

## AUSTRALIAN ABORIGINAL HUMAN RIGHTS AND APPREHENDED BIAS: SKIRTING MAGNA CARTA PROTECTIONS?

Gary Lilienthal\* and Nehaluddin Ahmad#

### INTRODUCTION

The significance of this paper is in discussion of the wholesale obliteration of religious and other rights among Australian Aboriginal people, constituting a subspecies of continuing genocide. The Constitution of the Commonwealth of Australia states its directive on religion as follows.

“The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.”<sup>1</sup>

This constitutional section prohibits the making of laws, as stated, but does not prohibit administrative action imposing religious procedures. Neither does it prohibit official administrative action to restrain the free exercise of religion in Australia.

Indeed, persuasive case law agrees with this proposition. In the 1984 case of *Grace Bible Church v Reedman*,<sup>2</sup> the appellant argued that in Australia there was “an inalienable right to religious freedom and that that

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\* Dr Gary Lilienthal, LLB, (Sydney University, Australia), Grad Dip Legal Practice, (College of Law, Sydney), M Psychoanalytic Studies, (Deakin University, Australia), PhD, (Curtin University, Australia).

Senior Lecturer, School of Law, College of Government and International Studies, Universiti Utara Malaysia. Email: garylilienthal@gmail.com

# Dr Nehaluddin Ahmad, MA, LLB, LLM (Lucknow University, India), LLM (Strathclyde University, UK), LLD (Meerut University, India).

Professor, Faculty of Law, Sultan Sharif Ali Islamic University (UNISSA), Brunei. Email: ahmadnehal@yahoo.com.

<sup>1</sup> Constitution of the Commonwealth of Australia, s 116.

<sup>2</sup> (1984) 36 SASR 376.

freedom cannot be abridged by any statute of the South Australian Parliament.”<sup>3</sup> The Full Court of the Supreme Court of South Australia dismissed the appeal unanimously. Zelling J opined that the appellant’s submission would compel a rewriting of history. This was in the light of examples of the intersection of the law, government and religion in the United Kingdom, when the common law was received in Australia.<sup>4</sup> White J held that the common law recognised the supremacy of Parliaments. As such, it never prevented the Parliament from exercising “an absolute right to interfere with religious worship and the expression of religious beliefs at any time that it liked”.<sup>5</sup> He added that the common law never included a basic guarantee of an inalienable right to religious freedom and expression.<sup>6</sup>

As to the receiving of the English common law in Australia, the British Parliament had passed “an Act to Provide for the Administration of Justice in New South Wales and Van Diemen’s Land” in 1828.<sup>7</sup> Section 24 of this Act stated: “That all Laws and Statutes in force within the Realm of England at the Time of the passing of this Act . . . shall be applied in the Administration of Justice in the Courts of New South Wales and Van Diemen’s Land respectively, so far as the same can be applied within the said Colonies”.<sup>8</sup> The wording of the statute applies English law only conditionally. However, by the statute, the state Church of England became the established and state-run Church in Australia.<sup>9</sup> This inferred no separation between church and state.

Thus, imposing administrative procedures, of a religious nature, within the court system, is not proscribed by the Constitution of the Commonwealth of Australia, and further must be compared with the strictures of Magna Carta’s requirement for judgment of all freemen by the law of the land, or in other words, the substantive law.<sup>10</sup> This paper

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<sup>3</sup> Ibid 377.

<sup>4</sup> Ibid 379.

<sup>5</sup> Ibid 385.

<sup>6</sup> Ibid 388.

<sup>7</sup> 9 Geo IV c 83.

<sup>8</sup> Ibid s 24.

<sup>9</sup> It is notable that the Chief Judge in Equity in the State of New South Wales also sits on the New South Wales Anglican Church Synod.

<sup>10</sup> Magna Carta (1297) s XXIX states: ‘NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor [condemn him,] but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.’

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argues that this imposition is exactly what has happened in Australia, according to the English common law, to the detriment of the Australian Aborigines. These people could never have been freemen within the meaning of Magna Carta.

The purpose of this paper is to depict, through the lens of priestly cultus and an apprehension of judicial bias, how abstract and removed the justice system can feel for Australian Aboriginal peoples, in the context of a foreign concept of being a freeman. It imposes on them a foreign religion and culture, to which they have no ancient loyalty. In *Nulyarimma v Thompson* Genocide Case, Australian Aboriginal litigants commenced a prerogative action in mandamus to seek relief against genocide.<sup>11</sup> Justice Crispin held that Australia did not have a domestic law against genocide, while adding that genocide had continued to occur in Australia. His honor held that British settlers and colonial officials committed acts of genocide during the colonization of Australia.<sup>12</sup> He held that it appeared that this was contrary even to the English law at the time of colonization.<sup>13</sup>

The scholarship has already suggested links between judicatures and religion, by judges exercising a kind of authority arising from principles of the organization of institutional religion, known as cultus.<sup>14</sup> Judges in Western countries, in effect, practiced priest craft, by asserting their authority on the same cultus bases as the priest.<sup>15</sup>

Therefore, this article asks whether the Australian courts are ignoring Aboriginal genocide claims, and if so, how? It tries to show that the Australian courts tend to prefer procedural rules to the substantive law in matters of Aboriginal claims for relief against genocide. The article will test two hypotheses, the first being that Australian courts ignore the common law against genocide through their operative cultus.<sup>16</sup> The

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<sup>11</sup> *In the matter of an Application for a Writ of Mandamus Directed to Phillip R Thompson Ex parte Wadjularbinna Nulyarimma, Isobel Coe, Billy Craigie and Robbie Thorpe (Applicants), Tom Trevorrow, Irene Watson, Kevin Buzzacott and Michael J Anderson (Intervenors)* [1998] ACTSC 136.

<sup>12</sup> *Ibid* [78].

<sup>13</sup> *Ibid* [32].

<sup>14</sup> Larry Cata Backer, 'Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of American Judges' [2003] 12 William & Mary Bill of Rights Journal 101, 4.

<sup>15</sup> *Ibid*.

<sup>16</sup> See below for a discussion of the description of cultus as meaning the routinized ritual process, evidenced in public loyalty, representing certain inner principles and meanings, performed publicly without reference to those inner meanings.

second hypothesis is that the Australian judicature has declined to enforce the law against child sexual abuse of Aboriginal children, as an indicator of genocide, and indicating judicial bias.

The paper's methodology is one of cumulative synthesis as the paper's argument proceeds.<sup>17</sup> Argument is delimited to viewing the problem through the lenses of cultus and apprehended bias. The focus will begin with a discussion of Australian Aborigines and their human rights issues related to genocide. This will serve to introduce the Australian Aborigines and the Aboriginal rights problem in connection with the Australian judiciary. Following this context-setting section, argument proceeds by explaining the cultus, or, religion perspective, and the bias, or law, perspective. Finally argument uses these two perspectives, synthesized together, to analyze the case of *Ngurampaa Limited v Brewarrina Shire Council*.<sup>18</sup> In *Ngurampaa*, a serving Aboriginal "Ghillar" Elder, Mr Michael Eckford, a non-lawyer, sought prerogative relief in prohibition. He wanted to prevent the Brewarrina Shire Council operating a government on his people's lands while trespassing on them, and their consequent taxing of his people by statute, without the express public consent of the taxed.<sup>19</sup>

The outcome of the research is likely to suggest that cultus is a widely acceptable system of rites formed by priestly artifice. In the legal system, cultus manifests as what Lord Diplock called over-judicialization,<sup>20</sup> leading to a doctrine of a "legally reasonable observer". The cultus procedure of the court could remove the litigant's choice of determining judicial bias, and eliminate the possibility of protection through due process as a freeman under Magna Carta. In *Ngurampaa Limited v Brewarrina Shire Council*,<sup>21</sup> there was apprehended bias by virtue of overt and sustained cultic utterances by the judge.

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<sup>17</sup> Lonergan described methodology as a normative pattern of recurrent and related operations yielding cumulative and progressive results; Bernard Joseph Fancis Lonergan, *Method in Theology* (Longman & Todd 1975) 5.

<sup>18</sup> *Ngurampaa Limited v Brewarrina Shire Council* [2014] NSWSC 524.

<sup>19</sup> The *Rhetorica Ad Herennium* sets out six sources of law: nature; statute; custom; previous judgments; equity; and, agreement. Statute is law enacted with express public consent: Harry Caplan (trs), *Rhetorica Ad Herennium* (Harvard University Press 2004) 91, 93.

<sup>20</sup> *Bushell v Secretary of State for the Environment* [1981] AC 75 (HL) 97.

<sup>21</sup> *Ngurampaa* (n 18).

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### AUSTRALIAN ABORIGINES AND HUMAN RIGHTS

Argument begins with an introduction to Australian Aborigines and Aboriginal problems in connection with the Australian judiciary. Australian Aboriginal people and their cultures are interwoven with the land and its creation mythologies. Their laws are well-developed and stabilized over some 60,000 years, each Aboriginal nation possessing a legislative debating structure, chief law officers and ancient mythological narratives to explain their laws. Their legal structures possess a transmission system using dance and song, by which the laws are both preserved and transmitted through the generations.<sup>22</sup> They have councils of elders, which resemble presidential commissions, and who appear to be very conservative in their decision-making. They preferred to err on the side of maintaining and observing the old laws.<sup>23</sup>

The Australian Museum has written about the Australian Aboriginal Peoples, stating that these peoples had occupied Australia for at least 60,000 years. They evolved with the land, viewing the land as a whole environment that sustained, and was sustained, by the Aboriginal peoples and their cultures.<sup>24</sup> Thus, the land was the core of their spirituality.<sup>25</sup> They and their entire culture could be said to be appurtenant to the land.

When British colonizers first arrived in Australia in 1770, they designated Australia as “terra nullius” and claimed all the land, despite the fact they had not seen more than a tiny fraction of the land. Neither had they circumnavigated and mapped the continent. Terra nullius is a Latin term meaning “land belonging to no one”. By using the principle of terra nullius, the British Government claimed sovereignty over Australia, ignoring the rights and sovereignties of Aboriginal people, organized into some 250 nations, who had lived there for at least 60,000 years.<sup>26</sup>

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<sup>22</sup> Since ancient times, kings had used mimetic symbols techniques, such as dance and plays, to communicate their power and their laws to the illiterate populace by analogy to what the populace already believed and understood. Lillian B Lawler, ‘Proteus Is a Dancer’ (1943) 36 *The Classical Journal* 116, 116-17.

<sup>23</sup> Gary Lilienthal, Interview with Michael Eckford (Sydney, 22 April 2014). Mr Eckford is a ‘Ghillar’, or senior Aboriginal Elder, of an Aboriginal nation situated in the North West of the Australian state of New South Wales.

<sup>24</sup> Stuart Humphreys, ‘The Land’ (*Australian Museum*, 24 December 2009) <<http://australianmuseum.net.au/indigenous-australia-the-land>> accessed 24 April 2015.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

However Aboriginal people fought, and still fight, for their land and lives.<sup>27</sup> British colonizers progressively dispossessed Aboriginal people of their land.<sup>28</sup> The issue of title has never been resolved, with many Aboriginal people claiming allodial title<sup>29</sup> to the entire Australian Continent, and colonial settlers' descendants operating a system of Torrens Title<sup>30</sup> to the Australian Continent's lands.

Thus, in the seminal 1992 High Court of Australia case on Aboriginal land rights, *Mabo and others v State of Queensland*,<sup>31</sup> Brennan J stated as follows:

“The common law of this country would perpetuate injustice if it were to continue to embrace the notion of terra nullius and persist in characterising the Indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.”<sup>32</sup>

In the Australian judicial hierarchy, there is a state hierarchy for each of the states and territories, and another Federal judicial hierarchy. The High Court of Australia is at the apex of all the judicial hierarchies. In 1998, Wadjularbinna Nulyarimma, a Gungalidda Elder from Doomadgee, in Australia's northeastern Gulf of Carpentaria, commenced a genocide

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Allodial lands are the absolute property of their owner. They are not subject to any rent, service, or acknowledgment to a superior holder. Allodial title is the opposite of feudal land tenure: James Clarke Holt, *Colonial England 1066–1215* (The Hambledon Press 1997) 115.

<sup>30</sup> A Torrens title is a single certificate of title for an allotment of land. The certificate is issued administratively, and abolishes deeds of transfer of title, drawn up by the parties to the transfer. It is the most common type of title in British Commonwealth countries. All transactions such as transfers of ownerships, are registered on the certificate of title. The Torrens title certificate shows: details of who currently owns the property, any easements, registered on the property, any encumbrances, registered on the property, and the title's unique reference details. Torrens title was designed in the Colony of South Australia after an 1839 fire destroyed the Colony's district maps. After 1842, district divisions were replaced gradually by counties and hundreds, and the government resurveyed and renumbered the land: 'Torrens Title' (Government of South Australia, 26 May 2015) <<https://www.sa.gov.au/topics/housing-property-and-land/property-and-place-information/certificates-of-title/understanding-types-of-titles/torrens-titles>> accessed 30 April 2015.

<sup>31</sup> [1992] 175 CLR 1.

<sup>32</sup> Ibid [41] (Brennan J).

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action in the Supreme Court of the Australian Capital Territory against the sitting Prime Minister of the time and the entire Federal Parliament, over the government's Native Title Act<sup>33</sup> statutory amendments. The sitting Prime Minister promised what he called "bucket loads of extinguishment" of Native Title rights and interests,<sup>34</sup> so to pave the way for unimpeded mining and other kinds of development.

The Australian Capital Territory had ruled Aborigines pursuant to a 1954 Ordinance, signed into law personally by the Queen,<sup>35</sup> and later repealed on 11th November 1965. Thus, official colonization activities continued in Australia in 1965. Section 10 of that Ordinance stated as follows.

"For the purposes of section seven of this Ordinance inspections and the last preceding section, a member of the police force, or an Inquiries person authorized in writing by the Minister, shall have access at all reasonable times to an aboriginal at any place in which he is residing or employed and may make such inspections and inquiries as that member or person thinks fit."<sup>36</sup>

This ordinance section granted police and other officials unfettered authority to inspect and inquire into Aborigines as the equivalent of an on-going and unlimited investigation. Thus, Aboriginal people were subject to constant surveillance while living the most private parts of their lives, including their secret rites. This abridged their freedom of what they saw as religious and other cultural activities, and, it amounted to treating them as the inspecting officials' property.<sup>37</sup>

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<sup>33</sup> Native Title Act 1993 (Australia).

<sup>34</sup> 'Native Title Report - July 1996 to June 1997: Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Attorney-General as Required by Section 209 of the Native Title Act 1993' (*Australian Government*, 2001)

<[https://www.humanrights.gov.au/sites/default/files/content/pdf/social\\_justice/native\\_title\\_report\\_97.pdf](https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/native_title_report_97.pdf)> accessed 24 April 2015.

<sup>35</sup> An Ordinance relating to Aborigines No 8 of 1954 (Australian Capital Territory).

<sup>36</sup> *Ibid* s 10.

<sup>37</sup> International Labour Organization, *Convention to Suppress the Slave Trade and Slavery, 1926*, as amended by *The Supplementary Convention on the Abolition of Slavery, 1956*. Art 1 of the 1926 Convention defined slavery as: 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.

In this *Nulyarimma v Thompson* Genocide Case, the ACT Supreme Court, in Canberra, heard a prerogative action in mandamus against Australian Capital Territory officials.<sup>38</sup> Justice Crispin held that Australia did not have a domestic law against genocide, while admitting from the bench that genocide had continued to occur in Australia. Crispin's ruling was upheld on appeal in the Federal Court of Australia.<sup>39</sup> Justice Crispin made a landmark declaration on the subject of genocide committed against Aboriginal Peoples of Australia. His honor held that there was ample evidence to satisfy the Court that acts of genocide were committed during the colonization of Australia.<sup>40</sup> He held it was clear from what he called "the bloody pages of Australian history" that the comprehensive destruction of Aboriginal peoples coincided with an equally extensive and unlawful usurpation of their lands. His honor held that in the light of current knowledge, it appeared that this course was contrary even to the English law prevailing at the time of colonization.<sup>41</sup> This suggested a subsisting English common law against the commission of criminal genocide, which the Australian courts were either unwilling to discover, or were prevented from such discovery by the nature of the pleadings.

Pointing to a defect in the element of international relations within Australian sovereignty, and emphasizing the irony of the dictum of Brennan J, as above, Justice Crispin went on to conclude that Australia did not act as a civilized country,<sup>42</sup> because it appeared to him that, while the law effectively ratified the Convention,<sup>43</sup> it did not purport to incorporate the provisions of the Convention into Australian municipal law.<sup>44</sup> He concluded that no criminal offence of genocide existed in the domestic law of Australia.<sup>45</sup>

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<sup>38</sup> *Nulyarimma* (n 11).

<sup>39</sup> *Nulyarimma v Thompson* [1999] FCA 1192.

<sup>40</sup> *Nulyarimma* (n 11) [78].

<sup>41</sup> *Ibid* [32].

<sup>42</sup> 'Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951' (*The International Court of Justice*, 28 May 1951)

<<http://www.icjci.org/docket/index.php?sum=276&code=ppcg&p1=3&p2=4&case=12&k=90&p3=5>> accessed 1 June 2015.

<sup>43</sup> United Nations, *Convention on the Prevention and Punishment of the Crime of Genocide*, Adopted by the General Assembly of the United Nations on 9 December 1948.

<sup>44</sup> *Nulyarimma* (n 11) [66]; and see International Criminal Court (Consequential Amendments) Act 2002 (Australia), ss 268.121-268.122.

<sup>45</sup> *Nulyarimma* (n 11) [73].



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The possibility of a subsisting common law against the commission of genocide, coupled with the Court's finding that no criminal offence of genocide existed in the domestic law of Australia,<sup>46</sup> constituted an unexplored paradox in the state of the Australian common law. The inner-doctrine of the law against genocide had disappeared into this apparent judicial non sequitur. One hypothesis would be that, while the common law prohibited genocide, the courts simply ignored acts of genocide by some kind of special cultus-style of arrangement in the court rules. Thus, the question arises as to what aspects of court procedure might facilitate the ignoring of genocide.

During the case's appeal to the full bench of the Federal Court of Australia,<sup>47</sup> one level below the High Court of Australia in the Australian judicial hierarchy, the Australian Government articulated its policy on Aboriginal genocide through the Australian government's Chief Legal Counsel, a Queens' Counsel Barrister-at-law. He stated that the Australian Government "deliberately did not enact the Genocide Convention",<sup>48</sup> and continued as follows.

"...there are good reasons why this court should be very slow to create a new civil cause of action based on an international right which parliament has deliberately chosen not to directly incorporate into Australian criminal law."<sup>49</sup>

From the Australian Government's perspective, the thought of a massive award in general damages in tort might dwarf their repugnance to any conviction for a criminal offence. The International Court of Justice had inferred,<sup>50</sup> in its deliberations on the Genocide Convention,<sup>51</sup> that a country could not be considered civilized if it did not have a law to prevent genocide.<sup>52</sup>

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<sup>46</sup> Ibid.

<sup>47</sup> *Thompson* (n 39).

<sup>48</sup> Federal Court transcript *Nulyarimma v Thompson* No A 5 of 1999 and No S 23 of 1999, 31 May 1999 at nulbu 31.5.99 P-4.

<sup>49</sup> Ibid.

<sup>50</sup> 'Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951' (n 42).

<sup>51</sup> *Convention on the Prevention and Punishment of the Crime of Genocide* (n 43).

<sup>52</sup> The preparation of the Convention on Genocide shows that an undertaking was reached within the General Assembly on the faculty to make reservations and that it is permitted to conclude therefrom that States, becoming parties to the Convention, gave their assent thereto. What is the character of the reservations which may be made and the objections, which may be raised thereto? The

“The principles underlying the Convention are recognised by civilised nations as binding on States even without any conventional obligation. It was intended that the Convention would be universal in scope. Its purpose is purely humanitarian and civilising.”<sup>53</sup>

The Preamble to the Genocide Convention stated as follows.

“HAVING CONSIDERED the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world.”<sup>54</sup>

All those signing the Convention effectively condemned genocide, unless they failed to facilitate a jurisdiction under which they could prosecute those responsible for committing the crime of genocide. To behave otherwise would defeat any such condemnation. It would most certainly require that signatory nations would not commit genocide.

The Commonwealth of Australia has still not fully reduced the Genocide Convention<sup>55</sup> into its municipal law, although Australia was the third country to sign the Convention on 8th July 1949.<sup>56</sup> For example,

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solution must be found in the special characteristics of the Convention on Genocide. The principles underlying the Convention are recognised by civilised nations as binding on States even without any conventional obligation. It was intended that the Convention would be universal in scope. Its purpose is purely humanitarian and civilising. The contracting States do not have any individual advantages or disadvantages nor interests of their own, but merely a common interest. This leads to the conclusion that the object and purpose of the Convention imply that it was the intention of the General Assembly and of the States which adopted it, that as many States as possible should participate. This purpose would be defeated if an objection to a minor reservation should produce complete exclusion from the Convention; ‘Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951’ (n 42).

<sup>53</sup> Ibid.

<sup>54</sup> *Convention on the Prevention and Punishment of the Crime of Genocide* (n 43).

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

Article II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or

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only some parts of the Genocide Convention were imported into Australian domestic law.<sup>57</sup> Only the Australian Attorney General could commence a genocide case, and if the Attorney General had some reason to refuse, and did refuse to prosecute, there was no right of appeal and no statement of reasons was required.<sup>58</sup> A complainant seeking to sue for

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religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article III: The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

<sup>57</sup> International Criminal Court (Consequential Amendments) Act 2002 (Australia), ss 268.121-268.122.

<sup>58</sup> Ibid s 268.121.

Bringing proceedings under this Division

(1) Proceedings for an offence under this Division must not be commenced without the Attorney General's written consent.

(2) An offence against this Division may only be prosecuted in the name of the Attorney General.

(3) However, a person may be arrested, charged, remanded in custody, or released on bail, in connection with an offence under this Division before the necessary consent has been given.

268.122 Attorney General's decisions in relation to consents to be final

(1) Subject to any jurisdiction of the High Court under the Constitution, a decision by the Attorney General to give, or to refuse to give, a consent under section 268.121:

- (a) is final; and
- (b) must not be challenged, appealed against, reviewed, quashed or called in question; and
- (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari.

(2) The reference in subsection (1) to a decision includes a reference to the following:

- (a) a decision to vary, suspend, cancel or revoke a consent that has been given;
- (b) a decision to impose a condition or restriction in connection with the giving of, or a refusal to give, a consent or to remove a condition or restriction so imposed;
- (c) a decision to do anything preparatory to the making of a decision to give, or to

genocide simply could not commence a genocide action in Australia. This placed the decision firmly into the political field, as was contrary to the intent of the long-standing Genocide Convention,<sup>59</sup> to which Australia was a high contracting party.

In 2007, the Government of the Northern Territory of Australia published what was known as the “Little Children are Sacred” report.<sup>60</sup> In this report were many allegations of Aboriginal child sexual abuse perpetrated by Aboriginal men, but with no matching record of wide-scale prosecutions of Aboriginal men for this crime. The Australian Government acted on the report, without public consultation and without prosecutions in the courts, with what many Aborigines viewed as a military invasion.<sup>61</sup> On 21 June 2007, after the release of the “Little Children are Sacred” report,<sup>62</sup> the Australian Federal Government announced the Northern Territory Emergency Response, also commonly known as “the intervention”, suggestive of mass psychological harm to Aboriginal men by virtue of these public denunciations.<sup>63</sup> They used the term in a common psychological or psychotherapeutic sense, and thereby avoided the country’s judicature. This sent a clear signal to the judicature, a possible breach in the separation of powers within the Australian Constitution,<sup>64</sup> indicating the judicature ought comply with the government’s intervention-related military policies.

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refuse to give, a consent or preparatory to the making of a decision referred to in paragraph (a) or (b), including a decision for the taking of evidence or the holding of an inquiry or investigation;

(d) a decision doing or refusing to do anything else in connection with a decision to give, or to refuse to give, a consent or a decision referred to in paragraph (a), (b) or (c);

(e) a failure or refusal to make a decision whether or not to give a consent or a decision referred to in a paragraph (a), (b), (c) or (d).

<sup>59</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, (n 43).

<sup>60</sup> Government of the Northern Territory, *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, 2007.

<sup>61</sup> The Tasmanian Aboriginal Centre, *The Invasion of Northern Territory Aboriginal Communities and its Implications for Tasmania*, 2007.

<sup>62</sup> *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (n 60).

<sup>63</sup> ‘The NT Intervention and Human Rights’ (*Amnesty International*, 2007) <<http://www.amnesty.org.au/hre/comments/24400>> accessed 24 April 2015.

<sup>64</sup> See the structure of the Constitution of the Commonwealth of Australia, and see the High Court of Australia case of *Kable v DPP* (1997) 189 CLR 51, in which the High Court of Australia found there to be no separation of powers in the State of New South Wales.

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With a paucity of prosecutions, and a military intervention later to be judged internationally as specious, the reader might consider that the judicature and the police had declined to enforce the law against child sexual abuse, as an indicator of genocide. In this hypothesis, it could be because it might have interrupted the Report's evidence of Aboriginal self-destruction, and made it easier to maintain a policy of usurping Aboriginal allodial title to their ancient lands. This hypothesis strongly demands a consideration of systemic apprehended bias within the judicature.

The Australian Government deployed the following policies as part of the "intervention". (a) The Government introduced management of 50% people's welfare income, dictating how the money was to be spent.<sup>65</sup> (b) It introduced compulsory leases of Aborigine-owned land, giving the government "exclusive possession" of Aboriginal land for five years. These leases under military duress allowed the Government to repair, demolish, or replace any existing building without the owners' consent.<sup>66</sup> (c) They introduced blanket bans on alcohol, gambling and pornography in named communities and placed signs announcing these bans at the entrances to Aboriginal communities.<sup>67</sup> (d) They abolished the permit system, which had given Aboriginal people control over who came into their traditional lands. The Northern Territory Land Rights Act had recognized Aboriginal land as private property, and the permit system was designed to ensure Aboriginal people had the same rights as other owners of private property.<sup>68</sup> (e) They offered government services in exchange for leases, such as housing and housing maintenance, on the condition that Aborigines waived permanently their property rights. To make it legal to implement the intervention, the Australian Government suspended the Racial Discrimination Act and the Northern Territory anti-discrimination laws, in contravention of the government's obligations under cognate international instruments. Australian and international law prohibited discrimination on the grounds of race, however the government claimed that it was necessary to override human rights in order to protect the children, the subject of the "Little Children are Sacred" report.<sup>69</sup>

Amnesty International stated that many of the policies of the intervention: (a) did not protect children, or were not related to achieving

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<sup>65</sup> 'The NT Intervention and Human Rights' (*Amnesty International*, 2007) <<http://www.amnesty.org.au/hrc/comments/24400>> accessed 24 April 2015.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

that goal; (b) did not relate to the goals expressed in the media to justify the intervention; and, (c) offered benefits to Aborigines that could have been provided without breaching human rights.<sup>70</sup>

### THE NATURE OF PRIESTLY CULTUS

According to sociological theory, the social system has been structured to generate impact without necessarily having to find any authoritative person to fill its official public positions. In this way, domination and power were relations between persons, and, an organised institution was a coherent system of action, regulated in part by these personal relationships. Thus, personal influence became transformed within a stable institutional system. Weber framed this change using his three interconnected ideas of routinization, rationalisation, and formalisation.<sup>71</sup> He believed that these three processes resulted in the typical ritualism of institutions. The form of rationalisation of traditional authority was the systematic use of ritual procedures in every overt part of society's life. Formalisation made regular ritual activity purely symbolic, meaning it would consist of beliefs, myths and doctrines.<sup>72</sup>

Ritualization also occurred in other non-traditional systems, signalling that, in them, the internal justification of behaviour had become partly traditional.<sup>73</sup> On Weber's account, when the legal structure justified public authority, its leaders such as a judge or prosecutor did not need charisma, on which to base power. Instead, this authority had to be based on a systemic precept, such as a procedural doctrine.<sup>74</sup> Judicial appointments to the bench were predicated on the judges' symbolic and doctrinal standing within the legal profession, and therefore, cognate to priesthood.

Typically, cultus meant the routinized ritual process, representing internal principles and implications, performed publicly by opaque, or fungible, officials without reference to those hidden meanings. This would suggest such officials were commodified as professionals, their individual personalities being veiled and made irrelevant to their official functions.

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<sup>70</sup> Ibid.

<sup>71</sup> Donald McIntosh, 'Weber and Freud: On the Nature and Sources of Authority' [1970] 35 *American Sociological Review* 901, 907.

<sup>72</sup> Doctrine could be described as a belief or set of beliefs held and taught by a Church, political party, or other group.

<sup>73</sup> McIntosh, 'Weber and Freud' (n 71) 907.

<sup>74</sup> Ibid 909.

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Examples of *cultus* would include temple service.<sup>75</sup> Also, they might include those public systems of ritual procedures of a court of law, such as ritual bowing to the judge, coats of arms on the wall behind the bench, court officials stationed in court with *de facto* priestly functions, use within the court of a special dialect of the language, the wearing of black robes and sometimes wigs, and the arrangement of the hearing according to prescribed procedural rules.

The word “*cultus*” is not in everyday usage, and for this reason, its investigation might reasonably come from its apparent Latin root. There is a comprehensive context of the word “*cultus*” from the Latin,<sup>76</sup> identifying this range of meanings: that which is adored;<sup>77</sup> cultivated or manured;<sup>78</sup> honour or deference;<sup>79</sup> an apparatus of ornamentation;<sup>80</sup> reverence;<sup>81</sup> husbanded;<sup>82</sup> worshipped;<sup>83</sup> occupational;<sup>84</sup> habitual;<sup>85</sup> respected;<sup>86</sup> revered;<sup>87</sup> celebrated;<sup>88</sup> tilled;<sup>89</sup> and, ornate.<sup>90</sup> The term appears to have accommodating facets.

This range of meanings allows separation of the term “*cultus*” into four generic facets. The allurements facet suggests being adored; an apparatus of ornamentation suggests ornateness. It also indicates the presence of rhetorical persuasion by ornamentation. The georgic aspect indicates being cultivated or manured, husbanded, occupational, habitual, tilled.<sup>91</sup> It also suggests seasonal or customary modifications to nature.

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<sup>75</sup> An example would be the Priestly legislation of the Tabernacle service. See Frank Moore Cross Jr, ‘The Tabernacle: A Study from an Archaeological and Historical Approach’ (1947) 10 *The Biblical Archaeologist* 45, 59.

<sup>76</sup> John Entick, *New English-Latin Dictionary* (London: Charles Dilly 1783).

<sup>77</sup> *Ibid* 5.

<sup>78</sup> *Ibid* 58.

<sup>79</sup> *Ibid* 62.

<sup>80</sup> *Ibid* 81.

<sup>81</sup> *Ibid* 116.

<sup>82</sup> *Ibid* 118.

<sup>83</sup> *Ibid* 120.

<sup>84</sup> *Ibid* 164.

<sup>85</sup> *Ibid* 176.

<sup>86</sup> *Ibid* 209.

<sup>87</sup> *Ibid* 211.

<sup>88</sup> *Ibid* 219.

<sup>89</sup> *Ibid* 272.

<sup>90</sup> *Ibid* 277.

<sup>91</sup> See Janet Lembke (trs), *Virgil's Georgics* (1st edn, Yale University Press 2006), in which Virgil explained how to cultivate a field to allure bees to the flowers and to the making of honey. The bees were farmed beyond their

The status aspect suggests honor or deference, reverence, being respected or revered. All this is suggestive of forces of social hierarchy. The ritual facet suggests being worshipped, celebrated, all inferring a routinized ceremony.<sup>92</sup>

In Hegel's taxonomy of religions,<sup>93</sup> there was a suggestion that foundational religion was incomplete and spiritless unless it included a cultus to display a human comprehension of nature? This taxonomy compared the structure of four versions of determinate religion and included cultus as a necessary element of each example religion's structure,<sup>94</sup> conveying spirit to the religion's adherents.

Religious, and other groups united by common patterns of belief and behaviour, showed that any nonconformity indeed would produce a separating conflict. When cultus predominated over theology, ritual nonconformity would be a more serious threat to group stability than would heresy. This was the case within the antique religious world. Individual philosophers dominated questions of belief and theology, in ancient polytheism, without any official relationship to the cultus. Hierarchies of priests restricted themselves to the operation and maintenance of prescribed ceremonials,<sup>95</sup> sounding somewhat like division into the substantive field and the practice of law.

Cultus is also used to provide a kind of annulment of any anomaly between the procedural and substantive issues.<sup>96</sup>

"The expression "Cultus" or "worship" is ordinarily used in the narrower sense of external, public actions; this definition does not lay stress on the inward activity of the soul. The meaning which we shall attach to the word Cultus will comprise this inward activity as well as its outward manifestation; this activity is to bring about the rehabilitation of the union with the Absolute, and is therefore an inner conversion of spirit and soul. [Church] Cultus or worship contains, for instance, not only the sacraments, church-

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knowledge. He explained that making the area beautiful, colorful and shady would suffice.

<sup>92</sup> See McIntosh, 'Weber and Freud' (n 71) 907.

<sup>93</sup> Peter C Hodgson (ed), *Lectures on the Philosophy of Religion* (University of California Press 1984-87).

<sup>94</sup> Peter C Hodgson, 'Logic, History, and Alternative Paradigms in Hegel's Interpretation of the Religions' (1988) 68 *The Journal of Religion* 1, 8.

<sup>95</sup> Massey Hamilton Shepherd Jr, 'The Early Apologists and Christian Worship' (1938) 18 *The Journal of Religion* 60.

<sup>96</sup> F Louis Soldan, 'Hegel's Philosophy of Religion' (1886) 20 *The Journal of Speculative Philosophy* 407, 413.



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rites, and duties, but also the so-called "way of salvation" which is an absolutely inward history and a succession of acts of the soul, a movement which is to take place, and does take place, within the soul."<sup>97</sup>

Later, argument will suggest that in court cultus the "way of salvation" consists in a belief that only the court could decide what law was valid, and only the judge could decide whether or not a litigant was reasonable. This substance of reasonableness manifested in a show of loyalty. Aggregating a key proposition<sup>98</sup> from Theophilus,<sup>99</sup> from Clement of Alexandria<sup>100</sup> and Tertullian,<sup>101</sup> it appeared that the general adherence to, and interweaving of, customs was seminal for public respect for a religious cultus. There was more evidence for this aggregated public loyalty scheme in noting that the ancients derided any religion lacking publicly accepted artistic ornamentation. Affluent people preferred to be present loyally at worship within a beautiful edifice.<sup>102</sup> The many went to church only for aesthetic delight while common and ignorant people were induced to attend only by glittering golden, silver, and ivory decorations, suggesting a consecration of avarice. Even Tertullian had admitted the pagan reasoning for the arts to be the acceptance of enjoyment of all good god-created things offered to men.<sup>103</sup> From this, only by ceremonial and ritual in religious life, were religious practices, attitudes and beliefs articulated to, or joined with, the masses.<sup>104</sup>

In consequence, it appeared that reasonable people would find the cultus more acceptable than the inner concepts it represented. Similarly, for example, reasonable people would find less authority attributable to the courts, if courts were in small, inauthoritative and unornamented rooms. Thus, cultus had an alluring effect on reasonable people to make priestly functions appear credible. This public facet of cultus married cultic functions into acceptable public life, while inner meanings attached to them disappeared into a comfortable absence, veiled of any requirement to explain.

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<sup>97</sup> Ibid 414.

<sup>98</sup> Shepherd Jr, 'The Early Apologists and Christian Worship' (n 95) 71.

<sup>99</sup> Theophilus of Antioch, *Apology to Autolytus (Apologia Ad Autolytum)*, iii, 4.

<sup>100</sup> Clement of Alexandria, *Protrepticus (Exhortation)*, 4.

<sup>101</sup> Tertullian, *Ad Nationes*, Lib. I & II (*To The Nations*), i, 10.

<sup>102</sup> Tertullian, *Ad uxorem*, ii, 8.

<sup>103</sup> Shepherd Jr, 'The Early Apologists and Christian Worship' (n 95) 78.

<sup>104</sup> Ibid 79.

**APPREHENDED BIAS**

In the English common law world, the concept of fairness in due process subsisted as the precepts of natural justice and procedural fairness, such as for example within Magna Carta's apparent requirement for judgment by the substantive law,<sup>105</sup> but only for freemen. There was a suggestion, in this, of due process being veiled. Why not just call it due process? In the 1985 High Court of Australia case of *Kioa v West*,<sup>106</sup> Brennan J referred to Lord Diplock's dictum on the concept of fairness. Lord Diplock observed as follows in *Bushell v Secretary of State for the Environment*.<sup>107</sup>

"To "over-judicialise" the inquiry by insisting on observance of the procedures of a court of justice which professional lawyers alone are competent to operate effectively in the interests of their clients would not be fair."<sup>108</sup>

Thus, unfair meant public persuasion by the professional artifice of over-judicialisation. Brennan J went on to state as follows.

"Nevertheless in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with

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<sup>105</sup> Magna Carta (1297) s XXIX: 'NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor [condemn him,] but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.' But consider the meaning of the term 'freeman' as follows. Up to 1835, every person who wished to become a city freeman first had to become a freeman of one of the City livery companies. These were mercantile successors to the medieval trade and craft guilds. The freedom of a livery company was merely an ordinary membership. A person wishing to become a senior member of a livery company had to be first a freeman both of that company and of the City of London. A person who was a freeman of both the City and a livery company was named, referred to, and thus identified as 'Citizen and [Livery Company name] of London'. Research Guide 1: City Freedom Archives, Vivienne Aldous (1990 revised 1996, 1999) Publication by Corporation of London Records Office, <<http://www.cityoflondon.gov.uk/nr/rdonlyres/155d63ec-c7bf-4b8f-b7d2-9574c07fe071/0/cityfreedom.pdf>> accessed 24 November 2010.

<sup>106</sup> [1985] HCA 81; (1985) 159 CLR 550.

<sup>107</sup> [1981] AC 75.

<sup>108</sup> *Ibid* 97.

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adverse information that is credible, relevant and significant to the decision to be made. It is not sufficient for the repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it. Information of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information. He will be neither consoled nor assured to be told that the prejudicial information was left out of account.”<sup>109</sup>

This veiling of subconscious information would allow procedure to predominate in the law. Thus, the Judicial Commission of the State of New South Wales<sup>110</sup> stated, in its procedural manual for judges and complaints against them, that the test for determining if a judge was disqualified for apprehended bias was: “whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide”.<sup>111</sup> This statement proposed that judges assessed their brother judges’ public apprehensions of bias. The primary test for disqualification on the ground of apprehended bias was stated by the High Court in the 1994 case of *Webb v The Queen*,<sup>112</sup> using the code word “reasonable” to suggest a judicially applied objective test, as follows:

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<sup>109</sup> (1985) 159 CLR 550 [38].

<sup>110</sup> ‘Disqualification for Bias’ (*Judicial Commission of New South Wales*, 15 May 2015)

<[http://www.judcom.nsw.gov.au/publications/benchbks/civil/disqualification\\_for\\_bias.html](http://www.judcom.nsw.gov.au/publications/benchbks/civil/disqualification_for_bias.html)> accessed 1 October 2014.

<sup>111</sup> *Johnson v Johnson* [2000] 201 CLR 488 [11], affirmed in *Ebner v Official Trustee in Bankruptcy* [2000] 205 CLR 337; applied in *Michael Wilson & Partners Ltd v Nicholls* [2011] 244 CLR 427; distinguished in *British American Tobacco Australia Services Ltd v Laurie* [2011] 242 CLR 283; see also *Slavin v Owners Corporation Strata Plan 16857* [2006] NSWCA 71; *Barakat v Goritsas (No 2)* [2012] NSWCA 36. As to the former association of the judge with legal representatives and litigants, see *Bakarich v Commonwealth Bank of Australia* [2010] NSWCA 43. As to the relevance of non-disclosure to issues of apprehended bias, see *Whalebone v Auto Panel Beaters & Radiators Pty Ltd (in liq)* [2011] NSWCA 176. As to a party being a member of the trial court, see *Rouvinetis v Knoll* [2013] NSWCA 24.

<sup>112</sup> [1994] 181 CLR 41 67 (Deane J) quoting from *Livesey v The NSW Bar Association* [1983] 151 CLR 288 293–4 (Mason, Murphy, Brennan, Deane & Dawson JJ).

“Whether, in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts “might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question.”<sup>113</sup>

The compounded nature of this dictum again suggested a veiled substance to fairness. In *Webb v The Queen*<sup>114</sup> Deane J sought to categorise potentially disqualifying factors into four groups.

“The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment. The second is disqualification by conduct, including published statements. That category consists of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias. The third category is disqualification by association. It will often overlap the first and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings. The fourth is disqualification by extraneous information. It will commonly overlap the third and consists of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias.”<sup>115</sup>

The High Court of Australia redefined the apprehension of bias principle in December 2000 in the case of *Ebner v The Official Trustee in Bankruptcy*.<sup>116</sup> It laid down a method for applying the apprehension of bias principle. This process comprised three steps: (a) Identify what it was said might lead a judicial officer to decide a case other than on its legal or factual merits. For example, “the judge has shares in the respondent bank” or “the judge has a brother who is a partner of the solicitor acting for the

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<sup>113</sup> Ibid.

<sup>114</sup> [1994] 181 CLR 41.

<sup>115</sup> Ibid 74.

<sup>116</sup> [2000] HCA 63; (2000) 205 CLR 337.

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respondent”.<sup>117</sup> (b) There needed to be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.<sup>118</sup> (c) There needed to be an assessment as to whether a fair-minded observer might reasonably apprehend that the case might not be decided impartially.<sup>119</sup>

Following logically from this, in 2006, the High Court of Australia handed down its judgment in *Forge v Australian Securities and Investments Commission*,<sup>120</sup> discussing the application of an apprehension of bias principle. Three judges of the court said:

“In applying the apprehension of bias principle to a particular case, the question that must be asked is whether a judicial officer *might* not bring an impartial mind to the resolution of a question in that case. And that requires no prediction about how the judge will in fact approach the matter. Similarly, if the question is considered in hindsight, the test is one which requires no conclusion about what factors actually influenced the outcome which was reached in the case. No attempt need be made to enquire into the actual thought processes of the judge; the question is whether the judge might not (as a real and not remote possibility rather than as a probability) bring an impartial mind to the resolution of the relevant question.”<sup>121</sup>

This altered the view of fairness to how well the judge conformed to the court’s cultus. The court’s view in *Forge v Australian Securities and Investments Commission*<sup>122</sup> suggested that the principle of articulation stated in *Ebner v The Official Trustee in Bankruptcy*,<sup>123</sup> had been altered to be a fair observer’s perception of the judge’s fairness. Thus, the principle of apprehended bias meant that if the judge felt that a reasonable observer felt excluded by the adjectival, or cultic, part of the court’s process, then this observer might attribute to the judge’s mind a certain unfairness. Such a reasonable observer might not coincide with a

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<sup>117</sup> *Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337 para 8.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> [2006] HCA 44.

<sup>121</sup> *Forge v Australian Securities and Investments Commission* [2006] HCA 44 (Gummow, Hayne and Crennan JJ) [67].

<sup>122</sup> *Ibid.*

<sup>123</sup> [2000] HCA 63; (2000) 205 CLR 337.

reasonable Aboriginal aggrieved person. This articulation suggested a form of over-judicialisation in operation, per Lord Diplock's dictum in *Bushell v Secretary of State for the Environment*,<sup>124</sup> rendering a hearing's outcome void for apprehended bias.

## SUMMARY

The tests for apprehended bias suggested the subsistence of a legally reasonable person. This term would mean a person who was reasonable by virtue of a judicial determination. It appeared that a legally reasonable person would find a cultus more acceptable than the system's inner concepts it represented. Similarly, for example, a legally reasonable person would find less authority attributable to the courts, if courts were less publicly august, employing less public ornamentation. Such ornamentation might include special court architecture, judicial dress and the dialect of English used within the court's procedures. Thus, cultus had an alluring effect on the legally reasonable person to make courtly/priestly functions appear credible.

The principle of apprehended bias meant that if the judge felt that a reasonable observer felt excluded by the adjectival, or cultic, part of the court's process, then this observer might attribute to the judge's mind a certain unfairness. Such a reasonable observer's method of attribution would not coincide with a reasonable Aboriginal aggrieved person, in the context of the court's history of dealing with Aboriginal people, discussed above, because such a litigant would not be a legally reasonable person. This articulation indicated a form of over-judicialisation in operation, per Lord Diplock's dictum in *Bushell v Secretary of State for the Environment*,<sup>125</sup> rendering a hearing's outcome void for apprehended bias.

Since the legally reasonable observer would feel drawn by the court's various indicia of ornamentation, making judicial pronouncements plausible, the principle would fail in the case of an aggrieved person from a culture embattled by centuries of war and allegations of genocide, such as for example an Aboriginal litigant. This would be because such a litigant could never be legally reasonable.

Aspects of court cultus would include publicly acceptable narrative not conforming with reason. They would include a preference for established procedure over substantial issues of justice. Finally, consider a litigant appearing before a judge, where the judge came onto the bench clearly angry with this litigant, in the absence of any presented evidence,

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<sup>124</sup> [1981] AC 75.

<sup>125</sup> *Ibid.*

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then citing procedure over substantive justice, or suggesting that procedure was indistinguishable from justice. This litigant would apprehend bias. However, the test was whether the judge determined a reasonable observer might apprehend bias. The cultus procedure of the court could remove the litigant's choice of determining judicial bias. This abridgment of juridical personality,<sup>126</sup> as an outcome of court cultus, would be a serious defect in reason.

### **THE NGURAMPAA LIMITED CASE**

This section discusses the case of *Ngurampaa Limited v Brewarrina Shire Council*,<sup>127</sup> in the context of the accumulated findings and suggestions from previous sections. The *Ngurampaa Limited Case* represents field data, because this section combines the court transcript with personal interviews conducted at court. It assesses the conduct of the case in court in the critical context of the legally reasonable person discussed above. This legally reasonable person perception of judicial bias

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<sup>126</sup> In respect of a cognate legal environment, Germany's mass manufacture of concentration camp corpses came after the historically and politically intelligible preparation of what Arendt called living corpses. It was intelligible because it followed a plain logic of necessary and catastrophic movements. First was the destruction of the juridical person. Then came the murder of the moral person. Finally came the destruction of unique identity, the spontaneity through which a person might still call an action 'mine'. It was a necessary and catastrophic process of reducing human persons to animal slavery, and this article investigates the necessity in that process. Only that human destruction beginning with obliteration of the juridical and moral personality could create this kind of systemic significance. It was a three-part process of destruction. Annihilation of the juridical personality required the deprivation of all civil and political rights. It made some categories of person outside the law's protection, through denationalization, and consequently making individuals into outlaws. This meant that the camp inmates were nonagents. They had no capacity for regular or criminal legal action. Mostly, these individuals were innocent. They were jailed only for who they were. Murder of the moral persons required incapacitation of their consciences' operation. For this, the concentration camps made death anonymous. This robbed death of its natural meaning as the conclusion of the fulfilled life. This destruction of individuality began with the removal of all distinguishing characteristics, and it began by sadistic torture, and proceeded with systematic ruin of human bodies. It was calculated to destroy everyone's human dignity. Six million human beings died in Germany during NAZI times, but no one could say how many juridical persons perished. Hannah Arendt, *The Origins of Totalitarianism* (Meridian 1958) 447, 451, 452, 453, 454.

<sup>127</sup> *Ngurampaa* (n 18).

would be a construct of the judge's mind, rather than the litigant's assessment of the judge's apprehended bias. Thus, the judge would have in mind whether or not a fictitious person, not necessarily present in court at the time, would apprehend judicial bias.

The contextual circumstances of the case were as follows. Mr Eckford was a well-known Head of the Euahlayi people. He held a rank as Senior Elder, or Ghillar, of the Euahlayi people, and also, he was lawman of the Euahlayi Nation. His functions within his nation represented the consequences of some 60,000 years of human history. Mr Eckford was, in the early 1970's, one of a small group of founders of the Aboriginal Embassy on the lawns of Old Parliament House in Canberra. This Embassy still stands to this day and is accorded measures of diplomatic immunity by the Australian Government.<sup>128</sup>

The lands of the Euahlayi Nation had been carefully mapped and stretched from inside the State of New South Wales across an Australian state border into the State of Queensland. Mr Eckford stated that the Euahlayi Nation had acceded to the Statute of Rome, had defined land boundaries, routinely conducted international relations and had a fully functional legal system. He asserted that the Euahlayi Nation had declared its sovereignty in the required forms at international law. The Euahlayi Nation legal system included lawmen. These were people who were the repositories for maintenance and transmission of the law. It included specific methodologies for transmission of the law over archaeological periods of time, and also, a functioning legislature structure. He claimed an Australian Continental Common Law sanctioned by the ancient people<sup>129</sup> subsisted within the lands of the Euahlayi Nation, from time immemorial, and, foreign occupiers could not extinguish this Continental common law, merely by ignoring it.<sup>130</sup>

Mr Eckford argued that, in the mid 1800's, British settlers acting for the Crown led an unlawful massacre of apparently outlawed members of his society, as well as of some Chinese immigrants he claimed were peacefully living in the area at the time.<sup>131</sup> The victims included women,

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<sup>128</sup> Interview with Lilienthal (n 23).

<sup>129</sup> The *Rhetorica ad Herennium* sets out six sources of law: nature; statute; custom; previous judgments; equity; and, agreement. Custom is defined in it as that which in the absence of any statute is by usage endowed with the force of statute law, which it defines as law set up by the sanction of the people. Cicero, *Rhetorica Ad Herennium* (Harvard University Press) 91, 93.

<sup>130</sup> Interview with Lilienthal (n 23).

<sup>131</sup> Eburn stated that when Governor Arthur Phillip arrived in Sydney with the first fleet of colonists, they carried with them ' . . . so much of the English law, as is applicable to their own situation and condition in any infant colony'; Michael



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children and very young babies. The burial site of these victims had been identified as on the said lands and had been duly investigated by generations of Euahlayi officials. Mr Eckford claimed that many descendants of the original perpetrators of the said massacre were now operating the Brewarrina Shire Council, which Council was established in or about 1843. Also, these descendants were variously holding senior and professional positions in the neighbourhood.<sup>132</sup>

He argued further that his people's title to the land was indistinguishable from allodial title and that his people's nation had held a community form of allodial title over the described lands for some 60,000 years. In any event, they had held this title from time immemorial and had never abandoned the land. Nor had they acceded to any suggestion of colourable title to the land by the British settlers. Having made this declaration of allodial title, Mr Eckford argued that the Brewarrina Shire Council illegally had set up a government on his people's lands, and purported *inter alia* to levy taxes on his people. He stated that his people evinced no express public consent to the existence of the Brewarrina Shire Council or its acts. He noted that during the period of administration of the Brewarrina Shire Council, British settlers acting under Crown authority had arranged for his people to be forcibly enslaved, from time to time. They removed the children from their parents and transmigrated them long distances away, to be denied rights to their own sources of food and economy. They had arranged for his people to have been subjected to other capricious State of New South Wales Police actions such as regular deaths in Police custody. He noted that these actions were now considered

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Eburn, 'Outlawry in Colonial Australia: The Felons Apprehension Acts 1865-1899' [2005] ANZLH E-Journal 80, 80. Also See *R v Farrell, Dingle and Woodward* [1831] 1 Legge 5; *Mabo v Queensland (No 2)* [1992] 175 CLR 1. Neal suggested that although the new English colony of New South Wales was to be a penal settlement, it was a society established and governed by law. David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (CUP 1991). As such, neither the convicts nor the indigenous population were outside the law's jurisdiction. *R v Murrell* (1836) 1 Legge 72. This meant they were not outlaws. Despite this, in 1865 the public and legislature somehow believed that outlawry was indicated to counteract law-and-order crises in the colony's remote regions. Criminal activities in these remote areas were said to enjoy widespread community support. This led to a public newspaper rhetoric of demands for these people to be placed beyond the law's protection. See for example: Sydney Morning Herald, Sydney, Australia (SMH) 11 July 1864, 4; 12 July 1864, 4; 2 February 1865, 4; 7 February 1865, 4; 6 March 1865, 4. In a way, it appeared like an abdication of the English claim to rule these remote regions.

<sup>132</sup> Interview with Lilienthal (n 23).

to be crimes against humanity.<sup>133</sup> He further alleged that, by occupying his people's lands with a government, those people now operating the Brewarrina Shire Council were committing continuing criminal trespass, as well as civil trespass, accumulating a huge quantum of damages. To date, they had no lawful authority to be on the said lands, and therefore could not purport to operate a government on the lands.<sup>134</sup>

By way of jurisdictional analogy, Stern reviewed California courts' treatment of the foreign law of an antecedent foreign government. He cited *Ohm v San Francisco*,<sup>135</sup> where the court stated that the foreign law of an antecedent foreign government "was deemed to be the law of its successor government to the extent to which the old law has created property rights, affected status or continues to be in force".<sup>136</sup> Stern suggested that this antecedent law would be subject to judicial notice to

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<sup>133</sup> For assessing the veracity of this proposition, see 'Rome Statute of the International Criminal Court' (*United Nations: Treaty Collection*, 11 August 2015)

<[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en)> accessed 7 October 2014. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

<sup>134</sup> Interview with Lilienthal (n 23).

<sup>135</sup> (1891) 98 Cal 437.

<sup>136</sup> William B Stern, 'Foreign Law in the Courts: Judicial Notice and Proof' (1957) 45 California Law Review 23, 24.

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this extent and would be provable as fact,<sup>137</sup> and as such, Mr Eckford claimed that the Aboriginal law was still in force, with community adherents.<sup>138</sup>

Some time before, Mr Eckford had commenced a substantive action in the Supreme Court of New South Wales. His action pleaded for a prerogative order in prohibition, to effectively stay a decision of a State of New South Wales Magistrate to uphold the Shire Council's taxing of the Euahlayi people on their own sovereign lands.

As part of this substantive action, Mr Eckford issued a subpoena to the Brewarrina Shire Council to produce to the Supreme Court any deed, or any other kind of document, that showed the allodial title to the lands of the Euahlayi people had been lawfully transferred to the British Crown in right of the State of New South Wales, or to any other person, in such a way that they could exercise any sovereignty over the Euahlayi Nation. Mr Eckford alleged that, in any event, were such documents to be produced to the court, any such transfer thereby evidenced would be void for illegality, by virtue of the massacres referred to above.<sup>139</sup> The subpoena's inherent assumption, that no such land title transfer had taken place, would mean Mr Eckford did not subscribe to the State's jurisdiction over his lands. This would exclude him as a legally reasonable person in the judge's mind. Thus, Mr Eckford's apprehension of judicial bias would, at the outset, be irrelevant to the Court.

The barrister for the Brewarrina Shire Council, Mr Bell, submitted to the Court, and also confirmed to those attending at court that no such documents existed.<sup>140</sup> In consequence of this, Mr Eckford argued that the Brewarrina Shire Council had no power of taxation over the Euahlayi Nation.<sup>141</sup> This suggested that there was no deed of transfer of title, no deed of cession, or no deed of surrender to any acts of war. Mr Bell's statement strengthened the view that whoever owned the lands at the time of colonisation, had passed the land to their heirs, or had otherwise alienated the land. Mr Eckford claimed the lands were not alienated to any person, as that would be impossible under transmitted Aboriginal systems of law and spirituality.<sup>142</sup>

The action was an application by the Brewarrina Shire Council to strike out Mr Eckford's subpoena, described as above, on the grounds that

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<sup>137</sup> Ibid.

<sup>138</sup> Interview with Lilienthal (n 23).

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

Mr Eckford was not a Solicitor and that the subpoena was generated for a collateral purpose. A number of exchanges took place between Mr Eckford, Mr Bell, Mr Byers from the Crown Solicitor's Office, and the Judge.

Mr Eckford appeared for the Plaintiff, by leave of the court.<sup>143</sup> The judge canvassed the issue of this leave, referring to an unspecified court rule, rather than a specific grievance. Mr Eckford was the Chairman of an Aboriginal Corporation and argued that, as such, no non-Aborigine Solicitor representative would be acceptable to his nation. The judge opined that since the company was a registered corporation under Australian law, the rule applied, suggesting representation by an officer of the court would be mandatory. Mr Eckford stated that the company has asked him to represent it, and the judge relented, without articulated reasoning, giving qualified leave for Mr Eckford to appear.<sup>144</sup> It appeared the judge gave procedural leave so that Mr Eckford's subpoena could be struck out without an appealable ex-parte hearing.

Mr Eckford submitted to the court that the matter was about very serious matters in issue. The judge rebutted this by holding that the only context that mattered was independent of any more fundamental underpinning matters. His honour went on to say that only the argued irregularity of the subpoena mattered.<sup>145</sup> This holding was a preference for procedure over substantive law, an indicium of cultus in operation.

Mr Eckford argued that Brewarrina and the Crown were avoiding substantive argument by limiting the court to procedural matters. Inferring irrelevance of the substantive issues, the judge asked only for submissions relevant to the interlocutory decision about the subpoena.<sup>146</sup>

After Mr Eckford had alleged that Mr Byers unlawfully electronically recorded their conversation, the judge asked Mr Byers what he would say in the witness box if he were asked whether he used a recording device. Mr Byers failed to deny that allegation, but said he took file notes. Mr Eckford asked if he knew shorthand. The judge terminated this discussion summarily and said he thought Mr Byers was going to ask leave to strike out paragraph 16 of the Crown's affidavit. Mr Byers agreed with the judge. The judge stated that what Mr Byers said appeared entirely consistent with the usual practice of solicitors in their taking of file

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<sup>143</sup> Supreme Court of NSW Transcript *Ngurampaa Limited v Brewarrina Shire Council* [2014] NSWSC 524 1:10.

<sup>144</sup> *Ibid* 3:20-30 4:15.

<sup>145</sup> *Ibid* 7:25-35.

<sup>146</sup> *Ibid* 8:5-25.

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notes,<sup>147</sup> thus avoiding analysis, by resort to mere characterisation of propriety in procedure.

Mr Bell alleged the subpoena was issued improperly. The judge corrected him and suggested it was issued irregularly.<sup>148</sup> Mr Bell submitted that since there were no proceedings to determine the allodial title of the land, the wording of the subpoena was irregular. The logical error in this was a cultus view that no one had owned the land before British colonisation. This was a continuation of the doctrine of “terra nullius”, by which Aboriginal people were so far down the social scale, that their land title didn’t matter. This was indistinguishable from the operation of a court cultus.

The judge suggested that Mr Eckford was using the subpoena in this way for a collateral purpose. His honour continued that even if Mr Eckford had allodial title, that would not necessarily exempt the land from the State government’s jurisdiction.<sup>149</sup> This holding allowed for the possibility that it might so exempt the land. The judge omitted to follow-up on this reasoning, leading to an apprehension of bias in an observer.

Mr Bell submitted that it was difficult to determine what documents to produce.<sup>150</sup> Mr Byers changed the issue and submitted that the court had power under the rules, namely, Rule 36,<sup>151</sup> whereby the court could grant all appropriate relief whether sought or not. The judge agreed but said he would be slow to exercise this general power without a motion to that effect.<sup>152</sup> Thus, the judge stated he would be prepared, albeit slowly, to grant relief whether or not it was sought. The judge entertained an undisclosed system by which the court would grant unsought relief, a veiled system of cultus inhering within the court. As reasoned above, this would infer bias, and therefore imply apprehended bias.

Mr Eckford submitted that the New South Wales government and the Brewarrina Shire Council both must show when the land was transferred to them, for purposes of conducting a government by legitimate process. He referred to High Court of Australia case law stating that Aboriginal people did have proprietary interests in land, which continued pursuant to Aboriginal laws and customs. The judge then held that, in as much as traditional law was ever picked up by the Australian common law, any

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<sup>147</sup> Ibid 11:10-45.

<sup>148</sup> Ibid 16:40-45.

<sup>149</sup> Ibid 17:20-50.

<sup>150</sup> Ibid 19:5-25.

<sup>151</sup> This appears anomalous, as r 36 of the Supreme Court Rules has been repealed.

<sup>152</sup> *Ngurampaa Transcript* (n 143) 20:30-35.

allodial title would subsist under Australian law, and not under Aboriginal law. The judge ignored the High Court of Australia case law, implying that the court's cultus could override the doctrine of stare decisis.

Mr Eckford stated his disagreement, referring to the 1888 case of *St. Catherines Milling and Lumber Company v The Queen*<sup>153</sup> in the Privy Council in England, cited in *Mabo and Others v Queensland (No. 2)*,<sup>154</sup> a Canadian case.<sup>155</sup> Mr Eckford continued that the case was authority for the proposition that Aboriginal title survived British sovereignty, and in fact, burdened Crown title. Mr Eckford argued that this burdened the Crown to prove its title to any proprietary rights the land. The judge asked Mr Eckford if his argument about Council's power to tax the property depended upon the validity of unilateral declaration of independence by the Euahlayi Nation. He apparently ignored the fact that it was independent for thousands of years before British occupation, and didn't need to prove its bona fides to occupiers ignorant of local history.<sup>156</sup>

The judge held, without hearing further discussion on the point, that the Council was not acting as a feudal proprietor. It acted with the statutory authority of the Local Government Act, a State of New South Wales statute. This interesting holding, without the hearing of evidence, implied that a hierarchy of governments was not a feudal structure. His honour reasoned that since Councils in Sydney did not prove their title to Sydney householders, neither should the Brewarrina Council on Mr Eckford's lands.<sup>157</sup> However, his honour had just admitted that Councils routinely failed to prove their title to operate governments on the lands. Apparently they felt they could operate governments by virtue of agreements between governments, the details of which appeared to have been veiled to the governed.

The judge asked Mr Eckford if he accepted that traditional title operated by common law, and not by Aboriginal law. Mr Eckford identified this as a contested issue. The judge argued that this ran counter to Chief Justice Mason's dictum in *Walker v State of New South Wales*,<sup>158</sup> whereby all people should stand equal before the law . . . .<sup>159</sup> This proposition ran counter to reason, as traditional title would first operate by tradition.

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<sup>153</sup> [1888] 14 AC 46.

<sup>154</sup> (1992) 175 CLR 1.

<sup>155</sup> *Ngurampaa Transcript* (n 143) 23:30-50.

<sup>156</sup> *Ibid* 24:5-45 25:5-15.

<sup>157</sup> *Ibid* 26:40-50.

<sup>158</sup> (1994) 182 CLR 45.

<sup>159</sup> *Ngurampaa* (n 18) 31.

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### DISCUSSION AND CONCLUSIONS

According to the article's discussion on cultus, a reasonable extrapolation may be made. If religion and the court systems similarly each had their cultus, in order to maintain both priesthood and public loyalty as instruments of governance, rather than the substantive law of the land, then anything unreasonable these priests did could be nullified, on certain conditions. In this argument, the state could comprise its religions as well as its other constitutional instruments of governance. If the state was to commit genocide, this could be nullified, provided public loyalty to the cultus was maintained.

Lord Diplock's opinion on fairness suggested that overt resort to the court's cultus would constitute apprehended bias. Allowing a doctrine of a legally reasonable observer, therefore, facilitates the required nullification. The concept of legally reasonable observer is in reality the nullification discussed in this argument. Provided public loyalty holds good, apprehended bias could continue without remark. The pagan concept of loyalty serves to the same effect as the "way of salvation", because why sacrifice the system if it saves you, but not others. In this instance, Aboriginal Australians have no equivalent to the doctrine of the "way of salvation", and many are not loyal to the British-Australian system of justice. This means they have neither status as legally reasonable people, nor a method of cultically nullifying state acts of genocide. For them, genocide remains a serious and unaddressed grievance.

In *Ngurampaa Limited v Brewarrina Shire Council*,<sup>160</sup> there was no procedural right by which serious crimes against humanity could be addressed in the court. The judge gave leave for Mr Eckford's appearance, the natural consequence of which was that the court's procedure could continue and deny Mr Eckford any relief. Suggesting that unlawful occupiers, relatively recently arrived, could force long-term ancient owners to prove their title, from time immemorial, seemed specious at minimum. Asking the litigant if he recognised the principle that all people stood as equals before the law could only be seen as a *petitio principii*, or suggestive that in the judge's mind Mr Eckford was not a legally reasonable person. Were this true, the judge would have made decisions according to partially-veiled cultus rules, and would have been of the view that there was no apprehended bias.

Should designating Mr Eckford as not a legally reasonable person be applicable in general to Aboriginal claims of genocide, then the operative Australian court cultus acted to abridge the juridical personality of a

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<sup>160</sup> *Ngurampaa* (n 18).

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whole culture of people, including their rights to practice their religious procedures and faiths. It would be over-reaching to claim that Aboriginal people could claim Magna Carta protection as freemen, as the concept of the English freeman, as a member of a livery corporation, is foreign to the Continent of Australia. This abridgment of juridical personality is a serious defect in judicial reasoning, as it could breach the international law against slavery.