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Intending subscribers should please contact Ms Carole Vaughan at the above address. Intending subscribers in North America are advised to contact Wm W Gaunt & Sons, Inc, Gaunt Building, 3011 Gulf Drive, Holmes Beach, Florida 3417 2199.

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## EDITORIAL

I am pleased to introduce the second annual edition of the *Nottingham Law Journal* featuring a series of thematically linked articles in addition to several, stimulating articles on matters of contemporary legal interest. In this volume, our thematically linked pieces derive from the Symposium *Legal Perspectives on the Victim* hosted by Nottingham Law School's *Centre for Conflict Rights and Justice* in December 2012. These papers are introduced by the Centre's director, Tom Lewis.

Our articles on contemporary legal significance include the second part of Mark Ryan's timely analysis on House of Lords reform; the application of the child welfare principle in the context of immigration control and the principle of state neutrality. The subject of socially useful banking, of great concern to many of us, concludes our article submissions. We are also delighted to host the winners of two student essay competitions.

Research is alive and well at Nottingham Law School: Our Centre for Business and Insolvency Law is currently developing an online Insolvency Journal titled the *Nottingham Insolvency and Business Law Electronic Journal (NIBLeJ)*. This will be made available in electronic form on an open-access basis via the Law School's website. Submissions to the journal will be peer-reviewed by an international panel of experts in the business, commercial, corporate and insolvency areas. The first issue will appear in September 2013 and we hope to include a selection of the best early submissions in Volume 23 of the *Nottingham Law Journal*.

In addition to our three active research centres, there have been a number of research seminars in the fields of health and sports law. At the time of going to press we are hosting the David Price Memorial Seminar Series 'The Influence of Faith and Belief on the Formulation, Content and Operation of Health Law in the United Kingdom', and a lunchtime seminar by Luca Pezzano comparing sports law in Italy and England. The theme of student participation is a common point of discussion in law schools. To add to this debate, Dr Colin Anderson has provided a seminar and follow-up workshop on student engagement in a digital world, entitled 'Eighty percent of life is just turning up.'

Our editorial team consider these contributions to be the best from a large number of high-quality submissions, featuring analysis on subjects as diverse as parentage laws in Pakistan, homosexuality in Nigeria and cloud computing. We remain a small but committed team. 2012 saw the departure of Kay Wheat as case-note editor. Kay has provided invaluable support to the *Nottingham Law Journal* over the years and we would like to thank her for this important contribution. Janice Denoncourt will now be adapting her role to include case-notes with book reviews and we are delighted to welcome Louise Taylor to the editorial team.

I would like to take this opportunity to sincerely thank all our contributors, subscribers and reviewers for the vital part they play in supporting the journal. Particular gratitude is owed to Raffia Arshad and Chuka Agbu who have taken time out of their busy schedules to offer new perspectives on our submissions concerning overseas legal systems.

Finally, I must thank the rest of the editorial team and extend special thanks to my associate editor, Andrea Nicholson and, as always, the indispensable Carole Vaughan.

DR HELEN O'NIONS



## ARTICLES

*The address for submission of articles is given at the beginning of this issue.*

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### THE LATEST ATTEMPT AT REFORM OF THE HOUSE OF LORDS – ONE STEP FORWARD AND ANOTHER ONE BACK.

MARK RYAN\*

#### INTRODUCTION

“When it comes to House of Lords reform during this Parliament, the ship has sailed”.<sup>1</sup> Sadiq Khan, Shadow Lord Chancellor and Shadow Secretary of State for Justice, January 2013.

In September 2012 the Deputy Prime Minister Nick Clegg made a statement in the House of Commons confirming that the House of Lords Reform Bill had been withdrawn.<sup>2</sup> Although the Bill had secured a Second Reading in the House of Commons in July by the decisive margin of 462 to 124 votes,<sup>3</sup> there was nevertheless an evident lack of support from MPs for the Bill’s accompanying Programme Motion. Without such a motion the Bill could not have realistically navigated its passage through the Commons.<sup>4</sup> It might however have been so different as 2012 could have proved to have been the watershed year in the protracted history of Lords reform. Not only did a Joint Committee largely endorse the key elements of the Government’s draft Bill, but more significantly, the 2012 House of Lords Reform Bill was the first Government Bill aimed at substantial reform of the second chamber to be presented to the House of Commons since Harold Wilson’s Parliament (No. 2) Bill in December 1968.<sup>5</sup> This article examines these most recent developments and concludes by considering the prospects for reform.

\*BA, MA, PGCE, Barrister (non-practising), Senior Lecturer in Constitutional and Administrative Law at Coventry University. This is the second part of a two-part article with the first part published in 2012: M Ryan, ‘A summary of the developments in the reform of the House of Lords since 2005’ (2012) 21 Nottingham Law Journal 65. This paper draws upon a conference paper ‘The Joint Committee on the Draft House of Lords Reform Bill’ presented by the author to the SLS conference at Bristol University in September 2012. In addition, it makes reference to a written submission made by the author to the Joint Committee on the Draft House of Lords Reform Bill, *Draft House of Lords Reform Bill, Report Vol III* (2010–12, HL Paper 284-III, HC 1313-III) 172.

<sup>1</sup> HC Deb 29 January 2013, vol 557, col 815.

<sup>2</sup> HC Deb 3 September 2012, vol 549, col 35.

<sup>3</sup> HC Deb 10 July 2012, vol 548, col 274.

<sup>4</sup> Nick Clegg (n 2) col 36.

<sup>5</sup> HC Deb 19 December 1968, vol 775, col 1577. On the history of Lords reform see P Dorey & A Kelso, *House of Lords Reform since 1911. Must the Lords go?* (Palgrave Macmillan, 2011).

## THE JOINT COMMITTEE ON THE DRAFT HOUSE OF LORDS REFORM BILL

After the publication of the draft Bill in 2011, both Houses of Parliament established a Joint Committee with the remit to examine and report on its detail. Pre-legislative scrutiny is of course crucial for constitutional measures, as stressed recently by the House of Lords Select Committee on the Constitution. In fact, it argued that the requirement that significant constitutional legislation undergoes pre-legislative scrutiny should only be departed from in exceptional circumstances.<sup>6</sup> The presentation of the House of Lords Reform Bill in draft was therefore to be welcomed as sound legislative practice. The treatment of this particular constitutional measure however, contrasted markedly with the lack of pre-legislative scrutiny afforded the 2010 Fixed-term Parliaments Bill.<sup>7</sup>

The Joint Committee was chaired by Lord Richard and its composition was both large and unwieldy. It crossed the political divide and comprised 13 MPs<sup>8</sup> together with 13 members of the House of Lords (which included two crossbenchers and a Bishop).<sup>9</sup> Although pre-legislative scrutiny of the draft Bill could have been assigned to the House of Commons Political and Constitutional Reform Committee<sup>10</sup> or even a Royal Commission,<sup>11</sup> given that the measure was aimed at reforming the second chamber, it was apposite for it be considered by a Joint Committee which enabled the direct involvement and input of a significant number of peers. The Joint Committee issued its report after eight months (albeit with an extension) and the time allocated to this Joint Committee was in striking contrast to the woefully insufficient ten sitting weeks granted to the Joint Committee on the Draft Constitutional Renewal Bill in 2008.<sup>12</sup> In light of the size of the Joint Committee and given the highly divisive and emotive issue of Lords reform, it was inevitable that its report would not be a unanimous one. As Lord Richard observed, since Lords reform had been divisive for over a century “It would have been remarkable had this not been reflected in the committee itself.”<sup>13</sup>

The Joint Committee’s report was published in April 2012<sup>14</sup> and was debated shortly afterwards on the Floor of the House of Lords in a two-day *Motion to Take Note*.<sup>15</sup> It was curious that it was not considered in the Commons, but presumably this was because a debate on the Second Reading of the fully-fledged Bill was impending. As the Joint Committee’s report was not unanimous, in an unprecedented move a sizeable

<sup>6</sup> House of Lords Select Committee on the Constitution, *The Process of Constitutional Change, Report* (2010–12, HL Paper 177) para 95. The importance of pre-legislative scrutiny for constitutional measures was emphasised by the author in his oral evidence (Q 173) in July 2012 to the Political and Constitutional Reform Committee which was examining the issue of ensuring standards in the quality of legislation (report, written and oral evidence to be published in due course).

<sup>7</sup> See M Ryan, ‘The Fixed-term Parliaments Act 2011.’ [2012] PL 213.

<sup>8</sup> These MPs comprised 6 Conservatives, 5 Labour, 1 Liberal Democrat and 1 Democratic Unionist.

<sup>9</sup> The contingent from the House of Lords was as follows: 4 Conservatives, 3 Labour, 1 Labour Independent, 2 Liberal Democrats, 2 Crossbenchers and 1 Bishop.

<sup>10</sup> It is of interest to note that in January 2013, faced with the stalling of long term reform of the Lords, the Political and Constitutional Reform Committee launched an investigation into what smaller-scale consensual steps could be taken: ‘House of Lords reform: What next?’

<sup>11</sup> Following the one which considered reform over a decade ago *A House for the Future* (Cm 4534, 2000).

<sup>12</sup> Joint Committee on the Draft Constitutional Renewal Bill, *Volume 1: Report* (2007–08, HL Paper 166-I, HC Paper 551-I), para 7. Also see the unpublished Conference Paper delivered by the author to the SLS in Southampton in September 2010 (M Ryan, ‘The Constitutional Reform and Governance Act 2010 – The evolution and development of a constitutional Act’).

<sup>13</sup> HL Deb 30 April 2012, vol 736, col 1939.

<sup>14</sup> *Draft House of Lords Reform Bill, Report Vol I* (2010–12, HL Paper 284-I, HC 1313-I).

<sup>15</sup> HL Deb 30 April 2012, vol 736, col 1937ff and HL Deb 1 May 2012, vol 736, col 2081ff.

minority of 12 Committee members published their own parallel Alternative Report.<sup>16</sup> By virtue of Erskine May parliamentary rules, committee members who dissent from a report may not append a minority report,<sup>17</sup> however they can publish a report independently, outside of the formal framework of their select committee. Those members<sup>18</sup> who signed this separate report were mostly peers supplemented by three MPs, and politically the group was devoid of any Liberal Democrat representation (the junior partner of the Coalition clearly driving reform). In essence, the Alternative Report viewed Lords reform in a much wider context than the Joint Committee had done. This was not surprising given that the *raison d'etre* of the Joint Committee from its terms of reference was to consider the draft Bill presented to it. As Lord Richard stressed, the Joint Committee was not a Royal Commission and did “not start by being presented with a clean sheet of paper. We were not told to produce a plan for a future House of Lords; that was not the purpose of the committee.”<sup>19</sup> The Alternative Report argued that reform should involve considering the powers and functions of *both* chambers, together with the effectiveness of Government. As a result, the Joint Committee, confined by considering arguments within the context of the remit of the draft Bill and White Paper, “could not consider what we believe would be the real impact on the House of Commons of electing the House of Lords.”<sup>20</sup> In fact, the Alternative Report argued that the role, powers and functions of the House should be determined before any change to its composition.<sup>21</sup> In other words, form should follow function.

## THE JOINT COMMITTEE'S REPORT

In terms of functions, the Joint Committee agreed with the Government that the reformed House should continue to perform the roles of the present House of Lords (*viz.*, legislative, scrutiny and a forum for debate), but argued that following elections the House would also acquire an additional representational role.<sup>22</sup> According to the Alternative Report, this new role would have implications for accountability, constituency matters and would question the primacy of the Commons.<sup>23</sup> In respect of composition, the Joint Committee regarded the proposed size of the House of 300 members as too small in order for it to carry out its functions. This was a sensible finding given that this figure did appear somewhat low and instead, it recommended a House of 450 members.<sup>24</sup> The key issues for size would appear to be twofold: firstly, in common with international experience elsewhere, the House must be smaller than the lower chamber.<sup>25</sup> Secondly, whatever the capacity ultimately arrived at, it should not compromise the House's ability to perform its assigned functions.

<sup>16</sup> Alternative Report, *House of Lords Reform: An alternative way forward* (April 2012) (<http://www.houseoflordsreform.com/> last accessed 9/07/2012).

<sup>17</sup> *Erskine May Parliamentary Practice*, (24th edn, LexisNexis, 2011), p 901.

<sup>18</sup> These comprised 6 Conservatives (2 MPs and 4 peers), 3 Labour (1 MP and 2 peers), 1 Labour Independent peer, 1 Crossbencher together with the only Bishop on the Joint Committee.

<sup>19</sup> (n 13) col 1938.

<sup>20</sup> Alternative Report (n 16) 5.

<sup>21</sup> *Ibid* para 3.39.

<sup>22</sup> *Draft House of Lords Reform Bill, Report* (n 14) para 33.

<sup>23</sup> Alternative Report (n 16) para 2.13.

<sup>24</sup> *Draft House of Lords Reform Bill, Report* (n 14) para 114.

<sup>25</sup> On the comparative sizes of upper Houses see M Russell, *Second Chambers Overseas: A Summary* (Constitution Unit, 1999) Table 1: Composition.

With regard to whether the reformed House should have an electoral mandate, the Joint Committee conceded (hardly surprisingly) that there was a difference of opinion on this issue. By a majority, however, it agreed that the reformed House should have an electoral mandate *provided* that it had commensurate powers.<sup>26</sup> The issue of election<sup>27</sup> is self-evidently the central issue of reform and on which there is not, and never has been, any total agreement. Indeed, as the Joint Committee confirmed, some of its members preferred a fully appointed House.<sup>28</sup> It was inevitable therefore that the members of the Joint Committee would also disagree on the issue of a largely elected hybrid House. The majority accepted that if there were to be elections, the ratio of 80 per cent elected members as modelled in the draft was “a means of preserving expertise and placing its mandate on a different footing from that of the Commons.”<sup>29</sup> The principle of hybridity has historically been divisive. For some of course, such a House represents the best of both worlds combining democratic legitimacy with expertise. For others however, it is the worst, creating a two-tiered chamber which is neither fully elected nor fully appointed.<sup>30</sup> It could also be argued to be an inherently unstable constitutional arrangement as over time there would be an inexorable move towards a wholly elected House.

A key issue in any elected House is the electoral system to be used. The Joint Committee by a majority endorsed the use of a proportional type of system. It did this on the basis that such a system would preserve members’ independence as well as their political diversity, retain a different character of House from that of the Commons and be less likely to result in a challenge to the dynamic between MPs and their constituents.<sup>31</sup> In terms of the type of system to be adopted, the Joint Committee recommended that consideration be given to the New South Wales version of the Single Transferable Vote as an alternative to the pure version set out in the draft.<sup>32</sup>

In respect of terms, the Joint Committee by a majority agreed that a 15 year tenure was to be preferred.<sup>33</sup> It would be fair however to argue that this appeared to be an excessively long period given that French Senators enjoy a term of nine years, which in comparative terms, is unusually long.<sup>34</sup> The Joint Committee linked the issue of length directly to that of the transition to a fully reformed House (i.e. the longer the term, the longer the transition, the more existing members could remain to ensure continuity). Not only would a 15 year term allow elections in thirds,<sup>35</sup> but it is noteworthy that it argued that “the longer the term, the weaker the mandate of the House of Lords as a whole compared with the House of Commons.”<sup>36</sup> Such is the concern about possible conflict between the chambers that the emphasis here was to *lessen* the democratic mandate of the reformed second chamber.

The Joint Committee also agreed by a majority with the draft Bill that terms should be non-renewable in order to allow the potential for members to be more independent

<sup>26</sup> *Draft House of Lords Reform Bill, Report* (n 14) para 23.

<sup>27</sup> For an interesting article on an elected House see E Pearce, ‘An Elected Upper House and Other Fallacies.’ (2009) 80 *Political Quarterly* 495.

<sup>28</sup> *Draft House of Lords Reform Bill, Report* (n 14) para 106.

<sup>29</sup> *Ibid* para 107.

<sup>30</sup> On a mixed chamber see M Ryan, ‘Parliament and the Joint Committee on House of Lords Reform.’ (2003) 37 *Law Teacher* 310, 322.

<sup>31</sup> *Draft House of Lords Reform Bill, Report* (n 14) para 124.

<sup>32</sup> *Ibid* para 152.

<sup>33</sup> *Ibid* para 173.

<sup>34</sup> On the comparative length of terms of upper Houses see Russell, *Second Chambers Overseas: A Summary* (n 25).

<sup>35</sup> It should be recalled that the Fixed term-Parliaments Act 2011, which set five-year terms in between elections, had been enacted *after* the Draft Bill had been issued.

<sup>36</sup> *Draft House of Lords Reform Bill, Report* (n 14) para 171.

and to distinguish them from MPs.<sup>37</sup> The issue of non-renewability was always going to raise issues of accountability. As the Alternative Report stated, accountability to the public “is thwarted, and essentially made meaningless, if the electorate’s democratic power is not periodically returned to them, in the form of fresh elections.”<sup>38</sup> As a result, it considered quite rightly that the arguments about independence were outweighed by those relating to accountability.<sup>39</sup> Indeed, it does seem self-evident that accountability, by its very nature, necessarily requires *re-election*. In approving non-renewable terms, the Joint Committee did nevertheless recognise that non-renewability did not ensure “electoral accountability”,<sup>40</sup> and so recommended that the Government make provision for a recall mechanism to provide that elected members could be held accountable by the electors “in exceptional circumstances.”<sup>41</sup> In this context it is pertinent to draw attention to the parallel issue of the recall of MPs. Although in June 2012 the Political and Constitutional Reform Committee recommended that the Government abandon its proposals for creating a recall mechanism for MPs, the Government nevertheless remains committed to introducing this principle into the Commons.<sup>42</sup> In fact, it could be argued that the justification for a recall mechanism for members of an elected upper House would be surely even stronger than for MPs, given the excessive length and non-renewability of the proposed terms.

The draft Bill proposed holding elections at the same time as general elections to the House of Commons. This was supported by the Joint Committee,<sup>43</sup> although it did acknowledge a concern that House of Lords elections might be overshadowed (analogous to the devolved elections being overshadowed by the election of Westminster MPs in May 2015, if they had not been deferred a year as a result of the passage of the Fixed-term Parliaments Act 2011).<sup>44</sup> On balance, however, owing to the cost saving, avoidance of protest votes and minimising the disruption to the Executive’s legislative programme, the Joint Committee approved of elections coinciding with those to the Commons. Although the combination of elections is sensible, given the existing dominance of the Executive in our constitution, we could certainly quibble about the need to safeguard its legislative ambitions.

The most controversial and divisive aspects of the draft Bill were the inextricably linked issues of an electoral mandate and powers (including the issue of the primacy of the Commons). As noted above, the Joint Committee had agreed that the reformed House should have an electoral mandate *provided* that it had commensurate powers. According to the Alternative Report, such powers logically meant either, powers greater than those of the present upper House or the use of its existing powers in a different way.<sup>45</sup> In fact, if a reformed House was to be elected “Fresh consideration will need to be given to the powers of the second chamber” otherwise it risked destabilising the relationship between the two Houses.<sup>46</sup> It is clear that there is an argument to be had that any democratisation of the upper House necessarily requires the conferment of additional legal powers in order to reflect its new-found democratic legitimacy. For

<sup>37</sup> *Ibid* paras 164–7.

<sup>38</sup> Alternative Report (n 16) para 3.57.

<sup>39</sup> *Ibid* para 3.59.

<sup>40</sup> *Draft House of Lords Reform Bill, Report* (n 14) para 183.

<sup>41</sup> *Ibid* para 188.

<sup>42</sup> House of Commons Political and Constitutional Reform Committee, *Recall of MPs* (2012–13, HC 373) and *Recall of MPs: Government Response to the Committee’s First Report of Session 2012–13* (2012–13, HC 646).

<sup>43</sup> *Draft House of Lords Reform Bill, Report* (n 14) para 181.

<sup>44</sup> Ryan, ‘The Fixed-term Parliaments Act 2011.’ (n 7) 219.

<sup>45</sup> Alternative Report (n 16) para 3.38.

<sup>46</sup> *Ibid* para 3.37.

its part, the White Paper stated that the reformed elected House would not enjoy any extra formal powers<sup>47</sup> and accordingly the draft Bill had not conferred any. The fact that the formal legal powers of the House would remain unchanged was confirmed in the draft's *General saving clause* which stated expressly that the Act did not affect the powers of either House (clause 2(1)(c)). It is nevertheless arguable that consideration should have been given to whether the House ought to enjoy extra powers specifically in relation to constitutional measures, given its current role as the protector of the constitution.<sup>48</sup>

The Joint Committee was confident that it expected a largely or fully elected House to “seek to use its powers more assertively, to an extent which cannot be predicted with certainty now”,<sup>49</sup> and this appeared to be a reasonable assumption to make. In strict law, of course, these formal legal powers in comparative terms are already relatively great if used to their full.<sup>50</sup> It is interesting that the Joint Committee considered that it did not think that a more assertive upper House would enhance the overall role of Parliament in relation to the Executive's activities.<sup>51</sup> This is curious given that it seems inevitable that a more aggressive House, emboldened by an electoral mandate, will impact significantly on Executive/parliamentary relations. It should be remembered that the constitutional relationship between the two Houses is not confined to legal powers (i.e. the longstop of the Parliament Acts), as their day-to day relations are governed by constitutional conventions.<sup>52</sup> It is, after all, a constitutional convention that the House of Lords does not use its full legal powers under the Parliament Acts because of a recognition that it is unelected. The Joint Committee accepted that these conventions would evolve and that they “would need to be re-defined”<sup>53</sup> and argued that following reform, Parliament would need to define and agree these inter-House conventions and keep them under review. In fact in 2007, Parliament<sup>54</sup> had approved the report of the Joint Committee on Conventions which had stated that in the event of the emergence of firm proposals to change the composition of the House, these existing conventions would have to be re-examined.<sup>55</sup> The 2012 Joint Committee suggested that any new conventions or changes to existing ones should be promulgated in a *concordat* to be adopted by resolutions of both Houses and that preliminary work begin on this as soon as possible.<sup>56</sup> It also expressed concern that the reference in the *General saving clause* to conventions (i.e. that the Act would not affect the conventions governing the relationship of the two Houses- clause 2(1) (c)) would be ineffective and could become justiciable.<sup>57</sup>

In terms of the primacy of the House of Commons, the Joint Committee admitted that within the Committee there were different views on the impact that the Bill would have. A majority, however, accepted that although following the advent of an elected

<sup>47</sup> Cabinet Office, *House of Lords Reform Draft Bill* (Cm 8077, 2011) 7.

<sup>48</sup> On the constitutional role of second chambers see A Reidy & M Russell, *Second Chambers as Constitutional Guardians and Protectors of Human Rights* (Constitution Unit, 1999).

<sup>49</sup> *Draft House of Lords Reform Bill, Report* (n 14) para 34.

<sup>50</sup> M Russell, ‘Judging the white paper against international practice of bicameralism’ in A Fitzpatrick (ed), *The end of the peer show?* (CentreForum, 2011) 25.

<sup>51</sup> *Draft House of Lords Reform Bill, Report* (n 14) para 35.

<sup>52</sup> On the issue of conventions in general in the House of Lords see D Carter, ‘The Powers and Conventions of the House of Lords.’ (2003) 74 *Political Quarterly* 319 and on inter-chamber disputes see M Russell, *Resolving Disputes between the Chambers* (Constitution Unit, 1999).

<sup>53</sup> *Draft House of Lords Reform Bill, Report* (n 14) para 91.

<sup>54</sup> (House of Lords) HL Deb 16 January 2007, vol 688 col 573ff; (House of Commons) HC Deb 17 January 2007, vol 455 col 808ff.

<sup>55</sup> Joint Committee on Conventions, *Conventions of the UK Parliament* (2005–06, HL 265-I HC 1212-I) 3.

<sup>56</sup> *Draft House of Lords Reform Bill, Report* (n 14) paras 93–4.

<sup>57</sup> *Ibid* para 92.

House the balance of power would shift, the remaining pillars safeguarding primacy (i.e. financial privilege and the Parliaments Acts) would suffice to preserve it.<sup>58</sup> This was contested strongly by the Alternative Report on the basis that logically there was a fundamental incompatibility between the Government's proposals for an elected second chamber and the maintenance of the Commons primacy. In fact, it was an "unbridgeable gap"<sup>59</sup> which meant that the primacy of the Commons was put "into play."<sup>60</sup> Although clause 2(1) (b) of the draft Bill had stated specifically that nothing in the Act "affects the primacy of the House of Commons", the Joint Committee concurred with the overwhelming view of the evidence that it had received that clause 2 (of itself) was incapable of preserving primacy.<sup>61</sup> The Alternative Report agreed and pointed out that the only evidence in support of this clause came from the Government itself.<sup>62</sup>

One final issue concerning primacy is whether the Parliament Acts would continue to apply in the context of an elected second chamber. It should be recalled that the Parliament Act 1911 was forged in the context of an unelected upper House (the chamber being then virtually entirely hereditary) and so would, or even *should* these Acts apply to an elected chamber? The Joint Committee took note of distinguished lawyers who had some doubts as to whether the Parliament Acts would be effective.<sup>63</sup> As a result, the Joint Committee recommended that the Government should make express provision for this in the Bill if it wanted to ensure that the Acts would continue to apply. As an adjunct, although the Joint Committee did not provide legal advice on whether the Parliament Acts could be used to force reform through Parliament, it left the evidence of two witnesses, Lord Goldsmith QC and Lord Pannick QC, "to speak for itself."<sup>64</sup> They had indicated that it *would* be lawful to do so.<sup>65</sup>

The 20 per cent appointed aspect of the draft Bill attracted little real controversy and the Joint Committee sensibly accepted that there should be a statutory Appointments Commission. In order to remove appointees who did not contribute to the House, the Joint Committee did make a rather curious suggestion that appointed members should initially be appointed for five years only and that the Appointments Commission could thereafter determine if they had provided an appropriate contribution in order to remain in the House.<sup>66</sup> The draft Bill enabled the 300 elected and appointed members of the House to be supplemented by additional ministers and Bishops. The Joint Committee agreed that ministers should continue to sit in the House as Government representatives,<sup>67</sup> although it could be argued that this was an ideal constitutional opportunity to separate formally the Executive from the upper House. The Joint Committee agreed that the Prime Minister should be able to make a small number of ministerial appointments, but that they should not enjoy voting rights and cease membership of the House at the end of their ministerial appointment.<sup>68</sup> In terms of

<sup>58</sup> *Ibid* para 67.

<sup>59</sup> Alternative Report (n 16) para 3.18.

<sup>60</sup> *Ibid* para 3.23.

<sup>61</sup> *Draft House of Lords Reform Bill, Report* (n 14) para 55.

<sup>62</sup> Alternative Report (n 16) paras 3.16–17.

<sup>63</sup> *Draft House of Lords Reform Bill, Report* (n 14) para 368.

<sup>64</sup> *Ibid* para 367.

<sup>65</sup> *Ibid* para 361. See also D Pannick QC, "Securing political success by repetition" (FE Smith): Can the Parliament Act 1911 be used by the House of Commons to Insist on Reform of the House of Lords? [2012] PL 230.

<sup>66</sup> *Draft House of Lords Reform Bill, Report* (n 14) paras 257–8.

<sup>67</sup> *Ibid* para 266.

<sup>68</sup> *Ibid* paras 267–9.

religious representation, the Joint Committee by a majority agreed to retain 12 *ex officio* seats for Bishops.<sup>69</sup>

It is obvious and in fact generally accepted, that any move to a reformed House will have to involve a long transitional period. This would allow some continuity of membership and enable the *grandfathering system* (referred to in the Coalition Agreement)<sup>70</sup> to operate whereby existing members would be able to transfer their knowledge to new members. The Joint Committee accepted the option modelled in the draft Bill as the best transitional model canvassed and recommended that the political parties and crossbenchers themselves determine who should be selected as a transitional member.<sup>71</sup> Finally, the Joint Committee called for a referendum on the Government's proposals and advised that the Government should facilitate debate in the Commons on the issue prior to the Committee Stage of the Bill.<sup>72</sup> In terms of the impact of the Joint Committee's report, it is fascinating to note that the reaction to it varied considerably. For example, whereas Lord Forsyth of Drumlean asserted that the draft Bill had been "comprehensively filleted by the Joint Committee",<sup>73</sup> in contrast, the Deputy Prime Minister noted that its conclusions had "supported the main tenets of the Bill on a cross-party basis."<sup>74</sup>

## THE GOVERNMENT'S RESPONSE AND THE HOUSE OF LORDS REFORM BILL

In June 2012 the Government published its Formal Response<sup>75</sup> to the Joint Committee at the same time that it unveiled the fully-fledged Bill (House of Lords Reform Bill). Although the Bill had been shaped by the Joint Committee's findings, it must be remembered of course that the report was not unanimous. In very broad terms, the Government accepted the majority of the Joint Committee's recommendations and conclusions.<sup>76</sup> This was hardly surprising given that the report had largely endorsed the key elements of the draft Bill (*viz.*, an 80 per cent elected House, 15 year non-renewable terms, a proportional electoral system, a statutory Appointments Commission, ministerial appointments and the retention of a reduced number of Bishops). In broad overall terms, therefore, most of the main features and principles of the 2011 draft Bill were also found in the House of Lords Reform Bill presented to the House of Commons in June 2012.

In terms of the size of the chamber, the Government accepted the recommendation to increase the size of the House (albeit with the addition that elected members – as well as their appointed counterparts – would be able to vary their participation).<sup>77</sup> Clause 1(3) of the Bill therefore provided for a House of 450 members (360 elected members and 90 appointed) supplemented by the Lords Spiritual and ministers. The Bill however conferred no additional formal legal powers on the House as the

<sup>69</sup> *Ibid* paras 289–90. On the Bishops in general see A Harlow, F Cranmer & N Doe, 'Bishops in the House of Lords: a Critical Analysis.' [2008] PL 490.

<sup>70</sup> HM Government, *The Coalition: our programme for government* (2010) 27.

<sup>71</sup> *Draft House of Lords Reform Bill, Report* (n 14) paras 312–13. It is of interest that the Joint Committee did recommend its own alternative option for transition involving an initial cull in 2015 with all these remaining transitional members then leaving in 2025 (para 317).

<sup>72</sup> *Ibid* paras 384–5.

<sup>73</sup> HL Deb 1 May 2012, vol 736, col 2081.

<sup>74</sup> HC Deb 9 July 2012, vol 548, col 33.

<sup>75</sup> *Government Response to the Report of the Joint Committee on the Draft House of Lords Reform Bill* (Cm 8391, 2012).

<sup>76</sup> *Ibid* 4.

<sup>77</sup> *Ibid* 11–12.

Government maintained that the present powers of the chamber “would remain appropriate”.<sup>78</sup> The Government did not agree that work should begin on a *concordat* on the relationship between the two Houses because it did “not accept that measures need to be taken to constrain the reformed House.”<sup>79</sup> It also disputed (quite rightly) the view of the Joint Committee that an elected House would not enhance the ability of Parliament to hold the Executive to account.<sup>80</sup> In addition, the Government insisted that as the purpose of clause 2 of the draft Bill was merely declaratory and to provide reassurance, it was never meant by itself to preserve the primacy of the Commons.<sup>81</sup> It nevertheless excised this provision as superfluous given that the Joint Committee had agreed that primacy would not be undermined by its reform proposals. Instead, the Bill contained a redrafted clause 2 which expressly affirmed that the Parliament Acts would continue to apply notwithstanding “the changes to the House of Lords made by this Act” (clause 2(1)). This clause also purported to repeal the Preamble to the Parliament Act 1911 (clause 2(2)).

As far as the electoral system was concerned, firstly the Government rejected any consideration of indirect elections on the basis that recent reforms had all advanced direct elections. Secondly, the Government stated that on reflection it had concluded that a more appropriate system in place of the Single Transferable Vote set out in the draft Bill would be the semi-open list<sup>82</sup> (clause 5 and schedule 3) comprising eleven Electoral Districts (schedule 2).<sup>83</sup> The twelfth Electoral District of Northern Ireland, however, would retain the Single Transferable Vote for historical reasons (clause 5(5)). For one thing, this would mean that there would be two electoral systems in operation within the same chamber which could lead to competing legitimacy claims between members. In any case, this change to the electoral system for Great Britain led to the legitimate charge being levelled at the Government that the system detailed in the fully-fledged Bill had *not* been subject to pre-legislative scrutiny by the Joint Committee.<sup>84</sup>

In terms of appointments, the Government agreed with the recommendation of the Joint Committee that there was merit in stating on the face of the Bill the “broad criteria to which the Appointments Commission should have regard when recommending individuals for appointment”,<sup>85</sup> although the criteria set out in the Bill (clause 17(2)) were not identical to the Joint Committee’s suggestions. It quite rightly dismissed the odd suggestion that appointments should be made for an initial term of five years on the basis that it would be inappropriate for the Commission to determine whether a member would remain part of the chamber.<sup>86</sup> The Government did welcome the Joint Committee’s endorsement that the Prime Minister should be able to appoint a small number of ministers. In order to limit patronage, although a maximum of five appointments at any one time had been suggested by the Joint Committee in the event that such ministers would be able to vote,<sup>87</sup> the Bill however set the cap at eight (clause 24(4)). Furthermore, rather controversially, the Government argued that such ministers

<sup>78</sup> *Ibid* 5.

<sup>79</sup> *Ibid* 8.

<sup>80</sup> *Ibid* 6.

<sup>81</sup> *Ibid* 7.

<sup>82</sup> *Ibid* 14.

<sup>83</sup> For example, the Electoral District of London would return 14 elected members at each election, whilst the North East would return 5 (schedule 2).

<sup>84</sup> Sadiq Khan (n 74) col 41.

<sup>85</sup> *Government Response to the Report of the Joint Committee on the Draft House of Lords Reform Bill* (n 75) 22.

<sup>86</sup> *Ibid* 23.

<sup>87</sup> *Draft House of Lords Reform Bill, Report* (n 14) para 268.

should be treated like other appointed members and be allowed to remain *in situ* for three electoral cycles<sup>88</sup> (clause 24(5)). This in turn then raised the prospect of a minister who had resigned, remaining in the House as an ex-minister in a position to support the incumbent Government.

The Government welcomed the Joint Committee's endorsement of the transitional arrangements of Option 1 set out in the White Paper, but dismissed the alternative option suggested by the Joint Committee because of its projected increase in the overall cost of reform.<sup>89</sup> Finally, with regard to two miscellaneous matters, the Government accepted the recommendation<sup>90</sup> that the Bill should include a *General saving clause* in order to make it clear that the Act did not impinge on parliamentary privilege (clause 49). In contrast, it was not surprising that the Government rejected the call from the Joint Committee for a referendum as it had consistently resisted one and argued that there did not appear to be a compelling case to justify the expense that it would incur.<sup>91</sup> It does appear inconsistent however from a constitutional perspective, to have a national referendum in 2011 on whether to change the type of electoral system for the House of Commons (i.e. to the Alternative Vote), but not to have one on the fundamental constitutional principle of introducing the principle of elections to the upper House.<sup>92</sup>

## THE SECOND READING OF THE HOUSE OF LORDS REFORM BILL

The Second Reading in July 2012 comprised a two-day debate. This was unusual for a Second Reading, but entirely appropriate for a Bill of such constitutional magnitude. It proved to be a very full and lively debate with around 80 MPs contributing speeches. The debate on Second Reading can be usefully separated into arguments relating to the substantive elements of the Bill and those concerning the Programme Motion to accompany the Bill during its passage through the Commons. Firstly, in relation to its content, it was all too predictable that the debate would include the impact of the Bill on the relationship between the two Houses (embracing both legal and political powers), together with the issue of the continued primacy of the Commons. Concern was also raised in relation to the electoral system, length of term, accountability and competing constituency matters with MPs. The Leader of the House was adamant however that with elections in thirds over a long period, together with some members being appointed, any notion that the authority of the Commons could be challenged was "simply far-fetched" as in any event, the Lords could not unilaterally change their powers.<sup>93</sup> In terms of a referendum, it is interesting that over 20 MPs – both those in favour and against the Bill – spoke in favour of holding a referendum on the Government's proposals. It was hardly surprising that a number of Labour MPs did so given that this was their 2010 manifesto policy<sup>94</sup> (although interestingly, Labour had

<sup>88</sup> *Government Response to the Report of the Joint Committee on the Draft House of Lords Reform Bill* (n 75) 24.

<sup>89</sup> *Ibid* 27

<sup>90</sup> *Draft House of Lords Reform Bill, Report* (n 14) para 358.

<sup>91</sup> *Government Response to the Report of the Joint Committee on the Draft House of Lords Reform Bill* (n 75) 32.

<sup>92</sup> M Ryan, *Draft House of Lords Reform Bill, Report* Vol III (2010–12, HL Paper 284-III, HC 1313-III) 173. In addition, in September 2011 the author lodged an e-petition on the HM Government website calling for a referendum to take place on the Draft House of Lords Reform Bill as to whether the upper House should be wholly or largely elected.

<sup>93</sup> Sir George Young (n 3) col 193.

<sup>94</sup> 'A future fair for all, The Labour Party Manifesto 2010' (Labour Party, 2010), 9.4

previously rejected the idea of holding one whilst in Government).<sup>95</sup> One obvious argument in favour of a referendum is that if such a vote were to take place before the Bill was presented to the Lords, this would undoubtedly help to militate against significant resistance to the measure in the upper House itself. Another argument is that given that all three main political parties supported Lords reform in their manifestos, what choice did this leave the public at the 2010 General Election?<sup>96</sup> In other words, suppose a Conservative voter in May 2010 did not support the principle of an elected upper House, how could they have registered that view at the election? Nick Clegg dismissed the referendum as unjustified, but then rather oddly appeared to concede the idea of holding one after the first wave of elections.<sup>97</sup>

As a Coalition Bill drawing its antecedents from the May 2010 Coalition Agreement, the vote on Second Reading was not a free one, unlike in relation to the previous two votes on House of Lords composition in 2003 and 2007. This also raised the issue of whether a constitutional Bill should be ever whipped; after all, the consequences of the enactment of this measure would definitely outlast the Coalition Government which introduced it. Although the Bill passed decisively on its Second Reading, it is fascinating to note that the majority of speakers actually opposed the Bill. All five Liberal Democrat speakers spoke in favour of the Bill, notwithstanding that it contradicted their 2010 manifesto commitment for a wholly elected House.<sup>98</sup> In terms of the Conservative element of the Coalition, 29 Conservative speakers opposed the Bill. More significantly, out of the 124 MPs who voted against the Bill, over two thirds (89) were Conservative. Indeed, John Stevenson ruefully recognised that he was probably in a small minority on the Government Benches (i.e. Conservative) who welcomed the measure.<sup>99</sup> In fact, one Conservative MP even resigned his position as Parliamentary Private Secretary in order to vote against the Bill.<sup>100</sup> This is interesting given that the 80 per cent elected House is directly in line with the Conservative manifesto commitment for a mainly elected House.<sup>101</sup> Graham Brady emphasised however that this commitment was not to actually legislate<sup>102</sup> (the manifesto stated that the Party proposed to work towards a consensus – on which of course there was palpably none). The policy of the Labour Party was to support the Bill, even though this was inconsistent with its manifesto commitment for a wholly elected House. It was however similar to the 80 per cent elected House set out in the previous 2008 White Paper.<sup>103</sup> Most Labour speakers spoke in favour of the Bill, and only 26 voted against it. The support of Labour was nevertheless hedged with a requirement that the details of the Bill should be subject to full debate, which together with a number of Conservative backbenchers who opposed the principle of the Bill itself, laid the seeds for the Bill's ultimate abandonment.

<sup>95</sup> In February 2010 the House of Lords Select Committee on the Constitution did point out to Labour minister Michael Wills MP (Ministry of Justice) during his oral examination the apparent inconsistency in the then Labour Government's proposals to have a referendum on the Alternative Vote (scheduled under that particular incarnation of the Constitutional Reform and Governance Bill), but *not* one on the reform of the composition of the House of Lords: House of Lords Select Committee on the Constitution, *Referendums in the United Kingdom, Report with Evidence* (2009–10, HL Paper 99) para 90.

<sup>96</sup> Ian Austin (n 3) col 198.

<sup>97</sup> (n 74) col 36.

<sup>98</sup> 'Change that works for you, Liberal Democrat Manifesto 2010' (Liberal Democrats, 2010) 88.

<sup>99</sup> (n 74) col 106.

<sup>100</sup> Conor Burns (n 3) col 231.

<sup>101</sup> 'Invitation to join the Government of Britain, The Conservative Manifesto 2010' (Conservative Party, 2010) 67.

<sup>102</sup> (n 74) col 62.

<sup>103</sup> Ministry of Justice, *An Elected Second Chamber: Further reform of the House of Lords* (Cm 7438, 2008).

The Government had anticipated a Programme Motion to provide a timetable for the Bill to navigate its passage through the House of Commons. There is certainly an issue however as to whether a constitutional Bill (particularly one of such fundamental importance) should be programmed with a time limit placed on debate.<sup>104</sup> Angela Eagle made the valid point that full and effective scrutiny was particularly important given that the Bill leaving the Commons could be subject to the Parliament Acts.<sup>105</sup> The counter argument of course was that without any timetable at all, the concern was that the Bill would never leave the Commons as it would have to rely upon the self-restraint of parliamentarians not to filibuster and run it into the sand. In terms of a timetable, Minister David Heath rather ruefully commented that “There are those, predominantly in the Official Opposition, who will vote for the end but not for the means, namely the programme motion.”<sup>106</sup> In the event, it became clear that there would be no agreement on the Programme Motion and the Speaker declared that if the Bill passed on Second Reading, it would remain uncommitted<sup>107</sup> (i.e. in limbo). The standard practice following the Second Reading is for a Bill to be sent to a Committee and in the case of a constitutional Bill, typically to a Committee of the Whole House so that all MPs can debate the measure.<sup>108</sup>

Although the principle of the Bill passed muster at Second Reading, it was somewhat of a Pyrrhic victory given that in the absence of any accompanying Programme Motion imposing some restriction on debate, the Bill would simply eat up parliamentary time. Nick Clegg therefore sensibly withdrew the Bill, thereby unfortunately emulating the fate endured by the Parliament (No. 2) Bill which became bogged down in Committee in the Commons in 1969.

## THE POSITION IN SPRING 2013 AND THE PROSPECTS FOR REFORM

Although the withdrawal of the House of Lords Reform Bill in September 2012 left the long-term reform of the House in abeyance, there was still one legal measure on the parliamentary table which would have introduced modest, but immediate reforms to the House. Lord Steel of Aikwood’s Private Member’s Bill the House of Lords (Cessation of Membership) Bill had already passed through the Lords and was introduced in the Commons in December 2012 under the aegis of Eleanor Laing. In fact, during the Second Reading of the House of Lords Reform Bill a number of MPs made reference to this Bill as a sensible way forward. The Bill was narrower in scope than the various other reform Bills Lord Steel has introduced over the years in the Lords. In essence, it sought to allow peers to resign (clause 1), thereby helping to reduce the size of the chamber. It also proposed to remove non-attending peers (clause 2) and those if convicted of a serious criminal offence (clause 3). As Lord Steel said in 2007 at the Second Reading of an earlier (albeit wider) incarnation of one of his Bills, his limited measure offered a teaspoonful of jam on reform “today as against being offered a whole jar of jam – shelves of jam – not tomorrow but at some indefinite time in the future”.<sup>109</sup> These reforms would not prejudice any long-term reform

<sup>104</sup> Eleanor Laing (n 74) col 50. A similar argument was made by Keith Vaz in the context of the Constitutional Reform and Governance Bill, HC Deb, 3 November 2009 vol 498, col 758.

<sup>105</sup> (n 3) col 196.

<sup>106</sup> The Parliamentary Secretary, Office of the Leader of the House of Commons (n 74) col 132.

<sup>107</sup> (n 3) col 204.

<sup>108</sup> For an examination of how Parliament has examined a series of constitutional Bills see R Hazell, ‘Time for a New Convention: Parliamentary Scrutiny of Constitutional Bills 1997–2005’ [2006] PL 247.

<sup>109</sup> HL Deb 30 November 2007, vol 696, col 1484.

proposals, although it might be feared that their effect would consolidate an appointed chamber by remedying some of the glaring deficiencies of the existing House, thereby dissipating any appetite for more fundamental reform.

In the event, although scheduled to have its Second Reading in early March 2013, the Bill was not moved for debate. The reality was that it had no realistic chance of becoming law as there was insufficient time for it to complete its stages in the Commons before the end of the 2012–2013 parliamentary session. In any case, it would not have enjoyed governmental backing as the Government dismissed the measure during the Second Reading of the House of Lords Reform Bill on the eminently sensible basis that it did not encapsulate the full reform sought.<sup>110</sup> More recently in February 2013, the Government declined to offer support to the Bill even though long-term reform had been side-lined at this juncture. The justification for this was that there were no easy small scale reforms and that in a modern democracy “reform measures must include introducing elected Members to the House of Lords.”<sup>111</sup>

In January 2013, faced with the stalling of long-term reform, the Political and Constitutional Reform Committee launched an inquiry into what smaller-scale changes might be agreed in the interim. This inquiry was apposite as it is clear that the status quo is not feasible because in the absence of any reform at all, the size of the chamber will continue to rise<sup>112</sup> as more new peers are inevitably created in due course. In fact, the Lord Speaker has already expressed fears about the burgeoning number of peers opening the House up to ridicule.<sup>113</sup> As a result of this widespread concern, in late February 2013 the House of Lords passed a *Motion to Agree* calling for restraint in the recommendation of new appointments to the chamber. The Motion also called on the Government to support proposals (ie the Steel Bill) to allow members to permanently retire; provide for the exclusion of non-attendees and thirdly, that members convicted and sentenced to more than one year in prison should not attend the House.<sup>114</sup> It is of interest to note that the original Motion set down by Lord Steel was amended by Lord Hunt of Kings Heath in the terms set out above, but thereafter supported by Lord Steel. This Motion of Lord Steel had resolved that *no* introduction of new peers should take place until the concluding recommendation made by the Leader’s Group on Members Leaving the House had been complied with. This had called for restraint in recommending new appointments until the debate concerning the size of the House had been “conclusively determined.”<sup>115</sup> Lord Steel’s original Motion had raised the issue of the constitutional propriety of the House seeking to prevent new peers being introduced who had already been appointed by the Monarch.<sup>116</sup>

In terms of numbers, Lord Steel noted that if it is to be an interim strategy that the composition of the chamber is altered to reflect the view of the public at the last general election (as set out by the Coalition Government and the previous Labour Government), this could lead to “leapfrogging of increases after every election”<sup>117</sup> and requires a corresponding interim exit strategy for existing peers. In response to the Motion, the Leader of the House of Lords and Chancellor of the Duchy of Lancaster countered that the current Prime Minister had shown restraint and pointed out that the

<sup>110</sup> David Heath (n 74) col 130.

<sup>111</sup> Lord Wallace of Saltaire, HL Deb 14 February 2013, vol 743 col WA 176.

<sup>112</sup> In February 2013 the House of Lords comprised 762 members (<http://www.parliament.uk/mps-lords-and-offices/lords/lords-by-type-and-party/> last accessed 13/03/2013).

<sup>113</sup> Baroness D’ Souza, ‘We’re in danger of becoming a place of ridicule.’ *The Times* (6 February 2013) 20.

<sup>114</sup> HL Deb 28 February 2013, vol 743 col 1168.

<sup>115</sup> Leader’s Group on Members Leaving the House, *Members Leaving the House* (2010–12, HL Paper 83) para 67.

<sup>116</sup> Lord Hunt of Kings Heath (n 114) col 1170.

<sup>117</sup> (n 114) col 1167.

number of peers eligible to vote was not so different from five or six years ago.<sup>118</sup> As far as retirement is concerned, it is worth noting that to date only two members have taken advantage of the recently introduced (non-statutory) voluntary retirement scheme. In order to encourage members to retire, one possibility, which is opposed by the Government<sup>119</sup> and no doubt unpalatable to the public at large, would be for there to be a financial inducement. In terms of the attendance requirement of the Motion, it could be argued that in order to satisfy the requirement to attend, peers could simply make one appearance per session and thereby retain their position within the chamber. In any event, the Government has already set its face against the Steel/Laing Bill which will inevitably run into the sand. The likelihood therefore of the Government implementing this Motion is doubtful given that it contains the same elements of the Bill which the Government has already dismissed.

Finally, long-term reform of the House of Lords has clearly stalled and is currently at an impasse with the future prognosis looking far from promising. This is hardly surprising given that this issue has bedevilled parliamentarians since the passage of the 1911 Parliament Act. There is self-evidently no universal view on the composition of a reformed House. Constitutional reform moreover is complex and cannot take place in a vacuum as the reform of the upper House will necessarily have secondary effects on inter-House and Executive/parliamentary relations. There is no widespread agreement on the precise legal powers of the House of Lords and there are differing views as to the impact of reform on the conventions which regulate the chamber. The implementation of fundamental reform is years away and although the main political parties will undoubtedly include a manifesto commitment on Lords reform (either largely or fully elected), it seems unlikely that this would be a priority for any incoming Government in May 2015. Constitutional reform, after all, is hardly a vote winner and does not appear to raise great interest in the world outside Parliament. It is fair to speculate that it would certainly not be a priority for any future Conservative Government (the recent reform Bill having clearly been driven by the Liberal Democrats). It is clear that any Bill to reform the House in the next Parliament will inevitably endure a difficult time. This is aptly illustrated by the House of Lords Reform Bill, which, without an accompanying Programme Motion, would have taken up a considerable amount of valuable parliamentary time as did the last fully-fledged Government sponsored reform Bill in 1969 (i.e. the Parliament (No. 2) Bill). In any case, such a Bill would almost certainly face significant resistance in the Lords itself, unless the measure had been approved in a pre-legislative national referendum (a costly enterprise in an age of austerity).

## CONCLUSION

In the spring of 2013 the prospects for fundamental, long-term reform of the House of Lords look bleak to say the least. Sadiq Khan's prediction noted at the outset that the opportunity for reform this Parliament has now gone certainly seems to have been prescient. More worryingly, prospects look equally pessimistic for any incremental smaller-scale reforms to address the issue of increasing membership. It seems clear that the issue of House of Lords reform will continue to be hallmarked by division and controversy together with an apparent unwillingness for compromise. In conclusion, it

<sup>118</sup> Lord Hill of Oareford (n 114) cols 1178–9.

<sup>119</sup> *Ibid* col 1181.

seems apposite to quote the late Robin Cook who, speaking as the Leader of the House ten years ago made the following poignant observation about Lords reform: 'I was struck by the fact that there is a real possibility that we could drift into House of Lords reform becoming our parliamentary equivalent of "Waiting for Godot", as it never arrives and some have become rather doubtful whether it even exists, but we sit around talking about it year after year.'<sup>120</sup>

<sup>120</sup> HC Deb 4 February 2003 vol 399, col 152. For an interesting comparative approach to the reform of upper Houses see M Russell & M Sandford, 'Why are Second Chambers so Difficult to Reform?' (2002) 8 *Journal of Legislative Studies* 79.

# THE BEST INTERESTS OF THE CHILD IN UK IMMIGRATION LAW

AYESHA CHRISTIE \*

## INTRODUCTION

On 18 November 2008, nearly two decades after ratification of the United Nations Convention on the Rights of the Child (UNCRC), the United Kingdom withdrew its general reservation on immigration matters. The reservation had permitted the UK to derogate from the UNCRC rights and obligations in relation to legislation concerning immigration and nationality matters. As noted by Drew and Nastic, the withdrawal of the reservation was due to the persistence of children's charities, rather than the UK government relaxing its concerns about compromising immigration control.<sup>1</sup> Section 55 of the Borders, Citizenship and Immigration Act 2009 (BCIA 2009) came into force on 2 November 2009. It imposed upon the Secretary of State, in discharging her immigration functions, a statutory duty to "[have] regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".<sup>2</sup> This duty applies when making immigration, asylum or nationality decisions which affect children.<sup>3</sup> This article will analyse the impact of section 55 BCIA 2009 on the development of UK immigration law, considering a selection of domestic case law and Strasbourg jurisprudence, preceding and subsequent to the enforcement of section 55. It will also consider the extent to which the overhaul of UK family immigration law of 9 July 2012 is compatible with the section 55 duty.<sup>4</sup>

Article 3(1) of the UNCRC states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>5</sup>

Yet prior to the UK withdrawing its reservation to the UNCRC on immigration matters and section 55 BCIA 2009 coming into force, there was little reference to the UNCRC in domestic immigration case law. Children were often treated as an appendage to their parents rather than rights-bearers in themselves, deserving of special individual attention. For many years, the Secretary of State and the courts accorded less weight to family relationships formed during an applicant's precarious immigration status, applying this reasoning not just to relationships between adults (*Abdulaziz, Cabales and Balkandali v UK*<sup>6</sup>), but also where children were involved (*Mahmood v SSHD*<sup>7</sup>). Where a child's parent faced removal or deportation, the courts held that the best interests of the child should not be given paramountcy or primacy. Rather, a

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<sup>1</sup> Sandhya Drew and Dragan Nastic, 'The immigration reservation to the Convention on the Rights of the Child: an insuperable difficulty no more' [2009] Journal of Immigration, Asylum and Nationality Law, 23(2).

<sup>2</sup> Borders, Citizenship and Immigration Act 2009, s 55(1)(a)

<sup>3</sup> *Ibid.* s 55(2)(a)

<sup>4</sup> Case law promulgated prior to 1 December 2012 has been considered, with the exception of the later cases of *EU (Afghanistan) & Ors v SSHD* [2013] EWCA Civ 32, *Izuazu (Article 8 – new rules) Nigeria* [2013] UKUT 45 (IAC) and *Ogundimu (Article 8 – new rules) Nigeria* [2013] UKUT 60 (IAC), which add substantially to the discussion in this article.

<sup>5</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3, Article 3(1)

<sup>6</sup> *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471

<sup>7</sup> *Mahmood, R (on Application of) v SSHD* [2000] EWCA Civ 315, [2001] HRLR 14

balancing exercise should weigh the interests of all parties against the interests of immigration policy, in which “the scales start even with no preferences being given to the interests of the child” (*Gangadeen and Khan*<sup>8</sup>). Children who had resided in the UK from birth for a number of years, including those with a British parent, were expected to follow their non-British parent abroad, or remain in the UK, separated from them. Children were defined by their status as migrants, with no attention paid to their rights as children.

Where children were detained, the courts had accepted that Article 5 of the European Convention on Human Rights (ECHR)<sup>9</sup>, the right to liberty and security, must be read in light of Articles 3 and 37(b) UNCRC, which states that detention should be used only “as a measure of last resort and for the shortest appropriate period of time”.<sup>10</sup> Detention would be unlawful if an immigration officer failed to have regard to the UNCRC (*ID v SSHD*).<sup>11</sup> In *R (S, C and D) v SSHD* Wyn Williams J held that the UK’s reservation to the UNCRC (which reserved the right to apply legislation on immigration matters where it was deemed “necessary”), did not extend to permitting legislation relating to administrative detention which contravened the provisions of the UNCRC.<sup>12</sup> Nonetheless, he found that the Secretary of State’s detention policy was compatible with “the general thrust” of the UNCRC. However, no reference was made to the “best interests of the child” test required by Article 3 UNCRC; compatibility was assessed by comparing the domestic policy with the international convention “objectively” and “in the round”.

In 2008 the House of Lords issued a number of judgments which signified a shift in jurisprudence in relation to Article 8 ECHR, the right to family and private life, where children are concerned. *Beoku Betts* stressed that the Article 8 rights of *all* family members concerned, including children, must be taken into account when making a decision to remove a family member.<sup>13</sup> *Chikwamba* held that it would disproportionately breach Article 8 to expect a child to be separated from her mother, or alternatively to travel with her to Zimbabwe and endure “harsh and unpalatable conditions” in order for her mother to apply for entry clearance to return to the UK.<sup>14</sup> Their Lordships departed from the decision in *Mahmood* that it would be unfair for an applicant to “skip the queue” by not having to return home to apply for entry clearance, even if children were involved.<sup>15</sup> *EB (Kosovo)* considered the relevance of delay by the Secretary of State to Article 8, finding that when assessing the reasonableness of relocation of a child, factors such as the child’s integration in the UK, living arrangements, and strength of family relations which would be severed on leaving the UK, should all be considered.<sup>16</sup> *EM (Lebanon)* acknowledged that separate consideration of the child’s Article 8 rights is required, with Lady Hale discussing the possibility of separate representation of children where required.<sup>17</sup>

<sup>8</sup> *R v SSHD ex parte Gangadeen and Khan* [1998] 1 FLR 762

<sup>9</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)

<sup>10</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3, Article 37(b)

<sup>11</sup> *ID and Others v SSHD* [2005] EWCA Civ 38, [2006] 1 WLR 1003

<sup>12</sup> *R (S, C and D) v SSHD* [2007] EWHC 1654 (Admin)

<sup>13</sup> *Beoku Betts v SSHD* [2008] UKHL 39, [2009] AC 115

<sup>14</sup> *Chikwamba v SSHD* [2008] UKHL 40, [2009] 1 All ER 363

<sup>15</sup> *Mahmood, R (on Application of) v SSHD* [2000] EWCA Civ 315, [2001] HRLR 14

<sup>16</sup> *EB (Kosovo) v SSHD* [2008] UKHL 41, [2009] 1 AC 1159

<sup>17</sup> *EM (Lebanon) v SSHD* [2008] UKHL 64, [2009] AC 1198

Although these cases significantly expanded the assessment of Article 8 where children were concerned, there was, as described by Bolton, “a deafening silence” on the issue of the UNCRC, with the rights of the child “almost wholly seen as part of an overall assessment of the family unit and not in the context of the UNCRC”.<sup>18</sup> This was despite confirmation from the European Court of Human Rights that where Article 8 ECHR is engaged, it is mandatory that the decision-maker treat the best interests of the child as a primary consideration (*Uner v Netherlands*<sup>19</sup>). No obligation was placed on the decision-maker to seek evidence necessary for an objective assessment of the interests of children affected by immigration decisions. Drew and Nastic, writing following the withdrawal of the reservation to the UNCRC, comment on the “lack of structure and specificity under art 8 jurisprudence as to how the executive and the judiciary are to carry out the assessment of best interests”.<sup>20</sup>

### THE ENACTMENT OF SECTION 55 BCIA 2009

However, after section 55 BCIA 2009 came into force, the courts began to expressly consider the nature and scope of the duty imposed on the Secretary of State, with reference to the UNCRC. Section 55 requires that the Secretary of State’s immigration, asylum and nationality functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK. Section 55(3) requires that a person exercising any of the Secretary of State’s functions must have regard to statutory guidance relating to the section 55 duty; this includes contractors such as G4S, Reliance, and Serco, who run immigration detention centres, operate detainee escort services and provide housing for asylum seekers.<sup>21</sup> The statutory guidance, *Every Child Matters*, imposes a duty to treat the best interests of the child as a primary consideration in accordance with the UNCRC. It also imposes positive obligations on the Secretary of State, not normally seen in an immigration context, for example, “ensuring that children are growing up in circumstances consistent with the provision of safe and effective care” and “enabl[ing] those children to have optimum life chances and to enter adulthood successfully”. In order to depart from the guidance, the Secretary of State’s officials must “have clear reasons for doing so”.<sup>22</sup>

Following the implementation of section 55, various judgments began to refer to the “interests” and “welfare” of children. The Upper Tribunal confirmed that the interests of the child should be a primary consideration in immigration cases, and must be treated as such in an assessment of Article 8 ECHR (*LD (Article 8 – best interests of child) Zimbabwe*<sup>23</sup>). In assessing the content of a “best interests” consideration in removal cases, factors such as the social welfare of the child, the importance of educational continuity, and the effect of removal on the child’s health were addressed (*R (TS) v SSHD*<sup>24</sup>). In *R (Banda) v SSHD* the Administrative Court ruled that the Secretary of State was irrational in the public law sense and “cavalier” in certifying a

<sup>18</sup> Syd Bolton, ‘Promoting the best interests of the child in UK asylum law and procedures’ [2012] *Journal of Immigration, Asylum and Nationality Law*, 26(3) 232–254

<sup>19</sup> *Uner v The Netherlands*, App no 46410/99 [2006] ECHR 873, (2007) 45 EHRR 14

<sup>20</sup> Sandhya Drew and Dragan Nastic, ‘The immigration reservation to the Convention on the Rights of the Child: an insuperable difficulty no more’ [2009] *Journal of Immigration, Asylum and Nationality Law*, 23(2).

<sup>21</sup> *Borders, Citizenship and Immigration Act 2009*, s 55(3)

<sup>22</sup> Home Office, *Every Child Matters, Change for Children*, November 2009

<sup>23</sup> *LD (Article 8 – best interests of child) Zimbabwe* [2010] UKUT 278 (IAC), [2011] Imm AR 99

<sup>24</sup> *R (TS) v SSHD and Northamptonshire County Council* [2010] EWHC 2614 (Admin), [2011] Imm AR 164

family's claim against removal as clearly unfounded.<sup>25</sup> The Secretary of State was criticised for failing to investigate the availability of realistically alternative childcare if the children's parents, both HIV positive, should die or become unable to care for them on return to Malawi. This judgment placed an unprecedented investigatory burden on the Secretary of State where children are concerned, which the courts have since expanded.

The first in-depth consideration of the scope and meaning of section 55 BCIA 2009 was in *R (TS) v SSHD and Northamptonshire County Council*.<sup>26</sup> The High Court ruled that the transfer of a child asylum-seeker under the Dublin II Regulation was unlawful due to the failure to comply with section 55.<sup>27</sup> The court held that decision-makers must have regard to the section 55 duty as well as *Every Child Matters*, and it must be clear from the decision that the duty has been discharged. Wyn Williams J criticised the Secretary of State's approach to consideration of the child's welfare. Instead of first making a decision to remove as normal practice, and only afterwards considering whether any factors militate against removal, the court held that the decision-maker must look at what is in the child's best interests as a primary consideration, before making a decision. The court ruled that a decision-maker may not treat the best interest of the child as a primary consideration if "cogent reasons" are given for not doing so; however, this was subsequently overruled by the Supreme Court in *ZH (Tanzania) v SSHD*, discussed below.<sup>28</sup>

In *R (Suppiah) v SSHD*, Wyn Williams J gave guidance on the best interests of children in detention, finding the detention of two families to be unlawful due to a failure by the Secretary of State to comply with section 55 duties.<sup>29</sup> The court was critical that there was no documentation to demonstrate that the duty under section 55 was properly considered, finding that an assertion by UKBA officials that they had considered section 55 was by itself insufficient. Wyn Williams J confirmed his ruling in *R (S, C and D) v SSHD* (discussed above) that the Secretary of State's detention policy complied with the UNCRC and was consistent with section 55.<sup>30</sup> The Appellants argued that the absence of safeguards in the policy, to ensure that the best interests of the child are treated as a primary consideration, renders the policy inoperable in practice. This was rejected, although the court did stress the requirement for "rigorous implementation" of the policy to ensure greater focus on the welfare of children by decision-makers.

Whilst the detention policy was found to comply with the statutory duty, the introduction of section 55 resulted in cases challenging the lawfulness of decisions to detain a parent, which *indirectly* affected a child. In *R (MXL & Ors) v SSHD*, Blake J criticised the failure of the UK Border Agency to systematically consider its obligations towards children separated from their mother whilst her detention was maintained.<sup>31</sup> He stressed the importance of considering the claimant's representations alongside advice from external professionals, and keeping the proportionality of the claimant's detention under review.

<sup>25</sup> *R (Banda) v SSHD* [2010] EWHC 2471 (Admin)

<sup>26</sup> *R (TS) v SSHD and Northamptonshire County Council* [2010] EWHC 2614 (Admin), [2011] Imm AR 164

<sup>27</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50

<sup>28</sup> *ZH (Tanzania) v SSHD* [2011] UKSC 4, [2011] 2 AC 166

<sup>29</sup> *R (Suppiah) v SSHD* [2010] EWHC 11 (Admin)

<sup>30</sup> *R (S, C and D) v SSHD* [2007] EWHC 1654 (Admin)

<sup>31</sup> *R (MXL & Ors) v SSHD* [2010] EWHC 2397 (Admin)

## THE DECISION OF THE SUPREME COURT IN ZH (TANZANIA)

In February 2011 the Supreme Court gave a landmark ruling on the weight to be accorded to the best interests of children affected by a decision to remove or deport one or both of their parents, in *ZH (Tanzania) v SSHD*.<sup>32</sup> Lady Hale, giving the leading judgment, distinguished between decisions which directly affect a child's upbringing (such as decisions as to with whom a child will live), in which the child's best interests must be the "paramount" consideration, and other decisions which affect children indirectly, such as decisions about the removal or deportation of a parent. In the latter, a weaker test is applied, in which the best interests of the child must be considered first, as a primary consideration. Failure to consider the best interests of children will render the decision "not in accordance with the law" for the purposes of Article 8(2) ECHR. However, she held that the child's interests could be outweighed by the cumulative effect of other considerations.

Lady Hale, in distinguishing between decisions which directly and indirectly affect a child, appears to leave room to argue, in the case where a deportation decision applies directly to a child, that a stronger test than "primary consideration" should be applied. However, *ZH (Tanzania)* considered the removal of a parent, and the courts have yet to determine which test applies when the expulsion decision applies directly to a child. Of relevance will be the European Court of Human Rights' judgment in *Maslov v Austria*.<sup>33</sup> The court applied Article 40 UNCRC, which requires the promotion of a child delinquent's reintegration into society, emphasising that a duty to promote the rehabilitation of juvenile offenders is incorporated into the best interests obligation when considering expulsion measures.<sup>34</sup>

*ZH (Tanzania)* concerned a mother with "an appalling immigration history". Yet Lord Hope stressed that it is wrong to judge the reasonableness of a child's relocation in light of the fact that they were conceived during a parent's precarious immigration status, or to devalue their best interests as a consequence. This signified a departure from the reasoning hitherto followed by the courts, that lesser weight should be accorded to family and private life formed whilst immigration status was precarious (see *Mahmood*). In *R (Reece-Davis) v SSHD* the High Court acknowledged the change to the way in which a parent's poor immigration history is viewed, following the enactment of section 55 BCIA 2009 and the ruling in *ZH (Tanzania)*.<sup>35</sup> More recently, in *HH v Deputy Prosecutor of the Italian Republic*, a case concerning extradition, Lady Hale reiterated that

The importance of the child's best interests is not to be devalued by something for which she is in no way responsible, such as the suspicion that she may have been deliberately conceived in order to strengthen the parents' case.<sup>36</sup>

*ZH (Tanzania)* stressed that what is relevant to the reasonableness of relocation is the child's integration in the UK, living arrangements in the country of removal, and the strength of the child's relationship with family members in the UK (factors which were considered in *EB (Kosovo)*). This reflects the Strasbourg ruling in *Uner v The Netherlands* which explicitly mentions the requirement, when assessing proportionality,

<sup>32</sup> *ZH (Tanzania) v SSHD* [2011] UKSC 4, [2011] 2 AC 166

<sup>33</sup> *Maslov v Austria* App no 1638/03 [2009] INLR 47

<sup>34</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3, Article 40

<sup>35</sup> *R (Reece-Davis) v SSHD* [2011] EWHC 561 (Admin), [2011] All ER (D) 275

<sup>36</sup> *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2012] 3 WLR 90 [15]

to consider the difficulties which any children being expelled along with their parents would face in the receiving country.<sup>37</sup>

Lord Kerr's judgement in *ZH (Tanzania)* extends the furthest, finding that the best interests of children are a factor "that must rank higher than any other. . . Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them".<sup>38</sup> The Court of Appeal has held that the judgments in *ZH (Tanzania)* are consistent (*Lee v SSHD*).<sup>39</sup> This raises the threshold in removal cases, indicating that the "maintenance of immigration control" alone would be insufficient to outweigh the best interests of the children if they point to remaining in the UK, although in deportation cases, the public interest may outweigh that of the children concerned.

The Supreme Court considered the circumstances in which it is permissible to remove or deport a non-citizen parent, where the effect is that the child, who is a British citizen, will also have to leave the UK. Citizenship was found to be an important factor in the best interests assessment. The court stressed that it is insufficient to assume that a young British citizen child will readily adapt to life in another country, for that child will be deprived of the social, cultural, medical, educational and linguistic opportunities of the country of their nationality.<sup>40</sup> They will be unable to exercise their rights as British citizens and will have lost the advantages of growing up in their own country. The court held that British Citizenship "will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country".<sup>41</sup> Prior to *ZH (Tanzania)* the courts had not allocated particular importance to a child's citizenship; it was generally considered to be reasonable for a British citizen child to accompany their non-British parent when removed, with the option to return to the UK as an adult.

Additionally, the importance of Article 12 of the UNCRC, which relates to the child's right to be heard, was highlighted.<sup>42</sup> Lady Hale stressed, following *EM (Lebanon)*, that some circumstances may require a child to be separately represented.<sup>43</sup> The court found that "the immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so",<sup>44</sup> and that it should not be taken for granted that a child's interests will be the same as their parents, although this may often be the case.

## THE RIGHTS OF CHILDREN SUBSEQUENT TO ZH (TANZANIA)

Following *ZH (Tanzania)*, there has been a proliferation of litigation on the subject of the "best interests of the child". Whilst *ZH (Tanzania)* principally examined the weight to be accorded to the best interests of children affected by a decision to remove or deport one or both of their parents, subsequent case law has looked further at the content and scope of the duty. The Court of Appeal in *AJ (India)* stressed that compliance with section 55 is a matter of substance rather than of form, finding that

<sup>37</sup> *Uner v The Netherlands*, App no 46410/99 [2006] ECHR 873, (2007) 45 EHRR 14

<sup>38</sup> *ZH (Tanzania) v SSHD* [2011] UKSC 4, [2011] 2 AC 166 [46]

<sup>39</sup> *Lee v SSHD* [2011] EWCA Civ 348, [2011] Imm AR 542

<sup>40</sup> *ZH (Tanzania) v SSHD* [2011] UKSC 4, [2011] 2 AC 166, [30–32]

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

<sup>42</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3, Article 12

<sup>43</sup> *ZH (Tanzania) v SSHD* [2011] UKSC 4, [2011] 2 AC 166, [35]

<sup>44</sup> *Ibid.* [37]

it is not necessary to specifically refer to section 55 if the substance of the duty is considered by the decision-maker in the “overall assessment”, and that the order in which factors are considered is not crucial.<sup>45</sup> However, in *Asefa* the Judge held that considering the best interests of the children involved *first*, will ensure that they are an integral part of the initial decision, and will avoid the error of first determining whether a parent should be removed, and then considering the interests of the children as an afterthought or a reason to review the decision.<sup>46</sup> It was stressed, however, that this must amount to more than a purely temporal approach to decision-making so as to ensure that sufficient regard is paid to the interests of the child.

Likewise, more recently in *HH v Deputy Prosecutor*, Lord Kerr reiterated the importance of considering the best interests of the child first, stating that it was “a matter of logical progression” to first understand the nature of the rights of the children concerned and the importance to be attached to them, secondly to assess the degree of interference, and finally to decide whether the interference is justified. Lord Kerr also emphasised that the order of evaluation of the various considerations extends beyond being a technical approach; it “accords proper prominence to the matter of the children’s interests”, and avoids any risk of the child’s interests being undervalued.<sup>47</sup> However, the issue remains open, given that an equal number of Justices took the view that the order in which factors are considered is not decisive, providing the issue has been addressed in substance.

It is clear now that the Tribunal is required to consider the section 55 duty in its role as decision-maker, even if the Secretary of State has failed to do so, and even if section 55 was not in force at the time the initial decision was taken (*DS (Afghanistan)*).<sup>48</sup> Failure by the Tribunal to consider the best interests of the children affected by the decision, amounts to a serious error in law such that it justifies a grant of permission to appeal to the Court of Appeal (*SS (Sri Lanka) v SSHD*).<sup>49</sup> Furthermore, an ongoing assessment of families may be required, to avoid a breach of section 55, even when the particular circumstances do not presently meet the threshold such as to occasion a breach of their ECHR rights. *NA (Iran)* stressed that section 55 places a continuous obligation on the Secretary of State, rather than one which can be discharged once and for all once a decision is taken.<sup>50</sup> Where a number of decisions are taken separately, each decision should be reconsidered afresh (*Tinizaray*).<sup>51</sup>

*Tinizaray*, which concerned an application for leave to remain by overstayers, issued comprehensive guidance on the type of information the Secretary of State ought to have sought in assessing the child’s best interests. This included matters specified in Section 1 of the Children Act 1989, such as obtaining detailed information as to where a child is living; his or her relationship with family members; educational history; social network; aptitudes and future predictions for further all-round development if remaining in the UK; how the family would live and be maintained on return to their country of origin and where the child would go to school.<sup>52</sup> The feelings, attitudes and preferences of the child should be objectively obtained by a third-party source, with due weight given according to the child’s age and maturity.<sup>53</sup> The Court stressed that

<sup>45</sup> *AJ (India) and others v SSHD* [2011] EWCA Civ 1191

<sup>46</sup> *Asefa, R (on the application of) v SSHD* [2012] EWHC 56 (Admin)

<sup>47</sup> *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2012] 3 WLR 90 [144]

<sup>48</sup> *DS (Afghanistan) v SSHD* [2011] EWCA Civ 305, [2011] INLR 389

<sup>49</sup> *SS (Sri Lanka) v SSHD* [2012] EWCA Civ 945

<sup>50</sup> *NA (Iran) v SSHD* [2011] EWCA Civ 1172

<sup>51</sup> *Tinizaray R (on the application of) v SSHD* [2011] EWHC 1850 (Admin)

<sup>52</sup> Children Act 1989, s 1

<sup>53</sup> *Tinizaray R (on the application of) v SSHD* [2011] EWHC 1850 (Admin) [13]

without sufficient information, a decision-maker cannot give primary consideration to the child's best interests.<sup>54</sup> Whilst the burden of proof is on the Appellants to show a breach of Article 8, *Tinizaray* indicates that section 55 imposes an investigatory burden on the Secretary of State to procure such evidence as to the child's circumstances as is necessary to assess the best interests, which may include separately interviewing parent and child, and seeking the view of professionals. This suggests that, despite statutory guidance to the contrary, new functions are indeed imposed on the UK Border Agency.<sup>55</sup> With regards to the cuts to legal aid in immigration cases, discussed further below, it has been submitted by the Immigration Law Practitioners' Association (ILPA) that "Absent a lawyer to assist the separated child, the obligations on the UK Border Agency will become more onerous as well as conflicted".<sup>56</sup>

## DEPORTATION AND THE BEST INTERESTS OF THE CHILD

Many of the cases exploring the scope of section 55 have involved a parent facing deportation and the potential splitting up of a family. Article 9(3) UNCRC requires the State to respect a child's right "...to maintain personal relations and direct contact with both parents on a regular basis...".<sup>57</sup> The approach of the Secretary of State has been that where a person is subject to automatic deportation under section 32 of the Borders Act 2007, the case for deportation is prioritised, with consideration of whether the impact on family life outweighs it following subsequently.<sup>58</sup> However, as the case law on section 55 develops, this approach has been criticised. In *Sanade*, instead of placing emphasis on the reasonableness of the family's relocation, the Tribunal held that the focus should be on whether the crime committed is of such a serious nature that the family should be divided.<sup>59</sup> This confirmed the Court of Appeal's ruling in *Lee*, although in *Lee* the conviction of the father for possession of Class A drugs with intent to supply was held to be sufficiently serious to justify separation from his children.<sup>60</sup> Yet in *Sanade*, where Mr Sanade had been convicted of indecent assault, but did not pose a risk of re-offending, deportation was held to be disproportionate. Similarly in *Omotunde (best interests – Zambrano applied – Razgar) Nigeria*, the deportation of a father convicted of serious fraud on public revenue, who was the primary carer of his young British son, was found to disproportionately interfere with his son's Article 8 rights.<sup>61</sup> The Tribunal rejected the Secretary of State's submission that family life between the deported father and young child remaining in the UK, could be maintained appropriately by "modern methods of communication".<sup>62</sup> The development in case law illustrates that whilst the right to deport a parent convicted of a very serious crime is preserved, the focus on the splitting up of a family must be given principal importance in deportation decisions.

<sup>54</sup> *Tinizaray R (on the application of) v SSHD* [2011] EWHC 1850 (Admin) [25]

<sup>55</sup> Home Office, *Every Child Matters, Change for Children*, November 2009, states that "The duty does not create any new functions, nor does it over-ride any existing functions, rather it requires them to be carried out in a way that takes into account the need to safeguard and promote the welfare of children." (Home Office, 2009) para 2.3

<sup>56</sup> Immigration Law Practitioners' Association, Submission to the Joint Committee on Human Rights inquiry into the human rights of unaccompanied migrant children and young people in the UK, October 2012, para. 26

<sup>57</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3, Article 9(3)

<sup>58</sup> Borders Act 2007, s 32

<sup>59</sup> *Sanade and others (British children – Zambrano – Dereci)* [2012] UKUT 48 (IAC)

<sup>60</sup> *Lee v SSHD* [2011] EWCA Civ 348, [2011] Imm AR 542

<sup>61</sup> *Omotunde (best interests – Zambrano applied – Razgar) Nigeria* [2011] UKUT 00247 (IAC)

<sup>62</sup> *Ibid.* [28]

*Sanade* applied the principles in *ZH (Tanzania)* and the decisions of the Court of Justice of the European Union in *Ruiz Zambrano*<sup>63</sup> and *Dereci*<sup>64</sup>, which emphasised the importance of European Union citizenship as a factor which raises the threshold of when interference with family life may be justified. British children constructively removed from the UK would be deprived of opportunities inherent in growing up in their country of origin. The Tribunal found that “it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so”.<sup>65</sup> Where British children are not required (due to dependency) to follow their parent being removed from the UK, their right to reside in the UK is not impaired, but rather, their right to enjoy family life whilst residing in the UK. Interference with family life in such circumstances can only be justified on the basis that the conduct of the person facing deportation is so serious as to justify separation.

A number of cases in 2012 dealt with the cross-over between the immigration and family courts where a parent is subject to deportation. The two jurisdictions apply different tests; in immigration proceedings the best interests of the child are a primary consideration, which may be outweighed by other factors, whereas in the family courts, the welfare of the child is *the paramount consideration*.<sup>66</sup> A decision of the family courts cannot prevent the Secretary of State from making a decision to remove a child subject to immigration control from the UK; however, it will be relevant to an assessment under Article 8 ECHR. In most cases, therefore, where there are parallel family proceedings related to the care of children, deportation proceedings against a parent or carer should be adjourned or a short period of discretionary leave granted, pending the decision of the family courts as to what is in the best interests of the child, which may be decisive to determining the deportation appeal (*RS (immigration and family court proceedings) India*).<sup>67</sup> The Court of Appeal in *Mohan v SSHD* confirmed this approach, highlighting the expertise of the family courts and the resources at its disposal to determine what is in the best interests of the child.<sup>68</sup> The court allowed for circumstances in which the immigration courts may conclude that it is unnecessary to delay deportation proceedings to await the judgment of the family court, where “the material in favour of the appellant lacks substance and the public interest in deportation is overwhelming”,<sup>69</sup> such as was the case in *Nimako-Boateng*.<sup>70</sup> However, Kay LJ stressed that in other circumstances, the judgment of the family court “could and should inform the decision-making of the Tribunal on the issue of the proportionality of deportation”, in relation to the best interests of the children involved.<sup>71</sup> The recognition of the expertise of the family courts in determining the best interests of children is a positive step forward. However, in immigration cases without parallel care proceedings, it remains for immigration judges, whose expertise lies elsewhere and whose resources do not permit for an independent assessment of a child’s circumstances, to determine the impact on children faced with the splitting up of their family. Children whose lives are not touched by the involvement of the family courts remain viewed within the prism of immigration control, which is not conducive

<sup>63</sup> Case C-34/09 *Ruiz Zambrano (European citizenship)* [2011] EUECJ, [2012] QB 265

<sup>64</sup> Case C-256/11 *Dereci & Ors (European citizenship)* [2011] EUECJ

<sup>65</sup> *Sanade and others (British children – Zambrano – Dereci)* [2012] UKUT 48 (IAC) [95]

<sup>66</sup> Children Act 1989, s 1

<sup>67</sup> *RS (immigration and family court proceedings) India* [2012] UKUT 00218 (IAC)

<sup>68</sup> *Mohan v SSHD* [2012] EWCA Civ 1363, WLR(D) 291

<sup>69</sup> *Ibid.* [31]

<sup>70</sup> *Nimako-Boateng (residence orders – Anton considered) Ghana* [2012] UKUT 00218 (IAC)

<sup>71</sup> *Mohan v SSHD* [2012] EWCA Civ 1363, WLR(D) 291 [31]

to treating these children as children first, with all their specific rights and needs as children, and as migrants (or children of migrants) second.<sup>72</sup>

Notwithstanding, the developments in the UK case law regarding the deportation of parents where children are affected have, since the enforcement of section 55, been positive. However, the European Court of Human Rights has been less consistent in its judgments, as illustrated by two recent cases, *Antwi and Others v Norway*<sup>73</sup> and *Nunez v Norway*<sup>74</sup>. In *Antwi* the Strasbourg court ruled by a majority that it would not violate Article 8 ECHR to expel from Norway the Ghanaian father of a ten year old Norwegian child, and to impose a five year ban upon re-entry. In this case the father had repeatedly used a false passport to obtain permission to live and work in Norway. Despite the father's close involvement in his daughter's life, the child's limited links with Ghana, her inability to speak the national language, and the fact that at age ten, she was actively involved in school, recreational activities and with friends in Norway, the court ruled that father's deportation and re-entry ban would not violate the daughter's Article 8 rights. The court held that the daughter did not have any "special care needs" and that her mother would be able to provide "satisfactory" care by herself.<sup>75</sup> The court held that there were no "exceptional circumstances" pertaining to the child, and concluded therefore that sufficient weight had been attached to the best interests of the child in ordering her father's expulsion and five year ban on re-entry. The court did not acknowledge the daughter's vulnerability and specific needs as a child, and no reference was made to the guidance of the UN Committee on the Rights of the Child, that

Young children are especially vulnerable to adverse consequences of separations because of their physical dependence on and emotional attachment to their parents/primary caregivers. They are also less able to comprehend the circumstances of any separation.<sup>76</sup>

The dissenting opinions of Judge Sicilianos and Judge Lazarova Trajkovska, however, paid far greater attention to the principle of the best interests of the child, noting that the majority of the Norwegian High Court had acknowledged that the father's expulsion would "clearly not" be in the best interests of his daughter, and further, that the Strasbourg Court had previously ruled that "the passage of time can have irremediable consequences for relations between the child and the parent with whom he or she does not live".<sup>77</sup> The dissenting judges describe the majority in *Antwi* as "seem[ing] to pay lip service to a guiding human rights principle", concluding that the deportation and re-entry ban "could entail a serious disruption of the third applicant's adolescence"<sup>78</sup> and would violate the daughter's Article 8 rights.

The absence of consideration of the best interests of the child in this case by the majority of Strasbourg judges is striking. There is no assessment of the right of the child to educational continuity, to be cared for by both her parents, or to the social and cultural advantages of growing up in the country of her nationality. The judges

<sup>72</sup> The issue of a child's status as a migrant first, child second, is discussed with reference to asylum-seeking children by Eva Zschirnt, 'Does migration status trump the best interests of the child? Unaccompanied minors in the EU asylum system' [2011] *Journal of Immigration, Asylum and Nationality Law*, 25(1) 34–55.

<sup>73</sup> *Antwi and Others v Norway* App no 26940/10 (ECHR, 9 July 2012)

<sup>74</sup> *Nunez v Norway* App no 55597/09 (ECHR 28 September 2011)

<sup>75</sup> *Antwi and Others v Norway* App no 26940/10 (ECHR, 9 July 2012) [99]

<sup>76</sup> United Nations Committee on the Rights of the Child, General Comment No. 7, 'Implementing Child Rights in Early Childhood' (2005) [18]

<sup>77</sup> *Macready v the Czech Republic*, 4824/06 and 15512/08 (ECHR 22 April 2010)

<sup>78</sup> *Antwi and Others v Norway* App no 26940/10 (ECHR, 9 July 2012), Dissenting Opinion [8]

instead refer to the precariousness of the father's immigration status at the time that family life was formed, requiring "exceptional circumstances" for the best interests of the child to be given greater weight.

In *Nunez* a differently constituted chamber had, several months earlier, ruled that it would be a violation of Article 8 ECHR to expel and impose a two year re-entry ban on the mother of two children (aged eight and nine) who had resided in Norway since birth, although they were not Norwegian nationals.<sup>79</sup> The children were living with their father who was a settled immigrant. In this case the mother had committed repeated breaches of immigration law, including defying a ban on re-entry and using a false passport. The Court in *Nunez* emphasised that it was uncertain whether the mother would be permitted to re-enter Norway following the two year prohibition, stressing that two years was a long period for the children to be separated from their mother, and not in their best interests (factors not considered by the court in *Antwi*). The court in *Nunez* had regard to the "disruption and stress" experienced by the children in relation to their custody arrangements, during the long period prior to the Norwegian authorities imposing an expulsion order and re-entry ban upon their mother; yet the lack of disruption regarding custody of the child in *Antwi* was a factor the court used to deny "exceptional circumstances".<sup>80</sup>

The dissenting judgment in *Nunez*, however, highlights the difficulty even the European Court of Human Rights has with viewing the children's interests in isolation from their parent's immigration history. The dissenting judges state:

We are particularly concerned that this case will send the wrong signal, namely that persons who are illegally in a country can somehow contrive to have their residence 'legitimised' through the expedient of marriage and of having children.<sup>81</sup>

Such a view fails to consider children as individual human beings, as holders of rights in themselves. It fails to even consider a child's best interests, let alone view them as a primary concern. Rather, it reverts, shamefully, to considering children as no more than a convenient excuse for an immigration offender.

In contrast, it is extremely positive that the UK Supreme Court has stressed, repeatedly now, that a parent's poor immigration history is not to be taken into account when assessing the best interests of the children. Whilst Strasbourg has referred to the requirement to find "exceptional circumstances" where family life is formed during a precarious immigration status (language echoed in the revised UK Immigration Rules), the domestic courts have confirmed that there is no test of exceptionality in determining the weight to be accorded to the best interests of the child; the test is that of proportionality (*HH v Deputy Prosecutor*).<sup>82</sup>

## BRITISH CITIZENSHIP OR SEVEN YEARS' RESIDENCE

The impact of a child's British citizenship extends further than deportation and removal cases, and is also material to detention cases. In *R (SM)*, the court held that the Secretary of State's failure to assess the effect of the child's British citizenship on the detention and proposal to deport the non-citizen father, was material to whether

<sup>79</sup> *Nunez v Norway* App no 55597/09 (ECHR 28 September 2011)

<sup>80</sup> *Antwi and Others v Norway* App no 26940/10 (ECHR, 9 July 2012), [101–103]

<sup>81</sup> *Nunez v Norway* App no 55597/09 (ECHR 28 September 2011) Dissenting Opinion [1]

<sup>82</sup> *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2012] 3 WLR 90

there was a realistic prospect of deportation within a reasonable timeframe, and consequently detention was found to be unlawful.<sup>83</sup>

Although the court has stressed that “non-British nationality is not of decisive importance”,<sup>84</sup> where neither the child nor one of the parents is British or settled in the UK, the courts have been more reluctant to find that the best interests of young children require a grant of leave to remain in the UK. In *E-A (Article 8 – best interests of child) Nigeria*, the parents had temporary stay in the UK with no legitimate expectation of settlement.<sup>85</sup> The Tribunal held that the private life formed by young children is “still of a very personal, intra-family nature in the main, with the focus on the home and family”,<sup>86</sup> and although some adaptation would be required on the family’s return to Nigeria, removal did not involve splitting the family, and refusal of leave to remain was proportionate. Nonetheless, it is argued that even where young children are concerned, the courts should consider that the child’s interests comprise of two limbs, as emphasised by the Supreme Court: “maintaining family ties and ensuring his development within a sound environment”.<sup>87</sup> The second limb arguably includes a child’s future social and educational prospects, which are relevant regardless of a child’s age or period of residence in the UK. Adequate consideration of a child’s right to future development requires decision-makers to view the child distinctly from their status as a migrant. Given our long history of scant regard as to the rights of migrant children, this may prove a long-standing challenge.<sup>88</sup>

Despite the view taken on young children with temporary stay in the UK, where children have resided in the UK for a longer period, in decisions subsequent to *ZH (Tanzania)*, the courts appear to be resurrecting the thrust of Home Office policy *DP5/96*. Known as the ‘seven year child concession’, it recognised the interests of children who had lived in the UK over a significant period of time, allowing families in this position to regularise their immigration status. The practice had previously been not to remove children who had been living in the UK for ten or more years; however in 1999, the policy was modified, with the Immigration Minister Mike O’Brien stating that ten years was too long a period: “Children who have been in this country for several years will be reasonably settled here, and may, therefore, find it difficult to adjust to life abroad”.<sup>89</sup> The presumption was thus applied, that the disruption of children’s lives if removed from the UK, would outweigh the legitimate aim of immigration control. The policy was applied to allow families with children who had lived in the UK for seven or more years to apply for indefinite leave to remain, which differed from the Secretary of State’s policy to grant three years’ discretionary leave where removal was found to breach Article 8 ECHR.

<sup>83</sup> *R (SM) v SSHD* [2011] EWHC 338 (Admin)

<sup>84</sup> *Tinizaray R (on the application of) v SSHD* [2011] EWHC 1850 (Admin) [13(4)]

<sup>85</sup> *E-A (Article 8 – best interests of child) Nigeria* [2011] UKUT 315 (IAC), [2011] Imm AR 872

<sup>86</sup> *Ibid.* [40]

<sup>87</sup> *Re E (Children)* [2011] UKSC 27, [2012] 1 AC 144, [21]

<sup>88</sup> Bolton discusses the inappropriate treatment of children in asylum appeals, the lack of confidentiality on the part of Social Services towards asylum-seeking children in their care, and the disregard of the best interests of migrant children in relation to their care, and within immigration proceedings. Syd Bolton, ‘Promoting the best interests of the child in UK asylum law and procedures’ [2012] *Journal of Immigration, Asylum and Nationality Law*, 26(3) 232–254. A 2010 report by Refugee and Migrant Justice highlighted a “shocking disregard for children’s welfare needs within the UK Border Agency”. Refugee and Migrant Justice, ‘Safe at last? Children on the front line of border control’, 2010 [[http://www.crin.org/docs/RMJ\\_safe\\_at\\_last.pdf](http://www.crin.org/docs/RMJ_safe_at_last.pdf)] accessed 14 December 2012. The issue is also raised by the Children’s Society; see The Children’s Society, ‘Into the unknown, Children’s journeys through the asylum process’, September 2012 [<http://www.childrensociety.org.uk/sites/default/files/tcs/into-the-unknown-childrens-journeys-through-the-asylum-process-the-childrens-society.pdf>] accessed December 2012.

<sup>89</sup> House of Commons, Hansard, Written answers to Parliamentary Questions, 24 February 1999, Cols 309–310

In *R (A) v SSHD* the High Court recognised that

the legitimate aim that ‘DP5/96’ pursues is protection of the interests of a child who has, over a significant period of time at a formative age, put down roots in this country from which (other than in an exceptional case) he or she should not be uprooted...<sup>90</sup>

In an Article 8 assessment, the policy was relevant to proportionality.<sup>91</sup> It affected the weight to be attached to the legitimate aim of maintaining immigration control, given the Secretary of State’s explicit recognition that immigration control did not normally require families with children who had lived in the UK for seven years or more to be removed.

However, the policy was withdrawn on 9 December 2008 by Immigration Minister Phil Woolas, who stated:

The original purpose and need for the concession has been overtaken by the Human Rights Act and changes to the immigration rules. The fact that a child has spent a significant period of their life in the United Kingdom will continue to be an important relevant factor to be taken into account by case workers when evaluating whether removal of their parents is appropriate.<sup>92</sup>

Although the courts had emphasised that the aim of the policy was to protect the child’s interests, with any benefit derived by the parent being a “by-product of that aim”,<sup>93</sup> the Immigration Minister’s statement shifted the focus away from assessing the interests of the child in remaining in the UK without disruption to their lives, to concentrating primarily on the removal of the child’s parents. In conducting the balancing exercise under Article 8 ECHR, the withdrawal of the policy required a child’s length of residence in the UK to be considered under the “countervailing considerations” aspect of the proportionality assessment, rather than as part of the “maintenance of immigration control”, where it previously reduced the weight of the Secretary of State’s aim.<sup>94</sup>

The Court of Appeal subsequently ruled that the policy does not apply to families who would have qualified but failed to rely on it prior to withdrawal, or to families who were short of acquiring seven years at the time of withdrawal.<sup>95</sup> However, following the enforcement of section 55 BCIA 2009, the Upper Tribunal repeatedly referred to the seven year child concessionary policy, describing it as “an administrative way of giving effect to the principle of the welfare of the child as a primary consideration”.<sup>96</sup> The long residence of a child in the UK was held to afford a basis for regularising the immigration status of the child and parents, in the absence of countervailing reasons of conduct (*EM and Others (Returnees) Zimbabwe*).<sup>97</sup>

The decision in *MK (best interests of child) India*, however, conflicted with this.<sup>98</sup> The elder child, aged 12, had lived in the UK for seven years; she was a high-achieving

<sup>90</sup> *R (A) v SSHD* [2008] EWHC 2844 (Admin), [2009] 1 FLR 531 [50]

<sup>91</sup> This was conceded by the Secretary of State in *NF (Ghana) v SSHD* [2008] EWCA Civ 906, [2009] INLR 93

<sup>92</sup> House of Commons, Hansard, Written Statements, 9 December 2008, Cols 49–50

<sup>93</sup> *R(A) v SSHD* [2008] EWHC 2844 (Admin), [2009] 1 FLR 531 [48]

<sup>94</sup> See *Razgar*, in which the House of Lords set out the steps which should be followed in an assessment of Article 8 ECHR. *Razgar, R (on the Application of) v. Secretary of State for the Home Department* [2004] UKHL 27, [2004] 3 All ER 821 [17]

<sup>95</sup> *SSHD v Rahman* [2011] EWCA Civ 814

<sup>96</sup> *LD (Article 8 best interests of child) Zimbabwe* [2010] UKUT 278 (IAC)

<sup>97</sup> *EM and Others (Returnees) Zimbabwe CG* [2011] UKUT 98 (IAC)

<sup>98</sup> *MK (best interests of child) India* [2011] UKUT 475 (IAC)

student, actively involved in extra-curricular activities, including a Young Artists programme and borough-wide debating. The younger child, aged six, was born in the UK. The Upper Tribunal held that the family's return to India would not be contrary to the children's best interests, attaching "very significant weight" to the fact that the children's parents had developed their family and private life in the UK "in full knowledge that their immigration status was precarious".<sup>99</sup> This decision is difficult to reconcile with much of the preceding case law. In finding that the family's return to India was in the children's best interests, the Tribunal appears to conduct a negative assessment of how much harm removal would cause the children, emphasising the return of the family as a whole, rather than positively considering what would be in the children's best interests. The Tribunal considers the impact of removal on the children's broader educational development, rather than what they consider to be a "short-term disruption in schooling".<sup>100</sup> However, subsequently, in *SC (Article 8 – in accordance with the law) Zimbabwe* the Upper Tribunal found that in the absence of strong countervailing factors such as criminality or fraud, removal of a parent with a child who had resided in the UK for eight years was likely to be disproportionate.<sup>101</sup> The new Immigration Rules, discussed in more detail below, have re-introduced the seven year continuous residence 'test' for children (and their parents) seeking to remain in the UK.

## SECTION 55 IN ENTRY CLEARANCE CASES

There has been limited judicial consideration of the application of section 55 or the UNCRC in entry clearance cases. In *T (s.55 BCIA 2009 – entry clearance) Jamaica*<sup>102</sup> the Upper Tribunal held that section 55 BCIA 2009 does not apply to children who are outside the UK.<sup>103</sup> However, the Tribunal found that the "spirit of the section 55 duty", as referred to in the guidance *Every Child Matters*, applied where the Entry Clearance Officer suspected that the child was in need of protection.<sup>104</sup> It imposed a requirement to "sufficiently explore disputed material" to reach a conclusion on what is in the child's best interests. This would involve interviewing the child if they are of a suitable age. The Tribunal also found that it would be difficult to envisage circumstances in which section 55 indicated a certain outcome but Article 8 did not, confirming that in assessing family life under Article 8 in entry clearance cases, the child's best interests must be a primary consideration through the application of Article 3 UNCRC, for the decision to be in accordance with the law.

What has yet to be assessed by the courts is whether the requirements under the Immigration Rules for entry clearance to the UK for the child of a single parent residing in the UK, are compatible with the best interests consideration.<sup>105</sup> The current test, where a child seeking entry clearance only has one parent, who lives in the UK, is that the UK-based parent must have "sole responsibility" for the child's upbringing (*TD (Paragraph 297(i)(e): "sole responsibility") Yemen*<sup>106</sup>). This test can be difficult

<sup>99</sup> *Ibid.* [62]

<sup>100</sup> *Ibid.* [56]

<sup>101</sup> *SC (Article 8 – in accordance with the law) Zimbabwe* [2012] UKUT 00056 (IAC)

<sup>102</sup> *T (s.55 BCIA 2009 – entry clearance) Jamaica* [2011] UKUT 00483 (IAC)

<sup>103</sup> Borders, Citizenship and Immigration Act 2009, s 55(1)

<sup>104</sup> Home Office, *Every Child Matters, Change for Children*, November 2009

<sup>105</sup> Immigration Rules HC 395, as amended [297(i)(e)]

<sup>106</sup> *TD (Paragraph 297(i)(e): "sole responsibility") Yemen* [2006] UKAIT 00049

to satisfy where a child is being cared for by relatives abroad. Yet it is questionable whether it can be in the best interests of a child to be separated from their parent when the “sole responsibility” requirement is not met, especially given that Article 7 UNCRC protects the rights of children to be cared for by their parents.<sup>107</sup>

## THE SECTION 55 DUTY AND ASYLUM-SEEKING CHILDREN

A number of far-reaching decisions concerning asylum-seeking children demonstrate the broad application of the section 55 duty. The Court of Appeal has, in a number of cases, held that there is a proactive obligation on the Secretary of State to trace the family members of an unaccompanied child, under the EU Reception Directive.<sup>108</sup> Article 19(3) requires: “Member States, protecting the unaccompanied minor’s best interests, shall endeavour to trace the members of his or her family as soon as possible”.<sup>109</sup> It was held that this obligation forms part of the section 55 duty to “promote and safeguard the welfare of children who are in the UK” (*DS (Afghanistan)*<sup>110</sup>, *HK (Afghanistan)*<sup>111</sup>), and that the duty is not discharged where a minor is uncooperative with the tracing process. Article 22(2) UNCRC also requires the State to co-operate with the United Nations and other organisations to trace the family of a refugee child to obtain information necessary for reunification with his or her family.<sup>112</sup>

In July 2012, the Court of Appeal in *KA (Afghanistan)* unequivocally confirmed that the positive obligation on the Secretary of State to endeavour to trace the family of an unaccompanied minor extends beyond informing a minor of the tracing facilities of the Red Cross.<sup>113</sup> The Court held that there had been “a systemic breach” of the duty to endeavour to trace, which may be relevant to the section 55 duty. It criticised the Secretary of State’s policy of granting discretionary leave to remain to minors until they reach the age of seventeen and a half, whereupon the duty to endeavour to trace, the result of which may be supportive of their claim for asylum, would be close to expiration. The appellants in *KA (Afghanistan)* submitted that the Secretary of State’s failure to endeavour to trace their family undermined their assertions that they were without family support in Afghanistan. Consequently, they were left without access to evidence with which to prove their case; that even the resources and efforts of the Secretary of State were insufficient to locate their close relatives. This evidence is crucial, as current Country Guidance finds that a lack of family support in Afghanistan places children at risk of persecution (*AA (unattended children) Afghanistan*).<sup>114</sup>

The claimants argued that the historic illegality of the failure to trace should be remedied. In *R (S) v SSHD*,<sup>115</sup> the High Court emphasised that the intervention of the court to correct past illegality did not conflict with the *Ravichandran* principle – that

<sup>107</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3, Article 7

<sup>108</sup> Council Directive (EC) 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L31/24, Article 19(3)

<sup>109</sup> This duty was transposed into domestic law by the Asylum Seekers (Reception Conditions) Regulations 2005, SI 2005/7, Regulation 6

<sup>110</sup> *DS (Afghanistan) v SSHD* [2011] EWCA Civ 305, [2011] INLR 389

<sup>111</sup> *HK (Afghanistan) and Others v SSHD* [2012] EWCA Civ 315

<sup>112</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3, Article 22(2)

<sup>113</sup> *KA (Afghanistan) & Ors v SSHD* [2012] EWCA Civ 1014, [2012] WLR(D) 230

<sup>114</sup> *AA (unattended children) Afghanistan* [2012] UKUT 00016

<sup>115</sup> *R(S) v SSHD* [2008] EWHC 733 (Admin)

asylum appeals should be considered on the basis of the circumstances and facts prevailing at the time of the hearing.<sup>116</sup> This was because, whilst respecting that decisions should be made on the basis of present circumstances, “it recognised that those circumstances might include the present need to remedy injustice caused by past illegality”.<sup>117</sup> The Court of Appeal in *KA (Afghanistan)* recognised that the *R (S)* principle may apply where the Secretary of State failed to discharge the duty to trace. The Court analysed hypothetical claimants on a spectrum, distinguishing between claimants on one end, whose accounts of having no surviving family in Afghanistan are credible, or who have cooperated with the tracing process but have failed to contact any family, and claimants on the other end of the spectrum, who are disbelieved and have been uncooperative or have frustrated attempts to trace their family. The former, despite turning eighteen, may be able to avail themselves of the *R (S)* principle, or section 55, as a consequence of being disadvantaged by the Secretary of State’s failure to comply with the tracing duty. They have “lost the opportunity of corroborating [their] evidence about the absence of support in Afghanistan by reference to a negative result from the properly discharged duty to endeavour to trace”.<sup>118</sup> The latter, disbelieved claimant, may not have established a causative link between the Secretary of State’s breach of duty and his claim to protection, and may not be able to establish a disadvantage; thus, depending on the facts, he may not benefit from the corrective principle. Whilst the court stressed that a lack of past cooperation will not always defeat a claim, it may lead to adverse inferences being drawn.

*KA (Afghanistan)* also emphasised that although the duty to trace and the section 55 duty does not extend beyond the age of eighteen, the assessment of risk on return is not subject to a “temporal bright line across which the risks to and the needs of the child suddenly disappear”.<sup>119</sup> Kay LJ stressed that risks such as forced recruitment or sexual exploitation of young males occurs regardless of birthdays, and that “apparent or assumed age is more important than chronological age”.<sup>120</sup> When assessing risk on return, although a child may have turned eighteen by the date of the decision, the decision-maker must assess whether the risks they would have faced as an unaccompanied minor continue to exist.

Subsequent to *KA*, *EU (Afghanistan)* confirmed that no “bright line” is reached at the age of 18, pointing out that as birth dates ascribed to claimants are often arbitrary, especially when resulting from an age assessment, “the achievement of adulthood cannot of itself necessarily change the assessment of risk on return”.<sup>121</sup> However, *EU (Afghanistan)* was highly critical of the use of the corrective principle in the absence of a proven causative link between the Secretary of State’s breach of the duty to trace, and the appellant’s claim to protection.<sup>122</sup> In *EU*, none of the appellants were found to be in need of protection, and their appeals were dismissed. Notwithstanding, the court held that “the failure to endeavour to trace may result in a failed asylum seeker, who may in consequence lose contact with his family, putting down roots here and establishing a valid Article 8 claim.”<sup>123</sup>

<sup>116</sup> *R v The Immigration Appeal Tribunal & Anor ex parte Rajendrakumar* [1995] EWCA Civ 16, [1996] Imm AR 97

<sup>117</sup> *KA (Afghanistan) & Ors v SSHD* [2012] EWCA Civ 1014, [2012] WLR(D) 230 [47]

<sup>118</sup> *Ibid.* [25]

<sup>119</sup> *Ibid.* [7]

<sup>120</sup> *Ibid.* [18]

<sup>121</sup> *EU (Afghanistan) & Ors v SSHD* [2013] EWCA Civ 32 [9]

<sup>122</sup> *Ibid.* [6]

<sup>123</sup> *Ibid.* [7]

The section 55 duty has also been applied in decisions to exclude children from humanitarian protection. In *R (ABC (a minor) (Afghanistan))* the claimant, a minor, had accidentally killed his half-brother.<sup>124</sup> The Secretary of State decided his asylum claim was unfounded and excluded his claim for humanitarian protection on the basis that he had committed a serious crime.<sup>125</sup> He was granted discretionary leave for a rolling six month period, as removal was deemed unsafe. The Administrative Court roundly criticised the Secretary of State for failing to properly consider section 55 in relation to the “serious crime” decision, for failing to analyse the culpability of the claimant in a legally sound manner, and failing to demonstrably place the claimant’s welfare in a pivotal position in the grant of discretionary leave.<sup>126</sup> Richardson J found that the rolling six month review, whilst possibly suitable for an adult (*R (N) v SSHD*<sup>127</sup>) may not be appropriate for a child, and in the present case, held that “the stress of this constant re-appraisal of his life is hardly conducive to the promotion of his best interests”.<sup>128</sup>

It is argued, on an extension of the above point, that the Secretary of State’s policy to grant discretionary leave to separated children who have been refused international protection, but who cannot be returned to their country of origin due to having no family to care for them or “inadequate reception arrangements”, also contravenes the section 55 duty.<sup>129</sup> Separated children are normally granted discretionary leave to remain in the UK until they reach the age of seventeen and a half, resulting in considerable uncertainty as to their future. The grant of discretionary leave, which brings with it the threat of potential removal from the UK upon reaching the age of eighteen, is not conducive to the promotion of a child’s development within a sound environment and is not a measure designed to acknowledge the child’s best interests. Goodwin-Gill makes the point that, “what is in the best interests of the child must necessarily be understood also as including those decisions and actions, the effects of which will continue or be felt *after* the age of eighteen”.<sup>130</sup>

Depending on their age at the time of the decision, some children are not granted a right of appeal due to the operation of section 83 of the Nationality, Immigration and Asylum Act 2002.<sup>131</sup> An appeal right only arises following the submission of an application to extend their leave, by which time many children have turned eighteen. These children, as argued by Bolton, are placed at a disadvantage in proving their claim to protection as a consequence of the delay in granting an appeal right, but additionally, they are disadvantaged as risk on return is considered at an adult standard.<sup>132</sup> For this reason, it is positive that the Court of Appeal in *KA (Afghanistan)* emphasised the need to consider whether the risk continues despite a child reaching the age of majority.

<sup>124</sup> *R (ABC (a minor) (Afghanistan)) v SSHD* [2011] EWHC 2937 (Admin)

<sup>125</sup> Immigration Rules HC 395, as amended, paragraph 339D

<sup>126</sup> *R (ABC (a minor) (Afghanistan)) v SSHD* [2011] EWHC 2937 (Admin) [44, 47]

<sup>127</sup> *R (N) v SSHD* [2009] EWHC 1581 (Admin)

<sup>128</sup> *R (ABC (a minor) (Afghanistan)) v SSHD* [2011] EWHC 2937 (Admin) [58]

<sup>129</sup> UK Border Agency, Asylum Policy Instructions, ‘Discretionary Leave’, para. 2.3 [<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/discretionaryleave.pdf?view=Binary>] accessed 14 December 2012

<sup>130</sup> Guy S Goodwin-Gill, ‘Expert Roundtable Discussion on “The United Nations Convention on the Rights of the Child and its Application to Child Refugee Status Determination and Asylum Process – Introduction”’ [2012] *Journal of Immigration, Asylum and Nationality Law*, 26(3), 226–231

<sup>131</sup> Nationality, Immigration and Asylum Act 2002, s 83

<sup>132</sup> Syd Bolton, ‘Promoting the best interests of the child in UK asylum law and procedures’ [2012] *Journal of Immigration, Asylum and Nationality Law*, 26(3) 232–254

Although section 55 BCIA 2009 has been the focus of many judgments, there remain areas in which its application has yet to be considered, particularly where asylum-seeking children are concerned. The lack of provision for children with refugee status in the UK to be joined by their parents under family reunion is an illustration of discrimination between child and adult refugees (*SS (Somalia) v Entry Clearance Officer*).<sup>133</sup> Adult refugees are entitled to family reunion with their spouse and children, whilst child refugees are not entitled to reunion with their parents. There is no provision within the immigration rules for child refugees to sponsor family members.<sup>134</sup> To succeed in an application under the immigration rules, they would be required to meet the stringent criteria of the revised rules relating to adult dependant relatives, which do not permit exceptions where child refugees are concerned.<sup>135</sup> This issue has also been raised by ILPA in submissions to the Joint Committee on Human Rights, where the point is made that “a child refugee is no less a refugee than an adult refugee; no more able to live with their immediate family in the country fled”.<sup>136</sup>

ILPA also argue that this discrimination between adult and child refugees contravenes Article 2 UNCRC, as well as Article 10, which requires that applications for family reunion be dealt with “in a positive, humane and expeditious manner”.<sup>137</sup> Further, Article 39 UNCRC directs that States

shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.<sup>138</sup>

Taking together the various elements of the UNCRC, it is in the best interests of refugee children, towards whom there is an obligation to promote their psychological recovery, to be reunited with their parents (who may also be in need of international protection) in the United Kingdom. Nonetheless, this remains an issue to be explored by the courts.

### *New rules and regulations*

On 9 July 2012 the immigration rules relating to family migration were drastically overhauled.<sup>139</sup> This followed amendments to the work and student immigration categories as part of the government’s strategy to “take net migration back to the levels

<sup>133</sup> *SS (Somalia) and others v Entry Clearance Officer* [2008] EWCA Civ 1534

<sup>134</sup> Home Office, Entry Clearance Guidance, SET10, states: “A child under the age of 18 years, who has been granted refugee status. There is no provision within the Rules for children recognised as refugees to sponsor family members.”

<sup>135</sup> Immigration Rules HC 395, as amended, Appendix FM, *Section E-ECDR*. This criteria requires the parent to demonstrate that they require long-term personal care to perform everyday tasks (as a result of age, illness or disability), and that they cannot obtain the required level of care in their country, even with the practical and financial help of their sponsor, because it is unavailable, cannot be reasonable provided, or is unaffordable. Sponsors would also have to meet a financial requirement and undertake to maintain and accommodate their parent without recourse to public funds.

<sup>136</sup> Immigration Law Practitioners’ Association, Submission to the Joint Committee on Human Rights inquiry into the human rights of unaccompanied migrant children and young people in the UK, October 2012. ILPA urged the Joint Committee to ask the UK government to give children recognised as refugees or granted humanitarian protection the right to family reunion with their parents.

<sup>137</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3, Article 10

<sup>138</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3, Article 39

<sup>139</sup> Statement of Changes to Immigration Rules HC 194, 13 June 2012

of the 1990s – tens of thousands a year, not hundreds of thousands”, by 2015.<sup>140</sup> The amendments also sought to define and therefore to constrain the judiciary with respect to Article 8 ECHR. Home Secretary Theresa May expressed the government’s view:

for too long, the courts have been left to decide cases under article 8 without the view of Parliament, and to develop public policy through case law. It is time to fill the vacuum and put the law back on the side of the British public. . .<sup>141</sup>

Whilst a full analysis of the changes to the immigration rules is beyond the scope of this article, attention will be paid to the changes affecting children. The government maintains that, “As well as setting out how the balance should be struck when considering proportionality under A8”, the revised rules reflect the section 55 duty and “set out a clear framework for weighing the best interests of the child against the wider public interest in removal cases”.<sup>142</sup> This, it will be argued, is far from being the case.

Within three months of the revised rules coming into force, the Upper Tribunal ruled, in *MF (Article 8 – new rules) Nigeria* that, “The fact that as a result of these changes the rules are longer and incorporate some of the vocabulary of Article 8 makes no difference”.<sup>143</sup> It remains necessary for an Article 8 ECHR claim to be assessed separately to the Article 8 claim under the Immigration Rules. The Upper Tribunal stressed that although the new rules “enhanced judicial understanding of the ‘public interest’ side of the scales”,<sup>144</sup> the rules do not accommodate all possible types of Article 8 claims. They do not encapsulate the *Maslov* criteria,<sup>145</sup> and do not fully reflect Strasbourg jurisprudence as interpreted by the higher domestic courts.

Subsequently, in *Izuazu (Article 8 – new rules) Nigeria*, the Tribunal re-affirmed that there is no presumption that the Rules will be conclusive of the Article 8 assessment, stating “The more the new rules restrict otherwise relevant and weighty considerations from being taken into account, the less regard will be had to them in the assessment of proportionality.”<sup>146</sup>

In *MF (Nigeria)*, the Upper Tribunal also made it clear that despite the tests of “exceptional circumstances” and “insurmountable obstacles” being legal tests under the revised immigration rules, they are *not* the tests to be applied when considering a claim under Article 8 ECHR, as has been made clear by our domestic courts (*Huang*<sup>147</sup> and *VW (Uganda)*<sup>148</sup>). The Tribunal confirmed that the proper test as to whether family life may be continued abroad, is “reasonableness”, and where an application fails under the immigration rules for a failure to show exceptionality or insurmountable obstacles, it may still succeed on human rights grounds, if relocation of a family is unreasonable. The Upper Tribunal did not express a view in *MF (Nigeria)* on whether the section 55 duty had been adequately incorporated in the revised rules, although it stressed that it was necessary to conduct a “distinct best interests of the child

<sup>140</sup> See *Invitation to Join the Government of Britain, The Conservative Manifesto 2010*, and Damien Green MP, House of Commons, Hansard, 12 December 2011: Col 513. For consideration of the changes to the work and student categories and analysis of the effect of the net migration target on UK immigration policy, see Steve Symonds, ‘The numbers game’ [2012] *Journal of Immigration, Asylum and Nationality Law*, 26(2)

<sup>141</sup> Theresa May MP, Home Secretary, House of Commons Report, Hansard, 11 June 2012, Col 50

<sup>142</sup> Home Office Statement, ‘Immigration Rules on Family and Private Life (HC194), Grounds of Compatibility with Article 8 of the European Convention on Human Rights’, 13 June 2012 [24–25]

<sup>143</sup> *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393(IAC) [34]

<sup>144</sup> *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393(IAC) [48(b)]

<sup>145</sup> *Maslov v Austria* App no 1638/03 [2009] INLR 47

<sup>146</sup> *Izuazu (Article 8 – new rules) Nigeria* [2013] UKUT 45 (IAC) [52]

<sup>147</sup> *Huang v SSHD* [2007] UKHL 11, [2007] 2 AC 167

<sup>148</sup> *VW (Uganda) v SSHD* [2009] EWCA Civ 5, [2009] INLR 295

assessment” as part of the Article 8 proportionality assessment. It is argued in this article, that the new rules fail entirely to reflect the nature of the section 55 duty.

In the revised rules of 9 July 2012, paragraph 276ADE(iv) allows a child who has lived continuously in the UK for at least seven years to apply for leave to remain of their own accord, on the basis of their ‘private life’ in the UK.<sup>149</sup> A child will be granted 30 months leave to remain, and will qualify to apply for indefinite leave to remain after ten years of continuous leave under this rule. Drawing the line at seven years residence, does not, however, take into account the duty to assess the best interests of children on an individual basis, which will vary. It does not allow for cases where the best interests of the child who has been resident in the UK for less than seven years, are best served by permitting them to remain in the UK. No reference is made to the need to assess a child’s education history, social and family network, or predictions for all-round development if remaining in the UK; factors emphasised as relevant to a child’s best interests by the court in *Tinizaray*.<sup>150</sup> Rather, the rule reflects the underlying policy objective of reducing migration. This is made clear in the statement of compatibility: “we would not propose a period of less than 7 years as this would enable migrants to enter the UK on a temporary route... to qualify for settlement if they had brought children with them”.<sup>151</sup> Indeed, the re-introduced ‘seven-year child concession’ has not lasted long, without being further restricted. Amendments to the rules of 13 December 2012 impose the additional requirement that “it would not be reasonable to expect the applicant to leave the UK”.<sup>152</sup> Once again, there is no explicit reference to the best interests of the child.

The revised rules make provisions for family members with children in the UK who are unable to meet various criteria of the new rules, including a stringent financial requirement. *EX.1* is the ‘Exception’ paragraph contained within Appendix FM of the revised rules. It applies only to non-deportation cases, setting out the criteria applied when assessing whether to grant leave to remain to the family member of a child in the UK.<sup>153</sup> However, it only applies to applicants in a parental relationship to a child; there is no provision for siblings or other family members. The UKBA guidance claims that the criteria in *EX.1* reflect the section 55 duty as well as Article 8 ECHR.<sup>154</sup> Yet *EX.1* itself has no mention of the best interests of the child; it refers only to a child (who has a genuine and subsisting relationship with their parent, the applicant) in the UK, who is either a British citizen or has lived continuously in the UK for seven years, with the caveat that in either case, it would not be reasonable to expect the child to leave the UK.

Where British children are concerned, the guidance acknowledges that a decision to remove the parent of a British child cannot have the effect of forcing the British child to leave the EU (acknowledging, to an extent, the ruling in *Ruiz Zambrano*<sup>155</sup>). However, the guidance suggests that separation of the British child from their parent may be justified where “the conduct of one of the parents gives rise to considerations of such weight as to justify separation, if the British Citizen child could otherwise stay

<sup>149</sup> Immigration Rules HC 395, as amended [276ADE(iv)]

<sup>150</sup> *Tinizaray R (on the application of) v SSHD* [2011] EWHC 1850 (Admin) [25]

<sup>151</sup> Home Office Statement, ‘Immigration Rules on Family and Private Life (HC194), Grounds of Compatibility with Article 8 of the European Convention on Human Rights’, 13 June 2012 [27]

<sup>152</sup> Statement of Changes to Immigration Rules HC 760, 22 November 2012

<sup>153</sup> Immigration Rules HC 395, as amended, Appendix FM, *EX.1*.

<sup>154</sup> UK Border Agency, Immigration Directorate Instructions, ‘Guidance on application of EX.1’ [<http://www.ukba.home-office.gov.uk/sitecontent/documents/policyandlaw/IDIs/chp8-annex/ex1-guidance-1pdf?view=Binary>] accessed 14 December 2012

<sup>155</sup> Case C-34/09, *Ruiz Zambrano (European citizenship)* [2011] EUECJ, [2012] QB 26

with another parent or primary carer in the UK”.<sup>156</sup> Such conduct includes “minor criminality” below the threshold that would trigger deportation, and “a poor immigration history”. This entirely sidesteps the best interests of the child, in blatant disregard of the Supreme Court’s judgment in *ZH (Tanzania)* that a parent’s poor immigration history must not devalue the interests of the child. Furthermore, it is another example of guidance extending beyond the criteria of the rules, which has been repeatedly criticised by the courts, most recently by the Supreme Court in *Alvi v SSHD*.<sup>157</sup>

Where non-British children are concerned, despite having lived in the UK for seven years, guidance is given on factors relevant to the reasonableness of the child’s relocation. The factors raised in *Tinizaray* as relevant to an assessment of the child’s best interests are not included in this guidance. Instead, considerations include whether the child will be leaving with its parents, which would “generally not be unreasonable. . . particularly if the parents have no right to remain in the UK”; whether the parents or child have lived in or visited the country for periods of more than a few weeks; and any existing family, social or cultural ties the parent or child has with the country of return, with the dubious conclusion that “a period of time spent living mainly amongst a diaspora from the country may in of itself give a child an awareness of the culture in the country”.<sup>158</sup> The guidance is entirely predicated on factors in favour of removal of the child along with the parent, with no mention of issues relevant to a fact-sensitive consideration of the child’s best interests.

The guidance also states that where the criteria in *EX.1* have been missed by a small margin, cases are not to be regarded as exceptional purely on that basis. In assessing exceptionality, case workers are instructed to determine “whether removal would have such severe consequences for the child that exceptionally refusal / return is not appropriate”.<sup>159</sup> Yet imposing a test of “such severe consequences” does not reflect the Secretary of State’s obligations under section 55, as they have been interpreted by the domestic courts. Factors relevant to the child’s best interests are not included in the guidance on determining exceptionality.

Where there is criminality, rules relating to deportation apply.<sup>160</sup> Paragraph 399 allows for an Article 8 claim against deportation to succeed in similar circumstances to *EX.1*, with, in addition to it being unreasonable to expect the child to leave the UK, the requirement that there must be “no other family member who is able to care for the child in the UK”. Paragraph 399 only applies to offenders sentenced to imprisonment of less than four years, or those whose deportation is deemed “conducive to the public good” due to the Secretary of State taking the view that they are a “persistent offender” or have caused “serious harm”. It does not apply in cases where an offender has been sentenced to imprisonment for four or more years; in such cases (as in cases where the child has been resident in the UK for less than seven years), there is no reference to any consideration of the best interests of any children affected by the

<sup>156</sup> UK Border Agency, Immigration Directorate Instructions, ‘Guidance on application of EX.1’, para. 11 [<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/chp8-annex/ex1-guidance-1pdf?view=Binary>] accessed 14 December 2012

<sup>157</sup> *Alvi v SSHD* [2012] UKSC 33, [2012] WLR(D) 211

<sup>158</sup> UK Border Agency, Immigration Directorate Instructions, ‘Guidance on application of EX.1’, para. 14 [<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/chp8-annex/ex1-guidance-1pdf?view=Binary>] accessed 14 December 2012. However, in *Ogundimu*, the Upper Tribunal stressed that the word “ties” involves more than “merely remote or abstract links to the country of proposed deportation or removal”. *Ogundimu (Article 8 – new rules) Nigeria* [2013] UKUT 60 (IAC), [Headnote [4]]

<sup>159</sup> UK Border Agency, Immigration Directorate Instructions, ‘Guidance on application of EX.1’, para. 18 [<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/chp8-annex/ex1-guidance-1pdf?view=Binary>] accessed 14 December 2012

<sup>160</sup> Immigration Rules HC 395, as amended [396–400].

decision to deport. “Exceptionality” must be demonstrated in such cases, with the threshold set at “such severe consequences for the child”.<sup>161</sup>

The rules do not reflect the requirement to assess the child’s welfare or best interests, as is argued by ILPA in its 2012 submission to the Joint Committee on Human Rights, as well as by the four UK Children’s Commissioners in their letter to Damien Green MP, then Immigration Minister.<sup>162</sup> The rules do not allow for circumstances in which the child’s interest in having their parent remain in the UK may outweigh the public interest in deportation. The presence of another family member to care for the child does not obviate the requirement to consider the impact of separation on the child, and the child’s right to be cared for by both parents. The requirement that there must be “no other family member who is able to care for the child in the UK” was roundly criticised in *Izuazu*. The Upper Tribunal stated

“it is very difficult to see how any weight could be given to this requirement in an Article 8 evaluation under the law as it is clear that the child’s best interests are a primary consideration to be taken into account, and a child’s best interests would normally require the maintenance of a genuine and effective care by both parents rather than a default position of the absence of any family member to care for the child.”<sup>163</sup>

In *Ogundimu (Article 8 – new rules) Nigeria*, the Upper Tribunal confirmed that the terms of paragraph 399 conflict with the duty under the UNCRC, and thus little weight should be attached to the rule when assessing the proportionality of the interference with family life under Article 8. The Tribunal further emphasised, “We doubt whether it is in any child’s best interests to lose the contact and support with a caring and devoted parent simply because someone else can be found to care for them.”<sup>164</sup>

The rules do not reflect the principles in *Sanade* and *Omotunde*, of the need to assess whether the crime committed is of such a serious nature to justify the splitting up of a family. Even where it is a child that is subject to deportation, there is no mention of the duty to assess whether it would be in their best interests. Further, the guidance in relation to the seven year rule does not allow flexibility for a child who has resided in the UK for any less time, despite the engagement of Article 8 ECHR. The rules are not fact-sensitive, and case law does not allow for a ‘near miss’ under the Immigration Rules (*Miah v SSHD*.<sup>165</sup>) However, the idea of fixed rule has been wholly criticised by the courts in relation to an assessment under Article 8. To quote Lord Bingham: “The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires”.<sup>166</sup> Yet this is precisely the effect of the new Immigration Rules.

The two sets of 2012 regulations amending the Immigration (European Economic Area) Regulations 2006<sup>167</sup> have created a new type of residence: a “Derivative Right of Residence” where the residence of a parent or primary carer is derived from the EU law right of residence of the child. The Immigration (European Economic Area)

<sup>161</sup> UK Border Agency, Immigration Directorate Instructions, ‘Guidance on application of paragraph 399 – consideration of a child’s best interests in cases where there is CRIMINALITY’, paras. 15–17%[http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/chp8-annex/399a-guidance-.pdf?view=Binary] accessed 14 December 2012

<sup>162</sup> Immigration Law Practitioners’ Association, Submission to the Joint Committee on Human Rights inquiry into the human rights of unaccompanied migrant children and young people in the UK, October 2012.

<sup>163</sup> *Izuazu (Article 8 – new rules) Nigeria* [2013] UKUT 45 (IAC) [44]

<sup>164</sup> *Ogundimu (Article 8 – new rules) Nigeria* [2013] UKUT 60 (IAC) [96]

<sup>165</sup> *Miah & Ors v SSHD* [2012] EWCA Civ 261, [2012] 3 WLR 492

<sup>166</sup> *EB (Kosovo) v SSHD* [2008] UKHL 41, [2009] 1 AC 1159 [12]

<sup>167</sup> Immigration (European Economic Area) Regulations 2006, SI 2006/1003

(Amendment) Regulations 2012 and Immigration (European Economic Area) (Amendment) (No.2) Regulations 2012<sup>168</sup> were long overdue attempts to incorporate the Court of Justice of the European Union's rulings in *Chen*, *Teixeira*, *Ibrahim*, and *Ruiz Zambrano*.<sup>169</sup> A full analysis of EU law on the issue of the rights of EU citizen children is beyond the scope of this article. However, for completeness, and as an indication of the level of commitment of the Secretary of State to the best interests of children where immigration control is an issue, the deficiencies of the new regulations implementing *Ruiz Zambrano* will be examined.

Firstly, Regulation 15A of the amended Immigration (European Economic Area) Regulations 2006, which makes provision for a "Derivative Right of Residence" that purports to implement *Ruiz Zambrano*, only applies to the primary carer of a British citizen. This does not allow for a non-British, European child resident in the UK to remain here. Rather, it would require the EU child, along with their non-EU parents, to uproot and relocate to the Member State of their nationality (a country where they may never have lived), to make their claim against constructive removal from the EU. This is likely to contravene the child's best interests. Secondly, under paragraph 7 of Regulation 15A, the primary carer of a British child cannot obtain a right to reside in the UK if they share parental responsibility with another parent who is British, European, or settled in the UK (on the basis that the child would not, in such circumstances, be constructively removed from the EU if their third country national parent is removed). Further, paragraph 7B does not allow a second parent to acquire a derivative right of residence where they assume equal responsibility for a British child with a person who has already acquired a derivative right of residence. This means that a British child who initially is primarily cared for by one third country national parent, but subsequently the care is shared equally between two third country nationals, may not enjoy family life with both parents in the UK. Both of these requirements would arguably engage Article 7 of the EU Charter of Fundamental Rights, as the child's right to enjoyment of family life with both parents in the EU would be impaired.<sup>170</sup> Again, there is no mention of the requirement to assess the best interests of the children affected by the refusal of residence to one of their parents.

Along with the amendments granting primary carers of British children a derivative right of residence, came the Social Security (Habitual Residence) (Amendment) Regulations 2012.<sup>171</sup> These regulations deny access to welfare benefits for primary carers of British Citizen children with a derivative right of residence. However, the effect of this may well be to place a British child in a similar position to the children in *Ruiz Zambrano*; if the child's parents are unable to find employment and are denied access to benefits, with no money to support their family, the child is at risk of constructive removal from the EU.<sup>172</sup> It is evident that the denial of welfare benefits to the parents of British citizen children, who are entitled to live in the country of their nationality, does not reflect the best interests of the child.

<sup>168</sup> Immigration (European Economic Area) (Amendment) Regulations 2012, SI 2012/1547; Immigration (European Economic Area) (Amendment) (No.2) Regulations 2012, SI 2012/2587.

<sup>169</sup> *Chen and Others (Free movement of persons)* [2004] EUECJ C-200/02, [2005] QB 325; *Teixeira (European citizenship)* [2010] EUECJ C-480/08; *Ibrahim (European citizenship)* [2010] EUECJ C-310/08, [2010] Imm AR 487; *Ruiz Zambrano (European citizenship)* [2011] EUECJ C-34/09, [2012] QB 26

<sup>170</sup> The EU Charter of Fundamental Rights applies to acts of EU institutions as well as to Member States when implementing EU law.

<sup>171</sup> Social Security (Habitual Residence) (Amendment) Regulations 2012, SI 2012/2587

<sup>172</sup> *Ruiz Zambrano*, whilst having far-reaching implications in EU immigration law, initially arose over the parent's failure to be issued with a work permit.

### Conclusion

It is clear from the wide selection of case law analysed that the duty imposed by section 55 BCIA 2009 has impacted significantly on the development of UK immigration law, and forms an integral part of the Article 8 ECHR assessment. The courts have confirmed that the best interests of children have become a factor that must be considered procedurally and substantively by the decision-maker as a primary consideration, before taking a decision. This is required when children are both directly and indirectly affected by immigration decisions. The courts have given guidance on relevant factors to the best interests assessment, giving structure and specificity to the content of the section 55 duty. Decision-makers must demonstrate that they have actively considered the best interests of children affected by their decisions, taking into account factors such as a child's education, social network, health and family relationships in the UK, as well as looking at difficulties they may face if required to leave the UK. Where a parent of a British child faces deportation, the courts ruled that the emphasis should no longer be on the reasonableness of the family's relocation. Instead, the question should be whether the crime is of such a serious nature that it justifies the division of a family and the separation of a child from one of their parents. The courts have held that where non-British children have resided in the UK for a lengthy period of around seven years, in the absence of strong countervailing reasons, removal is likely to be disproportionate.

Prior to the enforcement of section 55 BCIA 2009, the rights of children were often sidelined, with the focus centred on their parents. Factors such as the parent's poor immigration history were given considerable weight in the Article 8 proportionality assessment. It is now recognised by the courts that the interests of children must not be devalued by a parent's poor immigration history. Further, the Secretary of State has been found to have positive obligations which include procuring evidence as to a child's circumstances prior to making a decision which affects them, and to actively attempt to trace the family members of an unaccompanied asylum-seeking child. Failure to do so is a breach of duty, rather than a failure to exercise discretion.

Our domestic courts and tribunals, following the landmark ruling in *ZH (Tanzania)*, have been attentive to the significance of the best interests of children where immigration decisions are taken that affect their lives. However, it is shameful that in revising the immigration rules, the Secretary of State has, in essence, ignored the UK's obligations under the UNCRC and section 55 BCIA 2009, as well as disregarding the judiciary's interpretation of the duty. The commitment to reduce migration has taken precedence over the rights of children. The Upper Tribunal in *MF (Nigeria)*, *Izuazu* and *Ogundimu* has clearly ruled that Article 8 ECHR must be assessed separately to the revised immigration rules, which do not take into account the UK's obligations under the UNCRC. Undoubtedly, further legal challenges will bring rulings from the higher courts in relation to the inconsistency between the new rules and the section 55 duty.

In April 2013, under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, legal aid was withdrawn from immigration cases.<sup>173</sup> This affects all children other than those seeking international protection in the UK. Children seeking to rely in the UK on the basis of their private or family life under Article 8 ECHR, and refugee

<sup>173</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012; provisions relating to legal aid entered into force on 1 April 2013

children seeking family reunion are no longer eligible for legal aid.<sup>174</sup> As the case law evolves alongside the proposed cuts, it remains to be seen whether the section 55 duty will further expand the role of the decision-maker to ensure that the rights and interests of children are properly considered in the absence of legal representation. Yet it is highly questionable whether the UK Border Agency will undertake, where a child is unrepresented, to actively determine and obtain the necessary evidence to make a legally sound decision with respect to the child's best interests. The revised, inflexible immigration rules do not encourage this. The courts have made it clear that children affected by immigration decisions have the right to have their voices heard and their own interests separately considered. However, without a legal representative to ensure that this obligation is complied with, there is a very serious risk that migrant children and children affected by immigration decisions will have their rights and interests ignored.

<sup>174</sup> The suggestion by Mr Djanogly MP that social workers could assist children with immigration matters has been criticised by ILPA as well as by the Office of the Immigration Services Commissioner and the Local Government Association. See ILPA's submission to the Joint Committee on Human Rights inquiry into the human rights of unaccompanied migrant children and young people in the UK, October 2012.

# NEUTRALITY REVISED?

ELIZABETH CHADWICK\*

## INTRODUCTION

Rules of armed neutrality have been developed over centuries, and form an important subset of laws of international armed conflict. A legal status of neutrality during war reflects the sovereign right of any state to remain uninvolved. Perhaps the greatest advantage enjoyed by neutral states is that their territories and resources should not be diverted by the belligerents for the war effort. Otherwise, as the neutral state remains at peace with the belligerents, as well as with other neutral states, the neutral may carry on much as normal. Neutral state impartiality towards the belligerents,<sup>1</sup> and abstention from the hostilities,<sup>2</sup> together form an important aspect of state self-preservation during war, although neutral states may still have to exercise “due diligence”, to defend their neutrality against belligerent encroachment. Over time, the precise content and salience attributed to the legal institution of neutrality has naturally fluctuated,<sup>3</sup> but its essential core survives today, even in the face of the prohibition in UN Charter Article 2(4) of the use of force by states in their international relations. This prohibition modified the legal status of war in two crucial respects: first, inter-state “aggression” has formally been outlawed, and secondly, Security Council enforcement powers, pursuant to Charter Chapter VII,<sup>4</sup> enable the Security Council legally to obligate states to adopt un-neutral responses to threats or breaches of international peace and security.<sup>5</sup> Neutrality endures nonetheless because armed conflicts continue to occur, and Security Council decision-making is frequently deadlocked.<sup>6</sup>

The fact that neutrality remains subject to Security Council enforcement powers means that neutral states must remain conscious at all times of their wider international obligations. For this reason, modern rules of neutrality are likely to be utilised in a highly-flexible manner, as appropriate to the specific circumstances of different wars. In turn, the traditional trigger for neutrality was the onset of an armed conflict of sufficient material scope to disrupt international trade and diplomacy. Although designed originally to apply to international armed conflicts, the fact that a stance of neutrality enabled uninvolved states to preserve their own rights to remain at peace thus made it logical to apply to any *de facto* belligerency, including large-scale civil wars. In similar vein, many contemporary enforcement measures such as economic sanctions and weapons embargoes have been inspired by practices developed through

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<sup>1</sup> Neutral impartiality was not so much a general duty as a set of specific duties. The duty of non-discrimination implies the duty to treat belligerents formally, not materially, on the basis of equality, due to such vagaries as geography, and different wartime environments. A. Gioia, “Neutrality and Non-Belligerency”, in H.H.G. Post (ed), *International Economic Law and Armed Conflict* (Martinus Nijhoff Publishers 1994) 51, 80–81.

<sup>2</sup> Neutral government abstention is all that is required. It is up to each neutral state to regulate, or not, the private activities of its citizens, including private commercial activities.

<sup>3</sup> See, e.g., Gregory A. Raymond, “Neutrality Norms and the Balance of Power” (1997) 32 *Cooperation and Conflict* 123, <<http://www.sagepublications.com>>.

<sup>4</sup> UN Charter Articles 39–51. See also Charter Articles 25, 39, and 103.

<sup>5</sup> However, the Security Council has never condemned “acts of aggression” pursuant to Chapter VII. See, e.g., UNSC Resolutions 455 (23 November 1979) para 1 (Southern Rhodesia-Zambia), 573 (4 October 1985) para 1 (Israel-Tunisia), and 577 (6 December 1985) para 2 (Angola-South Africa).

<sup>6</sup> See Charter Article 27(3).

neutrality, such as the prohibition of the carriage of contraband to a belligerent,<sup>7</sup> and the institution of “effective” blockade.<sup>8</sup> Linkages of many descriptions thus continue to exist between laws of neutrality, of armed conflict, and of peace, which linkages are continuously developed, stretched, remade and renewed, when and as required.<sup>9</sup> Most fundamentally, the ethos surrounding neutrality during armed conflict reminds *all* parties to those conflicts that force has legal limits.<sup>10</sup>

However, as laws of neutrality were originally developed between states for use during their mutual armed conflicts, and as inter-state wars today are prohibited, the extension of neutrality to civil wars is doubly controversial and problematic.<sup>11</sup> On the other hand, civil wars can in fact disrupt the wider peace, and third states are frequently involved in them, either directly or indirectly. It would thus seem logical for neutrality to be more, not less, relevant to *any* armed conflict which attains a sufficient scope to disrupt the wider peace. The absence of any formal legal role for neutrality during non-international armed conflicts thus exposes a gap in legal coverage, which is exacerbated by state disregard for Charter prohibitions whenever those prohibitions are deemed to be misaligned with modern threat perceptions, such as “terrorism”.<sup>12</sup> In order to consider these issues, the structure of this discussion is as follows. First, laws of neutrality and of armed conflict are briefly outlined, in order to contextualise both legal areas in terms of UN Charter restraints over force. The relevance of neutrality during non-international armed conflicts is then considered, by comparing the examples of the former Yugoslavia and modern-day Syria. It is concluded that large-scale non-international armed conflicts would indeed benefit from the operation of laws of neutrality.<sup>13</sup>

## WAR AND NEUTRALITY

The prohibition in Charter Article 2(4) against the use of force between states carries both objective and subjective parameters. Objectively, the prohibition represents a peremptory international norm having the character of supreme law;<sup>14</sup> subjectively, states retain their inherent right to use force in self-defence against attack, as per Charter Article 51.<sup>15</sup> However, terms such as “aggression”, “attack” and “self-defence”

<sup>7</sup> See, e.g., the Proliferation Security Initiative of 2003, pursuant to which the US and its allies seek to interdict shipments of WMD in international waters, <<http://www.state.gov/t/isn/c10390.htm>>. Cf. the Persian Gulf “Tanker War” of the 1980s, when Iran was accused of attacking neutral commercial vessels which refused its stop-and-search requests. See *Oil Platforms Case (Islamic Republic of Iran v United States of America)*, Judgement [2003] ICJ Rep 161. See also F.A. Boyle, “International Crisis and Neutrality: US Foreign Policy Toward the Iraq-Iran War”, in A.T. Leonhard (ed), *Neutrality: Changing Concepts and Practices* (University Press of America 1988) 59.

<sup>8</sup> As first codified in the 1856 Paris Declaration Respecting Maritime Law, reprinted in A. Roberts and R. Guelff, eds, *Documents on the Laws of War* (3d edn, OUP 2000), 47–52 (with Commentary).

<sup>9</sup> See, e.g., A. Leander and R. van Munster, “Private Security Contractors in the Debate about Darfur: Reflecting and Reinforcing Neo-Liberal Governmentality” (2007) 21(2) *IntRel* 201.

<sup>10</sup> See, e.g., W.H. von Heinegg, “‘Benevolent’ Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality”, in M.N. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Fault Lines. Essays in Honour of Yoram Dinstein* (Martinus Nijhoff Publishers 2007) 543.

<sup>11</sup> Civil wars have caused more than 80% of war victims since 1945. “Introduction to Protocol 2 of 1977”, <<http://www.icrc.org/ihl.nsf/INTRO/475?OpenDocument>>.

<sup>12</sup> See, e.g., “The Chatham House Principles of International Law on the Use of Force in Self-Defence, Section F” (2006) 55 *ICLQ* 963, 969–971.

<sup>13</sup> See, e.g., C. Greenwood, “The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign” (2002) 78 *IntLawSt* 35, 44–45.

<sup>14</sup> *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v United States of America)* [1986] ICJ Rep. 14, para 190.

<sup>15</sup> See J. Moore, ed., “The 1842 *Caroline* Doctrine”, (1906) 2 *Digest of International Law* 409, 412, which provides the standard for necessity in customary international law: “instant, overwhelming, and leaving no choice of means, and no moment for deliberation”. Contrast *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

are largely undefined legally,<sup>16</sup> while measures short of “war”, e.g., countermeasures, self-help, and reprisals constitute less serious uses of inter-state armed force. Further, the Charter does not regulate the actual conduct of armed hostilities, which is the specific subject matter of International Humanitarian Law (“IHL”). In other words, once hostilities commence, IHL applies automatically,<sup>17</sup> at which point rules of neutrality also become relevant.

## LAWS OF NEUTRALITY – A QUICK OVERVIEW.

One form or another of neutrality during war has existed for so long as human history has been recorded. Beginning in the seventeenth and eighteenth centuries, states asserted sovereign “rights” to wage war for any reason, and third states countered with “rights” not to participate in those wars.<sup>18</sup> Therefore, alongside treaties of mutual defence and alliance grew treaties of “absolute” or “strict” neutrality,<sup>19</sup> “benevolent” neutrality,<sup>20</sup> and qualified neutrality.<sup>21</sup> Three essential neutral duties emerged: neutral states do not (1) favour either belligerent, (2) engage in any warlike acts themselves, or (3) allow their neutral territories to be used by the belligerents for the war effort.<sup>22</sup> These duties underpin two fundamental neutral rationales. First, neutral states, as non-belligerents, may carry on much as usual, including by allowing their citizens to trade. If that trade is with the belligerents, it must be on an equal basis in a formal sense, while the belligerents are entitled to monitor that trade in order to deprive the enemy of goods useful to the war effort.<sup>23</sup> Secondly, neutral rights and duties apply as international legal obligations between states, so neutral state citizens are not automatically bound by laws of neutrality. In turn, although many neutral states did in fact regulate the private commercial activities of their citizens during wars, others did

<sup>16</sup> Cf. Rome Statute 1998 Articles 8bis, 12, 13, 15bis, 15ter, and 16 – 21; UNGA Resolution 3314 (XXIX) (14 December 1974) (agreed by consensus). See also M. Bothe, “Terrorism and the Legality of Pre-Emptive Force” (2003) 14(2) EJIL 227; N.A. Shah, “Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law’s Response to Terrorism” [2007] 12 JCSL 95; T.D. Gill, “The Temporal Dimension of Self-Defence: Anticipation, Pre-Emption, Prevention and Immediacy” (2006) 11(3) JCSL 361; M.H. O’Connell, “The Myth of Preemptive Self-Defense” (August 2002) ASIL Task Force Papers, <<http://www.asil.org/taskforce/oconnell.pdf>>.

<sup>17</sup> Gioia argues that whenever war in the material sense exists, laws of war apply, as is implicit in the 1899 and 1907 Hague Conventions, in the 1949 Geneva Conventions Common Article 2, and in the 1954 Hague Convention on Cultural Property Article 18. A. Gioia (n 1), 55.

<sup>18</sup> See, e.g., the European-wide Armed Neutralities of 1780 and 1800, the US Neutrality Laws of 1794 and 1818, and the 1819 British Foreign Enlistment Act. E. Chadwick, “Back to the Future: Three Civil Wars and the Law of Neutrality”, in E. Chadwick, *Traditional Neutrality Revisited* (Kluwer Law International, 2002) 177, 183–187.

<sup>19</sup> “Strict”, “absolute”, or “perfect” neutrality is a stance of complete impartiality not permitting any assistance whatsoever to a belligerent. H. Lauterpacht, ed., *Oppenheim’s Treatise on International Law, Vol. II (Disputes, War and Neutrality)* (7th edn, Longmans 1952) 663. See also D. Schindler, “Comments to A. Gioia”, in Post (n 1) 121 (“absolute neutrality was not admissible under the Covenant”). Contrast J.B. Whitton, “La Neutralité et la Société des Nations” [1927, II] HagRec 453, 479–528, *passim*, and 530; E. Borchard and W.P. Lage, *Neutrality for the United States* (Yale University Press 1937).

<sup>20</sup> “Benevolent” neutrality permits one belligerent to be favoured over the other. Lauterpacht (n 19) 662–663. No legal distinction exists between benevolent and strict forms of neutrality, but “benevolent” neutrality was more “unstable and theoretically unjustifiable”. M.W. Graham, Jr., “Neutrality and the World War” [1923] 17 AJIL 704, 720.

<sup>21</sup> “Qualified” neutrality signifies a state that is neutral on the whole, but which is obligated by pre-existing treaty to afford some form of assistance to one of the belligerents. Lauterpacht (n 19) 663.

<sup>22</sup> A duty of prevention. D. Schindler, “Transformations in the Law of Neutrality since 1945”, in A.J.M. Delissen and G.J. Tanja (eds), *Humanitarian Law of Armed Conflict – Challenges Ahead* (Martinus Nijhoff Publishers 1991) 367, 379; Gioia (n 1) 81.

<sup>23</sup> E.g., trade in prohibited contraband, or a breach of blockade, was forbidden only by international law. Y. Dinstein, “The Laws of Neutrality” (1984) 14 IsrYBHR 80, 95–96. Captured cargoes were termed “prize”, the legality of which was adjudicated pursuant to municipal Prize Courts. See the 1907 Hague Convention XII relative to the Creation of an International Prize Court (never in force), reprinted in D. Schindler and J. Toman, eds., *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher 1988) 825–836; the 1909 London Declaration concerning the Laws of Naval War, reprinted *ibid.* 845–856.

not, or did so only minimally, which helped to create a highly-competitive market for belligerent wartime supplies.<sup>24</sup> Both neutral and belligerent states benefited from this “practical example of that anomaly of a military war and a commercial peace”.<sup>25</sup>

By the early twentieth century, international rules of neutrality were well-established in state practice and in customary international law, and in 1907, neutral rules for land and sea warfare were formally codified in Hague Conventions V and XIII.<sup>26</sup> Meanwhile, the competitive market in wartime supplies, which had arisen from the variations between states as to their municipal control over private commercial activities, left it to the belligerents to police their own prohibitions, e.g., against the carriage of contraband. Nonetheless, neutral states were constantly accused of un-neutral service because of their citizens’ private trade. Further, the idea of “neutral” trade itself was becoming more contestable, due to a growing, multi-national web of ownership, particularly of cargoes and merchant ships.<sup>27</sup> By the onset of World War I, most if not all neutral rights and duties were quickly discarded,<sup>28</sup> as exclusion zones, mines, submarines,<sup>29</sup> and so on, over-came neutral defences. The US, the largest neutral state at the time, was forced by belligerent maritime encroachments to declare war in April 1917. Afterwards, the League of Nations attempted to restrain “aggression”, which undermined neutrality,<sup>30</sup> but could do so only partially. Then, as now, League policies were insufficient to curtail a highly-profitable trade in armaments.<sup>31</sup> New developments in laws of war were also few,<sup>32</sup> as were those concerning neutrality.<sup>33</sup> With the political atmosphere in the 1930s politically-charged by the opposing forces of capitalism, corporatism, and communism, many states quietly began to renew their neutrality laws.<sup>34</sup>

As is well-known, the unrestrained nature of the means and methods of warfare employed during World War 2 made neutrality near-irrelevant. The recognition that international war had become too dangerous for the very survival of mankind was acknowledged in 1945, when the UN Organisation prohibited inter-state “aggression” altogether in Charter Article 2(4). Security Council enforcement powers pursuant to

<sup>24</sup> I.e., neutral states could choose whether to prohibit foreign enlistment, or private neutral commercial dealings with or on behalf of a belligerent, e.g., by ship-building, sales of weaponry, and so on, because private commercial activities were policed primarily by the belligerents. Lauterpacht (n 19) 656 (citations omitted).

<sup>25</sup> C.H. Stockton, “The Declaration of Paris” (1920) 14 AJIL 357, referring to the Crimean War (1853–1856).

<sup>26</sup> Hague Convention V of 1907, respecting the Rights and Duties of Neutral Powers and Persons in War on Land; Hague Convention XIII of 1907, respecting the Rights and Duties of Neutral Powers in Naval War.

<sup>27</sup> See, e.g., Ralph A. Norem, “Determination of Enemy Character of Corporations” (1930) 24 AJIL 310.

<sup>28</sup> See, e.g., E. Chadwick, “The “Impossibility” of Maritime Neutrality” (2007) LIV NethILR 337, 340–352.

<sup>29</sup> For the modern position on neutrality during maritime war, see L. Doswald-Beck, ed, *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press 1995), <<http://www.icrc.org/ihl.nsf/FULL/560?OpenDocument>>.

<sup>30</sup> But, policies of “benevolent” and “differential” neutrality certainly remained available. Graham (n 20) 721. Cf. League of Nations Covenant Article 16. Lauterpacht (n 19) 664, 666.

<sup>31</sup> E.g., the attempt to “outlaw” war in the General Treaty for the Renunciation of War (Pact of Paris, or Kellogg-Briand Pact), in force 24 July 1929, TS No. 29 (1929). As noted by Walker, World War 2 started ten more years later. G.K. Walker, “Neutrality and Information Warfare” [2001] 76 Naval War College International Law Studies 233, 234, published online as “Computer Network Attack and International Law: Information Warfare and Neutrality”, <[http://www.usnwc.edu/Research—Gaming/International-Law/New-International-Law-Studies-\(Blue-Book\)-Series/International-Law-Blue-Book-Articles.aspx?Volume=76](http://www.usnwc.edu/Research—Gaming/International-Law/New-International-Law-Studies-(Blue-Book)-Series/International-Law-Blue-Book-Articles.aspx?Volume=76)>.

<sup>32</sup> A notable exception being the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, reprinted in Schindler and Toman (n 23) 116.

<sup>33</sup> E.g., the 1928 Havana Convention on Maritime Neutrality, which reproduces the rules in the 1907 Hague Convention XIII, with some additions based on World War 1, reprinted *ibid.* 962–967.

<sup>34</sup> See, e.g., the 1936 European Non-Intervention Agreement regarding Non-Intervention in Spain, reprinted in N.J. Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (Macmillan 1939) Appendix 1, 205.

Chapter VII of the Charter were also agreed.<sup>35</sup> These measures made it appear initially that neutrality had no further role to play, but as the Charter retains in Article 51 the inherent right of states to use force in self-defence against attack, highly-subjective parameters continue to surround such terms as “aggression”, “attack”, “self-defence”, and “state survival”.<sup>36</sup> Further, once it is recalled that the Charter permits collective enforcement action (Chapter VII) and individual or collective force in self-defence (Article 51), and is silent regarding lesser uses of force, such as border incidents, and domestic force to maintain order or to fight terrorism,<sup>37</sup> one may in fact begin to understand why the Charter era has been so violent. Nonetheless, although neutrality clearly retains legally-binding character during international armed conflicts, subject to Security Council enforcement action, this cannot be said for neutrality during non-international conflicts regardless of the violence involved.

### LAWS OF ARMED CONFLICT.

Security Council enforcement powers in Charter Chapter VII include the adoption of sanctions pursuant to Charter Article 41, and/or of forceful measures pursuant to Article 42. The trigger for the deployment of these enforcement powers is the existence of *any* breach or threat to international peace and security, including *de facto* situations which are (or which are likely to become) of real concern to international society.<sup>38</sup> This trigger is in essence the same for laws of armed conflict (and arguably, for neutrality). However, as noted earlier, the Charter does not regulate the conduct of hostilities once they occur, which is the purpose of IHL.<sup>39</sup> This means that the *legality* of the use of international force entails a double scrutiny: first, the resort to force must be lawful according to the Charter,<sup>40</sup> and secondly, force, once utilised, must be employed lawfully in accordance with the regulation by IHL of the means and methods of warfare.<sup>41</sup> However, as equal sovereign states regulate their mutual uses of armed force far more rigorously than they do domestic force, IHL rules are divided between those for use during international armed conflicts, and those for non-international conflicts. International armed conflicts are regulated by the four 1949 Geneva Conventions, Geneva Additional Protocol 1 of 1977, surviving aspects of the 1907 Hague Conventions, military usages, and customary international law; non-international conflicts are governed by Article 3 common to the four Geneva

<sup>35</sup> Above (4). See also Articles 12 (Security Council priority in decision-making), 25 (member state obligations to carry out Security Council decisions), and 49 (member state positive obligation to afford mutual assistance to accomplish Security Council measures).

<sup>36</sup> See, e.g., D. Akande, “Nuclear weapons, unclear law? Deciphering the *Nuclear Weapons Advisory Opinion* of the International Court” (1997) 68 BYIL 209.

<sup>37</sup> See, e.g., A.P.V. Rogers and D. McGoldrick, “Assassination and targeted killing—the killing of Osama Bin Laden” (2011) 60(3) ICLQ 778. Consider EU Parliament, “Written Declaration on the use of drones for targeted killings”, DC\889077EN.doc, [0002/2012 (16 January 2012)]; P. Alston, “Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions”, UN Doc A/HRC/14/24/Add.6 (28 May 2010).

<sup>38</sup> See, e.g., Publication Review, Thakur, “International Authority and the Responsibility To Protect, by A. Orford” (2012) 23(1) EJIL 284; J. Sarkin, “The Role of the UN, the AU and Africa’s Sub-Regional Organizations in Dealing with Africa’s Human Rights Problems: Connecting Humanitarian Intervention and the RTP” (2009) 53(1) JAfrL 1; R. Thakur, “Humanitarian Intervention”, in T.G. Weiss and S. Daws (eds), *The Oxford Handbook on the United Nations* (OUP 2008) Chapter 22. See also UNSC Resolutions 1674 (28 April 2006) para 4 (RTP), and 1973 (17 March 2011) para 4 (RTP and Libya).

<sup>39</sup> W.H. von Heinegg, “The Current State of International Prize Law”, in Post (n 1) 5, 17–25. See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 226, paras 88–90.

<sup>40</sup> Consider the issue of a “state survival” exception. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 226. Cf. D. Akande (n 36).

<sup>41</sup> Crucially, IHL contains no “state survival” exception.

Conventions, Geneva Additional Protocol 2 of 1977, military usages, and minimal aspects of customary law.<sup>42</sup>

As noted earlier, neutral rights and duties were codified in the 1907 Hague Conventions as a subset of the rules for international armed conflicts; neutral rules have been developed since only in minor respects,<sup>43</sup> due largely to the stability of their content. Neutrality is not often recognised as relevant during civil wars to the extent that such wars are less likely to disrupt international trade and diplomacy. This division in function in turn “invites” states to adopt less restrained means and methods of force within their own territorial borders. States are not entirely free from restraint however, particularly once organised rebels utilise force of some intensity, and display the capacity to comply with IHL, at which point each party to the conflict becomes obligated automatically by IHL to respect the law “in all circumstances”,<sup>44</sup> and to endeavour to come to special agreements regarding the application of higher, international standards.<sup>45</sup> Further, certain armed struggles by “peoples” fighting for their self-determination are considered to constitute international armed conflicts.<sup>46</sup> Therefore, given the many controversies surrounding force, and the frequent inability of the UN Security Council to authorise collective enforcement, it is hardly surprising that states organise their responses to international crises by differentiating between “friends” and “enemies”,<sup>47</sup> and differentiating again between the weak and the strong, such that only strong states are likely to resist an ally’s request for support<sup>48</sup> – a stance inimical to neutrality and IHL alike.<sup>49</sup>

More worrying is the fact that, as international attention focuses on Charter prohibitions,<sup>50</sup> any doubt that a state can justify its use of force pursuant to “Charter law” simultaneously positions IHL and neutrality as of secondary importance.<sup>51</sup> For example, states which utilise force against each other can euphemise that force as a legitimate “reprisal”, or as a mere border incident, neither of which is deemed ordinarily to breach Article 2(4). However, IHL (and neutrality) should be automatically applicable from the start of armed hostilities.<sup>52</sup> Therefore, the fact that neutrality

<sup>42</sup> Consider K. Obradovic, “International humanitarian law and the Kosovo crisis” (30 Sept. 2000) 839 IRRC (armed conflict between the KLA and Serbia an Additional Protocol 2 situation, not terrorism), <<http://www.icrc.org/eng/resources/documents/misc/57jqqb.htm>>; *Prosecutor v. Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (Case No. IT-91-1-AR72, ICTY Appeals Chamber, 2 October 1995) paras 113–118 (“[IHL] includes principles or general rules protecting civilians from hostilities in the course of internal armed conflicts”), and 134 (“customary international law imposes criminal liability for serious violations of Common Article 3”).

<sup>43</sup> See, e.g., the 1949 Geneva Convention III Article 122: “neutrals or non-belligerent powers”; the 1977 Additional Geneva Protocol I Articles 2(c), 9(2)(a), 19, 22(2)(a), 31, 39(1), and 64: “neutral and other states not party to the conflict”.

<sup>44</sup> Article 1 common to the four Geneva Conventions of 1949.

<sup>45</sup> Article 3 para 3 common to the four Geneva Conventions of 1949.

<sup>46</sup> Additional Protocol 1 Article 1(4). See Y. Sandoz, C. Swinarski, and B. Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977* (Martinus Nijhoff Publishers 1987) 508 (citation omitted); M.N. Shaw, *International Law* (6th edn, CUP 2008) 1148 (“international law treats civil wars as purely internal matters, with the possible exception of self-determination conflicts”).

<sup>47</sup> See, e.g., the following excerpt from “President Bush’s Address to a Joint Session of Congress and the Nation” (20 September 2001): “[e]very nation in every region now has a decision to make: Either you are with us, or you are with the terrorists”, <[http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress\\_092001.html](http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html)>.

<sup>48</sup> See, e.g., C. Aradau & R. Van Munster, “Exceptionalism and the ‘war on terror’: criminology meets international relations” (2009) 49(5) *BJCr* 686, 698.

<sup>49</sup> See, e.g., D. Alexander, “Panetta urges Latin America not to use military as police”, yahoo.com (8 October 2012) (debate since 9/11 regarding whether the military or law enforcement should handle trans-national threats to peace and stability); Capt. D. Stephens (Austri.), “Military involvement in law enforcement” (June 2010) 92 *IRRC* 453, 456.

<sup>50</sup> C. Greenwood, “The relationship between *ius ad bellum* and *ius in bello*” (1983) 9(4) *RevIntSt* 221.

<sup>51</sup> Consider A.R. Gonzales, “Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban”, White House Memorandum for the President (25 January 2002)<[http://www.hereinreality.com/alberto\\_gonzales\\_torture\\_memo.html](http://www.hereinreality.com/alberto_gonzales_torture_memo.html)>.

<sup>52</sup> Contrast W. Abresch, “A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya” (2005) 16 *EJIL* 741, 765. Cf. S. Darcy and J. Reynolds, “‘Otherwise occupied’: the status of the Gaza Strip from the perspective of international humanitarian law” (2010) *JCSL* 211.

was *originally* designed to protect the mutual interests of belligerent and neutral *states* – a context reflected in the fact that neutrality has not been re-codified since the Hague Conventions of 1907, may no longer constitute a sufficient reason not to consider the application of neutrality during large-scale civil or other non-international armed conflicts. Similarly, the relative paucity of international armed conflicts during the Charter era cannot explicate the on-going attention paid to laws of neutrality in the military manuals of most states, in academic commentary, and in judicial decisions.<sup>53</sup> Accordingly, the traditional division in IHL rules in terms of the status of a conflict, rather than its material scope, no longer suits the vast majority of contemporary conflicts, as is now discussed.

### “CIVIL WAR”, COLLECTIVE INTERVENTION, AND NEUTRALITY.

Charter Article 2(4) represents a peremptory international norm,<sup>54</sup> but has no express counterpart in domestic state governance. On the other hand, Security Council enforcement powers exist to deal with *any* breach or threat to international peace and security, including domestic state situations which disturb the wider peace. Accordingly, while states may restore their domestic orders by imposing peacetime emergency decrees, and may utilise such “necessary” force internally as is officially deemed to be “proportionate” to the exigencies of the situation and in the “general interests in society”,<sup>55</sup> the freedom of governments when doing so is relative, as is their relative freedom to characterise as they wish the type of violence being suppressed. Specifically, the interpretive freedom of states as regards their uses of force has come under intense scrutiny in the post-9/11 era, due in large part to the assertion by certain states of a sovereign “right” to use force anywhere, under the banner of the “war on terror”. This led the International Law Commission’s Use of Force Committee to devote a two year study to the issues of “war” and “armed conflict”. Its final report in 2010 states that “[s]tates may not, consistently with international law, simply declare that a situation is or is not an armed conflict based on policy preferences.”<sup>56</sup>

In other words, “armed conflict” is fact-based. Further,

[T]he existence of armed conflict has many significant impacts on the operation of international law beyond the well-known fact that during armed conflict IHL will apply and states party to an armed conflict (or other emergencies) may have the right to derogate from some human rights obligations. In addition, . . . the *law of neutrality may be triggered*; . . .<sup>57</sup>

Reliance on an objective approach to ascertaining the existence of “armed conflict” would thus appear to make neutrality more rather than less relevant during large-scale civil wars, which governments prefer to characterise as “terrorism” in any event. Evidence for an objective approach is obtained from the material scope of a conflict – an approach which recognises that organised non-state groups also employ force of

<sup>53</sup> As noted by M. Gavouneli, “Neutrality – A Survivor?” (2012) 23(1) EJIL 267.

<sup>54</sup> *Nicaragua* (14) para 190.

<sup>55</sup> The 1948 Universal Declaration of Human Rights Article 29(2).

<sup>56</sup> “ILA Use of Force Committee Report, Final Report on the Meaning of Armed Conflict in International Law”, submitted at the ILA Annual Conference, The Hague (15–20 August 2010) 2, <<http://www.ila-hq.org/en/committees/index.cfm/cid/1022>>. See also *ibid.* 27–28 ([a]n “armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation”); *Prosecutor v. Tadić* (Opinion and Judgement) (Case No. IT-94, Trial Chamber, 7 May 1997) para 562 (criteria of intensity and organisation distinguish “an armed conflict from banditry, unorganised and short-lived insurrections, or terrorist activities”).

<sup>57</sup> “ILA Report” (56) 1. [Emphasis added.]

a sufficient intensity and duration to be deemed “armed conflict”. Therefore, as the trigger for the operation of neutrality is any situation which disrupts international trade and diplomacy, it would seem logical for laws of neutrality to be as relevant during non-international armed conflicts as is IHL, in accordance with the degree of violence utilised. On this basis, it becomes less surprising that civil wars do in fact lead third states to implement “neutrality-lite” avoidance strategies for their own protection, which policies then are available to strengthen into hard neutral “rights” of impartiality and “duties” of abstention, according to the degree of disruption actually caused.

### NEUTRALITY, AND NON-INTERNATIONAL ARMED CONFLICTS.

The lack of attention paid to laws of neutrality during non-international armed conflicts flows from the state-centric structures upon which international society is based. The UN Charter mirrors these structures by guaranteeing equal state sovereignty, state political independence, state territorial borders, and the prevention of external interference in state domestic affairs. On the other hand, the greatest innovation of the Charter lies in Security Council Chapter VII enforcement powers, which are available to deal with any breach or threat to the wider peace. However, unless the five Permanent Member States in the Security Council agree to authorise collective action,<sup>58</sup> third states are left to their own devices as to how to respond to an international crisis. The sovereign flexibilities available for state responses are many, so long as fundamental Charter prohibitions are not breached. Civil wars however raise unique challenges, the resolutions of which do not always fit well within state-centric frameworks of analysis, mainly for three reasons. First, third state responses to civil wars ordinarily favour their own national interests, resulting in international disunity. Secondly, as the Charter is not concerned with the actual conduct of armed hostilities, third states must themselves influence the overall trajectory of violence. Finally, a rules-based international order may in the final analysis depend for its effectiveness on the willingness of third states to intervene.

Nonetheless, the fact that the Security Council has the primary responsibility for maintaining international peace and security<sup>59</sup> does not mean that its enforcement powers will be utilised. Security Council deadlock thus leaves states with few options of last resort, including the organisation of their own voluntary enforcement action. Security Council impasse thus reverses the order of enquiry regarding lawful force. In other words, during unauthorised enforcement actions, the legality of the means and methods of force utilised will be scrutinised first, pursuant to IHL (and potentially, neutrality),<sup>60</sup> after which the question of the resort to force will be debated for its compliance with “Charter law”. However, reversing the normal sequence opens the door for states to avoid any immediate scrutiny, as force utilised in (pre-emptive or anticipatory) self-defence against the spillover risks from conflicts elsewhere, e.g., in terms of refugees or “terrorist” attack,<sup>61</sup> enables civil war more rapidly to become international war, which begs a variety of wider questions in *political* rather than *legal* terms.<sup>62</sup> For example, the NATO bombing campaigns in the former Yugoslavia during

<sup>58</sup> Above (6).

<sup>59</sup> UN Charter Article 24(1).

<sup>60</sup> E. Castren, *The Present Law of War and Neutrality* (Suomalaisen Tiedeakatemia Toimituksia Annales Academiae Scheintiarum Fennicae 1954) 36 (“even a prohibited war is a war”).

<sup>61</sup> See, e.g., C.J. Tams, “The Use of Force against Terrorists” (2009) 20 EJIL 359.

<sup>62</sup> Consider UNSC Resolution 1973 (17 March 2011) (Libya), UN Doc S/RES/1973 (2011). See C. Antonopoulos, “‘The Legitimacy to Legitimize’: the Security Council Action in Libya under Resolution 1973 (2011)” (2012) 14 Int’lCommLRev 359.

the 1990s<sup>63</sup> entailed unauthorised, voluntary enforcement action, due to Russia – a Permanent Security Council Member State which purported to remain neutral whilst supporting Serbia – vetoing enforcement action.

Unfortunately, the Charter's silence as regards external involvement in civil wars leaves states free to deny the formal existence of war, and thus the relevance of neutral rights and duties, whilst permitting states to adopt "neutrality-lite" avoidance strategies such as sanctions and embargoes. These strategies however only answer half the question as to whether neutrality "should" apply during civil wars, the other half comprising the material pre-conditions for this to occur. For example, neutrality would ordinarily come into operation in accordance with third state necessity, in the sense of declaring neutral rights to rely on hard international belligerent duties, e.g., to avoid encroachment on neutral state interests. Further, as the Security Council usually is unable to act decisively, as states do hesitate prior to intervening without authorisation in conflicts elsewhere, and as third state support to a threatened government, to "rebels", or to both, can be viewed as prohibited interference in state domestic affairs, the central premise of neutrality is renewed – that neutral third states may distance themselves from involvement in war, whilst leaving to private market forces the "ancient right of belligerents to buy anything anywhere"<sup>64</sup> – a predictable enough result in view of the centrality of politics to a rules-based international order.

### NEUTRALITY, KOSOVO, AND SYRIA.

The full-scale "civil war"<sup>65</sup> fought in Syria since 2011 provides a case in point with which to illustrate the factual relevance of neutrality during "internal" armed conflicts. The Syrian government, and its supporting states Russia and China, have consistently characterised the conflict as an "armed conflict" fought against "terrorists".<sup>66</sup> At a minimum, the phrase "armed conflict" would seem to mandate the implementation of basic IHL rules, e.g., those contained in Common Article 3, but the force being utilised by the Syrian government against "criminal terrorists" far exceeds Geneva limits or those found in customary international law. The sheer scale of the violence has thus led certain regional powers and Western states to impose a series of multi-level sanctions against the Syrian government, which have impacted on third state diplomatic and trading interests. For example, EU export controls on arms and equipment bound for Syria were put in place as early as May 2011,<sup>67</sup> the seventeenth round of which

<sup>63</sup> First in September 1995, to put an end to ethnic cleansing in Bosnia-Herzegovina, and subsequently, from 24 March to 8 June 1999, to put an end to ethnic-cleansing in Kosovo. See "The General Framework Agreement for Peace in Bosnia and Herzegovina, and Annexes, 14 December 1995" <[www.ohr.int/dpa/default.asp?content\\_id=380](http://www.ohr.int/dpa/default.asp?content_id=380)>. See also UNSC Resolutions 757 (31 May 1992), 777 (19 September 1992), 819 (16 April 1993), and 1244 (10 June 1999); "Documents Regarding the Conflict in Yugoslavia" (1992) 31 ILM 1421; M. Weller, "The International Response to the Dissolution of the SFRY" (1992) 86 AJIL 569; J. Summers, ed, *The Kosovo Precedent: Implications for Statehood, Self-determination and Minority Rights* (Brill 2011).

<sup>64</sup> "Message of the President to the Congress, 21 September 1939", reprinted in (Supp. 1940) 34 AJIL 36, 40.

<sup>65</sup> As confirmed by Herve Ladsous, Head of the UN Department of Peacekeeping Operations, [aljazeera.com](http://aljazeera.com) (13 June 2012). See also N. MacFarquhar, "Red Cross Classifies Crisis as Civil War", [nytimes.com](http://nytimes.com) (16 July 2012); RUSI Analysis, "Syria Crisis Briefing: A Collision Course for Intervention" (25 July 2012), <<http://www.rusi.org/analysis/commentary/ref:C500F639757A57/>>.

<sup>66</sup> As reported by [aljazeera.com](http://aljazeera.com) (13 June 2012). Cf. RUSI Analysis, Joshi, "Terrorism and the Evolution of Syria's Uprising" (11 May 2012), <<http://www.rusi.org/analysis/commentary/ref:C4FACFBAA6C484/#.UD-eFupzOR4.email>>. See also "The death of a country", *The Economist* (23 February 2013) 13 ("about a fifth of the rebels are jihadists").

<sup>67</sup> E.g., "grants, loans, export credit insurance, technical assistance, insurance and reinsurance for exports of arms and of equipment for internal repression". EU Fact Sheet, <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/128379.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/128379.pdf)>. See also Implementing Regulations (EU) 742/2012 (16 August 2012), and 673/2012 (23 July 2012). Turkey imposed sanctions on 30 November 2011, and on 16 August 2012, the Organisation of Islamic Conference suspended Syrian membership.

obligates EU member states to “inspect vessels and aircraft heading to Syria if they suspect the cargo contains arms or equipment for internal repression”.<sup>68</sup> Further, Western states continue to attempt to influence the trajectory of the rebels’ uses of force,<sup>69</sup> and at many points, rumours have abounded as to the direct and indirect supply of weaponry to both sides of the conflict by external states and private interests.<sup>70</sup> Arguably, one could be forgiven for thinking this sufficient to trigger the operation of neutrality.

As so often happens, the Syrian conflict began as civil unrest. In March 2011, a peaceful mass protest near Damascus, on behalf of political prisoners,<sup>71</sup> resulted in a number of demonstrators being killed, as the Syrian security forces over-reacted. By early October 2011, the violence had spread throughout the country. The Arab League suspended Syrian membership and imposed sanctions on 12 November. In April 2012 a UN-backed “peace plan” was agreed,<sup>72</sup> but it had unravelled by mid-June due to the intensifying violence. More decisive UN action has since been blocked by Security Council deadlock.<sup>73</sup> There is no doubt the situation is an “armed conflict”, in the sense of intense and prolonged fighting, but one difficulty remains: the hundreds of Syrian rebel groups do not yet seem able to co-ordinate their efforts into a coherent, organised force having a chain of command.<sup>74</sup> In any event, many of Syria’s neighbours are struggling to avoid any deeper involvement than providing for refugees, while sympathy clashes have broken out in Lebanon between Sunni and Shia, the Iraqi government has been unable to prevent Iranian use of Iraqi air space to fly weapons to the Syrian government, and Israel has been forced to fire missiles into Syria after its troops were shot at on the Golan Heights by Syrian rebels.<sup>75</sup> The Syrian government’s possession of chemical weapons warrants extra caution,<sup>76</sup> as does the risk of proxy war between Saudi Arabia and Iran.<sup>77</sup>

<sup>68</sup> “Council takes steps to limit arms deliveries to Syria”, Brussels, 23 July 2012, 12776/12, PRESSE 344, <[http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/131963.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/131963.pdf)>, thus causing havoc to neutral shipping due to the unavailability of marine insurance cover. See, e.g., I. Black and S. Carrell, “Russian arms shipment bound for Syria foiled by Britain’s insurers”, *guardian.co.uk* (London, 19 June 2012).

<sup>69</sup> See, e.g., J. Borger, “Hague to give extra £5 m to opposition groups”, *The Saturday Guardian* (11 August 2012) 17; Op-Ed, Rifkind, “A Call to Arm Syria’s Rebels”, *nytimes.com* (8 August 2012) (critical comparison with arms embargoes of the Balkans Wars, 20 years previously).

<sup>70</sup> See, e.g., J. Borger, “Arms from Europe expected soon, say Syrian rebels”, *The Saturday Guardian* (2 March 2013) 31; “The country formerly known as Syria”, *The Economist* (23 February 2013) 25 (Gulf countries supply mostly light weapons); M.R. Gordon and E. Bumiller, “US Military is Sent to Jordan to Help with Crisis in Syria”, *nytimes.com* (9 October 2012).

<sup>71</sup> See, e.g., “Timeline: Syria”, <<http://www.bbc.co.uk/news/world-middle-east-18891150>>; *nytimes.com* timeline, <<http://topics.nytimes.com/top/news/international/countriesandterritories/syria/index.html?inline=nyt-geo>>; UN News Centre, <[http://www.un.org/apps/news/infocusRel.asp?infocusID=146&Body=Syria&Body1=\(26 August 2012\)](http://www.un.org/apps/news/infocusRel.asp?infocusID=146&Body=Syria&Body1=(26%20August%202012))>. See also Syria: Introduction, <<https://www.cia.gov/library/publications/the-world/factbook/geos/sy.html>>.

<sup>72</sup> UNSC Resolutions 2043 (21 April 2012), authorising a UN observer mission (UNSMIS), and 2042 (14 April 2012), authorising a ceasefire monitoring advance team.

<sup>73</sup> E.g., on 4 October 2011, and 19 July 2012 (Russian and Chinese vetoes).

<sup>74</sup> See Human Rights Council, “Report of the independent international commission of inquiry on the Syrian Arab Republic”, UN Doc A/HRC/19/69, agenda item 4, 22 February 2012, para 13, (commission unable to verify sufficient level of rebel organisation for application of IHL), <[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf)>.

<sup>75</sup> “Syria’s rebels: Entanglement at home and abroad”, *The Economist* (30 March 2013) 52–53.

<sup>76</sup> See, e.g., N. MacFarquhar and E. Schmitt, “Syria Threatens Chemical Attack on Foreign Force”, *nytimes.com* (23 July 2012) (threat to deploy chemical weapons “against any foreign intervention”). Cf. S. Witthuhn, “The Law of Neutrality and the Threat or Use of Nuclear Weapons: Application of a Traditional Law to a Non-Traditional Weapon” (2011), <<http://www.lcnp.org/pubs/studentpapersfordham.htm>>. See also the list of 23 private security and military companies allegedly working in Syria, <<http://www.sourcesecurity.com/companies/search-results/company-search/c.syria,t.manned-guarding.html>>.

<sup>77</sup> See, e.g., D.D. Kirkpatrick, “Airstrikes Push Waves of Syrians to Jordanian Camps”, *nytimes.com* (1 September 2012) (“Syrians are getting killed in a war between Saudi Arabia and Iran”); T. Arango, “Turkish Public Sours on Syrian Uprising”, *nytimes.com* (18 September 2012).

On the level of international uncertainty as to how to end the killing, the Syrian conflict resembles somewhat the situation in the former Yugoslavia during the 1990s, particularly in terms of the numbers killed, injured, or fleeing. At the time of writing, the UN has estimated that over 70,000 Syrians, mostly civilians, have died, while the true figure is probably far higher. More than four million Syrians lack fuel, electricity, food and shelter, and an average of 5000 people are estimated to flee their homes each day; the UN High Commission for Refugees currently estimates the number of refugees in excess of 860,000, with many more unaccounted for.<sup>78</sup> Young, foreign and highly-radicalised Muslim fighters have been drawn to the conflict from around the world, just as occurred during the war in Bosnia-Herzegovina after the Srebrenica massacre in July 1995.<sup>79</sup> Therefore, in terms of the potential operation of neutrality, the main difference between Syria and the Kosovo conflict in 1999 is that state neutrality did in fact operate during the NATO bombing campaign, simply because NATO action against Serbia constituted an international armed conflict. The question whether a Kosovo-style intervention will or could be mounted in Syria is unlikely to elicit a positive response however, due to the wider geo-political tensions involved, but if it were to occur, neutral rights and duties would certainly apply, subject always to Security Council powers.

As such, neutrality could help to confine and resolve the Syrian conflict. The central rights of abstention and duties of impartiality would obligate the belligerents in particular to be doubly-vigilant not to encroach on neutral state territory or interests, as doing so would give any affected neutral state sufficient cause to defend itself without risking the breach of Charter Article 2(4). Neutrals are also under long-standing obligations to intern belligerents found within neutral territorial boundaries.<sup>80</sup> Therefore, as the industrial and technological innovations devised since 1907 combine with Security Council enforcement powers, flexibility in neutral policies is invariably necessitated, while new contexts for its operation are constantly being created, particularly as regards neutral air space,<sup>81</sup> “information warfare”,<sup>82</sup> and cyberspace.<sup>83</sup> On the other hand, old controversies are likely to persist, such as belligerent “rights” to intercept and divert neutral merchant ships suspected of carrying “contraband”, particularly when the Security Council has not authorised enforcement action – a concern which restrained NATO states from imposing an oil embargo on Serbia in 1999.<sup>84</sup> Other examples of neutral flexibility arise from the new Geneva category of “states not party to the conflict”, which permits more “benevolent” or “qualified” forms of neutrality to be applied on behalf of victims. In short, the rules of neutrality can easily be tailored to fit *any* conflict, to remind all states that force has limits, and to promote the wider peace.

<sup>78</sup> “The country formerly known as Syria” (70) 26.

<sup>79</sup> A. Barnard and C. Hauser, “Qaeda-Linked Group Claims Responsibility for Syrian Blasts”, nytimes.com (9 October 2012).

<sup>80</sup> Hague Convention V (n 26) Article 11 (belligerents to be interned).

<sup>81</sup> The rules for air warfare are analogised from the rules for land and sea warfare. See also the 1923 Hague Draft Rules of Aerial Warfare (never in force), <<http://www.icrc.org/ihl.nsf/FULL/275?OpenDocument>>; L. Doswald-Beck (29), which applies in part to belligerent and neutral aircraft.

<sup>82</sup> By which is meant the conduct of war via computer networks. See Walker (31).

<sup>83</sup> See, e.g., M.N. Schmidt, ed, *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge University Press 2013), available online in draft at <[http://issuu.com/nato\\_ccd\\_coe/docs/tallinmanual?mode=a\\_p](http://issuu.com/nato_ccd_coe/docs/tallinmanual?mode=a_p)>.

<sup>84</sup> For discussion on this point, see Greenwood, “Kosovo” (n 13) Pt IV sec II. Cf. the Proliferation Security Initiative (n 7); Publication Review, Lowe, “L.A. Ivanashchenko, Blockade at sea and contemporary international law” (1991) 40(2) ICLQ 503–504 (regarding the dubious legality of blockades). Contrast R. Buchan, “The Palmer Report and the legality of Israel’s naval blockade of Gaza” (2012) 61(1) ICLQ 264.

## CONCLUSION.

Traditional laws of neutrality were developed for use during armed conflicts, because third states which wished to remain uninvolved in hostilities took action to defend their sovereign rights to carry on much as normal. However, an attitude of non-involvement did not require neutral states to pay strict attention to the private commercial activities of their citizens. Instead, municipal neutral regulations, e.g., to prevent foreign enlistment and neutral private dealings in contraband, left such matters to the belligerents to police, which shifted much of the risk away from the neutral state and onto the individuals concerned. State impartiality and abstention thus facilitated the growth of a competitive market in belligerent supplies, and constructed a “practical example of that anomaly of a military war and a commercial peace”.<sup>85</sup> Since 1945, inter-state armed aggression has formally been prohibited, yet neutrality continues to influence a variety of uses of force, such as wars of self-defence, “mixed” international/non-international conflicts, and civil wars. The determination with which certain neutral states continue to insist on their rights to be left alone during the wars of others, international or “civil”, thus not only sustains the viability of neutrality, but also reinforces the international legal limits imposed on force generally. Nonetheless, and despite the many efforts made politically to restrain force, the on-going development of IHL and of neutrality exposes the essential contradiction at the heart of modern international society: the prohibition of force between states cannot prevent force being utilised by states.

It thus is of no real concern that the Charter does not refer expressly to neutrality. The Charter is also silent regarding civil wars – the predominant form of armed conflict since 1945. In fact, it can be argued that the central Charter prohibition against “aggression” merely distracts attention from other forms of violence which euphemistically-gifted states attempt to characterise as “lawful” under international law. Further, frequent Security Council deadlock and a state tendency to disregard IHL together permit states merely to mask wider pressures temporarily. As the use of force in modern international relations should naturally elicit consideration and concern in the Security Council and in the international community at large, states are likely to hesitate to act when faced with atrocity, until taking action is in their own best interests. Similarly, whether or not Charter prohibitions will ever be invoked on an equal basis with those in IHL and laws of neutrality, and/or on the basis of the material scope of a conflict rather than its status, remains to be seen. Nonetheless, as civil wars spread in scope and intensity to become international armed conflicts, evidence in support of the viability of neutrality during *any* armed conflict is likely to grow, subject always to wider UN obligations.

<sup>85</sup> Stockton (n 25).

**THE PURSUIT OF “SOCIALY USEFUL BANKING” IN  
TWENTY-FIRST CENTURY BRITAIN AND EXPLORING VICTORIAN  
INTERACTIONS BETWEEN LAW, RELIGION, AND FINANCIAL  
MARKETPLACE VALUES**

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**ABSTRACT**

This article considers the devastating impact of the global financial crisis in Britain, and the questions which are being asked in its aftermath. These concern regulating financial markets and conduct within them seeking to ensure that Britain’s economy becomes more long-termist and sustainable and less prone to ‘shocks’, and also more deeply rooted societal issues associated with the wide-spread and long-lasting effects of the crisis. In focusing significantly on the role attributed to banking in precipitating the crisis, the article shows how from an early stage in its aftermath these concerns were becoming aligned with theological perspectives on moving from ‘crisis to recovery’. Thus, the article draws extensively on the many writings Dr Rowan Williams penned whilst serving as Archbishop of Canterbury. It also references the proposals for re-moralising the City with religious values published in the St Paul’s Institute Report 2011, and the contemporaneous appointment of Ken Costa to open dialogue between the City and religious leaders from across different faiths. Centrally, it considers the significance that two key events from late 2012 are likely to have in shaping the regulatory move from ‘crisis to recovery’. These are the endorsement of the importance of the Occupy London movement for informing the future of banking sector regulation by Bank of England Executive Director Andy Haldane in October 2012, and the announcement within days of this, of the appointment of Justin Welby, then Bishop of Durham, as the next Archbishop of Canterbury. Both Mr Haldane and Justin Welby have recently made direct reference to the pursuit of “socially useful banking” as a key regulatory goal, and very significantly Justin Welby will continue to serve on the Parliamentary Commission on Banking Standards set up in July 2012, once he takes office as Archbishop of Canterbury in March 2013. Contributions from Mr Haldane have been endorsed by Justin Welby, but they are particularly worthy of close scrutiny for another reason. Mr Haldane’s commentary on the crisis exemplifies the significance that the Bank of England appears to be attaching to financial crises from Britain’s past for current regulatory conversations. These writings locate within mainstream discourses on regulation current favour amongst historians for proposing linkages between past and present. In exploring what interplay between law and religion might be seen in banking sector reform the article utilises key historiography to explore the role of religion in articulating concerns about “socially useless banking” during the nineteenth century. This is supported by primary research including that drawn from criminal trials actually generated from ‘banking scandals’, and the article considers what significance – if any- these findings might – or should – have in moving from crisis to recovery in the twenty-first century.

Key words: Financial Crisis, Banking, Regulation, Law, Society, Religion

## BACKGROUND AND CONTEXT

In this second decade of the twenty-first century, people of Britain have been warned that the “nice decade” is over.<sup>1</sup> It is becoming clear that from the time of considerable consumption which preceded the 2007–8 financial crisis there will now follow a lengthy ‘age of austerity’. The years preceding the financial crisis did not simply precede it of course, and out of control and wide-spread ‘debt finance’ on the part of financial institutions exposed by the sub-prime mortgage crisis in the US has had repercussions across the globe. In the US itself this can be seen in the failure of a number of very prominent financial institutions, such as Bear Stearns and Lehman Bros. Closer to home the effects of over-extension, unrealistic investment strategies, and also the increasing interconnectedness of financial systems across the world, can be seen clearly in the continuing Eurozone crisis, with increasingly apparent world-wide lasting consequences. Indeed, this is looking set to precipitate a “lost decade” for the global economy.<sup>2</sup> For the UK itself, the effects of this “first crisis of globalisation”<sup>3</sup> have been many and manifold. In illustrating the increasing global reach of disruption in financial systems, it was Northern Rock’s request for Bank of England assistance in 2007 – as a result of difficulties in its own financing as a direct result of the US sub-prime crisis – that marked the arrival of the financial crisis in the UK.

This “first crisis of globalisation” very quickly precipitated – domestically and on the international platform- reflection on what had allowed it to happen, and debate on reconfiguring financial sector regulation in its aftermath.<sup>4</sup> In the UK, alongside the political manoeuvring away from ‘debt finance’ through a combination of austerity measures and attempts to actually rebalance the economy, there has predictably been close focus on rethinking the way that financial institutions are structured and capitalised in order to reduce systemic risk.<sup>5</sup> As a new regulatory landscape for banking emerges, much is being said about tightening up capitalisation requirements and prudential considerations involved in loan and particularly investment finance. As steps are being taken to promote robust banking for the future, *investment* banking is becoming once again extremely lucrative and generating huge rewards for bankers<sup>6</sup>, with the issue of bankers’ bonuses being most controversial in the case of institutions owned outright or substantially by the State, by virtue of being deemed “too big to fail”.<sup>7</sup> But

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<sup>1</sup> Robert Winnett, ‘Recession danger is real, warns Mervyn King’ *The Telegraph* (London, 14 May 2008).

<sup>2</sup> This is so, according to Christine Lagarde, head of the IMF, speaking in Beijing, China. See ‘IMF chief Christine Lagarde warns world faces ‘lost decade’ *The Telegraph* (London, 9 November 2011).

<sup>3</sup> As coined by former UK Premier Gordon Brown: see Gordon Brown, *Beyond the Crash: Overcoming the First Crisis of Globalisation* (Simon & Schuster 2010).

<sup>4</sup> *ibid.* see also George Cooper *The Origins of Financial Crises* (Harriman House 2008); Martin Wolf, *Fixing Global Finance: How To Curb Financial Crises in the 21st Century* (Yale University Press 2009); and Joseph Stiglitz *Freefall: Free Markets and the Sinking of the Global Economy* (Penguin Books 2010).

<sup>5</sup> This can be seen stated in Sir John Vickers, *Final Report of the Independent Commission on Banking* (HM Treasury 2011). The Vickers’ Report’s key recommendation is that the retail banking activities of banks should be structurally separated (by ring-fencing) from wholesale and investment banking activities. The timeframe for the implementation of this is contentious, and while the City insists that implementation sooner than the recommended deadline of 2019 will cause the failure of banks, for others this timetable is exasperatingly slow, and a further financial crisis in the intervening period is considered a distinct possibility.

<sup>6</sup> See for example reportings of payment of bonuses which lament the continuing lack of restraint and the ‘business as usual’ mentality continuing to prevail, such as Jill Treanor, ‘Goldman Sachs bankers to receive \$15.3bn in pay and bonuses’ *The Guardian* (London, 19 January 2011), and more generally Rowan Williams, ‘Time for us to challenge the idols of high finance’ *Financial Times* (London, 1 November 2011).

<sup>7</sup> The terminology applied to so-called ‘systemical’ banks perceived to be central to preventing the collapse of the UK financial system: see Lord Turner ‘What do banks do, what should they do and what public policies are needed to ensure best results for the real economy?’ Cass Business School speech (17 March 2010). Controversies can be illustrated by the decision of RBS CEO Stephen Hester to forgo payment of his bonus in January 2012 in the face of considerable political and wider pressure, and disquiet generated by the announcement of Mr Hester’s 2013 bonus.

elsewhere in banking practice there are also concerns about a perceived lack of willingness on the part of bankers actually to engage in *lending*. The issue of lending is at the heart of Government insistence that banks “explicitly recognise their responsibility to support economic recovery”<sup>8</sup> and, as the crisis revealed, practices of securitisation can make these different limbs of banking extremely difficult to separate out from one another.<sup>9</sup>

Here, the emphasis given to conduct in banking, both in regulatory discourses, and increasingly in more ‘popular’ ones, reveals widely-held views that the financial crisis exposed much that is manifestly wrong with its operations, and much that is incompatible with expectations upon it for rebuilding of the economy. From this, some have already drawn conclusions that the opportunity for sufficiently far-reaching reform has not been taken up, and is unlikely to be done<sup>10</sup>, despite very incisive criticism of banking from regulators. In 2009, Lord Adair Turner, the Chairman of the then City ‘watchdog’ the Financial Services Authority (FSA), famously castigated “socially useless banking” characterising institutions which had become too swollen and too focused on profit-making to be beneficial for society.<sup>11</sup> Notwithstanding Lord Turner’s subsequent modification of this to “economically useless”<sup>12</sup> banking, and before the House of Commons Treasury Committee in 2011, then Barclays Bank Chief Executive Bob Diamond offered an altogether different take on the industry and its obligations. Mr Diamond insisted the “period of remorse and apology” for banking needed to be over, and that the City should be allowed to “move on” in order to facilitate recovery.<sup>13</sup> The crisis has generated much criticism of practices within financial systems generally<sup>14</sup> as well as banker-blame more specifically, but interestingly this very occasion in 2011 was billed by *The Telegraph* as the “ultimate show in bank bashing”<sup>15</sup>, with wider press reportings even revelling in the imagery of bankers as “Somali pirates”.<sup>16</sup>

... These views reveal just how closely bankers and banking are being associated with debates about reconfiguring financial systems, and there was surprise and much cynicism when later in 2011 Mr Diamond acknowledged that public trust in the banking system needed to be rebuilt, and that this required bankers to become “better citizens”.<sup>17</sup> Then in late June 2012 the Libor fixing scandal<sup>18</sup> forced his resignation as

<sup>8</sup> This is by virtue of the accord between the UK Government and the major UK banks – specifically Barclays, HSBC, Lloyds Banking Group and RBS, and, in the context of lending, Santander – known as Project Merlin, instituted on 9 February 2011.

<sup>9</sup> As is very clearly evident from the rationale underpinning the recommendations of the Vickers’ Report (n 5),

<sup>10</sup> See for example Joseph Stiglitz (n 4), but also see accounts suggesting that whilst radical reconfiguration might be desirable or even necessary, the crisis is already being seen merely as “exhaustion of the latest grazing pasture”, per Zygmunt Bauman, *Living on Borrowed Time* (Polity Press 2010) 17.

<sup>11</sup> See Lord Turner Mansion House Speech, *The City Banquet* (22 September 2009).

<sup>12</sup> In his subsequent Cass Business School speech (n 7) Lord Turner revised his position in the light of criticism generated to castigate banking that was “economically useless” or “of no economic value added”, insisting that his original intention was to provoke debate on ensuring confidence that the functions of banks within the economy will achieve benefit “for the real economy and thus for human welfare”.

<sup>13</sup> See Oral Evidence taken by the Committee (11 January 2011, to be published as HC 612-vi). This remark was made in response to questioning by Mark Garnier MP (specifically question (Q) 535).

<sup>14</sup> With particularly negative publicity surrounding so-called CDOs- collateral debt obligations. Explanation of them and their significance in the origins of the financial crisis can be found in works by Stiglitz and Wolf (n 4).

<sup>15</sup> But as *The Telegraph* observed, Bob Diamond, the “unacceptable face of banking”, “managed to dodge the blows of the Treasury Select Committee and even land some punches himself”. See Lucy Armistead and Harry Wilson, ‘Bob Diamond bites back at Treasury Select Committee’ *The Telegraph* (London, 12 January 2011).

<sup>16</sup> See Reporter, ‘Barclays bosses branded ‘Somali pirates’ by shareholders angry over ‘obscene’ bonuses’, *Daily Mail* (London, 27 April 2011).

<sup>17</sup> Bob Diamond, Inaugural Today Business Lecture, BBC House (London, 3 November 2011). Although Mr Diamond *had* said this in his appearance before the Treasury Committee in 2011 (in reply to Q543 (n 13) to David Ruffley MP, when insisting that Barclays would serve communities “both by lending and by being better citizens”), this was not the import attributed to him at that earlier point in time.

Barclays CEO as well as claiming the scalps of its Chairman and Chief Operating Officer. Notwithstanding these latter events, this article actually flows from the import of much of the evidence presented before the Treasury Committee in 2011 by Bob Diamond and current Barclays CEO Antony Jenkins. This clustered around the challenges entailed in requiring banks to behave responsibly whilst also being expected to engage in increased lending.<sup>19</sup> This article is centrally about risk-taking and its essence for financing capitalist economies, and particularly about the parameters for its operation which *legitimise* risk-taking activity undertaken by bankers, and how this will inform UK banking sector reform.

The Libor exposures would become a key reference point for this, in terms of precipitating a stinging attack on the “culture of banking” from the Governor of the Bank of England.<sup>20</sup> This became the strongest institutional entreaty to date on the need to rethink fundamentally what bankers do, and what they should be permitted to do in the pursuit of the collective benefits of risk-taking. But in a slightly earlier reflection on the Bank of England’s own role in the onset of the crisis, and mindful of its envisioned enhanced role in the future of banking regulation<sup>21</sup>, the Governor lamented that in the lead up to the crisis the Bank “should have preached that the lessons of history were being forgotten”.<sup>22</sup> This article now considers how issues relating to banker conduct were configured as the capitalist economy of Britain actually took shape and became embedded during the nineteenth century. In making the case for linking past and present, and exploring similarity in concerns and responsive directions in financial risk management between these two points in time, it considers a corpus of Bank of England commentary on the ‘lessons of history’, and not simply Governor King’s 2012 allusion to it.

## CRISIS AND RECOVERY: RECONFIGURING CAPITALISM FOR THE 21ST CENTURY AND THE ROLE OF RELIGION

Returning initially to the current crisis and its aftermath, as far as clerical commentary is concerned, former Archbishop of Canterbury Rowan Williams is likely to be best remembered for his public statement of support for St Paul’s Cathedral authorities in the light of the controversial protest by Occupy London. Dr Williams observed that the Church of England’s sympathy with Occupy’s protest mirrored public concern about the pace of banking reform in the aftermath of the crisis.<sup>23</sup> However, some time before this, in 2010<sup>24</sup>, Dr Williams had suggested that the earliest days of the crisis had generated a number of questions about its origins, and he alluded strongly to the role of greed in bringing it about.<sup>25</sup> This 2010 address reinforced his own concerns voiced

<sup>18</sup> This related to the so-called ‘inter-bank’ lending rate which provides a formal measure of the cost of this inter-bank lending, setting out the average rate banks pay to borrow from one another.

<sup>19</sup> As seen in Mr Diamond’s response to the Treasury Committee’s questions in 2011 (n 13), specifically Q535 (n13), and in a number of questions (Q538-Q545) asked by David Ruffley MP.

<sup>20</sup> See Philip Aldrick, ‘King attacks “deceitful” banking culture’ *The Telegraph* (London, 29 June 2012).

<sup>21</sup> For an overview of the Bank of England’s envisioned role see *A New Approach to Financial Regulation: Building a Stronger System* (HM Treasury 2011).

<sup>22</sup> This was because banking crises *had* occurred before. Sir Mervyn King, BBC Radio 4 *Today* Lecture 2012 (2 May 2012).

<sup>23</sup> See Rowan Williams (n 6).

<sup>24</sup> This was in his speech accompanying the launch of Rowan Williams and Larry Elliott (eds) *Crisis and Recovery: Ethics Economics and Justice* (Palgrave 2010), 28 September 2010, available from <http://rowanwilliams.archbishopofcanterbury.org/articles.php/941/crisis-and-recovery-book-launch-28th-september> (last accessed 30 May 2013).

<sup>25</sup> See the book launch speech (n 24) and also an earlier interview on BBC Radio 4’s *Today* programme (End of Year interview, 18 December 2008) which also analyses the credit crunch as an important reality check. See also Martin Beckford, ‘Archbishop of Canterbury: Greed has caused global financial crisis’ *The Telegraph* (London, 15 October 2008), and Dr Williams’ lead of the closing session of the World Economic Forum Annual Meeting 2010 on ‘Being Responsible for the Future’ (Davos, 31 January 2010).

as early as 2008 by asking very directly “[h]ow did we get to a situation where we took for granted that certain kinds of behaviour were to be rewarded, never mind the failure or devastation they left in their wake?” adding that “[w]e woke up to the fact that a great deal of our economic life seemed to be based on, well, nothing very much really, except the exchange of currencies and speculations”.<sup>26</sup> The culmination of this was to explain how the human condition allows us to change, and to do so for the better. Here his focus on ‘crisis and recovery’ is very much about the significance of values underpinning religion in the creation of a new culture of financing, and more fundamentally one for living. Indeed, Dr Williams had stressed in 2008 that “[w]hen the Bible uses the word ‘repentance’, it doesn’t just mean beating your breast, it means getting a new perspective . . .”.<sup>27</sup>

From the earliest days of the crisis, a consistent theme in Dr Williams’ messages has been that change is needed, and that change is possible. Dr Williams proposed that banks deemed too big to fail were not too big to change, and that the financial crisis was actually an opportunity for us to set a fresh agenda for rebalancing a spectrum of societal issues beyond economic ones, and that actually creating a new agenda which “draws in environmental, social, intellectual and artistic considerations” will help to “frame the questions about economics and what we value”.<sup>28</sup> Central to this, is adopting an ethical approach across a range of societal issues, at the heart of which can be seen the former Archbishop’s theological influences. This becomes very readily apparent in Dr Williams’ insistence that while the credit crunch provided an important reality check for Britain’s “wrong direction”,<sup>29</sup> and provided an opportunity to repent in accordance with its meaning for the twenty-first century, there was strong reluctance to do this: and what is needed is “what we are shrinking away from”.<sup>30</sup>

This theological insistence that we cannot shrink away from creating a new agenda for capitalism – as part of a much more extensive societal reconfiguration – is evident from both branches of the Christian tradition. In the light of the Occupy protest in the City of London, the reflections of Dr Giles Fraser, then Canon Chancellor of St Paul’s, were bound to acquire prominence. In the St Paul’s Institute Report prepared for publication in October 2011<sup>31</sup>, Dr Fraser insisted that whilst capitalism and ethics “... and not least specifically Christian ethics – can often feel like uncomfortable bedfellows” it was incumbent upon the Church to seek to engage the City in conversations about realigning the economy with societal interests.<sup>32</sup> Also in October 2011, a reporting of the Pontifical Council for Justice and Peace published by the Vatican insisted that the financial crisis requires everyone to “examine in depth the principles and the cultural and moral values at the basis of social existence”, with “the importance of ushering in a new era of sustainable global economic activity grounded in responsibility” also being demonstrable.<sup>33</sup> In his remarks in support of the Occupy protest, Dr Williams referred to the Vatican publication with approval, suggesting that its proposals should be the starting point for debate.

<sup>26</sup> Rowan Williams (n 24).

<sup>27</sup> Rowan Williams (n 25).

<sup>28</sup> Rowan Williams (n 24).

<sup>29</sup> Rowan Williams (n 25).

<sup>30</sup> *ibid.*

<sup>31</sup> *Value and Values: Perceptions of Ethics in the City Today* (London 2011). Actual publication was delayed until the beginning of November on account of the Occupy protest.

<sup>32</sup> *ibid.* 7

<sup>33</sup> *Towards Reforming the International Financial and Monetary Systems in the Context of Global Public Authority* (Vatican City 2011).

Upon publication of the St Paul's Institute Report, former Lazards International Chairman Ken Costa was appointed by the Bishop of London to "start a dialogue" between City and religious leaders on the pursuit of "ethical capitalism".<sup>34</sup> Mr Costa insisted it was "time to work together to reconnect the financial system that we all need with the moral framework that we cannot do without".<sup>35</sup> Here, key messages of reappraisal, justice and fairness, alongside values of moderation and restraint have obvious and apparent appeal to numerous faiths beyond Christianity, as is evident in reflections on the crisis from several high profile theologians.<sup>36</sup> Significantly, allusion within Mr Costa's remit to different faiths working together towards "ethical capitalism" gives important recognition to Britain's multi-faith society alongside its highly secularised nature, as well as acknowledgment of the aftermath of the crisis as a crucial societal juncture.

The public profile of these events was very quickly eclipsed by the publicity surrounding Rowan Williams' decision to stand down as Archbishop of Canterbury, and centrally his criticism of the Coalition Government's aggressive pursuit of "radical, long-term policies for which no one voted".<sup>37</sup> But many will regard the appointment of Justin Welby to succeed Dr Williams formally in March 2013<sup>38</sup> as the most significant development for the involvement of religion in the pursuit of ethical capitalism to date. This known "trenchant critic of the excesses of capitalism"<sup>39</sup>, who was appointed to the Parliamentary Commission on Banking Standards established in the wake of the Libor scandal under the Chairmanship of Andrew Tyrie MP, will continue to serve in this capacity once he takes office as the leader of the Anglican communion. Fellow Commission member Lord McFall has stressed that Justin Welby brings to the inquiry a detailed understanding of business and actual expertise in key aspects of financial services as well as an ethical perspective.<sup>40</sup> The former comes from his business background, and can be seen drawn together with the latter in his views that "[t]he industry was referred to as financial services, but in fact it served nothing", and that in the ruinous wake of the financial crisis, the key issue to be addressed was the need to orient banking and financial services towards "socially useful" purposes.<sup>41</sup>

The allusion to banking that is "socially useful" provides an interesting, and clearly deliberate play on Lord Turner's much vaunted castigation of banking, prior to his subsequent qualification of this in favour of "economically useless". Within days of Justin Welby's reference to it, the pursuit of "socially useful banking" provided the sub-title of a speech from Bank of England Financial Stability Executive Director, Andy Haldane.<sup>42</sup> This explained how banking had helped to 'tear' social fabric by starving other sectors within the domestic economy of human and fiscal resources.<sup>43</sup>

<sup>34</sup> Kamel Ahmed, 'Ken Costa: The City must rediscover its morality' *The Telegraph* (London, 5 November 2011).

<sup>35</sup> Ken Costa, 'It's time for radical change' *The Telegraph* (London, 5 November 2011).

<sup>36</sup> Including Rabbi Lionel Blue, Lord Indarjit Singh, and a number of representatives from the Muslim Council of Britain, including Sir Iqbal Sacranie.

<sup>37</sup> As set out in Dr Williams' Leader 'The government needs to know how afraid people are' *New Statesman* (London, 9 June 2011).

<sup>38</sup> On 4 February 2013 confirmation of Justin Welby's appointment was announced, ahead of his Enthronement on 21 March 2013: see <http://www.archbishopofcanterbury.org/articles.php/5014/justin-welby-to-be-confirmed-as-archbishop-of-canterbury-at-st-pauls-cathedral> (last accessed 30 May 2013).

<sup>39</sup> See Helen Warrell and George Parker, 'Next archbishop to keep bank panel role' *Financial Times* (London, 8 November 2012).

<sup>40</sup> *ibid.*

<sup>41</sup> Justin Welby, 'Repair or Replace: Where do we start among the ruins?' (Zurich, 26 October 2012) especially 2-3.

<sup>42</sup> Andrew Haldane, 'A leaf being turned: Occupy Economics, 'Socially useful banking'' (London, 29 October 2012).

<sup>43</sup> *ibid* 2 and 4, with suggestion at 5 that State subsidy for institutions deemed "too big to fail" was responsible for significant unequal distributions of assistance across the financial sector, and from which "the wider economy has clearly been the loser".

This had itself arisen from a culture within banking making it a beacon for supporting high risk-high reward activities, and thereby short-term trading activities rather than long-term investment.

Interestingly Mr Haldane’s speech gave strong endorsement to “Occupy Economics”, by suggesting that the Occupy London movement had been very significant and also successful in publicising the role played by bankers and also consumers in achieving growing inequality.<sup>44</sup> This was so in a context of narrowing global inequality, on account of an era of global “ultra cheap credit”, with levels of household debt rising “pretty much exactly in line with ... inequality”, which had allowed banks to become a “first among unequals”.<sup>45</sup> The Occupy movement had, according to Mr Haldane, given a much higher profile and wider platform to such views and corresponding calls for a different and long-termist approach for individual living, but with much of this being anchored to banking. At the heart of this, for Mr Haldane, lies banks’ rediscovery of their social usefulness.

... In insisting that policymakers *had* listened to Occupy, and that there was – contrary to some views- commitment to securing regulatory reform, Mr Haldane outlined his vision of the building blocks of a system of socially useful banking. At this point it is clear that at the heart of his so-called “five ‘c’s”<sup>46</sup> lies the need to change banking culture. This chimes in closely with Governor Mervyn King’s attack on banking culture following the Libor fixing exposure, but it also mirrors almost entirely all the key theological reflections on moving from crisis to recovery. The unintended location<sup>47</sup> of the Occupy protest outside St Paul’s could readily attract cynicism for any theological support it managed to attract, with this also being capable of being applied to Occupy’s own use of religious imagery during its protest. However, the essence of “Occupy Economics” can be seen very obviously in Justin Welby’s explicit references to “socially useful” banking, with this also much in evidence in Rowan Williams’ much earlier observations. A particularly noteworthy example of the latter for this article is Dr Williams’ remark on the capacity of human beings to change, and to change ‘course’ for the better.

... Messages on the need for change coming from regulators are particularly strong from the Bank of England, on account of its envisioned enhanced future role for banking regulation. They are also evident in FSA publications, on account of criticism of its role during the crisis.<sup>48</sup> But more generally, regulators’ references to the need for cultural change in banking have been a constant since 2007–8<sup>49</sup>, long before Mervyn King’s scathing attack in June 2012. Although it was only a short time prior to the latter that Governor King suggested that the lessons of history had been forgotten, commentary from the Bank of England shows how closely concerns about the future were becoming juxtaposed alongside discussion of the past at a much earlier date. This can be seen in a number of speeches from 2009 from Andy Haldane, and also from Deputy Governor Paul Tucker. Because of the nature and timing of Britain’s trajectory of modernity, references to the past are ones to the nineteenth century, but in common with the theological commentary generated by the crisis, emphasis is on the essence of change and is firmly forward-looking. Certainly, theologians are looking to tie this in

<sup>44</sup> *ibid* 2 and 3.

<sup>45</sup> *ibid* 3 and 4.

<sup>46</sup> *ibid* as set out at 6, and discussed thereafter, these are (“first and ... foremost”) culture; capital; compensation; credit; and competition.

<sup>47</sup> As is well known, the protest became located outside St Paul’s after protestors failed to occupy Paternoster Square, home of the London Stock Exchange.

<sup>48</sup> See Report of the Financial Services Authority Board *The Failure of the Royal Bank of Scotland* (London 2011).

<sup>49</sup> See the speeches of Hector Sants, FSA Chief Executive during the crisis.

with the value of rediscovering the essence of religion, and its reintegration within a number of societal agendas *including* approaches to the economy and its financing, through its promotion of non-market values. But allusion to the significance of the past by regulators presents the opportunity to reflect on just how significant religion was in the emergence of modern capitalism. This is so even if ultimately we conclude that the move from crisis to recovery for Britain in the twenty-first century can be better supported by non-marketised value systems from outside religion, which might be more salient for, and effective within a societal composition which is multi-faith yet also strongly secular.<sup>50</sup>

## DEBATES ON THE FUTURE OF CAPITALISM, AND UNDERSTANDING ITS PAST

Ultimately it will become clear that such ideas on human capacity to change and evolve are also integral to the intellectual approach found within historical methodology that proposes experiences from our past can be invaluable for us as we live through our present. Thus for an appraisal of whether financial marketplace values should have, or indeed need to have, a grounding in the ethical values underpinning religion in the twenty-first century, there will be a discussion of the profound significance of religiosity for those which emerged during the nineteenth century. In turn, there will be reflection on what bearing – if any – these experiences from our history have for our present and future, given both the obvious distinctiveness of the global age generally, and also intellectual postulating that, as far as the crisis itself is concerned, “this time is different”.<sup>51</sup>

Whilst the ‘spotlight’ of debate is firmly fixed on the future, current reflections on ‘Regimes for handling bank failures’ and centrally ‘redrawing the banking social contract’<sup>52</sup> from the Bank of England are referencing the operation of banking during the nineteenth century. This situation of the past alongside current concerns about the role of banking in the crisis, as well as failures within the sector, is seen in the speech that Deputy Governor Paul Tucker presented to a conference appositely titled ‘Restoring Confidence – Moving Forward’. Here, Mr Tucker opened his address on the ‘rules of the game’ or social contract<sup>53</sup> – within which banks will need to operate in future – by insisting that in accepting “[t]he defining characteristic of banks lies in the liquidity services . . . [provided] to the economy, and in the consequent liquidity risks that [are] run”, “[h]istory shows that banks are inherently fragile . . . [and] vulnerable to deposit runs”.<sup>54</sup>

Further allusion to the significance of the past for present and future from the Bank of England can be seen in Andy Haldane’s suggestion, also in 2009, that the history

<sup>50</sup> A proposition which appears to be borne out in the results of the 2011 Census, with its key finding that the proportion of the population who reported they have no religion has now reached a quarter of the population; in numerical terms, 14 million. See <http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/rpt-religion.html> (last accessed 18 February 2013).

<sup>51</sup> See Carmen Reinhart and Kenneth Rogoff, *This Time is Different: Eight Centuries of Financial Folly* (Princeton University Press 2009). The authors reference ‘this time is different’ *syndrome* to explain why we seem to learn so little from financial crises which have occurred in our past, always finding reasons for arguing that “this time is different”.

<sup>52</sup> Paul Tucker, ‘Redrawing the Banking Social Contract’ British Bankers’ Association Annual International Banking Conference speech (London, 30 June 2009), embodies this mission.

<sup>53</sup> *ibid* 2. The speech explained that three elements have traditionally characterised the social contract between banking and society. This compact has allowed banks to profit from risk-taking inherent in providing liquidity and vital monetary and credit services to the economy, by being subject to prudential regulation; being given access to liquidity insurance at the central bank; and required to finance industry-wide insurance schemes to protect depositors.

<sup>54</sup> *ibid*. 1

of banking showed “. . . the importance of banks being built, first and foremost, on *trust*”.<sup>55</sup> Earlier still, in January 2008, the Treasury Committee Report on Northern Rock, revealingly titled *The run on the Rock*<sup>56</sup>, suggested that the “most notorious bank run in British history” actually took place in 1866 on account of difficulties experienced by City finance house Overend and Gurney.<sup>57</sup> And much like Northern Rock, when troubles forced Overend and Gurney to suspend payment, “terror and anxiety” exposed other institutions which were experiencing financial difficulties, and the stability of the entire banking system was threatened.<sup>58</sup>

As for moving forward, the picture emerging of bank regulation for the future – pieced together from regulators’ contributions as well as from key policy contributions found in Lord Turner’s Report on the global financial crisis<sup>59</sup>, Sir David Walker’s recommendations on disclosure of bankers’ remuneration<sup>60</sup>, and also the Vickers’ Report – is one where unduly risky banking practices must be dis-incentivised and the trinity of interests embodied in risk-taking, responsibility, and remuneration thereby realigned. What is required in the face of “what is, without question, a big crisis” are new ‘big ideas’ and even ideology.<sup>61</sup> In this vein, recent reference from within the Bank of England itself to the pursuit of “socially useful banking” shows unity between regulatory and theological agendas. There is also evident unity in favour of simplicity in approach rather than complexity, and for giving more credence to “Thou shalt not” and thereby some retreat from ‘regulatory commandments’ espousing “Thou shalt provided the internal model is correct”.<sup>62</sup>

. . .The Bank of England speeches predating Mervyn King’s reference to the importance of “lessons from history” are able to connect all these elements together: seeking effective prospective reform and signposting the importance of looking at financial distress experienced in the past in moving forward from ‘crisis to recovery’ in the twenty-first century. For Justin Welby, the challenges extend beyond modern capitalism’s accommodation of the much criticised “socialised losses and privatised profits” associated with the crisis, with a culture within high finance which has prioritised transactions providing large profits for banks “ . . . and ignored areas where relationships are needed to unite communities and help lift them out of poverty”.<sup>63</sup> But the new Archbishop firmly believes in a “less is more” approach to regulation, which has led to him endorsing the views of Andy Haldane in this regard.<sup>64</sup> In this context we can ponder what kind of values might inform redrawing the social contract underpinning the financial system, and which might assist in restoring confidence in this- and ultimately the move from ‘crisis to recovery’. And in linking this in turn to Andy Haldane’s own reference to financial crises from the past, reactions to

<sup>55</sup> Andrew Haldane, ‘Credit is Trust’, Association of Corporate Treasurers speech (Leeds, 14 September 2009), 4.

<sup>56</sup> Treasury Committee (HC 2007–8, 56–1), 1–181.

<sup>57</sup> *ibid* 8.

<sup>58</sup> *ibid*.

<sup>59</sup> Lord Turner, *The Turner Review: A regulatory response to the global banking crisis* (FSA 2009).

<sup>60</sup> As part of the report of Sir David Walker, *The Walker Review: A review of corporate governance in UK banks and other financial industry entities* (HM Treasury 2009).

<sup>61</sup> Andrew Haldane, ‘Small Lessons From a Big Crisis’, Remarks at the Federal Reserve Bank of Chicago 45<sup>th</sup> Annual Conference (Chicago, 8 May 2009); see also Bank of England, *The Role of Macroprudential Policy: A Discussion Paper* (London 2009).

<sup>62</sup> Thereby distinguishing so called ‘price-based’ regulation from ‘quantity-based’ restrictions, with recognition that whilst the former (focusing on pricing risk within a financial system, rather than prohibiting or restricting it) makes sense for optimising in a risky world, the latter (“thou shalt not”) may be more robust to mis-calculation in an uncertain world: see Andrew Haldane (and Bank of England Economist Vasileios Madouros), ‘The Dog and the Frisbee’ (Wyoming, 31 August 2012) 22–23.

<sup>63</sup> Justin Welby (n 41) 4.

<sup>64</sup> *ibid* specifically Justin Welby referencing Andy Haldane’s ‘The Dog and the Frisbee’ Paper (n 62).

nineteenth-century ‘shocks’ demonstrate just how strongly religion influenced the emergence of modern capitalism.

### CAPITALISM AND RELIGION IN NINETEENTH-CENTURY BRITAIN: IMPROVEMENT, ATONEMENT AND MATURATION

In the light of Justin Welby’s key role in banking reform, it is likely that Rowan Williams’ commentaries will become obscured significantly if not entirely. And indeed, the new Archbishop’s business background would appear to address Rowan Williams’ own concerns that without an economist’s training, his contributions might be deemed “suicidally silly”.<sup>65</sup> Nevertheless, the essence of Dr Williams’ commentary on the causes and consequences of the financial crisis<sup>66</sup> is evident in many reflections from regulators, many of whom *are* trained economists. For these reasons Dr Williams’ juxtaposition of ‘harm caused’ alongside his insistence that responsibility is central for securing a sustainable future<sup>67</sup> is noteworthy. And in taking the first steps to link past with present intellectually, articulations of the need for responsibility in modern capitalism can be seen very clearly in commentaries on the significance of religion for its emergence, found within historiography. A particularly salient illustration of this can be seen in Boyd Hilton’s submission that in Britain the first half of the nineteenth century was both the “Age of Improvement” and also an “Age of Atonement”.<sup>68</sup> Hilton summarises this position in his suggestion that while in times of considerable social and economic upheaval, upper and middle-class consciousness found itself torn in a “war of ideas” between two “incompatible opposites”<sup>69</sup> there does appear to have been a dominant mode of thought, which was an amalgam of enlightenment rationalism and evangelical eschatology. At the heart of this, Hilton proposes, was the Christian doctrine of the Atonement.

Keen not to be drawn into and sidetracked by the inadequacies of the term ‘evangelical’, Hilton clarifies that his analysis attributes the term to the “third and fourth generations of the revival begun by Wesley” with its main emphasis on the established clergy, Anglicans and Scottish Presbyterians, illuminating this as the world of “. . . the Clapham Sect- of William Wilberforce, Henry Thornton, Zachary Macaulay, and John Venn- as well as of Henry Elliott, Isaac Milner, Charles Simeon, Edward Bickersteth, Thomas Chalmers, Henry Ryder, Hannah More, Daniel Wilson, John and Charles Sumner”.<sup>70</sup> As Hilton explains, what distinguished evangelicalism from the broader sweep of the Judeo-Christian heritage was an emphasis on particular doctrines and fervent practice of ‘vital religion’. This rested on belief in a sharp discontinuity existing between this world and the next, where God’s providence is responsible for all that happens on Earth, and that earthly creatures exist in a natural state of depravity, weighed down by original sin, with life on Earth being an “arena of moral trial” awaiting judgement. Here, faith in the Atonement “sanctifies the sinner as well as justifying him, and so prepares his heart for the Heaven which will be his home”.<sup>71</sup>

<sup>65</sup> Rowan Williams (n 25).

<sup>66</sup> Rowan Williams (n 24).

<sup>67</sup> *ibid.*

<sup>68</sup> Boyd Hilton, *The Age of Atonement: The Influence of Evangelicalism on Social and Economic Thought 1785–1865* (Clarendon Press 1986) 3.

<sup>69</sup> *ibid.*

<sup>70</sup> *ibid* 7.

<sup>71</sup> *ibid* 8.

... Whilst alluding to the differences harboured by different sects and groupings, and notable disagreements between individuals, Hilton then insists that evangelicalism – both national and provincial – was extremely influential in the mentality of the *haute bourgeoisie* that dominated British politics from 1784 to the 1840s, on account of a combination of *rentier* economic interests, office-holding and social notability. In particular, this article considers the way that in the first half of the nineteenth century, evangelicalism’s “distinctive middle-class piety” helped to fashion “new concepts of public probity and national honour, based on ideas of oeconomy, frugality, professionalism, and financial rectitude”.<sup>72</sup> This is what allowed evangelicalism to become “a gamut of attitudes and beliefs” during this time<sup>73</sup>, and to ‘harness’ demands for responsibility and restraint within capitalist activity. Here, the article is particularly interested in the nature of religion’s continuing influence once the Age of Atonement itself subsided by the 1850s, and what this might suggest about how religious values espousing moderation and restraint could assist recovery from the financial crisis in twenty-first century Britain.

For Hilton, evangelicalism and its distillation into the doctrine of the Atonement during the first half of the nineteenth century accounted for upper and middle class obsession with ‘catastrophe’ and God’s plan, and for the emerging regard for improvement merely as terrestrial fumbling towards private and public salvation, rather than being a reward of itself. In charting the significance of religion within the dominant upper and middle social classes, Hilton considers key economic, social, political and intellectual debates of the nineteenth century. From this he demonstrates how the prominence of Atonement ensured that ‘social underdogs’ received harsh treatment at the hands of governments, before this started to change from the 1850s and 1860s on account of, as Hilton argues, changing emphasis on religion and its significance, and on which more is said shortly. In his analysis of the first half of the century, Hilton makes a lengthy exploration of the significance of religious embeddedness for business, emerging as transformations from industrialisation became forged into the basis of modern capitalism.

Discussion of Thomas Chalmers’ *Commercial Sermons* of 1820 and *Christian and Civic Economy* (first published in 1821)<sup>74</sup> is central in Hilton’s explanation of how the Atonement was significant beyond informing the way that the upper and middle classes rationalised treating the poor. These elevated societal echelons were equally if not more occupied with concerns about how the age of “enormous money-making” (as well as intense religiosity) could affect their “mortal souls and temporal prospects”, given “Christ’s injunctions as to the ‘spiritual superiority of the poor’”.<sup>75</sup> The sin of speculation loomed large and the pursuit of profit presented a considerable threat for values of moderation and restraint, and helped to shape disputation between the infamous tellings of Reverend Thomas Malthus and the equally notable political economy of David Ricardo on the effects of “middle-class avarice ... [outpacing] the natural limits of consumer demand”.<sup>76</sup> Here, according to Hilton, the third volume of Chalmers’ *Christian and Civic Economy*, published in 1826, reveals its author’s intensifying concern about the incompatibility of the political economy with “the Christian ideal of self-denial and other-worldliness”.<sup>77</sup> This reflected the immediate

<sup>72</sup> *ibid* 7.

<sup>73</sup> *ibid*.

<sup>74</sup> *ibid* 116–117.

<sup>75</sup> *ibid* 115.

<sup>76</sup> *ibid* 118.

<sup>77</sup> *ibid* 116.

aftermath of the repeal of the Bubble Act 1720, whereby incorporation for commercial purposes was once again permitted in 1825 after over a century of being effectively outlawed. The speculation which followed this liberalisation had resulted in the failure of hundreds of firms and had ensured that the Bank of England itself hovered close to being forced to stop payment. In his reference to the “terrifying and panicky weeks for the capitalist establishment”<sup>78</sup>, Hilton is also able to illustrate the transmission of religiosity into an obsession with catastrophe which was perhaps most pronounced in “great commercial upheavals”.<sup>79</sup>

Returning to his initial overview of evangelicalism and its influence during the first half of the nineteenth century, Hilton explains that the “Age of Atonement” began with upper and middle class reaction against the French Revolution and English Jacobinism. The years of war and scarcity which closed the eighteenth century attracted support for William Wilberforce’s *A Practical View of Christianity* published in 1797 and Thomas Malthus’ *Essay on the Principle of Population* a year later in reaction against the inappropriate complacency of William Paley’s earlier writings (dating from 1785) on key questions flowing from the ability of nature to provide for humanity.<sup>80</sup> As Hilton summarises, the search for pragmatism which came somewhere between Paley’s unfounded optimism and Malthus’ vista of inevitable doom, and which also countered atheism, emerged in the position exemplified in Wilberforce’s “evangelical manifesto”<sup>81</sup>. This was that the world was in a state of alienation from God, and lost in depravity and guilt, and raised for Christians the question of how to escape the wrath which would come as a natural consequence of this. For Wilberforce this required reflection on questions beyond absolution from this guilt, requiring also emancipation from the power of moral corruption. In turn this required the power of the Holy Spirit, and placed commensurate obligation on those dwelling on Earth who partook in moral writings to: “. . . produce in us that true and just sense of the intensity of the malignity of sin . . ., and of the real magnitude of our danger, which would be likely to dispose us to exert ourselves to the utmost to obtain deliverance from the condemnation and emancipation from the power of sin . . .”.<sup>82</sup>

For Hilton, the end of the “Age of Atonement” around 1850 did not mark the end of the significance of religion for the upper and middle class mindset, but instead represented a turning point in the nature of its influence. Here, the “theological transformation” that took place awakened interest in drawing inspiration from the life of Jesus to formulate a more worldly Christian compassion.<sup>83</sup> Here the article embraces Hilton’s analysis of the new emphasis on Jesus “as man rather than as lamb” which enabled religion to be transformed into a “guide to living as well as a passport to Paradise” as a reference point for the growth in a more compassionate view of social problems.<sup>84</sup> But his work also invites us to consider how its effects on the upper and middle classes *themselves* were rather less transformative. This is so given the continuing fear of speculation on account of its perceived private and public consequences amongst the Victorian elite, notwithstanding the “age of equipoise”

<sup>78</sup> *ibid* 118 which occurred from 9 November 1825 to 19 January 1826, with this period of financial panic mapping the commencement and completion of Chalmers’ third volume of *Christian and Civic Economy*.

<sup>79</sup> *ibid* taken from the back jacket summary of the remit of the text.

<sup>80</sup> *ibid* 4.

<sup>81</sup> *ibid* 3.

<sup>82</sup> *ibid* 4

<sup>83</sup> *ibid* 5.

<sup>84</sup> *ibid*.

which is said to have followed on from the acute anxieties of the early decades of the nineteenth century for these societal groupings.<sup>85</sup>

This continuing upper and middle class emphasis on moderation and restraint and the pursuit of endeavour will provide the basis for considering whether religious values could play a role in reconfiguring capitalism within British society for the twenty-first century. These ideas are now explored in relation to how banking practices became the basis of criminal charges during the nineteenth century, and where crucial development occurred from 1850–1880.<sup>86</sup> In this initial phase of criminalising conduct in business ‘banking scandals’ were regarded as extremely significant. Given current concerns about reckless investment and lending on the part of bankers and insatiable consumer demand for credit, as well as debate on how best to respond for a better and more financially stable future, it is striking that a number of ‘banking scandals’ from the nineteenth century appear to have raised similar concerns.

### RELIGION AND VICTORIAN DISCOMFORT AT THE ‘BUSINESSMAN CRIMINAL’

The scope of contemporary concern about banking is evident from the number of trials for what would today be termed ‘financial crime’ which arose from ‘banking scandals’. These events also revealed a range or “continuum of actions”<sup>87</sup> including relatively uncontentionously wrongful instances of bankers misappropriating ‘bank funds’ for personal use or misapplying customer deposits. Even in these instances, the criminalisation of such behaviours was only *relatively* straightforward. This was so because any associations of criminal behaviour with those in higher social echelons was difficult for Victorian society to countenance on account of its strong identification of ‘the criminal’ with the ‘criminal classes’ drawn from those “who have poverty and want, bad education, and worse example, as possibly some extenuation of their offences”.<sup>88</sup> But beyond this very elemental discomfort at acknowledging the existence of the ‘respectable criminal’<sup>89</sup>, there *were* more creative practices within business environs which *would* challenge existing criminal law and call for new approaches. It is here that considerable use appears to have been made of religious values. It is here we find rhetoric capable of being identified with Wilberforce’s concerns about escaping from the wrath to come and humankind’s ability to obtain deliverance from condemnation and emancipation from the power of sin, as much as it might be with the more human and worldly face of Christianity believed to characterise the second half of the century.

It was not of course only bankers who engaged in misconduct in their professional lives, with key legislative enactments from 1844 and 1857<sup>90</sup> showing legal and

<sup>85</sup> Per William Burn, *The Age of Equipose: A Study of the Mid-Victorian Generation* (Allen & Unwin 1964), and see also Mark Noll (ed) *God and Mammon: Protestants, Money, and the Market, 1790–1860* (OUP 2001). See also the explicit connecting of this rhetoric with the rise of the middle class investor in Michael Lobban, ‘Commercial Morality and the Common Law: or, paying the price of fraud in the later nineteenth century’ in Michael Lobban, Margot Finn and Jenny Bourne Taylor (eds), *Legitimacy and Illegitimacy in Nineteenth-Century Law, Literature and History* (Palgrave 2010) 119–147.

<sup>86</sup> See further Sarah Wilson, ‘Law, Morality, and Regulation’: Victorian experiences of financial crime’, (2006) 46 *Brit.J.Criminol.* 1073.

<sup>87</sup> David Friedrichs, ‘Wall Street: Crime Never Sleeps’ in Susan Will, Stephen Handelman, and David Brotherton (eds), *How They Got Away With It: White Collar Criminals and the Financial Meltdown* (Columbia University Press 2012) 3–26, 6.

<sup>88</sup> David Morier Evans, *Facts Failures & Frauds Revelations Financial Mercantile Criminal* (first published 1859, Augustus M. Kelley 1968) 209.

<sup>89</sup> And thereby expose the thereto “hidden affinities” between respectability and criminality: see Martin Wiener, *Reconstructing the Criminal: Culture, Law, and Policy in England 1830–1914* (CUP 1990) 244.

<sup>90</sup> Respectively the Joint Stock Companies Act 1844 and the Fraudulent Trustees Act 1857.

socio-cultural acceptance that impropriety from outside banking would also be regarded as criminal activity. Nevertheless, banking scandals do appear to have had particular prominence in securing this societal acceptance of business activity as criminal conduct. Indeed, the Fraudulent Trustees Act 1857 was enacted hastily in response to the infamous banking scandal generated by the collapse of the Royal British Bank in 1856. In addition, concerns about banking can also be seen much more widely cast in key discourses relating more generally to the increasing institutionalisation of industrial capitalism dating from that particular decade.

A short time prior to the collapse of the Royal British Bank Parliamentary Debates during 1855, discussing incorporation with limited liability being made generally available, are perhaps best known for the lengthy, extensive, and intense discussion of the merits (or even essence) of permitting this, and very serious concerns about the scope for its misuse. In addition to these deeply polarised views which found judicial expression almost fifty years later in the high-watermark *Salomon* litigation<sup>91</sup>, these debates also provided a location for considering the nature of banking and its significance in the growth and maturation of industrial capitalism. Here, banking was identified as unique amongst businesses. Although central for financing commercial activity, banking itself was not regarded as being underpinned by the same objectives as enterprise, and on account of this it was believed to be premised on different value systems. This was explained by Viscount Palmerston who recognised the increasing popularity of the joint stock form for banking as distinct from the traditional partnership model. Palmerston insisted that the nature of a bank and its functions were altogether different from the paradigmatic joint stock company, which was an association of individual persons collecting together their capital, for engaging in some form of profit-making. Banking was instead concerned with the safe keeping of customers' deposited money.<sup>92</sup> Most tellingly, Palmerston insisted that a bank was special to the extent that "its duty partook of the nature of a trust".<sup>93</sup>

A short time after the collapse of the Royal British Bank, the Report of the Select Committee investigating the 'commercial distress' which had been experienced in the later part of the 1850s<sup>94</sup> did much to amplify a further crucial element of banking subsisting alongside its unique position as a commercial entity underpinned by trust rather than the pursuit of profit. Although these financial institutions are ones on whom savers and borrowers alike crucially depend, as then Governor of the Bank of England Sheffield Neave's testimony noted, at the first sign of any difficulty being experienced by a bank, depositors habitually withdrew their money.<sup>95</sup> In these circumstances loss of confidence in an institution was instantaneous as much as it was inevitable, and there was a real risk of this spreading to other institutions in times of such panic. In a very clear echoing of current Bank of England mindfulness of the need to avoid "scaring the horses"<sup>96</sup> (not to mention the enduring images of the queues of anxious depositors during the 'run' on Northern Rock in 2007), Governor Neave was very acutely aware of how vulnerable banking was to loss of confidence.

<sup>91</sup> The *Salomon* litigation commenced initially in 1893, continuing with the Court of Appeal decision in *Broderip v Salomon* [1895] 2 Ch 323, and culminating as the House of Lords' decision *Salomon v A. Salomon & Co. Ltd.* [1897] AC 22.

<sup>92</sup> HC Deb 27 July 1855, vol. 139, col 1446.

<sup>93</sup> *ibid.*

<sup>94</sup> P[arliamentary] P[apers] 1857–8 V xxi (381) *Report from the Select Committee appointed to inquire into the Operation of the Bank Act[s] ... and into the Causes of the recent Commercial Distress and to investigate how far it has been affected by the Laws for Regulating the Issue of Bank Notes payable on demand* (hereafter *The 1857–8 Report*).

<sup>95</sup> *ibid* Minutes of Evidence, 4.

<sup>96</sup> Per Paul Tucker (n 52) 3.

The effects of loss of confidence in investment markets generally were exposed for the Victorians by the ‘railway crisis’ of the 1840s. From this it became clear that the very business activity required to embed the capitalist economy could easily become starved of essential capital by loss of investor confidence, and that the very progress of capitalism could be threatened by this.<sup>97</sup> Loss of confidence in banking was a distinct but closely related hazard, and one which could have repercussions of even greater severity. Thus, the need to avoid what has become known as systemic risk within the sector actually financing capitalism ensured the need to come down hard on those whose conduct could disrupt its proper functioning. This would involve ‘naming and shaming’<sup>98</sup> actual institutions involved in undermining confidence in the sector, and thus compromising its reputation for being able to “bear any strain which might [be] brought upon it . . .”.<sup>99</sup> This would also involve castigating irresponsible conduct, both as far as investment activity and also lending were concerned, and where difficulties arising in the latter could actually include bankers being too mindful of clients’ interests at the expense of exercising prudential judgement.<sup>100</sup> These responses to unacceptable conduct in banking could be seen in very public emphasis of the need for the banking sector to engender trust and stability, such as in the 1857–8 Report itself. They can also be seen in the trials brought as a result of accusations of criminal conduct against bankers.

In common with other types of commercial activity, banking did of course experience pressure that was especially pronounced during times of ‘commercial distress’. But even outside these times of extreme pressure<sup>101</sup> the affairs of troubled bankers were investigated and very publicly castigated in the setting of the criminal court. Following the collapses of the Royal British Bank in 1856 and the City of Glasgow Bank in 1878, there was no shying away from attributing failure directly to irresponsible conduct. These two cases also show how the criminal law required creative development to respond to misconduct in business. Unlike the trial and conviction of private bankers Strahan, Paul, and Bates for embezzlement in 1855, neither of the later two cases involved embezzlement or actual misappropriation of property being proven.<sup>102</sup> Here, the trial and conviction of the City of Glasgow Bank directors and manager, and the Royal British Bank defendants, for offences relating to the mis-stated financial health of their respective institutions sent a very clear message across business interests. Criminal liability *would* be far-reaching, because there existed a range of misconduct so manifestly wrong that it would attract this rebuke from society.<sup>103</sup> And furthermore, it appears that whilst there were legal distinctions drawn between species of wrongful conduct, approaches taken in actually prosecuting different degrees of wrongfulness in fact harboured much similarity.

<sup>97</sup> See Sarah Wilson (n 86) 1079.

<sup>98</sup> In *The 1857–8 Report* (n 94) five named banks were accused directly (at (xxi)) of contributing “more than any others to the commercial disaster and discredit of 1857”, with their dubious legacy being on account of “their inherent unsoundness, the natural, the inevitable result of their own misconduct”.

<sup>99</sup> *ibid* Minutes of Evidence 75.

<sup>100</sup> There was much discussion of the competing perspectives arising from being mindful of local clients’ needs from representatives of the Association of Private Country Bankers and Bank of England Governor Sheffield Neave.

<sup>101</sup> Notwithstanding that the nineteenth century was characterised by “economic uncertainty”, and “saw severe trade cycles and a stock market crash roughly every ten years”: see Michael Lobban, ‘Nineteenth Century Frauds in Company Formation: *Derry v Peek* in Context’ (1996) 112 LQR 287, 287–288.

<sup>102</sup> Notwithstanding that the Royal British Bank directors were widely believed to have engaged in such activities, and from the initial indictment in the City of Glasgow Bank trial, which included theft and embezzlement, it was only the ‘boundary’ charges relating to falsely representing the financial health of the bank that were pursued.

<sup>103</sup> See Sarah Wilson, ‘Tort law, actors in the “enterprise economy”, and articulations of nineteenth-century capitalism with law: The Fraudulent Trustees Act 1857 in context’ in T.T. Arvind and Jenny Steele, *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart 2012).

There *were* of course important legal differences subsisting between accusations of actual misappropriations of others' property and misrepresentations of assets and profitability, with these found reflected in charges brought and punishments arising on conviction.<sup>104</sup> In respect of the latter misconduct, there were also distinctions drawn in the determinations made, and punishments meted, for those actually making misrepresentations, and others who saw fit to acquiesce with what was being fabricated. But the rhetorical warnings against misconduct did not follow such legal trajectories, and neither did the religious ideas underpinning them. Pronouncements of utter "rotteness of a commercial system . . ."<sup>105</sup> were not confined to activities which were self-serving rapacity of others' property. In such situations, warnings against the alliance of "wickedness and commerce . . ."<sup>106</sup> were warnings against the consequences of engaging in conduct that was irresponsible, even for reasons which might appear well-motivated. Here the trials sought to discourage pursuits apparently contrary to "[g]ive me neither riches no[r] poverty, but enough for my sustenance"<sup>107</sup> even when arising in circumstances whereby "[a]ccording to all outward seeming, every ordinary incentive to wrong-doing was wanting".<sup>108</sup>

In such situations, it was often not "till the last moment did it appear that there had been either extravagance, ignorance, or mismanagement . . .".<sup>109</sup> These scenarios *were* common in the context of struggling businesses, and whilst the trials did castigate most harshly behaviour motivated by self-enrichment, there was also recognition that *all* pursuits not governed by moderation and restraint could have catastrophic consequences for the economy, for the nation, and for society. This ensured that those engaged in commerce had to be seen as occupants of positions of responsibility for ensuring the nation's prosperity, and the trials were clear that there would be no excuse for acting contrary to this. This position of reposed trust required commercial actors to engage in risk-taking on the nation's behalf, but also charged them with ensuring that this was of a responsible nature through severe warnings against causing harm.

## RELIGION AND LIMITATIONS ON THE LEGITIMACY OF THE "DYNAMIC ENTREPRENEUR"

In seeking to manage the less desirable consequences of risk-taking, by celebrating (with moderation, of course) the essential activities of the "dynamic entrepreneur"<sup>110</sup> whilst placing limits on legitimate risk-taking in business decision-making, the influence of religion is readily apparent. This can be seen in warnings that unacceptable conduct must be "visited with the greatest severity of punishment", otherwise "the consequences to society would be too alarming to contemplate".<sup>111</sup> In this vein, in Strahan, Paul, and Bates' trial, the prosecution alleged that the bankers had engaged in "the desperate and guilty expedient of resorting to the securities they held in their hands, belonging to their

<sup>104</sup> See Gary Wilson and Sarah Wilson, "Getting away with it' or 'punishment enough?': the problem of 'respectable crime' from 1830" in James Moore and John Smith (eds), *Corruption in Urban Politics and Society, Britain 1780–1950* (Ashgate 2007) 65–89.

<sup>105</sup> David Morier Evans, *The Commercial Crisis 1857–1858* (first published 1859, Augustus M. Kelley 1969) 11.

<sup>106</sup> *ibid.*

<sup>107</sup> Taken from the Book of Proverbs with an articulation appearing to date from the thirteenth century: see Richard H. Tawney, *Religion and the Rise of Capitalism* (first published 1926, Penguin Books 1990) 67.

<sup>108</sup> David Morier Evans (n 88) 111.

<sup>109</sup> *ibid.*

<sup>110</sup> Ben Pettet, *Company Law* (2nd edn, Pearson Press 2005) 160.

<sup>111</sup> David Morier Evans (n 88) 117, quoting Mr Bodkin laying the case of Strahan, Paul, and Bates before Bow Street Magistrates' Court.

customers ... to meet the necessities of the hour” including seeking to bolster a failing business.<sup>112</sup> This intervention was not regarded as one in the pursuit of good, and was instead seen as lying on the continuum of wrongdoing which required ‘checking’ through public insistence on restraint and moderation. Similar approaches are evident in the Royal British and City of Glasgow Bank trials relating to the misrepresentations made in attempts to avoid ‘scaring the horses’ and prevent loss of public confidence. The directors of both institutions clearly understood that a great number of private and commercial clients were reliant upon their continuing ability to make payment, but prosecutors emphasised the evils emanating from such action rather than the humanity shown by it. In the former, Sir Frederick Thesiger insisted that the directors were responsible for “Wide-spread ruin ... scattered over the whole of the country, ... [whereby] houses have been brought to destruction, families have been plunged from affluence into poverty, the hard earnings of industry, collected by long labour, have been entirely lost”<sup>113</sup> with the Lord Advocate’s closing address to the jury in the latter emphasising how the directors and manager had been entrusted with millions by the public only to “work that wreck ... which has befallen the City of Glasgow Bank”.<sup>114</sup>

In many ways these approaches do not embody Atonement as found in the writings of true believers, and as exemplified in Wilberforce’s *Practical View*. This is notwithstanding much talk about “resorting to unusual, and in ordinary circumstances illegitimate speculation”<sup>115</sup>, and views from the 1850s that “there are many crimes not enumerated in the statute book that are still heavy sins against the dictates of morality”.<sup>116</sup> There is little significance being attached to the incurrence of wrath or the anxiety about achieving salvation from it which characterised the “Age of Atonement” during the first half of the nineteenth century that is readily apparent in these trials dating from the second half. And indeed references to ‘sinfulness’ tended to be made by defence counsel focused on distancing their clients from the legal – rather than moral- bounds of liability.<sup>117</sup> These prosecutorial approaches are identifiable with the post-Atonement orientation of Christianity and its values in emphasising religion in a more worldly way as a guide to living, and the trials did embody the sentiment that soundly practiced commerce “provided a framework of Christian discipline in ordinary life ...”.<sup>118</sup> But this function does not appear to have been aligned with that of preparing “men in time for spiritual trading”, as proffered during the first half of the century.<sup>119</sup> Certainly insistence on soundly practiced commerce *was* articulated more as a warning than as a source of reward for endeavour. But this appears to have emphasised how the avoidance of the frightful public and also private consequences of failure in business would provide assistance for (relative) ease in mortal living.<sup>120</sup> In this latter respect, there was acceptance that failure in business could result from unfavourable economic conditions, but this was part of a more prominent message that failure was a morally justifiable outcome of irresponsibility in the face of reposed trust- the trust of customers and borrowers, and the trust of the nation.

<sup>112</sup> *ibid.* 128, quoting the prosecuting Attorney-General.

<sup>113</sup> *ibid.* 289, Evans’ transcription of the trial of the Royal British Bank directors.

<sup>114</sup> Charles Tennant Couper, *Report of the Trial of the Directors and Manager of the City of Glasgow Bank* (The Edinburgh Publishing Company 1879) 325.

<sup>115</sup> *ibid.* 316.

<sup>116</sup> David Morier Evans (n 88) 2.

<sup>117</sup> Sarah Wilson (n 86) 1083.

<sup>118</sup> Boyd Hilton (n 68) 124.

<sup>119</sup> *ibid.*

<sup>120</sup> *ibid.* 76, where there is discussion of the view that actually the ordinary state of mankind was one of “ease and positive enjoyment”, with occasional interruption of this from pain of a ‘corrective’ nature (see also below n 134 and main text thereto).

But it is also very interesting to consider how the consequences of failure arising from irresponsibility were actually packaged and presented. In all three trials discussed, reference is made to the significance of guarding against threatened toppling of “the world’s first capitalist system”<sup>121</sup> through the harbouring of irresponsible practices in business in the “great commercial community” emerging from the City of London’s pre-eminence on the world stage.<sup>122</sup> It is here that we see that if Christianity at this stage was becoming worldly and humanist in nature, it was nevertheless capable of articulating its guidance in very retributionist terms. This can be seen in the discussion of the consequences of over-trading or over-extension, or as it became known- in one of the most pejorative terms in contemporary parlance – *speculation*.<sup>123</sup> That speculation appeared to be inherent within modern commerce caused considerable discomfort, notwithstanding that it allowed many within the upper and middle classes – including clerics and other spiritual guides – to benefit from a *rentier* economy.<sup>124</sup> This is because speculation also had much, and increasingly embedded, association with “human avarice and ambition”.<sup>125</sup>

The retributionist articulation of the consequences of over-extension can be seen in the discussions within the trials of what happened to a business which was not sound but had ‘over-traded’. Over-trading could take many forms, such as making investments of an ‘unusual’ nature in order to secure more by the way of economic advantage (personal or for one’s business) than one actually needed. Over-trading could also occur from making advances which were not prudent and soundly judged because they could not be afforded in the context of the business concerned. These activities would themselves result in failure, or this would ensue from efforts to conceal them, or from further (over) extension seeking actually to make them good. The trials *did* proffer explicitly that businesses deserving to prosper were those built on trust and confidence, because this was ‘solid commerce’. They also appear to have embodied the view that such was “God’s instrument for the development of his world”, without this being stated directly. In contrast lay ‘excrement trade’ where risk became inseparable from profit, and “the line between fair trade and foul” impossible to draw, causing the “. . . distemper of . . . [the] nation”<sup>126</sup>, concern about which *was* articulated directly in the trials.

In this context “over-trading” (any “*fast trading ... making haste to be rich*”) was considered far worse than unwise but otherwise moderate trading, and was “chargeable with all the ruin of those vast commercial earthquakes . . .”.<sup>127</sup> And in helping to explain why apparently well-motivated attempts to protect impecunious clients, or to bolster defendants’ own failing businesses (where failure *would* adversely affect others) might have been construed as such in the trials, insight can be found in Hilton’s reference to views that “[i]t is excessive much more than deliberately fraudulent adventure which brings on commercial convulsion”.<sup>128</sup> Hilton explores this distinction through suggesting that fraudulent rogues like George Hudson and John Sadlier were

<sup>121</sup> *ibid.* taken from summary on back jacket.

<sup>122</sup> The words of Baron Alderson upon the conclusion of the trial of Strahan, Paul, and Bates, in David Morier Evans (n 88) 145.

<sup>123</sup> Boyd Hilton (n 68) 123.

<sup>124</sup> *ibid.* 124.

<sup>125</sup> *ibid.* 125. See also the discussion of speculation in nineteenth-century cultural consciousness in Francis O’Gorman, ‘Speculative Fictions and the Fortunes of H. Rider Haggard’ in Francis O’Gorman (ed), *Victorian Literature and Finance* (OUP 2007) 157–172.

<sup>126</sup> Boyd Hilton (n 68) 122.

<sup>127</sup> *ibid.* 123.

<sup>128</sup> *ibid.* quoting Benjamin Gregory, *The Thorough Business Man: Memoirs of Walter Powell* (1871).

cast in a “romantic and almost an heroic” light whilst those who sought to “jump above their proper economic stations” were castigated as ‘sinful’.<sup>129</sup> But just as deliberate fraud *was* problematic for nineteenth-century society, and whilst concern about excessive trading was likely to be a cover for socially conservative attitudes<sup>130</sup>, the trials reveal very deeply-rooted repugnance for it. Allowing legitimate businesses to be tempted to over-extend would interfere with the location of risk across a range of core capitalist activities- investment opportunities *and* activities of lending institutions vulnerable to ‘deposit runs’. This already considerable scope for undermining confidence and precipitating catastrophe was itself exacerbated by the growing popularity *of* banks *as* investment opportunities during this time.

Within the trials it was perceived that there would be a range of extremely grave consequences befalling those with reputation, and often personal wealth, who chose to act irresponsibly by over-trading. Accusations were made that businesses had failed precisely because they were unsound, and that criminal charges were an appropriate outcome for decisions to act without restraint. Moreover, the ‘fall from grace’ which accompanied the exposure to criminal charges, long before any formal determination of guilt, was believed to have lasting consequences for the defendant himself, as “[i]t requires the labour of a whole life to build up a character of honour and virtue, which in one fatal and unguarded moment may be entirely destroyed”.<sup>131</sup> But the trials also suggest that irresponsible conduct – albeit occurring in one fatal and unguarded moment – would also have repercussions for “those who were connected with them”; that families and friends, and even acquaintances, would feel a fallen business man’s position “with great severity”.<sup>132</sup> The trials appeared to be determined to lock together the public and private consequences of irresponsibility, through articulating closely conjoined commercial and familial ramifications of failure, for the very purpose of discouraging over-extension.<sup>133</sup> In terms of what these consequences for others might actually be, the criminal trials observed that failure in business would often result in the personal bankruptcy of a disgraced businessman himself. An irresponsible businessman would of course destroy his business and many who depended on it, and in this respect the personal ruin he experienced through the operation of bankruptcy would be a wholly natural outcome. But in emphasising the exposure of his family to bankruptcy, and ‘tainting’ others associated with him, there was allusion to consequences persisting long after the failure itself could become a more distant memory. But although these *were* consequences which would endure, and from which there would be no mortal escape, they would amount to being ‘corrective’ in a worldly sense rather than a spiritual one.<sup>134</sup>

<sup>129</sup> *ibid.*

<sup>130</sup> *ibid* 122.

<sup>131</sup> David Morier Evans (n 88) 133. See also in the City of Glasgow Bank trial where it was submitted on behalf of defendant Lewis Potter (Couper’s Report (n 114) 368) that he lacked any motive which could actuate him to the commission of any frauds, with the failure of the bank ruining himself, and also those connected with him, including his own family who were amongst its shareholders.

<sup>132</sup> As proposed by Baron Alderson in passing sentence on Strahan, Paul, and Bates, as noted in David Morier Evans (n 88) 145.

<sup>133</sup> Sarah Wilson ‘Invisible Criminals?: Legal, Social and Cultural Perspectives on Financial Crime in Britain 1800–1930’ (PhD thesis, University of Wales 2003).

<sup>134</sup> See Boyd Hilton (n 68) where the author at 76 discusses perceptions of occasional “infrequent, extraordinary” pain designed to ensure improvements would transpire until man in society reflected the “benevolent purposes of the Almighty”, and which would thus interrupt man’s ordinary state of “ease and positive enjoyment” (as considered above in n 120).

## CONCLUDING THOUGHTS: RELIGION AND ATONEMENT, CRISIS AND RECOVERY

These trials sought to be very powerful warnings against indulgence in irresponsible business activity. They also suggest that these *legal* responses to misconduct in business were premised on socio-political values of *laissez-faire* and individualism which can be attributed to an evangelical ethos.<sup>135</sup> Within this they indicate that as Christianity acquired a more worldly and human face as far as ‘social questions’ were concerned, the upper and middle classes remained rather less compassionate in their approach to their own short-comings, on account of remaining fearful of avarice and ambition, and uncomfortable even with profit-making. And whilst we might associate questions of whether on balance banking practices of the past were “morally superior . . .”<sup>136</sup> with very recent conduct destined to affect many millions of lives detrimentally for many years to come, concerns about practices actively fostering crime<sup>137</sup> were being expressed over 100 years earlier with much evident discomfort. Indeed, in the City of Glasgow Bank trial it was proposed that if the exceedingly strict approaches in obtaining “proper security from a poor fellow ... who wanted to get a little money in advance . . .” had been applied to “those so-called capitalists” who had indulged in irresponsibility on a grandiose scale, “. . . it would have been a great deal better for the Bank”.<sup>138</sup> Strongly implied here is that this would have been better for *society*, as even in the immediate aftermath of the bank’s collapse, it was readily apparent that the City of Glasgow would not recover for many years as a result of *this* catastrophe.

We might regard such circumspection as a healthy reference point for considering how financing capitalism, and indeed capitalism *itself*, must proceed in the future in the aftermath of the crisis. The intense religiosity of nineteenth-century Britain *is* evident in these criminal trials, with their warnings against over-extension and insistence on restraint, moderation and long-termism cast strongly as a “guide to living”.<sup>139</sup> In acknowledging this we would do well to appreciate Rowan Williams’ early post-crisis perceptions on the importance of reflection and a reorientation towards need rather than greed, and for moderation and sustainability to replace the accumulation of wealth as goals of capitalism. Interestingly, John Bird Sumner who became Archbishop of Canterbury in 1848, and who celebrated private property as “a crucial link between the ‘economy of nature’ and human virtue”<sup>140</sup>, also had stern warnings on the consequences of disregarding prudential restraint, because “. . . bankruptcy will come upon a man who takes no care of his fortune”.<sup>141</sup> This sentiment became fashioned into the influential contemporary proposition of extended and irreversible societal harm arising from ‘super-saturation’ of capital<sup>142</sup>, embodied classically as: “what disease does with the redundant population, bankruptcy does with the redundant capital of our land”, thereby proclaiming there was a (limited) “safe or profitable occupancy” for capital.<sup>143</sup>

<sup>135</sup> As distinct from those with utilitarian inspiration: see Boyd Hilton (n 68) 7.

<sup>136</sup> David Friedrichs, ‘The Financial Crisis as White Collar (or Economic) Crime and the Criminogenic Architecture of Wall Street’ (presented at *Economic Crime and the State in the Twentieth Century: A German–American Comparison*, German Institute of Historical Research, Washington DC, 14 April 2011), cited with permission.

<sup>137</sup> *Ibid.*

<sup>138</sup> Charles Tennant Couper (n 114) 302.

<sup>139</sup> Boyd Hilton (n 68) 5.

<sup>140</sup> *ibid* 77.

<sup>141</sup> *ibid* 119.

<sup>142</sup> *ibid*. Classically expressed in Chalmers’ *Christian and Civic Economy* (discussed briefly in the main text), which as Hilton explains transformed “Malthus’s long-run stagnation thesis into an explanation of business cycles”.

<sup>143</sup> *ibid.*

This theological message against applying capital beyond *need*-based ‘human reasons’<sup>144</sup> appears to be a persistent one across 150 years, albeit that the nineteenth-century credo was presented in a highly retributionist way. This is not obviously appropriate for society today, and would not likely resonate with highly secularised British society. In even acknowledging secularisation it is not obvious that religious values can and should reinvigorate faith in capitalism, and such messages can of course be found in secular discourses and value systems, such as political theory, philosophy and ethics. However, offerings from religion generated by the 2007–8 crisis contrast significantly with nineteenth-century ones by being balanced in tenor and substance, with criticisms of short term-ism and general ‘over-consumerism’ alongside castigation of the culture of banking also being largely ‘doctrine neutral’ as between different theologies. They are also virtually indistinguishable from contributions from regulators, and interestingly support for “Occupy Economics” has now been expressed by both spheres.

The tenor of today’s messages from religion suggest that rediscovering its essence could well assist post-crisis societal reorientation in a very positive way. Indeed Canon Angela Tilby’s reference to experiencing a “secular advent”<sup>145</sup> in the lead up to Christmas 2011 was to ‘taking stock’ and restraint, albeit couched as repentance. This could represent a repackaging of the messages of Sumner and his contemporaries for a largely secular population with twenty-first century expectations. Equally Richard Harries’ discussion of the wide attraction of “cultural Christianity”<sup>146</sup> in a highly secularised age speaks to how much religion could offer the pursuit of non-marketised values within a marketised society rather than to how little. But in any case, understanding our religious heritage may be able to help us to move forward even if this does not involve actually recentralising religion. This is because understanding the significance of religion for nineteenth-century society can help us to understand just how much a cause for concern “economically useless” and even actually “socially useless” banking was for that society. At a time when regulators are speaking of banking reform as part of demanding that banking reconnects with social needs, their confidence in achieving this is guarded as it is optimistic. For example, notwithstanding that the Libor revelations established that 2007–8 represented something beyond an “ethical crisis”<sup>147</sup> and, despite the rhetoric of criminal accountability emerging from Libor, criminal responsibility for misconduct during the crisis and in its aftermath remains elusive.<sup>148</sup> This fragility is tellingly illustrated by Andy Haldane’s insistence that banking reform remains an active pursuit<sup>149</sup>, given the years that have now passed since the onset of the crisis.

Looking at the influence of religion in the emergence of modern capitalism is a way of understanding that such was the concern about banking’s social importance alongside its economic necessity that very severe consequences were put in place for those who operated within it without respecting its proper bounds, albeit that these were actively being developed. This was against a backdrop of a cultural repugnance for greed and avarice, and even any extension beyond ‘moderation’. The legal framework for capitalism emerged from this, and scholars of legal history have long

<sup>144</sup> Rowan Williams (n 25).

<sup>145</sup> Canon Angela Tilby, BBC Radio 4 *Today* ‘Thought for the Day’ (29 November 2011).

<sup>146</sup> Lord Harries of Pentregarth, BBC Radio 4 *Today* ‘Thought for the Day’ (14 December 2012).

<sup>147</sup> Justin O’Brien, ‘The Facade of Enforcement: Goldman Sachs, Negotiated Prosecution, and the Politics of Blame’ in Susan Will, Stephen Handelman, and David Brotherton (eds) *How They Got Away With It: White Collar Criminals and the Financial Meltdown* (Columbia University Press 2012) 178–202, 178–9.

<sup>148</sup> Apart from the conviction of UBS trader Kweku Adoboli in November 2012.

<sup>149</sup> Andrew Haldane (n 62) 23–24.

proffered the continuing relevance of law's origins for law today: that "[u]nless we regard law as no more than a body of randomly changing rules, its history must be an essential dimension in its study".<sup>150</sup> Furthermore, the essence of understanding law's history for securing effective law reform is found illustrated in the proposition that:

[t]he structure of modern law is too heavily dependent on the legacy of the past for it to be marginalized as something of purely antiquarian interest. If we are to make sense of today's law we have to understand its history, and it is only when we can make sense of it that we can confidently begin to reform it.<sup>151</sup>

Those who believe that change in the culture of banking is possible do not shy away from the monumental nature of such a task. Andy Haldane suggests that because the market has (for some time) been leading where regulators fear to tread, regulatory responses need to be grounded in simplicity, rather than 'feeding' the complexity of modern finance. He also stresses that delivering this will involve a significant 'about turn' from the regulatory path of the past fifty years, but that "[i]f a once-in-a-lifetime crisis is not able to deliver that change it is not clear what will".<sup>152</sup> Given this also requires considerable wider societal as well as regulatory reorientation, perhaps exploring our past gives us the best possible chance of understanding ourselves, and the challenges to be faced.

For many, understanding law's own ancestry and trajectory is a crucial element in knowing ourselves and for gleaning confidence as law reformers. But at this very crucial juncture for society, perhaps we should extend our search beyond law's own history into social history more generally. There are also questions of the nature of dynamics operating between 'law' and 'society' to be considered of course<sup>153</sup>, but the work of historians is giving increasing emphasis to the linkages between past and present. This is captured intellectually within historiography in the principle of historical process which proposes the continuing nature of societal processes. It proposes that all points in time are part of a trajectory which is still unfolding, and that appreciating this can even help to explain current states of play. Furthermore, situating events in such a way can even give "purchase on the future and allows a measure of forward planning".<sup>154</sup> In other words, lessons *can* be learned from the past, and applied to current issues and concerns even if we might consider that the global age of the twenty-first century is markedly different from the nineteenth.

There are of course objections to looking at the past for responding to the 'here and now', with a spectrum of intellectual and pragmatic views here capturing sentiments that legal history is "purely antiquarian" and questioning the value of any historical enquiry.<sup>155</sup> But even amongst history's supporters, it is also often proffered that "all periods in history centre on the interplay of change and continuity".<sup>156</sup> So in reflecting what might be distinctive or even unique about the twenty-first century, it might be worth considering the view that "the nineteenth century was a century of striking

<sup>150</sup> John Baker, 'Why the history of English law has not been finished' [2000] CLJ 59(1) 62, 62.

<sup>151</sup> David Ibbetson, *A Historical Introduction to the Law of Obligations* (Clarendon 1999) v and vi.

<sup>152</sup> A. Haldane (n 62) 23–24.

<sup>153</sup> See for example William Cornish and Geoffrey de N. Clark, *Law and Society in England 1750–1950* (Sweet & Maxwell 1989).

<sup>154</sup> John Tosh, *The Pursuit of History: Aims, methods and new directions in the study of modern history* (Longman 2010) 40: see generally chapters 1 and 2 for Tosh's discussion of the uses of history.

<sup>155</sup> *ibid* 30–32 explaining that at one extreme these suggest history is no more than an 'accidental' set of events, from which we can learn nothing; with other more moderate perspectives suggesting that even if the past appears to have some bearing on the present, regarding it as useful is inimical to modernity and finding a 'forward looking' approach to current issues: see generally chapters 1 and 2.

<sup>156</sup> Jeremy Black and Donald Macraill, *Nineteenth-Century Britain* (Palgrave 2003) xvii.

change and a great pressure of change. It was a modern age ... [and] radically different from what had come before”.<sup>157</sup> So perhaps we should bear this in mind as we recognise the onset and progression of an increasingly globalised world, and are now being forced to confront its challenges. In coming to terms with “the first crisis of globalisation” perhaps we should reflect critically on how much of what we are experiencing by way of societal stasis and evolution really is so different from what was arguably the first “age of insecurity”.<sup>158</sup>

This article has considered a number of apparent similarities subsisting between concerns about the 2007–8 financial crisis and its aftermath and the views of a society deeply obsessed with catastrophe- and particularly with the “great commercial upheavals which periodically threatened to topple the world’s first capitalist system”. In terms of how we might respond to these similarities as well as obvious differences subsisting over time historian John Tosh suggests that: “History reminds us that there is usually more than one way of interpreting a predicament or responding to a situation, and that the choices open to us are often more varied than we might have supposed”.<sup>159</sup> For Tosh the point is not to find a precedent, but to alert us to possibilities: history is “an inventory of alternatives”.<sup>160</sup>

Perhaps this is a message of hope that the kind of reconfiguration of capitalism envisaged by regulators and theologians is possible, and that banking can rediscover its social utility. Applying this rendition of what history can offer us at this juncture reveals that banking’s social contract has always been complex, for example in exposing perceived threats for societal well-being coming from bankers believed to be taking too much account of social utility as well as acting more obviously with disregard for it. Perhaps most tellingly, exploring the nature and setting for nineteenth-century responses to misconduct in banking helps to scope the challenges for securing effective regulation in the aftermath of the recent financial crisis. In this regard, paying attention to the past isn’t about calling for actual responses from the past to be resurrected, or for their underpinning values to be directed towards current difficulties. Instead, the value attached to past experiences by this article can be best understood from a suggestion made by Lord Turner in relation to the failure of Royal Bank of Scotland. This concerned serious questions arising from no individual being found legally responsible for the failure, and centrally that of “if action cannot be taken under existing rules, should not the rules be changed for the future?”<sup>161</sup>

Regarding history as Tosh’s “inventory of alternatives”, invites us to consider the choices we have in the aftermath of the financial crisis alongside the difficulties we understand that we face. In reflecting on the manifest lack of legal recourse for banker misconduct during the crisis we need to consider something far more significant than the actual values directed towards regulating the financing of capitalism in nineteenth-century Britain. We should focus instead on how determined Victorian society was to utilise law in order to protect its social fabric from the hazards presented by banking. In pointing to the need for responses, which are of course tailored to the distinctiveness of the twenty-first century, above all else reflection of this kind calls for responses which are bold and determined. Even if this does, as Andy Haldane has suggested, require a retreat from the regulatory path of the past fifty years.

<sup>157</sup> *ibid.*

<sup>158</sup> This is an insignia reference within the literature on globalisation: see for example Larry Elliott and Dan Atkinson, *The Age of Insecurity* (Verso 1998).

<sup>159</sup> John Tosh (n 154) 33.

<sup>160</sup> *ibid.*

<sup>161</sup> Lord Turner (n 48), Chairman’s Foreword 6.

# SYMPOSIUM: LEGAL PERSPECTIVES ON THE VICTIM

## INTRODUCTION

*Tom Lewis\**

The 19th December 2012 saw the official launch of Nottingham Law School's newest research centre, the Centre for Conflict, Rights and Justice, with an evening reception and address by His Honour Judge Michael Stokes QC, and a daytime symposium entitled *Legal Perspectives on the Victim*.<sup>1</sup> The Centre's mission is to pursue and encourage innovative scholarship in the areas of human rights, domestic and international criminal justice, international humanitarian law, conflict resolution and post conflict justice; and to inform debate, influence law and policy makers and contribute to the development of a vibrant and inclusive research culture within the Law School.

The symposium certainly ticked many of these mission 'boxes'. Speakers spanned the range from professors to post-graduate students and from NGO activists to legal practitioners, hailing from as far afield as South Africa and Spain. The range of papers examining the concept of 'victim' from a host of perspectives was impressive (as the organisers had hoped). Subjects included: the victimhood of children in the Victorian and modern criminal justice systems, child grooming, stalking, the International Criminal Court, human rights abuses, domestic violence, hate crime and even the environment, all of which inspired searching questions and productive debate amongst delegates.

In this issue of the *Nottingham Law Journal* we publish several of the symposium papers encapsulating, it is hoped, the essence of what the symposium aimed to achieve. In *Victims, Trauma, Testimony* Sandra Walklate explores the links between rising policy concerns with the victims of crime on the one hand and the social recognition of trauma on the other, particularly in the digital media age with its breathtakingly fast developments in the technologies of communication, and examining the central question 'who can and who cannot legitimately claim the label victim?'. Also with an eye on the impact of the digital revolution, and the fact that the internet is no respecter of national borders, Richard Lang examines the EU's new Directive on Victims' Rights and the difficult area of cyber stalking in *The EU's New Victims' Rights Directive: Can Minimum Harmonization Work for a Concept Like Vulnerability*. In vivid contrast, at least in terms of geographical space, Andy Noble explores the reasons for the particular vulnerability and victimisation of those who drive taxis for a living in *Victimised by Regulation: the Victimogenicity of Taxi Drivers*. Finally Phil Edwards explores perhaps one of the most nebulous manifestations of victimhood, that in relation to the infamous 'ASBO' in *Anti Social Behaviour, Harassment and the Context Dependent Victim*.

Not so long ago (and to this day in large sections of the press) there was (and is) a tendency to portray and to think of the 'victim' as one half of a simple binary relationship: good and evil; black and white; victim and perpetrator. One of the things of which the papers in the symposium remind us is that it was never so simple. If the work of the Centre, through events like this, enables the deep undercurrents of our understandings to be explored and our received wisdoms to be questioned, as these papers do, it will surely have achieved one of its most important objectives.

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<sup>1</sup> The other two new research centres are the Centre for Legal Education and the Centre for Business and Insolvency Law.

# VICTIMS, TRAUMA, TESTIMONY

SANDRA WALKLATE

## INTRODUCTION

The purpose of this paper is to explore the interconnections between the rising policy concern with the victim (of crime) on the one hand and the social recognition of trauma on the other. In so doing the paper will address three interconnected themes. In the first instance it will map some aspects of the changing contours of victimhood over the last fifty years. This section of the paper will be particularly concerned to address the changing nature of claims to victim status: who can and who cannot legitimately claim the label victim. The second part of the paper will overlay this map with an appreciation of the changing nature of the concept of trauma: who can and who cannot legitimately claim to be traumatised. In the light of these considerations the third section of the paper will ask some questions about the legitimacy of the policy concern to listen to victims' voices: the problem of testimony. Here the paper will be concerned to ask some questions concerning the efficacy of such policy developments *if* the claim to victim status rests on a presumption of trauma. All of these considerations will be presented in the spirit of exploring what might be called a critical victimological imagination.

## PART ONE: VICTIMS, VICTIMOLOGY AND THE CHANGING CONTOURS OF VICTIMHOOD

Arguably, over the last fifty years or so, there have been two phases in the contours of victimhood. These phases cannot be separated from each other easily but thinking of them as separate, if not separable, is a heuristic device that facilitates an understanding of the issues with which this paper is concerned. The first phase takes us from the late 1960s until the early 1990s. During this phase it is possible to map the emergent concerns of victimology as a discipline alongside those of feminism. The second phase takes us from the mid 1990s to the present. Here our attention is drawn to the emergent concerns of what might be called a 'culture of victimhood' that resonates with the work of Furedi.<sup>1</sup> In what follows something will be said about each of these phases in turn, but first it will be useful to make some observations about the origins of victimology as an area of investigation.

Victimology, rather like criminology, is an eclectically informed meeting place for academics, practitioners and policy makers who share a common concern with the victim (of crime) and the processes associated with victimhood. Its life began in the late 1940s. A number of different people have been attributed as the Founding Fathers of this (sub)discipline, notably, Benaimin Mendelsohn, Hans Von Hentig and Frederic Wertham. However what is without doubt is that Mendelsohn is widely regarded as proposing this area of concern as a *scientific* study of the victim. Moreover their collective concern with the victim needs to be situated in its historical context. These

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<sup>1</sup> Frank Furedi, *Culture of Fear: Risk Taking and the Morality of Low Expectation*. (London: Cassell 1997).

men, as émigré lawyer- criminologists, were concerned, as many other intellectuals were from the 1930s onwards, to try and make sense of the events surrounding the Second World War, particularly The Holocaust. Their interest in the victim, stemming from these wider concerns, generated two key concepts: victim precipitation and victim proneness. These concepts lay the foundation of what Miers was later to call 'positivist victimology'.<sup>2</sup> This version of victimology informs one of the strands of work that can be associated with what I have called here the first phase of the contours of victimhood.

The refinement of each of these concepts over the years, but particularly the latter of the two, became transformed into what became known as the 'lifestyle exposure model' of criminal victimisation and this underpinned the development of the criminal victimisation survey. The introduction of this survey method, in the late 1960s in the United States and in the early 1980s in the U.K. contributed not only to the emergence of victimology as a discipline but also to the dominance of this version of victimological work: positivist victimology. Indeed this kind of work appears to have gone from strength to strength since its first introduction and in the subsequent use and deployment of the ever increasingly sophisticated criminal victimisation survey method that has become an important source of victim related data both nationally and internationally. The growth and development of this kind of victim-informed survey work, alongside the growth and development of victim centred support groups, largely increased awareness of and focused attention on, the kind of impact that what might be called conventional crime (burglary, theft, street violence) had on people's everyday lives. It also provided, and still does provide, a considerable data base that points to the evidence that, depending upon what kind of crime is being considered, an individual's chance of criminal victimisation can be maximised or minimised by factors such as age, ethnicity, sex and social class. In addition, this kind of data consistently confirms that it is the poorest members of society who bear most of the burden of crime especially in terms of impact (see for example the work of Dixon and others<sup>3</sup>). Indeed, more often than not, these are the people who have the least resources to manage that impact. This is especially the case for the elderly and for those who are experiencing other disruptions to their lives, like divorce or bereavement. Whilst it should be noted, as Tim Hope<sup>4</sup> has convincingly argued, there is much left to be desired from this data source in terms of *explaining* the patterning of criminal victimisation, its use and the evidence it provides, has been very influential in informing policy initiatives and re-orienting the work of criminal justice practitioners.<sup>5</sup>

Alongside the emergent influence of positivist victimology outlined above, during the 1960s and 1970s 'second wave' feminism began to raise its voice about violence against women and children. Regarding the term victim as a tool of ideological oppression, feminist voices preferred to raise questions not about women and children's criminal victimisation per se but to talk of women's rights in the face of patriarchy. These campaigning voices, sparking the development of organisations like Rape Crisis and the Women's Refuge Movement, also exposed not only the nature and extent of

<sup>2</sup> David Miers, 'Positivist victimology: a critique part 1' (1989) 1(1) *International Review of Victimology* 1.

<sup>3</sup> Mike Dixon, Howard Reed, Ben Rogers, and Lucy Stone, *CrimeShare: The Unequal Impact of Crime*. (London: IPPR 2006).

<sup>4</sup> Tim Hope, 'Theory and method: the social epidemiology of crime victims' in S.Walklate (ed) *Handbook of Victims and Victimology* (Devon: Willan 2007).

<sup>5</sup> See for example the work of David Garland, *The Culture of Control* (Oxford: Polity 2001); Basia Spalek, *Crime Victims* (London: Palgrave 2006); JanVan Dijk, 'The International Crime Victims Survey' in M. Herzog-Evans (Ed.), *Transnational Criminology Manual, volume 2* (Nijmegen: Wolf Legal Publishers 2010); and Sandra Walklate, *Imagining the Victim of Crime* (Maidenhead: Open University 2007).

violence against women (and children) but also the gaps in criminal justice and other responses to these issues. Nevertheless, despite the historic ideological and methodological tensions that have existed between victimology and feminism (discussed in more detail by Rock and Walklate<sup>6</sup>), the relationship between victim oriented work and feminist inspired work is much less fractious contemporarily. Indeed following on from the seminal survey work of Russell<sup>7</sup> on the nature and extent of rape, the feminist informed embrace of the criminal victimisation survey tool had led to a more informed understanding of the nature and extent of violence against women, (see for example, the work of Walby and Myhill<sup>8</sup>) that has had a significant impact on the policy response to these issues. Such policy directives, on the back of legislative changes, have been the backcloth against which endeavours have been made to improve the practices of criminal justice professionals to such violence(s), though as the edited collection by Brown and Walklate<sup>9</sup> illustrates, much remains to be done.

From this first phase of academic and policy interest in the victim it is possible to see that the map of victimhood comprised all those categories of individuals who might be considered to be more or less vulnerable and thereby more or less deserving of victim status. It goes without saying that the concepts of vulnerability and deserving are in and of themselves problematic. How they are understood, to whom they are applied, and under what circumstances are all questions that need to be answered and, from the point of view of the individual claiming victim status, are all hurdles to be overcome.<sup>10</sup> Nonetheless, it is easy to see how the elderly, female victim of crime, the child who has been abused by their parents, or the woman who has been subjected to systematic abuse might feature most readily higher up on the 'hierarchy of victimisation'.<sup>11</sup> This hierarchy facilitates an understanding of the ways in which the characteristics of what Christie referred to as the 'ideal' victim,<sup>12</sup> are more or less salient depending upon what kind of victim an individual is claiming to be and what kind of characteristics they possess. Moreover as the recent revelations concerning allegations made against Jimmy Savile have illustrated, even when the claimants to victim status might be considered ideal (i.e. young and vulnerable), there are all kinds of questions to be asked about who, what, and under what conditions, victimisation is made visible or rendered invisible and by whom. Such questions notwithstanding, during the 1990s the contours of victimhood as outlined above were put to the test as other kinds of victims' voices, documenting additional dimension in both the range and depth to being a victim, were increasingly heard. These voices, whilst chronologically overlapping with some of the concerns outlined above, gained a greater policy presence as questions around identity and diversity of all kinds found a more central place on both academic and practitioner agendas.

In this second phase of mapping victimhood, academic research and policy responses became much more sensitive to the questions of ethnicity and sexual diversity. This

<sup>6</sup> Paul Rock, 'Theoretical perspectives on victimisation' in S. Walklate (ed) *Handbook of Victims and Victimology* (London: Routledge-Willan 2007); Sandra Walklate, 'Can there be a feminist victimology?' in P. Davies, P. Francis and V. Jupp (eds) *Victimisation: Theory, Research and Policy* (London: Palgrave 2003)

<sup>7</sup> Diana Russell, *Rape in Marriage* (New York: Collier 1990)

<sup>8</sup> Sylvia Walby and Andy Myhill, 'New Survey Methodologies in Researching Violence Against Women' (2001) 41(3) *British Journal of Criminology* 502

<sup>9</sup> Jennifer Brown and Sandra Walklate (eds), *Handbook on Sexual Violence* (London: Routledge-Willan 2011)

<sup>10</sup> For a fuller discussion of the ramifications of this concept see Simon Green, 'Crime, victimisation and vulnerability' in Sandra Walklate (ed.), *Handbook of Victims and Victimology* (London: Routledge-Willan 2007) and Sandra Walklate, *Reframing criminal victimisation: finding a place for vulnerability and resilience* (2011) 15(2) *Theoretical Criminology* 179

<sup>11</sup> Eamonn Carrabine, Paul Iganski, Paul, Maggy Lee, Ken Plummer, and Nigel South, *Criminology: A Sociological Introduction* (London: Routledge 2004)

<sup>12</sup> Nils Christie, 'The ideal victim' in Ezzat Fattah (ed), *From Crime Policy to Victim Policy* (London: Tavistock 1986)

focus of attention has conceptual continuities with the work of feminism through its concern to foreground the importance of the impact of power relations experienced also as a constant feature of the everyday life of people from ethnic minority groups. For example, the seminal work of Hesse and others brought to the fore the problems of racial harassment and latterly the problem of racially motivated crime has been recognised.<sup>13</sup> This concern was particularly 'boosted' by the murder of Stephen Lawrence in 1993. Appreciating the question of sexual diversity also shares some lineage with the feminist movement. In centring the problem of men and masculinity, feminist work was one impetus for the increasing recognition of not only diversity amongst women but also amongst men. This work made important interventions in recognising that men could be victims too<sup>14</sup> and even more significantly that this experience applied not only, or even exclusively, to homosexual men. Again, in more recent times, the relationship between men and victimisation has presented itself in a very real way in allegations made of child abuse by men on young boys in a children's home in North Wales during the autumn of 2012.

Thus, whilst Rock<sup>15</sup> was correct to propose that we still knew very little about who claimed victim status and the circumstances under which victimisation became part of their identity, the developments referred to above certainly point to quite a complex and extensive picture of the contours of victimhood by the start of the twenty first century. During this second phase in the emergence of the victim, academic and policy commentators, like Furedi,<sup>16</sup> were making observations about a 'culture of victimhood'. These kinds of commentaries offer a somewhat different stance about the rising influence of the concept of victim and the impact that claiming victim status might have. For example, Furedi observes: 'Advocates of victimhood integrate the themes central to the culture of abuse and imply that once a person has become a victim, he or she will always be a victim'.<sup>17</sup> This position echoes that of Alison Young who also observed that victimhood had become, if not equated, certainly elided with citizenship.<sup>18</sup> Thus, in policy terms, in making claims for 'Justice for All' (the title of a Government White Paper published by the Home Office in 2002) the victim of crime, in this iteration of victimhood, is all of us. Of course what is being observed here is a cultural shift in the (privileged) attention being given to suffering in and of itself rather than any evidenced claim about the nature and impact of the harm done (crime). To quote Furedi again:

In the past, people who suffered from a particular violent incident did not identify themselves as victims. . . . Even when people felt badly hurt and deeply aggrieved, their own self-identity was not defined by the experience. In contrast, today there is a belief that victimhood affects us for life – it becomes a crucial element of our identity. . . . Society encourages those who suffer from a crime or tragedy to invest their loss with special meaning.<sup>19</sup>

<sup>13</sup> Barnor Hesse, Dhawant Rai, Christine Bennett, and Paul Gilchrist, *Beneath the Surface: Racial Harassment* (Aldershot: Avebury 1992).

<sup>14</sup> See Cathy Hobdell and Betsy Stanko, 'Assaults on men: masculinity and victimisation' (1993) 33(3) *British Journal of Criminology* 400; and Joanna Goodey, 'Boys Don't Cry: masculinities, fear of crime and fearlessness' (1997) 37(3) *British Journal of Criminology* 401.

<sup>15</sup> Paul Rock 'On becoming a victim' in C. Hoyle and R. Young (eds), *New Visions of Crime Victims* (Oxford: Hart 2002)

<sup>16</sup> Furedi (n 1).

<sup>17</sup> *ibid* 97.

<sup>18</sup> Alison Young, *Imagining Crime* (London: Sage 1996).

<sup>19</sup> Furedi (n 1) 100.

Some would argue (including Furedi) that the changes alluded to here can be attributed to the seeking of financial gain: the compensation culture. It is possible to suggest that there are other forces at play here too.

Since the deployment of the criminal victimisation survey in the United States in the late 1960s and the U.K. in the early 1980s, and the rising recognition and appreciation of the impact of crime that has gone alongside this, we have also witnessed what Valier has called the return to the gothic: the vicarious attention paid to the suffering of others.<sup>20</sup> This attention, manifested contemporarily primarily through visual means (TV, film, the Internet, mobile phones), places us side by side with the victim: we are encouraged to feel what they feel. Indeed media, political, and professional invocations of the victim are all intended to move us in this way. This return to the gothic underpins some of the observations made by Furedi.<sup>21</sup> The point here is that it is not that suffering is not caused by the more mundane, ordinary and everyday acts of criminal victimisation: burglary, street theft, common assault, and sexual assault. These events do take their toll on different people in different ways as much mainstream (positivist) victimology has been concerned to demonstrate. Whether that be in the form of loss of earnings,<sup>22</sup> stress, shock, and sense of invasion,<sup>23</sup> impact on family and other relationships,<sup>24</sup> or post-traumatic stress syndrome experienced by some women who have been raped and others not normally considered victims, like soldiers.<sup>25</sup> This amounts to considerable harm done on individuals as a result of criminal victimisation. Moreover, as Maguire and Bennett observed some time ago in their study of burglary, and commented on above, that experience is likely to take its greatest toll on individuals who are already experiencing or trying to cope with other events of significance in their lives.<sup>26</sup> The point is that in this return to the gothic, 'Suffering becomes reshaped, commodified, and packaged for its public and didactic salience',<sup>27</sup> in a context in which, to return to Furedi 'Anyone who has witnessed something unpleasant or who has heard of such an experience becomes a suitable candidate for the status of indirect victim'.<sup>28</sup> The excavation of our feelings in this way, without doubt, poses all kinds of questions about the contemporary role of the media, and our access and greater exposure to a wider variety of media outlets, including what has come to be called social media. However such excavations also pose questions about the kinds of events to which we have become increasingly, repeatedly, and rapidly exposed, in and of themselves. Arguably a key moment in this return to the gothic was the events in New York, September 11th 2001.

The constant (re)presentation of the images associated with these events, as observed by Pollard,<sup>29</sup> that neither distance nor time fails to dilute or contaminate is but one example of what has been called 'indirect' victimhood. Our collective exposure to such

<sup>20</sup> Clare Valier, *Crime and Punishment in Contemporary Culture* (London: Routledge 2004).

<sup>21</sup> Furedi (n 1).

<sup>22</sup> Dixon and others (n 3).

<sup>23</sup> Tony Kearon and Rebecca Leach, 'Invasion of the body snatchers: burglary reconsidered' (2000) 4(4) *Theoretical Criminology* 451.

<sup>24</sup> Beth Hodgson, 'Angry or what? Experiences of being a victim of crime' (2005) 3(3) *British Journal of Community Justice* 50.

<sup>25</sup> Didier Fassin and Richard Rechtman, *Empire of Trauma* (Princeton: Princeton University Press 2009).

<sup>26</sup> Mike Maguire with Trevor Bennett, *Burglary in a Dwelling* (London: Heineman 1982).

<sup>27</sup> Kieran McEvoy and Ruth Jamieson, 'Conflict, suffering and the promise of human rights' in D. Downes, C. Chinkin, and C. Gearty (eds), *Crime, Social Control and Human Rights: Essays in Honour of Stan Cohen* (Cullompton, Devon: Willan 2007), 425.

<sup>28</sup> Furedi (n 1) 97.

<sup>29</sup> Jennifer Pollard, 'Seen, seared and sealed: Trauma and the visual presentation of September 11' (2011) 13(1) *Health, Risk & Society* 81.

(re)presentation constitutes us all as witnesses of events that may actually be quite distant in space and time. Since the 9/11 moment there has been Madrid, November 2003, London July 2005, Mumbai, November 2008, to name but a few, and as Jenks has commented, these events are transgressive.<sup>30</sup> They challenge our collective and our individual understanding of what it is that can be taken for granted in our everyday lives particularly in relation to what is understood as crime and the nature of criminal victimisation. The media coverage given to these events and others, (like for example, hurricane Katrina, and the tsunami of Aceh) is intended to move us: to encourage us to place ourselves next to the victim, for after all, are they not just like us?

So, taken together these two phases of victimhood have taken us from appreciating the (powerful) impact that criminal victimisation can have on individuals, to claims to victim status based on experiences relating to collective identity (racial harassment is an example of this referred to by Spalek, as ‘spirit injury’<sup>31</sup>), to a cultural context in which some would say ‘we are all victims now’. These shifting contours of victimhood, and indeed the policy responses that have followed in their wake are predicated on a rising awareness of the toll that different kinds of problematic experiences can have on people. This is particularly the case in the context of media coverage of both individual high profile criminal cases as well as more collectively experienced disasters. From a point of view such coverage, in foregrounding these experiences as traumatic, can be considered problematic. This is illustrated in the observations made by Fassin and Rechtman on the foregrounding of trauma, by the media and NGO’s in the aftermath of the tsunami in Aceh, in that: “Both before and after the tsunami survivors in Aceh were already victims of political domination, military repression, and economic marginalisation. . . Trauma is not only silent on these realities it actually obscures them”.<sup>32</sup> So, from a point of view, trauma can silence and obscure victimhood as well as foreground it. It is at this juncture that it will be useful to consider the ways in which understandings of trauma and understandings of victimhood have become so co-joined.

## PART TWO: THE CHANGING CONTOURS IN UNDERSTANDING TRAUMA

The word ‘trauma’ carries a range of meanings. It has its origins as a medical term referring to wounds sustained by the body. Indeed it still does retain this meaning. However trauma has also come to be used as a metaphor for almost anything unpleasant and contemporarily refers more to psychological than physical unpleasantness.<sup>33</sup> This shift in emphasis from the physical to the psychological occurred around the turn of the twentieth century. Moreover, despite the taken for granted influence of Freudian thought on contemporary understandings of trauma, as a psychic concept it has its origins in the work of Charcot in the 1860s who was primarily interested the psychological impact of railway accidents and other workplace incidents.<sup>34</sup> For Charcot, trauma was triggered by an external event that may or may not justify a claim for workplace compensation. It was for the psychiatrist to determine the veracity or otherwise of such claims. Freudian analysis, through seduction theory and later fantasy theory, however, took trauma to be the result of an internal psychic problem from

<sup>30</sup> Chris Jenks, *Transgression* (London: Routledge 2003).

<sup>31</sup> Spalek (n5).

<sup>32</sup> Fassin and Rechtman (n 25) 281.

<sup>33</sup> See Ian Hacking *Rewriting the Soul* (Princeton: Princeton University Press 1995).

<sup>34</sup> Fassin and Rechtman (n 25) and Hacking (n 33).

which psychopathological problems developed. These two different ways of thinking about trauma were clearly evident in the stance taken towards soldiers by the medical military profession who were driven by a concern to search out 'malingerers'. For them the solution to this problem was, more often than not, to subject the soldier suspected of being a 'malingerer' to electric shock treatment. This was intended to elicit a confession that they were not really ill at all and wanted to return to the front. At this juncture the concept of trauma acquired a moral connotation along with its medical, and psychical understanding. Normal people (men) did not shirk from their moral duty to fight for their King and Country. So now trauma was a moral, medical, and psychological problem. It was, however, still very much a concept applied to individuals that psychiatric victimology laid claim to in terms of professional expertise.<sup>35</sup> The debate concerning the efficacy of trauma as a psychic and/or moral phenomenon and its associated causal mechanisms continued until 1980 when the American Psychiatric Association published DSM-III, its categorisation of psychiatric disorders. This classification included, for the first time, the identification of post-traumatic stress disorder (PTSD). The characteristics associated with this disorder were clear. Any person might suffer from such distress if exposed to a traumatic event and the symptoms including flashbacks, frequent nightmares, avoidance behaviours etc. could occur in any combination but had to last for at least six months. Thus the veracity of the victim of trauma was no longer in question. '...the diagnosis conferred the right to appropriate reparation. A new era of thinking about trauma had begun'.<sup>36</sup>

It is important, for the purposes of the discussion here, to note that a number of processes lay behind, and contributed to, the recognition of PTSD. There are three worth commenting on: the growth of the women's movement from the 1960s onwards bringing to the fore in particular the nature and extent of sexual abuse of women and children (commented on above), the Vietnam War, and the trial of Adolf Eichmann. Taken together these three processes not only contributed to a change in understanding of individual trauma and its manifestation as reflected in DSM-III, they also contributed to what came to be labelled as 'cultural' trauma. Some reflection on the last two of these processes is worthwhile since in many respects they are interconnected.

In 1968 the 'Mai Lai Massacre' committed by American soldiers on Vietnamese people, sent shock waves around the United States. Up until this point in time many people in the United States believed that they were involved in a 'just' war in Vietnam and this event, alongside the investigation that it generated prompted serious questions about that involvement and how it was conceivable that ordinary men could commit such atrocities. Were they monsters or did the exceptional circumstances render these men capable of such horrific acts? These kinds of questions were not that dissimilar from those posed by the increasing awareness and recognition of the Holocaust prompted by the trial of Adolf Eichmann. Alexander reminds us that The Holocaust was not always referred to as such.<sup>37</sup> In fact in the 1930s, during the Second World War, and even on the discovery of the concentration camps, there was expressed doubt and disbelief about what had been found. In the decade or so immediately after the war came to a close, the predominant political desire was to rebuild after victory rather than dwell on the horrors of the past. That was until the trial of Adolf Eichmann, captured by the Israelis and tried in Jerusalem, in part to ensure that the victims were

<sup>35</sup> Fassin and Rechtman (n 25) chapter 5.

<sup>36</sup> *ibid* 77.

<sup>37</sup> Jeffrey Alexander, *Trauma: A Social Theory* (Cambridge: Polity 2012).

not forgotten. Karstedt has commented on the telling absence of victims' voices (of the Holocaust) in the post war years.<sup>38</sup> Shalhoub-Kevorkian and Braithwaite state:

The profound contribution to victimology of Karstedt's work is the conclusion that the absence of any testimony from victims is one of the reasons the Nuremberg trials promoted a collective amnesia on the back of an interpretation that all this was the dirty work of just Hitler and his inner circle. Karstedt shows that it was not until a series of trials that started in the 1960s with the Eichmann trial in Israel that the German public were confronted with the voices of victims.<sup>39</sup>

However the trial of Eichmann did not only confront the German public. It was to confront other publics too, as the powerful analysis of the trial offered by Hannah Arendt was to demonstrate. Postulating that Eichmann represented the 'banality of evil', the reverberations of this analysis around the intellectual world, particularly in the United States, were telling. Indeed in the years that followed, the ramifications of Arendt's analysis informed responses to the Mai Lai massacre. That massacre, leaving big question marks around the US involvement in Vietnam as it did, leads Alexander to ask: ". . .if the United States itself committed war crimes, what chance could there be for modern democratic societies ever to leave mass murder behind?"<sup>40</sup> Taken in historical context, then, the space that these processes gave to listening to victims' voices, in relation to the Holocaust in particular, alongside the increasing awareness of the impact of rather more mundane events of ordinary crimes on people's everyday lives documented above more generally, it is perhaps easier to appreciate how wider social processes underpinned the recognition and classification of PTSD. Importantly these wider social processes marked the beginnings of recognizing trauma not only as a psychic problem for individuals but also as a problem for collectivities. Moon observes, for example, that the emergence of what has been referred to as the 'new wars' in the 1990s (wars that minimized the harm done to military personnel but resulted in a greater number of casualties amongst civilian populations) added weight to the view that such war torn societies constituted traumatized collectivities in need of therapeutic intervention.<sup>41</sup> So, to paraphrase Alexander,<sup>42</sup> what is interesting is how a particular historically situated event, marked by atrocities of all kinds, became transformed into something that stood for all such atrocities transcending the generations: The Holocaust. Moreover, by implication, how it is that the phenomenon of cultural/collective trauma came into being. He suggests four elements underpin this kind of transformation: the nature of the pain, the nature of the victim, the capacity to relate the victim's trauma to a wider audience, and the attribution of responsibility. When all four elements are present the cultural classification of what has happened as traumatic become possible: trauma becomes the new master narrative.

Alexander's analysis offers an understanding of how The Holocaust achieved the status of a master narrative whilst simultaneously offering us an understanding of why some equally atrocious events did not achieve this status.<sup>43</sup> Moreover the four elements

<sup>38</sup> Susanne Karstedt, 'From absence to presence from silence to voice: victims in international and transitional justice since the Nuremberg trials' (2010) 17 *International Review of Victimology* 9.

<sup>39</sup> Nadera Shalhoub-Kevorkian and John Braithwaite, 'Victimology between the local and the global' (2010) 17 *International Review of Victimology* 1, 1.

<sup>40</sup> Alexander (n 37) 12.

<sup>41</sup> Claire Moon, 'Healing past violence: traumatic assumptions and therapeutic interventions in war and reconciliation' (2009) 8 *Journal of Human Rights* 71.

<sup>42</sup> *ibid* (n27).

<sup>43</sup> see *ibid* for further details.

that he distills as pre-requisites for the cultural classification of trauma could be equally applied to the ever rising focus on victimhood discussed in part one of this paper viz; the increasing evidence of the pain of criminal victimization, the recognition of the relatively powerless victim, the proliferation of victim centred organizations making claims on behalf of victims' voices,<sup>44</sup> and the attribution of responsibility to criminal justice practitioners in particular and the system of justice more generally. Notably, when all these elements were present, 9/11 happened.

Interestingly Young reports that a year after this event, 'twenty-two per cent of those living within a kilometre radius of the World Trade Center were said to be suffering from Post Traumatic Stress Syndrome (PTSD), a two hundred per cent increase affecting some 422,000 individuals'.<sup>45</sup> This vision of harm done to the American body,<sup>46</sup> reverberated around the world and its media outlets with consequences, that Howie reports,<sup>47</sup> have been simultaneously widespread and mundane in our collective experience of the uncertainty of the twenty-first century. Fassin and Rechtman observe that at this juncture 'Rather, trauma has become common property, part of everyone's life, its reach extending far beyond the scope of psychiatric expert opinion'.<sup>48</sup> If victimhood and trauma have become co-joined in the way that this paper has suggested so far, what implications does this have for policies that claim to be listening to victims' voices?

### PART THREE: LISTENING TO VICTIMS' VOICES, THE PROBLEM OF TESTIMONY

During the time period under discussion elsewhere I have suggested it is possible to trace four strategies that have been concerned to offer greater attention to and awareness of the victim of crime within the criminal justice system in England and Wales. These are perpetuating welfare, tinkering with adversarialism, moving towards allocution, and restorative justice.<sup>49</sup> Of all of these strategies it is the moves towards allocution that are the main focus for this paper. Cavadino and Dignan suggest that whilst the conventional approach to criminal justice is rooted in a just desserts model (as far as the victim is concerned), the victim allocution model is concerned with victim empowerment, that is, with the victim's wishes being considered paramount in prosecution and sentencing decisions.<sup>50</sup> Moves towards allocution have materialised in the U.K. primarily in the form of two initiatives; the victim personal statement scheme introduced in November 2000 (though there is some earlier reference to such opportunities having been made in the 1996 Victims' Charter), and the victim advocates scheme introduced in April 2006. Both can be considered to be part of government policy to 'rebalance' the criminal justice system in order to better address the needs of the victim. Rock suggests that this agenda was generated by Jack Straw's embrace of the Human Rights Act in 1998.<sup>51</sup> This was taken to mean giving entitlements to protection for victims as well as suspects and, alongside the greater willingness to listen

<sup>44</sup> See for example Paul Rock, *Constructing Victims' Rights: The Home Office, New Labour, and Victims*. (Oxford: Clarendon 2004).

<sup>45</sup> Alison Young, *The Scene of Violence: Cinema, Crime, Affect* (London: Glasshouse Books 2010), 106.

<sup>46</sup> Alyson Cole, *The Cult of True Victimhood* (Stanford, Ca.: Stanford University Press 2007).

<sup>47</sup> Luke Howie, *Witnesses to Terror* (London: Macmillan-Palgrave 2012).

<sup>48</sup> Fassin and Rechtman (n 25) 127.

<sup>49</sup> Walklate (n5) chapter five.

<sup>50</sup> Mike Cavadino and Jim Dignan, 'Reparation, retribution and rights' (1996) 4 *International Review of Victimology* 233.

<sup>51</sup> Paul Rock, 'New Labour Policies for Victims' (2007) 67(1) *Criminal Justice Matters* 38.

to women's experiences of the criminal justice system in pursuing complaints of rape, and the unfolding legacy of the Lawrence Inquiry, (both commented on above), resulted in the government White Paper, *Justice for All*.<sup>52</sup>

Clark stated, 'Justice for All is guided by a single clear priority – to rebalance the criminal justice system in favour of the victim and the community so as to reduce crime and to bring offenders to justice'.<sup>53</sup> This pre-occupation with rebalancing the justice system has been a key policy platform since then and reached a particular high point in the passing of the *Domestic Violence, Crime and Victims Act* in 2004. This piece of legislation introduced surcharges on fines and fixed penalties for motoring offences that contribute to the funding of the Victims Fund; allowed the Criminal Injuries Compensation Authority to recover payments made to victims from their offenders; widened the opportunities for victims to be given information and to provide information in cases where their offender receives a prison sentence; provided for a Commissioner for Victims and Witnesses and set out a Code of Practice for Victims. The breadth of this legislation in relation to victims of crime was without precedent in England and Wales. What this legislation in general has achieved is subject to considerable debate. Moreover, against this wider backcloth of legislative changes what has been achieved by the efforts to give victims a voice in the criminal justice system, as shall be seen, is also subject to debate. A brief review of those findings follows.

The purpose of the victim personal statement scheme is to offer an (optional) opportunity to the victim of crime to relate to all the agencies of the criminal justice system how a crime has affected them, and to provide the system with more information about that impact. In an assessment of the first introduction of this scheme Tapley reported 'Victim Personal Statements were not being offered to victims on a consistent and regular basis'<sup>54</sup> and Graham and others (2004) in a more qualitative evaluation pointed to problems in victims' understanding of the scheme.<sup>55</sup> Nonetheless their report also suggested that those who participated felt that it had been a positive process. In a more recent review, however, it appears little has changed. Roberts and Manikis, using data from the Witness and Victim Experience Survey, found that from 2007–2010 only 42% of victim/witnesses recall being offered the opportunity to make a personal statement, and of these 55% actually made a statement with 67% of them recalling it having been taken into account.<sup>56</sup> This study also found significant variations in the use of this scheme by type of crime and geography. The Victims Advocates Scheme extended the opportunity for victims to have a voice in court. This scheme, offers the families of those bereaved in cases of murder and manslaughter to present a statement to the court as to the impact that that event had on them (a Family Impact Statement) once a conviction had been secured for the crime and before sentencing had been pronounced. Sweeting and others suggest that families welcomed these statements as an opportunity to have their voice heard in court and felt a sense of positive and active involvement in the trial reporting the process to be therapeutic.<sup>57</sup> Rock goes on to comment on the importance (for the families of the bereaved) of

<sup>52</sup> Home Office, 2002.

<sup>53</sup> Paul Clark, 'Redressing the balance: the criminal justice bill 2002' in E. Capes (Ed), *Reconciling Rights* (London: LAG 2004).

<sup>54</sup> Jackie Tapley, 'Public Confidence Costs – Criminal Justice From a Victim's Perspective' (2005) 3(2) *British Journal of Community Justice* 39, 32.

<sup>55</sup> Jenny Graham, Kandy Woodfield, Mike Tibble and Sarah Kitchen, *Testaments of Harm: a qualitative evaluation of the Victim Personal Statement scheme* (National Centre for Social Research, May 2004).

<sup>56</sup> Julian Roberts and Maria Manikis, *Victim personal statements: a review of the empirical evidence. Report for the Commissioner for Victims and Witnesses in England and Wales* (London: Ministry of Justice 2011).

<sup>57</sup> Anna Sweeting, Rachel Owen and Caroline Turley and others, *Evaluation of the victims' advocate scheme pilots* (Ministry of Justice Series 17/08, London: Ministry of Justice 2008).

memorialisation and ‘normalisation of the dead’.<sup>58</sup> However, at the same time, he observed that other court members displayed ‘civil inattention’<sup>59</sup> whilst these statements are being made. Nonetheless there is some evidence to suggest that both schemes have a cathartic effect for some victims under some circumstances. However, as this brief review implies, the extent to which policy moves such as these equate with ‘hearing victims’ voices’ remains a moot point. For the purposes of the discussion here the more pertinent issue is, why do policy moves such as these persist? There are arguably both political and cultural answers to this question.

Miers has commented that the metaphor of ‘rebalancing’ the criminal justice system, first used in the debates surrounding the establishment of the Criminal Injuries Compensation Board in 1964, is contentious.<sup>60</sup> This metaphor puts victims/witnesses (complainants) and offenders (defendants) in an oppositional relationship with one another (a relationship that may be more imagined than real) and begs the question as to the purpose of the criminal justice system itself. To state the obvious, in an adversarial system the case against the defendant is made on behalf of the state not on behalf of the victim/complainant per se. So, the observation made by McBarnett some time ago, that if the victim feels that no one cares about his/her pain, it is because, *institutionally*, in an adversarial system, no one does, remains pertinent.<sup>61</sup> There are, however, other issues at stake here that move us to consider the problems associated with victim/witness testimony more generally and the possible interconnections between these problems, the changing contours of victimhood and understandings of trauma.

From identification parades to eyewitness testimonies, psychologists have spent much time and effort in conveying the cognitive and memory problems that exist for witnesses in recalling accurately, that is for the purposes of evidence, what they have seen. The witness statements taken from those who were in Stockwell tube station in the Jean Charles de Menezes case are an illustrative case in point. These problems are, of course, well known in the legal system and more often than not constitute part of the justification for subjecting such statements to close scrutiny under cross-examination. Whilst there have been considerable efforts to protect ‘vulnerable’ witnesses from some aspects of these processes,<sup>62</sup> that which Ellison has referred to as the ‘credibility gap’, and how it might be closed particularly in cases of sexual assault, remains.<sup>63</sup> If these kinds of problems are overlaid with the difficulties associated with ‘false memory syndrome’<sup>64</sup> especially in cases that have involved physical and/or sexual abuse, it is easy to see how the problems associated with victim/witness testimony can become compounded. Peters reminds us, “Witnessing is an intricately tangled practice. It raises questions of truth and experience, presence and absence, death and pain, seeing and saying, and the trustworthiness of perception-in short fundamental questions of communication”.<sup>65</sup>

<sup>58</sup> Paul Rock, ‘Hearing victims of crime: the delivery of impact statements as ritual behaviour in four London trials for murder and manslaughter’ in A. Bottoms and J. Roberts (Eds), *Hearing the Victim* (Cullompton: Willan 2010), 216.

<sup>59</sup> *ibid* 219.

<sup>60</sup> David Miers, ‘Looking beyond Great Britain: the development of criminal injuries’ in S. Walklate (ed.), *The Handbook of Victims and Victimology* (Cullompton: Willan 2007), 337.

<sup>61</sup> Doreen McBarnett, ‘Victim in the witness box- confronting victimology’s stereotype’ (1988) 7 *Contemporary Crises* 7279,300. See also the more detailed discussion of the victim in court offered by Andrew Sanders and Imogen Jones, ‘The victim in court’ in S. Walklate (ed.), *The Handbook of Victims and Victimology* (Cullompton: Willan 2007), 282–308.

<sup>62</sup> Sanders and Jones (n 61).

<sup>63</sup> Louise Ellison, ‘Closing the credibility gap: the prosecutorial use of expert testimony in sexual assault cases’ (2004) 6 *International Journal of Evidence and Proof* 239.

<sup>64</sup> For a review of these issues see Joseph Davies ‘Victim narratives and victim selves; false memory syndrome and the power of accounts’ (2005) 52(4) *Social Problems* 529.

<sup>65</sup> John Peters, *Witnessing* (2001) 23(6) *Media, Culture, Society* 707,707.

Indeed, the criminal justice system faces the problems of witnessing on a routine daily basis. These problems are not necessarily alleviated when individuals have been subjected to more extreme experiences of victimisation. Exposure to extreme threat or violence does not necessarily improve the quality or veracity of witness testimony not even for Holocaust survivors,<sup>66</sup> the importance of such voices in giving recognition to the horror of those events notwithstanding. (The writings of Primo Levi are particularly significant in this regard). The questions that this discussion raises, alludes to the tensions that exist between the recognition of trauma on the one hand and using that recognition as the basis for action and/or policy on the other. Leys observes that:

... the history of trauma is a history of forgetting and it is not at all obvious even today, when the traumas of war and sexual abuse, the diagnosis of dissociation, and the deployment of hypnosis for the recovery of traumatic memories are commonplaces of psychiatry and psychotherapeutic practice, that we have grasped the scandalous nature of the traumatic cure.<sup>67</sup>

Here Leys is pointing to not only the history of trauma as a concept but also reminds us that to be traumatised is to forget. Traumatic events have to be elicited (from individuals) by one means or another. If this is one of the characteristics of being traumatised; then how can trauma be related in testimony (in court or anywhere else) unless trauma, in and of itself, has been redefined? If this is the case in respect of an individual who has been traumatised, what of the claims for collective and/or cultural trauma? Tumarkin states: 'The word's continuous misuse obscures the fact that 'traumatic' is in no way a synonym for 'unpleasant' or 'emotionally taxing'...'.<sup>68</sup> The co-joining of victimhood with trauma, as outlined above, has contributed to this misuse. Thus it is no great surprise that policies designed to listen to the victim may, ultimately miss the mark.

## CONCLUDING PROVOCATIONS

The first thoughts for this paper were developed during the autumn of 2012 when the media in the U.K. were paying particular attention to the allegations of sexual abuse being made against the now deceased television personality, Jimmy Savile, alongside claims of child abuse having taken place in children's homes in North Wales. One feature of the latter of these two issues was the role of social media, particularly Twitter, as an outlet for information and allegation. The use of social media in this way is a reminder of the ways in which we can, and are, increasingly exposed to the vicarious suffering of others as observed by Valier.<sup>69</sup> This kind of development, alongside, "The belated construction of the Holocaust as the central event of the twentieth century [is] inextricably linked to the rise of trauma as one of the key interpretive categories of contemporary politics and culture"<sup>70</sup> point to one way of understanding why the kinds of historical claims being made, in both of the cases mentioned above, get so much attention. However, Kansteiner also wishes to bring to our attention two further problematic issues reflected in the contemporary use of

<sup>66</sup> See Renata Salecl, *On Anxiety* (London: Routledge 2004), chapter six.

<sup>67</sup> Ruth Leys, *Trauma: A Genealogy* (Chicago: University of Chicago Press 2000), 119.

<sup>68</sup> Maria Tumarkin, *Traumascapes* (Melbourne: Melbourne University Press 2005), 11.

<sup>69</sup> Valier (n 20).

<sup>70</sup> Wulf Kansteiner, 'Genealogy of a Category Mistake: A Critical Intellectual History of the Cultural Trauma Metaphor' (2001) 8(2) *Rethinking History* 8(2) 193, 193.

trauma as a cultural concept: the inaccurate conflation of the different meanings attributable to it, (discussed above) and the associated elision of the question of moral differences between victims, perpetrators and bystanders. Such moral differences are, more often than not, shades of grey rather than black and white,<sup>71</sup> but nonetheless such differences exist and raise important questions if we are indeed, all victims now. So who the victim is, and how we can hear them, remain equally problematic issues contemporarily as they were fifty years ago, which is where this paper began.

<sup>71</sup> Kieran McEvoy and Kirsten McConnachie, 'Victimology in transitional justice: victimhood, innocence and hierarchy' (2012) 9(5) *European Journal of Criminology* 527.

# THE EU'S NEW VICTIMS' RIGHTS DIRECTIVE: CAN MINIMUM HARMONIZATION WORK FOR A CONCEPT LIKE VULNERABILITY?

RICHARD LANG\*

## INTRODUCTION

This is a conceptual piece. It is also, to use the latest pedagogical jargon, a reflective piece. It arose from a project which the author undertook with the National Centre for Cyberstalking Research at the University of Bedfordshire in 2012, lobbying for an explicit mention of cyberstalking in what was then the draft Victims' Rights Directive.<sup>1</sup> The Commission's originally proposed draft had contained a very brief list of crimes the victims of which were to be considered vulnerable.<sup>2</sup> However, at the Committee stage, the European Parliament seized on this list and greatly expanded it.<sup>3</sup> The Centre argued that the EU had an especial responsibility where cyberstalking was concerned, due to the crime's large cross-border dimension, both in terms of the location of victims and perpetrators, and in terms of the location of intermediaries (including Internet Service Providers) without whom the crime could not be committed. Although the objective was ultimately not attained, the project did at least raise awareness, with a number of MEPs expressing interest, including the President. The project was in some ways hampered by the fact that there was never a public debate on this directive. Rather, the Danish Presidency hurriedly wrapped it up with a triologue between the three institutions concerned, and the Parliament concluded the matter via a "first reading agreement" on 12 September 2012. In a supposed compromise between the Parliament's desire for a long list of vulnerable victims and the Council's apparent desire for no list at all, it was decided to abolish the list and instead merely to strengthen the individual "assessment mechanism", by which, with a short non-exhaustive list of indicia to go by, police officers and victim support professionals were to assess vulnerability on a case by case basis. The Council adopted the Directive on 4 October 2012. The Directive was published in the Official Journal in November 2012, and given the moniker Directive 2012/29.<sup>4</sup>

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<sup>1</sup> Commission (EU), *Proposal for a Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime (Proposal)* COM (2011) 275 final, 18 May 2011.

<sup>2</sup> *ibid*, Article 18(2). The crimes were sexual violence and human trafficking.

<sup>3</sup> To include victims of gender-based violence, victims of violence in close relationships, victims of terrorism, victims of organised crime, victims of mafia organisations, victims of drug traffickers and victims of organ trafficking. While much of the pre-debate negotiations went on 'behind closed doors', this list has been discerned mainly from the two relevant committees' Draft Report of 26 January 2012 and some Compromise Amendments which followed on 22 March 2012: European Parliament Draft Report on the proposal for a directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, PE 480.616 v01-00, dossier no CJ01\_PR(2012)480616, 26 January 2012; European Parliament Compromise Amendments 1-39 of the Draft Report on the proposal for a directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, 22 March 2012, available at <[http://www.europarl.europa.eu/meetdocs/2009\\_2014/organes/libe/libe\\_20120327\\_1700.htm](http://www.europarl.europa.eu/meetdocs/2009_2014/organes/libe/libe_20120327_1700.htm)>accessed 28 May 2012. For a full discussion of the process, including references to further relevant Parliamentary documents, please see C Maple and R Lang, 'Vulnerability, Victims and Free Movement: The Case of Cyberstalking', (2012) 3(2) *New Journal of European Criminal Law* 208.

<sup>4</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57.

With the ink dry on the rushed directive, there is now time to reflect on the final text. Such critique as is made here should in no way be seen as a denigration of this clearly valuable directive. However, what is now Article 22 on the individual assessment merits further scrutiny. Setting out special measures for vulnerable victims, but then leaving the assessment as to who is vulnerable to Member States, resembles minimum harmonization. The question is therefore posed: can minimum harmonization work for a concept like vulnerability?

What lies at the heart of this question is the allocation of power as between the EU institutions on the one hand and the Member State governments on the other, and more precisely the reallocation of power from the former to the latter which minimum harmonisation represents. This in turn raises issues of sovereignty, subsidiarity and the identification of the appropriate level at which rights – any rights – should be granted, and that at which their exercise should be reviewed.

In terms of structure, the author humbly borrows an idea from Wittgenstein, and offers four propositions.<sup>5</sup> It should be noted though that the propositions are not interlinked, and that the first three merely lay the groundwork for the fourth, in which the titular question is actually answered. Each proposition will be taken in turn.

#### PROPOSITION ONE: FREE MOVEMENT RIGHTS INCLUDE THE RIGHT TO STAY WHERE YOU ARE

Article 82(2) TFEU, on which Directive 2012/29 is based, never promised free movement. This legal basis is rooted in the idea of an area of Freedom, Security and Justice,<sup>6</sup> and calls on the EU institutions to establish minimum rules for various aspects of criminal law and procedure “[t]o the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension”.<sup>7</sup> However, the use of free movement vocabulary and techniques invites the reader to attempt a kind of free movement analysis of the directive.

At a stretch, one could force Directive 2012/29 into the free movement paradigm by analogy with the case of *Decker*.<sup>8</sup> In this case, a Luxembourgish individual wished to travel to Belgium to buy some spectacles. On his return he claimed for these spectacles pursuant to the Luxembourgish health insurance system. The Luxembourgish health insurance replied that, although this was possible in theory, Mr Decker should have asked permission before travelling to Luxembourg. Since he had not done this he was not entitled to the reimbursement which he sought. The Court of Justice ruled that the Luxembourgish requirement for permission was a hindrance to Mr Decker’s free movement. However, there was nothing stopping Mr Decker from physically travelling to Belgium, from buying the spectacles, or indeed from bringing them back into Luxembourg. The hindrance such as it was more psychological. The Court’s argument was that he would be discouraged from travelling if he thought that there was a risk that he would not receive the desired reimbursement on his return – a hindrance in the head, as it were.

<sup>5</sup> Ludwig Wittgenstein structured his *Tractatus Logico-Philosophicus* around seven main propositions: L Wittgenstein, *Tractatus Logico-Philosophicus* (Routledge, Oxfordshire 2013).

<sup>6</sup> The article comes within Title V of the Treaty on the Functioning of the European Union, which is entitled ‘Area of Freedom, Security and Justice’.

<sup>7</sup> Article 82(2) TFEU.

<sup>8</sup> Case 120/95 *Nicolas Decker v Caisse de maladie des employés privés* [1998] ECR I-1831.

Turning to the Directive, while there are those who will travel to another Member State and find themselves the victims of crime, it is likely that they will return to their home state as soon as possible and almost certainly will not wish to return to the host state. The vulnerability assessment will of course have been carried out in the host state, before they depart, at the point that they report the crime. As a traveller they are almost certainly to be regarded as vulnerable as they do not speak the language of the country they are in. It goes without saying that they are at greater risk in terms of susceptibility to crime and in terms of the impact which a criminal process in a foreign tongue will have upon them. However, once they return home, if strict mutual recognition is observed, then the traveller's home state authorities will be equally bound by this positive vulnerability assessment, which triggers extra rights including the right to use video-conferencing facilities in lieu of physical attendance at any future trial.

Our traveller, just like Mr Decker, has started out in his home state, moved briefly to the host state, and then returned to the home state again. Were the home state to refuse to pay for this traveller's video-conference, it could be argued that they would be hindering the tourist's free movement in the same way that Luxembourg hindered Mr Decker's free movement. The tourist would be discouraged from making the journey if they thought that on becoming the victim of a serious crime in the host state and being declared vulnerable there, they would on their return have this vulnerability-assessment negated, and be forced to return to the host state for the trial of the suspected perpetrator. They would not wish to travel in the first place, the home state's potential refusal acting as a hindrance in the head in the same way that Luxembourg's requirement for permission had done in the *Decker* case. It would thus be a hindrance to this traveller's free movement were they to be forced to move again. In other words, it would be a hindrance to their free movement to make them move. Quite a paradox!

It has already been admitted that this is something of a stretch and the more one studies this directive the more one comes to the conclusion that the rights it contains were never destined for the few Europeans who travel, but for the many who do not; this idea is revisited in the third proposition. Nevertheless it is possible to view this directive as a free movement directive, but only if one is prepared to concede that free movement rights include the right to stay where you are.

**PROPOSITION TWO: ARTICLE 22 INVERTS SUBSIDIARITY BY NOT TAKING ACTION WHERE CERTAIN OBJECTIVES COULD BE BETTER ACHIEVED BY THE UNION, AND TAKING ACTION WHERE SUCH OBJECTIVES COULD BE BETTER ACHIEVED AT NATIONAL LEVEL**

Having spoken only so far of nationals of one Member State who become victims of crime while travelling in another Member State, there is a second category of cross-border victim which needs addressing – those stationary citizens in one Member State who suffer crimes at the hands of someone resident in another Member State. Although the situation is rare one crime in relation to which it is possible is cyberstalking. Although it might be thought that the stalker is always local to their victim, as in the case of former intimate partners or “infatuates”, that is not always the case in cyberspace where internet trolls for example take delight in degrading and humiliating victims hundreds or even thousands of miles away.<sup>9</sup> In the case of

<sup>9</sup> That is not to say that infatuation can never have a cross-border element, as witness the case of Ramazan Noyan Culum, at least some of whose stalking activities were carried out online: R Alleyne, ‘Obsessed Turkish sailor’s eight month sea odyssey to find British love’ *Telegraph* (London 21 November 2012) <<http://www.telegraph.co.uk/news/newstopping/howaboutthat/9694054/Obsessed-Turkish-sailors-eight-month-sea-odyssey-to-find-British-love.html>> accessed 9 December 2012.

cyberstalking, the vulnerability assessment will take place where the victim resides at the point that they report the matter if they do at all. The extra rights which are then triggered however must be exercised in the state where the perpetrator resides, that state having had no opportunity to assess the victim's vulnerability for itself. A hard and fast list as to who was or was not vulnerable in all circumstances would make life easier here and prevent one state's police and victim-support system being hostage to the decisions of another.<sup>10</sup> The directive was supposed to *protect* the victim from having to face a bewildering array of national systems, and from the increased trauma resulting therefrom. It was supposed to close up the "lacunae... in the protection of victims in the internal market",<sup>11</sup> not create more.

We must also bear in mind that there is doubt as to the *locus delicti* of a cybercrime and it is not entirely certain whether someone typing a malicious communication into their computer would be liable in the state where they do the typing or in the state where the receiving server is located. If victimhood and crime occur in separate states, then two police forces and two sets of victim support services are potentially involved, begging the question: which should carry out the vulnerability assessment? Certainly, in the UK, Sections 127(1) and 127(2) of the Malicious Communications Act 2003<sup>12</sup> make clear that the offence is committed on the act of communication, regardless of whether or not this communication is ever received. This would mean the party sending the communication would be criminally liable at the moment of typing it (or at the least when the relevant message is received on his or her Internet Service Provider's network). However, the person to whom the communication was addressed could in fact be in another country, as happened in the Australian cyberstalking case of *Sutcliffe*.<sup>13</sup> In that case, an Australian national, Brian Sutcliffe, was accused of stalking an actress who lived in Canada; the Australian court felt that enough of the alleged crime had been committed in Australia (in fact, everything "save for the final ingredient of harmful effect") for Australian jurisdiction to be engaged.<sup>14</sup> But the fact remains that the police force investigating the alleged offence, and therefore best placed to understand "the circumstances of the crime",<sup>15</sup> were not the same police force to which the distressed victim would have turned. One could easily foresee a similar scenario transpiring within the EU. Thus, as Murray notes, "[t]he issue is not the need

<sup>10</sup> As opposed to the national *judges*, for whom, since the introduction of the European Arrest Warrant, it is too late. For the police, even more difficulties may lie ahead with the advent of the European Investigation Order. This will present more problems than the directive under discussion here, as suspects are much more likely to flee across borders, triggering a need for cross-border cooperation, than victims are.

<sup>11</sup> European Parliament Opinion of the Committee on Legal Affairs for the Committee on Civil Liberties, Justice and Home Affairs and the Committee on Women's Rights on the proposal for a directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, PE480.514 v02-00, dossier no JURI\_AD(2012)480514, 26 March 2012, 3.

<sup>12</sup> (1) A person is guilty of an offence if he—

(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or  
(b) causes any such message or matter to be so sent.

(2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—

(a) sends by means of a public electronic communications network, a message that he knows to be false,  
(b) causes such a message to be sent; or  
(c) persistently makes use of a public electronic communications network'.

<sup>13</sup> *Director of Public Prosecution v Sutcliffe* [2001] VSC 43 (Victoria Supreme Court, Australia, 1 March 2001), <<http://www.austlii.edu.au/au/cases/vic/VSC/2001/43.html>> accessed 24 February 2013.

<sup>14</sup> Paragraph 69 of the judgment. This case is cited in the excellent article by SW Brenner and B-J Koops, 'Approaches to Cybercrime Jurisdiction' (2004) 4 J High Tech L 1, in which the authors conduct a thorough worldwide survey of different solutions to the jurisdictional problems which cybercrime can cause. These including founding jurisdiction on "territorial claims" (such as the location of the computer) or on "personality claims" (such as the nationality of the victim).

<sup>15</sup> One of the factors to be taken into account by those performing the individual assessment: Directive 2012/29 (n4), Article 22(2)(c).

for further measures, it is rather for international cooperation in the detection and prosecution of such activity".<sup>16</sup>

Until such cooperation materializes, the current state of confusion is likely to continue. Once again the state where the victim resides will have to pay for the video-conferencing facilities and so on, paying as it were to help prosecute a wrongdoer from another state who committed a crime in the territory of that other state and where normally then one would expect that other state to foot any bill resulting from the crime. In the extremely hypothetical event that the state where the victim resides finds that there is no vulnerability, then the victim will have to travel to the country where the perpetrator resides to give evidence, an extremely traumatic matter no doubt. This is extremely hypothetical because if the police in the state where the victim resides has not taken the matter seriously, as often happens with cyberstalking, then it seems unlikely that the police in the state where the perpetrator resides will be actively seeking, arresting and prosecuting the wrongdoer in that second state. The issue of cost for video-conferencing would therefore simply not arise. But since internet trolls regularly commit their crime choosing their targets – near and far – according to their own whim, it seems not impossible that a troll could be targeted by the police of the state in which that troll normally resides and operates, but that one of their victims could be many miles away, unprotected thanks to a negative vulnerability assessment, and having to travel if they wish to participate in the conviction of the perpetrator. This seems to be a cross-border situation requiring of action at EU level, since clearly no individual state's law can cover it, and yet the EU's very attempt to write a victim-protection law leaves this situation utterly unaddressed.

If strict subsidiarity rules are followed then the EU should only be dealing with the cross-border aspects of a certain problem and not the parochial aspects. Often though a kind of mission creep leads to measures which address the cross-border and some or all of the parochial aspects. But here we have, surely for the first time, an EU measure that appears to only address the parochial aspects of the problem and ignores the EU aspects altogether, as though there were some inverse subsidiarity that said that the EU should *only* act where the matter *can* be addressed by Member States and should *not* act where it *cannot*. It is precisely the cross-border elements of crime that are ignored by this directive, transnational victimhood effectively remaining unlegislated. Meanwhile the EU – a sort of Euronanny – fusses with “purely internal situations”.<sup>17</sup> Lavenex is therefore right to see in the importation of mutual recognition to (what is now) the Area of Freedom, Security and Justice a sort of “governmentalisation”.<sup>18</sup> Mitsilegas too has noted the threat to subsidiarity which this directive could represent, commenting at an earlier stage of its gestation: “In the light of the absence of a cross-border element and the often local character of cases involving victims, national parliaments should... check thoroughly whether proposals on victims' rights pass the subsidiarity test”.<sup>19</sup>

<sup>16</sup> A Murray, *Information technology law: The law and society* (OUP, Oxford 2010) 391. In the EU, such cooperation may be around the corner in the form of the European Investigation Order, although, as mentioned above (n 10), that is likely to bring with it its own problems.

<sup>17</sup> The issue of purely internal situations is addressed in more detail in the third proposition, below.

<sup>18</sup> S Lavenex, ‘Mutual recognition and the monopoly of force: limits of the single market analogy’ (2007) 14 JEPP 762, 775.

<sup>19</sup> V Mitsilegas, ‘Written evidence submitted to the House of Lords European Union Committee for their inquiry into the European Union's Policy on Criminal Procedure’ (7 December 2011) in House of Lords EU Sub-Committee E (Justice and Institutions), *EU Criminal Procedure Policy: Written Evidence*, 107, 111. <<http://www.parliament.uk/documents/lords-committees/eu-sub-com-e/eupolicycriminalprocedure/criminal-procedure-evidence.pdf>> accessed 17 February 2013.

PROPOSITION THREE: THE COURT WILL NOW BE EMPOWERED TO PROVIDE A RIGHTS REVIEW OF MEMBER STATE BEHAVIOUR EVEN WHERE THE CASE HAS NO CONNECTION TO EU LAW WHATSOEVER

If we cannot accept the analysis in proposition one, how should we interpret the Directive? What is left once we abandon the free movement paradigm altogether? This is the EU moving away from technical, common market concerns towards the wider concept of a so-called "Social Europe".<sup>20</sup> Many of Social Europe's directives deal with some aspect of protection, be it consumer protection, or employee protection; these provide a "level playing field", facilitating (for example) the free movement of goods and workers. The question is whether victim protection should join the roster, devoid (as it largely is) from a free movement dimension. Recent case-law from the Court of Justice concerning citizenship<sup>21</sup> suggests that travelling from one State to another may no longer be a prerequisite for enjoyment of EU rights. An EU directive granting rights to stationary victims would at the very least seem to be in keeping with this approach.

However, once the EU wades into the universalised rights business, Member States must accept the pitfalls of universalisation. This was faced by the Convention drafting the EU's Charter of Fundamental Rights and was resolved by declaring that the rights it contained would be justiciable as against Member States "only when they are implementing Union law". But there is no such caveat in Directive 2012/29, nor could any such caveat reasonably be drafted. Unless it is a crime of EU fraud, the victims of which are less likely to be in the vulnerable category, the crime being reported is very unlikely to contain any EU element whatsoever, but the right is invoked and must be respected by the Member State nonetheless. Those who have for a while now spoken of the demise of the special status of "purely internal situations"<sup>22</sup> will have a new source of evidence, as a victim of Member State A, subjected to a crime in Member State A, committed by a perpetrator of or resident in Member State A, can invoke an EU right in their national court without the slightest need for any party to have moved from Member State A and without the need for the subject matter of the crime to be related in any way to the European Union. This is the nightmare scenario that the British and Polish feared at the time when they negotiated their "opt-out" from the Charter.<sup>23</sup> It is true that this is only one right, and perhaps one which no reasonable person would begrudge a victim under any geographical or contextual circumstances, but there is the hint that this may be the thin end of the wedge and that, thanks to directives such as these, the Court will slowly be able to impose itself as an appellate court with complete jurisdiction and the final say in a state's treatment of rights matters.<sup>24</sup>

<sup>20</sup> Opinions vary as to whether "Social Europe" is simply auxiliary to the single market project (market-making), or whether it can be regarded as a separate, countervailing project in its own right (market-correcting). For a helpful discussion on this, see J Shaw, J Hunt and C Wallace, *Economic and social law of the European Union* (Palgrave Macmillan, Hampshire 2007) 344–5.

<sup>21</sup> Perhaps most famously Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)* [2011] ECR I-1177.

<sup>22</sup> To take just one example, A Lansbergen and N Miller, 'Court of Justice of the European Union – European Citizenship Rights in Internal Situations: An Ambiguous Revolution? Decision of 8 March 2011, Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*' (2011) 7(2) *European Constitutional Law Review* 287.

<sup>23</sup> The Protocol on the application of the Charter of Fundamental Rights of the EU to Poland and to the UK [2007] OJ C306/156.

<sup>24</sup> The alternative, to limit the effect of the Directive to cross-border cases, would hardly be much better, as this would have deleterious consequences for equality and would lead to reverse discrimination: V Mitsilegas, 'Supplementary written evidence submitted to the House of Lords European Union Committee for their inquiry into the European Union's Policy on Criminal Procedure' (10 January 2012) in House of Lords EU Sub-Committee E (Justice and Institutions), *EU Criminal Procedure Policy: Written Evidence*, 113, 114. <<http://www.parliament.uk/documents/lords-committees/eu-sub-com-e/upolicycriminalprocedure/criminal-procedure-evidence.pdf>> accessed 17 February 2013.

PROPOSITION FOUR: MINIMUM HARMONIZATION AND MUTUAL  
RECOGNITION ARE UNSUITABLE FOR THE PROTECTION OF  
VULNERABLE VICTIMS

It is submitted that Directive 2012/29 falls between two stools. On the one hand, there are sound arguments for simply leaving this issue with Member States. On the other hand, if the issue was felt to deserve harmonization at supranational level, then (full) harmonization at supranational level is what the Directive should have delivered. The “half way house” of minimum harmonization, coupled *de jure* or *de facto* with mutual recognition, was simply not appropriate in this case. The protection of vulnerable victims’ rights is just not an issue which lends itself to these two principles, as discussed further in following two subsections.

*Is The Protection Of Vulnerable Victims’ Rights An Issue Which Lends Itself To Mutual Recognition?*

The very proximity (in most cases) of victims to perpetrators and of carers to victims means that a market-liberalization mechanism, designed to facilitate movement across Europe’s internal borders, is out of place in a directive to establish minimum standards for victims of crime. To its credit, the body of the directive does not mention mutual recognition directly.<sup>25</sup> But in the few cases with a cross-border dimension (such as the ones in propositions one and two), it would seem perverse for every country the victim visits to provide its own assessments, as all but one of these assessments would be decontextualized from the crime itself. Logic, if not the legislator, therefore dictates that mutual recognition of assessments will take place, and that the second states will have to accept the judgment of the first.<sup>26</sup> This inevitably entails loss of sovereignty, for, as Maduro has written, “A state that has to recognize and give effect, in its jurisdiction, to the rules of another state can be said to transfer, in part, some of the exercise of its sovereign powers to that other state”.<sup>27</sup> The snag here, though, is that the vulnerability assessment is not a “rule” being made by a parliament and so one must look more closely to discern which, if any, powers the home parliament has in fact lost when it is made abroad and not at home.

One could make an analogy with *Van Duyn v Home Office*.<sup>28</sup> Here, pursuant to Article 3(1) of Directive 64/221,<sup>29</sup> the UK immigration authorities were under an obligation, when deciding whether a potential migrant worker was or was not a threat to the host state, to base their decision exclusively on the personal conduct of the individual concerned. This obligation was not regarded by the Court of Justice as requiring implementation.<sup>30</sup> It follows, then, that when a compliant Member State’s

<sup>25</sup> There are three references in the recitals (Recitals 1, 3 and 7), although these relate to other legislation.

<sup>26</sup> Compare the *ne bis in idem* cases. In Joined Cases C-187/01 and C-385/01 *Criminal proceedings against Hüseyin Gözütok (C-187/01) and Klaus Brügge (C-385/01)* [2003] E.C.R. I-1345, the Court described the ‘necessary implication’ that ‘each of [the Member States] recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied’ (para. 33 of the judgment).

<sup>27</sup> MP Maduro, ‘So close and yet so far: the paradoxes of mutual recognition’ (2007) 14(5) *Journal of European Public Policy*, 814, 819.

<sup>28</sup> Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 1337.

<sup>29</sup> Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1963-4] OJ English special edition/117. This has since been replaced by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

<sup>30</sup> *Van Duyn* (n 25) para. 13.

immigration authorities based their decision on the individual's personal conduct alone, this action could not represent implementation; at most it was *application*. Indeed, the Court has been consistent in holding that mere administrative practices, which by their nature can be modified as and when the administration pleases and which are not publicized widely enough, cannot be regarded as a proper fulfilment of the obligation imposed on the Member States by what is now Article 288 of the Treaty;<sup>31</sup> proper implementation of directives will usually require the enactment of binding rules of general application which are sufficiently specific, precise and clear for affected individuals to enforce their rights in national courts.<sup>32</sup> The provision in question in *Van Duyn*, although a provision in a directive, was treated as a mini-regulation, giving Miss Van Duyn the possibility of invoking it in the national court as long as the *Van Gend* test was satisfied.<sup>33</sup>

In the circumstances of the Victims' Rights Directive, it could be argued that the obligation of the home state police or victim support services to decide whether or not the person in front of them is vulnerable would not be regarded as an "implementation" of Directive 2012/29 either. According to this argument, the provision in question, Article 22, although enclaved within a directive, would in fact be a mini-regulation. Thus the parliament of the home state would lose nothing by the exportation of that decision-making process to a neighbouring Member State, except for its monopoly over choosing the decision-makers. This exclusive power is vitiated somewhat when decision-makers chosen by or with the approval of foreign parliaments will be entitled to wield influence in the home state or at least take decisions which have material consequences in the home state. To borrow terminology from competition law, the home parliament's exclusive distribution system of decision-makers is rendered merely a selective distribution system, introducing a competitive element which many would see as undesirable, purposeless or even dangerous.<sup>34</sup> Lavenex refers to the process as a "horizontal transfer of sovereignty":<sup>35</sup> "[T]he introduction of mutual recognition [in this field]. . . facilitates the cross-border movement of sovereign acts exercised by states' executives".<sup>36</sup>

Sovereignty loss therefore appears to have occurred after all. But on this occasion it would seem disruptive to national processes, burdensome to national resources, unfair to national victims and necessitating the kind of solidarity between Member States which is arguably not there in the criminal legal sphere at all, as problems with the European Arrest Warrant have already demonstrated. For one thing, the identity and severity of crime varies from state to state and so the vulnerability assessment which the traveller brings back with them may sit uneasily with national attitudes to the same crime suffered by the returning party when he or she was abroad. If tariffs for criminals vary in respect of the same crime from one state to another it follows that vulnerability assessments should vary. Clearly each country considers the same crime differently and in particular each populace has its own view as to how severe that crime may be as reflected in national criminal tariffs for those found guilty of it. It follows that the

<sup>31</sup> For example, Case C-131/88 *Commission v Germany* [1991] ECR I-825.

<sup>32</sup> See, for example, Case C-29/84 *Commission v Germany* [1985] ECR 1661; Case C-361/88 *Commission v Germany* [1991] ECR I-2567.

<sup>33</sup> This is the test for direct effect first espoused in Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [ECR English special edition] 1.

<sup>34</sup> The carrying out of the obligation in Article 22 by the Member State administrators means that the decision as to who is or is not vulnerable was 'passed' to them rather than being taken by law-makers (national or European): see further below, text accompanying n 52.

<sup>35</sup> Lavenex(n 18) 771.

<sup>36</sup> *ibid* 765.

vulnerability assessment will similarly vary from high in a state which regards that crime as severe to low in a state which does not.<sup>37</sup>

Granted, the directive attempts to set some standard criteria for police officers and victim support professionals to follow when making their assessment, but, as will be discussed further below, the police for one may be too busy to make a fair assessment each time. And unfortunately it is not just the police's shortage of time which may vitiate the fairness of the assessment. Article 22 makes a mention of "specific attention" needing to be paid where victims "have suffered a crime committed with a bias or discriminatory motive". What if it is the police themselves whose bias is the greatest impediment to the victim's gaining assistance? In a number of judgments of the European Court of Human Rights, EU Member States have been found to be in breach of Article 14 after their police forces treated members of the Roma community in a discriminatory fashion.<sup>38</sup> It may be better to set out a uniform European standard by which to decide who is or is not in need of special protection; the variation in national standards cannot help the vulnerable victim, and could potentially make things worse.

The integration of systems which mutual recognition usually brings about is regarded as a good thing in internal market law. However, to allow differing standards of protection for vulnerable victims from one Member State to the next is not safeguarding consumers' rich variety of choices, and aiding marketeers in the preservation of traditions in those Member States where local traditions exist, but abandoning potential victims to the vagueness of national law, and all but acquiescing in criminals' commission of offences in those Member States where protection is lax.

### *Is The Protection Of Vulnerable Victims' Rights An Issue Which Lends Itself To Minimum Harmonization?*

A good starting place for answering this question might be the "protection" directives, on matters such as health and safety and consumer protection, which were mentioned in proposition three, as some of these also utilize minimum harmonization.<sup>39</sup>

It is in fact not unusual for "protection" directives to leave it to the Member State to decide both the identity of the persons to whom protection is due, and the amount of protection required, but this may bring with it a cost in legal certainty and judicial scrutiny for the party needing protecting. By way of example, the EU directive at stake in the *Miret* case,<sup>40</sup> which was the directive on the insolvency of employers,<sup>41</sup> left Member States a broad discretion with regard to the organization, operation and financing of guarantee institutions. But it was this very imprecision which led to the directive's failing the *Van Gend* test for direct effect,<sup>42</sup> and being incapable of indirect

<sup>37</sup> In this sense, vulnerability follows the law; this theme is revisited in the Conclusion.

<sup>38</sup> *Šečić v. Croatia* (App no 40116/02) ECHR 31 May 2007; *Petropoulou-Tsakiris v. Greece* (App no 44803/04) ECHR 6 December 2007; *Stoica v. Romania* (App no 42722/02) ECHR 4 March 2008. And in the UK, the Macpherson Report into the murder of Stephen Lawrence famously found the police to have been institutionally racist, at least in respect of some areas of its activity: Sir William Macpherson of Cluny, 'The Stephen Lawrence Inquiry' (Report of an Inquiry, February 1999) <<http://www.archive.official-documents.co.uk/document/cm42/4262/sli-06.htm#6.6>> accessed 17 December 2012.

<sup>39</sup> Such as the former Distance Selling Directive, Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19, which, perhaps tellingly, has recently been recast as a maximum harmonization measure: Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64.

<sup>40</sup> Case C-334/92 *Teodoro Wagner Miret v Fondo de Garantía Salaría* [1993] ECR I-6911.

<sup>41</sup> Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [1980] OJ L283/23.

<sup>42</sup> The Court alludes to this at Case C-334/92 *Miret*, (n 40) [19], but does not name *Van Gend* specifically as authority.

effect either, since (in Mr Miret's case anyway) the national provisions could not be interpreted in a way which conformed with the directive.<sup>43</sup> Might the discretionary elements within Article 22, and in particular the leaving of the vulnerability-assessment to be carried out "in accordance with national procedures",<sup>44</sup> be insufficiently precise to satisfy *Van Gend*? And might it even be predicted or at least predictable that national judges would be unable to use indirect effect either? The victim would now have recourse only to state liability where they felt that they had been wrongly assessed and even then they may have difficulty showing a causal link between the distress caused by live participation in the trial and the state's failure to properly characterise them as vulnerable since causation here is unclear – the distress possibly arising from other factors including the trauma of having suffered the crime in the first place.<sup>45</sup> And all of the foregoing is to say nothing of the fact that a vulnerable victim is ill-equipped psychologically and (more likely than not) financially to start undertaking complicated international litigation.<sup>46</sup>

Cases such as Case 29/84 *Commission v Germany* suggest that, where a directive instructs Member States to set up an assessment mechanism, they will only have fulfilled their obligation when they have set it up *by legislation*. An argument that the assessment is being carried out in practice, even though this is in the absence of a specific (national) legislative basis, will be given short shrift by the Court.<sup>47</sup> However, as long as that hurdle was cleared, a Member State could presumably quite easily escape state liability for a flawed vulnerability-assessment by saying that they were not under an obligation to implement Article 22 beyond setting up the mechanism, and they were certainly not under an obligation to guarantee a positive result.

On this analysis, the vulnerable seem somewhat let down by the fuzzy nature of the European institutions' compromise (discussed in the Introduction). The decision then by the EU's legislative draftsman to oblige Member States only to establish an assessment-mechanism, rather than obliging them to find specific groups of vulnerable victims vulnerable *ipso facto*, can be criticized as effectively leaving them with nothing, minimum harmonisation in this case amounting to no harmonisation at all.<sup>48</sup> Put another way, the floor provided by this legislation is (practically) no different from the

<sup>43</sup> *ibid* [22].

<sup>44</sup> Art 22(1).

<sup>45</sup> Another way in which the Member State concerned might escape liability would be where it could blame its wrongful interpretation on the vagueness or imprecision of the EU provision (Article 22 in this case), as happened in Case C-392/93 *The Queen v H.M. Treasury, ex parte British Telecommunications plc* [1996] ECR I-1631. As Timmermans later pointed out, this hardly creates much of an impetus for Member States to draft more clearly when adopting legislation in Council: CWA Timmermans, 'How to improve the quality of Community legislation: the viewpoint of the European Commission' in AE Kellermann and others (eds), *Improving the Quality of Legislation in Europe* (Kluwer, the Hague 1998) 47. Directives have also been held to be vague in Joined cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] ECR I-6609, para 31 (regarding Art 2(c) of Directive 90/270/EEC on the minimum safety and health requirements for work with display screen equipment [1990] OJ L156/14) and in Joined cases C-283/94, C-291/94 and C-292/94 *Denkavit International BV, VITIC Amsterdam BV and Voormeer BV v Bundesamt für Finanzen* [1996] ECR I-5063, para 52 (regarding Art 3(2) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [1990] OJ L225/6).

<sup>46</sup> It is also to say nothing of the fact that the Court of Justice would have to decide at what standard to pitch *its* assessment. If it defers to the local standard, then direct effect means nothing, as to invoke the directive in the national court would merely be to hold up a mirror, reflecting the national law back on itself. If it adopts a higher standard, then it spares direct effect but damns subsidiarity. For more details on the Court's choices, and their consequences, see LFM Besselink, 'Entrapped by the maximum standard: On fundamental rights, pluralism and subsidiarity in the European Union' (1998) 35 CMLRev 629.

<sup>47</sup> Case C-29/84 *Commission v Germany* [1985] ECR 1661. The Directive at issue was Council Directive 77/452/EEC of 27 June 1977 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of nurses responsible for general care, including measures to facilitate the effective exercise of this right of establishment and freedom to provide services [1977] OJ L176/1.

<sup>48</sup> One of the reasons why the Commission is now favouring maximum, or 'full', harmonisation again. See, for example, Directive 2011/83/EU (n 39).

floor already in place.<sup>49</sup> Even in a minimum harmonisation directive, the legislative draftsman usually sets out a basic level of protection below which the Member States may not fall; they are then invited to go further if they so wish. A list of victims who were always to be considered vulnerable would at least have fulfilled that purpose. But, beyond a reference in Article 22(4) that “child victims shall be presumed to have specific protection needs”, the final text of the directive does not even have that.<sup>50</sup> And of course there is danger in the use of mutual recognition “in the absence of a complementary approximation of minimum standards”.<sup>51</sup>

In a regulation, the EU legislature calls for certain action to be taken, Member States take the action without further ado, and the benefit of the action is felt by the citizens almost immediately (the principle of direct applicability). In directives on the other hand basic guidelines are provided at EU level and the exact action to be taken is only filled in at Member State level; still the citizen, if all goes to plan, receives the benefit, oblivious<sup>52</sup> as to which of the two levels of governance provided their new rights. But where a directive merely requires the Member State to set up a decision-making process, it seems that the buck is passed all the way down to grassroots level: a kind of super-sub subsidiarity. The decision as to action is not taken at EU level, is not taken at Member State level (the Member State’s obligation stretching only as far as setting up the mechanism), and is finally left to be taken by national administrators. These are busy law enforcement professionals and providers of victim support services operating in high-stress environments, with little time on their hands. They will inevitably have recourse to shortcuts, rules of thumb, and so on, to provide help in processing the many victims who pass through their offices every day. They are not best-placed to take this decision, they do not have the time to make reasoned and composed judgments and mistakes will inevitably be made resulting in the wrong sort of treatment being received by society’s most vulnerable citizens, or society’s citizens at their most vulnerable. One could make an analogy with road traffic legislation, where certain decisions on driving are not left to be taken by the driver themselves in high-risk circumstances that could cause damage to life and limb. They are taken calmly in advance by legislatures, thus avoiding this danger and ensuring consistency. The same should apply in the case of Directive 2012/29. Instead, the passing of the deliberative buck to the police officer or victim support professional on the ground is a failure of legislative nerve which leaves the vulnerable victim in a situation little different to the one they were in prior to the directive being adopted.

It seems there is a continuum between the EU legislator merely requiring the Member States’ administrators to ask a certain question (one extreme), and the EU legislator telling them – definitively – the answer (the other extreme). In the middle is the situation where the EU legislator requires the Member States’ administrators to ask the question, but at the same time giving them factors or criteria to ensure some consistency of outcomes, while leaving enough room for the preservation of State diversity, a margin of discretion. This middle path may seem the best compromise, but surely the decision as to where on the continuum to pitch a given directive is dependent

<sup>49</sup> Such “ultra-minimum” harmonisation is not a new phenomenon in this field. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13 is described by Lavenex as “[f]raught with exemption clauses, vague formulations and providing for minimum standards *below those usual in national legislation*” (emphasis added): Lavenex (n 18) 770.

<sup>50</sup> The author is excluding from this analysis the list of crimes in the last sentence of Article 22(3). This sentence seems merely to enjoin Member States to “duly consider[. . .]” the crimes listed, with no explanation as to what that means, or indeed who is to judge what is ‘due’. It falls way short of an assertion that victims of these crimes are in fact vulnerable, or in fact have specific protection needs.

<sup>51</sup> Lavenex(n 18) 765.

<sup>52</sup> Unless they scrutinize the national legislation in some detail.

on how much diversity there is to preserve, or – if the whole point of the exercise is to reduce disparities – how much diversity can be tolerated. Put simply, how much of a discretionary margin is allowable by the EU legislator without jeopardizing the sufficient achievement of the objectives of the proposed action?<sup>53</sup> This question cannot be answered without a thorough consideration of what those objectives are: the length of the lead should depend on the breed of the dog.

In the Habitats Directive, for example, national administrators were required to make an assessment of the (environmental) implications of national “plans” or “projects” which might affect a site protected under the Natura 2000 regime.<sup>54</sup> Confusion around this assessment mechanism caused legal action to be taken, and, on a reference from a Dutch court, the Court of Justice explained the criteria which the administrators should use in making their decision.<sup>55</sup> Such clarification cannot be a bad thing, and perhaps the EU legislator was inspired by cases such as this to include a list of decision-making criteria within each directive, as in the Victims' Rights Directive (the middle position in the continuum previously described). However, there was a great deal of potential diversity within the Habitats Directive. A forest in Spain or Greece, for example, might be much more prone to forest fires than one in the UK. This in turn would mean that a “plan” to build a campsite would pose more risks in the former two countries than in the latter one. A black-and-white list of “plans” deemed – at EU level – to be too harmful to any and every protected site would thus be too hard, or more likely impossible, to draw up. But victims of rape, or domestic violence, or for that matter cyberstalking<sup>56</sup>, are equally vulnerable the continent over. There is simply not enough diversity in evidence to justify provision for variegated decision-making in the case of vulnerable victims. The choice facing the EU legislator in this case was between full harmonization on the one hand, and the *status quo ante* on the other, with no neutral ground.

It is submitted that, for some matters, even some matters within an otherwise “minimum” directive, the assessment-making is better performed at EU level. In the case of the protection of wild birds, for example, potential derogations by Member States from the general rule of complete protection must be approved first by the Commission.<sup>57</sup> Likewise, the list of species protection of which may be withdrawn under certain circumstances, and following Commission approval, is monitored by a committee with representatives from all Member States.<sup>58</sup> Other lists of species protection of which may *not* be withdrawn (or not yet) are similarly monitored.<sup>59</sup> By way of a second example, the REACH regime for the control of dangerous chemicals can only work with the evaluation procedures being carried out at EU level.<sup>60</sup> For chemicals which may come into contact with foodstuffs, there is a separate regime, with

<sup>53</sup> Borrowing language from Art 5(3) TEU, which is a definition of subsidiarity.

<sup>54</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7, Article 6(3).

<sup>55</sup> Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-7405.

<sup>56</sup> From the physical and psychological points of view, anyway.

<sup>57</sup> Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [1979] OJ L103/1, Art 6(3).

<sup>58</sup> *ibid.*, Arts 15–17.

<sup>59</sup> *ibid.*

<sup>60</sup> Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L396/1. This regime represented a fundamental change from the previous system of chemicals regulation under the Existing Substances and Notification of New Substances regime, where assessment had indeed been left to each individual Member State.

a list of approved substances maintained by the Commission.<sup>61</sup> And, perhaps most pertinently of all for the area of European criminal law, the European Arrest Warrant could not have worked if the list of extraditable offences was left to each Member State to decide for itself; that would simply defeat the object of the exercise. Thus the Framework Directive lists thirty two offences to which the EAW will apply, whether *or not* those offences are criminalized in both the requested and requesting states.<sup>62</sup>

For the Victims' Rights Directive, too, the middle position in the abovementioned continuum was simply not an option. Put another way, the relevant distributive sphere (the distribuend in question being protection) was, in this case, the whole of Europe, rather than each individual Member State. This is not the sort of issue that lends itself to the variegated approach which minimum harmonization encourages. In fact, a variegated approach had already been tried with an earlier directive and the result was high levels of inconsistency.<sup>63</sup> Treating a vulnerable victim kindly in one Member State and harshly in the next would not seem to be a victory for pluralism but a defeat for fairness and an affront to logic. While so often the EU sends Member States a sledgehammer to crack a nut, here it seems to have sent a nutcracker to open a safe.

## CONCLUSION

Vulnerability follows the law. If a matter is not a crime in a Member State, then its victim cannot be vulnerable as they are not technically a victim at all, and no vulnerability assessment will be carried out. Some cross-polonization (negative harmonization) is possible, but only in a few discreet situations (as described in the first and second propositions). A list of those victims who are vulnerable in all circumstances (complementing, not replacing, the individual assessment) need not have represented positive harmonization, as local diversity could have been accommodated in the composition of the list, excluding sensitive matters involving serious differences of opinion amongst Member States. But once a list was committed to, it had to be maximum harmonization. The problem here was not lack of nuance where nuance was needed, but excessive nuance where nuance was impractical.

While it might be counter-argued that this would threaten what the philosopher Michael Walzer calls "local understandings"<sup>64</sup>, in fact the only local understandings that are threatened are those as to which crimes give rise to vulnerability – the whole point of the legislation. The Member States, having decided that this was a matter that needed standardizing so that victims across Europe received the same treatment, should have finished the task they had set themselves. Instead, their compromise with the European Parliament can only lead to de-standardization, except where cross-border cases lead to a degree of negative harmonization. As already stated, though, such cases will be rare.

Again, it could be counter-argued that there is a standardized *test*, and that that should suffice. This author would agree that there is nothing wrong with standardizing the test but not the result. But such an approach works better on the bench; it is the

<sup>61</sup> Commission Directive 90/128/EEC of 23 February 1990 relating to plastic materials and articles intended to come into contact with foodstuffs [1990] OJ L75/19.

<sup>62</sup> 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, Art 2(2).

<sup>63</sup> 2001/220/JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings [2001] OJ L82/1; Commission (EC), 'Report from the Commission pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA)' COM(2009)166 final, 20 April 2009.

<sup>64</sup> M Walzer, *Spheres of Justice – A Defense of Pluralism and Equality* (Basic Books, New York 1983) 30.

Court's job to make the judgment calls needed in tie-break situations. Judges should be the guardians of flexibility. Legislators draw the line or lines which – in their opinion – the abstract problem demands. This line-drawing is necessarily black-and-white – an in-or-out world which exists only in theory. Judges operate in the real world of hazard and happenstance, shading the grey areas between the lines. The EU's legislature failed to draw the necessary lines in this case, for once adopting a “light touch” approach where in fact maximum rules would have been preferable. Maximum rules (for which read, one rule) are appropriate to criminal law because criminals do not forum shop, and (potential) victims should not have to.

# VICTIMIZED BY REGULATION: THE VICTIMOGENICITY<sup>1</sup> OF TAXI DRIVERS

ANDY NOBLE\*

## ABSTRACT

Taxi driving is a strictly regulated occupation, with the stated aim of such regulation being the protection of the public. Whilst there is a recognised need to protect vulnerable taxi passengers against drivers who may wish to take physical or financial advantage of that vulnerability, it is taxi drivers themselves who are far more frequently victims of crime than perpetrators. Although occasional, and mercifully rare, life-threatening assaults on taxi drivers draw media attention, taxi drivers are victims of lower level offending every day of their working lives. Most of this offending is unreported and has attracted little research attention. Drawing on traditional models of victimology and empirical sources, this article explores the extent to which taxi drivers' regulated status both contributes towards their susceptibility to victimization and inhibits measures which may avoid or reduce their vulnerability to such detrimental treatment.

## INTRODUCTION

The extent to which state regulation of specific professions and trades contributes towards victimization of members of that occupation is a neglected area of research. Taxi driving is a heavily regulated occupation, with taxi drivers being subject to strict qualitative controls through local authority licensing regimes. The purpose of such strict regulation is said to be the protection of vulnerable members of the public against drivers who may wish to take physical or financial advantage of that vulnerability.<sup>2</sup> Whilst protection of the public is a proper aim of regulation, it is the taxi drivers themselves who are more likely to be victims of crime, with offences perpetrated by the customers whom regulation is designed to protect. In this article it is contended that such stringent regulation contributes to the victimization of taxi drivers and inhibits measures which could reduce their susceptibility to become victims of offending. Whilst the findings of this research have implications for other regulated occupations, some features of taxi driving are unique to that trade and make the drivers particularly susceptible to victimization.

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<sup>1</sup> The author is indebted to Professor Diane Vaughan for the word 'victimogenic' as an elegant way of conveying the notion of a person or organization that is particularly susceptible to victimization – D Vaughan, 'Crime Between Organizations: Implications for Victimology' in G Geis and E Stotland (eds), *White Collar Crime: Theory and Research* (Sage, Beverley Hills 1980) 95.

<sup>2</sup> *R (Newcastle City Council) v Berwick Upon Tweed Borough Council* [2008] EWHC 2369, [2009] RTR 34 [22] (Christopher Symons QC, Deputy High Court Judge); JTH Button, *Button on Taxis: Licensing Law and Practice* (3rd edn Tottel, Haywards Heath 2009) 1.

This is a subject which has featured very little in the United Kingdom literature and has been the topic of only limited studies in other jurisdictions.<sup>3</sup> For this reason it has been necessary to draw on a number of unorthodox sources to explore the issues involved. The sources used comprise of a combination of theoretical traditional views of victimology and existing empirical studies from other jurisdictions on victimization of taxi drivers. Other resources, such as local authorities' records and documentation, media reports, and anecdotal evidence of taxi drivers taken from interviews as part of an investigation into general issues concerning regulation of the trade, are also used.

In this article, the following issues are considered in order to develop the main theme of the research. First, the extent of taxi driver victimization in England and Wales, drawing on existing research literature relating to occupational victimization in general and to taxi drivers more specifically. Second, why taxi drivers are considered to be particularly vulnerable to victimization, including some of the traditional views of victimology and how those theories can be applied to taxi drivers. Third, how the regulated nature of the taxi driving trade contributes towards drivers' susceptibility to victimization. This includes some recommendations for improvement of the existing regulatory regime to address the contribution made towards victimization by regulation. Finally, the article concludes with some of the limitations on tackling victimization through the regulatory regime, together with some suggested areas for further research.

## THE EXTENT OF TAXI DRIVER VICTIMIZATION

Taxi driving regularly appears on lists of occupations considered most likely to be vulnerable to crime. The rate of workplace violence experienced by taxi drivers in the United States has ranked near the top of all occupational categories.<sup>4</sup> Homicide rates amongst taxi drivers in that country are up to 21 times the national average,<sup>5</sup> and are even five times higher than those in occupations traditionally thought to be more susceptible to violence, such as the police and other protective services.<sup>6</sup> Across all industrialised countries, taxi drivers have one of the highest levels of work-related homicide and serious assaults.<sup>7</sup> Studies carried out in the United States and other countries tend to focus on the more serious incidents of violence.<sup>8</sup> Media accounts of workplace violence also largely direct their attention toward homicide, rather than to other harmful but less dramatic acts.

Studies of violence at work in the United Kingdom also concentrate on the more serious offences, such as assaults and threats of violence, although the findings of such

<sup>3</sup> Studies in this area have been conducted in Australia: J Hume, 'Violence Grows but Cab Security Ignored' (1995) 15(11) *Security Australia* 16; I Radbone, *Taxi Safety Initiatives Study: Final Report* (University of South Australia, Adelaide 1997); C Mayhew, 'Violent Assaults on Taxi Drivers: Incidence Patterns and Risk Factors' (Report No 178, Australian Institute of Criminology, Canberra 2000), in Canada: PC Stenning, *Fare Game, Fare Cop: Victimization of, and Policing by, Taxi Drivers in Three Canadian Cities* (Department of Justice, Ottawa 1996), and in the United States RK Schwer, MC Mejza and M Grun-Réhomme, 'Workplace Violence and Stress: The Case of Taxi Drivers' (2010) 49(2) *Transportation Journal* 5.

<sup>4</sup> Schwer *et al.* (n 3) 6.

<sup>5</sup> National Institute for Occupational Safety and Health, 'Preventing Homicide in the Workforce' (NIOSH Alert, Publication No 93-109, September 1993).

<sup>6</sup> SA Hendricks, EL Jenkins and KR Anderson, 'Trends in Workplace Homicides in the US 1993-2002: A Decade of Decline' (2007) 50(3) *American Journal of Industrial Medicine* 316.

<sup>7</sup> Mayhew (n 3).

<sup>8</sup> C Mayhew, 'Occupational Violence in Industrialized Countries: Types, Incidence Patterns and "At Risk" Groups of Workers' in M Gill, B Fisher and V Bowie (eds), *Violence at Work: Causes, Patterns and Prevention* (Willan, Cullompton 2002) 25.

studies are very general in nature. Occupations are grouped together using the Standard Occupational Classification devised by the Office for National Statistics. This classification does not give any indication of the frequency or numbers of violent incidents at work in respect of individual occupations.<sup>9</sup> It is not possible, therefore, to identify how many, or how often, taxi drivers are victims of crimes of violence from traditional 'crime survey' statistical sources. Furthermore, the existing studies of violence at work look at the United Kingdom as a whole and do not provide information which is exclusive to England and Wales.

However, as studies in other jurisdictions have revealed, non-lethal forms of violence occur with substantially greater frequency than fatal assaults yet are largely ignored by researchers.<sup>10</sup> Taxi drivers in particular are likely to be victims of non-fatal physical assaults, robbery, verbal abuse, threats and fare evasion on a regular basis.<sup>11</sup> Studies conducted in Australia report some of the lower level offences of which taxi drivers are regular victims, such as verbal and physical harassment, particularly of female drivers,<sup>12</sup> and female passengers making false allegations of sexual advances against male drivers.<sup>13</sup>

In the United Kingdom, incidents involving serious violence or assault upon taxi drivers are not as frequently reported as is the case in other countries. Mercifully, homicidal attacks upon taxi drivers in the United Kingdom are very rare and, when they occur, they tend to make headline news.<sup>14</sup> Because of the lack of empirical studies and general under-reporting, there are no reliable statistics available to identify how widespread the problem of taxi driver victimization is. Recent examples of the variety of offences committed against taxi drivers, drawn largely from media sources, include racially motivated hate crimes, which are reported as occurring six times per week in one town alone.<sup>15</sup> Other examples include criminal damage,<sup>16</sup> thefts from vehicles,<sup>17</sup> and crimes of violence involving varying degrees of assault.<sup>18</sup> One particularly serious assault occurred just over one year ago, when a taxi driver near Rochdale had his throat slashed by a knife wielded by a 17 year old male, who fled with just £100. The perpetrator had carried out a similar attack on another taxi driver on the previous day.<sup>19</sup> In a more recent example, an Aylesbury taxi driver was attacked with a knife

<sup>9</sup> H Cookson and P Buckley, 'Violence at Work: Findings from the 2010/11 British Crime Survey' (Health and Safety Executive, London 2012).

<sup>10</sup> JH Neuman and RA Baron, 'Workplace Violence and Workplace Aggression: Evidence Concerning Specific Forms, Potential Causes, and Preferred Targets' (1998) 24(3) *Journal of Management* 391, 399.

<sup>11</sup> Mayhew (n 3); Stenning (n 3).

<sup>12</sup> Hume (n 3).

<sup>13</sup> Radbone (n 3).

<sup>14</sup> For example, the murder of Mohammed Arshad near Birmingham in July 2009. BBC News, 'Man Convicted of Taxi Driver Mohammed Arshad's Murder' (6th April 2011) <<http://www.bbc.co.uk/news/uk-england-birmingham-12988967>> accessed 9th December 2012. The motive for Mr Arshad's murder was said to be financial gain, but his vehicle was found abandoned a mile from the scene of the fatal assault with cash still inside it.

<sup>15</sup> D Crookes, 'Bolton Cabbies Use CCTV to Stop Racist Attacks' *Bolton News* (26th February 2012).

<sup>16</sup> D Kirby, 'Mum Forced Out of Work After Yobs Torch Her £20,000 Taxi Outside Blackley Home' *Daily Mail* (Manchester, 25 June 2012).

<sup>17</sup> Humberside Police, 'Police in Hull Urge Taxi Drivers to Steer Clear of Being Victims of Crime' (31st October 2012) <<http://www.humberside.police.uk/newsmedia/police-in-hull-urge-taxi-drivers-to-steer-clear-of-being-victims-of-crime>> accessed 5th November 2012.

<sup>18</sup> J Dunn, 'Taxi Drivers Urged to Report Every Attack as Frequency of Assaults Increases' *Grimsby Telegraph* (9th October 2012). The most recently reported assault involved a taxi driver who was approached in a supermarket car park and asked about a fare. When the car door was opened, the attacker began punching and kicking the driver in an apparently motiveless assault.

<sup>19</sup> P Britton, 'Rochdale Taxi Driver Had His Throat Slashed by Thug in Middleton' *Manchester Evening News* (Manchester, 17 November 2011).

and a metal bar and robbed of money and mobile telephones after taking three men home.<sup>20</sup>

These are simply illustrative examples of the type and nature of offences of which taxi drivers can become victims. Media reports, like most of the existing studies, tend to focus on the more serious, headline-grabbing offences. However, anecdotal evidence from taxi drivers themselves suggests that the extent of driver victimization is much more widespread than the picture presented by the literature and media reports. The information from drivers indicates that the majority of offences to which they are subjected is of a more trivial nature, but occurs on a much more regular basis, than the victimization acknowledged by current research.

The evidence from taxi drivers can be illustrated by some of the comments made by driver representatives during the course of interviews conducted by the author as part of his doctoral research into local authority regulation of the taxi trade. This research was not aimed specifically at the issue of violence against taxi drivers, but the following statements represent typical examples of taxi drivers' views of their vulnerable position in the context of general regulation of their trade:

You get a lot of personal and abusive comments. The youngsters usually egg each other on, you know, pushing and shoving you or showing off in front of some girl they've picked up. They tell you they're just 'having a laugh' with you, but when they are the tenth one that night misbehaving, I just don't see what's funny about it. Sometimes I think they do it because they're thinking can I get away with it; it's only a taxi driver. (Taxi Driver, North West England).

I've had my share of trouble over the years. I wouldn't call it trouble exactly, a lot of the time it's fairly trivial, but you get a lot of verbal abuse, threats, damage to the cab. . . I think a lot of them think we're just there to have a go at. (Taxi Driver, South East England).

We get runners fairly regularly. They can make a big dent in our livelihoods. It has happened to me about ten to 15 times. They all do it; men, women and children too. If you challenge them, then that can lead to the driver being attacked. If you phone the police the response is typically nil. . . you might as well forget it and chalk it down to experience. (Taxi Driver, East Midlands).

In the absence of any extensive survey or other quantitative data, it is not possible to verify any of this evidence empirically. However, the anecdotal evidence from drivers in England and Wales provides support to some of the findings from studies in other jurisdictions. For example, comments from the drivers suggest that the majority of offending goes unreported because of its trivial nature and a perceived lack of support from the criminal justice system. Studies have concluded that non-lethal forms of violence occur with substantially greater frequency than fatal assaults yet, perhaps because they often go unreported or are considered by both the victims and the law enforcement agencies to be trivial, they have been largely ignored.<sup>21</sup>

Information provided by drivers also suggests that, although of a relatively trivial nature, the offending to which they are subjected is a routine and frequent occurrence. It is said that, in general, routine victimization by way of assault, theft and verbal abuse is capable of grinding down the morale of the recipient.<sup>22</sup> This appears to be

<sup>20</sup> A King, 'Thugs Stab Aylesbury Taxi Driver in "Brutal and Violent" Attack' *Bucks Herald* (26th November 2012).

<sup>21</sup> Neuman and Baron (n 10) 393.

<sup>22</sup> I O'Donnell and K Edgar, 'Routine Victimization in Prisons' in B Williams and H Goodman-Chong (eds), *Victims and Victimization: a Reader* (Open University Press, Maidenhead 2009) 322–323.

borne out by the taxi drivers' views, and this could have implications for the standard of service received by the travelling public. Other studies have found that persistent victimization, or at least the constant fear of being the victim of even low level offending, can also have a detrimental effect on the health of taxi drivers,<sup>23</sup> although this is not something which is claimed explicitly by the drivers themselves.

In some ways, however, the evidence from the trade either contradicts the existing studies or indicates that the extent of offending is greater than that reported in those studies. Contrary to many of the existing studies, the data from drivers suggest that not all victimization of taxi drivers is necessarily motivated by some form of financial gain or advantage. According to taxi drivers, minor assaults, verbal threats and abuse, harassment, criminal damage, false allegations, as well as theft and fraud, are all everyday crimes committed against them. There is also concern among the drivers that offences which are initially very trivial can escalate into more serious offences. If this is correct, then it suggests that taxi driver victimization extends considerably beyond the serious, violent and acquisitive crimes upon which existing studies focus.

The absence of any empirical research on the subject means that it is not possible to gauge the full extent of taxi driver victimization. A combination of studies conducted in other jurisdictions and anecdotal evidence from members of the trade strongly suggests that offences committed against taxi drivers are wide ranging in their nature, from the fatally violent to the most trivial acts of verbal harassment, and such victimization is both a frequent and widespread occurrence. The obvious question is 'why taxi drivers?' What is it about this particular occupation that makes them such a frequent and regular target for offenders? In the following section, this question is examined through some of the traditional theories of victimology.

### WHY ARE TAXI DRIVERS ATTRACTIVE TO OFFENDERS?

Why are taxi drivers considered to be more susceptible to offending than other occupations? They do not fit into the traditional view of the ideal victim as someone who is weak and vulnerable.<sup>24</sup> Taxi drivers are generally thought of as robust and resilient individuals, who would feel insulted to be thought of as helpless victims. And yet it is possible to identify some characteristics of taxi drivers and their victimization which link in with some of the traditional theories of victimization, although many of these theories are regarded with a certain degree of scepticism today.

There is some sense of 'precipitation' or 'victim blaming' in that taxi drivers are seen to be there to 'have a go at'. In some cases, while not necessarily looking for trouble or being the aggressor, taxi drivers are viewed as not unwilling to participate in trouble if it comes their way. In this sense, it could be said that "the victim shapes and models the criminal".<sup>25</sup> Such a view represents drivers as their perpetrators would wish, as people who are complicit in their own downfall and deserving their fate.<sup>26</sup> Taxi drivers may also be viewed as victims who elicit little sympathy as victims, and as such their status makes them more attractive as a target. This is because they are unlikely to raise sufficient sympathy for their victimization to be taken seriously by law enforcement

<sup>23</sup> R Noble, 'An Investigation into the Health and Safety Concerns Expressed by Hackney Carriage Drivers Working in Lancaster, North-West England' (Unpublished M.A. Dissertation, University of Lancaster, September 2008) [6.4].

<sup>24</sup> N Christie, 'The Ideal Victim' in E Fattah (ed), *From Crime Policy to Victim Policy* (Macmillan, Basingstoke 1986).

<sup>25</sup> H Von Hentig, *The Criminal and His Victim* (Yale University Press, New Haven 1948) 384.

<sup>26</sup> P Rock, 'Theoretical Perspectives on Victimisation' in S Walklate (ed), *Handbook of Victims and Victimology* (Willan, Cullompton 2007) 43.

agencies. Taxi drivers are often portrayed as being less than exemplary citizens themselves, and so have precipitated their own victimization.<sup>27</sup> This is based on a stereotyped popular image of taxi drivers as persons who regularly and systematically ‘rip off’ or assault customers. Indeed, the main justification for regulation of taxi drivers at all is that, without controls, taxi drivers would assault and defraud vulnerable passengers. This may well be the reason for regulation, but it is not in itself the cause of drivers’ victimization.

On the same point of stereotyped views, however, taxi drivers as a general body may come to represent, at least in the minds of perpetrators, an organization which symbolizes economic exploitation. There is a popular misconception that taxi drivers earn large incomes and so, as a general body, symbolize economic exploitation of the general public, whether or not such a view is actually justified. As such a symbol, in the minds of perpetrators, a normative right to exploit the resources of such an organization emerges.<sup>28</sup> This view of taxi drivers creates an attraction for offenders, because they can rationalize their behaviour on the grounds that they are defrauding or stealing from, or otherwise offending against, an exploitative organization rather than individual drivers.

It may also be suggested that there are connections with so called ‘routine activities’ or ‘lifestyle’ theories, which suggest that the life circumstances of individuals, such as their age, occupation and socio-economic status, means that the probability of meeting the conditions for victimization are increased.<sup>29</sup> Convergence of “likely offenders, suitable targets and an absence of capable guardians”<sup>30</sup> is more likely to occur for taxi drivers, particularly those who work late at night and travel to remote locations.

Many of these traditional theories have been criticised at a general level,<sup>31</sup> but it is not the purpose of this article to analyse common criticisms of such theories. The limitations of these theories should not, however, detract from their utility in offering some explanation for the victimization of taxi drivers. Traditional theories still offer an insight into the victimization of taxi drivers by providing an account of that victimization at a general level. Nevertheless, none of the traditional theories on their own explain the susceptibility of taxi drivers in particular as victims of crime. The absence of empirical studies substantiating a link between these hypotheses and the experiences of taxi drivers means that traditional ideas can only provide a limited insight into this phenomenon. None of the recognized theories take into account the regulatory environment in which taxi drivers operate and so lack consideration of an important element in accounting for victimization amongst this group of workers.

The relationship between taxi drivers and their passengers is said to be characterized by an asymmetry of power and information created by the way in which taxi services are engaged. This asymmetry combined with a departure from normal values of acceptable behaviour all contribute to the probability of workplace violence.<sup>32</sup> Studies carried out in other jurisdictions have suggested that taxi drivers are victims because

<sup>27</sup> ME Walsh and DD Schram, ‘The Victim of White-Collar Crime: Accuser or Accused?’ in Geis G and Stotland E (eds), *White Collar Crime: Theory and Research* (Sage, Beverly Hills 1980) 47.

<sup>28</sup> RR Dynes and EL Quarantelli, ‘Organizations as Victims in Mass Civil Disturbances’ in Drapkin I and Viano E (eds), *Victimology: Vol 5* (Heath, Lexington 1975) 71–72.

<sup>29</sup> MJ Hindlang, MR Gottfredson and J Garofolo, *Victims of Personal Crime: An Empirical Foundation for a Theory of Personal Victimization* (Ballinger, Cambridge Mass 1978) 121.

<sup>30</sup> L Cohen and M Felson, ‘Social Change and Crime Rates Trends: A Routine Activity Approach’ (1979) 44 *American Sociological Review* 588, 592.

<sup>31</sup> For example, by RA Silverman, ‘Victim-precipitation: an Examination of the Concept’ in I Drapkin and E Viano, (eds), *Victimology: Vol 1* (Heath, Lexington 1974); S Green, ‘Crime, Victimization and Vulnerability’ in S Walklate (ed), *Handbook of Victims and Victimology* (Willan, Cullompton 2007).

<sup>32</sup> Schwer *et al.* (n 3) 8.

of the “prevalence of cash transactions, working alone, and the easy availability of escape for criminal perpetrators”.<sup>33</sup> Broader based studies have recognised that those undertaking jobs which involve dealing in cash and a lot of face to face contact between workers and customers are at higher risk of victimization.<sup>34</sup> Mayhew found that workers in the transport industry in general were at particular risk of violence because they work alone, carry money, work at night, drive on quiet streets and carry inebriated passengers.<sup>35</sup> This finding is affirmed in the specific case of taxi drivers by other studies, which concluded that drivers are at risk through the nature of the work, as they have to operate in all parts of the city, late at night and pick up random people who may be drunk, on drugs, or simply looking for trouble.<sup>36</sup>

It has also been postulated that certain victims or groups of victims are considered to be more ‘attractive’ to repeat victimization than more difficult potential targets.<sup>37</sup> This does not explain, however, why taxi drivers are considered more vulnerable than other potential targets. One explanation for the high levels of risk in taxi driving is that taxis are now seen to be a more ‘attractive’ target than banks, service stations and other cash handling businesses, because of the tighter security involved in those other businesses.<sup>38</sup>

However, even these analyses do not provide a sufficient explanation for the vulnerability of taxi drivers to would be perpetrators of offences against them. These explanations do not give the full picture of why taxi drivers are so prone to victimization. Whilst carrying cash may be an attraction for a would-be thief or robber, the motivation for many other offences against taxi drivers is not necessarily financial gain. Although the essential nature of the job combined with the characteristics of the users of taxi services partly accounts for driver victimization, these aspects alone do not distinguish taxi driving from other ‘high-risk’ occupations.

One important, and unique, feature of the taxi trade is the degree of regulation to which it is subject. In the next section, an argument is advanced that it is the regulated nature of the taxi driver’s occupation which contributes towards the attractiveness of drivers as victims. Whilst this is not the only factor, it is suggested that regulation of the trade is a significant element in the victimization of drivers.

## THE REGULATED NATURE OF THE JOB

One element leading to vulnerability, the adoption of a certain lifestyle and the susceptibility of taxi drivers to offenders, is the regulated nature of the job. Every aspect of a taxi driver’s job is regulated from entry to the market; control over how the job is done once in the market, in terms of enforcing quality standards of conduct and behaviour; and the fares which the driver is entitled to charge for providing a service. Regulation of driver conduct and behaviour and charging of fares is the responsibility of each local authority in England and Wales. Regulation is implemented through byelaws,<sup>39</sup> breach of which can result in prosecution, or conditions attached to the licence, breach of which can result in a driver’s licence being suspended, revoked

<sup>33</sup> *ibid.* 7.

<sup>34</sup> D Chappell and V Di Martino, *Violence at Work* (3rd edn, International Labour Office, Geneva 2006).

<sup>35</sup> Mayhew (n 8).

<sup>36</sup> D Fennessy, ‘Problems Taxi Drivers Face’ (*Revirda* 23rd April 2012) <<http://www.revirda.com/problems-taxi-drivers-face/>> accessed 19th November 2012.

<sup>37</sup> L Bellamy, ‘Situation Crime Prevention and Convenience Store Robbery’ (1996) 7 *Security Journal* 41.

<sup>38</sup> Mayhew (n 3); Chappell and Di Martino (n 34).

<sup>39</sup> Town Police Clauses Act 1847 s 68.

or not renewed.<sup>40</sup> The heavily regulated nature of the work contributes not only to victimization and the susceptibility of taxi drivers to such victimization, but also prevents steps that could be taken to reduce that attractiveness and vulnerability. Although there are a number of areas by which this point can be expounded, in this article four such areas are considered. The first two areas, compellability and metered fares, illustrate how regulation can contribute towards the susceptibility and vulnerability of taxi drivers. The second two areas, payment in advance and installation of security devices, are used as examples of measures which could be taken to remove or reduce that susceptibility and vulnerability, but which are severely restricted by local authority regulation.

### COMPELLABILITY

Under section 53 of the Town Police Clauses Act 1847, a taxi driver “who refuses or neglects, without reasonable excuse, to drive the carriage to any place within the [local authority area]. . .to which he is directed to drive by the person hiring or wishing to hire such carriage” commits an offence.<sup>41</sup> The statutory provision only applies to taxis “standing at any of the stands for hackney carriages. . .or in any street”,<sup>42</sup> and so does not apply to vehicles which are pre-booked or answer a ‘street-hail’.

The effect of this offence is that drivers operating from a taxi rank or stand are obliged to take all customers, no matter what doubts the driver has about an individual, unless the driver has a “reasonable excuse” for refusing to accept the passenger. Taxi drivers are unique in being compelled to provide a service to all customers, regardless of the customer’s condition, attitude or demeanour. Providers of other services, including those considered to be at high risk of victimization such as door supervisors, bar staff and bus drivers, are generally only prohibited from refusing service for reasons which are discriminatory on specified grounds.<sup>43</sup> Beyond that, however, other occupations are under no obligation to provide service to a customer. This is not the case for taxi drivers, who do not have the luxury of an option to refuse service. Taxi drivers are subject not only to the general prohibition on refusing service on discriminatory grounds, but are also subject to a specific prohibition against refusing to provide a service for any customer.

The difficulty for taxi drivers in this provision is the issue of what constitutes a “reasonable excuse”. In what circumstances could a driver legitimately refuse to accept a particular individual? The short answer is that nobody knows. There is no statutory indication of what amounts to a “reasonable excuse”, and there is no central government or local authority guidance on what would constitute such an excuse. The only guidance available from case law is the somewhat obscure and ancient judgment in *Shepherd v Hack*.<sup>44</sup> In this case, a licensed taxi driver was directed by a hire car driver, who found himself booked to carry out two jobs simultaneously, to drive to an address, pick up passengers and take them to the railway station. The taxi driver refused. In dismissing the driver’s appeal against conviction for an offence under section 53, the Court held that doubts about the *bona fides* of the hire or the customer’s willingness or ability to pay did not provide a “reasonable excuse” to refuse the hire.

<sup>40</sup> Local Government (Miscellaneous Provisions) Act 1976 s 47 and s 61.

<sup>41</sup> Town Police Clauses Act 1847 s 53.

<sup>42</sup> *ibid.*

<sup>43</sup> For example, the prohibition against discrimination in the provision of services contained in the Equality Act 2010.

<sup>44</sup> (1917) 117 LT 154.

Even taking into account this judgment, however, the position is not entirely clear. This lack of clarity on the interpretation of “reasonable excuse” was highlighted in the case itself. One of the judges indicated, *obiter*, that had the driver adduced evidence to support the reasons for refusal advanced on his behalf, then “I am not sure that I should have come to the same conclusion as the justices”.<sup>45</sup> This suggests that, if the contention is supported by adequate evidence, suspicions about the hirer’s *bona fides* or ability to pay could be viewed by a court as a “reasonable excuse”.

There are two further difficulties for drivers caused by the decision in *Shepherd v Hack*. First, it is not clear from the judgment where the burden of proof of the existence or absence of “reasonable excuse” falls. The statutory wording suggests that absence of reasonable excuse is part of the offence, and so the burden of proving such absence would normally fall on the prosecution. However, the Court in *Shepherd v Hack*, without determining the issue either way, clearly proceeded on the basis that there was an evidential burden on the defendant driver to establish the existence of a reasonable excuse. This is in keeping with the contemporary approach of imposing an evidential burden on the defendant where a statutory offence contains some “exception, exemption, proviso, excuse or qualification to avoid liability”.<sup>46</sup> Second, at a more practical level, drivers are unlikely to be familiar with the law and generally operate on the assumption that they are obliged to accept all customers who wish to use their services.

Whilst it is clear that factors such as the shortness or length of the proposed journey, or simple dislike of a particular passenger or group of passengers do not amount to a “reasonable excuse” within section 53, the lack of clear guidance leaves drivers in a vulnerable position. There may be obvious cases where there is a reasonable excuse, and so refusal to take the customer is legitimate without committing an offence. There is no compulsion, for example, to drive the passenger to a destination outside the local authority’s licensed area. There may be situations where a potential customer is clearly very drunk, to the point where he or she does not have the capacity to enter the contract of hire.<sup>47</sup> The customer may request the driver to act in a manner which would infringe the general law or place the driver in a position where he or she may be acting in breach of the licence conditions. However, apart from such relatively clear cut cases, the lack of clear guidance leaves open a number of potential grey areas. It is not clear whether, for example, a driver, would be legitimately entitled to refuse a passenger who, in the driver’s view, is only moderately inebriated or who gives the appearance of being aggressive. Similarly, could a driver refuse to accept a passenger who is a notorious ‘troublemaker’, or a known ‘runner’, or someone who appears unlikely to pay the fare.

The effect of the rule on compellability of taxi drivers is that drivers are obliged to take any passenger, regardless of any unease or uncertainty about their motives or propensity for assault or leaving the taxi without paying the fare. Members of the travelling public generally conduct themselves on the common, often implicit, understanding that a taxi driver will always accept them as a fare in any circumstances. It is highly unlikely that the majority of taxi customers are aware of the statutory provisions regarding compellability. Nonetheless, there is a collective assumption that a taxi driver will provide a service, no matter what the condition of the passenger. Taxi drivers have no idea who they are picking up, and yet are compelled to accept any passengers that come along, if they wish to stay on the right side of the law.

<sup>45</sup> *ibid.* 156 (Ridley J).

<sup>46</sup> Magistrates’ Court Act 1980 s 101; *R v Lambert* [2002] 2 AC 545.

<sup>47</sup> *Gore v Gibson* (1845) 13 M & W 621.

Victimization of drivers as a result of the compellability rule could be reduced without any major amendment to the current regulatory regime. The statutory provisions on compellability help to prevent discrimination in the provision of taxi services against certain individuals or groups. Indeed, it might be said that these provisions were one of the earliest forms of anti-discrimination legislation, long before discrimination was ever a political or legislative issue. However, in an era of wide ranging anti-discrimination legislation, it has to be questioned whether the compellability rule is still needed. Outright abolition is unnecessary, but modification of the provisions to permit drivers more discretion to accept or refuse fares without fear of prosecution would be appropriate. There is certainly a need for clarification from regulators, which could be achieved by central or local government guidelines, on when drivers may legitimately decline the offer of a fare, and what amounts to a 'reasonable excuse' for so doing.

### METERED FARES

Taximeters, to record the fare by reference to distance travelled and time taken, are not a legal requirement in the sense that there is no statutory provision which compels a taxi driver to install or operate a meter to calculate the appropriate fare. Nevertheless, members of the public usually expect to see a taximeter in a hackney carriage and expect to pay the charge shown on the meter.<sup>48</sup> For this reason, almost all hackney carriages have a taximeter fitted as a requirement of either local byelaws or conditions attached to the vehicle's licence. In either case, these provisions will require the meter to be properly calibrated and sealed, and brought into operation for each and every journey.<sup>49</sup>

The vulnerability of the driver as the target for an offender caused by the compulsory use of meters is that there is little opportunity for the driver to charge the fare, or calculate what the fare might be, before arriving at the customer's chosen destination. This is in contrast to other areas of public transport, where the price is fixed and paid in advance. By the time the vehicle arrives at a destination, the customer has achieved what they set out to achieve and has no incentive or compulsion to pay the fare, other than the general contractual obligation or the customer's innate sense of decency and honesty. This can produce one of three results. The customer may decide to pay the fare, to leave the taxi without paying or may use the demanded fare as a cause of disagreement, culminating in the driver being assaulted or the vehicle being damaged. In the latter event, non-payment, or under payment, of the fare is also likely to be the outcome.

It may be argued, of course, that the absence of a fare displayed on the meter may also be the cause of some dispute between the driver and the passenger. In this context it is worth bearing in mind that the metered fare is a maximum fare,<sup>50</sup> and it is always open to the driver and passenger to negotiate a lower fare. A pre-journey negotiated fare could prevent any dispute at the end of the journey and thereby avoid the possibility of a fare related offence. The Department for Transport, however, advises against such negotiated fares at ranks or on-street hailings on the grounds that this

<sup>48</sup> *R v Liverpool City Council ex p Curzon Ltd* (QBD, 12th November 1993).

<sup>49</sup> *Button* (n 2) [9.8].

<sup>50</sup> Local Government (Miscellaneous Provisions) Act 1976 s 65.

could cause confusion and lead to security problems.<sup>51</sup> Downward negotiation of fares may also be difficult in practice, even for drivers willing to negotiate, because of the local authority's byelaws or licence conditions relating to the use of taximeters. Taximeters have to be calibrated and sealed to the council's set tariff. This means that proprietors and drivers have no control over the meter once activated, other than to switch it off. Under the byelaws or licence conditions, the customer can only be charged what is on the meter and will expect to pay what is on the meter even if this is a discounted fare.<sup>52</sup> The scope for charging less than the council's set fare is considerably reduced. It may be a cause of dispute if the customer, despite having agreed a negotiated lower fare, believes that the driver is attempting to charge a higher fare recorded on the face of the meter. Discounted fares may also cause practical difficulties for the driver, especially if he or she is not also the proprietor of the vehicle, and will have to account for any discrepancy between the fares recorded on the meter and the amount of fares actually collected.

Nonetheless, the compulsory use of meters and the requirement to bring the meter into operation for all journeys, even where a discounted fare has been negotiated, contribute to a situation where the driver has performed a service for which there is every opportunity for the customer to refuse or avoid payment. When the meter is operated in accordance with the regulatory obligations, this in itself can be a source of dispute. Drivers are often accused of 'fiddling' the meter, which is normally impossible. Drivers may also face allegations of overcharging or 'ripping off' the customer when the fare rates are set by the local authority, not the driver. Overall, the use of a meter is often used as an excuse by passengers to manufacture a confrontational situation in which offences can be committed.

Despite the misgivings about negotiated and discounted fares, many of the difficulties caused by the use of taximeters could be diminished relatively easily without any fundamental changes to the legislation. Wider promotion to the public of the fact that metered fares are maximum fares and downward negotiation is possible,<sup>53</sup> together with a relaxation by regulators of the mandatory operation of meters for all journeys, would assist in reducing the opportunities to victimize drivers associated with the use of taximeters.

## PAYMENT IN ADVANCE

Payment of an agreed fare, or deposit towards the final fare, in advance would avoid some of the low level fraud type offences. 'Runners' (customers who leave the taxi without paying the fare) or passengers who simply refuse to pay could be committing any one of four taxi specific or general fraud offences,<sup>54</sup> but it is not clear whether demanding payment in advance is permitted under the existing law. There is no statutory right or power to demand payment of taxi fares in advance; the legislation

<sup>51</sup> Department for Transport, 'Taxi and Private Hire Vehicle Licensing: Best Practice Guidance' (HMSO, London, March 2010) [53].

<sup>52</sup> *Curzon* (n 48) [12] (McCullough J).

<sup>53</sup> This was recommended by the Office of Fair Trading in an influential report as long ago as 2003 – Office of Fair Trading, *The Regulation of Licensed Taxi and PHV Services in the UK* (OFT, London, Report No 626, November 2003). The recommendation has not been widely implemented by local authority regulators.

<sup>54</sup> These offences are under the Town Police Clauses Act 1847 s 66 (Refusing to pay fare); Theft Act 1978 s 3 (Making off without payment); Fraud Act 2006 s 2 (Fraud by false representation); Fraud Act 2006 s 11 (Obtaining services dishonestly).

is silent on the subject. This has created uncertainty on the issue of whether drivers are lawfully entitled to demand payment 'up front' from passengers.

The courts' view of the law relating to payment in advance is also somewhat ambiguous. From the little authority available on the point, on the one hand it can be inferred that failure to make or offer payment in advance is not a "reasonable excuse" to refuse a fare.<sup>55</sup> On this view, a driver would be committing an offence if he refused to take a passenger on the grounds that no money had been paid in advance when requested. On the other hand, other judicial pronouncements have suggested that payment, in the case of a taxi fare, could be demanded at any time between commencement and the end of the journey. In *R v Aziz*,<sup>56</sup> the Court of Criminal Appeal so held in the context of an offence of "making off without payment".<sup>57</sup> This is not a definitive statement of the law, as the point in issue was the meaning of "on the spot" for the purposes of that specific offence. But the *obiter* comments of the Court provide an indication of the way in which the question of payment in advance is regarded, and suggests that taxi drivers can lawfully seek payment in advance. This decision too, like *Shepherd v Hack*, is not widely reported, and leaves the whole issue of requesting payment in advance as something of a legal grey area.

The lack of clarity on the issue of payment in advance places taxi drivers in a vulnerable position. Requesting some form of 'up front' payment helps to provide security against a driver's exposure to offending, particularly where the potential customer is a notorious 'non-payer' or indicates impecuniosity. This vulnerability is exacerbated when the lack of power to demand payment in advance is combined with the rules on compellability and mandatory use of taximeters. Even in the case of an agreed negotiated fare, it is not clear whether the driver could lawfully refuse to take the passenger if the agreed fare is not paid in advance. This undoubtedly contributes to the susceptibility of taxi drivers as a target for the dishonest.

Clarification on the position with regard to advance payments would undoubtedly assist in reducing drivers' vulnerability to low level offences of dishonesty. Although such clarification could be provided by the courts in a suitable case, it would be more appropriate for the law to be made clear by legislative change. This would not necessarily involve a radical overhaul of the regulatory framework. In this respect, adopting some of the minor changes introduced in a number of other jurisdictions might be helpful. In Ireland, for example, there are specific statutory provisions requiring passengers to pay the fare or part of the fare in advance.<sup>58</sup> In South Australia, similar provisions have been introduced by way of secondary legislation, which include a specific power to ask for payment of all or part of the fare in advance and to refuse the fare if no such payment is made.<sup>59</sup>

## SECURITY DEVICES/CCTV

One way in which much offending against taxi drivers, especially the persistent but low level offending, could be reduced or prevented is by the installation of security devices, such as closed circuit television (CCTV) or screens dividing the driver from the passengers. Putting in place such devices overcomes some of the lack of security and

<sup>55</sup> *Shepherd v Hack* (n 44).

<sup>56</sup> [1993] Crim LR 708 CA Crim Div.

<sup>57</sup> Theft Act 1978 s 3.

<sup>58</sup> Taxis Regulation Act 2003 s 40 (Ireland).

<sup>59</sup> Passenger Transport Regulations 2009 No 215 of 2009 Part 3 Div 5 (South Australia).

absence of suitable guardians problems discussed in the context of 'lifestyle' theory. As well as producing evidence admissible in court, recorded sound and images prevent arguments about what was said or done at the time of an incident.

The difficulty for drivers under the current regulatory regime is that the statutory provisions are silent on the question of whether the fitting of such devices in taxis is permitted. The position is dealt with under the licence conditions for the vehicle licence. It is a controversial issue, as it raises potential objections on the grounds of human rights issues, such as invasion of privacy, for both driver and passenger,<sup>60</sup> as well as data protection issues. Drivers do not help themselves in this regard; as a body, they are somewhat divided on the issue, particularly on the question of installing audio and visual recording devices. Attempts by some councils to make the installation of CCTV and other recording equipment in taxis compulsory have faced considerable opposition from the trade.<sup>61</sup> Many taxi drivers call upon their local councils to permit CCTV cameras and other security devices to be fitted to vehicles to protect themselves from victimization.<sup>62</sup> However, there are others who object to the installation of such devices on privacy, necessity or cost grounds.<sup>63</sup> Whilst the issues surrounding rights to privacy and how far they extend to operators and users of public transport are interesting questions, they are beyond the scope of this article. The important point for present purposes is that the approach of local authorities to installation of security devices has implications for the susceptibility of drivers to victimization.

Of the 253 local authorities from which it was possible to obtain information, out of a total of 315 throughout England and Wales outside London,<sup>64</sup> 71 (28.1 percent) had no policy at all on CCTV cameras or security screens. 65 local authorities (25.7 percent) prohibited such measures altogether. The remaining 117 councils (46.2 percent) imposed licence conditions on the vehicle licence which require approval from the council before any safety devices may be fitted. Two of these 117 local authorities have made installation of CCTV a mandatory licence requirement.<sup>65</sup>

The significant aspect is that the whole issue of installing security devices is under the control of the local authority, and not left to the drivers' choice. A system under which drivers require specific permission to install security devices entirely misses the purpose of such devices and what they are attempting to achieve. CCTV cameras and security screens are designed to reduce the vulnerability of drivers and the travelling public to offending behaviour. Prohibiting the use of security devices altogether removes this deterrent to victimization. Allowing instalment of such devices only with the permission of the local authority creates a disincentive to equipping taxis with these safety features. Not only may costs be prohibitive, but also there is the added impediment of having to apply for permission, which could be refused. Even if permission is granted, it is often subject to stringent conditions imposed by the local authority. Drivers may find it difficult, costly or inconvenient to comply with such conditions, and so are likely to be discouraged from installing security devices at all.

<sup>60</sup> *Southampton City Council v May* (Salisbury Crown Court, 27th November 2011, Recorder Patterson).

<sup>61</sup> L Jones, 'Mixed Views Over Oxford Council's New Compulsory CCTV Decision' *Oxford Times* (Oxford, 22nd October 2011).

<sup>62</sup> Crookes (n 15).

<sup>63</sup> O Evans, 'Oxford City Council Plans to Film and Record All Taxi Rides' *Oxford Times* (Oxford, 15 November 2011) 17.

<sup>64</sup> The figure of 315 local authorities does not include any of the London Borough Councils. Taxis in London are regulated by Transport for London under separate legislation from the rest of England and Wales.

<sup>65</sup> There are currently mandatory CCTV schemes in force in Southampton and Kirklees, with others proposed in a number of other locations across the country.

Although there may be detractors on the installation of CCTV and other security devices in taxis, both within and outside the trade, overall such devices can reduce the vulnerability of drivers to victimization. Even though control of fitting security devices in taxis is still very much on the local authority's terms, drivers are safer and less susceptible to offending with such devices than without them. A clearer and more unified approach to the issue would, however, assist drivers considerably.

Although abolition or modification of the regulatory provisions considered in this section would not by any means solve all the problems associated with the susceptibility of taxi drivers to victimization, it is likely to assist with some. The current regulatory approach is not appropriate to protect driver safety and is likely to make them more of a target. Being compelled to take any passenger who comes along, the metering of fares, and the legal uncertainties surrounding these requirements make drivers more vulnerable to offenders and more susceptible to victimization. Ambiguity and lack of uniformity on the issues of advance payments and installation of security devices increase that susceptibility.

In the concluding section of this article, some of the limitations on tackling victimization through the regulatory regime are considered, together with some suggested areas for further research.

## CONCLUSIONS

It has to be acknowledged that often the behaviour which leads to victimization of taxi drivers is a reflection of general offending behaviour in society. Acts of low level anti-social, aggressive and dishonest behaviour directed towards taxi drivers are manifestations of such behaviour in society generally, but occurring in a specific context.<sup>66</sup> To the extent that offending behaviour against taxi drivers reflects a divergence from social norms,<sup>67</sup> then victimization of taxi drivers has to be addressed by enforcing acceptable standards of behaviour. Enforcement of social norms, and the difficulties which such enforcement creates, is an issue for society as a whole, and cannot be solved by rules concerning one particular trade.

Some of these issues could be addressed, however, by providing better protection for drivers through minor amendments to existing statutes. Mention has already been made of innovative legislative changes introduced in other jurisdictions with regard to the issue of payment in advance. Those same statutory provisions have also included requirements that passengers comply with reasonable requests from the driver, do not misbehave in the vehicle,<sup>68</sup> and refrain from interfering with the controls of a vehicle.<sup>69</sup> These provisions are reinforced by creating specific criminal offences of failing to comply with the legislation without reasonable excuse.<sup>70</sup> Although such a provision transfers the need to provide a "reasonable excuse", and the difficulties raised by such a requirement, to the passenger, this is necessary and appropriate to protect the driver. The circumstances in which a passenger could justify not complying with the legislation are much more restricted than those in which a driver could claim to be excused from compliance. This makes enforcement of the provisions much more straightforward.

<sup>66</sup> Neuman and Baron (n 10) 413.

<sup>67</sup> Schwer *et al.* (n 3) 22.

<sup>68</sup> Taxis Regulation Act 2003 s 40 (Ireland).

<sup>69</sup> Passenger Transport Regulations 2009 No 215 of 2009 Part 4 Div 2 (South Australia).

<sup>70</sup> Taxis Regulation Act 2003 s 40(3) and s 40(5) (Ireland).

It is accepted that there are potentially difficulties with all of the recommendations for improvement of the regulatory system suggested in the previous section. It is recognized also that the recommended courses of action do not provide complete solutions to the problem of driver victimization. Some sources of attraction to offenders are not easily dealt with by regulation. The fact that drivers carry cash with them is not an easy characteristic of the trade with which to deal in terms of driver protection. Although local authorities in some areas have introduced facilities for acceptance of credit or debit cards as means of payment,<sup>71</sup> in such areas, it is necessary for regulation to keep pace with changing technology. Even then there are potential issues of passenger offending, such as the use of stolen cards or attempts to steal the card reading equipment. Historically, the taxi trade has always been a 'cash-heavy' business and is likely to remain so for the foreseeable future.

However, it has to be acknowledged also that, even with other factors taken into account, the manner in which taxi drivers are regulated in their trade makes a significant contribution towards their susceptibility to victimization. Certain features of taxi driver regulation distinguish them from other 'high risk' occupations and account, at least in part, for taxi driving consistently appearing at the head of lists of victimized occupations. It is these features of regulation which make taxi drivers vulnerable to offences. The prevalence and widespread nature of taxi driver victimization call for more empirical research into the issue. Such research would enable a clearer picture of the full extent of the problem, and the connection between regulation and the susceptibility of drivers to offending, to be obtained.

This article should not be seen, however, as advocating abolition of taxi driver regulation. Regulation of the trade serves a purpose and is needed. Nor is it necessary to consider wholesale legislative changes. It is possible to provide better protection for drivers from victimization without interfering with the protection of public safety for which the regulation was designed. The steps to remove or reduce the vulnerability of taxi drivers that have been proposed in this paper could be taken within the existing regulatory framework, or by making minor amendments to the current statutory provisions. Because some of the legislative changes from other jurisdictions upon which the recommended amendments are based are relatively new, it would be of considerable interest to research empirically whether, and how, these changes have had an impact on driver safety in their local taxi markets.

However, from the point of view of removing or reducing driver susceptibility to victimization, the recommendations should provide a workable and practical solution to the problems of regulation created victimization.

<sup>71</sup> Darlington Borough Council is an example of one local authority which has introduced such a system.

# ANTI-SOCIAL BEHAVIOUR, HARASSMENT AND THE CONTEXT-DEPENDENT VICTIM

PHIL EDWARDS\*

## INTRODUCTION

In May 2012 the Coalition government announced replacements for the main legal instruments used to control anti-social behaviour in England and Wales, including the Anti-Social Behaviour Order (ASBO). Introducing the new powers, Home Secretary Theresa May wrote: “This Government is committed to significant reform of how we deal with crime and anti-social behaviour. We need to ensure that the approach to anti-social behaviour is changed, to put victims at the heart of the response”.<sup>1</sup> This article suggests that May’s invocation of victims in the context of anti-social behaviour is inherently problematic. Throughout the history of the ASBO the position of the victim has been unstable and unclear. Anti-social behaviour has been conceptualised as ‘context-dependent’ to an unusually high degree: particular activities can be judged to be anti-social only in a given context, by virtue of the offence given to others in that setting. In this respect the legal definition of anti-social behaviour harks back to the earlier context-dependent offence of harassment. The development of harassment and anti-social behaviour powers from 1997 onwards suggests a threefold evolution: towards flexible and ‘light-weight’ remedies; towards wider and less legally constrained use of these powers; and, undercutting the first two trends to some extent, towards a formalisation of what constitutes anti-social behaviour. The Coalition’s plans suggest that the first two of these trends will be entrenched while the third goes into reverse; the effect will be to make wide-ranging powers of behavioural regulation available to anyone who feels offended.

## IN SEARCH OF DEFINITION

The phrase ‘anti-social behaviour’ entered the policy literature in the early 1990s, used initially by local authority housing managers. From the outset there was uncertainty about the definition of anti-social behaviour: did it refer to petty offending or to activities that were legal but offensive? Was it defined by its inherent nature or by its effects? If anti-social behaviour was defined by its effect on a victim or victims, who were these victims – in particular, were they identified individually or collectively?

In the mid-1990s a series of different definitions appeared in rapid succession. According to the Chartered Institute of Housing, writing in 1995, anti-social behaviour could be defined without any reference to its effects or any identifiable victim: anti-social behaviour is “behaviour that opposes society’s norms and accepted standards of behaviour”, and as such is defined in contradistinction to nuisance (“Behaviour that unreasonably interferes with other people’s rights to the use and enjoyment of their home and community”).<sup>2</sup>

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<sup>1</sup> Theresa May, ‘Home Secretary’s Foreword’, in Home Office, *Putting Victims First: More Effective Responses to Anti-Social Behaviour* (White Paper, Cm 8367, 2012), 3–4.

<sup>2</sup> Chartered Institute of Housing, *Neighbour Nuisance: Ending the Nightmare*. Good Practice Briefing No. 3 (Chartered Institute of Housing 1995).

In the same year, the Welsh Office listed a range of examples of anti-social behaviour, including criminal as well as legal activities: “vandalism, noise, verbal and physical abuse, threats of violence, racial harassment, damage to property, trespass, nuisance from dogs, car repairs on the street, so-called joyriding, domestic violence, drugs and other criminal activities, such as burglary”.<sup>3</sup> These activities collectively formed a problem which threatened to degrade living conditions on the estates affected: “Anti-social behaviour by a small minority of tenants and others is a growing problem on council estates . . . Estates can be stigmatised by the anti-social behaviour of a few.”<sup>4</sup> Anti-social behaviour is constituted by its effects, but the effects are felt over time and at the level of an estate as a whole.

Also in 1995, a Labour Party discussion document put forward two overlapping definitions of anti-social behaviour. Anti-social behaviour was defined in terms of serial petty offending by problem neighbours, seen as having a long-term harmful effect on individuals:

Every citizen, every family, has the right to a quiet life – a right to go about their lawful business without harassment or criminal behaviour by their neighbours. But across Britain there are thousands of people whose lives are made a misery by the people next door, down the street or on the floor above or below. Their behaviour may not just be unneighbourly, but intolerable and outrageous.<sup>5</sup>

The document stresses the limited preventive or deterrent impact of repeated court appearances resulting in a fine or conditional discharge, suggesting that a mechanism is needed by which a course of criminal conduct can be considered (and penalised) as a whole.

At this point, however, an ambiguity in formulations such as ‘harassment or criminal behaviour’ becomes apparent. The document suggests that anti-social behaviour should be considered as a ‘chronic crime’, defined as taking place “where the offending behaviour is chronic and persistent, where the separation of incidents may lack forensic worth, where it is the aggregate impact of criminal behaviour which makes it intolerable and where the whole is much worse than the sum of its parts”.<sup>6</sup>

The unanswered question here is whether an individual incident seen as forming part of a course of chronic crime – an incident which may not be ‘intolerable’ and may lack ‘forensic worth’ – must itself be identifiable as a criminal offence: is ‘chronic crime’ a criminal offence created by the cumulative effect of non-criminal acts, or an additional offence arising from the cumulative effect of individual criminal acts? Research on multiple victimization had noted that, for people living in “conditions of life where fights, verbal abuse, sexual assault and property theft [are] commonplace”, it may be difficult to “isolat[e] those events which are to be counted as ‘crimes’ for survey purposes from the normal course of day-to-day existence”; “violent victimization may often be better conceptualized as a *process* rather than as a series of discrete events”.<sup>7</sup> Envisaging crime as chronic rather than acute would make this process capable of being grasped by the criminal law. While an individual incident of ‘chronic crime’ might be tolerable and non-criminal, or at least beyond the scope of feasible prosecution, a series of incidents might nevertheless rise to the level of crime – both in

<sup>3</sup> Cited in P Papps, ‘Anti-social Behaviour Strategies – Individualistic or Holistic?’ (1998) 13 Housing Studies 5 639.

<sup>4</sup> Cited in Papps (n. 3).

<sup>5</sup> Labour Party, *A Quiet Life: Tough Action on Criminal Neighbours* (Labour Party 1995).

<sup>6</sup> Labour Party (n. 5).

<sup>7</sup> H Genn, ‘Multiple Victimization’, in M Maguire and J Pointing (eds), *Victims of Crime: A New Deal?* (Open University Press 1988).

its effects and in being capable of being processed through the criminal justice system. This suggests that the 'chronic crime' approach could be extended to cover relatively trivial behaviours (e.g. car repairs in the street) whose aggregate impact was 'intolerable'; there could be legal activities, in other words, which would rise to the level of criminality through their cumulative effect. In either case, the remedy for anti-social behaviour is envisaged, significantly, as an injunction prohibiting the recipient from continuing the anti-social course of conduct.

Anti-social behaviour had been defined, firstly, as behaviour which was inherently anti-social ("behaviour that opposes society's norms") irrespective of its effects or whether it was defined as a crime. A second definition linked the phrase with a range of activities which might be either lawful or unlawful, but which were united by the effect of lowering the quality of life on those social housing estates where they were allowed to take place. The third and fourth definitions, introduced by the Labour Party's 1995 document, stressed the cumulative effect of anti-social behaviour on individual victims. The behaviour itself was defined imprecisely, leading to the distinction between the third and fourth definitions: this turns on whether an individual incident of anti-social behaviour must be a criminal offence in itself or not. The possibility that the prevention of anti-social behaviour might involve an injunction barring an individual from lawful activities had been broached.

These definitions dated from 1995, at which point anti-social behaviour had not entered legislation. The first UK legislation to mention anti-social behaviour by name was the Housing Act 1996, which created the power for local authorities to request "injunctions against anti-social behaviour"; these would prohibit an individual from "engaging in or threatening to engage in conduct causing or likely to cause a nuisance or annoyance" to residents in or visitors to social housing premises, but could only be applied for if violence had been used or threatened.<sup>8</sup> Situating anti-social behaviour as a problem associated with social housing, this legislation harks back to the earlier definition of anti-social behaviour as activities tending to stigmatise housing estates. However, its provisions are cautious: the requirement for prior use or threat of violence, in particular, precludes the use of the new power to control most of the activities which had been listed by the Welsh Office.

The main legislative offensive on anti-social behaviour, following the 1997 election, would build on the 'chronic crime' formulation; the Crime and Disorder Act 1998 established anti-social behaviour in law as a type of activity defined by its effects on a victim or victims, which need not be otherwise unlawful, and which could be controlled by an injunction prohibiting otherwise legal activities. In a key innovation, the 1998 Act framed anti-social behaviour in terms of individual actions: acting "in a manner that caused or was likely to cause harassment, alarm or distress"<sup>9</sup> constituted anti-social behaviour, even if this only took place on a single occasion. This extension of the law's reach was made possible not only by the developing consensus on the nature and significance of anti-social behaviour which has been outlined above, but also by the precedent set by a separate strand of legislation. The type of harm represented by anti-social behaviour had been established in law by successive laws on harassment; in particular, harassment prefigured anti-social behaviour in being defined in 'context-dependent' terms.

<sup>8</sup> Housing Act 1996 s152(1)(a).

<sup>9</sup> Crime and Disorder Act 1998 s1(1)(a).

## HARASSMENT AND THE CONTEXT-DEPENDENT VICTIM

Jaconelli<sup>10</sup> has proposed a division between ‘context-independent’ and ‘context-dependent’ criminal offences. Most crimes are context-independent, which is to say that they can be described “in terms in which the actions of the accused and the harm inflicted on his victim are coextensive”. In the case of a context-dependent crime, the effect of the action on another person is crucial. “the law may require the question to be asked: did the actions of the accused tend towards the rousing of certain feelings in the person or persons with whom . . . [he] came into contact? If the answer is in the affirmative, the accused is guilty: if in the negative, he is not guilty.”

Most of the offences discussed by Jaconelli are speech-based – examples include obscene publications and contempt of court – but not all. In particular, Jaconelli notes that, while the most serious public order offences introduced by the Public Order Act 1986 (riot, violent disorder and affray) are all context-independent – evoking the effect of the actions involved on a hypothetical ‘person of reasonable firmness’ – the two less serious offences of ‘Fear or provocation of violence’ and ‘Harassment, alarm or distress’ are both wholly or partly context-dependent; so too is the later addition of ‘Intentional harassment, alarm or distress’. To be precise, the section 4 offence of ‘Fear or provocation of violence’ has both context-dependent and context-independent elements: as well as the use of threats and abuse with the intent of provoking violence or causing fear of violence, it covers the use of threats and abuse in such a way that violence was likely to be provoked or another person was likely to believe violence would be used. The section 5 offence of ‘Harassment, alarm or distress’ is defined only in terms of the action (a ‘threatening, abusive or insulting’ communication or else ‘disorderly behaviour’) and its likely effect on a witness (‘a person likely to be caused harassment, alarm or distress thereby’)<sup>11</sup>; neither actual effect nor an intent to harass is required.

The context-dependent formulation of these offences – and of harassment in particular – can be seen in two very different lights. On one hand, it would be hard to sustain that inducing a mental state (such as the experiences of harassment, alarm and distress) should never be a criminal offence. If there are to be criminal offences relating to mental states, subjectivity – and hence context-dependence – is unavoidable: to apply a ‘person of reasonable firmness’ standard would risk denying justice to anyone whose psychological makeup did not meet that standard (and, more hypothetically, burdening the courts with cases of harassment which a more psychologically robust victim had taken in her stride). It can be argued, in other words, that harassment deserves to be criminalised, and that it is only by defining it with reference to the victim’s mental state that the law can adequately criminalise it; the context-dependent definition allows the law to grasp a category of crime which would otherwise be overlooked.

On the other hand, it is undeniable that criminalising an action by reference to its subjective mental effects gives wide scope to police discretion – all the more so if ‘likely’ effects are included in the definition. Commenting on a judgment<sup>12</sup> that police officers should not be considered to have a general immunity to being caused harassment, alarm and distress by members of the public, Gearty observed that “A lack of orderliness likely to distress a policeman now seems to be a crime”.<sup>13</sup> The argument is that the section 5 offence effectively gives police officers a discretionary power to

<sup>10</sup> J Jaconelli, ‘Context-Dependent Crime’ [1995] Crim LR 771.

<sup>11</sup> Public Order Act 1986 s5(1).

<sup>12</sup> *D.P.P. v. Orum* [1988] 3 All ER 449.

<sup>13</sup> C Gearty, ‘Trusting the Judges: Public Order’ (1989) 48 CLJ 2 168.

criminalise selected examples of abusive speech or disorderly behaviour – a power which could easily be used excessively or inappropriately. Given the wide range of activities which could be labelled ‘disorderly behaviour’, Gearty argued, “Section 5 comes close to providing a mechanism for punishing non-violent non-conformity for the crime of being itself.”<sup>14</sup>

This may seem to be an unresolvable difference, deriving from conflicting perspectives on the criminal justice system as a source of social control. If we see the criminal justice system as a force tending to promote order and prevent avoidable harms, we will welcome context-dependent offences, as they makes it possible to criminalise undesirable behaviour which would otherwise go uncontrolled. If we see the criminal justice system as a source of unaccountable coercion over relatively powerless individuals, we will object that the availability of context-dependent offences makes it possible for harmless behaviour to be criminalised at will.

However, the point here is not to choose between these two models – one victim-oriented and focusing on harm, one enforcement-oriented and focusing on disorder – but to recognise that both are valid. When a context-dependent offence is defined in law, the effect may be to recognise a genuinely overlooked category of harmful acts, benefiting hitherto neglected victims, while ensuring safeguards against the hasty or inappropriate criminalisation of relatively harmless acts. Equally, the effect may be to empower the police to criminalise what they see as undesirable behaviour at will, with little concern for the harmfulness of the actions involved or for their effect on any victim.

Three criteria are involved. First, whether the harm experienced by the victim is actual (representing a genuine victim orientation) or only potential (creating an offence which could be invoked in defence of identifiable potential victims, but could also be used much more widely). Second, whether the acts covered by the offence are defined precisely or loosely: this, similarly, corresponds to a distinction between an offence tailored to a newly-recognised context-dependent harm, on one hand, and an offence which could be used to criminalise undesirable behaviour at will. Third, *mens rea*: whether the offence is defined exclusively in terms of its harmful effects, or a mental element is also required, showing that the harmful effects were brought about intentionally or knowingly. The offender’s state of mind may also be stressed to the point where an offence is only committed if harmful effects were positively intended. The degree of stress placed on *mens rea* considerations is independent of how precisely the behaviour concerned is defined and of whether the accusation relates to actual or only potential harm.

Gearty’s commentary on section 5 harassment suggests that, in this case, looseness of definition goes together with a harm considered as potential rather than actual and limited attention to the offender’s intentions, but this is not the only possible combination. An offence requiring actual experience of harassment may be defined loosely and focus on harm without consideration of intention. Conversely, an offence framed in terms of potential harm may limit the broad reach it would otherwise have by defining offending behaviour precisely and specifying that the harmful effects must have been intended. It should be stressed that a narrowly-defined offence would be no less context-dependent: carrying on offensive behaviour intentionally and without reasonable excuse would only amount to harassment at the point where a victim experienced that behaviour as harassing. Generally, laws against harassment do not criminalise types of act, but acts with a certain type of effect.

<sup>14</sup> Gearty ( n. 13).

## THE EVOLUTION OF HARASSMENT

The history of legislation on harassment shows how the law has shifted on all these axes. Harassment was initially defined in law by the section 5 Public Order Act offence of ‘Harassment, alarm and distress’. The section has a detailed definition of the conduct covered by the offence, which may take three forms: ‘threatening, abusive or insulting words or behaviour’, ‘disorderly behaviour’ and displaying ‘any writing, sign or other visible representation which is threatening, abusive or insulting’. Disorderly, threatening or abusive behaviour, or threatening or abusive speech or display, amounts to an offence if carried out ‘within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby’.<sup>15</sup> It is a defence for the accused to show that his conduct was reasonable, or that he had no reason to believe there was any potential victim within hearing or sight.

Assessing the legislation using the three criteria outlined above, we can see that the offending behaviour is defined in some detail, albeit with the use of vague terms such as ‘disorderly’ and ‘abusive’; actual harassment is not required; and there is no requirement for harassment to be positively intended. These features combine – as Gearty suggested – to produce an offence which has little emphasis on harm done to victims, and is readily available for the suppression of disorder. While there is a defence that the accused had no reason to believe that a potential victim was within hearing or sight, case law has established that this can be interpreted very narrowly, effectively denying it to anyone carrying on disorderly behaviour in a public place or a residential area.<sup>16</sup> It has also been established that a police officer may be considered liable to being alarmed or distressed by the activities covered by the section;<sup>17</sup> that an officer who does not suffer this emotional reaction may nevertheless experience harassment;<sup>18</sup> and that an officer who denies having experienced any adverse effect may nevertheless be considered *likely* to be caused harassment, alarm or distress.<sup>19</sup> The effect of all these findings has been to minimise the context-dependent nature of the offence, by removing any requirement for an identifiable victim to be subjected to actual or likely harm before the offence is invoked.

A House of Lords amendment to the Criminal Justice and Public Order Act 1994 amended the Public Order Act, introducing the section 4A offence of ‘Intentional harassment, alarm or distress’. The offence specifically targeted racial harassment, although the racial stipulation did not appear in the final text.<sup>20</sup> ‘Intentional harassment’ under section 4A is a more serious offence than section 5 harassment. It requires harassment, alarm or distress both to have been intended and to have been caused to another person (although this need not be the person intentionally targeted).

In terms of definition, the offence has the same strengths and weaknesses as section 5 harassment. As its name implies, however, the offence stresses intentionality. There is also an explicit requirement that harassment be actual, as well as intended. This offence thus has a stronger orientation to harm suffered by victims, and to acts carried out with intent to harass, than section 5 harassment. That said, the *Orum* precedent – enabling a police officer to make an arrest for an offence which would not have occurred had

<sup>15</sup> Public Order Act 1986 s5(1).

<sup>16</sup> *Reda v. D.P.P.* [2011] All ER (D) 167 (Jun).

<sup>17</sup> *D.P.P. v. Orum* [1988] 3 All ER 449.

<sup>18</sup> *Southard v D.P.P.* [2006] All ER (D) 101 (Nov).

<sup>19</sup> *Cain v D.P.P.* [1994] QB (unreported).

<sup>20</sup> S Greenfield and G Osborn, ‘When the Whites Go Marching In? Racism and Resistances in English Football’ (1996) 6 *Marquette Sports LJ* 315.

the officer not been present to suffer harassment, alarm or distress – remains available and has been used (albeit without success).<sup>21</sup>

A new harassment offence was created by the Protection from Harassment Act 1997. The Act made it illegal for an individual to pursue a ‘course of conduct’ amounting to harassment of another, if he knew or ‘ought to know’ that it amounted to harassment. ‘Course of conduct’ was defined as involving conduct on two or more occasions,<sup>22</sup> echoing contemporary discussions about ‘chronic crime’. ‘Conduct’ was defined as including speech, while ‘harassment’ was defined to include alarm and distress (echoing the Public Order Act). The ‘ought to know’ formulation was defined by reference to how the conduct would be interpreted by the hypothetical ‘reasonable person’.<sup>23</sup>

As compared with section 5 harassment, the offence is defined with a greater emphasis on actual effect on a victim. The conduct amounting to harassment is defined only in very broad and inclusive terms; however, the ‘ought to know’ stipulation militates against creative interpretations of the legislation, limiting the scope of the offence to cases which could be covered by contemporary understandings of harassment. This is not to say that this offence is context-independent: in this respect the role of the ‘ought to know’ clause is not to bring specified behaviours within scope of the offence but to disqualify some behaviours which would otherwise have been within scope by virtue of their effect on a victim. The ‘ought to know’ provision also qualifies the mental element of the offence: a defendant who claimed to have no awareness that his or her offending course of conduct constituted harassment could nevertheless be found to have acted recklessly, by disregarding the effects that he or she ought to have known that course of conduct would have.

The evolution of harassment over time is uneven and contradictory. The most straightforward trend is a growing emphasis on actual harassment, and hence on harm caused to identifiable victims. In terms of precision, the 1997 offence is defined in less specific terms than its two precursors, but this distinction is equivocal: given the vague and loaded terms used in the earlier legislation, it could even be argued that the 1997 Act’s omission of a prescriptive definition, in favour of an invocation of shared assumptions about what types of behaviour amount to harassment, represents a gain in precision. As regards the mental element, the 1994 offence – requiring a positive intention to harass – is the odd one out. The 1986 offence allows that harassment may be carried out recklessly; the 1997 offence places still less emphasis on the mental element, invoking constructive knowledge of what a ‘reasonable person’ would consider to be harassing behaviour.

As of the 1997 Act, then, harassment was legally conceptualised in terms of a harmful pattern of behaviour affecting identifiable victims, implicitly defined by reference to ‘common knowledge’ assumptions. The 1997 offence addresses actual experiences of harassment and responds to a known harm, albeit one which is thought to be known well enough not to need defining. This victim- and harm-orientation goes along with a relative lack of emphasis on subjective culpability: given those shared assumptions about the nature of harassing behaviour, proof of intention or recklessness was not considered essential.

Two additional points about the Protection from Harassment Act should be noted. One is that the Act prohibited harassment by way of two distinct mechanisms: as well

<sup>21</sup> *R (on the application of R) v D. P. P.* [2006] EWHC 1375 (Admin).

<sup>22</sup> The Act would later be amended (at some cost to conceptual coherence) to incorporate an alternative definition of ‘course of conduct’, involving the harassment of more than one person on at least one occasion: see Serious Organised Crime and Police Act 2005 ss 125(2), 125(7).

<sup>23</sup> Protection from Harassment Act 1997 ss 1(1–2), 7(2–4).

as defining breach of its prohibitions as a criminal offence, the Act provided for a injunction to be taken against 'actual or apprehended' breach, with a higher sentencing range for breach of such an injunction than for the offence.<sup>24</sup> This was also the first attempt to frame anti-social behaviour as a criminal offence: presenting the legislation, the then Home Secretary stated that "those who harass their neighbours through a course of conduct would fall within the ambit of this offence".<sup>25</sup> As well as the latest in a series of attempts to legislate for the context-dependent offence of harassment, this legislation can thus be seen as the first legislative response to the discussion of anti-social behaviour and 'chronic crime' in documents such as *A quiet life*. Significantly, the Home Secretary's Labour counterpart dismissed the proposals as "fail[ing] in many key respects to measure up to the scale of the problem of criminal anti-social behaviour", and bracketed harassment with anti-social behaviour as examples of 'chronic crime': "behaviour such as stalking or serious neighbourhood disruption, which is continuous and where the whole is infinitely worse than the sum of the parts or any individual part".<sup>26</sup> Labour's own response would follow the 1997 election.

### THE PHANTOM MENACE: ANTI-SOCIAL BEHAVIOUR AND THE LAW

Labour's 1997 election victory was followed by the first explicit legislative definition of anti-social behaviour. Introducing the ASBO, the Crime and Disorder Act 1998 defined anti-social behaviour in terms echoing the earlier legal definitions of harassment: it was defined as acting 'in a manner that caused or was likely to cause harassment, alarm or distress'.<sup>27</sup> Like the civil remedy offered by the Protection from Harassment Act, the ASBO was a civil injunction against the offending behaviour. However, it was defined more broadly than the civil remedy defined under the earlier Act, which had been defined as 'an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment'.<sup>28</sup> The ASBO was a preventive injunction, imposing conditions which would forestall harassing behaviour rather than prohibiting it directly: 'The prohibitions that may be imposed by an anti-social behaviour order are those necessary for the purpose of protecting [others] from further anti-social acts by the defendant'.<sup>29</sup> Unlike the previous year's legislation, however, the Crime and Disorder Act did not define on anti-social behaviour as a 'chronic crime' whose effect was cumulative; a single act could qualify.

In terms of the criteria outlined above, the new offence builds on two features of the 1997 harassment legislation while breaking with a third. Unlike the 1994 or 1997 offences, anti-social behaviour may be constituted by behaviour judged likely to cause harassment rather than actual harassment having to be shown. As regards the mental element, the new offence goes further than the 1997 offence: neither intention nor recklessness is required, even considered against what the defendant 'ought to have known' (although it is still a defence for the behaviour to be shown to be 'reasonable in the circumstances').<sup>30</sup> Similarly, the lack of specificity with which harassment is

<sup>24</sup> Protection from Harassment Act 1997 s3.

<sup>25</sup> M Howard, Statement to House of Commons introducing Protection from Harassment Bill. HC Deb, 17 December 1996, col 784.

<sup>26</sup> J Straw, Questions in House of Commons on Protection from Harassment Bill. HC Deb, 17 December 1996, col 788, 791.

<sup>27</sup> Crime and Disorder Act 1998 s. 1(1) (a).

<sup>28</sup> Protection from Harassment Act 1997 s3(3)(b).

<sup>29</sup> Crime and Disorder Act 1998 s.1(6).

<sup>30</sup> Crime and Disorder Act 1998 s.1(5).

defined in the 1997 legislation is developed further: anti-social behaviour is not defined at all, other than in terms of its context-dependent effects (or potential effects). Behaviour does not need to be disorderly or abusive in order to qualify as anti-social, nor does it need to meet a 'reasonable person' standard.

The absence of any definition of anti-social behaviour is perhaps the single most striking aspect of the 1998 offence. Section 5 harassment – defined as potential as well as actual, and with no defence of lack of intention – made it possible for a wide range of 'disorderly' or 'abusive' behaviours to be criminalised. Anti-social behaviour as defined in the Crime and Disorder Act could be constituted by any action which could be held to have the actual or likely effect of producing harassment, alarm or distress in another person (not of the suspect's household), irrespective of whether the effect was intended. Even the unspecific shared assumptions regulating the invocation of harassment in the 1997 legislation are absent. Moreover, although the offence remains context-dependent – indeed, it is context-dependent to a very high degree, being defined solely by its effect – the victim has disappeared from view: the effect in question can be stipulated by the official applying for an ASBO. While the 'reasonable in the circumstances' defence echoes earlier harassment offences, its effect in this case is considerably weaker. In the case of section 5 harassment, the 'reasonable in the circumstances' defence effectively goes to the disorderly or threatening quality of the conduct alleged to cause harassment. In the case of anti-social behaviour, disorderly or threatening behaviour is not required, leaving only the more debatable question of whether conduct deemed to cause harassment might nevertheless be reasonable.

The Crime and Disorder Act 1998 thus defined anti-social behaviour in strongly enforcement-oriented terms, offering limitless scope for the criminalisation of a wide range of undesirable actions irrespective of their actual effect. The peculiarity of anti-social behaviour as an offence is that the rhetoric surrounding the introduction of the ASBO presented it as a coherent and under-addressed problem causing real harm to its victims; it was positioned at the other end of the 'context-dependent' spectrum, in other words. In Parliament, Alun Michael MP stated that anti-social behaviour "has caused tremendous distress and even the ruination of the lives of many individuals and families".<sup>31</sup> Anti-social behaviour could have these dramatic effects even where intention was lacking: "anti-social behaviour can be thoughtless or heedless but can nevertheless destroy its victims".<sup>32</sup>

Pressed to describe the behaviour which could have these ruinous effects, Michael adopted two strategies. One was to invoke the horrors of a "neighbours from hell" scenario:

Let us take the example of the proverbial family from hell. It might involve arguments with neighbours, peppered with threats; persistent loud noise at unsocial hours; the posting of excrement through the letter box of a neighbour who dared to complain; the dumping of refuse all over the place, perhaps in neighbours' gardens; and abusive language, intimidating behaviour and the intimidation and bullying of neighbours' children on the way to and from school. Hon. Members can fill in further detail for themselves. Several of the events that I have listed might be criminal acts, but the impact of that pattern of behaviour on neighbours is the important thing.<sup>33</sup>

<sup>31</sup> SC Deb (B), 28 April 1998.

<sup>32</sup> SC Deb (B), 30 April 1998.

<sup>33</sup> *Ibid.*

Despite its rhetorical impact, this catalogue of abusive behaviour is a poor argument to support the supposed identification of a new category of crime; as Michael acknowledged, several (or most) of the acts listed were already criminal offences. If this paragraph gives any definition of anti-social behaviour it is through its emphasis on the context-dependent impact of a pattern of behaviour. In other words, Michael's argument here tacitly reverted to a 'chronic crime' model of anti-social behaviour – which was not supported by the Crime and Disorder Bill.

Michael's second and more productive line of argument was to suggest that anti-social behaviour was inherently protean.

Some amendments were tabled that sought to specify the behaviour, or to define it as serious . . . It would not be right to limit the definition in the ways that have been suggested. The essence of such orders is their flexibility to respond to local needs.<sup>34</sup>

Anti-social behaviour could take different forms in different places; some of these forms might appear less serious than others to an outside observer, but all should be addressed by the law.

This is consistent with an understanding of anti-social behaviour as context-dependent, with the degree of offensiveness determined by the effect of a particular act on a particular victim. However, Michael's argument was not based on a purely context-dependent definition of anti-social behaviour, whereby multiple types of behaviour might qualify in different situations by virtue of their effects. A more essentialist – and ultimately context-independent – model of anti-social behaviour, as a single phenomenon taking multiple forms in different situations, seems to be intended. Thus Michael argued that the scope of the ASBO itself needed to be drawn equally broadly, for fear that an attempt to prohibit anti-social behaviour would merely lead to it springing up, Hydra-like, in a different form: "The prohibitions are required to be necessary to protect the community from further anti-social acts. . . . Any narrower formulation would permit the defendant to circumvent the order by subtly changing the anti-social activity in question."<sup>35</sup> The implication here is that anti-social behaviour is an identifiable (but perhaps very populous) set of behaviours; that anti-social behaviour is carried out by individuals who are either consciously committed or unconsciously predisposed to behaving anti-socially; and that if they are barred from carrying out one form anti-social behaviour, they are likely to adopt an alternative form if possible.

This essentialist understanding of anti-social behaviour was associated with a stress on the ASBO's nature as an injunctive remedy. The argument was that it would be futile to prohibit anti-social behaviour in any given form, or to deter others from committing that particular form by punishing it; the issue was to modify the behaviour of those who had behaved anti-socially so as to prevent further anti-social behaviour occurring. Prohibitions aimed at individual behaviours should therefore be replaced by coercive measures, tailored by the practitioners involved in the situation, which can be relied on to deprive the individual of any of the opportunities they might otherwise have taken for anti-social behaviour. In this light, the ASBO was not a criminal sanction but a mechanism for schooling behaviour, backed by the possibility of a criminal sanction. In Michael's words, "[ASBOs] will succeed when they make punishment unnecessary for the people on whom they are imposed. Those people will

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

no longer be a nuisance to the public and their anti-social behaviour will have been curbed.”<sup>36</sup> This argument also suggests that, while anti-social behaviour cannot be described *a priori*, its essential anti-social nature enables it to be recognised by those professionals who see it happening and know what to look for.

The definition of anti-social behaviour as a protean menace, and one which can only be prevented by forcibly modifying the offender’s behaviour, legitimates the lack of definition of anti-social behaviour in the Crime and Disorder Act, as well as the enforcement orientation of the Act’s provisions and the lack of emphasis on intention. If anti-social behaviour could take a variety of equally anti-social forms, precise definition was not appropriate. Moreover, if anti-social behaviour was a single, identifiable problem – rather than a general label for a miscellaneous range of behaviours which might in practice cause harassment, alarm and distress – then actual experiences of harassment, alarm and distress were not required: an expert witness could simply recognise behaviour likely to have these effects. Lastly, if individuals behaving anti-socially could be assumed to have a predisposition to do so, then questions of conscious intention were irrelevant: what was at issue was the behaviour itself and the imposition of conditions which would effect modifications to it.

These assumptions derive ultimately from the legislation’s roots in earlier harassment law. From the Protection from Harassment Act 1997, the specification of anti-social behaviour inherited a lack of definition – or more precisely an assumption that common knowledge of a given problem was sufficient to allow it to be addressed without definition – and a lack of emphasis on intention. From section 5 harassment it drew the lack of any requirement for actual harassment – and, more broadly, the assumption that behaviour likely to have a particular effect could be recognised as such by a professional, irrespective of the intentions of the perpetrator or the experience of the victim. If anti-social behaviour was to fit both of these profiles, it must be conceptualised as a crime which takes varying forms, has varying effects on its victims and is not necessarily committed deliberately, but which can be consistently recognised and appropriately managed by local practitioners.

Despite invocations of the effect of anti-social behaviour on its victims, anti-social behaviour as defined in the Crime and Disorder Act 1998 is thus at the enforcement-oriented extreme of the spectrum of context-dependent crime. Indeed, the emphasis in parliamentary debate on anti-social behaviour’s inherent qualities, despite the many different forms it can take, suggests that anti-social behaviour is beginning to be defined as a known and context-independent problem, irrespective of its effects in a given situation. Like harassment as defined in the Protection from Harassment Act, anti-social behaviour could be defined by reference to shared assumptions. Unlike that definition of harassment, the implicit definition of anti-social behaviour would rely on assumptions about the nature of the undesirable behaviour, rather than about types of behaviour likely to have undesirable effects.

## BACK TO THE ESTATES: THE ANTI-SOCIAL BEHAVIOUR DAY COUNT

The implicit definition of anti-social behaviour under the Crime and Disorder Act had thus been entrusted to local enforcement agencies. The lack of explicit definition created a danger of variable enforcement; this could arise as an effect of responsiveness to differing local needs, since similar actions might give rise to differing experiences of

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

harassment in different localities. Thus the then Home Office minister Beverley Hughes argued in 2003, “[anti-social behaviour] can mean very different things from one place to the next. In one area it’s young people causing problems on the street, in another it’s noisy neighbours or abandoned cars. In one town centre it’s street drinking and begging, in another it’s prostitution.”<sup>37</sup> The implication here is not that begging, prostitution or rowdiness are only found in certain areas, but that there are only certain areas in which these phenomena amount to anti-social behaviour – and hence that beggars, prostitutes and rowdy young people will find themselves tasked with behaving anti-socially in some areas but not in others.

The prospect of systematically uneven law-enforcement which this opens up is perhaps the inevitable result of creating a broad category of problematic behaviour whose only explicit definition was context-dependent. However, while in practice enforcement of anti-social behaviour legislation was frequently capricious and occasionally creative,<sup>38</sup> a core range of behaviours likely to be regarded as anti-social rapidly emerged. The explicit context-dependent definition of anti-social behaviour was not the only one at work. Practitioners, who were free to invoke likely as well as actual effect, worked with an implicit and largely context-independent definition of anti-social behaviour, which over time became more explicit. The 2003 Anti-Social Behaviour Day Count – a comprehensive survey of incidents of anti-social behaviour reported on a single day – collated data on anti-social behaviour reported to a range of agencies under the following headings:

1. Drugs (drug dealing, drug use, evidence of drug use)
2. Street drinking (includes begging)
3. Prostitution (includes kerb crawling, sexual acts, indecent exposure)
4. Abandoned vehicles
5. Vehicle nuisance (street car repairs, joyriding, arson to cars, street racing, off-road motorcycling, inconvenient parking, cycling in pedestrian areas)
6. Noise (from domestic premises, pubs, businesses)
7. Rowdy behaviour (includes public drunkenness)
8. Nuisance behaviour (includes setting fires, inappropriate use of fireworks, playing in inappropriate areas)
9. Hoax calls to emergency services
10. Animal problems
11. Intimidation (includes harassment, stalking and voyeurism)
12. Criminal damage (includes vandalism and graffiti)
13. Litter (includes fly-tipping and fly-posting).<sup>39</sup>

This is an extraordinarily detailed and comprehensive list of behaviours, covering a far wider range than might be expected. Michael’s ‘proverbial family from hell’ was guilty under only four of these headings – harassment, noise, rowdiness and litter. A closer comparison is the 1995 Welsh Office list quoted above. Three criminal offences included on that list – burglary, domestic violence and trespass – are not included, but the other eleven potential anti-social activities remain, supplemented by twice as many again – including each of the ‘very different things’ suggested by Hughes. Unlike Hughes’s context-dependent formulation, however, the Day Count survey frame

<sup>37</sup> B Hughes, ‘Developing Locally-Led Responses to Anti-social Behaviour’. Speech to New Local Government Network, 10/6/2003.

<sup>38</sup> See S MacDonald, ‘A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBO’s Definition of ‘Anti-social Behaviour’, (2006) 69 MLR 183.

<sup>39</sup> Home Office, *Defining and measuring anti-social behaviour* (Development and Practice Report, HODPR 26, 2004).

suggests that each of these things qualifies as anti-social behaviour, irrespective of where it occurs.

The standardised survey frame used to produce the Day Count effectively produced knowledge of anti-social behaviour as a unified phenomenon with a known range of manifestations.<sup>40</sup> Individual victimisation is implied in only a few cases; in most cases the public are victimised collectively (noise), indirectly (litter, vandalism) or not at all (begging, hoax calls). The implicit definition of anti-social behaviour has ceased to have any strong context-dependent element. While the activities listed are almost all capable of causing harassment, alarm or distress, there is no suggestion that they should only be considered anti-social when those effects are produced – or that the severity of the anti-social behaviour might vary with the reaction it provokes, so that a particularly offensive example of cycling on the pavement might be considered on a par with a relatively minor example of fly-tipping. These, by implication, are the known forms which anti-social behaviour takes and by which it can be recognised – indeed, the Day Count rests on the assumption that anti-social behaviour always occurs where one of these activities takes place, and does not occur at any other time.

#### FORWARD TO THE PAST: THE FUTURE OF ANTI-SOCIAL BEHAVIOUR LEGISLATION

It might be objected that the story of anti-social behaviour set out in this article ends where it began: that the notion of anti-social behaviour began as a label applied by social housing managers to a variety of disorderly behaviours affecting quality of life in housing estates, and that the list embodied in the Day Count represents an expansion and crystallisation of the consensus among practitioners as to what those behaviours are. On this argument, that the historical association between anti-social behaviour and harassment is an irrelevance, with nothing to tell us about the present and future of anti-social behaviour legislation. In other words, the reason why anti-social behaviour (as of 2003) was not a context-dependent offence is that it never had been: it was only ever a way of talking about types of behaviour that housing managers wished to suppress.

This would be mistaken, for two reasons. Firstly, the essentialist formulation which was put forward by Michael in parliamentary debate – and which echoed assumptions embodied in legislation on harassment – has been lastingly influential. Michael argued that anti-social behaviour is an identifiable category of activities, associated with individuals predisposed to commit them and taking an unpredictable variety of forms. Measures to deal with anti-social behaviour should therefore be preventive rather than punitive or prohibitive, addressing the offender as the source of problem behaviours rather than as a moral subject to be punished or deterred; the regime imposed should be tailored by local practitioners, who are in a position to assess what conditions will best forestall anti-social behaviour in a particular case.

These essentialist – and ultimately context-independent – assumptions have outlived the Labour government and seem likely to outlive the ASBO. The Coalition has recently published a draft Anti-Social Behaviour Bill,<sup>41</sup> including a replacement for the ASBO: the ‘Injunction to Prevent Nuisance and Annoyance’. Despite claims that the

<sup>40</sup> P Edwards, ‘How the News Was Made: The Anti-Social Behaviour Day Count, Newsmaking Criminology and the Construction of Anti-Social Behaviour’. (2012) *Critical Criminology*. Epub ahead of print 25 November 2012. DOI 10.1007/s10612-012-9167-y.

<sup>41</sup> Draft Anti-Social Behaviour Bill (Cm 8495) (2012).

new legislation would be victim-centred,<sup>42</sup> the new injunction and the version of ‘anti-social behaviour’ implied by it are defined even more broadly, and with even more latitude in terms of enforcement, than their predecessors. Following the terminology used in housing legislation, the Bill defines anti-social behaviour as “conduct *capable of causing nuisance or annoyance* to any person”<sup>43</sup> (emphasis added): neither actual nor likely effect is required, and the effect stipulated may be far more trivial than ‘harassment, alarm or distress’. An injunction may be granted if the respondent has engaged or threatens to engage in conduct so defined; the injunction may impose any combination of prohibitions and positive requirements which the court finds “just and convenient” for the purpose of “preventing the respondent from engaging in anti-social behaviour”.<sup>44</sup> The troubled and contradictory history of legislation on anti-social behaviour, and the highly flexible and easily extended legislative instrument which it created, will continue to be relevant.

There is also a more positive reason for taking account of the context-dependent prehistory of anti-social behaviour legislation. Since the 1990s there has been a strong association between the ‘anti-social behaviour’ label and the context-dependent criminal harms grouped under the heading of harassment. Anti-social behaviour in popular consciousness has retained its associations with ‘neighbours from hell’, and more generally with wilfully and maliciously provoking distress in and around the home. A strong association between anti-social behaviour and harassment – and in particular, harassment considered as a problem yet to be adequately addressed by the law – was established under Labour and has not gone away.

Nor, perhaps, should it. The admitted extension and over-use of anti-social behaviour, like section 5 harassment, does not permit us to assume that context-dependent public order offences never correspond to real harms. Indeed, what is most problematic about these offences in practice is precisely their drift away from the context-dependent approach, becoming catch-all mechanisms for the criminalisation of undesirable and/or disorderly behaviour. If context-dependent offences were ruled out, the alternative would be to assume either that there cannot be an offence of wrongfully inducing a subjective mental state, or else that the law can only incorporate such offences by invoking an objective standard in the form of a hypothetical ‘person of reasonable firmness’. This would seem unsatisfactory. An abstracted judgment of the level of distress likely to be caused by actions of a certain kind seems plainly less appropriate than a context-dependent approach in cases where genuine distress has been caused intentionally and without reasonable excuse – and, for that matter, in cases where it has not.<sup>45</sup> Alongside its application to assorted disorderly behaviours of concern to local housing managers, anti-social behaviour remains a label widely used to refer to harms of this type: a difficult category of genuinely context-dependent harms, which the criminal law is likely to be called on to address again, whether under this or another name.

<sup>42</sup> E.g. May (n. 1).

<sup>43</sup> Draft Anti-Social Behaviour Bill (Cm 8495) (2012) s. 1(2).

<sup>44</sup> Draft Anti-Social Behaviour Bill (Cm 8495) (2012) s. 1(3).

<sup>45</sup> *Cain v D.P.P.* (n. 19).

## CASE NOTES

*The address for submission of case notes is given at the beginning of this issue.*

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### **KEY2 LAW (SURREY) LLP V DE'ANTIQUIS & ANOTHER: A RETURN TO CERTAINTY, BUT AT WHAT COST?**

*Key2 Law (Surrey) LLP v Gaynor De'Antiquis (Secretary of State for Business, Innovation and Skills intervening) [2011] EWCA Civ 1567*

(Lord Justice Rimer, Lord Justice Longmore and Mr Justice Warren)

#### THE FACTS

On 21 July 2008, the Claimant and others were made redundant from the firm of solicitors where they worked ("DK"). On 25 July, DK went into administration and on 28 July, the administrators entered into a management agreement with another firm of solicitors, Key2 Law (Surrey) LLP, ("Key2"), for the management of two of DK's offices.

The Claimant brought a claim against Key2 on the basis that Key2 was liable for unfair dismissal and sex discrimination under regulations 7 and 4 of the *Transfer of Undertakings (Protection of Employment) Regulations 2006* ("TUPE"). Key2 submitted that as, DK was in administration, regulations 4 and 7 were disapplied by regulation 8(7) of TUPE as DK was "subject to... analogous insolvency proceedings... instituted with a view to the liquidation of [its] assets".

In a reserved judgment, the Employment Tribunal ("ET") held that, for the purpose of TUPE there was a transfer to Key2 of part of DK's undertaking and a change in service provision. The ET judge held that regulations 4 and 7 of TUPE had not been disapplied by regulation 8(7). In reaching this conclusion, the ET judge applied the guidance of the Employment Appeal Tribunal ("EAT") in *Oakland v Wellswood (Yorkshire) Ltd* [2009] IRLR 250. This guidance required a fact based enquiry to determine whether or not DK was subject to insolvency proceedings with a view to liquidation and the judge concluded that DK was not.

Key2 appealed to the EAT. The EAT considered that the issue before them was whether administration proceedings under *Schedule B1 Insolvency Act 1986* constituted "insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor" within the meaning of regulation 8(7) and concluded that they could not. The EAT rejected the ET's fact-based approach to the question as being inappropriate and applied what it called an "absolute" approach and so dismissed Key2's appeal. On this analysis, the EAT did not need to consider Key2's challenge to the ET's findings of fact.

Key2 was given permission to appeal to the Court of Appeal on the grounds that, as TUPE gave domestic effect to the *EC Council Directive 2001/23/EC* (the "Directive"), the case raised an important issue.

Key2 submitted that: (i) the EAT was wrong to hold that administration proceedings cannot be “analogous insolvency proceedings” within the meaning of regulation 8(7); (ii) the ET had been correct to follow a fact-based inquiry; and (iii) the ET had made a perverse finding of facts.

The main issue before the Court of Appeal was, therefore, whether the Directive applied to administration.

## DECISION

The Court of Appeal unanimously dismissed the appeal.

Rimer LJ held that, bearing in mind that the first objective of administration under para 3 of Schedule B1 to the *Insolvency Act 1986* is to rescue the company as a going concern, it was not possible rationally to conclude that the appointment of an administrator was made with a view to the liquidation of the transferor company’s assets.

The EAT’s absolute approach had been correct.

## CASE COMMENT

It is now clear that if a company goes into administration, the rights of its employees cannot be disregarded under regulation 8(7) TUPE where the company’s business is transferred. Regulation 8(7) determines the circumstances in which employee rights can be ignored on the transferor company’s insolvency. It applies to insolvency proceedings that are “analogous to bankruptcy” and “instituted with a view to the liquidation of the assets” of the transferring company.

Lord Justice Rimer spent some time in his judgment considering what was intended by the use of the word “bankruptcy” in regulation 8(7), only to observe that doing so was “probably substantially pointless” as the real issue was how to interpret article 5.1 of *EC Directive 2001/23*.

He considered that a purposive rather than a semantic approach was necessary and concluded that it was clear that the term “bankruptcy proceedings” under article 5.1 was intended to include the insolvent liquidations of corporate transferors. Only in such cases was it appropriate for the protection of the interests of employees to be “sacrificed to the superior commercial interests of the transferor’s creditors” (para 85).

It was clear from EU case law that the rights of employees had been upheld in a number of cases where the corporate entity did not go into insolvent liquidation, but into some other form of insolvency proceeding (for example, the Dutch SvB procedure in the *Abels* case: Case C-135/83 [1985] ECR 469). In these cases, the court had looked at the “purpose of the procedure in question” (*d’Urso*: Case C-362/89 [1991] ECR I-4105 at para 26). As Rimer LJ put it, the focus was on the “object” of the procedure.

This then led to a discussion as to whether the object of the procedure could be determined as a question of fact, or whether, with regard to administration, there was an absolute position: i.e. it either was or was not analogous to bankruptcy.

Rimer LJ concluded that when trying to determine whether administration proceedings were “analogous” to bankruptcy proceedings it was “unsatisfactory in principle” and “wrong” to identify the purpose of the appointment of administrators by reference to pre-appointment considerations as to the objectives to be achieved.

In reality, an administration order is made “with a view to” an administrator implementing para 3 of Schedule B1 to the Insolvency Act 1986. In the hierarchy of objectives, rescuing the company as a going concern is the first. This objective may or may not be achieved in fact, but must mean that the appointment is not made “with a view to the liquidation” of the transferor’s assets.

## A THEORETICAL PERSPECTIVE

The Court of Appeal’s decision in *Key2* provides an opportunity to analyse the tension that exists between the business rescue goals of insolvency law and the employment protection goals of employment legislation such as TUPE in the context of corporate insolvency. In theoretical terms, the tension may be seen as mirroring the fault line that lies between the two main camps of insolvency theorists who are often referred to in the literature as ‘Proceduralists’ and ‘Traditionalists’.<sup>1</sup> The main ideological difference between the Proceduralists and the Traditionalists concerns the substantive goal of insolvency law and, in particular, whether insolvency law be used to promote the interests of stakeholders other than the creditors?<sup>2</sup> Granted, both the Proceduralists and the Traditionalists agree that preserving the value of an insolvent business is a key goal of insolvency law, but for the Proceduralists (who are mostly of the law and economics school of thought), insolvency is nothing other than a procedural means for facilitating the distribution the debtor’s assets based on non-bankruptcy entitlements, and in an economically efficient manner.<sup>3</sup> This group of scholars tends to push for ‘an efficient bankruptcy statute and crystalline statutory drafting’.<sup>4</sup>

At the other end of the ideological spectrum, the Traditionalists ‘eschew economic methods in favour of broader conception of fairness and statutory mud’<sup>5</sup>. Traditionalists not only support rules aimed at enhancing and allocating the insolvent corporate debtor’s value among existing rights holders (i.e. secured creditors), but also approve of some rules that are better able to protect other classes of creditors and non-creditor groups (such as the employees)<sup>6</sup>. These groups are likely to have been impacted negatively by the corporate debtor’s insolvency even though they may not be entitled to any of the debtor’s value under normal collection or priority rules.<sup>7</sup>

From the opposing ideological standpoints of these two camps, it is safe to conclude that the Proceduralists are creditors’ rights primacy theorists<sup>8</sup> while the Traditionalists

<sup>1</sup> Douglas G Baird, ‘Bankruptcy’s Uncontested Axioms’ (1998) 108 Yale L J 573, 576. See also Janger (n 39) 559, 566; Ziad Raymond Azar, ‘Bankruptcy Policy, Legal Heritage, and Financial Development: An Agenda for Further Research’ (2008) 24 (2) Emory Bankr. Devs. Journal 382 – 466. Charles W Mooney, Jr., ‘A Normative Theory of Bankruptcy Law: Bankruptcy as (Is) Civil Procedure’ (2004) 61 Wash & Lee L Rev. 931.

<sup>2</sup> See generally, Elizabeth Warren, ‘Bankruptcy Policy’ (1987) 54 U. Chi. L Rev. 775; Elizabeth Warren & Jay Lawrence Westbrook, ‘Searching for Reorganisation Realities’ (1994) 72 Wash. ULQ 1253.

<sup>3</sup> C W Mooney, Jr., ‘A Normative Theory of Bankruptcy Law: Bankruptcy Law As (Is) Civil Procedure’ 61 Wash. & Lee L. Rev. 931 (2004), available online at <http://scholarlycommons.law.wlu.edu/wlulr/vol61/iiss3/2> accessed 20 October 2012.

<sup>4</sup> Janger (n 39) 562.

<sup>5</sup> Janger (n 39) 562.

<sup>6</sup> See e.g. Elizabeth Warren, Bankruptcy Policymaking in an Imperfect World (1993) 92 Mich. L Rev 336; Karen Gross, ‘Taking Community Interests Into Account in Bankruptcy An Essay’ (1994) 72 Wash. U.L.Q. 1031; Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (New Haven, CT: YUP, 1997). For a critique on the use of insolvency for expansive goals, see e.g. C W Frost, ‘Bankruptcy Redistributive Policies and the Limit of the Judicial Process,’ (1995) 74 N C L Rev. 75, 80.

<sup>7</sup> See e.g. Karen Gross, ‘Taking Community Interests into Account in Bankruptcy An Essay’ (1994) 72 Wash. U.L.Q. 1031; Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (New Haven, CT: YUP, 1997); Donald R Korobkin, ‘Rehabilitating Values: A Jurisprudence of Bankruptcy’ (1991) 91 Colum. L. Rev. 717; Elizabeth Warren, ‘Bankruptcy Policy’ (1987) 54 Uni. Chi. L Rev. 775, 800; Warren, ‘Bankruptcy Policymaking in an Imperfect World’ (1993) 92 Mich. L Rev. 336–387.

<sup>8</sup> See e.g. Thomas H Jackson, ‘Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors’ Bargain,’ (1982) 91 Yale Law Journal 857, 860; *The Logic and Limits of Bankruptcy Law* (HUP, Cambridge, MA 1986); Douglas G Baird & T H

may be characterised as stakeholders' primacy theorists. These ideological positions have implications for all stakeholders in insolvency and especially for the creditors and the employees of insolvent companies. This is because these positions, apart from reflecting the inclusive and exclusive views of the scholars who belong to these two distinct ideological camps, also provide a useful lens through which to critically analyse all forms of legislative protection<sup>9</sup> given to those potentially affected by insolvency or to the values held by them in that context.<sup>10</sup>

Thus, the Proceduralists may not support a law that guarantees employees continuity of their contracts of employment following the transfer an insolvent company's business to a purchaser. Their reasoning would be as follows: a prospective purchaser would be unwilling to pay the asking price for the business if it included employee costs and so would seek a discounted sale. But a discounted sale would prevent the insolvent company's creditors – who, in an insolvency are the legal owners of the debtor's assets<sup>11</sup> – to capture the full going concern value of the business. For the Proceduralists, the "fact based" approach taken by the ET in *Key2* would have been preferred.

On the other hand, the Traditionalists advocate having a just and equitable disposition for those whose economic interests would, in different ways, be affected by insolvency.<sup>12</sup> In addition to accepting that secured creditors should be given their legal entitlements in insolvency situations, the Traditionalists would not want to overlook the interests of other stakeholders. Consequently, these theorists would insist on having a mechanism capable of ensuring that the interests of non-creditor stakeholders (such as employees) are accorded equal weight to the interests of secured creditors. Thus Traditionalists would support the "going concern" transfer of an insolvent company's business because it would preserve jobs for its employees. For this camp, the Court of Appeal's decision would be considered to be the correct one.

## CONCLUSION

The Court of Appeal has finally put to rest several years of legal uncertainty following the conflicting decisions of *Oakland* and *OTG*. From a theoretical perspective and in relation to the tension between business rescue and employment protection during going concern transfers of insolvent undertakings, it could be argued that employment protection is, based on this decision, the victor. The Court of Appeal's decision in *Key2* operates to deter less scrupulous transferors and transferees who may have been tempted to use a pre-pack administration to avoid employment liabilities and then to

Jackson, 'Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 U Chicago L. Rev. 97; T H Jackson & R Scott, 'On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain' (1989) 75 Virginia L. Rev. 155; Douglas G Baird, 'Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren' (1987) 54 Uni. Chi. L Rev. 815; Douglas G Baird, 'A World without Bankruptcy' (1987) 50 Law & Contemp. Probs. 173.

<sup>9</sup> Helen Anderson, 'Theory and Reality in Insolvency Law: Some Contradictions in Australia' (2009) 27 Company and Securities Law Journal 506–523 <http://www.clta.edu.au/professional/papers/conference2009/AndersonCLTA09.pdf> accessed 10 March 2012.

<sup>10</sup> Elizabeth Warren, Bankruptcy Policymaking in an Imperfect World (1993) 92 Mich. L Rev 336; Donald R Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Colum. L. Rev. 717.

<sup>11</sup> Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (HUP, Cambridge, MA 1986); D G Baird & T H Jackson, 'Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 U Chicago L. Rev. 97.

<sup>12</sup> Donald R Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Colum. L. Rev. 717; E Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92 Mich. L Rev. 336–387; R J Mokal, 'The Authentic Consent Model: Contractarianism, Creditors' Bargain, and Corporate Liquidation' (2001) 21 Legal Studies, 400; Rizwaan J Mokal, *Corporate Insolvency Law: Theory and Application* (OUP, Oxford 2005).

re-emerge under a phoenix company. However, the triumph of employment protection could be the bane business rescue. Whilst employees will now be protected from transfer-related dismissals there is no doubt that, in the current economic climate, adding employee liabilities to the cost of buying insolvent companies will act as a significant disincentive to those engaged in rescuing failing businesses.

Thus, the CA's decision in *Key2* will, arguably, make businesses in administration less attractive to potential purchasers and may result in otherwise viable businesses not being rescued.<sup>13</sup> The employees may be the winners following this decision but ultimately the effect of this decision will be most felt by the employees themselves in, for example, situations where the seller is unable to find a buyer for its insolvent business and this leads to closure of the business and results in job losses. Accordingly, the court may need to have a rethink about the adoption of the 'absolute-approach' since a 'fact-based' approach in spite of what may be its perceived shortcomings<sup>14</sup> has greater potential of yielding high percentages of business rescues and job preservation in comparison to the 'absolute-approach'.

It seems that certainty is finally assured: although *Key2 Law Surrey LLP* was given leave to appeal to the Supreme Court in May 2012, at the time of writing, it is understood that the appeal will not proceed<sup>15</sup>.

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PAULA MOFFATT\*\*

<sup>13</sup> It is pertinent to note however that there are other measures to incentivise purchases of insolvent businesses. The burdens assumed by potential purchasers of such businesses are lessened by Regulation 8 (5) and Regulation 9 of TUPE 2006. According to Regulation 8(5), in relevant insolvency proceedings, Regulation 4 (which requires contracts of employment and all of the transferor's rights, powers, duties and liabilities to automatically transfer to the transferee following a business transfer) shall not operate to transfer liability for the sums payable to affected employees under the relevant statutory schemes. Under Regulation 9, when a transferor is involved in relevant insolvency proceedings 'permitted variations' of contract terms can be agreed by either the transferor or transferee (or an insolvency practitioner) and the representatives of the employees.

<sup>14</sup> Granted, the 'fact based' approach is capable of increasing the likelihood of disputes over who would be liable for the transferor's obligation, and could result in costs, delay and uncertainty.

<sup>15</sup> <http://www.gateleyuk.com/news-and-events/news/item/administrations-and-the-impact-of-tupe/> accessed 5 February 2013.

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## LEGISLATION AND COMMENT

### REFORM TO THE UK COMPANY REGISTRATION OF CHARGES SCHEME

*The Companies Act 2006 (amendment of Part 25) Regulations 2013 (SI 2013/600)*

#### INTRODUCTION

The recent reforms to modernise the corporate security registration system significantly strengthen the law relating to corporate security. Following a series of government consultations aimed at streamlining the process, the procedure for registering security at Companies House has changed since 6 April 2013 for charges created on or after that date. The *Companies Act 2006 (amendment of Part 25) Regulations 2013* updates and improves the security registration system, the rules of which are decades old. The new regime aims to enhance the registration of security created by companies and limited liability partnerships (LLPs) in several ways. Firstly, by decreasing the cost to publicly record the required information via the creation of a modern electronic filing system. Secondly, by reducing uncertainty as to which charges must be registered. Thirdly, by introducing a single scheme for all UK-registered companies. Fourthly, by upgrading the quality of information available about the security. Finally, to improve public access to information about and the ability to search the registered security instruments that create the companies' charges. These are important developments for those who grant or take new security over corporate assets.

#### COMMENTARY ON THE REFORMS TO SECURITY REGISTRATON

In the UK, the term 'charge' is used to describe a loan security (a form of collateral). A charge is a property interest in some or all of the assets of the company created to secure a loan to the company or to secure some other right against the company.<sup>1</sup> Typically, charges are classified into fixed<sup>2</sup> and floating<sup>3</sup> charges, an important factor in relation to the requirement to register. Previously, section 860(1) of the *Companies Act 2006* set out that particulars of certain fixed and *all* floating charges created by a company, together with the instrument, if any, creating them, had to be delivered to the registrar within 21 days after creation (s870). This meant that if a type of charge was not included on the list it did not need to be registered. Now, instead of setting out a prescribed list of registrable charges, the new legislation assumes that all security (including under the law of Scotland) must be registered, subject to the list of exceptions. In other words, all charges must be registered, other than those listed in the regulations. This is a much clearer and certain position in terms of the legal requirement to register security. While statutory duty to register a charge lies with the

<sup>1</sup> McLaughlin, S. *Unlocking Company Law* (2013) Routledge, London, 2013.

<sup>2</sup> Generally, a fixed charge is a property interest in specific property preventing the owner from selling or otherwise dealing with the property without first either paying back the sum secured against it or securing the permission of the charge holder.

<sup>3</sup> The floating charge was invented by Victorian lawyers to enable manufacturing and trading companies to raise loan capital on debentures. It could offer the security of a charge over the whole of the company's undertaking without inhibiting its ability to trade, per Lord Hoffmann in *Re Brightlife* [1987] Ch 200.

company and its officers, lenders are also entitled to register to ensure that the priority of the charge is not forfeited. The Company Registrar's determination to issue a certificate of registration is not able to be judicially reviewed.<sup>4</sup> Further, the old requirement for every company to internally manage such charges by keeping a register of charges available for inspection has been abolished.

A key change that has come into force is that it is no longer a criminal offence to fail to register a charge, although civil consequences will still apply in that an unregistered registrable charge is void against the liquidator and any other creditor (note that the loan itself is not void). This change indicates a more *laissez faire* attitude to security registration.

Importantly, the separate regimes for Scottish and English companies have been removed resulting in the creation of a single UK-wide scheme irrespective of the place of incorporation of the company within the UK.<sup>5</sup> Previously, there were two schemes: one for England and Wales companies and another for companies registered in Scotland.

In terms of enhancing accessibility and reducing costs, for the first time, corporate charges may be registered electronically (although the paper system by post will also continue to operate) with an online filing charge of £10 compared to £13 for paper registration. The new form MR01 replaced the previous MG01 and although they are largely similar applications the new version will require a short statement of particulars for land, ship, aircraft and intellectual property. There will be separate forms for registering charges created by an instrument and those where there is no instrument. To file electronically, lenders (or other third parties who present the particulars for registration) will have to apply for a 'lender authentication code'. Companies will use their 'company authentication code'. The Registrar issues a certificate of registration which is irrefutable evidence that the requirements of the Act as to registration have been met (s896(6)) and each charge will be allocated a 12 digit Unique Reference Code to be included on the certificate.

However, a substantial change to the registration system relates to the requirement that a certified copy of the charge document (if one exists) be lodged. The document will then be uploaded to the Companies House website and form part of the public record, thereby enhancing transparency to assist to determine priority of charges. Crucially, members of the public will be able to obtain copies of these documents. The requirement to provide access to the security document (if one exists) outweighs concerns relating to disclosure of commercially sensitive information, even including commercial terms. However, certain confidential information may be obscured in the recorded documentation, namely, an individual's personal information (not their name); bank account numbers and other identifiers as well as signatures. The strict 21 day requirement to file corporate charges remains unchanged.

A particularly progressive impact of the new regime is that carrying out due diligence on a company or LLP's<sup>6</sup> corporate charges by searching the register will be easier and more transparent for charges registered after 6 April 2013. This will obviate the need to contact the company or its lenders directly for particulars and have the knock on effect of reducing lending transaction costs. A full regulatory impact assessment of the effect that these new Regulations will have on the costs to business is available from

<sup>4</sup> *R v Registrar of Companies, ex parte Central Bank of India* [1986] QB 1114.

<sup>5</sup> Scots law does not recognise equitable charges and there were two different definitions of the period for delivery of the charges which created significant practical difficulties for a unified UK scheme.

<sup>6</sup> The Schedule applies with modifications for LLPs.

the Business Environment Directorate of the Department for Business, Innovation and Skills.<sup>7</sup>

Overall, the reforms mean a higher level of transparency and information will be available for registered security interests. This is a positive development in the present financial environment as third parties such as lenders, investors and buyers who deal with companies and LLPs should have: (1) more confidence in the information they can access regarding security taken over assets; (2) their financial position; and (3) the order of priority between security interests where a number of interests are registered against the same property. This is important in the event of bankruptcy or insolvency and will provide greater certainty for all stakeholders. The new legislation echoes reforms that have taken place in other common law countries such as Australia which implemented an electronic Personal Property Securities Register in 2009 where details of security interests in personal property can be registered and searched online.<sup>8</sup>

JANICE DENONCOURT\*

<sup>7</sup> See [www.bis.gov.uk](http://www.bis.gov.uk).

<sup>8</sup> See <http://www.ppsr.gov.au/Pages/ppsr.aspx> accessed on 9 April 2013.

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# THE LIFE AND WORK OF ELINOR OSTROM

*Graham Ferris\**

It is a shame that the law and economics movement is so strongly associated with one particular type of economics in the legal mind, at least on this side of the Atlantic. The economics is one that combines the hyper-rational economic agent with a deep distrust of the State and a fondness for models of free markets that tend towards a single efficient point of equilibrium. However, economics is a far broader church than this suggests. In the words of Diane Coyle:<sup>1</sup>

“...scholars working on the frontiers of economics have firmly put behind them the inward-looking reductionism which did indeed sometimes characterize the discipline in the past. Economics is enjoying a spectacularly fruitful period, in particular where it overlaps with other disciplines such as psychology, history, or anthropology.”

One economist whose work epitomised an economics that eschewed reductionism was Elinor Ostrom. She was the first woman to receive the Nobel Prize for economics. Her work was concerned with how people managed common resources. This subject is clearly of concern to property lawyers. After all the management of resources, and the ability to use resources to pursue individual or social ends, is the foundation of property law. The approach usually associated with law and economics to problems of common resources is the one taken by Scott, who takes the creation of private property rights to be paradigmatic.<sup>2</sup> The debate over common resources has been dominated, since it was launched by Hardin, by a binary opposition between public or private control; one or the other being posited as necessary to prevent despoliation of the resource. Ostrom refused to accept this binary choice, as it did not reflect the diversity of solutions that existed in the real world. She was interested in intermediary solutions, the management of a resource by the group that used the resource. The article by Alison Clarke explores the life and work of Elinor Ostrom below. Here I will attempt to explain why the work fits so well within the boundaries of “practical applied legal theory” and why as lawyers, whether interested in law and economics or not, it is a useful area for us to consider.

Ostrom’s work is marked by a very practical orientation as she rejected the reductionism of overly crude models and started out by engaging in a rich description of practical reality. Rather than forcing the diversity of response to commons management into the available “ideal” forms or concepts available she took the time to investigate and describe what was happening. It was the success of self-organisation that caught her attention. In order to understand how it succeeded it was necessary to describe it without pre-conceptions as to which features were vital. In an example of “grounded theoretical” investigation before the term was current she investigated how resource users responded to the risk of a collapse of a common asset, threatened with short-term and self-interested over-use and exhaustion. One thing she found was that people were able to see the common action problem, and to think beyond short-term interest, and to invent institutional structures that safeguarded the common resource. In short a prisoner’s dilemma problem assumes the prisoners cannot talk to each other and co-ordinate their actions, and in real life that assumption belies what is a matter of conscious intelligence and the ability to organise collective action.

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<sup>1</sup> Diane Coyle, *The Soulful Science: What Economists Really Do and Why It Matters* (2007) Princeton: Princeton University Press pp. 3–4.

<sup>2</sup> Anthony Scott, *The Evolution of Resource Property Rights* (2008) Oxford: Oxford University Press.

The emphasis is also thoroughly applied. Ostrom was interested in description in order to identify factors that would allow such collective self-organisation to work. The institutions that allow the management of common resources for collective use can, and do, break down sometimes. Sometimes collective exploitation can continue for centuries. The purpose of a rich description was to discover when a collective management was likely to be possible, how it could be supported, and when an alternative response such as private rights or public management was necessary.

However, it might be doubted whether the work is legal theory, as formal courts and legislative apparatus are not prominent features of the self-organisation. If we allow the outward form of the matter, and indeed Ostrom's linguistic usage, to determine this issue then she was not interested in law. However, if we start from a more substantive appreciation, such as used by Llewellyn in his account of "law jobs" then she was certainly concerned with law jobs, and was producing a theory of when self-binding law can be effective.<sup>3</sup> Equally obvious, if we express the problem in these terms, we are concerned with issues that are recurrent problems in the areas of international and transnational law. It seems the work has resonance with legal theory in several ways. It is concerned with a central issue of property law. It is concerned with law jobs, not merely with resource management but monitoring, trouble cases, and enforcement. It is concerned with law type regulation (i.e. through rules and norms of conduct, "law type" to avoid arguing over definitions of law) in the absence of a single authority with a monopoly of force.

So, why is Ostrom's work not already familiar to us, and fully integrated into the legal curriculum? The answer, apart from the fact that there is a lot of useful work in the world and we cannot use all of it, probably lies in the levels of generality at which she worked. She managed to be both too general and too particular for the legal mind. Ostrom used quite general concepts (rather more abstract than we are used to) in order to illuminate very specific concrete cases (rather more specific than we are used to dealing with at the rule making level). So, we lawyers search for a form of rule that is general enough to function as a general guide that can be applied to myriad circumstances but specific enough for its limits to be clear and appropriate in order to avoid arbitrary interference with social life.<sup>4</sup> Ostrom tried to formulate her principles at a higher level of abstraction (a more formal level, that lacked the sort of clarity in range we value) in order to understand a specific instance (individual, not at this level representative of a generally occurring fact situation). She is involved in the same type of problems we are concerned with, but her levels of analysis are uncomfortable.

Happily Professor Clarke has written an article that facilitates our understanding of Elinor Ostrom in three ways. First, in terms of the problems and methods as understood by Ostrom herself, an explanatory exposition of her successes in developing analytical structure and methodological practice. Second, in terms we can understand as lawyers, starting the process of synthesis that will allow us to use the work for our purposes. Finally, in terms of a life led by a woman who refused to live down to the expectations of a sexist academic and social world, for as Fiona Cownie has reminded us, the female Professor is a shockingly recent phenomenon.<sup>5</sup>

<sup>3</sup> Karl Llewellyn *The Normative, the Legal and the Law Jobs: The Problem of Juristic Method* (1940) 49 *Yale Law Journal* sets out the theory, however, it is far better expressed and illustrated in KN Llewellyn and E Adamson Hoebel *The Cheyenne Way* (1941) reprinted (1973) Norman: University of Oklahoma Press.

<sup>4</sup> Fuller was aware of the importance, and difficulty in identifying or expressing, of the right level of generality for legal rules see: Lon L. Fuller, *The Morality of Law* (1969) New Haven: Yale University Press, pp. 46-49.

<sup>5</sup> Cownie, F. *Early Women Law Professors: are they of any interest?* Legal Education Section, SLS Conference Bristol 11-14 September 2012.

# HOW PROPERTY WORKS: THE COMPLEX WORLD VIEW

*Alison Clarke\**

## INTRODUCTION

2013 is a good time for UK property lawyers to celebrate the life and work of Elinor Ostrom. During the last decades of her life – she died on 12 June 2012, aged 78 – she was responsible for a radical change in the thinking about the nature and effect of property rights, a change which has had, and is having, a direct impact on the lives of millions of people across the world. Her major achievement was to open our eyes to the variety and complexity of workable property relationships. When her seminal work, *Governing the Commons: the Evolution of Institutions for Collective Action*<sup>1</sup> was published in 1990, the conventional wisdom (on which national and international development and environmental protection policies were then largely based) was that efficient and sustainable use of land and other resources can be achieved only through private ownership and/or state control. Ostrom argued, and went on to demonstrate, that this was simply wrong. Specifically, she pointed out that, given the right conditions, communities can and do organise themselves to take collective control over land and other resources at their disposal. Moreover, when they do so, the rules they evolve for regulating their collective use are likely to result in a better use of those resources than regulations devised and imposed on them by external agencies. In other words, in some situations communal property is a viable alternative to private or state ownership, and sometimes it works better than either. Ostrom was one of the first people to put forward this hypothesis in the mid-1980s. Her major contribution was to spend the rest of her life devising and deploying ways of demonstrating its truth, building on her earlier work on institutional analysis, and utilising a formidable combination of field and laboratory studies, multidisciplinary approaches and abstract analysis. Crucially, she was able not only to demonstrate *that* communities can successfully self-organise their use of local resources, but also to develop principles for identifying the conditions under which they *will*.

Ostrom was not a lawyer, and the questions about property she pursued in her work were not generally framed as legal questions. Nevertheless, her work has profound implications for property lawyers.

## BIOGRAPHY

Elinor Ostrom, the first (and, so far still the only) woman to be awarded the Nobel Prize in Economic Sciences, had a remarkable academic career. She was Distinguished Professor and Arthur F Bentley Professor of Political Science at Indiana University, co-director of Indiana University's Workshop in Political Theory and Policy Analysis (which she founded in 1973 with her husband, the political scientist Vincent Ostrom), and one of the founders of the International Association for the Study of the Commons. She was elected to the US National Academy of Sciences in 2001 and

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<sup>1</sup> Elinor Ostrom, *Governing the Commons: the Evolution of Institutions for Collective Action* (Cambridge University Press 1990).

awarded the John J. Carty Award for the Advancement of Science by the National Academy of Sciences in 2004 and the Nobel Prize for Economic Sciences in 2006.<sup>2</sup> She was also the first woman to chair the political science department at Indiana University, and the first woman to be elected president of the American Political Science Association. However, as she herself said, soon after winning the Nobel Prize,

To an outside observer, my career may look rather successful at the current time. Has it always been this way? To be honest, the answer is no.<sup>3</sup>

She was born in 1933 in California and grew up in the Depression, a child of divorced parents. As “a poor kid in a rich kid’s school” in Beverly Hills, she decided to go to College because that was what 90% of the students at her school did, so it seemed to her the “normal” thing to do, even though no-one in her immediate family was educated beyond high school level. She took various jobs to pay her way through an undergraduate degree at the University of California Los Angeles (her mother considered college “a useless investment” and “saw no reason to support me during my college years since she had been supported only through high school”). She majored in political science, married a fellow student, and after graduating they moved to Cambridge, Massachusetts, where she looked for a job to support her husband whilst he attended Harvard Law School. The first question she was asked at every job interview she attended was whether she had shorthand and typing, and when she was finally taken on by a firm in Boston as Assistant Personnel Manager she was the first woman they had ever hired for a position above secretary. Three years later when her marriage had broken up she moved back to UCLA, but not as an academic: she was employed by the University to work in the personnel office. Once there she enrolled for graduate seminars on a part-time basis and, after great difficulties, gained admission to a PhD programme and the award of an assistantship to enable her to study full-time. She had wanted to do her PhD in economics but was discouraged from applying because she was thought to have insufficient mathematics (a result of poor earlier career advice, she said). She was eventually admitted to the PhD programme in political science, but only after stern warnings from the graduate advisor:

He strongly discouraged me from thinking about a doctorate, given that I already had a very good “professional” position. He indicated that [being a woman] the “best” I could do with a PhD was to teach at some city college with a very heavy teaching load.

Nevertheless, she and three other women were taken on as PhD students and given assistantships in the political science department in that year, after 40 years without a woman on the faculty or as a PhD student. This decision was said to have attracted strong criticism within the Faculty. As she was told later:

Some faculty members were concerned that allocating four out of 40 assistantships to women was a waste of departmental resources. They feared that none of

<sup>2</sup> The Nobel Prize was awarded to her “for her analysis of economic governance, especially the commons”. Her contribution to the field of economic governance was stated to be that she “Challenged the conventional wisdom by demonstrating how local property can be successfully managed by local commons without any regulation by central authorities or privatization”. The prize was divided equally between her and the economist Oliver E. Williamson, the latter “for his analysis of economic governance, especially the boundaries of the firm”.

<sup>3</sup> Elinor Ostrom, ‘A Long Polycentric Journey’ (2010) 13 Annual Review of Political Science 1. The information in this paragraph is taken from this autobiographical essay and from the autobiographical note which appears appended to her entry in the Nobel Foundation website at <[http://www.nobelprize.org/nobel\\_prizes/economics/laureates/2009/ostrom.html](http://www.nobelprize.org/nobel_prizes/economics/laureates/2009/ostrom.html)> accessed 6 February 2013, also published in Karl Grandin (ed), *Les Prix Nobels 2009* (Nobel Foundation 2010).

us would obtain good academic positions, which would harm the department's reputation.

Nevertheless she immediately became actively and enthusiastically involved in what turned out to be momentous research activity in the department. Her doctoral research project was a case study of the organisation of the West Basin groundwater basin in Southern California, which lay under part of the city of Los Angeles and also under 11 other cities. Although neither she nor anyone else categorised it as such at the time, what she was studying was a classic example of what came to be called polycentric governance of a common pool resource.<sup>4</sup> Her research grew out of a graduate seminar exercise set by Vincent Ostrom,<sup>5</sup> who was then studying the institutional arrangements for managing groundwater basins facing growing populations and declining water levels, where no governmental or other organisation had the same physical boundaries as any of the groundwater basins.<sup>6</sup> The concept of polycentric systems had been formulated by Vincent Ostrom and Charles M. Tiebout<sup>7</sup> and it was to become central to Elinor Ostrom's analysis of what makes communal property work. A polycentric system is a system which can be said to exist where a diverse array of public and/or private centres of decision-making, who are formally independent of each other, nevertheless successfully engage in the provision of a public service or the management of a resource. In other words, they manage to function together as a "system".<sup>8</sup> The conventional view at that time was that where multiple government or other agencies are engaged in the provision of a service or the management of a resource without a clear hierarchy the result will be chaotic. The studies of water industry performance carried out by Victor Ostrom and his colleagues demonstrated that this was not inevitable, and that the agencies involved were capable of evolving their own strategies for co-operation and delivery of an effective service. This was precisely what Elinor Ostrom discovered in her doctoral study of the West Basin groundwater basin, where various agencies involved had recently decided to take action to reverse chronic and potentially fatal over-extraction and saltwater infusion. At that time there were more than 500 water producers drawing on the basin, ranging from small farmers with a single well to municipal water utilities serving large populations. Each of the relevant government bodies covered areas that were smaller or larger than the basin, and none had the authority to implement or enforce a solution to the basin's problems. Nevertheless, Ostrom found, the 500 water producers got together to form a private association, the West Basin Water Association, which was open to all water producers and which provided a forum for all the authorities and agencies involved to discuss the problems. Over time the Association was successful in devising and implementing a scheme for reducing water extraction which was acceptable to most of its members and effectively self-enforcing, and in developing and implementing an innovative water replenishment system tailored to the specific requirements of the geographic area. Ostrom described this evolved system as "not a perfect solution" but one that solved

<sup>4</sup> At the time she categorised it as a study in what she called public entrepreneurship: her PhD dissertation title was 'Public Entrepreneurship: A Case Study in Ground Water Basin Management'. For consideration of the notion of a common pool resource see Elinor Ostrom, 'Rudiments of a Theory of Common-Property Institutions' in Daniel W. Bromley (ed) *Making the Commons Work: Theory Practice and Policy* (Institute for Contemporary Studies Press 1992) 295–297.

<sup>5</sup> She commented that this was the first and last of his research seminars she ever attended, because, as she put it "we started to date and eventually married": Ostrom, 'A Long Polycentric Journey' (n 3) 4.

<sup>6</sup> Victor Ostrom, 'The political economy of water development' (1962) 52 *American Economic Review* 450.

<sup>7</sup> Victor Ostrom, Charles M. Tiebout and Robert Warren, 'The Organisation of Government in Metropolitan Areas: A Theoretical Enquiry' (1961) 55 *American Political Science Review* 831, 832.

<sup>8</sup> Elinor Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' 100 *American Economic Review* 641, 643 (a revised version of her Nobel Prize Lecture, available at <[http://www.nobelprize.org/nobel\\_prizes/economics/laureates/2009/ostrom-lecture.html](http://www.nobelprize.org/nobel_prizes/economics/laureates/2009/ostrom-lecture.html)> accessed 2 February 2013).

problems better than systems (or lack of them) operative in other water basins in the region. Subsequent follow-up studies conducted by her own doctoral students in 1992 and 2006 showed that the system in West Basin continued to work relatively effectively, surviving conflicts with an upstream neighbour and the predations of a corrupt public official.<sup>9</sup> So, Ostrom had identified, and studied the evolution and operation of, a workable polycentric system which enabled local users and the relevant authorities to work together to regulate the use and operation of a natural resource system. Moreover, she discovered from her fellow doctoral students who were studying other water basins in the region, that some of the other water basins failed to self-organise at all, and that of those that did, the systems they evolved varied in their effectiveness, but all were complex and each was unique, specifically tailored to its particular geographic, institutional and demographic context and to the particular mix of diverse interests of its users. All of these findings were consistent with, and can be seen to be laying the foundations for, Ostrom's later analysis of the workings of communal property systems. Her PhD work also set a pattern of interdisciplinary research and collaboration which was to feature strongly throughout the rest of her career: to form the committee to examine her PhD dissertation, UCLA had to call on faculty with expertise in engineering, sociology, economics and political science.<sup>10</sup>

Meanwhile, however, even after the successful completion of her PhD in 1965, Ostrom's academic career did not immediately take off. Vincent accepted a post at Indiana University and Elinor moved there with him but the University had nothing to offer her initially. She was given some temporary part-time teaching in the Political Science Department for a year, then when she agreed to take on the pastoral role of graduate advisor she was promoted from Visiting Assistant Professor to Assistant Professor. However, the graduate advisor role left little time for anything else: she was responsible for up to 90 students a year and, as she put it "Needless to say, I was not able to start an ambitious research programme in my early years as an Assistant Professor".<sup>11</sup> It was not until she gave up the role in 1969 that, at the age of 36, she was able to start a serious research career. This, as she noted, was not an unusual career pattern for a woman social scientist in the US in the 1960s and 1970s.<sup>12</sup>

## THE TRAGEDY OF THE COMMONS

As it happened, the start of Ostrom's post-doctoral research career coincided with the most significant event in the study of the commons in the twentieth century: the publication in 1968 of Garret Hardin's 'Tragedy of the Commons'.<sup>13</sup> In 'The Tragedy of the Commons' Hardin argued that once a resource becomes scarce, it will inevitably become overexploited to the point of destruction if it is left "open to all". The principal example he used to illustrate his thesis was a pasture ground used by herdsmen to graze their cattle. He argued that each herdsman would want to keep as many cattle as possible on the pasture land, and that such an arrangement could work for centuries whilst "tribal wars, poaching, and disease" kept the numbers below the carrying

<sup>9</sup> E. Ostrom, 'A Long Polycentric Journey' (n 3) 5-6.

<sup>10</sup> Interview of Elinor Ostrom by Margaret Levi, Professor of International Studies in the Department of Political Sciences at the University of Washington and editor of the Annual Review of Political Science on 13 May 2011 as part of the Annual Reviews Conversations series, available at <<http://www.annualreviews.org/userimages/ContentEditor/1326999553977/ElinorOstromTranscript.pdf>> accessed 5 February 2013.

<sup>11</sup> E. Ostrom, 'A Long Polycentric Journey' (n 3) 7.

<sup>12</sup> *Ibid.*

<sup>13</sup> Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.

capacity of the pasture.<sup>14</sup> However, once full capacity is reached “the inherent logic of the commons remorselessly generates tragedy”.<sup>15</sup> Each herdsman, as a rational being, seeks to maximise his gain<sup>16</sup> and calculates that, whilst he will be able to keep the whole of the profit to be made from raising and selling each extra animal he grazes on the pasture, he will have to bear only a fraction of the cost of the damage caused to the pasture by having to carry an additional animal: the total cost will be shared with all the other herdsmen. Each of the herdsmen comes to the same conclusion and, acting in their own rational self-interest, they each increase the number of cattle they graze on the pasture until it is irreversibly exhausted. Hardin famously concludes:

Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination towards which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.<sup>17</sup>

He argued that the same phenomenon threatens areas of outstanding natural beauty such as Yosemite Valley (there comes a point where there are so many visitors that their number destroys the qualities they came to enjoy) and inexorably leads rivers to be destroyed by pollution.<sup>18</sup> The main thrust of Hardin’s 1968 article is that the root of the problem lies in uncontrolled population growth (what he describes as the “intolerable . . . freedom to breed”) and the only real answer is compulsory birth control. However, he treats the resource examples he gives (the herdsmen, national park and river pollution examples) as analogous: the real problem is ‘the commons’, which allows freedom of access to all, and the only answer is the controlled access provided by private ownership or state regulation.<sup>19</sup>

Leaving aside the question of population control, it can be said that the only two things wrong with Hardin’s ‘Tragedy of the Commons’ analysis is that he misunderstands ‘the Commons’ and fails to explain the ‘Tragedy’. To take the second point first, Hardin uses the word ‘tragedy’ to describe an inevitable outcome, and his argument is that destruction of the resource is inevitable because it is in each herdsman’s rational self-interest to add another animal to graze on the pasture. But why is that so? Hardin’s explanation (that each individual’s gain exceeds that individual’s share of the loss) is not of itself sufficient. Rational self-interest takes long-term as well as a short-term gains and losses into account (even if not necessarily giving equal weight to each). At some not-too-distant point, the immediate gain to the herdsman from adding another animal to graze on the pasture will be outweighed by the loss the herdsman incurs when the pasture is exhausted by over-grazing and the herdsman loses all grazing for all her cattle. So, why does this not stop the herdsman from adding another animal? Hardin fails to provide an explanation. However, an explanation is provided by others.<sup>20</sup> The herdsman adds another animal even when she knows it will over-tax the pasture because she fears that, whether she does so or not, other herdsmen will add other animals for themselves, leading to exhaustion of the pasture anyway, and there is no way in which she can stop them or predict whether or not this is what they will

<sup>14</sup> *Ibid* 1244.

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

<sup>16</sup> All herdsmen – and indeed other actors – are male in Hardin’s account (perhaps not so surprising in 1968).

<sup>17</sup> Hardin, ‘Tragedy of the Commons’ (n 13) 1244.

<sup>18</sup> *Ibid* 1245.

<sup>19</sup> *Ibid* 1248.

<sup>20</sup> See for example Harold Demsetz, ‘Towards a Theory of Property Rights’ (1967) 57 *American Economic Review* 347, 354–357.

do. In other words, the herdsmen are in a Prisoner's Dilemma,<sup>21</sup> aware that by acting together they could gain more than by acting separately (they could preserve the self-regenerating pasture) but prevented by transaction costs and free-rider and hold-out problems from communicating and co-operating. This is more plausible, but as seen below, Ostrom and others have demonstrated that the conclusion is by no means inevitable: there is no 'tragedy'.

As to "the commons" Ostrom and many others have pointed out that if a 'commons' is "open to all" it is not a commons at all: it is what is often referred to as an open access resource, that is, a resource in which no-one has any property rights, and which consequently everyone is free to use. Such a resource is subject to no property regime at all. 'Commons' is more helpfully used to describe a resource which is owned, used or controlled by a limited group of people, with power (in law or in fact) to exclude outsiders. It is generally accepted that the 'Tragedy of the Commons' can threaten open access resources which are *in fact* open to all and which have become scarce.<sup>22</sup> This is because there are no institutions for devising and enforcing a system for regulating use: by definition, open access resources are subject to no property law systems. However, such institutions can easily be supplied, and the tragedy averted, by the imposition of *any* property law regime, provided the property rules within that regime regulate the use of the resource effectively. This can be done by reducing the resource to private ownership, to state ownership, to communal ownership or to a combination of all or any of them. The challenge, as Ostrom recognised, is to establish the kind of property regime best suited to the governance of that particular resource. What the best kind of property regime is, in relation to any particular resource, depends on a number of factors. Ostrom put it like this, when considering the governance of forests:

We found that it is possible for local users of a forest to self-organize and develop their own set of rules for managing a forest. Some groups try and fail while others succeed. Others start a system that collapses over time. The crucial and strong finding is that it is not impossible for resource users to self-organize, as Hardin earlier asserted and many scholars still believe.

Further, we found some government forests that operate well and are able to sustain forest conditions in good shape over time. We found some private forests that work well and also some co-managed forests. In other words, it is not the general type of forest governance that makes a difference but rather how a particular governance arrangement fits the local ecology, how the specific rules are developed and adapted over time, and whether users consider the system to be legitimate and equitable.<sup>23</sup>

So, the short answer to the tragedy of the (open access) commons is to subject the resource in question to property law rules. Whether, under those rules, property rights should be conferred on individuals, communities or the state is a separate question.<sup>24</sup>

<sup>21</sup> Daniel H. Cole and Peter Z. Grossman, 'Institutions Matter! Why the Herder Problem is not a Prisoner's Dilemma' (2008) available at <http://ssrn.com/abstract=1114541> provide a good explanation at 3–5.

<sup>22</sup> Different considerations apply to resources which are in law open access, but in practice used by defined groups: such groups seem to have the same likelihood of evolving self-enforcing norms of use as groups with formal communal property rights: Richard C Elickson, *Order Without Law: How Neighbours Settle Disputes* (Harvard University Press 1991).

<sup>23</sup> E. Ostrom, 'A Long Polycentric Journey' (n 3) 16–17. The point is made in more detail and by reference to specific case studies carried out by Ostrom and others, in Ostrom, 'Beyond Markets and States' (n 8) 658.

<sup>24</sup> An interesting parallel can be found in H.L.A.Hart's brief analysis of the "minimal form of the institution of property (though not necessarily individual property)" which he saw as an "indispensable" part of the minimal natural law content of law: H.L.A Hart, *The Concept of Law* (2nd ed. Clarendon Press 1994) 196–197.

## OSTROM'S COMMONS ANALYSIS

Ostrom's immediate response to the 'Tragedy of the Commons' was, essentially, to ask two questions. First, if it correctly describes the fate of (genuinely) communal property, how do we account for the undoubted existence of long-lasting robust self-governing communal property institutions? Secondly, assuming the answer to the first question is that the 'Tragedy of the Commons' is not the inevitable outcome when resources are communally used or controlled, how do we identify which communally used resources will be self-managed effectively and which will not?

As Ostrom pointed out, there has long been evidence of the existence of enduring communal property regimes. However, the evidence was discounted, largely for two reasons. The first was a consequence of the evolutionary theory of property rights. According to this theory, widely assumed to be correct in the middle of the twentieth century, property rights evolve lineally from a no-property state (open access) to an intermediate primitive form (communal property) which in its turn inevitably gives way to private property as modern market economies emerge, because private property promotes the most efficient use and development of resources.<sup>25</sup> In this view, surviving communal property regimes are either relics from the past, preserved out of sentiment,<sup>26</sup> or primitive property forms surviving because the society in which they operate is not yet sufficiently developed,<sup>27</sup> or because there has been some other market failure. However, this evolutionary theory is now largely discredited. It is historically inaccurate in respect of at least some countries (most notably, for present purposes, England and Wales<sup>28</sup>) and in respect of some resources (water is the best example<sup>29</sup>). It fails to explain how, even in market economies, some groups choose to utilise some of their resources communally and some under private ownership (historically the case in some Swiss alpine meadows<sup>30</sup>). It also fails to explain the emergence of new commons in established market economies such as Scotland, where the Land Reform (Scotland) Act 2003 introduced provisions which allow the transfer of large tracts of land from private ownership into the ownership of local communities.<sup>31</sup>

<sup>25</sup> The classic account of (and in support of) the theory is Demsetz, 'Towards a Theory of Property Rights' (n 20). Hardin assumes its truth in 'The Tragedy of the Commons' (n 13) 1248.

<sup>26</sup> This appears to have been the motive behind the enactment of the English Commons Registration Act 1965, which explains the failure (only partially remedied by the Commons Act 2006) to provide a legal framework for the governance and adaptation of pre-existing town and village greens and the emergence of new ones: Alison Clarke, 'Property Law: Re-establishing Diversity' in M. D. A. Freeman and A. D. E Lewis (eds) *Law and Opinion at the End of the Twentieth Century* 50 Current Legal Problem (Oxford University Press 1997) 123–137. See also Christopher P Rogers, Eleanor A. Staughton, Angus J. L. Winchester and Margherita Peraccini, *Contested Common Land: Environmental Governance Past and Present* (Earthscan 2011).

<sup>27</sup> Until comparatively recently this was assumed to be the case in developing countries, to be remedied by 'formalisation' (otherwise known as privatisation) of customary and indigenous communal property rights: D. W. Bromley, (2008) 'Formalising Property Relations in the Developing World: the Wrong Prescription for the Wrong Malady' (2008) 26 *Land Use Policy* 20 and Daniel Fitzpatrick, 'Evolution and Chaos in Property Rights Systems: the Third World Tragedy of Contested Access' (2006) 115 *Yale Law Journal* 996.

<sup>28</sup> Barry C. Field, 'The evolution of Property Rights' (1989) 42 *Kyklos* 319. See also more generally Stuart Banner, 'Transitions between Property Regimes' (2002) 31 *Journal of Legal Studies* 359 and Saul Levmore 'Two Stories about the Evolution of Property Rights' (2002) 31 *Journal of Legal Studies* 421.

<sup>29</sup> Carol M. Rose, 'Energy and Efficiency in the Realignment of Common Law Water Rights' (1990) 19 *Journal of Legal Studies* 261; see also Joshua Getzler, *A History of Water Rights at Common Law* (Oxford University Press 2004) and James Salzman, 'Thirst: A Short History of Drinking Water' (2006) 18 *Yale University Journal of Law and the Humanities* 94.

<sup>30</sup> Robert McC. Netting, 'Of Men and Meadows: Strategies of Alpine Land Use' (1972) 45 *Anthropological Quarterly* 45 and Glenn G. Stevenson, *Common Property Economics: A General Theory and Land Use Applications* (Cambridge University Press 1991), also a case study on Swiss Alpine meadows.

<sup>31</sup> Matthew Hoffmann, 'Why Community Ownership? Understanding Land Reform in Scotland' (2013) 31 *Land Use Policy* 289. Reference may also be made here to the emergence of new commons in China, as noted by Xu Ting, 'The End of the Urban-Rural Divide? Emerging Quasi-Commons in Rural China' (2010) 96 *Archiv fuer Rechts und Sozialphilosophie* 557.

The second reason why case studies of long-lasting communal property regimes were discounted until relatively recently is that they were simply unnoticed by theorists and public officials because they were so disparate. By the mid-1980s it was apparent that scholars from multiple disciplines had studied at least 1000 cases of communal resource use of diverse resources in many parts of the world.<sup>32</sup> However, as Ostrom pointed out:

Cumulation of the knowledge contained in these studies did not occur, due to the fact that the studies were written by scholars in diverse disciplines focusing on different types of resource located in many countries.<sup>33</sup>

To meet this problem a US National Research Council was set up, and Ostrom was invited to join its Committee on Common Property Institutions. An Institutional Analysis and Development Framework was developed to enable scholars from different disciplines to discuss their cases within a common framework, and over the next few years Ostrom was instrumental in setting up a Common-Pool Resource database using this framework. Analysis of this data produced at least preliminary answers to both of Ostrom's immediate questions. First, subsisting robust self-governing communal property institutions were not isolated anomalies. Sometimes communal resource users failed to develop workable resource use rules but since they also sometimes succeeded, the argument that failure was inevitable (ie the Tragedy of the Commons) was simply untenable, at least in so far as it was said to apply to communal resource use as opposed to open access resources. Secondly, it was possible to identify common broad characteristics shared by many of the successes, and also those shared by many of the failures.

### OSTROM'S DESIGN PRINCIPLES

Ostrom denied any hope or expectation that it would be possible to draw up a blueprint or template for successful communal resource use. In particular, the analysis of the database confirmed what she had already learned from her West Basin doctoral research and subsequent fieldwork: the rules and systems that local users evolve to govern the resources they use in common are dictated by local conditions, and therefore are highly idiosyncratic. However, in *Governing the Commons* in 1990 she did produce what she described as "design principles illustrated by long-enduring common pool resource institutions."<sup>34</sup> She explained what she meant by 'design principle' and what they were intended to demonstrate:

By 'design principle' I mean an essential element or condition that helps to account for the success of these institutions in sustaining [the common pool resources] and gaining the compliance of generation after generation of appropriators [ie the local resource users] to the rules in use . . . For these design principles to constitute a credible explanation for the persistence of these [common pool resources] and their related institutions I need to show that they can affect incentives in such a way that [users] will be willing to commit themselves to conform to operational rules devised in such systems, to monitor

<sup>32</sup> Ostrom, 'A Long Polycentric Journey' (n 3) 14.

<sup>33</sup> Ostrom, 'Beyond Markets and States' (n 8) 417.

<sup>34</sup> Ostrom, *Governing the Commons* (n 1) 89–102.

each other's conformance, and to replicate the [common pool resource] institutions across generational boundaries."<sup>35</sup>

The eight design principles she produced have proved to be remarkably robust. They have been tested against the results of case studies subsequently entered on the database and found to be broadly accurate – in other words, on the whole, successful communal property institutions conformed to the design principles and ones that failed did not. In addition, in 2010 Cox *et al* surveyed 91 studies which had explicitly or implicitly evaluated the design principles with a view to recommending modifications. In the end they reproduced the principles with only minor reformulations.<sup>36</sup>

The principles as originally formulated can be summarised as follows:

1. "Clearly defined boundaries" – the boundaries of the resource itself are clearly defined, as are those who are entitled to make use of the resource.
2. "Congruence between appropriation and provision rules"- the detailed rules governing use of the resource must be matched to local needs and conditions.
3. "Collective-choice arrangements" – most individuals affected by the operational rules can participate in modifying them.
4. "Monitoring" – those responsible for auditing the state and condition of the resource must either be the users of the resource or must be accountable to them.
5. "Graduated sanctions" – users who violate operational rules should be subject to graduated and proportionate sanctions, and the sanctions must be imposed by other users or by officials accountable to the users, or by both.
6. "Conflict-resolution mechanisms" – rapid access to low-cost local arenas to resolve conflicts.
7. "Minimal recognition of rights to organise" – the rights of users to devise their own institutions and rules are not challenged by external governmental authorities.
8. "Nested enterprises" – in the case of resources which are part of larger systems, rules and activities are organised in multiple layers of nested enterprises.

The most striking feature of these principles for present purposes is the emphasis on genuine collectivity. Communal property regimes seem to work best when they are genuinely self-governing (principle 7), with all members of the community involved in the formation and enforcement of the rules (principles 3, 4 and 5) and having the collective freedom to vary the rules. This suggests that traditional hierarchical communal property institutions might be vulnerable once members start questioning the authority of traditional leaders, no longer trusting them to act in the interests of the community.<sup>37</sup> Trust is also behind the principle of member participation in monitoring compliance with the rules, as Ostrom repeatedly emphasised:

... multiple studies [of forest governance] have found that one of the most important factors affecting the likelihood of sustainability is whether the users themselves engage in day-to-day monitoring of activities in the forest ... The importance of user monitoring amazes some scholars. It is consistent, however,

<sup>35</sup> *Ibid* 90–91.

<sup>36</sup> M. Cox, G. Arnold and S. Villamayor Tomás, 'A Review of Design Principles for Community-based Natural Resource Management' (2010) 15 *Ecology and Society* 38.

<sup>37</sup> W. J. du Plessis, 'African Indigenous Land Rights in a Private Ownership Paradigm' (2011) 14 *Potchefstroom Electronic Law Journal* 45 available at <http://ssrn.com/paper=1995454>.

with our understanding from field and experimental studies that building trust that others are generally following agreed-upon rules is essential for sustaining rule conformance over time and sustaining the resource itself.<sup>38</sup>

Another aspect of collectivity is that rules must evolve from within the community: imposition of standard form rules by outside bodies appears to be fatal (principles 2 and 3). This is consistent with Ostrom's argument in 'Coping with Tragedies of the Common'<sup>39</sup> that national governments "have been notably unsuccessful in their efforts to design an effective and uniform set of rules to regulate important common pool resources across a broad domain" She attributes this to an underlying foundational belief on the part of policy makers

in the feasibility of designing optimal rules to govern and manage common-pool resources for a large domain utilizing top-down direction. Because common-pool resources are viewed as relatively homogeneous and interlinked, and because simple models exist of how they work, officials acting in the public interest are considered capable of devising uniform and effective rules [for their governance . . . and that] designing rules to change the incentives of participants is a relatively simple analytical task best done by objective analysts not intimately related to any specific resource. Analysts view most resources in a particular sector as relatively similar and sufficiently interrelated that they need to be governed by the same set of rules.<sup>40</sup>

This is perhaps the foundational belief behind English legislation prescribing standard form constitutions and governance rules for bodies such as commonhold associations, to govern residents' collective use and control of communal areas in commonhold residential developments.<sup>41</sup>

## COMPLEXITY IN THEORY AND PRACTICE

For property lawyers, perhaps the most important point to learn from Ostrom's analysis is the importance of complexity. She refers to the mid-twentieth century scholarly tendency to try to fit the world into simple models and to criticise the institutions that did not fit,<sup>42</sup> and sees this as gradually giving way to a fuller understanding of complex human systems.

Just three examples will suffice here. First, the simple world view required a false dichotomy to be made between 'private goods' and 'public goods'.<sup>43</sup> On this view private ownership is the natural form of property for private goods, because a private good has two characteristics: it is by its nature both excludable and rivalrous. A resource is excludable if it is possible for the person holding the resource to exclude others from it, and thus either to prevent others using/benefitting from it or to make sure that no-one uses/benefits from it without paying; it is rivalrous if one person's use of or benefit from it diminishes or limits the use or benefit available to others. Public

<sup>38</sup> Ostrom, 'A Long Polycentric Journey' (n 3) 16–17, and see also Elinor Ostrom, 'Building Trust to Solve Commons Dilemmas: Taking Small Steps to Test an Evolving Theory of Collective Action' in S.A. Levin (ed) *Games, Groups, and the Global Good* (Springer 2009).

<sup>39</sup> (1999) *Annual Review of Political Science* 493.

<sup>40</sup> *Ibid* 494 and 496.

<sup>41</sup> *Commonhold and Leasehold Reform Act 2002*.

<sup>42</sup> Ostrom, 'Beyond Markets and States' (n 8) 409.

<sup>43</sup> The classic formulation was by Paul A. Samuelson, 'The Pure Theory of Public Expenditure' (1954) 36 *Review of Economics and Statistics* 387.

goods, on the other hand, are neither excludable nor rivalrous (it is impossible or impracticable to exclude non-payers, and use/consumption by one person does not diminish the use/consumption available to others). Like private goods, public goods must be propertyised to avert the tragedy of the commons, but in the case of public goods private property is inappropriate, because – to put it crudely – there is nothing in it for the private owner. The state must take charge to ensure that such goods are provided and maintained, and that their use is properly regulated. In other words, public goods must be state owned.

However, as Ostrom and others have demonstrated, this two-fold classification of goods is simplistic:

This basic division was consistent with the dichotomy of the institutional world into private property exchanges in a market setting and government-owned property organized by a public hierarchy. The people of the world were viewed primarily as consumers or voters.<sup>44</sup>

In the complex real world the division breaks down. Rivalry of consumption is not an absolute, nor is excludability: some goods are more rivalrous than others and some have a greater degree of excludability than others. More importantly, the public/private division fails to take into account common pool resources like forests, water systems, fisheries and the atmosphere. These are all rivalrous like private goods but with a low level of excludability. Moreover, as noted above, the empirical evidence firmly establishes that such resources can be managed sustainably under private ownership, state ownership or communal ownership: it depends on the local conditions. The position is further complicated by the interactions between the types of owner and the nature of the property interests owned. So, ownership of user rights, the power to manage, the power to exclude, or the power to discipline: all of these property rights may be in different types of owners, some privately held, some held communally, some in public authorities. Furthermore, the neat analytical divisions between state, private, or communal property may be far more ambiguous in practice. For some purposes it may be more helpful to view them as existing along a spectrum, together with intermediate hybrid forms such as semi-commons and anti-commons.<sup>45</sup>

The second over-simplification concerns human behaviour. As already noted, empirical evidence has established that, faced with a threatened tragedy of the commons, resource users can and do co-operate to evolve rules to regulate their resource use. However, Ostrom and others go further and point out that it was an over-simplified and inappropriate model of human behaviour which led Hardin *et al* to assume that they would not be able to do so. The Prisoner's Dilemma is not the appropriate model because communal resource users have the opportunity for face-to-face communication, and it is wrong to assume that they are “norm-free maximisers of immediate gains who will not co-operate to overcome the commons dilemmas they face.”<sup>46</sup> A more persuasive model for use in this context is of humans as “fallible, boundedly rational and norm-using.”<sup>47</sup> It is this that accounts for the empirical findings that, as a matter of fact, communal resource users *do* co-operate and evolve self-regulating rules.

<sup>44</sup> Elinor Ostrom, ‘Beyond Markets and States’ (n 8) 642.

<sup>45</sup> Identified respectively by Henry Smith, ‘Governing the Tele-Semicommons’ (2005) 22 *Yale Journal on Regulation* 289 and Michael A. Heller, ‘The Tragedy of the Anticommons: Property in the Transition from Marx to Markets’ (1998) 111 *Harvard Law Review* 621.

<sup>46</sup> Ostrom, ‘Coping with Tragedies of the Commons’ (n 39).

<sup>47</sup> *Ibid* 11–12 where Ostrom develops the argument at length.

Finally, there is the complexity of property rights themselves. Economists taking the mid-twentieth century simple world-view also took a simple view of property rights, equating property rights with private ownership. This eliminates not only communal property but also the full range of private and communal proprietary use rights. As Ostrom says:

Property rights had been defined by many scholars as existing only when users had the right to sell (alienate) their harvesting rights to others . . . In this view, users who could not sell their rights to others, in effect, had no property rights. Instead, [we<sup>48</sup>] found that user rights of access, withdrawal, management, exclusion, and alienation were all important rights and were generally cumulative. It is not possible, for example, to exercise rights of withdrawal without rights of access. This led to a new conceptual terminology for analyzing bundles of rights within a hierarchy of possible rights. An authorized user only has rights of access and withdrawal. A claimant has these rights plus management rights. Proprietorship adds rights of exclusion. Ownership encompasses the full set of rights. . . Examples from the CPR database illustrated each bundle of rights and demonstrated that users did not need alienation rights in order to manage a resource sustainably.<sup>49</sup>

The taxonomy developed by Ostrom and outlined here may not precisely match the common law property rights taxonomy. However, it does reflect the complexity of real-world property relationships at least as well as the common law does. It also makes the important point that non-alienable property rights are as deserving of protection as alienable ones, and likely to be discounted if the focus is on private tradeable property rights. If it has also developed a vocabulary which can be used to identify property rights within different property rights systems across the world, that would be a significant step forward.

<sup>48</sup> Edella Schlager and Elinor Ostrom, 'Property-Rights Regimes and Natural Resources: A Conceptual Analysis' (1992) 68 *Land Economics* 249. See also Elinor Ostrom and Charlotte Hess, 'Private and Common Property Rights' (2007) available at <<http://ssrn.com/abstract=1304699>>.

<sup>49</sup> E. Ostrom, 'A Long Polycentric Journey' (n 3) 14.

## BOOK REVIEWS

*Book reviews and books for reviewing should be sent to the address given at the beginning of this issue*

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### CORPORATE LAW THEORY

*The Corporate Objective*, by ANDREW KEAY, United Kingdom, Edward Elgar, 2011, x + 346 pp, Hardback, £89.95, ISBN 978-1-84844-771-4

AND

*The Enlightened Shareholder Value Principle and Corporate Governance*, by ANDREW KEAY, United Kingdom, Routledge, 2012, viii + 303 pp, Hardback, £85.00, ISBN 978-0-415-68434-7

The days when corporate law scholarship was primarily characterised in the common perception by detailed doctrinal analysis of case law, the statutory regime and, where appropriate, of the complex interplay between them, if they ever truly existed (for the nature of corporate personality, at least, has consistently exercised the legal mind), have now long been consigned to history. This is not to suggest that such study is not of immense and continuing value but to acknowledge that corporate law is now very much concerned with theory and that this focus has in turn widened the nature of the subject so that the frame of legal debate may now be seen as incorporating scholarship from many disciplines. In particular, both economics and business ethics have provided the intellectual materials to enable legal scholars to craft corporate law theory whether of a contractarian or a stakeholder (or communitarian) variety. Furthermore, against the background of the fall of the Berlin Wall, decline of direct state involvement in industry and wider processes of globalisation such theory fell on fecund policy ground as states sought to develop comparative advantage for businesses incorporated in their jurisdiction.

In this context, the Company Law Review, instituted by the then Labour Government in 1998 in order to provide a thoroughgoing examination of the legal framework of corporate law in the United Kingdom, placed the theoretical understanding of the corporate purpose at the centre of its extensive deliberations. In essence, the argument was between the models offered by shareholder primacy and pluralism. In the former the directors were required to give priority to the interests of the shareholders when making business decisions, whereas in the latter the directors instead had to balance the interests of all relevant stakeholders (including e.g. employees, customers and even the community) in making such decisions. Despite the intellectual attraction of the pluralist approach the Company Law Review clearly rejected it on practical grounds (concerning both the nature of the duty and its enforcement) and recommended instead a variant of the traditional shareholder primacy model where the directors were nevertheless required to have regard to the

impact of their decisions in the light of a non-exhaustive list of factors which went beyond simply the direct shareholder interest. This approach was termed the enlightened shareholder value model and was subsequently adopted, in the form of section 172, as one of the central provisions of the new codification of directors' duties in the *Companies Act 2006*. The precise meaning and effect of this section is, however, one of the most hotly debated areas of contemporary corporate law.

It is in addressing key aspects of this central debate that Andrew Keay has emerged (his earlier academic roots being as an acknowledged specialist in insolvency law) as both a significant and a prolific commentator in the years following the enactment of the *Companies Act 2006*. The two books that form the subject matter of this brief review (both of which are derived in part from previous published works authored by Keay) provide a substantial contribution to the on-going contemporary academic and policy discussions that have arisen as a response to the fundamental question raised by the Company Law Review, namely, in whose interests should the company be run?

The earlier work, *The Corporate Objective*, is in many ways the most ambitious as it seeks to develop an alternative model, the Entity Maximisation and Sustainability model, to the theoretical approach adopted by the Company Law Review which centred on the notions of shareholder primacy and pluralism (or stakeholding). As might be expected given the ambitious nature of the project undertaken, the book is a substantial monograph. It is organised into eight substantive chapters and a short concluding epilogue. The first three chapters essentially seek to set the scene. Chapter one provides a guide to the structure of the book and indicates that it is seeking to develop a novel theoretical approach and that it will draw upon trans-disciplinary materials. It is made clear that the focus of the work is on the corporate objective and that issues such as corporate power, corporate social responsibility and the tensions running through corporate law due to the public/private divide, although obviously important, will not be examined.

Chapters two and three are concerned with a very extensive critical review of the literature underpinning shareholder primacy theory and stakeholder theory respectively. Keay is clear that this is a necessary foundation in order to understand his own theory in due course and that accordingly these two chapters are intended simply as a work of synthesis of the existing academic materials in the respective areas rather than to be seen as adding new insights. However, even on this premise and even for a reader familiar with the literature it is hard to be anything other than exceedingly impressed at the sheer volume of references encompassed in these chapters and the assiduous nature of the scholarship thereby displayed. In fact, somewhat ironically, and perhaps rather churlishly given the constraints of space in the book overall, for this reviewer the principal drawback of these chapters lay in the inevitable relative lack of development of some of the theoretical frameworks that were displayed, accompanied by a loss of the author's own voice at times under the sheer volume of material reported. However, putting aside this reviewer's unreasonable greed for more, the chapters are well structured and provide an excellent critical introduction to the principal enterprise.

Having so comprehensively set the scene, the meat of the book in terms of Keay's own distinctive contribution is to be found in chapters four and five. In chapter four Keay consciously, in a way reminiscent of Ayres and Braithwaite in their classic text *Responsive Regulation* (1992) where they seek to develop the concept of responsive regulation as a means of transcending the regulation or de-regulation debate in the sphere of business regulation, seeks to move beyond the traditional polarisation of corporate theory examined in chapters two and three by adopting a normative

argument in favour of what he terms an Entity Maximisation and Sustainability model (hereafter 'EMS model').

The basis of this approach is essentially to take the corporation seriously as a distinct entity in its own right and to focus the question of the corporate objective that management needs to pursue around the needs of the corporate entity itself in terms both of maximising its wealth (meaning not simply profits but 'the long-run market value of the company as a whole, taking into account the investment made by various people and groups' (p. 198)) and of sustaining the company as a going concern (p. 174–5). Whilst this may not seem *prima facie* revolutionary both the shareholder primacy model and the stakeholder model, as Keay notes, tend to downplay the theoretical role of the corporate entity (indeed, often to the point of invisibility for these purposes) and to focus on the interests of either the shareholders or stakeholders respectively. If instead all parties with an input into the company are to be viewed as investors who will benefit indirectly if the company does well then such a conflicted polarisation is in Keay's view avoidable, and furthermore directors will be free to take a long-term view of the best course of action for the enterprise rather than seeking to privilege the shareholder interest or balance the various stakeholder interests.

This theoretical approach draws upon a vein of realist thinking in company law that Keay elucidates to establish the importance of the company as an entity in itself. However, such approaches traditionally tend to be attached to seeking to govern the company in the public interest (which Keay expressly eschews) or to be addressing issues of organisational integrity and the precise conceptual links with the corporate theories set out in chapters two and three are perhaps not obvious. Equally, the criteria on which directors should make decisions under the new EMS model are not entirely clear (see p. 210). This is perhaps particularly the case in the context of takeovers where the on-going nature of the corporate business is the very issue that is presumably at stake and which therefore makes recourse to the interest of the corporate entity itself especially problematic in terms of being able to identify what that interest comprises. Also it would seem far from obvious that the long-term focus required for entity maximisation will not necessarily generate frequent tension with the short-term considerations at play in sustaining the corporate entity in the light of market vicissitudes and pressures.

Chapters five and seven constitute an important adjunct to the substantive aspect of the EMS model as they respectively examine the enforcement of the principle and the need to hold directors with such a wide discretion accountable. Keay is in no doubt that these are both vital issues and is inclined towards a relaxation of the current statutory derivative action both to allow all investors (as he defines the term) to maintain such an action and, as a logical corollary, to remove the existing shareholder right of ratification. However, despite Keay's extensive arguments to the contrary, it would also seem inevitable that the judiciary will have to assume an unaccustomed role under the EMS model (given their traditional approach of non-intervention in substantive business decisions) in that any derivative action will have to be brought to enforce the company's interest and this will involve the judiciary determining this matter as a core issue and not in the context of policing the bounds of directorial behaviour where there has been negligence or breach of a fiduciary duty (as admittedly is currently the case in derivative actions). Further investigations into some of the wider implications of the EMS model are set out in chapter six in relation to investors and chapter eight in respect of the allocation of corporate profit.

At first blush it would seem that EMS model thus does raise considerable difficulties (as might be expected from a novel approach) that would need far-reaching

adjustments to aspects of United Kingdom corporate law and that the EMS model also might not sufficiently acknowledge the fundamental conflicts underlying capitalist processes. Nevertheless, *The Corporate Objective* is a very stimulating and thought provoking book and the EMS model is an extremely interesting idea and doubtless one which Key will develop further over time.

The later work to be reviewed herein, *The Enlightened Shareholder Value Principle and Corporate Governance* is, as noted above, not as theoretically ambitious in its aims as the *Corporate Objective*. However, this is in no way to suggest that it does not have a very significant contribution to make to this field of corporate law. As is obvious from its title, the later work is focused around the enlightened shareholder value concept that is now a central component of United Kingdom corporate law by virtue of section 172 *Companies Act 2006*. As a substantial monograph the book is able to offer a comprehensive treatment of the subject and is composed of nine chapters. The first chapter acts as an introduction to the basic concepts (e.g. the company, corporate governance, the directors, and the stakeholders) and provides a clear structure for the following exposition.

Chapter two addresses the underlying theoretical issues and covers both shareholder primacy and stakeholder theory. Whilst this is obviously the area with most commonality with *The Corporate Objective* the account given in chapter two is fresh and to this reviewer's mind has a stronger and more integrated authorial viewpoint. Once again there is an impressive reference to the relevant literature (including reference to literature not available when *The Corporate Objective* was published) and pertinent policy issues such as short-termism. Interestingly, as well as a critical account of the two principal theories, Key also gives an analysis of the case law and literature examining the extent to which the shareholder primacy theory could be said in reality to have been represented in the common law. Given that the Company Law Review clearly endorsed the view that it was, it is helpful to have an account which is rather more equivocal and gives voice to academic commentators who take the view that the matter was far from clearly settled.

The core of the book is to be found in chapters three, four and five. Chapter three gives an excellent institutional account of the genesis of the enlightened shareholder value principle by reference to the different stages of the Company Law Review process itself, the subsequent Government White Papers, and finally the passage of the legislation through Parliament. Whilst coverage of the latter stage is perhaps a little less comprehensive, the overall account collecting the disparate materials in one place will surely be a very useful point of reference to any scholar interested in the field.

The stage is thus set for the two key substantive framing chapters in the work. Chapter four examines the meaning of section 172 *Companies Act 2006* in considerable detail and chapter five assesses the role of the Business Review required by section 417 of that Act in supporting the aims of section 172 (as well comparing it with the ill-fated Operating and Financial Review). As there is no case law of any substance as yet in relation to section 172 (excepting some brief references in the context of the derivative action) Key has perforce had to have recourse to the materials produced in the process outlined in chapter three and the previous common law cases. Nevertheless, Key is able to produce an extensive disquisition on the key concepts employed by the section, including in particular the meaning of 'good faith'; 'success'; 'long term'; and 'have regard to'. There is also a welcome section on the duty owed to creditors (though this is substantially developed in chapter seven) and the perennial difficulties surrounding enforcement given the tradition in the United Kingdom of both rational

shareholder apathy and also of judicial non-interventionism in reviewing substantive business decisions.

Such is the pace of development in the corporate governance field that chapter five is already in danger of becoming slightly outdated due to the present review of narrative reporting (though as might be expected from such an assiduous researcher Key has reference to the initial Government proposals in this respect) but this will not reduce the considerable value of the historical analysis of the genesis of the provisions and the reference to empirical studies assessing their impact. This drawing together of empirical studies is, in fact, also a key aspect of chapter seven which seeks to evaluate the legal and business impact of the enlightened shareholder value concept generally and specifically in the context of the problem of short-termism. Chapter eight (which also provides a useful review of the possible reception of the enlightened shareholder value idea in other jurisdictions, thereby complementing the discussion of constituency statutes in the USA contained in chapter six) and the epilogue contain a summing up of the position, and it is fair to say that, whilst conceding it is as yet far too early to make a definitive judgement, Key is clearly sceptical that the enlightened shareholder value concept offers sufficient guidance to alter significantly the traditional position. In short, Key is inclined to the position that section 172 has a largely educative function, but that it is in substance clearly not strongly stakeholder orientated (in part due to restricted enforcement rights) and, indeed, to the contrary arguably for the first time clearly embeds a shareholder primacy norm in United Kingdom corporate law (see p. 284).

To conclude, either of these books taken separately would represent a significant resource to scholars and advanced students of corporate law (whether formally situated in the legal discipline or not) in terms of the range of argument advanced and the multiplicity of sources presented. Taken together they represent a considerable academic achievement for which Key is to be congratulated warmly. Whilst it remains to be seen how section 172 is developed by the courts or otherwise has an impact on business and legal practice, and also how the theory of Entity Maximisation and Sustainability is received by the wider academy and further developed by its author, there can be no doubt that the two books which form the subject of this review are foundational to the contemporary debate and deserve a place on the bookshelf of all parties with an interest in corporate law and theory.

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## DEVELOPMENTS IN PATENT LAW AND VALUATION

*Valuation of Patents* by ALEXANDER J. WURZER, THEO GRUNEWALD and  
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Wolters Kluwer, The Netherlands, 2012, 1st Edition, 576 pp, Hardcover, £121,  
ISBN: 978 90 411 2723

Price is what you pay. Value is what you get.

Warren Buffet

The underlying value of patent assets has soared in the last decade as patents have become increasingly important in the knowledge economy. However, this increase in value remains largely invisible to the business world as there is yet no agreement on the definition of patent value. How to define and appraise the value of patents as financial assets is the critical question posed in the book. The authors provide a much needed detailed overview of state of the art as to various methods and approaches to patent valuation.

The authors of this book are recognised experts in the developing body of research into patent law and valuation. The lead author, Professor Dr. Alexander Wurzer, is the director of the Institute for Intellectual Property (IP) Management at the Steinbeis-Transfer-Institute for IP Management in Berlin. Further, he holds teaching positions for IP Valuation at the University of Dusseldorf and the University of Applied Science in Amberg-Weiden, the European Patent Academy, the Banking Commerce College and the European Business School among others. Importantly, Professor Dr. Wurzer is the chairman of the Deutsches Institute fur Erfindungswesen (DIN) Committee on standardization of patent valuation. His co-author, Theo Grunewald, is an IP valuation consultant and project manager for the firm Wurzer & Kollegen, a strategic IP management company founded in 2001 by Professor Dr. Wurzer. Grunewald is also a member of the DIN working committee. The third author, Dieter Reinhardt, is an experienced patent engineer with Muller Hoffmann & Partners.

The authors state that the most important goal of the book is to clearly and systematically present the present knowledge about patent valuation and to provide the reader with guidance as to how to complete the patent valuation task. This work builds on the work of British authors, Sykes and King in their book *Valuation and Exploitation of Intellectual Property and Intangible Assets* published in 2003.

In essence, there are three broad categories of patent valuation methods. The first is effectively the liquidation value of selling the patent asset on the market, the second is based on estimating the net proceeds from enforcing the patent rights against infringers and the third is an estimate of the potential future licensing revenues. The book adopts and international perspective and analyses developments in patent valuation in both Europe and the United States. A collaborative effort, an unfortunate weakness of the book is that the English language writing style is rather stilted. The opening sentences in the introductory paragraph give a flavour of the unnatural writing style, “A discussion about the value of patents is unfortunately frequently dramatically shortened. The shortenings strive in two opposite directions. For the one the topic is terminated with the doubtful deduction: “patent=monopoly, monopoly=wealth → patent=wealth.” While the book does provide substance over form, it is not a pleasure to read if English is your first language. Nevertheless, the authors’ enthusiasm for their subject and depth of knowledge is apparent.

The book helpfully provides a glossary of terms related to patent valuation which is useful to read before beginning the text. The Table of Contents organises the book into 6 chapters. Chapter 1 is an introduction to the economic importance of patents and

helps to contextualize the material in the chapters to follow. Chapter 2 introduces the reader to the basics of patent valuation. Chapter 3 is curiously titled 'Valuation Proceedings' and consolidates the material from the previous chapters into a ten step valuation method. Chapter 4 focusses on tools for patent valuation and differentiates between valuation procedures, methods and instruments (arithmetic rules). The most interesting chapter is Chapter 5 which presents a case study based on a German enterprise, Innovation AG, which manufactures medical technology, namely, patented bio-sensors (implantable blood sugar meters). The fact scenario sets out an R&D project relating to medical technology which is internally developed. The IP in the project is and managed by the firm's patent department who apply for German, European, United States and Japanese patents. The patents are granted a few years later in 2004. Costs are directly assignable to sub-projects categorised in patent families P1, P2, P3 and P4. The project is to be market ready in 2005 and the firm wishes to provide its IFRS<sup>1</sup> annual financial statement for the period ending December 2004. The firm wishes to carry out an individual valuation of the patent families. The valuation would take into account various elements such as projected sales figures, tax rates, royalty rates, market power (core markets, competitors, potential buyers), patent infringement analysis, comparable transactions. Finally the firm then determines to sell its medical technology patent portfolio to Meditech Corp. The scenario highlights that patent valuations are required for several different purposes. The first purpose is for internal cost management and thus the authors conclude that the patent families should be valued by making a comparison with an investment in an alternative project, using the income approach. The second purpose is for recording the value of the intangible patent assets in the firms IFRS financial statements for external purposes and must be carried out in accordance with accounting standards on the basis of existing verifiable data. Innovation AG's patents meet the definition of intangible assets if they are intangible, identifiable and controlled by the firm. However, the patents may only be recognised on the balance sheet if it is highly probable that they will generate future economic benefits for the firm. Accounting standard IAS 38.51.67 requires the application of a cost approach. The book value at initial recognition is the sum of expenditure incurred from the date when the development phase began. The patent valuation must adopt the cost approach for this valuation purpose. The authors also analyse the valuation purpose relating to the sale of the technology to Meditech Corp. This is very instructive and neatly illustrates when and how to adopt and apply differing valuation approaches. Nonetheless, there is little commentary by way of concluding remarks relating to standardization of patent valuation or developments in the field to harmonize patent valuation approaches in Germany, in Europe or internationally. The scenario does not present any facts which would give rise to a valuation purpose related to debt finance, which is a particular interest of mine. Finally, an appendix Chapter 6 sets out the mathematics used to calculate present value and net value. Chapters 2 and 3 are very long at a couple of hundred pages, with the remaining chapters substantially less. The writing is peppered with diagrams to visually depict the content and these are a welcome relief.

Extensively referenced, there are succinct footnotes rather than endnotes.

The book is not aimed specifically at patent lawyers, but to anyone with an interest IP management and of course, accountants. How well are the patent valuation concepts explained? How are the authors' ideas developed? As a lawyer with an interest in the field patent finance, I found the explanations of the valuation methods

<sup>1</sup> International Financial Reporting Standards.

and approaches accessible and explained concisely, if somewhat repetitive in certain chapters. It is not clear which author contributed which chapter. The discussion of the legal characteristics of patent value (litigation, inventors' remuneration) could have been further developed in Chapter 3 to provide wider appeal to the legal profession.

Although in hard cover, the book runs to a reasonable 576 pages in total, however it is very expensive at £121. There is another competing text, *Patent Valuation: Improving Decision Making Through Analysis*<sup>2</sup> which is shorter, more competitively priced, and available as an e-book, and is American.

In conclusion, *Valuation of Patents* is an authoritative, straightforward book covering the key patent valuation methods in clear non-technical language. However, it lacks critical analysis of some of the key questions relating to accounting for intangibles. There is no concluding chapter that considers the 'big picture' in relation to developing patent valuation methodology. The text could have been significantly improved with editing to provide plain English. The book is not a light read, but it is a satisfying introduction to the subject. It is indeed a contribution to legal scholarship on patent law, but it has left the door open.

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<sup>2</sup> Murphy, W.J., Orcutt, J.L., Remus, P.C., Wiley Finance (2012).

## CENTRE FOR CONFLICT RIGHTS AND JUSTICE: STUDENT PRIZE

Critically analyse the below proposal:

“I think householders acting instinctively and honestly in self-defence are victims not criminals. They should be treated that way. That’s why we are going to deal with this issue once and for all. I will shortly bring forward a change to the law. It will mean that even if a householder faced with that terrifying situation uses force that in the cold light of day might seem over the top, unless their response is grossly disproportionate, the law will be on their side.” (Chris Grayling MP, Secretary of State for Justice, Conservative Party Conference, 9 October 2012).

*Matthew Caples\**

When considering such a statement of change aiming to solve a perceived problem, it is necessary to assess to what extent a problem exists and then to what extent the change will correct the problem. Here the perceived problem is that of the criminalisation of homeowners who are protecting themselves and their properties from burglars and therefore the inadequacy of the law in protecting the homeowner.

The current law requires force used in self-defence or in the defence of another to be reasonable in the circumstances. This is outlined in case law<sup>1</sup> and codified to some extent in legislation<sup>2</sup>. What is reasonable in the circumstances is determined by assessing the reasonableness of the degree of force used<sup>3</sup>. This in turn requires consideration of the circumstances as the defendant believed them to be. The actions taken in self defence must be reasonable in these perceived circumstances. This provides a part subjective and part objective test for reasonableness where the force used must be objectively reasonable in the circumstances as the defender subjectively saw them, as confirmed in *Owino*<sup>4</sup>. This objective element does not excessively restrain the defence as the courts accept that, “*a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive actions*”<sup>5</sup> as per Lord Morris, and as such takes this into account when assessing the reasonableness of the defenders actions. Nonetheless “*acting unreasonably in self-defence destroys the defendant’s justification for deliberately injuring his attacker*”<sup>6</sup>. The effect of the defence being pleaded successfully is that the actions of the defender are lawful and as such no crime has been committed and they are found not guilty. The law of self defence seems to provide those who honestly act to defend themselves with adequate protection.

Mr Grayling in the above quote seems to be suggesting that at present the law operates in such a way as to judge the reasonableness of someone’s actions in self defence, in a wholly objective way without consideration of the circumstances in which an incident occurs. It appears a rather peculiar suggestion, given that any confusion which may have existed regarding the test for reasonableness diminished some years ago with cases such as *Owino*<sup>7</sup>. To say that the law will (implying change) be on the side of those who use ‘force that in the cold light of day might seem over the top’ is

\* LPC Full Time.

<sup>1</sup> *R v Rose* (1884) 15 Cox 540, *Palmer v R* [1971] AC 814, *R v Scarlett* [1994] Crim LR 288.

<sup>2</sup> Criminal Law Act 1967, s.3.

<sup>3</sup> Criminal Justice and Immigration Act 2008, s.76.

<sup>4</sup> [1996] 2 Cr. App. R. 128.

<sup>5</sup> *Palmer v R* [1971] AC 814 (Morris LJ).

<sup>6</sup> *R v Smith (Morgan)* [2001] 1 AC 146 (Hoffman LJ).

<sup>7</sup> [1996] 2 Cr. App. R. 128.

misleading given that, that “*is in essence exactly what the law says now*”<sup>8</sup>. Unfortunately for Grayling he appears to have “*paraded ignorance of the law alongside disrespect for it*”<sup>9</sup>.

The significant difference between the law at present and what Grayling is proposing is that all actions up to the point of that which is grossly disproportionate would become lawful under the defence. This implies allowing actions which are disproportionate to be deemed reasonable for the purposes of self defence. This again is peculiar since allowing something which is disproportionate is in direct conflict with allowing justice to be done, the two are not reconcilable. Similarly it is difficult to allow something which is disproportionate to be reasonable given that disproportionality is commonly equated to unreasonableness throughout the law. Michael Turner QC observed that “[t]here’s no concept in British law of allowing someone to use disproportionate force for good reasons”<sup>10</sup>. This sentiment was shown previously in 2005 when a private members bill proposing a change in the law of self defence extending what was allowed to that which is not grossly disproportionate, was reviewed by the Government and found to be an unnecessary change<sup>11</sup>.

Why is a change necessary? According to Grayling it is necessary to “*dispel doubts in this area once and for all*”<sup>12</sup> yet while this is a very noble intention it appears to be unnecessary. Informal research by the Crown Prosecution Service suggests that between 1990 and 2005 there were only 11 prosecutions of people who attacked intruders in houses, commercial premises or private land<sup>13</sup>. The Home Office recorded crime statistics for that same period of time indicate that there were over nine million burglaries of dwellings alone<sup>14</sup>. This means that of those nine million burglaries only 11 resulted in confrontations leading to prosecution. Whilst statistically it is not of great concern it may be that some feel that 11 prosecutions is nevertheless too many. A recent ICM poll for the Sunday Telegraph found that of those who responded only 17% of voters backed the current self defence laws, whilst 79% of all voters support a change in the current law<sup>15</sup>. Whilst this could not be described as an accurate representation of the population, it does suggest that there may be a significant number of people who feel this way. This seems likely to be the result of a misunderstanding of the law which seemingly reflects that illustrated by Grayling’s proposal.

Sensationalist emotive media coverage of certain high profile cases has certainly influenced public opinion and potentially caused the concern that the current law is inadequate. The case of *R v Martin*<sup>16</sup> is probably the most publicised and controversial

<sup>8</sup> Professor Spencer ‘Householders who use violence on burglars’ (*Youtube*, 26 October 2012) [https://www.youtube.com/watch?feature=player\\_embedded&v=7H5Sovem8wo](https://www.youtube.com/watch?feature=player_embedded&v=7H5Sovem8wo)

<sup>9</sup> Liberty ‘Lord Chancellor Misleads on the Law’ (*Liberty*, 10 October 2012) <http://www.liberty-human-rights.org.uk/media/press/2012/lord-chancellor-misleads-on-the-law.php>

<sup>10</sup> Cahal Milmo ‘The burglar is unarmed. You have a knife. So what do you do next’ (*Independent*, 9 October 2012) <http://www.independent.co.uk/news/uk/politics/the-burglar-is-unarmed-you-have-a-knife-so-what-do-you-do-next-8203046.html>

<sup>11</sup> CPS, ‘Guidance published on use of force by householders against intruders’ (*CPS*, 1 February 2005) [http://www.cps.gov.uk/news/press\\_releases/110\\_05/](http://www.cps.gov.uk/news/press_releases/110_05/)

<sup>12</sup> Owen Bowcott, ‘Plan to allow ‘disproportionate force’ against burglars included in crime bill’ (*Guardian*, 25 November 2012) <http://www.guardian.co.uk/law/2012/nov/25/disproportionate-force-burglars-crime-bill>

<sup>13</sup> BBC, ‘Conservative conference: Force against burglars to be allowed’ (*BBC*, 9 October 2012) <http://www.bbc.co.uk/news/uk-politics-19879314>

<sup>14</sup> Home Office, ‘Recorded crime statistics 1898 – 2001/02’ and ‘Recorded crime statistics 2002/03 – 2009/10’ (*Home Office*, 19 July 2012) <http://www.homeoffice.gov.uk/science-research/research-statistics/crime/crime-statistics-internet/>

<sup>15</sup> Patrick Hennessy, David Barrett and Rebecca Lefort, ‘Overwhelming support for a campaign to protect householders who confront intruders’ (*Telegraph*, 16 January 2010) <http://www.telegraph.co.uk/news/politics/7004471/Overwhelming-support-for-campaign-to-protect-householders-who-confront-intruders.html>

<sup>16</sup> [2003] Q.B. 1

example of this described as a “frenzy whipped up by the media and politicians”<sup>17</sup>. After being previously burgled Martin waited for intruders with a shot gun. He then confronted the intruders shooting both and killing one, eventually leading to a manslaughter conviction. Here the law seems to apply fairly simply on the facts once established. It is difficult to claim that you are defending yourself by shooting a fleeing man in the back and as such the law of self defence will offer no protection in these circumstances. According to Professor Spencer of Cambridge University, “*This case has been misinterpreted by the newspapers showing how the law is not on the side of the householder*”<sup>18</sup>. Even with this new suggestion based on grossly disproportionate force it is difficult to see that Martin’s actions would not have been considered unlawful. Another case which received much media attention was that of *R v Hussain*<sup>19</sup>, in which a man chased and beat an intruder with a cricket bat, fracturing his skull after the intruder had broken into his house and threatened his family. Here the defence of self defence was unsuccessful because the actions of the defendant went beyond that which was reasonable in the circumstances. The point at which they caught the intruder was arguably the point at which self defence ceased to be available. If not then, the point at which the defendants went beyond holding the intruder until arrest and proceeded to beat him, was when they went beyond what was reasonable and self defence ceased. “*The purpose of the appellant’s violence was revenge*”<sup>20</sup>. It is suggested that this is not vigilantism<sup>21</sup>, but it seems to be exactly that, a view shared by Liberty who state that the change would be “*irresponsible*” and warned it appeared designed to encourage “*vigilante execution*”<sup>22</sup>. As with the Martin case this would certainly still be disproportionate under the proposed new provisions.

It is also at present debateable as to whether or not the current law on self defence is compliant with the Government’s positive obligation<sup>23</sup> to protect the right to life under Article 2 of the European Convention on Human Rights<sup>24</sup>. These positive obligations do arise in the criminal law and have done in many cases notably *X and Y v Netherlands*<sup>25</sup>. The right to life is a qualified right, meaning that in certain circumstances someone’s life may be taken without contravening Article 2. Article 2(a) is of relevance to self defence as it allows taking a life in defence of any person from unlawful violence, but only where it is absolutely necessary. At present the leeway commonly given to what is absolutely necessary is based on the difficulty in “*weigh[ing] to a nicety the exact measure of ... necessary defensive actions*”<sup>26</sup>. It could be argued this leeway allows for occasions when a life can be taken in self defence where it was not absolutely necessary. The same could arise where the person relying on self defence misunderstood the circumstances. At present it could be said that the law does not, “*secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by a law enforcement*

<sup>17</sup> G.Virgo, ‘A common sense guide to the law of murder’ [2005] C.S.L.R. 55.

<sup>18</sup> Professor Spencer ‘Householders who use violence on burglars’ (*Youtube*, 26 October 2012) [https://www.youtube.com/watch?feature=player\\_embedded&v=7H5Sovem8wo](https://www.youtube.com/watch?feature=player_embedded&v=7H5Sovem8wo)

<sup>19</sup> [2010] EWCA Crim 94.

<sup>20</sup> D.A.Thomas, ‘Case Comment: *R. v Hussain (Tokeer) and Hussain (Munir)*: sentencing – causing grievous bodily harm with intent’ [2010] Crim.L.R. 428.

<sup>21</sup> *Ibid.*

<sup>22</sup> Liberty, ‘Lord Chancellor Misleads on the Law’ (*Liberty*, 10 October 2012) <http://www.liberty-human-rights.org.uk/media/press/2012/lord-chancellor-misleads-on-the-law.php>

<sup>23</sup> European Convention on Human Rights, Article 1.

<sup>24</sup> J.Roger, ‘Applying the doctrine of positive obligations in the European Convention on Human Rights to domestic substantive criminal law in domestic proceedings’ [2003] Crim.L.R. 690.

<sup>25</sup> (1986) 8 E.H.R.R. 235.

<sup>26</sup> *Palmer v R* [1971] AC 814 (Morris LJ).

*machinery for the prevention, suppression and punishment of breaches of such provisions*<sup>27</sup>. Thus failing to protect the Article 2 right to life and therefore failing to fulfil the associated positive obligations.

A further change to the law in the suggested manner would only make such speculation more likely to be a real problem for the Government, since it would seem to allow the use of disproportionate force, which could never be said to be absolutely necessary<sup>28</sup>. Furthermore there may be an equally significant problem arising out of the both the current law and the proposed change in the law regarding the state's positive obligations concerning Article 3; "*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*"<sup>29</sup>. At present the European Convention on Human Rights is not really in play, but a change as suggested would certainly see it bite. The media and conservatives alike would then once more be reacquainted with their familiar foe, the Human Rights Act

So whilst Grayling's change in the law is significant theoretically, it appears that those occasions which have caused the public most concern would not have seen different outcomes. It is thus difficult to see what Grayling is actually seeking to achieve. . It seems that all this change will do is cause confusion in a sensitive area which up until now has in reality seen very few significant cases. Proclaiming to make not only a change but a significant change is potentially very dangerous and arguably, will lead to more instances of the kind which have caused the "*moral panic*"<sup>30</sup> which has lead us to where we are now. Grayling appears to be one of two things; either a politician intent on gaining votes by any means<sup>31</sup> or a man with power which he is too ignorant to wield responsibly<sup>32</sup>. Grayling proclaimed that "*we need to dispel doubts in this area once and for all*"<sup>33</sup>, but unfortunately for him it seems that he has in fact achieved the opposite, creating doubt.

<sup>27</sup> *Edwards v United Kingdom* (2002) 35 EHRR 19 [54].

<sup>28</sup> J.Roger, 'Applying the doctrine of positive obligations in the European Convention on Human Rights to domestic substantive criminal law in domestic proceedings' [2003] Crim.L.R. 690.

<sup>29</sup> European Convention on Human Rights.

<sup>30</sup> S.Cohen, *Folk Devils and Moral Panic* (first published 1972, Routledge 2011); S.Cohen and J.Young, *The Manufacture of News: Deviance, Social Problems and the Mass Media* (Constable, London 1981).

<sup>31</sup> Cahal Milmo 'The burglar is unarmed. You have a knife. So what do you do next' (*Independent*, 9 October 2012) <http://www.independent.co.uk/news/uk/politics/the-burglar-is-unarmed-you-have-a-knife-so-what-do-you-do-next-8203046.html>

<sup>32</sup> Liberty 'Lord Chancellor Misleads on the Law' (*Liberty*, 10 October 2012) <http://www.liberty-human-rights.org.uk/media/press/2012/lord-chancellor-misleads-on-the-law.php>

<sup>33</sup> Owen Bowcott, 'Plan to allow 'disproportionate force' against burglars included in crime bill' (*Guardian*, 25 November 2012) <http://www.guardian.co.uk/law/2012/nov/25/disproportionate-force-burglars-crime-bill>

# NOTTINGHAM LAW SOCIETY'S KEVIN DE SILVA MEMORIAL COMPETITION

## HOW DOES PUBLIC OPINION INFLUENCE THE LAW?

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### INTRODUCTION

In physics, the phenomenon of momentum often occurs after the influence of a force – namely pressure. Public opinion most strikingly influences the law in much the same way – through pressure. It exists as a background presence and, because the public is not a maker of law, can only influence decisions and actions. As already mentioned, the most obvious example of how this occurs is through pressure. However, public opinion can also be a persuasive reason for choosing a particular policy or deciding a case a certain way. Public opinion may guide the direction of law reform by guiding policy or it may affect the speed at which policy becomes law – by either slowing down or speeding up the process. At this point, however, it is vital to appreciate another aspect of the analogy with physics; although momentum is affected by pressure it is also affected by a variety of other forces such as gravity and electromagnetism. Similarly, although the law is influenced by public opinion, there are several other equally if not more important factors which influence the legislation process. Examples include: mathematical prediction models relating to the future of the economic climate, logical deduction of what justice would require in a given case, and even a well-placed politician's charisma. Overall, public opinion is only one of many substantial factors which influence the law concurrently; the extent of any particular factor's influence differs depending on the circumstances.

### SCOPE OF ANALYSIS AND FINDINGS

Due to inherent uncertainties and wide range of factors which influence the formation of law, one cannot sensibly measure the contribution of public opinion without extensive empirical sample-testing. To that end, in order to keep speculation to a minimum, any assertion the author makes about the extent of influence can only be general. The more pertinent focus is upon the variety of influential methods and effects.

This essay will also focus on the relationship between public opinion and the law in western democracies, namely the United Kingdom ("UK") and the United States of America ("US"). These systems give relatively high prominence to public opinion but that is not to say that public opinion has no influence upon the law in other systems around the world. Furthermore, 'public opinion' is given a concrete meaning as the average opinion on a given issue. As such, public opinion polling gives the fairest indication of what the public opinion is. Herbert Blumer defines public opinion as the end product of an interaction between functional groups rather than the collective opinion of the mass.<sup>1</sup> This purist definition is rejected. If Blumer's definition were

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<sup>1</sup> Blumer, "Public Opinion and Public Opinion Polling" (1948) 13 *American Sociological Review* 542.

adopted, the relationship between public opinion and the political process would be so close that the results of most parliamentary debates could sensibly be deemed to be 'public opinion'. In essence, public opinion would be *the* progenitor of all legislation. A better name for this conception would be 'state opinion'. Further, Blumer criticised public opinion polling because of the random sampling method. He argued that individuals in power exert more influence upon public opinion than others but this is a flawed way of thinking. Individuals with power and influence may bring the opinions of many others into line with theirs but the crucial issue is whether the opinion is endorsed by the collective. As such, there are two differing opinions at separate points in time – before and after the change brought about by the individual with power. Blumer's definition is too narrow in that it disregards the original opinion.

### MODES OF INFLUENCE

Two entities stand out as prominent evidence of public opinion: opinion polls and the media. Opinion polls are straightforward evidence of raw public opinion drawn from a random sample of persons. The media, on the other hand is a more complex creature and its dedication to public interest coverage makes it a reliable indicator of public opinion. When there is a clear public opinion on an issue highly in the public interest, the tenor of the news reflects that opinion through the points it draws particular attention to. By way of example, the issue of gay marriage is currently a hot topic and one can see just from a selection of a few articles that the overall tenor of public opinion is in favour of it.<sup>2</sup>

Two 'central vehicles' convert public opinion into law. First and foremost is public policy. One of the most fundamental aspects of democracy is the public's self governance. The ideal democracy, assuming unlimited time and resources, would allow for a vote on each and every issue which would then be converted into law. However, because this is an unrealistic ideal, politicians are required. In a fundamental sense, they are at the public's mercy because it is the public that decides whether to vote for them. Although it is important not to overstate the effect of this consideration, a 1983 article written by Benjamin Page and Robert Shapiro<sup>3</sup> illustrates an empirical trend that public opinion does affect policy. They found that there is substantial congruence between changes in public opinion as gathered by opinion polls and public policy trends. Stronger congruence was found where the issue in question was one of social or constitutional importance whereas economic decisions appeared to be less affected by public opinion. Perhaps the most telling finding of their study was that, in most cases, the changes in public opinion occurred before the respective changes in public policy. Although one could argue that the government influences public opinion through means such as education and potentially manipulation, the overall conclusion must be that public opinion influences and guides public policy more than public policy influences public opinion. It is submitted that most of these changes operate through a combination of pressure and presence. Where the opinion is a particularly vocal one, politicians may be under much pressure to appease voters. However, where the issue is relatively uncontroversial or there is an absence of significant preference within the opinion, public opinion affects the decision-makers as a 'background fact' which

<sup>2</sup> See: Savage, Michael, "Gay marriage laws are divisive, wrong and undermine freedom to worship, claims Fox", *The Times*, 11/01/2013 page 13 and <http://www.bbc.co.uk/news/uk-politics-20680924> – accessed on 18/01/2013. Notably, most of the highest rated comments in the latter article are for same-sex marriage and most of the lowest rated are against.

<sup>3</sup> Page and Shapiro, "Effects of Public Opinion on Policy" (1983) 77 *The American Political Science Review* 175.

informs their deliberative policy-making process. This latter method is probably the most ordinary form of influence in practice but one cannot underestimate the striking pressure that a prominent public opinion can exert upon the formation of public policy. There are many examples of this in the legal history of the UK.

### EXAMPLES FROM HISTORY AND TODAY

In the 90s, there was large public interest in the Alder Hey scandal which involved unauthorised organ removal and retention by the Alder Hey Children's Hospital in Liverpool.<sup>4</sup> The scandal caught the imagination of the public and there was widespread condemnation of the hospital's acts. In large part due to the scandal, Parliament passed the *Human Tissue Act 2004* which tightened controls in the area primarily through the creation of a regulatory body: the Human Tissue Authority. Similarly, the death of Peter Connelly – more popularly known as Baby P – was widely reported and met with public indignation and lack of faith in the welfare system.<sup>5</sup> As a result of this and Lord Laming's report on the matter, councils started to intervene much more readily in child protection cases.<sup>6</sup> This also illustrates another important way in which public opinion affects the law. Rather than altering the content of legislation, public opinion led to a markedly different application of welfare legislation already in place. Relatively recently, the scandal surrounding phone hacking committed by the News of the World has led to a sharp decline in public faith in the media.<sup>7</sup> As a result, there is a real possibility that a regulatory body will be established to 'police' the media. One can clearly see a trend in line with the Alder Hey and Baby P scandals.

Another way in which public opinion influences the law through pressure is by hastening or delaying shifts in policy and the transposition of those shifts into law. The progression of the proposed *Cyber Intelligence Sharing and Protection Act* is a good example. Understandably, US citizens showed concern about the effects the security-focused bill would have on privacy to the extent that there was a 'Stop Cyber Spying Week' in 2012.<sup>8</sup> Although this negative attention has not completely halted the passage of the bill, amendments limiting its scope are currently expected and its progression has been slowed down.<sup>9</sup> It is also important to appreciate the hastening effect that public opinion can have. Public opinion in the US regarding the 2013 fiscal cliff was largely negative.<sup>10</sup> Further, the public urged politicians to reach agreement through compromise on the matter.<sup>11</sup> Negotiations in the Senate took place on the 1st January 2013 and a compromise bill was passed. Immediately the next day, President Barack Obama signed the *American Taxpayer Relief Act of 2012* into law. This was a very rapid progression for the legislation and, although the economic pressure was undoubtedly the main reason for emergency compromise, one cannot ignore the effect that public

<sup>4</sup> <http://news.bbc.co.uk/1/hi/1136723.stm> – accessed on 18/01/2013.

<sup>5</sup> <http://www.guardian.co.uk/society/baby-p?page=1> – accessed on 18/01/2013.

<sup>6</sup> See: <http://www.guardian.co.uk/society/2011/sep/08/baby-p-effect-child-protection> and <http://www.cafcass.gov.uk/pdf/Baby%20peter%20summary%20report%20FINAL%2020Dec.pdf> – both accessed on 18/01/2013.

<sup>7</sup> <http://www.gallup.com/poll/159110/snapshot-britons-less-trusting-media.aspx> – accessed on 18/01/2013.

<sup>8</sup> <http://rt.com/usa/news/cyber-week-cispa-government-206/> – accessed on 18/01/2013.

<sup>9</sup> <http://www.digitaltrends.com/web/new-cispa-amendments-expected-but-the-fight-will-go-on/> – accessed on 18/01/2013.

<sup>10</sup> See: <http://www.gallup.com/poll/159170/americans-fiscal-cliff-harmful-own-finances.aspx>, <http://www.gallup.com/video/159209/americans-say-fiscal-cliff-negatively-affect.aspx>, and <http://www.gallup.com/video/159428/americans-say-fiscal-cliff-negatively-affect-personal-finances.aspx> – all accessed on 18/01/2013.

<sup>11</sup> See: <http://www.gallup.com/poll/158801/americans-urge-congress-president-avoid-fiscal-cliff.aspx>, <http://www.gallup.com/video/158870/americans-parties-compromise-equally-avoid-fiscal-cliff.aspx>, and <http://www.gallup.com/video/159149/majority-americans-expect-fiscal-cliff-agreement.aspx> – all accessed on 18/01/2013.

pressure for agreement would have had upon the Senate's deliberations and the hastened progression of the legislation.

Aside from its effect on policy, public opinion can influence the law through judicial decision-making: this being the second 'central vehicle'. Although the extent of the effect in this regard is more limited than that of public policy, there is a strong argument that judges take public opinion into consideration – especially where public interest is high and preference is strong. Former Chief Justice of the US Supreme Court: William Rehnquist, writing extra-judicially in 1986, considered the matter.<sup>12</sup> By way of example, he cited the case of *Youngstown Sheet & Tube Company v Sawyer*, 343 US 579 (1952) – otherwise known as the Steel Seizure Case. That case concerned the attempted seizure of steel mills by President Harry Truman in order to avoid a worker's strike in the wake of the Korean War. The steel companies issued legal proceedings against the government seeking an injunction against the seizure. Incredibly, in less than nine weeks, the case had run its course from the initial application to a district court to a decision on the merits by the Supreme Court. Additionally, the decision was contrary to what one would expect at the outset of the case. As Rehnquist states, public opinion that the President should not be above the law undoubtedly factored into the Justices' focus upon, and decisions in respect of, the constitutional question of whether the President effectively had 'unlimited power'. The article itself provides a fuller analysis but one quotation in particular stands out: "'Great' constitutional cases often derive their 'greatness' from the very fact that they involve broad jurisprudential themes, rather than simply the nuts and bolts of the law, and are therefore more likely to be affected by tides of public opinion already running in the country."<sup>13</sup> This quotation highlights a similarity with the strength of influence public opinion has on public policy. In a democracy, the public should have more of a say regarding important constitutional issues because its consent is the primary source of that constitution's legitimacy. Furthermore, public opinion can be a source of inspiration for judges. The application of common sense and the often used 'reasonable man' test undoubtedly draw from public opinion.

## CONCLUSION

Public opinion influences the law indirectly through its background presence. Legislators must take public opinion into account on a wide variety of issues and where it is a strong opinion, public pressure can have a very large effect. Its effect on judges is understandably lower but there is some evidence that they do take the public's opinion into account in matters extending beyond issues of high constitutional importance. As Rehnquist so aptly stated: "Somewhere 'out there'-beyond the walls of the courthouse- run currents and tides of public opinion which lap at the courthouse door."<sup>14</sup>

<sup>12</sup> Rehnquist, "Constitutional Law and Public Opinion", (1986) 20 *Stoffolk University Law Review* 751.

<sup>13</sup> *Ibid* 768.

<sup>14</sup> *Ibid*.