

Amicus Curiae

The Journal of the Society for Advanced Legal Studies



Inside ...

Introduction

Read more on page 329

Articles

Read more on page 338

Review article

Read more on page 459

Notes

Read more on page 476

Book reviews

Read more on page 542

News and
events

Read more on page 554

Contributors'
profiles

Read more on page 560

Visual law

Read more on page 564

Series 2 No 1(3)

CONTENTS

Introduction

Michael Palmer **329**

Articles

‘AI Theory of Justice’: Using Rawlsian Approaches to Legislate Better on Machine Learning in Government

Jamie Grace and Roxanne Bamford **338**

Domestic Abuse during the UK’s COVID-19 Lockdown: From Normal to New Normal and What Survivors’ Experiences Might Teach Us

Amy Kellam **361**

Homeless Applicants with Dissatisfactory Decisions, Appropriate Dispute Processing and Access to Justice

Patricia Ng **379**

Judicial Experiments in Caseflow Management 1920-1970

Michael Reynolds **389**

Assessing the Efficiency of the District Courts of Pakistan—Why is Better Evaluation Needed?

Muhammad Saeed **418**

Two Dimensions of the Rule of Law: A Reminder from Hong Kong

Cho Kiu Chiang **439**

Review Article

Jonathan Sumption, *Trials of the State: Law and the Decline of Politics*

Patrick Birkinshaw **459**

Notes

Making Law for Children in Scotland: Turning Commitment into Reality

Lesley-Anne Barnes Macfarlane **476**

Judicial Early Neutral Evaluation

Victoria McCloud **487**

Telecom Centre (UK) v Thomas

Sanderson (Early Neutral Evaluation): Full Text **496**

British Association of Comparative Law

Yseult Marique **501**

Corporate Liability for Breaches of Fundamental Human Rights in Canadian Law: *Nevsun Resources Limited v Araya* (2020)

Peter Muchlinski **505**

R (Hans Husson) v Secretary of State for the Home Department (2020)

Russell Wilcox **532**

Book Reviews

Patrick Birkinshaw—*European Public Law: The Achievement and the Brexit Challenge*

Yseult Marique **542**

Katie Benson, Colin King, Clive Walker (eds)—*Assets, Crimes and the State: Innovation in 21st Century Legal Responses*

Umut Turksen **547**

News and Events

COVID-19 Response **554**

Results of the 2020 IALS Library Reader Satisfaction Survey **555**

Launch of New Research Centre **557**

Building Transformation Project Update **558**

Events, Podcasts and Short Courses **558**

Profiles of Contributors to Articles, Review Article and Notes **560**

Visual Law

Maria Federica Moscati **564**

INTRODUCTION

MICHAEL PALMER

IALS and SOAS, University of London

Welcome to the third issue of the first volume of the new series of *Amicus Curiae*. We thank contributors, readers and others for the progress that the relaunched journal has enjoyed.

In this issue a number of contributions address broad issues in access to justice, legal reform and rule of law. Jamie Grace and Roxanne Bamford's essay concerns the question of how to achieve clear ethical and democratic standards in the regulation of algorithmic justice. The authors argue that these standards are best established through implementing the ideals of John Rawls as expressed in his seminal study, *A Theory of Justice*. They note the potential issues in policy and regulation that may arise from the increasing use of

big data analysis. These include data bias, unfairness, threats to privacy, equality, and human rights standards, and lack of transparency and accountability. These worries need to be borne in mind in developing new legislation in order to meet the emerging challenges of algorithmic justice in data-driven governance. They argue that a regulatory framework for governing the processes by which data and technology are used, including the use of artificial intelligence in our criminal justice system and in other public agencies, needs to reflect Rawls' principles of equality of basic liberties and rights, and fair distribution of all social goods.¹

Amy Kellam's essay on the question of domestic abuse during the UK's COVID-19 lockdown

Amicus Curiae Contacts

Editor: Professor Michael Palmer,
SOAS and IALS, University of
London

Production Editor: Marie Selwood

Email address for all enquiries:
amicus.curiae@sas.ac.uk

By post: Eliza Boudier, *Amicus Curiae*,
Charles Clore House, 17 Russell
Square, London WC1B 5DR

If you would like to contribute an
Article or short Note to a future issue,
please visit the *Amicus Curiae* webpages
to view the Style Guide and
submission information.

¹ See also the essay in *Amicus Curiae* 1-1 by Adam Harkens (2019) 'Fairness in Algorithmic Decision-Making: Trade-offs, Policy Choices, and Procedural Protections'.

explores the significance of the information which is increasingly available on domestic abuse during the lockdown commencing spring 2020. It does so with particular reference to the proposed Domestic Abuse Bill (2019-2021) and against the wider socio-economic background. A central concern is the manner in which domestic abuse is characterized in popular culture and especially in the media, and how this characterization impacts on our perceptions of the necessity of, and proposals for, legal reform in order to deal better with the problem of domestic abuse.

Patricia Ng's contribution looks at the issue of homeless persons and their negative experiences in the handling of their applications to local government in England for temporary accommodation. It explores concerns in the decision-making process, and in the realistic availability and suitability of remedies, in what is often a situation of power imbalances in the relationship between, on the one hand, the applicants—especially those whose vulnerability triggered an application in the first place—and, on the other, local government officers. The applicants often fail to challenge negative decisions which they perceive to be wrong and unfair, and the essay draws on socio-legal analysis to show

why this is so. Briefly stated, their 'grievance apathy' is best explained as a combination of factors operating in a context of restricted access to legal advice, assistance and representation. Among these factors is a lack of legal consciousness on the part of many applicants, so that grievances do not easily become transformed into challenges or appeals.

The article by Cho Kiu Chiang (William Chiang) looks at issues in the rule of law in the context of Hong Kong and the protests ongoing there. His essay focuses on the meaning and conceptual boundaries of 'rule of' and 'law', and relevant jurisprudential perspectives on the rule of law are also considered. The analysis leads the author to conclude that the phrase 'rule of law' needs to be understood as binding the hands of those who invoke it—in particular, governments should not see themselves free to exploit the term for ulterior purposes, and the words in the term themselves require some basic obligations on the part of those who rule and govern. If a government does not want to fulfil those obligations—to keep its promise of the rule of law—then it should not engage in rule of law rhetoric.

In an extended assessment of Lord Sumption's *Trials of the State: Law and the Decline of Politics*, Patrick Birkinshaw

considers, in relation to arguments put forward in that book, issues of law in public life. Of these issues, the most pressing in the contemporary UK for Sumption is the impact of the growth of judicial law, weakening both legislation and political process (including active citizenship). While agreeing with Sumption on a number of key issues—in particular, the inadvisability of public decision-making by referenda, the need for electoral and other political reforms, and greater citizenship involvement—Birkinshaw challenges the analysis offered in *Trials of the State*. He does so, among other things, by pointing to a lack of clear conceptualization in Sumption's analysis of the apparently distinctive realms of law and of politics, and of the boundaries between them, as well as by leaving open the question of who decides what the law is.

Moreover, suggests Birkinshaw, what *Trials of State* views as primarily the consequences of judicial (more rigorous, adjudicative) activism—in particular, the growth of administrative law as developed since the 1960s, and changing ideas of parliamentary supremacy—need to be more firmly understood in terms of their roots in fundamental principles of the common law. These common law values took on a new dimension as government came to

assume greater social responsibilities and to become more interventionist. But, at the same time, argues Birkinshaw, historical origins and contemporary functions should not be conflated, with reference in particular to Article 8 of the European Convention on Human Rights (ECHR) and the judicial activism of the European Court of Human Rights. Birkinshaw holds that original intentions to protect individuals against Nazi and Communist authoritarianism and abuse do not necessarily preclude a more activist and imaginative use of Article 8 by the courts to create innovative rights such as that of personal autonomy in more recent times. Historical origins and contemporary functions may differ significantly, and, as Birkinshaw stresses, 'it is a weak argument to suggest that the [anti-authoritarian] context in which the ECHR was formed has no relevance to novel manifestations of rights today'.

While acknowledging that judges in their decision-making are embedded in a normative structure which is suffused with systemic bias, Birkinshaw rejects the call for a less robust judiciary and instead falls firmly on the side of judicial activism. And he raises the question: when parliamentary sovereignty is abused what should be the appropriate judicial response? To which he himself

replies, that it is for the judge, exercising her or his conscience and offering reasoned judgment. For it is the responsibility of judges not only to uphold the law but also the rule of law on which the law is built. This is all the more important when democracy is threatened by pervasive digital exploitation utilized primarily by those able to fund such efforts. Moreover, a very important function that judges have fulfilled in recent times, namely plugging the holes left by deficiencies in the political process, should not be overlooked, and the underlying issues need to be fully addressed.

The note contributed by Russell Wilcox examines the case of *R (Hans Husson) v Secretary of State for the Home Department* [2020] EWCA Civ in which the Court of Appeal considered the question of damages for delays in the immigration system. Problems in this case arose from a failure promptly to issue the appellant with a biometric residence permit (BRP). Such permits are necessary in the UK for purposes of securing employment once leave to remain has been granted. The court found it arguable that this delay effectively deprived the appellant of the ability to work such that its impact was a sufficiently serious

interference in his private and family life to engage Article 8(1) of the ECHR² and justify damages for consequential loss. It also found it arguable that the delay gave rise to a claim in negligence on the basis of a prior assumption of responsibility.

Peter Muchlinski's essay 'Corporate Liability for Breaches of Fundamental Human Rights in Canadian Law: *Nevsun Resources Limited v Araya*' looks at a recently decided case in the Canadian Supreme Court. It analyses issues of corporate liability for violations of fundamental human rights, and argues that the judicial activism of the majority of justices in this case represents an important step forward in this area of international law. In the *Nevsun* case, the Supreme Court of Canada held the claims of human rights abuses bought by Eritrean claimants are admissible. The allegations were that the plaintiffs had been conscripted to work for the subsidiary of a Canadian multinational mining company and subjected to systematic abuse. In considering the case, the court examined issues of act of state,³ the reception of customary international law into Canadian domestic law, and developments in Canadian tort law. The

² See also the comments on the ECHR in Patrick Birkinshaw's contribution to this issue.

³ See also the essay by Justice Mary Newbury (2019) 'Foreign Act of State—A Practical Guide from *Buttes Gas to Belhaj*', in *Amicus Curiae* 1-1.

supportive majority decision was accompanied by dissenting judgments which may yet assume significant importance in future litigation. The majority in the instant case held that foreign claimants have the right to bring claims against a Canadian parent company on the grounds of alleged violations by its overseas subsidiary of fundamental human rights. The author argues that such judicial activism is important for the development of international law, and that such activism also encourages progress in domestic law in the same direction. The outcome also encourages Canadian corporations to be much more cautious in matters of human rights protection in their overseas operations, especially in jurisdictions which lack robust legal and administrative frameworks and institutions.

Further contributions focus on issues of judicial reform and developments in civil justice. Thus, Dr Victoria McCloud explores the innovative hybrid process of 'early neutral evaluation' (ENE) in her contribution entitled 'Judicial Early Neutral Evaluation'. She considers the value and potential of judicial ENE for enhancing civil justice in the context of UK proceedings (particularly in England and Wales). She invokes continuing fear of spiralling costs

for the parties, as illustrated so powerfully in the Dickensian tale of *Bleak House*, and suggests that early judicial intervention in the form of ENE now offers the parties a process by means of which they may limit their legal costs and avoid the difficulties arising from entrenched position-taking, while also receiving sound, informed, judicial views on the merits of their case. The emerging norm in English case law is that the court may make an order for ENE regardless of whether the parties make such a request. Master McCloud (a Master of the High Court Queen's Bench Division) reiterates the observations of the distinguished scholar of alternative dispute resolution, Californian judge Wayne Brazil, which offer guidance on issues that may usefully be considered when ENE is contemplated. These include, for example, the helpfulness or otherwise of having a judge indicate likely outcome when the case is adjudicated (by another judge), contemplating whether or not ENE will save financial resources, enhancing a sense of realism in the parties, and creating space for parties to make concessions without serious loss of face. Moreover, given the rapid developments in legal e-technology and the online core proposals offered by Briggs LJ, this note encourages a sense of potential for the evolving

e-technology to assist by enhancing the quality and consistency of ENE-encouraged outcomes.⁴

Michael Reynolds' article builds on his earlier contribution (featured in *Amicus Curiae* 1-2), which identified the macro-level challenges the Judicature Commissioners faced in the late nineteenth century in reforming the structure and procedures of the court system of England and Wales. The essay in this issue examines an innovation arising out of the 1872 Judicature Commission, namely, a pioneering form of case management that emerged more than 70 years before its formal introduction in the courts under the Civil Procedure Rules in the late 1990s. The contribution explores the manner in which Sir Frances Newbolt took the opportunity to conduct experiments in chambers with the aim of realizing the Commissioners' objectives of creating a more effective and efficient system, while avoiding unnecessary costs. The essay contends that the approach adopted by Newbolt and others encouraged resolution by means of informal judicial promotion of

settlement at an early interlocutory stage. Newbolt's Scheme is also assessed in terms of 'quality of outcome', as characterized by Marc Galanter, and the essay also points to the relevance of its findings for the work of the late Simon Roberts, and his analysis of the rise of structured negotiation within the civil courts.

Muhammad Saeed, a former judge in the district judiciary of Pakistan, provides an essay that points to the serious problems of inefficiency, and difficulties in the assessment of inefficiency, in the district courts of Pakistan. Delay, vexatious litigation and abuse of court process are serious concerns, but the nature and magnitude of these issues require empirical evaluation. There is an urgent need for more effective performance appraisal through greater use of empirical research to identify specific problems and solutions. This is all the more pressing given contextualizing issues of limited judicial accountability by democratic institutions, weaknesses in official appraisal processes, and a dearth of assessing the impact of reform initiatives. The court service in

⁴ See also the essay by Jamie Grace and Roxanne Bamford in this volume, entitled "AI Theory of Justice": Using Rawlsian Approaches to Better Legislate on Machine Learning in Government', and the paper by Michael Reynolds on 'Newbolt's Scheme', a pioneering form of judicial case management that emerged many decades before the Woolf civil justice reforms. On the value or otherwise of e-technology in some forms of dispute resolution, see Carrie Menkel-Meadow (2016) 'Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference, the Hague, the Netherlands, 22-23 May 2016' 3(1) *International Journal of Online Dispute Resolution* 4-7.

Pakistan needs to remove the barriers that undermine the system and limit user trust in the system, and the most important initial steps to be taken in the process of reform include, in particular, the introduction of institutionalized and empirically based scrutiny of judicial performance.

Important legislative developments in the law of Scotland in relation to the rights of children are explained and analyzed in the note by Lesley-Anne Barnes Macfarlane entitled ‘Making Law for Children in Scotland: Turning Commitment into Reality’. (An extended analysis is also available as a report commissioned by the Scottish Parliament Justice Committee, *Balancing the Rights of Parents and Children* [Barnes Macfarlane 2019]). The essay argues that these changes are likely to give greater practical support in the law for supporting children’s rights. First, the Children (Scotland) Bill is in the process of reforming legislation on a number of specific issues. The proposed reforms in part are related to the absence in Scotland of family courts, so that it is procedural rules of court that provide the detailed framework for dealing with different sorts of

family case. The Bill, *inter alia*, looks to provide better support for children involved where parents are in dispute over such matters as care and upbringing of their children, and to quicken decision-making so as to avoid delay and expense. It will also remove the increasingly controversial statutory capacity presumption regarding the expression of views by children, so that children under 12 years of age would henceforth have the right to offer their opinion on matters affecting them. In addition, the Bill will likely introduce a statutory checklist of factors that the courts need to take into account in making decisions where abuse or risk of abuse is involved, in deciding about parental upbringing of their child or children, and in considering the likely impact of court decisions on the important relationships which the child shares within the family such as, for example, with grandparents (although Barnes Macfarlane notes that, disappointingly, siblings are not specifically mentioned in the amendments proposed to Part 1 of the Bill).⁵ The court would have a duty to explain its decisions affecting children unless, for example, such explanation is

⁵ Of course, since the Bill is still ‘live’ it may be subject to change in terms of final shape and content. It may well be that some of the children’s groups table amendments for consideration in the immediate future on, for example, the position regarding siblings so that they are specifically mentioned in Part 1. A link to the [Bill page](#) for the Justice Committee—the committee at the Scottish Parliament considering the Bill—provides information on the Bill’s progress.

considered not to be in the best interests of the child. Another responsibility placed on the court in the Bill is a duty to investigate any failure to obey a contact/residence order. While overall many of the Bill's reforming provisions are to be welcomed, Barnes Macfarlane suggests that there are legitimate concerns that its effectiveness will be limited by the somewhat overcomplicated nature of the framework of provisions that it offers. A second significant development relates to the UN Convention on the Rights of the Child (CRC). Reform of child law is buttressed by Scotland's decision to incorporate fully the CRC into Scottish domestic law. This development would help to ensure that children's rights are properly taken into account when courts and other bodies make decisions impacting on children's interests and rights. Taken together these two developments offer significant advances in respecting the rights of children.

Yseult Marique provides a note on the work of the British Association of Comparative Law (BACL), created in 1950. The Association fosters comparative legal research and teaching throughout the UK and has three main functions. One is a PhD workshop held annually in the spring every year in order to provide early career researchers

an opportunity to present their doctoral research and receive supportive feedback from colleagues. In addition, BACL holds a seminar at the Society of Legal Scholars' Conference in September every year. Thirdly, the national committee is responsible for coordinating reports for UK law schools for the International Academy of Comparative Law, which organizes a world congress in comparative law every four years. The next congress will be held in 2022 in Asunción, Paraguay. BACL has recently launched a call for blog contributions entitled 'COVID-19 in comparative perspective'. See (1) the [BACL website](#) and (2) the [BACL Blog](#).

The Editor thanks contributors, and also Amy Kellam, Patricia Ng, Maria Federica Moscati, and Marie Selwood, for their kind efforts in making this issue possible.

Visual Law

Readers of *Amicus Curiae* are encouraged to submit photographs taken by them, along with a short (200 words maximum) description of the theme of each picture. Submissions may illustrate any topic of legal interest and should be compelling, both intellectually and visually. They may be single pictures, or they may be a series of pictures—in the latter case, descriptions of the series may be

up to 1,000 words in length. The final page(s) of each issue of *Amicus Curiae*, assuming there is sufficient interest, will feature the photo(s) and explanatory caption(s). Contributors should confirm that they hold the copyright in the pictures submitted for publication.

In this issue, Dr Maria Federica Moscati has kindly contributed a picture taken during London Pride in 2018, and which speaks to the restrictions that the Italian legal system places on the protection of LGBTI people.

In memory of Dr Aonghus Cheevers

Finally, we should like to pay tribute to the life and work of Aonghus Cheevers whose essay on mediation in Ireland was published earlier this year in *Amicus Curiae* 1-2: 143-64. Aonghus sadly passed away at an early stage of his career in April this year. We cherish the memory of Aonghus and extend all our sympathies to his family and many friends. A brief profile of Aonghus is also available at *Amicus Curiae* 1-2: 322

‘AI THEORY OF JUSTICE’: USING RAWLSIAN APPROACHES TO LEGISLATE BETTER ON MACHINE LEARNING IN GOVERNMENT

JAMIE GRACE* AND ROXANNE BAMFORD**

*Sheffield Hallam University and **Tony Blair Institute for Global Change¹

Abstract

Policymaking is increasingly being informed by ‘big data’ technologies of analytics, machine learning and artificial intelligence (AI). John Rawls used particular principles of reasoning in his 1971 book, *A Theory of Justice*, which might help explore known problems of data bias, unfairness, accountability and privacy, in relation to applications of machine learning and AI in government. This paper will investigate how the current assortment of UK governmental policy and regulatory developments around AI in the public sector could be said to meet, or not meet, these Rawlsian principles, and what we might do better by incorporating them when we respond legislatively to this ongoing challenge. This paper uses a case study of data analytics and machine-learning regulation as the central means of this exploration of Rawlsian thinking in relation to the redevelopment of algorithmic governance.

Key words: data, algorithms, machine learning, fairness, Rawls, justice, privacy, bias, transparency, accountability, data protection, human rights

[A] INTRODUCTION

The difficulty in regulating ‘algorithmic justice’ according to clear human rights standards forms the issue under discussion in this paper. It uses the legal and moral philosophy of John Rawls to reinvestigate the need for a purposive approach to regulating algorithmically assisted decision-making in government and to regulate

¹ The authors would like to thank Ben Archer and Dr Collette Barry at the Department of Law and Criminology, Sheffield Hallam University, for their advice on an early draft, and colleagues at the Tony Blair Institute for Global Change for their support for this work.

that 'algorithmic governance' according to certain Rawlsian principles with regard to equality, liberty and distributive justice. Jennifer Cobbe, amongst a wide range of authors, has recently highlighted that '[m]achine learning systems are known to have various issues relating to bias, unfairness, and discrimination in outputs and decisions, as well as to transparency, explainability, and accountability in terms of oversight, and to data protection, privacy, and other human rights issues', but also that 'the processes and metrics for fair, accountable, and transparent machine learning developed through ... research do not always translate easily to legal frameworks' (Cobbe 2018: 4-5). We argue that Rawlsian principles can guide this process of marrying data science approaches to fairness for machine learning and AI to the development of new legal frameworks.

In the words of Alistair Duff (2006: 17): 'The ideas of philosopher John Rawls should be appropriated for the information age.' John Rawls, in his 1971 book *A Theory of Justice*, set out the idea that from behind a 'veil of ignorance', in an 'original position', a human policymaker with no conception of the disparities and inequalities in power, wealth or privilege that come about through the realities of class, race and geopolitics, would contract with other policymakers, also in a similarly ignorant position, to ensure a system of fair and liberal rules to benefit all (Rawls 1999: 11). Duff (2006: 21) argues that for 'neo-Rawlsians, therefore, the response to the digital divide, as to any other inequality, will be to regulate social and economic institutions, including information institutions, so that differentials demonstrably work for the good of all, and especially the worst off'.

Rawls used two principles of reasoning to set out and encapsulate this theory of justice. In 'The Original Position', an essay by Ronald Dworkin, Rawls' critic explained this pair of principles. Firstly, 'every person must have the largest political liberty compatible with a like liberty for all' (Dworkin 1975: 17). Initially, we should note that inequality and discrimination are not new issues brought about by AI. They occur all the time, whenever we are not in the original position. And machines, like humans discriminate. Of course, we might accept that not everybody will be subject to governance or AI governance equally. But decisions should be easy to scrutinize. For Rawls, liberty, and equality of challenge, is a public good that should be available to all. This results in an imperative to create the accessible avenues required for scrutiny and to enable civilians to challenge those that govern them. Everybody would like to think that if they were unfairly, in their view, 'profiled' by a human or by AI, then it would be easy to challenge the resulting decision. Even if AI

was only being used as a tool to advise the subsequent decision of a human, it should be easy to understand the steps the AI has taken to reach its output. Members of the public must be able to hold those that govern them to account, this includes the algorithms informing their decisions.

Additionally, Dworkin explains, Rawls develops a second principle that ‘inequalities in power, wealth, income and other resources must not exist except in so far as they work to the absolute benefit of the worst-off members of society’ (Dworkin 1975: 17). This second principle translates into an imperative that ‘big data’ technologies used to assist decision-making must be used in such a way that they do not re-entrench inequality in power, wealth, income and other resources, i.e. that they work to the absolute benefit of the worst-off members of society.

Policymaking is increasingly being informed by ‘big data’ technologies of analytics, machine learning and AI. But the application of data science occurs through a general legal framework on data protection (which in the UK differentiates mainly along the lines of law enforcement versus non-law enforcement uses of data), non-binding professional codes of ethics and a body of human rights law that is catching up with the developing practice of data-informed governance. To deliver a sense of the variety and scope of the challenge of regulating the use of data science in government, in its next two sections this paper presents a case study highlighting the issues with ‘algorithmic justice’ in policing contexts. First, it is appropriate to give an overview of the common problems of ‘algorithmic justice in government’.

Grace (2019), as noted above, has attempted to develop a theoretical account of how the use of machine learning and AI within government, in both policymaking and in the application of policy, could raise concerns over ‘algorithmic impropriety’. As Grace (2019) has highlighted, strands of algorithmic impropriety can include: ‘decisional opacity’, leading to an inability to effectively challenge the results of algorithmic justice; ‘data inequality’, resulting in the embeddedness of inequalities, and arising from unfairly skewed data sets; and ‘accuracy bias’, resulting from a risk-averse and predominantly public protection-oriented approach to defining accuracy in predictions and algorithmic profiling. This essay now looks at these issues using a case study of data analytics in policing, drawing on an approach taken by other studies—notably the ground-breaking piece by Selbst (2017).

[B] AN OVERVIEW OF THE PROBLEM—AND A CASE STUDY OF DATA ANALYTICS IN POLICING

People will not experience justice evenly, and algorithmic justice is no exception. There is a risk that algorithms entrench existing inequalities. Those who are more reliant on state welfare handouts, or who are the object of criminal investigations, are a cost that will be, increasingly over time, algorithmically ranked and assessed for risks posed to the public purse, or to public protection. A Rawlsian approach would demand a high degree of information in the public domain, enabling individuals to challenge decisions on a range of grounds. Assessing a system from the 'original position' requires that citizens be well equipped with the knowledge needed to take on the state if they felt they were subject to informational discrimination. A lack of transparency over the algorithms used to govern us is an innate threat to our equal system of liberties for all.

We can see a recent (and, so far, rare) example of a successful challenge to a lack of transparency in algorithmic justice in the Systemic Risk Indication (SyRI) judgment from the first instance Hague Divisional Court in the Netherlands. In *Netherlands Committee of Jurists for Human Rights v State of the Netherlands* (2020) there were findings on transparency failures in relation to an algorithmically assisted benefit fraud prediction tool. Given the importance of proportionality in interferences with the right to respect for private and family life and the requirement of a 'fair balance' between that right and the public interest in the investigation of benefit fraud, there were problematic shortfalls in transparency over the extent to which members of the public subject to risk reports under the SyRI process were aware of this, or could challenge their profiling as likely fraudsters or otherwise.

In the SyRI judgment, the Hague Divisional Court found (paragraph 6.49) that the Netherlands authorities had 'not made public the risk model and the indicators that make up the risk model', or 'any objectively verifiable information to the court to enable her to test the State's view of what SyRI is', noting that this less than transparent approach was 'a conscious choice by the State'. The Hague Divisional Court was dismissive of the state defence that if there were more transparency over the algorithm then citizens could adjust their behaviour accordingly. In terms of the detailed issues over transparency shortcomings, the Hague Divisional Court observed (at paragraph 6.90) that:

it is not possible to check how the simple decision tree, which the State speaks about, is created and which steps it consists of. It is thus difficult to see how a data subject can defend himself against the fact that a risk report has been made with regard to him or her. Likewise, it is difficult to see how a data subject whose data has been processed in SyRI but has not led to a risk report can be aware that his or her data has been processed on appropriate grounds. The fact that in the latter situation the data did not lead to a risk notification and, moreover, must have been destroyed no later than four weeks after analysis does not detract from the required transparency with regard to that processing.

SyRI had been based on an item of legislation which was successfully challenged as non-compatible with the European Convention on Human Rights (ECHR), and the Hague Divisional Court noted (at paragraph 6.54) that:

SyRI law does not provide for an information obligation of those whose data are processed in SyRI so that those involved can reasonably be considered to know that his or her data is or has been used for that processing. Nor does the SyRI legislation provide for an obligation to inform data subjects separately, where appropriate, of the fact that a risk report has been made. There is only a legal obligation in advance to announce the start of a SyRI project by publication in the Government Gazette and afterwards on request access to the register of risk reports. The model letter that can be used in practice ... is not based on a legal obligation to inform those involved 'house to house', while the court cannot determine on the basis of the available information whether there is a fixed practice [between] municipalities in the implementation of the law. Those involved are also not automatically informed afterwards. This only happens if there is an audit and investigation in response to a risk report. This is not simply done.

The Hague Divisional Court also picked up on the point that greater transparency in relation to predictive modelling of a profiling system is crucial for those who would be aware of the need to challenge biases and system unfairness or discrimination in a system. As the court observed (at paragraph 6.91):

The importance of transparency, with a view to controllability, is important in part because the use of the risk model and the analysis that is carried out in this context involves the risk that (unintentionally) discriminatory effects will occur.

The Hague Divisional Court judgment in the SyRI case, above, is one of the first cases brought against state authorities in relation to issues of transparency of algorithmic profiling, and the first known to be successful in that regard, and on the basis of Article 8 ECHR. In the UK, there has been a (so far unsuccessful) challenge to the use of live facial recognition (LFR) in the case of *R (Bridges) v South Wales Police* (2019), and a claim

for judicial review, as yet unheard by the High Court, brought by the data rights advocacy NGO known as Foxglove, in relation to a visa decision algorithm used by the Home Office (McDonald 2019).

Policing in the UK is prone to complex multifaceted regulation on any issue, with an interplay in policy terms at all times between the Home Office, the National Police Chiefs’ Council, the College of Policing, Her Majesty’s Inspectorate of Constabulary, Fire and Rescue Services, the National Crime Agency, and any one, through to all, of the nearly 50 regional or specialist police forces in the UK. The UK police service has a range of explicit and implicit statutory powers and obligations (but no specific statutory basis to use algorithmic or machine learning approaches for intelligence analysis) and a range of common law powers around information retention, analysis and intelligence sharing. In the UK, the ECHR increasingly informs police leadership and occupational culture, and the training of decision-makers in senior operational roles (Poolman et al 2019). The UK police service should also develop, pilot and deploy AI tech and data science expertise, whether in-house or through contractors, by following the Defence Contract Management Agency Code of Ethics on AI, while there is also a draft code for AI procurement published by the UK Office for AI. The Committee on Standards in Public Life (CSPL) has had its say in a report on AI and standards in public life (2020), discussed below, and there has been a report of a parliamentary committee on AI technology implications for civil society in the UK (Lords Select Committee 2017). Furthermore, the Information Commissioner’s Office (ICO) has published its own consultation on a draft AI auditing framework (2020). The UK Centre for Data Ethics and Innovation is also to undertake a public consultation on a code of practice for policing in the UK with regard to the use of data analytics and machine learning (Macdonald 2020), following reports from the Royal United Services Institute (Babuta and Oswald 2020) on concerns around bias in predictive policing and other data-led approaches.

In the midst of this regulatory complexity, at the time of writing, many forces within the UK police service use a self-regulation framework in relation to machine learning and data analytics, aimed at police forces that are adopting greater data science approaches in their intelligence analysis processes. Known as ‘ALGO-CARE’, this regulatory framework is a checklist of key considerations in legal, ethical and data science best practice, to be used by police forces in their innovation and adoption of capabilities around data analytics and machine-learning applications.

ALGO-CARE requires police forces to use predictive analytics in an advisory (not determinative) way, with control over their intellectual property in the algorithm concerned, and in a way that is lawful; granular; challengeable; accurate; responsible and explainable. The research developing ALGO-CARE was a co-authored evaluation of the legalities of the 'Harm Assessment Risk Tool' (HART), used currently by Durham Constabulary (Oswald & Ors 2018). The HART tool is a leading application of machine-learning technology as used in intelligence analysis and risk management practices by police in the UK. HART was the first such police machine-learning project in the UK to be open to early academic scrutiny; and as a result was the first which has led to the development of a model regulatory framework, in the form of ALGO-CARE, for algorithmic decision-making in policing.

The National Police Chiefs' Council (NPCC) took the decision in November 2018 to promote the use of ALGO-CARE as a model for best practice in the self-regulation by UK police forces of their development of machine learning/algorithmic tools (Grace 2020). In the summer of 2019, it was confirmed by the NPCC that West Midlands Police (WMP) were incorporating the ALGO-CARE checklist or framework in internal development processes in relation to new intelligence analysis tools. WMP now host the National Data Analytics Solution (NDAS) for the UK police service as a whole. ALGO-CARE is built into the project initiation process for NDAS, and has been used to provide ethical oversight for data analytics projects concerning identifying risks factors around vulnerability to modern slavery, and the perpetration of knife crime (West Midlands Police and Crime Commissioner (WMPCC) 2020a). Importantly, Essex Police have also drawn on the ALGO-CARE framework in setting up the oversight processes for their data analytics partnership with Essex County Council (Essex Centre for Data Analytics 2019). This adoption of self-regulation is proof of a respect for professional ethics in the use of machine learning and data analytics in policing.

However, police force ethics committees might never feel they know enough, as outsiders to policing, about exactly what 'interventions' predictive modelling will underpin, and whether these will exacerbate inequalities of opportunity, and unequal interferences with liberties and rights. For example, in April 2019 the independent ethics committee for data analytics for the Office of the Police and Crime Commissioner for the West Midlands (the committee), of whom the first author is vice-Chair, at the time of writing, were asked to consider ethical approval for an Integrated Offender Management (IOM) data analysis tool. The terms of reference of the committee put to the fore its scrutiny of the human rights

impacts of algorithmic tools, built either by the WMP Data Lab, or the National Data Analytics Solution (NDAS), based at WMP. However, a fundamental question was even more basic than questions of balancing human rights concerns: what was the real purpose, and what would be the estimated impact of the use, of the IOM tool? Offender managers are already experienced in risk scoring offenders under their supervision, and the minutes of the committee meeting from April 2019 reveal that the aim of the IOM tool was to allow for a data-driven means of doing this in a far more rigorous and reliable way, with the IOM tool forming an advisory profiling tool, in time, for those officers 'providing supportive interventions to those considered to be at high risk of re-offending and transitioning to higher harm crimes' (WMPCC 2020a), but the committee had initial questions about what these interventions might be, not to mention concerns about the extent to which the tool, in its development iteration at the time, might be 'trained' on stale data stretching back many years, or which was riddled with disproportionality in relation to stigmatized demographic groups. In time, the WMP Data Lab addressed these issues in an informative dialogue with the committee. At the time of writing, a pilot of the IOM tool has only just been started in two small areas of the area covered by WMP, and plans are in place to begin public engagement over the use of the IOM tool with offender data.

The IOM tool is a *predictive* model, and a running concern of the West Midlands committee is the extent to which initially explanatory models developed out of large datasets might unintentionally become predictive in the way they might influence officers' investigative behaviour. For example, the WMP Data Lab had developed an explanatory analysis of rape and serious sexual offences investigations (the RASSO project). The RASSO project identified that, based on fairly recent WMP data, bar the time spent by a lead investigator working on a case, the biggest single factor on a rape investigation being progressed versus being subject to no further action was the failure to obtain the mobile phone data of rape complainants themselves. There are, most understandably, some distinct privacy concerns around requiring complainants to hand over their mobile phones for data extraction, but the process of disclosure of potentially exculpatory evidence to the defence is something that is mandated by an Act of Parliament, in the form of the provisions of section 3 of the Criminal Procedure and Investigations Act 1996. The committee sought assurances and commitments from the force as to how this finding would be acted on by WMP before it could advise that the RASSO project could progress to its next pilot phase (WMPCC 2020a).

In short, there are a wide range of algorithmic justice techniques, and we cannot possibly be as comfortable with them all at once, when some of them raise more questions for the rights of victims of crime, or when some of them might mean more of a risk of stigmatizing a community than other tools.

[C] RAWLSIAN APPROACHES TO REGULATION: APPLYING A *THEORY OF JUSTICE* TO MACHINE LEARNING IN PUBLIC INSTITUTIONS

John Rawls used two principles of reasoning to set out and encapsulate his theory of justice which might help explore these problems. In 1975, Norman Daniels highlighted that the First Principle, ‘which has priority over the Second, guarantees a maximal system of equal basic liberties’, while the Second Principle ‘distributes all social goods, other than liberty, allowing inequalities in them provided they benefit the least advantaged and provided equality of opportunity is present’ (Daniels 1975: xxvii).

Rawls’ First Principle

Rawls’ first principle (Rawls 1999: 53) reads: ‘Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.’

As discussed in the introduction, in a real-world scenario we might accept that not everybody will be subject to AI governance in equal measure or to an equal extent. But everybody would like to think that if they were unfairly, in their view, profiled by AI then it would be easy to challenge that self-same scoring/ranking/risk prediction. The Rawlsian view is that this liberty should be available to all, resulting in an imperative to create accessible avenues to enable challenge, and to assist civilians to challenge the decisions of those that use ‘big data’ technologies to govern them.

Holding to account those that govern us requires transparency. It is essential that we understand how decisions affecting the most important aspects of our lives have been arrived at. Rawls himself wrote (1999: 49) that ‘in a well-ordered society, one effectively regulated by a shared conception of justice, there is also a public understanding as to what is just and unjust’. Much more recently, David Spiegelhalter has observed that there is ‘increasing demand for accountability of algorithms that

affect people’s lives’ (Spiegelhalter 2020: 181), since ‘if we do not know how an algorithm is producing its answer, we cannot investigate it for implicit but systematic biases against some members of the community’ (Spiegelhalter 2020: 177).

There is a lack of transparency and understanding of how many algorithmic decisions support tools work. The process by which the calculation is made must be accessible to humans and open to challenge. However, many algorithmic systems, particularly machine-learning tools, produce predicted outcomes without being able to show how those predictions have been arrived at. It is this prevalent lack of auditability that led the UK House of Lords Select Committee on Artificial Intelligence to conclude that (2018: 40):

it is not acceptable to deploy any artificial intelligence system which could have a substantial impact on an individual’s life, unless it can generate a full and satisfactory explanation for the decisions it will take.

A failure of proper accountability of algorithmic decision-making to individuals threatens the first Rawlsian principle that there is a set of basic liberties afforded to us all. As the use of algorithms to inform critical and sometimes life-changing decisions becomes more prevalent in our criminal justice system and in other public services, the issue of access to justice is fast becoming a problem of access to *algorithmic* justice.

The General Data Protection Regulation and the Law Enforcement Directive (both now part of ‘retained EU law’ in the UK as a result of the Brexit process) provide some safeguards against fully automated decision-making using machine learning, algorithms or AI. Greater signposting is likely to be required, however, where these technologies are used in government in fully automated ways. There is then the crucial issue of the increasingly large degree to which decisions by public bodies—about policy, but often about individuals in particular personal circumstances—are algorithmically informed decisions. Here, both greater statutory clarity as to rights of challenge and greater safeguards involving transparency are required. Challenge requires transparency. Transparency is severely limited in what it can achieve if there are no mechanisms for challenge.

Rawls’ Second Principle

Rawls’ Second Principle (Rawls 1999: 53) demands that: ‘Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage and (b) attached to

positions and offices open to all.’ This Second Principle translates into an imperative that ‘big data’ technologies used to assist decision-making must be used in such a way that they do not re-entrench inequality in power, wealth, income and other resources, i.e. that they work to the overall benefit of the worst-off members of society.

Rawls’ notion that ‘social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged’ is termed his ‘difference principle’. Duff (2006: 21) explains that:

The difference principle ... is regarded as Rawls’s special contribution to the repertoire of principles of distributive justice in the western tradition. Its genius lies in its balancing of two powerful moral intuitions: that equal shares are fair, at least as an initial benchmark; but also that inequalities can be acceptable if the incentives they allow lead to a greater total cake, thus benefiting everyone, including the worst off. For who wants an equality of misery?

Our moral intuition, to use Duff’s phrase, concerning the difference principle in the context of algorithmic justice, is that AI and machine learning can be based on ‘training data’ which is either known or suspected to be biased, as long as this is a) acknowledged and mitigated when the AI or machine learning tool is developed, and b) such a tool is meaningfully used to redress inequalities, not re-embed them, lest there be an inherent unlawfulness in its use. In essence, the stated and true purpose of algorithmic justice must be more equal justice, or algorithmic justice must be avoided altogether. This approach to applying the difference principle to matters of algorithmic justice would need to be based in primary legislation, in a development of something like the public sector equality duty (PSED) which already exists in the UK under the provisions of the Equality Act 2010.

Using the PSED and Protected Characteristics as a Rawlsian Structuring Tool

The PSED is a statutory requirement to be ‘properly informed’ of the equality implications of decisions made in the course of carrying out public functions, following Elias LJ in *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills* (2012) (paragraph 89). There are equality implications in relation to the impact on protected characteristics, including age, disability, and so forth.² Section 149 Equality Act 2010 provides that:

² ‘Protected characteristics’: section 149(7) of the Equality Act 2010: ‘age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation’.

- (1) A public authority must, in the exercise of its functions, have due regard to the need to—
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The PSED has required a degree of proactivity and culture change in the work of government bodies in the UK, as well as a clear commitment to gather information and to undertake consultation that would inform their work on preventing discrimination. In the words of Lord Boyd, in the recent case of *R (McHattie) v South Ayrshire Council* (2020: 31): 'The duties in the Equality Act 2010 and specifically section 149 are not simply about the prevention of discrimination but the promotion of policies which will help eliminate differences between the protected group and those who do not share that protection.'

The Metropolitan Police have published a document (Metropolitan Police Service 2020) that sets out what they term their legal mandate for LFR, and this acknowledges the need for compliance with the PSED in deploying the controversial technology in public spaces, but has few details as to how decision-makers in this regard would ensure they were 'properly informed' about the equality issues inherent in deploying LFR in various areas of London with a differing prevalence of people of different ethnicities, for example when there is a consistent and important concern about poorer accuracy rates for facial recognition technology with regard to the real-time identification of non-white persons (Harwell 2019).

The Met have an interesting pair of issues in their own recently published *guidance* document on LFR technology (as opposed to their purported 'legal mandate' document). First, they seem to make a policy commitment to public notification prior to deployments; second, they committed to only deploy the technology overtly. These are two commitments to be applauded, from the perspective of Rawls' First Principle concerning an equality of liberties for all. But the Met say their watch lists of suspect photographs used in the deployment of LFR are not marked with data about ethnicity, meaning that accuracy rates for 'hits' or 'flags' in each LFR will be harder to determine. This seems to undermine PSED compliance, in either the spirit or the letter of the law. The Met claim it is because they should only process ethnicity data when strictly necessary for policing purposes, and that this is not a strictly

necessary purpose under the terms of Part 3 of the Data Protection Act 2018. But this disregards the self-monitoring the PSED requires. The PSED is a statutory duty, just as the requirement for minimal data processing under the Data Protection Act 2018 is a statutory duty. Perhaps in an evaluation of LFR deployments, ‘hits’ or matches by ethnicity can be added back in to the watch list data—but, if this is the case, the Met’s claim that they need to remove ethnicity data from watch lists seems pointless. Efforts to engage with the public over LFR must be more genuine than this sort of dry, data protection-driven detailing in response to valid concerns (Yesburg & Ors 2020).

The operational guidance from the Met concerning LFR would be more reassuring for public confidence on the issue of bias if there was a clearer commitment and explanation as to the overall purpose of the use of LFR by the police in London in meeting their duties under the PSED, and actually reducing bias in street-level policing over time. The force falsely claimed in an equalities impact assessment that the use of the technology was supported by the UK Biometrics Commissioner under current governance arrangements, risking public confidence in the integrity of their use of LFR (Gayle 2020).

The ICO picked up on a key issue of intersectionality—in this case an increased impact on the protected race and age, and a likely breach of the PSED—when it issued an Enforcement Notice under the Data Protection Act in relation to the Gangs Matrix operated by the Metropolitan Police (ICO 2018a). The Gangs Matrix had not been used in a way that was sufficiently transparent or open to challenge by the disproportionately high number of young black men and teenage males that it ‘scored’ for gang connections in the London area (MOPAC 2018). The ICO has produced a checklist for compliance for police forces using gang intelligence databases (ICO 2018b), but arguably the best confirmation of the impact of greater scrutiny arising from the Enforcement Notice against this algorithmic (in)justice came when the Mayor’s Office for Policing and Crime (MOPAC) in London purported to overhaul the workings of the Gangs Matrix (MOPAC 2020).

Gangs of any type can be statistically modelled as networks with a number of nodes representing suspects (or ‘nominals’, in police intelligence parlance), victims and witnesses to reported crimes. The WMP Data Lab plans to use the measure of ‘network centrality’ when building algorithmic models that explain the links between organized crime groups and the individuals that make them up—a tool to be used to better target police operations and investigations aimed at disrupting serious organized

crime (WMPCC 2020b). The problem with using ‘network centrality’ in predictive or explanatory modelling is the potential for bias when this ‘centrality’ is calculated from police intelligence.

The data from police intelligence is always going to be subjective and prone to human bias, especially when a ‘network’ is partly or wholly a proxy for, or situated within, a demographic group affected by societal inequalities. Humans all behave according to ‘assortativity’, a tendency to be aligned with or attracted to people who are like themselves.³ This is a great underlying influence on calculating an individual’s ‘eigenvector centrality’—or influence in a network (University of Chieti-Pescara 2020). So, if society does not allow for much mobility and is not really progressive, the disadvantaged will form denser ‘network nodes’ (read: closer human relationships) with other disadvantaged people.

Issues around the uneven spread of poverty in society, on a geographical basis, is a real problem for the use of analytics from the perspective of Rawls’ Second Principle. When the WMP Data Lab seeks to use postcode data linked to individuals (‘nominals’) as a reasonable proxy, even though they acknowledge this is not ideal, we see an example of the police building an explanatory model using an analytical approach they know to be biased against individuals who reside in poorer areas of cities or towns (WMPCC 2020c). It must be acknowledged that this model is statistically valid as a matter of data science. It is an explanatory model which is not designed to make predictions about individuals and target interventions, though it is built from masses of data about many individual cases. However, the data science considerations are separate from the questions this model raises in relation to its implications for operational policing and thus Rawls’ philosophy.

A worrying concern is how this explanatory model, when used in relation to young people at risk of being drawn into serious violence, will be interpreted by officers. There is a potential that it is misapplied by officers who allow the results of the Youth MSV project to confirm their own assumptions about the affluence or poverty in the places where people live, and the effect this relative deprivation has on them. For this reason, it is to be welcomed that the independent ethics oversight committee for WMP has required that public consultation over the use of the Integrated Offender Management (IOM) tool in development by the Data Lab at the force be augmented by a qualitative evaluation of how the piloting of the tool saw changes in the way that officers worked with

³ For an overview of assortativity and other network theory principles please see Ferguson (2017: 24-29).

offenders and how this related to their decisions on ‘interventions’ (WMPCC 2020a). As Chouldechova and Roth have observed (2018: 5), when ‘dealing with socio-technical systems, it is also important to understand how algorithms dynamically effect their environment and the incentives of human actors.’

The impact of the PSED, and the Equality Act 2010, on the regulation of the use of algorithmic governance would be extended even further, in order to meet Rawls’ Second Principle, if section 1 of the Equality Act 2010 were brought into effect. Currently enacted but not in force in England and Wales, this provision of the 2010 Act would require police forces, and many other public bodies, to have ‘due regard’ to the need for decisions ‘designed to reduce the inequalities of outcome which result from socio-economic disadvantage’. However, as currently enacted this ‘due regard’ duty for socio-economic disadvantage would apply only to ‘strategic decisions’ as opposed to all the ‘public functions’ of a force. A natural step, and one in line with Rawls’ Second Principle, would be to make ‘relative poverty’ or ‘low income’ a protected characteristic under section 149(7) of the 2010 Act.

[D] DISCUSSION: HOW CAN WE INCORPORATE RAWLS INTO THE USE OF AI IN PUBLIC INSTITUTIONS?

Increasingly, algorithms play a vital role in our lives. In relation to the use of big data technologies in our public institutions there are many areas which require effective oversight and clearer laws and guidance in order to conform to Rawls’ philosophy. The need for greater transparency and accountability is highlighted in a recent report on the use of *Algorithms in the Criminal Justice System* produced by the Law Society, along with issues of privacy, fairness and equality (Law Society 2020).

In the recent case of *Gaughran v UK* (2020), the European Court of Human Rights made an interesting comment on Article 8 ECHR and technology, noting (86):

the importance of examining compliance with the principles of Article 8 where the powers vested in the state are obscure, creating a risk of arbitrariness especially where the technology available is continually becoming more sophisticated.

Are the powers of UK police forces to use algorithmic technologies obscure, creating that risk of arbitrary use of continually more sophisticated machine learning or AI? The CSPL, in its report on *Artificial*

Intelligence and Public Standards, published in February 2020, made as one of its key recommendations the creation of a duty on public bodies to clearly articulate their legal basis for the use of algorithmically informed governance, arguing (CSPL 2020: 40) that: 'All public sector organisations should publish a statement on how their use of AI complies with relevant laws and regulations before they are deployed in public service delivery.' This degree of transparency would be admirable, as it would entail the creation of a statutory duty through a new Act of Parliament to apply to law enforcement agencies and bodies, and public bodies more broadly, alike. The CSPL also concluded that on AI, including the use of machine learning for predictive policing and for LFR, the current 'regulatory framework is not yet fit for purpose' (CSPL 2020: 40).

Another report in February 2020, by the Royal United Services Institute (RUSI) for the Centre for Data Ethics and Innovation (Babuta and Oswald 2020: ix), recommended that for UK police forces 'investing in new data analytics software as a full operational capability, an integrated impact assessment should be conducted, to establish a clear legal basis and operational guidelines for use of the tool'. Babuta and Oswald argued for a range of requirements to be placed on UK police forces adopting algorithmic justice approaches and practices, recommending the mandated 'integrated impact assessment'. Their RUSI report calls, overall, for the use of: combined data protection impact assessments; equality impact assessments; human rights impact assessments (with a particular focus on positive obligations in relation to protection of the right to life, and protecting individuals from serious violence or abuse); assessments of expected levels of errors in any predictions made by an algorithmic model; and a requirement for independent ethical oversight mechanisms for data analytics or AI projects in police forces (Babuta and Oswald 2020).

With regard to the notion of ethical oversight as valuable, some academic critics have reminded us of the need to maintain the necessary focus on legal reform so as to not drift into using more flexible and ultimately non-binding ethical standards for regulating algorithmic justice. Black and Murray (2019: 7), for example, explain that:

The wider discourse that is taking place is drawing us away from law, or even traditional models of command and control or co-regulation and governance, towards soft self-regulation and codes of practice. This ethical model ... has seen the adoption of codes of practice for general AI and for data-driven health and care technology, among others. However ... ethical standards for such systemic risks are insufficient.

[E] CONCLUSIONS

To begin our conclusions on an optimistic point, we would agree with Ori Gilboa (2019), who has suggested that: ‘AI provides us with the unprecedented opportunity to transform our society into one that is more just.’ And while it is important to note, as Kalle Eriksson does, that with regard to increasingly algorithmic governance, the approach of “business as usual” is bound to move us towards increased inequalities and decreased possibilities for most individuals to pursue their conception of the good life’, we also agree with Eriksson that ‘there are reasons for hopefulness, since we have also seen that this development could be reversed by making the social choice to own and administer the technology jointly’ (Eriksson 2018: 40).

Machines like humans can be flawed. However, it can be easier to identify their flaws and correct for them. While AI systems today are often opaque and poorly understood, if they can be unpacked to show how the output was reached, as is possible in the HART model, algorithms can increase auditability. This is not the same for a solely human decision-making process, which is always going to be opaque to some extent. If people exercise judgement with access to auditable information provided by an algorithm, this could increase transparency, accountability and correct for human bias.

Civil society is certainly beginning to add momentum toward stricter regulation of algorithmic justice matters. After consulting widely, the UK national human rights body, the Equality and Human Rights Commission (EHRC) has submitted (EHRC 2020: 66) to a UN Committee that it has concerns about algorithmic governance in the UK today. The EHRC stated that: ‘predictive policing replicates and magnifies patterns of discrimination in policing, while lending legitimacy to biased processes. A reliance on ‘big data’ encompassing large amounts of personal information may also infringe upon privacy rights and result in self-censorship, with a consequent chilling effect on freedom of expression and association.’ The EHRC would also ‘suspend the use of automated facial recognition and predictive programmes in policing, pending completion of the ... independent impact assessments and [a public and parliamentary] consultation process, and the adoption of appropriate mitigating action’ (EHRC 2020: 89).

Zuiderveen Borgesius goes a logical step further, arguing for new legislation aimed at tackling new unfairnesses affecting ‘newly invented

classes', amongst those subjected to bias in algorithmic governance, explaining that:

Non-discrimination law and data protection law are the most relevant legal instruments to fight illegal discrimination by algorithmic systems ... But some types of algorithmic decisions evade current laws, while they can lead to unfair differentiation or discrimination. For instance, many non-discrimination statutes only apply to discrimination on the basis of certain protected grounds, such as ethnic origin. Such statutes do not apply if organisations differentiate on the basis of newly invented classes that do not correlate with protected grounds. Such differentiation could still be unfair, however, for instance when it reinforces social inequality. We probably need additional regulation to protect fairness and human rights in the area of algorithmic decision-making (Zuiderveen Borgesius 2020: 15).

In relation to the PSED, the Law Society has recommended (2020: 7) that, with respect to the growing use of algorithmic governance in the criminal justice system and the 'importance of countering discrimination within algorithmic systems, Equality Impact Assessments should be formalised as a requirement before deploying any consequential algorithmic system in the public sector and these should be made proactively, publicly available'. The Law Society also recommended (2020: 7) that given 'algorithmic systems' high potential for socioeconomic discrimination, the Government should commence the socioeconomic equality duty in the Equality Act 2010, section 1, in England and Wales, at least with regard to algorithmic decision-support systems'.

Our overall conclusion is that, in order to gain maximum value and help for the vulnerable, and in doing so by applying Rawlsian thinking to the regulation of algorithmic governance in the UK, there needs to be a political commitment to a rolling programme of sector-by-sector legal reform, in order to legislate more deeply for a culture of algorithmic justice. As Zuiderveen Borgesius has also concluded (2020: 15):

it is probably not useful to adopt rules for algorithmic decision-making in general. Just like we did not, and could not, adopt one statute to regulate the industrial revolution, we cannot adopt one statute to regulate algorithmic decision-making. To mitigate problems caused by the industrial revolution, we needed different laws for work safety, consumer protection, the environment, etc. In different sectors, the risks are different, and different norms and values are at stake. Therefore, new rules for algorithmic decision-making should be sector-specific.

Mechanisms for oversight such as ethics committees and regulators need to be bolstered by the law. At the time of writing, in April 2020, the Committee of Ministers of the Council of Europe has just published a set

of Recommendations concerning ‘human rights impacts of algorithmic systems’ (Council of Europe, 2020a), ‘calling on governments to ensure that they do not breach human rights through their own use, development or procurement of algorithmic systems’, and explaining that ‘as regulators, [governments] should establish effective and predictable legislative, regulatory and supervisory frameworks that prevent, detect, prohibit and remedy human rights violations, whether stemming from public or private actors’ (Council of Europe 2020b). The preamble of the recent Recommendation demands that ‘the rule of law standards that govern public and private relations, such as legality, transparency, predictability, accountability and oversight, must also be maintained in the context of algorithmic systems’ (Council of Europe 2020a). This of course accords with Rawls’ First Principle. The Recommendation also follows the notion of Rawls’ Second Principle, purporting to mandate that Member States of the Council of Europe, like the UK, put data bias, and equality concerns to the fore in developing legal standards in relation to algorithmic systems used in government. The Recommendation sets out how:

In the design, development, ongoing deployment and procurement of algorithmic systems for or by them, States should carefully assess what human rights and non-discrimination rules may be affected as a result of the quality of data that are being put into and extracted from an algorithmic system, as these often contain bias and may stand in as a proxy for classifiers such as gender, race, religion, political opinion or social origin. The provenance and possible shortcomings of the dataset, the possibility of its inappropriate or decontextualised use, the negative externalities resulting from these shortcomings and inappropriate uses as well as the environments within which the dataset will be or could possibly be used, should also be assessed carefully (Council of Europe 2020a).

Thus, it remains to be seen how the UK government will choose to combine data protection, equality law approaches and human rights standards in developing new legislation to meet emerging challenges of algorithmic justice in data-driven governance. In our view, laws and guidance for the use of AI in our criminal justice system and in other public institutes must ensure that the data, the technology and the process by which the technology is used reflect Rawls’ principles. A *Theory of Justice* provides a blueprint for our democracy and it remains highly relevant today as we grapple with the ethics and regulation of ‘big data’ technologies.

References

- Babuta, Alexander & Marion Oswald (2020) *Data Analytics and Algorithms in Policing in England and Wales: Towards A New Policy Framework* London: Royal United Services Institute.
- Black, Julia and Andrew Murray (2019) 'Regulating AI and Machine Learning: Setting the Regulatory Agenda' 10(3) *European Journal of Law and Technology*.
- Cobbe, Jennifer (2018) 'Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making' a pre-review version of a paper in *Legal Studies*.
- Chouldechova, Alexandra & Aaron Roth (2018) 'The Frontiers of Fairness in Machine Learning' arXiv preprint
- Council of Europe (2020a) Recommendation CM/Rec (2020)1 of the Committee of Ministers to Member States on the Human Rights Impacts of Algorithmic Systems 8 April Strasbourg: Committee of Ministers.
- Council of Europe (2020b) 'Algorithms and Automation: New Guidelines to Prevent Human Rights Breaches' 8 April Strasbourg: Council of Europe.
- CSPL (Committee on Standards in Public Life) (2020) *Artificial Intelligence and Public Standards: A Review by the Committee on Standards in Public Life* Chair: Lord Evans of Weardale London: Committee on Standards in Public Life
- Daniels, Norman (ed) (1975) *Reading Rawls: Critical Studies of a Theory of Justice* Oxford: Basil Blackwell.
- Duff, Alistair (2006) 'Neo-Rawlsian Co-ordinates: Notes on A Theory of Justice for the Information Age' 6 *International Review of Information Ethics* 17-22.
- Dworkin, Ronald (1975) 'The Original Position' in N Daniels (ed) *Reading Rawls: Critical Studies of a Theory of Justice* Oxford: Basil Blackwell.
- EHRC (Equality and Human Rights Commission) (2020) *Civil and Political Rights in Great Britain: submission to the UN* London: Equality and Human Rights Commission.
- Eriksson, Kalle (2018) 'Realizing Rawls in an Automated Future', unpublished Master's thesis.
- Essex Centre for Data Analytics (2019) 'Transparency and Trust' Essex Partnership.

- Essex Centre for Data Analytics (2020) 'Be Part of the Conversation: The Ethics of Data Analytics' Essex Partnership.
- Ferguson, Niall (2017) *The Square and the Tower: Networks, Hierarchies, and the Struggle* London: Penguin.
- Gayle, Damien (2020) 'Watchdog Rejects Met's Claim that He Supported Facial Recognition' *The Guardian* 12 February.
- Gilboa, Ori (2019) 'Rawls' Ghost in the Machine' *The Varsity* 7 May.
- Grace, Jamie (2019) 'Algorithmic Impropriety in UK Policing?' 3(1) *Journal of Information Rights, Policy and Practice* online.
- Grace, Jamie (2020) 'Fresh, Fair, and Smart: Data Reliability in Predictive Policing', about:intel European Voice on Surveillance.
- Harwell, Drew (2019) 'Federal Study Confirms Racial Bias of Many Facial-Recognition Systems, Casts Doubt on their Expanding Use' *Washington Post* 19 December.
- House of Lords Select Committee on Artificial Intelligence (2018) 'Artificial Intelligence in the UK: Ready, Willing and Able?' HL Paper 100: Report of Session 2017-2019 London: House of Lords.
- ICO (Information Commissioner's Office) (2018a) *Metropolitan Police Service Gangs Matrix Enforcement Notice* Wilmslow: Information Commissioner's Office.
- ICO (Information Commissioner's Office) (2018b) *Processing Gangs Information: A Checklist for Police Forces* Wilmslow: Information Commissioner's Office.
- Law Society (2020) *Algorithms in the Criminal Justice System* London: The Law Society.
- McDonald, Henry (2019) 'AI System for Granting UK Visas Is Biased, Rights Groups Claim' *The Guardian* 29 October.
- Macdonald, Lara (2020) 'What Next for Police Technology and Ethics?', Centre for Data Ethics and Innovation.
- Metropolitan Police Service (2020) *Live Facial Recognition: Legal Mandate* London: Metropolitan Police Service.
- MOPAC (Mayor's Office for Police and Crime) (2018) *Review of the Metropolitan Police Service Gangs Matrix*, London: Mayor's Office for Police and Crime.
- MOPAC (Mayor's Office for Police and Crime) (2020) 'Mayor's Intervention Results in Overhaul of Met's Gangs Matrix' London: Mayor's Office for Police and Crime.

- Oswald, Marion & Ors (2018) 'Algorithmic Risk Assessment Policing Models: Lessons from the Durham HART model and "Experimental" proportionality' 27(2) *Information and Communications Technology Law* 223-250.
- Poolman, Sarah, Richard Wilshaw & Jamie Grace (2019) 'Human Rights in Policing' *Political Quarterly* 90(3) 449-456.
- Rawls, John (1971) *A Theory of Justice* Boston MA: Harvard University Press.
- Rawls, John (1999) *A Theory of Justice: Revised Edition* Boston MA: Harvard University Press.
- Selbst, Andrew D (2017) 'Disparate Impact in Big Data Policing' 52 *Georgia Law Review* 109-195.
- Spiegelhalter, David (2020) *The Art of Stats: Learning from Data* London: Penguin Random House.
- University of Chieti-Pescara (2020) '[Eigenvector Centrality](#)'.
- WMPCC (West Midlands Police and Crime Commissioner) (2020a), 'Ethics Committee Minutes' (January) Birmingham: Office of the Police and Crime Commissioner for the West Midlands.
- WMPCC (West Midlands Police and Crime Commissioner) (2020b) 'Paper: Serious Organised Crime (SOC)' (January) Birmingham: Office of the Police and Crime Commissioner for the West Midlands.
- WMPCC (West Midlands Police and Crime Commissioner) (2020c) 'Paper: Youth Most Serious Violence (MSV)' (January) Birmingham: Office of the Police and Crime Commissioner for the West Midlands.
- Yesburg, Julia & Ors (2020) '[Public Support for Live Facial Recognition and Implications for COVID-19 Policing](#)' London School of Economics Politics and Policy Blog.
- Zuiderveen Borgesius, Frederik J (2020) 'Strengthening Legal Protection against Discrimination by Algorithms and Artificial Intelligence' 24 *International Journal of Human Rights* DOI: 10.1080/13642987.2020.1743976

Legislation and Normative Documents Cited

Criminal Procedure and Investigations Act 1996

Data Protection Act 2018

Equality Act 2010

European Convention on Human Rights 1950

Cases Cited

Gaughran v UK (2020) (Application no 45245/15)

Netherlands Committee of Jurists for Human Rights v State of the Netherlands (2020) ECLI: NL: RBDHA: 2020: 865

R (Bridges) v South Wales Police [2019] EWHC 2341 (Admin)

R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin)

R (McHattie) v South Ayrshire Council [2020] CSOH 4

DOMESTIC ABUSE DURING THE UK'S COVID-19 LOCKDOWN: FROM NORMAL TO NEW NORMAL AND WHAT SURVIVORS' EXPERIENCES MIGHT TEACH US

AMY KELLAM

IALS, University of London

Abstract

This article considers emerging data on the escalation of domestic abuse in lockdown and, with reference to the proposed Domestic Abuse Bill 2020, explores how the depiction of, and response to, domestic abuse during lockdown sheds light on wider socio-legal issues and challenges.

Key words: domestic abuse, domestic violence, COVID-19, tech abuse, remote access

[A] COVID-19 LOCKDOWN: ESCALATING DOMESTIC ABUSE, ESCALATING PUBLICITY

Given the unprecedented and robust nature of the restrictions placed upon the UK population during lockdown, it is not difficult to imagine why existing domestic abuse might escalate, or new patterns of abusive behaviour emerge. A Home Affairs Select Committee report, recently published on 27 April, identified a global surge in pandemic-related domestic violence and noted that the UK was following this pattern with cases 'escalating more quickly to become complex and serious, with higher levels of physical violence and coercive control' (Home Affairs Select Committee 2020: paragraphs 1-3).¹ Slipping somewhat under the radar, despite the extensive media coverage of lockdown-related abuse, on

¹ To place this in comparative perspective the Home Affairs Select Committee's report (2020: paragraph 1), based on an article in *The Guardian* (Graham-Harrison & Ors 2020), found that: 'In Hubei province, China, domestic violence reports to police more than tripled in one county during the lockdown in February. In Brazil it has been estimated that cases have risen by 40-50% in consequence of coronavirus isolation requirements, and calls to domestic abuse helplines in Catalonia and Cyprus rose by 20% and 30% respectively in the week after confinement measures were introduced. In Italy activists have reported "an overwhelming emergency" as women who are no longer able to access helplines without being overheard have sought to make contact with support services by text and email.'

28 April the Domestic Abuse HC Bill, first tabled in 2019, received its second hearing in the House of Commons. If made law, it will, for the first time, create a statutory definition of domestic abuse. Presently, there is no specific criminal offence of domestic abuse in England and Wales. Prosecutions may fall under criminal offences such as assault or threatening behaviour. Alternatively, under the Crime and Security Act 2010 police have the power to obtain domestic violence protection notices and orders. Provisions for prosecuting non-violent abuse were expanded under section 76 of the Serious Crime Act 2015, which created a new offence of coercive or controlling behaviour. But the transition to a concept of domestic abuse as something more than physical violence has been uneasy and, arguably, incomplete.

When the UK entered lockdown on 23 March 2020, the prospect that a direct result would be an increase of domestic abuse was already in evidence. On 25 March, the day that the Coronavirus Act 2020 was enacted, Beverley Hughes, Greater Manchester's deputy mayor for policing and crime, cited reports of abuse linked to the lockdown and stated that authorities were preparing for serious incidents (Hughes 2020). Elsewhere, Avon and Somerset police reported a 20.9 per cent increase in domestic abuse incidents during the two-week period of voluntary social distancing that had already been in place (Parveen and Grierson 2020). In the weeks that followed, the issue remained in the public eye. On 11 April, the Home Secretary launched a targeted response, announcing an extra £2 million fund for domestic abuse online support services and helplines, which came on top of a previous government pledge to provide frontline charities with £750 million as part of its pandemic response package (Patel 2020). A new national communications campaign was launched under the hashtag #YouAreNotAlone. At the same briefing, the National Police Chiefs' Council chair Martin Hewitt addressed 'victims of domestic abuse or controlling behaviour' directly, stating: 'We will come when you call for help. To abusers, do not think this is a time you can get away with it. We will still arrest, we will still bring people into custody, and we will still prosecute.' (Parveen and Grierson 2020)

The government's commitment to address the issue of abuse during lockdown is surely welcome. Yet, this seemingly unequivocal statement of victim support is not without ambiguity. The reassuring emphasis on tackling abuse as a crime belies the complex socio-legal reality that both victims and perpetrators inhabit. Domestic abuse covers a wide spectrum of behaviours and its consequences are addressed across a range of sectors. Incidents that transition to the criminal courts are in the

minority, and, whilst the family and civil courts offer alternative routes to legal remedy, the majority of domestic abuse remains outside the scope of the judicial system. Its effects are only indirectly quantifiable through impact upon other social support networks and healthcare services (Office for National Statistics (ONS) 2019b).² Moreover, the response to COVID-19-related domestic abuse risks underplaying the need for integrated, whole family services; something that is echoed in the current draft of the Domestic Abuse Bill. In its consultation submission for the Bill, SafeLives undertook a survey of survivors that found that:

82% of respondents said that they supported the introduction of more perpetrator programmes, nearly 80% wanted tougher sentences, 74% wanted mental health support for perpetrators, and 73% wanted public awareness campaigns specifically targeted at perpetrators. And yet, less than 1% of perpetrators are challenged to change (SafeLives 2019b: paragraph 13).

As is discussed below, in its current form the Domestic Abuse Bill may unintentionally divert resources towards accommodation-based refuge, at the expense of other services that cultivate early intervention and whole family support.

[B] THE DOMESTIC ABUSE BILL 2019-2021: FIRST STEPS

Nonetheless, the Domestic Abuse Bill, as presently drafted, represents a step towards addressing some important issues. It includes within its scope non-violent forms of abusive behaviour, such as controlling or coercive behaviour; economic abuse and psychological, emotional or other abuse (Part 1, section 1(3)).³ Of particular note, is that the Bill will prohibit abusers cross-examining survivors in the family courts, an occurrence which has hitherto been inadequately dealt with. Special measures such as separate entrances and exits, separate waiting rooms and a screen in court so that neither party can see the other may be currently requested in the family court, with judicial guidance for such provisions laid out in the Family Procedure Rules 2010. However, a 2018 survey by Women's Aid—a federation of frontline domestic abuse services—found that 61 per cent of their respondents were not provided with special measures in

² The ONS (2019b) provides a comprehensive overview of how data on domestic abuse is captured. It includes data from multiple sources to map how victims and perpetrators of domestic abuse engage with the criminal justice system and support services and outlines how the limitations of such data leave the true extent of domestic abuse difficult to accurately quantify.

³ This reflects a pre-existing cross-party, non-statutory, definition of domestic abuse that has been in place since 2012, see Home Office 2012: See [Bill documents — Domestic Abuse Bill 2019-21](#) for the current draft of the Bill, and any subsequent amendments as it continues its passage.

family court and that 24 per cent had been cross-examined by their abusive ex-partner (Women's Aid and Queen Mary University of London 2018: 27). That judicial discretion in applying procedural rules can negatively impact upon the right to a fair hearing in the family court has been highlighted by *JH v MF* (2020), an appeal which dealt with a case in which a mother—the appellant—was refused a request for special measures, and in which the judge directed that both appellant and respondent should give evidence from counsel's row in order to maintain what he described as the 'feng shui' of the courtroom (paragraph 16). A victim support service noted how such cases exacerbate pre-existing fears about court procedures, stating that: 'We advise women on our family law advice line every week who fear the response of the court to allegations of abuse' (Rights of Women 2020).

Whilst the issue of domestic abuse during lockdown has remained in the public eye, media coverage has depicted the crisis primarily as one of violence and homicide. That violent offences should be met with a sense of urgency is understandable, but, as the Domestic Abuse Bill seeks to confirm, abusive behaviour encompasses more than physical violence. The depiction and response to rising domestic abuse during lockdown highlights the hurdles that the Bill must overcome if it is to provide an effective and sustainable framework for addressing the issue. Indeed, the challenges are discernible within the very statement issued as part of the government's lockdown response. When Martin Hewitt (Parveen and Grierson 2020) assured the public that perpetrators of abuse would be arrested and 'victims of domestic abuse or controlling behaviour' would be aided by police, domestic abuse was framed squarely as a criminal matter. To push the point further, even the use of the conjunction 'or' in the statement 'victims of domestic abuse or controlling behaviour' underscores an uncertainty about how domestic abuse is understood. Perhaps the result of a simple verbal misstep, the separation of the term 'domestic abuse' from the expression 'controlling behaviour' is reminiscent of the transition that the concept of domestic abuse has made, as the term has been redefined through law and policy over the past decade. The definition contained within the current Bill derives from a cross-party policy agreed in 2012 which was published as a 'New Definition of Domestic Violence', which explicitly recognized: 'Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality' (Home Office 2012). This was later published as a policy document in 'Definition of Domestic Violence and Abuse: Guide for Local

Areas' (Home Office 2013). The new Bill sees the elision of violence from the legislative title, marking its evolution from the primary descriptor, to a secondary subcategory of abuse.

It may seem pedantic to fixate upon a single word when preliminary research by Counting Dead Women estimated that there had been at least 16 domestic abuse killings of women and children in the UK in the first three weeks of the lockdown, which amounts to the largest number of killings in a three-week period for a decade, and an approximate doubling of the weekly average (Smith 2020; see also ITV 2020). However, violence is not simply a physical act. The Oxford English Dictionary (OED) includes within its list of definitions, quite separately from any act of physical force: 'Undue constraint applied to some natural process, habit, etc., so as to prevent its free development or exercise' (OED Online 2020: *violence*, n p 1) and 'vehemence or intensity of emotion, behaviour, or language; extreme fervour; passion' (OED Online 2020: *violence*, n Art 4).

The linguistic shift from domestic violence to domestic abuse reflects a recognized need to move beyond reactive responses to physical assault. Women's Aid reported in 2017 that:

From our work with survivors, we know that coercive and controlling behaviour is at the heart of domestic abuse. It is a repeated pattern of behaviour that perpetrators use to intimidate, isolate and frighten victims, and has a long-lasting and devastating impact on the survivor. Yet since it was made a criminal offence in December 2015, less than 1% of all domestic abuse-related offences recorded by the police were classified as coercive control and an even smaller number of these cases resulted in a charge or conviction (Ghose 2017).

This was supported by a report from Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS) (2017) on the police response to domestic abuse, which found that some officers lacked the training to adequately understand the role of coercive control. A 2019 report (HMICFRS 2019) indicates training has since improved support provision. But it is evident that all forms of domestic abuse have far-reaching social consequences, with research suggesting that victims of intimate partner abuse frequently suffer long-term mental and physical health symptoms, such as anxiety, depression, suicidality, post-traumatic stress disorder and chronic pain (Loxton & Ors 2017; Pico-Alfonso & Ors 2006).

Against this backdrop, the response to the crisis of domestic abuse during lockdown raises significant issues. The publicity generated around lockdown-related domestic abuse has led to calls for the public to increase vigilance and report possible incidents. DCI Dan St Quintin, of Cumbria

police, for example, asked everyone, including ‘postal workers, delivery drivers, food delivery companies and carers who will still be visiting houses, to keep an eye out for any signs of abuse and to report any concerns to us’ (Parveen and Grierson 2020). A report on the Home Office’s preparedness for COVID-19-related domestic abuse (Home Affairs Select Committee 2020: paragraph 35) found that approximately 40 per cent of notifications of abuse to the police come from neighbours and that, overall, 120 such reports had been made through Crimestoppers in the week beginning 6 April. This represented ‘an increase of 49.3 per cent from the average of 80.4 reports per week across a five-week period in January and February, before the lockdown’ (see also Sparrow & Ors 2020). Yet, this emphasis upon the potential visibility and criminality of domestic abuse risks detracting from the insidious nature of coercive control and psychological abuse and further compounds a lack of clarity about the support that both victims and perpetrators seek.

The recent increase in arrests for domestic abuse in lockdown and its related reportage capture only a specific sub-category of affected persons. In normal times, within the legal system, domestic abuse is less likely to appear as a matter of criminal justice—it is estimated that only 80 per cent of domestic abuse survivors contact the police (SafeLives 2019a: 20), and that only 8 per cent of domestic abuse-related crimes reported to the police will end in conviction (ONS 2019a). Within the judicial system, domestic abuse will, more likely, arise before the family court for reasons such as divorce and childcare arrangements. Or, as a private legal action to bring an injunction against a perpetrator, with part IV of the Family Law Act 1996 providing for the civil remedies of a non-molestation order or an occupation order. These injunctions, if breached, may lead to arrest. Here, once more, the significance of fear to the legal process becomes evident, albeit in an altogether different context: Women’s Aid has found that: ‘While getting a court order may provide some protection, it isn’t always helpful: sometimes it makes very little difference, and it can even (in some cases) be counter-productive. It really depends on the perpetrators fear of being arrested’. The impact of fear on domestic abuse is, therefore, not only critical to evaluating how a victim engages with remedial legal processes; it is also important when considering the way in which perpetrators perform and sustain patterns of abusive behaviour.

This dynamic of fear, and its complex interplay with socio-legal responses to abuse from the standpoint of both survivors and the perpetrators, is likely to have been amplified by the COVID-19 crisis. It was recognized early on that the ‘stay home to save lives’ mantra of lockdown would confine some to homes that were not safe. The awareness

campaign launched by the Home Secretary stressed that victims would not be reprimanded if they left their home to seek refuge. Attention was drawn to the fact that victims could contact emergency services using a silent option of dialling 999 and then 55, or even coughing or tapping in response to questions (Patel 2020; West Midlands Police 2020). However, the very nature of lockdown, and the wider context of the pandemic, means that victims may remain under the surveillance of their abuser. Access to telephone and digital support may be limited, even unsafe. Meanwhile, in an environment rendered potentially fatally unsafe by an invisible yet pervasive pathogen, the assurance that victims may flee their homes, and that the police are arresting perpetrators and breaking down doors to protect victims (Lenihan 2020), places an incalculable burden upon victims to assess risk and navigate competing objects of fear. The Women's Aid (2020b) Survivor Survey found that not only was domestic abuse intensifying under lockdown but that '72 per cent said that their abuser has more control over their life since COVID-19'. Difficulties accessing support were raised, such as NHS counselling services being stopped, and informal face-to-face networks being curtailed. One respondent, required by government guidance to not leave their home for 12 weeks for even essential supplies, reported: 'I am reliant upon my abuser to get food and medication as shielding for 12 weeks. This is being used against me.' Such testimony may represent a minority of victims, but nonetheless draws attention to the much broader, and important, issue of how domestic abuse is portrayed and perceived.

In its written evidence to the Domestic Abuse Bill consultation, SafeLives (2019b: paragraph 13) noted that 'The Domestic Abuse Bill makes no substantive provision for perpetrators to change, yet we know that the vast majority of survivors want perpetrators' behaviour to be challenged' and stated that:

Instead of asking 'why doesn't she leave' the Government needs to ask 'why doesn't he stop?' and then take the necessary measures to embed this principle as a practical reality. This principle remains the same whatever the gender of the victim or the perpetrator and whatever the nature of their relationship. (SafeLives 2019b: paragraph 14).⁴

Indeed, some of the measures within the Bill that seek to improve support services may well have the inadvertent effect of removing access to specialist services that address domestic abuse within the community. The Bill will place a legal duty on local authorities to assess the need for and commission refuge services. Given that a decade of austerity

⁴ This warning was reiterated in the SafeLives (2020) briefing following the Bill's second reading, which warns that this issue remains unaddressed by any amendments thus far.

measures have left refuge shelters underfunded, with 64 per cent of refuge referrals being declined last year (Women's Aid 2020a: 30), this has potential to redress what has become an increasing deficit in support provision. Yet, the focus on accommodation-based support, where the victim flees the home to seek refuge, risks removing funding from independent domestic violence advisors (IDVAs), who support abusers within their own homes and communities.⁵ The vital role of IDVAs is plain. SafeLives has found that most victims do not wish to flee the home, or feel ready or safe to do so. Furthermore, sometimes what is sought is someone able to deal with the perpetrator. As one survivor stated:

he was the one with mental health issues. Had he been picked up sooner, he might have been sectioned and the story could have been very different. He went to the doctors once because his anxiety levels were getting worse, he needed some kind of counselling because he had a history of DA in his family and his brother had committed suicide. The doctors told me to phone Mind, who said there was a 13 month waiting list. There was no whole family approach (SafeLives 2019b: paragraph 15).

The above statement draws attention to the critical, but inadequately addressed, need to understand how both victims and perpetrators engage with other social services, and in particular the health system. As touched upon in a previous 'Note' that I published (Kellam 2020: 292) on disability welfare reform in England and Wales, there is a growing body of research that identifies a complex, bidirectional interaction between law and health, and that 'social and economic problems with a legal dimension can exacerbate or create ill health and, conversely that ill health can create legal problems' (Genn 2019: 159). There are multiple issues relating to domestic abuse, including how it is experienced, responded to and portrayed, that are suggestive of a similar bidirectional interaction. Certainly, it seems unlikely, at least in its present form, that the legal system has capacity or means to provide the safety net that those affected by domestic abuse deserve and require without the facilitation of an integrative, multi-agency approach. This is supported by a recent quantitative study of domestic abuse, in its physical and non-physical

⁵ A summary of the role and duties of IDVAs is provided by SafeLives (2019b: paragraph 19): 'Established in England and Wales in 2005, IDVAs are trained specialists who act as a single point of contact to help victims who are at the highest risk of serious harm or death to become safe, ensuring their voice is heard by statutory agencies. An IDVA carries out a risk assessment to identify the level of risk to a victim (high, medium or standard) and supports them with immediate safety plans, such as helping to increase security at their home through target hardening, sanctuary schemes, protection orders or accompanying them to court hearings (family, criminal and civil), and implementing longer-term interventions to ensure their safety, such as accessing counselling, drug or alcohol misuse or mental health services.'

forms, which examined the impact of providing IDVAs in a hospital setting. It concluded that:

Hospital IDVAs can identify survivors not visible to other services and promote safety through intensive support and access to resources. The co-location of IDVAs within the hospital encouraged referrals to other health services and wider community agencies (Haliwell & Ors 2019: 1).⁶

Significantly, there was a greater reduction or cessation of abuse in survivors accessing hospital IDVAs and an overall improvement in their physical and mental health prospects (Haliwell & Ors 2019: 7-8).

[C] A NEW NORMAL

Given that domestic abuse, even in normal times, is mostly a hidden issue, then the government response to, and media coverage of, domestic abuse during lockdown may offer some insight into the prospects and challenges that lie ahead. In particular, the data explored within this article suggests that the recognition of, and response to, coercive control remains fraught within the justice system as a whole, from initial contact with the police through to the procedures of the criminal and civil courts. Given such complexities, how are we to evaluate official lockdown guidance requesting delivery drivers, postal workers, and even the wider public, to identify and report domestic abuse? Is it helpful to encourage social vigilance and awareness in this context? Or does such publicity, during a time that requires the population as a whole to live a life hidden behind private doors, risk heightening perceptions that domestic abuse is primarily a crime of physical violence? After all, by its very nature, coercive control can remain unrecognized by the victim themselves, as famously depicted in Patrick Hamilton's play *Gas Light* (1938)—and its later film adaptations—to which we owe the term *gas-lighting*: 'The action of manipulating someone by psychological means into accepting a false depiction of reality or doubting their own sanity' (OED Online: *gas-lighting*, n 2). As one survivor reported: 'It took me 13 years before I realised that I was being subjected to emotional and psychological abuse. I used to think abuse was just when someone hit you' (SafeLives 2019a: 20).

Nonetheless, the collective necessities of lockdown have also led to an unprecedented expansion of digital technologies across both public and

⁶ Hospital-based IDVAs were more likely to connect and support survivors currently experiencing abuse from a cohabiting partner, whereas community-based IDVAs supported more survivors experiencing abuse from an ex-partner (Haliwell & Ors 2019: 5). Of further note is the fact that people presenting to hospital IDVAs were more likely to have first sought help from their GPs, whereas those accessing community IDVA support had a greater tendency to report to the police (Haliwell & Ors 2019: 6).

private sectors. The rise of remote working to enable social connectivity during isolation also raises the prospect of improved digital access to support for domestic abuse survivors. Even in normal times, one of the challenges that survivors of abuse face is finding a safe space to contact support lines. As one respondent stated to the SafeLives' (2019a: 29) 'Tech v Abuse Design Challenges' initiative:

At the beginning, online information as quickly as possible is key. Calling a helpline or service is a huge barrier, even just finding somewhere private and safe to call from is really difficult – if you have time in the toilets at work you can't just call there. We haven't met that need yet.⁷

In an attempt to bridge this gap—before the pandemic crisis unfolded—Refuge (2020) launched an online chatbot, designed to guide users towards the most appropriate information and support. Meanwhile, in October 2019, Women's Aid introduced a live online chat service to augment its existing email support staffed by trained support workers, and its moderated community survivor's forum (Women's Aid 2019).

After lockdown, the National Domestic Abuse helpline reported a 25 per cent increase in calls and online requests for help (West Midlands Police 2020). Elsewhere, it was reported that 'Calls to Refuge increased by 49% in the week before 15 April,' that visits to the domestic abuse charity Chayn website had trebled in March 2020, and that calls to the Men's Advice Line had increased by 16.6 per cent (ITV 2020). Conversely, Somerset Integrated Domestic Abuse Service said: 'We're very much open for business at the moment, but we're concerned that calls to our helpline and referrals have reduced.' (Avon and Somerset Police 2020)⁸ In response to the latter statement, Avon and Somerset Police (2020) pointed to the fact that domestic abuse 'survivors living in isolated rural communities are less likely to report it or ask for help'. Yet, this alone seems inadequate for explaining a lack of take-up of remote support services: the response relied upon a previous report that hypothesized that differences between rural and urban support access was driven by physical circumstance, with those living in rural areas 'at high risk of under-reporting for a number of reasons such as lack of access to available services due to location, fear of reprisals from tight-knit communities, as well as the stigma and shame associated with domestic abuse' (Avon and Somerset Police 2019). It will require further research before a clearer picture can

⁷ See also Snook & Ors 2017.

⁸ In a follow-up with the Team Manager (29 April 2020, on file with the author), it was stated: 'At present we're not able to provide any data/analysis or statement due to it being too early into the lockdown period. It's a very complex situation and things are changing daily.'

be obtained.⁹ Nonetheless, even at this preliminary stage, it is evident that digital services have potential to connect survivors, who may have historically remained hidden, to a network of support that spans multiple formal and informal networks, including online communities, charities, national health services and the legal system.

In this regard, the rapid expansion of remote working during lockdown represents an opportunity for developing and improving remote support access for those affected by domestic abuse. But this push towards tech support is not without caveats. In the government's daily briefing of 11 April 2020, when an extra £2-million fund for domestic abuse online support services and helplines was announced, specific emphasis was given to the Bright Sky app, which provides victim support and can be disguised for people worried about partners checking their phones (Parveen and Grierson 2020). Yet, such apps are not without their limitations. Bright Sky, for example, allows a user to call 999 within a few screen clicks. It also allows survivors to maintain a journal of incidents, uploaded to a cloud location. But these facilities are not unavailable through other means, and the very fact that Bright Sky has received such publicity presents cause for concern. It may well be that the app can be disguised, but what use is such a disguise if it becomes a well-recognized public pseudonym—in this case an easily identifiable weather app? There is an inherent risk that utilizing such technology may escalate situations in which domestic abuse occurs, rather than mitigate against it.

This is especially so, given that the emergence of new technology, including smartphones, online services and the internet of things (IoT) have all been used to perpetrate domestic abuse. Refuge, the UK's largest domestic violence charity, reported that in 2019, 72 per cent of users accessing its services experienced abuse through technology, such as 'persistent telephone calls from perpetrators, being targeted via social media, having their location tracked or spyware installed in their homes' or through abusers 'impersonating their online identity, putting recording devices inside children's toys, attaching GPS trackers to cars, or logging into online storage to monitor messages' (Refuge 2020; see also Snook & Ors 2017; Parkin & Ors 2019). Bowles (2018) reported that some victims who presented at WomenSV, a domestic violence programme in Silicon Valley, had been 'put on psychiatric holds—a stay at a medical facility so mental health can be evaluated—after abuse involving home devices'. She identified a range of cases in which domestic abuse was:

⁹ Disparities in data on help-seeking behaviour during lockdown might present for a number of reasons, such as, for example: limited data; survivors turning to highly publicized national support services rather than local support networks; or deprivation such as tech poverty.

tied to the rise of smart home technology. Internet-connected locks, speakers, thermostats, lights and cameras that have been marketed as the newest conveniences are now also being used as a means for harassment, monitoring, revenge and control.

The scope and availability of tools such as spyware to facilitate domestic abuse should not be underestimated. In 2017, *Forbes* published an article about a software company which provided tools through which partners could spy on their partner's phone (Brewster 2017). In my own research, I contacted the same company, Flexispy, and was assured by a sales rep that I could use their software on the 'target's phone' to secretly take audio and video recordings, access text and WhatsApp messages and monitor call logs and social media activity. On questioning if, and how, I could install such software on a phone that was not my own, I was assured that the software could be installed without leaving a trace, that no notification would be evident if recording was switched on, and that all data would be uploaded to a remote server which I could access through a personal dashboard provided through a monthly subscription service (Webchat with FlexiSpy, 28 April 2020, screenshots on file with author).

The Domestic Abuse Bill in its current form has yet to fully address tech abuse. Despite reports that it has been designed to be future proof and that it will make tech abuse illegal (Hymas 2020; *The Verdict* 2020), it does not provide clear and comprehensive measures. Issues raised in written evidence during the Bill's consultation still remain. This includes addressing a need for further government research on the availability and (mis)use of spyware, and for court orders allowing for the homes and electrical devices of victims to be swept for spyware or tracking devices. This requirement was highlighted by McCurley in written evidence to the draft Bill committee:

21st Century slavery is depressingly common as a feature of abuse of women not being allowed out of the house, not allowed access to money, bank account, even a key to the door and the ability to install CCTV cameras which could be monitored by the perpetrator's phone is also a very significant and sinister form of control (McCurley 2019).

In addition, my own research suggests that there is what may be described as a substantial technological inequality between the tools of abuse and tools of support. Put bluntly, the technology available to perpetrate abuse is more sophisticated, pervasive and less risky to use than the digital tools available to survivors. This is compounded by a lack of certainty about the admissibility of covert recordings as evidence in the family courts. The Family Procedure Rules (22.1) allow for such recordings to be admitted at the court's discretion. The nature of coercive behaviour and emotional abuse is such that it may be difficult to prove without

corroboration, yet resorting to covert recording presents a conundrum in that such recordings may provide:

inferential evidence of controlling or coercive behaviour. On occasions, the use of recording equipment or tracker devices demonstrates possessive and obsessive tendencies – which are unattractive qualities for litigants to place before a court. Far from providing cogent evidence to support a case, in many instances, the surveillance of another party may damage a litigant's case (Dent 2017).¹⁰

The Domestic Abuse Bill's statutory provision to increase funding for accommodation support should therefore be met with an equally robust statutory obligation to provide funding for safe, comprehensive and stable technologies to expand remote support access across digital platforms.¹¹ Measures should also be considered to clarify when and how survivors can record evidence, and use it thereafter.

[D] CONCLUSION

As the Domestic Abuse Bill continues its path to becoming law, the concurrent increase in lockdown-related domestic abuse arrests and the extensive media coverage that this has engendered should give pause for reflecting upon wider socio-legal perceptions of domestic abuse—even a reconsideration of the concept of violence itself. This is not to diminish the need to address physical violence within the home. Rather, it should be cause for (re)assessing the routes to justice that are available to victims trapped within dysfunctional, abusive relationships. Given the extensive media coverage given to the subject, with its particular emphasis upon reactive responses to domestic abuse as violent crime, it should also be a cause for evaluating how popular culture depicts and modifies perceptions of domestic abuse and the ways in which this may alter the characteristics of legal engagement.

As Diane Shoos (2018) stated in her study of depictions of domestic violence in Hollywood films: 'There are ways in which genre formulas have brought this issue to the screen, and that's important, but at the end of the day, visibility for domestic violence is not enough. The question is

¹⁰ See also the Family Justice Council's debate on the use of covert recordings (Family Justice Council 2018).

¹¹ It should be noted that funding such development and research would not only reduce the human cost of abuse, in terms of lives lost and trauma caused, but has strong potential to reduce the economic cost of domestic abuse. A Home Office (2019) report found that economic cost of domestic abuse overall (for the year ending March 2017) was £66 billion and that, of this: 'The largest element of domestic abuse cost is the physical and emotional harm suffered by the victims themselves (£47 billion). The next highest cost is for lost output relating to time taken off work and reduced productivity afterwards (£14 billion).'

what kind of visibility it has.’ Shoos draws attention to the disproportionate effect that film can have upon social perceptions of domestic abuse because what is portrayed is, by its very nature, something that is largely unobserved and generally takes place behind closed doors. Her study of film reflects the statement that SafeLives (2019b: paragraph 13) gave in its written evidence for the Domestic Abuse Bill: ‘Instead of asking “why doesn’t she leave” the Government needs to ask “why doesn’t he stop?” and then take the necessary measures to embed this principle as a practical reality.’

Shoos similarly found that popular films portrayed victims being empowered by the act of fleeing, thus emphasizing that it was the responsibility of the victim to change their identity. Given that this same emphasis is evident in the government’s COVID-19 guidance for abuse survivors, and also in the media coverage of incidents during lockdown, this is suggestive of a wider need to question the dynamics of popular culture’s engagement with domestic abuse-related law and policy. Given the disparate, multi-arena response of the justice system to domestic abuse, it is also necessary to question the impact that popular portrayals of courts may have upon individuals seeking access to justice for domestic abuse disputes. As mentioned above, a lack of measures to prevent perpetrators from cross-examining survivors in the family court has allowed the courtroom to propagate fear. This material obstacle to access to justice is potentially amplified by portrayals of court in popular culture. To take a recent example, watched widely during lockdown, the drama *Quiz*¹² drew fire from barristers who slammed it for inaccuracies such as gavel-banging and advocates wandering about the courtroom. As one advocate, Pauline Roberts, pointed out, such criticism signifies more than mere flippancy: ‘It matters,’ she stated. ‘I spend hours supporting witnesses whose only knowledge of a court room is based on what they see in TV dramas. Their biggest fear nearly always relates to barristers wandering around the court and approaching the witness in the box. TV companies need to get it right.’ (Hussain 2020)

During COVID-19 lockdown, it is likely that an unprecedented segment of the UK population will, at some point, have experienced increased tension within their home. The ONS (2020) reports that almost half of people in the UK experienced a sudden decline in happiness and an increase in anxiety in the days around lockdown during 20 to 30 March 2020. A further breakdown of data of the 16-69 age group shows that

¹² *Quiz* is a courtroom drama mini-series based upon a real case, in which Charles and Diana Ingram, along with a Tecwen Whittock, were convicted of attempting to swindle a £1-million cash prize on *Who Wants to Be A Millionaire?*.

between 3 to 13 April 2020, 50.9 per cent reported that their wellbeing had been affected, with either 28.1 per cent reporting that this was the result of a strain on relationships or, alternatively, 19.5 per cent reporting reduced wellbeing from spending too long with others in their household.¹³ For most, such emotional and psychological pressures will be transitory, as individuals, households and wider society undergo a process of adjustment. The latest ONS reports on wellbeing suggest that people are, indeed, adjusting to the new normal, a psychological process that has been likened to grieving (Berinato 2020). However, for some people, such pressure will remain. In fact, what for many is a unique experience, for others marks an extension of the pre-existing reality of daily life. As society moves towards a new normal, which places emerging technology and remote working at its centre, the collective experience of social isolation thus offers some insight into the prospects and challenges facing domestic abuse survivors and guidance on how the Domestic Abuse Bill should proceed.

In examining data on domestic abuse during COVID-19 lockdown, this paper draws attention to a significant increase in coercive control during this period. By considering this data alongside short-term government and media responses to COVID-related domestic abuse, this paper identifies an urgent need to develop safe and effective remote-access support mechanisms. Furthermore, this paper argues that, whilst refuge support provision remains indispensable, the lessons of COVID-19 lockdown reveal that remote-access support is a fundamental necessity in post-pandemic society. Developing tech for remote-access support is a prerequisite to bridging the inequality between urban and rural support access; to cultivating multi-agency cooperation; to improving whole family health and wellbeing outcomes; and, finally, it will be critical to managing the emergent crisis of tech-related domestic abuse.

References

- Avon & Somerset Police (2019) 'Rural and Isolated Locations Used as a Weapon by Domestic Abusers' *Avon & Somerset Police Forcewide News* 25 November.
- Avon & Somerset Police (2020) 'You Are Not Alone – Police Launch Domestic Abuse Campaign to Victims and Survivors to Seek Help' *Avon & Somerset Police Forcewide News* 29 April.
- Berinato, Scott (2020) 'That Discomfort You're Feeling Is Grief' *Harvard Business Review* 23 March.

¹³ The data cited can be downloaded as a [spreadsheet](#) from the ONS. The figures cited here can be found in Tables 2b and 7 available as part of the ONS (2020) 'Personal Well-being and COVID-19' update.

- Bowles, Nellie (2018) 'Thermostats, Locks and Lights: Digital Tools of Domestic Abuse' *New York Times* 23 June.
- Brewster, Thomas (2017) 'This Software Company May Be Helping People Illegally Spy On Their Spouses' *Forbes* 22 February 2017.
- Daniel, Ellen (2020) 'Domestic Abuse Bill makes Tech Abuse Illegal' *The Verdict* 4 March.
- Dent, Nick (2017) 'Covert Recordings and Coercive Behaviour—An Area Ripe for Reform?' *Kingsley Napley* 2 November.
- Family Justice Council (2020) 'Family Justice Council—12th Annual Debate: Covert Recordings in Family Law' Leeds, 3 December.
- Genn, Hazel (2019) 'When Law is Good for your Health: Mitigating the Social Determinants of Health through Access to Justice' 72(1) *Current Legal Problems* 159-202.
- Ghose, Katie (2017) 'Two Years Since the Criminalisation of Coercive Control yet Perpetrators Are yet to Feel "the Full Force of the Law"' *Women's Aid* 29 December.
- Graham-Harrison, Emma & Ors (2020) 'Lockdowns Around the World Bring Rise in Domestic Violence' *The Guardian* 28 March.
- Halliwell, Gemma & Ors (2019) 'Cry for Health: A Quantitative Evaluation of a Hospital-based Advocacy Intervention for Domestic Violence and Abuse' 19(718) *BMC Health Services Research* 1-12.
- HMICFRS (2017) 'A Progress Report on the Police Response to Domestic Abuse' November London: HMICFRS.
- HMICFRS (2019) 'The Police Response to Domestic Abuse: An Update Report' March London: HMICFRS .
- Home Affairs Select Committee (2020) 'Second Report of the Home Affairs Committee, Home Office Preparedness for Covid-19: Domestic Abuse and Risks of Harm within the Home' (HC321) 27 April.
- Home Office (2012) 'New Definition of Domestic Violence' 18 September.
- Home Office (2013) *Definition of Domestic Violence and Abuse: Guide for Local Areas*.
- Home Office (2019) 'The Economic and Social Costs of Domestic Abuse' Home Office Research Report 107.
- Hughes, Beverly (2020) 'Mayor Andy Burnham is Joined by Deputy Mayor Bev Hughes' Greater Manchester Combined Authority Weekly Mayoral COVID19 Press Conference 25 March.
- Hussain, Aishah (2020) 'Barristers Lose It over Quiz Courtroom Blunders' *Legal Cheek* 20 April.

- Hymas, Charles (2020) 'Using Technology to Spy on Ex-Partners to be Outlawed in New Domestic Abuse Laws' *The Telegraph* 2 March.
- ITV (2020) 'Domestic Abuse Killings Double and Calls to Helpline Surge by 50% during Coronavirus Lockdown' *ITV News Report* 27 April 2020.
- Kellam, Amy (2020) 'Personal Independence Payments—Research Note' 1(2) *Amicus Curiae* 287-94.
- Lenihan, Sarah Jane (2020) 'Domestic Abuse, Lockdown and the Law' *Stowe Family Law* 28 April.
- Loxton, Deborah & Ors (2017) 'Intimate Partner Violence Adversely Impacts Health over 16 Years and Across Generations: A Longitudinal Cohort Study' 12(6) *PLOS One*.
- McCurley, Chris (2019) 'Written Evidence Submitted by Chris McCurley, Solicitor and Partner in the North-East Practice of Ben Hoare Bell LLP, April 2019' (DAB0514).
- OED Online (2020) Oxford: Oxford University Press.
- ONS (2019a) 'Domestic Abuse and the Criminal Justice System, England and Wales: November 2019' 25 November.
- ONS (2019b) 'How Domestic Abuse Data Are Captured through the Criminal Justice System' 25 November.
- ONS (2020) 'Personal Well-being and COVID19' 4 May.
- Parkin, S & Ors (2019) 'Usability Analysis of Shared Device Ecosystem Security: Informing Support for Survivors of IoT-Facilitated Tech-Abuse' *Proceedings of the New Security Paradigms Workshop* (NSPW 2019) San Carlos, Costa Rica 1-15.
- Parveen, Nazia & Jamie Grierson (2020) 'Warning over Rise in UK Domestic Abuse Cases Linked to Coronavirus: Manchester Deputy Mayor says Police Beginning to Classify Incidents Connected to Virus' *The Guardian* 26 March.
- Patel, Priti (2020) 'Home Secretary's Statement on Domestic Abuse and Coronavirus (COVID-19): 11 April 2020' press conference, 11 April.
- Pico-Alfonso, Maria A & Ors (2006), 'The Impact of Physical, Psychological, and Sexual Intimate Male Partner Violence on Women's Mental Health: Depressive Symptoms, Posttraumatic Stress Disorder, State Anxiety, and Suicide' 15(5) *Journal of Women's Health* 599-611.
- Refuge (2020) '72% of Service Users Experience Abuse through Technology' 9 January.
- Rights of Women (2020) 'Letter to the Rt Hon Robert Buckland QC MP, the Lord Chancellor, RE: *JH v MF* – Special Measures in the Family Court and the Domestic Abuse Bill' 23 January.

- SafeLives (2019a) ‘Seeing the Whole Picture’ SafeLives Annual Impact Report 2018-19
- SafeLives (2019b) ‘Written Evidence for the Domestic Abuse Bill Committee’.
- SafeLives (2020) ‘Briefing for the Second Reading of the Domestic Abuse Bill—28th April 2020’.
- Shoos, Diane (2018) ‘Big Little Representations: How Hollywood Shapes our Views of Domestic Violence’ Michigan Tech 3 March.
- Smith, Karen (2020) ‘Coronavirus Doesn’t Cause Men’s Violence against Women’ Karen Ingala Smith 15 April.
- Snook, Chayn & SafeLives (2017) *Tech vs Abuse: Research Findings*.
- Sparrow, Andrew & Ors (2020) ‘Coronavirus UK Live’ *The Guardian* 17 April.
- West Midlands Police (2020) ‘Protecting Domestic Abuse Survivors During Home “Lockdown”’ 7 April.
- Women’s Aid (2019) ‘Women’s Aid Launches New Live Chat Service for Survivors of Domestic Abuse’ 30 October.
- Women’s Aid (2020a) *The Domestic Abuse Report 2020: The Annual Audit Bristol: Women’s Aid* Bristol: Women’s Aid.
- Women’s Aid (2020b) ‘Survivors Say Domestic Abuse is Escalating under Lockdown’ 28 April.
- Women’s Aid & Queen Mary University of London (2018) “What about my Right Not to Be Abused?” Domestic Abuse, Human Rights and the Family Courts’.

Legislation Cited

- Coronavirus Act 2020
- Crime and Security Act 2010
- Domestic Abuse HC Bill (2019-2021) [96]
- Family Law Act 1996
- Family Procedure Rules 2010
- Serious Crime Act 2015

Cases Cited

- JH v MF* [2020] EWHC 86 (Fam)

HOMELESS APPLICANTS WITH DISSATISFACTORY DECISIONS, APPROPRIATE DISPUTE PROCESSING AND ACCESS TO JUSTICE

PATRICIA NG¹

Mary Ward Legal Centre

Abstract

This short article examines the situation of the homeless applicant in relation to unsatisfactory decisions when attempting to secure temporary accommodation from local government in England. The issues of appropriate dispute processing, or methods of redress, and whether in practice legal and other remedies are available to applicants, should be analysed in the context of power imbalance in the applicant and local government officer relationship. Additionally, the applicant's vulnerability, which led to the request for assistance in the first place, would need to be considered. Given that applicants are more likely not to challenge unsatisfactory decisions, socio-legal tools could assist in acquiring an insight into why this might be the applicant's default position.

Key words: homelessness, appropriate dispute processing, access to justice, power imbalance, socio-legal tools

[A] INTRODUCTION

This article explores the notion of appropriate dispute processing of homeless applicants' dissatisfactory decisions when they have failed in their attempts to secure their substantive benefit within part VII of the Housing Act 1996 (hereafter the 1996 Act), as amended by the Homelessness Reduction Act 2017 (hereafter the 2017 Act), which applies to England. There is a clear two-part appeal route for homeless applicants who have been issued with a decision that they find unsatisfactory. The appeal process is triggered by the applicant requesting an internal review (1996 Act, section 202) of the negative homelessness decision. External

¹ The author is grateful to Professor Michael Palmer for his suggestions and helpful guidance in preparing this contribution. Any errors are entirely my responsibility.

review by a county court then follows, provided there is a point of law at issue (1996 Act, section 204). In addition to the statutory appeal process for scrutinizing the homelessness decision, judicial review is also available in specific circumstances for matters that fall outside of the appeal procedure—for example, in the event that interim accommodation has not been provided while enquires are still being carried out, or the applicant seeks to challenge the suitability of interim accommodation (section 188(1) of the 1996 Act; MHCLG 2018: chapter 15, paragraph 15.4). In addition, it would be possible for applicants to make formal complaints at any stage of the application process or after. Should the applicant be dissatisfied with the final outcome of the complaint, ultimately, the applicant would be able to request that the Local Government and Social Care Ombudsman investigate the complaint.

A homeless applicant hopes to be granted the benefit of temporary accommodation assistance. However, should an applicant be issued with a negative decision, a question that needs to be addressed is whether the appeal route is appropriate and in practical terms available to failed applicants. In relation to applicants who experience problems during the enquiry stage, the issue is whether or not the judicial review and complaints system are appropriate methods of redress. And are they in practice available to unsuccessful applicants? The reasons that homeless people would need emergency housing assistance in the first place are connected to their circumstances, which involve issues of vulnerability.² For example, more than likely, the applicant will have physical as well as mental health issues at the same time as experiencing multiple legal and non-legal problems (Genn & Ors 1999; Pleasance & Ors 2006). The ‘clusters’ of legal problems experienced could interconnect with each other, such as, problems with a current or former landlord, homelessness, welfare benefits and debt. The applicant’s situation could well include causal factors to the homelessness or to the applicant becoming homeless.

So, when applicants fail in their attempts to secure their potential right to temporary housing assistance at any stage of the application process, what factors should be considered, when exploring appropriate dispute

² Vulnerability is a criterion itself within the ‘priority need’ consideration (MHCLG 2018: chapter 8, paragraph 8.3).

processing³ in the context of access to justice issues? There are at least three that should be taken into account. First, bearing in mind the situation of the relationship between the applicant and local authority, which is represented by various officers, power imbalance would be one factor. The second is the vulnerability of applicants when they experience difficulty—during the application process or after the issue of a decision—whether they seek legal advice, and, if they do, whether they are successful in seeking advice and what happens in the applicant–advisor relationship. Third, there is the nature of dispute processes available to an aggrieved or failed applicant to pursue, as well as their availability in practice.

[B] HOMELESSNESS APPLICATIONS

In terms of local authority assistance, it is possible for homeless applicants or those threatened with homelessness to seek assistance, within the 2017 Act, in relation to three areas: homelessness prevention, relief or the main homelessness duty. The sole focus of this paper, for reasons of space, is the homelessness duty, as contained in part VII of the 1996 Act, and as amended by the 2017 Act.⁴ The legislation is meant to provide a safety net for the more vulnerable among the homeless. An officer carries out an enquiry into the homelessness circumstances of an applicant. In order to make a successful application, a homeless person must be able to provide evidence, and otherwise demonstrate in relation to homelessness, eligibility for assistance⁵ and priority need.⁶

³ The ‘primary’ dispute resolution processes, such as negotiation and mediation, that can be used as an alternative to court adjudication—another primary dispute resolution process—are still referred to as ‘alternative dispute resolution’ processes. ‘Appropriate’ dispute resolution of legal disputes usually refers to the ‘best fit’ to the matter in dispute considered by the parties involved. See, for example, Wolfe (2001); Menkel-Meadow (2014). See also Merry and Silbey (1984). For discussion of primary forms of dispute process, see Menkel-Meadow (2000: 29); Palmer & Roberts (2020).

I prefer to use the term ‘dispute processing’ to reflect that not all legal disputes can be resolved, although it is possible to process legal disputes by using one or a range of methods. See also Menkel-Meadow (2000: 3 and 36) and her use of the term ‘dispute handling’.

⁴ The 2017 Act only affects applicants who applied as homeless after April 2018.

⁵ In relation to homeless applications made on or after 3 April 2018, provided the applicant meets the first two conditions, the authority might offer emergency housing. Known as the relief duty, the authority has an overlapping duty to assess the applicant’s needs and produce a personalized housing plan at the same time (section 189B (1) of the 1996 Act as inserted by section 5(2) of the Homelessness Reduction Act 2017, see also MHCLG 2018: chapter 13), as well as potentially a main housing duty. The relief duty does not guarantee the provision of accommodation by the authority.

⁶ At this stage, provided the applicant has supplied the authority with the lower threshold of evidence, and the authority has reason to believe that the applicant may be homeless, eligible for assistance and in priority need, an interim duty to provide accommodation would have been triggered. See section 188 of the Housing Act 1996; MHCLG (2018: chapter 15).

Furthermore, the applicant should not have caused him or herself to become homeless intentionally, and, in general, must have a local connection with the authority area where the application has been made.⁷ Commonly known as ‘obstacles’, an applicant needs to ‘jump’ successfully over each of the obstacles, which represents the circumstances which led to the applicant’s homelessness or impending homelessness, in order to achieve a positive outcome of a homeless application. Provided homeless applicants meet certain conditions,⁸ interim accommodation should be offered towards the beginning of the enquiry process. After enquiries have been completed, a decision has been made, and a written decision issued, applicants with positive decisions should be offered temporary accommodation until the main housing duty comes to an end.⁹

Applying for homelessness assistance from the local government appears to be a straightforward administrative process. However, this process involves a local authority officer who will be exercising discretion when making decisions in the course of carrying out an enquiry into the applicant’s homelessness circumstances. Many applicants will experience the enquiry as an investigation, largely because of the nature of questions asked and the supporting evidence sought. A socio-legal perspective offers insights into whether homeless applicants take any action to challenge negative decisions (Cowan & Ors 2003; Law Commission 2006a, 2006b).

[C] THE NATURE OF THE DISPUTE AND AVAILABLE DISPUTE PROCESSES

Thus, a significant question connected to the applicant’s circumstances from a socio-legal viewpoint is: when an applicant experiences problems

⁷ Within Part VII of the Housing Act 1996, see sections 189B and 193(2); see also MHCLG (2018: chapter 13). Before the main housing duty is triggered, the authority must be satisfied—a higher threshold—that the applicant is homeless, eligible for assistance, in priority need, not have made him or herself intentionally homeless, and in general to have a local connection (see MHCLG 2018: chapter 10 for exceptions). The main housing duty is a duty on the authority to provide temporary accommodation until the duty ends—see section 193 of the 1996 Act for the six conditions that would bring the main housing duty to an end.

⁸ Note 6 above.

⁹ See MHCLG (2018: chapters 15-17 (accommodation duties); 18 (applications, decisions and notifications), see also above note 7 for an explanation of the main housing duty and when it comes to an end.

¹⁰ Meaning an increase in the formal written law, for example, in relation to the rights in social welfare law such as entitlements in housing and welfare benefits. In the context of this essay, I mean the reframing of problems that applicants experience in relation to their homeless applications, within the legal framework regulating homelessness law: the 1996 Act as amended by the Homelessness Reduction Act 2017. See also Pleasance & Ors (2017), and more generally, Habermas (1987: 357); Bourdieu (1987); Flood and Caiger (1993).

in any part of the homelessness application, do the applicant's problems arise as a result of the process of 'juridification'? The idea that problems become juridified (Cowan & Ors 2003)¹⁰ enables us to understand whether and when problems are transformed into a dispute. Socio-legal analytical tools assist in understanding, for example, whether an applicant has 'legal consciousness' (Cowan 2004) that could be a vital factor in determining whether an applicant seeks legal advice and assistance, as well as representation (see also Silbey 2005). Also, what happens in the advisor-applicant relationship when the applicant seeks legal advice. An internal review could remain a simple administrative process if the applicant does not seek legal advice and does not have representation (Cowan & Ors 2003). However, if the applicant seeks legal advice following a negative decision (1996 Act: section 184), the request of a section 202 review may become a legal dispute through a transformation process—that is, the new understanding that the applicant acquires through adopting a more legal perspective.

The 'transformation' process itself is a useful tool in assisting us to understand the part that different parties play in transforming problems into disputes (Cicourel 1976; Felstiner & Ors 1980-1981). The Law Commission (2006b: 10-15) in its *Further Analysis* paper, dealing with issues of proportionate dispute resolution in relation to housing disputes, discusses the transformation of problems into disputes within the context of an 'accountability space'.¹¹

As to whether the statutory appeal procedure might be the most appropriate method to process disputes about negative homelessness decisions, it would appear to be so. Although useful comments by Seneviratne were made before the appeal route formally became available to homeless applicants, they remain useful: the statutory appeal route involves institutions that are too adversarial, and therefore a more conciliatory process might well be more appropriate (Seneviratne 1990: 127). In terms of which procedural forum would be the most appropriate for the appeal to be considered, over time various suggestions have been made. In relation to the section 202 review, a suggestion was made of the possibility of the then Local Government Ombudsman carrying out the internal review, with its more investigative or inquisitorial approach (Ng

¹¹ In its 2006b *Further Analysis* paper, the Law Commission discusses the 'accountability space' as a 'polyvocal grievance-handling system', citing the example of local authorities having a range of mechanisms to deal with grievances, such as audit, internal review, quality control mechanisms, which includes the complaints system.

2009).¹² While JUSTICE (2020) suggests that a new Housing Disputes Service (HDS) should carry out the internal review. With the intention of establishing a new culture of collaborative non-adversarial working, the HDS aims to investigate and ‘to find solutions and remedies which most closely match the justice of the issue and the parties’ aspirations for the resolution of the dispute’ (JUSTICE 2020: 17). In a sense, the HDS’s functions would be similar to a ‘multi-door courthouse’¹³ except the HDS’s focus would be on informal dispute resolution processes only, using negotiation and other forms of alternative dispute resolution (JUSTICE 2020: 18-19). The HDS ‘would not have hearings’. JUSTICE envisages that there would be a right to appeal decisions to the appellate courts and tribunals. The Law Commission (2006b) had considered that the section 204 external review could be carried out by the Upper Tribunal.

In terms of potential problems experienced by applicants where an officer’s decisions create a grievance or series of grievances, it would be useful to consider which problems would be more suited to the complaints process and which problems would be better processed by way of judicial review. Certainly, problems that are clearly administrative in nature could be processed by a management response, which connects to quality control, with the aim of improving organizational practices (Law Commission 2006b: part 8). Where officers’ decisions exceed the legal limits of their power and questions are raised in terms of the legality of a decision, then judicial review would be the solution.¹⁴ Yet, what do administrative problems encompass?¹⁵ At what point does an administrative problem that an applicant experiences during the homeless application stage become a legal problem and therefore a dispute to be processed by judicial review rather than through an administrative management response? Within the legal system of England and Wales,

¹² It is possible for local authorities to contract out its homelessness functions and statutory obligations (MHCLG 2018: chapter 5).

¹³ The idea of a multi-door courthouse, as envisaged by Frank Sander, would screen any incoming cases, triage disputes and match them to a range of dispute resolution processes. Each ‘door’ represents a dispute process, which includes litigation. See Sander (1976).

¹⁴ Elliot and Varuhas (2017). However, see note 16 below and the Pre-Action Protocol for Judicial Review.

¹⁵ Although not defined in legislation, in terms of ‘service failure’ maladministration includes: delay; poor record-keeping; failure to take action; failure to follow procedures or law; poor communication; giving out misleading information; and failure to investigate. See Local Government and Social Care Ombudsman, ‘[What Can I Complain About?](#)’.

the choice of judicial review for an unsatisfied homeless applicant is rather restricted, since ‘litigation should be a last resort’.¹⁶

Furthermore, appropriate dispute processing is inextricably linked to access to justice issues for homeless applicants, with funding for legal services being a significant matter. Since the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (hereafter LASPOA 2012), fewer people have been eligible for legal aid (Hynes 2012). Since 2012, there have been a decreasing number of county courts (Caird and Priddy 2018), and decreased government funding has caused a drying-up of the availability of legal advice, creating ‘advice deserts’ (Law Society 2019). Strategies have been suggested to address the need for legal advice and the paucity of services (Low Commission 2014, 2015). Moreover, following the recent review of LASPOA 2012, the government has developed a Legal Action Plan (Ministry of Justice 2019).

[D] CONCLUSION

To conclude, the homeless application process involves a local government officer exercising power while performing a duty to carry out enquiries in relation to the homelessness situation of a person, along with his or her household. The applicant—more than likely vulnerable—is attempting to seek assistance for a basic human need. The officer could be perceived as either the barrier or gate through which an applicant would or would not be assisted. When an applicant experiences problems in relation to any aspect of the homeless application process, an indicator of appropriate dispute processing would include a mechanism or series of mechanisms that would effectively address any power imbalance present in the applicant–bureaucrat relationship. Any indicator would need to take into account a landscape of ‘legal advice deserts’ and the paucity of legal advice, assistance and representation. In any event, a consideration of access to justice issues may not necessarily equalize the power imbalance between an applicant and local government officer—for example, an applicant might have managed to secure legal representation, yet the applicant’s representative might not have fully grasped the applicant’s circumstances.¹⁷ To ensure that steps are taken to address any power

¹⁶ [Pre-Action Protocol for Judicial Review](#), paragraph 9. Parties are expected to consider other ADR processes, including the complaints system, and provide evidence that ADR has been considered. In the event that the Pre-Action Protocol has not been followed in relation to ADR, then, in considering and awarding costs, the court must factor in the decision not to pursue ADR.

¹⁷ In this situation, potential issues, which would need to be explored, include: the lawyer’s workload; and the lawyer working with clients within the limitations of the legal aid framework – there could be any number of reasons why a representative might not have fully grasped the client’s circumstances.

imbalance in a disputing relationship, the dispute processes would also need to be examined as part of the enquiry to assess whether the processes might be available in practice and would be appropriate. In England and Wales, given that litigation should only be used as a last resort, it would be useful to ask, ‘when, how, and under what circumstances should cases be settled?’ (Menkel-Meadow 1995: 2665, italics in original). As Menkel-Meadow puts it: ‘We must learn to analyse and understand what conflicts and disputes are about, in their full contextual complexity, before we can choose the appropriate behavioural response.’ (2004: 18)

The situation of the homeless applicant highlights that in any area of law a thorough examination is required in terms of the dispute itself, before assessing which dispute process or series of dispute processes would be the most appropriate. Moreover, any dispute processes applied should enhance access to justice, and not suppress the problems, particularly in relation to public law cases. This may mean that a mixture of different processes or methods might be involved in ‘handling’ disputes.¹⁸ Adjudicators, for example, could need to adopt a more inquisitorial style where litigants in person are conducting their own case in court. Although it has been pointed out that judges potentially lose impartiality, and the shifting of a judge’s responsibility impacts on their independence when in the role of an inquisitor (Genn 2017).

References

- Bourdieu, Pierre (1987) ‘The Force of Law: Towards a Sociology of the Juridical’ 38 *Hastings Law Journal* 814-853.
- Caird, Jack Simpson & Sarah Priddy (2018) [Court Closures and Reform](#) Number CDP_0081, 26 March.
- Cicourel, Aaron V (1976) *The Social Organization of Juvenile Justice* London: Heinemann.
- Cowan, Dave (2004) ‘Legal Consciousness: Some Observations’ 67(6) *Modern Law Review* 928-958.
- Cowan, David S & Ors (2003) *The Appeal of Internal Review: Law, Administrative Justice and the (Non-)emergence of Disputes* Oxford and Portland OR: Hart.
- Elliot, Mark & Jason N E Varuhas (2017) *Administrative Law. Texts and Materials* Oxford: Oxford University Press.

¹⁸ See note 3 above.

- Felstiner, William L F, Richard L Abel and Austin Sarat (1980-1981) 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...' 15 (3-4) *Law and Society Review* 631-654.
- Flood, John A & Andrew Caiger (1993) 'Lawyers and Arbitration: The Juridification of Construction Disputes' 56(3) *Modern Law Review* 412-440.
- Genn, Hazel (2017) 'Birkenhead Lecture 2017: Online Courts and the Future of Justice' Gray's Inn, 16 October.
- Genn, Hazel & Ors (1999) *Paths to Justice: What People Do and Think about Going to Law* Oxford, Portland OR: Hart.
- Habermas, Jurgen (1987) *The Theory of Communicative Action: Volume 2 Life World and System—A Critique of Functionalist Reason* Boston MA: Beacon Press.
- Hynes, Steve (2012) *Austerity Justice* London: Legal Action Group.
- JUSTICE (2020) *Solving Housing Disputes: A Report by JUSTICE*.
- Law Commission (2006a) *Housing: Proportionate Dispute Resolution: Issues Paper*.
- Law Commission (2006b) *Housing: Proportionate Dispute Resolution: Further Analysis*.
- Law Society (2019) *Parliamentary Briefing: Housing Legal Aid Deserts*.
- Low Commission (2014) *Tackling the Advice Deficit: A Strategy for Access to Advice and Legal Support on Social Welfare Law in England and Wales*.
- Low Commission (2015) *Getting it Right in Social Welfare Law: The Low Commission Follow-Up Report*.
- Menkel-Meadow, Carrie (1995) 'Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)' 83 *Georgetown Law Journal* 2663-2696.
- Menkel-Meadow, Carrie (2000) 'Mothers and Fathers of Invention: The Intellectual Founders of ADR' 16(1) *Ohio State Journal on Dispute Resolution* 1-37.
- Menkel-Meadow, Carrie (2004) 'From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context' 54(1) *Journal of Legal Education* 7-29.
- Menkel-Meadow, Carrie (2014) 'Chapter 50 Alternative/Appropriate Dispute Resolution in Context. Formal, Informal and Semiformal Legal Processes' in Morton Deutsch, Peter T Coleman and Eric C Marcus (eds) *The Handbook of Conflict Resolution. Theory and Practice* San Francisco: Jossey-Bass. Chapters 46-56 are available to download.

- Merry, Sally E & Susan S Silbey (1984) 'What Do Plaintiffs Want? Reexamining the Concept of Dispute' 9(2) *Justice System Journal* 151-178.
- MHCLG (Ministry of Housing, Communities and Local Government) (2018) *Homelessness Code of Guidance for Local Authorities* London: MHCLG.
- Ministry of Justice (2019) *Legal Support: The Way Ahead—An Action Plan to Deliver Better Support to People Experiencing Legal Problems*.
- Ng, Patricia (2009) *Down and Out and Denied in London: Appropriate and Inappropriate Dispute Processes for Homeless Applicants* unpublished PhD thesis, School of Law, SOAS, University of London.
- Palmer, Michael & Simon Roberts (2020) *Dispute Processes: ADR and the Primary Forms of Decision-Making* 3rd edn Cambridge & New York: Cambridge University Press.
- Pleasance, Pasco with Nigel Balmer and Alexy Buck (2006) *Causes of Action: Civil Law and Social Justice* (2nd edn).
- Pleasance, Pascoe, Nigel Balmer and Catrina Denvir (2017) 'Wrong About Rights: Public Knowledge of Key Areas of Consumer, Housing, Employment Law in England and Wales' 80(5) *Modern Law Review* 836-859.
- Sander, Frank E A (1976) 'Varieties of Dispute Resolution Processes' 70(76) *Federal Rules Decisions* 111-137.
- Seneviratne, Winifred Mary (1990) *Complaints Procedures in Local Government* unpublished PhD thesis, Centre for Socio-Legal Studies, Faculty of Law, University of Sheffield.
- Silbey, Susan S (2005) 'After Legal Consciousness' 1 *Annual Review of Law and Social Science* 323-368.
- Wolfe, Jeffrey Scott (2001) 'Across the Ripple of Time: The Future of Alternative (Or Is It Appropriate) Dispute Resolution' 36(4) *Tulsa Law Review* 785-812.

Legislation Cited

Homelessness Reduction Act 2017

Housing Act 1996

Legal Aid, Sentencing and Punishment of Offenders Act 2012

JUDICIAL EXPERIMENTS IN CASEFLOW MANAGEMENT 1920-1970

MICHAEL REYNOLDS

London School of Economics, University of London¹

Abstract

This article explores the evolution of a subordinate judicial office of the Official Referee which was the revolutionary creation of the Judicature Commission of 1872. What is described here is the innovation and evolution of a rudimentary form of case management more than 70 years before its formal introduction in the English courts under the Civil Procedure Rules. This article considers evidence of that evolution as well as the innovations and experiments of judges ahead of their time: Sir Francis Newbolt and his successor Official Referees. It argues that the consensual and business-like approach adopted by Newbolt and others facilitated earlier settlement by means of judicial encouragement during discussions in chambers at an early interlocutory stage. It considers the extent to which Newbolt's Scheme focused on what Marc Galanter has described as 'quality of outcome' and attempts to place this study in the context of the approach taken by Galanter. Such study would not be complete without reference to the work of the late Simon Roberts, which saw civil courts as being transformed into instruments of structured negotiation.

Keywords: Official Referee, judges, micro-caseflow management, Newbolt's Scheme, procedure, backlog, rules

[A] INTRODUCTION

In an earlier article published in *Amicus Curiae* (Reynolds 2020), I examined the extent to which the referees adopted the old Chancery practice of a reference to the master or chief clerk, or to an arbitrator under the Common Law Procedure Act 1854, a substitute for a lay jury.

¹ The author would especially like to thank Professor Michael Palmer and Dr Amy Kellam for their kind comments on an earlier draft of this article.

This Chancery practice was invented to overcome the deficiency in the Common Law Procedure Act 1854 of non-compulsory referral and needless expense of referral back to the court to correct erroneous awards of commercial arbitrators. The essential causes that facilitated a rudimentary form of caseflow management were the outmoded trial system, the divergent remedies in different courts of separate jurisdiction, and the backlog of cases, some of which involved complex factual matters of a scientific or technical nature. The nature of such cases, born of the industrial revolution, took precious time which busy High Court judges suffering increasing workloads did not have. Even when the referees were in place, time was not on their side, and it became necessary for them to adopt a more flexible and informal process in some areas. Investigating that era and those methods is difficult, but even with the remnants of surviving records it is possible to present some evidence of a revolutionary process.²

In order to meet this challenge, a leading referee, Sir Francis Newbolt,³ invented what I might term as his ‘Scheme’. Some elements of it may be identified from his article *Expedition and Economy in Litigation* (Newbolt 1923) and from his reports to the Lord Chancellor. The purpose of this paper is to explore the nature and significance of that Scheme. It survived Newbolt and evolved into the practice and procedures of the Technology and Construction Court today.

In this Scheme there are important elements I recognize as an inception of micro-caseflow management. These elements may be identified in summary as:

- a) special procedures in chambers enabling informal referee resolution and early settlement;
- b) judicial encouragement at various stages of the process to effect settlement;
- c) the use of a single joint expert/court expert;

² As with all historiography, existing evidence of times past is not so comprehensive that we can be certain that all cases were recorded or catalogued, or that those recorded represented all the cases tried. The Lord Chancellor’s Office only retained samples of Minute Books and Notebooks for reasons of space and cost.

³ KC 1914; Hon RA; JP, MA, FCS, ARE Hon Professor of Law in the Royal Academy. Publications included: *Sale of Goods Act 1893*; *Summary Procedure in the High Court and Out of Court*. Official Referee 1920-1936. He was educated at Clifton, and later at Balliol College, Oxford, where he read natural science (chemistry) obtaining honours in 1887. Newbolt read law with Sir Thomas Wilkes Chitty, called to the Bar by the Inner Temple in 1890 and joined the Western Circuit. He remained in Wilkes Chitty’s Chambers for 10 years but did not enjoy an extensive practice. Newbolt took Silk in 1914. While at the Bar he continued his interest in science and gave over 1,000 experimental science lectures in board schools. He became a referee after Sir Henry Verrey’s resignation in 1920. He was the author of a number of books in law, art and literature.

- d) the implementation of a proportionate approach to costs so that the costs of the case should bear some reasonable relationship to the value of the item in dispute;
- e) the innovation of special forms of submission such as a Referees' Schedule;
- f) the formulation of preliminary issues or questions for the court; and
- g) the facilitation of a more convenient and economic place for the hearing and judicial attendances to view works on site.

The primary reason why Newbolt exercised such innovative powers, usually with the consent of both parties, was principally to achieve expedition and economy in litigation. That was his objective and that is what he confirmed to Lord Birkenhead, and what is described in his article in the *Law Quarterly Review* (Newbolt 1923: 427-435). There is a certain symmetry between Newbolt's and the Judicature Commissioners⁴ objectives because Newbolt understood their idea of ways to promote the more effective and efficient conduct of court business at micromanagement level. The Commissioners' objective was to reconcile the rival systems of Common Law and Equity and to resolve technically complex cases where a jury of laymen had difficulty. It was 'to provide a system of tribunals adapted to the trial of all classes of cases that were *capable of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried*' (Parliamentary Papers 1869: 13). At the core of this was 'the more speedy economical and satisfactory despatch of the judicial business transacted by the courts' (Newbolt 1923: 435).

In addition to the seven elements of caseflow management identified above from Newbolt's work, he was also concerned that the case be referred as soon as possible. The earlier the case was considered for directions by the referee the better (Newbolt 1923: 435-437). It was also his view that the trial judge should take his own summonses for directions, as was the referees' practice. It was that unique practice that

⁴ In September 1867 Queen Victoria appointed the Judicature Commissioners. They included: Lord Justice Cairns of the Court of Appeal in Chancery; Sir James Wilde, a judge of the Court of Probate, Divorce and Matrimonial Causes; Sir William Page Wood, a Vice-Chancellor; Sir Colin Blackburn, a judge of the Court of Queen's Bench; Sir Montague Smith, a judge of the Court of Common Pleas; Sir John Karlake, Attorney General; William Jones, Vice Chancellor of the County Palatine of Lancaster; Henry Rothey, Registrar of the High Court of Admiralty; Sir William Phillimore, a judge of the High Court of Admiralty; Sir Robert Collier and Sir John Duke Coleridge as Solicitor General appointed as Commissioners on 25 January 1869. They were appointed to investigate the operation of the constitution of the courts in England and Wales; the separation and division of jurisdictions between the various courts at macro level; and the distribution and transaction of judicial business of the courts, and courts in chambers at micro level. Additionally, the Commission considered whether there were sufficient judges and the position of juries.

gave Newbolt his chance to exploit his scheme of efficiency and economy. It was at the first directions hearing in chambers where 'mere discussions across a table which costs nothing in comparison with the costs per minute in court' (Newbolt 1923: 435) were held. These would have been held shortly after the referral and used by him to understand the issues and promote either an effective process or encourage settlement. How far the latter went is not certain, but a quantitative analysis indicates some marginal effect (Reynolds: 2008). Newbolt also suggested that a second summons be taken before trial, a practice followed by his successor Sir Thomas Eastham. By these means the court exerted more control over the process.

Newbolt's use of experts was of particular advantage to litigants, resulting in cost and time savings. Newbolt wrote that this saved litigants four-fifths of the time normally spent on such matters (Newbolt 1923: 427).

Just as the invention of the referee was conceived as a means to relieve the pressure on the High Court judges, Newbolt's Scheme was necessary due to the overload and backlog of the referees' lists when Newbolt became a referee. Coinciding with Newbolt's appointment was the acquisition of the non-jury list which trebled references in the three years 1919-1921. In his letter dated July 1920 to Lord Birkenhead he reported that this list 'will occupy my Court for a year'. Two cases in that list took 18 months to reach trial. It is clear that what troubled him is probably what also troubled Lord Bowen in writing anonymously to *The Times* in 1892: 'how much is it likely to cost and how soon at the latest is the thing likely to be over?' (*The Times* 10 August 1892: 13).

Newbolt's resourcefulness linked cost and time in the utilization and subordination of his office for the benefit of the parties. He did this by means of his informal discussions in chambers which facilitated a greater understanding between the parties at an early stage of the proceedings, which in many cases encouraged settlement, saving costs and time to the participants.

What emerges from a study of the Official Referees' court in the period 1919-1970 (Reynolds 2008) is the view that the referees in many cases succeeded in trying cases 'within a few weeks after the order of reference'. (Eastham 12 July 1954). That would mean an efficient completion rate for those times and harmonization with the objectives of Newbolt's Scheme. Eastham made that comment in a memorandum to the Lord Chancellor dated 13 July 1954. In that year 302 cases or 46 per cent of the 657 referrals were tried: there was a backlog of 225 cases, with 130 others being disposed by settlement or otherwise. The percentage of

disposals (otherwise than by trial) that year was down at 15 per cent below the post-war average percentage of 24 per cent (Reynolds 2008).

From the evidence obtained by means of a review of Judicial Statistics, Minute Books of the Court and the Judges' Notebooks that have survived it has been possible to approximate the time that may have been taken in cases during the research period 1919-1970.

From Table T1 there appears to be a significant average time-saving in those cases where evidence of micro-caseflow management or elements of Newbolt's Scheme were identified. Newbolt himself attested to the fact that his use of experts could cut trial times by up to 80 per cent. Thus, in a number of cases, I conclude that he achieved an overall saving as he recorded. We do not know in how many cases or how much time and cost was saved because the court records for the period 1919-1938 do not exist and appear to have been destroyed by enemy action in World War II. I have his reports to the Lord Chancellor and other contemporaneous evidence, but it is patchy. What I analyse, however, are the cases coming into the list and the cases settled or tried during that time. When statistical analysis was undertaken on this period it was found that the settlement disposal rate, particularly in the context of what Newbolt describes as his 'discussions in chambers', showed an increase of 21 per

Table T1

1919-1938 Average time per case according to Judicial Statistics	
Average time taken per case	Average time taken per case using caseflow management
2¼ days [Taking an average referee day at 3 hours 20 minutes] 7 hrs 30 mins	No record But Newbolt says use of court expert reduced time by 80%.

Sources: Judicial Statistics 1919-1938

Table T2

1947-1970 Average time per case according to Judicial Statistics	
Average time taken per case	Average time taken per case using caseflow management
8 hrs 40 mins	No record 66 cases recorded in Notebooks examined

Sources: Judicial Statistics 1947-1970

Table T3

1959-1962		1965-1967	
Average time taken per case	Average time taken per case using caseflow management	Average time taken per case	Average time taken per case using caseflow management
7 hrs 56 mins 83 cases in Minute Books 4 & 5 and J 114/41	4hrs 11 mins 17 cases identified in Minute Books 4 & 5 examined	15hrs.5 mins 43 cases identified in Minute Books 4 & 5	3hrs 45 mins 11 cases in J 116/2, 3, 4

Sources: Minute Books and Judges' Notebooks as listed in the Appendix

cent between 1919 and 1929 and in 1931. In the latter part of the period 1932-1936 there was found to be a 9 per cent drop in settlement rates.

I can be a little more certain, however, in the two post-war periods, 1959-1962 and 1965-1967 for which more direct evidence from the judges and their clerks was available. If I take the evidence of the Minute Books and Judges' Notebooks which record the time spent in interlocutory applications and hearings, I found that in the period 1959-1962 the average time an official referee spent on the proceedings was 7 hours and 56 minutes (Table T3). Where elements of Newbolt's Scheme were identified in the record of the proceedings, the average time taken was 4 hours and 11 minutes. In other words, a saving in time of 3 hours 45 minutes. This analysis was compiled from National Archive files: J 116/1 and 2, Carter: Minute Book Nos 4 (1959-1962) and 5 (1962-1965); Notebook (1959-63); J 114/41 Notebook (1959-63) and J 114/44 Notebook (1962-1965)

In respect of the period 1965-1967, the records for time spent on the proceedings on average was 15 hours and 5 minutes but, where elements of the Scheme were identified, the average time spent was 3 hours 45 minutes: a time-saving of 11 hours and 20 minutes. This analysis was compiled from National Archive files: J 116/2 Minute Book No 5 (January-March 1965); J 116/3 Minute Book No 6 Court "C" (March 1965-October 1967); Minute Book No 7 Court "C" (January-October 1967); J 116/4 (January-December 1967): Notebooks: J 114/47 (1965-1966); J 114/49 (1963-1966); J 114/50; (1966-1968); J 114/51 (1967); J 114/52 (1967-1968)

Table T4 Increase in caseload

Period	No of years	Referral	Average referrals per year	Trials, disposals, withdrawals, settlements, transfers	Average disposals per year	Backlog	Average backlog per year
1919-1938	20	7,683	384	5,255	263	2,427	121
1947-1970	24	13,932	581	8,370	349	5,489	229

Sources: *Civil Judicial Statistics 1919-1937 and 1947-1970*

Whilst these computations demonstrate a reduction in time spent by the court on cases, there was an increasing backlog indicating that, despite the efforts of the judges and lawyers, such a scheme was unable to cope with the rising trend of a backlog. This may be demonstrated by Table T4.

According to Judicial Statistics presented in Table T4, the average referrals in the pre-war period were 384 per year with an average backlog of 121 cases per year or 35 per cent of the annual average number of referrals. What this table shows is an 81 per cent increase in referrals after the war from 7,683 to 13,932. It also shows a 59 per cent increase in the rate of the disposal of cases in that period from 5,255 to 8,370. Whilst the latter figure would support a theory of efficient micro-caseload management, the increase in case backlog after the war from 2,427 to 5,489 amounting to an increase of 126 per cent would militate against such a theory. It also demonstrates that inter-referee transfers were not as efficient as might have been expected.⁵

Most of the work of the referees concerned matters of account and building cases, although factually complex, they did not take up as much time as other cases in the 1959-1962 period, but in the 1965-1967 period, after more complex RIBA standard form construction contracts had been introduced, the average time spent on building cases increased on average 10 to 13 hours beyond the time spent on other types of case.

Apart from these analyses the *Final Report of the Committee on Supreme Court Practice and Procedure* (Parliamentary Papers 1953)⁶ acknowledged the 'more expeditious form of trial before an Official Referee'. Whilst the

⁵ Made possible by RSC (No 3) 1949.

⁶ This had been appointed on 22 April 1947 under the chairmanship of Sir Raymond Evershed, subsequently Master of the Rolls, to enquire into the practice and procedure of the Supreme Court and to consider what reforms should be introduced for the purpose of reducing the cost of litigation and securing greater efficiency and expedition in the despatch of business.

comment was made in the context of a possible right of appeal on matters of fact, the acknowledgment of their reputation is sustained.

[B] PROMOTING SETTLEMENT AND SAVING COSTS

It may be said that judges decide cases; they do not settle disputes. The judge cannot enter the arena of adversarial contest between the parties. Newbolt's scheme was primarily concerned with settling cases early to save time and costs but also to lessen the case load. Thus, the extent to which settlement was promoted and succeeded is a true test of Newbolt's scheme. Whilst Lord Birkenhead, did not consider this matter to be the function of the trial judge, Newbolt thought it was his duty to compromise the case so far as the parties allowed him to do so. He did not appear to have any reservation about that. It was easier for him, a subordinate judge, to effect settlement by business-like discussions in chambers than it was for a High Court judge. This could be facilitated by the referees who could adopt a more informal and flexible approach at directions hearings. Birkenhead's unease about settlement discussions goes to the heart of a dilemma here: on the one hand, the referees wanted to have a status akin to High Court judges which Newbolt felt they were 'all but in name'. On the other hand, Newbolt wanted to dispense justice informally because this was the only way he could expedite his list. Newbolt's approach might be reconciled to the Judicature Commissioners' objective of a process being 'capable of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried'. Birkenhead thought that Newbolt should have special regard to 'the interests and the pockets of the litigants', and he also felt some 'uneasiness' in that there were dangers in judges 'exerting any undue pressure towards a settlement'. On the other hand, he was alive to 'the waste of public time'. Birkenhead could not sanction an overt encouragement of settlement because of his unease in the light of his own experience in sitting as a judge and anxiety over 'undue pressure' from the bench. On the other hand, Birkenhead and the Permanent Secretary, Claude Schuster, cautiously supported Newbolt's resourcefulness. It is fortunate that Newbolt's early experimentation in this field coincided with Birkenhead's tenure as Lord Chancellor and that Birkenhead did not discourage Newbolt in his reports, his experimentation, or his Scheme.

The genesis of Newbolt's Scheme may be inferred from the *First Report* (Parliamentary Papers 1869: 13) where the Commissioners were charged with establishing tribunals that were: 'capable of adjusting the rights of

the litigant parties in the manner most suitable to the nature of the questions to be tried'. The referees carried out the mandate of their tribunal by adjusting the procedural norms to suit the parties and the case, dealing with the matter in a more business-like fashion. The referees were the substitute for expensive arbitral references which often entailed further references back to the High Court. They were also a substitute for juries that had difficulty with complex factual cases of a scientific and technical nature. Thus, referees avoided the useless expense of such ineffective processes. The adoption of experts' opinions, and referrals to experts for determination of certain technical questions, undoubtedly facilitated a more effective process. To an extent the referees adopted some practices of surveyors such as the Scott Schedule. In the arbitral context, it was the relative informality of the interlocutory process that contributed to the referees' success in micro-caseflow management. More particularly it was the seven elements of the Scheme that may have given referees the advantage over arbitrators because the referee could issue orders as a High Court judge, particularly in relation to matters of discovery and production of documents.⁷ Under the same rule, the referee had power to enter judgment. The adjustment of 'the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried' encompassed not just the way the judge conducted the trial, but the interlocutory process that some referees undertook to achieve earlier settlement. In Newbolt's case this was at the core of his judicial philosophy which he expressed in *Expedition and Economy in Litigation* (Newbolt 1923: 427).

to use the available machinery of litigation to enable them to settle their disputes according to law without grievous waste and unnecessary delay and anxiety: and in particular to show them how this, if desired, may be accomplished.

It is debatable whether that philosophy was acceptable then or even now as the proper role of a judge in a court of law. According to Kelly (Kelly 1966: 148 and 150) and Roberts and Palmer, in Roman times the praetor actually encouraged a solution and opines that it was 'his duty to induce the parties to compose their differences' (Roberts and Palmer 2005: 16). This very much accords with Newbolt's thinking in the context of the referee's function. Newbolt had that debate with Birkenhead. In sum the conclusions that can be drawn from Birkenhead's reply to Newbolt are that settlement was of obvious importance to the lay client; there were 'dangers' in the judge doing this; and that clients sometimes desired to

⁷ RSC (1883) Order 36, rule 50.

have a fight and were sometimes more content with defeat rather than an 'inglorious peace' (Letter from Sir Claude Schuster 1922).

That view was probably the view of the senior judiciary of those days. That view does not take into account the financial disparity that often existed between parties to a building dispute which entailed disproportionate legal and expert expense. It does not take account of the financially weaker party being unable to pay either the damages or costs at the end of the case through the war of attrition that such litigation often became. I consider the examples of cases such as: *Louis Obermenter v Rodwell London & Provincial Properties Limited* (1966) where the trial lasted 19 days; and *Ancor Colour Print Laboratories Limited v J Burley & Sons Limited and F & D Hewitt Limited* (third parties) (1967) where the trial lasted 45 days. Pecuniary inequality can lead to procedural disparity, and complexity can lead to protracted proceedings and lengthy trial. In those circumstances, and in consideration of other court users, especially where in Newbolt's time the list trebled in three years, Newbolt considered intervention appropriate. Whilst a judge may have to do justice to each case on the particular facts and merits, he has to dispense justice to all cases in his list. In this latter context Birkenhead's approach would appear passé.⁸

Newbolt's letter to *The Times* dated 4 September 1930 not only confirms his views about the utility of the single joint expert, but also suggests numerous ways in which he could otherwise encourage settlement. Such methodology is further described in his article: *Expedition and Economy in Litigation* (Newbolt 1923) and in his reports to the Lord Chancellor. There are a number of cases recorded in the Notebooks which settled at the commencement of the case, the terms of which were embodied in the referee's order.

In other areas the referees differed in their interventions. For example, Walker Carter in *Cowley Concrete Limited v Alderton Construction Co Limited* (1962) issued a number of interlocutory orders. The case lasted for four years starting in 1962. Whilst there was some degree of case management, it seems it was at the behest of the parties not the judge. On the other hand, Carter's notes for *W J Barrs Limited v Thomas Foulkes* (1965) record a clear instance of effective judicial intervention regarding expert evidence. Carter was not satisfied and ordered a site visit as a result of which the counterclaim was dismissed. His initiative brought

⁸ Birkenhead was a scholar of international law amongst many other subjects and, although he did not overtly encourage Newbolt, he may have cast a blind eye for he well appreciated Newbolt's work.

about a swift resolution of the case. *Clifton Shipways Co Limited v Charles Lane* (1960) and Carter's notes dated 2 and 3 March 1960 indicate judicial participation in the final terms of settlement in chambers. Another example of effective caseflow management is *Bogen v Honneyball & Rossal Estates Limited* (1973). Whilst that case is not a good example of expedition—it took six years to resolve—a significant intervention was made by Norman Richards QC when he directed further and better particulars, the exchange of experts reports, and set a trial date. This was the catalyst for settlement.

In many cases there was no clear evidence in the record of the Scheme, but some were marginally affected by these processes depending on case type and the parties' adoption of the judge's suggestions.

The Backlog and its Effect

This study found that generally speaking the increased rate of settlement did not lower the backlog. An effective summation is provided in Table T5 and the percentage rates of disposals and settlements.

Taking the research periods before and after the war I measured the comparative disposal rates as shown in Table T5.

From this analysis we see that approximately a fifth to a third of cases were being disposed before trial. The mean average is just over 27 per cent, and these figures would tend to support a possibility that as many as a quarter of the cases may have been caseflow managed. Such conclusions appear to confirm a link between the more efficient disposal of business and micro-caseflow management. More so perhaps when I consider that the average rate of disposals to referrals before trial before the war was 27 per cent and after the war 24 per cent, the mean average being 25.5 per cent which equates to the proportion of cases caseflow-managed.

Table T5

Year	Referrals	Disposals	Percentage disposed
1919-1931	5,244	1,495	29%
1932-1938	2,439	538	23%
1948-1956	5,923	1,253	21%
1957-1970	7,624	2,707	36%

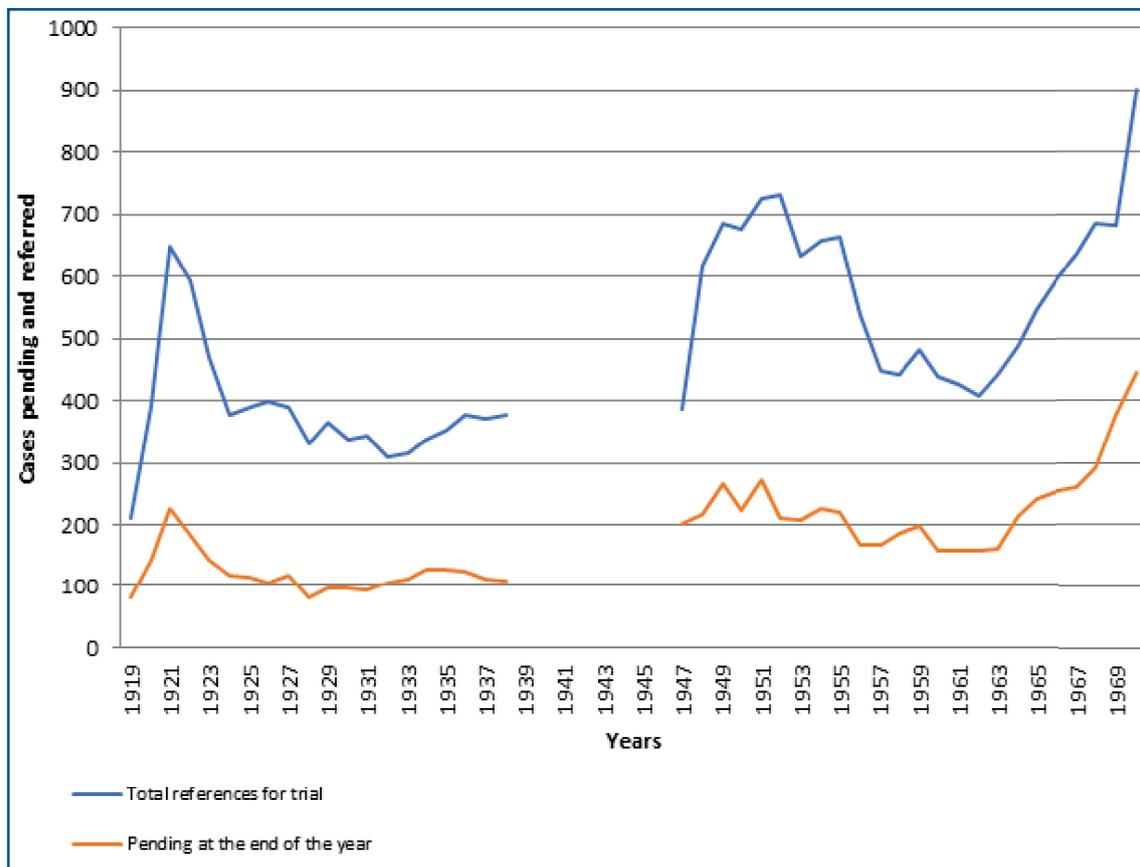
Sources: *Civil Judicial Statistics 1919-1938 and 1947-1970*

The general conclusion from my quantitative study (Reynolds 2008) was that the key to effective micro-caseflow management is early settlement or resolution giving an average disposal of 29 per cent of cases before trial, very slightly above the average and just slightly more effective. Evidence of this was found in the judges' Notebooks.

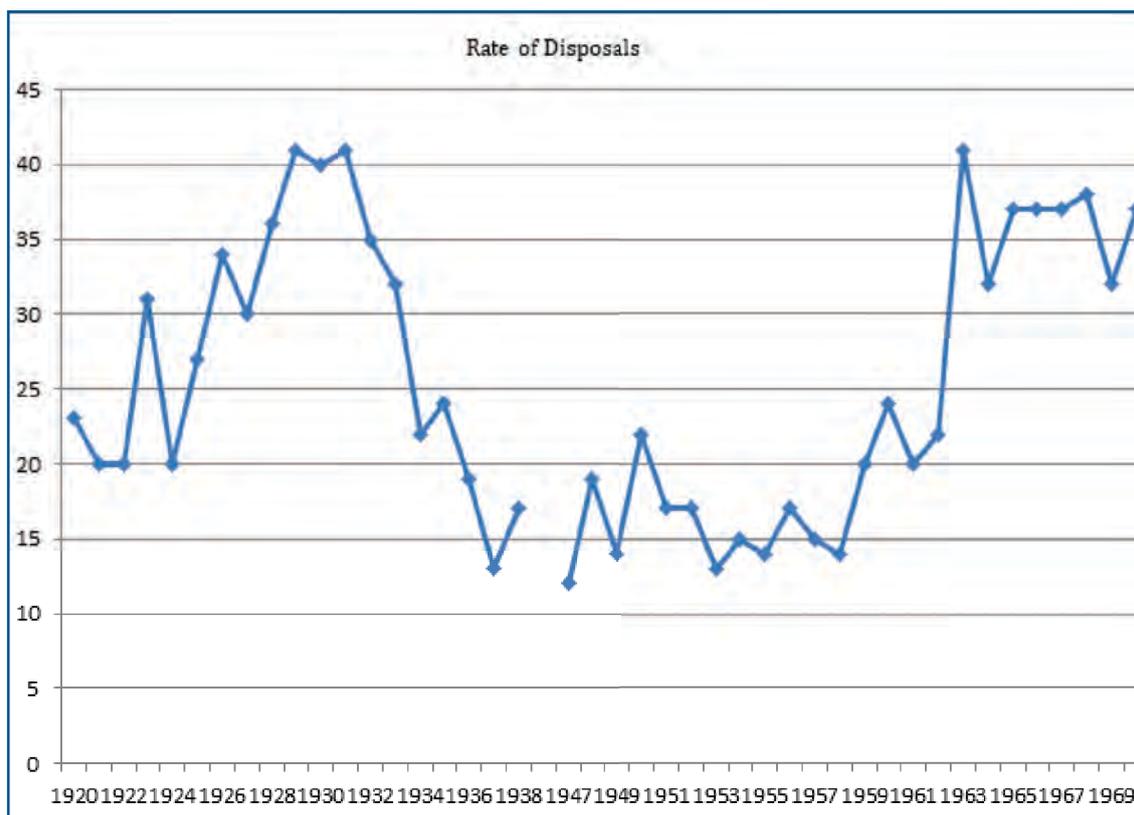
Martin French v Kingswood Hill Limited (1959) is a case in point where there is clear indication of judicial encouragement for settlement. Another example of prompting settlement is found in *Alexander Angell Limited v F C Pilbeam (Male)* (1968) where Percy Lamb's clerk issued the standard settlement enquiry to the parties. A further example was noted in the *Clifton Shipways Co Limited v Charles Lane* (1960).

As to overall comparative efficiency of Newbolt and Richard's times, Charts C 1 and 2 confirm that referrals in the Newbolt era more than doubled between 1919 and 1923, and disposals before trial more than trebled in the same period. This corresponds to an almost identical doubling increase in referrals between 1962 and 1970 with a similar trebling of disposals.

Chart C1 Caseflow management analysis



Sources: Civil Judicial Statistics Analysis: Official Referees 1919-1970

Chart C2 Disposal rates 1919-1938 and 1947-1970

Sources: *Civil Judicial Statistics 1919-1938 and 1947-1970*

More importantly the analyses of the Judicial Statistics in Chart C2 indicate support for the proposition that the referees were involved with judicial settlement. The substantial increase in disposal rates is demonstrated by Chart C2—from 20 per cent in 1921 to 41 per cent in 1931. This is significant. It is arguable that this extraordinary doubling of such rates is due to a more activist role and is consistent with the procedural measures Newbolt was advocating. On the other hand, this is followed by a decline in disposal rates, from 41 per cent in 1931 to 13 per cent in 1937, amounting to a 27 per cent decline which in those years was possibly due to a higher focus on reducing the backlog of trials and a lack of manpower during the Great Depression. There were only two referees in post in that period.

[C] DISCUSSION OF A HYPOTHESIS OF EFFICIENCY AND ECONOMY

I hypothesize that the invention and evolution of a rudimentary caseflow management and consensual interlocutory process made referees more effective. This has been the conclusion drawn from a qualitative and

quantitative examination (Reynolds 2008). The final discussion therefore centres on the implications of Newbolt's Scheme and on the supposition that this is more suitably addressed by Newbolt's idea of 'informal discussions in chambers' (Newbolt 1923: 438-439). This appears to be the major discovery of this study and unknown generally. The other extraordinary discovery is the instances of judicial intervention whether to facilitate settlement or to expedite proceedings. Judges did not overtly intervene to settle or expedite matters, but they often gave 'indications' as to the merits of submissions which could certainly dissuade litigants from pursuing the case (Roberts 2013). Apart from Birkenhead's warnings to Newbolt, Owen Fiss has argued that settlement is a negation of the judicial process (1984). Ross Cranston (2006) puts the Fiss position clearly:

In the judicial administration perspective, he would argue, the opportunity to articulate legal values gives way to an over-emphasis on efficiency and technique, which demonstrates the value of law.

In the case of the referees, 'efficiency and technique' was a necessity. The underlying argument being that referees like Newbolt had no real option other than to develop more efficient ways of dealing with long and complex cases. Contrary to Fiss's philosophy, Newbolt's way was not a means of undermining what Fiss calls the 'value of the law' (Fiss 1984). Newbolt used the law to provide an early answer and result that most probably would not have been very different from his judgment at the end of a trial. It is equally arguable that, if Newbolt had not expedited some cases, he and his colleagues could not have completed the job required. In this case it was very much a matter of practicality and doing justice to the merits of each case. Procedurally, some cases could be dealt with by preliminary issues, some by expert decision, some by a site visit, and some by 'informal discussions in chambers', and in many other cases, only by a full trial. To that extent Fiss's traditionalist view does not accord with the evidence of the referees' practice without which justice could not be done to the parties and the Judicature Commissioners' objectives of taking pressure off the High Court judges fulfilled. If the referees had followed the traditional view that judges could not intervene or encourage settlement, the delays and backlog would have been unacceptably greater.

To do justice to all the parties is the objective of caseflow management, and at micro-level it means having regard to the rights of others to be heard within a reasonable time. The referees had a contractual obligation to the Lord Chancellor to complete their lists and to some extent to the Treasury to ensure that court resources were not wasted. They were also directly accountable to the Lord Chief Justice, their Head of Division. In

that context they had an obligation to those whose cases they were to hear. Efficiency in this context was a necessity for justice to be done.

An essential element of micro-caseflow management is the allotment of sufficient time for the case. This must be considered from both a qualitative and quantitative standpoint. In the study (Reynolds 2008) numerous cases covered a wide range of subject matter; there was a considerable variance between the times allocated for certain cases. Some cases required more time than others for reasons of complexity, for example, *Ancor Colour Print Laboratories Limited v J Burley & Sons Limited and F & D Hewitt Limited (third parties)* (1967) which occupied the referee for 45 days. Others such as *Bickley v Dawson* (1966) required only 10 minutes. It is obvious that more complex and important cases require more judicial time, and case management requires that the appropriate allocation be made. This entails allocating a fair and reasonable time to the case according to its judicial requirements, having regard to its nature, complexity, importance, value of the claim, and resources of the parties. All this was encompassed in Newbolt's approach. His interventionist style did not apparently compromise the referee's neutrality or the principle of judicial independence. In most cases he operated his Scheme with the assent of the parties. If the case is not otherwise settled, the parties have a right, subject to the rules, to pursue the case to trial. However, in the context of restricted resources, such as were available to the courts in the 1860s through to the 1920s, the judiciary had to consider how justice could be apportioned economically and fairly to those who chose to litigate. In those circumstances, the referees were compelled to manage cases more effectively: it was a matter of necessity dictated by Treasury allowance.

[D] SUPPORT FOR THE HYPOTHESIS OF EFFICIENCY AND ECONOMY

The interlocutory innovations invented by the referees for the more efficient conduct of business were recognized by the Evershed Committee on Supreme Court Practice and Procedure. This Committee, which was appointed on 22 April 1947, produced four reports, three of which are relevant here (Parliamentary Papers 1949, 1951 and 1953). Its primary purpose was to consider what forms of practice and procedure should be introduced 'for the purpose of reducing the cost of litigation and securing greater efficiency and expedition in the despatch of business'. One of the recommendations of the First Report was to make it possible to transfer cases between referees (Parliamentary Papers 1949). This caused some

concern to the Lord Chancellor's Permanent Secretary, Sir George Coldstream, in 1954.⁹ Historically, this was a link with arbitration which was finally severed by operation of the rota.¹⁰ More importantly, Evershed's Final Report (Parliamentary Papers 1953) adds credence to the efficiency of Newbolt's Scheme.

In that report Evershed recommended that 'increased use should be made of the power under Order 37A R.S.C. to appoint a Court Expert'. This was Newbolt's innovation in the 1920s and an integral part of micro-caseflow management. Second, Evershed recommended that, where a plaintiff gave appropriate notice after the entry of an appearance by the defendant, the plaintiff could apply to the master for a dispensation of pleadings. In *Expedition and Economy in Litigation*, Newbolt (1923) referred to a case of dilapidations where he dispensed with pleadings. Third, Evershed said it was important that any further summons for directions should if practicable be heard by the same master. This followed the referee practice of referees taking their own summons for directions and, interestingly, Newbolt's earlier suggestion that a second summons before trial was beneficial (*The Times* 4 September 1930). Newbolt also wrote:

there is no greater check on wasteful expenditure than the arrangement by which the Trial Judge takes his own summonses (Newbolt 1923: 435).

Fourth, Evershed heralded a 'new approach' to litigation spearheaded by the robust summons for directions which would 'limit the issues to be tried and the expenses of proof' (Parliamentary Papers 1953: 324). Again, this coincides with the Newbolt philosophy of saving expense in the context of his article in *Law Quarterly Review*:

the mere discussions across a table which costs nothing in comparison with the costs per minute in Court [author's italics] discloses what issue it is exactly that the parties wish to try, and eliminates the very source of the litigants grievances (Newbolt 1923: 435-437).

Fifth, Evershed aimed to make the Summons for Directions 'a more effective instrument for reducing costs' (Parliamentary Papers 1953: 81). Again, in that article Newbolt had underlined the importance of the cost-saving utility of such summonses and hearings in chambers as opposed

⁹ Coldstream was a member of the Committee which produced the First Report and this recommendation which he later reviewed and revised in the form of RSC Order 36 rule 47(c) to prevent transfers of cases between referees without the parties' consent.

¹⁰ This was implemented by RSC Order 36A on 1 October 1957 giving effect to section 15, Administration of Justice Act 1956.

to the 'costs per minute in court'. Sixth, at paragraph 73 of the Report, Evershed recommended that it was desirable in every case that pleadings should be available to the judge before he came to court (Parliamentary Papers 1953: 326). This is certainly a practice that was adopted by the referees as is evident from the case of *Alloy & Fireboard Co Limited v F Superstein* (1965).

[E] THE ADVANTAGE OF A SUBORDINATE JUDICIAL OFFICIAL

Having established further support for the hypothesis as to the more effective referee processes, it remains, before drawing final conclusions, to consider the advantage, if any, of the subordinate judicial role. In this case it is submitted that the same strict judicial role that Fiss articulates might not apply to a subordinate judge especially where, as in this case, the judge has an important interlocutory function. The essence of this argument is Newbolt's view that 'the mere discussions across a table costs nothing in comparison with the costs per minute in Court'. This study sustains the argument for the use of expedient and economic measures by referees in the 20th century, and to some extent confirms the success of such measures, especially where the case settles before trial as a result of interlocutory intervention. It is arguable that in such cases a judicial officer has a duty in the best interests of justice to do so. Such a subordinate official has a greater flexibility when acting in a more informal chambers setting with the powers of a High Court judge. This in modern times is similar to that role that arbitrators adopt acting in a business-like setting. In acting with the consent of the parties Newbolt was in a stronger position to facilitate settlement. In many cases the parties are not in an equal bargaining position and such intervention is a useful neutral instrument to assuage fears of the more influential party. In the case of the referee he is in a stronger position to resist any such domination, more so than an arbitrator because he exercises all the powers of a High Court judge and sits daily in a national court. Thus, Newbolt may have been able to hold the balance in such chambers discussions whereas other non-judicial neutrals might not. By procedural innovation he was able to control the excesses of an adversarial process where settlement might otherwise have had a lower priority.¹¹

¹¹ Lord Woolf's *Interim Report* (Parliamentary Papers 1995), chapter 3, stated that 'questions of expense, delay, compromise and fairness may have only a low priority. The consequence is that expense is often excessive, disproportionate and unpredictable; and delay is frequently unreasonable'.

The Procedural Judge

Thus, in the procedural context it may be said that the referee or procedural judge might enjoy a unique advantage over higher-ranking judges. One of the central findings of this study is that judicial officers, exercising the ‘powers’ of an English High Court Judge, engaged in settlement discussions as long ago as the 1920s. This, so far as is known, is unprecedented.¹² This remarkable fact suggests that the role of a subordinate judge may be considered more flexibly in the context of judicial hierarchical structures and his or her place in the legal system. Although referees were abolished by the Courts Act 1970 and became circuit judges, and whilst there are now two grades of Technology and Construction Court Judge, High Court Judge and County Court Judge, there is possibly some consideration to be given to the maintenance of a subordinate grade, not to denigrate the office, but to facilitate the work of the court in the public interest where a more informal and flexible approach by a lesser judge might produce earlier resolution building upon some of the lessons from the Newbolt era and beyond. This subordinate judicial role has the advantage of combining the two key rudiments of dispute resolution in one forum: that of settlement and procedural management, in other words that radical notion that a judge can undertake a settlement role as well as a procedural one. This may well be revolutionary but then, as *The Times* proclaimed, the invention of the office itself was revolutionary.

Assessment

It is possible to consider some overall conclusions for and against the effect that the referees contributed to the legal system in the form of a rudimentary micro-caseflow management process in the 1920s and its manifestations in an interventionist, and latterly a non-interventionist, judicial settlement process.

A preliminary analysis was conducted here to assess the general effectiveness of the referee. This demonstrated that the pre-war era was marginally more efficient than the post-war era for the disposal of cases whether by trial settlement or otherwise: 49 per cent before the war and 42 per cent after it. The overall average percentage of disposals to referrals was 27 per cent before the war, as opposed to 24 per cent after it. I also found that the percentage of trials to referrals was 41 per cent before the war and 32 per cent after it.

¹² The author is not aware of any such.

The Judicature Commissioners established a Supreme Court of Judicature that had three essential macro-caseflow management forms in civil cases: trial by a single judge; trial by jury; and trial by a referee. All these modes of trial were to be 'capable of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried' (Parliamentary Papers 1869: 13). In terms of that objective, it is submitted that such objective was achieved by the referees, and it is that aim that facilitated their practice. This found expression in informal directions meetings in chambers; the more effective use of expert witnesses and experts, whether as investigators or determiners of fact or opinion, and the invention of procedural directions and special pleadings to shorten court hearings and crystallize issues. One of the important practices to emerge out of the Judicature Commissioners' objective was the referees' practice of an early summons for directions, plus the fixing of the date for trial within weeks of the reference. Another interesting and significant feature was the relationship between certain referees, the Lord Chancellors and other senior officials. Under section 83 of the Judicature Act 1873, the Lord Chancellor was responsible for their appointment, their qualifications and their tenure in office, with the concurrence of the Heads of Divisions subject to Treasury sanction. To that extent the Treasury played a very important part in the development of the court. Permanent Secretaries played a key role in the relationship and were kept well informed of developments. There were no complaints about the quality of work, but the court was under-resourced in terms of manpower and accommodation intermittently. Status and salary were perceived as a problem in not attracting the right recruits. All these somewhat negative factors would have increased pressure to expedite the list. In reading the correspondence between Newbolt and Birkenhead, there can be no doubt as to the depth of understanding and support Birkenhead gave, and how much he appreciated their work.

The Judicature Commissioners provided the office and the opportunity for the evolution of the referees' office and for caseflow management. This is explained in Newbolt's contemporaneous reports and articles as well as in Eastham's reports and memoranda and are further demonstrated from the various extracts from the judges' Notebooks after the war. Seven elements of micro-caseflow management were identified:

- ◇ early procedural evaluation by the referee in chambers;
- ◇ the efficient use of experts;
- ◇ directions resulting in proportionate costs and proportionate costs orders;

- ◇ special pleadings tailor-made for the case;
- ◇ and the more convenient sitting of the court.

The application of one or more of these practices facilitated caseload management in certain cases.

On further analysis, it was discovered that when Eastham was appointed in 1937 there were 372 referrals that year. When he retired in 1954 (the year Walker Carter took office), the court had 657 referrals. By 1970 it had 901 referrals. It was against this background that Eastham triumphed in his caseload management by confirming in a memorandum to the Lord Chancellor (Eastham 12 July 1954) that, despite a threefold increase in workload in the previous decade, referee cases were often tried within a few weeks of the order of reference. In contrast to Newbolt, it would appear that Eastham achieved some success by ordering a visit to the building site and seeing the progress of work for himself. In several instances this resulted in settlement being agreed afterwards in court. He also appears to have granted adjournments giving the parties time to reconsider their position before embarking on the trial. This reactive approach contrasts with Newbolt's active approach to caseload management. It must be considered that, just as some caseload management mechanisms resulted in quicker resolution, they were not suitable in all cases. It would appear that some measure of caseload management was used in almost a quarter of all cases between 1919 and 1970. Although there is some evidence of relative success with these procedural tools, it was also concluded: that Newbolt reduced the backlog by up to 51 per cent in the period 1919-1931; that in 1937 the referees were 88 per cent efficient in terms of trials to referrals and 84 per cent efficient in 1948 in that respect; that trial times could be halved or in Newbolt's cases reduced by as much as 80 per cent; and that in Newbolt's time the backlog was halved, and in Richard's time it trebled.

Experts were a particular tool of referee case managers like Newbolt. In the 20th century expert evidence was admitted by direction of the court or by agreement between the parties. Newbolt went further, with groundbreaking use of experts (Letter from S A Merlin 1921), thus inventing a role for the court expert on the way. He found that the expert could be instrumental in settlement in terms of estimating quantum, or deciding the issue referred for opinion or decision. Newbolt was also aware that experts could also be a wasteful expense if they were not managed. Where experts were used by him to determine facts or resolve issues it would appear that Newbolt briefed the expert with the consent of the parties. The expert answered his questions, thus saving time and costs. Other

processes used by the referees included special pleadings and schedules to reduce trial times and narrow issues.

Whilst there is evidence of chambers discussions resulting in settlement in Newbolt's time, there is little contemporaneous evidence. Subsequently though, *Clifton Shipways Co Limited v Charles Lane* (1960), *WJ Barrs v Thomas Foulkes* (1965) and *Nathan Bernard v Britz Brothers Limited and Britz Brothers Limited and Nathan Bernard and Ruth Bernard* (1962) are all examples of similar chambers proceedings.

In conclusion, the existence of a form of caseflow management can be demonstrated to the extent that in 1919-1938 the percentage of trials and disposals to referrals was 68 per cent, and in 1947-1970 it was 61 per cent. Both results were achieved during a time when I concluded that a form of caseflow management was used in 25 per cent of cases: and that in the pre-war period 27 per cent of referrals were disposed of before trial and 24 per cent after the war. Thus, a mean average of 25 per cent of cases was disposed of before trial, at a time when I hypothesize that a form of caseflow management was used in 25 per cent of such cases. Perhaps the clearest demonstration of the Scheme's effectiveness is demonstrated in the doubling of the rate of disposals to referrals, from 20 per cent in 1921 to 41 per cent in 1931.

The post-war period was slightly more efficient in terms of trials. When contrasting two eight-year periods, one before and one after the war, the comparison demonstrated that referrals were slightly less efficient after the war in disposals and trials and that there was a higher backlog. There was a sharp decline in the number of trials from 144 in 1962 to 91 in 1970. This figure remained below the 100 mark until 1967. This coincided with a steep rise in settlement/disposal rates from 90 in 1962 to 329 in 1970.

In respect of the cases where it has been possible to identify caseflow management elements, time spent has been radically reduced. Newbolt wrote that issues could be so narrowed 'to something which occupies the Court for perhaps one fifth of what used to be considered the normal time' (Newbolt 1923: 437).

This meant an 80 per cent time saving.

After the war further examination of the two research periods, 1959-1962 and 1965-1967, showed that time reductions of more than 50 per cent and, practically, 80 per cent were possible. Caseflow management properly applied could cut trial times in half or by two-thirds of the time.

It may be surmised that 22 to 25 per cent of all referrals may have been caseflow-managed.

What this analysis demonstrates is how Newbolt's experiments evolved into a practice scheme extending beyond his tenure. He was ahead of his time, although selective in using the Scheme in particular cases. This may be considered an early form of what has become known as differential case management in the United States (Bakke and Solomon 1989).

Running counter to the arguments in favour of caseflow management's effectiveness, Judicial Statistics confirm that in the period 1957-1970 the number of disposals ranged from 66 to 329, higher than in other periods examined, whilst the backlog of cases increased from 167 in 1957 to 446 in 1970. Referrals increased from 449 in 1957 to 901 in 1970. Whilst referrals more than doubled, the backlog almost tripled. Failure to deal with backlog is not a sign of effective caseflow management. More cases were tried than were summarily disposed of between 1919 and 1938: there were 3,202 trials, and 2,048 cases otherwise disposed of. Between 1947 and 1970 there were 4,360 trials compared to 3,335 cases that were otherwise settled or disposed of. What this suggests is that the ratio of trials to disposals remained relatively stable in both periods, but that the comparative ratio of referrals to backlog indicates that caseflow management became less effective in the second period of analysis. Several reasons may explain this.

Despite the existence of caseflow management, the backlog of cases increased after the war. However, there were only three referees in post from 1957 to 1970 when the average annual intake was 586 referrals as compared to the earlier period from 1919 to 1938 when the average annual intake was 437 cases per year. It appears that diminution in manpower in the periods 1932-1938 and 1956-1970 was a critical factor. This was despite evidence of rudimentary caseflow management activity. The backlog rose from 82 cases in 1919 to 109 cases in 1938 and from 202 cases in 1947 to 446 by 1970. In terms of backlog, I found that each referee had an average backlog of 40 cases before the war and 76 after the war. In both periods I detected an increase in backlog and a lack of manpower. Despite this, in the first period backlog was kept below 130 cases per year with only two judges in post. In the second period the increasing backlog occurs at a time when the rate of disposal is above 32 per cent. What may also account for the build-up of the backlog in the latter period was the fact that it was a time of post-war recovery when construction and engineering expanded. With that expansion came new and more complex forms of building and engineering contract and

increasing input from claims quantity surveyors and formulaic applications determining loss and expense of projects. Cases took much longer with voluminous documentation and a growth in expert evidence.

[F] CONCLUSIONS

Scheme Quality of Outcome

In conclusion we may ask whether Newbolt and his successors and colleagues of the court also considered what Galanter called 'quality of outcome' (Galanter 1985: 1, 10-12). Galanter looked at court process in the United States and refers to some experiments in settlement conferences in the 1920s. There is no evidence that Newbolt knew of any of this, for example, the work of Justice Lauer of the Municipal Court in New York (Lauer 1928). The question is: did Newbolt's and other judicial interventions affect the quality of the outcome? It is clearly arguable that an early outcome benefitted the parties in saving on time and costs of proceedings which might otherwise have gone to trial.

If I take Galanter's tests as to the special effects of judicial participation and the wider systemic effects, I may conclude as follows (Galanter 1985: 11-12).

In terms of quality of process, the referees enjoyed a unique advantage over High Court judges. Their creation was influenced by a need to substitute for a jury in certain complex matters of account which a jury would find difficult. Like a master, who was a subordinate officer of the court and dealt with interlocutory procedural matters, referees also dealt with interlocutory issues, such as directions for trial, which gave them the opportunity to have business-like discussions on practical aspects such as time, expenses and amount of evidence. But, importantly, they were able to facilitate matters in acting with the parties' consent to enable negotiations to take place following discussions in chambers. Timing was important because the referee would undoubtedly consider fixing the date for trial which focused the parties' minds. One of the important practices to emerge out of the Judicature Commissioners' objective was the referees' practice of an early summons for directions and the fixing of the date for trial within weeks of the reference. Newbolt hinted at its effectiveness and that of a second interlocutory summons before trial. This had obvious advantages of giving the parties a further chance of settlement (Parliamentary Papers 1953: 257).

Furthermore, on timing, the referees facilitated resolution by granting adjournments or stays to assist settlement discussions between the parties. There were numerous examples of this in the judges' Notebooks.¹³ Certainly, Newbolt would agree with Galanter that judicial involvement in settlement would result in lower costs in time and money to reach settlement, which was precisely Newbolt's objective as expressed to Birkenhead (Letter to Lord Birkenhead 1920). Galanter describes some American judges chairing settlement. Interestingly, Newbolt was *directly* involved in chambers discussions, as he put it: 'the mere discussion across a table' (Newbolt 1923).

The demands on the court must be considered in these cases as a factor as Lord Birkenhead expressed his concern for what he called: 'the waste of public time' (Letter from Sir Claude Schuster 1922). By settling cases early, more time could be spent on the more complex matters.

Galanter opined that lawyers' style was more co-operative before the judge (Galanter 1985: 11). As Newbolt said: 'This is not arbitration or conciliation or concession, but an intelligent use of a Court of justice by business men.' (Newbolt 1923: 438-439) As to experiences and perceptions of the parties, Newbolt had good support from the profession and litigants (Letter to Lord Birkenhead 1920).

As to Galanter's question of wider systemic effects, it can be said that the success of Newbolt's experiments resulted in a continuous practice for the referees that carried on until the time of the civil justice reforms of 1996 when a number of his ideas were adopted in those measures. It may be as Galanter suggests that an agreed settlement is more likely to elicit compliance, and that appears to be what Newbolt concluded. In the end, the quality result was achieved in the Newbolt Scheme because it was an agreed result which both parties could live with.

Comparative Analysis

The findings of this study complement the role taken by American judges, although they have taken Newbolt's model to a far greater degree of intervention albeit most of them appear to 'intervene subtly' (Galanter 1985: 7). The lesson of the Scheme suggests that a triadic configuration and the interaction of the judge and the parties present an effective means, and this is a conclusion that Galanter confirms in relation to the American experience (Galanter 1985: 7.)

¹³ Fifty-four Notebooks of Sir Tom Eastham, Sir Kelly Carter-Walker and Sir Brett Cloutman VC, QC and three Minute Books were examined as part of the 3,800 documents reviewed in the course of the study.

Newbolt's perception of what is now called case management was wider than what Galanter considers. Galanter discusses settlement conferences, but the Scheme encompassed a form of early judicial evaluation in chambers discussions, the relevant use of a single joint expert and proportionate costs orders. This was all achieved with the consent of the parties and without, an essential element of the Scheme in that court-facilitated settlement prevents 'arm twisting' and 'churning' of cases by private mediators following the example of Newbolt's Scheme and the American examples (Genn 1998). Newbolt's Scheme was voluntary not mandatory, and this distinguishes it from some of the conferences described by Galanter as mandatory. Birkenhead, as noted above, would have been uneasy at undue pressure being brought to bear by a judge in that respect.

Galanter was told that judges saw their role as mediators (Galanter 1985: 4). Galanter also opined that it was the United States judiciary who took the lead in this field in terms of judges acting as mediators (Galanter 1986: 257-262). In this sense it seems that the Newbolt philosophy is now part of the judicial process in the United States, save that Newbolt did not perceive his role as that of a mediator. When he used an accountant expert, he noted that this was not the role of an 'arbitrator or conciliator or concession, but an intelligent use of a court of justice by businessmen' (Letter to Lord Birkenhead 1920).

It should be remembered that the referees were subordinate judicial officers for much of their time and could exhibit a more business-like manner. Galanter does not describe the status of the judges in America, but they would rank higher than the referees when Newbolt invented his scheme. Also, the system in America is no longer tied to the English legal system as it was before the War of Independence, although their law derives from the Common Law of England.

Galanter's reference to rule 16 of the Federal Rules of Civil Procedure describes the pre-trial conference as that of an extrajudicial process. It appears that the practice of the federal judges varies, some being interventionist and others not so interventionist. This mirrors the practice of the referees after Newbolt's time. Some were interventionists and more activist than others. In my study I could not ask the judges as Galanter did for his was contemporary research. My research was based on the contemporaneous judges' and Lord Chancellors' records.

Galanter did not find that the settlement judge process increased judicial productivity. Notwithstanding Galanter's negative finding, the American courts seem to lean towards more judicial involvement

(Galanter 1985: 10). So far as the referees were concerned, my study demonstrated that, whilst there was a reduction in 1922-1923, 1924 and 1928 which may have some bearing on Newbolt's Scheme, it is difficult otherwise to find a very marked effect. After the war I found three reductions in the backlog: in 1952 of 61 cases; in 1956 of 51 cases; and in 1960 of 40 cases (Reynolds 2008).

Galanter concludes that judicial intervention is because of the increased volume of cases (Galanter 1985: 10). This was certainly the case when Newbolt invented his Scheme.

In his last work, Simon Roberts interpreted the role of the courts through the prism of its constitutional function as an organ of the state (Roberts 2013). Taking the executive's classical Hobbesian role of command and domination, he detected a transformation from this long-established approach to a form of inducement. Newbolt would have championed such an ambition. Roberts also considered this phenomenon something of a takeover of private settlement negotiations by the judiciary. Roberts rightly discerned that the focus of the court has pivoted to case management and away from trial, a transformation somewhat disguised by the traditional architecture and design of our courts.

References

- Bakke, Holly & Maureen Solomon (1989) 'Case Differentiation: An Approach to Individualized Case Management' 73 (1) *Judicature* 17-21.
- Cranston, Ross (2006) *How Law Works* Oxford: Oxford University Press.
- Eastham, Tom (1947) *Report by Sir Tom Eastham to Lord Chancellor Kew*, The National Archives LCO 4/417.
- Eastham, Tom (1953-56) *Official Referees: Note by Sir Tom Eastham on Recommendations of the Second Interim and Final Reports of the Evershed Committee* Kew, The National Archives, LCO 2/5976.
- Eastham, Tom (1954) 'Memorandum' 12 July *Lord Chancellor's Office and Lord Chancellor's Department: Establishment Files* Kew: The National Archives LCO 2/5976.
- Fiss, Owen (1984) 'Against Settlement' 93 *Yale Law Journal* 1073-1090.
- Galanter, Marc (1985) '... "A Settlement Judge, not a Trial Judge." Judicial Mediation in the United States' 12(1) *Journal of Law and Society* 1-18.
- Galanter, Marc (1986) 'The Emergence of the Judge as a Mediator in Civil Cases' 69(5) *Judicature* 257-262.

- Genn, Hazel (1998) *Central London County Court Pilot Mediation Scheme: Evaluation Report* LCD Research Series 5/98 London Lord Chancellor's Department.
- Genn, Hazel (2007) *Twisting Arms: Court Referral and Court Linked Mediation under Judicial Pressure* London: Ministry of Justice Research Series 1/07.
- Kelly, J M (1966) *Roman Litigation* Oxford: Clarendon Press.
- Lauer, E J (1928) 'Conciliation—A Cure for the Law's Delay' 156 *Annals* 54-59.
- Merlin, S A (1921) Letter to Francis Newbolt November 1921 Lord Chancellor's Office Files *Official Referees: Report on the Work of the Official Referee's Court: Suggestions for Improving the Work Status and Salaries*.
- Newbolt, Francis (5 July 1920) Letter to Lord Birkenhead *Lord Chancellor's Office Files: Official Referees: Report on the work of the Official Referees' Court. Suggestions for improving the work status and salaries*. The National Archives: Kew LCO 4/152.
- Newbolt, Francis (1923) 'Expedition and Economy in Litigation' 39 *Law Quarterly Review* 427-440.
- Newbolt, Francis QC *Lord Chancellor's Office Files Official Referees: Report on the work of the Official Referees' Court. Suggestions for Improving the Work Status and Salaries*. The National Archives: Kew LCO 4/152.
- Parliamentary Papers. (1869) *First Report of the Judicature Commissioners* [Session 10 December 1868-11 August 1869] (No 41340) Vol XXV 25 March 1869.
- Parliamentary Papers (1949) *Interim Report of the Committee on Supreme Court Practice and Procedure* Cmnd 7764.
- Parliamentary Papers (1951) *Second Interim Report of the Committee on Supreme Court Practice* Cmd 8176.
- Parliamentary Papers (1953) *Final Report of the Committee on Supreme Court Practice and Procedure* Cmnd 8878.
- Parliamentary Papers (1995) *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* London: Stationery Office.
- Reynolds, Michael (2008) *Caseflow Management: A Rudimentary Referee Process, 1919-70* London School of Economics, PhD Thesis
- Reynolds, Michael (2020) 'In Chancery: The Genesis of Micro Caseflow Management' 1(2) *Amicus Curiae* 165-200.

Roberts, Simon (2013) *A Court in the City: Commercial Litigation in London at the Beginning of the 21st Century* London: Wildy, Simmonds & Hill Publishing.

Roberts S & Michael Palmer (2005) *Disputes Processes: ADR & the Primary Forms of Decision-Making* Cambridge: Cambridge University Press.

Schuster, Claude (21 February 1922) Letter from Sir Claude Schuster to Sir Francis Newbolt.

The Times 10 August 1892 p 13 Issue 33713.

The Times 4 September 1930 p 11 Issue 45609 col F.

Legislation Cited

Common Law Procedure Act 1854

Judicature Act 1873

Rules of the Supreme Court (1883)

Rules of the Supreme Court (1949) No 3

Cases Cited

Alexander Angell Limited v F C Pilbeam (Male) (1968) Unreported Supreme Court of Judicature Official Referee's and successors: Case Files The National Archives: Kew J 115/28

Alloy & Fireboard Co Limited v F Superstein (1965) Unreported Supreme Court of Judicature Official Referee's and successors: Case Files The National Archives: Kew J 115/6

Ancor Colour Print Laboratories Limited v J Burley & Sons Limited and F & D Hewitt Limited (third parties) (1967) Unreported Supreme Court of Judicature Minute Book Official Referee's Court "C" Minute Book The National Archives: Kew J116/3 p 193.

Bickley v Dawson (1966) Unreported Supreme Court of Judicature Minute Book Official Referee's Court "C" Minute Book The National Archives: Kew J 116/3 p 191

Bogen v Honneyball & Rossal Estates Limited (1973) Unreported Supreme Court of Judicature Official Referee's and Successors: Case Files The National Archives: Kew J 115/49

Clifton Shipways Co Limited v Charles Lane (1960) Unreported Supreme Court of Judicature Minute Book Official Referee's Court "C" Minute Book The National Archives: Kew J 116/1

Cowley Concrete Limited v Alderton Construction Co Limited (1962)
Unreported Supreme Court of Judicature Official Referee's and
Successors: Case Files The National Archives: Kew J 115/1

Louis Obermenter v Rodwell London & Provincial Properties Limited (1966)
Unreported Supreme Court of Judicature Minute Book Official Referee's
Court "C" Minute Book The National Archives: Kew J 116/3 p 139

Martin French v Kingswood Hill Limited (1959) Unreported Supreme Court
of Judicature Official Referee's Court Minute Book No 4 The National
Archives: Kew .116/1 and Supreme Court of Judicature Official
Referee's Notebook Sir Walker Carter QC The National Archives: Kew J
114/34

*Nathan Bernard v Britz Brothers Limited and Britz Brothers Limited and
Nathan Bernard and Ruth Bernard* (1962) Unreported Supreme Court
of Judicature Official Referee's Notebook Sir Walker Carter QC The
National Archives: Kew J 114/34

WJ Barrs Limited v Thomas Foulkes (1965) Unreported Supreme Court of
Judicature Minute Book Official Referee's Court "C" Minute Book The
National Archives: Kew J 116/3 p 49

ASSESSING THE EFFICIENCY OF THE DISTRICT COURTS OF PAKISTAN—WHY IS BETTER EVALUATION NEEDED?

MUHAMMAD SAEED¹

Newcastle Law School, Newcastle University

Abstract

In this article, the case is made for the need for appraisal of performance of the district courts of Pakistan from an efficiency perspective and a framework of practical tools are suggested to secure that end. It is argued that an effective appraisal system using empirical research is desirable in view of an absence of judicial accountability by democratic institutions and gaps in the internal official appraisal practice and in methods for locating the impact of the justice reform initiatives. The assessment can be done by analysing the relevant statistical data, qualitative feedback of the litigants and by comparing Pakistan's judicial performance with countries with similar conditions. Empirical evidence available so far suggests that the court service in Pakistan is plagued with delay, vexatious litigation and abuse of court process causing suffering for the end-users. Hence, for any future reform effort to eradicate these maladies, institutionalized empirically based scrutiny of judicial performance is indispensable.

Keywords: district judiciary, Pakistan, judicial performance, evaluation, court service, efficiency.

[A] INTRODUCTION

Taking Pakistan's district courts as a case study, this paper explores why it is important in the context and specific milieu of Pakistan to assess the work of the court service on the yardstick of efficiency and how to make such scrutiny possible. From a normative perspective and given the societal

¹ I would like to express my gratitude to my mentors in the Newcastle University namely, Professor Christopher Rodgers, Professor T T Arvind and Ian Dawson who guided and supervised the main research project. Also, Professor Michael Palmer (SOAS), who has encouraged me to publish key findings.

objective of establishing the rule of law generally, and catering for the legal needs of the citizens in a democratic polity for effective dispute resolution, it is desirable that an efficient and quality court service is offered for determining parties' rights and obligations in litigation. An ordinary user of the court system reasonably expects that resolution of the contentious matter would be factually and legally correct, arrived at by competent and impartial judges, within a reasonable time, at minimum possible cost, after affording fair treatment and equal opportunity of hearing and resulting in an efficacious remedy. In response, a well-functioning judiciary, directed towards achieving its organizational objective, would respond to these expectations by extending a service that is accessible, affordable, expeditious, efficient, fair and effective. A fundamental and important question needs to be addressed in this context: namely, whether or not courts on the ground in a particular jurisdiction are performing sufficiently well to live up to these normative ideals.

Inordinate delay, rampant misuse of the court process and frivolous proceedings (with high cost as the natural corollary) are generally cited to be core problems of Pakistani litigation culture. Without detracting from the importance of other institutional causes occasioning this malfunctioning, an inefficient court process is one major reason related to the outdated procedural law and poor case management. The study builds on the ontological assumption that an efficient court service is one where judicial activity and proceedings are managed in such manner, and with such planning and vigilance that, while handling litigation, the legal remedy is provided avoiding delay, vexation and resultant unnecessary cost. Several important studies have pointed to the significance of the efficiency of courts for access to affordable and timely justice, smart management, economic use of public resources, promotion of economic growth, good governance and so on (see e.g. Palumbo & Ors 2013).

With this perspective of the importance of efficiency, the paper explores why a better strategy and framework of evaluation of courts' performance at the lower rungs in Pakistan is needed and how an effective appraisal might be made possible. It will be argued that the official evaluation regime currently used is inadequate, and systemic democratic oversight is, sadly, non-existent. Internal judicial accountability is limited only to the collection of workload statistics without deducing meaningful conclusions to paint a vivid broader picture of the justice service. Also, the practice of using qualitative data—especially litigants' feedback and calculating the end-user satisfaction indicator—is alien to the official evaluation system. The paper starts with elaborating the contextual setting of Pakistan and the structural and functional contours of its

judicial system. This is followed by a critique of the official evaluation practice and insufficient judicial accountability. Lastly, it will be shown what suitable methods of appraisal may be applied in the case of Pakistan to identify issues of performance and their intensity and magnitude in order to pave the way for future reform.

[B] PAKISTAN AND ITS JUDICIAL SYSTEM

An Overview

Since the creation of the state of Pakistan in 1947 by seceding from the United India, development of the constitutional and democratic process has often been interrupted by intermittent military interventions (i.e. military-led coups establishing direct military rule for the periods 1958-1970, 1979-1988 and 1999-2002). Political institutions as well as the superior judiciary remained mostly subdued under the military thumb. Strained relations with India, the turmoil of the Afghan War in the 1980s and the later unleashing of terrorist outfits as an aftermath of the war have kept Pakistan's internal security concerns prioritized and its international geostrategic position significant. In all this mayhem, the military establishment attained the position of a dominant player in Pakistani politics.

Huge defence budgets eat up one-fifth of the nation's total revenue. In 2018-2019 the proposed defence budget was 21 per cent of the total allocations which amounts to 3.2 per cent of gross domestic product (Syed 2018). In addition to enormous military spending, massive public debt-servicing consumes more than half of the total revenue. Both these heads together eat up three-fourths of the entire budget of Pakistan leaving very little for socio-economic, human and institutional development (Rana 2017). The traditional political elite, the civil bureaucracy and the superior judiciary had also mostly remained accepting of the status quo at least until the 2000s. Due to these complexities and their mutual interplay, Pakistan has long been locked into problems of bad governance, institutional inefficiency and the resultant slow socio-economic development. In addition, the growing influence of non-state actors, radicalization and lawlessness are problems which have eroded Pakistani society, and are also posing a threat to global peace (see, generally, Siddique 2013; Khan 2016).

And yet, the elected governments, democratic institutions and the overall constitutional structure have somehow survived and gradually evolved. Since the turn of the century, the emergence of fresh political

forces, a strong and independent electronic media and an activist and vigilant superior judiciary have been positive developments. Even the new military leadership has helped to speed up the democratic process, institutional reform, accountability and good governance. These winds of change have also encouraged the process of reform in the justice sector. The court service had long been considered plagued with inordinate delay, inefficiency, and the resultant cost and incapacity. District courts, where 90 per cent of the entire country's litigation is conducted, were the most neglected and outdated area of the public sector. The judicial leadership, successive political governments and the international development community started putting serious and concerted efforts into improving access to justice at the grassroots level. It was increasingly recognized that the role of courts is not only very significant for dispute resolution, but also for the overall context of rule of law and for providing a conducive environment for entrepreneurship. The decade of the 2000s saw a major justice reform effort, alongside intensive investment in this development. However, institutional performance appraisal of the court service remained relatively underexplored, despite the problems in court performance. It is in this context that this paper presents the case for assessing district courts' performance in Pakistan and some ways to measure it.

Superior Courts and District Judiciary

The Constitution of Pakistan 1973 lays down the overall framework of the state institutions, including specifying the hierarchical and administrative structure of the superior courts. Pakistan is a federal republic, with the Federal Government and the legislature (Parliament) at the centre. Each province has its executive authority (Provincial Government), a legislature (Provincial Assembly) and provincial judicature (the High Court). Each province is further divided into basic administrative units called districts. Administration of the districts is mainly governed by the respective provincial governments through its field district officers and also by the elected local councils of districts under the overall supervision of the provincial government. There are 124 districts in total, clustered under each of the four provinces.

The Supreme Court and provincial High Courts are referred to as the 'superior judiciary' while the lower rung is called the 'lower', 'subordinate' or 'district' judiciary. The apex court of the country is the Supreme Court of Pakistan (SCP), but the district courts function under the direct control of the High Court of a Province and this High Court has exclusive control and superintendence over the district courts within that Province. The High Court has authority under the Constitution to 'make rules

regulating the practice and procedure of the [High] Court or any court subordinate to it' (Articles 202 and 203, Constitution of Pakistan 1973).

At the district level, subordinate courts function in two hierarchical tiers: the first tier contains district courts (for civil matters) and sessions courts for (criminal cases), acting as courts of first appeal for civil litigation and criminal courts for serious offences respectively. The second tier consists of courts of civil judges and magistrates dealing with civil cases as courts of first instance and for certain minor or summary offences. Though criminal and civil courts act under different procedural law, all courts in a district function under a single administrative setup headed by one district and sessions judge under the overall supervision of the provincial High Court.

The Supreme Court of Pakistan, the apex court of the country, has no direct administrative role in the affairs of district courts. However, since 2002, it has attained and exercised considerable influence in the policymaking process for the district courts through the National Judicial (Policy Making) Committee (NJPMC)—a statutory forum created in 2002 and headed by the top judicial leadership, i.e. the Chief Justice of Pakistan and chief justices of the four provincial High Courts. The forum provides a platform for formulating and implementing a uniform judicial policy for all the courts of the country. Policy decisions of the Committee relating to the district courts are enforced through the chief justices of the provincial High Courts who are members of the Committee. A major initiative to clear the backlog and expedite the pace of disposal of cases was taken by the Committee in 2009 through the design and implementation of the National Judicial Policy (NJP) in 2009.

[C] WHY ASSESS THE DISTRICT JUDICIARY OF PAKISTAN

Generally, states not only need to have a formal court system in place, but the system must also be working *well enough* to cater for the legal needs and legitimate expectations of the citizens. One significant attribute of good courts is that judicial remedy to a litigant should be provided through an efficient process, so that expedition and economy is ensured as far as practicable. With this efficiency perspective, it is desirable to know whether or not the judicial system at the district level in Pakistan is functioning well.

Efficiency, being an important value of the justice system, relates to how cases are treated and processed in the courts through the procedural law regime and case management tools. The most general and common

understanding of efficiency is the maximization of output by utilizing available resources. For a judicial remedy to be effective, it not only has to be adequate and accurate, but it also has to be timely, otherwise its utility is eroded—especially in cases where delay adversely affects one of the parties or entails undue advantage to the other. This is the legal parallel to providing medical care in good time, where such efficiency is not an independent aspect of treatment but an integral part of it (Zuckerman 2006: 18). Without undermining other attributes of an ideal court system (i.e. accuracy, fairness, impartiality, effectiveness and good quality outcomes), this paper looks into the court service from the efficiency perspective alone.

No doubt every organization and public sector entity needs to have a mechanism for, and a continuous process of, monitoring its performance. In the case of Pakistan's district courts, however, the need is pressing and imminent due to several peculiar factors. Indeed, it would be gratifying to put the district judiciary itself in the dock, given the inherent weaknesses of the official appraisal system; the dearth of empirical studies in the scholarship; the gravity of the issues in terms of the sufferings of millions of litigants; the absence or weak accountability and ineffective role of democratic institutions; and the elusive impact of two major justice reform endeavours. These factors are elaborated below in some detail.

Accountability of District Courts—The Role of Democratic Institutions

Performance monitoring and overall accountability of the district courts of Pakistan legally, and in practice, rests exclusively with the superior judiciary. Each High Court of a province exercises complete administrative control and supervision over the lower judiciary in that province. Under the Constitution, the structural and functional domain of the judiciary is designed to keep it independent and completely segregated from the executive and legislative institutions. Besides their extensive judicial powers, the High Courts of the provinces have exclusive administrative authority and adequate financial autonomy within the sphere of administration of justice. Apart from the payoffs of this independence, the phenomena in practice creates an insulating *aloofness* of the judiciary, allowing no room even for the genuine accountability of the court service through public oversight. In his recent treatise on the political history of the judiciary of Pakistan, Hamid Khan, a leading lawyer and prominent member of the Bar observed:

Pakistan has a chequered judicial history, replete with periods of independence from and capitulation to the executive. The relationship of

the judiciary and the executive in Pakistan has always been difficult because of struggles and vicissitudes in the life of the nation (Khan 2016: 1).

He concludes:

The judiciary in Pakistan has had to pass through difficult times, perform uphill tasks and face threats to its very existence during the course of its turbulent history. It is these vicissitudes that characterize the institution and define its strengths and weaknesses (Khan 2016: 537).

Recent political developments have further widened the gap in the strained relations between the superior judiciary and political governments. And the role of democratic institutions is further marginalized relative to the lower courts. The struggle by political actors and the military establishment to dominate the superior courts was mostly for political objectives and interests and not for the genuine accountability and performance monitoring of the justice sector. After 2005, the evolution and emergence of an activist judiciary incorporated a new brand of judicial leadership which has a highly reactive posture and an assertive demeanour towards political governments.

These developments further solidified the traditional aloofness of the judiciary and pushed the higher courts further away from representative institutions. That is why the locked legal community is viewed as having 'habitually displayed resilience to ideas of further training and professional up-gradation, quite often branding the same as contemptuous of the judiciary and a violation of its independence' (Siddique 2013: 226). Hence the political landscape of Pakistan and polarized relations between the higher judiciary and the executive has in practice made the possibility of judicial accountability through democratic institutions redundant. Even a genuine effort of reforming justice from without is viewed as an intrusion into the judicial turf exclusively occupied by the superior judiciary.

Appraisal of District Courts by Superior Judiciary— An Added Burden

As noted above, each provincial High Court has direct and complete administrative control over the district courts of the province. Supervision and performance monitoring by the High Court comes via two inter-related areas. Firstly, there is human resource management, which involves recruitment, training, job allocation and monitoring the individual performance of judges, their conduct, integrity, competence and quality of judicial work. In the second domain, performance of district

courts may be weighed as a whole at the institution level relative to the workload, legal needs and reasonable expectations of the litigants. This involves providing access to the justice system, timeliness and efficiency of the court service, affordability and cost of litigation, economic use of public resources, fairness of process, equality of opportunity, accuracy of decisions and effectiveness of relief (Fox 2012). Of these, expedition and economy are relevant attributes as this paper focuses on the 'efficiency perspective'.

In the constitutional and political scenario of Pakistan, the entire brunt of improvement and reforming of the justice sector, and of providing an efficient court service at the grassroots level, is on the superior judiciary alone, not only in line with its constitutional mandate but also due to public expectations and moral pressure. The constitutional arrangements and structure of the judicial system of Pakistan provide no accountability of lower courts by external and independent observers. No governmental executive agency, not even the legislature, has any constitutional or legal role in monitoring the judicial functioning of the lower courts.

That is why the dismal performance of the lower courts on the ground offers ripe material for critics to take a pessimistic view of the legal community itself. For instance, Siddique believes that judges and lawyers have an exclusive role in reforming justice, but they in turn are unwilling to review the fundamentals of the institution because they have technocratic perspectives and narrow agendas. He comments:

Current defenders and controllers of the justice sector reform agenda in Pakistan are by and large incapable of, unsuitable for, and disinterested in any deeper substantive issues of justice; it is about foreground institutions rather than background norms; and, therefore, it is inherently socially and politically de-contextualized (Siddique 2013: 260).

It is under these circumstances that an official monitoring system needs to bear the added burden to weigh performance consistently, candidly and most rigorously.

Gaps in Official Evaluation Practice as to Analysis of Statistical Data

In the official evaluation discourse, a consistent process of on-ground performance monitoring of the lower courts and its analysis based on empirical data appears weak in Pakistan. It was observed in the pre-reform study by the Asian Development Bank in 2001 that there 'is no coordinating body for developing legal and judicial policy, and no system

for collecting empirical data to evaluate performance of the system, improve accountability, or recommend reform' (Asian Development Bank 2001: 9). In 2002 when the Access to Justice Program (AJP 2002-2008) was initiated by the Asian Development Bank to promote law and justice reform in Pakistan, authentic statistical data of cases was badly needed. For that end a statutory forum was created, the NJPMC, as a central and permanent body to 'harmonize the judicial policy within the court system' for improving the performance of the administration of justice.² One function of the Committee was to compile and publish judicial statistics.

The Committee published the first report titled 'Judicial Statistics of Pakistan 2002' in 2003, followed by similar annual reports until 2014. Importantly, these reports merely offer abundant descriptive numerical data of cases, with no *analysis of performance* for public consumption and accountability purposes. The reports accumulated piles of data, but then the effort leaves short of necessary examination as to what it all means and what conclusions regarding court service can be extracted. The reports lack evaluative scrutiny of overall performance and comparison over time and across diverse regions of Pakistan to ascertain the trends of improvement or otherwise through objective quantifiable indicators: namely, the case clearance rate (CCR), the volume of backlog, the filing-disposal ratio and the average age of cases.

No doubt data compilation is the first important step towards the appraisal cycle. Though it is claimed that it is 'through these reports that the Courts ... present a measure of their performance' (Law and Justice Commission of Pakistan 2003: 1), yet this data lacks results as to the pace of determination and other attributes of a good court service. The reports, containing bare statistics on their own, never offer any 'measure' of performance; an in-depth and necessary analysis is most conspicuous by its absence. This scenario may be due to a lack of capacity, motivation or interest.

In the absence of a systematic, comprehensive and consistent institutional mechanism of evaluation based on rigorous empirical data and its deeper analysis, the judicial leadership and court administrators may develop their own perception as to performance of lower courts. These internal images of the output may not be easily sellable to external independent observers, justice reform experts and the court critics. In the context of the Indian legal system, Baxi has termed this lack of institutionalization as the crisis of law reform (1982). In contrast, in

² Functions of the Committee i.e. NJPMC is elaborated in the National Judicial Policy Making Committee Ordinance 2002. One function is the publication of the annual or periodic reports on the judicial statistics of all the courts.

certain other jurisdictions, the process of evaluation and reformation is highly institutionalized and sophisticated. For instance, in the United States, the National Centre of State Courts (NCSC)³ provides academic and research consultancy for evaluation and implementation of court management tools and methods. Such an external and institutionalized evaluative system is non-existent in Pakistan, while internal monitoring processes clearly appear to be underdeveloped.

The Elusive Impact of Justice Reform and the Evaluation Gap

Contemporary law and development scholarship supports justice reform in developing economies in socio-economic development. With the rise of New Institutional Economics (NIEs) and neo-institutionalism during the 1980s and early 1990s, justice reform, among other factors, was linked with entrepreneurial confidence, protection of property rights and economic transactions (North 1990). The rule of law is also regarded as an intrinsic social value and a political ideal in itself (Sen 2006). Justice reform in developing economies, therefore, remained high on the agenda of the international development community and law and development scholarship (Messick 1999).

Pakistan has the sixth largest population in the world and has long been beleaguered by problems of bad governance, institutional inefficiency and the resultant socio-economic regress (Ahmed 2005). Therefore, in addition to other areas, international development agencies have engaged with Pakistan to reform its justice sector. The largest ever funding intervention came from the Asian Development Bank for its AJP (2002-2008). USAID also proposed a project offering \$90 million for the Strengthening Justice with Pakistan Program in 2010 (Siddique 2013: 139). The UK government, through the Department for International Development (DFID), also initiated projects for strengthening the rule of law in Pakistan.⁴

Such huge funding interventions for reform initiatives call for robust systematic appraisal and ongoing monitoring of the lower courts'

³ The National Centre for State Courts (NCSC) is a non-profit court improvement organization based in the United States. It works in collaboration with the Conference of Chief Justices, the Conference of State Court Administrators, and other associations of judicial leaders. It is a think-tank which provides research studies, information, education and consultation to the courts in judicial administration. Information about NCSC is available on its [website](#).

⁴ See DFID development projects i.e. Strengthening Rule of Law, Justice System Support Program (JSSP) 2016-2020 funding £25 million, and also Accountable Justice in Pakistan available on the [DFID Development Tracker](#).

performance on the ground. In developmental scholarship, there are voices which regard justice reform enterprise as generally misdirected and ‘based on inadequate theory, selective evidence and insufficient evaluation’ (Armytage 2012: 2). These observations also suggest that rigorous evaluation is required as part of reform policy and practice. The need in this direction becomes more pressing in the case of Pakistan where the official and internal process of review and development of court service is inadequate. Moreover, it is highly undesirable for struggling economies like Pakistan to go for costly reform programmes, taking long strides ahead on the path of trial and error without being sure as to the impact.

Law and development sceptics have raised concern over the direction of reform by claiming that its impact has remained tenuous. Armytage, building on the academic commentaries of Trubek, Carothers, Jensen and Hammergren, identifies growing disappointment with the outcomes and prospects of judicial reform. His critical analysis ‘shows that both judicial reform practice and evaluation are demonstrably deficient’ (2012: 17) and he describes this as an ‘evaluation gap’ which obscures actual performance. That is why it is difficult to conclude whether performance deficit is due to ineffective reform or inadequate evaluation of design and practice.

In the case of Pakistan, the effect of two major reform waves in the country—the AJP 2002-2008 and the NJP 2009-2011—have remained elusive and unexplored. The impacts of these efforts have not been comprehensively analysed through empirical scrutiny in the subsequent years to date, either in the official realm or through academic research; hence, the impacts remain elusive. There is generally an evaluation gap in the justice reform landscape the world over which necessitates empirical inquiry into court services. However, it has become especially pressing for a country like Pakistan.

Access to Justice Program (2002-2008)

The justice reform drive started for the first time in Pakistan during the early 2000s. Importantly, the first ever foreign funding intervention came in 2002 when the Asian Development Bank launched for Pakistan the AJP of 2002-2008, funding a loan of \$350 million to improve Pakistan’s justice service—the biggest ever foreign funding in Asia at that time for the justice sector (Asian Development Bank 2009). Under the AJP the number of judges in the subordinate judiciary was considerably increased (i.e. from 1362 judges in 2001 to 2061 in 2008), the infrastructure for courthouses and judges’ residences was constructed, salaries and benefits were increased, and court facilities were enhanced (Asian Development Bank

2009). However, it is hard to find any empirical study which examines the precise effects of these capacity-enhancing measures, especially the impact on the speed and efficiency factors of the court process. Generally, and especially from the 1990s onwards, judicial reform has been an important component of the development enterprise the world over. But, despite the push for these reform programmes, there appeared a ‘mounting chorus of disappointment in the literature’ as to the success of these efforts (Armytage 2012: 1).

National Judicial Policy (2009-2012)

In 2007 the semi-autocratic regime of General Pervez Musharraf in Pakistan sacked the judges of the superior judiciary in an unprecedented move. This ignited a countrywide agitation—the Lawyers’ Movement (2007-2009)—that succeeded in building enough pressure so that the judges were ultimately restored to their posts in 2009. The freshly revived and triumphant judicial leadership took a major initiative to speed up the disposal rate of court cases and clear the years-old backlog. It was resolute in re-invigorating the justice system at the grassroots level by inhibiting the twin problems of delay and backlog in the lower courts. To that end the NJP 2009-2011 (Supreme Court of Pakistan 2009) was ushered in by the NJPMC.

Under the Policy, stringent measures were enforced and directions issued to the lower courts for the speedy disposal of cases and clearing of the huge backlog piled up over decades. The Policy was rigorously pursued for three years until 2012, but after the retirement of the then Chief Justice of Pakistan, Justice Iftikhar Mohammad Chaudhry, the chief architect of the Policy, the vigour slowed down. Importantly, the impact of the stringent measures was never explored officially or in the scholarship. This would have required weighing and critically examining the measures and the extent of improvement, if any, in the efficiency and overall quality of the court service. The lack of attention within Pakistan to the effects of three years of consistent directions under the NJP (2009-2011) meant that the need to examine performance appraisal as a priority in the post-NJP years was also overlooked.

[D] HOW TO MEASURE JUDICIAL PERFORMANCE

For judicial performance appraisal, various tools have been developed the world over, covering both quantitative and qualitative methods to weigh various attributes of court services. For instance, for finding out the expedition factor, indicators like average age of cases, volume of backlog

and CCR have been utilized. Comparison of performance based on these indicators across regions, over time and within different categories of cases may unveil the underlying causes and problem areas (Lewin & Ors 1982). Under the growing influence of socio-legal research, there is also abundant empirical research in the scholarship based on litigants' surveys and ethnographic fieldwork exploring the humanistic aspects of the real-life litigation experience. Elite and expert interviews may reveal the worldview of insiders and the way they see the problems. Court service assessment tools can be grouped under the following headings:

- a) **workload analysis:** data of cases is analysed to measure speed of disposal, backlog, and age cases;
- b) **litigants' experience:** on the touchstone of end-user satisfaction, litigant feedback as to court service;
- c) **ethnographic inquiry:** studying specific cases and observing court proceedings;
- d) **expert interviews:** collecting views of court officers, judicial administrators and the legal community;
- e) **elite interviews:** gathering views of superior court judges and policy-makers to assess the vision and overall direction of the judicial and political leadership and
- f) **international ranking:** the relative position of a jurisdiction among countries of similar conditions as to performance of justice institutions.

These evaluative tools may be utilized for assessing various attributes of the court service and for different purposes. But this paper attempts to present an evaluation framework for the court service of Pakistan by weighing the efficiency aspect. For that specific purpose, three different approaches are suggested as multi-pronged strategies for effective triangulation. These are workload analysis, end-user satisfaction level and the comparative position of the judiciary of Pakistan among similar jurisdictions.

Workload Analysis—Exploring Judicial Statistics for Efficiency

The tradition of collecting and analysing quantitative court data for judicial efficiency started in the early 1980s, deviating from the traditional qualitative approach in Latin America and Europe (Merryman & Ors 1979). Statistical analysis of data of court cases offers the most objective method of assessing efficiency and timeliness factors. The indicators mainly employed in this respect are CCR, time of disposition, age of cases, volume of backlog and number of adjournments. The Massachusetts trial courts metric reports is a good example of using these measures

extensively.⁵ It reveals the capacity of the court system to deal with the cases filed, the time it takes on average to dispose of these and the growth of the backlog relative to the influx of new cases.

The CCR, which shows the difference between cases filed and disposed of during a fixed period, is the most revealing indicator in this regard. It reflects the demand side (i.e. the total number of registered cases) in terms of legal needs of the citizens and the supply side (i.e. cases finally determined) in terms of services provided by the courts within a fixed period. The CCR represents the ratio of incoming cases as a percentage of the outgoing cases. For instance, if the CCR for one year is 90 per cent, this indicates that cases decided during that year are 90 per cent of the cases filed, leaving 10 per cent of cases at the end to be carried forward in the next period as a backlog. If the CCR is consistently lower than 100 per cent, the backlog would bulge over time. A steadily low CCR would thus have a snowball effect⁶ causing gradual expansion in the volume of the backlog. Growth or decline of the volume of backlog during a longer period is a related significant indicator showing improvement or regress from a wider angle.

Such statistical indicators can be calculated from the official data and reports available on cases in the district courts of Pakistan from 2002 until 2014 on the website of the Law and Justice Commission of Pakistan (LJCP).⁷ The reports contain voluminous numerical information for each year as to cases of all types filed and decided in all district courts. On their own, these reports do not show any measure of performance. This numerical data pertaining to 13 years of the courts' output was thoroughly scanned by the author in a research project at Newcastle University (2015-2019); performance indicators were worked out and compared over time, across different regions of Pakistan and among different types of cases.

Analysis carried out in that project reveals that the CCR in most of the years has been consistently low (under 100 per cent), causing gradual bulging of the backlog throughout. Capacity-building measures under the AJP (2002-2008) and stringent measures under the NJP (2009-2011) did boost the CCR and reduce the overall volume of the backlog, but only temporarily. During the reform years, the CCR surpassed 100 per cent,

⁵ See Massachusetts Government, *Court Data, Metrics and Reports* (2019).

⁶ See National Centre of State Courts *CourTools*.

⁷ The *Law and Justice Commission of Pakistan Law* is a statutory body headed by the Chief Justice of Pakistan and Chief Justices of the High Courts of the four provinces having a support secretarial set-up.

but it remained around 90 per cent for most of the years from 2002 to 2014. As the reform measures focused on certain aspects of the court system (like infrastructure, human and financial resource capacity etc.), it appears that some other aspects were not addressed; some deeper institutional drawbacks and practices causing slow pace of disposal and growing backlog remained. In particular, the outdated procedural law and poor case management was an area which remained almost entirely underexplored and overlooked.

Litigants' Experience—End-user Satisfaction as A Measure of Efficiency

Another approach to assessing court service efficiency is to study the experiences and take into account the views of users of the system who interact with it in real-life situations. This inquiry suggests how the litigants and general public rate the Pakistani judiciary in terms of delivery of service and efficiency relative to their legal needs and expectations. This approach is important in the context of Pakistan as, within the administration of justice and official evaluation discourse, public opinion and litigants' feedback has never been used as a tool to assess institutional performance. No official data is compiled and published as to the problems faced by the very citizens generally for whom the entire façade of justice is erected. The *folk concept* of justice issue thus has remained almost invisible. Although delay is often cited officially as an issue faced by the litigants, this official view remains untested empirically; the very nature, extent and gravity of the issue and its adverse impact on the parties' welfare remain elusive and unfelt. Courts and judicial administrators in Pakistan focus on numerical data and at the institutional level remain aloof from the difficulties parties face at the grassroots level. Real-life stories of litigants can directly and truly reflect the miseries of such individuals which simple digits would miss out. Bare data may let the problems be seen, but the human agony may not be conveyed and experienced.

The litigants who interact with the court system are well placed to offer first-hand information as to the efficiency and effectiveness of the judicial service; their stories are more revealing. According to Rottman and Tomkins, 'A court that does not have the trust or confidence of the public cannot expect to function for long as an effective resolver of disputes, a respected issuer of punishments, or a valued deliberative body' (1999: 24). Therefore, it is important to assess the performance of the court system on the judgment of the very people for whom the entire façade of justice

is built to serve. While building on his theory of disconnects between Pakistan's justice sector reform discourse and litigants' problems on the ground, Siddique observes:

Pakistani justice sector policy dialogue and reform agenda has never made an attempt to be informed and shaped by any rigorous empiricism that looks to probe the nature of actual problems faced by disputants who seek recourse to courts (2013: 105).

This humanistic aspect of court experience was explored in detail by the author in his research project in which the secondary data collected in the shape of surveys and face-to-face interviews already published as the Lahore District Courts Litigants Survey (2010-2011) was re-analysed (Siddique 2010). The data consists of extensive interviews of 440 randomly selected litigants when they were attending the district courts on various days to pursue their cases in the Lahore District Courts Complex. Results of the analysis alarmingly reveal that there is enormous abuse of the court process, with strategic vexation of the opposing party by design, rampant deliberate delaying manoeuvres and abundant frivolous litigation. The court system appears not capable, motivated or directed to contain such practices effectively. Misuse of court process, lawyers' high-handedness and financial interests, disruptions of court proceedings, lack of motivation and mismanagement on the part of the judicial administration, and resultant delay are key features intensifying litigants' anguish. The stories, some of which are deeply shocking, reveal that generally 'for the majority of respondents, a civil suit is synonymous with a costly, exhausting, and frustrating wait' (Siddique 2013: 124). These responses place a big question mark on the costly decade-long justice reform efforts during the 2000s.

The analysis also reveals an important anomaly between the official conception of delay and the actual prolongation of the litigation process. In the official data, a 'case' is counted as a single unit pending or decided by a judicial forum; it does not indicate actual time taken by the judicial system to resolve a single controversy between the same parties on the same subject matter going through the preliminary, trial and appellate phases in different tiers of judicial fora. When the litigants complained of delay, they were actually referring to the often very extended time spent on unresolved differences between the parties on the same subject matter.

International Ranking of Pakistan's Judiciary— A Comparison among the 'Equals'

Generally, it can be argued that external factors like social and cultural conditions, level of economic development and the geopolitical scenario of a particular jurisdiction may have an impact on the performance of its institutions. However, comparative ranking and the score of various public sector entities among countries of similar conditions can offer valuable insights for locating institutional drawbacks. Comparison among the equals may bring forth the real performance when other external and possibly instrumental factors are, more or less, constant. The ranking of countries of the world based as to the rule of law by the World Justice Project (WJP) can be a good way to measure relative performance of justice sectors. Being an independent international entity to advance the rule of law the world over, the WJP measures the rule of law through extensive empirical research. The *WJP Rule of Law Index 2016* uses more than 110,000 household survey and expert interviews to 'measure how the rule of law is experienced and perceived in practical, everyday situations by the general public worldwide' (World Justice Project 2016: 13).

For performance appraisal, the WJP uses nine factors, namely constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement and civil, criminal and informal justice. On the yardstick of civil justice and criminal justice factors (Factors 7 and 8), Pakistan's overall ranking is 106 among all the 113 jurisdictions of the world surveyed. Within the South Asian region, Pakistan ranks at number five out of six countries, below Nepal, India, Sri Lanka, and Bangladesh. Importantly, among 28 lower-middle-income jurisdictions in the World

Table A: World Justice Project Rule of Law Index (World Justice Project 2016)

WJP Rule of Law Index 2016	World ranking	Regional ranking	Lower-middle income group ranking
Civil justice (Factor 7)	106/113	5/6	23/28
Criminal justice (Factor 7)	81/113	4/6	14/28
RoL (all 9 Factors)	106/113	5/6	25/28

Justice Project survey, it is ranked 23rd (2016: 122: see Table A). The analysis suggests that the justice sector in Pakistan is malfunctioning and, quite importantly, despite having similar geopolitical and socio-economic difficulties, judiciaries in identical or very similar jurisdictions are performing *relatively* better.

[E] CONCLUSION

Given the internal political and socio-economic conditions of Pakistan and the importance of the judicial service at the grassroots level, performance appraisal of the lower judiciary has remained an underexplored and neglected area especially from the developmental and institutional reform perspective. Strained relations between the higher judiciary and the government and political actors has in practice diminished the possibility of public accountability of court performance through representative institutions. Absence of oversight by democratic bodies and the marginalized role of other state agencies in justice appraisal necessitates that the internal processes of monitoring for correctional purposes are highly significant. The superior judiciary, therefore, is under a heavy responsibility to assess judicial performance consistently through a robust institutionalized system employing rigorous empirical methods. There exist visible gaps in the official evaluation and accountability process as numeric data is compiled and published without the necessary analysis as to performance in terms of speed and efficiency. Official reports containing bare statistics miss out what all this data *means* as to court performance. In the context of socio-economic development and justice reform to establish the rule of law, rigorous and continuous evaluation of the court service is required to inform reform policy and practice. The impact of two major reform initiatives in Pakistan during the 2000s (AJP 2002-2008 and NJP 2009-2011) has remained elusive. Qualitative feedback of the litigants is not used at all as a tool of assessing the system's output in the official discourse. Therefore, in view of these gaps, empirical research on these lines and a comprehensive and in-depth analysis of issues of performance as to efficiency is highly desirable.

The framework of evaluation suggested for Pakistan may include: (a) appraisal through quantifiable indicators like CCR and volume of the backlog of cases; (b) collection of data of litigants' real-life experiences and looking into the problems through their eyes; and (c) comparative ranking of Pakistan's justice service among countries with similar conditions. Using these three different sets of indicators, the author analysed the performance of Pakistani courts in his research project at Newcastle

University. The findings revealed a consistently low clearance rate which resulted in a gradual bulging of the backlog throughout. Capacity-building measures under the AJP (2002-2008) initially improved the CCR; emergency surgical measures under the NJP (2009-2011) also reduced the backlog. However, these reforms had only temporary effects; the CCR remained low in most of the years from 2002 to 2014. Moreover, the measures were not directed to explore other areas, specifically the root causes of problems and deeper institutional factors which in the first place had slowed the pace of disposal and let the backlog bulge.

Qualitative feedback of the litigants reveals inordinate delay and human suffering, largely due to lawyers' self-interest, disruption of court proceedings through parties deliberate conduct and administrative mismanagement. Inevitably, court processes are prone to be misused and frivolous litigation is prevalent, but the court system appears unable to contain such practices effectively. International ranking of Pakistan's court service among countries of identical regional and economic conditions gives Pakistan a low position, indicating the instrumentality of institutional factors. Only by empirical scrutiny and effective appraisal may we better understand the long-standing issues of delay, misuse of court process and vexatious litigation.

References

- Ahmad, Naved (2005) 'Governance, Globalization, and Human Development in Pakistan' 44(4, Part II) *Pakistan Development Review* 585-594.
- Armytage, Livingston (2012) *Reforming Justice: A Journey to Fairness in Asia* Cambridge: Cambridge University Press.
- Asian Development Bank (2001) 'Report and Recommendations of the President on Proposed Loan and Technical Assistance Grant to Pakistan for Access to Justice Program'.
- Asian Development Bank (2009) 'ADB Completion Report—Pakistan: Access to Justice Program'.
- Baxi, Upendra (1982) *The Crisis of the Indian Legal System: Alternatives in Development Law—Stranger Journalism* New Delhi: Vikas Publishing House.
- Fox, Russell (2012) *Justice in the 21st Century* London: Routledge-Cavendish.
- Khan, Hamid (2016) *A History of the Judiciary in Pakistan* Oxford: Oxford University Press.

- Law and Justice Commission of Pakistan (2003) *Judicial Statistics of Pakistan 2003* Islamabad: Law and Justice Commission of Pakistan Secretariat.
- Lewin, Arie Y, Richard C Morey & Thomas J Cook (1982) 'Evaluating the Administrative Efficiency of Courts' 10(4) *Omega* 401-411.
- Merryman, John, David S Clark, & Lawrence M Friedman (1979) *Law and Social Change in Mediterranean Europe and Latin America: A Handbook of Legal and Social Indicators for Comparative Study* Stanford CA: Stanford Law School (Stanford Studies in Law and Development).
- Messick, Richard E (1999) 'Judicial Reform and Economic Development: A Survey of the Issues' 14(1) *World Bank Research Observer* 117-136.
- North, Douglass C (1990) *Institutions, Institutional Change and Economic Performance* Cambridge: Cambridge University Press.
- Palumbo, Giuliana, Giulia Giupponi, Luca Nunziata and Juan Mora-Sanguinetti (2013) *Judicial Performance and its Determinants: OECD Economic Policy Papers 5* Paris: OECD Publishing.
- Rana, Shahbaz (2017) 'Defence, Interest Payments Consume over Three-fourths of Tax Revenue' *Express Tribune* 30 November
- Rottman, David B & Tomkins, Alan (1999) 'Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges' 36 *Court Review: Journal of the American Judges Association* 172-174.
- Sen, Amartya (2006) 'What is the Role of Legal and Judicial Reform in the Development Process?' 2 *World Bank Legal Review* 33-50.
- Siddique, Osama (2010) 'Law in Practice—The Lahore District Courts Litigants Survey (2010-2011)' DPRC Working Paper Lahore: Lahore University of Management Sciences.
- Siddique, Osama (2013) *Pakistan's Experience with Formal Law: An Alien Justice* Cambridge: Cambridge University Press.
- Supreme Court of Pakistan (2009) '[National Judicial Policy 2009](#)' Islamabad: Secretariat Law and Justice Commission of Pakistan.
- Syed, Baqir Sajjad (2018) '[Budget 2018-19: Rs 1.1 Trillion Proposed for Defence](#)' *The Dawn* 28 April.
- World Justice Project (2016) '[Our Approach: WJP Rule of Law Index](#)' Washington DC: World Justice Project.
- Zuckerman, Adrian (2006) *Zuckerman on Civil Procedure: Principles of Practice* London: Sweet & Maxwell.

Legislation Cited

Constitution of Pakistan 1973 (Pakistan)

National Judicial Policy Making Committee Ordinance 2002 (Pakistan)

TWO DIMENSIONS OF THE RULE OF LAW: A REMINDER FROM HONG KONG

CHO KIU CHIANG

The University of Hong Kong

Abstract

In this article, two dimensions of the rule of law, namely the ‘rule of’ dimension and the ‘law’ dimension, are discussed with reference to the ongoing protests in Hong Kong. The meaning and the linguistic boundaries of ‘rule of’ and ‘law’ are explored, and relevant theories of the rule of law are also considered. By analysing the dimensions of ‘rule of’ and ‘law’, we understand that the usage of the term may reveal the ambit of rule of law. The question of whether some ideas count as conceptions of the rule of law can be answered to some extent. More importantly, on the view of the rule of law that I defend, governments are not free to blame the governed for undermining the rule of law, and they are bound to do what the rule of law requires when making their official representations and statements.

Keywords: rule of law, Hong Kong, public order, obedience, police powers, discretion

[A] INTRODUCTION

The rule of law has always been a matter for debate amongst legal scholars. Different theories of the rule of law may be categorized as thick or thin theories (Tamanaha 2008). The emphasis of thick theory is on substantive justice, while thin theory concerns mainly procedural fairness and formal legality (Dworkin 1985: chapter 1; Raz 2009: chapter 11; Tamanaha 2004, 2008).¹ Due to the plurality of conceptions, there are some recurring issues surrounding the rule of law. For example,

¹ Brian Tamanaha (2008: 4) said ‘more substantive or “thicker” definitions of the rule of law ... include reference to ... democracy.’ However, he did, on a different occasion, include democracy in the formal or thin version of the rule of law (2004: 91). Potentially, this gives rise to a contradiction in his construction of the rule of law.

whether we should include the respect for human rights as a principle of the rule of law (see e.g. Bingham 2011; Dworkin 1985: chapter 1; cf. Raz 2009: chapter 11, 2019), and whether social welfare is also something of which the rule of law should take care (see e.g. Barber 2004; King 2018). These issues are highly relevant to the development and our understanding of the theory of the rule of law. However, there are more basic questions to be answered.

When scholars propose their versions of the rule of law and argue against others, they tend not to take reality and history into consideration. There is a fresh attempt by Joseph Raz to update his account of the rule of law, the major aim of which 'is to avoid *arbitrary government*' (2019: 5 emphasis in original). The 'obvious advantages' of the doctrine of rule of law (Raz 2019: 11–12) may be obvious in countries which have a culture or tradition of the rule of law but may not be so obvious to people who are not speaking in the same tradition. The doctrine will be more relatable if the wrongs committed by arbitrary governments are sufficiently depicted. Even if we think that the pervasiveness of arbitrary governments is evident, for the sake of argument, it may be necessary to point to some specific social issues that can be resolved by invoking the principles of the rule of law. Brian Tamanaha (2004) noted the endorsement of the rule of law by autocratic regimes, such as China (2), but as his study unfolds, the reflection, let alone criticism, on the reception and application of the rule of law in these countries is limited.² This illustrates a wider tendency within the rule of law discourse to focus on theory, with inadequate attention paid to the implications of such theories in the real world.

Nonetheless, various academic writings seek to put the theories of the rule of law into practice or apply those theories as standards to assess whether legal systems comply with the principles of the rule of law. It can be noted, however, that when the practice of the rule of law is at issue, a 'rule-and-application' approach is often adopted.³ In other words, the evaluation of facts and events affecting the rule of law is preceded by the

² Tamanaha (2004) referred to China again when he attempted to make the points that rule by law 'is the Chinese government's preferred understanding of the rule of law' (92), that 'China can implement formal legality without democracy' (112), and that the rule of law understood in terms of formal legality 'is also consistent with authoritarian or non-democratic regimes, as illustrated by the respective examples of Singapore and China' (120). However, these claims sound like bare assertions without sufficient proof or at the very least extended discussion.

³ For example, Albert Chen (2016) applied the thin conception of the rule of law to assess whether China had been moving towards or turning against the rule of law. Chen summarized Randall Peerenboom's evaluation of China's compliance with the rule of law (2016: 10–11, 29–30) which Chen likened to Lon Fuller's account (2016: 27). See also *The World Justice Project Rule of Law Index 2019* in which the World Justice Project measured the practice of the rule of law in different countries by a set of factors (2019: 10).

delineation of the concept and does not deviate from existing discourses on the theories of the rule of law. Yet, human interaction with, utilization of and subjection to the law may raise doubts about the nature of law, politics and government. As we attempt to clear the doubts, we may come to realize that the theories of the rule of law can be revisited and reformulated.

If we want to connect our theorization of the rule of law to reality and reflect upon how this could lead to advancement of the theories of the rule of law, the ongoing protests in Hong Kong may be a meaningful starting point. Two aspects of the protests are of specific interest. First, protesters have reportedly engaged in serious unlawful behaviour. Second, the police have been shown to be involved in grave misconduct and violence. We may gain insights into the ‘rule of’ dimension of the rule of law by reviewing the former and further learn about the dimension of ‘law’ in the rule of law by scrutinizing the latter. The major lesson from this analysis, I suggest, is that people, and more importantly governments, cannot attach the term to any idea relating to the law, and ‘rule of’ and ‘law’ in the term may serve as constraints on those who rule and govern. If a government is unwilling to observe those constraints, then it should not make claims that it operates on the basis of the rule of law.

[B] THE ‘RULE OF’ DIMENSION

Since the protests in Hong Kong started in June 2019, we have frequently heard that protestors or—according to the Hong Kong and Chinese governments—‘rioters’, damage the ‘rule of law’ through ‘violence’ and unlawful deeds (see the news reports and editorials of the Chinese state-owned newspaper, e.g. *China Daily* 2019a; 2019b; 2019c).⁴ That breaking the law is breaking the rule of law is a propaganda-like governmental slogan in Hong Kong.⁵ The ‘rule of law’ in this sense means ‘public order’ which requires compliance with the law on the part of the citizens. Having all of the ruled subject to the commands of the sovereign is perhaps many

⁴ The ‘violence’ at this stage involved, inter alia, ‘clashes between police and radical protesters, paralyzing core administrative and business areas’ (*China Daily* 2019d). It may be difficult to see how ‘paralyzing core administrative and business areas’ alone is violent, and it is equally perplexing that the expression of the word 奪 *duo*—to seize in English—is violent according to some judges in the Court of Appeal in Hong Kong (*Secretary for Justice v Wong Chi Fung* (2018)), but it is not the purpose of this article to discuss the dubious and shifting meaning of ‘violence’ according to the Hong Kong and Chinese governments and their aides.

⁵ The saying is nothing new. It was propagandized during the Occupy Central Movement in 2014 (see e.g. *China Daily* 2014).

rulers' dream.⁶ Some commentators have argued that this is not what the rule of law means, citing a variety of theories of the rule of law (see, e.g., Dupré 2019; Eu 2019). Different interpretations of the rule of law continued to oppose each other at the ceremonial opening of the new legal year in Hong Kong (see Lau & Ors 2020). However, people are not persuaded by one another. This shows that we are unable to denounce rival theories of the rule of law as wrong simply by being in line with the government position or drawing on the reasoning of renowned jurists.

Raz (2019: 2) is right that '[t]here is no point in verbal disputes about which ideals deserve to be called the rule of law', but the reason is not that 'the term "the rule of law" is used to designate somewhat different ideals'. The problem we are encountering is that different idea(l)s are being labelled as the rule of law, by governments, and people—including Raz—but an authoritative and conclusive understanding of the rule of law has yet to emerge. The Razian account of the rule of law is correct only if the 'two premises—that governments may act only in the interests of the governed, and that honest mistakes about what that is and what it entails are the stuff of ordinary politics'—are correct (see Raz 2019: 14). While Raz (2019: 14) believed that his 'defence of the doctrine of the rule of law depends on the soundness of the premises, not on everyone's agreement with them', he seemed to have neglected, in reality, the absolute power of some governments to 'disagree with' the premises and the adverse consequences such 'disagreement' brings. It is troublesome when some authoritarian governments disagree with the premises. The disagreement would come in the form of the premises being 'unsound'. Raz has not really defended his premises by exploring their moral force and political attractiveness, for example why governments may act only in the interests of the governed. Advantages of the doctrine of rule of law that Raz presented may point to this premise, but the premise itself is not justified. It seems that the premises were expected to be convincing to many, but if they are rejected from the very beginning, we will not be able to bring up the Razian account of the rule of law. It is possible that a government would base the doctrine of the rule of law on the premises that governments may act only in the interests of the ruling party, and that decisions about what that is and what it entails are the stuff of General Secretary of the Central Committee of that party. Thus, the cardinal principle of the rule of law based on these two premises would be 'the governed must obey the orders of the ruling party'. The reply might be that it would be evil, immoral, unethical and without virtue for the regime to espouse a theory of the rule of law based on those premises. It may

⁶ The 'command' theory of law by John Austin is alluded to here (see Austin 1995: Lecture 1).

even be contrary to the rule of law from the Razian perspective, but the unfortunate fact is that nothing stops governments from making theories parallel to the premises proposed by Raz. The objects of government Raz identified (2019: 2) cannot resist competing claims, such as ‘people are born into a strong community which values sacrificing individual rights for group interests’, and ‘the government is not here to protect personal autonomy but to monitor the operation and growth of the country’. One can build a doctrine of the rule of law on any foundations of the state, whether good or evil. We must look for something irrefutable or universal, but political theories based on an assumption that the government must govern in the interests of the governed, like liberalist theories which (over)emphasize the importance of reason, tend not to be universal (see e.g. Young 1989).⁷

Raz (2019: 13) did qualify his account of the rule of law by declaring that the doctrine ‘can be observed, while respecting significant variations between countries that express their local traditions’, and, in a footnote that follows this declaration, he felt that ‘[n]eedless to say, it [the rule of law] will not be compatible with all possible traditions’.

The cold hard truth is that, even if we regard some traditions or cultures non-compliant with the doctrine of rule of law, the possible reaction nowadays of a non-Razian state will be that it is committed to its version of rule of law. The introduction of ‘adaptation’ and ‘local traditions’ risks substantial departure from the Razian notion in the theorization of a conception of the rule of law, although this might not have been intended by Raz. Moreover, to conclude that some traditions are inconsistent with the (Razian) doctrine of rule of law does not sound like a condemnation here since the acknowledgment of different local traditions would make non-compliance with the rule of law excusable. Thus, the need for adaptation may hurt both the construction and operation of the doctrine. To put it crudely, the characterization of a state as flouting the rule of law does not relieve the pain of a human being who suffers in a non-Razian state dominated by the propaganda that the state

⁷ See also Richard Rorty (1997) who criticized the universalist arguments of Jürgen Habermas and John Rawls for the case of ‘Western’ liberalism. I shall not enter the debates on theories of justice, liberalism and communitarianism here.

complies with its particular ‘ideal’ of rule of law.⁸ The thorny issue for Raz or indeed everyone is how to establish firmly the premises and hence a doctrine of the rule of law and deny extreme premises and a totalitarian rule of law.⁹

Notwithstanding the ambiguities that the rule of law ‘will not be compatible with all possible traditions’ (Raz 2019: 13 note 11) and that the rule of law is ‘a universal doctrine applying to all legal systems’ (Raz 2019: 15), we may ignore the former and consider the universality of the rule of law if we want to confirm whether certain theories are properly labelled as the rule of law, for example whether the demand of obeying the law is equal to the rule of law.¹⁰ ‘Flexibility and adaptability’ in applying the rule of law and the ‘respect for local traditions’, as embraced by Raz,¹¹ are somewhat elusive. Imagine a government controlled by a single political party which rules ‘in accordance with the law’, and its body of law consists of a piece of legislation criminalizing ‘inciting subversion of state power’ vaguely defined. There are also arrest, detention and

⁸ My unease with ‘local traditions’ stems from Raz’s invocation of international documents (2019:10). Although he did not use them on the point of ‘adaptability of the rule of law to local traditions’ (2019:13), we should not overlook that there is the ‘Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels’ adopted by the General Assembly of the United Nations in 2012, which allows ‘a broad diversity of national experiences in the area of the rule of law’ (paragraph 10; see also Burnay 2018: 225). Matthieu Burnay commented that:

The rule of law is, in other words, recognised as a home-grown concept whose definition and content vary by state depending on the legal culture, constitutional tradition as well as economic, social and political system at hand. This innovative approach negates the universal character of the rule of law and recognises the existence of a multiplicity of rule of law experiences across legal cultures and traditions (2018: 225).

I do not have to speculate that the Declaration was carefully drafted in a way not to anger some non-Razian states. Raz certainly does not dominate the conversation of the rule of law. The fear is that universality—which Raz rightly attached to the rule of law—would be true only to the extent that ‘rule of law’ remains as a label.

⁹ Raz anticipated that ‘securing the rule of law is a condition for respect for human rights, for principles of justice and more’ (2019: 15), so the version of the rule of law that is unwanted is at least something open to ‘the denial of human rights’, ‘extensive poverty’, ‘racial segregation’, ‘sexual inequalities and religious persecution’ (cf. Raz 2009: 211).

¹⁰ Raz (2009: chapter 12) explained in detail to us that there is no obligation to obey the law while the president of the Law Society of Hong Kong, who has often sided with the Hong Kong and Chinese governments, preached without reasons that ‘[I]est it be forgotten that obedience of the law, safeguard of the law are not only our duties, but our core values’ (see Ng 2020).

¹¹ The example of local traditions Raz had in mind was trial by jury (2019: 13), but traditions may be big or small. Local traditions may be taken by autocrats in Asia to mean ‘Asian values’ employed by autocrats to justify developing the economy at the expense of political virtues, such as the rule of law, human rights, democracy and justice (Sen 1997). The ‘adaptability of the rule of law to local traditions’ would not, as Raz claimed, ‘help[] refute criticism that it is a manifestation of one culture imposing its norms on others,’ (2019:1 3) but invite the ‘clash of civilizations,’ to borrow the term of Samuel Huntington (1996).

punishment, if not torture, for any act of the people the government dislikes in the name of 'going to prostitutes'. This government may be a regime of the rule of law. Since there are 'threats' to national unity and security, the legislation to combat subversion is protecting the people as a nation and 'in the interests of the governed' (Raz 2019: 7). The only ruling party of the government advertises itself, internally and internationally, as the 'custodian' of the governed (see Raz 2019: 7). Arrest, detention and punishment of the dissidents always come with the reason of 'visiting prostitutes', and the 'evidence' for this behaviour is abundant. The measures and tactics to eradicate anybody the government sees as 'anti-party' and 'counter-revolutionary' flow from the tradition of this country. We have to consider whether we should adapt the rule of law to conclude that this imaginative regime satisfies the requirements of the rule of law. It is doubtful how flexible we should be, and above all, how valuable and respectable traditions are when they refer to oppression, persecution and subjugation. The role traditions should play in formulating theories and principles of the rule of law is questionable. Raz would not wish to strip the rule of law of its moral quality as he insisted that 'it is a moral doctrine' (Raz 2019: 5, 9, 12, 13, 14, 15). To admit that the rule of law is incompatible with some traditions implies that the rule of law may be an irrelevant consideration to these traditions from their perspectives, and this admission may be intentionally perceived as an excuse for some legal systems to evade the universality of the Razian doctrine of rule of law. The result is usually not that these legal systems are regarded as immoral due to the lack of the rule of law, but that they are simply immune from appraisal since our attitude becomes: this culture does not conform to the rule of law, but it does not matter as it is a deep rooted problem of that tradition which is fundamentally different from ours.

It is clear that our task is to set out a genuinely universal theory of the rule of law which is invariably a moral virtue that the law should have. The Hong Kong and Chinese governments are not amongst the first to assert that the rule of law means obeying the law. According to Raz (2009: 212), "[t]he rule of law" means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it.' Ivor Jennings, whom Raz referred to, went further. Jennings (1943: 42) declared that 'the people became law-abiding; the rule of law was established. The rule of law in this sense implies, therefore, simply the existence of public order.' While Raz did not dwell on the rule of law in this sense as he focused on the rule of law 'in political and legal theory' (Raz 2009: 212), Jennings recounted the history of the

rule of law and the liberal tradition and moved on from the rule of law in terms of 'public order' and being 'law-abiding' (Jennings 1943: 44–45). The parlance of political and legal theorists or the literature of political and legal theory and the shift of popular attitude through the course of history obviously do not compel rejection of the rule of law as the obedience of law. The Hong Kong and Chinese governments will happily rely on the aforesaid statements of Raz and Jennings to push us into equating the rule of law with obeying the law, although it can be recalled that Raz (2019: 7) eventually attached his account of the rule of law to some arguably sound and plausible premises on 'what it is to act as a government'.

It is unfortunate that Raz did not really enquire about what the 'rule of' law literally means. Theorists should ensure both the form and substance of their theories, and the connection between the two make sense. Bringing the concept of the rule of law within its linguistic boundaries may allow us to have a picture of the rule of law without the stains of 'public order' and 'abiding by the law'.¹² The term itself does not permit the inclusion of whatever ideals in the rule of law. It may be perfectly legitimate to ask for order and obedience, but one is not free to do so by naming the two 'virtues' the rule of law. The 'rule of' element of the rule of law determines its fate as a doctrine imposed on the ruler, the government and the administration. Regardless of how people theorize it and thought of it in the past, the rule of law stands as a quality about the 'rule' but not 'being ruled', 'being governed' or 'being administered'. Were the meaning that the rule of law connoted the condition of being ruled, governed, administered or even controlled, the expression of it would be phrases such as the doctrine of being subject to the law, the virtue of being ruled, governed, administered or controlled by law and the ideal of being subject to the rule, governance, administration and control of law.

The first impression of 'the rule of law' is that it is put in active rather than passive terms. The obligations surrounding the rule of law fall unequivocally on the ruler or the government instead of the ruled or the governed. Even if the rule of law can be transformed into a doctrine of being subject to the law, we do not know who or what is called upon to follow the law. There is nothing preventing anybody, especially

¹² We are concerned here with the situation where, first, we use the term 'rule of law', and then, we sense that the way in which the concept is expressed prevents it from burdening the governed with a duty to obey laws. The worry that a society may not have the expression of the rule of law but is up to the standard of the rule of law is irrelevant. The focus on language does not mean the rule of law exists only in societies where the term exists. Rather, it is inviting people to reflect upon whether it is accurate and sensible to associate the term with the desire of some governments for an obedient herd.

governments, from pleading for or requiring public order and compliance with the law (on the part of the ruled or the governed), but the one making the call or issuing the command shall not invoke the rule of law for this purpose. Otherwise, the name so used does not match the meaning so intended. The same can be put forward for the ‘rule of’ dimension in the ‘rule of law’ translated into Chinese. 法治 *Fazhi*—the most common translation of the rule of law in Chinese—is constituted by 治 *zhi* which as a noun means ‘rule’ or ‘governance’. Some may argue that *zhi* can also denote 治安 *zhian*—public order. If this were true, *fazhi* would be the abbreviation of 法律 治安 *falü zhian*—law and order. Then, this *fazhi* points not to the rule of law but law and order, and ‘law and order’ shall be used all along.

Emphasizing only adherence to law on the part of the people without subjecting those who rule and govern to the same duty resembles ‘rule by law’, and legal theorists are conscious of the marked difference between rule by law and the rule of law (see e.g. Postema 2014: 22–23). It is hardly enough to point out the rule-by-law character of an authoritarian government for instance. The propaganda that such a rule-by-law mode of governance is the authentic rule of law persists. We must have a device that excludes in our discourse the ‘rule by law as rule of law’ (mis)understanding. Confining any construction of a theory of rule of law to thinking from the perspective of the ruler or government through stressing ‘rule of’ in the term may help clarify the matter. The general saying that rule of law means no one, including the government and the ordinary public, is above the law sounds unobjectionable, but I do not know whether this is to forge a sense of fairness between the government and the governed so that the former would readily subscribe to the rule of law. Roughly speaking, there is always an imbalance between the government and the governed, the former of which usually monopolizes political power. It is doubtful if we should judge the latter with equal harshness or apply the concept of rule of law to the latter at all.¹³ More importantly, to include public order in the doctrine of rule of law may be a reaction to the fear for lawlessness, but one should not forget the power and duty to maintain public order are in the hands of the government, and complete failure to keep peace in the society may be a form of misuse of power which is dealt with by the rule of law in supervising the exercise of power. To require the governed to adhere to the law appears redundant. Furthermore, to understand the rule of law as public order and obedience

¹³ I note in passing that Gerald Postema (2014) argued for fidelity to law from everyone in a society as a *condition* of the realization of the rule of law. Arguably, fidelity on this account is then not an intrinsic part of the contents of rule of law.

to the law may cripple the rule of law to the extent that there no longer exists any legal system which is up to the standard of the rule of law in the world. This is because, in each and every jurisdiction, there are outlaws and criminals disobeying the law and hence eroding the so-called 'rule of law'. To the disappointment of the president of the Law Society of Hong Kong, who spoke at the ceremonial opening of the new legal year in Hong Kong,¹⁴ the 'rule of law' by her definition is too unrealistic to be taken seriously.

Giving a speech on the same occasion, the Secretary for Justice of the Hong Kong special administrative government portrayed the 'state of turmoil' in Hong Kong in 2019 as 'rule of mob' (see Ng 2020). 'Rule of mob' and the 'rule of law' are then seemingly antonymous. However, we may consider, as a peripheral issue, how the rule of mob can happen. As long as the Hong Kong government is exercising a tight grip on Hong Kong, there is no rule of mob. The one who rules and governs is the Hong Kong government (under the omnipotent Chinese government and with the uncontrolled or uncontrollable police) but not the protesters or 'rioters'. It never has been. To adopt the rhetoric of 'rule of mob' and with accusing the protesters of destroying the rule of law risks giving the subversive idea that the Hong Kong government has been overthrown, one-party dictatorship ended and the police condemned.

[C] THE 'LAW' DIMENSION

While 'rule of mob' is not the opposite of the rule of law, the rule of men may be truly antithetical to the latter. 'The rule of law asks what it means to be governed by law, rather than by men', wrote Barber (2004: 474) at the beginning of his article on the social dimension of the legalistic conceptions of the rule of law. 'Rule of law, not man' is one of the three key themes Tamanaha (2004: 122) gleaned from the pool of theories of the rule of law. Raz (2009: 212) also noted '[t]he ideal of the rule of law in [the narrower sense in political and legal theory] is often expressed by the phrase "government by law and not by men"'. Barber (2004) and Raz (2009: chapter 11) did not pursue the enquiry about the notion of rule of men, thinking perhaps such an enquiry would not be helpful. Tamanaha (2004: 122) on the other hand mentioned, amongst other things, 'law is non-discretionary, man is arbitrary will'. In the recent months of protests, it is well-known that the Hong Kong Police have committed many wrongdoings ranging from unnecessary stop and search, and unlawful

¹⁴ 'Every wilful disobedience of the law is an erosion on our rule of law', said the president (see Ng 2020).

detention and arrest to violence, torture and excessive use of weapons and live ammunition (see Amnesty International Hong Kong 2019). The Police have categorically denied that they committed any misconduct and alleged that every action they took in handling the protests was lawful, proclaiming themselves the symbols of justice (see Cheng 2020). The police are given a wide range of powers and discretion which are barely and rarely constrained, for instance the power to arrest and detain suspects and the discretion to employ weapons, including pepper spray, tear gas, batons and firearms. It is probably generally acknowledged that the existence of too much police power itself threatens the rule of law let alone the abuse of it. By virtue of the Razian account of the rule of law, unreasonably great police power and serious police misconduct may amount to arbitrary government which should be avoided. Nevertheless, the Hong Kong Police would argue that what they did was no more than necessary and was authorized by the law. Thus, we are bound to be confronted with the age-old problem of how to hold the opponents to a certain account of the rule of law.

Raz (2019) invited us to reason with him. He highlighted only ‘familiarity’ and ‘predictability’ as crucial to the process of people ‘acculturating’ and ‘learning to make their own life’, so ‘[t]he rule of law consists of principles that constrain the way government actions change and apply the law—to make sure, among other things, that they maintain stability and predictability, and thus enable individuals to find their way and to live well’ (2019: 2). That people ‘acculturate ... creatively using the opportunities and observing the limits set by their cultural norms’ (Raz 2019: 2) may be circular. Since cultural norms are determined by the people who are the authors of the limits of the society, it is difficult to see why they must observe the norms and limits without regard to the reasonableness and justification of those norms and limits. If people create a culture of respecting human rights, then perhaps the preservation of humanity and personhood as reflected in principles of human rights will be integral to people ‘learning to make their own life’. It is inconceivable that only the stability and predictability of norms and government actions are ‘essential for the well-being of individuals’ (see

Raz 2019: 2).¹⁵ This looks similar to the theory of F A Hayek (1982) that laws are generated by the spontaneous social order and should not be disturbed by legislation. Beside stability and predictability, liberty, as Hayek observed, is also essential for the well-being of individuals since laws originally came from how people conduct their own affairs, and government actions and legislation may offend the social order, causing injustice and affecting the stability and predictability of the norms under the social order. In any event, Raz seemed to have disagreed with Hayek regarding liberty or whether the rule of law protects liberty (see Raz 2009: chapter 11), but he chose ‘what are essential for the well-being of individuals’ as the starting point of thinking about the rule of law in his 2019 article, so it is unlikely that he can evade any challenge flowing from his omission of protection of human rights and civil liberties in his revised account of the rule of law. Raz did not stop at reasoning from the essentials for the well-being of individuals and said repeatedly that the rule of law shall be premised on ‘the interests of the governed’ (2019: 7). The governed are human beings. James Griffin (2010: 346) stated that ‘human rights are protections of our human status ... normative agency’ or ‘personhood’. There is therefore no room for ‘ordinary politics’ and ‘honest mistake’ in determining what the interests of the governed are in the aspect of human rights (see Raz 2019: 14). The question of ‘what are necessary to ensure people can pursue their good life and hence demonstrate their normative agency’ must be answered (see Griffin 2008: 45–48). The interests of the governed must involve the respect and protection of human rights. Raz (2010) himself might have had a sceptical view on human rights under which he thought there were no human rights but human rights practices, but he seemed to welcome human

¹⁵ It may be argued that Raz thought of the rule of law or law in response to disorientation and chaos resulting from lawlessness, which is similar to the ‘state of nature’ of ‘perpetual war’ put forward by Thomas Hobbes. However, the Hobbesian version of the state of nature is no more ‘truer’ than other versions, such as John Locke’s. Postema citing both Hobbes and Locke said:

Law, on this ancient idea, is a bulwark against domination by others. In this vein, some, such as Hobbes, thought of law narrowly as a ‘hedge’ against power wielded by one’s fellows, whereas others, such as Locke, construed it more broadly as a framework of common rules giving equal status in the community to each member. (2014: 21 footnotes omitted)

We have no reason to stick to the Hobbesian state of nature. Further, as the scholarship of liberalism has developed for decades, it is hard to see why the Hobbesian state of nature should be chosen or prevail over the more liberal ‘original position’ imagined by John Rawls (1999). Humanity, human dignity, human rights and so on are not some ordinary valuable pursuits, such as classical music, but the fundamentals of being human. If they were pursuits just like classical music, then stability and predictability in government actions would be no more different. Raz should have justified his choice of the state of nature and explained why a reflection on humanity was unnecessary.

rights when he recognized that ‘securing the rule of law is a condition for respect for human rights’ (2019: 15).¹⁶

Raz’s arguments from the essentials for the well-being of individuals and the interests of the governed may not be without flaws.¹⁷ Efforts have been made, but the outcome is not so satisfactory. Dealing with the dimension of ‘law’ in the rule of law may be more convenient and effective. Indeed, in his earlier account of the rule of law, Raz considered the meaning of ‘law’: ‘Government by law and not by men is not a tautology if “law” means general, open, and relatively stable law.’ (2009: 213) He said that this is the lay sense of law. In order for law to guide, and fulfil the requirements of the rule of law, particular laws have to conform to the lay sense of law. However, it is extremely doubtful whether a law ordering the killing of a group of people, however general, open and stable, can guide human behaviour nowadays. Personal conscience and social psychology vary, but a law intended to be a guiding norm cannot be possible without justifying its substance to a certain extent.¹⁸ There is also no reason to insist that the rule of law requires the law to guide but not to educate and moralize. Raz did not endorse the legal positivist meaning of law as ‘law’ in the rule of law. He (2009: 213) said ‘[f]or the lawyer anything is the law if it meets the conditions of validity laid down in the system’s rules of recognition or in other rules of the system’, citing H L A Hart’s *The Concept of Law*, and the rule of law means subjecting such ‘legal orders’ to the law in the lay sense. This proves that Raz was not unwilling to adopt an understanding of law different from the legal positivist conception.¹⁹ The

¹⁶ This is a charitable reading of Raz’s view, I guess. He did not stress the centrality of the rule of law as a condition for securing human rights when he said ‘while the rule of law does not secure conformity to the other principles the law should conform to, it is *close* to being a condition for the law’s ability to conform to them’ (2019: 15 emphasis added). Raz was aware of the fact that his article was not chiefly about the relationship between the rule of law and human rights, so he did not speak with certainty that the rule of law *is* a condition for human rights but merely *close* to such a condition. This can be contrasted with Postema’s (2014) treatment of fidelity to law as central to the discussion on the rule of law.

¹⁷ Compare what Raz said in *The Morality of Freedom*: ‘All but the biologically determined aspects of a person’s well-being consist of the successful pursuit of goals which he has or should have’ (1986: 308). Goals that a person has or should have are definitely not confined to stability and predictability. In order to ‘enable individuals to find their way and to live well’ (2019: 2), by virtue of Raz’s own ‘autonomy-based doctrine of freedom’, ‘the state has the duty not merely to prevent denial of freedom, but also to promote it by creating the conditions of autonomy’ (1986: 425).

¹⁸ See the discussion of *telos* and the law by Peter Railton (2019).

¹⁹ I thank the anonymous reviewer for pointing out the difference between the lawyer and lay senses of law is one between *lex* and *ius*. See also John Gardner (2012: 228). However, this is not obvious from the chapter by Raz (2009: 213), and I concentrate here on Raz’s treatment of the rule of law as the law from the lay perspective instead of digging out the Roman history and the Latin roots of lawyer’s law or laypeople’s law.

law in the lay sense is somewhat moral and is an example of good law.²⁰ It seems there was an opportunity to set the law in the lay sense as just law. Laypeople would think that the law should be just and fair. We do not know what was stopping Raz from checking particular laws in the legal positivist sense against the standard of just law as a considerable amount of laypeople would expect.

While building a theory of the rule of law as the rule of just law is commendable,²¹ ascertaining the meaning of the word 'law' in the rule of law may be a more direct way to address our problems in reality for 'thick' theory or theory of substantive justice of the rule of law may not be a theory to which unscrupulous people or governments would subscribe. Ideally, to discover the 'law' dimension in the rule of law, we should endeavour to suggest the linguistic limits of the word 'law'. The task would then become definitional. A definitional theory of law, the aim of which is to define 'law', may fail spectacularly.²² The matter is further complicated when law may be 'interpretive' rather than 'semantic' (Dworkin 1986) or 'criterial' (Dworkin 2013).²³ Without sailing into the deep sea of jurisprudential debates on the nature of law, we may look not at what law is but at what law is not.

It is a common perception that 'law is non-discretionary' (see Tamanaha 2004: 122). Theories of the rule of law (not men) usually contain a non-discretionary aspect or an aspect of discretionary powers being curbed by laws or legal rules, and the theory of the rule of law expounded on by A V Dicey is classical and representative in this regard.²⁴ That law is the opposite of discretion is a view held by many theorists of the rule of law, but there is some unease in this statement. Either by the rules of recognition or by interpreting the integrity of our legal system which includes all the legal and political principles, rules and standards,²⁵ we must admit that a lot of discretionary powers exist in the legal system.

²⁰ Compare the 'inner morality of law' proposed by Lon Fuller (1969). See also Jeremy Waldron's (2008) account of Fuller's work and the rule of law.

²¹ For example, the theory of T R S Allan (2001).

²² Ronald Dworkin (1978: chapters 2, 3) attempted to show that the law is broader than what legal positivists might have envisaged. However, this may not be an effective criticism on H L A Hart's rule of recognition (see Hart 2012; Shapiro 2007).

²³ Dworkin regarded natural law theories and legal positivism as semantic theories (1986: chapter 1), and legal positivism as a theory treating law as a criterial or sociological concept of law (2013: 10–11).

²⁴ 'Dicey made the further point that the exercise of discretionary powers by government officials to impose constraint on individuals is inconsistent with the rule of law. Discretion and law, for Dicey, are antithetical' (see Tamanaha 2004: 63–64).

²⁵ See the Hartian concept of law (2012) and the Dworkinian interpretivism (1986).

These powers are usually granted by law or legislation to be precise, for example the police powers under the Police Force Ordinance (Cap 232) in Hong Kong. Raz (2019: 4) pointed out that while ‘the principles [of this account of the rule of law] appear to rule out changes in the law and reliance on discretion by legal authorities’, ‘[i]t is impossible for [the authorities] not to have discretion’. Thus, we are actually not concerned with the legality of official discretionary powers, although the fact that something is legal does not alter the nature of that thing. That is, we may say, the authorization or empowerment by law does not transform discretion or power into the law itself. In the end, such an utterance does not clarify the matter much. As cautioned by Raz (2019: 4), ‘[d]iscretion in the application and interpretation of laws is inevitable ... and even in the absence of discretion in interpreting, applying or modifying it, [the law] generates uncertainties and risk’.

While law and discretion may be two comparable concepts, we can appreciate that discretion is more about the application or non-application of the law. Non-application, it can be noticed, is the point at which the present discussion differs from Raz’s ideas. Discretion allows the official decision to apply or not apply what is prescribed or proscribed in the legal rules, principles and standards. Sometimes, the exercise of discretion is not a manifestation of the application of the law. Notwithstanding that the law may generate uncertainties and risks, there is a difference between, for instance, applying a rule which mandates the police to stop, search or detain any person ‘whom he reasonably suspects of having committed or of being about to commit or of intending to commit any offence’ and exercising discretion to or not to stop, search or detain depending on the circumstances.²⁶ The former situation may be that the statute states the police must stop, search or detain a person ‘whom he reasonably suspects of having committed or of being about to commit or of intending to commit any offence’ and must not do so if he does not have the requisite reasonable suspicion, whereas the latter can be that ‘it shall be lawful for the police officer’ to stop, search or detain when he has the said suspicion.²⁷ In spite of whether the police factually do as the law says and whether ‘reasonable suspicion’ is reasonably unambiguous, in the former case, the application or operation of the law is straightforward, but in the latter case, we can tell, the ‘application’ of the law is subtle and indirect. There is a substantive decision or judgement made between the law and its realization, which is not merely a determination of the meaning of the

²⁶ See section 54(2) of the Police Force Ordinance (Cap 232) (HK) which is titled ‘Power to stop, detain and search’.

²⁷ Taking the words from section 54(2) of the Police Force Ordinance (Cap 232) (HK).

words. It will be equally lawful for the police not to stop, search or detain a person 'whom he reasonably suspects of having committed or of being about to commit or of intending to commit any offence', and the police can decide to omit to exercise the discretion to stop, search or detain.²⁸ The chain of causation may be broken by that decision or judgment, and the law does not in this sense order or lead to the results of exercising the discretion. Arguably, the rule of 'law' at best covers the direct application of laws but does not tolerate the exercise of discretion which is influenced heavily by human factors. By the lay sense of law, we do not consider discretion law even if it passes the tests of being law in the lawyers' sense. The application of discretion in the name of (lawyers') law is not a manifestation of respecting the element of law (in the lay sense) in the doctrine of rule of law. When the Hong Kong Police exercise discretionary powers, they cannot purport that they follow the law, especially the Police Force Ordinance which may not give much guidance on how to conduct policing precisely. They are on their own to follow their own minds. A person exercising discretionary powers may follow his or her impulses, desires and so on in the absence of concrete substances. In this situation, one does not follow the law, and the respect for the rule of law seems improbable. The 'law' of discretion fails its mission to inject stability and predictability in the Razian society which needs a background that can provide directions for individuals (Raz 2019: 2), let alone a bigger project to guarantee the 'well-being of individuals', generously understood.

Kenneth Davis (1969: 3) famously noted that '[w]here law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness'. It is believed that discretionary powers can be properly allocated and utilized. Denis Galligan (1986) viewed discretion in a positive light as well and approached discretion by developing legal principles to regulate the exercise of it. The discomfort, when these theories of discretion are conveyed to the people of Hong Kong, may be that the theories are too grand and general to be plausible given the intensity and extent of police misconduct in Hong Kong. It strikes people that Galligan 'rationalized' and 'justified' the use of discretion due to its inevitability (see 1986: chapters 1, 2). It is acknowledged that discretion will pave the way for justice or tyranny, but it is unknown whether the chance of having discretionary tyranny is comparatively small and whether the benefits discretion may bring are great enough to

²⁸ If the burden on the police to stop, search or detain any suspicious person is too heavy, we may agree that the police must stop, search or detain *as far as reasonably practicable* any such suspicious person. Whether the reasonable practicability requirement is sufficiently clear is another question.

counterbalance the risk and harm of tyranny flowing from discretionary governance. Specific to Hong Kong or everywhere faced with the abuse of power by the police, the ‘law’ dimension of the rule of law invariably requires the curtailment of discretionary powers of the police. Police powers are different from general administrative and judicial discretion not only because the former often result in personal injury and even death, but also because the qualification, experience and skills of the ones who exercise the latter are normally guaranteed.²⁹

[D] CONCLUSION

In the term ‘the rule of law’, the ‘rule of’ dimension informs us that the virtue is about the government which is the one capable of undermining the rule of law unless it is ascertained that the government has collapsed and does not rule anymore, and the dimension of ‘law’ strongly discourages the use of discretion and hence directs that clear rules are maximized while discretion is kept to a minimum. Given the experience of Hong Kong, amongst the approaches that discretion is largely granted with limits and that discretion is only handed to the officials when necessary, one should prefer the latter. The benefits of clarifying the linguistic boundaries of the two dimensions of the rule of law include not merely that some dubious theories can be excluded, but also that the phrase itself binds the ones who invoke it: people, and particularly governments, are not free to exploit the term for whatever purposes, and the words in the term themselves require some basic obligations on the part of those who rule and govern. If a government does not want to fulfil those obligations—to keep its promise of the rule of law—then it should not utter those words at all. It is hoped that we know more by now about what we should talk about when we talk about the rule of law and what to talk about when we start talking about the rule of law.

References

- Allan, T R S (2001) *Constitutional Justice* Oxford: Oxford University Press.
- Amnesty International Hong Kong (2019) ‘[Interviews: Arbitrary Arrests, Brutal Beatings and Torture in Police Detention](#)’.
- Austin, John (1995) *The Province of Jurisprudence Determined* W E Rumble (ed) Cambridge: Cambridge University Press.

²⁹ It is doubtful if it can ever be accepted that some human beings are qualified, experienced or skilled to injure or kill their fellow human beings.

- Barber, N W (2004) 'Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?' 17 *Ratio Juris* 474–88.
- Bingham, Tom (2011) *The Rule of Law* London: Penguin Books.
- Burnay, Matthieu (2018) 'Chinese Perspectives on the Rule of Law' in T Suami & Ors (eds) *Global Constitutionalism from European and East Asian Perspectives* Cambridge: Cambridge University Press.
- Chen, Albert H Y (2016) 'China's Long March towards Rule of Law or China's Turn against Law?' 4 *Chinese Journal of Comparative Law* 1–35
- Cheng, Kris (2020) 'Hong Kong District Councillors Grill Police Chief Chris Tang' Hong Kong Free Press HKFP.
- China Daily* (2014) 'Hong Kong's Color Revolution'.
- China Daily* (2019a) 'Violence after HK Rally Clearly Premeditated and Planned: China Daily Editorial' 10 June.
- China Daily* (2019b) 'Lawlessness Undermining Rule of Law in Hong Kong: China Daily Editorial' 12 June.
- China Daily* (2019c) 'Beijing Backs Lam, Government of HKSAR' 18 June
- China Daily* (2019d) 'Legal Experts Urge Respect for 'long-Cherished' Rule of Law' 22 June.
- Davis, Kenneth Culp (1969) *Discretionary Justice: A Preliminary Inquiry* Baton Rouge: Louisiana State University Press.
- Dupré, Jean-François (2019) 'Legality and Equality Are Not Enough—There Is No Rule of Law in Hong Kong without Democracy' Hong Kong Free Press HKFP.
- Dworkin, Ronald (1978) *Taking Rights Seriously* Cambridge MA: Harvard University Press.
- Dworkin, Ronald (1985) *A Matter of Principle* Oxford: Oxford University Press.
- Dworkin, Ronald (1986) *Law's Empire* Cambridge MA: Harvard University Press.
- Dworkin, Ronald (2013) 'A New Philosophy for International Law' 41 *Philosophy and Public Affairs* 2–30.
- Eu, Audrey Yuet-mee (2019) 'Opinion—Can Hong Kong's Courts Save the City?' *New York Times* 16 November.
- Fuller, Lon L (1969) *The Morality of Law* New Haven: Yale University Press.
- Galligan, D J (1986) *Discretionary Powers: A Legal Study of Official Discretion* Oxford: Oxford University Press.

- Gardner, John (2012) *Law as a Leap of Faith* Oxford: Oxford University Press.
- Griffin, James (2008) *On Human Rights* Oxford: Oxford University Press.
- Griffin, James (2010) 'Human Rights and the Autonomy of International Law' in S Besson and J Tasioulas (eds) *The Philosophy of International Law* Oxford: Oxford University Press.
- Hart, H L A (2012) *The Concept of Law* 3rd edition Oxford: Oxford University Press.
- Hayek, F A (1982) *Law, Legislation and Liberty* London: Routledge.
- Huntington, Samuel P (1996) *The Clash of Civilizations and the Remaking of World Order* New York: Simon & Schuster.
- Jennings, Ivor (1943) *The Law and the Constitution* 3rd edition London: University of London Press.
- King, Jeff (2018) 'I-CONnect Symposium on "Constitutional Boundaries"—The Social Dimension of the Rule of Law' Blog of the *International Journal of Constitutional Law*.
- Lau, Chris & Ors (2020) 'Hong Kong's Chief Justice Sets up Task Force to Speed up Protest Cases but Hits Back at Critics Who Accuse Courts of Being Slow' *South China Morning Post* 13 January.
- Ng, Kang-chung (2020) 'Take "Public Interest" into Account on Whether to Bring Cases to Court, Instead of Just Sufficient Evidence, Head of Hong Kong Bar Association Says in Speech' *South China Morning Post* 13 January.
- Postema, Gerald J (2014) 'Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law' in X Zhai and M Quinn (eds) *Bentham's Theory of Law and Public Opinion* Cambridge: Cambridge University Press.
- Railton, Peter (2019) "We'll See You in Court!": The Rule of Law as an Explanatory and Normative Kind' in D Plunkett & Ors (eds) *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* Oxford: Oxford University Press.
- Rawls, John (1999) *A Theory of Justice* revised edition Cambridge MA: Harvard University Press.
- Raz, Joseph (1986) *The Morality of Freedom* Oxford: Clarendon Press.
- Raz, Joseph (2009) *The Authority of Law* 2nd edition Oxford: Oxford University Press
- Raz, Joseph (2010) 'Human Rights without Foundations' in S Besson and J Tasioulas (eds) *The Philosophy of International Law* Oxford: Oxford University Press.

- Raz, Joseph (2019) 'The Law's Own Virtue' 39 *Oxford Journal of Legal Studies* 1–15.
- Rorty, Richard (1997) 'Justice as a Larger Loyalty' in R Bontekoe and M Stepaniants (eds) *Justice and Democracy: Cross-Cultural Perspectives* Honolulu: University of Hawai'i Press.
- Sen, Amartya (1997) 'Human Rights and Asian Values' 217 *New Republic* 33–40.
- Shapiro, Scott J (2007) 'The "Hart–Dworkin" Debate: A Short Guide for the Perplexed' in A Ripstein (ed) *Ronald Dworkin* Cambridge: Cambridge University Press.
- Tamanaha, Brian Z (2004) *On the Rule of Law* Cambridge: Cambridge University Press.
- Tamanaha, Brian Z (2008) 'A Concise Guide to the Rule of Law' in G Palombella and N Walker (eds) *Relocating the Rule of Law* Oxford: Hart Publishing.
- Waldron, Jeremy (2008) 'The Concept and the Rule of Law' 43 *Georgia Law Review* 1–61.
- World Justice Project (2019) *The World Justice Project Rule of Law Index 2019* Washington DC: World Justice Project.
- Young, Iris Marion (1989) 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' 99 *Ethics* 250–274.

Legislation Cited

- Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (adopted 30 November 2012) UNGA Res 67 L1
- Police Force Ordinance (Cap 232) (HK)

Cases Cited

- Secretary for Justice v Wong Chi Fung* [2018] 2 HKLRD 657 Chinese Judgment (Hong Kong Court of Appeal)

**JONATHAN SUMPTION, *TRIALS OF THE STATE:
LAW AND THE DECLINE OF POLITICS****

PATRICK BIRKINSHAW¹

University of Hull

Jonathan Sumption, who delivered the 2019 BBC Reith lectures, was a pre-eminently successful barrister who rose from the Bar to the highest perch of judicial appointment in the UK, the Supreme Court, without occupying any intervening full-time judicial positions. He is clearly possessed of considerable ability and, while he loved the academic life as a don, he turned to the Bar as a career because he did not like penury. He is a conservative neo-liberal and a libertarian although he has given judgments that would support government claims, and his own thesis, that judges allow the judicial process to be used as the pursuit of politics by other means.² His libertarian views were well illustrated when he very publicly criticized the police for over-zealously implementing the wishes of ministers (and not the law), themselves reacting to public pressure, in applying stringent lockdown measures in the COVID-19 crisis in March 2020. Britain risked becoming a ‘police state’, he warned. Was the severe police reaction justified he asked? (*The Spectator* 2020)

The subject of *Trials of the State: Law and the Decline of Politics*, the book under review, is the role of judicial law in public life and law’s expanding empire. Sumption’s thesis is that judicial law has undermined legislation and the political process in the UK today. The argument was unfolded in lectures delivered in May and June 2019 in London, Birmingham, Edinburgh, Washington DC and Cardiff. These were, with some editing, then published in the present monograph.

* Profile Books 2019 and 2020.

¹ Emeritus professor of public law at the University of Hull. I would like to record my thanks to Martin Gallagher for his very helpful comments and criticism of this review. The faults that remain are the author’s.

² See e.g. *Bank Mellat No 2* [2013] UKHL 39, *Miller No 1* and his comments on *Miller No 2* below. Compare Lord Sumption in *Lord Carlile* [2014] UKHL 60.

As a judge, Sumption was not predictable or one-dimensional. In *Kennedy v The Charity Commission* ([2014] UKHL 20), he remarked, in terms which seemed favourable, that ‘The Freedom of Information Act 2000 [FOIA] was a landmark enactment of great constitutional significance for the United Kingdom’ (paragraph 153). He also sided with the majority in *Miller No 1* ([2017] UKHL 5) concerning the unlawful invocation of Article 50 Treaty on European Union by the government to serve notice of exit from the EU under the prerogative and not by parliamentary legislative consent. Such notice could only be served in the only manner known to our constitution; by consent of Parliament. In his retirement he supported the unanimous judgment of 11 judges of the UK Supreme Court in *Miller No 2* ([2019] UKHL 41). In the latter, which declared the Prime Minister’s advice to prorogue Parliament at a crucial stage in the Brexit process to be unlawful and void for undermining common law constitutional principles, he described Boris Johnson’s action and advice as ‘constitutional vandalism’ hardening ‘conventions of political accountability into law’.³ He changed his opinion from his initial thoughts which went in the opposite direction to the eventual judgment.

However, in *Evans v Attorney General* ([2015] UKHL 21), in which he did not sit, and which concerned an executive power given by Parliament in legislation to override the effect of a judicial decision over a veto on disclosure under section 53 FOIA, he wrote disapprovingly of the majority’s decision to outlaw an executive review of the judgment. This override, he argued, was clearly what Parliament, or in reality the executive, intended.

This theme was continued by Sumption in the *Privacy International* case ([2019] UKHL 22). He broke with orthodoxy established by the Law Lords in 1969 to argue in the minority that the secretary of state was entitled to succeed in arguing that Parliament had successfully locked out judicial review of the merits of the Investigatory Powers Tribunal’s decision, concerning what in effect are contemporary general warrants (thematic warrants) of mass surveillance, under the Regulation of Investigatory Powers Act 2000 (RIPA), section 67(8): this despite the long-standing 18th-century judgment of Lord Camden holding in *Entick v Carrington* ([1765] 19 St Trials 1029) that general warrants were unknown to the common law and therefore unlawful. The powers were now provided for by legislation but, if the lock-out was successful, a challenge under the Human Rights Act 1998 (HRA) was impossible if section 67(8) said what the government claimed it meant. The majority ruled that it is for

³ *The Times* 24 September 2019.

the courts to set limits on the *legal interpretation* of what the executive may do, not Parliament or the executive. Anything else would undermine the rule of law and violate the separation of powers. I agree with the majority. At paragraph 209 Sumption reasoned that the rule of law applies as much to the courts as it does to anyone else, and, under our constitution, effect must be given to parliamentary legislation. Presaging his 2019 lectures, he wrote:

In the absence of a written constitution capable of serving as a higher source of law, the status of Parliamentary legislation as the ultimate source of law is the foundation of democracy in the United Kingdom. The alternative would be to treat the courts as being entitled on their own initiative to create a higher source of law than statute, namely their own decisions.⁴

The executive override case law above is indicative of how judges have interpreted statutes in such a way that the courts have the final say on legality, not the executive. Although judgments may be reversed by legislation, the courts interpret what legislation means.

Judges, in reality judges in the Supreme Court, Court of Appeal and Administrative Court, have back-seated politics. Sumption's model of the ideal judicial process would encapsulate a minimal role for the rule of law emphasizing the formal attributes and not the substance. The vision of fundamental rights is one with a minimum content which, although the content might be arguable, the rights would be only those necessary for the protection of the democratic political process and communal (social) life. The more human rights are developed or are elaborated in adjudication, the more this assumes a role for the opinion of judges and non-consensual legislative action by judges. It objectifies what is inherently subjective judicial value preference and removes combative debate from the field of politics and representation of the citizens. Judicial supremacy, he argues, undermines active citizenship. It is power without accountability. It can also cut both ways, liberally and illiberally, as he shows in the *Lochner* line of cases in the United States.⁵ One individual's freedom may be another individual's oppression.

⁴ Just one further case of Sumption's deference to the legislature can be illustrated: *P, G and W* [2019] UKHL 3 on disclosure of conviction records etc to a prospective employer and the margin of judgment properly allowed to the legislator or the Secretary of State on whom the legislator has laid the task of defining the exceptions to the rehabilitation regime requiring disclosure. Although he agreed two of the exceptions allowing disclosure were disproportionate, the scheme generally was in 'accordance with the law', although capable of producing what some would consider very disproportionate results. See Lord Kerr's dissent.

⁵ *Lochner v New York* 198 US 45 (1905) and the 14th amendment protection of employers imposing unlimited working hours on employees under freedom of contract.

The message seems to have influenced Boris Johnson in his 2019 manifesto promise to appoint a commission to examine ‘broader aspects of our constitution and the relationship between government, Parliament and the courts’ and to restore ‘trust in our institutions’. The prerogative, so central in the *Miller* cases, will be examined by the commission. The HRA and judicial review will be ‘updated’, Johnson promises, in order to prevent the judicial process becoming an alternative means of doing politics.⁶ Not only some of the ideas, though not all of them, viz. Sumption’s role and comments in the *Miller* prerogative cases above, but also some of the wording are taken from Sumption.

Judges’ subjective values, Sumption argues, are given legal effect. The process produces a more substantive rule of law ‘that penetrates legislative and ministerial policy’: a form of the rule of law that focuses on justice according to greater openness, transparency and accountability rather than a strict literal and technical interpretation of language. Interestingly, Sumption referred in his lecture to judges ‘creating’ the realm of administrative law since the 1960s—in the book a weaker word, ‘developing’, is used. The principles are not recent creations or developments. They travel way back into our common law constitution. It was in the 1960s that they took on a new dynamic/momentum in an age of increasingly interventionist government.

Not only in the judicial role have judges overreached themselves, argues Sumption. Judges should not be asked to chair inquiries whose subject-matter is really within the province of political overlords. The Leveson Inquiry into the culture, ethics and practices of the press following scandalous behaviour should have been conducted by those more adept at political judgement (Questions, Lecture 1). The conclusions of a judge are not likely to be very helpful, he believes, in such matters. The politicians decided that the second inquiry by Leveson should not sit. Was this not because Leveson’s recommendations on ‘more sensitive aspects’ of relations between the press, the police and the state might be too inimical to the interests of politicians, press barons and the police? The politicians have subsequently done nothing apart from create a voluntary regulator to which no significant newspaper has signed up.

The resort to a written constitution is an extreme form of the tendency to judicialize politics, Sumption continues. But the UK system, he believes, makes politics supreme. The law did not create parliamentary sovereignty; politics did, he asserts. This reviewer’s belief is that it was

⁶ The Conservative and Unionist Party Manifesto 2019 page 48.

not politics that made Parliament supreme but the common law: not common law expressed in a judgment—judgments recognize Parliamentary supremacy—but common law as a system which ordained and ordains the English and UK matrix of governance; common law which develops and is subject to change (Birkinshaw and Varney 2017). The common law created parliamentary sovereignty. It was common law which brooked the power of the Crown and which established the Crown in Parliament. A written constitution would have no basis in our ‘historic experience’, Sumption argues. The UK’s unwritten constitution’s basis lies in habits, traditions and attitudes which are far more powerful than law. But those matters form the basis of our law. They were the basis of the claims in Magna Carta, the Petition of Right, the Bill of Rights and so on.

Miller No 2 illustrates the way in which the common law works constitutionally. The prerogative, the realm of state politics and high political judgement, was not intended to be subject to judicial control. As Francis Bacon reasoned in Book II of *The Advancement of Learning* (1605), government is ‘obscure and invisible’. A judge in court determined in the early 17th century that the law in England only recognizes those prerogatives which are known to the law and not simply pronounced on the *ipse dixit* assertion of the king. Whether a prerogative exists, and what is its extent, are judicial questions.⁷ By asking these questions courts helped set upon the route to establish the independent role of the judiciary from the monarch and the limits on prerogative legislation—rule by decree. The story of the development of the judicial review of the prerogative to protect individuals against arbitrary action, to stop unlawful expenditure and then to question mighty matters of state such as prorogation of Parliament, is well told (Sedley 2015). Had Sumption been writing 200 years ago, would he declare such matters as ‘political’ and outwith the courts? Yet after initial criticism of any successful review of prorogation in the courts, he gave full support to the decision in *Miller No 2*. When the Supreme Court was advised by Crown counsel it was treading on political territory in *Miller No 2*, Lady Hale correctly retorted that the history of our public law had *always* voyaged into the political, the realm of political decisions. Political decisions are not, and never have been, unconfined by law. Such decisions did not occupy an inviolable and preferential realm.

Sumption seems to wish that the role of our public law would be frozen in the past. It is, in reality, impossible to fathom where Sumption’s border between law and politics exists.

⁷ *Case of Proclamations* (1611) 12 Co Rep 74.

Sumption acknowledges as much in his belief that the unwritten constitution accommodates fundamental constitutional change through flexibility. Yesterday's political has become today's legal. The constitution comprises not only legislation, but judicial decisions, conventions and standing orders of Parliament setting out parliamentary procedure. A written constitution will produce rigidity and transfer power from an 'aristocracy of knowledge and power', namely ministers and MPs, who are at least removable, he reminds us, to an unelected and unremovable judiciary.

A focal point of Sumption's criticism of judicial activism is on the role of the European Court of Human Rights (CHR) and its interpretation of the European Convention on Human Rights (ECHR). Article 8 ECHR and CHR jurisprudence on private and family life and privacy are used to illustrate the problem as he sees it. Article 8 has been the armature around which all forms of controversial rights have been created, he claims. He lists these at pages 57-58 'and much else besides' where the CHR has given substance to a right to 'personal autonomy'. The Convention has also been given extra-European effect following invasion in middle-eastern states by UK and other forces. The ECHR was never meant to operate in these places in wartime conditions. The CHR has ruled to the contrary.⁸

If rights are controversial, they are not universally accepted, therefore the representative political process is the best means to resolve them through a process in which each vote counts equally, he writes. The process is more important than the outcome. Law is no substitute for politics. But what if politics, by which I mean here the legislature, denies the rights' existence? Sumption, like David Cameron, questions whether the 'international' ECHR has outlived its utility and, in the absence of a fundamental change in judicial attitude, whether it would be better to withdraw from the ECHR and replace it with a purely domestic measure leaving Parliament in ultimate control. What rights would Sumption remove from such a measure? Please be specific. It is a weak argument to suggest that the context in which the ECHR was framed has no relevance to novel manifestations of rights today and that its real target in its original conception and design were Nazi and Communist regimes and their abuses. The drafters of the ECHR, including the highly influential UK lawyers, also wanted a protection against social-democratic redistributive governments acting in a statist or authoritarian manner, a protection with which, one presumes, Sumption would concur.

⁸ *Al-Skeini v UK* [2011] 53 EHRR 18; *Al-Jedda v UK* [2011] 53 EHRR 23; *Hassan v UK* [2014] App No, 29750/09 Grand Chamber (16 September). The *Hassan* case has been interpreted by the UKSC as a qualification on *Al-Skeini and Al-Jedda: Abd Ali Hameed Al-Waheed v Ministry of Defence* [2017] UKSC 2.

Oppression and evil take many forms. If one expects the devil to be possessed of cloven hooves, goat's horns and a forked tail one will never see the devil (Miller 2010). The concept of autocratic abuse of power is not framed in a time capsule.

Central to the book's thesis is that modern society wants more legal and judicial regulation so that decisions are not a matter of individual choice but collective will. Modern society (interest groups) seeks to enforce conformity. Moral relativism has given way to moral absolutism as the collective welfare seeks greater security and reduction of risk. Society has become more censorious and increasingly seeks judicial enforcement of a particular point of view. Makers of controversial decisions increasingly seek judicial endorsement to protect their position. The end result is an overall loss of liberty and a reduction of the realm of private choice. Diversity is removed, he continues. For those whose vision of the good life is not endorsed through the courts, the outcome may smack of oppression. This is done under the guise of 'absolute democracy'.

An outcome through referendum presents a similar problem. But if a bare majority asserts its right to take 100 per cent of the spoils, the basis of political community is eviscerated. A majority may win, but their victory is not legitimated by the outcome of a winner-takes-all contest. Brexit and its referendum and narrow outcome illustrate this point. The referendum undermined the representative political process. Its narrow margin of victory has wrought seemingly irreconcilable societal division. I add that only the advent of the worst global viral crisis since 1918 has removed the subject of Brexit from the headlines. There will be precious little time left within the deadline set by Johnston, and presuming the pandemic is abated before that deadline, to forge a sensible way forward.

Why is it that judges have assumed such prominence in the UK? Is it, one asks, because they are seen to be independent of the political machine and party politics? Sumption addresses the virtues of the *representative* political process and the reasons why, despite those strengths, it has fallen into low public esteem. The representative democratic political process is one that has a mediating and healing role. MPs as representatives should seek to remove fissiparous tendencies. A blurring and obfuscation of differences in the legislative process help assuage divisive societal issues—on abortion, for instance—and help to achieve compromise as in the UK. This is not the case where the outcome on abortion was determined by judicial fiat as in the USA.⁹ Political parties

⁹ *Roe v Wade* 410 US 113 (1973). See also *Griswold v Connecticut* 381 US 479 (1965) forbidding contraception and *Obergefell v Hodges* 135 S Ct 2584 (2015) on same sex marriage.

are comprised of diverse members and diverse electorates. But the political process has weakened its representative basis—there has been a fall in party membership, growing resort to referendums, and a huge gap between professional politicians and the public. A more partisan, populist and authoritarian style of political leadership has emerged. Democracy brings high expectations of change. It results in disenchantment and disappointment with the ‘self-interested’ hustlers (my expression) who have come to dominate in politics when those expectations are thwarted. Despite this, he claims that younger generations are more inclined to prefer autocratic leaders. Whether true or not, autocratic leaders are certainly on the rise.

The prognoses offered by Sumption for improvement of the political process and its current malaise and to provide an antidote to public disenchantment with institutions and disempowerment and disengagement are not without merit. But they are not original. By themselves they appear simplistic. These include the removal of the first-past-the-post UK election system. The removal may encourage greater public participation and reduce the role of a ‘tiny number of activists’ who dominate local political machines. It could end the duopoly that has dominated British politics—surely the Scottish Nationals would have something to say about that? Open primaries for selection of MPs could further reduce the influence of the activists, he believes. Strong leadership may be reduced, but reforms may encourage compromise not only within political parties but between parties. Political compromise could be encouraged, he suggests.

But is this the way to increase citizen engagement? Most individuals simply do not engage with the political process. Politicians are careerist. Their aids and active supporters are party obsessives. It may be that the outcome of the COVID-19 crisis will have far more effect in bringing communities, local, regional, national and global together. This may help establish a common bond of humanity and cooperation in our relationships that over 40 years of neo-liberal Thatcherite politics have done so much to undermine. And maybe not.

In offering an analysis of political decline and possible antidotes, Sumption has drifted far from the moorings of where politics ends and where law begins. But that is not a question he has adequately answered in this monograph. One has to have a tolerable sense of the distinction and the boundaries to know when trespass is being committed. At heart, he does not seem to believe that law (I mean adjudication) should operate on anything other than a conservative, narrow base. Even assuming that

a judge believes his role is *ius dicere* and not *ius facere*, and the judge supports this philosophy by giving judgments that support a proprietorial bias towards the possessors of wealth, that judge is acting politically. His or her decisions favour one group, the haves, over the have-nots. Most of us will accept this because it gives us security in our property and possessions. But this does not remove the proprietorial bias and its impact in forging social division and hierarchical advantage.

Or, if we take the example of tort liability, which is judicially developed case law, judicial decisions have in the past favoured one group of haves (farmers) over another (manufacturers) or vice versa. Or their decisions favour the collective rights of employers over the collective rights of employees (trade unions). No doubt those judges have in the past believed they were upholding a political status quo and simply and neutrally applying 'the law'. Their decisions are nonetheless suffused with systemic bias.

In terms of fundamental rights, his vision again is a very conservative one. Upholding human rights in novel areas may have redistributive effects. A right of access to justice is not self-realizing but invariably depends upon resources.¹⁰ The rule of law should entail access to justice and not its displacement by executive or legislative fiat. Sumption accepts that the *Unison* judgment (*UNISON* [2017] UKHL 51), where the government increased employment tribunal fees to such an extent that the tribunals were effectively placed out of the reach of individual employees, was correctly decided. The government had acted unlawfully in increasing the fees. I have problems with Sumption's criticisms levelled against the publication of the letters of Prince Charles in *Evans* for the reasons set out above. The government action effectively denied access to justice. The case was an attempt to allow the executive to stand in judgement of the judiciary. The reasons put forward by the Attorney General did not justify this action.¹¹ In *Privacy International*, the applicant had received a decision from a tribunal, but it was not a judgment the applicant liked. Unlike virtually every other occasion in which a litigant loses at first instance, there would be a right of appeal or a review. That was not the case here. At issue is a fundamental point of liberal-democratic governance and an independent judiciary. Who decides what the law is?¹²

¹⁰ JUSTICE, 'Legal aid and human rights'.

¹¹ Lords Neuberger and Mance gave majority judgments which differed in their own reasoning and intensity for deciding against the Attorney General.

¹² The Investigatory Powers Act 2016, section 242, introduced an appeal from the tribunal to the Court of Appeal.

As we have also seen above, Sumption is particularly troubled by the CHR judgments prescribing a catalogue of ‘novel’ rights under Article 8 ECHR. What was intended by the Convention’s drafters as a protection for private and family life, privacy and correspondence against totalitarian states has become a part of ‘mission creep’ and protection of wide-ranging novel rights (pages 57-58). None of this was intended by the drafters or expressed in the language of the ECHR, he asserts, although he writes in the same breath that some of the ‘additional rights’ ought to exist (page 60). Well, again, which? His problem is not with the rights (or some of them) but the manner in which they were made, namely by courts. The CHR has determined many of these ‘additional’ rights when deciding what qualifications to rights are necessary in a democratic society. In so doing, the CHR undermines decisions of democratic assemblies. My response is that ‘in a democracy’ surely must entail a society with equal rights and equal concern and respect for every individual. This focuses on the individual not the collective, although the outcome is for the collective good. It has come to focus on proportionate use of political power. What is undemocratic about that?

Despite these criticisms, Sumption acknowledges the positive aspects of the HRA which brought much of the ECHR, as well as the corpus of CHR case law, into domestic UK law.¹³ It has supported weak and vulnerable groups with no media or political support, he claims. It has forced more humane values on ministers and civil servants (although *Windrush* shows us how far there is to go). The HRA has promoted coherent and more detailed responses when official action has been challenged. But all of these, he argues, are achievable without international law! The HRA has prevented the UK being one of the most frequent defendants in the CHR as it was in the 1970s and 1980s. But over the years that court has repeatedly pointed out serious abuses of power which domestic courts left unremedied. *Sunday Times* highlighted the draconian nature of the common law of contempt of court and its unjustified denial of freedom of speech.¹⁴ *Golder* and *Silver* showed how effectively lawless our prisons were.¹⁵ *Malone* highlighted the lawless world of covert surveillance in England, to which one may add the recent RIPA

¹³ The use of CHR case law is governed by section 2 and interpretation of UK legislation by section 3 HRA.

¹⁴ *Sunday Times v UK* (1979-80) 2 EHRR 245.

¹⁵ *Golder v UK* [1975] 1 EHRR 524; *Silver v UK* [1983] 5 EHRR 347.

2000 case on inadequately regulated bulk surveillance.¹⁶ The war against terrorism encouraged executive excesses and a compliant House of Commons. The reputation of the Lords was better, but the House of Lords is one of the subjects to be examined by the Commission on the Constitution (above). UK courts have occasionally refused to follow the CHR which, in turn, has been clearly influenced by UK courts (Young 2017).¹⁷ The influence has been mutual and two-way. Even in the case of prisoner voting rights, on which Sumption is particularly exercised, adjustment has been made by the UK. The CHR never said that all prisoners had the right to vote. It ruled a total ban was disproportionate.¹⁸ The UK made some (minimal) concessions. The same mutual and two-way influence is also true of the engagement of UK and EU judges in the UK's membership of the EU. As I develop elsewhere, our membership of the EU prompted UK judges to put questions to sovereignty, not only in relation to the EU, but also in relation to Parliament (Birkinshaw 2020). Domestic judges have matured immeasurably under this experience. They began to think constitutionally. I doubt that *Miller No 2* would have been decided the way it was without our European experience since 1973. *Miller No 1* was about our departure from the EU and removal of a source of law from our constitution. This could only be achieved by legislation, the court insisted. The court had to remind Parliament of its sovereignty! There has been a judicial learning process on both sides. Sumption addresses the ECHR issue as a question of *foreign* interference. There is an emphatic message that *we* know best. He is far from a populist, but many populists and nationalists would take comfort from these sentiments.

How is the judge to respond to illegitimate power? Sumption's constitution places judges under Parliament, and Parliament is supreme. That in theory is orthodoxy. As a consequence, judges cannot rule legislation null and void. He acknowledges that Parliament's actions may be undemocratic—would, one might ask, they lack legitimacy? If so with what consequence? What is the judge's response to be where parliamentary sovereignty is abused? What should the individual do—

¹⁶ *Malone v UK* [1985] 7 EHRR 14; *Big Brother Watch v UK* [2019] ECHR 258 (Grand Chamber). For bulk surveillance and its legality under the Investigatory Powers Act 2016, see *R (Liberty) v Secretary of State for Home Affairs et al* [2019] EWHC 2057 (Admin).

¹⁷ In *AM v Secretary of State for the Home Department* [2020] UKSC 17 the court said: 'Our refusal to follow a decision of the CHR, particularly that of the Grand Chamber, is no longer regarded as ... always inappropriate. But it remains, for well-rehearsed reasons, inappropriate save in highly unusual circumstances ...' (paragraph 34).

¹⁸ *Hirst v UK No 2* [2005] 42 EHRR 849; *Scoppola v Italy (No 3)* 56 EHRR 663. See Johnson (2020).

simply break the law as he suggests in the case of assisted suicide?¹⁹ ‘I don’t believe that there is necessarily a moral obligation to obey the law, and ultimately it is something that each person has to decide within his own conscience,’ he says, in response to a question at the end of the first lecture. But, he says in the same breath, the law criminalizing assisted suicide should be in place. So, one cannot complain if one is prosecuted. If the Director of Public Prosecutions (DPP) decides charitably not to prosecute, is he or she not suspending or dispensing with the law? As Stephen Sedley has pointed out, the Bill of Rights has something to say on that (Sedley 2019).²⁰ If the DPP does prosecute, presumably Sumption as judge would approve conviction?

What is the judge to do if Parliamentary sovereignty is abused by the government? What if legislation authorizes the abuse of human rights, denies courts jurisdiction in controversial or inconvenient subject areas and deliberately and inhumanely undermines the rule of law? Is there not room where sovereignty is abused by Parliament to refuse to enforce the law, even to issue a declaration of unconstitutionality? Is a judge not entitled to exercise his or her conscience, after a reasoned judgment, where such abuses occur? (Young et al 2019: 137)²¹ A judge’s duty is not only to uphold the law, but the rule of law on which law is built. It is the rule of law, not the law of rules. Under the judicial oath, the judge ‘will do right to all manner of people after the laws and *usages* [my emphasis] of this realm, without fear or favour, affection or ill will’.

The ideal judge would seem to be a conservative paragon of sense, reservation and reflection; neither a Hercules, as per Dworkin’s intrepid adjudicator (1977: chapter 4), nor an Ocnus. There are nonetheless serious problems with Sumption’s model of adjudication. There are not ideal separate worlds of politics, law and government. We know that there are adjudicative functions, legislative functions and executive or governmental functions. Initially, distinctions are easy to draw. However, these functions seep into each other. In the common law, judges develop and thereby make the law and create binding precedent. In public law

¹⁹ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 concerning assisted suicide under section 2 of the Suicide Act 1961. Five of the nine justices held that the court has a constitutional authority to rule on a blanket ban for assisted suicide. Three of those would not issue a declaration of incompatibility at this stage; let Parliament attempt resolution. Four of the nine judges, including Sumption, ruled that, while the court had jurisdiction under the HRA, the question was pre-eminently one for Parliament. Sumption stated at paragraph 207: ‘English judges tend to avoid addressing the moral foundations of law.’

²⁰ See also Lady Hale’s ‘[Law and Politics: A Reply to Reith](#)’. See Sumption in *Nicklinson* at paragraph 241.

²¹ A more detailed account on this is in Birkinshaw and Varney (2016).

they have done this incrementally under common law techniques to achieve more developed and effective forms of accountability. Whether it was Denning's 'Let the little man have his say,' or more developed and refined subsequent theories of opening up decision-making processes of government and public power to more effective scrutiny, accountability, openness, justification and now transparency—what we see developed, and developing, are principles for the advancement of justice and responsiveness. It is impossible to grasp the handle of where law ends and politics begins in Sumption's analysis. They co-mingle: patently, as in public law; latently, as in private law. So, would he be critical of judgments that have ruled overseas aid illegal where it has been given for an uneconomic project taking it outside the statutory remit which amounts to an improper purpose?²² He is quick to assert the right of free-born Englishmen to roam miles from their homes when the nation faces a highly contagious pandemic disaster (above). I am not concerned about the application of the precautionary principle in such a case in favour of public safety. I would be concerned if lockdown continued for a disproportionate period after the emergency. We will all have to be concerned about the longer-term impact and consequences of the strong state fight against the contagion and enhanced methods of digital surveillance and digital licensing, algorithms, facial recognition and omnipresent sensors. The balance between national security and personal autonomy will have to be drawn proportionately, in accordance with the law and as necessary in a democratic society. Would Sumption really want to argue that the judges were not up to this challenge where the legislative framework left lacunae or where there was legislative or executive overreach?

UK judges do not say I am condemning a law preventing abortion. They say laws preventing abortion are incompatible with the ECHR if they remove an individual's right to private and family life where the legislature has not adequately protected that right and is unlikely to. There are putative rights which the political system may not like, may despise and which it hasn't provided for.²³ A judge's role is to ask whether the rights are protected by a catalogue of principles which the legislature has

²² *R v Secretary of State for Foreign Affairs ex p WDM* [1995] 1 All ER 611. There were suspicions that the aid was linked to military procurement by the Malaysian government. See also *R (Campaign against Arms Trade)* [2019] EWCA Civ 1020; and *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 on ruling the government's policy for the third runway at Heathrow airport was produced unlawfully. That was a question of law unlike a political decision on the merits of expansion the court ruled, paragraph 2.

²³ *Re NIHRC Application for Judicial Review* [2018] UKHL 27. The law in Northern Ireland prohibited abortion in cases of rape, incest and fatal foetal abnormality.

provided (HRA) or which it has not (the common law of human rights respecting human autonomy and integrity). A judge has to reason according to received legal doctrine. What makes the judgment convincing is its coherence in articulating and comprehending underlying principle. If it lacks conviction and coherence it will persuade no one. It will not persuade the unpersuadable, just as the *Miller* judgments will persuade Brexiteers of nothing but their own choices/prejudices. The judges would be seen as part of a Brexit conspiracy to prevent leave. Read the judgments carefully. They are not the product of anti-Brexit conspiracy. They are not fabrications.

Sumption represents an elitist view of the role of the judge and the political process. Here is a man who has been privileged, powerful and influential. At the end of Lecture 5 he says in response to a question—‘Inequality is not a threat to democracy. I do agree that it is a problem!’ To which I would add, inequality in political power based on wealth and oligarchic influence, inequality brought about by rapacious greed, lack of opportunity, social exclusion are serious toxic threats to a just society. They will become a threat to democracy through gerrymandering, exclusion from ballots, setting identity tests for voting that hit poorer sections of society harder, and so on. The greatest threat to democracy today comes from manipulation of consent by ubiquitous digital exploitation and those who have the finance to pay for and utilize it. Is this inequality not a threat to democracy?

What Sumption offers to remedy the democratic political process is not without virtue—e.g. proportional representation and open primaries for selection of MPs—and I would support these reforms. It is, however, thin gruel to revitalize representative democracy. Rejection by referendum of the Liberal Democrats’ arguments for an alternative to first-past-the-post voting outcomes in general elections was followed by rejection of the Liberal Democrats in 2015 and 2019! The vista of the 2017 Parliament, a Parliament that could not make decisions, was replaced by a Parliament with a government majority of 80 empowered to make sweeping changes accepted by a minority of the popular vote in 2019, backed by a narrow victory in the 2016 referendum (above). In the early sessions, the MPs of the victorious government party were treated by its leader like a bunch of sycophantic parrots repeating their leader’s election mantras. An alternative electoral outcome may have produced similar behaviour. Heaven forbid a world in which there is not a forum to protect human rights except on a basis that was understood or believed in 1950, to protect the integrity of the individual and anything other than a very formal, narrow expression of the rule of law. Sumption has written that

the ‘only effective constraints upon the abuse of democratic power are political’. The HRA shows the weakness of this bold statement. It enacts that the courts, Parliament and the government must work *together* to protect human rights—together but independently. Democracy will be undermined if the courts are not afforded the duty to make their full contribution to the protection of individual rights and collective welfare, not in the promotion of formal equal treatment but in treating all with equal concern and respect.²⁴ Parliamentary democracy will be undermined if there is no option but to accept serious abuses of parliamentary sovereignty.

Sumption has written an eloquent and limpid short monograph on themes that will be of interest to politicians, judges and lawyers and individuals who care about justice, and, possibly, those who wish to be rid of European legal influence in the UK. Although I disagree with many of the author’s tenets and the assumptions on which they rest, he states his case clearly and fluently. What judges have done in the UK in recent years has been to plug holes left by deficiencies in the political process. The politicians are too frequently the last to recognize such deficiencies. I doubt that that will change.

References

- Bacon, F (1605) *The Advancement of Learning*.
- Birkinshaw, P (2020, 3rd edn retitled) *European Public Law: The Achievement and the Brexit Challenge* EU Alphen aan den Rijn: Kluwer Law.
- Birkinshaw, P and M Varney (2016) ‘[How EU Membership has Transformed the Constitution](#)’ The Constitution Unit, 19 April 2016.
- Birkinshaw, P and M Varney (2017) ‘Britain Alone Constitutionally’ in P Birkinshaw and A Biondi (eds) *Britain Alone! The Implications and Consequences of UK Exit from the EU* Alphen aan den Rijn: Kluwer Law.
- Dworkin R (1977) *Taking Rights Seriously* Cambridge MA: Harvard University Press.
- Johnson, N (2020) *Prisoners’ Voting Rights: Developments since May 2015* House of Commons Library Briefing Paper 07461 April 2020.
- Miller, K (2010) *The Eternal Ones* London: Puffin
- Sedley, S (2015) *Lions Under the Throne: Essays on the History of English Public Law* Cambridge: Cambridge University Press.

²⁴ The phrase comes from Dworkin (1977) chapter 6.

Sedley, S (2019) 'A Boundary where There is None' 41 (17) *London Review of Books*, 12 September 2019.

The Spectator (2020) 'Former Supreme Court Justice: "This is What a Police State is Like"', 30 March 2020

Young, A (2017) *Democratic Dialogue and the Constitution* Oxford: Oxford University Press.

Young, A, P Birkinshaw, V Mitsilegas and T Christou (2019) 'Europe's Gift to the United Kingdom's Unwritten Constitution – Juridification' in A Albi and S Bardutzky (eds) *National Constitutions in European Governance: Democracy, Rights and the Rule of Law* Vol 1 New York: Springer.

Legislation Cited

Freedom of Information Act 2000

Human Rights Act 1998

Investigatory Powers Act 2016

Regulation of Investigatory Powers Act 2000

Suicide Act 1961

Cases Cited

Abd Ali Hameed Al-Waheed v Ministry of Defence [2017] UKSC 2

Al-Jedda v UK [2011] 53 EHRR 23

Al-Skeini v UK [2011] 53 EHRR 18

AM v Secretary of State for the Home Department [2020] UKSC 17

Big Brother Watch v UK [2019] ECHR 258 (Grand Chamber)

Case of Proclamations (1611) 12 Co Rep 74

Entick v Carrington [1765] 19 St Trials 1029

Evans v Attorney General [2015] UKHL 21

Golder v UK [1975] 1 EHRR 524

Griswold v Connecticut 381 US 479 (1965)

Hassan v UK [2014] Grand Chamber (16 September)

Hirst v UK No 2 [2005] 42 EHRR 849

Kennedy v The Charity Commission [2014] UKHL 20

- Lochner v New York* 198 US 45 (1905)
- Malone v UK* [1985] 7 EHRR 14
- Miller No 1* [2017] UKHL 5
- Miller No 2* [2019] UKHL 41
- Obergefell v Hodges* 135 S Ct 2584 (2015)
- P, G and W* [2019] UKHL 3
- Privacy International* [2019] UKHL 22
- Re NIHRC Application for Judicial Review* [2018] UKHL 27
- R v Secretary of State for Foreign Affairs ex p WDM* [1995] 1 All ER 611
- R (Campaign against Arms Trade)* [2019] EWCA Civ 1020
- R (Liberty) v Secretary of State for Home Affairs et al* [2019] EWHC 2057 (Admin)
- R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214
- R (Nicklinson) v Ministry of Justice* [2014] UKSC 38
- Roe v Wade* 410 US 113 (1973)
- Scoppola v Italy (No 3)* 56 EHRR 663
- Silver v UK* [1983] 5 EHRR 347
- Sunday Times v UK* (1979-80) 2 EHRR 245
- UNISON* [2017] UKHL 51

MAKING LAW FOR CHILDREN IN SCOTLAND: TURNING COMMITMENT INTO REALITY

LESLEY-ANNE BARNES MACFARLANE

Edinburgh Napier University

Abstract

This note discusses ongoing developments in Scottish law concerning children and the creation of more children's rights-based legislation in Scotland. Two steps being taken by the Scottish government are considered. The first of these is the current Children (Scotland) Bill, which is intended to modernize and render more child-centred certain aspects of family law. The second step is the commitment to introducing, imminently, a further Bill to fully incorporate the United Nations Convention on the Rights of the Child into Scottish Law. The discussion below is distilled from the author's recent report, *Balancing the Rights of Parents and Children* (Barnes Macfarlane 2019), commissioned by the Scottish Parliament Justice Committee.

Keywords: United Nations Convention on the Rights of the Child, children's rights, Scotland, children, reform, family law, Children (Scotland) Bill 2019

[A] INTRODUCTION: THE COMMITMENT

It has long been the stated commitment of the Scottish government that Scotland becomes 'the best place in the world to grow up' (Scottish Government Announcement 2019a). Various steps have been taken in recent years towards achieving this highly ambitious aim. This note focuses on two significant steps currently in progress. The first of these steps is the reform of the statutory framework regulating private family law cases through the introduction of the Children (Scotland) Bill 2019. The main focus of the Bill is the provision of better support for the many children caught up in parental disputes about their care and upbringing. The second step, discussed below, is more wide-ranging in nature: the pledge to incorporate the United Nations Convention on the Rights of the

Child (UNCRC) into Scottish Law. The Scottish government has said that it will introduce a Bill in 2020 to fully incorporate the UNCRC.

[B] THE CURRENT CHILDREN (SCOTLAND) BILL

Unlike England, there are no specialist family courts in Scotland. Instead, there are detailed procedural court rules applicable to different types of family law court cases (see e.g. the Ordinary Cause Rules: chapter 33). These procedural rules facilitate the day-to-day operation of family law cases in Scotland. The substantive law governing private family disputes (i.e. disputes between parents and/or wider family members) is found in part 1 of the Children (Scotland) Act 1995.

The overarching framework set out in part 1 of the Children (Scotland) Act 1995 provides for the acquisition and exercise of ‘parental responsibilities and rights’ (the Scottish equivalent of ‘parental responsibility’), the paramountcy of the child’s welfare and the granting of court orders such as ‘residence’ and ‘contact’ awards. There is also a specific requirement to ascertain whether a child wishes to express a view where that child is considered to possess the ‘capacity’ to do so. In those circumstances, the court must take account of that view (section 11(7)(b)). Part 1 of the 1995 Act has remained largely intact for 25 years—a period during which much of Scottish family law has been reformed or rewritten.

However, in more recent years, concerns have been raised by court users and support groups about the operation of the Children (Scotland) Act 1995. Many of these concerns are child-centred. They include: (i) the imposition of an age presumption, currently 12 years of age, in respect of capacity to express a view; (ii) the lack of specific provision for domestic abuse victims and witnesses; (iii) the dearth of mechanisms to address failure to obey court orders; (iv) inconsistencies surrounding the use of ‘child welfare reporters’ (independent reporters, usually solicitors, appointed by the court to investigate and make recommendations); (v) the detrimental impact of delay in any final determination; and, significantly, (vi) the lack of infrastructure to support, guide and inform children involved in family law court cases.

The Children (Scotland) Bill 2019 (the 2019 Bill) was introduced on 3 September 2019 to address the above-mentioned concerns and is currently progressing through the Scottish Parliament. It follows a lengthy public consultation and government review of the Children (Scotland) Act 1995 in 2018. The 2019 Bill was also published simultaneously with the

Family Justice Modernisation Strategy outlining the government's longer-term commitment to updating the family law court system in Scotland (Scottish Government 2019b). In this regard, the 2019 Bill can be viewed as the first significant step in the government's strategy to improve the experience of family members (both adults and children) involved in family law litigation.

Two of the key aims of the 2019 Bill are to place children's best interests at the heart of family cases and to ensure that their views are heard. Respectively, these aims accord with Article 3 (consideration of the child's best interests) and Article 12 (child's right to be heard) of the UNCRC. The government has also sought to incorporate various aspects of guidance published by the United Nations Committee on the Rights of the Child (the Committee) in the Bill. For example, the Committee's General Comment No 12, 'The Right of the Child to Be Heard' (Article 12) stresses that listening to children requires that children are properly supported and, in particular, made aware of how their views have been taken into account. This has been reflected by a provision in the 2019 Bill to impose a duty upon courts to explain family law decisions to children who are the subject of the dispute.

Five proposals in the current Bill that are particularly significant from a children's rights perspective are discussed below

(1) Removal of the Age Presumption for Children Expressing a View in Family Law Cases

Section 1(2) and 1(3) of the Bill proposes the removal of the age presumption for children being deemed mature enough to express a view, currently set at age 12.¹ The policy intention behind this section is ensuring that courts hear from younger children as well as those aged 12 and over. Regardless of the longstanding statutory presumption, Scottish courts often do take account of the views of younger children when making orders in family cases (*Shields v Shields* 2002). Accordingly, removing the reference to the age of 12 is most welcome as it assists in clarifying the law.

In addition, neither Article 12 of the UNCRC, nor the guidance issued on the article by the Committee, specifies a minimum age limit for expressing a view. The Committee has also stressed that Article 12:

¹ It is also worth noting that the current age presumption of 12 years old, found in section 2(4A) of the Age of Legal Capacity (Scotland) Act 1991, is left untouched by the 2019 Bill for the purpose of instructing a solicitor. The retention of such an age presumption in connection with instructing a lawyer may well be an issue for wider discussion and debate in Scottish law.

imposes no age limit on the right of the child to express her or [their] views, and discourages States parties from introducing age limits either in law or in practice (General Comment No 14 on ‘Best Interests’: paragraph 21).

The rationale for this is that full implementation of Article 12 requires respecting all children as rights-holders from the earliest stages in life. Even very young children can use a wide range of communication methods to convey understanding, choices and preferences. Research also confirms that biological age is not the sole determining factor of capacity, or ability, to form a view. Many other factors (including e.g. experience, environment, levels of support provided) can affect a child’s ability to form or express a view (Lansdown 2005: 9).

However, as has long been observed by the international human rights community, simply “putting the law in place” is inadequate to achieve ... effective implementation of children’s rights.’ (Perrault 2008: 1). Notwithstanding the prospect of involving younger children in family court cases, no specific provision has been made in the Bill to render court processes themselves more child-friendly. It is this lack of detail about the infrastructure to support and empower children (regardless of age) that has generated particular concern among children’s rights organizations. It raises questions about a proposed new culture in which no minimum age is benchmarked for capacity to express a view.

One possible solution, supported by recent Scottish research (Morrison and Tisdall forthcoming 2020), would be the introduction of a child support worker, a professional appointed solely to protect and advise the child. This role was consulted upon by the Scottish government in its 2018 review of the Children (Scotland) Act 1995, but it does not currently feature in the Bill (Scottish Government 2018).

(2) Introduction of a List of Factors for Courts to Consider in Deciding Family Cases

There is currently no equivalent in Scotland to the checklist found in section 1(3) of the English Children (Act) 1989. Scottish courts are instead bound to apply a three-part welfare test, set out in section 11(7) of the Children (Scotland) Act 1995. Broadly speaking, that section provides that: (i) the welfare of the child is paramount; (ii) the court should not intervene by making any order about a child unless it is better to do so than not at all; and that (iii) any child who wishes to express a view should be free to do so and should be listened to. There are also additional provisions, inserted by the Family Law (Scotland) Act 2006, requiring the

court to consider particularly the risk of domestic abuse (now section 11(7A)-(7E) of the Children (Scotland) Act 1995).

The 2019 Bill proposes a new section 11ZA of the 1995 Act, which contains (among other things) a statutory checklist. Such lists are often loosely termed ‘welfare checklists’. The various parts of this checklist are distributed throughout the 2019 Bill in a somewhat confusing fashion. For example, the list factors proposed by sections 1(4) require to be read in conjunction with the additional factors proposed in sections 12(2) and 21(2). This is because, only when taken together, do they create the intended checklist. The court would require to have regard to the totality of this checklist in deciding family cases brought under part 1 of the Children (Scotland) Act 1995.

In particular, the proposed checklist contains three factors to which the court must have regard. These include: (i) protection from abuse/risk of abuse (the new provision is a slightly reworded version of the anti-abuse provisions currently found in section 11(7A)-(7E)); (ii) the effect that the order might have on the child’s parents in bringing up the child; (iii) the effect that the order might have on the child’s important relationships with others (in practice this would include, for example siblings and grandparents, although it is perhaps disappointing that siblings in particular were not explicitly mentioned in this section of the Bill).² Elements (ii) and (iii) are new. The question might be raised as to why such a checklist should be introduced now in Scotland.

The consultation responses to the 2018 Scottish government review had been divided as to whether the introduction of a statutory checklist in family cases would be considered helpful. One concern expressed by respondents was that the creation of a statutory checklist might hamper the wide and long-standing discretion exercised by Scottish courts in family cases. However, the checklists used in other jurisdictions, including England, were reviewed. It was noted that a checklist might provide greater assurance to contemporary court users that all professionals involved in family cases would be required to consider the same list of factors. It has been suggested that the accessibility that a checklist could provide was also noted to be a desirable feature in family

² Section 12 of the 2019 Bill, which is concerned with private family law cases brought under part 1 of the 1995 Act, does not mention siblings specifically. Section 10 of the Bill (which is concerned with public family law provisions) does. Section 10(2) imposes a legal duty upon local authorities. It provides that ‘they must take active steps to promote on a regular basis, personal relations and direct contact between [a looked after] child ... a sibling’ (whether half or whole-blood) and ‘any other person with whom the child has lived or is living and with whom the child has’ a sibling-like relationship.

court cases: a well-drafted checklist should make it easier for family members (including children) to understand the rationale behind decisions that have such great impact on their lives (Barnes Macfarlane 2019: 31).

(3) New Obligation to Explain (Most) Decisions to (Most) Children.

There is currently no statutory requirement that decisions made in family law court cases are explained to the children concerned by professionals involved in the court system. Section 15(2) of the Bill proposes the insertion of a new section 11E to the 1995 Act entitled ‘Explanation of court decisions to the child’. It will be the court’s duty to ensure an explanation is provided. The inclusion of the proposed section in the Bill represents a positive step forward in terms of respecting the Article 12 rights of ‘all children to be heard and taken seriously’ (General Comment No 14 on ‘Best Interests’: paragraph 2).

The new duty will apply to most of the decisions made by courts that affect most children. However, where the court considers that it is not in the best interests of the child to give an explanation, the court need not comply with the duty to explain (proposed section 11E(3)(b)). This is problematic from a children’s rights perspective. In particular, the section lacks clarity as to what ‘best interests’ might mean in the context of explaining family case outcomes to children. It begs the question as to whether decisions not to explain family case outcomes to children on the grounds of their ‘best interests’ would prove to be a highly unusual practice, or commonplace? For example, a child may be unwell, or particularly upset by the circumstances surrounding their family breakdown. Or, sensitive details about the adults’ relationship may have influenced the court’s decision, and it might be thought better not to disclose those details to the child. However, arguably none of these circumstances should remove the need to give the child some appropriately worded explanation about the decision that has been made.

In exceptional circumstances, it might be in the child’s best interests that they do not receive an explanation of the court’s decision. Yet, there is a danger that this particular best interests test, as currently worded in the 2019 Bill, might operate to prevent explanations to children becoming the regular practice in family cases.

(4) Imposition of a New Duty to Investigate Failure to Obey Court Orders

Section 16 would empower the court to investigate further in situations in which the court has reached the stage of considering whether to find a person in contempt or change the contact/residence order currently in place. The rationale is that such a duty would assist in ascertaining whether a contempt of court has been demonstrated or whether there are other circumstances (e.g. domestic abuse) leading to non-compliance with a court order.

Scottish courts currently have the power to find parties in ‘contempt of court’ if they fail to obey a court order. A party found in contempt can be fined or imprisoned. Findings of contempt are used sparingly in family cases because it is generally assumed that the child’s best interests are not served by punishing their parent (see e.g. comments of the Inner House (Scottish Appeal Court) in *SM v CM* 2017: paragraph 62). The child’s perspective on this issue may be quite distinct from that of their parent. It is disappointing to note that there is no reference in section 16 of the 2019 Bill to the duty to investigate, including ascertaining the child’s views on the issue of compliance.

(5) New Anti-delay Provision where Delay Is Prejudicial to the Child’s Welfare

This duty in the 2019 Bill requires the court to ‘have regard to any risk of prejudice to the child’s welfare that delay in proceedings would pose’ (section 21(2A)). The focus of the new section is delay that is prejudicial to the child—rather than the sometimes unavoidable, or necessary delays that can occur in complex family cases. The provision is also designed to avoid a repeat of *B v G* 2012, a Scottish family case in which the UK Supreme Court strongly criticized delay and the unnecessary expense.

Overall, it is fair to say that, while the 2019 Bill is clearly directed towards achieving a number of positive outcomes, the content of the Bill is not easy to absorb. It contains many insertions, deletions and amendments (including amendments to the amendments already proposed). Also, if part 1 of the Children (Scotland) Act 1995 is amended as proposed by the Bill then that statute will become considerably more complicated in layout than it currently is. This raises the issue of accessibility again: would the terms of the 1995 Act, as amended by the Bill, then be capable of clear explanation to members of the public seeking advice about a family law dispute? At present, there is also a lack of

detailed provision in the Bill (and in the supporting documentation) regarding the steps required to better support children. Without such provision, the removal of the age presumption is likely to make little difference to the environment in which children express a view. This is concerning, particularly given the key aims of the Bill.

The 2019 Bill is still progressing through the Scottish Parliament. As observed above, the Bill seeks to address a number of issues concerning children and their rights that are much in need of discussion and debate. As such, the Children (Scotland) Bill 2019 presents a welcome opportunity for improving not only the substantive legal provisions but also the systems and processes governing Scottish family law court cases.

Next, the commitment to fully incorporate the UNCRC is briefly discussed.

[C] THE PROPOSED FULL INCORPORATION OF THE UNCRC

Last year marked the 30th anniversary of the adoption, by the United Nations, of the UNCRC and it is now the most widely ratified human rights treaty in the world. The UNCRC is a comprehensive statement of the human rights of all children (individuals up to the age of 18 years). So far, the UK has ratified the UNCRC. Ratification is not the same as full incorporation. Ratification means that a state has committed itself to taking steps to implement an international convention into its national laws, policies and practices. However, like the other UK jurisdictions, Scotland has yet to fully incorporate the UNCRC into domestic law.

The Scottish approach to date where children's rights are concerned has been to incorporate certain specific UNCRC rights in relevant statutory provisions (see e.g. Adoption and Children (Scotland) Act 2007, sections 2, 9.15, 20, 31, 32, embedding aspects of Articles 3, 12, 7, 9, and 21 of the UNCRC). Scottish courts have also on occasion referred to the UNCRC when making decisions about children and young people (see e.g. *Dosoo v Dosoo No 1* 1999; *White v White* 2001; *O v City of Edinburgh Council* 2016). Yet, without incorporation, there is no requirement that courts or authorities consider or apply the provisions of the UNCRC. In a wider sense, this means there is currently no guarantee that the rights of children will be given proper regard when decisions affecting them are made.

Full statutory incorporation of the UNCRC in Scotland has long been promised. Small legislative steps towards this aim have been taken in

recent years. For example, the Children and Young People (Scotland) Bill 2014, originally mooted as being the legislation that might incorporate the UNCRC, instead placed duties on Scottish ministers and public bodies to report on their activities in promoting children's rights (sections 1-4). Five years passed and then, on 22 May 2019, the Scottish government launched a consultation seeking views on the best way to fully incorporate the UNCRC (Scottish Government 2019a). The focus of this consultation was on identifying the best way to provide what the Scottish government described as the 'gold standard' for incorporating children's rights into Scottish law. On 20 November 2019, marking the date of the 30th anniversary of the adoption of the UNCRC, the government announced that the Bill to incorporate the UNCRC will:

[T]ake a maximalist approach ... incorporate[ing] the rights set out UNCRC in full and directly in every case possible—using the language of the Convention (Scottish Government Announcement 2019b).

It is hoped, then, that such an approach would promote recognition of the specific rights of children to a position of general parity with the current implementation of human rights in practice. The Human Rights Act 1998 fully incorporated the European Convention on Human Rights (ECHR) into UK Law. By virtue of this UK-wide legislation, it is possible to bring legal proceedings asking the court to review the conduct of a public body where there are concerns that the body has breached human rights (section 6). It is also possible to ask a court to interpret any existing statutory provision so that it is compatible with the ECHR. If this cannot be done, the appropriate court can issue a 'declaration of incompatibility' (section 4). The Scotland Act 1998 also provides that it is also outwith the legislative competence of the Scottish Parliament to pass any devolved provision that is 'incompatible with any of the Convention rights' (section 29(2)(d)).

[D] IN CLOSING

This note has considered two significant Scottish Bills, one current and one promised, about children and their rights. The current Children (Scotland) Bill 2019 addresses a number of specific issues impacting upon the experience of children involved in family law court cases. The promise of a new Bill later this year to fully incorporate the UNCRC generates even greater momentum for ensuring that the current Bill is both child-centred and UNCRC-compliant. John Swinney, Scotland's Deputy First Minister, has stressed that the forthcoming incorporation Bill, to be introduced in 2020, 'represents a huge step forward for the protection of child rights in

Scotland’ (Scottish Government Announcement 2019b). It also represents a clear government commitment to turn child-centred policy into reality.

References

Barnes Macfarlane, Lesley-Anne (2019) *Balancing the Rights of Parents and Children, Report (and Report Summary)* Edinburgh: Scottish Parliament Justice Committee.

Lansdown, Gerison (2005) *The Evolving Capacities of the Child* Florence: Innocenti Research Centre/UNICEF/Save the Children.

Morrison, Fiona and Tisdall E Kay (forthcoming 2020) *Children’s Participation in Family Actions: Probing Compliance with Children’s Human Rights* Scottish government-funded research.

Perrault, Nadine (2008) *Comprehensive and Holistic Legislative Reform on Behalf of Children’s Rights* New York: UNICEF.

Scottish Government (2018) *Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy and Consultation* Edinburgh: Scottish Government.

Scottish Government (2019a) *Children’s Rights: Consultation on incorporating the United Nations Convention on the Rights of the Child into our Domestic Law in Scotland*.

Scottish Government (2019b) *Family Justice Modernisation Strategy*.

Scottish Government Announcement (2019a) ‘Improving Children’s Rights’ 22 May.

Scottish Government Announcement (2019b) ‘Strengthening Children’s Rights’ 20 November.

Sutherland, Elaine E (2017) ‘Family Law: Still Scope for Reform’ 62(7) *Journal of the Law Society of Scotland*.

Sutherland, Elaine E & Lesley-Anne Barnes Macfarlane (eds) (2016) *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* Cambridge: Cambridge University Press.

Statutes and Other Normative Documents Cited

Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No 1956 (S223), Chapter 33 (‘Family Actions’)

Adoption and Children (Scotland) Act 2007

Age of Legal Capacity (Scotland) Act 1991

Children Act 1989

Children (Scotland) Act 1995

Children (Scotland) Bill, as introduced 3 September 2019

Children and Young People (Scotland) Act 2014

European Convention on Human Rights, ETS No 005, 1951

Family Law (Scotland) Act 2006

General Comment No 12, 'The Right of the Child to Be Heard' (Article 12)
CRC/C/GC/12 (2009)

General Comment No 14, 'The Right of the Child to Have his or her Best
Interests Taken as a Primary Consideration' (Article 3, paragraph 1)
CRC/C/GC/14 (2013)

Human Rights Act 1998

Scotland Act 1998

United Nations Convention on the Rights of the Child, 1577 UNTS 3, 20
November 1989

Cases Cited

Dosoo v Dosoo No 1, 1999 SLT (Sh Ct) 86

White v White 2001 SC 689

Shields v Shields 2002 Fam LR 37

B v G [2012] UKSC 21; 2012 SC (UKSC) 293

O v City of Edinburgh Council [2016] CSIH 30; [2016] 5 WLUK 56

SM v CM [2017] CSIH 1; 2017 SC 235

JUDICIAL EARLY NEUTRAL EVALUATION

VICTORIA MCCLOUD

Centre for Socio-Legal Studies, Faculty of Law,
University of Oxford

Abstract

In the light of the recent judgment in *Telecom Centre (UK) v Thomas Sanderson (Early Neutral Evaluation)* (2020) the author provides a brief overview of some of the history and principles behind early neutral evaluation (ENE) and in particular ‘judicial’ ENE as understood in the *Telecom* judgment (reproduced in this edition).

Keywords: judicial early neutral evaluation, legal costs, litigation, alternative dispute resolution, mediation

[A] WHY EARLY NEUTRAL EVALUATION?

Any lawyer who has practised in the courts of a jurisdiction such as any of those within the UK will probably have experienced the type of dispute where, in the end, whatever the outcome of the case on its merits, the reality is that the dispute is driven by the legal costs of the litigation. In a system where in general the ‘loser pays’, there can be a tipping point where the parties have become so committed to the litigation in terms of what they have paid—or owe—their lawyers that they simply must proceed and hope to win and obtain an order for costs against a (hopefully solvent) opponent. Of course, if the opponent itself becomes insolvent due to its own legal bills then that may be a forlorn hope.

One can, as happened in the (only slightly) fictional *Jarndyce v Jarndyce* dispute in Dickens’ *Bleak House*, also see the unjust situation where quite simply the money runs out in mid-dispute, and nothing good ever comes of it at least from the parties’ perspective. Without funding, the lawyers stop; without assets sufficient to meet costs and judgment, the justice of a case can simply slip away. The ghost of Dickens’ *Bleak House* and his fictional Chancery case clanks its chains even today in the

UK's jurisdictions as if Dickens had merged the spirit of Christmas Past with the Lord Chancellor's foggy courtroom. Along the way during any case—as in *Jarndyce* itself—there may be rulings, judgments, all contributing in their own ways to the corpus of the Common Law but, as Mr Kenge himself says in that novel, that benefit to the public has to be paid for in money or money's worth, by someone:

that on the numerous difficulties, contingencies, masterly fictions, and forms of procedure in this great cause, there has been expended study, ability, eloquence, knowledge, intellect, Mr. Woodcourt, high intellect. For many years, the ... flower of the bar, and ... the matured autumnal fruits of the woollack—have been lavished upon Jarndyce and Jarndyce. If the public have the benefit, and if the country have the adornment, of this great grasp, it must be paid for in money or money's worth, sir. (Charles Dickens, *Bleak House* (1853: chapter 65)).

[B] COSTS INCUR COSTS: A FURTHER INCENTIVE TO RESOLVE DISPUTES

Even if the fuel for the engines of the case does not run out—in other words even if matters come to their conclusion with a judgment and an order for costs payable to one side or the other—one then sees the usual order that the loser shall pay the costs of the case 'to be assessed if not agreed' (Civil Procedure Rules 44-47), which triggers a whole new process.

If the loser does not agree the amount then yet further litigation takes place, this time commenced in the Costs Court—typically the Senior Courts Costs Office where specialist judges hear cases (with advocates, solicitors, bundles and all the common accoutrements of litigation) in which the subject of the new dispute is 'how much the loser pays' and where the evidence in the claim is the detritus of the court files, the advices, the attendances and conferences within the concluded case: in short the paper and digital pile of material spanning perhaps several years, pertaining to each and every detail of the case as it progressed and the time and work put in by the lawyers acting for the ultimate winner. The author has from time to time acted as a judge in just such cases and in earlier days as advocate in them.

Such costs cases themselves can span days or weeks, can involve witnesses and cross-examination, and judgments and appeals.

Then there is the question of who pays *the costs of the costs* of the dispute and sometimes also a need for an evaluation of the amount of costs of that.

One is reminded of the rhyme by Jonathan Swift (1733) in *On Poetry: A Rhapsody*:

So, naturalists observe, a flea
Hath smaller fleas that on him prey;
And these have smaller still to bite 'em;
And so proceed *ad infinitum*.

It is no wonder then that for all the value which decided court cases and judgments may add to our Common Law, given that cases must be paid for, the courts have long since begun to stress that every effort must be made to control legal costs, and a part of that is to encourage early settlement.

We have seen the introduction of costs budgeting (a subject outside the scope of this paper but worthy of consideration in itself by legal scholars) whereby costs are to some extent predetermined and more predictable, perhaps with the risk of 'crystal-ball gazing' given that the course of a case is never certain at the start. We also see, and this is where the point of this paper comes in, a succession of cases in which courts have stressed time and time again that parties must try to resolve disputes without going to court, or if they must go to court they should seek to resolve matters before the claim has gone too far and, potentially, the level of legal expense has become the core driver of what takes place.

In *Egan v Motor Services (Bath) Ltd* (2007: paragraph 53), Ward LJ said:

'This case cries out for mediation', should be the advice given to both the claimant and the defendant. Why? Because it is perfectly obvious what can happen. Feelings are running high, early positions are taken, positions become entrenched, the litigation bandwagon will roll on, experts are inevitably involved, and, before one knows it, there will be two/three day trial and even, heaven help them, an appeal. It is on the cards a wholly disproportionate sum, £100,000, will be to fight over a tiny claim, £6,000. And what benefit can mediation bring? It brings an air of reality to negotiations that, I accept, may well have taken place in this case, though, for obvious reasons, we have not sought to enquire further into that at this stage. Mediation can do more for the parties than negotiation. In this case the sheer commercial folly could have been amply demonstrated to both parties sitting at the same table but hearing it come from somebody who is independent.

The theme continued in *Halsey v Milton Keynes General NHS Trust* (2004: paragraph 11) where Dyson LJ said:

the value and importance of ADR have been established within a remarkably short time. All litigators should now routinely consider with their clients whether their disputes are suitable for ADR.

Since then, numerous decisions have stressed—and nowadays frequently court orders state—that an unreasonable refusal to engage in alternative dispute resolution can result in the court making adverse costs orders against the party at fault. Application of such penalties has varied but the message at least has been clear, often underpinned by orders whereby if a party refuses to engage in dispute resolution it must provide a witness statement explaining why.

[C] SOME HISTORY AND PRINCIPLES OF EARLY NEUTRAL EVALUATION

‘Financial dispute resolution’ appointments have for many years (since 1996 on a pilot basis and formally incorporated in family court rules currently in their 2010 edition) been available and a key component in divorce cases, under rule 9.17 of the Family Procedure Rules which specify that: ‘The FDR appointment must be treated as a meeting held for the purposes of discussion and negotiation.’

Those rules provide that the judge hearing the FDR must thereafter have no further involvement in the case and will have access to copies of all offers and proposals made by both sides in the case (which would otherwise be confidential and which are returned to the parties at the end if requested).

The UK civil courts were rather slower to take on board any official form of robust evaluative process by judges outside trial (albeit that judges nonetheless would sometimes express a view—asked or unasked—if they were not going to have any further involvement in trying the case, a role which historically was fulfilled by the frank and straightforward approach for which the masters of the High Court were known).

Much of the case law thus refers more or less expressly to *mediation* for dispute resolution. There is not a great volume of academic scholarship in this jurisdiction on ENE let alone more specifically ENE where it is undertaken by a Judge (judicial ENE). It is, however, notable that in his *Civil Courts Structure Review: Final Report* (2016) Lord Justice Briggs recommended the creation of an online court (a subject about which I wrote in ‘Suing in Cyberspace’: McCloud 2017).

A key stage in that anticipated new court is *conciliation* at which a court officer—not a judge—considers the case and makes recommendations as to how it might best be resolved in terms of what type(s) of alternative dispute resolution may be useful for the parties to consider. (In daily court life, judges or at least this judge often does much the same if it appears likely to help.) Briggs LJ's stance was that if the method adopted is to be ENE then at least within his conception of the Online Court that should be a matter done by a judge, though clearly, in this jurisdiction it is always, quite separately, open to parties to agree to some form of evaluation by an external third party such as an expert and to agree to be bound by that decision.

There has been consideration in reported case decisions relating to judicial ENE. In *Seals and Another v Williams* (2015) the court said that:

it is highly commendable that the legal representatives for the parties have proposed as a way forward, and the court has been invited to undertake, an Early Neutral Evaluation of the case. The advantage of such a process over mediation itself is that a judge will evaluate the respective parties' cases in a direct way and may well provide an authoritative (albeit provisional) view of the legal issues at the heart of the case and an experienced evaluation of the strength of the evidence available to deploy in addressing those legal issues. The process is particularly useful where the parties have very differing views of the prospect of success and perhaps an inadequate understanding of the risks of litigation itself.

Not long thereafter, the Civil Procedure Rules applicable to cases in England and Wales were amended so that the function of the court in engaging in the expression of provisional opinions about the merits of a case was placed on a more formal footing by way of an amendment to rule 3.1(2)(m) which in its current form says that the court may:¹

take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.

In *Lomax v Lomax* (2019: 29) (per Moylan J) the court held that the court may make an order for ENE whether or not the parties request it. It also approved what was said by Norris J in *Bradley v Heslin* (2014: 24):

¹ ENE had in fact by then already found its way into court guides by specific courts, but its basis was uncertain, per Norris J in *Seals* (2015): 'The FDR process is familiar in the Family Courts. Although the process endorsed in the Chancery Modernisation Review as a valuable tool (see paragraphs 5.23 to 5.30) and features in the Guides both of the Commercial Court (see paragraph G.2.1 – G.2.5 of the Commercial Court Guide) and the Technology and Construction Court (see paragraph 7.5 of the TCC Guide) its precise foundation is unclear.'

I think it is no longer enough to leave the parties the opportunity to mediate and to warn of costs consequences if the opportunity is not taken. In boundary and neighbour disputes the opportunities are not being taken and the warnings are not being heeded, and those embroiled in them need saving from themselves.

It is against the backdrop of the amended CPR rule and the above decisions which we see the judgment in *Telecom Centre (UK) v Thomas Sanderson (Early Neutral Evaluation)* (2020) which is reproduced at the end of this Note. It is a decision of the present author but plainly with cooperation from the parties (not a case where ENE had to be imposed albeit it was raised by the court as a suggestion), and it sets out some views as to how one may progress ENE in the particular Division in which I sit as a judge.

It has drawn some attention but is little more than a restatement of some basic principles, albeit in something of a procedural vacuum in formal terms for the court in which I sit.

It is self-explanatory in terms of suggestions as to how to go about arranging judicial ENE such as the one envisaged in that case. The brevity of the relevant court rule is a blessing inasmuch as the parties and the judge may shape the process as necessary for the specifics of the case, the resources available and the likelihood that ENE may help to resolve 'logjam' issues in a claim.

Key points of note which arise from the above judgment applicable to this jurisdiction are that:

- ◇ judicial ENE is confidential unless the parties agree otherwise;
- ◇ it is non-binding unless agreed otherwise;
- ◇ the judge hearing the ENE will not hear the ultimate trial;
- ◇ the ENE may cover some or all issues in the case;
- ◇ the procedure is as formal or informal as the judge directs, taking into account the parties' views; and
- ◇ the case papers lodged for the ENE will be returned to the parties at the conclusion of the ENE process so as to avoid the private process from being accessible publicly.

According to Norman Chow and Kamal Halili (2014: 138), court-based ENE was (as at the end of 2014) available in 22 US states in civil claims. Judge Wayne Brazil, an (perhaps *the*) acknowledged US pioneer of ENE as a judge in California in his useful piece in 2007 (Brazil 2007: 10; and see also Brazil 2013), discusses situations where (in his jurisdiction in the USA but of much relevance to the UK) ENE may be preferable to other methods such as mediation. He proposes several questions to help parties to form

a view (and I suggest that such questions may also be of use to any judge—I have added some comments of my own to the questions he proposes):

- 1** *How important to achieving your goals at this juncture is a credible evaluation of the merits of the case from an impartial and knowledgeable source?*—This speaks for itself: evaluation by a judge can be a weighty indication as to how some other judge may decide issues if the matter goes to trial.
- 2** *How important at this stage is focusing and expediting the case development process?*—This perhaps translates in terms of the UK into the extent to which resolving parts of a case may have structural effects useful to saving money and court resources.
- 3** *How important to achieving your objectives at this juncture is face-to-face interaction with the other side?*—The fact that ENE can take place with all parties present can be a very useful way to help the lawyers advise clients credibly, especially where clients may be reluctant to take bad news from them rather than the judge. It can also give rise to surprising opportunities for parties to talk via lawyers outside the door of the court and find helpful ways forward.
- 4** *How important is it for your client (or an opposing litigant) to feel he or she has had something like his or her day in court?*—This is perhaps especially relevant in personal litigation where one must never forget the role which psychology and pride can play. Sometimes people are prepared to change position if they can do so without loss of face, and that can be assisted by a tactful and fair evaluation by a neutral party, and not ‘because the other side dictated it’.

Similarly, the valuable review by Chow and Halili (2014) offers the following as examples of ‘distinctive features’ of ENE: that it is confidential; that it encourages settlement discussions even if the ENE itself does not resolve the case; that it is specifically ‘evaluative’ as to the merits; and typically, that it happens early in the case. To Chow and Halili also there may be a sense of ‘empowerment’ of the litigants (similar to Brazil’s observation about the sense of ‘having one’s day in court’) and a clarification of the issues in dispute.

[D] CYBER-ENE?

Briggs LJ envisaged ENE being done by judges exclusively in his Online Court proposals. But what if one considers the future and the rapid rate of development of legal technology?

In a world with increasing focus on online dispute resolution, if one pauses for a moment to consider relatively circumscribed specialist fields,

such as the adjudication of disputes relating to dissolution of partnerships or relatively technical commercial disputes over contracts which have boilerplate clauses, one may foresee that technology may be capable of providing a form of ‘dispute resolution co-pilot’ for neutral evaluation purposes so as to assist with consistency of resolution.

Following the important case of *Cape Intermediate Holdings v Dring* (2019), where the UK Supreme Court approved certain principles relating to open justice from the first instance decision, the court has jurisdiction to allow public access to court documents subject to certain constraints and burdens of proof, beyond the categories spelled out in court rules.

This opens up the potential for a greater use of the detail of legal disputes for the purposes of informing digital systems seeking to model judicial reasoning and forecast case outcomes based on real, fine-grained data and not simply the rarefied language of judgments themselves. If deep learning systems could be trained in specialist areas of work to provide assistance to dispute resolution specialists, and perhaps judges too, and to propose solutions and weigh up prospects given the detail of known prior decisions and crucially the facts and evidence which underlay them, it may become possible for judicial or non-judicial ENE to be facilitated by systems which provide processed digital insight into the case law based on real and not sparse detail seen through the lens only of a judgment.

References

- Brazil, Wayne (2007) ‘ENE or Mediation? When Might ENE Deliver More Value?’ 14 *Dispute Resolution Magazine* 10-15.
- Brazil, Wayne (2013) *Early Neutral Evaluation* Chicago IL: Section on Dispute Resolution, American Bar Association.
- Briggs, Michael, Lord Justice (2016) [Civil Courts Structure Review: Final Report](#) July London: Judiciary of England and Wales.
- Chow, Norman & Kamal Halili (2014) ‘Integrating Early Neutral Evaluation into Mediation of Complex Civil Cases in Malaysia’ 7(4) *Journal of Politics and Law* 138-147.
- Dickens, Charles (1853) *Bleak House* republished (5 December 1993) San Diego CA: Wordsworth Editions.
- McCloud, Victoria (2017) ‘Suing in Cyberspace’ 36(1) *Civil Justice Quarterly* 34-50.
- Swift, Jonathan (1733) [On Poetry: A Rhapsody](#).

Legislation Cited

Civil Procedure Rules 1998

Family Procedure Rules 2010

Cases Cited

Bradley v Heslin [2014] EWHC 3267 (Ch)

Cape Intermediate Holdings v Dring [2007] EWHC 3154 (QB)

Cape Intermediate Holdings v Dring [2019] UKSC 38

Egan v Motor Services (Bath) Ltd [2007] EWCA Civ 1002

Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576

Lomax v Lomax [2019] EWCA Civ 1467

Seals and Another v Williams [2015] EWHC 1829 (Ch)

Telecom Centre (UK) v Thomas Sanderson (Early Neutral Evaluation) [2020]
EWHC 368 (QB)

[2020] EWHC 368 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

MASTER VICTORIA MCCLOUD

BETWEEN

TELECOM CENTRE (UK) LIMITED

CLAIMANT

AND

THOMAS SANDERSON LIMITED

DEFENDANT

Mr Alexander Robson, instructed by Messrs Mayfair Rise
Solicitors for the

Claimant.

Mr Sam Neaman, instructed by Messrs Bingham Mansfield
Solicitors for the

Defendant.

**Keywords: Early Neutral Evaluation – ENE – Queen’s
Bench Division – Master – order - procedure**

JUDGMENT

1. This brief decision concerns the use of Judicial Early Neutral Evaluation, in this case in the Queen’s Bench Division before a Master.
2. By CPR rule 3.1(2)(m) in an appropriate case the court may provide an Early Neutral Evaluation (ENE) for the purposes of

assisting the parties to settle the case. In this case, the facts of which I need only briefly spell out, the Claimant sues the Defendant on the basis, among other things, of an alleged wrongful termination of a contract for provision of phone based customer services. It claims to be entitled to payment on the basis of alleged (and disputed) terms as to the amount of damages payable in such circumstances and also in relation to rights to compensation under Regulations namely the Commercial Agents (Council Directive) Regulations 1993. The Defendant inter alia alleges the Claimant was in repudiatory breach of contract entitling it to terminate the relationship between the parties.

3. The case was transferred to this Division from the Business and Property Court and assigned to me. I raised with the parties whether they may be assisted by some form of Judicial Early Neutral Evaluation and if so on what aspects of the case. It appeared to me that there were four potential candidates for useful ENE namely (i) whether based on a sample of alleged breaches, there was merit in D's argument as to repudiatory breach, (ii) whether there was merit as to an argument raised as to oral variation of a written contract, (iii) whether there was merit as to an argument as to the existence of a separate oral contract and (iv) a short point as to the applicability of Reg. 8 of the above EU Regulation. The subject of ENE had in fact been canvassed at an earlier stage between the parties before my own suggestion.
4. For the avoidance of doubt nothing in this judgment in any way relates to confidential matters to be dealt with at the ENE appointment, which is listed before me on a future date, but I indicated to the parties that in view of the lack of current specific information in the QB Guide as to use of ENE before QB Masters it may assist if I supply my judgment as to the approach to be taken in this case. It may inform other litigants and I will supply a copy to the current author of the Queen's Bench Guide for her information and consideration.
5. The Chancery Guide, by contrast, contains a section on ENE in that court. In this decision I have set out the process which will be followed in this case and have endeavoured to tailor my approach to the circumstances applicable to litigation before QB Masters. Counsel on both sides were helpful in commenting on the content of the draft order which I have provided as a template annexed to this judgment (the ultimate form of order in this case is still being finalised as to its specific details).
6. Early Neutral Evaluation is a procedure which involves, in this instance, an independent party expressing an opinion about a

dispute or parts of it. The evaluative nature of ENE means that positive or negative views as to merits are expressed, perhaps robustly, by the judge. It is therefore different from many forms of 'mediation' where the focus is facilitative. The process to be adopted for Judicial (or any other form) of ENE is not stated in the Civil Procedure Rules and it is intended that the approach can be tailored to the needs of any given case. Thus one may for example proceed wholly on the basis of written evidence and submissions or by way of written evidence and written argument supplemented at an oral hearing.

7. In the QBD, an ENE process may be useful for example where a view on merits is needed on the merits of points of law and construction (such as in this case whether Reg. 8 of the Regulations is likely to have been excluded by the wording of the contract) or whether alleged breaches if proved would likely amount to repudiatory breaches. Consideration may be given to ENE in respect of any or all issues in a case and may also be especially useful where the resolution of some key issues would encourage settlement of others, or where the trial time estimate and use of resources and costs would be significantly reduced if parts of the case are resolved as a result of ENE.
8. ENE is a confidential process. The judge dealing with the ENE will thereafter not (absent agreement) try the case or deal with contentious applications. It will therefore be the case that in this instance once I have dealt with ENE I will release the case to another Master who will not be aware of the views expressed at the ENE appointment. That Master may then try the case if appropriate or release to some other judge or court in the usual way, perhaps on a much reduced trial time estimate if any issues have been resolved as a result of the ENE.
9. In the Chancery Division the Guide indicates that the opinion of the judge will be provided informally and that it may be necessary for a hearing of half a day to take place. In my judgment in the Queen's Bench Division given the vast range of types of case and complexity handled by Masters it is a matter for the judge to decide the form and degree of informality or formality of the opinion given, and to consider an appropriate time estimate which may well be more than half a day depending on complexity and substance in a QB case.
10. The outcome of Judicial ENE is normally 'without prejudice' unless privilege is mutually waived and is normally not binding unless the parties agree. It is possible that agreed terms of ENE may be that the decision is binding only upon the happening of certain events, or binding only for a defined period such as where an issue is dealt with on an interim basis.

11. Papers considered at the ENE will be returned to the parties at the end and not retained in the court file so as to ensure that subsequent judges or the public will not access them.
12. I have set out below in the ANNEX a generic version of the order which I will make in this case (the final form will be determined once the parties have discussed matters) but with additions which may usefully be adapted to suit other cases so as to make this decision more useful to others considering ENE. In this particular case the ENE is to be heard for 1 day on the basis of succinct skeleton arguments and the issue of repudiation shall be dealt with on the basis of a small sample of particulars selected by the Defendant from its statement of case on that issue. The other issues may include those set out above and the parties will discuss the precise range of the ENE whilst remaining within the time estimate. The evidence relied on will be in writing and shall be the witness statements of the relevant witnesses as (by the date of the ENE) by then already served for the purposes of the trial, ie there are not to be specific separate statements produced only for the ENE. I have indicated that if any modest issues of procedure arise before the ENE I will be willing to deal with those on the basis of email submissions.
13. I have given permission for the skeletons in this case to address the substance of what the relevant party would say if given the opportunity to respond to the opponent's statements, rather than permission to file formal statements in response, so as to avoid any risk that the ENE process leads to a tailoring of one side's case by way of achieving sequential exchange where such has not been ordered in the claim itself.

MASTER MCCLLOUD

20/2/20

ANNEX

DRAFT ORDER for ENE – QB Masters

1. The parties shall exchange [skeleton arguments/written submissions] [no longer than Pages] by no later than 4pm on
2. The parties shall [serve upon/indicate to] each other the written evidence upon which they wish to rely for the purposes of ENE by 4pm on [...]

Spring 2020

3. The parties shall agree a core bundle of documents for the Master which shall be lodged by 4pm on [...]
4. [The ENE appointment shall take place [in private] at on before Master with a time estimate of]
5. The non-binding opinion of the judge hearing the ENE will be provided in such form as the judge decides and may be given orally, or in writing, and with such degree of formality or informality as s/he decides. The opinion may be given in issue by issue or as a whole. The opinion shall be without prejudice to the claim and the opinion shall remain confidential to the parties.
6. After the ENE is concluded the papers relating to it shall be removed by the parties and shall be confidential unless the parties agree otherwise. No non-party shall be entitled to obtain a transcript of the hearing.
7. The judge shall (unless agreed by the parties) thereafter have no further involvement with the case.

BRITISH ASSOCIATION OF COMPARATIVE LAW

YSEULT MARIQUE

Essex University, FÖV Speyer and ULB

ABOUT THE BRITISH ASSOCIATION OF COMPARATIVE LAW

Created in 1950 under the name of the United Kingdom National Committee of Comparative Law, the British Association of Comparative Law (BACL) is the UK body which coordinates and encourages comparative legal research and teaching throughout the UK. It has three main activities with these aims in mind.

First, BACL holds a PhD workshop in spring every year. The last workshops were held in Oxford (2016), Cambridge (2018) and Lancaster (2019). This year the COVID-19 crisis meant that the workshop scheduled in Bristol will need to be rearranged. In 2020, Kent University has kindly offered to organize the next workshop (with a special topic dedicated to Latin America). The overall objective of these workshops is to provide a friendly forum for about 15 early career researchers to present their doctoral research and receive supportive feedback from colleagues.

Secondly, BACL holds a seminar just at the start of the Society of Legal Scholars' Conference in September every year. In 2019, the topic was held in honour of the late Professor Watson on transplants and mixed jurisdiction, with papers presented by Professor Uwe Kischel (Greifswald), Professor Geoffrey Samuel (Kent), Professor John Cairns (Edinburgh) and Dr Richard Kirkham (Sheffield). Although the BACL annual seminar is usually held in the UK, the 2017 seminar was organized in cooperation with the Irish Society of Comparative Law in Dublin on the topic of 'Comparing UK and Irish Law: A Special Relationship?'. Following the Dublin seminar, Professor Paula Giliker, the then Chair of BACL, edited the papers which were published in the *Common Law World Review* (2018) 47(1).

Thirdly, BACL is the national committee coordinating reports for UK law schools for the International Academy of Comparative Law, which organizes a world congress in comparative law every four years. The next congress will be held in Asunción (Paraguay) in 2022.

Current BACL membership is drawn from many of the UK's law schools (including Aberdeen, Bangor, Birmingham, Bristol, Cambridge, Cardiff, City, Dundee, Edinburgh, Exeter, Essex, Glasgow, Hull, Kent, King's College London, Kingston, Law Institute Jersey, Leeds, Leicester, Liverpool, Liverpool John Moores, LSE, Manchester, Manchester Metropolitan, Newcastle, Northumbria, Nottingham, Oxford, Queen Mary University, School of Advanced Study University of London, Sussex, Strathclyde, UCL, UEA, Warwick and Westminster).

More recently, BACL has started a blog in order to foster the interaction and visibility of comparative law projects among the academic community: see the [BACL website](#).

In response to the current exceptional situation making us all aware how interconnected our globalized world has become, BACL has launched a call for blog contributions entitled 'COVID-19 in comparative perspective'.

COVID-19 IN COMPARATIVE PERSPECTIVE: CALL FOR BLOG PIECES

The current COVID-19 pandemic is bringing into sharp focus two key questions at the core of comparative law research: first, **globalization** and how increasing and intense are our political, social, cultural and economic interactions with countries, public and private organizations and fellow humans across the world; secondly, **the distinctiveness of national reactions to this shared common challenge**.

The COVID-19 crisis brings this very tension between these local and global dimensions sharply into our daily lives when we need to stay six feet away from others and shows how differently we experience these general guidelines, depending on whether we are pregnant and about to give birth, taking care of toddlers, home-schooling children, caring for vulnerable relatives, ensuring there is food on the table, or keeping up with our work through online technologies.

Many blogs are currently putting together excellent insights and thoughts about this crisis. BACL would like to contribute to this discussion by *bringing comparison more sharply in focus in order to*

understand where lessons can be learned, how far they can be learned and how important contextualizing the discussions may be. BACL would thus be interested in short blog pieces on the following perspectives on the COVID-19 crisis:

- ◇ **Risks and legal techniques dealing with risks**—medical risks, financial risks, travel-related risks, mental risks, risks of fake news spreading on social media, risks prevention, risk assessment, torts etc. How does the approach to risks in a given country (or entity) help us better understand globalisation and national cultures? Can different models be identified?
- ◇ **Comparison on protecting vulnerable people**—how vulnerable people are understood in this crisis: this would include the vulnerable categories regarding their physical conditions but also women and domestic violence, the homeless, inmates, refugees etc. How does the World Health Organization's (WHO) definition of 'vulnerability' shape who is understood to be 'vulnerable'?
- ◇ **Comparison with previous experiences of crisis in a given country**—current governments often do not reinvent the wheel in dealing with the COVID-19 crisis. They go back to previous crises to address the current one. How do they do that? Which types of previous crisis? Is this self-evident regarding the subject-matter (due to being related to a crisis arising from food poisoning or disease) or because of the powers needed by the government (state of emergency type of reaction)?
- ◇ **Research designs (and comparisons) in times of crisis**—Lessons from elsewhere can be tempting to gain time or to address lack of domestic expertise, but should the government and their experts not make basic checks before looking elsewhere for inspiration? How can/should this be done? Can comparative lawyers contribute to the WHO's thinking here in the sense that uniform broad guidelines may actually be problematic in various ways as they do not address local specificities (needs or expertise etc.) or how regulators, national government, private organizations develop their short and longer-term responses to the crisis?

This call has three rolling deadlines, which would allow for a more instant approach to our questions and then a more conceptual take on COVID-19 as the crisis unfolds. The next deadlines will be:

- ◇ 15 September 2020
- ◇ 15 March 2021
- ◇ 15 September 2021.

The blog pieces should be ca 1,500 words long. Acceptance to publish the blog pieces and/or suggested revisions prior to publications will be communicated shortly after the deadline.

Please do send your enquiries or blog posts to [Dr Yseult Marique](#).

CORPORATE LIABILITY FOR BREACHES OF FUNDAMENTAL HUMAN RIGHTS IN CANADIAN LAW: *NEVSUN RESOURCES LIMITED V ARAYA*

PETER MUCHLINSKI

School of Law, SOAS, University of London

Abstract

Corporate liability for violations of fundamental human rights has become a major issue in numerous legal systems. This article considers the legal situation in Canada concerning the admissibility of such claims before the Canadian courts. This follows the recent, and significant, Canadian Supreme Court majority decision in *Nevsun Resources Limited v Araya* which held admissible claims made by Eritrean claimants that they had suffered violations of their fundamental human rights by being conscripted to work and systematically abused, contrary to fundamental international law standards, in a mine owned and controlled by the Eritrean subsidiary of Nevsun, a Canadian multinational mining corporation. The majority decision involves many novel, and controversial, legal issues considering the scope of international law-based human rights claims against private corporations, leading to significant dissenting judgments which may influence the course of any eventual trial of the claims. The case involved a number of key issues: whether the claims were subject to the act of state doctrine, as the claims involved showing *inter alia* that the Eritrean government had forced the claimants to work at the mine; whether the claims could arise directly out of customary international law prohibitions against violations of fundamental human rights, involving issues concerning the reception of customary international law into Canadian domestic law and the proper constitutional role of the courts in this process; and whether the claims could be adequately covered through existing torts under Canadian law or whether new torts, based on international human rights law, should be developed given the heinous nature of the alleged violations, involving, as they did, allegations of forced labour; slavery; cruel, inhuman and degrading treatment; and crimes against humanity. The article assesses the legal arguments in the case on a doctrinal and

comparative basis referring to relevant US and English law. It concludes by considering whether judicial activism, of the kind displayed by the majority, is legitimate in this novel and developing field of international law.

Keywords: act of state, multinational enterprises, business and human rights, customary international law, corporate liability, tort law, fundamental human rights, *jus cogens*, relationship between international and domestic law

[A] INTRODUCTION

Corporate liability for violations of fundamental human rights has become a major issue in numerous legal systems.¹ The typical case involves a parent, or affiliate, corporation incorporated in the forum jurisdiction being sued by foreign claimants for alleged violations of their human rights committed by a subsidiary in the host state of which they are residents, usually a developing country where legal redress is effectively non-existent. Until recently, the United States led the world with corporate human rights litigation brought under the Alien Tort Claims Act (ATCA), but this has been significantly restricted by the US Supreme Court. In particular, in *Jesner v Arab Bank* (2018) the Supreme Court excluded claims against foreign corporations from the ambit of ATCA. Though this still leaves open the possibility of claims against US corporations, following the Supreme Court in *Kiobel v Royal Dutch Petroleum* (2013), which held that ATCA did not remove the presumption against the extraterritorial application of US law, it is unlikely that ATCA will give rise to many future claims against US parent companies for the overseas conduct of their subsidiaries, though claims continue to be lodged against US-based corporations.² By contrast, claimants in England have followed a tort-based route to establishing liability rather than relying on human rights-based claims, though no case has yet reached a decision on the merits.³

A different approach has been taken by the Supreme Court of Canada in its recent decision in *Nevsun Resources v Araya* (2020). By a majority, the Supreme Court held that foreign claimants have the right to bring claims against a Canadian parent company based on alleged violations of fundamental human rights committed by its overseas subsidiary. The

¹ For detailed comparative analysis see Business and Human Rights Resource Centre (2020).

² See e.g. *Doe v Nestle* (2018), currently under consideration for appeal by the US Supreme Court.

³ See e.g. *Vedanta Resources plc and another v Lungowe & Ors* (2019) and *Meeran* (2011).

decision contains many novel and, indeed, controversial ideas which appear to make Canadian law *prima facie* amenable to transnational business and human rights litigation. However, as will be shown, the decision leaves many issues unsettled. This is especially so given the strongly reasoned dissenting judgments, which will be considered in some detail. As for non-Canadian companies, this matter is not touched upon directly, but the decision applies to Nevsun as a ‘company bound by Canadian law’ (*Nevsun* 2020: paragraph 132) and so may extend to Canadian incorporated affiliates of non-Canadian parent companies.

[B] THE FACTS OF THE CASE

The claimants, three workers at the Bisha mine in Eritrea, owned by Canadian mining corporation Nevsun Resources Limited, brought a class action on behalf of over 1000 workers who claim to have been compelled to work at the Bisha mine between 2008 and 2012. They sought damages for breaches of domestic torts including conversion; battery; false imprisonment; conspiracy; and negligence. In addition, they sought damages for breaches of customary international law prohibitions against: forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity (*Nevsun* 2020: paragraph 4).

The claims arose out of Eritrea’s National Service Program, established in 1995, requiring all Eritreans upon reaching the age of 18 to undertake six months of military training followed by 12 months of ‘military development service’. Conscripts were assigned to direct military service and/or ‘to assist in the construction of public projects that are in the national interest’ (*Nevsun* 2020: paragraph 9). The Bisha mine produces gold, copper and zinc and is one of the largest sources of revenue for Eritrea. It was established in 2008 under the ownership of the Bisha Mining Share Company (BMSC) which is 40 per cent owned by the Eritrean National Mining Corporation and, through subsidiaries, 60% owned by Nevsun, a publicly held corporation incorporated in British Columbia (*Nevsun* 2020: paragraph 7). Conscript labour was provided for the mine through subcontracts entered into between a South African company, SENET, hired to construct the mine on behalf of the Bisha Company, and Mereb Construction Company, controlled by the Eritrean military, and Segen Construction Company, owned by Eritrea’s only political party, the People’s Front for Democracy and Justice. Both companies received conscripts from the National Service Program (*Nevsun* 2020: paragraph 8). In 2002 military conscription was indefinitely extended and conscripts were forced to provide labour at subsistence wages. At Bisha, conscripted tenure was indefinite.

The three main claimants, Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle, alleged that they were working in harsh and dangerous conditions for years and were subjected to cruel and degrading punishments. Their pay was docked if they became ill, a common occurrence at the mine. They were confined to camps and could only leave under authorization. Absence without leave was severely punished (*Nevsun* 2020: paragraphs 10-13). In addition, unlike his co-claimants, who were conscripts, Gize Yebeyo Araya was initially a volunteer but was forced to continue his military service after completing his 18 months. All three eventually escaped from Eritrea and became refugees in Canada (*Nevsun* 2020: paragraphs 13-15).

At first instance, *Nevsun* sought to set aside the claims on the grounds of *forum non conveniens*, as Eritrea was the more appropriate forum; to strike out some of the claimants' evidence; alternatively, to strike out on the grounds that the British Columbia courts lacked subject-matter jurisdiction under the act of state doctrine; and to strike out the pleadings so far as they were based on customary international law as these were unnecessary and disclosed no reasonable course of action (*Nevsun* 2020: paragraph 16). Having established that *Nevsun* exercised effective control over the Bisha Company through its majority position on the company's board and operational control through its involvement in all aspects of Bisha's operations, Abrioux J dismissed *Nevsun*'s motions to strike (see *Araya v Nevsun Resources Limited* 2016). The Court of Appeal upheld the first instance decision (see *Araya v Nevsun Resources Limited* 2017)). On appeal to the Canadian Supreme Court, *Nevsun* focused on two issues only: the applicability of the act of state doctrine and whether the customary international law prohibitions against forced labour; slavery; cruel, inhuman and degrading treatment; and crimes against humanity could ground a claim for damages under Canadian law.

[C] ACT OF STATE DOCTRINE AND HUMAN RIGHTS CLAIMS

The act of state doctrine evolved to meet the need for judicial restraint when issues involving the acts of foreign states arose in domestic legal proceedings. It is an expression of the sovereign equality of states based on the principle that 'domestic courts should not "sit in judgment" on the laws or conduct of foreign states.' (Newbury, 2019: 7). Despite this apparently simple formulation, in practice the doctrine has caused significant complexity, if not confusion, as to its proper limits, especially at the admissibility stage of proceedings. This is due, in large part, to

emerging limitations on the absolute territorial sovereignty of the state through increased subjection to international obligations concerning the treatment of individuals within its territory. The most conspicuous example is the rise of international human rights laws which raises a question at the heart of the *Nevsun* case: where a human rights claimant has to aver to the conduct of a foreign state in making their case does that render the claim non-justiciable?

Historically, although the English courts have barred claims where the lawfulness or validity of acts of the foreign state would have to be determined, an exception has emerged whereby acts of state, including legislation, based on violations of fundamental human rights that are contrary to the public policy of the forum will not be given effect (see *Oppenheimer v Cattermole* 1976), as has a wider exception based on an act of state that is in clear violation of international law more generally (see *Kuwait Airways Corporation v Iraqi Airways Co* 2002). In the most recent case of *Belhaj v Straw* (2017), a case concerning allegations of UK involvement in the detention and torture of the claimants at the hands of foreign states, Lord Sumption, who was followed on this point by five out of the seven judges (Newbury 2019: 45), held that:

it would be contrary to the fundamental requirements of justice administered by an English court to apply the foreign act of state doctrine to an allegation of civil liability for complicity in acts of torture by foreign states. Respect for the autonomy of foreign sovereign states, which is the chief rationale of the foreign act of state doctrine, cannot extend to their involvement in torture, because each of them is bound *erga omnes* and along with the United Kingdom to renounce it as an instrument of national or international policy and to participate in its suppression. In those circumstances, the only point of treating torture by foreign states as an act of state would be to exonerate the defendants from liability for complicity (paragraph 262).

In coming to its decision that the act of state doctrine was no bar to the claims before it, the Canadian Supreme Court noted that their Lordships in *Belhaj* gave four separate sets of reasons for their decision which led to considerable confusion over the limits of act of state (*Nevsun* 2020: paragraphs 40-42).⁴ The Canadian Supreme Court also found confusion in the Australian cases on this issue (*Nevsun* 2020: paragraphs 42-43). Accordingly, Canada could go a different way.

Under Canadian law, the principles underlying the act of state doctrine had been completely subsumed within principles of private international law which generally called for deference when dealing with questions of

⁴ For detailed analysis see Newbury (2019: 28-40).

enforcing foreign laws, ‘but allow for judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law’ (*Nevsun* 2020: paragraph 45). The Supreme Court declined to follow the English act of state doctrine, or to accept *Nevsun*’s argument that it formed part of Canadian law (*Nevsun* 2020: paragraphs 56-59). Accordingly, act of state was no bar to the admissibility of the respondent’s claims.

Moldaver and Côté JJ dissented on this point. They felt that the claims arose on the plane of international affairs for resolution in accordance with principles of public international law and diplomacy and so were non-justiciable before the Canadian courts (*Nevsun* 2020: paragraph 271). In particular, adjudication of this case would impermissibly interfere with the conduct by the executive of Canada’s international relations (*Nevsun* 2020: paragraph 276). The act of state doctrine under Canadian law was indeed a part of private international law as asserted by the majority, but this did not negate the existence of a rule of non-justiciability under Canadian law whereby ‘a court should not entertain a claim, even one between private parties, if a central issue is whether a foreign state has violated its obligations under international law’ (*Nevsun* 2020: paragraph 286).

Issues involving violations of international law could not be subsumed under rules of private international law, such as choice of law, as these do not mediate between domestic legal systems and the international legal system, this being an issue determined under Canada’s domestic constitutional arrangements (*Nevsun* 2020: paragraph 292). Justiciability was rooted in a commitment to the constitutional separation of powers which required the courts to defer to the executive and legislature so as to refrain from unduly interfering with their legitimate institutional roles (*Nevsun* 2020: paragraph 294). Accordingly, although the court had the institutional capacity to hear a private claim which impugns the lawfulness of a foreign state’s conduct under international law, it would be overstepping the limits of its proper institutional role (*Nevsun* 2020: paragraph 296). The constitutional separation of powers that rendered such cases non-justiciable also excluded any public policy exception (*Nevsun* 2020: paragraph 301). In addition, if the Canadian courts accepted the power to pass judgment in such cases:

that could well have unforeseeable and grave impacts on the conduct of Canada’s international relations, expose Canadian companies to litigation abroad, endanger Canadian nationals abroad and undermine Canada’s reputation as an attractive place for international trade and investment. Sensitive diplomatic matters which do not raise domestic public law questions should be kept out of the hands of the courts (*Nevsun* 2020: paragraph 300).

This conclusion was supported by the absence of any legislative mandate or constitutional imperative for the courts to review the legality of a foreign state's executive or legislative acts in a private law claim, which distinguished this case from public law decisions such as whether municipalities could levy rates on foreign legations, or whether federal or provincial governments possessed property rights in the Canadian continental shelf, or the power to examine the human rights records of foreign countries in extradition and deportation cases that the majority had relied on as proof that the courts could adjudicate on human rights issues in private law claims (*Nevsun* 2020: paragraphs 303-304).

Turning to the facts, Moldaver and Côté JJ held it was clear that the legality of Eritrea's acts under international law was central to the respondents' claims. The respondents alleged that *Nevsun* was liable because it was complicit in the Eritrean authorities' allegedly internationally wrongful acts, namely, that the National Service Program was a system of forced labour that constituted a crime against humanity. The respondents' claims, as pleaded, thus required a determination that Eritrea had violated international law and as such were bound to fail (*Nevsun* 2020: paragraph 312).

The choice between the majority and minority is a fine one and much depends on what is perceived to be just in such cases. At first sight the obvious reaction may be that judges should sweep aside inconvenient rules of law to achieve just ends. However, the minority's view cannot be so easily dismissed. The separation of powers doctrine is a cornerstone of democratic government. As stated by Montesquieu:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty ... there is no liberty if the power of judging is not separated from the legislative and executive... there would be an end to everything, if the same man or the same body ... were to exercise those three powers (House of Commons 2011: 2; citing Montesquieu c1748).

The US follows a strict doctrine of separation of powers, while the UK takes a more nuanced approach based on a 'balance of powers', though, in more recent years, the separation of the three branches of government has become more pronounced with developments including the establishment of the UK Supreme Court, replacing the Judicial Committee of the House of Lords as the highest judicial organ in the UK (House of Commons 2011). The Canadian system recognizes a formal separation of powers under the Constitution Acts (1867-1982) but is closer to the UK experience. While there is much debate in Canada over the lack of separation between the executive and legislature, the courts appear to

have a measure of independence from the other branches and remain ready to assess executive and legislative action in appropriate cases. (see Richard 2009; Roach 2018; Van Santen 2018).

The impact of the Canadian Charter of Rights and Freedoms (Canada Constitution Acts 1867 to 1982) is a significant development in this regard (Roach, 2018). For example, in the leading case of *Doucet-Boudreau v Nova Scotia* (2003) the Canadian Supreme Court upheld, by a majority, the right of the Nova Scotia courts to order a scheme for the introduction of francophone rights, guaranteed under the Charter, for the French-speaking minority of Nova Scotia following years of governmental inaction. In relation to the Canadian government's foreign policy role, the Canadian Supreme Court in *Operation Dismantle v The Queen* (1985) held that foreign policy decisions were reviewable under the Charter, though with a measure of restraint. The case accepted that the Charter applied to Cabinet's decision to allow the United States to test cruise missile technology in Canada's north and overturned lower court decisions and government arguments that the decision was non-justiciable.

Thus, the Canadian courts accept a degree of judicial intervention, including in relation to foreign policy, in human rights cases. However, the courts retain a high degree of discretion over the merits and remedies and have used this to recognize legitimate state interests in Charter cases. In *Operation Dismantle* (1985), for example, the Supreme Court found that, while it could review the government's actions, the claim, brought by the appellant peace group, that cruise missile testing increased the risk of nuclear war was dismissed as showing no actual threat that could lead to any person's rights under the Charter being violated. In other cases, declarations have been issued giving the executive considerable discretion over how to meet the court's concerns of conformity with the Charter (Roach 2018: 324-325).

Returning to the *Nevsun* decision, the above factors suggest that the majority is in line with wider Canadian judicial approaches to human rights questions and non-justiciability, while the minority dissent has overemphasized the need for judicial restraint and separation of powers and has also introduced factors, such as harm to Canadian trade and investment, which should not be traded off in a cost-benefit analysis with the observance of human rights by Canadian corporations. As Abella J noted in the opening two paragraphs of her majority opinion:

[1] This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was

to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.

[2] The process of identifying and responsively addressing breaches of international human rights law involves a variety of actors. Among them are courts, which can be asked to determine and develop the law's scope in a particular case. This is one of those cases (*Nevsun* 2020).

This perspective is given strength by Lord Mance, one of the Supreme Court judges in *Belhaj*, who, in the course of a speech given in 2017, said:

The courts have an important role in ensuring the legality and propriety of executive action, at home and abroad. They can never be primary decision-makers. It is the function of the executive to decide and to administer, and the executive is in many respects much better placed to judge on the necessity or appropriateness of action at the international level. At the same time, there are limits, and deprivation of liberty or allegations of torture are example of areas where courts may be expected to become involved (Mance 2017).

Given the decision in *Belhaj*, and the human rights public policy exception to the act of state doctrine under English law, his Lordship offers a succinct summary of the English position. The majority in *Nevsun* are following a similar path, albeit through distinctive reasoning.

Turning from technical legal justifications for the majority view, wider Canadian public policy developments also confirm that their decision is appropriate. In particular, in January 2018, the government of Canada announced new initiatives for responsible business conduct abroad, an Ombudsperson and a Multi-stakeholder Advisory Body on Responsible Business Conduct. The Canadian Ombudsperson for Responsible Enterprise (CORE), currently Sheri Meyerhoffer, is the first position of its kind in the world. The CORE is:

mandated to review allegations of human rights abuses arising from the operations of Canadian companies abroad. Recommendations made by the Ombudsperson will be reported publicly, and companies that do not cooperate could face trade measures, including the withdrawal of trade advocacy services and future Export Development Canada support. While serving in this role, the new Ombudsperson will focus on the mining, oil and gas, and garment sectors and is expected to expand to other sectors in the first year of operation. This appointment underlines the importance of inclusive trade and respect for the fundamental rights of people abroad, as part of Canada's trade diversification strategy, and reflects Canada's commitment to responsible business around the world (Global Affairs Canada 2019; and see Canada Order in Council, 2019).

Given this development,⁵ it would be odd if the Canadian courts were to refuse even to consider claims arising out of alleged human rights violations by the overseas subsidiaries of Canadian companies where these involve complicity with the host state authorities.

That said, the Supreme Court has so far only accepted that admissibility will not be determined by any concept of non-justiciability. This is far from saying that, at any eventual trial of the issues, the judge will not consider further the core issues underlying the act of state doctrine, namely, comity and equality of states. As noted by Newbury (2019: 46), ‘these difficulties will require trial judges to give even fuller consideration to the problematic and changing interface between domestic and international law’.

[D] HUMAN RIGHTS CLAIMS ARISING OUT OF CUSTOMARY INTERNATIONAL LAW

The second limb of *Nevsun*’s appeal was that claims based directly on customary international law violations should be struck out as they disclosed no reasonable claim or were unnecessary. The Supreme Court rejected this line of argument and upheld the lower courts’ decisions as it was not ‘plain and obvious’ that the claims had no reasonable prospect of success or were unnecessary. This finding is bound up with the Supreme Court’s view concerning the role of the Canadian courts in the ongoing development of international law. Citing academic sources, the majority accepted that Canadian courts were an active participant in the global development of international principles in the fields of human rights and other laws impinging on the individual (*Nevsun* 2020: paragraph 70), that international law not only comes down from the international to the domestic sphere but also ‘bubbles up’ from national courts (*Nevsun* 2020: paragraph 71) and that Canadian courts should meaningfully contribute to the ‘choir’ of domestic court judgments around the world shaping the ‘substance of international law’ (*Nevsun* 2020: paragraph 72).

Against this background, the Supreme Court’s initial task was to determine whether the respondent’s claims made under the prohibitions of forced labour; slavery; cruel, inhuman and degrading treatment; and crimes against humanity were part of Canadian law. This involved a two-step process: whether these prohibitions were part of customary international law and whether they were part of Canadian law.

⁵ Which has been criticized for limiting the CORE’s powers of subpoena and investigation see Canadian Network on Corporate Accountability (2019).

On the first question, the majority accepted that these prohibitions formed part of customary international law. The norms relied upon by the Eritrean workers had ‘emerged seamlessly from the origins of modern international law, which in turn emerged responsively and assertively after the brutality of World War II’ (*Nevsun* 2020: para 75). They also fulfilled the two requirements for a norm of customary international law to be recognized as such involving a ‘general but not necessarily universal practice and *opinio juris*, namely the belief that such practice amounts to a legal obligation’ (*Nevsun* 2020: para 77). Furthermore, crimes against humanity and the prohibition against slavery were of such fundamental importance as to be characterized as *jus cogens*, or peremptory norms of international law, from which no derogation is permitted (*Nevsun* 2020: paras 83-84 and 99-101), while the prohibition against forced labour was described by the International Labour Organization (ILO) as a peremptory norm and was at least undoubtedly a norm of customary international law (*Nevsun* 2020: para 102). The prohibition against cruel, inhuman and degrading treatment was an absolute right which no social goal or emergency could limit (*Nevsun* 2020: para 103).

On the second question, the majority, relying on a mix of academic sources and common law cases, viewed customary international law as automatically adopted into Canadian domestic law without any need for legislative action, making it part of the common law of Canada in the absence of conflicting legislation (see *Nevsun* 2020: paras 85-95). As a result, Canadian courts must treat public international law as law, not fact, and must give judicial notice to such law not requiring formal proof of international law through evidence (*Nevsun* 2020: paras 96-98).

In response *Nevsun* argued that, even if the norms relied on by the respondents were part of Canadian law, it was immune from their application because it was a corporation. Relying exclusively on academic opinion, the majority rejected this argument. International law had evolved beyond its state-centric template, and there was no tenable basis for restricting the application of customary international law to relations between states, especially as human rights law transformed international law and made the individual an integral part of this legal domain (*Nevsun* 2020: paras 104-110). Citing Professor Beth Stevens, the majority asserted that human rights could be violated by private actors and that ‘there is no reason why “private actors” excludes corporations’ (*Nevsun* 2020: para 111). Citing Professor Howard Koh, the majority added that there was no reason why a corporation could not be held civilly liable for a violation of human rights law (*Nevsun* 2020: para 112). Abella J, for the majority, concluded:

As a result, in my respectful view, it is not ‘plain and obvious’ that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of ‘obligatory, definable, and universal norms of international law’, or indirect liability for their involvement in what Professor Clapham calls ‘complicity offenses’ (Koh, ‘Separating Myth from Reality’, at pp. 265 and 267; Andrew Clapham, ‘On Complicity’, in Marc Henzelin and Robert Roth, eds., *Le Droit Pénal à l’Épreuve de l’Internationalisation* (2002), 241, at pp. 241-75).

This conclusion was reinforced by the absence of any Canadian laws which conflicted with the adoption of the norms relied upon by the respondents or their application to Nevsun. On the contrary, the fact that the Canadian government had created the CORE showed that it had adopted policies to ensure that Canadian companies operating abroad respected these norms (*Nevsun* 2020: paras 114-5).

The final issues raised by Nevsun revolved around whether Canadian law could develop appropriate remedies for breaches of customary law norms and whether existing nominate torts were sufficient remedies making such other remedies unnecessary. On the first issue the majority was satisfied that Canada had an international obligation to ensure effective remedy to victims of violations of human rights, and there was no law or other procedural bar precluding the Eritrean workers’ claims. Thus, it was not ‘plain and obvious’ that Canadian courts could not develop a civil remedy in domestic law for corporate violations of customary international law norms adopted in Canadian law (*Nevsun* 2020: paras 119-122). Furthermore, the Eritrean workers’ allegations encompassed conduct not captured by existing domestic torts as their character was of a more public nature since they ‘shock the conscience of humanity’ (*Nevsun* 2020: para 124), and their heinous nature could not be adequately addressed by such torts, even by awarding punitive damages (*Nevsun* 2020: paras 125-126). Accordingly, this second argument was also no bar to the claims going forward.

The majority decision appears, at first hand, to offer a strong argument for developing Canadian law to encompass direct corporate liability for complicity in human rights violations, arising out of the activities of overseas subsidiaries in conjunction with host state authorities, and based on customary international human rights norms. However, the majority remind us that all of this is to be heard by the trial judge:

because some norms of customary international law are of a strictly interstate character, the trial judge will have to determine whether the specific norms relied on in this case are of such a character. If they are, the question for the court will be whether the common law

should evolve so as to extend the scope of those norms to bind corporations (*Nevsun* 2020: para 113) ...

The workers' customary international law pleadings are broadly worded and offer several ways in which the violation of adopted norms of customary international law may potentially be compensable in domestic law. The mechanism for how these claims should proceed is a novel question that must be left to the trial judge (*Nevsun* 2020: para 127) ...

This proceeding is still at a preliminary stage and it will ultimately be for the trial judge to consider whether the facts of this case justify findings of breaches of customary international law and, if so, what remedies are appropriate (*Nevsun* 2020: para 131).

Accordingly, it is yet to be settled whether the majority argument will prevail, based, as it is, largely on academic opinion, which is a subsidiary source of international law under the Statute of the International Court of Justice (Wood 2017). In the circumstances, a close examination of the dissent on this issue is necessary.

Brown and Rowe JJ, while agreeing with the majority on the act of state finding, rejected the claims based on customary international law. They disagreed with the majority on their characterization of the content of international law; the procedure for identifying international law; the meaning of 'adoption' of international law in Canadian law; and the availability of a tort remedy (*Nevsun* 2020: para 135). They identified two theories of the case: the majority's theory based on a cause of action for 'breach of customary international law'; and the chambers judge's theory which saw the claims as being based on new nominate torts inspired by customary international law and which more accurately reflected the worker's pleadings and was to be preferred (*Nevsun* 2020: paras 137 and 143). However, both theories were wrong.

The majority approach displaced the proper role of international law from the Canadian legal system. Canadian law defined the limits of the role played by international law in the Canadian legal system and so international law could not require Canadian law to take a certain direction, except inasmuch as Canadian law allowed it (*Nevsun* 2020: paras 151-152). The majority, in effect, determined a change in Canadian law allowing for a new remedy based on international law which only the act of a competent legislature could undertake (*Nevsun* 2020: para 153). Under Canadian law a treaty required an Act of the legislature to be effective in domestic law while customary international law could have a direct effect on common law, without legislative enactment, but the existence of the norm had to be proven as a matter of fact, be subject to

the absence of conflicting legislation, and could only operate with respect to prohibitive rules of international custom, which prohibit a state acting in a certain way (*Nevsun* 2020: paras 159-169). Furthermore, the courts had to follow the legislature if a law was passed in contravention of a prohibitive norm of international law, nor could they construct the law if the legislature failed to pass an Act giving effect to a mandatory norm of international law, requiring the state to act in a certain way (*Nevsun* 2020: para 170). Indeed, the courts were not as well suited to make legal change as the legislature which had the institutional competence and the democratic legitimacy to enact major legal reform. By contrast, the courts were confined to considering the circumstances of the particular parties before them and so could not anticipate all the consequences of a change (*Nevsun* 2020: para 225).

The majority were also wrong in their identification of the content of customary international law. The majority were correct to take judicial notice of the prohibition of crimes against humanity, but not in relation to the contested norm on the question of whether corporations could be held liable at international law. For this the majority relied only on academic opinion which did not indicate that international law *had* thus evolved but, that it *could* so evolve (*Nevsun* 2020: paras 188 and 200, emphasis in the original). Brown and Rowe JJ were unequivocal: ‘in our view, that corporations are excluded from direct liability is plain and obvious’ (*Nevsun* 2020: para 189).⁶ They cited the UN Special Representative on the issue of human rights and transnational corporations and other business enterprises who, in 2007, stated that preliminary research ‘has not identified the emergence of uniform and consistent state practice establishing corporate responsibilities under customary international law’ and the writings of Professor James Crawford to the same effect (*Nevsun* 2020: para 190). In addition, the doctrine of adoption did not transform prohibitive rules such as the prohibition against slavery into a domestic liability rule between individuals and corporations (*Nevsun* 2020: para 194). Furthermore, any mandatory rule to the effect that ‘Canada must prohibit and prevent slavery by third parties’ could only be given effect through criminal and not civil law, and Parliament had unequivocally prohibited the courts from creating new criminal laws via the common law (*Nevsun* 2020: paras 208-209). Moreover, since there was no simple private law remedy for a simple breach of Canadian public law it would be astonishing for the courts to recognize a private law cause of action for a simple breach of customary international law (*Nevsun* 2020: para 211).

⁶ Moldaver and Côté JJ agreed on this point: *Nevsun* 2020: paragraphs 268-269.

Turning to the issue of whether existing torts could suffice, Brown and Rowe JJ held that the majority undervalued the tools Canadian courts already had to condemn crimes against humanity and degrading treatment. Were this action formally for the tort of battery, a court could express its condemnation of the conduct through its reasons. A trial court could also express its condemnation through its damage award (*Nevsun 2020*: paras 220-221).

Furthermore, on the second theory of the case, that the claims require the court to recognize four new nominate torts inspired by international law, Brown and Rowe JJ held that three clear rules governed this exercise:

- (1) The courts will not recognize a new tort where there are adequate alternative remedies;
- (2) the courts will not recognize a new tort that does not reflect and address a wrong visited by one person upon another and
- (3) the courts will not recognize a new tort where the change wrought upon the legal system would be indeterminate or substantial (*Nevsun 2020*: para 237).

Applying these tests, the dissenting justices concluded that the proposed tort of cruel, inhuman or degrading treatment failed the necessity test, since conduct captured by this tort would also be captured by the extant torts of battery or intentional infliction of emotional distress and any greater degree of harm would go to damages (*Nevsun 2020*: para 245). The proposed tort of ‘crimes against humanity’ also failed as it was too multifarious a category to be the proper subject of a nominate tort and many crimes against humanity would be already addressed under extant torts (*Nevsun 2020*: para 246). On the other hand, the possible torts of slavery and use of forced labour would pass the tests (*Nevsun 2020*: paras 247-249). However, it would be inappropriate for the courts in the present case to recognize the proposed torts based on conduct that occurred in a foreign territory, where the workers had no connection with British Columbia and the defendant corporation had only an attenuated connection to the tort (*Nevsun 2020*: para 251). It would also constitute an unwarranted intrusion into the executive’s dominion over foreign relations:

Canadian courts have no legitimacy to write laws to govern matters in Eritrea, or to govern people in Eritrea. Developing Canadian law in order to respond to events in Eritrea is not the proper role of the court: that is a task that ought to be left to the executive, through the conduct of foreign relations, and to the legislatures and Parliament (*Nevsun 2020*: para 259).

Accordingly, Brown and Rowe JJ would allow the appeal in part and strike the paragraphs of the workers' claims related to causes of action arising from customary international law norms (*Nevsun* 2020: para 266).

The majority decision will be welcomed by proponents of the need for greater corporate accountability for human rights violations. It is also in line with the Canadian courts' generally favourable reception of international law, especially since the adoption of the Charter of Rights and Freedoms (van Ert 2019). However, the contrasting majority and dissenting opinions leave a minefield of unanswered questions for the eventual trial judge. The main point of agreement between all of the Supreme Court judges is that customary international law forms part of Canadian domestic law in the absence of legislation to the contrary. But this does not take us very far in predicting the outcome of the trial. The dissent has questioned whether there exists a customary international law norm by which corporations can be held liable for breaches of human rights in which they are complicit.

In taking this approach, Brown and Rowe JJ made the surprising assertion that customary international law was a question of fact under Canadian law, thus relegating its status to no more than another foreign law. This is contrary to existing Canadian, and international, practice which regards public international law as law (Crawford 2019: 52). As noted by Gib van Ert, Canada's leading expert on the reception of international law in Canada, who was cited by the majority in this regard, 'unlike foreign law, which is treated as a question of fact and therefore requires proof, in conflicts of laws cases, international laws derived from treaties and custom are ... to be judicially noticed rather than proved' (van Ert 2018: 6; *Nevsun* 2020: paras 96-98). However, van Ert qualifies this statement by noting that, 'a claimant contending for the existence of a new rule of customary international law may be required to prove in evidence the state practice element of that claim' (van Ert 2018: 6, note 60). The majority answered this point by saying that such an inquiry did not undermine international law as law and that:

the questions of whether and what evidence may be used to demonstrate the existence of a new norm are not, however, live issues in this appeal. Here the inquiry is less complicated and taking judicial notice is appropriate since the workers claim breaches not simply of established norms of customary international law, but of norms accepted to be of such fundamental importance as to be characterized as *jus cogens*, or peremptory norms (*Nevsun* 2020: para 99).

Again, the key issues are left to the trial judge. Given the paucity of legal precedent cited by the majority, it cannot be ruled out that the trial

judge will find that no principle of customary international law exists, to the effect that a parent corporation can be found liable for its complicity, through the acts of its overseas subsidiary, in human rights violations committed against claimants in the host state.

Secondly, the constitutional argument against judicial activism in the field of international law made by the dissent is a familiar one, and one that has found favour in other jurisdictions.

For example, in *Jesner v Arab Bank* (2018) the majority held that neither the language of ATCA nor precedent supported an exception to the general principle that the courts should be reluctant to extend judicially created private rights of action. Such caution should extend, ‘to the question whether the courts should exercise the judicial authority to mandate a rule imposing liability upon artificial entities like corporations’ (*Jesner* 2018 at 18). This applied with particular force to the ATCA which implicates foreign-policy concerns that are the province of the political branches. (*Jesner* 2018 at 19).

The *Jesner* case involved claims, by victims of terrorist acts committed abroad, against the New York branch of the Arab Bank, a Jordanian financial institution with alleged links to the financing of terrorist groups responsible for these acts. Claims against the Arab Bank had inflamed US relations with Jordan over recent years, a critical ally that saw the litigation as an affront to its sovereignty. Accordingly, it was for Congress, not the courts, to extend private rights of action under the statute (*Jesner* 2018: 26). Finally, the majority also noted that, if the US accepted a right of action for foreign corporations under ATCA, similar actions against US corporations could arise in the courts of foreign states and this could create a dampening of investment that contributed to the economic development that was an essential foundation for human rights (*Jesner* 2018: 24).

The *Jesner* case reinforces the dissenting view of the proper role of the courts in responding to novel human rights-based claims. As Brown and Rowe JJ noted, the majority in effect sought to use the doctrine of adoption to introduce a Canadian version of ATCA, ‘without accounting for the unique statutory context from which the American doctrine arose. It goes without saying that Canadian courts cannot adopt a U.S. statute when Parliament and the legislatures have not.’ (*Nevsun* 2020: para 212) A future trial judge may agree.

On the matter of whether existing torts or new nominate torts are necessary to ground the claims in this case, again the majority leave it

for the trial judge to decide (*Nevsun* 2020: para 131). The core question is whether the majority are correct to say that existing torts are not capable of expressing the seriousness of the alleged violations of fundamental human rights. Here, it must be remembered that human rights claims originate against states not private persons or corporations. The dissenting judges have a strong point when they assert that tort remedies can offer effective relief against a corporate wrongdoer, including the use of punitive damages to underscore the seriousness of the breach. Indeed, a variety of regulatory standards, in which human rights violations are implicit, are enforced against corporations through tort remedies (Laplante 2017). Equally, the tort-based approach to corporate liability for human rights violations has made an impact in several jurisdictions starting in common law countries but now extending to civil law jurisdictions.⁷ It has also been argued that the common law of negligence may offer a stronger analytical tool than a claim based on a violation of positive human rights obligations for establishing the parameters of, and limits to, liability (Stoyanova 2019). Accordingly, the use of existing tort claims may not effectively deprive the claimants of redress, though, as a matter of Canadian public policy, it may be deemed useful to develop new torts based directly on breaches of customary international law.

A further unanswered issue concerns the factual context of the case. It is not the direct liability of *Nevsun* that is in issue but complicity in actions undertaken by its Eritrean subsidiary which employed conscript labour through its South African intermediary SENET. This rests on a finding that *Nevsun* was sufficiently in control of its subsidiary and its operations to be seen as having acquiesced to the use of forced labour and its associated abuses of human rights. This issue was not raised before the Supreme Court, and so the trial judge will be free to develop their own view on this. In the first instance decision *Abroix J* held:

[50] At the relevant times, members of *Nevsun*'s senior management primarily resided in Vancouver, British Columbia. *Nevsun*'s directors resided in Vancouver, Ontario and Connecticut.

[51] *Nevsun* exercises effective control over BMSC. It controls a majority of the Board of BMSC and Cliff Davis, the CEO of *Nevsun*, is the Chair of BMSC (*Araya v Nevsun* 2016).

⁷ For discussion of early tort claims involving human rights concerns in England, Australia and Canada see Joseph (2004: chapter 6) and for the Netherlands and England see Kamminga and Zia-Zarifi (2000: part III, chapters 9-12); and Meeran (2011). More recent studies include: for a UK perspective: Meeran (2013); Chambers and Tyler (2014) and Srinivasan (2014); for civil law jurisdictions, especially the Netherlands, see Enneking (2012); for a comparative approach see Muchlinski and Rouas (2014).

However, *Nevsun* denied that Bisha Mine was its asset. It averred that BMSC and not *Nevsun* was party to the agreements with the state of Eritrea and the Eritrean National Mining Corporation that entitled it to operate the mine. *Nevsun* also claimed that operational decisions at the material times, including selecting SENET, were made by BMSC's management and that BMSC required SENET to agree not to employ forced labour and ensure any subcontractors it engaged did likewise. *Nevsun* further asserted that SENET and all subcontractors providing services to BMSC in connection with the Bisha Mine were required to refrain from violence, crime or abuse and to comply with BMSC's corporate policies prohibiting such conduct (*Araya v Nevsun* 2016: paras 54-55). These questions of fact will ultimately determine the case, and the majority decision offers no indication as to how these issues should be determined even though they remain central to any principle of corporate liability for complicity in human rights violations. In effect the majority failed to outline the contours of the proposed liability principle that they say is not plainly and obviously unarguable, nor did it indicate the evidence that would be relevant.

[E] WIDER IMPLICATIONS OF *NEVSUN*: JUDICIAL ACTIVISM IN THE DEVELOPMENT OF TRANSNATIONAL CORPORATE LIABILITY FOR HUMAN RIGHTS VIOLATIONS

The *Nevsun* case raises significant wider issues concerning the role of domestic courts in the progressive development of international law and, in particular, the development of corporate liability for human rights violations. The immediate result of the *Nevsun* decision, whatever the eventual outcome of the case itself, is to raise the threshold of litigation risk for Canadian corporations, opening the door for further claims based on its ruling (Mining Association of Canada, 2019 especially paras 22-28; Debevoise and Plimpton 2020). The Canadian Supreme Court has, in effect, claimed a wide extraterritorial jurisdiction over the foreign conduct of Canadian multinational groups so as to further their compliance with a growing body of human rights-oriented responsibilities. These are based in large part on the United Nations Guiding Principles for Business and Human Rights (UNGPs) (United Nations 2011). However, it has gone further than the UNGPs, which contain only a voluntary responsibility to respect human rights based on a corporate human rights due diligence risk assessment (Muchlinski 2012; Muchlinski forthcoming: chapter 14). The Canadian principle is a legally binding duty subject to a remedy. As

such it goes beyond what is currently available under general international law. Until a binding international treaty outlining corporate legal duties and available remedies is adopted, this will not change (United Nations 2020). It places a question mark against the majority decision and favours the dissent's reading of international law. A further element favouring the dissent is that, in Canada, 'incorporation cases are very rare, seemingly because customs usually concern state-to-state relations and lack application to domestic legal issues' (van Ert 2018). Extending a contested norm of customary international law to a private claim is thus highly unusual in the Canadian legal system. But should this alone have stopped the majority, or cause the eventual trial judge to conclude that such a remedy does not exist?

Canada is committed to upholding international human rights (Government of Canada 2020). It is a signatory of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights, acceding to both instruments in 1976. Canada is also a member of the ILO and has ratified all eight core ILO Conventions including the Convention on Forced Labour (ILO 2020). According to Article 2 of the ICCPR:

- 1 Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- 2 Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
- 3 Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

According to the UN Human Rights Committee’s Interpretative Note 31 on the ICCPR, ‘the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party’ (UN Human Rights Committee 2004: para 10). The claimants in *Nevsun* clearly fall within this protected category, and indeed the majority accepted that Canada’s obligations under Article 2 of the ICCPR required the court to offer a remedy for the reasons given by the UN Human Rights Committee (*Nevsun* 2020: para 119).

Furthermore, it is at least arguable that the Supreme Court, through its decision, was discharging its international legal obligation, as the highest court of the land, to give effect to Canada’s human rights obligations. This decision also gives force to Canada’s approach to the accountability of Canadian corporations for their international human rights practices. Indeed, the lack of an effective international system of enforcing international law requires that states, including their judicial and other dispute settlement bodies, offer effective remedies. It is required by the UNGPs.⁸ In addition, it is legitimate for domestic courts to react to new developments in international law and ensure that domestic law reflects these (Ammann 2019: chapter 4). In such cases the constitutional argument, though correct in its own domestic legal terms, appears at odds with Article 2 of the ICCPR on the facts of this case.

That said, a key legal obstacle to this line of argument is that the Supreme Court of Canada is effectively applying its judicial system, with its contentious reading of customary international law, extraterritorially to facts arising in Eritrea, contrary to the norms of comity and the sovereign equality of states. The issues of comity and sovereign equality were already discussed in relation to the act of state doctrine above and remain open for the trial judge to consider. However, it is hard to see how the sovereign rights of Eritrea are adversely affected in this case, as neither the Eritrean government, nor any of the state-owned enterprises implicated in the alleged violations, is involved as a defendant in the case, nor is the ability of Canada to act freely in its international affairs compromised. Given its commitment to furthering human rights accountability for Canadian corporations on the plane of international

⁸ By principle 25 of the UNGPs (United Nations 2011): ‘As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.’

affairs there appears no issue of divergence on policy between the executive and the judiciary in this case. Also, given the heinous nature of the allegations in this case, it would sit ill for the Canadian government to argue that this is a matter for diplomacy rather than legal remedy. It is notable that the Canadian government has not intervened in the case to argue that this is not an issue for the courts.

As for the extraterritoriality argument, the right of the claimants to bring a claim before the Canadian courts was challenged on the grounds of *forum non conveniens* at first instance and Nevsun lost. Nevsun's appeal on this issue was also dismissed by the Court of Appeal (*Araya v Nevsun Resources Limited* 2017). The lower courts concluded that, despite the considerable inconvenience of hearing the evidence in Canada, Eritrea could not be the more appropriate forum, due to the 'real risk' of corruption and unfairness in its legal system. As this issue was not appealed, it would appear that Nevsun accepts that the Canadian courts have jurisdiction to hear the claims. However, the wider jurisdictional question remains whether it is appropriate for domestic courts to adjudicate upon the overseas activities of domestic multinational corporate groups.

In such cases, a distinction should be made between situations of direct extraterritorial jurisdiction, as where a statute or court order covers matters entirely outside the forum jurisdiction and affects parties with no connection to the forum, and domestic measures with extraterritorial implications that help influence the behaviour of domestic private actors abroad without the direct use of extraterritorial jurisdiction (see Zerk 2010: 5). The *Nevsun* case is an example of the latter approach.

As was seen above, the Canadian authorities have developed a policy that is designed to affect how Canadian parent companies manage their global operational networks so as to encourage human rights-compliant behaviour across the corporate group. This is a domestic regulatory policy which impacts primarily on Canadian-based parent companies and so is not an exercise of direct extraterritorial regulatory jurisdiction. The Canadian Supreme Court's ruling is also not an example of direct extraterritorial jurisdiction, but a domestic case, based on foreign facts involving a Canadian defendant, which is entirely within the Canadian court's jurisdiction to hear and decide. Nevsun, as a corporation incorporated in British Columbia, is present within the territory of Canada and so is amenable to suit. Should the trial judge find as a matter of fact that Nevsun was indeed in operational control of its Eritrean subsidiary and, as a result, complicit in the alleged violations of human rights

through knowledge and inaction to stop them, then it is highly likely that the decisions affecting BMSC would have been made in British Columbia and the relevant evidence would be located in Nevsun's offices, as well as in the records of BMSC. Equally, Eritrea's sovereignty will not be affected by any Canadian court decision on compensation for the claimants which would be enforced against Nevsun within Canada. Accordingly, the decision is in line with the jurisdictional boundaries of Canadian policy on business compliance with human rights and offers no significant challenge to established norms of jurisdiction.

[F] CONCLUDING REMARKS

To conclude, while there remain strong legal arguments against the development of the international customary law-based remedies for Canadian corporate violations of human rights abroad, the Canadian Supreme Court's activism can be defended. Domestic courts have a significant role to play in the progressive development of international law and to ensure that domestic law develops in line with this. That said, the trial judge may be more cautious, and it may well be that the Supreme Court has effectively 'passed the buck' by leaving open many key questions for that stage of the proceedings. However, the majority decision remains as a precedent for new claims until such time as a subsequent Canadian Supreme Court overrules the case or the Canadian legislature does, though this appears highly unlikely at the time of writing.

As for the case itself, human rights and tort claims against multinational corporate groups often settle out of court, and this case may be no different (see Meeran 2011). That said, regardless of the final outcome, the Supreme Court will have paved the way towards making Canadian corporations warier of creating human rights litigation risk in the context of their overseas operations, especially in countries without a strong legal or administrative system for the protection of human rights. The decision may also incentivize corporate lobbying of the executive and legislature to have the case overruled by statute, though this would set Canada back significantly in its quest for Canadian corporate human rights accountability and would no doubt be strongly criticized by human rights organizations in Canada and more widely. Canada has already been criticized internationally for its lack of oversight over Canadian mining corporations' overseas operations (see Canadian Network on Corporate Accountability 2017), which led to the establishment of the CORE, and any move to overrule the *Nevsun* decision would do further damage to its reputation. So, for now, the decision of the Canadian Supreme Court

remains as a significant, though also legally controversial, precedent in the legal development of binding corporate human rights obligations and as an example of judicial activism that brings the prospect of access to justice not only to the claimants in this case but also to others who may follow.

References

- Ammann, Odile (2019) *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example* Leiden & Boston MA: Brill Publishing.
- Business and Human Rights Resource Centre (2020) ‘[Corporate Legal Accountability](#)’.
- Canadian Network on Corporate Accountability (2017) ‘[International Human Rights Authorities Call for Extractive Sector Ombudsperson](#)’.
- Canadian Network on Corporate Accountability (2019) ‘[Government of Canada Turns Back on Communities Harmed by Canadian Mining Overseas, Loses Trust of Civil Society](#)’ Press release, 11 July.
- Chambers, Rachel & Katherine Tyler (2014) ‘The UK Context for Business and Human Rights’ in Lara Blecher, Nancy Kaymar Stafford & Gretchen C Bellamy (eds) *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* Chicago: American Bar Association.
- Crawford, James (2019) *Brownlie’s Principles of Public International Law* 9th edition Oxford: Oxford University Press.
- Debevoise and Plimpton (2020) ‘[Canadian Supreme Court Opens Door to Corporate Liability for Human Rights Abuses Abroad](#)’ Debevoise in Depth 19 March.
- Enneking, Liesbeth F H (2012) *Foreign Direct Liability and Beyond—Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* The Hague: Eleven International Publishing.
- Global Affairs Canada (2019) ‘[Minister Carr Announces Appointment of First Canadian Ombudsperson for Responsible Enterprise \(CORE\)](#)’ News Release 8 April, Ottawa, Ontario.
- Government of Canada (2020) ‘[Canada’s Approach to Advancing Human Rights](#)’.
- House of Commons Library (2011) *The Separation of Powers Commons Research Briefing* SN06053 16 August.
- International Labour Organization (2020) ‘[Ratifications for Canada](#)’.

- Joseph, Sarah (2004) *Corporations and Transnational Human Rights Litigation* Oxford: Hart Publishing.
- Kamminga, Menno and Sam Zia-Zarifi (eds) (2000) *Liability of Multinational Corporations under International Law* The Hague: Kluwer Law International.
- Laplante, Lisa J (2017) 'Human Torts' 39 *Cardozo Law Review* 245-312.
- Mance, Lord (2017) '[International Law in the UK Supreme Court](#)' London: King's College London 13 February.
- Meeran, Richard (2011) 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' 3(1) *City University of Hong Kong Law Review* 1-41.
- Meeran, Richard (2013) 'Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations' in Surya Deva, and David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* Cambridge: Cambridge University Press.
- Mining Association of Canada (2019) [Factum of the Intervener Nevsun Resources Limited v Araya](#) SCC File Number: 37919, 7 January.
- Montesquieu, Charles de Secondat, baron de (c1748) *The Spirit of Laws* (see also: *Montesquieu: The Spirit of the Laws* Anne M Cohler, Basia Carolyn Miller & Harold Samuel Stone (eds) *Cambridge Texts in the History of Political Thought* Cambridge: Cambridge University Press).
- Muchlinski, Peter T (2012) '[Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation](#)' 22(1) *Business Ethics Quarterly* 145-177.
- Muchlinski, Peter T (forthcoming) *Multinational Enterprises and the Law* 3rd edition Oxford: Oxford University Press.
- Muchlinski, Peter T & Virginie Rouas (2014) 'Foreign Direct Liability Litigation' in Lara Blecher, Nancy Kaymar Stafford & Gretchen C Bellamy (eds) *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* Chicago: American Bar Association.
- Newbury, Mary V (2019) 'Foreign Act of State—A Practical Guide from Buttes Gas to Belhaj' 1(1) *Amicus Curiae* (Series 2) 6-46.
- Richard, J D (2009) 'Separation of Powers: The Canadian Experience' 47(4) *Duquesne Law Review* 731-760.
- Roach, K (2018) 'The Separation and Interconnection of Powers in Canada: The Role of Courts, the Executive and the Legislature in Crafting Constitutional Remedies' 5(2) *Journal of International and Comparative Law* 315-336.

- Srinivasan, Shubhaa (2014) 'Current Trends and Future Effects in Transnational Litigation against Corporations in the United Kingdom' in Lara Blecher, Nancy Kaymar Stafford & Gretchen C Bellamy (eds) *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* Chicago IL: American Bar Association.
- Stoyanova, Vladislava (2019) 'Common Law Tort of Negligence as a Tool for Deconstructing Positive Obligations under the European Convention on Human Rights' 23 *International Journal of Human Rights*.
- United Nations (2011) *Guiding Principles on Business and Human Rights*.
- United Nations (2020) 'Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights'.
- United Nations Human Rights Committee (2004) General Comment No 31 [80] 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' adopted on 29 March (2187th meeting).
- van Ert, Gib (2018) 'The Reception of International Law in Canada: Three Ways We Might Go Wrong' *Canada in International Law at 150 and Beyond*, Paper No 2, January Waterloo: Centre for International Governance Innovation.
- van Ert, Gib (2019) 'The Domestic Application of International Law in Canada' in Curtis A Bradley (ed) *The Oxford Handbook of Comparative Foreign Relations Law* Oxford: Oxford University Press.
- van Santen, B (2018) 'Turbulent Origin and an Uncertain Legacy: The Separation of Powers in the United States and Canada' 3(1) *Cambridge Law Review* 256-287.
- Wood, Sir Michael (2017) 'Teachings of the Most Highly Qualified Publicists (Art 38 (1) ICJ Statute)' *Max Planck Encyclopaedia of Public International Law* (MPEPIL).
- Zerk, Jennifer (2010) 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' *Corporate Social Responsibility Initiative Working Paper No 59* Cambridge MA: John F Kennedy School of Government, Harvard University.

Legislation Cited

Canada Constitution Acts 1867 to 1982

Canada Order in Council (2019) PC 2019-299 of 8 April

United States Alien Tort Claims Act 28 US Code § 1350

Cases Cited

Araya v Nevsun Resources Limited 2016 BCSC 1856

Araya v Nevsun Resources Limited 2017 BCCA 401

Belhaj v Straw [2017] UKSC 3

Doe v Nestle, SA, 906 F (3d) 1120 (9th Cir 2018)

Doucet-Boudreau v Nova Scotia 2003 SCC 62

Jesner v Arab Bank 584 US ____ 12 (2018) Slip Opinion; 57 ILM 631 (2018)

Kiobel v Royal Dutch Petroleum 569 US ____ (2013) Slip Opinion; 52 ILM 969 (2013)

Kuwait Airways Corporation v Iraqi Airways Co [2002] AC 883 (HL)

Nevsun Resources v Araya 2020 SCC 5

Operation Dismantle v The Queen [1985] 1 SCR 441

Oppenheimer v Cattermole [1976] AC 249 (HL)

Vedanta Resources plc & Another v Lungowe & Ors [2019] UKSC 20

***R (Hans Husson) v Secretary of State
for the Home Department [2020]***
EWCA Civ 329

RUSSELL WILCOX

1 Chancery Lane

Abstract

R (Hans Husson) v Secretary of State for the Home Department (2020) considered the arguability of a claim in damages for the respondent's 30-month delay in issuing the appellant with a biometric residence permit (BRP). A BRP is required in order for a grantee of leave to remain (LTR) to secure employment. It should have been issued immediately or very soon after the appellant was granted LTR but was not. On those facts, the Court of Appeal found, first, that it was arguable the appellant had been entirely or very substantially deprived of the ability to undertake work, that this was the correct test to apply when considering potential breaches of Article 8 of the European Convention on Human Rights in such circumstances, and that it was also arguable that such a breach would require an award of damages to provide 'just satisfaction'. Secondly, the court found arguable for the purposes of establishing a claim in negligence that the respondent had assumed responsibility to make a timeous decision under the terms of a previous consent order.

Key Words: damages, immigration negligence claims, Article 8 loss of earnings claims, assumption of responsibility

In the case of *R (Hans Husson) v Secretary of State for the Home Department* (2020) the Court of Appeal was tasked with deciding two questions of some significance. The first of those questions related to whether or not it was arguable, on the facts of the case before the court, that the appellant, Mr Husson, was entitled to damages under section 8 of the Human Rights Act 1998 with reference to Article 8 of the European Convention on Human Rights (ECHR) on the basis of violation of his family and private life. The second question, the more finely balanced one, was whether those same facts gave rise to a claim against the Secretary

of State in the tort of negligence on the basis of a claimed underlying assumption of responsibility.

It is important to note that the court was dealing with these questions against the standard of arguability only and was not determining the question of liability to damages in substance since this was an appeal against a refusal by the Upper Tribunal (Immigration and Asylum Chamber) to grant Mr Husson permission to bring a substantive application for judicial review. Nevertheless, in the course of so doing, the court was still required to wrestle with the case law as it related to each question and to reach conclusions which are likely to be widely cited in subsequent litigation.

The occasion for Mr Husson's appeal arose out of the circumstances surrounding his grant, in May 2016, of 30 months' limited leave to remain (LTR) in the United Kingdom, which carried with it a right to work. In line with this grant, Mr Husson should have been granted a biometric residence permit (BRP) within a matter of weeks confirming his entitlement to work, but the permit was not issued and sent to him until more than two years later, on 19 June 2018. Mr Husson sought to challenge that delay by an application for judicial review, in part on the basis that such a delay was unlawful and gave rise to a claim for damages against the Secretary of State.

At first instance, Mr Husson was refused permission to bring his application on the papers and then subsequently, upon renewal, at an oral hearing before Upper Tribunal Judge King (UTJ King) in June 2019. In the circumstances of Mr Husson's case, UTJ King felt that the tribunal simply had no jurisdiction to consider a claim for a breach of duty of care or statutory duty. Whilst the judge accepted that there may be a cause for damages for breach of human rights, relying on what was said in the case of *R (Atapattu) v Secretary of State for the Home Department* (2011), he found that to mount such a claim it was necessary to establish a deprivation of the right to work altogether, which Mr Husson could not do in light of the respondent's assurance the Mr Husson would have had the right to work clearly endorsed in his passport upon its return following his grant of LTR. UTJ King also commented on the paucity of the additional evidence furnished by Mr Husson to establish loss flowing from his alleged inability to work, which did not even include a witness statement detailing the same.

An important feature of this case as the arguments developed was the historic background to Mr Husson's eventual grant of LTR in May 2016. Mr Husson, a national of Mauritius, first came to the United Kingdom as

a visitor in July 2004. He then obtained LTR as a student nurse, which was extended until November 2007 after which he applied for and was refused LTR under Articles 3 and 8 of the ECHR. In February 2010 he married a British citizen and they had a child together. Thereafter, Mr Husson sought to reopen the refusal of LTR by way of a request for reconsideration, the making of further representations and, finally, by issuing judicial review proceedings (on 2 September 2013). Permission to apply for judicial review was refused, and in due course those proceedings found their way to the Court of Appeal in late 2015. Eventually the parties agreed to settle proceedings by way of agreement, the terms of which were set out in the recitals to a consent order made by Tomlinson LJ dated 26 November 2016. In so doing, the respondent agreed to reconsider Mr Husson's application together with any further representations he wished to rely upon within three months of their receipt.

By a letter dated the 20 May 2016, within the agreed three-month period, the respondent reconsidered Mr Husson's position and granted him a period of 30 months LTR valid until 20 November 2018. The letter added that a BRP would be sent separately within seven working days, but that if it had not arrived within 10 days Mr Husson should follow up with the respondent. On 26 May 2016, Mr Husson's passport was returned to him, but despite his numerous attempts to chase the respondent, he was not sent the promised BRP until 19 June 2018. No explanation was given for the delay.

Contrary to what had been submitted before UTJ King, by the time the matter came before the Court of Appeal, the respondent accepted that Mr Husson's passport would not, in fact, have been endorsed with the grant of LTR and that, consequently, his passport would not have been a document which would have been acceptable to an employer demonstrating his right to work. This was a significant factual concession, which served considerably to weaken the respondent's case in relation to Mr Husson's damages claim for breach of human rights. As mentioned above, reliance in the Upper Tribunal had been placed on the case of *R (Atapattu) v Secretary of State for the Home Department* (2011). *Atapattu* concerned the prolonged retention of a merchant seaman's passport after its submission as part of an entry clearance application. The parties did not dispute that the relevant paragraphs of *Atapattu*, as set out by the Court of Appeal in its judgment, were an accurate summary of the law:

149. Under the ECHR, there is no express right to work and there is no right to choose a particular profession (*Thlimmenos* cited at §46 *Sidabras*). In my judgment, *Sidabras* was a case, where on the facts, the applicants were wholly or very substantially deprived of the ability

to work altogether. Furthermore it involved other effects on private life, going well beyond the ability to pursue one own particular chosen career, including public embarrassment as being former KGB officers. (I note in passing that *R (Countryside Alliance v Attorney General* [2008] 1 AC 719 Lord Bingham described Sidabras as a ‘very extreme case on the facts’ and that the applicants were ‘effectively deprived of the ability to work’ altogether). The position in *Smirnova* was even more extreme. The effect of retention of the passport not only precluded all work, but affected almost every reach of daily life in Russia.

150. In the present case, whilst Mr Atapattu’s ability to pursue his chosen occupation of merchant navy seaman was hampered, there is no evidence that, for the time in which he was deprived of his passport, he was unable to work at all. ... Nor is there any evidence that the withholding of his passport had any other particular effects on the ability of Mr Atapattu to enjoy his private life, on his relations with other human beings or on his personal development. Article 8 does not give a right to choose one’s particular occupation or to pursue it once chosen. The retention of the passport did not interfere with Mr Atapattu’s right to respect for his private life.

Despite its concession, however, the respondent continued to argue on appeal that permission was rightly refused here in light of the high threshold established by the cases referred to in *Atapattu* and on the basis that the respondent’s failure to issue Mr Husson with a BRP had not deprived him of the right to work in the relevant sense as he could still have left the United Kingdom and obtained employment in Mauritius. It also pointed to the limited evidence provided by Mr Husson to establish any loss flowing from being unable to work or detailing how it otherwise had interfered with his or his family’s Article 8 rights.

In rejecting these arguments, Simler LJ, giving judgment for the court, focused in upon the question of whether or not the consequences to Mr Husson of the respondent’s delay in issuing him with a BRP fell within the scope of his private and/or family life under Article 8(1) of the ECHR and met the threshold of interference with it.

Whilst it was recognized that there is no direct authority establishing that a right to work is of itself protected by Article 8 of the ECHR, it was accepted that the authorities cited in *Atapattu* ‘demonstrate that where an individual is wholly or substantially deprived of the ability to work altogether, Article 8(1) is at least arguably engaged’ (paragraph 36). Further, the case of *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124 (paragraph 59) was authority for the proposition that, in determining whether or not to award damages under section 8 of the Human Rights Act 1998 to afford just satisfaction, ‘where the established

breach has clearly caused significant pecuniary loss, this will usually be assessed and awarded' (*Anufrijeva v Southwark LBC* 2004: 37).

In relation to the circumstances in which Mr Husson found himself, Simler LJ stated:

38. It is now conceded as a matter of fact, that without a BRP or a stamp in his passport evidencing the right to work, the appellant was unable to take up any lawful employment in the UK because he would not be able to satisfy a UK employer of his entitlement to work lawfully. In those circumstances, the only basis on which it is now argued that there was not a total deprivation is by reference to the possibility of the appellant returning to Mauritius to work there.

39. It seems to me that as a matter of real world practicality, the appellant was prevented altogether from securing employment during the period of delay. It is unrealistic to expect him to have returned to Mauritius in a period when he expected to receive a BRP at any moment, had the right to remain here by reason of his family life here, and had the right to work here. Moreover, leaving the UK would have involved leaving behind his British wife and child.

With respect to the contention that the evidence of loss provided by Mr Husson was insufficient, she went on to observe:

40. It is true ... that the evidence of loss of employment and the chance of earnings is very limited, and the appellant did not even produce a witness statement setting out the efforts he made to obtain employment and/or a schedule of his estimated earnings losses. However, be that as it may, in circumstances where the respondent's own policy documents make good this aspect of the appellant's case in the sense that no employer could lawfully have employed him in the UK, it is an inevitable inference that he was deprived of all employment opportunities that were available. Moreover, the Prema Construction rejection letter (purely because he had no BRP) establishes an arguable basis (at the very least) that he suffered some pecuniary loss. There is also evidence of the arguably harsh impact this had on the appellant's ability to enjoy his private and family life given the debt into which he had fallen, with the inference that he was unable to support his wife and young child. As for the fact that his debts accrued before the grant of his LTR ... that there was, again, at least arguably, an ongoing and accumulating debt, which coupled with the inability to earn a living to reduce and/or discharge it, or to avoid county court judgments being entered against him, made the impact all the more harsh.

The court found a much harder question to answer: whether or not the facts of Mr Husson's case gave rise to a claim for damages in negligence against the respondent? The central issue was, of course, whether those facts supported an actionable duty of care towards Mr Husson on the part

of the respondent. It was rightly recognized at the outset that imposing a duty of care,

in respect of the exercise of statutory powers or the performance of statutory duties by a public authority is notoriously difficult ... [and that there was no suggestion that] the statutory scheme giving immigration powers to and imposing duties on the respondent [creates] a statutory cause of action that sounds in damages (paragraphs 42 and 43).

Central to Mr Husson's argument was rather that a common law duty of care had arisen in his favour on the basis of the respondent having voluntarily assumed responsibility, as recorded in the recitals to the consent order of 26 November 2015, to reconsider and give him an *effective* decision on his application for LTR within three months of having received his updated written representations:

An effective decision in this context meant if the decision was positive, it would be followed promptly by the issue of a BRP. However, by granting LTR, but failing to issue a BRP, the decision taken by the respondent was not an effective decision and, as well as being unlawful, represented a failure by the respondent to discharge the responsibility voluntarily assumed to the appellant (paragraph 54).

In a brief and selective consideration of the jurisprudence touching upon these questions, Simler LJ recognized that, particularly subsequent to Lord Hoffman's comments in the case of *Gorringe v Calderdale Metropolitan Borough Council* (2004: paragraph 2), the issue of '[w]hether or not a public authority voluntarily assumed responsibility has been regarded as critical as to whether a duty of care was owed' (paragraph 46) She quoted paragraph 73 of Lord Reed's judgment in the recent case of *Poole Borough Council v GN & Another* (2019) providing an up-to-date summary of the position, and making it clear that operation of a statutory scheme does not preclude the assumption of responsibility sufficient to give rise to a duty of care:

73. There are indeed several leading authorities in which an assumption of responsibility arose out of conduct undertaken in the performance of an obligation, or the operation of a statutory scheme. An example mentioned by Lord Hoffmann is *Phelps v Hillingdon*, where the teachers' and educational psychologists' assumption of responsibility arose as a consequence of their conduct in the performance of the contractual duties which they owed to their employers. Another example is *Barrett v Enfield*, where the assumption of responsibility arose out of the local authority's performance of its functions under child care legislation. The point is also illustrated by the assumption of responsibility arising from the provision of medical or educational services, or the custody of prisoners, under statutory schemes. Clearly the operation of a

statutory scheme does not automatically generate an assumption of responsibility, but it may have that effect if the defendant's conduct pursuant to the scheme meets the criteria set out in such cases as *Hedley Byrne and Spring v Guardian Assurance plc*.

It was recognized that whilst, in the immigration context, the cases of *W v Home Office* (1997), *Home Office v Mohammed* (2011) and *Atapattu* had each rejected the contention that a common law cause of action in negligence against the Secretary of State arose, none of those cases specifically dealt with claims that the Secretary of State had voluntarily assumed responsibility in the manner suggested by Mr Husson. Indeed, in the case of *Atapattu* 'the absence of an assumption of responsibility was an important factor in the refusal to find a duty of care had arisen' (paragraph 53). In contrast, in Mr Husson's case, the respondent, whilst exercising powers under a statutory scheme, went on voluntarily to assume responsibility for making a decision under that scheme within a specified period. The respondent need not have undertaken to do so, but once it did, Mr Husson's argument was that it became fair, just and reasonable to hold a duty of care existed between the parties, and that the respondent should be held liable 'for the material consequences of the failure to discharge that duty' (paragraph 55).

In disposing of this ground, Simler LJ was candid as to the difficulties she had encountered in resolving the arguments before her; though she admitted to having 'grave doubts as to the prospects of the appellant establishing that a duty of care was owed by the respondent in the circumstances of this case' (paragraph 58), however, she concluded that the ground did ultimately reach the threshold of arguability. In so doing, she adopted the three-stage approach set out in *Caparo Industries plc v Dickman* (1990) as qualified by later cases in the context of negligence claims against public bodies. With respect to the first two stages of foreseeability of harm and proximity, she recognized the force both in Mr Husson's contention that his inability to work during the prolonged period of delay in issuing him with a BRP was foreseeable, and 'that having been granted LTR he was a member of a specific group identified as entitled to the prompt issue of a BRP to enable him to do so' (paragraph 59). She was, in consequence, able to see the potential justification on these bases for imposing liability on the respondent.

Her hesitation came when considering questions at the third stage of *Caparo*: namely, whether there was, in fact, a voluntary assumption of the responsibility by the respondent; and whether, in light of that, it would be fair, just and reasonable to impose a duty of care upon it? In relation to the first of these questions, she had the following to say:

Leaving aside the question whether the terms of the order were in fact breached ... the conduct said to have generated the duty here was the agreement recorded in the recitals to the consent order, to make an effective decision within three months. I am doubtful that a common law duty of care can be derived from such an agreement given to support a consent order of the court. Moreover, it seems to me that the decision to reconsider the appellant's further submissions in his changed family situation, is one the respondent may have been bound to take under paragraph 353 of the Immigration Rules (fresh representations) as part of the respondent's statutory function and public law obligations. On the other hand, as Lord Reed observed in *Poole*, there are several leading authorities in which an assumption of responsibility arose out of conduct undertaken in the performance of an obligation, or the operation of a statutory scheme (paragraph 61).

With respect to the second and wider question, her doubts centred upon considerations of policy or the practical consequences of imposing a duty of care in the circumstances. To her mind, these may well be sufficiently adverse such as to be 'inconsistent with the proper performance of the respondent's statutory functions' (paragraph 62). Indeed:

[i]t might discourage the respondent from agreeing to reconsider fresh representations rather than contesting judicial review claims. It may also be (though I have doubts about the viability of any real remedy) that there is an alternative avenue for achieving redress by means of the relevant Ombudsman scheme as the respondent contends, though I recognise the force of the arguments advanced ... that such schemes do not provide adequate alternative redress.

Nevertheless, her ultimate reason for allowing the appeal also on this ground was not only the complexity of the questions arising 'in what is an evolving area of law', but also that the question of 'whether responsibility was in fact assumed here ... may depend on a greater exploration of the particular facts', such that it would be better to leave the 'individual facts of the case to be determined so that the evolution of the law can be based on actual factual findings' (paragraph 63).

Whilst the jurisprudential issues raised by the Court of Appeal's attempt in *Husson* to grapple with the existence and/or extent of negligence liability in relation to immigration matters are arguably the more complex and interesting, and whilst the later stages of Mr Husson's litigation promise to throw up further answers to the questions they raise, it is likely that the court's more significant findings relate to Mr Husson's damages claim for breach of his human rights, and, in particular for breach of his Article 8 rights.

Husson roundly approves the test contemplated in *Atapattu* by Mr Stephen Morris QC that where a claimant can show that he has very

substantially been deprived of the ability to work, and consequential loss can be established on the facts, he will be entitled to pecuniary compensation as ‘*just satisfaction*’ under section 8 of the Human Rights Act 1998. Compensation for loss of earnings could inevitably be quite significant in individual cases, and, in terms of quantum, could come to rival the sums awarded in unlawful detention actions. Moreover, given the ‘hostile environment’ which has been part of government immigration policy for some time now, there are many instances in which LTR (together with its associated right to work) has been refused and/or cancelled only to be reinstated on appeal at some later stage. To what extent the consequences of a wrongful decision by the Secretary of State may now give rise to a claim for compensatory damages in light of *Husson* is likely to become a question of some significance. Finally, over the past three to four years, there has been a spate of cases in which the Secretary of State has cancelled LTR on the basis of allegations of fraud. The most notorious of these cancellations, numbering in the tens of thousands, relate to allegations of the fraudulent procurement of English language test certificates for the purposes of satisfying certain immigration application qualifications (*SM and Qadir (ETS – Evidence – Burden of Proof)* (2016); and *Majumder v SSHD* (2016)), but parallel allegations have also been made in relation to discrepancies between income declarations to HMRC and the Home Office in the context of paragraph 322(5) of the Immigration Rules (*R (Shahbaz Khan) v Secretary of State for the Home Department* (2018)). The evidential bases of such allegations have come under sustained attack and the case law relating to them continues to evolve apace (*MA (ETS – TOEIC testing) Nigeria* (2016) and *Balajigari & Ors v SSHD* (2019)).¹ Given the gravity with which the courts have always treated allegations of fraud improperly, or incorrectly, made, it is quite possible that the loss of earnings that have resulted in these cases could draw particular inspiration from the *Husson* judgment.

The author would like to point out that he was Counsel for Mr Husson and has written this Note in his personal capacity.

Legislation Cited

European Convention on Human Rights

Human Rights Act 1998

Immigration Rules

¹ See also *R (Ahsan) v SSHD* (2018); and *R (Khan) v SSHD* (2018)

Cases Cited

Anufrijeva v Southwark LBC [2003] EWCA Civ 1406

Anufrijeva v Southwark LBC [2004] QB 1124

Balajigari & Ors v SSHD [2019] EWCA Civ 673

Barrett v Enfield London Borough Council [2001] 2 AC 550

Caparo Industries plc v Dickman [1990] 2 AC 605

Hedley Byrne & Spring v Guardian Assurance plc [1994] UKHL 7, [1995] 2 AC 296

Home Office v Mohammed [2011] EWCA Civ 351

Gorringe v Calderdale Metropolitan Borough Council [2004] UKHL 15; [2004] 1 WLR 1057

MA (ETS – TOEIC testing) Nigeria [2016] UKUT 450 (IAC)

Majumder v SSHD [2016] EWCA Civ 1167

Phelps v Hillingdon LBC [2001] 2 AC 619

Poole Borough Council v GN & Another [2019] UKSC 25

R (Ahsan) v SSHD [2018] HRLR 5

R (Atapattu) v Secretary of State for the Home Department [2011] EWHC 1388 (Admin)

R (Countryside Alliance) v Attorney General [2008] 1 AC 719

R (Hans Husson) v Secretary of State for the Home Department [2020] EWCA Civ 329

R (Khan) v SSHD [2018] EWCA Civ 1684

R (Shahbaz Khan) v Secretary of State for the Home Department [2018] UKUT 00384 (IAC)

Sidabras & Another v Lithuania (App nos 55480/00 and 59330/00) [2004] ECHR 55480/00

SM and Qadir (ETS – Evidence – Burden of Proof) [2016] UKUT 229 (IAC)

Smirnova v Russia (App Nos 46133/99 and 48183/99) [2003] ECHR 46133/99

W v Home Office [1997] Imm AR 302 (CA)

PATRICK J BIRKINSHAW—
EUROPEAN PUBLIC LAW: THE ACHIEVEMENT AND
THE BREXIT CHALLENGE

YSEULT MARIQUE¹

Essex University, FÖV Speyer and ULB

2020 is yet another year with a major challenge for our collective well-being and for the basic components of the human commons. International, national and local public bodies and collective actors—that is, charities, international corporations and small and medium-sized enterprises—have to pull together to find the means to overcome logistical hurdles in manufacturing personal protective equipment, dispatching masks, operating ventilators and achieving successful vaccines and drugs. The human, social and economic costs of failing to properly address the COVID-19 crisis would be immeasurable. Optimists discuss how to build a more resilient and sustainable society. Pessimists flag cybersecurity threats and risks to our privacy if tracing and zooming develop in an unwieldy manner. Scholars may turn to European shared values of ‘justice, solidarity and equality’ (Article 2 of the Treaty on European Union) to start developing answers to the post-COVID-19 situation. Other scholars may soon undertake a post mortem of the pre-COVID-19 collective frenzy, where alarm bells and indications that a major pandemic might be looming were set aside as other concerns, such as financial troubles, protectionism and nationalism, took centre stage in 2019. In an intensively interconnected physical, economic, social and political world, European public law seems to have failed to deliver on ‘justice, solidarity and equality’. In *European Public Law—The Achievement and the Brexit Challenge* Patrick Birkinshaw (Emeritus Professor at the University of Hull and former editor of *European Public Law*) provides us with an excellent forensic analysis of the dynamic interactions between the European Union (EU) systems and national

¹ I am grateful for discussions with Sophie Boyron (Birmingham) and with colleagues from [Network the Future of Administrative Law \(Brussels\)](#) on the underlying issues of this book review, especially Jean-Bernard Auby (Sciences Po Paris) and Emmanuel Slautsky (ULB).

systems that have shaped institutional, procedural and substantive limits on public power in the UK and Europe.

Benefitting from the extensive references to case law and literature gathered over the course of the first two editions (2003 and 2014), this edition recounts the Europeanization of UK public law from the early days when the UK became a member of the (then) European Economic Community until Brexit. This journey through time takes the reader across 14 chapters divided into three parts.

The first part sets the overall legal landscape of European public law: its context (chapter 1); a comparative tour of law and government at EU level, in the UK and in France and Germany (chapter 2); the contribution of the EU, French and German systems to European public law (chapter 3); and the main features of UK constitutional law and European integration (chapter 4). The second part discusses substantive issues including: subsidiarity (chapter 5); transparency (chapter 6); national participation in EU affairs (chapter 7); judicial review (chapter 8); citizenship and the protection of human rights (chapter 9); public liability (chapter 10); complaints and grievance procedures (chapter 11); and competition, regulation, public service and the market (chapter 12). The final part deals with future considerations (chapter 13) and a discussion of the legacy of European public law in the UK (chapter 14).

As this overview of the chapter headings shows, *European Public law—The Achievement and the Brexit Challenge* leads the reader through the most remarkable changes in the building of EU public law and their impacts on UK public law. It charts this as a ‘multi-dimensional process’, including convergence and cross-fertilization between public law systems in two different directions. The first direction relates to the top-down and bottom-up interactions between the EU level and national systems, and the second to the direct and indirect influences between member states (sections 1.03 and 1.04). For instance, chapter 3 extensively covers the contribution of French and German public law to European public law, asking whether EU law is a system of administrative law. It is difficult to clearly identify all the reciprocal influences on each other’s legal systems: there is ‘no rational conceptualisation’ at the end of the day. There is neither a transplant strategy nor convergence by design: ‘It is simply that different systems have to work in ever-increasing proximity and borrowing or influencing are standard and universal characteristics.’ (page 25) However, ‘As the world moves ever closer together temporally and in terms of communication and as ancient barriers and not so ancient evaporate or are dismantled, and new ones emerge, we must increasingly seek

enlightenment from each other to see how political power may be tempered with legal discipline.’ (page 30) This way may help to advance how ‘the content of the law reflects values which protect us all’ (page 26).

In this endeavour one silver lining of this book is to offer the opportunity to chart where there have been changes since the previous edition (published in 2014). As the addition of ‘Brexit’ in the title indicates, many chapters have been augmented with a section pertaining to the impact of Brexit on UK public law. These discussions of Brexit have been included throughout the book in relation to national constitutional law and the *Miller* cases (page 234), devolution (page 297), and procurement (page 733), culminating in a full chapter on the legacy of European integration covering the last 60 pages of the book. Other changes include more detailed discussions of the UK devolution (sections 5.06-5.09), Article 290 of the Treaty on the Functioning of the European Union and comitology (section 6.05), access to justice and judicial protection (section 8.11) and the German case law on the European Financial Stability Facility (section 2.12). It is equally interesting to note that some key topics did not need to undergo any structural change: public liability had seen sea changes before 2014, but its main features seem to have been settled for now (chapter 10). Equally telling, but probably more disturbing, is that the proposal for reforming transparency and access to documents at EU level has not made any significant progress over the last six years!

The discussions in the reviewed book lead to three more general questions about legal changes in European public law, their underlying processes and the overall direction of travel.

First, the UK public law system is in itself at a crossroads between two legal communities: it has one foot in Europe and the other one in common law. This distinctiveness in UK public law has been thoroughly discussed by Paul Craig in UK, *EU and Global Administrative Law—Foundations and Challenges* (Cambridge: Cambridge University Press 2015), for instance. This is not a mere doctrinal or theoretical statement. In *European Public Law—The Achievement and the Brexit Challenge* concrete consequences of this distinctiveness are elaborated upon. In particular, the development of judicial review to include proportionality as a ‘common law standard of review’ (i.e. outside the scope of application of European law) is extremely contentious. According to Birkinshaw, even if it is difficult to calibrate the intensity of judicial review depending on the specific context, proportionality has fostered the development of a greater culture of justification, where the reasoning of public bodies is searched more deeply than under the traditional ‘Wednesbury’ (or reasonableness) test (page

438). Equally fascinating is how equality has been incrementally embedded in UK public law, even if the UK relies partly on specific duties and procedural schemes, such as the public sector equality duty (Equality Act 2010, section 149), leading to its own specific case law (section 8.05). This illustrates the complexity of charting ‘Europeanization as one single uniform process, while the detailed analysis of the borrowing and exchanges between legal systems illustrates the creativity and malleability of legal techniques in adapting to their specific contexts.

Secondly, this book makes questions arise about the fitness of public (administrative and constitutional) law in times of crisis. The EU has been plagued by various political, economic and financial crises over time. One of these crises, the 2008 financial crash, led to the case law on *Pringle*, discussing sovereign bonds (section 13.02) and more generally questioning solidarity in Europe. Despite this discussion, however, solidarity remains a weakness in Europe, as European public law has not succeeded in developing a coherent and robust legal framework to accommodate this objective (see recital 6 of the Treaty on European Union: ‘Desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions’) in a meaningful and justiciable way. Sadly, this failure has been illustrated acutely with the first EU reaction when COVID-19 struck Italy. Now, Europe has officially acknowledged its initial harshness. Yet, at the time of most pressing need, help came first from China, Russia and Cuba in very material terms of doctors, ventilators and masks. Only in a second step did help come from within European partners. Although it may be easy to pick up on only a few media announcements, which may be more of a public relations enterprise than a more enduring and far-reaching commitment to solidarity, one cannot miss the initial aloofness of the EU and the absence of a legal pathway in European public law to trigger a solidary reaction across the EU member states and the EU. When thinking about possible advancement in European public law, this collective dimension may have to receive due attention.

Finally, the UK is now leaving Europe, which leads to many political and legal questions for the future of UK public law as well as the future of Europe. Achievements such as the protection of human rights, including those of minorities, and judicial limitations on arbitrary powers are being challenged. In recounting the evolution from the House of Lords to the UK Supreme Court, Birkinshaw seems to accept that the UK Supreme Court has become a fully-fledged constitutional court in order to address issues arising between the devolved UK entities and the UK as a whole (section 5.14). Yet, its very powers to protect citizens are forever

weak as long as no formal constitution entrenches them. The discussions about repealing the UK Human Rights Act 1998 also lead back to political uncertainty over the roles that judges need to fulfil in a democratic society (section 14.25) and the appropriate limits to these roles. Similar questions are more present than ever at EU level, with the proceedings against Poland, for instance (e.g. CJEU, Case C-791/19 R, *Commission v Poland*). On this score, if there is no Europeanization of solutions it seems that some fundamental issues pertaining to the maintenance of democratic societies and individual freedoms are more than shared across European states.

As Birkinshaw writes: ‘The need for legal cooperation to address global corporations and their efforts to avoid appropriate responsibility, privacy invasion and exploitation, the problem of global crime and terrorism and exploitation of migrants will remain in any post-global arena.’ (page 30). In a post-COVID-19 society, public law scholars in the UK and in Europe will need general overviews and analyses of how we got to the place we have arrived at along the lines of the model of the questions asked in *European Public Law—The Achievement and the Brexit Challenge*. Old institutional, procedural and substantive challenges will be put in a new light. There may be political will, economic needs and social demand for imagining a different society—in the UK, in Europe and beyond. European public lawyers have to take up this small window of opportunity and rise up to meet one of Birkinshaw’s most stimulating questions: ‘What have we to learn from each other?’ (page 29)



The 3rd edition of *European Public Law—The Achievement and the Brexit Challenge* (2020) by Patrick J Birkinshaw is published in hardback by Kluwer in the European Monographs Series, priced £159.00 ISBN 9789041197511.

**KATIE BENSON, COLIN KING &
CLIVE WALKER (EDS)—
ASSETS, CRIMES AND THE STATE: INNOVATION
IN 21ST CENTURY LEGAL RESPONSES**

UMUT TURKSEN

Centre for Financial and Corporate Integrity, Coventry University

This new book from Routledge, which critically explores the contemporary (21st century) and innovative approaches adopted by states to counter financial crimes is a welcome addition to the Transnational Criminal Justice Series. By bringing together 17 emerging and established legal scholars, the book not only provides novel chapters on topics such as tax evasion and asset freezing, but also offers legal analysis of jurisdictions such as Kuwait, Qatar and Iran which have been given scant attention by the academia. The book provides critical inquiries mainly from distinctive criminal and international law perspectives yet at the same time offers insights which would complement other social science approaches on the current state of the policies and laws (law in books) and human or institutional factors, impacting law in action.

The book starts with a well-referenced introduction (chapter 1) by the editors which outlines the foci of the book and the chapters therein. In doing so, it also provides a summary of the evolution of the current international anti-money laundering (AML) and counter-terrorist financing (CTF) framework. Overall, the editors have cleverly knitted and harmoniously blended all 17 contributions that follow and provided a variety of complementary perspectives in three distinctive parts.

Part One, 'Innovative techniques and new perspectives on existing techniques', consists of six excellent chapters. Chapter 2 critiques the efficacy of the UK's *modus operandi* of tackling tax crime-driven money laundering and if and to what extent the Common Reporting Standard (CRS) of the Organisation for Economic Co-operation and Development (OECD) may yield the intended results. This is done by looking into AML intelligence gathering in the UK; cross-country assistance (exchange of information) as envisaged by the OECD; and critical examination of the CRS against the benchmarks of right to privacy and data protection

principles. The chapter concludes that, while AML rules and OECD principles have developed in tandem, they have failed to consider whether these provisions strike the balance between crime prevention, detection and revenue protection on the one hand and the right to privacy and data protection on the other.

Chapter 3 considers the ever-evolving and expanding roles and powers of financial intelligence units (FIUs) in the European Union (EU) and whether such expansion is conducive and/or proportionate to the protection of fundamental rights such as privacy rights and data protection. The chapter also identifies aptly the instances of contradiction between national measures and EU provisions, particularly in the context of information exchange, consent, loss of control of the data in question and joint analysis challenges pertaining to legal, information technology and operational elements in different jurisdictions.

Chapter 4 questions the current practices of ‘risk-based approach’ (RBA) to AML in the UK and explores whether the RBA has produced the desired results effectively. The concept of effectiveness is tested by looking at the optimization of effort and costs by the regulated entities as well as considering if and to what extent suspicious activity reports (SARs) are utilized by law enforcement agencies. In doing so, the chapter also previews the practical challenges faced by obliged (regulated) reporting entities. The analysis is generally confined to one type of regulated entity, namely banks, and it does not consider other regulated entities such as accountants, auditors, casinos, etc. While the chapter does not address effectiveness of SARs after they are submitted in detail, it is clear that future research ought to include empirical studies on what percentage of SARs actually lead to prosecution, successful convictions and asset recovery.

Chapter 5 considers the relatively new regime of unexplained wealth orders (UWOs) in the UK. Firstly, the chapter offers a summary of the mutual evaluation report on the UK by the Financial Action Task Force (FATF) and the new provisions that have been introduced as the AML regime has evolved. It does not, however, mention the requirement to establish beneficial ownership across the EU which is directly linked to UWOs and necessary for asset freezing and recovery. The chapter identifies the elements that must be present and the obstacles that may arise, *inter alia* burden of proof, self-incrimination and presumption of innocence in applying UWOs. It is not entirely clear if and to what extent the UWOs regime has been effective, hence a further empirical study on how many UWOs have been issued and what percentage of these have yielded the desired results would be welcome in the future.

Chapter 6 considers the impact of asset recovery, not only on suspects and actual criminals but also on their family members. In doing so, it critiques how the confiscation regime is conducted (e.g. calculations or miscalculations as the case may be) and questions whether the current post-conviction confiscation regime under Proceeds of Crime Act 2002 is excessive or disproportionate. What is most revealing and interesting (based on Bullock's empirical work in 2014) is how solicitors have misinformed clients when it comes to 'benefit figure' and the subsequent financial (e.g. accruing interest) and socio-economic consequences which hinder rehabilitation, re-entry into the labour market and impact negatively on mental health and family relations. The combination of these factors, it is argued, inflicts 'iatrogenic harm' upon people who are subject to confiscation orders, and such an oppressive regime is not conducive to human rights and legitimacy of state punishment.

Part Two, 'Innovative assemblages of government', consists of 5 chapters. Chapter 7 considers the legal profession's stance in response to being designated as gatekeepers and/or as obliged entities to report suspicious activities to relevant authorities under AML/CTF legal instruments. In doing so, the chapter firstly posits that there has been a 'fierce resistance' from the legal profession in terms of due diligence and reporting duties under AML laws. Secondly, the chapter explores the 'institutional consciousness' or institutional concerns which derive the rationale behind such resistance by legal professionals who see themselves as public interest actors; and thirdly it contrasts the legal sector's with that of the banking sector. It is argued that the resistance from the legal profession is mainly driven by fundamental rights and principles which underpin democracy and freedom, such as the independence of lawyers from the state their clients' rights to a lawyer (including client confidentiality), a fair trial, privacy and family life.

Chapter 8 seamlessly follows the previous chapter by considering how legal professionals as enablers can aid high-end money laundering. The conclusions are informed by the analysis of cases in which solicitors were convicted of money laundering offences in the UK. The rights and principles, such as confidentiality between lawyers and their clients and legal professional privilege (e.g. autonomy and independence), which have been argued (in the previous chapter) to underpin the resistance by the legal profession, are aptly demonstrated to form a barrier to scrutiny and effective investigations on suspected activities.

Chapter 9 critiques the UK's CTF regime pertaining to new payment systems (NPSs) against the international standards (namely the United

Nations legal instruments and FATF Recommendations). In addition, it considers whether the UK's CTF regime corresponds to the risks that NPSs pose. In doing so, three NPSs (pre-paid cards, mobile payment systems and internet-based payment systems), which are deemed relevant and risky or vulnerable in the context of terrorist financing, are examined. It is concluded that the UK has adopted a sound CTF policy in relation to NPSs.

Chapter 10 focuses on another enabler, estate agents, and the risks and challenges associated with the increased use of crypto-currencies in the property market. For instance, establishing the source and legitimacy of the crypto-currency funds can be particularly problematic owing to the anonymity and the difficulty in tracing crypto-currency transactions. Given the fact that crypto-currency transactions may not involve formal financial institutions (e.g. banks), establishing identity of persons and conducting due diligence on them would be an onerous task. This is yet another empirical study informed by interviews with the end-user stakeholders—estate agents. The chapter concludes with recommendations for future action and reform, *inter alia* policies that do not hinder technological development and positive aspects of crypto-currencies; training of estate agents; and better cooperation and partnership between obliged entities and national agencies (the shared governance model).

Chapter 11 looks at the legal implications of the AML framework for the art market, which has been proven to be an exploitable commodity by criminals. The chapter also offers a number of suggestions as to how current policing and governance can be improved. One of the suggestions put forward is the use of open-source data and intelligence so as to improve investigations. Another suggestion refers to fragmented governance and legal frameworks whereby not only open access data can be made user-friendly across many jurisdictions to aid policing (e.g. by translation of local evidence and knowledge and data sharing) but also by the utilization of private experts in the form of public-private partnership. These suggestions are informed by a number of actual examples of illicit art trade.

Part Three, 'Country-specific insights or rebellion', is composed of 7 chapters. Chapter 12 questions how corporate corruption and proceeds deriving from it may be best addressed, and whether the present self-regulatory regime is fit for anti-corruption purposes. It is opined that more proactive policy and enforcement responses are necessary because the current self-regulatory regime has not yielded the desired results, such as controlling or deterring corporate criminality in the context of

corruption and bribery. This is yet another chapter that focuses on the UK legal regime (examining mainly the Bribery Act 2010), which can be treated as a pivotal inquiry model for other jurisdictions in future research.

Chapter 13 focuses on ‘failure to prevent offences’ (FTPs), which are currently confined to bribery and tax evasion in the UK, and explores whether FTPs or omissions-based offences can be expanded to include FTP money laundering offences in order to curtail corporate criminality. Informed by relevant jurisprudence on establishing *mens rea* of companies, one of the critical insights offered by the chapter is how the identification principle can be exploited by large multinational companies (with complex management structures) to escape criminal liability. At the same time, the said principle can result in different treatment of small and medium-sized enterprises to their detriment. It is clearly demonstrated that the identification principle in the context of countering financial crime is inadequate. It is not convincing, however, if the deferred prosecution agreements (DPAs) secured under the Bribery Act 2010 can be considered as success stories as the companies which were subjected to DPAs seem to have escaped the full force of the law. Another valuable insight is the identification of how the Criminal Finances Act 2017 (CFA) differs in its approach to its benchmark for failing to prevent; while the Bribery Act 2010 utilizes the term ‘adequate’ preventative measures, the CFA employs the term ‘reasonable’. It is concluded that if the opportunity to include FTPs under the Sanctions and Anti-Money Laundering Bill 2018 had materialized, such a provision would have provided a significant advantage in countering financial crime.

Chapter 14 considers whether the recent anti-corruption measures (namely the Anti-Corruption Law No 2 2016) in Kuwait may be viewed as innovative. In doing so, the chapter provides an overview of the development of anti-corruption legal regimes and compares Kuwaiti law with international legal instruments pertaining to anti-corruption. Furthermore, the chapter analyses the extent to which the offence of illicit enrichment has been enforced, mainly against public officials. The analysis includes consideration of important and contemporary issues pertaining to fundamental rights, *inter alia* fair trial, self-incrimination and burden of proof.

Chapter 15 also focuses on Kuwait and critically examines how the law has responded to corruption offences, namely public money offences, illicit enrichment offences and money laundering in grand corruption cases. The author opines that the current legal powers conferred on law

enforcement agencies are adequate. Furthermore, it is suggested that civil forfeiture (rather than criminal legal process) and unexplained wealth orders can be effective tools if introduced in the Kuwaiti legal regime.

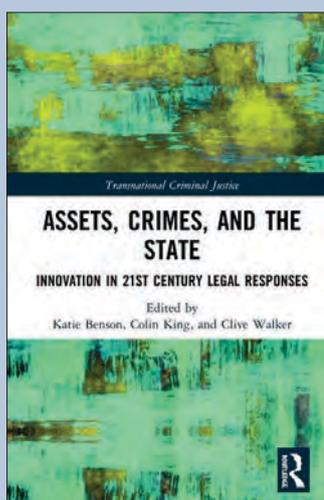
Chapter 16 focuses on Nigeria, another jurisdiction where the gap between law in books and the law in practice is vast, and corruption is endemic. The chapter examines the Nigerian AML/CTF legal regime against the benchmarks provided by international instruments (e.g. FATF Recommendations and Egmont Group standards). It is concluded that the country suffers from ineffective implementation and enforcement of law, as well as political interference and lack of political will. The key observation which should receive the most attention is the fact that developed countries and/or the financial institution therein either knowingly or unintentionally enable the flow and laundering of illicit assets generated by corrupt practices in countries such as Nigeria. This needs to be addressed in order that global efforts to counter financial crime can be more effective.

Chapter 17 returns the focus to the Middle East whereby the legitimacy and legality of the sanctions imposed on Qatar's alleged shortcomings in terms of meeting its international obligations to counter terrorism are examined. Readers are reminded and cautioned about the fact that such arbitrary and seemingly unilateral actions in the form of isolation and sanctions (which are often practised by Western states) may be applied in other jurisdictions (this time by a coalition-led by Saudi Arabia) where safeguards, such as and effective human rights protection regime, are weak. It is concluded that these targeted sanctions did not deliver the desired results. Finally, the chapter puts forward a number of recommendations for ensuring such a sanctions regime is legitimate and in line with the fundamental principles of international law in general and international human rights law in particular.

Chapter 18 is the final chapter of this book. It explains the CTF measures taken by Iran following the UN Security Council Resolutions in the aftermath of the 9/11 terrorist attacks. This is done against the background that Iran has been considered both as a victim and sponsor of terrorism, with its open support for terrorist organizations such as Hizballah, Hamas and the Palestinian Islamic Jihad. In addition, the explanation offered for the Iranian stance is based on the definition of terrorism in Iran whereby the support it provides to these organizations is seen as a legitimate effort to further self-determination and self-defence against Israeli occupation. Therefore, such entities are designated as National Liberation Movements not terrorist organizations. This is

identified as the crux of the matter when it comes to Iran's uneasy relationship with the international CTF framework, *inter alia* the relevant UN Conventions, Resolutions and FATF Recommendations. Despite the fact that the majority of states in the world are parties to key CTF legal instruments, it is argued that these legal instruments fail to articulate CTF expectations in a way that they can be perceived normatively and politically as universal. Despite the recent efforts to bring the Iranian CTF regime in line with international standards, the unique position driven by the Shariah law and the Iranian Constitution make it impossible for Iran to overcome the current impasse over its compliance with the international CTF framework.

Each chapter of the book is well written and outlines its respective aim and objectives clearly at the outset. While confined to a particular jurisdiction, the areas of inquiry and analysis within each chapter offer numerous novel insights which can be treated as seeds for future research in other jurisdictions. Despite the wide spectrum of topics and perspectives covered, the book is thematically coherent. It is a unique contribution to the AML/CTF literature, providing excellent and detailed inquiries into distinctive legal, political and policy considerations by fresh analyses and insights. It is a must-read for scholars and students of law and other social sciences. It is also an excellent reference point for professionals, commentators, policy-makers and law enforcement agencies.



Assets, Crimes and the State: Innovation in 21st Century Legal Responses (2020) edited by Katie Benson, Colin King and Clive Walker is published in hardback or ebook format by Routledge in the Transnational Criminal Justice Series, priced £120.00/£24.04 ISBN 9780367025922.

NEWS AND EVENTS

COMPILED BY ELIZA BOUDIER

COVID-19 Response

On 19 March 2020, Charles Clore House, home of the Institute of Advanced Legal Studies, was closed until further notice due to the coronavirus pandemic. Since then, staff have been working at home and all meetings have been conducted remotely. Although the pandemic has necessitated the cancellation and postponement of numerous events and courses, as well as the closure of the Library, there is a great deal of ongoing activity designed to support the Institute's stakeholders during these difficult times. These initiatives are being advertised via the website and through a very active social media presence. For an excellent discussion of the role of the IALS Library during the pandemic, see the blog written by Alice Tyson, Access Librarian, entitled 'The Library is Closed (or is it?)'.

With respect to the Institute's commitment to its students, a move has been made to remote learning for the remainder of this academic year. The Institute is fortunate in that our primary LLM programme—in Legislative Studies

—is delivered primarily through a distance-learning mode. In addition, Dr Colin King, supported by Lindsey Caffin of IALS Digital, has launched a series of [research training 'masterclass' podcasts](#). A number of these podcasts are now 'live'.

The response from stakeholders to this innovation has been extremely positive.

The Institute's Information Law and Policy Centre (ILPC) has played a proactive role in contributing expertise to both academic discourse with significant policy impact and in responding to calls for evidence from policymakers concerning policy responses to the COVID-19 pandemic and their impact on human rights law. In May, the Centre's Director, Dr Nóra Ni Loideain, submitted [written evidence](#) to the Joint Committee on Human Rights concerning the NHSX contact-tracing app, which is going to be rolled out by the UK government in order to reduce COVID-19 transmissions.

In April, the ILPC was a co-author on a draft Bill on legislative

safeguards, led by Professor Lilian Edwards (University of Newcastle): the Coronavirus (Safeguards) Bill 2020. This policymaking initiative has since been cited by the Home Office Biometrics Commissioner in his ‘Statement on the Use of Symptom Tracing Applications’ and the Joint Committee on Human Rights’ recent report on ‘Human Rights and the Government’s Response to COVID-19: Digital Contact Tracing’.

Results of the 2020 IALS Library Reader Satisfaction Survey

The week-long annual reader satisfaction survey took place in early March 2020 and asked 21 questions of our readership. The resulting ‘You said, we did’ Summary Report and Full Report and appendices have now been published on our [website](#).

IALS is very pleased with these results, particularly the impressive **97.4%** satisfaction rating and very positive comments for the newly transformed library space and new library services following the major two-year refurbishment project and the £11.5 million investment from the University of London. It is very reassuring to have evidence that our detailed plans for the new library space and the new library services are meeting reader

expectations and needs. Here is a brief summary of the results.

IALS Transformation Project—Reader Satisfaction results

Although we were initially concerned that the IALS Transformation Project building works might have a negative impact on this year’s survey results (as the works had been ongoing throughout much of the beginning of the 2019/2020 academic year), we are very pleased to report that not only was there no general drop in reader satisfaction ratings, but that almost all the ratings improved.

The improved individual satisfaction ratings are mirrored by the high rating and very positive comments given in response to the new one-off survey questions which asked about the long-term and temporary effects of the major IALS Transformation Project. Readers were asked, firstly, to rate and comment on the permanently transformed library space and new library services and, secondly, to comment on how the temporary building works were handled in terms of keeping the noise and disruption to a minimum and communications. The reader satisfaction rating for the newly transformed library space was 97.4% which is very impressive. Almost all of the comments for the new library space were very positive and

complimentary and can be read in Appendix A of the Full Survey Report. Here are a few examples:

'Very well laid out, and it is a better environment than ever in which to work.'

'I come here to be productive and am always happy with the spaces available.'

'Wonderfully quiet and the computers are excellent.'

'Much more comfortable space, very happy with the improvement.'

'Beautiful space.'

'It is now a modern, extremely well-resourced study centre.'

The comments on the handling of the building works were more mixed with some readers complaining about the inevitable noise. However, a majority seemed to understand the reasons for the noise and disruption and the long-term benefits for readers, and many complimented us on our temporary arrangements to keep the library open throughout the duration of the works. The full list of comments can be read in Appendix B of the Full Survey Report. Here are a few examples:

'Great, I believe. I always knew what was going on, either through Facebook or the info board at the entrance.'

'Could have been worse. Builders always friendly and pleasant.'

'There were a few insignificant noises. I sit mostly at the 3rd floor and it didn't really impact my study experience.'

'Some serious noise issues, but this was inevitable. Otherwise excellent.'

'The result has been worth any inconvenience.'

'Was expecting it to have been much worse.'

Other Reader Satisfaction Survey results

The top rating was for our research skills public training sessions at **98%** (97% in 2019). The overall satisfaction rate increased to **97.5%** (95.5% in 2019).

This year we had **10** satisfaction ratings above **90%** which were for helpfulness of library staff at 96.6%, range of print journals at 96.6%, study facilities at 95.1%, range of electronic journals and databases at 94.7%, availability of PCs at 91.5%, range of books at 91.4%, ease of use of the library catalogue at 91.3% and closing times at 90.4% (as well as for our research skills public training sessions and for overall satisfaction). In 2019 we received eight satisfaction ratings above 90%.

We had **seven** satisfaction ratings above **80%**. These included opening times at 89.7%, quality of computing facilities at 88.9%, ease of access to

e-resources at 88.4%, availability of photocopiers at 86.6%, study environment—noise at 86.1%, availability of printing at 83.9% and sufficient copies of LLM textbooks at 83.7%.

We continued to have one satisfaction rating above 70%, this was for study environment—heating at 76.5%. Even though this is the second highest mark we have ever received on this question, IALS Library is disappointed to note that the rating for heating has dropped slightly from last year's record high mark. Part of the recent refurbishment project included the installation of a sophisticated new library heating and cooling system with onsite temperature controls, which we hoped would assist in our control over local temperatures in the reading rooms. Despite its introduction, the comments section shows that we do not always seem to have achieved a comfortable temperature over all floors of the library. However, this is counterbalanced by some respondents praising the heating levels within the library. Library staff will continue to monitor temperatures in the reading rooms as part of their regular patrols and will ask the supplier to review the working of the new system.

We continued to have one satisfaction rating above 60%, this was for the cost of copying,

scanning and printing at 64.4%. This rating is higher than the 62.9% 2019 rating. Indeed, this rating has been improving steadily for a number of years.

Some positive comments made several times:

'Wonderful, quiet place to conduct research – I always have a productive day at IALS.' (x 16)

'Superb range of resources, the library has everything I need.' (x 15)

'The helpful and polite staff are second to none!' (x 11)

'Quite simply, an excellent library.' (x 8)

Launch of New Research Centre

In March, the Institute Management Committee approved the launch of a new research centre, the Centre for Financial Law, Regulation and Compliance (FinReg) under the leadership of Dr Colin King.

This is an important development in the research capacity of IALS, and it builds upon its historical strength in this field. The purpose of the centre is to promote knowledge and understanding of financial law/regulation/compliance, broadly construed. For example, the centre embraces the study of traditional aspects of financial

law, regulation theory and processes, economic/financial crime, development of white-collar crime, compliance and procedural justice, the psychology of regulation, and financial sanctions.

The centre acts as a national and international hub for promotion and facilitation of research in these areas.

Building Transformation Project Update

The first (and major) stage of the IALS Transformation Project was brought to successful completion in the spring. The new fifth floor was handed over to the university on Friday 6 March 2020, and new furniture was installed during the following week.

The Institute Director and the Academic and Administrative teams had been based at Dilke House in Malet Street since May 2018. Unfortunately, due to the rapidly escalating COVID-19 situation it has not proved possible for them to take up residence on the fifth floor as planned.

The Project Team is continuing to explore options and costs for limited, further works on the lower floors of the Institute.

Events, podcasts and short courses

Due to the closure of the building many events are being rescheduled. Please check the IALS website, Twitter and Facebook pages for further updates or contact ials.events@sas.ac.uk for more information.

Podcast series: Judicial Ways of Working

The global pandemic has had a profound impact upon the ways in which people live and work across the globe. The coronavirus has created particular challenges for the judicial system, which has relied to a large extent on doing its business in a live forum, to ensure both fairness to the parties and access of the public. This [podcast series](#) explores the ways in which judges are working in the midst of the pandemic. Hosted by Professor Carl Stychin, IALS Director, the series engages members of the judiciary in discussions on the use of technology to enable courts and tribunals, as well as the potential long-term implications of new ways of working even when we return to a 'new normal'. Guests in the series include: The Honourable Richard Humphreys, High Court of Ireland; The Honourable Lorne Sossin, Ontario Superior Court of Justice, Canada; The Honourable Kristine Eidsvik and the Honourable

Charlene Anderson, Alberta Court of Queen's Bench, Canada; Upper Tribunal Judge Elizabeth Cooke, Upper Tribunal (Lands Chamber), Royal Court of Justice.

Short course for professionals

The Institute is pleased to be launching its first ever entirely remote course on Finance, Law and Security: An Analysis of Money Laundering, Terrorist Financing, Sanctions and Corruption.

This course is based in our new Centre for Financial Law, Regulation and Compliance. We are hopeful that the course structure will provide a template

which can be used for the delivery of other short courses in the future.

Advanced Certified Course on Post-Legislative Scrutiny

The IALS and the Westminster Foundation for Democracy are joining forces to offer a second certified course on [Post-Legislative Scrutiny](#). The one-week professional course will take place from 5 July to 9 July 2021.

The curriculum is being prepared by a multidisciplinary and international team of academics and parliamentary development specialists.

Profiles of Contributors to Articles, Review Article and Notes

ROXANNE BAMFORD

Roxanne Bamford is a Policy Lead on the Technology and Public Policy team at the Tony Blair Institute for Global Change. Her work focuses on equipping the world's leaders to understand better the revolution in technology, accessing its benefits and mitigating its risks. Roxanne previously worked on the Public Policy team at Google and has more than seven years of experience working at the intersection of technology, public policy and politics. She is a candidate on the Executive Master of Public Administration at the London School of Economics and holds a Bachelor of Arts in Political Science and Philosophy from Trinity College Dublin.

Email: r.bamford@institute.global.

LESLEY-ANNE BARNES MACFARLANE

Dr Lesley-Anne Barnes Macfarlane lectures in Child and Family Law at Edinburgh Napier University. Her research interests lie in the fields of child and family law, private law and children's rights. Before joining the university, Lesley-Anne was a child and family solicitor, working in a specialist family law firm regularly representing children and adults

in court. She has been accredited as a lawyer–mediator and her experience as a child welfare reporter and *curator ad litem* in complex family proceedings informs her ongoing research.

Email: l.macfarlane@napier.ac.uk.

PATRICK BIRKINSHAW

Patrick Birkinshaw is Emeritus Professor of Public Law at the University of Hull. He was Editor in Chief of the quarterly journal *European Public Law* between 1995 and 2018. He has authored numerous books including: *Government and Information Rights* (with Dr Mike Varney, Bloomsbury Professional 2019) and *European Public Law – The Achievement and the Brexit Challenge* (Wolters Kluwer 2020). He has worked as a specialist adviser to the Commons Public Administration Select Committee and frequently acted as a government adviser. He was a member of the transparency team for Nirex and the Nuclear Decommissioning Authority and was an ombudsman on information requests. He has worked on several national research councils. Email: p.birkinshaw@emeritus.hull.ac.uk.

CHO KIU CHIANG

Cho Kiu Chiang is a postgraduate researcher at the University of Hong Kong. He holds an LLB from the same University and an LLM from University College London. Email: ckchiang@connect.hku.hk.

JAMIE GRACE

Jamie Grace is a Senior Lecturer in Law in the Department of Law and Criminology at Sheffield Hallam University (SHU), holding this post since January 2014. Jamie has been course leader of both the MA and LLM in applied human rights courses in his department for four years and is an active researcher in the Helena Kennedy Centre for International Justice (SHU). Jamie was previously a Senior Lecturer in Law in the School of Law and Criminology at the University of Derby. Jamie is currently Vice Chair to the Data Analytics Ethics Committee established by the West Midlands Police and Crime Commissioner and also serves on the West Midlands Police general force ethics committee. Jamie will hold a Visiting Fellowship at the Institute of Advanced Legal Studies (University of London) in the summer of 2020, as a guest of the Centre for Information Law and Policy. Email: j.grace@shu.ac.uk.

AMY KELLAM

Amy Kellam is an Associate Research Fellow at the Institute of Advanced Legal Studies. She holds a PhD from the School of Oriental and African Studies, University of London, and her early published research explored issues of law and diplomacy in relations between Britain, China and Tibet, examining the evolution of legal mechanisms governing religious and minority rights in China and placing these mechanisms within the context of the transition from colonialism to post-colonialism in international law. This early research developed into a wider interest in socio-legal issues in comparative perspective. Her recent research has focused upon access to justice for vulnerable groups. She is currently involved in a research project on the short-term impact—and long-term implications—of the COVID-19 pandemic on access to justice issues.

Email: amy.kellam@sas.ac.uk.

YSEULT MARIQUE

Yseult Marique is a Senior Lecturer at the University of Essex and a Research Fellow at the FÖV Speyer (Germany). She researches comparative public law in Europe, with a focus on Belgian, Dutch, English, French and German administration, with a special focus on the rule of law and public contracts. She holds a PhD in Law

from the University of Cambridge and is the treasurer of the British Association of Comparative Law. Email: ymarique@essex.ac.uk.

VICTORIA McCLOUD

Dr Victoria McCloud (otherwise known as Master McCloud) is a judge in the Queen's Bench Division of the High Court but also divides her time between judicial work and academic work at Oxford University Centre for Socio-Legal Studies where she presently is engaged in research on interference with political discourse on US Social Media and is an affiliate of the Swiss Re Programme for Civil Justice systems. She gave the judgments in *Telecom Centre (UK) v Thomas Sanderson (Early Neutral Evaluation)* (2020) and at first instance in *Dring v Cape Intermediate Holdings* (2017). Email: victoria.mccloud@law.ox.ac.uk.

PETER MUCHLINSKI

Peter Muchlinski is Emeritus Professor of International Commercial Law at the School of Law, the School of Oriental and African Studies, University of London. He is the author of *Multinational Enterprises and the Law* (Oxford University Press, 2nd edn 2007, 3rd edition forthcoming). He specializes in the regulation of multinational enterprises, international investment law and business and human rights. Email: pm29@soas.ac.uk.

MICHAEL REYNOLDS

Michael Reynolds is a Senior Research Fellow at the London School of Economics completing an historical study of international dispute resolution between sovereign states. He is the Module Director of International Dispute Resolution and Arbitration at BPP University College. He was formerly a Senior Law Lecturer teaching jurisprudence, professional legal skills and tort as well as being the PhD House Tutor. He is an experienced solicitor having worked in Westminster and the City, in local government and private practice. He is a chartered arbitrator and has recently presided over an international tribunal. He is the author of several professional practice books and was formerly a member of the Editorial Board of *Arbitration* and the Commissioning Editor of *Construction and Engineering Law*. Prior to returning to the LSE he was an Academic Visitor at the Centre for Socio-Legal Studies, University of Oxford undertaking research on dispute resolution processes in England and the European Union. He is a regular contributor to *The Company Lawyer*.

Email: m.p.reynolds@lse.ac.uk.

PATRICIA NG

Patricia Ng currently works as an Access to Legal Services Adviser at the Mary Ward Legal Centre in

London. She holds a PhD in law from SOAS, London University. Her research interests include dispute processing and access to justice, particularly from law in context and socio-legal perspectives. She has mainly worked for the not-for-profit sector, in two main areas—housing and homelessness and violence against women and girls. She has contributed in a range of voluntary sector roles including as housing adviser and caseworker, campaigner, and through policy and research work in relation to gendered violence and its many impacts on black and minoritized women and girls. Email: patricia.ng@btinternet.com.

MUHAMMAD SAEED:

Muhammad Saeed is a former judge in the district judiciary of Pakistan, and was recently awarded his doctorate by Newcastle University (Newcastle Law School). His research work is mainly focused on securing better performance by local courts in Pakistan.

Email: m.saeed2@newcastle.ac.uk.

RUSSELL WILCOX

Russell Wilcox is a practising barrister at 1 Chancery Lane. He holds a PhD in law from the University of London, and he is a visiting lecturer at Strathmore Law School, Kenya. Email: rwilcox@1chancerylane.com.

Visual Law



This picture was kindly given to me by the activists of Wake Up-Italia, an organization of Italian young adults who live in London. The placards which the march participants display call for legal reforms in Italy—the legal framework concerning sexual orientation and gender identity is rather limited in Italy and leaves LGBTI people without appropriate protection. Although in 2016 the Italian Parliament approved a law on same-sex civil unions (Law 76/2016) this reform, among other shortcomings, does not extend parenting rights to same-sex partners, does not grant rights to full adoption for them, provides dissolution of different-sex marriage when one of the partners changes their legal gender and the parties do not agree to the downgrading of the marriage to civil union, and overall does not define same-sex unions as family. But the limits and lacunae of the Italian legal framework also go beyond family life. Thus, law protecting against homophobia, biphobia and trans-phobia is not yet in place; the law on gender recognition is significantly invasive of individual autonomy as it requires court proceedings; intersex children are subject to reparative surgeries; relationships and sex education are absent from primary and secondary schools; and there is no attention given to the needs and rights of LGBTI children. The reasons for the poor legal framework are several and cannot be addressed here. However, in my view a key explanatory factor of the above limited attention to sexual orientation and gender identity is that, historically, legal developments concerning the family and the individual have proceeded at a rather slow pace in order to serve broader economic, political-party and religious interests. A strong patriarchal approach has characterized legal developments in Italy where the focus has not been on the individual *per se*—or at least not on all individuals—but rather on the individual as part of specific social groupings, and this contributes to preserving patriarchal norms and values.

Maria Federica Moscati (University of Sussex)