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## IPSO MUST SHOW WHAT IT IS MADE OF

Culture Secretary Matt Hancock confirmed on 1 March 2018 that the government has decided not to proceed with Part 2 of the Leveson Report, and will repeal section 40 of the Crime and Courts Act 2013 at the earliest opportunity. Later in the month an attempt in the House of Lords to introduce controls through the back door via amendments to the Data Protection Bill was defeated in the House of Commons; clauses 168 and 169 required publishers to pay both sides of legal actions brought against them in data protection cases. With Leveson officially laid to rest, the current position is that 95 per cent of national newspapers are regulated by the Independent Press Standards Organisation (IPSO) while IMPRESS, the approved regulator recognised under the Royal Charter on press regulation, has few members and is ignored by the mainstream printed media. An attempt by the News Media Association (NMA) to challenge the decision by the Press Recognition Panel (PRP) to recognise IMPRESS was rejected by the High Court in October 2017.

In his Parliamentary statement on the consultation response to Leveson, Mr Hancock noted that IPSO had introduced a new system of low cost-arbitration and had processed more than 40,000 complaints in its first three years of operation, ordering “multiple front page corrections or clarifications” in the process. He acknowledged the existence of IMPRESS but did not elaborate on the organisation’s achievements or its future role. Mr Hancock’s message was that the media landscape today is markedly different from that which Sir Brian Leveson examined in 2011. Newspaper circulation has fallen by about 30 per cent; digital circulation is rising, but publishers are finding it much harder to generate revenue online; social media continues to grow and is largely unregulated; and high quality-journalism is threatened by issues such as clickbait, fake news, malicious disinformation and online abuse. In short, life has moved on and the framework of press regulation proposed by Leveson is regarded by those in power as largely irrelevant and indeed potentially harmful to press freedom. The government is preoccupied with other matters, particularly Brexit, and is content for IPSO to assume the role of de facto press regulator with IMPRESS drifting along in its wake.

So far so good, but anyone who believed that journalism had totally reformed itself since the phone hacking scandals affecting various titles and the closure of the *News of the World* received a rude shock with the publication of the independent Kerslake Report into the preparedness for, and emergency response to, the terrorist attack at the Manchester Arena on 22 May 2017. The report, released on 27 March 2018, focuses mainly on the performance of the emergency services in coping with the consequences of an explosion detonated by a suicide bomber at a concert by the American singer Ariana Grande which killed 22 people – many of them children – and injured over 100. However, the report also considers the role played by the

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media, and the Kerslake panel was “shocked and dismayed” by the accounts of families of those involved with their experiences with some reporters. Actions complained of included a foot in the door by a reporter at the home of a family; a child being stopped on the way to school; and a note offering £2,000 for information included in a tin of biscuits given to hospital staff. There were at least two examples of impersonation, with one journalist claiming to be a bereavement nurse in the course of a telephone call while another purported to be from the police. Facebook and other social media accounts were accessed and photographs used without permission. People felt “hounded” and “bombarded”, and it was clear that the behaviour of some of the media covering the attack fell well short of the standards required by the IPSO Editors’ Code of Practice (notably the clauses dealing with privacy, harassment, and intrusion into grief or shock).

The overall picture was not entirely bleak, with the *Manchester Evening News* receiving praise for raising £1 million in 24 hours for the emergency appeal. Efforts were made by some media organisations to report facts accurately and limit the number of contacts made to individual families; the BBC, for example, established a central newsgathering team and created a “round robin” group to set limits on who could approach people. Some families acknowledged the supportive role played by their local newspapers.

In its response to Kerslake, IPSO has said that it will be “looking at what more we can do to support victims, families and the agencies that work with them, as well as making sure that IPSO-regulated publishers are aware of their obligations and responsibilities under the Editors’ Code of Practice.” Members of the public involved with the Manchester Arena explosion who have levelled specific complaints against journalists will expect IPSO to investigate the conduct of people and organisations involved where breaches of the Code can be shown to have taken place. IPSO’s mission statement includes the statement that “we hold newspapers and magazines to account for their actions”. It is time for IPSO to do so.

### Julian Harris

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# A proposal for a Global Ombudsman Service

by Justin Malbon

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Supply chain workers face considerable obstacles in gaining legal redress for the harm done to them by a global corporation. Often the corporation is able to distance itself from the harm-doing. This is done by deploying sub-contracting and other arrangements. In this way, the corporation can benefit from the harm by obtaining products produced by cheap or non-paid labour without being answerable for it.

The lack of answerability is contributing to an environment which incentivises human rights abuses worldwide. The abuses take various forms, including through: the use of forced labour (sometimes described as modern slavery); the use of child labour; the employment of workers in dangerous and unhealthy workplaces; the underpayment or non-payment of workers; the deprivation of the right to join unions or other associations; and the subjecting of workers to harassment and abuse. The International Labour Organisation conservatively estimated the number of people subjected to forced labour alone during 2002-2011 to be nearly 21 million. These people are trapped in jobs into which they were coerced or deceived and which they cannot leave. They include people who are subjected to human trafficking for labour and sexual exploitation (ILO Global Estimate of Forced Labour, International Labour Office, Special Action Programme to Combat Forced Labour (SAP-FL), Geneva, ILO, 2012) at Part 2.1 <https://downloads.globalslaveryindex.org/GSI-2016-Full-Report-1514872354.pdf>).

This article proposes the establishment of a Global Industries Ombudsman Service (GIOS) to improve access to justice for those adversely affected by a (global) corporation's production or investment activities. The proposed GIOS would be roughly modelled on the industry funded consumer complaints ombudsman services that have successfully operated in many jurisdictions for decades. Under the GIOS the parties entitled to lodge a complaint would be those alleging harm being caused by a corporation's production or investment activities, and not consumers.

Although the GIOS would be no panacea for the harms done throughout the world to those suffering human rights abuses from production processes and investments, it would come some distance towards providing recourse to justice. The GIOS would offer a low cost, relatively speedy and fair means for gaining redress. It would overcome most of the jurisdictional

barriers that face litigants suing global corporations in their home jurisdiction. It would also show that a corporation is serious about taking responsibility for human rights abuses in its production processes or investments.

In proposing the GIOS, this article describes some of the considerable barriers that confront a litigant when taking action against a global corporation. It then outlines the pressures being placed on corporations (that can so easily evade legal liability) to nevertheless take responsibility for the abuses, and the ways some corporations are responding by taking responsibility. The appropriate nature and extent of responsibility are to some extent being framed by international documents such as the "UN Guiding Principles on Business and Human Rights", the "OECD Guidelines for Multinational Enterprises" and the "International Labour Organisation's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy". These are described below. To some degree, corporations are also being nudged into taking responsibility by transparency laws, such as the Californian Transparency in Supply Chains Act 2010, the UK Modern Slavery Act 2015, and the French Duty of Vigilance legislation 2017. The operations of some of this legislation is also described below.

Disappointingly, in the vast majority of instances where corporations have accepted responsibility, they have not gone so far as to establish or engage with any processes for providing remedies or access to justice for affected people. The proposed GIOS seeks to address that problem.

## CORPORATE LEGAL LIABILITY FOR HUMAN RIGHTS VIOLATIONS

A person seeking a remedy for human rights abuses from a global corporation benefiting from the abuse is very unlikely to succeed. If the harm occurred in a country with a weak legal system, recourse is unlikely because of that very fact. Gaining a remedy within the corporation's home jurisdiction, even one with a strong rule of law, will also be extremely difficult. This is in part because global corporations are increasingly able to arrange their activities beyond the scope of any government or regulatory organisation (L Backer, "On the Evolution of the United Nations Protect-Respect-Remedy Project: The State, the Corporation and Human Rights in a Global Governance

Context”, (2011) 9 *Santa Clara Journal of International Law* 37 at 38). A corporation, for example, can easily distance itself from any harmful mistreatment of workers through subcontracting and other arrangements.

A litigant pursuing her legal rights also faces high legal expenses and drawn out proceedings. These may involve disputes about whether the court dealing with the matter is the appropriate forum, and complex arguments about the admissibility of evidence (see the Report of the Special Representative of the Secretary-General on the “Issue of Human Rights and Transnational Corporations, Business and Human Rights: Towards Operationalizing the ‘Protect, Respect and Remedy’ Framework” (UN General Assembly A/HRC/11/13, 22 April 2009) at paragraphs 94 and 95). As Skinner, McCorquodale and de Schutter observe:

*It is incredibly costly to bring transnational litigation in Europe and North America. This is because of the costs associated with gathering evidence in a foreign State to support a claim, the cost of legal and technical experts, and the sheer fact that these cases can take upwards of a decade to litigate. For human rights victims who may have very limited financial resources, the cost of litigation can preclude access to a judicial remedy (G Skinner, R McCorquodale and O de Schutter, “The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business” (2013) at p18).*

In addition to the difficulties in suing for human rights abuses in a corporation’s production processes, there are many examples of the immense difficulties litigants face in obtaining remedies in an investor’s home jurisdiction for abuses arising from the investments. These include: *Sarei v Rio Tinto* (2013) (US) 722 F.3d 1109 (2013); *Dooch et al v Royal Dutch Shell* (2015) (Netherlands) Court of Appeal of the Hague (December 18, 2015); *Fidelis Ayoro Oguru v Royal Dutch Shell* (2013) (Netherlands) Court of Appeal of The Hague; and *The Bodo Community v Shell* (2014) UK [2014] EWHC 1973.

The US is proving to be an increasingly difficult jurisdiction for overseas litigants to take action against a US-based parent company. The US Alien Tort Statute once offered litigants better prospects of gaining standing to bring suit than now exist because of the Supreme Court’s decision in *Kiobel v Royal Dutch Petroleum Co* (133 S.Ct. 1659 (2013)). The court reasoned that the general presumption that US law does not apply outside the US extended fully to the Alien Tort Statute.

In sum, as Wallace notes, we are:

*slowly confronting the reality that the remedial structures available in national, supra-national, and international courts are incapable of providing effective remedies for victims of human rights abuses perpetrated by businesses within and outside the jurisdiction of the states in which the businesses are domiciled (S Wallace, “Private Security Companies and Human Rights: Are Non-Judicial Remedies Effective”, (2017) 35 Boston University International Law Journal 69 at 71).*

A case that runs counter to this trend is *Song Mao v Tate & Lyle Industries Ltd* (Claim No 2013, Folio 451 (EWHC (Comm), 28 March 2013). In 2013, the plaintiff Cambodian villagers filed a complaint with the Queen’s Bench Division of the High Court of England and Wales against the British-based corporation Tate and Lyle Industries Ltd. Somewhat remarkably, the court found it had jurisdiction to hear the matter. *Song Mao* illustrates, however, the kinds of legal ingenuity required to bring suit against a corporation that ultimately benefits from the alleged harm done to litigants in a foreign jurisdiction. In that case over 19,000 hectares of land were allegedly forcibly taken from about 2,000 Cambodian villagers. The land was then used by two Thai companies to grow sugar. These companies entered into a five-year contract to sell the raw sugar produced on the plantation exclusively to the UK based company Tate & Lyle Sugars. The first shipment of 10,000 tons arrived in the UK in 2010. The villagers at first attempted to gain redress through the Cambodian administrative and judicial systems, but to no avail. The essence of their case before the English courts is that their land was wrongly appropriated, and therefore they remain its legal owners. They claim that any sugar grown on their land belongs to them, and the defendant Tate and Lyle therefore wrongly converted the sugar to its own use. The matter had not proceeded to trial at the time of writing, some four years after filing.

The difficulties in gaining redress for human rights violations are not limited to litigants who are individuals, as the Guatemala Arbitration attests ([http://legal.un.org/riaa/cases/vol\\_XV/47-75.pdf](http://legal.un.org/riaa/cases/vol_XV/47-75.pdf)). The arbitration arose from a US claim that Guatemala was breaching the terms of the Central America-United States Free Trade Agreement (CAFTA), to which both countries were parties. The US alleged that Guatemala was failing to enforce its domestic labour legislation, and in so doing was adversely affecting trade between the countries. The US further alleged that by producing and exporting goods to the US in circumstances where the workers producing the goods were doing so in exploitative conditions led to a repression of the price of the goods, thereby leading to unfair trade by putting American workers at an unfair competitive disadvantage. The amounts at stake were not trivial, given that Guatemala’s exports to the United States in 2013 were worth \$4.2 billion. Most of the exports were clothing, and agricultural products such as bananas and melons. The alleged human rights abuses were serious. According to the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), 83 trade unionists have been murdered since CAFTA took effect, with most cases being insufficiently investigated and unsolved (<https://aflcio.org/2017/6/26/us-trade-policy-fails-workers>). The International Trade Union Confederation consistently ranks Guatemala as one of the world’s worst countries for workers ([https://www.ituc-csi.org/IMG/pdf/survey\\_ra\\_2017\\_eng-1.pdf](https://www.ituc-csi.org/IMG/pdf/survey_ra_2017_eng-1.pdf)).

The US formally launched its trade violation case in 2010 and an arbitral panel was formed in 2013 to hear the dispute.

The US alleged that Guatemala's failures to enforce its own labour laws constituted a sustained or recurring course of action or inaction in a manner affecting trade, thus violating the agreement's labour provisions. The arbitral panel published its decision in July 2017, finding against the US. Although there was evidence that the Guatemalan government had failed to enforce its own labour laws, the panel was not satisfied that its actions or inactions occurred on a sustained basis. Nor was the panel satisfied that the government's failures affected trade with the US. The case illustrates the evidential difficulties faced by a complainant. The US collected witness statements from affected workers, however it was unable to present them to the tribunal. If the names of the witnesses were given to the tribunal, it would have been compelled under due process requirements to pass them onto the Guatemalan government. This would have risked the witnesses being seriously harassed or even killed. The absence of this crucial evidence made it difficult for the US to mount its case. The dispute raises a number of thorny issues for the future, particularly regarding how due process requirements about witness evidence can be or should be met in circumstances where the provision of the evidence puts them at risk.

## CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS ABUSES

In light of the difficulties of establishing the *legal liability* of global corporations for human rights abuses arising in their production processes and from their investments, a consensus is developing that corporations nevertheless bear *responsibility* for the abuses. This responsibility extends beyond the limits of corporate legal liability. Increasing pressure is being exerted by civil society, which is demanding that corporations accept responsibility for the abuses (see for example, Human Rights Watch; <https://www.hrw.org>). The pressure becomes particularly intense after scandals such as the Rana Plaza factory collapse that killed 1,134 people. In 2013 H&M, Primark, Zara, and PVH (the owner of Tommy Hilfiger and Calvin Klein) signed an Accord on Fire and Building Safety in Bangladesh as a result of the collapse.

More recent examples of human rights abuses have been revealed by a BBC investigation that found that Turkish textile factories were exploiting child labour by asking seven and eight-year-old children to work 60-hour weeks, and were underpaying Syrian refugees. Ross Dress for Less, Forever 21 and TK Maxx have also been found to have close ties to suppliers that owed \$1.1 million in unpaid wages to their workers (<https://charterforcompassion.org/human-rights-in-supply-chains-human-rights-watch-cci>). These instances of abuse are far from isolated (see <https://waronwant.org/>).

Legal liability has relatively distinct boundaries compared to the highly dynamic and evolving boundaries of corporate responsibility for human rights violations. The normative frameworks for corporate responsibility, however, are taking shape. This is partly due to the publication of some

key international documents, including the "UN Guiding Principles on Business and Human Rights" (Office of the High Commissioner, United Nations Human Rights, "Guiding Principles on Business and Human Rights" (HR/Pub/11/04, United Nations, New York and Geneva, 2011)). The guiding principles seek to enhance standards and practices concerning business and human rights (guiding principles, p 1).

The principles appear to draw a distinction between the responsibilities of a corporation and its legal liabilities. It states, for instance, that the principles should not be read as creating new international law obligations, or as limiting or undermining any existing legal obligations (guiding principles, p 1). Corporate responsibility, on the other hand, extends to business enterprises respecting human rights. This means that they should "avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved" (principle 11). These principles appear to implicitly propose that corporate responsibility should extend beyond a corporation's legal liability.

The term "human rights" as used in the principles refers to internationally recognised human rights, and at a minimum includes those set out in the International Bill of Human Rights, and the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work (principle 12). According to principle 13, a business is required to:

*avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and, seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.*

Another key document is the OECD Guidelines for Multinational Enterprises (OECD, 2011) <http://dx.doi.org/10.1787/9789264115415-en>, which state that enterprises should respect human rights. This is stated to mean that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved (para IV.1). The guidelines add that: "Within the context of their own activities, [enterprises should] avoid causing or contributing to adverse human rights impacts and address such impacts when they occur" (para IV.2).

Additionally, the International Labour Organisation's "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy", 5th ed (Geneva, Switzerland 2017) states that enterprises "should take immediate and effective measures within their own competence to secure the prohibition and elimination of forced or compulsory labour in their operations" (at para 25).

In summary, the circumstances to which corporate responsibility extends includes abuses that occur:

- within the corporation's own competence (ILO);
- with which it is involved (OECD);

- within the context of its own activities (OECD and UN Guiding Principles); and
- within its operations (ILO).

These international documents tend to define the scope of corporate responsibility in somewhat generalised terms. Their use of broad language might be designed to avoid the setting of narrow and technical boundaries for establishing a corporation's responsibilities. The upside of this is that responsibility cannot be avoided through the kinds of artifice that the law sometimes either allows or tolerates. The downside is that it side-steps more precise questions about how far responsibility should extend. To illustrate the complexities involved in answering such questions, consider the position of a global apparel brand that purchases cotton t-shirts from an overseas buyer in one country. Should the apparel brand be responsible for the working conditions of cotton growers in farms in yet another country, where the cotton in the t-shirt came from the farms? The supply chains for apparels can be very extensive. The apparel company Gap, for example, has over 1,000 first tier factories that supply its products. (<http://www.gapincustainability.com/sites/default/files/Gap%20Inc%20Factory%20List.pdf>)

The supply chains for products such as cars and smart-phones are even more complex than those for apparels, which adds further difficulties in determining the reasonable limits of corporate responsibility. Nevertheless, as Backer observes:

*Companies realize they must comply with laws for their legal license to operate, but some realize that it is not enough to maintain their social license to operate, especially with weak local law. Social license emerges from prevailing social norms which may be just as important as legal norms. Social norms vary, but the one with near universal recognition is the corporate responsibility to respect human rights, or to not infringe on the rights of others (Backer, above, at p 61).*

An increasing number of corporations are voluntarily expressing acceptance of responsibility for human rights abuses in their codes of conduct. Taking one of many such codes of conduct to illustrate the nature of this acceptance of responsibility, Nike's Code of Conduct states that it "lays out the minimum standards we expect each supplier factory or facility to meet" ([https://s3.amazonaws.com/nikeinc/assets/74579/Nike\\_Code\\_of\\_Conduct\\_2017\\_English.pdf?1506532815](https://s3.amazonaws.com/nikeinc/assets/74579/Nike_Code_of_Conduct_2017_English.pdf?1506532815)). The code goes on to say that it expects "all our suppliers to share our commitment to the welfare of workers and to using resources responsibly and efficiently". It adds that Nike seeks partners who show leadership in corporate responsibility and who seek to move beyond minimum standards. The code lists a number of issues of concern, including ensuring that: employment is voluntary; employees are 16 years and older; there is respect for freedom of association and collective bargaining; work premises are properly managed and provide a safe workplace; there is no harassment or abuse; and working hours are not excessive.

Sectorial commitments to protecting human rights also exist. For instance, the Dutch banking sector has an agreement on human rights (Sociaal-Economische Raad, Dutch Banking Sector Agreement on International Responsible Business Conduct Regarding Human Rights, The Hague, The Netherlands, 2016). It links the scope of corporate (including banking) responsibility to the responsibilities set out in the OECD Guidelines and the UN Guiding Principles, along with the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work (at para 3). The agreement also states that the parties agree to work towards "the effective prevention, mitigation and, where appropriate, remediation of adverse human rights impacts" (at para 7).

More broadly still, over 9,500 organisations from more than 160 countries have committed themselves as participants to the United Nations Global Compact, which supports companies in doing business responsibly by aligning their strategies to principles regarding human rights, labour, environment and anticorruption (<https://www.unglobalcompact.org/>).

### **Legislative nudging**

Often global corporations accept responsibility because of concerns that to do otherwise risks tarnishing their brand's image. The trend towards acceptance of responsibility for human rights abuses, however, might not necessarily be prompted only by pressure from civil society groups and public outrage at scandals such as the Rana Plaza factory collapse. Corporations are also being nudged along by transparency legislation. These include the Californian Transparency in Supply Chains Act 2010, the UK Modern Slavery Act 2015, the French Duty of Vigilance legislation 2017, and the Netherlands Child Labour Due Diligence legislation, 2017. Other countries, including Australia have indicated they will follow suit with similar transparency legislation.

The French law applies to companies headquartered in France that employ more than 5,000 people in France, or are headquartered in France or abroad and employ more than 10,000 employees worldwide. These companies must each publish a vigilance plan. The plan must set out the company's measures for identifying risks and its steps for preventing serious violations of human rights and fundamental freedoms. The plan must also set out measures for protecting the health and safety of people and the environment for which the company is responsible. Responsibility extends to the activities of the company and of any companies it controls, either directly or indirectly, as well as the activities of subcontractors or suppliers with whom an established business relationship is maintained.

Section 54 of the UK Modern Slavery Act requires a commercial organisation that supplies goods or services within the UK (regardless of whether it is registered in the UK), and has a global turnover of at least £36 million in any financial

year, to prepare a slavery and human trafficking statement for each financial year. The statement must either set out the steps the organisation is taking to ensure that slavery and human trafficking is not taking place in any of its supply chains or in any part of its business, or state that the organisation is taking no such steps. The statement may include information about the organisation's supply chains, policies relating to slavery and human trafficking, its due diligence processes, the parts of the business that are at risk of slavery and human trafficking and its staff training.

The obligations being placed on companies by the Modern Slavery Act are not particularly stringent. Although the legislation requires an organisation to disclose and report on its voluntary efforts to address and prevent forced labour in global supply chains, it places no obligation upon it to do anything about the issue. Indeed, a company will be in compliance with the Act if it reports that it is not taking any steps regarding slavery and human trafficking. The legislation does not establish extraterritorial liability, nor does it set binding standards or sanctions for non-compliance. LeBaron and Ruhmkorf analysed the impact of the Act on 25 FTSE top 100 companies, and expressed scepticism about claims that section 54 will improve matters for affected parties (G LeBaron and A Ruhmkorf, "Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance" (2017) 8 *Global Policy* 15). In sum, the Act arguably invites, or at least is satisfied with, a situation where corporations say fine things about their responsibilities but actually do little or nothing about them.

## VOLUNTARY CORPORATE GRIEVANCE MECHANISMS

The acceptance of responsibility by global corporations for human rights violations is of little consequence if aggrieved parties are unable to obtain any meaningful redress, just as laws are of little consequence if no action can be taken if they are breached. As outlined above, in practice formal legal proceedings, at best, offer only very limited possibilities for redress. The only realistic hope for victims is for the establishment of alternative means for gaining justice. An industry funded system that is independent, accessible and fair can offer the prospect of providing victims such effective means for redress. Indeed, principle 29 of the UN Guiding Principles states that "business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted". In addition, the principles propose that a grievance mechanism be one administered by a business enterprise alone or with other stakeholders.

A study undertaken by MSI Integrity and the Duke Human Rights Center at the Kenan Institute for Ethics investigated the nature of multi-stakeholder initiatives (MSIs) that govern corporate or government conduct, and have transnational reach.

MSIs are initiatives undertaken collaboratively by a number of stakeholders, including corporations, civil society, government, and affected populations for addressing issues that often relate to corporate accountability. The research by MSI Integrity et al involved mapping the MSI claims made, which affect over 9,000 companies, including 65 Fortune Global 500 businesses (*The New Regulators? Assessing the Landscape of Multi-Stakeholder Initiatives* (2017), at pp 2-19. <https://msi-database.org/data/The%20New%20Regulators%20%20MSI%20Database%20Report.pdf>).

The researchers found that about 90 per cent of the MSI's they identified were clustered in three industries: consumer goods; agriculture, forestry, and fishing; and mining and energy. Of the surveyed MSI's, 40 per cent had some kind of complaints process for enabling communities or individuals to report human rights or environmental standards violations. However, the researchers noted that most of these processes failed to meet even basic requirements for a remedial system as set out in the UN Guiding Principles, such as being legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.

As an example of one set of "commitments" for engaging with non-judicial redress mechanisms, the Dutch banking sector has agreed that "when enterprises identify through their human rights due diligence process or other means that they have caused or contributed to an adverse impact they should provide for or cooperate in their remediation through legitimate processes" (Dutch Banking Sector Agreement on International Responsible Business Conduct Regarding Human Rights, above, at p 26). This is a noticeably non-committal undertaking.

The Rana Plaza Accord on Fire and Building Safety in Bangladesh provides for a dispute settlements process for any alleged breaches of the accord. Paragraph 3 of the accord provides for any dispute between the parties about the agreement to be presented to and decided by the agreement's steering committee, which is subject to an agreed dispute resolution process. The process adopts an arbitration process model. In addition, the accord provides for the establishment of a worker complaint process and mechanism "that ensures that workers from factories supplying signatory companies can raise in a timely fashion concerns about health and safety risks, safely and confidentially, with the Safety Inspector" ([http://bangladeshaccord.org/wp-content/uploads/the\\_accord.pdf](http://bangladeshaccord.org/wp-content/uploads/the_accord.pdf), para 18). The accord, however, does not provide access to justice mechanisms for affected workers.

The Fair Labor Association (FLA) has operationalised a mechanism that receives complaints from affected parties and investigates them where appropriate. The aim of the mechanism is to identify whether an association member is non-compliant with agreed membership workplace standards. These standards comply with human rights standards. If a member is found to be non-compliant, the association will seek to work with the

member to develop a remediation plan, or to propose some other safeguard mechanism to be put in place. The system aims at prodding members to comply with the workplace standards rather than to directly provide remedies to affected workers or other affected parties.

The association's members include (mainly US) universities, "civil society organizations and socially responsible companies" ([www.fairlabor.org](http://www.fairlabor.org)). University members include Princeton, Washington, Pennsylvania State, the University of Texas, and the Georgetown and Yale Law Schools. Participating corporations include Patagonia, New Balance, Nike, Nestle, Adidas, Hugo Boss and Puma. The members are required to monitor their own supply chains and ensure they meet the FLA's labour standards. They are also subject to the FLA's assessments of a random sample of the members' supplier factories. In 2016, the association conducted 149 assessments of facilities owned or contracted by its members. As mentioned, the mechanism is not designed to compensate affected parties or provide them any other form of remedy.

An instance of a voluntary corporate grievance mechanism that did provide monetary compensation to affected parties is one established by the Canadian miner Barrick Gold Corporation for its Papua New Guinea mine. The miner established the Olgeta Meri Igat Raits (All Women Have Rights) Framework of Remediation Initiatives in 2012 to deal with allegations that local women had been subjected to over 100 cases of sexual violence, including numerous gang rapes by the company's security guards and other employees. By mid-2015, 137 claims were deemed eligible, and 119 claims were settled, with the provision of a business grant and services valued at an average \$US8,900 per claimant and an additional payment of \$US10,905 per claimant (see S Knuckey and E Jenkin, "Company-created Remedy Mechanisms for Serious Human Rights Abuses: A Promising New Frontier for the Right to Remedy?" (2015) 19 *International Journal of Human Rights* 801).

## A PROPOSAL FOR A GLOBAL OMBUDSMAN SERVICE

There is, then, an increasing number of global corporations that accept responsibility for human rights abuses occurring in their production processes and in relation to their investments. Some corporations actively engage in practices designed to minimise or remove the occurrences of abuse, including through their monitoring processes, and through the requirements they set in their sub-contracting arrangements. Very few corporations, however, have processes for providing remedies to those people who have suffered abuse. There are some instances where corporations do this, but they tend to be sporadic and ad hoc. For corporate responsibility for human rights abuses to have more meaningful impact than is presently the case, a broader and deeper industry-wide approach needs to be taken.

The so-called "Third Pillar" of the UN Guiding Principles proposes that corporations adopt alternative redress mechanisms that are non-judicial and are speedy, low cost and have transnational reach (guiding principles, p 31). The principles further propose that grievances be resolved by means of a "mutually acceptable external expert or body". In terms of the underlying elements of a "non-judicial grievance mechanism", principle 31 states that the mechanism should be:

- (a) *legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;*
- (b) *Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;*
- (c) *Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;*
- (d) *Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;*
- (e) *A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.*

In terms of the operation of the mechanism, the principles state that it should be based on engagement and dialogue, so that stakeholders are consulted and the focus be on dialogue as the means to resolve grievances. The mechanism should also be equitable so that all the parties have reasonable access to sources of information and advice. The operation should also be transparent.

This article proposes the establishment of an industry-funded Global Industry Ombudsman Scheme (GIOS). It could provide an industry-wide means for giving effect to the Third Pillar objectives. A GIOS would enable complaints to be dealt with in a more structured and systematic way than the present ad hoc approaches allow. It would also enable the Ombudsman to build knowledge, expertise and a reputation for integrity and fairness that would benefit corporate members and complainants alike. It would also allow greater cost efficiency by distributing the costs of running a grievance mechanism amongst corporate members. An industry-wide GIOS could also build to a sufficient size to enhance its public visibility. This in turn could mean that corporate membership of a widely respected scheme that deals with human rights abuses will enhance the reputations of those members.

The proposed GIOS could be loosely modelled on the industry funded consumer complaints schemes that have successfully operated in a number of countries for a few decades (See N Creutzfeldt, "Ombudsman Schemes — Energy Sector in Germany, France, and the UK" in *The New Regulatory Framework for Consumer Dispute Resolution* P Cortés (ed) (Oxford

University Press, UK 2016). The proposed GIOS would fundamentally differ from the consumer ombudsman schemes in that those entitled to bring complaints to the GIOS would be people who claim to have suffered human rights abuses within the responsibility of members of the scheme, and not consumers.

Industry-funded consumer ombudsman schemes have successfully operated for more than three decades in the Europe, Canada, Australia and other countries. One of the oldest schemes is the UK Insurance Ombudsman Bureau (IOB), formed in 1981 (P Tyllesley, “The Insurance Ombudsman Bureau - the early history” (working paper, Centre for Financial Regulation Studies, London Metropolitan University)). It subsequently merged with the Financial Ombudsman Scheme. The IOB was established and funded by a number of UK insurance companies. The model developed by the IOB evolved over time, and was adopted by a range of industries including financial services, telecommunications, and water and energy services (see G Howells and S Weatherill, *Consumer Protection Law*, 2nd ed, (Routledge, UK 2005) at para 11.6). The dominant form of alternative dispute resolution process for complaints by consumers regarding financial products and services is by means of an ombudsman scheme in many European countries, including Austria, Belgium, France, Germany, Ireland, Italy, the Netherlands, Switzerland and the United Kingdom (D Thomas and F Frizon, “Resolving Disputes Between Consumers and Financial Businesses: Fundamentals for a Financial Ombudsman, A Practical Guide based on Experience in Western Europe”, *The World Bank Global Program on Consumer Protection and Financial Literacy*, 2012, at p 24).

The typical attributes of an industry-funded consumer complaints scheme include the following:

- The scheme operates as a separate company.
- The company’s board has an equal number members nominated by the scheme’s member corporations, and by consumer and community organisations. The board has an independent chair.
- The scheme operates under a charter requiring the ombudsman to deal with complaints fairly and in an unbiased way.
- The charter sets due process requirements for dealing with a complaint, without the ombudsman being bound by strict legalism.
- The dispute resolution process is inquisitorial, and not adversarial. The ombudsman is usually permitted to provide some assistance to the complainants in presenting their case, so long as it does not compromise the ombudsman’s impartiality. Other elements of these schemes are that:
- A corporate member agrees as a condition of

membership of the scheme to abide by a decision of the ombudsman.

- There is a minimum amount of formality involved in lodging a complaint.
- Assuming the ombudsman has jurisdiction to hear the complaint under the terms of the charter, he or she can – after receiving evidence from the parties (the consumer complainant and the member who the consumer makes the complaint about) – decide that the complaint is not made out, or that the member must compensate the consumer.
- There are limits on the amount of compensation that can be ordered, which are set out in the charter.
- The member has only very limited rights of appeal to a court or tribunal.
- The member is required to pay for the costs of the complaint regardless of its outcome.
- No costs or fees can be imposed on a complainant.
- The consumer does not forgo her legal rights if his or her complaint is unsuccessful. However, if an order of compensation is made, the complainant must sign a waiver of her legal rights against the member before receiving the compensation.
- Complaints are invariably dealt with “on paper”, which is to say the parties do not appear in person before the ombudsman, nor is any oral evidence provided. One exception is that videoed evidence provided by an insurer of a complainant making a disability claim that shows the complainant undertaking physical tasks can be admitted.
- The ombudsman is usually required to publish the reasons for her decision. The publicly available published reasons must remove any mention of the identity of the parties.

Some of these elements of these schemes may seem unreasonably burdensome on the corporate member, and unduly favourable to the complainant, at least in terms of the payments of costs aspect. Nevertheless, these elements are commonly found in the schemes that have operated successfully for a number of decades. The benefits of the scheme for members are that it provides a predictable and systematic way of dealing with complaints that have escalated beyond being able to be dealt with internally by the member. The process is cheaper and generally faster than a court process. The parties know their dispute is being heard by a neutral umpire who understands the way the industry operates. The existence of an industry funded scheme can enhance the industry’s reputation, or at least mitigate bad publicity arising from unresolved grievances against the industry. The ombudsman schemes can also operate as a signalling mechanism for individual members. If, for example, a member receives a number of adverse

decisions, it can be an indicator of a systemic problem to which the member needs to attend.

Many of the key elements of the consumer ombudsman schemes can be adopted by a GIOS, with the obvious exception that the complainants would be those affected by human rights abuses, and not consumers. The key elements of the consumer ombudsman schemes are consistent with the Third Pillar proposals under the UN Guiding Principles. The GIOS would have a particular advantage over domestic court systems in that jurisdictional issues present much less of a barrier to complainants. Membership of the scheme establishes a contractual relationship between the member and the ombudsman in which the member agrees to comply with the ombudsman's decisions. It is therefore of little consequence that the member and the complainant are located in different jurisdictions.

The GIOS charter would be a crucial document because it would set out the types of complaints the ombudsman can deal with, who has standing to bring a complaint, and the way the dispute process is to be handled, including how the evidence is to be dealt with. The sorts of issues that arose in the Guatemala arbitration regarding protecting the interests of witnesses would need to be taken into consideration in drafting the charter. It would also set limits on the amounts of compensation that can be ordered, and the nature of any other remedies and recommendations that the ombudsman can make. Given how crucial the charter would be, its drafting should involve key stakeholders, including nominees from potential corporate members and non-government organisations and relevant community groups.

Finally, it might be asked as to what would prompt reforms leading to the establishment of a GIOS? Changes could take place in much the same way as was the case with the establishment of the UK Insurance Ombudsman Bureau in the early 1980s. It took a champion for change in an insurance company to spur its establishment. An employee of the insurance company was concerned that the insurance industry was constantly facing bad press for its refusal of claims, and so he felt that the industry needed to be proactive by introducing an independent complaints mechanism. He actively advocated for the proposal within his company, and after receiving its support, advocated for an industry operated scheme amongst other insurance companies. After initial resistance from some

other insurers, the scheme was established and flourished (see P Tyldesley, above).

A GIOS, like the IOB, is not a panacea for all of the problems within an industry, and should never purport to do so. A GIOS will not rid the world of slavery and other human rights abuses within an industry, and it is unrealistic to expect as much. A GIOS can, however, make a contribution towards dealing with this intractable problem.

The establishment of a GIOS might also arise from pressure from non-government organisations and other members of civil society. It could also be prompted, or required, by governments. It is not all that difficult to envisage legislation such as the Modern Slavery Act being amended to require industries to establish and fully fund a GIOS in conformity with requirements set out in the Act. Alternatively, a government, or co-operative arrangements between governments, could lead to the one or more governments establishing the GIOS, which would be required by legislation to be funded by corporations.

## CONCLUSION

Corporate accountability for human rights abuses in their production processes and investments, if it is to be taken seriously, needs to provide access to justice to those affected. For the most part court systems are inadequate for the task of providing access to justice, in part because of jurisdictional issues and the enormous time and expense involved. The Third Pillar of the UN Guiding Principles proposes that businesses engage in establishing non-judicial grievance mechanisms. Consistent with the Guiding Principles, this article proposes the establishment of a GIOS.

The next steps towards achieving the establishment of a GIOS would entail interested corporations, non-government organisations, community groups and other interested parties in accepting that the provision of effective access to justice is a necessary component of corporate responsibility for human rights abuses. A second step is to gain in-principle agreement as to the type of non-judicial grievance mechanism that is likely to be effective. This article, of course, proposes the establishment of a GIOS. If that was accepted in principle as a likely effective mechanism, the next and most demanding task would be to draft the charter for the service.

**Professor Justin Malbon**

*Monash Law School, University of Monash, Australia*

All events take place at the Institute of Advanced Legal Studies. Events are free unless otherwise indicated. CPD accreditation is provided with many events. For enquiries and bookings please refer to Belinda Crothers, Academic Programmes Manager, IALS, 17 Russell Square, London WC1B 5DR (tel: 020 7862 5841; email: belinda.crothers@ sas.ac.uk).

You can also find out what is coming up on the School of Advanced Study events listing page (<http://www.sas.ac.uk/support-research/public-events>) or on our Eventbrite (<http://www.eventbrite.co.uk/o/institute-of-advanced-legal-studies>) and Facebook pages (see <http://www.ials.sas.ac.uk/>).

## Thursday 10 May, 12.30 – 1.30pm

*Criminal law's role in sustaining civil peace and liberal democracy*

### PROFESSOR DARYL BROWN

O M Vicars Professor of Law, University of Virginia: IALS Visiting Fellow

## Friday 11 May, 10.00am – 4.00pm

### How to get a PhD in law

Disseminating and publishing in the digital world

Sessions and speakers

*The PhD in law in the digital world*

### DR JUDITH TOWNEND

University of Sussex

*Legal writing*

### PROFESSOR LISA WEBLEY

University of Westminster

*Disseminating your legal research*

### DR NORA NI LOIDEAIN

Director, Information Law & Policy Centre, IALS

*Getting your research published in journals*

### PROFESSOR JANE WINTERS

Chair in Digital Humanities, School of Advanced Study, University of London

*What books are law publishers looking to publish?*

### SINEAD MOLONEY

Hart Publishing

*Publishing in Open Access online law journals*

### STEVEN WHITTLE

Information Systems Manager, IALS library

*Tips on keeping up-to-date with your topic after completion*

### LAURA GRIFFITHS

Senior Librarian, IALS library

There will be optional tours of the IALS library led by senior staff. Although tailored specifically for PhD law students,

this training programme may contain some material which repeats and reinforces generic training suitable for all PhD students.

### Fees and booking

Student £75.00; standard £100

Staff and students of SAS should contact Belinda Crothers direct.

## Thursday 17 May

### IALS New Book Forum

Co-hosted by Kent Law School

*Law and the Precarious Home: Socio Legal Perspectives on the Home in Insecure Times*

Published by Hart Publishing, the book explores the emergent and internationally widespread phenomenon of precariousness, specifically in relation to the home. It maps the complex reality of the insecure home by examining the many ways in which precariousness is manifested in legal and social change across a number of otherwise very different jurisdictions.

Chair:

### PROFESSOR DIAMOND ASHIAGBOR

IALS

Editors:

### PROFESSOR HELEN CARR

Kent Law School

### PROFESSOR BRENDAN EDGEWORTH

University of New South Wales

### PROFESSOR CAROLINE HUNTER

York Law School

### EMERITUS PROFESSOR ALISON CLARKE

University of Surrey

### PROFESSOR DAVID COWAN

University of Bristol Law School

### PROFESSOR BECKY TUNSTALL

University of York

## 18 May, 10.30am – 5.00pm

### Research training

### Socio-legal sources and methods in social welfare and family law

Training will include the following sessions:

#### Sources and methods in family justice

*Researching out of court family dispute resolution: methodological challenges and how to overcome them*

**PROFESSOR ANNE BARLOW**

University of Exeter

**Socio-legal research in the Court of Protection**

*The methodological challenges of research in the Court of Protection*

**PROFESSOR PHIL FENNELL**

University of Cardiff

*Observing legal proceedings: researching welfare cases at the Court of Protection*

**JAIME LINDSAY**

University of Essex

**Methodological challenges in family and social welfare law**

*Balancing the challenges and opportunities of involving people with intellectual disabilities in empirical research*

**PROFESSOR ROSIE HARDING**

University of Birmingham

*Interdisciplinary approaches to understanding the experiences and support needs of new adoptive families*

**DR JULIE DOUGHTY**

University of Cardiff

**Social context of family and social welfare research**

*Family and welfare law: researching the social context at the British Library and the Social Welfare Portal*

**JONATHAN SIMS, BEN HADLEY**

British Library

*Sources of social welfare law in the LSE library*

**MARIA BELL**

Law Librarian, London School of Economics

The day is aimed at PhD/MPhil researchers, early career academics and policy researchers

Jointly organised by the British Library, the Socio-Legal Studies Association and the IALS

**Fees**

Standard rate £80.00; SLSA members £70.00; students £55.00

**Tuesday 22 May, 5.30 – 7.30pm**

**John Coffin Memorial Annual Lecture**

*Placeless people: writing, rights and refugee*

Host:

**PROFESSOR DIAMOND ASHIAGBOR**

IALS

Chair:

**PROFESSOR PHILIPPE SANDS QC**

Professor of Law, UCL

Speaker:

**PROFESSOR LYNDSEY STONEBRIDGE**

Professor of Modern Literature & History, University of East Anglia

In 1944 the political philosopher and refugee, Hannah Arendt wrote: “Everywhere the word ‘exile’ which once had an undertone of almost sacred awe, now provokes the idea of something simultaneously suspicious and unfortunate.” Exiles from other places have often caused trouble for ideas about sovereignty and the law and nationhood. But the meanings of exile changed dramatically in the twentieth century, often leaving human rights law struggling to catch-up. This lecture discusses how writers such as Arendt, Orwell, Simone Weil, Dorothy Thompson, and Samuel Beckett responded to the mass displacements of the last century. Sceptical about the ability of human rights to legislate for refugees, yet committed to universal justice, these writers challenge us to imagine new terms for placelessness in modern times.

*About the speaker*

**PROFESSOR LYNDSEY STONEBRIDGE** is the author of *The Judicial Imagination: Writing after Nuremberg* (winner of the British Academy Rose Mary Crawshay Prize 2016), *The Writing of Anxiety* (2007) and *The Destructive Element* (1998). Her new book, *Placeless People: Writing, Rights, and Refugees*, is due out later this year with OUP. She is also writing a short polemic, *Writing and Righting: Literature in an Age of Human Rights*. Working between literature, law, and history, Lyndsey’s research in human rights and refugee studies is strongly interdisciplinary. Her current work for Refugee Hosts, for example, a GCRF-supported AHRC/ESRC project on refugee-refugee humanitarianism, uses poetry, photography, and oral history to understand how non-nation state political sovereignties are taking shape today. She is a co-editor of *Refugee History*, and writes journalism and broadcasts regularly.

**Thursday 24 May, 2.00 – 3.15pm**

**IALS PhD Masterclass**

*Careers – academia, legal practice, NGOs*

The IALS PhD Masterclass is an opportunity to discuss PhD research with colleagues, with expert input from senior academics experienced in PhD research. The Masterclasses should not be seen as an alternative to the advice and instruction received from supervisors, but should rather complement them.

**Monday 11 – Tuesday 12 June 2018**

**W G Hart Legal Workshop 2018**

*Building a 21st century bill of rights*

Almost all states have some form of bill of rights in their national legal system. Whilst their specific content will vary, most cover many of the same issues such as the procedure for amendments, links with international law and institutions, and the status of the bill of rights in relation to other laws.

The purpose of this workshop is to fill a significant gap in practice and scholarship and make an original contribution to current debates by bringing together scholars to discuss the construction of an effective 21st century bill of rights.

Confirmed speakers to date include:

**HARRIET HARMAN MP**

Chair, Joint Committee on Human Rights

**PROFESSOR CONOR GEARTY**

LSE

**JUDGE TIM EICKE**

European Court of Human Rights

**PROFESSOR COLM O'CONNOR**

UCL

Alongside keynote addresses, the following nine sessions will address a number of the most important questions facing any state concluding, or revising, a bill of rights:

1. Establishing the bases of a bill of rights
2. Design and implementation
3. Linkages with international and comparative laws and institutions
4. The protected rights
5. The bill of rights in the national constitutional order
6. Claimants and respondents
7. Remedies
8. Rights and civil society
9. Addressing the populist backlash

Papers are welcome on any of these themes. Abstracts of approximately 300 words and a short speaker biography should be submitted to the Academic Directors:

**PROFESSOR MERRIS AMOS**

Queen Mary, London University  
(m.e.amos@qmul.ac.uk)

**PROFESSOR ROGER MASTERMAN**

Durham University  
(r.m.w.masterman@durham.ac.uk)

**DR HELENE TYRRELL**

Newcastle University  
(helen.tyrrell@ncl.ac.uk)

Further details available from Belinda Crothers, IALS (belinda.crothers@sas.ac.uk)

(the deadline for papers was 31 December 2017, with full versions of accepted papers due by 30 April 2018).

**Monday 9 July, 10.00am – Friday 13 July, 4.00pm**

**Five-Day Professional Course**

*Making science and law work together: skills for drafting legislation for agriculture, food safety and environmental protection*

The course aims to start or continue the development of skills in the critical evaluation of existing legislation and the drafting of new or amended legislation in the broad areas of agriculture, food regulation and environmental protection. It is directed not only towards lawyers who would like insight into review and drafting of legislation in these specialised sectors but also technical experts and administrators working in public and private bodies and development organisations who encounter legislation in the course of their work. By bringing together lawyers and non-lawyers in this way, the course will help demystify the legislative drafting process as frequently perceived. The emphasis will be on legal skills that facilitate the effective incorporation of science and risk assessment into sectoral legislation.

The morning sessions will be devoted to seminars, the afternoons to practical exercises. Detailed content, particularly in practical sessions, will be tailored to suit the professional background and experience of individual participants but focusing on current issues of importance such as Brexit and trade agreements.

Course leader and principal tutor:

**DR ROBERT BLACK**

Formerly Principal Scientist (Regulatory Affairs) and then Reader in Law at the University of Greenwich until 2006, Rob Black has been teaching part-time since 2011 on food law and sanitary and phytosanitary regulation in accordance with World Trade Organisation norms, and environmental law at the Faculty of Science and Engineering, Medway Campus of the University of Greenwich, continuing consultancy work related to international trade in agricultural products and exploring the biosecurity implications of Brexit. He combines expert scientific knowledge of the agricultural and environmental sectors with in-depth experience of reviewing and drafting legislation in many countries in Africa, Eastern Europe, Caribbean and Former Soviet Union (his current focus), as well as professional training in law and regulation.

Topics covered:

- International sources for national legislation relevant for agriculture, food and environmental protection and mode of adoption in national legislation.
- The legislative process.
- Interpretation of scientific terms as the key to effective legislation in the study area.
- Embracing science and risk in agricultural legislation. Is such legislation fit for purpose, does

it conform to international normative standards?

- Drafting techniques – secondary legislation; embracing science and risk.
- Implications for Brexit.
- Choosing drafting style and format appropriate for the purpose of legislation.
- Amendment of legislation.
- Reflections on rules for interpretation and drafting.
- Multi-lingual legislation.

Course fee: £1,500.00

For more information, to register, or to reserve a course place please write to Dr Robert Black (R.Black@greenwich.ac.uk).

## TUESDAY 10 JULY, 10.30 AM – 5.30PM Seminar

### *Post-legislative scrutiny*

Parliament has a responsibility to monitor the extent to which the laws it has passed are implemented as intended and have the expected impact. Therefore, post-legislative scrutiny is an important tool for increasing government accountability and is part of the oversight role of parliament. Despite its importance for the respect of the rule of law, it is not uncommon for the process of reviewing the implementation of legislation to be overlooked. In several countries, there is the risk that laws are passed but not applied, that secondary legislation is not adopted, or that there is insufficient information to assess the actual state of a law's implementation and its effects.

Implementation is a complex matter depending on the mobilisation of mechanisms, funds and different actors. Implementation does not happen automatically, and several factors can affect its course, including: changes in facts on the ground, diversion of resources, deflection of goals, resistance from stakeholders and changes in the legal framework of related policy fields. Implementation of legislation depends on the clarity of the legislative text, the compatibility with other laws, constitution and international obligations, the resources (human, financial) accessible to implement the law, the availability of secondary legislation, and the accessibility of laws to those in charge of its enforcement.

As Parliaments start to pay more attention to implementation and begin to create specific procedures to oversee it, three main benefits emerge from the process of post-legislative scrutiny:

1. It strengthens democratic governance: legislation adopted by Parliament should be implemented and applied in accordance to the principles of legality and legal certainty.
2. It allows the identification of potentially adverse effects of new legislation and the opportunity to act to prevent these.

3. It enables the consistent appraisal of the how laws respond to the issues they intend to regulate. It enables the legislator to learn from experience both in terms of what works and what does not and how effective implementation is in meeting objectives, with an eye to making better legislation in future and reducing the need for corrective action.

Post-legislative scrutiny is a broad concept, consisting of two dimensions. First, it looks at the enactment of the law, whether the legal provisions of the law have been brought into force. Second, it looks at the impact of legislation, whether intended policy objectives have been met, if implementation and delivery can be improved, and if lessons can be learnt and best practices identified. It is recommended that Parliaments look at both dimensions of post-legislative scrutiny.

Throughout 2017, the Westminster Foundation for Democracy (WFD) worked with partnering Parliaments to help expand their internal capacity to review how a new law has worked in practice. WFD developed three tools on post-legislative Scrutiny: Comparative study on post-legislative scrutiny in Parliaments in 10 countries; Principles for post-legislative scrutiny by Parliament; and A guide for Parliaments on post-legislative scrutiny. WFD supported emerging practices in the conduct of post-legislative scrutiny in the Parliaments of Indonesia, Myanmar, Pakistan, Lebanon and Algeria, and deepened its cooperation on post-legislative scrutiny with the UK House of Commons, the Scottish Parliament and the Swiss Parliament.

For 2018, the Institute of Advanced Legal Studies and the Westminster Foundation for Democracy (WFD) are cooperating on the organisation of an academic seminar on post-legislative scrutiny, which will result in the publication of a special issue of the European Journal of Law Reform, published by the IALS. The objectives of the seminar are to:

1. Discuss post-legislative scrutiny (in terms of the legal enactment and policy impact aspects of law implementation) as a substantial dimension of the oversight role of Parliament, within different political systems;
2. Analyse which structures, procedures, emerging methodologies and resources are shaping Parliaments' ability to conduct post-legislative scrutiny, including interaction with executive and implementing agencies;
3. Analyse lessons learned from established ex-ante legislative processes (incorporating review/sunset clauses in Bills, regulatory impact assessments, gender analysis) for the ex-post review process of impact of legislation.

The one-day seminar will be structured around three panel discussions. It is proposed that each session be chaired by a Parliamentary representative (one session chaired by UK Westminster Parliament, two sessions chaired by another Parliament).

Organised jointly by the IALS and the Westminster Foundation for Democracy.

For further details see <https://ials.sas.ac.uk/events/event/15677>

# Other Events

**Thursday 31 May, 9.45am – 5.30pm**

## Conference

*Ways of knowing: epistemology and law*

Venue:

University of Westminster, London

Hosted by:

The Westminster Law & Theory Lab in association with the Institute of Advanced Legal Studies

The conference will provide a forum for presentations and discussion on the place, significance, and further potential of epistemology within socio-legal studies.

Invited speakers:

**PROFESSOR MARIA DRAKOPOLOU**

Kent University

**PROFESSOR PETER GOODRICH**

Cardozo Law School, USA

**PROFESSOR ANNA GREER**

Cardiff University

**PROFESSOR GEOFFREY SAMUEL**

Kent University

**PROFESSOR BOAVENTURA DE SOUSA SANTOS**

University of Coimbra, Portugal

Academic Coordinators:

**DERMOT FEENAN**

Associate Research Fellow, IALS

**PROFESSOR ANDREAS PHILOPOULOS-  
MIHALOPOULOS**

University of Westminster

The preliminary programme and abstracts are available via the conference website

(<https://store.westminster.ac.uk/product-catalogue/law/conference/ways-of-knowing-epistemology-law>)

**Thursday 24 – Saturday 26 May 2018**

*Legal discourse: context, media and social power*  
(5th annual conference)

**Venue:** National School of Public Administration (Royal Place of Caserta), Italy

Keynote speakers include:

**VIJAY K BHATIA**

CEO and Academic Director, ESP Communication Services, President, LSP and Professional Communication Association, Hong Kong

**DELIA C CHIARO**

Professor of English Language and Translation, Department of Interpreting and Translation. University of Bologna, Italy

**JAN ENGBERG**

Professor of Knowledge Communication, School of Communication and Culture Aarhus University, Denmark

**GUILIANA E GARZONE**

Professor of English Language and Translation, Department of Studies on Language Mediation and Intercultural Communication, University of Milan, Italy

**JOHN M SWALES**

Professor Emeritus of Linguistics, University of Michigan, USA

Original paper, panel and poster proposals are invited that explore language through the broad areas being pursued by the conference, which include:

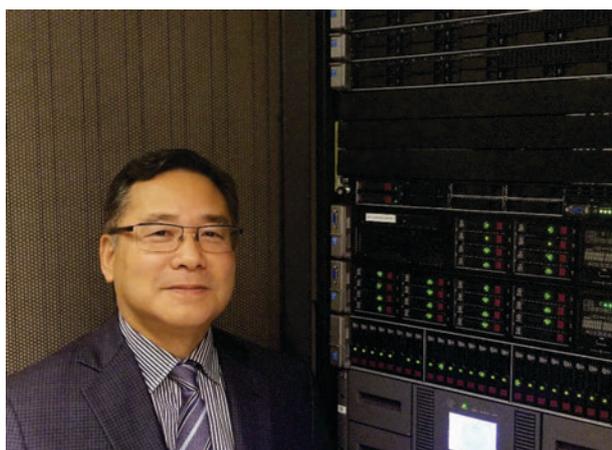
- Legal discourse in contexts
- Law in broadcast media (film, radio, television), digital media (internet/web-based and mobile technologies), and print media (magazines, newspapers, books, comics)
- Media in the construction, storing and dissemination of legal knowledge
- Web-based media for the construction of interdiscursive/interdisciplinary issues affecting law and other fields (politics, economics, criminology, sociology, psychology, healthcare and medicine)
- Social media in criminal and forensic investigations

- Social media in the process of conflict resolution
- Issues of harassment, defamation, privacy/publicity/government surveillance, freedom of speech, cyberbullying, trolling and intellectual property in social media environments
- Disciplining and regulating social media activities
- Legal and ethical challenges on social media
- Role, power, identity, and ideology on social media
- Multilingualism/multiculturalism, migration, race, and ethnicity on social media
- Web-based media resources for higher legal education (formal and informal learning, collaborative work)

Organised by the Centre for Research in Language and Law (CRILL) (website <http://www.crill.unina2.it> - English Language Chair, Department of Law, University of Campania ‘Luigi Vanvitelli’, Italy) in partnership with the Institute of Advanced Legal Studies and the Institute of Modern Languages Research, School of Advanced Study, University of London

## IALS News

### CANADIAN JUDGE BRINGS ARTIFICIAL INTELLIGENCE INSIGHTS



Justice David Masuhara, a judge of the Supreme Court of British Columbia, joined the IALS in February 2018 as its 2017–18 Inns of Court Fellow. During his tenure he will focus on the advances in artificial intelligence and its impact on the future of the judiciary and the judicial function.

For most of his career, Justice Masuhara has been involved in information technology matters for his court including various initiatives to move the court system to digital platforms and reviewing technology policies. British Columbia has been progressive in adopting online dispute resolution processes for small civil claims and strata disputes; and the electronic receipt of uncontested divorce applications, estate applications, pleadings, motions, affidavits and digital court orders.

Over this period, he has noted “intelligent” machines have overtaken humans in complex gaming scenarios. Predictive algorithms arising from large data have been developed in a growing number of areas, including the field of law.” These developments pose opportunities for the justice system which at the same time necessitate a serious exploration of AI implications for the administration of justice.

Justice Masuhara’s exploration has included a survey of over 130 members of the Canadian judiciary inquiring into various aspects of AI to assist in his review as to the receptiveness, sensitivities and concerns from a judicial perspective.

### PLANNING PERMISSION GRANTED FOR TRANSFORMATION PROJECT

Camden Council has granted planning permission for the £11.5 million refurbishment of the IALS, work on which is due to start on 1 July 2018.

The building, its seminar rooms/lecture theatre and the main reading rooms of the library will remain open during the two-year programme of works. There will be some noise and disruption and temporary arrangements for entry to the library and for the issue & enquiry desk. From 2 July or soon after there will be temporary arrangements for entry/exit of the library and a library enquiry desk on the 2nd floor. At that time the offices of the library staff will move to the 5th floor.

Most academic and administrative members of staff from the 5th floor are scheduled to move to Dilke House, 1 Malet Street, on or soon after 1 June. A Fellows’ Room will be provided on the 4th floor.

The transformation project will replace the infrastructure with new heating, cooling, ventilation, cabling and wifi. IALS library will be completely refurbished and re-designed, and will be able to offer a new second floor entrance looking out on to Russell Square, 50 additional study desks, bookable group study and training rooms, special needs room, 10 additional lockable library research carrels, new desk and chair furniture throughout the library, more control over our reading room heating and cooling, more self-issue laptops and improved IT services.

A new dedicated study room outside the library on the 5th floor of the building will be created for IALS PhD students. The project will take around two years but the IALS will

remain open throughout.

The key objectives of the refurbishment project are to:

- enhance the entrance to the building;
- enhance and improve the entrance to the library;
- provide flexible academic space throughout the building that caters for research centres and collaborative interaction between staff, fellows and student;
- increase the number of reader workstations and study carrels in the library;
- add group study and other flexible spaces at the library entrance level;
- improve the building's thermal stability and reduce its carbon footprint;
- ensure that the building's heating, cooling, and ventilation systems provide an optimal work and study environment for its users;
- upgrade or replace all services installations that are either at or approaching the end of their lifecycle.

Additional necessary funding for the project will be sought through a fundraising campaign. Updates on the scheduled programme will be provided in the news section of the IALS website (see <https://ials.sas.ac.uk/about/news>).

## SALS News

The following letter to SALS members is from the SALS Administrative Team:

**Dear SALS Members,**

We wish to update you on the relaunch of the Society for Advanced Legal Studies. In the months since we announced the changes to the Society, we have been busy preparing for the relaunch of the Society as part of the Institute. The process has had some unforeseen challenges, further complicated by personnel changes, and we are aware that in a number of cases, our communication with you has not been timely. For this, please accept our sincere apologies.

However, the restructuring process is almost complete. With a new administrative team in place, we expect that normalised communications will resume going forward.

The main feature of the restructuring is that the Society will no longer be an independent charity or company; rather, it will be managed by the Institute, in conjunction with the University of London Development Office. Membership of the revamped Society will be free for all eligible individuals, and benefits such as free Library entrance tickets (10 day tickets per year), discounts to paid events, and free online access to the latest issues of *Amicus Curiae* will remain. For more details, please see the SALS membership page on the IALS website:

[www.ials.sas.ac.uk/about/sals/membership](http://www.ials.sas.ac.uk/about/sals/membership). New members can now join online via this page; existing members should e-mail [sals@sas.ac.uk](mailto:sals@sas.ac.uk) to notify us of any changes to their details. The Society is in the process of establishing its Advisory Group, and we look forward to announcing the members of the Group this summer.

It is our hope that SALS members will be active participants, breathing renewed life into the Society as a central part of legal life in London. It has been some years since the Working

Groups – where academics and legal professionals came together to research and write on various aspects of the Law – were a feature of the Society, but these groups did good work and, with your help, we would like to revive them.

Likewise, Julian Harris, Deputy General Editor of *Amicus Curiae*, shares with all editors an insatiable desire for articles. Whether you are an academic or a professional, you will have insights that will be of great interest to other members, and we would be delighted should you choose to share them by writing articles to feature in this, our journal. The Institute hosts and collaborates on a wide range of events, many of which are free and, of course, you are always welcome to attend. We also hope that you will be willing to help us in our efforts to raise funds to support the work of both the Society and the Institute.

This is an exciting time for the Institute in particular, as it prepares to begin its transformation project this summer. Charles Clore House in Russell Square, Sir Denys Lasdun's iconic Grade II\*-listed Brutalist building, has served the needs of the academic and student legal communities well since its opening in 1976, but it now requires much-needed refurbishment to make it fit for 21st century scholarship. Designed by Burwell Deakins Architects, the plans have been approved by the University of London's Board of Trustees, and Camden Council has now given planning permission, with a contractor to be appointed imminently.

The focus of the transformation is the Library, described by Sir Roy Goode as 'the jewel in the Institute's crown'. As the number of postgraduate law students increases, both at the University of London and at universities across the globe, the Library needs to increase available workspace and improve its working environment, while maintaining the breadth of its collections and its position as one of the world's great legal research libraries. The 5th floor will also be redesigned to better

accommodate the needs of staff, Fellows and postgraduate students, by providing more collaborative workspaces to foster and enable the exchange of ideas. This is also an opportunity to improve accessibility provision, and a lift will be installed at the entrance to the building. Deputy Librarian David Gee will be sharing the benefits of the transformation project to the Library in a future issue of this publication; in the meantime, more details are available on the Institute’s website at [www.ials.sas.ac.uk/about/ials-transformation-project](http://www.ials.sas.ac.uk/about/ials-transformation-project). We plan to arrange hard-hat tours of the building for SALS members while works are ongoing, as IALS will remain open for business throughout the project’s term.

While the University of London is contributing the majority of

the cost of the project, IALS itself is now tasked with raising £2 million through philanthropic donations. If any SALS members within the legal profession think that their firms might be interested in supporting the IALS Transformation Project, for instance by naming a study carrel or a teaching room, please do e-mail us at [sals@sas.co.uk](mailto:sals@sas.co.uk) to help us make contact with the decision-makers in your organisations.

We look forward to hosting a re-launch event in 2018, to mark the 21st anniversary of the founding of the Society, and hope that many of you will be able to join us.

Warm regards,

**The SALS Administrative Team**

# Sir William Dale Centre

**25 June -20 July**

## Course in Legislative Drafting 2018

The Course in Legislative Drafting was first offered in 1964, under the name of “The Government Legal Advisers Course”. Since then it has been attended by more than 5,000 legal officials from 100 countries, mostly from within the Commonwealth. Many of these officers have attained posts of great distinction either in the service of their Governments or in international organisations.

From its modest beginnings in the 1960s, the Course in Legislative Drafting has grown to become the most renowned training programme in its field. The Legislative Drafting Course was directed by Sir William Dale until 1999. Between 1999 and 2015 the Course Director was Professor Helen Xanthaki, who was the former Director of the Sir William Dale Centre for Legislative Studies. Since 2016 the Course Director has been Dr Constantin Stefanou, the current Director of the Sir William Dale Centre for Legislative Studies. The course is taught by prominent members of the drafting and academic professions over a period of four weeks of intensive daily lectures and tutorials/seminars.

A good indication of the course’s excellence has been the growing numbers of students, mainly from Commonwealth countries. During the 30 years since the course has been in existence, it has not been found necessary to make any major changes. However, recent developments in teaching standards applicable to all university courses and recent developments in the field of drafting have made some change in the course necessary.



*Course of 2017*

The course now includes some theoretical examination of the legal and political framework of legislative drafting in addition to, rather than instead of, the core of practical issues examined in the course so far. The syllabus is determined before the beginning of each course and is distributed to all students. Course materials (lecture hand-outs, tutorial, drafting exercises and extracts of the main reading materials covering each topic) are also available. The curriculum is devised in a way which allows students first to familiarise themselves with the basic concepts of drafting from a theoretical point of view so as to enable them when they subsequently come into contact with professional drafters to understand the practical aspects of drafting and specific types of legislative texts.

For further details, including fees, download the course brochure (<http://ials.sas.ac.uk/sites/default/files/files/study/docs/IALS%20LDC%20Brochure%202018.pdf>) or contact Dr Stefanou (<http://ials.sas.ac.uk/about/about-us/people/constantin-stefanou>).

# Other News

## INTERNATIONAL MENTORING PROGRAMME LAUNCHED AT KING'S

The inaugural Young Public International Law Group (YPILG) Mentoring Programme was launched in the Great Hall of King's College, London on 5 February 2018.

Experienced individuals are connected by the programme with newer members (with two to five years' experience). Mentors are partners and senior associates at leading law firms, members of the Bar, specialist academics, government legal advisers, and leaders in civil society

The programme is being run on a pilot basis with 40 participants. The format was rapid-fire conversation (with a 10-minute limit) between each mentor and mentee, with two follow-up telephone calls during the next 12 months. YPILG hopes that this combination of focused conversations and defined time commitments will make this a fruitful experience for both mentor and mentee.

King's postgraduate law students with the requisite work experience attended the launch event.

## UCL INSTITUTE OF BRAND AND INNOVATION LAW CONTEMPLATES "THE SHAPE OF THINGS TO COME"



A distinguished panel of experts was called upon by the UCL Laws Institute of Brand and Innovation Law to predict the trajectory of design and trade mark protection of product shapes in light of recent case law and legislative developments at an event held on 14 February 2018.

Chaired by The Hon Sir Richard Arnold, the panel consisted

of Professor David Musker (QMUL), David Stone (Allen & Overy LLP), Professor Martin Senftleben (Vrije Universiteit, Amsterdam) and Thorsten Gailing (Nestle UK).

Once perceived as the "Cinderella" of IP rights, design law has now caught policy makers' attention. Existing protection regimes, including those within the EU, are being scrutinised for their fitness for purpose.

The panel reviewed the key recommendations included in the European Commission's legal review on industrial design protection in Europe, identifying the continued disparity in relation to national levels of design protection for spare parts, but reporting on increasing convergence in other areas. The lessons learnt from the Supreme Court ruling in *PMS v Magmatic* [2016] UKSC12 were also explored and the positive outcomes for design-holders before the Intellectual Property Enterprise Court (IPEC) were noted.

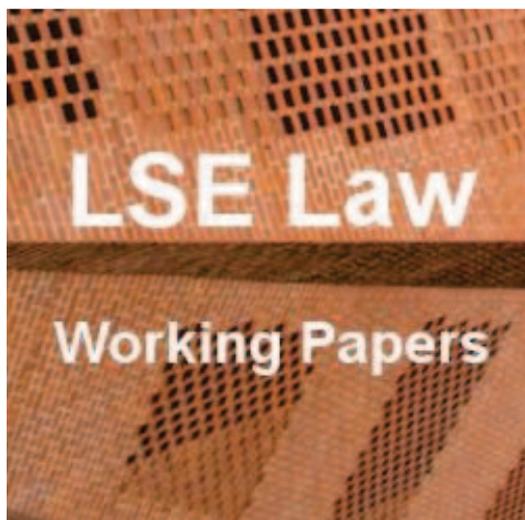
In the early years of EU-harmonised trade mark law, trade mark protection seemed to provide a useful supplement to design registration. After all, the Trade Mark Directive specifically includes the shape of goods as a class of signs eligible for registration. While recent CJEU jurisprudence has left many struggling to identify which types of product shapes will be registerable, the panel considered the "escape routes" which still remained following *Hauck v Stokke* (Case C-205/13).

The case, concerning the TRIPP-TRAPP chair, underlines the need to balance enhanced market transparency (which trade mark protection promotes) against preservation of the public domain of cultural expressions and technical knowledge.

The best hope for those product shapes which do survive the functionality exclusion is to show distinctiveness acquired by use. Few disagreed that more judicial guidance is needed to explain how this could be demonstrated, as a practical matter.

Speaking after the event, Dr Ilanah Fhima, co-director of UCL Law's Institute of Brand and Innovation Law, characterised the debate as "good spirited, yet candid." She added that the evening's discussions "not only acknowledged the very real problems which design-led businesses and brand owners face when protecting the shape of their products, but made some contribution towards providing some possible solutions."

## LSE LAW WORKING PAPERS PUBLISHED



The third issue of LSE Law Working Papers for 2017 was announced on 23 January 2018.

In this Winter 2017 issue, Michael A Wilkinson (WP17/2017) examines the autonomy of the political realm at the foundations of public law and exposes its fragility from a material perspective; Martin Loughlin (WP18/2017) argues

that today's political constitutionalists have distorted John Griffith's method and thereby misconstrued its significance to British constitutional thinking; Jacco Bomhoff (WP19/2017) critiques and offers alternatives to Loughlin's characterisation of both law and religion in his account of public law; Nicola Lacey (WP20/2017) takes up the story of the gradual marginalisation of criminal women in both legal and literary history, asking whether a criminal heroine such as Moll Flanders is thinkable again, and what this can tell us about conceptions of women as subjects of criminal law; Thomas Poole (WP21/2017) questions the continued existence of prerogative as a meaningful juridical category within UK constitutional law; Thomas Poole (WP22/2017) considers Locke's analysis of the federative (or foreign affairs) power, presented as a distinct category separate from both the ordinary and special prerogative powers of the executive, and argues that Locke downplays its juridical dimensions; and Krisztián Pósch (WP23/2017) reviews causal mediation analysis as a method for estimating and assessing direct and indirect effects in experimental criminology and testing procedural justice theory and shows that it is a versatile tool that can salvage experiments with systematic yet ambiguous treatment effects.

## OBITUARY

### Sir Henry Brooke 1936-2018

The former Lord Justice of Appeal, Sir Henry Brooke, who died on 30 January 2018 following cardiac surgery, was noted for his commitment to reform of the justice system and his work in making the law accessible through the use of computers and technology.

Called to the Bar in 1963, he was appointed a QC in 1981, becoming a recorder in 1983 and a High Court judge in 1988. He became a Lord Justice of Appeal in 1996, and Vice-President of the Civil Division of the Court of Appeal in 2003. Sir Henry retired from judicial office in 2006.

His other achievements included chairing the Law Commission from 1993-95, and serving as vice-chair of the Bach Commission on Access to Justice from 2016-17. An enthusiastic blogger, Sir Henry provided commentaries on a range of topics. The following tribute to him was posted on the website of the British and Irish Legal Information Institute (BAILLI):

We are sad to announce the passing of Sir Henry Brooke. Sir Henry was a driving force in establishing BAILII and was one of the key instigators of the "Free the Law" movement in the United Kingdom. As a judge of the Court of Appeal, he was responsible for modernising court processes. This included the introduction of electronic publication of judgments by the Royal Courts of Justice as well as the adoption of medium neutral citation which has now become standard for courts and tribunals in the UK.

Sir Henry was the inaugural Chair of BAILII and served in this role for over a decade until 2011. During this time, he oversaw the development of BAILII from its simple beginnings. His guidance and good humour were essential in making BAILII what it has become today. Sir Henry was a champion of free access to legal information not only for the UK, but for the whole common law world.

Sir Henry married Bridget Kalaugher in 1966, and she survives him along with their four children.

# The transnational crime of human trafficking: taking the Canadian human security approach

by Maria O'Neill

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There are a number of jurisdictional approaches can be taken to tackle the crime of trafficking in human beings (THB). From a Eurocentric point of view these are:

- persons, especially women and children, supplementing the United Nations Convention on Transnational Organized Crime 2000 (the THB Protocol);
- the Council of Europe Convention on Action against Trafficking (the Warsaw Convention) 2005;
- or even the UK's Modern Slavery Act 2015.

My current research is taking the EU Directive 2011/36/EU as my frame of analysis. However, in light of Brexit, it is necessary to use the transnational rather than the supranational lens. I will be taking a cross border law enforcement approach to my analysis, building on my research to date.

Within the UK further issues arise, as there is not one legal framework operating, but three. These are:

- the Modern Slavery Act 2015, while it does have some UK wide provisions, is essentially and England and Wales piece of legislation; with
- the Scottish (Human Trafficking and Exploitation (Scotland) Act 2015; and
- the Northern Ireland (Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, authorities having enacted their own legislation in this area where the terminology used is that of human trafficking rather than the England and Wales definition of Modern Slavery.

The core definitions of the crime in all three UK jurisdictions are essentially the same, however these UK definitions (being EU THB+) are different from that adopted at the EU level under Directive 2011/36/EU, thereby giving rise to the term “modern slavery”. The three UK jurisdictions differ on levels of protection afforded to victims, and the approach to the borderline between human trafficking and prostitution. The EU Directive does not go into the issues of the domestic

regulation of prostitution. It is however influenced by the THB Protocol, the Council of Europe laws on and relevant to this area, and ILO provisions.

## WHAT IS HUMAN TRAFFICKING?

Human trafficking is not “voluntary” prostitution (as understood by law enforcement officials), human smuggling, traditional slavery, which continues to be illegal, or poor working conditions per se, (which are predominantly addressed by employment law). Human trafficking builds on pre-existing and pre-defined crimes of “slavery”, “servitude”, “forced labour” and “compulsory labour”, and while it overlaps with each of these, it is not an exact match for any of these definitions. Each of these words, used in the EU definition on THB, has a long pedigree in ECtHR and other case law. THB may or may not occur in the context of organised crime, and it may be either a domestic crime or a transnational crime.

It is up to individual states to regulate for domestic crimes of human trafficking, pursuant to their voluntarily assumed European and international human rights obligations. This lack of compulsion on a state to legislate to combat THB is the reason why there is a lot of pressure from international human rights lawyers to try to have the crime formally recognised under international criminal law. This has not happened yet.

Human trafficking is not covered expressly in the European Convention for Human Rights 1953, but that convention has been interpreted to include human trafficking in *Ranste v Cyprus and Russia* (Application no 25965/04 ECtHR). Human trafficking is expressly covered in the EU Charter of Fundamental Rights 2000, at Article 5.3. There are therefore enforceable rights for Council of Europe and EU Member States to make a state properly pass and implement human trafficking laws.

The laws in the UK are directly based on the EU laws – and the EU laws passed to the date of Brexit – which has not happened yet, will be part of UK law in the future, even if the UK does not keep up with any post Brexit EU laws, a matter which still has to be negotiated.

In the EU definition issues have arisen in practice as to what is meant by “transportation” and whether this needs to be across borders. It is clearly recognised generally, and reflected in UK domestic law, that human trafficking need not be across borders, and may in fact involve travel just up and down one street. However, as the EU can only legislate for crimes affecting two or more of its Member States, and is prohibited from becoming involved in internal security issues of individual member states (Art 72 TFEU) or indeed national security issues (Art 73 TFEU – unlikely to arise in the context of human trafficking) then the internal trafficking of human beings within individual Member States is necessarily a matter for those individual member states.

As within the UK, at an EU level the laws on prostitution are quite diverse. Prostitution is not a matter for EU regulation. Forced prostitution, to the extent at least that a law enforcement officer would classify forced prostitution, and the prostitution of minors, under the age of 18, falls under THB. The word prostitution is gender neutral, and while it is true that the majority of victims falling into this category are women and girls, being abused by men, it is important not to allow others, whatever their original or current gender, to fail to benefit from protective measures. There is a need to protect and prosecute all, regardless of gender.

At an EU level a Europol representative reported (at an IALS presentation) recently that 78 per cent of the cases that they handle at Europol are in the area of sexual exploitation, with 12 per cent being in the area of labour exploitation, forced begging being 3 per cent, sham marriage 3 per cent, forced criminality 3 per cent, illegal adoption 1 per cent, and a small amount of benefit fraud. The UK speaker, from the Crown Office, speaking about the UK cases currently being dealt with, said that they are handling more victims of labour exploitation than sexual exploitation, with roughly 50/50 male and female victims (for all types of THB/ modern slavery exploitation) in the UK National Referral Mechanism (NRM). It would appear that the more people look for human trafficking cases, the more they find. Europol is reporting that they are only dealing with the lowest hanging fruit, with limited resources preventing them doing more. However, many cases in the NRM related to human trafficking outside the UK, with which the UK has no jurisdictional connection, or in many cases, any working police relationships for the exchange of information and intelligence. Not all cases in the NRM pertaining to the UK, therefore, are actionable by UK (or even EU) law enforcement.

There is therefore a problem.

How much can UK authorities actually action intelligence received, or recorded in the NRM, an issue which has been raised in the press recently? How much actionable intelligence received can actually be passed on to responsible law enforcement in other countries? How much intelligence received cannot be actionable at all due to state failure/ corruption or lack of interest in other countries?

In addition, if the UK authorities are going to action the intelligence received which have some sort of territorial connection with this country, do they have the necessary resources? Even Europol is complaining about a lack of resources in this area, and they are dealing only with the more serious and organised versions of the crime.

The following key issues therefore arise, and will be central to the development of my research:

- What is transnational criminal law, as opposed to international or domestic criminal law?
- When is human trafficking a transnational crime?
- What is the Canadian human security approach?

These are considered in greater detail below.

### WHAT IS TRANSNATIONAL CRIMINAL LAW, AS OPPOSED TO INTERNATIONAL OR DOMESTIC CRIMINAL LAW?

International human rights lawyers have argued much about the current classification of trafficking in human beings as an international crime, and have expressed much dissatisfaction that trafficking in human beings is being treated as “merely” a transnational crime. While international human rights lawyers and lobbyists will not doubt continue to press for further developments in this area, particularly with a view to bringing non-signatories of the UN Protocol on Human Trafficking into the fold, those states which have signed up to the UN Protocol can continue to develop their domestic and transnational laws and practice frameworks to combat this crime, which affects all jurisdictions. As pointed out by Boister (2003), “there is no international crime of drug trafficking”, but that does not prevent willing states from legislating domestically and cooperating transnationally on drug trafficking.

Boister argues that it is possible to distinguish between international criminal law, transnational criminal law and domestic criminal law. He argues that there was less clarity in the difference between international criminal law and transnational criminal law “prior to the conclusion of the Rome Statute” and “the founding of the International Criminal Court” in 1998. He states that the differences between the two legal jurisdictions became clearer after that date. For international criminal law “core crimes” the jurisdiction now rests with the International Criminal Court; however for transnational crimes the authority to penalise derives from “national law and individual criminal liability is entirely in terms of national law.”

National crimes, in contrast, arise from the jurisdiction of the state itself, and do not require an international treaty for their establishment. Whether the definition of human trafficking as set out in the Protocol on Human Trafficking is broad enough to cover all possible forms of exploitation, to include human trafficking and related crimes, will be addressed later in my research, in the context of the UK chapter and the UK’s approach to modern slavery.

While international crimes are of concern to “international society as a whole”, transnational crimes are only of concern to a particular jurisdiction when there is “a direct injury threatened or caused” for that particular state to become involved in the investigation and prosecution of that particular crime. There needs to be some sort of link between the crime and the jurisdiction investigating and prosecuting. These connections are set out, for pursuing organised crime, in Article 3(2) of the Transnational Organised Crime Convention, 2000, to which the Protocol on Trafficking in Human Beings, for better or worse, is attached.

Issues arise as to whether human trafficking actually predominantly occurs in the context of “organised” crime, as defined in the Palermo Convention, or whether it is more likely to be classified as “serious” or “entrepreneurial” crime. Crime is often classified as “serious and organised” in domestic and transnational /EU legislation, with the two terms, “serious” and “organised” being separate legal concepts, while “entrepreneurial” crime is a term often used by law enforcement officers when reflecting on crime as they encounter it in their day to day work. Many serious crimes occur outside the framework of an “organised” crime group, as defined by the Palermo Convention, and need to also be addressed in the context of transnational justice and law enforcement measures. Human trafficking is one such crime. (The EU does not limit THB to organised crime. Europol deals with both serious and organised crime – which affects two or more Member States).

Despite their flaws, the point of the “suppression conventions” like the Palermo Convention and its protocols is to suppress “harmful behaviour by non-state actors”, which Boister (2003) argues “can already ... be said to establish a system of” transnational criminal law. The intention is to “minimise or eliminate the potential havens from which certain crimes can be committed and to which criminals can flee to escape prosecution and punishment”. They standardise “co-operation among governments” which have otherwise “have few other law enforcement concerns in common”. In addition, “they create an expectation of co-operation that governments challenge at the cost of some international embarrassment”.

For a territorial connection to be established for transnational organised crime, as set out in the 2000 Convention, there needs to be a crime committed in (a) either one or more states, or (b) the crime occurs in one state, but there is a substantial territorial connection with another state, either in the planning, perpetration, subsequent behaviour or effects of that crime. As Rijken (2003) states, it can also result when an organised crime group operates in a number of different jurisdictions. There may or may not be an actual physical crossing of a border. In this era of globalisation, there are many ways in which criminal behaviour in one state can affect or have an impact in another state. It is clear, and is evidenced whenever comprehensive audits are undertaken, that “transnational criminal groups and criminals live and

operate in a borderless world” (Zagaris, 2011).

Boister (2003) has opted for a definition of transnational criminal law that is “the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects”. It is without doubt that transnational criminal law, even when legislated for in “suppression conventions” is incomplete, and “relies on domestic law to flesh out” the details. It assumes that domestic legal systems have “fully developed penal systems” something which in reality, is not always the case. This is something that the politicians and civil servants in those jurisdictions need to work on.

Transnational criminal law, however, is to be distinguished from the extra-territorial (and therefore unilateral) effect of domestic laws on what are otherwise purely national crimes. Sovereignty is closely connected with domestic criminal law. Interstate cooperation arises when the need to properly operate the domestic criminal system requires transnational cooperation.

## WHEN IS HUMAN TRAFFICKING A TRANSNATIONAL CRIME?

For its part, trafficking in human beings has been classified as “one of the fastest growing crimes worldwide” with the UNODC saying that it has “reached ‘epidemic proportions’” (Tavakoli, 2009). It is very difficult to put exact figures on human trafficking offenders or criminals. However, the more that law enforcement looks for it, the more they find, with those law enforcement officials (at Europol) who are actively engaged in this area speaking of only “going after the low hanging fruit” due to the volume of the crime vis-a-vis the resources allocated – by governments (in the EU) focused on the issue – to tackle it.

It will not be sufficient for states to just operate within regional integration associations (RIAs) such as the well-developed, and still developing provisions within the EU, but also along the human trafficking chain of jurisdictions, through countries of origin, transit and destination, where ever those chains lead. (In the UK these chains predominantly lead to Romania (EU), Vietnam and Nigeria.)

If the interest is there, then the practice may follow, even if substantial capacity building partnerships have to be entered into between more experienced, and possibly better resourced countries at one end of an often used human trafficking chain, with interested but less resourced or experienced jurisdictions at other points of the chain. Gallagher (2010) reports that there is now a dedicated UN funding mechanism to assist developing countries with economic and technical assistance in this area.

Challenges will necessarily arise in developing transnational law enforcement and prosecution provisions along a human trafficking chain. Differences in the design of a state, its criminal law, rules of evidence, understanding and use of

fundamental/human and due process rights, and the design and operational style of their law enforcement bodies, will need further and detailed examination. These are all challenges that have been encountered within the EU in the development of its Area of Freedom Security and Justice (AFSJ), and in the EU's relationship in this area with the United States. This has resulted in some very high profile culture clashes, leading to detailed case law and subsequent treaties attempting to resolve issues which arise on a regular basis. Problems will arise, but the evidence exists that given the necessary political impetus, these problems can be surmounted.

As stated by Boister (2003), the development of these networks or geographical regional groupings need to "be more transparent and open to greater public participation" than has been the case for the development of the existing organised crime or drug trafficking networks, of which there are many. In this way they will "ensure greater legitimacy" and support from the public.

They "must be produced by an authentic political process" in all relevant jurisdictions "in order to justify the use of state and inter-state authority against individuals" (Zagaris, 2011). There is also a need, for jurisdictions to "develop international enforcement regimes that are balanced and maintain fundamental international human rights." To this may be added, from the EU's experience in developing the Area of Freedom Security and Justice, fundamental (as understood under the EU legal framework) and due process rights, such as the right to a lawyer, the right to translation and interpretation, consular support, etc. The EU's approach to these issues will be examined further in the context of the EU response to this crime in my research.

Key in the development of effective, legitimate and human security focused transnational law enforcement networks to combat, *inter alia*, human trafficking, is the principle of legality, which derives "from the general principles of international law". This applies whether international law arises out of conventions, customs or general principles. The principle requires that an offence involving a transnational crime "should be dealt with in any state that has jurisdiction using the same general principles, procedures and penalties" as for domestic crimes (Boister, 2003). This, as pointed out by Boister, "is not commonly the case". This needs to be government/ diplomat led, with law enforcement support in designing workable structures.

## WHAT IS THE CANADIAN HUMAN SECURITY APPROACH?

Generally, but also in the context of human trafficking, there is a need to focus on human beings, in a transnational context, and not just on the concept of "state security", with the UN's Human Development Report calling for a move away "from an exclusive stress on territorial security to a much greater stress on people's security". The right to personal security is seen as

not just protection from "agents of the state" but also "safety against physical assault by private actors" (Donnelly, 2013). The concept of "human security" is emerging to occupy this space.

A human security approach provides that "all lives ought to weigh the same" (de Wilde in den Boer and de Wilde, 2008). The concept of human security was "first coined in the 1994 Human Development Report" of the UN Development Programme, and further developed into a broad ranging policy agenda by the Commission on Human Security (Kaldor, in den Boer and de Wilde, 2008). While human security is "peopled centred" (Human Development Report, 1994) two diverging dominant themes have emerged from this debate; the concept of "freedom from want" championed by Japan, and "freedom from fear", advocated by Canada. While both of these themes feed into the broader trafficking in human beings discourse, my research will follow the "freedom from fear" approach.

For Canada the freedom from fear approach to human security has identified five policy priorities: "protection of civilians, peace support operations, conflict prevention, governance and accountability, and public safety" (Bruggeman in den Boer and de Wilde, 2008). These all form the backdrop to issues relating to human trafficking, in particular the protection of civilians and public safety themes. Human trafficking often arises in the context of failed states or states in conflict, where individuals are no longer benefiting from the protection of their state of origin, or they have become effectively stateless. The challenges of protecting individuals where there is a lack of a state counterpart to interact with are large. Nevertheless there are sufficient numbers of effectively operating states which can cooperate to combat human trafficking along the trafficking supply chain.

The concept of "human security" is closely connected with the concept of "human rights". However it should be noted that "distinctions of nationality are deeply embedded in international human rights regimes", with the right to claim human rights being "only against governments of which they are nationals" or are otherwise resident (Donnelly, 2013). However internationally recognised human rights, to include the right to be free from slavery or slave-like practices, are, as stated by Donnelly, "minimal standards of decency, not luxuries of the West." The concept of "human security" requires that "nation-states can no longer privilege the lives of their own nationals", requiring states to intervene to protect those individuals that come within their sphere of influence, and who are not being adequately protected, whether it is due to war, or in the case of failed or weak states, by their own states (Glasius and Kaldor, 2006).

Human security, while now a very broad concept, includes issues related to transnational crime. In addition, the UN Millennium Declaration of the General Assembly, of 8 September 2000, takes a human security approach, referring, *inter alia*, to the need to "intensify our efforts to fight

transnational crime in all its dimensions, including trafficking as well as smuggling in human beings and money laundering”.

Following the “freedom from fear” analysis, the EU’s Barcelona Report has called for “coordination between intelligence, foreign policy, trade policy, development policy and security policy initiatives” of the EU member states and the EU’s institutions. This was to be done along with “other multilateral actors, including the United Nations, the World Bank, the IMF and regional institutions”, in order to develop an effective human security approach (A Human Security Doctrine for Europe, 2004). Again this is a very broad canvas, with only some of these themes being developed further in my research, with the focus being on the EU supranational legal framework, where any EU law conflicting with national law over rides that national law, and its interaction with global regulatory actors in tackling a number of the issues which arise.

State security (or more recently in the context of counter-terrorism, homeland security) prioritises the state, and the citizens of that state over all other individuals, thereby leaving some individuals without protection. It is those individuals without protection, or without adequate protection, who most often fall victim to human traffickers. It is for this reason that the human security approach is a most appropriate lens with which to examine the issue of the transnational crime of human trafficking. As it is no longer possible to isolate one population from another in the context of globalisation, and its ancillary risks, the human security approach recognises “the interdependence and interlinkages among the world’s people” (Human Security Now, 2003). The human security approach seeks to “forge alliances that can yield much greater force together than alone.”

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## REFERENCES

“A Human Security Doctrine for Europe: The Barcelona Report of the Study Group on Europe’s Security Capabilities”, presented to EU High Representative for Common Foreign and Security Policy, Javier Solana, Barcelona 15 September

2004.

Boister, Neil, “Transnational criminal law?” (2003) 14 *European Journal of International Law* 5, 953-76.

den Boer, Monica & de Wilde, Japp, (eds), *The Viability of Human Security* (Amsterdam, Amsterdam University Press, 2008).

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15/04/2011 p 1.

Donnelly, Jack, *Universal Human Rights in Theory and Practice*, (Ithaca NY, Cornell University Press, 2013).

Gallagher, Anne T, *The International Law of Human Trafficking*, (Cambridge, Cambridge University Press, 2010).

Glasius, Marlies and Mary Kaldor, (eds), *A Human Security Doctrine for Europe: Project, Principles, Practicalities*, (London: Routledge, 2006).

“Human Development Report 1994”, (UNDP, New York, 1994).

“Human Security Now”, (Commission on Human Security, New York, 2003).

Legg, Stephen, “The life of individuals as well as of nations: International law and the League of Nations’ anti-trafficking governmentalities”, (2012) 25 *Leiden Journal of International Law*, 3, 647-64.

Rijken, Conny, *Trafficking in Persons: Prosecution from a European Perspective*, (The Hague, TMC Asser Press, 2003).

Tavakoli, Nina, “A Crime that Offends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an International Crime”, (2009) *International Criminal Law Review* 9, 77-98.

UN Millennium Declaration of the General Assembly of 8 September 2000.

Zagaris, Bruce, “International enforcement Law trends for 2010 and beyond: can the cops keep up with the criminals?” *Suffolk Transnational Law Review*, Winter 2011.

# Legal form and independence of specialist regulators: the case of the Oil and Gas authority

by Terence Daintith

## INTRODUCTION

The business of exploring for and producing oil and gas in the United Kingdom has always been regulated differently from other sectors of the energy industry. Functions like electricity and gas distribution, once the province of nationalised industries, have since the 1980s been regulated according to the pattern for public utilities developed in consequence of the Thatcher government's programme of privatisations, under which monopoly powers of the resulting private companies have been controlled by independent regulatory agencies established by the privatisation statutes. Since 2000, the regulator for gas and electricity distribution has been the Gas and Electricity Markets Authority, acting through Ofgem (the Office of Gas and Electricity Markets). Since the UK's petroleum deposits were nationalised in 1934, by contrast, their exploitation has been organised through a system of licences granted to oil companies by government as owner of the resource, and the licensing authority has at all times – until the developments to be discussed here – been a government department, most recently the Department of Business, Energy and Industrial Strategy.

While the system of Departmental licensing worked well in the good years of the UK oil industry, when major offshore finds first of gas and then of oil attracted high levels of investment and produced petroleum self-sufficiency and large fiscal returns, its limitations appeared as UK offshore production began to decline and the need was identified for a more aggressive, better informed and resourced regulatory approach that would ensure the highest levels of recovery of petroleum from the deposits that remained. In 2014 a government inquiry led by Sir Ian Wood made the case for the transfer of licensing powers to a specialist regulator, and the conferment on it of extensive new powers aimed at securing maximum economic recovery of offshore petroleum resources. Enthusiastically welcomed both by government and by the industry, the proposals were enacted first by the Infrastructure Act 2015, setting up “maximum economic recovery (MER)” as the primary obligation of participants in the upstream industry, and then the Energy Act 2016, transferring licensing functions to a new

regulator, the Oil and Gas Authority (OGA), and adding new and extensive powers to enforce the MER obligation: settling disputes, attending licensee meetings, enforcing collaboration, and imposing sanctions including fines, loss of operating rights, and even licence revocation.

On the model of utility regulation one might have expected this new regulator to be created by the statute that was the source of its functions and powers. In fact OGA began in 2015 as an executive agency of the Department, with defined functions but no separate legal personality, and was transformed, on passage of the Energy Act, into a company limited by shares under the Companies Act 2006, in which the Secretary of State was the sole shareholder. This legal form had never before been used for a specialist regulator in the UK, so it is worth asking:

- why this was done;
- what government companies normally do;
- what were the closest precedents;
- what were the effects of the choice in relation to the control, accountability, and independence of the regulator; and
- what might be the implications for the future.

## WHY A COMPANY?

The Wood report asked for an arm's length regulator but did not specify the legal form it should take. There was brief discussion of the issue in Parliamentary debate on the Energy Bill, in which the Minister justified arm's length status by reference to familiar considerations like expertise, industry respect, resources (OGA is funded by industry fees and levies), and recruitment freedom. None of this demands company status: statutory arm's length bodies can be structured so that their staff are not part of the civil service and may be given (subject to Treasury approval) distinctive terms and conditions. Most such regulatory bodies are classified as non-Departmental public bodies (NDPBs – a category that also

includes many bodies with executive or advisory functions), though some, including all the utility regulators (except the Office of Communications – Ofcom) are instead constituted as non-Ministerial Departments (NMDs).

The impact statement on the Energy Bill prepared by the Department claimed that it was necessary to choose the Companies Act form because other forms were unavailable. OGA could not be an NDPB because the policy was not to create any more of these, and it could not be a so-called public corporation (like, for example, the Post Office) because European and UK public sector classification rules demand that these be mostly funded by sales of goods and services at economic rates. While the second reason was perfectly correct, the first was blatantly wrong: the Cabinet Office has made it clear both that save in exceptional circumstances all “arm’s length” bodies, not forming a part of a core Department, must be classified as either unincorporated executive agencies, NMDs or NDPBs, or public corporations; and that the legal form of bodies with corporate status (statutory, Royal Charter, Companies Act) is irrelevant to their classification.

The real reasons for the choice, though nowhere publicly acknowledged, seem to have been twofold. First, companies can be created very quickly and quietly, without needing to bother Parliament (though obviously Parliament will need to be bothered at some point if coercive powers to be conferred). Second, company status for OGA may have been thought likely to produce more freedom in recruitment, pay and financial capacity generally than a “statutory” NDPB could enjoy, thus helping it to operate on more equal terms with players in the rich and well-funded oil and gas industry.

### PRECEDENTS AND THE USE OF COMPANIES BY GOVERNMENT GENERALLY

If it still seems remarkable to have a company acting as a public regulator, perhaps there are precedents? In Parliament, the Minister cited in this respect the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA), and Highways England (until 2015 an executive agency of the Department of Transport). But Highways England is not a regulatory body, and PRA was a short-lived subsidiary of Bank of England with responsibility for the prudential regulation major financial institutions, which was reabsorbed into the Bank itself after only five years of life. FCA, our main financial regulator, is indeed a company, established in 1985 as the Securities and Investments Board in the first round of financial regulation reforms. SIB was set up as a company limited by guarantee, not shares, reflecting its origins as an essentially self-regulatory operation under government control, overseeing the activities of established regulatory bodies like the Stock Exchange, which would have representation on its board of directors. The self-regulatory aspect of financial regulation has fallen away with successive reforms over the years (the Financial Services and Markets Act 2000 and the Financial Services Act 2012), but the regulator’s legal status remains the same. OGA, by

contrast, has no self-regulatory or representational rationale, and is limited by shares, not guarantee. This format has never before been used for a regulatory body.

We find it being used in a range of circumstances:

- as a vehicle for government rescues of key private enterprises, like the banks ruined by the 2008 financial crisis;
- as a step between nationalised industry and privatisation, where a public corporation like British Gas transfers all its assets to a company owned by the Secretary of State, whose shares can then be sold into the private sector;
- for new government initiatives that might eventually be ripe for privatisation: a recent example is the Green Investment Bank;
- to meet short-term quasi-commercial needs such as organising Commonwealth Games;
- to discharge quasi-commercial functions with strong public interest, often previously in the hands of executive agencies: Royal Mint, Ordnance Survey, Highways England.

There also exist a number of companies limited by guarantee but effectively controlled by a Department, which usually operate in the not-for-profit sector (like museums) or function as a forum for interest representation (the UK-China Centre).

### CONTROL, ACCOUNTABILITY AND INDEPENDENCE

All these companies, including OGA and FCA, are subject to the disciplines of the Companies Acts. Their core instrument of governance is their Articles of Association. While these are filed at Companies House and may easily be inspected, there is no obligation to communicate them to Parliament, nor is there any Parliamentary control over their content. The Companies Acts regulate reporting and auditing: there is, again, no link with Parliamentary accountability. The emphasis of the Companies Act rules is on protection of the members of the company, on controlling directors, and on assuring financial transparency. This is an appropriate discipline where government involvement is driven by financial and economic considerations, as in rescue operations, but the link is much less obvious where government is seeking to advance other interests like energy policy or consumer protection. Changes in Companies Act reporting requirements in 2013 have however widened the scope of companies’ annual reports: all but the smallest companies must now provide an annual strategic report, not just providing financial information, but assessing the performance of the company in relation to its objectives. Clearly this enables company reporting to be linked to the public interest concerns that justify the existence of government companies, though it should still be noted

that these reports are primarily for company members: any Parliamentary accountability needs to be secured through separate arrangements.

Before looking at how this may be done, we should note the significance of Companies Act status for the independence of the regulator and the extent and means of ministerial control. Where regulators are constituted by legislation, there will be provision, sometimes highly detailed, about the appointment of Board members, their tenure, the staffing of the body, its procedures, its reporting arrangements, and the extent to which Ministers may issue directions to it. Such provision may be made even if the regulator has Companies Act form: the Financial Services Act 2012 contains detailed provisions of this type for the FCA (and formerly, the PRA also). Such provisions represent Parliamentary endorsement of a particular balance, appropriate to the functions of a given regulator, between independence, accountability arrangements, and control by Ministers.

OGA offers a remarkable exception. The Energy Act provides only for a limited power of direction by the Secretary of State (ss 9-10), and to for the separation of investigatory and decision-making functions in the exercise of OGA's sanctions powers (s 59). It says nothing about the board, about staffing, about reporting to Parliament. All this is to be determined by OGA's Articles and by the framework document that – as is now the practice both for executive agencies and for NDPBs – sets out the relationship between OGA and its sponsoring Department. These both refer to the intention of the Secretary of State that OGA should control its own day-to-day business, but the Articles give the Secretary of State, as sole shareholder, power to give instructions to the directors of OGA on any matter. This power, moreover, is expressed to be separate from and additional to the statutory directions power, and is not subject to the constraints of publicity, and only exceptional applicability to individual regulatory decisions imposed by the Act. If it is further noted that the tenure of all directors may be determined by the Secretary of State, it will be apparent that OGA does not meet the criteria for independence that have, for example, been promulgated by the European Union in respect of national energy regulators.

While the Energy Act, in strong contrast to other legislation about regulators, is totally silent on the issue of OGA's Parliamentary accountability, it is important to realise that general legislative and other rules may fill the gap. Thus the Chief Executive of OGA, like almost all other heads of arm's length bodies, is its Accounting Officer for the purposes of the system of control of public expenditure, and as such is responsible for its performance both to the head of the sponsoring Department, as the Departmental Accounting Officer, and to Parliament, where he may be called upon to appear before the Public Accounts Committee. OGA also falls within the structure set up by the Government Resources and Accounts Act 2000, under which it has been designated – along with other arm's length bodies with the exception of public

corporations – as a body whose accounts are to be consolidated with those of its parent Department, and which is to provide accounting information for the purpose of preparation of “whole of government” accounts by the Treasury. In addition, the Treasury has directed that OGA's accounts should be audited by the Comptroller and Auditor-General, rather than by commercial auditors. (Before amendments were made to companies legislation in 2006, the Comptroller and Auditor-General was not qualified to audit the accounts of bodies constituted as companies under the Companies Acts.)

As a result of these general rules, the main disparity, in terms of Parliamentary accountability, between OGA and other regulators is that it has no legal obligation to lay an annual report before Parliament. Even its framework document requires only that the report be published on OGA's website. In fact OGA's first annual report as a company was laid before Parliament along with its accounts, but “by command of Her Majesty,” a formula that reflects the absence of an obligation to do so. Doubtless this practice will continue, but the lacuna in accountability obligations is to be deprecated.

## IMPLICATIONS AND SIGNIFICANCE

OGA's Companies Act status may thus have only a marginal impact on its Parliamentary accountability, but represents a significant departure from general norms and expectations relating to the independence of industry regulators. This has not worried the upstream oil and gas industry: up to now, it has given, through its representative body, Oil and Gas UK, a broad welcome to OGA, despite the additional controls and costs that have accompanied its creation. These appear to be outweighed, for the industry, by the greater expertise and regulatory resource associated with OGA, though it is not apparent that these could not have been provided by a statutory regulator. Some such regulators have, like OGA, obtained modifications to the general civil service pay and conditions structure, though all remain subject to general government pay policy.

Lack of industry concern about independence doubtless reflects the fact that, because licence regulation was previously carried on in-house in the Department, any transfer to an arm's length body, however constituted, provides greater distance from political decision-making. There is a further special factor. In contrast to other energy sectors, the government is present as the effective owner of the relevant onshore and offshore oil resources. Unlike other regulators, OGA may thus be seen as the manager of a public resource as much as a regulator, a job often done in oil-rich states by a national oil company allocating contracts to international oil companies and supervising their work. Objectively, this consideration might provide a good reason for adopting a distinctive vehicle for OGA, but it has never been referred to by government, which has instead stressed that OGA's Companies Act status does not imply any intention that it should in the future engage in commercial activities.

Even if the industry is content, OGA's status gives cause for concern in relation to the general public interest. Civil servants have acknowledged that there is currently an "appetite" in government for organising arm's length bodies, whether with regulatory or other functions, in the form of government companies. Examination of OGA's case demonstrates, however, the scope such companies offer for exercise of "proprietary" and extra-statutory Ministerial influence, and for evading Parliamentary discussion of their establishment and organisation. Future proposals of this type should receive

more searching scrutiny.

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