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Inside ...

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Editor's Introduction

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Welcome to the second issue of the fourth volume of the new series of *Amicus Curiae*. We are grateful to contributors, readers and others for supporting the progress that the new series of the journal is making.

The contribution by Hon Dame Justice Susan Glazebrook, with an introduction by Mai Chen, is based on her presentation at a seminar held last year entitled 'Tikanga and Culture in the Supreme Court: *Ellis v R* and *Deng v Zheng*'. The presentation concerned issues in Māori culture that had been considered recently in the Supreme Court of New Zealand and offered comments on the cases *Ellis v R* (role of tikanga in the law of New Zealand) and *Deng v Zheng* (aspects of Chinese culture) in which the courts examined dimensions of indigenous law and culture and gave guidance on questions of diversity of culture. The two cases shared issues in common but were also very different. Even though tikanga is a normative system embedded in Māori society and culture, the majority judges in *Ellis*—including Justice Glazebrook—accepted that tikanga was the first law of New Zealand.

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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.

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New Series Volume 4

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But the question to then be addressed is when does such an indigenous culture become jural? Justice Glazebrook introduces the background to these cases, their findings and offers comments. She also links these recent developments with other judicial-led projects in addressing issues of culture and law.

The article contributed by Daniel Beresford and Jens H Krebs entitled 'Augmented Legal Services: Enhancing the Provision of Legal Services by Use of LegalTech' examines the possibilities of greater use of technology and software to provide better legal services and give greater support to the legal industry. The authors assess the long-term benefits of commoditizing legal services and the progress that has been made in achieving this goal. Additionally, their paper examines the factors preventing the sector and individual firms from taking advantage of technological advancements such as connected systems and LegalTech providers. The authors argue that this reluctance to embrace modern technology also carries with it significant risks related to stasis. Fortunately, there are incentives which could help further the adoption of LegalTech. To take full advantage of these opportunities though, firms need to invest both time and resources into understanding how modern technology can benefit them and to train staff appropriately so they can benefit from these capabilities efficiently.

The article contributed by Benedict Okay Agu ('Institutional Approach to Preventing and Countering Violent Extremism in Nigeria—National Human Rights Commission in Perspective') examines how Nigeria's National Human Rights Commission might best take a preventative and proactive approach to addressing the problems of violent extremism. Drawing from both primary and secondary sources, the contribution demonstrates the destructive effects that Boko Haram, armed bandits, kidnappers and other extremist groups have had on ordinary citizens' human rights as well as peace, security, social stability and economic development in Nigeria. In order to counter such extremism, the article makes a number of recommendations, including reorienting citizens with new values of respect for life, property and human dignity as well as encouraging a greater sense of patriotism.

There follow several contributions that are part of a larger study on issues and developments in alternative dispute resolution (ADR), with some essays already published (see Amicus Curiae Vol 4, No 1) and others to be published in the next issue of *Amicus Curiae* (Vol 4, No 3). In her contributed article entitled 'Pre-Action Protocols and Pre-Action

Dispute Resolution Processes: Horizons Near and Far' Dr Victoria McCloud analyses the role of 'alternative' dispute resolution in the light of the release of Part 1 of the Civil Justice Council (CJC) *Review of Pre-Action Protocols*. The author was herself part of this review. The contribution also considers the manner in which the CJC Report and Master of the Rolls' vision for digital justice interconnect. Moreover, it explores salient details of the Report's suggestions, such as a mandate for dispute resolution engagement, utilization of digital portals to manage pre-action steps and data collection, as well as an approach to punishing alleged cases that fail to comply with these protocols. Lastly, the article examines further improvements that technology and data gathered by artificial intelligence processes may bring in the near, medium and distant future.

Lesley A Allport's contributed essay, entitled 'Mediation and Cultural Change', explores the most significant legislative developments in England and Wales over the past 25 years that have sought to advance mediation as a means of resolving disputes. It notes that one of the common themes running through efforts at reform is the view of mediation as a process by means of which a culture transformation in the way that disputes are handled might be achieved. The essay identifies the shifting dynamics between adjudication and mediation, where mediation is seen as the preferred process due to its informality and individual responsibility, while adjudication remains an option of last resort. Despite efforts to encourage greater use of mediation, however, take-up of mediation has been low and debates about whether it should be mandatory persist. As a result, there continues to be a lack of clarity around how best to meet the needs of individuals in dispute, public sector funders and government agencies. This presents substantial challenges for those involved in mediating disputes.

The Arbitration Act has been a cornerstone of English arbitration law since it was adopted in 1996. However, after two decades of operation, reform of the Act is now being considered by the Law Commission as part of its review process. The aim of the paper entitled 'Reviewing the Arbitration Act 1996: A Difficult Exercise?' contributed by Myriam Gicquello is to explore and analyse some of the changes proposed by the Commission's Consultation Paper released in September 2022. The essay shows that some of the issues that are currently being examined by the Law Commission are actually not new but, rather, were identified by the Departmental Advisory Committee on Arbitration prior to the introduction of the Arbitration Act 1996—these include questions

such as whether there should be an 'opt-out' clause from arbitral proceedings; and how best to ensure fairness when dealing with multiple parties or complex cases. The Law Commission is attempting to address these issues by means of an updated Arbitration Act which reflects recent developments in arbitral practice and is better equipped (though not always fully equipped) to tackle contemporary challenges such as climate change and technological advances.

The UK Government has long sought to promote consumer ADR as a process for handling and resolving consumer disputes. This is reflected in the Consumer Rights Act 2015, which requires all businesses selling goods and services over the internet or by phone to provide details of an approved ADR provider when a customer complaint cannot be resolved. The Government also publishes official guidance on its website which provides further information on how to handle complaints effectively and access free help from accredited ADR providers. Cosmo Graham's contribution examines two problematic issues which continue to limit the effectiveness of the system. First, the institutional framework for consumer policy. The essay maintains that there are shortcomings in its institutional arrangements that need addressing. Secondly, there are issues surrounding the use of relevant information publicly available. Currently, while there is some useful information obtainable to assess the performance of consumer ADR as a whole, such information is not readily accessible and is not used by aggrieved consumers very much. As a result, it is difficult to assess the effectiveness of consumer ADR accurately and to build appropriate policies.

Roger Mallalieu and Colin Campbell then turn to the matter of costs in their article entitled 'Resolving the Costs of the Action by Mediation not Litigation'. In civil proceedings, the costs of litigation can sometimes become a source of dispute in themselves. In England and Wales, under the Civil Procedure Rules 1998 (CPR), when such disputes arise, an application is made to a court for 'detailed assessment'—a process whereby a judge assesses the amount of costs payable by one party to another. When compared with detailed assessment under CPR, mediation offers a number of benefits, and the authors point to the savings of time and costs, and to the value of informality and privacy which resolution other than going to court is able to provide. The essay also considers whether making mediation in costs mandatory would benefit parties who pay and receive costs, and whether such a development will likely emerge in due course.

The link between trauma and crime is an important issue given that the majority of those who offend in the UK have experienced abuse, neglect and/or other forms of trauma in childhood or adult life. It is important to understand the root causes of an individual's conduct, so that effective interventions can be provided which will address the needs of the individual concerned, and trauma practice seeks to take into account the psychological, emotional, physical, and spiritual impact of trauma on individuals. A key component of this approach is to build relationships with those affected by trauma in order to provide them with emotional support and resources that will help them to heal. The authors Adnan Mouhiddin and Jack Adams, in their paper entitled 'Restorative Justice, Desistance, and Trauma-Informed Practice in the Youth Justice System', argue that it is important for trauma-informed practice to be implemented in the justice system as this may well assist offenders who have suffered trauma, and thereby reduce crime. Their contribution explores key principles around restorative justice and examines the manner in which trauma-informed practice that implements a restorative approach may tackle issues around the wellbeing of young offenders and also their victims. It reviews the evidence on how restorative justice and trauma-informed practices may work together to prevent re-offending, reduce recidivism and provide support for victims. It also considers potential areas of improvement that could be made to ensure effective implementation of these combined approaches.

In Notes & Other Matters, the Note contributed by Tochukwu Onyiuke, entitled 'A Critique of the Nigerian Proceeds of Crime (Recovery & Management) Act 2022', examines the effectiveness of Nigeria's recent legislative response to problems of recovery of financial assets gained from crime. The 2022 Act forms a central part of new anti-money laundering and counter-terrorism financing policies in Nigeria. Although the authorities have made considerable efforts over the years to deal with the problems, results have not been impressive. The new Act provides a legal and institutional framework so as better to target, manage, and recover proceeds of crime within and outside Nigeria—it primarily governs the recovery of assets from criminal activities and establishes a clear legal framework for asset forfeiture. The intention is to pursue recovery though civil rather than criminal proceedings, as the burden of proof is less robust. The author argues that in order to make the law more effective, however, other reforms should be considered such as placing the burden of proof on the defendant and adjusting the presumption of innocence of an accused.

Also in that section, Mátyás Bódig responds to Geoffrey Samuel's article 'Can Doctrinal Legal Scholarship Be Defended?' (*Amicus Curiae*, Series 2, Vol 4, No 1, Autumn 2022, 43-70).

In the Reviews section, Jessica Mant analyses the new publication *Justice in a Time of Austerity* by Jon Robins and Daniel Newman.

Finally, in 'Visual Law', Barrie Nathan contributes a short essay on 'Dickens and the Law'.

The Editor also thanks Eliza Boudier, Narayana Harave, Amy Kellam, Maria Federica Moscati, Patricia Ng, Simon Palmer and Marie Selwood, for their kind efforts in making this issue possible.

Tikanga and Culture in the Supreme Court: *Ellis* and *Deng*

Susan Glazebrook
Judge of Te Kōti Mana Nui o Aotearoa/Supreme Court of New Zealand[1]

with 'Introduction' by Mai Chen
Barrister and President of New Zealand Asian Lawyers

Abstract

The following article is based on a speech delivered by Justice Glazebrook on two recent Te Kōti Mana Nui o Aotearoa/Supreme Court of New Zealand cases: *Ellis v R* (role of tikanga in the law of Aotearoa/New Zealand) and *Deng v Zheng* (cultural considerations). After a short introduction by Mai Chen, Justice Glazebrook introduces the background to these cases, their holdings and makes a few preliminary comments. She also links these recent developments with other judicial-led projects to address cultural considerations.

Keywords: tikanga; cultural considerations; appeals; Supreme Court of New Zealand.

[A] INTRODUCTION BY MAI CHEN

Welcome to the seminar 'Tikanga[2] and Culture in the Supreme Court: *Ellis v R* and *Deng v Zheng*' and thank you to our kind host and sponsor, Russell McVeagh, and to Law Partner Mei Fern Johnson for her leadership.

The reason why New Zealand Asian Lawyers asked Justice Glazebrook to speak on 'Tikanga and Culture in the Supreme Court' and to comment on both *Ellis v R* (2022) and *Deng v Zheng* (2022) is because these cases apply indigenous law and culture and give guidance on superdiverse[3]

[1] This article is based on a speech given on 8 November 2022 in Auckland. I thank my clerk, Don Lye, and my associate, Rachel McConnell, for their assistance in preparing this article. I also thank New Zealand Asian Lawyers for inviting me to give this speech and law firm, Russell McVeagh, for hosting the event.

[2] 'Tikanga is a body of Maori customs and practices, part of which is properly described as custom law.' See *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board & Ors and Environmental Protection Society* (2021) at para 169.

[3] Superdiverse cities have been defined as cities where more than 25% of the resident population is composed of migrants: Spoonley 2013.

culture (Goddard & Chen 2022); they share issues in common but are also very different.

Even though tikanga is a normative system embedded in the lived experience of Māori, the majority judges in *Ellis*—Justices Winkelmann, Glazebrook and Williams—accepted that tikanga was the first law of Aotearoa/New Zealand (*Ellis v R* (2022) (continuance judgment) para 22).[4] The key question is when does indigenous culture become jural?

The New Zealand Law Commission, Te Aka Matua o te Ture, and specifically the Hon Justice Christian Whata, who I believe is online today, has to grapple with that very issue in the detailed study paper it is producing that examines tikanga Māori and its place in Aotearoa/New Zealand's legal landscape. We look forward to the publication of that paper, and I am sure the Supreme Court judgment of *Ellis* has assisted in this endeavour.

I wanted to highlight two footnotes in *Ellis* where Glazebrook J refers to the application of *Deng v Zheng* to Tikanga. Her Honour sat on both cases. The first is footnote 142 in Ellis where Glazebrook J states:

> But note the caution expressed in *Deng v Zheng* [2022] NZSC 76 about stereotyping at [80]-[82]. See also the general observations in that case at [78]. While the Court in *Deng v Zheng* said at [77] that these comments do not address tikanga, many of the observations will still have resonance in this situation (*Ellis v R* (2022) (continuance judgment) fn 142 at para 118).

The second is footnote 149 in *Ellis*, on appropriate ways of ascertaining the relevant tikanga, which states:

> As noted above at n 142, while the case of *Deng v Zheng*, above n 142, said at [77] that it does not address tikanga, the comments in that case may nevertheless be of relevance in this context (*Ellis v R* (2022) (continuance judgment) fn 149 at para 121).

Dr Rawinia Higgens (Chairperson of Te Taura Whiri i Te Reo Māori—the Māori Language Commission) said at Rt Hon Sir Geoffrey Palmer KC's 80th celebration in the Grand Hall of the New Zealand Parliament that she had spent her life learning Te Reo Māori (the language of the indigenous people of New Zealand) and learning about tikanga. She said that you could not understand tikanga if you did not understand Te Reo Māori. And despite learning Te Reo Māori her whole life, she professed that she felt that she hardly understood anything about tikanga. This is a stiff challenge to the legal profession to have enough cultural capability

[4] Ellis builds on *Takamore v Clarke* (2012) and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board & Ors and the Environmental Protection Authority* (2021).

and understanding of Te Reo Māori to truly understand and therefore be able to properly adduce, and apply, tikanga correctly.

Fortunately, in terms of mana tangata—mana derived from one's actions or ability (*Ellis v R* (2022) (continuance judgment) at para 131)—Justice Glazebrook has been training her whole life to write the judgments in *Ellis v R* and *Deng v Zheng* with cultural competence, as judges face the same challenge. Selecting just a few examples from her glittering *curriculum vitae*, Justice Glazebrook has a DPhil from the University of Oxford on Criminal Justice and Revolutionary France and she speaks French. Justice Glazebrook is also President of the International Association of Woman Judges which has 6,500 members from over 100 countries. She has an MA First Class from Auckland University in history and she has chaired the Institute of Judicial Studies.

Your Honour, you are so busy, yet you have kindly gifted us some of your precious time to address us on this increasingly important topic as New Zealand's population transforms. Can you please join me in welcoming, the Hon Dame Justice Susan Glazebrook?

[B] JUDGE GLAZEBROOK'S SPEECH

Preliminary comments

E aku nui, e aku rahi, koutou kua huihui mai nei, tēnā koutou katoa. E te kāhui roia nō Āhia, tēnei taku mihi maioha ki a koutou. Greetings to all esteemed guests and also my warm greetings to New Zealand Asian Lawyers. Thank you for inviting me to speak to you this evening about two recent Supreme Court cases: *Ellis v R* (role of tikanga in the law of Aotearoa/New Zealand) and *Deng v Zheng* (cultural considerations).

First some obvious disclaimers. Tikanga has been defined as including all the 'values, standards, principles or norms that the Māori community subscribe to, to determine the appropriate conduct' (Statement of Tikanga attached to *Ellis v R*: 2022: 26). I am not in any sense an expert in tikanga. I am not Māori and have no lived experience of tikanga in practice.

I am not Asian, and my experience of Asian cultures and business practices is limited to my involvement with the Inter-Pacific Bar Association (President in 1988) and, since becoming a judge, with the Advisory Council of Jurists for the Asia-Pacific Forum of Human Rights Institutions (from 2002 to 2010) and the International Association of Women Judges (IAWJ) (currently as its President). I use the plural because, of course, the word

Asian covers a multitude of different cultures and business practices, often in the same country and sometimes within the same family.

I am a judge. As judges we cannot pick and choose our cases, except to some degree in the Supreme Court and other leave courts, but we do so only through applying the statutory criteria for leave under section 74 of the Senior Courts Act 2016. We are obliged to sit and adjudicate when cases that may involve tikanga or cultural considerations meet the statutory criteria for leave and come before us.

Incidentally, this highlights the need to ensure that the courts as far as possible reflect the society in which they operate (Glazebrook 2021). This is very much a work in progress in New Zealand, although the Supreme Court does have equality of gender among the permanent judges and one of our number is Māori. We have no Asian judges, although we have had Asian judges' clerks and registry staff.

Some further preliminary comments. If anything that I say is contrary to anything in the judgments I discuss, then of course the judgments prevail. Anything I say is also subject to the obvious caveat that it is my personal view and not the view of the Supreme Court. And I reserve the right to change my mind about anything I say tonight in any future cases, after hearing full argument.

Background to the cases

Ellis v R

I start with *Ellis*.[5] The case involved convictions for sexual offending. The alleged offending was said to have taken place mostly in 1988 and 1989. Mr Ellis was convicted, after a jury trial in 1993, of 16 counts of sexual offending. There had been two largely unsuccessful appeals to the Court of Appeal in 1994 and 1999. In July 2019, the Supreme Court granted Mr Ellis' application for leave to appeal against his convictions, but Mr Ellis died in September 2019 before the appeal could be heard. Before he died, Mr Ellis had filed an affidavit expressing a wish that the appeal should continue despite his death. After his death his brother, who was his executor, filed an affidavit asking that the appeal proceed. (For full procedural history see *Ellis v R* 2022: 24–40.)

The issue before the Supreme Court in what I will call the continuation application was whether the application for the appeal to continue

[5] All in-text citations used here refer to the 'continuance judgment', or the reasons given for why the appeal should continue.

despite Mr Ellis' death should be granted. Both parties agreed there was jurisdiction for an appeal to continue in these circumstances (*Ellis v R* 2022: 44). The issues, therefore, for the Court were the circumstances in which the discretion to continue could be exercised and whether it should be exercised in Mr Ellis' case. In the event, the Court by majority decided the appeal should continue. The appeal was therefore heard and subsequently allowed.

The death of an appellant before the appeal can be heard is not likely to be common, but I apprehend that the real interest in the continuation judgment is the discussion in that judgment about tikanga.

I thought I should begin by explaining how tikanga became an issue in the continuation application in circumstances where it was not originally raised by the parties and where neither Mr Ellis nor, as far as the Court is aware, any of the complainants are Māori.

We began hearing the application for continuation in November 2019. In the course of argument, I asked the Solicitor General to address in her oral submissions any possible tikanga aspects of the case, referring to Crown Treaty settlements which show that miscarriages of justice, both individual and collective, 'have a profound effect right through the generations'. Later in the hearing, Williams J suggested that it was a 'very Anglo approach' to argue that on death there is nothing left to protect. He said that '[i]n a tikanga context … an ancestor has even more reputation to protect, is more tapu, has more mana'.

The parties asked for the hearing to be adjourned to allow them to consider the tikanga issue fully and prepare further submissions. We issued a minute the following day asking that the submissions cover:

a. whether tikanga might be relevant to any aspect of the Court's decision on whether the appeal should continue;
b. if so, which aspects of tikanga; and
c. assuming tikanga is relevant, how tikanga should be taken into account.

The parties decided to convene a wānanga with tikanga experts to discuss the issues in the Court's minute. As we note in the continuation judgment, this was a process agreed between the parties and not something the Court ordered (*Ellis v R* 2022: 35). The Court granted an application by Te Hunga Rōia Māori o Aotearoa (the Māori Law Society) to intervene, and they were also involved in the wānanga (*Ellis v R* 2022: 36-38).

Once the wānanga had been completed and a report from the tikanga experts issued, another hearing was held in June 2020. A results judgment was issued in September allowing the appeal to continue (*Ellis v R* 2020). The continuation reasons were issued in October 2022, at the same time as the judgment on the substantive appeal (*Ellis v R* 2022: 5).

So, what did the Court decide on the tikanga issue?

The Court was unanimous that tikanga has been and will continue to be recognized in the development of the common law of Aotearoa/New Zealand in cases where it is relevant, that it forms part of New Zealand law as a result of being incorporated into statutes and regulations, that it may be a relevant consideration in the exercise of discretions and that it is incorporated in the policies and processes of public bodies (*Ellis v R* 2022: 19).

The Court (by majority of the Chief Justice and Glazebrook and Williams JJ) held that the colonial tests for incorporation of tikanga in the common law no longer apply (*Ellis v R* 2022: 113-116, 177 & 260). Rather the relationship between tikanga and the common law will evolve contextually and as required on a case-by-case basis (*Ellis v R* 2022: 116, 119,127, 183 & 261).

The majority judges accepted that tikanga was the first law of Aotearoa/New Zealand and that it continues to shape and regulate the lives of Māori (*Ellis v R* 2022: 107, 110, 168, 169, 172 & 272). In light of this, the majority commented that the courts must not exceed their function when engaging with tikanga (*Ellis v R* 2022: 122-123, 181, 270-271). Care must be taken not to impair the operation of tikanga as a system of law and custom in its own right (*Ellis v R* 2022: 120, 122, 181 & 270-271). The majority judges also said that the appropriate method of ascertaining tikanga (where it is relevant) will depend on the circumstances of the particular case (*Ellis v R* 2022: 121, 125, 127 181, 261-267 & 273).

Tikanga was seen as relevant to the test for the continuation of the appeal by all of the majority judges. Given this, while some of the comments on tikanga can be seen as *obiter*, this does not apply to the statements about tikanga being part of the common law (which effectively just confirmed earlier authorities including those of the Supreme Court) (*Ellis v R* 2022: 92-97, 175-176 & 257-259) and the removal of the colonial tests for incorporation of tikanga (which the Supreme Court had not previously pronounced on) (*Ellis v R* 2022: 113-116, 177 & 260). Nor does it apply to the proposition that the relationship between tikanga and the common law will develop on a case-by-case basis in accordance

with the usual common law methodology (*Ellis v R* 2022: 116, 119, 127, 183 & 261). This is because, although there were differences in the approach to tikanga in this particular context between my approach and the approach taken by the Chief Justice and Williams J, all three of us considered tikanga was at least relevant to this case, and thus it was necessary for all three of us to decide whether or not the old incorporation tests had to be applied.

The comments in the three judgments about the different ways tikanga might be relevant in other cases, on the means of ascertaining tikanga and how it might arise in future cases can be seen as *obiter*. However, all those comments were still very tied to the reasoning of the majority judges in the case, and we did have the benefit of the Statement of Tikanga, a comprehensive report on tikanga from the experts attached to the judgment, as well as the very helpful comprehensive submissions from the parties and the intervener.

Some observations.

First, tikanga and tikanga concepts are increasingly being incorporated into statutes and policies of government entities (both in terms of process and in substance) (*Ellis v R* 2022: 100). In many cases, these statutes apply to Māori and non-Māori alike (*Ellis v R* 2022: 101). This trend is likely to continue and, indeed, to grow.

The Legislation Guidelines (2021), for example, require consideration of Te Tiriti (Treaty of Waitangi) and Treaty principles, both in terms of process (the need for consultation) and substantively (consideration of the rights and interests of Māori under Te Tiriti) (*Ellis v R* 2022: 99). One of the specific questions to be asked is: 'Does the legislation potentially affect rights and interests recognized at common law or practices governed by tikanga?' (Legislation Guidelines 2021: 5.3).

There has been criticism that, notwithstanding efforts in statutes to reflect tikanga, in some cases, they do not properly reflect tikanga and pay lip-service only to concepts taken out of their proper context. This may be the case, but the fact is that tikanga is referenced and must be applied. I expect that both the way in which tikanga is incorporated in statutes and the way the courts interpret and apply such references will become more sophisticated in the future as tikanga concepts become more well known and as projects such as the current Law Commission | Te Aka Matua o Te Ture project, led by High Court judge Whata J, on tikanga and the law are completed. This project plans to explain tikanga Māori, examine the place of tikanga and the law, as well as 'map' tikanga

Māori as a system of law, drawing, among other things, on its expression in the courts and the Waitangi Tribunal with the aim of providing a framework for engagement with tikanga within Aotearoa/New Zealand's legal system. Victoria University of Wellington (2022) is also developing a tikanga Māori 'digital companion'.

The Legislation Guidelines also recognize that, because of the constitutional significance of Te Tiriti, legislation should be read consistently with the principles of the Treaty (Legislation Guidelines 2021: 5.7). As I point out in my judgment, consistency with Te Tiriti has been suggested to include consistency with tikanga because the tino rangatiratanga guarantee in article 2 is generally taken to include the rights of Māori to live by tikanga (*Ellis v R* 2022: 98).

All of this means that lawyers should have been educating themselves on tikanga principles, even without tikanga being part of the common law. It can be argued that our decision in *Ellis* is the courts finally playing 'catch-up' to the developments in the law that have been taking place through actors other than the courts (*Ellis v R* 2022: 258).

As Williams J said in his judgment, over the last 45 or so years tikanga has been woven back into modern New Zealand law and policy (*Ellis v R* 2022: 257). These developments reflect deeper social change: both a growing appreciation of the indigenous dimension in our identity as a South Pacific nation but also broad support for Māori to maintain and strengthen their distinct language, culture, economic base and iwi institutions (*Ellis v R* 2022: 257). As he also said, it also shows how far we have come in that no party had submitted in *Ellis* that tikanga was not relevant (*Ellis v R* 2022: 259). The difference between the parties was merely how it was relevant.

The second point is that there is, however, nothing new in the proposition that tikanga is part of New Zealand common law (*Ellis v R* 2022: 108, 176 & 259). This has been the case since colonial times (*Ellis v R* 2022: 93). And some of the early cases where tikanga was applied involved Pākehā parties so its application was not confined to Māori (*Ellis v R* 2022: 93 & 246). There is no doubt that, since those early cases, tikanga was perhaps a bit lost sight of in the common law. There has therefore been a dearth of cases on tikanga in modern times until relatively recently. But this does not change the position as to the longstanding place of tikanga in the common law.

The third point is that there is no need to panic. The concept of tikanga being part of the common law does not mean that it will somehow replace

the common law wholesale. Indeed, that would not be consistent with the common law method of incremental change and adherence to precedent, as is made clear in all the majority judgments (*Ellis v R* 2022: 116-119, 163-167, 170, 259 & 266). Binding precedent must still be applied (*Ellis v R* 2022: 117, 163, 183 & 265).

Further, tikanga, like the common law more generally, will cede to statute (*Ellis v R* 2022: 98). This comment is of course subject to the fact that there is likely a requirement for statutes to be read consistently with tikanga where possible and the principle that clear statutory words are needed to displace it (*Ellis v R* 2022: 98).

The fourth point (and probably still to some extent part of the 'no need to panic' point) is that the wānanga in *Ellis* was the 'Rolls Royce' version. It will not be practical to emulate this in most cases for reasons of time and cost (*Ellis v R* 2022: 125 & 272). The fact remains, however, that most judges and counsel, even if Māori, will not be experts in tikanga (*Ellis v R* 2022: 123, 124 & 270). So, some evidence of tikanga will usually be needed, apart from in simple cases. This is particularly important in order to maintain the integrity of tikanga and to ensure that we engage in decolonization and not recolonization of the law.

The fifth point (and still on the theme of 'do not panic') is that *Ellis* does not require tikanga to be addressed in all cases (*Ellis v R* 2022: 117). It need only be addressed where it is relevant. Prior case law on tikanga will be a good guide to relevance, and of course from now on it is likely that case law on tikanga will increase as counsel get more attuned to the idea of tikanga being part of the common law and are more prepared to bring up tikanga issues where these are relevant.

Lawyers will need to keep abreast of this case law in the same way that they must keep abreast of case law relevant to their areas of practice more generally. And here the young lawyers coming out of law schools will have a lot to offer as tikanga will in future be woven through their studies (New Zealand Council of Legal Education website; Ruru & Ors 2020).

I can understand the concern that there was no test articulated in *Ellis* to replace the old colonial tests for recognition of tikanga. But these tests only excluded tikanga in very limited circumstances. They did nothing to indicate when and how tikanga might be relevant—the more vital question. Further, the tests did not take account of the nature of tikanga as living and not static, and they manifested an inappropriate colonial attitude towards tikanga which is at odds with modern thinking (*Ellis v R* 2022: 115, 177 & 260).

In any event, the tests were not applicable to tikanga concepts contained in statutes, and, even in the common law, the tests were not necessarily applied. For example, they were not applied by or even referred to by the Supreme Court in *Takamore v Clarke* (2012), a dispute about burial, even though the Court of Appeal in that case had discussed and applied them (*Takamore v Clarke* 2011: 109-175), albeit suggesting that a more modern approach to the incorporation of tikanga in the common law was appropriate (*Takamore v Clarke* 2011: 254-257).

The sixth point (and again probably part of the 'no need to panic' point) is that, just because tikanga might be part of the common law, this does not mean that tikanga will necessarily be directly applied. For example, none of the counsel in *Ellis* suggested that tikanga should be directly applied in that particular case. The submission rather was that it might be relevant in formulating the test and in providing some insight into the appropriate result.

In fact, tikanga is likely to be directly applied, at least in the near future, in a relatively limited number of cases: for example, where tikanga has been incorporated into a statute in a manner that makes it controlling or in other cases where there is a strong link between the dispute and tikanga principles (*Ellis v R* 2022: 118 & 267). One such example could be where the issue involves customary title to land or other customary property rights.

In other cases, tikanga principles or values may be a relevant consideration with regard to some aspect of the case. Tikanga might shape and influence public law decision-making as a permissible and even mandatory consideration. Tikanga might also explain the social and cultural context for the actions of Māori parties, and here there are parallels with *Deng*, which I will come to shortly.

Where tikanga will likely be of particular assistance is where a question arises (as it did in *Ellis*) on how to develop the New Zealand brand of the common law such that it is attuned to New Zealand society and values (*Ellis v R* 2022: 110, 176 & 267-269). I leave for another day the role that might be played by Asian, Pasifika or other cultural traditions in the development of the law, apart from to say that the New Zealand courts are increasingly prepared to consider and engage with material from non-Western cultural traditions and no longer limit themselves to looking to material and cases from other common law jurisdictions.

It is worth turning at this stage to examine the actual decision in *Ellis* and how tikanga was used in that decision.

Before deciding whether the appeal should continue or not in *Ellis*, it was necessary to work out the appropriate test or framework for deciding that question. At the November hearing, the argument proceeded on a standard basis. First, the relevant New Zealand cases were referred to. Then assistance was sought from case law in other comparable jurisdictions where the matter had been considered. In this regard, it was submitted by both parties that the appropriate test was whether it was in the interests of justice that the appeal should be allowed to continue. The parties also agreed that the factors set out by the Canadian Supreme Court in *R v Smith* (2004: 50) were useful in assessing whether that test was met.

At that first hearing, one of the issues raised with the parties was whether the interests of victims and the reputational issues related to the appellant and their whānau (family) should be factors to be added to those in *Smith*.

The Crown's argument was that the jurisdiction to hear an appeal, despite the death of the appellant, should be exercised very sparingly. One of the circumstances was where an interested person had a continuing pecuniary interest in the outcome of the appeal. It was submitted, however, that reputational issues relating to an appellant and their whānau were either not relevant or only marginally so. That had occasioned Williams J's remark I referred to above during the hearing that this was an Anglo approach. The issue of how tikanga might be relevant then led to the adjournment to receive submissions on tikanga and the June hearing where the submissions on tikanga were heard.

After the June hearing, the Supreme Court held unanimously that the test was the interests of justice (*Ellis v R* 2022: 7, 48, 57, 152, 233 & 294) and (by a different majority of myself and O'Regan and Arnold JJ) that the factors set out in *Smith* were useful to assess this, but with some modification to include consideration of the interests of the appellant and the victims and their whānau (*Ellis v R* 2022: 57, 278 & 292-293). As is clear from my judgment in *Ellis*, I had already come to the view that these additions should be made after the November hearing, but consideration of tikanga solidified that decision (*Ellis v R* 2022: 145).

I did not consider that any modification to the test was needed after hearing the tikanga submissions at the June hearing but noted that tikanga may be taken into account if and when relevant when assessing each of the factors in the test (*Ellis v R* 2022: 144). I noted that the concepts of mana, whanaungatanga (relationships), whakapapa (kinship), hara (the commission of a wrong) and utu (restoring balance) may be relevant in

assessing the interests of the appellant, the victims and their whānau, particularly if any of the parties are Māori. I also noted that the concept of ea (a state of balance) may be useful in assessing issues relating to finality.[6]

For myself, I very much doubt that most Pākehā New Zealanders would accept that the reputation of their deceased loved ones is unimportant. Nor would they consider that the reputation of their deceased ancestors has no effect on the living relatives, whatever the legal position with regard to defamation, for example. But there is no doubt at all that, for Māori, mana survives death. And the position of those in our Asian and Pasifika communities would likely be similar, even if not articulated in exactly the same way and arising out of different cultural traditions.

I note that this survival of reputation after death has been recognized by the practice of posthumous pardons, such as of the prophet Rua Kēnana, and in the Pardon for Soldiers of the Great War Act 2000 (incidentally, as far as I know, relating to non-Māori soldiers or at least the legislation was premised on the injustice suffered rather than whakapapa). And I note also that there was in the case of *Ellis*, unlike for defamation, no statutory impediment to considering the reputation of a deceased person when considering if an appeal should continue despite the death of the appellant (*Ellis v R* 2022: 56, n 64, 194 & 285).

I do stress, however, that the interests of both the appellant and the victims are only factors to be considered in the overall interests of justice assessment when deciding whether or not an appeal should continue. They are not controlling in themselves. And it is worth noting too that, while the interests of the complainants in *Ellis* were opposed to those of Mr Ellis and his family, this will not always be the case. For example, in a clear case of mistaken identity, the interest of both the appellant and the victims would be in ensuring that the true perpetrator is brought to justice. There is also, as pointed out in *Ellis*, a public interest component to miscarriages of justice (*Ellis v R* 2022: 14, 55, 78, 191, 227-228 & 274).

The approach of the Chief Justice and Williams J was different, although their test has much in common with that of the majority. In determining what was in the interests of justice they would have weighed four matters: practical considerations, the interest in finality in litigation, the personal interest in having a miscarriage of justice addressed through the appellate process and the public interest in addressing concerns that there has been such a miscarriage (*Ellis v R* 2022: 216-227 & 236).

[6] I give the bracketed definitions for ease of understanding, but I am acutely aware of the caution expressed in the Statement of Tikanga at para 30 that the concepts are intertwined and cannot be defined in isolation by a single English word.

Tikanga was more clearly woven into their test than it was in mine.

In terms of finality, the Chief Justice said that the concept that the grant of leave had unsettled the state of ea and that resolution of the appeal was needed to restore balance provided a useful perspective on why it is necessary to weigh the interest of finality against the personal and public interest in addressing miscarriages of justice when determining whether an appeal should continue despite the death of an appellant (*Ellis v R* 2022: 201).

In looking at the deceased appellant's personal interest in continuation, the Chief Justice said that this is informed by mana (a concept now firmly understood in broader New Zealand society) and includes not only consideration of the deceased appellant but also the interests of their whānau (*Ellis v R* 2022: 210(c)). Such interest is not limited to financial interests but may include clearing their family member's name and the impact of that upon mana tangata (mana derived from one's actions or ability) and mana tuku iho (mana inherited from ancestors).

The Chief Justice noted that this framework represented the development of common law appropriate for New Zealand, drawing on appropriate sources of legal influence and reflecting an interpretation consistent with tikanga and the existing principles of common law both here and overseas (*Ellis v R* 2022: 212). She said that the issue for the Court could in essence be expressed as being a consideration of which course of action – continuing the appeal or discontinuing it – would be most likely to achieve ea.

In Williams J's view the relevant tikanga principles provided a very helpful perspective on the issues but not because they provide any particular answer (*Ellis v R* 2022: 256). In his view, the Māori legal tradition, whose values are so different from those of the common law, still echoes in its own way the underlying considerations which the common law takes into account.

The slightly different emphasis on the place of tikanga in ascertaining the appropriate test between me and the other two majority judges in *Ellis* may signal differing views of tikanga's role in the development of the law. It may arise from a different legal methodology when considering the development of the law (the Chief Justice and Williams J being more influenced by values relevant to New Zealand rather than case law from comparable jurisdictions) or it might just be an accident of how the case proceeded, with the split hearing. The answer to which of three explanations is the correct one will have to wait until future cases. That

is not me being mysterious, by the way. I do not myself know the answer at this stage. I suspect, like everything, the approach taken by particular judges in any particular case will depend on the context.

What is clear though from my judgment and the judgments of the Chief Justice and Williams J is that, in considering what the law should be, the courts must make sure that we have a law that works for the whole of society as far as possible, and also one that takes into account Tiriti obligations, given its constitutional nature (*Ellis v R* 2022: 98, 109, 174 & 262). In this context, tikanga has an obvious role to play because of article 2 of Te Tiriti.

I mention briefly that the minority judges, O'Regan and Arnold JJ, did not consider *Ellis* a suitable case for making general pronouncements on the place of tikanga (*Ellis v R* 2022: 281), although they agreed that tikanga considerations supported personal reputational issues relating to a deceased appellant being taken into consideration in deciding whether an appeal should continue after death (*Ellis v R* 2022: 315).

One of the reasons they did not wish to make general pronouncements is the very different approach under tikanga compared to that under the common law to conduct that has wronged others or disrupted social order (*Ellis v R* 2022: 286). In this regard, they referred to the comments of the late Moana Jackson (*Ellis v R* 2022: 287; Jackson 1988:10-11).

As I note in my judgment, there is no doubt that challenging issues may arise due to the traditionally more individualistic nature of the common law and the more relational and communitarian perspective of tikanga (*Ellis v R* 2022: 119). But I do note that recent processes deriving from tikanga have increasingly been applied in our criminal courts, such as in the Rangitahi courts, and that these initiatives are now in the process of being rolled out more generally in the District Court through its new Te Ao Marama operating model (*Ellis v R* 2022: 104).

As Williams J notes in his judgment, tension between tikanga and the common law is not a given, and engagement between tikanga and the common law in respectful mutually advantageous dialogue will often do the work of ensuring the common law of Aotearoa/New Zealand develops along a path that is mindful of both legal traditions (*Ellis v R* 2022: 268–269).

Deng v Zheng

Turning now, and you will be relieved to know more briefly, to *Deng* (for more information, see Goddard & Chen 2022). This was a case concerning

two Chinese property developers. They had worked closely together for a number of years on a variety of projects before they had a falling out. Unfortunately, they failed to come to an agreement on separating out their interests. At the heart of the dispute was the relationship between the two men. Mr Zheng said that he and Mr Deng were in partnership. Mr Deng said they were not. Mr Deng prevailed in the High Court (*Zheng v Deng* 2019) but the Court of Appeal overturned the High Court decision (*Zheng v Deng* 2020)

The Supreme Court, after analysing the evidence that had been before the High Court (which had not included any cultural evidence), dismissed the appeal and agreed with the Court of Appeal that there was a partnership between the two men.

When the Supreme Court granted leave to appeal in *Deng*, it had invited Te Kāhui Ture o Aotearoa | New Zealand Law Society, after consultation with New Zealand Asian Lawyers, to intervene to make submissions on cultural issues that could arise in such cases (*Deng v Zheng* 2021). In the event, the Supreme Court considered that the nature of the relationships between the two parties had emerged with sufficient clarity from the contemporaneous documents and so did not need to engage with the cultural considerations in the instant case (*Deng v Zheng* 2022: 77), but the Court did make some *obiter* comments (*Deng v Zheng* 2022: 78-84).

There is no time for a comprehensive analysis of the Court's comments or on the wider issues arising. I just note a few points.

First, it is important that courts remember, where parties come from different cultural traditions, not to assess their business practices through a Western or Pākehā lens (*Deng v Zheng* 2020: 78). This is of particular significance in light of demographic changes in Aotearoa/New Zealand as our population becomes increasingly diverse.[7] The Court of Appeal was particularly conscious of this concern when it discussed the importance of sensitivity to social and cultural context and, in particular, stressed the need for courts to be cautious about drawing inferences based on preconceptions about normal or appropriate ways of conducting business (*Zheng v Deng* 2020: 86-89).

On the other hand, there are also concerns around stereotyping and the application of presumed group or personal characteristics by virtue of the parties' cultural background or ethnicity (*Deng v Zheng* 2022: 80). Further, there is a danger of assuming that people who share an ethnic or

[7] Stats NZ: the median projection is that the 'broad Asian ethnic group will [increase] from 16 percent of the population in 2018 to 26 percent (about 1 in 4 residents) by 2043'.

cultural similarity are a homogeneous group (*Deng v Zheng* 2022: 81(a)). As the Supreme Court put it (*Deng v Zheng* 2022: 80): 'Assuming, without case-specific evidence, that the parties have behaved in ways said to be characteristic of that ethnicity or culture is as inappropriate as assuming that they will behave according to Western norms of behaviour.'

It is also important to remember that, whatever the cultural traditions of the parties, what is being applied is the law of Aotearoa/New Zealand. In this regard, it would be inappropriate for example to reason that the concept of *guānxi* means (on its own) that the relationship between Chinese people doing business together must inevitably be as partners (*Deng v Zheng* 2020: 81(b)). The actual relations between the parties must be examined to ascertain if there is in fact a partnership according to New Zealand law.

Cultural considerations

It will pose a challenge for judges to be attuned to the cultural nuances of the case, while at the same time avoiding stereotyping or unwarranted assumptions. Judges will require assistance to negotiate this from a combination of evidence and submissions of the parties, expert evidence, interveners, judicial education programmes and benchbooks.

There are several judicial-led projects on foot to address cultural considerations (Te Tumu Whakawā o Aotearoa | Chief Justice of New Zealand 2022). Te Kura Kaiwhakawā | Institute of Judicial Studies, which supports the education and development of judges, has targeted programmes towards promoting cultural understanding. I also mention the development of *Kia Mana te Tangata – Judging in Context: A Handbook*. This is a judicial benchbook which aims to provide guidance on providing fair hearings for all those who come before our courts, regardless of gender, sexuality, religion, culture and ethnicity.

Importantly, Te Awa Tuia Tangata | Judicial Diversity Committee (Te Tumu Whakawā o Aotearoa | Chief Justice of New Zealand 2022: 9) is developing an approach to increase diversity and inclusivity of future judges. I chair the committee, Tomo Mai, which is tasked with looking at inclusion at all levels within our courts: including for the parties, their whānau, their counsel and court staff. And I mention the very helpful and honest preliminary dialogue we have had with New Zealand Asian Lawyers and other legal groups.

Finally, a word about the role of New Zealand Asian Lawyers, not only as a potential intervener in future cases but also as lawyers

representing clients and educators. New Zealand Asian Lawyers has an important role to play in bringing greater awareness to lawyers and judges and other justice sector personnel about the different cultural and ethnic backgrounds of those who may come before the courts. The Superdiversity Institute report on Chinese parties is a very good start (Chen 2019). But more work remains to be done for other communities, such as those of Indian or South-East Asian whakapapa. In practice, such work must address cultural ground rules of respect, must work with communities, and share processes and knowledge. I look forward to hearing more from you.

About the authors

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Te Kura Kaiwhakawā | Institute of Judicial Studies

Augmented Legal Services: Enhancing the Provision of Legal Services by Use of LegalTech

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Abstract

This article considers the opportunities of LegalTech in law firms. It assesses the long-term benefits of a commoditization of legal services and the progress that the industry has made in achieving this. It will become clear that the sector is still operating traditionally, mostly ignoring technological advancements. Thus, there ought to be an analysis of what is holding back the sector and individual firms. The focal points of this analysis will be connected systems, LegalTech providers and the risks of stasis. Finally, heed will be paid to the potential incentives which might assist in the greater adoption of LegalTech.

Keywords: LegalTech; law in practice; access to justice; legal services; augmentation.

[A] INTRODUCTION

Technology has impacted the evolution of businesses for over 30 years. In particular, the omnipresence of the internet and the resulting constant access to social media, shopping apps and online/mobile banking have allowed markets to grow rapidly (Embley & Ors 2020: 575). In contrast, the legal sector has been on fairly steady ground with little incentive or desire to evolve. In the last decade, however, law firms have experienced a great acceleration towards modernization. Thus, many academic writers debate the likelihood of machines replacing the traditional lawyer (Susskind 2008; Pasquale & Cashwell, 2015; Pasquale 2019), often concluding that, while complementation of lawyers, at least in the foreseeable future, is realistic, and has already begun (Pasquale & Cashwell, 2015: 47), a total replacement of human lawyers is currently unlikely (cf Susskind 2017: 188). It does not require yet another piece to reinforce what most writers have already established. Instead, this article

aims to evaluate how far the move towards technology complementation has come. However, the effect of technology in law should not be viewed solely as a means of making a lawyer's work easier, lighter or more profitable; 'augmented lawyering', in the words of Armour (Armour & Ors 2020), considers changes to the legal profession by use of technology and the positive, and possibly negative, effects this may have on those who seek legal advice.

Historically, lawyers would make use of basic information technology that was at their disposal. With the 1990s came the broader availability of personal computers, and law firms, like other businesses, upgraded from electronic typewriters to more integrated computing solutions, including large file storage, word processors for document drafting, and email to ease communications, on a single device. Computers made legal work far more efficient and, thus, cheaper, so that early adopters of computers could easily out-perform their competition. In 2020, reliance on computers, email, chatbots, and online chats, to name but a few, has become the baseline for the acquisition of a steady stream of clients. In areas where the acquisition of clientele is not an issue, the most limiting factor to greater success is often a lawyer's finite amount of time. A large proportion of a lawyer's day is typically taken up by law-adjacent tasks—ie those tasks without which the actual 'lawyering' cannot take place. As such, much of the time is spent on requesting information from clients, checking on progress within the legal team, drafting, wording and checking the accuracy of the information and personal details in documents and scheduling meetings. All of these have to be arranged in such a way that advice is given to clients within the agreed timeframe. 'Augmentation' aims at optimizing those tasks to free up competency. Already in 2003, Susskind predicted a shift from fully bespoke services to commoditization (Susskind 2003: 111). Within the last two decades, we have come a long way towards Susskind's vision; yet, what we see today is still generally considered 'legal services' rather than legal products. We, therefore, want to assess what the current obstacles to commoditization are and how they could be overcome.

[B] CHANGING SYSTEMS

Many practitioners will be aware of machine-learning solutions, blockchain technology and smart contracting, but adoption of these technologies in the legal profession is still staggeringly low (Law Society 2019: fig 7). As it stands, there has not been a sufficient incentive for law firms that outweighs the concerns and risks of adopting technology that requires 'trust' without fully understanding its workings. But because a law firm

is a fee-earning business, its need for clientele might lower some firms' aversion to risk in the off-chance of gaining an early advantage over their competitors. Due to the availability of the internet and other technologies, today, clients are in a better position to 'shop' for a law firm and maybe even the lawyer of their choice (Solicitors Regulation Authority 2019). The resulting change has reshaped the legal service industry more into a marketplace, which has led to a conceptual change in the sector by which many firms would now consider their 'clients' to be 'customers' (*The Forte Edge* 2021). Acquisition of 'customers', as opposed to 'clients', necessitates a new, or at least different, business strategy (Law Society 2019: 16-19) with greater visibility through marketing and competing on price and quality being the most obvious changes to be implemented (Susskind 2017: 60). Consequently, a firm must find a way of lowering costs and enhancing quality without squeezing its profit margin unduly, in the same way that players in more traditional markets would.

To put themselves ahead, savvy firms have implemented case management systems early on, streamlining their overall workflow and organization. On an economic level, the use of case management systems has also furthered a shift from the traditional law firm to a more managed archetype (see Pinnington & Morris 2003: 86), with client satisfaction at its heart (Rogers & Ors 2021: 135). Lawyers can rely on legal software to organize their cases, build courtroom presentations, and manage the economic side of their law firm (LexisNexis 2021). These efforts of streamlining certainly improve how lawyers provide services internally, but much of this does not reach the client or yield an immediate benefit to them, which would affect their choice. Additionally, none of these changes will fundamentally alter the kinds of tasks that lawyers undertake. These economic savings may lead to increased earnings for the firm or maybe more affordable services for clients, but the greatest of benefits—ie 'freed expertise' for lawyers to pay greater heed to the core tasks of lawyers—remains unobtained. Greater improvements come from 'intelligent' software that completes monotonous tasks with great precision.

There are already various examples of intelligent services and augmented lawyering and their benefits. Tens of millions of online disputes are resolved every year without engaging lawyers (Civil Justice Council Advisory Group 2015; Perriam 2021). Large online marketplace platforms, like Amazon and eBay, typically provide a free service to resolve disputes over transactions made on their platforms. The initial steps of their dispute resolution process are typically automated, and common issues such as refunds or non-delivery are usually resolved without the need for any human intervention. More complex matters are considered

by employees of the platform company (Civil Justice Council Advisory Group 2015: para 4.2). While these services seem to contradict some of the above sentiments, in that technology might divert some legal traffic away from lawyers, two aspects must be borne in mind: firstly, the development of alternative dispute resolution, generally, and the European Union's Online Dispute Resolution (ODR) platform were introduced to 'contribute to the attainment of a high level of consumer protection' (ODR Regulation 2013, rec 1). Ease of access via an online portal is seen as a cheap, non-bureaucratic and necessary step to allow consumers to self-enforce their rights, particularly for purchases of minimal value (under £50). The reason for this leads to the second point, namely, the assumption that disputes of minimal value are diverted away from lawyers hinges on the fact that consumers would otherwise seek legal services, but for the availability of ODR. However, the amount of time and money a consumer would have to spend to enforce their rights in court exceeds the value of the item by far and, as such, these disputes would simply never be raised (ODR Regulation 2013, rec 7).

Even though online dispute resolution does not assist lawyers, *per se*, it is a prime example of how software can be used to provide or enhance knowledge about a legal subject and, from a lawyer's view, externalize it as a marketable product to customers.

Taking this one step further, the same technology (artificial intelligence (AI)) is revolutionizing legal analytics. LexisNexis' AI, *LexMachina* (*LexMachina* nd), is capable of analysing US cases to predict results in patent litigation more accurately than legal experts in this area (Susskind & Susskind 2017: 69). Practitioners, and those aspiring to be legal professionals, will certainly have to rely upon legal databases such as LexisNexis or Westlaw and their advanced search algorithms to conduct efficient research (Haggerty 2018). Yet, the ability to offer AI predictions of that nature to customers is a valuable product, saving customers time and money, while reducing the amount of 'manual' research required by lawyers.

Although these examples show an indicative shift in the use of LegalTech solutions, there does not seem to be an industry-wide (normed) move towards it (Tromans 2021). This is despite Susskind paving the way by explaining, in general terms, a route to a technology-integrated future (Susskind & Susskind 2017: 195-202). In the following, we will therefore go through these steps and outline where the industry at large is situated, and we will consider the steps to be taken to move ahead.

[C] TOWARDS COMMODITIZATION

A higher level of technology integration in law firms would allow for greater optimization of processes through automation. Currently, the optimal way of exploiting LegalTech is by way of commoditizing legal services. Achieving this is a transformative journey whereby a law firm evolves its services from bespoke advice to standardized, automated and eventually commoditized advice products (Susskind & Susskind 2017: 196). 'Externalization' is only the final step in developing a law firm that has packaged its services into defined, yet flexible, products. However, before this level of integration can be reached, a law firm must successfully traverse 'standardization' and 'systematization'.

While this sounds like a long and tedious process, the legal profession, as a whole, has come quite far in this process. Standardization of contracts and processes, for instance, has been in existence for a long time: for example for the disposition of land, sales contracts or wills. Most of these documents exist as template documents, condensed to their essentials and, while in each instance, these documents will need to be 'completed' by adding personal data, or amending optional or conditional clauses, much of the document does not require more than a final look to check its accuracy and applicability to the client. The standardization of contracts, for instance, usually pursues at least one of four possible goals: reduction in negotiations, definition of the parties' relationship, allocation of risk and definition of the non-bespoke products (Baffi 2007: 2). Legal consequences aside, much of this is intended to save time and lower costs. However, because a law firm typically offers a greater variety of services, not all of the common benefits of standard-term contracting apply. For example, the standard contracts that a seller of goods uses are designed to define the transaction between them and the buyer. In contrast, documents drafted by a lawyer are intended for their client and not for the relationship between them and the client. Thus, these documents show more variation between clients than would be common for sellers of goods in transactions with different buyers. However, this does not mean that it is impossible to design templates. A sophisticated template document requires experience with the common variations that clients often need. Consequently, a template can be created that contains core provisions and optional blocks or provisions that can be added or removed depending on the client's needs. Even though many templates used in law firms may not have reached the highest level of sophistication and, thus, do not utilize a lawyer's time efficiently, their existence is sufficiently common to consider their systematization. One of the reasons why systematization might be desirable, even though not all

processes have been fully standardized, is that the implementation of a system may improve and complement standardization. A 'system' might provide additional data which, otherwise, may not have been available, or which would have been too cumbersome to procure without sufficient technological integration.

Automation is a major aspect of systematization. Due to the widened access to data, it can make working with templates much easier and quicker. Automation software will generate the desired document, including most of the content needed in the particular instance, based on definable conditions and triggers. As a result, there is no need for human intervention: for example, to add a start date or calculate the end date in contractual agreements, or automatically enter the client's personal data into a will, as it can be imported from the client database. Already, there are a variety of providers of 'automated document creation' solutions in the market. In essence, these programs allow lawyers to add 'coded' rules to their templates. Typically, these are formulated in a 'mark-up language' where instructions mimic spoken languages, like English (Thomson Reuters 2021: 28). This way, an instruction might take the following shape:

If *Begin_date* **IsGreaterThan** *End_date* **Then**

Alert ("Please check the dates.")

For people without a background in computing, this syntax is a much more accessible way of defining rules and, thus, significantly reduces the entry barrier. By defining these additional rules in a template, lawyers can work through it and, with only a few clicks, design a document that is ready for use. In a well-designed automated template, the system will already know what information is required and where to insert it in the document and prompt the user to input it as and when needed (Sumners 2021). The framework in which the document is created is narrowly controlled by the system, and it warns about information that does not match the required format (such as invalid email addresses or postcodes) and raises inconsistencies, like conflicting dates. This can reduce the margin of error to the point where the 'drafting' is fully completed by paralegals and trainees, and a solicitor or partner only carries out the final checks before releasing it. To reduce the duplication of data, the client's address and contact details might be automatically inserted from the firm's client database, or if not available, the template will feed the data into the database for future use.

However, the term 'automation' intuitively suggests efficiency and cost savings. As a result, some expertise, or at least some careful thought,

is required to capitalize on the benefits which these systems promise. The uninformed introduction of automation and the blind 'automation' of templates could easily result in the opposite. Before a law firm begins the actual work of automating, its processes and procedures require careful analysis, or an 'automation audit' (see echo.legal 2021). The full picture of how the law firm operates and when information, relevant to the template, becomes available will impact how the template is designed and what information is requested, at any given point in time. The effects of 'over-automation' typically appear where documents or templates are designed in a way that does not correspond with the firm's workflow. As an example, the document might ask for completion dates for certain stages in a project or an inventory list that must be provided by the client. If the completion of the document requires some input, the frictionless flow is disrupted, and placeholders are put in place. These will need to be fixed at a later stage, but because the system is not aware of the temporary nature of the information, it will not prompt subsequent changes.

Furthermore, it is not uncommon that initial attempts rely on a totalitarian approach. In other words a little automation is good, more must be better. However, this is a fallacy. It can certainly be enjoyable to test new functions and add little gimmicks that bring a smile to the designer's face every time they complete the document, but this does not mean that these would add any value in practice. For instance, it would be possible to set up a data table containing a list of all lawyers in the law firm. Upon completion, the template reads the list and presents it to the individual to indicate who has worked on the form. In many instances, this will not be necessary, and where it is required, it is probably best entered as plain text. Having to comply with this step for every mandate could result in slowing down the process or even driving lawyers away from using it altogether.

These optimizations will already enhance a law firm's efficiency and make it more profitable. However, we recall one of the key drivers of LegalTech being a firm's clients. Regardless of whether a firm's clientele consists of commercial entities or individuals, externalized services are a core influencer (the same is also true for in-house lawyers) (Law Society 2019: 56).

[D] COMMODITIZATION

At the time of writing, the implementation of automation systems is anything but commonplace. The legal profession is a traditional one, built upon history and precedents (Simon & Ors 2018: 257). With lawyers

reluctant to change, it is unsurprising that many firms are still using paper files. A smooth transition to a modern and connected law firm may not be possible until the stigma that latches on to technology is lifted. However, it would be naive to assume that this stigma is the sole reason for a slow and fragmented transition. Reaching Susskind's vision of commoditization is not only a matter of technology, but also one of structural and cultural shifts, which can only occur if the industry understands the purpose, and commercial opportunities, of 'commoditization' as a concept.

Susskind believes that technology is making a move from the back office to the front office in firms (Susskind & Susskind 2017). Today, however, technology must *become*, at least partially, the front office of the modern firm. The legal commodity, the product on offer, consists of information, knowledge and expertise in legal documents, many of which may not require any oversight. This implies that firms can offer greater access to their products to clients by using technology with only a marginal investment of time, money and effort. For example, existing legal products can use quantitative data, such as dates, prices and names, for software to generate tailored wills or contracts. Automation of this kind has already been explored above; 'commoditizing' would mean making this 'product' accessible to clients for a fixed price, using a website where clients can self-serve beyond conventional business hours. A carefully drafted form guides the client through the steps to completion and, in some cases, the complete document is immediately available for download. Of course, some legal documents will need to be finalized by a lawyer and their completion will remain pending until then. Refining a firm's processes to the point that legal services can be commoditized has two beneficial effects: firstly, it allows for the acquisition of work outside business hours, and a new work structure, whereby part of the day is dedicated to finalizing accrued document requests from clients; secondly, it creates a separate, passive source of income for the firm from purchases of fully automated documents, whose existence may only be revealed on the firm's bank statements.

Most large firms have recognized this opportunity and considered implementing technology as a high priority (Wolstenholme & Ors 2021), but reliance on sophisticated technology is often seen to be a risky expenditure. Thus, mostly well-funded city firms make the greatest use of advanced technologies (Embley & Ors 2020: 638). Small firms that harness these methods, too, can see a profound increase in efficiency, as staff utilization is maximized and room for error minimized.

[E] CONNECTED SYSTEMS

We have already considered the use of case management software and the new business model (see Pinnington & Morris 2003; Rogers & Ors 2021) but have concluded that reliance on these systems alone will not significantly further 'augmented lawyering'. One key inhibitor to the wider success of LegalTech might be the fragmented use of systems, not within the sector, but the law firm. Technologists have developed a plethora of tools available to firms, each with a particular role. For example, providers like *Clio* and *Needle* specialize in 'practice management'. *Contract Express*, *Rocket Lawyer* and *Lawyaw* provide solutions for 'document assembly and creation'. *OpenText* and *Everlaw* are specialists in 'eDiscovery', whilst *LexMachina*, *Colossus* and *Ravel* are revolutionizing 'outcome prediction' (Engstrom & Gelbach 2021: 1011, 1012). These tools are often referred to as 'point solutions' aimed at completing specific legal tasks (Dale 2018). Often, these technological tools are limited by their interfaces, like their connectivity to other internal or external tools/systems. Data isolation and the need to change between systems or software, depending on the task, are what hinder even the most tech-savvy firms from achieving higher efficiency. Furthermore, switching between tools can be frustrating, counterintuitive and, in any event, time-consuming. Likewise, a firm's use of multiple platforms can make them more prone to security risks.

Issues arising from the use of multiple unconnected platforms are not new. Enterprises in other sectors have long recognized the opportunities and worked towards positive solutions. Over two decades, the successful integration of different systems has been achieved by the use of standardized data formats and communication protocols. Software-as-a-Service (SaaS) is a model of software deployment whereby a provider licenses an application to customers for use as a service on demand. SaaS software providers may host the application on their own servers or upload the application to the consumer device, disabling it after use or after the on-demand contract expires (Stanley & Briscoe 2010). Within the context of law, SaaS tools aim to harmonize platforms by implementing consistent protocols. Reliance on standard protocols is necessary as cloud-based software cannot access local tools or data. Communication protocols provide seamless integration into the office environment.[1] This way, users can transport data from one system to the next, set up automatic synchronization between systems, or utilize a Hub-and-

[1] Common protocols are OAuth2.0 (Hardt 2012) or Enterprise Service Bus integration (Binildas 2008: ch 1).

Spoke solution or an Enterprise Service Bus which act as intermediaries between systems (Binildas 2008: 37-39).

This level of integration is not present in, or insufficiently advertised to, law firms. Solution providers emphasize the qualities of their products over those of their immediate competitors, but little to no emphasis is placed on synergies with complementary systems.

[F] EVOLVING THE LEGAL SECTOR

Thus far, we have considered the approach that the majority of firms in the legal sector take and presented some opportunities that technology offers to these firms. But it remains unclear what has led to the continued separation of the two. Law firms are commercial entities, and at least some players have successfully started relying on technology so it stands to reason that these success stories would incentivize others to follow suit. Potential reasons for this stagnation might be the regulation of the legal sector, missed opportunities by service providers or a silent offensive from another sector. It is time to look at these in some detail.

Sector regulation

The UK's legal sector is strictly regulated, and lawyers require a practitioner's licence in order to provide legal advice. While this ensures clients receive advice from qualified professionals only, it can also create an entry barrier for more innovative business entities. Relaxing this might introduce to the sector the level of IT competence needed to successfully operate LegalTech. But, in turn, it could reduce the quantity or quality of legal advice offered to the public (cf Rigertas 2014). However, the introduction of 'alternative business structures' (ABSs) by the Legal Services Act 2007 (LSA) does allow for traditionally atypical firms to enter the market. An ABS is a company comprising lawyers and non-layers that can provide 'reserved legal services' (Rab 2021). The 'new legal eco-system', whereby non-lawyers can be involved in 'aspects of lawyering', enables LegalTech start-ups to develop and offer technology-assisted, augmented services which are more appealing to clients than traditional legal advice, and more empowering to lawyers in the execution of their profession.

Lucy Bassli claims that the growth of legal services and its participants have transformed the profession into an industry (*The Forte Edge* 2021). As was intended by the LSA, a more diverse field of players in the market has increased competition and is a strong incentive for innovation. Given

the currently fast-moving nature of technology, a focus on technological innovation in law firms is the most promising way to improve a firm's legal services and increase its competitiveness. The success of a large player in the LegalTech service industry might change the legal services landscape in a similar way Amazon did with bookselling (cf Susskind 2008: 94). To date, however, Bassli's claims seem over-optimistic. In 2019, the Law Society reported little acceleration in the adoption rate of LegalTech systems among practitioners, despite the increased number of LegalTech start-ups (Law Society 2019: 8). While a clear reason for this is yet to be found, there are some possible causes which should be considered.

Law is often viewed as a traditional profession with longstanding rules and customs, and technology has only slowly found its way in. Many lawyers may still see themselves as insufficiently capable of using 'tech' to advocate for radical change, or they see it as an inadequate and disruptive solution, forced upon them. Trialling new methods is generally disregarded, or delayed, until hard evidence is available. Of course, anyone waiting for such evidence will lag behind and become a mere follower in the 'LegalTech Revolution'. This aversion to risk would certainly explain the industry's reluctance to endemic change, but it does not address the high level of rejection of those software solutions shown by ABS start-ups.

Missed opportunities

Assuming that LegalTech solutions are as successful as claimed and confer great benefits on the law firms and their clients, a sufficient number of clients will have experienced LegalTech's workings and request or enquire about its use in cases where the technology is not used. There are a number of powerful IT solutions for the legal sector offering enhancements like those discussed above, and a few large providers run campaigns to advertise these solutions and their benefits. However, one cause for slow adoption could be that these marketing strategies are insufficient or ineffective.[2] A detailed analysis of current marketing strategies falls outside the scope of this article and exceeds our expertise. However, where the sector is largely unaware of the product solutions or, despite promotions, adoption remains slow, it stands to reason that sellers are not doing enough, or what is needed, to convince firms to adopt their products.

[2] It is important to note that this argument relates to the LegalTech sector as a whole. It does not address any particular service providers, products or campaigns.

Providers' websites offer extensive information about the features of their products and the resulting benefits for a firm's stakeholders. Service providers make conscious attempts to reduce complexity. As such, Thomson Reuters intentionally relies on the term 'authoring' as opposed to 'coding' to emphasize a more light-touch approach to dynamic document creation by lawyers, rather than software developers (Thomson Reuters nd). Furthermore, information is typically kept concise, aided by abstract icons. These sound-bites might seem appropriate and convincing to those who know the product. The same might not be true for partners in a law firm. As an example, features like the 'volume assembly engine', 'DocuSign', 'iManage' or 'document suite generator' remain opaque to non-enthusiasts and could overwhelm and make the product appear far more complex and difficult than it might be in reality.

Websites also contain little about the wider context of the product within the context of the law firm. We have already discussed the narrow focus on individual solutions for particular tasks in a law firm. However, exploiting the potential of LegalTech fully would inevitably require as many tasks as possible to be augmented. This would mean that a law firm would need to obtain multiple products. Furthermore, there is no clarity on whether, or how far, these products would work together to form a complex solution. Service providers may need to reconsider their marketing approach or their product's compatibility if they want to convince more firms to adopt their products. With missing integration capabilities, ABSs might draw on their experience in other sectors and design their solutions in line with those global standards which would allow for data to flow freely between systems.

Silent invasion and innovation incentives

The LegalTech Revolution might take an unexpected shape. All too often, innovation is an evolved version of what is currently practised. However, the threat of disruptive technology is its very nature: in the legal context, this might mean that LegalTech start-ups might move away from developing IT solutions for law firms altogether. Instead, it could be more lucrative to develop tech solutions that allow them to offer legal advice independently and silently divert clients away from lawyers. This potential risk to the legal profession has not yet been recognized by the majority, and once law firms perceive signs of declining business, it will already be too late to reverse the transition. For traditional law firms to ringfence their clientele, they need to embrace the evolving nature of legal services and start adopting current technology solutions ahead of the market.

In early 2020, businesses around the world were given another incentive to consider new ideas on how to conduct business. Due to the pandemic, governments around the world instituted national lockdowns. From one day to the next, all face-to-face interactions ceased, and companies and individuals were forced to rely on technology for tasks that would be considered face-to-face and low-tech (grocery shopping, doctors' appointments, education). In sectors, such as health service and education, technological solutions emerged quickly as a matter of necessity and, for that reason, did not come with a stigma of adversity. The legal sector, too, was forced to rethink its approach to accommodate the public's access to justice. Worldwide, courthouses had to remain closed for a prolonged and uncertain period and cases started piling up (*Municipio De Mariana v BHP Group plc* 2020). With concerns about overwhelming backlogs in court cases, the use of technology was heralded as the main solution (Meadows 2020). Shortly after the introduction of lockdowns, justices in Columbia swiftly made use of Remote Courts Worldwide, adopting online virtual conferences for urgent matters (Remote Courts Worldwide 2020).

The pandemic as a catalyst is not the only reason for such expert systems to prevail. They serve as examples of innovative thinking and successful blends between the two disciplines. This is important as many recognize that technology will still have critical use in legal services beyond the pandemic (Meadows 2020). The extent to which the pandemic has 'forced' law firms to introduce online legal services or, at least, consider potential avenues to providing a continued presence in the market remains to be seen. In any event, it will have reinforced that holding on to traditional forms of legal services can quickly lead to an unviable business model, with technology as the obvious solution.

[G] CONCLUSION

It is indisputable that the systems mentioned will become more prominent in the legal sphere as technology improves, but this will not be without its shortcomings. Some software products can already complete tasks once done by lawyers (Susskind 2018: 31), and, eventually, professionals will have no choice but to embrace this augmented way of working. Trying to assess which roles in the legal sector may, or may not, be consumed by technology is merely fear-mongering. A better way to view the future could be to consider how LegalTech will present new methods of supplying services. The focus should be on the transformation of roles to match the demands of the new digital era. The shift to a consumer market for the acquisition of clients in some areas of law is already discernible, albeit in the early stages. As such, the role of a traditional lawyer will continue to

evolve. Examples of this can be seen in the recent uptrend in the use of subscribed legal packages, where a client pays a fixed monthly price in exchange for legal advice, often delivered remotely (Solicitors Regulation Authority 2019: 27). Therefore, jobs that require creativity and experience will remain, but the need for new skill sets will gradually expand the definition of a legal expert to include the roles responsible for discovering and implementing such alternatives. As time progresses, the definition will no doubt extend to include legal-data analysts, design engineers and software developers. The usage of technology in law remains modest but is nonetheless growing (Armour & Ors 2020). It will be the responsibility of these new experts to ensure a smooth transition from two distinct sectors into a blended discipline.

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Institutional Approach to Preventing and Countering Violent Extremism in Nigeria—National Human Rights Commission in Perspective

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Abstract

The article discusses the institutional approach to preventing and countering violent extremism through the role of the National Human Rights Commission, Nigeria. It uses primary and secondary materials to argue that extreme violent activities by the Boko Haram sect, armed bandits, kidnappers etc, have impact on the enjoyment of human rights by citizens and jeopardize peace and security, as well as threatening social and economic development. The article recommends that the average citizen in Nigeria ought to be given a reorientation to instil in them value for human life, property and dignity of the human person and patriotism to checkmate and prevent violent extremism in the country, among other recommendations.

Keywords: institutional approach; violent extremism; human rights; National Human Rights Commission, Nigeria.

[A] INTRODUCTION

The crises of insurgency activities of Boko Haram and the menace of banditry, kidnapping, herders/farmers clashes, and ethno-religious difficulties have predominantly ravished the northern part of Nigeria. The situation has left millions of the citizenry devastated. This calls for urgent intervention of both state and non-state actors. In 2020, Nigeria was ranked the third most impacted country by terrorism after Afghanistan and Iraq (Global Terrorism Index 2020: 10). The religious violence which started in the northern part of the country in the 1980s continues until the present date but in changing forms and nomenclature (Higazi 2019). The Kano riots, the Maitasine attacks, the Zaingo-Kataf crisis of Kaduna

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and the Jos-Plateau crises have left one with no other option than to agree with the assertion that northern Nigeria is synonymous with ethno-religious conflict (Yake 2015).

There have been a large number of incidents of communal violence across the north, including some appalling episodes in Plateau, Taraba, Benue and Kaduna states in which hundreds or even thousands of people have been killed. However, this does not mean that other forms of conflicts are not in existence in the northern part of Nigeria. Kidnapping, militancy, pipeline vandalization, communal conflicts, ethno-nationalism, communal and socio-economic conflicts have all been endemic and constituted the triggers of crises in the southern part of Nigeria (Olaifa 2017).

The question that yearns for an answer is whether these unwholesome activities such as violent ethno-nationalism, violent communal and socio-economic conflicts, kidnapping, militancy, pipeline vandalization, insurgency, farmers/herders clashes and armed banditry have impacted on human security in the country and on the enjoyment of human rights by the citizens.

This article argues that these occurrences constitute extreme violent activities. They have real and direct impact on human rights and human security with devastating consequences for the enjoyment of the rights of victims to life, liberty and integrity, health, education, housing, water, sanitation, agriculture and food security. In addition, these extreme violent activities can destabilize governments, undermine civil society, jeopardize peace and security, and threaten social and economic development.

Having commenced with this introduction, the article follows with definition of key terms. It analyses the international and regional commitments, domestic policies and legal framework in place in Nigeria to address violent extremism as well as its root causes, the actors involved and measures for countering violent extremism.

The article further discusses the role of the National Human Rights Commission (NHRC)—Nigeria's national human rights institution charged with the mandate under the NHRC (Amendment) Act 2010 for the promotion and protection of the human rights of everyone as well NHRC activities in the prevention and countering of violent extremism.

[B] DEFINITION OF KEY TERMS

'Institutions' may be formally described in the forms of law, policy, or procedure or they may emerge informally as norms, standard operating procedures or habits. In another way, they are mechanisms for adjusting behaviour in a situation that requires coordination among two or more individuals or groups (Hurwicz 1989; Polski & Ostrom 1999). In the context of this article, institutional approaches to preventing and countering violence include but are not limited to the sensitization activities against violent extremism by civil society organizations, traditional institutions, faith-based organizations, ministries, departments and agencies of government whose sphere of influence or mandate have direct bearing or impact on countering violent extremism. However, this article dwells specifically on the activities of the NHRC deployed towards preventing and countering violent extremism (PCVE) in Nigeria.

Definitional perspectives to 'violent extremism'

There is no globally agreed definition of the term 'violent extremism'. Different countries have deployed different perspectives in defining the term. For instance, according to the Australian Government 'violent extremism is the belief and actions of some people who support or use violence to achieve ideological, religious or political goals' (Baker 2014-2015: 1). In the United States of America, the Federal Bureau of Investigation conceives violent extremism as encouraging, condoning, justifying or supporting the commission of violent acts to achieve political, ideological, religious, social or economic goals. Furthermore, for the United States Agency for International Development (USAID), violent extremism means calling, involving or getting ready or supporting ideologically motivated or justified violence to advance social economic and political objectives (USAID Policy 2011: 1). In the United Kingdom, the Government regards extremism as the vocal or active opposition to fundamental values including democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs as well as the call for death of members of the United Kingdom's armed forces at home and abroad (HM Government UK 2015).

'Violent extremism' under the Nigerian Policy Framework and National Action Plan for Promoting and Countering Violent Extremism 2017 is defined as the beliefs and actions of persons who support, promote or use ideologically motivated violence to achieve social-economic, political, ethnic and religious objectives. For this article, violent extremism connotes the deployment of violent, reckless and indiscriminate activities targeted

towards the destruction of human life and property to achieve ideological political, social and economic objectives or goals by a person or group of persons.

Preventing and countering violent extremism

PCVE is defined as policies and activities that aim to prevent and counter individuals and groups from committing or materially supporting ideologically motivated violence against innocent targets by discrediting the messages and propaganda of the extremists, disrupting their plans and activities, and challenging their actions. It also includes measures to engage and change the behaviour of violent extremist offenders and rehabilitate and reintegrate them back into society (Federal Government of Nigeria (FGN) Policy Framework and Action Plan (FGN Action Plan) 2017: 14). Countering violent extremism further includes proactive actions to counter efforts by violent extremists to radicalize, recruit and mobilize followers to violence and to address specific factors that facilitate violent extremist recruitment and radicalization to violence (Mandaville & Nozell 2017).

[C] LEGAL FRAMEWORK FOR PREVENTING AND COUNTERING VIOLENT EXTREMISM IN NIGERIA

Nigeria's policy and the legal framework for PCVE is anchored in the United Nations (UN) Security Council Resolutions. Resolution No 2178 2014 requires countries to address foreign terrorist fighters including the restriction of such persons from entering and transiting their territory; Resolution No 2199 2015 mandates states to ensure that their nationals and persons in their territory do not make economic resources available to ISIL etc; Resolution No 2250 2015 urges member states to increase representation of youths in decision-making at the local, national, regional and international level; and Resolution No 2349 2017 focuses on the threat of terrorism in the Lake Chad basin by Boko Haram and ISIL.

Furthermore, Nigeria's PCVE has recourse to the Report of the UN Secretary General on the Plan of Action to Prevent Violent Extremism (2015) that adumbrates not only on essential security-based counter-security measures, but also on systematic preventive steps to checkmate the conditions that make a person become radicalized and enlist into violent extremist organizations. Also, Nigeria leverages the United Nations Global Counter Terrorism Strategy 2006, which provides for a

common strategic and operational approach by all UN members to fight terrorism, as well as the African Union Plan of Action on the Prevention and Combating of Terrorism to bring up Nigeria's prevention and Policy Framework and National Action Plan for Promoting and Countering Violent Extremism 2017 (at 12).

Besides these international normative frameworks for PCVE adopted by Nigeria, there is other domestic legislation for the same purpose, as discussed in the immediately following sections of this article.

Constitution of the Federal Republic of Nigeria 1999 (As Amended)

Under the Constitution of the Federal Republic of Nigeria 1999, section 14(2)(b) obligates the Government to protect the lives of persons and guarantee their security and welfare. To achieve this purpose, government-established security and law enforcement agencies must discharge this onerous task. Although the Nigeria Police Force is the law enforcement institution provided under section 214 of the Constitution of the Federal Republic of Nigeria 1999 for the maintenance of law and order, other specific law enforcement agencies have been created by law to carry out particular obligations, namely: Department of State Service; Nigerian Armed Forces; Nigerian Immigration Service; Nigerian Customs Service; Nigeria Correctional Service; National Drug Law Enforcement Agency; and Nigeria Security and Civil Defence Corps. These agencies, either individually or jointly, are involved in guaranteeing the security of the citizenry.

Economic and Financial Crimes Commission (Establishment) Act 2004

This Act was established to checkmate economic and financial crimes. However, under section 15, the Act lays out 'offences in relation to terrorism'. But this is not exhaustive because this is the only section in the whole Act that deals with terrorism. The reason for this may be because, at the time of the enactment of the Act, the ugly incidence of terrorism 2004 was not as intense as it is at present in the country. Thus, the Act devotes only three subsections to offences against terrorism by providing that any person who wilfully collects money directly or indirectly with the intent that the money shall be used for terrorist activities commits an offence (section 15(1)). It also makes it an offence for any person to commit or attempt to commit a terrorist act or participate in the commission of a terrorist act (section 15(2)). Under section 15(3), the Act finally makes

it an offence for a person to make available funds, financial assets, economic resources or other related services to any person to commit or attempt to commit or participate in the commission of a terrorist act. Any person that commits any of these offences is liable on conviction to life imprisonment.

Terrorism (Prevention) (Amendment) Act 2013

The Terrorism (Prevention) (Amendment) Act 2013 (TPA Act) was enacted, essentially, to prevent and deal with incidents of terrorism in Nigeria. The Act has been established pursuant to section 4(2) of the Constitution of the Federal Republic of Nigeria 1999 that empowers the National Assembly to make laws for the peace, order and good government of Nigeria. Also, section 11 thereof provides that the National Assembly may make laws for the Federation or any part with respect to the maintenance and securing of public safety and public order and providing, maintaining and securing of supplies and services as may be designated by the National Assembly as essential supplies and services. As the name implies, the Act amends the 'Principal Act'—the Terrorism Prevention Act 2011. It prohibits all acts of terrorism (section 2(1)). The Terrorism Prevention Act 2011 provides for the seizure of terrorist cash (section 12) and dealing with financial assets of terrorist groups (section 15). Also, under the TPA Act 2013, any person or body corporate knowingly in or outside Nigeria that omits to do anything that is reasonably necessary to prevent terrorism commits an offence and is liable on conviction to a maximum of the death sentence (section 2(2)(a)-(h)) among other provisions.

Furthermore, under the Act in section 1A, the Office of the National Security Adviser (ONSA) is designated the coordinating office for the country's counter-terrorism efforts. The ONSA is also to provide support to all relevant security, intelligence and law enforcement agencies and military services to prevent and combat terrorism in Nigeria. The ONSA must also ensure the effective formulation and implementation of a comprehensive counter-terrorism strategy for the country as well as building capacity for the effective discharge of the functions of all relevant security, intelligence, law enforcement and military services under the Act or any other law on terrorism in Nigeria. The question that yearns for an answer is to what extent the ONSA has been able to successfully deliver on this mandate given the continuing spate of attacks by Boko Haram insurgents especially in the north-east part of the country that brings in its wake the deaths of many people and destruction of properties.

[D] POLICIES

Nigerian National Security Strategy 2014

The security challenges that have engulfed the country in the past few years have affected the economy and the security architecture etc. Although these trends might not be peculiar to Nigeria, the country has been exposed to incessant unrest in different aspects of national life. The National Counter Terrorism Centre (of the ONSA to the President in 2004 worked on the National Security Strategy which recognizes that, while the country must continue to focus on the persistent and evolving terrorist threats, it must at the same time address the full range of potentially catastrophic events, including man-made and natural disasters, due to their implications for national security. The purpose of Nigeria's National Security Strategy is to guide, organize and harmonize the nation's security policies and efforts (National Counter Terrorism Centre 2020).

The strategy provides a common framework on which the entire nation should focus its efforts to counter and prevent violent extremism. In order to properly articulate a government strategy for combating these security challenges, there is a need for a strategic plan in the form of a document to guide security agencies in the conception of ideas, formulation of policies and conduct of operations so that every single agency will be properly guided and seen to be working towards the same goal. In this way, they should be aware that individual agencies are part of a larger whole, which when properly coordinated would present a neat, coherent, orderly and complete system (National Counter Terrorism Centre 2020).

The Policy Framework and National Action Plan for Preventing and Countering Violent Extremism in Nigeria 2017

As the intensity of the security threats increased, so has government resolve and its attempts to prevent and counter violent extremism. This has brought the need to clearly articulate a broad policy framework to provide direction and coordination for the various initiatives that have been launched to tackle the menace of violent extremism in the country (FGN Action Plan 2017). This policy, under the strategic coordination of the ONSA, seeks to ensure that PCVE is institutionalized and mainstreamed into the mandates of ministries, departments and agencies of governments, including at state and local levels. It has four components, namely: strengthening institutions and coordination of

PCVE programming; strengthening the rule of law, access to justice and human rights approaches; engaging communities; and building resilience and integrating strategic communications in PCVE programming.

[E] ROOT CAUSES

The current situation faced by Nigerians is a direct result of violent disenchantment among citizens because of mass impoverishment brought about by bad governance. The insurgency and extremist behaviours in the country cannot only be attributed to Boko Haram alone. There is also the dichotomy based on the country's Christian-South and Muslim-North partisan politics that brings to the fore deep-rooted ethnic, linguistic and class conflicts that constitute some of the underlying drivers of violence (Muyiwa & Ayodamola 2021: 202). Undeniably, the most recent and widespread extremist group in Nigeria, Boko Haram, continues to grow and commit various terror acts, posing one of the main threats to national security. A self-declared ally of the Islamic State, this terrorist organization has been responsible for immense damage and suffering in Nigeria and surrounding countries, including Chad, Niger and Cameroon. Through mass abductions, assassinations and bombing campaigns, the group has created chaos and hindered political stability and development efforts in the region. Using an 'us versus them' narrative, it has spread the fundamentalist ideology of *jihad* in its effort to override the Nigerian state and turn it into a Taliban-like Sharia state. A combination of unfortunate national circumstances, weak state actors, fragile or weak civil society organizations and power vacuums have enabled the Boko Haram campaign to run rampant in certain parts of the country (Muyiwa & Ayodamola 2021: 202). The causes of radicalization and extremism are typically explained through a variety of perspectives that emphasize psychological, ideological, social, political, economic and other factors (Christmann 2012; Mohammed & Mullins 2015; Senzai 2015: 202).

Corruption is the culture of dishonesty and duplicity seen among national, political and economic elites, in which government positions are seen as a vehicle for obtaining economic benefits and increasing private wealth. This unjust situation, combined with a general lack of accountability, aggravates ordinary citizens, generates dissatisfaction and facilitates the recruitment efforts of extremists (Muyiwa & Ayodamola 2021: 203).

Poverty and unequal resource distribution affecting the majority of the population cause intense resentment towards the political *status quo*. Inefficiencies in the formal justice system and the usual delays in

court decisions exacerbate the sense of marginalization and exclusion of citizens, whose calls for equality remain unheard. Lack of formal education prevents citizens from gaining practical critical-thinking skills that would greatly aid in dissecting the issues of radicalization and violent extremism (World Leadership Alliance Club 2017; Muyiwa & Ayodamola 2021: 202).

For example, decades of mass impoverishment caused by bad governance in the northern region of the country have created frustrated and vulnerable population groups for Boko Haram's radicalization operations. The Nigerian military's indiscriminate use of force has only made things worse. This sense of social and economic injustice and a lack of political legitimacy is not a vague assumption. It seems that many Nigerians no longer believe in Nigeria's political, economic, or legal institutions. Their most common grievances included corruption among political and economic elites, economic disparity, barriers to social and educational opportunity, energy poverty, environmental destruction, human insecurity and social and economic injustice (Rosenberger 2021).

[F] ALLEGED GROUPS INVOLVED IN VIOLENT EXTREMISM IN NIGERIA

Indigenous People of Biafra

Biafra had existed as an independent multi-ethnic republic consisting of the Igbo, Ijaw, Efik and Ibibio peoples and was declared as a country by Lieutenant Colonel Odumegwu Ojukwu for three years, 1967 through 1970 (Britannica 2022). The FGN fought hard to preserve the Federal Republic of Nigeria. It did not like the idea of an independent state of Biafra. The result of tensions between Biafra and the FGN resulted in the Nigerian civil war for three years. There were an estimated 3.5 million deaths of civilians caused by starvation on the side of Biafra (Campbell 2017). In 1970, the Biafran forces surrendered through the armistice brokered by the defunct Organization for African Unity (Akuchu 1977). The Indigenous People of Biafra (IPOB) has since brought both local and international attention to the plight of the people of south-eastern parts of Nigeria whom they refer to as Biafrans that are still in Nigeria.

Nnamdi Kanu established IPOB after he initially gained fame from his broadcasts on Radio Biafra, which was established in 2009. This was a radio station from London that broadcast messages that called for 'freedom of Biafrans' and criticized corruption in the Government of Nigeria. Radio Biafra catalysed Kanu's rise to the public scene, as he

was previously an unknown figure. Kanu was arrested by the Nigerian security forces on 19 October 2015, on charges of 'sedition, ethnic incitement and treasonable felony' (Ibeanu & Ors 2016). There have been many other pro-Biafran groups that have come into existence. For instance, the Movement for the Actualization of the Sovereign State of Biafra began gaining attention in the early 2000s, along with the Biafra Zionist Movement which rose to the spotlight in 2012. The FGN alleges that IPOB uses extreme violence as a tool to force the Government to do its bidding.

Niger Delta Militia/Avengers

Nigeria is home to Africa's largest economy and one of the world's biggest populations. Notwithstanding frequent oil supply disruptions, Nigeria as a member of the Organization of Petroleum Exporting Countries was also the continent's top crude producer. The oil industry accounts for about 70 per cent of government revenue. After seven years of relative peace, one of the world's most oil-rich regions is under siege by militants. Although Nigeria is well-acquainted with violence on its southern shores, the group behind a new wave of attacks, the Niger Delta Avengers, is shrouded in mystery and sabotaging one of the world's biggest oil producers. The Niger Delta Avengers are in the business of destroying oil infrastructure—working in teams, carrying small arms and explosives, blowing up pipelines and sabotaging facilities, taking advantage of the Delta's complex, creek-filled terrain to stay one step ahead of the Nigerian soldiers chasing them. They are driven by economic and environmental grievances, and, until those issues are addressed, the Delta will remain in a cycle of sabotage, and Nigeria's oil output will remain under pressure (DiChristopher 2016).

Boko Haram

Boko Haram, officially known as *Jamā'at Ahl as-Sunnah lid-Da'wah wa'l-Jihād,* is a terrorist organization based in north-eastern Nigeria. It is also active in Chad, Niger and Northern Cameroon (United States Department of State 2014). In 2016, the group split, resulting in the emergence of a hostile faction known as the Islamic State's West Africa Province. Founded by Mohammed Yusuf in 2002, the group was led by Abubakar Shekau from 2009 until his death in 2021, although it splintered in 2015 into other groups after Yusuf's death. When the group was first formed, its main goal was to 'purify' Islam in northern Nigeria, believing *jihad* should be delayed until the group was strong enough to overthrow the Nigerian Government. The group formerly aligned itself with the Islamic

State of Iraq and the Levant. The group has been known for its brutality, and, since the insurgency started in 2009, Boko Haram has killed tens of thousands of people, in frequent attacks against the police, armed forces and civilians. It has displaced 2.3 million from their homes and during part of the mid-2010s was adjudged the world's deadliest terror group according to the Global Terrorism Index 2022. Boko Haram has contributed to regional food crises and famines (Matfess: 2017). Of the 2.3 million people displaced by the conflict since May 2013, at least 250,000 left Nigeria and fled to Cameroon, Chad or Niger (Nichols 2015). Boko Haram killed over 6,600 people in 2014 (Troup Buchanan 2015) The group has carried out mass abductions including the kidnapping of 276 schoolgirls in Chibok, Borno State, Nigeria, in April 2014. Corruption in the security services and human rights abuses committed by the group have hampered efforts to counter the extreme violent activities of Boko Haram (Glenn 2014).

Herders clashes/cattle rustling

According to a 2021 report by the Armed Conflict Location and Event Data Project, about 8,343 persons have died in the violence involving herders and farmers (Armed Conflict Location & Event Data Project 2021). What were once spontaneous attacks have become premeditated scorched-earth campaigns in which marauders often take villages by surprise at night. The FGN has taken welcome but insufficient steps to halt the killings. Its immediate priorities should be to deploy more security units to vulnerable areas; prosecute perpetrators of violence; disarm ethnic militias and local vigilantes; and begin executing long-term plans for comprehensive livestock sector reform.

The conflict is fundamentally a land-use contest between farmers and herders across the country's Middle Belt. It has taken on dangerous religious and ethnic dimensions because most of the herders are from the traditionally nomadic and Muslim Fulani who make up about 90 per cent of Nigeria's pastoralists, while most of the farmers are Christians of various ethnicities. Also, tens of thousands have been forcibly displaced, with properties, crops and livestock worth billions of naira destroyed (International Crisis Group 2017). The violence exacts a heavy burden on the military, police and other security services, distracting them from other important missions, such as countering the Boko Haram insurgency.

Banditry and kidnapping

In 2011 north-west Nigeria experienced a surge in bandit attacks between the nomadic Fulani herders and sedentary Hausa farming communities. Environmental and ecological changes caused land and water to become valuable commodities, sparking fierce, and often violent, competition over resources. Over the past decade banditry has evolved from a communal rivalry into lethal militia groups (Brenner 2021).

Banditry has become an appealing method of income in north-west Nigeria, where weak governance, youth unemployment, poverty and inequality have left people with depleted options for livelihood. Security services are often understaffed and lack the proper resources to effectively combat banditry. Vast areas of ungoverned and under-policed forests allow for easy concealment, and police and military forces have difficulty penetrating the rough terrain. In addition, under-policed borders have aided the proliferation of small arms and light weapons amongst bandit groups (Brenner 2021).

The rise of banditry and armed attacks has severely disrupted means of livelihood and the distribution of essential services for people across the north-west region. Since 2011, nearly 200,000 people have fled the violence of bandits and remain internally displaced within the north-west region. Approximately 77,000 Nigerians have fled to neighbouring countries, and humanitarian efforts to respond to emergencies in Nigeria as well as crises in neighbouring Sahel and Lake Chad are overstretched. The majority of those displaced do not receive organized assistance and are in desperate need of basic necessities (Brenner 2021).

Informal security actors such as vigilantes have played an increasing role in protecting their communities from bandit groups. Vigilante groups are often preferred over the police because official security agencies are often unavailable when rural communities most need them. Although, these informal security providers play essential roles in providing safety and security to their communities, many lack proper security training and often compete against each other. In addition, many vigilante groups have committed human rights abuses, armed robbery, corruption and extortion against bandits and members of the communities they vow to protect. Nigerian security forces have utilized a variety of tactics over the years to combat banditry. Initially, the FGN embraced an aggressive approach by deploying police and military operations to the states of Zamfara, Katsina, Kaduna, Niger and Sokoto. While the security response has pushed back attacks, destroyed hideouts, and killed and arrested hundreds of bandits, attacks have continued. In 2019, a peace deal was

secured between the armed bandits and the governors of Katsina, Sokoto and Zamfara (Brenner 2021).

The deal encompassed disarmament, the release of kidnapped civilians, and pardoning for the bandits. Although the number of fatalities decreased from August to November due to reconciliation initiatives, attacks picked up again in 2020. Though routinely denied, the Nigerian federal and state authorities have often paid ransoms to keep victims alive and secure their release. Mass kidnappings have become a major source of income for criminal and extremist groups because of the Nigerian authorities' willingness to pay ransoms and secure the release of victims, but it also provides an incentive for bandits to continue their malign activities (Brenner 2021).

Effective mechanisms must be implemented to mitigate the threat of banditry in Nigeria's north-west. A peacebuilding process that includes dialogue between security agencies and communities will be crucial to establishing effective policing, early warning and intelligence gathering. The FGN must increase funding for police and security forces to effectively oversee rural areas, control cross-border arms proliferation and strengthen intelligence capabilities. In addition, addressing the root problems that often drive people to violence is needed to stem the recruitment of youth into banditry activities (Brenner 2021).

[G] THE ROLE OF THE NATIONAL HUMAN RIGHTS COMMISSION IN PREVENTING AND COUNTERING VIOLENT EXTREMISM IN NIGERIA

The NHRC of Nigeria was established by the NHRC (Amendment) Act 2010 in line with Resolution 48/134 of the United Nations' General Assembly which enjoins all member states to establish independent national institutions for the promotion, protection and enforcement of human rights in line with the Paris Principles. The Commission serves as an extrajudicial mechanism for the enhancement of the respect for and enjoyment of human rights.

The Commission's approach to the promotion and protection of the human rights of everyone in Nigeria against violent extremism is in line with its mandate under the NHRC (Amendment) Act 2010 and in tandem with component 2 of the Strategic Implementation Matrix for the Prevention and Countering of Violent Extremism. The objective is to strengthen an accessible justice system and respect for human rights and

the rule of law with the expectation of improving the justice system and thereby reducing violations of human rights. The Commission's approach is twofold.

Civil/military dialogue

The NHRC, faced with numerous complaints against personnel of the Nigerian Military particularly over their conduct during internal security operations across the country, decided to engage the Nigerian military. This has led to instituting a regular Dialogue with the military since 2015.

The Dialogue is open for participation by the following ministries, departments and agencies, including Office of the Chief of Staff to the President; Office of the Chief of Staff to the Vice President; Chambers of the Hon Attorney-General of the Federation and Minister of Justice; Ministry of Defence; ONSA; Office of the Chief of Defence Staff; Chief of Army Staff; Chief of Air Staff; Chief of Naval Staff; the Nigeria Bar Association; and an umbrella body for non-governmental organizations, the Human Rights Agenda Network.

The NHRC/military/civil Dialogue revolves around four overarching goals. These goals are: improving awareness of respect for human rights by the military; prevention of human rights violations by the military, particularly during internal security operations; speedy investigation and resolution of allegations of human rights violations by the military and mainstreaming human rights in military operations, in particular military justice administration; and providing a sustainable platform for national and international human rights organizations to constructively interaction with the Nigerian military.

The key activities undertaken as a result of the NHRC/Nigerian military Dialogue since 2015 include:

a. training of armed forces personnel deployed to the north-eastern states for internal security operations;
b. training of military personnel from the rank of captain and its equivalent on legal aspects in counter-terrorism and counter insurgency operations facilitated by the Armed Forces Command and Staff College, Kaduna;
c. a joint fact-finding visit between NHRC and the Nigerian Army to Giwa Barracks and human rights training for Regimental Sergeant Majors, Maiduguri Borno;
d. participation in a Nigerian Air Force Refresher Seminar on Law of Armed Conflict/Humanitarian Law;

e. media chats with African Independent Television and Channels TV to win the support of the civil population in the war against terrorism;
f. interactive sessions with NGOs in Adamawa and Borno States in north-east Nigeria on the need to protect the internally displaced persons (IDPs) and put in place safety measures in the camps; and
g. consultation with the Hon Attorney-General of the Federation and Minister of Justice to ascertain the legal status of insurgents awaiting prosecution and work out modalities for speedy prosecution or referring such suspects to the de-radicalization programme of the ONSA as may be appropriate.

Other important outcomes of the NHRC/military Dialogue include:

◊ input to the National Counter Terrorism Strategy 2016;
◊ review of training curricula for the military and law enforcement agencies as well as operational doctrine to include modules and information on international human rights, humanitarian law and constitutional provisions on civilian protection during internal security operations;
◊ part of the Inter-Ministerial Review Committee (inaugurated 2 February 2017) to review the Armed Forces Act CAP A20 Laws of the Federation of Nigeria 2004—submitted to the then Hon Minister of Defence in 2018;
◊ part of the Inter-Ministerial Committee to review the Code of Conduct and Rules of Engagement for Military during internal security operations by the Chief of Defence Staff (April 2019);
◊ establishment of a Directorate of Civil–Military Affairs headed by two-star generals in the offices of the Chief of Defence Staff, Chief of Army Staff, Chief of Air Staff, Chief of Naval Staff and the establishment of a Civil–Military Relation (at the Ministry of Defence);
◊ appointment of a Human Rights Adviser in the Office of Chief of Defence Staff; establishment of a Human Rights Desk in the Army Headquarters, as well as at the various Divisions and Brigades of the Nigerian Army;
◊ setting-up of a Presidential Investigation Panel to Review Compliance of the Armed Forces with human rights obligations and rules of engagement;
◊ the Commission has, pursuant to the NHRC Act 2010 and the Standing Orders and Rules of Procedures of the Commission, authorized and held a number of inquiries to investigate grave allegations of violations of human rights against the FGN and the security agencies in parts of Nigeria. This exercise had the full

support of the FGN and the security agencies. Some of the inquiries include investigations into all alleged cases of violation of the rights of civilians by the military in the counter-insurgency activities of the military;

- ◊ impromptu and joint investigation visits to military detention facilities and barracks for on-the-spot investigation of allegations of violations within the facilities; and
- ◊ issuance of advisories to the military for prompt profiling of suspects and timely trial of all those with *prima facie* cases of violent extremism against them as well as recommendations for immediate release of those without any case against them. This has led to the release of many suspects by the military.

Human rights protection monitoring

As part of Nigeria's intervention strategy aimed at addressing challenges of human rights abuses by the armed forces especially as it concerns civilians in the insurgency area and IDPs, the NHRC with support from UN Office of the High Commissioner for Refugees in Nigeria intervened through human rights protection-monitoring activities in the north-east.

The protection-monitoring activities are aimed at identifying and strengthening community-based protection mechanisms in order to get a complete picture of protection issues with a view to urgently and effectively addressing human rights concerns of all the affected population. To do this, over 310 human rights monitors were engaged, trained and deployed to the north-east to monitor and report cases of human rights violations and violent extremist activities committed by law enforcement personnel, as well as others, against civilians particularly and the IDPs in the affected areas.

[H] CONFLICT RESOLUTION

Integrating Human rights in the Peacebuilding Response to the Farmers–Herders Crisis in Middle Belt Region

The violent clashes between farmers and herders in Nigeria particularly in the Middle Belt have led to a grave human rights and humanitarian crisis. The clashes have resulted in fatalities, injuries and displacements, as well as the destruction of livelihoods and properties. It has heightened religious and ethnic hostilities within the region. With a record of over 1800 fatalities within the first half of 2018 alone, the fatality rate relating

to farmer–herder clashes is higher than that attributed to the Boko Haram insurgency.

Thus, stakeholders, in order to respond to the humanitarian crisis and displacements caused by the clashes, commenced humanitarian actions to ameliorate the sufferings of displaced persons and to generally facilitate peacebuilding within the region. The NHRC in collaboration with the Office of the High Commissioner for Human Rights, considering gaps in the humanitarian response, conceived a project titled 'Integrating Human Rights in UN Peace-building Response to the Farmer–Herder Crisis in the Middle Belt' to run for a period of 18 months. The objectives of the project include:

a. to understand security trends and allow for a deeper understanding of the farmers–herders crisis, including root causes, and facilitating the design of targeted responses to address the crisis and attendant human rights violations;
b. to improve the capacity of key stakeholders, security and government actors on the application or integration of human rights norms in response to the crisis;
c. to enhance preventive capacities by promoting dialogue and proactive engagement between farmers and herders with the aim of building mutually beneficial economic relationships between farmers and herders;
d. to improve the effectiveness of the security response through strengthened human rights monitoring and accountability and providing an impartial and evidence-based narrative to defuse the politicized debate and help mobilize a broader response to the crisis; and
e. to provide opportunities for lessons learned and developing best practices for demonstrated conflict prevention programming that delivers peace dividends to affected populations in different contexts.

The project, which lasted for 18 months, focused on the 15 Local Government Areas (LGAs) of Benue State (Guma, Logo, Ukum, Katsina Ala, Gwer East, Gwer West, Makurdi, Buruku, Tarka, Otukpo, Agatu, Kwande, Ogbadibo, Oju and Gboko) with potential for scaling the project to other states.

Accordingly, field officers were assigned in each of the above LGAs and tasked with the responsibility of sending weekly reports on identified thematic areas and protection issues including the protection of children, women and persons with specific needs and access to justice.

A key component of the project is the Community Outreach Programme which involves awareness sessions and interfaith dialogue. The report shows that the monitors conducted a total of 6,942 Community Outreach Programmes, awareness sessions and interfaith dialogues for the promotion and protection of human rights in the affected areas. The project achieved the following:

a. community gatekeepers were empowered, trained and engaged in peacebuilding efforts and transformation in various communities;
b. the concept of early warning and response was institutionalized in the sense that timely information on conflicts is reported to law enforcement and security agencies; and
c. regular townhall meetings between stakeholders and the Commission/UNHCR were established.

[I] CONCLUSION

Countering violent extremism requires interventions to protect the security of people and assets. However, an integrated approach to PCVE needs to be taken forward beyond outright security concerns and needs to consider the conditions conducive to violent extremism. Bringing on board inclusive development and the promotion of tolerance and respect for diversity will go a long way towards mitigating the impacts of violent extremism on the enjoyment of human rights by the citizenry. The impacts include but are not limited to the violation and abuse of the citizen's human rights to life and integrity of the person, liberty, health, education, water, sanitation and hygiene and so forth and so on. All this should make us search committedly for fast and long-lasting solutions to bring it to an end.

There is no doubt that there is a relationship between poverty, corruption and bad governance and insurgency, violent extremism and other forms of criminal activities in Nigeria. This needs to be addressed urgently and decisively. There is mistrust and resentment in the activities and expertise of the actors who are saddled with the responsibilities of entrenching the tenets of democracy including provision of basic security. We need to address this too. The Government and all stakeholders should as a matter of necessity bring everyone to the table and assign roles in tackling and addressing extremism and security issues. This will assist in developing and reinforcing the confidence of the citizenry in the Government.

The ordinary Nigerian irrespective of age and affiliation must be given a reorientation that will instil values for human life, patriotism and dignity of labour. Also, through this process, Government should insist

on proper and quality education free from the bias of religion, community mobilization, participation and engagement as well as providing good governance to better the human condition in the country as a means of preventing and countering violent extremism.

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Pre-Action Protocols and Pre-Action Dispute Resolution Processes: Horizons Near and Far

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Abstract

This article explores the role of 'alternative' dispute resolution in the context of the publication of Part 1 of the Civil Justice Council (CJC) Review of Pre-Action Protocols, to which the author contributed. The relationship between the CJC Report and the Master of the Rolls' vision for the future of digital justice are considered as are the most salient details of the Report's proposals, not least mandating dispute resolution engagement, digitalizing portals to manage pre-action steps and gather rich data, and a process for raising alleged failures to comply. The article concludes with consideration of further improvements which the use of technology and rich data may bring, on the near, medium and far horizons.

Keywords: alternative dispute resolution; ADR; mediation; early neutral evaluation; ENE; negotiation; pre-action protocol; settlement; artificial intelligence; AI; funnel; digital pathfinder; deep learning; reinforcement; sanctions; non-compliance; rich data.

[A] ALTERNATIVE DISPUTE RESOLUTION AT A TIME OF CHANGE

This article returns to the topic of what has often been called alternative dispute resolution (ADR) and considers it in the specific context of the forthcoming reforms to pre-action protocols under the legal system in England and Wales. This is timely and relevant because at the time of writing and of publication of this Special ADR Section (Part II) of *Amicus Curiae* the intention of the Court Service, Ministry of Justice and, equally

significantly, the judiciary itself is to create a seismic shift in the role of ADR specifically in the pre-action period before any claim is issued and to ensure that pre-action protocols integrate with both ADR and with expanding use of computational and internet technology.

The context is a recent history of consideration of mandatory ADR, the Civil Justice Council (CJC) Report of 2021 (CJC 2021) reaching conclusions as to its permissibility in human rights terms, and the expected publication, almost simultaneous with this paper going to press, in early 2023, of the first Report of the CJC Working Group on pre-action protocols, of which this author was a member and also a member of the specific sub-group on digital technological aspects of the pre-action protocol process. Central to that Report is consideration of how the pre-action protocols can incentivize and give effect to the wider public policy push to implement effective ADR in the pre-issue period of a legal dispute.

Turning further ahead, this article engages in some forward thinking, considering possible future developments in the pre-action ADR process and how technology as part of that may assist in the pre-action period. Some of the observations here, especially the more forward-looking aspects in Part E of this paper, formed part of this author's address at the University of Leicester's conference on 2 December 2022, entitled '[A]DR & Neutral Evaluation in the Reformed Civil Justice System' at which the Master of the Rolls also spoke, and it will be noted that observations by the Master of the Rolls are quoted (from various publications) in this article, illustrating the significant degree of engagement taking place with the sitting senior courts judiciary on this topic.

For the purposes of this article and its discussion of how ADR out of court does, and will, more and more fully mesh with the pre-action protocol process, I will use the expression (with a deferential nod to the preference of the Master of the Rolls to drop the 'alternative') 'dispute resolution' henceforth, albeit that of course a trial is also a form of dispute resolution, to refer to any and all forms (lawful) of resolution of disputes of a generally legal nature, either wholly or partly without judicial or other adjudicative court intervention. (See also the reference to this author's own 'Historic Abuse Resolution Procedure' (below page 349 & n 2) as a species of hybrid dispute resolution proposal in court after issue, but with pre-action elements relating to packaged social and psychological support for a victim in that specific civil litigation field, laying groundwork for an investigative narrative judgment.)

[B] 'I WAS FRAMED': LOSING FACE AND MISSING YOUR DAY IN COURT—HOW WE FRAME 'JUSTICE'

We all know the image: the movie where the protagonist is in grave jeopardy. This may be (in a farce) a risk of some social disaster, or it may be (in a legal thriller) a risk of some enormity of injustice even unto death in Old Sparky or the Chamber. It often arises because someone has been 'framed'. Framing is the relatively well-known term for how the general perspective one applies to perception of a set of facts can affect what one decides.

As Tversky and Kahneman (1981) say:

> Explanations and predictions of people's choices, in everyday life as well as in the social sciences, are often founded on the assumption of human rationality … 'decision frame' [refers] to the decision-maker's conception of the acts, outcomes, and contingencies associated with a particular choice. The frame that a decision-maker adopts is controlled partly by the formulation of the problem and partly by the norms, habits, and personal characteristics of the decision-maker. It is often possible to frame a given decision problem in more than one way. Alternative frames for a decision problem may be compared to alternative perspectives on a visual scene.

It seems to this author that much of the way in which lawyers, policymakers and law-reformers think about the resolution of disputes outside of court is based on the dubious heuristic that rational people will tend to reduce the risk-and-cost penalty to themselves, and hence that if resolving a dispute without a court decision is likely to yield something better than taking the risk of a fallible judicial decision then it should, logically, be pursued. In other words an assumption of logical and self-interested behaviour. Such a heuristic is dubious because in the human world, a world beyond logic where other considerations come into play, things do not work quite like that, but lawyers and policymakers may well do so. A delightful metaphor was deployed by Mark Randolph (2010) in his discussion of why, especially among non-lawyers, the opportunity to resolve matters (in this instance by mediation) is not taken up as often as it might be:

> Imagine for a moment that mediation is a product—a stain remover—that can be purchased from any supermarket. Almost all who have used it praise it highly. … cheap, quick, is easy to use, and saves time, cost and energy. On the adjacent shelf is another stain remover called litigation. Almost all who have used it are highly critical of it: it frequently fails to deliver its promise of success: it is extremely costly, very slow, and takes up huge amounts of time, money and energy.

> Yet people queue up to purchase litigation, and leave mediation on the shelf.

The desire to choose the expensive, slow and unreliable product described by Randolph may be about individual notions of what justice actually is. Looked at through Goffman's lens, a 'framing' of the dispute resolution process can be seen as composed of social interaction activities (here, as part of the dispute and possible resolution) which are 'bounded by theoretical expectations of the participants' (Goffman 1974). See, for example, discussion in De Girolamo (2020). Litigants do not always act as if they are the rational beings we may hope them to be, bounded by self-interested and logical expectations,[1] and instead they confound us by pressing on to a losing fight or to a Pyrrhic victory. This may very well be because to them the dispute is 'framed', especially where lay people are concerned, in terms of binaries of 'winning' or 'losing' and also is mixed up with self-esteem, a loss of face (perhaps with a neighbour), or just plain anger driven by a sense of injustice. Once 'framed' in that way the idea that one might avoid going to court, that one might actually even *avoid issuing a claim in the first place*, becomes unappealing and may feel like a concession, and moreover one too great to bear.

Important, too, may be framing considerations arising from societal perceptions of 'justice' and its association with a judicial process of some sort leading to a *denouement*: an untying of the knot, an unravelling, or in plain terms 'a day in court'. De La Mare (2020a) has observed that 'The role and exclusivity of the physical courtroom has been embedded as a cardinal principle or assumption of English open justice' and it may be said that perhaps 'justice being seen to be done' is a part of the psyche of society to the extent that it becomes mixed up with what it means to 'be seen [by others] to win' for the sake of one's own personal sense of justice. A settlement out of court behind either physically or digitally 'closed doors' perhaps does not achieve that sense of justice for many.

Arguably therefore resolving a dispute by way of dispute resolution and never 'having your day in court' may be a disincentive to engage in dispute resolution, and perhaps all the more so where personal values and personalities are engaged such as in a neighbour dispute. Lindsey

[1] One may here point out that models of expectation of dispute resolution which assume rationality and self-interested logic lean implicitly in the direction explored for example by Habermas in relation to the notion of the 'ideal speech situation' applied to the context of dispute resolution where participants in a dispute have the goal of reaching mutual understanding, have equal chances of participating, are not externally constrained from evaluating argument, and aim towards agreement about what is right (Habermas 1979). The 'real world' is one in which the ideal conception of negotiation is, rather, as Habermas also puts it, at most 'a foil for setting off more glaringly the rather ambiguous developmental tendencies in modern societies' (Habermas 1989).

(2020) argues (in the context of the sense of justice in non-physical, remote, hearings, but it would seem applicable *a fortiori* where *no* hearing at all takes place):

> The 'majesty of the law', judicial prestige and authority, the value that court room spaces hold in our culture, and the ritualistic experience of going to court all play a part in this perception of 'having your day in court'. Further, the perceived coldness and distance of the virtual space from a human perspective is clear from reading the reflections of non-legal professionals … . Something material and experiential is patently missing from the virtual court room, not least the ability to pick up subtle cues of behaviour which extend beyond audio.

The need for the 'day in court', too, in other instances may be associated in some deeply personal cases with the sense of devaluation which a victim of an injustice may experience such as in civil damages cases arising from non-recent child sexual abuse. Those claims are typically brought against institutions such as schools or churches, where there is no doubt about the abuse. The issues revolve normally around the level of damages, yet the victim may well feel that the point of the case is not, in fact, damages but about the sense of justice arising when their personal life experience is heard, valued and considered. There is a desire that lessons be learned so that a life-experience greatly affected by child abuse is not wasted and the likelihood of others experiencing the same is reduced. Such a desire may well be shared by both victim and (for example) charity trustees and insurers on the defendant side. However, the law is about money, in what is after all a personal injury claim. The court trial process and the build up to it whether pre-action or after issue of claim necessarily focuses on 'how much' the harmful experience and its lifelong consequences 'are worth', and hence argument and evidence can and usually do concentrate on the extent to which a victim would have (for example) done well at school but for the abuse.

The process in turn leads to consideration (even though the claimant has long since reached adulthood) of his or her school reports, how well siblings or parents did, how well-behaved the child was before the abuse, the company they kept, and so on, under the umbrella of sympathy and acceptance that the victim is, for all that, truly a victim. Unsurprisingly the victim may feel re-abused whilst on their journey to the culmination at trial, and often one sees claimants who lose contact with lawyers and do not pursue claims to the end. In that 'frame' therefore justice is more about the victim perceiving that they are, and them *actually being*, heard, valued and learned from by society and not simply gaining a payment from an opponent to buy them off and cause their own lawyers to terminate a conditional fee agreement in the face of a reasonable (financial) offer.

This recurring pattern led the present author to propose and discuss a form of post-issue ADR[2] in such cases which aims to have an agreed investigative collaborative court process, and *not* to settle privately out of court for money, which can place the victim under the control of the insurer (as perceived proxy for the abuser, psychologically), in which the process is designed to have synergy with psychological support and as far as possible recovery of the victim and at the same time enable institutional learning from victims' life experiences (Independent Inquiry into Child Sexual Abuse (IICSA) 2016: 197; 2019: ch 7, para 68 'The initial stages of a claim'; and McCloud 2017).

We see therefore that dispute resolution is not as simple a concept as 'settlement out of court', and indeed one may also have dispute resolution *without* perceived justice. It is against that far from simple background that one turns to the near and far horizons of dispute resolution in the pre-action period.

[C] ADR PUBLIC POLICY: COMPULSION AND DIGITAL FUNNELLING

Having set out the above caveats as to what is meant by dispute resolution one turns to the current official vision of the near future for dispute resolution in the protocol period before litigation. The present direction of travel within the United Kingdom court system, and certainly the policy emphasis, is that it is desirable in the common, public interest and the context of limited resources in courts, where we should deal only with fights which need to be fought there, to seek to have disputes resolved before issue of any claim. Vos (2021: para 6) argues:

> I think that common law jurisdictions like England & Wales and Ireland need completely to re-think the way we resolve civil, a term I use to include family and tribunals disputes.

If it is desirable in many instances to get parties to settle out of court more often than they do at present in the pre-action period, then what is needed may be an effort to 're-frame' the idea of resolving the dispute in the pre-action period in the eyes of the protagonists so that it becomes more appealing or so that they are incentivized to do so.

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[2] The proposed 'Historic Abuse Resolution Procedure' in which the parties work towards a narrative, investigatory, judgment, rather than solely a damages decision or settlement, and the abuse survivor receives social and medical support to help them through the process from the outset funded by insurers for the institution irrespective of case outcome. The outputs would then feed usefully back into business regulation within institutions and authorities and make better use of the valuable experiences of abuse survivors in improving child protection.

Doing what the Master of the Rolls proposes is no mean feat in circumstances where the jurisdictional reach of the judge does not, for most purposes at least, subject to well-known exceptions such as pre-action disclosure, extend to the period before the court is seized with a claim. Perhaps a part of the process of 'encouraging' litigants to engage in ADR is the hoped-for change in perception of dispute resolution, abandoning the term 'alternative' so that it becomes expected and normal. Comments and speeches by the present Master of the Rolls Sir Geoffrey Vos are clear enough:

> ADR should no longer be viewed as 'alternative' but as an integral part of the dispute resolution process; that process should focus on 'resolution' rather than 'dispute' … it is exciting to see the HMCTS reform project delivering online justice. All kinds of dispute resolution interventions will be embedded within that online process (Courts and Tribunals Judiciary 2021).

Compulsion

Irrespective of terminology, the concept of mandatory dispute resolution in court claims is not a new one. The debate over compulsion has historically been dominated by the decision in *Halsey v Milton Keynes* 2004.[3] In *Halsey*, the Court of Appeal considered the role of mediation in the civil claims system and, in the process, implicitly contributed to a two-tracked debate as to whether it is *desirable* to have a civil system which mandates mediation, and whether, leaving aside considerations of desirability, such, if actually mandated by the courts, would be *legal* in terms of article 6 of the European Convention on Human Rights. In what has become something of a conceptual obstacle to mandatory ADR ever since, Dyson LJ, as he then was, said this in *Halsey* at paragraph 9 when considering legality:

> to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived … but such waiver should be subjected to 'particularly careful review' …: see Deweer v Belgium (1980) 2 EHRR 439, para 49. … it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6. Even if … the court does have jurisdiction … we find it difficult to conceive of circumstances in which it would be appropriate to exercise it.

[3] See also precursor cases *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 WLR 803; *Dunnett v Railtrack plc* [2002] EWCA Civ 303, [2002] 1 WLR 2434; *Hurst v Leeming* [2001] EWHC 1051 (Ch), [2003] 1 Lloyds Rep 379.

Still further at paragraph 10 the court went so far as to describe compulsion of ADR as 'wrong'—and hence also undesirable.

> if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.

The court set out guidelines to be applied when considering whether the unsuccessful party in a claim had acted unreasonably (and hence faced costs risks) in unreasonably refusing mediation (summarized from *PGF II SA v OMFS Company 1 Ltd* 2013, per Briggs LJ at 22):

a. the nature of the dispute;
b. the merits of the case;
c. the extent to which other settlement methods have been attempted;
d. whether the costs of the ADR would be disproportionately high;
e. whether any delay in setting up and attending the ADR would have been prejudicial;
f. whether the ADR had any reasonable prospect of success.

Given its quite restrictive approach to even the limited penalty of imposing costs orders where a party has not cooperated in seeking out-of-court resolution, and its outright rejection of compelling mediation, *Halsey* was, unsurprisingly, described as 'the judicial anomaly threatening the UK mediation system' (Peschl 2022).

Rowing back from *Halsey*

Case law subsequent to *Halsey* has sought to define what is considered to be a 'reasonable' engagement in mediation or an 'unreasonable' refusal to engage or cooperate. In *PGF v OMFS Company 1 Ltd*[4] the Court of Appeal held that silence in response to an invitation to mediate amounted to an unreasonable refusal because parties were expected to engage with a serious invitation to participate in ADR:

> The constraints which now affect the provision of state resources for the conduct of civil litigation (and which appear likely to do so for the foreseeable future) call for an ever-increasing focus upon means of ensuring that court time, both for trial and for case management, is proportionately directed towards those disputes which really need it, with an ever-increasing responsibility thrown upon the parties to civil litigation to engage in ADR … Just as it risks a waste of the court's resources to have to try a case which could have been justly settled, earlier and at a fraction of the cost by ADR, so it is a waste of its resources to have to manage the parties towards ADR …, where they

[4] And see *Burchell v Bullard* 2005: para 43; *Rolf v De Guerin* 2011: para 46.

> could and should have engaged with each other in considering its suitability, without the need for the court's active intervention (*PGF II SA v OMFS Company 1 Ltd* 2013: para 27 per Briggs LJ).

Judicial 'chipping away' of *Halsey* continued with, for example, Ward LJ's query in *Wright v Michael Wright (Supplies) Ltd* 2013 as to whether the observations relating to mandatory mediation in *Halsey* were *obiter*. Distinctions began to be drawn more openly as to the difference between ordering a party to engage in ADR (in effect, by implication implying a threat of penal notice if they did not do so) on the one hand and ordering parties to make reasonable efforts to do so: *Uren v Corporate Leisure (UK) Ltd* 2011; *Mann v Mann* 2014; and notably *Bradley v Heslin* 2014 at para 24 where Norris J held that:

> I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice.

A decisive turn to mandating pre-issue dispute resolution in the protocol period

With such strong observations as those in *Halsey*, one might have anticipated that the door was closed to notions of compelling dispute resolution, but the recent period has seen a decisive turn away from *Halsey*'s approach to article 6. It led to the long-anticipated CJC Report into pre-action protocols, which also engages with digitalization of ADR.[5]

The ultimate departure from *Halsey* originated in part in reliance on European Court of Justice (ECJ) case law. In *Alassini v Telecom Italia SpA* 2010 the ECJ held that an obligation in law to engage in ADR before resorting to litigating was compatible with article 6. Thereafter in *Menini v Banco Popolare Società Cooperativ* 2018 the ECJ considered what were the necessary features of a system requiring ADR whilst remaining compatible with article 6:

> 60. … the ADR procedure must be accessible online and offline to both parties, irrespective of where they are.
>
> 61. Accordingly, the requirement for a mediation procedure as a condition for the admissibility of proceedings before the courts may prove compatible with the principle of effective judicial protection,

[5] The author was on the relevant Working Group and chaired the digital sub-group within that group. However, observations here, insofar as they may (especially in Part E) go beyond the Report, are wholly the author's own views and should not be attributed to the CJC or the Working Group unless they are quoted from the Report.

> provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs—or gives rise to very low costs—for the parties, and only if electronic means are not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.

In retrospect perhaps the impending decisive shift away from *Halsey* in England and Wales, at least in terms of wider dispute resolution processes, was seismically signalled by rumblings in the form of an amendment to the Civil Procedure Rules (CPR) in 2015,[6] by which provision was added ('for the avoidance of doubt', according to the Explanatory Notes to the Statutory Instrument, signalling the draughtsperson's sense of humour in view of the debates over mandatory ADR which had been in play for years) by which CPR rule 3.1(2)(m)—the court's power to order any party to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective—was augmented with the express statement 'including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case'.

The amendment was considered by the Court of Appeal in *Lomax v Lomax* 2019, and *Halsey* was distinguished, the court noting at 26 that a compulsory early neutral evaluation (ENE) was not an unacceptable constraint on article 6 rights. In *Telecom Centre (UK) v Thomas Sanderson Ltd* 2020 the present author judicially set out a draft template order for directing non-binding ENE, in mandatory terms under rule 3.1(1)(m) in what is now the King's Bench Division (see eg McCloud 2020 or Guise 2022). In the English and Common law field ENE is a species of judge-led dispute resolution which generally adheres (as can be seen from the template order in *Telecom Centre*) to the principle that a judge who has been involved in that process then does *not* act as the trial judge later. Other judicial approaches are, however, possible and can be effective, albeit challenging in European terms in relation to article 6 of the Convention. Whilst outside the scope of this paper, it is to be noted that the Chinese legal system adopts a process where the judge acts as mediator but may then go on to give an adjudication if the ideal of a settlement is not reached (for a discussion, see Waye & Xiong 2011).

The CJC issued its report *Compulsory ADR* in June 2021 and concluded that, subject to considerations of the sort canvassed in *Menini*, mandating ADR in litigation was capable of being compatible with the Convention.

6 Civil Procedure (Amendment No 4) Rules 2015, SI 2015/1569.

One route, and the route which we shall turn next to consider because of its direct relevance to the pre-action protocol period, was summarized thus: 'Compulsion can equally well be achieved by simply mandating participation in ADR as an automatic requirement for commencing or proceeding with litigation' (CJC 2021). The Master of the Rolls following the 2021 report signalled a shift (in terms which echo, in part, the guidance in *Menini*, above) towards positively requiring parties to engage, meaningfully, in ADR:

> In my view, the direction of travel ought to be clear. It should be possible … to direct a party to attempt to reach a consensual resolution through mediated interventions. The mandated process should not, of course, be costly or cause delay in judicial resolution. But none of that should mean that parties can, as they sometimes do, resolutely refuse to consider mediation. Being entitled to one's day in court is not the same thing as being entitled to turn down appropriate and proportionate attempts to reach consensual solutions (Vos 2021: para 38).

Vos (2022a) describes near-horizon plans in terms of implementing a digital portal system with what are termed as three 'funnel' layers as depicted in Figure 1.

The immediate interface for disputants will be a website and/or application where any party contemplating litigation can find details of

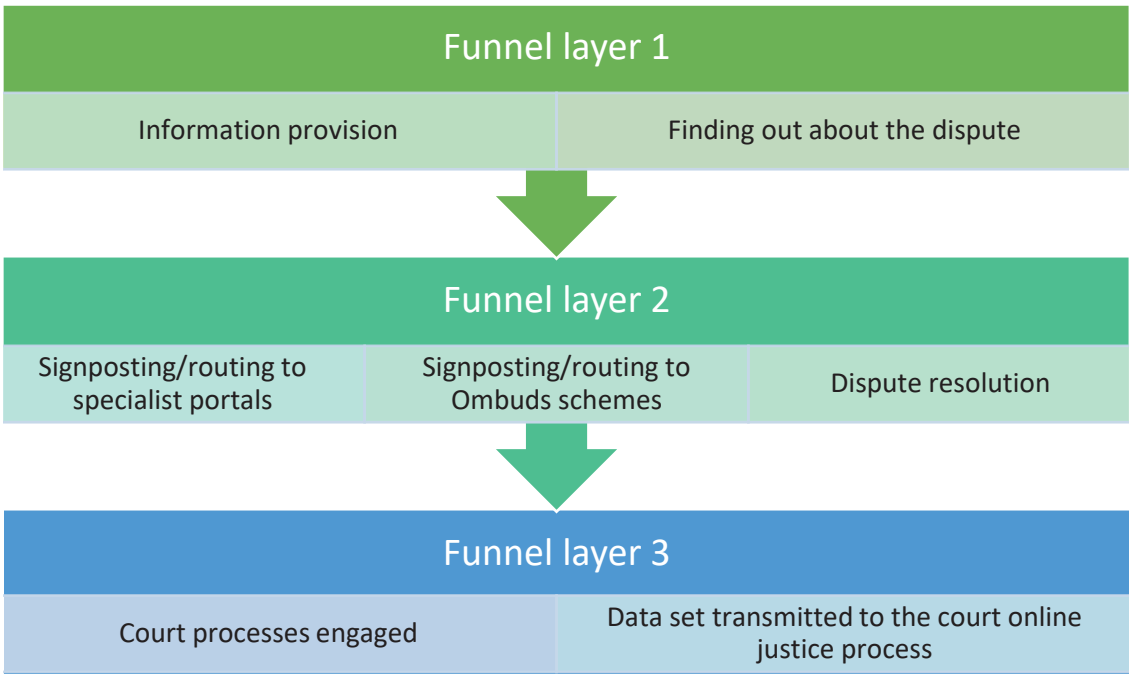

Figure 1: The three 'funnel' layers for implementing a digital portal

how to pursue claims and a system of signposting or diverting users to the relevant specialist digital portals, or in some instances ombudsperson services or tribunals. At the second stage the focus is on ensuring that a dataset is gathered about the dispute and that a process of dispute resolution is facilitated. The third layer of the funnel is the automatic transmission of data about the dispute from the previous layers into the court digital justice process.

The funnels, or rather the second-stage portals to which potential litigants (at this stage perhaps best called 'disputants') effectively digitalize and operationalize the required steps and procedures in the pre-action period, amount to the digital incorporation of the pre-action protocols. As Vos (2022b) puts it:

> If the portals, which effectively replace the pre-action protocols introduced after the Woolf reforms in 1999, cannot resolve the dispute, the idea is that a single data set created within the portal would be transferred by an Application Programming Interface (API) directly into the digital court process (para 11).

However, foreshadowing the conclusions of the 2023 CJC Report into pre-action protocols, due at time of going to press, it is plain that the intention is not only to operationalize pre-action requirements and to gather data but also that built into the system at the pre-action portal stage is a *requirement* to attempt to resolve issues consensually (with the author's own emphasis in the quotation): 'The objective of the pre-action portal is quickly to identify the issues that truly divide the parties. Once those issues are identified, attempts *must* be made to resolve them consensually' (Vos 2022c).

We shall return later to look ahead to the possibilities which arise once one posits the full digitalization of the pre-action process and the collection of data, in Part E of this paper where the author expands upon outline ideas set out to the 2022 conference '[A]DR & Neutral Evaluation in the Reformed Civil Justice System' held as this paper was going to press, and which go beyond the proposals in the 2023 CJC first paper on protocols but which flow naturally from it and provide a solid base for future research and the enhancement of broadly civil justice (including family law property cases).

[D] THE 2023 CJC REPORT ON PRE-ACTION PROTOCOLS: THE RELATIONSHIP BETWEEN PROTOCOLS AND DISPUTE RESOLUTION

The CJC Final Report (Part 1) with which this paper was timed to coincide is an understated piece of work, based as such things are in the language of how respondents replied and what the views of the Working Group were. Yet careful consideration of the document reveals a high degree of underpinning for the aims and objectives of the funnel approach proposed by the Master of the Rolls in the various quotations cited here. This section will turn to consider the key elements which impact on dispute resolution. The report and its annexed draft Practice Direction (PD) and draft Notice of Failure to Comply are, it must be stressed, recommendations by the CJC Working Group and will only become part of the CPR if adopted by the relevant rule, PD and Protocol-making bodies (and even then may be changed when and if implemented), but the report marks a substantial turning point for the likely future role of dispute resolution.

The new explicit obligation to comply with protocols

The approach of the new draft General Pre-Action Protocol (PD)[7] and report is much more clearly mandatory than hitherto. Out goes the original text: 'Pre-action protocols explain the conduct and set out the steps the court would normally expect parties to take' and in comes, at paragraph 1.1, instead the mandating of compliance so that failure would without doubt be a breach: 'The pre-action protocols set out the steps the parties must take before starting proceedings. The parties must not start court proceedings without first complying with a protocol. Compliance with a protocol is mandatory except in urgent cases.' In, also, comes a mandatory duty not only to cooperate with each other but, expressly, a duty of honesty. Paragraph 2.1 of the draft states that 'Co-operating with each other means that the parties must be honest with each other at all times. Providing false information without an honest belief in its truth can lead to severe sanctions, including criminal sanctions.'

The three steps

The influence, albeit not expressed, of the Master of the Rolls' thinking in terms of the three-stage funnel discussed above appears early in the proposals where we see the introduction at paragraph 4.1 of a now

[7] The report annexes a draft which is entitled Draft General Pre-Action Protocol (Practice Direction) and Joint Stocktake Template.

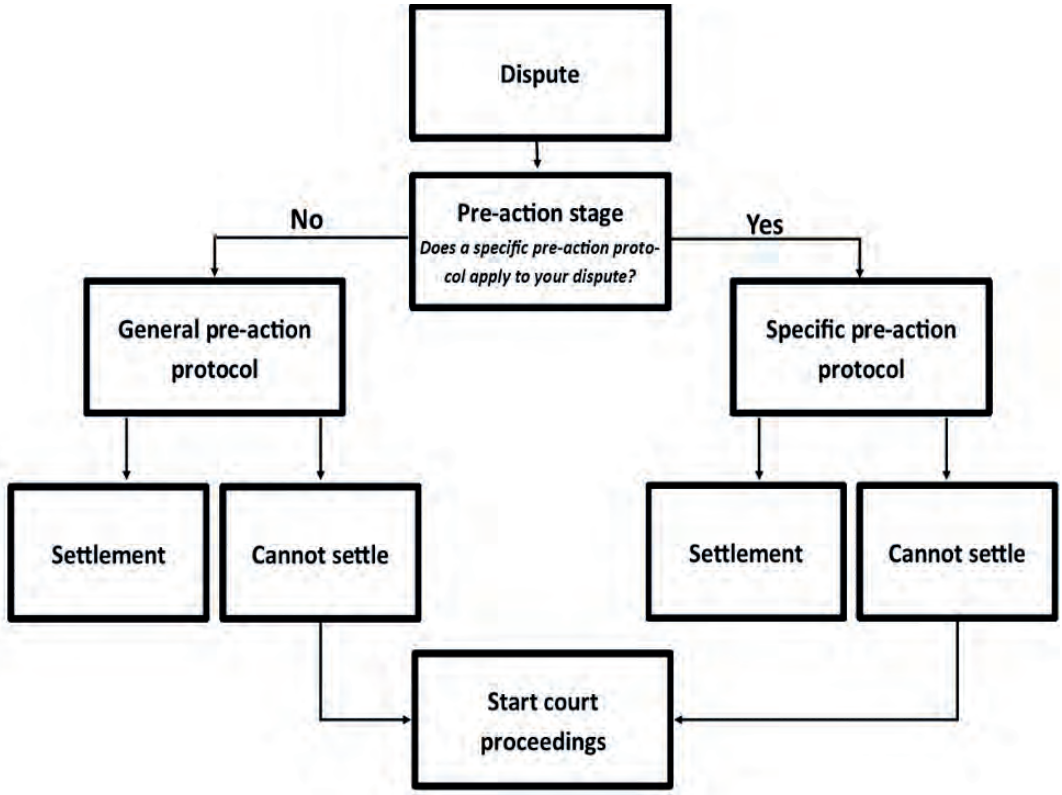

Figure 2: Diagram from appendix 2 to the CJC Report 2023

explicitly mandatory sequential three-step procedure to be adopted in all cases when following a Protocol, namely: (i) early exchange of relevant information by all parties; (ii) engaging in a dispute resolution process; and (iii) completing a joint stocktake report prior to issue. This does not differ greatly from the 'advised' approach in the original PD on Pre-Action Conduct and Protocols but is clarified by being more explicit about the sequence, and that clarity will be of use when courts need to consider whether any step has not been sufficiently complied with, especially after service of a Notice of Breach, which is discussed below. The flowchart of pre-action steps is set out in Figure 2 and is a copy of a figure from the draft PD annexed to the CJC Report.

The express obligation to engage in dispute resolution

The culmination of the *Halsey* debate and the gradually waning influence of the decision appears at paragraph 1.5 of the draft PD: 'By engaging with the protocols, the parties must try to resolve their dispute fairly, within a reasonable time, and at proportionate cost.' And (at para 4.11): 'The parties to any dispute are therefore required to engage in a dispute resolution process with each other prior to any proceedings being issued.'

Non-compliance with protocols: an entirely new notice procedure

It may be recalled by those familiar with it that in the sphere of landlord and tenant work, under the Law of Property Act 1925, section 146, where a tenant is believed to be in breach of obligations under the lease formal notice to remedy the breach can be given by serving what is conventionally referred to as a 'section 146 notice'. The proposed PD creates something which may be seen as the pre-action distant cousin of such notices, adapted to the context not of breaches of leases but of breaches of the requirements of a pre-action protocol or the PD.

Unlike the section 146 notice in landlord and tenant law, the procedure is not mandatory, but the framework set out is likely to offer a means to ensure *that no party can be in any doubt that it is being alleged that there is non-compliance*, thus mitigating against the risk of debate over whether, when a court is later asked to impose sanctions, there has been an 'ambush'. The draft sets out not only a procedure which can be followed in order to make a formal allegation of breach but also provides a standard form notice which may be used.

Arguably the creation of this new very simple procedure will assist non-lawyer litigants in person in the sense that, if they receive a notice alleging a breach of the protocol, they will be aware in plain terms of the allegation of breach, what the other side believes they should do to remedy it, and of the potential consequences if a breach is later found to have been committed. Furthermore if one turns one's mind to the reality that at present it is not commonplace for breaches of protocols to be penalized, the use of the formal notice of non-compliance process in proper form will serve as encouragement to courts to give more aggressive consideration to sanctions where a breach is found and where a party was duly served with the standard form Notice of Failure to Comply and then did not take steps to remedy a breach.

Notably the draft proposed standard Notice of Failure to Comply sets out clearly the significance of what it contains and sets out the core duties of litigants in the pre-action period so that the materials which the party serving it then sets out by way of what failure to comply is alleged and how it should be remedied are invariably set in the context of those duties: no litigant will in future be able to claim they did not understand what is required in the pre-action period. The Notes reiterate that 'parties must comply with all procedural steps under the protocol' and give notice that the party served *must* complete any required procedural steps to remedy the failure within a specified period of time stated in the form

and which at present is proposed in the report to be seven days. It warns the defaulting party that the Notice can be drawn to the attention of the court and 'when' (not if) the court considers imposing sanctions for a failure. It stresses that, whilst use of the notice is not mandatory, if it is used then it will be a factor which the court takes into account in relation to whether to impose sanctions. In addition to the Notice itself the draft PD specifies at paragraph 5.1 that, whilst in general 'without prejudice' communications cannot be considered by a court, the court can be shown any communications between the parties that suggest or invite steps by way of dispute resolution, or which respond to or comment upon such a suggestion or invitation (for example a reply from a party refusing to remedy a breach or conversely a constructive response which proposes some other way to progress matters than that set out in the Notice of Failure to Comply). The court can also look at evidence of the fact of any meetings or dispute resolution communications and details of who attended.

In the concluding section of this article the author considers the potential future for how digitalization of the portals process may assist dispute resolution via heuristics, rich data, artificial intelligence (AI) and reinforcement learning. However, in passing, a topic outside the scope of this article which might be considered in future is whether AI systems may be capable of 'flagging' cases where there may have been failures to comply, such as unresolved Notices of Failure, and drawing these to the attention of the first judge seized of the case if the matter goes to court. If flagged sufficiently early, such as at the time an attempt is made to issue a claim, the judge could in principle be given powers to impose increased issue fees, veto the grant of a fee exemption, or impose a requirement on a defendant to pay the issue fee for the claimant if the defendant has acted unreasonably, thus offering the parties a last incentive to stay out of court and back down before committing to a potential use of court resources on a greater level.

[E] CONCLUDING REMARKS: THE DIGITAL FUTURE, RICH DATA AND THE PRE-ACTION PROCESS IN AN AI WORLD

Digital systems can offer important opportunities for the collection of rich datasets relating to disputes and the pre-action period:

> Another idea that the WG considered was whether portals could be used to collect data on settlement proposals for use by researchers after the case was finally resolved. Ultimately, a policy decision needs

> to be made as to how 'visible' to others the process of negotiation ought to be: it may be desirable that the history of the negotiation be available after the event so that processes of settlement and settlement rate data can facilitate research and better understanding of those processes in the future. This data collection would, of course, require party consent but where negotiations are uploaded to portals via any of the options outlined above, the possibility of making this information available to researchers after the parties have resolved their dispute, is worth exploring further (CJC Report 2023: para 2.19).

This 'rich data' could therefore even include material on how and in what terms settlements are reached and how they relate to the issues in the dispute, provided safeguards in terms of non-identifiability of the data and protections via encryption or blockchain approaches are in place. We have seen in the foregoing discussion that the current policy vision for creating digital portals will handle much of the compliance and data provision required in the pre-action protocol period. The collection of rich data and not merely statistics would afford, for what may be the first time on any large-scale systematic basis, for academics and rule- or law-makers, the opportunity to do at least three things:

(i) to research settlement processes and strategies and better understand what it is that can serve as an obstacle to settlement;

(ii) if a case could be followed from start to conclusion (including, if it fails to settle, through to trial seamlessly from portal stage to judgment) then, if combined with the collection of exit survey data obtained from parties as to their experience of the justice process, we may start to improve our understanding of what it is that court users experience as a genuine sense of justice and satisfaction or, indeed, what can lead to a lack of satisfaction and a sense of justice not being done in any given case; and

(iii) the collection of rich data could feed into exciting possibilities for the future of AI and digitally enhanced dispute resolution, based on truly evidence-based information.

This article will conclude by focusing just on the third of the above possibilities and explore some speculative themes for the medium-distance and further horizon of civil justice which the author outlined in her address at Leicester University in December 2022 alluded to above.

The basic digital pathfinder concept

We have seen that mandatory requirements to engage in dispute resolution are on the immediate horizon. From the author's perspective, this is a welcome and long-awaited development and crucial to restoring

the civil and family justice systems to a greater degree of efficiency and the targeting of resources where they are most needed.

However, one must sound a note of, if not caution, then at least realism: if efforts to engage meaningfully in dispute resolution are to be mandatory then consider a statistic sourced from a briefing note released by the House of Commons Library in 2021 (Sturge 2021): in a typical pre-Covid year the courts as a whole received 4.2 million cases and more than half were civil in nature (ie around 2.1 million or more claims). Most claims settle, and only around 19 per cent are defended (Sturge 2021: 8). Even given the 'good news' that most claims settle even without a current mandatory requirement for dispute resolution, 19 per cent of 2.1 million cases is self-evidently still a substantial figure. One can anticipate a large demand for forms of assisted dispute resolution such as mediation or ENE by 'neutrals' in the pre-action period. That in turn points to the potential for resource shortages in terms of people such as mediators, and it also demands that access to such people is streamlined via the digital portals.

The question of ease of access to mediators and other dispute resolution professionals or volunteers is perhaps the easier challenge to address: a well-designed portal system could and, in the author's view, should routinely be a basic form of what the present author terms a 'digital pathfinder' which provides to the parties specific links to sources of help in resolving disputes, tailored using heuristics to the value of the dispute, the parties' locations (where face-to-face processes are considered) and the subject matter of the dispute. One can realistically hope that the systems will propose lists of registered professionals and costs and (making more generous assumptions about system design) also hope that it may be possible for parties to book online dispute resolution or mediation immediately, online, via APIs (application programming interfaces) which interface with the work diaries of dispute resolution professionals so as to know their availability and create immediate bookings and pay any booking fees online. This could, it is suggested, greatly improve take-up of resolution processes by removing practical obstacles in the way of disputing parties: if the metaphorical horse is led to water, it may very well drink, and a good way to ensure that it goes thirsty is to fail to lead it to the water, or fail to make the water available at all.

Keeping costs of resolution proportionate to claim value and complexity poses challenges given the modest value of many claims. A potential solution, firstly, would be to ensure the portal system lists services intelligently so that it does not provide high-cost links but draws instead

on its own prior knowledge of fee ranges stated by specific service providers suitable for the dispute in hand. An elaboration which the author favours and which it is submitted would help to reduce costs pressure and potential excess profit-making would be to introduce an automated quoting service whereby parties could propose a maximum cost and the system could then actively seek responses from service providers, or where the case is automatically 'proposed' to a range of providers who then in effect compete in the digital marketplace by proposing their fees digitally. The model is a simple one and very much like, for example, eBay or indeed most forms of online shopping where one may 'shop around' to find the same product offered at lower cost by particular sellers.

The advanced digital pathfinder concept

What, though, of the challenge in terms of the availability of sufficient numbers of providers in the first place, to engage with the new demands which will arise for dispute resolution? The obvious response is that there will need to be enhancement of the numbers of people or organizations offering dispute resolution services. That may take much time to develop or prove unachievable: and one must consider alternatives.

The concept of the 'advanced' digital pathfinder as elaborated here within a civil or family justice system could, it is proposed, go much further than providing ease of access and competitive, intelligent pricing and service selection. The author's experience of AI and what has become known as 'deep learning'—hailing back to proof-of-concept work in the 1980s, often then referred to as distributed learning when it takes data-driven forms of the general 'neural net' type—suggests that the following propositions may be tenable (on technical foundations, see eg Rumelhart & McClelland & Ors' 1987 classic exposition):

(i) deep, data-driven learning can thrive if it is fed rich data of the sort which may now become available from the digital justice system; and

(ii) the law and procedure of dispute resolution, and indeed the parameters of a dispute and the parties' desired objectives, can serve as forms of constraining heuristics to deep learning systems targeted at that rich data.

The above two points raise the possibility of creating AI-based systems which learn actively from the datasets of real-world disputes, and settlement or trial outcomes, and which progressively improve the realism with which a technological dispute pathfinder might be able to prompt parties towards not only types of resolution process suitable for

their dispute but also, potentially, to begin to offer hints as to possible resolution terms. One could envisage a system which says, based on its understanding of a particular dispute:

> 'Dear Mrs Smith, and Generic Kitchens Limited: The Digital Pathfinder, given what you have provided about this dispute, has researched its database of disputes nationally which seem similar to this one. In more than 90% of cases relating to kitchen-fitting disputes under £10,000 where the parties disagreed about whether the work was of suitable quality, and where the customer was willing to ask for repairs or a discount, the parties agreed to an average of a 15% price reduction, and in more than half of cases which settled, an element of repairing the disputed defects was agreed, sometimes with a price reduction as well. You may wish to discuss something along those lines.'

And note that feedback could be sought automatically about whether it was a helpful suggestion or not, as part of learning reinforcement by the system in how it interprets dispute documents.

As the pathfinder system envisaged here gains more and more rich data, it may on the further horizon become technically possible, *at least in specific categories* of well-defined dispute such as family finance division on divorce, to create systems which can be more specific in terms of proposing a range of tailored proposed outcomes about which the parties may want to discuss, going beyond the general and condescending into ranges of (say) settlement values based on how similar cases were resolved. Furthermore, by having systems which follow a case through to judgment after trial, for non-settled outcomes, the system could begin to learn from its accuracy or inaccuracy in 'predicting' outcomes.

In the still more far future but not in the realms of fantasy, again likely constrained to specific case categories, *if and only if such systems demonstrated an acceptable degree of reliability in predicting outcomes*, it could be deemed unreasonable for a party to fail to accept the proposal, and possibly a concept of 'proceeding at your own risk on costs' could be introduced at that point if a party or parties unreasonably carry on to trial and the outcome is within a range suggested by the digital pathfinder system much as one might in the event of a part 36 offer.

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Mediation and Cultural Change

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Abstract

In this article I describe the most significant legislative developments in England and Wales in relation to mediation over the last 25 years. Similar patterns emerge from a number of consultations and reforms across several different sectors of mediation provision. One of the most notable is the perception of mediation as a means by which to achieve a culture change in the way that disputes are handled. Recent legislation affecting several fields of delivery has attempted to position mediation as the default process which encourages informality and individual responsibility, with adjudication as the exception when all else fails. At the same time, these efforts cannot be divorced from the clear motivation to reduce time, costs and pressure generally on the civil justice system. In either case, these aspirations have not been fully realized. The take-up of mediation has been relatively low and has led to recurring debates about whether it should be mandatory. Conflicting interests and expectations have led to a lack of clarity and have resulted in a struggle to establish a mediation provision which meets the needs of individuals in dispute as well as those of the civil justice system, public sector funders and the Government. This raises considerable challenges for the mediation community.

Keywords: mediation; voluntariness; culture change; mandatory mediation; civil justice; legislation.

> What we are ultimately aiming for is a shift from a culture where we look to the law to resolve conflicts to one where we take more responsibility for addressing them ourselves in the first instance (MOJ 2011: 6).

[A] THE INFLUENCE OF LEGISLATION

Ironically, while recent policy developments call on mediation as a means by which to achieve culture change, the process itself has deep historical roots that pre-date the justice system. Roebuck's extensive work demonstrates the use of mediation and arbitration as two conceptually distinct but often related processes with which people have been very familiar from Ancient Greece to the present day. His study of Greek dispute resolution concludes:

> Everywhere and at all times, disputing parties considered mediation-arbitration to be a natural, perhaps the most natural, method of resolving the differences they could not settle themselves, though they sometimes resorted to litigation … when they did not get their own way (Roebuck 2000: 308).

It might therefore be more accurate to describe the efforts detailed in this article as an attempt to return to more traditional ways of resolving differences to the mutual benefit and satisfaction of parties in disagreement. However, it would be simplistic to assume that the aspiration for culture change exists in isolation without other drivers at work, many of which have an impact on some of the key principles of mediation practice. While usage has been low and lack of awareness high, the arguments for compulsion have had an immediate appeal for policy-makers. Concerns about reducing cost and saving time are prevalent in many fields of mediation delivery, often carrying a risk that these become prioritized over mediation's more ideological aims of conflict resolution, relationship repair and informal justice (Allport 2016). However, the most powerful barrier to culture change is the lack of awareness and understanding of the process among potential users of and referrers to the court system alike. Despite its ubiquity, mediation is not a process with which the public is familiar. Nor is it commonly considered as an automatic first step when disputes arise.

Family mediation has been heavily influenced by several major pieces of legislation over the last three decades resulting in rapid change in this sector. The Family Law Act 1996 proposed to dispense with the idea of fault-based divorce and encouraged parties to use mediation in order to reduce acrimony and encourage collaborative decision-making before reaching court. The first part of the Act was never implemented and, 18

years later, the Children and Families Act 2014 repealed the 'no-fault' divorce. However, turning full circle, the introduction of the Divorce, Dissolution and Separation Act in 2020 removed the need to establish fault once and for all, allowing joint divorce applications to be made. The place of mediation within that remains clear and has been encouraged throughout.

Despite the demise of the Family Law Act, the encouragement to use mediation was transported to the Access to Justice Act 1999, which also established the Legal Services Commission (LSC) and introduced legal aid to cover the costs of mediation.

It was at this time that the first element of compulsion appeared within the family context, whereby people eligible for public funding were required at least to attend an information meeting with a mediator to find out about the process before they could access funding for legal representation. On the positive side, mediation providers expected an increase in uptake. However, while a contractual relationship with the LSC promised a steady income, it also brought the expectation of settlement within time limitations and fixed case fees. This had an inevitable impact on practice, both in terms of the voluntary engagement of parties and the introduction of new pressures on mediators to reach settlement.

However, uptake was disappointing and for several reasons: the route into mediation for those who were publicly funded effectively placed legal representatives in a gatekeeping role. Yet a report published by the National Audit Office in 2007, reflecting figures for the period 2004-2006 showed over 50% of applicants going straight to court with no involvement from a mediator. Surveys suggest that one-third had not been advised that mediation was an option. In addition, judges responded inconsistently to applicants who had not considered mediation, often preferring to move the process on rather than delay further. Parties themselves were reluctant to mediate, whether because of the intensity of the issues, the late referral into the process or a general resistance to quasi-compulsion. Mediators found that they were having to 'sell' the process rather than working with people who had themselves initiated an approach, and this did not sit well with the principle of voluntariness.

Over the next decade, various adjustments were put in place to address these issues until a review of the family justice system pointed to a series of problems in terms of delay, cost, overlapping processes and a lack of cohesion. The Norgrove Report recommended the establishment of a Family Justice Service with a single family court, stating that '[t]he emphasis throughout should be on enabling people to resolve their

disputes safely outside court whenever possible'. (Norgrove 2011: para 4.6). The aim was that '[i]t should become the norm that where parents need additional support to resolve disputes they would first attempt mediation or another dispute resolution service' (para 115).

New recommendations included the attendance of all parties, whether privately paying or publicly funded, at a meeting with a mediator to be known as a mediation, information and assessment meeting (MIAM). In 2014 the Children and Families Act made this meeting mandatory for anybody making an application to court, though this compulsion did not extend to the respondent. This provides a clear example of a contradiction in priorities whereby one perceived method by which to achieve culture change (ie introducing quasi-compulsion so that it becomes the norm) compromised the fundamental principle of voluntariness. Furthermore, a lack of publicity or clear information did nothing to contribute to public awareness.

Yet, while these reforms anticipated an increase in the use of mediation as a first option, the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) had quite the opposite effect. The Act withdrew legally aided representation for all but the most exceptional cases. While public funding for mediation itself remained in place, the changes overlooked the gatekeeping role of the family lawyer, now the major source of referral for most mediation providers. Previously, lawyers could not access public funding to represent their clients without certification from a mediator. With the removal of public funding, the incentive to refer disappeared, often to be replaced with offers to settle through negotiation at competitive rates.

Ironically, though the NAO had anticipated a significant rise in publicly funded mediation, the withdrawal of legal aid was seriously misjudged and resulted in a 'precipitous decline in numbers' (Kneale & Ors 2014) and a dramatic fall of 56% in those attending MIAM meetings (MOJ 2014: 4-8). Today legal aid statistics still show usage at less than 50% of the peak in 2012.[1] In reality, the implementation of LASPO saw a massive rise of 39 per cent in cases where neither party was represented, lengthened the time taken to process cases and reduced any savings introduced by the reforms (*New Law Journal* 2014). It raised concerns about access to justice for vulnerable members of society and resulted in lower settlement rates, more orders being made and additional work for judges and court staff.

[1] See National Statistics: Legal Aid Statistics: January to March 2022.

The Norgrove Report had also highlighted the need for self-regulation and, in response, the Family Mediation Council (FMC) appointed Professor John McEldowney to formulate proposals for reform (McEldowney 2012) and Stan Lester to implement them (Lester 2014a; 2014b; 2014c).

The reforms pushed some sectors of family mediation provision into crisis, particularly those that were dependent on funding from legal aid contracts. With a real risk that the provision of family mediation was about to fall apart, the Government established a Family Mediation Task Force in 2014 to investigate these trends and develop a more innovative approach. Drawing on their study of practices in other jurisdictions, Barlow and Walker (2014), members of the Task Force, noted that an important influence in achieving culture change had been an increase in the level of co-operation between lawyers and mediators, a factor they highlighted as a barrier in the United Kingdom (UK) which had never been specifically addressed. This, despite the fact that it has been characterized by tension, competition and conflict of interest for a considerable time (Webley 2010). Far from increasing co-operation, the effect of LASPO was to aggravate this unresolved relationship even further.

In both Canada and Australia an 'implementation gap' had been identified and was eventually plugged with good provision of information, one-to-one support, a change in the use of language and better planning and decision-making. In Australia, Family Relationship Centres provide a point of entry within the community and offer free mediation. The motivation to mediate out of court is therefore strong and results in a significant decrease in the number of court applications for children and property matters.

The Task Force introduced incentives such as funding MIAMs and a first joint meeting where at least one party is publicly funded. However, despite these and greater promotion from Government to the public, uptake remained low.

Today, the campaign to move family disputes out of court rages on and the same questions concerning the use of mandatory mediation continue to be raised. The introduction of a voucher scheme in March 2021 met with a great deal of success. Before the political turmoil within the UK Government in autumn 2022 the Ministry of Justice (MOJ) had intended to launch a consultation proposing mandatory family mediation, following the direction of other mediation sectors (see below). This may yet be initiated. The President of the Family Division, Andrew McFarlane, spoke recently of the continued commitment of the family courts to 'provide information and support for parents so that they may move away from a

"justice" based response to parental fallout towards cooperative separated parenting, where child welfare (rather than playing out parental conflict) is the central and overriding factor' (McFarlane 2022). This emphasis on improved parental discourse with a strong child focus is central in other recent initiatives such as the Family Solutions Group report 'What about Me?' (2021) which argues for 'the need to restore the child to the centre in systems which currently operate for parents'. Citing the case of *K v K* (2022), Sir Andrew also identified the need to address the apparent ease with which it is possible to make use of exemptions to avoid attending a MIAM and his concern 'that a culture has developed in the Family Court which accepts that the MIAM requirement is honoured more in the breach than the observance'. In addition, he called for a reconsideration of the notion that a MIAM should be mandatory for the respondent as well as the applicant, an idea which would in all likelihood be welcomed by family mediators, while still falling short of mandating mediation itself. The publication of a report on 'Improving Access to Justice for Separating Families' (JUSTICE 2022) continues the theme of a more holistic and integrated provision of services out of court. It argues for the giving of information and early legal advice, and the co-ordination of legal and non-legal services that are accessible in the local community through the use of hubs, alliances and networks. Meanwhile, the FMC continues to strengthen its role in setting professional standards and assurances processes for mediators listed on its register: for example, the recent publication of standards and guidance for the delivery of MIAMs (FMC 2022a; 2022b).

While legislative changes in the civil, commercial and workplace sectors have not been so rapid or so revolutionary, mediation has nevertheless been consistently encouraged. There are some striking parallels across mediation contexts, and it is notable that many similar issues have been raised as a consequence of new legal requirements, in particular the question of compulsion. Significantly, one outcome has been the requirement to attend a MIAM (or its equivalent) in many settings. The principle of voluntary engagement in mediation itself is therefore protected in theory, though in practice it is 'already heavily compromised' (Clark 2022).

The Children and Families Act 2014 also had relevance for disputes concerning provision for children with special educational needs and disability (SEND). The Act strengthened a precedent, established in the SEN Code of Practice 2001, which stated that local authorities had a responsibility to appoint independent facilitators to try to resolve disagreements between authorities, parents and schools and therefore

prevent cases going to SEND tribunal. The purpose was 'not to apportion blame but to achieve a solution to a difference of views in the best interest of the child' (Department for Education and Skills 2001: 581).

The legislation distinguished between disagreement resolution (used at any stage and voluntary for all concerned) and mediation (used as a direct alternative to a tribunal) (Children and Families Act 2014, part 3, paras 51-57). In this context the availability of mediation was one element of a cultural change in which parents and young people were being strongly encouraged to take control of their own budgeting and resources, as well as handling disputes at an early stage. The provisions of the Act introduced an element of compulsion similar to the family context in that parents were required to have a conversation with a mediator and obtain a certificate before filing a claim with the tribunal. Parents were under an obligation to find out about mediation, but retained the choice as to whether or not to use it. By contrast the local authority was required to engage if a parent wished to proceed.

These requirements continue to the present day but may well change in the near future. In March 2022 the Department for Education issued a green paper (2022) outlining proposals to reform SEND provision including the adoption of mandatory mediation. For the most part mediators themselves have welcomed a stronger encouragement to use mediation while preferring to stop short of compulsion. The joint written response of the College of Mediators (COM) and Civil Mediation Council (CMC) suggested that mandatory mediation would be 'a step too far', going against the fundamental principle of voluntary attendance and removing choice from parents and young people. This choice goes some way towards addressing an inherent power imbalance that exists between parents and the local authority. The response points out that though mediation is effective in most circumstances there can be good reasons for not going ahead: sometimes lengthy discussions will already have taken place; and some parents may not have the emotional energy to participate. Instead, the recommendation was for an 'opt-out' approach whereby the default expectation would be participation in mediation, with the opportunity to withdraw if desired.

In the workplace context, the current requirement to explore conciliation as an option represents the conclusion of a process that has gone full circle. The Employment Act 2002 was informed by the findings of a significant consultation (Department of Trade and Industry 2001) which set out to improve dispute resolution processes within the workplace and reduce the number of cases heard by employment tribunals. The

Dispute Resolution Regulations came into effect in 2004 and, in a bold move, implemented a compulsory three-step disciplinary and grievance procedure for both employers and employees, the purpose of which was to exhaust alternative means of dispute resolution before formal proceedings were initiated. The Gibbons Review (2007), conducted some three years later, found that, though sound in principle, the changes largely had a negative effect. Disputes had become formalized, time-consuming and stressful, and the new procedures created an unintended perception that disputes would end in an employment tribunal claim (Davey & Dix 2011).

With a marked similarity between the family and commercial sectors, Gibbons argued strongly for culture change and the early, informal resolution of disputes through mediation and conciliation (Gibbons 2007: 38). The Regulations were repealed in the Employment Act 2008 and the Advisory, Conciliation and Arbitration Service (ACAS) published a statutory Code of Practice on discipline and grievance. A helpline administered by ACAS was put in place and pre-claim conciliation was introduced as an option where litigation was likely. An explicit benefit, aside from reducing disruption to business and time and costs spent, was the opportunity to achieve 'outcomes not available through the tribunal system, for example an apology, or changes in behaviour' (Davey & Dix 2011: 3). The aim of preserving relationships was therefore more clearly stated in this context than elsewhere.

The theme of culture change and the potential of mediation to 'lead to a major dramatic shift' in employment relations was picked up again in yet another consultation conducted by the Department of Business Innovation and Skills in 2011 (2011: 13). The government response introduced the idea of early conciliation (implemented in 2014) as an alternative to litigation. This requires that prospective claimants submit their details to ACAS which, in parallel with other contexts, offers conciliation as a first option. If either party rejects conciliation or there is no agreement, a claim can subsequently be filed at the tribunal.[2]

Research in this area suggests that mediation does have an impact. Saundry and colleagues (2014) argued that mediation can improve working relationships, avoid litigation, prevent long-term sickness and bring about savings in money and staff time (Latrielle 2011; Saundry & Ors 2014). The ACAS Code of Practice led to the simplification of policies and procedures and a greater emphasis on informal resolution. Disputes have, it seems, been dealt with more efficiently, effectively and creatively,

[2] The ACAS definition of conciliation is similar to that of mediation generally. See ACAS 'Early Conciliation'.

particularly where in-house mediation schemes have been established (Saundry & Ors 2014: 6 and 30ff). However, other evidence implies that these benefits may be short-term. Saundry and colleagues identified a risk that 'mediation could be used to shift the responsibility for conflict from the organisation to the individual by reinterpreting unfair treatment as a personal issue' (Saundry & Ors 2014: 9). Overall findings from the research series broadly recognized the benefits of mediation, particularly regarding individual empowerment, but suggested that the government aspiration for it to achieve transformational culture change is too ambitious unless other measures are in place to support it. These should include the pursuit of more innovative approaches to conflict resolution, the development of good employment relations, the upskilling of line managers and an effective use of structures that give employees voice and representation. They highlight the importance of recognizing workplace conflict not simply as a transactional occurrence but as a strategic issue which, when effectively addressed, underpins 'workplace justice, trust and employee engagement, and ultimately organisational performance' (Saundry & Ors 2014: 13-14).

These findings have significance for other sectors too. The implication is that, while mediation can influence specific situations positively, the wider benefit of achieving culture change can only be realized when all the stakeholders have shared priorities, are agreed on approaches to conflict and have similar perceptions of what justice (in the broadest sense) means and how it can be met. Similarly, public engagement depends on clear information from professional mediators about the role that they perform alongside other services that support dispute resolution. Research indicates that a number of different processes must be available to meet different needs. I would argue, therefore, that, in order to go beyond individual empowerment, it is necessary to put in place strategic interventions which foster the generation of community norms and universally understood approaches to conflict.

In the civil and commercial mediation arena the publication of the Woolf Reports (1995; 1996) effectively sparked a revolution in the civil justice system leading to the prioritization of settlement over adjudication. The Access to Justice Act 1999 had a huge impact on this sector. The legislation provided public funding for mediation in non-family civil disputes and indicated that disputants should try alternative dispute resolution (ADR) options before accessing legal aid for representation—or risk their funding application being turned down. In the following years, the LSC published various Funding Codes re-emphasizing the

benefits of mediation both as a problem-solving tool and as a means by which to promote a collaborative future. Lord Jackson's Review of Civil Litigation Costs endorsed mediation even further, describing it as 'the most important form of ADR' among a number of other alternatives including lawyer negotiations, joint settlement meetings and early neutral evaluation (Jackson 2010: ch 36, para 1.2).

One of the main issues facing the civil and commercial sector, as in other contexts, has been the lack of awareness of mediation as an option among the general public, court users, lawyers, businesses and the judiciary as well as a lack of consistency in its referral and use. Lord Jackson saw that mediation could be more widely attempted at the pre-litigation stage, but stopped short of compulsion. He echoed the Government's ambitions for the use of mediation in the workplace, calling to the 'need for culture change, not rule change', and suggested raising awareness through campaigns, the provision of proper information for judges and lawyers and a handbook for mediators. The theme was picked up in the government consultation the following year which stated its aim to 'equip people with the knowledge and tools required to enable them to resolve their own disputes … to be better able to craft durable solutions that avoid further conflict' (MOJ 2011: 'Foreword' 6).

The outcome was to encourage automatic referral to mediation for small claims. However, a mandatory requirement to go ahead with mediation was not implemented. *Halsey* (2004) had established that courts should not insist litigants use mediation against their will, arguing that to do so would be counter-productive in terms of both costs and access to justice. However, there was a significant stipulation to say that litigants who won their case without attempting mediation might still be subject to costs where it was considered that it might have been used successfully. A series of factors that could justify these costs were identified, known as the 'Halsey Guidelines', but the case clearly highlighted the role of mediation in settling disputes. This balance between encouragement and compulsion is one that the court continues to struggle with. Meggitt (2014) pointed out that the courts appeared to be pushing people toward using mediation without being explicit and argued that, following other jurisdictions, it would be better to dispense with ambiguity and make a clear statement if mediation was to become compulsory.

Despite considerable debate since *Halsey*, such clarity has not been achieved. Several subsequent cases have contributed to the argument (Koo 2014). Two are notable for the fact that they extended the understanding of 'unreasonable refusal' to mediate to include a lack of intention to settle

(*Carleton v Strutt & Parker* 2008) and a lack of response to an invitation to mediate (*PGF vs OMFS* 2013).

Koo (2014; 2015) subsequently examined the question of unreasonableness at some length and argued that it was important to maintain voluntariness on the grounds that it strengthens the role of civil justice in upholding social norms and ensures that mediation does not become a substitute for judicial decision-making. He pointed out that the growth of mediation and other settlement methods extends the role of the courts to the case management of ADR options and to narrowing down those issues that cannot be decided other than by judgment. Koo called for further review of the Halsey Guidelines stressing the importance of a principled approach and arguing that, while they bring flexibility, there is a risk that the reasons for imposing costs can be infinitely extended and can themselves lead to further argument, thereby exacerbating the dispute.

While these government initiatives state their aim to achieve culture change, it is clear from other reforms that this has not been the only motivation and that reducing the expense of the civil justice system and increasing its income is also of primary importance. In the political context of austerity measures imposed on public services, increasing court fees was inevitable. In 2015, the Government raised the cost of filing a claim, emphasizing the drive for efficiency (MOJ 2015). Critics were inevitably concerned about affordability for some claimants and the possibility therefore of undermining access to justice.

While theoretically this might have led to an increase in the uptake of mediation, the experience of family mediation had already demonstrated that this was by no means guaranteed. As it was, County Court claims continued to generally increase from 2015, reaching a peak in 2017. In conclusion, despite the requirements, powers and incentives that the MOJ has put in place, the evidence is that uptake of mediation has remained limited, particularly for small claims valued at under £10,000. The recent consultation on mediation (MOJ 2022), for example, states that in only 21% of small claims do both parties agree to attend a mediation session with the Small Claims Mediation Service (SCMS) offered by HM Courts and Tribunal Service.

Once again, the latest proposals suggest automatic referral to mediation. The document speaks less of culture change and more of 'embedding mediation as an integral step in the court process' (MOJ 2022: 4) while still referring to the benefits of a consensual outcome for disputants. All parties (ie both the 'claimant' and 'defendant') to a defended small claim

for under £10,000 would be required to attempt to resolve the dispute using one hour of free mediation provided by the SCMS, conducted by telephone, before their case can progress to a hearing. The Government is also considering whether this should be extended to claims above £10,000 using external mediators.

The response of the CMC to the consultation indicates that civil mediators broadly welcome the proposal for automatic referral to mediation with some modifications: that consideration is given as to how this is conveyed to parties (emphasizing opportunity and benefits rather than compulsion, which can encourage negativity); that the one-hour timeframe has potential to be extended when required and funded through a voucher scheme; and that a choice of process is offered including the opportunity to exchange directly with each other, something which the current proposal does not allow for (CMC 2022).

It is clear that legislative changes across several contexts have set out to encourage the use of mediation to resolve disputes rather than resort to more formal, adjudicative processes. Where, then, do these developments leave the professional mediation community in terms of a sense of shared purpose and identity?

[B] THE MEDIATION COMMUNITY

In England and Wales, mediation has developed independently within the various contexts that I have been examining, with little cross-over between sectors, considerable perceptions of difference in practice and a strange reluctance to engage in dialogue. The three hallmarks of professional status, outlined by Marian Roberts (2005: 516) as 'a recognized and distinct body of knowledge; mechanisms for transmitting that body of knowledge; and means for self-regulation and evaluation' are evident, to some degree, in all of the settings described above. The professional membership bodies approve training programmes and providers largely adopt an approach that is predominately skills-based, offering courses that are not dissimilar in length and content. In each sector there is some level of regulation from these bodies which require members to have complaints procedures in place and to be adequately insured. However, there is no one professional body that unifies the mediation community with the consequence that standards of practice, policies and guidelines vary widely. Saunders (2020) describes in detail the development of a regulatory framework in the family field, influenced by 'increasing pressure from government and the courts for the industry to have a comprehensive and well managed professional framework for

public protection' (2020: 34). The development of family mediation was therefore strengthened with the introduction of the Mediation Quality Mark and contractual arrangements with the LSC. Norgrove had called for further, more consistent regulation, which resulted in the creation of the Family Mediation Standards Board, the publication of a self-regulatory Standards Framework (FMC 2014) and the creation of an Accreditation Board in order to streamline training, assessment, accreditation and professional development of family mediation within the private and not-for-profit sectors. More recently, the FMC has taken steps to support consistency within the profession by assuming responsibility for aspects such as the approval of training providers across its various membership organizations (in 2016) and handling complaints (in 2022).

By contrast, the community, civil, commercial and workplace sectors have been slower to consider these developments and, in some arenas, the imposition of even light-touch regulation has met with resistance. The issue of qualification is one example. The family sector requires a post-training accreditation for which applicants must evidence their skills and knowledge based on an amount of mediation practice; the community field recognizes this as an option; while the civil, commercial and workplace settings have yet to introduce the concept. The CMC has recently introduced a tiered membership system based on levels of experience. While the family and community sectors accept supervision for their mediation practice, the civil/commercial and workplace sectors have been less amenable to this though more recently are exploring the benefits of mentoring support.

One factor that may go some way to explaining these inconsistencies is the extent to which mediation is viewed as a vocational career in its own right or as an additional skillset that supplements another profession, such as law or human resources. The family sector has presented the clearest opportunities for primary employment as a mediator. In the community sector, it is rare for mediators to be paid, while in the civil and commercial sector there is a small minority of well-established mediators who undertake the vast majority of the work.[3] Even the family arena presents a mixed picture with increasing numbers of family lawyers training to be mediators as a secondary part of their mainstream role, and a widening gap between those who are or are not qualified to undertake publicly funded work.

[3] For a profile of civil and commercial cases going to mediation and those conducting them, see the annual audit conducted by the Centre for Effective Dispute Resolution (2021).

It seems clear that vocational mediators of the future will have to be prepared to develop the skills and knowledge to work across sectors. At one time, thinking seemed to be moving in this direction. In the early 1990s, following the development of the National Vocational Qualification, representatives from a range of mediation contexts including family, community, commercial, industrial and environment came together, with the Law Society, to develop generic mediation practice standards and an evidence base for their application in these areas (CAMPAG 1998). While this occupational standard was adopted and still forms the basis of training and assessment today in many areas of delivery, the idea of a generic foundation to which it is possible to add specialisms that are context-specific seems to have been lost.

Most importantly, there is no one voice that represents the mediation community as a whole. Over time, there has been very little discussion or collaboration across sectors. Instead, there has been distrust and competition. These factors, in my view, have added to the confusion experienced by users and referrers alike.

[C] MEDIATION WARS

At a rare interdisciplinary conference of mediation trainers held some years ago, Sir Alan Ward, chair of the CMC at the time, pointed out that 'the greatest difficulty for the mediation community is their great failure to mediate their own disputes' (Ward 2015). Addressing conflict constructively is challenging even, it appears, for those who encounter it on a professional basis every day. Earlier attempts to work collaboratively across delivery areas have been largely unsuccessful: for example, the merger of National Family Mediation and Mediation UK in 2003, which attempted to provide an umbrella body for both family and community mediators, but which collapsed acrimoniously within months.

Even within sectors, finding ways to cater for conflicting professional motivations has proved to be difficult. In 1996 the UK College of Family Mediators (UKCFM), incorporating the three main providers in the UK at the time,[4] was set up as a single professional body intended to perform a regulatory function for all family mediators, whether their background was law, social work or counselling. The UKCFM sanctioned 'approved bodies' authorized to carry out the recruitment, selection, training and supervision of their own members. This meant that objective standard-setting and monitoring could be kept separate from selection, training and provision.

[4] National Family Mediation, the Family Mediators Association and Family Mediation Scotland.

The establishment of the UKCFM 'marked the formal arrival in the UK of family mediation as a new profession' (Roberts 2005: 516) but sadly not its unity as such. Broadly speaking, its formation had brought together practitioners from the private sector who were acting as lawyer mediators and those from the voluntary, not-for profit sectors who were more likely to have come from the caring professions. From the outset there were differences in professional approach. Competing interests soon surfaced and 2006 saw the beginning of a period of 'turbulence, transition and transformation' (Saunders 2020). Expectations concerning standard-setting varied, and there were differences of view as to the feasibility of combining a regulatory function (objective setting and monitoring of standards) with that of service provision (income generation). At the same time individual members who saw mediation as an addition to their primary career had no wish to meet two sets of professional requirements. In 2007 the UKCFM split apart and the FMC[5] was formed with a lighter-touch regulatory function. The COM retained the original standards and expanded to cater for a wider membership including community, workplace and potentially members from other sectors. Since then, the FMC has become recognized as the representative voice of family mediation and therefore acted in dialogue with the MOJ during the recent legislative changes of the last decade. Paradoxically, the calls for greater self-regulation outlined in the Norgrove Report were therefore directed to this body.

The CMC provides a level of regulation for civil and commercial providers. Traditionally, trained practitioners belonged to a panel of mediators accredited by the CMC whose responsibility was to ensure that their members were adequately trained and experienced. In 2009 membership was extended to providers of workplace mediation and, more recently, has moved away from panels to individual membership. The requirements for membership include evidence of training, casework and ongoing professional development. But standards in terms of practice guidelines, supervision and competence assessment are not yet in place. The CMC has traditionally maintained a powerful lobbying function, with a significant proportion of its membership belonging to the judiciary. In the past it has claimed to be the recognized authority in the country for all matters related to civil, commercial, workplace and other non-family mediation, but in doing so it maintained the divide between family and other types of mediation. There are some recent indicators, however, that the positions of these professional membership bodies are undergoing a change.

[5] The FMC comprises National Family Mediation, the Family Mediators Association, Resolution, the Law Society and the COM.

[D] FUTURE CHALLENGES FOR THE MEDIATION PROFESSION

The issues I have discussed hold three main challenges for the future of the mediation profession. The first concerns the whole concept of culture change and what this means in reality. Legislative changes since the publication of the Woolf Reports have persistently sought to challenge the idea that disputes should be disposed of through formal, adjudicative processes. Settlement and mediation have been encouraged as ways of resolving disputes. The motivations for this, however, are mixed. Speedy, cheap resolutions to disputes are very attractive to policy-makers and provide a primary incentive in many contexts. While the potential for mediation as a tool to achieve culture change has been recognized and promoted, research evidence suggests that it is unrealistic to assume that a process primarily geared towards individuals can achieve this in isolation. Culture change also requires the corporate commitment of the wider system (whether that be the workplace, the court system, a school, a local community or society at large) together with a variety of other measures in place if it is to be successful. It begs the question of a reappraisal of approaches to conflict and the public recognition of values such as the acceptance of personal responsibility and the willingness to address difference, or 'civility' (Folger & Bush 2012). These are not values that can be imposed but are arrived at through clear information, choice, inter-agency co-operation and the demarcation of professional roles. Peer mediation in schools provides an excellent example of how this can realistically be achieved. When a school provides peer mediation it requires a commitment at every level from headteacher and staff, to pupils, to other support staff, all of whom are part of the running of the school. All those within the school community learn about mediation and a selection of pupils will train as mediators in order to manage conflicts as they arise in the school day. The implementation of a project such as this recognizes conflict as an everyday occurrence which can be constructively dealt with. It provides clear information about how to approach disagreement and difference thereby creating community norms and expectations. Core skills from the training are utilized by the mediators and provide an all-round educative experience as they work through a process that, in its essence, follows the same steps that any adult mediator would recognize. When these elements are combined with successful outcomes based on tolerance, understanding and creative solutions,[6] it is possible to see how a culture change can occur, to which

[6] See CRESST for an example.

it is in everyone's interests to be committed. It is not difficult to see how organizations, workplaces and local community forums might mirror this kind of cultural development. It is more challenging to draw the parallel with the court system, in particular when the parties to the dispute are transitory players motivated by their own individual interests. While mandating mediation might have the effect of increasing settlement rates and changing people's expectations of the court process, it seems to run the same risk identified by Gibbons (2007): that mediation simply becomes more formalized as a step to complete before adjudication. Mediation, I believe, can achieve a change in culture, but can it do so while it is so closely linked to the court system?

The second issue, that of mandatory mediation, is linked. It is a prospect which, as this article shows, is looming in several different fields of delivery but which threatens core principles[7] of mediation practice. The first is that of voluntariness. Research evidence suggests that mediation works best when undertaken voluntarily (Genn 2007). While mediators welcome a stronger encouragement of the use of mediation, my own research (Allport 2016) demonstrated that they also know the value of an individual commitment to the process based on informed choice. Barlow and colleagues (2014) point out the significance of emotional readiness in order to be able to engage in mediation and note that attempts to mediate where this is not the case often break down. Though the focus of their research was on separating couples facing the loss of their relationship, the emotional aspects associated with other kinds of dispute cannot be ignored. An order to attend mediation risks closing down participants' willingness to be open to the process. As Clark (2022) points out, agreement cannot be mandated. One justification for the proposal for mandatory mediation is formed on the basis that it does not contravene a right to fair access to justice: participants are still able to take their claim to court and so the principle of party determination, in that sense at least, remains intact. However, both the confidentiality of the process and impartiality of the mediator might also be compromised if, as Clark suggests, there is any question that mediators might be called upon to comment on the conduct or approach of the parties to the mediation.

Importantly, the current proposals prioritize settlement over other mediation outcomes. Practitioner respondents in my research identified several different purposes to the process which I organized into themes. While 'resolving issues' and 'reaching settlement' formed two of these, the others had a much broader application and included 'empowering parties',

[7] My research of 2016 practitioners across all fields of mediation delivery identified confidentiality, voluntariness, impartiality and party determination as the core principles of practice (Allport 2016).

'ending the conflict', 'improving communication' and 'relationship repair' (Allport 2016). Under the proposals for automatic referral to mediation (small claims), the parties in dispute are allocated one hour to reach an agreement over the telephone, during which time there would be no opportunity to communicate directly with one another. It would be a mistake to assume that a claim that is considered small in financial terms does not have a significant impact emotionally, psychologically and socially (Bush & Folger 2005).[8] The higher aspirations for successful mediation would, in my view, be very difficult to achieve under these circumstances.

The third challenge concerns the development of a more cohesive approach within the mediation profession. I have argued that the encouragement of mediation across sectors has largely been driven by legislative change. Separate fields of practice have responded and developed, but historically there has been little to unite mediators across these different contexts. In recent years there have been some indicators of change. During 2017, in the first piece of collaborative work of its kind, the COM and the CMC jointly chaired a working group of SEND mediation providers. The group, supported by the Department for Education, drew up practice standards for the training and delivery of SEND mediation and created a shared register of qualified SEND mediators publicized on both their websites. The intention was that local authorities, parents and other stakeholders would be able to access appropriately qualified mediators for SEND disputes. Other collaborative initiatives include the National Mediation Awards organized by the COM, CMC and FMC, and a joint conference by the CMC and COM in 2021 titled 'Collaboration for the Future'. However, standards and guidelines vary and there are differences to overcome. This comes at a point where the Government and the justice system are looking to professional mediation bodies to provide consistency and the guarantee of quality provision to protect the public—now is the time to pull together. A question that is being asked of all sectors is about mediator capacity to meet increased demand. This raises further challenges about pooling of resources, routes into the profession as a whole (rather than segments of it) and the effective support of newly trained mediators. A major shift would be to put appropriate mechanisms in place to enable mediation as a 'first choice' profession: 'To be mediators, not just first and foremost, but just' (Saunders 2020: 49). This could include clearer career routes that place more emphasis on theoretical

[8] Bush & Folger describe the experience of conflict as a threat, both to individual autonomy and social connection. Mediation seeks to address this through the empowerment and recognition of the participants.

underpinning as well as skills development and allow people to move from training to gaining experience to qualification more smoothly. In other words, cohesion must come from within the mediation community of practice.

[E] CONCLUSION

While legislative reform has attempted to achieve a cultural shift in the way that disputes are resolved using mediation as a primary vehicle by which to do so, this aim remains unfulfilled. Although mediation is a process that could play a part in bringing about such change, this cannot be achieved without knowledge, understanding and commitment from all stakeholders as well as accessibility outside the justice system as much as within it. This calls for a fundamental reappraisal of approaches to conflict. It seems doubtful that mandating mediation as an isolated initiative can fulfil these aims.

It also seems clear that a lack of definition and cohesion within the mediation community has meant that those who control policy and funding have made decisions about mediation provision which have led to further confusion and a lack of enthusiasm among potential users. The challenges for mediators across the board are to consider how those aspirations of the process other than settlement are given full weight and how, while encouraging an increased uptake in usage, mediators can remain true to the core principles of practice rather than stray into other forms of dispute resolution. A good deal of this might be accomplished if different sectors of the mediation profession could work collaboratively together to provide a consistent voice and a clear sense of what mediation can achieve in establishing cultural norms for dealing with conflict.

About the author

Lesley A Allport *has had a long career in mediation, including mediation training (see www.ladr.net) and regulation. Working initially as a family mediator in the 1980s, she has been involved in developing new areas of practice including special educational needs and disability conciliation. She has an active commitment to the establishment of professional standards and gives public service on various boards and committees within the mediation sector. She mediates conflicts within families, education settings, workplaces and cross-border family disputes and specializes in child-inclusive mediation. In 2016 Dr Allport was successfully awarded her PhD at Birmingham University Law School, which involved empirically researching the comparative growth of mediation by looking at mediators*

working across a variety of contexts and identifying core aspects of mediation practice. Her publications include 'Square Pegs and Round Holes: The Divergent Roles of Lawyers and Mediators' in Maria Federica Moscati, Michael Palmer & Marian Roberts (eds) (2020) Comparative Dispute Resolution *London: Edward Elgar and 'The Voice of the Child in Family Mediation' in Marian Roberts & Maria Federica Moscati (eds) (2020)* Family Mediation: Contemporary Issues *London: Bloomsbury Professional.*

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Reviewing the Arbitration Act 1996: A Difficult Exercise?

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Abstract

The (English) Arbitration Act 1996 is currently under review by the Law Commission as it turns 27 this year. This article analyses its Consultation Paper released in September 2022, and which contains preliminary recommendations for an update of the Arbitration Act. This analysis reveals that some issues considered by the Law Commission are not new since they had already been identified by the Departmental Advisory Committee on Arbitration Law prior to the adoption of the Arbitration Act 1996. In fact, some of these concerns were unable to be settled back in the 1990s, and still are to some extent 27 years later. For other issues, however, the Law Commission attempts to draw on recent developments in arbitral practice and contemporary challenges (such as climate change and technological advances) though at times failing to integrate them in an updated Act.

Keywords: English arbitration; international arbitration; Arbitration Act 1996; Law Commission's Review of Arbitration Act.

[A] INTRODUCTION

Arbitration—both domestic and international—has so far been one of the (if not *the*) most popular out-of-court mechanisms for dispute resolution. With its promises of neutrality, confidentiality, finality, effectiveness, expertise, enforcement and party-appointment of arbitrators, disputing parties increasingly chose arbitration as an alternative to litigation (Born 2014; Gicquello 2020). Despite arbitration's promises and popularity, it has, however, been facing mounting criticisms since at least a decade. While these have been more vocal and outspoken about international investment arbitration with concerns about its

legitimacy (Franck 2005), others rather address the framework, design, of arbitration as a whole. For example, William Park once famously compared arbitration to a shoe-repair shop where you can only get two out of the following three options: fast service, low price, and high quality (Park 2010). Other (more targeted) criticisms have rather pointed to the lack of transparency of arbitration and the (potential) partisanship of arbitrators to name a few.

Arbitration is, however, very much still alive and here to stay, alone or in combination with another alternative dispute resolution (ADR) mechanism such as mediation. The 2021 International Arbitration Survey conducted by Queen Mary University of London (QMUL) and White Case indeed found that arbitration is 'the preferred method of resolving cross-border disputes for 90% of respondents' (QMUL & White Case 2021: 2). This is especially true in jurisdictions which are already competing to be the most popular destination for arbitrations. In Europe, England is one such arbitration hub with London and English law each being among the most popular seats or laws chosen by the parties for the conduct of their arbitrations, alongside Paris and Geneva (QMUL & White Case 2021). To illustrate, the London Court of International Arbitration (LCIA) had over 85% of its arbitrations seated in London in 2021 (LCIA 2021); while for arbitrations instructed by the International Chamber of Commerce (ICC) in 2020, English law remained the most popular choice and England was a top four destination as an arbitration seat following Switzerland, France and the United States (ICC 2020).[1]

Arbitration laws are therefore one element to take into consideration when parties draft their arbitration clauses. Indeed, although arbitration does give them more powers compared to litigation, laws are still needed to regulate the arbitral process. Furthermore, what popular arbitration jurisdictions have in common—such as France, England and Switzerland—is their friendliness towards arbitration with laws and courts supporting arbitral tribunals for example. Countries are therefore competing on the arbitration market to be the 'friendliest' towards arbitration and potentially adapt to changes. However, while France updated its 1981 arbitration law in 2011 and Switzerland its 1989 arbitration law in 2021, England has not yet updated its Arbitration Act 1996.[2]

It is therefore not surprising that for the 25th anniversary of the Arbitration Act 1996, the United Kingdom (UK) Ministry of Justice

[1] With the 2021 International Arbitration Survey from QMUL and White Case identifying London, Singapore, Paris, Hong-Kong, and Geneva as the five most preferred seats for arbitration.

[2] Note that the UK or English Arbitration Act 1996 is not applicable to Scotland, but only to England Wales and Northern Ireland.

commissioned the Law Commission to undertake a review of the Act (Law Commission 2022a). However, because it is already very competitive domestically and internationally, the Law Commission does not intend to undertake an entire reform of this Arbitration Act. Instead:

> This anniversary presents a good opportunity to revisit the Act, to ensure that it remains state of the art, so that it provides an excellent basis for domestic arbitration, and continues to support London's world-leading role in international arbitration (Law Commission 2022a:1; 2022b).

After a comprehensive review of the Arbitration Act 1996, which started in January 2022 and involved preliminary discussions with stakeholders in arbitration, the Law Commission released a Consultation Paper in September 2022 including provisional reform proposals (Law Commission 2022a). Highlighting a number of debated issues in the world of arbitration and how best to respond to these, the Law Commission thus launched its consultation from 22 September 2022 to 15 December 2022 in order 'to inform the final recommendations' (Law Commission 2022b).

This article analyses this Consultation Paper and the provisional recommendations to keep the Arbitration Act 1996 up to date with current practices, developments and debates in arbitration. Before undertaking this evaluation, it first considers the adoption of the Arbitration Act 1996. It then addresses the impact of this new legislation on arbitration in England—both domestic and international—and whether a review of the Act by the Law Commission is now really necessary. Against this background, the paper evaluates the Consultation Paper of the Law Commission. This analysis reveals that some issues identified by the Law Commission are not new since they had already been extensively discussed by the Departmental Advisory Committee on Arbitration (DAC) prior to the adoption of the Arbitration Act 1996. In fact, some of these concerns were unable to be resolved back in the 1990s and still are, to some extent, today. Nevertheless, for other issues, the Law Commission attempts to draw on recent developments in arbitral practice and contemporary challenges (such as climate change and technological progress), though at times failing to integrate them in an updated Act.

[B] THE ARBITRATION ACT 1996

Although London and English laws are now both prime choices for the conduct of arbitrations, this has not always been the case. This status indeed owes much to the Arbitration Act 1996 which has been praised as being 'remarkable, highly accessible, comprehensive, thorough, cogent,

coherent, cohesive, outstanding, masterful, lucid, excellent, and worthy of international emulation' (Carbonneau 1998: 131-132, 154). Indeed, the Arbitration Act 1996 marked a profound departure from previous arbitration laws—here encompassing the Arbitration Acts 1950, 1975, and 1979. Previous laws, which led some to assert that suggesting London as an arbitration venue back in the 1970s could have led an international lawyer to be accused of 'professional negligence' (Paulsson 2007: 478).

This unattractiveness of arbitration in England, and of English arbitration laws, was mainly due to the hostility of the judiciary towards arbitration, in turn leading to a high level of judicial intervention in the arbitral process (Chukwumerije 1999; Reid 2004). In turn, this meant that the benefits of arbitration—highlighted in the introduction—were greatly impeded upon. For example, the principles of party autonomy, finality and effectiveness (both in terms of times and costs) were undermined by such distrust towards arbitration and associated court activity. Yet, this high level of court intervention was not only explicitly allowed by the legislative framework at the time, but was also fed by the lack of a clear philosophy behind the practice of arbitration in England (Chukwumerije 1999). Lack of clarity, which then further fed the inherent judicial suspicion and hostility towards arbitration, manifested through increased judicial activity in arbitrations—both in relation to the arbitral process and outcomes (Chukwumerije 1999; Reid 2004).

However, the competitiveness and associated popularity of arbitration depend upon the parties' satisfaction with the process (Yu 2002). If arbitration were to become a replication of court processes—which parties are trying to avoid by choosing arbitration—or if it were to be burdened by additional steps in courts, in turn leading to additional costs and delays, arbitration would then be unlikely to take off in a given jurisdiction. These concerns—or the unfitness of English arbitration laws—were picked up by the DAC in its reports published in 1989, 1995 and 1996. As such, it first recommended in 1989 that there should be 'a new and improved Arbitration Act for England, Wales, and Northern Ireland' (DAC 1996: 276) adding in an interim report in 1995 that:

> what is called for is much more along the lines of a restatement of the law, in clear and 'user-friendly' language, following, as far as possible, the structure and spirit of the Model Law, rather than simply a classic exercise in consolidation (DAC 1996: 276).

From this recommendation was born the Arbitration Act 1996, which applies to both domestic and international arbitrations. This Act has been deemed 'innovative' in that it clearly defines the philosophy behind the Act and of arbitration in England, thus leaving no room for judicial

discretion as to when the courts can/should intervene in an arbitration: discretion, which usually responded to a sentiment of distrust or hostility towards arbitration as mentioned earlier (Chukwumerije 1999).[3] This clear philosophy, liberalization of arbitration, is clearly set out in the very first section of the Arbitration Act 1996, which simply states, in plain and intelligible English, the 'general principles' of the Act. This provision directly responds to the first two features identified by the DAC in 1989 that the new law of arbitration should have: 'a statement in statutory form of the more important principles of the English law of arbitration … limited to those principles whose existence and effect are uncontroversial' (DAC 1996: 276). Section 1 of the Act therefore states:

> The provisions of this Part are founded on the following principles, and shall be construed accordingly—(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; (c) in matters governed by this Part the court should not intervene except as provided by this Part (Arbitration Act 1996, section 1).

In a nutshell, this provision now explicitly and clearly identifies three principles underpinning arbitration in England and beyond. These are: the recognition of arbitration as an alternative to court processes; party autonomy; and judicial non-intervention except for instances explicitly provided for in the Act. While the first principle was not subject to much controversy in previous Acts—since arbitration did already exist as an alternative to litigation, yet with a high level of judicial intervention—the same did not hold true when it comes to party autonomy and limited (or non-)judicial intervention (Chukwumerije 1999). Following the adoption of the Arbitration Act in 1996, however, a balance is now deemed achieved between these two principles; that is to say between the interests of the parties and the interests of states, which could sometimes be conflicting (Chukwumerije 1999).[4] The wishes of the parties are indeed not absolute since they are constrained by elements of public policy and mandatory rules in the Arbitration Act. Furthermore, the state does have to regulate arbitration in order to both 'provide assistance to the arbitral process' and 'secure the fairness and legitimacy of the system' through its courts (Chukwumerije 1999: 177). Judicial intervention is therefore widely accepted when it is supportive of arbitration, but not so much when it is used to weaken the process or its finality. As Toby Landau

[3] For example, Alan Reid mentions that 'English judges were required to be re-educated to work under a new legal regime in which they would adopt a less interventionist role' (Reid 2004: 230).

[4] For a detailed review of how this balance was achieved with the Arbitration Act 1996, see Chukwumerije 1999.

nicely summarized, the drafters' desires in the 1990s were to 'cut back the powers of the court as far as possible, and to ensure that the court's powers were only of a nature as to, and only exercised in such a way as to, support arbitration, not interfere with it' (Landau 1996: 159).

The limited role of courts in arbitration proceedings is itself a core principle of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law) adopted in 1985. Although, the Arbitration Act did not adopt this Model Law following the DAC's recommendation, it has been influenced by it both in terms of structure and content. As Alan Reid noted, the differences between the Model Law and the English Arbitration Act are actually 'more imagined than real, more procedural than substantive' with 'both systems attempt[ing] to reduce the level of judicial intervention in the arbitral process' (Reid 2004: 227). One difference being, for example, that there are more recognized circumstances in the Arbitration Act 1996 allowing for judicial interventions, such as the controversial section 69 which allows for appeals of arbitral awards on a point of law.

[C] A NEED FOR REVIEW? ARBITRATION IN ENGLAND POST-1996

Although praised, the Arbitration Act 1996 is not perfect. There have been criticisms on some of its provisions—such as the aforementioned section 69. As far as this provision is concerned, however, these concerns could be mitigated given the strict conditions of its application, its insignificant use by the disputing parties, and its non-mandatory character (Law Commission 2022a).[5]

Furthermore, the Arbitration Act 1996 does not address all aspects related to an arbitration. These intended *gaps* are then addressed by arbitral institutions and case law, in turn allowing for some flexibility. The role of UK courts in this endeavour—supportive rather than opposed to arbitration—has recently been confirmed, in 2020, by the UK Supreme Court in the *Halliburton v Chubb* (2020) case, acknowledging that 'The 1996 Act is not a complete code of the law of arbitration, but allows judges to develop the common law in areas which the Act does not address' (para 47). One could argue, however, that given this plurality of actors—legislature, judiciary and arbitral institutions—time has come to codify

[5] Less than 1% of arbitration cases seated in England lead to an application to courts under section 69 of the Arbitration Act 1996 (Law Commission 2022a).

undebated and established arbitration practices into a single statute. A review of the Arbitration Act 1996 could indeed build on the past 27 years and be an opportunity to do just that, hence bringing some (more) clarity.

So far, the Arbitration Act 1996 has been working rather well if one considers the status of London and English law in the world of (cross-border) arbitrations. As mentioned briefly in the introduction, English arbitration law and London, as an arbitration seat for cross-border disputes, have consistently been favourites and topped the rankings of major arbitral institutions. This is certainly true of the LCIA—and one might say not surprising given its headquarters are based in London—but also of others such as the ICC (ICC 2020). This ongoing popularity of London and English arbitration law has similarly transpired in surveys involving arbitration practitioners and respondents (QMUL & White Case 2021).

Given the established popularity and dominance of the Arbitration Act 1996 in the arbitration landscape,[6] the question is: does this Act really need an update? Could we just not continue to rely on the existing relationship/dialogue between the law (with its mandatory and non-mandatory provisions), the courts, arbitral institutions, tribunals and disputing parties? With, for example, arbitral institutions drafting model clauses to bypass the non-mandatory elements or default choice of the Arbitration Act (such as section 69). After all, the Arbitration Act 1996 seems to have already fulfilled the DAC's desires that 'England should have the best possible arbitration statute' (Steyn 1993: 8), hence a change may not necessarily be called for.

Certainly, no statute can be perfect. But, legislation should ideally be adapted to a changing world. One could therefore wonder whether this review of the Arbitration Act—leading to light-touch amendments of the Act and not to a complete reform or revolution—will indeed allow for both longstanding/debated issues to be set in statute, and for new challenges to be acknowledged and dealt with appropriately. Considering the Consultation Paper published by the Law Commission in September 2022, in some respects, the answer to this question unfortunately appears to be a no; unless some of the policy recommendations are updated based on the responses received as part of its consultations with stakeholders in arbitration.

[6] With this success itself acknowledged by the Law Commission as a prelude to its consultation, mentioning the Chartered Institute of Arbitrators having its headquarters in London with 17,000 registered members and the value of arbitration for the British economy: worth at least £2.5 billion a year (Law Commission 2022a).

[D] THE LAW COMMISSION'S CONSULTATION PAPER

This review of the Arbitration Act commissioned by the UK Ministry of Justice is welcome in order to ensure that 'the Act remains state of the art' (Law Commission 2022a: 1). However, some preliminary recommendations suggested by the Law Commission have already met criticisms from academics and practitioners alike. This part will briefly address these after a brief overview of this Consultation Paper.

Overview

The Consultation Paper issued in September 2022 is a comprehensive and carefully drafted review of the Arbitration Act 1996 by the Law Commission. After some preliminary discussions with users of the Act, this 150-page document—which submits questions to stakeholders in arbitration—does provide a clear view as to what the current debates and recent developments in arbitration are, and which may be worth tackling should the Act be updated (Law Commission 2022a).

The Consultation Paper further characterizes these debates and developments as either worthy of inquiry, and thereafter of amendments, or not. As such, debates/criticisms regarding the privacy and confidentiality of arbitrations, the impartiality and independence of arbitrators, their appointment and immunity, arbitral tribunal's powers for frivolous claims as well as courts' powers in support of arbitration, challenges to a tribunal's jurisdiction under section 67 and appeals on a point of law under section 69 were all identified as main issues by the Law Commission (2022a). For these, it therefore conducted a comprehensive review providing some background, by reviewing case law and some practices of foreign jurisdictions and arbitral institutions for example, so as to get the bigger picture to recommend either amendments or keeping the *status quo*. Alongside these main issues addressed in detail, the Law Commission also recommended small changes for a number of provisions in the Arbitration Act.[7]

Finally, the preliminary discussions and submissions which fed this initial review also identified 'other issues' which have not been shortlisted by the Law Commission for further consideration (Law Commission 2022a: 8). While some of these may indeed not be worthy of further interest, it is not as clear-cut for others. Therefore, early commentary on and public responses to this Consultation Paper have already challenged

[7] Summarized in chapter 10 of the Consultation Paper.

some recommendations to not investigate further. The law applicable to the arbitration agreement is one such contentious issue that has been dismissed by the Law Commission due to recent case law from the UK Supreme Court in *Enka v Chubb* (2020). Furthermore, not only has the stance of the Law Commission been criticized as to these *smaller* issues, but similarly as to issues which it addressed extensively in the review. This is, for example, the case of the debates pertaining to the confidentiality of arbitration and to challenges before state courts through sections 67 and 69, which were already controversial issues identified by the DAC in the 1990s (DAC 1996). One could thus wonder why these issues that were unable to be solved in the 1990s when drafting the Act could/would potentially be solvable now.

Controversial issues: same old, same old?

One such issue already considered by the DAC at the time of the drafting of the Arbitration Act 1996, and now similarly brought back to the attention of the Law Commission, is confidentiality (DAC 1996; Law Commission 2022a). The confidentiality of arbitrations is one promise of the process, which proceeds behind closed doors and without the publication of the decisions as opposed to what happens in courts. While confidentiality is a valued characteristic of arbitration which has repeatedly been mentioned by the parties in arbitration surveys (QMUL & White Case 2015; QMUL & White Case 2018), the Arbitration Act 1996 is silent on confidentiality. The confidentiality of arbitration is instead implied, and parties are also free to agree to confidentiality expressly—in their arbitration agreement or by choosing a set of arbitration rules, for example. Although there is an implied duty/obligation of confidentiality, this is not absolute either since there are exceptions to this principle (DAC 1996; Law Commission 2022a).[8]

The question put to the Law Commission—as it was to the DAC in the 1990s—is whether the Arbitration Act should codify a duty of confidentiality with some exceptions carefully spelled out. Back in the 1990s, the answer to this question had been a carefully considered no: settling instead on an implied duty of confidentiality (DAC 1996). Twenty-five years later, the Law Commission reached the same conclusion following the same reasoning despite some arbitration laws having now

[8] This is a mere example of the dialogue between the law and the courts, where the latter are asked to fill gaps in the former as mentioned in the *Halliburton* case; and as further shown below for other issues on which the Arbitration Act similarly stayed silent. Issues, which recently were brought to the attention of the UK Supreme Court (*Halliburton v Chubb* and *Enka v Chubb* cases).

codified such a duty.[9] Both the DAC and the Law Commission thus concluded that a codification would indeed entail more disadvantages than advantages for the conduct of arbitrations in England. In the DAC's words in 1996: 'It would be extremely harmful to English arbitration if any statutory statement of general principles in this area impeded the commercial good-sense of current practices in English arbitration' (DAC 1996: 279). This was because principles usually have exceptions—and the formulation of these is a difficult enterprise which is better left to the courts. This was clearly articulated in paragraph 2.45 of the Law Commission's Consultation Paper (2022a):

> The law of confidentiality is complex, fact-sensitive, and in the context of arbitration, a matter of ongoing debate. In such circumstances, there is a significant practical advantage in relying on the courts' ability to develop the law on a case-by-case basis. Far from being a weakness, we consider it one of the strengths of arbitration law in England and Wales that confidentiality is not codified.

The confidentiality of arbitrations is therefore one example that bringing clarity through codification, at the expense of flexibility, is not always welcome. Instead, keeping the *status quo*—currently consisting in a dialogue between the law, the courts, arbitral institutions, and the parties—is at times preferable.[10]

Another issue that has also been the object of discussions by both the DAC back in the 1990s and now the Law Commission is the controversial section 69 of the Arbitration Act, which confers a right to appeal an arbitral award on a point of law. This provision is directly challenging the finality of arbitration and is therefore nowhere to be found in the Model Law, which the UK decided not to adopt on recommendation of the DAC in 1989 (DAC 1996). Yet, here too, in considering whether this provision needs to be reformed, the Law Commission decided to keep the *status quo* despite recognizing the existence of conflicting camps on this issue: one arguing for section 69 to be repealed, the other arguing for its liberalization (Law Commission 2022a).

To reach this conclusion, the Law Commission put great emphasis on the fact that section 69 is, after all, a default, non-mandatory, provision of the Arbitration Act 1996; meaning that the parties are free to contract out of it for their arbitration and have already done so. Because of this, this provision already achieves a compromise between two (laudable)

[9] See, for example, the Scottish Arbitration Act 2010.

[10] Though not always, as seen below with issues regarding disclosure from arbitrators and the law applicable to the arbitration agreement also considered by the Law Commission and recently the UK Supreme Court (*Enka v Chubb* and *Halliburton v Chubb*).

motivations—a consistent application of the law and the finality of arbitral awards, hence not calling for its repeal nor expansion (Law Commission 2022a). This was echoed by the General Council of the Bar of England and Wales in its response to the Law Commission's consultation and which expressed its strong opposition 'to a default provision which removed the right of appeal on a point of law' since section 69 already 'strikes a broadly appropriate balance' (2022: 10).

Although there seems to be a general agreement as to the fate of section 69 so far, the same does not hold true for the reform of section 67 of the Arbitration Act 1996. This provision allows for the challenge of an award on the ground that the arbitral tribunal lacked substantive jurisdiction. The contentious issue raised by the Law Commission here is whether this challenge should be by way of a rehearing—as provided by section 67—or by way of appeal when the party challenging the jurisdiction of the tribunal has already participated in the arbitration while raising a jurisdictional objection. This latter position is currently the one favoured by the Law Commission.

To get to this recommendation, the Law Commission considered that allowing a party which has already raised a jurisdictional objection in arbitral proceedings they have participated in entails both additional costs and delays through repetition, and concerns of fairness (Law Commission 2022a). However, these arguments have already been refuted by academics and practitioners, who instead contend that such arguments are 'significantly overstated' (Members of Brick Court Chambers 2022: 4) and 'minor' compared to the arguments in favour of keeping the *status quo*, which are 'overwhelming, both from a theoretical and a pragmatic perspective' (Grierson 2022: 769).[11] Jacob Grierson, for example, considers that the proposed change of section 67 'risks seriously damaging the legitimacy of arbitration by allowing illegitimate arbitrations to go unchecked', while consent is at the cornerstone of arbitration (Grierson 2022: 766). Members of the Brick Court Chambers together with Lord Mance, Sir Bernard Rix and Ricky Diwan KC have similarly raised concerns as to this proposed reform emphasizing that the current approach is an 'essential procedural safeguard … [not] resulting in significant additional costs and or delays', while the proposal does not align with the laws of 'leading jurisdictions' including France (2022: 5).

For this contentious issue, it therefore remains to be seen what the Law Commission will decide in its final recommendations based on the

[11] For some comprehensive reviews of disagreements with the Law Commission's Consultation Paper, see: Grierson 2022 and Members of Brick Court Chambers 2022.

responses to its consultation: either moving forward with this proposal or keeping the *status quo* with section 67 as well.

Recent jurisprudence from the UK Supreme Court in 2020 has also highlighted further areas for review of the Arbitration Act 1996. While the independence, impartiality and related duty of disclosure of arbitrators were considered in *Halliburton v Chubb*, the law applicable to the arbitration agreement was addressed in *Enka v Chubb*. Both cases are significant, and yet the ruling of one (*Halliburton*) has been deemed worthy of codification by the Law Commission but not the other (*Enka*). The Law Commission instead considers that concerns raised about the law applicable to the arbitration agreements in English-seated arbitrations were not worthy of further discussions, though this matter could be reopened should arbitration stakeholders disagree—and so far, some publicly did as shown below.

Considering the proposals of the Law Commission about the duties of impartiality, independence and disclosure first, unlike other jurisdictions and the Model Law, the Arbitration Act 1996 does not provide for a duty of independence and continued disclosure but only for a duty of impartiality for arbitrators. Impartiality requires arbitrators to be neutral, while independence requires them to have no connections with the parties (Law Commission 2022a). This position was not an omission by the drafters of the Arbitration Act in the 1990s, but (as with confidentiality) the result of careful considerations. Back then, the DAC indeed considered that the 'lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance' (DAC 1996: 292), while also emphasizing that requiring total independence—the absolute absence of connections—would be difficult (if not impossible) to achieve given the tight-knit community that is arbitration and repeat players (often in different roles, what is known as double-hatting) in different cases. As such, impartiality is what matters, although it is linked to independence. Disclosure (of previous connections, relationships) is one way to ensure that an arbitrator is impartial (*Halliburton v Chubb*). Since, after all, justice must not only be done, but also be seen to be done (*R v Sussex Justices; ex parte McCarthy* 1924).

Although disclosure is an important element to ensure the impartiality of arbitrators,[12] there is no such duty in the Arbitration Act. Good arbitral practice has instead relied on the well-known International Bar Association Guidelines on Conflicts of Interests in International

[12] The UK Supreme Court in paragraph 70 of the *Halliburton* case on the role of disclosure stated: 'One way in which an arbitrator can avoid the appearance of bias is by disclosing matters which could arguably be said to give rise to a real possibility of bias.'

Arbitration. Only in 2020, the UK Supreme Court found in paragraph 81 of the *Halliburton* case that:

> There is a legal duty of disclosure in English law which is encompassed within the statutory duties of an arbitrator under section 33 of the 1996 Act [which sets the duty of impartiality] and which underpins the integrity of English-seated arbitrations.

This duty of disclosure would, however, not be applicable to all connections an arbitrator may have—as this would be a never-ending rabbit hole given how arbitration works in practice. Instead, this obligation to disclose for an arbitrator only applies in circumstances 'which "might" give rise to justifiable doubts' as to their impartiality (*Halliburton*: para 108). The Law Commission has now endorsed this general duty of disclosure in these given circumstances by recommending its codification, while sticking to not expressly providing for a duty of independence (Law Commission 2022a). So far, available academic commentary and consultation responses seem to agree with this approach (General Council of the Bar of England and Wales 2022; Grierson 2022).

This is, however, not the case for the Law Commission's conclusion as to the law applicable to the arbitration agreement, about which it decided to do nothing, nor to investigate further. In a nutshell, it was submitted to the Law Commission that 'there should be a default rule that the law governing the arbitration agreement is the law of the seat' (Law Commission 2022a: 112).[13] Such a provision would bring some clarity and in turn avoid unnecessary delays to find which law is applicable to the arbitration agreement, which could be quite an ordeal following the lack of clarity of case law on this matter (Grierson 2022; Members of Brick Court Chambers 2022). Indeed, the decision of the UK Supreme Court in *Enka v Chubb* in 2020, while bringing '*some* clarity' (Grierson 2022: 770, original emphasis), is not perfect either and may even lead to some detrimental effects by still entailing delays and potentially giving 'a new weapon to recalcitrant parties who can thereby slow down or scupper altogether London-seated arbitrations' (Members of Brick Court Chambers 2022: 23).[14] This is because this recent decision by the UK Supreme Court still requires some investigation from lawyers and arbitrators as to the applicable law to the arbitration agreement—while Grierson adds that this judgment is quite long and not 'sufficiently clear' (Grierson 2022: 773). Therefore, the Law Commission could have taken the opportunity

[13] This is the position already adopted by the LCIA Arbitration Rules 2020 in its article 16.4 which provides for the law of the seat as the applicable law (by default) to the arbitration agreement, unless otherwise agreed by the parties.

[14] For a simplified review of this judgment, see Grierson 2022.

through its review of the Arbitration Act to either codify the *Enka* decision, clarify it, or depart from it altogether by providing for the law of the seat as the default applicable law to the arbitration agreement. Although this issue is not deemed worthy of further investigation and amendments, this may change following the consultation of arbitration stakeholders.

Contemporary challenges: forgotten already?

One pressing challenge not considered by the review undertaken by the Law Commission—but only mentioned in passing when addressing modern technology—is climate change. This is disappointing for at least two reasons: the urgency to mitigate and adapt to climate change and the increased recognition that ADR could in fact play a role in that endeavour (ICC 2019). But still, the review fails to acknowledge these realities and to consider the addition of a provision to this effect.

The numerous reports of the Intergovernmental Panel on Climate Change (IPCC) and international organizations, such as the United Nations, are increasingly alarming on the need to mitigate climate change. The last report from the IPCC simply concluded that 'it is now or never' and 'the time for action is now' (IPCC 2022). We are indeed increasingly witnessing extreme weather events, while we are also 'far off the trajectory of stabilising global temperature rise at 1.5-degrees' (United Nations Framework Convention on Climate Change 2022)—the objective set forth by the Paris Agreement 2015. Instead, 'the world is on a "catastrophic pathway" to 2.7-degrees of heating' by the end of the century (United Nations Secretary General 2021). The message is clear though, we need to drastically reduce our carbon emissions.

As seen during the Covid-19 pandemic, the level of greenhouse gases released in the atmosphere dipped for a while due to lockdowns and travel restrictions. Travels, especially by plane, are indeed one massive source of carbon emissions. And, unfortunately, cross-border disputes involving numerous actors—such as parties, lawyers, experts, witnesses, arbitrators—do entail a lot of carbon emissions (most often by air). As such, (international) arbitration was/is not eco-friendly given the need for travels but also the voluminous hardcopy bundles produced during the course of an arbitration. By way of example, the Campaign for Greener Arbitrations estimated in 2021 that, for a single cross-border arbitration, we would need to plant 20,000 trees to offset its carbon emissions (Campaign for Greener Arbitrations 2021a). It is true that because of the pandemic the carbon footprint of arbitrations—and similarly of litigation and other ADR processes—has been reduced over the past few years due

to a move to remote hearings out of necessity. However, now that the world is opening up again and Covid-19 restrictions are being lifted, we should still keep the benefits of a reduced carbon footprint in arbitrations.

The question then is how this could be achieved. Undoubtedly, the answer—as witnessed during the pandemic—lies in moving arbitration online with virtual hearings and the electronic submission and sharing of documents. There have thus been private initiatives and suggestions in order to make arbitration greener. Lucy Greenwood (2021) has identified a number of ways which require a change of behaviours from actors in arbitration (lawyers and arbitrators alike), while the Campaign for Greener Arbitrations (2021b) has developed a pledge that arbitrators are free to sign up to. Here too, the message/pledge is simple: the use of online means to conduct an arbitration should be encouraged both for hearings and written submissions, while flying should be used in last resort only.

Although not all disputes are suited to online proceedings, the experience gained during the pandemic and continuous adjustments—made not only by legal actors and institutions (through training and guidelines for example) but also by software developers (through updates of functionalities and security responding to users' feedback)—suggest that the online administration of justice could be/is the way forward (Susskind 2019).[15] This new practice would have implications for the mitigation of climate change but also increase access to justice, as consistently argued by Richard Susskind (2019). The Law Commission should therefore consider this reality in its update of the Arbitration Act 1996. This move would in fact go hand-in-hand with the England and Wales reform programme launched by the Ministry of Justice aiming at the modernization of justice through technology and innovation, for which more than £1 billion has already been allocated by the Government (Ministry of Justice 2016).

To achieve this modernization of the justice system, however, we do also need to endorse the role of technology in arbitration, and not only in litigation. Obviously, modern technology was not a concern back in the 1990s, though the Law Commission has now identified it (albeit briefly) in its Consultation Paper. Yet, no recommendations have so far been reached as to whether this issue should be legislated upon in the updated Arbitration Act. This is instead left open to the consultation asking directly to arbitration stakeholders whether the Arbitration Act 'should make express reference to remote hearings and electronic documentation

[15] With Richard Susskind (2019) even considering this could one day become the norm, and in-person processes the exception.

as procedural matters in respect of which the arbitral tribunal might give directions' (Law Commission 2022a: 105).

It is argued here that there should be such an express reference as this would bring some clarity. Indeed, several arbitral institutions have issued guidance and guidelines on online arbitral proceedings given the abrupt and unprepared turn to technology due to the pandemic. The ICC has, for example, highlighted a number of factors that should be carefully considered before an arbitral tribunal decides to conduct an arbitration online (ICC 2021). These texts are, however, only mere guidelines and thus deprived of any legislative or judicial authority. In turn, this plurality of sources could potentially lead to inconsistencies between arbitral institutions and practices. The consideration of modern technology and the formulation of some general principles for the conduct of virtual arbitrations—building on the experience during the Covid-19 pandemic—would therefore be welcome in this updated Arbitration Act.

Similarly, a clarification that a decision to conduct an arbitration online is within the powers of an arbitral tribunal, and particularly within its broad procedural discretion, would be beneficial. This would present a number of advantages not only for arbitrators, but also for the arbitral process as a whole. For arbitrators, this would remove a concern about due process (or due process paranoia) that may prevent them from going online even if that decision were to be appropriate in the case before them. This clarification would also remove concerns about whether arbitrations conducted online are in breach of article 6 of the European Convention on Human Rights 1950 (ECHR) which guarantees a right to a fair trial. This codification would thus have the advantage of avoiding tactical challenges by a frustrated party before the courts for lack of due process or breach of article 6 ECHR. This issue has indeed already made its way up to the Austrian Supreme Court which 'confirmed a tribunal's power to hold remote hearings [even] over one party's objections' (Blackaby & Ors 2022: 294). Addressing online arbitration in the updated Arbitration Act would therefore bring more certainty to the arbitral process as a whole and avoid unnecessary additional costs and delays due to challenges before the courts. Finally, England would not be the first Arbitration Act to explicitly endorse the use of modern technology in arbitral proceedings since the Netherlands has already done so in its updated Dutch Arbitration Act from 2015.

[E] CONCLUSION

As their European counterparts on the continent and Scottish neighbour have already done, England and Wales stand ready to update the Arbitration Act 1996 which has recently celebrated its 27th anniversary. It is undeniable that English arbitration law is one of the most popular laws (if not the most) and London a top destination for the conduct of arbitrations. Therefore, this review will likely consist of targeted updates, light-touch reforms, or simply keeping the *status quo* in order to not disrupt this established and uncontested popularity. Although this article has highlighted some controversial aspects of the Consultation Paper published by the Law Commission in September 2022, it should, however, be acknowledged that this review is overall positive.

This article has focused on issues worthy of further investigations in order to improve the competitiveness of English arbitration law given recent developments and contemporary challenges. Concretely, this means that the Law Commission should further consider how it could add provisions reflecting the increased use of modern technology by arbitral tribunals—through video hearings or the sharing of e-documents for example—and the urgent need to reduce the carbon footprint of arbitration to help towards the mitigation of climate change. In addition, a provision to clarify the law that is applicable to an arbitration agreement in the absence of an express choice by the parties would be welcome, even though the UK Supreme Court recently considered this matter in 2020.

Furthermore, the review of the Arbitration Act is not only an opportunity to address concerns that were non-existent (such as modern technology) or not as prevalent (such as climate change) 27 years ago. Indeed, the English arbitration law could be further refined by building on good arbitration practice. However, for some of the issues identified in this article (such as the confidentiality of an arbitration) keeping the *status quo* was deemed preferable, since these issues had already proved unsettling to the DAC in the 1990s.

In any case, given that the Law Commission is now analysing the answers provided by stakeholders in arbitration as part of its public consultation, it remains to be seen what its final recommendations will be.

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Some Failings of Consumer ADR Policy

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Abstract

The promotion of consumer alternative dispute resolution (ADR) has been a consistent policy of the UK Government and appears to be well used. This article addresses two issues. The first is institutional arrangements for consumer ADR policy. The second is the availability of information about the performance of consumer ADR schemes. The argument is that the current institutional arrangements are flawed and that although there is some useful information publicly available to assess the performance of consumer ADR as a whole, it is not easily accessible and has not been used very much. Until these matters are addressed, it is not possible to evaluate the performance of consumer ADR properly and to develop appropriate policies.

Keywords: consumer; alternative dispute resolution; Ombudsman; information; complaints.

[A] INTRODUCTION

Promoting or encouraging alternative dispute resolution (ADR) for consumer disputes with businesses has been a long-running policy of UK Government and has survived numerous changes of government (Department for Business, Enterprise, Innovation and Skills (BEIS) 2022). There are lots of consumer ADR schemes and, in the form of the Financial Ombudsman Service (FOS), the United Kingdom (UK) is home to the largest consumer ADR scheme in the world dealing with up to half a million cases a year at its peak. Not only has the number of schemes grown, but the techniques used have seemingly had an influence on reforms to the small claims procedure in the county court and the creation of Money Claims Online (Ministry of Justice 2021). Why, then, am I talking about some failings of consumer ADR?

Research and evaluation of consumer ADR schemes in the UK has been patchy and the results have not always been positive. Consumer activists have produced very negative evaluations of consumer ADR (Dewdney & Williamson 2016; 2018; Lewis & Ors 2017). FOS has been subject to critical commentary and evaluation (Hunt 2007; Lloyd 2018; Treasury Committee 2022). The limited research evidence that is available suggests that the users of consumer ADR are not representative of the population as a whole, being largely older white males, well-educated and more affluent (BEIS 2018: 14-15). There has also been a long-standing criticism of consumer ADR for providing second-class justice as opposed to the courts (Genn 2009: ch 3). This essay does not explore these lines of criticism but takes a different angle. It focuses on two issues: the institutional arrangements for consumer ADR policy and the information that is available about the performance of consumer ADR schemes. The argument is that the institutional arrangements are flawed and that, although there is some useful information publicly available to assess the performance of consumer ADR as a whole, it is not easily accessible and has not been used very much. Until these matters are addressed, it is not possible to evaluate the performance of consumer ADR properly and to develop appropriate policies.

[B] THE INSTITUTIONS OF CONSUMER ADR

Consumer ADR is seen as part of consumer policy, and so responsibility is vested in BEIS. Given that ADR is about the resolution of disputes, it is surprising that this is not part of the brief of the Ministry of Justice or His Majesty's Courts and Tribunal Service (HMCTS). This has, however, always been the position. The result is that whatever expertise in dispute resolution that the Ministry of Justice or HMCTS has because of their roles in relation to the courts and tribunal system, this is not readily available to BEIS, and *vice versa*, although the Government has said that BEIS will work with the Ministry of Justice to help and support their policy analysis (BEIS 2022). There is apparently no forum where lessons can be learned across courts, tribunals and ADR systems.

The framework within which consumer ADR works is provided by the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (the ADR Regulation) which have their origin in the European Union (EU) ADR Directive (Directive 2013/11/EU). These regulations do not make it compulsory for sectors of the economy to establish consumer ADR schemes, nor do they make it compulsory for traders to join a consumer ADR scheme. Nor is it compulsory for an ADR scheme to seek approval under these

regulations. The result is a wide variety of arrangements existing in the UK. Not all sectors have ADR schemes and not all traders are members of ADR schemes. Since each consumer ADR scheme is based in a sector, they each have their own rules and jurisdiction which limit their activities. Whether or not these legal rules will remain in place after 2023 is currently an open question because the Retained EU Law (Revocation and Reform) Bill which is currently before Parliament envisages the revocation of regulations such as the ADR Regulation by the end of 2023, unless time is extended by a ministerial decision. The Bill also gives power to ministers to replace such regulations. Regardless of the future of these legal rules, the argument in this article still holds because the existing arrangements will not cease to function at the end of 2023. Certain schemes, notably financial services but also energy, have independent statutory backing which is not going to disappear while there would seem to be no incentive for the voluntary schemes to cease operating.

In order to be approved as an ADR scheme, an organization has to meet the criteria set out in the ADR Regulation which cover issues such as accessibility, impartiality, transparency, fairness, legality and effectiveness (ADR Regulation, sch 3). The decision is made by a competent authority, and there are currently eight; seven covering certain regulated sectors and one, the Chartered Trading Standards Institute (CTSI), acting as a delegate of the Secretary of State covering all the rest. Regulated industries means financial services, energy, gambling, airlines, telecommunications, legal services and estate agents (ADR Regulation, sch 1). This list is odd because it omits two other regulated sectors: water and rail. Arguably, buses and post could also be considered regulated sectors. These sectors have their own ADR schemes, although water sits outside the usual arrangements as customers do not have a contractual relationship with water companies. Everything else is referred to as a non-regulated sector.

As mentioned, the functions of the Secretary of State under the ADR Regulation have been delegated to the CTSI. The CTSI is largely a professional membership body for trading standards professionals, but it also undertakes related work. This includes acting as a competent authority to approve ADR schemes in industries which are not regulated and keeping a list of approved ADR schemes which can be found on its website. The ADR Regulation also provided that there should be a report on the development and functioning of ADR entities by July 2022 which identifies best practices, shortcomings and provides recommendations to improve the functioning of ADR entities (ADR Regulation, para 18). I do not think that this report has yet been done.

As an aside, there is an elephant which is not in the room. The body with overall responsibility for the enforcement of consumer law in the UK, the Competition and Markets Authority (CMA), has no oversight or responsibility for consumer ADR. Its focus is on the enforcement of consumer protection law, as well as having significant other responsibilities in competition law and related fields. This is an odd omission given that, at least, consumer ADR schemes might have some information about potential enforcement issues.

There are currently 60 approved ADR entities in the UK according to the CTSI website.[1] This is not a complete list as it does not include the Legal Ombudsman nor the water redress scheme which is operated by the Centre for Effective Dispute Resolution (CEDR). CEDR operates a number of ADR schemes, some approved under the ADR Regulation and some are not. CEDR's website lists 18 different industries that it covers, and in 2021 it estimated that it ran over one hundred consumer dispute schemes used by about 30,000 consumers. CEDR is a non-profit organization and a registered charity which provides a range of related services in addition to operating ADR schemes, such as training. Two of the biggest schemes, energy and telecommunications,[2] are run by Ombudsman Services,[3] another non-profit provider which also administers parking on private land appeals for the British Parking Association, as well as operating a scheme for sectors where there is no existing provision for redress.

An important difference between the regulated and non-regulated sectors is that there is a regulatory body in the regulated sectors which acts as a competent authority. Compared to the CTSI, the regulators have more resources, even if only a small amount of those resources are applied to the ADR schemes that they have responsibility for. This does not mean that there is any consistent pattern. In financial services, energy and legal services, there is one consumer ADR scheme. In relation to telecommunications and estate agents, there are two schemes. The Civil Aviation Authority lists five consumer ADR providers. The Gambling Commission has approved eight schemes.

One of the more developed arrangements is that between Ofgem and Ombudsman Services: Energy (OSE). OSE has been handling complaints against energy companies for some time. In addition to the work of OSE, Citizens Advice also operates the Extra Help Unit, a UK-wide service, based in Scotland, which deals with more difficult cases referred to it by

1 See Chartered Trading Standards Institute: ADR Competent Authority, ADR Approved Bodies.

2 Although note that there is another telecommunications ADR scheme run by CEDR.

3 Soon to be the Trust Alliance Group.

advisers, in other words, the public has no direct access (Citizens Advice Extra Help Unit). Since 2017, OSE has been part of a tripartite group with Ofgem and Citizens Advice which involves bimonthly meetings with the aim of, among other things, identifying emerging trends.[4] This is a relatively new role for OSE that has arisen in part as a response to a critical report commissioned by Ofgem which found that, although OSE agreed it had a wider role than just complaint handling, it had not focused on the wider role, was unsure about it and had limited systems and processes to support it (Lucerna Partners 2015; Ombudsman Services 2016). This also makes the point that Ofgem has regularly reviewed the performance of OSE, as required under the ADR Regulation.

There are also structured arrangements in relation to FOS, which has memoranda of understanding with the FCA and the Prudential Regulation Authority, as well as working with other partners in the Wider Implications Framework.[5]

These institutional arrangements make no sense. At the highest level, separating responsibility for consumer ADR from the wider justice system is counter-productive. Consumer ADR is an alternative to the court system because at least some consumer ADR claims could be heard by the small claims court. It would make logical sense to have one body with overall responsibility for both the small claims courts and consumer ADR. This seems particularly relevant given that some of the procedures and approaches found in consumer ADR have been influential in the reform of the courts and tribunals.

Even if that is not accepted, the current arrangements sitting under BEIS are inadequate. There are currently eight competent authorities, of which the CTSI has the biggest remit covering 60 schemes. There is a case for distinguishing between sectors with a regulator and those without, on the grounds that there could be useful communication of information between the ADR scheme and the regulator as regards general trends in the industry and concerns about specific providers. It is not clear that this works effectively, but there is a good argument for it in principle. There is no forum in which the regulators discuss their experiences of the consumer ADR schemes for which they are competent authorities. Leaving responsibility for 60 schemes to the under-resourced CTSI does not seem a sensible arrangement. That the top-level consumer enforcement body, the CMA, has no role or communication, seemingly, with consumer

[4] See Tripartite Group Engagement Diagram 21 March 2019.

[5] Respectively available at: Financial Conduct Authority/FOS; Financial Conduct Authority/Prudential Regulation Authority; and Financial Conduct Authority, Wider Implications Framework.

ADR bodies seems bizarre. Overall, the competent authorities have no institution where they can learn lessons from each other.

Nor is there any forum where consumer ADR schemes can come together and share their experiences. Those that are members of the Ombudsman Association can participate in the work of that Association and its annual conferences, but not all consumer ADR schemes are eligible for membership. There is no equivalent of the Administrative Justice Council (AJC) which takes an overall view of the workings of administrative justice in the UK.[6] This would be a difficult enterprise, given the number of schemes and the difficulty in obtaining basic information, discussed below, but if consumer ADR is seen as an important policy, a systematic attempt to assess what is happening would seem to be the bare minimum and a starting point for trying to improve the arrangements.

[C] INFORMATION

In order to begin to assess the performance of consumer ADR schemes basic information is needed on all the schemes. The ADR Regulation sets out in schedule 5 certain information that must be included in an ADR entity's annual activity report which at least imposes a common format on these reports. The information required includes: number of disputes; types of disputes; the number of disputes that the ADR entity has refused to deal with and the grounds for so doing; the percentage of disputes that were discontinued for operational reasons; the average time taken; and the rate of compliance, if known. To this bare minimum should be added the outcomes of disputes, sometimes referred to as the uphold rate, and also at what stage did disputes reach, as most consumer ADR schemes attempt to settle disputes before a formal investigation.

It would also be sensible to have information on industry and company complaint handling, as the general rule is that the ADR entity will not become involved unless the company has had an opportunity to deal with the dispute. It is important to have an idea of the number of disputes dealt with by companies which then migrate to the ADR scheme as it is well known that ADR schemes are only the tip of the iceberg. It would also be helpful to know how many disputes individual companies were dealing with. It would be useful to know who the users of an ADR scheme are, but, with the exception of FOS, there are no schemes which regularly collect data on this, although there is collection of customer satisfaction data.

[6] See the ACJ website. The AJC is a private sector replacement for the Administrative Justice Forum which was abolished in 2017 and which replaced the Council on Tribunals.

Sector	Complaints received	Notes
ABTA	15,988	
Airlines	26,737	Aviation Disputes and CEDR
Buses	556	Outside London only
Communications	44,862	Communications Ombudsman and CISAS
Energy	71,282	
Financial Services	235,507	
Legal Services	4,573	Accepted for investigation
Property and Estate Agents	21,696	Property Ombudsman and Property Redress Scheme
Railroads	2,052	
Total	**423,253**	

Table 1: Disputes received 2020-2021

The ADR Regulation also requires ADR entities to identify systematic or significant problems that they have become aware of and any recommendations that they might make as to how those problems should be resolved. In addition, every two years they should communicate their assessment of their own effectiveness and how it might be improved (sch 6). These are sensible provisions.

A starting point for understanding how ADR works is to know how many cases are dealt with by ADR schemes. This has to be done on a scheme-by-scheme basis, using the ADR entity reports under the regulations as there is no one body which collates the statistics and publishes them. Table 1 provides information on the number of complaints received by a selection of ADR schemes in 2020-2021 which was the latest date at which comparable information was available. The total is 423,253 disputes which gives an idea of the scale of activity in this sector. This is, however, an underestimate of the number of disputes. The property side does not include disputes about tenancy deposit schemes, which are in the order of 30,000 a year, and Table 1 does not include disputes with water companies, as that information is not readily available, although the Consumer Council for Water publishes an annual complaints report. The non-regulated sector is largely excluded, with the exception of ABTA.

For comparison, over the same time period there were 974,497 money claims in the county courts.[7] We also know that, for all county court claims, only 243,250 were defended. It also seems to be the case that most of these claims are not consumers suing businesses, but businesses pursuing consumers. In the period 2019-2020, Iain Ramsay identified that 80% of money claims were issued by ten legal firms.[8] If that proportion

[7] Civil Justice Statistics 2021.

[8] Credit Debt and Insolvency, Assembly-Line Debt Collection and the International Overindebtedness Industry.

Name of scheme	Days	Notes
Aviation ADR	73.00	
Aviation – CEDR	39.00	
Buses	24.00	
CISAS	37.00	
Communications Ombudsman	80.00	
Energy Ombudsman	41.00	
Financial Ombudsman	58.47	
Legal Services	542.00	Calculated simple average of range from 356-745 depending on complexity
Property Ombudsman	52.70	Calculated weighted average
Property Redress Scheme	36.20	Calculated simple average of range from 33-39 depending on subject
Railroads	31.25	Calculated simple average of range from 13.2-40.6 depending on complexity

Table 2: Average time to resolve dispute in days 2020-2021

is applied to 2020-2021, then the potential figure for consumer claims comes to just under 200,000. This is likely to be an overestimate, as Ramsay's figures relate only to the top ten issuers of bulk claims. In 2021, Money Claims Online is reported to have issued 81,715 claims and settled 26,082.[9] The point is that the majority of consumer claims are being heard through ADR schemes, not the courts.

The second comment is that this information is not easy to obtain, although it can be found online. The Energy Ombudsman's website provides an interesting example. At the time of writing (November 2022), there is a section of the website called 'Annual Reports'. The latest Annual Report is for Ombudsman Services, the umbrella provider for the Energy and Communications Ombudsman, but only for 2020, and it does not provide meaningful statistics. There is a section on ADR entity reporting which provides information up to 2021 and another section on complaints data which is divided up into energy and communications complaints and goes into 2022, which are reported on in different formats. For the Property Redress Scheme, the information is contained in the 'Resources' section under the title of ADR Regulation 2015 Appendix D Report – hardly the clearest description.

Table 2 shows the average times to resolve disputes that are reported by the ADR entities. This ranges from 24 to 542 days. Here the outlier is the Legal Services Ombudsman which takes between 365 and 745 days to resolve complaints, depending on their complexity. This seems simply too slow. But also striking are the differences between schemes

9 Fact Sheet: Online Civil Money Claims Gov.uk.

Name of scheme	Number	% (rounded)
Aviation ADR	1,806	8
Aviation – CEDR	91	3
Buses	570	102
CISAS	1,131	5
Communications Ombudsman	10,957	28
Energy Ombudsman	31,107	44
Legal Services	NA	
Financial Ombudsman	2,913	1
Property Ombudsman	10,786	55
Property Redress Scheme	1,628	83
Railroads	875	42

Table 3: Disputes rejected 2020-2021

within sectors. The Communications Ombudsman takes 80 days while the Communication and Internet Services Adjudication Scheme (CISAS) takes 37. Similarly, Aviation ADR takes 73 days while CEDR takes 39. On the face of it, this takes some explanation, as it would be expected that the range of disputes within the sector is the same for both ADR entities. Although it is possible that the types of disputes are different, and it is also possible that they may compile their statistics differently.

Table 3 looks at the number of disputes rejected by ADR schemes, which is an often-neglected issue. One of the problems with having a variety of schemes which apply to different companies with different rules is that consumers will go to the wrong scheme at the wrong time and will be, correctly, directed elsewhere by those operating the scheme. We do not know what happens to these consumer complaints; there has been no research done on this issue and the ADR entities do not follow up complaints which have been rejected. Some of these complainants presumably go back to the correct scheme or the supplier and have their complaints dealt with. Others presumably simply abandon their complaint. There are some high numbers and some low numbers. It is striking that the biggest scheme, FOS, has the lowest percentage of rejections, followed by the two aviation schemes. It is puzzling that CISAS rejects very few cases, but the Communications Ombudsman rejects around 28%. The high rejection rates that are seen indicate, at the least, a failure on the part of the ADR schemes to communicate their rules to complainants.

Finally, it is worth looking briefly at information on compliance. With the exception of the Property Redress Scheme, two approaches are found in the reports. The first is to report close to one hundred per cent compliance and the second is to either not report or say that they do

not know (FOS, CISAS, Aviation ADR, Rail Ombudsman, Legal Services Ombudsman). Without knowing how the information is compiled, it is difficult to see this as useful.

At this point, it is worth moving to additional information that it would be useful to have. The starting point is FOS because it is the largest of the schemes. FOS publishes its uphold rates as part of its complaints data, also splitting this out into uphold rates depending on the subject matter of the complaint. The full dataset also divides cases into those resolved by the Ombudsman and those not resolved by the Ombudsman. This is also divided into the subject matter of complaints. In addition, FOS publishes all its final Ombudsman decisions and provides a searchable database.

FOS provides data on complaints against named businesses in its half-yearly data reports, while the Financial Conduct Authority provides industry-level data on complaint handling, as well as firm-specific data.[10] It is easy to understand the volume of complaints received by financial services firms and how few, relatively, reach FOS.

The next most active area for consumer ADR is energy. The first problem is that the last report by Ombudsman Services specifically on energy was for 2019; there are no reports for the last two years. The 2019 report provides percentages of disputes that were upheld, not upheld, settled or maintained (where the company had made a fair and reasonable offer). As regards company performance, the website publishes overall industry data for complaints submitted to the Ombudsman on a quarterly basis and individual data for the top seven suppliers. Ofgem provides information on complaints received by all suppliers per 100,000 accounts, splitting that down into all large and medium-sized suppliers and a selection of small suppliers.[11] Additional information is provided on how long it takes suppliers to resolve complaints, again with supplier-specific information. The absolute numbers of complaints dealt with by energy suppliers are provided on the company websites as part of their complaints reports although not all of them provide an archive. Quite why Ofgem does not provide absolute numbers is a mystery.

The position in communications is different. Here data is provided by Ombudsman Services and CISAS, as mandated by Ofcom. Again, the last communications sector report by Ombudsman Services was in 2019, although the ADR entity report covers 2021. This data gives the percentage outcome of cases, upheld, settled or not upheld, divided into

[10] Financial Conduct Authority, Complaints Data, 20 October 2022.

[11] Ofgem, Customer Service Data, November 2022.

broadband, landline or mobile and split up by provider. It also breaks out issues, on a percentage basis, by broadband, landline and mobile and by provider. It can be seen, for example, what percentage of broadband issues involving BT are concerned with service as opposed to billing. Ofcom publishes data on the number of complaints that it receives per 100,000 subscribers for individual companies, but no data on outcomes. Nor are absolute numbers given.

One of the advantages of consumer ADR schemes is supposed to be that they offer an insight into systemic problems or problems a particular trader might have, for example, as happened with Extra Energy,[12] and can therefore bring about improvements in practice, unlike courts who will focus on the dispute in front of them. This is not to argue that court decisions do not have wider implications, they frequently do. An ADR scheme can, however, look at trends in the cases before it and identify issues which are of concern to consumers. Given the connection an ADR scheme should have with its membership, in principle this should facilitate a discussion of the issues.

The ADR Regulation recognizes this and requires ADR schemes to address systematic or significant problems in their annual reports and provide suggestions for improvement. The required ADR entity reports are disappointing here, dealing with the issue in one or at most two paragraphs with a distinct lack of detail. It may be that these discussions are taking place elsewhere, as explained above in relation to the Energy Ombudsman and FOS, but there does not seem to be any explanation in the public domain, even after the fact.

[D] CONCLUSIONS

The first point is that, as far as consumer disputes are concerned, the courts have been sidelined. This is now the business of multiple ADR schemes in the UK. It might be argued that this is a bad development, but I think that ship has sailed. It is not possible to reverse the growth of consumer ADR and replace it with an efficient and effective court process, especially in the current economic climate. The way forward is to try and improve consumer ADR as was recognized in the most recent government paper (BEIS 2022).

The starting point must be a coherent policy structure. ADR policy at the moment appears to be homeless, being located as a subset of consumer

[12] Extra Energy was a small supplier which ceased trading in 2018. In June 2017, Citizens Advice reported that it had the worst score for complaint handling between January and March: 'Extra Energy Bottom of Customer Service Rating Again'.

policy within BEIS. An initial decision has to be made as to whether ADR is located within consumer policy or within justice policy. Although logic suggests the Ministry of Justice, given that department's record and the need for both business and consumer buy-in to any arrangements, BEIS is better placed to continue looking after the policy.

Certain aspects of the ADR Regulation are sensible, and the wheel does not need reinventing, even though it originates from a piece of EU law. There needs to be an approval process for ADR schemes run by an independent authority, and there need to be criteria for approval. The criteria in the ADR Regulation are a good starting point and the Government has said that it is committed to strengthening them (BEIS 2022). The operation of ADR schemes needs to be reviewed on a regular basis, again an idea seen in the regulations. All of this needs to be done by a properly resourced competent authority. As currently constituted, that cannot be the CTSI.

The choice for a lead competent authority rests between BEIS and the CMA, given the current arrangements. The CMA as the lead consumer enforcement body would seem a better choice than a government department, although this will require proper resourcing. Approving, monitoring and encouraging best practice for consumer ADR schemes is not a resource-light set of activities. Or, if it is conceived of as resource-light, it is likely to lead to problems. This is one issue with choosing the CMA because the CMA has had a number of new jobs dumped on it recently, for example, digital markets and subsidy control.

If there is a top competent authority, the question then arises if the current arrangements, where there are eight competent authorities, should be retained. It is tempting to suggest that there should be one and that it should be the CMA. The difficulty here is whether it is worth unpicking current arrangements where sectoral regulators approve the ADR schemes in their sectors. It is important that sector regulators are happy with their ADR schemes, but it is equally important that they do not get 'captured' by them and industry and push them to improve. It is probably more realistic to leave the regulators as the competent authorities in their sectors and leave the CMA to deal with the unregulated sectors as there seems to be an acceptance that this is the area in greater need of improvement.

Whatever body serves as the competent authority, there needs to be a forum where consumer ADR schemes can meet and try and learn from their experiences. There is a UK Regulators Network, so why should there

not be a UK ADR network? There is a resourcing issue here, given that ADR schemes are voluntary and generate their own income, even though they are typically not for profit. If it is a case of organizing one meeting a year, this cannot be an insoluble problem.

There is also an important role to be played in monitoring the performance of ADR schemes and in collating and disseminating information as well as ensuring schemes provide information in comparable formats based on common definitions. In terms of information, the ADR regulation lays down a baseline which can be built on. Regardless of what information is thought to be useful, it is important that there is a central point which collates the information and publishes it, rather than just relying on each scheme to publish its own data. If we publish basic information for tribunals, why not do this for ADR schemes? Whoever is responsible for collecting the information should ensure that it is done on a comparable basis.

There are also many of what I would call substantive questions. These range from practical ones such as how to make the public more aware of ADR schemes and guide them to the right places, to bigger issues of principle. For example, to what extent should membership of an ADR scheme be compulsory for traders? Is it sensible to have more than one ADR scheme in a given sector? There are many more questions to be addressed but addressing them effectively requires a sensible set of institutions for policy design and better availability of information on how ADR schemes are performing.

About the author

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Data Sources for Tables

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Aviation CEDR

Buses

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Communications Ombudsman

Energy Ombudsman

Financial Ombudsman Service (FOS)

Legal Services: Complaints Data and Annual Report and Accounts

Property Ombudsman

Property Redress Scheme

Rail Quarterly Statistical Reports

Resolving the Costs of the Action by Mediation not Litigation

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Abstract

This article considers the role of mediation in resolution of the quantum of costs in civil proceedings in the courts of England and Wales as an alternative to detailed assessment by a judge under the Civil Procedure Rules 1998. The benefits of mediation are reviewed by carrying out a comparison with the court process, emphasizing the speed, costs savings, informality and privacy which resolution other than going to court can deliver. The article also comments upon whether making mediation in costs mandatory would assist parties who pay and receive costs, and whether this is likely to happen in the foreseeable future.

Keywords: civil procedure; legal costs; detailed assessment; alternative dispute resolution; costs mediation.

[A] INTRODUCTION

In civil proceedings in the Courts of England and Wales, the general rule is that the winner's costs are paid by the loser because they 'follow the event', meaning the outcome of the trial.

There are numerous exceptions: in family law cases, the usual order is that each party pays their own costs, whilst in most other forms of litigation, the general rule is often adjusted to reflect the claimant's relative success or failure. For example, a case may involve a claim seeking damages in the hundreds of thousands of pounds, but which is concluded at trial in an award of a few hundred pounds. In circumstances such as these, the order for costs will be modified to reflect the success which the opponent has had in defeating all but a small part of the claim. In an extreme case, that might involve the claimant, even though the theoretical winner, being ordered to pay all the defendant's costs.

Once a costs order in a civil action has been made at the conclusion of a case, either by a judge or by agreement, the question arises—what happens next if the parties cannot agree what those costs should be?

[B] DETAILED ASSESSMENT

The answer which will usually be given to that question is that the Civil Procedure Rules (CPR) 1998 must be deployed. They provide that costs will be quantified by the process of detailed assessment, by which is meant the justifying by the successful party to the satisfaction of a judge that the costs claimed have been reasonably incurred. However, before that happens, parties ought to be considering whether there is an alternative way of dealing with the costs other than by 'having one's day in court'. The reasons for that are multifarious.

The court way proceeds as follows. CPR rule 47 provides that the detailed assessment cannot be started until the proceedings have reached their conclusion, but, when that has happened, the party receiving costs must commence proceedings under CPR rule 47.6. The rule continues:

> (1) Detailed assessment proceedings are commenced by the receiving party serving on the paying party–
>
> (a) notice of commencement in the relevant practice form;
>
> (b) a copy or copies of the bill of costs, as required by Practice Direction 47 …

The time limits for doing so are set out in rule 47.7:

> 47.7 The following table shows the period for commencing detailed assessment proceedings.

	Time by which detailed assessment proceedings must be commenced
Judgment, direction, order, award or other determination	3 months after the date of the judgment etc. Where detailed assessment is stayed pending an appeal, 3 months after the date of the order lifting the stay
Discontinuance under Part 38	3 months after the date of service of notice of discontinuance under rule 38.3; or 3 months after the date of the dismissal of application to set the notice of discontinuance aside under rule 38.4
Acceptance of an offer to settle under Part 36	3 months after the date when the right to costs arose

The bill referred to in CPR rule 47.6(1)(b) must set out in a prescribed form, the claim for costs, so that the paying party can see, through the detailed assessment process, how the money sought has been calculated. If the sums claimed are thought to be unreasonable, the party paying the costs must set out their objections. Rule CPR 47.9 provides that:

> (1) The paying party and any other party to the detailed assessment proceedings may dispute any item in the bill of costs by serving points of dispute on –
>
> (a) the receiving party; and
>
> (b) every other party to the detailed assessment proceedings.
>
> (2) The period for serving points of dispute is 21 days after the date of service of the notice of commencement.

Provision is then made for replies to be served to the Points of Dispute, if the receiving party wishes to do so. After payment of a court fee of up to £6,640 depending upon the size of the bill, the matter will then be listed before a judge who will adjudicate upon the reasonableness of the charges and decide what sum is one that it is just for the paying party to pay. That amount is then enforceable as a judgment debt if it is not paid, which carries interest at 8%.

If this procedure sounds relatively straightforward, the reality can be starkly different. Although the introduction of costs budgeting on 1 April 2013 has meant that, in most cases where the costs are not fixed, all parties will know what their respective expenditure in costs will be as the action unfolds, detailed assessments are far from being a 'tick through'. The potential exists for entrenched arguments about preliminary points, for example whether the winner had actually authorized (in the sense of being liable for the costs sought) the expenditure, or about the hourly expense rates the solicitors have charged.

Frequently, too, the costs of the assessment proceedings themselves increase to a level which is out of all proportion to the size of the damages recovered, meaning that arguments about the amount which it is reasonable for the loser to pay can take days to sort out, on occasion, even longer than the trial itself took—see *Deutsche Bank AG v Sebastian Holdings Inc* (2022) in which the detailed assessment lasted 104 days. Little wonder, then, that consideration should be given to finding different and more financially effective means to sort out the costs. It is here that alternative dispute resolution (ADR) has a role to play.

[C] ADR—THE ALTERNATIVE TO DETAILED ASSESSMENT

In other spheres of dispute, it has long been the case that ADR can resolve differences as an alternative to going to court. The glossary to the CPR defines ADR as 'a collective description of methods of resolving disputes otherwise than through the normal trial process'.

The best-known form of ADR is mediation, a concise description of which was given by Catherine Newman QC in *Burgess v Penny* (2019):

> Mediation should not be about one side getting what they want. That is a misconception of the purpose of mediation. Mediation should be about attempting to reach a solution which both parties can live with as a better alternative to litigation (para 15).

[D] JUDICIAL GUIDANCE IN RELATION TO ADR

In deciding who should pay the costs of an action, judicial encouragement to use ADR, and in particular mediation, has gathered strength over the past two decades: it is now trite law that an unreasonable refusal to participate in mediation is likely to lead to an adjustment in the costs award which otherwise would be made. In *Halsey v Milton Keynes General Hospital* (2004), Dyson LJ expressed the position thus:

> In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is known (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR (para 13).

A decade later, Briggs LJ put it more forcefully in *PGF II SA v OMFS* (2013):

> In my judgment, the time has now come for this court firmly to endorse the advice given in chapter 11.56 of the ADR handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless of whether an outright refusal or refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds (para 34).

Turner J followed this guidance when awarding costs at a trial in which the case had been decided in favour of the defendant on every substantive

issue pleaded against him—see *Laporte v The Commissioner of Police of the Metropolis* (2015). However, as the defendant had declined an offer to mediate, and due to his failure without adequate (or adequately articulated) justification to engage in a mediation that had had a reasonable prospect of success, the judge reduced his award of costs (estimated to exceed £200,000) by one-third.

The principle applied by Turner J of punishing an unreasonable refusal to mediate was followed by Jackson LJ in *Thakkar and Another v Patel and Another* (2017) in these terms:

> The message which this court sent out in PGF II was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that where bilateral negotiations fail, but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction (para 31).

[E] THE QUESTION OF COMPULSION

One key question—to date answered generally in the negative, but which remains on the table for possible future development—is whether ADR should be compulsory, either in general or in specific categories of cases.

To some extent at least, the risk of costs penalties for unreasonably failing to engage in ADR already carries a degree of compulsion. However, that has generally instead been couched in terms of 'encouragement' to mediate—even 'encouragement in the strongest terms' to use Dyson LJ's description in *Halsey*.

In *Halsey*, Dyson LJ addressed the questions both of whether compulsion, rather than encouragement, was legally permissible and, if so, whether it was desirable. The answer to both questions, at that time at least, was 'no':

> It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court …
>
> Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it … If the court were to compel parties to enter into a

> mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process … if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it … the court's role is to encourage, not to compel (paras 9-11).

However, nothing in law is immutable. Driven no doubt at least in part by what might be described as at best the limited success only of other 'Jackson' measures such as costs budgeting and a 'new' proportionality test under CPR rule 44.3(5) to control the costs of litigation, these questions have been revisited. In its June 2021 report on *Compulsory ADR*, the Civil Justice Council (CJC) reached the opposite view, concluding firstly that parties could lawfully be compelled to participate in ADR and secondly that in certain circumstances at least such compulsion could be both desirable and effective.

In part, the answer to the first question was led by the developing jurisprudence in relation to compulsion and, in particular, the distinction drawn by the courts between compelling parties to mediate and compelling parties at least to consider an attempt at ADR.

Here, the parties' powers of compulsion are essentially twofold. Firstly, the ability to impose a stay to allow time for ADR to be attempted, even if the parties (or more usually one of the parties) does not want such a stay. Secondly, the already well-established threat of a costs sanction. The practical thinking here appears to be that if parties are told that the case will not proceed for a period in any event, and are also told at the same time that if they behave unreasonably in not engaging in ADR, then there will be very limited disincentive at least to attempt ADR.

In *Lomax v Lomax* (2019), the Court of Appeal drew a distinction between mediation and early neutral evaluation (ENE), noting that compelling parties to engage in ENE could not be seen as a denial of justice, since the court process remained available to the parties if the ENE was unsuccessful. Whilst the distinction from mediation was perhaps necessary in order to avoid a conflict with the otherwise binding precedent of *Halsey*, it is difficult in practice to see why the same principle could not be applied to other forms of ADR.

In *McParland v Whitehead* (2020), Sir Geoffrey Vos went further and considered that it was probably open to the court to require parties to engage in a mediation notwithstanding *Halsey*. The now Master of the Rolls' views on ADR (or perhaps now simply DR) are well recorded, as is

his enthusiastic support for dispute resolution in the pre-proceedings 'space', particularly through the portal schemes now well established for low-value personal injury claims and similar schemes.

One of the key points made by the Master of the Rolls is to remove the perceived divide between ADR and other forms of dispute resolution (such as the court process) and to achieve a process of 'integrated dispute resolution',[1] with an increased use of online dispute resolution methods, particularly in 'bulk' areas. It was the Master of the Rolls who instigated the CJC report (2021) referred to above, and he has wholeheartedly endorsed its conclusions.[2]

The principle, therefore, is clear: parties who unreasonably refuse a reasonable offer of mediation do so at their peril as to costs. The drive towards ADR is only likely to grow stronger and the prospect of compulsory ADR (or perhaps it should be said compulsory ADR more widely in civil litigation generally, since it may legitimately be said that it already exists in some forms in some areas of civil disputes) looms large.

If ADR is to be encouraged generally and if unreasonable failures to consider or engage in it are routinely to be sanctioned, that in turn begs the questions: what is the position where the quantification of costs after the action has been settled or resolved at trial is concerned, does mediation have a role to play in the assessment of costs and, if so, in what way? Are the principles applicable—and the judicial guidance—any different in the costs sphere? And does it work?

The answer is that it does, but the contrast between mediation and detailed assessment could hardly be more stark.

[F] MEDIATION IN PRACTICE IN THE COSTS SPHERE

In detailed assessment proceedings, once the receiving party has served the bill, exchanged Points of Dispute and replies under CPR rule 47.9 and paid the court fee, control of the case is transferred almost exclusively to the court. It is the court which fixes the hearing date, it is the court which allocates the judge, it is the court which decides which materials are to be deployed, it is the court which conducts the assessment, it is the court

1 See, for example, the Master of the Rolls' March 2021 speech on 'The Relationship between Formal and Informal Justice' (Vos 2021a).

2 See, for example, the Master of the Rolls' October 2021 speech on 'Mediated Interventions within the Court Dispute Resolution Process' (Vos 2021b).

which dictates who should say what and when and it is the court which makes decisions that will bind the parties.

Mediation is strikingly different. It is the parties who control events. They decide whether there should be a mediation, they decide who will be the mediator, they decide where the mediation will take place, they decide how long the mediation will last, they decide how much they want to spend and, perhaps most importantly, they decide whether they wish to settle the claim or take their chances later on in court, the mediator having no power to impose a solution which will bind the parties.

There are other differences. In court, the judge runs the show, everything is tape-recorded and it all takes place in public. In mediation, the show goes on in private, the participants decide what documentation (if any) they wish to use, everything said and done is in confidence and if the mediation does not result in an agreement, nothing that has gone on can thereafter be used or referred to in court. However, if a settlement is reached (the percentages are high), there can be no subsequent change of heart. The agreement is binding and enforceable, just as it would be if made by order of the judge after a contested hearing.

And a final nuance, unlike the judge, the mediator can be told of offers made and refused. Knowing the amount that it will take to bridge the gap is an important feature of any mediation, a matter about which a judge must be kept in complete ignorance if offers have been made under CPR Part 36 until the detailed assessment has been completed.

Of course, not every mediation results in a settlement and those sceptical about its use are quick to point to the fact that, if there is a failed mediation, two sets of assessment costs will have been incurred where there would only have been one set of expenditure had mediation not been attempted in the first place. That is beside the point. If the parties put their minds to mediation early enough, that is to say before the court fee has been paid and the mediation then succeeds, the overall saving (no court fee, no costs of the detailed proceedings, no appeals) will be substantial.

There are other advantages for both sides where costs are settled through mediation. For a receiving party anxious for payment, receipt of the money will be accelerated, an all-important factor when cash flow is tight and the wait for a date for a detailed assessment hearing can be up to a year. For a paying party, resolving the costs and paying them, means that interest will stop accruing at 8% from the date that the order

for costs was made. Moreover, for all parties, there is no risk that one or other will fail to beat a Part 36 offer at the assessment hearing, thereby engaging the costs consequences which flow thereafter, still less taking the chance that the unpredictable 'proportionality test' under CPR rule 44.3(5) will deal a blow to one or other side, or possibly to both.

Assuming now that the parties have agreed to appoint a mediator with a view to resolving the costs of an action through mediation rather than through the courts, there are various prerequisites. Administratively, there need to be signed terms and conditions of business and a mediation agreement. So far as the costs of the mediation are concerned, it is usual for the agreement to provide that the mediator's fee will be shared, but if the mediation does not work, the costs of the ADR process will be 'costs in the case'. That means that whoever is ultimately awarded the costs of the detailed assessment proceedings will also collect the costs of the mediation.

Once the administration has been completed, there comes the day of the mediation itself. This can take place in-person or via a remote platform, as has become customary during the Covid-19 pandemic. Optionally and preferably and in advance, an agreed bundle of relevant documents will be provided. Position statements setting out the big-ticket items which have prevented agreement are helpful, but these should be short and to the point. In particular, they should not deploy detailed legal arguments on every point as if they were skeleton arguments for the use of the trial judge.

In terms of personnel, it is usual for representation to be by counsel, solicitors or costs lawyers, and it is essential that the mediation is attended by a party authorized to settle. Ideally, that will be the claimant in person, if receiving costs (which can be a remote attendance) and a representative of the defendant if paying, with authority to sign the cheque. Both also need a willingness to compromise, so that a solution can be reached which both sides can live with.

In no sense can either party expect to 'win' at a mediation. If a spectacular victory is the prize sought, the ambitious party must go to court, but doing that brings the chance not only of winning, but also of losing.

There is no such thing as a case which cannot be lost. None is totally watertight: things can go wrong on the day, such as not beating a Part 36 offer or of a witness not coming up to proof. Therefore, a party who is unwilling to compromise should not go to mediation, but they need to be

cautioned that an intransigent stance carries a major risk if matters go awry before the costs judge. There needs to be a realization that a party who goes to a detailed assessment may win, but that party could also lose or that there will be no winners, only two losers if neither side get their way.

A mediation carries no such risks because the parties cannot be compelled to settle and only agree terms if they wish to do so. That said, if a mediation works, it usually does so on the basis that if the receiving party takes less than he or she feels is just and the opponent considers that over the odds has been paid, the outcome is probably about right.

Finally, with the administrative documents complete and the representatives in place, the mediation can begin. It is usual, after an introduction by the mediator, for the parties to discuss points of difficulty across the table in the mediation room. This is known as facilitative mediation. Rarely, if ever, does the facilitative stage result in a settlement. It is more likely that the parties will invite the mediator, who is likely to be an expert in the field of legal costs, to engage in a private session. That involves the parties retiring into private rooms (which can be created remotely if using a remote platform) in which they will have confidential discussions with the mediator. Whilst the mediator is neutral, if asked to do so, a view on merits will be given. That is a sensible step: after all, as the mediator will be experienced in the types of costs dispute being the subject matter of the mediation, it would be pointless not to take advantage of that expertise.

If the mediation 'works', that is to say, terms are agreed at the facilitative stage after private session, such an outcome will usually have been achieved through shuttle diplomacy undertaken by the mediator between the private rooms. That will have involved the bearing of offers of settlement to and fro between the parties until a figure that is acceptable to both has been reached. Upon that event, it is the responsibility of the parties to draft any settlement agreement: the mediator does not have a hand in that.

If, however, the facilitative mediation does not result in a settlement, that is the end unless, by agreement, the parties are willing to move to an evaluative mediation. By that is meant that the parties ask the mediator (signing a further document expressing their wish to do so) to provide a non-binding view about the case. That must be consensual. If only one side asks for an evaluative mediation, the day is at an end. However, if both agree, the mediator can be asked to give a view on merits and/or to provide a fair figure for settlement. It is then 'take it or leave it'. The

mediator cannot compel the parties to accept the figure advanced, but, having reached that stage, it would be unwise if they were unwilling to do so.

So, if mediation can and does work in the costs sphere, do the same judicially driven imperatives to engage in mediation—or other forms of ADR generally—also exist?

[G] INCENTIVES TO ADR (OR DISINCENTIVES NOT TO) IN THE COSTS SPHERE

In many ways it would be perverse if there was any less incentive to engage in ADR in the costs sphere. By its very nature, a detailed assessment is essentially a dispute about quantum in circumstances where liability has effectively been decided. One party is subject to a costs order and has to pay a sum yet to be determined.

Such disputes pre-eminently appear to be suited to a process of mediation.

Often that process—and the process of settlement generally—will be further facilitated by the fact that the paying party may already have been ordered to pay a significant percentage of the costs on account, a process which has grown more common and where the ordered percentage has typically grown in size since the introduction of costs budgeting.

Further incentives to settle exist in the fact that interest will usually run on outstanding costs at the Judgments Act 1838 rate (presently 8%), providing paying parties with a good reason not to delay settlement and from the fact that the express presumption under CPR rule 47.20 is that the paying party will be paying the (often expensive) cost of the detailed assessment process unless the court orders otherwise.

Whilst the court will take into account all the circumstances when deciding whether to order 'otherwise', a major factor in any such decision will be whether the paying party has made—and bettered—an offer to settle the assessment process. The paying party is therefore again incentivized to make effective offers. The fact that the general scheme of Part 36 also applies to assessments means that the CPR rule 36.17 'benefits' are available to a receiving party who makes and betters their own offers on assessment, and is a further reason why paying parties have good reason to engage in the settlement process.

Overall, therefore, there are substantial reasons for both paying and receiving parties to seek to resolve costs claims without going to a hearing, even without engaging in any formal ADR process.

Nevertheless, the value of mediation remains. Indeed, it is arguably in those very cases where the existing incentives 'baked into' the CPR have not worked that mediation perhaps holds its greatest strength. A case where the arguments are all about quantum, where the parties have made offers and tried to settle, but where they have reached an impasse is, perhaps, a classic case for ADR. Moreover, it is well established that the detailed assessment process itself is costly, lengthy and a drain on the use of the court's time and the parties' resources. Anything which encourages the resolution of those cases which otherwise seem intractable is likely to produce a benefit for all concerned.

What has been the court's approach to encouraging the use of ADR in such situations?

The starting point is that the *Halsey* principles are of equal application to detailed assessments as to any other form of civil litigation. Indeed, for some of the reasons identified above, arguably of greater application.

Those principles have been applied by the costs courts in a number of cases—see for example *Bristow v The Princess Alexander Hospital NHS Trust* (2015), a decision of Master Simons, where the paying party took three months to respond to a request for mediation and then ultimately declined, which led to an order for costs of the detailed assessment being made against it on the indemnity basis.

Similarly, in *Reid v Buckinghamshire Healthcare NHS Trust* (2015), a different costs judge ordered a paying party to pay costs on the indemnity basis from three days after the date that an offer had been made to mediate, which it had unreasonably refused.

There have been a number of other similar cases including *BXB v Watch Tower and Bible Tract Society of Pennsylvania and Another* (2020), *DSN v Blackpool Football Club Ltd* (2020) and *Wales (t/a Selective Investment Services) v CBRE Managed Services Ltd and Another* (2020).

Those cases include matters where the paying party was the 'unsuccessful' party on the assessment and faced a sanction that the costs it would otherwise have been ordered to pay for the assessment process on the standard basis were instead ordered to be paid in whole or part on the indemnity basis: and also of instances where the paying party was the 'successful' party (having bettered its own offer), but where it

did not recover all the costs it otherwise would have done because those costs were disallowed in whole, or in part, by virtue of its unreasonable refusal to engage in mediation.

The recurrent theme of the cases appears to be that it is usually the paying party which is sanctioned for unreasonably not engaging in mediation. There is no particular legal reason why this should be so—the proposal to engage in mediation could as easily come from a paying party and for the reasons identified above (not least that unless and until it finds a reason to displace the presumption then the paying party will be paying the costs of the detailed assessment process anyway)—there is every good reason for paying parties to engage in active dispute resolution. Nevertheless, perhaps for institutional reasons, there appears to be a relatively well-established pattern that it is usually paying parties, not those receiving the costs, who are loathe to engage in ADR.

[H] CONCLUSIONS

The general conclusion that can be drawn, therefore, is that not merely are mediation and ADR generally likely to be effective mechanisms for resolving costs disputes (perhaps more so even than in other spheres of litigation), but also that the general principles by which the courts 'encourage' the use of mediation, are of at least equal applicability in this sphere.

What has yet to be seen (or at least reported) in the costs assessment arena is the even more pro-active approach towards ADR identified by the Master of the Rolls and the Court of Appeal and set out above. Again, it could perhaps be said that if there was an area of dispute where there would be real merit in the courts, at an early stage, not merely encouraging, but also requiring parties to engage in ENE or short-form mediation or ADR, then costs assessments might be it.

Indeed, if the rule-makers were looking for a part of the CPR such as CPR rule 47, where there was a bespoke set of procedural rules which could be adapted to introduce a mandatory dispute resolution process for some cases without 'infecting' the rest of the CPR, with a reasonable prospect of such rules resulting in savings of time and cost, then perhaps detailed assessment is precisely that test bed.

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Restorative Justice, Desistance and Trauma-Informed Practice in the Youth Justice System

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Abstract

Trauma-informed practice involves understanding the impact of trauma on an individual's life and how trauma has a direct impact on behaviour. It is an approach that has been implemented in various sectors such as education, health and the justice system. There appears to be a direct link between trauma and crime whereby the majority of those who offend in the UK have experienced trauma such as abuse and neglect during their childhood or adult life. It follows, therefore, that it is vital for trauma-informed practice to be implemented in the justice system as this may enable the future desistance of offenders and consequently reduce crime. Using restorative justice as an approach, this article will demonstrate the impact of trauma-informed practice on offending. This article, therefore, explores key principles around restorative justice and examines how trauma-informed practice that adopts a restorative approach may tackle issues around the wellbeing of young offenders and their desistance as well as the victims of their offending behaviour.

Keywords: restorative justice; trauma-informed practice; justice system; desistance; deviance; young people.

[A] INTRODUCTION

In 2000, Lader and colleagues (2000) reported that 95% of young offenders in England and Wales suffer from mental disorders. Since 2011, first-time entrants to the youth justice system in England and Wales have fallen by over 80%; the number of children in custody at any one time of the year has fallen to its lowest level and the number of young people reoffending has decreased for the sixth consecutive year (Youth Justice Board 2022). At a glance, these numbers appear to present recent

successful penal reform as they suggest that those who can be are being diverted from offending or custody. However, these numbers also reveal a group of persistent young offenders with extremely complex backgrounds and needs which have not been and will not be met by employing traditional offender and offence-oriented youth justice measures. Johns and colleagues (2016) argue that such measures result in risk-based models that are constructed as a result of our general understanding of risk factors—which tend to be psychosocial and thus individualistic. By employing models on the basis of individual risk factors, a very narrow view of the young person concerned is constructed which ignores the wider historical and structural context of their lives and which also risks missing a valuable opportunity to enable their desistance from crime. In this article, we discuss the role of restorative justice in a trauma-informed practice within the youth justice system and the way in which restorative justice enables the desistance of young offenders.

[B] TRAUMA-INFORMED PRACTICE

The traditional approach to juvenile offending in England and Wales is reactionary and punitive in nature, which assumes that a *slight* modification to the adult justice system will deter young people from committing crime. However, this traditional approach has to be questioned when considering the historical and structural context of offenders, particularly those with adverse childhood experiences (ACEs). In 2016, Public Health Wales published its first study of ACE which defined it as traumatic events in early childhood that impact the wellbeing of people in later life. Such traumatic events range from suffering abuse, parental separation or growing up in a household where substance misuse or domestic violence is present. The study found that almost half (47%) of adults in Wales had suffered at least one of these ACEs and 14% had suffered at least four. The long-term physical and mental health implications of people who have experienced adverse events during their childhood have been well documented, particularly since the CDC-Kaiser study by Felitti and colleagues (1998), but children who suffer ACEs are also more likely to develop poor behavioural outcomes as well, such as performing badly at school and later becoming involved in crime. Such behavioural implications are not limited to the exposed individual either, as ACEs have been found to be intergenerational (Lê-Scherban & Ors 2018) whereby anti-social behaviour is passed down through generations as a result of trauma.

Young people with ACEs need positive interactions with adults, which must be at the heart of achieving desistance.[1] When a youth enters the juvenile justice system they enter what Baglivio and colleagues (2014) describe as secondary intervention which requires a trauma-informed care tool of asking 'What happened to you?' rather than 'What's wrong with you?' which is what the traditional justice system tends to imply whereby the state assumes itself as the primary victim of the offence, whether committed by an adult or a young person. In this 'secondary intervention', the young person endures the ceremonial justice which enforces and demonstrates the state's sovereignty rather than concerns regarding the wellbeing of the young offender and their crime victim (Foucault 1977).

While the background of young offenders plays a role in determining and measuring the appropriate punishment, little attention is paid to considering such a background regarding their desistance. In this process of justice, many young offenders suffer trauma that makes them susceptible to environmental triggers—and it is as if many of the traditional criminal justice agents are the perfect stimuli to trigger trauma and its associated behaviours, such as interrogation, intimidation, bright lights, periods of isolation and threats of violence (Kemshall 2003). When these triggers are activated, producing adverse behavioural outcomes, it undermines the notion of positive adult–youth interactions as it signifies to young people that they are dangerous and to be feared. This further erodes the young person's sense of self and positive self-image (Goffman 1990). Primary intervention or prevention (Baglivio & Ors 2014) emphasizes improved youth life circumstances to prevent criminal behaviour and involves the young person, their parents and/or caregivers, the school, health professionals and law enforcement. This would be beneficial because a desistance paradigm would be better informed if we provided young offenders with the opportunity to guide us, and if we 'listened to what they think might best fit their individual struggles out of crime, rather than continue to insist that our solutions are their salvation' (Porporino 2010, cited in Maruna & Lebel 2010: 68). So instead of relying on an individual tale which stems from personal experience as a narrative for 'what works', the question should be about the evidence and what it says (Sherman 2002: 221–222). Reoffending rates and programme assessment tools remain the primary parameter in the justice system to measure whether a preventive approach is working or not. Here, mechanism and implementation issues could be missed by merely focusing on the design

[1] Desistance from crime was defined by Rocque & Ors as 'the process of decreasing the frequency of and/or seriousness of criminal and antisocial behaviour over time, ultimately concluding with cessation from such conduct' (2017: 184).

and the outcome of any given programme (Fielding & Ors 2019). For this reason, and instead of what works, which often is the wrong question to ask (Ward & Maruna 2007), other questions such as how it works, where it works and when it works should be considered.

The increased awareness of the often re-traumatizing experiences of incarceration has seen a shift towards a more trauma-informed approach to the way in which the criminal justice system operates. However, less attention is attributed to a trauma-informed and trauma-specific approach that juvenile justice stakeholders can take to mitigate trauma throughout the criminal justice process by using community-based restorative justice programmes to achieve desistance and avoid the revolving door of ACEs, crime and incarceration. Branson and colleagues (2017) argue that the adverse experiences that some young people may have in the juvenile justice system can be reduced by restorative justice programmes and this increases the community and social connections young offenders need so as to recognize the consequences of their offending and be accountable for it. Compared to the traditional, retributive juvenile justice responses, restorative justice programmes teach young people conflict resolution by building social skills to make amends through dialogue with an adversary, thereby reducing recidivism among participants. This is particularly important when considering the association between multiple ACEs and violence. Public Health Wales (2016) found that, compared to prisoners with no ACEs, those with four or more are three times more likely to have been convicted of violence against the person. This demonstrates an acute need for juvenile justice stakeholders to ensure that those with ACEs are supported to cope with their experiences and are not retraumatized by punitive justice measures.

More recent research in this field also indicates an interlink between traumatic experiences and criminal behaviour (Moore 2022), revealing that offenders present a higher prevalence of post-traumatic stress disorder (Ardino 2012; Winningham & Ors 2019; Lefebvre & Ors 2021). It also suggests that criminal conduct could be both more widespread and more extensive among mentally ill individuals (Raman & Ors 2021). This chimes with a considerable body of literature which has documented the relationship between trauma and child abuse and subsequent aggressive and criminal acts (Cocozza & Skowyra 2007). Having said that, the relationship between mental disorders and crime should be approached with caution. While not every young person with mental illness is a prospective criminal (Pearce 1952: 151), the importance of the traumatic event here is not whether it is a determining factor towards offending, but rather identifying it as a risk factor. After all, we should avoid treating

social questions in terms of abstracts (Fromm 1956). To tackle youth offending effectively we need a personalized approach which takes into consideration young people's experience, background, passions, needs and other personal factors to them. In other words, the aim should be enabling the young person to desist from crime.

[C] DESISTANCE

As noted in footnote 1 above, desistance from crime was defined by Rocque & colleagues as 'the process of decreasing the frequency of and/or seriousness of criminal and antisocial behaviour over time, ultimately concluding with cessation from such conduct' (2017: 184). Desistance paradigms should seek first what is empirically known about the persisting criminal behaviour of a given group and the desistance of others. Then, they should seek to determine how interventions can support or accelerate approximations of these 'organically' occurring processes (Farrall 2004). Or as Maruna & LeBel put it, desistance paradigms should start by asking 'what is empirically known about why some individuals persist in criminal behaviour over time and others desist from criminal behaviour'. Then, they should seek to determine how interventions can support or accelerate approximations of these 'organically' occurring processes. (2010: 68).

Lemert (1951) distinguished between two kinds of deviance, the primary and secondary. The primary is the act of deviance itself, whereas the secondary is the process in which deviance defines and organizes the life and the identity of the deviant. Drawing on this distinction, Maruna & colleagues (2004) also conceptualize desistance on two levels, primary and secondary. The primary desistance refers to desistance as 'any lull or crime-free gap in the course of a criminal career' (at 274). And since the offender experiences pauses in their criminal career, the focus should be on the secondary desistance in which the identity of the deviant is visited and altered, so desistance is the 'continuity of nondeviant behaviours' (Maruna 2001: 27). So, rather than an event that happens, desistance is 'the sustained absence of a certain type of event' (in this case, crime) (Maruna 2001: 17).

Farrall and Maruna (2004) stipulate that desistance paradigms without reference to the needs of the recipients are unlikely to do much to help them desist. In other words, these conditions may well have a negative impact on the secondary desistance of the young offender (Maruna & Ors 2004) and deprive them of the opportunity to reflect on their identity (Maruna 2001) under the impact of criminogenic effects of unresolved

trauma (Halsey 2018). In this sense, understanding and researching desistance 'does not start with programmes and aggregated outcomes, but individual lives and personal trajectories' (Maruna & Mann 2019: 6).

To demonstrate what we mean by desistance, let's consider a practical example. In the Good Lives Model,[2] Ward & colleagues (2012: 95) draw from psychological, social, biological and anthropological research to assert that, like all human beings, 'individuals with a history of offending are goal directed and are predisposed to seek a number of primary human goods'. Primary goals include what Ward and colleagues have identified as the state of mind of the offender, their personal characteristics and the experience that they (the offender) are seeking. In this sense, the Good Lives Model is distinctly different from risk management methods that focus on reducing the risk rather than tackling its roots. Now if we examine trauma through the lenses of desistance, trauma alters the reality of its victim as well their self-understanding, and what might look senseless in the eyes of the public and the justice system might be perfectly rational to the traumatized young person who offends (Burke 2018). During his research in HM Whitemoor Prison, Maruna shared the inputs of an inmate there, who provided his account of the theft of his gold chain and the power of his perception of the outside world in determining his action and reaction:

> I said, 'Give me the fucking chain back,' and he pulled a knife out at me and his friend had got this baseball bat. … I went home, and I couldn't sleep. I kept waking up at 2 a.m. saying, 'I can't deal with this.' My girl was telling me to calm down, let it go. But I kept thinking to myself, 'This is going to have to be something big.' This isn't going to be just a fist fight. This is going to be big. … Everybody in the scene knew I was looking for him. … Then eventually I met him at the pub. I brought this knife and I stabbed him. … Unless you actually grew up in that situation, you wouldn't understand what I was going through. Common sense is just different in that situation. You just don't have the same common sense. Lying in bed, really, I think about it a lot. 'If this …' 'If that …', but then the 'ifs' go away and you just have to say, 'This is the real you.' I had little choice really. Either you do it, or you do nothing and you get written off the scene altogether. Street-wise, that's suicide – you're back to the bottom of the ladder, you're nobody. Sensible-wise, of course, that's the best thing that could happen to you. That means taking the alternative route with the suit and job and all. But I've got a rough streak in me somewhere. … I had to do it (personal interview, 27.2.97) (Maruna 1999: 10)

Only by understanding the way this man understood himself, his actions, the outside world and his common sense, can one begin to

[2] Which is used and implemented by various youth offending services in England and Wales (Ball & Moore 2021).

understand why he attempted murder. To truly desist from crime, this person needs to restructure his understanding of self. But deciding or choosing to give up crime can be very different from actual desistance from crime, which we are discussing here. In fact, maintaining abstinence from crime involves more than choice. Offenders typically decide to 'go straight' (for quite rational reasons) many times over the course of a criminal career, but continue to offend—for reasons that are more to do with their perceptions of their situation (Burke 2018: 337). Understanding the person's narrative can help practitioners in the justice system (and all institutions and agencies involved) to understand these narratives as less than rational decisions. Whilst the juvenile justice system continues down the path of incarceration, these critical developmental milestones to achieve desistance will remain largely inaccessible for young offenders.

In 2002, the Home Office reported that 'the public are sick and tired of a sentencing system that does not make sense' (Home Office 2002: 86). This mirrors the public mood which aims for change and alternatives. The 'alternative' should tackle all the issues that are absent in the traditional sentencing system, thereby involving all the parties to the incident rather than excluding them (Zehr 2002); that does not view crime as a mere challenge to the order and the sovereignty of the state, but sees it as a community issue where the latter is involved; an alternative which restores rather than punishes and whose core focus is on the wellbeing of the parties involved.

[D] RESTORATIVE JUSTICE

Although this paper has focused thus far on the role of trauma-informed practice in enabling young people to desist, this practice should also include victims. However, restorative justice is not a straightforward approach, especially with complicated cases. Nevertheless, restorative practices in the youth-offending services across the country show some promising outcomes. Restorative justice has been defined as communication between victims and offenders within a controlled environment to talk about the harm that has been caused and finding a way to repair that harm (Braithwaite 1998).

While retribution concerns itself with the moral dimension of the wrongdoing and seeks to make right rather than restore (Crawford & Newburn 2003), restorative justice aims at solutions (Shearing, 2001) in preferring an 'inclusive and collaborative process' (Zehr 2002). The involvement and participation of the victims, the offender and the community are considered by McCold (2000) as essential criteria for 'full

restorativeness'. The satisfaction of the parties has been identified by Van Ness and Strong (1997) as a key element as to why restorative justice excels beyond the traditional methods of justice. In 2016, the Prison Reform Trust reported that 85% of victims and 80% of offenders surveyed were either 'very' or 'quite' satisfied with their restorative conference. Such satisfaction is reflected in the re-offending rates: 27% fewer crimes were committed by offenders who had experienced restorative conferencing, compared with those offenders who had not participated. In fact, out of those convicted adults who do not experience restorative conferencing, 46% are reconvicted within one year of release. Reconviction rates increase to 60% among those serving less than a 12-month sentence, which demonstrates less effectiveness than community sentences at reducing reoffending. This arguably indicates why the use of community sentences has nearly halved (44%) in the past decade (Prison Reform Trust 2016).

Therefore, restorative justice as a community sentence is progressive in its nature and aims to understand why the crime happened and how to move forward while involving the victim, the community and the state (presented in the agencies of the youth justice system), whereas imprisonment is focused on the past, with fewer strategies concerning the future. When both the victim and the offender share a minimum interest in settling the aftermath of the crime, a significant level of engagement of the parties to the crime occurs (Walgrave 2003). Such engagement, as the evidence demonstrates, impacts the emotional wellbeing of the parties involved. As Kelly and Thorsburne put it:

> The emotions and the wellbeing of the parties are central in the restorative approach … Explicitly addressing issues of human emotion, connection and relationships, restorative practice is an amalgam of specifically targeted activities, theoretical and practical constructs to support individual wellbeing and repair harm, through the development of nurturing, robust families and communities. (2014: 155)

In this sense, the restorative process is a trauma-informed practice not only for the young offender, but for their victim as well. Foucault (1977) argues that those who execute the penalty imposed on the offender relieve the justice system of responsibility by the bureaucratic concealment of the penalty. The offenders are faced with the consequences of their actions rather than discussing the reasons behind their behaviour, which not only might potentially alter their course of behaviour but also offer them an opportunity to take responsibility for the past. Restorative justice associates the past with responsibility and the future with alteration. Subsequently, this will have direct impact on offenders' desistance,

behaviour and the process of their thinking which will reflect on their mental and emotional wellbeing.

However, we should be cautious while approaching restorative justice as an alternative, as Kelly and Thorsborne remind us that restorative practices can often become 'little more than an alternative means of providing a consequence or penalty' (2014: 154), including the inherited ritual of shaming. But in his book *Crime, Shame and Reintegration* John Braithwaite considered the conditions under which certain forms of social reaction can produce responses that enable offenders to become law-abiding and respectable citizens (Braithwaite 1989). Shaming is a principal element in such a process. However, he identified two types of shaming; disintegrative shaming and reintegrative shaming. The former labels and excludes the person being shamed, while the latter involves a process which aims to reintegrate the offender back into society (Braithwaite 1989). It is noteworthy though that shame is also experienced by the victim. Tomkins argues that such shame occurs in a person any time that their experience of positive affects is interrupted (Tomkins 1987). So an individual does not have to do something wrong to feel shame. Rather, the individual just has to experience something that interrupts interest-excitement or enjoyment-joy (Nathanson 1997).

The debate about the differences and similarities between restorative justice and other traditional forms of justice has been a long one (Crawford & Newburn 2003). Zehr took a radical view, considering restorative justice to be the opposite of retributive justice (1990). Considering how referral orders work, which are available for young offenders who plead guilty to an offence and in which restorative approaches should be utilized, Zehr's position might be somewhat problematic. In addition to that, there is an element of coercion as we are not fully certain whether the offenders participate voluntarily (Haines 2000). Being embedded in the aspect of 'community sentences', the coercion element is evident in the offenders' realization that the alternative to the community sentence is going to prison (Sparks 2002). These factors could be counterproductive while restorative justice is at work on reconstructing the self-sense of the offender, which we discussed earlier in this article.

Duff (1992), however, adopted the radical opposite of Zehr's view by claiming that restorative justice is an alternative punishment. Others, such as Morris, have adopted a modest position arguing that 'any outcome, including a prison sentence, can be restorative if it is an outcome agreed to and considered appropriate by the key parties' (2002: 599). Ultimately, for the community sentence or referral orders to gain the trust of the public,

whose lack is identified as one of the main criticisms of the former (Newburn 2009; Fionda 2005), there is a need for a robust and efficient community sentencing system that delivers effective results (Prison Reform Trust 2012) and does not live in the shadow of the retributive justice system, which is the case at the moment (Worall 2013). A key element to elevate that possibility is probably to deliver community sentences that embody the ritual expression of both shaming and integration in a principle called 'reintegrative shaming'—a principle at the heart of restorative justice practice, which involves a social disapproval that is followed by process, subsequently aiming to reintegrate the young offender back into society, decertifying them as deviant and enabling their long-term desistance (Braithwaite 1989). Furthermore, reintegrative shaming suggests that it enables the offender to construct a new narrative about their life which frames a new self now going straight (Maruna 2001).

In the first qualitative research study on the provision of restorative justice in Scotland, Maglione and colleagues (2020) interviewed 14 restorative justice practitioners to gain an insight into practitioner understandings and views of restorative justice. The interviews highlighted a great need for restorative justice methods to be used in cases of young people to ensure they are not simply dragged through the criminal justice system and forced into the university of crime. Instead, by getting young people engaged in constructive dialogue, they are more likely to amicably resolve issues they might encounter in the future. This study demonstrates a utilitarian alternative to traditional juvenile justice. The non-labelling tools that restorative justice practitioners use (discussed in this study) show a concerted effort towards achieving desistance among young people by instilling problem-solving skills for their future.

However, the interviews conducted by Maglione and colleagues (2020) also highlight some shortcomings when it comes to referring young people to restorative justice. Early and effective intervention in Scotland deals with relatively minor youth offending and is designed to filter such offending out of the formal juvenile justice system. The way in which young people are referred depends on the local authority responding to the offence. For example, in some local authorities in Scotland, a screening group—made up of police, social work, education, health and third-sector organizations—meets regularly in response to police referrals of young people who are on the periphery of offending. On the back of the discussions, a decision is made on the most appropriate outcome, which may include a referral to a restorative justice provider. In other local authorities, many of the same agencies are involved but not in the same collaborative way. In these local authorities, a coordinator is appointed whose responsibility it is to

liaise with agents such as schools, health and social workers in order to obtain information. Once the coordinator believes they have sufficient information, the coordinator then makes a decision on the outcomes for the young person concerned. The practitioners interviewed by Maglione and colleagues (2020) expressed dissatisfaction with the second referral model as it undermines the multi-agency approach that restorative justice should involve. This study—ensuring practitioners' views on best practice are central to the response to youth offending—provides a clear policy design for early and effective intervention to guarantee that the voices of all appropriate agencies are heard loud and clear before a decision is made on the best outcome for the individual. This approach to youth offending must be employed collaboratively if desistance is to be achieved through restorative justice.

Another important issue concerning the use of restorative justice was raised by Evans & colleagues (2020) who noted that interaction during the restorative session is a cognitive task, which 'requires the individual to be able to sit calmly in a room with another individual, take turns in a conversation, understand things from someone else's viewpoint, weigh up the arguments, reason appropriately, consider future options, and consistently apply learning to behaviour' (at 62). In this sense, practitioners could rightly question the ability of the traumatized young person to perform such a cognitive task. Moreover, trauma can be a barrier to the young person's ability to accept support (Youth Justice Board 2017).

The answer to these concerns is embedded in the restorative process itself. In his attempt to demonstrate the ways in which humans react when feeling shame, 'the Compass of Shame' was developed by Nathanson for that very purpose (Kelly & Thorsborne 2014). He argued that humans develop a set of defensive strategies to convert their shame into something less toxic. Those strategies revolve around four scripts, described by Nathanson as the Compass of Shame, namely; attacking self, attacking others, avoidance and withdrawal (Nathanson 1997). Each of those points clearly conflicts with the principals of an effective restorative justice conference, therefore jeopardizing the task of the practitioner. Nathanson, as have other scholars, illustrated that attacking others involves shifting attention away from the self to another person or thing: in other words, an attempt to disassociate from the experience of shame (Sanderson 2015). This notably could eliminate the element of respect, which is a necessary in the restorative conference. It also reduces the capacity of empathy or compassion, which causes the

offender to dehumanize others. In addition, it reduces opportunities for connection and mutuality. Similarly, attacking one's self increases shame rather than reducing it. In a milder form, it leads to shyness whereby the offender accepts part of the shame experience, preventing the emergence of the whole (Nathanson 1992). Apparently, this would preclude the offender from realizing the consequences of their action, subsequently affecting the efforts of the practitioner to have them addressed. In the case of 'withdrawal', the individual removes people from the situation which caused the shame, keeping their feelings to themself (Pattison 2000). In such an environment, the offender would be unable to relate to the emotional and practical consequences imposed on the victim of their acts. They use denial (avoidance) in various forms in an attempt to remove feelings of shame from conscious awareness.

If there is one theme that could be derived as a result of the four abovementioned elements it is the severe lack of communication and clarity in the potential conference attended by the offender and the victim. In the case of the latter, it is important to note that the victim, too, could operate under the shame. They might blame themselves for the offence, withdraw and hide their feelings, and sometimes distract themselves. They might also lash out at others. Providing an environment in which both parties can express their feelings and move forward towards resolution and reintegration is crucial. Hence the restorative conference is important to both the offenders and the victims. Using the Compass of Shame to facilitate the recognition of behaviours motivated by its four scripts minimizes the negative effect of shame that will be seen throughout the restorative efforts on behalf of offenders as well as their victims. In order to care for others effectively, one must have an approach based upon a solid understanding of how others care and how that motivates their behaviour. Recognizing one's motivation for a particular behaviour or reaction will enable the practitioner to conduct an effective conference based on clear understanding with visible aims. Providing the opportunity to both parties to express their shame, along with other emotions, could reduce the parties' intensity and move beyond the shame (Kelly & Thorsborne 2014). Moreover, Kelly & Thorsborne argue that conference participants begin to experience the positive effects of interest and enjoyment once they gain a shared understanding of each other's perspective (Kelly & Thorsborne 2014). An understanding of the Compass of Shame by the practitioner will inevitably lead to the unblocking of what hinders positive feelings from being revealed. It will enhance the quality of the communication between the practitioner and the parties. Unblocking positive feelings will also lead to a process which

is voluntary and based on informed choice made by the parties, hence resulting in effective cooperation between the concerned individuals. Tomkins argues that shame precludes sober analysis of failure and it hinders techniques of conversation and dialogue (Tomkins 1962). Serving a technical purpose, a proper understanding by the practitioner of the Compass of Shame would consequently enable them to understand the conditions under which the parties are operating and therefore make informed choices and decisions beforehand in relation to the safety of the venue from any potential aggressive or disrespectful behaviour.

Finally, restorative justice is a multi-agency task which should involve all community institutions and agencies that concern themselves with the wellbeing and the welfare of young people. For instance, Beside the skills and the sense of community which the education sector may provide, subjects such as ethics, peaceful dispute resolution and restorative justice practices may be incorporated and implemented in schools' curricula as well as the necessary emotional support (Sprott 2004).[3] To this end, greater public awareness of child development skills for parents during both antenatal and postnatal periods is needed. When teachers and health professionals observe particular behaviours such as bullying, disruptive behaviour, substance misuse or over/under-eating, ACE screening should take place to ascertain the appropriate interventions. Moreover, law enforcers taking a trauma-informed approach to young offending should see an increased likelihood of poor behaviour being dealt with by health or community services.

[E] CONCLUSION

A new approach to youth offending is needed if we think of justice as a lived experience (Moore 2022: 401) which involves all parties concerned rather than a ceremonial role played by the state to confirm its sovereignty (Foucault 1977). This approach should consider the wider view and reasons behind youth offending which transcend socio-economic explanations to mechanisms that consider the well-being of the young offender, their welfare and their future desistance. While this article does not propose that restorative justice is the answer, a restorative approach to crime nevertheless offers a mechanism that involves all parties to an offence and allows the chance for the young offender to reflect and, with the aid of involved support practitioners, to reconstruct their perception of reality and their self. This, by all means, is a trauma-informed practice

[3] Education in general has a proven track record of success in teaching young people to be tolerant, which could eventually discourage delinquency (Becker & Mulligan 1997).

that considers the need of the majority of young offenders who are caught in the revolving doors of the justice system.

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A Critique of the Nigerian Proceeds of Crime (Recovery & Management) Act 2022

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Abstract

Organized crime is a hazard to national security and the realization of institutional principles. Any society plagued by this menace must stir itself up to leave no safe space for any individual or entity seeking to surreptitiously transfer, conceal or utilize the proceeds of crime and corruption or to evade sanctions. In past decades, Nigeria's effort expended on the anti-corruption war, although commendable, has not been met with commensurate outcome. This article examines Nigeria's anti-corruption legislation in respect of the Proceeds of Crime (Recovery and Management) Act 2022 by providing legal analysis of this legislation in comparison with international best practices in the acquisition and disposal of these assets of crime. With the enactment of the Proceeds of Crime (Recovery and Management) Act 2022, the recovery of assets from the proceeds of crime remains the first priority of this legislation to meet the Government's ambition to steadily increase the value of assets denied to and recovered from criminals. It does appear that the jurisprudential basis for the enactment of the Act is for the recovery of these assets through civil proceedings.

Keywords: criminal liability; forfeiture; Nigerian legislation; non-conviction-based recovery; proceeds of crime; right to property; stay of proceedings.

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[A] INTRODUCTION

The definition of asset recovery captures all activities to investigate (search, trace and identify) illicit finance that enables the process for the timely and successful recovery (freezing and seizure) of assets (Home Office 2019). A successful framework for combating financial crime and money laundering includes depriving criminals of the proceeds of their crimes. In the past, there was no known legislation for recovery of the proceeds of crime in non-conviction-based judicial proceedings. Now, however, in Nigeria asset recovery principally takes place using the Proceeds of Crime (Recovery and Management) Act 2022 (the Act), which generally provides for certain asset recovery powers which include confiscation of the proceeds of crime upon a finding that such realizable assets have been obtained through unscrupulous and questionable means worthy of attracting criminal sanctions. This takes place subsequently to the initiation of proceedings, civil or criminal, against any individual or a third party, although the Act empowers the court to grant preservative orders to preserve property reasonably suspected to have been derived from unlawful activities and represent instrumentality of unlawful activity or unclaimed property. The aim to be achieved, as contained in the relevant sections of the Act, is to demonstrate that a convicted person should not be allowed to benefit from the proceeds of their criminal activity.[1] Noteworthy is that 'proceeds of crime', according to article 2(e) of the United Nations Convention against Transnational Organized Crime, means any property derived from or obtained, directly or indirectly, through the commission of an offence. In some jurisdictions, the terms 'profits of crime' or 'benefit derived from crime'[2] are preferred. Further, the Act aims to provide an effective process by which the total benefit from a person's criminal activity is calculated and an equivalent amount, where recoverable, is confiscated on behalf of the Federal Government of Nigeria; to ensure the preservation of all realizable properties, as defined under section 53 of the Act; and to ensure that the said realizable properties are preserved and available to satisfy a confiscation order.

Further, the Act recognizes that any suspect who is detected by the 'relevant organization' and who may potentially face a confiscation or forfeiture order may attempt to dispose of the said properties before the determination of the criminal case pending against the suspect so

[1] Which would include enabling the relevant organization (as outlined in section 82 of the Act) to implement confiscation proceedings against a convicted person.

[2] 'Benefit derived from crime' or 'criminal benefit' means any property, service, advantage or benefit that is a constituent of a person's wealth and which was directly or indirectly acquired as a result of the person's involvement in the commission of an offence, whether or not the property, service, advantage or benefit was lawfully acquired. See UNODC 2012a.

that the law would not be able to deprive them of the properties. In this respect, the court[3] has been empowered to make restraining orders such as an interim order of attachment or Mareva injunction, which have the effect of freezing the property thereby preventing the suspect, or accused person as the case may be, from dealing with the proceeds of crime held by that person or the third parties on their behalf (see parts IV, V and VI of the Act). The trend all over the world is to prevent the accused person from accessing the proceeds of their criminal conduct. The pertinent question at this juncture is whether the practice of temporarily depriving the accused person from dealing with the assets suspected to be proceeds of crime pending the final determination of the civil/criminal case against them is unconstitutional or otherwise (*Dangabar v FRN* 2012 *per* Bada JCA, 33–38, para D). There is no doubt that pursuant to sections 43 and 44 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) (the Constitution) all citizens of Nigeria have the right to acquire and own property anywhere in Nigeria, and their property should not be compulsorily acquired without payment of compensation. However, there is a *caveat*: this right to property is not absolute. Section 44(2)(k) of the said Constitution creates an exception and it states as follows:

> Nothing in sub-section (1) of this section shall be construed as affecting any general law; (k) relating to the *temporary taking possession of property* for the purpose of any examination, investigation or inquiry (emphasis added).

The above-stated provision shows the intention of the law-maker to validate any law such as sections 9, 19, 33, 34 and 43 of the Act which are in respect of property reasonably suspected to be the proceeds of unlawful activities, whether directly or indirectly, sought to be seized and placed under the control and custody of the relevant organization. Further, the intention of sections 9 and 19 of the Act is merely to obtain a preservative order on the property suspected to be proceeds of crime so as to prevent the accused person or suspect from dissipating the assets and thereby create a situation of a *fait accompli* at the conclusion of trial. The word 'investigate' is defined by *Black's Law Dictionary* (Black 1991) to mean 'to examine and inquire into with care and accuracy, to find out by careful inquisition, examination, the taking of evidence, a legal inquiry'.[4] The same *Black's Law Dictionary* defines 'examination' as it relates to crime as:

[3] Section 82 of the Act defines 'court' as the Federal High Court, High Court of the Federal Capital Territory or State High Court.

[4] See also, the *Legal and Commercial Dictionary* (Choudhury 1979) which defines 'investigation' as 'Careful search, study, close inquiry, scrutiny, detailed examination, collection of facts, inquiry to ascertain facts, inquiry, exhaustive study, and systematic search' (at 479).

> an investigation by a Magistrate of a person who has been charged with crime and arrested or of the facts and circumstances which alleged to have attended the crime in order to ascertain whether there is sufficient ground to hold him to bail for his trial by the proper court; the preliminary hearing to determine whether a person charged with having committed a crime should be held for trial.

'Enquiry' as defined by *Legal and Commercial Dictionary* (Choudhury 1979) means 'investigation of a matter from the various sources in order to find the truth'.[5]

After a careful examination of the above definitions, it would be clear that allowing civil forfeiture, confiscation and/or civil recovery of property, instrumentalities of unlawful activities and realizable assets for the purpose of examination, investigation or enquiry would unavoidably extend to the conduct of a criminal case whether or not a conviction has been pronounced. The writer is of the view that to do otherwise will give the constitutional provision a very narrow interpretation which will defeat the purpose of the Constitution itself.

Forfeiture to the state is a norm as it presupposes that defendants in an action brought pursuant to the Act must be prepared to face the might of justice. The court has a social duty to help in sounding a note of warning and frowning at criminals who think that the long arm of the law cannot reach them. It has been held that 'an appellant cannot be allowed to enjoy the proceeds of his crime' (*Nwude v FRN* 2015 *per* Ndukwe-Anyanwu JCA, 38-40, para A). There is no gainsaying that a criminal who is convicted ought not to be allowed to enjoy the proceeds of their crime. Therein is the justice of the law. Criminals must not be allowed to enjoy the proceeds of their crime in total disregard of the well laid-down norms and values of society and to the detriment of their victims. The sanctions of the court, for instance, forfeiture of proceeds, and other such mechanisms and tools provided by the law, would serve as a deterrent to intending criminals that the long arm of the law will always catch up with them.

[B] ANALYSIS OF THE ACT

Amongst its admirable objectives, the Act ensures that relevant organizations must establish the Proceeds of Crime (Management) Directorate to carry out the functions conferred on it under this Act.

[5] 'Enquiry' covers the hearing of the case—ie recording evidence, admitting documents and generally completing the record upon which a finding would be based. It is only after all the material has been placed on record by both sides that the stage of reporting a find would arise. See *Dr M N Dasanna* (1973).

Seizures and forfeitures typically follow law enforcement activity by certain government organizations. Typically, these organizations derive their recovery powers from enabling provisions in their establishing statute, such as section 2(c) of the Economic and Financial Crimes Commission (EFCC) Act, which empowers the Legal and Prosecution Unit of the EFCC to conduct proceedings as may be necessary for the recovery of any asset or property forfeited. This is one respect in which the Act is innovative, in that the powers and duties under the Act are conferred not on individual agencies but on a group of diverse law enforcement and security agencies, which the Act describes collectively as 'Relevant Organisations'.[6]

The relevant organization is to enforce and administer the Act. Specifically, the powers and duties of the relevant organization relate to property seized and placed under the control and custody of the relevant organization upon an order of court to that effect; the Act refers to these as 'controlled property'.

The Act, in section 59(1)(a-d), mandates the relevant organization to do everything 'reasonably necessary' for preserving the controlled property, including:

a. Becoming a party to any civil or criminal proceedings affecting the controlled property;

b. Realising or otherwise dealing with controlled property that is securities or investments; and

c. Where the controlled property is a business, (i) employing/terminating the employment of persons in the business; and (ii) doing anything necessary to carry on the business on a sound commercial basis.

Essentially, the Act gives the relevant organization the power to act and make key decisions in respect of the controlled property. In this regard, the Act empowers the relevant organization to exercise the right attaching to any of the controlled property in the form of shares, securities, stocks, bonds or debentures, and equally allows the relevant organization to destroy the controlled property (on grounds of public interest, health or safety) or dispose of the controlled property—by sale or other means—if it is susceptible to deterioration or is excessively burdensome or expensive to maintain.

6 The Act defines 'Relevant Organisation' to include, the EFCC, Nigeria Police Force, Armed Forces, Department of State Services, Independent Corrupt Practices and other Related Offences Commission, Nigerian Financial Intelligence Unit, Code of Conduct Bureau, Standard Organisation of Nigeria, Federal Inland Revenue Service, Nigeria Customs Service, National Drug Law Enforcement Agency, National Agency for Prohibition of Trafficking in Persons, National Agency for Food and Drug Administration and Control, Nigeria Ports Authority, Nigeria Immigration Service, Nigeria Maritime and Safety Agency, National Inland Waterways Authority etc and 'such other organisation as the Attorney-General may designate'.

The Act also grants immunity to the relevant organization against (i) any loss or damage sustained by a person claiming interest in the controlled property, arising from the relevant organization taking custody of property; (ii) the cost of proceedings taken to establish an interest in the controlled property; and (iii) payments of any rates, land tax, municipal or statutory charges imposed under any law pertaining to the controlled property, except out of the rents or profits that had accrued from the controlled property.

Further, the Act makes provisions for the relevant organization, under the direction of the Attorney-General of the Federation, to initiate proceedings in a foreign country for the recovery of forfeited property and also allows the relevant organization, under the direction of the Attorney-General of the Federation, to apply for the assets or property of a convicted person in a foreign country to be forfeited to the Federal Government of Nigeria, subject to any treaty or arrangement with the foreign country.

Section 3(b)(i)-(vi) of the Act authorizes the establishment of the Proceeds of Crime Management Directorate (PCMD/the Directorate), which in some common law jurisdictions may be called the Asset Recovery Office. The Act enables each relevant organization to issue guidelines relating to the exercise of the duties, functions and powers of the PCMD. Furthermore, the Attorney-General of the Federation may, in consultation with the relevant organization(s), make regulations relating to a 'standardized automated asset forfeiture management system expedient for the efficient implementation of the provisions of this Act'.

Non-conviction-based recovery

The Act provides for non-conviction-based recovery for the proceeds of crime as it is a procedure that provides for the seizure and forfeiture of stolen assets without the need for a criminal conviction.

The Act in section 82 (the definition section) defines 'non-conviction-based confiscation' as confiscation through judicial procedure related to a criminal offence for which criminal conviction is not required. It requires the relevant organization to commence civil proceedings for the recovery and forfeiture of the proceeds of crime, abandoned properties or unclaimed properties reasonably suspected to be proceeds of unlawful activity, without conviction.

Two orders (as stipulated in the Act) which the relevant organization may seek from the court in recovering proceeds of crime are a 'preservation order' and a 'forfeiture order'. The relevant organization may, by way of an

ex parte application, apply for a preservation order to restrain a person from dealing with the property in any manner. *Prima facie*, a preservation order will last for 60 days, but may be renewed upon an application by the relevant organization to the court. It is pertinent to mention that in granting a preservation order, the court will *inter alia* consider whether the property concerned represents the proceeds of unlawful activity and it is immaterial that the said property has been passed to another person. In fact, it is specifically provided in section 9(5) of the Act that, where the said property has been amalgamated with other property, the courts are empowered to make preservation orders on the portion of the property resulting from unlawful activity. The writer opines that, in practice, there seem to be abuses especially in physical properties where the property sought to be preserved or forfeited had been acquired prior to the period of the commission of the crime. The recovery of illegally obtained assets first entails tracing the asset even when commingled with other untainted assets that are not proceeds or instrumentalities of the said crime committed. Even where the investigation reveals that certain properties were acquired before the commission of the crime, more often than not, the investigative officers/the relevant authorities fail to distinguish the legality of the assets thereby allowing the abuse of the assets to persist at the detriment of a *bona fide* owner of the said asset(s). The writer is of the opinion that the Act ought to specifically state that assets acquired only after the commission of the unlawful activity, that is the subject matter of the proceedings, are subject to preservative or forfeiture orders to curb possible abuses by officers of the relevant authority in respect of the said assets.

The Act provides that a court 'may' direct the relevant organization to publish the preservation order within 14 days of its issue to notify persons who may have an interest in the affected property. Although the Act appears to leave publication to the discretion of the court, it nevertheless provides that persons affected by a preservation order may challenge such an order within 14 days of its publication.

With respect to the forfeiture order, pursuant to section 17(1) of the Act, the relevant organization may, before the expiration of a preservation order, apply to the court for a forfeiture order against all or any part of the property that is subject to the preservation order. Once a forfeiture order has been made, the relevant organization will promptly hand over the forfeited property to the Directorate.

The Act stipulates that the validity of forfeiture will not be affected 'by the outcome of criminal proceedings or of an investigation with a view to

instituting criminal proceeding, in respect of an offence with which the property concerned may be associated'.

Recovery of cash

The Act authorizes a designated officer[7] to seize and detain any cash in the process of being moved within or outside Nigeria, if the designated officer has reasonable grounds for suspecting that the cash represents proceeds of unlawful activity, is intended to be an instrumentality of an offence, or exceeds the prescribed amount under the law and has not been declared to the appropriate authorities. The Act defines 'cash' to include 'jewelries and gold', thus extending the application of the Money Laundering Act 2022, under which the requirement to declare relates only to cash and negotiable instruments.

With respect to timeframes for detention, cash may be detained for a period of seven days (excluding Saturdays and Sundays or any public holiday) to enable the designated officer to apply to the court for an order to detain the cash.[8] The court may extend the timeframe, provided it does not exceed three months from the date the order of extension was made. Subsequent orders for continued detention are not to exceed a cumulative period of 12 months from the date of the first order. The court may also direct a release of the whole or part of the detained funds upon an application by the person from whom the cash is seized, provided the applicant can satisfy the court that the detained funds or part were not unlawfully obtained.

Confiscation of proceeds of crime: conviction-based recovery

Section 33 of the Act provides for the confiscation of the proceeds of the criminal activity of a convicted person through confiscation proceedings against the convicted person. In this regard, the Act seeks to ensure that a convicted person is not allowed to benefit from the proceeds of their criminal activity, by providing an effective process for the calculation and confiscation of the total benefits of a convicted person's criminal activity. Further to this, the Act provides for the issuance by the court of a restraint order(s) and a confiscation order(s). The purport of a restraint order is to prevent the

[7] Section 26(2)(b) of the Act defines designated officer as an officer of Nigeria Customs Service, National Drug Law Enforcement Agency, Economic and Financial Crimes Commission, Nigeria Police Force, Nigeria Immigration Service and officers of other relevant organizations.

[8] The court is expected to adopt procedures similar to those of summary proceedings, as provided for in the High Court (Civil Procedure) Rules 2019. See section 26(5) of the Act.

defendant from dealing with realizable assets held under their custody or control. The application is to be made by the relevant organization by way of a motion *ex parte*, as prescribed by section 36 of the Act.

Confiscation orders pursuant to section 52(2) of the Act aim to secure payment of a sum of money up to the amount that a convicted person has acquired from the offences for which the person was convicted. A confiscation order against a person may be enforced as if it were an order made in civil proceedings instituted by the relevant organization against a person to recover a debt due by that person to the Federal Government of Nigeria.

The relevant courts within the jurisdiction to entertain matters and proceedings arising under the Act are the Federal High Court, High Court of the Federal Capital Territory and State High Courts; and the Heads of these courts are equally empowered by virtue of section 73(1) of the Act to designate special courts to hear and determine all cases under the Act.

Further, section 68 of the Act establishes a designated account to be known as the Confiscated and Forfeited Properties Account (the Account) to be maintained at the Central Bank of Nigeria and managed by the head of the relevant organization who shall be responsible for providing reports to the Minister of Finance.[9]

[C] A CRITIQUE

It does appear that the intention of the persons drafting the Act, from the analysis of the Act, is to encourage actions *in rem* against the property sought—including cash or jewellery. In other words, bringing an action *in rem* against the property or assets of such illegality gives the said assets a juristic personality, especially when the owners of the assets are unknown. Section 10 of the Act, having provided 14 days' notice of the preservative order to be published by the relevant organization in order to notify any persons having interest in the subject property, creates a window of opportunity to challenge the preservative order so as to afford the supposed owner of the subject assets reasonable time to prove the legality of those assets. Section 74 of the Act places the burden of proof on the defendant. In essence, the defendant in any proceeding under the

[9] The categories of payments to be made into the Account include money realized from the proceeds of sale, management or other form of disposal of forfeited assets under this Act and other relevant laws; proceeds of any forfeited property acquired in abuse or corruption of office further to section 23(2)(c) of the Code of Conduct Bureau and Tribunal Act 1989; money paid to Nigeria by a foreign country; and money paid to the relevant organization on behalf of the Federal Government in settlement of proceedings connected with this Act and other relevant laws.

Act bears the burden of proving that they are the legitimate owner of the assets suspected to be proceeds of crime or derived from unlawful activity or that the assets are of legitimate origin and not proceeds of unlawful activity. This section is controversial and might be subjected to judicial interpretation especially when it seemingly contravenes the provisions of section 36(5) of the Constitution of Nigeria on presumption of innocence. Under the Act, the manner of proceedings presupposes that the interested person challenging the order must prove that the assets were acquired through legitimate means. Notwithstanding, whether criminal or civil, the burden of proof rests on the defendant, plaintiff or the prosecution, as the case may be. The evidential burden placed on the defendant under this Act runs contrary to the provisions of the Constitution which provide for the presumption of innocence. This would be a great subject of judicial interpretation in the event that this provision of the Act were to be tested.

Another notable section of the Act is the prohibition on 'stay of proceedings'. The Act categorically prohibits the court from entertaining any application for stay of proceedings on whatever ground. Section 75 of the Act excluded the discretionary power of the court in granting stay of proceedings where the usual traditional legal practice might entertain such a notion. The writer opines that this provision of the Act is quite blanket and does not protect public confidence in the integrity of the court. Proceedings brought under this Act are usually initiated by *ex parte* applications which sometimes are taken to be oppressive. Therefore, there is a need for equity and fairness in the dispensation of justice to all parties. Chief of all, where a party is challenging the competence or jurisdiction of the court to entertain the non-conviction-based proceeding of the court, such a party challenging the jurisdiction ought to be entitled to be granted an order for stay of proceedings where there is an appeal arising out of the suit. It is trite law that, where issue of jurisdiction is involved in a pending appeal, a court is bound to grant an application of stay of proceeding pending the determination of the appeal.[10]

As previously stated, section 19(4) of the Act, controversially, provides that a forfeiture order, obtained in respect of an asset under the non-conviction-based proceeding, will not be invalid or affected by the outcome of criminal proceedings or of an investigation with a view to instituting criminal proceeding in respect of an offence with which the asset may be associated. Therefore, an accused or a suspect's property could be

[10] Therefore, before granting stay of proceedings on issues of jurisdiction, a court faced with an application for stay must be fully satisfied and convinced that there really is a genuine issue of jurisdiction involved in the matter sought to be stayed. See *Federal Republic of Nigeria v Abacha* (2007) *per* Sanusi JSC, at 13-15, para C.

subjected to forfeiture irrespective of the suspect being acquitted from charges brought against them or exoneration from criminal investigation. In effect, property alleged to be the proceeds of crime and seized through non-conviction-based proceedings will remain confiscated even if the accused person is acquitted of the offence by which the accused person is alleged to have acquired the property. The provision of section 44 of the Constitution is a potential flashpoint for judicial interpretation. The writer opines that the jurisprudential basis for this provision is to shut out any form of interference by a court of coordinate jurisdiction sitting in a criminal capacity discharging and acquitting an accused person whose assets have been confiscated under the non-conviction-based proceedings. The proceeds of crime, no matter how they are painted, come from criminal activity. A party being prosecuted on a charge of having taken part in such an activity and who is eventually discharged and acquitted on the said charge ought not to have their assets confiscated perpetually since the party has been found to be innocent, based on the discharge and acquittal. Therefore, on what basis is a confiscation on a non-conviction-based proceedings allowed to subsist? The writer further opines that these provisions allowing a confiscation order to subsist are simply oppressive and do not aim to achieve anything. Section 43 of the 1999 Constitution guarantees the right to property by stating 'subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria'. As provided earlier in the first part of this article, section 44(2)(k) only permits the *temporary taking possession of property for the purpose of any examination, investigation or inquiry*; 'temporary' being the key word. However, there are certain limitations to be followed. Although this is a guaranteed right, the 1999 Constitution states that no moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria '*except in the manner and for the purposes prescribed by a law*'. The section expounds that such property shall not be taken forcibly unless under the circumstances listed by a law of the National Assembly, or State House of Assembly; the Proceeds of Crime Act lacks any (reasonably) justifiable grounds for the perpetual detention or confiscation of the property belonging to an accused who has been acquitted of all charges. Obviously, this lacuna in the provisions of the Act amounts to a clear contravention of the constitutionally guaranteed right to property in Nigeria and as such ought to be expunged from the Act by the National Assembly, or suffer ridicule by the courts of law for being inconsistent with the provisions of the 1999 Constitution. It may be presumed that words are not used

in a statute without a meaning and are not superfluous, and so effect must be given, if possible, to all the words used, for the legislature is deemed not to waste its words or say anything in vain (*Daymond v South West Water Authority* 1976: 58). Therefore, the writer opines that the framers did intend the wordings of section 19(2) of the Act to have the effect of a forcible confiscation of property by the Government, without any reasonable grounds whatsoever, regardless of an acquittal of the accused, which amounts to an absurdity and is in conflict with the 1999 Constitution thereby defeating the guaranteed fundamental rights of the individual, and therefore the court will not lend its weight to such application of the Act. It goes without saying that the Government does not have the right to perpetually confiscate the property of any citizen in Nigeria contrary to the express provisions of section 44 of the 1999 Constitution.

The Act confers abysmal powers on the Proceeds of Crime Management Directorate created in the relevant organization, which include the doing of 'anything it considers appropriate for facilitating, or which is incidental to the performance of its functions'. However, the writer opines that to avoid falling short of the requirements of the law with regards to jurisdiction of the relevant organization, such wider powers must be expressly provided to avoid ambiguity in its interpretation. The UNODC *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime* (UNODC 2012a) specifically recommends what powers an Asset Recovery Office[11] should have, which includes powers to access all relevant information; to coordinate and correlate all relevant information effectively at the national level; to access information using coercive means, where necessary; to share the information both nationally and internationally, where appropriate; to protect this information and impose conditions on both its use and further transmission, nationally and internationally; to issue a short-term administrative restraint order where funds that could be dissipated quickly are identified; and to conduct joint investigations internationally. From the foregoing, the goal should be to freeze the illicit assets, home and abroad, of the criminal offence as early as possible in the context of the larger organized crime investigation. The need to simultaneously investigate assets and the substantive crime means that states should, wherever possible, consider the possibility of establishing specialized asset-tracing or asset recovery units, perhaps in the form of an asset recovery office.

[11] Equivalent to the Proceeds of Crime Management Directorate, as provided for by section 3 of the Act, which the relevant organization, as set out in section 82, shall establish to enforce the provisions of the Act.

[D] CONCLUSION AND RECOMMENDATIONS

The non-conviction-based-confiscation seems to be an admirable approach employed by the Act to recover the proceeds and instrumentalities of crime without the burden of the weighty standard of proof in criminal proceedings. However, the jurisdiction to issue an order may be limited by the territorial jurisdiction of the court. In addition, it is not clear whether a non-conviction-based trial can be considered to be criminal proceedings for the purposes of mutual legal assistance[12] in criminal matters. On 15 February 2012, the Financial Action Task Force (FATF) updated its 40 Recommendations,[13] including recommendation 38 (see below), by expanding the scope of the enforcement of foreign confiscation orders. Recommendation 38 reads:

> Countries should ensure that they have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered; proceeds from money-laundering, predicate offences and terrorist financing; instrumentalities used in, or intended for use in, the commission of these offences; or property of corresponding value. This authority should include being able to respond to requests made on the basis of non-conviction-based confiscation proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law. Countries should also have effective mechanisms for managing such property, instrumentalities or property of corresponding value, and arrangements for coordinating seizure and confiscation proceedings, which should include the sharing of confiscated assets.

Obtaining a confiscation order from a criminal court as opposed to a civil court may be considered too difficult in the light of the higher standard of evidence required for a criminal conviction or confiscation. Non-conviction-based confiscation, however, frequently relies upon a civil court's expectation of proof based on a balance of probabilities standard, depending on the jurisdiction.[14] What is important here is that

[12] Equally, a mutual legal assistance request may be submitted and then enforced by authorities in the foreign jurisdiction by either directly registering and enforcing the order of the requesting jurisdiction in a domestic court (direct enforcement) or issuing a domestic order based on the facts (or order) provided by the requesting jurisdiction (indirect enforcement). In such a case, the *Manual on Mutual Legal Assistance and Extradition* (UNODC 2012b) should be used to facilitate the request. This will be accomplished through the mutual legal assistance process. It is also important to understand that in the mutual legal assistance scenario the property, especially if it is immovable, remains in the requested state, and asset management costs need to be evaluated.

[13] FATF Recommendations.

[14] See *Abdullah v Suleiman* (2011), where it was held by the Supreme Court of Nigeria *per* Ogubiyi JSC (at 22-23, para E) that: 'The concept of balance of probability necessitates on imaginary scale as it is predicated on perception. This is not dependent on the number of witnesses needed in proof of an assertion. In other words, proof on balance of probability is not a game of numbers that should count.'

there is no requirement for criminal charges to have been instituted or a conviction obtained to undertake non-conviction-based confiscation. The procedure allows for a confiscation application in cases where the offender is unavailable for any number of reasons, such as being deceased, being a fugitive from criminal justice or claiming prosecution immunity. However, the application may still result in an order that may not be enforceable using the mutual legal assistance provisions. If that is the case, the effectiveness of this approach can be limited whenever a criminal uses national borders to frustrate law enforcement and judicial authorities.

The writer recommends that to enhance the administration and the conduct of non-conviction-based proceedings under the Act, the Evidence Act 2011, and the Constitution of the Federal Republic of Nigeria 1999 (as amended) are to be amended, with respect to the shift in the burden of proof to the defendant and the presumption of innocence of an accused respectively, to accommodate non-conviction-based proceedings. And further, section 75 of the Act, on prohibition of stay of proceedings, ought to be amended to capture that where the application for stay involves the issue of jurisdiction, the application ought to be granted.

About the author

Tochukwu Onyiuke *is a Legal Practitioner with over two decades of experience, specifically on insolvency. Having completed a Master's degree in financial management from Middlesex University Business School, London (in 2005), he joined Punuka Attorneys & Solicitors under the distinguished leadership of Anthony Ikemefuna Idigbe, SAN, in 2006. In 2011, he left Punuka to set up a partnership, Accendo-law, and has since been in private practice to date and heads the dispute resolution division of the firm.*

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The Epistemological Profile of Legal Doctrinal Scholarship—A Reply to Geoffrey Samuel

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Abstract

This piece is a response to Geoffrey Samuel's review article that deals with my 2021 monograph, Legal Doctrinal Scholarship. I aim to correct misrepresentations of my position, but I also seek possibilities of a more constructive engagement between Samuel's diachronic analysis of the development of legal thought and my synchronic account of the character of legal scholarship. The first substantive section aims to set the record straight by explaining my account of legal doctrinal scholarship (as a normative and hermeneutic discipline) against the background of my thoroughly interpretive methodology. Then, I move on to addressing some of Samuel's specific objections to my account—related to the idea of the rational reconstruction of the law, the scope of interdisciplinary engagement in academic research into law, and the ideological profile of legal doctrinal scholarship. Finally, I address why Samuel's own account does not fit into the parameters of my own theoretical project. My methodology leaves room for a range of different approaches to legal scholarship—including Samuel's historical jurisprudence. However, Samuel's approach lacks the argumentative force he would need to exclude the possibility of providing legal doctrinal scholarship with a plausible epistemological justification within the methodological parameters of my account. I argue that, ultimately, our debate is about the implications of methodological pluralism: the conditions under which theoretical accounts with very different methodological assumptions may have a correcting influence on one another.

Keywords: Samuel (Geoffrey); interpretivism; science; scholarship; normativity; rational reconstruction; interdisciplinary engagement; ideology; methodological pluralism.

[A] INTRODUCTION

In the previous issue of *Amicus Curiae*, Professor Geoffrey Samuel published an intriguing article (Samuel 2022b) that focuses primarily on my 2021 monograph, *Legal Doctrinal Scholarship*. I am honoured that such a prominent scholar found my work worthy of extensive engagement. At the same time, I cannot hide my disappointment with some aspects of his article. I think he seriously misrepresented important aspects of my position.[1] Also, I would have appreciated if the analysis had been written in a different (as in less dismissive) tone. However, I recognize that it would be small-minded and futile to dwell on issues of tone.

The challenge was not unexpected. In my book, I engage explicitly with Geoffrey Samuel's own views on legal scholarship—albeit in much less detail (Bódig 2021: 161-163). I am fully aware that we stand on two sides of an important theoretical divide, and that epistemological reflection is central for both of us. There is a conversation to be had here. I write this reply not only to correct misrepresentations but in search of that conversation. I wonder whether we can move forward on that basis. By clearing up misunderstandings and misrepresentations, perhaps, we can both benefit from this debate. I do not assume that my position may not be in need of corrections.

This is made easier by the fact that I do not need to launch a general attack on Samuel's position. We clash on a limited front. My work is not just a theory of legal doctrinal scholarship. It is also a legal theoretical manifesto that reflects my views on the (parlous) state of academic legal theory—the legal theory produced by professional academics (predominantly) in law schools. I search for a suitable role (one among several) for academic legal theory. As it happens, Samuel is much more sympathetic to the legal theoretical dimensions of my book (Samuel 2022b: 59-60). Similarly, there are important aspects of Samuel's work I am comfortable with.

In this reply, I pursue three interconnected objectives. This first is to paint a more accurate picture of my position on legal doctrinal scholarship—to correct at least the most important misrepresentations. Secondly, I counter some specific objections raised by Samuel. And thirdly, I want to

[1] There is one misrepresentation I need to object to above all else. According to Samuel, I conclude that 'the epistemological ambitions of legal scholarship are not fully intelligible' (Samuel 2022b: 57). Well, the quoted passage is genuine, but my actual claim is that those epistemological ambitions are not fully intelligible 'without assuming that the law has enough sense invested in it to reward an interpretive approach to its normative demands and internal processes' (Bódig 2021: 243). And that is an assumption I stand by.

make clear why Samuel's approach did not seem attractive in the light of my specific theoretical objectives. The first two objectives are closely intertwined. Sections B and C will be dedicated to them—going from more general points to more specific ones.

The third objective relates to the exact 'battle lines' between Samuel and me. Some relevant points will be raised in section B, but section D will be dominated by this issue. Hopefully, addressing it will help us move this academic debate forward. It will also help me demonstrate what it means that I work with a methodology that leaves room for a range of different approaches to legal scholarship—with different upsides and downsides. In abstract terms, I readily recognize the viability (and value) of Samuel's 'historical jurisprudence' project. It can answer questions that my theoretical initiative is not designed to address. Still, it is not the case that my only problem is that he does not recognize the viability of my theoretical project in return. If we look at his analysis in more concrete terms, the clash of perspectives becomes sharper, and I am bound to find some aspects of his specific theoretical strategy problematic.

I seek to avoid needless repetition of points articulated in my monograph. A published piece needs to speak for itself. Still, some restatement of my position will be necessary to substantiate my arguments. Naturally, limiting restatements means leaving some aspects of Samuel's criticism unaddressed.[2] Also, a note on how I approach Samuel's position is in order. I found it really helpful to read Samuel's challenge to my position in conjunction with his recent monograph, *Rethinking Historical Jurisprudence*. Most of the claims turned against me in the article get more detailed treatment there. At the same time, in order to keep the debate focused, I avoid referencing his earlier work. I take the 2022 monograph as the most complete statement of his position. I need to add that, in the interest of a more constructive engagement, I contacted Professor Samuel, and he generously provided me with some further clarifications about his position. They are also factored into this reply.

[2] In particular, I choose not to address Samuel's way of capturing how my position relates to some of my key theoretical sources: Ronald Dworkin, Herbert Hart and Hans-Georg Gadamer. Nor do I deal with the suggestion that 'doctrinal scholarship is little more than an opinion column in a daily newspaper' (Samuel 2022b: 56).

[B] LEGAL DOCTRINAL SCHOLARSHIP AS A NORMATIVE ACADEMIC DISCIPLINE

There are several important points of disagreement between Samuel and me. But the crunch point is obvious. As he frames it, I have put forward an epistemological defence of legal doctrinal scholarship. And he thinks that that effort is doomed. I note that I never thought of my analysis as a 'defence'. I offer a theory of legal doctrinal scholarship that, indeed, puts heavy emphasis on the epistemological profile of the discipline. But that discipline has a well-established position in academia. In some ways, it could do better, but it is not in danger of losing its status. There is room for improving our understanding of its character, but the discipline does not need saving.

Importantly, there are notable differences in how we capture the character and scope of legal scholarship. This needs to be kept in mind to make sure that we do not talk past each other. My analysis is focused on legal *doctrinal* scholarship specifically which I regard as a self-standing academic discipline. It is just one among several disciplines that represent academic engagement with law ('scholarship about law') (Bódig 2021: 7, 181). Even though Samuel acknowledges doctrinal work as an aspect of academic practices around law, he places it in the context of a more broadly defined 'discipline of law' or simply 'law' instead (eg Samuel 2022a: 305). Samuel treats this discipline unequivocally as a social science (eg Samuel 2022a: 9, 134). And the argumentative edge of his broader analysis points towards the transformation of the 'discipline of law' to make it better adjusted to the methodological standards of contemporary social science. (This is why he urges legal scholars to adopt his so-called 'inquiry paradigm', eg Samuel 2022a: 281.) In my telling, a lot of the scholarship about law is indeed social science (like legal anthropology or the sociology of law), but when it comes to legal doctrinal scholarship more specifically, we are looking at a hermeneutic discipline (with a normative focus) that does not fit into well-established umbrella terms like 'natural sciences', 'social sciences', and the 'humanities'. (Bódig 2021: 152) It is best characterized in terms of a separate category: 'doctrinal scholarship'.

Clearly, we have more than a terminological squabble on our hands. The substantive question is whether we can characterize the whole of legal scholarship as a social science, and whether there are ways to make a hermeneutic discipline (focused on the normative aspects of the doctrinal structures of the law) methodologically viable in contemporary academia. Importantly, Samuel recognizes that the kind of doctrinal scholarship I talk about is indeed practised by legal scholars. (His

recurrent engagement with Peter Birks is a good indicator (Samuel 2022a: 20-21, 49, 147).) However, Samuel refuses to attribute to it a distinctive disciplinary character and insists on measuring it against the methodological standards of the social sciences. By those standards, the academic practices of doctrinal scholars are failing. They represent a paradigm (the 'authority paradigm', Samuel 2022a: 37-39, 280, 329) that has no place in contemporary science. This explains why he is bound to reject my position as unacceptable. If someone finds a plausible way to locate legal doctrinal scholarship (as a credible academic discipline) outside the scope of social sciences, Samuel's position loses much of its critical edge. By the same token, if Samuel is right about the discipline of law, my account of legal doctrinal scholarship cannot be viable. I need to challenge his position, and he needs to challenge mine.

Samuel's attack on my position is multifaceted. But his objections cluster around two central claims. The first is that I do not have a viable account of science (and social science in particular). I do not engage enough with social science methodology (Samuel 2022b: 56), and that comprehensively undermines my effort. Secondly, my epistemological defence fails on its own terms. I have set an impossible task for myself (Samuel 2022b: 57), and I undermine my own project (Samuel 2022b: 55, 65). In the end, my analysis does not even qualify as an epistemological defence of legal doctrinal scholarship (Samuel 2022b: 63). At best, I provide an object lesson in the (deleterious) 'effect of the authority paradigm on legal knowledge and its generation' (Samuel 2022b: 59).

This section looks at Samuel's two central claims. (In section C below, I move on to a few more specific objections that will help amplify my points.) We need to be careful, once again, how we frame Samuel's challenge. There is an obvious clash between us, but the mutual relevance of our claims depends on how our methodological assumptions relate to one another. In this section, the focus will be on my methodology, and I will develop my answers to Samuel's two central claims from a common core on that basis. In section D below, I will also reflect on Samuel's own methodological assumptions.

In my work, I apply a thoroughly interpretive methodology. Importantly, that determines not just my treatment of the law but all the constitutive concepts of my inquiry—including the likes of 'scholarship' and 'disciplinarity'. This matters because my main complaint about Samuel is that he has systematically ignored key aspects of my interpretivism. Once we factor them in, some of his objections lose relevance. And some others get at least blunted.

I have articulated my position on interpretivism on multiple occasions—including my monograph (Bódig 2021: 27-33; Bódig 2013). Here, I only highlight the few crunch points most relevant in the current context. Interpretivism accounts for phenomena by relying on interpretive data gained from participant communication. Here, it is probably helpful to put the point the following way: interpretive analysis operates on a 'phenomenological ground' provided by interpretive data (Bódig 2021: 21-22). Crucially, interpretive data constitute practice-relevant facts. Participant communication itself constitutes a mass of social facts (speech-acts that have been uttered as a matter of historical record), and it references factual features of social practices (like power relations between participants, procedural steps, decisions, value commitments). However, this does not turn interpretivism into a form of empirical enquiry. Interpretive accounts are 'calibrated' on practice-relevant facts (that provide the phenomenological ground for them) (Bódig 2021: 27), but their methodological character is determined by a crucial fact: the relevant interpretive data can be accounted for in different ways and from different perspectives. Even if the interpretive analysis prioritizes the conceptual tools (including the terminology) offered by participant communication (which is, incidentally, one of the features of legal doctrinal scholarship, Bódig 2021: 125), multiple interpretive accounts remain possible with a more or less equal claim to plausibility. I will call this the *hermeneutic condition* (a term not used in my monograph).

A few further aspects of operating in the hermeneutic condition will have significance below. First, social practices generate masses of practice-relevant new facts on a continuous basis. This is what gives interpretive theorizing its dynamism. Even when most practice-relevant facts reinforce existing theoretical constructs, the ones that do not are always potential triggers of conceptual development. Secondly, the fact that interpretive data are compatible with a series of different interpretive accounts of any given social practice has a further implication. Think of the law. It can be accurately described as a system of obligations, as well as an institutional manifestation of oppressive power relations (where the normative language of obligations is just window-dressing). There are no facts about functioning legal systems that either of these (otherwise incompatible) conceptions of law cannot account for. The choice between them cannot be simply the function or fit with the available social facts. Other factors (like epistemic focus, practical orientations, value assumptions, terminological preferences) also come into play. Thirdly, the available interpretive data will always have gaps and contradictions in it. Participant communication will record conflicting views on the scope

of the relevant social practice (including the criteria for participation), its character-defining processes, the values associated with it, etc. Interpretive theorizing needs to do some 'work' on the interpretive data (eg making judgements on the significance of particular sets of interpretive data). In other words, interpretive theorizing has an inevitable constructive aspect (Bódig 2021: 32). (Clearly, this is not news to Samuel: Samuel 2022a: 25.) Crucially, this point becomes particularly rich in methodological implications when the theory addresses the normative aspects of social practices. Interpretive accounts face up to the failings of normative mechanisms and end up engaging with ways in which the practice could be improved on.

It is against this background that we can assess Samuel's first main objection: my account of 'scholarship' is too weak to serve my theoretical ambitions. This line of criticism is targeted at one of my central claims (already mentioned above): legal doctrinal scholarship does not fall under categories like natural sciences, social sciences, or the humanities. Samuel's complaint is that the point I make has remained (to put it mildly) underdeveloped due to the lack of any 'in-depth analysis of the epistemological features of the natural sciences, of the social sciences and the human sciences' (Samuel 2022b: 56). The lack of engagement with the literature on social science epistemology (and Jean-Michel Berthelot more specifically, Samuel 2022b: 56) is a particular concern.

Indeed, I do not provide a deeper analysis of the different categories of academic disciplines. In that regard, I took some calculated risk (exposing myself to the kind of criticism Samuel has put forward). That risk is related to a strategic decision about thematic focus: I set out to explore how the intellectual resources of academic legal theory can be used to deepen epistemological reflection on legal doctrinal scholarship. (After all, as I have mentioned above, the book also functions as a legal theoretical manifesto.) The kind of in-depth analysis Samuel calls for would have altered the very character of my project. So, I will not argue that Samuel may not have a point here. More than that, I am ready to give ground in the light of successful challenges to my position.

However, those challenges must be relevant within the methodological parameters of my inquiry. It needs to be emphasized that, unlike in Samuel's work, 'science' is not among the technical terms deployed. Instead, I rely on the literature on academic disciplinarity to develop a concept of 'scholarship' as a term of methodological significance (Bódig 2021: 147-149). Crucially, I treat 'scholarship' as an interpretive concept. That leaves Samuel with two basic ways to challenge my account. He can

argue that scholarship (or science) cannot be treated as an interpretive practice (and, by implication, 'scholarship' as an interpretive concept). Notice that it would not be enough to demonstrate that the concept can be framed differently, or even that it is better framed in a different way. The point needs to be that scholarship has some features that are incompatible with my interpretive methodology. (After all, not all concepts are interpretive ones. Eg 'quark' in particle physics is not.) Alternatively, Samuel can argue that my interpretive account is flawed. There is a critical mass of interpretive data that I am unable to account for. Or that I have falsified the available interpretive data.

It is of some significance that Samuel does not pursue either of these two lines of argument. He rarely ever engages with the methodological underpinnings of my monograph, and he never goes into any details about it. In fact, his article starts with a long exposition that sets up his own conceptual framework to deal with the epistemological features of legal scholarship, and then projects it on my key claims without ever asking whether his approach is justified in methodological terms. His basic *modus operandi* is navigating academic sources and checking my book for the signposts of academic sources he has found useful in his own work.

Even more interestingly, Samuel does not really counter any of my specific claims about scholarship. It is clear in his book that legal scholarship cannot be taken as a natural science (Samuel 2022a: 27). And he has consistently argued that the kind of normative scholarship I talk about (trapped in the authority paradigm, Samuel 2022a: 329) does not meet the standards of social science research. So, what a lot of legal scholars do now is not social science, really. Also, in his own book, Samuel needs to face up to the fact that by far his most important source for social science epistemology, Berthelot, excluded law from the social sciences on the ground that it concerns itself with normative judgements (Samuel 2022a: 30; cf Berthelot 2001). This is a nice piece of interpretive data that chimes with my position, if I may say so.

Samuel also backs away from a direct challenge when it comes to dealing with my specific claims about the profile of legal doctrinal scholarship. My argument that empiricism is a poor fit for legal doctrinal scholarship is 'not inaccurate' (Samuel 2022b: 56). And my characterization of the epistemological features of legal doctrinal scholarship (being internalist, normative, practice-specific, interpretivist, deferential to practice-specific authorities) is also 'not inaccurate' (Samuel 2022b: 55-56; cf Bódig 2021: 121-126).

But then, what is Samuel's specific complaint? Well, it seems that I have missed that my characterization of legal doctrinal scholarship could apply equally to astrology (eg Samuel 2022b: 55-56)—a pseudo-discipline that lacks the quality of science.

Notice that, in this context, Samuel uses the term 'science' as a marker of a certain epistemological quality. We are looking at knowledge that captures aspects of our reality, and that lays claim to a certain type of validity (Samuel 2022a: 25). This suggests that Samuel uses the term 'discipline' in markedly different ways compared to 'science'. While science is captured in terms of epistemological validity, discipline is a more of a historical category. I mean he tends to talk of the 'discipline of law' in terms of historical narratives. (That is one of the central themes of his book, after all.) And the concept of 'science' is used to assess its epistemological quality in different phases of its historical development. This is how it makes sense to talk of the discipline of law while claiming that (in the grip of the authority paradigm) much of it lacks scientific quality.

What are the criteria for scientific quality here? Interestingly, I am not unsympathetic to Samuel's abstract framing for 'science'. In my own account of 'scholarship', I also touch on the importance of epistemological validation (Bódig 2021: 148). However, when it comes to the implications for standards of quality, we part ways. Samuel insists that the relevant standard is the production of new knowledge (eg Samuel 2022a: 291), and he denies that the systematization of existing knowledge could qualify as a scientific undertaking. This was confirmed by him in conversation. So, he measures legal scholarship against the requirement of producing new knowledge (Samuel 2022b: 53). This explains why he challenges on multiple occasions my claim that much of legal doctrinal scholarship is not new doctrinal knowledge (Samuel 2022b: 54-55), or that legal scholarship is not exactly a factory of new ideas (Samuel 2022b: 58). He even quips that I am getting PhD students in law schools into trouble. After all, they are supposed to earn their research degree by producing new knowledge (Samuel 2022b: 55).

My account of scholarship is markedly different on this point. I dispute the common (but ill thought-out) idea that scholarship (as manifested in academic research) is all about producing new knowledge—operating on the frontiers of human knowledge. Much of academic research across disciplines is about framing (and reframing), systematizing, or better establishing existing knowledge. In other words, epistemological validation is not just about the process of establishing new knowledge, but also the 'vetting' and regimenting of existing knowledge. The practices of academic

disciplines all reflect some balance between these two aspects of academic research. This is why I often talk of 'cultivating' knowledge when it comes to the practices of scholarship (Bódig 2021: 118). And I argue that, in some disciplines, framing and systematizing existing knowledge plays a particularly important role. This point is central to my account of legal doctrinal scholarship. I emphatically do not claim that legal doctrinal scholarship does not produce new knowledge. But I indeed emphasize that it affords a much bigger role to systematizing existing knowledge than most other disciplines.

Once again, we should not lose sight of the methodological point. I do not need to claim that my account of scholarship or academic research is the only viable one. I only need to establish that it has the support of interpretive data, and it is fitting for my theoretical undertaking. And I indeed think that—across disciplines—interpretive data suggest that framing and systematizing existing knowledge is a key aspect of academic research of scientific quality. We do not even need to look at obvious examples like successive instances of historical research into Caesar's Civil War that use (and reframe, reinterpret) mostly the same sources. My favourite example is from the natural sciences. Newtonian mechanics revolutionized physics in the late 17th century, but physicists have been much likelier to work with Lagrangian or Hamiltonian mechanics since the 19th century. Both effectively restatements of Newtonian physics (Deriglazov 2010). In some sense, they may represent new knowledge (as in getting to know a different way of formalizing mechanics). But in the sense Samuel means 'new knowledge' (operating on the frontiers of human knowledge), they clearly do not. There is no new physics there. Both Lagrangian and Hamiltonian mechanics translate the same physics into a markedly different conceptual framing (and mathematical formalism). Importantly, new formalization along these lines (that represents both reframing/restatement and systematization) often facilitates later scientific advancements. For example, the typical formalization used in quantum physics today is based on Lagrangian mechanics. Most famously, it sets the conceptual parameters for the most iconic manifestation of quantum mechanics: the Schrödinger equation (see eg Cook 2002: 147-148.) This reminds us of ways in which the production of new knowledge and the continued work on existing knowledge are intertwined in practices of academic research.

So, I doubt that Samuel's take on 'science' would constitute a devastating challenge to my account of scholarship. From my perspective, he works with rather constraining epistemological standards of academic research. It may be adequate for some purposes, but certainly for a project given

my methodological assumptions. And I think I have ample support from crucial pieces of interpretive data.

In the light of these points, it may be useful to return to Samuel's contention that some of my key claims would fit into a book on astrology (Samuel 2022b: 55-56). Indeed, in my book, I look at the analogy suggested by Samuel between astrology and legal doctrinal scholarship (Bódig 2021: 163) because I also recognize the danger of the loss of academic quality if legal scholarship becomes insular (if internal coherence is over-emphasized, if academic standards are calibrated exclusively on already existing scholarship). Legal doctrinal scholarship done poorly can come to resemble astrology. However, the gist of my point is that it can be avoided. This is why I emphasize the connection with the 'phenomenological ground' provided by social facts. And this is why I point to the role of dealing with the influx of knowledge from other disciplines in the form of either interdisciplinary or multidisciplinary engagement. (More on this in section C.)

Ironically, Samuel ends up helping me out on this point. He offers a couple of excellent arguments that can be used to show how legal doctrinal scholarship (done well) is unlike astrology. I wish I had thought of them. He is right that astrology cannot be interdisciplinary (Samuel 2022b: 57). Legal doctrinal scholarship certainly can be—as I argue in chapter 5 of my monograph. Also, astrology clashes with other disciplines 'with more reliable methodologies' (astrophysics, astronomy), and that undermines its epistemological credentials (Samuel 2022b: 65). Legal doctrinal scholarship has no such problems. Its claims about the doctrinal structures of legal practices are not contradicted by any other discipline.

Of course, if we want to produce an analysis of legal doctrinal scholarship that is based on a viable account of scholarship and academic disciplinarity, it is not enough to make room for systematizing and reframing knowledge. My theory of legal doctrinal scholarship does not revolve around the claim that legal doctrinal scholarship strikes a distinctive balance between systematizing existing knowledge and producing new insights. My central claim on this point is that we are dealing with a (hermeneutic) discipline with a normative focus, and that a sensible conception of academic disciplinarity would leave room for disciplines of this kind. In this regard, it is much harder to pin down the disagreement between Samuel and me. When he unequivocally labels the discipline of law as a social science, his account does not reckon with the possibility of distinctly normative disciplines. At the same time, he sometimes gives indications that aspects of scientific research may

revolve around normative concerns.[3] In conversation with me, Samuel said he was hesitant to assert that there could be specifically normative disciplines.

Regardless of the difficulties with pinning down the exact disagreement here, we need to address the possibility of normative disciplines before turning to Samuel's claim that my epistemological defence fails on its own terms. Two points need to be highlighted briefly. The first concerns how I make room for normative disciplines, and the second is about the character of legal doctrinal scholarship more specifically. As to the first point, I argue that exerting a rationalizing influence on our understanding of our (natural, social, psychological) world, as well as our uses of the knowledge (deemed relevant for academic inquiry) is an important aspect of the academic pursuit of knowledge (Bódig 2021: 148). And this rationalizing influence must extend to addressing the normative aspects of concrete social life (eg the concrete ethical life of communities, policy formation, the functioning of legal institutions). Of course, social sciences have a lot to say about how normative arrangements affect social relations, what power dynamics sustain them, what cultural patterns they reflect, etc. But there are also questions of academic significance around the intelligibility and justifiability of action (including practical judgements) within the parameters of those normative arrangements. When addressing the limits of competent practical judgement in line with the given normative arrangements, or the ways in which normative arrangements could be improved upon, the focus shifts to the normative (action-guiding) significance of social facts.

In my telling, it is this normative focus that determines the character of legal doctrinal scholarship. It will shape up as a hermeneutic discipline because the hermeneutic condition forces it into the methodological posture of interpretive engagement with legal practices.[4] I argue in my monograph that it is normative in three interconnected senses (Bódig 2021: 123). First, as I indicated in the previous paragraph, it focuses on the normative aspects of legal practices—more specifically the articulation of the contextual meaning of and interconnections between normative claims arising from positive law. Secondly, it internalizes the constitutive value assumptions about the law—like the value of legality. (More on this

[3] '[J]urists are, on an analogy with scientists and social scientists, striving to forge rational and coherent models. They are attempting, if not to provide insights into empirical reality, at least to furnish a conceptual framework for achieving social, economic and political justice that is institutionally grounded' (Samuel 2022a: 310).

[4] For the sake of clarity, it needs to be added that this point makes my interpretivism layered. I offer an interpretive account of a discipline that centres around interpretive engagement with the law.

in section C.) Thirdly, it is explicitly committed to improving legal practices. (This third feature is conspicuously manifested in academic concerns with institutional design.) Crucially, legal doctrinal scholarship is not the site for abstract speculation about values considered relevant for law. It is not just that it is anchored in practice-relevant social facts. In epistemological terms, it connects with the body of knowledge participants already utilize (and dynamically shape) as they navigate existing legal practices. That is what I call 'doctrinal knowledge'. The character-defining job of legal doctrinal scholarship is cultivating doctrinal knowledge. (This is why the epistemological analysis in the monograph revolves around the concept of doctrinal knowledge. The whole of chapter 3 is dedicated to it.)

What can be Samuel's objection to accepting the viability of an academic discipline along these lines? It seems to me that the answer must lie in his arguments for categorizing the discipline of law as a social science. Perhaps, those arguments defeat my position. In that regard, Samuel's key claim comes from an interesting source. Inspired mainly by Berthelot, he identifies six 'schemes of intelligibility' (Samuel 2022a: 51-53; cf Berthelot 1990) that are all reflected in the social sciences (causal, functional, structuralist, hermeneutical, 'actional', and dialectical). And he demonstrates that they are also embedded in the discipline of law—providing a shared epistemological framework with the other social sciences. I think this aspect of Samuel's work is excellent. It offers a great opportunity for all legal scholars to raise their level of methodological awareness. Indeed, those schemes of intelligibility are embedded in the practices of legal scholarship.

However, Samuel's analysis sidesteps an important issue (with far-reaching methodological implications). Does it make an epistemologically relevant difference whether the orientation of academic research is normative? What if the research questions concern the viability of normative arrangements or the ways in which they could be improved? Naturally, I argue that it does make a difference. (And as we have seen, I find myself in at least partial agreement with Berthelot—the very author of those six schemes of intelligibility—who distinguished legal scholarship from the social sciences on the ground that it deals with normative judgements.) Specifically, placing the thematic focus on the normative aspects of social practices makes a character-defining difference. It changes the problem horizon for academic research (eg by necessitating engagement with issues of institutional design), and, in the case of legal doctrinal scholarship, it confers special methodological significance on rational reconstruction. (More on this in section C.)

I emphasize again that my position has ample support from relevant interpretive data. The kind of normative engagement I talk about is an integral part of the disciplinary practices of legal scholars. There is no sign of it dying out. Two decades ago, Fiona Cownie found that about half of the legal scholars in British law schools fall into that category (Cownie 2004). Siems and Mac Síthigh confirmed this finding a few years later (Siems & Mac Síthigh 2012). And if we look further, the position of this kind of scholarship is significantly stronger in Germany and France (Samuel 2022a: 27-28). As a matter of interpretive data, legal scholarship has a stable (albeit not too prestigious) position within academia. Samuel is well aware of this—that is why he has been on a long campaign to change the minds of legal scholars about worthwhile academic research into law. Of course, Samuel can argue that these interpretive data are not determinative of scientific quality. However, as I have argued, on this score, he is not standing on a particularly stable ground—especially when it comes to categorical statements directed at an interpretive account of legal doctrinal scholarship.

[C] A FEW SPECIFIC OBJECTIONS

Of course, even if Samuel does not have knockdown arguments against the viability of legal doctrinal scholarship as a normative discipline, he might still be right to dismiss my specific account. He is clearly unconvinced by a series of my key points—like my reliance on the idea of the rational reconstruction of the law, my treatment of the ideological aspects of legal doctrinal scholarship, and my take on interdisciplinary engagement. Perhaps, my account fails on its own terms due to the accumulation of specific failings on these points. It is worth taking a look at them.

I have already mentioned that the idea of rational reconstruction is central to my account: it is at the methodological core of legal doctrinal scholarship (Bódig 2021: 141-146). It connects the three characteristic activities of legal scholars: systematizing the law, the critical assessment of legal developments (both in legislation and case law) and addressing institutional design (Bódig 2021: 8, 141-142).

Samuel does not deal with the idea in much detail, but he deems it unclear (Samuel 2022b: 54-55). I am not sure what the problem may be. I regard rational reconstruction as a rather undemanding and flexible concept. It is rooted in the basic insight that the law is socially constructed. Creating, sustaining (and further developing) the law demands continuous investment of (human and other) resources. It poses the question of what makes those efforts worthwhile. Also, we need to

recognize that the (socially constructed) law reflects choices: all normative arrangements could be more or less different to how they are now. There must be reasons behind those choices. These two considerations prompt the assumption that there is 'reason' invested in all aspects of the law. Rational reconstruction is about tracing the reason invested in legal mechanisms—both on the micro and the macro level (depending on the focus of academic research). For a hermeneutic discipline, the corresponding epistemological commitment is that we can access that reason through interpretive engagement with legal practices.

Importantly, the idea is not premised on some overarching rational scheme embedded in the law. Many different actors contribute to creating and sustaining legal mechanisms—often over long periods of time. Those actors can (and do) make conflicting 'investments of reason'. Also, legal mechanisms are subject to institutional drift (eg through institutional decay) that meddles with the meaning and functions of normative arrangements. Efforts directed at rational reconstruction will always find the law less than fully coherent and riddled with internal tensions (often manifested in institutional rivalries)—with deficiencies even in terms of its own stated action-guiding ambitions. Notice that, for those who see value in sustaining legal mechanism, this makes engagement with issues of institutional design a necessity, and it intertwines the systematization of the law with constructive theorizing—two features built into the very fabric of the interpretive methodology.

Notice the conditionality, 'for those who see value in sustaining legal mechanisms'. Rational reconstruction (in this context) does not assume seamless rational coherence, but it does have a constitutive value assumption. It construes *legality* (in the sense of managing a series of social relations and interactions through legal processes) as a value of major social significance (Bódig 2021: 131). Despite their (often glaring) dysfunctions, legal mechanisms are worth having and worth developing. (I will return to this point when dealing with the ideological profile of legal scholarship.)

I provided this brief overview of my position partly to indicate that I am ready for a substantive debate on rational reconstruction. But the more immediate motivation is that it serves as the template for addressing some of Samuel's more specific objections. First, it shows why it is a misrepresentation of my position that I assume an 'inner structure' in the law like Ernest Weinrib (Samuel 2022b: 65). Indeed, I believe that theorists like Weinrib or Charles Fried provide a useful starting point for a thoroughly interpretive and non-instrumentalist account of the law.

But I argue that we need to go well beyond them (Bódig 2021: 148-148) to capture the dynamic and dialectical relationship between practical reason and institutional practices in law (Bódig 2021: 251-253). I do not assume any mystical inner structure—as my treatment of the idea of the 'artificial reason of law' demonstrates (Bódig 2021: 253-254). Instead, I assume that, depending on the specific alignment of institutional, political, and other factors, practical reason operates in very different ways in concrete legal practices (Bódig 2021: 254-255). And when I highlight the importance of a non-instrumental approach to law in legal theory and legal doctrinal scholarship, I do not mean that legal mechanisms have no manifest or latent functions that they are instrumental to. (I explicitly recognize the viability of instrumental approaches to law: Bódig 2021: 243.) What I mean is that, by way of interpretive engagement, we cannot explain adequately any bit of the law as being thoroughly instrumental to external preferences. Even when pieces of law are designed to implement specific policies (hammered out in the political process), they will operate in the broader context of other normative arrangements, and no policy can fully determine how the law will be used by a range of participants with different practical orientations, interests, and agendas. The fact that the law engages with masses of differently positioned agents gives it remarkable hermeneutic depth. There is always more to learn about how practical reason operates in a complex institutional environment, and that brings dynamism to the challenge of rational reconstruction in legal doctrinal scholarship.

This also helps me provide a more adequate response to Samuel's suggestion (Samuel 2022b: 54-55) that I get PhD students (who work on doctrinal problems) into trouble by arguing that much of legal doctrinal scholarship is not new doctrinal knowledge—but rather the processing, structuring, and systematizing of existing doctrinal knowledge (Bódig 2021: 127). How are they supposed to produce new knowledge that would earn them a research degree? Above, I pointed to the need to strike a balance between producing new knowledge and framing, validating, systematizing existing knowledge in all disciplines. On that basis, I insist that legal scholars (or research students) would not have a hard time producing valuable and original new research. First, engaging with issues of institutional design (which typically means working on recommendations for improving the law) is inherent to the academic practices of legal doctrinal scholarship (Bódig 2021: 142-143). Interpretive engagement (directed at the rational reconstruction of the law) virtually always finds the given normative arrangements in need of further doctrinal development. Let me add a further point that does not feature in my book. Siems and

Mac Síthigh rightly emphasized that doctrinal legal research addresses 'deep hermeneutic questions' that go beyond the immediate concerns of practitioners (Siems & Mac Síthigh 2012, 654). And we must also agree with Becher and Trowler who characterized academic law as a 'rural discipline' where research efforts are scattered across a broad intellectual territory (Becher & Trowler 2001: 106, 185-187). The combined effect is the there are always segments of the law (partly because fast-changing modern legal systems recreate them on a continuous basis) where there is much need for the kind of deep interpretive engagement with the doctrinal structures that legal scholars specialize in.

To move forward, it is worth picking up on an implication of the latter point. In contemporary legal systems that are in a symbiotic relationship with the regulatory (or administrative) state, significant legal changes are always just around the corner (as multiple consultations are running in parallel at any given time). And the vast body of state regulations in diverse areas of social life generate a constant influx of external knowledge (from education and health care through manufacturing standards to financial procedures). That influx comes to dictate aspects of doctrinal development (Bódig 2021: 194). Processing these trends with a focus on preserving the integrity of the doctrinal structures of law becomes a permanent challenge for legal scholars. Of course, there is scope for throwing out bright new ideas, but the primary concern has more to do with preserving the intelligibility of the law—to make its doctrinal structures more transparent and clearer in its practical implications. Also, let us not forget that a hermeneutic discipline will have a built-in preference for working out the answers to doctrinal challenges from the epistemological resources the law already provides.

The pressure that the influx of external knowledge exerts on doctrinal structures leads us to the problem of interdisciplinary engagement. I must say that a key reason for writing this reply was the way Samuel misrepresented my position on interdisciplinary engagement in legal scholarship. He finds it bizarre that I argue that legal scholarship leaves a relatively narrow scope for interdisciplinary engagement (Samuel 2022b: 58). Moreover, he detects a certain 'fear of interdisciplinarity' in my account (Samuel 2022b: 60). He recognizes that I am not completely hostile to interdisciplinary research (Samuel 2022b: 61), but he senses that I am afraid of alienating legal scholars who consider interdisciplinarity as the enemy (Samuel 2022b: 62). Honestly, this reading of my intentions came as a stunning surprise to me. I have never even met a legal scholar who

would have framed interdisciplinarity as the enemy.[5] (But then, I may not move in the right circles.)

But let us focus on the key objection here. One of the reasons why Samuel thinks that my analysis fails on its own terms is that I have worked on an epistemological justification for legal scholarship 'with very little recourse to interdisciplinarity' (Samuel 2022b: 57). I can see how my position may look puzzling at first. I account for the adaptation pressures from the influx of new knowledge into law. (For Samuel, this is 'not unwelcome', Samuel 2022b: 62.) But then, is it not the case that the influx of external knowledge should drive interdisciplinary work? Well, the answer is rather straightforward. I am not sure how, but Samuel completely missed what I say about *multidisciplinary* engagement. Following a conceptualization that is pretty standard in the relevant academic literature, I distinguish interdisciplinarity from multidisciplinarity on the ground that interdisciplinary engagement implies at least some measure of methodological integration (Bódig 2021: 173-174; cf Alvargonzález 2011). My claim is that, for a normative discipline, there are more limited options for methodological integration with other (typically non-normative) disciplines. (In my monograph, I systematically explore the options for interdisciplinary engagement.) So, the other side of my claim is that I see a lot more options for multidisciplinary engagement for legal scholars (Bódig 2021: 186-187). In fact, I positively encourage it because I think that (due to the influx of external knowledge) legal scholarship is becoming ever more reliant on multidisciplinary engagement.

There is one more objection I need to address in this section. In some ways, it is the trickiest one, and I do not think I can deal with it adequately in this reply. Another key reason why I undertook to write this reply is that I needed to take on Samuel's claim that I did not even produce an epistemological defence of legal doctrinal scholarship: I offer an ideological defence masquerading as an epistemological one (Samuel 2022b: 63).

On the face of it, I could dismiss this objection in short order. Simply put, there is no masquerading here. It is not, as Samuel suggests, that I am 'at times' aware of the ideological dimension of the discipline (Samuel 2022b: 63). Dealing with that ideological dimension is an important theme in my book. I explicitly argue that certain ideological commitments are built into the very epistemological profile of legal doctrinal scholarship (Bódig 2021: 127). However, I realize that my position may be (unpleasantly) surprising, and that it requires further clarification. Of course, I need to refer the

[5] On this point, Samuel may be influenced by Dan Priel who indeed detected a hostile attitude towards interdisciplinarity among some legal scholars. Even the language (interdisciplinarity as the 'enemy') seems to come from him (Priel 2019: 167).

reader to my book for the full analysis (that spans several chapters there). Here, I limit myself to briefly highlighting the key considerations that make me think that Samuel's objection misses the mark. Also, just like in the book (Bódig 2021: 129), I signal my openness to further discussions on this important topic.

The methodologically crucial point is that, in this context, the epistemological inquiry needs to factor in certain ideological commitments[6] that affect the perspective from which knowledge is produced, framed, and utilized. Contrasting an ideological and an epistemological approach (as Samuel seems to suggest) is counterproductive and positively misleading. So much so that I very much assume that ideologically fixed assumptions play a role in the epistemological profile of all academic disciplines.[7]

Admittedly, the ideological aspects of legal doctrinal scholarship are more complex (and potentially more problematic) compared to most other disciplines. This is mainly due to the hermeneutic character of the discipline. As mentioned above, available interpretive data can support a series of different (potentially equally plausible) accounts of any social practice. This implies that a hermeneutic discipline can only acquire a coherent identity and a settled problem horizon if the relevant cohort of scholars can occupy a shared perspective on the relevant social practices. And this is how I see it playing out in legal doctrinal scholarship.[8] This discipline is focused on the normative aspects of legal practices, and that turns the doctrinal knowledge generated in and around legal practices into its defining epistemological concern. However, legal practices give rise to multiple versions of doctrinal knowledge—some more sophisticated than others. Legal doctrinal scholarship gains its distinctive identity by adjusting its problem horizon to the dominant form of doctrinal knowledge—the one that professional lawyers produce. This is what confers specific ideological commitments on legal doctrinal scholarship. I mean ideologically fixed value commitments drawn from the professional culture of lawyers. I argue that those commitments revolve around the value of legality (that I have already mentioned when addressing rational

6 It needs to be emphasized that my analysis is premised on a specific conceptualization of ideology. It refers to value commitments that are constitutive of social roles. For social actors in those roles, the given value commitments are 'ideologically fixed' (Bódig 2021: 129-130).

7 Eg physicists do not reckon with the possibility of supernatural forces affecting the phenomena they observe. And sociologists do not ponder whether they should factor in demons as a category of social actors when accounting for social processes. These are not conclusions they draw from empirical or other inquiries. Well, observations by themselves can never substantiate such a conclusion. They are ideologically fixed commitments built into the epistemological profile of their disciplines.

8 What I provide here is a skeletal overview of points developed in chapters 3 and 4 of my monograph.

reconstruction). This is what legal doctrinal scholars cannot call into question without placing themselves outside the epistemological scope of their discipline.

It is said sometimes that legal scholarship should break its dependence on the legal profession. Samuel seems to share the sentiment. But I believe that, from my methodological perspective at least, this suggestion misconceives the position of legal doctrinal scholarship. The functional connection with the legal profession makes the discipline epistemologically feasible in the first place. If doctrinal scholars severed the connection, they would need to look for another 'client group' (cf Bódig 2021: 119).

This leads us back to a point I have emphasized above: the key to my account is the epistemological analysis of doctrinal knowledge (provided in chapter 3 of my monograph). I also consider it my original contribution to the literature. My theory of legal doctrinal scholarship stands and falls with it. Unfortunately, Samuel shows limited interest in that analysis. He mentions it a few times (eg Samuel 2022b: 54) but always in passing. I think we could have a more constructive conversation if my take on the variety of doctrinal knowledge produced by legal professionals were a bit more central to it.

[D] A LOOK AT SAMUEL'S ALTERNATIVE APPROACH

In the light of the previous two sections, we should be better positioned to explore the exact battle lines between Samuel and me. Up to this point, I have focused on setting the record straight on my account on legal doctrinal scholarship. In this section, I round out the picture by offering some reflections on Samuel's own approach.

I mentioned above that, in the abstract, I have no problem accepting the initial plausibility of Samuel's 'historical jurisprudence' approach. I embrace a form of methodological pluralism: I grant that every bit of law (procedural, as well as substantive) and every legal concept is a legitimate object of sociological analysis (Cotterrell: 1998)—as well as economical, anthropological, political, etc. I add Samuel's historical jurisprudence to the list. In his monograph, Samuel listed a series of questions that can only be answered within the parameters of his account (Samuel 2022a: 2, 327). I agree that there are such questions. I only insist that there are aspects to the law that only a doctrinally focused analysis can bring into the domain of academic research.

Accommodating Samuel's approach is made even easier by the fact that he touches on a series of points that demonstrate at least partial compatibility with my own analysis. He accepts, like I do, that lawyers have distinctive expertise (Samuel 2022b: 65). He points out that social facts and situations can be classified in multiple ways in law (Samuel 2022a: 26). This is what I capture as the 'hermeneutic condition'. And, considering my focus on the constructive aspect of academic engagement with law, I can only agree that describing the law is to transform it (Samuel 2022a: 244). Clearly, there is a real possibility of a more constructive engagement between us—despite the methodological divide. If I have objections, they only concern the specific way in which Samuel has developed his account of the discipline of law.

I have explored important methodological differences between our approaches, but I have not touched on a particularly salient one: the contrast between diachronic and synchronic models of law. Samuel's 2022 monograph offers a historical explication of the development of legal thought—written in the tradition of grand narratives about intellectual history. That is, he offers a diachronic theoretical model that he repeatedly contrasts to synchronic ones (Samuel 2022a: 303, 308). Even when engaging with my position (formulated from a different methodological vantage point), his default mode is to fall back on a historical framing. When the character of the academic practices of legal scholars is in question, he quickly directs us to an inquiry into a 'two-millennia project' of scholarship (Samuel 2022b: 46).

If we are to use this terminology, my account is (consciously and unashamedly) synchronic. Samuel does not rule out the very viability of synchronic models, and he may sympathize with some of them (Samuel 2022a: 225), but he has the tendency of fomenting distrust around them. Most characteristically, he argues that a synchronic model would assume that the law can transcend its own history (Samuel 2022a: 303). But that is not quite right. What a synchronic model assumes is not that, somehow, history can be transcended. Rather, it is that legal mechanisms (or academic practices) can be made intelligible by way of (interpretive or other) engagement with their contemporary manifestations. No doubt, they were all comprehensively shaped by their history, and they have aspects that we only understand adequately if we engage with the historical development of legal thought. But their very intelligibility (for the purposes of competent participation) cannot be dependent on familiarity with their historical background and trajectory. That would presuppose the kind of deep historical knowledge that most participants (even professional ones) do not have (and cannot be expected to acquire).

If we are to understand what enables the law or legal scholarship to function in its contemporary (institutional, social, political, cultural, etc) environment, we need synchronic models as well.

If we look deeper into the specifics of Samuel's own account, certain limitations of his diachronic model may reinforce this conclusion. It makes sense to start with the observation that his account is not thoroughly diachronic. He consistently develops his points about the law (and the discipline of law) from historical analysis, but that analysis is framed by conceptual constructs articulated in often strikingly ahistorical ways. We have actually come across the most characteristic example: 'science'. Samuel's conceptualization (Samuel 2022a: 13, 22-25, 287) is not based on the historical trajectory of scientific thought. Nor is it drawn from a phenomenological analysis of what scholars characteristically do. It is established by way of authoritative statements distilled from academic sources. As we have seen, Samuel uses science as a rather rigid epistemological category to pass categorical judgements on what qualifies as academic work of scientific quality. Notably, the ahistorical framing gives even Samuel pause at times—like when he ponders whether he can apply the term 'social science' (only coined in the 19th century) to the work of Roman jurists (Samuel 2022a: 56-57).

I stress that I do not blame Samuel for mixing historical analysis with the reliance on more ahistorical conceptual devices (that end up framing the historical analysis). I do not think that he had any other choice. As he is well aware (Samuel 2022a: 2), a range of widely different narrative accounts can be developed from the available historical data, and historical analysis by itself cannot discriminate between them without becoming viciously self-referential. (It seems that, with historical analysis, we also find ourselves in the hermeneutic condition.) But then, we should expect that any combination of historical and ahistorical analysis (if it is to meet standards of academic rigour) is provided with a transparent methodological justification. As I was not sure what that justification is in Samuel's case, I needed his help. In reply to my inquiry, he denied he had a specific method. He has no objection to being called a 'methodological pluralist'. Crucially, this is different to the methodological pluralism I embrace (and that I have referenced above). In my case, it is the pluralism (and co-existence) of distinct approaches with clearly defined methodological profiles. For Samuel, it is the 'internal' pluralism of his account. This is what enables him to slide back and forth between different methodologies in the course of articulating his historical jurisprudence.

Samuel's methodological pluralism would be way too risky for my taste, but I have no reason to reject it in the abstract. However, I have a series of specific problems with the way it plays out in his rendition of historical jurisprudence. I do not mean the most predictable challenge: making sure that the historical account of legal thought does not become selective in tendentious ways. There are issues that could be raised in that respect (like the way he systematically prioritizes private law over public law and ends up marginalizing the aspects of legal thought that remained less well developed in Roman law), but I recognize that he needed to make such choices to be able to produce an analysis with internal coherence and manageable proportions.

I have more worries about another challenge: under the conditions of Samuel's methodological pluralism, the historical and ahistorical aspects of the analysis can intersect in confusing ways. For instance, he adopts a fascinating point from Robert Blanché without any critical scrutiny (and historical validation): sciences go through four phases of development (descriptive, inductive, deductive, axiomatic) (Samuel 2022a: 283; cf Blanché 1983). Then he projects this claim on the historical trajectory of academic law, concluding that the authority paradigm reached the axiomatic stage with 19th-century German Pandecticism (eg Samuel 2022a: 284, Samuel 2022b: 50). This clearly informs the momentous claim that, once Pandecticism fell apart, legal scholarship found itself in epistemological confusion (Samuel 2022a: 226). As there is no 'next phase', any effort to revive their kind of normative scholarship can only count as futile nostalgia without much academic value (This conclusion is strikingly manifested in Samuel's treatment of most contributions to a 2019 volume *Form and Substance in the Law of Obligations*—Samuel 2022a: 244-245; cf Robertson & Goudcamp 2019). Here, from the uncritical adoption of a questionable regimenting device, we get to a whole historical narrative without ever asking whether Pandecticism was indeed the pinnacle of doctrinal scholarship—as opposed to an excess and a methodological blind alley from which the discipline needed to recover.

In more general terms, my main worry concerns the standard-setting role of Samuel's more ahistorical conceptual building blocks. Even though I accept that such concepts need to play a role in framing his historical inquiry, it remains a problem that Samuel has the tendency to acquire them from the relevant academic literature without much regard for the variability of the methodological assumptions in his sources. As he checks the implications of his conceptual assumptions against their phenomenological ground only intermittently, this may lead to problematic framing and the accumulation of problematic claims.

I only point to one complex example here. It is one of Samuel's recurrent themes that legal thought is self-referential (Samuel 2022a: 22-23, 330): it constructs its models without reference to an exterior object (eg Samuel 2022b: 49; Samuel 2022a: 281). This claim guides his forays into ontological reflection (eg Samuel 2022a: 46-50), and it also affects his framing of issues of justification (Samuel 2022a: 15; Samuel 2022b: 49-50). The trouble is that the underlying claim clashes with the basic insight that the law is a social practice—its aspects are all anchored in masses of social facts. (As Samuel rightly emphasizes, these are not 'brute' facts—but facts, nevertheless, Samuel 2022b: 62). Those facts are the point of reference for legal thought. Oddly, Samuel seems to recognize this in certain contexts (Samuel 2022a: 23). In relation to Roman and medieval legal thought, he talks of legal reasoning projecting itself on a world of social fact (Samuel 2022a: 97), the analysis of factual situations (Samuel 2022a: 110), and operating inside factual problems (Samuel 2022a: 229). But his adherence to a dubious point acquired through academic sources (like Marie-Laure Mathieu, Samuel 2022a: 22-23; cf Mathieu 2014) gets in the way of applying this valid insight to the whole of legal thought more generally. Moreover, problematic points like this one have ripple effects. For example, Samuel's framing of justification overemphasizes consensus and coherence (giving in to a controversial form of conventionalism about values). And he also commits to the problematic claim that the object of legal scholarship is the legal text (Samuel 2022b: 50). No, the epistemic objects for the discipline are legal practices. Legal texts only gain normative significance if they can be matched to legal practices manifesting themselves in masses of social facts. The texts matter only because they are sources of information about them.

It bears pointing out that Samuel's tendency to straddle methodological differences also affects his treatment of my work. It lures him into measuring my claims against academic sources that served him well and then making categorical claims without regard for the specific methodological features of my inquiry. (Well, this is what made it necessary to explain my methodology in section B.) Perhaps, the most instructive example is that, as it turns out, one of my major failings is that I did not confront Felix Cohen's seminal critique of law as a system of concepts. Cohen famously called it 'transcendental nonsense'. He could have alerted me to the futility of my reliance on a metaphysical 'inner structure' (Samuel 2022b: 65). The trouble is that my methodology is not transcendental—it is interpretive. I do not see jurisprudence as 'an autonomous system of concepts' (cf Cohen 821). And most importantly, as explained in section C, I do not assume that the law has any kind of

metaphysical inner structure. The whole line of criticism is based on ignoring the specific methodological parameters of my account of legal doctrinal scholarship.

There is one more point I need to raise. As I have noted above, Samuel has the tendency to approach the discipline of law (and law itself) historically, while his framing of science is largely ahistorical. Admittedly, this is often the source of great insights (like when he deploys Berthelot's 'schemes of intelligibility'). But there seems to be a trend here. The framing devices tend to be external to legal scholarship and legal theory. And it means consistently subjecting legal scholarship to external standards. Its academic practices are rarely taken as possible sources of learning about standards of academic achievement. And Samuel rarely ever allows legal theory to set the epistemological parameters for the analysis of the discipline of law. Legal theory itself is taken mostly as providing historical data for intellectual trends.

That contrasts with my approach. I argue that academic legal theory should lead on exploring the epistemological parameters for legal doctrinal scholarship, and I have developed my methodological outlook to facilitate that. The epistemological inquiry should be guided by what academic legal theory finds out about the conceptual features of legal practices (Bódig 2021: 218). It is not just that I believe that conceptual legal theory has the requisite intellectual resources. I also think that outsourcing this task to a combination of social science epistemology and historical jurisprudence may miss aspects of the relevant epistemological features. Specifically, it can underplay the epistemological relevance of doctrinal knowledge. We certainly need to encourage more engagement with how epistemological reflection develops in other disciplines. But we also need to encourage epistemological reflection that works from the internal resources of legal theory and legal doctrinal scholarship. All self-respecting disciplines need to develop theoretical discourses that serve that purpose.

[E] CONCLUSION

The debate between Professor Geoffrey Samuel and me is of an interesting kind. There is no significant disagreement about the overall character of legal doctrinal scholarship. Instead, we have clashing views on whether that kind of scholarship constitutes a worthwhile academic pursuit. Should legal scholars be helped to break out of the trap of their authority paradigm to become better social scientists? Or should we work on providing the existing practices of legal doctrinal scholarship with a more robust epistemological grounding? This is a nicely focused

debate, but I still think that it is not really about who is right on our specific points of disagreement. On a deeper level, the debate explores the implications of methodological pluralism. How are we to handle the co-existence of theoretical accounts that have very different methodological and conceptual assumptions? What are the conditions under which they may be a correcting influence on one another?

At this stage of the debate, I remain convinced that, when provided with the appropriate methodological framing, it is not an impossible job to provide legal doctrinal scholarship with an epistemological justification. The current methodological discourse around the discipline may be scattered and disjointed, and we may need to face up to some 'home truths' (like the one about ideological commitments), but the key insights and conceptual building blocks we can work from are out there.

Samuel started his article by confronting academic lawyers with a choice: settling for the role of only assisting the legal profession or dedicating themselves to advancing knowledge (Samuel 2022b: 43). I think that, in the light of the variety of our methodological options, this is a false dichotomy. The two choices are not mutually exclusive, and there are other pathways as well for scholarship about the law. Even when scholars dedicate themselves to academic research into doctrinal challenges, and even when their primary focus is the academic validation of existing doctrinal knowledge, they can be confident that there is a perspective from which their job comfortably falls within the scope of worthwhile academic pursuits.

About the author

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Justice in a Time of Austerity by Jon Robins and Daniel Newman

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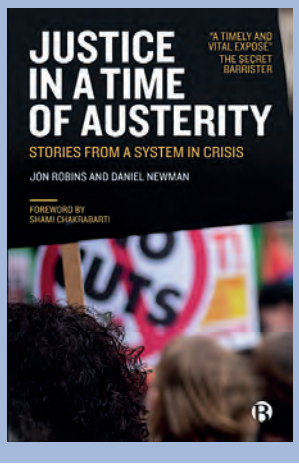

Jon Robins & Daniel Newman (2021) *Justice in a Time of Austerity* is published by Bristol University Press in hardback priced at £9.99 ISBN: 978-1529213126.

On 5 September 2022, criminal law barristers in England and Wales walked out of courthouses around the jurisdiction to embark on an indefinite strike. In doing so, they called for a 25% increase in the value of legal aid fees that they would be able to claim for their work in both ongoing and future cases (Grey 2022). At the time, industrial action of this scale and severity had never been witnessed before in the justice system. In total, the action lasted for over a month, at which point the Criminal Bar Association voted to accept a compromise deal from the Government of a 15% increase in fees for work conducted on future cases only (Siddique 2022). However, the legal profession—and barristers in particular—are not typically those that one might imagine needing to take such extreme measures to improve their working conditions. Many members of the public are now likely to be asking questions such as: what prompted this situation and what does it reveal about our legal system?

In response to these questions, there is no more useful starting point than *Justice in a Time of Austerity*, by Jon Robins and Daniel Newman.

This book reports the findings of one of the largest qualitative explorations of how the justice system in England and Wales is experienced first-hand. It looks beyond criminal law[1] and draws together interviews with over 200 people (conducted over a 12-month period between 2018 and 2019) who were facing a range of legal challenges and trying to navigate the law in order to find solutions. It explores the stories of these individuals in a dynamic and engaging way which is refreshingly accessible for a piece of academic scholarship. In doing so, it provides an account of our legal system through the eyes of those who are relying on it, in a way that the general public would find interesting and compelling. However, these narratives, taken together, paint a bleak picture of the justice system which is likely to be extremely confronting for those who may assume that the law operates as a safety net that can be relied upon by citizens in times of crisis.

Through the experiences of these individuals, the book explores several key crises occurring within the justice system itself. Chapters 1, 2 and 3, for instance, tackle the issues of homelessness, the legacy of the Grenfell fire of June 2017[2] and frontline accounts of what it is like to go to housing courts to dispute an eviction, or to navigate the complex system of social housing in England and Wales. Of course, as is well documented within existing literature, at the same time that people experience housing insecurity, they are very likely to also be facing clusters of other legal problems, such as precarity in relation to their income and their available resources (Pleasence & Ors 2004). Chapters 3, 4 and 5 address this important intersection by moving to explore the journeys that people may take when trying to navigate the welfare benefits system, with a particular emphasis on the roll-out of universal credit and how this has affected experiences of food poverty. While it is clear that such issues are likely to overlap, what is often less visible is the way that these clustered legal problems tend to orbit particular demographics and groups that are already facing marginalization within our society (Pleasence & Ors 2004). In chapters 6 and 7, Robins and Newman draw specific attention to this by highlighting the ways that these issues commonly coalesce with legal problems related to immigration. In particular, they demonstrate how these difficulties do not occur for certain demographic groups by chance, but rather due to the disproportionate burdens and challenges that are faced by those from non-white or non-British backgrounds, especially those who are seeking asylum in the United Kingdom amidst

[1] It should be noted that Daniel Newman, one of the authors of this text, has previously explored criminal legal aid specifically, see Newman 2018.

[2] See generally Whitehouse & Ors 2019 and Bright 2021.

an increasingly 'hostile' political environment (Global Justice Now: 2018). Finally, the book also acknowledges that there is one point in life at which all of these issues are likely to suddenly come into sharp focus: the breakdown of a family or long-term relationship. Family law problems are widely recognized as 'trigger' events, in that they facilitate a range of legal issues that need to be resolved as people adjust to their new existence as individuals, with re-arranged lives, finances, living situations and legal status (Pleasence 2006). In chapter 8, the authors explore the capability of the legal system to effectively support individuals at this point, in light of the near wholesale removal of private family law from the scope of legal aid that occurred under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012. Throughout these chapters, the book uses the words and experiences of members of the public in order to illustrate the ways that the justice system in England and Wales is falling short in relation to all of these issues, and the disproportionate way in which certain people are at risk of falling through the cracks entirely when they find themselves at the intersection of these problems.

It is rare for scholarship to be able to provide rich, qualitative insights such as those described above, on a scale of this magnitude. However, in doing so, Robins and Newman are able to tap into an interesting and important debate: what it means, in practice, to be able to access justice within this legal system. The concept of 'access to justice' is frequently employed within academic work, usually as a universally accepted goal that silently underpins our justice system and motivates those working within it. In this book, Robins and Newman provide tangibility to the otherwise abstract concept of access to justice by asking members of the public precisely what this concept means to them. Emphasizing bottom-up experiences and perspectives of the justice system, the authors are able to elaborate upon the notion of access to justice in a way that goes far beyond the abstract. During their interviews, members of the public revealed details about where they sought help in relation to their legal problems, what was at stake for them, and what expectations and perceptions they had of the professionals and the system that they interacted with.

Importantly, these interviews revealed that many people were faced with situations where they were unable to interact meaningfully with professionals and struggled to navigate the system altogether. In reality, very few people are eligible for legal aid, and even those that are eligible face significant difficulties finding a lawyer within the post-LASPO landscape

of advice and support.[3] As such, Robins and Newman caution against simplistic understandings of access to justice as something that can be equated with legal aid. In practice, legal aid is not available to the general public and is not a major conduit through which the justice system can ensure the accessibility of justice.

This revelation prompts the authors—and the reader—to consider what is left of access to justice within this present context. On this, Newman and Robins argue that the concept has in fact been substantially diminished:

> Over the last eight years, 'access to justice', a conceptually elusive idea at the best of times, has been so debased as to be rendered meaningless. What we have documented in this book … are the human consequences of a society in which the state has abandoned its commitment to ensuring proper 'access to justice' (2021: 172).

The abandonment of access to justice has, however, not been universal. Throughout this book, the authors demonstrate that the justice system is being held up by an inspiringly resilient advice sector. Despite the absence of legal aid, and the lack of political endorsement, there are a range of professionals and organizations—legal aid lawyers, welfare advisors, and volunteers working at advice services—who endure this context so that they can continue to provide support and assistance to those that need legal help. During interviews with such professionals, Robins and Newman depict the resourcefulness and commitment of those who have managed to continue serving their communities in the face of the advice sector's own hostile environment.

Since the publication of this book, I have had the privilege of working alongside Newman as well as other colleagues—Catrina Denvir and Jacqueline Kinghan—to produce the first ever legal aid census in England and Wales (Denvir & Ors 2022). This census sought to reveal a large-scale overview of the state of the advice sector in England and Wales, with particular emphasis on the challenges facing those working in the sector as well as the longer-term sustainability of organizations undertaking this work. Our findings revealed a similarly dire insight into the working environments that comprise the advice sector. With diminishing funding streams and political commitments to the existence of advice services, the legal advisors and lawyers who responded to our census reported genuine concern about the accessibility and efficacy of the justice system, as well as the future accessibility of justice for those that find themselves in situations where they need legal help. In undertaking this project,

[3] As the authors note, the Bach Commission in 2017 acknowledged that the proportion of the population eligible for legal aid has collapsed from 80% in 1980 to 29% in 2007 and could possibly be as low as 20%. See Bach Commission 2017.

I became aware of just how crucially important it is for scholarship to reject abstract understandings of access to justice and to instead produce tangible evidence of the extent to which this concept has been abandoned within the present context. It is only through producing such evidence and concrete insights that scholarship may be used as a tool for advocacy and impact, in a way that may help to make a difference to the current crisis facing our justice system in England and Wales.

The importance of this is acknowledged and emphasized by Robins and Newman in the final chapter of *Justice in a Time of Austerity*, where they call for a new understanding of access to justice in a post-austerity environment. For the authors, the phrase 'access to justice' encapsulates three goals which the justice system should be striving to achieve. First, a fully funded system of publicly accessible legal advice and support. Second, a system in which people have the ability to access that advice through a national network of providers. Third, a system in which people have an ability to enforce rights through the courts if necessary. Each of these goals directly tackles components of the justice system that have been diminished as a consequence of austerity measures and which have contributed to the long-term debasing of the concept of access to justice.

By setting out these three principles, Robins and Newman ensure that their scholarly contribution is not only a detailed, retrospective insight into the ways that access to justice has been impaired, but is also a forward-looking, ambitious agenda for the future of access to justice. In places, this book is a sobering read. Through first-hand experiences, the authors reveal the extent to which poverty and social inequality are entrenched through a failing justice system, and the ways that access to justice is so frequently and catastrophically denied to people who should be supported by the safety net of our justice system. Yet, in illustrating the scale and depth of the demise of access to justice, the authors are able to shed light on the possible routes out of this crisis. As noted above, the abandonment of access to justice is far from universal, and great strength and resilience still remains within the advice sector, if only we can take steps to protect it. The first step, as demonstrated by Robins and Newman, is to reject the conceptual intangibility of access to justice and start building demonstrable commitments to its preservation. For those interested in pursuing and promoting justice and equality within our legal system, this book provides not only a useful evidence base and academic resource, but also a much-needed call to action.

About the author

Jessica Mant *is a Lecturer in Law at Monash University, Australia. Her research specialisms span access to justice, legal aid, technology, lay participation in court processes, family law, and socio-legal theory and empirical methods. Her recent monograph* Litigants in Person and the Family Justice System *(Hart 2022) is the first book to explicitly examine the relationship that litigants in person have with the family justice system. Her research has also appeared in journals including the* Child and Family Law Quarterly, Journal of Social Welfare and Family Law *and* Social and Legal Studies. *She currently sits on the editorial board of the Journal of Law and Society and often collaborates on research projects with practitioner-led organizations, charities and regulators such as the Access to Justice Foundation, the Legal Aid Practitioners Group and the Victoria Law Foundation.*

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Legislation, Regulation and Rules

Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012

News and Events

Compiled by Eliza Boudier

University of London

Upcoming IALS Events

W G Hart Legal Workshop 2023

The W G Hart Legal Workshop is a major annual legal research event organized and hosted by the Institute of Advanced Legal Studies (IALS). Over the years this eponymous workshop series, subsidized by funds from the W G Hart Bequest, has focused on a wide range of comparative and international legal issues and topical interests.

This year's Workshop will be held on **29–30 June 2023**, in person at Charles Clore House in London on the topic of 'Theorists in Company Law'. The Workshop aims to rediscover forgotten and neglected authors of company law theory; to encourage thinking about the biographical element of an author's work and the placement of their work in its social, economic and historical context; and to cement an account of the distinctiveness of Company Law in the United Kingdom (UK). The Workshop will feature three distinguished invited plenary speakers: Professor David Cabrelli (University of Edinburgh); Professor Janette Rutherford (The Open University); and Professor Charlotte Villiers (University of Bristol).

The workshop organisers are Professor Sally Wheeler (Australian National University School of Law), Professor Marc Moore (Faculty of Laws, University College London), and Victoria Barnes (Brunel Law School).

Book and Series Launch: *Law, Humanities and the COVID Crisis* and the 'Reimagining Law and Justice' Open Access Series

Date: 16 March 2023, 4:00pm–6:00pm
Venue: IALS, 17 Russell Square, London WC1B 5DR

As we approach the three-year mark since the first Covid lockdown in the UK, the Institute of Advanced Legal Studies and the University of London Press are pleased to announce the publication of *Law, Humanities and the COVID Crisis*, edited by the Director of IALS, Professor Carl Stychin. This book emerges from the Director's Series of online seminars held during the 2020–

2021 academic year. The occasion also marks the launch of the new IALS Open Access Series with the University of London Press, 'Reimagining Law and Justice'. The series will comprise an exciting collection of open access books focused on key issues, challenges and debates in legal studies today. *Law, Humanities and the COVID Crisis* will launch the new series, underscoring the commitment of IALS to open access publishing without author payment.

The event celebrates the launch of this important book and series and is open to all. It will provide an opportunity for potential authors to meet with the publishing team from IALS and the University of London Press and to learn more about the series. See website for details.

Positive Action Library Graduate Traineeships to Address Underrepresentation of Black, Asian, and Global Majority Library Staff

Date: 24 March 2023: 12:00pm–17:00pm
Venue: IALS Council Chamber, 17 Russell Square, London WC1B 5DR
Chairs and moderators: Marilyn Clarke, IALS Librarian, Head of IALS Library; Nuala McLaren, Head of Reader Services and Academic Support, Goldsmiths University of London; Elaine Sykes, Head of Open Research, Lancaster University; and Tom Morley

This event is a collaboration between Goldsmiths University of London and Lancaster University to share knowledge and experience using positive action to recruit Library Graduate Trainees to address the underrepresentation of Black, Asian and Global Majority staff in libraries, and to work towards implementing such traineeships across many more libraries.

A CILIP ARA workforce survey conducted in 2015, found: 'Low ethnic diversity: 96.7% of the LARKIM [library, archives, records, information and knowledge management] workforce identify as "white" compared to 87.5% identifying as "white" in UK Labour Force Survey statistics."

Case studies from Goldsmiths and Lancaster will be shared alongside other institutions' experiences. The legal aspect of using positive action will also be discussed by a Goldsmiths human resources staff member and a legal expert in equality law. There will also be an opportunity for attendees to network.

See website for details.

The Director's Seminar Series

Current Attitudes Towards International Law in Russia

Date: 3 April 2023, 4:00pm–5:30pm
Venue: online seminar
Speaker: Professor Tim Potier (Senior Fellow, Center for International Law and Governance, Fletcher School of Law and Diplomacy, Tufts University), IALS Senior Associate Research Fellow
Chair: Professor Carl Stychin (IALS)

Russia commands much attention right now. Its latest activities in Ukraine have caused considerable concern globally. Whatever the rights and wrongs, the fact remains that Russia regards international law with much seriousness and its international lawyers assert the importance of the subject as much as their colleagues in the rest of the world do. Professor Tim Potier's talk will be in two parts. First will be an outline of the views of international lawyers in Russia on a range of international legal topics; and second an account of the arguments international lawyers in the country use to justify Russia's actions (including since 2014) in Ukraine. See website for details.

Forensic Imaginaries: Visualising the Corpse in Law

Date: 7 June 2023, 5:00pm–6:30pm
Venue: IALS Council Chamber, 17 Russell Square, London WC1B 5DR
Speaker: Dr Marc Trabsky, Associate Professor in Law and Australian Research Council DECRA Fellow on 'Socio-Legal Implications of Virtual Autopsies in Coronial Investigations' (DE220100064) at La Trobe University
Chair: Professor Carl Stychin (IALS)

Medico-legal investigations into sudden, unnatural, violent and accidental deaths occupy an important role in the common law system. They require coroners to ascertain the identity of the deceased, determine the cause of a death and, in many instances, make recommendations for reducing the occurrence of preventable deaths. A key element of the coronial investigation has been the invasive autopsy, which is performed by a forensic pathologist if a coroner deems it necessary for determining the medical cause of death. In recent decades, the invasive autopsy has become a site of contestation, especially for families of the deceased who oppose post mortem dissections due to religious or cultural beliefs. Since the late 20th century, forensic imaging

technology, particularly post-mortem computed tomography (CT), has offered the ideal of a virtual autopsy. Little is known, however, about how technological modifications to medico-legal investigations assist or hinder practitioners in fulfilling their responsibilities under coronial law. This presentation will analyse how forensic imaging technology has transformed medico-legal investigations since the 20th century and how it continues to affect the way coroners and other legal personnel working in the jurisdiction perform their roles in the legal system.

The paper will focus on how legal institutions have sought to visualize the corpse through forensic imaging technology since the 20th century. This has demanded that coroners, pathologists and lawyers acquire new skills in deciphering the meaning of pixelated shadows and interpreting CT scans as evidence of death causation. It has also problematized the 'mechanical objectivity' of the forensic gaze by embedding an optical device between the dead body, the medico-legal expert and the judicial observer. CT comprises both a mechanical instrument and a computational technique that virtualizes the interiority of the corpse by cutting it into sections without opening it up. It obfuscates the epistemological boundaries between unique identifiers of a tomographic corpse, its representation as an undefined set of slices that could belong to any-body, and its abstraction in three-dimensional visualizations of data. In transmogrifying the materiality of organs, tissues and bones into multi-planar reconstructions, the technology offers judicial observers the allure of seeing 'corporeal evidence' with their own eyes. This paper argues that forensic imaging technology makes demands on legal institutions to question the truth of what they see and acknowledge the limits of their capacity to know the corpse. See website for details.

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Dickens and the Law

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Dickens' use of the law in his novels is very familiar and has been the subject of a vast literature. This note is just a very brief summary of a few points of interest. *Jarndyce v Jarndyce* is probably the best known case in English fiction, just as *Bardell v Pickwick* is probably the best known trial. Dickens' connection with the law began early. In 1827 at the age of 15 he became a junior clerk in a solicitors' office in Gray's Inn, where he worked for some 18 months. To understand what this entailed at that time, we need only turn to *The Pickwick Papers*:

> There are several grades of Lawyers' clerks. There is the Articled Clerk, who has paid a premium, and is an attorney in perspective, who runs a tailor's bill, receives invitations to parties, knows a family in Gower Street and another in Tavistock Square, goes out of town every long vacation to see his father, who keeps live horses innumerable: and who is, in short, the very aristocrat of clerks. There is the salaried clerk—out of door, as the case may be—who devotes the major part of his thirty shillings a week to his personal pleasure and adornment, repairs half price to the Adelphi at least three times a week, dissipates majestically at the cider cellars afterwards, and is a dirty caricature of the fashion, which expired six months ago. There is the middle-aged copying clerk, with a large family, who is always shabby, and often drunk. And there are the office lads in their first surtouts, who feel a befitting contempt for boys at day-schools, club as they go home at night, for saveloys and porter, and think there's nothing like 'life.'

Dickens no doubt was an office lad. His connections with the law then and afterwards meant that his depictions of it, both in his novels and other works, were remarkably accurate. Beyond their literary merit they serve as vivid historical sketches.

Only once did Dickens become a litigant himself, when he brought an action in Chancery against several defendants for breach of copyright. He won, but the costs far outweighed any damages he could recover from the defendants. He resolved never to repeat the experience.

'The Trial' from The Pickwick Papers. *Source: scanned image Philip V Allingham.*

It is in *The Pickwick Papers* that we come across the trial of *Bardell v Pickwick*, an action for breach of promise. This cause of action arose when a man's proposal of marriage was accepted by a woman and he subsequently refused to go ahead with the marriage. The proposal and the acceptance were treated as if they were an ordinary contract (although the breach is referred to as a tort). Breach of the contract entitled the lady

to sue for damages. Theoretically the same applied if a woman jilted a man, but in fact this hardly ever happened, if it happened at all. Failure to pay the damages would lead to imprisonment in a debtors' prison. Although this might be thought of as ancient history, in fact it was not abolished until 1970 by the Law Reform (Miscellaneous Provisions) Act. The footballer, George Best, was one of the last men to be sued in this country.

Mrs Bardell brought her suit in the Court of Common Pleas. She was represented by solicitors, Dodson and Fogg, and Mr Serjeant Buzfuz. Mr Pickwick was represented by his attorney,[1] Mr Perker, and Mr Serjeant Snubbin. Serjeants-at-law at that time had exclusive rights of audience in the Court of Common Pleas. They were a very old order. There was a King's Serjeant long before there was a Queen's Counsel. Becoming a serjeant led to assured wealth. After they lost their exclusive rights of audience in 1834, the order gradually died out and was replaced by Queen's Counsel. The last Englishman to be appointed a serjeant was Nathaniel Lindley, later to become Lord Lindley. He retired in 1905. The last serjeant was an Irish Serjeant, Serjeant Sullivan, an Irish barrister who practised at the English bar until 1949.[2]

Unfortunately for Mr Pickwick, neither his attorney nor his serjeant were experienced or effective in this type of work. At the trial Serjeant Buzfuz exhibits the browbeating style of advocacy that was typical of many Victorian barristers, and indeed continued more or less until Norman Birkett introduced a more polite, but very effective, style in the 1920s and 1930s. The aggressive tactics of Serjeant Buzfuz and Dodson and Fogg may give the impression that Mrs Bardell was a gold-digger, a plain woman, seeking to entrap Mr Pickwick. In fact she was a hard-working, honest woman, a widow, described as 'a comely woman of bustling manners and agreeable appearance, with a natural genius for cooking'. She sincerely believed that Pickwick had proposed to her.

The suit arose from a conversation between Mr Pickwick and Mrs Bardell, his landlady, in which Pickwick intended to consult her about his employing Sam Weller as his manservant. Pickwick never asked her in so many words, 'Will you marry me?' and she never said 'I will'. Dickens cleverly constructs a conversation in which everything Pickwick

[1] The terms 'solicitors' and 'attorneys' are used almost interchangeably.

[2] One of my former heads of chambers, Jack Sarch, was actually led by Serjeant Sullivan in the 1940s. In a trial lasting three days Sullivan only opened his brief once, to check a point. Otherwise he carried all the facts in his head.

says fits in with his thoughts about employing Sam, but can also be taken as a subtle proposal of marriage. It begins with him saying:

> 'Mrs. Bardell', at the expiration of a few minutes.
>
> 'Sir,' said Mrs. Bardell again.
>
> 'Do you think it's a much greater expense to keep two people, than to keep one?'
>
> 'La, Mr. Pickwick,' said Mrs. Bardell, colouring up to the very border of her cap, as she fancied she observed a species of matrimonial twinkle in the eyes of her lodger; 'La, Mr. Pickwick, what a question!'

And so it goes on, culminating in Mrs Bardell flinging her arms round Pickwick's neck, bursting into tears and fainting in his lap. At that point three friends of Mr Pickwick enter the room.

There is no doubt that the scene appears incriminating. It needs Pickwick to explain it. The trouble is that at that time neither plaintiff nor defendant were allowed to give evidence. Buzfuz cunningly called Pickwick's friends among witnesses for the plaintiff. The result was that there was virtually no challenge to the plaintiff's evidence and no explanation of the misunderstanding. It is not clear what was the reason for this exclusion of evidence which any modern lawyer would regard as vital. In criminal cases the supposed reason was that if a guilty defendant could be allowed to give evidence, he or she would be compelled to lie, and thus add the sin of perjury to that of the crime. It may be that analogous thinking applied in civil cases.

Percy Fitzgerald, an Irish barrister who was a friend and contemporary of Dickens, wrote a book in 1902, treating the trial as if it had been a real case. By that time the law had changed. He wrote:

> Since the law was changed both plaintiff and defendant may be examined in such cases as these. What a different complexion this would have put on the suit. The whole case would have tumbled into pieces like a pack of cards. For Mr. Pickwick 'put into the box' would have clearly shown that all that had been thus misconstrued, was his proposal for engaging a valet, which was to have been that very morning. He would have related the words of the dialogue, and the jury would have seen at once how the mistake arose.

In *The Pickwick Papers* Dickens satirizes the procedure of the court in a humorous way. In *Bleak House Jarndyce v Jarndyce* is a *leit motif* rumbling around under the surface throughout the book. It has been in process for decades. It never comes to trial. No one really understands it. It affects everyone who comes into contact with it. Hopes are raised and dashed. Lives are ruined. It was not a satire, but a biting condemnation of

the scandalous delay and costs of some cases in the Chancery Court. It is difficult today to understand how such cases came about. A very helpful illustration is set out in the 'Introductory Note' of the Norton Critical Edition of *Bleak House* (1977).

> Let us suppose a wealthy property owner dies and leaves most of his estate to a nephew, with also a few bequests to his servants. Another nephew contends that the will is invalid, and that an earlier will, leaving part of the estate to the second nephew, is the proper one. Employing a solicitor, this second nephew (the plaintiff) has a bill drawn up to state his claims against the first nephew (the defendant), and this opening transaction is filed in the Court of Chancery.
>
> Once such procedures were initiated, the heirs could not draw on the estates they had inherited, for all property was taken over by the court and held until a decision was reached—hence the expression that a house is '*in Chancery*.' Such an arrangement assured the Court that expenses involved in the case would be covered. If the settlement were long delayed, it also meant that some of the heirs would have a very long wait or would never receive the legacies assigned to them. As *The Times* commented (March 28, 1851) 'Butlers and housekeepers, and gardeners of the kindest master in the world, in spite of ample legacies in his will, are rotting on parish pay [ie on welfare payments].
>
> These proceedings having been launched, the first nephew would be obliged to employ a solicitor and a staff of clerks to gather evidence from witnesses at a hearing held under the auspices of commissioners appointed by the Court. All the living and travel expenses of these officials and witnesses had to be paid for by the litigants. Copies of all the evidence presented at these proceedings had to be made for the participants in the case and at their expense. … After the solicitors had gathered the written evidence for their cases, court officials … reviewed the assembled evidence and reported on whether it was in satisfactory order to present before the Lord Chancellor. These well-paid Chancery officials seem to have played a large role in delaying the settlement of the cases.

In his preface, written in 1853, Dickens refers to a Chancery judge he had met, who had claimed that the Court of Chancery was 'almost immaculate'. No doubt the judge had been reading *Bleak House* in the instalments. The only blemish, according to the judge, was due to the parsimony of the public in not providing more money so that more Chancery judges could be appointed. Dickens makes it clear that *Jarndyce v Jarndyce* is by no means exaggerated or unique:

> I mention here that everything set forth in these pages concerning the Court of Chancery is substantially true, and within the truth. … At the present moment there is a suit before the Court which was commenced nearly twenty years ago; in which thirty to forty counsel have been known to appear at one time; in which costs have been incurred to the amount of seventy thousand pounds; which is a

> *friendly suit*; and which is (I am assured) no nearer to its termination now than when it was begun. There is another well-known suit in Chancery, not yet decided, which was commenced before the close of the last century, and in which more than double the amount of seventy thousand pounds has been swallowed up in costs. If I wanted other authorities for JARNDYCE AND JARNDYCE, I could rain them on these pages, to the shame of a parsimonious public.

Reforms later in the century put an end to the worst vices of the system, although there is an anecdote, no doubt apocryphal, about Wilfred Hunt, an eminent chancery barrister who flourished in the 1930s and 1940s. It seems the desire for long trials had not entirely died out. He was briefed for a trial which was due to last several weeks. Every beneficiary and potential beneficiary was separately represented, some with leading counsel, at very substantial fees. On the day before the trial was to begin, the solicitors settled the case. Hunt is alleged to have remarked, 'What a pity it is that such a wonderful estate should be squandered on the beneficiaries.'[3]

There are several references in Dickens' works to the Inns of Court and the Inns of Chancery. The Inns of Chancery had endured for centuries. It is not entirely clear what they were. They had different functions at different times. All of them seemed at one time to be rather like preparatory schools for would-be barristers, who were trained so that they were able to be admitted to an Inn of Court. Later they were mainly occupied by attorneys and solicitors. Many of them were named after their founder, such as Clement's Inn, Clifford's Inn and Thavie's Inn. They were defunct by the 19th century, and mostly demolished. A few of them are represented today by plaques on the wall indicating where they were sited. Dickens was a tenant in Furnival's Inn when he was first married and he began to write *The Pickwick Papers* there. When Pip, in *Great Expectations*, first came to London, he lodged in Barnard's Inn with Herbert Pocket. The hall of the Inn still exists and is occupied by Gresham College.

Dickens learned shorthand in his time as a solicitors' clerk and thereafter worked as a parliamentary reporter and court reporter. One of his early pieces was a description of a visit to Doctors' Commons. This court specialized in ecclesiastical and civil law (a system based on Roman law as opposed to common law). He recounted one of the cases which he watched:

> Under a half-obsolete statute of one of the Edwards, the court was empowered to visit with the penalty of excommunication, any person

[3] Even if true, Hunt was joking. He was notorious for the modesty of his fees.

> who should be proved guilty of the crime of 'brawling', or 'smiting',[4] in any church or vestry adjoining thereto.

It was alleged against the defendant, one Thomas Sludberry, that in a parish vestry meeting he had said to one Michael Bimple, 'You be blowed';

> and that on the said Michael Bimple and others remonstrating with the said Thomas Sludberry, on the impropriety of his conduct, the said Thomas Sludberry repeated the aforesaid expression, 'You be blowed!'; and furthermore desired and requested to know, whether the said Michael Bimple 'wanted anything for himself'; adding, 'that if the said Michael Bimple did want anything for himself, he, the said Thomas Sludberry was the man to give it him'; at the same time making use of other heinous and sinful expressions, all of which Bimple submitted, came within the intent and meaning of the Act; and therefore he, for the soul's health and chastening of Sludberry, prayed for sentence of excommunication against him accordingly.

The judge found against Sludberry and

> then pronounced upon Sludberry the awful sentence of excommunication for a fortnight, and payment of the costs of the suit. Upon this, Sludberry, who was a little, red-faced, sly-looking ginger-beer seller, addressed the Court and said, if they'd be good enough to take off the costs, and excommunicate him for the term of his natural life instead, it would be much more convenient to him, for he never went to church at all.

How lucky we are to still be able to enjoy Dickens and the law.

About the author

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[4] Striking with a firm blow.

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