.wa.gov.au/swnts/South-West-Native-Title-Settlement/Pages/default.aspx>.
141 *Bennell v Western Australia* (2006) 153 FCR 120.
142 *Bodney v Bennell* (2008) 167 FCR 84.
143 *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA) s 5.

Some scholars contend that the Settlement is Australia's first Aboriginal treaty because it recognises the Noongar people as a 'distinct polity',[144] includes 'nation to nation dialogue',[145] was politically negotiated on good and equal standing,[146] and contains explicit recognition of Noongar authority over the land and benefits in a manner similar to Canadian agreements.[147] Just as in the Nisga'a Agreement, the Settlement involved the exchanging of native title claims and rights for a package of benefits, including rights to land and land management (though these rights are non-exclusive), enhanced cultural heritage protection, and a sustained financial contribution from the colonial government that could be utilised to improve the Noongar people's independent economic base.[148]

The Settlement also gives rise to potential self-government rights, establishing the Noongar Regional Corporations, and a Central Services Corporation that will receive extensive funding from the WA Government.[149] These corporations serve to maintain and protect Noongar culture and tradition on the Noongar Land Estate, while also negotiating with government parties and other parties for the benefit of Noongar communities.[150] Such corporations give the Noongar peoples a representative in discussions regarding policy affecting their land[151] and a vehicle to maintain a significant amount of authority over this land through Co-operative and Joint Management responsibilities shared with the WA Government.[152]

Co-operative Joint Management responsibilities include assisting to amend existing land use plans while also identifying and creating new land use plans over the Land Estate handed back to the Noongar people through

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144 Hobbs and Williams (n 79) 7.
145 Ibid 35.
146 Ibid 36.
147 Ibid.
148 Ibid.
149 Ibid 32.
150 Ibid.
151 Ibid 37.
152 See, eg, *Whadjuk People Indigenous Land Use Agreement*, signed 8 June 2015 (registered 17 October 2018) 153.

the Settlement.[153] While there is no scope within the Settlement for the creation of Noongar governmental institutions or law-making by the Noongar peoples in the same way that the Nisga'a Agreement provides, Hobbs and Williams assert that the Noongar Regional Corporations could institute a 'limited form of self-government'.[154] Hobbs and Williams appear to base this on the idea that recognition of the value of cultural governance in Noongar affairs—such as the use of traditional land—the input into cultural and land-use policy, and the sustained resourcing of institutions and bodies to achieve these goals, constitutes a step towards self-government.[155] The accommodation of the Settlement within Western Australian legislation and the Western Australian governmental system is just one signal that self-governance rights can coexist with the dominant systems of Australian government.

D *Other Self-Government Initiatives in Australia*

Other states have similar initiatives that indicate a tolerance among Australian governments and legal systems to Indigenous self-governance.[156] In Victoria, strides have been taken to legislate and establish a Treaty Authority to govern treaty negotiations between the Government of Victoria and Victorian Indigenous communities.[157] Both the relevant legislation[158] and the Victorian Government[159] acknowledge the right of Indigenous communities to self-determination and, subsequently, self-government.

Furthermore, in South Australia, the Ngarrindjeri Nation has established agreements that serve as legally binding contracts for dialogues

153 Ibid 602–4.
154 Hobbs and Williams (n 79) 36.
155 Ibid 37.
156 See generally Treaty Working Group on Queensland's Path to Treaty, *Path to Treaty* (Report, 3 February 2020).
157 *ATPAV Act* (n 136) s 28.
158 Ibid s 22.
159 See generally Government of Victoria, *Victorian Government Aboriginal Affairs Report 2019* (Report, November 2019) 10.

with the Government of South Australia and local governments. These agreements, and the negotiations undergone to reach them, are similar to Indigenous treaty negotiations in other jurisdictions.[160] These agreements have been recognised to be intergovernmental in nature,[161] evidencing that these negotiations are taking place in a context where the government acknowledges the right to self-government of the Ngarrindjeri. Additionally, through its Minister for Aboriginal Affairs and Reconciliation, the Government of South Australian has delegated the power to grant authority to disturb or interfere with Aboriginal objects and sites on Ngarrindjeri lands[162] to the Ngarrindjeri Regional Authority.[163] Whilst this power does not necessarily confer onto the Ngarrindjeri the right to govern the entirety of their cultural affairs, it does give the Ngarrindjeri a say in relation to the legislative enforcement of their own heritage matters and further reflects a legal system that can accommodate Aboriginal authority.

VII THE COEXISTENCE OF INDIGENOUS AUSTRALIAN AND AUSTRALIAN GOVERNANCE STRUCTURES

The reoccurring obstacle that tends to hinder discussions relating to Aboriginal treaties and Aboriginal self-government in Australia is the question: from where is an Aboriginal group's power to internally govern derived?[164] While a number, if not the majority, of Aboriginal Australians do not accept that Aboriginal sovereignty was legally ceded in Australia,[165] a formal recognition of this sovereignty has been viewed by some as a detraction from the dominant Australian legal narrative that said sovereignty

160 Vivian et al (n 10) 238.
161 Daryle Rigney and Steve Hemming, 'Is "Closing the Gap" Enough? Ngarrindjeri Ontologies, Reconciliation and Caring for Country' (2014) 46 *Educational Philosophy and Theory* 536, 542.
162 *Aboriginal Heritage Act 1988* (SA) s 23.
163 Vivian et al (n 10) 239.
164 See *Coe (on behalf of the Wiradjuri tribe) v Commonwealth of Australia* (1993) 118 ALR 193, 200 ('*Coe v Commonwealth*').
165 See, eg, the Uluru Statement from the Heart in Referendum Council (n 85) i.

was extinguished during colonisation.[166] Subsequently, it is feared that recognition will remove the authority of Australian governments to include Aboriginal peoples within their laws, deconstructing the centralist legal idea that Australian colonial law governs all Australian peoples.[167] However, the recognition of multiple legal systems, formal and informal, coexisting within the same society, is not novel,[168] and goes some way to demonstrating how the Aboriginal right to self-govern can coexist with colonial law in Australian society.

A *Legal Pluralism*

The concept of legal pluralism explains in part how multiple sources of Aboriginal authority and self-governance rights can coexist with Australian central governance. Legal pluralism describes the 'practical reality that society is constituted of coexisting communities with allegiances to laws other than those of the central government'.[169] In a more general sense, legal pluralism means 'that more than one law is observed at the same time in the same space'.[170] Often, legal pluralism refers to traditional laws, being set out in customs and traditional practice, as legal systems that successfully coexist with Western ideas of law.[171] As a theory, legal pluralism allows for a right to Indigenous self-government, in that it disregards issues associated with a singular colonial sovereignty and implies that a coexisting 'shared sovereignty' exists,[172] one which allows for the self-governance of the smaller polity while allowing for the observation of the laws of the larger.

166 See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44].
167 Vivian et al (n 10) 219.
168 John Griffiths, 'What is Legal Pluralism?' (1986) 18(24) *Journal of Legal Pluralism and Unofficial Law* 1.
169 Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28(3) *Sydney Law Review* 403, 404.
170 Ralf Seinecke, 'What is Legal Pluralism and What is it Good For?' in Marju Luts-Sootak et al (eds), *Legal Pluralism: Cui Bono?* (University of Tartu Press, 2018) 13, 14.
171 Ibid.
172 George Williams, 'Does Constitutional Recognition Negate Aboriginal Sovereignty?' (2012) 8(3) *Indigenous Law Bulletin* 10, 10.

This notion reflects what one might see in Canada's acknowledgement of continuing, pre-colonial, First Nations' self-government rights.

A key issue the Australian government has expressed with acknowledging Aboriginal sovereignty is the threat of secession or the undermining of the Crown's own sovereignty.[173] As was noted in Part IV(B), there has been a past association between 'treaty' and 'another sovereignty, a nation within Australia'.[174] This traditional concept of sovereignty presents an obstacle to a coexisting Aboriginal authority with Australian federal authority, as 'it is tied to the idea that a government … has an over-riding and authoritative decision-making power'.[175] The traditional concept of sovereignty refers to sovereignty in the colonial view, where Aboriginal sovereignty undermines the sovereignty of the Commonwealth, leading to a country within a country with external affairs powers and conflicting laws and boundaries. However, if power over external affairs, seen in the traditional definition of sovereignty,[176] is disregarded, 'there is … little difference between sovereignty and an inherent right of self-government'.[177] Disregarding traditional definitions of sovereignty, or acknowledging that sovereignty has gained a significantly different meaning from the colonial definition in recent years,[178] gives rise to the idea of 'internal' or 'shared sovereignty', in which power is divided between central governments and constituent governments, such as state or provincial governments.[179] This idea of sovereignty, in the theory of treaty federalism, is essential to the

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173 Vivian et al (n 10) 229; see also Mick Dodson and Sarah Pritchard, 'Recent Developments in Indigenous Policy: The Abandonment of Self-Determination?' (1998) 4(15) *Indigenous Law Bulletin* 4, 4, which includes the following quote from the then Foreign Minister: 'We don't want to see a separate country created for Indigenous Australians'.

174 Brennan, Gunn and Williams (n 102) 308. See also French (n 74).

175 Frank Cassidy, 'Canadian Update: The Modern Treaty Process and Aboriginal Governments in British Columbia' (1993) 3(64) *Aboriginal Law Bulletin* 10, 10.

176 Brennan, Gunn and Williams (n 102) 311.

177 Cassidy (n 175) 10.

178 See *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1 [52], wherein Gleeson CJ, Gaudron, Gummow and Hayne JJ stated that it has long been recognised that sovereignty is 'a notoriously difficult concept which is applied in many, very different contexts'.

179 Vivian et al (n 10) 230.

foundation of Commonwealth nations such as Canada and Australia,[180] where federal and state governments have shared responsibilities and distinct authority over different aspects of governance.

Furthermore, we see in Canada that First Nations self-government rights give rise to 'rights that may be at variance with the broader legal regime of society'[181] that are resolved in different areas with preference being given either to First Nations sovereign laws or Canadian federal or state laws. This concept forms a key part of legal pluralism and is already a fundamental part of Australian governance between the nation and the states.

As such, there appears no reason why, in combination with the principles of legal pluralism, Aboriginal sovereignty could not be recognised, explicitly or implicitly, in the form of the conferral of the right to self-govern, without resulting in the feared fracturing of the Australian central law.

B *Coexistence*

A number of contemporary examples suggest Aboriginal self-government rights—as derivatives of continuing Aboriginal sovereignty—can effectively coexist with Australian colonial sovereignty without conflict. *Mabo v Queensland (No 2)* ('*Mabo (No 2)*'),[182] which historically forms the foundation for Aboriginal native title claims in Australia, can be argued to have predicated a range of existing Aboriginal governance practices and arrangements. Further, *Mabo (No 2)* recognises ongoing Aboriginal traditional custom, which could form the basis of a legal plurality in Australia. The increasing recognition in Australian common law that the traditional, colonial definition of sovereignty lacks accuracy as a singular definition suggests that 'shared sovereignty' is plausible in Australia. Lastly, the

180 Ibid.

181 Chris Thornhill et al, 'Legal Pluralism? Indigenous Rights as Legal Constructs' (2018) 68(3) *University of Toronto Law Journal* 440, 441.

182 *Mabo (No 2)* (n 93).

authority by which Australian local governments operate and govern could also allow the delegation of sovereign authority and governance rights to Aboriginal peoples. In addition to providing support for the recognition of Aboriginal rights to self-government in Australia, it is contended that these examples could form the foundation from which further, more expansive self-government rights could be developed.

1 *Mabo (No 2) and Australian Aboriginal Legal Rights*

Native title rights, which form the basis of Aboriginal legal rights, [183] and self-governance in forms like the Noongar Settlement, confirm that Aboriginal self-government rights can coexist with current Australian central law.[184] The process of claiming native title assumes and acknowledges that there are distinct Aboriginal communities with rules to determine membership, traditional country, and community representatives; [185] and recognises property rights arising from a different system of laws.[186] At least in part, the construction of native title rights in *Mabo (No 2)* assumes that there are existing organisational and governance structures within Aboriginal communities that can manage native title after a successful claim.[187]

In *Coe v Commonwealth*, Gibb's J confirmed that *Mabo (No 2)* does not imply '[Indigenous] sovereignty adverse to the crown'.[188] Furthermore, the majority of the High Court rejected the assertion of a continuing, unextinguished Aboriginal sovereignty, as based on sovereignty adverse to the Crown.[189] However, while *Coe v Commonwealth* indeed affirms the Court's rejection of adverse Indigenous sovereignty, it does not reject the existence of Aboriginal rights to self-government altogether. In contrast, the

183 Vivian et al (n 10) 219.
184 Jayasekera (n 76) 39.
185 Reilly (n 169) 421.
186 *Mabo (No 2)* (n 93) 86–95 (Deane & Gaudron JJ).
187 Reilly (n 169) 421.
188 *Coe v Commonwealth* (n 164) 129–31 (Gibbs J).
189 Ibid 133.

assumptions of limited self-governance emerging from the *Mabo (No 2)* decision implicitly recognise Aboriginal communities as politically and legally distinct from colonial Australia, with rights arising from a different system of laws,[190] and reflects this article's previous discussion of Indigenous treaties and legal pluralism.

Legal pluralism supports the idea of negotiation between two distinct polities and the coexistence of two or more forms of law. The landmark case of *Mabo (No 2)* recognises limited forms of self-government powers similar to the explicit powers of self-government enshrined in the Noongar Settlement.[191] Furthermore, the Court's findings in *Coe v Commonwealth* does not infer rejection of Aboriginal rights to self-government.[192] Conversely, the implicit recognition of self-government powers in *Mabo (No 2)* exemplifies that self-government rights already exist at common law, albeit in a limited capacity. The fact that such mechanisms are already prescribed at common law supports the viability of further, more expansive, Aboriginal self-government rights effectively coexisting with Australian central law.

2 *Shared Sovereignty*

In addition to acknowledging the need for Aboriginal self-government, Australian common law has also implicitly recognised that 'sovereignty' no longer has a singular definition as conceptualisations of internal and external sovereignty have arisen. Australian case law suggests that 'internal sovereignty'—the right to manage your own affairs as a distinct polity—can coexist with 'external sovereignty'—the right to deal externally with other nations—which is most consistently defined as 'traditional sovereignty'.[193] By recognising that different definitions of sovereignty exist, including by

190 *Mabo (No 2)* (n 93) 86–95 (Deane & Gaudron JJ).
191 Reilly (n 169) 421.
192 *Coe v Commonwealth* (n 164) 133.
193 Jane Robbins, 'A Nation Within? Indigenous Peoples, Representation and Sovereignty in Australia' (2010) 10(2) *Ethnicities* 257, 258–9.

recognising an implicitly different Aboriginal definition of sovereignty, this author posits that Australian common law can allow for shared sovereignty.

For example, in *Shaw v Wolf*,[194] the Court was required to determine an issue relating to Aboriginal identity regarding a challenge to a person's eligibility to be elected to the Aboriginal and Torres Strait Islander Commission. Merkel J noted that it was unfortunate that the Court was to answer such a question as it was highly personal and one unsuitable to be determined by the Court given the Court was not 'representative of Aboriginal people'.[195] His Honour noted further that, ideally, such questions should be determined by 'independently constituted bodies or tribunals which are representative of Aboriginal people'.[196] The fact that State governments are now tending towards adopting policies of self-determination and agreement-making with Aboriginal Australians is perhaps a reflection, at least in part, of the issue identified by Merkel J.

Additionally, courts have not only acknowledged distinct meanings of sovereignty; they have also questioned the existence of exclusive Crown sovereignty. In *New South Wales v Commonwealth*, Barwick CJ noted that the meaning of sovereignty seemed to change depending on the context in which it was used.[197] In 2001, Kirby J considered in *Commonwealth v Yarmirr* that the 'very claims to sovereignty in the Crown … had a similar metaphorical quality' to the native title claimants' assertion of exclusive rights over 'sea country'.[198] Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth* even asserted that the 'imperial' definition of sovereignty had ended with the *Australia Act 1986* (Cth) and 'ultimate sovereignty resided in the Australian people'.[199] A move away from the

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194 (1998) 163 ALR 205 ('*Shaw v Wolf*').
195 Ibid 268.
196 Ibid.
197 *New South Wales v Commonwealth* (1975) 135 CLR 337, 364 ('*Seas and Submerged Lands Case*').
198 *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1 [304].
199 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136.

traditional idea of sovereignty affirms the idea that 'the indigenous concept of sovereignty' is not necessarily related to its 'Western connotation of original power over people and territory'.[200]

While the courts have asserted that Aboriginal sovereignty is a political issue and, therefore, not determinable at common law, the acknowledgement of distinct forms of sovereignty promotes the principles of legal pluralism in Australia. The court's persuasive recognition of distinct forms of sovereignty—a source of legal power—can exist without impassable conflict. Furthermore, the court's flexible interpretation of sovereignty also suggests Australia's willingness to accommodate 'shared sovereignty' or an Aboriginal Australian right to self-government in its current federal system in a manner similar to that of Canada. [201]

3 *Delegable Governance*

Finally, Australia's current system of delegated governmental authority could accommodate Aboriginal government institutions in the same manner that it accommodates local governments.[202] Local governments are not dealt with in the *Commonwealth of Australia Constitution Act 1900* ('*Australian Constitution*'),[203] and federal governments do not often interact with them directly.[204] Instead, Australia's state and territory governments institute local governments through legislation. Local governments, therefore, operate with delegated authority rather than any inherent or independent power.[205]

The role of local government was not recognised until 2006,[206] but had continued in similar form for long before this—similar to past and present

200 Wiessner (n 87) 1167.
201 Ibid 1166.
202 Vivian et al (n 10) 233.
203 *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, cl 12, s 9 ('*Australian Constitution*').
204 Lyndon Megarrity, 'Local Government and the Commonwealth: An Evolving Relationship' (Research Paper No 10 2010-11, Parliamentary Library, Parliament of Australia, 31 January 2011) 14.
205 Vivian et al (n 10) 233.
206 Megarrity (n 204) 21.

traditional practices and self-governance practiced by Aboriginal peoples. While local governments do not have independent status and cannot exercise power solely of their own accord,[207] they can make ordinance regarding local issues. As such, the power of local governments to make laws is qualified in a manner similar to the way in which the *UNDRIP* qualifies the right of Indigenous peoples to self-government—each must be exercised with respect to the Indigenous peoples' and local governments' 'internal and local affairs'.[208] It can be argued that the successful coexistence of local and state governments within the federal system 'demonstrate[s] fluidity in the allocation and exercise of jurisdiction across the tiers of government'.[209]

The parallel characteristics and operation of local governments with Aboriginal systems of self-government suggests that recognition of Aboriginal institutions of government could operate in a similar fashion—through legislative or other delegation. Such fluidity in the federal system indicates that self-government arrangements could be accommodated within Australia's current systems of governance, albeit without the recognition of an inherent right to self-govern.

VIII Sovereignty and Constitutional Recognition: Barriers to Self-Government?

The recognition and conferral of Aboriginal self-government rights in Australia is often mired in political discussions, which divert attention and resources from the government-provided assistance that is necessary for sustainable and effective self-government for Aboriginal peoples.[210] As has been alluded to above, one major stumbling block for the conferral of self-government rights in Australia is the lack of colonially recognised

207 Ibid.
208 *UNDRIP* (n 1) art 4. See also the discussion in Megarrity (n 204) 1–2.
209 Vivian et al (n 10) 234.
210 *Royal Commission into Aboriginal Deaths* (n 9) vol 1 [1.7.11].

sovereignty for Aboriginal Australians. Another issue has been the debate over the constitutional recognition of Aboriginal Australians. However, as has already been partly seen, these two issues can be resolved without the need to halt the development of Aboriginal self-government rights and, at least in the case of the discussion around sovereignty, may actually assist with the progression of these rights. Each issue will now be explored in turn.

A *Sovereignty*

Aboriginal self-government in Australia has often been impeded by claims that the right to self-government confers recognition of another sovereignty, which some fear could lead to either secession or a challenge to Australia's legal foundations.[211] Australian courts have conclusively shown that arguments against the validity of the Crown's sovereignty will not be determined at common law.[212] Aboriginal claimants must instead, as is the case with any legal action, bring forward claims based on 'some immediate right, duty or liability',[213] rather than the general denial of Aboriginal sovereignty.[214] However, it is contended that singular sovereignty, or the fear of undermining the validity of Australian sovereignty, do not constitute barriers to the creation of self-government agreements or to the conferral of further self-government rights. According to Vivian et al, the conferral of an 'Aboriginal jurisdiction' would not necessitate the removal or undermining of Australian sovereignty but would instead recognise a shared sovereignty founded in the principles of legal pluralism.[215] As was considered pt IV,

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211 Brennan, Gunn and Williams (n 102) 308.

212 Noel Pearson, 'Reconciliation: To Be or Not to Be? Separate Aboriginal Nationhood or Aboriginal Self-determination and Self-government within the Australian Nation?' (1993) 3(61) *Aboriginal Law Bulletin* 14, 14; see also *Shaw v Wolf* (n 194) 268 (Merkel J); *Coe v Commonwealth* (n 164) 200 (Mason CJ); and *Thorpe v Commonwealth (No 3)* (1997) 144 ALR 677, 683 (Kirby J).

213 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265.

214 Martin Flynn and Sue Stanton, 'Another Failed Sovereignty Claim: Thorpe v Commonwealth of Australia (No 3)' (1997) 4(7) *Indigenous Law Bulletin* 19.

215 Vivian et al (n 10) 228.

preliminary forms of these types of agreements already exist within the current Australian system of singular sovereignty.

Further, in both Australia and Canada—both of which are western, colonised, liberal democracies with laws and institutions inherited from England[216] —the issue of sovereignty has been set aside in efforts to achieve Indigenous self-governance and self-determination. In Australia, the Joint Select Committee on Constitutional Recognition noted that while sovereignty was significant to Aboriginal Australians, the question of sovereignty could be decided outside deliberations for constitutional recognition[217] and, subsequently, Aboriginal self-determination.[218] In Canada, the Royal Commission on Aboriginal Peoples acknowledged differing views on the definition of sovereignty, but ultimately decided to set the question aside in favour of 'resolving the practical issues of coexistence'.[219] The Nisga'a Agreement demonstrates that Canadian First Nations are not prevented from achieving self-government simply because Canada has not conclusively acknowledged their Indigenous sovereignty.[220] It therefore follows that the failure to formally recognise the sovereignty of Aboriginal Australians does not necessarily undermine their ability to achieve self-government through a practical agreement-making process.

B *Constitutional Recognition*

The constitutional recognition of Aboriginal Australians has formed a major part of advocacy efforts to achieve Aboriginal self-determination in Australia. Constitutional recognition could improve the context in which laws and

216 Petrie (n 4) 3.
217 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (Final Report, June 2015) [7.7].
218 Peter Dawson, 'On Self-Determination and Constitutional Recognition' (2015) 8(16) *Indigenous Law Bulletin* 3, 3.
219 Brennan, Gunn and Williams (n 102) 331.
220 Ibid 332, 336.

policies regarding Aboriginal people are made as most proposed models of constitutional recognition seek to enshrine the continuation of Aboriginal languages, cultures, and heritage, thereby helping to secure these in future policy and law-making.[221] However, the most relevant form in which constitutional recognition could help promote Aboriginal self-determination is through the enshrining of models of participation, such as Aboriginal advisory boards, of Aboriginal people in decision-making that directly affects them.[222] By extension, constitutional recognition could provide some form of self-government rights or, similarly to Canada, recognise a formal right to self-government.

At present, Aboriginal Australians, and their continuing connection to land and cultures, are not recognised in the *Australian Constitution*. This lack of recognition of Australia's first peoples in the *Australian Constitution* is a distinct difference from the Canadian position.[223] Further, the Canadian constitutional position appears unlikely to be emulated in Australia in the near future due to Australia's historic difficulty of passing constitutional reform by referendum and the current stances of Australia's political parties.[224]

Additionally, questions have emerged regarding the form of such constitutional recognition. Most recently, Aboriginal groups have advocated for an Aboriginal representative body to be enshrined within the *Australian Constitution*.[225] The federal government, on the other hand, has shown support for recognition only.[226] Scholars have expressed concerns with both approaches. Some are concerned that any recognition or acknowledgement of Aboriginal Australians will be a merely symbolic change would fail to

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221 Dawson (n 218) 3.
222 Ibid 3–5.
223 *Canada Act* (n 88) sch B para 35(1).
224 Vivian et al (n 10) 235.
225 Referendum Council (n 85) i.
226 Dan Conifer, 'There's Bipartisan Support for Constitutional Recognition of Indigenous Australians But How Can it be Achieved?', *ABC News* (online, 11 July 2019) <https://www.abc.net.au/news/2019-07-11/indigenous-recognition-in-constitution-referendum-explained/11300740>.

progress Aboriginal rights substantively.[227] Referendums are also costly, and the federal government would be put to significant expense in electing to hold one.[228] As such, the addition of another Aboriginal layer of governmental authority in the *Australian Constitution* has been identified as 'the least probable'[229] of all proposed constitutional reforms.

However, the Noongar Settlement demonstrates that a lack of constitutional recognition will not necessarily hinder self-government agreements.[230] Further, it is arguable that the constitutional enshrinement of an Aboriginal Australian right to self-determination would be an 'ineffective guarantee'[231] of such a right. If constitutional recognition were to be implemented in the immediate future, there are fears that there could be insufficient time for the necessary consultation with Aboriginal communities,[232] and proper negotiations between these groups and the federal government,[233] with respect to the specific form and wording of proposed amendments. Instead, the terms and operation of the relationship between the Aboriginal-state relationship should be defined through agreement-making.[234] Without agreement, consultations by the federal government with Aboriginal communities would leave any rights to govern Aboriginal affairs solely with the government.[235]

In Canada, self-government rights have been conferred through the use of policy and negotiation rather than expressly being recognised in Canada's

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227 Melissa Castan, 'Constitutional Recognition, Self-Determination and an Indigenous Representative Body' (2015) 8(19) *Indigenous Law Bulletin* 15, 17.

228 Ibid.

229 Vivian et al (n 10) 240.

230 Hobbs and Williams (n 79) 38.

231 Dylan Lino, 'The Politics of Inclusion: The Right of Self-Determination, Statutory Bills of Rights and Indigenous Peoples' (2010) 34(3) *Melbourne University Law Review* 839, 840.

232 Ibid 839.

233 Ibid 855.

234 Ibid 856.

235 See ibid 864, where Lino stated that 'statutory bills of rights give power to the state to define the content of Indigenous self-determination, to decide whether or not to abide by the precepts established in relation to Indigenous self-determination, and ultimately to determine whether the right will continue to exist in statutory form. This continues the state domination of Indigenous peoples …'.

constitution. The self-government rights from any agreements reached are then protected under the constitutional 'aboriginal rights' rather than solely by agreement subject to later negotiation. Accordingly, while constitutional recognition has the potential to protect Aboriginal people's right to self-govern, in the author's view, constitutional recognition is not necessary for Aboriginal Australians to achieve self-government through the use of negotiated agreements.

IX CONCLUSION

The preliminary recognition of Aboriginal rights to self-government in Australia has been expressed implicitly and explicitly by the *Mabo (No 2)* decision and the more recent negotiation of the Noongar Settlement. Given the flexibility of the Australian legal jurisdiction, combined with the observable outcomes seen in Canada, it does not appear that self-government outcomes are precluded by the current lack of acknowledgement of sovereignty or constitutional recognition of Aboriginal Australian peoples. Indeed, it appears that Aboriginal Australian communities can achieve a measure of self-government and, subsequently, self-determination through agreement-making and negotiation to coexist alongside Australian governmental authority.

Internationally, agreements and Indigenous treaties have been the primary method of enacting self-government rights and are recognised in Canada as the preferable method of First Nations empowerment and dealing with First Nations lands. Such agreements can give rise to the expansive self-government rights exhibited in the Nisga'a Final Agreement, which operates concurrently with Canadian federal and provincial authority. The theory of legal pluralism, the flexibility of the Australian governmental system to accommodate existing forms of preliminary self-government, differing sources and definitions of sovereignty, and the delegation of state sovereignty to local governments all indicate an accommodating environment for Aboriginal self-government rights to coexist with Australian governments, as exemplified by the Noongar Settlement. Subsequently, the stage may be set for agreement-making between Aboriginal Australians and Australian governments to drive meaningful pathways to Aboriginal self-determination further.

A DIVERGENT PATH: A COMPARATIVE INVESTIGATION INTO WHY AUSTRALIA IS WITHOUT A BILL OF RIGHTS

CINDY SHI*

CONSTITUTIONAL LAW—COMPARATIVE LAW—BILL OF RIGHTS—UNITED KINGDOM—CANADA—NEW ZEALAND

ABSTRACT

Australia is distinct among contemporary western nations because it does not have a bill of rights. It is vital to understand why this is the case if there is to be informed discussion on the further development of rights protection in Australia. Any decision to progress with a national rights document would be futile if the barriers to its success are not pinpointed and overcome. This article comparatively investigates Australia and three other Commonwealth countries—the United Kingdom, Canada, and New Zealand. Ultimately, the comparative analysis reveals that while it is possible for Australia to adopt a bill of rights, a proposal will not be successful if it simply replicates a rights model adopted by the nations identified above. A successful bill of rights must cater to the nuances that are unique to Australia's legal system and complex sociopolitical climate.

I INTRODUCTION

The absence of a national bill of rights places Australia on a divergent path from its most legally and politically comparable countries—including Commonwealth nations such as the United Kingdom, Canada and New

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Zealand. This divergence has earned Australia the moniker of being the only Western democracy without a bill of rights. While much focus has been placed on whether Australia should or should not adopt a bill of rights, there is far less foray into the barriers that see proposals fail time and time again. It should be noted that the absence of a bill of rights is certainly not for lack of trying. Several rights bills have been proposed since constitutional framer, Andrew Inglis Clark's first attempt in 1891—all without success.

The methodology used in this article will be quasi-controlled comparisons against three countries that bear very similar legal structures and comparable sociocultural values to Australia—the United Kingdom, Canada, and New Zealand. Each country operates under a common law system, are Commonwealth nations, and all uphold parliamentary sovereignty as a fundamental legal principle. Whilst none of these four nations included a bill of rights with their original Constitutions, all except Australia have subsequently adopted such a bill. This comparative set allows the research to investigate one obvious dissimilarity—the absence of a bill of rights—with relatively limited opportunity for explanations to be attributed to stark contrasts in legal systems or cultural values. The scope of this article will, therefore, be limited to discussion of these four countries.

Part II of this article will provide a brief background to the debate and sets up the question to be resolved. Part III will establish a theoretical framework from which the central argument against a bill of rights is to be understood. Part IV will analyse the viability of implementing various bill of rights models into the Australian legal framework. Part V will investigate the obstacles to a national bill of rights presented by Australia's sociopolitical climate. Part VI will conclude that mere replication of rights models from comparative nations will bring the continued failure of bill of rights proposals in Australia. While a national bill of rights in Australia is possible, it must cater to the unique nuances of Australia's legal system and sociopolitical climate.

II BACKGROUND

A national bill of rights in Australia is the subject of a seemingly eternal debate, passed down through generations of politicians and academics, advocates and opponents—its origins trace back to discussions amongst the framers regarding its inclusion in the *Australian Constitution*. Andrew Inglis Clark was inspired by the rights tradition in the United States and proposed a draft that reflected that inspiration.[1] A bill of rights was not included in Clark's 1891 constitution proposal, however, it did propose several rights protections—most of which were rejected.[2] Clark's proposal was viewed as an extreme departure from Australia's sense of national identity as being one that is closely associated with British institutions, such as the Westminster model of responsible government.[3]

Academics attribute two reasons to the framers' decision to exclude a bill of rights. The dominant understanding discussed in the literature is the belief that the framers wanted the *Australian Constitution* to act as a blueprint of how Australia would operate, almost exclusively reflecting functionality and utilitarianism, and indicating a strong commitment to British parliamentary sovereignty.[4] The other perspective on the framers' motivations suggests that there was an objective to establish a means of abrogating the rights and interests of particular sections of Australia's community. Specifically, that the framers sought to maintain race-based

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1 George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 60.

2 Ibid.

3 George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (New South Wales Publishing, New ed, 2017) 47–8.

4 Williams and Hume (n 1) 58–9.

distinctions.[5] Strong rights protection provisions were deemed problematic as they could be applied to the minority population.[6]

These explanations for why the *Australian Constitution* did not include a bill of rights can be accepted, but they naturally lead to the question of why contemporary rights legislation proposals continue to be met with rejection. Framers' motivations as to the inclusion of a bill of rights are either no longer relevant, or, in the case of denying rights to minority groups—they were never excusable. Australia's commitment to the United Kingdom has diminished considerably since Federation. And, increasingly, globalisation and changing economic and strategic alliances have propelled Australia to look beyond the United Kingdom and develop its own national identity. If it was accepted that the United Kingdom example continued to carry the most weight in influencing Australia's legal framework, it would follow that the *Human Rights Act 1998* (UK) ('HRA')[7] should have received a similar level of commitment or mimicry from Australia.

Additionally, the framers' choice to prioritise utilitarianism and pragmatism and exclude a bill of rights from the *Australian Constitution* is now also an untenable explanation as to why Australia is without a bill of rights. A solution to this concern is the statutory rights model, as adopted in the United Kingdom and New Zealand. This is an option that would not affect the pragmatic nature of the *Australian Constitution*, as the rights protection would be a separate document. Thus, if the factors that originally determined the status of a bill of rights in Australia are refutable, why then, is contemporary Australia without a bill of rights?

III THEORETICAL FRAMEWORK

5 Ibid 60.
6 Ibid.
7 *Human Rights Act 1998* (UK) ('*HRA*').

First, it is important to understand the arguments against Australia adopting a bill of rights if we are to comprehend why bill of rights proposals have failed. In this article, judicial review will refer exclusively to the review of legislation and not decision-making by the executive. Legal academic Jeremy Waldron is an outspoken critic of strong judicial review, which often has a direct connection to a bill of rights. Judicial review is a process by which courts examine the lawfulness of actions and decisions made by the executive and legislative branches of government. Waldron's theory, by extension, is a criticism of bill of rights models that are contingent on the use of strong judicial review. [8] His argument essentially purports that a bill of rights model green lighting the use of strong judicial review would permit excessive judicial power, extending the possibility of judicial activism while undermining parliamentary sovereignty.[9] Waldron's theory is a key argument employed by opponents to a bill of rights in contemporary Australian debate.[10]

An example can illustrate the key difference between 'strong judicial review' and 'weak judicial review' in the context of a bill of rights. In circumstances where ordinary statute contradicts provisions of the bill of rights, strong judicial review allows courts to either refuse the application of the statute; change the effect of a statute so that it no longer breaches the protection of individual rights; or strike down the legislation entirely, though this last avenue is uncommon. [11] By contrast, in a weak judicial review system, the courts' power regarding legislation that violates rights, is limited to an advisory function. [12] Courts may scrutinise the legislation on its adherence to protecting civil rights, but it cannot refuse its application or

8 Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115(6) *Yale Law Journal* 1346, 1406.
9 Hilary Charlesworth, 'Who Wins Under a Bill of Rights?' (2006) 25(1) *University of Queensland Law Journal* 39, 39–40.
10 Ibid.
11 Waldron (n 8) 1355.
12 Ibid.

modify the effect of its operation.[13] In some jurisdictions, courts may issue a 'declaration of incompatibility', however, this action is purely advisory and not binding on any parties.[14] In the Australian context, judicial review of legislation in either form is not available to federal courts, as there is no federal bill of rights document that statutes must conform, or attempt to conform, with.[15]

Waldron's critique—often referred to as 'anti-judicial review'—puts forward two key arguments. First, Waldron contends that a bill of rights model allowing unelected judges the power to invalidate certain legislation is democratically illegitimate.[16] Second, Waldron argues that a bill of rights is not required for adequate rights protection because statutes passed in parliament by democratically elected representatives should sufficiently fulfil this role.[17] Waldron argues that democratically elected representatives are entrusted with their legislative powers, and, therefore, an established system that aims to protect the rights of the public already exists.[18] A bill of rights mechanism of protecting rights—particularly one that involves the use of strong judicial review—is, therefore, deemed both undemocratic and unnecessary by Waldron.[19]

Analysing the barriers to an Australian bill of rights through anti-judicial review theory can explain why adopting a national bill of rights in Australia is difficult from both a legal and political standpoint. Regarding issues with the law, understanding Waldron's arguments helps to explain why a constitutionally entrenched bill of rights model is deemed so unlikely to be successful that it has been abandoned as a potential option by many bill of

13 Ibid 1355–6.
14 Ibid 1355.
15 Charlesworth (n 9) 39.
16 Waldron (n 8) 1406.
17 Ibid 1406.
18 Ibid 1360.
19 Ibid.

rights proponents.[20] Politically, the sentiments of the anti-judicial review theory are revealing as they are often expressed by politicians who have power over the success of the bill in Parliament.[21] This is largely because at the heart of the contemporary case against a bill of rights lies the claim that it threatens democracy by disproportionately empowering the judiciary.

Waldron's critique, however, is still limited in explaining why a national bill of rights remains unsuccessful. For instance, it cannot explain why referenda seeking to introduce additional rights provisions to the *Australian Constitution* have historically failed by a landslide.[22] Nor is Waldron's critique able to account for all the legal and political barriers to a successful bill. Why, for example, is an ordinary statutory bill of rights that would not invoke strong judicial review also unsuccessful in Australia? Clearly, there are numerous factors underpinning why Australia lacks a bill of rights at the federal level. While Waldron's theory may be used to understand the more obvious reasons for its lack of success, it does not account for the smaller, seemingly unrelated factors that come together to create a sociopolitical culture that prevents the adoption of a bill of rights.

IV LEGAL ANALYSIS

A *The United Kingdom Dialogue Model*

Waldron's sentiment of anti-judicial review was highly prevalent in the United Kingdom when discussions were underway regarding the potential for a bill of rights to be enacted.[23] In this regard, concerns over the consequences of a bill of rights observed in the United Kingdom prior to 1998 resonates

20 Bruce Stone, 'Why Australia Has No National Bill of Rights' (Conference Paper, Australasian Political Studies Association Conference, 30 September 2013) 14.

21 Paul Kildea 'The Bill of Rights Debate in Australian Political Culture' (2003) 9(1) *Australian Journal of Human Rights* 65, 66.

22 Williams and Hume (n 1) 60.

23 Aileen Kavanagh, 'What's So Weak About "Weak-Form Review"? The case of the UK Human Rights Act 1998' (2015) 13(4) *International Journal of Constitutional Law* 1008, 1012.

with the type of resistance Australian proponents for a bill of rights still seek to overcome.[24] How, then, was the United Kingdom ultimately successful in introducing a bill of rights, while Australia has struggled for decades to achieve the same outcome?

Analysing the legal factors that led to the adoption of the HRA in the United Kingdom could uncover a potential blueprint for overcoming barriers to a national bill of rights in Australia. Alternatively, it could illuminate any uniqueness in Australia's legal climate that makes the United Kingdom's journey to achieving rights protection impossible to replicate at Australia's national level. While the adoption of the HRA was influenced by certain sociopolitical factors—including the European Convention on Human Rights ('the Convention'), which will be discussed in Part V—first, the United Kingdom's establishment of a rights document will be discussed from a purely legal perspective. Specifically, this discussion will focus on the rights model proposed in the bill, most commonly referred to as the 'dialogue' model, which was key to the HRA's likelihood of success in Parliament.

1 *Features of the United Kingdom 'Dialogue' Model*

Academic Stephen Gardbaum characterises the dialogue model of a bill of rights as a 'new Commonwealth model'.[25] The dialogue model has emerged as an alternative option to the extremes of the spectrum—absolute parliamentary sovereignty and judicial supremacy[26]— and has been adopted by Commonwealth countries Canada,[27] New Zealand,[28] and, most recently, the United Kingdom.[29] The dialogue model's favourability in the United Kingdom arose due to its structural features, which allow the HRA to protect

24 Stone (n 20) 14.
25 Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2nd ed, 2013) 18.
26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid.

rights by empowering the courts without abandoning parliamentary sovereignty.[30] Aileen Kavanagh fittingly describes the legislation as a 'compromise solution'.[31] This compromise is entrenched in the following key sections of the HRA.

Section 2 of the HRA establishes a requirement for courts to consider any decision or advisory opinion made by the European Court of Human Rights in a relevant case where protected rights are concerned, though the courts are not bound by these judgments. Section 3 requires courts to apply an interpretation of legislation that aligns with the rights protected in the Convention wherever possible. When such an interpretation cannot be made, the HRA empowers higher courts to put forth a 'declaration of incompatibility' to Parliament, a feature established under section 4 of the HRA. There is no requirement for courts to exercise this power.[32]

Section 10 of the HRA allows Parliament to respond to courts by establishing the power for a government minister to acknowledge the court's declaration. They may choose to devise a 'remedial order' to adjust the legislation and remedy the incompatibility; however, as observed above, there is no obligation for Parliament to respond to the court.[33] The court's declaration is purely advisory in nature.[34] Therefore, the HRA can be said to offer a form of weak judicial review.

Section 6 is described as 'the most significant provision of the HRA',[35] creating a legal obligation for all public authorities—with the exception of Parliament—to act accordingly with the Convention. Significantly, the Scottish Parliament and the Northern Ireland Assembly are considered public authorities under section 6 of the HRA. Courts are, therefore, empowered to

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30 Kavanagh (n 23) 1014.
31 Ibid.
32 HRA (n 7) s 4.
33 Ibid s 10.
34 Ibid.
35 David Feldman, 'Extending the Role of the Courts: The Human Rights Act 1998' (2011) 30(1) *The Parliamentary Yearbook History Trust* 65, 84.

invalidate legislation in these jurisdictions if they do not uphold the Convention's rights. Essentially, this means that while parliamentary sovereignty is protected in the United Kingdom's central Westminster Parliament, a separate system of strong judicial review gives courts greater leverage in the United Kingdom's devolved jurisdictions.

Finally, s 19 of the HRA places an onus on lawmakers to legislate in line with the Convention by requiring the minister introducing the bill to make a statement regarding whether the contents are compatible with the Convention. If the minister is unable to make a statement of compatibility, they need only state that they 'nevertheless wish the house proceeds with the bill'.[36]

2 *Favourability of the Dialogue Model in the United Kingdom and Australia*

The United Kingdom's bill of rights model accurately reflects Kavanagh's 'compromise solution' description.[37] Every provision that grants courts an opportunity to check the legislature's power is curtailed by the non-mandatory nature of Parliament's compliance. The dialogue model's ability to preserve parliamentary sovereignty was, from a legal perspective, the key to its success[38] and relatively positive reception.[39] This lesson from the United Kingdom was considered by bill of rights proponents in Australia, who recognised that a dialogue model that does not interfere with parliamentary sovereignty would draw the least resistance from those sharing Waldron's concerns.[40] For this reason, the dialogue model was labelled the

36 *HRA* (n 7) s 19.
37 Kavanagh (n 23) 1014.
38 Ibid 1012.
39 Ibid.
40 George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30(3) *Melbourne University Law Review* 880, 880.

'front running option'[41] for Australia after academics observed its success in the United Kingdom.

Following the first decade after the adoption of the HRA in the United Kingdom, the debate around an Australian bill of rights changed, evidenced by shifting attitudes of receptivity within the community. In 2007, Ron Dyer, a politician who had previously rejected the Australian Bill of Rights Bill 2001 (Cth) at the time it was introduced to Parliament, stated, 'I have had cause to revise my views very substantially…The model I consider most attractive for use in the Australian context is the [HRA].'[42] Seemingly, the legal factors that made a bill of rights successful in the United Kingdom—that is, the use of the dialogue model and its weak form of judicial review—were the same legal elements required to make an Australian bill of rights supported and possible.

It soon appeared even more likely that a national bill of rights in Australia based on the structural features of the HRA would be introduced when the Australian Capital Territory ushered in a state-level bill of rights statute, the *Human Rights Act 2004* (ACT),[43] followed by Victoria two years later, introducing the *Charter of Rights and Responsibilities Act 2006* (Vic).[44] The Australian Capital Territory and Victoria formed consultation committees to investigate the potential of a bill of rights for their territory or state; each concluding that the dialogue model was the most viable option in Australian contexts.[45] Many bill of rights supporters believed that the statutory bill of rights adopted in the Australian Capital Territory and Victoria would lay 'the groundwork for the implementation [of a bill of rights] in the

41 Irina Kolodizner, 'The Charter of Rights Debate: A Battle of the Models' (2009) 10(16) *Australian International Law Journal* 219, 220.
42 Ron Dyer, 'Should Australia have a Bill of Rights?', *Evatt Foundation* (Web Page, 2007) <https://evatt.org.au/papers/should-australia-have-bill-rights.html>.
43 *Human Rights Act 2004* (ACT).
44 *Victorian Charter of Human Rights and Responsibilities 2006* (Vic).
45 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (Report No 03/0068, May 2003).

Australian national government, inspired by approaches developed some years earlier in…Great Britain.'[46]

Ultimately, however, the growing likelihood that the dialogue model had opened a door for a potential bill of rights to be supported and accepted at a national level was, unfortunately, short-lived. The High Court's 2011 decision in *Momcilovic v The Queen* ('*Momcilovic*'),[47] ended the possibility of adopting a dialogic bill of rights model similar to the HRA, or the statutes in the ACT and Victoria.[48] As will be explored, *Momcilovic* confirmed that the dialogue model could not be adopted at a federal level due to its incompatibility with the strict separation of judicial power.[49]

3 *The Legal Incompatibility of the Dialogue Model*

A combination of three High Court precedents, culminating in *Momcilovic*, terminated any chance of the dialogue model being introduced in Australia at a federal level but confirmed its validity in states and territories. These cases were *R v Kirby; Ex parte Boilermakers' Society of Australia ('Boilermakers Case')*;[50] *Kable v Director of Public Prosecutions (NSW)* ('*Kable*');[51] and *Momcilovic.*[52]

The key implications of the *Boilermakers case* can be summarised into two main points. First, the High Court ruled that Commonwealth judicial power, as established in s 71 of the *Australian Constitution*,[53] cannot be exercised by any tribunal other than a court established or authorised by Chapter III of the *Australian Constitution*.[54] A Chapter III court refers to the

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46 Stone (n 20).
47 (2011) 245 CLR 1, 45 [92] ('*Momcilovic*').
48 Will Bateman and James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36(1) *Melbourne University Law Review* 1, 7.
49 Ibid 7.
50 (1956) 94 CLR 254, [489]-[490] ('*Boilermakers Case*').
51 (1996) 189 CLR 51, [35] ('*Kable*').
52 *Momcilovic* (n 47) 45, [92].
53 *Australian Constitution* s 71.
54 Gabrielle J Appleby, 'Imperfection and Inconvenience: Boilermakers' and the Separation of Judicial Power in Australia' (2012) 31(2) *University of Queensland Law Journal* 265, 268.

High Court of Australia and any other federal courts created by Parliament through the authority of the *Australian Constitution*.[55] The Court also found that Chapter III courts cannot be invested with any non-judicial powers.[56] Therefore, the *Boilermakers case* reaffirmed the separation of powers doctrine, ensuring that the federal judiciary cannot operate beyond the scope of the powers set out in Chapter III of the *Australian Constitution*.[57] Furthermore, the *Boilermakers case* also attests that Parliament cannot confer certain functions on a court if there is no source in the *Australian Constitution* that authorises Parliament to do so.[58] This precedent is significant to the invalidity of the dialogue model because, in 2011, the High Court ruled in *Momcilovic* that the 'declaration of inconsistent interpretation' feature set out in s 36(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) was a non-judicial power.[59] Thus, the declaration of incompatibility feature, which establishes the model's namesake 'dialogue', cannot be exercised at the federal level because doing so falls outside the scope of powers established under Chapter III.[60]

Momcilovic, however, did not invalidate the dialogue model at a State level. To understand the reasoning for this, we must first look to *Kable,* where a principle known as 'institutional integrity' was established.[61] *Kable* affirmed that State Parliaments can confer non-judicial powers onto State courts; however, Gaudron J noted that there was a limitation to the type of power that could be conferred upon State courts '…so long as they are not repugnant to or inconsistent with the exercise by those courts of the judicial power of the Commonwealth.'[62] As State courts are, at times, repositories of federal judicial power, non-judicial powers bestowed upon State courts must

55 Ibid.
56 Ibid
57 Ibid.
58 Ibid.
59 *Momcilovic* (n 47) 45, [92].
60 Ibid.
61 Ibid 8.
62 *Kable* (n 51) 51, [35].

not impair the institutional integrity of federal courts. In *Momcilovic*, however, French CJ concluded that while the declaration of inconsistency function is indeed a non-judicial power, it does not compromise the institutional integrity of State courts.[63] Instead, it merely directs Parliament to an incompatibility between legislation and a Charter right, while the ultimate decision regarding the incompatibility still remains within the legislature's responsibility.[64]

This means that together, the *Boilermakers case*, *Kable* and *Momcilovic* confirm that human rights legislation based on the dialogue model is only valid at a State and Territory level in Australia. The most recent state to adopt a dialogue model similar to the United Kingdom's HRA is Queensland, with the *Human Rights Act 2019* (Qld),[65] which commenced on 1 January 2020.

The UK's HRA demonstrates that a bill of rights framework can be implemented without sacrificing parliamentary sovereignty. This compromise solution provided by the dialogue model initially appeared to be very well-received in federal Parliament as a viable rights option. Support for this framework has been reflected at the State level. However, the High Court judgment in *Momcilovic*, [66] in combination with the judgment in the *Boilermakers case*,[67] renders the key characteristic of the dialogue model—the declaration of incompatibility—unconstitutional at a federal level. The dialogue model's legal incompatibility at a federal level thus forces national bill of rights proponents to look elsewhere for a viable rights model to be implemented in Australia.

B *Canada Charter Model*

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63 *Momcilovic* (n 47) [605].
64 Ibid
65 *Human Rights Act 2019* (Qld).
66 *Momcilovic* (n 47) 45, [92].
67 *Boilermakers* (n 50) [489]-[490]

The incompatibility of the dialogue model with the strict separation of powers doctrine in Australia only rules out one model amongst many; it does not explain why Australia has not adopted a national bill of rights in any other form. However, the pervasiveness of Waldron's argument against strong judicial review in Australia makes many other rights protection models unlikely to receive the necessary support to succeed in Parliament. One such model is Canada's *Canadian Charter of Rights and Freedoms 1982* ('Canadian Charter'). The likelihood of Australia adopting a model similar to the Canadian Charter is slim, the reasons for which can be illustrated by first considering the context and features of the Canadian legal system.

1 *Context and Features of the Canadian Charter Model*

Gardbaum describes Canada's rights system as the 'founding member'[68] of the new Commonwealth rights model that sits in the middle of a spectrum between parliamentary sovereignty and judicial supremacy.[69] Prior to the Canadian Charter, Canada had enacted a statutory rights protection known as the *Canadian Bill of Rights* 1960 ('CBOR').[70] This model was widely perceived as an unsuccessful attempt at protecting rights.[71] The main consensus from academics and Canadian citizens alike was that it was 'ineffective'[72] as a result of several court interpretations of the CBOR that counter-intuitively limited the capacity for rights to be protected.[73] One such interpretation—known as the 'frozen concepts principle'—saw the courts interpret s 1 of the CBOR, which refers to 'rights and freedoms [that] have existed and shall continue to exist',[74] to mean that for a right to be protected

68 Gardbaum (n 25) 18.
69 Ibid.
70 *Canadian Bill of Rights*, SC 1960, c 44.
71 Gardbaum (n 25) 18.
72 Ibid.
73 Ibid.
74 *Canadian Bill of Rights*, SC 1960, c 44, s 5.

by the CBOR, it must have already been in existence on the day the statute was enacted.[75]

In 1982, Canada sought to remedy the CBOR's ineffectiveness by replacing it with the Charter. Two critical structural differences set the Charter and the CBOR apart. The first is that the Charter would apply to all of Canada, whereas the CBOR was only binding on the federal government and not the provinces.[76] Secondly, and significantly, the Charter is constitutionally entrenched and, therefore, superior to ordinary legislation.[77] By extension, Canada's rights model involves strong judicial review as the Charter authorises courts to strike down legislation that is inconsistent with rights protected by the Charter.[78] However, s 33 of the Charter attempts to prevent complete judicial supremacy and preserve a level of parliamentary sovereignty.[79]

Section 33 of the Charter is commonly known as the 'notwithstanding' clause; it empowers Canada's Parliament or a provincial legislature to declare that an Act will 'operate notwithstanding a provision included in…this Charter'.[80] Exercise of the notwithstanding clause is limited to a maximum of five years but may be reapplied indefinitely.[81] Like the United Kingdom's HRA, Canada's Charter model attempts to strike a compromise between legislative and judicial power, albeit in wholly different ways. While the United Kingdom's dialogue model leaves parliamentary sovereignty as the default position by placing the burden on the courts to issue a declaration of incompatibility and relying on a remedial response from Parliament; the

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75 Gardbaum (n 25) 19.
76 Ibid 20.
77 Ibid.
78 Ibid.
79 Ibid.
80 *Canadian Charter of Rights and Freedoms,* s 33, Part 1 of the *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
81 Ibid.

Canadian constitutional model places the burden on legislatures to immunise an Act from the courts' strong-judicial review.

Canada's original model involved a compromise feature that paved the way for Gardbaum's new Commonwealth model that reflected neither absolute parliamentary sovereignty nor judicial supremacy. Over time, however, the notwithstanding clause has become merely a symbolic gesture of compromise, as the power is largely unused by legislatures for fear of public scrutiny and political embarrassment. [82] Therefore, this model essentially gives courts the 'de facto final word'.[83]

2 *Charter Model in Australia*

The above analysis of the Canadian rights model gives rise to two main legal barriers that may preclude Australia from following in Canada's footsteps. First, the formidable process required for constitutional amendment in Australia. Secondly, the Canadian model authorises the use of strong judicial review. Regarding the first legal barrier, Canada did not need to face an onerous constitutional amendment procedure when it sought to introduce the Charter in 1982. Previously, the *Canadian Constitution* lacked an amendment procedure, and instead, any constitutional changes prior to 1982 were made through Acts passed by Parliament that first required the consent of provincial legislatures.[84] This was the far simpler procedure Canada underwent to adopt the Charter. In fact, the inclusion of the notwithstanding clause in s 33 is attributed to the federal government's attempt to acquire the support of the provinces.[85]

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[82] George Egerton, 'Writing the Canadian Bill of Rights: Religion, Politics, and The Challenge of Pluralism 1957–1960' (2004) 19(2) *Canadian Journal of Law and Society* 1, 6.

[83] Gardbaum (n 25) 18.

[84] Ted Morton, 'Who Guards the Guardians? Institutional Checks on the Power of Judicial Review: Canada in a Comparative Perspective' (Paper presented at the Canadian Institute for the Administration of Justice, Calgary, 2001).

[85] Ibid.

By contrast, adopting a rights model through constitutional amendment would be an extremely demanding process for Australia, where a successful referendum is notoriously difficult to achieve. As of 2019, out of 44 nationwide referendums that have been held, only eight have been carried.[86] Various sociopolitical drivers behind the high failure rate of referendums in Australia will be explored further in pt IV, however, the primary legal inhibitor is the onerous procedure for amendment laid out in s 128 of the *Australian Constitution*. The process requires approval from: (1) absolute majorities in both the House of Representatives and the Senate; (2) a majority of electors in a majority of states; and (3) a majority of electors nationwide.[87] These conditions are a 'very strict test of political and public support',[88] which leads to the second legal barrier that severely limits the possibility of a constitutional bill of rights.

The favourability of the HRA model in both the United Kingdom and Australia was, in large part, due to its weak judicial review system that protected parliamentary sovereignty. In contrast, the symbolic nature of the Charter's notwithstanding clause has effectively rendered the Canadian Charter a 'de facto' strong judicial review system. However, irrespective of this, a constitutionally entrenched bill of rights would be too difficult to implement in Australia given the formidable process of constitutional amendment. This, in combination with the pervasiveness of Waldron's strong judicial review criticisms, means a bill of rights framework modelled from the Canadian Charter model is likely to be sharply rejected by legislators and bill of rights opponents in Australia.

C *New Zealand Statutory Model*

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86 Williams and Hume (n 1) 63.

87 Australian Constitution s 128.

88 Stone (n 20).

Of the three Commonwealth countries most routinely discussed in comparison to Australia regarding legal and sociopolitical matters, neither the United Kingdom nor Canada present a rights model that is both legally compatible with the *Australian Constitution* and protects parliamentary sovereignty. Therefore, the attention of this article shifts to New Zealand, and specifically, the *New Zealand Bill of Rights Act 1990* (NZL) ('NZBORA').[89]

In 1985, a White Paper, presented by the Minister of Justice in New Zealand, called for the adoption of an entrenched bill of rights similar to Canada's model.[90] This suggestion was met with resounding opposition from the New Zealand Parliament, with the opinion that New Zealand was 'not yet ready'.[91] However, this was not the first time a potential bill of rights had been debated in New Zealand. The enactment of Canada's first rights model in 1960 inspired discussion in New Zealand, eventually leading to a bill being introduced to the New Zealand Parliament by the National Party in 1963.[92] This bill was met with overwhelming opposition amongst parliamentarians—their main arguments that it was not only unnecessary, but that 'judges do not have democratic legitimacy'[93] and, therefore, 'its enactment would be positively against the public interest'.[94] These reactions to the 1963 proposal reveal that, like the current legal climate in Australia, anti-judicial review sentiment was an issue for New Zealand bill of rights proponents to contend with.[95]

By the 1985 White Paper proposal, however, public attitudes surrounding a bill of rights in New Zealand had shifted, becoming more receptive to the concept.[96] Arguably, this shift can be accounted for by the

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89 *New Zealand Bill of Rights Act 1990* (NZ).
90 Department of Justice (NZ), *A Bill of Rights for New Zealand: A White Paper* (Report, 1985).
91 Kenneth J Keith, 'The New Zealand Bill of Rights Experience: Lessons for Australia' (2003) 9(1) *Australian Journal of Human Rights* 119, 119.
92 Ibid 126.
93 Ibid.
94 *Canadian Bill of Rights*, SC 1960, c 44; Comment, 'Evidence Presented to the Constitutional Reform Committee 1964 on the New Zealand Bill of Rights' (1965) 3(1) *Australian Journal of Human Rights* 52.
95 Ibid.
96 Ibid.

sociopolitical influences discussed in pt V.[97] Thus, while the Canadian rights model suggested by the White Paper was rejected, this result was primarily due to issues with an entrenched model, not with the idea of a rights bill itself.[98] Consequently, the NZBORA was adopted—paving the way for the United Kingdom's HRA and bill of rights statutes in the ACT, Victoria, and Queensland.[99] The NZBORA was significant to Australia because it demonstrated that a statutory bill of rights need not be simply an interim rights model leading to eventual entrenchment, as it was in Canada, but could be a final product itself. This alternative to a constitutionally entrenched model reinvigorated bill of rights discussions in Australia.[100]

1 *Features of the NZBORA*

So far, the United Kingdom's declaration of incompatibility feature and Canada's de facto strong judicial review have excluded these models as viable candidates for an Australian setting. The absence of a compatible rights model for Australia offers a partial explanation as to why Australia is without a bill of rights. However, the current form of the NZBORA provides the most achievable blueprint for a national bill of rights in Australia. Like the Canadian Charter, the rights protected by the NZBORA are similar, but not identical, to those laid out by the International Covenant on Civil and Political Rights ('ICCPR').[101] The general provisions of the NZBORA, which set out the powers and limitations it places on the courts and Parliament,[102] resembles that of the HRA to an extent.[103]

Section 6 of the NZBORA requires that the interpretation of legislation be consistent with the rights contained in the NZBORA wherever possible, and

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97 Geoffrey Palmer, *Unbridled Power* (Oxford University Press 1979) 30.
98 Keith (n 91).
99 Ibid.
100 Ibid.
101 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 49 UNGA (entered into force 23 March 1976).
102 *New Zealand Bill of Rights Act 1990* (NZ).
103 HRA (n 7).

section 7 states that the Attorney-General must bring to the attention of Parliament any inconsistencies between a bill and protected rights when that bill is introduced to the House of Representatives. Unlike the United Kingdom's model,[104] New Zealand does not explicitly offer a declaration of inconsistency remedy in the statute. Section 4 of the NZBORA outlines that courts have no power to invalidate, repeal, revoke, or deem ineffective a statute that is inconsistent with protected rights. While the HRA also notes that no United Kingdom court may invalidate a Westminster statute,[105] the ability to declare an inconsistency does provide courts in the United Kingdom with a course of action when faced with a breach. Under the NZBORA, however, courts were expected to simply apply the inconsistent legislation. There would be no consequence to a violation of protected rights by other legislation.

In 2018, the New Zealand government approved a move amending the NZBORA to include a declaration of inconsistency feature that would require a response from Parliament.[106] This development has been praised by scholars,[107] government officials,[108] and the United Nations, with the previous system having received heavy criticism for its absence of remedies.[109] New Zealand scholar Andrew Geddis critiqued that, 'the impact of the NZBORA on Parliament's behaviour is so minimal in nature as to be almost irrelevant'.[110] Of course, while this amendment is welcomed in New Zealand, the feature is not feasible at an Australian federal level because, as noted above, this would be an exercise of non-judicial power which the High

104 Ibid.

105 Ibid s 4.

106 Bill of Rights (Declarations of Inconsistency) Amendment Bill 2018 (NZ).

107 Joshua Ferrer, 'Re-Evaluating Consensus in New Zealand Election Reform' (2019) 72(2) *Political Science* 121, 121–2.

108 Ibid.

109 Ibid.

110 Andrew Geddis, 'Rights Scrutiny in New Zealand's Legislative Processes' (2016) 4(3) *The Theory and Practice of Legislation* 355, 362.

Court has said would be inconsistent with Chapter III of the *Australian Constitution*.[111]

2 *NZBORA in Australian Context*

Of the three Commonwealth models explored, it seems the NZBORA prior to the declaration of inconsistency amendment introduced in 2018 is the most well-suited option for Australia. We can, however, assume it is likely that such a model would receive similar criticism from Australian bill of rights proponents, suggesting the model is weak to the point of ineffectiveness.[112] While the HRA is also classified by scholars as a weak form judicial review model, it is still able to apply pressure on Parliament to not only legislate in line with the Convention, but also to remedy inconsistencies. As of 2015, 29 declarations of inconsistency had been made using the HRA in the United Kingdom; of these, 20 had been remedied by the government.[113] The United Kingdom's dialogue model is considered the more popular model because it fit the 'Goldilocks' principle of being 'just right' in striking the balance between parliamentary sovereignty and judicial supremacy.[114] In contrast, the sans-amendment NZBORA is too protective of parliamentary sovereignty, while the Canadian Charter leans too far towards judicial supremacy.

Despite its rigidity, the NZBORA without the declaration feature would still likely be more successful in attracting supporters than the Canadian Charter model,[115] which has proven too divisive for Australia.[116] Ultimately, the NZBORA is a viable model for Australia to replicate, though not without its issues. The absence of a remedy when there are inconsistencies between laws and protected rights would incite a considerable level of criticism at a national and international level, as it did in New Zealand prior to the 2018

111 Bateman and Stellios (n 48) 7.
112 Ibid.
113 Kavanagh (n 23) 1008.
114 Ibid 1014.
115 Williams and Hume (n 1) 64.
116 Morton (n 84).

amendment.[117] The natural progression of this pressure is what led the New Zealand Parliament to amend the model to introduce the declaration of inconsistency feature.[118] In the Australian context, however, neither the federal judiciary nor the legislature would be able to respond to such criticism with the same solution. Consequently, the NZBORA is not an ideal bill of rights model for Australia either.

V SOCIOPOLITICAL ANALYSIS

Having compared the legal and structural factors that explain why Australia has not embarked upon the same path to a federal bill of rights as its fellow Commonwealth countries, pt V examines some of the sociopolitical explanations for that divergence. Sociopolitical factors in the context of this discussion refer to: the development of international rights culture; shifting public opinion; and the effects of political party support or opposition on the success of a bill of rights proposal. These factors are inherently intertwined; the sway of public opinion cannot be discussed in isolation from policy development, just as the effects of globalisation and the influence of changes in the international community are now deeply embedded in domestic social values and political decisions. This part will begin by examining key sociopolitical factors that contributed to the adoption of rights protection in the comparative countries, followed by an analysis of how these influences have effected bill of rights developments in Australia.

A *The United Kingdom*

The creation of the HRA signalled the end of a long-standing debate over adopting a bill of rights in the United Kingdom, a debate that bore many

117 Ferrer, 'Re-Evaluating Consensus in New Zealand Election Reform' (n 107) 122.
118 Keith (n 91) 122.

similarities to the bill of rights discussion that continues in Australia today.[119] Much of the hesitancy and resistance towards a potential bill of rights in the United Kingdom prior to 1998 stemmed from a fear of granting excessive power to the courts,[120] echoing Waldron's critique of strong judicial review. In 1987, Lord McCluskey, a Supreme Court judge in Scotland, delivered a lecture that captured the viewpoint of many bill of rights objectors at the time, stating '[l]awmaking should be left to lawmakers…that's just the problem with a constitutional Bill of Rights…it turns judges into legislators.'[121] These anti-judicial review sentiments were pervasive amongst parliamentarians, academics, and judges alike.[122]

However, as a member of the Council of Europe, and having ratified the Convention in 1951, pressure to incorporate the Convention into domestic law was just as pervasive as the anti-judicial review sentiment.[123] A prominent judge in the United Kingdom, Sir Leslie Scarman, pointed to the United Kingdom's obligations as a member of the Council of Europe, stating, '[t]he legal system must… ensure that the law… will itself meet the exacting standards of… international instruments to which the United Kingdom is a party.'[124] The key complaint regarding the system prior to 1998 was that breaches of Convention rights by the government had to be taken to the Strasbourg Court in France, as there was no remedial process available domestically.[125] Though this system was quite effective in handing down decisions and protecting rights, the process itself was criticised for its inefficiency.[126] In fact, the Council of Europe stated that the average time they

119 Williams and Hume (n 1) 61.
120 Michael Zander, 'A Bill of Rights for the United Kingdom' (1997) 32(3) *International Law Journal* 441, 444.
121 Lord McCluskey, *Law, Justice and Democracy: The Reith Lectures* (Sweet and Maxwell, 1987).
122 Waldron (n 8) 1355.
123 Stone (n 20).
124 Ibid.
125 Zander (n 121) 444.
126 Ibid.

required to decide a case was over five years.[127] As such, rights advocates in the United Kingdom argued that the process to remedy a violation of the Convention was inaccessible to the ordinary citizen.[128]

The significance of incorporating the Convention into domestic statute was magnified by the Troubles—a 30-year period of violent conflict in Northern Ireland—which had already seen decades of conflict and violence occur in Northern Ireland by the time these proposals were being discussed.[129] Thus, brutality and human rights abuses were not vague concepts to citizens in the United Kingdom, but a reality that confronted them daily. Accordingly, incorporating rights protections into domestic legislation was widely supported by the public.[130]

Nevertheless, the concept of a bill of rights was initially rejected by both major political parties, largely due to concerns that echo Waldron's views on widening the scope of judicial power.[131] Between 1992 and 1993, the position of the United Kingdom's Labour Party regarding incorporating the Convention into domestic legislation changed dramatically.[132] This shift in party policy is attributed to the change in leadership that saw John Smith become leader of the Labour Party in 1992, and subsequently, championing the idea of a statutory bill of rights.[133] By the time a statutory bill of rights was brought to Parliament, it had attracted political support from parties across the board.[134] As was discussed in pt IV, the favourability of the dialogue model certainly contributed to this shift. It should also be noted that

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127 Council of Europe, *Explanatory Report to Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby* (1994) ETS No 155.
128 Stone (n 20) 16.
129 Zander (n 121) 418.
130 Ibid 444.
131 Stone (n 20) 15.
132 Zander (n 121) 419.
133 Ibid.
134 Ibid.

the bill received support from every party in Northern Ireland.[135] The HRA was also overwhelmingly approved by the House of Lords.[136]

B *Canada*

Attitudes in Canada towards a bill of rights, prior to the 1982 Charter, are quite different to the attitudes and sociopolitical climate towards a bill of rights in Australia. Before the Charter was officially adopted, it had already gained overwhelming public support.[137] The July 1980 Gallop Poll revealed that 91 per cent of the population supported the Charter.[138] At the height of its political debate a year later, the model still held 84 per cent of Canada's support,[139] with 63 per cent of this same group identifying themselves as 'strong supporters'.[140] Such a high concentration of Canadian society strongly supporting the Canadian Charter may seem unusual, however, Gardbaum suggests that Canada was most likely the 'pioneer' of the new Commonwealth model because it had been so influenced by the United States' rights-central culture.[141]

Given the Charter's popularity amongst the general population, some scholars suggest that politicians who may not have completely approved of the Charter felt pressure to pledge their support.[142] Though the Canadian provinces expressed their concerns about the Charter's power over their legislative assemblies,[143] Prime Minister Pierre Trudeau offered the notwithstanding clause as a compromise in the hopes of gaining provincial approval.[144] Professor Paul Weiler argues that the provinces' approval of the

135 Stone (n 20).
136 Zander (n 121) 444.
137 Egerton (n 82).
138 Paul C Weiler, 'Rights and Judges in a Democracy: A New Canadian Version' (1984) 14(2) *University of Michigan Law Journal* 51, 51.
139 Ibid.
140 Ibid.
141 Gardbaum (n 25) 18.
142 Ibid.
143 Ibid.
144 Weiler (n 140) 51.

Charter was less about the offer of s 33, and more that the Charter was so overwhelmingly favourable with the public and federal politicians—leaving the provincial legislatures to feel that they were 'the final obstacle in the way of the… public's wishes'.[145]

In stark contrast, Australian states' and territories' persistent scepticism of legislation that increases centralised power is one of the main reasons why Australian bill of rights proposals have lacked political support.[146] It is also important to point out that the Canadian Senate, like the United Kingdom's House of Lords, is formed by the executive appointment of members on the recommendations of the Prime Minister.[147] This would considerably limit disagreement and friction in the legislature over proposed bills.[148]

C *New Zealand*

Between the 1963 debates over a New Zealand bill of rights, and the 1985 bill of rights debate following the White Paper proposal, a number of factors influenced a shift in attitude towards the idea of following in Canada's footsteps. Firstly, by the late 1970s, the international rights scene had developed substantially—with both the International Covenant on Economic, Social and Cultural Rights ('ICESCR') and the ICCPR coming into effect in 1976. New Zealand was bound by both in 1978, meaning by 1985 there were international obligations and standards that New Zealand had agreed to incorporate into legislation. Even if the treaties were not binding by nature, their pressure and existence fostered dialogue on the possibility of a bill of rights.[149]

Secondly, New Zealand also observed an increased interaction with rights protection in its fellow Commonwealth countries, the United Kingdom

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145 Weiler (n 140) 51.
146 Stone (n 20).
147 Weiler (n 140) 51.
148 Stone (n 20) 17.
149 Bateman and Stellios (n 48) 7.

and Canada.[150] With increasing awareness, New Zealand had realised by the White Paper proposal that the international scene was changing, and that perhaps it was time that a bill of rights was given more serious consideration.[151]

Domestically, former New Zealand Prime Minister Geoffrey Palmer was one of several voices that began to raise concerns about growing and increasingly abused executive power in New Zealand. He published a book detailing his opinion on this issue, and, amongst a number of constitutional changes, called for a bill of rights.[152] His suggestions were promoted by the Labour Government in 1984, leading to the 1985 White Paper proposal which, in turn, ignited the discussion and debate that led to the eventual adoption of the NZBORA in 1990.[153]

D *Australia*

The clear three themes that have emerged from the sociopolitical factors that influenced the United Kingdom, Canada, and New Zealand, are: (1) the impact of international rights culture —from the Council of Europe, the United Nations, or neighbouring countries; (2) the level of public support for the bill; and (3) the level of political support generally, and the bipartisan nature of that political support.

Like New Zealand, the influence of international rights development has primarily been Australia's obligations to the ICCPR and ICESCR. Unlike New Zealand, however, attitudes towards the United Nations have been less receptive and, historically, more skeptical.[154] In fact, the United Nations has been characterised by some Australian politicians as a corrupt institution that

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[150] Ibid.
[151] Keith (n 91) 126.
[152] Geoffrey Palmer, *Unbridled Power* (Oxford University Press, Auckland, 1979) 30.
[153] Keith (n 91).
[154] Kolodizner (n 41) 221.

undermines Australian sovereignty.[155] Moreover, a consistently strong reluctance to co-operate with recommendations from the United Nations regarding Australia's treatment of asylum seekers and its Indigenous population[156]—both issues that could be affected by a national rights document—also suggest that Australia is less receptive to the influence of international rights culture.[157]

Where the Canadian Charter proposal and United Kingdom's HRA were met with overwhelming public support,[158] public support for rights protection in Australia has been unreliable, and often diminished by skepticism toward the Australian Government.[159] Academic Campbell Sharman refers to a referendum in 1988 to explain the lack of public support in Australia.[160] Sharman expounds that the referendum was initially assumed by the government to be uncontroversial and even designed as a means to familiarise the public with constitutional change.[161] Instead, this proposal failed overwhelmingly due to poor communication by the Government regarding the effects of proposal, which was subsequently met by mistrust from the public.[162] This example demonstrates that any attempts to introduce rights to the *Australian Constitution* would likely meet the same fate, due to the demanding procedure for amendment which will never be bypassed if referendum proposals are met with skepticism and mistrust.[163]

While the Australian Labor Party emerged in the 1970s as a supporter of a federal bill of rights, the Liberal National Party has remained staunchly opposed.[164] A lack of bipartisan support disproportionately affects Australia's

126 Kildea (n 21) 91.
156 Kolodizner (n 41) 220.
157 Ibid.
158 Egerton (n 82); Stone (n 20).
159 William and Hume (n 1) 64.
160 Campbell Sharman, 'The Referendum Results and their Context' In B Galligan and J R Nethercote (eds), *The Constitutional Referendum and the 1988 Referendums* (Centre for Research on Federal Financial Relations and Royal Australian Institute of Public Administration, Canberra, ACT, 1989) 111.
161 Ibid.
162 Kildea (n 21) 66.
163 Stone (n 20).
164 Stone (n 20) 20.

chances of passing national rights legislation.[165] New Zealand's unicameral legislature, and the upper houses of both the United Kingdom and Canada, are all significantly 'weaker' than Australia's strong bicameral system.[166] The appointment of seats in the House of Lords and Canada's Senate greatly reduces their legislative scrutiny function. For instance, Green and Remillard acknowledge that the composition of the Canadian Senate is often aligned with the governing party.[167]

Paul Kildea noted that while the Federal Labor Party has attempted to introduce a bill of rights bill into Parliament in both 1972 and 1983, both instances failed due to a hostile majority Senate.[168] There is less literature on the Rudd government's decision not to proceed with a bill of rights proposal in 2010, however, George Williams speculates that the Senate majority, formed by the Liberal Party, the National Party, and the Family First Party, was a deterrent to putting forth a proposal.[169] Opposition to a bill of rights from the Australian Liberal Party claims to draw from Waldron's theory of anti-judicial review—a sentiment that was also prominent in the United Kingdom and New Zealand during debates regarding bill of rights legislation, but was quelled by the types of weak judicial review models they ultimately adopted.

Evidently, there a number of sociopolitical factors that have worked in favour of bill of rights' successes in the United Kingdom, Canada, and New Zealand, but have either not had the same impact in Australia, or are simply elements that do not exist in the Australian context, such as: high levels of public support, or bipartisan support for rights proposals. Undoubtedly, a bill of rights model's success is contingent on more than just legal viability. A

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165 Ibid.

166 Ibid.

167 L C Green and Gil Remillard, 'Commentaries: The Entrenchment of a Bill of Rights (Canada)' (1981) 19(3) *Alberta Law Review* 383, 390.

168 Kildea (n 21) 68.

169 Williams (n 40) 880.

compatible rights model must inspire a level of public and political support if there is to be any chance of implementation.

VI CONCLUSION

The objective of this article was to investigate Australia's exceptionalism in its absence of a national bill of rights, despite numerous attempts at establishment throughout the decades. The inability for a rights proposal to be implemented at a federal level indicates that there must be barriers that have prevented its success, and that perhaps these barriers are also unique to Australia, given that it is known as the 'only Western democracy without a bill of rights'.[170] Australia's distinctiveness suggests that somehow, these obstacles have only managed to affect Australia, or, alternatively, Australia is the only Western democracy that is unable to overcome them.

Part IV sought to understand the legal reasons behind Australia's absence of a federal bill of rights. By observing other Commonwealth nations who have a bill of rights, it was understood that Australia's struggle to adopt a national bill of rights is largely attributed to the types of Commonwealth nation-preferred models, each having a characteristic making it unsuitable for Australia. While the New Zealand model was, unlike the United Kingdom model, legally compatible, and maintained parliamentary sovereignty to a greater effect than the Canadian Charter, its lack of an effective remedy can render it an ineffectual rights protection model, as was observed by the criticism in New Zealand.

Part V investigated the sociopolitical factors affecting the success of a bill of rights. It was elucidated that there were three key trends internationally that contribute to the success of a bill of rights. These were a recognition of rights developing internationally, a relatively high level of public support for

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170 William and Hume (n 1) 59.

the bill, and backing by the main political parties. In relation to the first factor, all four countries were observed to have been either influenced or pressured by the changing global landscape of rights protection. However, where the United Kingdom, Canada, and New Zealand have acknowledged these changes and adapted accordingly, Australia has not only remained relatively unaffected by international pressures but has, in some instances, completely rejected the notion of incorporating the ICCPR into domestic law. The latter two sociopolitical factors—public and political support of a rights proposal—go hand in hand. In Australia, it appears that a lack of political support leads to public scepticism of the proposal. Conversely, insufficient public support for a proposal will tend not to attract the interest or energy of politicians who seek to champion bills that will lead to reelection.

Ultimately, we may reach three key conclusions regarding the question as to why Australia has resisted introducing a bill of rights. First, a combination of legal and sociopolitical factors stand in the way of a national bill of rights in Australia. Secondly, comparing Australia's situation to the bill of rights journeys of the United Kingdom, Canada, and New Zealand confirms that Australia's legal and sociopolitical environment has the potential to be conducive to a bill of rights. Thirdly, that while it is definitely possible, a bill of rights proposal will not be successful if it is simply a replica of a rights model from a comparative country. Given Australia's complex legal and sociopolitical climate, a successful bill of rights must cater to the nuances of Australia's legal and sociopolitical climate. Understanding why Australia is without bill of rights brings us one step closer to finding the right model. The process must begin with turning the oft-used phrase 'Australia is the only Western democracy without a bill of rights' into the question, 'How do we create a bill of rights *for Australia*?'

DEVELOPMENT OF THE WORLD TRADE ORGANISATION'S 'LIKE PRODUCTS' AND 'NO LESS FAVOURABLE TREATMENT' JURISPRUDENCE

AIDEE VARAN*

INTERNATIONAL COMMERCIAL LAW—WORLD TRADE ORGANISATION JURISPRUDENCE—TECHNICAL BARRIER TO TRADE AGREEMENT—GENERAL AGREEMENT ON TARRIFS AND TRADE—LIKE PRODUCTS—NO LESS FAVOURABLE TREATMENT—PROCESS AND PRODUCTION METHODS—ARBITRARY OR UNJUSTIFIED DISCRIMINATION BETWEEN MEMBER STATES

ABSTRACT

Both art 2.1 of the Technical Barrier to Trade Agreement and art III:4 of the General Agreement on Tariffs and Trade specifically refer to the terms 'like products' and 'no less favourable treatment'. Through the development of World Trade Organisation case law, the meaning of these terms has expanded significantly, resulting in a shift towards a broader interpretation. The effect of this expansion has meant that Member States are more likely to be able to engage in conduct that provides less favourable treatment between Member States, provided non-discrimination is present. Although affording a stark contrast between a traditional free-trade approach, it allows for an appropriate balance for the possibility of Member States to pursue legitimate

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objectives, including, inter alia, the protection of the environment and human health.

I Introduction

As the paramount international forum that deals with global rules of trade, one of the World Trade Organisation's ('WTO's) primary functions is to promote a liberal trading system.[1] A foundational principle of the WTO in its promotion of liberal trade is the non-discrimination principle, which seeks to ensure fair trade conditions amongst its Members.[2] Discrimination in trade has been described as having the potential to 'breed resentment' through 'poisoning political relations and distorting the market',[3] highlighting the necessity for the non-discrimination principle. The non-discrimination principle encompasses two sub-principles which seek to ensure non-discrimination, being 'national treatment' and 'most favoured nation'. The national treatment obligation prohibits countries from favouring domestic products over imported products, while the most favoured nation obligation proscribes discrimination between different countries.[4] Provisions in both the Technical Barrier to Trade Agreement ('TBT Agreement')[5] and the General Agreement on Tariffs and Trade ('GATT')[6] encompass this non-discrimination principle by requiring 'no less favourable treatment' to be afforded to 'like products'.[7] However, interpretation of 'no less favourable

1 'What is the WTO?', *World Trade Organization* (Web Page) <https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm>; 'The Case for Open Trade', *World Trade Organization* (Web Page) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm>.

2 The non-discrimination principle is contained within several WTO agreements. See for example *Marrakesh Agreement Establishing the World Trade Organization,* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') art III:1 ('*GATT 1994*'); *Marrakesh Agreement Establishing the World Trade Organization,* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*') ('*TBT Agreement*').

3 Peter Van den Bossche and Werner Zduoc, *The Law and Policy of the World Trade Organization* (Cambridge University Press, 4th ed, 2018) 305.

4 Ibid ch 4–5.

5 TBT Agreement (n 2).

6 *GATT 1994* (n 2).

7 Ibid art 2.1; *TBT Agreement* (n 2) art III:4.

treatment' and 'like products' has proven difficult throughout WTO history, as a result of these terms not being expressly or clearly defined.[8]

Recent WTO case law has provided some clarity by suggesting that the original interpretation of 'likeness' has expanded. The case law dictates that determining 'likeness' now allows for the consideration of process and production methods (being the inputs and process technologies utilised in the production of a product), which has significantly expanded its meaning.[9] Furthermore, although affording less favourable treatment between Members may be justified where there is a legitimate objective present (such as the protection of the environment or human health),[10] developments in WTO jurisprudence suggest that such measures cannot be inconsistent with the over-arching non-discrimination principle. This is because such measures may have the effect of restricting trade, creating a tension between the protection of free-trade and legitimate objectives.[11] The desire to attempt a balance between these two competing ideals has long been acknowledged, with this objective being cited in the first preamble of the *Agreement Establishing the WTO*.[12] Although the WTO and GATT Panels have previously favoured the traditional orthodox free trade view,[13] there has been a positive shift in recent WTO decisions that allows for broader circumstances

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8 Dukgeun Ahn, 'Environmental Disputes in the GATT/WTO: Before and After US-Shrimp Case' (1999) 20(4) *Michigan Journal of International Law* 819; Christopher Tran, 'Just Another Fish in the Sea? The WTO Panel Decision in US-Tuna III' (2012) 29(1) *Environmental and Planning Law Journal* 45.

9 Appellate Body Report, United States — Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc WT/DS58/AB/R (12 October 1998) ('*US—Shrimp*'); Appellate Body Report, European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (22 May 2014) ('*EC—Seal*'); Appellate Body Report, United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Recourse to Article 21.5 of the DSU by Mexico, WTO Doc WT/DS381/AB/RW (14 December 2018) ('*US—Tuna II (Mexico)*'); Bruce Neuling, 'The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate' (1999) 22(1) *Loyola of Los Angeles International and Comparative Law Review* 1, 13.

10 *GATT 1994* (n 2) art XX; *TBT Agreement* (n 2) art 2.2.

11 Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R (4 April 2012) [173]–[182] ('*US—Clove Cigarettes*'); Klaus Liebig, 'The WTO and the Trade-Environment Conflict' (1999) 24(1) *Intereconomics* 83, 89; T Alana Deere, 'Balancing Free Trade and the Environment: A Proposed Interpretation of GATT Article XX's Preamble' (1998) 10(1) *International Legal Perspectives* 1, 24.

12 *GATT 1994* (n 2) preamble.

13 GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) ('*US—Tuna I (Mexico)*'); GATT Panel Report, *United States —Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) ('*US—Tuna (EEC)*').

where Members can provide less favourable treatment to pursue legitimate objectives.[14] Analysing this shift is necessary, as this change in approach ultimately provides the contemporary foundation for Member States who engage in trading activities.

This article argues that interpretations of 'likeness' and 'less favourable treatment' under the GATT and the TBT Agreement (and by extension, the interpretation of the non-discrimination principle as a whole), have broadened through the development of WTO jurisprudence, which has in turn allowed for a greater balance between the competing concerns of free trade protection and the pursuit of legitimate objectives. Thus, it follows that Members can in fact provide less favourable treatment between 'like products', provided that non-discrimination is present. The article begins by discussing the traditional interpretation of 'like products' under both the TBT Agreement and the GATT, as previously, there has been a reluctance in WTO jurisprudence to consider process and production methods as a legitimate basis for distinguishing products. This historical approach will then be contrasted with more recent WTO jurisprudence, where determining 'like products' has been approached more broadly. This article will then similarly contrast the traditional and contemporary meaning of 'no less favourable treatment' under both Agreements and consider in what circumstances less favourable treatment may be justified today. In doing so, this article confirms the contemporary approach for engaging in trade.

II BACKGROUND OF THE TBT AGREEMENT AND THE GATT

[14] Appellate Body Report, *EC—Seal*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (n 9); Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9); Nicolas DiMascio and Joost Pauwelyn, 'Non-discrimination in Trade and Investment Treaties: Worlds apart or Two Sides of the Same Coin' (2008) 102 *American Journal of International Law* 48, 58-9; 'WTO Rules and Environmental Policies: Key GATT Disciplines', *World Trade Organization* (Web Page) <https://www.wto.org/english/tratop_e/envir_e/envt_rules_gatt_e.htm>.

A brief background on the sub-principles that exist in the TBT Agreement and the GATT is necessary to fully appreciate the 'expansion' of interpretation on which this article is based. The TBT Agreement is an international treaty that binds all WTO Members and aims to ensure that technical regulations, *inter alia*, are non-discriminatory and do not create unnecessary trade barriers.[15] A technical regulation is a document that lays down product characteristics or related process and production methods to which compliance is mandatory.[16] These may be in the form of regulations, standards, testing and certification procedures otherwise known as measures.[17] Article 2.1 of the TBT Agreement provides:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.[18]

Evidently, art 2.1 contains both a most favoured nation obligation and a national treatment obligation.[19]

The GATT is a legal agreement that aims to promote international trade by reducing or eliminating trade obstacles, such as tariffs or quotas.[20] Article III of the GATT provides for a national treatment obligation by seeking to ensure that internal measures (such as laws, rules, regulations, procedures and decisions)[21] are not applied to protect domestic production.[22] Article III:4 of the GATT provides:

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15 *TBT Agreement* (n 2); 'Technical Barriers to Trade', *World Trade Organization* (Web Page) <https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm>; Jonathan Carlone, 'An Added Exception to the TBT Agreement After Clove, Tuna II, and Cool' (2014) 37(1) *Boston College Law School* 103, 105.

16 *TBT Agreement* (n 2) annex 1 art 1.

17 'Technical Barriers to Trade', *Department of Foreign Affairs and Trade* (Web Page) <https://www.dfat.gov.au/trade/organisations/wto/Pages/technical-barriers-to-trade-tbt>.

18 *TBT Agreement* (n 2) art 2.1.

19 Appellate Body Report, *US—Clove Cigarettes*, WTO Doc WT/DS406/AB/R (n 11) [87].

20 *GATT 1994* (n 2).

21 Ibid art XXVII(a).

22 Ibid art III:1.

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use …[23]

The GATT has a relatively general application in relation to technical regulations.[24] However, the TBT Agreement is tailored specifically to technical regulations, and thus, technical regulations will first be examined pursuant to this instrument.[25] Nevertheless, both agreements have a similar scope, and both contain non-discrimination obligations.[26] Additionally, both art III:4 of the GATT and art 2.1 of the TBT Agreement are similar in the sense that both agreements require Members to give 'no less favourable treatment' over 'like products'.[27] Although the development of WTO case law has demonstrated some key differences in interpreting 'likeness' under the GATT compared to the TBT Agreement, more recent WTO case law suggests the meaning of 'likeness' has expanded, allowing for a more consistent approach between both Agreements.[28] This shift also allows for a broader understanding of when products will be deemed alike and when an action will be considered 'less favourable'.

III LIKENESS

The term 'likeness' was originally afforded a narrow interpretation in WTO jurisprudence, though its interpretation has expanded significantly over time. The notion of 'like products' is not defined in either the GATT or the TBT

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[23] Ibid art III:4.
[24] Henry Hailong Jia, 'Entangled Relationship Between Article 2.1 of the TBT Agreement and Certain Other WTO Provisions' (2013) 12(4) *Chinese Journal of International Law* 723, 759.
[25] Appellate Body Report, European Communities — Measures Affecting Asbestos and Asbestos-Containing Products, WTO Doc WT/DS135/AB/R (12 March 2001) [80] ('*EC—Asbestos*').
[26] *GATT 1994* (n 2) art III; *TBT Agreement* (n 2) art 2.
[27] *GATT 1994* (n 2) art III:4; *TBT Agreement* (n 2) art 2.1.
[28] Appellate Body Report, *US—Shrimp*, WTO Doc WT/DS58/AB/R (n 9); Appellate Body Report, *EC—Seal*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (n 9); Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9); Neuling (n 9) 13.

Agreement. Rather, the meaning of 'like products' is derived from WTO case law, which has served as a cause for controversy in the development of WTO jurisprudence.[29] Determining the 'likeness' of products is critical; if products are not considered like, it is permissible for less favourable treatment to be applied to those products under art III:4 of the GATT and art 2.1 of the TBT Agreement, which is inconsistent with the non-discrimination principle.[30]

The term 'likeness' has been compared to an 'accordion' in that it can 'stretch' from a narrow to wide scope depending on which WTO provision it falls under.[31] In this context, the determination of 'likeness' focuses on whether products are in a competitive relationship with one another.[32] A collection of non-exhaustive factors have been developed throughout the case law to assist in determining whether two products are alike in the context of art III:4 of the GATT.[33] These factors have been held to include consideration of the product's physical properties, the extent to which the products are capable of serving the same or similar end-use, consumers taste and habits, and international tariff classification.[34] However, the Appellate Body in *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products* ('*EC—Asbestos*') emphasised that 'likeness' should nevertheless be determined on a case-by-case basis.[35]

The traditional criteria determining likeness, as established in WTO case law concerning art III:4 of the GATT, is also applicable to an analysis of the term 'likeness' under art 2.1 of the TBT Agreement.[36] The core

29 Joel P Trachtman, 'WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe' (2017) 58(2) *Harvard International Law Journal* 273, 290.

30 Markus Krajewski, '"Like Products" in International Trade Law: Towards a Consistent GATT/WTO Jurisprudence by Won-Mog Choi' (2015) 15(1) *King's Law Journal* 198; *GATT 1994* (n 2) art III:4; *TBT Agreement* (n 2) art 2.1; World Trade Organization and United Nations Environment Programme, *Trade and Climate Change: WTO-UNEP Report* (Final Report, 2009) 106.

31 Appellate Body Report, *Japan — Alcoholic Beverages II*, WTO Doc, WT/DS8/AB/R (1996) 21 ('*Alcoholic Beverages*').

32 Appellate Body Report, *EC—Asbestos*, WTO Doc WT/DS135/AB/R (n 25) 99.

33 Ibid 101.

34 Ibid.

35 Ibid 102; Appellate Body Report, *Alcoholic Beverages*, WTO Doc, WT/DS8/AB/R (n 31) 21.

36 Appellate Body Report, *US—Clove Cigarettes*, WTO Doc WT/DS406/AB/R (n 11) 108–13.

controversy under determining 'likeness' is whether process and production methods can be used as a legitimate factor to distinguish products, and thus, to discriminate between otherwise 'like products'.[37] Members often attempt to restrict trade based on the process and production methods used on a product, raising the question as to whether process and production methods can be legitimately used to distinguish products.[38] In considering the legitimacy of using process and production methods to determine likeness, it is necessary to differentiate between product-related process and production methods and non-product-related process and production methods. The essential difference between these two terms is that in the latter, process and production methods have no impact on the final product—making the position even more unclear.[39] Although a GATT interpretation and TBT Agreement interpretation of 'likeness' still both possess key differences, both interpretations are arguably shifting towards a consistent broader approach.

A *The Traditional vs Contemporary Take on Process and Production Methods*

Traditionally, decision makers of WTO jurisprudence have been reluctant to consider process and production methods in the assessment of 'likeness', resulting in an inability for Members to defend differential treatment of products based on its process production methods. This is the case even where different process and production methods create environmental or other harms.[40] However, more recent authority suggests that it is a legitimate factor to distinguish products.

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37 Krajewski (n 30).

38 Konrad von Moltke, 'Reassessing Like Products' (1998) 29(1) *Trade, Investment and the Environment* 4, 5.

39 World Trade Organization and United Nations Environment Programme (n 30) 107; Robert Cunningham and Susanah Vindedzis, 'Four Legs Good, Two Legs Bad? Animal Welfare vs the World Trade Organization (Featuring Article XX of the General Agreement on Tariffs and Trade and Article 2 of the Technical Barrier to Trade' (2017) 38 *Adelaide Law Review* 311, 318.

40 Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27(1) *The European Journal of International Law* 9, 37; GATT Panel Report, *US—Tuna I (Mexico)*, GATT

1 *Process and Production Methods in Determining Likeness under the GATT*

United States — Restrictions on Imports of Tuna ('*US—Tuna I (Mexico)*') is an example of the consideration of process and production methods in the context of likeness.[41] In *US—Tuna I (Mexico)*, the United States of America ('US') placed an embargo on tuna imports that were caught using purse-seine fishing, a method of fishing that indirectly caught and killed dolphins.[42] One of the states that predominantly used the purse-seine fishing method was Mexico, meaning that it was significantly affected by the US' embargo on purse-seine tuna imports. Mexico then requested the establishment of a panel to hear the issue, on the basis that the measures were inconsistent with, *inter alia*, art III:4 of the GATT (which operates to ensure that internal measures are not applied to protect domestic production). The GATT Dispute Settlement Panel ruled that art III:4 of the GATT did not apply to the production processes of a product, only to the final product in itself.[43] The consequence of this ruling was that tuna caught by harmful methods—in this case, purse-seine net fishing—was considered alike to tuna caught using other non-harmful methods, as the GATT Dispute Settlement Panel found that there was no impact on the final tuna product itself. Therefore, the US did not have the right to distinguish between these two tuna products, despite the differences in their impact on the environment, making for a controversial decision.

However, in *EC—Asbestos*,[44] the Appellate Body found that an imported carcinogenic product and a domestic non-carcinogenic substitute were not like products, as the associated health risks of the products impacted

Doc DS21/R (n 13) [5.15].

41 Howse (n 40) 37; GATT Panel Report, *US—Tuna I (Mexico)*, GATT Doc DS21/R (n 13) [5.15].

42 GATT Panel Report, *US—Tuna I (Mexico)*, GATT Doc DS21/R (n 13).

43 Tran (n 8).

44 Appellate Body Report, *EC—Asbestos*, WTO Doc WT/DS135/AB/R (n 25).

on their physical characteristics.[45] The Appellate Body clarified that 'health risks associated with a product may be pertinent in an examination of likeness under [art III:4]'.[46] This case clarified that health risks associated with a product may be enough to deem two products unlike. It is important to note that the health risks in this case impacted on the final product itself (falling into the category of product-related process and production methods), unlike the circumstances in *US—Tuna I (Mexico)*, where there was no distinguishable basis found for the final product.

Furthermore, in *US — Import Prohibition of Certain Shrimp and Shrimp Products* ('*US—Shrimp*'), [47] the Appellate Body accepted the possibility of non-product-related process and production methods being a legitimate basis for discrimination by a Member State, although provided for under the general GATT exceptions for less favourable treatment, rather than under a determination of likeness in itself.[48] This reflects a significant shift in previous GATT interpretations and decisions whereby differential treatment can now potentially be afforded to products based on their process and production methods, provided non-discrimination is still present. The case of *US—Shrimp* will be discussed in greater detail below in the context of no less favourable treatment.

2 *Process and Production Methods in Determining Likeness under the TBT Agreement*

Academics suggest that art 2.1 of the TBT Agreement adopts a broader scope in determining 'likeness' than the GATT, as process and production methods are specifically recognised as an inherent part of a technical regulation;

45 Ibid 99.
46 Ibid 113.
47 Appellate Body Report, *US—Shrimp*, WTO Doc WT/DS58/AB/R (n 9).
48 Ibid.

though it was previously unclear whether determining likeness extended to non-product-related process and production methods.[49]

The case of *US — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Recourse to Article 21.5 of the DSU by Mexico* (‘*US—Tuna II (Mexico)*’) concerned Mexico challenging a series of US statutory and regulatory measures to establish conditions for using ‘dolphin safe’ labels on canned tuna. The label could not be provided if, amongst other things, the tuna was caught through methods harmful to dolphins.[50] Unlike the decision in *US—Tuna I (Mexico),* the Appellate Body accepted that dolphin-friendly and dolphin-unfriendly tuna are not like products.[51] The Appellate Body heard evidence that US consumers preferred dolphin-safe tuna products over non dolphin-safe tuna products, speaking to the competitive relationship between the products and suggesting that art 2.1 can, in fact, apply to non-product-related process and production methods.[52] *US—Tuna II (Mexico)* raises questions as to the future determination of likeness under art III:4 in similar circumstances, as the competitive relationship between two products is a fundamental consideration for determining likeness.

Although ‘likeness’ was once interpreted narrowly, WTO case law decisions have resulted in a positive shift towards what constitutes ‘likeness’, by now allowing for the consideration of process and production methods as a legitimate basis for distinguishing between products, particularly where there is an impact on the competitive relationship between products.[53] However, even if process and production methods do not render products

[49] Trachtman (n 29) 282; Appellate Body Report, *US—Clove Cigarettes*, WTO Doc WT/DS406/AB/R (n 11) 169; Gabrielle Marceau, ‘A Comment on the Appellate Body Report in EC — Seal Products in the Context of the Trade and Environment Debate’ (2014) 23 *Review of European Community & International Environmental Law* 318, 325–8.

[50] Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9).

[51] Ibid [7.12]–[7.14].

[52] Meredith A Crowley and Robert Howse, ‘Tuna-Dolphin II: A Legal and Economic Analysis of the Appellate Body Report’ (2014) 13(2) *World Trade Review* 321, 327; Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9) [6.66].

[53] Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9).

unlike, there still might be a legitimate basis for providing less favourable treatment through the general exceptions, as illustrated in the case of *US—Shrimp*.[54] Ultimately, there is now greater potential for Member States to apply measures inconsistently to like products, as long as non-discrimination is present.

IV No Less Favourable Treatment Exceptions

Although the general proposition is that there must be no less favourable treatment between like products, less favourable treatment may actually be justified if considered a legitimate objective, and non-discrimination is present. Therefore, 'legitimate objective' can be considered an exception to the no less favourable treatment obligations in art III:4 of the GATT or art 2.1 of the TBT Agreement.

Interpretation of 'no less favourable treatment', which is not defined in the Agreements, has gained increasing attention in recent years.[55] Less favourable treatment arises where Members products are disadvantaged compared to the treatment of a like domestic, or otherwise imported, product. In *US — Measures Affecting the Production and Sale of Clove Cigarettes* ('*US—Clove Cigarettes*'),[56] menthol and clove cigarettes were interestingly deemed like products.[57] The Appellate Body then found that banning imported clove cigarettes while exempting domestic menthol cigarettes afforded less favourable treatment to imported clove cigarettes as clove cigarettes were placed at some disadvantage with no regulatory justification.[58]

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54 *GATT 1994* (n 2).

55 Won-Mog Choi, *'Like Products' in International Trade Law*: *Towards a Consistent GATT/WTO Jurisprudence* (Oxford University Press, 2003); Damien Neven and Joel P Trachtman, 'Philippines – Taxes on Distilled Spirits: Like Products and Market Definition' (2013) 12(2) *World Trade Review* 297, 326.

56 Appellate Body Report, *US—Clove Cigarettes*, WTO Doc WT/DS406/AB/R (n 11).

57 Ibid [173]–[182].

58 K William Watson, 'As Expected, WTO Clove Cigarette Case Goes Nowhere', *CATO Institute* (Web Page, 8 October 2014) <https://www.cato.org/blog/expected-wto-clove-cigarette-case-goes-nowhere>.

Similarly, in *US — Standards for Reformulated and Conventional Gasoline* (‘*US—Gasoline*’),[59] the US implemented a measure establishing baseline figures for gasoline sold on the US market (which had different methods for domestic and imported gasoline), with the overarching purpose to prevent air pollution, through regulating the composition and emission effects of gasoline.[60] Despite this purpose, the Appellate Body found that this measure violated art III:4 as the imported gasoline experienced less favourable sale conditions than those afforded to domestic gasoline, strictly being treated less favourably.[61]

No less favourable treatment does not require identical treatment between like products; however, it does require effective equality of competitive conditions,[62] as acknowledged in *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products* (‘*EC—Seal*’).[63] Yet *US—Gasoline* demonstrates that having regard only to competition conditions can result in unfair outcomes.[64] This interpretation prevents the possibility of Members making legitimate regulatory distinctions, although these are largely covered under the GATT’s general exceptions and the TBT Agreement’s equivalent.[65]

Even where less favourable treatment appears, measures may still be excused where a legitimate objective is present.[66] However, if a legitimate objective is construed too narrowly, it may prevent Members from pursuing important policy objectives. On the other hand, if a legitimate objective is construed too broadly, it could undermine free trade objectives.[67] As such, an

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59 Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, WTO Doc WT/DS2/AB/R (29 April 1996) (‘US—Gasoline’).

60 Ibid.

61 Ibid 22.

62 Appellate Body Report, *United States—Section 337 of the Tariff Act of 1930,* WTO Doc BISD 36S/345 (1989) [5.11]–[5.13].

63 Appellate Body Report, *EC—Seal*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (n 9) [5.101].

64 Ibid; Appellate Body Report, *US—Gasoline*, WTO Doc WT/DS2/AB/R (n 59) 22.

65 Trachtman (n 29) 284.

66 *GATT 1994* (n 2) art XX; *TBT Agreement* (n 2) art 2.1.

67 Glyn Ayres and Andrew D Mitchell, ‘General and Security Exceptions Under the GATT and the GATTS’ (2012) *International Trade Law and WTO* 2, 15.

appropriate balance of these competing considerations is necessary to adequately uphold the non-discrimination principle. For less favourable treatment to be justified, the measure in question must be both a legitimate objective and be applied in a non-discriminatory manner.

The GATT art III:4 no less favourable treatment jurisprudence, inclusive of its justifications, is also applicable to the interpretation of no less favourable treatment under art 2.1 of the TBT Agreement. Under the GATT, no less favourable treatment justifications are specifically considered under the general exceptions, whereas under the TBT, they are considered more generally. Although this suggests an approach inconsistent between the two Agreements, the same factors are ultimately still considered under both Agreements and are applied in such a way to deliver similar outcomes. For convenience, these justifications will be discussed together.

A *Justifications Under the Agreements*

Even where a Member has acted inconsistently with art III:4 of the GATT or art 2.1 of the TBT Agreement by affording a like product less favourable treatment, the measure may still be justified provided that the Member is pursuing a legitimate objective in a non-discriminatory manner.[68] The notion of what constitutes a legitimate objective has a broad ambit and includes, *inter alia*, measures for the protection of the environment and human health.[69] The legitimate objective notion falls within the ambit of the general exceptions in the GATT and is more specifically contained within articles in the TBT Agreement, namely art 2.2.

Article XX of the GATT provides for a number of instances where Members may be excused from acting in breach of GATT rules; these are

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68 *GATT 1994* (n 2) art XX; *TBT Agreement* (n 2) art 2.2.
69 *TBT Agreement* (n 2) art 2.2.

known as the 'general exceptions'.[70] To justify protection of a GATT breach under art XX, the conduct in question must fall within one of the sub-ss (a)-(j) and must also satisfy the stringent requirements imposed by the opening clause of art XX, known as the 'chapeau'.[71] The chapeau essentially requires that non-discrimination be present. Most relevant to the environment and human health, art XX(b) establishes an exception for measures that are necessary to protect human or animal life or health, and art XX(g) provides an exception for measures taken in relation to the conservation of exhaustible natural resources.[72] Case law interpreting these sub-sections has long allowed for a broad interpretation, however, the chapeau (being the second hurdle) continues to be interpreted narrowly.

1 *The Use of Legitimate Objective under the GATT*

In *US—Tuna I (Mexico),* the Panel accepted that art XX(b) could apply to measures protecting dolphin life and, therefore, would allow for distinction between the established like products. However, the US' justification ultimately failed for not satisfying the chapeau requirements of non-discrimination.[73] This finding was also supported in *US — Restrictions on Imports of Tuna* ('*US—Tuna (EEC)*').[74] In 2018, *US—Tuna II (Mexico)* qualified the art XX(b) exception by holding that protection of the life or health of individual animals will be a legitimate objective, even if the environment does not comprise part of the measure, thereby confirming an even broader application for the first requirement under art XX.[75]

70 'WTO Rules and Environmental Policies: GATT Exceptions', *World Trade Organization* (Web Page) <https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm>.

71 *GATT 1994* (n 2) art XX, sub-ss (a)–(j).

72 Ibid art XX, sub-ss (b), (g).

73 GATT Panel Report, *US—Tuna I (Mexico)*, GATT Doc DS21/R (n 13).

74 GATT Panel Report, *US—Tuna (EEC)*, GATT Doc DS29/R (n 13) [5.25].

75 Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9); Cunningham and Vindedzis (n 39) 332.

The phrase 'relating to' under art XX(g), merely requires a direct connection, which generally has not proven difficult to satisfy.[76] The meaning of the term 'necessary' under art XX(b) requires the weighing of several factors, including the importance or value protected by the measure, the contribution of the measure to its overall objective and the trade-restrictiveness of the measure.[77] If a less trade-restrictive alternative is reasonably available, the measure will not be 'necessary'.[78] Despite this, these sub-sections are not difficult to satisfy when pursuing a legitimate objective in a non-discriminatory manner.

2 *The Use of Legitimate Objective Under the TBT Agreement*

Unlike the GATT, the TBT Agreement does not contain specific general exceptions. However, art 2.2 of the TBT Agreement provides that 'technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create'.[79] These 'legitimate objectives' include, *inter alia*: protection of human health or safety; animal or plant life or health; and the environment (similar to that provided for under the GATT general exceptions).[80] The term 'necessary' under art 2.2 is interpreted similarly to the same term under art XX(b) of the GATT, thus requiring a weighing exercise of all relevant factors, with consideration given to any alternatives.[81] The 'necessity' requirement is not typically a high standard to meet and has been given an expansive application under WTO case law, similar to that under the GATT.[82] Although

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76 Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc, WT/DS161/AB/R (10 January 2001) 16–18 ('*Korea—Beef*').

77 Cunningham and Vindedzis (n 39) 336; Ibid [164].

78 Appellate Body Report, *Korea–Beef*, WTO Doc, WT/DS161/AB/R (n 76) [166].

79 *TBT Agreement* (n 2) art 2.2.

80 Ibid.

81 Appellate Body Report, *Korea–Beef*, WTO Doc, WT/DS161/AB/R (n 76); Anyi Wang, 'The Necessity Test in Article 2.2 of the TBT Agreement' (MSc Thesis, Wageningen University, 2019) 58; Gisele Kapterian, 'A Critique of the WTO Jurisprudence on Necessity' (2010) *International and Comparative Law* 59(1) *Quarterly* 89, 97.

82 Appellate Body Report, *Korea–Beef*, WTO Doc, WT/DS161/AB/R (n 76).

a legitimate objective is likely to be interpreted broadly, the legitimate objective principle must be applied in accordance with the non-discriminatory principle, which has a stricter application.

B *The Non-Discrimination Principle and No Less Favourable Treatment*

Even if a legitimate objective is present, Members are still limited in applying measures in accordance with the non-discrimination principle under both the GATT and TBT Agreement. The chapeau of GATT art XX provides that the objectives contained in sub-ss (a)-(j) are not to be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail' and must not be 'a disguised restriction on international trade'.[83] The chapeau is said to be included to prevent the abuse of art XX for protectionism, given the sub-sections have such a broad ambit.[84] A measure will be arbitrary or unjustified where it is not rationally connected to the objective of the measure.[85] The requirement in the chapeau has proven more difficult to satisfy, as opposed to the legitimate objective discussed above. This necessitates a balance between traditional free trade principles and allowing Members to pursue a legitimate objective where needed.[86]

In *US—Clove Cigarettes*, the Appellate Body stated that a technical regulation which is de facto discriminatory may still comply with art 2.1 of the TBT Agreement if the discrimination comes from a legitimate regulatory distinction in the sense of being 'even-handed' in its application.[87] Although not provided for in the same form (i.e. as a 'general exception'), it appears

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83 *GATT 1994* (n 2) art XX.

84 Van den Bossche and Zduoc (n 3) 573.

85 Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9) [337]–[339]; Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (3 December 2007) [227].

86 Johanna Sutherland, 'International Trade and the GATT/WTO Social Clause: Broadening the Debate' (1998) 14(1) *Queensland University of Technology Law Journal* 83, 85.

87 Appellate Body Report, *US—Clove Cigarettes*, WTO Doc WT/DS406/AB/R (n 11) [173]–[182].

that the scope of art 2.2 (encompassing the non-discrimination principle) of the TBT Agreement applies similarly to art XX of the GATT.[88] Thus, where arbitrary or unjustified discrimination is present, there will also be a violation under art 2.1 of the TBT Agreement.[89] The chapeau test and the similar even-handedness requirement under the TBT Agreement both fall under the broader umbrella of non-discrimination requirements.[90]

The non-discrimination requirement is well illustrated through the case of *US—Shrimp*.[91] In *US—Shrimp*, the US implemented a ban on the importation of shrimp caught by shrimp trawl fishing on the basis that this method of fishing contributed to the mortality of sea turtles (similar to the issues presented in *US—Tuna I (Mexico)* and *US—Tuna II (Mexico)*).[92] In order to import shrimp caught by this method of fishing, importers were required to use a 'turtle excluder device' or an equivalent system to minimise incidental fishing of sea turtles when harvesting shrimp.[93] The Appellate Body viewed this measure as directly connected to the policy of conservation of sea turtles within the ambit of art XX(g), further clarifying that it is possible to distinguish likeness based on non-product-related process and production methods.[94] However, the US' justification ultimately failed as the measure was not applied consistently and was not in the 'spirit' of the chapeau.[95] This is because there was evidence that the US provided turtle excluder devices to other jurisdictions—such as the Caribbean—but not to the complainants. Therefore, the measure had a discriminatory application, breaching the chapeau.[96]

88 Cunningham and Vindedzis (n 39) 334.
89 Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc WT/DS384/AB/R, WT/DS386/AB/R (29 June 2012) [271].
90 Marceau (n 49) 325.
91 Appellate Body Report, *US—Shrimp*, WTO Doc WT/DS58/AB/R (n 9).
92 Ibid.
93 Ibid.
94 Ibid.
95 Ibid.
96 Appellate Body Report, *US—Shrimp*, WTO Doc WT/DS58/AB/R (n 9); Cunningham and Vindedzis (n 39) 319–20.

Similarly, in *US—Tuna II (Mexico)*, the Appellate Body found that the measure seeking to address fishing through the purse-seine method in the Eastern Tropical Pacific Ocean did not address other similar methods, which also harmed dolphins in other jurisdictions. As such, the measures lacked even-handedness, preventing them from being justified.[97] Following this determination, the US now requires certification that no dolphin has been injured before any tuna products are eligible for the dolphin-safe label, applying consistently to all Members in a non-discriminatory manner.[98]

Finally, in *EC—Seal*, the European Union placed a ban over the import of seal-related products (including meat, oil, blubber, organs, raw fur skins and fur skins) for animal welfare concerns but allowed for several exceptions which did not address the same concerns, such as for the indigenous communities.[99] Canada and Norway challenged the consistency of the European Union measure. The WTO held that prohibiting other jurisdictions—such as Canada and Norway—from commercial hunting for animals was not rationally connected to the measure's objective, as the same concerns existed with the exceptions but were not adequately addressed, lacking even-handedness.[100] Following this, the European Communities now base the indigenous community exception on the satisfaction of animal welfare conditions, achieving a consistent application across the board.[101] It is likely that if *EC—Seal* or *US—Tuna II (Mexico)* were reconsidered today, the measures would be justified as they are no longer applied in a discriminatory manner due to the subsequent certification and conditions implemented, which previously hindered its effectiveness.

97 Cunningham and Vindedzis (n 39) 319–20.
98 Ibid 337; Appellate Body Report, *US—Tuna II (Mexico)*, WTO Doc WT/DS381/AB/RW (n 9) [7.266].
99 Appellate Body Report, *EC—Seal*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (n 9).
100 Ibid [5.338].
101 Regulation (EU) 2015/1775 of the European Parliament and of the Council of 6 October 2015 Amending Regulation (EC) No 1007/2009 on Trade in Seal Products and Repealing Commission Regulation (EU) No 737/2010 [2015] OJ L 262/1; Cunningham and Vindedzis (n 39) 337.

Although the GATT's chapeau and the TBT's similar even-handedness requirements are a more difficult burden to satisfy than the achievement of a legitimate objective, the WTO case law discussed above provides authority for the proposition that less favourable treatment can be afforded to like products, so long as a legitimate objective is being pursued in a non-discriminatory manner.[102] This provides an appropriate balance between protection of free-trade and the pursuance of legitimate objectives by Member States, both of which have validity.

V CONCLUSION

This article has argued that interpretations of 'likeness' and 'less favourable treatment' under the GATT and the TBT Agreement have broadened through the development of WTO jurisprudence, resulting in a greater balance between the competing concerns of free trade protection and the pursuit of legitimate objectives. Ultimately, it appears that it is now possible to have 'less favourable treatment' between 'like products', so long as there is a legitimate objective involved which is applied in a non-discriminatory manner. While this approach seeks to uphold traditional WTO objectives, it also allows a balance for Member's sovereign freedoms to be achieved. Although this approach could continue to change over time, as has been seen in WTO history, it provides the current framework in assessing whether a Member State has acted in accordance with either the TBT Agreement or the GATT when engaging in trade.

The task of interpreting 'likeness' and 'no less favourable treatment' under both art III:4 of the GATT and art 2.1 of the TBT Agreement continues to develop under WTO jurisprudence. Recent cases tend to indicate a broader interpretation of 'like products', allowing for consideration of process and

[102] Appellate Body Report, *US—Shrimp*, WTO Doc WT/DS58/AB/R (n 9); Appellate Body Report, *EC—Seal*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (n 9).

production methods as a legitimate basis to provide less favourable treatment under both the GATT and TBT Agreement.[103] This is particularly justifiable when the process and production methods impact the product's competitive relationship, falling under traditional factors for determining likeness. However, further clarification is necessary as to applicability for art III:4 of the GATT.

Additionally, even where less favourable treatment is afforded to like products, the measures may still be justified by the nature of art XX of the GATT and art 2.2 of the TBT Agreement. Both [104] arts require a broad legitimate objective, applied in accordance with non-discriminatory objectives, where a stricter standard remains.[105] This outcome is achieved through the requirements in the chapeau, prohibiting arbitrary or unjustified discrimination, and the similar even-handedness requirements in the TBT Agreement.[106] This approach allows for a more appropriate balance between tensions of free trade, on the one hand; and allowing Members to achieve legitimate objectives, on the other. The modern approach evoked in these cases contrasts with traditional WTO jurisprudence, which previously held that trade restrictions in response to other countries' environmental policies were inconsistent with the GATT.

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103 Ibid.

104 Howse (n 40) 36.

105 Appellate Body Report, *EC—Seal*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (n 9).

106 *GATT 1994* (n 2) art XX.

LIFE, LIBERTY AND THE PURSUIT OF GUN CONTROL: A COMPARATIVE ANALYSIS OF GUN CONTROL IN AMERICA AND AUSTRALIA

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GUN CONTROL—COMPARATIVE LAW—AMERICA—AUSTRALIA

ABSTRACT

America's approach to gun control has long puzzled Australians. After the swift implementation of gun control laws following the Port Arthur massacre, Australia's strict gun control regime has been a point of national pride. Contrastingly, America's hesitance—or perhaps inability—to act on this issue, even after some of the deadliest and most horrific shootings, has been a blemish on the nation's reputation. This article outlines the different gun control regimes in America and Australia and argues that the differences run far deeper than the mere words of the law. This article argues that the deeply entrenched, nation-shaping ideologies rooted in the notion of 'the American Dream' are to blame for the lack of any significant gun control in America, while Australia's strict gun control regime has thrived.

I INTRODUCTION

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Deeply entrenched political, social, and legal ideologies stemming from the *United States Constitution* ('the US *Constitution*') have prevented the country's effective implementation of gun control. In contrast, Australia has implemented legislative gun control quickly and effectively in the absence of such constitutional and ideological roadblocks. This article will discuss how Australia has implemented strict and effective gun control laws, while a gun crisis in America has flourished.

Americans and global spectators hoped that the Sandy Hook Elementary School shooting ('Sandy Hook') in 2012 would be America's 'Port Arthur moment'.[1] However, this dream was short-lived.[2] Vox, a media outlet, stated that '[a]fter Sandy Hook, [America] said never again. And then we let 2 498 mass shootings happen'.[3] It is telling that the author was required to update the statistics referred to in this article frequently during the preparation of the article. Tim Fischer, the deputy Prime Minister when the Port Arthur massacre occurred, commented that 'Port Arthur was [Australia's] Sandy Hook … Port Arthur we acted on. America is not prepared to act on their tragedies'.[4] The question, then, is *why*? Through addressing the legal, structural, and ideological issues that have moulded gun laws in Australia and America, this article will illuminate historical roadblocks to tighter gun control in America.

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1 See, eg, Stephanie March, 'Sandy Hook Anniversary: Families of Those Killed in Mass Shootings Call for More Gun Control', *ABC News* (Online, 15 December 2015) <https://www.abc.net.au/news/2015-12-15/sandy-hook-anniversary-sparks-calls-for-more-gun-control/7028178>; Will Oremus, 'In 1996, Australia Enacted Strict Gun Laws. It Hasn't Had a Mass Shooting Since', *Slate* (online, 2 October 2017) <https://slate.com/news-and-politics/2017/10/australia-enacted-strict-gun-control-laws-after-a-horrific-mass-shooting-in-1996-it-worked.html>.

2 Ibid.

3 German Lopez and Kavya Sukumar, 'After Sandy Hook, We Said Never Again', *Vox* (Online, 3 June 2020) <https://www.vox.com/a/mass-shootings-america-sandy-hook-gun-violence>; Gun Violence Archive, *Gun Violence Archive 2020: Evidence Based Research: Since 2013* (Web Page, 28 May 2020) <https://www.gunviolencearchive.org/>.

4 Calla Wahlquist, 'It Took One Massacre: How Australia Embraced Gun Control After Port Arthur', *The Guardian* (Online, 15 March 2016) <https://www.theguardian.com/world/2016/mar/15/it-took-one-massacre-how-australia-made-gun-control-happen-after-port-arthur>.

The ideological entrenchment of 'the American Dream' into America's constitutional, political and legal framework has prevented, and will continue to prevent, the implementation of effective gun control legislation in America. Unless America acknowledges and works to overcome these ingrained philosophies, the state of gun control in America is unlikely to improve. Part II of this article will identify and delineate the concept of 'the American Dream'. Part III will explore the contextual background in regard to gun culture and control, and Part IV will discuss the legal status and issues of guns in both nations. Part V will examine the ideological issues behind the gun debate, including those stemming from Australia and America's constitutions, the rights systems in both countries, neoliberalism and self-defence, and the intersections of gender and race with self-defence.

II THE AMERICAN DREAM

The 'American Dream' has come to personify America's national identity, and in doing so has become intertwined with gun culture. Marco Rubio, United States Senator for Florida, stated that 'the American Dream is a term that is often used but also often misunderstood. It isn't really about becoming rich or famous. It is about things much simpler and more fundamental than that'.[5] For the purposes of this article, I have adopted Cal Jillson's interpretation of the concept of the American Dream, where the core values have been identified as liberty, equality, democracy, the rule of law under a constitution and laissez-faire.[6] The rule of law under a constitution 'draws attention to [America's] base commitments to democracy, limited government, and free markets',[7] while laissez-faire refers to

5 Marco Rubio, 'Making Community Colleges Work' (Keynote Speech, 10 February 2014) 1.
6 Cal Jillson, The American Dream: In History, Politics, and Fiction (University Press of Kansas, 2016) 3.
7 Ibid.

‘a dedication to capitalism, markets, and competition’.[8] While this definition is adequate for the purposes of this article, historically, the term has been difficult to define. The term is used so often that it has become a noun, yet its meaning is elusive. It reflects the contention that America is more than just a place—it is an idea. Ted Yoho, former United States Representative, said:

> The American Dream comes from opportunity. The opportunity comes from our founding principles, our core values, that are held together and protected by the Constitution. Those ideas are neither Republican, Democrat, conservative, liberal, white, or black. Those are American ideologies.[9]

The term’s meaning has been shaped by centuries of law, literature, politics, and media. Political and legal instruments such as the United States Declaration of Independence, which provides that ‘all men are created equal’ and have the right to ‘life, liberty and the pursuit of happiness’,[10] have become entrenched into what Rubio refers to as ‘American ideologies’.[11] The ubiquitous term and ideologies it encompasses are central to American national identity and have, in turn, permeated America’s political and legal systems by becoming the basis upon which the *‘US Constitution’*, in particular, the Bill of Rights, was drafted.

The crux of this article is to illustrate how America’s unwavering commitment to its pursuit of the American Dream has created a culture which allows gun idealism to thrive and prevented the implementation of any meaningful gun control legislation. By providing a comparative analysis of America’s gun control framework and culture to Australia's gun control framework and culture, this article will demonstrate the detriment of these pervasive ideas to a continuing gun crisis in America. Without addressing its

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8 Ibid.
9 Peter D Looney, *Lost Cedar Rapids* (The History Press, 2020) 99.
10 Declaration of Independence (US 1776) 1.
11 Rubio (n 5).

unwavering devotion to the American Dream that have shaped America's political, legal and social frameworks, America will be unable to address its ongoing and devastating gun crisis.

III BACKGROUND

A *America and the Sandy Hook Massacre*

Sandy Hook occurred in 2012, and resulted in the death of 20 children between the ages of six and seven, six adults, and the gunman.[12] In 2013, Shultz et al described Sandy Hook as a 'tipping point' of the gun crisis in America,[13] exemplifying the belief that Sandy Hook would 'ultimately lead toward constructive solutions to diminish high rates of firearms deaths and injuries in the United States'.[14] However, these 'constructive solutions' did not occur. Instead, four years later, Sandy Hook was identified as the point where the 'gun debate stalemated'.[15] Sandy Hook has since been recognised as a symbol of America's failure to enact gun control—the phrase '"since Sandy Hook" has become shorthand for an apparently broken system that allows unfettered gun violence'.[16]

The absence of impact that Sandy Hook had on gun violence is illustrated by America's death by firearms statistics, which have increasingly worsened in the years since Sandy Hook. In 2012, there were 33,563 deaths by firearm, at an age-adjusted rate of 10.5 per 100,000 people.[17] In 2019, there were 39,707

12 Justin Eckstein and Sarah T Partlow Lefevre, 'Since Sandy Hook: Strategic Maneuvering in the Gun Control Debate' 81(2) *Western Journal of Communication* (2012) 225, 225.

13 James Shultz et al, 'The Sandy Hook Elementary School Shooting as Tipping Point' (2013) 1(2) *Disaster Health* 65, 65.

14 Ibid.

15 Eckstein and Lefevre (n 12) 225.

16 Ibid.

17 Centers for Disease Control and Prevention, National Center for Health Statistics, 'Firearm deaths by intent, 1999–2019', *Underlying Cause of Death, 1999–2019 Results* (Web Page, 2020) <https://wonder.cdc.gov/controller/saved/D76/D48F344>.

deaths, at a rate of 11.9 per 100,000 people.[18] In fact, despite the beliefs that Sandy Hook could be an opportunity to improve the gun crisis, often shootings in America result in gun sales increasing as was evidenced by the 2012 Aurora movie theatre shooting ('Aurora').[19]

Mere months before Sandy Hook, a shooting inside a movie theatre in Aurora, Colorado, resulted in 12 deaths and 58 injuries.[20] The gunman used a shotgun and an AR-15 semi-automatic rifle and had 6,000 rounds of ammunition in his home, all of which were legally obtained.[21] Despite the tragedy of Aurora, which was enabled by gun ownership and use, in the weekend after the shooting, the State of Colorado approved 25 per cent more background checks for gun purchases than the weekend average from 2012.[22] If Sandy Hook, a shooting of 20 young children while at school, was unable to turn the tides of the gun crisis in America, what will it take to effect change? Why have guns become so ingrained in American society that even the most brutal and tragic incidents have been unable to sway anti-gun control proponents? This article will illustrate how fundamental belief systems about the American Dream have prevented even the worst tragedies from breaking through the American psyche and instigating change.

B *Australia and the Port Arthur Massacre*

The issue of gun control came to the forefront of the Australian political conversation most significantly in 1996. The Port Arthur massacre occurred on

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18 Ibid.

19 William Briggs, How America Got Its Guns: A History of the Gun Violence Crisis (University of New Mexico Press, 2017) 1.

20 Ibid.

21 Ibid.

22 Associated Press, 'Gun Sale Background Checks Spike After Aurora', *CBS News* (Online, 19 September 2012) <https://www.cbsnews.com/news/gun-sale-background-checks-spike-after-aurora/>.

28 April 1996. Martin Bryant murdered 12 people in just 15 seconds, using military-style semi-automatic rifles.[23] A total of 35 people were killed, and 23 were injured.[24] Following the massacre, the National Firearms Agreement ('NFA') was negotiated and drafted. The Federal Cabinet endorsed the NFA on 6 May 1996.[25] On 10 May 1996, a mere 12 days after the massacre, a special meeting of the Australasian Police Ministers' Council ('APMC') was called, and approved the NFA.[26] While gun regulations are a state power,[27] then Prime Minister John Howard insisted all eight states and territories enact the NFA into legislation.[28] Polling illustrated up to 90 per cent support for reform.[29] Howard used this wide public support to pressure the NFA's national entrenchment.[30] Howard said: '[w]e do not want the American disease imported into Australia. Guns have become a blight on American society'.[31] The federal government gave the states and territories a deadline of 21 July 1996 to bring the NFA into law, which they all met.[32] The unprecedented uniformity of all of the states and territories and the Commonwealth government and the speed with which the NFA was drafted, negotiated, approved and enacted into local legislation illustrates just how impactful the Port Arthur massacre was on Australia.

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23 Philip Alpers and Zareh Ghazarian, 'The "Perfect Storm" of Gun Control: From Policy Inertia to World Leader' in Joannah Luetjens, Michael Mintrom and Paul Hart (ed), *Successful Public Policy: Lessons from Australia and New Zealand* (Australian National University, 2019) 207, 207.

24 Wahlquist (n 4); Tom Frame, *Gun Control: What Australia Got Right (and Wrong)* (NewSouth Publishing, 1st ed, 2019).

25 Frame (n 24) 18.

26 Ibid 16.

27 Ibid 14.

28 Ibid.

29 Ibid 13.

30 Ibid.

31 Toni O'Loughlin, 'Plan to Fight American Gun Disease', *Sydney Morning Herald* (Online, 19 April 2002) <https://www.smh.com.au/national/plan-to-fight-american-gun-disease-20020419-gdf7k7.html>.

32 Frame (n 24) 34; The NFA, and its updated 2017 version, the *National Firearms Agreement 2017* (Cth) ('*National Firearms Agreement*') is now in effect in law in *Firearms Act 1996* (NSW) and *Weapons Prohibition Act 1998* (NSW); *Firearms Act 1996* (Vic) and *Control of Weapons Act 1990* (Vic); *Weapons Act 1990* (Qld); *Firearms Act 1973* (WA); *Firearms Act 1977* (SA); *Firearms Act 1996* (Tas); *Firearms Act 1997* (NT); and *Firearms Act 1996* (ACT) and *Prohibited Weapons Act 1996* (ACT).

The NFA and related legislation were comprehensive. The NFA included provisions banning certain weapons, including semi-automatic rifles (except in exceptional circumstances),[33] and required a person to have a 'genuine reason' for having a firearm.[34] Significantly, 'personal protection' was not a genuine reason.[35] Following the NFA's implementation, the Commonwealth implemented the 'Gun Buy-Back Scheme',[36] which began in October 1996.[37] The scheme led to the surrender of 640,000 firearms across Australia.[38] Since then, state and territory legislation has been compliant with the NFA,[39] partly due to the heavy-handed coercion of the federal government, which led to enactment of the NFA legislation in the first place,[40] but also due to how deeply Australia felt the impact of Port Arthur.

The effectiveness of the NFA has been illustrated by the rate of gun deaths falling after its implementation. In 1996, the rate of gun deaths per 100,000 people was 2.84, in 2006 it was 1.20, and by 2016 it had fallen to 0.95.[41] Firearm suicide rates dropped from an annual average 2.6 per 100,000 people across the seven years prior to the NFA, to an annual average of 1.1 in the seven years after its implementation.[42] Most significantly, the lack of incidence of 'mass shootings' (defined as shootings where five or more people were killed) decreased.[43] In the 13 years prior to 1996, there were 13 mass fatal shootings,

33 National Firearms Agreement (n 32) s 1(a).
34 Ibid s 3(b).
35 Ibid s 3(a).
36 Australian National Audit Office, *The Gun Buy-Back Scheme* (Report, December 1997) 5 <https://www.anao.gov.au/sites/default/files/anao_report_1997-98_25.pdf?acsf_files_redirect>.
37 Frame (n 24) 34.
38 *The Gun Buy-Back Scheme* (n 36) 5.
39 Samantha Bricknell, *Firearm Trafficking and Serious and Organised Crime Gangs* (Research and Public Policy Series No 166, Australian Institute of Criminology, 29 June 2012) <https://www.aic.gov.au/publications/rpp/rpp116>.
40 Frame (n 24) xi.
41 Philip Alpers and Michael Picard, 'Gun Facts, Figures and the Law', *Sydney School of Public Health, The University of Sydney* (Web Page, 9 June 2020) <https://www.gunpolicy.org/firearms/region/united-states>.
42 Harvard Injury Control Research Center, 'The Australian Gun Buyback' [2011] (Spring) *Bulletins* 1, 1.
43 Simon Chapman, Philip Alpers and Michael Jones, 'Association Between Gun Law Reforms and Intentional Firearm Deaths in Australia, 1979–2013' (2016) 316(3) *The Journal of the American Medical Association* 291,

however in the following 20 years there were zero.[44] This is significant because mass shootings have been enabled and assisted by semi-automatic weapons, which allow shooters to engage in rapid fire. The banning of such weapons was a key element of the NFA and has been crucial to its success.[45] The lack of mass shootings and reduction in firearm fatality rates in Australia demonstrates the efficacy of restrictions and regulations on firearms. Despite evidence from the Australian experience, America has still been unable to implement reform.

IV LEGAL ISSUES

A *The Legal and Constitutional Status of Guns in America*

Firearms, and their use, have shaped American history and, consequently, America's political and legal structure. The central role guns played in American society was solidified at the drafting of the Second Amendment to the Bill of Rights in the *US Constitution*. This constitutional entrenchment ensured guns would play a pivotal role in American society for centuries to come. The Second Amendment is one fundamental source of attitudes towards guns in America. It provides that 'a well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed'.[46] It is necessary to consider the context in which the *US Constitution* was drafted and what implored the drafters to include the Second Amendment.

America ratified the *US Constitution* in 1787.[47] This is significant for two reasons. First, the gun technology available today is vastly different to that which

293.
44 Ibid.
45 Ibid.
46 United States Constitution amend II.
47 Letter of Transmittal, *United States Constitution.*

the drafters of the *US Constitution* would have considered. For example, all descendants of the original eighteenth-century musket have been deemed to legally constitute 'arms',[48] including semi-automatic rifles, despite these rifles exceeding the traditional musket's rate of fire twenty-fold.[49] Second, the historical context was particularly influential on the contents of the *US Constitution* and the Bill of Rights. Prior to 1787, American distrust of government was brewing. Whilst America was still under English rule, the English Parliament passed the *Stamp Act of 1765*,[50] which imposed taxes on Americans by a 'distant government in which they were not represented'.[51] To enable the *Constitution* to be implemented and federalisation to occur, anti-federalists who were cautious of entrenching too much power in a federalist government had to be appeased.[52] The movement was deeply suspicious of any central ruler reverting the country to a pre-independence style of ruling.[53] Fears of 'big government' and 'hostile' Aboriginal peoples fuelled this movement.[54] The introduction of the first 10 Amendments, known as the Bill of Rights, won over the anti-federalists. America ratified the Bill of Rights into the *US Constitution* in 1791, offering strict protection of individual and personal rights.[55]

Since the ratification of the Bill of Rights, the United States Congress has implemented legislation regulating gun use, albeit generally with minimal impact on both the prevalence of gun violence and the continuation and development of anti-gun violence laws. For example, despite being a positive step towards

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48 *United States v Miller,* 59 SCt 816 (1939).

49 John McNamara, 'The Fight to Bear Arms: Challenging the Second Amendment and the U.S. Constitution as a Sacred Text' (2017) 12(2) *European Journal of American Studies* 1, 2.

50 *Duties in American Colonies Act 1765*, 5 Geo III, c 12.

51 'The Bill of Rights: A Brief History', *American Civil Liberties Union* (Web Page) <https://www.aclu.org/other/bill-rights-brief-history> ('The Bill of Rights: A Brief History').

52 Ibid.

53 Caroline Light, 'From a Duty to Retreat to Stand Your Ground: The Race and Gender Politics of Do-It-Yourself-Defense' (2015) 15(4) *Cultural Studies and Critical Methodologies* 292, 293.

54 Ibid.

55 'The Bill of Rights: A Brief History' (n 50).

stricter gun control in America, the Federal Assaults Weapons Ban ('FAWB') enacted in the *Violent Crime Control and Law Enforcement Act of 1994*[56] was negotiated down significantly in order to obtain bi-partisan support, and its impact was far less meaningful than it could have been. The FAWB provision contained a 'sunset clause', which meant that the legislation expired in 2004 after being in force for 10 years.[57] The legislation contained a number of other exclusions from its restrictions on ownership and the use of assault weapons, including a 'grandfather clause', which meant that weapons that were possessed lawfully prior to the enactment of the FAWB were allowed to continue to be possessed and transferred.[58] This stands in stark contrast to Australia's NFA which implemented a gun buyback scheme and incentivised the return of newly banned weapons while criminalising the holding of them entirely (regardless of the date of purchase).[59] Given these caveats, it is hardly surprising that America continues to have the highest rate of gun ownership internationally and high rates of deaths and injuries by firearms.[60]

The interpretation of gun laws in the courts has also failed to contribute to meaningful gun control. American courts have been inclined to interpret the Second Amendment as a plenary right—a right that is absolute and unrestricted—by avoiding narrowing its scope and application. This occurred in the landmark case of *District of Columbia et al v Heller* ('*Heller*')[61] where proponents of gun control argued that the specification of 'militia' in the Second Amendment excludes the private ownership and use of firearms.[62] However, the

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56 *Federal Assaults Weapons Ban,* 42 USC ch 136; Meghan Keneally, 'Understanding the 1994 Assault Weapons Ban and Why It Ended', *ABC News* (Online, 13 September 2019) <https://abcnews.go.com/US/understanding-1994-assault-weapons-ban-ended/story?id=65546858>.

57 *Violent Crime Control and Law Enforcement Act of 1994*, 18 USC §110105 (1994).

58 Ibid §§ 922(v)(2); (w)(2) (1994).

59 National Firearms Agreement (n 32) 1(a).

60 See above Part III(a).

61 *District of Columbia v Heller*, 554 US 1, 1 (USC, 2008) ('*Heller*').

62 Ibid.

Court held that 'the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defence within the home'.[63] This finding reflects the tendency of American courts to interpret the Second Amendment as broadly as possible. This constitutional backdrop has been used to quash even the mildest attempts to restrict gun ownership and use in America.

B *The Legal and Constitutional Status of Guns in Australia*

Australia has been championed as a leader in the way of gun control laws internationally, with the NFA being referred to as the 'gold standard'.[64] The NFA is one of the strictest gun control regimes in the world and was passed with relative ease in comparison to America's ongoing uphill battle against increasing gun control.[65] This has been largely enabled by Australia's constitutional framework and its underlying principles that differ greatly to the *US Constitution* and its guiding principles. Australia's 'Washminster' system is a merging of the American and English political and legal systems.[66] From America, Australia took principles of federalisation—including a written constitution—and from the United Kingdom ('UK'), Australia took the general principles and concepts underlying its drafting, such as representative and responsible government.[67] A key difference between the English and American systems is that the *US Constitution* 'created' a model, while the UK's model and its unwritten constitution merely 'described' centuries of tradition.[68] The Australian system is

63 Ibid.
64 Frame (n 24) viii.
65 See above Part III(b).
66 Elaine Thompson, 'The Constitution and the Australian System of Limited Government, Responsible Government and Representative Democracy: Revisiting the Washminster Mutation' (2001) 24(3) *University of New South Wales Law Journal* 657, 657.
67 Helen Irving, 'A Nation Built on Words: The Constitution and National Identity in America and Australia' (2007) 33(2) *Journal of Australasian Studies* 211, 211.
68 Ibid.

a 'curious blend of both practices and words'.[69] Australia has no Bill of Rights, and this was a conscious choice made by the framers of the *Australian Constitution*, as 'the prevailing view was that Australia did not need a Bill of Rights because basic freedoms were adequately protected by the common law and by the good sense of elected representatives, as constrained by the doctrine of responsible government'.[70]

Evidently, while America believes in individuals protecting their own rights and liberties and having the means to ensure this protection, Australia instead relies on the already entrenched political and legal systems that were described by the *Australian Constitution* (rather than created by it) to uphold citizen's rights. This illustrates the vital role the Bill of Rights has played in establishing American identity and the American Dream, whereas Australia has no similar loyalty to the *Australian Constitution*. Australia has a lesser focus on specific individual rights, as they are not explicitly written and delineated, but rather a broader focus on social justice and equality that does not home in on any one particular notion. This has established a more flexible, albeit often inadequate, system of rights protection.[71] While America relies on a strict interpretation of the word of law to give citizens their rights, Australia relies far more on the principles and traditions *described* by the *Australian Constitution*—such as representative government—to ensure the nation's safety and security.[72] In this way, the specific words of the *US Constitution*, rather than the principles they enunciate, are fundamental to America's national identity—in fact, the *US*

69 Ibid 213.

70 George Williams, Consultant Law & Bills Digest Group, 'The Federal Parliament and the Protection of Human Rights' (Research Paper 20, 11 May 1999) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99rp20#:~:text=The%20prevailing%20view%20was%20that,the%20doctrine%20of%20responsible%20government.>.

71 Louise Chappell, John Chesterman and Lisa Hill, *The Politics of Human Rights in Australia* (Cambridge University Press, 2009) 23.

72 Irving (n 66) 211.

Constitution forms the basis of American national identity[73]—while Australia has 'no concept of constitutional identity'.[74] The historical and ideological context behind the *Australian Constitution* explains why it does not contain a Bill of Rights or any mention of firearms, and why the *Australian Constitution* did not act as a barrier to effecting gun control in Australia as it has in America.

V IDEOLOGICAL ISSUES

While the constitutional entrenchment of the right to bear arms is significant, it is not determinative of the current state of America's gun control. As was argued above, legislative regulation of firearms can lead to a reduction in firearm-related death and injury. Why, then, has America refrained from enacting a suite of such legislation? Why does America continue to have the highest rate of private gun ownership of 178 countries?[75] Comparatively, Australia sits at a rate of 13.7 per 100 people and is ranked at 42 of 178 countries.[76] Ideologies and values borne from the American Dream have contributed greatly to America's resistance to gun control. These ideological factors must be examined to ascertain whether they explain why America has not enacted effective gun control.

There are a myriad of ideological issues underlying the lack of gun control in America. The fundamental question driving the ideological differences is: 'does the government's ultimate responsibility to keep people safe from harm give it limitless authority to regulate the lives of citizens and the power to ensure their compliance?'[77] The analysis of America and Australia's differing answers to this question can be traced back to the principles upon which each country's

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73 Ibid 217.
74 Ibid 222.
75 According to a 2020 University of Sydney study, which found that the rate of private gun ownership in America is 120.50 per 100 people: Alpers and Picard (n 40).
76 Ibid.
77 Frame (n 24) I.

constitution has been built. The overarching principle of each constitution is usefully summarised by Justice Nettle in *McCloy v NSW* (‘*McCloy*’),[78] where his Honour stated:

> Unlike the “great underlying principle” of the Australian Constitution— “that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power”—United States constitutional law puts emphasis on individual rights.[79]

This focus on individual rights is why the *US Constitution* contains a Bill of Rights, which guarantees individual rights to American citizens. Due to this focus on guaranteeing individual rights, attempts to restrict the Second Amendment in America have become perceived as ‘a challenge to cherished individual freedom itself’.[80] Additionally, the right to bear arms has often been considered one of the most (if not the most) important of these rights—as Hubert Humphrey, Democratic Vice-President between 1965–1969, stated, ‘[c]ertainly one of the chief guarantees of freedom under any government, no matter how popular and respected, is the right of citizens to keep and bear arms’.[81] In contrast, the *Australian Constitution* contains very basic ‘implied’ rights, such as the implied freedom of political communication, which has been extrapolated from the right to vote.[82] The ideological perspectives guiding law and society in America, including the focus on individual rights and liberties, neoliberalism, civilian self-defence, and patriarchal and racial structures, fostered the drafting of the Second Amendment and its ongoing glorification and approval. This entrenched ‘gun freedom’ in America’s national identity—a notion absent in Australia—has created a culture where guns and gun violence is ubiquitous.

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78 (2015) 257 CLR 178 (‘*McCloy’*).
79 Ibid [219].
80 McNamara (n 49) 1.
81 Briggs (n 19) 1.
82 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (‘Lange’); Australian Constitution ss 7, 24.

C *Commercialised Politics and the Freedom of Speech*

Gun lobbies, in particular, the National Rifle Association ('NRA'), have significant power in America. This has been enabled by America's constitutionally protected freedom of speech, whereas gun lobbies in Australia have a far lesser ability to impact political outcomes due to the limited application of Australia's implied freedom of political communication. The NRA plays a significant role in American politics through electoral campaigning.[83]

President Bill Clinton, in his 1995 State of the Union Address, stated that many Democratic incumbents were defeated in the election due to the lobbying efforts of the NRA.[84] A study that looked at the surprisingly Republican-leaning election results of 1994 confirmed Clinton's statement. The study found that NRA endorsement gave incumbent electoral candidates a 1.7 point increase, and challenging electoral candidates a 1.8 point increase.[85] Although at the time of the Port Arthur massacre 'the gun lobby was the ruling lobby in Australia',[86] the Howard government was able to push through radical legislative reform in a matter of days. In stark contrast, American congress and other lobbyists have repeatedly challenged the NRA and lost. Some studies have shown up to 91 per cent of Americans support increased gun control,[87] however legislation has not reflected this, which illustrates how the NRA's political power is so considerable that it outweighs the power of the people. American Democratic Party

83 Joshua Newman and Brian Head, 'The National Context of Wicked Problems: Comparing Policies on Gun Violence in the US, Canada, and Australia' (2017) 19(1) *Journal of Comparative Policy Analysis: Research and Practice* 40, 45; Christopher Kenny, Michael McBurnett and David Bordua, 'The Impact of Political Interests in the 1994 and 1996 Congressional Elections: The Role of the National Rifle Association' (2004) 34(2) *British Journal of Political Science* 331.

84 Kenny, McBurnett and Bordua (n 83) 331.

85 Ibid 339.

86 Wahlquist (n 4).

87 Tom Smith, 'Public Opinion About Gun Policies' (2002) 12(2) *The Future of Children* 154; M Bennett, 'Misfire: How the Debate over Gun Rights Ignores Reality' (2008) 1(2) *Albany Government Law Review* 482, 488; Gallup poll cited in Phil Hasselback, *The Intractable Issue of Gun Control in America* (2020) [94].

Representative Feighan stated: 'at least two dozen House members had privately spoken of their support for the [Brady] bill but had refused to vote for it, not because they feared losing their seats, but because of "the aggravation" that accompanied opposing the NRA'.[88] The NRA releases 'legislative scorecards' on how well members of congress comply with NRA policy to influence voters and political candidates alike.[89] In 2019, the NRA directly contributed USD349,844 to congressional candidates—98.95 per cent of whom were Republicans[90]—while USD3,220,000 was spent on political lobbying.[91] This spending is constitutionally protected by the First Amendment, which states: 'congress shall make no law … prohibiting the free exercise thereof; or abridging the freedom of speech'.[92] This freedom of speech has been a key enabler of the NRA's power over American politics, as political donations are legally a form of political communication or speech.[93]

In contrast, in Australia, there is no 'freedom of speech', but an implied freedom of political communication ('IFPC').[94] The IFPC acts as a legislative limitation in Australia, rather than an absolute freedom.[95] A significant element of the IFPC is that political communication must not only be 'compatible with the system of representative government, but [must] preserve and enhance it'.[96] *McCloy* is instrumental, as the Court considered the IFPC and contrasted it to America's freedom of speech. *McCloy* concerned the issue of whether caps on

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88 The Brady Bill is the informal name for the *Brady Handgun Violence Prevention Act* Pub L No 103-159, 107 Stat 1536 (1993); Gregg Lee Carter, *Guns in American Society: An Encyclopedia of History, Politics, Culture, and the Law* (ABC-CLIO, 2nd ed, 2012) 108.

89 Lois Beckett, '"FX": NRA's New Letter Grade for Politicians it Opposes in "Gunshine state"', *The Guardian*, (Online, 11 October 2018) <https://www.theguardian.com/us-news/2018/oct/10/nra-new-rating-florida-candidates-gun-control>.

90 Open Secrets: Center for Responsive Politics, 'National Rifle Association', *Influence & Lobbying* (Web Page, 21 May 2020) <https://www.opensecrets.org/orgs/recipients?id=d000000082>.

91 Ibid.

92 United States Constitution amend I.

93 *Citizens United v Federal Election Commission* 558 US 1, 1 (2010) ('*Citizens United*').

94 *Lange* (n 82); Australian Constitution ss 7, 24.

95 *McCloy* (n 78) [2].

96 Ibid [47].

political donations by property developers was a justifiable burden on the IFPC. The High Court of Australia held that the caps were constitutional as they supported representative government by ensuring certain groups with significantly disproportionate access to funds were not able to control the arena of political communication through donations.[97] In *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*,[98] Lord Bingham stated:

> [Representative democracy] is achieved where, in public discussion, differing views are expressed, contradicted, answered, and debated … it is not achieved if political parties can, in proportion to their resources, buy unlimited opportunities to advertise in the most effective media, so that elections become little more than auction.[99]

This limit on political donations was law in America for a time,[100] but its authority was subsequently found inconsistent with the First Amendment.[101] In *Citizens United v Federal Election Commission* (‘*Citizens United*’), Citizens United, a not-for-profit organisation, released a documentary that was critical of Hillary Clinton prior to the 2008 Democratic primary elections.[102] Such a campaign violated the *Bipartisan Campaign Reform Act of 2002*, which prohibited corporations from expending funds opposing or support a political candidate.[103] Citizens United applied for a declaration that the Act contravened the First Amendment. The Court upheld the notion that the ‘First Amendment has its fullest and most urgent application to speech uttered during a campaign

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97 Ibid [49], [50], [53].
98 [2008] 1 AC 1312.
99 Ibid [28] cited in *McCloy* (n 78) [39].
100 *Austin v Michigan Chamber of Commerce*, 494 US 652, [660] (1990).
101 Citizens United (n 93) 1.
102 Ibid.
103 Ibid 2.

for political office'.[104] As such, the offending sections of the Act were deemed unconstitutional.[105]

In America, the only political donation or communication that is restricted is blatant 'quid pro quo' corruption.[106] In *McCutcheon v Federal Election Commission*, the Court differentiated between quid pro corruption and allowable political spending, stating that:

> spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties.[107]

This lack of limitation on political donations is what has enabled the NRA to maintain a significant stronghold over the Republican party. Legislation imposing restrictions on political donations, such as that considered in *McCloy,* is unconstitutional in America.[108] This type of spending restricted by this American legislation falls under the allowable category of spending large sums of money in connection with elections, regardless of its potentially overbearing influence on the political party or elected official.[109] If the Second Amendment was a great impediment to gun control, the combination of both the First and Second Amendments have effectively blockaded any meaningful firearms regulations or restrictions in America. Conversely, Australia's lack of an explicit right to freedom of speech and total absence of any right to firearms allowed effective and strict gun control to be implemented in a matter of days.

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104 *Monitor Patriot Co v Roy*, 401 US. 265, 272 (1971).
105 Citizens United (n 93) 3.
106 *McCutcheon v Federal Election Commission*, 188 L Ed 2d 1, [494] (2014) ('McCutcheon').
107 Ibid.
108 Ibid.
109 Ibid.

D *Neoliberalism and 'Do-It-Yourself' Defence*

Gun ownership and use have become synonymous with the concept of self-defence in America. Deeply entrenched attitudes regarding self-defence, that stem from neoliberalism and anti-federalism, have allowed gun culture to further taint notions of the American Dream. The concept of 'do-it-yourself' defence is inherently linked to the American focus on individual rights identified above. While in Australia, citizens are to rely on the overall systems and structures in place to protect rights; in America, the onus of upholding individual rights is put onto the individual. Rather than the government defending rights, American values encourage citizens to 'do-it-themselves' and protect their own rights.

America's approach to 'do-it-yourself' self-defence can be traced back to the anti-federalist movement at the drafting of the *US Constitution*, which was wary of giving too much power to a centralised government and wanted to ensure that power remained in citizens' hands.[110] Not only has this strengthened the importance of the ability to defend oneself in America, and thus, meant people feel they need guns to be able to do this, it has also created significant resistance to increasing regulations generally.[111] Self-defence is one of the key arguments in favour of unregulated and unrestricted gun control. Following the Aurora shooting, which occurred in a 'gun-free zone', Erich Pratt from 'Gun Owners of America' stated that 'the victims were disarmed by law or regulation … They were made mandatory victims by restrictions which never stop the bad guys from getting or using guns'.[112] Ironically, Pratt argues that not only were the legislated gun-free zones ineffective to stop the gunman, but they inhibited the victims from protecting themselves. This contention is illustrative of how the belief that

110 Light (n 53) 293.
111 Ibid.
112 Briggs (n 19) 1.

citizens need to have the ability to 'self-defend' has prevented significant gun control reform, whilst further increasing the prevalence of gun possession in America.

The *US Constitution*, and its Bill of Rights, was influenced by neoliberal ideas espoused by the anti-federalist movement;[113] specifically, 'the dangers of "big government"' and 'the virtues of "rugged individualism" and "self-reliance"'.[114] These notions have strong ties to neoliberalism, as was helpfully described in the following quote from Esposito and Finley:

> Neoliberalism stresses competitive individualism as a natural outgrowth of human freedom, encourages a religious-like faith in the presumed powers of the free market to promote freedom and an optimal order, and understands the state as a protector of the prevailing market order as opposed to guarantor of social or economic justice. In effect, supporters of neoliberalism envision an ideal universe as one consisting of autonomous, self-contained individuals freely pursuing their self-interests with minimal political interventions.[115]

This quote explains how notions of individualism and self-reliance work to foster a 'free market', as a market is not truly 'free' if there is government interference in it. The American Dream places strong emphasis on the value of free markets and tells Americans that anyone can succeed if they try hard enough. In turn, this has created a belief that it is the citizen's role to defend themselves, rather than the role of the government to interfere and (to an extent) protect citizens. This is how the concept of 'do-it-yourself-defence' was borne.

Furthermore, these notions stemmed from the anti-federalist movement that existed at the drafting of the *US Constitution* and have been reiterated by

113 See above Part III(A).

114 Luigi Esposito and Laura Finley, 'Beyond Gun Control: Examining Neoliberalism, Pro-Gun Politics and Gun Violence in the United States' (2014) 7(2) *Theory in Action* 74, 74. See also Light (n 53) 292.

115 Esposito and Finley (n 114) 76.

world events such as the 9/11 terrorist attacks.[116] To the American public, 9/11 highlighted both the vulnerability of America's threat from the 'other' (whether that be the terrorist, the undocumented immigrant, the Indigenous person, or the African-American criminal) and the inability of the government to protect its people.[117] As such, the 9/11 terrorist attacks gave rise to an acute awareness of the American people that the government was unable to protect its citizens, further solidifying the importance of self-defence in the mind of the average American citizen.

In contrast to Australian attitudes that divert to elected officials to secure the nation's safety, American attitudes regarding self-defence have allowed 'Stand Your Ground' ('SYG') laws—adopted in over half of America's states[118]—to expand dramatically. It is argued that the dramatic expansion of SYG laws reflects worsening, rather than bettering, attitudes of Americans towards gun use and self-defence. SYG laws are central to the NRA's policy,[119] and are the laws that, rather than requiring a person to retreat in the face of danger if possible, allow citizens to 'stand their ground' and defend themselves or their property. The first state to officially enact SYG laws was Florida in 2005.[120] Florida's SYG law states:

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.[121]

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116 Light (n 53) 12.
117 Ibid 295; Susan Faludi, *The Terror Dream* (Metropolitan Books, 2007) 12.
118 Noel Otu, 'Stand Your Ground Laws in The United States' (2019) 7(1) *Salus Journal* 1, 3.
119 Light (n 53) 292.
120 Otu (n 118) 3.
121 *Crimes*, ch 776, §776.013, XLVI Fla Laws (2020).

Since Florida's SYG law was enacted, another 32 states have enacted such laws.[122] Prior to the implementation of SYG laws, the English concept of the 'duty to retreat' was the norm in America.[123] The history of Americans needing to defend themselves in their fight for independence, in addition to their desire to diverge from English principles, contributed to the departure from the 'duty to retreat'.[124]

The castle doctrine protects an individual's right to protect their 'castle', being their home, and has always been excluded from the duty to retreat, as citizens have the right to protect their property.[125] This doctrine, however, has slowly been expanded in America, as the concept of 'castle' has extended from the boundaries of private property into the public domain.[126] In Australia, self-defence laws vary across states but generally sit somewhere between those of America and the UK. While the castle doctrine does exist in Australia,[127] self-defence must occur in circumstances where the victim has a genuine, reasonable belief that the act of self-defence was necessary to protect themselves (or their property).[128] Further, 'the existence of an opportunity to retreat from the conflict' is a relevant consideration as to whether the act was lawful.[129]

The most distinctive element of the Australian notion of self-defence is that personal protection is *not* a genuine reason to own a gun. Thus, gun ownership under the guise of self-defence is unlawful.[130] The converse is true in America,

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122 Otu (n 118) 3.

123 Jeannie Suk, At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy (Yale University Press, 2009) 56.

124 Light (n 53) 293.

125 Ibid.

126 Ibid; Suk (n 123) 55.

127 See, eg, *Criminal Law Consolidation Act 1935* (SA) ss 15(1), 15A(1); *Criminal Code Act Compilation Act 1913* (WA) ss 251, 244.

128 See, eg, *Criminal Code* (WA) s 248; *Zecevic v Director of Public Prosecutions* (Vic) [1987] HCA 26; *R v Burgess* [2005] NSWCCA 52.

129 *R v Randle* (1995) 81 A Crim R 113, 15.

130 National Firearms Agreement (n 32) 3(a).

as the rhetoric surrounding self-defence is centred around protecting gun rights. A landmark American case, *Runyan v State,* recognised that 'the law of self-defence is founded on the law of nature; and is not, nor can be, superseded by any law of society … the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed'.[131] Similarly, *Miller v State* referred to 'the divine right of self-defence'.[132] In both *Runyan v State* and *Miller v State,* the defendant was acquitted for fatally shooting the victim in self-defence, despite having the opportunity to retreat and avoid a fatality. These references to 'the law of nature', 'the American mind', and 'divinity' illustrate how the impediments to gun control go far deeper than constitutional entrenchment.

While amending the *US Constitution* is an extensive process, it is theoretically achievable under Article V, which allows an amendment to be proposed by a two-thirds vote in both the House of Representatives and the Senate. The amendment must then be ratified by the legislatures of 75 per cent of the states.[133] The key impediment to gun control is not, however, the difficulties associated with amending the *US Constitution*. The issue is how one would go about altering the 'American mind' or natural law. Who can deny *divine rights*? The complexity of these notions explains why it has been so difficult for America to achieve any meaningful gun control. While, theoretically, the Second Amendment can be amended, it is far more difficult to amend centuries-old ideologies. Amending the right to bear arms, or enacting legislation that is seen to be impeding the right to bear arms in any way goes directly against

131 *Runyan v State*, 57 Ind 80, 84 (1877).
132 *Miller v State*, 139 Wis 57, 72 (1909).
133 United States Constitution art V.

the ideals purported by the American Dream, such as restricting government interference, a free market, self-reliance and individualism.

E *Phallic Weapons: Self-Defence and Masculinity*

American gun ideologies are inextricably linked to notions of patriarchy and white supremacy, and are centrally conveyed through acts of, or beliefs about, self-defence. As previously discussed, the intersections of race, gender, and self-defence into beliefs about guns stem from notions of liberal democracy and anti-federalism. As Nettle J noted in *McCloy*, the principles underpinning America and Australia's constitutions are disparate. The American values of individual rights and liberties to 'protect' oneself stand in stark contrast to the Australian focus on the role of the state in fostering this protection.[134] This section asserts that America's racial and gender stereotypes and hierarchies have created a strong belief that women and children are to be protected by men, often from men of colour, and this protection is to be achieved through gun violence.

Attitudes towards racial and gender stereotypes have shaped American notions of self-defence. In 2015, Gahman conducted a study in rural Kansas on the role of hegemonic masculinity in perpetuating certain ideologies about guns,[135] and subsequently identified a link between beliefs about guns and beliefs about gender norms. For example, regarding beliefs about gender norms, participants of the study highly valued 'being considered a "good family man"'.[136] In the participants' views, a 'good family man' is one who protects his family and is 'tough, rational, aggressive, and strong'.[137] This understanding of

134 *McCloy* (n 78); see above Part III(A).
135 Levi Gahman, 'Gun Rites: Hegemonic Masculinity and Neoliberal Ideology in Rural Kansas' (2015) 22(9) *Gender, Place & Culture: A Journal of Feminist Geography* 1203.
136 Ibid 1207.
137 Ibid 1208.

the 'good family man' is rooted in patriarchal gender norms of both the man and the woman's place in the household. Beliefs about gun use were then interwoven with these ideas, as participants expressed views that a good family man should protect his 'helpless' and 'vulnerable' wife and children, and a primary way through which this was to be achieved was through gun ownership and use.[138] A participant in the study encapsulates the relationship between such beliefs and gun use:

> [I]f owning a gun helps me protect my wife and kids and provide for the family—then I'm surer than shit going to have one … you never know when a criminal may be on the loose and all drugged up, or when a pervert may come sneaking around. It's times like that when a guy has to 'man up' and protect what's his. And if that requires shooting some nutcase then that's what he's got to do.[139]

This idea of having to 'man up' through owning and potentially using a gun to help protect one's 'wife and kids', illustrates the strong relationship between American notions of masculinity and gun use. This concept of being a 'good family man' is a driver of the philosophies reflected in strong self-defence laws. *Erwin v State of Ohio*[140] and *Runyan v State*[141] marked the end of the 'duty to retreat', codifying the imagery of any form of retreat as 'masculine cowardice',[142] while championing violent self-defence as an example of the 'true man'.[143] In each case, the perpetrator was a white man.[144] This is significant as it reflects how these laws tend to be utilised by those in society with the most power—

138 Ibid.
139 Ibid.
140 29 Ohio St 186, 199 (1876) ('*Erwin*'). See also Suk (n 123) 56.
141 57 Ind 80, 84 (1877).
142 Light (n 53) 294.
143 *Erwin* (n 140) 199 [26], [34]; Suk (n 123) 55.
144 Light (n 53) 294.

reflecting how they stem from, and reinforce, harmful racial and gender hierarchies.

F *Stand Your Ground: Self-Defence and Race*

The practical effect of SYG laws further illustrates the devastating harm arising from ideals of the American Dream. Although SYG laws contain 'race-neutral language', [145] white-on-black homicides are significantly more likely to be deemed lawful homicides than white-on-white homicides in American states with SYG laws in place.[146] SYG laws were twice as likely to result in the acquittal of a defendant accused of killing a black person than a defendant accused of killing a white person.[147] These statistics indicate the capacity for SYG laws to perpetuate white supremacy and racial hierarchies by effectively decriminalising murders perpetrated against people of colour.[148] The necessity and continuing relevance of the Black Lives Matter ('BLM') movement illustrates how the racialised nature of gun use in America is still widespread and prolific. One of the most publicised deaths sparking the BLM movement was the shooting of 17-year-old Trayvon Martin in 2012. Trayvon Martin was killed in Florida, seven years after it passed an SYG law, and his murderer was acquitted under the SYG law.[149]

This is not to say that Australia is free of these gendered and racial notions. There remain overwhelming issues regarding: Aboriginal deaths in custody;[150]

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145 Ibid 292.

146 Dream Defenders, Community Justice project of Florida for Legal Services and National Association for the Advancement of Colored People, *United States' Compliance with the International Covenant on Civil and Political Rights: Written Statement on Stand Your Ground Laws* (Report, United Nations Human Rights Committee, October 2013) 162, 163.

147 Ibid.

148 Ibid.

149 Ibid 162.

150 See, eg, Royal Commission into Aboriginal Deaths in Custody (National Report, April 1998) ('Royal Commission into Aboriginal Deaths').

racism and xenophobia against immigrants and Indigenous Australians;[151] and misogynistic ideals that continue to permeate cultural, legal, and social norms.[152] The key difference, however, is that in Australia, these issues are neither defined nor enabled by guns. For example, the *Royal Commission into Aboriginal Deaths in Custody* concluded that, of the deaths investigated, none were the result of police violence (and, therefore, gun use), but rather, 'glaring deficiencies in the standard of care' of the deceased.[153] By contrast, in America, there were only 27 days in 2019 where a person was not killed as a result of police violence.[154] Of these deaths, people of colour were more likely to be killed and less likely to be armed or threatening someone when killed.[155] This is not to diminish the seriousness or prevalence of these issues in Australia but to recognise the blatant absence of gun-use permeating such issues in Australia—not just physically, but ideologically.

This physical and ideological distinction demonstrates the extreme divergence between gun control in Australia compared to America. Police in both countries carry guns, yet fatal shootings perpetrated by police officers are an endemic issue in America, accounting for 92 per cent of those killed by police,[156] while only 30 per cent of deaths in custody in Australia were by gun.[157] The deep entrenchment of, and loyalty to, gun culture in America explains this. Guns are so heavily ingrained into the American psyche that they have infiltrated every aspect of society—not only in fringe, radical groups, but also in the mainstream.

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[151] See, eg, Kevin Dunn, Natascha Klocker and Tanya Salabay, 'Contemporary Racism and Islamaphobia in Australia: Racialising Religion' (2007) 7(4) *Ethnicities* 564.

[152] See, eg, Julia Baird, 'In Australia, Misogyny Lives on: Commentary', *New York Times* (New York, 6 July 2013).

[153] Royal Commission into Aboriginal Deaths (n 50) vol 1.

[154] 'Police Violence Map', *Mapping Police Violence* (Web Page) <https://mappingpoliceviolence.org/>.

[155] '2017 Police Violence Report', *Mapping Police Violence* (Web Page) <https://policeviolencereport.org/>.

[156] Ibid.

[157] Laura Doherty and Samantha Bricknell, 'Shooting Deaths in Police Custody' (Statistical Bulletin No 19, Australian Institute of Criminology, 4 February 2020) <https://aic.gov.au/publications/sb/sb19>.

Misogyny and racism convey pro-gun ideologies, and these principles have manifested into the daily lives of all Americans.

VI Conclusion

The question as to how Australia and America solve (or decline to solve) the socio-legal problem of gun violence comes down to the distinctive ideological differences underlying the constitutions of both countries. The idealisation of the American Dream has allowed certain values—such as hyper-individualism, minimal government intervention, a strong self-defence regime and a focus on individual rights—to become deeply ingrained in America's national identity. In turn, these values have become inextricably intertwined with an unwavering loyalty to gun freedom. The ideologies commanding the 'American mind', as identified in this article, demonstrate that many Americans would not consider gun violence to be a problem but a rightful practice of the individual's divine right to self-defence and personal liberty. The historical and ideological connotations of guns and individual rights have proven impossible for America to shake, despite growing political unrest. The absence of any constitutionally explicit rights in Australia are a blessing in disguise for the nation's gun control. While a lack of delineated, express rights elicits its own host of problems, Australia has avoided the trap of a legal stalemate in which the implementation of rigorous gun control appears to be an illusory fantasy. The ideal of the American Dream has, ironically, acted as a significant impediment to America's progress in the context of gun control. For any meaningful reform to occur, America must first recognise and address the ideological roadblocks that have fostered the harmful and pervasive national culture of gun freedom.