V U L J

VICTORIA UNIVERSITY LAW AND JUSTICE JOURNAL

Kirby Oration

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Justice and Fairness
Vicki Treadell

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Some Personal Reflections
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The cover image depicts the 19th Governor-General of Australia, Sir Zelman Cowen AK GCMG GCVO QC – a public figure dedicated to higher education and the welfare of the nation.

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ABOUT THE JOURNAL

Aim and Scope

Victoria University Law and Justice Journal ('VULJ') is the flagship journal of the College of Law & Justice. VULJ is a generalist student-run law publication, under the supervision of an academic managing editor. The articles featured in VULJ are generally shorter and more topical than in traditional legal publications.

Information for Contributors

All articles featured in VULJ are refereed by at least two anonymous referees. Referees include domestic and international experts in a given area of law. Contributors are advised to submit their manuscripts in electronic form through the journal's website: https://vulj.vu.edu.au. All submission guidelines and further related information can be found on the website. Submissions should:

- Include an abstract of 100–150 words;
- Comply to a word limit of 4000–6000 words (excluding abstract and footnotes);
- Comply with Australian/UK spelling standards (Macquarie Dictionary / OED)
- Comply with the most recent Australian Guide to Legal Citation; and
- Include citations in the form of footnotes. Bibliographies are not required.

Publication Dates and Process

Once the Editors have successfully received a manuscript it will be immediately screened by the Editors to ensure that the minimum procedural criteria have been satisfied. The Editors aim to notify contributors of the outcome of this review within one week. All manuscripts successful beyond the initial review are forwarded to an expert in a given area of law. Once the first reviewer recommends the article for publication, the manuscript is forwarded to a second reviewer for commentary. Once the article has been through the peer review process, the Editors will make a final decision on whether to make the author a conditional publication offer. Should the author accept, the article will become the official copyright of VULJ. Contributors will be able to track the publication process via the website.

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FOREWORD

PROFESSOR KATHY LASTER*

Sir Zelman Cowen AK GCMG GCVO QC (1919–2011), legal scholar, university leader and Australian statesman, would have celebrated his 100th birthday in 2019. As the inaugural Chair of the Victoria University Foundation, he gave his name to the Sir Zelman Cowen Centre ('SZCC'), which continues his legacy through its work in law and cultural diversity. A series of public events were arranged by the SZCC to mark his centenary.[1]

The centrepiece of the program was a touring exhibition of the life of Sir Zelman, including a two-week season at the Jewish Museum of Australia. For the exhibition, the SZCC created a documentary film[2] and 20 short interviews with people who were close to Sir Zelman – family, friends, colleagues and former students – including Professor Emeritus Harry Glasbeek, who has written a tribute to Sir Zelman in this issue of the journal.

The 2019 SZCC Oration was delivered by the Hon Josh Frydenberg MP, Treasurer of Australia, on the topic 'The Age of Disruption'.[3] The Treasurer paid personal tribute to Sir Zelman, as his cherished mentor. We were honoured that the large and distinguished audience included members of Sir Zelman's family, most notably his wife, Anna, Lady Cowen.

A series of public lectures culminated in a symposium on 'The Role of Universities in the 2020s' attended by senior academics from across Australia. A panel session on 'Sir Zelman's Legacy' was presented by five Vice-Chancellors of the universities with which he was closely associated – Griffith, Melbourne, New England, Queensland, Victoria ('VU') and through video link, the Provost of Oriel College (Oxford).

One might ask, why undertake an extensive centenary program for Sir Zelman when so many other important figures of the last century enjoy no such commemoration? For us, Sir Zelman epitomises the university's vision of itself as 'A Life of Opportunity and Success'. Our diverse student body and our heartland

* Sir Zelman Cowen Centre, Victoria University, Australia

1 'Centenary of Sir Zelman Cowen', *Victoria University* (Web Page) <https://www.vu.edu.au/sir-zelman-cowen-centre/about-szcc/centenary-of-sir-zelman-cowen>

2 Cowen Centre, 'Sir Zelman Cowen: A Life of Opportunity and Success' (YouTube, 20 October 2019) <https://youtu.be/aSDjfnor_AQ>

3 Josh Frydenberg, 'The Age of Disruption' (Speech, Victoria University, 28 August 2019) <https://joshfrydenberg.com.au/wp-content/uploads/2019/09/Treasurer-Speech-The-Age-of-Disruption-Sir-Zelman-Cowen-Oration-29-August-2019.pdf>

constituency in the West of Melbourne deserve to be exposed to role models who demonstrate the possibilities in a multicultural society like Victoria. While few individuals can aspire to become Governor-General of Australia, the fact that the son of immigrants did attain such high office and then contribute to this university's development and mission is an inspiring story for us to retell.

A man of towering intellect, Sir Zelman could have followed any career he chose, such as the Bar or the Bench, but he elected to be a university leader. University leadership was his calling and his passion. He believed that universities, teaching and research really matter. At a time when universities face such enormous, even existential, challenges, it is good to remember a champion of the sector who was never shy about proclaiming the significance of universities for society.

For Sir Zelman, an academic was a public intellectual who freely shared knowledge and expertise with the wider community. For him, as for us at VU, our work is about relevance and impact. For the SZCC that translates into capacity-building work with culturally and linguistically diverse and hard to reach communities about law as well as in assisting the courts and legal institutions engage more effectively with the diverse public they serve.

At the core of Sir Zelman's ethos was a love of learning, a commitment to teaching broadly defined, as well as informed public debate on key issues of the day. His legacy of public service is certainly worth commemorating and emulating. I hope you enjoy reading this issue of the journal.

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EDITORIAL

Pavithra Jayasekera

Welcome to the ninth volume of the *Victoria University Law & Justice Journal* ('VULJ'). It is with pleasure my team and I present this collection of articles written by eminent legal academics from around the country.

Working as a VULJ Senior Editor has been one of the highlights during my studies at the College of Law & Justice. As a law student, reading academic journals becomes second nature, but preparing an issue of VULJ for publication does not! It is a time-consuming and meticulous job, which requires a passion for attention-to-detail and patience. It is hard work, but it is immensely rewarding. I have had the privilege of engaging in candid discussions with judges in their chambers and talks on an array of topics (of which I now have some knowledge) with legal professionals from around Australia. Without VULJ this would probably not be possible.

This issue opens with the edited transcript of the 9th Kirby Justice Oration delivered by Her Excellency Mrs Vicki Treadell CMG MVO. Her Excellency reflects on how her mother and father, who faced challenges as a mixed-race couple, raised her and her sister to be equipped to confront prejudice. Armed with confidence about who she was and where she was from, she joined British diplomatic service and is now the incumbent High Commissioner for the United Kingdom, resident in Canberra. Her Excellency talks about navigating her current role and dealing with challenges bought on by Brexit and the rise of the digital world.

Next, we present a reflection by Professor Emeritus Harry Glasbeek, which provides an intriguing insight into the life of Australia's 19th Governor-General. Sir Zelman Cowen was something of a mentor for Professor Glasbeek, making time to challenge him, to push his boundaries and to advocate for his career development (despite his own tremendous workload). A person of integrity and humour, Sir Zelman was unwavering in his commitment to the practice of law, while respecting the views of people around him. The article documents the changing relationship and the enduring friendship between Professor Glasbeek and a *very good man.*

The first article, by Kate Offer and Dr Renae Barker, tackles whether vegans who follow the diet for ethical reasons should be protected from discrimination based on their philosophical beliefs. In the United States and recently in the United Kingdom, there has been some case law that has found in favour of this claim. Australia does not have a definitive legal definition of religion so Offer and Barker contend that it is

unlikely that veganism would be captured within the definition in its current state. Given the rise of veganism in Australia, this article is topical as it identifies an issue that we are likely to encounter in the near future.

The second article, by Dr Sophie Riley, considers a new approach in implementing sustainable development, one based on Earth jurisprudence. Earth jurisprudence proposes that human laws need to be consistent with, and limited by, the laws of nature. It is the contention that in order for society to live in harmony with nature and protect the Earth for future generations, humans need to reassess their interactions with the Earth and its ecological systems. Specifically, Riley suggests replacing anthropocentric trajectories with philosophies that prevent nature being marginalised and commodified. Moving away from a structure of systems that have historically valued nature when its interests align with human interests is a monumental task. Barker elucidates that it is a task we must collectively face as a global population and that the conclusions, findings and recommendations from the United Nations Dialogues strongly support the implementation of Earth-centred law.

The third and final article, by William Brown, tackles a topic that I believe almost everyone that has studied law has ruminated on. That is, how can complex language in legal documents, such as contracts, be made more accessible and understandable by using plain English? There is no simple answer. Brown points out that there is a need for brevity in drafting contracts, but this need gives way to the perceived greater need for legal clarity, ergo complex language prevails. He concludes that although plain English will not be widespread in the legal landscape, there is an opportunity for reducing ambiguity and maximising intelligibility in several legal contexts.

On an editorial note, we acknowledge that the on-going nature of COVID-19 has affected life in many ways. While the release of this issue was delayed slightly, we remain committed to keeping VULJ as up-to-date as possible. As such, some minor updates were made to articles as part of the editorial process.

As I prepare to hand over the editorial baton, I would like to thank my team, our Managing Academic Editor, Nussen Ainsworth, and the extended journal staff that I have worked with over the past two years. It has been an honour. To our readers, I trust you like the new-look VULJ and the articles presented in this issue.

UNIVERSAL VALUES: JUSTICE AND FAIRNESS

Her Excellency Mrs Vicki Treadell CMG MVO

The 2019 Michael Kirby Justice Oration was delivered on 27 August 2019 by the High Commissioner for the United Kingdom at the College of Law & Justice, Victoria University, Melbourne. An edited transcript is presented below.

The Honourable Michael Kirby AC CMG, distinguished guests, ladies and gentlemen, what an honour and privilege to have been invited to deliver the Kirby Justice Oration, especially so as Michael (if I may) is with us tonight.

I do not pretend to be well studied in the law, nor someone with a deep understanding of judicial systems or the execution of justice – even if I have an Honorary Doctorate of Laws from the University of Reading!

I am mindful that this oration is named and established in honour of an eminent justice of the High Court of Australia, so his scrutiny of my every word over the next 45 minutes is daunting!

As a British diplomat, my job entails upholding and promoting shared values and working with likeminded partners in that endeavour. This includes the shared democratic principles of:

- the rule of law;
- democracy, itself underpinned by good governance and accountability; and
- the freedoms of speech, assembly, thought, identity and self-expression (our human rights).

This is part of my tradecraft and expertise – the purpose I serve in building understanding, partnership and collaboration. The values we share lie at the heart of our bilateral relationships with our closest of partners, such as Australia. For those who see the world through a different lens, they are the values we seek to persuade them of, even, if at first, we do not agree or see eye-to-eye. It is to this that I will address my remarks. I will also share my personal context and experience in how these values have shaped who I am and what I do.

I was born in Malaysia. My father was born in Malaysia (Malaya at that time). He was Eurasian of French and Dutch Burgher descent. My mother was born in Singapore. She is of Chinese ethnicity. They were both born in the first half of the last century in what were then British colonies. As such, they were British Subjects. They

came into a world defined by British values, administered in accordance with common law and governance structures. An environment where they felt justice was, overall, well served and where the people were treated fairly and protected by the law.

In life we all make choices and their choice, at the time of Malaya's independence, was to remain British and to exercise their right of abode in the United Kingdom ('UK'). You may recall prior to the 1981 revisions to the *British Nationality Act* that the old blue British passports, contained the phrase *right of abode* as part of one's rights as a British Subject.

So, even before I came into the world, my fate was cast by my parents' decision. From my earliest memories, as little girl growing up in Ipoh in the state of Perak in Malaysia, we were going to live in Britain and the family plan was clear. I remember asking my father why we were doing this, maybe a month or two before we left Malaysia for the UK. His answer was simple:

> I believe in British Values and Britain is the place where I want you and your sister to grow up and to have the opportunities a free and open society offers.

The year was 1968 and I was eight. I have always understood why I am British. A free and open society, with a set of values at its heart, where a girl from Ipoh can become a British High Commissioner.

Plato, over a millennium ago, said, 'justice in life and conduct of the state is possible only as it first resides in the hearts and souls of the citizens'. One could say that in my father and mother, this sense of justice and fairness resided. I have no doubt, they faced challenges as a mixed-race couple. There was courage in their love of each other and they were of the mind that, in bringing up my sister and me, they wanted us to understand who we were and that we would be equipped to confront prejudice. They created an environment in which my sister and I could thrive. It instilled in me a confidence about who I am. An understanding of history and where you come from, armed with a set of values you subscribe to, makes a huge difference.

On my first day at work in the Foreign Office, as an aspiring 18-year-old would-be diplomat at the very bottom of the ladder, my first boss, intrigued by my background, questioned how someone of mixed race, born in Malaysia, could be a British diplomat. My answer was simple, 'I am a legacy of the Empire and you are now reaping what you sowed'. Empire and its consequences are not all bad! I said it, not to be rude, rather because it was the truth, it was a just and fair answer to his – one might argue – provocative question over my eligibility to be a British diplomat. I hasten to add that the Foreign Office of 40 years ago is a very different place to the Foreign Office

of today. We are, today, a far more diverse and inclusive organisation and more reflective of modern Britain where equality of opportunity matters.

In my adulthood I have learnt that life is more complex. The law cannot be monolithic. It needs to evolve, to be repealed or be enacted to meet new challenges or shifts in societal values or other environmental factors. It is what the citizenry expects of their legislators. In short, democracy in action, recognition of human rights in action. Otherwise, we would not have seen positive change, such as women gaining the right to vote and antiquated laws against homosexuality repealed to allow people the human right to love whom they choose.

Over human history, across societies, empires that have come and gone, we have seen and continue to see variations on guiding principles and practice, frameworks for society, including religious and cultural, as we continue to seek justice and fairness through the rule of law. Taking his cue, I suspect, from Plato, Robert F Kennedy said that:

> the glory of justice and the majesty of law are created not just by the constitution, nor by the courts, nor by the officers of the law, nor by lawyers, but by the men and women who constitute our society, who are the protectors of the law as they are themselves protected by the law.

This is why in our human rights work, in our promotion of democracy and its principles, engagement with civil society is a priority. Our work on shared values sits at the very heart of what we do. In the last century Britain played a leading role in shaping the international order, as we have known it, after the horrors of the Second World War. We did so with our closest security and defence partner, the United States. For all the challenges of the last 75 years, this has largely stood us, and the world, in good stead.

The great international institutions that provided the pillars for that order were founded in London:

- The first meeting of the United Nations ('UN') General Assembly took place in the Methodist Central Hall, in Westminster, in 1946. Its first Acting Secretary-General was [Hubert Miles] Gladwyn Jebb CMG – a British diplomat; and
- The World Bank and the International Monetary Fund were conceived by the leader of the British Delegation [Lord Keynes CB] to the Bretton Woods Conference in 1944.

The main purposes set out for the UN were:

- keeping the peace;
- developing friendly relations between nations;
- improving lives – poverty alleviation – conquering hunger, disease and illiteracy – encouraging respect for each other's rights and freedoms; and
- harmonising the actions of nations to achieve these goals.

We also founded the Commonwealth of Nations – a legacy of empire too. Now 54 member states strong and with its secretariat headquartered in London. Its purpose echoes those of the United Nations and were set out in the Singapore Declaration[1]:

- commitment to world peace;
- promotion of representative democracy and individual liberty;
- pursuit of equality and opposition to racism;
- fight against poverty, ignorance and disease; and
- free trade.

As with laws, as I mentioned earlier, principles and frameworks must equally adapt as we become more enlightened, or as we meet new challenges, or as we fail to deliver on what we set out to do. For example, the Lusaka Declaration of 1979 added opposition to discrimination based on sex,[2] while the Langkawi Declaration of 1989 added the need to ensure environmental sustainability to the Commonwealth's purpose.[3] Meanwhile, the UN has had the Millennium Development Goals followed by the Sustainable Development Goals ('SDG').[4] All this, and more, to help secure a more just and fair world for all.

Britain puts its money where its mouth is. We are an international development leader – perhaps even a superpower. Our commitment to spend 0.7% of gross national income on official development assistance – a budget of about GBP14 billion [AUD25 billion] this year – is a statement of our intent to play a leading role to tackle the global challenges of our time from climate change to ongoing efforts to alleviate poverty and eradicate disease. We work to build a safer, healthier, more prosperous world for people in developing countries. We see access to education, especially for girls, through funding of initiatives such as *Leave No Girl Behind,* as a key means to

1 The Commonwealth, *Commonwealth Declarations* (Commonwealth Secretariat, 2019) 8–9.
2 The Commonwealth, *Commonwealth Declarations* (Commonwealth Secretariat, 2019) 10–12.
3 The Commonwealth, *Commonwealth Declarations* (Commonwealth Secretariat, 2019) 22–5.
4 *United Nations Millennium Declaration*, GA Res 55/2, UN Doc A/RES/55/2 (18 September 2000, adopted 8 September 2000). The 17 sustainable development goals are available at <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

deliver transformational change.[5] Britain's role in the world therefore continues to be a force for good.

Today, I do not talk of British values as my parents did, though, of course, they are inherently what has helped shape the very frameworks and principles I have described. Rather that these are universal values, relevant to every citizen of this planet that is our home. Our collective responsibility for all life on this planet is clearly set out in the UN's SDGs, specifically [goals 11–17 focus on]: sustainable cities and communities; responsible consumption and production; climate action; life below water; life on land; peace, justice and strong institutions; and partnerships – to achieve all of this.

To ensure peace and justice you need defence and security. Britain may not be a superpower in terms of hard power, though we remain the sixth strongest military power globally, a leading contributor to NATO guaranteeing Europe's defence, a member of the Five Eyes Community and committed to spending 2% of GDP on defence.

Our armed services do not only provide for the defence of the UK [and its overseas territories/dependencies], they contribute to global efforts such as UN peacekeeping, the delivery of humanitarian aid – for example the fight against Ebola in West Africa, and ensuring maritime security and freedom of navigation through vital trading routes – as we are seeing in the Straits of Hormuz at the moment.

In line with our values, we have spearheaded global initiatives, for example the Preventing Sexual Violence in Conflict Initiative, which aims to put a spotlight on the use of rape as a weapon of war, to bring together the international community to call it out for what it is, a war crime, and to work to ensure that those responsible are brought to account.[6]

We have supported training, including of peacekeepers, to deliver on this agenda. In my time as High Commissioner in Malaysia, we funded two training courses in partnership with the Malaysian Peacekeeping Centre in Port Dickson.

Values, however, are also about hearts and minds. Hard power is a secondary tool. It is my view – and my assertion here tonight – that the real advantage is soft power, including that delivered through our aid programmes. Here Britain is a global superpower. In the annual Soft Power 30 global index, Britain has consistently been ranked in the Top 3 for years and, despite BREXIT headwinds, was once again ranked

5 For more information on the Leave No Girl Behind initiative see the UK Department for International Development's Girl's Education Challenge website at <https://girlseducationchallenge.org/#/article/leave-no-girl-behind-2> and its initiative explanatory leaflet at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/559123/leave-no-girl-behind.pdf>.

6 For more information on the Preventing Sexual Violence in Conflict Initiative see <https://www.gov.uk/government/organisations/preventing-sexual-violence-in-conflict-initiative>.

first in 2018. Institutions such as the BBC and the British Council as well as internationally-recognised brands, such as the English Premier League, the formats of popular television shows that we sell to the world and our world-class education providers, touch the lives of people worldwide. This gives us unique global reach and influence. Cultural diplomacy and innovative campaigns, delivered through our *GREAT* national branding, speak to who we are, what we stand for and outline our offer to the world.[7]

We strive to find the right balance between hard and soft power as part of our effort to deliver peace, justice and fairness in the world. Former US president, Dwight D Eisenhower, once said, 'though force can protect in an emergency, only justice, fairness and co-operation can finally lead men to peace'.

Diplomacy is a vital part of this equation. Creating groups of likeminded partners on issues that matter. Working in partnership to influence and secure change. These efforts are more important in this new century, with the shifts in economic power, a new multi-polar reality, in a less certain world. Diplomacy, as an instrument of justice and fairness, has never been more important. Take the Novichok incident in Salisbury last year. An attack counter to all international norms. A dreadful criminal act without regard. Through British diplomacy we saw 28 countries support the UK's position with an unprecedented 153 Russian diplomats expelled from these countries. Working with likeminded partners we secured and strengthened the role of the Organisation for the Prohibition of Chemical Weapons. This was British diplomacy at its best.

In other areas, off the radar, quiet diplomacy in pursuit of justice and fairness takes place every day. You may have read of two Malay women arrested in the state of Terengganu in Malaysia last year for purported lesbian acts. As Muslims, they had gone through the Sharia court system where acts of homosexuality are deemed *haram* – forbidden under Islamic law – and their sentence included the humiliation of public caning. By the way, homosexuality remains illegal in Malaysia because the colonial era law we left has not been repealed since independence. This posed a challenge for me. When it comes to tackling issues of justice and fairness when a different set of rules steeped in religious beliefs apply. Nevertheless, I felt that as part of our work to promote the human rights of the LGBTQ community I should seek a meeting with the Mufti of Terengganu and appeal for clemency.

7 The British prime minister, David Cameron, launched the *GREAT Britain Campaign* in 2012 to create a lasting economic legacy in the UK following The Queen's Diamond Jubilee and the Games of the XXX Olympiad, which were hosted in London. See the campaign's website for more information <https://www.greatbritaincampaign.com> .

In preparing for this meeting, as a non-Muslim, I sought advice from an amazing non-government organisation, called Sisters in Islam, which fights every day for women's rights within their community and use scholarly understanding of Koranic verses and associated Hadiths to make their case in defence of women's right. These are women of courage who are themselves facing a *fatwa.*

My meeting with the Mufti was intense. I started by trying to establish common ground, citing the shared roots of the three great Abrahamic religions of Christianity, Judaism and Islam which speak of one god and of justice and fairness. I cited Hadith that promote compassion and understanding – forgiveness.

In the end, I failed to persuade him but sometimes the act of trying is, in itself, a just cause. There is no doubt the Mufti was a man of deep faith. He believed his position was right. We agreed to disagree. Our meeting ended cordially, as it had begun. I believe there was mutual respect even if we had not found common ground. One day perhaps, such divergence will be a thing of the past but that will only happen through dialogue.

The pursuit of justice and fairness requires discourse – freedom of religion must be a right but where human rights and associated freedoms of self-expression clash with religious doctrine as practiced, the topography we must navigate is difficult and fraught with sensitivities. This is not to say, we take the easy path, or that we abandon the journey. We must travel the road, find ways through the roadblocks, as we aim for that horizon ahead, one of greater understanding and shared universal values. The Dalia Lama once said that 'all religions try to benefit people, with the same basic message of the need for love and compassion, for justice and honesty, [and] for contentment'.

Of course, the freedoms we celebrate also come with responsibility. Freedom of speech is not licence to insight hatred or violence or spread untruths. Today's challenges include how we navigate the digital world. What should be a powerful tool to spread knowledge and understanding can be equally used, and is being used, to present truth as lies, and lies as truth. Our new frontline is online. From criminals to malign state actors we must find a way to uphold freedoms with responsibility and accountability. In this arena, Britain in this century has a leading role to play. Our Online Harms White Paper is one we are sharing with partners,[8] our support of the Australian prime minister's 'Preventing Terrorist Use of the Internet Initiative' and, of course, our work across law enforcement, security and intelligence collaboration at the forefront of this agenda.

An international rules-based system is vital for global stability and social cohesion within our nations and across nations. Whatever you hear, read or see about Britain today and our BREXIT challenge, know this: Britain will play its part to uphold values and to secure justice and fairness in a fast changing world and British diplomats will be at the forefront of that endeavour.

Over a century ago, Benjamin Disraeli said that 'justice is truth in action'. I hold to this truth and the values that took my family to Britain. I have the great privilege to represent a country that seeks to be a force for good.

Just as we did, last century, we will help shape the international order of this century. We will use our seat on the UN Security Council, our role in the Commonwealth, our memberships of NATO, the G7 and the G20, we build our individual bilateral relationships to be load bearing, and, as a global soft power and development superpower make a difference. Whatever BREXIT holds, we will stand for the values that matter, for justice and for fairness. Thank you.

ZELMAN COWEN: SOME PERSONAL REFLECTIONS

Professor Emeritus Harry Glasbeek*

I was asked to write a personal note on Sir Zelman Cowen and gladly accepted the invitation. I have found the task a little more difficult than I thought it would be. There is much to say about him. He was a man of considerable significance. His many public roles, contributions to social welfare and accomplishments have been written and talked about often and will be spoken about and analysed for many years to come. There is little for me to add on this front. He was a colossus who strode across our social landscape. I experienced and enjoyed him as the man this had made him. He had lived a life of what he liked to call *a good man.* It was a favourite phrase of his when he evinced approval of someone's contributions to society.

My first encounter with Professor Cowen came about when I was a lowly law student and he a high-flying dean. I had been a part-time Bachelor of Arts/Bachelor of Laws student for four years and was desperate (emotionally and, more importantly, financially) to make the fifth year my last. To do so I would have to complete nine subjects. I needed permission. The administrators, abiding by rational rules, denied my plea to enrol in that many subjects. Rather naively, I asked Professor Cowen to intervene. In what I came to know to be one of his more amazing attributes, he made time for me and listened, although he could have avoided me as, my own long experience of academic institutions tells me, most deans would have. He gave me permission. These were my first insights into his character. People, individuals, came first. Rules were guidelines, not blinkers. He cared about the people whose paths he crossed.

I passed my examinations and did well enough to be asked to sit for the honours examinations, which were offered to those who qualified and had reasonable success. I had not spoken with him since my original interview. As far as I knew, he had forgotten the whole thing, a small incident in a busy life where much more serious problems had to be confronted daily. When my results were posted, he made a point to seek me out. He was at least as delighted as I was and not just because his hunch had worked out but because I, one of his students, had done well. This generosity of spirit was not a one-off experience for me.

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A few years later, after I had begun work at the University of Melbourne, Professor Cowen called several tutors together and told us that we should pursue graduate students overseas and that he would help us find the right place. In my case, he thought that the University of Chicago would be the best fit. When I wrote, that school told me that it had filled its spots. Upon being given the bad news, he fired off a note to Chicago's law school. A couple of weeks later, I was giving a class when Professor Cowen burst in, waving a yellow scrap of paper, a telegram from the University of Chicago. 'We have got it!' he shouted triumphantly to the bemusement of the students. Undoubtedly, he was pleased by this evidence of his influence but his dash into my class said it was much more than that. His joy for me was palpable, he cared about people.

He cared about people who studied law. I was made aware of this very early on in my stint as a tutor. When I took up my post, Professor Harold Ford was the dean. Ford was reserved, even aloof. Although he was very good at making us all smile because he was good at puns, in his dealings with his colleagues, certainly with his junior colleagues, he kept us at arms' length. Professor Ford showed no particular interest in what we were doing, as long as we did our job to the satisfaction of the more senior teachers who told us what to do in the subjects we taught for them. We called him *Professor Ford* and he addressed us as *Mr Glasbeek* or *Miss Jones.* He was polite, *comme il faut,* but not engaged. The law school was a rather sterile place for me. All that changed when, near the end of my first year, Professor Cowen returned from leave to resume his decanal duties. He called me and, I believe, all the other tutors in and talked to us about our academic aspirations. I was to call him *Zelman* (something I was not able to do for several years) and he made it his task to whisk past the cubby-hole that served as my study every few days. He would pick up whatever I was working on and it would be back on my desk the next morning, marked-up in alarming blue, pointing to elisions, inelegance and the like. After the genteel Ford period, we were in the midst of a hurricane. Today, his approach to vulnerable and insecure tutors would be considered paternalistic, at best, bullying, at worst. In truth, it was neither, certainly not the latter. To this day, I remain grateful for his eagerness to help me and my cohort be better.

After a little while, he had formed the opinion that I needed to be more analytically rigorous. He arranged for me to produce two case notes for the *Australian Law Journal* every month. This meant I had to find at least six cases that I thought might be of some interest to the journal, compose a few paragraphs that set out the salient facts and my opinion as to what was intriguing about the decision. I found it burdensome. The discipline it was imposing on me was invaluable. This, of course, had been his goal. He wanted me, and everyone who was to be a lawyer, to be a good technician.

To him, this was the first basic step we had to take to be serious contributors to the law. This was important because the law, the study and practice of law, was, and remained his driving passion.

He loved the intricacies of legal argumentation, the nuanced drawing of distinctions, the synthesising of cases. His lively intelligence enjoyed the pyrotechnics of legal analysis. His many writings in evidence law exhibited his abilities as a fine legal technician. He revelled in the refinements so often resented by the public as unworldly pedantry. In class, when teaching private international law, he would walk from one end of a long lectern where he positioned *Ruritania,* a mythical country, and stood there while he made the best case possible for its claim that its very strange law should apply to the issues before a court. Having convinced us all, he would walk to the other end where we found New South Wales making its case. His ability to make both cases completely plausible to us revealed not only the uncertainty and flexibility of the law, features he was at pains to make us understand, but also his ability to split hairs in a legally meaningful way. He did not disrespect the law because it was uncertain and malleable. He believed that, while clever people could make sophisticated arguments about the state of the law, there were parameters, there were boundaries that could not be crossed. In short, he was a believer that the law and its institutions had a core set of values and norms and, while there was, as there should be, a great deal of elasticity as to how to give rein to those values and norms, they had to be respected.

He was not a materialist, one of those who thought the law should respond primarily to economic and pragmatic needs. Rather he espoused the beliefs of liberal philosophy, of civil and political liberties for one and all. He thought the law was the repository and a guardian of those beliefs. Indeed, his most passionate (and, in my view, his best) work as a legal scholar is to be found in his publications and public lectures on civil liberties. He admonished courts for forgetting their true task by readings which led to the inhibition of the freedoms of expression and thought, values he sincerely thought could never be abandoned by our legal system, no matter how technically defensible an argument that had such an impact might be. Long after he had retired, he expressed his puzzlement about legal strains of scholarship such as law and economics that placed so much emphasis on the rational calculating individual, instead of the compassionate, altruistic one, the one he firmly thought should be the primary concern of the law. He loved the potential of the law and its institutions to civilise us, to create a society in which tolerance and respect for one and all would flourish. This explained, to me, some of his preferences and decisions. His enthusiasm for the law made that part of his career spent as a law teacher and scholar very precious to him. Talking and writing about the law, training students,

debating with colleagues, hob-nobbing with judges and legislators, all this was not just professionally satisfying to him, but politically and psychologically fulfilling. He told me on several occasions that his time at the University of Melbourne Law School was the best portion of his very successful life. It is hard for me to remember an occasion when, after he had lost touch with the Law School's daily doings, he would not ask me how the school was going. Did it still have some 'good' people? Was it still turning out 'good' people?

I am sanguine that his concern that the law should play a part in improving life, in civilising our society, made him take on some of his many public roles. For instance, his participation in the Australian Press Council was, so I gathered from our chats, of interest to him because the balance between having a commercially successful press and a responsibility to telling the truth and let people have a chance to tell their truth, was a delicate one to attain. He felt that, as a well-informed devotee of liberal legal values and norms crafted over the centuries, he might be able to contribute. His acceptance of the role as a Governor-General, of course, allowed him to feel that his profound commitment to Australia's constituting legal institutions would be useful. Undoubtedly, he was very flattered and pleased to be offered the post, not least because he would be emulating one of his heroes, Sir Isaac Isaacs, the first Jew to be appointed to the post, and about whom he had penned a riveting book. More significant to him was that, at the time of his appointment, an institution that had played a pivotal part in our constitutional framework required burnishing (following Sir John Kerr's time in office). It had to be shown that it was an institution that still could serve the stabilising purpose for which it had been designed, provided that the appointee behaved as a 'good' man.

Behind the scenes, he stood ready to provide advice if asked. He was an excellent public speaker. He was charming and he and his wife, Anna, Lady Cowen, made wonderful hosts, presenters and representatives of Australia. They travelled tirelessly, celebrating people and their events. They returned dignity to the office, no small feat given the perceptible sentiment for rejection of the Governor-General position because, in large part, it had been so degraded. This brings out two quite different facets of his multi-faceted persona.

Everyone knows that when the issue of republicanism became a live political one when he publicly stated that he would support the drive for Australia to be a republic. It demonstrated one of his capacities that made him so special to me. He served loyally as a Governor-General because that was what the proper operation and maintenance of his cherished legal system required. Unquestionably, even then, he thought it sensible to think about a change – but such a change should come after debate and pursuant to an accepted legal process. In the meanwhile, it was a duty,

his duty, to make the law and its institutions work as well as it could to help it maintain (what he considered) a civilised society. This goal imbued his every thought. The second facet of his nature that emerged from his spell as The Queen's representative was that, while I secretly believed that he liked a lot of the pomp and formality of the many functions, dinners and formal occasions over which he had to preside, he never lost his sense of self, his sense of being a man like any other. He told the story of how one of the nicer things that happened to him while in office was that, now he was a *someone,* he had been invited into the locker rooms of the St Kilda Football Club. He and Lady Cowen had been long-suffering supporters. The climax of the story was that he, Sir Zelman Cowen, the Governor-General of Australia, was able to meet a truly great man, one of his heroes, Daryl Baldock. A red letter day for a modest man.

As an individual he remained grounded. Although he knew the makers and shakers, in Australia and in good many other countries, he never became unmoored. He was loyal to the people he grew up with, he saw and remembered them. Much of that had to do with his sense of being Jewish, not so much in a religious sense as in a cultural one. He was an ever-present figure in Melbourne's small, but tightly bound, Jewish community's affairs. As noted, he had time for everyone and everything that interested him – a lot of disparate things did.

He loved classical music, attended as many performances as he could, right up to the end of his life. He gave generously. As a scholar, books, especially biographies and histories, were a passion. These Renaissance-like interests were some of the things which made afternoon teas and dinners at the Cowens gracious and joyful affairs, almost salon-like. Conversations took us all over the place. Lady Cowen and Sir Zelman could easily have dominated those encounters, but both were too courteous. They cleverly inveigled everyone at the table – and it usually was a diverse group – to offer opinions. He was always curious. Early in the piece, it seemed to me that he was playing devil's advocate, beguiling his guests into participation but I soon realised that this was not the case. He was truly stimulated by what other people thought about public events, people or books or music. I do believe that this characteristic is one of the reasons he accomplished so much. Respect for other views and people came naturally to him. So did grace.

One evening, only four years before he died, the Cowens were to be our dinner guests. Sir Zelman had a fall when he got out of the car and hit his head on the footpath. Paramedics were called. Luckily, after some anxious moments, it was decided that he did not need any further medical attention. Both he and Lady Cowen insisted that they would come in for dinner – they were not going to be the reason for upsetting our plans. During the dinner, they adroitly steered us all away from

making the mishap the centre of attention. Perhaps some would see this as a kind of bravado. I know it was not. It was the instinctive reaction of two people who really cared about how their actions affected others, both important and unimportant ones.

To use his favourite language, Sir Zelman was a good man, a very good man. To use my language, he was not only a fine contributor to scholarly and public life, he was a *mensch,* a real *mensch.*

SHOULD ETHICAL VEGANS HAVE A BEEF WITH THE DEFINITION OF RELIGION?

KATE OFFER* AND DR RENAE BARKER†

Veganism, where adherents eschew the consumption of animals or their by-products, has seen a substantial increase in popularity in recent years. Vegans who follow the diet for moral or ethical reasons (ethical vegans) *have argued in the United States, with limited success and, more recently, in the United Kingdom that they should be protected from discrimination on the grounds of their adherence to ethical veganism, contending that ethical veganism should be subject to similar protections as religion. In the United Kingdom, anti-discrimination legislation protects* philosophical beliefs *in addition to* religion *and it was recently held in a preliminary hearing in* Casamitjana v The League Against Cruel Sports *that ethical veganism falls within the ambit of the relevant statute. The authors examine the situation in the United Kingdom and the United States and conclude that, given that Australian anti-discrimination statutes only refer to religion as a protected attribute, this outcome is unlikely to be replicated since veganism is highly unlikely to meet the current definition of religion.*

And to every beast of the earth, and to every bird of the air, and to everything that creeps on the earth, everything that has the breath of life, I have given every green plant for food. – Genesis 1:30

I INTRODUCTION

Veganism has been variously described as a lifestyle, a dietary preference and a social philosophy[1] but it does not generally fit into what most people would regard as a religion. Vegans who follow the diet for moral or ethical reasons ('*ethical vegans*'), however, have argued in the United States ('US') and, more recently, in the United Kingdom ('UK') that they should be protected from discrimination on the grounds of their adherence to veganism. They contend that ethical veganism should be subject to similar protections as religion. The recent case in the UK involving an

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1 Niccolò Bertuzzi, 'Veganism: Lifestyle or Political Movement? Looking for Relations Beyond Antispeciesism' (2017) 5(2) *Relations* 125, 126.

ethical vegan, Jordi Casamitjana, and his claim that he was unfairly dismissed on the grounds of his beliefs has attracted a great deal of attention. Anti-discrimination legislation in the UK protects philosophical beliefs in addition to religion. In a preliminary hearing ethical veganism was held to fall within the ambit of the relevant statute. It is doubtful that this outcome would be replicated in Australia, however, as the anti-discrimination statutes only refer to religion as a protected attribute, and veganism is extremely unlikely to fall within the current definition of religion.

II VEGANISM

Veganism is a sub-category of the vegetarian diet[2] in which adherents forgo the consumption and use of all products derived from animals. The Vegan Society defines veganism as 'a way of living which seeks to exclude, as far as is possible and practicable, all forms of exploitation of, and cruelty to, animals for food, clothing or any other purpose'.[3] Although it is accepted there are varying degrees of adherence to veganism (with many now choosing to use the term *plant-based* to describe their dietary preferences), a committed vegan will not consume animal flesh, dairy products, eggs or honey or use clothing made from wool, cotton or silk or products that have been tested on animals. There are many different motivations for adopting a vegan diet:

- Health or medical reasons.
- Environmental or sustainability concerns over the long term viability of current farming practices and animal husbandry.
- Spiritual or religious reasons.
- Moral or ethical reasons (due to concern for the welfare of animals or their rights).[4]

The majority of vegans choose veganism due to a combination of some or all of the preceding factors, although some vegans identify solely as *ethical vegans.* While the practices of ethical vegans in abstaining from the use of animal products may present as identical to vegans who identify as *health vegans* or *environmental vegans,* the beliefs inspiring those practices are quite different. Ethical vegans are motivated by several overlapping concerns: a belief that it is morally wrong to use or eat products made by animals, given that animals are sentient beings[5], concerns about

2 Cramer et al, 'Characteristics of Americans Choosing Vegetarian and Vegan Diets for Health Reasons' (2017) 49(7) *Journal of Nutrition Education and Behavior* 561, 561.

3 'Definition of Veganism', *The Vegan Society* (Web Page) <www.vegansociety.com/go-vegan/definition-veganism>.

4 Cramer et al (n 2) 561.

5 Jan Hoole, 'Here's What the Science Says About Animal Sentience', *The Conversation* (online, 24 November 2017) <https://theconversation.com/heres-what-the-science-says-about-animal-

animal cruelty involved in current institutional farming practices and concerns about the impact the slaughtering of animals has on farmers and workers in abattoirs.[6] Ethical veganism is, as David Mitchell notes, 'coherent, heartfelt and spreading'.[7]

The term *vegan* was coined by Donald Watson who formed the first vegan society in 1944 in the UK.[8] Watson became vegan as a result of witnessing the slaughtering of a pig on his family's farm as a young boy. He subsequently eschewed the consumption of all animals and their by-products.[9] Although veganism gained more widespread recognition and followers as part of the burgeoning animal rights movement in the 1960s and 1970s until quite recently veganism was seen as a relatively extreme alternative dietary lifestyle.[10]

At present, veganism is enjoying increasing mainstream acceptance and is one of the fastest-growing diets in the world. Research suggests that a vegan diet is conducive to good health, which is at odds with the general perception of vegans as pale and undernourished.[11] The popularity of veganism, promoted by celebrity endorsements of the diet and events such as *Veganuary,* in which people are encouraged to eat a vegan diet for the month of January, continues to grow.[12] In the UK, approximately 600,000 persons currently identify as being vegan with that number quadrupling between 2014 and 2018.[13] In the US, over 19 million persons currently identify as vegan.[14] In Australia, statistics show that 11% of the population identify as vegetarian, with an unknown proportion of that group following a vegan diet.[15] During the period 2014–19, Australia had the greatest search interest worldwide for the term *vegan.*[16]

sentience-88047>.

III The Casamitjana Case

Jordi Casamitjana was employed by the League Against Cruel Sports in 2016. He had previously worked for the organisation from 2004 to 2007. Shortly thereafter, he discovered that the pension fund used by the League invested in pharmaceuticals and tobacco companies, some of which conducted testing on animals. Believing that this was antithetical to the stated mission of the organisation for whom he worked and to his own deeply held beliefs as an ethical vegan, he campaigned for a change to the pension fund. Although his employers acceded to this request, the pension fund they subsequently chose resulted in lower returns for employees. Casamitjana claimed that when he drew other employees attention to this fact via an all-staff email, he was sacked.[17] Although his employer stated that he was dismissed for misconduct – which had nothing to do with his vegan beliefs – Casamitjana brought an action against his employer them alleging that he had been dismissed because of his veganism. Casamitjana argued that ethical veganism constituted a philosophical belief and, as such, his dismissal qualified as discrimination contrary to the relevant provisions of the UK's *Equality Act 2010* ('the UK Act'). In a hearing in January 2020 to determine the preliminary issue of whether ethical veganism was a philosophical belief, Employment Judge Postle held that it met the established criteria and therefore constituted a protected characteristic under the Act.[18]

Religion or belief is one of the nine protected characteristics covered by the UK Act. The definition of belief according to s10(2) of the UK Act is 'any religious or philosophical belief'. In the 2005 decision of *R (Williamson) v Secretary of State for Education and Employment* ('*Williamson*'),[19] Lord Nicholls considered the section in the context of a religious belief, noting that

> when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements … The belief must be consistent with basic standards of human dignity or integrity … The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied.[20]

17 Amanda Erickson, 'This British Man Says He Was Fired for Being Vegan, Which He Believes Was Discrimination', *The Washington Post* (online, 5 December 2018) <https://www.washingtonpost.com/world/2018/12/05/this-british-man-says-he-was-fired-being-vegan-which-he-believes-was-discrimination/?utm_term=.827f7707276d>.

18 The respondents conceded that ethical veganism was a philosophical belief, although the Employment Judge went on to consider the issue before them to ensure that the concession had been reasonably made on the available evidence.

19 [2005] 2 AC 246.

20 Ibid [24].

Lords Nicholls went on to state that

> Article 9 embraces freedom of thought, conscience and religion. The atheist, the agnostic, and the sceptic are as much entitled to the freedom to hold and manifest their beliefs as the theist. For the purpose of this guaranteed freedom, these beliefs are placed on an equal footing. Thus, if its manifestation is to attract protection under article 9 a non-religious belief, as much as a religious belief, must satisfy the modest threshold requirements implicit in this article. In particular, for its manifestation to be protected by article 9 a non-religious belief must relate to an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs.[21]

The 2010 decision of the Employment Appeal Tribunal in *Grainger plc v Nicholson* (‘*Grainger*’),[22] considered the section and the definition of philosophical belief in the context of a worker who alleged discrimination on the grounds of his belief in catastrophic climate change. The claim had been brought under the *Employment Equality (Religion or Belief) Regulations 2003* which prohibited discrimination in employment on the grounds of religion or belief.[23] Belief was defined in Paragraph 2(1) of the Regulations to mean ‘any religious or philosophical belief’.

In *Grainger*, the Tribunal held that to establish a protected philosophical belief, it must be established that the belief must:

- be genuinely held;
- be as to a weighty and substantial aspect of human life and behaviour;
- attain a certain level of cogency, seriousness, cohesion and importance;
- be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others; and
- not be an opinion or viewpoint based on the present state of information available.[24]

The Tribunal held that belief in catastrophic climate change was capable of meeting the criteria and could therefore be considered a philosophical belief.

Casamitjana identifies as an ethical vegan, as distinguished from someone who adopts veganism purely for health or environmental reasons. He was able to provide ample evidence to demonstrate to the satisfaction of the court that he lives his daily life in accordance with his beliefs and that much thought went into his decision to abide by ethical vegan principles.[25] For example, he showed that this personal

21 Ibid [24].

22 [2010] IRLR 4 (EAT) *(‘Grainger’).*

23 *Employment Equality (Religion or Belief) Regulations 2003* (UK) para 3.

24 *Grainger* (n 22) [24].

25 See also Caroline L Kraus, ‘Religious Exemptions: Applicability to Vegetarian Beliefs’ (2001) 30 *Hofstra Law Review* 197, 222.

philosophy 'affects every aspect of his life'[26] and informs his 'career and employment'.[27] It was also established that his belief is genuinely held.

Ethical veganism was held to be a belief as to a weighty and substantial aspect of human life and behaviour, impacting as it does on 'the relationship between humans and other fellow creatures'.[28] Employment Judge Postle also held that ethical veganism attains a certain level of 'cogency, seriousness, cohesion and importance'.[29] Few people would argue that the right to choose what one consumes is not worthy of respect in a democratic society, particularly given that the right to bodily integrity is protected in law. Ethical veganism does not conflict with the fundamental rights of others as it does not, as was noted by Employment Judge Postle, require 'non-vegans to behave in a particular way'.[30] The final component (i.e. that ethical veganism is a belief and not an opinion or viewpoint based on the present state of information available) was also held to be met with Employment Judge Postle noting that ethical veganism 'carries with it an important moral essential', which is 'founded upon a long-standing tradition recognising the moral consequences of non-human animal sentience'.[31] Ethical vegans follow this practice due to 'deeply held moral and ethical beliefs with the strength of traditional religious beliefs'.[32]

While the issue of whether Casamitjana was unlawfully dismissed from his employment has yet to be determined,[33] the decision that ethical veganism is a protected belief has moved the law significantly forward in relation to legal protection for vegans in the UK.[34] The legal ramifications of the decision are not necessarily directly applicable elsewhere, largely due to the relatively wide definition of the exemption in the UK Act. However, the attention paid to the case and the growing popularity of vegan diets, suggest that this issue is one that is likely to arise in the future.

26 *Casamitjana v The League Against Cruel Sports* [2020] UKET 3331129/2018 [10], [17]–[18], [20]–[22] ('*Casamitjana*'); Clive Coleman, 'Sacked Vegan Claims Discrimination in Landmark Case', *BBC News* (Web Page, 3 December 2018) <https://www.bbc.com/news/uk-46385597>.

27 *Casamitjana* (n 26) [10]; Jordi Casamitjana, 'Help an Ethical Vegan Who Was Dismissed by an Animal Welfare charity', *Crowd Justice* (Web Page) <https://www.crowdjustice.com/case/help-a-discriminated-ethical-vegan/>.

28 *Casamitjana* (n 26) [35].

29 Ibid [36] & [37].

30 Ibid [19].

31 Ibid [34].

32 Donna Page, 'Veganism and Sincerely Held "Religious" Beliefs in the Workplace: No Protection Without Definition' (2005) 7 *University of Pennsylvania Journal of Labor and Employment Law* 363, 404.

33 Note: the parties decided to settle the case after this article was accepted for publication.

34 The same protection does not extend to vegetarians. In *Conisbee v Crossley Farms Ltd* [2019] UKET 3335357/2018, Employment Judge Postle held that vegetarianism was not a philosophical belief capable of protection under the UK Act.

IV Is Veganism a Religion?

In Australia, all state discrimination statutes that prohibit discrimination based on religion do not include philosophical belief in the statutory provision. For an argument similar to Casamitjana's to be successful in Australia, on the current state of the law it would be necessary for ethical veganism to fit within the definition of a religion. Although no cases have yet been heard on the issue of the status of ethical veganism in Australia, it has been raised in the US with mixed success. As with the UK statute, the wording of the relevant anti-discrimination legislation in the US is key.

A *United States*

The definition of religion has never been authoritatively determined by the US Supreme Court, however, several lower-level courts have considered the question.[35] In *United States v Seeger* ('*Seeger*')[36] the court concluded that religion should include any sincere belief that is 'based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent' and that 'occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption.'[37]

In *Welsh v United States* ('*Welsh*')[38] the Court found that a conscientious objector (who did not view his beliefs as religious) could nevertheless qualify for an exemption based on religious belief if his 'opposition to war stem[med] from … moral, ethical or religious beliefs about what is right and wrong' and if 'these beliefs … [were] held with the strength of traditional religious conviction' and 'impose[d] upon him a duty of conscience to refrain from participating in any war at any time' thus 'occupy[ing] in the life of that individual a place parallel to that filled by … God in traditionally religious people.'[39]

The context in which these definitions were applied must be kept in mind. Both involved claims for exemptions from military service during the Vietnam War and technically only applied to the relevant statute. The definitions from both *Seeger* and *Welsh*, however, have influenced latter definitions.

Other US courts have taken a different approach. In *Malnak v Yogi*[40] and *Africa v Commonwealth of Pennsylvania*[41] Adams J outlined three indicia to determine whether a particular set of beliefs and practices constitute a religion:

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognised by the presence of certain formal and external signs … that may be analogised to accepted religions. Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organisation, efforts at propagation, observance of holidays and other similar manifestations associated with traditional religions.[42]

More recently Judge Brimmer in *United States v Meyers*[43] outlined a more extensive list of five indicia, with the fifth containing a further ten sub-indicia. He determined that religion involves:

- ultimate ideas;
- metaphysical beliefs;
- moral or ethical system;
- comprehensiveness of beliefs; and,
- accoutrements of religion (including a founder, prophet, or teacher, important writings, gathering places, keepers of knowledge, ceremonies and rituals, structure or organisation, holidays, diet or fasting, appearance and clothing and propagation).

While neither Adams or Brimmer required that all of their indicia be present for a set of beliefs and practices to constitute a religion, absence of a significant number of the indicia would make it unlikely that the beliefs and practices under consideration be deemed as such.[44]

In *Friedman v Southern California Permanente Medical Group* ('*Friedman*'),[45] Friedman had been offered a permanent position of employment as a computer contractor at the defendant's premises but he was required to be vaccinated against mumps as a condition of his employment. Friedman refused the vaccination as the vaccine had been grown in the yolk of a fertilised chicken egg. This case was heard under the *California Fair Employment and Housing Act of 1959,* which prohibits discrimination on the grounds of religious creed, which is defined to include

40 592 F 2d 197 (3rd Cir, 1979); for a discussion of *Malnak v Yogi* see Sarah Barringer, 'The New Age and the New Law' in Leslie Griffin (ed), *Law and Religion: Cases in Context* (Aspen Publishers, 2010) 11.

41 *Africa v Commonwealth,* 662 F 2d 1025 (3rd Cir, 1981).

42 Ibid 1035.

43 906 F Supp 1494 (D Wyo 1995), *aff'd*, 95 F 3d 1475 (10th Cir, 1996).

44 See *United States v Meyers* 906 F Supp 1494, 1503 (D. Wyo 1995).

45 *Friedman v Southern California Permanente Medical Group,* 102 Cal App 4th 39, 69 ('*Friedman*').

> any traditionally recognised religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognised religions.[46]

The plaintiff argued that veganism held a place in his life that was akin to religion. In applying the definition of religion from the Act the California Court of Appeal first identified the current confused state of the meaning of religion in US case law.[47] The Court concluded that the best option was to 'utilise the objective analysis enunciated by the Third, Ninth, Eighth, and Tenth Circuits in Africa, Wiggins, Alvarado and Meyers'.[48] As such, the Court held that veganism was not a religious creed but a personal philosophy and lacked the three indicia of a religion. Unlike a religion the court found that veganism was not 'comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching'.[49] Ethical veganism also did not address 'fundamental or ultimate questions', and, while the court noted that lack of formal or external signs of religion was not determinative, it did take the lack of 'teachers or leaders, services or ceremonies, structure or organisation, orders of worship or articles of faith, or holidays' into account.[50]

The 2012 case of *Chenzira v Cincinatti Children's Hospital Medical Center* ('*Chenzira*'),[51] also involved a refusal to be vaccinated. In *Chenzira,* the plaintiff was employed by the medical centre as a customer service representative. Her employer required all employees to be vaccinated for influenza but Chenzira, a vegan, objected to being vaccinated because the vaccine was formulated with animal products. Ms Chenzira brought an action against the hospital on the grounds that she was being discriminated against as a result of her veganism, which she argued constituted religious discrimination under both Title 7 of the *Civil Rights Act of 1964* (US) and Ohio State anti-discrimination legislation.

The defendants brought an action to dismiss the plaintiff's claim on the grounds that veganism was not a religion but rather a dietary preference or social philosophy.[52] The plaintiff argued that her beliefs were moral and ethical ones, which are 'sincerely held with the strength of traditional religious views in accordance with *United States v Seeger* and *Welsh v United States*'.[53] Noting that in 'the context of a

46 *Establishing Religious Creed Discrimination,* 2 CA ADC § 11060.
47 *Friedman* (n 45).
48 Ibid.
49 Ibid 70.
50 Ibid; See also Page (n 32) 397.
51 (SD Ohio, No 1:11-CV-00917, 27 December 2012).
52 Ibid.
53 Ibid.

motion to dismiss, [the court] merely needs to determine whether [the] plaintiff has alleged a plausible claim',[54] the Ohio Federal Court has held in the case of *Chenzira,* at the very least, it was indeed plausible that Chenzira subscribed to veganism with 'a sincerity equating that of traditional religious views' and could come within the terms of the Act.

B *Australia*

In Australia, the legal definition of religion was determined by the High Court in *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* ('*Scientology Case*').[55] While the Court unanimously determined that Scientology is a religion, the definitions of religion applied by the three judgments varied. As a result, like the US, Australia does not have a definitive legal definition of religion.

Further, as noted above, anti-discrimination statutes use the term 'religion' and do not extend out to protect philosophical beliefs. For ethical veganism to qualify as a religion for the purposes of anti-discrimination legislation, veganism would need to fit within the current definition of religion.

While the *Scientology Case* case has been criticised for not having clear dicta, the definitions outlined in the three judgments have been influential both in Australia and around the world.[56] The widest definition was given by Murphy J. In his definition:

> any body which claims to be religious, whose beliefs or practices are a revival of, or resemble earlier cults, is religious. Any body which claims to be religious and to believe in a supernatural Being or Beings, whether physical and visible … or a physical invisible God or spirit, or an abstract God or entity is religious … Any body which claims to be religious, and offers a way to find meaning and purpose in life, is religious.[57]

Wilson and Deane JJ followed the indicia approach from the US listing five indicia which they considered relevant for determining whether or not a given set of beliefs were a religion, these were:

- the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses;
- the ideas relate to man's nature and place in the universe and his relation to things supernatural;

54 Ibid.

55 (1983) 154 CLR 120, 128.

56 See Ian Ellis-Jones, 'What is Religion?' (2008) 13 *Local Government Law Journal* 168; Pauline Ridge, 'Not-for-profit Law and Freedom of Religion' in Matthew Harding (ed) *Research handbook on Not-for-Profit Law* (Edward Elgar, 2018) 284, 292–3.

57 *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 151.

- the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance;
- however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups; and
- the adherents themselves see the collection of ideas and/or practices as constituting a religion.[58]

Further, they considered that:

> no one of the above indicia is necessarily determinative of the question whether a particular collection of ideas and/or practices should be objectively characterised as 'a religion'. They are no more than aids in determining that question and the assistance derived from them will vary according to the context in which the question arises.[59]

Finally Mason ACJ and Brennan J defined religion as:

> belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, although canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.[60]

All three judgments determined that the Church of Scientology was a religion. The Australian definition has been adopted by a number of jurisdictions and notably in the case *R (Hodkin) v Registrar of Births, Deaths and Marriages* ('*Hodkin*').[61] Lord Toulson considered the definitions from *Church of the New Faith* before determining that religion is:

> a spiritual or non-secular belief system held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system.[62]

In *Registration decision: the Jedi Society Incorporated*[63] the New Zealand Charities Registration Board considered both the definitions from *Church of the New Faith* and *Hodkin* concluding that the definition in *Hodkin* was 'a useful modern reading of

58 Ibid 174.
59 Ibid.
60 Ibid 136.
61 *R (Hodkin) v Registrar General of Births, Deaths and Marriages* [2014] 1 All ER 737 ('*Hodkin*').
62 Ibid 752.
63 *Registration Decision: The Jedi Society Inc (JED49458)* (Charities Registration Board, Decision No 2015-2, 14 September 2015).

Church of the New Faith and confirms that this case is still current in terms of the law's definition of religion.'[64] Within Australia the *Scientology Case* has only been directly applied a handful of times. In *RSSB Australia Pty Ltd v Ross*[65] Emerton J concluded that Radha Soami Satsang Beas ('RSSB') was a religion that meets both the definition proposed by Mason ACJ and Brennan J and that proposed by Deane and Wilson JJ.[66] Presumably given Murphy J's definition is the widest of the three the beliefs and practices of RSSB would also satisfy that definition.

There has been a small number of other cases where the Court has applied the definitions from the *Scientology Case* more briefly or indirectly. For example, the court has referred to the *Scientology Case* to confirm that:

- religion has a broad meaning for the purposes of Australian law;[67]
- that religious belief includes the manifestation of that belief;[68] and,
- that the term religion does not include no religion.[69]

Unlike the US, Australian courts have not been prepared to include non-religious beliefs such as those espoused in *Seeger* and *Welsh* within the legal definition of religion.

V Discussion

As Latham CJ pointed out in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*:[70]

> almost any matter may become an element in religious belief or religious conduct. The wearing of particular clothes, the eating or the non-eating of meat or other foods, the observance of ceremonies, not only in religious worship, but in the everyday life of the individual – all of these may become part of religion.[71]

64 Ibid [28].

65 (2017) 224 LGERA 224.

66 *RSSB Australia Pty Ltd v Ross (2017) 224 LGERA 224, 231.*

67 *Lebanese Moslem Association v Minister for Immigration & Ethnic Affairs* (1986) 11 FCR 543, 556; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, 509–10.

68 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, 391–2, 403–4; *Minister for Immigration and Multicultural Affairs v Darboy* (1998) 52 ALD 44, 50–1.

69 *Dixon v Anti-Discrimination Commissioner of Queensland* [2005] 1 Qd R 33, [19]. However, Douglas J went on to confirm that:

> the question whether there has been discrimination against an atheist, for example, on the basis of religion is not, in my view, answered simply by the assertion that the attribute of religion does not include an absence of religion. What one must focus on principally is whether there has been discrimination either direct or indirect on the basis of that attribute.

70 (1943) 67 CLR 116.

71 Ibid 124.

There is, of course, no bar to a vegan diet being recognised as a religious practice where it is part of a religion. Dietary restrictions are a common feature of religious belief and practice. Abstaining from eating pork and shellfish products by Jews and fasting during Ramadan for Muslims springs readily to mind. Jains follow one of the more extreme dietary religious practices. As well as abstaining from eating meat they also refrain from eating eggs, gelatine and anything that grows underground (e.g. potato, carrot and garlic).[72] As discussed above, however, vegans may adopt a vegan diet or lifestyle for a variety of reasons independent of what has traditionally been recognised as a religious belief.

Veganism, particularly ethical veganism, may very well hold a place akin to or parallel to that of religion in a person's life. Certainly, this is what Friedman argued in the *Friedman* case. The difficulty with this argument is that 'parallels, by definition, never meet.'[73] While ethical veganism may hold a place similar to that of a religion it lacks many of the features traditionally associated with religion and required by most legal definitions. It lacks belief in or some kind of connection with a 'supernatural being, thing or principle'[74] or 'divine, superhuman or controlling power'[75] or 'relationship with the infinite'.[76] It also lacks many of the external trappings associated with religion such as a religious text, leaders or services and rituals.[77] Finally ethical veganism does not see itself as a religion.[78] While the lack of any one of these factors is not in and of itself decisive, cumulatively they make it extremely unlikely that an Australian court would recognise ethical veganism as a religion for the purposes of anti-discrimination law.

VI Conclusion

It seems clear that veganism will not fall within the definition of religion. Therefore, it would not be protected by anti-discrimination statutes as they currently exist in Australia. As noted above, this may not be the case for a vegan who follows the diet as a part of a commitment to a recognised religion. The unfairness of this situation has not gone unnoticed by some commentators, including Page, who notes:

> it is arbitrary to say that a vegan who is affiliated with an organised religion must be given protection while a vegan who holds the same beliefs though internally derived does not deserve the law's protection.[79]

The distinction exists because the law protects discrimination based on a person's religion, not based on specific manifestations of that religion. Many religious practices

79 Page (n 32) 407.

have secular equivalents which are not protected in the same way as their religious counterpart. It is the motivation for the practice which attracts protection – not the practice itself. Indeed, the manifestation of religious beliefs may be abrogated by law, for example, to protect the human rights of others. Religious belief on the other hand is protected absolutely.[80]

Whether the protection of anti-discrimination legislation should be extended to ethical vegans in the future is beyond the scope of this paper – although it is an issue that is likely to arise in the future given the increasing number of vegans (and therefore, presumably, the number of ethical vegans) and concerns about discrimination against those who practice veganism.[81] It also raises a more fundamental question about the basis upon which the law protects the manifestations of a person's fundamental beliefs and practices. With a growing proportion of the Australian population rejecting religion,[82] more and more Australians are likely to seek meaning and rules for living in non-religious belief systems. The basis upon which the law protects actions based on a person's fundamental beliefs may need to be re-examined. Parallel lines, by definition, may never meet, but those lines can certainly occupy an equivalent role in a person's life.

80 Renae Barker, *State and Religion: The Australian Story* (Routledge, 2018) 36–41.

81 See Oscar Horta, 'Discrimination Against Vegans' (2018) 24(3) *Res Publica* 359.

82 '2016 Census: Religion', *Australian Bureau of Statistics* (Web Page, 27 June 2017) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551D7CA258148000E2B85>.

SUSTAINABLE DEVELOPMENT AND THE UNITED NATIONS DIALOGUES: LIVING IN HARMONY WITH NATURE?

Dr Sophie Riley*

The Earth Summit (1992) heralded what was anticipated to be a new era in environmental regulation with the advent of sustainable development. The concept was based on integrating environmental protection with economic development, supported by specific objectives, such as protection of biodiversity and achievement of intergenerational equity. By the early part of the 21st century it was apparent that sustainable development had become equated with continuous economic growth, human domination and commodification of nature. This article argues that shortcomings in sustainable development, apparent over the past 25 years, are partly due to the concept's initial formulation and also attributable to the way the concept has been interpreted and implemented. This validates calls for reconfiguring society's value systems by better integrating law and policy with Earth-centric principles. The discussion argues that this involves more than tinkering with the key tenets of sustainable development, instead of necessitating their reconceptualisation in accordance with philosophies of Earth jurisprudence.

I Introduction

The 1980s were dominated by a series of high-profile pollution disasters and the realisation that human-generated problems, including ozone depletion and climate change, were inexorably leading to environmental degradation.[1] Events such as the Bhopal Gas Tragedy of 1984, the nuclear power plant explosion at Chernobyl in 1986

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Many thanks to Associate Professor Tracey Booth from UTS, and also to the anonymous referees for their helpful comments and suggestions on improving the structure and flow of arguments of the article. All errors remain my own.

1 V Haynes and M Bocjun, *The Chernobyl Disaster* (Hogarth Press, 1988); John F Piatt et al, 'The Immediate Impact of the 'Exxon Valdez' Oil Spill on Marine Birds' (1990) 107(2) *The Auk* 387; TR Chouhan, 'The Unfolding of Bhopal Disaster' (2005) 18 *Journal of Loss Prevention in the Process Industries* 2; Rafe Pomerance, 'The Dangers from Climate Change, a Public Awakening' (1986) 12 *EPA Journal* 15; JL Foster, 'The Significance of the Date of Snow Disappearance on the Arctic Tundra as a Possible Indicator of Climate Change' (1989) 21(1) *Arctic and Alpine Research* 60; Ozone depleting substances led to the negotiation of the *1987 Montreal Protocol on Substances that Deplete the Ozone Layer,* opened for signature on 16 September 1987 [1989] *ATS* 18 (entered into force on 1 January 1989). It has 197 ratifications, ascensions, acceptances and successions.

and the Exxon Valdez oil spill in 1989[2] placed human impacts on the environment firmly on the international agenda. Moreover, they contributed to a creeping awareness, starting from at least the 1960s, that humans needed to reassess their interactions with the Earth and its ecological systems.[3]

In 1992, the Earth Summit heralded what was anticipated to be a new era in environmental regulation, integrating environmental protection with economic development. Of paramount importance was the objective of intergenerational equity, designed to protect the earth for future generations. This principle was central to the definition of sustainable development, already adopted in 1987 by the Brundtland Report: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[4] The concept of intergenerational equity wove its way through several instruments adopted at the Earth Summit, such as the Convention on Biological Diversity ('CBD'), the Rio Declaration on Environment and Development ('Rio Declaration') and the United Nations Framework Convention on Climate Change ('UNFCCC').[5] Article 3 of the UNFCCC calls on the parties to 'protect the climate system for the benefit of present and future generations of humankind'. In accepting intergenerational equity as the foundation for sustainable development, these instruments also implicitly acknowledged that limitations to development were critical if society were to maintain the potential for biodiversity 'to meet the needs and aspirations of present and future generations'.[6]

While the wording of intergenerational equity places humans at the forefront of sustainable development, this did not necessarily mean that human needs were the only consideration. The CBD, for example, also toyed with the notion of intrinsic value of biodiversity, a vision that attributes worth to biodiversity, independently of human needs.[7] In an analogous manner, the Rio Declaration acknowledged that while humans are 'at the centre of concerns for sustainable development', this was

2 Generally, Haynes and Bocjun (n 1); Piatt et al (n 1); Chouhan (n 1).

3 Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 9th ed, 2016) 7; United Nations Conference on Environment and Development, 1992, available from <https://sustainabledevelopment.un.org/milestones/unced>; also Thomas R Dunlap, *Saving America's Wildlife* (Princeton University Press, 1991) 99 referring to Fairfield Osborn, *Our Plundered Plant* (Faber & Faber, 1948).

4 *Report of the World Commission on Environment and Development: Note by the Secretary-General*, UN GAOR, 42nd sess, Agenda Item 83(e), UN Doc A/42/427 (4 August 1987) pt 2.1 ('*Brundtland Report*').

5 *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force on 29 December 1993) art 2 ('*CBD*'); *Rio Declaration on Environment and Development*, UN GAOR, UN Doc A/CONF.15 1/26 (vol 1) (12 August 1992) principle 4 ('*Rio Declaration*'); *The United Nations Framework Convention on Climate Change 1992,* opened for signature 9 May 1992, [1994] ATS no 2 (entered into force on 21 March 1994) Preamble and art 3 ('*UNFCCC*'). The Convention has 201 parties.

6 *Rio Declaration* (n 5) principle 3.

7 *CBD* (n 5) preamble.

tempered by objectives of living in harmony with nature.[8] These perspectives foreshadowed expectations that sustainable development would allow humanity to reconfigure its interactions with the Earth, reining anthropocentrism within broad scientific and ethical parameters.[9]

In a practical sense, appeals for harmonious relationships with the Earth did not prevail. The version of sustainable development that evolved over the next 25 years was grounded in utilitarian economics that subsumed intrinsic value into use prerogatives – an outcome foreshadowed by several provisions of the CBD.[10] This occurred in tandem with scientific and technological advances that allowed society to use the Earth's resources with increasing efficiency, yet did not provide a solution to the problem of how to avoid economic growth, which occurs at the expense of the environment.[11]

Instead, economic standpoints entrenched views that nature and biodiversity were resources to be exploited. This led to sustainable development becoming equated with human domination and the commodification of nature.[12] Changing sensibilities, however, have generated debate, questioning whether continual exploitation of nature is consistent with initial formulations of sustainable development and whether the concept can be rehabilitated; or, whether its key principles should be replaced by new paradigms, realigning humanity's relationship with the Earth.[13] This article contributes to that discussion by evaluating the progress of sustainable development against the backdrop of the United Nations dialogues ('UND').

The UND comprise a series of meetings held under the umbrella title 'Living in Harmony with Nature'. Since 2011, the meetings have been convened annually by the United Nations ('UN') and adopted by way of resolutions of the General Assembly.[14]

8 *Rio Declaration* (n 5) principle 1.

9 David G Victor, Kal Raustiala and Eugene B Skolnikoff, 'Introduction and Overview' in David G Victor, Kal Raustiala and Eugene B Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (MIT Press, 1998) 7; James Justus et al, 'Buying into Conservation: Intrinsic Versus Instrumental Value' (2009) 24(4) *Trends in Ecology and Evolution* 187, 187.

10 *CBD* (n 5) Preamble, arts 1, 5, 6(a), 7(a), 7(c), 8(c), 8(g), 8(j), 10(a), 11, 12(b), 13(a), 16(1), 18(1), 21(4), 25(2)(c), annex I (2); *Harmony with Nature – Report of the Secretary-General*, 69th sess, Provisional Agenda Item 19(h), UN Doc A/69/322 (18 August 2014) ('*HN-69*') para 2.

11 Michael Redclift, 'Sustainable Development, Needs, Values, Rights' (1993) 2(1) *Environmental Values* 3, 7.

12 Val Plumwood, *Environmental Culture: The Ecological Crisis of Reason* (Routledge, 2002) 99–100; *Harmony with Nature – Report of the Secretary-General*, 66th sess, Provisional Agenda Item 19(h),UN Doc A/66/302 (15 August 2011) paras 62, 66 ('*HN-66*').

13 *HN-66* (n 12); *Harmony with Nature – Report of the Secretary-General*, 67th sess, Provisional Agenda Item 20(h),UN Doc A/67/317 (17 August, 2012) paras 8, 55 ('*HN-67*'); *Harmony with Nature – Note by the Secretary-General*, 71st sess, Provisional Agenda Item 19(h), UN Doc A/71/266 (1 August 2016) paras 95, 96 ('*HN-71*').

14 *HN-66* (n 12); *HN-67* (n 13); *Harmony with Nature – Report of the Secretary-General*, 68th sess, Provisional Agenda Item 19(h), UN Doc A/68/325 (15 August 2013) ('*HN-68*'); *HN-69* (n 10); *Harmony with Nature –*

In accordance with the UN's charter, such resolutions are not binding.[15] Given that the UND are conducted under the auspices of the UN's Development Agenda, they have proved influential.[16] The UND have been particularly critical of how society has implemented sustainable development, noting that measures have not been successful, either in halting the decline of biodiversity or in grappling with the philosophical underpinnings of sustainability.[17] For these reasons, the delegates at the UND propose a new approach, based on *Earth jurisprudence.*[18]

Earth jurisprudence represents a legal response to the problem of environmental exploitation and domination and is based on 'formal recognition [of] the reciprocal relationship between humans and … nature'.[19] It calls for a shift away from the idea that humans form the summit of a governance hierarchy, and a move towards recognising that humans are only one component of an interconnected web of life. As such, Earth jurisprudence proposes that human laws need to be consistent with, and limited by, the laws of nature.[20]

In investigating these themes, the analysis in this article uses a frame of reference provided by international law at large, focusing on textual analyses of instruments developed around the Earth Summit. More specific examples and illustrations are sourced from the protection of biodiversity. The discussion commences by evaluating the conceptual basis of sustainable development, including intergenerational equity, which draws on the work of Brown Weiss[21]. This highlights the fact that at its inception intergenerational equity was sufficiently comprehensive to encompass broader equities, such as intragenerational equity and equity for the Earth. These perspectives could have infused sustainable development with strong

Report of the Secretary-General, 70th sess, Provisional Agenda Item 20(g), UN Doc A/70/268 (4 August 2015) ('*HN-70*'); *HN-71* (n 13); *Harmony with Nature – Report of the Secretary-General*, 72nd sess, Provisional Agenda Item 20(h), UN Doc A/72/175 (19 July 2017) ('*HN-72*'); *Harmony with Nature – Report of the Secretary-General*, 73rd sess, Provisional Agenda Item 20(h), UN Doc A/73/221 (23 July 2018) ('*HN-73*'); *Harmony with Nature – Report of the Secretary-General*, 74th sess, Provisional Agenda Item 19(i), UN Doc A/74/236 (26 July 2019).

15 *Charter of the United Nations* arts 10, 13, 14. The Charter has 193 parties.

16 For example, Harmony with Nature, GA Res 67/214, UN Doc A/RES/67/214 (15 March 2013, adopted 21 December 2012) para 10.

17 *HN-67* (n 14) para 40; *HN-70* (n 14) 3.

18 *HN-71* (n 13) Introduction.

19 Generally, RHS Tur, 'What is Jurisprudence' (1978) 28(111) *The Philosophical Quarterly* 149; Begonia Filgueira and Ian Mason, 'Wild Law: Is there Any Evidence of Earth Jurisprudence in Existing Law?' in Peter Burdon (ed) *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 192, 195; Cormac Cullinan, 'A History of Wild Law' in Peter Burdon (ed) *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 12, 12–13.

20 Peter Burdon, 'The Great Jurisprudence' in Peter Burdon (ed) *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 59, 59–61.

21 Edith Brown Weiss, 'In Fairness to Future Generations and Sustainable Development' (1992) 8(1) *American University International Law Review* 19.

ecological and ethical underpinnings beyond traditional economic utilitarianism. It is argued that the focus on economic growth, however, has made it difficult to allocate meaningful regulatory space for the Earth.

The article then evaluates the UND, elaborating on their critiques of anthropocentrism and their calls for society to live in harmony with nature (by adhering to principles of Earth jurisprudence). To achieve the latter requires profound changes to humanity's value systems, transforming the view that the environment is predominantly a resource for human use. It is argued that the nature of these transformations calls for more than reinterpreting key principles of sustainable development – justifying their replacement with principles of Earth jurisprudence.

II Sustainable Development and Broader Equities

Sustainable development became a widely-accepted concept in the 1990s as it provided a way of demonstrating an awareness that development needs to have limits, potentially transforming pathways that would otherwise lead to environmental degradation.[22] Society's reluctance to modify its underlying set of values, particularly those concerning the role of economics and regard for long-term environmental sustainability, meant that the concept faced many challenges in its implementation.[23]

A *Sustainable Development and Neoclassical Economics*

The influence of neoclassical economics, with its emphasis on supply, demand and consumption, has been succinctly summarised by Bates who stated:

> in our Western democratic, capitalist system of government, it is arguable that political values are already weighted towards economic and social issues, and although environmental values are important, the prevailing assumption is that development and growth should be allowed to proceed unless there are proven reasons for limiting it.[24]

These conclusions are supported by textual analyses of instruments adopted at the Earth Summit. Although at the time of the Earth Summit, society had acknowledged the need to grapple with human-induced environmental degradation,[25]

22 Robert F Blomquist, 'Clean New World: Toward an Intellectual History of American Environmental Law, 1961–1990' (1990) 25 *Valpraiso University Law Review* 1, 23.

23 Frank Biermann et al, 'Earth System Governance: A Research Framework' (2010) 10 *International Environmental Agreements*, 277, 279; Jamie Murray, 'Earth Jurisprudence, Wild Law, Emergent Law: The Emerging Field of Ecology and Law—Part 1' (2014) 35 *Liverpool Law Review* 215, 220.

24 Bates (n 3) [8.23].

25 Lee Godden, '"Globalized Localisms": Three Phases of International Environmental Governance for Biodiversity Protection' in Shawkat Alam, Natalie Klein and Juliette Overland (eds) *Globalisation and the Quest for Social and Environmental Justice: The Relevance of International Law in an Evolving World Order*

the decade prior to 1992 was also a period of economic hardship, especially for developing countries.[26] Consequently, international concern at alleviating environmental deterioration was tempered by the need to provide financially for humans.[27] Sustainable development was not intended to *(a)* equate with environmental conservation; or *(b)* impose a caveat against development.[28] The importance of economic security was evident in the way the putative focus at the Earth Summit rested on biodiversity, climate change and forests, yet the most contentious debates were provoked by population growth, consumption and the right to develop.[29] The range of objectives and statements adopted in 1992 reflect these controversies and run the gamut from propositions that states enjoy sovereign rights to exploit resources found in their territory, to the notion that equitable use of biodiversity can contribute to social good by alleviating poverty and promoting peace.[30] Underscoring the environment's instrumental values –particularly pronouncements relating to the sovereign right of exploitation – creates an inherent tension which arguably limits the influence of a global conception of sustainable development.[31]

In the CBD, for example, the phrase *sustainable development* is used interchangeably with *sustainable use,* even though the two concepts differ.[32] Sustainable use is an ancient notion, based on the idea that exploitation of resources should not lead to their depletion.[33] In contrast, sustainable development, which started appearing in the literature from approximately the early 1970s, implies that humans can improve their standard of living by using nature and natural resources, but in a way that does not lead to its depletion.[34] This objective seems to suggest the possibility of continual

(Routledge, 2010) 11, 11.

26 *Brundtland Report* (n 4) ch 3 II para 8; Brian Preston, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' (2005) 9(2&3) *Asia Pacific Journal of Environmental Law* 109, 114.

27 *Brundtland Report* (n 4) ch 3, II para 8; Preston (n 26) 114.

28 Michael Kidd, 'Removing the Green-Tinted Spectacles: the Three Pillars of Sustainable Development in South African Environmental Law' (2008) 15 *South African Journal of Environmental Law and Policy* 85, 85, 102.

29 Simon Dalby, 'Reading Rio, Writing the World: the New York Times and the 'Earth Summit'' (1996) 15(6–7) *Political Geography* 593, 593–4.

30 *CBD* (n 5) art 3, Preamble.

31 *Rio Declaration* (n 5) Principle 2; *CBD* (n 5) art 3, Preamble.

32 *CBD* (n 5) conservation is linked to sustainable development/sustainable use: 3 times in the Preamble; and Articles 1, 5, 6(a), 7(a), 7(c), 8(c), 8(g), 8(j), 10(a), 11, 12(b), 13(a), 16(1), 18(1), 21(4), 25(2)(c), Annex I (2) – see further discussion in this part of the article, surrounding footnotes 24–6.

33 Ben Boer, 'Implementing Sustainability' (1992) 14 *Delhi Law Review* 1, 4–5.

34 John Harlow, Aaron Goluband and Braden Allenby, 'A Review of Utopian Themes in Sustainable Development Discourse' (2013) 21 *Sustainable Development* 270, 271, where he refers to the 1974 joint UN Environment Program and UN Conference and Trade and Development and the 1972 Conference on the Human Environment held in Stockholm.

growth and (irrespective of its feasibility) has been widely translated into domestic regulation.[35] Acceptance of economic growth as an outcome of sustainable development is also consistent with other provisions of the CBD, which aim at sustainable exploitation under the aegis of sustainable development.[36] Textual analysis reveals that the word *conservation* is used 27 times in the CBD and 20 of these are in conjunction with sustainable development/sustainable use.[37] Article 2 of the CBD defines sustainable use as using biodiversity in a 'way and at a rate that does not lead to [its] long-term decline'. This presupposes that although conservation will have corresponding use components, this will occur in ways that are sustainable, prudent, rational, wise, or appropriate and are also integrated into decision-making processes.[38]

Decision-makers rarely acknowledge that the three foundational pillars of sustainable development (economic, environmental and social) create challenges deriving from inconsistent objectives and unequal values.[39] Although the Brundtland Report was based on integration, in reality, the aims of each foundation may not be sufficiently compatible to permit integration, leading regulators to balance the relative merits of each pillar as if they were equivalent.[40] Were this failing to be acknowledged, it would question the application of neoclassical economic theory that regards natural capital – in the form of nature, natural resources and the environment – as equivalent and interchangeable with economic capital, such as wealth and assets.[41] In reality, it is doubtful whether these types of capital are truly

35 *Brundtland Report* (n 4) pt 2.1; Hans Christian Bugge and Lawrence Waters, 'A Perspective on Sustainable Development After Johannesburg on the Fifteenth Anniversary of Our Common Future: An Interview with Gro Harlem Brundtland' (2003) 15 *Georgetown International Environmental Law Review* 359, 359.

36 Godden (n 25) 14, 15–16.

37 *CBD* (n 5) (excluding headings) "conservation" is used five times in the preamble, Articles 1, 2 (twice) 5, 6(a), 7(a), 7(c), 8(c), 8(g), 8(j), 9(b), 9(e), 13(a) 10(a), 11, 12(b), 13(a), 16(1), 18(1), 21(4), 25(2)(c), Annex I (2). Conservation is linked to sustainable development/sustainable use: three times in the preamble; and Articles 1, 5, 6(a), 7(a), 7(c), 8(c), 8(g), 8(j), 10(a), 11, 12(b), 13(a), 16(1), 18(1), 21(4), 25(2)(c), Annex I (2).

38 Preston (n 26) 127; Joseph Chun, 'Animal Welfare and Nature Conservation Laws in Singapore: A Moral Duty to Non-Human Nature?' (2005) 9(1) *Asia Pacific Journal of Environmental Law* 39, 60; *CBD* (n 5) art 10.

39 Preston (n 26) 127; Chun (n 38) 60; *CBD* (n 5) art 10.

40 *Brundtland Report* (n 4) para 72; Bates (n 3) [7.33]. These assumptions are duplicated in Paul James Brown, 'Calculation of Environmentally Sustainable Residual Income (eSRI) from IFRS Financial Statements: An Extension of Richard (2012)' in D Bensadon and N Praquin (eds) *IFRS in a Global World* (Springer, 2016) 141, 141, 142, 145.

41 Robert Costanza and Herman E Daly, 'Natural Capital and Sustainable Development' (1992) 6(1) *Conservation Biology* 37, 41, 44; Zandra Balbinot and Rafael Borim-De-Souza, 'Sustainable Development and Sustainability as Quasi-objects of Study in Management: A search for Styles of Reasoning' (2012) 10(3) *Management Research: The Journal of the Iberoamerican Academy of Management* 153, 159; *HN-68* (n 14) paras 10, 55; Allan Holland, 'Sustainability, Should We Start from Here?' in Andrew Dobson (ed) *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford University Press, 1999) 46, 50–5.

interchangeable. It is even more doubtful whether reductions of natural capital, offset by increases in economic capital, can be said to be sustainable in the long-term.[42] Even if regulators could ensure that natural capital as a whole is not reduced, the substitution of natural and economic capital leads to a form of weakened sustainability where sustainable development reduces to a process, rather than an outcome.[43] In such circumstances, regulators do not undertake a robust evaluation whether development should proceed, but instead, evaluate how it can proceed.[44] As a result, evaluation processes frequently subordinate environmental protection to economic gain.[45] This form of weak sustainability exemplifies how economic growth can shape the evolution of sustainable development, as well as debates which surround it.[46] In contrast, strong sustainability regards natural and economic capital as dissimilar and non-interchangeable, so that decision-makers need to maintain them separately.[47] Strong sustainability would also limit economic growth by Earth system functioning, thus retaining natural capital at a level that does not compromise principles of intergenerational equity.[48] The notion of intergenerational equity challenges whether, in a practical sense, it is feasible for society to enjoy continual economic growth while still being sustainable.[49]

B *Sustainable Development and Broader Equities*

Balancing the needs of the present against the needs of the future necessarily imbues sustainable development with strong elements of distributive justice – traditionally understood in terms of intergenerational rights and responsibilities in the allocation of resources.[50] These duties oblige current generations to 'hold the environment in trust for the benefit of future generations'.[51] Such obligations do not mandate that current generations sacrifice themselves for the sake of the future. They do, however,

42 Costanza and Daly (n 41) 41, 44.

43 Redclift, 'Sustainable Development, Needs, Values, Rights' (n 11) 7.

44 Matthew Cashmore, 'The Role of Science in Environmental Impact Assessment: Process and Procedure Versus Purpose in the Development of Theory' (2004) 24(4) *Environmental Impact Assessment Review* 403, 417; for practical ramifications, generally, Sophie Riley, 'Prioritizing and the Environment in Sustainable Development: Lessons from Australian Environmental Impact Assessment' in Volker Mauerhofer (ed) *Legal Aspects of Sustainable Development* (Springer, 2015) 271.

45 Cashmore (n 44) 403, 417.

46 John Harlow, Aaron Goluband and Braden Allenby, 'A Review of Utopian Themes in Sustainable Development Discourse' above n 34, 271.

47 Costanza and Daly (n 41) 44; Bates (n 3) [8.7]; *Brundtland Report* (n 4).

48 Costanza and Daly (n 41) 44; Bates (n 3) [8.7]; *Brundtland Report* (n 4).

49 Yosef Jabaree, 'A New Conceptual Framework for Sustainable Development' (2008) *Environment, Development and Sustainability* 179, 184.

50 Brown Weiss (n 21) 19–20; Lynda M Collins, 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' (2007) 30 *Dalhousie Law Journal* 79, 101–2.

51 Bates (n 3) [8.7].

need to maintain environmental resources at an acceptable level so that subsequent generations are not deprived of choices in fulfilling their own needs and aspirations.[52] At the same time, the phrase 'needs of the present' extends distributive justice towards consideration of human needs among generations at a given point in time, (i.e. towards consideration of intragenerational equity).[53]

In a hypothetical sense, these needs are likely to be broadly similar.[54] As the Brundtland Report notes, development is 'what we all do in attempting to improve our lot'.[55] Societies and generations do not derive from points of equality and needs are shaped by a range of values and aspirations, as well as pragmatic pressures stemming from levels of affluence or poverty. Accordingly, needs are likely to differ across societies and change over time.[56] The links between poverty and environmental degradation are particularly significant.[57] States whose inhabitants lack basic services, such as access to clean air and water, may emphasise concern for survival, weakening intergenerational equity by regarding the future as something expendable and non-essential.[58] Society has traditionally categorised this problem as one of uneven development, proposing solutions that re-allocate burdens towards developed states.[59] Thus, in the context of climate change, developed countries (those listed in UNFCCC Annexes I and II), committed to reductions of greenhouse gas emissions as well as assisting developing countries by providing financial assistance.[60] In theory, these types of concessions allow developing states to reap more benefits from their environment and also free up regulatory space to consider the future.[61] Solutions to poverty and inequality are therefore seen through the lens of economic growth, increased trade and greater use of the Earth's resources.[62]

52 Brown Weiss (n 21) 22–3; *CBD* (n 5) art 2, definition of sustainable use.

53 Brown Weiss (n 21) 19; Justin Lee, 'Rooting the Concept of Common but Differentiated Responsibilities in Established Principles of International Environmental Law' (2015) 17 *Vermont Journal of Environmental Law* 27, 41.

54 Dudley Seers, *The Meaning of Development* (IDS Communication Series No 44, 1969) 2 and 5 <https://www.ids.ac.uk/files/dmfile/themeaningofdevelopment.pdf>.

55 *Brundtland Report* (n 4) Chairman's Foreword.

56 Reinhard Steurer, 'Sustainable Development as Governance Reform Agenda: An Aggregation of Distinguished Challenges for Policy-making' (Discussion Paper No 1, Institute of Forest, Environmental, and Natural Resource Policy, 2009) 1.

57 *CBD* (n 5) Preamble; *Agenda 21: Programme of Action for Sustainable Development*, (adopted at the United Nations Conference On Environment and Development (UNCED), 3–14 June 1992, Rio De Janeiro, Brazil) paras 3.1–3.12 <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>.

58 Bugge and Waters (n 35) 366; Collins (n 50) 97.

59 *Brundtland Report* (n 4) Chairman's Foreword.

60 *UNFCCC* (n 5) arts 4(2), 4(4), 4(5).

61 Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Martinus Nijhoff Publishers, 2008) 218, quoting Patricia Birnie and Alan Boyle, *International Law and the Environment* (Oxford University Press, 2002) 45.

62 Carmen G Gonzales, 'Bridging the North-South Divide: International Environmental Law in the

By focusing on the allocation of resources, burdens and benefits, both intergenerational and intragenerational equity reflects a classic form of distributive justice based on Western ideologies. These tend to be human-centred, viewing development as sustainable if it supports people and communities, rather than evaluating development for its environmental sustainability.[63] The corollary is that human needs have become the justification for the exploitation of nature, a tendency that has lost sight of the fact that distributive justice cannot be fulfilled without maintaining the integrity and functioning of the Earth.[64]

In reality, distributive justice is closely linked with environmental sustainability, so that fair allocation of resources should also ensure that the environment has sufficient room to fulfil its biological and geophysical potential.[65] For these reasons, although the formulation of intergenerational equity stresses human needs, it is more readily captured by Earth-centred paradigms that include elements of environmental justice, which limit the quality of life and right to develop by the functioning of the Earth and its ecological systems.[66] Society has partially implemented such restraints, typified by the creation of protected areas, adoption of law and policy that gives rights to nature, as well as the integration of non-traditional knowledge and philosophies.[67] The latter may also be particularly useful in enhancing understanding of human-nature interactions by identifying how best to accommodate the needs of the Earth.[68]

Notwithstanding anthropocentric themes apparent at the Earth Summit, several provisions in the Rio Declaration and Agenda 21 are consistent with Earth-centred approaches because limitations to development extend beyond the allocation of resources, to include protection of biodiversity, the application of the precautionary principle and intergenerational equity.[69] In a similar vein, the CBD notes that the protection of biodiversity needs to be guided by intrinsic values as well as instrumental ones, reflected in the variety of ecological, scientific, cultural and aesthetic uses biodiversity proffers.[70] Although the language of the CBD appears to conflate inherent

Anthropocene' (2015) 32(2) *Pace Environmental Law Review* 407, 419–20.

63 James C Wood, 'Intergenerational Equity and Climate Change' (1996) 8 *Georgetown International Environmental Law Review* 293, 295; Jabaree (n 49) 183; Michael Redclift, 'Sustainable Development (1987–2005): An Oxymoron Comes of Age' (2005) 13(4) *Sustainable Development* 212, 223; Preston (n 26) 130–2; Schrijver (n 61) 217; Balbinot and Borim-De-Souza (n 41) 159.

64 Redclift, 'Sustainable Development (1987–2005): An Oxymoron Comes of Age' (n 63), 223; Preston (n 26) 130–2; Schrijver (n 61) 21; Balbinot and Borim-De-Souza (n 41) 159; Brown Weiss (n 50), 19–20.

65 Redclift, 'Sustainable Development (1987–2005): An Oxymoron Comes of Age' (n 63) 223.

66 Jabaree (n 49) 183.

67 Filgueira and Mason (n 19) 196–8.

68 *HN-69* (n 10) para 11; *HN-70* (n 14) para 16; Gonzalesn (n 62) 423; *HN-72* (n 14) paras 27–54.

69 Schrijver (n 61) 217.

70 *CBD* (n 5) Preamble.

and intrinsic values, the acknowledgment is nevertheless important for its juxtaposition of intrinsic and instrumental values.[71] This signals that the importance of non-instrumental values is potentially consistent with sustainable development and also with broader equities deriving from intergenerational equity[72].

The fact that this potential was not realised, has led commentators such as Gonzales to critique sustainable development. She concluded that the predominant influence of economic growth has led humanity to the edge of a 'precipice of global environmental catastrophe … [having already laid] the groundwork for an increasingly dangerous, unpredictable, and unstable environment inconsistent with a flourishing society'.[73] In a similar vein, Godden points out that protection of biodiversity is now regarded as 'an adjunct to other goals of a global environmental or economic character' which transform nature to a value vector for human purposes.[74] Likewise, Plumwood notes that nature is primarily valued when its interests align with human interests.[75]

Such critiques evince changing sensibilities on the advantages of sustainable development, assessments that have been taken up by the delegates of the UND to explore whether current practices have led to sustainable development and if not, whether society should adopt new paradigms.[76]

III UN Dialogues: Living in Harmony with Nature

As noted in the introduction to this article, the UND are held annually (since 2011). The meetings are summarised in the form of reports of the Secretary-General and adopted by way of resolutions of the General Assembly.[77] UND delegates are representatives of UN member states, as well as experts from around the globe. While the UND are not binding, they serve to signpost the direction of discourse and debate and to introduce a new paradigm – Earth jurisprudence – into the domain of sustainable development. At the time of writing, the UND have released nine specially-themed report, which are summarised in Table 1, overleaf.

71 Michael Bowman, Peter Davies and Catherine Redgwell, *Lyster's International Wildlife Law* (Cambridge University Press, 2nd ed, 2010) Chapter 3, where they discuss the nature of value and pages 62–4, 68–73 where they state that non-instrumental value to humans, is more correctly described as inherent value.

72 *CBD* (n 5) Preamble; *Rio Declaration* (n 5) Principle 1.

73 Gonzales (n 62) 407.

74 Godden (n 25) 13–14.

75 Plumwood (n 12) 109–10.

76 *HN-67* (n 13) paras 8, 55; *HN-71* (n 13) paras 95, 96.

77 For example, *HN-73* (n 14); Resolution adopted by the General Assembly on 20 December 2018, Harmony with Nature, General Assembly, 11 January 2019, A/RES/73/235. The complete listing of reports and resolutions is available from United Nations, Harmony with Nature, Chronology, <http://www.harmonywithnatureun.org/chronology/>.

Table 1: UN Dialogues – Report Themes

Year	Theme
2011	Humanity's evolving relationship with nature
2012	Human impacts on the Earth
2013	Economic aspects of environment and development
2014	Social dimension of sustainable development
2015	Sustainable development in the era of climate change
2016	Earth jurisprudence as a means of achieving living in harmony with nature
2017	Implementation of Earth-centred law
2018	Commemorates International Mother Earth Day
2019	Commemorates 10 years of International Mother Earth Day and Harmony with Nature

The conclusions, findings and recommendations from the UND reports (summarised in Tables 2 and 3) help to identify aspects of the human-nature relationship that need to change, as well as providing guidance on how to modify human values to allow humans to live in harmony with nature. The themes are subdivided into topics, which provide the building blocks for living in harmony with nature and also epitomise societal shifts that question anthropocentrism and its economic influence.[78]

Of particular significance are society's non-engagement with meaningful ethical principles and prioritisation of economic exploitation.[79] For these reasons, the UND conclude that society needs to transform environmental regimes with the objective of living in harmony with nature, an aim that requires reconsideration of ideals that elevate humans and their needs above the functioning of Earth's ecological processes.[80] These aims necessarily entail developing respect for nature, starting with earth-centred law and policy, in the manner promoted by Earth jurisprudence.[81]

78 *HN-68* (n 14) para 2.

79 *HN-67* (n 13) para 40; *HN-70* (n 14) 3; *HN-69* (n 10) para 3; *HN-71* (n 13) para 15.

80 *HN-67* (n 13) para 40; *HN-69* (n 10) para 3; *HN-70* (n 14) 3; *HN-71* (n 13) para 15.

81 *HN-71* (n 13) para 15.

Table 2: Theme of UN Dialogues – The Place of Humans in Nature

Topic	Comment
Humans are merely one life form and are not superior to others	• There is no scientific basis for anthropocentric paradigms that consider humans superior to other life forms or as being separate from nature.[a] Humans, however, have obligations to use their foresight and empathy for the benefit of nature.[b] • Society needs to find a way to live in a mutually beneficial relationship with nature and disavow philosophies that regard the Earth as a collection of resources for human exploitation at will.[c]
Living well	• Living well is based on ethical principles and living in harmony with nature, that replace domination and the commodification of nature, especially where it is expressed in purely economic values.[d] • The challenge for regulators is to change consumption patterns to create a society where people see nature as their home rather than a source of capital.[e]
Empathy with nature	• A paradigm that re-connects humans with nature and changes consumerist models that regard nature as a resource to be exploited.[f]
Respect for the Earth and deep ecology	• The starting point is a recognition that humans are guardians, rather than masters, of the Earth.[g] From this perspective flow responsibilities to: • restore the health and integrity of the Earth system;[h] • promote the flourishing of all living components of the earth, which in accordance with deep ecology, have intrinsic value, and equal rights to live and flourish;[i] • there are limits to economic growth, and society needs to engage with principles of deep ecology.[j]
Rights of Mother Earth	• Society needs to adopt systems based on ethical practices that lead to life in harmony with nature.[k]

Note: *Referenced UN documents may be found by searching for the symbol at <https://www.un.org/en/ga/documents/symbol.shtml>.*
Source: (a) *A/67/317, paras 34, 63;* (b) *A/67/317, para 34;* (c) *A/72/175, para 9;* (d) *A/69/322, para 15;* (e) *A/73/221, paras 16, 18;* (f) *A/66/302, para 62, 66;* (g) *A/67/317, para 35;* (h) *A/67/317, para 35;* (i) *A/68/325, para 17;* (j) *A/68/325, paras 60–4;* (k) *A/69/322, para 2.*

Table 3: Theme of UN Dialogues – Reconstructing Regimes

Topic	Comment
The need for a new paradigm	• Society has established highly developed technology as well as unsustainable consumption and production methods that are beyond the capacity of the Earth, and have already resulted in ecosystem deterioration, soil erosion, desertification, climate change, loss of biodiversity and ocean acidification.[(a)] • The problems stem from the interpretation of sustainable development as an anthropocentric paradigm that has focused on promoting economic growth rather than supporting diverse natural and social life.[(b)] • Society needs to accept that there are limits to economic growth and revise neoclassical economics by taking environmental concepts into account.[(c)]
Ethical principles to balance economic principles	• The absence of ethics makes it easy to misuse economic principles, by separating humans from nature and also exploiting and marginalising nature.[(d)]
Legal system in balance	• Laws should reflect growing ethical awareness and be Earth-based.[(e)]
A place for traditional knowledge	• Traditional and non-traditional knowledge can work together to provide an enhanced understanding of human lives and the Earth.[(f)] • Society can gain inspiration from indigenous peoples who maintain spiritual traditions and relate to the Earth within ecological and Earth-centred parameters.[(g)]

Note: *Referenced UN documents may be found by searching for the symbol at <https://www.un.org/en/ga/documents/symbol.shtml>.*
Source: (a) *A/67/317, paras 49, 55, A/70/268, para 3;* (b) *A/68/325, para 55, A/71/266, para 32;* (c) *A/68/325, para 60–64;* (d) *A/67/317, para 40, A/68/325, para 10, A/71/266, para 96;* (e) *A/69/322 para 59;* (f) *A/70/268, para 16;* (g) *A/72/175, paras 14, 23.*

Topic	Comment
Earth jurisprudence and rights of nature	• Replace anthropocentrism with a new world view that encompasses: • a holistic system of governance;[h] • an understanding that humanity's well-being depends on a healthy Earth that can be achieved by living in harmony with nature;[i] • an acknowledgement that traditional indigenous views of the world share features of many of the world's spiritual traditions that are based on humanity's connection with nature;[j] • advancing the rights of nature in our governance systems. Replace views of nature as something to be exploited with views that recognise nature as the source of Earth rights;[k] • Earth jurisprudence, that is acknowledged as the thread that increasingly binds the disciplines together and which should be used to develop governance systems to implement living in harmony with nature;[l] and • a recognition of Earth jurisprudence as the fastest-growing legal movement of the 21st century.[m]

Note: *Referenced UN documents may be found by searching for the symbol at <https://www.un.org/en/ga/documents/symbol.shtml>.*
Source: (h) *A/71/266, para 15;* (i) *A/71/266, para 15;* (j) *A/71/266, para 2;* (k) *A/71/266, para 36;* (l) *A/71/266, para 32, 113;* (m) *A/74/236, para 129.*

IV UN Dialogues: From Anthropocentrism to Earth Jurisprudence

The UND acknowledge that the original inception of sustainable development incorporated eco-centric principles, that could have restrained anthropocentricism, averting inappropriate development.[82] Over the past 25 years, sustainable development has come to be seen as synonymous with continued growth, profit-making and increasing consumerism, on the false premise that 'more goods make people happier'.[83] Delegates at the UND pointedly conclude that the combination of human-centred approaches and a trajectory of never-ending economic growth has fostered an economic system that, 'since the industrial age … has not been determined by what is good for people, much less for nature, but rather by what is good for the growth of the economic system'.[84] Consequently, sustainable development has come to entrench the elevation of humans and their needs, paying scant regard to environmental issues, unless this also coincides with human wants.[85]

While it is not feasible or desirable to remove economic considerations from sustainable development, as already explained, economic philosophies that have driven the sustainable development agenda have also skewed the long-term environmental health of the planet. Even before 1992 and the formal adoption of sustainable development, commentators had identified ecological limits to cost-benefit analyses based on utilitarian economics. In a telling article published in 1976, David Pearce concluded that cost-benefit accounting, which factored in the assimilative capacity of the earth, could easily become 'a mechanism for shifting … [environmental costs] forward in time to future generations'.[86]

The notion of intergenerational equity potentially could have addressed these types of issues but was interpreted in an overwhelmingly anthropocentric manner, not including a fair allocation of resources for the Earth. Accordingly, the UND delegates save some of their most forceful criticisms for policies that evolved at the intersection of anthropocentrism and economic ideologies, calling for new models that integrate economic concerns with Earth-centred values.[87] The key to reform is seen in replacing anthropocentric trajectories with philosophies that prevent nature

82 *HN-67* (n 13) para 55; *HN-68* (n 14) para 48.

83 *HN-66* (n 12) para 62; *HN-67* (n 13) para 49.

84 *HN-66* (n 12) para 76.

85 *HN-68* (n 14) para 48; *HN-69* (n 10) para 54; *HN-67* (n 13) paras 34, 63.

86 David Pearce, 'The Limits of Cost-Benefit Analysis as a Guide to Environmental Policy' (1976) 29 (1) *Kyklos* 97, 104.

87 *HN-67* (n 13) paras 55, 58–66; *HN-68* (n 14) para 64; *HN-69* (n 10) paras, 3, 54, 59; *HN-71* (n 13) paras 15, 36; *HN-72* (n 14) para 9; also, Jules Cashford, 'Dedication to Thomas Berry' in Peter Burdon (ed) *Exploring Wild Law: The philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 3, 3–4.

being marginalised and commodified.[88] Such reforms would potentially allow humans to reconnect with nature and construct relationships with the Earth that are not primarily driven by economic interests.[89] Against this backdrop, the UND advocate using Earth jurisprudence as the basis for a new order.[90]

Earth jurisprudence derives from the works of Thomas Berry, a Catholic priest and environmentalist who was highly critical of humanity's relationship to the environment.[91] In his seminal tome, Berry argued in favour of an Earth-centred approach, steering human-nature interactions away from exploitation, towards exchanges that are mutually beneficent.[92] The foundation of Berry's approach lies in recognising that humans comprise only one component of life on Earth – one that does not form the apex of an Earth hierarchy.[93] Berry's standpoints, which have been adopted into legal philosophies such as wild law and Earth jurisprudence, have the potential to achieve sustainable development in a way that has thus far eluded the practical operation of that concept.[94]

The legal foundations of Earth jurisprudence may be epitomised as: 'the philosophy of law and regulation that gives formal recognition to the reciprocal relationship between humans and the rest of nature'.[95] The legal dimensions of Berry's ideology have been termed the *great law* or *great jurisprudence.*[96] In accordance with Berry's views, this law, which is based on the needs of nature, sits in a hierarchical position above human laws, proscribing human laws where they contravene nature's laws.[97] An unsettled issue stems from the scope and content of the great jurisprudence because at present, broad references to the needs of nature, or the laws of nature, are not sufficiently certain to be translated into law and policy.[98] Nevertheless, at a minimum the needs of nature can be discovered by scientific research and investigation, leaving the door open for science to assist in guiding law and policy.[99]

88 Generally, *HN-66* (n 12); *HN-67* (n 13) para 3; and *HN-68* (n 14).

89 Generally, *HN-66* (n 12) and *HN-68* (n 14); *HN-69* (n 10) para 11; *HN-71* (n 13) para 15.

90 *HN-71* (n 13) para 15.

91 Thomas Berry, *The Great Work: Our Way into the Future* (Three Rivers Press, 1999) 132–5.

92 Berry (n 91); Cashford (n 87), 5; Michelle Maloney, 'Earth Jurisprudence and Sustainable Consumption' (2011) 14 *Southern Cross University Law Review* 119, 119.

93 Berry (n 91) 3–5; Ian Mason, 'One in All: Principles and Characteristics of Earth Jurisprudence' in Peter Burdon (ed) *Exploring Wild Law: The philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 35, 35–6.

94 Cullinan, 'A History of Wild Law' (n 19) 12–13, 19.

95 Tur (n 19); Filgueira and Mason (n 19) 195; Cullinan, 'A History of Wild Law' (n 19) 13; Maloney (n 92) 119.

96 Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Green Books, 2003) 84; Burdon, 'The Great Jurisprudence' (n 20) 65.

97 Burdon, 'The Great Jurisprudence' (n 20) 59, 61.

98 Ibid 66.

99 Ibid 60, 66.

In this respect, Earth jurisprudence has much in common with deep ecology, a movement that calls on society to transform its relationship with the Earth by living harmoniously with the planet.[100] Among other things, the movement entails setting ecological limits to economic growth and allowing the environment to be natural.[101] As with Earth jurisprudence, deep ecology acknowledges the inherent value of human and nonhuman life, independent of the latter's usefulness to humans.[102] This principle also underscores that humans are merely one component of the Earth's biosphere, behoving humans to minimise their ecological impacts.[103]

Although humans are part of the biosphere, deep ecology admits that humans may need to reduce their population numbers and that humanity cannot aspire to ever-increasing standards of living.[104] For these reasons, deep ecology has been criticised for being anti-human, 'politically misguided … and impractical'.[105] One pointed criticism derives from the fact that the movement is strongly grounded in biology and lacks engagement with social theory.[106] Proponents of deep ecology, however, highlight that environmental concerns are invariably seen through the lens of economics and human desires, so that engagement with social issues would diminish the environmental message of deep ecology.[107]

In contrast, Earth jurisprudence incorporates both science and social issues. The core tenet of Earth jurisprudence, Earth rights, acknowledges the interconnectedness of nature (science-based) and shows an appreciation of rights of Mother Earth (social and legally-based).[108] Important principles include the following:

- the Earth community and all the beings that constitute it have fundamental rights, including the right to exist, to habitat or a place to be and to participate in the evolution of the Earth community;
- human acts or laws that infringe these fundamental rights violate the fundamental relationships and principles that constitute the Earth community (great jurisprudence) and are consequently illegitimate and unlawful; and

100 George Sessions, 'Deep Ecology, New Conservation, and the Anthropocene Worldview' (2014) 30(2) *The Trumpeter* 106, 109.

101 Ibid.

102 Ronnie Hawkins, 'Why Deep Ecology Had to Die' (2014) 30(2) *The Trumpeter* 206, 226–7; Arne Naess, 'Basics of the Deep Ecology Movement' in Anne Naess, Alan Drengson and Bill Bevall (eds) *The Ecology of Wisdom: Writings by Arne Naess* (Counterpoint, 2018) 105, 111.

103 Hawkins (n 102) 226–7; Naess (n 102).

104 Naess (n 102).

105 Mick Smith, 'Deep Ecology: What is Said and (to be) Done?' (2014) 30(2) *The Trumpeter* 141, 141.

106 Ibid 143.

107 Ibid 150–1.

108 Peter Burdon, 'A Theory of Earth Jurisprudence' (2012) 37 *Australian Journal of Legal Philosophy* 28, 30; *HN-69* (n 10) paras 3, 4; *HN-71* (n 13) para 21.

- humans must adapt their legal, political, economic and social systems to be consistent with the great jurisprudence and to guide humans to live in accordance with it, which means that human governance systems at all times take account of the interests of the whole Earth community.[109]

Generally speaking, rights stemming from Earth jurisprudence centre on the ability of entities and components of the Earth to exist and fulfil their evolutionary role.[110] These rights are role-specific or species-specific, so that the rights of trees and rivers are different from the rights of birds or mammals.[111] A fundamental similarity, however, stems from the fact that such rights do not depend on human law and policy.[112] Instead, they derive from the very existence of entities,[113] a notion that is also consistent with the interconnectedness of nature and the entitlements of nature; perspectives that are acknowledged in their own right by the UND.[114]

Examining the above principles, it is clear that giving rights to the Earth or using science to determine limits to development does not automatically ignore the needs of people. Humans are part of the community of life, meaning their needs ought to be taken into account.[115] In particular, Earth jurisprudence does not authorise restrictions that lead to 'economic hardship ... [and/or] irreversible cultural impacts'.[116] Rather, the concept is inclusive, providing a framework for unifying science, philosophy, spirituality and law.[117] It is a call to move away from anthropocentrism and to live in harmony with the Earth.

Human law, shaped by the great jurisprudence, forms the backbone of Earth jurisprudence, being necessary to give practical effect to the rights of nature, a realisation that is gaining traction nationally and internationally. At the national level, the recent New Zealand determination in the Whanganui River Claims Settlement saw legislation enacted that declared *Te Awa Tupua*, a river, to be a legal person.[118] Internationally, events such as the adoption of the Universal Declaration of Rights of Mother Earth, at the 2010 World People's Conference on Climate Change and the Rights of Mother Earth, held at Cochabamba in Bolivia, signal a shift away

109 Cullinan, 'A History of Wild Law' (n 19) 20, 13.

110 Maloney (n 92) 140.

111 Cashford (n 87) 3, 9.

112 *HN-68* (n 14) paras 16–17; *HN-69* (n 10) para 22.

113 Maloney (n 92) 140.

114 Arne Naess, 'The Shallow and the Deep, Long-Range Ecology Movement. A Summary' (2008) 16 *Inquiry*, 95, 95; *HN-68* (n 14) paras 16–17; *HN-69* (n 10) paras 1–6.

115 Peter R Wilshusen et al, 'Reinventing a Square Wheel: Critique of a Resurgent 'Protection Paradigm' in International Biodiversity Conservation' (2002) 15 *Society and Natural Resources* 17, 25.

116 Ibid.

117 *HN-71* (n 13) paras 30–2, 113.

118 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 14 <http://www.nzlii.org/nz/legis/consol_act/tatrcsa2017470/>.

from economic anthropocentrism towards earth-centred perspectives.[119] In reality, societies across the globe are increasingly embracing the rights of nature, a trend evinced by the Secretary-General's report, which discusses numerous state activities in this field.[120] Actions include:

- judicial recognition, or granting, of rights to rivers;[121]
- recognition of the rights of nature included in local constitutions;[122] and
- the enactment of local ordinances and by-laws recognising the rights of nature.[123]

Notwithstanding these developments, the impact of Earth jurisprudence in a practical sense remains to be seen. Sustainable development is still the mainstay of environmental regulation and in a broader sense, it is arguable that there is little point in normative pleas for action, without specific proposals for law and policy reforms. Further evaluation of the linkages among sustainable development, the UND and Earth jurisprudence reveals that states are forging pathways towards reforms that can provide the basis for more specific proposals to amend laws/policy.

V Sustainable Development, the UN Dialogues and Earth Jurisprudence

The discussion thus far has evaluated how the concept of sustainable development failed to challenge underlying growth patterns, leading the UND to recommend the adoption of an alternative paradigm, that of Earth jurisprudence. At least two issues flow from this recommendation: whether it is possible to rehabilitate sustainable development, or whether society should replace it with new ideologies;[124] and whether society is willing to traverse the ideological terrain from sustainable development to Earth jurisprudence.[125]

119 Universal Declaration of the Rights of Mother Earth (World People's Conference on Climate Change and the Rights of Mother Earth, 22 April 2010) arts 1(2), 1(3) and 1(4), <http://therightsofnature.org/wp-content/uploads/FINAL-UNIVERSAL-DECLARATION-OF-THE-RIGHTS-OF-MOTHER-EARTH-APRIL-22-2010.pdf>.

120 *HN-72* (n 14) paras 27–39, implementation of Earth-centred law, paras 40–54, policy development of Earth-centred law; further discussion, David R Boyd, 'Recognizing the Rights of Nature: Lofty Rhetoric or Legal Revolution' (2018) 32(4) *Natural Resources and Environment* 13, 13–16.

121 *HN-72* (n 14) paras 27–31 recognition by the Constitutional Court of Colombia that the Atrato River had rights; para 32, granting of legal personhood to the Ganga and Yamuna Rivers by the High Court of Uttarakhand, India.

122 *HN-72* (n 14) para 32 referring to the constitution of Mexico City.

123 *HN-72* (n 14) para 39 referring to municipalities in the United States; para 46 referring to the United Kingdom.

124 Mumta Ito, 'Nature's Rights: Why the European Union Needs a Paradigm Shift in Law to Achieve its 2050 Vision' in Chris Maser and Cameron La Follette (eds) *Sustainability and the Rights of Nature in Practice* (Taylor and Francis, 2020) 311, 325.

125 Mike Bell has discussed issues in navigating from human jurisprudence to Earth jurisprudence, Mike Bell,

Turning to the first issue, it is significant that the UN has placed its dialogues within the sustainable development agenda, suggesting that sustainable development can be rehabilitated. This appears to be the trajectory in mind when in 2015, the General Assembly adopted the Sustainable Development Goals ('SDG').[126] It appears that Earth jurisprudence can be used to rehabilitate sustainable development because the Earth itself forms the foundation of the goals, thus making it possible to integrate the rights of nature with economic and societal objectives.[127] This would require policy shifts beyond the four corners of the SDG, particularly in the area of economic reform.

By 2015, five UND had been held that critiqued human impacts on the earth and highlighting the links between environmental degradation and unrestrained economic growth. The 17 goals and 169 targets outlined in the SDG do not come to grips with these issues in a meaningful way. There are no references to the intrinsic or inherent value of nature or to Earth jurisprudence. Consequently, sustainable development is still seen as human-centred,[128] although in a nod to the UND, it is recognised on an international level that:

> there are different approaches, visions, models and tools available to each country … to achieve sustainable development; and we reaffirm that planet Earth and its ecosystems are our common home and that 'Mother Earth' is a common expression in a number of countries and regions.[129]

Elsewhere, the notion of living in harmony with nature is partially reflected in the preamble to the resolution and also in target 12.8 of the goals that aim at ensuring 'people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature'.[130]

The challenges presented by economic issues, have not been addressed. While the resolution is littered with references to sustainable economic growth,[131] paragraph 18 more or less repeats Principle 2 of the Rio Declaration, confirming that every state has sovereignty over its natural resources and economic activity. As already discussed, this approach is not conducive to establishing a global concept of sustainable development. Goal 8 envisages that states will achieve higher levels of economic productivity through diversification, while simultaneously improving global resource

'Thomas Berry and an Earth Jurisprudence an Exploratory Essay' (2003) 19(1) *The Trumpeter* 69, 75–6.

126 *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, Agenda Items 15 and 116, UN Doc A/RES/70/1 (21 October 2015, adopted 25 September 2015) ('*Sustainable Development Goals*').

127 Ito (n 124) 325.

128 *Sustainable Development Goals* (n 126) paras 8, 10, 14, 15, 19, 20, 34, 50.

129 *Sustainable Development Goals* (n 126) para 59.

130 *Sustainable Development Goals* (n 126) Preamble under 'Prosperity', para 9.

131 *Sustainable Development Goals* (n 126) paras 8, 9, 13, 27.

efficiency in consumption and also separating economic growth from environmental degradation.[132] Conceivably, these objectives may not be consistent with each other, leaving in abeyance fundamental reforms comprehended by Earth jurisprudence.[133]

To be precise, unchecked economic growth, with its basis in neoclassical economics and its focus on 'outputs and income distributions … through supply and demand', presents significant challenges for achieving sustainable development.[134] From the discipline of economics, suggestions for reform include standpoints based on the steady-state economy and/or ecological economics. Each aims at achieving sustainability, although by a slightly different mechanism. A steady-state economy eschews continuous growth, replacing it with a 'dynamic market economy that efficiently allocates goods and services but uses the lowest feasible rates of natural capital depletion to achieve a high quality of life';[135] while ecological economics concentrates on integrating ecosystems with economic systems, to achieve sustainability.[136] Earth jurisprudence requires that ecological frames of reference provide boundaries for economic systems so that society regards 'nature as their home instead of an endless source of capital'.[137] These types of considerations seriously question whether the economic imperatives of sustainable development are compatible with eco-centric approaches and whether sustainable development can be rehabilitated.

In the context of protecting biodiversity, outcomes within the CBD reinforce these difficulties. The Conference of the Parties to the CBD ('COP') has followed the UND with interest, acknowledging in 2016 that living in harmony with nature proffers strong critiques of anthropocentrism and its role in sustainable development.[138] Moreover, the COP also admit that greater emphasis needs to be placed on the intrinsic value of nature and the interdependent relationship of humans to the Earth.[139] Although in 2010 – before the initiation of the UND – the COP had adopted the Aichi Targets, which promote living in harmony with nature, however, the targets

132 *Sustainable Development Goals* (n 126) para 8.4.

133 Ito (n 124) 326.

134 Haydn Washington and Michelle Maloney, 'The Need for Ecological Ethics in a new Ecological Economics' (2020) 169 *Ecological Economics* 1, 1.

135 James Magnus-Johnston, 'What Is the Steady State Economy?' in Haydn Washington (ed) *Positive Steps towards a Steady State Economy* (Casse, 2017) 31, 33.

136 Robert Costanza, 'Ecological Economics: A Research Agenda' (1991) 2(2) *Structural Change and Economic Dynamics* 335, 355.

137 *HN-73* (n 14) Summary, paras 8, 16; Washington and Maloney (n 134) 2, 4.

138 *Interactive Dialogue, 'Living in Harmony with Nature' – Note by the Executive Secretary*, Item 2 of the Provisional Agenda, UNEP/CBD/COP/13/9 (13th mtg, Cancun, Mexico, 4–17 December, 2016) paras 18–20 <https://www.cbd.int/doc/meetings/cop/cop-13/official/cop-13-09-en.pdf>.

139 Ibid para 19.

do not appear tto have led to a fundamental change.[140] These matters are exacerbated by concerns as to how the needs of future generations are taken into account. Decision-makers who identify and evaluate economic, environmental and social interests determine what is just and equitable, not only for the present but also for generations to come.[141] In some cases, such as agriculture and energy production, development creates long-tail risks and problems whose impacts may not be fully felt for decades.[142] This situation largely stems from mechanisms that evaluate developments on a project-by-project basis and that concentrate on benefits to humans, without adequately taking cumulative impacts and ecosystem detriments into account.[143] Consequently, the process undermines notions of intergenerational equity by not adequately considering long-term impacts, providing another reason for reconceptualising what is understood by sustainable development.

In contrast, Earth jurisprudence starts from the premise that humans are guardians of the Earth rather than it master, thus a compelling change to how society visualises its relationship to the environment.[144] In the 1990s, Brown Weiss reached a similar conclusion, noting that intergenerational equity necessarily entails obligations to the planet, so that current generations should leave the Earth 'in no worse condition' than they received it.[145] Earth jurisprudence strengthens this stance by crystallising legal obligations formulated for the good of the planet, rather than the advancement of economic systems.

Nevertheless, while arguments can be made that Earth jurisprudence can address the shortcomings of sustainable development, whether it is adopted and implemented depends on society's willingness to traverse the ideological terrain from sustainable development to Earth jurisprudence. Critiques of eco-centric approaches suggest that some parts of society will find this difficult, as demonstrated by the fact that criticism of deep ecology is now mirrored by criticism of Earth jurisprudence.[146] One barbed assessment of rights for nature, states that the concept panders to

> deep ecologists, global warming alarmists, and other assorted green radicals [who] want to accord legally enforceable 'rights' to 'nature', thereby subverting human exceptionalism by demoting us, in effect, to just another species in the forest.[147]

Such an appraisal does not engage with the failings of sustainable development and the need for fundamental reform. Others, who would favour the evolution of rights for nature, nevertheless urge caution, because there is little point to appeals for improvement, without specific proposals for law and policy reforms. Taking a pragmatic approach, these commentators identify the need for governments to appoint strong regulators, with access to sufficient resources to enable them to enforce the law.[148] In the face of these challenges, society's push towards the rights of nature has not been dampened.[149] Although momentum may be building up slowly and in a piece-meal manner, state practice nevertheless demonstrates a willingness to engage with Earth jurisprudence and the rights of nature.

VI Conclusion

This article has argued that sustainable development has not successfully established an eco-centric basis for humanity's relationship to the Earth. This flaw is partly explained by the way sustainable development evolved and partly understood by the fact that from the outset the concept was infused with economic anthropocentrism.[150] The focus pre-Brundtland settled on humanity's relationship with the environment in terms of economic development, economic growth and income levels.[151] Meanwhile, post-Brundtland, society came to accept a framework of exploitation limited by equity in the allocation of resources for current generations.[152] While humanity has made great strides in understanding nature, institutional mechanisms have not used these advances to achieve environmental sustainability, but rather to exploit nature more efficiently.[153] Accordingly, it is questionable whether the very mechanisms that led to environmental failings can transform society's relationship to the Earth; this

147 Ibid 17, quoting Welsley J Smith from the Conservative Discovery Institute.

148 Nick Kivert, 'There's a Growing Push to Give Nature Legal Rights, but What Would that Mean?', *ABC Science* (online, 16 March 2019) <https://www.abc.net.au/news/science/2019-03-16/rights-of-nature-science/10899778> interview with Dr McGrath.

149 Discussion surrounding footnotes 122–5 above.

150 Redclift, 'Sustainable Development (1987–2005): An Oxymoron Comes of Age' (n 63) 224.

151 Seers (n 55).

152 David Freestone, 'The Road from Rio: International Environmental Law After the Earth Summit' (1994) 6(2) *Journal of Environmental Law* 193, 209.

153 Michael M Crow, 'None Dare Call it Hubris: the Limits of Knowledge' (2007) 23(2) *Issues in Science and Technology* 29.

has resulted in the UND recommending principles of Earth jurisprudence.[154] States have taken up the call, engaging with the concept, and also with its key foundation, the rights of nature. As Boyd indicates:

> to move from exploiting nature to respecting nature will require a massive transformation of law, education, economics, philosophy, religion, and culture. Rights for nature impose responsibilities on humans to [phase out or revise behaviour that] … threaten[s] the survival of species, or undermine[s] the ecological systems upon which all life depends.[155]

The extent to which states take up these appeals and adopt Earth jurisprudence remains to be seen, as does the extent to which Earth jurisprudence principles can transform the anthropocentric and economic cornerstones that characterise sustainable development. Nevertheless, the rights of nature have been described as a spearhead concept. Given that states are adopting it, confronts society's anthropocentric constructs, providing a new platform for a new relationship with the Earth.[156]

154 Biermann et al (n 23) 279; Murray (n 23) 220.
155 Boyd (n 120) 17.
156 Kivert (n 148) interview with Michelle Maloney.

LIMITATIONS OF CODE IN CONTRACTS: WHAT WE CAN LEARN FROM THE PLAIN ENGLISH MOVEMENT

William Brown*

Smart contracts have been identified as a potential replacement for traditional written contracts, offering objective and predictable code as a substitute for complicated and impenetrable prose. The inherent complexity in contractual relationships, however, requires agreements to account for a range of often unpredictable circumstances. This complexity also prevented the widespread simplification of legal documents in the wake of the Plain English Movement.

I Introduction

In 1997, computer scientist Nick Szabo claimed that code-based protocols could be used to write computer software that resembled contractual clauses.[1] Szabo claimed these *smart contracts* would, 'give us new ways to formalise and secure digital relationships which are far more functional than their inanimate paper-based ancestors'.[2] Theoretically, smart contracts offer an alternative to traditional contracts which rely on objective and predictable code rather than subjective human decision making.[3] This article argues that the implementation of code-based smart contracts is limited and that there will not be a seismic shift in the way legal documents are drafted. This is because the viability of smart contracts will rely on the capacity for natural language clauses to be transposed into obligations in code. It is contended that the complete replacement of natural language obligations by code-based obligations is not possible due to the inherent complexities of contract law, the contracting environment, and the nature of the logic underpinning code. To demonstrate this, this article analogises the case of code with the case of the Plain English Movement ('PEM'), which attempts to simplify contracts through the incorporation of simple linguistic features and more readily understandable language.

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1 Nick Szabo, 'Formalizing and Securing Relationships on Public Networks' (1997) 2(9) *First Monday* <https://firstmonday.org/ojs/index.php/fm/article/view/548/469>.

2 Ibid.

3 Eliza Mik, 'Smart Contracts: a Requiem' (2019) 36 *Journal of Contract Law* 70, 71.

For context, this article defines smart contracts in terms of their contemporary use, including an introductory explanation of common programming language and the benefits of its use. It is argued that the aims of both the PEM and smart contracts proponents are conceptually the same but that is it only the approaches which differ. As such, it is argued that smart contracts represent the next movement along the same continuum as the PEM. After establishing their conceptual similarities, the criticisms and limits of the PEM are applied to smart contracts, in order to demonstrate that as long as there are complex and multifaceted agreements made between two parties, the continued simplification of contracts will not be possible.

The ultimate conclusion of this analysis is that smart contracts can be incorporated as a way of improving contractual relationships in the same way that the changes proposed by the PEM have been implemented. It is likely that smart contracts will be integrated into the contracting framework alongside text as hybrid agreements, capitalising on the benefits of natural language and code.

II Framework for Analysis

The basic framework underlying this article relies on an examination of the academic critique of the PEM and its relevance to the context of code-based contracts. To establish this framework it is necessary to outline the PEM, criticisms of it and how these criticisms are useful in assessing the place of smart contracts in contemporary legal practice.

A *The Plain English Movement*

The PEM promotes the use of simple, concise English as the preferred method for legal writing. The seductive idea of allowing the law to speak 'directly to its subjects' represents the last definitive evolution in contractual drafting.[4] The philosophical origins of the PEM can be traced to the criticisms raised by luminaries such as Marx and Bentham, both of whom concur that the law is deliberately complicated in order to mystify its content.[5] At its core, the objective of the movement is to ensure that legislation and legal documents are concise and widely accessible. This, it is contended by PEM proponents, leads to the demystification of the law and a greater sense of engagement.[6] As Arthur Symonds observed, drafters of statutes and legal documents

4 Edwin Tanner, 'The Comprehensibility of Legal Language: Is Plain English the Solution?' (2000) 9 *Griffith Law Review* 52.

5 HLA Hart, *Essays on Bentham: Study in Jurisprudence and Political Theory* (Oxford, 1982) 21.

6 Rabeea Assy, 'Can the Law Speak Directly to its Subjects? The Limitation of Plain Language' (2011) 38(3) *Journal of Law and Society* 376, 378.

'seldom succeed in giving to the people a law intelligible either to themselves or the persons for whose special guidance the law was designed'.[7] Beginning with demands to improve the intelligibility of government document and legislation, advocates eventually lobbied for commercial agreements to be drafted in more accessible language.[8]

In Australia, for example, the *Legal Profession Uniform Law* requires conditional costs agreements 'to be in writing and in plain language'.[9] The *National Consumer Credit Regulations* also require that information relating to fees and charges 'must be set out in a way that is easy for the consumer to understand without being required to do any working out or to look elsewhere for additional information'.[10] Perhaps the most concerted effort to legal language is the four-yearly reviews of modern awards undertaken by the Fair Work Commission in order to ensure the modern award system is simple, easy to understand, stable and sustainable.[11] The Full Bench of the Commission explained that its draft guidelines were developed by an external plain language expert in order to 'remove ambiguity, promote certainty and make awards simpler and easier to understand'.[12]

These examples reflect the trend to avoid archaic language, simplify grammatical structures, shorten sentences and adopt a more organised form.[13] Ultimately, these changes are pursued to ensure that material can be discerned by non-lawyers and to minimise the risk of future disputation by providing clarity about the rights and responsibilities of those whose conduct is governed by legal documents.[14] Justice Michael Kirby, writing extracurially, noted that the incorporation of plain language, including the features outlined above, serve to improve the clarity of legal documents.[15] Justice Kirby argued that what is at stake 'is not just the theoretical goal of improving the understanding of law' but rather, 'the noble objective of making the law speak with a clearer voice to the people who are bound by the law'.[16]

7 Peter Butt and Richard Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge University Press, 2001) 59.

8 Ibid 91.

9 *Legal Profession Uniform Law 2014* (NSW) s 181.

10 *National Consumer Credit Protection Regulations 2010* (Cth) s 28E(5).

11 *Four-Yearly Review of Modern Awards -Pharmacy Industry Award 2010* [2017] FWCFB 344, [20].

12 Ibid [20].

13 Joseph Kimble, 'Plain English: A Charter for Clear Writing' (1992) 9 *Thomas M. Cooley Law Review* 1, 8.

14 *Four-Yearly Review of Modern Awards -Pharmacy Industry Award 2010* [2017] FWCFB 344, [20].

15 Justice Michael Kirby, 'Ten Commandments for Plain Language in Law' (2010) 33 *Australian Bar Review* 10, 10.

16 Ibid.

Noble as the objective may be, contract law is a complex and vastly documented subject. As Richard Wincor aptly quipped 'only a lawyer can deal with it on a serious level, and only a monk can know all of the published literature that expounds it'.[17]

B *Limitations of Plain Language*

While the motivations of the PEM are commendable, complex commercial agreements continue to exist for several reasons. These reasons suggest that there is a need for brevity in the drafting agreements which is overlooked by proponents of the PEM. If agreements are to effectively organise social and economic activities in a meaningful way, clarity will inevitably be compromised. As Nazareth notes 'to enter into a contract, to transfer ownership of property, and the like, legal texts have to be detailed and lengthy'.[18] This is because the context of contractual obligations is essential to understanding their effect, as it is the context and the interplay between obligations themselves which give agreements, and laws more generally, their meaning.[19] As such, the more complex the legal relationship between parties, the more intricate the structure of an agreement is likely to be. The more complex the structure, the more complex the balancing exercise becomes with respect to the relevant principles and rules.

Refraining from the use of archaic phrasing and convoluted clause structuring has not reduced the need for legal services, lawyers, or the complex agreements they continue to draft. This is because the intersection and relationship between certain rules require considerable familiarity. The volume and complexity wrapped up in the subject matter means that any attempt to represent legal obligations on paper is fraught with complications. For a person to develop a legal agreement relevant to their particular circumstances, an individual needs to understand the role of precedent and analogise with previous borderline cases. These issues are so prevalent that they cannot be bypassed by the act of breaking down the law into short, elegant clauses which are free of technical terms and presented in a user-friendly way.[20]

This issue is demonstrated in an empirical study by Tanner,[21] who compared the intelligibility of a bank guarantee, described by Higgins J as 'incomprehensible legal

17 Richard Wincor, *Contracts in Plain English* (McGraw-Hill, 1976) 1.

18 CBE Nazareth, 'Legislative Drafting: Could our Statutes be Simpler' (1987) 8 *Statute Law Review* 81, 89.

19 Timothy Endicott, 'Law and Language' (2002) in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 946–8.

20 James Penner, 'Legal Reasoning' in J Penner, D Schiff and R Nobles (eds), *Introduction to Jurisprudence and Legal Theory* (Butterworths, 2002) 649.

21 Edwin Tanner, 'The Comprehensibility of Legal Language: Is Plain English the Solution?' (2000) 9 *Griffith Law Review* 52, 52–3.

gobbledygook',[22] with two plain English versions of the guarantee. One passage was prepared by the bank itself and one was prepared by a researcher. The participants in the study were law students, whose comprehension of the materials was tested with multiple-choice questions with simple answers based on the order of information in the extract.[23] The respective rates of comprehension were:

- 52.6% – original text;
- 62.4% – redraft by the bank; and
- 68.6% – redraft by the researcher.

While there was an improvement of 16%, one-third of the text was indecipherable by individuals with some legal training.[24] This experiment demonstrates that the simplified expression of complex ideas does not simplify the concepts themselves.

C *Limits of Precision*

Analysis of the simplification of legal drafting leads to a divergence between two types of clarity: linguistic clarity and legal clarity. While the two concepts are not mutually exclusive, the need for legal clarity will always prevail in contracting. This is because the sorts of situations that require contracts will be sufficiently complex that the contract itself must anticipate a wide variety of behaviour and contingencies.

HLA Hart notes that the scope of contractual rules is dynamic as 'they evolve by being adapted, adjusted, restricted, qualified or otherwise'.[25] Hart's point illustrates the nature of legal documents is less about the nature and structure of words and more about the organisation of ideas and rules. This is a task which requires brevity and which is beyond the 'limit … inherent in the nature of language, to the guidance which general language can provide'.[26]

In the context of the Hart-Fuller debate, it was observed by Schauer that words themselves may never have a clear meaning and cannot be relied upon in and of themselves.[27] This line of scholarship and empirical evidence suggests that there is a limit to the simplification of contracts. While the tension between linguistic and legal clarity indicates that contracts cannot be simplified at the expense of brevity, there is

22 *Houlahan and Houlahan v Australian and New Zealand Banking Group Limite*d [1992] ACTSC 103, [27] (Higgins J).
23 Tanner (n 21) 59.
24 Ibid.
25 HLA Hart, *The Concept of Law* (Oxford, 1994) 128.
26 Ibid 126.
27 Frederick Schauer, *Thinking Like a Lawyer* (Harvard University Press, 2009) 151–8.

merit in the pursuit of simplification where practicable. A simpler and accessible law language may ensure that lawyers can provide a more effective service and some information asymmetries between parties can be remedied.

D *Modern Movement to Simplify: Smart Contracts*

The similarity between the PEM and the modern movement to incorporate smart contracts into common use is that they are both in pursuit of the same goal. That is, to simplify legal documents, particularly contracts, which have been described as a 'flood of darkness and confusion'.[28] As discussed below, smart contracts are designed to simplify the execution and enforcement of legal agreements through the use of programming language. At its crux, the transposing of legal agreements into code represents the next development in the pursuit of simplification. The difference is that the simplification of linguistic features is being superseded by the use of code. This article argues that both the PEM and smart contract movements are befallen to the same issues of complexity. Moreover, it is contended that the implementation of smart contracts will serve only to improve on traditional contracts rather than facilitate a radical change in contracting. In the same way that the use of plain English has improved how complexity is managed in contracting, smart contract functionality will operate as an efficiency tool in the form of hybrid agreements.

III Introduction to Smart Contracts

The first definition for a code-based smart contract was provided by Nick Szabo, a computer scientist credited with pioneering much of the early research on digital currencies. Specifically, Szabo described a smart contract as a 'set of promises specified in digital form, including protocols which the parties perform on those promises'.[29] Following increased interest in the application of smart contracts, particularly during the rise of crypto-currencies, this definition has been revised. Smart contracts are now considered to be computer code that 'automatically executes all or parts of an agreement and is stored on a blockchain-based platform'.[30] The agreement governing the relationship between Party A and Party B may be the

28 *DeLancy v Insurance Co*, 52 NH 581 (Doe J) (1873).

29 Nick Szabo, *Smart Contracts: Building Blocks for Digital Markets* (1996) <http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html>.

30 Stuart D Levi and Alex B Lipton, 'An Introduction to Smart Contracts and Their Potential and Inherent Limitations', *Harvard Law School Forum on Corporate Governance and Financial Regulation* (Web Page, 26 May 2018) <https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitations/>.

only representation of the contractual relationship, or it may exist in addition to a traditional, text-based contract to execute certain provisions such as payment. The point of difference between smart contracts and traditional agreements is that smart contracts are capable of enforcing obligations autonomously with code. This process involves the memorialisation of obligations in a formal programming language, such as Ethereum's Solidity.[31] If the parties meet the parameters of the agreement, the code will execute the relevant step triggered by the parameters. For example, an insurance company, AXA, implemented a parametric insurance product called *fizzy* which was designed to compensate customers for delayed flights.[32] The insurance premium was determined by analysing historical flight and frequently updated flight data to calculate the risk of delay.[33] Policyholders whose flights were cancelled or landed with at least a two-hour delay were compensated automatically without the need to file a claim or submit paperwork of any kind.[34]

As AXA demonstrated, smart contracts have the potential to leverage efficiency, impartiality and security of contractual agreements, ultimately leading to reduced costs and increased trust between parties.[35] To gain a greater understanding of how these potential benefits can be leveraged, companies have piloted a variety of other commercial arrangements underpinned by smart contracts. For example, Commonwealth Bank of Australia partnered with Wells Fargo and Brighann Cotton to undertake 'the first global trade transaction between two independent banks'.[36] The open account transaction involved a shipment of cotton from Texas in the United States to Qingdao in China, where the agreement mirrored a letter of credit executed through a private distributed ledger.[37] The distributed ledger hosted a collaborative workflow between Brighann Cotton (US-based seller) and Brighann Cotton Marketing (Australian-based buyer) alongside their respective banks. By relying on geographical triggers, payments were released in accordance with the location of the goods in transit. This mechanism provided greater protection from

31 Ferreira et al, 'Blockchain: A Tale of Two Applications' (2018) 8(9) *Applied Sciences* 16; Vitalik Buterin, 'Ethereum White Paper: A Next Generation Smart Contract and Decentralized Application Platform' (2015).

32 AXA, *AXA Goes Blockchain with Fizzy* (Web Page, 13 September 2017) <https://www.axa.com/en/magazine/axa-goes-blockchain-with-fizzy>.

33 Andre Clemente, 'fizzy by AXA: Ethereum Smart Contract in details', *Medium* (Web Page, May 2019) <https://medium.com/@humanGamepad/fizzy-by-axa-ethereum-smart-contract-in-details-40e140a9c1c0>.

34 Ibid.

35 Florian Idelberger et al, 'Evaluation of Logic-Based Smart Contracts for Blockchain Systems' in Jose Julio Alferes et al (eds) *Rule Technologies: Research, Tools, and Applicatons* (Springer, 2016).

36 Commonwealth Bank of Australia, 'Commonwealth Bank, Wells Fargo, and Brighann Cotton Pioneer Landmark Blockchain Transaction' (Media Release, 24 October 2016) <https://www.commbank.com.au/guidance/newsroom/CBA-Wells-Fargo-blockchain-experiment-201610.html>.

37 Ibid.

premature payment or withholding of payment. Ultimately, this mechanism provided greater certainty of payment to both parties whilst minimising the need to enforce payment after the fact. It could be argued that the combination of these benefits creates an environment where this is no need for intermediaries such as lawyers, courts, and banks. While smart contracts may be elegant, clear and simple it does not mean that they are a legally or commercially viable alternative to traditional natural language contracts.

IV Code and Complexity

The process of simplifying complex processes into code was first devised by George Boole and the processes he developed in the 19th century underpin the basics of most modern computers and computer programming.[38] Smart contracts themselves are usually programmed in a procedural language, which is interpreted based on Boolean logic that reduces all values to either *true* or *false.*[39] When programming in a procedural language, the programmer writes an explicit sequence of steps, wherein the programming must outline what is to be done and how to achieve it.[40] In its most basic form, this proposition would state, if *x* occurs, then execute step *y.* This basic, binary logic most frequently facilitates the movement of cryptocurrency from one account to another upon completion of some form of obligation, such as payment. As with other forms of software, this form of program allows for clarity, modularity and precision.[41] This logic has long been recognised as a means of decreasing ambiguity by turning mere promises into technical rules.[42]

The promotion of technical language can be seen as a useful foil for drafting errors and inconsistent language in complex and lengthy agreements, of which many are drafted under time pressure. To those who perceive smart contracts as the cure to poor drafting, it is always possible to draft complete and unambiguous agreements and a failure to do so embodies the failings or incompetency of the lawyer responsible.[43] Ambiguity, however, is a feature which is essential in the context of contracting to allow for the interpretation of contractual terms flexibly. This means

38 Alexander Savelyev, 'Smart Contracts as the Beginning of the End of Classic Contract law' (2017) 26(2) *Information and Communications Technology Law* 116, 125.

39 Ibid.

40 Mik, 'Smart Contracts: a Requiem' (n 3) 71.

41 Primavera De Filippi and Aaron Wright, *Blockchain and the Law: The Rule of Code* (Harvard University Press, 2018) 81.

42 P Carl Mullan, *The Digital Currency Challenge: Shaping Online Payment Systems through US Financial Regulations* (Palgrave Macmillan, 2014) 84–92.

43 Eliza Mik, 'Smart Contracts: Terminology, Technical Limitations and Real World Complexity' (2017) 9(2) *Law, Innovation and Technology* 269, 288.

that transposing contracts into code is made difficult by the fact that agreements have been written in natural language that has evolved to reflect and regulate the complexity of human behaviour. As such, obligations and contractual terms cannot easily be transposed into the binary, technical language of code.[44] Well-constructed legal agreements are designed, like pieces of legislation, to account for a variety of contingencies which cannot always be seen at the time of drafting. By drafting contractual obligations in a broad and open-ended manner, they can be applied in a variety of contexts without requiring additional amendment or supplementary agreements.[45] Natural language provides greater uncertainty, which, although it can be characterised as a shortcoming, provides a level of flexibility which allows agreements to be interpreted on a case-by-case basis. This allows judges or arbitrators room to reinterpret the law if it appears that on the facts of a case, the agreement's blind application would violate the agreement's initial intent.

Substituting such natural language clauses into code could permit distortions of their meaning and make them less adaptable to unforeseen circumstances. Because smart contracts rely wholly on this sort of programming language, they cannot be drafted in a way which facilitates open-ended legal interpretation. As the above example demonstrates, this is because the code can only be applied to a set of objectively verifiable rules, defined in code.[46] This premise limits the application of code before the emergence of more advanced programming and artificial intelligence capabilities that can adapt to unforeseen situations.[47] Further, the inability to account for every contingency in addition to the formal and binary language allows people to game the system, as explored in the decentralised autonomous organisation ('DAO') case study below. This is because the language used is one-dimensional and can be bypassed if the code is not precise enough or is too broad. By simply looking at the simple *if-then* proposition memorialised in code, it would be possible to work out exactly what to do to trigger or not to trigger the defined terms of the agreement.

A *Case Study: The DAO Attack*

The collapse of the crowd-funding platform, the DAO, provides a useful illustration of the issues set out above. The DAO was a contract implementing a crowdfunding platform which initially raised USD 150 million before it was attacked on during

44 Alan Watson, *Sources of Law, Legal Change, and Ambiguity* (University of Pennsylvania Press, 1998).

45 Ronald Dworkin, 'Law as Interpretation' (1982) 9(1) *Critical Inquiry* 179.

46 De Filipi and Wright (n 42) 200.

47 Jay Kesan and Rajiv Shah, 'Setting Software Defaults: Perspectives from Law, Computer Science and Behavioral Economics' (2006) 82 *Notre Dame Law Review* 583, 590.

mid-June 2016.[48] The hacker managed to control USD 60 million until the blockchain was able to nullify the transactions in question.[49] By exploiting a fallback in the coding, the hacker was able to request the smart contract to give the ether back multiple times before the smart contract could update its balance. By exploiting this recursive call, the hacker was merely executing the existing code.[50] In the wake of the attack, two main issues were identified that enabled the money to be redirected. First, the coders did not anticipate the possibility of a recursive call. Second, the coders did not account for the need to update the internal token balance to coincide with the immediate transfer of the funds.[51] By opting to encode the contractual rules into code, the DAO was unable to reflect the actual intentions of the contracting parties.[52] In the wake of the attack itself, there was disagreement within the Ethereum community between those wishing to intervene and reverse the transaction, and those who wanted to abide by the strict formulation of the code itself and refrain from intervening.[53]

Put simply, this was a standoff between those who wanted the intention of the code to prevail over wording of the code, reflecting the common contractual dispute between strict and broad interpretations.[54] Despite the evident failings of code in this situation, many who formed the view that an intervention should not be pursued on the basis that it would set a dangerous precedent.[55] The Ethereum Foundation suggested that intervention would erode the very social contract they had set up with its network of independent nodes.

If one was to project these facts onto a traditional contractual framework, a judge would be able to use the flexibility and brevity built into the contract to ensure that a blind application of the rules would not yield a result contrary to the parties' intentions. While the DAO example demonstrates the need for brevity with respect to

48 Giulio Prisco, 'The Dao Raises More Than $117 Million in World's Largest Crowdfunding to Date,' *Bitcoin Magazine* (online at 16 May 2016) <https://bitcoinmagazine.com/articles/the-dao-raises-more-than-million-in-world-s-largest-crowdfunding-to-date-1463422191/>.

49 Gaye Middleton, 'The Weakest Link on the Blockchain — Smart Contracts and the DAO Attack' (2016) 19(8) *Internet Law Bulletin* 402, 402.

50 Richard Price, 'Digital Currency Ethereum Is Cratering Because of a $50 Million Hack,' *Business Insider* (online at 16 June 2016) <www.businessinsider.com/dao -hacked-ethereum-crashing-in -value-tens-of-millions-allegedly -stolen-2016-6>.

51 Samuel Falkon, 'The Story of Dao - Its History and Consequences', *Medium* (Web Page, 24 December 2017) <https://medium.com/swlh/the-story-of-the-dao-its-history-and-consequences-71e6a8a551ee>.

52 Primavera De Filippi, 'A $50M Hack Tests the Values of Communities Run by Code', *Vice Motherboard* (Web Page, 11 July 2016) <https://www.vice.com/en_us/article/qkjz4x/thedao>.

53 Ibid.

54 Ibid.

55 David Siegel, 'Understanding the DAO Attack', *Coindesk* (Web Page, 27 June 2016) <https://www.coindesk.com/understanding-dao-hack-journalists>.

intention, which cannot be replicated in code, there are two further key features of contracts which cannot easily be replicated in code – the concept of good faith as well as representations and warranties.

B *Good Faith*

Good faith is a principle of interpretation that embodies a multitude of standards[56] and is expressed with greater or lesser specificity in reference to a particular contextual focus.[57] While the actual standard of good faith may differ depending on the context there will always be a common thread. That is, that there will be a minimal standard of reasonableness. This is not an objective rule, rather it is one of fairness, established by reference to the broader community interest in fair treatment.[58] Given the inherent complexity of good faith, it can be difficult to define what constitutes appropriate performance. For instance, while a party may agree to use their best effort to fulfil their obligations, the most effective way of doing so is not clear at the outset. To account for this uncertainty, traditional contracts are drafted in such a way which that they are open-ended and ambiguous. This is the sort of vagueness which has attracted the ire of both PEM and smart contract proponents, however, it is necessary and even efficient in the context of contracting.[59]

C *Representations and Warranties*

In addition to good faith, standard legal agreements also include representations and warranties which cannot be programmed by reference solely to data stored or managed on a blockchain-based network. In the case of warranties, complexity is an issue insofar as the test for determining what is a warranty and not a condition of the agreement is defined in relation to the 'general nature of the contract'.[60] This line drawing problem is inherently complex and the impact on the interpretation of the contract is considerable, because the determination of what constitutes a condition

> goes to the heart of the matter, so that a failure to perform it would render the performance of the rest of the contract a thing different in substance from what [is] stipulated for'.[61]

56 Anthony Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66, 69.

57 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

58 Suzanne Corcoran, 'Good Faith as a Principle of Interpretation: What Is the Positive Content of Good Faith?'(2012) 36 *Australian Bar Review* 1, 8.

59 See generally George Triantis, 'The Efficiency of Vague Contract Terms: A Response to the Schwartz-Scott Theory of U.C.C Article 2' (2002) 62 *Louisiana Law Review* 1065.

60 *Tramways Advertising Pty Ltd v Luna Park (NSW)* (1938) 38 SR (NSW) 632, 641–2 (Jordan CJ).

61 *Bettini v Gye* (1876) 1 QBD 183, 188 (Blackburn J).

Further, contracting parties will also assign ownership interests, confidentiality, and compliance with particular laws. These open-ended obligations are neither highly formulaic nor sufficiently binary to be replicated in code for the foreseeable future.

D *Limits Imposed by Complexity*

In commercial practice, these issues were neatly illustrated in the implementation of Hogan Lovells' earthquake insurance smart contract.[62] The proof of concept included a digital term sheet to govern the relevant pay-outs and was modelled as an Ethereum-based smart contract. Following initial trials, the firm identified key differences between the code agreement and a comparable traditional agreement.[63] One of the problems identified by the firm in its vulnerabilities memo was that the smart contract was unable to account for aftershocks. This led the firm to observe that 'programmers think in terms of bits and bytes, while the contracting parties have been doing these types of agreements for years', and to bridge the gap between traditional and smart contracts, lawyers' involvement will be essential.[64]

This example, along with the analysis outlined above, illustrates the ongoing need for standard legal agreements to account for a range of unknown factors at the inception of the agreement. Traditional legal agreements continue to be the primary form of contracting because their brevity ensures that contractual relationships are clearly defined and that unforeseen circumstances can be catered for. Because of the complexity of the contractual landscape the notion that complex commercial agreements can be obviated by simplified linguistic features or code is unrealistic. What can be said, however, is that both plain English drafting and code can be used to ensure that the primary agreement can function more effectively.

V Hybrid Agreements

In light of the limitations imposed by complexity, it is possible to predict how smart contracts will alter the landscape of commercial agreements. In this context, the PEM provides a useful precedent for how the contracting process can be improved. Ultimately, despite its limitations, the PEM has led to contracts being drafted in such a way that the inherent complexities, such as unforeseen circumstances, can be

62 Steven Norton 'Law Firm Hogan Lovells Learns to Grapple with Blockchain Contracts', *Wall Street Journal* (Blog Post, 1 February 2017) <https://blogs.wsj.com/cio/2017/02/01/law-firm-hogan-lovells-learns-to-grapple-with-blockchain-contracts>.

63 Ibid.

64 Ibid.

effectively managed by while ensuring the language is clearly expressed and can be understood by a non-legal audience. The most likely way in which smart contracts will also improve commercial drafting is in the form of hybrid or split agreements. There is no firm definition of such an agreement, although it is the subject of considerable embryonic research.[65] This research suggests that there are two divergent pathways for development. First, a model whereby human decision making will be permitted at certain critical junctures by code. Second, a model based on electronic data interchange ('EDI') agreements, wherein a natural language master agreement exists and is supplemented by the use of code. In this article, they are referred to as code-based and text-based models.

A *Code-Based Model*

This model would consist of the digital portion of the contract supplemented by a pre-programmed safety switch which would allow for humans to intervene where necessary.[66] While the digital and analogue components of the contract would appear to operate side-by-side, the majority of the contract including all key components would be memorialised in code. To rely on human intervention under an analogue process, a predetermined event would need to occur. In the context of the examples outlined above, this could happen in the event of an aftershock or the application of good faith. The difficulty with code-based models is that they are subject to the same issues of complexity as smart contracts. This is because programming for human intervention would require an exclusive definition of a particular event, which as this article has argued, is complex and perhaps unachievable.

B *Text-Based Model*

Text-based models would likely be similar to EDI agreements, whereby parties choose not to rely wholly on code. Instead, parties execute a master agreement which outlines the use of code in the context of the contractual relationship.[67] This approach would allow for the traditional language components of the agreement to account for complexity while simultaneously allowing code to be utilised to quickly and efficiently execute simple and non-complex elements of the contractual relationship.

65 Scott Farrell et al, 'How to Use Humans to Make "Smart Contracts" Truly Smart', *King and Wood Mallesons* (Web Page, 7 July 2016) <www.kwm.com/en/knowledge/ insights/smart-contracts-open-source-model-dna-digital-analogue-human-20160630>.

66 Anurag Bana and Maxine Viertmann, *The Not-So Distant Future: Blockchain and the Legal Profession* (Report, February 2017) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=92F2723C-DF49-41E7-9E76-224CD67331DB>.

67 Robert Wittie and Jane Winn, 'Electronic Records and Signatures under the Federal E-SIGN Legislation and the UETA' (2000) 56 *Business Lawyer* 293, 294.

The issue with hybrid agreements is that the job of determining what elements of the relationship are to be code-based may be complicated and parties may have divergent views.

C *Operational and Non-Operational Clauses*

To effectively identify the elements of a hybrid agreement that can or cannot be replicated in code, it is necessary to understand the distinction between non-operational and operational clauses. Non-operational clauses are those which relate to the wider relationship between legal parties, including clauses that define which law should govern in the event of a dispute, what is meant by in good faith and reasonableness, and that all transactions entered into under a master agreement form a single agreement. Operational clauses are those that relate to a deterministic action following the occurrence of a specified event or at a specified time, for example, clauses requiring an amount to be payable on a payment date equal to the product of a calculation, that one party to the contract pays the other an amount equal to the difference between the settlement price and a forward price, or that a party transfer assets on a particular date.

The key difference between the two types of clauses is that non-operational clauses are not fixed and are therefore less susceptible to being expressed in pure Boolean logic. Conversely, operational clauses can be expressed readily in Boolean logic and can be represented in code more easily. For example, the standard contractual representation that a party is duly organised and registered under a particular jurisdiction is not a statement of conditional logic and therefore could not be transposed into a programming logic based on Boolean logic. Again, this reinforces that the process of simplification of contracts into code or plain English will crash against the bulwark of complexity.

D *Settling on a Model*

The benefit of the hybrid model is that the blend of text and code will allow for contracts to work more efficiently and ensure that simple components of the contract can be executed seamlessly. Complexity remains a key feature in determining which model ought to be incorporated. The interaction between off-blockchain and on-blockchain features of a hybrid model will require a high level of technical execution by both programmers and lawyers. Given that contracting parties will continue to pursue certainty and brevity in their contractual arrangements, it is very likely the text-based model of hybrid agreements will prevail. This conclusion is aided by the fact that a clause relating to the relationship between the master agreement

and other auxiliary agreements is non-operational in nature. This view is consistent with the limited number of applications initially envisaged for smart contracts, such as the trading of financial instruments.[68] It is important to note that the ambitious narrative of the application of smart contracts emerged alongside the explosion of interest in cryptocurrencies and many of the initial assertions are now being scrutinised by technology and legal academics.[69] The view that all contractual provisions can be simplified into an algorithmic and finite form replicable in code represents a misunderstanding of contract law and the purpose of contracts. It must be conceded, however, that developers are right to view certain contractual conditions as simple enough to be reduced to an algorithm replicable in code. For example, provisions operational in nature can be prescribed by simple sequences of actions, such as *deliver [object] to [place] on [date]*.[70] Based on this analysis it would appear that the text-based model is the most effective way of accounting for complexity while harnessing the simplification of operational clauses in code. It follows that if one was to establish a hybrid agreement in code, the inability to broadly define the non-operational relationship between the code and text components would render it ineffective.

VI Conclusion

To predict how smart contracts will redefine the contractual landscape, it is essential to examine the purpose of contracts, their evolution, and the technological limits of code itself. Both the PEM and smart contract movement aim to simplify how commercial agreements are drafted and effectively minimise ambiguity by incorporating strict rules and binary logic. The method for achieving this is conceptually the only distinction. As such, simplified contracts and code-based contracts aim to reduce ambiguity and maximise intelligibility. Proponents of the PEM, who claim contracts can be wholly simplified, and proponents of smart contracts, who claim that they can be replicated entirely in code, both overlook that contracts are not supposed to be simplistic. Brevity and ambiguity are necessary to ensure that contracts can be read in light of a multitude of unforeseen circumstances and in light of the complex jurisprudence which has developed around contracts. Further, while advances in programming will ensue, the logical basis upon which they are built is unlikely to change substantially. This means that smart contracts will always be

68 Mik, 'Smart Contracts: Terminology, Technical Limitations and Real World Complexity' (n 43) 289.

69 Mik, 'Smart Contracts: a Requiem' (n 3) 70.

70 ISDA & Linklaters, *Whitepaper: Smart Contracts and Distributed Ledger – A Legal Perspective* (August 2017).

deterministic, rigid and unable to account for complexity. Despite this conclusion, it is important to acknowledge the benefits of incorporating code in the contractual landscape. Code offers contracting parties an efficient way to simplify the execution of operational clauses which are capable of being simplified following Boolean logic. The same cannot be said for non-operational obligations relating to conceptually broad notions such as 'good faith', 'reasonableness', or in the interplay relating to representations and warranties. These benefits will build on the important results of the PEM, ensuring that the documents which govern the way we interact on a commercial and social level will be improved.

It will be important for legal practitioners and developers to come to grips with this reality and familiarise themselves with the similarities and differences in their respective approaches. If hybrid agreements are to be drafted effectively, programmers will need to understand the limits imposed by complexity and lawyers will need to embrace code's ability to ensure perfect performance and lower transactions costs caused by unnecessary intermediaries.

V U L J

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