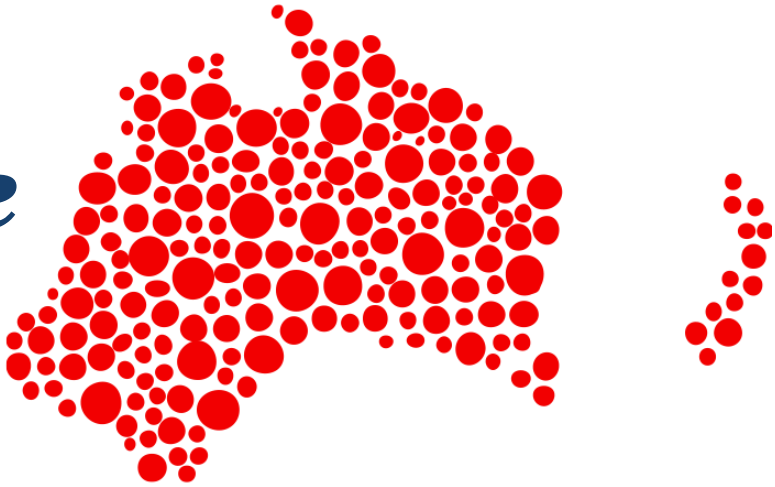
ANZSIL *Perspective*



Edition 32
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EDITORIAL

WELCOME to our 32nd edition of ANZSIL *Perspective* with excellent perspectives on Authors' Rights as Human Rights, Defending Crimes of Aggression and how this was discussed at the International Bar Association Conference in Miami, an important decision in the New Zealand High Court and a memorial for Moana Jackson. Some of these articles were submitted earlier in the year but I wanted us to go out of 2022 on a bumper issue so I am sorry for the slight delay. They are all well worth a read! In other news, last week was the Assembly of State Parties in the Hague. The Assembly of States Parties is the management oversight and legislative body of the International Criminal Court. It is composed of representatives of the States that have ratified and acceded to the Rome Statute. This year many non-state parties were represented including the United States of America. The discussion was dominated by the events in Ukraine and the press to prosecute. Defence voices were heard on the picket lines outside campaigning for better remuneration and recognition for defence staff where there is a woeful disparity with the Office of the Prosecutor. It is shocking that defence representatives do not have the same platform and budget as the prosecution. I declare my own interest as defence counsel for Mr Al Hassan. It has been a bit of an eye opener. As Editor of this publication, I hope we can attract further expert submissions on a range of international law issues, including identifying those areas in practice that need attention.

For 2023, I extend a warm invitation to ANZSIL members and non-members to submit your perspectives for publication. We accept submissions on public and private law international law issues and where international law may be a topic for domestic decision making particularly international law issues related to the multicultural nature of Australia's and New Zealand's societies. My team and I welcome analyses of this and other similar issues in both jurisdictions.

As ever, I look forward to receiving submissions from a diverse range of scholars who have previously contributed to ANZSIL Perspective, and welcome new and emerging authors at every level of postgraduate scholarship and legal practice. The next deadline is 23 January 2023.

Felicity Gerry QC (Editor)

The deadline for the next ANZSIL *Perspective* is 27 January 2023. The current call for *Perspectives* and submission details and guidelines are on the ANZSIL *Perspective* webpage.

The views expressed in contributions to ANZSIL *Perspective* are those of the authors. Those views are not necessarily shared by ANZSIL or the Editors of *Perspective.*

PERSPECTIVES

Authors' Rights as Human Rights

Graeme Austin and Jane C. Ginsberg

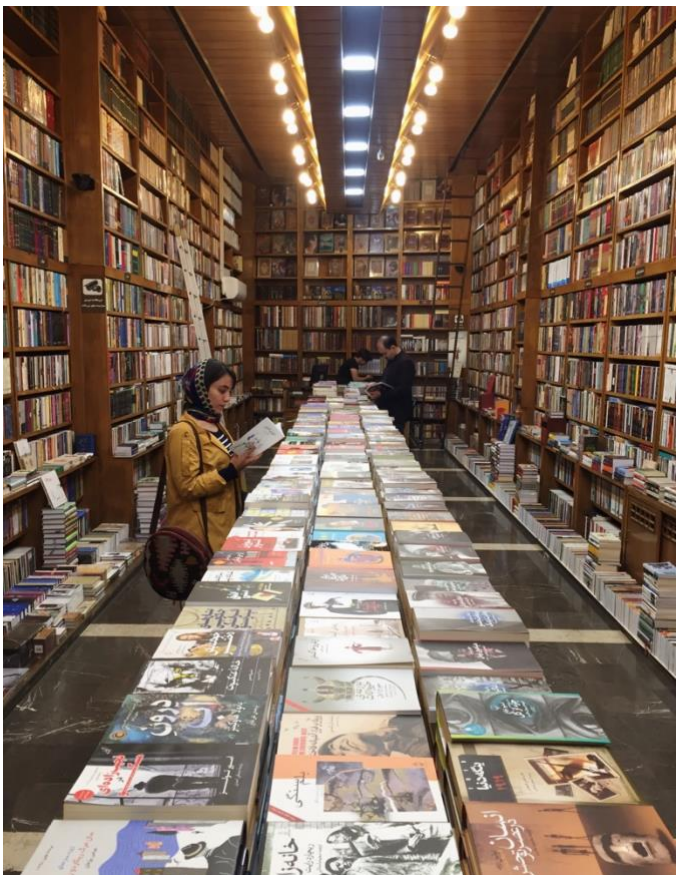


Photo by Asal Lotfi

A September 2022 decision of the European Court of Human Rights (ECtHR), *Safarov v Azerbaijan*, reminds us that failing to protect authors' rights is not just an economic issue. It can be a breach of human rights. The ECtHR case is not an isolated instance. A jurisprudence on the human rights of authors is emerging in an array of different contexts. It offers new ways of thinking about domestic policy debates about the rights of authors and states' obligations to protect them.

The ECtHR decision concerned a book that an NGO posted online without the author's consent. In line with its earlier decisions, the ECtHR confirmed that the protection of "possessions" in the First Protocol to the European Convention on Human Rights extends to copyrights. The NGO's actions had directly infringed the book's copyright, but there was a further breach of the author's rights under the First Protocol when the Azerbaijani domestic courts declined to remedy this infringement.

Human rights instruments expressly recognise authors' rights. The Universal Declaration of Human Rights (UDHR), the 1948 cornerstone of the modern human rights movement, announces in article 27(2) that everyone has the "right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". Article XIII of the American Declaration of the Rights and Duties of Man, the world's first human rights instrument of a general character, incorporated a similar statement. The International Covenant on Economic, Social, and Cultural Rights, a widely ratified binding instrument (subject to the

qualifications in article 2), includes a similarly worded obligation in article 15(1)(c). All three instruments conjoin authors' rights with the recognition of the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancements and their benefits. As a leading commentator on the drafting history of these articles has said, the rights of authors "were understood as essential preconditions for cultural freedom and participation and access to the benefits of scientific progress."

This body of international law sits alongside international instruments that might come to mind more readily when thinking about legal protections of creative work, including the great nineteenth century treaty, the Berne Convention for the Protection of Literary and Artistic Works (1886). The World Trade Organization, through the Agreement on Trade Related Aspects of Intellectual Property, conditions membership on compliance with the substantive articles of the Berne Convention.

It is conventional to see international intellectual property instruments as principally concerned with economic interests. And yet, at least in the authors' rights context, universalist, humanist ideals, distilled from a commitment to the idea that authors' contributions to culture transcend national boundaries, informed the original drafting of the Berne Convention. In 1986, the Assembly of the Berne Union (an association of states that was established by the Berne Convention) drew a direct connection between human rights and copyright, with its "Solemn Declaration" that "copyright is based on human rights and justice and…authors, as creators of beauty, entertainment and learning, deserve that their rights be recognized and effectively protected both in their country and in all other countries of the world."

There now exists a growing body of official commentary on the human rights of authors, including a 2005 General Comment of the United Nations Committee on Economic, Social, and Cultural Rights (CESCR) on article 15(1)(c). The UN Special Rapporteur on Cultural Rights has issued influential statements on authors' rights. Individual academic commentators and research centres are also engaging with the topic.

The "moral interests" referenced in the UDHR include the right to be identified as the author of a work, and to object if a work is debased or mutilated in ways that damage the author's honour or reputation. "Material interests" include authors' financial rewards, assuming a paying audience can be found. The Berne Convention also protects authors' moral and material interests further underscoring the alignment between copyright and authors' human rights. In the Azerbaijani case, the ECtHR ordered the government to pay the author EUR 5,000 for the failure to protect both his moral and material rights. Significantly, moral rights loomed larger than

material interests in the award of financial compensation. The evidence of pecuniary loss was relatively thin.

Recognising authors' rights as human rights brings with it the potential to change our thinking about domestic copyright law. Domestic policy discussions about copyright certainly tend to emphasise economic concerns. This strand of utilitarian thinking is especially strong in common law countries. Courts and commentators inquire whether copyrights are strong enough to encourage creating works of authorship, and the follow-on investment in publishing and distributing these works: books, films, music, television programmes, computer games, etc.? At the same time, copyrights should not be so strong that they inhibit other desirable forms of creative activity, such as news reporting, academic commentary, and parodies.

But if authors' rights are human rights, copyrights should not be characterised merely as economic rewards, begrudgingly bestowed. While important, the economic framework derives from a narrow instrumentalist perspective, one that risks treating the human creator merely as means to economic ends. Authors' human rights, in contrast, connect authors' creative endeavours to the principle that undergirds all human rights: the dignity of all people.

In General Comment No 17 (2015), the CESCR discussed the tripartite obligations of states parties to the ICESCR to respect, protect, and fulfil authors' rights. Respecting authors' moral and material interests requires states to abstain from taking actions that impede the recognition of authors as the creators of their works or their ability to object to any distortion, mutilation or other modification or derogatory action in relation to their productions which would be prejudicial to their honour or reputation. States must also abstain from unjustifiably interfering with the material interests of authors. These interests do not necessarily equate with the ability to extract all possible economic value from the work. Rather, legal protections for material interests are those "which are necessary to enable those authors to enjoy an adequate standard of living." Obligations to protect authors' rights require states to "ensure the effective protection of the moral and material interests of authors against infringements by third parties," acknowledging that the obligations are relevant to horizontal relationships between private parties. The obligation to fulfil requires States to "provide administrative, judicial or other appropriate remedies in order to enable authors to claim their moral and material interests." The General Comment also recognises that, if these rights are not to be "devoid of any meaning" their protection "needs to be effective."

Addressing the problem of online piracy of authors' works is key to effective realisation of the human rights promise of protecting authors' material and moral interests. Governments should therefore assess whether adequate legal tools are in place to enforce authors' rights. These tools

include "site-blocking orders" which require Internet Service Providers to prevent unlicensed access to copyright-protected materials. Many countries, including Australia, have adopted these measures. The 2001 EU Information Society Directive requires EU Member States to ensure that copyright owners "are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right" (article 8(3)). The 2004 EU Enforcement Directive extends this obligation to all intellectual property rights. These remedies, directed at limiting exposure to massive online infringement, are not yet available everywhere. The UK/NZ free trade agreement includes an obligation to make blocking order injunctions available. The recently-released text of the EU/NZ free trade agreement sets out an equivalent obligation, in wording that closely tracks the language of the Information Society Directive. The New Zealand government has suggested that the senior courts may already have this power, under their inherent jurisdiction. Unfortunately, the significant expense of High Court proceedings may put this remedy beyond the reach of many authors.

Within the EU, the obligations go yet further. The 2019 Digital Single Market Directive (DSM) imposes liability on large content-sharing platforms for copyright-protected material shared by users. Immunity depends on securing a licence from rights holders for the display of this content. Absent a licence, immunity is conditioned on taking prescribed steps to prevent the accessibility of infringing material. A recent decision of the Court of Justice of the European Union (CJEU) held that while implementation of the DSM is likely to restrict the right to freedom of expression (as guaranteed under the Charter of Fundamental Rights of the European Union), the restriction was a proportionate response to online infringement. Importantly, the DSM's preclearance system largely removes the litigation burden imposed on authors.

The CESR's analysis also underscores the need to ensure that barriers to enforcing authors' rights should not be too high. The point is especially salient in the New Zealand context, where markets for the products of creative endeavour are not large. Some countries, including the United States, have advanced new initiatives to solve copyright disputes in a low(er)-cost forum. In England and Wales, authors and other owners of copyrights have the Intellectual Property Enterprise Court, which has a small claims track for disputes involving claims up to £10,000 – a significant sum for many working authors. Initiatives of this kind warrant consideration elsewhere.

As the term implies, "authors' human rights" foreground the human creator. The CESCR has said that corporations are not the beneficiaries of authors' human rights. Furthermore, copyrights are not, as the UN Special Rapporteur on Cultural Rights has observed, synonyms for authors' human rights. That said, the copyrights owned by large firms offer the means to pay the individual creators whose work contributes to productions that are expensive to make, such as films and

television programmes. They are therefore relevant to the security of authors' moral and material interests, even if firms are not direct beneficiaries of authors' human rights.

Even so, a human rights lens offers new perspectives on power imbalances that exist in contractual negotiations between authors and large firms. Authors often give away their rights too cheaply, or enter into agreements that fail fully to include authors in the future success of their works. Some national copyright laws soften the economic consequences of these transactions by, for example, by providing for automatic revision of rights after a specified period. The Canadian Copyright Act is an example. Other laws give authors the right to terminate or re-open transfers of rights after a defined period. The UN Special Rapporteur on Cultural Rights has suggested that termination rights advance the human rights of authors.

The idea that protecting creative outputs is not just an instrumentalist economic issue is apparent in other fundamental rights contexts. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognises the right of indigenous peoples to "maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions" and requires states, in conjunction with indigenous peoples, to "take effective measures to recognise and protect the exercise of these rights" (article 31). The reference to the efficacy of protective measures aligns with statements by CESCR in relation to the obligation to protect the rights of authors. Recall that it was the *failure* to protect the author's rights in the Azerbaijani case that prompted the ECtHR to find there had been a breach of the obligations in the ECHR. Current work by the WIPO references UNDRIP in preliminary drafts of instruments aimed at providing enhanced international protections for indigenous peoples' genetic resources, traditional cultural expressions, and traditional knowledge. The draft articles of the WIPO instruments directed at enhancing protections for traditional cultural expressions specifically acknowledge the "dignity, cultural integrity and spiritual values" of "holders" of cultural expressions. The objectives of the instrument include achieving "balanced and adequate protection" of this material.

In Aotearoa New Zealand, the Te Tiriti o Waitangi (Treaty of Waitangi) is a source of legal protections for kaitiaki (or guardianship) interests of Māori in respect of cultural productions. Like all authors, indigenous peoples are entitled to derive a livelihood from creative work, so these rights are partly economic. But there is also legal salience to the deep connections that exist between creators and their works, and the links to identity and cultural survival. While the rights guaranteed under Te Tiriti have a different legal grounding from international human rights protections for authors, there is common ground between them.

Refreshingly, there have been a few signs that cognisance of authors' human rights is emerging in domestic policy frameworks. For example, with the introduction of legislation providing for site-blocking measures, the Australian Parliament referred to the rights of authors in the ICESCR. Here, authors' rights provided a counterweight to claims that site-blocking orders would impermissibly trespass on the right to freedom of expression. Acknowledging that authors' rights are human rights implies that copyrights do not always need to give way when other human rights are invoked. As the CJEU has explained, a balance is needed between the different rights in play. This is also consistent with statements by the CESCR recognising that an "adequate balance" must be achieved between the obligation to protect other rights in the ICESCR and the rights of authors.

Sometimes, the balancing analysis does support tempering the controls authors and copyright owners are otherwise entitled to exercise over their works. An example is the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled, a WIPO initiative which came into force in 2016 – a major step toward enabling blind and other print-handicapped persons to access the printed word and participate equally in cultural life. The Preamble to that instrument references the principles of "non-discrimination, equal opportunity, accessibility and full and effective participation in society", proclaimed in both the UDHR and the UN Convention on the Rights of Persons with Disabilities.

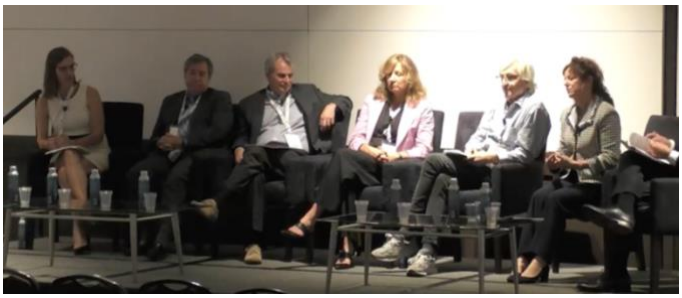
Looking further ahead, authors' human rights might inform thinking about the protections that AI-produced outputs deserve. If authorless AI products ever evolve from curiosity to cultural onslaught, authors' human rights might inform thinking about the legal protections they deserve. Here, though, taking authors' *human* rights seriously might pull in a different direction. The idea that AI-produced products merit copyright protections has met with significant scepticism. There is certainly no human rights basis for protecting them. After all, without human authors, "authors' human rights" is an oxymoron.

Graeme Austin rejoined the law faculty of Victoria University of Wellington in 2010 as Chair of Private Law after serving for nearly ten years as a tenured professor at the University of Arizona. With first degrees from Victoria University of Wellington (BA(Hons), LLB, LLM (distinction)), he graduated LLM and JSD (PhD equivalent) from Columbia University, where he held the Burton Fellowship in Intellectual Property. His published work has focused on a range of intellectual property and private law subjects and has been twice cited by the United States Supreme Court. He is currently researching technological protection measures and the right to repair.

Jane C Ginsburg is the faculty director of Columbia's Kernochan Center for Law, Media, and the Arts. Prof Ginsburg is a renowned authority on intellectual property law and a staunch defender of authors' rights. She teaches and writes about copyright law, international copyright law, legal methods, statutory methods, and trademark law. She is also the author or co-author of casebooks on all five subjects, including *International Copyright: U.S. and EU Perspectives* (with Edouard Treppoz) and *Copyright: Cases and Materials* (9th ed) (with Robert A. Gorman and R. Anthony Reese).

Defending Crimes of Aggression in Miami

Dr Felicity Gerry KC



At the International Bar Association (IBA) Conference last month in Miami, much talk was on Russian responsibility for aggression and atrocities in Ukraine. It began with opening remarks from Ukraine's President Zelensky that "lawyers will ensure that all those guilty of terror are brought to justice". The theme on the value of lawyers and justice systems to investigate and prosecute atrocities to end impunity was continued in a range of events throughout the week.

As ever, the defence counsel voice was small but vocal in asking the difficult questions, not to "Trumpet" that international mechanisms do not work – they can and they do - but they must continue to work fairly and sometimes they don't. International Judge Silvia Fernández de Gurmendi was brave enough to speak out about the continued detention of acquitted defendants from the Rwanda Tribunal saying it is a "huge problem" for the international law mechanisms which need to maintain legitimacy. These 8 people have been detained under illegal house arrest for over 300 days because no state, even those committed to international justice, has offered them a home.

In one session the panellists took the opportunity to discuss atrocity prevention. Accepting that prevention is generally about development, aid and capacity building, US Ambassador Beth Van Schaack maintained that international mechanisms can provide a level of deterrence, although research on deterrence in criminal law tends to suggest it doesn't function and fear of an international tribunal and criminal charges does not appear to have deterred President Putin.

Several experts on international law were enthusiastic about the idea that victim reparations could be separated from the need to convict an individual, citing ongoing projects seeking to find ways to engage in peace building and transitional justice for the benefit of victims. However, they did not discuss how the necessity to support victims in a situation may risk an overly determined prosecutorial approach to conviction. It is an increasing concern – a situation may cry out for financial support for those affected - but in the absence of prosecution of major players, there is a danger that low level persons will be targeted incorrectly because of the need to try and convict "someone" in order for financial support for those affected to flow.

On a novel note, the IBA promoted its "eyewitness" App which enables the capture of potential evidence for international trials, with security and confidence in meta data. Ukraine has become the most documented war in history so the concept is to make images verifiable and reliable. However, it remains to be seen whether it will be used to the same prejudicial effect as gang matrix evidence and alleged terrorist images which have created stereotypes against individuals from certain groups. Guidance on this topic remains lacking.

There are also serious concerns over the adequacy of Defence funding which is about 2% of the International Criminal Court (ICC) budget. As millions is spent on supporting Ukraine in prosecutions and the formation of an international tribunal for crimes of aggression, the defence continues to struggle for adequate funding and to have public education as to the fundamental importance of the accused's right to a fair trial, including the right to the presumption of innocence and due process of law. Tweets on the role of the defence are few compared to the global tour of prosecutor Karim Khan KC, despite the necessity of the role of the defence to ensure such mechanisms remain fair.

The value of the ICC as just one of the potential tribunals in which aggressors and war criminals can be brought to justice and properly defended was agreed amongst participants in Miami, alongside a recognition of the work needed to expand reach through the "law not war" objective. However, at least twice speakers referenced ongoing cases as if they had reached conviction and had to be reminded not to do so, despite a panel accepting that misreporting can influence case outcomes and cause miscarriages of justice.

Each defendant is entitled to public, fair proceedings conducted impartially and in full equality. As attacks on human rights defenders rise, we need to think about the criminal law defenders too. For lawyers to ensure that all those guilty of terror are brought to justice, this inevitably means that has to be done properly and that those who are not guilty are not. A suitable topic for the IBA conference in Paris for 2023.

Dr Felicity Gerry KC is our Editor and currently one of the defence team for Mr Al Hassan at the ICC.

Almarzooqi v Salih: High Court Rules that Mahr under a *Sharīʿa* Law-based Contract is Enforceable in New Zealand

Dr Durgeshree Raman

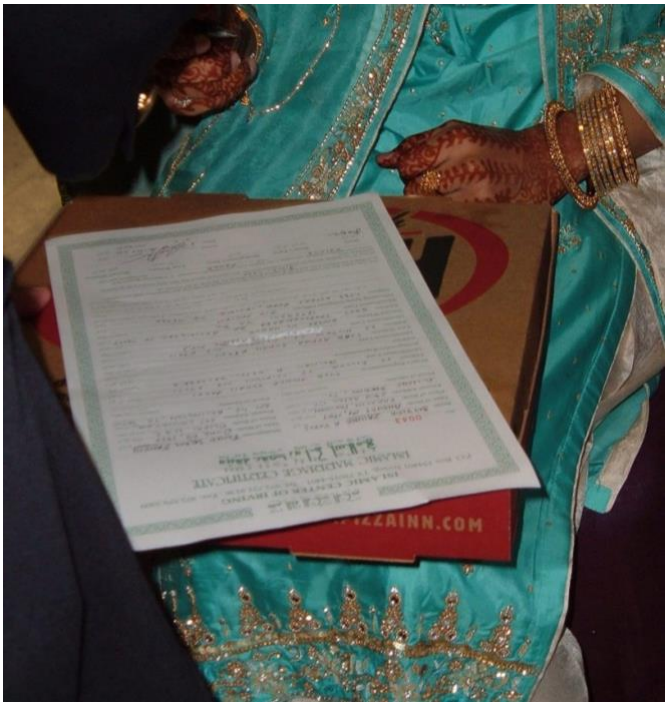


Image by Zainub Razvi

For the first time in New Zealand (NZ), the High Court in *Almarzooqi v Salih* [2022] NZHC 1170 recently ruled that a refusal to pay mahr (dower/dowry) as part of a marriage contract concluded overseas as per *sharīʿa* law, constitutes a breach of contract that is enforceable. In setting out the basis for this decision, this article provides the background to the litigation, the matters arising from it and demonstrates how this decision is in line with the approaches taken in other common law jurisdictions.

Background

The parties to this litigation are Ms Almarzooqi, a citizen of UAE with residency status in NZ and Mr Salih, a NZ citizen. They are both Muslims and they got married in accordance with *sharīʿa* law in Dubai, UAE. This involved a Nikah (marriage contract), with the required component of mahr comprising of two payments by the husband to the wife; an immediate payment of 30,000 dirhams (approximately NZD215,000) and a deferred payment of 500,000 dirhams (approximately NZD13,000) conditional upon the husband's death or divorce. These were recorded in the marriage Certificate issued by the Personal Status Court of Dubai (Dubai Court).

The couple were married for 5 months and lived together in NZ for only a month. Ms Almarzooqi filed for divorce in the Dubai Court. In granting the divorce, the Court also made an ancillary order for the payment of the deferred mahr. Mr Salih did not pay and Ms Almarzooqi initiated legal proceedings in NZ. The formation and validity of the contract was not challenged.

Litigation History: the Jurisdictional Issue

There are two sets of litigation history as one relates to the issue of whether or not NZ courts have the jurisdiction to enforce the ancillary order and the other looks to enforce the deferred payment based on contract law, be it the law of the UAE or NZ.

Regarding the first issue, the marriage contract is silent as to jurisdiction. Since the Reciprocal Enforcement of Judgments Act 1934 and Senior Courts Act 2016 do not allow for the enforcement of UAE judgments, the High Court turned to common law to assess enforcement of the ancillary order; [2020] NZHC 2441. This is the first occasion upon which a common law action of enforcement of a UAE judgment was considered in NZ and was contingent upon (citing *Eilenberg v Gutierrez* [2017] NZCA 270 at [30]): 1. That the foreign court had jurisdiction, 2. That the judgment is for a liquidated sum and 3. That the judgment is final and conclusive. As to whether the Dubai Court had the jurisdiction to make the ancillary order for it to be enforceable in NZ, Ms Almarzooqi relied on: 1. the signing of the marriage contract and 2. the fact that Mr Salih attempted to participate in the proceedings of the Dubai Court. However, the High Court stated that the signing of the marriage contract did not equate to submission to the Dubai Court's jurisdiction. Furthermore, Mr Salih's attempt to file documents opposing the grounds for divorce (which was rejected by the Dubai Court's Registrar) was not to be taken as submission to the Court's jurisdiction either because as per New Zealand law, "submission to the jurisdiction is a technical term that involves taking some unqualified formal step in the proceeding, usually by entering a defence"; at [38]. Mr Salih was prevented from doing this and a default judgment was issued, which as per NZ law, the Court did not have jurisdiction over Mr Salih to do so.

Significantly, the High Court held that the Dubai Court's judgment in granting the divorce and the ancillary order begs different jurisdictions of the Court. The grant of divorce is a judgment *in rem* (or a judicial pronouncement to the world generally) which it had the jurisdiction for, but not for the judgment *in personam* (as is pronounced against the individual(s) concerned) insofar as it relates to the ancillary order; [2020] NZHC 2441 at [36]. Hence, whilst s 44 of the Family Proceedings Act (NZ) allows for recognition of the divorce, it does not extend to the ancillary order. This was sufficient to dispose of the summary judgment. Had jurisdiction not been an issue, the court expressed that:

> "[62] New Zealand courts have not yet … enforced a foreign judgment … concerning Islamic traditions around marriage and divorce. However, … I can see no reason why New Zealand courts would not enforce such a judgment. New Zealand places a high value on cultural and religious autonomy. Recognising and enforcing a judgment such as this would reflect this commitment" (footnote omitted)

and hence would have granted Ms Almarzooqi's application to enforce the order; at [63] and [2021] NZCA 330 at [23]. Since that was not the outcome, Ms Almarzooqi appealed.

The essential argument on appeal; [2021] NZCA 330, was that the ancillary order could not be severed from the divorce order and since the Dubai Court had jurisdiction to deal with the divorce, it had jurisdiction to make the ancillary order. The Court of Appeal, in a unanimous decision, rejected this argument and clarified the law that a court's rem jurisdiction over divorce matters can be analysed separately to assess whether there was jurisdiction over *in personam* matters. In agreeing with the High Court that the Dubai Court did not have jurisdiction over Mr Salih, the Court of Appeal dismissed Ms Almarzooqi's appeal.

Ms Almarooqi then appealed to the Supreme Court which did not find any error with the Court of Appeal's assessment and the application was dismissed.

Current Litigation: Breach of Contract?

With the issue of jurisdiction put to rest, changing tact Ms Almarzooqi brought an action for breach of contract. This required the High Court to determine the proper law of contract.

As with jurisdiction, the marriage contract is silent as to the governing law of contract. The High Court considered that the contract was universal to Muslim traditions everywhere in the world. However, given that the couple got married in the UAE in accordance with a particular tradition and the divorce process and the grounds for it are concepts which are informed by principles of *sharīʿa* law, the Court determined that "on balance" the proper law of contract was that of the UAE; at [26]. If so, then as Mr Salih had not paid the deferred mahr, he was in breach of the marriage contract. The High Court opined that the result would not be different if the proper law is NZ contract law; see at [49]. Having assessed the evidence of three expert witnesses, the High Court came to the conclusion that regardless of which process is followed for divorce under the UAE law, the fact of divorce triggered the obligation to pay the deferred mahr, which was owed since the date of the divorce, together with interest. As a closing remark, the High Court further stated that Mr Salih's "case was dependent upon … findings as to the requirements of *sharīʿa* law..."

Preferring the expert evidence of practitioners in Dubai over one who had no specialised training in *sharīʿa* principles, the Court conveyed that a "witness with appropriate authority to assist the Court is to be expected"; at [48]. This is reinforced by the Supreme Court's recent

pronouncement regarding the use of expert evidence to view a legal matter within a cultural context; see *Deng v Zheng* [2022] NZSC 76.

It is notable that *sharīʿa* based marriage contracts have been enforceable in other common law jurisdictions. The leading English case of *Shahnaz v Rizwan* [1965] 1 QB 390 concerned a marriage contract formed in India under "Mohammedan law." The contract provided for the payment of a deferred mahr upon divorce, which the wife sought to enforce. The Divisional Court characterised the mahr as a contractual obligation upon the husband and held that it was enforceable by the wife in the English courts. In the leading Australian case of *Mohamed v Mohamed* [2012] NZWSC 852 the couple had married in a *sharīʿa* ceremony, not under Australian law. Their agreement provided for the payment of mahr to the wife in the event the husband initiated separation and/or divorce. As this was the first Australian case, the Supreme Court noted that in enforcing such contractual agreements, courts of common law countries such as United States, England and Canada have applied common law or the relevant legislation (if any), rather than *sharīʿa* law.

Even though a leave to file an appeal against the current High Court's decision has been granted, precedent cases overseas dictate that this decision is most likely to be upheld by the Court of Appeal. This would mean that those seeking to enforce *sharīʿa* based marriage contracts, whether it was formed locally or abroad, can be rest assured that absent valid legal exceptions, the contract will be enforceable in NZ provided that the contractual conditions triggering the obligation to pay the mahr are met.

Dr Durgeshree Raman has been lecturing at Te Piringa - Faculty of Law, University of Waikato since completing her doctoral studies on transboundary freshwater governance in 2015. Durgeshree has taught a range of law papers including Equity, Trusts, Succession, Family, Crimes, Evidence and Legal Systems. She has a number of publications including the most recent - Raman, D and Chevalier-Watts J, *Equity, Trusts and Succession* (2nd ed, 2022, Thomson Reuters). Durgeshree is also an enrolled Barrister and Solicitor of the New Zealand High Court and has previously worked as a Lawyer and Judges' Research Counsel.

Remembering and celebrating the contributions of Moana Jackson (10 October 1945 – 31 March 2022)

Michelle Kidd QSM Edmond Carrucan

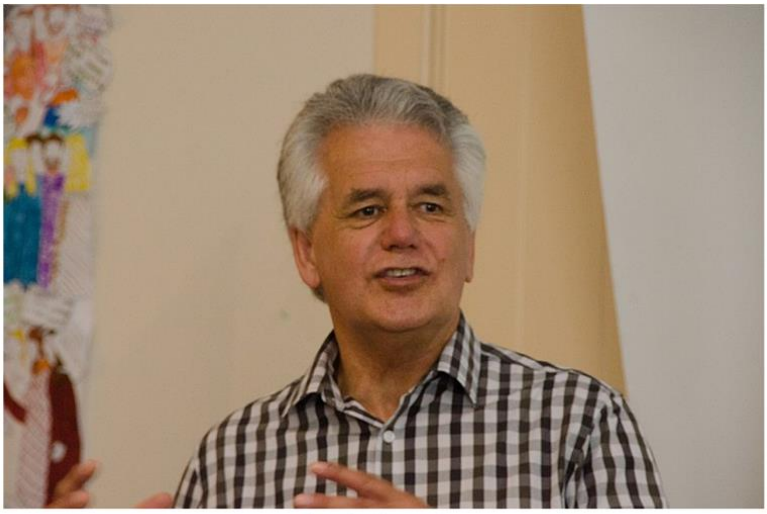


Photo by Simon Dixon

This perspective may be unlike prior published perspectives to which you are accustomed. Different. Considered. Genuine and a little poetic. This is perhaps how Moana would have preferred it.

Unlike Moana, I may not skillfully find one poignant joke or humorous story to share with you. Those of us who identify as tangata whenua, people of the land, *and* who have had the privilege of hearing him speak publicly can attest to many humorous and insightful stories Moana shared over the years.

Each story helped to break the ice in a sombre setting and is a reminder of how tangata whenua can relate through our cultural lens. My reasoning in writing this perspective is that perhaps Moana always reminded listeners that we can all say a lot without using many words. His contributions speak for themselves.

Flax Roots Change

Moana came to my attention as a result of the changes he made from flax roots. I came to know him through his published works during my undergraduate academic studies.

Today, in delivering lectures, I remind students and myself that we come from flax roots in Aotearoa, not grassroots. The importance of harakeke, flax, means flax roots have more significance to our world of Aotearoa than the notion of grassroots.

Moana was mindful of those who lived on this whenua before us, our tūpuna, our ancestors and how lasting change that survives must come from the whenua through the community. It then

rises from the community to a national level. The notion of flax roots may seem so small a part of his thinking and contributions to the fields of constitutional law, equity, philosophy, jurisprudence and tangata whenua rights that it is often mistakenly, and unjustifiably overlooked. This is especially so in an online, international law context.

Moana knew how justice was viewed from and at the community's flax roots. He sat with community people and listened. He observed injustices and how the community viewed justice and injustice. Then he took this away and contributed to the fields I mentioned earlier. If more researchers and legal representatives took this approach, the world would be more connected, and through that involvement law would be more meaningful.

Moana always acknowledged the people with whom he sat. He returned to them for further reflection, at the flax roots. Within reflection, he wanted to ensure and confirm he was on the right path.

Moana was certainly involved in and saw the value of international forums. However, he was more interested in what people at the flax roots had to say about legal issues, society, and the impact of legal processes upon them. Moana conversed with and for us, as people. One contribution from Moana can be highlighted to demonstrate this knowledge.

He Whaipaanga Hou – A New Perspective

This is the title of his seminal report, comprising parts 1 and 2. The report covers the New Zealand justice system and its continued failings for Māori as tangata whenua. As one of the first projects of its kind, this project gained insights into Māori Youth offending and imprisonment, with a view to having the disproportionate rates addressed.

This research was a great success for it exposed the disproportionate imprisonment of Māori. The process of consultation involved in his research continues at present, in my opinion, to be one of the most thorough and broad sets of interviews ever undertaken with Māori people.

The research and its interview excerpts are of great value to Māori and other Indigenous peoples who keep suffering inequity due to personal, interpersonal, systemic and structural racism.

Finally, this research continues to have relevance. Little has improved and in fact life has worsened for Māori. As one recent example, the New Zealand Police force has been breaching privacy rules, when taking photos of Māori youth. A new perspective remains. There is a need to

urgently see things for what they are *and* what they can be, to change justice processes and outcomes.

Flax roots research continues to be necessary for the world.

However, this two-part report is not in my view his single greatest contribution.

Moana Jackson's Continuing Legacy

My contention is his single greatest contribution is yet to be seen. The legal minds and more importantly, the whānau, the families whom he helped shape will bear the fruits of his work over the next 25 years and beyond.

Moana endorsed a vision of constitutional transformation. This can serve as a constitutional blueprint for Aotearoa New Zealand. A forward-looking, practical path for tangata whenua and state relations in today's changing world. In doing this, he leaves the international community with proof positive that transformation is available to any nation willing to think, plan, act, commit adequate resources and have the political will to trust those at flax roots.

It is because of his efforts that as tangata whenua researchers we are given a firm basis, direction and encouragement in our own work. Recently, his discussion on how law is storied, led to the publication of my master's thesis *Ko Tikanga Te Mātāmua*. His work helps to form the theoretical basis and practical application of several academic works, as it did with mine. Such works are a credit to him.

Parting Words

Moana Jackson continues to be a humble hero to many of us including me and for many reasons. Without him, it is arguable the notion of Indigenous rights, which I have referred to instead as tangata whenua rights, would be in a worse position. Moana represents something greater than the dreams which obviously outlive him. Dreams of an unwritten future. Dreams for change. Dreams of hope for all peoples.

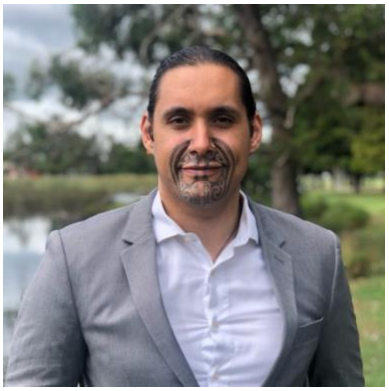
Moana is a giant for all time. Humble. Heartfelt.

I end by sharing a few words of farewell to Moana:

> Moe mai rā I te moeroa o te moana. Haere ki te rimu tapu.

Sleep in the long sleep of the ocean. Go to the sacred hiding place.

Michelle Kidd QSM has tirelessly served at the Auckland District Court for twenty five years providing invaluable assistance to all those affected by the criminal justice system, in particular the Homeless, vulnerable, addicted and those affected by family violence. Michelle's contribution was formally recognised in 2011 when she was awarded the Queen's Service Medal. It is difficult to put into words the work that she does, for it is a calling, not a job. Her role is 24 hours a day, 7 days a week, 365 days a year. Michelle's vision is to see tikanga Maori enshrined within the justice system of Aotearoa.



Edmond Carrucan is Ngāti Hako, Ngāti Pāoa and Ngāti Porou. As a Māori academic, his research is helping to further articulate a Māori legal method as a step towards realising an Indigenous legal education in Aotearoa New Zealand and reaffirming that Tikanga Māori is a primary source of law. At the time of writing this perspective, he is employed as a law lecturer at the University of Waikato.