

Amicus Curiae

The Journal of the Society for Advanced Legal Studies



Inside ...

Introduction

Read more on page 139

Articles

Read more on page 143

Notes

Read more on page 260

Bibliographies

Read more on page 310

News and
events

Read more on page 317

Contributors'
profiles

Read more on page 322

Series 2 No 1(2)

CONTENTS

Introduction

Michael Palmer **139**

Articles

The Irish Mediation Act 2017: Much Done, More to Do

Aonghus Cheevers **143**

In Chancery: The Genesis of Micro Caseflow Management

Michael Reynolds **165**

Limits to Terror Speech in the UK and USA: Balancing Freedom of Expression with National Security

Ian Turner **201**

Legislative Developments in Cybersecurity in the EU

Faye F. Wang **233**

Notes

Awards of Costs in International Commercial Arbitration: A Simple Guide to the Principles

Doran Doeh **260**

Money Cleansing and the Effectiveness of FATF Coercive Measures: An Overview

Ejike Ekwueme & Mahmood Bagheri **274**

Personal Independence Payments

Amy Kellam **287**

Critical Legal Conference 2020

. **295**

Civil Unrest in Hong Kong Conference: 21 January 2020

Anna Dziedzic, Alex Schwartz & Po Jen Yap **298**

Thinking about Development in Southern China

Zhou Ling **301**

Bibliographies

The Published Work of Professor Anthony Dicks

Chao Xi & Michael Palmer **310**

News and Events

David Sugarman awarded: honorary ASLH fellowship **317**

IALS Transformation Project **318**

OBServing Law **318**

IALS forthcoming events **319**

Profiles of contributors to Articles and Notes **322**

Amicus Curiae Contacts

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

Production Editor: Marie Selwood

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

By post: Eliza Boudier

Amicus Curiae

Charles Clore House

17 Russell Square

London WC1B 5DR

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

INTRODUCTION

MICHAEL PALMER

IALS and SOAS, University of London

Welcome to the second issue of the first year of the new series of *Amicus Curiae*.

In this issue, several contributions address procedural concerns related to civil justice and include Aongus Cheevers' examination of progress in the development of mediation in Ireland in his article 'The Irish Mediation Act 2017: Much Done, More to Do'. He points out that, while the regulation of the practice of mediation in Ireland has been enhanced through the Act, the development of mediation as a profession has been less successful, and that an important factor in this slow professionalization has been uneven implementation of the provisions of the 2017 Act. His paper also shows a divergence from judicial practice in England and Wales in that a lack of robustness on the issue of award of costs against parties who fail to engage seriously with mediation in civil proceedings has also limited more widespread acceptance of mediation for resolving civil disputes. In his contribution, Doran Doeh lays out some of the issues that arise in relation to awards of costs in commercial arbitration. He points

out that arbitration practitioners—arbitrators and counsel—often view costs considerations against their experience of the practices relating to allocation of costs of their respective national courts. Under the 'American rule', each side bears its own costs. By contrast, under 'the English approach' in another major common law legal system on the other side of the Atlantic, the principle is that 'costs follow the event', i.e. in a simple case the loser pays the winner's costs. Other countries, many of which have civil law systems, apply variations on these approaches. However, in international commercial arbitration, the parties, their counsel and the arbitrators may, and often do, have differing national backgrounds. International arbitration practitioners have therefore evolved (and continue to evolve) their own ways of approaching the costs issues, and these are explored in the analysis offered. In his article 'In Chancery: The Genesis of Micro Caseflow Management', Michael Reynolds looks at how responses to the serious problems in the civil justice system of England and Wales in the 1870s, including inefficiencies in case handling and

the competing jurisdictions of equity and common law, involved fundamental procedural reform, including codification and unification of the procedural and administrative system, and the creation of the Official Referees Office, inspired to some extent by the work of arbitrators and by a felt need to restore confidence in commercial dispute resolution. There were also innovations that in today's language might be thought of as 'fitting the forum' to the seriousness and complexity of the 'fuss', and glimpses of 'judicial case management' and 'expert evaluation'. In many respects they were revolutionary and anticipated the civil justice reforms of the 1990s, acknowledging possibly a transformative role for a judge.

Several contributions take up issues of security. Thus, in his essay entitled 'Limits to Terror Speech in the UK and USA: Balancing Freedom of Expression with National Security', Ian Turner notes how the speed, ease and little cost incurred in sharing terror speech online is an increasingly important national security concern. But, at the same time, there has to be protection of freedom of expression. He examines how the Terrorism Act 2006 characterizes and implements the offence of 'encouragement of terrorism'. He argues that the proportionality test applied in the UK undermines 'freedom of

expression' more than the US test of 'strict scrutiny', and that the UK's approach to limiting terror speech is arguably too intrusive of freedom of expression. He suggests reform of UK law so that there is a more balanced approach and *inter alia*, argues for a tightening of the proportionality by incorporating some elements of strict scrutiny from the US law. Faye Wang's article on 'Cybersecurity Regulatory Development in the EU' observes that cyber-attacks have become a very serious matter in Europe, often in an unpredictable manner, threatening essential services, important products and key infrastructures. Finding solutions to such aggression is difficult, but appropriate technical and legal measures may prevent or at least limit the seriousness of the intended damage. The contribution examines the most recent EU cybersecurity legislative developments, such as the newly adopted EU Cybersecurity Act and other legal and technical measures, and considers their capacity to withstand such intrusions. Also linked, albeit indirectly, to issues of national security is the problem of large-scale and often international processes of money laundering. In their contribution, 'Money Cleansing and the Effectiveness of FATF Coercive Measures: An Overview', Ejike Ekwueme and Mahmood Bagheri examine responses to the serious problem of money-laundering

proceeds of crime and argue that the Financial Action Task Force's (FATF) soft law approach to the problems has in fact been quite successful—the indirect power it has gathered from links with both the International Monetary Fund and the World Bank has enabled it to play a cohesive and coercive role in the implementation of its anti-money laundering recommendations and encouraged a number of states to take appropriate measures against such practices.

Amy Kellam, in her Note on 'Personal Independence Payments' (PIP), addresses recent changes to disability benefits in England and Wales. She argues that the implementation of PIP has had a significant, but under-recognized, impact upon Her Majesty's Courts and Tribunals Service (HMCTS), accounting for the majority of receipts to the Social Entitlement Chamber. In light of ongoing reform to implement Online Dispute Resolution within the HMCTS, the handling of PIP appeals merits particular scrutiny. Kellam concludes that the potential for negative socio-legal consequences to reform should not be underestimated. This is especially so, given that such consequences may manifest in areas different from those where initial reform was initiated and, by hiding in the shadows of wider social issues, make good governance harder to evalu-

ate and failures of governance harder to bring to account.

Two contributions then consider developments in Hong Kong and the southern China region, in part in the context of recent public unrest in Hong Kong. First, Anna Dzedzic, Alex Schwartz and Po Jen Yap report on an important conference held earlier this year at the University of Hong Kong. Entitled 'Civil Unrest in Hong Kong', the meeting highlighted issues that are likely to attract continuing debate, particularly with respect to the modalities of amnesties for criminal offences and the establishment of an independent inquiry into the unrest, especially over the past year or so. Then Zhou Ling, in a Note entitled 'Thinking about Development in Southern China', looks at the emerging Greater Bay Area in southern China and examines a recent and important study from the mainland side on how best the Area might develop and be integrated with Hong Kong. The study, authored by a recently retired civil servant and senior party official who had held office in Shenzhen and at the provincial level of Guangdong, argues that Hong Kong has an important role ahead of it in the development of the Area and may well be an important influence on the trajectory of change.

Another Note introduces the UK's Critical Legal Studies (CLS)

movement, and its perspectives on law, and also includes a call for papers for the 2020 September CLS meeting at the University of Dundee. The meeting this year was intended to build on the characterization of Frankenstein as the assembling by modern scientific processes of dead parts in order to constitute a reanimated whole. From this characterization, the idea emerges of Frankenstein as a conceptual figure, symbolizing both unity and separation, of life and death, and of the power of reason to structure and animate otherwise individual and decaying parts. Applying the metaphor to law—as a Frankenlaw—issues are raised of tensions and links between detachment and community, of touching and separation, of independence and being bound, of unity and corporation, of the rational resolution of multiplicity—and of the modern social order: a divided whole, a community of atomistic modern subjects under a single, sovereign hierarchy.

Finally, Professor Chao Xi and Michael Palmer offer a Bibliography of the published works of Professor Anthony Dicks SC (SOAS School of Law and Essex Court Chambers), whose [Obituary](#) was published in *Amicus Curiae* in the Autumn 2019 issue (S2 1(1): 122-23). For many years, Professor Dicks was a leading expert on issues of Chinese law, but his writings were sometimes published in

relatively inaccessible outlets, and this compilation may assist those who wish to read more of the work of Professor Dicks on Chinese law.

The Editor thanks contributors, and Dr Amy Kellam and Marie Selwood, for their kind efforts in making this Issue possible.

Special Issues: publication

Amicus Curiae encourages its readers and others to submit proposals for Special Issues of the journal.

It is pleased to announce that the University of London Press will publish, as hard copy books, Special Issues of *Amicus Curiae*. Each issue would be sold with an ISBN number on the University of London Press platform.

THE IRISH MEDIATION ACT 2017: MUCH DONE, MORE TO DO

AONGHUS CHEEVERS

School of Law and Government, Dublin City University

Abstract

The Irish Mediation Act 2017 was intended to cement the place of mediation in the civil justice system. A key part of the Act is the regulation of mediation. The Act contains a series of regulatory measures affecting how mediation is practised and organized as a profession. This article shows how the Act has achieved one of these regulatory goals (the regulation of the practice of mediation), while failing to achieve the second (the organization of mediation as a profession). Drawing a comparison with other jurisdictions, the article shows how the failure to fully implement some of the provisions of the Mediation Act 2017 has stymied the development of mediation in Ireland.

Keywords: Ireland, Singapore, England and Wales, mediation, mediation regulation, mediator standards, mediator code of practice, Mediation Council, voluntarism, mediation principles

[A] INTRODUCTION

The Irish Mediation Act 2017 was introduced not only in order to make mediation a more important part of the civil justice system but also to regulate the practice of mediation in Ireland (Mediation Act 2017). Containing provisions governing how mediation is practised and regulated, the statute governs mediation at a micro and macro level. This article discusses how the effects of these different regulatory actions have differed.

On one side of the coin, the time since the enactment of the statute has increased the visibility of mediation, with judges recommending that parties should consider or use mediation in a range of cases. In a recent case involving the Dáil Public Accounts Committee, for example, Kelly J

(the President of the High Court) recommended that the Committee should consider whether the dispute was suitable for mediation (Carolan 2020; RTE 2020). Mediation has also been regulated to a greater extent than ever before, particularly in the case of the process itself and the actions of mediators within the process.

Nevertheless, it can be argued, as this article does, that the enactment of the statute has not achieved all the effects that the drafters hoped for. Although mediation appears to have become more visible, and although some of the aims of the statute have been achieved—in that the actual practice of mediation has been regulated—the wider regulation of mediation as a profession has not been as successful. This article examines these aspects of this process and argues that the failure to attend to these regulatory issues has stymied the effectiveness of the legislation.

The article proceeds in three substantive parts. The first section (B) outlines the regulatory efforts in the Mediation Act 2017 that are focused on the process itself. These efforts, related to how mediation happens in a case, have largely been successful. This part discusses these provisions and their effect. The next section (C) moves on to discuss the parts of the Act that are intended to regulate the mediation profession and the wider practice of mediation. Three different topics are examined: the development of a Mediator Code of Practice; the establishment of a Mediation Council; and the courts' power to invite parties to use mediation under section 16(1) of the Mediation Act. This section shows how the implementation of these three provisions has been constrained, limiting the effectiveness of the Mediation Act. The final substantive part of the article (D) draws some comparison to Singapore, which also enacted a Mediation Act in 2017. The comparison with that jurisdiction shows how the implementation of the Irish statute is deficient.

[B] MEDIATION ACT 2017: MUCH DONE

Procedural Regulation: Mediation as Part of a Dispute Resolution Process

The Mediation Act contains a series of provisions designed to make the use of mediation more widespread and to provide a framework for the practice of mediation in civil disputes. Section 16 allows a court, either by itself, or after a party request, to invite the parties to attempt to mediate their dispute. Such an invitation comes with consequences. If a court feels that a party has acted unreasonably, following an invitation, a costs

penalty may be imposed on the recalcitrant party (Mediation Act 2017, section 21). An invitation can also change the role of a mediator. Section 17 requires a mediator to prepare a report which outlines the circumstances of the mediation (whether it happened, what was agreed etc.). At present the exact scope of this report remains unclear, although this author has previously argued that a pre-prepared reporting form should be developed by the courts service (Cheevers 2018b). As presently constituted, the report requires a mediator to judge the parties and their engagement with the mediation process, changing their role and affecting their neutral stance.

The Act underlines the importance of mediation in provisions which require solicitors to adapt their practice. Under section 14, solicitors need to discuss the possibility of using mediation with their clients. The same section requires the practitioners to provide their clients with details of mediation providers. Like section 16, these requirements also come with consequences. Before they can institute proceedings, solicitors need to ensure that the originating documents are ‘accompanie[d] by a statutory declaration ... evidencing ... that the solicitor has performed the obligations imposed on him or her under subsection (1)’ (Mediation Act 2017, section 14(3)). Section 15 will impose similar obligations on barristers when they are allowed to institute proceedings in the future.

The place of mediation in civil proceedings is further enhanced through a series of procedural rules regulating the use of mediation. Section 19(1) allows a court to adjourn proceedings for mediation to take place. An adjournment can be granted if an agreement to mediate has been signed and a party tries to institute proceedings related to the dispute. A court will grant an adjournment provided it is satisfied that there are insufficient reasons that mediation cannot take place and the applicant is ready, and willing, to comply with the agreement to mediate (Mediation Act 2017, section 19(2)). Under section 18, the Statute of Limitations is stayed when mediation is attempted for the period between the signing of an agreement to mediate and 39 days after a mediation settlement is reached or the mediation is terminated.

The costs associated with mediation are outlined in section 20. This ensures that the costs of the process are shared between the parties equally, unless the court orders otherwise. Nevertheless, regardless of whether the costs are divided, they should ‘be reasonable and proportionate to importance and the complexity of the issues at stake and to the amount of work carried out by the mediator’ (Mediation Act 2017, section 20(2)). An aspect of these costs is outlined in section 21. This

section allows a court to consider any unreasonable party conduct in refusing to engage with, or attempt, mediation (following a section 16(1) invitation) when making a decision on a costs award, an aspect of the Act which is discussed later in this article.

These provisions outline how mediation will be interwoven into the Irish civil dispute system, particularly in court proceedings (Smith 2017). Outlining how mediation fits, though, is only one part of the Act's purpose. In addition to these procedural provisions the Act also contains sections which regulate how mediation is practised on an individual, case-by-case basis.

Mediation Process Characteristics

The provisions that regulate mediation on an individual basis operate on two levels. The first level of requirements sets out what mediation is and how it operates. These requirements are backed by a second level of provisions that aim to develop an overall governance framework for mediation in Ireland. Reflecting the central argument of this article, the implementation of these individual and wider policy-focused regulatory approaches is markedly different. The first set of provisions, concerning the practice of mediation as an individual process, is discussed in the paragraphs which follow. The second set of regulatory provisions, focused on the wider mediation field, is discussed in the next section.

The ideas of what mediation is, and how it is practised, as commonly shared among Irish practitioners (*Annual Review of Irish Law* 2017; Sammon 2017a; Sammon 2017b; Cheevers 2018a; Cheevers 2018b; Cheevers 2019), are underlined in the Act.¹ Voluntarism is firmly protected in section 6(2), which states that: 'Participation in mediation shall be voluntary at all times.' Voluntarism is reinforced in section 6(3) and section 6(4) which allow parties to withdraw from mediation if they so choose and to be accompanied by a person of their choosing or a legal advisor. Voluntarism, though, is not without limits. Quite apart from the matter of a court inviting parties to attempt mediation (under section 16(1)), the parties using mediation and the mediator are under an obligation to 'make every reasonable effort to conclude the mediation in an expeditious manner which is likely to minimize costs' (Mediation Act 2017, section 8(2)(c)).

¹ However, it should be noted that although a common view of how mediation should be practised exists, not all the commentary around mediation has been positive. See Sammon 2017a where the author identifies some of the problems arising from the use of mediation including, for example, the effect of the use of ADR processes on human rights (notably the right of access to court contained in Article 6 ECHR) and the fact that the use of ADR processes and settlement meant that the value of public dispute resolution, in courts, was diminished.

Section 10 protects the confidentiality of ‘all communications (including oral statements) and all records and notes relating to mediation’. Confidentiality can be breached in certain instances including where communication is needed to ensure that an agreement is enforced, to protect a party who might be the subject of psychological or physical violence, or where communication is obliged by law. A final exception to the rules governing confidentiality are the mediator reports referenced earlier in this article. These reports need to be prepared after the parties are invited to use mediation by the court (under section 16(1)) and are attempting to re-enter litigation. The Act outlines the contents of such a report but keeps this description to a minimum. If a mediation took place, the mediator needs to outline whether an agreement was reached and include a statement of the terms of the agreement (Mediation Act 2017, section 17(1)(b)). If a mediation did not occur, the mediator needs to let the court know why mediation did not take place (Mediation Act 2017, section 17(1)(a)). In either case, the requirements could impact the confidentiality of the mediation process.

Mediator neutrality is a key part of the legislation and is protected in section 8(1). This section insists that mediators must determine if a conflict of interest exists and inform the parties and withdraw from the mediation if it does. Section 8(2) imposes an additional obligation that the mediator is impartial and acts with ‘integrity’, while being fair to both parties. Like the other principles, neutrality is not absolute. A mediator can, following a request of the parties, ‘make proposals to resolve the dispute’ (Mediation Act 2017, section 8(4)). Again, the requirement to make a report under section 22 could, arguably, impact the mediator’s neutrality if this report is framed as a judgment of the parties, rather than a simple description of what happened in the mediation process (Cheevers 2018b).

These provisions have helped ‘to promote mediation as a viable, effective and efficient alternative to court proceedings’ (Mediation Bill 2017: Second Stage, 2 March 2017). In the courts, judges have been suggesting that parties might want to consider mediating their cases. In the case referred to earlier, this suggestion was made to representatives of the Dáil Public Accounts Committee. The imposition of standards and the setting of expectations about what parties can anticipate in mediation regarding neutrality, voluntarism and confidentiality is also welcome. Nevertheless, despite these beneficial effects of the legislation, some lacunas still remain. Such gaps are arguably hindering the wider effectiveness of mediation in Ireland.

[C] MEDIATION ACT 2017: MORE TO DO

In addition to regulating the practice of mediation on an individual level and putting in place a procedural framework for mediation in the courts, the Act also contains a series of provisions to strengthen the wider regulation of mediation and to make mediation a more effective part of court proceedings. The first of these provisions allows for the development, or approval, of a mediator code of practice. The second outlines the manner in which a Mediation Council, of both mediators and public representatives, will help to regulate the practice of mediation in Ireland. The final rules outline how courts can invite parties to attempt mediation. Unlike the provisions (discussed in section B) which have been introduced and implemented, the rules discussed in this section remain a work in progress.

This part of the article shows how the failure to address these issues limits the effectiveness of the Act. The section starts by outlining how mediator accreditation and regulation have been a debated issue throughout the world, before outlining how Irish accreditation and regulation is handled under the Mediation Act. The final part of the section draws a comparison between Ireland and England & Wales. That jurisdiction has implemented similar rules around courts inviting parties to use mediation. The application of the rules in the two jurisdictions, though, has been different.

A Mediator Code of Practice

Mediator accreditation as a wider discussion

The accreditation of mediators and the implementation of mediator standards has been widely examined, with the advantages and disadvantages of regulation being highlighted. Alexander discusses how developing and imposing mediation regulations can make it more difficult to maintain ‘the flexible and democratic nature of the mediation process’ (2013: 146). This occurs when the imposition of legal norms and rules affects the flexibility, efficiency and openness of the mediation process and the mediation profession. Nussbaum (2016) discusses how the use of mediation in legislation regulates disputants in two ways. Firstly, the imposition of mandatory mediation in certain cases impacts disputant procedural choice. Rules which tell people ‘how to mediate’ also impact upon how people use mediation (Nussbaum 2016: 381). These provisions include rules that govern who can and cannot participate in mediation, that incentivize settlement, and that contain good-faith requirements

governing party conduct and engagement with the process (Nussbaum 2016: 384-85).

Press (2000) identified different stages in mediation regulatory processes (institutionalization, regulation/codification, legalization, innovation, internationalization and co-ordination). Each of these stages raises its own questions. Institutionalization, regulation and legalization all raise issues about the proper role of the state in the regulation of an informal practice, like mediation, with regulation requiring the state to strike a balance 'between the need to balance consumer protection with concerns about over-regulating a developing and diverse practice' (Carrol 2002: 191).

Boon & Ors (2007) outlined the reasons that mediation regulation might and might not be appropriate. Most of the factors in support of regulation concern public confidence in mediation and public expectations of the process. When the Law Reform Commission (LRC) evaluated the need for the regulation of Irish mediation (discussed in the next section) this was one the factors it considered. For Boon & Ors (2007) a key concern with any regulatory system was whether parties were expected to bear the costs of a court case if they have a complaint against their mediator. The arguments against regulating mediation focused on a variety of concerns, including the argument that regulation would hinder the development of a flexible process (see, for example, the discussion in Alexander 2013).

The next objection is that standards limit the development of a mediation market and bring it, instead, 'closer to the rule bound justice system to which it is supposedly alternative' (Boon & Ors 2007: 35). Universally applicable standards are also said to lead to homogenization, with some practitioners unable, or unwilling, to meet the educational standards that professional accreditation might require. Other objections state that greater regulation is unwarranted, since the number of complaints is low and that regulation would increase mediator expenses, leading to increased costs for clients.

Cole & Ors (2014), when considering mediation regulation generally, raised at least six questions that should concern legislators or policy-makers before they enact mediation legislation. These questions concern a range of issues including: how the law will interact with the confidentiality of mediation; whether the people using mediation will be aware of the legislation (and whether they are likely to be aware of its effect); and what the unintended consequences of the law might be. Other considerations include: deciding if the law is actually necessary; whether

it risks muddying ‘the lines between adjudication and mediation’; and whether the law will clash with long-held practices (Cole & Ors 2014: 36).²

The question, then, of whether mediation and mediators should be regulated, and if so how, is one with a wider relevance. The question is also not an easy one to answer. On the one hand, the need to effectively protect mediation clients, especially if mediation is used in a court process, is clear. These people need to be assured that the service they are using and the practitioners providing that service meet identifiable standards. On the other hand, Alexander’s (2013) criticisms also hold water. An overt focus on mediation could impact the flexibility associated with the process. In Ireland, the LRC addressed some of these issues in 2010 when it assessed how mediation could operate, with some of its recommendations being implemented in the Mediation Act (LRC 2010).

Accreditation and regulation in Ireland

The first obligation dealing with accreditation and standard-setting allows the Minister for Justice and Equality to develop or approve a code of practice for mediators (Mediation Act 2017, section 9(1)). Section 9(2) lists the type of information that the code can contain and includes mediator continuing professional development (CPD) requirements, the ethical standards applicable to mediators, and the rights of parties if they wish to complain about their mediation. The use of this approach follows the recommendations of the LRC (2008; 2010). That organization recommended that mediators should self-regulate, with professional organizations accrediting ‘only those practitioners meeting the levels of training established by the professional body’ (LRC 2010: 80). The Commission, however, also recognized that the need for minimum standards required the Minister for Justice and Equality to develop universally applicable practice standards, with the aid of a specialist committee, established for the purpose.

The LRC noted that a universally applicable code would have three effects: enhanced mediator knowledge, skill and ethics; higher quality practice overall; and ‘the protection of the needs of consumers of mediation ... and the provision of accountability where they are not met’ (LRC 2010: 180). Daly (2010) raised similar topics, noting that the

² When they assessed the need for regulation in England and Wales, de Oliveira and Beckwith also showed how the need for regulation depended on different factors. They noted that: ‘As mediation derives of parties’ freedom to contract, they should also be free to determine the steps taken through mediation. A mediator is a facilitator who will help parties reach an agreement, if the process becomes too bureaucratic, parties might feel that it is not functional.’ (de Oliveira and Beckwith 2016: 353). Nevertheless, they still highlighted how at least one sector (family disputes) could benefit from more regulation to increase consumer confidence in the process.

legitimacy of mediation (and alternative dispute resolution (ADR) more generally) depended on effective accreditation. In this context, accreditation helps to inform the public about the profession's presence and the services that are on offer and provides an assurance that certain minimum standards will be met in the provision of those services. As she noted: 'Professions are by definition service industries.' (Daly 2010: 50)

Accreditation, however, does not necessarily need to be a public act and can take many forms. Although the Commission felt that accreditation and standard-setting were necessary, as already discussed, it also felt that these acts could best be carried out by the imposition of standards by mediation organizations. The recommendation that these accrediting actions should be backed by a universally applicable code of practice was also limited. Even while favouring a universally applicable code of practice, the Commission stressed that the code should not be 'over cumbersome or prescriptive' (LRC 2010: 181). This recommendation was made in the interests of protecting the flexibility which is inherent in mediation.

Supporting accreditation, while at the same time highlighting how it can affect the mediation process, reflects the wider discussion of mediation regulation and accreditation (addressed in the previous section). At heart, however, the issues raised around regulation come down to a question of how best to use mediation, protecting its strengths (including, informality, voluntary participation and the opportunity to discuss a dispute in the fullest possible terms), while effectively protecting the parties using the process (especially in a state-backed civil justice system). In addition, the embedding of mediation as part of the formal justice system sees 'public' expectations becom[ing] attached to what has hitherto been thought of in terms of a private activity' (Whitehouse 2017: 3).³ Fiss (1984; 2009), in addition, criticized the settlement paradigm that he saw as undermining the work of civil courts in the United States. Part of the thinking behind the Fiss criticism lay in the informal and confidential nature of settlement discussion, which limited the precedential potential of a court ruling. Mediation, even the best mediation, struggles, unfortunately, to overcome this criticism.⁴

³ The need for regulation has been questioned by others, however. Reece (1998) notes that the imposition of standards could limit entry to the mediation profession and make mediation more formal. Nevertheless, she also notes that, even in 1998, the professionalization of mediation was already happening since 'many mediators, including all of the entrepreneurial ones, were members of existing professions' (Reece 1998: 45).

⁴ Although arguments have been made in support of Fiss. See, for instance, Weinstein (2010). Luban argues that the Fiss criticism should be reworked from being against settlement *per se* to being 'against the wrong settlements' (Luban 1995: 2665).

As part of the civil justice system, mediation raises questions about how best to regulate the process and the people practising the process. In the Irish context, some of the questions raised by Boon, Cole and their fellow authors have been considered. The mere fact that Ireland has a Mediation Act shows that regulation is happening. The question that arises, however, is why this regulatory exercise has not been fully completed. Any worries that a code of practice will impact the flexibility of mediation might be overcome by the requirement that the development or approval of the code is a collaborative process, as the LRC recommended. As discussed in the next section, a function of the Mediation Council is the development of a code of practice. Section 9(3) also requires the Minister to publicize their intention to approve or develop a code of practice on the Department of Justice and Equality's website and, at the very least, one daily Irish newspaper, with people being free to inspect the proposed code and to comment on its contents. In this respect, any code should represent regulations which reflect the 'pluralistic thinking' which Alexander referenced (Alexander 2013: 147).

In terms of the development of mediation, it could be argued that mediation is reaching the stage where it is now established as part of civil justice in Ireland. Although mediation practitioners come from diverse backgrounds, already most mediators have some form of accreditation. A codified provision could simply make this accreditation requirement a necessity. Any discussion of such a requirement would need to happen in concert with a more wide-ranging discussion of mediator expenses and the value of mediation. For many mediators, in Ireland and elsewhere, mediation is something of a voluntary pursuit. The imposition of standards could encourage greater professionalization of mediation practice and, hence, increase the fees payable to mediators.

In some ways, the Mediation Act seems to show how professionalization might evolve. Alexander identified five 'primary regulatory forms associated with mediation' (Alexander 2013: 147):

- ◇ market regulation;
- ◇ industry-based regulation (e.g. Mediators' Institute of Ireland (MII) Code of Ethics Practice);
- ◇ framework legal instruments (e.g. EU Directive on Mediation);
- ◇ model laws (e.g. Model Law on International Commercial Conciliation 2002); and

- ◇ domestic legislation (e.g. Mediation Act 2017 (Ireland), Mediation Act 2017 (Singapore)).⁵

The LRC, as noted above, has also characterized mediation regulation in Ireland as an amalgam of acts carried out by public and private bodies. As currently constituted, then, Irish practice is a mixture of these various approaches, with the majority of the regulation that is occurring happening in the private sector through private organizations (such as the MII) or using market forces.

Although the Act applies generally in civil cases, section 3(2) limits the Act's application, including where mediation is required under another statute or under a contract made by the parties. This is one form of market regulation, since mediation remains a creature of contract and parties are free (as shown in section 3(2)) to contractually agree to mediate their dispute on terms that suit their needs. Market regulation also appears where mediators are required to provide disputants with details of their qualifications, CPD training etc. This, in effect, uses a market-based approach to professionalize mediation practitioners, since those mediators with more, and better, qualifications will likely receive more appointments. Where this leaves mediators who do not have the time, or money, to burnish their credentials remains unclear.

Still, without the development or approval of a state-backed, overall code of practice, the duties of mediators and the expectations of the clients using mediators remain indistinct. Even if a mediator practises under an existing code (such as that of the MII), what does this actually mean? A client who is unhappy with a service can complain to that organization, which may punish its member, but this does not mean that the mediator may not continue to practise. This is in contrast to other professions, such as solicitors and doctors, with regulatory bodies with teeth. The Solicitors Disciplinary Tribunal often hears complaints and punishes guilty parties. In October 2019, for example, a solicitor was struck off the register after being found guilty of professional misconduct (Carolan 2019).

As things currently stand, even if such a finding were made against a mediator, a similar result would not be possible. The failure to develop and approve a code of practice, and to require mediators to sign up to the code,

⁵ In an earlier article, Alexander (2008) discussed four regulatory approaches to market regulation, self-regulation, formal frameworks and formal legislation. She argued for 'a multi-layered approach to regulation in mediation—a combination of market-based legislative and self-regulation with strong responsive and reflexive review mechanisms in place. In a dynamic and developing professional field, participative regulatory processes with the ability to review and adapt the mediation mix to changing circumstances are vital.' (Alexander 2008: 23) The regulatory framework of the Mediation Act starts to put such a dynamic framework in place. Whether the correct balance has been struck could also be questioned, however, as it is in this article.

means that mediation in Eire today remains a largely unregulated profession. Although this might be a good thing for mediators and other stakeholders who want to maintain ‘the flexible and democratic nature of the mediation process’, the question remains whether it is the most appropriate way to make mediation an effective part of the civil justice process and to protect effectively the parties using mediation (Alexander 2013: 146).

THE MEDIATION COUNCIL

Another section that could assist the wider regulation of mediation is section 12. This allows the Minister for Justice and Equality to establish the Mediation Council of Ireland, referred to above in the previous section. This body is intended to report to the Minister for Justice and Equality each year, with the report (in line with other statutory bodies) being laid before the Houses of the Oireachtas (Irish Parliament) (Mediation Act 2017, section 13). The Council may also provide the Minister with additional reports relating to ‘any matter concerning the policies and activities of the Council’ (Mediation Act 2017, section 13(2)(a)).

The Council’s functions extend beyond reporting on how mediation is used to cover the regulation of the mediation profession. The Council is charged with some of the functions of mediation regulation that the LRC (2010) considered, which include the development and maintenance of ‘standards in the provision of mediation, including the establishment of a system of continuing professional development training’ (Mediation Act 2017, Schedule). In addition, it is obliged to maintain a register of mediators who have subscribed to any code of practice which the Minister develops or approves, as well as advising the Minister about the contents of the code and supervising the code’s implementation.

The Council is both independent in its functions and make-up of representatives, consisting of mediators and the wider public. Membership of the body is divided between six individuals who are public-interest members and five mediators or members ‘representative of bodies promoting mediation services or representing the interests of mediators’ (Mediation Act 2017, schedule). Importantly, the Act notes that the public-interest members should be persons ‘who are independent of the interests of mediators’ (Mediation Act 2017, schedule).

The Council represents an important addition to the Irish mediation landscape and should ensure that all the relevant interests are taken on board during the development of a code of practice. In this case, relevant interests not only include mediators and mediation organizations, but the people who use the mediation process. Considering this, the failure to

appoint a Mediation Council is surprising. Despite widespread support for, and the continued and expanded use of mediation, the failure to appoint the Council raises questions about whether government support for the process is simply smoke and mirrors: providing support in public, but being unwilling, or unable, to support the process in a concrete manner. This question also arises when one considers some of the cases in which parties have suggested mediation. In cases such as the *Atlantic Fisheries* decisions (discussed below in the next section), it was government or public bodies rather than private individuals who refused to use mediation.

In addition, the failure to appoint, or even to nominate, a Council has stymied the usefulness of mediation. Although the Act has been in force for a couple of years, it is unclear if the disputing process has necessarily changed in the majority of cases. Mediation remains very much an alternative, rather than the primary approach that is envisaged in the Act. This, coupled with the failure to develop and maintain a register of mediators who have subscribed to a code of conduct, or even to develop or approve a code, means that clients are still reliant on their legal advisor when deciding on a mediator appointment. As already noted, this also means that the regulation of the mediation profession remains a private undertaking, where clients cannot be sure what effect their complaints against mediator misconduct or incompetence will have.

COSTS PUNISHMENTS AND UNREASONABLE BEHAVIOUR?

The final impediment to the wider use of mediation and the effectiveness of some of the provisions in the Mediation Act are the rules concerning court invitations to use mediation under section 16(1). These rules bear a close resemblance to similar provisions in England and Wales. In that jurisdiction, the amendment of the Civil Procedure Rules (CPR) helped courts to begin to develop an understanding of how mediation should be used in civil proceedings. CPR rule 44(4) allows a court to consider party conduct, who won the case, and any settlement attempts made by the parties, when deciding whether to award costs to one of the parties. Under CPR rule 44(5), 'party conduct' includes not only the parties' actions during proceedings, but also before proceedings and any failure to follow relevant pre-action protocols.

Paragraph 8 of the Pre-action Conduct and Protocols Practice Direction requires litigants to 'consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings'. This requirement is backed by an additional obligation to provide evidence that the parties have considered an ADR process if the

court requests (Pre-action Conduct and Protocols Practice Direction, para 11). In *Halsey v Milton Keynes NHS Trust*,⁶ Dyson J, for the Court of Appeal, outlined a number of factors that courts could use to assess the reasonableness of a refusal.

The judge started by noting that, since the imposition of a costs penalty meant departing from the general rule of costs following the event, the burden of proving that a party's behaviour was unreasonable falls on the party making the claim. In assessing the claim, relevant factors include:

... the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success. We shall consider these in turn. We wish to emphasise that in many cases no single factor will be decisive, and that these factors should not be regarded as an exhaustive check-list.⁷

The *Halsey* decision led to a divergence in courts in England & Wales, between keeping mediation a voluntary process, on the one hand, and, on the other, compelling the parties to consider mediation, with the imposition of costs penalties following unreasonable behaviour. This has resulted in an ADR jurisprudence which is 'inconsistent, contradictory and confusing' (Ahmed and Arslan 2019: 2). This situation is underlined in two recent cases. In *Thakkar v Pattel*⁸ in the Court of Appeal, Jackson LJ imposed a costs sanction on a defendant who had failed to engage with the claimant's invitation to participate in mediation. In *Gore v Naheed*,⁹ however, decided only four months after *Thakker*, Patten LJ reached the opposite conclusion, refusing to punish a defendant for failing to engage in mediation.

In *Lomax v Lomax*,¹⁰ the Court of Appeal was asked to consider whether the *Halsey* criteria, that a party could not be compelled to use mediation, should be extended to an early neutral evaluation (ENE) process in an inheritance proceeding. This proceeding was governed by CPR rule 3.1(2)(m), which allows a court to either make an order or ask the parties to enter an ENE process, 'for the purpose of managing the case and furthering the overriding objective' (CPR rule 3.1(2)(m)).

⁶ [2004] EWCA Civ 576.

⁷ Ibid para 16.

⁸ [2017] EWCA Civ 117.

⁹ [2017] EWCA Civ 369.

¹⁰ [2019] EWCA Civ 1467.

The claimants in *Lomax* argued that the parties' consent was not required under CPR rule 3.1(2)(m). The defendants, however, argued that an application of the *Halsey* principles meant the court could not order the parties to use an ENE process. This argument was backed by an insistence that the *Halsey* principle was underpinned by the various CPR rules which showed that compulsion would limit the parties' rights of access to court, and 'the authors of the various Court Guides considered that consent is required before an ENE can be ordered' (Ahmed and Arslan 2019: 6). The Court of Appeal sided with the claimants, with Moylan LJ stressing that, if party consent was needed, this could easily have been shown in the wording of the rule. This was not, however, the case.

The *Lomax* decision further cemented the role of the ADR process in English civil disputing. The decision also reflects an ongoing process which has been taking place in England & Wales. In the *Chancery Modernisation Review* (Briggs 2013), for example, Briggs LJ argued that courts needed to recognize that litigation was unlikely to resolve most disputes. This recognition meant that courts needed to manage disputes using a wider range of procedural options. This would see courts playing 'a more active role in the encouragement, facilitation and management of dispute resolution in the widest sense, including ADR as part of that process, rather than merely focusing on preparation for trial' (Ahmed and Arslan 2020: 16).

In *PGF II SA v OMFS Co 1 Ltd*,¹¹ Briggs LJ ruled that refusing to engage with an invitation to attempt ADR could constitute an unreasonable refusal. This has since been reflected in the Pre-action Conduct and Protocols Practice Direction, with paragraph 11 noting that: 'A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable.' Although *Halsey* left the question of whether parties could be compelled to use mediation (or another ADR process) in the air, the courts have moved to bring about an expectation that parties will at least attempt to settle their dispute with an ADR process if necessary. Even when Moylan LJ dodged the question of whether the issue of compulsion in mediation was correctly decided in *Halsey*, the court in *Lomax* still supported the ENE process in the case.

In Ireland, on the other hand, such an understanding of how mediation and other ADR procedures can be used has not occurred. The courts are still grappling with whether, and how, to use mediation. As yet, no court has invited the parties before it to attempt mediation (as allowed under section 16(1)) or punished an unreasonable refusal to attempt mediation

¹¹ [2019] EWCA Civ 1288.

(as allowed under section 21). In *Atlantic Shellfish v County Council of Cork*,¹² Irvine J, for the Court of Appeal, outlined how a court should approach the question of whether to invite a party to attempt mediation. The interesting part of this approach is that the decision continues to rest with the parties themselves, rather than the court. This is shown by the judge's statement that:

To my mind the court could not be satisfied that it would be 'appropriate' to make an order unless it was first satisfied that the issues in dispute between the parties were amenable to the type of ADR proposed.¹³

Only if a court is satisfied that mediation could be successful or that the parties' dispute is capable of being resolved in mediation will the court consider the other factors that 'might weigh in favour or against the granting of the relief sought' (Irvine J).¹⁴ These factors include: the purpose of the application (whether it is actually a *bona fide* attempt to settle the dispute, or merely a mechanism to maintain a costs claim); the actions of the parties until the making of the application; the potential savings from the ADR process; and the likelihood that the process could bring the parties closer together.

As things currently stand, the need to identify if a case is capable of being resolved with the proposed ADR process places too much power in the hands of disputants (particularly those disputants who do not want to use mediation or another ADR procedure). In the *Atlantic Shellfish* cases, some of the public defendants argued that the case raised novel issues of law which needed to be resolved by a court. Irvine J stated that:

I do not believe it is unreasonable for the party against whom complex legal claims have been made, and which may have ramifications that extend well beyond the confines of the proceedings and their parties, to maintain their entitlement to have those issues resolved by the court.¹⁵

Similarly, in *Grant v Minister for Communications*,¹⁶ Costello J followed this line of reasoning when he held that the dispute was unsuitable for mediation and, thus, refused an Order 56A application. More recently in *Danske Bank v SC*,¹⁷ Gilligan J agreed with O'Connor J's refusal to grant a plaintiff's Order 56A application. Gilligan J referred to a number of

¹² [2015] IECA 283.

¹³ *Ibid* para 33.

¹⁴ *Ibid*.

¹⁵ *Ibid* para 43.

¹⁶ [2016] IEHC 328.

¹⁷ [2018] IECA 117.

factors that the trial judge had considered, including whether the proposed ADR process could resolve the dispute, whether the application was *bona fide*, and whether the party making the invitation ‘knows that an invitation from the Court will for good reason be refused’.¹⁸ The actions of the parties throughout the litigation led the judge to conclude that mediation would likely not work and that an order should not be made.

These cases show two things. First, as already argued, the question of whether mediation, or another ADR process, is likely to be successful privileges those parties who argue that mediation should not be used. As long as they can raise an objection that the court accepts the refusal will be upheld. Although this approach starts in the same place as England & Wales (unreasonableness being punished), the application of the rules means that the parties end in a different space. Unlike England & Wales, the Irish courts appear to be more willing to side with a party who is arguing against mediation, as opposed to a party who is arguing for the process. Focusing on party conduct before the making of an Order 56A application sees mediation as an addition to the legal system, which might aid settlement, rather than something different that might provide advantages that litigation cannot provide.

Secondly, the application of the rules has limited the use of mediation. Instead of the Mediation Act leading to a new way of doing disputes, it simply becomes an addition to the old way of disputing. This is shown most forcefully, perhaps, in the way the government has handled Order 56A applications. If the government supports mediation, on the one hand, yet refuses to engage with the process when involved in a case, does this hinder mediation? This remains an issue, as the earlier reference to the Dáil Public Accounts Committee case shows.

[D] WHERE DOES ALL THIS LEAVE US?

In the same year that Ireland enacted the Mediation Act, Singapore also ratified and put into effect its own Mediation Act. Much like the Irish legislation, this statute defines mediation and sets out the contours of mediation in Singapore. Both statutes share some common characteristics. In the Singapore Act, much like the Irish equivalent, no overarching code of conduct has been imposed on mediators. Anderson (2017) highlights how Hong Kong (which passed a Mediation Ordinance in 2012) also adopted an approach where mediation codes of practice are set by organizations and not the government. In Singapore, the Singapore

¹⁸ Ibid para 35.

International Mediation Institute carries out this function. As Anderson noted: ‘This body currently administers a four-tiered mediation credentialing scheme.’ (Anderson 2017: 278)

Like Ireland, then, Singapore has decided that the mediation profession should be regulated. The difference between the two jurisdictions is that Singapore has followed through on these regulatory commitments. The nomination of one certification body ensures that the mediators who conduct mediation meet the required standard and that the clients who use mediation know that this is the case. The regulatory process is strengthened by the requirement that a ‘mediation is administered by a designated mediation service provider or conducted by a certified mediator’ before the agreement can be recorded as an order of the court (Singapore Mediation Act 2017, section 12(3)). For clients, especially those from outside the jurisdiction, these requirements build trust in the mediation process. At the same time, the attractiveness of Singapore-based mediation is enhanced because clients can also make use of ‘an expedited enforcement mechanism for their settlement terms’, providing their mediator is properly certified (Anderson 2017: 286).

The fact that Singapore, unlike Ireland, has developed and implemented a framework to regulate mediation is no accident. Already, the country has developed ‘an elaborate commercial mediation ecosystem’ (Chua 2019: 204). Importantly, this ecosystem is underpinned by government support (McFadden 2019). The Singapore International Mediation Institute, for instance, was established as a non-profit with support from the Ministry of Law and the National University of Singapore. Like the proposed Irish Mediation Council, the Institute is made up of representatives of mediators and the users of mediation. Unlike the proposed Mediation Council, however, the Institute is actually operational.

The implementation of a recognizable public and private framework has another effect on mediation in Singapore. Arbitration is generally seen as an effective mechanism for resolving international disputes. Mediation less so. This may be changing, though. In the Singapore Act, the Act’s provisions support the development of mediation as a viable alternative not only for domestic disputants but also for disputants from another jurisdiction. Section 6(1) states that the Act applies to any mediation, occurring under a mediation agreement between parties, which ‘is wholly or partly conducted in Singapore’ or a mediation in which the agreement states that the Mediation Act, or another Act of Singapore will apply. The recent signing of the United Nations Convention on International Settlement Agreements Resulting from Mediation (or Singapore

Convention) might reinforce this trend in the coming years (Schnabel 2019). Singapore, unlike Ireland, appears aware of these changes and seems to be preparing for them.

Even though both Ireland and Singapore have recognized that mediation could and, perhaps, should be regulated, the jurisdictions have approached this task in different ways. Ireland remains wedded to the idea that regulation is best carried out by private mediation organizations. As the earlier discussion showed, though, this method could limit the effectiveness of the regulations for the people using the process. When the LRC considered how mediation should be regulated, a phrase it regularly employed was ‘at this stage in the development of mediation and conciliation’ (LRC 2010: 184). The earlier discussions of the LRC’s recommendations were framed by this statement. The question now is whether the development of mediation is still at the same stage, or whether mediation’s development has progressed to a point where universal standards are appropriate, with a body appointed to oversee the formulation and implementation of these standards? In this author’s opinion, it has.

[E] CONCLUSION

The use and effectiveness of mediation in Ireland has increased in recent years. As stated earlier, courts are beginning to suggest that the parties consider whether mediation could be used to resolve their disputes. Simply because things are better, though, does not mean that they could not be made better still. As yet, no party has been invited officially to use mediation, or punished because they have refused to use mediation. In the discussion of the approach adopted in England & Wales, the *Halsey* question was raised. Ireland appears to have put aside that question of whether courts should, or can, order parties to use mediation, in favour of an approach in which mediation is, and must remain, voluntary. It is argued that this places too much power in those parties who do not want to use mediation.

It also remains the case that mediation is still misunderstood, that people might not know what mediation is, and, even if they do, they do not fully understand what the process entails. Part of the purpose of the Mediation Council is to overcome these obstacles by publicizing information about mediation and, through regulation, making the process more professional. As long as the Council remains unappointed, this task is left to a disparate range of stakeholders, who might not necessarily be singing from the same hymn sheet. The appointment of a Council and the

subsequent development of a universally applicable code of practice will help mediation to be seen as a profession, rather than a practice that a range of people simply carry out. By taking on board the opinions and suggestions of various stakeholders, mediators, lawyers, judges, civil society and litigants, the Council could help to develop a code that reflects the needs of the people practising and using mediation, which effectively protects disputants who have complaints and also protects the added value that mediation can provide.

References

- Ahmed, M & FN Arslan (2019) 'Compelling Parties to Judicial Early Neutral Evaluation but a Missed Opportunity for Mediation: *Lomax v Lomax* [2019] EWCA Civ 1467' 39(1) *Civil Justice Quarterly* 1-11.
- Alexander, N (2008) 'Mediation and the Art of Regulation' 8(1) *Queensland University of Technology Law Review* 1-23.
- Alexander, N (2013) 'Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulatory Reform' in K J Hopt & F Steffek (eds) *Mediation: Principles and Regulation in Comparative Perspective* Oxford: Oxford University Press.
- Anderson, D Q (2017) 'A Coming of Age for Mediation in Singapore? Mediation Act 2016' 29 *Singapore Academy of Law Journal* 275-93.
- Annual Review of Irish Law* (2017) 'Mediation Act 2017' 1(1) *Annual Review of Irish Law* 459-72.
- Boon, A, R Earle & A Whyte (2007) 'Regulating Mediators?' 10(1) *Legal Ethics* 26-50.
- Briggs, Lord Justice (2013) *Chancery Modernisation Review: Final Report* London: Courts and Tribunals Judiciary.
- Carolan, M (2019) 'Solicitor to be Struck off over Professional Misconduct' *Irish Times*, 14 October 2019.
- Carolan, M (2020) '[Dáil Urged to Reconsider Refusal to Mediator Angela Kerins Claim](#)' *Irish Times*, 20 January 2020.
- Carrol, R (2002) 'Trends in Mediation Legislation: "All for One and One for All" or "One at All"?' 30 *University of Western Australia Law Review* 167-207.
- Cheevers, A (2018a), 'Voluntarism and the Need for a Civil Justice Reform Project in Ireland' 37(1) *Civil Justice Quarterly* 98-123.
- Cheevers, A (2018b) 'Confidentiality Protections and Mediator Reporting Requirements under the Irish Mediation Act 2017: A Comparative Perspective' 13(2) *Journal of Comparative Law* 99-119.

- Cheevers, A (2019) 'Neutrality in Irish Mediation, One Concept, Different Meanings' *Conflict Resolution Quarterly* 1-20.
- Chua, E (2019) 'The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution' 9 *Asian Journal of International Law* 195-205.
- Cole, S R, C A McEwen, N H Rogers, J R Coben & P N Thompson (2014) 'Where Mediation is Concerned, Sometimes "There Ought not to be a Law"' 20(2) *Dispute Resolution Magazine* 34-38.
- Daly, C C (2010) 'Accreditation: Mediation's Path to Professionalism' 4 *American Journal of Mediation* 39-54.
- de Oliveira, L V P & C Beckwith (2016) 'Is There a Need to Regulate Mediation? The English and Welsh Experience' 42(2) *Commonwealth Law Bulletin* 327-54.
- Fiss, O (1984) 'Against Settlement' 93 *Yale Law Journal* 1073-90.
- Fiss, O (2009) 'The History of an Idea' 78 *Fordham Law Review* 1273-80.
- Law Reform Commission (2008) *Alternative Dispute Resolution* (Consultation Paper LRC CP 50-2008) Dublin: Law Reform Commission.
- Law Reform Commission (2010) *Alternative Dispute Resolution Mediation and Conciliation* (Report LRC 98-2010) Dublin: Law Reform Commission.
- Luban, D (1995) 'Settlements and the Erosion of the Public Realm' 83 *Georgetown Law Journal* 2619-62.
- McFadden, D (2019) 'The Growing Importance of Regional Mediation Centres in Asia' in C Titi & K Fach Gomez (eds) *Mediation in International Commercial and Investment Disputes* Oxford: Oxford University Press.
- Nussbaum, L (2016) 'Mediation as Regulation: Expanding State Governance over Private Disputes' 2016(2) *Utah Law Review* 361-415.
- Press, S (2000) 'International Trends in Dispute Resolution: A US Perspective' 3(2) *ADR Bulletin* 21-26.
- Reece, C (1998) 'The Quandary of Setting Standards for Mediators: Where are We Headed' 23(2) *Queen's Law Journal* 441-74.
- RTE (2020) 'High Court President Urges Dáil to Enter Mediation with Angela Kerins' *RTÉ News* 20 January
- Sammon, G (2017a) 'Mediation in Ireland: Policy Problems' 57 *Irish Jurist* 175-86.
- Sammon, G (2017b) 'The Mediation Act 2017' 58 *Irish Jurist* 106-20.

- Schnabel, T (2019) 'The Singapore Convention on Mediation: A Framework for the Cross Border Recognition and Enforcement of Mediated Settlements' 19(1) *Pepperdine Dispute Resolution Law Journal* 1-60.
- Smith, W M (2017) 'The Mediation Act' 22(6) *Bar Review* 160-63.
- Weinstein, J B, (2010) 'Comments on Owen M Fiss, Against Settlement' 78 *Fordham Law Review* 1265-72.
- Whitehouse, P (2017) 'Regulating Civil Mediation in England and Wales: Towards a "Win-Win" Approach' 2(1) *Mediation Theory and Practice* 68-83.

Legislation Cited

- EU Directive on Mediation 2008
- Mediation Act 2017, Number 27 of 2017 (Ireland)
- Mediation Act 2017 (Singapore)
- Model Law on International Commercial Conciliation 2002

Cases Cited

- Atlantic Shellfish v County Council of Cork* [2015] IECA 283
- Atlantic Shellfish & Hugh Jones v County Council of Cork and Others* [2015] IEHC 570
- Danske Bank v SC* [2018] IECA 117
- Gore v Naheed* [2017] EWCA Civ 369
- Grant v Minister for Communications* [2016] IEHC 328
- Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576
- Lomax v Lomax as Executor of the Estate of Alan Joseph Lomax (Deceased)* [2019] EWCA Civ 1467
- PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288
- Thakkar v Pattel* [2017] EWCA Civ 117
- Mediation Ordinance 2012 (Hong Kong)

IN CHANCERY: THE GENESIS OF MICRO CASEFLOW MANAGEMENT

MICHAEL REYNOLDS¹

London School of Economics, University of London

Abstract

This article explores an early example of subordinate judicial practice in England and Wales in which we may see some issues that later appear in the relationship between informal justice initiatives (especially alternative dispute resolution) and the civil justice system. Broadly speaking, the paper looks first at the symptoms of systemic failure in the pre-1873 system which led to the creation of the Official Referee's office. It then considers the relevant recommendations of the Judicature Commissioners and the reasoning behind such recommendation, looking at both the macro- and the micro-levels, before exploring the referees' diverse jurisdiction which provided a creative foundation for the evolution of interlocutory innovation. The article argues that structural realignment of the court system by the Judicature Commissioners was not sufficient in itself to eradicate all its encumbrances, but it indirectly empowered the referees to eventually bring about revolutionary procedural changes.

Keywords: Official Referee, judges, macro-management, micro-management, procedure, rules

[A] MACRO-MANAGEMENT PROBLEMS IN THE CIVIL JUSTICE SYSTEM

The problem with the legal system which led to the judicature reforms of the 1870s in the early to mid-nineteenth century was endemic. The system was described by the Attorney General² on 9 June 1873 as:

¹ The author would especially like to thank Professor Michael Palmer and Dr Amy Kellam for their kind assistance in the production of this article.

² Sir Richard Baggallay (20 April 1874-25 November 1875).

... having grown up during the Middle Ages, was incapable of being adopted to the requirements of modern times

and that:

... it was beyond controversy, that in many instances our procedure was impracticable and inconvenient, for no one practically conversant with its details could deny that there were certain great defects in them which ought to be remedied. (HC Deb 9 June 1873, vol 206, cols 641)

The Attorney in the same debate spoke of the great waste of judicial power within the Common Law courts, with four judges on the same bench and the 'great defect' represented by the Terms and Vacations of the legal year (HC Deb, vol 206 col 642). The great defect he further described as the divide and conflict between the competing jurisdictions of equity and Common Law. This resulted in delay, duplication and contradictory decisions at first instance with separate appellate regimes for courts of Chancery and Common Law with single judges adjourning a question of law to a four-man court rendering two trials necessary (Gregory HC Deb, vol 206, col 669).

[B] JUDICIAL OVERLOAD AND BACKLOG

An analysis of *Returns of Judicial Statistics* in this period suggests systemic failure in the superior courts.³ By way of example, consider the Court of Chancery. Here, the problem was acute. Proceedings in Chambers in the Chancery Court increased from a Cause List total of 28,083 in 1861 to 42,726 in 1870-1871; an increase of 152%, or an average yearly increase of 1,464 cases. Proceedings in Chancery as a whole increased from 69,008 in 1861 to 84,730 in 1870, an increase of 122%; or an additional 15,722 matters in Chancery as a whole (HC Deb 9 June 1873, vol 206, col 667).⁴ Things were so bad that one solicitor had written to *The Times* to say that there were 507 cases in Chancery, and it would take three years to complete them (HC Deb 30 June 1873, vol 206, col 1587).⁵ Clearly, backlog and judicial overload were a problem, and thus there was some justification for the promotion of a radical review of the civil justice system at that time.

³ The Courts of Chancery, Common Pleas, and Exchequer Chamber.

⁴ As given in the Attorney General's speech to the House of Commons, quoting from *Judicial Statistics* 1860-1861 and 1870-1871.

⁵ The Chancery Court dealt, however, with 1000 cases per year according to the Solicitor General.

As a 'Leader' in *The Times* (4 December 1872: 9) stated:

The Exchequer Chamber sat 5 days in all; out of eight cases from the Queen's Bench Division, after two days sitting six were left in arrear; out of nine cases in the Common Pleas, six were left in arrear, after two days sitting. The last time the court sat was at the end of June, and it cannot sit again before next February at the earliest.

Further evidence of the problem is provided from the debate on the Judicature Bill in June 1873. The Bill was based upon the recommendations of the Judicature Commissioners⁶ and their report published in 1869. Its remit focused on investigating the operation and effect of three aspects: first, the constitution of the courts in England and Wales; second, the separation and division of jurisdictions between the various courts at macro-level; and, third, the distribution and transaction of judicial business of the courts, and courts in chambers at micro-level. Additionally, the Commission considered whether there were sufficient judges and the position of juries.

In debating the Bill, the Attorney General, Sir Richard Baggallay, thought that the problem might be overcome if the judges extended their sittings by six weeks per year (HC Deb 30 June 1873, vol 205, col 1588).⁷ He reported that the position may have been even worse on any given day in 1870, 1871, 1872 and 1873, as there were respectively 302, 461, 431 and 536 cases pending in that court. Mr Morgan, a Chancery barrister, speaking in the same debate, said that 'there never was such a block in Chancery as at present ... The judges were worn out with Court work before they went into Chambers.' (HC Deb 30 June 1873, vol 206, col 1590) He said that there had been a 123% increase in cases from 1,844 cases in 1863 to 2,275 cases in 1871. He also reported that some of the judges had 'completely broken down' under the strain. Clearly, relief for the judiciary was urgently required.

The problem as a whole was alarming. The *Return of Judicial Statistics* for 1866 discloses that there was a great increase in the business of the courts. As compared with 1859 (the year in which the number was lowest since the *Statistics* had commenced) the increase in 1866 amounts to

⁶ In September 1867 Queen Victoria appointed the Judicature Commissioners. They included: Lord Justice Cairns of the Court of Appeal in Chancery; Sir James Wilde a judge of the Court of Probate Divorce and Matrimonial Causes; Sir William Page Wood, a Vice-Chancellor; Sir Colin Blackburn, a judge of the Court of Queen's Bench; Sir Montague Smith, a judge of the Court of Common Pleas; Sir John Karslake, Attorney General; William Jones, Vice Chancellor of the County Palatine of Lancaster; Henry Rothey, Registrar of the High Court of Admiralty; Sir William Phillimore, a judge of the High Court of Admiralty; Sir Robert Collier and Sir John Duke Coleridge, as Solicitor General, appointed as Commissioners on the 25 January 1869.

⁷ At that time the court sat for 27 weeks of the year.

46,890, or 54%. As compared with the average of the eight years 1858-1865, the increase in 1866 was 28,475, or 27%. This influx of work overloaded an outmoded system, and its effect is demonstrated in Table 1.

Table 1: Rate of increase of actions

Year	Writs issued	% increase on previous year
1859	86,270 ⁸	
1863	100,042	16%
1864	113,158	13%
1865	119,097	5%
1866	133,160	12%

Sources: Returns of Civil Judicial Statistics 1859 and 1863, 1864, 1865 and 1866

Whilst 1866 may be regarded as the high-water mark of civil litigation, The *Return of Judicial Statistics* for 1869 states that there was a 'great decrease' in the number of writs issued in 1868 as compared to 1866 and 1869. See Table 2.

Table 2: Rate of increase of actions

Year	Writs issued	% increase on previous year
1868	82,876	
1869	83,974	1%

Sources: Returns of Civil Judicial Statistics 1868 and 1869

The percentage decrease as between 1866 and 1868 was 38%.

In 1875 there was a further decline after enactment of the Judicature Act 1873 with the number of writs issued numbering 68,950 (*Return of Judicial Statistics of England and Wales 1875*).

⁸ *Return of Judicial Statistics* 1866 of which only 27.5% were contested; only 23,762 appearances were entered.

[C] FIRST REPORT OF THE COMMISSIONERS 1869

This Commission was chaired by two successive Lord Chancellors and former Attorneys General, Lord Selbourne (formerly, Sir Roundell Palmer) and Lord Cairns (formerly, Sir Hugh Cairns). Their report was first published in 1869 (Parliamentary Papers 1869). No evidence was published with the report, but we may conjecture that the Commissioners debated it in their meetings. Sir John Hollams wrote up the minutes of the meetings and then prepared a draft report.

This was followed by two Judicature Bills introduced by Lord Hatherly in 1870 (HL Deb 13 February 1873, vol 214, col 334). These Bills failed to command support in the House of Commons and were sent down by the Lords to the Commons after heavy criticism from the judiciary and Members of Parliament. The scheme for the administration and organization of the courts incorporated in the original Bill was revised by Chief Justice Cockburn and his senior colleagues. This revision formed the basis of the reintroduced Bill in 1873 (HL Deb 13 February 1873, vol 214, cols 335-36).

[D] THE OFFICIAL REFEREE: REASONS FOR CREATION

Chancery and Common Law Practice

The Judicature Commissioners were aware of the practice in Chancery of a referral process. In their report the Commissioners stated:

questions involving complicated inquiries, particularly in matters of account, are always made the subject of reference to a Judge at Chambers. These references are practically conducted before the Chief Clerk, but any party is entitled, if he think fit, to require that any questions arising in the course of the proceedings shall be submitted to the judge himself for decision. In such a case the decision of the judge is given after he has been sitting in court all day hearing causes. (Parliamentary Papers 1869: 13)

This was not ideal, and it was suggested to the Commissioners that the judges found this difficult because Chancery judges were too busy with other work (Parliamentary Papers 1869: 13).⁹

⁹ There is no evidence cited at page 13 of the *First Report* as to who made that submission, but presumably members of the Bar.

According to Burrows (1940: 506), the reason why the Judicature Commission recommended the appointment of referees was the practice of the old Common Law and Chancery Courts.

These two macro-caseflow management processes were already developed. First, a process whereby the Master¹⁰ or Chief Clerk would report to the judge or otherwise direct an issue to be tried by a Common Law judge sitting with a jury. In the former case, the report would be embodied in the judge's judgment. Second, Chancery matters could be referred to an expert who was not a lawyer (*Gyles v Wicox* 1740). This might well be the genesis of modern 'expert determination', although in the Chancery practice the expert's view was not final and binding but incorporated into the judgment.

Furthermore, under section 3 of the Common Law Procedure Act 1854, a judge could direct a reference of an account before trial or the taking of an account at trial under section 6 of that statute. He could direct that any preliminary question of law should be decided by way of special case or otherwise. Under this power the judge could decide the matter himself summarily, or order that it be referred to an arbitrator appointed by the parties, or to an officer of the court, or in country cases, to a county court judge. In such matters, the award or decision was enforceable as if it were the verdict of a jury (Burrows 1940: 504-13). Here, we have the genesis of the referee.¹¹ As Judge Fay wrote, the officers of the court in those times were Masters (Fay 1988: 17). The innovation was the reference to an arbitrator in the course of the proceedings (a compulsory reference in accounts cases). Fay says that it was Holdsworth who concluded that in respect of section 3 Common Law Procedure Act 1854:

It was this extended use of arbitration by the courts which induced the Judicature Commissioners to recommend and the Judicature Acts to create the office of official referees. (Holdsworth 1964: 198)

Holdsworth may be right, but Sir Roland Burrows QC, who was Lord Birkenhead's former private secretary, wrote: 'The reason for the recommendation is to be found in the practice of the Courts of Common Law and of Chancery.' (Burrows 1940: 504) Whether the inducement was the practice of arbitration or litigation, a new model was created: a court officer and a subordinate judge with a referral jurisdiction to deal with

¹⁰ The Common Law Courts also had power to delegate to a Master.

¹¹ According to Burrows (1940: 510), section 3 of the Common Law Procedure Act 1854 took into account the practice of the Court of Chancery of ordering reference to officers of the court or specially qualified persons to inquire and report, and the other the practice of making consent orders for arbitration.

matters of enquiry and report, reference for a preliminary issue, and the taking of an account.

The Commissioners also considered section 3 Chancery Practice (Amendment) Act 1858, which provided that the Court of Chancery could make provision for the assessment of damages or any question of fact arising in any action or proceeding to be tried by a special or common jury. Juries were not always appropriate in understanding complex scientific and technical issues, and this in the Common Law context influenced the Commissioners towards the use of the referee in such matters (Parliamentary Papers 1869: 10).

Interestingly, ten years before the Judicature Commission's *First Report*, Dr Clifford Lloyd, an Irish jurist, gave evidence to a similar commission. In his evidence on the working of the Irish Chancery Act he referred to the position of a referee and converting 'the office of Master from that of a referee to a judge with original jurisdiction' (Parliamentary Papers 1863). He concluded that the subordinate office of a referee was more akin to that of a Master. Section 172 of the Superior Courts of Common Law (Ireland) Act 1864 provided for matters of account to be referred by the judge to an arbitrator, or officer of the court, or to a referee who was empowered to make an award or issue a certificate effective as the verdict of a jury.

Experts

In their *First Report* (Parliamentary Papers 1869: 12), the Judicature Commissioners considered that there was a class of case unfit for jury trial, and in many cases the disputants were compelled to arbitrate.¹² This was an important part of their consideration, as was the recommendation of the Patent Law Commissioners (1864) regarding the judge trying such cases with assessors whom he selected, or alone without a jury unless the parties required. They considered it might be desirable to have the aid of scientific assessors during the whole or part of the proceedings (Parliamentary Papers 1869: 14, para 4).

The Commissioners also considered referrals under the Common Law Procedure Act 1854 where disputes had been referred to a barrister or an expert. Barristers could not be expected to give such matters the continuous attention they deserved. Experts were not recommended because they were unfamiliar with the law of evidence and rules of

¹² The parties could not, however, be compelled to do so until the enactment of the Common Law Procedure Act 1854 where the dispute related wholly or partly to matters of account under section 3 of the Act or where the parties had entered into a covenant to refer the dispute to an arbitrator.

procedure and because of the risk that they would allow irrelevant questions.

Juries

The Judicature Commission was critical of the role of the jury in some cases. It reported:

The Common Law was founded on the trial by jury, and was framed on the supposition that every issue of fact was capable of being tried in that way; but experience has shown that supposition to be erroneous. A large number of cases frequently occur in practice of the Common Law Courts which cannot be conveniently adapted to that mode of trial. (Parliamentary Papers 1869: 5)

The Commissioners further concluded:

there are several classes of cases litigated in the courts to which trial by jury is not adapted, and in which the parties are compelled—in many cases after they have incurred all the expenses of a trial—to resort to private arbitration (Parliamentary Papers 1869: 12).

The practical problem with the Common Law Procedure Act 1854 was that the referee had no authority over practitioners and witnesses, and this led to constant adjournments.

Arbitrators

Arbitration may have had an influence on the Commissioners, as Holdsworth suspected, because the Commissioners recommended that a party to an action could apply to a High Court judge for the appointment of a referee, or the judge himself appoint one (Parliamentary Papers 1869: 14). Under the Common Law Procedure Act 1854, the parties could be compelled to arbitrate the dispute where the matter related wholly or partly to accounts or where they had agreed in writing (Parliamentary Papers 1869: 12). But the Commissioners were also alive to the difficulties caused by arbitration, which they expressed as:

The Arbitrator thus appointed is the sole judge of law and fact, and there is no appeal from his judgement, however erroneous his view of the law may be, unless perhaps when the error appears on the face of his award. Nor is there any remedy, whatever may be the miscarriage of the Arbitrator, unless he fails to decide on all matters referred to him, or exceeds his jurisdiction, or is guilty of some misconduct in the course of the case. (Parliamentary Papers 1869: 13)

There was also public disquiet about that alternative process, as *The Times* 'Leader' commented:

The especial scandal of the Common Law—we mean the system of compulsory arbitration, so often imposed at the eleventh hour upon the unwilling suitor because the judge will not, or cannot, entertain his case—is to be removed, and official and other referees will act under the court. (*The Times* 22 April 1869: 8)

It was said that arbitrators regulated their own fees and that:

The result is great and unnecessary delay, and vast increase of expense to suitors ... Fees were large, adjournments frequent and erroneous results could not be rectified on appeal. (Parliamentary Papers 1869: 13)

The problem was exacerbated because counsel and witnesses were frequently involved in other matters necessitating adjournments (Parliamentary Papers 1869: 13).¹³

The Commissioners therefore sought to avoid references whether to an arbitrator, expert or barrister and compel parties to litigate before a referee.¹⁴ They considered they had good reason to replace juries and arbitrators at that time because a common jury could not handle complex matters of fact, arbitration was costly and there was much delay. The Commissioners concluded that this caused ‘great and unnecessary delay, and a vast increase of expense to suitors’ (Parliamentary Papers 1869: 12-13). The referral to a referee would be compulsory and the referee would sit from day to day (Parliamentary Papers 1869: 14). In this way delays and appeals would be avoided and the referee would replace a special jury, an arbitrator, an assessor and an expert. In that respect, referees were an essential tool of more efficient macro-caseflow management.

The Judicature Reforms

The Commission had a dual purpose: to reconcile the rival systems of Common Law and Equity and to resolve technically complex cases where a jury of laymen had difficulty. Thus, the terms of reference of the Commission included an enquiry into the civil courts apart from the House of Lords, but including ‘the operation and effect of distributing and transacting the judicial business of the courts, as well as courts in chambers’ (Parliamentary Papers 1869: 4).

¹³ Sometimes counsel appearing before the referees considered themselves equally senior.

¹⁴ As Fay (1988: 13) says: ‘The good was to be taken, the bad rejected.’ In certain cases, it became compulsory for enquiry and report (section 56), or for complex factual scientific or technical questions, or any account (section 57).

Administrative reform

The background against which the office of referee was invented was momentous. The judicature reforms transformed the litigation landscape with equitable and legal remedies available in one Supreme Court of Judicature. Trial by jury had been the cornerstone of the civil justice system predicated on the supposition that every issue of fact was capable of trial in that way, but a large number of cases could not be adapted to that mode (Parliamentary Papers 1869: 5), and many suitors favoured arbitration because of ‘the defects of the inadequate procedure’ (Parliamentary Papers 1869: 6). There had to be a transfer and blending of jurisdiction of equity and law, a conclusion independently reached by two other judicial commissions enquiring into the Common Law Courts (1850) and into Chancery (1851). There was also the litispence problem of concurrent actions in the Common Law and Chancery Courts producing different outcomes at first instance and in their separate appeal courts.

Thus, the Judicature Commissioners considered that:

It seems to us that it is the duty of the country to provide a system of tribunals adapted to the trial of all classes of cases and be *capable of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried*. (Parliamentary Papers 1869: 13, emphasis added)

They had in mind a more flexible system adapted to the needs of all types of cases. In the context of the referee it might be interpreted as justifying the ‘Scheme’. The ‘manner most suitable’ inferred some flexibility in the process applied.

Procedural reform

Another objective of the Judicature Commission was to make recommendations for the ‘more speedy economical and satisfactory despatch of the judicial business transacted by the courts’ (Parliamentary Papers 1869: 4). In order to effect this, the Judicature Commission recommended:

That as much uniformity should be introduced into the procedure of all Divisions of the Supreme Court as is consistent with the principle of making the procedure in each Division appropriate to the nature of the case, or classes of cases, which will be assigned to each; such uniformity would in our opinion be attended with the greatest advantages, and after a careful consideration of the subject we see no insuperable difficulty in the way of its accomplishment. (Parliamentary Papers 1869: 10-11)

The Commissioners decided to recommend that great discretion should be given to the Supreme Court as to the mode of trial and that any questions should be capable of being tried in any Division. They concluded that there should be three modes of trial: before a judge, jury or a referee (Parliamentary Papers 1869: 13).

It is interesting to note that the Commissioners also recommended the use of short statements,¹⁵ as distinct from pleadings, to be called a 'Declaration', constituting the plaintiff's cause of complaint, and a similar statement from the defendant, constituting an 'Answer'. They warned, as Newbolt was to warn half a century later, about pleadings that were open to 'serious objection' (Parliamentary Papers 1869: 11). They went on to say:

Common Law pleadings are apt to be mixed averments of law and fact, varied and multiplied in form, and leading to a great number of useless issues, while the facts that lie behind them are seldom clearly discernable.

They suggested the best system to be:

one, which combined the comparative brevity of the simpler forms of Common Law pleading with the principle of stating intelligibly and not technically, the substance of the facts relied upon as constituting the plaintiff's or the defendant's case as distinguished from his evidence (Parliamentary Papers 1869: 11).

Regrettably, pleadings were not simplified because of the complexity of certain cases, but certainly Newbolt dispensed with them altogether in at least one action.¹⁶ Despite the Commissioners' purpose a 'Judicature Commissioner' wrote anonymously¹⁷ to *The Times* (16 August 1880: 11), stating:

But I unhesitatingly assert that the present system of pleadings is often productive of enormous delay and expense, with little, if any corresponding advantage. I have now lying before me the pleadings in an action recently commenced which, although yet incomplete, have already reached the length of upwards of 2,500 folios. I have another case before me in which a statement of claim 260 folios in length has just been delivered. I could refer to other similar cases in my own experience, but I will content myself by mentioning one in which, although an action to recover the amount of two promissory notes, the pleadings extended to upwards of 200 folios in length.

¹⁵ A Reply would be allowed, but not any further submissions, with 'special permission' of the judge.

¹⁶ Sir Francis Newbolt and his reforms were described in detail in Reynolds (2008: chapter 3).

¹⁷ Reputedly, Lord Bowen.

It may be said these instances are exceptional and that they are taken from the Chancery Division; but few, I think will deny that prolixity is on the increase in the Common Law Division also.

I think I may with confidence, assert that the Judicature Commissioners did not anticipate that these results would follow from their recommendation that the plaintiff and defendant should respectively deliver a statement of complaint and defence, which statements were to be 'as brief as the nature of the case will admit.'

[E] PIONEERS OF CASEFLOW MANAGEMENT: SELBOURNE AND CAIRNS

The principal pioneers of the referees' office were Lords Selbourne and Cairns as they were responsible for drafting the enabling legislation, as well as piloting that legislation through Parliament, and making the administrative arrangements. Both Lord Chancellors were classics' scholars: one from Oxford, the other from Dublin.¹⁸ Both had served as Attorneys General. Lord Selbourne was a distinguished member of the Church of England, and Lord Cairns was described by Lord Chief Justice Coleridge as 'a person of severe integrity' (Steele 2011: 1-10).

Lord Selbourne, Lord Chancellor of England¹⁹

In 1872 Roundell Palmer became Lord Chancellor in succession to Lord Hatherly. He pioneered the Supreme Court of Judicature Bill that took effect in 1873. In his *Memorials Personal and Political 1865-1895*, he wrote:

It was a work of my own hand, without any assistance beyond what I derived from the labours of my predecessors; and it passed substantially in the form in which I proposed it. (Selbourne 1898: 301)

He acknowledged support from Lords Cairns, Hatherly, Westbury, Romilly, Lords Justices Cockburn, James, Mellish and Bovill, Chief Baron Kelly, the Solicitor General and the Attorney General.

As to the *First Report* he says:

Much as I profited by the experience and work of others, I might without presumption take to myself some credit for the initiative, advancement and completion of this work If I leave any monument behind me which will bear the test of time it may be this. (Selbourne 1898: 300)

¹⁸ Lord Selbourne, Magdalen College; Lord Cairns, Trinity College.

¹⁹ 1872-1874 and again in 1880-1885.

Selbourne's Macro- and Micro-objectives

Selbourne introduced the referee into the wider public domain in his historic speech in the House of Lords on the second reading of a third Judicature Bill on the 13 February 1873 (HL Deb, vol 214, c 331). His predecessor Lord Hatherly had had difficulty in introducing two previous Bills: the High Court of Justice Bill and the Appellate Jurisdiction Bill. Both Bills were read a second time in 1870 but were lost in committee and withdrawn (*The Times* 14 February 1873: 7). Selbourne confirmed that this movement for reform came from Parliament and the judiciary itself.²⁰ The superior judiciary²¹ appear to have been the most vociferous critics of the outdated legal system. He said that the reforms sprang from the advancement of society, the increase in legal business, and separation of the superior courts. The aims of the Bill were directed to more efficient macro-management in the unification of legal and equitable jurisdictions: a single undivided jurisdiction; provision as far as possible for cheapness, simplicity and uniformity of procedure; and an improvement in the constitution of the Court of Appeal.²²

Under the new arrangements, cases could be transferred for the efficiency of business.²³ The emphasis here was clearly on efficiency, cheapness, simplicity, and uniformity. It was also on practicality.

Regarding the new officer of the court, the referee, he said:

It is proposed to retain trial by jury in all cases where it now exists, except in one particular.

Your Lordships know that there is a class of cases which the parties may take to the Assizes, and in some instances must take there, and which are yet totally unfit to be tried by a jury at all. The result is that the parties are compelled to take such cases out of court and submit them to arbitration; and as no provision has been made by law for the conduct of these arbitrations, the consequence is that very great expense frequently arises out of them. It was a very valuable recommendation of the Judicature Commission that public officers to be entitled 'Official Referees' should be attached to the court, to deal with cases of this kind, and to whom such cases should be sent at once without the useless expensive form of a jury trial.

²⁰ The Report was presented to Parliament in 1869.

²¹ Description of senior judges in the pre-1873 system.

²² The court being constituted by the enactment, there was concern about manpower.

²³ Although judges would be enabled to transfer cases to Official Referees, one referee could not transfer a case to another. In 1888 the Rules were changed to enable the Lord Chancellor and the Lord Chief Justice to transfer cases from one referee to another having regard to the state of business (RSC December 1888).

The Bill proposes that such cases should be sent to reference, even if the parties do not consent, and it also provides for the appointment, where the parties may desire it of special referees. The proposal in the Bill is that they shall determine all questions of fact or account, leaving questions of law to be determined by Divisional Courts. I venture to think that will be found a valuable and important provision. (HC Deb 13 February 1873, vol 214, col 346)²⁴

Selbourne thus recommended the creation of the referee.

Whilst this was a subordinate jurisdiction, it had the germ of a flexible process which provided an opportunity for caseload management.

Selbourne and his successors' roles were critical here in relation to the new referees. Under section 83 of the Judicature Act 1873, he was responsible for referee appointments, qualifications and tenure in office, with the concurrence of the Heads of Divisions subject to Treasury sanction. The Treasury limited the number of referees to four. This created a tension with the judiciary at times when the lists were overloaded. This overload created a backlog further justifying Newbolt's 'Scheme'.

Lord Selbourne's objectives were echoed in the House of Commons by the Solicitor General speaking on 10 July 1873:

Referees were to be appointed without the consent of the parties for conducting any enquiry which could not, in the opinion of the court, be conducted in the ordinary way. The Bill proposed as regarded documents, to continue the present practice of the Court of Chancery, and it was quite impossible that questions of detail should be examined in court except on appeal. Accounts in Chancery were never taken in court, but were referred to chambers in some way or other, and were taken by an officer termed a Chief Clerk. At Common Law such matters were referred to a master or to an arbitrator. They could not be taken in court at all. (HC Deb 10 July 1873, vol 217, col 174)

The Solicitor General went on to say:

The intention of the clause (Clause 54-Power to direct trials before referees) was to prevent useless expenditure of that description, and that references should be made without the consent of the parties. Clients were often disgusted at finding that heavy expenditure incurred in the preliminary stages of a trial were thrown away, on their case going to arbitration.

The Lord Chancellor's and the Solicitor General's speeches confirm the objective of avoiding unnecessary cost through referrals to arbitrators, and also to relieve High Court judges of detailed factual examinations. They also confirm the reason for the creation of the office of the referee,

²⁴ The Hansard reports here are in indirect speech.

answering the first research question. They incidentally disclose an understanding of the difficulties of judicial macro-management. In many respects there is empathy between Selbourne, Baggallay and Newbolt in relation to delay and cost. All these concepts are relevant to what Newbolt and some referees attempted in later years and the roots of what Newbolt developed have their origin in concept here.

A Judge without Jurisdiction

However, it is important to appreciate that the referees had no inherent jurisdiction, as Burrows stated:

an Official Referee as such has no jurisdiction. He can only try such actions as by law can be and by order are referred to him and his decisions are not of authority for other cases. (Burrows 1940: 506)

In other words, the referee had no jurisdiction other than what was referred. The Commissioners designed a flexible role for referees whereby they could refer the matter back to the judge or resolve the issue themselves.

The Referee should be at liberty, by writing under his hand, to reserve, or pending the reference to submit any question for the decision of the Court or to state any facts specially with power to the Court to draw inferences; and the verdict should in such case be entered as the Court may direct. In all other respects the decision of the referee should have the same effects as a verdict at *nisi prius*, subject to the power of the Court to require any explanation or reasons from the referee, and to remit the cause or any part thereof for reconsideration to the same, or any other Referee. The referee should, subject to the control of the Court, have full discretionary power over the whole or any part of the costs of the proceeding himself. (Parliamentary Papers 1869:14)

The fact that the judge could direct where the trial took place was a departure from the centralist policy of the courts being in one building in London. The referee was to investigate the case and report his findings to the High Court judge. He was also given power to hear the case *de die in diem* (from day to day) and to adjourn if necessary.

His primary task was to relieve the High Court judge of complex factual analysis and compile a report. Thus, where the parties consented, a matter could be referred. Where the parties did not consent to a referral, the judge could only refer the case to a referee if it involved a prolonged examination of documents, or accounts, or an investigation of scientific or local matters on a question or issue of fact or account (Judicature Act 1873, section 57). Section 83 of the Judicature Act 1873 provided that

the numbers and qualifications of the referees were to be determined by the Lord Chancellor and with the concurrence of the Heads of Divisions and the sanction of the Treasury.²⁵

Rules of the Supreme Court

A greater appreciation of what Lord Selbourne was attempting is evident from his personal directions and orders to three lawyers who were employed with the task of drafting the first *Rules of the Supreme Court* (RSC) (Letter from Roundell Palmer 1866). In his general directions dated 25 November 1873, Selbourne set out the guidelines for the draftsmen:

Substance of the Work

... the object is now to frame one general system of procedure which shall be as far as possible uniform in every Division of the High Court and equally applicable to all kinds of actions and suits. In constructing this system, the utmost attainable degree of conciseness and simplicity is to be aimed at; all superfluous steps (such as applications for orders or praecipes of Court, when mere notice between parties might be sufficient) should be dispensed with; and all occasion for any unnecessary expense and delay, should, as far as practicable be cut off.

There is empathy here with Newbolt's 'Scheme' in eradicating unnecessary expense and delay. The draftsmen were also to adapt:

to general use, in the High Court whatever is best, and most approved by experience, in the existing practice of the present Courts, with proper simplifications and improvements.

Selbourne's objective was clear: simple concise rules for all actions without any unnecessary or uneconomic steps. The lawyers were referred to Chancery practice and the Common Law Procedure Acts²⁶ and other states' procedures, for example, the New York Code of Civil Procedure and the Indian Procedure Act 1859 (Letter from Roundell Palmer 1866).

At the macro-level, the essence of the proposals was designed to bring about a fundamental reorganization of the courts and make them more efficient. A key part of the reform was the referral system relieving High Court judges of complex technical cases and avoiding lengthy jury trials. In that respect the referee's role was critical in alleviating cost and delay in complex factual cases. This was given expression in the rules regarding

²⁵ Referees were appointed under section 84 of that Act, and the Treasury determined their salary under section 85.

²⁶ Chancery Practice Amendments Acts 1850, 1852, 1858, and 1860. Common Law Procedure Acts were passed in 1852, 1854 and 1860.

referees. The RSC 1873-1875²⁷ provided for trials by the referee at first instance in accordance with sections 56 and 57 of the Judicature Act 1873.²⁸ RSC 1875 Order 36, rule 30, provided that the referee could hold the trial at, or adjourn it to, any convenient location, carry out inspections and view the site. RSC Order 36, rules 31 and 32, gave the referee power to conduct the trial as a High Court judge.

Lord Cairns 1874-1880

Whilst Selbourne may have been the architect of the legislation, it was Cairns who sustained the office of the referee. Arguably, without Lord Cairns' support the Judicature Bill would never have been passed by the House of Lords nor might the Treasury have been willing to support the appointment of four referees. Cairns had a particular concern as he chaired the Commission which authored the *First Report* and the creation of the referee's office.

Lord Cairns was the first Lord Chancellor to operate under the new court system. Whilst Selbourne and Hatherly were also instrumental in creating the concept of the referee, Cairns ensured its survival. He succeeded in macro-managing the unification of the courts of Equity and Common Law and codifying procedural law. In the particular context of this study, the referees owed their existence possibly more to him than any other Lord Chancellor. He shared the 'very strong' opinion of the Presidents of Divisions that referees should be substituted for arbitrators

²⁷ The rules 34 and 35 of the Rules of Procedure were appended in a Schedule to the Judicature Act 1875. They provided for proceedings before an Official Referee and described the effect of the referee's decision. See Preston (1873).

²⁸ Section 56

Subject to any rules of court and to such right as may now exist to have any particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice or before the Court of Appeal may be referred by the court or by any Divisional Court or judge before whom such cause or matter may be pending, for inquiry and report to any official or special referee and the report of such referee may be adopted wholly or partially by the court and may (if so adopted) be enforced as a judgment of the court.

Section 57

In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its other ordinary officers, the court or judge may at any time on such terms as may be thought proper, order any question or issue of fact or any question of account arising therein to be tried either before an official referee, to be appointed as hereinafter provided, or before a special referee to be agreed on between the parties.

(Graham 12 November 1875). His unequivocal support for the office is evident in the earliest correspondence commencing with his secretary's letter to the Lords Commissioners of HM Treasury:

Nov 12th 1875

Sir,

I am directed by the Lord Chancellor to enclose for the information of the Lords of the Treasury the opinion and determination of the Lord Chancellor and of the Heads of the Divisions of the High Court of Justice as to the numbers, qualifications, and tenure of office of the Official Referees in pursuance of Section 83 of the Judicature Act 1873 and I have to ask the sanction of the Treasury ... that these Official Referees should be substituted for arbitrators *pro hac vice*, that the number of Official Referees will not be sufficient and that a greater number will be required: but they (Presidents of Divisions) think that within first instance the experiment may be tried with four Referees, that is to say one for each of the four Divisions, Chancery, Queen's Bench, Common Pleas and Exchequer.

The salary of these Official Referees has to be fixed under Section 85 by the Treasury with the concurrence of the Lord Chancellor.

The Lord Chancellor is of the opinion that looking to the judicial character of the functions which these Referees will have to perform, to the circumstances that they will have to give up all private practice and that their work will be *ejusdem generis* with but certainly higher than that which the Masters who receive £1,500 a year now perform. The salary specified ought not to be less than £1,500 and competent men cannot be got for less, and this opinion is held very strongly by the Presidents of the Divisions.²⁹

The Lord Chancellor understands that upon references to Masters of the Common Law Courts of matters of account it has been the practice to charge a fee for each hour of the Master's time occupied, which fee went into the general revenue.

The Lord Chancellor thinks it would be open to the Treasury to consider whether some charge should be made to the suitors to the reference for the time of these Official Referees that may be occupied and that this whole charge of the Official Referees may be lightened.

The Lord Chancellor would be obliged to Their Lordships if they would give the subject of this letter their immediate attention as it is highly desirable that the Official Referees be appointed as soon as possible there being already cases which have been referred to them and are now waiting for trial before them.

Yours
G

²⁹ The salaries of judges in 1873 were: Lord Chancellor, £10,000; Lord Chief Justice, £8,000; Vice President of Division, £5,000; and a special allowance of 10 guineas per day for judges on circuit (Cairns 27 January 1873).

This letter underlines the uncertainty as to manpower resource. Lord Selbourne had thought three referees sufficient; Cairns four.

The Treasury reply (Laws 19 November 1875) acknowledged the referees' 'higher' status.

Treasury Chambers

19 November 1875

My Lord,

In reply to Mr Graham's letter ... I am directed by the Lords Commissioners of Her Majesty's Treasury to state that My Lords observe that it is proposed to appoint a referee for each of the four Divisions of Chancery, Queen's Bench, Common Pleas and Exchequer, but they also do not understand whether it is intended that the Referee shall be exclusively attached to the service of the Division to which he is appointed, or shall be available for duties in another Division if necessity should arise.

With reference however to the present proposal and to the opinion which it is stated that the Presidents of the Divisions entertain that the number of four Referees will not be sufficient but that more will hereafter be required, my Lords would desire to submit to your Lordship some observations which it appears to them should be fully considered before their sanction to the present proposal is given.

When the Judicature Act was before the House of Commons My Lords caused enquiries to be made of your Lordships predecessor as to the probable number of Official Referees whom it would be necessary to appoint, and were informed by Lord Selbourne that in the first instance he considered that three would be sufficient, only one for each of the second third and fourth Divisions of the High Court from which this class of references would come, the first or Chancery Division being already sufficiently provided for by the Chief Clerks in Chancery.

As it is now proposed to appoint a Referee for the Chancery Division also, My Lords would be pleased to be informed whether the point has been considered as to the aid which the Chief Clerks might give in disposing of References from the Chancery Division or to what extent if a Referee is appointed for this Division in addition to the Chief Clerks, the labours of these latter officers might be lightened as to render some reduction of their number practicable.

As regards also the appointment of Referees for the Queen's Bench, Common Pleas and Exchequer Divisions of the High Court and as regards the suggestion that a greater number than four of these may hereafter be required My Lords perceive with reference to the class of cases which will be heard by the Referees (See Section 57 of the Judicature Act 1873) that it is stated by your Lordship that their duties are ejusdem generis, although certainly higher than those which have hitherto devolved upon the Masters under the Common

Law Procedure Acts the class of cases referred to the Masters is understood to have been so important in character, and the number of them to have been on the increase: but if the appointment of Official Referees would have a tendency to lessen the references hitherto made to the Master, the consideration will arise now for it will be necessary to retain the foremost number of the latter officer.

The Legal Department's Commissioners have stated their opinion as your Lordship is no doubt aware that a reduction might be made of four out of the whole number of Masters, as vacancies arise, if this opinion appears to have been formed on grounds apart from any questions of the appointment of Official Referees.

Your etc
Laws.

This Treasury reply indicates that the office involved a compromise between Masters and referees, with acknowledgment of the referee's higher status, but with provision for the referees to have chambers and clerks themselves. Lord Cairns' reply on 24 November 1875 stated that he did not think there would be so many references from the Chancery Division as from other Divisions, so that the fourth referee might not be so fully occupied (Cairns 24 November 1875).³⁰ Lord Cairns based his view on estimates of references from the Divisions and asked the Treasury to note that the referee would operate under a compulsory reference different from the Common Law Act Procedure 1854. The referees would be sitting from 10 am until 4 pm, about 200 days per year on an hourly fee basis which in Lord Cairn's words 'would afford a wholesome check against any laxity of practice'.

Cairns succeeded in obtaining funds for four referees³¹ against Treasury opposition (Laws 19 November 1875). On 18 February 1876, he confirmed the appointment of four Queen's Counsel to the Treasury: Mr J Anderson,³² Mr G Dowdeswell,³³ Mr C Roupell³⁴ and Mr H Very,³⁵ albeit Lord Selbourne appointed Anderson in 1873 (Graham 12 November 1875). There had been some delay and cases had already been referred

³⁰ The reason being the employment of the Chief Clerk of Chancery.

³¹ Lord Selbourne had suggested three referees with a referee appointed to the Chancery Division.

³² James Anderson QC was educated at Edinburgh University and was a member of the Faculty of Advocates of Scotland. He resigned as a referee because of bad health in 1886. He was a member of the Council of Legal Education, a Mercantile Law Commissioner, Examiner to the Inns of Court, Examiner in the Court of Chancery and stood as a Liberal candidate, contesting two Scottish constituencies in 1852 and 1868.

³³ In post 1876-1889.

³⁴ In post 1876-1887.

³⁵ In post 1876-1920.

to the referees. On 24 February 1876, the Treasury agreed to Cairn's proposal that the referees could appoint their own clerks as clerks of the High Court commensurate with the duties of the clerks to the Chief Clerks. It was in this way that Lord Cairns secured the referees' position.

Importance of chambers business

As a postscript to the *First Report*, the *Selbourne Papers* contain a Memorandum from Colin Blackburn (Blackburn 31 March 1873), one of the leading High Court judges of those times. In the context of the referees' role it is significant.

He states:

The new mode of pleading proposed will create a great deal of new and important business to be transacted at Chambers in settling issues or otherwise.

Much of the success of the new Scheme must depend on how this is worked and it cannot therefore I think be properly delegated to Masters.

I do not see how it can be satisfactorily disposed of unless these judges regularly attend at Chambers. It certainly would require more than one judge at Chambers ...

Required for sittings *in banc* 9 judges

For *nisi prius* in London and Middlesex 6 judges

For Chambers 3 Judges

18 judges altogether.

The conclusion I draw is that the present number of 18 judges should not be diminished.

Colin Blackburn

31 March 1873

Whilst referees are not expressly mentioned by Mr Justice Blackburn, the important issue here is that the new business would require a judge in chambers not a Master in chambers to settle issues.³⁶ This idea juxtaposes Newbolt's later conception of 'discussions in chambers' to resolve issues in some matters. Just what Mr Justice Blackburn had in mind is unclear but most probably not what Newbolt invented. However, the idea may well have been to deal with quite a number of issues that might otherwise have wasted time at trial.

³⁶ Prior to the Superior Courts (Officers) Act 1837, the Masters' work in chambers was carried out by the judges.

Legacy of the Commission

Despite Lord Selbourne's visionary objectives, and the careful deliberations of the Judicature Commissioners, there were subsequent problems. The intended results were not achieved in several respects. Writing anonymously to *The Times* on 10 August 1892, Lord Bowen regretted the drift of commercial work to arbitrators because it was quick and cheap, but not necessarily right in law. This had been one of the criticisms of the Commissioners and what they sought to avoid by creating the referee's office. Lord Bowen mentioned two fundamental considerations to men of business:

The first is-money. 'How much is it likely at most to cost?'

The second is-time. 'How soon at the latest is the thing likely to be over?'

He then wrote:

The one supreme attraction which draws merchants and traders into the circle of such grotesque justice is that it is prompt, it is cheap, that there are (or were until Lord Bramwell spoilt the innocent pleasures of all arbitration rooms by his recent Act of Parliament) no Appeal Courts, no House of Lords in the background, 'no fresh fields and pastures new' of litigation, stretching in interminable prospect. (*The Times* 10 August 1892: 13)

Lord Bowen's reservation was concern about 'grotesque justice' practised by commercial arbitrators. The Commission's invention of the referee was intended to avoid that problem by the appointment of experienced Queen's Counsel exercising High Court judge powers. His other concern was the delay and cost of proceedings which Newbolt's 'Scheme' was designed to reduce.

However, apart from the criticism of Lord Bowen, we note from this material reviewed above:

- 1** a recognition that the provision of separate remedies in separate courts created unnecessary cost and delay, as well as duplicity and contradiction, in judgment at the expense of the litigant;
- 2** a further recognition that the pre-1876 court organization and machinery of justice could not cope with the influx of work on the 1866 scale where 133,160 writs were issued;
- 3** that the experience of Chancery practice and the Common Law Procedure Act 1854 suggested a possible solution to the backlog of cases;

- 4 that the disillusionment of commercial men with arbitration in the 1860s influenced the Commission in its invention of the referee's function and subordinate office;
- 5 that by the 1890s commercial men were disillusioned with the 1870 model;
- 6 that the referees would dispose of cases more efficiently than a jury;
- 7 that the referees could relieve the High Court judiciary of technically complex factual cases requiring a detailed enquiry or local investigation; and
- 8 that the Commissioners encouraged a more efficient process regarding cost and delay, as well as suggesting new instruments of micro-management, such as 'statements of issues' and Preliminary Issues.

It may be argued that, without the macro-reforms of the Commission (1867-1869) embodied in the Judicature Acts 1873 and 1875, Newbolt's 'Scheme' might never have been invented. At micro-, or referee, level, it was undoubtedly the flexible powers conferred on the referee that facilitated Newbolt's experiments in caseflow management and enabled a more activist approach.

[F] THE GROWTH IN REFERRAL BUSINESS

We may argue that micro-caseflow management was an inevitable development because of the rearrangement of business in the High Court and the unique jurisdiction that devolved on the referees as a result. Such jurisdiction, as described below gradually, evolved.

By reference to Table 3 below we find that in 1880 referee caseload increased by 52% on 1879 figures,³⁷ and that the 1890 caseload was more than four times the 1878 caseload, demonstrating a strong growth in business.

In 1880 most of the referrals were of values between £200 and £100 (*Return of Judicial Statistics of England and Wales 1880*), but by 1897 the *Returns* indicate that the referees had three cases of a value exceeding £5,000: the administration of an estate, a building case, and a sale of goods case. Such growth in business in the late nineteenth century may be illustrated by the Table 3.³⁸

³⁷ The number of defended cases increased from 44 in 1879 to 76 in 1880: a 72% increase.

³⁸ See *Return of Judicial Statistics of England and Wales 1900* (Part 2 Civil Statistics) for data relating to the year 1898.

Table 3: Annual referrals 1876-1898³⁹

Year	Referrals
1876-77	78
1877-78	70
1878-79	91
1879-80	139
1888-89	277
1889-90	313
1896-97	267
1897-98	262

Sources: *Returns of Judicial Statistics*
1876-1898

In the absence of contemporaneous judicial records,⁴⁰ the nature of the cases referred may be described by reference to categories of reported cases and archival material. From this analysis, a disparate jurisdiction becomes apparent.

Property Cases

Here, the reports confirm that matters adjudicated comprised: boundary disputes (*Lascelles v Butt* 1876); enquiry into damages for breach of a lessor's covenant to supply a specified quantity of water per day (*Turnock v Sartoris* 1889); an enquiry as to quantum of damages for interference with ancient lights (*Presland v Bingham* 1888); action for damages for breach of covenant to repair (*Proudfoot v Hart* 1890); enquiry into assessment of damages for value and quantity of minerals taken from farm and compensation as way leave for use of roads and passages (*Phillips v Homfray* 1883); assessment of damages for failure to carry out tenant's repairs under repairing covenant (*Tucker v Linger* 1898); assessment of balance due following a decree for successive redemption of mortgages (*Union Bank of London v Ingram* 1882); action by landlord against tenant and by tenant against sub-tenant in respect of dilapidations (*Hornby v Cardwell; Hanbury (Third Party)* 1881); direction for an account of minerals taken from property (*Jenkins v Bushby* 1891); action for damages for breach of covenant to deliver up premises in repair (*Joyner v Weeks* 1891); action for account on a mortgage (*In re Piers* 1898);

³⁹ *Return of Judicial Statistics of England and Wales* 1880.

⁴⁰ No records exist of court files prior to 1944 in the National Archives save file J141/326 *Official Referees: Directions by the Senior Master* which is referred to subsequently.

matters of account in disputes between spouses as to property rights (*In re Married Women's Property Act 1882*);⁴¹ damages for breach of repairing obligation regarding assignment of reversion expectant on determination of tenancy (*Cole v Kelly* 1920); damages for illegal distress (*Davies v Property and Reversionary Investments Corporation* 1929); partitioning of joint family property (*Anantapadmanabhaswami v Official Receiver of Secunderabad* 1933);⁴² claims for damage to leasehold property (*Davies v Property and Reversionary Investments Corporation* 1929); and a claim for damages by mill-owners for loss of riparian rights taking water from a river for the purpose of driving condensing low-pressure steam engines (*Ormerod and Others v The Todmorden Joint-Stock Mill Company (Ltd)* 1882).

Commercial Cases

Referrals also comprised commercial cases consisting of: actions for accounts on money-lending transactions (*Burrard v Calisher* 1878); assessment of damages for breach of agreement to purchase machinery on the expiry of a lease (*Marsh v James* 1889); assessment of damages for value of goods sold by enemy alien during war (*Jebara v Ottoman Bank* 1927);⁴³ inquiry into damage for cost of repair of taxi-cabs (*Albemarle Supply Company Ltd v Hind and Company* 1928); action for an account on money-lending transactions (*Burrard v Calisher* 1878); trial determining whether goods of merchantable quality (*Jackson v Rotax Motor and Cycle Company* 1910); enquiry into quality of hops from Pacific Coast (*Biddell Brothers v E Clemens Horst Company* 1911); questions as to damages for breach of commercial agreement for Anglo-American trading partners (*Rose and Frank Co v JR Crompton and Brothers* 1923);⁴⁴ value of goods not returned under bailment (*Rosenthal v Alderton & Sons* 1946); assessment of damages for conversion of goods disposed of through

⁴¹ See also per Scrutton L J *In re Questions between W A Humphrey and H A Humphrey* (1917: 74), questioning whether Ridley J, a former referee, could delegate matters under section 17 to the referee where it was not a matter of account and neither party would consent to that course. Cozens-Hardy MR considered that Ridley J had exceeded his powers in so referring the whole matter to a referee.

⁴² Whilst not an English case but a Madras High Court case, it confirms that the Official Referee was also a judicial office in British India at the time. They had similar jurisdiction.

⁴³ Appellant claimed sterling payment for goods under Article 84 Treaty of Lausanne and Treaty of Peace (Turkey) Act 1924 for goods sold by Ottoman Bank in Beirut during war at the exchange rate before the war and not at fluctuating piastres (Ottoman currency) rates.

⁴⁴ In this action, order was made by the Master that the action be transferred to the Commercial List and that all questions of damages that became material would be transferred to an Official Referee.

fraud (*Beaman v ARTS* 1949);⁴⁵ and an assessment of damages for delay in supply of plant for laundering and dying works (*Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* 1949).

Ecclesiastical Cases

Amongst cases referred, there is reference to an action for an account to recover arrears of pension under the Incumbents Resignation Act 1871 (*Gathercole v Smith* 1881).

Business Law

Some evidence is found of references of a business nature, such as: a partnership action determining distribution of partnership property on dissolution (*Potter v Jackson* 1880); an action for breach of agreement transferring stock of a railway company and transfer of engineering sub-contract for the construction of a railway line (*Miller v Pilling* 1882); and an assessment of damages due to company agent for breach of agreement by company (*Reigate v Union Manufacturing Company (Ramsbottom) Ltd and Elton Cop Dyeing Company Ltd* 1918).

Chancery Matters

These included: an action on an account in relation to administration of an estate (*Lady de la Pole v Dick* 1885); action by executors to recover monies paid by testator to defendant and assessment of monies due to executors (*Baroness Wenlock v River Dee Company* 1887); a direction to take an account of monies due to beneficiary from trustee of Ceylonese estate (*Rochefoucauld v Boustead* 1897); and an action by an art dealer against an estate in respect of 24 pictures (*Rowcliffe v Leigh* 1876).⁴⁶

Tort Actions

These included an assessment of costs due to a plaintiff in respect of a defendant's unlawful action in maintaining an action through a common

⁴⁵ Appeal against Denning J upheld. Trial limited to question of damages referred to Official Referee.

⁴⁶ One of the first cases to be referred where the Vice Chancellor of the Chancery Division ordered the case to be tried before an Official Referee as distinguished from the related action of *Leigh v Brooks* (1876) regarding the sale by the defendant to her testator of 130 pictures for prices amounting in the whole to £50,000 with an allegation of fraud. Because of the fraud question the matter was referred to a High Court judge to deal with in open court.

informer (*Bradlaugh v Newdegate* 1883)⁴⁷ and an assessment of damages in respect of embezzlement and conversion of sawdust (*Rice v Reed* 1900).

Construction and Engineering

The referees gradually assumed specialist jurisdiction over what High Court judges loosely termed ‘bricks and mortar’ cases.⁴⁸ This work encompassed: a declaration as to conclusiveness of surveyor’s certificate (*Richards v May* 1883); action for moneys due under building contract and counter-claim for defective building works (*Lowe v Holme and Another* 1883); assessment of damages in respect of contractor obstructing highway with temporary electric tramway (*T Tilling Ltd v Dick Kerr & Co Ltd* 1905); reference determining delay in delivering possession of site for building works (*Porter v Tottenham Urban Council* 1915); and time in which to complete building works after practical completion (*Joshua Henshaw and Son v Rochdale Corp* 1944).

Employment

This included a reference for the ascertainment of a fair wage (*Hulland v William Sanders & Son* 1945).

Marine

There are references enquiring into circumstances causing delay in the unloading of a vessel in port (*Kay v Field & Co* 1882) and an assessment of damages for repairs to a schooner in collision with barge (*Rockett v Clippingdale* 1891).

Patents

Patent matters referred related to: an enquiry into damages for infringement of a patent (*American Braided Wire Company v Thompson* 1890);⁴⁹ assessment of damages for infringement of patent (*Cropper v Smith* 1884); a determination of the novelty of patented specification

⁴⁷ Where Coleridge LCJ ordered the defendant, an MP, to pay the plaintiff’s costs arising through the MP’s maintenance and champerty of an informer’s action against Mr Bradlaugh who refused to take the oath in Parliament.

⁴⁸ Anecdotal evidence given to the author by a TCC judge.

⁴⁹ Mr Justice Kekewich, at the trial of the action, held that the plaintiffs’ patent was invalid; but his judgment was reversed by the Court of Appeal, which directed an inquiry as to what damages had been sustained by the plaintiffs by reason of the infringement of the patent by the defendants, and this decision was affirmed by the House of Lords. The inquiry as to damages was by consent referred to an Official Referee.

concerning interlocking apparatus for railway points and signals (*Saxby v The Gloucester Wagon Company* 1881); and the determination of costs as a result of Crown infringement of patented inventions (*In re Letters Patent No 139, 207; In re Carbonit Aktiengesellschaft* 1924).

This diverse workload is further illustrated in the Appendices to my thesis *Caseflow Management: A Rudimentary Official Referee Process 1919-1970* (Reynolds 2008) which contain schedules describing the types of case referred and, in certain cases, the element of the ‘Scheme’.⁵⁰ In 1947, Eastham (28 January 1947) sent a Memorandum (n.d.) to Lord Jowitt, then Lord Chancellor, confirming that the referees also dealt with claims for forfeiture, breaches of repairing covenants, injury reversion, injunctions, fraud and conspiracy, damage by enemy air-raids,⁵¹ subsidence of coal mines,⁵² pollution of rivers and fishing rights, costs of plant and machinery, public works, defective machinery, and conflicts of evidence between architects and surveyors (Eastham n.d.).

We may infer from this that, whether the referees were dealing with questions of riparian rights or fixing an exchange rate of Ottoman currency, the pressure of a diverse and increasing caseload necessitated the pioneering of new judicial techniques.

[G] CONCLUSIONS

Conclusions at Macro-level-general

Here, we have explored the question as to why and how the office of referee came about and how, perhaps unintentionally, it facilitated a form of what we now may recognize as caseflow or case management.

The office was created against a background of fundamental procedural reform; codification and unification of the procedural and administrative system, some calling it revolutionary. The Judicature Commissioners attempted to provide for the more speedy economical and satisfactory despatch of the judicial business transacted by the courts. In that they realigned the jurisdiction of the courts and made provision for equitable remedies in the courts of Common Law and abolished the Courts of Common Pleas and Exchequer, replacing Exchequer Chamber with the

⁵⁰ Michael Reynolds, ‘Caseflow Management: A Rudimentary Referee Process, 1919-1970’ (Thesis, LSE 2009, ProQuest Dissertations ISBN: 978-1-321-35703-5).

⁵¹ Pitman (9 December 1943) confirms numerous war-damage claims referred to Official Referees.

⁵² This case involved 130 pages of pleadings.

Court of Appeal, they succeeded in streamlining the system. Whilst *The Times* (22 April 1869) was correct in its 'Leader' in saying:

The report of the Judicature Commission, to which we recently drew the attention of readers, will, we are confident, mark the beginning of a new period of legal history. The influence which it is destined to exercise is not to be measured by the force with which the inconveniences of the present system are portrayed, nor even by the specific recommendations which it contains. It is the sanction of the high official authority which it possesses that constitutes this document a powerful lever of reform.

Undoubtedly, the 'high authority' provided 'a powerful lever of reform', which included the creation of the referee. But an anonymous former member of the Judicature Commission, reputed to be Lord Bowen, wrote:

Recent legislation has, without doubt, effected many most important and valuable improvements; but the system, as administered, amounts to a denial of justice to all prudent persons as respecting claims for a moderate amount, and in all cases causes expense, uncertainty and delay most disappointing to at least one .

MEMBER OF THE JUDICATURE COMMISSION

London, August 10.1880. (*The Times* 16 August 1880)

Whilst structurally this was transformative and provided a more streamlined system it failed to reconcile the practical procedural problems of delay and expense. It was this failure, like that of many other procedural reforms, that became the catalyst for Newbolt's procedural innovations.

Conclusions at Macro-level-specific

More specifically, we may conclude from the above review that the overall objective in the words of the Judicature Commission was:

The duty of the country to provide tribunals adapted to the trial of all classes of cases, and capable of adjusting the rights of litigant parties in the manner most suitable to the nature of the questions to be tried. (Parliamentary Papers 1869: 13)

We also found that the office of referee was created to avoid the problems posed in certain cases of referrals under the Common Law Procedure Act 1854, as explained by the Lord Chancellor and the Solicitor General in 1873, which caused the 'scandal' of complications and delay under the Common Law Procedure Act 1854. We have also discovered how the referee was inspired to some extent by the work of arbitrators and a need to restore confidence in commercial dispute resolution. Here, we saw the

germ of a judicial office that bifurcated the functions of a puisne judge and an arbitrator in the context of subsequent procedural innovations. Today's Technology and Construction Court (TCC) is the result of the evolution of that process.

We may also consider that the conception of the office was significant in that it marked acknowledgment of the industrial age and more technically complex cases where a judge would perhaps more readily understand complex facts than lay jurors. Indeed, it would be difficult to envisage how juries could deal with so many referrals of such a nature at that time with the dramatic increase in actions in the 1860s and, in the Attorney General's words, a system founded in the Middle Ages that 'was incapable of being adapted to the requirements of modern times' (HC Deb 9 June 1873, vol 206, col 641). If the earlier system had been retained, then the 'scandal' of the increasing backlog would have caused much greater difficulty. Fortunately, that was not the case and processes, such as that of enquiry and report by a referee were compulsory under section 56 of the Judicature Act 1873, undoubtedly facilitated a better caseflow, as did the procedural improvement introduced by Lord Selbourne in the Judicature Bill 1873. This enabled the transfer of cases from one court to another. This had particular utility in the case of the referees because without this process the new system would have run into difficulty with heavy technically complex cases before High Court judges clogging the lists. Such referrals also enabled a group of referees to gain expertise in these matters.

Perhaps, also, we might reflect that the particular statutory powers conferred on these officers of the court included powers of investigation and report. In that context they acquired some traits of a more interventionist court at interlocutory stage.

Conclusions at Micro-level

We may also conclude that this process was innovative because, as the Judicature Commission recommended, a court system with three modes of trial was capable 'of adjusting the rights of the litigant parties in the manner most suitable to the nature of the questions to be tried'.⁵³

⁵³ Order 36, rule 2, RSC 1875 provided for five modes of trial by: one or more judges; a judge with assessors; a judge and jury; an official or special referee with assessors and a referee alone.

This gave them a certain amount of discretion which Sir Francis Newbolt KC⁵⁴ was able to use to the advantage of users ‘in the manner most suitable to the nature of the questions to be tried’. That ‘most suitable’ manner implies that the traditional judicial approach may not have been appropriate in all cases where subordinate judicial officers were working on heavy factual cases. The words imply a more flexible approach, and, if that hypothesis is right, then some of the argument of traditionalists, that judges must not be involved in settlement, might be subject to question.⁵⁵ This also involved alertness in managing an application or a trial: keeping counsel on the point as time was limited. Certainly, the way Newbolt interpreted his role as a referee questions the idea of a detached judge unconcerned with settlement or the management of the trial. The thrust of the Commissioners’ Report here tends to suggest that a passive as opposed to an activist approach runs counter to the central objective of the Commission to procure ‘the more speedy economical and satisfactory despatch of the judicial business transacted by the courts’ (Parliamentary Papers 1869: 13). Further support for such a wider interpretation of the referees’ role is to be found in the provision the Judicature Commission made in respect of referees visiting the scene or the site. This was a considerable departure from the judge in the courtroom and led to many cases being settled or issues narrowed after such visits. It is significant that this element of micro-caseflow management was invented by the Commission itself and put to excellent effect by Newbolt, Sir Tom Eastham QC,⁵⁶ Sir Walker Carter QC⁵⁷ and Sir Norman Richards QC.⁵⁸

In other ways such an interpretation of their role may be seen as harmonizing a disciplinary diffusion of relationships between referees as judges, experts and assessors. As a result of this, Newbolt devised better ways of using experts in a case-managed role and acting to give what today we would recognize as an expert evaluation. We see a similar effect in terms of submissions and pleadings which were the subject of heavy criticism by the Commissioners. They wanted greater clarity recommending ‘a statement of issues for trial’ (Parliamentary Papers

⁵⁴ KC 1914; Hon RA, JP, MA, FCS, ARE, Hon Professor of Law in the Royal Academy. Publications included: *Sale of Goods Act 1893*; *Summary Procedure in the High Court* (London: Sweet & Maxwell 1893); and *Out of Court* (London: P Allan & Co 1925). Official Referee 1920-1936.

⁵⁵ This is principally the argument advanced in support of the view that judges must not intervene to encourage settlement. See, for example, Fiss (1994).

⁵⁶ In office 1936-1954.

⁵⁷ In office 1954-1971.

⁵⁸ 1963-1978.

1869: 13). This, if necessary, would be settled by the judge. In a number of referee cases on preliminary issues there are to be found instances of referee intervention facilitating the formulation of preliminary questions in keeping with this recommendation.

We may therefore conclude that, what the Commissioners sought to achieve at macro-level, Newbolt and his colleagues subsequently sought to achieve at micro-level through a process of subordinate judicial activism or micro-caseflow management. Arguably, they portended the civil justice reforms of the late twentieth century.

References

- Blackburn, Colin (31 March 1873) 'Memorandum as to the Number of Judges Required for the Business now Transacted in the Common Law Courts and the New Business Proposed to be Created by the Bill' *Personal and Political Correspondence of Lord Selbourne 26 June 1872-17 May 1873* Lambeth Palace Library 84 MS 186 f.259.
- Burrows, Roland (1940) 'Official Referees' 56 *Law Quarterly Review* 504-13.
- Cairns, Lord (27 January 1873) 'Letter, Lord Cairns to Lord Selbourne 27 January 1873' *Papers of Lord Selbourne* Lambeth Palace Library MS 1865.
- Cairns, Lord (24 November 1875) 'Letter 24 November 1875' *Lord Chancellor's Office: Unregistered Papers* Kew: The National Archives LCO 1/73.
- Eastham, Tom (n.d.) 'Memorandum, Rough Draft' *Lord Chancellor's Office and Lord Chancellor's Department: Establishment Files* Kew: The National Archives LCO 4/152.
- Eastham, Tom (28 January 1947) 'Letter Tom Eastham QC to Lord Jowitt, 28 January 1947' *Lord Chancellor's Office and Lord Chancellor's Department: Establishment Files* Kew: The National Archives LCO 4/153.
- Fay, Edgar (1988) *Official Referee's Business* London: Sweet & Maxwell.
- Fiss, Owen (1994) 'Against Settlement' 93 *Yale Law Journal* 1073-1090.
- Graham, H J L (12 November 1875) 'Letter, H J L Graham, Principal Secretary to L C to William Laws, HM Treasury' *Lord Chancellor's Office: Unregistered Papers* Kew: The National Archives LCO 1/73.
- Holdsworth, W S (1964) *History of English Law, Vol XIV* London: Methuen.

- Laws (19 November 1875) 'Letter, Laws to Graham, 19 November 1875' *Lord Chancellor's Office: Unregistered Papers* Kew: The National Archives LCO 1/73.
- Memorandum (n.d.) 'Memorandum from Official Referees to Lord Chancellor' *Lord Chancellor's Office and Lord Chancellor's Department: Establishment Files* Kew: The National Archives LCO 4/152.
- Palmer, Roundell (1866) 'Letter from Roundell Palmer to Henry Cadman Jones, Tristram (Thomas Hutchinson) and Arthur Wilson' *Papers of Lord Selbourne* Lambeth Palace Library 89 MS 1866 ff.75-78.
- Parliamentary Papers (1863) 'The Evidence of Dr B Clifford Lloyd QC, Dublin 12 November 1862 to the Royal Commission to Enquire into Superior Courts of Common Law and Courts of Equity of England and Ireland' *First Report* [3228].
- Parliamentary Papers (1869) *First Report of the Judicature Commissioners* [Session 10 December 1868-11 August 1869] (no 41340) vol XXV 25 March 1869.
- Patent Law Commissioners (1864) *Report* 29 July 1864.
- Pitman, Charles (9 December 1943) 'Letter, Senior Official Referee Charles Pitman to Senior Master V Ball (KBD) 9 December 1943' *Lord Chancellor's Office and Lord Chancellor's Department: Establishment Files* Kew: The National Archives LCO 4/152.
- Preston, Thomas (1873) *The Supreme Court of Judicature Act 1873* London: William Amer.
- Return of Judicial Statistics 1866* (1867) [3919].
- Return of Judicial Statistics 1869* (1870 [C 195].
- Return of Judicial Statistics of England and Wales 1875* (1876) [C 1595].
- Return of Judicial Statistics of England and Wales 1876* (1877) [C 1871].
- Return of Judicial Statistics of England and Wales 1877* (1878) [C 2154].
- Return of Judicial Statistics of England and Wales 1878* (1879) [C 2418].
- Return of Judicial Statistics of England and Wales 1879* (1880) [C 2726].
- Return of Judicial Statistics of England and Wales 1880* (1881) [C 3088].
- Return of Judicial Statistics of England and Wales 1888* (1889) [C 5882].
- Return of Judicial Statistics of England and Wales 1889* (1890) [C 6164].
- Return of Judicial Statistics of England and Wales 1890* (1891) [C 6443].
- Return of Judicial Statistics of England and Wales 1895* (1896) [C 8536].
- Return of Judicial Statistics of England and Wales 1896* (1898) [C 8838].

- Return of Judicial Statistics of England and Wales 1897* (1899) [C 9204].
- Return of Judicial Statistics of England and Wales 1898* (1900) [Cd 181].
- Return of Judicial Statistics of England and Wales 1900* (1901) [Cd 181].
- Reynolds, M P (2008) *Caseflow Management: A Rudimentary Referee Process, 1919-1870* PhD Thesis London: London School of Economics.
- Selbourne, Lord (1898) *Memorials Personal and Political 1865-1895* London: Macmillan & Co.
- Steel, David (2011) ‘Cairns, Hugh McCalmont, first Earl Cairns (1819–1885), Lord Chancellor’ *Oxford Dictionary of National Biography*.
- The Times* 22 April 1869 Issue 26418, p 8.
- The Times* 4 December 1872 Issue 27551, p 9.
- The Times* 14 February 1873 Issue 27613, p 7.
- The Times* 16 August 1880 Issue 29961, p 11.
- The Times* 10 August 1892 Issue 33713, p 13.

Legislation Cited

- Chancery Practice Amendments Acts 1850, 1852, 1858 and 1860.
- Common Law Procedure Acts 1852, 1854 and 1860
- Incumbents Resignation Act 1871
- Indian Procedure Act 1859
- Judicature Acts 1873 and 1875
- Superior Courts of Common Law (Ireland) Act 1864
- Superior Courts (Officers) Act 1837

Cases Cited

- Albemarle Supply Company Ltd v Hind and Company* [1928] 1 KB 307
- American Braided Wire Company v Thompson* (1890) 44 Ch Div 275
- Anantapadmanabhaswami v Official Receiver of Secunderabad* [1933] AC 396
- Baroness Wenlock v River Dee Company* (1887) 19 QBD 156
- Beaman v ARTS* [1949] 1 KB 550
- Biddell Brothers v E Clemens Horst Company* [1911] 1 KB 934

- Bradlaugh v Newdegate* (1883) 11 QBD 1
- Burrard v Calisher* [1878] 19 Ch
- Burrard v Calisher* (1882) 19 Ch Div 644
- Cole v Kelly* [1920] 2 KB 107
- Cropper v Smith* (1884) 26 Ch Div 700
- Davies v Property and Reversionary Investments Corporation* [1929] 2 KB 223
- Gathercole v Smith* (1881) 7 QBD 626
- Gyles v Wicox* (1740) 2 Atk 141
- Hornby v Cardwell; Hanbury (Third Party)* (1881) 8 QBD 329
- Hulland v William Sanders & Son* [1945] KB 78
- In re Letters Patent No 139, 207; In re Carbonit Aktiengesellschaft* [1924] 2 Ch Div 53
- In re Married Women's Property Act 1882; In re Questions between W A Humphrey and H A Humphrey* [1917] 2 KB 72
- In re Piers* [1898] 1 QB 628
- Jackson v Rotax Motor and Cycle Company* [1910] 2 KB 937
- Jebara v Ottoman Bank* [1927] 2 KB 254
- Jenkins v Bushby* [1891] 1 Ch 484
- Joshua Henshaw and Son v Rochdale Corp* [1944] KB 382
- Joyner v Weeks* [1891] 2 QB 31
- Kay v Field & Co* (1882) 10 QBD 241
- Lady de la Pole v Dick* (1885) 29 Ch Div 351
- Lascelles v Butt* (1876) 2 Ch Div 588
- Leigh v Brooks* [1876] 5 Ch Div 592
- Lowe v Holme and Another* (1883) 10 QBD 286
- Marsh v James* (1889) 40 Ch Div 563
- Miller v Pilling* (1882) 9 QBD 736.
- Ormerod and Others v The Todmorden Joint-Stock Mill Company (Ltd)* [1882] 8 QBD 664
- Phillips v Homfray* (1883) 24 Ch D 439

- Porter v Tottenham Urban Council* [1915] 1 KB 778
- Potter v Jackson* (1880) 13 Ch Div 845
- Presland v Bingham* (1888) 41 Ch Div 268
- Proudfoot v Hart* (1890) 25 QBD 42
- Reigate v Union Manufacturing Company (Ramsbottom) Ltd and Elton Cop Dyeing Company Ltd* [1918] 1 KB 592
- Rice v Reed* [1900] 1 QB 54
- Richards v May* (1883) 10 QBD 400
- Rochevouald v Boustead* [1897] 1 Ch 213
- Rockett v Clippingdale* [1891] 2 QB 31
- Rose and Frank Co v J R Crompton and Brothers* [1923] 2 KB 271
- Rosenthal v Alderton & Sons* [1946] KB 375 appeal from H H Trapnell KC
- Rowcliffe v Leigh* [1876] 4 Ch Div 661
- Saxby v The Gloucester Wagon Company* (1881) 7 QBD 305
- T Tilling Ltd v Dick Kerr & Co Ltd* [1905] 1 KB 562
- Tucker v Linger* (1898) 21 Ch Div 18
- Turnock v Sartoris* (1889) 43 Ch Div 150
- Union Bank of London v Ingram* (1882) 20 Ch Div 463
- Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 529

LIMITS TO TERROR SPEECH IN THE UK AND USA: BALANCING FREEDOM OF EXPRESSION WITH NATIONAL SECURITY

IAN TURNER

Lancashire Law School

Abstract

Article 10(1) of the European Convention on Human Rights, freedom of expression, is incorporated into UK law. With the growing Islamist terror threat after 9/11, particularly threatening European security, the Council of Europe introduced the Convention on the Prevention of Terrorism (CPT) 2005. One of the Articles within the Convention, Article 5, obliges states to outlaw 'public provocation to commit a terrorist offence'. Drawing on its obligations in the CPT, the UK enacted section 1 of the Terrorism Act 2006: 'encouragement of terrorism'. But, in implementing its duties, the UK went further. There are very real concerns, therefore, about the effects of this legislation on freedom of expression. The test for interpreting breaches of Article 10 is 'proportionality'. Comparatively, in America there is a much stronger test than proportionality, 'strict scrutiny', in assessing limits to terror speech. However, in the age of Islamism, together with the speed, ease and little cost incurred in sharing terror speech online, should there not be a reappraisal of American law? The author is based in the UK. But the UK's approach to limiting terror speech is arguably too intrusive of freedom of expression. This paper, therefore, proposes a compromise approach between the two jurisdictions.

Keywords: European human rights law, freedom of expression, American constitutional law, First Amendment, encouragement of terrorism, national, regional and international security

[A] INTRODUCTION

As per the Human Rights Act (HRA) 1998, the European Convention on Human Rights (ECHR) is incorporated into UK law. One of these rights is Article 10(1), freedom of expression. This protects speech that

either offends, shocks or disturbs, as per the case of *Handyside v United Kingdom*¹ at the European Court of Human Rights (ECtHR). Following its obligations in Article 5 of the Council of Europe (CoE) Convention on the Prevention of Terrorism (CPT) 2005, public provocation to commit a terrorist offence, the UK enacted the Terrorism Act 2006, to disrupt Islamists, for example, from exploiting the internet for terrorist purposes. Section 1 of the Terrorism Act 2006 outlaws the encouragement of terrorism. Firstly, there is no need to show a danger that such an offence may be committed, only that it is likely to be understood by some members of the public as an encouragement of terrorism; secondly, in addition to including the intentional encouragement of terrorism, the offence can be committed recklessly. As the offence seemingly exceeds the UK's obligations in the CPT, there are very real concerns, therefore, about the effects of this legislation on freedom of expression. If a person distributes, sells, gives, shares etc. the encouragement of terrorism, they are committing an offence contrary to section 2 of the Terrorism Act 2006, the 'dissemination of terrorist publications'. For example, following the beheading of US journalist James Foley, in 2014, videos of which were posted on YouTube, the British police reminded people not to share the pictures in case of incurring criminal prosecution under section 2 (Halliday 2014).

The test for interpreting breaches of Article 10(1) of the ECHR is 'proportionality', as per *Handyside*,² that is whether the limitation on expression is merely in proportion to the objective of the state, such as protection of national security, prevention of disorder and crime etc. Where the infringement of Article 10(1) is attributed to terror speech, the courts interpret the proportionality test much more in favour of the state at the expense of the individual, as per *Leroy v France*.³ So, there is almost a double deference shown by the courts to the interests of the state: the test employed, as well as the context in which it is applied.

Comparatively, in the USA, for example, there is a much stronger test than proportionality in assessing content-based interferences with the First Amendment of the Constitution, free speech: 'strict scrutiny'. This follows the ruling of the Supreme Court of the United States (SCOTUS) in

¹ App no 5493/72, para 49. Note: a draft of this author's paper was presented at the Annual Workshop of the International Association of Constitutional Law Research Group on Constitutional Responses to Terrorism at Bocconi University in Milan, Italy, on 14 June 2019. The author is grateful to a couple of audience participants, Fionnuala Ní Aoláin and Kim Lane Scheppele, for giving him feedback on his presentation.

² Ibid.

³ App no 36109/03.

Brandenburg v Ohio.⁴ But in the age of Islamist terrorism post 9/11, and the speed, ease and little cost incurred in sharing terror speech online, is the *Brandenburg* test of ‘strict scrutiny’ too much in favour of the individual at the expense of the state? America is clearly not subject to European human rights law, but its approach to curtailing rights within the ECHR, especially those that directly conflict with the rights and freedoms of others such as freedom of expression, deserve serious consideration. The author is based in the UK. But the UK’s approach to limiting terror speech—indeed Article 10 of the ECHR itself—is arguably too intrusive of speech. This paper, therefore, proposes a compromise approach between the two jurisdictions.

[B] SECURITY THREATS, AND TERROR SPEECH IN PARTICULAR

Europol, the EU’s law enforcement agency, reported that a record number of terrorist attacks—211—had been planned, foiled or carried out in EU countries in 2015, the highest since records began in 2006. All of them occurred in just six member states: Denmark, France, Greece, Italy, Spain and the UK (*BBC News* 2016a). Indeed, the *Global Terrorism Index 2018* noted that the number of terrorist incidents in Europe increased to 282 in 2017, which itself was an increase from 2016, when it was 253 (Institute for Economics and Peace 2018).⁵ In the author’s own country, the UK, in 2017, 23 people died and 250 people were injured in Manchester when a suicide bomber detonated a suicide vest at an Ariana Grande concert. Also in 2017, there were two terror incidents in London, primarily on London and Westminster Bridges, killing a further 12 people. In addition, a bomb was left on a tube train at Parsons Green, west London, in September of that year, but failed to fully explode. A further nine terrorist attacks, in 2017, were prevented (Johnston 2017). In December 2018, it was reported that the UK authorities were investigating about 700 ‘live’ counter-terrorism cases (Dodd and Halliday 2016). The head of MI6, Britain’s secret intelligence service, has recently said that the scale of the terrorism threat facing the UK is ‘unprecedented’ (*BBC News* 2016b). The UK’s terror threat level is currently at ‘substantial’, meaning an attack is likely. Twice in 2017 it was raised to its maximum level, ‘critical’, meaning an attack was imminent, after the Manchester and Parsons Green attacks.

⁴ 395 US 444 (1969).

⁵ But in 2018, in Europe, the number of deaths from terrorism fell to 62—see, for example, Institute for Economics and Peace (2019: 2).

The ‘substantial’ terror threat to the UK, for example, does not simply come from those who commit, or even prepare, attacks: there are those who either encourage or instigate them via the worldwide web (Rudner 2017). The internet is the perfect platform for terrorists: it is inexpensive, fast, instantaneous, anonymous and, unlike the traditional print media, permits those intent on hate to control the narrative. It allows for the limitless collection and sharing of terrorist propaganda, across multiple devices, such as home computers and mobile devices. Terrorists can indoctrinate, radicalize, recruit and train new members within closed communities and/or chat rooms, through the media of sermons, instructional videos, blogs, social media—such as Twitter, Facebook, Instagram, WhatsApp and Snapchat—and interactive websites. It also affords terrorists the valuable opportunity to raise funds.⁶ The transnational nature of the web permits terror speech, which has been shut down in one country, to simply find a host in another (Renieris 2009: 676).

In the UK, for instance, the leader of the extremist group al-Muhajiroun, Anjem Choudary, was convicted of supporting Islamic State in Iraq and the Levant (ISIL) in July 2016. He was convicted after jurors heard he had sworn an oath of allegiance to ISIL. He had also urged followers to support ISIL in a series of broadcasts on YouTube: supporters were told to obey Abu Bakr al-Baghdadi, the ISIL leader, and travel to Syria (Grierson et al 2016). Choudary is reported to have influenced at least 100 British jihadis (Dodd and Grierson 2016). But, because of free speech concerns, social media platforms were reluctant to remove Choudary’s online posts, even after he was arrested for inviting support for ISIL. British authorities allegedly made repeated efforts to have his Twitter posts and YouTube videos removed, but they had no power to force corporations to remove material from the internet even if it had breached UK anti-terror laws. In August 2016, even after Choudary had been convicted, he had more than 32,000 followers on Twitter and his account could still be viewed online, despite requests for its removal in August 2015 and the following March (Press Association 2016). Maybe because of repeated criticism from foreign governments about the hosting of terror material on their platforms, in June 2017 Facebook, Microsoft, Twitter and YouTube formed the Global Internet Forum to Counter Terrorism (GIFCT). The objective of GIFCT is ‘to substantially disrupt terrorists’ ability to promote terrorism, disseminate violent extremist propaganda, and exploit or glorify real-world acts of violence using our

⁶ For a general discussion of the internet as an ‘indispensable medium’ for terrorists, see, for example, Tsesis (2017: 655-62).

platforms'.⁷ GIFCT claims, for example, that between July 2017 and December 2017, a total of 274,460 Twitter accounts were permanently suspended for violations related to the promotion of terrorism. Of those suspensions, 93% consisted of accounts flagged by internal, proprietary spam-fighting tools, while 74% of those accounts were suspended before their first tweet.⁸ In addition, 99% of ISIL and Al Qaeda-related terror content that is removed from Facebook is content that is detected before anyone in its community has flagged it, and, in some cases, before it goes live on the site. Once Facebook is aware of a piece of terror content, it claims to remove 83% of subsequently uploaded copies within one hour of upload.⁹ However, later, in January 2018, the then British Prime Minister, Theresa May, called on social media platforms to do more to combat terrorism (Stewart and Elgot 2018). And more recently, in March 2019, there were multiple shootings by a far-right terrorist, Brenton Tarrant, at two Mosques in Christchurch, New Zealand, killing 50 people, which Tarrant livestreamed for 17 minutes on Facebook.¹⁰ Although the original footage was removed by Facebook after an hour, it was repeatedly re-uploaded by other users (Waterson 2019).

[C] THE ENDURING INFLUENCE OF INCITING TERROR VIOLENCE ONLINE: THE CASE OF ANWAR AL-AWLAKI

In 2010 the British domestic security services, MI5, feared that a new generation of British extremists were being radicalized online by Anwar al-Awlaki, who at the time was regarded as one of the world's most-wanted terrorists. Al-Awlaki, who was born in America, but was of Yemeni descent, was in hiding in Yemen. He had become the foremost influence on young radical Muslims across the world through his English-language sermons delivered over the internet. In the UK, for example, he developed a following among terrorists and terrorist groomers, including, in 2005, the 7/7 and 21/7 bombers in London. CDs of his sermons were found in the Iqra bookshop in Leeds—where the bombers had held meetings—when it was raided. In 2009 a UK government analysis of YouTube found that al-Awlaki had 1910 videos on the site, one of which had been viewed 164,420 times (Gardham and Coughlin 2010). Moreover, in 2010, Roshonara Choudhry, a 21-year-old student, was jailed for life for trying

⁷ GIFCT, 'About our Mission'.

⁸ Ibid.

⁹ Ibid.

¹⁰ Twitter has also been used to livestream a terror attack—see, for example, Mair (2017).

to murder the Labour MP Stephen Timms because he had voted for the war in Iraq. Choudhry stabbed the MP twice in the stomach at a constituency surgery in east London. The student had become radicalized after watching online sermons by al-Awlaki (*BBC News* 2010).

Anwar al-Awlaki had a significant influence beyond the UK because of the reach of the internet. Major Nidal Hasan, for example, who had killed 13 people at the Fort Hood military base in Texas in 2009, had asked for al-Awlaki's advice in emails about a suicide attack (Kenbar 2013). After the attack, al-Awlaki bragged that Hasan was his student and defended the murder spree as 'a heroic act' and 'a wonderful operation' (Tsesis 2018: 660). Also, in 2009, following the influence of al-Awlaki, Umar Farouk Abdulmutallab, a Nigerian, was recruited by Al Qaeda to blow up an American airliner approaching Detroit, but the bomb did not explode. Abdulmutallab told FBI agents that, with guidance from al-Awlaki, he had 'worked through all [the] issues' (Shane 2017). Anwar al-Awlaki was eventually killed by an American drone strike in Yemen in 2011 (Mazetti & Ors 2013). But the influence he exerted, even after death, remains. For example, Dzhokhar Tsarnaev, who was responsible for the Boston Marathon bombing in 2013, was a self-radicalized jihadist. His audio collection included speeches and videos of al-Awlaki (O'Neill 2015). Indeed, America's worst domestic shooting, the killing of 49 people and the wounding of 53 others at the Pulse nightclub in Orlando in 2016, was committed by Omar Mateen, who had been influenced by watching videos of al-Awlaki (Shane 2016).

[D] THE SIGNIFICANCE OF FREEDOM OF EXPRESSION IN THE UK AND USA

The HRA incorporates the ECHR into UK law. One of these rights is Article 10(1), freedom of expression. As per the case of *Handyside*, the ECtHR said that, subject to Article 10(2), the right was applicable not only to information or ideas that were favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offended, shocked or disturbed the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there was no democratic society.¹¹ The First Amendment of the Constitution of the United States protects free speech. Like Article 10(1)

¹¹ See n 1 para 49.

of the ECHR, it protects speech that is not favourably received. In *Matal v Tam*,¹² in SCOTUS, Justice Samuel Alito said:

We have said time and again that the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers ... If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.¹³

The ECtHR in *Handyside* also said that the court's supervisory functions oblige it to pay the utmost attention to the principles characterizing a 'democratic society'. Freedom of expression constituted one of the essential foundations of such a society. A key argument for this is the idea of personal autonomy—the state should not determine what is/is not appropriate for an individual to view, hear, read etc. In *FCC v Pacifica Foundation*,¹⁴ SCOTUS famously declared: 'It is a central tenet of [free speech] that the government must remain neutral in the marketplace of ideas.'¹⁵ Indeed, the 'marketplace of ideas' argument is another important consideration in the determination of the significance of freedom of expression. In *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*,¹⁶ for example, the UK's highest court, the House of Lords (as it was then called) said:

The fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out the bad and the true prevail over the false. It must be assumed that, given time, the public will make a sound choice when, in the course of the democratic process, it has the right to choose.¹⁷

The significance of free speech to countries like the UK and America is not only reliant on domestic law, but also international law: Articles 19 of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) both decry limitations on expression.

¹² 137 US 1744 (2017).

¹³ *Ibid* 1763.

¹⁴ 438 US 726 (1978).

¹⁵ *Ibid* 745-46.

¹⁶ [2008] UKHL 15.

¹⁷ *Ibid* para 28.

[E] THE QUALIFICATION OF FREEDOM OF EXPRESSION IN THE UK AND USA, ESPECIALLY TERROR SPEECH

Free speech is not unlimited. For example, Article 19(2) of the ICCPR, freedom of expression, is qualified by Article 19(3):

The exercise of the [right] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Indeed, Article 20 of the ICCPR also states: ‘(1) Any propaganda for war shall be prohibited by law. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’ Regionally, for the purposes of the UK, Article 10(1) of the ECHR, freedom of expression, is also qualified in this regard. In *Erbakan v Turkey*,¹⁸ the ECtHR said: ‘As a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance.’¹⁹ There is also an express duty to act responsibly within the right, as per Article 10(2) of the ECHR. Furthermore, the test for interpreting breaches of Article 10(1) is ‘proportionality’, that is whether the limitation on expression is in proportion to the objective of the state, such as protection of national security, prevention of disorder and crime etc. For example, in the above case of *Handyside*, the applicant, a publisher, was charged and convicted under the Obscene Publications Act 1959 for ‘having in his possession obscene books entitled *The Little Red Schoolbook* for publication for gain’. Copies of the book, which were meant for children over 12 and included information on sex—abortion, homosexuality, intercourse and masturbation etc—were seized, forfeited and later destroyed. The court said that the infringement was in breach of Article 10(1) of the ECHR but was lawful, as per Article 10(2), since the interference was in proportion to the state’s aim of protecting health and morals.²⁰

¹⁸ App no 59405/00.

¹⁹ Ibid para 56.

²⁰ See n 1 para 49.

Comparatively, there is a much stronger test than proportionality in America, ‘strict scrutiny’, in reviewing content-based limitations on free speech: see, for example, *Adarand Constructors, Inc v Pena*.²¹ Indeed, when ratifying the ICCPR, in 1992, the USA filed reservations in respect to Articles 19 and 20 to afford its domestic law on free speech greater protection than the ICCPR seemingly allows. In the past, however, SCOTUS upheld the constitutionality of various statutes that significantly limited freedom of speech under the pressures of world wars, *Schenck v United States*,²² and the perceived communist threat, *Dennis v United States*.²³ In *Schenck*, for example, two defendants were convicted under the Espionage Act of 1917 of inducing conscripted personnel from joining the armed forces. The test then for violations of the First Amendment involved less exacting intensity of review than ‘strict scrutiny’: ‘The question in every case is whether the words used are in such circumstances and are of a such nature as to create a *clear and present danger* [my italics] that they will bring about the substantive evils that Congress has a right to prevent.’²⁴

However, after the Second World War, SCOTUS began to take a tougher stance on the protection of free speech, even in cases of perceived speech inciting violence: *Yates v United States*.²⁵ This culminated in the ruling in *Brandenburg v Ohio*.²⁶ In *Brandenburg* a Ku Klux Klan (KKK) leader was filmed by a local television crew at a rally making racist remarks about returning Black people to Africa and Jews to Israel: ‘We’re not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.’²⁷ This was accompanied by KKK sympathizers holding firearms. Brandenburg’s original conviction for advocating violence was quashed. The court said: ‘The constitutional guarantees of free speech ... do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.’²⁸ (SCOTUS has since confirmed that

²¹ 515 US 200 (1995).

²² 249 US 47 (1919).

²³ 341 US 494 (1951). See, for example, Barnum (2006: 270-74).

²⁴ See n 22 at 52.

²⁵ 354 US 298 (1957).

²⁶ See n 4.

²⁷ Ibid 446.

²⁸ Ibid 447.

regulation of the internet is afforded the same First Amendment protection as the print media: *Reno v ACLU*.²⁹)

There are, therefore, three issues to prove for inciting terrorism in America, even if the hate speech is conducted online: 1) imminent harm; 2) the likelihood of that imminent harm; and 3) the intention to directly cite others (Tsesis 2017: 655-67). This is a much narrower test than proportionality for assessing unlawful breaches of Article 10(1) of the ECHR. Thus, there is far more tolerance of hate speech in America than in the UK.³⁰ In 2016, the Rock musician Ted Nugent drew fire for insinuating gun control in America was the product of a vast Jewish conspiracy. In a post on Facebook, he showed the faces of several American politicians next to Israeli flags beneath the caption: ‘So who is really behind gun control?’ In a later post he claimed: ‘Jews for gun control are Nazis in disguise.’ (Blake 2016) According to Amos Guiora, this is not an instance in which the American government could limit speech online: ‘As vile, anti-Semitic, or odious Mr Nugent’s posting may be, it need not be removed from social media.’ (Guiora 2018: 142) Guiora also references Palestinian terrorist groups’ social media posting about running over Jews in cars in 2015. This, too, would be protected by the First Amendment: ‘This ... is [very] general and [unclear] in its “how to” instructions.’ (ibid 143)

[F] ATTEMPTS TO LIMIT TERROR SPEECH IN THE UK AND USA

With the growing Islamist terror threat after 9/11, the UN Security Council (UNSC), in 2005, passed Resolution 1624 ‘condemning in the strongest terms the incitement of terrorist acts and repudiating attempts at the justification or glorification (apologie) of terrorist acts that may incite further terrorist acts’. Thus, the resolution, in section 1, calls upon all states to adopt such measures as may be necessary and appropriate to: (a) prohibit by law incitement to commit a terrorist act or acts; (b) prevent such conduct; and (c) deny safe haven to any persons guilty of such conduct. (More recently, the UNSC has passed Resolution 2178 (2014), in which it addresses the threat of foreign terrorist fighters. The UNSC cites effective implication of Resolution 1624 as an important factor in the effective implementation of Resolution 2178: UNCTED 2016: 5.) Similarly, in the same year as Resolution 1624, in 2005, the CoE

²⁹ 521 US 844 (1997).

³⁰ SCOTUS is less tolerant of some forms of expression, however, such as child pornography, obscene speech, fraudulent utterances etc—see, for example, Price (2018: 827).

published the CPT. One of the Articles within the CPT, Article 5(1), obliges states to outlaw ‘public provocation to commit a terrorist offence’. This means: ‘the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed’.

Drawing on its international and regional counter-terror obligations, as well as following the 7/7 bombings in London in 2005, killing 52 people, the UK enacted the Terrorism Act 2006, to disrupt individuals from exploiting the internet for terrorist purposes. Section 1 introduced a new offence of ‘encouragement of terrorism’. Section 1(1) applies to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism. Furthermore, the mental element of the offence, according to section 1(2), is that a person publishes a statement and, at the time they publish it, they either (i) intend members of the public to be directly or indirectly encouraged or (ii) are reckless as to whether members of the public will be directly or indirectly encouraged. So, the offence can be committed recklessly, as well as intentionally. For the purposes of indirectly encouraging terrorism, this includes every statement which glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences, as per section 1(3). Section 1(5) says that it is irrelevant: (a) whether anything mentioned in those subsections relates to the commission, preparation or instigation of one or more particular acts of terrorism or of acts of terrorism generally; and, (b) whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence. As per section 17, the UK has universal jurisdiction to try encouragements of terrorism committed abroad. The ‘public’ for whom a statement can either intentionally or recklessly encourage terrorism can be outside the UK, as per section 20(3). Interestingly, in practice, the UK prosecuting authorities have confined the prosecution of the offence to countering international terror groups, meaning there have been no prosecutions against domestic terror groups, particularly in Northern Ireland: ‘The absence of any charges being laid for the offence of encouraging terrorism in Northern Ireland appears peculiar. The prevalence of paramilitary murals on walls in Northern Ireland falls well within the scope of the provisions of the Act, which criminalises statements—including images—which encourage or glorify terrorism.’ (Blackbourn 2013: 30)

An example of a person convicted of an offence contrary to section 1 of the Terrorism Act 2006 is Tareena Shakil, who glorified terrorism on social media. Shakil was radicalized on the internet and travelled to Syria via Turkey after telling friends and family she was off on a beach holiday. She spent more than two months living in a mansion and, while there, sent messages and pictures glorifying ISIL, including ones of herself posing with an AK-47 assault rifle (Morris 2019). It was irrelevant that her incitement occurred outside the UK.

If a person distributes, sells, gives, shares etc. the encouragement of terrorism they are committing an offence contrary to section 2 of the Terrorism Act 2006, the ‘dissemination of terrorist publications’. A person convicted of an offence contrary to section 2 is Mohammed Gul, who was sentenced to five years’ imprisonment for creating jihadi videos between 2008 and 2009 and sharing them online via YouTube.³¹ The prosecuting authorities in the UK may wish to regulate the promotion of terrorist propaganda online in other ways: instead of charging someone with a terror offence, they may wish to prosecute someone contrary to section 1 of the Malicious Communications Act 1988. Here, a person sends either an indecent or grossly offensive electronic communication with the intention of causing distress or anxiety (section 127 of the Communications Act 2003 is a similar offence). This is what happened recently when a man in the UK allegedly supported the recent far-right terror shootings in Christchurch on social media (Grierson and Dodd 2019).

With the strict interpretation of the First Amendment by SCOTUS in *Brandenburg*, an attempt to limit terror speech, particularly by mirroring the UK’s Terrorism Act 2006, would be unconstitutional. Encouragement of terrorism in Britain does not require threats of imminent lawless action, for example (Parker 2007: 748). But America can limit the speech of terrorists in other ways, such as in the case of ‘true threats’. A true threat is a statement that is meant to frighten or intimidate one or more specified persons into believing that they will be seriously harmed by the speaker or by someone acting at the speaker’s behest (O’Neill 2019). Reference to the degree of harm and the First Amendment is the ruling of SCOTUS in *Watts v United States*,³² which was in the same year as *Brandenburg*, 1969. At a very public, political forum—an anti-Vietnam War rally—the defendant allegedly said to a large crowd: ‘If they ever make me carry a

³¹ This was the subject of an appeal on a point of law to the UK’s highest court, the Supreme Court, on the subject of, for example, the extra-territorial effect of the definition of terrorism in section 1 of the Terrorism Act 2000: *R v Gul* [2013] UKSC 64.

³² 394 US 705 (1969).

rifle the first man I want to get in my sights is LBJ [a reference to the then President of the United States Lyndon B Johnson].’ Watts’s conviction for advocating violence against the President was quashed—SCOTUS did not believe his statement had constituted a ‘true threat’. ‘Political hyperbole’ was protected by the First Amendment.³³ The law on true threats was developed in the later case of *Virginia v Black*:³⁴ “True threats” encompass those statements where the speaker means to communicate a serious expression ... to commit an act of unlawful violence to a particular individual or group of individuals’.³⁵ A speaker therefore need not actually intend to carry out the threat, but they must actually intend, through a statement, to instil fear in the recipient (O’Neill 2019). There is no need to prove that a recipient was actually in fear of harm (Tsesis 2017 669). And the true threats doctrine, unlike *Brandenburg*, does not contain an imminence component (ibid 667). Thus, this type of expression is reflective of terrorist speech on the internet (ibid), but, of course, one or more specified persons have to be targeted, so vague ideas about jihad will be excluded.

There are other ways in which terror speech in the US can be limited, which do not engage the *Brandenburg* test, as the ruling of SCOTUS in *Holder v Humanitarian Law Project*³⁶ illustrates. The court ruled that a criminal prohibition on advocacy carried out in coordination with, or at the direction of, a foreign terrorist organization was not an unconstitutional infringement of freedom of speech. The offence in question was ‘providing material support or resources to designated foreign terrorist organizations’, contrary to section 2339B of Title 18 of the United States Code, Crimes and Criminal Procedure. The Humanitarian Law Project was therefore prevented from providing support to Partiya Karkeran Kurdistan (PKK), even though this was for non-terrorist purposes of the organization. It wanted to advise the PKK on how to follow and implement humanitarian and international law and petition various international bodies such as the UN.³⁷ The Humanitarian Law Project was also constrained from helping the Liberation Tigers of Tamil Eelam (LTTE) to present claims for tsunami-related aid to international bodies and/or negotiating peace agreements between its

³³ Ibid 707-08.

³⁴ 538 US 343 (2003).

³⁵ Ibid 359.

³⁶ 130 SC 2705 (2010).

³⁷ Ibid 2710-11.

organization and the Sri Lankan government.³⁸ Importantly, the court emphasized that support for these designated organizations freed up other resources within the group to be used for terror ends. And support gave the groups legitimacy—‘legitimacy that makes it easier for ... groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks’.³⁹ On the significance of *Holder* for remaining true to the principles of the First Amendment, Daphne Barak-Erez and David Scharia note: ‘The decision presumably follows the US freedom of speech jurisprudence ... that it affirms a prohibition that abstains from addressing the content of the speech and focuses only on the link between the speaker and the terrorist organisation.’ (Barak-Erez and Scharia 2011: 19) There are other ways in which terror speech in America may be curtailed, without being an unconstitutional infringement of the First Amendment: the offences of seditious conspiracy and advocating overthrow of government, contrary to sections 2384 and 2385 of Title 18 of the United States Code, Crimes and Criminal Procedure.⁴⁰

It is important to note, however, that international and regional law demands that speech, even of a ‘dubious’ nature, should not be arbitrarily curtailed. Above, there was reference to UNSC Resolution 1624. This resolution does oblige states to have regard to Articles 19 of the UDHR and ICCPR. (Similarly, Article 12 of the CPT obliges states to respect their freedom of expression duties in the ICCPR and the ECHR.) Furthermore, UNSC Resolution 1624, which condemns ‘in the strongest terms the incitement of terrorist acts’, references condemnation only in the preamble, not the later substantive obligations of the resolution. And, even in the later duties, the term ‘prohibit’ is only used, not ‘criminalize’ (Barak-Erez and Scharia 2011: 21). Indeed, the UN Counter-Terrorism Committee Executive Directorate (UNCTED), in its global survey of the implementation of UNSC Resolution 1624 by member states in 2016, was keen to stress that the powers exercised by states should only be used for legitimate aims, that is for limiting genuine terror speech, and not for illegitimate aims such as the suppression of political dissent or the advocacy of controversial beliefs or views (UNCTED 2016: 8). Otherwise, the consequences could have the opposite effect of leading to greater radicalization (*ibid*).

³⁸ *Ibid*.

³⁹ *Ibid* 2725.

⁴⁰ Renieris (2009: 701-05) identifies other criminal laws in America which could indirectly limit terror speech, such as immigration violations, visa fraud, providing false statements, credit card fraud and money laundering.

[G] CRITICIZING LIMITATIONS TO TERROR SPEECH IN THE UK

In criticizing limitations to speech in the UK, is the test for assessing infringements of Article 10(1) of the ECHR, ‘proportionality’, sufficiently demanding to protect expression, in general? In the case of protection of health and morals, for example, the courts regularly defer to the interests of the state, as in the case of *Handyside*, and in the UK domestic interpretation of Article 10(1)—see, for example: *Belfast City Council v Miss Behavin’ Ltd*.⁴¹ Indeed, is freedom of expression, at least in the UK, becoming much less tolerant of individuals who may cause others offence, meaning the bar for employing proportionality is set too low? In a recent conviction, YouTuber, Mark Meehan, who trained his girlfriend’s dog to perform Nazi salutes, was fined £800 after posting videos of the dog online, in breach of section 127 of the Communications Act 2003. The case provoked widespread concern from comedians and free speech campaigners, including the human rights organization Index on Censorship. Index said that freedom of expression included the right to offend: ‘Defending everyone’s right to free speech must include defending the rights of those who say things we find shocking or offensive ... Otherwise the freedom is meaningless.’ (Dearden 2018)

Where the infringement of Article 10(1) is attributed to terror speech, in particular, the courts interpret the proportionality test much more in favour of the state at the expense of the individual: *Leroy v France*.⁴² (For the purposes of domestic implementation of the ECHR, the UK courts must have regard to the case law of the ECtHR, as per section 2 of the HRA.) In *Leroy* a cartoon was published in the Basque weekly *Ekaitza*, two days after the 9/11 attacks in New York and Washington in September 2001. The cartoon was a caricature representing the attack on the twin towers of the World Trade Center, with a caption stating: ‘We have all dreamt of it ... Hamas did it.’ *Leroy* was convicted under French law for complicity in condoning terrorism—the ECtHR found this to be a proportionate interference with Article 10(1). The cartoon not only glorified the terror attacks, but the date of publication, so close to 9/11, was significant. And the effect of the cartoon in a politically sensitive region such as the Basque country was relevant, too, as was *Leroy*’s fine in the French courts, €1500, which was modest.⁴³

⁴¹ [2007] UKHL 19.

⁴² See n 3.

⁴³ *Ibid* paras 36-48. For broader analyses of the UK’s Terrorism Act 2006 and the case law of the ECHR, see, for example, Murray (2009).

However, compare the punishment in *Leroy* with that of Muhammad Hamza Siddiq, in the UK. Siddiq was recently jailed for four-and-a-half years for using social media to encourage others to commit terrorism. He made a post on his Facebook timeline in which he referred to the struggle of jihad as an obligation that ‘is not limited to defensive operations’. The post was liked 67 times and led to an investigation by the police. The officer in charge of the investigation said: ‘The Facebook post made by Hamza Siddiq was published just months after many people, young and old, lost their lives in UK terror attacks in both London and Manchester. The statement was inflammatory and inciting.’ (Counter-Terrorism Policing 2019) Agreeing with the conviction of Siddiq is not difficult, especially as it was an apparent direct encouragement of terrorism, unlike an indirect—condonation—of terrorism in *Leroy*. But was the length of the sentence, four-and-a-half years, not excessive, especially considering that: it occurred months after the UK terror attacks, not days after 9/11 as in *Leroy*; it was posted on Facebook, which was only liked 67 times, not published in a weekly newspaper in the politically sensitive Basque country; and resulted in a significant jail-term, not a fine? In domestic law, the British courts must have regard to the case law of the ECtHR, as per section 2 of the HRA. But the clear disparity in outcomes between the two cases suggests that the application of proportionality review, for the purposes of assessing breaches of Article 10, at least domestically, is insufficient to protect expression that allegedly incites violence of a terrorist nature.

Next, criticisms of the specific UK offence of encouragement of terrorism, as per section 1 of the Terrorism Act 2006, are considered. In 2008, for example, the UN Human Rights Committee (UNHRC), in considering the UK’s observance of its responsibilities under the ICCPR, was particularly concerned about the effect the offence of encouragement of terrorism had on freedom of expression in general. This was because section 1 was defined in ‘broad and vague terms’ (UNHRC 2008). There is a worry, therefore, that the broad and vague nature of the offence will inhibit even speech unconnected to terrorism. Hunt states: ‘There are concerns that broadcasters, internet service providers, as well as organizations and individuals representing particular categories of legitimate political opinion, may engage in all manner of self-censorship.’ (Hunt 2007: 457-58; see also Cram 2006; Bansar 2009) Indeed, more worryingly, rather than countering terrorism, do the measures increase the likelihood of extremism and political violence, which is a previous concern expressed by the UNCTED in states’ implementation of UNSC Resolution 1624? At the time the Terrorism Bill 2005 was progressing

through Parliament, Human Rights Watch expressed concern that the very communities whose support was needed in the fight against terrorism would be alienated (Human Rights Watch 2005).⁴⁴

In specific terms, dismay can be expressed about encouraging an act of terrorism, since an act of terrorism in the UK is not in itself an offence. So, it outlaws conduct, albeit in statements, that is not, strictly speaking, an offence known to law (Jones & Ors 2006: 15). The wide definition of terrorism in the UK, as per section 1 of the Terrorism Act 2000, is also problematic. Broadly, the definition of terrorism in the UK involves either serious violence against people or property or creates a serious risk to public safety, in advancing either a racial, religious, political or ideological objective, for the purposes of either intimidating the public or influencing the government or a foreign government. In 2013, for example, in *R v Gul*⁴⁵ the UK's Supreme Court said: 'While acknowledging that the issue is ultimately one for Parliament, we should record our view that the concerns and suggestions about the width of the statutory definition [of terrorism] ... merit serious consideration.'⁴⁶

Within the UK definition of terrorism, Human Rights Watch is particularly concerned with the term 'influence'; for them, it is too low a threshold for targeting the state (Human Rights Watch 2005: 9). According to a previous Independent Reviewer on Anti-Terror Legislation in the UK, David Anderson QC, 'influence' draws the definition so broadly that it can mean political journalists and bloggers are subject to the full range of anti-terrorism powers, if they threaten to publish or prepare to publish something that the authorities think may be dangerous to life, public health or public safety. With 'influence' the UK definition is so broad it could even catch a campaigner who voices religious objections to a vaccination campaign on the grounds that they are a danger to public health (Anderson 2014: 27-32). Similar concerns were also expressed by the UNHRC, in 2015, in that year's report on the UK's compliance with the ICCPR (UNHRC 2015: para 14).

Section 1(5) of the Terrorism Act 2006 says that it is irrelevant (a) whether anything mentioned in those subsections relates to the commission, preparation or instigation of one or more particular acts of terrorism or of acts of terrorism generally. Anderson is concerned that it is unnecessary to show that specific acts of terrorism are being

⁴⁴ On this issue more generally, see, for example, Awan (2012).

⁴⁵ See n 31.

⁴⁶ *Ibid* para 62.

encouraged (Anderson 2012: 123). Under the CPT it will be recalled that an incitement should only be unlawful where it ‘causes a danger’ that a terrorist act might be committed. There must therefore be a causal link between a hateful statement and the act that is to be prevented. Section 1(5) of the Terrorism Act 2006 exceeds this: it says that it is irrelevant whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence. Causality is further attenuated in that ‘members of the public’ can include anyone in the world (Human Rights Watch 2005: 10). On this latter issue Jones and others further note:

It is not clear how a court ... is to identify ‘the member of the public’... The larger the class of person who may read or hear the statement, the more obvious are the problems...The larger, and more diverse, the ‘members of the public’ may be, the more difficult will be the evidential proving that...members of the public may be susceptible to such statements so as to consider them as an inducements to the commission of acts of terrorism. (Jones & Ors 2006: 13)

Section 1(1) also says: ‘some ... members of the public’. In addition to the evidential problems concerned with the meaning of ‘public’, how many people actually constitute ‘some’ (ibid 12)?

Concern has been expressed about the mental element ingrained within section 1, too. In implementing its CoE obligations, the UK also went further than it was required to do so in the CPT. It will be recalled that Article 5 defines a public provocation to commit a terrorism offence as intentionally inciting the commission of a terrorism offence. Section 1 does expressly reference the intentional encouragement of terrorism, but, unlike the CPT, it permits the offence to be conducted recklessly. In 2005 when the then Terrorism Bill was progressing through Parliament, alarm was expressed that a person could encourage terrorism without realizing it (Human Rights Watch 2005: 10).⁴⁷

As per section 1, terrorism can be indirectly encouraged, of which glorification, whether in the past, present or future, is a feature. This has drawn particular criticism for being too wide and unclear. Certainty in the law is a key criterion of human rights norms. Article 7 of the ECHR is ‘no punishment without law’. This clearly references the rule of law but has been widely interpreted as also requiring legal clarity.⁴⁸ Moreover, in curtailing Article 10(1) of the ECHR, states cannot do so without relying on limitations that are ‘prescribed by law’, as per Article 10(2). For this

⁴⁷ For more detailed analyses of the CPT, and its applicability to the UK’s Terrorism Act 2006, see, for example, Hunt (2007).

⁴⁸ See, for example, *SW v UK* App no 20166/92.

reason, when the Terrorism Bill 2005 was being debated, the Parliamentary Joint Committee on Human Rights (JCHR) called for the removal of references to glorification, for violating this element of Article 10(2) (JCHR 2005: para 34). Finally, unlike the offence in section 1 of the Terrorism Act 2006, the universal jurisdiction rules of the CPT, as per Article 14, are much more limited.

[H] A (GREATER?) BALANCING FREEDOM OF SPEECH WITH NATIONAL SECURITY IN THE USA

The offence of encouragement of terrorism in the UK is an unlawful interference with free expression. But, conversely, does America's protection of free speech, in the First Amendment, insufficiently attach weight to the rights and freedoms of others, especially the potential victims of terror incitement? There are ways of limiting terror speech in the USA without engaging the First Amendment, such as providing material support to a designated terror organization, as per the ruling of SCOTUS in *Holder*. Indeed, free speech can be curtailed more directly, as the true threats doctrine illustrates, though the law on this is still developing and is confined, at least currently, to a specified victim or victims. But, in the age of the worldwide web, the USA could do more to limit this classification of free speech, as Guiora observes: 'The 1969 ruling [in *Brandenburg*] came well before the digital age. We live in a time where clicks and shares spread hate and false information instantaneously across the Internet.' (Guiora 2018: 145) European human rights law clearly does not apply to America. But the values behind Articles 1, 2, 3 and 17 of the ECHR, for example, warrant serious consideration.

Article 1 of the ECHR obliges states to secure the rights of all citizens. What about the equal security of the rights of terror victims? Specifically, Articles 2 and 3 of the ECHR, the right to life and freedom from torture respectively, impose a substantive duty on the state to prevent violations of the rights by non-state actors (though this is not an absolute obligation): see, for example, *Osman v UK*.⁴⁹ Article 17 of the ECHR, prohibition of abuse of rights, is particularly interesting. The general purpose of Article 17 is to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by

⁴⁹ App no 23452/94.

the ECHR. In *Norwood v UK*,⁵⁰ for example, the applicant was a member of the British National Party, an extreme right-wing political party. Between November 2001 and January 2002, the applicant displayed in the window of his first-floor flat a large poster. The poster depicted New York's Twin Towers in flames after 9/11, accompanied by the words 'Islam out of Britain—Protect the British People'. Following a complaint from a member of the public, the police removed the poster. Despite being contacted by the police and invited to attend an interview, Norwood refused to turn up. He was therefore prosecuted. Norwood challenged his subsequent conviction on the grounds of it being a disproportionate interference with Article 10(1) of the ECHR. The ECtHR dismissed his application. To equate the whole of Islam with the 9/11 attacks was in fact an abuse of Article 10, as per Article 17; it denied the rights of others and ignored the fundamental values of the ECHR such as tolerance, social peace and non-discrimination.⁵¹ The ECtHR upheld a similar case, *Ivanov v Russia*,⁵² on the same grounds, Article 17, where the applicant had expressed hatred against Jews rather than Muslims (Holocaust denial does not qualify for Article 10 protection either: *Garaudy v France*).⁵³ If the ideas which Article 17 of the ECHR represent were a factor in determining breaches of the First Amendment of the US Constitution, surely Brandenburg's conviction would be upheld?

Linked to the Article 17 argument, to afford less protection in America to content inciting terror, violence is the 'suicide pact' argument—a homage to the dissenting judgment of Justice Robert Jackson, in SCOTUS, in *Terminiello v City of Chicago*.⁵⁴ In *Terminiello* the City of Chicago had sought to criminalize speech that provoked public disorder. Arthur Terminiello was giving a speech to the Christian Veterans of America in which he criticized various racial and religious groups such as Jews and made a number of inflammatory, pro-fascist comments. There was a crowd of approximately 1000 people outside, protesting against the speech, some violently. The Supreme Court held that Terminiello's conviction for disorderly conduct was unconstitutional. But Justice Jackson believed that the majority had attached far too much weight to Terminiello's free speech, failing to appreciate the very real concerns of public safety, with two opposing groups, pockets of which

⁵⁰ App no 23131/03.

⁵¹ Ibid 4.

⁵² App no 35222/04.

⁵³ App no 65831/01.

⁵⁴ 337 US 1 (1949).

were intent on committing violence against the other. Johnson's dissent in this case is most famous for its final paragraph:

This Court has gone far toward accepting the doctrine that ... all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.⁵⁵

The phrase 'suicide pact' is often associated with the former US President, Abraham Lincoln. Lincoln suspended the constitutional right of *habeas corpus* during the American Civil War, in 1861. According to section 9, clause 2, of Article I, of the US Constitution, 'The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.' Was the American Civil War a 'rebellion'? More importantly, however, Article I of the US Constitution references the powers of the legislature—Congress—not the executive—the President. But Congress was not in session (Posner 2006: 39). Lincoln claimed the violation of a constitutional right to save the Constitution so, to him, he was not acting against the Constitution: he was preserving it (ibid 40). Conceptually, one may find the actions of Lincoln during the Civil War, and the 'suicide pact' argument of Justice Robert Jackson in *Terminiello*, on the state theory of the German constitutional theorist, Carl Schmitt, in his book *Dictatorship*, first published in 1921 (2014).⁵⁶ Here Schmitt supported the conferring of wide powers on the then German President to protect the state, at the time, from extreme groups seeking to destroy it. Schmitt based the President's

⁵⁵ Ibid 36.

⁵⁶ Carl Schmitt famously joined the Nazi Party in 1933 and was its so-called 'Crown Jurist'. So the author is keen to acknowledge that Schmitt is a controversial academic figure and continues to divide opinion. In an email to me dated 12 February 2019, my good friend and noted Schmittian scholar, Michael Salter, wished me to emphasize the following about Schmitt's apparent voluntary joining of the Nazi Party, in 1933: 'Schmitt's pre-1933 writings were not at all Nazi and he was widely regarded as a political enemy of Nazism by the Nazis themselves as well as his socialist Jewish PhD students (such as Franz Neumann and Otto Kirchheimer) because he was aligned with the Nazis' conservative enemies, and they never included his works on their list of approved propaganda ... In 1933 ... he knew he and his family were highly vulnerable to being put in a concentration camp by Hitler's new government so he made dramatic and entirely inconsistent lip service to their cause and received some official positions as a reward, in what was really pretty morally disgusting opportunism. It is always easy for us to think we would have acted entirely differently, given up our legal/academic careers and go into exile rather than collaborate. Most liberal legal academics, lawyers and judges did not however. However, the hard-core Nazis of Himmler's SS never believed Schmitt was sincere (they were right!) and never forgave his earlier attacks and succeeded in having him expelled. It was only the fact that Goering had appointed Schmitt, and was not willing to allow Himmler to depose and kill one of his own appointees, that saved him. Schmitt's religious prejudices, including mild anti-judaism, were of a typical Catholic kind of the time.' For a much less favourable interpretation of Schmitt's anti-Judaism and association with Nazism, see Strong (1996: xviii-xix).

powers on emergency provisions within Article 48 of the German Constitution of 1919.⁵⁷ This form of constitutional protection was premised on a ‘commissarial dictatorship’, in that a commissioner dictator was appointed by the sovereign, whose aim was to ‘eliminate the danger and to strengthen the foundation which had been threatened’ (Schwab 1989: 32-33).⁵⁸

In his later work, *Political Theology*, dating from 1922, Schmitt determined that the sovereign’s commissarial dictator could only be appointed, and the wide powers conferred on them to address the crisis, when it was a state of exception. A state of exception was characterized by a situation of extreme peril and a danger to the existence of the state (Schmitt 2005: 6). In his later works, e.g. *Legality and Legitimacy*, first published in 1932, Schmitt continued to believe that liberalism was ill-equipped to protect the state from extremist groups seeking to destroy it. For Schmitt, liberalism’s neutrality and tolerance exacerbated the potential for chaos. Extremist groups then abused this neutrality and tolerance for their own political gain (Lazar 2009: 38-40). Of course, the author here is not likening the existing terror threat, post 9/11, to the Schmittian exception, but merely to illustrate that too much respect for hate speech is counter-productive, since extremists do not reciprocate liberal, constitutional ideals of tolerance, social peace and non-discrimination.

In the age of terrorism post 9/11, therefore, together with the speed, ease and little cost incurred in sharing terror speech on the internet, should there not be a reappraisal of, for example, the *Brandenburg* ruling? The author is based in the UK. But the UK’s approach to limiting terror speech is arguably too intrusive of freedom of expression. Therefore, a compromise approach, a ‘third way’, between the two jurisdictions is suggested in the following section, though a common definition for both countries is not proposed.

⁵⁷ See Schmitt (2014 180-226), ‘Appendix: The Dictatorship of the President of the Reich According to Article 48 of the Weimar Constitution’. To be exact this Appendix was an addition to the second edition of *Dictatorship*, which was not published until 1928.

⁵⁸ Indeed, Schmitt’s ‘commissarial’ dictatorship was not a new concept, however: Ancient Rome had many examples of a suspension of the existing order for its self-preservation. Moreover, in *The Social Contract*, for example, Jean-Jacques Rousseau (1712-1778) dedicated a whole chapter to ‘the Dictatorship’ to maintain the survival of the state—see Rousseau (1998, book IV: chapter VI, 124-26).

[I] A 'THIRD WAY' FOR LIMITING TERROR SPEECH IN THE UK AND USA

A possible solution to narrowing the reach of terror speech in the UK, for example, would be, first, to revisit the wide definition of terrorism, within section 1 of the Terrorism Act 2000. The term 'influence the government' is particularly contentious, as stated above. But, in the later case of *R (Miranda) v Secretary of State for the Home Department*,⁵⁹ in the Court of Appeal of England and Wales, Lord Dyson said:

Terrorism as it is ordinarily understood is the attempt to advance some political or religious cause not by persuasion but by violence, the endangerment of life etc. To describe a newspaper writing political stories that inadvertently reveal the identity of members of the intelligence service or oppose government policy on vaccination as committing an act of terrorism is to use the word terrorism in a way that bears no relationship to any ordinary understanding of the concept.⁶⁰

So, for the purposes of influencing the government, since *Miranda* there has to be some mental element such as intention, or at least recklessness, to commit an act of terrorism. The Court of Appeal clearly narrowed the reach of the definition by requiring some form of *mens rea* on the part of a criminal suspect, through statutory interpretation, but it had no power to literally change the legislature's conscious use of the word 'influence'. For comparison, at the international level, the UN's *Draft Comprehensive Convention Against International Terrorism 2002* defines terrorism, in Article 2(1), as including 'to *compel* [my italics] a Government or an international organization'. 'Compel' is of course a higher standard than 'influence'. This UN Convention is yet to be agreed, but the same words, 'compel a Government', have been adopted by the UNSC, for example, in its Resolution 1566 of 2004. Indeed, the EU even adopts a higher standard than compel: 'unduly compel', in Article 3(2)(b) of its Directive 2017/541 on combatting terrorism. Paying particular attention, therefore, to the breadth of the UK's definition of terrorism is certainly one way of limiting the effect the offence of encouragement of terrorism has on freedom of expression.

The ruling of the Court of Appeal in *Miranda* imposed a mental element within the definition of terrorism in the UK, but concern about the mental element for the substantive offence of encouragement of terrorism still remains. It will be recalled that the CPT suggests only a standard of

⁵⁹ [2016] EWCA Civ 6.

⁶⁰ *Ibid* para 48.

intention, so the reference to recklessness in section 1 should be removed; indeed, advocating violence in America, as per *Brandenburg*, requires intention. *Miranda* is not the only ‘reform’ to the reach of the offence of encouragement of terrorism since its inception in 2006: recently, the UK enacted a new piece of relevant legislation, the Counter-Terrorism and Border Security Act 2019. Section 5 amends section 1 of the Terrorism Act 2006: ‘Some ... members of the public’ is replaced by ‘a reasonable person’.

The concerns previously expressed about the reach of the term ‘public’, and the exact number of people required to constitute ‘some’, have apparently been addressed by section 5 of the Counter-Terrorism and Border Security Act 2019. This is to be welcomed. But, in addition to the issue of recklessness, the exclusion of proof that a crime could actually be committed remains. Under the CPT it will also be recalled that an incitement should only be unlawful where it ‘causes a danger’ that a terrorist act might be committed. There should therefore be some causal link between a hateful statement and the act that is to be prevented. This is another issue, after the requirement of intention, where the UK and US offences could conceivably overlap. In America the requirement that the speech likely incites or produces imminent lawless action, as per *Brandenburg*, should be relaxed: the CPT only references a danger that such an offence may be committed. (True threats do not carry an element of imminence but, of course, have their own limitations, such as a specified victim or victims.) If so, this could represent something of a return to a ‘clear and present danger’ type of test adopted by SCOTUS in, for example, *Schenck* in 1919.⁶¹ A final way of negotiating the limits to free speech in the UK and America could be to tighten the proportionality test by employing some elements of strict scrutiny and/or loosening the strict scrutiny test by employing some elements of proportionality.

[J] CONCLUSION

Following the recent terror shooting in Christchurch, the British Home Secretary, Sajid Javid, said that online platforms had a responsibility not to do the terrorists’ work for them: ‘This terrorist filmed his shooting with the intention of spreading his ideology ... Allowing terrorists to glorify in the bloodshed or spread more extremist views can only lead to more radicalisation and murders.’ (Gayle 2019) This is a legitimate argument.

⁶¹ Interestingly, there has been a growing support in the case law of the ECtHR for a test to be applied in cases of terror speech that is similar to the US Supreme Court’s ‘clear and present danger’ standard—see, for example, Dyer (2015). Dyer argues that the ECtHR should adopt a test under which there is but one enquiry: ‘did the impugned speech create a real risk of violence?’

The spectacular rise of Islamist terrorism after 9/11, with the enduring threat Islamism poses, justifies curtailments of terror speech, especially online. Indeed, the recent terror attack in Christchurch cannot be blamed on Islamism: the terrorist was a neo-Nazi. In the UK and elsewhere the rise of far-right political violence is of particular concern (Osborne 2018). But existing provisions in the UK to prevent terror speech, and the sharing of it, online are surely sufficient? If anything, they go too far. The offence of encouragement of terrorism, as per section 1 of the Terrorism Act 2006, is a disproportionate interference with freedom of expression. This is despite recent limitations on the scope of the crime by the Court of Appeal of England and Wales in *Miranda* and the enactment of section 5 of the Counter-Terrorism and Border Security Act 2019. The definition of terrorism in the UK, including the term ‘influence’, as per section 1 of the Terrorism Act 2000, is too wide; the offence can be committed recklessly, as well as intentionally; and there is no need to show a real risk that someone may be encouraged by the speech. These issues need addressing.

Comparatively, limitations on terror speech in America can only be committed intentionally, as per the rulings of SCOTUS in *Brandenburg* (though for true threats there is only an intention to state something that puts a person in fear, not to intend that a person is actually put in fear). But the respect for free speech in this instance, because of the demands of the First Amendment, date from, in the case of *Brandenburg*, 1969. This is obviously unreflective of the internet age, in the 21st century. European human rights law, arising from Articles 2 and 3 of the ECHR, imposes positive obligations on states to prevent violations of death and serious harm from third parties such as terrorists (though these are not unqualified duties). The recent terror attacks at churches in Sri Lanka, in April 2019, in retaliation for the Christchurch shootings, could have been avoided if the Sri Lankan authorities had acted on intelligence passed on to them from foreign governments (Burke and Safi 2019). This is a human rights violation by Sri Lanka, although it was not the perpetrator of the attack. SCOTUS has upheld indirect restrictions on terror speech in *Holder*, but a reflection of these other values, from within European human rights law, could entail a reconsideration of the American requirement of imminent lawful action; a danger that harm might be committed should be sufficient, mirroring, to some degree, the old test of ‘clear and present danger’ in *Schenck*.

Some academics in America are strongly resistant to reappraising the doctrine from *Brandenburg*, even in the context of limiting terror speech. For them this will ‘easily send us skidding down a quite slippery slope’

(Price 2018: 845). There is also a legitimate question whether genuine attempts by states to honour their international and regional responsibilities to limit the advocacy of terrorist violence are, in practice, effective. Terrorists intent on sharing information can do so privately through encrypted messaging services such as WhatsApp and Telegram (Waterson 2019). And the perpetrator of the recent postal attacks in the USA, in October 2018, used the dark web for information—16 packages containing pipe bombs were sent to several prominent critics of US President Donald Trump (Swaine and Holpuch 2018). So, whilst the restrictions proposed here may not stop hard-line ideologists, or even those on the cusp of extremism and violence, effective counter-terror strategy involves ‘preventing’ individuals from being radicalized. Content-based restrictions challenge traditional liberal constitutional ideals of tolerance, but tolerance only goes so far before, as the German constitutionalist theorist Carl Schmitt predicted, it becomes self-defeating and injurious to society.

References

- Anderson, David (2012) *The Terrorism Act in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*.
- Anderson, David (2014) *The Terrorism Act in 2013: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*.
- Awan, Imran (2012) ‘Glorifying and Encouraging Terrorism: Preserving the Golden Thread of Civil Liberties in Britain’ 4(3) *Journal of Aggression, Conflict and Peace Research* 144-54.
- Bansar, Davis (2009) ‘Speaking of Terror: A Survey of the Effects of Counter-terrorism Legislation on Freedom of the Media in Europe’ 7 *International Journal of Civil Society Law* 33-50.
- Barak-Erez, Daphne and David Scharia (2011) ‘Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law’ 2 *Harvard National Security Journal* 1-30.
- Barnum, David (2006) ‘Indirect Incitement and Freedom of Speech in Anglo-American Law’ *European Human Rights Law Review* 258-80.
- BBC News (2010) ‘Woman Jailed for Life for Attack on MP Stephen Timms’ 3 November 2010
- BBC News (2016a) ‘Record Number of EU Terror Attacks Recorded in 2015’ 20 July 2016.

- BBC News* (2016b) 'Terrorism Most Immediate Threat to UK, says MI6' 8 December 2016.
- Blackbourn, Jessie (2013) 'The UK's Anti-terrorism Laws: Does their Practical Use Correspond to Legislative Intention?' 8 *Journal of Policing, Intelligence and Counter-Terrorism* 19-34.
- Blake, Andrew (2016) 'Ted Nugent Blames Jews for Gun Control in Facebook Posts' *The Washington Times* 9 February 2016.
- Burke, Jason and Michael Safi (2019) 'Sri Lanka Told of Extremist Network Months before Blasts—Sources' *The Guardian* 24 April 2019.
- Chadwick, Elizabeth (2007) 'The 2005 Terrorism Convention: A Flexible Step too far?' 16 *Nottingham Law Journal* 29-43.
- Counter-Terrorism Policing (2019) 'Man Jailed for Encouraging Terrorism' 22 February 2019.
- Cram, Ian (2006) 'Regulating the Media: Some Neglected Freedom of Expression Issues in the United Kingdom's Counter-terrorism Strategy' 18 *Terrorism and Political Violence* 335-55.
- Dearden, Lizzie (2018) 'Man who Taught Girlfriend's Pet Pug Dog to Perform Nazi Salutes Fined £800' *The Independent* 23 April 2018.
- Dodd, Vikram and Jamie Grierson (2016) 'Revealed: How Anjem Choudary Influenced at Least 100 British Jihadis' *The Guardian* 16 August 2016.
- Dodd, Vikram and Josh Halliday (2018) 'Police Thwart Possible Isis-inspired Plot after Newcastle Arrest' *The Guardian* 11 December 2018.
- Dyer, Andrew (2015) 'Freedom of Expression and the Advocacy of Violence: Which Test should the European Court of Human Rights Adopt?' *Netherlands Quarterly of Human Rights* 78-107.
- Gardham, Duncan and Con Coughlin (2010) 'Anwar al-Awlaki: MI5 Warns of the al-Qaeda Preacher Targeting Britain' *The Telegraph* 11 June 2010.
- Gayle, Damien (2019) 'Christchurch Attack: Tech Firms must Clean up Platforms—Javid' *The Guardian* 16 March 2019.
- Grierson, Jamie and Vikram Dodd (2019) 'Police Declare Stabbing in Surrey a Terrorism Incident' *The Guardian* 17 March 2019.
- Grierson, Jamie, Vikram Dodd and Jason Rodrigues (2016) 'Anjem Choudary Convicted of Supporting Islamic State' *The Guardian* 16 August 2016.
- Guiora, Amos (2018) 'Inciting Terrorism on the Internet: The Limits of Tolerating Intolerance' in Anne Bayefsky and Laurie Blank (eds) *Incitement to Terrorism* Leiden: Brill, 137-49.

- Halliday, Josh, 'Police Warn Sharing James Foley Killing Video is a Crime' *The Guardian* 20 August 2014.
- Hunt, Adrian (2006) 'The Council of Europe Convention on the Prevention of Terrorism' 12 *European Public Law* 603-28.
- Hunt, Adrian (2007) 'Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism' [2007] *Criminal Law Review* 441-58.
- Human Rights Watch (2005) *Briefing on the Terrorism Bill 2005* November 2005.
- Institute for Economics and Peace (2018) *The Global Terrorism Index 2018* November 2018.
- Institute for Economics and Peace (2019) *The Global Terrorism Index 2019* November 2019.
- Johnston, Chris (2017) 'Two Detained under Terrorism Act as UK Arrests Reach Record High' *The Guardian* 29 November 2017.
- Joint Committee on Human Rights (2005) *Third Report Session 2005-06: Counter-Terrorism Policy and Human Rights* 28 November 2005.
- Jones, Alun; Rupert Bowers and Hugo Lodge (2006) *Blackstone's Guide to the Terrorism Act 2006* Oxford: Oxford University Press.
- Kenbar, Billy (2013) 'Nidal Hasan Convicted of Fort Hood Killings' *The Washington Post* 23 August 2013.
- Lazar, Naomi Claire (2009) *States of Emergency in Liberal Democracies* Cambridge: Cambridge University Press.
- Mair, David (2017) '#Westgate: A Case Study: How al-Shabaab Used Twitter during an Ongoing Attack' 40 *Studies in Conflict and Terrorism* 24-43.
- Mazzetti, Mark, Charlie Savage and Scott Shane (2013) 'How a US Citizen Came to be in America's Cross Hairs' *New York Times* 9 March 2013.
- Morris, Steven (2016) 'British Woman who Joined Isis in Syria Guilty of Encouraging Terror Acts' *The Guardian* 29 January 2016.
- Murray, Darragh (2009) 'Freedom of Expression, Counter-terrorism and the Internet in Light of the UK Terrorist Act 2006 and the Jurisprudence of the European Court of Human Rights' *Netherlands Quarterly of Human Rights* 331-60.
- Osborne, Samuel (2018) 'Number of Far-right Terror Attacks Increases as Overall Deaths from Terrorism Fall, Report Finds' *The Independent* 5 December 2018.

- O'Neill, Ann (2015) 'The 13th Juror: The Radicalization of Dzhokhar Tsarnaev' *Cable News Network* 30 March 2015.
- O'Neill, Kevin Francis (2019) 'True Threats' in *The First Amendment Encyclopedia*.
- Parker, Ellen (2007) 'Implementation of the UK Terrorism Act—The Relationship between Counter-terrorism Law, Free Speech, and the Muslim Community in the United Kingdom versus the United States' 21 *Emory International Law Review* 711-57.
- Posner, Richard (2006) *Not a Suicide Pact: The Constitution in a Time of National Emergency* Oxford: Oxford University Press.
- Press Association (2016) 'Twitter and YouTube would not Remove Anjem Choudary's Posts, Court Told' *The Guardian* 16 August 2016.
- Price, Zachary (2018) 'Our Imperiled Absolutist First Amendment' 20 *Journal of Constitutional Law* 821-48.
- Renieris, Elizabeth (2009) 'Combating Incitement to Terrorism on the Internet: Comparative Approaches in the United States and United Kingdom and the Need for an International Solution' 11 *Vanderbilt Journal of Entertainment and Technology Law* 673-709.
- Rudner, Martin (2017) "Electronic Jihad": The Internet as Al Qaeda's Catalyst for Global Terror' 40 *Studies in Conflict and Terrorism* 10-23.
- Rousseau, Jean-Jacques (1998) *The Social Contract* Ware: Wordsworth Editions.
- Schmitt, Carl (2005) *Political Theology* Chicago: University of Chicago Press.
- Schmitt, Carl (2014) *Dictatorship* Cambridge: Polity Press.
- Schwab, George (1989) *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936* 2nd edn Westport, Connecticut: Greenwood Press.
- Shane, Scott (2016) 'The Enduring Influence of Anwar al-Awlaki in the Age of the Islamic State' 9 *Counter Terrorism Center Sentinel* 15-19.
- Shane, Scott (2017) 'Inside Al Qaeda's Plot to Blow up an American Airliner' *The New York Times* 22 February 2017.
- Stewart, Heather and Jessica Elgot (2018) 'May Calls on Social Media Giants to Do More to Tackle Terrorism' *The Guardian* 24 January 2018.
- Strong, Tracey (1996) 'Foreword' in Carl Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure in a Political Symbol* Chicago: University of Chicago Press, vii-xxviii.

- Swaine, Jon and Amanda Holpuch (2018) 'Pipe Bomb Investigation: Florida Mail Facility Searched by FBI and Police' *The Guardian* 26 October 2018.
- Tsisis, Alexander (2017) 'Terrorist Speech on Social Media' 70(2) *Vanderbilt Law Review* 651-708.
- United Nations Counter-Terrorism Committee Executive Directorate (2016) *Global Survey of the Implementation of Security Council Resolution 1624 (2005) by Member States* 21 January 2016.
- United Nations Human Rights Committee (2008) *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland* CCPR/C/GBR/CO/6 30 July 2008.
- United Nations Human Rights Committee (2015) *Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland* CCPR/C/GBR/CO/7 17 August 2015.
- Waterson, Jim (2019) 'Facebook Removed 1.5m Videos of New Zealand Terror Attack in First 24 hours' *The Guardian* 17 March 2019.

Legislation Cited

- Communications Act 2003 (UK)
- Constitution of the United States 1787
- Council of Europe Convention on the Prevention of Terrorism 2005
- Counter-Terrorism and Border Security Act 2019 (UK)
- Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA
- Espionage Act of 1917 (USA)
- European Convention on Human Rights 1950
- Human Rights Act 1998 (UK)
- International Covenant on Civil and Political Rights 1966
- Malicious Communications Act 1988 (UK)
- Obscene Publications Act 1959 (UK)
- Terrorism Act 2000 (UK)
- Terrorism Act 2006 (UK)
- Title 18 of the United States Code, Crimes and Criminal Procedure

United Nations Draft Comprehensive Convention Against International Terrorism 2002

United Nations Security Council Resolution 1566 (2004)

United Nations Security Council Resolution 1624 (2005)

United Nations Security Council Resolution 2178 (2014)

Universal Declaration of Human Rights 1948

Cases Cited

Adarand Constructors, Inc v Peña 515 US 200 (1995)

Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19

Brandenburg v Ohio 395 US 444 (1969)

Dennis v United States 341 US 494 (1951)

Erbakan v Turkey App no 59405/00

FCC v Pacifica Foundation 438 US 726 (1978)

Garaudy v France App no 65831/01

Handyside v UK App no 5493/72

Holder v Humanitarian Law Project 130 SC 2705 (2010)

Ivanov v Russia App no 35222/04

Leroy v France App no 36109/03

Matal v Tam 137 US 1744 (2017)

Norwood v UK App no 23131/03

Osman v UK App no 23452/94

R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15

R v Gul [2013] UKSC 64

R (Miranda) v Secretary of State for the Home Department [2016] EWCA Civ 6

Reno v ACLU 521 US 844 (1997)

Schenck v United States 249 US 47 (1919)

SW v UK App no 20166/92

Terminiello v City of Chicago 337 US 1 (1949)

Virginia v Black 538 US 343 (2003)

Watts v United States 394 US 705 (1969)

Yates v United States 354 US 298 (1957)

LEGISLATIVE DEVELOPMENTS IN CYBERSECURITY IN THE EU

FAYE F. WANG

Brunel University London

Abstract

Cyber-attacks have become a very serious issue in Europe, targeting essential services such as national health systems, banks, electoral campaigns or mobile services. There is certainly no one single solution to the need to improve cybersecurity, but a wide range of collective and far-reaching technical and legal measures may make it as hard as is possible for those who want to attack the security of infrastructures, services and products. This article aims to aid our understanding of cybersecurity, cyber threats, cyber-attacks and cyber defence from both legal and technological perspectives. It discusses the most recent EU cybersecurity legislative movements and considers whether current legal and technical measures, including the newly adopted EU Cybersecurity Act 2019, have provided efficient solutions to respond to radically changed cyber threats and attacks, in particular in critical services in the EU. It offers insights into the scope and limitations of technical measures in achieving the highest possible level of cybersecurity due to the unpredictable nature of certain cyber-attacks.

Keywords: cybersecurity, cyber-attacks, cyber defence, cybercrime, cyber threat, Fintech, artificial intelligence

[A] INTRODUCTION: THE RISE OF CYBERSECURITY CONCERNS

‘Cybersecurity’ is a term which often refers to the confidentiality, integrity and availability (known as the CIA) of information in cyberspace (ENISA 2016a). Cybersecurity is considered to be a relatively new term (Kosseff 2018: 1010), and the US courts first used the term ‘cybersecurity’ in a court opinion in 2007 (*Pisciotta v Old National Bancorp* 2007: 638).

Cybersecurity also concerns how individuals and organizations reduce the risk of cyber-attacks, a point emphasized by the National Cyber Security Centre (n.d.) in the UK. Breaching or attacking cybersecurity is conduct that may constitute cybercrime. One of the most common forms of cyber-attack is cyber espionage. Cyber espionage (such as botnets, ransomware, spyware and backdoor) is considered the biggest motivator for cyber-attacks (McAfee 2018). Computer networks are used to gain unauthorized access to confidential information in public or private organizations, so as to enjoy an advantage over competitors, including state-sponsored actors. In order to deliver these cyber-attacks, phishing (tricking someone to click on a malicious link or download a malicious attachment via email) is often used as the first step (ENISA 2017).

Nowadays, cyber-attackers are able to deliver high-profile and sophisticated attacks to both public and private sectors, including sensitive public services, national infrastructures and businesses for consumers. They have primarily taken the forms of physical damage, psychological damage, financial damage or invisible damage, as pointed out in an earlier essay in *Amicus Curiae* by Chatterjee and Lefcovitch (2016: 2). Their hidden nature can make it difficult to identify the attacker. Many of these attackers use an advance persistent threat and may remain undetected for years. This poses a growing concern over our safety, health and security. In early 2018, it was reported that Europe continues to be a cybercrime hub—cyber-attacks in Europe in 2017 increased by 30% compared with the previous year, whilst 38% of these attacks were initiated from Europe (ThreatMetrix 2018). In 2019, more than half of British firms reported cyber-attacks (*BBC News* 23 April 2019). During the first quarter of 2019, nearly 50% of human-initiated cyber-attacks came from the EMEA (Europe, Middle East and Africa) region, with UK and Germany being the top two targets for cybercrime attackers by volume (LexisNexis Risk Solutions and ThreatMetrix 2019).

In the public sector, it is often the case that hackers try to break into telecommunication networks to steal sensitive or valuable data to sell on or use to blackmail the legitimate owner. For example, in the UK case of *R v Connor Douglas Allsopp*, there was a hacking attack to TalkTalk telecommunication network. Computer files of TalkTalk's customers were unlawfully accessed and the Chief Executive Officer of TalkTalk at the time was blackmailed to pay bitcoins to the hacker for the stolen data (*R v Connor Douglas Allsopp* 2019: 9).

Concern about cyber-attacks in the public sector continues to grow. It is estimated that 90% of critical national infrastructures in the US, UK,

Germany, Australia, Mexico and Japan have experienced at least one successful attack over the past two years (Ponemon Institute, 2019). In January 2019, German politicians were targeted in a mass data attack after which their personal data was unlawfully published online (*BBC News* 4 January 2019).

It has been suggested that the four most important ways to protect infrastructures are: to be prepared for attacks; to be aware of attacks being non-stop; to be guarded (i.e. against employees clicking on phishing emails); and to be willing to share intelligence with similar organizations (Simmons 2019). From a technical perspective, it is argued that the two most effective ways to reduce the chance of circumventions to security are: firstly, to change the names, locations and references of files and software applications in a computer's memory so that the system is not configured the same way each time the computer is turned on; and, secondly, to isolate computers from local networks and the internet—known as 'air gapping'—(Russon 2019). However, none of these measures can completely guarantee cybersecurity because it is possible for hackers to hack an air-gapped computer while the supply chain is being built or via attached storage during software and firmware updates. For example, a hacker could hack a nuclear power station in this way resulting in power cuts or a nuclear gas leak without the need for a physical presence of an attacker entering into a highly secure nuclear power station building.

In the private sector, hacking into email accounts is very common, in that data from email accounts may be extracted by obtaining users' credentials or by sniffing network traffic. Email is historically not considered as secure because many email providers do not encrypt messages while they are in transit. For example, in the UK case of *J Brazil Road Contractors v Belectric Solar Ltd*, a contractor's British Telecom email account was hacked, which caused his customer to send payment to the bank account of the hacker (*J Brazil Road Contractors v Belectric Solar Ltd* 2018: 294). In recent years, there is a growing trend for email providers to encrypt messages in transit, making it harder for others to hack into email accounts and extract data from them. For example, since 2014 Google has been applying a security protocol called transport-layer security (TLS) to make email messages more secure in transit (Google n.d.; Walder 2016).

More recently, there is increased alarm over cybersecurity concerns from the rise of the employment of artificial intelligence in products. For example, it may be possible to hijack an expensive car via the smartphone apps linked to smart car alarms (*BBC News* 8 March 2019). Breaches of

smart car systems could also lead to car crashes. This is a rather difficult issue to resolve. It is understood by professionals that there is no software system that is 100% safe and secure, though software engineers have been working to review and improve their codes and engineering practices, in order to enhance the safety and security of their products at all times. However, it is argued that, if the costs of circumventing a security system are higher than the profit hackers can make, it may just make them choose other, easier targets (Russon 2019).

With the advent of driverless cars, a breach of cybersecurity may result in even more serious and complicated consequences. For example, the computer system of a driverless, autonomous or self-driving car may communicate various attributes to a central server to improve autonomous system performance for all other cars made by the same manufacturer. If a hacker breaks into and damages the central service, there may be safety implications for the entire fleet. For example, when the hacker hacks the radar sensor of cars from the central server, this may cause the radar sensor to misrecognize certain types of hazard, so that there is no signal issued for the necessary braking, or a signal is issued for false braking. For example, the signal from a radar sensor is reflected by a metal object much more strongly than a wood or plastic object, thus, an overhead metal road sign may at first appear a major hazard to this sensor, but, when compared against the sensor data and subsequent car behaviour from other cars in the fleet at that location, the autonomous system can understand the road sign is not a hazard and therefore braking is not required (Tesla 2016).

In addition, hacking of a central server of self-driving cars may also pose a potential threat to privacy. The centrally stored vehicle-generated data can include vehicle location and speed. The hackers may use the stolen data to spy on car owners in order to break into their houses or conduct other intended harm. It was reported that Tesla is recording short video clips from the car's external cameras for lane lines, street signs or other necessary surrounding information to perform self-driving functions (Muller 2019). However, the unauthorized access to such data may enable the offender or hacker to use the data to publish identifiable individuals' personal information.

In response to cybersecurity challenges at the national level, countries and regions have been establishing public-private partnerships to tackle issues of cybersecurity. This partnerships initiative originates from the USA. For over 25 years, the USA has considered the development of public-private partnerships as key to tackling cybercrime. In 1997, a

Commission for Critical Infrastructure Protection was established by President Clinton to assess threats to infrastructure. However, there are opposing views as to the benefit of public–private partnerships (Chatterjee and Lefcovitch 2016: 4). In practice, a degree of mistrust towards public sectors may result from concerns over increased regulatory measures.

At the international level, global efforts have been made to address cybersecurity, which is now a global issue. For example, in 1983, the Organisation for Economic Co-operation and Development (OECD) initiated a study on the possibility of an international application and harmonization of criminal law for computer-related crime and abuse, which subsequently published ‘Computer-Related Crime: Analysis of Legal Policy’ in 1986. In 1992, the OECD finally issued ‘Guidelines for the Security of Information Systems’ to encourage cooperation between public and private sectors. In 2012, the OECD published a report on ‘Cybersecurity Policy Making at a Turning Point’, discussing a new generation of cybersecurity strategies in several countries (OECD 2012). Following OECD initiatives, in recent years, the International Organization for Standardization (ISO) has also been working with nations and companies such as Tesla to develop the new international standards for consumer protection via ‘privacy by design’ for consumer goods and services (ISO/PC 317).

With regard to transnational cooperation and coordination among governments, the establishment of cooperation between the EU and US in 2000 to create a safer information society (COM (2000) 890 final), which was subsequently enhanced after the EU–US summit in 2010, was considered to be the first major transatlantic cooperation in security (Fahey 2014: 55). In order to enhance the coordination, it was suggested that the Court of Justice of European Union should look to how the European ombudsmen deal with EU privacy complaints, while the US authorities should prompt more searching inquiry into the ombudsmen’s practice (Margulies 2017: 495).

Moreover, specialized international organizations, such as the International Telecommunication Union (ITU), an agency of the United Nations (UN), have also issued recommendations for governments to take preventative action against Cybercrime. It is noted that the nature of threats has changed significantly since the inception of the ITU in 1865 (Chatterjee and Lefcovitch 2016: 6). Nonetheless, the approach of international cooperation should be enhanced, as the level of international cooperation often affects the level of the success of preventing cybercrime, given the global nature of cyber-related criminal activities. In 2007, to improve

international cooperation, the ITU Secretary-General launched the Global Cybersecurity Agenda (GCA). The legal framework of the GCA recommends harmonization of cybercrime legislation, in conjunction with the ITU.

This article aims to aid the understanding of cybersecurity, cyber threats, cyber-attacks and cyber defence from both legal and technological perspectives. It discusses the most recent EU cybersecurity legislative movements (2013-2019) and considers whether current legal and technical measures, including the newly adopted EU Cybersecurity Act (March 2019), have provided efficient solutions to respond to radically changed cyber threats and attacks, in particular in critical services in the EU. Additionally, it offers insights into the scope and limitations of technical measures in achieving the highest possible level of cybersecurity due to the unpredictable nature of certain cyber-attacks.

[B] EU CYBERSECURITY LEGISLATIVE MOVEMENTS

General EU Cybersecurity Strategies

As described above, cyber-attacks have become a very serious issue in Europe, targeting essential services such as national health systems, banks, electoral campaigns or mobile services. In recent years, the EU has issued strategy, communications, action plans and legislative proposals to assess new challenges and review the ENISA Regulation (Regulation (ECU) No 526/2013).

For example, in 2013 the EU set out a cybersecurity strategy (Joint Communication 2013) providing five strategic priorities:

- 1** achieving cyber resilience;
- 2** drastically reducing cybercrime;
- 3** developing cyber defence policy and capabilities;
- 4** developing the industrial and technological resources for cybersecurity; and
- 5** establishing a coherent international cyberspace policy (JOIN (2013) 1 final: 4-5).

In the same year, Europol established the European Cybercrime Centre (EC3) to strengthen the law enforcement response to cybercrime in the EU, focusing on three types of cybercrime:

- 1** cyber-dependent crime;
- 2** online child sexual exploitation; and
- 3** payment fraud (European Cybercrime Centre n.d.).

In 2017, the Council of the EU adopted these three areas as Europol's priority crime areas under the 2018-2021 EU Policy Cycle. It recommends fighting cybercrime by:

(1) disrupting the criminal activities related to attacks against information systems, particularly those following a Crime-as-a-Service business model and working as enablers for online crime, by (2) combating child sexual abuse and child sexual exploitation, including the production and dissemination of child abuse material, and by (3) targeting criminals involved in fraud and counterfeiting of non-cash means of payment, including large-scale payment card fraud (especially card-not-present fraud), emerging threats to other non-cash means of payment and enabling criminal activities (EU Policy Cycle—Empact 2017).

In 2014, the EU cyber defence policy framework was adopted by the Council of the EU. This framework, which was updated in November 2018, calls in particular for restrictive measures for cyber-attack response and deterrence (Council of the EU, Press Release: 19 November 2018). The updated framework set out six priorities, including encouraging further protection through common security and defence policy communication, information systems and networks and promoting civil-military cooperation and international cooperation with significant international organizations, such as the UN and North Atlantic Treaty Organization (Council of the EU, Press Release: 19 November 2018).

In 2016 the European Commission (EC) adopted a Communication on Strengthening Europe's Cyber Resilience System and Fostering a Competitive and Innovative Cybersecurity Industry (COM (2016) 410 final). In the same year, Directive (EU) 2016/1148 concerning measures for a high common level of security for network and information systems across the EU (known as the EC Directive on Security of Network and Information Systems) was adopted, which continues to strengthen the role of the ENISA. Directive (EU) 2016/1148 established the first mechanisms to enhance strategic and operational cooperation among member states (Position of the European Parliament, 12 March 2019). It also set up requirements for national capabilities and member states' obligations for dealing with cybersecurity measures and incident notifications.

In December 2016, the ENISA published a report on Cyber Hygiene Practices (ENISA Review 2016b). Cyber hygiene is considered a fundamental principle of information security, which is equivalent to the 'personal hygiene' of establishing simple daily routines, good behaviours and occasional check-ups to maintain good online health, increase immunity and minimize the risks from attacks (ENISA Review 2016b: 6, 14).

This review called for a standard approach with minimum baseline requirements for cybersecurity which should be flexible enough to support cross-border and cross-industry recognition across Europe (ENISA 2016b: 5). In this report, the ENISA reviewed the fundamental guidelines for small business information security by the US National Institute of Science and Technology, published in November 2016 (US Department of Commerce 2016). According to the findings in this report, there are no unified European cyber hygiene programmes (ENISA 2016b: 12). The UK appeared to be the strongest nation across Europe in terms of a relevant cyber hygiene programme, however, it was only mandatory to public-sector contracts (ENISA 2016b: 13). This report recommended employing an attainable, accreditable and affordable approach to set up cyber hygiene programmes and identified five main areas to establish their compliance regimes: ‘1) Protect the perimeter; 2) Protect the network; 3) Protect individual devices; 4) Use the cloud in a secure manner; and 5) Protect the supply chain’ (ENISA 2016b: 15). It further provides ten corresponding action points:

- 1) Have a record of all hardware so you know what your estate looks like;
- 2) Have a record of all software to ensure it is properly patched;
- 3) Utilise secure configuration/hardening guides for all devices;
- 4) Manage data in and out of your network;
- 5) Scan all incoming emails;
- 6) Minimise administrative accounts;
- 7) Regularly back up data and test it can be restored;
- 8) Establish an incident response plan;
- 9) Enforce similar levels of security across the supply chain; and
- 10) Ensure suitable security controls in any service agreements (including cloud services). (ENISA 2016b: 15)

Subsequently, in December 2018, the ENISA further published *Cybersecurity Culture Guidelines: Behavioural Aspects of Cybersecurity*, providing various contextual understanding of how human aspects of cybersecurity behaviours within organizations can affect organizational cybersecurity and how to plan and implement changes to improve security for organizations. Based on the findings, the Guidelines promoted cybersecurity adherence (active participation) rather than compliance (in particular threats and punishments) within organizations to raise cybersecurity awareness.

Regulatory Developments for EU Cybersecurity

In Autumn 2017 the EC proposed a regulation on cybersecurity (known as the EU Cybersecurity Act), which builds on previous actions and sets out measures to reinforce objectives. This is the first time that definitions of various key concepts have been provided in the EU cybersecurity legislative framework (COM (2017) 477 final/2), for example:

- ◇ ‘cybersecurity’ comprises all activities necessary to protect network and information systems, their users, and affected persons from cyber threats (Article 2(1));
- ◇ ‘cyber threat’ means any potential circumstance or event that may adversely impact network and information systems, their users and affected persons (Article 2(8));
- ◇ ‘European cybersecurity certification scheme’ means the comprehensive set of rules, technical requirements, standards and procedures defined at EU level applying to the certification of information and communication technology products and services falling under the scope of that specific scheme (Article 2(9)).

On 27 June 2019, the European Cybersecurity Act came into force. It provides detailed provisions for the establishment of an EU-wide cybersecurity certification scheme and the enhancement of the role of the EU cybersecurity agency—ENISA.

In December 2018, the European Parliament, Council and Commission finally reached a political agreement on the Cybersecurity Act (EC 2018). On 12 March 2019, Members of the European Parliament adopted the European Cybersecurity Act giving it the effect of an EU regulation that applies automatically and uniformly to all EU countries when it enters into force, without the need of being transposed into national law (EC March 2019). This regulation serves two main aims as follows.

First, to reinforce the ENISA’s role as a centre of expertise and advice for cybersecurity matters, facilitating operational cooperation among member states, and strengthening capacity building in both their technical and human capabilities and skills in response to cyber threats (Position of the European Parliament, 12 March 2019).

Second, to implement a common cybersecurity certification approach through the establishment of the EU-wide cybersecurity certification framework. The certification schemes are key to increase trust and security in digital products (Position of the European Parliament, 12 March 2019).

Other Complementary Legislative Initiatives

Despite all the legislative movements to tackle Europe’s cybersecurity problem, it appears that Europe continues to face big challenges. In 2017 there was a series of high-profile cyber-attacks which hit Europe with ransom demands targeting governments and key infrastructures (Roth and Nakashima 2017). Sophisticated cyber-attacks can happen without

any notice before being launched. Where the software vendor has no previous knowledge of the particular vulnerability, the attack is known as a zero-day exploit (Kaspersky n.d.). A documentary called *Zero Days* (Gibney 2016) explained how Stuxnet, a state-sponsored computer malware, targeted an Iranian nuclear facility without any pre-warning signs. This shows that the knowledge to carry out such an attack with no defence is highly valuable to criminals. The nature of high-profile cyber-attacks is often cross-border and unpredictable.

In response to mass cyber-attacks and alongside the legislative developments of the EU Cybersecurity Act, in 2017 the Council of the EU agreed to develop a framework called the ‘cyber diplomacy toolbox’ for a joint EU diplomatic response (Council of the EU, 29 June 2017). The proposed EU cyber diplomacy toolbox introduced several measures to tackle malicious cyber activities, including crucial initiatives, such as ‘shared situational awareness’ and ‘restrictive measures’ (sanctions) (Draft Council Conclusions 2017). Some researchers have raised concerns over such a mechanism, i.e. it is argued that it ‘will be dysfunctional from the get-go and might actually produce counter-productive results’ because there is inequality in capacity and capability for collective attribution and also for attribution assessment in different member states (Soesanto 2018). Research data also showed that sanctions may not be effective for the deterrence of cyber-attacks because, in 2018 despite cybercrime activities from 59 individuals and 28 companies in Iran, North Korea and Russia being sanctioned by the US Treasury Department’s Office of Foreign Assets Control, there was no reduction in these activities (Soesanto 2018). There was also concern over the implementation of sanctions based on inaccurate assessment of attribution, which may violate international law (Moret and Pawlak 2017).

In January 2018, the EC initiated a communication concerning the Digital Education Action Plan (Communication from the Commission 2018). This Action Plan reinstates the importance of education and training systems to improve the competency of using innovation and digital technology. It calls for EU-wide cooperation to develop relevant digital skills and competence. It also calls for improving education systems through better data analysis and foresight.

In July 2018, concerns over the reality of the EU’s lack of operational and legal capacity to respond to major cyber-attacks and prosecute the attackers was raised by the Centre for European Reform (Mortera-Martinez 2018). In that report, it urged the EU to work with other nations to agree on international rules (i.e. a transatlantic treaty), in particular to

improve access to cross-border digital evidence to respond to attacks (Mortera-Martinez 2018). It also called for the EU to work with other nations and technological companies to better understand cyber threats and support member states to invest more in cyber security, implement the cyber diplomacy toolbox and thus combat these attacks more effectively (Mortera-Martinez 2018).

In September 2018, the EC also proposed a regulation to establish the European Cybersecurity Industrial, Technology and Research Competence Centre and the Network of National Coordination Centres (COM (2018) 630 final). Apparently, the aim of this Centre is to provide complementary efforts to support the ENISA's capacity-building work, but with a different focus and to stimulate the development and deployment of technology in cybersecurity. At the same time, the ENISA will act as a permanent observer on the Governing Board of the new Centre (COM (2018) 630 final: Article 12(7)). Although their relationship and functions are provided for in the proposed regulation, it still appears that some of their responsibilities may overlap. This requires further clarification, in particular stakeholders, data subjects or any other rights-holders need to be made aware as to which authority they should report any incident of cyber breach or attack. The reporting structure should be made clear and straightforward because rights-holders may not be able to define the nature of the attacks and the specific responsibilities of different authorities in order to know which one they should approach. It may be helpful to have one single point of contact for incident notifications for cyber-attacks or breach emergencies across sectors in the EU.

In addition, during the movements of the general EU cybersecurity legislative developments, specific areas and sectors, such as cybersecurity in the financial sector, which are more susceptible to cyber-attacks have also been emphasized. Corresponding measures have been proposed and reviewed in order to tackle continued cyber threats to the security of the digital financial markets.

[C] SIGNIFICANT THREATS TO CYBERSECURITY IN THE FINANCIAL SECTOR

As noted above, payment fraud has already been recognized as one of the three priorities of cybercrime areas that need to be tackled in the EU policy cycle from 2018 to 2021. With the continuing technology innovation in financial industries, cyber threats to global financial markets are reaching new heights due to the expanding scale of attacks and the growth of advanced methods.

It is known that Fintech has been a driver for current financial innovation. Fintech is understood as promoting ‘technology-enabled innovation in financial services’, which involves a variety of technological solutions to provide services, e.g. digital identification, mobile applications, cloud computing, big data analytics, artificial intelligence, blockchain and distributed ledger technologies (Fintech 2018).

Fintech has also been advancing global financial services. However, the cybersecurity of Fintech is of great concern, because the largest users of digital technologies are located in the financial sector (Fintech 2018). There is understandably a growing fear of cyber risks in the financial sector. According to the World Bank, there was a 29% increase in cyber-attacks in the financial sector from 2015 to 2016, whilst there were 65% more cyber-attacks in 2016 on customers of financial services than customers from other industries (World Bank 2018). In 2017 the EU report on the assessment of the risks indicated that the level of threat to a variety of attacks concerning virtual currencies, money laundering and terrorist financing was most often considered as very significant—namely level 4, the highest (COM (2017) 340 final). It is noted that the ‘terrorists financing threat related to cash couriers/unaccompanied cash movements shows that terrorist groups have made use of various techniques to move physical cash across the external borders, particularly in the case of larger organisations’ (COM (2017) 340 final). In December 2018, it was reported that cybercrime continues to increase in global financial sectors—one of the most common methods of cyber-attack is to steal funds from victims by using phishing emails that appear to come from legitimate financial organizations (McAfee 2018).

Fintech has digitally transformed the economy and society globally and increased the efficiency of financial services. This has changed the business models of established financial institutions and other companies offering financial services and has had an impact on trust from consumers and businesses using new financial services, in particular with the fear of cybersecurity compromise in financial institutions.

On 8 March 2018 the EC launched the ‘Fintech Action Plan: For a More Competitive and Innovative European Financial Sector’ (the Fintech Action Plan) (COM (2018) 109 final). This action plan interacts with the EU’s cybersecurity strategy (JOIN (2017) 450 final) and initiates specific cybersecurity actions for digital financial services to fill gaps in general EU cybersecurity legislative developments. The European Parliament has also called on the EC ‘to make cybersecurity the number one priority in

the Fintech action plan' (Motion 2016/2243 (INI)). There are three main objectives in the EU Fintech Action Plan as follows:

- 1** to support innovative business models to scale up across the single market;
- 2** to encourage the uptake of new technologies in the financial sector; and
- 3** to increase cybersecurity and the integrity of the financial system (EC Memo 2018).

Correspondingly, the EU Fintech Action Plan has initiated various measures to build up the resilience and integrity of the financial sector, in particular in response to the cross-border nature of cyber threats. The measures include: reinforcing ENISA's Cyber Hygiene Practices and the Commission's Digital Education Action Plan; and recommending digital services to incorporate a 'security by design' approach to minimize cyber-attacks (COM (2018) 109 final) in line with the EU Cybersecurity Act (Recital 12). The EU Fintech Action Plan stresses the fundamental importance of 'access to threat intelligence and information sharing' to improve cybersecurity and identifies difficulties of accessing intelligence due to potential conflicts with the General Data Protection Regulation 2016/679.

In order to enhance cybersecurity and encourage Fintech developments, countries have been establishing global or regional Fintech Hubs to combine different elements (such as capital, markets, talent, government support and regulation), in particular to bring together people with different skills to interact and encourage learning between regulators, innovators and established players (Institute of Chartered Accountants in England and Wales and Institute of Singapore Chartered Accountants 2018). It was reported in 2018 that there were seven global Fintech Hubs in the world: four in China, two in the US and one in the UK (Global Fintech Hub Report 2018). This shows that European countries have made limited progress in establishing global Fintech Hubs. Nevertheless, there are currently six regional Fintech Hubs in Europe (Switzerland, Ireland, Netherlands, Germany, France and Sweden) (Global Fintech Hub Report 2018).

In March 2018, the European Banking Authority (EBA) published a Fintech Roadmap, setting out its five priorities of work and also initiating the establishment of a Fintech Knowledge Hub to enhance knowledge sharing and develop technological-neutral regulatory measures (EBA 2018). One of EBA's priorities is 'promoting best supervisory practices on assessing cybersecurity and promoting a common cyber threat testing

framework' (EBA's Fintech Roadmap 2018). Another priority also involves establishing regulatory sandboxes and innovation hubs. It is not clear in this roadmap about the differences or relationships between a Fintech Knowledge Hub and an innovation hub. It is also unclear whether the Fintech Knowledge Hub is to serve as a global Fintech Hub in the EU. In the roadmap, it appears that the Fintech Knowledge Hub is just a forum for competent authorities to share knowledge and engage with other stakeholders, whilst the innovation hub (together with 'regulatory sandboxes') is for regulated or unregulated entities to engage with competent authorities (EBA's Fintech Roadmap 2018: 4-5). 'Regulatory sandboxes' are defined as 'safe spaces in which innovative products, services, business models and delivery mechanisms can be tested without being subject to the full set of regulatory or supervisory requirements that would otherwise apply' (EBA's Fintech Roadmap 2018: 4-5). There is a need for further clarification of why two different hubs are required and how these two hubs can liaise with each other to achieve the common goals of knowledge sharing and security enhancement. It would also be helpful to clarify why there is the need for both the innovation hubs and regulatory sandboxes, as well as what the differences are between these two models in terms of functions and features. In April 2019, the European Forum for Innovation Facilitators was launched by the EC and the European Supervisory Authorities (ESAs) to act as facilitators (in the form of innovation hubs and regulatory sandboxes) to improve cooperation on technological innovation (EC April 2019). It further clarifies that 'innovation hubs' provide a dedicated point of contact for financial firms to engage with competent authorities on Fintech issues, whilst 'regulatory sandboxes' are schemes for competent authorities to allow firms to test innovative financial products and services (EC April 2019).

In some countries, sandbox mechanisms or frameworks are regulated through national Fintech laws. For example, the Mexican Fintech Law, effective in March 2018, has set out relevant provisions on the sandbox mechanism, which provide a trial period of up to two years (with a potential one-year extension) for tech firms to implement new technology financial services for a limited number of clients within a certain geographic area (Baker Mckenzie 2018). In other countries, sandboxes are implemented by national monetary authorities. For example, in Hong Kong, a regulatory sandbox is also called a supervisory sandbox. The Hong Kong Fintech Supervisory Sandbox, launched in 2016 by the Hong Kong Monetary Authority, is a forum with a chatroom for tech firms to test their new Fintech products and services (including cross-sector products) and seek feedback without the need for full supervisory

requirements or going through a bank (Hong Kong Monetary Authority ‘Sandbox’ n.d.). The Hong Kong Monetary Authority also hosts the Fintech Facilitation Office (FFO). The innovation hub proposed by the EBA in the EU appears to intend to serve similar functions to the FFO in Hong Kong, which provides a platform for exchanging ideas among stakeholders, bridging understanding between market participants and regulators, and initiating industry research (Hong Kong Monetary Authority ‘FFO’ n.d.).

Although cybersecurity in the financial sector has been considered as one of the priorities in the EU Fintech Action Plan and the EBA Roadmap, unfortunately, there are still no specific security measures or technical measures identified in the roadmap, and the ESAs most recent joint report on regulatory sandboxes and innovation hubs (ESAs Joint Report 2019). It is noted that ESAs include three authorities: the European Securities and Markets Authority, the EBA and the European Insurance and Occupational Pensions Authority. Technical measures are of fundamental importance from the initiations of the trial period of financial products and services to safeguard users, in particular due to the vulnerability of new products and services. It should be the joint responsibility of supervisory authorities and innovation facilitators to work with the ENISA to make sure that appropriate technical measures are built into pilot projects. For example, the ‘moving target security’ approach is often employed by sensitive services and products such as stock exchanges, banks or robotic firms. The purpose of the moving target security approach is to move around the names, locations and references of files and software applications, so that the system is not configured in the same way each time. However, there is always a trade-off between usability and security because the more secure a computer is, the less practical it is (Russon 2019). Thus, it is important to define a set of standards for security by design, as proposed in the EU Fintech Action Plan, and set out realistic and appropriate security-by-design approaches for financial services and products.

[D] IMPROVING LEGAL AND TECHNOLOGICAL MEASURES ON CYBERSECURITY IN THE EU

As shown above, in the EU cybersecurity legislative movements in recent years, there have been numerous new creations in the form of authorities, facilitators, centres, hubs, institutions and public organizations. These have been set up to work on regulatory developments on cybersecurity issues in the EU. It can be observed that one of the common goals of these new establishments is to facilitate continuing dialogues among different

competent authorities and stakeholders to set out appropriate legal and technical measures to enhance cybersecurity in both public and private sectors in the EU. While it is helpful to have a variety of establishments which share their special skills and knowledge in cybersecurity legislative developments, it may be more effective if these establishments were set out in a logical structure and with clear and non-duplicated functions. It is vital that these establishments are not established spontaneously, but rather that they are carefully thought out in terms of definitions, functions, responsibilities, connections and relationships with one another.

In addition to a lack of integrated strategic working plans across numerous establishments relating to cybersecurity-related issues in the EU, it appears that technical measures have also been under-researched by these establishments. It is essential that best practices for minimum technical standard and measures for security are established for both public and private sectors. Moreover, minimum technical standards and measures for sensitive public services and national infrastructures should be regulated and implemented harmoniously across the EU. Setting up appropriate technical-neutral measures for security can be the most challenging task for regulators because it requires regulators to understand current technologies, technological developments and their potential implications in law. There is certainly no one single solution to the need to improve cybersecurity, but a wide range of collective and far-reaching technical and legal measures may make it as hard as possible for those who want to attack the security of infrastructures, services and products.

Moreover, the Council of Europe Convention on Cybercrime (also known as the Budapest Convention 2001) was the first international treaty to foster international cooperation to deal with cyber-related criminal activities such as computer-related fraud, child pornography and network security violations. However, it appears that the current EU cybersecurity legislative movements, including the EU Cybersecurity Act, have made no clarification about the conceptual connection and differences between cybersecurity and cybercrime as defined in the Budapest Convention. It would be helpful to define in what circumstances breach of cybersecurity constitutes tortious (civil), administrative or criminal liability. For example, Article 65 of the EU Cybersecurity Act gives member states discretion to lay down the rules on penalties and necessary measures. Such penalties are required to be effective, proportionate and dissuasive. However, there is no harmonized standard as to what is considered as effective, proportionate and dissuasive penalties or sanctions across member states.

Generally speaking, there are two main types of legal and technical measures for cybersecurity: namely forward-looking measures and backward-looking measures. Forward-looking solutions may be arguably much more efficient and effective than backward-looking solutions. However, forward-looking solutions may be more challenging as they require an ability to foresee potential harms and anticipate future trends of technological developments.

Prevention is one of the main forward-looking measures in law and technology. Legal measures for prevention mean that law-makers, regulators and competent authorities need to enhance their understanding of potential hazards, risks and dangers in technologies and establish best practices or legal requirements of minimum standards to minimize risks. Technical measures for prevention mean that computer coding needs to be reviewed and updated periodically and that engineers need to implement best practices in industries.

For example, in the automotive domain, software development guidelines, such as MISRA C (Motor Industry Software Reliability Association) are commonly followed to ensure code is written with safety and reliability in mind. Standards have also been created for the entire safety lifecycle, such as the international standard for functional safety of electrical systems in production of road cars (ISO26262). Such standards provide a necessary foundation of safety and reliability, upon which security resilience can be built.

Automotive cyber-security is now taken increasingly seriously, as many new vehicles have an always-on connection to the internet. Vehicle manufacturers perform threat analysis and develop attack models to test the resilience of their systems. Road vehicles commonly have dozens of networked electronic components, from engine control to electric seat movement. Nowadays, the vehicle is not considered a closed system, but a system at risk of attack from the outside, either by direct physical access or by virtual access over the internet. Communications between components (i.e. engine control units and anti-lock brake systems) are now increasingly being encrypted and segregated into distinct sub-networks. For example, components responsible for critical safety systems may be kept separate from components responsible for the infotainment system. Thus, a successful attack on less critical parts of the vehicle infrastructure cannot spread to a critical part.

The battle against hackers may be a challenging one for vehicle manufacturers to win. The embedded systems have limited resources compared with a desktop personal computers, making anti-virus software

impractical. Where software patches previously had to be installed at a main dealer, over-the-air (OTA) updates from the internet are becoming more common. These have traditionally focused on updating non-safety critical areas of the vehicle due to the risk of rendering the vehicle undrivable in the event of a failed update or bug in the update. As OTA updates become the standard method of patching all components in the vehicle, manufacturers will have to, firstly, ensure hackers cannot gain widespread access to critical components and, secondly, that updates are well validated to minimize disruption.

Public awareness can also be considered as part of prevention measures. The EU Cybersecurity Act sets out guidelines to increase and enhance public awareness on cybersecurity. It provides that such public awareness is:

to promote safer online behaviour by individuals and digital literacy, to raise awareness of potential cyber threats, including online criminal activities such as phishing attacks, botnets, financial and banking fraud, data fraud incidents, and to promote basic multi-factor authentication, patching, encryption, anonymisation and data protection advice (Position of the European Parliament 12 March 2019).

In order to build up strong cyber resilience, effective training and awareness-raising activities are required. Subsequently, in January 2018 the EC adopted its Digital Education Action Plan to improve digital skills throughout Europe, including for an action plan (in Action 7) for cybersecurity (COM (2018) 022 final). Action 7 includes two initiatives: one is to initiate an EU-wide awareness-raising campaign on cyber culture to promote online safety, media literacy and ‘cyber hygiene’ for children, parents/carers and teachers; and the other is to provide a course (online and offline) to teach cybersecurity in primary and secondary education (EC Education and Training n.d.). Although these two initiatives sound promising, the challenging part is how to implement them effectively. In other words, whether this action plan can be effectively conducted, relies on more appropriate programmes and strategies for different levels of teachers and learners: for example, what level of knowledge and awareness is expected for all levels of learners including children, and how it is possible to know whether the desired outcomes are delivered and achieved among learners.

Correct response is another example of forward-looking measures in law and technology. Legal measures for correct response make a great difference in minimising aftershocks and impacts. For example, legal measures should provide well-defined responsibilities for each responsible authority and also provide clear information and single contact for all

types or nature of security breach notification. This is because it is not reasonable to expect harmed parties or entities to be able to identify the nature, scale and scope of breach or harms immediately when reporting incidents. Correct response also relies on a harmonized cyber defence framework, which enables cooperation and information-sharing between civilian and military incident response communities.

Technical measures for correct response mean that the harmed parties, entities or their agents and competent representatives are capable of implementing the required emergency circumvention measures without undue delay. For example, a Norwegian aluminium company with 35,000 staff in 40 countries, Hydro, was hit by malware in March 2019, which has cost it at least £25.6m (*BBC News* 27 March 2019). However, note that Hydro adopted the best incident representation response plan to the cyber-attack and did not pay a ransom. The company was able to put up a temporary website up and remain open to the press and its staff. Hydro even had daily webcasts, with the most senior staff talking through what was happening and answering questions from webcast watchers. Hydro also used its backup data, utilized recovery support from Microsoft and other companies, and engaged with national cybercrime bodies, industry groups and police authorities (Beaumont 2019). In the EU, there are no specific guidelines on correct response to cybersecurity breaches for public and private entities. This is an area that needs to be strengthened. Raising awareness of correct response can be partially enhanced within the general Digital Education Action Plan. Providing correct response to cyber threats or attacks requires more than just awareness: specific skills and knowledge are also needed. Thus, specific training may be required for engineers who are responsible for taking correct technical response action and for leaders who are responsible for taking correct administrative response action.

In addition, there is also a need to establish an efficient mechanism for reporting cyber threats, attacks, security breaches or cyber-related criminal activities. Providing a single point of contact in each state will allow the public, business or organizations to report any cybersecurity concerns without undue delay. However, an internal reporting structure or management plan for gathering and passing information to relevant authorities should also be established and be ready to respond to cybersecurity issues concerning one state across multiple states or multiple sectors.

Collective efforts are a crucial forward-looking solution. It has been noted that the collective securitization of cyberspace among member

states is crucial to the function of EU governance (Christou 2019: 294). There are various levels at which collective efforts can be made. Firstly, collective efforts can be made among member states in the EU and with other non-EU countries and international organizations. For example, member states should work together to provide the most accurate assessment of the situation of cyber threats or attacks and share relevant intelligent evidence.

Secondly, collective efforts can also be made through bilateral agreements or multilateral agreements among countries towards an effective and collective response to cross-border cyber threats or attacks. Such agreements can be made to facilitate cooperation among nations in terms of intelligent evidence-sharing, administrative procedures, investigation procedures or even prosecution procedures.

Thirdly, collective efforts have been made among stakeholders to protect the public. For example, software vendors are keen to gain advance knowledge of security vulnerabilities so that they can provide software patches to circumvent the intended attack. Microsoft offers a bounty programme to reward individuals and groups of researchers who can provide advance information concerning security vulnerabilities. For example, Microsoft currently offers a bounty of up to \$100,000 for unreported critical or important vulnerabilities in Microsoft Identify services that can bypass user authentication (Microsoft n.d.). Governmental organizations can also make use of a bounty programme to issue social and public recognition in addition to monetary awards to motivate public collective efforts in combatting cybersecurity breaches.

Fourthly, collective efforts can also be made among non-governmental organizations and communities. For example, the Global Forum on Cyber Expertise comprises various non-governmental organizations, the tech community and members from academia. The Forum aims to develop practical initiatives to build cyber capacity amongst stakeholders. In this Forum, No More Ransom, a public-private initiative, was launched on 25 July 2016, providing a common portal. This web portal provides free decryption tools to victims, prevention advice and links to report a crime online.

Legal sanctions are often considered as backward-looking measures, though certain measures under legal sanctions may also be considered as forward-looking, such as deterrence, rehabilitation and incapacitation (Cutler and Nye 1983: 2). In the context of backward-looking measures, legal sanctions mean penalties, punishment or other law enforcement procedures. Under the UK Serious Crime Act 2015 (Part 2 Computer

Misuse, amending the Computer Misuse Act 1990), if the cyber-attack causes serious economic or environmental damage or social disruption, the offender can be sentenced to up to 14 years' imprisonment (UK Serious Crime Act 2015, Part 2, section 41). Punishment may not be an effective measure if cyber attackers think they are unlikely to be caught, in particular when the attack has been instigated in another jurisdiction. In these cases, legal sanctions will not have a positive effect. Thus, legal sanctions need to be strengthened in the areas that may make a difference, for example, if private or public entities have not complied with the required technological standard for cybersecurity, or if private or public entities have not followed legal procedures during the very limited and crucial response period when an incident happens.

[E] CONCLUSION AND REFLECTIONS

Cyberspace is classified as the fifth domain of operations after land, sea, air, and space in the EU (Council of the EU, Press Release, 19 November 2018). It is understood that the politics and strategies of cybersecurity are 'one of the most complex and diverse technical and political challenges of our contemporary world' (Stevens 2018: 1). Robust and resilient security in cyberspace is crucial for the healthy operation of public and private sectors in all member states. The EU has made efforts to build a harmonized cybersecurity legislative framework through the establishment and enhancement of cybersecurity strategies, regulations (i.e. the EU Cybersecurity Act 2019) and complementing initiatives. Numerous public organizations, non-governmental organizations, centres, hubs, agents, institutions and teams have been established to improve the level of cybersecurity in the EU. The ENISA appears to play a key role in offering expertise and advice on cybersecurity matters, implementing the EU-wide cybersecurity certification scheme and facilitating strategic and operational cooperation among member states.

Enhancing cybersecurity is an ongoing process due to the ever-changing and unpredictable nature of technologies used in cyber threats and attacks. Legal measures and technical measures need to be continuously reviewed and improved in response to such challenges. Minimum technical measures on cybersecurity need to be established for all sectors, in particular for sensitive infrastructures and services. Legal measures can be further established to facilitate cooperation and intelligent evidence-sharing among member states and to implement the required standard of technical measures in all sectors.

It is essential to build up a set of both forward-looking measures and backward-looking measures in order to combat cyber threats and attacks and increase cybersecurity. Prevention, public awareness, collective efforts and correct response are the key set of forward-looking measures. These four main forward-looking measures are interlinked and intertwined with one another. Prevention is a key goal. Legal measures for prevention can be through best practices, whilst technical measures for prevention are through reviewing and updating computer coding and complying with a set of coding standard guidelines. The requirements of general technical measures, such as privacy by design and security by design, need to be further clarified in the current EU legislation. Although technical measures may be limited (e.g. it is possible for even air-gapped computers to be hacked), implementing a set of minimum standards will minimize the risk of being attacked. For example, for email services, it is good practice to employ TLS for messages to be encrypted in transit. For Fintech services, the moving target security approach should be further developed and implemented.

Although legal sanctions are usually considered as backward-looking measures, they also relate to forward-looking measures in terms of deterrence, rehabilitation and incapacitation. It would be beneficial for the EU to look into strengthening a harmonized standard in legal sanctions, in particular, for serious cybercrime across member states due to the cross-border nature of cyber-attacks.

Finally, all levels of cooperation are fundamentally important to build up strong cyber defences. National, regional and international cooperation needs to be established to enable collective, effective and correct response and increase the resilience of cybersecurity around the globe.

References

- Baker McKenzie (2019) 'Fintech Law in Mexico: What to Expect, How to Prepare and What Comes Next' 9 March 2019.
- BBC News* (4 January 2019) 'German Politicians Targeted in Mass Data Attack'.
- BBC News* (8 March 2019) 'Security Holes Found in Smart Car Alarms'.
- BBC News* (27 March 2019) 'Aluminium Firm Cyber-attack Cost at Least £25.6m'.
- BBC News* (23 April 2019) 'More than Half of British Firms "Report Cyber-attacks in 2019"'.

- Beaumont, Kevin (2019) 'How Lockergoga Took Down Hydro—Ransomware Used in Targeted Attacks Aimed at Big Business' *Double Pulsar* 21 March 2019.
- Chatterjee, Charles and Lefcovitch, Ann (2016) 'Cyber Security, Diplomacy and International Law' 108 *Amicus Curiae* 2-12.
- Christou, George (2019) 'The Collective Securitisation of Cyberspace in the European Union' 42(2) *West European Politics* 278-301.
- COM (2000) 890 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creating a Safer Information Society by Improving the Security of Information Infrastructures and Combating Computer-related Crime, 26 January 2001.
- COM (2016) 410 final, Commission Communication on Strengthening Europe's Cyber Resilience System and Fostering a Competitive and Innovative Cybersecurity Industry, 5 July 2016.
- COM (2017) 340 final, Report from the Commission to the European Parliament and the Council on the Assessment of the Risks of Money Laundering and Terrorist Financing affecting the Internal Market and relating to Cross-border Activities, 26 June 2017.
- COM (2017) 477 final/2, Proposal for a Regulation of the European Parliament and of the Council on ENISA, the 'EU Cybersecurity Agency', and repealing Regulation (EU) 526/2013, and on Information and Communication Technology Cybersecurity Certification ('Cybersecurity Act'), 4 December 2017.
- COM (2018) 022 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Digital Education Action Plan, 17 January 2018.
- COM (2018) 109 final, 'Fintech Action Plan: For a More Competitive and Innovative European Financial Sector', 8 March 2018.
- COM (2018) 630 final, Proposal for a Regulation of the European Parliament and of the Council establishing the European Cybersecurity Industrial, Technology and Research Competence Centre and the Network of National Coordination Centres, 12 September 2018.
- Council of the EU (29 June 2017) 'Cyber Attacks: EU Ready to Respond with a Range of Measures, including Sanctions'.
- Council of the EU (19 November 2018) Press Release 'Cyber Defence: Council Updates Policy Framework'.

- Cutler A and D Nye (1983) 'Forward and Backward Approaches to Criminal Law' in *Justice and Predictability* London: Palgrave Macmillan.
- 'Draft Council Conclusions (2017) on a Framework for a Joint EU Diplomatic Response to Malicious Cyber Activities (Cyber Diplomacy Toolbox)' 7 June 2017.
- EBA's Fintech Roadmap (2019) *Conclusions from the Consultation on the EBA's Approach to Financial Technology (Fintech)* EBA, 15 March 2018.
- EU Policy Cycle—Empact (2017) 'Robust Action to Target the Most Pressing Criminal Threats'.
- European Banking Authority (EBA) 2018 'EBA Publishes its Roadmap on Fintech' 15 March 2018.
- European Commission (EC) (2018) 'Cybersecurity Act' 11 December 2018.
- European Commission (EC) Memo (2018) 'Frequently Asked Questions: Financial Technology (Fintech) Action Plan' 8 March 2018.
- European Commission (EC) (March 2019) 'The Cybersecurity Act Strengthens Europe's Cybersecurity' 19 March 2019.
- European Commission (EC) (April 2019) 'Financial Technology: European Commission and European Supervisory Authorities Launch New Platform to Improve Cooperation on Technological Innovation in the Financial Sector' 2 April 2019.
- European Commission (EC) Education and Training (n.d.) 'Digital Education Action Plan—Action 7 Cybersecurity in Education: Raising Awareness of Teachers and Students'.
- European Cybercrime Centre (EC3)
- European Supervisory Authorities (ESAs) Joint Report (2019) 'Fintech: Regulatory Sandboxes and Innovation Hubs' JC 2018 74, 7 January 2019.
- European Union Agency for Network and Information Security (ENISA) (2016a) 'Definition of Cybersecurity—Gaps and Overlaps in Standardisation'.
- European Union Agency for Network and Information Security (ENISA) (2016b) 'Review of the Cyber Hygiene Practices' December 2016.
- European Union Agency for Network and Information Security (ENISA) (2017) 'Phishing on the Rise'.
- European Union Agency for Network and Information Security (ENISA) (2018) 'Cybersecurity Culture Guidelines: Behavioural Aspects of Cybersecurity'.

- Fahey, Elaine (2014) 'The EU's Cybercrime and Cyber-Security Rulemaking: Mapping the Internal and External Dimensions of EU Security' 5(1) *European Journal of Risk Regulation* 46-60.
- Gibney, Alex (2016) *Zero Days*.
- Global Fintech Hub Report (2018) 'The Future of Finance is Emerging: New Hubs, New Landscapes Hangzhou' 16 November 2018.
- Global Forum on Cyber Expertise.
- Google (n.d.) 'Email Encryption in Transit'.
- Hong Kong Monetary Authority 'Fintech Facilitation Office (FFO)'.
- Hong Kong Monetary Authority 'Fintech Supervisory Sandbox (FSS)'.
- Institute of Chartered Accountants in England and Wales (ICAEW) and Institute of Singapore Chartered Accountants (ISCA) (2018) 'Fintech Innovation: Perspectives from Singapore and London'.
- ISO/PC 317 (2018) 'Consumer Protection: Privacy by Design for Consumer Goods and Services' ISO 2018-2021.
- JOIN (2013) 1 final, Joint Communication of the European Commission and the European External Action Service: Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace, 7 February 2013.
- JOIN (2017) 450 final, Resilience, Deterrence and Defence: Building Strong Cybersecurity for the EU, 13 September 2017.
- Kaspersky (n.d.) 'What is Zero Day Exploit?'.
- Kosseff, Jeff (2018) 'Defining Cybersecurity Law' 103(3) *Iowa Law Review* 985-1031.
- LexisNexis Risk Solutions and ThreatMetrix (2019) 'EMEA Cybercrime Report: Q1 2019'.
- Margulies, Peter (2017) 'Global Cybersecurity, Surveillance, and Privacy: The Obama Administration's Conflicted Legacy' 24(2) *Indiana Journal of Global Legal Studies* 459-95.
- McAfee (2018) 'McAfee Labs Threats Report' December 2018.
- 'Microsoft Bug Bounty Program' (n.d.)
- Moret, Erica and Patryk Pawlak (2017) 'The EU Cyber Diplomacy Toolbox: Towards a Cyber Sanctions Regime?' EU Institute for Security Studies (EUISS) Brief 12 July 2017.
- Mortera-Martinez, Camino (2018) 'Game Over? Europe's Cyber Problem' Centre for European Reform July 2018

- Motion (2016/2243 (INI)) for a European Parliament Resolution on Fintech: The Influence of Technology on the Future of the Financial Sector, Committee on Economic and Monetary Affairs, Rapporteur: Cora van Nieuwenhuizen, 28 April 2017.
- Muller, Joann (2019) 'What Tesla Knows about You' *Axios* 13 March 2019.
- National Cyber Security Centre (n.d.) 'What is Cyber Security?'.
[No More Ransom.](#)
- Organisation for Economic Co-operation and Development (OECD) (1986) *Computer-related Crime: Analysis of Legal Policy (Information, Computer, Communications Policy)* Paris: OECD.
- Organisation for Economic Co-operation and Development (OECD) (1992) 'OECD Guidelines for the Security of Information Systems' Paris: OECD.
- Organisation for Economic Co-operation and Development (OECD) (2012) 'Cybersecurity Policy Making at a Turning Point: Analysing a New Generation of National Cybersecurity Strategies for the Internet Economy' Paris: OECD.
- Ponemon Institute (2019) 'Cybersecurity in Operational Technology: 7 Insights You Need to Know' Traverse City: Ponemon Institute.
- Position of the European Parliament adopted at first reading on 12 March 2019 with a view to the adoption of Regulation (EU) 2019/... of the European Parliament and of the Council on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act).
- Roth, Andrew and Nakashima, Ellen (2017) 'Massive Cyberattack Hits Europe with Widespread Ransom Demands' *Washington Post* 28 June 2017.
- Russon, Mary-Ann (2019) 'Should Cyber-security be more Chameleon, Less Rhino?' *BBC News*, 9 April 2019.
- Simmons, Dan (2019) 'Cyber-attacks "Damage" National Infrastructure' *BBC News*, 5 April 2019.
- Soesanto, Stefan (2018) 'A Hammer in Search of a Nail: EU Sanctions and the Cyber Domain' (December) *Journal of International Affairs*.
- Stevens, Tim (2018) 'Global Cybersecurity: New Directions in Theory and Methods' 6(2) *Politics and Governance* 1-4.
- Tesla (2016) 'Upgrading Autopilot: Seeing the World in Radar' 11 September 2016.

ThreatMetrix (2018) 'The ThreatMetrix European Cybercrime Report: Q1 2018'.

US Department of Commerce (2016) 'Small Business Information Security: The Fundamentals' NISTIR 7621 Revision 1, November 2016.

Walder, Bud (2016) 'Gmail TLS Email Encryption—Is It Good Enough?' *Datamotion* 24 August 2016.

World Bank (2018) 'Cybersecurity, Cyber Risk and Financial Sector Regulation and Supervision' 24 February 2018.

Legislation Cited

Council of Europe Convention on Cybercrime (Budapest Convention 2001

Directive (EU) 2016/1148 concerning measures for a high common level of security of network and information systems across the Union (known as 'EC Directive on security of network and information systems') OJ L 194, 19 July 2016

EU Cybersecurity Act 2019

General Data Protection Regulation 2016/679

Regulation (EU) No 526/2013 of the European Parliament and of the Council of 21 May 2013 concerning the European Union Agency for Network and Information Security (ENISA) and repealing Regulation (EC) No 460/2004 Text with EEA relevance

UK Serious Crime Act 2015

UK Computer Misuse Act 1990

Cases Cited

J Brazil Road Contractors v Belectric Solar Ltd (2018) 1 WLUK 294

Pisciotta v Old National Bancorp 499 F3 d 629, 638 (7th Cir 2007)

R v Connor Douglas Allsopp (2019) EWCA Crim 95

AWARDS OF COSTS IN INTERNATIONAL COMMERCIAL ARBITRATION: A SIMPLE GUIDE TO THE PRINCIPLES

DORAN DOEH

36 Stone, Gray's Inn, London

Abstract

In September 2019, I was on a panel discussing 'Forethought spares afterthought: Maximizing return on pre and post-award interest, costs, and other non-core components of arbitration damages' at the American Bar Association/Russian Arbitration Association 11th annual conference on Resolution of CIS-related Business Disputes in Moscow. My part focused on costs. To brief myself, I prepared a note which I also used to make slides. Because time for the panel session was limited, I had to keep the note and slides relatively simple. Although the subject is complex, I did not find a lot of literature on it, even in textbooks and practitioners' works. What there is was either too superficial for my purpose or too long, requiring analysis and some abstraction on my part to achieve a succinct summary. I have prepared this article in order to share my note with others who might find it useful.¹

Keywords: arbitration, tribunal, award, costs, court process, institutional, *ad hoc*, costs follow the event, third-party funding, IBA, CIArb, UNCITRAL, ICC, LCIA

[A] INTRODUCTION

Whereas the courts of countries with reputable legal systems have extensive rules and regulations on virtually all aspects of proceedings, in arbitration there is relatively little such regulation or even formal guidance. In England, for example, the *White Book* (so-called because its covers in hardback form are white) contains the sources of law relating to the practice and procedures of the English courts for civil

¹ In this article, I only cover costs in commercial arbitration and not, for example, investor-state dispute settlement (ISDS).

litigation (Vos 2020; *The White Book Civil Procedure Service*, published annually, contains the Civil Procedure Rules of England and Wales—the CPR). When I started in practice over 40 years ago, the White Book seemed enormous, but it was then only half the size it is now—one huge volume then instead of two now (on thin paper and in relatively small print).

By contrast, for an arbitration under the auspices of the London Court of International Arbitration (LCIA), which is frequently used for London-seated arbitrations, the rules (*LCIA Arbitration Rules 2014*) are contained in a slim, narrow pamphlet which, if published on A4 paper, would come to about 25 pages. In addition, there is the Arbitration Act 1996 (the Arbitration Act), which in print comes to about 35 pages of A4.

There is also soft law (in the form of guidance and rules) which is of great practical significance in the arbitration context. Often, soft law guidance and sets of rules provide, with the agreement of the parties and the arbitrators, a framework for the conduct of the arbitration. A number of these are issued by the International Bar Association (IBA) (such as the IBA Guidelines on Conflicts of Interest in International Arbitration 2014/2015; and the *IBA Rules on the Taking of Evidence in International Arbitration 2010*), the Chartered Institute of Arbitrators (CI Arb) (2016, including its very relevant guideline on *Drafting Arbitral Awards Part III—Costs*) and the United Nations Commission on International Trade Law (UNCITRAL) (2010). However, all of these are relatively thin compared with the *White Book*.

In arbitration pleadings, little is usually said about costs. The Claimant often includes, at the end of its request for relief, where it enumerates the various kinds and amounts of damages it seeks, simply the word ‘costs’ on a separate line. The Respondent often mimics this approach, whether it submits only a defence or both a defence and a counterclaim. In some cases, one side or the other (usually the Respondent but not always) will make a specific pleading about the costs on a particularly vexed issue where it feels that it should have its costs regardless of the overall outcome.

The approach of arbitration practitioners—both arbitrators and counsel—is often heavily informed by the practices of their respective national courts but, in international arbitrations, the parties, their counsel and the arbitrators may, and often do, come from different countries. Therefore, the international arbitration profession has evolved ways of approaching this issue, which is the main subject of the remainder of this article.

[B] WHAT ARE THE MAIN COSTS?

There are essentially two sets of costs in an arbitration. These are the costs of holding the arbitration and the costs of the parties in presenting their respective cases.

The costs of holding the arbitration usually include the following:

- ◇ The costs of engaging the arbitral tribunal—the fees of the arbitrator if a sole arbitrator or of the three arbitrators if there are three. In order to ensure that the decision is not tied where there is more than one arbitrator, normally an odd number of arbitrators is required to be appointed under most arbitration agreements or under the rules specified in the relevant arbitration agreement as being applicable. (Occasionally, the provision may be for two arbitrators and an umpire in case the arbitrators cannot agree amongst themselves.) In some instances, there may be a separate arbitration agreement, but frequently the agreement to arbitrate is contained in the dispute resolution clause of the agreement setting out the terms of the relevant transaction.
- ◇ The fees of the arbitral institution, where an institutional arbitration is designated in the arbitration agreement. In an *ad hoc* arbitration, no institution is designated as such, but an institution may be nominated for the appointment of the arbitrator if the parties cannot agree or for the appointment of the chair or president of the tribunal if the party-appointed arbitrators cannot agree. In such a situation the institution may charge a fee for making the appointment.
- ◇ Other common costs of the arbitration—i.e. costs which are necessarily incurred for the arbitration to take place. These costs include the cost of the hall for the hearing(s), conference rooms to enable each of the parties to meet with its counsel and others involved on its side for confidential discussions at the hearing, a room in which the arbitrators can meet for their own discussions, stenographers, translators/interpreters, meals and refreshments. These costs can, of course, be much reduced if, for example, there is no hearing because the arbitration is based on documents only.

Normally, these costs are either shared by the parties from an early stage or they are carried by the Claimant in order to move the process forward against a recalcitrant Respondent—the Claimant will usually then seek to recover at least half of the costs in the award.

The parties' own costs may include the following.

- ◇ The fees of the lawyers advising and representing the parties in the arbitration, plus those of experts and witnesses, and

other related costs. A study conducted by the International Chamber of Commerce (ICC) in 2015 (*Decisions on Costs in International Arbitration—ICC Arbitration and ADR Commission Report*) reported that usually the parties' own costs were over 80% of the total. The study was based on past arbitration awards rendered under ICC auspices.

- ◇ In addition to fees, there are usually transport, lodging and subsistence costs. In some arbitrations, one or both parties may seek to recover the costs of in-house lawyers, management and other staff—this is not common, however, and tribunals are not usually sympathetic to such claims.

[C] WHAT ARE THE MAIN APPROACHES TO ALLOCATION OF COSTS?

The American Rule

The court practice in the US is that each side bears its own costs. The reason for this is that the US and its courts do not want to discourage people from pursuing legal actions. The prospect of costs being awarded against a party bringing a claim might be an inhibiting factor. The US prides itself on being 'the land of the free and the home of the brave', and often recourse to the courts is the only civilized way of resolving a dispute between parties from very different backgrounds or where a party is determined to win by any means. One only needs to view part 1 of Francis Coppola's *The Godfather* (1972) to see what some of the alternatives are (there is a scene early in the film in which a supplicant to Don Corleone explains how disappointed he was in the legal process and asks for extrajudicial help).

The tendency in US arbitration is to follow this approach, in what is called 'the American rule'. There is an exception for manifest fraud, corruption, spuriousness and abusiveness of process. The US Arbitration Act 1925 (more commonly referred to as the Federal Arbitration Act or FAA) makes no mention of costs. The Uniform Arbitration Act (which in various iterations has attempted to harmonize state laws) provides that, absent agreement to the contrary, costs of arbitration are to be dealt with in accordance with the award but excluding lawyers' fees. Specific federal and state laws may provide differently.

The international arbitration rules of the American Arbitration Association (AAA) (called the *International Dispute Resolution Procedures of the International Dispute Resolution Center* but generally referred to as the AAA Rules) allow the tribunal to apportion costs of arbitration in the

award. In its list of costs that may be included, it mentions arbitrators' fees and expenses and the reasonable legal and other costs incurred by the parties.

Parties anticipating arbitration seated in the US or otherwise subject to American rules may be advised that, if they want to ensure that the tribunal is empowered to award lawyers' fees and other costs, they should expressly so provide in their arbitration agreement.

The English Approach

The English courts take a different approach. It has long been established that the English courts generally award costs, and the principle is that 'costs follow the event' unless there are reasons to take a different approach. The effect is that, in a simple win-lose situation, the loser pays the winner's costs. This approach is of course highly nuanced in actual practice.

The English courts also want to encourage use of the courts to resolve disputes. However, circumstances in England are different from the US, and legal costs for English dispute resolution are generally amongst the highest in the world.² The prospect of the loser paying the winner's costs is seen as a way of encouraging a degree of moderation and balance into the process.³

The courts in most western European countries take a similar approach to those of England, although they may be more restrictive as to costs they allow to be claimed. However, the process of the English courts relating to costs is probably the most complex and detailed (the English courts have specialist judges dedicated to the assessment of costs). It is for this reason that, although 'costs follow the event' is a commonly shared principle, it is known in arbitration as 'the English approach' or 'the English rule'.

The relevant English legislation for arbitration sets out, in relatively simple terms, that the principle applies to arbitration, without going into the complexity and detail of the CPR.

² In arbitration, it is, of course, possible for the parties to agree a much more informal process that will greatly reduce costs, such as adopting a documents-only approach or limiting the issues and time involved in a pre-agreed manner carefully managed by both sides.

³ Until relatively recently, conditional fees—called contingency fees in the US, where they are much more common and have a longer history of usage—were not permitted in England, but since 1990 they have been gradually introduced and the system for using them developed, so that this is no longer the case. Conditional or contingency fees also reduce risk for a party considering bringing a claim.

Section 61(2) of the Arbitration Act provides that:

Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.

Section 63(4) provides that, if the tribunal does not award costs, application may be made to the court for such determination. Section 63(5) provides that unless the tribunal or the court decides otherwise:

- (a) the recoverable costs of the arbitration shall be determined on the basis that there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and
- (b) any doubt as to whether costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.

The effect of section 61(2) enshrines the ‘costs follow event’ principle as a rebuttable presumption. Section 63(3) provides that the tribunal may determine by award the reasonable costs as it sees fit. Section 63(5) introduces into arbitration the principle that costs are to be assessed on what was known as the ‘standard’ basis in English court practice traditionally. This does not, however, preclude the tribunal from awarding costs on an ‘indemnity’ basis—i.e. full cost recovery provided the costs have not been unreasonably incurred and are not of an unreasonable amount—where it considers appropriate.

An arbitral tribunal, whether seated in England or elsewhere, is of course not itself bound by the CPR, which sets out a very comprehensive and elaborate set of rules for assessment of costs. However, where English practitioners are involved in an arbitration either as arbitrators or as counsel, they will be familiar with the CPR and may in practice import its principles into the assessment of costs in the arbitration, regardless of whether the seat is in England or elsewhere.

Practitioners not from England who are experienced in international arbitration are often also familiar with the principles of English practice on costs. Many western European court systems apply similar (if less detailed or generous) principles, although they may not formalize the ‘costs follow the event’ principle in their legislation affecting arbitration in the same way as English law does.

The situation may be different in eastern Europe (where the legal systems are often based on western European ones, but practice is not the same) or in countries in other parts of the world whose legal systems are not rooted in the systems and practices of western European

countries—or where accessibility to the courts is, as in the US, of primary importance.

Institutional Rules

The specific rules applicable to the arbitration may also contain provision about costs. It is beyond the scope of this article to deal with these in detail. However, again they tend to be statements of principle rather than extensive sets of detailed rules. Institutional rules either tend to incorporate some form of ‘costs follow the event’ rebuttable principle or simply to provide that the arbitral tribunal is to decide which of the parties should bear the costs and in what proportion. The ICC, which hosts the largest number of arbitrations of all the international arbitral institutions, follows the latter approach but found, in its 2015 report, that in practice ICC tribunals generally apply the rebuttable principle.⁴

As to *ad hoc* arbitrations, the *UNCITRAL Arbitration Rules (as revised in 2010)* provide that the tribunal shall fix the costs of the arbitration in its final award or in another decision. It sets out that the costs of the arbitration are to be borne by the unsuccessful party, but the tribunal may apportion the costs ‘between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case’ (Article 42). Its listing of costs that may be awarded includes arbitrators’ fees and legal costs, with emphasis on reasonability.

By choosing a set of rules (whether institutional or *ad hoc*) for their arbitration, the parties agree contractually that those rules should apply. However, as indicated previously, these generally only provide a framework, and the tribunal has a great deal of discretion in how it awards costs.

It should be noted that there is potential for conflict if the *lex causae* (the law applicable to the matter—in a contractual dispute, this will be the governing law of the contract), the *lex arbitri* (the law applicable to the

⁴ It may be useful to give an example of how the ‘costs follow the event’ principle is included in a set of institutional rules by setting out rule 28 of the LCIA Rules:

The Arbitral Tribunal shall make its decisions on both Arbitration Costs and Legal Costs on the general principle that costs should reflect the parties’ relative success and failure in the award or arbitration or under different issues, except where it appears to the Arbitral Tribunal that in the circumstances the application of such a general principle would be inappropriate under the Arbitration Agreement or otherwise. The Arbitral Tribunal may also take into account the parties’ conduct in the arbitration, including any co-operation in facilitating the proceedings as to time and cost and any non-co-operation resulting in undue delay and unnecessary expense. Any decision on costs by the Arbitral Tribunal shall be made with reasons in the award containing such decision.

arbitration process, usually the law of the seat) and the applicable institutional or *ad hoc* rules differ from one another.

It is fortunate, therefore, for the issue of costs in general, that the ‘costs follow the event’ principle is so widely applied in one form or another. In a seat where the law makes no provision for a tribunal to award costs, by choosing a set of rules that do make such provision the parties would empower the tribunal accordingly. So, for example, in the US, by choosing the AAA Rules the parties would empower the tribunal to award costs in its discretion.

[D] HOW DO TRIBUNALS ALLOCATE COSTS IN PRACTICE, WHERE COSTS FOLLOW THE EVENT?

‘Costs follow the event’ is a rebuttable presumption. The tribunal is entitled to take a different approach where it considers it appropriate.

There are number of approaches to implementation:

- ◇ Pure—where there is clearly a winner and loser, there is also usually also a clear case for awarding the winner its costs. However, in some cases, a tribunal may do this even where the outcome is not so clear, for example, where one side has won on some issues, but the preponderance of success is on the other side.
- ◇ Pro rata to success—this is a very common approach, but it begs the question of what success is. There may be differing outcomes on, for example, the merits, the quantum, preliminary issues (e.g. jurisdiction, challenge to arbitrator(s), arbitrability, parallel proceedings). In some instances, it may be appropriate to allocate costs on a claim-by-claim or issue-by-issue basis.
- ◇ Pro rata (as above), but only reasonable, proportionately incurred fees for lawyers and experts (along the lines of the standard basis/indemnity basis distinction in English court practice).

In practice, where it is difficult to determine success because the outcome is relatively balanced, the tribunal may decide to allocate costs 50/50 including lawyers’ fees or 50/50 only as to common costs with each side bearing its own legal and other costs.

If lawyers’ fees are awarded on a 50/50 basis it will mean that, if one side incurred higher fees than the other, the whole pool of fees will be aggregated and shared. This may seem unfair if one side had an expensive

firm and the other had a less expensive firm or if one side took a lot more trouble over its case than the other. However, in some instances the complexity is such that the tribunal recognizes that the dispute could not properly be settled without going to arbitration and one side had a much more demanding case to make—because of either the legal or evidentiary issues on which it had to prove its position—and therefore had to work much harder to put its case.

To illustrate this, I would mention an award I recently came across by a US-seated tribunal. Under the applicable institutional rules, the tribunal had authority to award costs on a ‘costs follow the event’ basis. The Claimant succeeded on the merits, and the Respondent succeeded on quantum. The Claimant’s case was inherently much more difficult to make. The tribunal therefore determined that each side should bear its own legal costs, but that the common costs should be split 55/45 in favour of the Claimant.

[E] WHAT OTHER FACTORS DO TRIBUNALS TAKE INTO ACCOUNT?

There are other factors which tribunals also take into consideration when determining cost allocations in their awards.

Offers to Settle

The most important in some instances are offers to settle.

English court practice has special procedures for this. The CPR Part 36 provides a formal process whereby, if the unaccepted offer is the same or higher than the judgment sum, the court will not permit recovery of costs incurred after the offer date. Normally, the court only considers the issue of costs after judgment, so any such offer is effectively made ‘without prejudice, except as to costs’ and served on the offeree. The fact of the offer and its terms must not be communicated to the trial judge until the case has been decided. The judge will then hear arguments as to the costs, at which point the offer will be brought into consideration. If an issue arises in relation to the offer before the case has been decided, the issue must be referred to a judge other than the trial judge. An offer made under CPR Part 36 is usually called a ‘Part 36 offer’.

There is also an informal process for an offer called a ‘Calderbank offer’ (after the case in which this kind of offer was upheld (*Calderbank v*

Calderbank 1975) which has a similar effect. It is usually made expressly ‘without prejudice except as to costs’.

Other countries have much simpler processes for making offers to settle but ultimately based on the same principle. However, in some civil law jurisdictions, a settlement offer is confidential between the counsel (subject to a professional obligation of confidentiality) and cannot be raised with the court.

Whatever the relevant law in relation to court process, an arbitration tribunal is not bound by it, but an offer to settle is nonetheless usually an important consideration in allocating costs. Arbitrators and counsel will have experience of such matters from their professional background. If there has been an offer to settle, counsel for the relevant party will usually wish it to be taken into consideration by the tribunal, which will usually be prepared to do so.

However, an offer to settle is much more awkward to deal with in an arbitration context. In English court proceedings, as indicated above, the judgment is usually presented, and counsel then are invited to make submissions on costs. If the issues are complicated, they may be referred to a specialist costs judge. This is impractical in arbitration, where the award (including as to costs) would normally be issued without a further hearing, and it could be problematic in practice to try to hold a further hearing.

To make it more difficult, in many instances (but not always, of course), counsel will not want the tribunal even to know that an offer to settle has been made because it might prejudice the tribunal’s decision on the merits or quantum.

One solution is for the parties to provide sealed written submissions on costs which are only to be opened by the tribunal members after they have decided on all other issues in the award. The ICC has suggested that, because its process involves review of the tribunal’s draft award before finalization, it could retain the sealed submissions on costs and provide them to the tribunal at that stage.

Another alternative is for the tribunal to deliver a partial award on the issues other than costs and invite submissions (hopefully by written submissions without the need for a further hearing) with a view to making a costs award and bringing the arbitration to a close.

Other Factors

One of the most important ways in which a tribunal can exert discipline over the parties in an arbitration is by indicating at an early stage—e.g. at the initial case management conference or subsequently when considering procedural matters—that, in assessing costs, it will take into account the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. It can also make an interim award as to costs where appropriate.

Amongst the things that a tribunal might take into account are the behaviour of the parties and their representatives. The ICC has helpfully given the following examples of behaviour that might be considered unreasonable, including:

- ◇ excessive document requests;
- ◇ excessive legal argument;
- ◇ excessive cross-examination;
- ◇ dilatory tactics;
- ◇ exaggerated claims;
- ◇ failure to comply with procedural orders;
- ◇ unjustified applications for interim relief; and
- ◇ unjustified failure to comply with the procedural timetable.

Another item that can be regarded as unreasonable is disproportional expenditure, for example, where one party obsessively pursues an issue of relatively little importance and incurs excessive costs.

There are also instances where a party will seek to recover its internal legal costs or the costs of its management or other executives. Tribunals are rarely receptive to this kind of request, but there may be special circumstances where it is warranted.

[F] THIRD-PARTY FUNDING

Third-party funding has been of increasing importance in dispute resolution in recent years, and parties receiving such funding seek to recover their costs incurred. These can be very substantial.

For court proceedings, there may be provisions of law or regulation as to what is and is not recoverable in relation to funding. These limitations generally do not apply in arbitration.

Arbitrators and counsel are usually familiar with the issues that arise and their treatment in the courts of their own home jurisdiction. They

may or may not seek to bring them to bear in an arbitration depending on the circumstances. Nonetheless, they will not be binding if the arbitrators do not apply them, so that, in an arbitration, it may be possible to get an award of funding costs in excess of what the courts in the relevant jurisdiction would permit.

Essar v Norscot

A significant case in this regard was decided in the English court in 2016.

In *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* 2016, the dispute related to an operation management agreement for an offshore drilling platform. The sole arbitrator in an ICC-administered arbitration awarded damages and sums due of over \$12 million in Norscot's favour. He awarded costs on an indemnity basis including £1.94 million for the third-party funding which had been paid for Norscot's defence. The funding was for £647,000 on terms that, if successful, Norscot would pay 300% of the funds advanced or 35% of the amount recovered, whichever was higher. Evidence was accepted by the court that these were standard market rates for such funding. The dispute was characterized by the judge as 'a David and Goliath battle' (para 21).

Essar challenged the award in the English court under section 68 of the Arbitration Act, alleging that the arbitrator had acted in excess of his powers. Much of the argument turned on the meaning of the word 'other' in the phrase 'legal and other costs' in section 59(1) of the Arbitration Act.

The arbitrator criticized Essar's conduct and found that Essar had deliberately put Norscot in a position where it could not fund the arbitration out of its own resources, and therefore it was reasonable for Norscot to seek and obtain litigation funding. He awarded costs on an indemnity basis including the funding costs. The judge said the provisions of the CPR as to third-party funding in a court case were irrelevant to an arbitration and upheld the costs award.

The case has been controversial. Critics have argued that no general inference should be drawn from it as to recovery of funding costs because the case was decided on special circumstances due to Essar's behaviour.

Other Issues

Another issue concerning funding concerns the situation of the winner in an arbitration where the impecunious loser is funded and has no money of its own with which to pay costs when awarded to the winner. A court

would have authority within its own jurisdiction to require the funder to pay if the law of the jurisdiction supports that. An arbitral tribunal would have no such authority.

There are moves in some countries to require funding to be disclosed during court proceedings. Such moves are unlikely to affect arbitration generally unless specifically adopted in actual arbitrations.

One approach to dealing with this issue is for a party to the arbitration that anticipates that the other side may have a problem in paying costs to apply to the tribunal for security for costs. Another is to purchase ‘after the event’ (ATE) insurance. ATE insurance provides cover against the possibility that the insured may have to pay the other side’s legal costs if the insured loses the dispute.

References

American Arbitration Association-International Dispute Resolution Center (Amended and Effective 2014, Fee Schedule Amended and Effective 2016) *International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)* (AAA Rules) New York: AAA

Chartered Institute of Arbitrators (CI Arb) (2016) *International Arbitration Practice Guideline, Drafting Arbitral Awards Part III—Costs* London: CI Arb.

Coppola, Francis Ford (Director) (1972) *The Godfather* Los Angeles: Paramount Pictures.

International Bar Association (IBA) (2010) *IBA Rules on the Taking of Evidence in International Arbitration* London: IBA.

International Bar Association (IBA) (2014, updated 2015) *IBA Guidelines on Conflicts of Interest in International Arbitration* London: IBA.

International Chamber of Commerce (ICC) (2015) *Decisions on Costs in International Arbitration—ICC Arbitration and ADR Commission Report* Paris: ICC.

London Court of International Arbitration (LCIA) (2014) *LCIA Arbitration Rules* London: LCIA.

United National Commission on International Trade Law (UNCITRAL) (2010) *UNCITRAL Arbitration Rules (as revised in 2010)* Vienna: UNCITRAL.

Vos, The Rt Hon Sir Geoffrey (Editor-in-Chief) (2020) *The White Book Service 2020: Civil Procedure Volumes 1 and 2* London: Sweet & Maxwell.

Cases Cited

Calderbank v Calderbank [1975] 3 All ER 333 (EWCA); [1976] 93 Fam CA

Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm)

Legislation Cited

Arbitration Act 1925 (USA) (known as Federal Arbitration Act/FAA)

Arbitration Act 1996 (UK)

Uniform Arbitration Act (a model statute, originated 1955, updated 2000 as Revised Uniform Arbitration Act) (USA)

MONEY CLEANSING AND EFFECTIVENESS OF FATF COERCIVE MEASURES: AN OVERVIEW

EJIKE EKWUEME AND MAHMOOD BAGHERI

IALS, University of London

[A] INTRODUCTION

The advent of globalization and liberalization pushes both natural and legal persons to increase the profitability of their commercial interactions. However, there are potential problems where the modes of wealth creation are not compatible with orderly and lawful conduct, avoiding the regulatory radar in creating their wealth, often in a manner or by means tainted with corruption. For the culprits to enjoy the fruits of their labour, they have to be involved in the ‘macabre dance’ of money laundering or cleansing. The disguise and facilitation of economic misconduct through the processes of money laundering has a distorting effect on economies around the world and government policy-makers may find it difficult to plan effectively for economic growth.

It is not all illegally acquired money that goes through the money laundering or cleansing process.¹ Of course, corruption which is often accompanied by secrecy is considered as one of the predicate offences of money cleansing. Money laundering is a serious issue in criminal justice. As suggested above, its significance has grown in recent years *inter alia* as a result of globalization, and this has been reflected in a number of very high-profile cases in the past decade or so. A typical example is the case of James Ibori, a former governor of Nigeria’s oil-rich Delta state, who received a 13-year jail sentence in Southwark Crown Court in London in 2012 for a range of offences relating to stealing substantial funds from Delta state, corruption and money laundering. In addition, Elias Preko, a former Goldman Sachs investment banker who had assisted in money laundering for the corrupt Nigerian state governor, was also jailed,

¹ Money laundering or cleansing processes carry basically the same meaning. The intention by the culprits is to reuse the unlawfully obtained money legitimately without being caught by the law. There is no difference between the two terms.

receiving a jail sentence of four-and-a-half years for laundering at least £50 million, likely only a small fraction of the total amount stolen and laundered.²

Authorities such as the Financial Action Task Force (FATF)³ have reacted accordingly to try to slow down the tempo of the cleansing scenario. In this write-up, the authors will focus on the efforts introduced by the FATF. The reader should be mindful of the fact that there are other anti-cleansing mechanisms⁴ that were introduced as a result of the global reaction to money cleansing. But FATF coercive measures will be the primary focus. This is because of the characteristics of the body as a soft law organization and its ability to prudently and quickly cause countries to adhere to its recommendations. It commands a high compliance level among the global community in the fight against money laundering and, arguably, the ‘best’ compliance level amongst such organizations. This soft law body was primarily set up for the sole purpose of thwarting the damaging impact of money cleansing in the global financial space. Although the FATF has adopted a soft law posture, it has succeeded in introducing effective measures that a number of states have come to embrace in their fight against money cleansing and, by extension, against corruption.

[B] MONEY CLEANSING: HISTORY, MEANING AND PROCESSES

The fact is that the practice of money cleansing has been with us for much longer than some of the regulations fashioned to tackle the scourge. Interestingly, it has been referred to as the ‘second oldest crime’ and has been in existence even since before the first tax code came into play (Munshani 2009: 48): its purpose usually being the attempt to hide a financial transfer (Naylor 2002). It is also pertinent to note that the term ‘money laundering’ has been traced to the Mafia ownership of the

² Over the years, writers have suggested that a three-pronged process of placement, layering and integration predominates in money laundering. However, it should also be pointed out that this is only a general observation, and money laundering can occur at any of one of these stages. See Section B below for further consideration.

³ This was established in 1989 by G7 countries specifically to fight the scourge of money laundering that was seen to cause significant damage to the global financial system if left unchecked.

⁴ There are other bodies like the OECD, International Chamber of Commerce, the IMF and the World Bank, alongside the United Nations Convention against Corruption 2003, to mention but a few. Much of the research for this Note was carried out whilst the first contributor was a PhD candidate of University of London. Special thanks go to Dr Amy Kellam and Professor Michael Palmer for their constructive comments. Any remaining errors are completely those of the authors.

Laundromats (Sneider and Windischbaur 2008) in the USA during the prohibition era. It was a period during which organized crime gangs profited massively from money generated through extortion, prostitution, kidnapping, gambling and the like. In order to obscure the source of their wealth or money, they would mix the cash yielded from their rackets with the legitimate funds earned from their various Laundromats (Giriraj and Mishra 2010). The scheme was supervised by their gang leader Al Capone. In October 1931 he was eventually prosecuted and convicted of tax evasion offences. Many people have wondered why he was not convicted of money laundering/cleansing. However, this would not have been possible because the offence of money laundering was not legislatively or statutorily known to law at that time.

Indeed, it has been argued that the notion that the term ‘money laundering’ has its origins in gangland Chicago in the 1930s is mistaken:

Money Laundering is called what it is because that perfectly describes what takes place – illegal, or dirty money is put through a cycle of transactions, or washed, so that it comes out the other end as legal or clean money. In other words, the source of illegally obtained funds is obscured through a succession of transfers and deals in order that those same funds can eventually be made to appear as legitimate. (Robinson 1998: 3)

However, readers should note that definitions of money cleansing range from the authoritative language of statutes to the punchy comments of judges. Rider has indicated that it amounts to a process which obscures the origin of money and its source (1996). In fact, some definitions have tended to tie it to the massive drugs trade or trafficking that was happening on a global scale, and this was later reflected in the US anti-money laundering framework.

Interestingly, in England and Wales and other Common Law countries, as well as on continental Europe,⁵ money cleansing is seen as activity that occurs with respect to any form of property derived from criminal acts that seeks to obscure the beneficial owners.⁶ In the US, money cleansing is seen as engaging in financial transactions that usually conceal the identity, source, or destination of illegally acquired money.⁷

⁵ See Article 1 of the Council Directive 91/308/EEC definition.

⁶ This is the position in the common law in England and Wales, and the Money Laundering Regulation 2017 and Proceeds of Crime Act 2002, Part 7, are more expansive.

⁷ Deitz and Buttle (2008: 4). See also US key money laundering provisions in the US Code at 18 USC § 1957, which refers to ‘specific unlawful activities’. See also USA Bank Secrecy Act 1970.

The truth of the matter is that because initially too much attention was directed to the issues of the drug trade, the topic of money cleansing was perceived to be somewhat synonymous with tracing the illicit gains acquired from those particular activities. However, this is problematic, as not all crimes involve a continuous enterprise.

It may be pertinent to point out that the term ‘money laundering’ as an expression gained prominence colloquially during the presidency of Richard Nixon in the Watergate Scandal of the 1970s. In fact, the expression was first accorded a judicial mark of approval in the Florida case involving money on deposit at Capital Bank—*United States v \$4,255,625.39* (1982).⁸

Without the network of financial institutions, epitomized by the banks, to facilitate the three stages, and to lend an air of respectability to the process, money cleansing would be virtually impossible. It then follows that banks and other financial institutions have been positioned in the frontline to combat this (Ellinger et al 2011: 95). In addition, there is often a complicated set of activities mostly not evidenced just by a singular act. In an effort to present a more robust analysis of the phenomenon, in recent decades it has become academically expositional to present a three-pronged approach to the analysis. Indeed, a report from Australia indicated thus:

Such a scheme would take raw proceeds of crime, held by the offender, manoeuvre them through a process that would conceal their source and confuse and break the money trail, and then return them to the offender legitimised and ready for further use. (National Crime Authority 1991: vii)

Placement is generally recognized as the first stage or step. Here, the culprit will attempt to put or deposit the illegal slush fund into the financial system. This process for transfer of funds starts in the informal economy and moves to the formal economy. The term ‘informal’ is employed by the authors to emphasise that the money was not legitimately acquired in the first place. And, for the loot to be enjoyed, there has to be a transition into the legitimate economy where the culprit will be in a better position to reap the benefits of the transaction. Therefore, for the transition to take place, the dirty money must begin its journey for legitimization from the placement stage to be later mixed with the legitimate money in the system.

It is good to point out that the placement stage comprises two segments—primary placement and secondary placement. In point of fact,

⁸ See also Gilmore (1993: 23).

the cleanser will initially try to deposit the money into the banking system. This is arguably the most difficult part of the process. The launderer runs a great risk of being caught at this stage. However, the launderer can be successful and evade the regulatory radar, possibly through conniving with corrupt bank officials and other gatekeepers who have been mandated to protect the system. Primary placement can *ipso facto* involve the use of ‘structuring’ or ‘smurfing’ methods, in banking jargon. Here, large quantities of money are usually broken down into small amounts (Lastra 2012: 37) and then deposited to evade reporting scrutiny from government agencies. The officials usually look the other way on account of the fact that they have been compromised. In the USA, any sum that is above \$10,000 is mandatorily subject to reporting requirements.⁹

In Nigeria, many natural persons exemplified as top government officials and other legal persons have been able to evade the regulatory radar and deposit into the banking system unaccountably large sums of money, amassed through corrupt processes. Some of these individuals are well known politically exposed persons. Their activities were made possible because these individuals were able to bribe their way through, thereby circumventing the system.

Secondary placement involves converting money into different assets. This can include the use of front persons, the setting up of legal persons or, in some instances, the use of insurance policies (e.g. various professional gatekeepers have been identified who use their knowledge to circumvent the system). In these circumstances, it should be noted that the services of professionals, such as accountants and lawyers, are usually employed to achieve this. For example, a lawyer, Mr Badresh Gogil, was used by a former Nigeria governor James Ibori. The presiding judge described the lawyer as the ‘architect’. The governor was later convicted for money laundering in the UK and has since served his term of imprisonment. In some instances, during this stage, the launderer might even purchase or own the said bank in order to continue with their illegal activities.

The second level of stratification is the laundering itself. This is made up of two basic parts—washing and layering. Washing refers to the process of removing the illegitimate toga of the loot or dirty money. There are three techniques that can be used here. First, the culprit or the launderer can mix the dirty fund with clean assets. This can be achieved by combining the lawfully derived money from a business with the

⁹ See US Bank Secrecy Act 1970 which contains the requirement for currency transaction report (CTR); see also 31 USC § 324.

unlawful proceeds of a cash-intensive operation like a pizzeria, or by under-invoicing the exports and over-invoicing the imports of an export/import business that has the hallmarks of an export commodity company. Secondly, the culprits can transform the medium of the money. For instance, cash can easily be exchanged with casino chips and then back into money. The essence is to make it very difficult to differentiate the dirty money from the legal funds. Lastly, the launderers can conceal the beneficial owners by formulating sophisticated financial vehicles designed to cheat the system. These can include fake mortgages and the use of solicitor trust accounts.¹⁰

Layering usually requires a systematic web of serial and possible parallel transactions that are designed in such a manner as to make it difficult to follow the paper trail. Offshore Financial Centres are involved here in a significant manner. The essence is that routing money via various jurisdictions makes it more difficult for the investigating and regulatory apparatus to trace the loot. Here, there can be a noticeable clash of bureaucratic red tape due to divergent jurisdictional legal undertones.

Integration is the last academic process in money cleansing. Here, illicit money is 'being brought home to rest' in the formal or main economy. This can include specific stocks or direct investments in real estate. There are various cases of individuals who have attempted to integrate their loot into the legitimate economy. For instance, Dr Erastus Akingbola was found guilty by a London court for buying a property in London worth £8.5 million with laundered funds. He had misappropriated depositors' money and cleansed it. For the records, he was a former managing director of a collapsed bank in Nigeria—InterContinental Bank plc, now known as Access Bank.¹¹

There are other methods of integration. For instance, a loan-back technique can be used. In this method, the culprits will arrange for money they have in an offshore account to be given to them in an onshore account in the form of a loan to their company. This sum would be transferred completely free of taxes and in addition can be used to cut taxes that are due in domestic income. It may be noted that the borrower has a legal obligation to repay the loan once it is incurred, and with interest. This will generate a situation where the process can be repeated successfully many times with the consequent result that the money

¹⁰ The Fourth EU Money Laundering Directive and, by transposition, the UK Money Laundering Regulations 2017 have made this difficult for the culprits.

¹¹ *Access Bank v Erastus Akingbola and Others* [2012] EWHC 2148 Comms. See the [The Eagle Online](#).

cleansing integration would increase in expansive diameter (Blum, 1998). It has to be appreciated that money cleansing involves a series of stages and each has its own characteristics, the dynamics of which are not particularly well understood.

[C] GERMINATION OF FATF

Money cleansing is a situation that arises as a result of corruption or illegal activities. It is generally agreed among academics that there are various facets of corruption. It is only when the illegal money is generated that a way will be sought to put it back into the system. This, the authorities were quick to notice, has all the ingredients for disrupting and distorting the global financial system. It is as a result of this that various international bodies kicked against the money-cleansing operations. The International Monetary Fund (IMF) has indicated that money laundering is a problem of global concern (IMF 2001a) which threatens to undermine the stability and integrity of the financial markets. And it is one of the core responsibilities of the IMF to combat it (IMF 2001b). Of all the bodies concerned in this trade, it is only FATF, formed in 1989, that has been identified as the sole organization that was set up specifically to deal with money cleansing. It shares an office with the Organisation for Economic Cooperation and Development (OECD) in Paris.

It was as a result of the negativities associated with money cleansing that a group of countries known as G7 (FATF 1990) formed the FATF. These were Canada, France, Germany, Italy, Japan, the UK and the USA. As a background to the formation, the G7 mandated a task force:

to assess the results of cooperation already undertaken in order to prevent the utilization of the banking system and financial institutions for the purposes of money laundering, and to consider additional preventive efforts in the field, including the adaptation of the legal and regulatory systems so as to enhance regulatory judicial assistance (G7 Information Centre 1989: para 52).

The consensus was that the problem ‘has reached devastating proportions’ (Nakajima 2016: 297-98). FATF’s initial mandate was to examine money-laundering techniques and trends. As terrorist financing has risen up the international agenda, the FATF role has naturally and incrementally extended to encapsulate counter-terrorism financing. As of 2012, its remit was extended to include the proliferation of weapons of mass destruction (Packman 2015: 25). It should be noted that the cleansing of money that FATF is tackling involves illegitimate *sources* of funds, whilst terrorist financing is concerned with the illegitimate *use* of the funds.

[D] SOURCES OF FATF COERCIVE MEASURES

We should bear in mind that FATF is seen as a soft law body and, therefore, legally, does not possess coercive force. Soft laws are those laws that are legal norms, principles, codes of conduct and transactional rules of state practice which are recognized in either formal or informal multilateral agreements (Wellens and Borchardt: 1989). It is acknowledged that soft law has the characteristics of presuming consent to the basic standards and norms of state practice but generally without the necessary *opinio juris* required to form binding obligations under customary international law. However, FATF has always been taken very seriously, principally due to the support it enjoys amongst important global financial institutions, notably exemplified by the IMF and the World Bank. These two international financial institutions are, of course, especially important players in the global economy.

For instance, the IMF Articles of Agreement (Article IV of IMF) empower it to oversee the international monetary system to ensure its proper and efficient operation. It does this by exercising surveillance over the exchange rate policies of its members. On the other hand, the World Bank's Articles of Agreement permit it to promote economic development amongst its members by making loans available to them. These loans may be directed towards the following: economic adjustment programmes; the rule of law; and improving both public and private-sector accountability, including prudent governance that has an impact on reducing corruption.

The reality on the ground is that countries that are members of the IMF and the World Bank do come to them for loans. In summary, both organizations will inform countries that, for them to have access to the requested facilities, they must as part of the conditions comply with certain international benchmarks. And one of these is adherence to the FATF Recommendations that are seen as the antidote to money cleansing and, by extension, corruption. You can now appreciate how this soft law body's recommendations suddenly transform it into a 'hard law' organization on account of the IMF and World Bank's 'carrot-and-stick' approach to access their facilities. This can be said to be a source of FATF powers.

Since the formation of FATF, one of the coercive tactics it has used is to classify countries as Non-Cooperative Countries and Territories (NCCTs). This is one of its internal mechanisms. It is a fact that countries do not want their names on this list. We should not forget that FATF membership is made up of not less than 130 countries, and all the members of the OECD are automatically also members of FATF. The truth

of the matter is that, once a country is designated an NCCT, it follows that it will find it extremely difficult to conduct financial transactions with the other members of FATF and the OECD. The impact is colossal. It is on account of the above that countries try as far as possible to adhere to FATF recommendations against money cleansing. From a critical perspective, FATF later decided that the use of NCCT classification was not diplomatically encouraging and rather too blunt and moved its functions to a working group known as the International Cooperation Review Group (ICRG). The ICRG uses a more diplomatic approach to make countries comply (Packman 2015: 271).

Another coercive measure that FATF can employ is the threat of expulsion. However, since its formation, this has not been utilized as countries try as hard as possible not to test the limits of FATF patience on this matter (FATF 1996a). Instead, FATF can use a recommendation that notifies other members to closely monitor any financial transaction from the erring member and put it under close scrutiny.¹²

We are minded readily to recall that, when FATF recommendations were initially emerging, some countries actually experienced the full weight of FATF's influence. In 1996, Turkey got a dose of what it would be like to go against the wishes of FATF. After FATF pressure to make Turkey pass a law to prohibit money cleansing had failed, FATF issued a press release condemning Turkey. The organization urged other members (and by implication OECD members also) to be wary about entering into any financial transaction with Turkey. In fact, members were advised to forensically scrutinize financial relationships with businesses and individuals that were based in Turkey (FATF 1996b). To say the least, this negatively impacted on Turkey. The adverse implications made Turkey not only enact a new anti-money cleansing law, but it also complied with the necessary FATF recommendations (FATF 1999c).

Additionally, as far back as 2000, it was the coercive effect of FATF that eventually made Austria ban the use of anonymous bank accounts, enacting a law that prohibited their use. It was FATF's threat to suspend the country from its membership and by implication from the OECD that made Austria comply (OECD 2000).

FATF coercive powers can even extend to non-members. If there are infractions of FATF recommendations, the body can signal to its members to avoid the jurisdiction involved. This was exactly what happened with the Seychelles, which was an offshore jurisdiction. It enacted legislation

¹² This involved the then Recommendation 21 before the 2012 recommendations.

known as the Economic Development Act in February 1995. The Act granted immunity from criminal prosecution to anyone willing to invest US\$10 million or more in approved investment schemes. Their assets were to be protected from government compulsory acquisition schemes. On account of FATF warnings, the Seychelles government quickly changed its mind.

Indeed, there is little doubt that the tool of mutual evaluation that is periodically employed by FATF is a cohesive and coercive measure to put countries in check regarding money cleansing. Sansonetti points to this process as one of FATF's most potent tools and suggests that it is probably the most successful element of its activities (2000: 218). In truth, countries prepare for this evaluation and would not want to be caught off-guard, and they therefore try as hard as they can to abide by the recommendations. Interestingly, FATF visited the UK in October 2018 for a mutual evaluation. Prior to this, the UK had been subject to such an evaluation in 2007. In December 2018, FATF indicated that the UK has a robust and well-developed regime to effectively combat money cleansing and terrorist financing. However, it was quick to point out that the country still needs to strengthen its supervision and increase the resources of its financial intelligence unit (FATF 2018). Within the next five years, two more reviews are expected for the UK—a technical compliance review in 2021 and an effectiveness review in 2023.

The fact is that, after the mutual evaluations, countries usually try to correct the deficient areas identified by FATF as regards its recommendations. For instance, FATF indicated in January 2019 that Tunisia had tried to improve on the deficiencies noted in its 2016 visit. Tunisia has now been given some time to upgrade the rating of four recommendations: 6, 8, 26, and 34, from partially compliant to largely compliant. And FATF is expected to downgrade the rating of Recommendation 18 from largely compliant to partially complaint. Tunisia remained in an 'enhanced follow-up' on this until November 2019.

[E] CONCLUSION

Money cleansing is not good for the global financial system and can be very disruptive of economic order. This is the basic position of FATF and other leading international financial organizations like the IMF and the World Bank. Since its formation, FATF has played a very effective role in getting states to adhere to its recommendations. Although FATF has been identified as having soft law characteristics, the indirect power it has gathered from links with both the IMF and the World Bank has actually

galvanized it into playing a cohesive and coercive role in the implementation of its recommendations. Presently, membership of this organization is seen as a positive sign of compliance to anti-money laundering issues and portrays a state as attractive for those wishing to engage in financial transactions with it. Of course, money cleansing cannot be completely eradicated, but the work of FATF is taking us in the right direction. In this Note, it has been shown that, irrespective of the soft law status accorded to FATF, the body has demonstrated sufficient mandatory energy in contributing to the reduction of financial crimes through its recommendations. It has shown that it has efficient teeth to bite when it is necessary to do so to reduce the scourge of money laundering and by extension corruption. This article has argued that the activities of the FATF should be seen as a significant contributory mechanism in the global financial template.

References

- Blum, BA et al (1998) 'Financial Havens, Banking Secrecy and Money Laundering' Paper prepared for United Nations Office for Drugs and Crime Vienna: UNDC.
- Deitz, Alison and John Buttle (2008) *Anti-Money Laundering Handbook* Sydney: Thompson Law Co.
- Ellinger, E Peter, Eva Lomnicka and Christopher Hare (2011) *Ellinger's Modern Banking Law* 5th edn Oxford: Oxford University Press.
- FATF (1996a) *International Anti-money Laundering Recommendations* Paris: Organisation for Economic Cooperation and Development.
- FATF (1996b), *Financial Action Task Force Report on Money Laundering Typologies—V11* Paris: Organisation for Economic Cooperation and Development.
- FATF (1999c), 'FATF Statement about the Lack of Anti-money Laundering Law in Development' 19 September Paris: Organisation for Economic Cooperation and Development.
- FATF (2018) *Anti-money Laundering and Counter-terrorist Financing Measures: United Kingdom—Mutual Evaluation Report* Paris: Organisation for Economic Cooperation and Development.
- G7 Information Centre (1989) '[Economic Declaration](#)' 16 July 1989.
- Gilmore, WC (1993) *Dirty Money: The Evolution of Money Laundering Counter-measures* Netherlands: Council of Europe Press.

- Giriraj, Arvin and Prashant Kumar Mishra (2010) *Money Laundering: An Insight into the Modus Operandi with Case Studies*, Thinkers and Writers Forum 2009-10 Gurgaon: Skoch Development Foundation.
- International Monetary Fund (IMF) (2001a) 'Making Global Economy Work for All' 17 September Washington: IMF.
- International Monetary Fund (IMF) (2001b) 'Policy Paper: Enhancing Contributions to Combating Money Laundering' April Washington: IMF.
- Lastra, Rosa Maria (2012) 'Money Laundering and Financial Regulation' in J Kleineman and L Gorton (eds) *Money Laundering* Stockholm: Stockholm Centre for Commercial Law.
- Munshani, Kalyani (2009) 'The Impossibility of Regulating Terrorist Finance—A Critical Study of Nine Special Recommendations Formulated by Financial Action Task Force on Anti-Money Laundering' 5(1) *Journal of Islamic State Practice in International Law* 40-44.
- Nakajima, Chizu (2016) 'Are We Ready for "Integrity Governance"?' 37(10) *Company Lawyer* 297-98.
- National Crime Authority (1991) *Taken to the Cleaners: Money Laundering in Australia vol 1* Canberra: Australia Government Publishing Service.
- Naylor, Tom (2002) *Wages of Crime: Black Markets Illegal Finance and the Underworld Economy* Montreal: McGill-Queens University Press.
- Organisation for Economic Cooperation and Development (OECD) (2000) 'Financial Action Task Force on Money Laundering Welcomes Proposed Austrian Legislation to Eliminate Anonymous Passbooks' *OECD Press Release* 15 June 2000.
- Packman, Tim (2015) *Mastering Anti-Money Laundering and Counter Terrorist Financing* Harlow: Pearson FT.
- Rider, B A K (1996) 'Taking Money Launderers to the Cleaners' 1(2) *Private Client Business* 134-48.
- Robinson, J (1998) *The Laundryman* London: Simon & Schuster.
- Sansonetti, Richardo (2000) 'Mutual Evaluation Process: A Methodology of Increasing importance at International Level' 7(3) *Journal of Financial Crime* 218-26.
- Schneider, Friedrich and Ursula Windischbaur (2008) 'Money Laundering: Some Facts' 26(3) *European Journal of Law and Economics* 387-404.
- Wellens, Karel and Gustaaf Borchardt (1980) 'Soft Law in European Community Law' 14 *European Law Journal* 267-321.

Legislation Cited

18 US Code § 1957, Engaging in monetary transactions in property derived from specified unlawful activity (USA)

31 US Code § 324, Structuring transactions to evade reporting requirement prohibited (USA)

Bank Secrecy Act 1970 (USA)

Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering

Directive (EU) 2015/849 of European Parliament and of the Council of May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (Fourth EU Money Laundering Directive)

Economic Development Act 1995 (No 20 of 1995) (Seychelles)

Money Laundering Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLR 2017)

Proceeds of Crime Act 2002 (UK)

Cases Cited

Access Bank v Erastus Akingbola & Others [2012] EWHC 2148 Comms

United States v \$4,255,625.39, 551 F Supp 314 (SD Fla 1982)

PERSONAL INDEPENDENCE PAYMENTS

AMY KELLAM

Institute of Advanced Legal Studies

This Note considers the implementation of Personal Independence Payment (PIP) in England and Wales, a benefit introduced in 2013 for working-age claimants who suffer significant ill-health or disability. PIP is frequently discussed in the context of disability and welfare rights. It has also, however, had a notable impact upon Her Majesty's Courts and Tribunals Service (HMCTS). This Note is part of an ongoing research project on legal development and good governance. It presents a brief summary of PIP and places it in the context of broader strategies to simplify the delivery of public services. It raises the prospect that such strategies produce negative socio-legal outcomes, such as reduced access to justice and a consequent increase in pressures on other public services, including the HMCTS and the NHS.

Following the Welfare Reform Act 2012, significant and sweeping changes have been made, and are still in the process of being made, to the UK state welfare system. Arguments for reform centred around three main points: first, a need to simplify what was a complex and disjointed system of different individual benefits; second, a need to cut costs; and, third, a need to develop a social security system more in keeping with a modern, digitized world. Set in an era of economic austerity, these arguments carried force.

PIP was introduced in 2013, to replace Disability Living Allowance (DLA), which was issued to approximately 3 million UK citizens. PIP was a decisive move towards a more simplified assessment based upon 14 'point-scoring' questions. Twelve of these questions evaluate a claimant's eligibility to the daily living component of PIP, whilst a further two questions assess eligibility for a mobility component. Answering these questions is primarily a box-ticking exercise. Applicants are required to select multiple-choice answers to each of these 14 questions. Decision-

makers evaluate whether an applicant's answers meet certain 'descriptors' and calculate points accordingly. The statutory minimum for a successful claim for either of these components is 8 points (Social Security (Personal Independence Payment) Regulations 2013: parts 5.6 and 5.7).

The decision-making process is outsourced by the Department of Work and Pensions (DWP) to three contracted, for-profit assessment providers. Most claimants are invited to a face-to-face assessment with their regional provider. Again, this is largely a box-ticking exercise, which utilizes proprietary DWP software to guide the assessor's decision-making pathway. Assessors are medical professionals drawn from a variety of different fields including doctors, nurses, paramedics, occupational therapists and physiotherapists. There is no requirement for assessors to have specialized knowledge of a claimant's condition. Thus, depending upon regional providers, a claimant suffering from a psychiatric illness could well find themselves assessed by a physiotherapist. The DWP's digital assessment portal and internal guidelines are intended to provide sufficient data for contracted decision-makers to carry out assessments regardless of their specialism.

It should be noted that the application process does not automatically engage with a claimant's own doctors or consultants. Under Question 1, applicants provide the details of their healthcare providers. However, whilst decision-makers may request evidence directly from GPs, the onus is upon the claimant to provide supporting documentation at the time of application. As the DWP (2018: 2) guidelines for health professionals state:

Claimants are only required to send in evidence they already hold, such as copies of clinic letters—they are *not* told to contact their GP or health professional to obtain further evidence.

There is *no requirement* for a statement from a GP or other health professional on the PIP claim form.

It may be necessary to provide factual information, but it will be the assessment providers who will contact you rather than your patient or DWP. (emphasis in original)

When introducing PIP the government intended that the reform would save money and reduce DWP caseloads. In addition, four specific claims relating to good governance were made:

- 1** It would target support more closely on those most in need of support.
- 2** It would be more responsive as claimants' circumstances change.

- 3 It would be based on a fairer, more transparent and consistent assessment of need.
- 4 It would be easier for claimants, DWP staff and disability organizations to understand (Mackley & Ors 2019).

Instead, the simplified assessment procedure has arguably failed to achieve these key aims. Claim rejection rate is high; 47% of DLA claimants who registered a claim for PIP received a lower level of award or no award. However, for claimants who proceed to appeal before a tribunal, the success rate is 73% with an average case clearance time of 31 weeks (Mackley & Ors 2019). Due to over-simplification of the initial assessment procedure, appeal at tribunal may be the first time complex cases are able to receive full and fair judgment. Such a system can have devastating consequences for claimants, as months may pass before critical financial welfare is obtained. Indeed, the DWP has admitted that between 2013, when PIP was introduced, and 2018 some 17,000 claimants died waiting for disability benefit decisions (Pring 2019). On the other hand, despite government estimates that a pared-down PIP process would cost 20% less than DLA, the Office for Budget Responsibility (2019: 120) revealed that by 2017-2018 it was costing around 15-20% more.

The introduction of the Welfare Reform Act 2012 coincided with significant changes to the provision of legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). LASPO removed legal aid eligibility for welfare benefit cases. Whilst the Ministry of Justice (MoJ) recognized that this would have a disproportionate impact upon the ill and disabled, it concluded that 'legal aid is not justified in these cases because the issues are not generally of sufficiently high importance to warrant funding, and the user-accessible nature of the tribunal will mean that appellants are able to represent themselves' (Ministry of Justice 2010: 4.219). However, MoJ statistics revealed that only around 28% of unrepresented benefit claimants are successful on appeal, jumping to 90% for those who go with the support of a legal representative (HC Deb 23 April 2019, vol 658, col 22).

There was an expectation that the not-for-profit sector would fill the gap left by cuts to legal aid for welfare benefit cases (Ministry of Justice 2010: 4.218). This has failed to manifest. Services such as Law Centres have struggled under the burden of both legal aid and local authority funding cuts, whilst the Citizens Advice service (Citizens Advice 2014: 2) withdrew provision of specialist legal advice across the majority of its centres. In addition, there has been a shortage of new legal practitioners specializing in social welfare law. Modules on legal aid have been removed

from law school curriculums and the Solicitors Regulation Authority has included no mandatory social welfare law modules in its plan for the new solicitors qualifying examination (Law Centres Network 2019: 19; Rose 2019). Thus, an existing lack of access to advice may become entrenched.

A consequence of lack of access to advice is that opportunities for early intervention have been limited, increasing the likelihood that individuals do not, or cannot, seek help until they are at crisis point (Low Commission 2014: 16). Individuals eligible for PIP are by nature a particularly vulnerable group, suffering from physical and/or mental illness and disability, including terminal conditions. It has been well documented that in family law LASPO precipitated a fall in mediation and a sharp increase in litigants in person, placing considerable strain on the courts (Richardson 2018). Similarly, the implementation of PIP, combined with the changes set in motion by LASPO, has created a perfect storm for a dramatic increase in caseloads at tribunals.

PIP appeals at the First-tier Tribunal level are heard in the Social Entitlement Chamber, which deals with cases from three jurisdictions Asylum Support, Criminal Injuries Compensation and Social Security and Child Support (SSCS), the latter being the largest of the First-tier Tribunals. In the last quarter, the SSCS received 38% of receipts to all First-tier Tribunals, of which 60% were PIP appeals (Ministry of Justice 2019: 2-3). The Senior President of Tribunals' Annual Report 2019 notes that the rapid rise in appeals before the SSCS since 2012 'has outstripped our ability to recruit and train sufficient numbers of panel members to keep pace with increased receipts' (Aitken 2019: 25).

Judge Aitken (2019: 27), the president of the Social Entitlement Chamber, has noted that one reason PIP appeals have come to represent the bulk of cases before the SSCS is that: 'The regulations relevant to a claim to PIP were drafted in such a way that considerable interpretation was always going to be a significant requirement.' This raises important questions about the legislation-drafting process in relation to the then presiding government's claims that disability benefit reform would embody, and advance, fundamental principles of good governance. What was outwardly a simplified assessment process, purportedly designed to increase accessibility, instead gave rise to complex issues of interpretation that are only slowly coming into focus through case law. Meanwhile, vulnerable claimants have been left with a shrinking resource pool of advice and representation, with considerable uncertainty about the criteria for eligibility.

PIP is just one of several welfare benefits administered by the DWP, and along with DLA—which PIP is in the process of replacing—constitutes approximately 8% of overall welfare spending (Office for Budget Responsibility 2018: 23). However, PIP has the unique status of producing the largest workload in the Social Entitlement Chamber. It therefore warrants particular scrutiny, especially in light of the ambitious project of reform currently being implemented across HMCTS. As part of this project, introduced in 2016 (Ministry of Justice & Her Majesty’s Court and Tribunal Service 2016), the SSCS is intended to lead the way in the shift to Online Dispute Resolution (ODR).

Across the welfare system as a whole, it is expected that over 80% of UK claimants will eventually manage their benefit claims online (Finn 2018). Whilst human decision-makers will still play a role, person-to-person contact will decrease and automated decision-making will increase. PIP is not marked out as an e-delivery benefit, but the move away from face-to-face tribunal appeals for PIP to digital appeals has already begun (Aitken 2019: 26). There remains considerable uncertainty about if and how ODR will meet the needs of PIP claimants. Social welfare law is a markedly complex area of law, and there are concerns that the digitization of the appeal process will result in a simplification that will have detrimental consequences for claimants. It has been noted that ‘the ability of tribunal members to see the appellant in the flesh and to make their own assessment of the medical issues and the degree of functionality’ is critical to the appeal process (House of Commons Justice Committee 2019: 15). In addition, concerns have been raised about the capacity of disadvantaged and vulnerable groups to utilize digital systems (House of Commons Justice Committee 2019: 12-13).

Both welfare and legal aid reform were ushered in as part of wider austerity measures following the 2008 financial crisis. The brief overview of PIP given in this Note suggests that efforts to simplify and reduce public expenditure can carry hidden costs. DLA was a relatively minor and stable component of welfare spending, but its transition to PIP set in motion a trajectory of changes which ultimately increased DWP expenditure. PIP has also had a significant impact upon HMCTS. In order to meet demands, over the past year the Social Entitlement Chamber has trained 350 medically and disability qualified personnel who had no prior legal or judicial experience (Aitken 2019: 26). It is evident that cost-cutting in one department can lead to increased costs in other areas.

It remains to be seen whether the transition to ODR in the tribunal system will be successful in reducing pressures in the Social Entitlement

Chamber. More research is needed to fully assess the impact such reform will have, particularly upon disadvantaged and vulnerable groups. In addition, it is unclear how reforms in the SSCS will impact upon the NHS. An inability to access welfare can lead to a downward spiral of indebtedness, relationship, housing and health issues. As noted above, withdrawal of public funding reduced the capacity for early intervention in social issues. It is thus not surprising that there has been an increase in individuals turning to their GPs for support. A survey carried out by the Citizens Advice (2015: 1) 'indicated that GPs spend an average of 19 per cent of their time dealing with social issues that are not principally about health, costing the NHS an estimated £400m per year'. In addition, there is a growing body of research pointing to a bidirectional link between law and health, revealing that 'social and economic problems with a legal dimension can exacerbate or create ill health and, conversely that ill-health can create legal problems' (Genn 2019: 159).

The impact upon the NHS is demonstratable, albeit hard to quantify. More insidious and incalculable are the broader implications of a deficit in social justice. A parliamentary Select Committee that investigated PIP heard evidence that the 'ramifications of incorrect decisions ... go far beyond those claimants directly affected'. The final report highlighted that 'Trust is fundamental to the overall running of a successful society' and emphasized the necessity of procedural fairness and transparency (Work and Pensions Committee 2018: paras 8-9). Following the reforms, legal aid frontline agencies have reported a growing sense of anger as individuals face seemingly intractable barriers to justice. As Lord Neuberger has said, such circumstances can place the rule of law itself under threat:

My worry is the removal of legal aid for people to get advice about law and get representation in court will start to undermine the rule of law because people will feel like the government isn't giving them access to justice in all sorts of cases. And that will either lead to frustration and lack of confidence in the system, or it will lead to people taking the law into their own hands. (Neuberger 2013)

As a preliminary conclusion to further research, this Note observes that, whilst the adoption of the digital delivery of public services, including ODR, has the potential to increase access to justice, processes to simplify administrative procedures need to be undertaken with caution. The potential for negative socio-legal consequences should not be underestimated. This is especially so given that such consequences may manifest in areas different from those where initial reform was initiated and, by hiding in the shadows of wider social issues, make good

governance harder to evaluate and failures of governance harder to bring to account.

References

- Aitken, John (2019) ‘Annex B: First-tier Tribunal—The Social Entitlement Chamber’ in E Ryder, *The Senior President of Tribunals’ Annual Report 2019*.
- Citizens Advice (2014) ‘Nowhere to Turn—Citizens Advice Speaks out on Impact of Legal Aid Cuts’ Press Release 8 July 2014 London: Citizens Advice.
- Citizens Advice (2015) ‘A Very General Practice: How Much Time Do GPs Spend on Issues Other than Health?’ Policy Briefing London: Citizens Advice.
- Department for Work & Pensions (2018) ‘PIP: A Quick Guide for Health Professionals’ December 2018.
- Finn, John (2018) ‘The British Government is Closing Dozens of Job Centres. The Decision will Come Back to Haunt It’ *CityMetric* 11 July 2018.
- Genn, Hazel (2019) ‘When Law is Good for your Health: Mitigating the Social Determinants of Health through Access to Justice’ 72(1) *Current Legal Problems* 159-202.
- House of Commons Justice Committee (2019) ‘Court and Tribunal Reforms: Second Report of Session 2019’ 31 October 2019.
- Law Centres Network (2019) ‘Doing Justice in Dark Times: LCN Annual Review 2018/2019’.
- Low Commission (2014) ‘Tackling the Advice Deficit—A Strategy for Access to Advice and Legal Support on Social Welfare Law in England and Wales: Report of the Low Commission on the Future of Advice and Legal Support’ January 2014 Legal Action Group.
- Mackley, Andrew, Roderick McInnes, Steven Kennedy & Alexander Bellis (2019) ‘Administration of Personal Independence Payments on Merseyside’ House of Commons Library, 25 March 2019.
- Ministry of Justice (2010) ‘Proposals for the Reform of Legal Aid in England and Wales’ Consultation Paper November 2010.
- Ministry of Justice (2019) ‘Tribunal Statistics Quarterly, July to September 2019 (Provisional)’.
- Ministry of Justice and Her Majesty’s Court and Tribunal Service (2016) ‘Transforming our Justice System—A Joint Statement’ September 2016.

- Neuberger, Lord (2013) *Today Programme*, BBC Radio 4, 5 March 2013.
- Office for Budget Responsibility (2018) ‘An OBR Guide to Welfare Spending’.
- Office for Budget Responsibility (2019) ‘Welfare Trends Report—January 2019’.
- Pring, John (2019) “‘Shocking’ PIP Death Figures Show Assessment Process is Unfit for Purpose’ *Disability News Service* 7 February 2019.
- Richardson, M (2018) ‘Litigants in Person—An Inherent Problem with the Justice System’ *Family Law Week* 16 November 2018.
- Rose, Neil (2019) ‘Regulators “Need to Sustain” Social Welfare Law Training’ 15 February 2019.
- Work and Pensions Committee (2018) ‘PIP and ESA Assessments’ 12 February 2018.

Legislation Cited

- Legal Aid, Sentencing and Punishment of Offenders Act 2012
- Social Security (Personal Independence Payment) Regulations 2013
- Welfare Reform Act 2012

CRITICAL LEGAL CONFERENCE 2020: CALL FOR PAPERS

The Critical Legal Conference (CLC) is an annual meeting dedicated to critical legal theory. It brings together a community of critical legal enthusiasts, both theoreticians and activists. The CLC has assisted in the development of critical legal theory as a movement and field, paralleling the efforts also of the Conference on Critical Legal Studies in north America and France's *Critique du Droit*. The CLC is based in the UK, but annual meetings have also been held in India, Finland and Ireland. It contributes to the critical legal studies (CLS) movement and is associated with the journal *Law and Critique*, established in 1990. The next meeting (2020) is to be held this coming September at the University of Dundee.

The CLC sees itself as an intellectual movement with important political dimensions and constitutions. The CLC started in 1984, with Alan Hunt as the founding chair, and has been held annually without interruption ever since. Throughout, Conference was and remains a momentary meeting and an umbrella name. There is no organization, and so no officers nor posts, chairs, secretaries, committees or delegates have been created. It is 'a community always to come', a transient broad church that exists only for the three days of its annual meeting. Every September the place for the next conference is decided and people bid farewell for another year, leaving it to the next organizer to put together the programme on an issue or issues regarding the role of law in society or the implications for law with respect to current critical questions in related disciplines (such as philosophy, politics, or cultural studies). Western Marxism, postmodernism and deconstruction were early concerns, but issues in race, gender, queer and post-colonial theory came to be central in later years. The CLC has encouraged mainstream academic life to adopt these innovations.

The next meeting is entitled ...

Winter 2020

Frankenlaw: Community, Division, Modernity

Critical Legal Conference 2020 University of Dundee

3-5 September 2020

I lived principally in the country as a girl, and passed a considerable time in Scotland. I made occasional visits to the more picturesque parts; but my habitual residence was on the blank and dreary northern shores of the Tay, near Dundee. Blank and dreary on retrospection I call them; they were not so to me then. They were the eyry of freedom, and the pleasant region where unheeded I could commune with the creatures of my fancy.

Mary Shelley, preface to the 1831 edition of *Frankenstein, or The Modern Prometheus*

Dundee had an embryonic role in the creation of Mary Shelley's novel *Frankenstein*. Approaching the northern fringes of the UK, Dundee's 'eyry of freedom' helped shape the imaginary that would result in Shelley's famous text, and the infamous and unnatural conglomeration that it unleashed upon the world. Shelley's reconstituted monster, created by Victor Frankenstein in his experimentations with the fringes of life, has become a cultural icon from page to stage to screen, and beyond. In taking it as inspiration for the theme of the CLC 2020, *Frankenstein's* monster is reformulated as a rich and productive concept that encounters many of the multiple and profound tensions of modern law.

Frankenstein's monster is typically characterized by the joining together of dead parts to constitute a reanimated whole, brought (back) to life by the power of modern science. As a conceptual figure, it thus becomes a notion of both unity and separation, of life and death, and of the power of reason to structure and animate otherwise individual and decaying parts. Rendered as a form of law—as a Frankenlaw—it conjures questions of detachment and community, of touching and separation, of independence and being bound, of unity and corporation, of the rational resolution of multiplicity—and of the modern social order: a divided whole, a community of atomistic modern subjects under a single, sovereign hierarchy.

Partaking in CLS at Dundee, in the temporal shadow of Mary Shelley's nascent imagination, it seems appropriate to let the theme of Frankenlaw permeate our reflections. To think with Frankenlaw is to encounter questions of corporate personhood, of the relationship between life and science, of bodies and their parts, of post-state or post-sovereign modes of power, of law as dead things (texts, buildings, victims) compiled and

brought to life in different ways, of the possibility of unifying plurality, of community and modern subjecthood. It is an invitation and an opportunity to construct new concepts and modes of legal thought out of dead and useless ones, to animate our encounters with law in controversial and provocative ways, to seek to go beyond the boundaries of reason and modernity and see what we find.

Huddled around the thought of law, the dark of the uncritical creeping in, we shall make ghost stories of our own—we shall conjure for one another our own terrifying and inspiring visions ... of Frankenlaw!

Call Details

Below is a further information for CLC 2020 which, as noted above, will be hosted by the University of Dundee, from 3-5 September 2020. The call for papers for this conference will be released later in the year, sometime in March 2020. Please visit www.clc2020.org for more information, or contact CLC2020@dundee.ac.uk. However, below you will find some indicative themes or topics around which the call for papers might revolve.

- ◇ Law as a separated whole
- ◇ Community and division
- ◇ Ethics of critique and/or of going beyond
- ◇ Law and science fiction
- ◇ Law and corporeality
- ◇ Politics, law, and technology
- ◇ Law and literature perspectives on Shelley's *Frankenstein*
- ◇ The power and limits of reason
- ◇ Law at boundaries of life/death/human
- ◇ The idea of localizing law and theory

Please note that the final streams included may differ from the above list.

CIVIL UNREST IN HONG KONG CONFERENCE 21 JANUARY 2020

ANNA DZIEDZIC, ALEX SCHWARTZ
AND PO JEN YAP

Faculty of Law, University of Hong Kong

Since June 2019, Hong Kong has been rocked by months of civil unrest. The protests originally arose in opposition to the Hong Kong government's attempt to pass an extradition law that would allow for Hong Kong residents to be extradited to China to face trial for alleged offences committed on the Mainland. Even though the Bill was eventually withdrawn, the unrest continued as protestors pressed on for other demands, including universal suffrage in the city that has been governed by Beijing under a 'One Country, Two Systems' constitutional framework.

On 21 January 2020, the Centre for Comparative and Public Law at the University of Hong Kong's Faculty of Law, convened a one-day conference that brought together historians, sociologists, political scientists, lawyers and law students to discuss different facets of this unrest, and explore ways in which Hong Kong might move forward and heal as a community.

The first panel examined the historical and sociological aspects of this unrest. It analysed three significant protest movements in Hong Kong's recent history, namely, the 1967 riots, the Umbrella Movement of 2014 and the current crisis, and compared and contrasted the connections between them. Historian Gary Cheung began the conference by explaining that, while the 1967 riots were influenced primarily by the Cultural Revolution in China, the riots exposed deeper social issues neglected by the British colonial government. In the next presentation, Associate Professor John Wong, also a historian, argued that the colonial government's legitimacy was strengthened after it had addressed these issues following the riots, but this narrative of 'prosperity and stability' no longer rings true in Hong Kong today as economic mobility has decreased and the gap between rich and poor in Hong Kong has grown. Professor Laikwan Pang examined the Umbrella Movement of 2014. She

argued that protest is not just a message, but a process of people coming together, and explained how the law is not only abstract rules to be obeyed, but actively created by citizens in a democracy. Professor Ching Kwan Lee explained that the critical difference between the Umbrella Movement and the current protests pertains to the scope of protesters' demands. The Umbrella Movement focused on universal suffrage, where protestors sought reforms within Hong Kong's existing constitutional structure. The ongoing movement, however, questions the very meaning of the rule of law and justice, and the identity of Hong Kong as a community. Associate Professor Agnes Ku explored how the 'decentralization' of human agency in the ongoing protest—especially among young people—has placed ethical questions about non-violence and militancy at the front and centre of the current social movement. Professor Eliza Lee concluded the panel with her observations about the political dimensions of the civil unrest, arguing that Beijing's strategy of 'indirect rule' through pro-government elites has resulted in a significant rift between the Hong Kong leadership and society at large.

The second panel centred on matters relating to young people, policing, and transitional justice. Professor Eric Chui began by delving into his ongoing empirical research on youth activism and radicalization in Hong Kong. Professor Chui presented quantitative evidence suggesting a correlation between young people who are most engaged in legal forms of civic activism and those who engage in 'radical' extra-legal forms of protests. Professor Tim Newburn then spoke about his role in a study of the 2011 riots in England, produced in collaboration with *The Guardian* newspaper. Professor Newburn highlighted the potential for academics and journalists to work together to produce timely research in the context of social unrest, and he went on to summarize some of the key findings of his research, including the role that poor police–community relations played in England's riots. He also highlighted the need to study social unrest more 'in the round', focusing not only on questions of aetiology but also on the dynamics and aftermath of unrest. Professor Kieran McEvoy then spoke about the various types of transitional justice mechanisms that can be used to help a society move on from conflict or unrest. Drawing in particular on his expertise of the Northern Ireland context, Professor McEvoy highlighted examples of both good and bad practice in truth recovery, amnesties, institutional reform, and apologies/acknowledgment. He further stressed the importance of leadership and careful choreography in delivering meaningful transitional justice. Professor Maggy Lee concluded with commentary and questions on the issues raised by the speakers. In particular, Professor Lee suggested that

social scientists might do better if they were to pay more attention to understanding the conditions of social order and why social unrest is not more frequent than it is.

In the third and final panel of the day, the legal profession, the legal academy, and law students came together to dialogue on the legal dimensions relating to the current unrest. The panel was moderated by Professor Fu Hualing, Dean of Law Faculty, and the participants included: Anna Wu, Chair of the Competition Commission of Hong Kong; Jat Sew-Tong, a Senior Counsel; Professors Po Jen Yap and Simon Young; and four law students (Adrienne Lam, Luo Jiajun, Joanna Wong and Aaron Yam). The panellists addressed questions raised by the students on the justification for the civil disobedience of perceived unjust laws, the constitutionality of the measures passed by the government to prohibit face-covering at public protests, the role of the courts in the ongoing crisis, and what part the legal profession and law students can play to heal this rift in society.

In sum, this event highlighted several issues that are likely to attract further debate going forward, particularly with respect to the modalities of amnesties for criminal offences and the establishment of an independent inquiry into the unrest. The Centre for Comparative and Public Law will continue to organize events to foster dialogue on these and other related issues.

THINKING ABOUT DEVELOPMENT IN SOUTHERN CHINA

ZHOU LING

China Law Programme, Hong Kong Institute of Asia-Pacific Studies, Chinese University of Hong Kong

[A] INTRODUCTION

In China's economic reform strategy, raising living standards by means of rapid economic growth and also, more recently, by a process of urbanization, have been key elements. Today, as a result, the People's Republic of China has become the second largest consumer market and possesses the world's largest number of urban residents. In order to further the reform process, a major policy of developing multiple city clusters has emerged. These conurbations represent substantial concentrations of economic power. Perhaps the most important example of this approach is the newly established Guangdong–Hong Kong–Macau Greater Bay Area (GBA) in southern China. This occupies significant parts of what is perhaps China's most 'market-liberal' and economically advanced area, and clearly raises questions about future relations between Hong Kong and mainland China. Southern China's GBA idea is in part inspired by other global cities situated on large coastal bays—San Francisco, New York and Tokyo. In view of its growing economic potential, it is not surprising to find that there are also emerging debates and controversies about how this southern Chinese GBA should best evolve, including in terms of law and politics. Given the political sensitivities involved in discussions about relations between Hong Kong and mainland China, a new and important analysis on such issues from a mainland commentator is to be welcomed. This very significant publication is the Chinese language book authored by Zhang Siping (2019) on *The Guangdong–Hong Kong–Macau Greater Bay Area: A New Chapter in China's Reform and Opening-Up*.

[B] ZHANG'S INNOVATORY APPROACH

The book introduces readers to the history and contemporary developments of what is a very important dimension of regional changes in China, namely, the development of the GBA, comprising the economically most advanced areas of Guangdong Province, together with the Special Administrative Regions of Hong Kong and Macau. The author of the book, Zhang Siping, is a former Deputy Mayor of Shenzhen, and a former member of the Standing Committee of the Chinese Communist Party (CCP) Municipal Committee in Shenzhen. He is a specialist in economic reform and has served as the Guangdong director of the Economic Reform Commission (*Jingji Tizhi Gaige Weiyuanhui*) and the director of the Shenzhen Economic Reform Office (*Jingji Tizhi Gaige Bangongshi*). The influential but controversial mainland magazine, *Southern Weekly* (*Nanfang Zhoumo*), has characterized Zhang as a 'path-breaker' (*chuangjiang*) in the reform history of Shenzhen (Luo 2016), praising him for the boldness of his plans and policies for economic reform, especially in contrast to the slowness of other local leaders in China's administrative system today. The extent to which his reformist ideas have actually been put into practice, even in a progressive city such as Shenzhen, is not very clear, however.

The book reveals a bold approach to economic reform in China. Even though Zhang only fairly recently (in 2014) stepped down from important official positions in Shenzhen and Guangdong, his study offers radical thinking on the opening-up and reform policies that bear the imprint of Deng Xiaoping's sweeping programme of economic reform that evolved in the 1980s and early 1990s. The core proposal made in the book is that Hong Kong should serve as a role model for GBA cities in the Guangdong Province in order that these mainland urban areas might learn how better to pursue economic and social development. More importantly, Zhang suggests, since Hong Kong is a free port that does not levy any customs tariff and has only limited excise duties, this approach to economic macro-management should be broadly accepted and applied through the region of the GBA. In this way there would be free movement of people, goods, capital, information, technology, and so on within the area—which includes many of the economically developed areas of Guangdong Province, as well as Hong Kong and Macau. In addition, aspects of the EU's system, including elimination of hard borders and other policies encouraging free movement and communication within the GBA, are important possible templates. The ultimate goal of the GBA development, Zhang argues, is to become the biggest free trade zone in China, dwarfing

another 19 ‘new districts’ (*xinqu*) across the country which also serve as trial locations for economic reforms. In Zhang’s vision for the future, there will be no hard borders between Hong Kong, Macau and Guangdong Province. Instead, borders (and tax zones) will be moved backward to inland cities in the GBA, and through them the GBA will connect with cities in other provinces in China.

[C] ONE COUNTRY, TWO SYSTEMS— LOOKING AHEAD

Zhang sees such a radical development as nevertheless consistent with ‘One Country, Two Systems’. Hong Kong, in his view, is no longer a strictly ‘capitalist’ system (p 220). It has changed, having been influenced by its relations with the mainland over the past 40 years and the reform and opening-up of mainland China. By 2047, when Hong Kong is due to lose its status as a Special Administrative Region along with the ‘high degree of autonomy’ it enjoys under the Hong Kong Basic Law, the mainland’s socialist system will have further matured, and in many respects China will have become internationalized, so there may well not be any need for Hong Kong’s mellowed and modified ‘capitalist’ system to make significant changes. Clearly, one of the purposes of the GBA is to bring Hong Kong closer to the mainland, even though Hong Kong residents may well regard such a development as worrying. Many Hong Kong residents are concerned that, if Hong Kong is robustly incorporated into the mainland, then Hong Kong’s distinctive culture and society will be lost. Zhang’s proposals are in part intended to allay such fears on the Hong Kong side, and the author predicts that, after 2047, while there will indeed likely be ‘One Country, One System’, this system may well be one that is infused with internationalization and the ‘advanced’ economic and social institutions and processes of Hong Kong and Macau. What the author encourages, then, is a true opening-up of mainland China, and that reformist changes should be made by mainland China, despite the conservativeness of many local bureaucrats, and that such changes would facilitate a smooth re-incorporation of Hong Kong into mainland China.

The book, as its title suggests, discusses developments in and around the GBA. However, as stressed by the author in the ‘Preface’, it does not offer much of a discussion on Macau, choosing to see the former Portuguese colony as a relatively unimportant player in the region, and focusing instead on the developments in Guangdong and Hong Kong, more specifically, the relationship of mutual dependence and competition, and the developmental models of Hong Kong and Shenzhen. This reflects

the author's experiences as a former senior party-state leader in Shenzhen but, likely, does also reflect a feeling in the leadership that Macau is a weak player in the overall GBA project. In terms of its economic and political influence, it simply cannot compete with Shenzhen or Hong Kong.

The book thus raises important questions of how best to build systems in the GBA under the framework of 'One Country, Two Systems'; what are the directions, functions, and future prospects of the GBA; and how best to bring the GBA's perceived advantages into full play and to develop it into a world-class city cluster or conurbation, while at the same time bringing Hong Kong and the mainland closer in a manner acceptable politically on both sides of the current border. These are very broad ambitions and issues, and in my view, the author addresses them primarily in an ideological manner rather than in a practical way. Nevertheless, at this stage of development, the author's proposals are still valuable—at least in the sense that he is encouraging a bold vision for the future. We may question why the author did not make such noises while he was still in office, or, if in fact he did, why the reform proposals failed to proceed.¹ But it is important nonetheless that such ideas are being made public now, despite strict control of the press in China today.

[D] THE BOOK

Zhang's book comprises six chapters. The first chapter provides background and overall policy design, and also offers suggestions for reform in the GBA. It introduces, in particular, the development of Hong Kong and Hong Kong's successful experiences as a free port, Hong Kong's relationship with Shenzhen, and how Shenzhen borrowed successfully Hong Kong's approach to economic growth and development for its own advancement. As indicated above, the author has stressed the value of what he sees as Hong Kong's unique experience. To justify this stress, he devotes a section to explaining why Hong Kong is not best seen as 'capitalist' in strict terms, or at least is not a capitalist system that is simply a product of the 'West'. Hong Kong's policies have real value in Zhang's view as a template for GBA growth and development, but up to now they have not been fully understood, especially on the mainland, because of differences in ideology between Hong Kong and the mainland. He also looks to the EU, for inspiration for reforms (pp 30 and 34).

¹ As he explained in an interview with *Southern Weekly*, one aborted reform was the reform of household registration in Shenzhen, which he saw as a pressing need, as only 20% of Shenzhen residents hold Shenzhen household registration and enjoy rights such as electoral rights. He hoped that his proposed reforms could raise the percentage of local household registration to 50% of the overall population in Shenzhen (Luo 2016).

Zhang suggests two possible approaches for the integrated development of the GBA. The first is to keep the current policies of sending ‘gifts’ to Hong Kong—that is, offering Hong Kong special policies and arrangements such as signing more mainland and Hong Kong Closer Economic Partnership Arrangement types of agreement and establishing collaboration zones (*hezuoqu*), such as Qianhai in Shenzhen, so as to enhance the prospects of Hong Kong companies in the mainland market. The second approach is to use Hong Kong and Macau as examples for the GBA from which mainland players might learn, and to better link up China’s economic reforms with international practices and standards (pp 31-32). Zhang argues that the danger in the first approach is that Hong Kong will gradually become ‘mainlandized’ (*neidihua*), will rely more on the mainland and will gradually lose its global advantages and connectivity, thereby limiting the effectiveness of the GBA. What is needed instead is to strengthen market mechanisms and weaken the government’s administrative measures in the GBA’s developmental process (p 49), while ensuring that cities within the GBA not only collaborate but also become competitive (p 52).

Chapter Two argues the case for making the GBA the largest and most powerful free-trade region in China. Zhang sees Hong Kong’s free-trade policies as key in making Hong Kong successful (p 57). These policies are what have transformed Hong Kong from a small fishing village into one of the world’s most important international trade and shipping centres, while also creating a successful re-export and services-orientated economy. He argues that once the GBA has become fully developed, it will become the largest and most important duty-free area within China (p 63), and that there should therefore be no differing tax zones within the GBA. Further opening-up and pursuit of free-market policies are what the GBA needs for its development, and borrowing the mechanisms, institutions and processes—especially from Hong Kong or the EU—is to be welcomed. Another important point the author makes in this chapter is the need to sidestep ‘socialist’ and ‘capitalist’ ideological divisions. Instead, in the spirit of coordination and competition, the GBA should develop and share one telecommunications and internet network, breaking down communication and other information ‘walls’ between GBA cities. It should also avoid creating different tax zones and, instead, create a ‘second-tier custom’ (*erxian haiguan*) beyond the boundaries of the (minimal) ‘first-tier’ customs created between Guangdong’s large cities and Hong Kong and Macau (p 81). The reforms, Zhang hopes, can in turn put pressure on the whole country to deepen its market reforms.

Chapter Three explores financial reforms in the GBA. Again, free-market policies and, especially, free movement of capital are needed. Zhang here seems to be trying to dampen the worries of conservative mainland leaders—that a further opening-up of the mainland’s financial system, a free movement of foreign currency, and an opening of the door for foreign capital to invest more extensively in China will together expose weaknesses in mainland China’s financial system. Without such change, however, the mainland system will remain relatively parochial, holding back economic development, corporate competitiveness and the growth of financial sophistication. In many ways, Zhang’s proposals reflect neo-liberalist thinking, assuming that a free market is key for China’s economic development, and that the issue is how best to integrate such an approach into China’s framework of a socialist state intent on creating a ‘socialist market economy’. What China needs, Zhang argues, is less regulation and more reliance on the market, and to free itself from government plans, removing the legacies of China’s old system of planned economy and releasing the true growth power of China’s market.

The detailed analysis offered in the first three chapters is not matched in Chapters Four and Five on social management and law respectively. Reform suggestions here are mainly about learning from Hong Kong’s laws and administration of justice and also the more democratic systems found in Hong Kong. Clearly, there are deep political sensitivities for the author to propose bold reforms in these areas. Even though he has stepped down from office, he still feels it prudent not to elaborate in detail on these subjects. Nevertheless, his proposals in Chapter Four are quite radical and include abolition of household registration in the GBA cities situated in Guangdong, delivery of Hong Kong-type free medical services, introducing a Hong Kong style pension insurance system, promoting a Hong Kong style social community and social services system, and so on. Similarly, in Chapter Five, his discussion on ensuring citizens’ human rights and freedom, creating a rule of law environment, and legal mechanisms for protecting private property, and so on, point us in certain directions, but no concrete plans are provided in the book. These two chapters in their present form do not contribute a great deal to the study of the future of the GBA and seem very much like ‘castles in the air’.

Yet, these are areas which will be extremely important in the development of the GBA. The idea of extending Hong Kong law to many aspects of GBA governance and regulation is indeed politically very sensitive, but it also builds on China’s approach to legal modernization which has long been very dependent on processes of legal transplantation. So Zhang’s proposals, while quite thin at the moment, do have some

experience to build on. The transplantation of foreign law has been a fundamental feature of the modernizing reform of Chinese law since at least the last decade of the Qing Dynasty, albeit often with functional goals in mind rather than for its own sake or with ideological prerequisites for transplantation. The late Qing reforms introduced at the beginning of the twentieth century were in part inspired by Wu Tingfang, who qualified as (the first Chinese) barrister when called at Lincoln's Inn to the Bar in 1876, and who used several decades of public service and legal practice experience in Hong Kong to promote legal reforms in China with Common Law models in mind. Subsequently, under the Nationalist government, this transplantation of foreign law continued, albeit more derivative of German and Japanese law. The socialist legal system that emerged in parts of China before 1949 also relied heavily on foreign experience, but primarily that of the Soviet Union whose ideas and institutions of socialist legality were significantly modified to suit China's local conditions. Since 1992, when the CCP adopted the policy of developing a 'socialist market economy', foreign models and localizing China's international legal obligations are continuing processes. While the application of Hong Kong's common-law based system in the GBA would, of course, be politically very sensitive, it would not be at all novel given China's modern history of legal transplantation.²

The last chapter reflects on the issues raised and proposals made in the first chapter and further justifies the approaches the author suggest for learning from Hong Kong and the 'West' in order to develop the GBA. The author stresses the potential of the mutual dependency of Hong Kong and mainland China. For example, Hong Kong has excellent, world-ranking universities, while Shenzhen has very sophisticated high-tech companies, so that Shenzhen can and should work with Hong Kong in the process of transferring high-tech knowledge into commercial practice. At present, Zhang's suggested reforms remain largely theoretical, and the book itself does not offer sufficient detail on how best to execute Zhang's proposals. For example, the proposal for setting up 'second-tier' customs by the borders of inner cities and making the GBA a special trade zone, or indeed, another special administrative area like the Hong Kong Special Administrative Region, needs very detailed implementation planning. And what might work well for the GBA, might also be characterized and criticized on the mainland as separating the GBA from other parts of China. How the GBA's borders will be set and in what ways the inland cities will relate to the GBA are practical concerns that may give rise to such worries.

² For a specific example of such transplantation, see Zhou (2011).

[E] REFLECTIONS

There seems little doubt that, in Zhang's thinking, the ways in which Shenzhen's economic reform programme has emulated Hong Kong's experience has been a profound influence. And Shenzhen has effectively relied on Hong Kong in an economic arrangement that has been characterized as one of 'front shop, back factory' (*qiandian houchang*).³ However, in the current social and political situations in mainland China and Hong Kong, how might reforms encouraging more democratic processes and rule of law values be promoted? Innovations for social and legal development are important for the GBA. The current realities, however, are against such a direction. The control of borders has been getting stronger, communication barriers have been put higher, and for criminal justice there have been continuous protests in Hong Kong for months. Trust between the mainland and Hong Kong is currently very fragile.

Zhang has visualized three possible endings of 'One Country, Two Systems' after the initial guaranteed period which comes to a close in 2047 (pp 228-31). The first scenario is that 'One Country, Two Systems' will continue, and the flow of capital, goods and information will continue to be limited. The second scenario is that the development of the GBA will lead to a Hong-Kong and Macau-influenced system of 'One Country, One System', in which the GBA will become truly international and a genuine free-trade zone. The third scenario is that the GBA will lead to a mainland-dominated type of 'One Country, One System', in which the 'mainland China model' is paramount. Some observers are encouraged to support the third model by the burgeoning economic growth of Guangzhou and Shenzhen. Throughout the book, the author clearly hopes for a realization of the second scenario, which is the best in his view for encouraging continuous reform and opening-up for China as a whole. And publication of the book suggests that within China there are many like-minded people willing to work towards these ends.

³ 'Front shop, back factory' is a term used to describe economic cooperation between Hong Kong and the Pearl River Delta since the 1970s. However, as Guangdong's economy grows, the relationship between the two regions is changing. Li describes the relationship as it first emerged as follows: 'Hong Kong in a sense acted as the front shop (*qiandian*), handling not only marketing and sales but also fund raising and making other major financial decisions, whereas localities in the Delta, mainly Bao'an [in Shenzhen] and Dongguan, served as the back factory (*houchang*) undertaking actual production.' (Li 2009: 188)

References

- Li Si-ming (2009) ‘The Pearl River Delta: The Fifth Asia Little Dragon?’ in Koon-kwai Wong (ed) *Hong Kong, Macau and the Pearl River Delta: A Geographical Survey*, Hong Kong: Hong Kong Educational Publishing Co 178-209.
- Luo Huanhuan (2016) “‘Laojiang’ Zhang Siping “Wanyanshu” jianyan Shenzhen gaige’ (“Veteran” Zhang Siping’s “Ten Thousand Words” advice on Shenzhen’s reforms’) reprinted from *Nanfang Zhoumo* (*Southern Weekly*).
- Zhang Siping (2019) *Yue-gang-ao dawanqu: zhongguo gaige kaifang de xinpianzhang* (*The Guangdong–Hong Kong–Macau Greater Bay Area: A New Chapter in China’s Reform and Opening-Up*) Beijing: Zhongxin Chuban She.
- Zhou Ling (2011) ‘The Independent Director System and its Legal Transplant into China’ 6 *Journal of Comparative Law* 262-91.

**BIBLIOGRAPHY:
THE PUBLISHED WORK OF
PROFESSOR ANTHONY DICKS**

CHAO XI

CUHK Faculty Of Law

MICHAEL PALMER

IALS & SOAS (University of London; CUHK (HKIAPS))

This is a provisional list of the published works of Professor Anthony Dicks SC (SOAS School of Law and Essex Court Chambers), whose *Obituary* was published in *Amicus Curiae* in the Autumn 2019 issue. For many years, Professor Dicks was a leading expert on issues of Chinese law, but his writings were sometimes published in relatively inaccessible outlets, and we feel that this compilation may assist those who wish to read more of the work of Professor Dicks on Chinese law. We welcome any information you might have on publications or materials not listed below: contact chaoxi@cuhk.edu.hk and michael.palmer@sas.ac.uk.

Our list is republished with minor style amendments from the *China Quarterly*, and we thank the editor and publishers of that journal for their kind permission to republish.

**[A] REPORTS TO THE INSTITUTE OF CURRENT
WORLD AFFAIRS (1963-1968)**

Available on the Institute of Current World Affairs website.

- ◇ Chinese Law: An Inheritance?
- ◇ Exploratory Talks with Mr Lu
- ◇ Sinologues in Turin
- ◇ The China Trade Revisited
- ◇ Chinese Attitudes to International Law
- ◇ Staying in Hong Kong
- ◇ A New Leaf
- ◇ *Sun v Wang*: An Undivorce
- ◇ May Day in Peking
- ◇ A Discourse on Arbitration
- ◇ The Needle's Eye

- ◇ Sick Men of China
- ◇ Raising the Stakes
- ◇ Some Chinese Entertainments
- ◇ Hong Kong and the Cultural Revolution
- ◇ A Dream of Eastern Wisdom
- ◇ Macao: Legal Fiction
- ◇ Macao: Gunboat Diplomacy
- ◇ The Hong Kong Situation I: Impasse
- ◇ The Pueblo: A Legal Speculation
- ◇ The Non-agreement in Action: Sino-Japanese Trade

[B] 1981-1982: A LEGAL OPINION SERIES (CHINA TRADE REPORT)

Note: Entries in this section were all published under the title ‘A Legal Opinion’ in the *China Trade Reporter* during the early years of China’s economic reforms and re-embrace of more conventional ideas of socialist legality. We point (sometimes very approximately) to the main subject matter of each item by suggesting a short title, which is placed in square brackets.

Dicks, Anthony (1981) ‘A Legal Opinion’ [Need for Codification in the Economic and Civil Fields] XIX (April) *China Trade Report* 11.

Dicks, Anthony (1981) ‘A Legal Opinion’ [Expansion of Legal Publishing] XIX (May) *China Trade Report* 13.

Dicks, Anthony (1981) ‘A Legal Opinion’ [British Claims for Post-1949 Property Loss] XIX (June) *China Trade Report* 11.

Dicks, Anthony (1981) ‘A Legal Opinion’ [Enterprise Registration System] XIX (July) *China Trade Report* 11.

Dicks, Anthony (1981) ‘A Legal Opinion’ [Tensions between Economic Planning and the Autonomy of Enterprises] XIX (August) *China Trade Report* 11.

Dicks, Anthony (1981) ‘A Legal Opinion’ [Contract Supervision] XIX (September) *China Trade Report* 11.

Dicks, Anthony (1981) ‘A Legal Opinion’ [Professional Legal Exchanges; Questions of Sovereign Immunity] XIX (October) *China Trade Report* 11.

Dicks, Anthony (1981) ‘A Legal Opinion’ [Distinguishing between Government and Business] XIX (November) *China Trade Report* 11.

Dicks, Anthony (1981) ‘A Legal Opinion’ [Dispute Settlement] XIX (December) *China Trade Report* 11.

- Dicks, Anthony (1982) 'A Legal Opinion' [New Legislation] XX (February) *China Trade Report* 11.
- Dicks, Anthony (1982) 'A Legal Opinion' [Economic Contract Law] XX (March) *China Trade Report* 11.
- Dicks, Anthony (1982) 'A Legal Opinion' [Economic Contracts and Disputes] XX (April) *China Trade Report* 11.
- Dicks, Anthony (1982) 'A Legal Opinion' [Civil Procedure Law and Other Developments] XX (May) *China Trade Report* 11
- Dicks, Anthony (1982) 'A Legal Opinion' [Draft Constitution] XX (June) *China Trade Report* 11.
- Dicks, Anthony (1982) 'A Legal Opinion' [Unpublished Legislation] XX (July) *China Trade Report* 11.
- Dicks, Anthony (1982) 'A Legal Opinion' [Role of Law in the Chinese Economy] XX (August) *China Trade Report* 13.
- Dicks, Anthony (1982) 'A Legal Opinion' [Enterprise Regulations] XX (September) *China Trade Report* 13.
- Dicks, Anthony (1982) 'A Legal Opinion' [Chines Communist Party Self-regulation] XX (October) *China Trade Report* 13.
- Dicks, Anthony (1982) 'A Legal Opinion' [Regulating Marine Pollution] XX (November) *China Trade Report* 13.
- Dicks, Anthony (1982) 'A Legal Opinion' [Regulating Banking] XX (December) *China Trade Report* 13.
- Dicks, Anthony (1983) XXI (January) 'A Legal Opinion' [The Constitution 1982] *China Trade Report* 13.
- Dicks, Anthony (1983) 'A Legal Opinion' [Banking Innovations] XXI (February) *China Trade Report* 13.
- Dicks, Anthony (1983) 'A Legal Opinion' [Legal Development and the Provisions of an International Convention] XXI (March) *China Trade Report* 13.
- Dicks, Anthony (1983) 'A Legal Opinion' [Economic Legislation] XXI (April) *China Trade Report* 13.
- Dicks, Anthony (1983) 'A Legal Opinion' [People's Insurance Company of China] XXI (May) *China Trade Report* 11.
- Dicks, Anthony (1983) 'A Legal Opinion' [State Immunity] XXI (June) *China Trade Report* 13.
- Dicks, Anthony (1983) 'A Legal Opinion' [Regulating Enterprises] XXI (August) *China Trade Report* 13.

- Dicks, Anthony (1983) 'A Legal Opinion' [Collectively-owned Enterprises XXI (September) *China Trade Report* 13.
- Dicks, Anthony (1983) 'A Legal Opinion' [Maritime Safety] XXI (October) *China Trade Report* 13.
- Dicks, Anthony (1983) 'A Legal Opinion' [Equity Joint Ventures] XXI (November) *China Trade Report* 13.
- Dicks, Anthony (1983) 'A Legal Opinion' [Criminal Justice] XXI (December) *China Trade Report* 13.
- Dicks, Anthony (1984) 'A Legal Opinion' [Practical Experience in Legal Development] XXII (January) *China Trade Report* 13.
- Dicks, Anthony (1984) 'A Legal Opinion' [Legal Services] XXII (February) *China Trade Report* 13.
- Dicks, Anthony (1984) 'A Legal Opinion' [Particularized Legislation] XXII (March) *China Trade Report* 13.

[C] JOURNAL ARTICLES

- Dicks, Anthony (1974) 'A New Model for Chinese Legislation: The 1972 Shipping Regulations' 57 (January/March) *China Quarterly* 63-83.
- Dicks, Anthony (1974) 'The Position of Hong Kong and Macao in Recent Chinese Legislation' 4(2) *Hong Kong Law Journal* 151-61.
- Dicks, Anthony (1983) 'Treaty, Grant, Usage or Sufferance—Some Legal Aspects of the Status of Hong Kong' *Hong Kong Briefing* 95 (September) *China Quarterly* 427-55.
- Dicks, Anthony (1989) 'The Chinese Legal System: Reforms in the Balance The People's Republic of China After 40 Years' 119 (September) *China Quarterly* 540-76.
- Dicks, Anthony R (1995) 'Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform' *China's Legal Reforms* 141 (March) *China Quarterly* 82-109 (Special Issue: Guest Editor, Stanley Lubman) republished as: Anthony R Dicks, (1996) 'Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform' in Stanley Lubman (ed) *China's Legal Reforms* Oxford: Clarendon Paperbacks (Oxford University Press) 82-109.

[D] BOOK CHAPTERS

- Dicks, Anthony (1969) 'The Law and Practice of Hong Kong and Foreign Investment' in Vincent Shepherd (ed) *Roundtable Conference on International Law Problems in Asia Hong Kong*: Hong Kong University Press 153-64.
- Dicks, Anthony (1974) 'The People's Republic of China' in Robert Starr (ed) *East-West Business Transactions* New York: Praeger Publishers 391-446.
- Dicks, Anthony (1977) 'Some Aspects of Maritime Law and Practice' in Victor H Li (ed) *Law and Politics in China's Foreign Trade* Seattle and London: University of Washington Press 249-69.
- Dicks, A R (1983) 'Some Problems of Maritime Law,' in J A Cohen (ed) *Legal Aspects of Doing Business in China* New York: Practising Law Institute 331-71.
- Dicks, Anthony R (1984) 'Macao: Legal Fiction and Gunboat Diplomacy' in Göran Aijmer (ed) *Leadership on the China Coast* London: Curzon Press 90-128.
- Dicks, Anthony (1990) 'New Lamps for Old: The Evolving Legal Position of Islam in China, with Special Reference to Family Law' in Chibli Mallat and Jane Connors (eds) *Islamic Family Law* London: Graham & Trotman.
- Dicks, Anthony (1992) 'Negotiable and Analogous Instruments and Other Documents Embodying Payment Obligations' Part XIV/Appendix to David M Edwards CMG, JP (Chair) *Report of the Working Party on Legal and Procedural Arrangements between Hong Kong and China in Civil and Commercial Matters*, Hong Kong, 13 October.
- Dicks, Anthony R (2000) 'The Law-making Functions of the Chinese Judiciary: Filling Holes in the Civil Law,' in Ian Edge (ed) *Comparative Law in Global Perspective*, Ardsley NY: Transnational Publishers.
- Dicks, Anthony (2012) 'The Ownership of Buddhist Temples and the Civil Status of the Clergy in China' in Clara Bulfoni (ed) *Tradizioni Religiose e Trasformazioni dell' Asia Contemporanea* Milan and Rome: Ambrosiana and Bulzoni.
- Dicks, Anthony (2013) 'Introduction' in *La Famigli Nelle Culture e Nella Societa Dell 'Asia (Family in Asian Cultures and Societies)* Milan and Rome: Veneranda Biblioteca Ambrosiana & Bulzoni Editore.
- Dicks, Anthony (2014) 'Buddhism and Law in China: Qing Dynasty to the Present' in Rebecca Redwood French & Mark A Nathan (eds) *Buddhism and Law: An Introduction* New York: Cambridge University Press, chapter 13, 234-53

[E] BOOK REVIEWS

- (1966) 'Book Review' 15 (April) *International and Comparative Law Quarterly* 615-16: review of Dan Fenno Henderson (1965) *Conciliation and Japanese Law: Tokugawa and Modern* Seattle: University of Washington Press.
- (1969) 'Book Review' 32(3) *Bulletin of the School of Oriental and African Studies* 642-43: review of Derk Bodde and Clarence Morris (1967) *Law in Imperial China, Exemplified by 190 Ch'ing Dynasty Cases (translated from the Hsing-an hui-lan) with Historical, Social, and Juridical Commentaries* Cambridge MA: Harvard University Press.
- (1970) 'Book Review' 28(2) (November) *Cambridge Law Journal* 339-40: review of Derk Bodde and Clarence Morris (1967) *Law in Imperial China, Exemplified by 190 Ch'ing Dynasty Cases (translated from the Hsing-an hui-lan) with Historical, Social, and Juridical Commentaries* Cambridge MA: Harvard University Press.
- (1971) 'Book Review' 20(2) (April) *International and Comparative Law Quarterly* 390-91: review of Shao-Chuan Leng (1967) *Justice in Communist China: A Survey of the Judicial System of the Chinese People's Republic* Dobbs Ferry, New York: Oceana Publications.
- (1972) 'Book Review' 49 (January) *China Quarterly* 160-62: review of Jerome Alan Cohen (ed) (1970) *Contemporary Chinese Law: Research Problems and Perspectives* Cambridge MA: Harvard University Press.
- (1973) 'Book Review' 55 (September) *China Quarterly* 572-75: review of M J Meijer (1972) *Marriage Law and Policy in the Chinese People's Republic* Hong Kong and London: Hong Kong University Press and Oxford University Press.
- (1974) 'Book Review' 37(1) (February) *Bulletin of the School of Oriental and African Studies* 265-66: review of M B Hooker (1972) *Adat laws in Modern Malaya: Land Tenure, Traditional Government and Religion* Kuala Lumpur: Oxford University Press.
- (1974) 'Book Review' 60 (December) *China Quarterly* 795-99: review of Jerome Alan Cohen (ed) (1972) *China's Practice of International Law: Some Case Studies* Cambridge MA and London: Harvard University Press.
- (1974) 'Book Review' 60 (December) *China Quarterly* 795-99: review of James Chieh Hsiung (1972) *Law and Policy in China's Foreign Relations: A Study of Attitudes and Practice* New York and London: Columbia University Press.
- (1974) 'Book Review' 60 (December) *China Quarterly* 795-99: review of Shao-Chuan Leng and Hungdah Chiu (eds) (1972) *Law in Chinese Foreign Policy: Communist China and Selected Problems of International Law* Dobbs Ferry NY: Oceana Publications.

- (1975) 'Book Review' 61 (March) *China Quarterly* 168-69: review of William W Whitson (ed) (1974) *Doing Business with China: American Trade Opportunities in the 1970s* New York: Praeger.
- (1993) 'Book Review' 56(1) (February) *Bulletin of the School of Oriental and African Studies* 180-81: review of Ming K Chan and David J Clark (eds) (1991) *The Hong Kong Basic Law: Blueprint for 'Stability and Prosperity' under Chinese Sovereignty* Armonk NY and London: ME Sharpe.
- (1995) 'Book Review' 58(2) (June) *Bulletin of the School of Oriental and African Studies* 415: review of Thomas B Stephens (1992) *Order and Discipline in China: the Shanghai Mixed Court 1911-27* Seattle and London: University of Washington Press.
- (2014) 'Book Review' 54 *Journal of the Royal Asiatic Society Hong Kong Branch* 231-34; review of Patrick H Hase (2013) *Custom, Land and Livelihood in Rural South China: The Traditional Land Law of Hong Kong's New Territories, 1750-1950* Hong Kong: Hong Kong University Press.

[F] NEWS ARTICLES

- 'Protecting the Individual' *South China Morning Post* 25 April 1986.
- 'Civil Law in China is Still a Sensitive Issue' *South China Morning Post* 16 May 1986.
- 'Economic Law and the State-run Society' *South China Morning Post* 23 May 1986.

[G] UNPUBLISHED MANUSCRIPTS

- Dicks, A R (1973) 'Recent Developments in the Contract for Carriage of Goods with Special Reference to the Domestic Shipping Industry' Paper Contributed to Conference on Civil Law and Administration in the Chinese Economy, School of Law, University of California, Berkeley, 27-29 August 1973, 9-14.
- Palmer, Michael, A R Dicks and Y Chen (1992) *Modern Chinese Law Materials: Legislation and Related Materials vols 1-9* London: SOAS Law Department.
- Dicks, Anthony (1992) 'Negotiable and Analogous Instruments and Other Documents Embodying Payment Obligations' Part XIV/Appendix to David M Edwards CMG, JP (Chair) *Report of the Working Party on Legal and Procedural Arrangements between Hong Kong and China in Civil and Commercial Matters*, Hong Kong, 13 October 1992

NEWS AND EVENTS

COMPILED BY ELIZA BOUDIER

David Sugarman awarded honorary ASLH fellowship

Professor David Sugarman has been awarded an Honorary Fellowship of the American Society for Legal History (ASLH) for his 'scholarly distinction and leadership in the field'. The award was presented at the annual conference of the ASLH in Boston, USA, on 23 November 2019. In the words of the Society's website:

Election as an Honorary Fellow of the American Society for Legal History is the highest honor the Society can confer. It recognizes distinguished historians whose scholarship has shaped the broad discipline of legal history and influenced the work of others. Honorary Fellows are the scholars we admire, whom we aspire to emulate, and on whose shoulders we stand.

David is the first legal historian of modern England (as distinct from medieval or early modern England) to be so recognized. The award recognises his pioneering role in opening-up and developing an interdisciplinary legal history of modern England that addresses



the interplay between law, politics, economics, society and culture (so-called modern socio-legal history), and his dedication to mentoring and supporting other scholars.

Professor Sarah Barringer Gordon, President of the ASLH, said: 'Election as an Honorary Fellow is the highest recognition we confer on a fellow legal historian, and this honor recognizes your scholarly distinction and leadership in the field.'

David (pictured above delivering his acceptance speech) is Professor Emeritus of Law at Lancaster University, a Senior Associate Research Fellow at the Institute of Advanced Legal Studies, University of London, a Senior Associate of the Centre for Socio-Legal Studies, University of Oxford, and a Fellow of the Royal History Society.

IALS Transformation Project

All three floors of the IALS Library have now been refurbished with the entrance/exit on the second floor and the internal stairs open between the second, third and fourth floors.

The second floor has been completely redesigned with new lighting, services, carpet, toilets etc. Both the staff and student sides of the floor have all new desks and chairs. There are seven private study carrels and 12 desks with computers. The floor also in-

corporates group study meeting rooms which are bookable by users with their library cards, one-to-one assistance rooms, a new training room with 20 computer positions and a range of soft seating and 'huddle spaces'. A new self-service laptop loan facility is also planned.

The original revolving door has been replaced with two sets of curved sliding doors. This retains the circular profile while enabling wheelchair access in conjunction with the external lift which will be installed in March.

OBserving Law

OBserving Law—the IALS Open Book Service for Law—is an open access book publishing initiative developed with the School of Advanced Study and University of London Press.

The University of London Press builds on a century of publishing tradition by disseminating distinctive scholarship at the forefront of the humanities. Based at the School of Advanced Study, the press seeks to facilitate collaborative, inclusive, open access, scholar-led interchange within and beyond the academy.

Our open access books are free to read online and download in pdf format for anyone in the world to use in the [Humanities Digital Library](#).

- ◇ The aim of the IALS Open Book Service for Law is to provide a showcase for the vibrant state of legal scholarship, by publishing the best monographic works in law and making them free to read anywhere.
- ◇ The imprint embraces the full scope of legal scholarship, from doctrinal analysis to theoretical exploration and empirical study, and also welcomes interdisciplinary approaches.
- ◇ The aim is to publish innovative and intellectually stimulating fully peer-reviewed work which will reach a worldwide audience, widen knowledge and understanding, and play a major role in policy, practice and legal education.
- ◇ We welcome proposals from individual authors and

editors from across the academic and legal research community—including within and external to the University of London, and from learned societies and organizations.

- ◇ Our business model is designed to meet the requirements of the UK

Research Excellence Framework (REF) 2027 policy on long-form scholarly work and offer authors a full range of quality assured open access and print-on-demand options.

Visit the [OBserving Law webpages](#) for details.

IALS forthcoming events

A judicial conversation: portraying the Presidents of the UK Supreme Court—in conversation with the photographer Paul Stuart

Date: 23 April 2020

Venue: IALS, 17 Russell Square, London WC1B 5DR

To celebrate the tenth Anniversary of the UK Supreme Court, the Supreme Court Arts Trust commissioned photographer Paul Stuart to produce a set of portraits of the first three Presidents of the court, which were unveiled to widespread acclaim in the summer of 2019. They now hang in pride of place over the entrance to Court 1. This commission is a new and exciting departure. While there is a long tradition of making portraits of senior judges, it is rare for portraits to be commissioned for display in the court where the judge has served. The new portraits memorialize the important contribution that each officeholder has made.

Producing a new portrait of a judge is rarely a straightforward commission; judges are particularly challenging subjects. The conversation with Paul Stuart provides an exceptional opportunity to explore what these challenges are and to delve deeper into how one experienced photographer rose to meet them.

Paul Stuart is a celebrated photojournalist and portrait photographer. His work has been published in *GQ*, *The Guardian*, *The Sunday Times* and many more. His portfolio includes Justin Timberlake, Silvio Berlusconi, Simon Pegg, Derren Brown and Julie Walters. His work is in various major collections including the National Portrait Gallery.

Paul will be in conversation with Professor Leslie J Moran. Leslie is Professor of Law and a visiting researcher at Birkbeck College and a Fellow of IALS. He has an international reputation for his work on judges and visual culture.

The Bribery Act: Ten Years On

Date: 28 May 2020

Venue: IALS, 17 Russell Square, London WC1B 5DR

The Bribery Act received royal assent in April 2010. This expansive piece of legislation was introduced following recognition that the old law governing bribery was old and lacked clarity, but also in the wake of significant controversies (including the ‘cash for questions’ scandal and the dropping of the BAE Systems prosecution purportedly on the grounds of national security). In March 2019, the House of Lords Select Committee on the Bribery Act described the Act as ‘an excellent piece of legislation which creates offences which are clear and all-encompassing’. It continued by saying: ‘the Act is an example to other countries, especially developing countries, of what is needed to deter bribery’. Notwithstanding such positive endorsements, however, there remain concerns over whether the Act is being ‘adequately enforced’ and that collection of data is inconsistent across police forces; until 2019, there was no publicly available information on numbers of prosecutions/convictions; the number of prosecutions appears to be low; there are ongoing issues with both under-resourcing and delays of enforcement agencies (particularly where large-scale and/or complex cases are being investigated); there

remain issues with a lack of awareness of the Act on the part of police officials; and inter-agency cooperation is weak (House of Lords Select Committee 2019).

Ten years on from the Bribery Act receiving royal assent, this two-day symposium will bring together leading experts, from practice, policy and academia, to discuss and analyse the legislation and its operation thus far.

How to get a PhD in Law

Date: 11 March 2020

Venue: IALS, 17 Russell Square, London WC1B 5DR

The morning includes sessions on: the PhD journey; supervision; research ethics and preparing yourself for upgrade and vivas. In the afternoon, there is a panel discussion followed by a presentation by Hester Swift on the foreign, international and comparative law research collections at the IALS library. Speakers include Professor Sally Wheeler, Professor Carl Stychin, Professor Avrom Sherr and Dr Constantin Stefanou.

Publishing Masterclass

Date: 19 March 2020

Venue: IALS, 17 Russell Square, London WC1B 5DR

This session will focus on the process of publishing your research, for example, publishing your PhD as a book (and getting a book contract) and as academic

articles. The session will be led by Alison Kirk (Routledge) and Professor Carl Stychin (Editor, *Social and Legal Studies*).

Well-being and Exam Preparation

Date: 23 April 2020

Venue: IALS, 17 Russell Square, London WC1B 5DR

This session will discuss self-care in postgraduate study and will be of relevance to PhD and Masters students. This session will be delivered by members of the Wellbeing Team and by Dr Colin King (Director of Research, IALS)

Careers after the PhD

Date: 21 May 2020

Venue: IALS, 17 Russell Square, London WC1B 5DR

This session will involve a panel of guest discussants to talk about various pathways after the PhD—both in academia and elsewhere. The panel comprises Calvin Jackson (barrister at Charter Chambers), Dr Alan Brener (academic at UCL) and Dr Monica Sah (solicitor at Clifford Chance)

Contact: Benedict Turner
benedict.turner@postgrad.sas.ac.uk

Profiles of Contributors to Articles and Notes

MAHMOOD BAGHERI

Mahmood Bagheri is the Course Director of the LLM in International Corporate Governance, Financial Regulation and Economic Law at the Institute of Advanced Legal Studies, School of Advanced Studies, University of London. Email: mahmood.bagheri@sas.ac.uk.

AONGHUS CHEEVERS

Aonghus Cheevers is an Assistant Professor of Private Law in the School of Law and Government at Dublin City University (DCU). Prior to joining DCU, he worked as a postdoctoral researcher on an international project co-funded by the Economic and Social Research Council and the University of Leicester, examining commercial arbitration in Europe. He has lectured on various private and public law subjects at Technology University Dublin and the Sutherland School of Law at University College Dublin (UCD). Aonghus was awarded his LLB by the University of Southampton, LLM by Duke University School of Law, and PhD by UCD. He has also been qualified as a New York Attorney for over nine years. His research examines the manner in which Alternative Dispute Resolution (ADR) processes such as mediation and arbitration

intersect with the legal system. In particular, the research focuses on how ADR process users experience ADR procedures.

DORAN DOEH

Doran Doeh has over 40 years of experience as an English-qualified legal practitioner based in London (UK) and Moscow (Russia). He holds degrees in History, PPE and Law from (respectively) Dartmouth College, University of Oxford and University of London. He originally qualified as a barrister (of Lincoln's Inn) in 1973. After completion of pupillage and a short period as a tenant in chambers, he moved into the North Sea oil and gas industry from late 1975 and served as an in-house legal adviser to Burmah, BNOB and Britoil (one employment, subject to take-over and privatization). In 1986, he moved to Allen & Overy as their oil and gas specialist where he focused particularly on oil and gas mergers and acquisitions. While at Allen & Overy, he also became a member of their financial services advisory team and, after the Berlin Wall came down in 1989, joined their Central and Eastern Europe practice. He was based in their Moscow office during 1995-1998 and returned to London after the 1998 financial collapse in Russia. In 1999, he

moved to what was then Denton Hall and is now Dentons. He took over as head of their Moscow office at the end of 2001 and remained Moscow-based until March 2019. In April 2019, he reverted to his original profession as a barrister (having practised as a solicitor whilst engaged by Allen & Overy and Dentons) and returned to London. He joined 36 Stone chambers where he now practises as an arbitrator. He is a Fellow of the Chartered Institute of Arbitrators. Email: ddoeh@36stone.co.uk.

ANNA DZIEDZIC

Anna Dziedzic is a Global Academic Fellow at the Faculty of Law, University of Hong Kong, and co-convenor of the Constitution Transformation Network at Melbourne Law School. She researches in the field of comparative constitutional law with a particular focus on the constitutional systems of the Pacific. Her publications include analyses of constitutional law and constitution-making in Asia and the Pacific, as well as comparative work on aspects of federalism, courts and parliaments. She holds a PhD from Melbourne Law School, an MA in Human Rights from University College London and a BA/LLB from the Australian National University.

EJIKE EKWUEME

Ejike Ekwueme: PhD, LLM University of London, LLM London Metropolitan University, Member Nigeria Bar BL, BA (Hons), LLB

(Hons) University of Calabar Nigeria, Member Chartered Institute of Arbitrators MCI Arb UK, Non-practising Solicitor Supreme Court of England and Wales. His research interests are in financial crime and corporate governance. Email: eejuike@hotmail.com or ejike.ekwueme@postgrad.sas.ac.uk.

AMY KELLAM

Amy Kellam is an Associate Research Fellow at the Institute of Advanced Legal Studies. She holds a PhD from SOAS, University of London, and went on to become a Visiting Fellow at the University of Hong Kong. Her early published research focused upon the history of law and diplomacy between Britain, China and Tibet. In particular, it examined the evolution of legal mechanisms governing religious and minority rights in China and placed these mechanisms within the context of the transition from colonialism to post-colonialism in international law. This early research developed into a wider interest in socio-legal issues in comparative perspective. She is currently engaged in a research project on legal development and good governance. Email: amy.kellam@sas.ac.uk.

MICHAEL PALMER

Michael Palmer is editor of *Amicus Curiae*. Email: michael.palmer@sas.ac.uk.

MICHAEL REYNOLDS

Michael Reynolds is a Senior Research Fellow at the London School of Economics completing an historical study of international dispute resolution between sovereign states. He is also the Module Director of International Dispute Resolution and Arbitration at BPP University College. He is an experienced solicitor, having worked in Westminster and the City, in local government and private practice. He is also a chartered arbitrator and has recently presided over an international tribunal. He was formerly a Senior Law Lecturer and PhD House Tutor. He is the author of several professional practice books and was formerly a member of the Editorial Board of *Arbitration* and Commissioning Editor for *Construction and Engineering Law*. Prior to returning to the LSE he was an Academic Visitor in the Centre for Socio-Legal Studies at the University of Oxford and in collaboration with Professor Christopher Hodges wrote a paper there entitled 'An Overview of Arbitration in England'.

ALEX SCHWARTZ

Alex Schwartz is Assistant Professor at the Faculty of Law, University of Hong Kong. He mostly carries out empirical research on courts, judicial behaviour and judicial politics. Sometimes, he also writes about power-sharing and

constitutional design for deeply divided societies. He was previously Lecturer in Law at Queen's University Belfast, where he was also an Associate Fellow of the Senator George J Mitchell Institute for Global Peace, Security and Justice. Before that, Dr Schwartz was a Banting Fellow with the Department of Political Studies at Queen's University (Canada), a visiting scholar at the Centre for the Study of Social Justice at Oxford, and a postdoctoral fellow with the Canada Research Chair in Quebec and Canadian Studies at L'Université du Québec à Montréal.

IAN TURNER

Ian Turner is Reader in Human Rights and Security at the University of Central Lancashire (UCLan), where he has been based since 2002. Dr Turner is the Lead for Postgraduate Research in the UCLan School of Law and Social Science and has supervised many students to PhD completion in the areas of human rights and counter-terrorism. For a number of years he has taught undergraduate and graduate modules on constitutional law, human rights, security and counter-terrorism and has been published widely in these areas, particularly on matters relating to the killing and torture of terror suspects. He is an Associate Editor of the *International Journal of Human Rights* and serves on the Editorial Boards of *Studies in Con-*

flict and Terrorism and Democracy and Security. Email: idgeturner@uclan.ac.uk.

FAYE WANG

Faye Wang is a Senior Lecturer in Law at Brunel University London, where she also teaches internet law and contract law. Dr Wang served as Convenor of the Cyberlaw Section for the Society of Legal Scholars in the UK (2009-2016) and as an EU Correspondent for Intellectual Property Forum—an official journal published quarterly by the Intellectual Property Society of Australia and New Zealand Inc (IPSANZ) (2009-2019). Her research interests include cyberlaw, commercial law, comparative law, intellectual property law, private international law and alternative dispute resolution. She has published five monographs in these fields.

Email: fangfei.wang@gmail.com.

CHAO XI

Chao Xi is Professor and Vice Chancellor's Outstanding Fellow of the Faculty of Law, Chinese University of Hong Kong (CUHK), where he concurrently serves as Associate Dean (Research). He also heads the Chinese Law Programme, Hong Kong Institute of Asia-Pacific Studies (HKIAPS), CUHK.

PO JEN YAP

Po Jen Yap is a Professor of Law at the University of Hong Kong and

Director of the University's Centre for Comparative and Public Law. He graduated from the National University of Singapore with an LLB and he obtained LLM qualifications from both Harvard Law School and University College London. He also has a PhD from the University of Cambridge. He is the author of *Constitutional Dialogue in Common Law Asia* (OUP 2015) and *Courts and Democracies in Asia* (CUP 2017).

LING ZHOU

Ling Zhou is a Research Associate at the HKIAPS, CUHK, appointed following the award of her DPhil at Oxford in 2018. She studied for her LLM at SOAS (London), graduating with distinction. Her main research interests include civil justice and dispute resolution, socio-legal studies, and consumer protection. At the HKIAPS, Dr Zhou also researches issues in constitutional and administrative law, and legal issues in the Greater Bay Area of southern China. Her monograph on consumer access to justice in China will be published by Hart in May 2020.