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President’s Address

The Melbourne Law Masters Students Association aims to facilitate the dissemination of knowledge regarding developments in law and legal thinking. The publication of Melismata allows students to share their knowledge, ideas and stimulate new legal discussions.

Congratulations to the authors on their successful contribution to Melismata. I am honoured to present four outstanding legal research essays that confront and provoke readers to contemplate legal issues more thoroughly. These papers demonstrate exceptional original analysis and provides readers with the methodology with which they may consider the validity of the legal arguments and the conclusions drawn.

These papers reflect shifts within our society and challenges us to consider law as a forum to facilitate reform and justice. They cover vastly different topics that explore the Charter of Human Rights, A Bill of Rights for Australia, the delicate balancing act of legislating property law over human bodies and the spread of Islamic banking in South East Asia. These are a few of the myriad of issues facing the international legal community and the publication of these papers within Melismata allow us to discuss, prepare for, and face the challenges that lie ahead to ensure that the disjuncture between law, politics and justice can be overcome.

Thank you to those who have been involved with Melismata; special gratitude must be given to our editors. As a student run journal, Melismata has been very fortunate to have Daphne Francesca Tan and Timon Ibrahim as editors. They have dedicated and committed their valuable time and skills to produce an outstanding journal that enriches the educational experience for us all.

Vindya Liyanaarachchi

President

September 2014
Foreword

In this issue we begin with an article of remarkable insight into the importance of the Victorian Charter of Human Rights. Andrew Conley, a Victorian barrister, walks us through the significance of the Charter and the practical difficulties associated with its implementation. He sets out a working framework to improve the effectiveness of the Charter as a means of safeguarding fundamental rights.

Next, Lauren Brand explores Australia’s need for adopting a constitutionally entrenched Bill of Rights. In doing so, she examines the sufficiency of the current protection measures afforded in Australia, before exploring the legal form that should encapsulate such a Bill of Rights.

For those seeking some insight into banking and finance, Nina Araneta-Alana engages with us in an examination of the implementation of Islamic Finance in a range of jurisdictions, especially the United Kingdom and Malaysia, to propose a framework for the establishment of Islamic Finance in the Philippines.

Finally, Peter Botros takes us on a journey of enquiry into the nature of property rights in human biomaterial, engaging in a moral, legal and scientific debate of ownership.

Timon Ibrahim

Editor

September 2014
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WHY HAVEN’T LAWYERS JOINED THE CHARTER PARTY?

ANDREW T. CONLEY*

ABSTRACT

It was both hoped and feared that the Charter of Human Rights and Responsibilities Act 2006 (Vic) would have a significant effect on the administration of justice in the State of Victoria. By most accounts, it has not. This paper suggests various reasons for this, focussing on practical matters relating specifically to lawyers (that is, lawyers and judges) including how they work, how they think, what they know and do not know, and what they believe. The paper then concludes with suggestions for remedying the difficulties identified.

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I INTRODUCTION

The Charter\(^1\) has so far been a moderate (if colourless) success. The new restrictions\(^2\) it places on public authorities\(^3\) appear to have been beneficial insofar as they have catalysed some cultural change and prompted other reforms within the executive and local councils,\(^4\) though it must be conceded that those improvements have been neither uniform nor particularly impressive. The requirement that ‘statements of compatibility’ be provided with all bills\(^5\) and the enhanced responsibilities of the Scrutiny of Acts and Regulations Committee in relation to bills\(^6\) and statutory rules\(^7\) have had ‘a modest effect on the content’ and ‘some effect on the development and drafting’ of legislation.\(^8\) These assessments will be considered pessimistic by some and optimistic by others. There is one assessment, however, in which both detractors and proponents of the Charter seem to agree: it has not had a very significant effect on the work of the court. This paper seeks to understand why this is so and then proposes means of rectifying the situation.

In undertaking this analysis, a broad view of the relevant actors will be taken; thus, the matters affecting both lawyers and judicial officers will be included. This is done for the following reason. It is well accepted that the court – the judicial arm of government – is not like the other arms of government in that, amongst other significant differences, it is reactive not proactive. It can only hear and determine the matters that come before it, and does not and cannot ‘go out’ and find problems that it determines are in need of resolution. The persons that bring matters before the court are, in the main, its trusted officers: lawyers. In the same way that a comprehensive account of the activities of the executive must consider everyone from Ministers and the Secretaries of the Departments down to employees at the coalface, in order to understand

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\(^1\) Charter of Human Rights and Responsibilities Act 2006 (Vic) (‘Charter’).

\(^2\) Described in the Charter as ‘obligations’.

\(^3\) Charter s 38.


\(^5\) Charter s 28.

\(^6\) Charter s 30.

\(^7\) Subordinate Legislation Act 1994 (Vic) s 21(1)(ha) as inserted by Charter s 47 sch item 7.4 (now repealed).

\(^8\) SARC Review Report, above n 4, 87 [388].
why the Charter has been of such limited effect on the business of the court, one must understand the matters affecting both lawyers’ and judges’ behaviour. Having made that point, for ease of expression, this paper will use the word ‘lawyers’ to refer to both lawyers and judicial (and quasi-judicial) officers unless the distinction is relevant.

The argument put forward herein is that there are a number of impediments to lawyers’ use of the Charter. As will be seen, some have already been brought to light in judicial decisions and academic writings while others have not. Some are external to lawyers. Others are part of the make-up of Australian lawyers that have been trained and brought up in a system that views the functioning of the relevant parts of the Charter as foreign and in some respects even anti-thesitical. It is important to understand these impediments for two reasons: first, any effort to bring about more and/or better use of the Charter by the court ought to take them into account and, secondly, other Australian jurisdictions planning to enact similar legislation might do well to consider them when framing their own plan to ‘provide better protection for human rights’.9

There is an assumption underlying the argument just set out. It is that the Charter is not being used in court as it properly could and should be. There are two reasons for this assumption.

The first is that one of the main architects of the Charter, Professor George Williams, has said of it that, although it ‘is [based on] a “parliamentary rights model” . . . rather than [being] a law that focuses on enforcement by the courts’10 and ‘[t]o focus narrowly on [it] as it applies to courts is to misunderstand its operation and to take far too limited a perspective of its significance’,11 nonetheless ‘it is expected that [it] will have a major impact on how courts and other bodies perform their existing work, [though] it is designed so as not to lead to a significant increase in litigation.’12 It is clear that the Charter has not led to a significant increase in litigation,13 so that part of Williams’ prediction was correct. Whether or not the Charter has had a major impact of the kind described is, of course, a matter of judgment. It is submitted that a

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9 Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1289 (Rob Hulls, Attorney-General).
11 Ibid 903.
12 Ibid 894 (emphasis added).
fair assessment of the best available evidence supports the view that it has not. Even the Law Institute of Victoria, a strong supporter of the Charter, could only justify quite a moderate commendation of the effect of the Charter on judicial decision making in the first three years of its operation.

The second reason (or basis) for the assumption that the Charter is not being used as it could and should be is the perception of the author, having attended numerous lectures and seminars on the topic of the Charter, that senior lawyers and judges do not think that it is being used in full measure. The most notable expression of this that the author is aware of occurred in a speech given more than four years after the coming into effect of the Charter’s litigable provisions by Justice Nettle, a highly regarded judge of appeal of the Supreme Court. In that speech, his Honour mentioned the ‘flood’ of litigation that some had predicted and then implied that, having braced itself for the onslaught, the bench was surprised to find that it had prepared for nothing.

The assumption itself and the reasons given above in support of it are all contestable. It might be too early to form judgment. It might be that the number of cases is appropriately small for a developing jurisdiction or that the human rights situation in Victoria is sufficiently good that only a small number of cases have been prompted. Or it might be argued that the cases so far are having something approaching a ‘major impact’. An authoritatively justified argument on this matter is, it is submitted, extremely difficult to construct because it would need to be based upon an extensive understanding of the various human rights issues prevalent in Victoria and how, if at all, the Charter might be used to affect them through litigation. A deep expertise in

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14 Ibid appendix A: in a survey of the relevant cases determined during the first three and a half years of the Charter’s operation, the outcomes of a mere 19 cases were considered to have been caused by the application of the Charter.
15 Ibid 39–41 [148]–[156].
16 Joseph Santamaria QC has said ‘That puzzles me because, the Charter being part of our law, I would have thought that lawyers were duty bound to use it and ransack it and find whatever in it they can to advance the interests of their clients. I suspect that is not being done.’: Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, 21 July 2011, 6 (Joseph Santamaria QC).
17 Charter pt 4 div 3.
18 Justice Geoffrey Nettle, ‘[Untitled]’ (Speech delivered at the Australian Academy of Law Symposium, The Victorian Charter of Rights – Past, Present and Future, Supreme Court of Victoria, 19 April 2012); there is no transcript of the speech so this characterisation is given from memory; the author hopes most fervently that it does his Honour no injustice.
Part II of this paper will set out and analyse the perceived impediments to lawyers’ use of the Charter. Part III will analyse the interrelationships between those impediments. And part IV will combine the findings of the previous two parts to propose efficient means of overcoming those impediments. Finally, it should be acknowledged that there is a certain amount of overlap in the categories of impediments set out below; social occurrences are always open to multiple analyses. As will be seen in part III, some of the impediments are mutually reinforcing.

II IMPEDIMENTS TO THE USE OF THE CHARTER

The impediments discussed under the first three headings (A–C) are what might be termed psychological impediments in that they concern the inclination of lawyers to avoid intellectually engaging with the Charter, which is necessary, it is submitted, for it to be applied in litigation to its full extent. Those discussed under the second group (D–G) are practical impediments to the use of the Charter that apply regardless of a lawyer’s enthusiasm for the undertaking.

A Foreign Import

Of the impediments to be mentioned, this one truly is the elephant in the room, and, it is submitted, the most important. Human rights are a foreign import to Australia’s legal system. This is not necessarily a problem, Australia’s legal system having absorbed imported legal ideas since its inception. The difficulty is that human rights as a body of law relies upon a form of reasoning that is generally rejected by the common law tradition: reasoning from the general to the specific; from general statements of principle to the specific facts of each case. Australian lawyers, steeped as they are in the common law tradition, are, conversely, used to incrementally reasoning from the narrow ratio of one case to the detailed facts of the next. Not only are they merely used to it, many laud it as the superior method; intensely practical and pragmatic, the basis of a just system of government the survived with little need of legislation for hundreds of years. In the area of statutory drafting, Australian lawyers are used to legislation that is – to put it compendiously – quite specific and detailed in its application. And it is also believed that this is the ‘right way’ to draft. In making these observations, it is unnecessary to conclude whether
the views set out are right or wrong, but only to assert that they are the views taken by many Australian lawyers, whether knowingly or not.

An excellent exposition of the mindset was given by Justice Kirby when his Honour was President of the Court of Appeal of New South Wales. For the purposes of this paper, the characterisation is so apt that it warrants quotation at length. His Honour is speaking of his attitude towards international law and international human rights law prior to his ‘conversion’ (his word) at a judicial colloquium in India in 1988:

Faithful to the general view of the common law, my legal system had rejected the notion that international law was automatically incorporated into domestic law. For me, as for most judges and lawyers of this century, brought up in the common law, international law was a vague mélange of political statements and motherhood principles – not to be compared with the precise, renewable and generally just rules of municipal law made by legislatures answerable to the people and judges accountable in the courts.

... [These attitudes] were simple reflections of my legal education, the principles of law adopted by the courts of England and Australia, reinforced by the daily grind of solving legal problems, for the solution to which the principles of the international law of human rights seemed remote, irrelevant and some how foreign.

... [For countries which have to solve their problems by reference exclusively to common law principles as supplemented by local legislation, the International Bill of Rights and the doings of committees in Geneva and courts in Strasbourg seem far away. Either they are irrelevant because the rules of the common law are parallel, sufficient, complete, binding and authoritative, or they are inferior because they are not justiciable and enforceable, are mostly made by foreign politicians, are stated in language of extreme generality and are not susceptible to amendment or clarification in tune with changing attitudes, changing needs and changing times.

... [My view] reflected the legal tradition in which I had grown up – largely ignorant of the developments of Bill of Rights jurisprudence and of the case law and decisions of international courts and committees.20

Needless to say, his Honour’s conversion was thorough. That was 1988. Some 25 years later, this view remains alive and well in Australia. One example will suffice. Joseph Santamaria QC, who was recently appointed to the Court of Appeal of Victoria, made a submission to and appeared before the Scrutiny of Acts and Regulations Committee as part of its review of the

Charter in 2011 (‘SARC review’). In his paper, Santamaria describes the ‘overarching limitation[s]’ provision\(^{21}\) and ‘some of the rights’ contained in the Charter as having been ‘expressed in educational or inspirational terms’.\(^{22}\) He further writes of human rights in a manner that might be said to ignore the sophisticated jurisprudence as to the meaning of each human right and how human rights are to be sensibly applied that has been produced internationally over the last 60-odd years.\(^{23}\) In his appearance before the Committee, he said that ‘the description of rights in the Charter, as with the conventions upon which it is based, is extremely general, to say the least of it’,\(^{24}\) that ‘[b]ecause the [right] possessed is an inchoate right, the field for judicial creativity is necessarily large, and that activity will be governed by a particular judge’s sense of right and wrong, which, unlike a judge’s knowledge of legal principle, may be no better informed than that of other citizens’\(^{25}\) and ‘[t]he idea that the [international human rights] jurisprudence is stable is just not the case; there are too many institutions to draw from; too many that disagree with each other; too much to do.’\(^{26}\) These statements, it is submitted, evince a belief that human rights are vague, undefined concepts that are not a proper basis for judicial reasoning.

Finally, Santamaria said:

> When Parliament drafts legislation, it identifies a person and says that person must do something and must not do something in certain circumstances. Judges and lawyers were all trained – judges particularly were trained – to interpret legislation like that. The Charter is not drafted that way. The Charter says someone has something: for example, the right to free speech. It then is for the courts to determine what is permitted and what is prohibited. It provides a vast area for judicial creativity, which is not really what courts do.\(^{27}\)


\(^{22}\) Ibid 12 [19].

\(^{23}\) ‘As indicated above, we differ on the logic and meaning of “fundamental human rights”; we differ on the means appropriate to resolution of our disagreements. . . . Persons (dis)affected by some disposition of either the legislature or the executive can take their complaint to the courts and secure change by characterising that disposition as a breach of human rights.’: ibid 8 [14].

\(^{24}\) Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, 21 July 2011, 2 (Joseph Santamaria QC).

\(^{25}\) Ibid 3.

\(^{26}\) Ibid 4.

\(^{27}\) Ibid 8.
The tenor of these statements closely track those expressed by Kirby P. Further reading of the submissions to the SARC review and the transcripts of the hearings the Committee held reveals that many and varied lawyers take a similar view.

If all of this is accepted – that contemporary Australian lawyers have a certain view of how legal reasoning should work, that that view has been ingrained into them from the very beginning of their legal training and reinforced through daily experience, and that human rights are foreign to that view – what does it mean for lawyers’ use of the Charter?

In sum: a great deal. There are two aspects to this. The first is that a new way of thinking takes time to learn. The simplest way to understand the effect is to consider the difficulty that continental lawyers have when faced with the style of reasoning native to the common law. Or, similarly, the amazement that non-lawyers report when presented with the minute and detailed analysis to which lawyers regularly subject the text of a statute, contract or judgment. In this way, the Charter with its human rights and its limitations provision\(^ {28} \) has the capacity to render experienced common law lawyers beginners again. The second aspect is that not only is there a new way of thinking to take on, but the new way is at odds (to a greater or lesser extent) with the old way. What was impermissible is now permissible. What was formerly castigated is now actually required. Coming to grips with the techniques of human rights law can require a significant reconstruction of the Australian legal mind. The difficulty is compounded, it is submitted, the more ingrained the old ways of doing things are. None of this is insurmountable but it is an impediment to lawyers’ use of the Charter.

B  **Constitutional, Philosophical and Political Objections**

A less apparent but still real impediment to lawyers’ use of the Charter is what this paper will describe as constitutional, philosophical and political objections. These are reasoned objections to the underpinnings and operation of the Charter upon which reasonable and educated minds can differ and which, it is submitted, exert subtle pressure on lawyers both to avoid using the Charter and to minimise its usefulness and importance. In the interest of avoiding being seen to take sides in these debates, it is sufficient, here, simply to note that the submissions to the

\(^{28}\) Charter s 7(2).
SARC review run the gamut of these objections and employ a range of more and less persuasive arguments in support.

Constitutional objections are those that are based on predictions of what judges are expected to do in applying the *Charter* and whether that role is appropriate to the current system of government in Victoria. The main one of these is the proposition that the *Charter* requires judges to decide matters of public policy that are, so it is argued, properly to be left to the legislature. Another is the proposition that requiring the judiciary to resolve such policy matters (if that be the case) will have a deleterious effect on the legitimacy of the judiciary by affecting its presently apolitical position in the constitutional structure.

The philosophical and political objections go to the content of the human rights themselves. These include objecting to the very concept of rights, the foreign provenance of human rights, the particular rights and values included and excluded, and the particular political philosophy that human rights are said to represent. There are doubtless more.

Of course, it is not intended to suggest that the venting of such arguments is impermissible. It is submitted, however, that the *Charter* has prompted some unusually strong reactions from lawyers,²⁹ both in favour of it and against it, and this debate has had the effect of casting doubt upon the legitimacy of the *Charter*. Rather than just approach the *Charter* like any other law,³⁰ lawyers might feel a subtle pressure to resist embracing a law that is said to have such a questionable intellectual pedigree.

²⁹ An example of what can be fairly described as borderline contempt for the *Charter* by a lawyer of high standing is the submission of the Hon. Sir James Gobbo (former Queen’s Counsel, judge of the Supreme Court for nearly 16 years and later Governor of the State of Victoria) to the SARC review which describes the *Charter* as ‘somewhat vague’ [8], ‘otiose’ [9], ‘absurd’ and ‘capable of diminishing [democracy]’ [10], and ‘in danger of’ ‘sell[ing] short generations of sacrifice and commitment and success’ of those ‘persons and organisations who have laboured long and hard and successfully to reduce social injustice and misery’ [15]: Sir James Gobbo, Submission No 321 to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Victorian Charter of Human Rights and Responsibilities Act 2006*, 30 June 2011; less restrained was the submission of Glenn Waldron (Chief Judge of the County Court for nearly 21 years) who said that the *Charter* was ‘an obnoxious, politically-correct intrusion into the proper operation of the democratic process’ that ‘simply should be “put to death.”’: G R D Waldron, Submission No 328 to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Victorian Charter of Human Rights and Responsibilities Act 2006*, 6 August 2011.

³⁰ ‘It should be observed at this stage that nothing depends on the justice or injustice of the law in question. If the language of an Act of Parliament is clear, its merits and demerits are alike beside the point. It is the law, and that is all.’: *Australian Communist Party v Commonwealth* (1950) 83 CLR 1, 262 (Fullagar J).
C Provenance

Moving to the general circumstances that led to the enactment of the Charter and what they can reveal about the use of the Charter by lawyers, there are two areas: the general environment in which the Charter was brought into existence, and then the failure to engage lawyers as a group to build and retain their support for the enterprise. Whilst the taxonomy is quite different, many of the matters mentioned below are similar to those found important by the lawyers that answered a survey around the issue (which is discussed in more detail below).

1 Generally

The birth of the Charter was an elite affair. ‘Elite’ because it was not a response to a groundswell of public pressure but, rather, emanated from Parliament. True it is that there was a significant ‘consultation’ exercise undertaken, but it is hard to ignore the feeling that the consultation was more an exercise in education for most of its participants and a rubber stamp (though that term is too strong) for the government’s own proposal released on the eve of the consultation. Unusually, the Charter involved Parliament deciding to impede the free exercise of its own powers without the presence of any notable external event that prompted that reform. The Charter has a particularly elite origin in that it was made law largely due to the efforts of one person: Rob Hulls, the then Attorney-General for the State of Victoria. The

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32 Under the heading ‘Lack of Technical Expertise’.
33 Williams, above n 10, 887–9.
Charter was objected to for a variety of reasons by the Liberal and National Parties who ultimately voted against it (though, it should be added, with some abstentions).\(^{37}\) During the argument, proponents of the Charter seemed caught between wanting to assert both that the Charter was revolutionary and that it was not a significant change nor cause for concern.\(^{38}\)

These matters show that the Charter had neither broad popular support nor broad elite support.\(^{39}\) Outside of Parliament, many organisations lent their backing (including the Victorian Bar and the Law Institute of Victoria) but it is submitted that such bodies no longer have a great deal of clout when it comes to the more contentious questions of modern politics. The relevance of this to lawyers’ use of the Charter is similar to what was submitted in the previous section: subtle pressure to resist taking it seriously and to consider the Charter as a short-term aberration; an elite, stage-managed production of the Attorney-General without bi-partisan support that was liable to be repealed. And do not forget that that prediction came close to becoming reality; the SARC review did (by majority) recommend that the provisions of relevance to lawyers\(^{40}\) be repealed,\(^{41}\) it seeming that only the personal intervention of the Premier of the day, Ted Baillieu, saved the Charter from that fate.\(^{42}\)

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\(^{38}\) For example Gobbo, above n 29, 4 [8] quotes Hulls as saying that ‘there was no right in the Charter which was new or not found already in existing law.’; and, it is submitted, very tellingly ‘[t]his is preventive legislation that provides an educative framework of a statement of beliefs. It is not there to provide a lawyers picnic or for litigants to use to take the government to task.’: Victoria, Parliamentary Debates, Legislative Assembly, 13 June 2006, 1987 (Bruce Mildenhall).

\(^{39}\) In making the distinction, the Parliament is not seen as the extension of the public will: ‘[a]s has long been recognised in comparative politics, [Parliaments] are to a significant extent “autonomous” from the social base.’: Erdos, above n 35, 349.

\(^{40}\) Charter pt 3 div 3 & 4.

\(^{41}\) SARC Review Report, above n 4, 173 recommendation 35.

2 Specific to Lawyers

The consultation that led to the Charter consulted widely.\(^{43}\) It is submitted that it did not, however, drum up any (or significant) support amongst lawyers. The contrast is pointed up by omission in Professor Williams’ article cited above:

[t]he involvement of government [sic] in the development of the [Charter] also gave the public servants involved a sense of ownership of reform. This may assist over the longer term in fostering a human rights culture with the bureaucracy.\(^{44}\)

For whatever reason, and there are many that could be suggested, it was not thought necessary or desirable to give lawyers a ‘sense of ownership’ of the Charter, despite the matters raised above and the part that lawyers must play if it is to be made effective for the people it was designed to serve. It is true that lawyers are not Parliament’s constituents, and so in that respect their views are unimportant, but it is submitted that it is naïve to the point of incredibility to assert that a law like the Charter could be used with any facility by non-lawyers and members of the public (no matter how well-educated) without the assistance of legal advice, as Williams seems to suggest,\(^{45}\) and so lawyers must necessarily be a central part of any successful educational and political efforts leading up to the implementation of such a law. It is submitted that this failure to involve lawyers has had, and continues to have, an effect on lawyers’ engagement with the Charter, both at an individual and profession-wide level.

D Technical Difficulties

The terms of the Charter throw up a number of significant technical difficulties for any lawyer or judge wishing to apply it. Associate Professor Jeremy Gans’ thorough critique of the Charter’s remedies provision\(^{46}\) describes it as ‘egregious’ and advises any court applying it to ‘cross your fingers’.\(^{47}\) It is submitted that it is hard to overstate the chilling effect that this piece of drafting – the problems with it, not the fact that it is very limited in scope – has had on the use of the Charter to obtain remedies through litigation. Then there is the generally applicable

\(^{44}\) Williams, above n 10, 890–1.
\(^{45}\) Ibid 898–899 regarding the drafting of the Charter; it is added that not only is this view incredible, it is somewhat of an unfair deceit considering the amount of legal advice that is at the instant disposal of the executive branch compared to the resources available to the average person likely to be affected by government action.
\(^{46}\) Charter s 39.
\(^{47}\) Gans, above n 34, 129.
limitations provision\textsuperscript{48} which Dr Julie Debeljak has shown contradicts international human rights law and thereby adds an unnecessary additional layer to the analysis required in applying the \textit{Charter}.\textsuperscript{49} There is also the (former) uncertainty as to the meaning of the interpretation provision.\textsuperscript{50} Despite confusion at the time about the clarification of its meaning by the Court of Appeal and then the High Court,\textsuperscript{51} at least that difficulty is now (it seems) resolved.\textsuperscript{52} It is worth noting that it took five years of the \textit{Charter}'s operation to get to that point. And finally there is the indecision of the Court of Appeal on the basic question of whether the rights in the \textit{Charter} are to be conceived of and interpreted as human rights proper (that is, given a "human rights" meaning\textsuperscript{53}) with all of the corollaries that such an interpretation entails, including the international jurisprudence thereby picked up, or read in the (allegedly)\textsuperscript{54} ordinary way (that is, given the so-called 'dictionary meaning').\textsuperscript{55} There are also other difficulties that are being resolved.\textsuperscript{56}

The effect of all this is obvious. It is submitted that it stands to reason that the more difficult it is to apply the \textit{Charter}, the less inclined lawyers will be to use it.\textsuperscript{57} It is true enough that such considerations ought not to affect legal advice and judicial decisions, but lawyers are not robots and law is not maths; subjective judgment and subconscious inclinations are in play, and it is

\textsuperscript{48} Charter s 7(2).
\textsuperscript{50} Charter s 32(1).
\textsuperscript{51} \textit{Momcilovic v The Queen} (2011) 245 CLR 1 ("Momcilovic").
\textsuperscript{52} \textit{Victorian Toll v Taha} [2013] VSCA 37 (4 March 2013) ("Taha") though Maxwell P has said that the position was clear enough at the time: Justice Chris Maxwell, ‘Judges and Human Rights’ (Speech delivered at the Queen’s Inn Dinner, Queen’s College, the University of Melbourne, 4 May 2012) <http://www.supremecourt.vic.gov.au/home/library/speech+++judges++human+rights>.
\textsuperscript{53} \textit{W B M v Chief Commissioner of Police} [2012] VSCA 159 (30 July 2012) [98] (Warren CJ) ("W B M").
\textsuperscript{54} It is submitted in passing that, first, an orthodox interpretation plainly leads to the ‘human rights meaning’ and, secondly, talk of the ‘dictionary meaning’ is heretical because it ignores the statutory context and purpose.
\textsuperscript{55} \textit{W B M} [98] (Warren CJ); a joint judgment in one matter mentions the Chief Justice’s interpretation in \textit{W B M} but not the issue: \textit{DPP v Leys & Leys} [2012] VSCA 304 (12 December 2012) [136] (Redlich JA, Tate JA, T Forrest AJA); Tate JA makes it part of her Honour’s ratio in \textit{Taha} [2013] VSCA 37 (4 March 2013) [199].
\textsuperscript{56} For example, the effect of Charter s 4 (definition of public authority) and s 7 (the limitations provision and whether or not, and if so, how, it is used in statutory interpretation).
\textsuperscript{57} Without meaning to overstep the mark, it is fair to ask whether the recent growth of decisions that use the principle of legality to arrive at interpretations that were put in reliance on the \textit{Charter} is an example of this kind of avoidance; on the other hand it could be traditional judicial parsimony.
to ignore human nature to pretend that they are of no import to the decision of whether or not to turn to the provisions of the *Charter*.

E *Lack of Technical Expertise*

The next impediment is a difficult one to examine. There is no reliable objective information available, so suggestion and inference must be relied upon more than is comfortable. First, a preliminary point. 13 percent of respondents to a 2011 survey of (mostly) Victorian lawyers said that they were ‘not aware of’ the *Charter*. At the time of the survey, the *Charter* had been law for more than four years. It is reasonable to suggest that the actual percentage is actually much higher than 13 percent because there was a very low response rate to the survey and one can assume that those motivated enough to respond to the request to answer the survey are more likely to have known of the *Charter* and held an opinion about it that they wished to express. In any case, 13 percent is staggeringly high; in other words, more than one in eight Victorian lawyers are living (and more importantly working) in ignorance of one of the most important changes to the law of Victoria for many years. For the purposes of this paper, it is plain that a lawyer who is not aware of the *Charter* will not be making use of it in their practice.

Coming now to those lawyers that *are* aware of the *Charter*, the changes brought about by the *Charter* will see some, perhaps many, in need of updated training because they possess an incomplete or out-dated knowledge of the following three areas of law that are crucial to the *Charter’s* confident and thorough use. Before proceeding, it is worth noting the modern tendency amongst lawyers to specialise, which only exacerbates the problem under discussion.

1 *Administrative Law*

Even if the *Charter’s* remedies provision was clear, it would still be a difficult section to apply in practice because judicial review is a technical area of law which has changed rapidly and significantly over the last decade or so. This is not, of course, a problem for experts in the area. But, whereas in the past lawyers might have been able to more straightforwardly rely (or,
moreover, only be able to rely) on the terms of a statute creating and regulating government power, thereby avoiding the need to know the general principles of judicial review in depth, now they will need to consider the possible use and effect of the Charter’s generalised remedies provision. Lawyers need to see possible issues when they arise, and have the confidence to take them on. A lawyer seeing the average member of the public does not ordinarily have the funds for expansive investigation and consideration of their client’s case; the issues must be identified and dealt with promptly and authoritatively. And this is not to mention the other non-administrative law ways in which the remedies provision of the Charter might be used.62

2 Statutory Interpretation

The law of statutory interpretation has also experienced a realignment in recent times. The former reliance on presumptions and ‘ordinary meaning’63 has given way to the sophisticated text-focused and context-driven approach of modern High Court jurisprudence.64 The principle of legality, though of long-standing,65 has taken on a new importance.66 The Chief Justice of the High Court (via the same reading as the Court of Appeal67) has determined that the Charter’s interpretive provision works like the principle of legality ‘but with a wider field of application’.68 A firm understanding of these matters is of signal importance to the proper use of the Charter. It is submitted that this is another area of law that is not necessarily widely well-known at the present.

3 Human Rights

This area is not, like the previous two, a matter of the law changing so as to render lawyers’ understanding out-of-date. Rather, it is an area of which Australian lawyers are generally wholly ignorant. Until the enactment of the Charter, there was little reason, if any, for a do-

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63 Though this is a gross simplification.
64 For example, see Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27.
65 Potter v Minahan (1908) 7 CLR 277, 304 (O’Connor J).
67 Momcilovic (2011) 245 CLR 1, 47 [46] (French CJ).
68 Ibid 50 [51] (French CJ); of course the Court split many ways around this issue but it has been argued that this is a discernible ratio: see Taha [2013] VSCA 37 (4 March 2013) [25] (Nettle JA).
mestically-focused Australian lawyer to know anything about human rights law. Study of human rights law is not required by the Priestley 11. And, as has been mentioned above, it is a very different kind of law to what Australian lawyers are used to. Time and again one reads lawyers stating that human rights are vague, aspirational and irreconcilable; such statements can only be made by those unaware of how they are actually used in international and domestic jurisprudence the world over.

F usefulness

In addition to the practical difficulties stated above, there is the simple fact that, because the Charter does not contain a straightforward stand-alone cause of action, quite aside from the technical difficulties that that causes, it is of slim or no use to many persons whose human rights may have been infringed. Further, damages are not available even where the Charter is applicable. It has been said that the Charter is not welcome in the Magistrates’ Court, which seems to be borne out by the lack of use of it there. The effect of these matters on lawyers’ use of the Charter is clear; lawyers will obviously not invoke a law that they assess to be of no use to their client.

G Resources

The issue of resources will be approached in three ways; first, the situation with respect to litigants with little or no money; secondly, resource issues common to all litigants; and thirdly, the cost to lawyers of the education needed to become competent in applying the Charter.

The legal aid system in Victoria is in long-term financial difficulty. The amount that is provided to lawyers to pay for the representation of the most poor (and often complex) clients, which is especially minimal in the Magistrates’ Court, is not set at a level that encourages the often

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71 Charter s 39(3).


considerable extra work required of them to prepare arguments based upon the Charter; in fact, Victoria Legal Aid’s grants guidelines make no mention of the Charter. Doubtless many lawyers forge on regardless and accept the financial consequences of doing so, but the remainder, by deduction, do not. Community Legal Centres are often the place that the most vulnerable and disadvantaged members of the Victorian community turn to for assistance in matters of human rights, and they too are not well-resourced to assist. Thus far, members of the Victorian Bar have provided significant pro bono work in cases involving the application of the Charter. The upshot of all this is that despite, it is submitted, the Charter being of most importance to the poor and disadvantaged and their causes most likely to lead to the major impact that Williams believed would result from its enactment, on the whole they are unable to access the help they need to make use of the Charter; the corollary of this being that lawyers are not using the Charter to help them.

All litigants that raise the Charter in the County or Supreme Courts must give notice to the Attorney-General and Victorian Equal Opportunity and Human Rights Commission and should expect the Attorney or the Commission to enter an appearance about a quarter of the time. Whilst the policy behind this provision is sensible, it is submitted that it must have an effect on the decision as to whether to raise the Charter or not since it has the potential to increase the cost of the proceeding dramatically. There is currently no mechanism or convention by which the State alleviates this cost. And, even if the parties do not raise the Charter, the court or amicus curiae might do so, with similar potential for increased costs.

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76 Williams, above n 12, 894.
77 Charter s 35.
78 Though obviously the subject matter of the case will be highly relevant, it does provide some indication to note that the Attorney and Commission have appeared in 31 and 30 out of 125 cases respectively; Victorian Government, Submission No 324 to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Review of the Victorian Charter of Human Rights and Responsibilities Act 2006, unknown date, 29 figure 6.
79 For example, of the kind which sometimes occurs in appeals to the High Court where special leave is granted upon the basis that the Government litigant pays the costs of the respondent, regardless of the outcome.
80 In 43% of the matters contained in the associated survey, the Charter was raised by a person other than an ‘individual[] seeking to assert their rights’: Law Institute of Victoria, Submission No 247 to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Review of the Victorian Charter of Human Rights and Responsibilities Act 2006, 30 June 2011, 33 [134].
Finally, there is the obvious cost to lawyers of making themselves proficient in the areas set out above.\textsuperscript{81} The Judicial College of Victoria provided education, such as it was, regarding the \textit{Charter} to the bench. No doubt government lawyers and those in Victoria Legal Aid were given similar instruction. Private lawyers were required to provide for themselves. Of course, it is quite normal for laws to change, and keeping up with the changes is part of the cost of maintaining a proper professional knowledge for lawyers. Notwithstanding this, the significant investment in time and money required to update the training of a lawyer with little or no subsisting understanding of the relevant areas would have been a disincentive to many.

\section*{III \ INTERRELATIONSHIP OF THE IMPEDIMENTS}

Having set out the impediments that it is submitted are responsible for the lacklustre effect of the \textit{Charter} on litigation so far, the interrelations between them are now set forward.

Coming first to what were described above as the ‘psychological impediments’,\textsuperscript{82} it is submitted that those lawyers that hold a dim view of the \textit{Charter} for such reasons are less likely to make the effort required to obtain the education necessary to overcome a lack of technical expertise and master the difficulties caused by the various technicalities in the \textit{Charter} itself. And it stands to reason that it does not matter whether the negative view is held for reasons (good or bad) or is just based upon unexpressed inclination; the effect will be the same. This feeds into another matter: lawyers with experience using the \textit{Charter} are significantly more likely, across a range of aspects, to agree that the \textit{Charter} has resulted in positive effects than those with no experience in using it.\textsuperscript{83} One possible explanation for this fact is that seeing the \textit{Charter} in operation works to break down the prejudices that the lawyers harbour (that is, the psychological impediments). This is consistent with the findings of a number of research studies that looked at lawyers’ views of mediation in the United States; those views were found to become more positive towards mediation after repeated exposure to and experience of it.\textsuperscript{84} There is a vicious cycle here: lawyers are unlikely to have experience with the \textit{Charter} unless

\textsuperscript{81} Under the heading ‘Lack of Technical Expertise’.

\textsuperscript{82} ‘Foreign Import’, ‘Constitutional, Philosophical and Political Objections’ & ‘Provenance’.

\textsuperscript{83} Colmar Brunton Report, above n 31, 33 figure 19, 36 figure 20, 39 figure 21, 43 figure 22, 45 figure 23; of course, this assertion is only true insofar as the results of the survey in question are taken as being generally applicable, which the author has no reason for supposing they should not be: see at 61 [6.2.4].

they have obtained the necessary training; they are unlikely to take such training until they view the \textit{Charter} as worthwhile; but they are less likely to view the \textit{Charter} as worthwhile if they have no experience with it. In the following part, suggestions will be made on how this impasse might be broken.

Turning to what were named the ‘practical impediments’, \textsuperscript{85} again there are causal connections between them. Were the \textit{Charter} made simpler to apply, there would be a number of consequences. First, it would be applied more often simply because it was easier to do so, and it is submitted that this goes for both lawyers and the judiciary. Secondly, it would be cheaper and easier to learn about, which would make it more likely to be applied because of the greater number of lawyers qualified to use it to the benefit of their clients. Thirdly, less complexity means less time, less time means less cost, and less cost means more people, including the legally-aided and impecunious, able to afford the cost of employing it.

Even though the above matters are shortly stated, they are extremely significant. Because of the interrelated nature of the impediments discussed and the positive and negative cascades that depend on only a few factors, it may well be that carefully targeted changes could result in large effects, as will be suggested in the next part.

\textbf{IV Solutions}

It is submitted that, based upon the foregoing analysis, there are four actions that would have a disproportionately strong effect on lawyers’ use of the \textit{Charter} and, therefore, the impact that the \textit{Charter} has on judicial decision making.\textsuperscript{86} They are as follows.

First, to overcome, or at least make inroads into, the psychological impediments, the reputation of the \textit{Charter} needs to be rehabilitated (or, perhaps, established for the first time).\textsuperscript{87} This could be done by the leaders of the executive and the Parliament, when making the changes that


\textsuperscript{86} Incidentally, the suggestions that follow are largely consistent with the most popular options for ‘increasing the \textit{Charter}’s effectiveness’ according to the survey of lawyers mentioned above: Colmar Brunton Report, above n 31, 54 figure 26.

\textsuperscript{87} The irony in proposing this is that the tepid approach of the \textit{Charter}’s political parents in minimising, both in the text of the \textit{Charter} and in their rhetoric about it, its effect might have been exactly what was necessary to give it time to operate, become part of the State’s legal furniture, and allow those fearful of its effect on the Victorian system of government to check that the sky still remained in place.
follow below (or even if they chose not to make them), publicly commending the effect of the Charter and burnishing its intellectual reputation, perhaps in conjunction with leaders of the profession and the academy. Whilst, in the modern technocratic age, this suggestion might been seen as antiquated and ‘soft’, it is submitted that the analysis in the first part of this paper provides a strong basis for concluding that it would nonetheless be of value, and possibly significant value. In the field of human behaviour, it is perception that motivates action, not reality. Perceptions of the Charter will no doubt shift as more and more lawyers use it, but this may well take a long time to occur; more direct steps are warranted.

Secondly, significant education of lawyers as to human rights law (especially) and other relevant areas\textsuperscript{88} ought to be undertaken. There are two reasons for this. As was stated earlier, there are reasoned objections to the Charter. Some proceed from a factual basis, some do not. A proper understanding of human rights law and how it actually works (rather than a mere reading of the text of human rights treaties, which is about as useful to understanding their operation as a reading of the fifth and 14th amendments of the United States Constitution\textsuperscript{89} is to understanding their operation) would, it is submitted, cause many lawyers’ objections to the Charter to evaporate. The second reason is the more obvious point that, as has been stated, understanding of human rights law will promote the proper and better use of the Charter. There is one additional matter to note about this. It ought to be stressed that human rights law, though not drafted and expressed in exactly the same way that Australian lawyers are used to, is still law. There is some truth to the criticism that human rights are often wielded more as tools for advocacy than as law.\textsuperscript{90} This is a tendency that lawyers (including, again, their leaders in the profession) must strictly eschew, and rail against. The more rigorous thinking, the better, hence the need for proper education.

Thirdly, legal aid ought to be extended to recognise the value and importance of the advancement in court of arguments based upon the Charter. This would involve provision being made for extra funds to be expended (in the types of cases that are already funded) where significant extra work has been done in preparing and advancing such arguments, and provision being made for the funding of cases (that are not already funded) that assert the infringement of the

\textsuperscript{88} See under heading ‘Lack of Technical Expertise’.
\textsuperscript{89} United States Constitution amends V & XIV, § 1.
\textsuperscript{90} ‘The expansive approach can wind up equating “human rights” with anything “good.” Buddha and Jesus now become human rights activists. This sort of thing can get soggy fast.’: Kenneth Cmiel, ‘The Recent History of Human Rights’ 109(1) American Historical Review 117, 119.
Charter, including those based on the stand-alone cause of action recommended below. It is unfair to expect lawyers that take legally-aided work to do significantly more work for exactly the same amount of money.

Fourthly, the Charter’s remedies provision\(^91\) ought to be amended to provide for a stand-alone cause of action and the possibility of damages in appropriate cases. As submitted above, the lack of this is a significant impediment to the simple and effective use of the Charter to vindicate the rights contained therein. Further, a tiered jurisdiction could be implemented whereby declarations and a very limited amount of damages would be available in the VCAT,\(^92\) a more significant amount available at the County Court, and an uncapped jurisdiction in the Supreme Court. This would facilitate the government in triaging such claims, perhaps letting the various Departments ‘fend for themselves’ in the VCAT, with the educative effect that would serve.

The merit of these proposals, aside from effects that they are said to have above, is that they do not disturb the constitutional balance that has been struck by the Charter as it currently stands. They do not affect the current role of the court in interpretation.\(^93\) The clear downside to all of them except the first is that they cost money. The second might not cost the State but the third and fourth definitely would. It is submitted that the cost will not, in all the circumstances, be that great when compared to the individual and societal benefits that would be generated, but no doubt that is a matter that is enormously subjective. That is because it requires a value to be given to the individual assertion of human rights (an idea which does not currently attract universal approval), the benefits to wider society of the corrective effect that would have, and an assessment of how often such cases would be run, by whom and for how much (that is, the cost of running and defending such a case, and paying damages if they were awarded).

V Conclusion

Before concluding, two points are presented in defence and/or clarification of the argument put forward in this paper. First, as was made clear at the outset, this paper focuses exclusively on the effect of the Charter as it pertains to lawyers, including, where relevant, the judiciary. In doing that, it should not be thought that it intends to sideline the other effects of the Charter.

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\(^91\) Charter s 39.
\(^92\) Say, up to $10 000.00.
\(^93\) Though the interaction of Charter s 7(2) and a stand-alone cause of action would need to be sorted out and, it is acknowledged, that could cause some difficulty.
The *Charter* is not simply, or even mostly, a law that is only of relevance to lawyers and the courts; it is a law of great importance to the Executive and the Parliament. This paper simply takes one part of that picture and subjects it to specific analysis. Secondly, a brief consideration of the riposte ‘this is just another lawyer, writing for lawyers, in the “woe is me” genre, asking for more respect, more money and more power’. All that can be done with such a statement is to bear it with as much fortitude as can be mustered. There are some that more or less reject the proper role of lawyers (and, thus, the rule of law) in society, seeing them as pathological, and that the more that can be dealt with without their ‘interference’ the better. This may be so. On the other hand, it is submitted that lawyers ought not to be afraid to assert their historical and present-day value to the protection of individual rights against the intrusion of the State. Lawyers can and should, it is submitted, have a major role to play in the use of the *Charter* to vindicate human rights, not for their own benefit but, in the best traditions of their profession, for the benefit of the community. This is the basis upon which the arguments herein are made.

Now to some conclusions and suggestions for further enquiry. This paper has argued that there are a number of impediments to lawyers’ full use of the *Charter*. The main contribution sought to be made is to point out that some of these are not technical legal difficulties but are psychological. The application of social psychology may well be able to provide significant objective insights into whether those aspects of what is asserted above is actually the case. And specific research into Victorian lawyers would be valuable. The Colmar Brunton research[^94] that has been done is a start but it is limited in scope and, it is submitted, does not go ‘under the skin’ of its respondents’ views. Regarding the solutions proposed, it is acknowledged that none of them are likely to be accepted in the current political environment[^95], nonetheless they are principled and may well be realistic possibilities in the not too distant future.

[^94]: Colmar Brunton Report, above n 31.
[^95]: At September 2013.
SHOULD AUSTRALIA ADOPT A BILL OF RIGHTS IN ITS CONSTITUTION?

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ABSTRACT

Despite an on again, off again, debate that spans over a century, Australia remains one of the few modern democracies in the international community to not have a national Bill of Rights either imbedded constitutionally or in a statutory form. This paper reflects on the current protection mechanisms which operate in Australia for the protection of human rights beyond simple morality, including the legal defences afforded by the Australian Constitution, the common law and our democratic system. Through an examination of the limitations of this ‘intricate patchwork system’ of human rights protection the paper will consider the value and appropriateness of a Bill of Rights in ‘filling the gaps’ left by our current mechanisms.

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I INTRODUCTION

Thirty-five years ago, Justice Kirby made a speech at the seminar of the United Nations Association of Australia in which he addressed the debate as to whether a Bill of Rights should be adopted in the Australian Constitution. As a matter of both international and local concern, Justice Kirby recognised that the ‘current’ deliberation was ‘simply a reflection of the debate proceeding on the wider international stage’. A major issue he raised was that if Australia were not to adopt a Bill of Rights, the country may be ‘left behind in the international movement to provide improved, practical, accessible protection’ for human rights. Interestingly, now, three decades on, the debate has barely progressed and despite the

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2 Ibid.

3 Ibid.
movements on the international stage, Australia finds itself one of the few modern democracies without a Bill of Rights in any form.

This paper will explore the same issues that were raised by Justice Kirby, in considering whether a Bill of Rights would provide for, or at least improve the practical protection of, human rights. Recognising that the debate is one well established in Australia’s political and legal landscape, this paper will approach the question of whether a Bill of Rights should be adopted in the Australian Constitution from a contemporary perspective.

The paper, therefore, will consider the question in two separate ways. Firstly it will focus solely on the practical protection of human rights, by considering the current protection measures in Australia and analyse whether they are effective and sufficient, or if there is a need for greater protection. The analysis will seek to establish whether a written form of rights will have any value in a modern Australian context, and if these values will outweigh any disadvantages. The second point the paper will examine is what model of document would be most applicable to the Australian context if the adoption of a Bill of Rights is deemed necessary. This will involve addressing whether, in light of the political and legal landscapes of Australia today, it should realistically adopt a Bill of Rights that is constitutionally entrenched.

II  DOES AUSTRALIA NEED A BILL OF RIGHTS?

I  Are Human Rights Adequately Protected?

Though human rights may seemingly be born from moral foundations, in reality morality and the notions of natural law provide no protection in our current legal and political landscape other than ‘pious hope’; any appeals to ‘human rights’ based on morality, ideology or national concepts that are unanchored in legal recognition are therefore irrelevant. As such, to commence a debate as to whether Australia should adopt a written form of human rights requires the acknowledgement of the fundamental need for human rights to be formally recognised within our legal and political systems.

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By understanding that rights cannot be protected on a moral basis alone, the following analysis will consider the political and legal groundings in which human rights are today embedded, and look at the adequacy of the current system for the protection and promotion of human rights. Often described as ‘an intricate patchwork’ system, it consists of political institutional arrangements as well as international, Commonwealth and State law. This analysis will consider these in turn.

II  The Protection of the Democratic System

Sir Robert Menzies, former Prime Minister of Australia, held that the best guarantor of justice and human rights was our democratic federal system that ensured a ‘responsible’ and ‘representative’ government. Should a Minister act in a way as to violate ‘fundamental human freedom’, the doctrine of ‘responsible government’ ensures that he can be ‘promptly brought to account by Parliament’. Additionally, the constitutionally enshrined doctrine for the separation of powers safeguards an independent judiciary from the executive and parliamentary arms of government, allowing for accountability via judicial checks.

Furthermore, the implicit measures of accountability provided by the electoral process ensure that if the majority of voters acknowledge a violation of human rights then ‘they will speak at the ballot box’.

I  The Ballot Box Issue

These perceived strengths of the democratic system in providing human rights protection can also be viewed as its limitations. This is particularly illustrated by measures of accountability afforded to the ‘ballot box’ and the ‘majority’ in the democratic system.

The ballot box, which only comes around every three years, is limited in its speed to address a violation or to prevent human rights breaches. By the time an election comes around, ‘instances of human rights abuses might have faded from public memory and “mainstream”

6Ibid 127.
8 Ibid.
9 National Human Rights Consultation, above n 5, 106.
10 Ibid.
concerns such as the economy are more decisive’. Furthermore, what is perhaps more concerning is the implicit limitation of a democracy which builds it foundation on the ‘will of the majority’ when it is often the minorities that bear the brunt of human rights abuses. If the majority is unaware of the human rights abuses, or if they are ‘actively hostile or simply apathetic’ toward the minority group, this will directly influence the accountability of the ballot box. Therefore, whilst the democratic system can be seen to provide a measure of protection and accountability, it is certainly not without its limitations.

### III Common Law Protections

The common law system provides protection for human rights through both the development of case law and through statutory interpretation. Whilst case law has developed to recognise particular human rights including ‘the right of an accused to a fair trial, the right against self-incrimination, immunity from search without warrant, and the onus of proof in criminal proceedings’, these are limited.

Regarding statutory interpretation, the ‘principle of legality’ ensures that courts will interpret legislation ‘so that it is constant with’ or at least not in conflict with fundamental rights enshrined in international law, regardless of whether these rights have been implemented domestically. This principle, notably illustrated in the determinations of the *Mabo* case, assumes that Parliament intends to honour, not overturn, those rights it has ratified in the international sphere. This principle stands unless it is stated otherwise in the legislation.

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11 Ibid.
12 Ibid.
13 Ibid.
IV  The Principle of Legality – The case of Al-Kateb

The case of *Al-Kateb v Godwin*\(^{20}\) illustrates the limitations of the ‘principle of legality’ and of the common law in providing absolute protection of human rights. Mr. Al-Kateb, an asylum seeker who had arrived in Australia by boat, was under immigration detention as per the requirements of the *Migration Act*\(^{21}\) whereby a non-citizen must remain in detention until they are either granted a visa, or removed from the country. Mr. Al-Kateb found himself in a stagnant position, unable to be removed as was his request, due to being a stateless person, and not able to settle in Australia having not been granted a visa. The government argued that, despite his detention being non-punitive, under the *Migration Act* they might hold him in detention for the rest of his life. Taken to the High Court, the judges ruled his indefinite detention was, although ‘tragic’, nevertheless lawful.

Despite the implementation of the ‘principle of legality’ the majority of the High Court found that the Parliament’s intention regarding the *Migration Act*\(^{22}\) did provide for a system of potentially indefinite detention. Recognised in the determination of Justice McHugh, this overruled the fundamental, internationally recognised, human rights principles that would have otherwise influenced this case, as ‘it is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights’.\(^{23}\) The only manner in which this Court may have ruled otherwise, he states, is if Australia had a constitutionally entrenched Bill of Rights, which would adopt the rules of the ‘most important international human rights instruments’. The lack of such an instrument he alludes to be a ‘just criticism’ of the Australian system.\(^{24}\)

V  International Human Rights Law Protections

The case of *Al-Kateb v Godwin*\(^{25}\) introduces the role of international human rights law, and highlights the manner in which it may, or may fail to, provide protection of human rights. Australia is a party to a vast number of international human rights treaties and covenants that seek to protect all manners of human rights including social, economic, political and civil rights

\(^{20}\) Ibid.

\(^{21}\) *Migration Act 1958* (Cth).

\(^{22}\) *Al-Kateb v Godwin* (2004) 219 CLR 562, [19].

\(^{23}\) Ibid [74].

\(^{24}\) Ibid [73].

\(^{25}\) Ibid.
with particular reference to a number of marginalised groups including women and children. International law recognises that there are three obligations upon a State that has both signed and ratified a treaty, the obligation to respect, the obligation to protect and the obligation to fulfill.\textsuperscript{26}

In Australia, ratification of a treaty is the role of the executive arm of government, but it is the parliament that has the power to alter and make domestic law. As such, a ratified treaty can only operate as a direct source of law in Australia via active implementation through domestic legislation.\textsuperscript{27} Despite there being the obligation upon States to ‘fulfill’ – that is, to take positive action to facilitate the enjoyment of basic human rights – Australia has not implemented all of its treaty obligations, meaning that they cannot be enforced in Australian courts. The results of this are clear in \textit{Al-Kateb}.\textsuperscript{28}

It should also be recognised that many of these international committees incorporate mechanisms to hold State parties accountable, many of which Australia is a signatory to. Depending on the committee, these range from ‘Reporting’ or ‘Concluding Observations’ by the international bodies on States compliance, responding in the form of ‘Recommendations’ to ‘Individual Complaints’ measures, and through Human Rights Council mechanisms. It is important to acknowledge that these ‘Recommendations’, and the findings of the Individual Complaints process are just that, ‘recommendations’, to which parliament may respond at their own discretion, upholding their overarching inherent right to sovereignty.\textsuperscript{29} Therefore, any international mechanism that provides for accountability or remedy is limited by the prerogative of the government of the day in implementing reflective domestic legislation.\textsuperscript{30}

\section*{VI Legislative Protections}

At the Commonwealth level are a number of explicit examples of legislative implementation of human rights obligations in a domestic context. These statutes that enshrine human rights include the \textit{Racial Discrimination Act 1975} (Cth) and the \textit{Sex Discrimination Act 1984} (Cth).

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\textsuperscript{26} The Economic and Social Council, \textit{Optional Protocol to the International Covenant on Economic, Social and Cultural Rights} (2008), art 8(3).
\textsuperscript{27} \textit{National Human Rights Consultation}, above n 5, 100.
\textsuperscript{28} (2004) 219 CLR 562.
\textsuperscript{30} George Williams \textit{A Charter of Rights for Australia} (UNSW Press, 2007) 103.
\end{flushright}
To narrow the focus of this analysis, the *Racial Discrimination Act 1975* (Cth) provides for an interesting point of discussion whether such statutes adequately protect human rights in Australia. On one hand it provides for the domestic implementation of internationally recognised fundamental human rights and ensures that the rights are accessible and enshrined in the legal system. On the other hand the statute is, of course, at the discretion of the current government, and may be repealed or altered at any time. Furthermore, the current parliamentary mechanisms regarding the passage of legislation through the House of Representatives do not always ensure that human rights are considered and debated adequately before the statutes are passed.\(^{31}\)

2 **The Racial Discrimination Act and the ‘Intervention’**

These two issues of legislation not being considered and debated in light of human rights standards, and the vulnerably of human rights legislation to parliamentary power, are highlighted in the ‘law and order’\(^ {32}\) campaign of the ‘Northern Territory Emergency Response’ legislation\(^ {33}\). Otherwise known as the ‘Intervention’, this legislation ‘introduced measures to deal with welfare problems, child sexual abuse and family violence in Indigenous communities in the Northern Territory’\(^ {34}\). The House of Representatives passed the Intervention legislation merely nine hours after it was introduced\(^ {35}\) implying a clear lack of informed and rigorous debate about the serious potential human rights implications\(^ {36}\).

Furthermore the passing of the legislation involved the suspension of the *Racial Discrimination Act 1975* (Cth). As the rights were instilled in a statutory Act, they were not constitutionally guaranteed, and therefore the Parliament had the power to override, repeal or suspend them at any time.

This power to repeal and alter legislatively entrenched human rights has been further recognised in our current political landscape, whereby the Government has recently proposed

\(^{31}\) *National Human Rights Consultation*, above n 5.

\(^{32}\) Ibid.

\(^{33}\) *Northern Territory National Emergency Response Act 2007* (Cth).

\(^{34}\) *National Human Rights Consultation*, above n 5.

\(^{35}\) Ibid, 110.

\(^{36}\) Australian Human Rights Commission, Submission in *National Human Rights Consultation*, above n 5.
an amendment to narrow the ‘racial hatred provisions of the Racial Discrimination Act 1975 (Cth).’

The limitations of legislatively enshrined rights are that their powers and influence are at the discretion of the current day government. In addition, the current political mechanisms do not require human rights to be adequately considered in the passing of legislation.

VII Constitutional Protections

A few human rights are directly enshrined within the Australian Constitution, including both ‘explicit’ rights and ‘implied’ rights. Those explicitly incorporated include such human rights as the ‘right to a trial by jury’, ‘freedom of religion’ and ‘acquisition of property on just terms’, whilst the implicit rights include the individual right to vote. The protection and remedies provided for human rights that are enshrined in the Constitution have been, unfortunately, recognised as ‘limited in scope and generally … interpreted narrowly by the courts’. These limitations are acknowledged to be as a result of the nature and architecture of the document, as it is ‘not designed to protect individual rights but rather to limit the powers of the new federal government as against the states’. Looking beyond the limitations of design, it is nevertheless clear that to enshrine human rights in the Constitution affords them the ‘strongest form of protection’ on two grounds: firstly, they cannot be amended or repealed without a referendum; and secondly, they ensure that any ‘federal legislation that is inconsistent’ with human rights standards may be rendered invalid by the judiciary.


38 National Human Rights Consultation, above n 5, 111.

39 Ibid, 112.

40 Ibid, 111.

41 Ibid 112.

42 Ibid,113.

43 Ibid.

44 Ibid 111 [5.4].

45 Ibid.
VIII Are Human Rights Adequately Protected Under These Current Mechanisms?

Upon reflection of the five focus points of the major mechanisms and provisions that afford human rights protection in Australia’s current legal and political landscape, it is clear that whilst they create an intricate patchwork of protection, it is nevertheless flawed.

Our democratic system is limited in the protection it offers marginalised minorities who may fall ‘between the cracks’ if afforded minimal recognition. Furthermore, a reliance on the ‘ballot box’ provides for retrospective protection of human rights, rather than preventative protection measures.

The common law may protect some human rights through statutory interpretation and case law but it has no authority to stop Parliament passing legislation that repeals, amends or blocks the consideration of human rights.

Protections provided by international human rights law are limited in the sense that they are only enforceable by courts if the laws have been implemented by Parliament to domestic legislation. Furthermore, any accountability mechanisms in the international sphere are limited by the overarching authority of State sovereignty, and therefore are not legally binding. Whilst some international obligations have been implemented into Commonwealth legislation, these statutes are limited by their vulnerability to suspension, or amendment, by the Government of the day. Additionally, while the Constitution may enshrine within it a number of rights, they are, however, limited in scope and interpretation due to the design of the Constitution.

It is worth noting that there are further protection mechanisms through administrative law and ‘Independent Oversight Mechanisms’, both of which are limited by the discretion of Parliament.

To answer whether such a patchwork of legal and political institutional mechanisms, with its clear flaws and fragmentations, is adequate for protecting human rights in Australia requires recognition that it falls short of the State’s obligation to ‘respect, protect and fulfill’. In this

46 Ibid 99.
47 See Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, 288 (Mason CJ and Deane J).
48 National Human Rights Consultation, above n 5.
context, in light of the limitations found above, it is apparent that Australia’s current protection provided to human rights falls short of adequacy.

III SHOULD AUSTRALIA ADOPT A BILL OF RIGHTS?

A Would a Written Form of Rights Provide for Adequate Protection?

Having acknowledged that the current ad hoc protections provided for human rights are limited and flawed, the subsequent issue to address is whether a documented form of human rights, whether constitutionally or legislatively based, would ‘fill the gaps’. The following analysis will investigate whether a Bill of Rights will adequately address the limitations recognised above, whilst acknowledging whether this will come at any perceived, or real, detriment to the current Australian legal or political system.

B The Democratic System & Marginalised Groups

The limitations highlighted in the previous analysis regarding the democratic system were that, for all the checks and balances afforded by a ‘responsible’ and ‘representative’ government, marginalised minority groups still fell through the gaps. In the National Human Rights Consultation Report it was found that in order to adequately protect such disadvantaged groups it was ‘vital’ important that ‘comprehensive human rights protections’ were ‘set out clearly’ and easily accessible in a documented form.

Similarly as to the notion of morality, ‘good faith’ in government and the electorate cannot be relied upon for the practical protection of human rights, particularly with reference to unpopular groups such as ex-prisoners. A Bill of Rights therefore would provide for a documented set of human rights, against which proposed laws and policies would be assessed.

49 Ibid.
50 Ibid 271, quoting Edward Santow Gilbert + Tobin Centre of Public Law, Submission to the National Human Rights Consultation, Secretariat in the Attorney-General’s Department, National Human Rights Consultation: Submission, 2009, 48
51 Ibid 270.
52 Ibid.
so as to ensure that ‘the needs of the disadvantaged or marginalised’ would be taken into account. 53

Whilst a Bill of Rights would not possess ‘elixir-like qualities that will banish all the woes’ of the vulnerable communities, 54 it would ensure that the rights of these marginalised groups were recognised and not merely reliant on the ‘good faith’ of the government and electorate.

C The Common Law System and Al-Kateb

The limitations of the common law system were highlighted through the ‘tragic’ outcomes of the Al–Kateb 55 case, a case often referred to as ‘evidence of the inadequacy of human rights protection in Australia’. 56 The determination of the lawfulness of his indefinite detention was said to be as a result of the current design and intention of the legislation. 57 As ‘human rights are legally irrelevant in a jurisdiction without formal human rights protection embedded in the law’, 58 the reasoning of the case did not, and could not, refer to human rights standards.

Julian Burnside QC holds that a Bill of Rights would have ensured that reference to human rights standards was not only possible but also required. Indeed, the case may not have even made it to the High Court or even to court at all, as the issues raised in the case may have been ‘identified and resolved’ at an earlier stage of drafting or in through the ‘preparations of a human rights compatibility statement’. 59 The case of Al-Kateb 60 makes evident the direct influence a Bill of Rights would have on fostering greater adequacy of human rights protection.

D International Human Rights Obligations

As recognised in the above discussion, Australia’s lack of domestic implementation of the treaties and covenants it has ratified on the international stage, is in breach of its obligation to ‘fulfill’. It was further recognised that international human rights law is limited in the extent to which the relevant Committees can provide remedy or accountably when up against the buttress
of sovereignty. It therefore clearly stands that adopting a Bill of Rights that provides for the domestic implementation of these obligations would achieve greater protection of human rights. Beyond improving Australia’s reputation on the international stage, by limiting non-compliance criticism, it would bring Australia in line with other Western democracies. Domestic implementation would ensure that ratifying treaties does not become ‘hollow and meaningless gestures’; rather, it provides for practical protection.

Thus, to return to Al-Kateb, it is worth recognising that had international human rights law been implemented domestically, whether in a Bill of Rights or otherwise, would have allowed for greater reference to, and protection of, Mr. Al-Kateb's human rights. Furthermore, domestic implementation would give teeth to provisions of remedies and accountability, which would not only provide greater protection but also reduce embarrassment on an international stage through a reduction of complaints made directly to the international committees.

This is a particularly weighty issue in the political arena, as much criticism has been given to the notion of international Committees wanting to ‘play’ domestic politics. Naturally, however, the power and scope of these laws, and how they may dictate future legislation, and the reasoning of courts are dependent on whether they are constitutionally entrenched, or introduced as statutory legislation.

\[\text{E Legislation}\]

The implications of the adoption of a Bill of Rights would be the assurance that all legislation would be required to be compatible with human rights standards, or that non-compatibility would be required to be clearly disclosed and debated. The National Human Rights Consultation Report noted the significant role a Bill of Rights would have on the encouragement of public debates and political scrutiny when passing legislation. This would have had an immense effect on the decision-making process and on the time afforded to the passing of the legislature for the Northern Territory Intervention. Furthermore, it suggested that

\[\text{\footnotesize 61 Ibid 227, quoting Julian Burnside, Submission}\]
\[\text{\footnotesize 62 Ibid 277, quoting ACT Government, Submission.}\]
\[\text{\footnotesize 63 (2004) 219 CLR 562}\]
\[\text{\footnotesize 64 National Human Rights Consultation, above n 5.}\]
\[\text{\footnotesize 65 Tim Lester, Interview with Alexander Downer, Former Foreign Affairs Minister (Television Interview, 29th August 2000) <http://www.abc.net.au/7.30/stories/s168960.html>}.\]
\[\text{\footnotesize 66 National Human Rights Consultation, above n 5.}\]
a Bill of Rights may also prompt ‘systematic review and amendment of particular areas of the law, to ensure that they are consistent with human rights’. 67

Greater human rights legislation, whether encompassed in a Bill of Rights or through statutory acts will also have implications on judicial decisions, allowing for judges to ‘decide cases on first principles, rather than old precedents and would make judicial decisions more comprehensible, logical and reasonable’. 68

F The Detriments of a Codified Bill of Rights

While in light of this analysis the advantages of having a documented set of rights for improving the adequacy of protection for human rights are undoubtedly evident, to laud a Bill of Rights as a ‘magic bullet’69 would be to fail to recognise the potential detriments it may have. There are numerous criticisms that are expressed quite widely within the on-going debate of whether a Bill of Rights should be adopted. These include concerns that it would be anti-democratic and that human rights may be at the risk of becoming the preserve of lawyers.

1 A Bill of Rights is Undemocratic

Critics of a Bill of Rights deem it to be anti-democratic on the basis that they would upset the doctrine of ‘responsible’ and ‘representational’ government, as it would limit the powers of the Parliament whilst transferring them to the unelected judiciary. 70 The judiciary, as composed of individuals drawn from a ‘narrow section of society’, 71 is in no way representative of society, and would take decision making power away from the elected majority, conferring it to a single judge.

This criticism calls for an explanation of the roles of the different arms of government if a Bill of Rights were to be adopted. The executive arm of government would be required to act in a manner ‘consistent with human rights in its decisions making’ and may ‘face court action if it fails to do so’. 72

67 National Human Rights Consultation, above n 5, 273.
68 Ibid 275.
69 Joo-Cheong Tham, above n 54.
70 Byrnes, above n 7, 57.
71 T Campbell and N Barry, Submission as quoted in National Human Rights Consultation, above n 5, 285.
72 Ibid 241.
The Parliament’s role is to decide on the passing of legislation. If the Bill of Rights were constitutionally entrenched, Parliament would be required to ensure that the legislation was consistent. If the Bill of Rights were to be statutory, the limits on Parliament would be lessened, as they could decide to pass legislation that overrides human rights, and if the court were to find it inconsistent, they would retain the power to decide whether to amend it or not.

The role of the judiciary is to ‘interpret legislation in a manner consistent with human rights’. Depending on the model introduced, the court may ‘be empowered to provide remedies’ in cases where the executive or legislature is found to be in breach of, or inconsistent with, human rights. If Bill of Rights were statutory based, the decision of the court would have no effect on the validity of any legislation, to the discretion of the Parliament.

Julian Burnside QC sought to dispel these criticisms by reminding critics that a Bill of Rights would be one enacted by Parliament. This would be the case were it to be introduced as legislation, or constitutionally through a referendum. The role of the judiciary is to simply ‘apply the law passed by the government’. A Bill of Rights would set a baseline of human rights standards that would be democratically agreed upon, which Parliament would need to observe.

The ‘independent judiciary’ would therefore rule on whether Parliament had been in breach, or ‘gone beyond the bounds of its power’ as that is the constitutional role of the courts. Enforcing a democratically created document, therefore, cannot be rendered undemocratic. Acknowledging former Prime Minister John Howard’s condemnation of a Bill of Rights,
stating it would ‘interfere with the way governments do things’.

Burnside assures that ‘that is precisely the point’.

2 Would the Codification of Human Rights be Detrimental to Their Protection?

Another perceived cost of a Bill of Rights is that it would shape the culture of human rights in Australia to be solely judicial. Due to the increased role of the courts, there is a risk that human rights debates will become inaccessible for the general population, as they will ‘increasingly privilege legal material and expertise’.

As such, human rights may be perceived to be the preserve of lawyers and courts. This over-legalisation of human rights may also detrimentally impair the protection of rights, as they will be perceived only through the lens of legal provisions and case law, shutting out the roles of community groups and marginalising those unable to afford legal representation. This fear of human rights being ‘subsumed by legal culture’ when they are often ‘moral concepts’ and issues that can be resolved out of the court, fails to recognise two important concepts: the first was addressed earlier, highlighting the need for a legal foundation beyond morality to ensure practical protection of rights; the second is that the Bill of Rights would act as framework that could be ‘taken up by civil society’ for political and social action, beyond the legal actions of the courts.

3 Would Such a Model Fill the Gaps?

Having addressed the potential detrimental effect of a Bill of Rights, it is clear that they are overridden by the advantages a Bill of Rights would afford in improving the current limited patchwork of protection mechanisms in Australia.

As discussed above, the issue of whether such a Bill should be a non-entrenched statutory Bill or one that is adopted into our Constitution has already shown its weight and influence on how the Bill of Rights will change both the current protection measures, and our political and legal landscape as it is today. Therefore, the subsequent question this paper must address is ‘should the Bill of Rights adopted, be constitutionally entrenched’.

82 Burnside, above n 4, 48, 61.
83 Ibid.
84 Joo-Cheong Tham, above n 54.
85 Ibid.
86 National Human Rights Consultation, above n 5, 295.
IV SHOULD AUSTRALIA ADOPT A BILL OF RIGHTS IN ITS CONSTITUTION?

A Would it Provide the Most Adequate Protection of Human Rights in the Australian Context?

A constitutionally entrenched Bill of Rights, similar to the models of the US and South Africa, is binding, and cannot be repealed or amended by Parliament without a referendum. Additionally, Constitutional Bills of Rights ‘express the will of the people directly’ and as such ‘can only be changed by the people’. It empowers the courts to declare any legislation that is inconsistent with the human rights guaranteed in the constitution, to be invalid.

To perceive this through the lens of whether it would provide the most adequate protection requires a return to the previous issues raised regarding the holes in the current protection mechanisms. To recall the case of Al-Kateb, Justice McHugh explicitly noted that ‘(e)minent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights’, and it was due to the absence of such an instrument that there could be no check on the laws that violate the most basic of rights, that led to this ‘tragic’ outcome.

Currently, the strongest protection afforded to human rights, are to those enshrined in our Constitution, their protection limited only by the design of the instrument. Compared with current statutory human rights acts, such as the Racial Discrimination Act, they cannot be overridden or suspended. The argument is the same when regarding the domestic implementation of international human rights. Through this lens, the strength of a constitutional Bill of Rights in providing unwavering protection is obvious.

1 The Political Reality

There are, however, a number of risks associated with protecting rights under such an instrument. One such perceived risk is that by entrenching these rights in the Constitution they will lose their adaptability and become ‘dinosaur like rights’ which we will lumber upon our future generations. This is likened by some scholars to the outdated ‘right to bear arms’

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87 Burnside, above n 4, 50.
89 George Williams, A Charter of Rights for Australia (UNSW Press, 2007).
90 Racial Discrimination Act 1975 (Cth).
91 Byrnes, above n 7, 45.
entrenched in the 2nd Second Amendment to the US Bill of Rights.\textsuperscript{92} In this sense, a constitutional Bill of Rights would be counter-productive to their protection.

To approach this question beyond the lens of protection measures alone acknowledges broader issues with such an instrument. These include the criticisms toward the heightened authority of the judiciary that would in effect ‘transfer political decisions from a democratically elected legislature to an unelected, unaccountable and unrepresentative judiciary’.\textsuperscript{93} Whilst QC Burnside addressed this issue above, the issue is compounded when the Bill is constitutionally entrenched. Perhaps beyond this debate of democratic integrity, and any other consideration, is the realistic approach taken by Burnside in saying that, due to its unpopularity, a constitutional Bill of Rights is ‘politically impossible’. Indeed, the \textit{National Human Rights Consultation Committee} in compiling the report were briefed to provide ‘options that would preserve the sovereignty of Parliament, and therefore “not include a constitutionally entrenched Bill of Rights”'.\textsuperscript{94}

Therefore to ask whether Australia ought to adopt a Bill of Rights in its constitution requires consideration of the context of the political, as well as legal, landscape of modern Australia. Whilst a constitutional Bill of Rights may be perceived as the strongest in terms of providing adequate protection, acknowledging its flaws, both in a legal sense and in context with political reality, this paper cannot conclusively find that if a Bill of Rights were to be enacted, it should be constitutionally.

\textbf{B \ A Statutory ‘Dialogue’ Model}

Although a constitutionally entrenched instrument may not be the Bill of Rights Australia should enact, this analysis has nevertheless deduced that a Bill of Rights of some regard is necessary in Australia. Despite the few perceived detriments of a codified Bill of Rights, the consequences of sustaining our current patchwork of protection measures is uninformed and dangerous, given that the purpose of the debate is to protect people’s basic human rights. The manner in which such an instrument would fill the gaps of our current system is difficult to argue with.

\textsuperscript{92} Ibid.
\textsuperscript{93} Ibid 57.
\textsuperscript{94} Fr Frank Brennan SJ AO, ‘The Practical Outcomes of the National Human Rights Consultation’ (Address to Judicial Conference of Australia Colloquium, Sydney, 12th October 2013).
In light of the political and legal landscape, *The National Human Rights Consultation Report*95, QC Burnside96 and scholars alike,97 all suggest the adoption of a statutory Bill of Rights for Australia. The statutory model is preferred as it provides for the facilitation of a ‘dialogue’ between the three arms of government. The dialogue model staking a balance between the judicial protection of human rights and Parliamentary sovereignty. Under a statutory model the courts may only interpret statutes in a human rights consistent manner. They do ‘not have the power to declare statutes unconstitutional or repealed’98. The model, however, ‘has been proven to create important systematic and cultural change within governments towards the protection and promotion of human rights’.99 Furthermore, it would provide a format for the domestic enjoyment and realisation of internationally ratified human rights law.

Looking to the similar models currently enacted in the ACT100 and Victoria,101 early evidence suggests that a statutory Bill of Rights has ‘primarily affected the development of government policy, the drafting and adoption of legislation, and the delivery of services to the community’.102

Recognising that a statutory Bill of Rights inherently faces the same limitations as current legislation, that it may be a ‘fragile shield’ that could be ‘swept aside’ by the government of the day,103 its advantage lies in that it is not perceived to be as ‘alarming to politicians’104 compared to a constitutional Bill of Rights.

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95 *National Human Rights Consultation*, above n 5.
96 Burnside, above n 4.
97 See, eg, Byrnes, above n 7, 35.
98 Byrnes, above n 7, 51.
100 *Human Rights Act 2004* (ACT).
103 *National Human Rights Consultation*, above n 5, 271.
104 Burnside, above n 4, 50.
V CONCLUSION

Ultimately, given the political, social and cultural contexts through which we must consider the adoption of a Bill of Rights, the analysis suggests that the most appropriate model Australia should be adopting is a statutory Bill of Rights as it provides for the greatest protection balanced with the need for parliamentary sovereignty. Whilst this paper recognises that this model cannot be a ‘panacea for all violations on human rights’, it would nevertheless make them ‘more obvious and subject to scrutiny’.\textsuperscript{105} A Bill of Rights in this format contributes ‘thereby to the maintenance of an equilibrium’ between ‘individual rights and majoritarian politics’\textsuperscript{106}. Furthermore, it ought to be acknowledged that whilst a Bill of Rights would work to fill the gaps and sew together the patchwork of current protection mechanisms, due to the specific political, social and cultural contexts human rights operate in, a Bill of Rights will only be one piece of the overall mosaic of human rights protection. A Bill of Rights, in any form, must be supported and supplemented by effective policies, protections and institutions\textsuperscript{107} for the more comprehensive protection of human rights Australia can hope to achieve.

\textsuperscript{105} Byrnes, above n 7, 165.

\textsuperscript{106} Ibid 169.

\textsuperscript{107} Ibid 56.
ISLAMIC BANKING AND FINANCE PROMOTION AND DEVELOPMENT IN THE PHILIPPINES: LEGAL AND REGULATORY ISSUES

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ABSTRACT

There is a growing interest in expanding Islamic banking and financial services in the Philippines, a country with an existing conventional banking and financial sector. In line with this interest, and to assist legislators and regulators in establishing the proper legal framework, this essay studied how jurisdictions, particularly the United Kingdom and Malaysia, successfully established Islamic banking and finance alongside advanced conventional banking and financial sectors. The study involved the legal reforms that they undertook, the context and philosophy of the reforms and the issues that have confronted – and continue to confront – their respective endeavours. From this study, a number of lessons – including the importance of building a robust legal framework, the need to evaluate the existing laws and regulations for principles inconsistent with the Shari’ah, the importance in building Shari’ah expertise – and recommendations, including the amendment of specific laws, were derived to guide jurisdictions such as the Philippines in their efforts to establish, develop and promote Islamic banking and finance.

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I  INTRODUCTION

There is a growing interest in Islamic banking and financial services (IBFS) in the Philippines. Recently, regulatory authorities have become vocal in their desire to expand IBFS in the country. This is not surprising as the development of large-scale IBFS products may revitalize the financial market and trigger the entry of new participants.\(^1\) International organizations see

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\(^1\) JD (Ateneo de Manila University), LLM (Melb).
IBFS as a source of funding to bridge infrastructure gaps. Significantly, IBFS is seen as an instrument to include Philippine Muslims, who form a significant part of the population, into the banking and finance industry, and to assist in the development of Muslim Mindanao by attracting investors and creating employment opportunities.

Legislators and regulators alike agree that the key to the development and promotion of IBFS lies in appropriate legal reforms. According to Senator Grace Poe, ‘[t]he potentials of Islamic finance can be realized with comprehensive laws that would spur its development, with Philippines having a sizeable Muslim population.’ Meanwhile, Nestor Espenilla Jr., Deputy Governor of the Bangko Sentral ng Pilipinas (BSP), the Philippine central bank, has indicated that reforms, such as significant amendments to the BSP Charter, are necessary to develop the industry.

It cannot be doubted that IBFS has a universal appeal. It is attractive to many non-Muslims as the prohibition on *riba* or interest is but one aspect of IBFS; deceit, exploitation and ambiguity are also proscribed. Islamic financial institutions have also fared much better than their conventional banking counterparts throughout the global financial crisis, having, in accordance with Shari’ah principles, stayed away from overwhelmingly risky assets including sub-prime mortgage backed securities. Furthermore, the worldwide surge of

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5 Ibid.
8 Ibid.
attention to IBFS, including India and China,\textsuperscript{12} means that the Philippines cannot afford to be left behind in the development of this industry.

The objective of this essay is to highlight the legal and regulatory issues and challenges that will have to be addressed in the Philippines before IBFS can move forward within the jurisdiction. It is crucial to put in place a legal infrastructure that accommodates and promotes IBFS. Legislators and regulators should consider the issues and challenges discussed in the process of putting in place an IBFS system alongside an advanced conventional banking and finance system. This essay aims to study and derive lessons from jurisdictions that have successfully developed IBFS systems vis-à-vis their conventional banking systems.

In Part II of this essay, a brief overview is given on the fundamental concepts and principles of IBFS. Part III studies how IBFS developed in leading jurisdictions, particularly the United Kingdom (‘UK’) and Malaysia, the two biggest markets outside of the Middle East, and highlights attempts of other jurisdictions to develop the industry. In Part IV, a deeper look is taken at the issues and lessons learned in developing IBFS in a conventional setting. In Part V, the existing legal and regulatory framework of the Philippine banking and financial industry is considered. It discusses how the challenges that have been identified in earlier parts of the essay are likely to play out in the Philippine context. There is also a discussion on the unique challenges and issues applicable to the Philippines.

II ISLAMIC BANKING AND FINANCE – THE FUNDAMENTAL CONCEPTS

IBFS follows the Shari’ah or the ‘Islamic legal system or tradition, otherwise known as Islamic law or law of Islam.’\textsuperscript{13} It is ‘an all-inclusive code of conduct, fundamental to the moral, ethical, spiritual, social as well as legal aspects of a Muslim’s private or public life.’\textsuperscript{14} The sources of the Shari’ah are, primarily the Qur’an, the holy book believed to be the Word of Allah; and the Sunnah, which are the sayings, decisions and customs of the Prophet Muhammad.\textsuperscript{15} The

\textsuperscript{13} Abu Umar Faruq Ahmad, \textit{Theory and Practice of Modern Islamic Finance: The Case Analysis from Australia} (Brown Walker Press, 2010) 50.
\textsuperscript{14} Ibid.
\textsuperscript{15} Ibid 51-4.
secondary sources include the ‘Ijma or scholarly consensus’, and the ‘Qiyas or decision by analogical reasoning.’

One of the essential principles of IBFS is the prohibition on riba, which refers to interest, usury or ‘unjustified increase.’ The prohibition on riba comes from ‘divine orders’ and Muslims must absolutely eschew riba both in their commercial and non-commercial activities. Another primary principle of Islamic finance is the avoidance of gharar or uncertainty, and maisir or excessive risk. Haram businesses such as alcohol and gambling are also prohibited.

IBFS operates under two guiding philosophies: risk-sharing, and the promotion of social and economic welfare. Accordingly, the Profit-Loss-Sharing system (PLS) with participatory arrangements is one of the usual arrangements under IBFS. There are a number of other financial products used in different countries, the common ones being Murabaha – buy-sell-back-arrangements, where the financial institution purchases a specific property and sells it to the customer with a mark-up; Ijara or Musharaka Mutanaqisa – lease-to-purchase arrangements, where the financial institution purchases a specific property, holds title and leases it to the customer; Tawarruq – a three-party contract used to facilitate consumer finance where the financial institution purchases a certain commodity, sells it to a customer with a mark-up, who then sells it to a third-party to obtain the cash; Sukuk – the Islamic alternative to corporate and government bonds; and Takaful – the Islamic alternative to insurance contracts.

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16 Ibid.
19 Ibid.
20 Ibrahim, above n 17.
22 Ibid 224.
23 Ibrahim, above n 17.
24 Ibid.
25 See Ahmad, above n 13, 123-31.
Islamic banks offer *Mudarabah* investment deposits where the depositor shares in the profit of investments made from the deposit and also shares in the losses.\(^{26}\)

Legal opinion has a central role in IBFS and it has become standard practice to seek a legal opinion on whether a product or service is Shari’ah compliant.\(^{27}\) Providers of legal opinions or ‘juriconsults’ can be members of Shari’ah supervisory boards or consultants to IBFS institutions.\(^{28}\) They are critical to ensuring Shari’ah governance and avoiding Shari’ah compliance risk.\(^{29}\)

### III HOW CONVENTIONAL FINANCIAL SYSTEMS INTRODUCED IBFS

#### A United Kingdom – ‘No Obstacles, No Special Favourites’

Islamic retail products were first introduced into the UK by banks from the Middle East and South Asia.\(^{30}\) As the regulatory framework of the UK in the 1980s and the early 1990s did not include Islamic finance products, these products were unregulated.\(^{31}\) A number of Islamic financial products were already in the market even prior to any regulation.\(^{32}\) In 1982, Al-Baraka International Bank (AIB) took over Hargrave Securities, a domestic deposit-taking institution.\(^{33}\) AIB brought to UK its first Islamic banking experience.\(^{34}\) After the Bank of England imposed tighter regulatory requirements on ownership structure, the AIB surrendered its banking license in 1993 but maintained its operations as an investment company.\(^{35}\)

In 1995, Lord Edward George, then the Governor of the Bank of the United Kingdom, sought to develop Islamic banking and from then the UK implemented reforms for this purpose.\(^{36}\)

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\(^{27}\) Ibrahim, above n 17, 685-8.

\(^{28}\) Ibid.


\(^{30}\) Nizami, above n 21, 228.

\(^{31}\) Ibid.

\(^{32}\) Adohni, above n 1, 192.

\(^{33}\) Ibid 23.

\(^{34}\) Ibid 23.


\(^{36}\) Aldohni, above n 1, 192.
According to leading law practitioners, the UK is currently the only Western system that wholly allows Islamic finance.  

The first step undertaken by the UK was to establish a Treasury group to study and investigate the possible challenges that would face the growth of the IBFS industry in the UK. The group consisted of representatives from government, the Financial Services Authority (FSA) and the Muslim community. The group identified the barriers to Islamic finance, and from its work, legal reforms were introduced starting in 2003.

1 Registration and Licensing of Islamic Financial Institutions

All financial service activity in the UK is governed by the Financial Services and Markets Act 2000 (UK) (FSMA), and all financial institutions intending to provide IBFS should obtain a license from the FSA. There is no separate legislation or regulatory framework for IBFS. Under the FSMA, it was made clear that the FSA was the sole regulator, with the advantage that it can provide consistent examination and supervision of Islamic products. The FSA should be consulted on the products and services that the institution will offer and provide.

All financial institutions seeking licensing in the UK, including Islamic banks and financial institutions, should meet the ‘threshold conditions’ set forth in Schedule 6 of the FSMA, including having the appropriate UK incorporation, having adequate resources, and having executives who are ‘fit and proper’ to carry on the business. The conditions are broadly worded and flexible enough to apply to both conventional and Islamic financial institutions. The FSA admits that certain difficulties may arise with the application of the FSMA to Islamic banks and financial institutions, but discussions between the FSA and applicable institutions would be sufficient to deal with them:

37 Pui-Guan Man, ‘Lawyers Call for Clarity of Rules if UK is to become Western Hub of Islamic Finance’ (2013) 15 Legal Week 32.
38 Aldohni above n 1, 192.
39 Ibid.
41 Wilson, above n 26, 115.
42 Ibid 229-30.
43 Ibid.
45 Ainley, above n 40, 12.
46 Ibid.
In applying FSMA to Islamic firms, there are several areas where more work or clarification is needed. So far, however, they have not presented any obstacles that could not be overcome. This owes much to the collaboration between the FSA and the applicants to develop pragmatic solutions.47

A case in point is the FSA’s struggle to accept the PLS concept in Islamic finance. When the Islamic Bank of Britain applied for licensing, the FSA took into consideration the PLS structure under a *Mudarabah* agreement, where under the Islamic concept, a depositor shares not only in the profit of an investment but also with the loss and may not be entitled to the full amount of his deposit.48 The FSA refused to exempt this kind of deposit from the obligation of full repayment, and the licensing process took a painstaking two years to sort out these issues.49 The end result is that Islamic Bank of Britain is legally obligated to pay the full amount of a deposit, but, as a compromise, it notifies the depositor that acceptance of the full amount amounts to non-compliance with Shari’ah principles, and gives the depositor an opportunity to refuse the full amount returned and to absorb the loss.50

2 Underlying Philosophy of Reforms

The UK did not enact much regulatory laws or provisions that address the distinctive features of Islamic finance.51 In its reforms, the UK did not use the term ‘Islamic banking’ or ‘Islamic finance,’ and instead refers to IBFS under the umbrella term ‘alternative financial instruments.’52 The UK supported a ‘religiously neutral position’; it did not want to be seen as giving favours or special treatment to one financial system over another.53 Instead, it endeavoured to create a ‘level playing field’ which would facilitate the entry of alternative financial instruments such as Islamic financial products into its existing financial system.54

The tax reforms undertaken by the UK were primarily to remove ‘the barriers to Islamic finance’ but not to provide for incentives or special consideration.55 The UK avoided taking an approach that suggested a different regulatory treatment for Islamic banking and finance, and as such

49 Ibid.
50 Aldohni, above n 1, 160.
52 Ibid 70.
53 Ibid 73.
54 Ibid.
‘very few’ reforms or measures were enacted.56 A 2007 FSA paper contained the following statement:

The FSA is happy to see Islamic finance develop in the UK, but it would not be appropriate, nor would it be legally possible, to vary its standards for one particular type of institution. This was clearly articulated by Sir Howard Davies in his speech in Bahrain in September 2003. The FSA’s approach can be summed up as ‘no obstacles, but no special favours.’57

The reforms to existing legislation that were passed focused on the deductibility by Islamic banks and finance companies of the profits from Islamic arrangements distributed to investors and depositors.58

One of the major changes introduced was relevant to the Stamp Duty Land Tax (SDLT) that the UK charged on every sale of property.59 Because Murabaha arrangements involved two property transfers – first, the sale of property to the bank; then, upon full payment, the sale of the property to the buyer – SDLT would be imposed twice.60 In order to remove the double taxation, the Finance Act of 2003 (UK) restricted the application of SDLT on alternative property finance. The Finance Act of 2003 (UK) also provided for a tax-neutral treatment of Sukuk issuances.61 It stipulated that sukuk shall have the equivalent tax treatment as conventional bonds.62

While the UK has made significant inroads to provide equivalent tax treatment for Islamic finance and conventional finance, practitioners are of the opinion that these are not sufficient to deal with the more ‘exotic’ structures that are in place in Malaysia and in the Middle East, and call for the necessary reforms to enable the growth of the UK Islamic finance industry.63

3 Shari‘ah Compliance

There are no laws or rules that require the establishment of a Shari‘ah supervisory body; the Islamic financial institutions have the sole responsibility to determine whether or not their

57 Ainley, above n 40, 11.
58 Dabner, above n 55.
59 Nizami, above n 21, 230.
60 Ibid.
61 Ibid 231.
62 Ibid.
63 Man, above n 37, 32.
products, instruments or services are Shari’ah compliant. The only issue for the UK is the application of the FSA Approved Persons rules, which covers the qualifications of a company’s directors. If the Shari’ah advisory board is deemed a director, a number of guidelines apply, such as restrictions on multiple memberships to avoid conflict of interest. The FSA has thus far considered Shari’ah scholars as being advisors and not directors, so the Approved Persons rules have not been made to apply.

One of the objectives of the UK government in pursuing the growth of Islamic finance is to include the significant British Muslim population, which has avoided conventional banking on the basis of religiosity, into the financial sector. Thus, Shari’ah compliance should be a desired feature as it is the one factor that underpins the decision of a Muslim to deposit or invest in an Islamic financial product. Ercanbrack notes that despite this objective, the FSA appears ‘content to ignore’ Shari’ah compliance risk. The FSA has only indirectly addressed the risk by issuing the Approved Persons Rules, and English courts have been hesitant to apply Shari’ah in commercial disputes. The UK’s lack of commitment to preventing Shari’ah compliance risk has been taken as evidence that the ‘state is intent on garnering the economic and social benefits of Islamic finance, but it has no intention of making concessions that would prejudice the current regime.’ The issue of Shari’ah compliance may affect the government’s objective in attracting significant investments from the British Muslim population.

The existing framework of having Shari’ah Supervisory Boards, which are not accountable to a higher authority and are not supervised, poses a threat to corporate governance. For one, a decision of a Shari’ah Supervisory Board has far-reaching effects. Ultimately, the Shari’ah Supervisory Board decides which transactions will be operated by the bank or financial

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64 Ercanbrack, above n 51, 74.
65 Ibid.
66 Ibid.
67 Ibid.
68 Ibid.
69 Ibid 77.
70 Ibid.
71 Ibid.
72 Ibid.
73 Ibid.
74 Aldohni, above n 1, 106.
75 Ibid.
institution, which transactions are Shari’ah compliant and which are not.\textsuperscript{76} Customer and shareholder confidence rests greatly on whether Shari’ah Supervisory Boards are able to correctly decide on matters involving adherence to Islamic tenets.\textsuperscript{77} An errant decision of a Shari’ah Supervisory Board, or inconsistent decisions by Shari’ah Supervisory Boards of different institutions, may lead to lack of consumer confidence, withdrawal of deposits and, ultimately, systemic failure.\textsuperscript{78} Scholars such as Aldohni and Ercanbrack have pushed for improvement in this area, such as by the issuance of appropriate FSA regulations\textsuperscript{79} or the establishment of an authoritative body.\textsuperscript{80}

Of relevance to the issue of Shari’ah compliance is the lack of qualified Islamic scholars who could be members of Shari’ah Supervisory Boards. In 2007, it was estimated that there were only twelve scholars who possessed a thorough understanding of Shari’ah law and fiqh jurisprudence as well as of banking, finance and economics, and had the intellectual ability to assess whether a product is consistent with Shari’ah law.\textsuperscript{81} Islamic banks responded to this problem by funding legal scholars to study the subject of modern finance.\textsuperscript{82}

4 \textbf{Inadequacy of Rules}

The reluctance of the FSA to grapple with the complexity of the nature of Islamic financial transactions also leads to insufficient consumer protection. This is evident in the case of Islamic home mortgages. An Islamic home mortgage is based on the principles of Diminishing \textit{Musharaka} or co-ownership and \textit{Ijara} or leasing.\textsuperscript{83} The \textit{Ijara} or leasing part of this arrangement should be recognized as more than an ordinary lease and a customer of an Islamic home mortgage should have greater occupancy right than an ordinary lessee.\textsuperscript{84} In the FSA’s Mortgage and Home Finance: Conduct of Business Sourcebook (MCOB), the FSA identifies the right of a customer of an Islamic home mortgage to occupy the property throughout the term of the mortgage and for his interest thereto to be protected, but stops short of issuing actual

\begin{footnotesize}
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\item\textsuperscript{76} Ibid.
\item\textsuperscript{77} Ibid 107.
\item\textsuperscript{78} Ibid.
\item\textsuperscript{79} Ercanbrack, above n 51, 75.
\item\textsuperscript{80} Aldohni, above n 1, 108.
\item\textsuperscript{82} Ibid.
\item\textsuperscript{83} Aldohni, above n 1, 167
\item\textsuperscript{84} Ibid.
\end{itemize}
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rules, which the mortgage provider would be obliged to follow. The FSA leaves the responsibility of consumer protection largely to the Islamic financial institution, which may have an inherent conflict of interest. The FSA failed in providing clear and effective rules on the rights and obligations of the customer, which would have been an added legal protection against displacement or eviction.

5  Suitability of Safety-Net Schemes

The equal treatment by the UK of IBFS means that there are no special regulations that apply with regard to safety-net schemes, such as deposit insurance, and the lender of last resort principle. The UK has a deposit insurance system and, as with conventional banks, Islamic banks are required to join the system. The problem arises with the application of the system to Mudaraba accounts, particularly in the inconsistency between the 100 per cent guarantee and the PLS sharing principle where the depositor accepts the risk of loss. Aldohni underscores the lack of appropriate regulations to determine whether Mudaraba should be categorized as investment accounts, outside of the scope of the deposit insurance system.

The other issue relates to the deposit insurance fund itself, which consists of the premiums paid by all banks, conventional or Islamic. The premiums are co-mingled into one fund, which may be invested into transactions that involve interest. In the event that an Islamic bank requires the use of the funds, it would be availing of funds from a non-Shari’ah compliant source.

The ‘lender of last resort’ pertains to the role of the central bank in providing liquidity, by providing central bank credit, in times of emergency or crisis. One of the underlying principles of the ‘lender of last resort’ concept is that the central bank, using its discretion, will

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85 Ibid 168.
86 Ibid 169.
87 Ibid 169.
89 Ibid 174.
90 Ibid.
91 Ibid.
92 Ibid.
93 Ibid 175.
94 Ibid.
lend freely but charge a penalty rate of interest.\textsuperscript{96} In the UK, all banks are mandated to place deposits with the Bank of England.\textsuperscript{97} The deposits are non-interest bearing but there are no regulations as to how the fund will be maintained, and, as with the deposit insurance fund, may thus be invested in transactions that involve interest.\textsuperscript{98} There is also an issue as to whether Islamic banks may avail of the scheme at all considering that the Bank of England charges a penalty rate of interest and Islamic banks are prohibited from engaging in transactions involving interest.\textsuperscript{99}

The issues surrounding the deposit insurance and lender of last resort schemes would mean that if Islamic banks choose to apply Shari’ah principles strictly, they would be left with no safety nets that are important to secure consumer confidence and reduce systemic risk.\textsuperscript{100} Without these safety nets, Islamic banks are at a disadvantage compared to conventional banks.\textsuperscript{101} Ironically, from this perspective, the absence of rules designed particularly to take into consideration the nature of Islamic banking puts into question the ‘level playing field’ that the UK set out to achieve.

B \textit{Malaysia – Purposeful Reforms}

Strong public pressure influenced the entry of Islamic banking and finance into Malaysia.\textsuperscript{102} Malaysia commenced its IBFS industry with a full-fledged Islamic Bank, the Bank Islam Malaysia, in 1983.\textsuperscript{103} For a period of time, Bank Islam Malaysia was the only full-fledged Islamic bank; there was a trial period to discover the potential problems in Islamic banking before allowing a broader application.\textsuperscript{104} The next stage in Islamic banking in Malaysia was in 1993 when commercial banks were permitted to open ‘Islamic windows’ to offer IBFS.\textsuperscript{105} Three banks – the United Malayan Banking Corporation, Mabank and Bank Bumiputra thus offered Islamic banking alongside their conventional banking operations.\textsuperscript{106} In 1994, the

\textsuperscript{96} Ibid 342.
\textsuperscript{97} Aldohni, above n 1, 176.
\textsuperscript{98} Ibid.
\textsuperscript{99} Ibid.
\textsuperscript{100} Ibid 176-77.
\textsuperscript{101} Ibid.
\textsuperscript{102} Ibid 191.
\textsuperscript{103} Ibid.
\textsuperscript{104} Ibid 192.
\textsuperscript{106} Aldohni, above n 1, 191.
Islamic Inter-bank Money Market was established for the purposes of linking the institutions and the instruments they were offering. In 2005, foreign Islamic banks, such as the Kuwait Finance House, were granted licenses to practice Islamic banking in Malaysia. To date, Islamic banking services are offered by nearly all of the commercial banks in Malaysia.

1 Laws

Three major laws govern Islamic banking in Malaysia – the Islamic Banking Act 1983 (Malaysia), the Banking and Financial Institutions Act 1989 (Malaysia) and the Central Bank of Malaysia Act 2009 (Malaysia). The laws of Malaysia ensure the co-existence of Islamic and conventional banking – it is a dual banking system.

Kunhibava lauds the legal framework of Malaysia for being clear, transparent and for providing well-defined roles within the system:

Another lesson that can be learnt from the Malaysian regulatory and Shariah framework is the transparency of the structure and the distinct roles of every organ in the Islamic financial system. Each Islamic bank is governed by the IBA 1983, and conventional banks are governed by the BAFIA 1989. These Acts govern the operational aspect of the banks. Matters of substance that govern the Shariah compliance of the banks’ products and services are left to the Shariah Advisory Board, and National Shariah Advisory Council. Each organ in the Islamic financial system has distinct clear roles for which they are qualified for.

The Islamic Banking Act 1983 (Malaysia) and the Banking and Financial Institutions Act 1989 (Malaysia) provide that a company may engage in Islamic banking business only upon possession of a license from the Bank Negara (or the Malaysian central bank), such license to be granted only upon showing that the business ‘will not involve any element which is not approved by the Religion of Islam’ and that the company establishes a Shari’ah advisory body to be approved by the Central Bank. For conventional banks with Islamic windows, the law requires the operation of a separate unit within the bank to administer Islamic banking and

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107 Kunhibava, above n 105, 195.
108 Ibid.
109 Aldohni, above n 1, 191.
110 Kunhibava, above n 105, 195-9.
112 Kunhibava, above n 105, 200.
113 Thomas, above n 111, 169.
financial products.\textsuperscript{114} The conventional banks should also establish current, cheque and clearing accounts separate from their conventional products.\textsuperscript{115} Regulations also require conventional banks to specify in their balance sheets which assets, liabilities, profit and loss accounts pertain to Islamic products so investors can distinguish the Islamic banking and finance operations from the conventional operations.\textsuperscript{116}

2 \textit{Uniformity of Shari’ah Compliance}

Malaysia gives importance to the uniformity of decisions on Shari’ah matters so as to create ‘credibility and certainty for stakeholders.’\textsuperscript{117} Uniformity is ensured through the National Shari’ah Advisory Council, which is ‘the ultimate authority and center for any issues and questions on Shariah by financial institutions and also the courts of law.’\textsuperscript{118} It was created so Muslim investors would feel confident that the products offered and promoted were indeed Islamic.\textsuperscript{119} According to the Governor of Bank Negara, with the National Shari’ah Advisory Council, there is ‘assurance that the strategic direction, the formulation of policies and the conduct of financial transactions are in compliance with Shari’ah principles.’\textsuperscript{120}

The law provides that rulings by the National Shari’ah Advisory Council are binding, not only on financial institutions but, with regard to actual disputes, also on courts and arbitrators.\textsuperscript{121} The \textit{Central Bank of Malaysia Act 2009} (Malaysia) provides that:

\begin{quote}
where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shari’ah matter, the court or arbitrator shall: (a) take in consideration any published rulings of the Shari’ah Advisory Council; or (b) refer such question to the Shari’ah Advisory Council for its ruling.\textsuperscript{122}
\end{quote}

Resolutions from the National Shari’ah Advisory Council are thus able to guide Malaysian courts when disputes arise.\textsuperscript{123} It prevails over a particular financial institution’s Shari’ah board

\begin{footnotesize}
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  \item \textsuperscript{114} Ibid.
  \item \textsuperscript{115} Ibid.
  \item \textsuperscript{116} Ibid.
  \item \textsuperscript{117} Kuhnibava, above n 105, 199.
  \item \textsuperscript{118} Ibid 196.
  \item \textsuperscript{119} Thomas, above n 111, 174.
  \item \textsuperscript{120} Ibid citing Dr Zeti Akhtar Aziz, ‘Address’ (Speech delivered at the 3\textsuperscript{rd} Annual Islamic Finance Summit London, 13 January 2004).
  \item \textsuperscript{121} Kuhnibava, above n 105, 196.
  \item \textsuperscript{122} \textit{Central Bank Act of Malaysia Act 2009, Act 701} (Malaysia) s 56.
  \item \textsuperscript{123} Thomas, above n 111, 186.
\end{itemize}
\end{footnotesize}
or advisory body, and as a consequence, an act deemed un-Islamic is considered *ultra vires*.\footnote{Ibid 174.} Being *ultra vires*, the performance thereof may be restrained, and the underlying contract set aside.\footnote{Ibid.}

The *Islamic Banking Act 1983* (Malaysia) also requires Shari’ah advisory at an institutional level.\footnote{Ibid 175.} An Islamic bank should have its own Shari’ah advisory body to be created in the bank’s articles of association.\footnote{Ibid.} To ensure uniformity, the Bank Negara issued the Shari’ah Governance Framework, which had the following objectives:

1. sets out the expectations of the Bank on an IFI’s Shariah governance structures, processes and arrangements to ensure that all its operations and business activities are in accordance with Shariah;

2. provides a comprehensive guidance to the board, Shariah Committee and management of the IFI in discharging its duties in matters relating to Shariah; and

3. outlines the functions relating to Shariah review, Shariah audit, Shariah risk management and Shariah research.\footnote{Shariah Governance Framework for Islamic Financial Institutions (Malaysia) \textlangle}http://www.bnm.gov.my/index.php?ch=7&pg=1038&ac=352&bb=file1\textrangle.\footnote{Ibid pt 2 s 1.3.}

The Shari’ah Governance Framework provides that each bank or financial institution should have its own Shari’ah Committee to take on Islamic finance issues and issue sound Shari’ah decisions.\footnote{Ibid.} The bank or financial institution’s Board of Directors should respect the independence of the Shari’ah Committee and uphold its decisions on the Shari’ah aspects of the operations.\footnote{Kuhnibava, above n 105, 198.} On the other hand, it is the Board of Directors that is ‘ultimately responsible for the establishment of an appropriate Shariah governance framework’\footnote{Shariah Governance Framework for Islamic Financial Institutions pt 2 s 1.3.} and should have a thorough understanding of Shari’ah non-compliance risks.\footnote{Ibid.} The bank or financial institution is also required to have continuous internal Shari’ah reviews, annual Shari’ah audits and an
internal Shari’ah research team.133 Shari’ah decisions should be disseminated and disclosed to relevant parties and stakeholders.134

The Bank Islam Malaysia’s structure is illustrative of the level of sophistication of Shari’ah compliance of a Malaysian Islamic bank. To ensure Shari’ah compliance, the Bank Islam Malaysia has a double approach. First, it has a three-tiered structure, composed in the first instance of the Shari’ah Department, which is tasked with ensuring compliance with the bank’s internal Shari’ah compliance policies.135 The Shari’ah Department reports to the Shari’ah Supervisory Council (SSC), a team composed of eight members, and which is tasked with forming opinions regarding the bank’s Shari’ah compliance for the purpose of the financial statements.136 The SSC reports to the bank’s Board of Directors.137 Second, regular audits for Shari’ah compliance is conducted by the bank’s Internal Audit Division.138

Thomas maintains that there is strength in the Malaysia’s approach to Shari’ah compliance in that it:

> provides for standardisation of Islamic financial products throughout the country. It gives greater confidence to consumers that the products are Shari’ah-compliant, because their status is granted by a neutral and authoritative third party, as compared to an institutional Shari’ah compliance body appointed by bank executives.139

3 **Capital Adequacy**

Capital adequacy pertains to the ability of banks and financial institutions to absorb losses without passing them on to depositors.140 Banks need to show ‘a good margin of reserves in order to retain the confidence of their depositors and the public.’141 Capital adequacy regulation is an extremely important issue in banks and financial institutions to lessen systemic risk of

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133 Ibid.
134 Ibid.
136 Ibid.
137 Ibid.
138 Ibid.
139 Thomas, above n 111, 176.
contagion that can cause the collapse of an entire banking system, which may in turn create a spillover of negative consequences onto the real economy.

To address capital adequacy issues, Bank Negara issued the Capital Adequacy Framework for Islamic Banks. The Framework adheres to the recommendations of the Basel Committee on Banking Supervision and applies it to Islamic banking, including the Basel III standards that were released to respond to the global financial crisis. Section 8 of the Capital Adequacy Framework sets forth the minimum capital adequacy ratios. Section 8.3 provides that Bank Negara may ‘specify higher minimum capital adequacy requirements for a banking institution, having regard to the specific risk profile of the Islamic banking institution.’ The Capital Adequacy Framework also provides that Islamic banking institutions must hold additional capital buffers (based on a percentage of its risk-weighted assets), and that Bank Negara may ‘specify higher minimum capital adequacy requirements for a banking institution, having regard to the specific risk profile of the Islamic banking institution.’

The Capital Adequacy Framework clearly provides the formula for calculating capital adequacy ratios, including the criteria to be applied for evaluating which items or shares may be included or excluded as capital. For instance, investments in the capital of unconsolidated and takaful entities are to be excluded under certain circumstances. It contains provisions to ensure loss absorbency, such as when capital instruments (e.g. Mudarabah, Tawarruq) can be converted into ordinary shares or written off.

4 Taxation

With regard to taxation, Malaysia amended its tax laws for the following purposes: (i) to provide that returns or expenses from Islamic transactions are to be considered as interest; (ii) to respond to the issue of double capital gains tax; and (iii) to address issues surrounding stamp
Malaysia used taxation not only to ensure a level playing field for IBFS but to promote its growth. It used taxation incentives to attract IBFS activities, including, exemption applied to income from foreign currency Islamic finance transactions, withholding tax exemption for non-residents, exemption from partnership tax for *Musharaka* and *Mudarabah* arrangements, tax deduction for expenses incurred in the process of Islamic securities issuance, tax exemptions for managers of foreign investment funds and availability of tax deduction for Islamic finance-related courses.

A country that intends to develop the Islamic banking and finance industry would do well to look to Malaysia and the legal initiatives it has undertaken. Malaysia’s legal framework is regarded as ‘one of the main factors contributing to the competitiveness of Islamic Finance in Malaysia.’

5 **Safety-Net Schemes**

Under the *Malaysian Deposit Insurance Corporation Act 2005,* the Malaysian Deposit Insurance Corporation (MDIC) shall administer two separate funds – an Islamic fund, which is comprised of premiums in respect of Islamic deposits; and a conventional fund, which is comprised of premiums in respect of conventional deposits. The *Malaysian Deposit Insurance Corporation Act 2005* provides that investments made from the Islamic fund shall be in accordance with Shari’ah principles. The MDIC recognizes the PLS principle, and that investment depositors have agreed to share the risk of loss. The MDIC declares that: ‘Based on the contracts underlying the deposits, non-*mudarabah* (non-profit sharing) deposits have priority over *mudarabah* (profit sharing) deposits.’

The issue relating to the ‘lender of last resort’ is handled by Malaysia through the management of liquidity requirements. In 1983, the *Government Funding Act 1983* (Malaysia) was

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152 Dabner, above n 55, 12.
153 Ibid.
154 Ibid.
155 Kepli, above n 11, 831.
157 Ibid pt III s 29.
158 Ibid pt III s 31.
160 Ibid.
161 Aldohni, above n 1, 194.
enacted to ‘provide for the raising of funds by the Government of Malaysia in accordance with the Shariah principles.’ The law authorized the issuance of non-interest-bearing government certificates which may be traded in the Malaysian Islamic Inter-bank Money Market. Islamic banks may also trade monetary notes issued by Bank Negara and Islamic treasury bills. The objective of creating the Islamic Inter-bank Money Market is for Islamic banks to manage their liquidity and to avoid situations where the Bank Negara will be called in to act as lender of last resort. Note that Aldohni cautions that a developed Islamic Inter-bank Money Market may not always sufficiently respond to liquidity problems and that the lender of last resort may still be availed of in extreme cases.

C Other Jurisdictions

For purposes of comparison and illustration, it would be interesting to look at what approaches a number of other jurisdictions have taken with regard to adopting IBFS in their respective systems. Not surprisingly, Singapore follows the route taken by the UK and has not provided separate legislation for IBFS. It applies a ‘single regulatory approach for both Islamic and conventional banks’ and uses secular language with regard to regulations. Venardos notes that the Singapore’s IBFS is at the developing stage and that the players are still few. It faces key issues such as low public awareness and marketing difficulties in its pursuit of becoming a premier Islamic financial centre in Asia.

On the other hand, Asian jurisdictions with significant Muslim populations such as Indonesia and Brunei are taking on an approach similar to that of Malaysia’s. Indonesia, which has a dual Islamic and conventional banking and finance system, has a separate Shari’ah Banking Law and a Sovereign Sukuk Law. The Central Bank of Indonesia also initiated the Shari’ah Banking Development and Acceleration Programme to push the growth of IBFS in

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163 Aldohni, above n 1, 194-5.
164 Ibid.
165 Ibid.
166 Ibid 195-6.
167 Thomas, above n 111, 169.
168 Ibid.
169 Ibid 184.
170 Venardos, above n 7, 196.
171 Ibid 196-7.
172 Ibid 142.
the country. Brunei’s Ministry of Finance has also undertaken the active development of IBFS in the country by issuing the *Islamic Banking Order 2008* and the *Takaful Order 2008* to establish the regulatory framework. Both countries have national Shari’ah boards – Indonesia has a National Shari’ah Board while Brunei has a National Shari’ah Financial Supervisory Board. IBFS is also at the development stage in these countries but prospects appear to be quite favourable considering that Brunei has already issued more than B$2.1 billion worth of short-term *sukuk al-ijarah* issuances and that Indonesia’s IBFS sector has already grown an average of 34 per cent over the last five years.

**IV **ISSUES AND LESSONS LEARNED IN ACCOMMODATING IBFS IN A CONVENTIONAL SETTING

According to Casey, ‘many of the priorities and issues for supervisors in Islamic finance will be the same as in conventional finance.’ As with conventional banks and financial institutions, Islamic banks and financial institutions will need to be managed by a fit and appropriate board, they will need to be adequately funded, conflicts of interest should be avoided and risks should be managed in the proper manner. There are added challenges that arise mainly because of the special nature of Islamic finance – Shari’ah compliance mandates a prohibition on interest and uncertainty. It relies on the principle that profits and losses should be shared. These fundamental concepts require that products and transactions be structured in ways that would not be wholly compatible with how conventional banking and finance are currently regulated.

Unlike conventional banking, finance and insurance industries, which have had 300 years to evolve into their present state, and which have the advantage of a gradual development of relevant standards, techniques, and tools, IBFS finds itself confronted with a challenge of

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175 Venardos, above n 7, 142-3.
177 Ibid 147.
178 Ibid 171.
179 Ibid 174.
180 Ibid.
182 Ibid.
producing, in an accelerated manner, the Shari’ah compliance alternatives ‘while proactively meeting international standards of risk management and corporate governance.’

A Establishment of Legal Framework

Thomas identifies four reasons to support the establishment of a legal framework for IBFS. The first is to support its legitimacy and its introduction into mainstream banking alongside conventional services and products. Second, for investors and depositors to be confident about the products that Islamic banks and financial institutions offer, they have to be adequately protected by regulation. Third, parties should know their rights, obligations and remedies in case of default. Last, and perhaps most importantly, ‘regulation can ensure the health of the banking system as a whole.’ There are risks unique to the Islamic banking and finance (such as risks arising from the profit-loss-sharing nature of Mudarabah, and the need to hold title to assets in an Ijara), which can be managed by the proper supervision and regulation of the industry. Karbhari et al advocate for a legal structure founded on a thorough understanding of Islamic banking and finance, coupled with appropriate regulation, as the absence of one will cause tension between Islamic banks and regulators.

As discussed above, there are a number of approaches that can be taken in establishing a legal framework. A jurisdiction can choose to actively promote IBFS by providing for a set of different laws and rules to cover the industry. A jurisdiction can also choose to merely facilitate the entry of Islamic products, and aside from ensuring equal tax consequences, not recognize its special features, relying largely on the industry to govern itself. The question of which approach is more appropriate should be evaluated by a country’s legislators and regulators in accordance with the country’s objectives.

B Clarity

Venardos posits that for there to be a property legal foundation, it is imperative that laws provide clarity in the definition of the nature of Islamic banks and their operating relationship

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183 Archer and Karim, above n 140, 498.
184 Thomas, above n 111, 166.
185 Ibid.
186 Ibid.
187 Ibid.
188 Ibid 168.
with the central bank. The legal framework should provide, at a minimum, the guidelines for licensing and permissible modes of financing. There should be guidelines on which enterprises may properly call themselves Islamic banks, and thus promote, implement and carry out banking practices based on Shari’ah law. There should be clarity on which agency has the powers and authority to supervise Islamic banks.

A strategy for ensuring clarity is the use of nominate contracts. In the early development of Islamic Finance in the 1970s, Shari’ah boards faced the task of developing the rules, guidance and jurisprudence in ‘unchartered legal territory’ and the system they established, consistent with the Shari’ah, was to make use of nominate contracts, or transactions which were called specific or particular names. The contracts, such as Murabaha, Ijara or Mudarabah, being well-defined and articulated, gave transacting parties a greater opportunity to fully understand the transactions that they were to enter into. The feature of the contracts being nominate facilitated risk allocation and management. It also sends a signal to investors that a legal system is knowledgeable about Islamic finance principles and concepts, thus promoting confidence.

C International Standards

Islamic banks face pressure from the international community to comply with the standards adopted by the Basel Committee on Banking Supervision of the Bank for International Settlements. While some banks have criticized Basel Standards as being too restrictive, many in the industry welcome Basel standards as consistent with the guiding principle of the social and economic welfare promotion.

Compliance with Basel standards is among the areas addressed by the Islamic Financial Service Board (IFSB) and the Accounting and Auditing Organisation for Islamic Financial Institutions.

190 Venardos, above n 7, 83.
191 Ibid.
192 Ibid.
193 Ibid.
195 Ibid.
196 Ibid.
198 Ibid 573.
The IFSB is a body formed by a group of central banks and monetary authorities in a number of Islamic countries. It has been called the ‘Basel Committee for Islamic Banks’ as its role is to ‘provide guiding principles on risk management, capital adequacy, transparency and corporate governance.’

The Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI) is an organization that was established to respond to the problems that faced the early development of Islamic banking and finance, namely the lack of ‘guidelines on prudential, supervisory, accounting, auditing and other corporate regulatory practices’, and the resultant difficulty in issuing financial statements.

With the IFSB and the AAOIFI, the issues relating to international standards in Islamic banking are lessened. They provide the guidelines to manage risks that are similar to conventional banks, except that certain aspects are modified to take into consideration the distinctive features of an Islamic bank. According to Wilson, their objective is ‘not to promote substitute or alternative standards but rather to accept the existing international framework.’ A jurisdiction seeking to establish IBFS should maximize the usefulness of the IFSB and the AAOIFI.

**D Dealing with Special Features of IBFS**

One of the lessons derived from studying jurisdictions that have established IBFS is the attention they place on special features of IBFS. An illustration of this is PLS, which is a significant mode of financing in IBFS. The nature of PLS financing adds a level of complexity that should be dealt with in regulations. Under the PLS model, profits and losses are shared by the parties. In a *Mudarabah* contract, the bank and the agent-entrepreneur share the

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199 Ibid.

200 Aldohni, above n 1, 199.

201 Wilson, above n 26, 123. See Aldohni, above n 1, 199-200. The IFSB has released a number of documents that deal with the same subject matter covered by Basel Standards. For instance, in 2005, it issued the ‘Capital Adequacy Standard for Institutions Offering only Islamic Financial Services’ while in 2011, it issued a Guidance Note relevant to the IFSB Capital Adequacy Standard.

202 Ibid.

203 Venardos, above n 7, 75. The AAOIFI is an independent, international organization created by agreement of major Islamic financial institutions.

204 Wilson, above n 26, 124.

205 Ibid.

206 Venardos, above n 7, 89.

207 Ibid 85.
profits and losses, with the entrepreneur’s liability being limited to his time and efforts. Thus, the bank risks losing the principal of a loan if the enterprise ends up with no profit or a loss. Furthermore, banks are not allowed to become involved in the management of the business. On the other hand, in another form of PLS financing, the Musharaka or the direct investment contract, banks may supervise, monitor and become involved in the management of the enterprise. In regulating PLS financing contracts, regulators should be aware of the different kinds that exist in delineating the rights and obligations of the parties, and in managing the risks that are attendant thereto.

Another important aspect that has to be appreciated is that the prohibition on riba or interest exists not only with regard to the ‘financial institution-customer relationship,’ but also extends to relationships that the financial institution may have with other parties, such as inter-bank, inter-financial institution or ‘bank-Central bank.’ Thus, any fund to which a bank or financial institution will have access, such as a deposit insurance fund or liquidity management fund, will have to be managed in compliance with Shari’ah principles in order to maintain integrity and to avoid Shari’ah non-compliance risk.

V INTRODUCING ISLAMIC FINANCE TO THE PHILIPPINES: CHALLENGES AND RECOMMENDATIONS

Islamic banking, as a concept, is not new to the Philippines. The Philippines established the Philippine Amanah Bank (‘PAB’) in 1973. The PAB Charter did not make any reference to Islamic or Shari’ah law. In 1990, Philippine congress re-chartered PAB as the Al-Amanah Islamic Investment Bank of the Philippines (AAIIB). The Preamble of Republic Act 6848 stated:

The Government has committed itself to the establishment of an Islamic bank that operates within a legal framework permitting the investors or participants the rights to

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208 Ibid.
209 Ibid.
210 Ibid.
211 Ibid 86.
213 Ibid.
equitable or beneficial share in the profits realized from financing productive activities and other operations.\textsuperscript{215}

The AAIIB Charter specified that the operations and activities of the bank ‘shall be subject to the basic principles and rulings of Islamic Shari’a.’\textsuperscript{216} The AAIIB is currently 100 per cent owned by the Development Bank of the Philippines, a government owned and controlled corporation. While it appears that Islamic finance has been in the Philippines for several decades, its presence is limited to the autonomous region of Muslim Mindanao. According to the AAIIB Charter, the purpose of the Islamic Bank is to:

promote and accelerate the socio-economic development of the Autonomous Region by performing banking, financing and investment operations and to establish and participate in agricultural, commercial and industrial ventures based on the Islamic concept of banking.\textsuperscript{217}

According to the BSP, the AAIIB is not very active and is small-scale.\textsuperscript{218} Its limited operations are not enough to make the Philippines a player in the global Islamic finance industry.\textsuperscript{219} The BSP recognizes that reforms are necessary to develop an extensive Islamic banking system that is able to attract local and foreign participants.\textsuperscript{220}

A Which Approach?

In order to make Islamic banking and finance attractive, it is of paramount importance that the Philippines puts in place the appropriate legislation that sets forth, among others, the requirements of Islamic financial institutions to register, the rights and obligations of institutions and depositors to each other, the parameters surrounding the appointment of credible and qualified Shari’ah scholars, and the accounting and disclosure requirements.\textsuperscript{221}

\begin{itemize}
\item\textsuperscript{215} Ibid.
\item\textsuperscript{216} Ibid s 3.
\item\textsuperscript{217} Ibid s 4.
\item\textsuperscript{220} VS, above n 218.
\item\textsuperscript{221} See Kepli, above n 11, 829.
\end{itemize}
Part III of this essay discussed the different approaches taken on by UK and Malaysia – two of the three leading Islamic finance jurisdictions in the world.\footnote{The other leading jurisdiction in IBFS is Dubai. See Gemma Varriale, ‘Islamic Finance Goes Global’ (2014) 30 International Financial Law Review 37.} UK chose not to direct its reforms on the distinct nature of IBFS, and instead focused on tax reforms to avoid negative taxation impacts. In other respects, Islamic banks and financial institutions were made subject to the same regulations as conventional banks and financial institutions. The approach that the UK adopted is almost *laissez-faire*, and there is much reliance on self-correcting mechanisms to deal with issues arising from special features of Islamic banking and finance. Malaysia, however, was more purposeful in its approach. Aside from tax-related reforms, Malaysia enacted laws and regulations to deal with the distinct nature of Islamic finance, such as specific capital adequacy ratio requirements, guidelines to avoid co-mingling of IBFS funds with conventional banking and finance funds, a separate deposit insurance scheme, and the creation of an inter-bank money market to manage liquidity.

The Philippines may choose to adopt either of the foregoing approaches in its reforms. If it decides to follow the UK approach, the legislature may choose to direct its attention to reforms that will amend the tax code, the *National Internal Revenue Code 1997*, to avoid double taxes – stamp taxes and value added taxes – in arrangements where the transactions have increased in number for purposes of Shari’ah compliance; to provide for deductibility of profits distributed to customers; and to provide for similar tax treatment on Islamic instruments such as *Sukuk*. On the other hand, the Philippines may choose to go beyond tax-related reforms and instead, as with Malaysia, design a comprehensive Islamic banking and financial system with rules that deals with the unique nature of Islamic banking and finance. It may provide for the creation of a body to ensure Shari’ah compliance, provide for Shari’ah consistent rules relating to capital adequacy and liquidity, provide rules to avoid co-mingling of funds, and provide for incentives to attract customers to invest in Islamic finance.

Before embarking on reforms, it would be wise for the Philippine legislators to decide on their objectives in establishing Islamic banking and finance. It should decide on what the underlying philosophy of the reforms would be. It should note that the UK has a developed economy and a sophisticated banking and finance industry. As such, Islamic banking was included as a source of lucrative business, and not a platform for economic development.\footnote{Abdul Karim Aldohni, ‘The Emergence of Islamic Banking in the UK: A Comparative Study with Muslim Countries’ (2008) 22 Arab Law Quarterly 180, 190.} With the ‘unique
financial position of London,’ Islamic banking grew almost as a matter of course. A variety of financial institutions, including Islamic banks, gravitate towards London, the international financial centre of Europe. Legislation was needed to accommodate the industry but not necessarily to promote it.

On the other hand, the adoption of the Malaysian approach will demonstrate the Philippines’ commitment to the development of Islamic banking and finance. The adoption of the Malaysian approach comes with the advantage of avoiding the issues that have arisen with UK’s approach, such as lack of clarity, Shari’ah compliance risks and inconsistencies relating to safety net schemes.

Recent pronouncements of legislators and regulators exhibit a desire to develop the IBFS industry in order to attract investments and to promote ‘economic development in Muslim Mindanao.’ With this in mind, legislation may include certain provisions targeted specifically to the development of the region. For instance, there can be exemptions from government permits and fees for bank branches to be established in Mindanao, or applicable incentives tied to employment targets, or tax breaks for the first few years of operation.

From a timeline perspective, Philippine legislators and regulators should decide whether they would allow the sudden entry of Islamic bank and financial institutions into the market or if they would like to develop the industry in phases with regulators studying the issues that may arise at each phase. The Philippines appears to be better suited to adopting the Malaysia model as it already has started with a full-fledged Islamic bank, the AAIIB. It may look at the next step of allowing conventional banks to have Islamic windows, within which they can offer Islamic banking and finance products.

B Reforms vis-à-vis Current Framework

The following discussion will focus on how possible reforms will impact the current Philippine regulatory framework, by applying the challenges identified and lessons learned, as discussed in Parts II and III.

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224 Ibid.
225 Ibid 192.
226 Philippine Senate, above n 4.
227 See Aldohni, above n 1, 191.
1 Establishment of Robust Regulatory Regime

An entity that intends to engage in banking\(^{228}\) and quasi-banking\(^{229}\) operations is required to obtain an authority from the BSP under the *Philippine General Banking Law 2000*.\(^{230}\) The BSP ‘exercises supervision over the operations and exercises regulatory powers’ over banks, quasi-banks, trust entities and other financial institutions.\(^{231}\)

In the UK, it was established early on that the FSA will be sole regulator of the financial industry. One of the primary questions that the Philippines would have to deal with is which agency will be the regulator of Islamic banking and finance products. Currently, the Philippine General Banking Law provides that all banks, including Islamic banks, are under the supervision and regulation of the BSP. There is no need to make any changes to the power of the BSP and it should remain the sole regulator of the Philippine banking and financial industry.

However, in the event that the reforms are introduced to allow the entry of new Islamic banks other than the AAIIB, and to authorize conventional banks to have Islamic windows, there should be clarity as to which laws apply to which entities. There should also be clarity as to whether the provisions of the present Charter of the Al-Amanah Islamic Bank of the Philippines will be made applicable. As discussed by Kunhibava, Malaysia has clearly delineated which laws are applicable to each kind of institution and service.\(^{232}\) Having developed gradually, Malaysia was able to provide for separate laws for the operation of Islamic banks, and for conventional banks with Islamic windows. This dispels the confusion of interested investors regarding the appropriate regulatory framework. A significant lesson that the Philippines should note is the importance of preciseness. Aldohni criticizes the UK’s FSA’s regulations as being vague, leading to problems of interpretation with regard to consumer protection.\(^{233}\)

As discussed above, there are advantages in the use of nominate contracts to describe Islamic transactions. Philippine regulators should become well-versed with these contracts and consider maximizing their use in its regulations to promote certainty. For instance, the Bank

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\(^{228}\) Banks refer to ‘entities engaged in the lending of funds obtained in the form of deposits.’ *General Banking Law of 2000*, Republic Act No. 8791 (Philippines) s 3.

\(^{229}\) Ibid s 4. Quasi-banks refer to ‘entities engaged in the borrowing of funds through the issuance, endorsement or assignment with recourse or acceptance of deposit substitutes.’

\(^{230}\) Ibid s 6.

\(^{231}\) Ibid s 4.

\(^{232}\) Kunhibava, above n 105, 200.

\(^{233}\) Aldohni, above n 1, 168-9.
Negara Malaysia has issued the Shari’ah Standards on Mudarabah containing standards on features of Shari’ah contracts based on Mudarabah and to facilitate their understanding. The use of nominate Islamic transactions would also send a signal to Islamic investors that the Philippines is knowledgeable about Islamic principles, and would foster confidence in the newly-established system.

2 Shari’ah Compliance

Malaysia has a well-developed framework relating to Shari’ah compliance while the UK leaves Shari’ah compliance largely to the individual banks and institutions. The UK approach has been criticized as: prone to non-Shari’ah compliance risk, subject to inconsistencies between the banks and institutions, and being non-inclusive to Muslim investors who decide not to invest on faith-based reasons. On the other hand, the establishment of a Shari’ah compliance body will have bureaucratic and cost implications. With this in mind, regulators and legislators should weigh the advantages and disadvantages of creating a national body for this purpose. To this end, they should consider that a burgeoning Islamic banking and financial industry may not be able to withstand the impact of Shari’ah non-compliance, which is reputational risk – the loss of confidence of shareholders and customers in the integrity and credibility of the system. Reputational loss may be a reason for migration of investors’ funds or may cause potential investors to lose interest.

An urgent matter for regulators to consider is the current operations of the AAIIB. The AAIIB is in the practice of accepting conventional loans and offering developmental loans. This is problematic because of the confusion it foments. It is necessary to properly characterize the AAIIB – is it an Islamic bank or is it a conventional bank offering Islamic windows? Because the AAIIB is operating as a conventional bank, is it subject to laws relating to conventional banks or is it governed altogether by a separate framework? By offering conventional loans that charge interest, is it in violation of the proscription against riba? For a full-fledged Islamic Bank to succeed, it is imperative that it is seen as wholly Shari’ah

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236 Ibid.

compliant. Confusion with regard to the nature of the AAIIB may lead to the negative outcomes of the non-Shari’ah compliance risk discussed above.

3 Development of Shari’ah Boards and Shari’ah Expertise

In Malaysia, in order to develop the expertise of the Securities Commission on Islamic products, Bank Islam Malaysia was admitted as a principal advisor.238 In the UK, the Treasury group that was established to evaluate the growth of the Islamic finance industry included representatives from the Muslim community.239

The relationship between industry practitioners and Shari’ah scholars should be encouraged. Aldohni outlines the symbiotic relationship between Shari’ah scholars and Wall Street during the 1980s, when the industry was in the early stages of development:

Shari’ah scholars began working closely with Wall Street insiders, with some of the most knowledgeable and talented individuals in the business, and it was then that the exchange of ideas began in earnest. In some cases, a single member of a Shari-ah board would take part in such exchanges and report back, formally or figuratively, to his peers on the board. Exchanges of this nature provided Shari’ah scholars with valuable, and often key, insights into business practices that might have otherwise remained obscure and therefore suspect. Nor was this process of exchange a one-way street. On the contrary, as their own understanding of modern business concepts and practices increased, Shari’ah scholars were emboldened to make comments of their own, often pointing out parallels that exist between fundamental Shari’ah concepts of transacting and modern commercial law and then moving on to extrapolate shared concepts and to consider possible applications in modern situations. Through such exchanges many scholars acquired and insider’s grasp of the context of modern commerce.240

Thus, for a country that has no Islamic finance expertise, the ability to tap into the expertise of resource persons is crucial. Government should seek out members of the Muslim community, Shari’ah scholars, and industry practitioners in the development of the legal and regulatory framework. Further, Government should encourage these parties to develop relationships amongst themselves.

4 International Standards

To respond to potential accounting issues, Philippine regulators would do well to recognize the IFSB and AAOFI to adopt their standards. The adoption of their standards will build

238 Ram Ratings, above n 135.
239 Ibid.
240 Aldohni, above n 1, 177-8.
confidence in the Philippine’s IBFS industry. The Philippine regulator that will govern and supervise IBFS should issue guidelines that are based on those of AAOIFI’s standards, such as the Financial Accounting Standards (FAS). Currently, the BSP requires compliance with the Philippine Financial Reporting Standards (PFRS) /Philippine Accounting Standards (PAS) that are patterned after the International Accounting Standard Board’s (IASB) International Financial Reporting Standards (IFRS). The Implementing Rules and Regulations of the Charter of the AAIIB does not make any reference to the AAOFI or FAS, thus the general rule on compliance with PFRS/PAS currently applies. There are significant differences between the AAOFI and IASB standards. For instance, a difference exists with regard to the reflection of investment accounts as assets in the bank’s balance sheet. The assets in an Unrestricted Investment Account (URIA) on the basis of Mudarabah are co-mingled with the bank’s assets. The FAS requires these assets to be included in the balance sheet. On the other hand, under conventional standards, the assets of the URIA are not qualified to be included as assets in the balance sheet.

5 Tax

Philippine legislators and regulators would have to decide whether they would like to provide a level playing field for IBFS or if they would like to promote its development. Unlike the UK or Singapore where banking and finance are primary industries, the Philippines is not considered a key country for investors. As such, it is in its benefit to adopt aggressive incentives such as those implemented by Malaysia.

At a minimum, two of the subject areas that will need reform are documentary stamp taxes (DST) and value added taxes (VAT). Under the National International Revenue Code, a stamp tax is imposed on ‘documents, instruments, loan agreements and papers’ for every transaction. Under an arrangement based on Islamic principles, the number of transactions will increase, thus increasing the DST payable. For instance, in a Murabaha arrangement, DST tax will be payable on the first sale from the seller to the bank, and on the second sale, from the

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243 Venardos, above n 7, 76.
244 Ibid.
245 Ibid.
246 National Internal Revenue Code (Philippines) s 173.
bank to the buyer. The effect on VAT – which is the indirect tax applied on every sale, barter, exchange or lease\(^{247}\) – is similar. VAT will be payable on the first sale as well as on the second sale. In the case of leasing arrangements or *Ijara*, further VAT is imposed on the lease of the property to the customer. Because DST and VAT are assessed and based on *each* component transaction, IBFS contracts which increase the number of transactions involved will have a multiplier effect.

6 Safety-Net Schemes

(a) PDIC

The Philippines has a financial safety net in the form of the Philippine Deposit Insurance Corporation (PDIC).\(^{248}\) Under the PDIC Charter, there shall be a Deposit Insurance Fund, consisting primarily of assessments from member banks.\(^{249}\) In the event that closure of a bank is necessary, depositors shall be paid their deposits up to PhP500,000 from the Deposit Insurance Fund.\(^{250}\) Available funds of the PDIC will be ‘invested in obligations of the Republic of the Philippines or in obligations guaranteed as to principal and interest by the Republic of the Philippines.’\(^{251}\) In the event of systemic risk, the PDIC is authorized to extend loans, assume liabilities, purchase assets or make deposits in an insured bank.\(^{252}\)

One of the challenges that will arise with the establishment of an Islamic banking system in the Philippines is the suitability of the PDIC to cover Islamic banks. The PDIC Charter does not make any distinction with regard to Islamic banking operations. This is not unusual, considering that the AAIIB’s operations are involved mostly in conventional activities. However, if the Philippines intends to extend Islamic banking operations in the country, the issue on the suitability of Islamic banks’ membership in the PDIC will have to be addressed.

As discussed above, in the case of the UK, there will be an issue on the administration of the Deposit Insurance Fund. The money in the fund may be invested in interest-bearing obligations, making the fund Shari’ah non-compliant. Another issue is the need to differentiate between

\(^{247}\) Ibid ss 105-6. VAT is ‘levied, assessed and collected on every sale, barter or exchange of goods or properties.’


\(^{249}\) Charter of the Philippine Deposit Insurance Corporation 1963, Republic Act 3591 (Philippines) s 13.

\(^{250}\) Ibid s 14.

\(^{251}\) Ibid s 17.

\(^{252}\) Ibid.
different types of accounts in an Islamic bank, particularly to address PLS accounts where the depositor bears the risk of loss.

Legislators and regulators will have to consider whether to establish a separate fund to cover Islamic banking activities. To avoid any issues, the administration of the separate fund should be consistent with Shari’ah principles. Regulators will also have to consider how to apply insurance rules to PLS accounts; that is, whether to provide for priority in payment such as in the case of Malaysia, or whether to insure a lesser amount than current or savings accounts.

(b) Lender of Last Resort

The BSP’s role as the lender of last resort is institutionalized under *The New Central Bank Act 1993* (Phillipines). The BSP is authorized to extend non-collateral loans and advances to banking institutions ‘for the purpose of providing liquidity to the banking system in times of need.’ It may also provide extraordinary loans or advances ‘in periods of national and/or local emergency or of imminent financial panic which directly threaten monetary and banking stability’ or ‘for the purpose of assisting a bank in a precarious financial condition or under serious financial pressures brought by unforeseen events.’

An issue that the legislators and regulators will have to consider is whether to include a special provision in the law that will allow the BSP to grant funding to Islamic banks on a non-interest basis. For instance, it could be in the form of a benevolent loan or *Quad Hassan*, which does not charge any interest. Another point for consideration is the source of funds that the BSP will extend to Islamic banks. There may be apprehensions considering that administration of the funds of the BSP include investments in interest-earning transactions.

It is recommended that legislators and regulators explore the establishment of alternative schemes to manage liquidity concerns. The establishment of an Islamic inter-bank money market may be premature considering the nascent stage of the industry and the lack of participants, but this is an area that should be looked further into once the industry has been established.

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254 Ibid s 84.
255 See Aldohni, above n 1, 195-6.
C  Challenges Unique to the Philippines

1  Non-Common Law Legal Tradition

Aside from challenges common in other jurisdictions, there are unique issues that confront the Philippines in developing IBFS. Some scholars claim that common law jurisdictions appear to be better equipped to deal with the legal issues in Islamic finance. This may be because there are many similarities between Shari’ah law and common law such as the study of jurisprudence and the application of precedent. Unlike the UK and Malaysia, the Philippines has a legal tradition that is mixed civil law and common law. It has adopted the common law principle of *stare decisis* or precedent but only in a limited sense. Philippine courts are bound by the rulings of the Philippine Supreme Court; they are not bound by rulings of other jurisdictions. This becomes an issue in the event that Islamic finance-related disputes go to court. However, because of the common law tradition of the Philippines, brought by American influence, related rulings of other jurisdictions such as those made in the UK and Malaysia would be persuasive.

2  Constitutional Challenges

An issue that may arise with the promotion of IBFS in the Philippines is with regard to constitutionality as certain sectors may question the promotion of IBFS in relation to separation of Church and State provided by the *Philippine Constitution*. It is likely that, given the constitution’s support for pluralism (as seen in the constitutional provisions supporting an autonomous Muslim Mindanao), legislation relating to the promotion of Islamic Finance will survive a constitutional challenge on the basis of secularism.

On the other end, an interesting question to ponder is whether any Islamic banking and finance regulation that establishes the BSP as the primary or sole regulatory authority will be challenged on the basis of autonomy. The *Philippine Constitution* established Muslim Mindanao as autonomous region, which has legislative powers over certain matters, including: administrative organization, creation of sources of revenue and economic development.

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257 Archer and Karim, above n 140, 499.
258 Wilson, above n 26, 24-5.
259 The Philippines belongs to a mixed legal system where precedence applies to the rulings of the Supreme Court. The courts have recognized the applicability of the doctrine of *stare decisis*. Art 8 of the Civil Code provides: ‘Judicial decisions applying or interpreting laws shall form a part of the legal system of the Philippines.’ See *Saguiguit v People of the Philippines* [2006] G.R. No. 144054, 30 June 2006 (Supreme Court of the Philippines).
260 *Philippines Constitution* (Philippines) art X s 5.
261 Ibid art X s 20.
may be argued that the establishment and promotion of Islamic finance falls within the ambit of Muslim Mindanao’s autonomous powers. These issues are beyond the scope of this paper but may be the subject of further research as they potentially affect any regulatory regime that the central Philippine government will establish.

VI CONCLUSION

It is possible for a country with an advanced parallel banking system to establish and develop IBFS. As seen in the case of the UK and Malaysia, these can be achieved quite successfully. Other countries have attempted to replicate this success by adopting the approach suitable to their objectives. In taking the first step to establish IBFS, the Philippines should choose which approach is more suitable to its own objectives. An assessment of its current situation would lead one to conclude that, unlike London and Singapore, it may not be able to attract investments merely through the size and activity of its existing banking and finance industry. Thus, it would be more appropriate to undertake reforms designed to promote and develop IBFS.

To be able to do this successfully, legislators and regulators should establish a robust regulatory framework to accommodate IBFS. They should identify existing regulations which are inconsistent with Shari’ah principles such as those which require banks and financial institutions to contribute to funds managed through interest-bearing placements, those that disregard the particular risk-sharing nature of PLS, and those that impose double taxation on Shari’ah compliant structures. In the Philippines, these laws include the New Central Bank Act 1993, the Philippine Banking Law 2000, the Charter of the Philippine Deposit Insurance Corporation 1963, and the National Internal Revenue Code. They should also consider the important question of Shari’ah compliance – whether there is need to establish a national Shari’ah body or whether they will allow banks and financial institutions to self-regulate. While this step may seem complicated and costly, it has immense value in building trust and confidence in an infant IBFS industry. Relevant hereto, legislators and regulators should consider the question of expertise-building. Human resource investments may be made in the form of scholarships to create a pool of experts who can build the IBFS knowledge base. They should also consider the question of incentives – whether to give any and what to implement in order to attract investors.
The establishment and development of a successful IBFS industry alongside an advanced conventional banking and finance industry will require many steps, starting with thorough research and analysis. The advantage for countries such as the Philippines is that the global IBFS industry has become developed to a point that there are already numerous guidelines and case studies to assist in the adoption of IBFS and to lessen any issues that may arise. At the same time, there is still much potential for growth in the industry that the Philippines, with its significant Muslim population and recent GDP growth, can aspire to become a player in the field, provided that it does take the necessary steps to establish and develop IBFS in the country.

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‘LEND ME YOUR EARS’: EVALUATING THE SUITABILITY OF PROPERTY LAW FOR REGULATING VARIOUS TYPES OF HUMAN BODILY MATERIAL

PETER BOTROS*

ABSTRACT

Developments in medical science have highlighted the law’s inability to offer adequate protection and regulation of human bodily material. Calls for change have primarily suggested for the removal of the antiquated ‘no-property’ rule. However, the potential ramifications of subjecting human bodily material to property rights have cast doubt over whether it is the most appropriate method of recognising interests in the human body. By analysing the historical and contemporary application of interests in bodily material, this paper shows that interests in the human body have typically had to balance two competing claims; that of the individual, and that of the community. The balancing of these rights often involved granting property-like rights, but always fell short of ‘full’ property rights. This paper suggests that in order for the law to adequately deal with bodily material, it must recognise the complexities of the human body rather than treat it as a uniform entity to which a single set of rules can apply. By separating the bodily material into various categories different balances can be struck for each class of material. Furthermore, recognising that there are also a variety of elements to property rights enables us to pick and choose which aspects of property rights would be desirably applied to each category of bodily material.

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I INTRODUCTION

Who should have an interest in human bodily material? There appears to be two contrasting approaches. On one side of the spectrum, the human body is viewed as belonging only to the individual person. This view can be used to both justify and reject property rights, either by claiming that the individual should have total autonomy over the body including through property rights,¹ or by claiming that the body should be unalienable from the individual.² On the other side of the spectrum is the view that the body is a shared resource that belongs to the community. This perspective can also accept or deny property interests, either by claiming that

community resources should not be subject to exclusionary property rights, or by claiming that property interests encourage research in the interests of the community. The role of the law is to find an acceptable balance between these approaches in order to provide the community and the individual with an appropriate amount of control over bodily material. These balancing attempts can be seen not only in current legislation, but also in the historical no-property rule and its exceptions. Over time, the increased capability of medical science has created complications by bolstering the communities claim to bodily material, whilst also increasing the potential harm caused to an individual. However, our conception of the essential questions has remained simplistic.

Human body, or not human body? Property, or not property? Separating the bundle of rights known as ‘property’ into its essential sub-components allows for a more nuanced approach. We might choose to apply some property features and reject others, or vest different aspects of control with different parties. Furthermore, recognising and distinguishing between types of bodily material will enable us to apply these property interests whilst maintaining an appropriate balance. The first part of this paper will show how some degree of property interests have always existed in bodily material as part of balancing the community and the individual’s interests. The second part canvasses arguments as to why the present law is insufficient and what the most appropriate reforms are. Finally, the third part distinguishes between categories of human bodily material and makes recommendations as to which aspects of property law should apply to each.

II THE EVOLUTION OF RIGHTS IN THE HUMAN BODY

A Essential Characteristics of Property Rights

Before the law’s historical application of property rights can be seen, the concept of ‘property’ must first be defined. Although there exist many conceptions of property, Honoré’s incidents provide the critical features in a relatively uncontentious way. Some of the relevant features are:

1. the right to possession;

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2. the right to use;
3. the right to manage;
4. the right to income;
5. the right to transmissibility;
6. the power to alienate others;
7. the duty to prevent harm; and
8. the ongoing nature of these rights.  

According to Wittgensteinian property theory, not all of these features are required to create ‘property’. It is sufficient that only some apply. This flexibility means that modified property rights can be assigned to different categories of bodily material as appropriate. Furthermore, not all of the features of property need to be vested in the same party. Take prescription drugs for instance; I may hold the right to possess them but not the right to receive income derived therefrom; the chemist may hold the right to income derived from the drug, but not to its management, and the government may hold the right to manage the drug. Whilst dividing the bundle of property rights amongst many actors may lead them to conflict in some areas, this is by no means insurmountable.

B Historical Rights in Bodily Material: The ‘No-Property’ Rule

Although the law has long since held that there can be no property in a human body, there have always been some rights that resemble property interests in the human body. In 1856, George Sharpe deceived a grave keeper into allowing him access to the cemetery where his mother was buried. Mr Sharpe opened his mother’s grave, removed her corpse and took it to a Protestant cemetery where he intended to bury it alongside his father. Mr Sharpe was charged with trespass to land, but argued that the corpse was his property. In rejecting that argument, the court said that the no-property rule was a feature of the common law, not only of the ecclesiastical courts. However, by stating that the corpse could not be removed from the cemetery, the court effectively granted the cemetery two property-like rights: the right to possession of the corpse, and the right to alienate the world at large from it. Whilst these rights were a product of the land being property, they nevertheless had an effect on the management of the corpse. Assigning these rights to the cemetery involved balancing the interests of the

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5 Quigley, above n 1, 633-634.
6 Ibid 632.
7 R v Sharpe (1857) Dears. & Bell 160; 169 E.R. 959 (‘Sharpe’).
8 Ibid [163].
individual, Mr Sharpe, and the community. The court considered creating an exception to pardon Mr Sharpe due to his well-meaning intentions, but chose rather to opt in favour of the community, ordering nominal damages so as not to ‘lessen the only protection the law affords in respect of burials’.  

The balance was altered in the 1881 case of Williams v Williams,10 in which Sharpe was used as authority. The deceased left instructions in his will that he be cremated and that the cost of the cremation be taken from his estate. After doing this, Williams sought an order against the estate for the cost. The court applied the no-property rule stating that since the corpse was not property, it could not be disposed of by will.11 However they did recognise the next of kin’s right to possession of the corpse, albeit only for the purpose of burial. This right to possession is capable of founding an action in damages making it even more property-like.12

At law, this balance, which supported the community’s right to keep corpses in the ground, was maintained for some time. Medical science advanced and although it became common for medical students to use human parts in their studies,13 the common law did not change until in 1908 when police confiscated a preserved two-headed foetus from Mr Doodeward on the grounds that it was unlawful for him to possess it.14 The High Court created an exception that took into account the community’s new interest of using bodily material for scientific purposes, and also the individual’s interest of retaining something which was the fruit of their labour. Griffiths CJ reasoned that just because a corpse is not property at death, it does not follow that it can never become property,15 and he referred to several instances where a corpse had, or ought to have, some property rights including:

1. Anatomical parts used by students of medicine;

9 Ibid.
10 [1881] Ch D 659.
11 Ibid 665.
14 Doodeward v Spence (1908) 6 CLR 406.
15 Ibid 411: “It does not follow from the mere fact that a human body at death is not the subject of ownership that it is for ever incapable of having an owner”.

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2. Egyptian mummies whose legal status has never been challenged but that should surely belong to the museum;\textsuperscript{16} and
3. Decomposed corpses which become part of the land and are therefore capable of ownership.\textsuperscript{17}

Having concluded that there was nothing about the human body that completely barred it from being subject to property rights, Griffiths CJ recognised the individual’s interest, stating that there was nothing to justify limiting these rights only to medical students and museums. As such, the ‘work and skill’ exception was created so that:

when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it.\textsuperscript{18}

This exception is a clear application of Lockean property rights, whereby a person takes material from ‘the commons’ and, by expending their labour on it, transforms it into something to which they have a greater claim than the world at large. It granted to the individual an almost ‘full’ property right subject to any prohibitive statute, and notably, also subject to the ‘Williams’ right of anyone who wanted it buried.\textsuperscript{19} Therefore the hierarchy of rights in bodily material at that point was:

1. The community interest: the person with the right to have it buried held the predominant right; however they can only deal with the body in one way (burial/cremation); and
2. The individual: the person expending work and skill has the secondary right; he or she may do with it what he or she wishes, subject to ‘public health and decency.’\textsuperscript{20}

C Recent Rights in Bodily Material

For reasons that will be examined in more detail in Part III, the Doodeward exception proved to be inadequate in protecting interests over human bodily material. More recent cases have not only highlighted the need for a new balance of rights, but some have added to the situations where bodily material may attract property-like rights.

\textsuperscript{16} Ibid 413.
\textsuperscript{17} Ibid 412.
\textsuperscript{18} Ibid 415.
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid.
Roche v Douglas\textsuperscript{21} concerned the court’s ability to perform paternity tests by requiring ‘property’ to be brought to them. The court referred to the ‘real physical presence’ of the samples when deciding that they surely must constitute property for the purposes of the Court. That the samples were property was dubbed ‘common sense’ by the court, although the decision did not attach any further property-like rights, only the liability of requiring it to be produced to the court.

In Yearworth v North Bristol NHS Trust\textsuperscript{22} (‘Yearworth’) the defendants deposited sperm at the hospital in anticipation of undergoing cancer treatment that would render them infertile. They sought damages when the sperm was negligently destroyed. Since a claim in negligence must attach to a property right, the court considered whether or not, and how to give the sperm proprietary character. The Doodeward exception was of no use because neither the ejaculation of the sperm nor its storage was considered a sufficient amount of work and skill. Ultimately, the court deemed the sperm to be proprietary in nature based on the fact that the defendants intended to use it at a later point in time and had not relinquished their control over it.\textsuperscript{23} The recognition of property rights in this case was focussed on giving the individual an enforceable right over something that could only be described as rightly belonging to them.

The sperm was given proprietary character for the purposes of a claim in negligence, and this proprietary value was said to arise as a result of the intention to re-use it. However the court’s reasoning shows that even before this intention arose, it necessarily held some property-like qualities. The court gave effect to the plaintiff’s intention to re-use the sperm, meaning that they must have originally had the right to use and possess it. Furthermore, if the plaintiffs were free to decide to re-use the sperm then they were equally free to decide not to re-use it, making it transmissible. All of these uses of sperm are of course common sense. Therefore, when we break it down into its various rights, it appears that the only new property characteristic that the court in Yearworth recognised was the duty to prevent harm; all of the other ‘property’ rights which justified imposing this duty already existed.

In Moore v The Regents of UCLA\textsuperscript{24} (‘Moore’), Mr Moore had his spleen removed as part of his treatment for cancer. His doctors, without consent, used his spleen for research and deceived

\textsuperscript{22} [2009] EWCA Civ 37.
\textsuperscript{23} Ibid [45].
\textsuperscript{24} Moore v Regents of University of California (1988) 249 Cal Rptr 494.
him into providing further bodily samples to supplement their study. Moore brought an action
in conversion but his claim was denied by the Supreme Court of California on the basis that
the spleen was not his property. Although the court did award him damages based on a breach
of fiduciary duty both Broussard and Mosk JJ rightly pointed out that Moore would have been
unable to get a remedy if the material had been passed on to a third party, or any other person
who did not owe fiduciary duties, such as a biomedical company. Moore is a prime example
of when the Doodeward exception is of no assistance.

Along with the case of Moore, another US case, Greenberg v Miami Children’s Hospital illustrates how an absence of rights for the donor can create unjust results. The plaintiffs in that
case agreed to provide bodily material from their ill children to aide research into potential
treatment, with the expectation that any treatment would be made available to them. The doctor
who conducted the research proceeded to patent the material in order to restrict commercial
access to it. Since the plaintiffs did not hold a property right, they could not gain access to, or
demand the return of, the material. The absurd result in this case is neither due to a lack or
surplus of property rights, but rather, an imbalance of such rights. The doctor, representing the
community good of research, holds the power to exclude the world at large and the right to
income derived from the donor’s bodily material. The individualist interests are those of the
plaintiffs, who once held the right to possession and the right to manage, since their consent
was needed to give the material to the doctor initially. However, the rights they hold do not
reflect their beneficial interest in the material. A rebalance of these rights might have given the
doctor the right to income, whilst giving the plaintiffs the right to use the material. In practice,
this means that the material becomes the doctor’s ‘property’ (in the full sense of the term) only
upon discharging the plaintiff’s right to use it by providing them with the treatment. This case
therefore shows that it is not always a question of whether or not proprietary rights should
apply, but rather, which features of property should be vested in which party.

D Current Legislative Provisions

Although there are no legislations that designate any bodily material as ‘property’, several
legislations provide property-like rights by regulating what can and cannot be done with such
material. The provisions impose different requirements on various types of material showing

25 Ibid [174].
26 Greenberg v Miami Children’s Hospital Research Institute Inc (‘Greenberg’), 264 F Supp 2d 1064 (Fla DC, 2003).
us that for each type different concerns prevail. In Victoria, the Human Tissue Act 1982 (Vic) regulates the removal and donation of human tissue; similar legislation exists in other states.\textsuperscript{27} The Victorian legislation distinguishes between gametes, regenerative\textsuperscript{28} and non-regenerative tissue.\textsuperscript{29} The interests of the individual can be seen to supersede those of the community in this legislation, as evidenced through the rigorous consent requirements therein. For example, a living person may consent to the removal of regenerative material for either transplant, ‘therapeutic’ or ‘other medical and scientific purposes’ but retains the right to revoke their consent at any time.\textsuperscript{30} Furthermore, the removed material can only be used in a manner that the donor consents to.\textsuperscript{31} This scheme effectively gives the donor a right to transfer their regenerative material, and alienate others from its use. However, they cannot gain any income from it,\textsuperscript{32} nor does it attach to a duty to prevent harm.\textsuperscript{33} Non-regenerative material, on the other hand, can only be donated for transplant, and the donor’s consent must be subject to a 24-hour cooling off period.\textsuperscript{34} These increased measures reflect the importance of the material and the potential harm to the donor. At the same time, blood donations are very loosely regulated in comparison. Consent is still required, but it cannot be revoked.\textsuperscript{35} The relaxed regulation was designed to accommodate the public interest in blood donations.\textsuperscript{36}

The situation for deceased tissue is similar – tissue can be removed either with the consent of the deceased, their next of kin, or in the absence of both, with the approval of a doctor.\textsuperscript{37} However, whilst the consent requirement in living donors can be linked to the argument of individual autonomy, consent in deceased persons serves a different function. Since the deceased has no legal interest in their body after death,\textsuperscript{38} the posthumous consent requirement

\textsuperscript{27} Transplantation and Anatomy Act 1983 (SA); Human Tissue Act 1983 (NSW); Human Tissue and Transplant Act 1982 (WA); Human Tissue Act 1975 (Tas); Transplant and Anatomy Act 1979 (Qld).

\textsuperscript{28} Human Tissue Act 1982 (Vic), s 3: ‘tissue that, after injury or removal, is replaced in the body of a living person by natural processes’.

\textsuperscript{29} Ibid, ‘tissue other than regenerative tissue’.

\textsuperscript{30} Ibid, s 12.

\textsuperscript{31} Ibid, s10, s11; ‘for the purpose or use … specified in the consent’.

\textsuperscript{32} Ibid, s 38 (1).

\textsuperscript{33} Ibid, s 43.

\textsuperscript{34} Ibid, s 8 (1).

\textsuperscript{35} Ibid, s 23 (cf s 12).

\textsuperscript{36} Victoria, Parliamentary Debates, Assembly Chamber, 20 October 1982, 379, (David Ronald White, Minister for Minerals and Energy).

\textsuperscript{37} Human Tissue Act 1982 (Vic), s 26 (1) (c)-(e).

\textsuperscript{38} R v Sharpe (1857) Dears. & Bell 160; 169 E.R. 959, [163].
is one of community welfare, primarily designed to alleviate shock or grief for the next of kin.\(^{39}\) In doing so, the act allows for either the next of kin or the doctor to exercise the right to alienate others from the material by refusing consent. The Act balances the interests of an individual over their own body with the public’s interest over human tissue.

Gametes are regulated using a number of legislative instruments which differ between States and Territories. Importantly, at the federal level, there is a total prohibition on trading in human gametes.\(^{40}\) ‘Reasonable expenses’ may be recovered which includes ‘but is not limited to, expenses relating to the collection, storage or transport of the egg or sperm’.\(^{41}\) Here the legislature has made a clear attempt to ensure that no-one holds the right to income from human gametes. However, despite its clear intention, ambiguity in the term ‘reasonable expenses’ creates doubt as to whether this provision has succeeded in preventing people from holding a financial interest in gametes.

In 2013, Monash IVF announced that in partnership with an American company, The World Egg Bank (TWEB), it would be importing human eggs into Queensland and Victoria.\(^{42}\) It is unclear what TWEB gains from this transaction; however, Monash IVF claims that the deal complies with all relevant legislation so it is presumably not ‘valuable consideration’. Monash IVF states that egg donors act ‘altruistically’\(^{43}\) and are apparently paid up to $5000 for their donation, to cover expenses.\(^{44}\) This amount is presumably the ‘reasonable expenses’ related to collection, however it was said to cover ‘costs and the estimated 20 hours it takes’ to donate. Whilst the payment for costs would fall within reasonable expenses, the compensation for hours spent certainly cannot amount to ‘expense’ within the ordinary meaning of the word. ‘Expenses’ is defined as ‘the amount of money that is needed to pay’, or ‘the amount of money that needs to be spent’.\(^{45}\) A payment made to an individual for hours spent surely either amounts to ‘consideration’ for their time, or a ‘reimbursement’ for money that they could not otherwise earned, but it would be a misnomer to call it an expense. Interestingly, however,

\(^{39}\) Above n 36, 380.

\(^{40}\) *Prohibition of Human Cloning for Reproduction Act 2002* (Cth), s 21.

\(^{41}\) Ibid.


\(^{44}\) Medew, above n 42.

it is possible to convert an ordinary payment into an expense. If TWEB regularly reimburses donors for their eggs, then for TWEB the cost of that reimbursement would become ‘an expense incurred during collection’. If TWEB were then to pass that cost on to Monash IVF, Monash IVF would not be giving TWEB ‘valuable consideration’, but rather only ‘reasonable expenses’. It is unclear how the payment of these eggs is transacted, but it is suffice to say that the regulatory prohibition may not be serving its purpose.

Apart from the prohibitions on sale and importation, gametes are also heavily regulated with regard to their use when compared to other human tissue. The justification behind such regulation is the protection of the community interest from practices that the community may view as immoral or unethical.46 The variety of regulatory approaches adopted for each type of biological material is a response to the differing and often distinct considerations relevant to each type.

III THE PROBLEM OF PROPERTY

Although the law has until now sought to balance the interests of the community with those of the individual, advances in medical technology have made current exceptions redundant, and have strengthened calls for new approaches.

A Criticisms of Doodeward

Being a High Court authority, the work and skill exception has been the first resort in situations where proprietary rights in human material are sought, and subsequent cases have built on the work and skill principle. In the case of Re H, AE (No 3)47 (‘ReH3’) the applicant’s husband died in a motor vehicle accident and she applied to the Supreme Court of South Australia to take possession of his sperm. The urgency of the application led Gray JA to order the removal of the sperm until the law could be established. The Yearworth exception was of no assistance in giving the sperm proprietary character since the deceased husband obviously did not have an intention for further use. In what is evidently a case of putting the cart before the horse, Gray JA applied the Doodeward exception to give the applicant possession of the sperm. The process of extracting the sperm from the deceased was said to constitute the necessary ‘work and skill’

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47 Re H, AE (No 3) [2013] SASC 196 (‘ReH3’).
to transform the matter into property. The court then faced the issue of making the applicant wife the beneficiary of that property. Although the natural answer, and the one which was presumed in Doodeward, was that it would belong to the person exercising the work and skill, Gray JA noted that the doctors who performed the procedure had no interest in the sperm.\textsuperscript{48} Referring to a similar case in New South Wales,\textsuperscript{49} Gray JA concluded that the applicant was the only person who had an interest in the sperm and that therefore the doctors who exercised the skill and work were acting as agents on her behalf. Arguably, the Doodeward exception should not have been used in this case. Problems exist not only with the ‘work and skill’ requirement, but also with the question of who the beneficiary of the newly created property rights should be.

It is easy to see why, in the context of Doodeward, the person exercising the work and skill would be considered rightfully entitled to the property, given that it also conforms neatly to the Lockean theory of rights. Today, however, as Re H\textsuperscript{3} shows, the many uses of bodily material mean that there may be several parties who would be interested in the matter. The application of Doodeward in ReH\textsuperscript{3} theoretically vested the property rights of the sperm with the doctors who removed it. The concept of ‘agency’ was, strictly speaking, unnecessary since the doctors could have transferred their rights to the applicant by selling the sperm to her. In fact, that is how Mr Doodeward came to possess his specimen; it was extracted using work and skill by another before being sold as property to Mr Doodeward.

It is understandable why this would have been unsatisfactory to Gray JA, as it could have had the effect of converting medical professionals into merely harvesters of human goods for profit. However, the agency concept is unhelpful and is not workable. When will the exercisers of work and skill be agents and when will they be doing it for their own purposes? In ReH\textsuperscript{3} it was said that the doctors had no interest in the sperm, but a situation where the extractor has an interest is easily foreseeable. What if the doctor disagreed with the use of posthumous sperm and wanted to withhold it? What if the extraction was of valuable tissue from which the doctor desired to profit?\textsuperscript{50} Would the doctor in Moore, who undoubtedly expended skill and effort, have been considered as acting as an agent of Moore or for himself? Would all doctors not be

\textsuperscript{48} Re H, AE (No 2) [2012] SASC 177, [60].
\textsuperscript{49} Jocelyn Edwards; Re the Estate of the late Mark Edwards [2011] NSWSC 478.
\textsuperscript{50} This was the case in Greenberg.
acting as agents for the hospitals where extraction is performed? Without a principled approach, ‘agency’ only adds confusion and uncertainty to an already outdated rule.

There are also uncertainties with respect to the ‘work and skill’ requirement. The problem that ‘agency’ sought to rectify was that ordinary citizens do not have the skills to create the proprietary rights that they might later have an interest in. The property is vested in whoever exercises the work and skill. But if the extraction could be performed by a layman, then it is unlikely that it would be considered as entailing work and skill. The work and skill exception is therefore only capable of conferring property rights on medical professionals, who can then sell it to the general public. ReH3 shows us that there are situations where interests should be vested with someone who is not a medical professional, and that it is undesirable to give medical professionals a property interest by virtue of their skill. There may of course be valid arguments that the result in ReH3 could have been achieved without recourse to proprietary interests, in which case confining proprietary rights to medical professionals may be the socially desirable outcome.

The final criticism of the Doodeward exception is its tautological application in ReH3. The sperm was extracted by court order as a means of preventing its decay whilst it was determined whether or not the applicant was entitled to it. It was later found that the applicant was entitled to it by virtue of its skilful extraction. The paradox is that the applicant was entitled to it because of its extraction, but it was only extracted to decide whether the applicant was entitled to it. If an identical application was made to Gray JA the day after ReH3 had been passed down, the legal question before his honour would have been: ‘has there been work and skill applied so as to convert the sperm into property?’ The answer before extraction would of course be ‘no’, and thus there would be no need for the court to order the extraction which would change the answer. A basic tenet of the rule of law is that it should be applied consistently and this result is therefore unacceptable.

It seems clear that if recognising property in the human body is found to be a desirable outcome, the mechanism for conferring proprietary rights cannot be built on an outdated foundation. On the contrary, any law must not only take into account contemporary capabilities, but also those that are likely to be relevant in the future.

51 Dobson v North Tyneside Health Authority (1996) 4 All ER 474, 479.
52 Re H, AE (No 3) [2013] SASC 196.
B Arguments in Favour of Recognising Property Rights

The primary argument for recognising property rights in bodily material concerns the protection property law gives against third parties. Rights *in rem* not only ensure that the holder can exclude the world at large from unwanted intrusion with their bodily material, but also that actions can be brought against anyone who deals with the material without the owner’s consent.

Proponents of property law point to its flexibility and adaptable nature, arguing that although it may not immediately appear as appropriate for the human body, it is capable of bending as necessary. Furthermore, it has been argued that the suitability of property law to human bodily material is evidenced by the fact that courts consistently turn to it for recourse. The cases of *ReH3*, *Greenberg*, and *Yearworth* are all illustrative of when assigning proprietary rights to bodily material rectified (or, in the case of *Greenberg*, would have rectified) an overtly unjust scenario. Although it has been rightly argued that it is unnecessary to extend property status to the human body since it is already protected by tort law, this is not the case for material that has already been severed from the body. Once material is detached, there are convincing arguments that the individual’s interest in the material property law should extend to the detached material.

Further arguments are that proprietary rights are necessary to encourage research and innovation into advances that benefit the entire community. This, it seems, is the most convincing argument in favour of proprietary rights since the investors’ ultimate goal will be income and transmissibility, for which the law of property already provides. However, there have been concerns that providing such full property rights may lead to bodily material being used in a manner that the original donor did not agree with.

There is also the purist argument based on personal autonomy and ‘self-ownership’, that the body is the epitome of our domain, and that we should be permitted to do whatever we wish with it. This argument, however, is less convincing given the potentially horrendous moral

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54 Quigley, above n 1, 633.
58 Quigley, above n 1, 631.
implications of allowing people to do anything with bodily material. In recognition of this, most advocates of the property approach recommend some form of modified rights.\(^59\)

### C Arguments Against Recognising Property Rights

The most prevalent concern is the potential for commodification of human material, which will inevitably lead to the exploitation of the poor and the dehumanisation of the body. Whilst well-founded, these concerns only object to the idea of full property rights encompassing the right to sell.

A notable objection to property rights is that it is based on a philosophical misconception of what the body is. Mykitiuk has put forward a convincing formulation, stating that the concept of owning one’s own body, or any other human bodily material, is predicated on a fragmented conceptualisation of the body and the ‘person’ (or the ‘self’).\(^60\) She argues that if we view the mind and the body as a single entity, then the concept of the mind owning the body is absurd. Whereas, if there is a distinction between the mind and the body, then the ‘personhood’\(^61\) is vested in the mind, and the body becomes merely the vehicle capable of being owned. It is the latter conception which Mykitiuk shows to be prevalent in Western Philosophy, beginning with the Christian conception of the soul, as distinct from the body, and epitomized by Descartes’s ‘I think therefore I am’.\(^62\) Mykitiuk argues that there should be a new discourse of embodiment, one that does not disconnect the body and the mind. Using this we might recognize the body’s material nature without necessarily having to subject it to property law, the law of objects, and risk reducing human bodies to “raw material or bits of data on a diskette”.\(^63\)

Whilst Mykitiuk may explain why we would not want to remove material from our body, the law must still find practical rules for when people do choose to have material removed. There are also situations where removal of material is not by choice such as with bodily material in a corpse, or with material that must be severed for medical reasons. Once material is removed, or the person is dead, the philosophical objection that it forms part of the ‘self’ has no role to play. It does not matter whether our conception of the ‘self’ is disembodied or not since the severed material can no longer be seen as forming part of that ‘person’. As Sartre puts it:

\(^{59}\) Ibid.
\(^{60}\) Mykitiuk, above n 2, 63.
\(^{61}\) ‘Personhood’ as representative of the self.
\(^{62}\) Mykitiuk, above n 2, 77.
\(^{63}\) Ibid 98.
[h]e loves me, he doesn't love my bowels, if they showed him my appendix in a glass he wouldn't recognize it, he's always feeling me, but if they put the glass in his hands he wouldn't touch it, he wouldn't think, ‘that's hers’.

Philosophical objections to property law therefore do not apply to detached bodily materials. Further arguments against recognising property rights are that it is unnecessary and should be avoided in order to steer clear of absurd results. These results may arise from the right to alienate other people who might also have an interest in the material, or from the ongoing nature of property rights which would impose unreasonable burdens and liability on hospitals storing bodily material.

IV RECOGNISING COMPLEXITY – A SUGGESTED FRAMEWORK FOR MOVING FORWARD

There are clearly positive and negative consequences involved in applying the property approach to regulation. In order to find an acceptable middle ground, we must create categories of bodily material and recognise the variety of uses and potential complications that are unique to each. Once the categories are established, applying Goold’s approach of focussing on areas of agreement will allow for the best balance to be reached. This will mean establishing what the desired effect of any regulation is, from both the individualist and the community perspectives, before deciding which regulatory scheme is best placed to achieve it. The complicating factors of each type of material will be outlined and suggestions in respect of an appropriate regulatory model will be made. The categories are based on the physical characteristics of the material, its potential use and its importance to the donor. The categories dichotomised by this paper are:

1. Vital organs;
2. Non-regenerative material (non-vital organs such as the spleen, gall bladder, eyes, as well as bones, limbs, etc.);
3. Regenerative material (blood, bone marrow, skin, hair, nails, etc.); and

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65 Skene, above n 56, 169.
66 Ibid.
Where appropriate categories may be divided further based on potential uses, or attachment to living persons, as appropriate.

A Vital Organs

This is the simplest category to deal with since there are very few who would argue that vital organs should be regulated in any way other than the current statutory scheme. When attached to the body, there is no point in attaching further rights to this material since it is already regulated by the criminal law. The only outlier is a kidney, which can be removed without ending life, and under existing legislation individuals are already free to donate it. This ability recognises the individual’s autonomy over their own person. Extending the right to sell a kidney is a paramount example of enabling exploitation and is obviously undesirable in the interests of the community. However, there may be arguments for extending property rights over vital organs after death. Primarily, the argument would be that allowing the sale of deceased organs would supplement the drastically short supply of organs by providing the next of kin with financial incentives.

Even accepting that we should take steps to make organs more available, property law is not the best mechanism to achieve this. Although granting property rights may provide financial incentives, it will also create financial liabilities. Paramedics and hospitals may find themselves liable in negligence for the cost of organs that they failed to preserve at the scene of a death. The cost of the removal procedure and its related insurance may subsequently increase, driving the price of organs up and making them even less accessible than at present. Biomedical companies wanting tissue for research may outbid ill patients and cause a greater shortage of organs. Furthermore, granting property rights in organs would prevent the government from implementing an opt-out scheme for organ donation, which is being considered. Given that organ supply can be increased using other methods such as the ‘opt-out’ scheme, even property law proponents would be unlikely to advocate this approach which is so fraught with the danger of commodification.

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B  Non-regenerative Material

This category needs to be subdivided into three subcategories based on whether the material is still attached to the living person, and whether it intends to be reused by the person or not.

1  Still Attached

For materials still attached, it is the same analyses as vital organs. It can currently be donated under existing legislation, and recognition of financial interests in it is undesirable due to the potential for exploitation. Furthermore, it is protected by criminal law.

2  Intended to be Reused

There are strong arguments for extending property rights to this class of material. The detached material is not protected by tort or criminal law which, as the court in Yearworth noted, creates absurd results.

Why, for example, should the surgeon presented with a part of the body, for example, a finger which has been amputated in a factory accident, with a view to re-attaching it to the injured hand, but who carelessly damages it before starting the necessary medical procedures, be able to escape liability?\(^69\)

The area of agreement is that the ‘donor’ who intends to reuse their detached material should have their right protected until it is returned. Since the unique aspect of this category is the donor’s intention to reuse the material, it is appropriate that the rights attach to that intention. The exception in Yearworth is appropriate to deal with this situation (notwithstanding that it was created in the context of gametes). A person who intends to reuse their material should gain a proprietary right over that material until it is returned to them for use. Of course, since they gain this right by virtue of their intention to personally use it, their right should not be a ‘full’ right which includes the right to sell the material. It would also be fair to make this right subject to some other provisos such as time limitations, since detached bodily material naturally decays quickly. This last requirement would prevent patients whose material has been stored in hospital records or converted into valuable research specimens from later claiming that they intended to use it.

3  Not Intended to be Reused

If material is removed from one person and is not intended to be reused by them, then presumably the only other use will be one of research. Whilst the community interest may

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\(^{69}\) Yearworth v North Bristol NHS Trust [2009] EWCA Civ 37, [45].
encourage such research through proprietary rights, the donor may desire compensation or may want to retain the right to object to certain research practices (for example, conscientiously objecting for religious or ethical reasons). Unlike regenerative material which is removed voluntarily, removal of non-regenerative material (apart from transplant cases) is often of medical necessity, suggesting that subsequent compensation for the material is not necessary or appropriate. However, it also does not seem equitable to allow a researcher to use the material contrary to the patient’s wishes and also to profit from it. A consent based approach similar to that outlined by Skene\(^{70}\) seems preferable in these circumstances. The patient would be consulted about the use of their tissue and would have the right to object (in personam), whilst the researcher can gain a proprietary right in the tissue.

C Regenerative Material

This category is divided into two further categories based on potential use: therapeutic and research.

1 Therapeutic Use

Making regenerative material more widely available for therapeutic use, such as blood transfusions, would be a desired effect from a community perspective. The individualist perspective may likely argue that donors should receive compensation for their bodily material. As it happens, both perspectives are aligned on this issue since blood donation rates in the USA, where donors are paid, are significantly higher than in countries where they are not.\(^{71}\) Although property rights would allow donors to be paid as part of the ‘right to income’, the other rights would be of no benefit to any party in these circumstances. The donor could not and would not want to assert any of the other rights over the ill recipient. Although property rights would protect the material between the times it was donated and when it was used, this would be of no use to any party since during that period, the donor will have already been paid, thus relinquishing their rights, and the recipient will not yet have received or paid for the treatment.\(^{72}\) Since only one attribute of property rights is desirable in this situation, it appears


\(^{71}\) The donation rate in the USA is “less than 10%” compared with “only 4%” in countries where no payment is made – American Red Cross, Blood Facts and Statistics, Red Cross Blood <http://www.redcrossblood.org/learn-about-blood/blood-facts-and-statistics#blood-supply>; National Health Service, ‘Could You be a Donor?’ NHS Choices (16 April 2013) <http://www.nhs.uk/Livewell/Donation/Pages/Donationthefacts.aspx>.

\(^{72}\) Presuming that you pay your hospital bill after services have been rendered.
that it is not the right course of action. The preferable course of action may be to make an exception to the statutory prohibition\textsuperscript{73} on the sale of bodily material and allow for a one off payment of gratitude.\textsuperscript{74}

2 \hspace{1em} \textit{Research Purposes}

The community perspective may advocate proprietary rights in this category in order to encourage investment in research, which may not occur without property rights due to a lack of commercial certainty. The individual perspective might suggest either that the individual should retain control over how their material is used, or that they should be compensated financially. At first glance it may seem that the individualist’s argument regarding payment is the same as for therapeutic use and should be treated with a one off payment. However, given that the community interest is in the researcher gaining a property right in the material, it would be artificial to say that the researcher gains a property right at the same time that the donor is paid, but that the donor was not paid for their property right. It seems more consistent to say that regenerative material that is intended to be used for research is capable of holding ‘full’ property rights. Unlike the consent based approach recommended for non-regenerative material, in this situation it is the donor’s voluntary intention to remove the material and use it for research purposes that creates the right to payment and therefore moves this category closer to a proprietary right. The donor may therefore choose to accept payment for it, thus conferring all the rights on the researcher, or they may wish to give it to the researcher without accepting payment and therefore retaining control over how it is used. The property model in this situation allows both the donor and the researcher to choose what degree of rights they wish to exercise over the material.

\textbf{D \hspace{1em} Gametes}

Gametes form a class of their own because of their potential use in creating stem cells and new life. The interests of the individual would be in deciding how their gametes are used and/or obtaining payment. The community interests would be in both having an adequate supply of gametes and controlling the circumstances in which they can be used. Presuming that payment increases the rate of donation, the individual and the community interests are aligned with respect to providing payment. However the issue of control is more complicated and whilst the

\textsuperscript{73} Human Tissue Act 1982 (Vic), ss 38, 39. Note that such an exception can be made through ministerial declaration under s 39 (2) rather than by legislative amendment.

\textsuperscript{74} Skene, above n 56, 168.
tragic circumstances of cases like ReH3, Jocelyn Edwards,\textsuperscript{75} and Yearworth may encourage us to recognise property rights in gametes, it is certainly not the ideal regulatory method. Although the bundle of property rights can be divided amongst different parties, this scenario will not lead to situations where there is a dispute about which party exercises which right, but, rather, in what manner each right is exercised. For instance, the individual may want to exercise the rights of control and management by conducting stem cell research, whilst the State may want to exercise the same rights for the exact opposite purpose. Both interests must be made subject to each other, and the current legislative model is the most appropriate method. The State prescribes which practices are permitted, but those practices still require the consent of the donor.\textsuperscript{76} Although it may be regrettable that payment cannot be made for gametes, that they may not be protected from negligence, or that deceased gametes cannot be accessed for use, changing these matters using legislation will invariably lead to fewer complications than introducing a proprietary model.

V \quad \textbf{CONCLUSION}

The human body contains various types of material, each having different potential uses and being of different significance to the host. Creating classes of these materials allows us to apply a nuanced approach to regulation, which may involve proprietary rights. Furthermore, unpacking ‘property’ rights allows us to determine which aspect of ‘property’ is desirable or undesirable for each class of bodily material. Whether property law is the appropriate regulatory framework depends on how useful it is in bringing about the desired outcome for that category of material. The desired outcome for each category is ascertained by referring to and balancing two competing interests: that of the individual and that of the community. Although the end result is not one single approach but a combination of various approaches, this is only fitting given that human bodily material comes in various forms and can be used for various purposes.

\textsuperscript{75} Jocelyn Edwards; Re the Estate of the late Mark Edwards [2011] NSWSC 478.

\textsuperscript{76} For instance, one example is the Research Involving Human Embryos Act 2002 (Cth) which permits certain uses though a licence scheme (Division 4), but those uses remain subject to the donor’s consent – s 24 (1) (a).