NOTTINGHAM LAW SCHOOL

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EDITORIAL

It is with great pleasure that we present this edition of the Nottingham Law Journal. The contents are a demonstration of its strength as a generalist law journal, and a proud tradition stretching back to the 1970s. We have a diversity of contributions from a broad spectrum of legal topics, and are encouraged to see that an interdisciplinary perspective in many of the contributions. This is most certainly true of our opening article from Prof Jane Jarman, "Too Cunning to be Understood: Text, Context and the Poetic Imagination in Legal Practice" based on her inaugural lecture, it is a colourful dive into the creativity of language, the dance between clarity and eloquence, the chameleon capacity of words and the almost alchemical activities of lawyers in playing with text. Drawing on Shakespeare, Shelley, Donne, T S Elliot and, of course, Nottingham's most scandalous, and perhaps fabulous literary local, Lord Byron.

We then move to what is in some ways a radically different piece, and yet one with a complimentary dimension. Allan C. Hutchinson's article *"Law s politics" – So What?* explores some of the deep currents of legal decision-making, and provides striking insight into the often unseen, yet powerful and inexorable forces that drive legal reasoning and decision-making. In is certainly another antidote to any careless assertion that lawyers are engaged in a mechanical or neutral process.

Following this, the transition to Peter Cumper and Tom Lewis' reflection "*Hiding from history? The Government's 'Guidance on contested commemorative heritage assets in England"* is an appropriate way. This discussion grounds the relationship between law and political clashes in an ongoing debate. The melee over the appropriate engagement with history and heritage shows no sign of calming, given the real struggles for a diverse society immersed in the ongoing process of decolonisation, and differing responses to past, present and possible future realities. The analysis brings much needed light into an area where there is all too often more heat than illumination.

The same observation could be made about the scholarly contribution from Brandon Reece Taylorian: "*Guidance from the Strasbourg court and the OSCE on state recognition of religions and the legal registration of religious or belief organisations"* The relationship between religious organisations and wider society is also a sphere in which the parties to debates are all too often more focused on shouting over each other, than endeavouring to hear an alternative point of view. An academic exploration of relevant judicial principles is a specific area is therefore valuable in the project of building a more coherent and constructive approach.

The political and social aspect of legal activity is then taken forward further by Hakan Sahin in "*Understanding re-nationalisation through the theory of obsolescing bargain and political institutions: the case of Argentina".* This nuanced and complex exploration provides valuable insight into the primary context under consideration, and some lasting food for thought from a comparative perspective.

It also bridges the gap smoothly to the discourse from Kevin Sattarzadeh "*Efficacy of Director's Disqualification: Preventing Corporate Wrongdoing?"* as it provides a transition to the world of private law. However, as Sattarzadeh's reflections make clear, the behaviour of actors in the commercial world haw far reaching implications for the wellbeing of society as a whole. Economies can only flourish in a fair and just manner with meaningful accountability for wrongdoing in the business sector.

We then turn to accountability in a very different setting, with our final article, provided by Sophie Gallop: Res Judicata and the Exclusive Authority of Post Soviet Judiciaries: A Case Study of Supervisory Review, Judicial Independence, and the Separation of Powers in Belarus. Whilst there is subjectivity and imperfection in any judicial system operating by human beings, the need to strive for objectivity and neutrality is essential, as this discussion eloquently demonstrates.

Law and legal frameworks exist to further the collective good, whether they are characterised as public or private. The significance and complexity of the various ideological, political and pragmatic tides that move judges, practitioners and commentators provide an overarching theme for this edition of the journal. However, the articles are extremely diverse and all make fascinating reading in their own right. The case notes and book reviews listed below are all also immensely valuable reading.

My sincere thanks to all of our authors, to the dedicated and tireless editorial team and the administrative colleagues who support us. We are only able to maintain the high standards of this journal thanks to the immense hard work and skill of all of those involved. I hope that all readers will enjoy reading the fruits of so much effort as much as I have done.

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ARTICLES

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

TOO CUNNING TO BE UNDERSTOOD? TEXT, CONTEXT AND THE POETIC IMAGINATION IN LEGAL PRACTICE

*Jane Jarman**

ABSTRACT

Drawing on the work of poets such as Shakespeare, Shelley, Donne, and T S Eliot, this inaugural lecture explored the tension between the quest for clarity and the challenge of interpretation presented by the imaginative and, at times, tricky and economical language of the lawyer. Eloquence can be weaponised not in the service of erudition but as the agent of useful ambiguity.

Whilst much has been written about the law and literature in terms of narrative, is there a link between the craft of the poet and the lawyer in the search for precision and meaning with each new attempt, in Eliot's words, " . . . a raid on the inarticulate/With shabby equipment."[1]

What follows is an edited transcript of the Inaugural Lecture which took place at Nottingham Law School, Nottingham Trent University, on 17 June 2022. It has been reproduced here in response to requests from those who attended the lecture and also from those who could not do so.

Thank you for coming to this lecture. I have a very strange feeling right now because, as I look around the audience, I see people from all the different parts of my life together in one place, which was never supposed to happen! You were never all supposed to meet! However, this is a clash of worlds that I am absolutely delighted to see here today.

Is Your Lecture Ready?

So, as you heard, my first venture into public speaking was as an A level student who had to call upon her knowledge of the poet Alexander Pope to get herself out of a tricky situation during a debate. I wonder what that 17-year-old version of me would have thought, standing here tonight, rather than at Sedgley Park Teacher Training College at the Salford Schools Public Speaking Competition in 1983. I truth, I know the question my younger self would have asked. She could not have resisted the opportunity to mangle a bit of Shakespeare in

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[1] T S Eliot *Four Quartets*, East Coker, V (Faber & Faber, 1944) p11–.

the process, "how came thee hither"[2]. She might have gone for the David Byrne approach, "How did I get here?"[3] It is a reasonable question.

I ended up, in the past week, avoiding all questions as to how the lecture was coming along! It has almost become a meme, with a started Jarman venturing that it will all be all right on the night. Hopefully . . .

However, the answer to the question of "is your lecture ready?" is an emphatic no, actually. I have good reason for that answer because it is never going to be ready. I thought long and hard about the literature I have selected for this talk. The end point of the analysis is that we are all in a state of continual discovery and debate. By the end of this lecture both you and I should have more questions to move us forward than we do at present. The poetic imagination is about the need to question, not the search for a definitive answer.

So that is my title – too cunning to be understood? A question mark. Sorry, Shakespeare. I put the question mark in – he did not have one. I put it in. So, he can sue me, but he is out of copyright. The "poetic imagination in legal practice" . . . if you are a practitioner, you must be rolling your eyes now and thinking "poetry" and "legal practice" – really? So, my task, should I be willing to accept it (and I already have) is to explain why there is poetry in legal practice.

Am I being "too cunning to be understood" by saying that? You are going to be the judge.

How Did I Get Here?

When I was at school and studying for my A Level in English Literature, I realised that the wonderful thing about poetry was that it was usually contained, or so I thought, in a little book. This is my copy of T.S. Eliot's *The Waste Land* – a truly little book with a big attitude. Do not worry, we are not going to go through *The Waste Land* tonight. When I arrived at university to read English, I decided to shall specialise in poetry and drama, not the novel. Short books – how hard can it be? Right? My ruse did not survive an afternoon.

When I arrived, my tutors did not just suggest this or that book but, in the case of Shakespeare at least, read all of it? Did you say all? An entire movement or century. More metaphysical poets? Just how many?

So, the titles I show in my PowerPoint slide of my own books, *The Complete Shelley*, Milton, Spencer, Donne, Byron's *Don Juan* and Eliot, *The Complete Poems*, constituted my reading material in my third year at university. These texts stayed with me, literally, all this time. Like a literary *"This is Your Life,"* I have brought them all together tonight for the first time since finals.

I must have made a decision, at some point in my third year at university, not to accept a place at Liverpool University to read for an MA in English. I took a different path and took a job at the Joint Matriculation Board at the University of Manchester, working on A level examinations, in order to save up some money to go to law school and qualify as a solicitor.

On My Bookshelf

This juxtaposition made me think. People do things for a reason. What was it? What changed me? For me, the answer is to be found in those books.

When reading them again for this lecture, I was surprised by how much work I did! All of annotations in pencil and faded highlighter pen. I have no recollection of doing so much work as an English undergraduate. The text on this slide is from *Prometheus Unbound* by Shelley – I found on a little bit of a rummaging through of my books that most of that final year was spent reading the Romantic Poets. Now, the initial view of "romantic poetry" might

[2] "I must indeed, and therefore came I hither." William Shakespeare, Romeo and Juliet (1596); V,3.

[3] David Byrne, Brian Eno, "One In A Lifetime" (Sire Records, 1981).

be something you read on birthday and Valentine cards. Not the Romantic poets, especially Shelley and Byron. They were constantly in trouble and ended up in Italy because they had been run out of England by an amalgam of the courts, debts, and angry relatives. They were the active and activist poets of the moment. Rebels with a cause. Many causes. Take your pick. I urge you to read more about them but buckle up for a very bumpy ride.

They were brought back into prominence by another poet I spent a lot of that year reading, especially, T.S. Eliot *Four Quartets.* This is why, I said right at the beginning – that my lecture is not ready and never will be. This quotation from "Little Gidding," from *Four Quartets*, has always stayed with me.

> *We shall not cease from exploration.*
> *And the end of our exploring*
> *Will be to arrive where we started.*
> *And know the place for the first time.*[4]

Eliot is saying that we will never stop, but if we ever do, we will know where we started, and truly know it, in all its complexity.

The power of literature it is that it is not divorced from reality. It is not diametrically opposed to the work of the lawyer and that is my thesis today. Throughout my analysis of what a lawyer does, and what a poet does, if we look to their respective desks and the mental and intellectual labour involved, and not just their work product, I believe we will see similarity and an intensity hiding in plain sight.

Am I right or am I wrong?

An Expanding Bookshelf

On my bookshelf. Shelley, Shakespeare, Eliot. My book of Shelley's poetry, that book, is the reason I was so late this morning, but thirty minutes, way beyond Jarman Standard Time. So, as a lawyer, my bookshelf expanded to accommodate the *Rules of the Supreme Court*, the RSC, which pleased me, and then the *Civil Procedure Rules,* the CPR. Both sets of rules of civil procedure ended up being called *The White Book* by their devotees. I must include them for they are etched on my heart like Calais! For me this is the first fusing of the first poetic imagination and what the practising lawyer does.

So, I am going to look at litigation and the Civil Procedure Rules.

Now. This is a leap. A real leap. I know it is.

Many people think that a poet can do whatever they like in a form of free verse. Not true. There are rules. A poem will not scan, or rhyme, without rules and organisation. The way in which a poet constructs a poem is heavily constrained. It takes work. As W.B. Yeats wrote,

> *"A line will take us hours maybe;*
> *Yet if it does not seem a moment's thought,*
> *Our stitching and unstitching has been naught."*[5]

There are rules and, it must be said, rules that poets break. The Petrarchan sonnet lasts as a framework for ages and then Will Shakespeare comes along and says, "I'm not doing that" and changes the form. The same with Wordsworth. However, whilst they may finesse and innovate, they all work within a framework which is very prescriptive. Now, I am not comparing a Petrarchan sonnet to CPR 16, that would be a reckless leap, but there a balance and structure. An analysis and compression of thought that is central to the work of the poet and the litigator – in terms of elegance and financial cost. In *The Cause Won* by William Cowper, the poet (also a solicitor) observes with some irony.

[4] T.S. Eliot *Four Quartets*. Little Gidding (Faber & Faber, 1944) p33.

[5] W.B. Yeats "Adam's Curse" (1904).

The pleadings swell. Words still suffice.
No single word but has its price.
No term but yields some fair pretence
For novel and increased expense.[6]

So, I may have started by a little bit of a winding stair, to focus on why someone, who spent most of her time reading Romantic poetry from early 1816 ended up, suddenly, on Graduation Day or thereabouts, deciding to be a lawyer. I have found myself focusing on that decision and trying to find out who (or what) was responsible.

Law and literature is not really a big idea in the UK. There are only a few law and literature courses. The same is not true for the United States. There are lots of courses at many universities and colleges. It is very much a field of study. The movement starts with Richard Posner's *Law & Literature*[7] the irony being that Posner does not really believe in the concept of a separate field at all. Posner is, also, a practising attorney as well as an academic.

Now, I am going to apologise to Lord Burrows now. It is not often that one is able to apologise to a judge of the Supreme Court in a lecture, but I am going to do one of those irritating things that academic lawyers do and argue with a point made in a footnote to a lecture! I do so only because it points to a broader truth of the similarity between law and literature and, in my analysis, law and poetry.

In his paper *Judgment Writing: An Academic Perspective* Lord Burrows describes the subject of the law and literature movement in the following terms,

> *"one can divide the subject matter covered by 'law and literature' into (i) law in literature (e.g. Bleak House by Charles Dickens) (ii) law in literature (ego judgments as literary texts) (iii) law about literature (e.g. the tort of defamation).*" . . .[8]

This is an accepted analysis of the reach of the law and literature movement. However, in my view, there is another space, missing from this analysis. The question is where is the skill of the lawyer in this definition? Where is the mind of the lawyer in this analysis? The definition focuses on output and externality and not the inner workings of the legal mind. This, in a way, is why I have framed this lecture as the poetic imagination as Shelley, Keats, Byron, indeed most poets at some point, focus upon the intensity of the mind and the inner workings of the imagination and intellect.

So, if I had to blame anyone for my decision to become a lawyer, then it must be Percy Bysshe Shelley. It is undoubtedly his fault because his work is about reason and the imagination. Lawyers are all about reason but, also, in my view, law is about imagination as well.

"Poetry Is a Twin To The Law"[9]

This brings me to the work of Charles Abourezk, another practising attorney. I fell upon his work like a child who had found the last chocolate in the Christmas box. I realised that it was not just me who had heard the echoes of the poet in the practise of law, not just the narrative. He writes

> *"Poetry like trial practise or legal writing, if it works well, is an art of rhythms, imagery, and the crafting of language, with the intent to have a certain effect upon the reader/listener. . . . poetry is a twin to the law . . . just as demanding, and ultimately as capable of being used towards a multiplicity of ends . . . .*[10]

[6] *The Poetical Works of William Cowper*, edited by H.S. Milford, fourth edition, with corrections and additions by Norma Russell (London & New York: Oxford University Press, 1967).

[7] *Law and Literature* (Harvard University Press, 2009).

[8] Burrows, A, *Judgment Writing: An Academic Perspective* (2013).

[9] Shelley, *A Defence of Poetry* (1821).

[10] Charles Abourezk, From a Lawyer's Heart – The Pulse of Poetry, 41 *San Diego Law. Review* 624 (1996).

If he is correct, and he is, then we need to turn to the inner workings of the legal mind. The more sensory aspects of what happens when a decision is made not only on a rational basis, but on the basis of the imagination.

This aspect goes right back to the Romantic poets and, especially, Shelley.

> *"Poets are the unacknowledged legislators of the world."*

To make my point about Shelley, I call upon his paper *A Defence of Poetry*. He was, essentially, dared, by a friend, most likely on a rhetorical basis, to explain why he spent so much time on poetry when he should be focusing on the era of scientific discovery. Shelley tries to articulate this tension between reason and the imagination.

> *"Reason is the enumeration of qualities already known; imagination is the perception of the value of those qualities, both separately and as a whole. Reason respects the differences, and imagination the similitudes of things. Reason is to imagination as the instrument to the agent, as the body to the spirit, as the shadow to the substance*."[11]

When you unpack what he is trying to say it points to an articulation of the fusion between the two. It does not matter if you are working on a piece of case analysis, a document, or a poem, there is both reason and imagination. What will happen to this document after I have drafted it? Where is the law that I must apply and how should I frame this case? All these tasks demonstrate the interplay of reason and imagination. You can only be a good lawyer if you are creative. Law is not mechanistic. Shelley also states that "poets are the unacknowledged legislators of the world"[12] in this paper. It is one of his most famous works and it is not a poem.

Reason and Imagination

For me, my copies of the *White Book* and Shelley are happy neighbours on my bookshelf because of this interplay in the mind of the lawyer between reason and the imagination.

So, if you do a little bit of a trawl though literature you can find a number of character sketches of lawyers. Let us start with Chaucer and his depiction of the Sergeant of the Lawe. The translation of the character of the lawyer

> *Nowher so bisy a man as he there nas,*
> *And yet he semed bisier than he was*"[13]

There are many translations of this passage, but I have not found one which points to the irony of this depiction of the lawyer and the knowing depiction of the lawyer as appearing to be so terribly busy to shore up his own – self-importance: Nowhere so busy a man as he/yet not so busy as he appeared to be. The Middle English irony of the lawyer, Chaucer, could point to the fact that such characters stalked the courts and taverns of the 13th century as much as the wine bars of today.

There are other attempts to highlight the inner workings of the lawyer's mind. This brings me to Ben Jonson, a playwright and poet who really did not like lawyers one bit. I want to have a dialogue with him because that is one of the most startling things about literature and law, especially legal judgments, as well as history – it is about a dialogue across time. He may be long gone, but he is here now. At least his work is here on his behalf, and I am going to have an argument with him. In *Volpone*, this is Jonson's description of the lawyer.

> *"That, with most quick agility, could turn*
> *And re-turn, make knots and undo them;*

[11] Percy Bysshe Shelley, *A Defence of Poetry* (1821).
[12] *Ibid.*
[13] Geoffrey Chaucer, *The Canterbury Tales* (1400).

Give forked counsel; take provoking gold
On either hand, and put it up.[14]

He is talking about flexibility and imagination of the lawyer as to how the client wishes to be represented. Jonson may dislike this flexibility, and the text drips with his antipathy towards the legal profession, but that is their collective job. Jonson sees debit and I see credit.

Now my next witness is Lord Byron. If I talk about Shelley, I must talk about Byron. Byron is well used to the courts. This next quotation is from *Don Juan*, another book from my final year. I can see that I highlighted it as an English student. Now, as a lawyer, I see more than the description and narrative, and more the pressure on the lawyer in navigating the "vale of strife."

"The lawyer and the critic must behold
The baser sides of literature and life,
And nought remains unseen, but much untold,
By those who scour these double vales of strife.
While common men grow ignorantly old,
The lawyer's brief is like the surgeon's knife,
Dissecting the whole inside of a question,
And with it the whole process of digestion . . .[15]

You are trying to dissect the problem, to get to the meaning, and Byron's concept that the lawyer will leave no stone unturned in pursuit, even down to the dissection of the process of digestion. Unfortunately.

The End Is Where We Start From

This brings me to T S Eliot, and *Four Quartets* that I have spent some time reading over the last few years. This quotation,

What we call the beginning is often the end
And to make an end is to make a beginning.
The end is where we start from.[16]

Whether this is a lawyer analysing the case for the first time or putting together a closing argument for the end of a trial, the end point is your start point.

Rabelais: Case Analysis and the Dice of Judgment

I had to squeeze some Rabelais into this lecture. He has his place even though he is not a poet or a lawyer. He was a cleric and then a medical student, a surgeon, and a sharp observer of language. However, he is here to demonstrate that there is much of the vestigial tail of the art of the craft of lawyer in literature and there is a humour and a rhythm to this work. The passage below, from *Gargantua and Pantagruel, is* not just an amusing story, it is satire on the process by which a lawyer, in this case a judge, says he has decided his cases for over 40 years. The strangely named Judge Bridlegoose has decided cases by the throw of a dice. For 40 years, I love the language here, as the judge is asked to defend himself in relation to a tax judgment after it has been discovered that he decided the case by throwing a six or an eight with his little dice of judgment.

"*I will reply briefly. . . .*

[14] Ben Jonson, *Volpone* (1606).
[15] Lord Byron, *Don Juan* (1824) Canto X.
[16] T S Eliot Little Gidding p33.

> *I thoroughly view and review, read and re-read, thumb over and peruse, the bills of complaint, sub poenas, appearances, reports, investigations, preliminary proceedings, statements, allegations, interrogatories, rebuttals, written testimonies, protests, complaints, objections, cross examinations, confrontations, and face to facings of witnesses, demands, letters dimissory, royal missives, warrants, demurrers, anticipatories, injunctions, returns of injunctions, appeals, final judgments, citations of judgment, decrees, adjournments for appeal, acknowledgements, executions and other such drugs and spiceries on one side, and on the other side, as a good judge is bound to do . . . I tend place on the end of the table in my chamber all of the defendant's bags of documents, and give him the first throw . . . This done, I put down the plaintiff's bags of documents . . . and likewise, . . . I throw for him too.*[17]

Rabelais – in terms of his case analysis, despite all this legal "stuff" that has landed on his desk, with all the "drugs and spiceries" of the lawyers craft which provide such a relentless rhythm to the text, even in translation, Bridlegoose has been deciding cases using dice for 40 year and has never been overturned on appeal. Furthermore, Bridlegoose argues that his judgments have only been called into question because his eyesight is bad, and he cannot real the numbers on his little dice of judgment. The final irony.

Structure and Form

This brings me to Shakespeare and the original quotation at the beginning of this lecture – too cunning to be understood. This is Shakespeare the poet, understanding the structure and the art and form of the lawyer and subverting it. So, we arrive at Dogberry in *Much Ado about nothing*, who has just arrested two characters and is asked by Don Pedro, who is going to judge them, to explain why they have been arrested. You only have to read this text to feel the subversion.

> *DOGBERRY*
> *Marry, sir, they have committed false report;*
> *moreover, they have spoken untruths; secondarily,*
> *they are slanders; sixth and lastly, they have*
> *belied a lady; thirdly, they have verified unjust*
> *things; and, to conclude, they are lying knaves.*
> *DON PEDRO*
> *First, I ask thee what they have done; thirdly, I*
> *ask thee what's their offence; sixth and lastly, why*
> *they are committed; and, to conclude, what you lay*
> *to their charge.*
> *CLAUDIO*
> *Rightly reasoned, and in his own division: and, by*
> *my troth, there's one meaning well suited.*
> *DON PEDRO*
> *Who have you offended, masters, that you are thus*
> *bound to your answer? this learned constable is*
> *too cunning to be understood: what's your offence? Marry sir*[18]

At the end Don Pedro becomes exasperated and says, *"this learned constable is too cunning to be understood."* Dogberry has no idea what he is saying and is using borrowed, pompous language. The term "learned constable" is used to mock him. Dogberry is trying to be legalistic, but he is failing and making a fool of himself. Like Caliban in *The Tempest* when he says *"the red plague rid you for learning me your language"*[19] we know he is getting the language wrong. Cunning has morphed into foolishness.

[17] Francois Rabelais, *Gargantua and Pantagruel* (1534).
[18] William Shakespeare, *Much Ado About Nothing* (1599).
[19] William Shakespeare, *The Tempest* (1611).

This is the point at which we realise that the language, structure and technique put the lawyer and the poet at the same desk both searching for meaning and different aspects of interpretation, for good or ill. The novel sometimes forces the reader into a settled narrative, but poetry never does. Poetry leaves the reader to interpret meaning. Poetry is all about dialogue, and dialogue over time.

Even so, sometimes legal meaning can be especially pointed.

This quotation from Middleton & Dekker's *The Roaring Girl,* not a well-known play and not a particularly good play, they do have one good line about the deft drafting of the lawyer with the nib of a weaponised pen,

> *"Be wise, sir, let not you and I be tossed*
> *On lawyers' pens; they have sharp nibs and draw*
> *Men's very heart blood from them."*[20]

In the 16th century, if you have a quill, you have a knife. The time taken to sharpen that quill to a fine point is physical in the preparation to make your point. Literally. This is about technique but also effect – a lawyer's pen has a sharp nib to make corrections and to insert questions and conditions.

John Donne and the Conceit.

We could have spent a long time with him and is view of argument and the "conceit" or concept or argument. John Donne will have an argument with anyone ------ he does not care. The Sun, a Flea, or Death ("Death be not proud for thou art not so . . ."). The centrality of Donne's clever argument is to use analogy to persuade his reader of the irresistible logic of his argument. Sometimes, you can read Donne's poetry and think he is just a clever law student. The recent learning just seeps out of him in a poem like *The Flea*. However, in A *Valediction Forbidding Mourning,* he talks about twin compasses and using the conceit as a way of explaining an underlying idea, to get to the essence of the truth. John Donne could have a lecture of his own, just on his use of legal language, and I am very sad to say goodbye to John at this point.

Milton and The Legal Register

The legal register can often be found in poetry, no more so than in John Milton's *Paradise Lost*. Milton was not a lawyer, but his father was a Scrivener, and his brothers were lawyers. He was steeped in the language of the law and knew its cadences. Take the first line of Paradise Lost, "*Of Man's first disobedience, and the fruit of that forbidden tree."* This could be for all the world a recital to a contract or the preamble to a piece of legislation. *Paradise Lost* is full of the language of the law and judgment. Just because I love the section,

> *"Him the Almighty Power*
> *Hurld headlong flaming from th' Ethereal Skie*
> *With hideous ruine and combustion down*
> *To bottomless perdition, there to dwell*
> *In Adamantine Chains and penal Fire,*
> *Who durst defie th' Omnipotent to Arms.*[21]

There is a legal register at work in poetry in the ultimate judgment in *Paradise Lost.*

The Ideal?

I have gone back to *Four Quartets* to end my talk. I suppose that my argument is about the power of language and language is nowhere so intense as the distillation that is poetry. My idea is to look for it in all you do every day. It is just an intense form of communication.

[20] Thomas Middleton and Thomas Dekker, *The Roaring Girl* (1611).

[21] John Milton *Paradise Lost*, Book 1 (1674).

We owe Eliot a lot. He rehabilitated Shelley and Byron, so he deserves plaudits for that, but he was also obsessed with the limitations of language. When I wrote the legal imagination as text and context I was following this line – we are doing our best. Eliot talks about "*a raid on the inarticulate with shabby equipment."* He knows that language for all its beauty is not clear. The same is true for the language of lawyers. For contract enthusiasts, you only have to look at cases like *Chartbrook*[22] or *Rainy Sky*[23] and whether a word has a static meaning or is a product of context. Interpretation is fraught with difficulty for both the poet and the lawyer. They are both condemned to a raid on the articulate with shabby equipment. For the lawyer, this ambiguity is often a convenient impediment.

So, there is the ideal as Eliot says in *Four Quartets*

> *" . . . and every phrase*
> *And sentence that is right (where every word is at home,*
> *Taking its place to support the others,*
> *The word neither diffident nor ostentatious,*
> *An easy commerce of old and new,*
> *The common word exact without vulgarity,*
> *The formal word precise but not pedantic*
> *The complete consort dancing together) . . . .*[24]

The answer can only be a weary good luck with all of that.

We know that is not the way things are, as does Eliot, because

> *". . . . Words strain,*
> *Crack and sometimes break, under the burden,*
> *Under the tension, slip, slide, perish,*
> *Decay with imprecision, will not stay in place,.*[25]

Any lawyer will recognise that debate that language is imprecise and *"will not stay in place, will not stay still."* This is at the heart of the Hoffmann and Sumption debate as to contractual meaning[26].

So, my answer to how I got here is by that winding stair of Shelly and Eliot and the imagination and language. I always wanted to work with language. I found that language was inexact but fascinating, a feeling I hope we can all take away from this lecture. The text and the context is always going to be in play, and if the word 'cunning' in Shakespeare is apt for cleverness or foolishness and those ideas change over time, then we are all just trying to be understood. We are not trying, always, to be overly clever or opaque, are simply struggling with the "shabby equipment" of language to reach an accommodation. But we are going to try because, *"For us there is only the trying. The rest is not our business."* What will be made of our work, by literary critic or judge, has to be left to that time and place. We still read *Donoghue v Stevenson*[27] and Byron. Both have impacts, even now.

I owe a great debt of gratitude to a journalist from the *Manchester Evening News* whom I met once. I remember that having been asked a rather pompous question about Alexander Pope, by response made the audience laugh – "after becoming acquainted with Mr Pope, I have come not to trust him!" The journalist told me that wit can, sometimes, provide a speedy

[22] Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101.

[23] Rainy Sky SA v Kookmin Bank (2012) 1 WLR 2900.

[24] T S Eliot" Little Gidding" (V) p33.

[25] T S Eliot" Burnt Norton" p1.

[26] The debate between Lord Hoffmann and Lord Sumption on contractual interpretation in the following papers: J. Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts', Harris Society Annual Lecture, Oxford 8 May 2017 and L. Hoffmann, 'Language and Lawyer' [2018] 134 LQR (Oct) 553.

[27] Donoghue v Stevenson [1932] AC 562.

exit from a tight corner. Consequently, I thought I would find some Alexander Pope. He did not write a lot about law, but he did write something with which we can end. And I think I can trust him for once!

> *"Once (says an author; where, I need not say)*
> *Two Trav'lers found an Oyster in their way;*
> *Both fierce, both hungry; the dispute grew strong,*
> *While Scale in hand Dame Justice passed along.*
> *Before her each with clamor pleads the Laws,*
> *Explained the matter, and would win the cause.*
> *Dame Justice weighing long the doubtful Right,*
> *Takes, opens, swallows it, before their sight.*
> *The cause of strife remov'd so rarely well,*
> *"There take" (says Justice), "take ye each a shell*
> *We thrive at Westminster on Fools like you:*
> *'Twas a fat oyster — live in peace — Adieu."*

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‘LAW IS POLITICS’ – SO WHAT?

*ALLAN C. HUTCHINSON**

‘The law . . . is a battlefield of social [and political] theory’.[1]

One of the key fault-lines in jurisprudence continues to be the extent to which adjudication can or should be considered a political or ideological practice. There are almost no contemporary jurists who assert that adjudication can be performed without any reliance on contested values and choices. However, there are many who do maintain that, while a resort to such values is inevitable, this task can be accomplished without a descent into an ideological free-for-all. The division among these jurists is over whether this resort is a penumbral and marginal occurrence (e.g. Hartian positivists) or whether that resort to political values is pervasive, but can carried out in a neutral and objective way (e.g. Dworkinian naturalists). In effect, these traditionalists are all neo-formalists to one extent or another because they think that adjudication is largely, if not exclusively, a professional undertaking as opposed to an ideological exercise.

There is, of course, a small group of critical scholars (whom I count myself among) who reject any compromise with the idea that law is politics. Instead, they argue that adjudication is always and everywhere a thoroughly ideological act – it is politics up, down and sideways. Although diverse in their approaches and methods, such critical theorists insist that adjudication is not only political in the circumstances that give rise to it and in the consequences that follow from it, but also is inescapably political in its operation and performance. Whether following, changing or developing the law, adjudication is understood as ‘a forum of ideology’[2] and any efforts to appreciate or understand adjudication and law generally are themselves unavoidably ideological projects. In short, critical legal theory dismisses most traditional accounts of adjudication as a vain attempt to confer a vestige of institutional legitimacy on a profoundly political process that tends to advance some social interest over others.

In this short essay, my main focus will be less on re-entering and re-fighting this debate, but more on pursuing the practical implications of the critical claim that adjudication is a thoroughly political endeavour. In the first section, I will say a little bit more about what I mean by the claim that ‘law is politics’. In particular, I will be clearer about exactly what the critical assertion that law-is-politics suggests and implies in a general theoretical sense. Secondly, I will explore some of the assumed, but flawed assumptions about what could happen if the idea that ‘law is politics’ was taken seriously and consistently. The third section will look at some possible institutional responses and accommodations to the law-is-politics stance. Throughout the essay, the ambition will be to demonstrate that the assertion that ‘law is politics’ is not simply another jurisprudential posture or contribution, but is a practical and, of course, political intervention in substantive matters that are often decisive for society generally.

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[1] William Prosser and Page Keeton, *Prosser and Keeton on the Law of Torts* (5th edn, West Publishing Company 1984) §3, 15. Prosser and Keaton limited their observation to tort law only.

[2] Duncan Kennedy, *A Critique of Adjudication: Fin De Siècle* (Cambridge, Mass, Harvard University Press 1997) 63.

I. LAW AND POLITICS

The broader debate in jurisprudence over the nature of law and its relationship to political and moral values is heated and intense. It is perhaps at its most fiery within constitutional law, even if it touches all areas of law. Antagonists tend to divide over whether there is some professional way to read and apply legal texts, rules and principles that does more than act as a cover for political partisanship or imposing loaded moral preferences. Indeed, traditional legal theory is premised on the idea that law and political morality can be effectively and consistently kept at some distance from each other such that law does not only work exclusively as a formalized site of irreducible ideological contestation; adjudication is about morality, but it is law's own morality, not that of the judge or jurist, that wins the day.[3] As such, most traditional jurists presume that there exists a solid and detectable, if elusive, basis for judicial decision-making that can act as a realistic hedge against ideological unruliness or personal political agendas.

The major thrust of a critical theory of law and adjudication is that, despite the claims of judges and their academic apologists, the law and its judicial and creative interpretation are simply professional exercises in political decision-making and persuasion; it is partisan politics masquerading as objective politics. Put succinctly, 'the content of the law and how it is applied is largely a function of who is on the bench and their values'.[4] Accordingly, academic theorists and commentators have difficulty letting go of the idea that, whatever its contingent and occasional failings, judges can actually live up to the jurisprudential aspiration that law can be done in a way that grapples with politics, but in a way that does not collapse itself into partisan politics. They seem willing to declare that, while legal interpretation 'is necessarily a normative enterprise, not a mechanical one,'[5] it is possible to be normative without also being ideological. In contrast, I maintain that, while this is more acute and evident in the work of Supreme or final courts of appeal, it is no less present or pervasive in lower courts. Also, and again, although this is more obvious and apparent in constitutional law while being more discreet and understated in other areas of law, the political character of adjudication is ever-present.

Stated in these broad and sweeping terms, a law-is-politics critique may seem to be too blunt and too crass by far to be convincing; it can almost be readily dismissed when expressed in such stark and unconditional terms. Consequently, it is important to offer several riders and provisos in defending this critical approach. As such, there are three main clarifications or elucidations that need to be added – that the politics of law-is-politics is not reducible to only party-politics; that legal reasoning is not entirely a bad faith enterprise; and that the critical alternative to traditional legal theory's account of legal reasoning and judicial decision-making is not a nihilistic free-for-all.

First, it essential that the reference to politics in law-is-politics is not to be understood in a narrow and parochial sense. It is about much more than a loose collection of issues that comprise piecemeal and expedient agendas for the purposes of periodic elections and the like. In the critical playbook, as well as encompassing those matters, it is about a much broader and deeper set of values and normative commitments. Politics is as much structural and systemic as it is personal and discrete -- the nature of the individual the nature of the individual, the organization of society, the relationship between an individual and society, the role of government, institutional legitimacy (including the courts' own), the distribution of

[3] See generally Allan C. Hutchinson, *Hart, Fuller And Everything After: The Politics Of Legal Theory* (Oxford, Hart Publishing 2022).

[4] Erwin Chemerinsky, *Worse Than Nothing: The Dangerous Fallacy Of Originalism* (New Haven, Conn, Yale University Press 2022) 24.

[5] Jonathan Gould, 'Puzzles of Progressive Constitutionalism' (2022) 135 Harvard Law Review 2053, 2085.

power, and democratic dynamics. Many of these are dealt with in an unspoken and perhaps unappreciated manner; they are more assumed than admitted. However, these values are what animate and inform much debate about the issues that are to be dealt with in more prosaic contestation (e.g., taxes, abortion, gender, education, sexuality, immigration, law and order, etc.). Whether it is about the nature of private obligations or public arrangements, these deep-seated commitments orient people in a general direction when confronted with particular and substantive social challenges or moral controversies.

Also, I am using 'ideology' in a standard and neutral sense. In this defence of law-is-politics, I use it to refer to a roughly-integrated set of beliefs and ideas, both shallow and deep, that help to explain and justify a general understanding of society, its constituent components, its appreciation of justice and their dynamic interaction. I am not intending to talk about ideology in the pejorative Marxist meaning as a set of normative commitments through which the powerful deceive, and therefore subjugate, the less powerful by impressing on them the supposed justness of present social arrangements. As such, my usage is not about the contested notion of 'false consciousness'.[6] So, for present purposes, 'political' and 'ideological' are used interchangeably; they are intended to refer to the same group of informative ideas and justifications.Most importantly, from a critical standpoint, it must be emphasised that, in addressing these deeper value-commitments and their ideological framework, there is no sub-strata that can be excavated or explored that will provide solid and objective ground on which to stand. There is no place to reach that will obviate the need for justification and contestation. While people may well reach agreement on some of these basic premises, they do not offer an external or uncontestable platform that can legitimate them or put them beyond dispute. Such agreement between people is nothing more than that; it can and will shift and change as circumstances and conditions also shift and change across time, place, and topic. Moreover, even if there was a shared consensus or compromise on these deeper values, they will not cash-out automatically or easily when specific issues have to be dealt with in specific situations. In short, there is no context of contexts that can render contingent commitments into absolute truths and that will withstand interrogation and engagement – it is politics all the way down.

Secondly, there is nothing in the law-is-politics stance that commits critics to the position that legal reasoning and professional argumentation are meaningless or irrelevant endeavours. This relies upon a distinction between anti-formalists and informalists. Both reject the formalist idea that law should and can be applied by judges without any or, at least, very minimal resort to ideological preferences. However, whereas the anti-formalist insists that any appreciation of adjudication begins and ends with judges' ideological commitments (i.e., consult one's own ideological compass, choose a desired outcome, and rationalize it in terms of the existing legal doctrines and decisions),[7] the informalist takes a more nuanced approach. For the informalists (and me, therefore), it is not that law is something separate from ideology or that law is nothing other than ideological posturing. When understood properly, legal interpretation and judicial decision-making is an applied exercise in law-and-ideology; it is both constrained and unconstrained in equal measure. Accordingly, rather than treat legal reasoning and ideological argument as separate and antithetical practices, adjudication is treated as being both a thoroughly professional craft as well as a thoroughly ideological

[6] Karl Marx, *The German Ideology* (1845). The best introduction to ideology remains: *Terry Eagleton, Ideology: An Introduction* (Revised Edn, London, Verso Books 2007). However, I should say that there is a certain 'false consciousness' in play in the judicial and juristic community about the supposed apolitical and technical nature of the legal reasoning that they rely on.

[7] It is far from easy to identify any serious legal theorist or constitutional scholar who consistently runs such a line. Mainstream writers tend to label some of their critics as falling into such a camp so that they can be more easily dismissed without taking their critiques seriously. See, for example, Richard H. Fallon, Jr., *Law And Legitimacy In The Supreme Court* (Cambridge, Mass, Harvard University Press 2018) 13, 49, 120. For my own extended efforts to map out and defend an informalist position, see Allan Hutchinson, *Toward An Informal Account Of Legal Interpretation* (New York, Cambridge University Press 2016).

exercise; law is a result of the combination of legal technique and political vision, particularly at the level of supreme courts.

So, the informalist does not insist that adjudication cannot occur in a law-contained, principled, and good-faith reasoned way. It can. Any account of judging, including any critical one that wants to be taken seriously (especially by the broader legal community) needs to accept that the craft-skills of legal argument and judicial reasoning are not only self-serving exercises in convenient ideological window-dressing. A poorly reasoned opinion is unlikely to garner the support and approval of the legal community as a respected precedent whatever its political substance or slant. Consequently, while legal considerations and reasoning techniques do not explain all that judges do (and they do not), it is equally fallacious to assume that they have no influence or effect at all. Indeed, it is the case that the better and more compelling an argument is as a piece of legal reasoning, the more likely it will convince others about the decision reached. But legal craft alone cannot and does not carry the day. What makes a judicial decision good or bad is not based only on an internal technical assessment (i.e., does it best conform with existing legal doctrine in small and/or large ways?), but is validated by an external normative evaluation (i.e., does it reach and defend a stance that is politically desirable and defensible in terms of prevailing social and political contexts?).

II. POLITICS AND PRINCIPLES

The third caveat about the critical defence of the claim that law-is-politics is that the alternative to traditional legal theory's account of legal reasoning and judicial decision-making is not a nihilistic free-for-all. Although politics is always and everywhere a contestable matter with no final or fixed resolution, the engagement in politics does not need to be a descent into ideological mayhem in which there is no basis at all for principled or coherent engagement. Indeed, it not only is possible to be more reasoned and principled in politics than it is usually assumed by judges and jurists, but it also seems a desirable requirement for citizens in a society that considers itself committed to the ideals of democracy and justice. The robust and principled defence of contested positions within political debate is not the exclusive province of the formalist judge or jurist. Recognising and acting upon this insight will offer a partial answer to the 'so what?' question when it comes to the law-is-politics critique.

As things presently stand, the villain of the piece is the reliance by traditional jurisprudence on its own very partial and self-serving account of what politics is when it draws the basic distinction between law and politics. The reigning rendition of this distinction can be traced back to Herbert Wechsler in 1959. Insisting that judges should be principled in character and application, he urged that, in order to act legitimately, courts must not act as a 'naked power organ,' but be able to distinguish their work from 'the *ad hoc* in politics' where unprincipled, transient and self-serving ideological allegiances are the order of the day. To achieve this, Wechsler contended that courts 'are obliged to be entirely principled ' and thereby be neutral in their dealing with politics.[8] This general approach was adopted by Lon Fuller who viewed the task of judges as being to identify and engage with the law's overall purposive enterprise that we 'inevitably help to create as we strive (in accordance with our obligation of fidelity to law) to make the [law] a coherent, workable whole.'[9] More recently, of course, Ronald Dworkin also developed a defence of the courts as being 'a forum of principle' that is obliged to be political, but to be guided in that duty by reference to the law's own politics, not their own ideological preferences.[10]

[8] Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 73 Harvard Law Review 1, 12, 19. See also Cass Sunstein, *Constitutional Personae: Heroes, Soldiers, Minimalists, And Mutes* (New York, Oxford University Press 2015).

[9] Lon Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1957) 71 Harvard Law Review 630, 667.

[10] See Ronald Dworkin, *A Matter Of Principle* (Cambridge, Mass; Harvard University Press 1986) 146.

In this stark Wechslerian scenario, it is not at all surprising that judicial decision-making, especially in constitutional matters, is treated as being preferable to politics. The traditional role of the courts is understood to be a principled and reasoned refuge from the opportunistic hustle-and-bustle and arch-partisanship of the political arena. Unlike politics, the courts are thought of as bringing a measured, rational and non-ideological level-headedness to the cynical mud-slinging antics of ideological politics. If politicians and social activists are entitled to play politics and get their hands dirty, the judges are supposed to adopt a more elevated stance and keep their hands from being soiled by that same political dirt. For traditional jurists, therefore, the crunch question is, even if this scenario were a preferable state of affairs (and it is doubtful that it is), whether judges could actually achieve and pull off achieve this 'clean hands' ambition.

In contrast to this traditional view, a critical stance takes the position that it is simply not possible to do adjudication without judges getting their hands dirty. It argues that adjudication is not as principled as its apologists claim and that politics is (or at least can be) not as unprincipled as jurists suggest. Good political or ideological argument is no more or less arbitrary than any other kind of argument. Of course, ideological argument can be arbitrary and opportunistic, but it can also be as principled and as reasonable as any other mode of reason, including legal reasoning. In short, legal adjudication has no corner on being principled. Indeed, what does and does not count as 'principled' is both more and less constraining than is generally proposed. As well as it being difficult to distinguish principles from other types of norms, there is no definitive way to separate legal principles from more general moral and political principles. The fact is that the doctrinal resources of law are so ample, so capacious and so multi-dimensional that the range of principles available are prolific and abundant; it is possible to generate any number of principles at any number of levels in legal doctrine to support a range of positions and outcomes.[11] The jurisprudential problem is, therefore, that there are too many principles, not too few, with no available meta-principle or method to resolve any tension or contradiction between them.

Consequently, it is hard to see how the judicial resort to principles resolves political disputes in any neutral, impartial or objective way. It simply shifts the contested territory to a different level of abstraction. (i.e., from rules to principles). Despite the assertions of jurists and judges, posited and controlling principles fail to achieve the vaunted quality of generality or be sufficiently 'disinterested'[12] that would allow them to settle impartially and authoritatively ideological issues (e.g., abortion or euthanasia). Moreover, each and every principle relied upon cannot avoid having a built-in propensity to favour one set of social interests over others, even if what those are might change for one circumstance to another. There seems to be no or very few principles that could strike either a theoretical or operational balance that could be acceptable to all political or moral sides of a dispute.

Also, within the Wechslerian frame of reference, criticising judges because of their failure to act in a principled manner suggests that they are nothing more than crude or cynical ideologues who have abandoned principle or professional argumentation entirely and are fulfilling their judicial duties in bad faith. In short, under the traditional view, there is an unnecessary and self-defeating Hobson's choice -- judges can be principled, even if they occasionally fall short of that exacting standard, or they can be 'manipulative', in that they make no attempt to be principled.[13] For traditional jurists, this is a self-serving distinction

[11] See, for example, Mark Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, (1983) 96 Harvard Law Review 78, 805–14. Allan Hutchinson, *Democracy And Constitutions: Putting Citizens First* (Toronto, Canada University of Toronto Press 2021) ch.8.

[12] See Wechsler (n9) 31–34.

[13] Wechsler, (n9) 15. Of course, there will be occasions when the allegation of bad faith and manipulativeness might be warranted..

that, of course, directs and validates jurists' choice to adopt a (pseudo-)principled approach over any other explanation or account of judicial behaviour and decision-making.

As well, there is a certain other-worldliness to the traditional view of the principles/politics dichotomy. The assumption seems to be that there is some obvious and intuitive worth to a proposed principle that transcends or goes beyond familiar and contested stances on controversial issues (e.g., racial equality or same-sex marriage). Indeed, as the opinions in the recent American Supreme Court decision in *Dobbs* (that set aside the *Roe*-grounded recognition of a limited women's right to terminate a pregnancy) reveals, the belief that there could be some neutral principle that would reconcile or placate the competing values and camps on abortion seems wildly far-fetched.[14] It is not that the competing opinions in that case were unprincipled (or that the Roe decision was somehow undisputedly principled), but that the principles relied upon were clearly partial and controversial. As such, cases, both high and low profile, are not so much authoritatively or impartially resolved as politically worked-through.

Yet it would be naïve to maintain that a demonstration of the inescapable politicality of legal principles would lead to any necessary progressive or ameliorating consequence. The argument offered is that the greater the candour shown by judges and scholars about what they do and why they do it will have a proportionately positive effect on constitutional law and decision-making. Indeed, it is suggested that, once the false allure of principled reasoning has been exposed and its real political thrust and dynamics are revealed, judges and jurists will have to be more forthright and open about the political nature of their legal reasoning. Moreover, so liberated and emboldened, they will engage more directly and honestly in the debate about what values are truly fundamental and worthy of judicial protection as a matter of constitutional imperative. Consequently, it is argued that, if there is more candour, judges and scholars will be obliged to come clean about their political values and to defend them, not as constitutional or legal entailments, but as political preferences.

The problem with this candour argument is that it presumes that judges are somehow unaware that judicial decision-making, principled or otherwise, is largely a shell-game. Yet this presumption defies any genuine or serious credibility, particularly in regard to the highest levels of adjudication. But it is not that judges (and certainly not jurists) do not understand that legal reasoning is as much a political manoeuvre as a legal argument. This most apparent in constitutional law where they recognize that their obfuscation of this fact is the best way to hide and advance an ideological agenda. Indeed, the claim that public law, especially constitutional law, or the doctrines of private law can be applied in a principled, correct and politically neutral way is itself thoroughly political. Ironically, it is jurists most of all who seem gullible or arrogant enough to think that law is, or can be, insulated from out-and-out ideological contamination; most citizens recognise and accept that fact, albeit reluctantly and piecemealedly. For instance, although Dworkin conceded that law 'is deeply and thoroughly political,' he was equally adamant that it was 'not a matter of personal or partisan politics.'[15] Of course, the truth is that law's politics turned out to be very much in line with Dworkin's own liberal and partisan preferences.

Accordingly, the insistence that candour will encourage constitutional judges and scholars to talk about political values in a more informed and direct way is unlikely to lead to much progress in bridging the widening rift between political left and right. It will also, of course, show that the emperors really do have no legitimate clothes on; they will stand naked in their political affiliations. Further, it seems optimistic, at best, to pretend that, once judges accept

[14] *Dobbs v. Jackson Women's Health Organization,* 597 US 1 (2022 at 63 per Kavanaugh J. and 83 per Breyer J. and Roe v. Wade, 410 US 113 (1973). See also Allan Hutchinson, 'The Good, The Bad and The Ugly: A Constitutional Reckoning,' (forthcoming 2023) 63 Santa Clara Law Review.

[15] Dworkin, (n11) 146. Others who run a similar line include Richard Fallon (n8) and Lawrence Lessig, *Fidelity and Constraint: How The Supreme Court Has Read The American Constitution* (Cambridge, Mass, Harvard University Press 2019).

the inescapable politics of law and judicial decision-making, they will work together more reasonably and produce more reasonable results. If this was ever true, it is no longer the case. While this is certainly the case in modern America, where society is deeply fractured and divided, it is also true of the United Kingdom, albeit in a slightly less polarised and more understated way. After all, the middle-of-the-road is as a political as any other part of the road. The major reason that British judges are less overt and less diverse in their politics is that, apart from significant cultural and institutional constraints in place, they are drawn from a much narrower and more establishment-oriented stratum of British society. The cloak of institutional legitimacy is still considered an imperial and protective garment that can cover their political nakedness.

The bottom-line, therefore, is that the law-is-politics critique offers a much more subversive and destabilizing challenge to law and adjudication generally. Indeed, this is why many astute traditional judges and jurists resist its force so keenly and so determinedly. Not only does the law-is-politics assault sweep away the jurisprudential ground from under the feet of most judges and jurists in the battle-royal over legal interpretation and decision-making, but it also threatens the whole institutional structure and decision-making process within which law and adjudication is presently understood, developed and justified. Reliance on candour will not do the kind of heavy-lifting that its neo-traditional defenders think that it might. In short, it is hard to see how it could be business-as-usual once the ideological cat is out of the jurisprudential bag: broader and deeper institutional change will be required.

III. PROCESS AND POLITICS

If judicial decision-making is primarily a political enterprise, it places the continuing role and power of courts under serious jeopardy. An insulated and privileged assembly that functions in a directly political way is antithetical to most accounts of democratic governance. The primary rationale for the Supreme Courts' democratic legitimacy is largely dependent on its operation as a distinctly legal forum. If politics are accepted to be as much or more a part of judicial decision-making as legal reasoning, the authority of the courts will be compromised – how can judges as unelected officials be seen to be acting as politicians and countermand the decisions of elected legislators if those judges are to retain popular support and broad deference? At the very least, it would seem that if supreme courts are not to be done away with entirely, at least their influence and involvement should be severely reduced.

If the content of law is largely reducible to the ideology make-up of its sitting judicial custodians, there is little reason for the courts to receive any particular or special deference in making policy or defending its decisions; what the law is and what it should be becomes nothing more (and nothing less) than whatever the judiciary want it to be. This does not mean that the choices made are thereby substantively bad *per se*, simply that they are not neutral or impartial in origin or effect. Both the common law and constitutional law is straight-out politics in judicial garb with no greater claim to democratic authority (and perhaps much less) than the executive or legislative branches of government. Moreover, so long as a commitment to democratic values and processes are a mainstay of a society (as they are claimed to be in the United Kingdom, the United States and Canada), then the already-fragile legitimacy of the courts and its self-developed laws is further reduced. As a corollary, the need for substantial institutional reform must be taken seriously.

As such, the appropriate and pressing questions for jurists and commentators are not about whether judges act judicially by adopting a principled approach or not to the duties. Instead, the challenge becomes whether what it means to act judicially can be understood in more openly political terms. In saying this, I am not suggesting that there is no difference between

judges and politicians. However, I am suggesting that the difference is not as large or as significant as most scholars recommend. Moreover, no matter how desirable it is to maintain the traditional distinction between judges and politicians, it is simply not achievable or realizable as a practical matter – judges cannot fulfil their roles in deciding legal issues without resort to or reliance on controversial and disputed political values. In particular, supreme courts are inevitably and unavoidably political. In their work. In other words, acting judicially is one more way of acting politically. If that is the case, it is not a large step to concluding that the development and application of legal and constitutional principles are much too important to be left in the hands of elite judges alone or perhaps in the hands of judges at all.

Once it is conceded that courts are political institutions where the prevailing ideological views of judges reign, it becomes necessary to propose some different and more compatible ways of proceeding. There are, at least, two initiatives that seem to flow from the law-is-politics critique and that might be congruent with a more progressive approach to democratic politics: the first is to multiply the institutional sites at which legal authority can be exercised; and the second is to rethink what counts as legitimacy in such alternative forums to interpret and develop the law. These initiatives seem particularly compelling in regard to constitutional law. Both strategies can be pursued simultaneously and each will have an impact on the other.

If the traditional understanding of law and judicial decision-making does not offer a neutral account of politics, there is no reason why supreme courts should be the only or primary place to engage in and develop a different kind of law. This is acutely so if the aim is to be more progressive in substance and scope. Jurists must disavow themselves and others of the idea that courts are the only governmental venue that can handle and resolve disputes in any decisive way. Instead, it will be necessary to recommend practical initiatives to multiply the sites for developing a society's laws and its constitutional arrangements. Although there are serious obstacles to doing this, there is nothing that prohibits such a pluralistic undertaking, especially if done in the name of democratic governance. If law is inherently political, then the political and democratic branches of government can take up and share the institutional slack of constitutional decision-making.[16] By so acting, the whole of government might re-animate citizens' authority and primacy in establishing and developing the terms and conditions for the attainment of democratic ends. Indeed, the compelling issues of law are not about abstract or neutral jurisprudential theories, but about the substance of law's politics. These are matters that demand more, not less popular participation.

A second initiative that can be acted upon in line with this institutional imperative is a revised understanding of what counts as legitimacy in judicial decision-making. Of course, to follow through on the claim that law-is-politics would make public law into a very different exercise than it presently is. If supreme courts survived at all, they would become very different institutions in personnel and process. This will have profound implications for what standards and expectations ought to be in play to evaluate the performance and acceptability of decisions made. There are already strong concerns expressed about the fragile legitimacy of such courts if its judges are perceived to be following their own political agenda rather than an impersonal legal mandate. However, if the political character of constitutional review is acknowledged and acted upon, the concern would no longer be that a constitutional agency, whether it is the final court of appeal alone or some other combination of bodies, would have no credibility or authority. Instead, a new set of arrangements would have to be complemented by a new frame of critical reference that understood good and bad constitutional decision in quite different terms than the present doctrinal and professional ones. Rather than pretend that they have no responsibility for the social and political effects of their decisions (as originalist

[16] See, Mark Tushnet, *Power To The People: Constitutionalism In The Age Of Populism* (New York, Oxford University Press 2022) and Hutchinson (n12).

judges do), decision-makers would have to accept and defend the political consequences of those decisions made.

In short, the phony war over whether law can and should be treated as something separate and different from politics could be abandoned. Instead, attention would be directed towards the much more productive and important task of evaluating whether the decisions of the Supreme Court contribute to a more democratic or better society. This entails worrying less about the argumentative form of decisions being made and more about the substantive kind of decisions that are made. I do not suggest that this will increase the likelihood of an elusive consensus or even be conducive to temporary agreement among decision-makers. But what it does recommend is that, rather than there being a bogus trade in so-called constitutional verities or neutral principles, the worth of constitutional law would be measured in terms of its capacity to protect and enhance democracy that it is supposed to serve. In this way, it might become possible to combine the institutional form and the ideological substance of constitutional law – what are the most democratic locations at which to engage in political debate about those values and commitments that can best advance a democratic society?

IV. CONCLUSION

The main thrust of any acceptance that law-is-politics is to re-orientate both legal theory and legal practice. In theoretical terms, it strongly urges that jurists abandon their existing preoccupation with offering an account of law and adjudication that is analytically sound in the sense of being universal and necessary. While the tendency to generalise is not to be ignored or jettisoned, juristic efforts must be more directed towards how law, politics and morality can be appreciated in contingent, local and practical contexts. In particular, they should be informed by a keener and more focussed sensibility that looks to make better and worse insights in particular contexts about the law's capacity to achieve justice – what is it about law that can work to be more just than less just? In practical terms, there is an urgent need to get beyond the reasoned-principles/raw-power dichotomy. Lawyers and scholars should stop trying to salvage the judicial process as a technical enterprise and to show that it is professional, not ideological in its reasoning and result. At a minimum, judges would be obliged to take personal responsibility for the decisions they make; they will have to defend their substantive merit directly rather than hide behind the jurisprudential truths that their judicial methodologies supposedly disclose. In short, while the terrain is contested and perilous, the alleviation and, if possible, the eradication of injustice must be the guiding ambition of judges, jurists and lawyers.

HIDING FROM HISTORY? THE GOVERNMENT'S 'GUIDANCE ON CONTESTED COMMEMORATIVE HERITAGE ASSETS IN ENGLAND'

PETER CUMPER and TOM LEWIS***

PART 1: INTRODUCTION

In October 2023 the UK government issued its long-awaited 'Guidance for custodians on how to deal with commemorative heritage assets that have become contested' ('the Guidance') in England.[1] Since (at least) the toppling of a statue of the 17th century slave trader Edward Colston in Bristol during the Black Lives Matter protests in June 2020, the controversial question of what to do with memorials to those involved in Britain's slave-trading and imperial past has become a prominent front in what are commonly termed 'culture wars'.[2] Such conflicts over memorialisation have been rife in very many parts of the world for several years.[3] One of the most oft-voiced arguments against the removal or relocation of such objects is that this would amount to an erasure of, or a hiding from, history.[4]

At present, in respect of such statues and monuments in England, the Guidance makes the default position in respect of commemorative heritage assets (CHAs) that are subject to calls for removal or relocation clear – *viz*, 'to keep them in situ; to retain them'.[5] However, in 'some cases', CHAs may be 'accompanied by a comprehensive explanation'.[6] The clearly stated underpinning rationale for this '"retain" or "retain and explain"' position is that removal or relocation of such heritage assets would constitute 'hiding from history' – and this should not be permitted to shield us from aspects of our past that 'we might disapprove of today'.[7]

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We are grateful for the insightful comments of the editor and an anonymous reviewer on an earlier draft. Errors and omissions remain our own.

1 'Guidance for custodians on how to deal with commemorative heritage assets that have become contested' DCMS (5 October 2023). Simon Stephens, 'Government finally publishes "retain and explain" guidance' *Museums Journal*, 5 October 2023. https://www.museumsassociation.org/museums-journal/news/2023/10/government-finally-publishes-retain-and-explain-guidance/ The Guidance applies only in England, heritage being a devolved matter. It does not apply to artefacts in museums, nor to Church of England ecclesiastical buildings, which are excused from listed buildings control and subject to the so called 'ecclesiastical exemption' on which see Planning (Listed Buildings and Conservation Areas) Act 1990, s 60 (1). See further 'Contested Heritage in Cathedrals and Churches' The Church Buildings Council and the Cathedrals Fabric Commission for England' (2021) https://www.churchofengland.org/sites/default/files/2021–06/Contested_Heritage_in_Cathedrals_and_Churches.pdf. The Guidance applies to 'custodians' who are owners or guardians of commemorative heritage assets and have primary responsibility for decisions in relation to them, 6. The term 'contested' refers to 'when the status/dominant narrative concerning a commemorative heritage asset is challenged', 5.

2 Andrew Pilkington, 'Changing the Narrative on Race and Racism: The Sewell Report and Culture Wars in the UK' (2021) 11 *Advances in Applied Sociology* 384; Bobby Duffy, Kirstie Hewitt, George Murkin, Rebecca Benson, Rachel Hesketh, Ben Page, Gideon Skinner and Glenn Gottfried, 'Culture wars in the UK: how the public understand the debate' (King's Research Portal, 26 May 2021) at https://www.kcl.ac.uk/policy-institute/assets/culture-wars-in-the-uk-how-the-public-understand-the-debate.pdf and David Olusoga, 'Historians have become soft targets in the culture wars. We should fight back', *The New Statesman*, 8 December 2021 https://www.newstatesman.com/culture/2021/12/historians-have-become-soft-targets-in-the-culture-wars-we-should-fight-back.

3 On de-commemoration disputes generally see the excellent collection of essays in: Sarah Gensburger and Jenny Wüstenberg, (eds) *De-commemoration: Removing statues and renaming places* (Berghan Books 2023).

4 Boris Johnson, Twitter @Borisjohnson, 12 June 2020. See also, for example, Charles Moore, 'Why our statues need protecting', *The Spectator*, 19 July 2020 <https://www.spectator.co.uk/article/why-our-statues-need-protecting> Others have made similar arguments, see for example, Mary Beard, 'Cecil Rhodes and Oriel College Oxford', *The Times Literary Supplement* 2015 <https://www.the-tls.co.uk/articles/cecil-rhodes-and-oriel-college-oxford/>.

5 Guidance (n1) 7. Whilst admittedly inelegant, for the sake of consistency we shall, for the most part, use the term 'commemorative heritage asset', or its abbreviation CHA for statues, monuments and memorials in public space. For obvious reasons, the CHAs most likely to be 'contested' have tended *not* to include war memorials to the fallen from the World Wars.

6 *Ibid* 3.

7 *Ibid*.

In this article we explore the underpinning rationale of this new Guidance, that retention is necessary to protect history. We suggest that this position reflects a problematic elision between different, though inter-connected, ways of 'knowing the past' – namely history and collective or shared memory. We argue that often CHAs might more properly be understood as carriers of the collective/shared *memory* of *parts* of the communities in which they are found, rather than as history. The Guidance's reliance on the 'argument from history' is used to justify the presumption that CHAs should not be removed, albeit accepting that, in some circumstances, explanations may be provided. A better approach might have been for the Guidance to have accepted that CHAs can be seen as carriers of the collective/shared memory of parts of the communities in which they stand, and thus important contributors to group identity. As such, they have a value. However, given the diverse nature of contemporary Britain, public space is frequently devoid of such 'carriers of memory' for some communities today in the UK. In what is a multi-cultural and multi-ethnic society this is problematic, especially when members of those communities' forbears were often victims of those very men celebrated by the CHAs in question. However, despite voicing reservations about its underpinning rationale and the resultant policy conclusions, we nevertheless conclude that, subject to certain caveats, the Guidance has the *potential* to open the way to imaginative, inclusive and empathetic reinterpretations of contested monuments – reinterpretations that could give voice to a variety of collective memories.

This article adopts the following structure: Part 2 summarises the political and legal background and briefly sketches out the contents of the Guidance; Part 3 explores differing ways of 'knowing the past' that are relevant in these circumstances, namely history and collective or shared memory, and their inter-relationship as well as their relationship to CHAs; Part 4 critically evaluates the Guidance in the light of this material, and Part 5 concludes by arguing that, notwithstanding its limitations, the Guidance provides a framework for discussion of issues of increasing public concern.

PART 2. THE GUIDANCE AND ITS POLITICAL AND LEGAL BACKDROP

The Guidance opens with the proposition that 'history is an essential part' of our country's heritage, which public bodies play in important role in 'conserving, protecting and explaining'. CHA's 'bring our history to life, illustrating many great people and events of the past' and serve as a reminder 'of the human costs often linked with them'.[8] The Guidance goes on to say that: [9]

> There are times when a commemorative heritage asset in a public space depicts people or events that we might disapprove of today. On some occasions, this disapproval may result in calls for the commemorative heritage asset to be removed or relocated. Government policy is that these commemorative heritage assets should remain in situ. We *should not hide from aspects of our history that we may deem unacceptable today.*

However, whilst retaining an asset in situ 'often is sufficient and no "explanation" is needed', the Guidance introduces a caveat: that 'in some cases, retained commemorative heritage assets could be accompanied by a comprehensive explanation that allows the whole story of the person, building or event to be told so that a fuller understanding of the historic context can be known and understood'.[10] That said, removal or relocation will only be justifiable in 'very few circumstances' – for example to make way for infrastructure projects or where there is risk of damage due natural hazards such as erosion and subsidence.[11]

[8] *Ibid* 3.
[9] *Ibid* emphasis added.
[10] *Ibid.*
[11] *Ibid* 8.

Political And Legal Context

The new retain and explain policy Guidance has its immediate origin in the reactions to the Black Lives Matter protests following the death of George Floyd in the summer of 2020.[12] In Bristol city centre the statue of the 17th century slave trader and philanthropist Edward Colston was toppled from its plinth by protestors, rolled and dragged through the streets, and dumped in the city's docks.[13] Four of the protestors were prosecuted for criminal damage but acquitted by a jury at Bristol Crown Court. This prompted the then Attorney General (Suella Braverman) to seek clarification on the question of whether a defence of freedom of expression was available to protestors in such situations – and the Court of Appeal subsequently held that it was not.[14] The Colston toppling led to strong reactions on both sides of the statues debate.[15] It also led to a so-called 'reckoning' in which many other statues of figures from Britain's colonial and slave trading past were either removed or came under new scrutiny.[16] It was in this febrile climate that senior figures in the UK government not only condemned the use of violent means to remove the Colston statue, but also came out strongly against the removal of problematic statues and monuments more generally, citing the preservation of 'history', and the need to avoid 'lying about our history', as key factors in assuming their stance. The (then) Prime Minster Boris Johnson tweeted that:

> We cannot now try to edit or censor our past. We cannot pretend to have a different history. The statues in our cities and towns were put up by previous generations. They had different perspectives, different understandings of right and wrong. But those statues teach us about our past, with all its faults. To tear them down would be to lie about our history, and impoverish the education of generations to come.[17]

The (then) Local Government Minister Robert Jenrick introduced changes to planning regulations so as to require planning permission to remove unlisted statues, plaques or memorials.[18] In an article in *The Sunday Telegraph*, Jenrick criticised 'the flash mob' and 'town hall militants or woke worthies' who are attempting to 'censor our past or pretend we have a different history to the one we have'.[19]

The government amended the National Planning Framework so as to embody a 'retain and explain' policy whereby upon applications to 'remove or alter a historic statue, plaque, memorial or monument (whether listed or not), local planning authorities should have regard to the importance of their retention in situ and, where appropriate, of explaining their historic

[12] An earlier prominent campaign was 'Rhodes Must Fall' to remove the statue of Cecil Rhodes at Oriel College, Oxford. See Amit Chaudhuri, 'The real meaning of Rhodes Must Fall', *The Guardian*, (16 March 2016).

[13] Tim Cole, 'After the fall, where?: Relocating the Colston statue in Bristol, from 2020 to imaginary futures' (2023) 82 *Journal of Historical Geography*, 156–168; Saima Nasar, 'Remembering Edward Colston: histories of slavery, memory and black globality' (2020) 29(7) *Women's History Review* 1218–1225; Andrew Wells, 'Introduction – is it wise to decolonise?' (2021) 54(5) *Patterns of Prejudice: Remembering Wrongs in Public Space: A forum on the toppling of Edward Colston in Bristol, June 2020* 473–483. For the story of the campaign to remove the statue, and the resistance to it, see: Tristan Cork, 'How the city failed to remove Edward Colston's statue for years', *Bristol Post* (10 June 2020); Antonia Layard, 'Edward Colston: Listing Controversy', *University of Bristol Law School Blog*, 15 June 2020, <https://legalresearch.blogs.bris.ac.uk/2020/06/edward-colston-listing-controversy/>.

[14] *Attorney General's Reference (No 1 of 2022)* [2022] EWCA Crim 1259. The Court of Appeal held that such violent destruction could not constitute expression for the purposes of the ECHR.

[15] Charles Moore, 'Why our statues need protecting', *The Spectator* (19 July 2020); Matthew Parris, 'In praise of Statue Toppling', *The Spectator* (13 June 2020).

[16] Aamna Mohdin and Rhi Storer, 'The reckoning: the toppling of monuments to slavery in the UK', *The Guardian* (29 January 2021).

[17] Boris Johnson, Twitter @Borisjohnson, 12 June 2020.

[18] HC Deb vol 687, col 35, 18 January 2021. See, Town and Country Planning (Demolition – Description of Buildings) Direction 2021, Background Note. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/979413/Demolition_Direction_2021.pdf> For a detailed overview of the planning law issues in relation to these issues, see Richard Harwood, Catherine Dobson, and David Sawtell, *Contested Heritage: Removing art from land and historic buildings* (Law Brief Publishing 2022).

[19] Robert Jenrick, 'We will save our history from woke militants', *The Sunday Telegraph* (17 January 2021) <https://www.telegraph.co.uk/news/2021/01/16/will-save-britains-statues-woke-militants-want-censor-past/>

and social context rather than removal'.[20] In January 2021 the statutory regime was amended to 'protect England's cultural and historic heritage . . . strengthening the measures protecting statues, plaques, memorials and monuments which have been in place for at least 10 years'.[21] Thus, whereas previously the demolition or alteration of listed statues, memorials, plaques and monuments did require listed buildings consent or (usually) planning permission – under the so called 'small structure exemption' – unlisted ones did not. This exemption was removed in early 2021 meaning that planning permission is now required 'for the demolition or partial demolition of unlisted statues, memorials and monuments which have been in place for at least 10 years'.[22] Furthermore, if Local Planning Authorities had been minded to grant permission to demolish or partially demolish relevant memorials they are required now to consult the Secretary of State on planning applications, and the Minister is now able to 'call in' the decision and make the determination themselves.[23]

In the criminal law sphere, the government took the opportunity of the passage of what was to become the Police, Crime, Sentencing and Courts Act 2022 to change the maximum penalty for damage to a memorial, irrespective of the value of that damage, increasing it from 3 months to 10 years imprisonment.[24] This change addressed a perceived 'concern . . . voiced in Parliament and society that the law focuse[d] too heavily on the monetary value of the damage with insufficient consideration given to the emotional or wider distress caused by this type of offending . . . '.[25] As a consequence of this provision, all such matters are now potentially triable in the Crown Court.

With these legal and policy changes, the UK government made its stance very clear: monuments, memorials and statues – even of highly controversial and divisive figures – should be kept in place and retained. It was against this legal and political backdrop that the (then) Secretary of State for Digital Culture Media and Sport, Oliver Dowden, announced that new guidelines 'would be drawn up, commissioning a Heritage Advisory Board of academics and heritage professionals to advise on the new policy.[26] The resulting Guidance also draws inspiration from a series of case studies exploring ways of dealing with contested heritage assets in the UK and abroad, produced by Historic England.[27]

The 'Guidance for custodians on how to deal with commemorative heritage assets that have become contested' is the natural corollary of the above developments and attitudes. It is summarised as follows: 'Government policy is clear: it opposes the removal of commemorative heritage assets. Custodians must in the first instance seek to retain and, if necessary, explain any commemorative heritage assets which have become contested before considering any application for removal'.[28]

[20] National Planning Policy Framework 2021, at para 198. This is at para 204 in the 2023 issue of the NPPF available here: <https://assets.publishing.service.gov.uk/media/65a11af7e8f5ec000f1f8c46/NPPF_December_2023.pdf>.

[21] Guidance (n1) 20.

[22] The Town and Country Planning (Demolition – Description of Buildings) Direction 2021. Further, the Town and Country Planning (General Permitted Development etc) (England) (Amendment) Order 2021 now excludes from the existing permitted development right, the demolition of unlisted statues, memorials, and monuments which have been in place for at least 10 years. These developments are summarised in Appendix A to the Guidance.

[23] The Town and Country Planning (Consultation) (England) Direction 2021.

[24] Section 50.

[25] See Policy Paper, *Criminal Damage to Memorials: Police, Crime, Sentencing and Courts Act 2022 Factsheet*, 27 May 2022. Previously, where the damage value was less than £5000, the case had to be tried summarily, and attracted a penalty of 3 months imprisonment or a fine of up to £2500.

[26] A Heritage Advisory Board was established by the Secretary of State to advise on the development of the Guidance. The Board members are: Anna Keay, Mukesh Sharma, Laurie Magnus, Trevor Phillips, Robert Tombs, Martha Lytton-Cobbold, Samir Shah, at <https://www.gov.uk/guidance/the-heritage-advisory-board>.

[27] Historic England, the government's advisor on the historic environment, was also consulted and developed a set of case studies where reinterpretation of commemorative heritage assets has occurred: 'Reinterpreting Contested Heritage (5 October 2023) at <https://historicengland.org.uk/advice/planning/contested-heritage/reinterpreting-heritage/#aab0af62>.

[28] Guidance (n1) 17.

What The Guidance Says

After its opening injunction that we must not hide from history, the Guidance goes on to state the retain and explain philosophy that decisions must not be based on a partial view of history but 'attempt to understand it, and encourage people to learn from it'.[29] Thus, where there are calls to remove or relocate a CHA in a public space because it 'depicts people or events that we might disapprove of today' 'government policy is that [they] should remain in situ'. Whilst retention 'in situ is *often* sufficient and no "explanation" is needed', 'in *some cases*, retained commemorative heritage assets could be accompanied by a comprehensive explanation that allows the whole story of the person, building or event to be told'.[30] This enables 'a fuller understanding of the historic context can be known and understood'.[31]

If a decision is made by the custodian to add an explanation to a commemorative heritage asset this must be 'based on a rigorous, balanced and comprehensive interpretation of the past',[32] and should be taken after 'wide consultation' with 'community and stakeholders'.[33] But the outcome of consultations will only be one part of the evidence and, interestingly, 'weighing up this evidence, custodians should be mindful of those who cannot be consulted including past and future generations.'[34]

Where it is ultimately determined that an explanation is required on a commemorative heritage asset that has become contested, this 'does not have to be purely textual'. A range of explanation options are encouraged, such as artistic re-interpretations, counter-memorials and cultural events. But whatever explanation is chosen it must be 'rigorous and balanced'.

The expressly stated underpinning rationale for the Guidance is clear, and in a direct line of development with the political rhetoric and legal developments that followed the toppling of the Colston statue in June 2020, namely the protection of 'our history', and the view that to remove or relocate such monuments is to hide from it. Moreover, education about the past is emphasised so that any decisions regarding CHAs should facilitate exploration and understanding of the past and encourage people to learn from it.[35] There is much that is indisputably encouraging about aspects of the Guidance, but the emphasis of not hiding from our history is, we argue, problematic. It is to this aspect we now turn.

PART 3. WE MUST NOT HIDE FROM OUR HISTORY

In relation to controversial statues and monuments, the 'argument from history' – that to remove them would constitute an erasure or a censorship of, or a hiding-from our past – is commonly voiced. For example in the United States' context, Donald Trump tweeted about campaigns to remove the statue of the Confederate General Robert E Lee in Charlottesville Virginia: 'Sad to see the history and culture of our great country being ripped apart with the removal of our beautiful statues and monuments'.[36] A version of this sentiment was formulated by former US Secretary of State Condoleeza Rice, that monuments should be preserved to help present and future generations understand the complexities of the past:

> Nobody is alive today who remembers the [American] Civil War, but by looking at [a Confederate monument] you can trigger what it meant and what it was like. You don't need to honor the

[29] *Ibid* 4.

[30] *Ibid, emphasis added.*

[31] *Ibid*.

[32] *Ibid* 9.

[33] *Ibid*.

[34] *Ibid*. How the views of the deceased and those yet-to-be born are to be taken into account is not explained.

[35] *Ibid*, 4.

[36] "X" @realDonaldTrump, 17 August 2017, <https://twitter.com/realDonaldTrump/status/898169407213645824>

> purposes of people [who] were on the other side of history, but you are better able to remind people.[37]

The justificatory conceptual and political hook of 'not hiding from our history where it makes us uncomfortable' carries the assumption that such monuments somehow are themselves history, and that if they were not in the places they are this history would be irretrievably lost or at least left unknown. We would argue, however, that the 'mustn't hide from history' justification tends to run-together and confuse two distinct – albeit overlapping – 'ways of knowing the past', [38] namely history on the one hand, and collective or shared memory on the other.[39] Whereas both have value, and both have necessary social functions, they are fundamentally different in kind, and perform *different* roles. Further, we argue, to justify the CHA Guidance in the name of history is problematic and misleading. In order to explain this point, we must first briefly consider these concepts of history and collective memory.

History

The question what is 'history' has been the subject to intense debate for centuries, especially in relation to the vexed question of whether the historian *doing* history has the obligation or even the possibility of striving for objectivity.[40] Hegel distinguished between things that happened (*res gestate*) and the narration of things that happened (*historia rerum gestarum*) – acknowledging the difference between actual events that have happened in the world, and their later retelling.[41]

Very often today the term 'history' is used in a loose, vague, all-encompassing way to mean the past, the 'olden days'.[42] But in the 19th century a prevalent purpose of history was to help in the creation of the national story, to inculcate national unity, a sense of identity, and patriotism.[43] A crucial aspect of this national story creation could even be a degree of wilful misrepresentation in order to help cement a shared national identity. Thus, for example, in his classic 1882 essay, 'What is a Nation?' the eminent French historian Ernest Renan argued that the very idea of nationhood required a certain collective amnesia, even at the expense of the pursuit of historical truth:

> Forgetting, I would even say historical error, is an essential factor in the creation of a nation and it is for this reason that the progress of historical studies often poses a threat to nationality . . . the essence of a nation is that all of its individual members have a great deal in common and also that they have forgotten many things.[44]

Similarly, today, in a number of places – especially in relation to education in schools and public/governmental pronouncements – 'history' may have several functions. For example, in some states, 'history' is frequently considered a tool for the telling of national narratives and

[37] Cameron Smith, 'Condoleezza Rice Talks Religion, Confederate Monuments and Energy Policy, Youtube video, May 2017, cited in Travis Timmermans, 'A case for removing Confederate statues' in Bob Fischer (ed) *Ethics of Left and Right: The moral issues that divide us* (OUP 2019), 518. This argument is commonly associated with the philosopher George Santayana, *The Life of Reason: Or the Phases of Human Progress, vol 1: Reason in Common Sense* (Charles Scribner's Sons 1920), 284.

[38] David Lowenthal, *The Past is a Foreign Country – Revisited* (Cambridge University Press 2015), 303–378.

[39] There is by no means a consensus on the terminology of collective memory, with scholars using, in addition and *inter alia*, 'shared memory', 'historical memory', 'cultural memory' and 'public memory', see Geoffrey Cubitt, *History and Memory* (Manchester University Press 2007), 9–10.

[40] See Daniel Little, 'Philosophy of History', *The Stanford Encyclopaedia of Philosophy* (Winter 2020 Edition), Edward N Zalta (ed) at <https://plato.stanford.edu/archives/win2020/entries/history/> See the 1960s debate between EH Carr, *What is History?* (Penguin 2018) and GR Elton, *The Practice of History* (Blackwell 2001). See further Richard Evans, *In Defence of History* (Granta 2018); and Helen Carr and Suzannah Lipscomb (eds), *What is History Now?* (Weidenfeld and Nicholson 2021).

[41] Georg Wilhelm Friedrich Hegel, *The Philosophy of History* (2004 Dover Philosophical Classics).

[42] See for example 'Ian Hislop's The Olden Days': <https://www.bbc.co.uk/programmes/b040tm16>

[43] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 2016); Eric Hobsbawn and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 1983); Stiina Löytömäki, *Law and the Politics of Memory* (Routledge 2014) 130.

[44] Ernest Renan, 'What is a Nation?' in HK Bhaba (ed) *Nation and Narration* (Routledge 1990) 11; Löytömäki, *Ibid*, 130; A Funkenstein 'Collective Memory and Historical Consciousness' (1989) 1(1) *History and Memory* 5.

accomplishments, in addition to the inculcation of patriotism and national identity, as well as the furthering or bolstering of current political objectives. Such state-sponsored official history can be seen, for example in contemporary Russia,[45] where Vladimir Putin's use of this kind of nationalist history to justify policies such as the invasion of Ukraine is well documented.[46]

The use of the 'not hiding from history' justification as the basis for the contested heritage Guidance *could* have in mind this kind of conception of history – the nation-building, patriotic story of the past to build national identity. Indeed, in the US debates, this kind of argument – the importance of building the national myth, for instance in relation to US Civil War memorials – has been explored by the philosopher Dan Demitriou.[47] There is certainly value in this kind of narration of the past in terms of fostering identity and a national story. But this conception is not readily consistent with the notion of history as an academic discipline in a modern liberal democracy. True objectivity may indeed be impossible in historical endeavour – at the very least, for example, because of the actual choices historians make about what to study in the first place.[48] However, in its current sense, in modern liberal democracies at least, it is nevertheless the case that history is a *discipline* in which, as Jeffrey Blustein says, the pursuit of truth is the '*regulative ideal*', and wherein the 'accuracy in what is said about the past is the primary criterion for assessing the quality of historical research and the achievements of historical enquiry'.[49] As the author of the Stamford Encyclopaedia entry on the *Philosophy of History*, Daniel Little, puts it:

> Historians themselves have obligations of truthfulness and objectivity in the accounts they provide of the past. This topic has occupied much of the discussion of history and ethics in the past few years. Much of this discussion has centered on the intellectual virtues to which historians need to aspire, such as truthfulness, objectivity, and persistence. Perhaps more generally, we might argue that historians have an obligation to deliberately and actively include those aspects of the past for further research that are the most morally troublesome . . .[50]

Whilst there may have been heated debate over the possibility or achievability of objectivity in the production of any history, there nevertheless exists a core requirement of academic *discipline*. Indeed the former Special Rapporteur in the field of cultural rights, Farida Shaheed, in her report on the teaching and writing of history has strongly cautioned against history education that is designed to foster patriotism and national identity or mould the young in line with official ideology. Rather, she stresses, '[h]istory is an academic discipline based on rigorous and systematic research of historical sources using confirmed methods and providing ascertainable results',[51] whilst history *teaching* 'should promote critical thinking and adopt a multi-perspective approach . . .'.[52]

[45] See for example Julie Fedor, '"Historical Falsification" as a Master Trope in the Official Discourse on History Education in Putin's Russia' (2021)13(1) *Journal of Educational Media Memory and Society* 107. See further, Farida Shaheed 'On the writing and teaching of history' Report of the Special Rapporteur in the field of cultural rights, General Assembly, UNGA A/HRC/68/296, 9 August 2013, Part III.

[46] Ido Vock, 'Tucker Carlson interview: Fact-checking Putin's "nonsense" history', BBC News Website, February 2024, available here <https://www.bbc.co.uk/news/world-europe-68255302>.

[47] Dan Demitriou, 'The Ashes of our Fathers: Racist Monuments and the Tribal Right' in Bob Fischer (ed) *Ethics, Left and Right: the Moral Issues that Divide Us* (Oxford University Press 2020) 523–545.

[48] Lowenthal (n38) 336–8.

[49] Jeffrey Blustein, *The Moral Demands of Memory* (Cambridge University Press 2008), 178 (emphasis added) whilst conceding that there are 'difficult and important questions about what historical truth consists in' at 191.

[50] Daniel Little, 'Philosophy of History', *The Stanford Encyclopedia of Philosophy* (Winter 2020 Edition), Edward N Zalta (ed) (references omitted) Available at <https://plato.stanford.edu/archives/win2020/entries/history/>.

[51] Farida Shaheed (n45) para 5.

[52] *Ibid* para 7.

Such conceptions of history, albeit caveated with cautions about the impossibility of objectivity, do not sit readily with the proposition that commemorative heritage assets – monolithic, monotone, celebratory, imposing glorifications of powerful men – *are themselves* 'history'. We shall return to this point below, but before doing so we now turn to an alternative way of 'knowing the past' that is in-play here: that of collective or shared memory.

Collective/Shared Memory

In recent years there has been a huge growth in the study of what is most commonly referred to as 'collective memory' and its relationship to individual and group identity.[53] And this scholarship is sometimes itself seen as part of what some have termed a 'memory boom' – the seemingly insatiable interest in the past, manifested in a fascination with, *inter alia*, personal ancestry, ancient buildings, films, novels, documentaries *et cetera*.[54] However, the term 'collective memory' itself was first coined in the early 20th century by the French sociologist Maurice Halbwachs, whose key insight was that memory cannot be a purely individual phenomenon since personal recollections can only exist and are localized in the past by linking up with the memories of others: one remembers only as a member of a social group.[55] We are not here talking of a mysterious 'group mind' – only individuals can actually remember – but rather that, since individuals are 'located in a specific group context', they 'draw on that context to remember or recreate the past'.[56]

The historian of memory, Patrick Hutton, explains Halbwachs' position:

> [m]emory is only able to endure within sustaining social contexts. Individual images of the past are provisional. They are 'remembered' only when they are located within conceptual structures that are defined by communities at large. Without the life-support system of group confirmation, individual memories wither away . . . In recollection we do not retrieve images of the past as they were originally perceived but rather as they fit into our present conceptions, which are shaped by the social forces that act on us.[57]

Collective memory is possessed by groups, and each group has its own collective memory, constructed over a specific period of time depending on the nature of the group. Since as individuals we live our lives as members of social groups, our memories and our transmission of those memories to others contributes to the processes by which groups develop a sense of collective identity extending over time.[58]

A clear explanation of this rather elusive concept is given by the philosopher Avishai Margalit in his book *The Ethics of Memory*.[59] Margalit draws the distinction between what he calls 'common memory' and 'shared memory'.[60] The former is an aggregate of all the memories of people who remember a particular event, or series of events, that each of them

[53] See for example Blustein, (n49) 182–239; Aleida Assmann, 'Re-framing memory: Between individual forms and collective forms of constructing the past' in Karin Tilmans, Frank van Vree and Jay Winter (eds.) *Performing the Past: Memory, History and Identity in Modern Europe* (Amsterdam University Press 2010); and Jeffrey K Olick, Vared Vinitzky-Seroussi and Daniel Levy (eds), *The Collective Memory Reader* (Oxford University Press 2011) especially Part II.

[54] Jay Winter, 'The Generation of Memory: Reflections on the "Memory Boom" in Contemporary Historical Studies' (2007) 1 *Archives & Social Studies: A Journal of Interdisciplinary Research* 363; Olick *et al,* (n53) 3.

[55] Maurice Halbwachs, *On Collective Memory* (first published in 1925 as *Les cadres sociaux de la mémoire*, Lewis Coser tr and ed, University of Chicago Press, 1992); Joseph R Llobera, 'Halbwachs, Nora and "history" vs "collective memory:" a research note' (1995) Durkheimian Studies 37, 37.

[56] Llobera, (n55) 37.

[57] Patrick Hutton, *History as an Art of Memory* (University of New England Press 1993), 6–7. Similarly, Michael Schudson holds that in an important sense there can be no such thing as *individual* memory, which in reality merely 'piggybacks' on the social and cultural practices of memory that a person's society has developed, M Schudson, 'Dynamics of distortion in collective memory' in D Schacter (ed), *Memory Distortion: How Minds, Brains, and Societies Reconstruct the Past* (Harvard University Press 1995) 346.

[58] Geoffrey Cubitt, *History and Memory* (Manchester University Press 2007), 155.

[59] Avishai Margalit, *The Ethics of Memory* (Harvard University Press 2004), 50–51. See also Aleida Assmann, n53, 35.

[60] Margalit (n59) 50–51.

experienced individually and, when a certain proportion of people in a given group have the same memory of an episode, we can call it a 'common memory'. 'Shared memory', on the other hand, is not a simple aggregation but occurs where there is communication leading to different individuals' perspectives being integrated and calibrated into a single version; and this element of communication means that those who did not witness the episode at the time with their own senses may nevertheless be 'plugged into the experience . . . through channels of description rather than by direct experience'. Importantly, this 'division of mnemonic labour'[61] need not be confined to memories of a single point in time, but can take place diachronically, *over time*, *across generations*.[62] As Margalit says:

> As a member of a certain community of memory, I am related to the memory of people from a previous generation. They in turn are related to the memory of people from the generation that preceded them, and so on, until we reach that generation which remembers the event in question first-hand.[63]

Thus, for Margalit, the 'shared memory' of an event that no living person actually experienced becomes a 'memory of memory' of what others have told future generations about their past.[64] And that may be a memory which, through the division of 'diachronic labour', does not end up as an event that actually occurred.[65] Hence, whilst the individual sense of the term *remember* is akin to *know,* collective memory is closer to *believe.* But this certainly does not necessarily diminish its importance for group identity, indeed far from it. As Margalit says in relation to one of the foundational shared memories of the Jewish people, the Exodus from Egypt, '[e]ven if it is true that we have such a memory, it does not follow that that dramatic event ever occurred'. [66] Moreover, such collective/shared memory that traverses generations may not simply be of an original 'event' – in Margalit's Exodus sense – but may carry intergenerational trauma whose ripples impact upon the descendants of those subjected to the original damaging 'event' in ways that evolve and change, for example in relation to the harms suffered by First Nations peoples in North America.[67]

With regard to the nexus between shared/collective memory and group identity, the sociologist Barbara Misztal explains that the former is the 'representation of the past, both that shared by a group and that which is collectively commemorated', and this 'gives substance to the group's identity, its present conditions and its vision of the future'.[68] This collective imagined past provides an 'anchor' and 'stability' for the group,[69] acting as a kind of 'glue' that allows identity to form and to subsist over time.[70]

For this shared/collective memory to survive over time, across generations in the way described by Margalit, Misztal and others, it must be embodied in 'durable carriers'.[71] These carriers can come in multiple forms – rites, ceremonies, poetry, songs, and rituals. But such carriers also come in the form of monuments and memorials in public space, providing visible,

[61] *Ibid* 52.

[62] *Ibid* 51–55.

[63] *Ibid* 59.

[64] *Ibid* 58. See also Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (Routledge 1999).

[65] *Ibid* 58–59.

[66] *Ibid*.

[67] Amy Bombay, Kim Matheson and Hymie Anisman, 'Intergenerational Trauma: Convergence of Multiple Processes among First Nations Peoples in Canada' (2009) 5(3) *International Journal of Indigenous Health* 6.

[68] Barbera A Misztal, *Theories of Social Remembering* (Open University Press 2003) 7.

[69] *Ibid* 126.

[70] Sharon McDonald, *Memory Lands: Heritage and Identity in Europe Today* (Routledge 2013) 11–12. See also Daniel Abrahams, 'The Importance of History to the Erasing-History Defence', (2022) 39(5) *Journal of Applied Philosophy* 745, 749–51, who draws on Benedict Anderson (n43).

[71] Assmann (n53); Arno Meyer, 'Memory and History: On the Poverty of Remembering and Forgetting the Judeocide' (1993) 56(5) *Radical History Review* 12.

tangible reminders of people or events in the group's past, and hence also of the group's own continuous existence and identity.[72] In the late 20th century the French historian, Pierre Nora, identified the growth of what he called these *lieux de mémoire,* sites or places 'where memory crystallizes and secretes itself', defining them as 'any significant entity . . . which by dint of human will or the work of time has become a symbolic element of the memorial heritage of any community'.[73] They have great importance, Nora argued, since they 'help to create and sustain narratives about the past, and help to hold communities together'.[74]

Clearly, if we accept the above description of collective/shared memory, we can see that CHAs – statutes and monuments commemorating past figures and events – can be seen exactly as *lieux de mémoire*, durable carriers of collective memory and anchors of identity for those (or parts of those) communities in which they stand. But before we explore the Guidance itself in the light of these points, we first need to understand the relationship between history and shared/collective memory, and it is to this issue we now turn.

The Link Between Collective/Shared Memory and History

Collective/shared memory and history are linked and overlapping, like circles in a Venn diagram. Charles Maier has said that memory tends to motivate historians because 'historical research utilizes memory in the sources it uses' and historians 'bring their own memories to bear' on the value judgments they make about human actions in the past.[75] Nevertheless, many scholars accept that memory and history are fundamentally different in kind. Jay Winter puts it thus:

> History is memory seen through and criticised with the aid of documents of many kinds — written, aural, visual. Memory is history seen through affect. And since affect is subjective, it is difficult to examine the claims of memory in the same way as we examine the claims of history. History is a discipline. We learn and teach its rules and its limits. Memory is a faculty. We live with it, and at times are sustained by it.[76]

With the 'doing' of 'critical history' the historian makes an ontological commitment to securing the event which the memory is about' which is not the case with collective or shared memory.[77] Moreover, history 'must be reflective and inevitably discordant and plural' – historians 'must at least presuppose different life situations, and 'assume that individuals and groups bring limited perspectives to any conflict'. The historian will reconstruct 'causal sequences' and 'tell stories of before and after and explain events by their antecedents'. In contrast, the

> retriever of memory does not have the same responsibility to establish causal sequencing. Triumphs, traumas, national catastrophes make their presence felt precisely by their re-presence or representation. Memories are to be retrieved and relived, not explained.[78]

Echoing Hegel's distinction between *res gestate* and *historia rerum gestarum*, whilst the past can never be retrieved unaltered, historians 'still strive for impartial, checkable accuracy,

[72] Margalit (n59) 54; Assman *Ibid*.

[73] Pierre Nora, 'From *Lieux de Mémoire* to Realms of Memory: Preface to the English-language edition' in Lawrence D Kritzman, (ed) *Realms of Memory: the Construction of the French Past*, *vol 1: Conflict and Divisions* (Arthur Goldhammer tr, Columbia University Press 1996) xv, xvii.

[74] *Ibid*.

[75] Charles Maier, 'A Surfeit of Memory? Reflections on History, Melancholy and Denial' (1993) 5(2) History and Memory 136, 143.

[76] Winter (n54) 12. Arno Meyer (n71) 13; Shaheed (n45).

[77] Margalit (n59) 61.

[78] Maier (n75) 143. See also Blustein (n49) ch 4. Stiina Löytömaki, *Law and Politics of Memory* (Routledge 2014) 6–7; Lowenthal, (n38) 292; Jay Winter, Historical Remembrance in the Twenty-First Century' (2008) 617 The Politics of History in Comparative Perspective 6, 12.

minimizing bias as inescapable but deplorable'.[79] On the other hand those invoking memory 'use the past to find roots, to affirm identities, to claim legacies, to celebrate collective bonds, and to traduce rivals'.[80] Whilst 'authentic rethinking and re-inquiry are the historian's noblest and most exacting tasks', by contrast, memory 'privileges piety and consensus over freethinking and criticism. It tends to foreclose discussion rather than to free and encourage it'. [81]

Aleida Assmann, drawing on the work of the German historian Reinhart Kosselek, maps the watershed between memory and history on to subjective and objective conceptualisations of truth. Subjective truth can be claimed by a person who 'owns his specific distinctive and authentic memories' and the truth of these memories 'arises from the indisputable evidence of unmediated experience'. In contrast objective truth can be 'claimed by the professional historian who reconstructs past experience in an impartial way' comparing sources, weighing arguments and engaging in an 'open-ended discourse of experts who in continuously correcting each other aspire to come closer and closer to the truth'.[82]

Because of the characteristics outlined above, history has no subjects that are beyond-the-pale, no subject is sacrosanct, whereas memory focuses on certain tropes from the past. As Yerushalmi explains in his study of Jewish history and memory, the historian 'seeks ultimately to recover a total past . . . [n]o subject is potentially unworthy of his interest, no document, no artefact, beneath his attention'. On the other hand, collective memory is 'drastically selective . . . [c]ertain memories live on; the rest are winnowed out, repressed or simply discarded by a process of natural selection which the historian, uninvited, disturbs and reverses'.[83]

The conception of collective/shared memory sketched out above may have a great deal of overlap with the 19th century national-identity building conception of history associated with Ernest Renan,[84] or today, with Vladimir Putin. But we can see that whilst there are links, it is wholly different in kind from the *critical* history described in Part 3 above: it is partial, selective, emotional. As Pierra Nora colourfully put it, memory is:

> affective and magical . . . only accommodate[ing] those facts that suit it; it nourishes recollections that may be out of focus or telescopic, global or detached, particular or symbolic . . . [it] is blind to all but the group it binds – which is to say . . . that there are as many memories as there are groups . . .[85]

Mindful of the aforementioned distinction between critical history and collective/shared memory, the following section will address the new Guidance on how to deal with contested CHAs, with its underpinning rationale that we must not 'hide' from history.

PART 4. THE GUIDANCE AND THE HISTORY/MEMORY DISTINCTION

Having regard to the above, it is strongly arguable that CHAs can better be seen as 'durable carriers of memory' rather than as 'critical history'. It seems reasonably clear that it is this critical sense of the word history that the Guidance has in mind when it uses it as the justification for the policy – as opposed to the 19th century patriotic, national myth-building Ernest Renan (or Vladimir Putin) conception of history. It will be recalled from Part 1 above that

[79] David Lowenthal, 'History and Memory' (1997) 19(2) *The Public Historian* 30, 32.

[80] *Ibid*.

[81] Arno Meyer (n71).

[82] Assmann (n53) 38.

[83] Yosef Hayim Yerushalmi, *Zakhor, Jewish History and Jewish Memory* (University of Washington Press 1989) 94–5.

[84] See above (n44).

[85] Pierre Nora, 'Between Memory and History: *Les Lieux de Mèmoire*' (1989) 26 Representations 7; Yerushalmi (n83) 94, says 'Memory and modern historiography stand, by their very nature, in radically different relations to the past'.

at the very core of the Guidance – when setting out the kind of explanations that may be permitted to be added to existing CHAs – is a view of 'history' that is rigorous and academically disciplined and, importantly, contributes to public education about the past. Thus, the Guidance states (at risk of repetition), that:

> Decisions made about our heritage must *not be based on a partial or partisan view of our history*, but should seek to explore our past fully, attempt to understand it, and encourage people to learn from it. [86]

And

> Removing commemorative heritage assets diminishes our *understanding* of the past. Moreover, removing CHAs risks suppressing our ability to *understand and learn* from aspects of our history, including past actions which may not be considered acceptable today.
>
> . . .
>
> If . . . custodians decide to add further explanation to a commemorative heritage asset, it must be in a *balanced* way, which enables the public to *learn* about it in its entirety and to make up their own mind. Explaining our heritage should be based on a *rigorous, balanced and comprehensive* interpretation of the past.
>
> . . .
>
> The historical evidence provided to assist custodians in deciding a course of action should be rooted in *academic rigour'*.[87]

It is therefore clear that the Guidance has in mind a sense of the discipline of academic history, eschewing 'partisan and partial' views of history and encouraging exploration, learning, understanding, balance and academic rigour.

More fundamentally, however, it is also clear the majority of contested CHAs are not and cannot constitute the kind of critical history described above. For the most part they were erected to promote drastically selective and overwhelmingly dominant narratives about the past. [88] Their ostensible and obvious message is one-dimensional and uncritical, namely the celebration of a particular figure from, and a singular version of, the past. As the former Archbishop of Canterbury, Rowan Williams has put it:

> A statue is a very distinct sort of image: it freezes someone in a timeless moment: it literally fixes their position and so in a sense fixes their place in a system of influence and relationships and public mythology.
>
> . . .
>
> The statue of a slave trader, with an inscription about his exceptional virtues, isn't something you can argue with: it's *meant* to express solid public approval, the power of social agreement. It's there to help fix or freeze the way a society works and the values it endorses.[89]

Today, all artistic, symbolic, expressive forms of representation can convey – immediately or over time – a plurality of meanings, especially in relation to the 'interplay between designers' and users' interpretations'.[90] As Ballentini and Panico argue in their semiotic approach, whatever the intentions of those powerful elites responsible for erecting them in the first place, 'once erected . . . [monuments and memorials] become social properties and users can

[86] Guidance (n1) 4 emphasis added.

[87] Guidance (n1) 8–9 emphasis added.

[88] Frederico Ballentini and Mario Panico 'The meanings of monuments: toward a semiotic approach' (2016) *Punctum: International Journal of Semiotics* 28, 37.

[89] Rowan Williams, *Candles in the Dark* (SPCK, 2020), 41. Iain Hay, Andrew Hughes and Mark Tutton, 'Monuments, Memory and Marginalisation in Adelaide's Prince Henry Gardens, (2004) *Geografiska Annaler* 86 (B/3) 201, 204.

[90] Ballentini and Panico (n88). The European Court of Human Rights has stressed in its right to freedom of expression case-law that symbols have 'multiple meanings'. See, for example, *Vajnai v Hungary*, Application no. 33629/06 (ECtHR, 8 November 2008) para 51.

reinterpret them in ways that are different or contrary to the intentions of the designers'.[91] However, such meanings may be difficult to discern, or hard to extract. Moreover, even if different interpretations can be derived from them, this does not render CHAs history. As the historian David Olushoga has said:

> . . . what they're not, is history. What they are, is validation and memorialisation. Why do we want to say that these were great men when we know in many cases they were not? . . . Which statue can we point to that tells us about a difficult part of our history? They cannot teach us history. They are always silent about the victims and they are put up by tiny members of a male elite to celebrate the lives of other members of that tiny male elite.

It is axiomatic that CHAs cherry-pick certain interpretations of past historical events/figures, while totally ignoring others. In terms of 'ways of knowing the past' it is hard to argue that they fit anything other than into the category of collective/shared memory and, as such, are contributors to group identity.

Arguments on the survival of, or the not-hiding-from history, as sketched out in the sections above – and in the sense that the Guidance itself embraces when considering how the 'explain' side of the 'retain and explain' policy is to be pursued – would seem to be fallacious. History cannot seriously be said to depend on the unalloyed presence of CHAs glorifying particular individuals (predominantly men of the 18th and 19th century) for their military, colonial and imperial exploits. The information they contain is monochrome – one sliver of a perspective on the past, presented by those who emerged from it wealthy and victorious, and in a position to ensure that it was only their side of 'the story' that was immortalised in stone and bronze. Such CHAs do not proffer enlightenment or context, or offer critique, or balance opposing views. Moreover, and obviously, these stories are *not solely* available in these monolithic representations, but from a host of other sources.[92] Undoubtedly, if a monument is removed, this *changes* one narrow representation of the past in public places. But it is not a hiding from history in the way that is asserted in the Guidance.

Cleaving To History

In its use of the 'mustn't hide-from-history' justification the Guidance is apparently cleaving to the supposed objectivity, rigour, balance and universalistic credentials of critical 'history'. There are obvious tactical advantages to this approach. To claim the validation of history casts those who wish to remove such monuments as somehow attempting to subvert or distort the truth about the past. It firmly places the case for retention on the moral high ground, indeed, on the side of 'truth'. And it enables a stance to be adopted whereby the default position is one of status quo. The use of the 'mustn't hide . . .' argument enables a rebuttable presumption that things should stay the same, and that for them not do so is somehow being dishonest about the past. Consequently, the burden created by the Guidance falls squarely and heavily on those advocating for change.

Because the Guidance has as its justificatory rationale the eschewing of attempts to hide from history, when it comes to explanations which might 'in some cases' be proposed, the onus is on the advocates for change to be rigorous and scrupulously researched. This is of course justifiable in that it is concordant with the meaning of 'history' as a discipline, as sketched out above, with the pursuit of truth as its 'regulative ideal'. But those advocating for the status quo have *no such* presumption to overcome. And it raises questions about those CHAs that remain unexplained – namely, where is the vaunted balance and academic rigour in relation to them? They will still remain standing, still unexplained. The Guidance's injunction that '[d]

[91] Ballentini and Panico (n88) 28.

[92] Travis Timmerman, 'A case for removing confederate statues' in Bob Fischer (ed) *Ethics Left and Right: The Moral Issues that Divide Us* (OUP 2019) 518.

ecisions made about our heritage must not be based on a partial or partisan view of our history, but should seek to explore our past fully, attempt to understand it, and encourage people to learn from it' manifestly does not apply to 'decisions' to leave monuments unencumbered by unnecessary or unwanted explanations. Indeed, the adherence to the virtues of rigour and balance bites only once the decision has been made to 'explain'. Consequently, there now exists something of a zero-sum-game in respect of the CHAs to which the Guidance applies. Where advocates for the installation of an explanation are successful, they are required to adhere to the highest standards of balance and academic rigour. But those CHAs for which it is determined that no explanation should be added will remain obdurately unbalanced and un-rigorous, monolithic and monoglot, conveying no more than one side of any story.

More generally, in respect of *all* CHAs, it is arguable that there *has* been to-date a hiding-from-history, since *other* sides of the stories have not been told. In other words, to maintain the status quo essentially constitutes 'hiding from history'. The Colston statute illustrates this very point. It stood on a prominent plinth in a busy part of the city of Bristol, adorned by bronze plaques illustrating his philanthropy, and the words "Erected by the citizens of Bristol as a memorial of one of the most virtuous and wise sons of their city".[93] Not a word was inscribed as to the methods by which he secured the wealth that enabled him to bestow his largesse upon the city, nor of those who suffered incalculable pain as a result of his actions.[94] Thus, it could strongly be argued that the unexplained CHA *itself* constituted a hiding-from-history. As one of the protestors acquitted in 2022 of criminal damage for toppling the Colston statue said, 'We didn't change history, they were whitewashing history by calling (Colston) a f . . . virtuous man . . . We didn't change history, we rectified it'.[95]

Museums

If it were truly the preservation of history that was the aim of the Guidance, the possibility of relocation in museums where full historical context could be provided should surely be entertained.[96] This approach has been followed with the fallen Colston statue, relocated in the M Shed Museum in Bristol, lying prone, dents and graffiti and all, providing an educational opportunity for visitors to learn about the slave trade and resistance to it.[97] Another example can be seen in Berlin's Citadel Museum to which the monuments to Prussia's rulers have been transferred.[98] Such initiatives would address, full-on, the hiding-from-history defence. A full, balanced, rigorous context could be provided and an opportunity for education created about Britain's prominent role in the story of slavery and colonialism. In addition, it would go some way to re-inventing CHAs *as* history, and not simply as public glorifications and valorisations of particular powerful men. However, this avenue has been closed off by the near blanket prohibition on removal of commemorative heritage assets.

[93] See Roger Ball, 'Myths within myths . . . Edward Colston and that statue' (Bristol Radical History Group, 2018) at <https://www.brh.org.uk/site/articles/myths-within-myths/>.

[94] Madge Dresser, 'Colston Revisited' (History Workshop, 27 June 2020) at <https://www.historyworkshop.org.uk/colston-revisited/> It is estimated that Colston, as Director of the Royal Africa Company, was responsible for the transportation of 84,500 Africans into slavery, and for the deaths of approximately 19,300 men, women and children, see Saima Nasar, 'Remembering Edward Colston: histories of slavery, memory and black globality' (2020) 29(7) Women's History Review 1218, 1218.

[95] Chiara Giordano, 'Edward Colston statue trial: Four cleared of criminal damage for toppling memorial' *The Independent* 3 January 2022 <https://www.independent.co.uk/news/uk/crime/edward-colston-statue-trial-latest-b1987356.html>; See also Parris (n15).

[96] Timmerman (n92) 518.

[97] Tim Cole (n14); Joanna Burch-Brown and Tim Cole, *The Colston Statue: What Next?* (Bristol History Commission, 2022), <https://www.theguardian.com/uk-news/2024/mar/14/edward-colston-statue-placed-quiet-corner-bristol-museum>; <https://exhibitions.bristolmuseums.org.uk/the-colston-statue/wp-content/uploads/sites/22/2022/02/History_Commission_Short_Report_Final.pdf >; Steven Morris, 'Edward Colston statue placed in a quiet corner of Bristol museum' *The Guardian* (14 March 2024) <https://www.theguardian.com/uk-news/2024/mar/14/edward-colston-statue-placed-quiet-corner-bristol-museum>.

[98] The Berlin Citadel Museum's permanent exhibition 'Unveiled – Berlin and its monuments' (opened 2016): <https://www.zitadelle-berlin.de/en/museums/unveiled/>.

If the Guidance had referred to collective/shared memory, connected to the identity of which CHAs are durable carriers, it would have had less rhetorical force, appearing to favour the emotion and identity over rigour, balance and objectivity. Yet we argue that it would have been preferable had the Guidance acknowledged that public memorials are carriers of collective memory for many in those communities where such memorials are found. As such they have a value. And as Demitrou and Wingo point out, 'every people needs its heroes, and any people with a developed material culture will remember them with monuments'.[99] But, in a diverse, multi-cultural, multi-ethnic society like modern Britain, the unalloyed celebration of these 'heroes' by people in one community may be ineluctably at odds with the collective memories of those in other communities – especially those whose ancestors suffered at the hands of the transatlantic slave trade or British colonialism and imperialism. As such, the current state-of-affairs leaves many people without visible durable carriers of the collective memories linked to their heroes. Because the Guidance sets a presumption against change, and is in favour of the status quo, it rather sees things from one perspective – and it thereby displays a lack of empathy for the viewpoints of those with different collective memories. As the philosopher Daniel Abrahams observes, '. . . the key worry is not the preservation of some true history uniquely embodied in such commemorations, but the defence of some collective identity the commemoration supports'.[100]

The 'mustn't hide-from-history' justification is therefore, we argue, flawed, both in the Guidance's own terms – in that it asserts that history must be balanced and rigorous, and CHAs are not and cannot be – and in terms of the substance of the issue, in that they are for the most part, not history but monumental durable carriers of memory and identity. However, notwithstanding these problems with the Guidance's underpinning rationale, and the presumptions of retaining the status quo that it creates, when it comes to the suggestions to custodians on the possibilities for explanation, there is more room for optimism. It is therefore to the 'explain' part of the retain and explain Guidance that we now turn.

Chinks Of Light

The Guidance creates a virtually irrebuttable presumption against the removal of CHAs (apart form in the narrowest range of circumstances related to factors other than what they represent). This is the 'retain' bit. However, it acknowledges that *sometimes* explanation will be necessary and suggests many possible ways in which such explanations might be proffered, subject to the caveats as to academic rigour, balance, wide consultation etc outlined above.

The term 'retain and explain' rather conjures-up an impression of textual information boards set beside CHAs, designed to place them within their historic context. Indeed, this is one of the options that the Guidance suggests is possible.[101] Perhaps the most famous example of such textual contextualisation is in relation to the controversial statue of the Cecil Rhodes, at Oriel College Oxford. In October 2021, an explanatory plaque was placed nearby, describing him as a 'committed British colonialist' who exploited the 'peoples of southern Africa', and that his activities 'caused great loss of life'.[102] This kind of textual

[99] Dan Demitriou and Ajume Wingo, 'The Ethics of Racist Monuments' in David Boonin (ed) *The Palgrave Handbook on Philosophy and Public Policy* (Springer 2018) 341, 350.

[100] Daniel Abrahams, 'The Importance of History to the Erasing-History Defence' (2022) 39(5) *Journal of Applied Philosophy* 745, 753.

[101] Of the ten examples in the 'list of reinterpretation case studies' published by Historic England and intended to 'complement' the Guidance, only three consisted of textual plaques. Of these, one records an African contingent in a Roman garrison ('Aballava Fort Contextual Plaque, St Michael's Church, Burgh-by-Sands, Cumberland') and one is a plaque outside a university library (as opposed to a 'monument' or CHA ('Commemorative Plaque, All Souls College Oxford'). The remaining one sits beneath a memorial in a church ('Reconciliation Rederos, St Stephen's Church, Bristol') which would not be covered by the Guidance since it does not apply to Church property, (n27).

[102] Jamie Grierson and Damien Gayle, 'Oxford college installs plaque calling Cecil Rhodes a "committed colonialist"' *The Guardian* (11 October 2021).

information/explanation might, on our argument, go some way towards converting what are currently (we argue) carriers of collective/shared memory into something more akin to the kind of critical, rigorous, balanced, educative 'history' that the Guidance advocates. Indeed, this approach could be seen as a watered-down version of the (now ruled-out) move-them-to-museums strategy – but in the current climate of cash-strapped local authorities, and severely limited funding for the cultural and arts sectors, it might be seen as a more feasible option.[103]

This form of explanation is, however, subject to the major objection that it does nothing to mitigate or moderate the monumental, celebratory and eulogising character of many contested CHAs themselves. A bronze or stone monument, set on high plinth, is far more impactive on the senses than text on a board which, by its very nature, has to be deciphered, pored over, and read at close quarters. Furthermore, whilst the addition of historical contextualizing information to a CHA in situ may indeed provide historical education, it does not thereby 'transform it into a commemoration that *also* includes [the] victims'.[104] As the philosopher Chong-Ming Lim says, 'commemorations present their information in a primarily visual format', whereas information boards or contextualizing plaques do so in a far less impactful textual format, and '[t]hese differences in accessibility will affect the effectiveness of the contextualization in addressing the tainted commemoration'.[105]

The Guidance also suggests the use of QR codes to give access to digital accounts of the historical context, which would allow 'for a variety of viewpoints to be shared easily', or amendments 'to formal records, such as list descriptions or entries in the local Historic, Environment Record.[106] Whist having advantages of depth and breadth of coverage – and perhaps a move towards CHAs becoming key components of critical history – this approach would be subject to the same objections as information boards, in terms of relative prominence and strength of the stories told, and of the one-sided nature of the actual commemorations.

It is however important to bear in mind that the Guidance also contains proposals of more innovative, artistic and engaging approaches to reimagine CHAs – which might communicate not just bare historical contexts, but the complexity of differing and competing *collective memories*. These include 'cultural events which help to explain the context', the installation of complementary statues or other artwork to provide 'commentary or a counter-perspective', and the 'non-permanent, appropriate illumination of the heritage asset to draw attention to the wider context'.[107] These artistic possibilities perhaps can be seen as utilising collective/shared memory itself, attempting to engage at an emotional rather than a rational level.[108] Examples of the kind of powerful interventions that might be possible can be seen in the subversive responses to the Edward Colston statue in the days before it was toppled. These 'guerrilla installations' were unsanctioned and consequently removed. But they provide vivid indicators of the possibilities to which the Guidance *possibly* gives licence. Thus, for example, in 2018, on Anti-Slavery Day, a series of concrete blocks were laid out on the pavement in front of the statue in the shape of ship's hull, enclosing 100 prone plaster figures in powerful

[103] Dale Berning Sawa, 'Museums in the firing line as UK council funding crisis bites', *The Art Newspaper* (5 March 2024) Available at <https://www.theartnewspaper.com/2024/03/05/museums-in-the-firing-line-as-council-funding-crisis-bites>.

[104] *Ibid*.

[105] Chong-Ming Lim, 'Vandalising Tainted Commemorations' (2020) 48(2) *Philosophy and Public Affairs*, 185, 204.

[106] Guidance (n1) 14–15.

[107] *Ibid*.

[108] Lim (n105) 207–208 suggests that the 'vandalising' of statues might address such objections. Alicia Dixon examines the Roman practice of *damnation memoriae*, whereby statues of those who had committed crimes against the state would be removed or defaced so as to *enable* their dishonour and infamy to be remembered, see Alicia Dixon, 'Remembering to Forget: Correcting the False History of the Lost Cause in the American South Through *Damnatio Memoriae'* (2020) XXV(3) *Art, Antiquity and Law* 189.

evocation of the 1789 print of the Liverpool slave-ship, *The Brooks*, illustrating the most efficient (and hence profitable) method of storing human cargo in the hold.[109] Upon the concrete blocks were listed the jobs performed by victims of modern-day slavery.[110] On another occasion a ball-and-chain made of red wool was attached to the statue's ankle.[111] Such artistic endeavours could potentially have the role of helping to create and embody new, and more inclusive, collective memories. They are able to shed fresh light on the past, not through the recounting of historical facts, but rather by facilitating the ability to 'imagine the other'.[112]

Human Rights

One perspective that is conspicuous by its absence from the Guidance is that of human rights. Perhaps this is not surprising given the stance of the former Conservative government responsible for drafting it, with the former Prime Minister Rishi Sunak hinting strongly about possible withdrawal from the European Convention on Human Rights.[113] Nevertheless we have argued elsewhere that, in some circumstances at least, glorifications in public space of slave traders and colonialists from the past might engage the rights of those from communities who fell victim to such people and who continue to suffer structural inequalities into the present. Accordingly, decisions by public authorities as to how to deal with such monuments might entail a balance to be struck between competing rights in the ECHR, in particular the Article 10 free expression rights embodied in the monument (which includes the right to receive, as well as impart, information and ideas) and the Article 8 right to respect for private and family life which such CHAs might engage in those who are grievously offended by them.[114] If this is correct then governmental decisions on CHAs will have to be mindful of such considerations due to the Human Rights Act 1998, section 6 of which makes it unlawful for public authorities to act incompatibly with the ECHR, unless compelled to do so by primary legislation.

However, even if we leave aside the hard-edged principles of domestic human rights law, the principles of international human rights point in the direction of the kind of imaginative and innovative solutions for which the Guidance leaves the door (at least) ajar. Thus, for example, Farida Shaheed, the (former) UN Special Rapporteur on Cultural Rights in her report to the UN General Assembly on 'Memorialisation Processes', draws on the right to take part in cultural life under Article 15(1) of the International Covenant on Economic, Social and Cultural Rights (1966), in arguing that 'people's access to pluralistic memory [i]s a human right'.[115] She contends that this includes the right of all persons to 'access, participate in, enjoy and contribute to . . . cultural heritage, which encompasses both history and memory'.[116] For Shaheed, cultural rights require policies that promote 'cultural interaction and understanding between people and communities' and the 'sharing of perspectives about the past and

[109] Royal Museums Greenwich, Plan and Sections of a Slave Ship <https://www.rmg.co.uk/collections/objects/rmgc-object-254967>.

[110] 'Anti-Slavery Art Installation by Colston Statue in Bristol', *Inspiring City*, 22 October 2021 at <https://inspiringcity.com/2018/10/22/anti-slavery-installation-appears-next-to-edward-colston-statue-in-bristol/>

[111] Michael Young, 'Ball and chain attached to Edward Colston's statue in Bristol city centre', *Bristol Live*, 6 May 2018 available at <https://www.bristolpost.co.uk/news/bristol-news/ball-chain-attached-edward-colstons-1539315>

[112] Farida Shaheed 'Memorialization Processes', Report of the Special Rapporteur in the Field of Cultural Rights, General Assembly, UNGA A/HRC/25/49, 23 January 2014, para 66.

[113] Chris Smyth, 'Rishi Sunak ready to pull out of ECHR over Rwanda flights', *The Times* (23 April 2024). The new Labour government, elected on 4th July 2024, is more well-disposed the ECHR.

[114] Peter Cumper and Tom Lewis, 'The UK's "Statue Wars": Can Human Rights Law Assist in Their Resolution' (2023) XXVIII (2) *Art, Antiquity and Law* 83.

[115] Shaheed (n112) para 61.

[116] *Ibid* para 48.

the design of a cultural landscape is reflective of this cultural diversity.' [117] Moreover, in particular, in regard to memorials, Shaheed says that they constitute:

> part of the symbolic-cultural landscape, [and] impact on people's perspectives and understanding of past events but equally of contemporary issues. Hence, they must be critically assessed. This is particularly important when people, including children, live under the shadow of numerous, repetitive images and symbols, such as murals and statues. [118]

Shaheed recommends, amongst other things, partnerships with artists which may be 'particularly beneficial, as [they] are often able to introduce elements that spark discussions'. Furthermore, 'positive processes of memorialisation encourage critical thinking around history' and 'memorials can use creative ways to catalyse this civic engagement by opening new opportunities for dialogue . . .'.[119]

Shaheed's successor as the Special Rapporteur on Cultural Rights, Karima Bennoune, has emphasised that cultural rights, to be meaningful, require access to 'adequate public spaces by all, without discrimination'.[120] She also urges that the 'question of public space be recognised as a human rights issue, and that a human rights approach which centres on cultural rights should be taken to decision-making in these areas'.[121] In particular she argues that since 'local authorities are often given the responsibility to guarantee the collective and participatory character of public spaces [they] should promote creation and regeneration of public spaces in conditions of quality, equality, inclusiveness, accessibility and universal design'.[122]

The above glimpse at the influential opinions of the UN Special Rapporteurs clearly supports the argument that public spaces, and the memorials and statues that inhabit them, should be inclusive and non-discriminatory. Moreover, the content of the public space ought to be arrived at through consultation and this provides important opportunities for education about the past, and the involvement of artists to reimagine the memorial landscape. All this is possible under the Guidance, even though it is erroneously rooted in the 'mustn't-hide-from-history' premise.

PART 5. CONCLUSION

In 1986 the socialist soul-punk band *The Redskins* sang: 'The first act of freedom all over the world is to topple the statues . . .'.[123] The 2023 'Guidance for custodians on how to deal with commemorative heritage assets that have become contested' emphatically does not follow this injunction. Constituting something of a 'curate's egg', it is part good and part bad. Its retain and explain policy is based on a false premise that it is to hide from history to remove or relocate statues and monuments. By cleaving to the balance and rigour of history, the policy seeks the moral high ground. But this is problematic, not least because it leads to a high burden being placed on those seeking change and imposes upon them the 'critical history'

[117] *Ibid.* See also CESCR, General Comment 21, E/C12/GC/21, 21 December 2009, 'Right of everyone to take part in cultural life of the International Covenant on Economic, Social and Cultural Rights,' at paras 38 and 48–49. Shaheed cites the Joinet-Orentlichter and Van Boven-Bassioni Principles on transitional justice, which have been developed in the area of reparations and the fight against impunity, at para 27–32. See further Pok Yin S Chow, 'Culture as Collective Memories: An Emerging Concept in International Law and Discourse on Cultural Rights' (2014) *Human Rights Law Review* 611.

[118] Shaheed (n112) para 64.

[119] *Ibid*.

[120] General Assembly, UNGA A/HRC/74/255, 30 July 2019, Report of the Special Rapporteur in the field of cultural rights, Karima Bennoune, 'The importance of public spaces for the exercise of cultural rights,' at para 1.

[121] *Ibid*.

[122] *Ibid* para 84.

[123] *The Redskins* 'Kick Down the Statues' on their album *Neither Washington Nor Moscow* (London Records/FLP1, 1986), available at: <https://www.youtube.com/watch?v=yEZTZ3_cqHY>.

obligations of rigour and balance that those advocating for the status quo do not have to meet. It would perhaps have been more honest to have accepted that CHAs are carriers of shared/collective memory, and therefore have value for parts of the communities in which they stand.

There have been calls for the removal of statues of many of those traditionally regarded as being Britain's greatest heroes, such as Francis Drake,[124] Horatio Nelson,[125] Robert Peel,[126] William Gladstone,[127] and Winston Churchill.[128] As we argue above, to remove them would *not* be to hide from history. But these CHA's nevertheless often *do* have a great value in the shared/collective memory of the communities in which they stand, and indeed in society more widely. After all, even the name and statue of Edward Colston was held in evident affection by some Bristolians of a certain generation, with his name given to eight streets, two schools, a concert hall, a pub, a tower-block, and even a local current bun.[129]

To summarize, whilst the Guidance is founded on a false premise, it nevertheless provides a framework – albeit a less than perfect one – that may allow for greater education about the 'jagged complexity of history'.[130] Moreover, on an issue that has generated more heat than light in recent years, the Guidance provides a chink of light. If implemented by way of nuanced, artistic, and imaginative initiatives, it may potentially transform the memorial landscape from being partial and selective, to one more commensurate with a diverse British nation in the 21st century, in which a multitude of memories are capable of being carried.

[124] Alex Green 'Petition calls for removal of Sir Francis Drake statue from Plymouth Hoe' *Plymouth Live* (9 June 2020) <https://www.plymouthherald.co.uk/news/plymouth-news/petition-calls-removal-sir-francis-4204163>

[125] Afua Hirsch 'Toppling statues? Here's why Nelson's column should be next', *The Guardian* (22 August 2017) <https://www.theguardian.com/commentisfree/2017/aug/22/toppling-statues-nelsons-column-should-be-next-slavery>.

[126] Sami Pinarbasi 'The campaign to remove the statue of Robert Peel in Manchester', *London South Bank University Blog* (undated) <https://www.lsbu.ac.uk/lsbu-research-blogs/blogs/lss/2021/the-campaign-to-remove-the-statue-of-robert-peel-in-manchester>.

[127] John Powell, 'William Gladstone, Slavery and Reparatory Truth' *History Reclaimed* (28 February 2024) <https://historyreclaimed.co.uk/william-gladstone-slavery-and-reparatory-truth/>.

[128] Danny Gallagher, '"Bring down Winston Churchill's statue!" Black Lives Matter organiser calls for "offensive" statue to be removed and put in a museum' *Daily Mail Online* (13 June 2020) <https://www.dailymail.co.uk/news/article-8417809/Black-Lives-Matter-organiser-wants-offensive-statue-Winston-Churchill-museum.html>.

[129] Antonia Layard, 'Edward Colston: Listing Controversy', *University of Bristol Law School Blog* (15 June 2020) <https://legalresearch.blogs.bris.ac.uk/2020/06/edward-colston-listing-controversy/>.

[130] Cumper and Lewis, (n114) 113.

RES JUDICATA AND THE EXCLUSIVE AUTHORITY OF POST-SOVIET JUDICIARIES: A CASE STUDY OF SUPERVISORY REVIEW, JUDICIAL INDEPENDENCE, AND SEPARATION OF POWERS IN BELARUS

SOPHIE GALLOP

INTRODUCTION

The importance of the separation of powers and judicial independence for the democratic functioning of the State has been underscored for centuries by philosophers and international organisations.[1] With respect to the importance of judicial independence, Montesquieu famously concluded that 'there is no liberty, if the powers of judging be not separated from the legislative and executive'.[2] Effective separation of powers and effective judicial independence are integral to the realisation of liberty in all States, from those countries traditionally considered to be well-established democracies to those States going through democratising reforms.

Despite the widely acknowledged importance of both the separation of powers and an independent judiciary, over recent years there have been numerous notable attacks by respective executive branches on the independence of domestic judiciaries across the World. These attacks are notable because they have taken place both in countries where democratisation is ongoing, and in countries which are generally considered to be settled democracies. In the UK, after the controversial decision in *Miller II,*[3] the Justice Secretary proposed reforms aimed at drastically changing the ability of judges to review governmental decisions,[4] with commentators voicing concerns that these reforms represent efforts to 'clip the courts' wings'.[5] Across the Atlantic in the USA, significant concerns were raised after former President Trump attacked a 'so-called judge' who halted his executive order on immigration, leading to concerns about a possible constitutional crisis in the country.[6] Last year, in Israel the Knesset (the Israeli Parliament) adopted a controversial law dubbed the 'Reasonableness Bill' which strips the Supreme Court of the ability to determine the 'reasonableness' of cabinet and ministerial decisions,[7] the adoption of which has led to public protests and threats of strike action.[8]

Attacks on domestic judiciaries and efforts to limit judicial powers seem to be at this time a global phenomenon at present, and it is phenomenon that the Belarusian judiciary is also experiencing. Concerns about attacks on the independence of the judiciary and on the separation

[1] International Commission of Jurists International Principles on the Independence and the Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1 (International Commission of Jurists 2007) 1, 18; Maurice JC Vile 'The separation of powers' in Jack P Greene and JR Pole (eds) *A Companion to The American Revolution* (Blackwell Publishers 2000) 686; Aristotle *Politics* (CreateSpace Independent Publishing Platform 2015); Jean-Jacques Rosseau *The Social Contract* (Wordsworth Editions 1998); John Locke *Two Treatises of Government 1690* (Cambridge University Press 1988).

[2] Charles de Secondat, Baron de Montesquieu (edited by David Wallace Carrithers) *The Spirit of Laws: A Compendium of the First English Edition* (University of California Press, 1977), Book XI, Chapter 6, 202

[3] *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent); Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41.

[4] House of Commons Library 'Judicial review reform' (*UK Parliament* 2 April 2021) <https://commonslibrary.parliament.uk/judicial-review-reform/> accessed August 24, 2023.

[5] Professor Mark Elliott 'The Judicial Review, Review I: The Reform Agenda and its Potential Scope' (*Public Law for Everyone*, 3rd August 2020) <https://publiclawforeveryone.com/2020/08/03/the-judicial-review-review-i-the-reform-agenda-and-its-potential-scope/> accessed 3 June 2024.

[6] BBC News 'Taking on Trump: Is the US facing a constitutional crisis?' (*BBC* 6 February 2017) <https://www.bbc.co.uk/news/world-us-canada-38881119> accessed August 24, 202.

[7] Hadas Gold, Richard Allen Greene, and Amir Tal 'Israel passed a bill to limit the Supreme Court's power. Here's what comes next*' (CNN,* 24 July 2024) <https://edition.cnn.com/2023/07/24/middleeast/israel-judicial-reforms-vote-explained-mime-intl/index.html> accessed 3 June 2024.

[8] *Ibid*.

of powers have been raised in Belarus for decades, where the President and government have frequently sought to assert their own authority over the Belarusian judicial branch. One area where the ongoing power struggle between the respective branches remains apparent is with respect to the exclusive authority of the Belarusian judiciary. The exclusive authority of a judiciary makes up a fundamental element of both the separation of powers doctrine and of the effective realisation of judicial independence.[9] It demands that the judiciary have 'jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law'.[10] In addition, as part of the standard of exclusive authority, judicial decisions should be final and therefore should not be subject to change by a 'non-judicial authority'.[11] However, this aspect of judicial independence and of the separation of powers has been subject to various attacks. As noted above, we have seen such attacks in the UK and in Israel where the Executive branches have sought to remove areas of scrutiny from their respective judicial branches. Attacks on the exclusive authority of the judiciary is particularly problematic in Belarus, where the use of Supervisory Review and other overt forms of interference in judicial rulings routinely undermine the exclusive authority of the Belarusian judicial branch. Supervisory Review is a system whereby judicial decisions that would normally be considered final may be reviewed and overturned by either a court or other body (depending on the country in which the review would take place). This system is discretionary and falls outside of the ordinary appeals process, which (as discussed below) has been subject to criticism from various international human rights bodies. The use of Supervisory Review in Belarus and the impact that this has on the exclusive authority of the Belarusian judiciary has received particular attention from the United Nations Human Rights Committee when it has examined individual submissions alleging a human rights violation against Belarus. It is in those cases that the Human Rights Committee has been able to highlight the inappropriateness of Supervisory Review in modern democracies, and the impact that this has had on the exclusive authority of the Belarusian judiciary.

This paper will examine the crucial role that exclusive authority plays in both the separation of powers model and in the independence of the judiciary, noting its importance as a component part of these doctrines and in its own right as part of an effective judicial system. In this respect, this paper fills a gap in current academic discourse by identifying and exploring the fundamental role that the exclusive authority of the judiciary plays in democratic government, and examining the role it plays in post-Soviet countries, in particular in Belarus. It will analyse the context and effect of Supervisory Review on the exclusive authority of the judiciary with particular attention to the human rights context, building on analysis previously only undertaken in the NGO context. Finally, the paper will address the effect that Supervisory Review has had on individual complaints to international human rights bodies. This section will serve to highlight the undermining effect that Supervisory Review has on the exclusive authority of the judiciary, which in turn compromises the separation of powers and independence of the Belarusian judiciary. The section will also address the apparent unwillingness of the Belarusian government to reform Supervisory Review procedures and affirm the exclusive authority of the judiciary over judicial matters. In particular, with respect to the response of the Belarusian government, the danger of this unwillingness will be highlighted in the context of a refusal to cooperate with the Human Rights Committee.

[9] See detailed discussion of this in Part II 'Exclusive Authority: At the Intersection of Judicial independence and the separation of powers'.

[10] UN Congress on the Prevention of Crime and the Treatment of Offenders 'Basic Principles on the Independence of the Judiciary: UNGA Res 40/32 and 40/146' (endorsed 29 November 1985) UN Doc A/CONF.121/22/Rev.1, Principle 3 states 'The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law'.

[11] International Commission of Jurists (n1), 22.

EXCLUSIVE AUTHORITY: AT THE INTERSECTION OF JUDICIAL INDEPENDENCE AND THE SEPARATION OF POWERS

Defining exclusive authority

The importance of ensuring the exclusive authority of the judiciary has been recognised in numerous international and regional documents which address the fundamental right to a hearing before an independent and impartial judiciary.[12]

The exclusive authority of the judiciary demands that the judicial branch of government have exclusive jurisdiction over all issues of a judicial nature,[13] without unwarranted interference from the executive or legislative branches in that jurisdiction.[14] As part of that exclusive authority the judiciary must be afforded absolute authority over the determinations of law,[15] appeals processes,[16] and the ability to review legislation to ensure its compatibility with any relevant constitutional or international legal obligations.[17] Within the doctrine of exclusive authority, the principle of *res judiciata* plays an important role. The principle of *res judicata* demands that there should be no review of a 'final and binding decision or judgment merely for the purpose of obtaining a rehearing and a fresh determination of the same issue'.[18] On that basis, a judgment that has been definitively settled should not be subject to change or alteration to ensure the finality of the judicial decision.[19]

Exclusive authority, the separation of powers, and judicial independence

Whilst the exclusive authority of the judiciary is important in its own right, it also forms a fundamental part of separation of powers and of judicial independence. As an essential element of the separation of powers doctrine, exclusive authority requires that the judicial branch is free to operate within the judicial sphere free from interference from other branches of government.[20] Whilst the doctrine of the separation of powers was discussed by

[12] International Bar Association 'IBA Minimum Standards of Judicial independence, adopted 1982' (*International Bar Association*, 1982) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=bb019013-52b1-427c-ad25-a6409b49fe29> accessed 17 February 2021, Standard 8 states: 'Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration'; UN Congress on the Prevention of Crime and the Treatment of Offenders 'Basic Principles on the Independence of the Judiciary' (n10), Principle 3 states 'The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law', and Principle 4 states 'There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authority of sentences imposed by the judiciary, in accordance with the law'; Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region (Adopted by the Chief Justices of the LAWASIA region and other judges from Asia and the Pacific in Beijing in 1995 and adopted by the LAWAISA Council in 2001, Principle 33 states 'The Judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law'; The Principles and the Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Adopted as part of the African Commission's activity report at 2nd Summit and meeting of heads of state of the African Union held in Maputo from 4–12 July 2003, Principle 4(c) states 'the judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for decision is within the competence of a judicial body as defined by law'.

[13] International Commission of Jurists International Principles on the Independence and the Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1 (n1), 18.

[14] UN Congress on the Prevention of Crime and the Treatment of Offenders Basic Principles on the Independence of the Judiciary (n10).

[15] International Commission of Jurists International Principles on the Independence and the Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1 (n1), 22.

[16] UN Congress on the Prevention of Crime and the Treatment of Offenders Basic Principles on the Independence of the Judiciary (n10), Value 4.

[17] Commonwealth Secretary-General 'Commonwealth (Latimer House) Principles on the Three Branches of Government' (*The Commonwealth* 19 June 1998) <https://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf> accessed August 17, 2021, Principle (I)(1); American Bar Association Rule of Law Initiative 'Judicial Reform Index for Armenia: December 2012' (*American Bar Association*, December 2012) <https://www.americanbar.org/content/dam/aba/directories/roli/armenia/armenia_jri_vol_iv_english_12_2012.authcheckdam.pdf>, 21–26.

[18] *Prosecutor v Karadžić* (Judgment) IT-95–5/18 (18 June 2016), 4.

[19] William Pomeranz 'Supervisory Review and the Finality of Judgments under Russian Law' 34(1) Review of Central and East European Law (20099) 15, 17.

[20] John Ferejohn 'Independent Judges, Dependent Judiciary: Explaining Judicial independence' (1998–1999) 72 Southern California Law Review 353, 355.

Aristotle,[21] Rousseau,[22] and Locke,[23] it was most famously explored in Montesquieu's *The Spirit of the Laws*. In this thesis, Montesquieu argued that for democratic governance to be realised, the legislative, executive, and judicial branches of the State must remain independent and distinct from one another.[24] In practice, therefore, the separation of powers doctrine requires that each organ of the State have distinct authority over their respective government function to ensure an effective system of checks and balances between each branch;[25] this demands that domestic judiciaries are afforded exclusive authority over judicial matters. Similarly, with respect to judicial independence, exclusive authority is also fundamental. To reach a truly independent decision, the judicial branch must be certain of their exclusive authority over judicial matters. In turn the judicial branch should be certain of the finality of their decision, and thereby be able to act without fear of a decision being changed or altered by another branch,[26] which in turn helps to ensure that the independence of individual judges is effectively protected.[27] It introduces a sense of 'social responsibility' that membership of the judiciary conveys onto individual judges[28] and helps to engender respect for judicial decisions.[29] The appearance of independence and impartiality in decision-making endowed by awarding exclusive authority to the judiciary, helps to ensure 'a considerable measure of respect and confidence to the inquiry process'.[30]

Therefore, both the separation of powers and the doctrine of judicial independence rely on the exclusive authority of the judiciary, and the exclusive authority of the judiciary operates in tandem as a foundational requirement for both. With respect to the relationship between judicial independence and the separation of powers, the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the independence on judges and lawyers have both concluded that

> '(t)he separation of powers and executive respect for such separation is *sine qua non* for an independent and impartial judiciary to function effectively'.[31]

Judicial independence is therefore an integral element of the separation of powers doctrine.[32] To achieve effective separation of powers in practice, the judicial branch must provide an essential check on the power of the legislative and executive branches of government in order to prevent corruption and despotism.[33] In turn, the judiciary must be afforded exclusive authority to make adjudications of law, without interference from the legislative and executive branches.[34]

[21] Aristotle (n1).

[22] Jean-Jacques Rosseau (n1).

[23] Locke (n1).

[24] Montesquieu (n2), 202; See generally Edward H Levi 'Some Aspects of separation of powers' (1976) 76(3) Columbia Law Review 371–391.

[25] Montesquieu (n2), 202–203.

[26] UN Congress on the Prevention of Crime and the Treatment of Offenders Basic Principles on the Independence of the Judiciary (n10), Principles 3 and 4.

[27] Shimon Shetreet 'Judicial independence and accountability: core values in liberal democracies' in H.P. Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press 2011) 3, 16.

[28] *Ibid*.

[29] Patrick Monahan and Byron Shaw 'The impact of Extra-Judicial Service on the Canadian judiciary: the need for reform' in H.P. Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press 2011) 428, 447.

[30] *Ibid*, 447.

[31] UNCHR 'Report of Special Rapporteurs on the Situation of Human Rights in Nigeria' (1997) UN Doc E/CN.4/1997/62 Add.1, para 71.

[32] Judge J Clifford Wallace 'Resolving Judicial Corruption while Preserving Judicial independence: Comparative Perspectives' (1998) 28(2) California Western International Law Journal 341, 343.

[33] Maria Dakolias and Kim Thachuk 'Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform' (2000) 18 Wisconsin International Law Journal 353, 360.

[34] *Ibid*.

The importance of the separation of powers, judicial independence, and exclusive authority in the democratic model

The separation of powers model and the doctrine of judicial independence have been heralded as fundamental aspects of modern society. The separation of powers doctrine has long been cited as one of the cornerstones of a democratic society, integral to the full and proper functioning of State powers.[35] The separation of powers model originated in ancient Greece,[36] and the concept has since evolved throughout the centuries, emerging as a widely accepted facet of the democratic model.[37] Similarly, the importance of judicial independence in the functioning of democratic government has been emphasised repeatedly over the centuries. The same importance attached to the right to appear before an independent and impartial tribunal by Socrates,[38] the Magna Carta,[39] and Coke[40] continues to be expressed today by international organisations including the United Nations,[41] the Council of Europe,[42] and World Bank.[43] The United Nations believed that judicial independence was so integral to proper state governance that it declared that it would be a 'human rights priority' in 1996.[44] Within the context of industrial and sustainable economic development the World Bank,[45] the International Monetary Fund,[46] and the European Bank for Reconstruction and Development[47] have all emphasised the crucial role that judicial independence and judicial impartiality play in securing a stable and reliable domestic market. A number of civil society organisations and international non-governmental organisations have also established various projects that seek to set and monitor judicial independence standards. In particular the American Bar Association set up the Rule of Law Initiative to monitor judicial independence standards across the globe, noting that 'countries that lack the rule of law very often fail to meet the most basic needs of their populations'.[48] The Office for Security and Cooperation in Europe through the Office for Democracy and Human Rights established the Kyiv Recommendations in 2010, noting that judicial independence is 'an indispensable element of the right to due process, the rule

[35] International Commission of Jurists International Principles on the Independence and the Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1 (n1), 18.

[36] Vile (n1), 686.

[37] *Ibid*, 689.

[38] Justice Steven H David 'Four Things: Socrates and the Indiana Judiciary' (2013) 46(4) Indiana Law Review 871, 871.

[39] Magna Carta (1297), Chapter 39.

[40] John Hostettler *Sir Edward Coke: A Force for Freedom* (Barry Rose Law Publishers 1997) 129.

[41] United Nations 'The Independence of the Judiciary: a Human Rights Priority' (*United Nations*, 2016) <http://www.un.org/rights/dpi1837e.htm> accessed 15 August 2023.

[42] Council of Europe 'Council of Europe Plan of Action on Strengthening Judicial independence and Impartiality, CM(2016)36 final' (*Council of Europe*, 2016) <https://rm.coe.int/1680700285> accessed 22 May 2024.

[43] Legal Vice Presidency of The World Bank 'Legal and Judicial reform: Strategic Directions' (*The World Bank*, January 2003) <http://documents.worldbank.org/curated/en/218071468779992785/pdf/269160Legal0101e0also0250780SCODE09.pdf> accessed 3 June 2024, 2.

[44] United Nations 'The Independence of the Judiciary: A Human Rights Priority' (n41).

[45] Legal Vice Presidency of The World Bank (n43) 2; *see generally* James H Anderson and Cheryl W. Gray 'Transforming Judicial System in Europe and Central Asia' (World Bank, ABCDE Conference January 2006) <http://www1.worldbank.org/publicsector/anticorrupt/feb06course/transforming%20Judicial%20Systems%20in%20ECA.pdf> accessed 3 June 2024; Rudolf V. Van Puymbroeck Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century (*The World Bank* 2001) <https://openknowledge.worldbank.org/bitstream/handle/10986/13960/multi0page.pdf?sequence=1&isAllowed=y accessed> 3 June 2024.

[46] World and Economic Financial Surveys *Regional Economic Outlook: Europe Hitting Its Stride* (International Monetary Fund 2017) 39.

[47] The European Bank for Reconstruction and Development (EBRD) has particularly emphasised the importance of judicial independence within the context of Rule of Law. Within the EBRD 'Law in Transition' project, judicial reform to secure judicial independence was identified as one of the three foundations of the rule of law, alongside education and advocacy. See Emmanuel Maurice and others 'Law in Transition: Ten Years of Legal Transition' (*European Bank for Reconstruction and Redevelopment*, 2002) <http://www.ebrd.com/downloads/research/law/lit022.pdf> accessed 22 May 2024, 5; 59–60.

[48] The American Bar Association 'Rule of Law Initiative: About Us' (*American Bar Association*, 2024) <https://www.americanbar.org/advocacy/rule_of_law/about/> accessed 3 June 2024.

of law, and democracy'.[49] More recently, in 2016, the Council of Europe established the 'Plan of Action of Strengthening Judicial independence and Impartiality' which notes that judicial independence and judicial impartiality 'is of primordial importance'[50] and that it is of the utmost importance that such independence and impartiality exists 'in fact and is secured by law'.[51]

As a foundational element of both the separation of powers and of an independent judicial system, the realisation of the exclusive authority of the judiciary is subsequently crucial to achieving *de facto* democratic standards. Without the exclusive authority of the judiciary both the separation of powers and judicial independence cannot be realised, and without these, democracy is undermined.

CONTEXTUALISING EXCLUSIVE AUTHORITY IN BELARUS

Unfortunately, whilst the importance of the exclusive authority of the judiciary is apparent, in practice in Belarus it continues to be routinely undermined. The continued interference in the jurisdiction of the Belarusian judiciary comes in part as a result of the legacy of the USSR. This legacy can be seen in other former Soviet States, where ongoing interference with the domestic judicial branch continues to undermine judicial independence in Ukraine,[52] Azerbaijan,[53] Tajikistan,[54] Uzbekistan,[55] and Kazakhstan.[56] However, it is noteworthy that in Belarus the lack of separation of powers and judicial independence is particularly extreme, even in comparison to the country's other former Soviet counterparts.

Exclusive authority in the Soviet Union

Reform efforts with respect to the exclusive authority of the Belarusian judiciary were built on rocky foundations. Whilst Soviet law and the Constitution ostensibly ensured that the judiciary would have exclusive authority over judicial matters, in practice the judiciary had very limited jurisdiction instead often operating at the will of the executive branch. The exclusive authority of the judiciary was provided for under the Soviet Constitution. According to Article 160, no person should be convicted of a crime other than by a judgment of the court, in accordance with the law.[57] These sentiments were reiterated in other Soviet legal instruments, which stressed that all State organs should 'be obliged to fulfil the demand and ordinances of judges'[58] including the 'prompt . . . answering . . . [of] inquiries' from

[49] Office for Democratic Institutions and Human Rights 'ODIHR and Judicial independence: The Kyiv Recommendations' (Organization for Security and Co-operation in Europe, 2014) <https://www.osce.org/odihr/109880?download=true> accessed 15 May 2024, 1.

[50] Council of Europe *Plan of Action* (n42), 7.

[51] *Ibid*.

[52] International Commission of Jurists 'UN ICJ calls on Ukraine to ensure security of lawyers and judicial independence' (*International Commission of Jurists* 2021) <https://www.icj.org/at-un-icj-calls-on-ukraine-to-ensure-security-of-lawyers-and-judicial-independence/> accessed 3 June 2024.

[53] Parliamentary Assembly of the Council of Europe 'The functioning of democratic institutions in Azerbaijan' (*PACE,* 2017), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24024&lang=en> accessed 3 June 2024.

[54] International Commission of Jurists 'Neither Check nor Balance: The Judiciary in Tajikistan. ICJ Mission Report December 2020' (*ICJ* December 2020) <https://www.icj.org/wp-content/uploads/2020/12/Neither-Check-nor-Balance_Tajikisan_MR_ENG.pdf> accessed 3 June 2024.

[55] Diego García-Sayán 'Preliminary Observations on the Official Visit to Uzbekistan (19–25 September 2019)' (*OHCHR* 26 September 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25043&LangID=E> accessed 3 June 2024.

[56] Malika Tukmadiyeva 'Kazakhstan: Freedom House Report 2018' (*Freedom House,* 2018) <https://freedomhouse.org/sites/default/files/NiT2018_Kazakhstan.pdf> accessed 3 June 2024.

[57] Constitution (Fundamental Rules) of the Union of the Soviet Socialist Republics (as amended 1991) Article 160.

[58] Fundamental Principles on Court Organization of the USSR and the Union Republics (1924) Article 10; Fundamental Principles on Court Organization additionally included Articles protecting judges from "interference in concrete cases" (Article 4) which would entail criminal responsibility (Article 5). These provisions were reiterated in Law of the USSR: On the Status of Judges (1989) (No. 9 item 223) Article 5(2) which prohibited 'influencing of any kind of judges . . .'.

judges to other branches.[59] This exclusive authority was, however, not realised in practice. In contradiction to the principles established in the Constitution, in reality the Communist Party exercised power over all aspects of Soviet life, including the courts.[60] This meant that the Communist Party exerted authority over the judicial branch ensuring that judges adhered to Communist values when passing judgments.[61] Frequently aspects of cases or entire trials, including questions of guilt or innocence, were decided prior to trial, and appearances in court were simply to determine appropriate sentences.[62] This resulted in a situation where it was not judges passing judgment but instead local Communist leaders; the consequence being that the exclusive authority over judicial matters was effectively appropriated from the judicial branch. Even in instances where judges were initially awarded authority over a case, where a decision was not met with approval from the executive branch, then those members would simply not abide by the judgment.[63] In practice, this had a significant impact on both members of the judiciary and public confidence in the Soviet justice system. The failure to realise the exclusive authority of the judicial branch had the effect of demoralising its members, who were made acutely aware of the fact that in practice the Soviet judiciary possessed no real authority.[64] In addition, the public had very little respect for the Soviet judiciary and was suspicious of the judicial branch and the motives behind judicial decisions.[65]

Exclusive authority in modern day Belarus

Given the Soviet legacy, reform efforts to secure separation of powers and the independence of the judiciary in newly established States after the fall of the Soviet Union faced a significant uphill struggle. Whilst all former Soviet States built those reform efforts with a very similar historic context, some of those countries, including Belarus, have had notable failures in comparison to other former Soviet States in their judicial reform efforts. In part, factors external to the government have operated to undermine judicial reforms in Belarus. With respect to efforts to secure separation of powers and judicial independence and impartiality in the country, the Special Rapporteur on the Independence of Judges and Lawyers has emphasised the transitional nature of the country, its economic deprivation, and the effects the Chernobyl disaster have had on democratisation efforts in Belarus.[66] However, many of the failures are due to ongoing efforts from the Belarusian government to undermine the exclusive authority of the domestic judiciary.

In Belarus, legislative reforms provide for the exclusive authority of the Belarusian judiciary. Article 38 of the Law on the Constitutional Court of the Republic of Belarus confirms that decisions of the Constitutional Court are final and will not be subject to appeal or protest.[67] This principle is confirmed in the Code on Judicial System and Status of Judges.[68] Both

[59] *Ibid*.

[60] Peter Costea 'The Legal System and the Judiciary in the Marxist-Leninist Regimes of the Third World' (1990) 16(3) Review of Socialist Law 225, 253.

[61] *Ibid*.

[62] Peter H Solomon Jr 'The Role of the Defense in the USSR: The Politics of Judicial Reform under Gorbachev' (1988–1989) 31 Criminal Law Review Quarterly 76, 79; see generally N Dolapchiev 'Law and Human Rights in Bulgaria' (1953) 29(1) International Affairs 59–68.

[63] Scott P Boylan 'The Status of Judicial Reform in Russia' (1998) 13(5) American University International Law Review 1327, 1334.

[64] See generally *Ibid*.

[65] *Ibid*, 1327.

[66] UNHCR 'Civil and Political rights, including questions of: Independence of the judiciary, administration of justice, impunity: Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, submitted in accordance with Commission resolution 2000/42: Addendum, Report on the Mission to Belarus' (8 February 2001) UN Doc E/CN.4/2001/65/Add.1) para 100.

[67] Law of the Republic of Belarus on the Constitutional Court of the Republic of Belarus (1994 as amended in 2005), Chapter III Rules of Procedure Before the Constitutional Court, Article 38.

[68] Code of the Republic of Belarus on Judicial System and Status of Judges, Chapter Two: Constitutional Court of the Republic of Belarus, Article 24.

also confirm that judgments of the Constitutional Court enter into force from the day of adoption of judgment, unless specified otherwise.[69] Despite these legislative provisions, the Belarusian executive branch has routinely ignored the authority of the judicial branch to make legal determinations with respect to Belarusian law and the Belarusian Constitution,[70] and therefore these reforms have not been implemented nor respected in practice.

The lack of respect for the exclusive authority of the Belarusian judiciary was particularly apparent in 1996 during a significant constitutional referendum. The referendum addressed a number of constitutional issues, including a vote which permitted amendments to the constitution. The amendments under the referendum granted President Lukashenko significantly greater powers, including the ability to replace an apparently uncooperative Parliament, to increase the Presidential term, and limit the power of the Constitutional Court.[71] After the referendum the Constitutional Court determined the referendum was merely advisory and consultative,[72] and held that the amendments granted under the referendum would amount to a new constitution, and would therefore be in violation of Article 149 of the Belarusian Constitution.[73]

Despite this judgment, which according to the Constitution and domestic law of Belarus should have been final, the Belarusian government treated the result of the referendum as binding.[74] In the build-up to the decision around the constitutionality of the referendum, there were significant indications from the executive branch that there was only one acceptable decision that the Constitutional Court could reach. President Lukashenko purportedly went as far as threatening to 'take measures' and 'defend the Belarusian people' if the Court found the referendum to be unconstitutional.[75] After the decision that the referendum was not binding, President Lukashenko issued a decree which annulled the decision of the Constitutional Court and personally declared the referendum to be binding on the Belarusian government.[76] The UN High Commissioner for Human Rights condemned the decision of the Belarusian President highlighting that the 'nullification'[77] of the decision amounted to an 'interference with the judicial process'[78] and a contravention of the UN Basic Principles of the Judiciary.[79] The judiciary itself also responded. In protest to this unwarranted interference in the exclusive authority of the judiciary, a number of judges of the Constitutional Court resigned.[80] In retaliation, the President forced one of the remaining judges from the office of the Constitutional Court by a Presidential edict.[81] In this instance both the exclusive authority of the judiciary and the principle of *res judicata* were violated, compromising both the separation of powers and the independence of the judiciary in Belarus.

The exclusive authority of the judiciary in the country has also been undermined by the establishment of the inter-departmental commission. The commission was set up so that the government could monitor on-going cases before the judiciary, a move that the UN Special

[69] *Ibid*; Law of the Republic of Belarus on the Constitutional Court (n67), Article 38.

[70] UNHCR 'Civil and Political rights, including questions of: Independence of the judiciary: Report on the Mission to Belarus' (n66), paras 13–14.

[71] Human Rights Watch 'Belarus: Background' (Human Rights Watch, 2000) <https://www.hrw.org/reports/1999/belarus/Belrus99-04.htm> accessed 3 June 2024.

[72] UNHCR 'Civil and Political rights, including questions of: Independence of the judiciary: Report on the Mission to Belarus' (n66), paras 21–4.

[73] *Ibid*, para 21.

[74] *Ibid*.

[75] *Ibid*.

[76] *Ibid*.

[77] *Ibid*, para 104.

[78] *Ibid*.

[79] *Ibid*, paras 104–105.

[80] *Ibid*, para 24.

[81] *Ibid*.

Rapporteur on the Independence of Judges and Lawyers characterised as a further 'unwarranted interference in the judicial process'.[82] The 'monitoring' and oversight over judicial functions presents a significant interference with the separation of powers, the independence of the judiciary, and with the exclusive authority of the Belarusian judiciary. Whilst drafting the Bangalore Principles on the Independence of the Judiciary, the committee noted the importance of ensuring that a judiciary be free from 'dictates of the executive government'.[83] OSCE reported that judicial behaviour may have been further indirectly influenced by the presence of representatives of the Ministry of Interior, the Belarusian Special Forces (the SpetsNaz), and, reportedly, members of the KGB at trials.[84] OSCE noted that in a number of instances SpetsNaz officials seemed to be taping trials and filming members of the public entering the public gallery. [85] It concluded that the consistent 'overt presence'[86] of members of the executive branch in courtrooms should be understood as at least intimidation, 'if not outright interference'[87] by the executive in the exclusive authority of the judiciary over the judicial process.

The exclusive authority of the Belarusian judiciary has therefore faced significant threat from the President and the Belarusian executive branch. However, there has been very little effort to conceal this continued interference from the Belarusian public or from the international community. Instead, the President has purportedly been quite open about efforts to interfere with the Belarusian judiciary and its decision-making. In fact, President Lukashenko was reported to have claimed that when he

> takes a criminal case under his control, he bears responsibility for it, for the investigation and, it would be wrong to deny it, for the outcome of the judicial proceedings.[88]

SUPERVISORY REVIEW IN BELARUS AND BEYOND

Alongside the instances of interference in the Belarusian judiciary noted above, another significant impediment to the exclusive authority of the judiciary is the continued use of the Supervisory Review procedure within the Belarusian justice system. Whilst efforts to undermine the separation of powers in Belarus are often seemingly in contravention of domestic law,[89] in the case of Supervisory Review the ongoing interference in the jurisdiction in the judiciary is an interference permitted by Belarusian law.

Supervisory Review originated in the Soviet Union, where the procuracy was granted wide ranging supervisory powers over the Soviet legal system and over the administration of justice,[90] awarded on the basis that it was the role of the procuracy to 'supervise' the Soviet courts.[91] The procuracy was a Soviet institution that exercised 'supreme oversight'

[82] *Ibid*, para 109.

[83] United Nations Office on Drugs and Crime 'Commentary on the Bangalore Principles of Judicial Conduct' (*United Nations,* 2007) <https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf>, accessed 3 June 2024.

[84] Office for Democratic Institutions and Human Rights (ODIHR) 'Report Trial Monitoring in Belarus (March-July 2011)' (*OSCE* March-July 2011) <http://www.osce.org/odihr/84873?download=true> accessed 3 June 2024, para 14.

[85] *Ibid*, para 99.

[86] *Ibid*.

[87] *Ibid*.

[88] *Ibid*, para 39.

[89] See for example, Law on the Constitutional Court of the Republic of Belarus (as amended in 2005), Chapter III: Rules of Procedure before the Constitutional Court, Article 38; Code of the Republic of Belarus on Judicial System and Status of Judges, Chapter Two: Constitutional Court of the Republic of Belarus, Article 24.

[90] William Pomeranz 'Supervisory Review and the Finality of Judgments under Russian Law' 34(1) Review of Central and East European Law (20099) 15, 17.

[91] Kirill Koroteev and Sergey Golubok, 'Judgment of the Russian Constitutional Court on Supervisory Review in Civil Proceedings: Denial of Justice, Denial of Europe', 7(3) Human Rights Law Review (2007) 619, 619.

over the legality of acts of Soviet political, judicial, and administrative organs'.[92] As part of this oversight, the procuracy undertook the role of the prosecutor, and held responsibility for enforcing criminal law in the Soviet Union.[93] Under this umbrella of 'supreme oversight' Supervisory Review granted the Procuracy, alongside the Soviet Supreme Court, the right to overturn judicial decisions otherwise considered to be final.[94] The Procuracy or Supreme Court could intervene if it was considered that there had been a misapplication of the law.[95] The practice of Supervisory Review was inherited by former Soviet States including Belarus,[96] Kazakhstan,[97] Kyrgyzstan,[98] and Russia.[99]

In both Kazakhstan[100] and Kyrgyzstan[101] the Supervisory Review procedures lie with the Supreme Court, which has supervisory jurisdiction and review powers over judgments of the cassation and appellate courts.[102] To request a review of a prior judicial decision before the Supreme Court of Kazakhstan, the appellant must obtain leave from the Supreme Court.[103] In Kyrgyzstan the Supreme Court of Kyrgyz Republic has the power to review the verdicts of primary and appellate courts when there has been an application from a convicted defendant, or a petition from a prosecutor.[104] In Russia,[105] the power of Supervisory Review permits parties to civil proceedings to challenge an otherwise final judgment in the event that the challenge is within one year of the decision taking effect.[106] The power to overturn an otherwise final judicial decision lies with the Presidium of the Supreme Court of the Russian Federation, which will exercise the extraordinary review procedure in the event that relevant criteria have been fulfilled.[107]

The use of Supervisory Review has attracted significant criticism from various international and regional human rights bodies. The European Court of Human Rights has noted that the use of the Supervisory Review undermines standards of the rule of law by frustrating the finality of the judicial judgments.[108] The Court further condemned the continued use of Supervisory Review, noting that it undermines the principle of *res judicata* by giving the parties a fresh determination of a case when a judgment has already come into force.[109] As noted above, *res judicata* describes a matter that has already been finally adjudicated by a

92 Stephen C. Thaman 'Reform of the Procuracy and Bar in Russia' 3(1) Parker School Journal of Eastern European Law (1996) 1, 1.

93 *Ibid*, 2.

94 Pomeranz (n90) 16.

95 *Ibid*, 29.

96 Prosecutor General's Office of the Republic of Belarus 'Tasks and Functions' (*Belarusian Government* 2018) <http://www.prokuratura.gov.by/en/about/zadachi-i-funktsii/> accessed 16 September 2018.

97 International Monetary Fund 'The Republic of Kazakhstan: Financial System Stability Assessment – IMF Country Report No. 14/258' (*International Monetary Fund* 2014) <https://www.imf.org/external/pubs/ft/scr/2014/cr14258.pdf>, accessed 3 June 2024, 28.

98 International Federation for Human Rights (FIDH) 'Input into the EU-Kyrgyzstan Human Rights Dialogue in a Context of a Rapidly Deteriorating Situation' (*FIDH*, 23 May 2017) <https://www.fidh.org/IMG/pdf/20170523_eu-kyrgyzstan_note_final.pdf> accessed 3 June 2024, 6.

99 Koroteev and Golubok (n91), 91.

100 International Federation for Human Rights 'Input into the EU-Kyrgyzstan Human Rights Dialogue in a Context of a Rapidly Deteriorating Situation' (n98).

101 Scott Newton The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis (Constitutional System of the World) (Bloomsbury 2017) 203.

102 *Ibid*.

103 International Federation for Human Rights 'Input into the EU-Kyrgyzstan Human Rights Dialogue in a Context of a Rapidly Deteriorating Situation' (n98).

104 The Criminal Procedure Code of the Kyrgyz Republic No. 62 (1999, as amended up to Law No. 162 of 28 July 2017) Section XI: Review of Res Judicata Verdicts, Rulings and Resolutions of Courts, Chapter 42: Review of Res Judicata Verdicts, Rulings and Resolutions of Courts Pursuant to the Procedure for Review, Article 376.

105 For an excellent overview of Supervisory Review in the Russian Federation please refer to Koroteev and Golubok (n91).

106 Koroteev and Golubok (n91), 625.

107 *Ibid*.

108 *Ryabykh v Russia* App no 52854/99 (ECtHR, 24 July 2003).

109 *Vardanyan and Nanushyan v Armenia* App no 8001/07 (ECtHR, 27 October 2016).

competent court, and therefore demands that a matter should not be available to be re-litigated by the parties again.[110] The European Court of Human Rights has noted that the crucial role that *res judicata* plays in ensuring legal certainty,[111] by ensuring that a settled matter is not relitigated, and a prior decision is not nullified or amended. On that basis, the Court has concluded that the use of Supervisory Review operates to undermine legal certainty, in violation of the right to a fair trial.[112]

In a similar vein, the Human Rights Committee has consistently resolved that Supervisory Review proceedings do not constitute an effective remedy that must be exhausted for the purpose of Article 5(2) of the Optional Protocol to the International Covenant on Civil and Political Rights,[113] citing a number of reasons. The first criticism is that of the substantive nature of Supervisory Review. The Human Rights Committee has criticised the extraordinary nature of the remedy,[114] noting that it is only available under domestic legal systems in exceptionally limited instances.[115] The Committee has particularly condemned the discretionary nature of the remedy, concluding that the Supervisory Review mechanism cannot be seen to offer a reasonable prospect of success for the complainant,[116] given that the complainant has no automatic right to leave to appeal and that neither the courts nor the prosecutorial office are under an obligation to review the appeal.[117] Even when applicants are able to engage with Supervisory Review, the Human Rights Committee has queried the success rate of applications made under Supervisory Review. In particular, the Committee has noted that even in cases where the state has provided statistics regarding the success rate of applications before the Supervisory Review procedure,[118] generally information about the success rate of applications with respect to specific human rights abuses has not been forthcoming.[119] Finally, the Committee has criticised the procedural nature of Supervisory Review. Like the European Court of Human Rights, the Human Rights Committee has noted that such a remedy would have the force of *res judicata* against decisions that have already entered into force,[120] further precluding it from being considered an effective remedy.[121] In sum, the Human Rights Committee has concluded that the failure to seek or utilise Supervisory Review does not mean that domestic remedies have not been exhausted on the basis that Supervisory Review is ordinarily unavailable to applicants, that there is a lack of clarity with respect to its success rate even when it is accessible, and that the procedural nature of Supervisory Review undermines the finality of judicial decisions.

[110] *Ibid*.

[111] *Ibid*, at [64] – [71]; *Brumărescu v. Romania* App no 28342/95 (ECtHR, 28 October 1999).

[112] *Ibid*, at [71].

[113] *Alekseev v Russian Federation* (25 October 2013) Communication No 1873/2009 CCPR/C/109/D/1873/2009; *Koktish v Belarus* (26 August 2014) Communication No 1985/2010 CCPR/C/111/D/1985/2010 para 7.3.

[114] *Basarevsky and Rybchenko v Belarus* (14 July 2016) Communication No 2108/2011 and 2109/2011 CCPR/C/117/D/2108/2011-CCPR/C/117/D/2109/2011.

[115] *Ibid*.

[116] *Gelazauskas v Lithuania* (17 March 2003) Communication No 836/1998 CCPR/C/77/D/836/1998 para 7.4; *Sekerko v Belarus* (28 October 2013) Communication No 1851/2008 CCPR/C/109/D/1851/2008 para 8.3; *Protsko and Tolchin v Belarus* (1 November 2013) Communication No 1920/2009 CCPR/C/109/D/1919–1920/2009 para 6.5; *Schumilin v Belarus* (23 July 2012) Communication No 1784/2008 CCPR/C/105/D/1784/2008 para 8.3; *P.L. v Belarus* (26 July 2011) Communication No 1814/2008 CCPR/C/102/D/1814/2008 para 6.2.

[117] *Gelazauskas v Lithuania* (n116) para 7.4; *Sekerko v Belarus* (n116) para 8.3; *Protsko and Tolchin v Belarus* (n116) para 6.5; *Schumilin v Belarus* (n116) para 8.3; *P.L. v Belarus* (n116) para 6.2.

[118] Often States fail to provide the relevant statistical data. See *Sudalenko v Belarus* (3 May 2012) Communication No 1750/2008 CCPR/C/104/D/1750/2008. However, in *Evzrezov v Belarus* (14 July 2016) Communication No 2101/2011 CCPR/C/117/D/2101/2011, the Belarusian government claimed that of the 4,565 appeals filed under the supervisory review procedure in 2011 239 were upheld (a successful appeal rate of around 5.24%).

[119] *Evzrezov v Belarus* (n118).

[120] The matter having already been adjudicated by a competent court should not be available to be further pursued by the same parties. The European Court of Human Rights have raised similar objections to the *res judicata* nature of administrative and judicial Supervisory Review procedures to appeal decisions that should be 'irreversible'. See ECtHR *Vardanyan and Nanushyan v Armenia* (n109).

[121] *Evzrezov v Belarus* (n118).

Whilst Supervisory Review has been condemned generally by both the European Court of Human Rights and the United Nations Human Rights Committee, in Belarus the use of this Review is even more controversial. This is because the use of Supervisory Review in Belarus has additional factors which means that it not only undermines the principle of *res judicata,* but also contravenes the separation of powers doctrine, the independence of the judiciary, and the exclusive authority of the Belarusian judiciary. This is because in Belarus, the power of Supervisory Review lies with the Prosecutor General's Office, rather than with the courts. The power of Supervisory Review was awarded to the Prosecutor's Office on the basis that this Office was tasked with ensuring the rule of law,[122] and ensuring the 'congruence of court rulings with the law'.[123] The powers of Supervisory Review supposedly therefore allows the Prosecutor's Office to receive and consider appeals against court judgments, and to determine whether those judgments comply with Belarusian law.[124] As a result, Supervisory Review in Belarus undermines the exclusive authority of the judiciary to make determinations regarding judicial matters, as the power of Supervisory Review lies with the Prosecutor's Office. This in turn undermines the separation of powers in the country, by granting the executive branch power to interfere in judicial matters, and also undermines the independence of the Belarusian courts, by subjecting their decisions to external validation.

SUPERVISORY REVIEW – HERE TO STAY? ARGUMENTS ABOUT SUPERVISORY REVIEW IN BELARUS BEFORE THE HUMAN RIGHTS COMMITTEE

Despite clear jurisprudence on the issue of Supervisory Review from international human rights bodies and the problems that Supervisory Review presents to the domestic judiciaries in affected States, it seems that governments are unwilling to reform this practice. In fact some former Soviet States, including Belarus, have repeatedly argued that Supervisory Review is a domestic remedy that must be exhausted before a complaint can be admitted before a human rights body.[125] The Belarusian government, particularly, has utilised this challenge

[122] Law of the Republic of Belarus On the Prosecution Service of the Republic of Belarus No 220-Z (2007) Article 4.

[123] Prosecutor General's Office of the Republic of Belarus 'Tasks and Functions' (n96).

[124] *Ibid*.

[125] *Akmatov v Kyrgyzstan* (29 October 2015) Communication No 2052/2011 CCPR/C/WG/115/DR/2052/2011; *Quliyev v Azerbaijan* (16 October 2014) Communication 1972/2010 CCPR/C/112/D/1972/2010; *K.A. v Belarus* (3 November 2016) Communication No 2112/2011 CCPR/C/118/D/2112/2011; *Poplavny and Sudalenko v Belarus* (3 November 2016) Communication No 2139/2012 CCPR/C/118/D/2139/2012; *Misnikov v Belarus* (14 July 2016) Communication No 2093/2011 CCPR/C/117/D/2093/2011; *Basarevsky and Rybchenko v Belarus* (14 July 2016) Communication No 2108/2011 and 2109/2011 CCPR/C/117/D/2108/2011-CCPR/C/117/D/2109/2011; *Levinov v Belarus* (14 July 2016) Communication No 2082/2011 CCPR/C/102/D/1812/2008; *Korol v Belarus* (14 July 2016) Communication No 2089/2011 CCPR/C/117/D/*2089/2011; Evzrezov v Belarus* (n118); *Bakur v Belarus* (15 July 2015) Communication No 1902/2009 CCPR/C/114/D/1902/2009; *P.L. v Belarus* (26 July 2011) Communication No 1814/2008 CCPR/C/102/D/1814/2008; *Krasovskaya and Krasovskaya v Belarus* (26 March 2012) Communication No 1820/2008 CCPR/C/104/D/1820/2008; *Valentin Evrezov, Vladimir Nepomnyaschikh, Vasiliy Polyakov, Valery Rybchenko v Belarus* (10 October 2014) Communication No 1999/2010 CCPR/C/112/D/1999/2010; *Praded v Belarus* (10 October 2014) Communication No 2029/2011 CCPR/C/112/D/2029/2011; *Kalyakin and others v Belarus* (10 October 2014) Communication No 2153/2012 CCPR/C/112/D/2153/2012; *Stambrovsky v Belarus* (24 October 2010) Communication No 1987/2010 CCPR/C/112/D/1987/2010; *Nepomnyaschikh v Belarus* (10 October 2014) Communication No 2156/2012 CCPR/C/112/D/2156/2012; *Pinchuk v Belarus* (24 October 2014) Communication No 2165/2012 CCPR/C/112/D/2165/2012; *Mukhtar v Kazakhstan* (6 November 2015) Communication No 2304/2013 CCPR/C/115/D/2304/2013; *Abdussamatov v Kazakhstan* (18 January 2012) Communication No 444/2010 CAT/C/47/D/444/2010; *E.Z. v Kazakhstan* (1 April 2015) Communication 1855/2008 CCPR/C/113/D/1855/2008; *Leven v Kazakhstan* (21 October 2014) Communication No 2131/2012 CCPR/C/112/D/2131/2012; *Khuseynova and Butaeva v Tajikistan* (20 October 2008) Communication Nos 1263/2004 and 1264/2004 CCPR/C/94/D/1263–1264/2004; *Karimov and Nurastov v Tajikistan* (27 March 2007) Communication Nos 1108/2002 and 1121/2002 **CCPR/C/89/D/1108&1121/2002;** *Ashurov v Tajikistan* (20 March 2007) Communication 1348/2005 **CCPR/C/89/D/1348/2005;** *Yakupova v Uzbekistan* (3 April 2008) Communication No 1205/2003 CCPR/C/92/D/1205/2003; *Sharifova and Burkhonov v Tajikistan* (1 April 2008) Communication Nos 1209,1231/2003 and 1241/2004 CCPR/C/92/D/1209,1231/2003&1241/2004; *Sattorova v Tajikistan* (30 March 2009) Communication No 1200/2003 CCPR/C/95/D/1200/2003; *Lyashkevich v Uzbekistan* (11 May 2010) Communication No 1552/2007 CCPR/C/98/D/1552/2007; *Umarova v Uzbekistan* (3 November 2010) Communication No 1449/2006 CCPR/C/100/D/1449/2006; *Iskiyaev v Uzbekistan* (20 March 2009) Communication No 1418/2005 CCPR/C/95/D/1418/2005; *Salikh v Uzbekistan* (30 March 2009) Communication No 1382/2005 CCPR/C/95/D/1382/2005.

consistently before various UN human rights bodies, routinely challenging the admissibility of individual complaints by noting that the complainants 'did not appeal under the Supervisory Review proceedings to the Prosecutor's Office'.[126] In this respect, the Belarusian government is not alone, and the Kazakh government have similarly routinely disputed the admissibility of complaints to UN human rights bodies, arguing that complainants have not exhausted domestic remedies as they have neglected to file 'a request for a Supervisory Review of [their] final conviction'.[127] In comparison, however, the Kyrgyz and Russian governments which also have systems of Supervisory Review, have utilised this objection far more sparingly, only occasionally challenging cases for admissibility on the basis that the claimant has not sought Supervisory Review of the case before the regional courts.[128]

Despite established jurisprudence from the Human Rights Committee on Supervisory Review concluding that this individual complainants do not have to engage with Supervisory Review in order to exhaust domestic remedies, given the issues with the system noted above, the Belarusian government have failed to acknowledge this precedent.[129] Instead, the Belarusian government have continued to challenge the admissibility of claims before the Human Rights Committee and other human rights bodies on the basis of a failure by the complainant to initiate Supervisory Review proceedings. Belarus has been particularly unequivocal in its stance, and the Belarusian government has regularly challenged the Human Rights Committee's jurisprudence on the issue. In doing so, the Belarusian government has not only continued to undermine the separation of powers, judicial independence, and the exclusive authority of the judiciary within the country but has also asserted itself as having a competence greater than that of the Human Rights Committee.

As part of the Belarusian governments continued intractable position around Supervisory Review, it has claimed that any decisions undertaken by the Committee where the complainant has not utilised the Supervisory Review procedure will amount to 'illegally registered communications'.[130] It has further claimed that where the Committee reaches a decision in such an instance, that decision will be considered by the Belarusian government to be 'invalid'.[131] To support this assertion, Belarusian representatives have claimed that Belarus is under no obligation under the Optional Protocol to recognise the Human Rights Committee's rules of procedures nor its interpretation of the provisions contained within the Optional Protocol.[132] In particular, the Belarus government has concluded that it is under no obligation to accept or recognise the practice of the Human Rights Committee, the Committee's methods of work, or the Committee's case law, given that these are not part of the Optional Protocol.[133] As a consequence, the Belarusian government has concluded that if any communication is, in its view, registered in violation of Article 2[134] and Article 5(2)(b)[135] of the Optional

[126] *K.A. v Belarus* (n125), para 4.1.

[127] *Mukhtar v Kazakhstan* (n125).

[128] *Akmatov v Kyrgyzstan* (n125).

[129] *K.A. v Belarus* (n125); *Poplavny and Sudalenko v Belarus* (n125); *Misnikov v Belarus* (n125); *Levinov v Belarus* (n125); *Korol v Belarus* (n125); *V.L. v Belarus* (30 March 2016) Communication No 1984/2010 Communication No 2084/2011 CCPR/C/WG/116/DR/2084/2011; *P.L. v Belarus* (n116); *Govsha, Syritsa and Mezyak v Belarus* (27 July 2012) Communication No 1790/2008 CCPR/C/105/D/1790/2008; *Bakur v Belarus* (n125); *Evzrezov v Belarus* (n118); *Pugach v Belarus* (15 July 2015) Communication No 1984/2010 CCPR/C/114/D/1984/2010; *Sudalenko v Belarus* (n118); *Evrezov, Nepomnyaschikh, Polyakov, Rybchenko v Belarus*; *Praded v Belarus*; *Kalyakin and others v Belarus*; *Stambrovsky v Belarus*; *Nepomnyaschikh v Belarus*; *Basarevsky and Rybchenko v Belarus* (n125); *S.V. v Belarus* (30 March 2016) Communication No 2047/2011 CCPR/C/WG/116/DR/2047/2011; *E.V. v Belarus* (30 October 2014) Communication No 1989/2010 CCPR/C/112/D/1989/2010; *E.Z. v Kazakhstan* (n125).

[130] *K.A. v Belarus* (n125), para 4.1.

[131] *Ibid*.

[132] *Ibid*.

[133] *Misnikov v Belarus* (n125), para 6.

[134] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 2.

[135] *Ibid*, Article 5(2)(b).

Protocol, then it would be viewed by Belarus as 'incompatible' with the Optional Protocol, and any decisions taken by the Human Rights Committee will considered by the Belarusian government as 'invalid'.[136]

With respect to those decisions, the Belarusian government has stated that any conclusion the Human Rights Committee may make on those unjustly registered communications[137] will be 'rejected [by the Belarusian government] without observations on admissibility or the merits'[138] given that there are 'no legal grounds for the state party to consider those communications'.[139] Therefore, in those instances, the Belarusian government has concluded that any such decision 'will be considered legally invalid'.[140]

This position is despite the fact that when it became a part to the Optional Protocol to the ICCPR, the Belarusian government acknowledged that it recognised the competence of the Human Rights Committee under Article 1 of the Optional Protocol to

> receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State party of any rights set forth in the Covenant.[141]

The declaration by the Belarusian government that it will refuse to recognise the competence of the Human Rights Committee in such instances has been met with criticism from the Human Rights Committee. The Human Rights Committee concluded that implicit in the State's adherence to the Optional Protocol is

> an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications and, after examination thereof, to forward its views to the state party and to the individual.[142]

In particular, the Human Rights Committee has made it clear that the competence to determine whether a case is admissible before the Committee lies with the Committee, rather than the respondent State,[143] and that any decision by the Belarusian government to refuse to accept the Human Rights Committee's determination would be in violation of the State party's obligations under Optional Protocol.[144]

Nonetheless, in numerous communications between 2010 and 2016, the Belarusian government has continued to declare that it will decline to recognise the competence of communications that it deems should be held to be inadmissible due to the failure to exhaust domestic remedies. In particular, the Belarusian government has refused to recognise the Human Rights Committee's determination that the Supervisory Review procedure does not constitute an effective remedy that individuals are obliged to exhaust.[145] Instead the Belarusian government has repeatedly responded to communications to the Human Rights Committee in the following vein:

> The State party expresses its utmost concern over the fact that the Committee systematically violates responsibilities entrusted to it in accordance with the Optional Protocol, by registering and considering individual communications from persons who have not exhausted domestic remedies . . . The State party submits that in the spirit of good faith adherence to the Optional Protocol, it uses its right to not recognize Views adopted as a result of the Committee's unlawful

[136] *K.A. v Belarus* (n125), para 4.2.
[137] *E.V. v Belarus* (n125).
[138] *Misnikov v Belarus* (n125).
[139] *E.V. v Belarus* (n125).
[140] *Ibid*.
[141] *K.A. v Belarus* (n125), para 4.2.
[142] *Ibid*, para 5.2.
[143] *Ibid*.
[144] *Ibid*.
[145] *Sudalenko v Belarus* (n118); *E.V. v Belarus* (n125).

> actions. By exceeding its powers granted by the Covenant and its Optional Protocol, broadly interpreting its mandate and baselessly adopting the functions and powers of an international judicial body, the Committee undermines its own credibility and contradicts the goals of the Covenant and the Optional Protocol.[146]

The decision by members of the Belarusian government to challenge the competence of the Human Rights Committee to examine communications that have not engaged the Supervisory Review process in Belarus presents a two-pronged issue.

Primarily, the steadfast position of the Belarusian government in the face of clear criticism from human rights bodies[147] shows a clear indication that reforms to the Supervisory Review system in the country are not likely to be forthcoming in the near future. Instead, the government of Belarus continues to demonstrate a flagrant disregard for *de facto separation of powers*, judicial independence, and the exclusive authority of the judiciary in the country.

Secondly, the unilateral claim that the Human Rights Committee does not have the competence to examine communications where the author has not engaged the Supervisory Review process, demonstrates an unwillingness by the Belarusian government to engage with important international oversight over human rights and democratic standards in the country. This position may have far reaching consequences for human rights standards within Belarus, particularly in the modern context of human rights standards in Belarus.

CONCLUSION

The situation in Belarus raises issues of a domestic, regional, and international nature. On a purely domestic basis, the ongoing use of the Supervisory Review process in Belarus undermines the principle of *res judicata* in the country and challenges the exclusive authority of the Belarusian judiciary. Perhaps of even greater concern is the fact that this power lies with the Procuracy, giving the executive branch the power to undermine judicial decisions, thereby undermining the separation of powers and the independence of the Belarusian judiciary. In a perfect World, the Belarusian government would be seeking reforms to abolish Supervisory Review to strengthen the domestic judiciary. These reforms would need to be two-fold and would demand both legislative and practical changes. Primarily, legislative reforms would need to be introduced to abolish the practice of Supervisory Review in Belarus, and new laws introduced to ensure that questions of legality and rule of law are exclusively within the jurisdiction of the judicial branch. In addition, longer term changes in practice would also be necessary, in order to properly embed a culture of exclusive authority and judicial independence within the legal community.

On a regional basis, the use of Supervisory Review remains relatively commonplace in former Soviet States, in spite of various rulings from international human rights bodies. In fact, whilst the reaction of the Belarusian government to the oversight of the Human Rights Committee has been extreme, it is far from the only former Soviet State to challenge international jurisprudence with respect to Supervisory Review. In fact, Kazakhstan, Kyrgyzstan, and Uzbekistan have all challenged the admissibility of communications to the Human Rights Committee on the basis that domestic remedies were not exhausted after the applicant failed to utilise Supervisory Review.[148] Despite the fall of the Soviet Union over 20 years ago,

[146] *Rybchenko v Belarus* (17 October 2018) Communication No 2266/2013 CCPR/C/124/D/2266/2013, paras 6.1 and 6.3.

[147] *Ryabykh v Russia* (n108); *Alekseev v Russian Federation* (n113); *Koktish v Belarus* (n113) para 7.3.

[148] *Akmatov v Kyrgyzstan* (29 October 2015) Communication No 2052/2011 CCPR/C/WG/115/DR/2052/2011; *Quliyev v Azerbaijan* (16 October 2014) Communication 1972/2010 CCPR/C/112/D/1972/2010; *Mukhtar v Kazakhstan* (6 November 2015) Communication No 2304/2013 CCPR/C/115/D/2304/2013; *Abdussamatov v Kazakhstan* (n1494); *E.Z. v Kazakhstan* (1 April 2015) Communication 1855/2008 CCPR/C/113/D/1855/2008; *Leven v Kazakhstan* (21 October 2014) Communication No 2131/2012

the Soviet hangover of Supervisory Review continues to cause international tension before United Nations human rights bodies and continues to undermine domestic judiciaries across the region. In each of these countries reform is necessary to ensure appropriate judicial independence and certainty.

Finally, on an international basis, Supervisory Review at the hands of the Procuracy is symptomatic of a Worldwide issue. Across the globe we are seeing attacks on the independence of domestic judiciaries and attempts by governments to consolidate power in the executive branch. Whilst Belarus is notable in that the interference is one prescribed by domestic law, efforts to amend domestic law to increase executive influence over respective judiciaries are ongoing throughout Europe, in former Soviet States and beyond. In Romania 'justice laws' passed between 2018 and 2019 have granted significant powers to the Office of the Prosecutor General to investigate 'offences' committed within the judiciary, a move that the Venice Commission, GRECO, and the Council of Europe condemned as threatening the independence of the judiciary in the country.[149] Similarly, in Turkey, constitutional changes to the selection and promotion of judges have granted the President significantly greater power over the makeup of the judiciary.[150] This has attracted similar concerns about threats to the separation of powers and independence of the judiciary in the country, with the Venice Commission noting that these changes 'enhanced executive control over the judiciary (and) . . . weaken an already inadequate system of judicial oversight of the executive'.[151]

Belarus therefore serves as a stark and timely warning to the international community of how embedded executive influence over the judicial branch can become if domestic law does not effectively protect separation of powers, judicial independence, and the exclusive authority of the domestic judiciary.

CCPR/C/112/D/2131/2012; *Khuseynova and Butaeva v Tajikistan* (n1535); *Karimov and Nurastov v Tajikistan* (27 March 2007) Communication Nos 1108/2002 and 1121/2002 **CCPR/C/89/D/1108&1121/2002**; *Ashurov v Tajikistan* (n1535); *Yakupova v Uzbekistan* (3 April 2008) Communication No 1205/2003 CCPR/C/92/D/1205/2003; *Sharifova and Burkhonov v Tajikistan* (1 April 2008) Communication Nos 1209,1231/2003 and 1241/2004 CCPR/C/92/D/1209,1231/2003&1241/2004; *Sattorova v Tajikistan* (n1535); *Lyashkevich v Uzbekistan* (11 May 2010) Communication No 1552/2007 CCPR/C/98/D/1552/2007; *Umarova v Uzbekistan* (3 November 2010) Communication No 1449/2006 CCPR/C/100/D/1449/2006; *Iskiyaev v Uzbekistan* (20 March 2009) Communication No 1418/2005 CCPR/C/95/D/1418/2005; *Salikh v Uzbekistan* (30 March 2009) Communication No 1382/2005 CCPR/C/95/D/1382/2005.

[149] Dunja Mijatovic 'Commissioner for Human Rights of the Council of Europe: Report Following Her Visit to Romania from 12–16 November 2018' (*Council of Europe*, 28 February 2019) <https://rm.coe.int/report-on-the-visit-to-romania-from-12-to-16-november-2018-by-dunja-mi/1680925d71> at 24.

[150] *Ibid*, 15–7.

[151] European Commission for Democracy Through Law (Venice Commission) 'Turkey: Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017' (*Council of Europe,* 13 March 2017) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)005-e> at para 129.

GUIDANCE FROM THE STRASBOURG COURT AND THE OSCE ON STATE RECOGNITION OF RELIGIONS AND THE LEGAL REGISTRATION OF RELIGIOUS OR BELIEF ORGANISATIONS

*BRANDON REECE TAYLORIAN**

INTRODUCTION

Over the last twenty years, more than two dozen disputes involving states failing to recognise or legally register religious or belief organisations have escalated into cases at the European Court of Human Rights (hereafter 'ECtHR' or 'Strasbourg Court').[1] Applicants have claimed that states are violating their freedom of religion or belief (FoRB) as laid out in Article 9 of the European Convention on Human Rights (hereafter 'ECHR' or 'the Convention') by using the legal mechanism of registration to hinder the activities of religious or belief organisations which then impedes on the collective and individual rights of members.[2] The growing number of cases involving recognition and registration issues reflects a rise in states partied to the ECHR (hereafter 'ECHR-participating states') devising and implementing recognition and registration policies in ways that are non-compliant with FoRB.[3] ECHR-participating states are responsible for respecting the following three principles as part of their national and international commitments to FoRB: (1) the equality of religious communities; (2) the autonomy of religious institutions; and (3) non-discrimination.[4]

This research surveyed twenty-six ECtHR cases since 2006 that have involved claims of a violation of Article 9 due to the misuse of registration policies by states.[5] After surveying the judgements from the Strasbourg Court across these cases, the guidance provided is inadequate both in terms of its clarity and thoroughness.[6] The key concerns include the generality of Court guidance on subjective matters that necessitate greater specificity, a lack of guidance on how states are to maintain the ideals of multiculturalism and religious pluralism espoused by the Court, insufficient acknowledgement of the importance of institutional religious freedom and a lack of investigation by the Court on the underlying reasons for recognition and registration issues, including the identification of state endorsement as a salient factor. This article demonstrates how the current approach taken by the Strasbourg Court on issuing guidance is insufficient to address the violations of Article 9 resulting from recognition and registration issues. To achieve this aim, five ECtHR cases are selected out of the twenty-six cases surveyed and the Court judgements are critically analysed.

Furthermore, this research dedicated some time to analysing the Joint Guidelines on the Legal Personality of Religious or Belief Communities (hereafter 'the Guidelines' or 'OSCE

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1 E Fokas, 'The legal status of religious minorities: Exploring the impact of the European Court of Human Rights' (2018) 65(1) Social Compass 25.

2 S Flere, 'Registration of religious communities in European countries' (2010) 40(1) Social Compass 99.

3 R Finke, J Fox and D R Mataic, 'Assessing the Impact of Religious Registration' (2018) 56(4) Journal for the Scientific Study of Religion 720.

4 H Sharkey and J Green, *The Changing Terrain of Religious Freedom* (University of Pennsylvania Press 2021) 35.

5 J Witte, Jr. and A Pin, 'Faith in Strasbourg and Luxembourg? The fresh rise of religious freedom litigation in the pan-European courts' (2021) 70(3) Emory Law Journal 587.

6 D Anagnostou, 'Implementation and Impact of Strasbourg Court Rulings: The Case of Religious Minorities and Their Convention Freedoms' in M Evans, T J Gunn and J Temperman (eds), *The European Court of Human Rights and the Freedom of Religion or Belief* (Brill 2017), 388–418.

Guidelines') announced in 2014 which is focused on addressing recognition and registration issues. The OSCE's Office for Democratic Institutions and Human Rights (ODIHR), alongside the Council of Europe advisory body the Venice Commission, produced this document in response to OSCE member states repeatedly using the obtainment of legal personality to restrict access to the full range of rights protected under FoRB. With these Guidelines, the ODIHR and the Venice Commission sought to provide more specific parameters for OSCE member states to follow when it comes to reducing the obstacles to accessing registration and acquiring legal personality. However, the Guidelines do have several inadequacies, principally, their limited geographic scope to the OSCE area. This has meant that the Guidelines are not able to address the important recognition and registration issues in nations where Buddhism or Islam are established or where state atheism is professed.[7] However, another key issue with the Guidelines is their failure to present registration issues in any systematic way. For instance, the Guidelines would have been more effective if the registration issues had been presented chronologically by categorising the issues into three stages according to when they typically appear in procedures (i.e. before, during or after registration).[8]

The Guidelines also failed to establish clearer guidance on granular issues such as registration fees, state definitions of religion, quotas and qualifications for accessing registration, legal designations for registered religious or belief organisations and the types of benefits that states may permissibly grant organisations that have registered.[9] Moreover, further issues include a lack of clarity at the international level regarding how states use the pejorative terms 'cult' and 'extremist' to refer to religions and beliefs they do not favour as well as the differentiation between regulation or restriction of religious activity.[10] The analysis of the ECtHR judgements and the OSCE Guidelines is intended to demonstrate the need for a new approach to religious recognition and a new standards document that addresses the full range of issues.[11]

Registration issues constitute a category of limitations, interferences and violations of FoRB resulting from a state's enactment and enforcement of laws involving a religious or belief organisation's obtainment of legal personality.[12] Registration issues can appear either before groups have formally begun registration procedures (i.e. groups may find their access to registration restricted), during registration procedures (i.e. groups may face excessive requirements or onerous proceedings), or after registration has been granted (i.e. groups may face the threat of being deregistered or required to undergo cumbersome re-registration procedures).[13] Over the last two decades, claims of violations of Article 9 of the Convention have consistently arrived at the ECtHR and have been lodged by members or leaders of religious or belief organisations who claim they have been discriminated against when trying to obtain legal personality.[14] A probable reason for this trend is the gap in protections for the institutional dimension of FoRB as many still do not consider religious or belief organisations

[7] A Sarkissian and A M Wainscott, 'Benign bureaucracies? Religious affairs ministries as institutions of political control.' (Democratization, 2023) <https://doi.org/10.1080/13510347.2023.2293147> Accessed 9 February 2024.

[8] B R Taylorian, *Religious Freedom and State Recognition of Belief* (University of Central Lancashire 2023) 88.

[9] B R Taylorian and M Ventura, 'Registration, recognition, and freedom of religion or belief' (2022) 11(2–3) Oxford Journal of Law and Religion 197.

[10] F A Carvalho, C Santos and L Viana, 'Regulating religious proselytism: the views from Strasbourg and Luxembourg' in M J Oliveira, H Vilaça and A Zwilling (eds), *Contemporary Challenges to the Regulation of Religions in Europe* (U.Porto Press 2023), 119–129.

[11] F Rigel and P Tlčimuková, 'The Church Registration Processes in the Czech Republic: Current Situation from the Perspective of Sociological Jurisprudence' (Journal of Law, Religion and State, 2024) <https://doi.org/10.1163/22124810–20240001> Accessed 9 February 2024.

[12] L Peifeng, 'Issues in the Registration of Religious Associations' (2007) 3(1) Religion Monitor 47.

[13] B R Taylorian, *Religious Freedom and State Recognition of Belief* (University of Central Lancashire 2023) 90–119.

[14] A Isaeva, 'Registration of religious organizations: problems in decisions of the Constitutional Court of the Russian Federation and ECtHR' (2013) 6(1–2) The International Journal for Religious Freedom 25.

to be rights-holders but indeed the freedom for institutions to operate directly impacts the rights of individuals and the religious community.[15]

Cases involving registration issues raise a poignant question about the international and national provision of FoRB, including the limits of FoRB and the margins of appreciation that states may reasonably invoke when handling registration disputes.[16] For example, states are likely to have legitimate concerns about fraudulent organisations fronting as religious groups, or religious institutions infringing on the fundamental rights of their members, as alleged in the ECtHR case *Religious Cult 'Biserica Unificarii' and Akhunzyanov v The Republic of Moldova* (2016) that was recently communicated in November 2023.[17] In these instances, legal registration takes on an important role as an efficient mechanism for filtering out and monitoring suspected organisations. However, some states possess a clear bias against minorities and new religious groups and have misused their margin of appreciation to either withhold benefits or to restrict the activities of groups in disfavour.[18]

Overall, this study has identified six recurring issues in ECtHR cases involving registration:

- States denying registration to religious or belief organisations based on arbitrary or discriminatory requirements.[19]
- States discriminating between religious or belief organisations on which they will allow access to registration and to receive financial or legal privileges.[20]
- States deregistering religious or belief organisations which can entail the revocation of their ability to operate, personality in law and access to benefits such as tax exemption.[21]
- States forcibly disbanding unregistered gatherings or legislating reregistration requirements to gather more information about active religious groups.[22]
- States using registration to interfere in the internal structure of religious institutions, including what groups name themselves, how they arrange their clergy and how states sometimes fail to recognise the religious element of the group in law by registering them only under a secular designation.[23]
- States restricting one or more religious activities such as proselytising by making it a benefit of registering despite that it is already explicitly protected under FoRB in international human rights instruments.[24]

The circumstances and rulings of five ECtHR cases will now be analysed in-depth, three of which involve cases lodged by Jehovah's Witness organisations, one in Azerbaijan, the second in the Nagorno-Karabakh territory at the time controlled by Armenia, and another in

[15] A Ignatenko and Y Kotylko, 'State registration of religious organizations in Ukraine' (2022) 50(1) Scientific Journal of Polonia University 171.

[16] S E Berry, 'Religious Freedom and the European Court of Human Rights' Two Margins of Appreciation' (2017) 12(2–3) Religion & Human Rights 198.

[17] *Religious Cult 'Biserica Unifcarii' and Akhunzyanov v The Republic of Moldova* (2016) ECtHR, 45588/16. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–229225> Last accessed 7 January 2024.

[18] F Arqueros and T Vagramenko, 'Criminotheology: Persecution of Jehovah's Witnesses in Putin's Russia' (2023) 16(2) The International Journal for Religious Freedom 83–103.

[19] Ossewaarde v. Russia (2023) ECtHR, 27227/17. *HUDOC*. Available at <https:// hudoc.echr.coe.int/eng?i=001–223365> Last accessed 26 January 2024.

[20] *Magyar Keresztény Mennonita Egyház and Others v. Hungary* (2014) ECtHR, 70945/11. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–142196> Last accessed 26 January 2024.

[21] *The Moscow Branch of the Salvation Army v. Russia* (2006) ECtHR, 72881/01. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–77249> Last accessed 7 January 2024.

[22] *Church of Scientology Moscow and Others v. Russia* (2021) ECtHR, 37508/12. *HUDOC* Available at <https://hudoc.echr.coe.int/eng?i=001–214023> Last accessed 26 January 2024.

[23] *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria* (2009) ECtHR, 412/03. *HUDOC* Available at <https://hudoc.echr.coe.int/eng?i=001–90788> Last accessed 24 July 2024.

[24] *Biserica Adevărat Ortodoxă din Moldova and Others v. Moldova* (2007) ECtHR, 952/03. *HUDOC* Available at <https://hudoc.echr.coe.int/eng?i=001–79606> Last accessed 26 January 2024.

Austria, while a further two cases were lodged by an Orthodox Christian group in Bulgaria and a Baptist Christian in Russia.

RELIGIOUS COMMUNITY OF JEHOVAH'S WITNESSES V AZERBAIJAN

The Religious Community of Jehovah's Witnesses, a registered religious organisation in Azerbaijan since December 22, 1999, had been applying regularly from 2002 onwards to the State Committee for Work with Religious Associations (hereafter 'the Committee') for permission to import their religious literature. The group stated that they intended to use the literature both as part of their religious services and for sharing with members of the public who were interested. However, the Committee approached this request in an inconsistent manner, namely, by allowing the same title to be imported on one occasion but denying it on another. On June 13, 2008, the Committee allowed the applicant religious group to import three out of six titles it had requested, arguing that the remaining three could not be imported as they were hostile to other religions. The applicant religious group soon thereafter lodged an action against the Committee with the Sabail District Court, asking the Court to declare the decision unlawful and to reverse it. On August 13, 2008, the Court rejected this claim, basing its decision on a report it had commissioned and even though the applicant religious group lodged an appeal, the Baku Court of Appeal rejected it on December 3, 2008, as did the Supreme Court the following June.[25]

Overall, this case, which was communicated to the ECtHR in 2019, involved firstly a limitation placed on the right of a registered religious organisation to import its literature for purposes of propagation. The reason given for this was that the literature contained passages found to be intolerant of other religions which was considered to impair state security. In Azerbaijan, undergoing registration is a necessary precondition for importing religious literature legally but also, it is not a guarantee that a religious or belief organisation will be able to import their literature freely as permission must be granted by the Committee for Work with Religious Communities. Hence, the question over whether a violation took place of Articles 9 and 10 of the Convention in this case rests on whether, firstly, a religious or belief organisation by gaining registration has the right to import its literature regardless of state approval. Secondly, it depends on whether the state applies more leniency in the literature it allows to be imported depending on the religion or belief the organisation affiliates with and thirdly, whether the reasoning given by the national courts is justifiable under FoRB.

This case is emblematic of the systemic problems at the international level when it comes to addressing recognition and registration issues because it concerns the area of what margins of appreciation states ought to be given in limiting FoRB. Moreover, it relates to how the state ought to use registration to enact these limitations while remaining FoRB-compliant and what types of religious activities ought to be exempt from regulation due to their essential role in observing a religion. Further still, this case is just one in a growing collection of examples of when states have cited concerns over the exclusivist theology of a religion to justify stringent limitations placed on organisations affiliated with that religion.[26] Another example of this was when the Russian Federation declared the Jehovah's Witnesses an 'extremist' organisation due to their belief that the fate of all non-Witnesses is damnation.[27]

[25] *Religious Community of Jehovah's Witnesses v Azerbaijan* (2013) ECtHR, 12739/13. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–192837> Last accessed 7 January 2024.

[26] M J Perry, 'A Right to Religious Freedom? The Universality of Human Rights, the Relativity of Culture' (2005) 10(1) Roger Williams University Law Review 349.

[27] W Slupina, 'Religious Freedom and Jehovah's Witnesses in Putin's Russia, Georgia, and CIS' in G Besier, I Huhta and O Lange (eds), *Religious Freedom: Its Confirmation and Violation during the 20th and 21st Centuries* (LIT Verlag 2019), 183–215.

The Strasbourg Court used the term 'interference' to describe the nature of the actions of the authorities in Azerbaijan in halting the importation of Jehovah's Witness literature which the Court noted that neither party denied. The Court used a three-pronged criterion for determining whether this interference was compliant with the Convention, namely, whether it was 'prescribed by law', pursued one or more legitimate aims and was 'necessary in a democratic society' to achieve those aims. This criterion was set out in detail in *Ibragim Ibragimov and Others v Russia* (2018).[28] In its comments on whether this interference was prescribed in law, the Court discussed the concept of foreseeability which in this case concerns whether the applicant religious group could reasonably anticipate that their literature would be denied importation due to it including language reasonably deemed intolerant. In its final comments on this matter, the Court made no final decision on whether the interference was prescribed in law.

On the matter of whether the interference pursued a legitimate aim, the Court took the side of the state by contending that the measures taken were pursued to protect the rights of others by disallowing the importation of a book espousing an exclusivist theology, an action that effectively banned it from distribution in the country. However, the Court then needed to determine the state's compatibility with the third criterion of 'necessity in a democratic society' which the Court stated depends on the identification of a 'pressing social need' and whether the action was 'proportionate to the legitimate aim pursued.'[29] This criterion was framed as a limitation on the margin of appreciation granted to states in their interference with freedom of expression and FoRB. In the end, the Court declared there to have been a violation of Article 10 of the Convention on the basis that it identified the conclusions made by the Baku Court of Appeal and the Supreme Court of Azerbaijan to be summary and that the two higher courts failed to identify the deficiencies in the reasoning given by the Sabail District Court. This included a lack of evidence of how the literature would incite disturbances between religious communities or otherwise how the actions of the Sabail District Court would work to balance the right to freedom of expression of the members of the applicant religious group with the rights of others not to be insulted on the grounds of their beliefs.

The crux of this case is whether the Azerbaijani authorities discriminated against importing this religious literature purely because it belonged to the Jehovah's Witnesses and whether the authorities in this Muslim-majority country would treat with the same level of scrutiny literature imported by Islamic organisations.[30] This highlights an example of how state endorsement for religions can intersect with registration issues to inflame them, in turn causing further impediments to the rights of religious or belief organisations and their members. While religious equality is not explicitly protected under Article 9 of the ECHR, it is implied as part of the right to be free from discrimination on the basis of religion and so the degree of religious equality in a country is part of the measure for the overall conditions of FoRB. Thus, states have the opportunity to uphold this principle in policy and practice by treating all religions equally, including when states grant ceremonial or substantive privileges. Therefore, under the ECHR, states cannot legitimately recognise any particular religion or belief as having a special status either in the legal sphere or the sociocultural. For example, while Iceland's constitutional establishment of the Evangelical Lutheran Church may not place

[28] *Ibragim Ibragimov v Russia* (2018) ECtHR, 1413/08. *HUDOC*. Available at <https://hudoc.echr.coe.int/fre?i=001–185293> Last accessed 13 January 2024.

[29] *Religious Community of Jehovah's Witnesses v Azerbaijan* (2013) ECtHR, 12739/13. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–201087%22]}:~:text=proportionate%20to%20the%20legitimate%20aim%20pursued> Last accessed 23 August 2024.

[30] M Fadel, ''No Salvation Outside Islam': Muslim Modernists, Democratic Politics, and Islamic Theological Exclusivism' in 000000M H Khalil (ed), *Between Heaven and Hell: Islam, Salvation, and the Fate of Others* (Oxford University Press 2013) 35–62.

a significant burden on its human rights record unlike many other states with established religions, neither can Iceland be said to have full religious freedom because it falls short on the measure of religious equality under its establishmentarian model. However, returning to the case at hand, the Strasbourg Court identified a bias in the judicial proceedings of the three courts in Azerbaijan and so considered their judgements unnecessary in a democratic society.

The response of the ECtHR to this case highlights a systemic issue. Although the Court identified the endorsement of Islam in the national judicial system, its response failed to address to what degree state endorsement is permissible under FoRB and precisely how states and human rights advocates can work to identify and reduce preferential treatment. Cases involving recognition and registration are efficient at highlighting the lack of provisions at the international level on how religious endorsement not only violates FoRB but inhibits the pursuit of ideals such as multiculturalism and religious pluralism.[31] Simply declaring a Convention violation and awarding the winning applicant with damages does not undo the systemic problem of religious endorsement that is an ongoing, underlying cause of registration issues.

Moreover, cases where registered religious or belief organisations have been treated discriminately highlight how the benefits states claim registration includes are not equally bestowed to registered organisations.[32] In these cases, states overstretch the margins of appreciation granted to them by international law on the limits they can reasonably place on FoRB. Identifying the existence of religious endorsement in domestic judicial proceedings needs to be more explicitly integrated into the criteria used by the Strasbourg Court when dealing with registration issues to determine with greater efficiency whether a state's invocation of a margin of appreciation is grounded in FoRB-compliant reasoning.[33]

In future cases, the Court needs to determine with greater clarity whether preconditioning the legal importation of religious literature to prior registration with the state is a FoRB-compliant requirement. This greater level of attention given to the granular details of the activities of religious or belief organisations would support the prevention of these issues from reoccurring as they do and would help to ascertain with greater clarity and precision an appropriate role for registration as a filtering tool.[34] More guidance on religious endorsement would also provide states and human rights advocates with the tools necessary to effectively identify FoRB-compliance on matters more ambiguous such as the identification of bias in the actions taken by states.

Finally, there needs to be more emphasis in international guidance placed on the notion that it is the minimum responsibility of states to allow religious or belief communities to exercise their right to FoRB, including the range of activities FoRB protects. It would be ideal for states to facilitate a diverse range of religious or belief communities so that they may thrive rather than struggle to survive.[35] An undertone persists in the Court judgement and in the OSCE Guidelines that lessens the expectations of states at the international level when it comes to their responsibilities to both protect and facilitate religious or belief communities.[36] Expectations need to be raised to provide states with benchmarks to create an environment

[31] P McCormick, C Ovey and B Rainey, *The European Convention on Human Rights* (Oxford University Press 2017) 478–487.

[32] *The Religious Denomination of Jehovah's Witnesses in Bulgaria v Bulgaria* (2020) ECtHR, 5301/11. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–205217> Last accessed 7 January 2024.

[33] M L Chakim, 'The margin of appreciation and freedom of religion: assessing standards of the European Court of Human Rights' (2020) 24(6) The International Journal of Human Rights 850.

[34] J Fox, *Thou shalt have no other Gods before me: Why governments discriminate against minorities* (Cambridge University Press 2020) 20–55.

[35] M Fadel, 'Proselytism and Cultural Integrity' in C Durham, T S Lindholm and B Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Oslo Coalition on Freedom of Religion or Belief 2013) 651–668.

[36] S Hwang, 'Margin of Appreciation in Pursuit of Pluralism? Critical Remarks on the Judgments of the European Court of Human Rights on the 'Burqa Bans'' (2020) 20(2) Human Rights Law Review 361.

that encourages religious pluralism and cultivates a marketplace of ideas rather than one that merely tolerates minorities and new religions.[37]

CHRISTIAN RELIGIOUS ORGANIZATION OF JEHOVAH'S WITNESSES IN THE NKR V ARMENIA

On June 22, 2009, the Jehovah's Witnesses applied to the government of the former Republic of Nagorno-Karabakh (hereafter 'NKR government' or 'NKR territory') for legal registration under the Freedom of Conscience and Religious Organisations Act of 2008. On July 6, 2009, the Chief of Staff of the NKR government provided an opinion on whether the Jehovah's Witnesses met the criteria for state registration which was signed by the NKR government's Chief of the Department for National Minorities and Religious Affairs. The Chief of Staff concluded that the Jehovah's Witnesses use 'methods of psychological influence', 'persuasion and inspiration' and 'manipulation' including the provision of financial and social support to keep a person dependent on the organisation.[38]

Moreover, the Chief of Staff asserted that only the Armenian Apostolic Holy Church has the right to preach freely and spread its beliefs in the NKR territory and all other religious denominations are only to preach within the circle of their own believers. Furthermore, the Chief of Staff rejected the claim of the Jehovah's Witnesses that they are a Christian organisation as they do not adhere to the Nicene Creed which the Chief of Staff regarded to be a prerequisite for being Christian. This determination stems from an ongoing debate –– no longer by secular religious scholars but more so trinitarian Christian church leaders –– as to whether it is accurate to identify Jehovah's Witnesses as a denomination of Christianity, or to instead designate it as a separate religion.[39] Besides this, the Chief of Staff interpreted the apolitical stance and pacifism of Jehovah's Witnesses as conscientious objectors as undermining their civic duties which both 'weakens and disrupts the defence of the country at war'.[40]

Based on this reasoning, the State Registry Department rejected the application of the Jehovah's Witnesses on August 3, 2009, relying on the 'expert opinion' of the Chief of Staff. The applicant religious organisation thereafter lodged a claim with the General Jurisdiction Court, seeking an annulment of the decision and an order for registration. Four days after filing this claim, the Administrative Court declared the applicant's claim inadmissible on the grounds that it was not a registered legal entity and that the applicant had failed to pay the correct amount of court fees. Instead, the chairman of the applicant religious organisation himself made a claim to the Administrative Court the next week which the Court admitted.

However, in the following month, the Court declared lawful the State Registry Department's refusal to register on the basis that the decision did not deny the ability of citizens to profess the Jehovah's Witness faith. Despite this claim, in March, April and May 2010, NKR police raided religious meetings of the Jehovah's Witnesses in three cities in the territory and several members were charged with administrative offences for holding an unauthorised meeting because their religious organisation was not registered.[41] The chairman of the Jehovah's Witnesses in the NKR territory then made two further attempts to obtain registration with

[37] M Eswaran, 'Competition and Performance in the Marketplace for Religion: A Theoretical Perspective' (2011) 11(1) The B.E. Journal of Economic Analysis & Policy 1.

[38] *Christian Religious Organization of Jehovah's Witnesses in the NKR v. Armenia* (2022) ECtHR, 41817/10. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–216366> Last accessed 7 January 2024.

[39] B M Metzger, 'The Jehovah's Witnesses and Jesus Christ: A Biblical and Theological Appraisal' (1953) 10(1) Theology Today 65.

[40] *Ibid*.

[41] F Corley, 'Second ECtHR finding against Armenia on entity's religious freedom.' (Forum 18, 2022) <https://www.forum18.org/archive.php?article_id=2728> Accessed 9 February 2024.

the NKR government although he did not succeed in either. The case eventually reached the Supreme Court of the NKR territory which declared in 2012 that no substantial violation or erroneous interpretations had been made and that this decision was final and 'not amendable to appeal.'[42]

In its 2008 Freedom of Conscience and Religious Organisations Act, the NKR government set out criteria for a religious or belief organisation to qualify for registration: (1) the organisation does not use coercion or violence to influence a citizen's decision whether or not to participate in religious services; (2) the religion or belief the organisation follows is based on a historically-recognised holy book; (3) its doctrines form part of international contemporary religious-ecclesiastical communities; (4) it is free from materialism and it has purely spiritual goals; and (5) it has at least one-hundred members over the age of eighteen. Furthermore, the Act lists the rights granted through registration to religious or belief organisations, including the right to provide religious services in places of worship and on sites owned by the group, acquire objects and materials of religious significance and create groups for religious education but the Act prohibits 'soul hunting' which is likened to proselytism.[43]

Firstly, the Strasbourg Court declared that there had been an either side so it's 'interference' on behalf of the NKR government in the right of the Jehovah's Witnesses to exercise both their freedom of religion and freedom of association and that the Jehovah's Witnesses could not exercise the full range of their religious rights in the NKR territory without registration. Secondly, the Court used its three-pronged criteria of whether the state's actions were 'prescribed by law', pursued a 'legitimate aim for the purposes of that provision' and were 'necessary in a democratic society', to determine whether this interference was justified. The Court accepted the entitlement of the NKR government in its claim that the application for registration had been denied with the intention of protecting public safety and the interests of national security, the state and the population. However, the Court declared that the reasons provided by the Chief of Staff in their expert opinion, which the State Registry Department, Administrative Court and Supreme Court of the NKR territory factored heavily into their decision-making process, were not relevant or sufficient to justify the interference identified and thus cannot be accepted as necessary in a democratic society. This led the Court to declare a violation of Article 9 of the Convention in this case. Although no longer existent as a breakaway state due to the victory of Azerbaijan in its military offensive against the NKR government in September 2023, this case highlights the ongoing issue in states across Europe using narrow definitions of religion to exclude –– especially new religious movements (NRMs) –– from gaining access to registration, legal personality and financial benefits.

This survey of ECtHR cases over the past two decades confirms that recognition and registration issues have a greater tendency to impact NRMs more than religions with a longer history in a country which shows that how registration is enforced sometimes reflects a bias against communities that are new or unfamiliar.[44] The identification of this trend suggests that more guidance at the international level is required to address issues faced specifically by NRMs. Guidance specific to new and minority religions might help to prevent or at the very least better understand the cases of religious endorsement that often lead to issues such as states denying registration or withholding privileges, as was seen in the recent case *Ancient Baltic Religious Association Romuva v Lithuania* (2021).[45] Such guidance would

[42] *Christian Religious Organization of Jehovah's Witnesses in the NKR v. Armenia* (2022) ECtHR, 41817/10. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–216366> Last accessed 7 January 2024.

[43] *Ibid*.

[44] *Church of Scientology of St Petersburg and Others v. Russia* (2014) ECtHR, 47191/06. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–146703> Last accessed 7 January 2024.

[45] *Ancient Baltic Religious Association Romuva v. Lithuania* (2021) ECtHR, 48329/19. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–210282> Last accessed 7 January 2024.

work to address excessive registration requirements established to exclude new or minority religions from gaining the legal personality and protections necessary for members of their communities to exercise their rights.[46]

VEREIN DER FREUNDE DER CHRISTENGEMEINSCHAFT AND OTHERS V AUSTRIA

In March 1996, a Christian religious organisation that applied for recognition as a 'religious society' the year prior, filed an application with the Austrian Administrative Court due to the Minister's failure to give a decision on the application. This was despite the Constitutional Court's ruling in October 1995 that religious or belief organisations have a subjective right to recognition as a 'religious society.'[47] In January 1998, the Administrative Court rejected this application. The Court explained that since the 1998 Religious Communities Act had recently been enacted which the application would now not be dealt under, there had been no failure to give a decision as the six-month time limit for the Minister to give a decision had not lapsed. On July 20, 1998, the Minister decided that the first applicant had acquired legal personality as a registered 'religious community' within the meaning of the 1998 Religious Communities Act so the applicant was thereby not granted legal personality as a 'religious society' within the meaning of the 1874 Recognition Act.[48]

Meanwhile, the applicants had also filed on July 16, 1998, a request with the Federal Minister to be recognised as a 'religious society' under the 1874 Recognition Act. However, the Federal Minister dismissed this request, giving the reason that a religious or belief organisation already recognised as a 'religious community' could not also be recognised as a 'religious society' if it had not already existed as a registered 'religious community' for a minimum of ten years. The applicant religious organisation thereafter lodged a complaint with the Constitutional Court which returned with its observation that it was constitutional to establish a ten-year waiting period for registered 'religious communities' as a precondition for becoming eligible for 'religious society' status. Moreover, the Constitutional Court asserted that this eligibility criterion served the legitimate aim of ensuring that the competent authority could certify that the 'religious community' was willing and able to integrate into the existing legal order.[49]

The Constitutional Court stated that it was the duty of the competent authority during the ten-year window to observe the operations of the 'religious community' to ascertain whether it conducts any unlawful activities. The Constitutional Court gave the examples of 'incitement to commit criminal offences, endangering the psychological development of minors, violating the psychological integrity of persons or using psychotherapeutic methods to disseminate its religious beliefs' as unlawful activities that the competent authority was tasked with observing in 'religious communities' before they could ascend to 'religious society' status. The Austrian system for handling relations with religious or belief organisations is an example of verticalism –– a term coined by the researcher of this article to refer to a hierarchy of recognition and registration statuses differentiated by differences in benefits and privileges.[50] Recognition as a 'religious society' can be achieved by an international treaty (e.g.

[46] *Magyar Keresztény Mennonita Egyház and Others v. Hungary* (2014) ECtHR, 70945/11. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–142196> Last accessed 7 January 2024.

[47] *Verein Der Freunde Der Christengemeinschaft and Others v. Austria* (2009) ECtHR, 76581/01. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–91418> Last accessed 7 January 2024.

[48] *Ibid*.

[49] *Ibid*.

[50] B R Taylorian and M Ventura, 'Registration, recognition, and freedom of religion or belief' (2022) 11(2–3) Oxford Journal of Law and Religion 208.

the Roman Catholic Church is the only religious organisation recognised in Austria through this avenue), a special law or a decree under the 1874 Recognition Act. The preconditions for 'religious society' status set out by the Act are that the 'teaching, services and internal organisation, as well as the name' of the applicant organisation 'do not contain anything unlawful or morally offensive' and that there exists at least one community of worship. On the other hand, registration as a 'religious community' is achieved through the 1998 Religious Communities Act.

The ECtHR found there to have been a breach of Article 14 of the Convention in conjunction with Article 9 on the basis that the Court found there to be no objective and reasonable justification for the ten-year waiting period for 'religious communities' before they may qualify as 'religious societies.' The Court also identified that organisations classified as 'religious societies' enjoy privileged treatment by the state, including exemption from military and civilian service for members, reduced tax liability or exemption from specific taxes, state support for the founding of schools, and representation on various government boards. The Court emphasised that all religious groups must have a fair opportunity to apply for 'religious society' status and that the criteria established must be applied in a way that adheres to the principle of non-discrimination. While the Court admitted that such a waiting period may be necessary in exceptional circumstances, giving 'newly established and unknown religious groups' as an example of such circumstances, it found there to have been no objective reason why the Jehovah's Witnesses were forced to endure this waiting period in this case and so identified a discriminatory application of the law.[51]

Verticalism remains a widespread and ongoing challenge to FoRB in European states as demonstrated by a similar case lodged against Türkiye in 2016 by members of Alevism, a syncretic Islamic religious minority.[52] Verticalism is the systemic legal manifestation of religious endorsement, namely, the unequal treatment of religious or belief organisations based on their inherent characteristics (i.e. their beliefs and practices, size of the group etc.).[53] The term 'verticalism' and its antithesis 'horizontalism' are useful because they can capture two matters concurrently: (1) how states view religious communities whether as equals or as one being superior to others; and (2) the set of practices including lawfare that states employ to maintain the established hierarchy.

Although a sufficient amount of international material addressing the importance of non-discrimination exists, less focuses on the discrimination and unequal treatment of religious or belief organisations as entities distinct from the communities they represent which serves to highlight the current lack of recognition granted to institutional religious freedom.[54] Such discriminatory systems are often also cloaked under the reasoning that new or minority religions do not deserve the same benefits and privileges as established or majority religions that have existed in a country for far longer.[55] Present guidance from the Strasbourg Court is inadequate with regard to addressing the compatibility of religious endorsement and verticalism with FoRB, including a lack of counsel on how states can reconcile culture, tradition or national sentiment favouring a certain religion while remaining committed to FoRB and

[51] *Verein Der Freunde Der Christengemeinschaft and Others v. Austria* (2009) ECtHR, 76581/01. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–91418> Last accessed 7 January 2024.

[52] *İzzettin Doğan and Others v. Turkey* (2016) ECtHR, 62649/10. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–162697> Last accessed 7 January 2024.

[53] Office of International Religious Freedom, *2022 Report on International Religious Freedom: Czech Republic* (U.S. Department of State 2023) 3–4.

[54] P Marshall, 'Institutional religious freedom: an overview and defense' (2021) 12(5) Religions 364.

[55] R Torfs, 'Experiences of Western Democracies in Dealing with the Legal Position of Churches and Religious Communities' in S Devetak, L Kalčina and M Polzer (eds), *Legal Position of Churches and Religious Communities in South – Eastern Europe* (Institute for Ethnic and Regional Studies 2004) 19–26.

religious pluralism, or how policymakers might approach devising and implementing reforms in ways that avoid eliciting social upheaval.[56]

INDEPENDENT ORTHODOX CHURCH AND ZAHARIEV V BULGARIA

In July 2012, twenty-four people set out to establish a new church in Bulgaria which they chose to name the Independent Orthodox Church. The group then attempted to register their religious organisation and so applied to the Sofia City Court as is required in Bulgarian registration law. Crucially, they included in their registration application a certificate issued the same month by a state-owned company that keeps a database of for-profit and not-for-profit organisations which confirmed that the chosen name of the religious organisation did not match that of any other such entity in the country. The Religious Denominations Directorate, which is associated with the Council of Ministers, was invited to comment on the registration request as is allowed by the rules of the registration procedure.[57]

The Directorate stated that due to the recognition of the Bulgarian Orthodox Church in the Constitution of Bulgaria, denominations of the national church are exempt from having to register. On November 30, 2012, the Sofia City Court refused to register the applicant religious organisation. The Sofia City Court's reasoning was twofold: (1) holding Orthodox Christian beliefs meant the applicant church could not be sufficiently distinguished as a separate religious denomination from that of the Bulgarian Orthodox Church; and (2) the chosen name for the group was too similar to that of the Bulgarian Orthodox Church with the potential to cause confusion and perhaps mislead the public. The applicants appealed the decision by contending that section 15(2) of the 2002 Act pertaining to the registration of religious organisations states that only a complete match of the name of an existing denomination warrants a registration denial.[58]

The applicants also pointed out that the Sofia City Court had already registered a number of other religious or belief organisations professing the same denomination. For instance, the Sofia City Court had already registered several Armenian Apostolic Orthodox churches and an organisation named the Reformed Orthodox Church whose beliefs overlap with the Bulgarian Orthodox Church. However, the Sofia Court of Appeal continued to uphold the refusal to register the applicant religious organisation by stating, in essence, that it was not obliged to accept the registration application and made the claim that its refusal to grant legal personality did not impinge on the FoRB of the group nor their freedom to associate, in turn denying any violation of Article 9 of the ECHR.[59]

The Strasbourg Court declared that a 'limitation' had been placed on the applicant's right to manifest their religion or belief in being denied registered status due to the benefits and concessional rights granted through legal personality despite the state having not actively intervened in the religious group's activities. The Court implicitly acknowledged institutional religious freedom in this case by asserting that fixing legal personality as a precursor to a religious or belief organisation owning or leasing property, keeping bank accounts, appointing ministers and other employees, and ensuring judicial protection of its members and assets, was a violation of FoRB if registration was denied or made discriminatory. Further guidance of the Strasbourg Court in this case can be divided into the following two points:

[56] F Ispahani, 'Constitutional Issues and the Treatment of Pakistan's Religious Minorities' in M Kugelman, N Nair and B Omrani (eds), *Ghosts from the past? Assessing recent developments in religious freedom in South Asia* (Routledge 2021) 23–39.

[57] *Independent Orthodox Church and Zahariev v. Bulgaria* (2021) ECtHR, 76620/14. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–209351> Last accessed 7 January 2024.

[58] *Ibid*.

[59] *Ibid*.

(1) The Court pointed out that a government disallowing registration is a form of restriction on religious activity albeit indirect and so the government cannot claim it has not interfered in the exercise of FoRB.
(2) The Court also identified how a limitation had been placed on the right to FoRB by the government in this instance but that the justification given was insufficient according to the ECtHR criteria of being prescribed by law, pursuant to one or more legitimate aims and necessary in a democratic society.

However, the Strasbourg Court's invocation of the criterion 'necessary in a democratic society' for determining permissibility to FoRB in this case is questionable, specifically regarding whether this criterion works in the context of minority rights. For instance, NRMs often do not possess widespread public support for their activities, especially if their beliefs and practices diverge significantly from the mainstream.[60] Hence, subjecting the freedoms of NRMs to majoritarianism would be counterproductive to their protection as the public is more likely to support limiting the activities of religions they are unfamiliar with or deem as a potential threat to the cultural and religious norm.[61] The implicit meaning of the Court's criterion is not lost however in that a 'democratic society' is one in which equality and non-discrimination are respected but the subjectivity of this criterion makes its application vulnerable to the disenfranchisement of NRMs by allowing states to overexercise their margins of appreciation.

The underlying concern for FoRB in the case is how recognition issues often intersect with and worsen registration issues, an example of which is how the Bulgarian government in this instance granted privileges and recognition to the Bulgarian Orthodox Church over all other religions and beliefs. As a result, the government treated the national church differently from other religious or belief organisations and so fell short of its commitments to religious equality and non-discrimination in this case. Nominal restrictions of this type are not an isolated issue but can be found across nations in Europe as demonstrated by another case in Bulgaria in 2021[62] and in North Macedonia in 2017.[63] In the case of nominal restrictions placed on religious or belief organisations, the issue of religious endorsement reoccurs as such restrictions are often enacted to protect the integrity of the established, majority or privileged religion despite states often citing other reasons for the limitations placed on how religious or belief organisations may name themselves.[64]

OSSEWAARDE V RUSSIA

On August 14, 2016, Mr Donald Jay Ossewaarde, an American national living in Oryol, Russia, on a permanent residence permit at the time, was confronted by three police officers at his home.[65] They said that they had come to join the Sunday Bible gathering that the applicant was holding at his residence as he was a Baptist Christian, a member of the US-based religious organisation Baptist International Missions, Inc. Afterwards, Mr Ossewaarde was told by

[60] M O Ikeke, 'The new religions and their human right to religious freedom' (2023) 4(1) KIU Interdisciplinary Journal of Humanities and Social Sciences 223.

[61] E Barker, 'Religious Freedom and the 'New Religions' in G Besier and I Huhta (eds), *Religious Freedom: Its Confirmation and Violation During the 20th and 21st Centuries* (LIT Verlag 2019) 109–132.

[62] *Bulgarian Orthodox Old Calendar Church and Others v. Bulgaria* (2021) ECtHR, 56751/13. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–209327> Last accessed 7 January 2024.

[63] *Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy) v The Former Yugoslav Republic of Macedonia (*2017) ECtHR, 3532/07. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–178890> Last accessed 7 January 2024.

[64] Office of International Religious Freedom, *2022 Report on International Religious Freedom: North Macedonia* (U.S. Department of State 2023) 7–8.

[65] *Ossewaarde v. Russia (*2023) ECtHR, 27227/17. *HUDOC*. Available at <https:// hudoc.echr.coe.int/eng?i=001–223365> Last accessed 7 January 2024.

the officers that he needed to accompany them to the police station for fingerprinting where he was informed that the police had received a letter of complaint from a 'Ms B' who had expressed concern over the activities of 'foreign religious cultists' who had pasted evangelical tracts on the notice board at the entrance of her apartment building.

Mr Ossewaarde was subsequently accused of conducting illegal missionary work as a non-citizen. He was charged with placing an invitation to a religious service on notice boards which the Russian authorities interpreted as 'disseminating information about his religion among non-members of his religious association' which they saw as having amounted to conducting missionary work without sufficient notification of the authorities of his establishment of a religious group. After two and a half hours spent at the police station, Mr Ossewaarde was taken to the Zhelezhnodorozhnyy District Court in Oryol where, after a short hearing, he was found guilty of the charges and fined 40,000 Russian roubles (approximately 650 euros).

Mr Ossewaarde appealed this decision by stating that in organising Bible meetings at his home, he was exercising his right to freedom of religion and that he was not a member of any religious group in Russia, and that, accordingly, his Bible meetings could not constitute 'missionary work' within the meaning of the Religions Act which defines it as the activity of a religious association. The Oryol Regional Court upheld the District Court's conviction in a summary fashion and a judge of the Supreme Court of the Russian Federation later rejected Mr Ossewaarde's request for a review of the penalty. Afterwards, Mr Ossewaarde submitted an application to the ECtHR, principally on the basis of an alleged violation of his right to freedom of religion or belief protected under Article 9 of the ECHR.

A third-party intervener in the case submitted to the ECtHR, the European Association of Jehovah's Christian Witnesses, highlighted that making individual evangelism subject to a prior approval of state authorities amounted to an undue interference with the right to FoRB and freedom of expression. The Court found the Russian Federation to have violated Mr Ossewaarde's right to FoRB as protected by Article 9 of the ECHR. The Court's guidance was fourfold:

(1) The Court measured its assessment of the violation of FoRB on the necessity of the Russian Federation's legislations and actions in a democratic society.
(2) The Court reiterated that states are entitled under the ECHR to require the registration of religious or belief organisations in a 'manner compatible with Articles 9 and 11' but the Court did not specify what constitutes compatibility in this regard.
(3) However, the Court did reiterate the incompatibility of mandatory registration orders with the right to FoRB.
(4) The Court also found that the Russian Federation had not sufficiently explained the rationale behind subjecting missionary work to new legislation nor did the Court deem the new legislation that excluded private homes as legal places for missionary work to stand in accordance with the ECHR.

Ossewaarde v Russia focused on the activities of an individual but it holds significance for the discussion of institutional religious freedom because religious or belief organisations have faced deregistration[66] and the forced disbandment of their activities on the basis that they have not sufficiently notified authorities before engaging in acts of proselytism.[67] Of fundamental concern in this and similar cases is a need for the Court to provide more clarity on at exactly what point it becomes a violation of Article 9 for states to request that

[66] *Biblical Centre of the Chuvash Republic v. Russia* (2014) ECtHR, 33203/08. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–144677> Last accessed 7 January 2024.

[67] *Bryansk-Tula Diocese of the Russian Orthodox Free Church v. Russia* (2022) ECtHR, 32895/13. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–218300> Last accessed 7 January 2024.

individuals or religious or belief organisations notify authorities of their religious activities.[68] This constitutes an extension of the discussion surrounding what religious activities are to be considered off-limits to states to subject to registration before they may be conducted legally and freely. It also suggests the need for clearer and more thorough international standards as there may be reasonable grounds on which states request religious or belief organisations notify authorities, for instance, if planning a religious procession that is likely to require traffic management by the local authorities.

Although not the case for Mr Ossewaarde, disputes over notification and registration are less clear-cut in other instances. For example, in the ECtHR case *Taganrog LRO and Others v. Russia* (2022), the Jehovah's Witnesses were labelled a 'cult' and 'extremist' for their beliefs.[69] Although such weaponisation of terms can be identified as unfounded, these labels establish a narrative that is effective in justifying to the general public the actions of states in restricting the activities of religious or belief organisations so labelled even if such attempts at justification do not withstand judicial scrutiny. States that use the ongoing concerns surrounding harmful cult organisations, violent extremism and the war on terror as covers for their policies further complicate registration issues as this mechanism can also be legitimately used to filter extremist, harmful or terrorist groups posing as religious or belief organisations.[70] Overall, the guidance from the Strasbourg Court needs to be made more comprehensive and consolidated to establish a clearer framework for combatting the misuse of narrative tools and the various components of registration to restrict legitimate religious activity.

OSCE GUIDELINES CRITIQUE

In 2004, the ODIHR within the OSCE, in collaboration with the Venice Commission, produced the Guidelines for Review of Legislation pertaining to Religion or Belief. These guidelines were the first of their kind in addressing FoRB concerns stemming from how states recognise religions and beliefs and register religious or belief organisations. They began to establish some necessary parameters for OSCE member states on how recognition and legal personality ought to be granted in FoRB-compliant ways. Ten years later, the OSCE's Joint Guidelines on the Legal Personality of Religious or Belief Communities were announced at the 99th Plenary Session of the Venice Commission in June 2014 as an update to the original guidelines and were published on February 4, 2015. Yet another decade has passed since these revised guidelines were announced and so it seems appropriate to reconsider the efficacy of the 2014 Guidelines to ascertain which aspects are insufficient and require updating given the current conditions of recognition and registration issues as highlighted in the survey of ECtHR cases conducted in this article. It is also necessary that the competent aspects of the Guidelines are highlighted so that they may be retained whenever new guidelines or standards are published.

A principal concern with the OSCE Guidelines is how they lack a systematic approach to organising the variety of registration issues. For instance, it might have been more useful for researchers and state officials if the Guidelines had split registration as a process into three stages and introduced issues as they arise for religious or belief organisations. As a suggestion, the stages could have been labelled pre-registration, registration and post-registration. Pre-registration issues encompass states limiting access to registration by using stringent

[68] Office of International Religious Freedom, *2022 Report on International Religious Freedom: Russia* (U.S. Department of State 2023) 7.

[69] *Taganrog LRO and Others v. Russia* (2022) ECtHR, 41817/10. *HUDOC*. Available at https://hudoc.echr.coe.int/eng?i=001–217535. Last accessed 7 January 2024.

[70] Office of International Religious Freedom, *2022 Report on International Religious Freedom: Moldova* (U.S. Department of State 2023) 10.

eligibility criteria; registration procedure issues involve concerns about what documents and information applicants must supply to successfully register; finally, post-registration issues pertain to what registered religious or belief organisations are expected to do to retain their registered status, including supplying reports on their activities or paying fees for re-registration. Dividing registration issues in such a chronological format would have conveyed with greater clarity how onerous registration can become and that registration issues sometimes interrelate and often exacerbate each other.[71]

The OSCE Guidelines remain the only international guidelines established with the sole purpose of addressing issues involving religious recognition and the legal personality of religious or belief organisations and communities. However, their publication by the OSCE has led to them having a limited geographic scope meaning they have missed out key concerns and fail take into consideration approaches to the recognition and registration of religions found beyond the West. The jurisdiction of the OSCE spans from Europe (including Türkiye) to Central Asia, the Caucasus, Mongolia as well as the United States and Canada. While still a significant geographic area, the omission of countries in Africa, the majority of Asia, the Caribbean and Central America, Oceania and South America results in many of the recognition and registration issues endemic to these regions being given no attention in the Guidelines. This resulted in the Guidelines being based on a Eurocentric perspective with regard to the examples of case law and concerns cited in the Guidelines which were limited to countries within the OSCE area. In turn, this caused a lack of attention on recognition and registration issues arising where Buddhism or Islam is the state religion. In this case, it may be more appropriate that the United Nations produce the next set of guidelines or standards to reflect the global approach necessary to avoid leaving out key issues and perspectives.

A related insufficiency of the OSCE Guidelines is the lack of attention they grant to the institutional rights of religious or belief organisations, specifically how impediments to the activities of religious or belief organisations through the use of recognition and registration impact the collective and individual dimensions of FoRB. Moreover, a lack of mention of institutional religious freedom, models of state-religion relations and how civil society organisations and corporations may help to promote recognition and registration issues constitute further indicators of the need for an update to the Guidelines. Perhaps it is the limited geographic scope or the insufficient attention given to institutional religious freedom that is to blame but the OSCE Guidelines missed out some key registration issues. These included concerns involving registration fees, religious endorsement and state privilege, state definitions of religion, quotas and qualifications for accessing registration, legal designations for registered religious or belief organisations and the benefits that may or may not be permissibly granted to organisations after registering. Furthermore, the Guidelines need to reflect theoretical expansion taking place in academic scholarship on recognition and registration, especially on the types of mandatory and non-mandatory registration policies and what factors in policy and practice differentiate between the two categories.[72]

From pages ten to eleven in the document, the OSCE Guidelines provide criteria for when manifesting religion or belief may be limited by states while remaining FoRB-compliant.[73] A concern here is that the limitations listed do not identify state misuse of such margins of appreciation to undermine or curtail the rights of religious or belief organisations if they are not favoured by the state. More specificity is required on what is meant by the margins

[71] R E Iordache, 'Registration of Religious Entities and Religious Autonomy in Romania—Old Limitations and New Challenges' (2013) 8(1) Religion & Human Rights 77.

[72] B R Taylorian and M Ventura, 'Registration, recognition, and freedom of religion or belief' (2022) 11(2–3) Oxford Journal of Law and Religion 197.

[73] OSCE Office for Democratic Institutions and Human Rights, 'Guidelines on the Legal Personality of Religious or Belief Communities' (OSCE, 2014) <https://www.osce.org/files/f/documents/9/9/139046.pdf> Accessed 9 February 2024.

of appreciation listed including public safety, public order and health or morals and what limits should exist to avoid the margins being misused or overexercised. What also went unaddressed by the Guidelines was how numerous states have consistently used the narrative tools of 'cult behaviour', 'extremism' and 'terrorism' to undermine or constrict the rights guaranteed under FoRB as well as to unduly restrict the activities of both registered and unregistered religious or belief organisations.

Taking a broader perspective, having been published almost a decade ago, some aspects of the OSCE Guidelines have become outdated or superseded by world affairs. The recognition and registration issues that were of principal concern a decade ago may have been replaced by others today. Moreover, the occurrence of major world events impacting human rights such as the ongoing Rohingya genocide from 2017 and the Russian invasion of Ukraine in 2022 indicate that the Guidelines require revision to address with greater precision recognition and registration issues in light of the events that have occurred in the intervening decade since their publication.[74] A final inadequacy of the Guidelines is their failure to specifically delineate propagating and proselytising a religion or belief by communities, individuals and organisations as a right protected under FoRB, instead finding it sufficient that protections for proselytism be included under 'manifesting religion.' However, considering how some states such as Romania specifically use registration laws to restrict religious or belief organisations from proselytising, it seems appropriate that future guidelines would provide more explicit protections to proselytisers and explain their rights and limitations under FoRB in greater detail.[75] This reiterates the previous inadequacy in that any future guidelines or standards ought to address with greater precision the granular issues that religious or belief organisations and their members, administrators and leaders are facing, suggesting the need for more qualitative research conducted with individuals on the ground to identifying the issues they find most pressing.

CONCLUSION

The survey conducted in this article on ECtHR cases stemming from how states recognise religions and beliefs and register religious or belief organisations has highlighted several inadequacies with the present guidance published by both the OSCE and the Strasbourg Court. Clearer guidance is required from the Court on what constitutes an activity fundamental enough to a religion or belief that states may not plausibly subject it to registration unless to violate their ECHR commitments. New standards are required at the international level to set out a clearer precedent on granular issues such as whether a religious or belief organisation may freely adopt a name of its choice or import its literature and distribute it without first having to undergo registration procedures.

Part of any new standards ought also to include clearer margins of appreciation for states, especially to address the limitations of those margins and how states exercise them. It would be helpful to delineate clearer categories for the nature of a state's actions with regard to its infringement or potential infringement of FoRB. For instance, in its guidance, the ECtHR distinguishes between a limitation, an interference and a violation. Some registration issues place only a limitation on FoRB without necessarily violating this right which is why many states that have been challenged at the ECtHR have suggested that their limitations on FoRB through registration are justifiable and thus, do not constitute violations of the Convention.

[74] M O'Brien and G Hoffstaedter, ''There We Are Nothing, Here We Are Nothing!'—The Enduring Effects of the Rohingya Genocide' (2020) 9(11) Social Sciences 209.

[75] P Taylor, 'The Questionable Grounds of Objections to Proselytism and Certain Other Forms of Religious Expression' (2006) 3(8) BYU Law Review 811.

An important consideration is that more preventative measures are required to address recognition and registration issues rather than relying on the reactionary measure of Court guidance on specific cases. Hence, guidance that possesses broader applicability is required to establish clearer parameters for states to follow and for the Court to reference when making its judgements. The principal matter at hand is that in being spread out across various cases over the last twenty years, the Court's guidance on registration issues remains disjointed. Thus, a new standards document is required, one that is solely dedicated to addressing matters involving recognition and registration issue by issue and that successfully consolidates international guidance into a single comprehensive document. Moreover, it will be essential that any new standards document reflects a global approach that is necessary in a world shaped by globalisation, immigration and religious diversification.

Finally, the trend of recognition and registration cases that have reached the ECtHR is how they principally impact NRMs and minority religions, groups that tend to have less financial power and social influence compared to established, majority or privileged religions. For example, the Court itself has periodically mentioned in its guidance how it would accept some degree of differentiation in how newly established and unknown religious groups are treated in comparison to religions with a longer history.[76] This language from the Court would suggest that it acknowledges an exemption in the principle of the equal treatment of religions which, if accurate, would necessitate the creation of guidance for states for the specific handling of new religious or belief organisations. It is the conclusion of this article that a document with additional standards specific to new religions is essential in light of the analysis conducted.

[76] *Verein Der Freunde Der Christengemeinschaft and Others v. Austria* (2009) ECtHR, 76581/01. *HUDOC*. Available at <https://hudoc.echr.coe.int/eng?i=001–91418> Last accessed 14 January 2024.

UNDERSTANDING RE-NATIONALISATION THROUGH THE THEORY OF OBSOLESCING BARGAIN AND POLITICAL INSTITUTIONS: THE CASE OF ARGENTINA

*DR HAKAN SAHIN**

ABSTRACT

The surge in re-nationalisations of previously privatised state-owned entities across various sectors has been a major concern for multinational companies since the early 2000s, particularly those with a presence in South America. Some scholars argue that the catalyst for mass nationalisations was the political shift towards radical, populist left wing governments. However, others stress that economic factors were the main drivers of this phenomenon. This article contributes to the academic debate through a critical analysis of the Yacimientos Petrolíferos Fiscales (YPF)'s re-nationalisation. Vernon's obsolescing bargain theory is applied to the case, as well as a contextual analysis of the political regime and political institutions of Argentina to identify the driving force(s) which influenced the Argentinian government to re-nationalise this previously privatised company (YPF) in 2012. A framework is proposed to evaluate the role played by each of the following factors: economic nationalism, political regime, and weak political institutions. Vernon's obsolescing bargain theory facilitates an understanding of the initial bargaining power of Argentina after YPF's privatisation and to examine how this power balance shifted over time. The work also dedicates particular attention to how the political regime and political institutions of Argentina intervened to in facilitate YPF's re-nationalisation.

Keywords: Political Institutions, Political Regime, Obsolescing Bargaining theory; Argentina; YPF; Nationalisation

1. INTRODUCTION

One of the most widely applied frameworks to elucidate the bargaining relations between a host state and a transnational company is the obsolescing bargaining model (OBM) established by Raymond Vernon[1] in *Sovereignty at Bay,* 1971. The OBM has played an essential role in facilitating a documented illustration of the bargaining dynamics between host states and multinational companies in the literature from the 1970s to the early 1990s. According to the OBM, at the initial stage, the multinational corporation holds the balance of power, though this status shifts in the host state's favour over the duration of the relationship, until the company's assets effectively inhabit the status of hostages.[2]

This is particularly true of the petroleum sector, where once the host state has the upper hand, the government of that state is in a position to impose leverages on a transnational corporation ranging from excessive taxes to wholesale expropriation of the company's assets.[3] Henceforth, the initial bargain between the parties obsolesces.[4] A pertinent example of the

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1 Raymond Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises* (London, Longman: 1971).

2 Lorraine Eden, Stefanie Lenway, Douglas A., Schuler, 'From the Obsolescing Bargain to Political Bargain Model' in R. Grosse eds., *International Business and Government Relations in the 21st Century* (Cambridge: Cambridge University Press, 2005) 2.

3 Vlado Vivoda, Bargaining Model for the International Oil Industry, *Business and Politics,* Vol. 13, Issue 4, Article 3(2011) 2.

4 *Ibid.*

deployment of this mechanism is the re-nationalisation attempt by the Russian Federation of the Yukos company's assets.

In this case, the Russian Federal Government asked its tax authorities to re-assess the Yukos company tax returns. On completion of this formality, penalties, and interest changes amounting to 100% of total sales were imposed on Yukos by the Russian tax authorities, effectively crippling the oil company from both an economic and legislative perspective and giving it no other option than to declare bankruptcy. Through the introduction of excessive taxes and penalties, the state was able to essentially re-nationalise private company assets.[5]

In actuality, the risk posed by nationalisation stemming from government interventionist policies was a pervasive one in the developing world in the period from the 1950s through to the late 1970s. This was tempered by a trend towards neoliberal privatisation and deregulation policy from the 1980s which continued through to the late 1990s. In the latter period, resource-rich states were more disposed towards transforming their state entities into private companies believing this would generate more economic growth and help attract international investment.

Argentina, an oil-rich South American state with a legacy of economic instability, adopted market-oriented reforms as part of their broader economic programme in this period. One of the country's oldest state own companies, *Yacimientos Petrolíferos Fiscales* (YPF) was first re-structured in 1992 and then sold to the Spanish giant oil company Repsol in 1999, while under the President Carlos Menem administration.[6] The privatisation was conceived in an attempt to dismantle what had become a financially dysfunctional state-owned entity, enabling it to generate wealth to, in turn, promote economic stability in the country.[7]

Nevertheless, the privatisation process was beset with political and legislative obstacles. In order to implement the privatisation law, Menem's government needed to secure a majority in Congress. According to Yi, 'the main deterrent to making the quorum was the opposition Radical party, even though its actions in congress were focused not on privatisation itself but rather on timing and means of privatisation'.[8] In addition to opposition political party resistance, President Menem was also faced with the resistance of rebellious Peronist Congressmen.[9] In retaliation, President Menem threatened to authorise YPF's privatisation by decree if a quorum could not be reached immediately.[10] Menem also adopted a variety of additional tactical moves to secure YPF's privatisation.

First, he approached nationalists in Congress. Although the nationalist party did not constitute a direct threat to the bill as they had poor representation in Congress, Menem chose to play it safe, seeking to silence all potential opposition. He achieved this by providing assurances to the nationalists that the Argentinian state would maintain majority ownership of YPF and only 20% would be sold on to privative investors crossing the house. The president also managed to convince some of the Peronist Congressmen that the political and economic position and interests of the labour unions would be protected.[11] Ultimately, Menem achieved his goal without disruption, the Law of the Federalisation of Subsoil and Privatisation of

[5] *Yukos Universal Limited (Isle of Man) vs. The Russian Federation*, UNCITRAL PCA Case No. 2005 AA 227.

[6] Patricia Vasquez, 'Argentina's Oil and Gas Sector: Coordinated Federalism and The Rule of Law', Wilson Centre, *Latin American Programme* (May 2016) 6. <https://www.wilsoncenter.org/publication/argentinas-oil-and-gas-sector-coordinated-federalism-and-the-rule-law>accessed on 27th September 2021.

[7] *Ibid*.

[8] Sang-Hyun Yi, The political Economy of Privatisation of YPF in Argentina, (PhD Thesis, The University of Texas at Austin: 2006) 129. Available at <https://repositories.lib.utexas.edu/bitstream/handle/2152/2658/yis49668.pdf> Accessed on 8th April 2022.

[9] *Ibid*.

[10] *Ibid*.

[11] *Ibid*

YPF was eventually approved in 1992.[12] Implementing the privatisation law enabled the Menem government to partially privatise YPF. In May 1999, the full acquisition of YPF was completed and Repsol thereby obtained 85% of the company shares.

The YPF privatisation represents the most successful large-scale sell-off in Argentina of the early 1990s and served as a useful benchmark for the privatisation ambitions of other developing countries.[13] More importantly, the privatisation of the country's oldest state oil company, provided President Menem with an injection of funding to mitigate the ongoing economic and financial crisis. Although successful in this initial stage, after just a decade, the company was re-nationalised by the government of President Cristina Fernandez. This was affected without recourse to negotiation or the consideration of alternative solutions, on the grounds that YPF failed to boost petroleum production sufficiently to keep up with national demand. Following the swift approval of this motion by Argentinian Congress, with a resounding majority, Repsol's subsidiary company YPF was officially declared a public utility.[14] In this regard, it can be said that the initial bargaining relationship between Repsol and the Argentinian government was effectively obsolesced by the re-nationalisation of YPF.

There is extensive empirical and theoretical research in the literature by scholars from different disciplines, including political science and law on the intersections of obsolescing bargain and nationalisation. Scholars in political economy have focused on the risks that multinational companies face in capital intensive industries in developing states. For instance, Kindleberger and Vernon argue that multinational companies in lucrative sectors may face obsolescing bargaining in host states because once the companies have invested fixed capital into these markets, the host states may subsequently amend the commitments previously made.[15]

Institutionalist literature has focused on the role and effectiveness of check and balance institutions on the protection of foreign investors' property rights.[16] For instance, Spiller and Tommasi argue in their work that the economic factors and the political incentives – the exploitation of which the authors define as government opportunism – impact on the decisions of independent institutions and their eagerness to follow contractual obligations with privatised companies.[17]

In their analysis of the Argentina case, the authors state government opportunism as the incentive to expropriate/nationalise resulting from institutional failures in that state.[18] Manzetti builds on Spiller and Tommassi's arguments by focusing on the nexus between nationalisation and privatisation developing a new institutional economics framework.[19] In his work, the author contributed to the existing discussion in the literature by focusing on how ideological and public opinion factors can integrate institutional models in explaining the pendulum nature of the privatisation versus the nationalisation process. [20]

[12] The Law of the Federalisation of Subsoil and Privatisation of YPF No. 24,145, was approved on September 24, 1992.

[13] Robert Grosse and Juan Yañes, 'Carrying out a successful privatisation: The YPF Case' (1998) 12(2) The Academy of Management Executive 55.

[14] Argentina's Hydrocarbon Sovereignty Law 26,741. The law was approved by the congress and published in the official gazette on 7 May 2012.

[15] See Raymond Vernon (n1) 46–53; Charles P., Kindleberger, American Business Abroad; Six Lectures on Direct Investment, (New Haven, Yale University Press: 1969)

[16] See, Stephen Weymouth, 'Political Institutions and Property Rights: Veto Players and Foreign Exchange Commitments in 127 Countries' (2011) 44(2) Comparative Political Studies; Daron Acemoglu & Simon Johnson, 'Unbundling institutions' (2005) 113 Journal of Political Economy.

[17] Pablo Spiller and Mariano Tommasi, The Institutional Foundation of Public Policy in Argentina: A Transections Cost Approach: (New York, Cambridge University Press: 2007); Luigi Manzetti, 'Renationalization in Argentina 2005–2013' (2016) 58(1) Latin American Politics and Society 4.

[18] Pablo Spiller and Mariano Tommasi, The Institutional Foundation of Public Policy in Argentina: A Transections Cost Approach: (New York, Cambridge University Press: 2007).

[19] Luigi Manzetti, (n17) 4.

[20] *Ibid*.

The purpose of this article is to analyse the case of the YPF re-nationalisation under President Fernandez's administration between 2007–2015, utilising Vernon's obsolescing bargain model, political regime and political institutions in Argentina and examine what motivated the Argentinian government to re-nationalise *Yacimientos Petrolíferos Fiscales* (YPF) in 2012. The possible reasons why previously privatised state-owned companies are re-nationalised and how their bargaining relationship obsolesces over time have been the subject of analysis in the literature from economical, institutional, party ideology, company vs. government opportunism perspectives. While attention has been dedicated to the re-nationalisation of previously state-owned companies in Argentina, the intersection of obsolescing bargaining model and political regime has been underdiscussed.

The novelty of this paper is twofold. Firstly, it provides insight into the legal, theoretical and policy aspects of the YPF re-nationalisation process. Secondly, through an examination of Argentina's political regime, political institutions, and analysis of the issues and challenges in the country's legal system, a series of recommendations are provided, intended to be of instructive value to Argentinian government and to foreign investors contemplating doing business in Argentina.

This paper argues that economic factors and the prevailing political regime play a central role in the determination of bargaining relations between host states and multinational companies. Due to their weak bargaining position at the initial phase of negotiations, host states typically feel pressured to accept the terms offered by private companies lured by the prospect of rescuing failing economies and accessing the means to improve the standard of living of their citizens. Economic factors coupled with shifting political ideology can trigger the rise of economic nationalism and private companies can see themselves become the target of host states acquisitive tendencies. Politically motivated populist parties generally take advantage of economic depressions as an excuse to validate their unlawful unilateral acts in the eyes of the public. Hyper-presidentialism evades the purpose and efficacy of independent institutions. In the absence of mechanisms to ensure appropriate checks and balances, even arbitrary decisions taken by the president will generally be supported by members of congress or parliament, as the power of presidential decree is often operationalised as a looming threat. Therefore, in countries where presidents wield disproportionate power, the bargaining power of host states and multinational companies are more inclined to shift over time and their bargaining relationship inevitably obsolesces.

1.1 Methodology

The research method of this article is in the form of a case study. Argentina was selected as a case study because this state exhibits a broad spectrum of variance over time, in terms of economic maturity and stability for investment projects. Following a large-scale country privatisation programme, implemented during the term of President Menem, an investor friendly environment was subsequently transformed into a catastrophic investment environment by the hostile re-nationalisation measures imposed by the consecutive government. In the interests of analytical depth, the work does not intend to address all cases of re-nationalisation in Argentina over this period; instead it focuses specifically on YPF's re-nationalisation and how the bargaining relationship between Repsol and Argentina became obsolesced over time, and examines the key factors that facilitated such a re-nationalisation.

The paper is divided in six sections, of which the introduction forms the first part. Section two outlines the theoretical foundation of the obsolescing bargain model. It then moves onto an analysis of the privatisation programme initiated under President Carlos Menem, examining why market-oriented policy was adopted in the first instance, and why it was subsequently abandoned. Section three focuses on the bargaining power of Argentina and the previously privatised state entity, YPF's re-nationalisation under President Fernandez. An analysis of

YPF's re-nationalisation process aids an understanding of how the balance in power shifted from investor to host state and the way in which their relationship obsolesced over time. Section four examines the political regime and political institutions of Argentina to analyse how these internal factors influenced the Argentinian government to re-nationalise this previously privatised company (YPF). Section four also addresses the issues and challenges inherent in Argentina's legal system. Section five provides a critical analysis of the current economic and political crisis in Argentina. Section six moves the work to its conclusion, pulling together the strands of the research and providing suggestions for further research into obsolescing bargain theory and re-nationalisation.

2. OBSOLESCING BARGAIN MODEL: THEORETICAL FOUNDATIONS

The OBM illustrates the changing nature of bargaining positions of a multinational company and a host state. It articulates the respective positions of multinational commercial organisation and state with reference to their mutual goals, resources, and constraints. It provides for the fact that each party's objectives will differ at the initial bargaining stage.[21] For instance, while the host state is focused on economic, social, and political objectives, the company's overriding goal is to gain access to the host state's market so that it can make profit from the investment it has made. According to Frank, the bargaining relationships between host states and multinational companies are characterised by antipathy and mutuality interest.[22] The author contends that ' . . . it is fair to state that in much of the developing world, relations between transnational corporations and host countries have been marked by considerable tension'.[23]

In the petroleum industry, at the initial stage of the bargaining process, transnational companies are in a more favourable position than host states.[24] Why? Because, they have the technology, know-how and capital to extract the natural resources whereas the host states do not. Therefore, the petroleum companies use their power to gain the upper hand over the host state at the initial stage of the negotiation. However, this bargaining power obsolesces over time as the power balance shifts in the host state's favour. According to Kobrin, 'as the interest of host countries and investors are likely to diverge, the two parties become antagonists and governments seek to renegotiate the initial concession agreement when the initial advantages of Multinational Companies erode'.[25]

The OBM was first applied as an explanation for the widespread expropriation/nationalisation cases that transnational companies were exposed to in developing countries in 1970s.[26] In this regard an important question needs to be asked that which driving forces behind the surge of nationalisations in petroleum producing countries in 1970s. Multinational oil companies, commonly known as the 'Seven Sisters' (British Petrol, Shell, Exxon, Mobil, Texaco and Gulf) have secured exclusive concession rights in various regions across the globe, especially in resource reach countries at the beginning of the World War II.[27] It would not be wrong to express the view that until the 1970s 'no important petroleum export industries exist in

[21] Raymond Vernon (n1); Stephan J. Kobrin, Testing the bargain hypothesis in the manufacturing sector in developing countries, *International Organisation*, Vol.41 No.4 (Autumn, 1987).

[22] Isaiah Frank, *Foreign Enterprise in Developing Countries* (Baltimore: Johns Hopkins University Press, 1980) 25

[23] *Ibid*.

[24] Raymond Vernon (n1) 27.

[25] Stephan J. Kobrin (n21) 610–611.

[26] Raymond Vernon (n1) 27.

[27] Stephan J. Kobrin, 'The Nationalisation of Oil Production, 1918–80', in *Risk and Political Economy Development*, eds. D.W Pearce, H. Siebert & I. Walter (London, Macmillan Press:1984) 139. *See* also M. Erkal, *International Energy Investment Law: Stability Through Contractual Clauses*, (Alphen ann den Rjin, Wolter Kluwer: 2011) 36.

developing countries that are not operated by foreign firms'[28]. However, around 1970, the control over the petroleum sector prominently shifted from multinational petroleum companies to petroleum rich countries around the world.[29] According to Kobrin, 'at least eighteen countries nationalised oil production operations between 1970 and 1976. They accounted for 74 per cent of 1970 international production and included all of the major developing oil-exporting countries.'[30] Taking the Kobrin's data into account, it is worth providing a well-known nationalisation case occurred in Libya in 1970s.

In December 1971, The Libyan Government made a public announcement on the radio that the government had nationalised the assets of the BP Libya Ltd in Libya in retaliation for Great Britain's failure to prevent Iranian occupation of Arab Islands in the Persian Gulf.[31] According to a law passed by the Government's Revolutionary Council on that same day, a committee was established to determine an appropriate compensation within three-months. [32] The government also stated that a new company called the Arabian Gulf Petroleum Company would take over the assets and business operations of BP in Libya.[33] The tribunal held in this case the Libyan government had right to nationalise however, the measure taken by the Libyan government was against international law due to the political motivation behind the decision.[34]

Along with the trends of mass expropriation and nationalisation in this period, the parallel rise in oil prices played a central role in the bargaining relations between host states and petroleum companies over the course of the 1970s. Consequently, from the 1970s to the mid-1980s, host states were in a stronger position than multinational companies. During those years, multinational companies lost control of a number of 'sweetheart' deals that they had formerly made with host states and their initial bargains obsolesced.[35]

This leads us naturally to the question of how the fluctuations in oil prices impacted on the bargaining power of the parties. When oil prices increase, petroleum companies in the extractive sector naturally want to expand their production facilities as quickly as possible so that they can extract more profit from their investment while market conditions are favourable. [36] In such a scenario, the host state may seek to insert new terms and conditions into the contract or introduce new regulations to maximize their profits, either through forced contract renegotiation or by imposing excessive taxes or even more drastically, by expropriating

[28] R. F. Mikesell, 'The Contribution of Petroleum and Mineral Resources to Economic Development' in *Foreign Investment in the Petroleum and Mineral Industries: Case Studies of Investor-Host Country Relations*, eds. R. F. Mikesell, (Baltimore, The John Hopkins Press: 1971).

[29] It is important to note that the establishment of the Organisation for Petroleum Producing Countries (OPEC) and The United Nations Resolution 'Permanent Sovereignty Over Natural Resources' in 1960s were the other factors that motivated petroleum producing countries to nationalisations during the 1970s. The resolution which will be discussed below allowed resource rich countries to implement nationalisation measures as long as they meet certain requirements under both domestic and international law. Furthermore, the establishment of the OPEC was the other factor which bolstered petroleum producing countries' confidence in their negotiations with multinational petroleum companies. According to Bayulgen, the organisation was formed by the petroleum producing countries 'to present a unified and collective bargaining front to the major companies.' During the 1960, OPEC secured prices above, the world petroleum market prices and further enhanced the revenue base of its members. Soon OPEC became a powerful instrument in delineating relations between the oil-producing countries and major oil companies. It changed the balance of bargaining power in favour of producing countries.' See Oksan Bayulgen, Foreign Direct Investment, Oil Curse and Democratization: A Comparison of Azerbaijan and Russia, Business and Politics, (Cambridge: Cambridge University Press: 2010) 26.

[30] For instance, mass nationalisation occurred during the 1970s in Algeria 1971; Bahrein 1974, 1977; Iran 1971; Iraq 1975; Nigeria 1972; Kuwait 1972; Dubai,1975; Qatar 1974, 1976, 1977, Gabon 1973, 1976. *See* Stephan J. Kobrin, The Nationalisation of Oil Production, 1918–80'(n.27) 158–162; See also M. Erkal, International Energy Investment Law: Stability Through Contractual Clauses, (Alphen ann den Rjin, Wolter Kluwer) 35.

[31] G. Winthrop Haight, Libyan Nationalisation of British Company Assets, The International Lawyer, July., Vol.6, No 3 (1972) 541.

[32] *Ibid*.

[33] *Ibid*.

[34] Libya, British Petroleum Exploration Co. (Libya) v. Libyan Arab Republic, 53 Intɔl L. Rep. 297 (1973).

[35] Vlado Vivoda (n3).

[36] Oksan Bayulgen, (n29*)* 20.

the revenue streams or re-nationalising a previously privatized company. Conversely, if oil prices decrease, negatively impacting on the return on investment of projects, this in turn reduces the bargaining power of host states in investment term negotiations with petroleum companies.[37]

Stevens additionally calls attention to the nexus between high oil prices and resource nationalism.[38] Resource nationalism is a term that can be defined as a sovereign state's assertion of economic and political control over their natural resources within their territory. The ideology of resource nationalism equates natural resources with national patrimony and, deems that it is rightful that such resources be used for the benefit of the nation rather than for private gain. According to Stevens, 'A period of resource nationalism inevitably leads to less investment and a shortage of crude oil. This supports high prices encouraging further 'resource nationalism' as the obsolescing bargain kicks in and the need for capital and technology by the owner of the resources to expand capacity diminishes.'[39] By extension, it can be hypothesized that high oil prices are likely to trigger resource nationalisation and as a consequence of which the bargaining power of multinational companies obsolesces and the power in balance shifts to the host state.

2.1 The Argentina Case

Argentina's experience in the hydrocarbon industry goes back many years. The development of the industry was heralded in 1907 by the discovery of crude oil in the Golf San Jorge Basin.[40] Following the discovery of these rich crude oil reserves, the country soon became one of the fastest growing economies in the world.[41] The hydrocarbon sector in Argentina has a history of switching back and forth between full state control to opening up of the sector to multinational companies.[42] In Argentina, the unpredictable policy changes of different governments, nationalist state policy mobilised against foreign investors and unilateral contract terminations have always played a determining role in the shift in bargaining power between Argentina and multinational companies since the discovery of petroleum resources in the country. In order to understand the bargaining relationship between the parties prior to the YPF's privatisation, a chronological analysis starting in the 1930s through to the 1980s should be provided.

In 1922, the federal government formed the country's first state-owned oil company, YPF. The company was developed as a public oligopoly, increasing its petroleum production by inviting the participation of international companies which had operated in Argentina since the nineteenth century.[43] However, towards the second half of the 1930s, nationalist forces had gained sufficient momentum and public support to stage a wholesale power grab, taking over the management of the entire hydrocarbon sector. According to Vasquez, 'nationalistic forces spread across the hydrocarbon sector, favouring a more prominent role for YPF and the adoption of barriers to the entry of private investors.'[44] Vasquez concludes 'as a result, by the 1940s Argentina passed legislation that gave YPF the leading role in exploration, production

[37] *Ibid*.

[38] Paul Stevens, 'National oil companies and international oil companies in the Middle East: Under the Shadow of Government and the Resource Nationalism Cycle', *Journal of World Energy Law & Business* 1 (2008) 27.

[39] *Ibid*.

[40] Institute Argentino Del Petroleo Y Del Gas, Argentina's Hydrocarbon Industry: 2019 Outlook (2019) 1, available at <http://www.aogexpo.com.ar/ENG/OverviewEN.pdf> accessed on 29th Sept. 2021.

[41] <https://www2.deloitte.com/us/en/pages/energy-and-resources/articles/exploration-and-production-in-argentina.html/#-fullwidth-scc-how> accessed on 29th Sept. 2021.

[42] Patricia Vasquez, (n6) 5.

[43] Estaban Serrani, The Expropriation of YPF in Historical Perspective: Limits of State Power Intervention in Argentina, 1989–2015, Chapter 10 in Amelia M. Kiddle, (Ed), Energy in the Americas: Critical Reflections on Energy and History, (Calgary: University of Calgary Press, 2021) 273.

[44] Patricia Vasquez, (n6) 4.

and commercialisation of oil and oil products, making it more difficult for private operators to compete with the increasing powerful state-owned company.'[45]

From the late 1950s to the early 1960s the general tendency of Argentinian governments was to create initiatives for foreign investors to invest in the petroleum sector with the participation of its state-owned company, YPF.[46] In 1956, the Argentinian President, Pedro Aramburu, issued a presidential decree to approve the bylaw which was proposed to alter the structure of YPF.[47] This structural amendment enabled YPF to operate as a private legal entity with the autonomy to execute not only administrative but also commercial, industrial and financial activities.[48] Perhaps one of the most important and prominent phenomena made possible by this new bylaw was financing, because 'the new bylaw allowed YPF to request bank loans from official, mixed or private entities and receive contributions from the Federal Government.'[49] In the decade spanning the late 1950s and early 1960s, YPF executed 13 contracts for works and services with multinational companies, and the oil production undertaken by YPF increased by 121%, reaching almost 11 million cubic meters.[50] Although these were progressive sectorial developments that helped enable the country to achieve its aspiration of self-sufficiency within a short period of time, weak governance and institutional instability persisted in Argentina throughout this period. As a result of political and institutional instability in the country, the government was eventually brought down by a military coup in 1962.

After the military invention, José María Guido was elected and made President. The newly elected leader's first action was to cancel all previously signed contracts with multinational companies. [51] In other words, any previously entered into oil production contracts between YPF and multinational companies were declared as 'null or void' as these contracts were thereafter regarded against the interest of the Argentinian nation.[52] Consequently, during the 1970s and 1980s the investment environment in Argentina was rendered stagnant. The country's national state oil company, YPF hardly entered into any concessions or oil contracts with multinational companies.[53] In the absence of private participation, the country's oil production rate dramatically decreased, and oil imports increased as a direct consequence.

All the evidence suggests that from 1930 to the end of the 1980s, the bargaining relationship between Argentinian governments and multinational companies became obsolesced several times as a result of the unpredictable policy changes or military interventions during the terms of a series of ruling administrations over that period. It is important to note that although private investors were exposed to frequent contract terminations and changes in law by different Argentinian governments, this did not deter multinational companies from entering into new oil production agreements with the YPF in moments of reprieve when the country eased its nationalisation state policies in the hydrocarbon sector. The question is what was the impetus behind these frequent policy changes towards multinational investment in the fifty-year period up to the 1980s? Vasquez provides some insight into the contributing factors: 'the nature of the political pact between central government and the provinces; a long

[45] *Ibid*.

[46] Werner Baer & Gabriel Montes Rojas, *From Privatisation to Re-nationalisation: What went Wrong with Privatisations in Argentina*? Oxford Development Studies, Vol. 36, No.3, September (2008) 324.

[47] Decree 15.027/56 dated 08/29/56.

[48] Gonzalo Ariel Vina and Pablo Ferrara, '*Yacimientos Petrolíferos Fiscales* (YPF): History and legacy' (2019) 19(1) Journal of Public Affairs 6.

[49] *Ibid*.

[50] *Ibid*.

[51] *Ibid*.

[52] *Ibid*.

[53] *Ibid*.

tradition of populism in national politics and the role of economic pragmatism, especially when crisis is looming.'[54]

2.2 Argentina's bargaining power under President Menem in the 1990s

At the start of the 1990s, an ideological shift emerged in developing countries globally about the benefits of privatization.[55] In those years, Argentina adopted a neo-liberal programme following the election of the president Carlos Saúl Menem in 1989.[56] As a key tenet of state policy, throughout the 1990s the Menem government downscaled state-owned assets by handing over control of the country's well-established state-owned companies to foreign investors. According to Grosse and Yanes, in the specific case of YPF, as was the case for many other privatizations, it was motivated by a decline in the company's fortunes due to mismanagement and poor levels of productivity, characterized by overstaffing, bureaucratic culture and poor asset management.[57] External factors such as high inflation rates, foreign investors' opportunistic behaviour and interest from international financial institutions also played an influential role in YPF's privatisation.[58] Multinational companies actively lobbied financial institutions to put pressure on states to integrate privatization programmes into domestic policy and to implement them at speed. According to Manzetti, party ideology and the changing tide of public opinion were important contributing factors.

Moreover, one should take into consideration that when Menem was elected as president in 1989, the country was dealing with hyperinflation and he was under intense pressure from the United States, several multinational companies and international financial institutions to adopt market-friendly policies within a short timeframe.[59] Multinational companies were not keen on investing in Argentina without assurances from Menem's government that Argentina would work closely with the International Monetary Fund (IMF) and the World Bank and adopt their policy recommendations.[60]

It is worth explaining that these policy recommendations are known as the Washington Consensus. The term Washington Consensus was coined by the British economist John Williamson to refer to the set of market-oriented economic policies recommended by international financial institutions such as the IMF and the World Bank to Latin American countries in 1989.

During these transitional years, many Argentinians wondered whether President Menem had become a true believer in privatisation or was simply a shrewd opportunist, but whatever his own personal convictions happened to be, he made a very public and emphatic commitment to dominant neoliberal ideology through his policy, instructing the Ministry of Finance to direct and coordinate the government to follow the policy reforms recommended by international financial institutions. [61]

2.3 Shift in Bargaining Power: The Rise of Economic Nationalism and Policy U-Turns in Argentina

Argentina's economic policy has always oscillated between tight state control and the promotion of a free market economy. For instance, while state-led statist economic policy was

[54] Patricia Vasquez, (n6) 5.

[55] See, Christopher Adam, William Cavendish, and Percy S. Mistry, *Adjusting Privatization: Case Studies form Developing Countries* (London: James Currey,1992).

[56] Richard Huizar, 'Why was Yacimientos Petrolíferos Fiscales (YPF), Argentina's National Oil Company, privatized?' (2019) 6 The Extractive Industries and Society 863.

[57] Robert Grosse and Juan Yanes, (n13) 53.

[58] Luigi Manzetti (n17) 13–14.

[59] *Ibid* 13.

[60] *Ibid*.

[61] *Ibid*.

adopted during the Raul Alfonsin era, the approach was leftist, and free market approach adopted during Menem's presidency from 1989 to 1999.[62] Furthermore, a free market-oriented economy approach continued to be applied during the term of President Fernando de la Rua who succeeded President Menem and held power from 1999 to 2001. However, when economic crisis hit the country, President de la Rua was forced to resign, and interim President Eduardo Duhalde took office, stayed in power only for a year. After the 2003 presidential election, President Nestor Kirchner was elected, following which free-market economic policy was abandoned, and state-led statist economy policy was re-adopted.[63]

The millennium did not start well for Argentina, as the country confronted a series of severe economic, social, and institutional crises between 2001 and 2002.[64] The recession imposed major hardships on the populace, devastated the country's financial infrastructure and halted the development of hydrocarbon sector.[65] The Argentinian Congress implemented emergency measures in a bid to rescue the economy and to protect the hydrocarbon sector.[66] Nevertheless, the disorderly nature of the implementation of these measures generated a degree of insecurity among hydrocarbon investors, such that the country was unable to attract new investors and oil production decelerated.[67] Although the government guaranteed that the measures would not affect any contracts already in force, contracts in US dollars with utility companies were converted to devaluated pesos.[68]

Following the major economic crisis of 2001–2002, two governments ruled the country: Néstor Kirchner (2003–2007) and his wife Cristina Fernandez de Kirchner (2007–2015). During their administrations, the country adopted aggressively austere economic policies in an attempt to counteract the impact of the crash. The effectiveness of these measures, when offset against the human cost to many Argentinians is questionable. According to the economic historian, Pablo Gerchunoff, 'when the cyclical recovery after the 2001–02 catastrophe following default and devaluation is considered, economic growth during the Kirchners' years has averaged 3% per year. This is almost the same as during the Carlos Menem years (1989–99), when the economy bounced back from an earlier hyperinflationary crisis'.[69]

Following Néstor Kirchner's 2003 victory at the ballot box, his newly formed government targeted previously privatised companies asserting that those companies that had not fulfilled their contractual obligations must be re-nationalised. In his inaugural speech, he issued an explicit warning about the country's new control capitalism policy regarding multinational companies: 'The central part of our plan is to re-build national capitalism, which will generate alternatives that will allow us to restore upward social mobility. It is not a matter of shutting out the world, it is not a matter of reactionary nationalism, but of intelligence, observation, and commitment to the nation . . . '

In relation to President Kirchener's national capitalism plan, the phenomenon of national capitalism warrants a definition. Bremmer defines national capitalism as 'economies in which the state is the principal actor and judge and uses the markets for political gains'.[70] It is clear

[62] Gabe Collins, Mark P. Jones, Jim Krane, Ken Medlock, Francisco Monaldi, Shale Renders the 'Obsolescing Bargain' Obsolete: Political risk and Foreign Investment in Argentina's Vaca Muerta, *Resource Policy* 74(2021) 4.

[63] *Ibid*.

[64]

[65] Melgarejo Moreno Joaquin, Lopez Ma Inmaculada & Montano Sanz Borja, From privatisation to nationalisation: Repsol-YPF, 1999–2012, *Utilities Policy*, Vol. 26 (2013) 48.

[66] *Ibid*.

[67] *Ibid*.

[68] Patricia Vasquez P (n6) 7.

[69] Celia Szusterman, 'Argentina's Energy Policy: Context of Crisis' <https://www.opendemocracy.net/en/argentinas-energy-politics-context-of-crisis/> accessed on 7th October 2021.

[70] Ian Bremmer, The Rise of State Control Capitalism, available at <https://www.tpr.org/2010-05-16/the-rise-of-state-controlled-capitalism> accessed on 7th October 2021.

that in this inaugural speech, Néstor Kirchner wished to signal to the public, that in accordance with his left-wing party ideology, Argentina would leave behind the neoliberal policy programme adopted under Menem. Evidently, during his first year, the following companies were re-nationalised: Aguas Argentina (the water company), Thales Espectrum (which regulates Argentina's radio airwaves), Metropolitano (Buenos Aires' trains) and Correo Argentino (the post office). In light of the re-nationalisations enacted by Kirchner's government, it can be said that bargaining relationship of the Argentinian government and private investors became obsolesced once again.

According to a 2000 poll, 48% of the Argentinean population opposed re-nationalisation, while 36% favoured it.[71] However, just two months before the presidential election of 2003, the people who regarded re-nationalisation as indispensable had risen dramatically from 36% to 68%. As such, by the mid-2000s people's views about the privatisation had become completely negative.[72] One can argue that the severe financial crisis that the county faced in 2001 must have been regarded as a turning point by Argentinian people, and that before the presidential election the vast majority of people wanted to reject the neoliberal approach adopted under Menem in favour of tighter state control. The outcome of the poll validates the view that financial crises and party ideology can influence public opinion.

After four years in power, Néstor Kirchener chose not to run for re-election in 2007 election, stepping aside in support of his wife, Cristina Fernandez who was subsequently elected president. Fernandez was first elected president in 2007 and was re-elected in 2011, a year after the death of her husband. Néstor Kirchener's economic nationalism plan continued to be strictly adhered to under his wife's administration (between 2007 and 2015). As part of economic nationalist policy, Fernandez's government advised Repsol to downgrade its participation in the hydrocarbon market by selling a specific percentage of its shares to domestic companies.[73]

In 2007, Repsol reached an agreement with a local company the Petersen Group, which was owned by the Eskenazi family. The Petersen Group bought 15% of YPF from Repsol with the option to purchase a further 10% of YPF's capital stake.[74] According to Moreno, Ortiz and Sanz, the purpose of this operation was to 'Argentinise' the YPF.[75] In 2011, the Petersen Group used its option to purchase another 10% of YPF and the group run by the Eskenazi family came into possession of a 25.46% share of YPF. Although most of the shares were still held by Repsol (58.23%), the Group's 10% additional purchase was a huge step in YPF's so called 'Argentisation' process.[76]

ARGENTINA'S BARGAINING POWER UNDER PRESIDENT CRISTINA FERNANDEZ DE KIRCHNER (2007–2015)

In November 2011, the bargaining relationship between Argentina and Repsol underwent a seismic shift and both parties found themselves beset by a series of crises resulting from a difference of opinion between the parties on the control of the hydrocarbon industry. Fernandez's government warned Repsol that the company's investment in YPF was low; and needed to be increased.[77] This warning was prompted by several tax inspections conducted by Repsol,

[71] Luigi Manzetti (n17) 17.

[72] *Ibid*.

[73] Alexis Robrigo Laborias, 'Expropriation and the Settlement of Investment Disputes: An Account of the Controversy between Repsol and Argentina' (2015) 15(1) Global Jurist 83.

[74] Melgarejo Moreno Joaquín, López Ma Inmaculada & Montano Sanz Borja (n65) 48.

[75] *Ibid*.

[76] *Ibid*.

[77] Raquel Fernández González, María Elena Arce Fariña, and María Dolores Garza Gil; 'Resolving Conflict between Parties and Consequences for Foreign Direct Investment: The Repsol-YPF Case in Argentina' (2019) 11(21) Sustainability 7.

which resulted in administrative reprimands.[78] President Fernandez's government simply wanted to regain full control of the hydrocarbon sector while simultaneously making the sector attractive to multinational companies.[79] However, it would not be wrong to say that, due to the capital-intensive nature of the hydrocarbon industry, full sectorial control by the government is the last thing that multinational companies in the hydrocarbon sector would wish to confront. Furthermore, the bargaining relationship between Argentina and Repsol deteriorated when five governors rescinded the exploitation contracts that their provinces had entered into with Repsol-YPF; this withdrawal caused a 12% loss of oil production in Argentina.[80] Before the YPF's re-nationalisation, Repsol-YPF announced that the existence of significant volumes of shale oil and gas in the *Vaca Muerta* field which is located in the province of Neuquen Basin in Northern Patagonia.[81]

3.1 YPF's Re-nationalisation

In April 2012, President Fernandez introduced a bill that enabled the government to seize a 51% share of YPF. In May 2012, Argentina's Congress approved a national Hydrocarbon Sovereignty Law with a resounding majority.[82] The Hydrocarbon Sovereignty Law explicitly declared that achieving self-sufficiency in the supply of hydrocarbons was of national public interest and a priority for the Republic of Argentina.[83] Article 7 of the aforesaid law allowed the Argentinian government to re-nationalize the YPF:

> For purposes of ensuring the fulfilment of the objectives of this law, fifty-one percent (51%) of the equity of YPF Sociedad Anónima, represented by an identical stake of Class D shares held by Repsol YPF S.A., its controlled or controlling entities, directly or indirectly, is hereby declared a public interest and subject to expropriation. In addition, fifty-one percent (51%) of the equity of Repsol YPF GAS S.A, represented by sixty percent (60%) of the Class A shares of such company, held by Repsol Butano S.A., its controlled or controlling entities, is hereby declared a public interest and subject to expropriation.

With the insertion of Article 7 into Argentina's Hydrocarbon Sovereignty Law, it can be argued that Fernandez's government wished to underline the necessity of this re-nationalisation and thereby legitimise this act by including the public interest wording in Article 7. In the same vein, according to Article 17 of Argentina's Constitution, 'property is inviolable, and no inhabitant of the Nation can be deprived thereof except by virtue of a judgement supported by law. Expropriation for reasons of public utility must be authorized by law and previously indemnified.'[84] Notwithstanding the fact that the argument for the necessity of re-nationalisation in the YPF case was based on public interest under both the Hydrocarbon Sovereignty Law and the Constitution Law, Fernandez's government violated both of these laws by refusing to offer lump sum compensation as reparation for the expropriation. To this end, it can be argued that the expropriation process was not initiated in accordance with legal due process, nor was adequate compensation offered to Repsol. Moreover, it would not be o to suggest that the Fernandez administration shot itself in the foot in its misjudged step to re-nationalise the YPF, because in doing so, the Argentinian government violated its treaty

[78] *Ibid*.

[79] Patricia Vasquez (n6) 10.

[80] Raquel Fernández González, María Elena Arce Fariña & María Dolores Garza Gil (n77); See also Melgarejo Moreno Joaquin, Lopez Ma Inmaculada & Montano Sanz Borja (n65).

[81] Repsol Global, available at <https://www.repsol.com/en/press-room/press-releases/2011/11/07/repsols-largest-ever-oil-find/index.cshtml> accessed on 24 October 2023.

[82] Hydrocarbon Sovereignty Law 26, 741.

[83] *Ibid* Article 1.

[84] The Constitution of the Argentine Nation, Section 17.

commitments. Article 5 of the Argentina-Spain Bilateral Investment Treaty (BIT) clearly states the grounds for lawful expropriation:

> Nationalization, expropriation, or any other measure having similar characteristics or effects that might be adopted by the authorities of one Party against investments made in its territory by investors of the other Party, shall be affected only in the public interest, in accordance with the law, and shall in no case be discriminatory. The Party adopting such measures shall pay the investor or his assignee appropriate compensation, without undue delay, and in freely convertible currency.[85]

It is worth emphasizing that International economic law does not prohibit states from nationalising the property or assets of an alien investor. However, this does not mean that the states have an exclusive right to interfere with investor property rights or their business activities whenever they wish to do so. The conditions under which an intervention is in accordance with international law are limited to: i) a public interest/purpose; ii) non-discrimination manner; iii) due process of law; and iv) compensation. Taking into account the aforementioned conditions into account, it is important demonstrate the arbitral tribunals approaches to these conditions for lawful expropriation and nationalisation. Decision given by the international arbitral tribunals demonstrate that sovereign states have the authority to engage in nationalisation and expropriation of private property. However, such measures are deemed as lawful if certain conditions were met by the host states. For instance, in *LIAMCO* case, the tribunal stated that a host state can lawfully nationalize or expropriate natural resources as long as it is accompanied by adequate compensation for the termination.[86] In the *AMINOIL* case, the tribunal followed the similar approach for lawful taking. The tribunal held that Decree law No. 124 implemented by the Kuwait government with the aim of fulfilling its national programme and therefore justifiably motivated by public purpose.[87] Furthermore, the tribunal in the *AMACO* case stated that the sovereign states have complete discretion in determining their public interest.[88] The tribunal went further and expressed its view that 'an expropriation, the only purpose of which would have been to avoid the contractual obligation of the state or of an entity controlled by it, could not, nevertheless be considered as lawful under international law.'[89]

These legal requirements for lawful taking were announced in the United Nations (UN) Resolution on Permanent Sovereignty over Natural Resources. In 1962, the General Assembly accepted Resolution 1803 (XVII), which asserted that 'the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and the well-being of the people of the state concerned.'[90]

Furthermore, paragraph four of article one of the resolutions is the most hotly debated clause because it provides legal grounds for expropriation/nationalisation. According to paragraph four, states are free to implement nationalisation measures if deemed only for public utility, security, or national interest, because these factors are recognized as superseding individual or private interest, both domestic and foreign.[91] The paragraph also clearly indicates that 'appropriate compensation' should be paid by the expropriating/nationalising government

[85] Article 5 of the Agreement Between the Argentine Republic and The Kingdom of Spain on The Reciprocal Promotion and The Protection of Investments (BIT). September 1992.

[86] *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, (1981) 20 ILM 1.

[87] *American Independent Oil Company vs. Kuwait* Award, 24 March, 1982 21 ILM 976, para. 85, 1019 (Hereinafter *Aminoil* Arbitration).

[88] *Amoco Int'l Fin. Corporation Vs. Government of the Islamic Republic of Iran,*15 Iran-U.S.C.T.R. 189, 233.

[89] *Ibid*.

[90] Article 1 of the GA Res.1803, 14 Dec. 1962, reprinted in (1963), 2 ILM 223.

[91] *Ibid*.

to the owner of the property in accordance with domestic or international law.[92] In the well-known case *LIAMCO*, it was determined by the arbitrator that when a nationalisation takes place, the expropriated investor is only entitled to receive 'convenient and equitable' compensation.[93] This standard falls short of full compensation and the complete fair market value of the expropriated concession.[94] According to Marzal, 'in today's arbitral practice, a ruling such as *LIAMCO*, which seeks to strike a compromise between different political stances, is simply unimaginable.'[95] The author goes further and states that 'the general understanding is now that full compensation for acts of expropriation is a universal norm, as is the principle of full reparation for treaty breaches. It is also uncontroversial that the appropriate basis of value to quantify compensation/damages is fair market value.'[96]

As mentioned above, the aforementioned UN resolution emphasised that states have permanent sovereignty over natural resources and sovereign states are permitted to exercise this right in the interest of their national developments and 'well-being of the people'. Taking the 'well-being of the people' wording into account, it is important to pose the question of whether the re-nationalisation of YPF was a consequence of opportunist behaviour on the part of the Argentinian government, which spotted a chance to further its economic nationalism ambitions; or conversely, if it simply acted to protect the least advantaged members of society through this re-nationalisation. These questions can be answered with the help of utilitarianism and libertarianism theory. Utilitarianism is 'generally held to be view that the morally right action is the action that produces the most good.'[97] In the context of utilitarianism, it can be argued that the expropriation of YPF was morally right if the overall wellbeing of society was improved as a result of this taking.[98] However, the same argument cannot be put forward under the auspices of libertarianism because this theory strongly supports 'free-market economy: an economic order based on private property . . .'.[99]

According to Li, libertarians criticize the nationalisation of YPF as they find such a measure morally wrong because it infringes on the property rights of multinational corporations.[100] From the perspective of the utilitarianists, one can claim that the driving force behind YPF's re-nationalisation was the Fernandez government's opportunist behaviour. Why? Because re-nationalisation of the previously privatized YPF could be seen as one of the few alternatives to rescue a collapsed economy, thereby securing political support from their voters for the next election as well as receiving a greater slice of the cake after the discovery of shale in *Vaca Muerta*. Considering the above given fundamental requirements under international law, with the exception of the public purpose requirement, the Argentinian government did not meet the *sine qua non* requirements, producing a 'rather invented story about alleged mismanagement of the firm to justify the uncompensated nationalisation.'[101] In the absence of legal grounds for lawful taking, Repsol rejected all accusations and declared that:

[92] *Ibid*.

[93] Libyan American Oil Co (LIAMCO) v Government of the Libyan Arab Rep, Award (12 April 1977) para 317.

[94] *Ibid*.

[95] T. Marzal, 'Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS', *Journal of World Investment and Trade 22 (2021) 256*.

[96] *Ibid* 257.

[97] Julia Driver, 'The History of Utilitarianism', *Stanford Encyclopaedia of Philosophy*, Edward N. Zalta (ed.) (Winter 2014) 1 available at <https://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/> accessed on 21st October 2021.

[98] GA Res.1803 (n90).

[99] Bas Vander Vossen, 'Libertarianism' *Stanford Encyclopaedia of Philosophy*, Edward N. Zalta (ed.), (Spring 2019) 1. Available at <https://plato.stanford.edu/archives/spr2019/entries/libertarianism/>. Accessed on 21st October.

[100] Jane Li, *Nationalisation: Argentina vs. Spain, the YPF Repsol Case*. Available at < https://sevenpillarsinstitute.org/case-studies/nationalization-argentina-vs-spain-the-ypf-repsol-case/#_edn3 >21st October 2021.

[101] Fredrik Erixon, *The 'Repsol Case' Against Argentina: Lessons for Investment Protection Policy*, (2014) ECIPE Bulletin No 4, 1.

> The expropriation is manifestly unlawful and highly discriminatory (it only affects YPF S.A. and YPF Gas S.A. and no other oil and gas companies in Argentina; while also additionally it is expropriating solely the participating interest of one shareholder of YPF S.A. and YPF Gas S.A., namely Repsol, and not the other shareholders), the public interest it pursues is not justified in any way and it is a clear breach of the obligations assumed by the Argentinian government when the privatization of YPF took place.[102]

3.2 Settling the endless dispute: The Last Tango

As legally binding agreements, almost all BITs provide the means of settling investment disputes between host state and investor. Article 10 (1) of the Argentina-Spain BIT provides that if a dispute arises from the investor's investment, the parties should first seek to resolve this amicably.[103] If the parties cannot settle their disputes amicably within a period of six months from the date on which it was filed by one of the disputing parties, then either party shall appeal to the competent courts of the state where the internment was made.[104] The treaty between Argentina and Spain also provides an alternative option for the parties to apply to international arbitral tribunals: if 'a) at the request of one of the parties to the dispute, where no decision on the merits has been taken within eighteen months of the initiation of proceedings under paragraph 2 of this article, or where such a decision exists but the dispute remains between the parties; b) where both parties to the dispute have so agreed.'[105] Furthermore, paragraph four of article 10 enables parties to resolve their dispute either through ICSID or ad hoc arbitral tribunals established in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL).[106]

Taking into account the dispute settlement procedure indicated in Article 10 of the Argentina and Spain BIT, it is worth illustrating how the procedure was followed by the parties. In May 2012, Repsol notified the Argentinian government that the expropriation was unlawful and discriminatory and violated the Treaty of Promotion and Protection of Investments between Argentina and Spain. In addition to this, Repsol took its claims beyond the European continent-initiated series of claims in the local courts of Argentina, and the Southern District Court of New York in the United States in July 2012.[107] In December 2012, Repsol had filed a $10.5 billon ICSID claim against Argentina as a result of nationalising YPF's 51% of shares.[108] The Argentinian government disagreed with the amount and government officials stated that the share of the company was significantly less than that which was requested.[109]

The parties were given six months to resolve their dispute through a negotiation process. However, no consensus on the lump sum compensation was agreed. After the first six months of an unsuccessful negotiation attempt, the Spanish government announced that it would increase tariffs on Argentinian exports of biodiesel.[110] Similar support was received from the European Union. The spokesperson for Trade at the European Commission, John Clancy,

[102] Repsol, Annual Account 2012, Ordinary General Shareholders' Meeting (2013) 182–183 available at <https://www.repsol.com/content/dam/repsol-corporate/en_gb/accionistas-e-inversores/informes-anuales/2012/Annual_Accounts_Full_tcm14-14867.pdf> accessed on 9th October 2021.

[103] Argentine-Spain BIT 1991, Article 10(1).

[104] *Ibid* Article 10(2).

[105] *Ibid* Article 10(3).

[106] *Ibid* Article 10(4).

[107] Raquel Fernández González, María Elena Arce Fariña and María Dolores Garza Gil (n77) 10.

[108] Repsol S.A & Repsol Butano S.A V. Argentinie Republic, ICSID Case No. ARB/12/38; see also Kyriaki Karadelis, Repsol files YPF nationalisation claim at ICSID, Global Arbitration Review (December 2, 2012) available at https://globalarbitrationreview.com/repsol-files-ypf-nationalisation-claim-icsid >accessed 22nd October 2021.

[109] Reuters, World Bank tribunal accepts Repsol complain over YPF takeover, available at https://www.reuters.com/article/argentina-repsol-idUKL1E8NL1PR20121221 accessed on 22nd October 2021.

[110] IBP Inc, Latin America Energy Policy and Regulations Handbook Volume 1, Strategic Information and Programs, (Washington: International Business Publications, 2016) 224.

warned the Argentinian government that 'A forced takeover by the Argentinian government would give a very negative signal to investors, national and international, and could seriously harm the business environment in Argentina.'[111]

As a response to these retaliation threats, Fernandez's government pivoted and adopted a new strategy with respect to the *Vaca Muerta* deposit, inviting giant multinational oil companies, such as Petrobras (Brazil), Exxon (United States) and Talisman (Canada) to enter into contracts with the newly re-nationalised state-owned YPF.[112] Initially, it appeared that inviting multinational companies to the table in Vaca *Muerta* was a shrewd strategic plan that could help to increase the flow of investment into the country. However, it later transpired that the agreements entered into with the aforementioned multinational companies were 'less beneficial than expected for YPF and the Argentinian State: investments for smaller amounts than anticipated, the operating costs were supported mostly by YPF, the exploitation period was short, and the companies demanded tax benefits.'[113]

Evidently, the ongoing dispute between Repsol and Argentina must have had an impact on this particular group of multinational companies' bargaining relations with the Argentinian government since they did not wish to take part in any long-term investment project which could prove costly and risky, without extracting substantial tax relief or assurances. Insufficient investment agreements, a sharp decrease in foreign investment flow and retaliation pressures from the EU ultimately took effect. As a consequence, the Argentinian government decided to negotiate with Repsol and agreed to pay compensation for YPF's re-nationalisation.[114]

4. POLITICAL SYSTEM OF ARGENTINA

4.1 Presidential features of the Regime: Hyper-Presidentialism

The political regime in the country is categorised by the principles of the presidential system of government adopted by the Constitution of 1853, which is the current constitution of Argentina. It states that 'the Argentine Nation adopts the federal republican representative form of government as this constitution establishes.'[115] A large part of the Argentinian Constitution of 1853 was inspired by the Constitution of the United States and adopted the principles of a presidential system of government.[116] This appropriated version was in use for seven decades without any amendments in Argentina, but subsequently was subjected to a series of amendments over the fifty year period leading to 1994.[117]

The Argentinian presidential system is based on the separation of power between independent branches, namely, executive, legislative and judicial[118] and the relationship between these three independent branches are controlled by a system of checks and balances.[119] Executive power vested in the title of the president of the Nation who is also the head of state, head

[111] Reuters, available at <https://www.reuters.com/article/repsol-commission-idUSE8E8EU00O20120416> Accessed on 7th April, 2022.

[112] Raquel Fernández González, María Elena Arce Fariña, María Dolores Garza Gil (n77) 11.

[113] *Ibid*.

[114] As part of the parties' agreement the compensation was paid by Argentinian bonds; see also CNBC, <https://www.cnbc.com/2014/02/26/spains-repsol-agrees-to-5-billion-settlement-with-argentina.html>accessed 30 October 2022.

[115] The Constitution of the Argentine Nation 1853 (reinst., 1983, rev. 1994)), Section 1. Available at <http://www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf> Accessed 14 November 2022.

[116] Jonathan M. Miller, The Authority of Foreign Talisman: A Study of U.S. Constitutional Practice As Authority in Nineteenth Century Argentina and The Argentine Elite's Leap of Faith, *American University of Law Review* V. 46, no.5 (1997)1483.

[117] *Ibid* 1487–1488.

[118] For further information about the features of the presidential system in general see: Juan Linz, Presidentialism, and Democracy: A Critical Appraisal, in, Politics, Society and Democracy, Scott Mainwaring and Matthew S. Shugart eds. 1st ed. (New York: Routledge 1998) 449–471.

[119] Mariana Llanos, *Understanding Presidential Power in Argentina: A Study of the Policy of Privatisation in the 1990s*, Journal of Latin American Studies, Vol. 33, No. 1, (2001) 68.

of government and commander of the armed forces.[120] The President is also responsible for the general administration of the country. Taking the expansive role of the president into account, it would not be wrong to express that the Argentinian constitution bestows upon the president almost absolute power and means that the entire political regime pivots around the occupant of that office.

According to Linz, the presidentialism system is problematic because the way the system operates has a 'winner-takes all' logic.[121] The author goes further to state that 'the danger that zero-sum presidential elections pose is compounded by the rigidity of the president's fixed term in office. Winners and losers are sharply defined for the entire period of the presidential mandate . . . the losers must wait at least four or five years without any access to executive power and patronage.'[122] The The Argentinian presidential model has been referred to as hyper-presidentialism.[123] This phenomenon generally occurs when political institutions are weak and when there is an absence of strong opposition parties in Congress.[124] In other words, it can be seen in political regimes where checks and balance mechanisms do not function effectively. In most cases, in systems where hyper-presidentialism features, the president, as a head of the executive branch acts unilaterally in areas beyond his/her role.

Furthermore, in consideration of the excessive power of the president, it would not be wrong to argue that Argentina's political regime exemplifies the 'Delegation Democracy' model of the Argentinian political scientist Guillermo O'Donnell. According to this author, in delegative democracies the president is the embodiment of the entire nation, the main custodian of the national interest and 'what he does in government does not need to bear any resemblance to what he said or promised during the electoral campaign—he has been authorized to govern as he sees fit'.[125] This extends to the conflation of national interest with the interests of the individual holding presidential office. For instance, Cristina Fernandez de Kirchner used her presidential power to attack her political foes instead of fighting against widespread corruption within her own government.[126] Similarly, as president of Argentina, Fernandez intentionally attacked several media corporations that had criticised her and her husband's policies, thereby acting in the interests of personal power and the maintenance of it, rather than, ostensibly, in the public interest.[127]

4.2 Legislative: The Congress

Legislative power in Argentina is vested in the bicameral congress which consists of two houses, namely, the senate and the house of deputies.[128] As a legislative body, the Congress' legislative role in the Argentinian political regime has always lacked effectiveness in terms of keeping the executive branch in check.[129] Several factors can explain its apparent ineffectual

[120] The Constitution of the Argentine Nation (n115), Section 99.

[121] Juan Jose Linz, 'The Perils of Presidentialism' (1990) 1(1) *Journal of Democracy*, 56.

[122] *Ibid*.

[123] Carlos Santiago Nino, 'Hyper presidentialism and Constitutional Reform in Argentina' in A Lijphart and C. Waisman (1st eds.), *Institutional Designed in New Democracies. Eastern Europe and Latin America* (New York: Routledge, 1996) 165.

[124] Susan R. Ackerman, Diane A. Desierto and Natalia Volosin, Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and the Philippines, *Berkley Journal of International Law (BJIL*), Vol 23. Issue 1 (2011) 247. According to Moreno, Ortiz, Sanz, while legislative activities to privatise the YPF lasted 389 days during the Menem administration, the re-nationalisation process of the company under Fernandez's term was carried out in 17 days. Please see also Melgarejo Moreno Joaquin, Lopez Ma Inmaculada & Montano Sanz Borja (n65) 49.

[125] Guillermo O'Donnell, Delegative Democracy? Journal of Democracy Vol. 5 No. 1 (1994) 7, available at <https://kellogg.nd.edu/sites/default/files/old_files/documents/172_0.pdf> accessed 27th January 2022.

[126] Antonio Collison, Cristina Fernandez de Kirchner's Dominance in Argentina Revealed, available at < https://eminetra.co.uk/cristina-fernandez-de-kirchners-dominance-in-argentina-revealed/366143/> accessed 26th Nov. 2021.

[127] Anna C. Brito, *Misuse of Executive Power as an Obstacle to Democratic Institutional Reform in Argentina,* (2016) CMC Senior Theses Paper 1366, 6 available at http://scholarship.claremont.edu/cmc_theses/1366 > accessed 26th Nov. 2021.

[128] The Constitution of the Argentine Nation (n115) Section 44.

[129] Luigi Manzetti, 'Accountability and Corruption in Argentina During the Kirchners' Era' (2014) 49(2) *Latin American Research Review* 178.

nature. According to Manzetti, as legislators are not politically independent, the decisions they make must be in line with their party ideology as well as the wishes of governors and party bosses.[130] Additionally legislators typically do not have enough expertise in law-making to be able to critically interrogate the laws they pass, rendering their role clerical rather than meaningfully legislative.[131] The excessive use of powers of decree by the president, further undermines the role of congress. Section 76 of the Argentinian Constitution provides that 'the legislative powers shall not be delegated to the Executive Power save for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by Congress'.[132]

The above-mentioned provision legitimises presidential approval of necessary and urgency decrees (DNUs) without prior congress' authorisation or explicit delegation, to facilitate swift action in situations of imminent national danger. There is nothing irregular in giving direct authority to the president to issue such decrees in the event of a state of emergency. However, when such a power is used frequently and arbitrarily it can be said to undermine democratic institutions. The use of DNUs rapidly increased during the presidential term of Menem when the country suffered from economic difficulties and a wave of privatisation was initiated by the then president.[133]

In the same vein, the use of DNUs accelerated during the era of the Kirchners to immediately enact key measures which would normally have been subject, in the first instance, to the scrutiny of Congress.[134] According to Vasquez, 'these powers included the ability to freeze public utility tariffs; to regulate the exchange rate; to confiscate bank deposits; to expropriate property; to grant subsidies; to set import and export tariffs for hydrocarbons; and to renegotiate government contracts.'[135] For example, President Fernandez de Kirchner authorised her first DNU in 2008 to expand the size of the budget by $11.6 billion.[136] The president declared the budgetary increase urgent state business, claiming that following standard legislative procedure would add unnecessary delay.[137]

Conversely, the political parties contemporaneously in opposition, did not see budget increases as sufficiently urgent as to bypass the democratic process, and they alleged that the president's actions were unlawful.[138] A number of examples of the arbitrary use of DNUs during the era of Fernandez's presidency can be given. However, the most relevant one for this study was perhaps the DNU that triggered the YPF nationalisation process. As discussed above, despite the fact that Section 17 of Argentina's constitution explicitly states that any nationalisation must be approved by Congress, YPF's re-nationalisation was made via presidential decree. Taking this information into account, it would not be wrong to state that President Fernandez used this power to bypass any eventual intervention or delays effected by Congress and to ensure that her will was executed.

4.3. Judicial System

It goes without saying that an independent judiciary system is the backbone of a well-functioning democracy. Why? Because the independent judiciary system acts as a control mechanism to check the other government branches and helps to increase the rule of law in a country and provides assurances regarding civil liberties. The Argentinian Constitution

[130] *Ibid*.
[131] *Ibid*.
[132] The Constitution of the Argentine Nation (n115) Section 76.
[133] Susan R. Akerman, Diane A. Desierto, and Natalia Volosin, (n124) 258.
[134] Luigi Manzetti, (n114).
[135] Patricia Vasquez, (n6) 16.
[136] Susan R. Akerman, Diane A. Desierto, Natalia Volosin (n124) 259.
[137] *Ibid*.
[138] *Ibid*.

provides that the judiciary is independent and 'in no case may the President of the Nation exercise judicial functions, assume jurisdiction over pending cases, or re-open those already adjudged.'[139] Although the judiciary system is supposedly independent and impartial, it was reported that the judiciary process was inefficient and under the strong political influence of the government.[140] Consequently, during the Fernandez administration Argentina was ranked 133rd out of 144 countries in terms of judicial independence.[141]

In 2013, President Fernandez's government proposed six bills in Congress that shared the goal of enabling the executive branch to exert its considerable influence over the judiciary.[142] While the official party line was that said reforms aimed to democratise the judiciary system,[143] the proposed bills were subjected to intense criticism by non-governmental organisations as well as the United Nations (UN). According to the Human Rights Watch Report 2014, the proposed reforms were highly problematic: 'It included a bill to limit individuals' ability to request injunctions against government acts, and another that granted the ruling party an automatic majority in the Council of the Judiciary, which selects judges and decides whether to open proceedings for their removal, thereby granting the ruling party powers that undermined judicial independence'.[144]

Special Rapporteur Gabriella Knaul, who was appointed by the UN Human Rights Council, laid bare the detrimental impact of this move to judicial independence in uncompromising terms, 'By providing the opportunity for political parties to propose and organize the election of the directors, the independence of the Magistrates Council is put at risk, which seriously compromises the principles of separation of powers and independence of the judiciary, which are fundamental elements of any democracy and any rule of law'.[145] Opposition lawmakers echoed these criticisms. For instance, The National Chamber of Civil Appeals, which is the main body of appeal court judges, issued a statement that the proposed reforms violated the principle of judicial independence.[146] Despite these denunciations, in April 2013, the six bills were swiftly approved by Congress. In June 2013, however, the Supreme Court found some parts of the proposed reforms unconstitutional, including the norms with regard to the composition and selection of the Council of the Judiciary.[147] Taking this important ruling into account, it can be said that Fernandez's ostensible 'democratisation of the judiciary' ambitions was exposed as unconstitutional and undemocratic by decree of the Supreme Court.

4.3.1 Concerns and Challenges in the Legal system: Corruption and Political Control over the Courts

Corruption can be defined as the 'pecuniary or nonpecuniary considerations given to government officials for the use of public office for private gains.'[148] Generally speaking, corruption

[139] The Constitution of the Argentine Nation (n115), Section 109.

[140] Argentina and Judiciary: Subverting the Rule of Law, *Transparency International* (18 April 2013), available at <https://www.transparency.org/en/news/argentina-and-the-judiciary-subverting-the-rule-of-law >accessed 9th May 2022; See also The Global Competitiveness Report 2012–2013, World Economic Forum available at <http://reports.weforum.org/global-competitiveness-report-2012–2013/> accessed on 9th May 2022.

[141] *Ibid*.

[142] *Ibid*.

[143] Alejandro Rebossio, 'Reforms of Judiciary in Argentina seen as presidential weapon', El PAIS, 10th April 2013, Available at <https://english.elpais.com/elpais/2013/04/10/inenglish/1365613945_545293.html>accessed 9th December 2021.

[144] Human Rights Watch Report 2014: Argentina, available at<https://www.hrw.org/world-report/2014/country-chapters/argentina#> accessed 9th December 2021.

[145] United Nations, Argentina Must Ensure Independence of Its Judiciary-UN Expert, available at <https://news.un.org/en/story/2013/04/438452-argentina-must-ensure-independence-its-judiciary-un-expert > accessed on 10th December 2021.

[146] Hugh Bronstein and Guido Nejamkis, Argentine Congress Passes Judicial Reform Bill, 9th May 2013 available at https://www.reuters.com/article/us-argentina-courts-idUSBRE94801H20130509 accessed on 9th December 2021.

[147] *Ibid*.

[148] Mahesh. C. 'Purohit, Corruption in Tax Administrations' Chapter 9 in Anwar Shah, *Performance Accountability and Combating Corruption* (The World Bank: Washington, DC, 2007) 285.

can be classified into five categories: political corruption, administrative corruption, grand corruption, petty corruption, and patronage/paternalism.'[149] For instance, in cases where corruption is systematic or political, it can affect the design and implementation stages of government policies and even skew regulatory or state decisions.[150]Argentina is known as one of the most stable democracies in Latin America. It is, nevertheless, beleaguered by low levels of public trust and widespread corruption. The issue is made evident by Argentina's ranking as 98th of 180 countries in the Transparency International Corruption Perception Index 2021.[151] This places the nation as one the states with the most pervasive levels of corruption in Latin America. Moreover, its score on the index peaked in the years 2011, 2012 and 2013,[152] corresponding with a string of 'denunciations of government corruption and misuse of public funds by newspaper reports and non-governmental associations'[153] which also coincided with the administration of the former president, Cristina Fernandez. As mentioned above, the judiciary system in Argentina is independent. However, although it is independent in principle, the judiciary is often subject to interventions by 'political authorities; is in parts still plagued by corruption, delays and inefficiencies.'[154] According to Manzetti, although the judges and state prosecutors are supposed to be independent from political influence, in practice they are under the direct influence of government officials who seek impunity from the rule of law by quashing actions against them.[155] For instance, 'if such allegations expose government officials, then nothing happens, or initial investigations are quickly abandoned and left dormant.'[156]

Polls indicate that the vast majority (70%) of Argentinians believe that the judiciary is corrupt, and this perception can be attributed to the fact that they have borne witness to a series of corruption scandals at a judicial level in recent years.[157] As Abut exposes in plain terms, the country's judiciary system seems ineffective in its purported combat against corruption when 'only 1% of all corruption cases in Argentina ever results in an actual sentence'.[158]

In August 2022, Argentinian state prosecutors requested that former president, Cristina Fernandez, be handed a 12-year prison sentence for alleged corrupt practices in government tender bids during her tenure (2007–2015).[159] Now in her current role as Vice President, Fernandez has been 'accused for allegedly having directed the awarding of public works tenders in the province of Santa Cruz (south), her cradle of power, to favour businessman, Lazaro Baez.'[160] Although she was charged with committing crimes of aggravated illicit association and aggravated fraudulent administration, a crime that would carry a 12-year prison sentence,[161] the court verdict has been suspended because Fernandez enjoys political

[149] *Ibid*.

[150] David Lipton, Alejandro Werner and Carlos Goncalves, Corruption in Latin America: Taking Stoke. Available at <https://www.imf.org/en/Blogs/Articles/2017/09/21/corruption-in-latin-america-taking-stock> Accessed 17th October 2022.

[151] Corruption Perception Index 2021, available at < https://www.transparency.org/en/cpi/2021/index/arg> Accessed 9th October 2022.

[152] For instance, in 2011, the country ranked 102 out of 177 states. In 2013, the country's level of corruption in public sector was ranked 106 out of 177 states.

[153] Luigi Manzetti, Accountability and Corruption in Argentina During the Kirchners' Era (n129) 184.

[154] Argentina Country Reports 2022, BTI Transformation Index. Available at <https://bti-project.org/en/reports/country-report/ARG#pos4 > Accessed on 13th October 2022.

[155] Luigi Manzetti (n129) 184.

[156] *Ibid*.

[157] Victoria Abut, Argentinian Judicial Reform: A Wolf in Sheep's Clothing, available at <https://globalanticorruptionblog.com/2022/04/25/argentinian-judicial-reform-a-wolf-in-sheeps-clothing/> accessed 4th October, 2022.

[158] *Ibid*.

[159] <https://en.mercopress.com/2022/08/23/prosecutor-s-office-requests-12-years-in-prison-for-cristina-fernandez-de-kirchner> Accessed on 5th October 2022.

[160] *Ibid*.

[161] *Ibid*.

immunity thanks to her role as Vice President and President of the Senate. It is currently estimated that a verdict will be reached by the end of the year.[162]

Another challenge presented by Argentina's legal system, is the political control politicians exert over the courts. In February 2022, thousands of Argentinians marched on the streets of Buenos Aires against judicial reforms proposed by the current president, Alberto Fernandez in 2020. The demonstrators accused the president of shielding former president and current Vice President Fernandez from prosecution in several cases which span her two terms of office.[163] The introduced bill aimed to 'expand the federal courts by adding new tribunals and dozens of new federal judges as well as inserting additional judges into the Supreme Court'.[164] President Alberto Fernandez and his vice president Cristina Fernandez, attest that judicial reform will help to reduce corruption in the country by 'deconcentrating the judiciary's power and creating stricter limits on a judge's ability to interfere in investigations.'[165] In fact, the 'substantial expansion of the judiciary could worsen issues of corruption by making the courts even more politically malleable.'[166] Undoubtedly, creating dozens of new judicial positions would not only increase the arbitrariness of the judicial system but it would additionally enable 'the president to nominate judges favourable to his own agenda and therefore exercise more control over the courts.'[167] Another criticism made against the proposed reforms in the judiciary is over the way it has been designed to grant ongoing impunity to Fernandez.[168]

CURRENT ECONOMIC AND POLITICAL CRISIS IN ARGENTINA

With a Gross Domestic Product (GDP) of approximately USD $490 billion, Argentina is one of the largest economies in Latin America.[169] However the country has a long-standing history of volatile economic growth and political crises have been a major impediment to the country's development. Argentina's investment environment has worsened further in recent years as the country's overall economy has continued to shrink since 2018. Why? Because political dysfunction, high inflation, and sovereign debt concerns, coupled with the financial impact of the Covid-19 pandemic combined to drive the country to the financial cliff edge yet again. Furthermore, political corruption in Argentina continues to plague the country's ability to secure foreign direct investment. Among the most prohibitive concerns are expensive and difficult customs processes for foreign direct investors, with much of this revenue going to Argentinian elites.[170]. According to the World Investment Report, foreign investment flow slid dramatically to $4.1 billion per annum in 2021, down 38% from 2019, and several multinational companies announced plans to trim their investment or to exit the country, amid the country's recession.[171]

In 2018, Argentina fell into economic recession. In the same year, President Mauricio Macri signed a three-year $57 billion Stand-By Agreement with the International Monetary

[162] *Ibid.*

[163] https://www.trtworld.com/magazine/can-judicial-reforms-save-argentina-s-vice-president-from-corruption-trial-41304 Accessed on 6th October 2022.

[164] Victoria Abut (n157).

[165] *Ibid.*

[166] *Ibid.*

[167] *Ibid.*

[168] *Ibid.*

[169] The World Bank in Argentina, Available at <https://www.worldbank.org/en/country/argentina/overview#1> Accessed 15 October 2022.

[170] https://borgenproject.org/10-facts-about-corruption-in-argentina/

[171] World Investment Report 2021: Investing in Sustainable Recovery, (UNCTAD, Geneva: 2021)60. Available at <https://unctad.org/system/files/official-document/wir2021_en.pdf> Accessed on 17th October 2022.

Fund (IMF).[172] After the 2019 election, a new coalition government was formed by President Alberto Fernandez and Vice President Cristina Fernandez. Both Alberto Fernandez and his Vice President vowed to reverse fiscal austerity measures and suspend the new economic programme agreed upon with the IMF during the President Macri administration. They both declared public debt levels unsustainable.[173] However, these pledges proved much more challenging to execute than to make.

One of the key challenges the freshly inaugurated president faced was massive public debt. In 2020, the country's Economy Minister, Martin Guzman, and economist Joseph Stiglitz managed to restructure Argentina's debt by obtaining the support of private sector creditors.[174] However, although the debt was held by private sector creditors, the majority of the $44 billion dollars in debt that the country owed to the IMF was due for payment in 2022 and 2023.[175] After tough negotiations, the IMF reached a staff-level agreement with the Guzman in March 2022 to restructure the country's $44 billion debts owned from IMF during the term of President Macri.[176] The conditions of the deal were relatively flexible. Under the new terms, Argentina will not repay its debts until 2026.[177] Speaking to Senate in March 2022, the country's economy minister Martin Guzman said that the new agreement with IMF allows Argentina to avoid 'a profound monetary and inflationary stress that would derail Argentina's economic recovery and have consequences on poverty and the distribution of earnings'.[178]

Aside from continuous economic crisis and endemic corruption, political polarisation is another Achilles heel for Argentina. According to Roy, 'the divisiveness in Argentina is known as '*la grieta'*, or the rift, has often led to democratic dysfunction and policy repeals whenever a new administration takes power'.[179] Such polarisation has also manifested itself within Argentina's current coalition government. In May 2022, Vice President Fernandez criticised her own government's management of the economy declaring 'The principal problem today, as always, is the economy . . . high inflation is not stopping.' To hammer her point home, she added that Argentinians 'do not have enough to make it until the end of the month, their income is not enough, they do not have jobs, they cannot pay their rents and other things go up every day'[180] Cristina Fernandez's comments mark the first cracks in the pending disintegration of the coalition government that her and Alberto Fernandez established in 2019.

The most recent episodes of Argentina's ongoing political crisis were the resignation of economist Martin Guzman, Economy Minister from December 2019 to July 2022. Although he was the architect of a major deal with the IMF, the minister resigned unexpectedly in July 2022. His seven-page resignation letter was posted on Twitter by way of announcement. In his letter, Guzman wrote that internal battles in the coalition government were one of his reasons for resigning. He called on President Fernandez to mend the divisions within the government so that 'next minister does not suffer' from the same pressures that he dealt

[172] U.S. Department of States, 2022 Investment Climate Statements: Argentina. Available at <https://www.state.gov/reports/2022-investment-climate-statements/argentina/#:~:text=Argentina%20presents%20investment%20and%20trade,country%20from%20maximizing%20its%20potential.> Accessed on 17th October 2022.

[173] Bruno Binetti, Argentina's Ruling Coalition Hopes to Avoid 'Death by IMF'. Available at <https://www.thedialogue.org/analysis/argentinas-ruling-coalition-hopes-to-avoid-death-by-imf/ > Accessed on 15th October 2022.

[174] *Ibid.*

[175] *Ibid.*

[176] *Ibid.*

[177] Natalie Alcoba, <https://www.aljazeera.com/news/2022/3/18/argentinas-senate-approves-imf-deal-avoiding-default>Accessed 1 November 2022.

[178] *Ibid.*

[179] Diana Roy, Argentina: A South American Power Struggles for Stability, available at <https://www.cfr.org/backgrounder/argentina-south-american-power-struggles-stability#chapter-title-0–5,>accessed 16 October 2022.

[180] Buenos Aires Times, <https://www.batimes.com.ar/news/economy/vice-president-cristina-fernandez-de-kirchner-slams-government-over-economy.phtml> Accessed 16th October 2022.

with.[181] Furthermore, according to political analyst Carlos Fara, 'Guzman's resignation was a 'check mate for the president's autonomy' and had given Fernandez the upper hand in their power struggle.'[182] Following the resignation of Guzman, Sergio Massa took office in August 2022 as Argentina's fifth economy minister in just four years.[183]

The sudden resignation of the economy minister has triggered fears of the prospect of an even deeper political and economic crisis in the country. The new economy minister, Sergio Masa's swift appointment has proven ineffective in preventing another economic downturn, as the recent data indicates that annual inflation is growing at 100%.[184] Unfortunately, the rift between the President and his powerful Vice President, Cristina Fernandez over the management of a shrinking economy and growing social inequality seems set to continue until the next presidential election, due in 2023. However, the question remains whether the Argentinian economy can hold up against sustained turbulence, and the jury is out.

CONCLUSIONS

This article has analysed YPF's re-nationalisation, focusing on Vernon's obsolescing bargain model and Argentina's political institutions. Vernon's obsolescing bargain theory was applied to understand the initial bargaining relations between Repsol and Argentina after YPF's privatisation and to find out how the balance of power shifted from Repsol to Argentina over time. This analysis suggests that economic factors, weak political institutions, the ideology of the presiding government and public opinion are key factors in the determination of bargaining relations between multinational companies and host states.

Evidently, high inflation in the country's economy, alongside an unsatisfactory investment environment encouraged President Menem's government to adopt neoliberal reforms in the 1990s with the purpose of creating an investment friendly environment in Argentina and these reforms were supported by most Argentinians. However, Argentinian people's opinions about privatisation shifted dramatically with the onset of the economic crisis in the country in the early 2000s. Most Argentinians were convinced that the main factor behind the economic depression was the privatisation programme of the previous government. The ideology of economic nationalism as well as taking back control of national resources were the prevailing policies of the Nestor administration. Such policies continued to be adopted by his wife, then President Cristina Fernandez, in power from 2007 to 2015.

As a result of state economic nationalism and populist left-wing party propaganda targeting the country's hydrocarbon sector, we can see an illustration of OBM as the relationship between Repsol and Argentina transfigured. In other words, the bargaining power of Repsol obsolesced after YPF's re-nationalisation the balance in balance naturally shifted to Argentina.

This article also builds on the arguments on company versus government opportunism by bringing evidence to bear on how the discovery of shale oil and gas reserves in *Vaca Muerta* whet the Fernandez's government's appetite for YPF's re-nationalisation. It has been argued that the Fernandez government regarded such a discovery as a rescue boat to bail the country out of economic depression. The discovery of huge amounts of oil and gas shale was also seen as a good opportunity by the Fernandez government to secure political support from their voters in future elections and to receive more of the spoils after the re-nationalisation of the YPF.

[181] Augistin Marcarian, Martin Guzman: Argentina's Economy Minister Resigns. Available at <https://www.aljazeera.com/news/2022/7/3/martin-guzman-argentinas-economy-minister-resigns> Accessed 15th October 2022.

[182] Buenos Aires Times (n180).

[183] *Ibid*.

[184] According to National Institute of Statistics and Censuses, the country's inflation rate increased to 82.90% in September from 78.50% in August 2022. Available at, <https://tradingeconomics.com/argentina/inflation-cpi> Accessed on 16th October 2022.

Hyper-presidentialism and the weakness of political institutions in Argentina also played an influential role in YPF's re-nationalisation. Constitutionally granted excessive powers of the executive organ, enabled President Fernandez to interfere with the country's hydrocarbon sector and exert her powers in YPF's re-nationalisation process. It has been argued that DNUs used in the name of a so-called state emergency, simply aimed to bypass checks and balances mechanisms of legislative and judiciary organs. In the absence of checks and balances, Repsol's property rights were violated through the direct intervention of the executive organ.

This article also analysed concerns and challenges in the Argentinian legal system. It has been found that corruption and political control over the courts are the two major concerns in Argentina's legal system. It has been found that the judicial system is weak and inefficient particularly in resolving corruption cases. The author of this piece recommends that the Argentinian government should consider establishing specialised courts to deal with corruption cases. It should be borne in mind creating dozens of new vacancies would not be a practical solution in the long term as endemic corruption can only be dealt with by experienced judges. The establishment of specialised courts as well as recruitment of experienced judges might alleviate the burden of courts in the long term. It is noteworthy that these specialised courts have often have jurisdiction over the offences that are investigated and prosecuted by specialised anti-corruption bodies. There are only a few countries around the world that have taken initiative to establish dedicated anti-corruption courts.[185] In the European Union, for instance, Croatia and Slovakia have established dedicated specialised courts to deal with corruption related crimes.[186]

The question is how the judges can get experience to deal with endemic corruption? Perhaps, judges should be drafted to compulsory training programme in a country which has been successful fighting against corruption. The latter would enable native professionals to attain knowledge of how judges deal with corruption cases abroad that can be adopted to suit the needs of Argentina.

Political polarisation within the coalition government and the current economic downturn are the other concerns in Argentina. The confrontational approaches of the Vice-President Cristina Fernandez over economy increases political polarisation within the coalition government. In other words, the Vice-president's populist left wing party ideology impedes the government's priorities, such as dealing with high inflation. Therefore, the collation government should urgently priories Argentinian people needs first and aim to find a practical solution to re-store financial stability in the country. Perhaps creating initiatives such as welcoming investment package in the form of guarantees and stability against political risks might help increase foreign investment flow in the country. For instance, in order to protect investors from political risk in Argentina, it is recommended to establish stability guarantees either through national legislations such as foreign direct in investment law or by including stabilisation clauses in host state contracts that Argentina enter into with foreign investors. By doing so, investors can have the assurance that their contracts will not be unilaterally altered or terminated, and their investments will not be taken over by the Argentinian government's legislative and administrative activities. The benefit of stabilisation clause is to protect investors from variety of non-commercial risks, such as from unlawful expropriation/nationalisation to excessive taxation imposed by host state authorities.

In addition to this, the government should also consider extending the reach of Bilateral Investment Treaties by entering into them with more states. This would also help in attracting foreign investors and to in stimulating the Argentinian economy. It is undeniable that Bilateral

[185] M. Martini, Anti-Corruption Specialisation: Law Enforcement and Courts. Available at <https://knowledgehub.transparency.org/helpdesk/anti-corruption-specialisation-law-enforcement-and-courts> accessed 24 October 2023.

[186] *Ibid*.

Investment Treaties (BITs) play a crucial role for certain investors who are looking to establish investments in developing countries. This fact is supported by reports on treaty shopping, where investors opt to invest from nations that have a BIT with the host country, rather than investing from their home country.[187] However, it is worth emphasising that the presence BITs can sometimes influence the structuring of investments, but this does not necessarily mean that these investments would not have occurred without BITs.[188] Similarly, anecdotal evidence suggests that certain investors have delayed planned investments until BITs were in place, but this alone does not provide substantial insight into how these treaties initially attracted investors.[189] Furthermore, the report issued by United Nations Conference on Trade and Development (UNCTAD) also evidences that BITs have the potential to solve the issue of 'obsolescing bargaining'.[190] The report highlights that since the nationalizations that occurred in the latter half of the previous century, the risk of 'obsolescing bargaining' has been widely recognised as major obstacle to attracting new investments, particularly in natural resources and infrastructure sectors.

The author of this work hopes that the article has successfully addressed the question posed and that the analysis provided stimulates further studies into other related issues which have not been discussed or to apply methodology which has not utilised for this article. Further research into re-nationalisation and Vernon's obsolescing bargain theory may concentrate on landlocked countries in the South American region such as Bolivia and Paraguay from a comparative perspective. Further research may introduce the question of how geographic disadvantages of these countries affected their initial bargaining relations with multinational companies and how these countries' political regimes and political institutions played an influential role in the shift in power balance therefore their relationship becomes obsolesced over the time.

[187] K. Sauvant & L. Sachs, 'BITs, DTTs, and FDI flows: an overview,' in Karl Sauvant & Lisa Sachs, eds., *The effect of treaties on foreign direct investment: bilateral investment treaties, double taxation treaties, and investment flows* (New York: Oxford University Press, 2009) iv.

[188] L. N. Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, *Yearbook on International Investment Law and Policy* (New York: Oxford University Press: 2010) 3.

[189] *Ibid*.

[190] UNCTAD Report 2009, The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries (New York and Geneva: 2009) 15. Available at <https://unctad.org/system/files/official-document/diaeia20095_en.pdf> accessed 24 October 2023.

EFFICACY OF DIRECTORS DISQUALIFICATION: PREVENTING CORPORATE WRONGDOING?

KEVIN SATTARZADEH

1. INTRODUCTION

The effectiveness of director disqualification as a mechanism to prevent corporate misconduct in the United Kingdom (UK) represents a critical area of legal and economic inquiry.[1] The Company Directors Disqualification Act 1986 (CDDA 1986) and the Company Act 2006 (CA 2006) lay the groundwork for defining the role and responsibilities of company directors, establishing a framework intended to safeguard corporate governance and integrity. The collapse of Carillion, underscored by severe financial mismanagement and inadequate regulatory oversight, highlights the critical need for a comprehensive evaluation of governance mechanisms, including the effectiveness of director disqualification, in preventing such corporate failures in the UK.[2] This case underscores a significant gap between the intended deterrent effect of director disqualification and its actual impact in preventing corporate misconduct.[3] Therefore, it is crucial to re-evaluate and strengthen disqualification mechanisms to enhance their effectiveness in deterring corporate wrongdoing.[4]

The need for stronger enforcement of directors' disqualification mechanisms is further emphasised by the legal expectations placed on directors to fulfil their duties with due diligence, as exemplified in the case of *Re Barings plc (No 5)*.[5] The complexities of directorial accountability are highlighted by the CA 2006, which codified directors' duties, aiming to clarify these responsibilities, particularly for small and medium-sized enterprises. These duties mandate directors to act within their powers and for a "proper purpose".[6] Yet, the persistence of corporate failures and fraudulent practices[7] despite these statutory duties raises critical questions about the efficacy of the disqualification process.

1.1 Aim of the Research

This paper sets forth a primary objective: to critically evaluate the efficacy of current director disqualification mechanisms in the UK, focusing on legislation such as the CA 2006, Insolvency Act 1986, and primarily the CDDA 1986, the cornerstone of rules governing director disqualification under English law.[8] It assesses the real-world effectiveness of these laws in curbing corporate misconduct and identifies significant legislative gaps that may

[1] Institute of Chartered Accountants in England and Wales, 'Companies, directors and company law' <https://www.icaew.com/technical/corporate-governance/corporate-governance-and-stewardship/companies-directors-and-company-law> accessed December 04, 2023.

[2] F, Mor, 'House of Commons Library, 'Carillion collapse: what went wrong?' (2018) <https://commonslibrary.parliament.uk/carillion-collapse-what-went-wrong/> accessed April 05 2024. See also Carillion Collapse: Two Years On, 'Government Has Learned Nothing' (The Guardian, 2020) <https://www.theguardian.com/business/2020/jan/15/carillion-collapse-two-years-on-government-has-learned-nothing> accessed March 07, 2024.

[3] Department for Business, Innovation and Skills, 'Impact Assessments Part B: Director Disqualification Regime — Transparency and Trust' (BIS, 2014) <https://assets.publishing.service.gov.uk/media/5a75713aed915d7314959fcb/bis-14-908b-impact-assessments-part-b-director-disqualification-regime-transparency-and-trust.pdf> accessed April 10, 2024.

[4] Joan Loughrey, 'Smoke and Mirrors? Disqualification, Accountability and Market Trust' (2015) 9(1) Law and Financial Markets Review 50.; I Fletcher, "The Genesis of Modern Insolvency Law – an Odyssey of Law Reform" (1989) Journal of Business Law 365, 372–73.

[5] [2000] 1 BCLC 523.

[6] *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] UKPC 3.

[7] Ngozi Vivian Okoye, *Behavioural Risks in Corporate Governance: Regulatory Intervention as a Risk Management Mechanism* (Routledge 2015) 50–55.

[8] Jean Jacques du Plessis and Jeanne Nel de Koker, *Disqualification of Company Directors* (Routledge Research in Corporate Law, 2017) 46.

undermine their deterrent effect.[9] Furthermore, the research includes a comparative analysis of director disqualification practices in the United States and Canada to identify aspects of these frameworks that could strengthen the UK's mechanism. Additionally, it evaluates the impact of recent UK legislative developments, such as the Small Business, Enterprise and Employment Act 2015 (SBEEA 2015), to determine if these changes have bolstered the existing framework. Ultimately, based on insights from international comparisons and legislative evaluations, this paper will propose specific recommendations for reforms, aiming to refine the disqualification process and enhance its efficacy as a deterrent against corporate misconduct, thus ensuring a more transparent corporate environment in the UK.

1.2 Methodology

This paper uses black-letter and comparative legal methodologies to explore the UK's director disqualification laws. It delves into primary sources like the CA 2006, Insolvency Act 1986, and CDDA 1986, alongside case laws, to dissect the legal framework and understand its application and effectiveness in disqualifying directors. Utilising primary sources and a wide range of case laws, such as *Re Barings plc (No 5)*[10], offer insights into the statutory obligations of directors and judicial precedents that highlight the effectiveness of disqualification actions.

Secondary sources, including academic books, journal articles, legal commentaries, and official government websites, guide the analysis by offering practical perspectives on the impact of director disqualification on corporate governance. Furthermore, incorporating practical case studies into the discussion enhances the argument for potential legislative changes by demonstrating how these reforms could function in real-world scenarios. Case study analysis will enrich the analysis of the UK's director disqualification laws and help bridge the gap between theoretical research and practical implications. These sources lay the practical groundwork, deepening understanding of the principles, examples and goals behind director disqualification and its efficacy.

A comparative analysis with other jurisdictions highlights differing approaches to corporate misconduct, identifying best practices and potential areas that may lead to reform in the UK system. This analysis can shed light on alternative approaches to managing corporate misconduct, revealing effective practices and disadvantages that could hurt the system, which ultimately informs and inspires reforms within the UK's directors' disqualification framework.

THE PURPOSE OF THE DISQUALIFICATION OF COMPANY DIRECTORS

Lord Woolf MR described the purpose of CDDA 1986 in *Re Blackspur Group plc, Secretary of State for Trade and Industry v Davies* ". . . is the protection of the public by means of prohibitory remedial action . . . from those who are unfit to be concerned in the management of the company."[11] This serves as a critical tool for maintaining the integrity of the legal system.[12] Although there are no statutory definitions of public interest, it involves the broader interests that society values, which are more comprehensive than those parties directly involved in any given insolvency situation.[13] This underscores that, for the disqualification process to be effective in preventing director wrongdoing, it must align with the overarching societal interests, ensuring that its application supports the intended purpose of maintaining ethical corporate governance.

[9] *Re Barings plc (No 5)* (n 5).

[10] *Re Barings plc (No 5)* (n 5).

[11] [1998] 1 BCLC 676, at 680.

[12] M Davis-White and A Walters, *Director's disqualification and Insolvency restrictions* (3rd edn, Sweet & Maxwell 2010).

[13] A Keay, 'Insolvency Law: A matter of public interest?' (2005) 51 School of Law, Queen's University Belfast 509. See also *Re Tech Textiles Ltd, Secretary of state for trade and industry v Vane* [1998] 1 BCLC 259.

2.1. Intentions of Disqualification of Company Directors

As aforementioned, the role of disqualification is primarily to protect and not to punish.[14] The focus on public protection is evident in the nature of disqualification proceedings.[15]

For instance, in *Re Sevenoaks Stationers (Retail) Ltd,* the purpose is to protect the public from those whose conduct showed that they had abused the privileges of limited liability.[16] Moreover, it was held that in *Re Lo-Line Electrical Motors Ltd and others*, the primary purpose of s.6 of CDDA 1986 is not to punish individuals but to protect the public against the directors who had a history of misconduct to creditors and others.[17]

Although, it can be said that the secondary purpose of the directors' disqualification is to punish company directors. In *R v Young*, it was held that disqualification orders are punitive and appropriate in certain contexts.[18] Although some courts emphasise that the primary purpose of the CDDA 1986 is to protect the public interests, it is to be argued that their rulings contained punitive elements for directors. For example, in *Re Westmid Packing Services Ltd*, although it was mentioned that the primary purpose of this Act[19] was to protect the public interest, the ruling resembled punitive action.[20]

Still, some judges view the purpose of the disqualification as providing safeguards to the general public from directors unfit for the company's management practices.[21] As Professor Dine stated, had the CDDA 1986[22] intended to impose punishment, it would have been structured in another way similar to criminal trials to offer directors the same legal protections.[23]

Therefore, it could be said that the essence of disqualification under the CDDA 1986 is two-fold, as it protects the public from potential future misconduct by directors and has punitive aspects aimed at deterring such misconduct.[24] While failing to impose penalties can weaken established standards of conduct by signalling that non-compliance does not matter, imposing harsh punitive measures may deter corporate misconduct.[25] However, these measures could also discourage potential directors from taking up positions or investing in the UK, potentially impacting the willingness of individuals to serve as directors.[26]

2.2 Ethical Grounds and the Aim of Disqualification

The removal of unethical directors is pivotal in promoting ethical governance within the corporate sector, serving dual purposes.[27] Firstly, it acts as a preventative measure by providing a barrier against potential future misconduct, which is crucial for protecting the economic interests of all stakeholders, from shareholders to the public, and ensuring a transparent and fair business environment.[28] The statutes, including the CDDA 1986, highlight the government's commitment to upholding high standards of corporate behaviour, thereby preserving the UK's reputation as a trustworthy place for conducting

[14] *Re Blackspur Group plc, Secretary of State for Trade and Industry v Davies* (n 11).

[15] *Ibid*.

[16] [1991] Ch 164, 176.

[17] (1998) 4 BCC 415.

[18] [1990] BCC 549.

[19] Company Directors Disqualification Act 1986.

[20] [1998] 2 All E.R. 124. See also *Re Manlon Trading Ltd; Official Receiver v Haroon Abdul Aziz* [1995] 1 All ER 988.

[21] Andrew Keay, '*McPherson & Keay:the law of company liquidation'* (5th edn, Sweet and Maxwell Ltd 2001) 845.

[22] Company Directors Disqualification Act 1986.

[23] Janet Dine, 'Punishing directors' (1994) JBL 325.

[24] *Secretary of State for Trade and Industry v Hickling* [1996] BCC 678.

[25] *Secretary of State for trade and industry v Peter Reimer* Case no 7239 of 2000 (Ch D) (Companies Court) 2001.

[26] Above (n 4).

[27] M S Schwartz, T W Dunfee and M J Kline, 'Tone at the Top: An Ethics Code for Directors?' (2005)58 Journal of Business Ethics 79.

[28] A Keay, 'Insolvency Law: A matter of public interest?'(2005) 51(4) Northern Ireland Legal Quarterly 509. .

business.[29] Secondly, these regulations are crucial in creating a corporate governance culture where responsible business conduct and accountability are encouraged.[30] Supported by frameworks like the Corporate Governance Code 2018 (e.g. aimed at large companies both listed and private in London Stock Exchange), the CDDA 1986 helps transition corporate practices towards a culture rooted in ethical leadership and responsibility.[31]

Disqualification regulations mandate ethical practices and responsible management to ensure directors fulfil their fiduciary duties and maintain transparency.[32] However, it does not entirely address systemic issues within corporate cultures that may encourage unethical behaviour. Ultimately, while this regulation contributes positively to the welfare of the wider society, its capacity to align corporate objectives with the public interest is limited if it does not tackle these broader cultural issues (e.g., lack of transparency in decision-making and aggressive accounting practices).[33] It is important to note that directors can start again as soon as the disqualification period expires.

2.3 Circumstances Leading to Director Disqualification

The CDDA 1986 outlines various grounds[34] for disqualifying individuals from serving as company directors indirectly or directly influencing a company's management.[35] The most common ground for disqualification is in s.6 of the CDDA 1986, which relates to 'unfitness' that provides for mandatory disqualification.[36] The other circumstances leading to disqualification include but are not limited to insolvency offences,[37] failure to maintain proper accounting records,[38] and failure to comply with statutory duties.[39]

The current rules and restrictions for director disqualification appear thorough.[40] Since they are designed to identify actions that justify removing a director from their position and to discourage other directors from engaging in similar misconduct.[41] This was the case in *Industry v Gray*, where disqualification was to ensure that everyone whose conduct had fallen below the standard was disqualified for at least two years.[42] However, there are arguments to be made that the current rules for disqualifying directors might not fully cover every circumstance that can negatively impact a company.[43] This gap could be due to various reasons, such as evolving business practices, the complexity of modern businesses, and preventive measures.[44] For instance, the rise of digital technologies and the internet has introduced new realms of potential misconduct, such as data breaches; therefore, a modern

[29] GOV.UK, 'Company Director Disqualification' <https://www.gov.uk/company-director-disqualification> accessed February 02, 2024.

[30] *Secretary of State for Trade and Industry v Hickling* (n 24).

[31] Financial Reporting Council, 'UK Corporate Governance Code' (2024) <https://www.frc.org.uk/library/standards-codes-policy/corporate-governance/uk-corporate-governance-code/> accessed January 01, 2024.

[32] Companies Act 2006, s 172(1).

[33] Jas Bhogal, 'UK Corporate Governance Codes' (*Harper James*, 5 November 2019) <https://harperjames.co.uk/article/uk-corporate-governance-codes/> accessed February 02, 2024. See also V-W Mitchell and Joseph Ka Lun Chan, 'Investigating UK Consumers' Unethical Attitudes and Behaviours' (2010) <https://doi.org/10.1362/026725702277587 3> 5–26.

[34] Company Directors Disqualification Act 1986, ss 2–12.

[35] Above (n 4).

[36] Company Directors Disqualification Act 1986, s 1.

[37] Insolvency Act 1986, ss 206–218.

[38] Companies Act 2006, s 386.

[39] Companies Act 2006, ss 171–177.

[40] GOV.UK, 'Company Director Disqualification' <https://www.gov.uk/company-director-disqualification> accessed February 26. 2024.

[41] Meyrick Williams, 'International Journal of Disclosure and Governance' (2005) Int J Discl Gov 290.

[42] [1995] IBCLC 276, 284. See also *Re Grayan Building Services Ltd* [1995] Ch. 241, 253.

[43] R Williams, 'Disqualifying Directors: A Remedy Worse than the Disease?' (2007) 7(2) The journal of Corporate Law Studies 213..

[44] Above (n 42) 281–304.

regulatory framework might be beneficial to address these complexities, which could enhance the effectiveness of the director disqualification system.[45]

In conclusion, while the CDDA 1986 provides a comprehensive framework for the disqualification of directors based on grounds such as unfitness, fraudulent trading, and failure to maintain proper records, there is a need to continually update and refine this framework to keep up with evolving business practices.

3. CONSEQUENCES OF ACTING AS A DIRECTOR WHILE DISQUALIFIED

Serving as a director while disqualified carries significant legal consequences within the UK's corporate governance system. This section explores the repercussions for individuals who breach disqualification orders, including imprisonment and fines, while also assessing the current efficacy of the disqualification process.[46] This analysis helps to understand how effectively these penalties deter misconduct and enforce compliance with corporate governance standards.

3.1 The Legal Implications for Disqualified Directors

As Professor Dine highlights, director disqualification is handled through civil proceedings, reflecting its role in maintaining corporate integrity without criminalising directorial failures.[47] A disqualification order against a person is an order that for a specified period, the person shall not be a director of a company; act as a receiver of the company's property; be concerned or take part in the promotion, formation, or management of a company unless they have the leave of the court.[48] Furthermore, it disqualifies the person from acting as an insolvency practitioner.[49] These orders can be related to all types of enterprises.[50]

Under s.13 of the CDDA 1986, engaging in directorial activities while disqualified is a criminal offence, subject to severe penalties, including imprisonment and fines.[51] This ensures that disqualified directors bear criminal and financial responsibility for their actions, further deterring potential breaches of the disqualification order.[52] This dual nature of penalties has multiple purposes. Firstly, it addresses the direct consequences of misconduct, ensuring that individuals are penalised for their actions.[53] Secondly, community orders aim to rehabilitate the offender, preventing future breaches by disqualified directors.[54]

Navigating the path back into corporate roles is complex, and the damaged reputations of these directors create substantial barriers. Although severe penalties are presumed to deter breaches of disqualification orders, this assumption requires continuous evaluation, especially given the evolving nature of corporate governance responsibilities. Thus, it is critical to

[45] High Level Group of Company Law Experts, 'A Modern Regulatory Framework for Company Law in Europe: A Consultative Document' (2002) <https://www.eerstekamer.nl/eu/documenteu/a_modern_regulatory_framework_for/f=/vgklizzpd9we.pdf> accessed February 26, 2024.

[46] Company Directors Disqualification Act 1986, s 13; Insolvency Act 1986, s 216(4).

[47] Above (n 23).

[48] Company Directors Disqualification Act 1986, s.1 (1)(a). See also Department for the Economy, 'County Londonderry director agrees to disqualification' (Department for the Economy, 2023) <https://www.economy-ni.gov.uk/news/county-londonderry-director-agrees-disqualification-3> accessed March 24 2024.

[49] Company Directors Disqualification Act 1986, s.1 (1)(b).

[50] *R v Ward* [2002] BCC 953.

[51] Insolvency Act 1986, s 216(4).

[52] Company Directors Disqualification Act 1986, s 13; Insolvency Act 1986, s 216(4).

[53] The Gazette, 'What you need to know about director disqualification proceedings' (2023) <https://www.thegazette.co.uk/insolvency/content/104182> accessed February 28 2024.

[54] Sentencing Council, 'Imposition of Community and Custodial Sentences' (2017) <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/imposition-of-community-and-custodial-sentences/> accessed 28 February 2024.

regularly evaluate and refine these enforcement mechanisms to ensure they effectively deter corporate wrongdoing in an evolving business environment. Thus, it is critical to regularly evaluate and refine these enforcement mechanisms to ensure they effectively deter corporate wrongdoing in an evolving business environment.

3.2 Assessing the Broader Impact of Non-Compliance with Disqualification Rules

Directors disqualified for evading these restrictions can weaken the confidence in the regulatory framework to ensure ethical business practices. This can lead to a general scepticism towards the business community, potentially deterring them from investing in the economy since a poorly designed regulation can be counter-proactive to trustworthiness.[55]

Non-compliance can create an environment where unethical behaviour carries no risk of punishment, potentially encouraging further misconduct and leading to corporate scandals.[56] These scandals damage business reputations and have broader economic consequences, including job losses that affect society at large.[57] Additionally, non-compliance can disrupt the broader business ecosystem, creating an uneven playing field.

The global nature of modern business intensifies the challenge of enforcing disqualification rules. For instance, directors disqualified in one jurisdiction may participate in another unless there is international or domestic cooperation or rules that can prevent this.[58] The global aspect reveals a significant limitation in the disqualification regime's ability to operate effectively in a globalised economy.[59] Another factor that can impact is corporate culture's role in reinforcing disqualification rules.[60] A culture that prioritises short-term gains over long-term ethical considerations may encourage the participation of disqualified directors.[61] This suggests a need for a shift towards a culture that emphasises ethical leadership and accountability rather than merely relying on the imposition of penalties.

Understanding the real impact of disqualification also requires consideration of the psychological and behavioural responses of potential wrongdoers.[62] If, for instance, the perceived gains from non-compliance outweigh the fear of possible consequences, the deterrent effect of disqualification is limited.[63] Therefore, it is crucial to focus on the education of directors alongside disqualification penalties so that the directors can learn about the value of ethical governance and its long-term benefits for the business.[64]

Such comprehensive strategies could significantly enhance the effectiveness of the disqualification regime by shifting the focus from merely punitive to robustly preventative measures, addressing both immediate compliance and long-term ethical behaviour in corporate governance.[65]

[55] Above (n 4).

[56] Above (n 59).

[57] Above (n 4); I Fletcher, "The Genesis of Modern Insolvency Law – an Odyssey of Law Reform" (1989) Journal of Business Law 365, 372–73.

[58] Andreas Stephan, 'Disqualification Orders for Directors Involved in Cartels' (2011) Journal of European Competition Law & Practice 529.

[59] *Ibid*.

[60] 'Corporate Culture and the Role of Boards' (*Harvard Law School Forum on Corporate Governance*, 2016) <https://corpgov.law.harvard.edu/2016/08/13/corporate-culture-and-the-role-of-boards/> accessed 28 February 2024.

[61] *Ibid*.

[62] David Milman and C.M.S. Cameron McKenna, 'Managing Distressed Companies: Adapting to a New Legal Culture' (2002) 28(6) Managerial Finance 34.

[63] *Ibid*.

[64] Gov.uk, 'Being a Company Director' (2018) <https://www.gov.uk/guidance/being-a-company-director> accessed February 02, 2024. See also Institute of Directors, 'Professional Development' <https://www.iod.com/professional-development/> accessed February 02, 2024.

[65] *Salomon v A Salomon & Co Ltd* [1896] UKHL 1.

4. CHALLENGES IN THE CURRENT FRAMEWORK

Exploring the director disqualification framework under the CDDA 1986 may uncovers several challenges and gaps that can directly or indirectly impact its efficacy in deterring corporate misconduct. This section aims to identify and discuss these critical gaps, examining the scope and application of the system and how these factors influence the overall effectiveness of director disqualification in preventing corporate wrongdoings, both directly and indirectly.

4.1 Identifying Gaps and Deficiencies

The director disqualification regime under English law aims to uphold high accountability standards among directors, leveraging the concept of limited liability to promote risk-taking in business.[66] Per Lord Riggs, the limited liability structure under English law, designed to encourage entrepreneurship and risk-taking, can inadvertently pose challenges to the efficacy of the director disqualification regime.[67] The inherent risks of such misuse are highlighted in cases like *Secretary of State for Trade and Industry v. Bairstow*, which exposed limitations in the system's ability to balance the protective shield of limited liability against personal liability.[68] This framework has faced further scrutiny in how it handles cases of fraudulent activities, as illustrated in *Re G (Restraint Order)*.[69]

From the Review Committee on Insolvency Law and Practice ("The Cork Report"), wrongful trading provisions were introduced to hold directors personally liable.[70] However, enforcing these provisions is often challenging due to the stringent statutory criteria for establishing liability.[71] For instance, a report for the Association of Chartered Certified Accountants submitted that the disqualification laws did not influence the behaviour of directors in general.[72] Furthermore, this issue is added with the simplicity of creating a private limited company.[73] Due to the widespread use of a 'limited liability' company structure, many private limited companies find themselves unprepared to meet their obligations towards creditors effectively.[74] As noted by Hicks, disqualification orders are predominantly issued against directors of small private companies.[75] This presents a significant loophole since this situation allows disqualified directors to continue their business activities as sole traders or elsewhere, thereby questioning the effectiveness of the legislation in protecting the public interest.[76] This loophole indirectly affects the disqualification process by allowing individuals with a history of mismanagement or insolvency to evade the intended punitive and corrective measures of disqualification, thus continuing to pose risks to creditors and the public. This gap in the legislation highlights the need for more robust enforcement mechanisms that can effectively extend beyond the limits of the current limited liability structure to ensure broader accountability and protection.[77]

[66] D Milman, 'Disqualification of Directors: An Evaluation of Current Law, Policy and Practice in the UK' (2013) 2013(331) Sweet and Maxwell's Company Law Newsletter 1.

[67] *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, 145.

[68] *Secretary of State for Trade and Industry v. Bairstow* (n 12). See also *Re Westmid Packing Services Ltd* [1998] 2 All E.R. 124.

[69] [2001] EWHC 606. See also *Gilford motor company ltd v. Horne* [1933] Ch 935.

[70] Cork Committee, *Review Committee on Insolvency Law and Practice*, Cmnd 8558 (1982) 390–413, para [1782].

[71] Jassmine Girgis, 'Corporate Directors' Disqualification: The New Canadian Regime?' (2009) 46(3) Alberta Law Review 1.

[72] A Hicks, Disqualification of Directors: No Hiding Place for the Unfit? (Association for Chartered Certified Accountants Great Britian Research Report No 59, 1998) <https://discovered.ed.ac.uk/discovery/fulldisplay?vid=44UOE_INST:44UOE_VU2&tab=Everything&docid=alma997069243502466&query=creator,exact,%20Great%20Britain.%20Department%20of%20Trade%20and%20Industry.&context=L&lang=en> accessed January 02, 2024.

[73] *Ibid*.

[74] *Ibid*.

[75] *Ibid*.

[76] Ian B Lee, 'The Role of the Public Interest in Corporate Law' (Edward Elgar 2012) 106, 117. See also Michelle Welsh and Helen Anderson, 'Director Restriction: An Alternative to Disqualification for Corporate Insolvency' (2019) 37(1) Company and Securities Law Journal 23. .

[77] Above (n 78).

Moreover, s.6 of the CDDA 1986, which focuses solely on directors of companies entering insolvency proceedings, fails to consider those of dissolved companies.[78] This narrow scope, reliant on the discretion of insolvency practitioners, introduces inconsistency and potential confusion in enforcement.[79] While courts have broadly interpreted s.2 of the CDDA 1986 to prevent undue constraints,[80] this broad interpretation raises concerns about timeliness and the effectiveness of the disqualification regime in curbing director misconduct. Such inconsistencies underscore the need for more straightforward guidelines to ensure uniform enforcement.[81]

Furthermore, notable cases such as *Re Barings plc (No 5)*[82] highlight the severe consequences of neglecting directorial duties, yet they also reveal significant loopholes.[83] This narrow application may leave a considerable loophole for directors of companies that are managed irresponsibly but have not entered insolvency, thus diminishing the law's preventive measure.[84] This issue is significant because it allows directors who engage in misconduct or irresponsible management practices to continue operating without immediate consequences unless the company becomes insolvent. Such a gap in the regulatory framework undermines the preventive intention of the law, as it fails to address and rectify poor governance practices in their early stages. Consequently, this can lead to prolonged periods of detrimental conduct, which not only jeopardises the financial stability and reputation of the company but also poses risks to shareholders, employees, creditors, and the broader market. Additionally, the inconsistent application of disqualification orders, as seen in cases like *Official Receiver v Batmanghelidjh*, underscores further inconsistencies that can undermine the deterrent effect of these measures.[85] In this case, despite significant evidence of mismanagement and financial irregularities at Kids Company, the court did not impose a disqualification order on the charity's directors, including Camila Batmanghelidjh. The court acknowledged their failings but ultimately ruled that the directors had acted in good faith and with the intent to save the charity. This outcome illustrates how subjective interpretations of directors' intentions and actions can lead to inconsistent enforcement of disqualification orders.[86]

The framework is limited by strict criteria for what counts as 'investigative material' under s.8 of the CDDA 1986, suitable for initiating disqualification actions.[87] This often forces The Insolvency Service on behalf of the Secretary of State for Business, Innovation & Skills to conduct unnecessary repeat investigations when reliable evidence from other regulatory bodies is already available.[88] Such redundancy delays the disqualification process, wastes resources, and allows misconduct to persist.[89]

In another aspect, while the Sentencing Council has provided guidelines on penalties for breaches of disqualification from acting as a director, these guidelines lack clarity and do

[78] Above (n 44) 213–234.

[79] Sally Wheeler, 'Directors Disqualification: Insolvency Practitioners and the Decision-Making Process' (1995) 15(2) Legal Studies 283.-

[80] Sophia Nakandi, *The Disqualification of Company Directors* (LAP LAMBERT Academic Publishing, 2019) 12. See also Nolan, R.C, 'Disqualifying directors' (1994) 15(9) Company Lawyer 280.

[81] Andrew Hicks, 'Director Disqualification: Can It Deliver?' (2001) 433, 436 <https://llr.alma.exlibrisgroup.com/mng/pds HandleLogin> assessed January 04, 2024.

[82] *Re Barings plc (No 5)* (n 5).

[83] Sarah Worthington and Sinéad Agnew, *Text, Cases, and Materials in Company Law* (12th edn, Oxford University Press 2022) 297.

[84] *Ibid*,

[85] [2021] EWHC 175 (Ch).

[86] *Ibid*.

[87] Department for Business, Innovation and Skills, 'Impact Assessments Part B: Director Disqualification Regime — Transparency and Trust' (*BIS*, 2014) 24–27 <https://assets.publishing.service.gov.uk/media/5a75713aed915d7314959fcb/bis-14-908b-impact-assessments-part-b-director-disqualification-regime-transparency-and-trust.pdf> accessed April 12, 2024.

[88] *Ibid*.

[89] *Ibid*.

not adequately address the initial disqualification process for different types of misconduct.[90] Provided sentencing ranges are broad and lack detailed criteria for differentiating between the severity of offences, leading to inconsistent sentencing decisions due to the broad interpretations.[91] Although the Sentencing Council's efforts represent progress, they do not sufficiently create a structured approach that ensures penalties are consistently proportional. As Blair and Stout have noted, sanctions that impact reputation can undermine trust in regulatory bodies and decrease compliance among directors.[92] This suggests that a more detailed and nuanced approach, with proportional penalties to the misconduct, could potentially be more effective in addressing and preventing directorial misconduct.[93]

While the CDDA 1986 and CA 2006 establish a robust framework for director disqualification, the critiques and identified gaps underscore the urgent need for legislative enhancements.[94] Statistics from the National Audit Office, in 1999, indicate a significant perception of ineffectiveness, with 65% of respondents believing that the legislation fails to protect the public adequately.[95] This perception, combined with ongoing issues highlighted by incidents such as the Bounce Back Loans scandal,[96] clearly demonstrates the necessity for more transparent and comprehensive disqualification measures. Thus, these improvements are essential to safeguard corporate integrity and effectively prevent future misconduct.

5. COMPARATIVE ANALYSIS

This section offers a comparative analysis of director disqualification practices in the United States (US) and Canada to identify potential improvements to the UK's approach to preventing corporate wrongdoing. It will examine the strengths and weaknesses of each system and assess the feasibility of integrating successful elements into the UK framework.

5.1 Director Disqualification in the United States

In the US, corporate law operates at both federal and state levels, creating a diverse regulation landscape.[97] Each state has its corporate code, which sets standards for director conduct.[98] In the US, directors can only be removed 'for cause', and some other states adopted legislation that gives the court the power to remove a director,[99] which is different in the UK as shareholders have the non-variable statutory right who only can remove directors from companies by ordinary resolution.[100]

[90] Above (n 92).

[91] *Ibid*.

[92] A Ben-Ner and F Halldorsson, 'Trusting and Trustworthiness: What Are They, How to Measure Them, and What Affects Them' (2010) 31 Journal of Economic Psychology 64..

[93] Above (n 92).

[94] National Audit Office: Insolvency service Executive Agency: company director disqualification – a follow-up report. Report by Comptroller and Auditor General (*House of Commons Papers*, Session 1998–1999) p 48 <https://parlipapers.proquest.com/parlipapers/result/pqpdocumentview?accountid=14693&groupid=95592&pgId=e12c0bb9-578b-46c3-9a88-a82d81b197a7&rsId=18C5A97E618> accessed January 07, 2024.

[95] *Ibid*.

[96] GOV.UK, 'Ban and Tagging for Directors Who Abused Bounce Back Loan Scheme' <https://www.gov.uk/government/news/ban-and-tagging-for-directors-who-abused-bounce-back-loan-scheme> accessed March 12, 2024.

[97] Donald C Langevoort, 'Federalism in Corproate/Securities Law: Reflections on Delaware, California, and State Regulation of Insider Trading' (2006) 40 University of San Francisco Law Review, 2006) 879.

[98] Lucian A Bebchuk, 'The Case for Increasing Shareholder Power'(2004) 118 (Harvard Law Review 833..

[99] Jean J du Plessis and James McConvill, 'Removal of Company Directors in a Climate of Corporate Collapses' (2003) Australian Business Law Review 261–263. <https://www.researchgate.net/publication/305379495_Removal_of_company_directors_in_a_climate_of_corporate_collapses> accessed March 11, 2024.

[100] Jean Jacques du Plessis and Jeanne Nel de Koker, *Disqualification of Company Directors* (Routledge Research in Corporate Law, 2017) 21.

The primary mechanism for addressing director misconduct at the federal level is through the Securities and Exchange Commission (SEC) and related statutes,[101] focusing on penalising rather than preventing initial misconduct.[102] This decentralised approach allows for adaptation to the specific needs of different regions, which could enhance the responsiveness and flexibility of local corporate environments. The US disqualification criteria typically target serious misconduct, such as fraud or breach of fiduciary duty.[103] Therefore, US law does not generally punish business failures.[104] Although the US is moving towards incorporating preventative measures to address misconduct more effectively, the disqualification regime in the US is far less developed and used less often than in the UK.[105]

Despite its flexibility, the US system predominantly relies on internal corporate governance to remove unqualified directors, as exemplified by Delaware General Corporation Law, which governs most US corporations.[106] This reliance on internal mechanisms highlights a fundamental belief in the efficacy of internal governance structures to protect shareholder interests and ensure responsible company management.[107] However, this might result in insufficient governmental oversight, potentially leading to enforcement gaps.[108] This underscores a fundamental difference from the UK's approach, where a more centralised system under the CDDA 1986 facilitates uniform application and enforcement.[109]

The Sarbanes-Oxley Act of 2002 marked a significant shift in the US,[110] empowering the SEC to impose officer and director bars through administrative proceedings,[111] thus lowering the threshold for disqualification from "substantial unfitness" to "unfitness" and allowing more discretion for courts.[112] These changes enabled the SEC to bypass the court system entirely.[113] Yet, the preference for internal governance remedies over external enforcement reflects a fundamental difference from the UK's system.[114] Whereas the UK system is more centralised under the CDDA 1986, this proves the absence of clear legislative directives for the automatic disqualification of directors in the US legal framework, except for the Clayton Antitrust Act 2014.[115]

[101] Securities Exchange Act 1934, ss 10(b), 14(a), 16, 21C, 20(a).

[102] U.S. Securities and Exchange Commission, Disqualification of Felons and Other "Bad Actors" from Rule 506 Offerings and Related Disclosure Requirements (2013) <https://www.sec.gov/info/smallbus/secg/bad-actor-small-entity-compliance-guide> accessed March 01, 2024.

[103] Jean Jacques du Plessis and Jeanne Nel de Koker, *Disqualification of Company Directors* (Routledge Research in Corporate Law, 2017) 46.

[104] *In Re Lifschultz Fast Freight* 132 F (3d) 339, 346 (7th Cir, 1997).

[105] Renee Jones, 'Unfit for Duty: The Officer and Director Bar as a Remedy for Fraud' (2018) 82(2) University of Cincinnati Law Review 439.

[106] Delaware Division of Corporations, 'About the Division of Corporations' (Delaware.gov) <https://corp.delaware.gov/aboutagency/> accessed February 05, 2024.

[107] Rivka Weil, 'Declassifying the Classified' (2006) 31(23) Delaware Journal of Corporate Law 891. .

[108] Chrispas Nyombi, 'The USA as a Good Comparator for UK in Corporate Governance' (2018) 60(1) International Journal of Law and Management 135 <https://www.emerald.com/insight/content/doi/10.1108/IJLMA-04-2013-0014/full/html#sec003> accessed January 14, 2024.

[109] Richard Ascroft and Jeremy Bamford, 'CDDA Allegations – The Good, The Bad & The Ugly Defence Strategies – Fairness & Clarity' (Guildhall Chambers, February 2013) <https://www.guildhallchambers.co.uk/files/CDDA_Allegations_JeremyBamford&RichardAscroft_February2013.pdf> accessed February 06, 2024.

[110] Lisa H Nicholson, 'The Culture of Under-Enforcement: Buried Treasure, Sarbanes-Oxley and the Corporate Pirate' 2007 5(2)(5) (DePaul Business and Commercial Law Journal, 2007) 321.<https://via.library.depaul.edu/bclj/vol5/iss2/5> accessed February 05, 2024.

[111] Sarbanes-Oxley Act 2002, s 305 (US).

[112] Sarbanes-Oxley Act 2002 (US).

[113] *SEC v Patel* 61 F.3d 137 (2d Cir. 1995).

[114] Renee M Jones and Michelle Welsh, 'Towards a Public Enforcement Model of Directors, Duties of Oversight' (2021) 42(2) Vanderbilt Journal of Transnational Law 343.

[115] Eric N Fischer, 'Serving More than One Master: A Social Network Analysis of Section 8 of the Clayton Act'(2015) 41(1) (Journal of Corporation Law 313 ..

Comparatively, the UK disqualification regime has its own inconsistencies.[116] The UK disqualification regime actively prevents unfit individuals from becoming directors through stringent rules enforced by the Insolvency Service, contrasting with the US's higher reliance on corporate self-regulation.[117] Notably, the US imposes stricter financial sanctions (London Interbank Offer Rate)[118] and higher maximum imprisonment sentences for serious offences such as fraud or money laundering. This may indicate a more punitive approach once misconduct is detected.[119] For example, fraudster Bernie Madoff received a 150-year sentence in the US,[120] whereas Asil Nadir in the UK was sentenced to 10 years for similar financial crimes.[121]

This analysis reveals fundamental differences in how the US and UK approach director disqualification, with the US favouring corporate self-regulation[122] and the UK emphasising external oversight through the Insolvency Service and the Financial Conduct Authority. These distinctions prompt further inquiry into which regulatory framework maintains corporate integrity and public trust more effectively.

5.2 Director Disqualification in Canada

In Canada, director disqualifications are governed by both federal and provincial statutes, such as the Canada Business Corporations Act 1975 (CBCA 1975), the Ontario Business Corporations Act 1970 (OBCA 1970), and the British Columbia Business Corporations Act 2002 (BCBCA 2002). Under s 122(1)(a)-(b) of the CBCA 1975, directors are primarily tasked with fiduciary duties[123] and a duty of care to the company,[124] traditionally prioritising the corporation's interests over those of creditors. However, significant cases like *Peoples Department Stores Inc. (Trustee of) v. Wise*[125] have attempted to extend these duties to creditors,[126] though the Supreme Court of Canada did not uphold this extension.[127]

The business judgment rule in Canada,[128] similar to the UK's business judgment rule in s.172 CA 2006,[129] is that before judges make the ultimate decisions, they listen to business experts' decisions, provided they arrive at that decision with prudence and diligence.[130] This rule protects directors from allegations of breaching their duty of care, assuming their decisions are sound and adhere to established corporate governance standards.[131]

The mechanisms for disqualification in Canadian law are not as robust or direct as in the UK under the CDDA 1986. The primary legislative tools for director removal are found

[116] The Gazette, 'What you need to know about director disqualification proceedings' (2023) https://www.thegazette.co.uk/insolvency/content/104182 accessed March 04, 2024.

[117] GOV.UK, 'Company Director Disqualification' <https://www.gov.uk/company-director-disqualification> accessed March 11, 2024.

[118] Nicholas Ryder, *The Financial Crisis and White-Collar Crime – The Perfect Storm?* (Edward Elgar, 2014).

[119] Nicholas Ryder, *Financial Crime in the 21st Century: Law and Policy* (Edward Elgar 2011) 266.

[120] BBC News, 'Fraudster Madoff gets 150 years' (BBC News, 2009) <http://news.bbc.co.uk/2/hi/business/8124838.stm> accessed March 03, 2024.

[121] The Guardian, 'Asil Nadir jailed for 10 years for Polly Peck theft' (2012) <https://www.theguardian.com/business/2012/aug/23/asil-nadir-10-years-jail-polly-peck> accessed March 03, 2024.

[122] Jean Jacques du Plessis and Jeanne Nel de Koker, *Disqualification of Company Directors* (Routledge Research in Corporate Law, 2017) 21.

[123] Canada Business Corporations Act, s 122(1)(a) (CAN).

[124] Canada Business Corporations Act, s 122(1)(b) (CAN).

[125] (1998), 23 C.B.R. (4th) 200 (CAN).

[126] Canada Business Corporations Act, s 122(1)(a)-(b).

[127] Above (n 77).

[128] *BCE Inc v 1976 Debentureholders* [2008] S.C.C. 69.

[129] *Re Smith and Fawcett Ltd* [1942] Ch 304.

[130] J.E Smyth, and others, *The Law and Business Administration in Canada* (14th edn, Pearson Toronto 2014) 610.

[131] *Peoples Department Stores Inc. (Trustee of) v. Wise* (n 131). See also J.E Smyth, and others, *The Law and Business Administration in Canada* (14th edn, Pearson Toronto 2014) 610.

within securities legislation[132] and specific provisions like s.11.5 of the Companies' Creditors Arrangement Act 1985 (CCAA 1985) and s.64 of the Bankruptcy and Insolvency Act 1985, which allow for the removal of directors in debtor companies and enable courts to appoint replacements.[133] The criteria outlined in s.11.5 of the CCAA 1985 could be similar to the UK's standards for assessing director unfitness.[134] However, these provisions do not provide a robust framework for assessing director unfitness as systematically as the CDDA 1986, as they do not incorporate comprehensive standardised criteria for evaluating the full range of director behaviours and their impacts.

Furthermore, the Canadian approach includes the remedy of oppression inspired by UK laws, which allows for director removal in cases of misconduct.[135] However, unlike the UK's CDDA 1986, the Canadian oppression remedy does not extend to disqualifying directors from future positions, merely removing them from problematic situations.[136] Therefore, while directors can be removed, they cannot be disqualified as similarly as in the UK under the CDDA 1986.[137] This limitation highlights a significant gap in the Canadian regime's ability to prevent future misconduct by the same individuals.[138]

Provincial statutes in Canada allow for a decentralised approach to director disqualification, adapting to the specific needs and business climates of each province.[139] For instance, under s.248 of the OBCA 1970, a director may be deemed unfit due to ethical considerations, with general responsibilities outlined in ss.115–137 of the Business Corporations Act, RSO 1990, c. B.16. This variability can introduce inconsistencies and make the enforcement of director disqualification more complex across different jurisdictions. However, this decentralised approach allows for a broader application of disqualification, adapting to the specific needs and businesses of each province.[140]

While flexible and adaptive to regional needs, this decentralisation can lead to inconsistencies and potentially less effective enforcement of disqualification standards. Canadian law does not provide as stringent guidelines as the UK system, resulting in a framework that may allow more room for interpretation and potentially less accountability for directors across provinces.[141] As such, the UK's centralised approach is generally seen as more effective in providing consistent enforcement and holding directors accountable on a national scale, contrary to provincial statutes seen in Canada.[142]

5.3 Exploring a Hybrid Approach

There are benefits and drawbacks to implementing such a hybrid approach based on the US and Canada's systems in the UK's context. The US corporate law framework, characterised by its dual-level operation of federal oversight alongside state-specific regulations, offers a highly flexible structure that caters to diverse business needs across various states.[143]

[132] Jean Jacques du Plessis and Jeanne Nel de Koker, *Disqualification of Company Directors* (Routledge Research in Corporate Law, 2017) 32.

[133] *Ibid*.

[134] Marie Bruchet, 'Director Removal under the CCAA' (2008) 24(1) Banking & Finance Law Review 269.

[135] Innovation, Science and Economic Development Canada, Oppression Remedy Guidelines – Canada Business Corporations Act <https://ised-isde.canada.ca/site/corporations-canada/en/business-corporations/oppression-remedy-guidelines-canada-business-corporations-act> accessed March 02, 2024.

[136] Business Corporations Act, R.S.A. 2000, c. B-9, s. 242(2) [ABCA] (CAN).

[137] Above (n 77).

[138] *Ibid*.

[139] Midge Day, *Ontario Corporate Procedure* (4th edn, Thomson Canada Ltd 2001).

[140] Above (n 77).

[141] Francis Fitzpatrick, 'Disqualification of a Director on Grounds of Unfitness' (1992) 142 The New Law Journal 596.

[142] Above (n 77).

[143] Lucian Arye Bebchuk, 'The Case for Increasing Shareholder Power' (2004) 118 Harvard Law Review 833. .

However, implementing the US legal framework might complicate directors' understanding of their responsibilities, potentially diluting the general consistency of the UK's current framework.[144] Additionally, the US preference for self-regulation might not translate well to the UK context, where a more centralised and controlled approach is preferred. This could diminish the deterrent effects crucial for curbing corporate misconduct in the UK.[145]

Similarly, while the Canadian system is marked by its adaptability through provincial statutes like the BCBCA 2002 and OBCA 1970,[146] this approach suffers from variability in enforcement and legal interpretation across provinces. Such inconsistency could potentially compromise the fairness and uniformity of the UK's disqualification process.[147]

Therefore, while the hybrid approach offers intriguing possibilities by merging flexibility with strict regulation, there is clear tension between the US's decentralised, 'do-it-yourself' method and the UK's rigorous, tightly regulated approach.[148] Although the Canadian model provides valuable regional responsiveness, it also demonstrates potential difficulties in maintaining consistent standards across a unified national system.[149]

5.3.1 Balancing Positives and Negatives

By incorporating the UK's external proactive mechanisms, the flexibility of the US system, and Canada's provincial adaptability, a hybrid model could provide a comprehensive tool to maintain corporate integrity and improve public trust.[150] The positive aspects of this approach include an increased capacity to adapt to the fast-paced changes in the business world and the ability to address misconduct with a more focused understanding of each regional needs. Therefore, balancing the positives and negatives lies in maintaining fairness and consistency in disqualification proceedings.[151]

5.4 The Feasibility of Adopting International Director Disqualification Practices

It is important to note that each director disqualification system has proven effective within its regional context; however, integrating these diverse approaches could potentially undermine the strengths of each system. Therefore, the feasibility of adopting international director disqualification practices, particularly from the US and Canada, into the UK's framework must be carefully assessed. The UK is regarded by many European Union members, including Germany, as a leading model in corporate governance.[152] Therefore, modifying a system already considered a 'leading model' could undermine its effectiveness.[153]

When considering the integration of international practices, it is essential to maintain the consistency and fairness of enforcement that characterises the current UK system despite its

[144] *Official Receiver v Batmanghelidjh* (n 91).

[145] The Corporate Governance Institute, 'The difference between corporate governance in the UK and the US' (The Corporate Governance Institute) <https://www.thecorporategovernanceinstitute.com/insights/news-analysis/difference-between-corporate-governance-uk-and-united-states/> accessed March 01, 2024.

[146] Midge Day, *Ontario Corporate Procedure* (4th edn, Thomson Canada Ltd 2001).

[147] The Canadian Encyclopaedia, 'Federal-Provincial Relations' <https://www.thecanadianencyclopedia.ca/en/article/federal-provincial-relations> accessed February 29, 2024.

[148] Jean Jacques du Plessis and Jeanne Nel de Koker, *Disqualification of Company Directors* (Routledge Research in Corporate Law, 2017) 155.

[149] Above (n 153) 155.

[150] Jean Jacques du Plessis and Jeanne Nel de Koker, *Disqualification of Company Directors* (Routledge Research in Corporate Law, 2017) 155–169; Midge Day, *Ontario Corporate Procedure* (4th edn, Thomson Canada Ltd 2001).

[151] The Gazette, 'What you need to know about director disqualification proceedings' (2023) https://www.thegazette.co.uk/insolvency/content/104182 accessed March 04, 2024.

[152] European Corporate Governance Institute, 'Corporate Governance in the United Kingdom' <https://www.ecgi.global/content/> accessed March 01, 2024. See also Jean Jacques du Plessis, *Disqualification of Company Directors: A Comparative Analysis of the Law in the UK, Australia, South Africa, the US and Germany* (Taylor & Francis 2017).

[153] *Ibid*.

limitations.[154] Additionally, understanding the potential impacts on various stakeholders, such as shareholders, creditors, and employees, is crucial for evaluating the feasibility of a hybrid approach. The UK's corporate governance framework is renowned for its strength and has significantly influenced corporate practices across Europe and Asia.[155] While the flexibility and responsiveness of the North American models might seem attractive,[156] introducing these elements as aforementioned could risk diluting the UK's stringent disqualification standards.[157]

For instance, regional adaptability could be introduced to adapt international practices into the UK's director disqualification framework. Amendments to the CDDA 1986 might allow regulatory bodies in England, Wales, Scotland and Northern Ireland to tailor enforcement to local business models. Moreover, establishing regional advisory panels, such as the Northern Ireland Assembly Committee for Enterprise, Trade and Investment, would help customise these practices, ensuring they are effective and relevant.[158] Additionally, a flexible penalty framework would align sanctions more closely with the severity of misconduct. However, any benefits from such integration must be weighed against potential drawbacks such as, for example, tensions between different local standards.

6. RECOMMENDATIONS FOR REFORMS

This section advocates for a tiered penalty system in the UK's director disqualification framework, aiming to better deter corporate misconduct by categorising offences and tailoring penalties. Recognising the identified gaps, implementing a categorised penalty system could enhance the deterrent effect against corporate wrongdoing, ensuring a more precise and effective approach to penalisation.

6.1 The Small Business, Enterprise and Employment Act 2015

The SBEEA 2015 represents a pivotal moment in the evolution of UK company law, particularly in director disqualification. The Department for Business, Innovation and Skills explained the legislation's aims as strengthening and modernising the current director disqualification legislation.[159]

The SBEEA 2015 introduced many reforms to fortify the legal framework governing corporate directors, thereby enhancing accountability and safeguarding stakeholders within the corporate framework.[160] However, it has been proposed that the emphasis on reforms to the disqualification could be a reaction driven by politics aimed at addressing public anger over the absence of responsibility among individuals in the financial sector and the government's

[154] The Gazette, 'What you need to know about director disqualification proceedings' (2023) https://www.thegazette.co.uk/insolvency/content/104182 accessed March 04, 2024.

[155] *Ibid*.

[156] Lucian A Bebchuk, 'The Case for Increasing Shareholder Power'(2004) 118 (Harvard Law Review 833. .

[157] *Official Receiver v Batmanghelidjh* (n 91); European Corporate Governance Institute, 'Corporate Governance in the United Kingdom' <https://www.ecgi.global/content/> accessed March 01, 2024.

[158] Northern Ireland Assembly, 'Committee for Enterprise, Trade and Investment' <http://www.niassembly.gov.uk/assembly-business/committees/2011–2016/enterprise-trade-and-investment/#:~:text=Committee%20for%20Enterprise%2C%20Trade%20and%20Investment&text=The%20committee%20undertakes%20a%20scrutiny,consideration%20and%20development%20of%20legislation> accessed April 14, 2024.

[159] Department for Business, Innovation and Skills, '*Small Business, Enterprise and Employment Act: Directors Disqualification and Creditor Compensation Fact Sheet'* < https://assets.publishing.service.gov.uk/media/5a7f2475e5274a2e87db40da/bis-15-264-SBEE-Act-directors-disqualifications-fact-sheet.pdf> accessed February 24, 2024.

[160] Squire Patton Boggs, 'The Small Business, Enterprise, and Employment Act is Here – What Does it Mean for Your Business' <https://www.squirepattonboggs.com/-/media/files/insights/publications/2015/07/small-business--enterprise-and-employment-act-2015/smallbusinessenterpriseemploymentactalert.pdf?rev=2f6a1e5d893540faa9d3c4f169be7303> accessed March 01, 2024.

obligation to take action, which is deeply problematic.[161] Since these reforms are driven primarily by political reaction rather than thorough analysis, this can lead to implementing laws that may not effectively address the underlying issues.[162]

The SBEEA 2015 reforms were designed with two objectives.[163] To restore market confidence and enhance trust in companies and the business environment in general.[164] For instance, the SBEEA 2015 prohibits corporate directors (e.g., directors benefiting from the limited liability), which is a move that signals a shift towards greater transparency and accountability in company management,[165] as the government asserted that regulation that promoted accountability would also increase market trust.[166] This prohibition was also introduced by the new grounds for disqualification, including convictions for relevant offences in foreign jurisdictions and actions against individuals who have directed unfit directors.[167]

A particularly transformative aspect of the Small Business, Enterprise and Employment Act 2015 (SBEEA 2015) is the extension of powers to administrators, allowing them to pursue legal actions against directors for wrongful or unlawful trading. Prior to this change, only liquidators had the authority to initiate wrongful trading proceedings under the Insolvency Act 1986. The inclusion of administrators in this capacity represents a significant shift, as it broadens the scope of who can hold directors accountable for their misconduct.[168]

While SBEEA 2015 improves the UK's director accountability and transparency approach within its corporate governance framework,[169] it may not be sufficient to fully prevent corporate wrongdoings.[170] As stated previously, the broader measures complicate the disqualification process since the role of the disqualification regime has not changed, as the focus has always been on deterrence and protecting the public.[171] Furthermore, there are instances when businesses face financial difficulties due to external factors or events beyond the control of directors.[172] In these circumstances, it would not be wise for directors to face sanctions, which the recent reforms have not addressed; suggesting penalising them for these uncontrollable events would be 'reasonable'.[173]

However, the reforms overlook the current challenges regarding the system's effectiveness.[174] Therefore, it could be argued that this 'reform' was only to calm the public's anger for a need for change, as they deflected the attention away from improving accountability and ethical standards.[175] This oversight suggests buying time or losing focus on reforming

[161] Above (n 4).

[162] *Ibid*.

[163] Bob Ferguson, 'The Personal Accountability of Bankers' (2015) Law and Financial Markets Review 40, 49 <https://doi.org/10.1080/17521440.2015.1032070> accessed March 01, 2024.

[164] *Ibid*.

[165] *Ibid*.

[166] Department for Business Innovation & Skills, *Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business Discussion Paper* (2013) 53 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212079/bis-13–959-transparency-and-trust-enhancing-the-transparency-of-uk-company-ownership-and-increasing-trust-in-uk-business.pdf> accessed February 28, 2024.

[167] *Ibid*.

[168] Squire Patton Boggs, 'The Small Business, Enterprise, and Employment Act is Here – What Does it Mean for Your Business' (2015) <https://www.squirepattonboggs.com/-/media/files/insights/publications/2015/07/small-business--enterprise-and-employment-act-2015/smallbusinessenterpriseemploymentactalert.pdf?rev=2f6a1e5d893540faa9d3c4f169be7303> accessed March 01, 2024.

[169] *Ibid*.

[170] Above (n 78).

[171] *Re Blackspur Group plc* [1998] 1 BCLC 676 at 680.

[172] Norman Mugarura, 'Are the New Proposals for Reform of Directors' Disqualification Requirements in the UK Sufficient or Cosmetic?' (2015) 58(4) International Journal of Law and Management 372.

[173] *Ibid*.

[174] Above (n 78).

[175] Above (n 4) 58.

the law, which requires a more comprehensive approach to address the law's shortcomings.[176] Therefore, even if these reforms boost market confidence, this new boost might not be 'well-placed' as it is not based on genuine substantive changes that people need in accountability and ethical behaviour within the corporate sector.[177]

6.2 Updating the Laws

A discussion paper has underscored the importance of improving the UK's director disqualification framework to more effectively target the small minority of directors who do not comply with regulations.[178] Enhancing and expanding this system could reinforce the UK's reputation as a trustworthy business and investment destination.[179] Although the paper dates back ten years, it was instrumental in leading to the enactment of the SBEEA 2015.[180]

Expanding the admissibility of evidence should be considered to streamline the director disqualification process and eliminate redundant investigations.[181] This would allow The Insolvency Service to use a broader range of materials from regulators to initiate disqualification actions without waiting for reports from Insolvency Practitioners.[182] This would enhance the efficiency and effectiveness of the process, better aligning it with modern corporate governance.[183] This connection demonstrates that quicker and more flexible initial actions would allow the system to apply penalties that are accurately aligned with the severity and details of each case.[184] This streamlined approach would support the adoption of a tiered penalty system, ensuring that sanctions are proportionate and effectively tailored to the seriousness of the misconduct.

Implementing a tiered penalty system for director disqualifications could significantly enhance the current regulatory framework's responsiveness to various offences, which differ widely in their nature and severity. Although, the disqualification regime primarily addresses misconduct through uniform sanctions.[185] A tiered approach, however, would provide the nuanced approach needed to distinguish between degrees of misconduct.

6.2.1 Proposed Reform: Tiered Penalty System

The proposed tiered strategy organises directorial misconduct based on its severity and impact, ranging from minor administrative errors to severe fraudulent cases. Each tier can be linked to specific disqualification periods and penalties, introducing a fair, consistent, and proportionate framework to the nature of misconduct. For example, in *Secretary of State for Trade and Industry v Goldberg and McAvoy*, although the director was not dishonest, he breached his duty in a way that rendered him unfit.[186] The director in this case engaged in irresponsible financial management and failed to maintain proper accounting records, which contributed to significant financial losses. This kind of breach underscores the need for a nuanced approach to director disqualification, where even non-dishonest but

[176] *Ibid*.

[177] *Ibid*.

[178] Department for Business Innovation & Skills, *Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business Discussion Paper* (2013) 53 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212079/bis-13–959-transparency-and-trust-enhancing-the-transparency-of-uk-company-ownership-and-increasing-trust-in-uk-business.pdf> accessed February 29, 2024.

[179] *Ibid*.

[180] *Ibid*.

[181] Above (n 93) 28.

[182] *Ibid*.

[183] *Ibid*.

[184] *Ibid*.

[185] Sally Wheeler, 'Directors' Disqualification: Insolvency Practitioners and the Decision-making Process' (1995) 15(2) Legal Studies 283..

[186] [2003] EWHC 2843 (Ch).

grossly negligent behavior can lead to disqualification to protect the integrity of corporate governance.[187]

Secretary of State for Trade and Industry v Hickling underscores the current system's tendency to label directors as unfit for minor infractions, suggesting the need for a more nuanced approach.[188] Furthermore, *Re Stanford Services Ltd* also emphasised that the severity of a director's breach should directly correspond to the disqualification imposed, highlighting the necessity for a system that adjusts penalties based on the misconduct's gravity.[189]

The tiered penalty system would streamline enforcement by broadening acceptable criteria for evidence, reducing investigative redundancies, and accelerating responses to corporate wrongdoing.[190] Defining severe penalties for major offences (e.g., heavy fines and long disqualification periods) would improve deterrence, ensuring that penalties are impactful. This system provides guidelines for categorising offences from minor to severe and allows for personalised assessment based on each situation. Such a system promises to bolster compliance and enhance the effectiveness of governance measures overseen by the Department for Business, Innovation and Skills.[191]

Based on insights derived from research beyond the realm of director disqualification, this proposed reform serves as both a roadmap for understanding the complexities of the disqualification process and a tool for identifying legal issues related to director disqualification with details.[192] By enabling precise identification, this reform allows the government and legal entities to evaluate the consequences of their decisions thoroughly. It facilitates an in-depth consideration of how these policies might affect various stakeholders, ensuring that all implications are thoughtfully assessed.[193]

For instance, Canadian police forces, in response to budgetary constraints and limited resources, are innovating with tiered policing strategies to use their budgets efficiently while aiming to maintain or even improve service quality.[194] Although the concept of tiered policing is distinct from the topic of director disqualification, it shows the broader usage of tiered systems in efficiently allocating limited resources while enhancing the effectiveness of a service.[195] Just as tiered policing allows for more effective use of budget, a tiered penalty system for director disqualifications could provide a structured, efficient way to categorise offences and assign penalties that reflect the severity and nature of each case.

While the UK currently employs a case-by-case approach to director disqualification (although subject to criticism for lacking consistency),[196] incorporating a tiered penalty system could make this process more efficient. This structured approach would serve as a guideline for courts, potentially reducing the time and resources spent deliberating each case.[197] By establishing categories for various levels of director misconduct, courts could more swiftly determine appropriate penalties, enhancing the efficiency of the legal process.

[187] *Ibid*.

[188] *Secretary of State for Trade and Industry v Hickling* (n 24).

[189] [1987] 607 620.

[190] Above (n 93).

[191] *Ibid*.

[192] Craig McTaggart, 'A Layered Approach to Internet Legal Analysis' (2003) 48(4) McGill Law Journal, 2003) 1.

[193] *Ibid*.

[194] Paul F. McKenna, 'Tiered Policing: An Alternative Model of Police Service Delivery' (2017) (Canadian Police College Discussion Paper Series <https://publications.gc.ca/site/archivee-archived.html?url=https://publications.gc.ca/collections/collection_2017/grc-rcmp/PS67-1–2-2014-eng.pdf.> accessed March 05, 2024. See also Heathfield Knoll School, 'What is a Three-Tier Education System – Why is it Better?' (2022) <https://www.hkschool.org.uk/what-is-a-three-tier-education-system-why-is-it-better/.> accessed March 10, 2024.

[195] *Ibid*.

[196] The Gazette, 'Director Disqualification: What You Need to Know' <https://www.thegazette.co.uk/all-notices/content/225> accessed March 12, 2024.

[197] Above (n 93) 6–10.

However, there are arguments that adopting a tiered approach, despite its potential benefits, could complicate the decision-making process.[198] Since it is argued that the current structure is effective, introducing additional layers might lead to operational inefficiencies by adding complexity to decision-making.[199] Despite potential concerns about complexity, the benefits of a tiered system, as evidenced in other areas of law where it enhances fairness and adaptability, outweigh any drawbacks.[200] Given that the Department for Business, Innovation & Skills is evaluating the director disqualification system and considering the delays experienced by Insolvency Services in identifying misconduct, a tiered approach could significantly expedite this process.[201] Furthermore, the above argument critiquing the tiered system was mainly focused on a two-tiered structure and focused on a 'board' structure rather than a tiered penalty system for director disqualification, which is designed exclusively for categorising penalties based on the severity of conduct[202] since the UK is one of the eight Member States (Belgium, Bulgaria, Croatia, Cyprus, Denmark, Finland and Italy) that provide for one-tiered board structures.[203]

The following examples outline how misconduct could be categorised across five distinct tiers to demonstrate the application of the proposed tiered penalty approach.

Tier Zero (Preliminary Guidance Tier): 'Tier Zero' focuses on guidance and warning, which could be a formal penalty for minor infractions or first-time minor errors. Instead of imposing fines, this tier could involve warnings or training sessions focusing on prevention. This tier acknowledges the learning curve in directorship roles.

For example, in Sadikur Rahman Chowdhury's case, director of Simla Restaurant Ltd[204], a "Tier Zero" penalty initially could have been more advantageous, offering guidance and training to correct minor infractions or unintentional errors related to tax compliance, which, in this case, he was disqualified for five years for failing to submit accurate corporate tax returns. This tier could have provided an opportunity for corrective action through warnings or training sessions on tax compliance, acknowledging the learning curve in directorship roles. However, given this case's deliberate under-declaration of sales,[205] it may also align with "Tier One," which targets more severe misconduct.

Tier One (Corrective Action Tier): The 'Tier One' focuses on unintentional or repeated negligence mistakes. While both of these mistakes are minor, repeated negligence suggests a pattern that might warrant slightly harsher consequences. The consequences could be short bans or fines. This tier focuses on corrective actions but with escalating severity for repeated mistakes. However, this tier does not focus on mere incompetence as it is not enough to be deemed 'unfit'.[206]

For example, in the case involving the director of Gerards Ice Cream Company, Robert Scappaticci, a 6.5-year disqualification undertaking was accepted due to failures in maintaining,

[198] Andrew Towler, 'Two-tier board structure would hinder decision-making process, warn solicitors' (Law Gazette, 2002) <https://www.lawgazette.co.uk/news/two-tier-board-structure-would-hinder-decision-making-process-warn-solicitors/37746.article> accessed 8 March 2024.

[199] *Ibid*.

[200] Igor Linkov and others, 'Tiered Approach to Resilience Assessment' (2018) 38(9) Risk Analysis 1772.

[201] Above (n 93) 5–10.

[202] Andrew Towler, 'Two-tier board structure would hinder decision-making process, warn solicitors' (Law Gazette, 2002) <https://www.lawgazette.co.uk/news/two-tier-board-structure-would-hinder-decision-making-process-warn-solicitors/37746.article> accessed 8 March 2024.

[203] PL Davies 'Board Structure in the UK and Germany: Convergence or Continuing Divergence?' (2001) 2 International and Comparative Corporate Law Journal 435.

[204] Department for Business, Energy & Industrial Strategy, 'Restaurant Boss Banned for Hiding Takings to Avoid Tax' (GOV.UK) <https://www.gov.uk/government/news/restaurant-boss-banned-for-hiding-takings-to-avoid-tax> accessed 3 April 2024.

[205] *Ibid*.

[206] J Birds and AJ Boyle, *Boyle & Birds' Company Law* (6th edn, Jordans Publishing, 2007) [15.18.4].

preserving, and delivering accounting records.[207] A Tier One approach would have been more beneficial rather than a long disqualification period, as it focuses on corrective action for unintentional mistakes or negligence. This tier encourages not just punitive measures but also educational ones. This tier could have helped Mr Scappaticci find a pathway to rehabilitation and better business practices in the future with professional development courses.[208]

Tier Two (Serious Non-Fraudulent Misconduct Tier): 'Tier Two' is for tackling more serious issues but non-fraudulent misconduct, such as negligence in fulfilling duties and failure to monitor the business operations, which can harm the people involved.[209] The disqualification penalties in this tier would be longer, reflecting the greater severity of the misconduct. Although this tier acknowledges the seriousness, it allows for eventual re-entry into a corporate management role, leaving room for growth and improvement.

For example, regarding the situation with N&S Solutions Ltd[210], which is now dissolved,[211] the director was disqualified for nine years for applying for a Bounce Back Loan (BBL) despite the company being insolvent and ceasing trading, a "Tier Two" approach might suggest a more measured response.[212] Given the extraordinary circumstances of the Coronavirus disease pandemic, where businesses found themselves in difficult times, the directors' severe actions did not involve outright fraud but rather a misguided attempt to navigate an unprecedented circumstance.[213] It is worth noting, however, that lying to the government to secure a loan for a dissolved company might constitute fraud. Therefore, this tier would acknowledge the severity of the misconduct while also considering the context of the pandemic and the impact of the actions on creditors, employees, and the public. This approach mirrors strategies like the US Department of Health and Human Services' tiered penalty system for Health Insurance Portability and Accountability Act 1996 violations, emphasising proportional penalties.[214]

Tier Three (Grave Offenses and Compensation Tier): 'Tier Three' would deal with the most severe offences, such as fraud, embezzlement, or any misconduct that causes significant harm to creditors, shareholders or the public. Directors found guilty under this tier could face the most extended disqualification periods with heavy penalties, such as compensation orders to remedy the damage or harm caused. This tier, through its imposition of the longest disqualification period[215] and the potential for compensation orders, reflects a rigorous stance to deter corporate misconduct effectively.

For instance, considering the Carillion collapse, which involved serious financial mismanagement, "Tier Three" measures could have potentially led to stricter consequences for those involved, thereby acting as a stronger deterrent.[216] If this tier had been in place, it might

[207] The Business Desk, 'Ice Cream Company Director Frozen for Accounting Records Failure' (2017), <https://www.thebusinessdesk.com/northwest/news/2009881-ice-cream-company-director-frozen-accounting-records-failure> accessed April 03 2024.

[208] Institute of Directors, 'Professional Development' <https://www.iod.com/professional-development/> accessed April 03 2024.

[209] Institute of Directors, 'Directors' Duties and Responsibilities' (2021) <https://www.iod.com/resources/factsheets/company-structure/directors-duties-and-responsibilities/> accessed March 11, 2024.

[210] Insolvency Service, 'Insolvency Service Cracks Down on Bounce Back Loan Abusers' (GOV.UK) <https://www.gov.uk/government/news/insolvency-service-cracks-down-on-bounce-back-loan-abusers> accessed April 03 2024.

[211] Online Filings 'Company Profile for NS Solutions Ltd' <https://www.onlinefilings.co.uk/company/profile/11420824-ns-solutions-ltd/> accessed 3 April 2024.

[212] Above (n 214).

[213] *Ibid*.

[214] George B. Breen and Patricia M. Wagner, 'Changes to HHS' Interpretation of HIPAA Civil Monetary Penalties' (2019) he National Law Review <https://www.natlawreview.com/article/changes-to-hhs-interpretation-hipaa-civil-monetary-penalties> accessed March 12, 2024.

[215] GOV.UK, 'Company Directors Disqualification Act 1986 and failed companies' (2022) <https://www.gov.uk/government/publications/company-directors-disqualification-act-1986-and-failed-companies/company-directors-disqualification-act-1986-and-failed-companies> accessed March 12, 2024.

[216] House of Commons Library, 'Carillion collapse: what went wrong?' (2018) <https://commonslibrary.parliament.uk/carillion-collapse-what-went-wrong/> accessed April 05 2024.

have provided the judiciary with more robust tools to address severe corporate misconduct, potentially preventing extensive harm to creditors, employees, and the public by deterring directors from engaging in risky or fraudulent activities through the threat of severe consequences, including long-term disqualification and substantial financial penalties.[217] However, it is crucial to consider that although the current disqualification measures may be sufficient, tier three can specifically provide additional support or resolution in this complex case.

Tier Four (Repeat Offender Tier): Beyond 'Tier Three', a separate category for repeat offenders could be established. After serving their disqualification period, directors who find themselves again disqualified for similar or severe misconduct might face significantly longer bans or permanent disqualification. This added clarity ensures that life bans are strictly applied and reserved for the most extreme cases of director misconduct. Therefore, this tier underscores the importance of learning from past mistakes and the system's diminishing tolerance for repeat offenders.

The case of *Re Keeping Kids Company* highlights the complexity of applying a "Tier Four" system, especially within the charitable sector.[218] This case highlights the judiciary's approach to handling severe or repeated breaches of directorial duty. It further highlights the need for a nuanced approach, considering the distinct challenges of charities compared to commercial entities.[219]

Despite the structured approach of the proposed tiered penalty system, complex cases like the Patisserie Valerie scandal illustrate that not all instances of misconduct neatly align with predefined tiers.[220] This scandal involved financial misconduct, including severe discrepancies in reported cash and bank drafts, which were concealed from the shareholders.[221] The diverse nature of misconduct within a single case demonstrates that predefined tiers might not always capture the details of each situation adequately.[222] In such instances, it may be advantageous to allow judicial intervention to ensure that nuanced factors are appropriately considered. Additionally, judges might find it necessary to apply penalties from multiple tiers simultaneously to address all aspects of a complex case effectively.

To conclude, the tiered system offers a structured approach to categorising misconducts, ensuring appropriate penalties for each situation. Although this tiered penalty system will not resolve all the current issues within the disqualification framework, it can significantly enhance its efficiency and efficacy. The successful implementation of this reform requires cooperation among various stakeholders, including governmental bodies, industry leaders, and regulatory authorities, to strengthen the integrity of the UK's disqualification framework.[223]

Additionally, by providing clear guidelines for courts and judges, this system could reduce the burden on judicial resources, thus conserving resources while addressing some of the critical challenges faced by the current system.[224]

[217] House of Commons Library, 'The collapse of Carillion' (CBP 8206, 2018) <https://commonslibrary.parliament.uk/research-briefings/cbp-8206/> accessed April 05 2024.

[218] [2021] EWHC 175 (Ch).

[219] The Charity Commission, 'Charity Inquiry: Keeping Kids Company' (2022) <https://www.gov.uk/government/publications/charity-inquiry-keeping-kids-company/charity-inquiry-keeping-kids-company> accessed 5 April 2024.

[220] Alex Crimmins, 'What was the Patisserie Valerie controversy?' (*The Corporate Governance Institute*, 2024) <https://www.thecorporategovernanceinstitute.com/insights/case-studies/what-was-the-patisserie-valerie-controversy/> accessed April 07 2024.

[221] *Ibid*.

[222] *Ibid*.

[223] Cambridge University Press, 'International & Comparative Law Quarterly' (2008) 584–585.

[224] Above (n 44) 213,234.

7. CONCLUSION

In conclusion, this paper has critically evaluated the effectiveness of the UK's director disqualification mechanisms in deterring corporate wrongdoings, uncovering significant tensions between its straightforward legislative approach and the complex, multifaceted nature of corporate misconduct.[225]

A tiered penalty system, inspired by adaptable and flexible models from North American systems, is proposed as a vital reform to overcome some of these deficiencies.[226] Such a system would not only allocate penalties more proportionally according to the severity of the misconduct but also enhance directors' overall motivation to adhere to ethical and legal standards. However, implementing this system will require careful planning to integrate seamlessly into the existing framework without adding complexity, ensuring that reforms are effective and sustainable.[227]

By implementing these reforms, the intention is to further enhance the efficacy of the UK's director disqualification system, specifically in its role to prevent corporate wrongdoings.[228] By doing so, it is hoped that the efficacy of UK corporate governance can be significantly improved, aligning with best practices globally and responding effectively to the evolving challenges of modern corporate environments.[229]

[225] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 19.

[226] Jean Jacques du Plessis and Jeanne Nel de Koker, *Disqualification of Company Directors* (Routledge Research in Corporate Law, 2017) 155–169; Midge Day, *Ontario Corporate Procedure* (4th edn, Thomson Canada Ltd 2001).

[227] Daniela M Salvioni and Francesca Gennari, 'Stakeholder Perspective of Corporate Governance and CSR Committees' (2020) 1(1) Emerging Issues in Management 28.See also Cambridge University Press, 'International & Comparative Law Quarterly' (2008) 584–585 <https://doi.org/10.1093/iclqaj/24.3.584> accessed April 10, 2024.

[228] Jean Jacques du Plessis, *Disqualification of Company Directors: A Comparative Analysis of the Law in the UK, Australia, South Africa, the US and Germany* (Taylor & Francis 2017).

[229] Oghenejode Ojerime, 'The Most Challenging Aspects of the Modern Business Environment' (*University of Exeter*, 2017) <https://www.researchgate.net/publication/316106318_The_most_challenging_aspects_of_the_modern_business_environment> accessed 17 April 2024.

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BOOK REVIEWS

Book reviews and books for reviewing should be sent to the address given at the beginning of this issue

CRIME AND POLICING AT SEA

Maritime Crime and Policing
Edited by Yarin Eski and Martin Wright
United Kingdom, Routledge, 2023, 318pp, £120.00, ISBN 978 1 03202 211 6

Ever since Hugo Grotius announced the freedom of the seas in his influential 1609 text, *Mare Liberum*,[1] humanity has grappled with the challenge of how to police the fluid, intractable expanse that makes up two thirds of our planet. Indeed, the uniquely extraterritorial space of the seas – controlled by no single State and, yet, belonging to all – offers ripe space for exploitation by those with nefarious criminal agendas. This is notwithstanding the tremendous importance of the seas as a conduit for trade and movement, a trove of resources, and a rich palette of biodiversity.

It is into this space, then, that Yarin Eski and Martin Wright deign to insert a 'a unique and scholarly perspective on a little-studied subject', with a focus on the interdisciplinary intersection between law, criminology, policing studies, and myriad other approaches. The collection casts a broad net, with chapters covering *inter alia* piracy, armed robbery at sea, illegal fishing, migration, smuggling (drugs and weapons), terrorism, and illegal land reclamation, while adopting an approach that focuses on application as much as it does on scholarship, as reflected by the breadth of experience contained in the contributor biographies. The titular term 'Maritime' is intended in a broad sense, being indicative of problems arising generally at sea or in ports. The collection is separated into two principal parts: 'Maritime Crime' and 'Maritime Policing', with the former looking at phenomena that drive maritime crime and the latter more focused on containing it, though there are inevitably overlaps.

In the opening chapter of Part 1, Lydelle Joubert looks at the problem of piracy in the romantically titled 'Seas of Thieves: Who are the Pirates and What Drives Them?'. The chapter is a vital contribution: notwithstanding recent downturns in the prevalence of piracy, it remains 'a major concern for the international community as a whole',[2] not least given the potential risks it creates for global trade and, therefore, its universal effects. In what is a useful introduction to the topic, Joubert outlines the applicable international law and goes on to provide an overview of various drivers of piracy, factors influencing target selection, and a selection of prominent pirate networks. There is novel emphasis on potential environmental drivers of piracy: the impacts of overfishing and natural disasters, for instance, in pushing impoverished communities towards desperate acts. A key theme, throughout, is the assertion that 'piracy and other illicit maritime trades are land-based problems,'[3] whose elimination

[1] Hugo Grotius, *Mare Liberum 1609–2009* (ed. Robert Feenstra) (Leiden: Brill, 2009).

[2] Report of the International Law Commission to the UN General Assembly, 71st Session (2019), A/74/10.

[3] Page 27.

ultimately depends on 'adequate legislation and capacity building in law enforcement capabilities' in those communities on which pirates depend. The claim should not be underestimated, given that repression will always be a poor substitute for prevention. Joubert's chapter, overall, introduces readers to the relevant law, politics, and practical impacts of piracy, and is likely to be of use to those seeking to understand how it can be effectively combated. Given the collection's focus (in large part) on policing, one might expect greater insight into the jurisdictional dimensions of combating piracy and armed robbery at sea. While the chapter does ascertain the key differences between piracy (as defined in Article 101 of the 1982 UN Convention on the Law of the Sea) and 'armed robbery' (defined by reference to a resolution of the International Maritime Organisation), the implications of drawing the distinction – by reference, perhaps, to the right of States to exercise universal jurisdiction – are not clarified. This is not to detract, though, from the overall utility of the chapter.

Elsewhere in Part 1, Marta Fernández Sebastián documents trends and issues in 'illegal' cross-Mediterranean migration. Sebastián provides a comprehensive overview of the main routes taken by migrants seeking to cross into Europe, with recent trends informed by conflict, changing politics and by the COVID pandemic. The chapter re-emphasises the key themes of the Joubert chapter: that inter-State cooperation (between source and destination States, such as between Spain and Morocco) is key to solving ongoing crisis. The role of the European Union, and particularly its Border and Coastguard Agency – 'Frontex' – is also emphasised. Greater conceptual clarity is desirable in places; for instance, Sebastián seeks to differentiate between 'illegal migration' and seeking asylum, though the intended distinction is not made entirely clear throughout. Moreover, 'people smuggling' and 'human trafficking' (the terms appear to be used interchangeably) are intermittently referenced, with an implication that these are key drivers of 'illegal' migration, though the terminology is used without clear definition or analysis. Notwithstanding these reservations, Sebastián's chapter nonetheless provides a vital introduction to a pressing problem and re-emphasises the core theme of addressing the land-based causes of maritime issues.

Osato Anastasia Eruaga and Irekpitan Okukpon contribute a chapter on illegal, unreported and unregulated ('IUU') fishing: a key issue that endangers global food security, drives other seaborne forms of crime (such as piracy) and that features among the UN's Sustainable Development Goals initiative. Indeed, the authors report that up to 26 million tonnes (representing 23 billion USD) of fish are lost to IUU fishing each year, with several fish stocks having already collapsed. Eruaga and Okukpon set out a useful and comprehensive overview of the various forms of IUU fishing, followed by an overview of applicable international regulatory frameworks, though the case is made for greater focus on effective domestic criminal enforcement, with Indonesia and South Africa touted as case studies. The Indonesian policy of 'burning and sinking' vessels caught carrying out IUU fishing is highlighted as a successful deterrent to IUU fishing, though the authors express doubt that the policy would comply with the UN Convention on the Law of the Sea.[4] The authors go on to suggest that '[t]he conduct of judicial proceedings [. . .] can easily remedy this inconsistency',[5] although a brief analysis of relevant recent case law (such as from the International Tribunal on the Law of the Sea) might have shown this to be unlikely.[6] The case is then made for broader criminalisation of IUU fishing as a 'transnational organised crime', though the authors concede that political willpower is likely to be lacking, especially while several States appear to benefit directly from IUU fishing. The book's core themes of cooperation and local/regional partnerships are raised once again, while the collective failure to remedy the issue of IUU fishing suggests a

[4] Article 73.

[5] Pages 73–74.

[6] For instance, the M/V 'Virginia G' Case (Panama/Guinea-Bissau), Judgment Of 14 April 2014.

form of 'tragedy of the commons'.[7] The chapter is a strong entry to the collection, providing an excellent introduction to the legal and political issues inherent in IUU fishing while making a clarion call for action: 'efficient policing[,] more effective responses [and] requisite political will to ensure that the necessary commitments [are] established'.[8]

In 'Maritime Crime in the Western Indian Ocean: Interlinkages and Dynamics', Katja Lindskov Jacobsen and Linnea Kjølstad Larsen promote a theory that 'it is often important to [. . .] consider interlinkages between different types of (maritime) crime'[9] and that suppression of one form of illegal conduct at sea will, without more, simply lead to criminality elsewhere or to the perpetrators exploiting different forms of criminality. These entrepreneurial offenders are described as 'poly-criminals' operating within a multifaceted web of criminality labelled the 'maritime crime complex'.[10] The focus is on Somalia: notwithstanding the substantial decrease in piracy in recent years, other forms of criminality of have surged, with kidnapping, people smuggling and weapons smuggling (often in support of terrorist groups) having filled the vacuum. The unintended side-effects of counter-piracy operations serve as a reminder that the underlying *causes* of piracy remain and will manifest themselves in new ways, or ultimately lead to piracy 'ballooning back'.[11] With this revelation comes the recommendation for policymakers that 'a wider focus that looks beyond piracy is required'[12] and the suggestion that greater focus is required to consider the 'unintended consequences' of counterpiracy operations. The authors thereby direct the reader towards a heinously understudied issue which, one anticipates, scholars and policymakers will take note of and react accordingly.

In the opening chapter of Part 2, Giulio Calcara and Mike Launiala look at the role of INTERPOL (The International Criminal Police Organisation) in apprehending piracy, in what transpires to be a rich and detailed contribution to the collection. The chapter reveals the central role played by INTERPOL in counterpiracy operations, in particular by facilitating information-sharing within multinational anti-piracy naval missions (notably the EU's Operation Atalanta, NATO's Operation Ocean Shield, US-led Combined Task Force 151), by assisting in the gathering and preservation of evidence that may be useful at trial, and by contributing to capacity building in the most affected States (*e.g.* helping to develop more effective policing as well as investigative and prosecutorial practices). The authors go on to caution, however, against a freely accessible information-sharing space due to military involvement in providing or utilising data – something that might, inadvertently, place INTERPOL beyond its constitutional mandate (which forbids it from performing activities of military character) or that could render evidence inadmissible at trial. In a setting where 'policing' is generally carried out by State or multinational navies, these are key questions about fundamental issues of process. The authors indicate that it is, further, difficult to square the requirement for States to share relevant information *via* INTERPOL (*potentially* a legally binding requirement due to a series of UN Security Council resolutions 'urging' this)[13] with an international legal regime that, beyond requiring States to 'cooperate to the fullest possible extent in the repression of piracy',[14] establishes no concrete requirements for action. One may wonder whether this is indeed a genuine issue, however, given that those States, navies, and organisations that have relevant information to share will, inevitably, already be active and

[7] Garrett Hardin, 'The Tragedy of the Commons', (1968) 162 Science 1243.
[8] Page 78.
[9] Page 83.
[10] *Ibid*.
[11] Page 90.
[12] Page 92.
[13] *E.g.* UNSC Resolution 1950 (2010), clause 16.
[14] 1982 UN Convention on the Law of the Sea, Article 100.

closely involved in counter-piracy operations. This is a fine chapter overall, shedding light on the central and pivotal role of INTERPOL in containing piracy.

The collection returns to the challenges of migration with Shazwanis Shukri's chapter, 'Security Community-Building in the Mediterranean Sea: The European Union's Strategy in Combating Irregular Migration'. The appraisal of the EU's various operations in this area is generally positive, 'a good example of the spread of community practices within counter-migration initiatives',[15] a comment which links us, again, to the collection's core theme of inter-State cooperation. The overview, particularly, of 'Operation Sophia' (the 2015–2020 response to a surge in deaths of Libyan migrants) emphasises the work done to address the root causes of trans-Mediterranean migration (training the Libyan coastguard, in particular) and to dismantle human smuggling networks. In reality this may only be part of the overall story, however, given the lack of emphasis on the humanitarian aspect of the situation: in particular, accusations against EU authorities and Member States for failing to prevent several thousand deaths at sea, while simultaneously facilitating torturous conditions for several thousand would-be asylum seekers in Libyan detention centres. Thus, while the initiatives described may demonstrate progress by collaboration and coordination, there appears to be, still, a long road ahead, especially in terms of establishing, respecting and enabling the rights of those fleeing conflict or oppression. Shukri's chapter nevertheless provides a concise introduction to the EU's role in relation to this perennial crisis.

Elsewhere the collection offers critical insights into port crime, land reclamation (with a focus on China) and issues in the use of private security to defend against piracy (space precludes a full analysis of every chapter).

In a brief conclusion, Yarin Eski and Martin Wright unpack some of the key themes and findings of the collection, re-emphasising the land-based causes of – and solutions to – maritime crime, and highlighting the incontestable value of the collection in stating that 'fuller and more integrated perspectives' are required for us to better comprehend 'maritime crime as complex, multi-causal and, inherently, wickedly problematic.'[16] Indeed, this collection prompts us towards novel, interdisciplinary solutions to the problems we face in engaging with the unique and universal challenges of preventing and suppressing crime on the open, fluid, space of the world's seas and oceans. Moreover, it provides a useful one-stop point of reference for practitioners, scholars, policymakers and lawmakers alike. Drawing inspiration from Jacques Cousteau, the collection ends with a 'call to action' for further research in these areas: a call that, one hopes, will be heeded.

Dr Mark Chadwick, Nottingham Law School

[15] Page 189.
[16] Page 290.

ART AND HUMAN RIGHTS

Art and Human Rights: A Multidisciplinary Approach to Contemporary Issues
Edited by Fiana Gantheret, Nolween Guibert and Sofia Stolk
United Kingdom, Edward Elgar, 2023, 388pp, £130.00, ISBN 978 1 89229 814 6

The opening decades of the 21st century have seen a multitude of controversies over the role of cultural and artistic expression in contemporary societies. These have included, to name but a few: the censorship and persecution of artists; the problem of hate speech aimed at minorities; the causing of offence to moral and/or religious sensibilities; propaganda for war in a "post-truth" age; questions over what to do with cultural objects housed in Western museums and seized in the colonial era or looted during wartime; the difficulties of dealing with memorials in public space to controversial figures from the past such as slave traders and colonialists; and the role art should play in post-conflict societies and in transitional justice.

Set against this backdrop, and against the challenges posed by the COVID-19 pandemic, in this excellent collection the editors have done a superb job of gathering and marshalling a series of essays that explore the links between culture, art and human rights and make a compelling case for the vital importance of the subject. Indeed, whilst cultural rights are sometimes perceived as the "Cinderella of human rights" – as one of the editors, Nolween Gilbert, admits in her opening chapter – this volume makes an irresistible case for their centrality to the "doing" of human rights.

The chapters in this book are impressive in terms of their multi-disciplinarity, their breadth of coverage and their depth. The authors are drawn from a range of backgrounds, from practising lawyers, curators, artists, activists and academics. And they bring a wealth of expertise, wisdom and experience to bear. However, despite the broad spectrum of the book's coverage there is one central message that shines through: the commonality of art and human rights. This is by virtue of their similarities – they both are central to foundational concepts of humanity, universality, identity and dignity. But it is also because they are mutually supporting and cross-fertilising: as many of these essays vividly show, human rights can and must protect art and artists; and by the same token artists are uniquely placed to build trust and faith in the "human rights project". As joint editor Fiana Gantheret says in her introduction to the volume: art "has the power to translate universal concepts such as dignity and humanity into a subjective rendition" and thus "is a pathway to cultural individuality, which in turn allows us to understand universal concepts in their different 'époques', in the contemporaneity of their times".[1] Moreover, the essays make clear that, when in dialogue with each other, art and human rights can "shed a new light on one another" and help "(re)discover underlying meaning and values".[2]

With these strong themes of dignity and universality as the linking golden thread, the volume is divided into three parts: I. Peace and the Right to Art; II. Conflict(s); and III. Post Conflict Approaches. And each part is itself subdivided, part I into sections on the Right to Culture, the Right to Artistic Expression, and Art and Social Justice; part II into sections on Representation of Conflict Through Art, Art as a Catalyst for Charge, and Art as the Target of Conflict; and part III into Art in Non Judiciary Transitional Justice Mechanisms, International Criminal Justice, and Art and Restitution of Cultural Property. Finally, in her excellent concluding chapter Marina Askenov revisits and re-ties the book's pervasive threads of universality and dignity and expertly links these with the theme of aesthetics and of the "five great elements" of Indian philosophy, making the compelling argument for the

[1] Page 11.
[2] Page 6.

importance of art and cultural rights as not 'merely [. . .] a luxury' but a 'fundamental human need'.[3]

Of course, if it is accepted that art can be a force for good, and essential for human flourishing, it must also be accepted that it may be a force for the bad, and/or be used as a means for oppression. Several of the chapters in the volume explore these dangers. Thus in part II Henry Redwood and Hannah Partis-Jennings examine how art has been used to legitimise conflict-related violence, for example in the context of Afghanistan; and Predrag Dojčinović explores how propaganda, for example in the form of epic verse such as the 19th century Serbian poem "The Mountain Wreath", has been used as evidence of criminal intent at the International Criminal Tribunal for the Former Yugoslavia.

Part I – "Peace" – commences with a comprehensive and thorough explanation of the human rights frameworks in international law in relation to art and culture, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the work of the Special Rapporteurs in the Field of Cultural Rights whose mandate opened in 2009 and whose reports have exerted major influence in the field. The chapter concludes that "a right to art" both in terms of the "making and the enjoyment of it, can be said to have emerged".[4] And reflecting (in the wake of the COVID-19 pandemic in which these chapters – it must be remembered – were written) on the oft-ventured assertion that art is in fact a luxury and not properly the subject of human rights, concludes with a quote from the author Stephen King: "If you think artists are useless, try to spend your quarantine without music, books, poems, movies and paintings".[5] Following on with the pandemic theme, in the next essay Elsa Stamapolou examines the human rights issues that artists face in "normal" times and how these have been exacerbated during COVID-19 – with particular emphasis on the culture and rights of indigenous peoples.

The following two chapters focus on an area that might traditionally be seen as falling squarely within the field of art and human rights – that of the right to artistic expression. The founder of the Ramallah Ballet Centre on the West Bank, Shyrine Ziadeh, together with academic Rose Martin, explore movingly, and in conversational form, the notion of space and freedom and its relationship with democracy in some of the most troubled areas of the world. And Laurence Cuny offers a compelling analysis on the right of artistic freedom in international law by explaining how there has been a shift in focus away from freedom of expression and the individual right of the artist, towards a collective audience right to artworks (which can be an "invaluable contribution to vibrant cultures, democratic societies and cultural diversity").[6] She also reminds us that involvement in the arts is itself a "human rights statement" – an important point since there can be an instrumentalist tendency "to provide protection *only* to those artists that engage in political work".[7] In the following essay, dance ethnologist and writer Toni Shapiro-Phim, and choreographer and dancer Germaine Ingram, engage in a dialogic enquiry – an "active interdisciplinary engagement" – about those absent and misrepresented stories of black individuals and communities against the backdrop of historic and contemporary "anti-blackness" in the USA.

In the section on art as catalyst for change in time of conflict, Bernadette Buckley explores the "artist's war on war" of Berthold Brecht, the playwright's "life-long struggle to deploy aesthetic methodologies specifically as weapons of, or against war".[8] In so doing, Buckley draws

[3] Page 347.

[4] Page 37.

[5] Stephen King, *Twitter*, 3 April 2020.

[6] Page 76.

[7] Page 86.

[8] Page 166.

parallels with the contemporary "Forensic Architecture" movement in which a multitude of architectural techniques are used to turn "forensics into a counter-hegemonic practice able to invert the relation between individuals and states, to challenge and resist state and corporate violence and the tyranny of their truth".[9] Following on, Roula El Derbas gives an overview of the concept and practice of "cultural diplomacy" and its role in international relations; and Michael Danti describes the challenges and strategies for preserving and protecting cultural property, art and antiquities in some of the most challenging areas of the world, Libya, Syria and Iraq in which "performative destructions of cultural heritage" have been used as a means of promoting radical ideologies.

The final part of the book comprises essays on the vital role that art and the artist can play in post-conflict and post-colonial societies, and in the context of transitional justice. Within these contexts, societal divisions are often still very strong and conflicting narratives are an integral part of those societies. Thus, recognising that the interpretation of the past cannot be the sole "prerogative of historians" these chapters argue that art can become a "powerful ally in understanding these narratives".[10] With this in mind, Rachel Kerr examines the invocation of art in and around truth and reconciliation commissions in Sierra Leone and Canada; and curator Sofia N. González-Ayala explores the role of museums in opening dialogue and facilitating healing for victims through symbolic reparations processes – mandated by judicial decisions under the Special Jurisdiction for Peace – in Columbia. Next, Sofia Stolk, one of the editors, examines the use of visual art as a way to reach out to communities, with a particular focus on the use of art and documentary films by the International Criminal Court (ICC), and indeed the symbolic and real tensions between accessibility and security within the architecture of the ICC itself. Staying with the ICC, Marina Lostal considers orders for reparations for the destruction of cultural property, focusing on the *Al Mahdi* case involving the destruction of cultural and religious heritage in Timbuktu in 2012.

The final two substantive chapters interrogate the critical issue of restitution of cultural property. First, Kamil Zeidler and Agnieszka Plata look at disputes over the return of cultural objects taken during World War II; and Alessandro Chechi discusses the increasingly pressing problem of the repatriation of objects of cultural, artistic or spiritual importance looted during the colonial era from colonised territories.

This brief review cannot begin to provide the merest glimpse of the depth and breadth of coverage of the essays in this book. The editors must be congratulated for what is a magnificent achievement, which deserves to become essential reading for academics, lawyers, activists, artists and all those interested in this most fascinating and important of areas. As the former UN Special Rapporteur in the Field of Cultural Rights states in her foreword to the book, in the context of a "world in turmoil" this edited volume is "very timely" and "reminds us of all ways in which art is both an essential and powerful tool for the development of democracy and also an easy target of repression in times of war and peace."[11] As such this collection comes at a crucial time, and it deserves to be widely read.

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[9] Page 182, quoting Forensic Architecture (ed), *Forensis: The Architecture of Public Truth* (Sternberg Press 2014), 10.

[10] Page 15.

[11] Page "x".

LAW AND ARTIFICIAL INTELLIGENCE

The International Governance of Artificial Intelligence, by Mark Chinen
United Kingdom, Edward Elgar, 2023, 388 pp, Hardback, £105, ISBN 978 1 80037 921 3

The regulation of artificial intelligence (AI) is a topical issue. Industry leaders have expressed concerns about the regulation of AI and governments are attempting to tackle the issue. In the global economy, the regulation of AI is an international matter, with various competing interests. Only a few countries have the technology to produce machines that use AI, and will want to market their products to the widest extent. Within this context, *The International Governance of Artificial Intelligence* looks at emerging efforts to govern AI. The rapid pace of this technology results in difficulties in regulation, and also difficulties in describing the issues – so any book in this area will potentially suffer from being out of date fairly quickly. This book addresses this by describing the sources of law and the dynamics that will shape the law, with the adaptability of regulatory mechanisms being key.

Mark Chinen has previously published on international law and also published a monograph on law and autonomous machines in 2019.[1] The book is divided into four parts: 1) the need for regulation and the framework; 2) the stakeholders and actors in the regulatory milieu; 3) international perspectives and geopolitics; and 4) conclusions.

Within Part 1, Chapter One is key to understanding the regulation of AI. Chinen lays out the particular characteristics of AI that require a different approach to previous digital technology. He does not go into great details about the definition of AI. There is a brief discussion of machine learning and the implications, though one might have expected to see greater analysis of the problems that AI causes in terms of liability and causation. The issue of the legal status of AI is arguably the most fundamental issue with the regulation of AI, with the implications this has for legal liability. There is discussion of the sociological literature on the regulation of technology, including Collingridge's dilemma (which posits that, paradoxically, the impacts of technology will be difficult to measure understand *until* that technology is widely in use, while also warning that change will become difficult once a technology has become societally entrenched).[2] The effect of anticipatory governance in overcoming the difficulty posited in Collingridge's dilemma is, though, arguably rather glossed over.

Chapter Two deals with the important issue of what type of regulation is appropriate for AI. There is a discussion of the work so far on AI ethics. The author does not acknowledge that four of the five principles of Morley *et al* are the well-known principles of Beauchamp and Childress.[3] It would also have been useful to discuss the way that Scotland has approached the use of population health data, with input from the public informing the approach taken for the Scottish Health Informatics Programme.[4] The public acceptance of this project contrasts with the furore whipped up by the abortive care. data project in another part of the UK.[5]

Part 2 forms the bulk of the work, looking at the various contributors to international governance of AI. Chapter 3 examines the role of the market, which is very significant in this area. In this sector in particular, there are multinational corporations whose value exceeds the GDP of large, developed countries, though laws to restrict the activities of tech giants are

[1] *Law and Autonomous Machines,* Cheltenham: Elgar, 2019.

[2] *The Social Control of Technology,* London: Pinter, 1980.

[3] *Principles of Biomedical Ethics,* New York: OUP USA, 2019.

[4] Mhairi Aitken, Sarah Cunningham-Burley, and Claudia Pagliari. 'Moving from trust to trustworthiness: Experiences of public engagement in the Scottish Health Informatics Programme.' 43 *Science and Public Policy* (2016) 713.

[5] Pam Carter, Graeme Laurie, and Mary Dixon-Woods, 'The Social Licence for Research: why care data ran into trouble' 41 *Journal of Medical Ethics* (2015) 404.

notoriously difficult to pass in California, home of Silicon Valley, where the headquarters of such corporations are generally based. Conversely, while these tech giants possess the necessary access to the vast amounts of data required to create and improve AI, national limits of data flows on the basis of data sovereignty are a major block to this (this is dealt with further in Chapter 6).[6] Other national concerns around data sharing concern national security, hence the recent ban of TikTok from government devices in the UK.[7]

There is discussion of the influence of corporate social responsibility initiatives on the behaviour of corporations. This is currently a political hot potato in the UK and elsewhere, with concerns over the recent 'de-banking' furore and control over information dubbed as 'fake news'.[8] AI has been posited as one of the solutions to the problem of hate speech and disinformation, but the issue of the current level of sophistication of natural language processing makes this a future aspiration rather than a firm reality for now. As Oscar Wilde put it, 'Sarcasm is the lowest form of wit but the highest form of intelligence', and sarcasm appears difficult for AI to detect.

Chapter 4 deals with the developers of AI, Chinen acknowledges the importance of incorporating ethics into AI from an early stage. This is an issue that could have been developed further given the poor track record of large tech companies in engaging with the ethics bodies they set, as the treatment of Timnit Gebru demonstrates.[9] The depth of commitment of tech giants to ethical development of technology is questionable, although it is notable that individual companies have steered clear of entire sectors because of concerns. This is sometimes due to orchestrated pressure from employees. This is particularly true for dual-use technology, which is often problematic for the European Union (EU).[10]

As with all sectors reliant on innovation, there is lots of cooperation between industry and academia. Chinen notes that academia has tended to work with non-governmental organisations rather more, which avoids conflicts of interest. Academic projects will benefit from robust research ethics approval and institutional governance.

In chapter 5 there is acknowledgement of the considerable interplay between tech giants such as Microsoft, Apple, Amazon and Meta, and of the role of States in this regard. Data sovereignty is an emerging issue, and the accumulation of large amounts of text is vital for the creation of large language models (which are integral to the development of AI).[11] Going onto international law and organisations in Chapters 6 and 7, the EU has seen this play out with the decision in *Schrems*.[12] The reaction of the EU to the decision demonstrates the power of the 'tech giants' (and led to further litigation by Schrems).[13] Moreover, different States have fundamentally different approaches to personal data, with some viewing it as a communal resource to be used for the common good. An example of this would be the access

[6] Monika Zalnieriute. 'Data Transfers after Schrems II: The EU-US Disagreements over Data Privacy and National Security.' 55 *Vand. J. Transnat'l L*. (2022) 1.

[7] Chas Geiger & Zoe Kleinman, 'TikTok: UK ministers banned from using Chinese-owned app on government phones' (*BBC News*, 17th Mar 2023) https://www.bbc.co.uk/news/uk-politics-64975672 accessed 6th Dec 2023.

[8] Jessica Vredenburg, Sommer Kapitan, Amanda Spry, and Joya A. Kemper, 'Brands taking a stand: Authentic brand activism or woke washing?' 4 *Journal of public policy & marketing* (2020) 444; Aubrey Allegretti, 'Anti-protest laws and culture wars weakening UK's democracy, finds report' (*Guardian*, 2nd Aug 2023) https://www.theguardian.com/politics/2023/aug/02/anti-protest-laws-and-culture-wars-weakening-uks-democracy-finds-report accessed 6th Dec 2023.

[9] Cade Metz and Daisuke Wakabayashi, 'Google Researcher Says She Was Fired Over Paper Highlighting Bias in A.I.' (*New York Times*, 3rd Dec 2021) https://www.nytimes.com/2020/12/03/technology/google-researcher-timnit-gebru.html accessed 6th Dec 2023.

[10] Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast).

[11] Patrik Hummel, Matthias Braun, Max Tretter, and Peter Dabrock. 'Data sovereignty: A review.' 8 *Big Data & Society* (2021) 1.

[12] Case C–362/14, *Schrems v. Data Protection Commissioner*, ECLI:EU:C:2015:650.

[13] Case C-311/18 *Data Protection Commissioner v Facebook Ireland and Maximillian Schrems* EU:C:2020:559; Christopher Kuner, 'Reality and illusion in EU data transfer regulation post Schrems' 4 *German Law Journal* (2017) 881.

to health data allowed by Israel in return for early access to COVID-19 vaccines during the pandemic.[14] EU regulation will have a powerful impact here due to the economic power of the trading bloc,[15] an influence that may be sufficient to drive up global standards. Likewise, California has a great influence over the rest of the United States.

Chapters 8–10 deal with international aspects of AI law and governance. Attention must be paid of the specific uses of AI that cause the most concern and attitudes to them in different States. Governmental use of AI is potentially the most worrying use, partly because citizens will find this use the most difficult to avoid. It is clear therefore that States have an important role in setting international norms, and that national governments should be amenable to a greater or lesser degree to the influence of their citizens to avoid a democratic deficit in data governance. However, due to the necessary interconnections that underpin the development and use of AI, international law is vital for the regulation of this technology. The economic influence of the EU means that it will be a key influence on this technology.

In conclusion, this monograph is arguably light on examination of the particular legal issues around AI that arise from the difficulty in designating the nature of this technology. The same could be said about the ethical issues. These play a pivotal role in the national governance of AI. However, these issues are not the focus of the work and it does deal comprehensively with the issues of international governance of AI and how this arises. This is a rapidly evolving field and nation-states will need to respond to emerging issues, so it will be interesting to see which supranational bodies will tackle them and how they will do so.

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[14] Ilan Ben Zion, 'Israel trades Pfizer vaccine doses for medical data' (PBS, 18th Jan 2012) < https://www.pbs.org/newshour/science/israel-trades-pfizer-vaccine-doses-for-medical-data> accessed 10th Dec 2023.

[15] Anu Bradford, 'The Brussels Effect' 107 *Northwest University Law Review* (2012) 1.

INSOLVENCY LAW

Re-examining Insolvency Law and Theory Perspectives for the 21st Century
Edited by Emilie Ghio, John M. Wood and Jennifer L.L. Gant
United Kingdom, Edward Elgar, 2023, 312pp, £115.00, ISBN 978 1 80392 875 3

Students of corporate insolvency law are often faced with difficult scenarios where a company does not have enough money to pay all of its creditors in full. The approach which is taken in these circumstances will not only impact on creditors but also on stakeholders, such as employees or customers or local communities.[1] In hard cases these wider interests can conflict with the interests of creditors as, for example, keeping a non-viable business running temporarily to avoid impacts on the local community can reduce the amounts available for creditors. Theory can help to determine optimal approaches in difficult cases but students of insolvency law often consider only scholarship from the 1980s and 1990s, when there was a boom in literature on insolvency theorisations. This edited collection has a rich range of resources which can offer alternative inspiration. Rarely, however, have more general theorists engaged with insolvency topics, John Finnis being a notable exception.[2] Other theoretical approaches that might provide helpful starting points might be gained by wide reading and readers can now gain an easier foothold to this through this edited collection. The seventeen chapters take readers through a wide range of philosophical approaches, including perspectives on theorists Dworkin, Nietzsche, Rawls and Fineman as well as insights from theorisations in other disciplines of human rights and company law. Inevitably there is some overlap between the 17 chapters in discussion of previous insolvency theories and, on occasion, non- insolvency theories.

The 1980s and '90s scholarship discussed above was sparked by a normative theorisation of insolvency law in the late 1980s that had regarded insolvencies as a "common pool" problem.[3] This economically minded approach saw creditors as individual claimants to a limited pool of assets, who have incentives to act in a self-interested way, causing damage to the interests of creditors as a whole. Enforcement by one creditor with good information and resources can result in an advantage for that creditor but with other creditors receiving little if anything. Insolvency laws are seen to respond to the common pool problem by imposing a moratorium on creditor claims and implementing a collective system for the resolution of claims in line with policies as to where losses should fall. The justification for these claims is explained as resting on a hypothetical "creditors' bargain" that is said to be the system that creditors would choose if they were behind a Kantian "veil of ignorance" and therefore unaware of their own positions. The advantage of this creditors' bargain theory, hereafter "CBT", was in offering a clear and predictable approach, with non-creditor interests being addressed outside of the insolvency system, for example through social security systems.

The CBT reflects the approaches taken in many insolvency systems and the book includes a chapter by Jason Harris which discusses the CBT in detail and analyses how it is reflected in Australian law, ultimately concluding that it is in fact neither accurate nor helpful in understanding what insolvency is or how it operates. It is also notable that the CBT is liquidation-focused and fails to offer clear justifications for restructuring. Yet in recent years restructuring has become much more of a focus for legislatures. In another chapter, Stephan

[1] See e.g. *Re Baglan Operations Ltd* [2022] EWHC 647 (Ch); *Re Pantmaenog Timber Co Limited* [2004] 1 AC 158.

[2] Discussing bankruptcy as an example of distributive justice: John Finnis, *Natural Law and Natural Rights* (OUP, 1980; second edition 2011), 188–193.

[3] See Thomas Jackson, *The Logic and Limits of Bankruptcy* (Harvard University Press, 1986).

Madaus emphasises that restructuring is now an autonomous field of law. He therefore considers how a separate theorisation for restructuring law is needed. He notes that the complexities of restructuring in advance of a crisis create factors not present in a liquidation and tools are needed to achieve an agreement as to how the burden of restructuring should be shared. A contractual basis for restructuring is much more clearly evident and a hypothetical creditors' bargain, as underpinning the CBT, is no longer needed when creditors can and do bargain in real life contexts.[4] Also critical of the CBT is Lezelle Jacobs, who applies a feminist theory lens and finds the CBT to be too narrow, finding feminist ideology to be better reflected in other theories, including the Team Production theory of Blair and Stout.[5]

Of course, there were many critiques of the CBT in the years following its introduction, as being under-inclusive, being approached only around the interests of creditors and ignoring the interests of stakeholders. Considerable scholarship in the 1980s and '90s by scholars such as Elizabeth Warren[6] and Donald Korobkin[7] advocated approaches that paid greater regard to the interests of stakeholders yet their suggested approaches often lacked clear guidance in the way that creditor focused theories do. In this volume there are several chapters including that by Jennifer Gant, discussed later, that build on this scholarship.

The first chapter by Paul Omar offers reflections on morality, building upon a range of classical sources including Abrahamic beliefs and Roman societal perspectives, bringing out the nuanced approaches in these systems. Or course attitudes to the morality of overindebtedness have changed over the years. Attitudes to morality have led to restrictions on personal insolvency, and remain influential in many countries, still preventing discharges of debts of insolvent individuals. This chapter also points out positive influences and ultimately aids understanding of historic sources, but without advocating any approach to morality. More modern trends towards liberalisation of policies towards bankruptcy in more recent years are traced in David Milman's chapter. An eclectic approach is taken in this chapter, with regard to religious texts as well as the influence of literature and comparative law in leading to a softening of attitudes. A pattern of liberalisation is traced in UK legislation.

There are also chapters on more abstract concepts. John Wood's chapter on decision theory builds upon his earlier work on insolvency practitioner discretion and considers insights for the restructuring moratorium and restructuring plan, introduced to the Insolvency Act 1986 in 2020, discussing the variables that are to be considered in rational decisions, which can often not be well known in advance, as well as how rational outcomes can be achieved even if a course of action is not optimally rational.

Both the chapter on human rights perspectives and the chapter on vulnerability discuss Martha Feinman's work. Jennifer Gant traces the development of stakeholder theory before using Feinman's work in proposing an approach to fairness in insolvency cases. Vulnerability theory is used as a critical lens through which to view the scholarship of the 1980s and '90s, as discussed above, before highlighting Feinman's contribution in more detail. The chapter concluded with a promise of future work which would identify how vulnerability can be used to provide more concrete means to balance stakeholder interests in insolvencies. Eugenio Vaccari and Tara Van Ho use Fineman's work to challenge the CBT's approach of basing entitlements on the pre-existing status of creditors, whilst noting also some pragmatic limitations of the theory, and highlighting how human rights approaches can offer a fresh approach to insolvencies that would have greater flexibility to recognise the impacts of insolvency proceedings on vulnerable stakeholders.

[4] See also Barry Adler, 'The Creditors' Bargain Revisited', (2018) 166 University of Pennsylvania Law Review 1853.

[5] Margaret Blair and Lynn Stout, 'A Team Production Theory of Corporate Law' (1999) 85 Virginia Law Review 284–328.

[6] Elizabeth Warren, 'Bankruptcy Policymaking in an Imperfect World', (1993) 92 Mich. L. Rev. 336.

[7] See e.g. Donald R. Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) 71 Tex L Rev 541.

Sometimes chapters are more focused on aspects of insolvency law, rather than whole systems. Catherine Brown and Colin Anderson's chapter considers Dworkin's rights thesis and equality theories in relation to the contentious approach to treatment of tax claims. Laura Coordes discusses successor liability principles, noting tensions with US bankruptcy law's approach to purchasers of distressed businesses under s 363, who acquire their interests "free and clear" of the seller's liabilities.[8] This chapter is particularly interesting in discussing recent notorious cases in which the absence of successor liability has been exploited by companies facing large liabilities opportunistically using business transfers and releases of third-party liabilities such as guarantees to limit their exposure in ways that would not have been contemplated when the US bankruptcy code was enacted.[9] Debtor and creditor relations are the focus of John Tribe's chapter on Nietzsche, which provides a good introduction to a complex body of work, tracing the influences on Nietszche's scholarship with brief reflections on aspects relevant to debtor creditor relationships. Stathis Potamitis and Xenophon Paparrigopoulos examine insights from Rawls on approaches to preventive restructuring, finding approaches of fairness and equal treatment reflected in the EU Restructuring Directive[10] alongside aims of efficiency.

There are also contributions based on other areas of law or academic disciplines. Alasdair MacPherson discusses property law aspects of insolvency, discussing underlying concepts of property and how different assets are treated in insolvencies, as well as the interdependency of property law and insolvency law. Johnny Hardman considers the interrelationship between insolvency law and company law. The impact of insolvency law on company law is clearly evident in aspects like the limited liability of shareholders for the company's debts, as well as aspects of directors' duties. The chapter also highlights how asset partitioning prevents the creditors of shareholders from accessing the company's assets to pay the shareholder's debts. In a fresh approach he both sees insolvency law as framing corporate law issues and views it as a base line status, with rules for companies which are solvent being temporary deviations from it. Emile Ghio offers reflections on the EU harmonisation process and insights that can be gained from behavioural psychology.

Typically of a handbook the chapters are concise and effective introductions that raise key issues and will provide a platform for deeper considerations of the points raised through further reading. Even for experienced scholars there will be fresh insights. Inevitably, there are some complex points that can't be developed in detail in introductory chapters of this length (most of which are under 7000 words). In many instances, however, readers will be able to find further scholarship in other work by the authors of chapters, where they have developed the themes in more detail.

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[8] 11 USC, s 363(c).

[9] See also more recently the US Supreme Court's decision in Harrington v. Purdue Pharma L.P. (27 June 2024) available at <https://www.supremecourt.gov/opinions/23pdf/23-124_8nk0.pdf>

[10] Directive (EU) 2019/1023.

ECONOMIC CRIME

A Research Agenda for Economic Crime and Development
Edited by Barry Rider
United Kingdom, Elgar Research Agendas, 2023, 266pp, £295.00, ISBN: 978 1 80220 137 6

A Research Agenda for Economic Crime and Development, edited by Barry Rider, provides a comprehensive exploration of the relationship between economic crime and development. "Economic crime" is an umbrella term used by the authors to encompass corruption, money laundering, bribery, fraud and tax evasion, and their impact on economic growth and stability over nine chapters. The first chapter is authored by Rider, while the remaining eight chapters are by a diverse group of authors globally, each bringing their own views from their respective jurisdictions, and issuing recommendations using their experience and expertise.

Using "economic crime" as an umbrella term, the book covers a wide range of topics, including: theoretical and practical aspects of economic crime; its impact on governance, institutions and economic development; and recommendations on combating it. In the preface, Rider clarifies that the collection is not intended to be a comparative analysis of different areas of economic crime, rather it is an attempt to collate the perspectives and experiences of the authors with an aim to stir up discussions on the topic.[1]

The first chapter lays out an overview of the book's theme which is the impact of economic crime on development, highlighting the lack of research in this interdisciplinary area of law and development.[2] The challenges faced by developing nations in preventing economic crimes due to, for example, limited resource allocation and understaffed or underdeveloped institutions are noted as particularly important issues.[3] Various approaches undertaken by developed nations to combat economic crimes are discussed, such as the role of intelligence agencies, sharing technical information/assistance, providing training and enhancing cooperation.[4] However, the drawbacks of such traditional measures include the risk of information being compromised or a lack of understanding of local practices. Rider stresses the importance of understanding local contexts before copy-pasting western practices and concludes by encouraging greater research in this area.[5] Overall, the chapter is comprehensive in addressing the main themes of the book.

The second chapter is by Ingrida Kerusauskaite, focusing on the relationship between economic crime, security and sustainability.[6] The chapter begins by identifying a crucially ignored impact of the Covid-19 pandemic whereby the risk of economic crimes was ignored by governments and other stakeholders, particularly on development aid projects. The author recommends further research into balancing aid flows during international emergencies and how to sustain long term development targets during such times of crisis.[7] The focus then shifts to emerging threats such as, for instance, the risks that cybercrime poses to national elections and the subsequent instability this may lead to. Kerusauskaite also highlights the global migration crisis and particularly the unequal treatment of refugees from other regions of the world compared to, for example, Ukrainian refugees in Europe, highlighting national

[1] Page xxii.
[2] Page 2.
[3] Page 25.
[4] Page 25.
[5] Page 42.
[6] Page47.
[7] Page 49; Department of Health & Social Care, 'Investigation into the management of PPE contracts' HC1144 (30th March 2022) < https://www.nao.org.uk/wp-content/uploads/2022/03/Investigation-into-the-management-of-PPE-contracts.pdf> accessed 20th May 2024.

security concerns in the wake of Belarusian border authorities forcibly pushing refugees to the Polish border, creating a new form of 'hybrid warfare'.[8] There is a suggestion to conduct further research into the financing behind these migrant journeys, a topic that has garnered little interest from academics in comparison to other areas of refugee migration research. In relation to this, the author also raises the issue of environmental security and climate change refugees stemming from mismanagement of international funds due to economic crimes such as corruption, this being another area that has been under-researched.[9] In conclusion, Kerusauskaite describes the impact of economic crimes on tax revenues, the environment, and national security, and summarises the lack of resources available to States to combat illicit financing. A recommendation is made for States to attempt to understand the root causes of economic crimes and to tailor adequate countermeasures.[10] Another interesting suggestion is to incorporate academic researchers within "on the ground" teams for faster data sharing to understand the root causes of economic crimes and devise solutions.[11]

Dayanath Jayasuriya's chapter focuses on economic crime in developing and transitional economies, highlighting the vulnerability of these States to cyber-attacks and other forms of economic crimes due to increased globalisation and easy access to information.[12] Jayasuriya additionally documents problems faced by developing economies in combating financial crimes due to outdated laws, law enforcement bodies having limited resources, deficient international cooperation and even some instances of economic crimes committed by foreign diplomats. The author selects some interesting niche areas of discussion which are rarely covered elsewhere, but which are nevertheless highly relevant.[13] The chapter documents the Bangladesh Bank Heist, which involved a carefully planned cyberattack to steal $1 Billion from the Bangladesh central bank, and also Sri Lanka's bankruptcy in 2022 due to widespread corruption. It is refreshing to see some commentary on the impacts of these two incidents, which have otherwise generated little discussion in academic circles.[14]

Patrick Rappo's chapter focuses on corruption and its impact on development. Three approaches are recommended to tackle corruption: transparency, digitisation, and consideration of social norms.[15] The role of The Organization for Economic Cooperation in fighting anti-corruption and integrity and the United Nation's Sustainable Development Goals (SDGs) in enhancing transparency are discussed, though the author cautions that transparency alone is not a silver bullet to eradicate corruption.[16] A workable solution is suggested in the form of digitised e-tenders in developing nations for public projects.[17] Alongside enhancing transparency, Rappo emphasises the need for enhanced monitoring at the post-tender stage (using artificial intelligence to block entry points of corruption) alongside consideration of historical and social contexts and further research in these jurisdictions.[18]

Dominic Thomas-James's chapter focuses on anti-money laundering efforts, particularly in offshore financial jurisdictions or "tax havens".[19] Thomas-James observes that funds spent on Anti-Money Laundering (AML) initiatives do not correspond with the sums of laundered funds eventually recovered. The Financial Action Task Force's (FATF) concern about money

[8] Page 56.
[9] Page 57.
[10] Page 67.
[11] Page 72.
[12] Page 75.
[13] Page 80.
[14] Page 87.
[15] Page 93.
[16] Page 102.
[17] Page 106.
[18] Page 116.
[19] Page 117.

laundering's effect on financial systems are discussed, with some history of AML measures originating from the war on drugs in the 1970's-1980's era.[20] Crucially, the author identifies why most British Overseas Territories have booming financial sectors but poor public facilities such as healthcare, as most youths have a tendency to move abroad for higher education, resulting in lack of higher education institutions. The Panama and Paradise papers particularly exposed the lack of compliance in these jurisdictions.[21] Thomas-James recommends further research on understanding the underlying issues in offshore jurisdictions, studying the ongoing challenges, and considering enhanced transparency as a tool to be used against money laundering.[22]

Rohan Clarke's chapter discusses challenges to the sovereignty of developing economies created by international interventions against economic crime. Technological progress in "fintech" and globalisation has benefitted cross-border illicit markets, undermining State control over these activities inside their jurisdiction. For example, Clarke claims, international bodies such as the FATF often infringe the sovereignty of developing economies by intimidation through the threat of international sanctions or imposing regulatory standards. The author's view that international metrics imposed on developing states are often developed without their input would indeed seem to be supported by case studies. In Bangladesh, for instance, the International Monetary Fund has imposed strict unilateral economic contractual requirements as a prerequisite to any loans made.[23] Clarke recommends that the sovereignty of developing nations should hold more weight at the global stage in efforts against AML and Combating the Financing of Terrorism (CFT).[24]

Chizu Nakajima's chapter discusses the shifting focus towards sustainability, Corporate Social Responsibility (CSR) and Environmental, Social, and Governance (ESG) considerations. Nakajima notes, particularly, the interaction between these emerging areas and conventional corporate governance which generally has more focus on profitability and shareholder primacy.[25] As such there has been little scholarly literature connecting governance, integrity, and SDGs. Shareholder primacy results in short term goals instead of long-term sustained performance, but the 2008 financial crisis and high-profile corporate scandals have called this strategy into question.[26] Some initiatives aimed at rethinking the responsibilities of corporations include a reexamination of UK company laws, and for the UN's ESG definition to be taken into account in reaching investment decisions.[27] The author highlights that CSR should no longer be voluntary, and that several laws require corporations to consider stakeholder requirements collectively, rather than this being solely the role of shareholders.[28] Further interdisciplinary research is suggested to connect governance and responsibility and to push corporations towards SDGs while preventing economic crimes.[29] The chapter is a comprehensive analysis of the underlying issues with corporate governance in the 21st century (absent only, perhaps, the issue of "greenwashing" by corporations, and the role of institutional investors).

Louis de Koker's chapter scrutinizes the effectiveness of AML, CFT, and Counter Proliferation Financing (CPF_ measures in combating corruption in developing economies. The key focus is on enhancing FATF standards by introducing the concepts of PEP (Politically

[20] Page 120.
[21] Page 125.
[22] Page 133.
[23] Samiul Karim, 'IMF loan conditions: Catalysts or constraints?', *Dhaka Tribune*, 27th April 2023.
[24] Page 149.
[25] Page 155.
[26] Page 155.
[27] Page 160.
[28] Page 165.
[29] Page 166–169.

Exposed Persons), enhanced emphasis on beneficial ownership transparency and improving the governance of Financial Intelligence Units. The chapter draws recent examples from South Africa to demonstrate the positive and negative aspects of these measures.[30] The author identifies the problems in managing and identifying PEPs due to the ambiguous FATF definition of a PEP along with problems which arise when identifying beneficial ownership. To counter this, de Koker recommends that the AML/CFT/CPF agencies develop better governance practices.[31] A potential solution to identifying the beneficial ownership problem is the usage of simplified corporate forms for small and medium businesses which will potentially reduce the way complex ownership structures are abused without stifling national economic growth.[32] De Koker concludes that crucial questions surrounding AML/CFT/CPF measures aimed at combating corruption require more research to determine which measures work and which do not. What often works in one jurisdiction might not work in another; keeping this in mind may be beneficial while drafting such frameworks.[33]

Antonello Miranda's chapter on comparative perspectives in fighting organised crime discusses the challenges raised by such offences and suggests approaches to combating it, while ensuring compliance with applicable laws and regulations. This is done through a comparative lens.[34] The first issue identified is the fact that general comparative legal research currently focuses only on comparing rules between legal systems, which is inadequate to counter transnational crimes. The solution to this can be to include socio-political and economic contexts, especially if conducted properly in developing economies where corruption is rampant.[35] Another unorthodox suggestion is to not rely completely on criminal law, rather using other legal measures to combat crimes such as human trafficking. This can potentially be achieved by simplifying legal migration, giving employers incentives to hire legal migrants and using competition and consumer protection laws to combat exploitative practices by corporations. This is currently being implemented across the EU, for example.[36] Miranda presents some valid criticism of existing compliance frameworks, which he deems to be too "rules based", punitive and being possibly even counterproductive. The suggested solution is for a collaborative and mediative approach to ensuring compliance which would in turn be more convenient and potentially more rewarding. Furthermore, Miranda advocates for disincentivising non-compliance by using civil laws such as antitrust, competition laws and consumer protection laws rather than solely relying on criminal laws.[37] In conclusion, the author suggests we develop a better understanding of real world and region-specific contexts, use a mixture of incentives and disincentives from civil laws and have a collaborative mindset to make it more appealing for businesses to comply with laws.

Overall, each chapter of the book contributes to various under-researched aspects on the relationship of economic crime and development, each with a different angle and experiences from different corners of the world, making the book very enriching in terms of legal scholarship. The majority of the authors recommend areas of further research which can potentially solve existing problems and prevent the impact of future threats arising from economic crimes. The book also illustrates how little research has been done in this particular field.

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[30] Page 175.
[31] Page 181.
[32] Page 189.
[33] Page 199.
[34] Page 205.
[35] Page 210.
[36] International Labour Office, *International Labour Migration: A Rights-Based Approach* (International Labour Office 2010).
[37] Page 222.

NOTTINGHAM LAW JOURNAL

CASE NOTES

The address for submission of case notes is given at the beginning of this issue

Kaur v The Estate of Karnail Singh, Avtar Singh Lally & Jagtar Singh Lally
[2023] EWHC 304 (Fam); [2023] All ER (D) 55 (Feb)

Peel J
Mr Oliver Ingham for the Claimant;
Second Defendant self-represented;
Third Defendant unrepresented and did not attend.

SUMMARY

The case concerned a claim for financial provision out of the estate of a deceased spouse under the Inheritance (Provision for Family and Dependants) Act (hereafter, I(PFD)A) 1975. It raises a number of significant points, including the importance of the so-called 'divorce cross check' at s. 3(2) of the Act, and about the optimal way of presenting these claims procedurally. It is likely to be of considerable assistance in moving straightforward spousal claims to a swift and cost-effective conclusion.

FACTS

The claimant and the deceased were married for 66 years and had six surviving adult children: four daughters and two sons. The claimant had fully participated in the marriage, including working in the family clothing business without a salary. She had at all times been financially dependent on the deceased, who met all household outgoings. The Judge noted that she was a wife who had made a full and equal contribution to the marriage on the lines of *White v White,*[1] which established the 'yardstick of equality' concept when assessing matrimonial entitlement on divorce; this point was not contested. At the time of the hearing, she was 83 years old and registered disabled. She was living with one of her daughters.

The deceased had left his entire estate in equal shares to his two sons, who were also the executors. Other family members, including the claimant, were excluded because the deceased 'wished to leave his estate solely down the male line'.

The I(PFD)A 1975 provides a route for those who, like the claimant in this case, are excluded from the distribution of the estate, to advance a claim that that distribution does not represent reasonable financial provision for them. One category of such claimants, at s1(1)(a) of the Act, is the deceased's spouse.

One of the executors (D2) did not resist the claim and submitted no written evidence. The other, D3, appeared to be personally hostile to the claim but had simply refused to engage with the proceedings at all; he had not acknowledged service or submitted any evidence. The Judge therefore chose to treat the claim as undefended. There were no other claimants, and

[1] [2000] UKHL 54.

apparently there was no evidence about the financial needs or resources of the two beneficiaries (s3(1)(c)). At the hearing, the claimant was represented by counsel and D2 appeared in person. D3 neither attended nor was represented.

The main point of uncertainty at the date of the hearing was the size of the net estate, a factor which the Court is directed to take into account by s3(1)(e) I(PFD)A 1975. C estimated that it was worth about £1.99m gross; D2 appears to have submitted to the Court that the more likely value was about £1.2m gross.

The claimant expressed her claim as being for 'half the estate, whatever the value', and expressly set out at the hearing that any sum which she ultimately received would constitute reasonable financial provision, on the basis that 50% even of the lower figure would meet her needs. The uncertainty about the quantum of the estate (and therefore the quantum of the claim) could easily have led to an adjournment, particularly if the Court had expressed dissatisfaction about the wide spread of the valuations and sought more definitive evidence.

DECISION

Peel J found in favour of the claimant, awarding her 50% of the estate, in accordance with the Act.

REASONING

The 'divorce cross check' at s3(2) directs the court to 'have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a divorce order', but noting that 'nothing requires the Court to treat such provision as setting an upper or lower limit' on an Inheritance Act application. In *Ilott v Mitson*[2] at paragraph 13, the Supreme Court identified the main purpose of s. 3(2) as being to avoid, where possible, a result where the widowed family provision applicant is in a worse position than they would have been on divorce (paragraph 24 of the judgment). This is consistent with the overall approach, also emphasised in *Ilott*, that there is no 'maintenance limitation' on spousal claims.

Kaur v The Estate of Singh demonstrates the working through of this overall approach even where the amount of the net estate is uncertain. Here, there were no other claimants and the beneficiaries had not submitted any evidence of their financial needs or resources. There were therefore no contra-indications suggesting that this claimant was entitled to anything less than 50%, regardless of the value of the estate, and Peel J took the view that the Court did not need to make further enquiries in this context (para 27).

In doing so, he clarified that he was making the orders under the Part 8 'abbreviated inquiry' procedure. All Inheritance Act claims must be commenced as Part 8 proceedings, and Part 8 matters can be determined without oral evidence if there are no issues of fact. He noted that the Court would ordinarily not require or permit oral evidence, although it has the power to do so, unless it had been 'foreshadowed' in earlier written evidence and there was an obvious and *material* evidential *dispute* (italics added) (para 26). As we have seen, there was not in fact a dispute about the value of the net estate, but there was some uncertainty. Peel J took the view that this uncertainty did not prevent the Court from making a decision 'summarily', noting that the claimant was elderly and impoverished and that it would be unreasonable to prolong proceedings unless there was a clear justification for doing so (para 27). He further noted that in his view, there was no need to undertake a more detailed enquiry into the substantive merits by directing either further evidence or disclosure (para 27).

[2] [2017] UKSC 17.

COMMENT

Helpfully, Peel J went on to point out that although this decision was made under the abbreviated Part 8 procedure and was not therefore a summary judgment under Part 24 (where the threshold for success was higher), Part 24 judgments are generally available in suitable Inheritance Act proceedings. He further indicated that 'this seems to me the sort of case where a finding of summary judgment could be safely and properly made' (para 28).

This indication, and the general approach of Peel J, may be of very considerable assistance to those representing widowed spouses where (1) there are no viable competing claims on the estate and (2) all of the indications on the divorce cross-check are that the claimant would receive at least 50% of the assets. The judgment makes it clear that where these circumstances apply, there are good reasons to seek either a Part 8 judgment if there are no substantial material factual issues, or a Part 24 judgment if the evidence produced in defence of the claim does not appear to have real prospects of success.

One factor which Peel J appears to have found of particular assistance was the compliance by the claimant's solicitors with Practice Direction (PD) 27A (relating to trial bundles) of the Family Procedure Rules (FPR) 2010. Since *Re XY*,[3] it has been clear that this Practice Direction applies to Inheritance Act claims brought in the High Court even though CPR 57.15 stipulates that the Civil Procedure Rules will generally apply to such claims. FPR PD 27A in particular provides for up to date case summaries, statements of issues, position statements, chronologies and skeleton arguments, subject to an overall page limit of 350. Peel J commented that the full compliance with this PD had enabled the Court 'to get to grips swiftly with the factual background, issues, legal principles and suggested outcome' (para 5). While PD 27A is mandatory for Inheritance Act applications in the Family Division in any event, it clearly makes sense to comply as closely as possible with the requirements of the practice direction where an application is being made in the abbreviated procedure or for summary judgment.

The case raised one further interesting point. Inheritance Act claims cannot be issued in the Family Court.[4] They can be issued in any County Court with a Chancery District Registry, or in either the Chancery or Family Division of the High Court; but the Chancery Master's Guidelines of 2015 indicate that claims made by spouses will usually be suitable for transfer to the Family Division. However, as Peel J pointed out (para 7), the consequence of this is that all such matters must be heard by a High Court judge regardless of the total value of the estate. In contrast, financial remedies disputes with a total amount of less than £15m (which are, of course, commenced in the Family Court) will not normally be transferred to a High Court judge for hearing.

The result is that, where the Guidelines direct that a claim should be transferred to the Family Division, or the claimant believes that issue in the Family Division is appropriate (another example might be substantial claims for maintenance by a minor child or children), there is no jurisdiction lower than High Court judge level. In particular, the valuable work undertaken by District Judges in the former Principal Registry of the Family Division has been lost due to these changes and not replaced. Although the learned Judge's concerns appear to be directed primarily at efficient use of court and judicial time, the fact that highly experienced family judges at a lower level are no longer able to scrutinise and examine these cases represents a significant loss for litigation parties as well.

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[3] [2019] EWHC (Fam).

[4] President's Guidance of 24 May 2021, 'Jurisdiction of the Family Court'.

Made at home: Parental Orders following home insemination of surrogates
AY and BY v ZX
[2023] EWFC 39

In the Family Court Sitting at Manchester
Macdonald J

Ms Bronach Gordon and Mr Nathan Baylis (instructed by Duncan Lewis Solicitors) for the Applicants;
Respondent self-represented.

SUMMARY

This case addressed the Court's jurisdiction to grant s54, Human Fertilisation and Embryology Act (HFEA) 2008, parental orders in cases where a child is conceived, per a private surrogacy agreement, outside a licenced clinic. I assert that the decision clarifies the legal status of the parents of those children.

FACTS

An application for parental orders was made by AY and BY (the 'Applicants'), a married couple, in respect of twins, CY and DY born in October 2021. ZX (the 'Respondent'), is the surrogate who gave birth to the children, following the parties' surrogacy agreement, and election of home insemination with AY being the sperm donor. The Applicants supported the Respondent emotionally throughout her pregnancy, as well as providing reasonable expenses. The Applicants are the sole carers of CY and DY. The magistrates, to whom this application was scheduled before, and their legal adviser, were concerned that the circumstances of the case fell outside the ambit of the HFEA 2008 in as much as the insemination took place pursuant to a private arrangement and otherwise than at a licenced clinic, and therefore, a parental order could not be made. Having been informed of this concern, Madonald J requested that the case be re-allocated to him and listed it for hearing.

DECISION

Macdonald J granted the application for parental orders in respect of CY and DY on the basis that the court had jurisdiction to grant such orders under s54 in cases where a child is conceived via surrogacy pursuant to a private arrangement, and otherwise than in a licenced clinic. On the merits of the case, the requirements in ss54(1)–(8) were satisfied and it was in the best interests of the children to grant the orders.

REASONING

Macdonald J asserted that the relevant statutory provisions are encapsulated under s54 and not in ss33–53, which apply to granting parental status to parents whose children have been conceived by means of assisted reproduction, but *not within* a surrogacy arrangement (paras 15, 18, 25 and 30 of the judgment). S54(1)(a) provides, *inter alia*, that the court can make a

parental order if the child was carried by the surrogate: 'as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination'. Macdonald J considered that there was nothing contained in s54(1)(a) (above) or elsewhere in s54, requiring that the insemination took place at a licenced clinic. He therefore concluded that s54 does not prevent the court from making a parental order where a child was conceived via surrogacy, outside of a licenced clinic – at home, for example.

His Lordship relied on the case of *Whittington Hospital NHS v XX,* where the Supreme Court applied s54 of the 2008 Act and did not affirm or even suggest that it is a requirement for the artificial insemination to take place in a licenced clinic when it considered the requirements under s54(1).[1]

Macdonald J also referred to the Explanatory Notes to s54[2] and held that they do not mention a requirement that the artificial insemination must take place at a licenced clinic. He also stated that the government's guidance for surrogates refers to home insemination as a recognised first step on the surrogacy pathway[3] and that the Human Fertilisation and Embryology Authority's website[4] recommends insemination in a licenced clinic for safety reasons, but does not assert that home insemination will bar an application for a parental order (para 29).

On the merits of the case, Macdonald J was of the view that the requirements under s54 were satisfied (paras 31–40) in as much as:

- AY was genetically related to both children (s54(1)(b));
- AY and BY were married (s54(2));
- that, despite the application being made outside the 6 months delay it was in the best interests of the children to grand the order;
- CY and DY resided with the Applicants (s54(4)(a));
- AY and BY were over 18 years of age (s54(5));
- the Respondent had freely, and with full understanding of what was involved, agreed unconditionally to the making of the orders (s54(6) and (7));
- the Respondent's husband was not a parent of CY and DY because ZX had been separated from him for 5 years, had not had current contact with him and he had not given his consent to her acting as surrogate for AY and BY (s54(6));
- the Applicants only provided the Respondent with reasonable funds during the pregnancy (s54(8));
- no parental orders had previously been made in relation to CY or DY (s54(8A).

Macdonald J also concluded that it was in CY and DY's best interests that the orders be made and therefore his Lordship granted the parental orders (paras 18 and 41). However, one lacuna in the judgement is that Macdonald J failed to address the reason why the legal adviser and magistrates thought that parental orders could not be granted in this case, and why, his Lordship was of the opposite view. This could have been an aid in understanding and clarifying the magistrates' and their legal adviser's confusion and concern.

Comment

Perhaps the reason why the legal adviser and magistrates contended that the fact the insemination was done outside of a licensed clinic put the case outside the court's jurisdiction

[1] *Whittington Hospital NHS Trust v. XX* [2020] UKSC 14.

[2] Explanatory Notes to the Human Fertilisation and Embryology Act 2008, para 188.

[3] Department of Health and Social Care, 'The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales' (*Guidance*, 23 July 2021) <https://www.gov.uk/government/publications/having-a-child-through-surrogacy/the-surrogacy-pathway-surrogacy-and-the-legal-process-for-intended-parents-and-surrogates-in-england-and-wales>, accessed 1st June 2023.

[4] Human Fertilisation and Embryology Authority, 'Surrogacy', <https://www.hfea.gov.uk/treatments/exlplore-all-treatments/surrogacy>, accessed 1st of June 2023.

and the provisions of the HFEA 2008, was because s3(1) of the Human Fertilisation and Embryology Act 1990 states that: 'No person shall bring about the creation of an embryo except in pursuance of a licence'. Essentially, s54 of the 2008 Act does not mention licenced clinic, but s3(1) of the 1990 Act does. Macdonald J in this case is of the opinion that the parental order can be made, but could the embryo have been created in the first place? S3(1) of the 1990 Act could also appear to mean that home insemination is not permitted. Why then, would the government guidance and the Human Fertilisation and Embryology Authority's website mention the possibility of such? How accurate in law are these websites? It raises the question of why Macdonald J referred to these websites in the judgment, when they are not law, but merely informative websites targeted to potential users of surrogacy, and thus not authoritative sources, which could partly cast doubt on the soundness of the reasoning behind the judgement.

The Family Court's position in this case is that insemination taking place at home does not prohibit intended parents from applying for parental orders. The law requires that the child is conceived by artificial insemination, although it does not mention where, and carried by a woman who is not one of the applicants. Neither does it require that the artificial insemination takes place at a licenced clinic, nor does it exclude informal, private surrogacy arrangements. Macdonald J in the present case confirmed that the relevant statutory provisions are contained in s54 of the 2008 Act, and not in ss33–53 of the Act which grants legal parental status to parents of children born from assisted reproduction *outside of* a surrogacy arrangement. When it comes to children born from a surrogacy agreement, then it is s54 that applies. Nowhere in s54 of the 2008 Act does it mention the need for the insemination to be performed in a licenced clinic as a prerequisite for the granting of a parental order. Nothing in the HFEA 2008 prevents the court making a parental order under s54 of that Act where the insemination leading to the birth of a child via surrogacy has taken place pursuant to a private arrangement and otherwise than in a licenced clinic.

This judgement is important in clarifying the legal status of the parents of those children who were conceived via surrogacy pursuant to a private arrangement, and otherwise than in a licenced clinic. Whilst the literature recommends insemination in a licensed clinic for health and safety reasons, it does not prohibit at home insemination, for example, and grants the same legal status to the parents of those children, with regards to parental orders being made pursuant to s54 of the HFEA 2008. It ensures that couples or individuals who cannot afford to pay private clinics for insemination, and therefore opt for at home insemination, are protected with regards to their legal status as parents. While the case points out the quintessence and technicalities of the law on parental orders in relation to surrogacy agreements, it also shows the Family Court's intention in providing judgments that are in the best interests of the children and perhaps demonstrates flexibility in so doing to meet that intended outcome.

However, despite Macdonald J's judgement, there may be a need for Parliament to amend s54 of the HFEA 2008 to specifically mention that insemination in a licensed clinic is not a prerequisite in granting parental orders under s54. This would ensure that there is no uncertainty whatsoever left, further solidify the parental status of couples opting for insemination pursuant to a private arrangement and insemination done outside of licenced clinics and prevent future instances where magistrates or their legal advisers, as in the present case, are confused by or misinterpret s54 of the 2008 Act.

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